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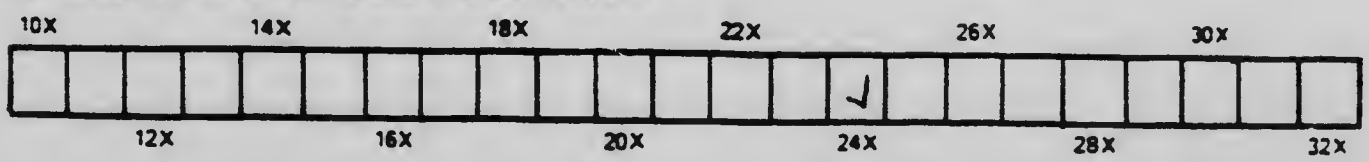

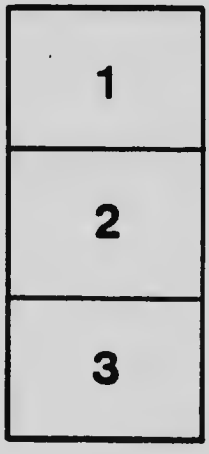

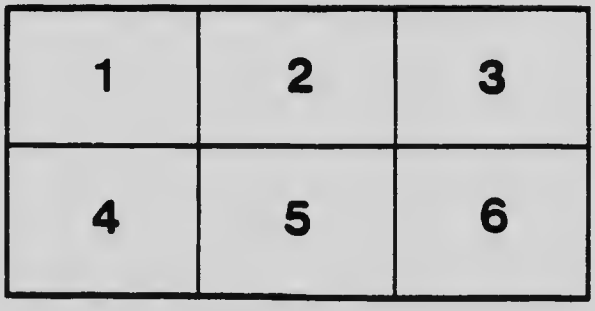

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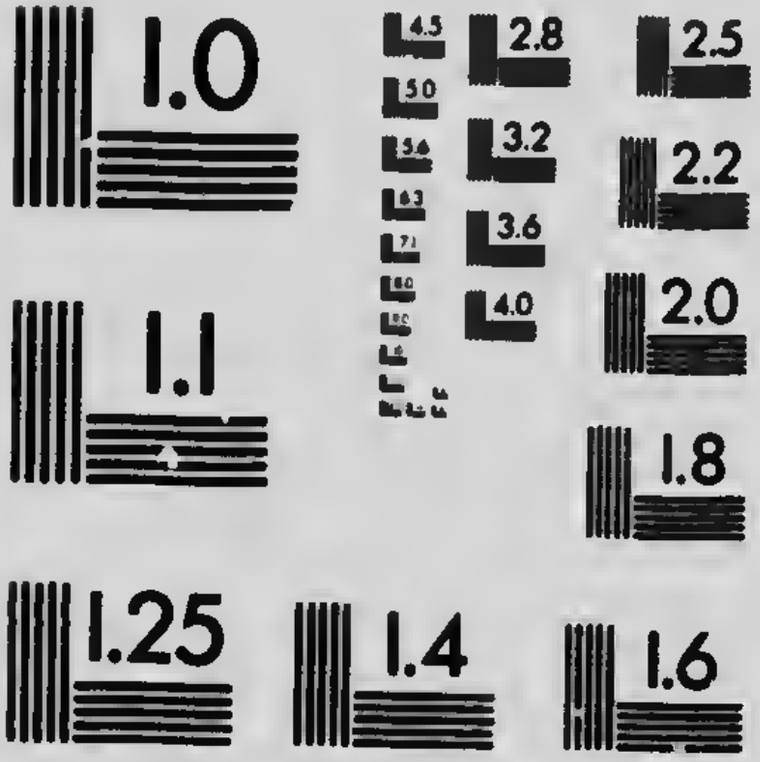

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A TREATISE

ON THE LAW OF

SALE OF PERSONAL PROPERTY

WITH REFERENCES TO THE

FRENCH CODE AND CIVIL LAW

BY

JUDAH PHILIP BENJAMIN

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ONE OF HER LATE MAJESTY'S COUNSEL FOR THE COUNTY PALATINE OF LANCASTER,
AND HOLDER OF A PATENT OF PRECEDENCE.

SIXTH EDITION

BY

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AND JOINT AUTHOR OF *A Commentary on the Sale of Goods Act*, 1893,
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PREFACE.

THE preparation of the present edition was entrusted to the Editor as long ago as March, 1913, but the work has been unavoidably delayed by the war. At that time it was desired by the owners of the copyright that an attempt should be made to reduce the size of the book; but this has unfortunately been found to be impossible consistently with the preservation of the Author's work. It remains for some future editor to consider whether a portion of that work should not be sacrificed.

About the present edition there is not much to say. One or two points may, however, be mentioned.

The discovery, since the publication of the fifth edition, of fresh authority—in particular the illuminating judgment of Chief Justice Griffith in *Hynes* v. *Byrne*—has, in the Editor's opinion, shown that the view taken in the fifth edition, and by some other text writers, of innocent misrepresentation cannot be supported. The truth now appears to be that innocent misrepresentation is not a separate head of law, but merely a branch of the law of Mistake; accordingly that no such misrepresentation can be "material" unless it nullify the assent of the other party. It had been supposed that in these cases Equity gave a less strict meaning to the term "material" than was attached to it by the Common Law as stated by Mr. Justice Blackburn in *Kennedy's Case*; so that, by the operation of the Judicature Act, the equitable rule prevailed. It seems to be reasonably clear that the Common Law and equitable rules are identical in all cases. But the reader must judge for himself, on reading the argument in the chapter on Misrepresentation, where—for the first time in any text-book, so far as the Editor is aware—the subject has been elaborately considered. The Editor commits himself at least to this proposition, that, to put any other interpretation upon "material" than that suggested is, so far as sales of "goods" are concerned, entirely inconsistent with the statutary definition of "warranty," and leads to an absurd result.

No reason has been found for the modification of the opinion stated in the fifth edition that Mr. Benjamin's treatment of the

unpaid seller's Common Law right of resale was based upon a misunderstanding of the cases, and that he had allowed himself unduly influenced by a purely tentative suggestion of Blackburn's made thirty years before, and founded on the n. scanty authorities existing at that date. But the language of Section 48 (3) of the Code has followed his statement of the case, and requires interpretation.

Certain difficulties felt by the learned Author in *Atkinson* v. *Bell* and *Bryans* v. *Nix* on the question of the passing of the property, and in *Heyworth* v. *Hutchinson* with regard to the law of warranty, have, it is submitted, been solved.

Principally in order to economise in space, little or no reference has been made to merely emergency legislation.

For the same reason, and also having regard to the fact that a separate American edition of this treatise exists, no notice of American law as such has been taken. But many references will be found to decisions of Courts in the United States where they throw light on English law. Some reference has also been made to Canadian and Australasian cases.

TEMPLE,

November, 1920.

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ADDENDA ET CORRIGENDA.

Page 26 (second paragraph). Add to "code" the reference (*r*).

" 52 (*l*). "*Johnston* v. *Stear*" should be *Johnson* v. *S.*

" 89 (*m*). "*Burton* v. *G. W. R.*" should be *B.* v. *G. N. R.*

" 116 (end of first paragraph). But Pothier's rule, if interpreted literally and without qualification, does not represent English law. The mere existence of personal considerations in the mind of one party is an immaterial factor: *Fellowes* v. *Lord Gwydyr* (1826) 1 Sim. 63; affirmed on another ground, (1829) 1 Russ. & M. 83. It is necessary that the other party should be estopped, so as to be unable to assert the existence of a contract. In such a case personal considerations are very material. See *Phillips* v. *Duke of Bucks* (1684) 1 Vern. 227; *Smith* v. *Wheatcroft* (1878) 9 Ch. D. 223; *Archer* v. *Stone* (1898) 78 L. T. 34; *Nash* v. *Dix* (1898), *ibid.*, 34; and *Said* v. *Butt*, summarised in Addenda to p. 138.

" 138 (after first paragraph). *Said* v. *Butt* (1920) 3 K. B. 497, was the converse case. There the plaintiff, who had been refused a ticket to the theatre, covertly procured one through the agency and in the name of P. *Held*, that the plaintiff could not maintain there was a contract he could adopt, as he knew the theatre managers would not contract with him.

Had the plaintiff not been aware of the personal considerations actuating the theatre managers, the estoppel would have been the other way, and the managers been precluded from asserting that the apparent contract with P. was not a real one. See *per* Hannen, J., in *Smith* v. *Hughes*, *ante*, 135.

" 144 (*c*). The reference to *Bonner* v. *Tottenham*, &c., should be (1899) 1 Q. B 161, C. A.

" 272 (last line but one). For "time" read term.

" 274 (s.v. *Leather Co.* v. *Hieronimus*). McCardie, J., in *Hartley* v. *Hymans* (1920) 3 K. B. 475, cannot reconcile this case with the rule that a contract within s. 4 of the Code cannot be varied by words or conduct. But there would seem to be an intelligible distinction between a "waiver" that involves a new executory promise (as in *Plevins* v. *Downing*, *post*, p. 792, which the learned Judge refers to), and a waiver by way of *ex post facto* assent to a substituted mode of performance when completed. An analogous case would seem to be *Stewart* v. *Eddowes* (on p. 304 of text), where it was held that parol evidence could be given of the appropriation of a previously affixed signature.

Hieronimus' Case can also be supported on an independent ground, viz., that the mode of performance was not a term of the contract, but a mere direction: *per* Cockburn, C.J.

" 282 (*g*) and 311 (*h*). See also *Grindell* v. *Bass* (1920) 2 Ch. 487 (counsel's signature to pleading).

Page 366 (i). "*Chappell & Co.*" should be *C. & Co.* v. *Harrison*; and "*Harison* v. *Ricketts*" should be *Hewison* v. *R.*

,, 417 (*z*). "*Hills* v. *Pittsburgh*" should be *Hays* v. *P.*

,, 442 (*d*), 445 (first paragraph). See also *The Orteric* (1920) A. C. 24; 89 L. J. P. 209.

,, 497 (eight lines from foot). "Sale of lands" should be sale of bonds.

,, 528 (fourth paragraph). In *Rawlings* v. *General Trading Co.* (1920) 3 K. B. 30, a mutual agreement between two persons, with the object of depressing the price, not to bid against one another at an auction of Government stores, was held contrary to public policy. And *semble* that the rule is a general one.

,, 594 (*t*). For "Kettlewith" read Kettlewell.

,, 600 (*u*). The reference to *Nat. Phonograph Co.* v. *Edison-Bell* is (1906) 96 L. T. 218.

,, 603 (*o*). "*Jones* v. *Kerr*" should be *James* v. *K.*

,, 641 (*i*). When the contract is within s. 4 of the Code, and that section is not otherwise satisfied, a waiver must, it seems, be in writing: *Hartley* v. *Hymans* (1920) 3 K. B. 475. But *cf.* Addenda to p. 274, *ante.*

,, 655 (*ss*). This case has now been affirmed: 123 L. T. 375, C. A.; and the general principle approved that a contract to be performed abroad is subject to an implied condition precedent that performance should be, or become, lawful by the foreign law at the place of performance.

,, 655 (*t*). But *Barker* v. *Hodgson*, and similar cases, would probably now be decided differently: *per Cur.* in *Ralli Bros.' Case*, *supra*. They can however, be distinguished on the ground that "a contract to load on fixed days, unless prevented by specified causes, excludes implied causes": *per* Scrutton, L.J., *ibid.*

,, 656 (*y*). *Cunningham* v. *Dunn* would now be decided on the ground that the parties contracted on the basis of the loading being legally possible: *per* Scrutton, L.J., in *Ralli Bros.' Case*, *supra*. It can also be supported on the ground that no time was fixed for loading (as in *Barker* v. *Hodgson*), and also of joint inability.

,, 687 (second paragraph); 774 (second paragraph). Bailhache, J., in *Niblett* v. *Confectioners' Materials Co.* (*Times*, Nov. 18, 1920) followed Lord Russell's rulings with reluctance, being himself of opinion that s. 12 (1) and (2) should protect the buyer if he be unable to deal with the goods because of the rights or lawful interference of a third person, *e.g.*, the owner of a trade-mark that is infringed by the brand under which the goods were sold.

,, 704 (s.v. *Hopkins* v. *Hitchcock*). But where the goods are sold *as being* of a particular brand, the brand is part of their description: *Scaliaris* v. *E. Ofverburg & Co.* (1920) 36 T. L. R. 743.

,, 735 (*c*), 855 (*x*). See also *Moore & Co.* v. *Landauer & Co.* (1920) 37 T. L. R. 52 (canned fruits to be packed in cases of thirty tins).

,, 784 (*e*). See also *Fisher, Reeves & Co.* v. *Armour & Co.* (1920) 36 T. L. R. 800, C. A. (goods sold "*ex* store" cannot be delivered *ex* lighter afloat.

,, 804 (*l*). A specific quantity added in explanation of qualifying words cannot be exceeded, except where the maxim *De minimis* applies: *Payne* v. *Lillico* (1920) 36 T. L. R. 569.

,, 816 (*e*). See also *Behrend* v. *Produce Brokers Co.* (1920) 36 T. L. R. 775.

,, 852 (*k*). See to the same effect where the buyer took the risk in a contract not c.f.i.: *Clark* v. *Cox*, *McEuen & Co.* (1920) 89 L. J. K. B. 153, C. A.

,, 864 (*r*). See also *Van Den Hurk* v. *R. Martens & Co.* (1920) 1 K. B. 850; 89 L. J. K. B. 545, where examination could not be made before the use of the goods by the sub-buyer.

Page 931 (after second sentence of third paragraph). Where, therefore, the damages are payable in a foreign currency they are such a sum in English currency as will, at the rate of exchange prevailing at the date of default, but not at the time of judgment or award, produce the sum in foreign currency: *Barry* v. *Van Den Hurk* (1920) 2 K. B. 709; 89 L. J. K. B. 899; *Di Ferdinando* v. *Simon*, *ibid.*, 704; affirmed in C. A. (1920) 89 L. J. K. B. 1039; *Lebeaupin* v. *Crispin*, *ibid.*, 714; 89 L. J. K. B. 1024.

,, 1095 (*b*). Add after first two cases *Lebeaupin* v. *Crispin*, *supra*.

,, 1154 (*k*). See s. 6 (1) of this Act interpreted in *Harvey & Co.* v. *Herefordshire C. C.* (1920) 2 K. B. 395.

SALE OF PERSONAL PROPERTY.

BOOK I.

FORMATION OF THE CONTRACT.

PART I.

GENERALLY.

CHAPTER I.

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

Contract of sale defined.

THE Sale of Goods Act, 1893 (*a*) (which is throughout this work referred to as "the Code"), thus defines a contract of sale:—

Code, s. 1 (1).

"1.—(1.) A contract of sale of goods (*b*) is a contract whereby the seller (*c*) transfers or agrees to transfer the property (*d*) in goods to the buyer (*e*) for a money consideration, called the price. There may be a contract of sale between one part owner and another" (*f*).

In order to constitute a *sale* there must be (1) an *agreement to sell*, by which alone the property does not pass; and (2) an *actual sale*, by which the property passes.

(*a*) 56 & 57 Vict. c. 71.

(*b*) "Goods" are defined by s. 62 (1); see this definition fully discussed. *post*, *et seqq.*

(*c*) "Seller" means a person who sells or agrees to sell goods: s. 62 (1).

(*d*) "Property" means the general property in goods, and not merely a special property: s. 62 (1).

(*e*) "Buyer" means a person who buys or agrees to buy goods: s. 62 (1).

(*f*) As to sales by part owners, see *Beed* v. *Blandford* (1828) 2 Y. & J. 278; *Ex parte Cooper* (1879) 11 Ch. D. 68, C. A.; 48 L. J. Bk. 49; *Nicol* v. *Hennessey* 1896) 1 Com. Cas. 410.

It will be observed that the definition of a *contract of sale* above cited includes a mere agreement to sell as well as an actual sale (*g*).

Bargain and sale defined

By the common law a *sale* of personal property was usually termed a "bargain and sale of goods." It may be defined to be a transfer of the *absolute* or *general* property in a thing for a price in *money* (*h*). Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz.:

The elements of the contract.

(1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised.

Parties. Mutual assent.

That it requires parties competent to contract, and mutual assent, in order to effect a sale, is manifest from the general principles which govern all contracts.

Transfer of *absolute* property

The third essential is that there should be a transfer of the *absolute* or *general* property in the thing sold; for in law a thing may in some cases be said to have in a certain sense two owners, one of whom has the general, and the other a special property in it: and a transfer of the special property is not a sale of the thing.

Jenkyns v. *Brown* (1849).

An illustration of this is presented in the case of *Jenkyns* v. *Brown* (*i*), where a factor in New Orleans bought a cargo of corn with his own money, on the order of a London correspondent. He shipped the goods for account of his correspondent, and wrote letters of advice to that effect, and sent invoices to the correspondent, and drew bills of exchange on him for the price, but took bills of lading to his own order, and endorsed and delivered them to a banker to whom he sold the bills of exchange. This transaction was held to be a transfer of the general property to the London merchant (*k*).

(*g*) *Cf.* the definition of "contract of sale" in s. 62 (1).

(*h*) Blackstone's definition is, "a transmutation of property from one man to another in consideration of some price": 2 Bl. 446. By the Indian Contract Act, 1872, s. 77: "'Sale' is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer." Kent's definition is, "a contract for the transfer of property from one person to another for a valuable consideration": 2 Kent, 468 (12th ed.). This definition would include barter, which, though in most respects analogous, is certainly not identical, with sale.

(*i*) 14 Q. B. 496; 19 L. J. Q. B. 286; 80 R. R. 287. See the distinction between general and special property discussed in *Sewell* v. *Burdick* (1884) 10 App. Cas. 74; see also *Nyberg* v. *Handelaar* [1892] 2 Q. B. 202, C. A. (special property as between co-owners).

(*k*) Lord Selborne's statement in *Sewell* v. *Burdick*, *supra*, that the property remained in the shipper, refers only to the time of shipment.

and therefore a sale to him: and a transfer of a special property to the banker by the delivery to him of the bills of lading, which represented the goods.

And in like manner when goods are delivered in pawn or pledge, the general property remains in the pawnor, which he may transfer to a third person subject to the rights of the pawnee (*l*), and a special property is transferred to the pawnee (*m*).

Price—must be money.

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

Distinction between sale and barter, gift, etc.

Moreover, the money must be given as the *price*, that is to

(*l*) *Franklin* v. *Neate* (1844) 13 M. & W. 481; 14 L. J. Ex. 59; 67 R. R. 683.

(*m*) *Halliday* v. *Holgate* (1868) L. R. 3 Ex. 299; 37 L. J. Ex. 174; *Harper* v. *Godsell* (1870) L. R. 5 Q. B. 422; 39 L. J. Q. B. 185.

(*n*) See an example in *Keys* v. *Harwood* (1846) 2 C. B. 905; 15 L. J. C. P. 207.

(*o*) For the distinction between sale and barter in English law, see *Harris* v. *Fowle* (1787), cited in *Barbe* v. *Parker* (1789) 1 H. Bl. 287; (in this latter case a loan taken partly in goods *valued as cash* was held to fall within the usury laws); *Campbell* v. *Sewell* (1819) 1 Chitty, 609 (goods to be paid for partly by bills); *Harrison* v. *Luke* (1845) 14 M. & W. 139; 14 L. J. Ex. 268 (price cannot be sued for on an exchange); *Read* v. *Hutchinson* (1813) 3 Camp. 352 (barter against bill of exchange). For incidents of the contract of exchange, see *Emanuel* v. *Dane* (1812) 3 Camp. 299 (express warranty of goods taken); *Fairmaner* v. *Budd* (1831) 7 Bing. 574; 9 L. J. (O.S.) C. P. 185 (sauce); *Power* v. *Wells* (1778) 2 Cowp. 818 (property); *Le Neuville* v. *Nourse* (1813) *ib.* 351 (caveat emptor). Under the old system of pleading where a money value was put upon the goods to be taken in exchange as part of the price and the exchange was completed, or the defendant refused to deliver the goods so valued to be taken in exchange by the other party, or only a money balance remained payable, the transaction might be considered as a sale of the goods given in exchange. See on these three heads *Hands* v. *Burton* (1808) 9 East, 349, and *Sarty* v. *Wilkin* (1843) 11 M. & W. 622; 12 L. J. Ex. 381; *Forsyth* v. *Jervis* (1816) 1 Stark. 437; and *Ingram* v. *Shirley* (1846) 1 Stark. 185, *Sheldon* v. *Cox* (1824) 3 B. & C. 420; *Garey* v. *Pyke* (1839) 10 A. & E. 512 (no balance settled); and *Bull* v. *Parker* (1842) 12 L. J. Q. B. 93, respectively.

(*p*) Delivery is essential to a gift of personal property. See the history of the law of gifts considered in *Cochrane* v. *Moore* (1890) 25 Q. B. D. 57, C. A.; 60 L. J. Q. B. 377.

say, as a *quid pro quo* on a transfer of property on a sale (*q*). It is not every transaction involving a transfer of property and a payment that constitutes a sale: the payment may be the motive for making a gift, or for giving some benefit by agreement or otherwise (*r*). The question becomes important, for example, where a contract of sale requires formalities (*s*).

Sale distinguished from agency, bailment, etc.

In Ex parte *White* (*t*) is an interesting exposition of the principles by which to distinguish between a contract of "sale or return" and a contract of agency: in *Livingstone* v. *Ross* (*u*) and *Kelly* v. *Enderton* (*v*) an offer of an agency for sale is distinguished from an offer to sell; and in *Dixon* v. *London Small Arms Co.* (*x*) the manufacture of goods for his principal by an agent is contrasted with a contract for the sale of them by an independent contractor. In *South Australian Insurance Co.* v. *Randell* (*y*), the distinction between a sale and a bailment is elucidated; and in *Lee* v. *Griffin* (*z*) the distinction between a contract of sale and a contract for work and labour.

Where the real effect of a transaction is to transfer to a person all the rights of an owner of property in return for a price, the transaction will be deemed to be a sale, although it may be called a guarantee or agency (*a*); and, conversely, a document agreeing to transfer property on payment of a certain sum will not be treated as an agreement for sale, if it can be shown that so to treat it would be contrary to the real

(*q*) An existing debt due from the seller to the buyer is sufficient: *Sands* v. *Norman* (1903) 4 St. Rep. (N.S.W.) 234.

(*r*) *Denn d. Manifold* v. *Diamond* (1825) 4 B. & C. 243; 3 L. J. (O.S.) K. B. 211; 28 R. R. 237; followed in *Massy* v. *Nanney* (1837) 3 Bing. N. C. 478; 6 L. J. C. P. 185; *Blaudy* v. *Herbert* (1829) 9 B. & C. 396; 7 L. J. (O.S.) K. B. 223; all cases under the Stamp Acts. See also *Henniker* v. *Henniker* (1852) 1 E. & B. 65 (partition with payment for equality).

(*s*) As under s. 4, *post*, 177.

(*t*) *Re Nevill* (1870) L. R. 6 Ch. 397; 40 L. J. Bk. 73; aff. in H. L. *sub nom. Towle* v. *White* (1873) 29 L. T. 78; *cf. Ex parte Bright, Re Smith* (1879) 10 Ch. D. 566, C. A.; 48 L. J. Bk. 81. See also *Weiner* v. *Harris* [1910] 1 K. B. 285, C. A.; 79 L. J. K. B. 342. As to "sale or return," see further *post*.

(*u*) [1901] A. C. 327, P. C.; 70 L. J. P. C. 58.

(*v*) [1913] A. C. 191; 82 L. J. P. C. 657.

(*x*) (1876) 1 App. Cas. 632; 46 L. J. Q. B. 617.

(*y*) (1869) L. R. 3 P. C. 101. In that case, where a farmer delivered corn to a miller, and was entitled to receive on a future day, at the option of the miller, either an equivalent amount of corn of like quality or the value of such equivalent, the transaction was called by the Board a *sale* by the farmer of his corn to the miller, and not a bailment; but *semble* all that the Board meant was that it was a transfer of property.

(*z*) (1861) 1 B. & S. 272; 30 L. J. Q. B. 252. The subject is considered, *post*, 177 *et seqq*.

(*a*) *Hutton* v. *Lippert* (1883) 8 App. Cas. 309, P. C.; 52 L. J. P. C. 54; *Pye* v. *British Automobile Syndicate* [1906] 1 K. B. 425; 75 L. J. K. B. 270.

intention of the parties (*b*). On a similar principle an *award* that one party to the arbitration shall deliver goods to the other on being paid a certain sum has not, even though the latter tenders the amount, the effect of transferring the property, unless the former assents to the transfer (*c*).

It is enacted by the Code that:

"61.—(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

Code, s. 61 (4). Transactions by way of security only.

The difficulty of saying what is the true construction to be placed on this clause is illustrated by a case decided by the House of Lords some years before the passing of the Code *McBain* v. *Wallace* (*d*). In that case Roney, a shipbuilder, who had nearly completed building a ship, entered into an absolute contract of sale with Wallace & Co., whereby he was to complete and deliver the vessel to them for £2,500 payable on completion, and if they elected to make advances in respect of the price the unfinished vessel and materials were to become their property; and if Roney failed to complete, they were empowered to take possession of the vessel, and either sell it and, after full reimbursement of all moneys due from him to them, pay over the balance to him, or complete it and recover from him any cost above the contract price. The evidence showed that Wallace & Co. had purposely entered into a contract of sale, probably with the motive and intention that they should thereby be able safely to make advances and have the security of the ship that had been sold to them. They subsequently made payments amounting to £2,550 to Roney, and took receipts from him on account of the price. Before the ship was completed or delivered Roney became bankrupt, and his trustee claimed it on the ground that it had not been sold to Wallace & Co., the transaction being by way of security only.

McBain v. *Wallace* (1881).

It was contended on behalf of the trustee that the contract did not set forth the true agreement between the parties, which was for a loan upon security, and not for a sale and purchase; and that although this might be a contract of sale in form, it was in substance intended thereby to give a security only; but the House of Lords, affirming the decision of the

(*b*) *Senécal* v. *Pauzé* (1885) 14 App. Cas. 637, P. C.
(*c*) *Hunter* v. *Rice* (1812) 15 East, 100; 13 R. R. 391.
(*d*) 6 App. Cas. 588.

Court of Session, held that there had been a *bonâ fide sale* without delivery within the meaning of the Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60), s. 1 (repealed by the Code), and that the motive and intention of the parties in making the contract was immaterial. Even if it had been proved that by the side of the contract of sale there was a collateral agreement that the ship should be held only as security, that would not, in the opinion of Lord Blackburn, prevent its being a binding contract of sale under that Act (*c*). And Lord Watson said that if the contract did not express the true agreement, and the parties had really meant a loan upon security, and not a sale, the judgment of the Lord Ordinary in favour of the bankrupt builder's trustee would have been right (*f*): but he held that a collateral motive of the parties could not affect the true construction of the contract, which was one of sale, although made to effect a purpose which ordinarily would have been more directly effected by a loan on security (*g*).

Effect of s. 61 (4).

Effect of s. 61 (4) on the preceding case.

It is not clear from the terms of section 61 (4) of the Code whether such a transaction is to be regarded as a contract of sale within the Code. The question depends upon the meaning to be given to the word "form." Do the words "in the form of a contract of sale" refer only to purely fictitious contracts of sale? or do they also include a genuine sale effected with the ulterior object of giving security, and as a mere means towards that result, as in *McBain* v. *Wallace*? The cases in Scotland (*h*) are to the effect that section 61 (4) was intended to override *McBain* v. *Wallace*. But the cases in which these opinions were given were all purely fictitious transactions, and Lord Young uniformly dissented, holding that the Code intended to confirm *McBain* v. *Wallace*. Perhaps the question is not yet settled. It may be that the distinction intended to be drawn in this sub-section is between a *bonâ fide* contract of sale and a transaction which is a contract of sale only in form, intended not to effect a sale but merely to give security; and that a transaction, such as that in *McBain's Case*, which amounts to a *bonâ fide* contract

(*c*) 6 App. Cas., at 612.

(*f*) See also *per* Lord Trayner in *Liddell's Trustee* v. *Warr & Co.* (1893) 20 Sess. Cas. 989.

(*g*) Lord Moncrieff says in *Robertson* v. *Hall's Trustee* (1896) 69 Sess. Cas. 120, that the Code has not altogether destroyed the authority of the case.

(*h*) *Robertson* v. *Hall's Trustee supra*; *Jones & Co.'s Trustee* v. *Allan* (1901) 4 Sess. Cas. 374; *Rennet* v. *Mathieson* (1903) 5 Sess. Cas. 591; *Hepburn* v. *Law* (1914) Sess. Cas. 918.

of sale is not excluded from the provisions of the Code, although its ulterior object may be to give security. Some cases illustrative of the distinction between contracts of sale and contracts by way of security are mentioned in the note (*i*).

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

Contract of sale, how made:—
1. Generally.

And now the Code, adopting the common law, provides as follows:—

"**3.**—Subject to the provisions of this Act (*m*) and of any statute in that behalf (*n*), a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. Code, s. 3.

"Provided that nothing in this section shall affect the law relating to corporations."

(*i*) *Cushing* v. *Dupuy* (1880) 5 App. Cas. 409; 49 L. J. P. C. 63 (pledge in form of sale); *Re Watson* (1890) 25 Q. B. D. 27, C. A.; 59 L. J. Q. B. 394 (hire-purchase or bill of sale); followed in *Madell* v. *Thomas & Co.* [1891] 1 Q. B. 230, C. A.; 60 L. J. Q. B. 227 (same); *McEntire* v. *Crossley* [1895] A. C. 457; 46 L. J. P. C. 129 (same); *Maas* v. *Pepper* [1905] A. C. 102; 74 L. J. K. B. 452 (same); *Lawrence* v. *Sierewright* (1899) 6 Sc. L. T. 135 (genuine sale: motive security).

(*k*) At an early stage, however, *delivery* was necessary to pass the property. See *per* Fry, L.J., in *Cochrane* v. *Moore* (1890) 25 Q. B. D. 57, at 72 C. A.; 59 L. J. Q. B. 577.

(*l*) *Post*, *et seqq.*

(*m*) See s. 4, and s. 61 (3) which saves the enactments relating to bills of sale, etc.

(*n*) *E.g.*, the Merchant Shipping Act, 1854, ss. 55—65 (bill of sale of ship), now represented by ss. 24—30 of the Merchant Shipping Act, 1894; 31 Eliz. 12, and 2 & 3 P. & M. c. 7 (sale of horses); see s. 22 (2) of Code, *post*, 14.

Code, s. 1 (3) and (4).

"1.—(3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

"(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

2. Under s. 4 of the Code.

The fourth section of the Code lays down a very important modification of the general rule regarding the formalities of the contract. This section substantially reproduces the 17th section of the Statute of Frauds, 29 Car. II. c. 3, and an amendment thereof, 9 Geo. IV. c. 14, s. 7, known as Lord Tenterden's Act, and these enactments are very fully considered hereafter (*o*).

Difference between sale and barter in the Civil Law.

It was long a moot point between two rival schools of Roman jurists, the Sabinians and the Proculians, whether the contracts of exchange (*permutatio*) and of sale (*emptio-venditio*) were essentially different. Gaius (*p*), professing to be a Sabinian, maintained from a purely historical point of view that barter was merely the more ancient form of sale, in support of which he cited a passage of Homer (*q*). Another school maintained the negative, on the ground that it could not be determined which was the thing sold, and which was the price, and that it was absurd that a thing should be both; and this opinion prevailed, being supported by other passages of Homer (*r*), and as being more in accordance with sound reason. The question was finally disposed of by a rescript (*s*) of the Emperors Diocletian and Maximian in A.D. 294, which was adopted by Justinian (*t*). Price being therefore held to be of the essence of the contract of sale, barter was relegated to the class of real contracts. The distinction was important, as a contract of exchange, not being a consensual contract (*u*), was enforceable only after a part performance by the party seeking relief. A contract of barter, therefore, so long as it was executory on both sides, was not enforceable in the absence of a *stipulatio* (*v*). To

(*o*) *Post*, 175 *et seqq*.
(*p*) 3, 141.
(*q*) Il. 7, 472—475.
(*r*) *E.g.*, Od. 1, 430.
(*s*) Code 4, 64, 7.
(*t*) Inst. 3, 23, 2.
(*u*) By the French Civil Code, however, exchange is a consensual contract: Arts. 1703—7. So also by the Quebec Civil Code, Art. 1596.
(*v*) Code 1, 64, 3; Dig. 19, 4, 1, 2.

this rule, according to Gaius (*x*), one exception only was allowed, and the transaction treated as a sale, namely, where a person had a thing for sale, and another, "*pretii nomine*," gave another thing for it; the reason of the exception obviously being, that in this case it could be determined which of the two things was sold and which was the price.

(*x*) 3, 141, adopted by Code 4, 64, 1.

CHAPTER II.

OF THE PARTIES TO THE CONTRACT.

Code, s. 2. Capacity to buy and sell.

"Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property" (*g*).

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

SECTION I. WHO MAY SELL.

The general rule upon this subject is to be inferred from section 21 of the Code, which is as follows:

Code, s. 21. Sale by person not the owner.

"**21.** (1.) Subject to the provisions of this Act (*z*), where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

"(2) Provided also that nothing in this Act shall affect

"(*a*) The provisions of the Factors Acts (*a*), or any enactment (*b*) enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

"(*b*) The validity of any contract of sale under any special, common law, or statutory power of sale or under the order of a court of competent jurisdiction."

(*g*) S. 2 of Code. For proviso to the section as to "necessaries" for an infant, etc., see *post*, 60.

(*z*) *I.e.*, ss. 22–25, considered *post*, 47–52.

(*a*) 1889 (52 & 53 Vict. c. 45), and (Scotland) 1890 (53 & 54 Vict. c. 40).

(*b*) The Editor is unable to suggest any enactment falling exactly within these words. Mr. Chalmers refers to the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111); the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (reputed ownership). See now the Bankruptcy Act, 1914 (4 & 5 Geo. 5. c. 59), s. 38; and for certain purposes the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31): Chalmers' Sale of Goods Act, 1893, 7th ed., 69. To these may perhaps be added s. 47 of the Bankruptcy Act, 1914 (bankrupt dealing with after-acquired property). *See Cohen v. Mitchell* (1890) 25 Q. B. D. 262, C. A., 59 L. J. Q. B. 409.

In general, no man can sell goods and convey a valid title to them unless he be the owner, or lawfully represent the owner. *Nemo dat quod non habet* (*c*). And the rule is the same, although the sale is accompanied by the transfer of a bill of lading, delivery order, warrant, or similar document. Such documents are not negotiable instruments, so as, by their transfer, to pass to the buyer a title superior to that of the seller (*d*). A person, therefore, however innocent, who buys goods from one not the owner obtains no property in them whatever (except in some special cases presently to be noticed); and even if, in ignorance of the fact that the goods were lost or stolen, he re-sell them to a third person in good faith, he remains liable in trover to the original owner, who may maintain his action without prosecuting the felon (*e*). But a man may make a valid *agreement to sell* a thing not yet his, and even a thing not yet in existence; this *executory* contract will be examined in Chapter IV., which treats of the things sold (*f*).

As a general rule none but the owner can sell, although sale accompanied by bill of lading, warrant, etc.

A person who does not purport to sell goods otherwise than as an owner, or by the authority of the owner, is estopped from denying to the buyer that he was the owner at the time of the sale (*g*). And any subsequently acquired title goes to "feed" the contract, and the property, whose title is acquired by the seller, vests in the buyer (*h*).

Selling as owner.

Subsequently acquired title.

If the owner of goods sold by a person without title afterwards receives moneys which are the proceeds of the tortious sale, he must, when he becomes aware of the fact, elect

Election by owner receiving proceeds of wrongful sale.

(*c*) *Peer* v. *Humphrey* (1835) 2 A. & E. 495; 4 L. J. K. B. 100; 31 R. R. 171; *Whistler* v. *Foster* (1863) 32 L. J. C. P. 161; *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459; 47 L. J. Q. B. 481.

(*d*) *Cole* v. *North Western Bank* (1875) L. R. 10 C. P. 354, at 363; 44 L. J. C. P. 233; *Ogle* v. *Atkinson* (1814) 5 Taunt. 759; 15 R. R. 617 (transfer of bill of lading after sale to third person); *Gurney* v. *Behrend* (1854) 3 E. & B. 622; 23 L. J. Q. B. 265; 97 R. R. 687 (bill of lading); *MacEwan* v. *Smith* (1849) 2 H. L. C. 309; 81 R. R. 105 (delivery order); *Johnson* v. *Crédit Lyonnais* (1877) 3 C. P. D. 32, C. A. (warrant). *A fortiori* where the documents do not represent the goods at all: *Dixon* v. *Bovill* (1856) 3 Macq. H. L. 1 (engagement to deliver); *Farmeloe* v. *Bain* (1876) 1 C. P. D. 445; 45 L. J. C. P. 261 (same); *Gunn* v. *Bolckow* (1875) L. R. 10 Ch. 491; 44 L. J. Ch. 732 (certificate that goods ready for delivery).

(*e*) *Stone* v. *Marsh* (1827) 6 B. & C. 551; 5 L. J. (O.S.) K. B. 201; 30 R. R. 480; *Marsh* v. *Keating* (1834) 1 Bing. N. C. 198; 37 R. R. 75; *White* v. *Spettigue* (1845) 13 M. & W. 603; 14 L. J. Ex. 99; 67 R. R. 753; *Lee* v. *Bayes* (1856) 18 C. B. 599; 25 L. J. C. P. 249; 107 R. R. 424.

(*f*) *Post*, 147 *et seqq.*

(*g*) *Edmunds* v. *Best* (1862) 7 L. T. 279.

(*h*) *Whitehorn Brothers* v. *Davison* [1911] 1 K. B. 463; 80 L. J. K. B. 425, C. A.; *Bradley & Cole* v. *Ramsay & Co.* (1912) 106 L. T. 771, C. A. But when the subsequently-acquired title is voidable under s. 23 of the Code, *i.e. post*, the buyer must take in good faith: *Whitehorn Brothers* v. *Davison*, *supra*.

whether he will affirm or disaffirm the sale. If he elect to disaffirm, and sue the buyer in trover, he must account to the buyer for the proceeds of the sale (*i*); and he cannot, without enquiry, appropriate such proceeds to a debt due from the seller on another account, to the prejudice of the buyer.

Effect of outstanding writ against owner.

In general, also, any person competent to contract may sell goods of which he is owner, and convey a perfect title to the purchaser. But if the buyer has, at the time when he acquired his title, notice that any writ of *fieri facias*, or any other writ by virtue of which the goods of the seller (being the execution debtor) might be seized or attached, has been delivered (*k*) to and remains unexecuted in the hands of the sheriff, the goods purchased by him are liable to seizure in his hands under such writ (by virtue of section 26 (1) of the Code (*l*)). The writ binds the property in the goods of the execution debtor as from the time when it is delivered to the sheriff to be executed, but does not change the ownership; so that the seller's transfer is valid, but the purchaser takes the goods subject to the rights of the execution creditor (*m*). And if the execution debtor sell in market overt the creditor's rights are barred (*n*). If, however, the purchaser had, at the time when he acquired his title (*o*), no such notice, the same sub-section protects him, by providing that in that event "no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration." And for the better manifestation of the time of delivery the sheriff must on receipt of the writ, and without fee, endorse upon the back thereof the hour, day, month, and year when

(*i*) *Creck* v. *James Moore & Sons* (1912) 15 Com. L. R. 426 (Austr.).

(*k*) Delivery to country sheriff's London deputy is delivery to sheriff: *Harris* v. *Lloyd* (1839) 5 M. & W. 432; 9 L. J. Ex. 95. If the creditor afterwards tell the sheriff not to proceed the writ is no longer delivered: *Hunt* v. *Hooper* (1844) 12 M. & W. 664; 13 L. J. Ex. 183; 67 R. R. 453; *Withers* v. *Parker* (1859) 4 H. & N. 524; 28 L. J. Ex. 292; 118 R. R. 593. As to time of delivery of a writ issued by one Court and sent to another, see *Birstall Candle Co.* v. *Daniels* [1908] 2 K. B. 254; 77 L. J. K. B. 590. Courts will also, so far as may be, adapt ten provisions of s. 26 (1) to their own procedure: *Murgatroyd* v. *Wright* [1907] 2 K. B. 333; 76 L. J. K. B. 747.

(*l*) This sub-section re-enacts (with the addition of the word "hour" to the time of delivery) s. 15 of the Statute of Frauds, and (by the proviso), s. 1 (now repealed) of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). The section does not apply to Scotland; s. 26 (3).

(*m*) Code, s. 26 (1). *Payne* v. *Drewe* (1804) 4 East, 523; *Samuel* v. *Duke* (1838) 3 M. & W. 622; 9 L. J. Ex. 177; *Woodland* v. *Fuller* (1840) 11 A. & E. 859; 9 L. J. Q. B. 181; *McPherson* v. *Temiskamming Lumber Co.* (1913) A. C. 145, 156, P. C.

(*n*) *Samuel* v. *Duke* and *Woodland* v. *Fuller*, *supra*.

(*o*) See *Ehlers* v. *Kauffman* (1884) 49 L. T. 806 (notice before completion of title).

he received it (*p*). The term "sheriff" includes any officer charged with the enforcement of a writ of execution (*q*).

Where the Crown is creditor.

The Crown, not being mentioned in the Statute of Frauds (*r*), was not bound thereby. Accordingly, even after seizure of the goods on behalf of the execution creditor, the goods may, before sale, be seized under an extent (*s*). The same rule will no doubt apply to section 26 (1) of the Code, and for the same reason.

Third persons only protected.

The provisions of the Statute of Frauds, and, it is conceived, also of the Code, are for the protection of third persons: as regards the debtor himself, or his personal representatives, the writ binds, as at common law, from the date of the *teste* (*t*).

Sales under authority or with consent of owner.

Common instances of sales "under the authority or with the consent" of the owner are sales by agents acting within the scope of their actual or implied authority; and under this head also fall sales made in the ordinary course of business by a person with a limited interest, *e.g.*, of mortgaged chattels by a mortgagor who has been allowed by the mortgagee to carry on the business to which such sales are incident (*u*).

Estoppel on owner.

The owner may also be "by his conduct precluded from denying the seller's authority to sell"; in other words, he may be estopped from setting up his title against the buyer (*v*). "There may be," says Cotton, L.J., in *Simm* v.

(*p*) Code, s. 26 (1).

(*q*) Code, s. 26 (2).

(*r*) 29 Car. 2, c. 3, s. 15, which lays down the same law as 26 (1), excluding the proviso. At common law the goods were bound as from the *teste* of the writ, and such is the law still in the case of the Crown, where execution creditor.

(*s*) *Per cur.* in *Edwards* v. *R.* (1854) 9 Ex. 628; 23 L. J. Ex. 42; 96 R. R. 886; Ex. Ch.

(*t*) *Giles* v. *Grover* (1832) 9 Bing. 128; 36 R. R. 27. H. L.; *R.* v. *Wells* (1804) 16 East, 278 (*n*); *R.* v. *Sloper*, Price 114.

(*u*) *Horton* v. *Ruesby* (1686) Comb. 33; *Anon* (1690) Ventr. 218; *Needham's Case* (1691) 12 Mod. 5; *per* Mellish, L.J., in *Ex parte Williams: Re Davies* (1872) L. R. 7 Ch. 314.

(*v*) *National Bank* v. *Hampson* (1880) 5 Q. B. D. 177; 49 L. J. Q. B. 480; *Taylor* v. *McKeand* (1880) 5 C. P. D. 358; 49 L. J. Q. B. C. P. 563; *cf. Payne* v. *Fero* (1881) 6 Q. B. D. 620; 50 L. J. Q. B. 446 (sale not in ordinary way of business). See also *Gough* v. *Wood* [1894] 1 Q. B. 713; 63 L. J. Q. B. 564, C. A.; *Ellis* v. *Glover* [1908] 1 K. B. 388; 77 L. J. K. B. 251, C. A.

(*x*) See *Gregg* v. *Wells* (1839) 10 A. & E. 90; 8 L. J. Q. B. 193; 50 R. R. 347 (owner standing by); *Waller* v. *Drakeford* (1853) 1 E. & B. 749; 22 L. J. Q. B. 274; 93 R. R. 377 (owner assisting sale); *Zwinger* v. *Samuda* (1817) 7 Taunt. 265 (issue by owner to fraudulent seller of warrant in blank). The word "precluded" appears to be used here as equivalent to "estopped," an English technical term unknown to Scotch law. On this ground, "precluded" was inserted in committee in lieu of "estopped" in the Bills of Exchange Act, 1882. See Chalmers on s. 24 of that Act, Bills of Exchange, 5th ed., 74.

The Anglo-American Telegraph Co. (*g*), "a good title by estoppel to things which do not require any instrument to transfer them, as for instance, goods; if an action is brought upon the ground that the property in goods has passed to the vendor of the plaintiff . . . the plaintiff is entitled to rely upon the admission of the defendant *which if true would have given the plaintiff a good title* to the goods."

Woodley v. Coventry (1863).

In *Woodley v. Coventry* (*z*), the defendants, corn factors, sold 350 barrels of flour, to be taken out of a larger quantity, to one Clarke, who obtained advances from the plaintiff on the security of the flour, giving to the plaintiff a delivery order on the defendants. Before consenting to make the advances, the plaintiff sent the order to the defendants' warehouse, and lodged it there, the granary clerk saying: "It is all right," and showing the plaintiff samples of the flour sold to Clarke. The plaintiff sold the flour to different persons, and the defendants delivered part of it, but Clarke having in the meantime absconded and become bankrupt, the defendants refused, as unpaid sellers, to part with any more of the flour. The plaintiff brought trover, and it was contended for the defendants, that their recognition of the delivery order, while estopping them in certain respects, did not go so far as to estop them in an action of *trover* from showing that the property had not vested: and that by the contract between the defendants and Clarke no property had passed, because the sale was not of any specific flour, but of flour to be supplied generally in accordance with the samples (*a*). But the Court held that the defendants were estopped from denying that the property had passed, and refused to set aside the verdict given in the plaintiff's favour.

Knights v. Wiffen (1870).

Under very similar circumstances, the Queen's Bench held in *Knights v. Wiffen* (*b*) that the estoppel took place, even where the second buyer had paid the price *before* presenting the delivery order, the Court holding that the buyer's position was nevertheless altered through the defendant's conduct, because the buyer was thereby induced to rest satisfied that the property had passed, and to take no further steps for his own protection.

The inference, however, in such cases that the buyer's position was prejudiced is an inference of *fact*, and not of

(*g*) (1879) 5 Q. B. D. 188, at 215–216: 49 L. J. Q. B. 392.
(*z*) 2 H. & C. 164: 32 L. J. Ex. 185.
(*a*) See as to samples, Chapter on Conditions, *post*, *et seqq*.
(*b*) L. R. 5 Q. B. 660: 40 L. J. Q. B. 51: foll. in *Dixon v. Kennaway* [1900] 1 Ch. 833: 69 L. J. Ch. 501.

law (*c*); and the decision would be different if the defendant were able to prove that the plaintiff had *not* been prejudiced by the defendant's conduct, *e.g.*, where the plaintiff's seller was insolvent at the time of the defendant's representation (*d*).

Henderson v. Williams, 1895.

In *Henderson* v. *Williams* (*e*), the owners of goods, lying at the warehouse of Williams, were induced by the fraud of Fletcher, who pretended he was agent for a well-known customer of theirs, to instruct Williams to transfer the goods to Fletcher's order. Fletcher then sold the goods to Henderson & Co., who, after obtaining a statement from Williams that he held the goods at their (Henderson's) order, in good faith paid the price to Fletcher. On discovery of Fletcher's fraud, Williams (being indemnified by the owners) refused to deliver the goods to Hendersons, who sued Williams for conversion. It was held by the Court of Appeal that Williams, having attorned to Hendersons, was estopped from impeaching their title. Lord Halsbury, moreover, held that the true owners, having allowed Fletcher to hold himself out as the owner, could not set up their title against the plaintiffs, who were innocent purchasers; and distinguished the case from *Kingsford* v. *Merry* (*f*), on the ground that in that case there was neither a contract in fact, nor a holding out. Lindley, L.J., agreed that it should be so held on principle, if the Court had to decide between the owners and the plaintiffs, although he had great difficulty in distinguishing the facts from those of *Kingsford* v. *Merry*. All their Lordships, however, agreed that the defendant in this case was clearly estopped by his attornment from setting up the owners' title.

Rule that he who has "enabled" a wrong to be done must suffer.

It was long ago laid down as a broad general principle that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it" (*g*). This rule which deals with particular instances only of the general rule of estoppel has since been frequently restated, both in England

(*c*) *Per* Bowen, L. J., in *Kingston-upon-Hull* v. *Harding* [1892] 2 Q. B. 494; at 506, 62 L. J. Q. B. 55, C. A.; *per* Collins, J., in *Foster* v. *Tyne Pontoon Co.* (1894) 63 L. J. Q. B. 50, at 55—56.

(*d*) *Per* Collins, J., *ibid.* And see *Dixon* v. *Kennaway* [1900] 1 Ch. 833; 69 L. J. Ch. 501.

(*e*) [1895] 1 Q. B. 521; 64 L. J. Q. B. 308, C. A., *coram* Lord Halsbury, and Lindley, L.J., and A. L. Smith, L.J.

(*f*) (1856) 1 H. & N. 503; 26 L. J. Ex. 83; 108 R. R. 694; *post*.

(*g*) *Per* Ashhurst, J., in *Lickbarrow* v. *Mason* (1787) 2 T. R. at 70; 1 R. R. 425; 1 Sm. L. C. 7th ed., 766; 11th ed., 701; *cf. per* Holt, C.J., in *Heen* v. *Nicholls* (1708) Salk. 289; *per* Buller, J., in *Fitzherbert* v. *Mather* (1785) 1 T. R. at 16.

and in America (*h*), but the authorities show that its value depends on the limitation to be placed on the word "enabled" (*i*). If a person is careless in guarding his property, in one sense he "enables" the finder or a thief to pass it off as his own, but in this sense the rule does not hold good, for such carelessness does not preclude the owner from recovering it from a *bonâ fide* purchaser or pledgee (*k*). Unless the owner has by some act on which the purchaser has relied *misled* him for example, by holding out to the purchaser a third person as having authority to deal with his goods he will not be estopped from claiming his property (*l*). Although, therefore, the rule may be a useful way of stating the law, especially in cases of agency (*m*), it cannot be relied upon without considerable qualification.

Farquharson v. *King* (1901).

This rule was much discussed in the recent case of *Farquharson* v. *King* (*n*). In that case the plaintiffs, who held stacks of timber at the docks, authorised the dock company to honour all transfer or delivery orders signed on their behalf by Capon, their confidential clerk. Capon, under the name of Brown, fraudulently sold the timber to the defendants, and signed in his own name orders to the dock company to transfer the timber to the order of Brown, which was done, and then, in Brown's name, he signed orders to deliver or transfer to the order of the defendants. The defendants knew nothing of the plaintiffs, or of Capon except under the name of Brown, and bought and paid for the goods in good faith, and took delivery of them. The action was for conversion, and Mathew, J., left to the jury the question: "Did the plaintiffs so act as to hold Capon out to the de-

(*h*) *E.g.*, in *Rodger* v. *Comptoir d'Escompte de Paris* (1869) L. R. 2 P. C. at 406; 28 L. J. P. C. 30; *Moyce* v. *Newington* (1878) 4 Q. B. D. at 35; 48 L. J. Q. B. 125; and in the Supreme Court of New York, *per* Savage, C.J., in *Root* v. *French* (1835) 13 Wendell, 570—the American *locus classicus*.

(*i*) See *Farquharson* v. *King*, in C. A., *per* Vaughan Williams, L.J., [1901] 2 K. B. at 711—713; 70 L. J. K. B. 985; and in H. L., *per* Lord Halsbury, L.C., [1902] A. C., at 332—333; Lord Macnaghten, at 335—337; Lord Lindley, at 342.

(*k*) *Ibid.*; and *Hartop* v. *Hoare* (1743); *coram* Lord Hardwicke, L.C., 3 Atk. 44.

(*l*) See *per* Lord Lindley in *Farquharson* v. *King* [1902] A. C., at 343; 71 L. J. K. B. 667; *Union Credit Bank* v. *Mersey Docks and Harbour Board* [1899] 2 Q. B. 205; 68 L. J. Q. B. 842 (issue of delivery order in blank); and as to what constitutes "holding out," at 341

(*m*) See Story on Agency, s. 127, note; and *per* Lindley, L.J., in *Gordon* v. *James* (1885) 30 Ch. D. 249, at 258, C. A. In *Rimmer* v. *Webster* [1902] 2 Ch., at 173; 71 L. J. Ch. 561, Farwell, J., appears to treat the rule in cases of agency as distinct from "cases of pure estoppel."

(*n*) [1901] 2 K. B. 697, C. A.; 70 L. J. K. B. 985; [1902] A. C. 325; 71 L. J. K. B. 667.

fendants as their agent to sell the timber to the defendants?" The learned Judge refused to leave another question, suggested by the defendants' counsel, namely: "Did the plaintiffs by their conduct enable Capon to hold himself out as the true owner or as entitled to dispose of the goods?" The jury answered the question left to them in the negative, and judgment was entered for the plaintiffs for the value of the timber. This judgment was reversed by the majority of the Court of Appeal (*o*), who held that the second question should have been left to the jury and answered in the affirmative. But Stirling, L.J., who dissented, was of opinion that as the dock company had not communicated their authority to the defendants, and as the defendants had not acted upon it, the plaintiffs, who had no knowledge of the transfer of the timber into the name of Brown, and of the sales under that name, had not held out Capon *to the defendants* as entitled to deal with the goods, and had not been negligent in any duty towards the defendants. On appeal to the House of Lords, this view was adopted, and the judgment of Mathew, J., was restored, and it was held that, as the defendants knew nothing of the plaintiffs, or of Capon except under his fictitious name, no representation of Capon's authority had ever been made by the plaintiffs to the defendants, and the former were consequently not "precluded from denying Capon's authority to sell" under section 21 of the Code; and that, on common law principles, the plaintiffs had not "enabled" Capon to commit the fraud, except in the sense in which any person who loses his property enables a thief to dispose of it to another.

Market overt.

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

The Code provides that:—

"**22.**—(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith (*p*) and without notice of any defect or want of title on the part of the seller.

"(2.) Nothing in this section shall affect the law relating to the sale of horses (*q*).

"(3.) The provisions of this section do not apply to Scotland" (*r*).

(*o*) A. L. Smith, M.R., and Vaughan Williams, L.J.

(*p*) *I.e.*, "honestly, whether negligently or not"; s. 62 (2).

(*q*) As to these, see *post*, 31.

(*r*) For a list of British possessions which either have or have not adopted this section, see Note on the Application of English Law, &c., to British Possessions, *post*.

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

Market overt is "an open, public, and legally constituted market" (*v*). The shop in London must be one in which goods are openly sold; that is, sold in the presence and sight of anyone entering the shop (*x*). If the sale be in a covert place—as behind a hanging or a cupboard in a shop, or in a back room, or in a showroom or other place not open to the public—it is not a sale in market overt (*y*). But if the sale takes place openly in a shop in the City, it has been held not to be at the present day a valid objection that the shop has glass windows, or is not sufficiently open for passers-by to see in (*z*).

A wharf in London is not a market overt, even for things usually sold there (*a*).

As a London shop is not a market overt for any goods

(*s*) Bl. Com. 2, 449; Co. 2 Inst. 220. See *Benjamin* v. *Andrews* (1858) 5 C. B. (N. S.) 299; 27 L. J. M. C. 310; 116 R. R. 677.

(*t*) *Case of Market Orert* (1596) 5 Co. 83 b.; Tud. L. C. Merc. Law, 2nd ed., 713; *L'Eresque de Worcester's Case* (1594) Moore, 360; Poph. 84; Comyn's Dig. "Market (E)"; Bac. Ab. "Fairs and Markets (E)"; 2 Bl. Com. 449.

(*u*) See cases cited in last note. This custom is confined to the *City*, and does not protect a sale in a shop outside the City bounds—*e.g.*, in the Strand: *Anon.* (1701) 12 Mod. 521; or the sale by auction of a horse at a repository at Southwark: *Lee* v. *Bayes* (1856) 18 C. B. 599; 27 L. J. C. P. 249; 107 R. R. 424. A like custom was formerly stated to exist in the City of Bristol: *Clifton* v. *Chancellor* (1600) Moore, 624; but the obscure report leaves it in some doubt (as is pointed out by Comyns, C.B., Dig. "Market (E)") whether this custom was recognised.

(*v*) Per Jervis, C.J., in *Lee* v. *Bayes* (1856) 18 C. B. 599, at 601; 27 L. J. C. P. 249; 107 R. R. 424. As to what is a legally constituted market, see *Benjamin* v. *Andrews* (1858) 5 C. B. (N. S.) 299; 27 L. J. M. C. 310; 116 R. R. 677, where it was held that the user, though for twenty years, of a market *de facto* was insufficient to establish a legal market, unless the jury inferred a grant from such user.

(*x*) *Per* Wills, J., in *Hargreare* v. *Spink* [1892] 1 Q. B. 25, at 26; 61 L. J. Q. B. 318; *Hill* v. *Smith* (1812) 4 Taunt., at 533; 10 R. R. 357.

(*y*) 5 Co. 83 b.; Moore, 360; *Palmer* v. *Wolley* (1595) Cro. Eliz. 454; Tud. L. C. Merc. Law, 2nd ed., 713. See also *Hargreare* v. *Spink* [1892] 1 Q. B. 25; 61 L. J. Q. B. 318.

(*z*) *Lyons* v. *De Pass* (1840) 11 A. & E. 326; 9 L. J. Q. B. 51. Scrutton, J., in *Clayton* v. *Le Roy* [1911] 2 K. B. 1031, at 1042; 81 L. J. K. B. 49, points out that this case lays down a less stringent rule than prevailed in Elizabethan days, when importance was attached to passers-by being able to see in.

(*a*) *Wilkinson* v. *King* (1809) 2 Camp. 335.

except such as are usually sold there, it was held in the leading case (*b*) that a scrivener's shop was not a market overt for plate, though a goldsmith's would have been. So, Smithfield was held not to be a market overt for clothes, but only for horses and cattle (*c*): and Cheapside not for horses (*d*): and Aldridge's not for carriages (*e*).

What is a "shop" *Clayton* v. *Le Roy* (1911).

In *Clayton* v. *Le Roy* (*f*), the rule as affecting shops was considered. There the plaintiff's watch was stolen, and pawned with pawnbrokers in the Strand, and subsequently sold, with other unredeemed pledges, at public auction at the "City Auction Rooms," in the City of London. It was there bought by a buyer in good faith. The auction rooms presented the appearance of an ordinary office, bearing the name "Auction Rooms" and the names of the auctioneers, and were placarded with an announcement of sales of jewellery, plate, and miscellaneous effects, stating the fact if the goods were on view. The interior of the ground floor could not be seen from the street. The first floor had large office windows, and, if there was sufficient light inside and outside, something could be seen from the street, including the watches hanging on the wall, which, however, could not be identified from the street. People in the street could not see the sales being conducted. Inside on the first floor, where the auctions took place, were three glass cases behind a circular counter. No one outside the counter could see the watches sufficiently to examine them, but persons known to the auctioneer were allowed inside the counter, and intending buyers could have lots produced for inspection. The auctioneers did not sell any of their own goods. Scrutton, J., after examining the history of the rule of market overt, and the cases, held that the City Auction Rooms were not a shop. He was not prepared to say that no room or building in which auction sales are held could be a shop: it was a question of fact in each case. But the custom, being in derogation of the common law, should be made out by those who rely upon it. In the case in question he saw no public reason why he should struggle to find that auction rooms, largely devoted to the prompt sale of unredeemed pledges

(*b*) *Case of Market Overt* (1596) 5 Co. 83 b.; Tud. L. C. Merc. Law, 2nd ed. 713; see also *Taylor* v. *Chambers* (1604) Cro. Jac. 68.
(*c*) *L'Evesque de Worcester's Case* (1594) Moore, 360.
(*d*) *Ibid.*
(*e*) *Marner* v. *Banks* (1867) 17 L. T. 147; 16 W. R. 62.
(*f*) [1911] 2 K. B. 1031; 81 L. J. K. B. 49; reversed on another point at *ibid.* 1046, C. A. But Vaughan Williams, L.J., was extra-judicially strongly of Scrutton, J.'s, opinion.

(often dishonestly pawned) after a very limited period of public exhibition, and very slight description in advertisements and catalogues, should be held to fall within the custom. On the question of openness, having regard to the advertisements and placards of the sales within rooms to which the public were admitted, he expressed *obiter* his opinion that the auction rooms, if they were a "shop" would be an "open shop," though Elizabethan judges, who attached importance to the question whether passers-by could see in, would have probably held differently, and that this publicity would protect sales made inside the rooms.

Modern markets.

Some doubt has been expressed whether the protection arising from a sale in market overt extends to modern markets established under statutory powers (*g*); but in the case of the Dublin cattle market the Queen's Bench Division in Ireland had "no hesitation in holding that this great public market, established by the Corporation under Parliamentary powers, is a market overt" (*h*). Such a market would certainly seem to fall within the definition of a market overt given by Jervis, C.J., above cited as "an open, public, and legally constituted market."

The whole transaction must be in the open market. *Crane* v. *London Dock Co.* (1864).

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

Protection not extended to innocent seller.

Delaney v. *Wallis* (1883).

The privilege of market overt protects the innocent purchaser only; the seller, however innocent, is not relieved from liability by reason of the sale having been made in market overt. Thus, in *Delaney* v. *Wallis* (*k*), before the Court of Appeal in Ireland, public salesmasters, who in market

(*g*) By the learned editors of the 4th ed. of this work, citing Cockburn, C.J., in *Moyce* v. *Newington* (1878) 4 Q. B. D., at 34; 48 L. J. Q. B. 12; but in that case, while it was admitted by counsel that the protection did not attach to a sale in such a market, it appears to have been quite immaterial from any point of view whether the sale took place in market overt or not.

(*h*) Per Barry, J., in *Ganly* v. *Ledwidge* (1876) Ir. R. 10 C. L. 33, at 35; foll. in Victoria (Australia) in *Ward* v. *Stephens* (1886) 12 Vict. L. R. 378. As to market overt in Australasia, see further *post*, 34, and Note on the Application of English Law, &c., to British Possessions, *post*, 194.

(*i*) 33 L. J. Q. B. 224, at 229; 5 B. & S. 313.

(*k*) 14 L. R. Ir. 31, follg. *Ganly* v. *Ledwidge* (1876) Ir. R. 10 C. L. 33.

overt and in the ordinary course of their business innocently sold animals which had been stolen from their owner, were held liable to him in trover for their value.

Sales in market overt that are not valid.

The exceptions to the validity of sales made in *market overt* by one who is not the owner, and the rules of law governing the subject, are fully treated by Lord Coke (*l*), and have been the subject of numerous decisions. Two exceptions are indicated in the Code (*m*), viz., absence of good faith, and notice of defect of title. The others are as follows, and may be considered either as instances of a transgression of market usage, or as part of the common law preserved by the Code (*n*). A sale in market overt does not give a good title to goods belonging to the Sovereign (*o*). The purchaser is not protected if the sale be made between sunset and sunrise; or if the treaty for sale be begun out of market overt (*p*). The privilege of market overt does not extend to gifts (*q*), or pawns (*r*); and if the original seller, who sold without title, again acquire the goods after any number of intervening sales, the right of the original owner revives (*s*).

Sale by sample, not a sale in market overt. *Hill* v. *Smith* (1812).

A sale by sample is not a sale in market overt, and in *Hill* v. *Smith* (*t*), Sir James Mansfield, C.J., said: "All the doctrine of sales in market overt militates against any idea of a sale by sample; for a sale in market overt requires that the commodity should be openly sold and delivered in the market."

Purchase by shopkeeper in London. *Lyons* v. *De Pass* (1840).

In *Lyons* v. *De Pass* (*u*), where a sale was made in a shop in the City of London *to* the shopkeeper who dealt in such goods, it was held to be entitled to the privilege of market

(*l*) 2 Inst. 713.
(*m*) S. 22 (1), *ante*, 17.
(*n*) S. 61 (2).
(*o*) *Willion* v. *Berkley* (1561) 1 Plowd. 223, 243.
(*p*) Per Mansfield C.J., in *Hill* v. *Smith* (1812) 4 Taunt., at 533; 10 R. R. 357.
(*q*) 2 Inst. 713.
(*r*) *Hartop* v. *Hoare* (1743) 3 Atk. 44; 2 Str. 1187.
(*s*) 2 Inst. 713; 2 Bl. Com. 450, where the word used is "possession." But mere possession by the seller would, it is conceived, not be sufficient to revest the original owner's title. Coke says "aequireth."
(*t*) 4 Taunt. 520, at 3 Ex. Ch., foll. in *Crane* v. *London Dock Co.* (1864) 33 L. J. Q. B. 224; 5 B. & S. 313. See also *per* Lord Ellenborough in *Bailiffs of Tewkesbury* v. *Diston* (1805) 6 East, 438; *Newtownards Com.* v. *Woods* (1877) 11 Ir. R. C. L. 506; *Anon.* (1554) Dyer, 99 B. pl. 66, where, the bargain having been made *out of* the market, with a right of assent or refusal by buyer, which was made *in* the market, it was held the property did not pass.
(*u*) 11 A. & E. 326. See also *Taylor* v. *Chambers* (1604) Cro. Jac. 68; *Anon.* (1701) 12 Mod. 521; *Hartop* v. *Hoare* (1743) 3 Atk. 44; where all the sales were to the shopkeeper, but the point was not raised.

overt; but the particular point was not raised, and the existence of the privilege in such a case was strongly questioned by the Judges in *Crane* v. *The London Dock Co.* (*r*).

Hargreave v. *Spink* (1892).

This point was further considered, although not actually decided, in *Hargreave* v. *Spink* (*x*), where Wills, J., expressed a strong opinion that purchases *by* shopkeepers in London are not entitled to the privilege. In that case, where jewellery had been sold to a jeweller in the City of London, the learned Judge said (*y*): "The custom as stated by Lord Coke (*z*) is that the shop is market overt 'for such things only which by the trade of the owner are *put there* to sale.' Blackstone says (*a*): 'Every shop in which goods are exposed publicly for sale is market overt for such things only as the owner professes to trade in,' *i.e.*, the owner of the shop. When a casual person having jewellery for sale goes into a jeweller's shop to sell it, if he can, to the jeweller, it seems to me that his goods so offered for sale to the one person who is carrying on business in that shop are neither 'put there to sale,' nor 'exposed publicly to sale,' expressions which seem to me to point to goods placed in the shop by or with the consent of the shopkeeper for sale to all comers prepared to buy. These two passages appear to me to be the best and most authoritative statements of the custom itself." Then after referring to *Taylor* v. *Chambers* (*b*) (in which the point was not raised), *Lyons* v. *De Pass* (*c*) and *Crane* v. *The London Dock Co.*, his Lordship continued: "The most important argument that I have been able to discover in favour of the contention that the privilege extends to sales in a shop *to* the shopkeeper is founded upon the statute 1 Jac. 1. c. 21, s. 5 (*d*). That Act . . . enacts that 'no sale or pawn of any goods wrongfully taken or stolen from any person, and which at any time shall be sold, pawned, or done away within the City of London,' or within certain other specified limits, 'to any broker or pawntaker shall work any change of the property' . . . an enactment which it may be contended would not have been passed if it had not been felt that there might at all

(*r*) *Ante*, 20.
(*x*) [1892] 1 Q. B. 25; 61 L. J. Q. B. 318.
(*y*) *Ibid.*, at 28, 30—31.
(*z*) 5 Co. 83 b.
(*a*) 2 Bl. Com. 449.
(*b*) (1604) Cro. Jac. 68.
(*c*) *Ante*, 20.
(*d*) Rep. partially by Pawnbrokers Act, 1872, s. 4, and wholly by the Code, s. 60.

events be a serious question whether the custom of overt market of the City did not cover sales *to* as well as *by* the shopkeepers. The argument would be worth more if the statute did not apply in terms to the case of goods pawned or mortgaged as well as sold, whereas there is no ground for saying that it has ever been attempted to extend the custom to goods pledged or mortgaged as well as sold. . . . While, therefore, there is undoubtedly something to be said on either side of the question, the weight of the argument from principle seems to me to incline against such sales. . . . The inclination of my opinion is certainly against such an extension of the custom as the defendants contend for."

Where true owner prosecutes felon.

The title of a purchaser in market overt who innocently buys stolen goods is affected by section 45 of the Larceny Act, 1916 (*e*). By this section it is provided that:—

24 & 25 Vict. c. 96, s. 100.

"(1) If any person guilty of any such felony or misdemeanour, as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any property, is prosecuted to conviction, by or on behalf of the owner of such property, the property shall be restored to the owner or his representative. (2) In every case in this section referred to, the Court before whom such offender is convicted shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner."

After a proviso substantially re-enacting section 24 (2) of the Code, hereafter quoted, and another dealing with valuable securities (*f*), the section continues:—

Proviso.

"Provided, that nothing in this section shall apply to the case of any offence against sections twenty, twenty-one, and twenty-two of this Act" (*g*).

The sections referred to deal with conversion by persons entrusted with powers of attorney, directors of companies, bailees entrusted with property, trustees, factors or agents entrusted with goods or documents of title, &c.

(*e*) 6 & 7 Geo. 5, c. 50, repealing as to E. and I. the Larceny Act, 1861, s. 100, which re-enacted and added to 20 & 21 Vict. c. 54, s. 4, which took the place of 7 & 8 Geo. 4, c. 29, s. 57, which extended 21 Hen. 8, c. 11 to cases of false pretences, &c. The history of the legislation on the subject is to be found in the argument of Mr. Charles, Q.C., in *Bentley* v. *Vilmont* (1887) 12 App. Cas., at 474; 57 L. J. Q. B. 18, app. by Lord Bramwell, at 479; and also in the judgment in *Payne* v. *Wilson* [1895] 1 Q. B. 658; 64 L. J. Q. B. 328. See (on the statute of Hen. 8.) *Parker* v. *Patrick* (1793) 5 T. R. 175.

(*f*) As to this, see *post*, 35.

(*g*) See *R.* v. *Brockwell* (1905) 69 J. P. 376. The provisions of s. 100 of the Larceny Act, 1861, were extended to proceedings before magistrates by the Summary Jurisdiction Act, 1879, s. 27 (3).

This proviso applies only to trustees, bankers, &c., "entrusted with the possession of goods &c.," and not to ordinary bailees (*h*); and the whole of these provisions must now be read subject to the following section of the Code:

Code, s. 21. Revesting of property in stolen goods on conviction of offender.

"**24.**—(1.) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

"(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

"(3.) The provisions of this section do not apply to Scotland."

Sub s. (1).

The policy of the older statutes, as is shown by their language, was to encourage the owner of stolen goods to prosecute the thief (*i*), but under this first sub-section it will be observed that the offender need not, as under section 45 of the Larceny Act, 1916, or under section 100 of the Larceny Act, 1861, be indicted "by or on the behalf of the owner of the property, or his executor or administrator."

Rule as to revesting on conviction, how modified.

The old rule of our law that on conviction of the thief the property in stolen goods revests in the original owner was in 1827 extended to the case of other offences, such as that of obtaining goods by false pretences (*k*), by 7 & 8 Geo. 4. c. 29, s. 57—which was followed by section 100 of the repealed Larceny Act, 1861 (*l*). *Bentley* v. *Vilmont* (*m*) decided under the

(*h*) *Per Cur.* in *Payne* v. *Wilson* [1895] 1 Q. B., at 659; 64 L. J. Q. B. 328.

(*i*) See 21 Hen. 8. c. 11; 7 & 8 Geo. 4. c. 29, s. 57; 20 & 21 Vict. c. 54, s. 4; and *per* Lord Esher, M.R., in *Vilmont* v. *Bentley* (1886) 18 Q. B. D., at 327; 57 L. J. Q. B. 18.

(*k*) For the distinction between larceny and false pretences, see *R.* v. *Fisher* (No. 2) (1910) 103 L. T. 320; 79 L. J. K. B. 187, following *R.* v. *Russett* [1892] 2 Q. B. 312; *per Cur* in *Oppenheimer* v. *Frazer* [1907] 2 K. B. 50, C. A.; 76 L. J. K. B. 806; and *Whitehorn Brothers* v. *Davison* [1911] 1 K. B. 463; 80 L. J. K. B. 425, C. A.

(*l*) As to the history of this legislation, see n. (*c*), *ante*, 23.

(*m*) (1887) 12 App. Cas. 471; 57 L. J. Q. B. 18, affirming C. A., *Vilmont* v. *Bentley* (1886) 18 Q. B. D. 322; 57 L. J. Q. B. 18; and overruling *Moyce* v. *Newington* (1879) 4 Q. B. D. 32; 48 L. J. Q. B. 125. In that case, the plaintiff in good faith bought sheep from a man who had by means of false pretences bought them from the defendant, and was subsequently convicted. Before the conviction the defendant had seized the sheep on the plaintiff's premises, and the latter sued him for conversion. The Q. B. D. held that the plaintiff having acquired a good title before the conviction, the property did not upon the conviction revest in the defendant, on the ground that s. 100 applied only to cases where possession and not property had passed from the owner, and consequently the defendant was liable for the value of the sheep. Although this decision has been overruled, the plaintiff was clearly entitled to *some* damages, as the defendant committed an actionable wrong in seizing the sheep *before* the conviction (see *per* Lord Watson in *Bentley* v. *Vilmont*, 12 App. Cas., at 479; 57 L. J. Q. B. 18), *i.e.*, at a time when they belonged to the plaintiff—

latter Act that where a contract for the sale of goods had been induced by false pretences and the seller had prosecuted the buyer to conviction, the property revested in the owner, who could recover the goods by action even from one who had innocently bought them in market overt before the conviction. The effect of section 24 (2) of the Code is to alter this law, and, so far as goods are concerned, restore the old rule respecting the revesting on conviction, which was limited to convictions for *larceny*.

S. 24 is subject to the Factors Act.

According to the express enactment of the Code (*n*), the provisions of section 24 are subject to the Factors Act. Accordingly, where a bailee of goods, who has "agreed to buy" them under section 9 of that Act, and who fraudulently parts with them, is convicted of larceny as a bailee, the buyer in good faith from the bailee gets a good title notwithstanding the conviction (*o*).

Effect of appeals against conviction.

By the Criminal Appeal Act, 1907 (*p*), the operation of any restitution order, and the revesting of stolen property, on a conviction on indictment, is (unless the Court before whom the conviction takes place direct to the contrary in any case in which, in their opinion, the title to the property is not in dispute) suspended in any case for ten days, and, where notice of, or leave to, appeal is given within ten days of the conviction, until the determination of the appeal. If on appeal the conviction be quashed, the restitution order and the revesting of the property does not take effect. The Court of Criminal Appeal may also annul or vary any restitution order made, although the conviction be not quashed.

Larceny Act, 1916, s. 45 (1).

The expression in section 45 (1) of the Larceny Act, 1916, "the property shall be restored to the owner," is somewhat equivocal, as the word "property" may mean the thing itself or the right to it; but the effect of the enactment is that, where the owner has lost only possession of the goods, the goods shall upon conviction be handed back to him; and that, where the right of property in the goods has become vested in another, upon conviction the goods shall be handed back to the original owner, and the right of property in them

a point apparently not referred to in the Q. B. D. Under s. 24 (2) of the Code, the property in such a case would no longer revest on conviction in the defendant (as it ought there to have been held to have done), and the plaintiff would now, therefore, be entitled to the value of the sheep.

(*n*) S. 21 (2), *ante*, 10.

(*o*) *Payne* v. *Wilson* [1895] 1 Q. B. 653; 64 L. J. Q. B. 328.

(*p*) 7 Edw. 7. c. 23, s. 6. The person against whom a restitution order has been made has no right of appeal against it: *R.* v. *Elliott* [1908] 2 K. B. 452; 77 L. J. K. B. 812, C. C. A.

shall revest in him (*q*). "The thing is to be restored on conviction; it is to be given up to the owner as having the right—that is the right of property and the right of possession" (*r*). Where the property in the goods has become vested in another, upon conviction for larceny, embezzlement, false pretences, &c., the property revests as a matter of law; and the Act empowers the Court in its discretion to order restitution in a summary way—an order which is "in the nature of execution" (*s*). If the Court refuse to order restitution, this will not prevent the property revesting in the original owner, but leaves him to his remedy by action (*t*).

Code, s. 24 (2).

This is still the law with respect to convictions for *larceny* (*u*): but with respect to the other offences specified, the proviso to section 45 (2) of the Larceny Act and the Code provide that so far as regards *goods* (as distinguished from things in action and money (*x*)), the property "shall not revest" in the former owner "by reason only of the conviction of the offender."

Revesting on avoidance of *de facto* contract.

The property, however, may still revest in the original owner for other reasons—as, for example, by the seller's avoidance, before the rights of any second buyer or pledgee intervene, of the voidable title (*y*) obtained by the buyer under a *de facto* contract through false pretences. In such a case, although the property does not revest "by reason only of the conviction," the goods may still be "restored to the owner," and the Court may effect this by a restitution order (*z*).

Where owner's title never divested.

So also it is apprehended that the goods should be restored under section 45 (1) of the Larceny Act in cases where no question of the revesting of the property is concerned, for example, where the buyer's false pretence does not lead to a *de facto* contract, and therefore the property does not pass out of the seller (as where the buyer obtains the goods by

(*q*) See the judgment in *Scattergood* v. *Sylvester* (1850) 15 Q. B. 506; 19 L. J. Q. B. 447; 81 R. R. 945, decided on the same words in 7 & 8 Geo. 4. c. 29, s. 57.

(*r*) *Per* Coleridge, J., 15 Q. B., at 512.

(*s*) *Ibid.*

(*t*) *Scattergood* v. *Sylvester*, *supra*.

(*u*) Code, s. 24 (1), *ante*, 24.

(*v*) S. 24 (2), *ante*, 24.

(*x*) *Ibid.*, s. 62, *post*, 198.

(*y*) As to voidable title, see Code, s. 23, *post*, 36.

(*z*) *R.* v. *George* (1901) 65 J. P. 729. And the avoidance may be made by the application for a restitution order: *ibid.* On the other hand, where a third person has acquired a good title there will be no restitution: *R.* v. *Walker* (1901) 65 J. P. 729.

pretending to be some one else), and there is no subsequent buyer in market overt (*a*).

The general effect of these enactments appears to be: (1) In the case of larceny, where a good title to stolen goods has been obtained in market overt the property in them revests on the expiration of ten days after the conviction of the thief, or until his appeal is determined, unless the Court otherwise order. (2) Where goods are obtained by false pretences the divesting and revesting of the property therein are governed by the general rules of the law of contract, as laid down in the Code or existing at common law, and these rules are no longer affected by the conviction of the offender. (3) In all cases where the original owner is entitled by law to the goods whether the property in them has remained vested in him, or has been divested and subsequently revested —the goods should be given up to him, and an order for restitution, subject to its operation being suspended, as above mentioned, may be made under section 45 (1) of the Larceny Act. Such an order is "cumulative to the ordinary remedy by action" (*b*). General effect of enactments.

It had been settled that the property in the chattel becomes revested in the original owner upon the conviction of the felon, even though no writ or order of restitution has been made by the Court (*c*). But now the revesting is, in the absence of an order to the contrary, suspended for at least ten days (*d*). Property revests after conviction without order.

But the statutory title does not relate back to the date of the theft, and therefore does not affect intermediate dealings with the goods. Accordingly, an action was held not to be maintainable against an innocent buyer in market overt who had disposed of the stolen goods *before* the conviction of the thief, although he was, while the goods still remained in his possession, notified of the robbery by the original owner; for the property, having been altered by the sale in market overt, did not revest in the plaintiff until the conviction; and since then the defendant had not been in possession (*e*). But does not relate back.

(*a*) See *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459; 47 L. J. Q. B. 481; *post*, 28.

(*b*) Per Patteson, J., in *Scattergood* v. *Sylvester* (1850) 15 Q. B., at 511; 19 L. J. Q. B. 447; 81 R. R. 945.

(*c*) *Scattergood* v. *Sylvester* (1850) 15 Q. B. 506; 19 L. J. Q. B. 447; 81 R. R. 945; *Bentley* v. *Vilmont* (1887) 12 App. Cas. 471; (1886) 18 Q. B. D. 322, C. A.; 57 L. J. Q. B. 18.

(*d*) Criminal Appeal Act, 1907, s. 6, *ante*, 25.

(*e*) *Horwood* v. *Smith* (1788) 2 T. R. 750; 1 R. R. 613; *Lindsay* v. *Cundy* (1876) 1 Q. B. D. 348; 47 L. J. Q. B. 481. (This point was not affected by the reversal of the judgment in the latter case on other grounds; in C. A.,

And it is conceived that the suspension of the owner's title under the Criminal Appeal Act, 1907, has not changed the law (*f*). But if the buyer buy the stolen goods out of market overt he is liable for conversion if he deal with them even before the conviction of the thief. Thus in *Lindsay* v. *Cundy* (*g*), one Blenkarn, falsely representing himself to be a reputable firm of Blenkiron & Co., was convicted of obtaining goods by false pretences from the plaintiffs, but the defendants had purchased the goods from Blenkarn and resold them before his conviction. The Judges of the Queen's Bench were of opinion that there was a voidable contract of sale which passed the property in the goods to Blenkarn, and, following *Horwood* v. *Smith* (*h*), they gave judgment for the defendant, on the ground that the Larceny Act, 1861, did not revest the property in the prosecutor until conviction, and that his title did not relate back to the date of the original fraud. On appeal, however, both the Court of Appeal (*i*) and the House of Lords (*k*) took a different view of the original transaction between the plaintiffs and Blenkarn, and held that there was *no contract* between them and that the property did not pass; and in that view the defendants were liable for the conversion of the goods before conviction, the sale to them not having been made in market overt. The authority, however, of the views expressed in the Court of Queen's Bench upon the effect of the statute of 1861 remained unimpaired (*l*).

Lindsay v. *Cundy* (1876).

It was decided in *Scattergood* v. *Sylvester* (*m*), and admitted in *Walker* v. *Matthews* (*n*), that an owner is, on conviction of the thief, entitled to recover from a *bonâ fide* buyer in market overt, not only the original goods stolen,

Intermediate increment and maintenance of goods.

2 Q. B. D. 96; and in H. L. 3 App. Cas. 459. The Court before which a conviction takes place within the terms of the Larceny Act (as modified now by s. 24 of the Code), has jurisdiction to entertain an application for the restitution of the proceeds of the goods as well as of the actual goods: *Reg.* v. *Justices of the Central Criminal Court* (1886) 17 Q. B. D. 598; affirmed in C. A., 18 Q. B. D. 314; 56 L. J. M. C. 25.

(*f*) See the reasoning of the judges in *Horwood* v. *Smith*, which seems equally applicable to existing circumstances of the law.

(*g*) 1 Q. B. D. 348; 47 L. J. Q. B. 481. See also *Peer* v. *Humphrey* (1835) 2 A. & E. 495; 4 L. J. K. B. 100; 41 R. R. 471; *White* v. *Spettigue* (1845) 13 M. & W. 603; 14 L. J. Ex. 99; 67 R. R. 753.

(*h*) (1788) 2 T. R. 750; 1 R. R. 613, *ante*, 27.

(*i*) (1877) 2 Q. B. D. 96; 47 L. J. Q. B. 481.

(*k*) (1878) 3 App. Cas. 459; 47 L. J. Q. B. 481. See also *In re International Society*; *Baillie's Case* [1898] 1 Ch. 110; 67 L. J. Ch. 81.

(*l*) *Per* Lord Watson in *Bentley* v. *Vilmont* (1887) 12 A. C., at 479; 57 L. J. Q. B. 18.

(*m*) (1850) 15 Q. B. 506; 19 L. J. Q. B. 447; 81 R. R. 945.

(*n*) (1881) 8 Q. B. D. 109; 51 L. J. Q. B. 243.

but also increment added to them between the date of his purchase and the conviction, as for example the calves and milk of stolen cows produced while in the buyer's possession. On the other hand, it was decided in the latter case that the buyer could not recover from the owner moneys expended on the keep of the beasts during that period, as the buyer was simply maintaining what was then his own property.

Reimbursement to innocent purchaser.

When an innocent purchaser of stolen goods has been forced to make restitution to the prosecutor of the thief, the Court may, upon the application of the purchaser, order that any money taken from him on his apprehension shall, on the restitution of the stolen property, be applied to reimbursing the purchaser the price paid by him (*o*).

Must owner prosecute thief before suing?

With regard to civil remedies by the owner of stolen goods against the thief, there is no lack of authority for the proposition that no civil remedy is enforceable by the owner until he has prosecuted the thief (*p*). Three distinct doctrines have prevailed: (1) That the private wrong is merged in the public wrong; (2) That, though there is no merger, prosecution is a condition precedent to the accruing of a cause of action: (3) That there is merely a duty on the aggrieved person not to sue to the neglect of his public duty (*q*). But, whichever theory be taken, there are difficulties in the way of its adoption (*r*): and the rule, though constantly stated by Judges and text-writers, appears to have been enforced in only two cases: *Ex parte Elliott* (*s*) and *Wellock* v. *Constantine* (*t*). In the former case, it was decided that a principal, who had not prosecuted his agent for embezzlement, could not prove in the bankruptcy of the agent for the moneys embezzled: and in the latter, Willes, J., nonsuited the plaintiff, on the face of whose pleadings it

(*o*) See the Larceny Act, 1916, s. 45 (3) re-enacting and amending the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 9.

(*p*) See (in addition to the cases mentioned in the notes below) *Hudson* v. *Lee* (1589) 4 Co. Rep. 43 a.: *Higgins* v. *Butcher* (1606) Yelv. 89; Noy, 18; *Markham* v. *Cobbe* (1626) W. Jones, 147; *Dawkes* v. *Corveigh* (1652) Sty. 346; *Crosby* v. *Leng* (1810) 12 East, 409; 11 R. R. 437; *Stone* v. *Marsh* (1827) 6 B. & C. 551; 5 L. J. (O. S.) K. B. 201; 30 R. R. 420, *White* v. *Spettigue* (1845) 13 M. & W. 603, 14 L. J. Ex. 99; 67 R. R. 753; *Appleby* v. *Franklin* (1885) 17 Q. B. D. 928, 55 L. J. Q. B. 129. The rule was restated in 1891 by Lord Halsbury, L.C., in *Vernon* v. *Watson* [1891] 2 Q. B. 666; 60 L. J. Q. B. 472, C. A.

(*q*) *See per* Watkin Williams, J., in *Midlands Ins. Co.* v. *Smith* (1881) 6 Q. B. D. at 568; 50 L. J. Q. B. 329; and at 574, he states that the second of these doctrines "if it ever had any solid foundation, was finally exploded in 1879 in Ex parte *Ball*, *infra*.

(*r*) They are stated by Bramwell, L.J., in Ex parte *Ball*, Re *Shepherd* (1879) 10 Ch. D., at 671, 672; 48 L. J. Bk. 57, C. A.

(*s*) (1837) 3 Mont. & A. 110; 6 L. J. Bk. 41.

(*t*) (1863) 2 H. & C. 146; 32 L. J. Ex. 285; 133 R. R. 622.

appeared that a felony had been committed, he having failed to prosecute: and the majority of the Court of Exchequer (Martin, B., dissenting) refused a rule for a new trial, but gave no reasons for their judgment. This case, however, was disapproved in *Wells* v. *Abrahams* (*u*), and cannot be treated as an authority.

In Ex parte *Ball* (*v*), it was decided by the majority of the Court of Appeal, that no obligation to prosecute lay on the owner's trustee in bankruptcy.

No such obligation on bankrupt owner's trustee.

Difficulty of enforcing alleged rule.

James, L.J. and Brumwell, L.J., while hesitating to say that there is no such rule binding the owner himself, expressed serious doubt whether there is any practical way of enforcing the alleged duty; whereas Baggallay, L.J., treated it as established that "notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice"; and that "the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect the seeking of civil redress by action."

In *Wells* v. *Abrahams* (*x*), Lush, J., said: "By what means that duty is to be enforced, we are nowhere informed. I am unable to find a single instance in which there has been directly any attempt to enforce that duty." It is clear that no third party can seek to enforce it (*y*). A statement of claim alleging as the cause of action a felonious act of the defendant is not demurrable (*z*); nor can the defendant set up his own felony in bar of the action (*a*); nor is the failure to prosecute a ground to nonsuit the plaintiff or to enter a verdict for the defendant, for the duty of the Judge at the trial is to try the cause on the issues joined (*b*).

(*u*) (1872) L. R. 7 Q. B. 554; 41 L. J. Q. B. 306; see *per* Blackburn, J., at 562; and *cf. per* Bramwell, L.J., in Ex parte *Ball*, *supra*.

(*v*) (1879) 10 Ch. D. 667, C. A.; 48 L. J. Bk. 57.

(*x*) (1872) L. R. 7 Q. B., at 563; 41 L. J. Q. B. 306.

(*y*) *White* v. *Spettigue* (1845) 13 M. & W. 603; 14 L. J. Ex. 99; 67 R. R. 753; following *Stone* v. *Marsh* (1827) 6 B. & C. 551; 5 L. J. (O. S.) K. B. 201; 30 R. R. 420; and *Marsh* v. *Keating* (1831) 1 Bing. N. C. 198, H. L.; 37 R. R. 75; and overruling *Gimson* v. *Woodfull* (1825) 2 C. & P. 41; and the law assumed in *Peer* v. *Humphrey* (1835) 2 A. & E. 495; 4 L. J. K. B. 100; 41 R. R. 471. See also *Lee* v. *Bayes* (1856) 18 C. B. 599; 25 L. J. C. P. 249. *Osborn* v. *Gillett* (1873) L. R. 8 Ex. 88; 42 L. J. Ex. 53; *Appleby* v. *Franklin* (1886) 17 Q. B. D. 93; 55 L. J. Q. B. 129.

(*z*) *Midland Ins. Co.* v. *Smith* (1881) 6 Q. B. D. 561; 50 L. J. Q. B. 329; *Roope* v. *D'Avigdor* (1883) 10 Q. B. D. 112.

(*a*) *Lutterell* v. *Reynell* (1670) 1 Mod. 282; *per Cur.* in *Stone* v. *Marsh* (1827) 6 B. & C. 564; 5 L. J. (O. S.) K. B. 201; 30 R. R. 420.

(*b*) *Wells* v. *Abrahams* (1872) L. R. 7 Q. B. 554; 41 L. J. Q. B. 306; disapproving *Wellock* v. *Constantine* (1863) 2 H. & C. 146; 32 L. J. Ex. 285;

In *Ex parte Leslie* (*c*), it was held by the Court of Appeal that, whether the alleged rule existed or not (which they did not decide) a banker could prove in the customer's bankruptcy for the amount of an overdraft secured by forged bills, as the debt was an ordinary debt independent of, and not founded on, the forgery.

Means suggested. Ex parte *Leslie* (1882).

The only means that has been suggested of enforcing the alleged obligation is by invoking the summary jurisdiction of the Court to stay the proceedings on the ground that they involve an abuse of the process of the Court (*d*); but no attempt ever appears to have been made to invoke this jurisdiction in such a case (*e*); and "it is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases" (*f*).

Sale of horses in market overt.

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

The statutes 2 & 3 P. & M. c. 7, passed in 1555, and 31 Eliz. c. 12, in 1589, contain the rules and regulations applicable to this subject (*g*). They are expressly preserved by the Code (*h*).

2 & 3 P. & M. c. 7.

The principal provisions of the first statute are, that there shall be a certain special place appointed and limited out in all fairs and markets overt where horses are sold; that a toll-keeper shall be appointed to keep this place from ten o'clock in the morning until sunset, and he shall take the tolls for all horses at that place and within those hours, and not at any other time or place; that the parties to the bargain and also the horse sold shall be before him present when he takes the toll: and that he shall write in a book, to be kept for that purpose, the names, surnames, and dwelling-places of

133 R. R. 622. *Contra* in Ireland, *Quinlan* v. *Barber* (1825) Batty, 47. "But nowadays a judge has complete control of the cause, and can enter judgment as he thinks right" *per* Collins, M.R., in *Wightwick* v. *Pope* [1902] 2 K. B. 99; 71 L. J. K. B. 709, C. A. It was not so when *Wells* v. *Abrahams* was decided.

(*c*) (1882) 20 Ch. D. 131, C. A.; 51 L. J. Ch. 189.

(*d*) *Per* Cockburn, C.J., and Blackburn, J., *in Wells* v. *Abrahams* (1872) L. R. 7 Q. B., at 557, 559; 41 L. J. Q. B. 306.

(*e*) See *per* Blackburn, J., in *Wells* v. *Abrahams* (1872) L. R. 7 Q. B. at 559, 562; 41 L. J. K. B. 306; and *per* Bramwell, L.J., in *Ex parte Ball* (1879) 10 Ch. D., at 672; 48 L. J. Bk. 57.

(*f*) *Per* Lord Herschell in *Lawrance* v. *Norreys* (1890) 15 App. Cas., at 219, H. L.; 59 L. J. Ch. 681.

(*g*) They are set out in minute detail in the two statutes.

(*h*) S. 22 (2), *ante*, 17.

the parties (*i*), and the colour, with one special mark at least, of the animal sold. The property in any horse "thievishly stolen or feloniously taken" is not to pass to the buyer, unless the animal be openly exposed for one hour at least at the place and within the hours above specified; and unless the parties come together and bring the animal to the toll-keeper or book-keeper (where no toll is paid), and have the entries properly made in the book. And the owner of any horse "thievishly stolen or taken," and not sold according to the tenor of the statute, may seize it, or have an action of detinue or replevin for the same.

31 Eliz. c. 12. By the second statute, it is required that the toll-keeper or book-keeper shall take upon himself "perfect knowledge" of the seller, and "of his true mystery, Christian name, surname, and place of dwelling or resiancy"; or that the seller shall bring to the keeper one sufficient and credible person that can testify that he knows the seller, and in such case the name and residence of the person so testifying, as well as those of the seller, are to be recorded in the book, and the "very true price or value" given for the horse; and in case of failure to comply with these provisions, the sale of "*any* horse" is to be void. The Act also provides that the owner of a *stolen* horse, or his executors or administrators, may take back his horse from the purchaser, even when the sale has been regularly made in market overt according to the rules laid down in the statute, on repayment to the purchaser of the price paid by him, provided claim be made before the mayor or head officer of the town or parish where the animal is found, or a justice of the county, within six months from the date of the felony, and proof be made of the ownership and of the theft by two sufficient witnesses within forty days after such claim (*l*).

It will be noticed that the main provisions of the 31 Eliz. c. 12 (contained in s. 2) are not confined, like those of the first statute, to horses "thievishly stolen or feloniously taken" (*m*).

(*i*) It was held in *Wikes* v. *Morefoots* (1588) Cro. El. 86, that the false entry of his name by a thief in the toll-book does not invalidate the sale to a *bonâ fide* buyer; but in *Gibb's Case* (1589) 1 Leon. 158; Owen, 27, the contrary was held. *Semble*, rightly.

(*l*) The decisions on these two statutes are collected in Bacon's Abr. "Fairs and *Markets* (E)," and in Com. Dig. "Market (E)." Their provisions have been found so effective in putting an end to the mischief they were intended to prevent that there are very few modern cases on the subject. See *Joseph* v. *Adkins* (1817) 2 Stark. 76; 19 R. R. 677; *Moran* v. *Pitt* (1873) 42 L. J. Q. B. 47; 21 W. R. 554; *Young* v. *Bond* (1896) 12 Times L. R. 160.

(*m*) 2 Inst. 717; *Barker* v. *Reading* (1627) W. Jones, 163.

Accordingly, it was held, in *Moran* v. *Pitt* (*u*), that the sale in market overt, but not according to the formalities of the statute, of a horse, though not proved to have been stolen, was tantamount to a sale *out of* market overt. Accordingly, the onus of proving the due formality of the sale lies on the person claiming the horse against the original owner (*o*).

Ships.

A ship is not like an ordinary personal chattel; it does not pass by delivery, nor does the possession of it prove the title. There is no market overt for ships (*p*). And even the taint of piracy, committed before the condemnation of the ship does not follow it, like a maritime lien, into the hands of successive *bonâ fide* buyers (*q*).

Law in Scotland.

By the law of Scotland an irremovable *vitium reale* attaches to stolen goods, which can be revindicated wherever met with, the privilege of market overt never having obtained sanction in that country (*r*). Nor has either s. 22 or s. 24 of the Code been extended to Scotland (*s*). But if a good title has been obtained in market overt in England or Ireland, this will be recognised in Scotland. Thus, in *Todd* v. *Armour* (*t*), where a horse had been stolen in Ireland, and afterwards sold there in open market to a buyer, who resold to the defender, a *bonâ fide* purchaser in Scotland, it was held that the defender was entitled to hold the goods as against the original owner, the pursuer.

"In Scotland, an intermediate *bonâ fide* purchaser is not liable to the true owner for the value of the goods by reason merely that they have passed through his hands. If the goods are recovered by the true owner from a *bonâ fide* purchaser, the latter may have action for repayment of the price from an equally innocent seller, but such action would be founded on an implied undertaking as to title (*u*). No

(*u*) (1873) 42 L. J. Q. B. 47; 21 W. R. 554.

(*o*) *Ibid.* But in *Todd* v. *Armour* (1883) 9 Rettie, 901, where the formalities were not raised on the pursuer's (the original owner's) pleadings, the Court refused to go into the question, there being other facts to show title in the defendant by a sale in market overt in Ireland to his predecessor in title.

(*p*) *Hooper* v. *Gumm* (1866) L. R. 2 Ch. 282; 36 L. J. Ch. 605.

(*q*) *R.* v. *McCleverty* (1871) L. R. 3 P. C. 673; 40 L. J. P. C. 18.

(*r*) See the Scotch cases since 1583 tabulated in Prof. Brown's Sale of Goods Act (pub. 1895), 324.

(*s*) S. 22 (3) *ante*, 17; s. 24 (3) *ante*, 24.

(*t*) (1882) 9 Ret. 901; see Brown's Sale of Goods Act, 112–113. On the same principle, a sale of goods in any foreign country, valid according to the law of that country, is binding in England: *Cammell* v. *Sewell* (1860) 5 H. & N. 728; 29 L. J. Ex. 350; 120 R. R. 799, Ex. Ch. It was also held in *Todd* v. *Armour*, that in the case in question it lay on the pursuer, the original owner, to plead and prove that the statutory formalities of the sale of a horse in market overt had *not* been complied with, which in this case he failed to do.

(*u*) See Code, s. 12 (1).

similar action (*e*) could be maintained at the instance of the owner of the goods, unless the party *dolo desiit possidere*, or unless he had made a profit, and even then only *in quantum lucratus*" (*x*).

Law in Australia.

There seems to be considerable doubt as to how far market overt exists in Australia (*y*). It has been said never to have been recognised in New South Wales (*z*). In Victoria, however, it has been held that a sale in a market duly established by a municipal corporation under statutory powers is a sale in market overt (*a*).

Law in Canada.

In Canada generally (except in Quebec) it is believed that the English law as to market overt prevails. It has been treated as existing in Ontario (*b*). In Quebec the law of sale is regulated by the Civil Code (*c*). By Article 1487, "the sale of a thing which does not belong to the seller is void, saving the exceptions contained in the three following Articles." By Article 1488, "The sale is valid if it is concerned with a commercial matter, or if the seller becomes immediately the owner of the thing" (*d*). This Article, however, does not affect the rights of the true owner: it only makes the sale good as between the parties (*e*). Article 1489 provides that: "If a thing lost or stolen be bought in good faith in a fair, market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it." "A trader dealing in similar articles" means one whose ostensible business is so to deal in the particular goods, not a mere casual dealer (*f*). And by Article 1490:

(*x*) The learned author appears to mean an action similar to an action of trover against an intermediate purchaser.

(*x*) Brown's Sale of Goods Act, 111—112.

(*y*) The Code has been adopted in all the Australian Colonies except New South Wales, including (except in Queensland) s. 22. In New Zealand s. 22 is specially qualified; see Note on the Application of English Law, &c., to British Possessions *post*.

(*z*) *Per* Martin, C.J., in *Carr* v. *Ash* (1876) 14 Sup. C. R. 352; *per* Windeyer, J., in *Emblem* v. *McRae* (1888) 9 (N. S. W.) L. R., at 186. *Cf. Boggs* v. *Hickie* (1863) 2 S. C. R. (N. S. W.) 214.

(*a*) *Ward* v. *Stephens* (1886) 12 Vict. L. R. 378; following *Ganly* v. *Ledwidge* (1876) Ir. R. 10 C. L. 33, cited *ante*, 20.

(*b*) See *Bowman* v. *Yielding* (1839), not reported, but cited in 1 Robinson and Joseph's Ontario Digest, 2226-7. As to the introduction of English law generally into Canada, see Note on the Application of English Law, &c., to British Possessions, *post*.

(*c*) Book 3, Title 5. Title is dealt with in Arts. 1487—1490, and 2265 (prescription by possession).

(*d*) See *Swan* v. *Eastern Townships Bank* (1912) 22 Q. L. R. (K. B.) 142.

(*e*) *Tremblay* v. *Mercier and Lachaine* (1909) 38 Q. L. R. (Sup. Ct.) 57; criticising *National Cash Register* v. *Demestre* (1905) 14 Q. L. R. (K. B.) 68.

(*f*) *Vezina* v. *Brosseau* (1906) 30 Queb. L. R. 493; *Parent* v. *Belanger* (1907) 31 *ib.* 383.

"If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed."

The rule of market overt does not prevail in America (*g*).

Law in America.

The second exception to the rule that one not the owner cannot make a valid sale of personal chattels, also arises out of s. 45 of the Larceny Act, 1916, already quoted (*h*), the main enactment of which is qualified as follows:— "Provided that nothing in this section shall apply to any valuable security which has been in good faith paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been in good faith taken or received by transfer or delivery by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect (*i*) that the same has been stolen." In such a case the Court will not award or order the restitution of such security.

Sale of negotiable securities by one not owner.

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

This clause bars not only the summary remedy by a restitution order, but also the right and title to the negotiable instrument (*l*). Its provisions are not affected by s. 24 of

(*g*) This appears to have been first stated by the S. C. of Massachusetts in *Towne* v. *Collins* (1785) 14 Mass. 500; 2 Kent's Commentaries, 324 (ed. 1873).

(*h*) *Ante*, 23.

(*i*) Qy. whether the words referring to suspicion are not repealed, with regard to bills, notes, and cheques, by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61)? See ss. 29, 38, and 96.

(*k*) See the Bills of Exchange Act, 1882, ss. 29, 38, extended to cheques by s. 73, and to promissory notes by s. 89; and as to "good faith," see s. 90. The Act applies to the whole of the United Kingdom. For authorities before that Act, see *Gorgier* v. *Mieville* (1824) 3 B. & C. 35; 2 L. J. (O. S.) K. B. 206; 27 R. R. 290; *Bank of Bengal* v. *M'Leod* (1849) 7 Moo. P. C. 35; 83 R. R. 1; *Goodman* v. *Harvey* (1836) 4 Ad. & El. 870; 43 R. R. 507; *Raphael* v. *Bank of England* (1853) 17 C. B. 161; 25 L. J. C. P. 33; *Goodwin* v. *Robarts* (1876) 1 App. Cas. 476; 45 L. J. Ex. 748; *per* Lord Blackburn in *Jones* v. *Gordon* (1877) 2 App. Cas. 629; 47 L. J. Bk. 1; and (since the Act) *London J. S. Bank* v. *Simmons* [1892] A. C. 201; 61 L. J. Ch. 723. See also the notes to *Miller* v. *Race*, 1 Sm. L. C. 9th ed. 502; 11th ed. 463; Byles on Bills, 16th ed. 187.

(*l*) *Chichester* v. *Hill* (1882) 52 L. J. Q. B. 160; 48 L. T. 364.

the Code (*m*), which does not relate to such securities or instruments (*n*).

Theft and sale of coin. *Moss* v. *Handcock* (1899).

The facts in *Moss* v. *Handcock* (*o*) were peculiar. A five-pound gold piece of the Jubilee year, which was current coin, and also a curiosity, and of greater value than its denomination, was stolen from the prosecutor and sold for five pounds to a dealer in curiosities. The thief was convicted, and an order for restitution was made. On a case stated, the Court, drawing the inference of fact that the coin was sold as a curiosity, and was not passed as currency, held that the order was right. In the course of his judgment, Channell, J., pointed out that, had the coin passed in circulation, as in payment for goods, a difficult question of law would have arisen under the main enactment of s. 100 of the Larceny Act (*p*), since the above quoted proviso does not deal with money, yet the consideration which induced the Legislature to protect *bonâ fide* holders of negotiable instruments applies equally to those taking stolen money in good faith; in fact, bills of exchange are negotiable *because* they are like currency. The learned Judge inclined to the opinion that the main enactment of s. 100 of the Larceny Act, so far as money is concerned, is limited to cases where the money stolen or its proceeds are found on the thief, or in the possession of some one who took it from him otherwise than as currency; but that if it were in good faith taken *as money*, even if the coins can in fact be identified, the title to them will not, on conviction, revest in the original owner.

A person having a voidable title to goods can also in certain cases make a valid sale of them. The Code enacts:—

Code, s. 23. Sale under voidable title.

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

A voidable title will arise under a contract induced by fraud, under influence, duress or other invalidating cause. In such a case, in the words of Lord Cairns in *Cundy* v.

(*m*) *Ante*, 24.

(*n*) S. 62 (1), "Goods," *post*.

(*o*) [1899] 2 Q. B. 111; 68 L. J. Q. B. 657.

(*p*) Now s. 45 of the L. A., 1916, *ante*, 23. The question is not affected by s. 21 (1) of the Code, *ante*, 21, which does not apply to money: s. 62 (1), "Goods," *post*.

(*q*) Defined in the Code as "honestly, whether negligently or not": s. 62 (2).

Lindsay (*r*): "If it turns out that the chattel has come into the hands of the person, who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances . . . will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced."

Instances in which this rule has been applied are furnished by *Lindsay* v. *Cundy* (in the Queen's Bench) (*s*), and *Moyce* v. *Newington* (*t*); and it has also been seen that, where false pretences induce a *de facto* contract for the sale of goods, the mere conviction of the offender will no longer revest the property in the original owner (*u*).

Pledge under voidable title.

The same principle applies to a pledgor with a voidable title. Thus a buyer of goods, whose title is liable to be avoided by the seller, may pass a good title to a *bonâ fide* pledgee as against the seller (*v*). And the rule is the same where a seller has a voidable limited interest in the goods, *e.g.* where a third party has a special property therein, and gives the seller possession of the goods for a special purpose only; for an ownership voidable in part cannot be treated differently from an ownership voidable as to the whole (*x*).

Onus of proof.

Notwithstanding the word "provided" in the section above quoted, the onus is on the party seeking to avoid the contract to show that the buyer *did not* purchase in good faith and without notice (*y*).

(*r*) (1878) 3 App. Cas., at 464; 47 L. J. Q. B. 484.

(*s*) (1876) 4 Q. B. D. 348; 47 L. J. Q. B. 484; cited *ante*, 22. See also *White* v. *Garden* (1851) 10 C. B. 919; 20 L. J. C. P. 166; 84 R. R. 846; and the cases cited in the chapter on Fraud, *post*.

(*t*) (1879) 4 Q. B. D. 32; 48 L. J. Q. B. 125; cited in n. (*m*), *ante*, 24. A seller may disaffirm, even after notice of an act of bankruptcy committed by the buyer: *Ex parte Ward, Re Eastgate* [1905] 1 K. B. 465; 74 L. J. K. B. 324; or after a receiving order: *Tilley* v. *Bowman* [1910] 1 K. B. 745; 79 L. J. K. B. 547. After disaffirmance the fraudulent buyer cannot bring detinue against the seller, but the latter must return the price paid: *ibid.*

(*u*) Code, s. 24 (2), *ante*, 24.

(*v*) *Whitehorn Brothers* v. *Davison*, *infra*; *Tilley* v. *Bowman* [1910] 1 K. B. 745; 79 L. J. K. B. 547.

(*x*) *Pease* v. *Gloahec* (1866) L. R. 1 P. C. 219; 35 L. J. P. C. 66; *Zwinger* v. *Samuda* (1817) 7 Taunt. 265; 18 R. R. 476; *Babcock* v. *Lawson* (1880) 5 Q. B. D. 280; 49 L. J. Q. B. 408, C. A., *post*.

(*y*) *Whitehorn Brothers* v. *Davison* [1911] 1 K. B. 463; 80 L. J. K. B. 425, C. A.

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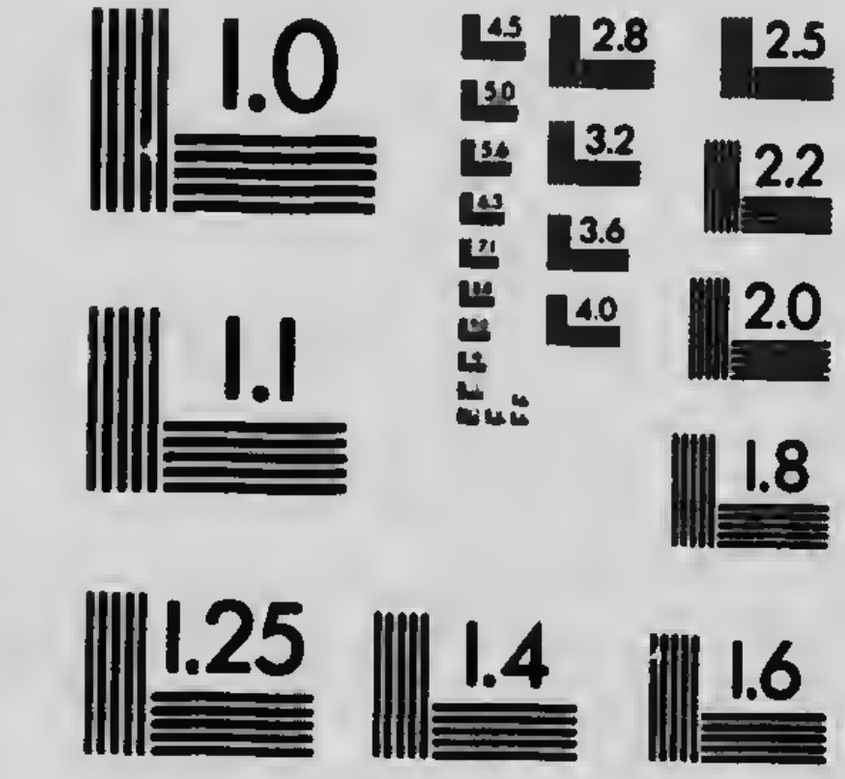

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Where no contract has come into existence– for example, where the seller or pledgor has received the goods on "sale or return," approval, or similar terms, and at the time of the sale or pledge the property has not passed to him (*z*); or where A. by falsely pretending that he is buying for B. has obtained goods from C.—as the owner's rights are not divested, this section has no application (*a*). The difference between false pretences inducing a contract, and what are called "bare" false pretences not having that effect, is discussed by Lord Esher, M.R., in *Vilmont* v. *Bentley* (*b*), to which the reader is referred. The subject of voidable contracts will be further considered in the Chapter on Fraud (*c*).

S. 23 compared with S. 25 (2).

It will be seen that s. 23 covers in part the same ground as s. 25. But under the latter clause the buyer must be in possession of the goods or documents, a requirement not declared by s. 23 (*d*).

Goods subject to an equitable right of third person.

According to a principle analogous to that declared in s. 23 of the Code, where a man sells goods which, or the proceeds of which, are subject to the equitable right of a third person, a *bonâ fide* purchaser without notice will obtain a good title to the goods (*e*).

Factors Act, 1889.

Another exception to the general maxim, *Nemo dat quod non habet*, is afforded by the case of factors. The law declaring the powers of disposition of this class of agent has now been consolidated and amended by the Factors Act, 1889 (*f*), which repealed the four previous Acts (*g*), and was extended to Scotland by the Factors (Scotland) Act, 1890 (*h*).

(*z*) Under s. 18, rule 4, *post*. *Trueman* v. *Attenborough* (1910) 26 Times L. R. 601.

(*a*) See *Higgons* v. *Burton* (1857) 26 L. J. Ex. 342; 112 R. R. 938; *Hardman* v. *Booth* (1863) 1 H. & C. 803; 32 L. J. Ex. 105; 130 R. R. 784; *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459; 47 L. J. Q. B. 481; *Morrison* v. *Robertson* (1908) Sess. Cas. 332.

(*b*) (1886) 18 Q. B. D., at 328; 57 L. J. Q. B. 18.

(*c*) *Post*, *et seqq*.

(*d*) See *White* v. *Garden* (1851) 19 C. B. 919; 20 L. J. C. P. 166; 84 R. R. 846, where the original seller was in possession.

(*e*) *Lempriere* v. *Pasley* (1788) 2 T. R. 485, 490; *Joseph* v. *Lyons* (1884) 15 Q. B. D. 280, C. A.; 54 L. J. Q. B. 1; *Hallas* v. *Robinson* (1885) *ib.* 288; 54 L. J. Q. B. 364, C. A.; *Chartered Bank of India, &c.* v. *Henderson* (1874) L. R. 5 P. C. 501; *Henderson & Co.* v. *Comptoir d'Escompte* (1873) *ib.* 253; 42 L. J. (N. S.) P. C. 60.

(*f*) 52 & 53 Vict. c. 45. As to the Act generally, see Butterworth's Bankers' Advances on Mercantile Securities.

(*g*) Act of 1823, 4 Geo. IV. c. 83; of 1825, 6 Geo. IV. c. 94; of 1842, 5 & 6 Vict. c. 39; of 1877, 40 & 41 Vict. c. 39.

(*h*) 53 & 54 Vict. c. 40.

The powers of disposition of a mercantile agent (which is the term employed throughout the Act) are stated in the following section:—

Powers of mercantile agent with respect to disposition of goods.

"2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods (*i*) or of the documents of title (*k*) to goods, any sale, pledge, or other disposition (*l*) of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same: provided that the person (*m*) taking under the disposition acts in good faith (*n*), and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

"Mercantile agent" is thus defined:—

Factors Act, 1889, s. 1 (1). "Mercantile agent" defined.

"1.—(1.) The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

Persons to whom the Act applies.

The Factors Acts (before 1889) applied solely to persons entrusted as factors or commission merchants, not to persons to whose employment a power of sale is not ordinarily incident, as a wharfinger who receives goods usually without power to sell (*o*). The Acts were limited in their scope to mercantile transactions, to dealings in goods and merchandise, and did not embrace sales of furniture or goods in possession of a tenant or a bailee for hire. A purchaser in good faith from such persons would be liable in trover to the true owner (*p*). The term "agent," it was said (*q*), "does not

(*i*) The expression "goods" shall include wares and merchandise: F. A. s. 1 (3).

(*k*) Defined in s. 1 (4) of F. A., *post*, 44.

(*l*) The words are wide enough to comprehend an exchange under s. 5. Bruce, J., in *Shenstone* v. *Hilton* (1894) 2 Q. B. 457; 63 L. J. Q. B. 584, was of opinion that a delivery of goods to an auctioneer for sale was an agreement for a "disposition" under s. 9. But see to the contrary *Waddington* v. *Neale* (1907) 96 L. T. 786.

(*m*) The expression "person" shall include any body of persons corporate or unincorporate: s. 1 (6).

(*n*) "Honestly, whether negligently or not": Code, s. 62 (2). And the bad faith of one of several buyers is imputed to all: *Oppenheimer* v. *Frazer* [1907] 2 K. B. 50; 76 L. J. K. B. 806, C. A.

(*o*) *Mouk* v. *Whittenbury* (1831) 2 B. & Ad. 484; 36 R. R. 637 (wharfinger, also flour-factor); *Wood* v. *Rowcliffe* (1846) 6 Hare, 183; 17 L. J. Ch. 83; 77 R. R. 68 (tenant); *Lamb* v. *Attenborough* (1863) 1 B. & S. 831; 31 L. J. Q. B. 41; 124 R. P 772 (clerk); *Jaullery* v. *Britten* (1838) 4 Bing. N. C. 242 (person in possession); *Hellings* v. *Russell* (1875) 33 L. T. 380 (forwarding agent); *Cole* v. *N. W. Bank* (1875) 10 C. P. 364; 44 L. J. C. P. 233 (warehouseman and wool broker).

(*p*) *Loeschmann* v. *Machin* (1818) 2 Stark. 311; 20 R. R. 687; *Cooper* v. *Willomatt* (1845) 1 C. B. 672; 19 L. J. C. P. 219; 68 R. R. 798; both cases of ordinary bailees.

(*q*) *Per* Willes, J., in *Heyman* v. *Flewker* (1865) 13 C. B. (N. S.) 519; 32 L. J. C. P. 132; 134 R. R. 629, at 527-528.

include a mere servant or caretaker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the Act has taken its name." And the definition in the present Factors Act of "mercantile agent" seems equally to exclude such persons from its operation.

Heyman v. *Flewker* (1863).

Some of the decisions as to what transactions fell within the Acts now repealed seem difficult to reconcile. In one case (*r*), it was held that a mere insurance agent who on a particular occasion was entrusted with pictures to sell on commission, and who fraudulently pledged them with a pawnbroker, was an "agent entrusted with the possession of goods" within section 1 of the Act of 1842 (*s*), on the ground that the character of the employment in the particular instance corresponded to that of a factor. It is conceived that such a transaction would not come within the protection of the present Act, having regard to the definition of a mercantile agent in section 1 (1), "having the customary course of his business as such agent authority, &c." (*t*), taken in conjunction with the expression in section 2 (1), "any sale, pledge, &c., made by him when acting in the ordinary course of business of a mercantile agent" (*u*). On the other hand, the words seem to cover the case of a man commencing business as a mercantile agent, whose first transaction is an irregular disposition: the words "his business" in section 1 (1) being read as meaning "business of a similar character to that which he is carrying on."

Meaning of "acting in the ordinary course of business of a mercantile agent."

The difference of language between section 1 (1) and section 2 (1) of the Factors Act should be remarked. The formal clause defining a mercantile agent is dealing with the status of the agent, the circumstances in which the agent *gets* his authority from his principal, and under it possession of the

(*r*) *Heyman* v. *Flewker* (1863) 13 C. B. (N. S.) 519; 32 L. J. C. P. 132; 134 R. R. 629; followed by Stirling, J., in *Tremoille* v. *Christie* (1893) 69 L. T. 338, under the F. A. of 1842. The learned judge points out that a question may arise whether the case is of any authority under the F. A. of 1889. As to "agent entrusted," *cf. Baines* v. *Swainson* (1863) 4 B. & S. 270; 32 L. J. Q. B. 281; 129 R. R. 41; and *Hellings* v. *Russell* (1875) 33 L. T. 380.

(*s*) 5 & 6 Vict. c. 39.

(*t*) See *per* Lord Alverstone, C.J., in *Oppenheimer* v. *Attenborough & Son* [1908] 1 K. B. 221, at 226; 77 L. J. K. B. 209, C. A.

(*u*) As to "usual and ordinary course of business" in s. 4 of the Act of 1825 (6 Geo. IV. c. 94) see and *cf. Monk* v. *Whittenbury* (1831) 2 B. & Ad. 484; 36 R. R. 637; *Sheppard* v. *Union Bank* (1862) 7 H. & N. 661; 31 L. J. Ex. 154; 126 R. R. 630; and *Biggs* v. *Evans* [1894] 1 Q. B. 88.

goods: he must be an agent having authority in the customary course of "*his* business *as such agent*" to sell, pledge, &c., goods. But in dealings with third persons, the Act gives him authority if he acts "in the ordinary course of business of a mercantile agent," that is, an ostensible authority. This authority cannot be limited by private instructions (*r*), or by a particular trade custom, except that the existence of a notorious trade custom would fix the agents' dispunee with notice of a curtailed authority to deal with the goods.

Oppenheimer v. Attenborough & Son (1907).

Thus in *Oppenheimer* v. *Attenborough & Son* (*s*), the plaintiff entrusted one Schwabacher, a diamond broker, with diamonds on his representation that two specified firms of diamond merchants would probably buy them. Schwabacher did not show the diamonds to either of those firms, but pledged them with the defendants, *bonâ fide* pledgees. In an action of detinue, evidence was given of a custom in the diamond trade that a diamond broker employed to sell has no authority to pledge them for his principal, and that the employment of a broker to pledge diamonds was unheard of. Channell, J., gave judgment for the defendants on the ground that the Act by the words "*a* mercantile agent" gave the agent a general authority: and this authority could not be cut down by a particular trade custom. This decision was affirmed by the Court of Appeal. "When you are dealing with a person who is a mercantile agent," said Lord Alverstone, C.J., "you have to find whether in the customary course of his business as such agent he has authority to sell, &c. . . When you are dealing with an agent in possession of goods, you have no doubt to consider what kind of agent he is, and what his customary course of business would be when he is acting in the capacity of agent. . . . Having got the *class* of mercantile agent. . . . we come to section 2 (1), which deals with the circumstances under which the transaction must be carried out. . . I think that. . . the words 'acting in the ordinary course of business of a mercantile agent," mean that the person must act as if he were carrying out a transaction which he was authorised by his master to carry out."

Buckley, L.J., said of the words that the meaning was

(*r*) *Turner* v. *Sampson* (1911) 27 Times L. R. 200.

(*s*) [1908] 1 K. B. 221; 77 L. J. K. B. 209, C. A. Cf. *De Gorter* v. *Attenborough & Son* (1904) 21 T. L. R. 19, where the agent pledged the goods by means of a private friend.

"'acting in such a way as a mercantile agent, acting in the ordinary course of business of a mercantile agent, would act,' that is to say, within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make."

Kennedy, L.J., reserved his final opinion as to the exact meaning of the expression discussed, but said: "I am inclined to think that it is meant to apply to a person who, being a mercantile agent, is acting at the time, and in the manner, and possibly in other respects, as though he had authority and occasion as a mercantile agent to make the pledge" (*y*).

This decision amounts, in effect, to a holding that in section 2 (1) the words "business of a mercantile agent," are not to be read as if they were "business of *such* mercantile agent."

Weiner v. *Harris* (1909).

In *Weiner* v. *Harris* (*z*), the plaintiff was a manufacturing jeweller, and the defendant a pawnbroker and moneylender. The plaintiff, from time to time, sent articles of jewellery to one Fisher, whose business was to travel about the country selling jewellery, on the terms of a letter written by Fisher, in which, after acknowledging he had received the goods "on sale or return," and that he must account for them, he added: "The goods are your property, and to remain so until sold or paid for, they being left with me for the purpose of sale or return, and not to be kept as my own stock. The goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one-half the profit. . . Immediately I receive the price of any article sold I am to remit to you the cost price and one half of the profit." It was held by the Court of Appeal that on the construction of the letter it was never intended that Fisher should be the buyer of the goods on an ordinary contract of "sale or return"; that the terms of the letter referred to a sale by Fisher, as the agent of the plaintiff, and

(*y*) These definitions were approved in *Weiner* v. *Harris* [1910] 1 K. B. 285; 77 L. J. K. B. 209, C. A.; overruling *Hastings* v. *Pearson* [1893] 1 Q. B. 62; 62 L. J. Q. B. 75.

(*z*) [1910] 1 K. B. 285; 77 L. J. K. B. 209, C. A., finally overruling *Hastings* v. *Pearson* [1893] 1 Q. B. 62; 62 L. J. Q. B. 75. See also *Janesich* v. *Attenborough & Son* (1910) 102 L. T. 605 (effect of pledge at high rate of interest).

not a sale to him by the plaintiff; that, it being the customary course of his business to carry jewellery about the country and sell it for the plaintiff, he was a mercantile agent (*a*); and that the defendant, being a *bonâ fide* pledgee of the goods from Fisher, had a good title.

Possession by agent. *Semble*, it should be *qua* mercantile agent.

The agent, to be enabled to dispose of the goods, must be in possession "with the consent of the owner" (*b*). The Factors Acts of 1825 and 1842 provided that the agent or "person" should be "*entrusted*" with the possession of the goods or documents of title. But notwithstanding the changed wording, it is conceived that those cases (*c*) under the earlier Acts are still law which decided that a mercantile agent, who *in some other capacity* was entrusted with goods, was not entrusted with them as a mercantile agent, and could not in consequence pass a good title to a third person. In other words, section 2 (1) of the Act of 1889 should be read as if it ran: "Where a mercantile agent is, with the consent of the owner, in possession, *as a mercantile agent*, of goods, &c." (*d*). A literal interpretation of the section would, for example, enable an auctioneer to whom a furnished house had been let to give a good title to the furniture if he sold it by auction—which can hardly have been intended (*e*).

Obtained by fraud.

The consent of the owner to the agent's possession is consent in fact. It is therefore none the less valid though it may have been obtained by fraud, provided the fraud do not amount to obtaining possession by a trick, in which case the consent would be negatived (*f*).

Notice.

The "notice," which will deprive a pledgee of the protection of the Act, does not mean formal notice; either knowledge, or the means of knowledge to which the party wilfully shuts his eyes (*g*), is enough, but mere suspicion

(*a*) *Cf. Mehta* v. *Sutton* (1913) 108 L. T. 214 (pearl broker in Paris: no authority to sell).

(*b*) Factors Act, 1889, s. 2 (1). *ante*, 39.

(*c*) *City Bank* v. *Barrow* (1880) 5 App. Cas. 664; *Cole* v. *N. W. Bank* (1875) L. R. 10 C. P. 354, Ex. Ch.; 44 L. J. C. P. 233; *cf. Biggs* v. *Evans* [1894] 1 Q. B. 88.

(*d*) See Butterworth's Bankers' Advances on Merc. Securities, 65-67.

(*e*) Case suggested by Blackburn, J., in *Cole* v. *N. W. Bank* (1875) L. R. 10 C. P., at 369; 44 L. J. C. P. 233.

(*f*) *Per* Blackburn, J., in *Cole* v. *N. W. Bank* (1875) L. R. 10 C. P., at 373; 44 L. J. C. P. 233; *per* A. L. Smith, L.J., and Collins, L.J., in *Cahn* v. *Pockett* [1899] 1 Q. B. 654, 659; 68 L. J. Q. B. 515; *per Curiam* in *Oppenheimer* v. *Frazer* [1907] 2 K. B. 50; 716 L. J. K. B. 806, C. A. "Consent means consent in the eye of the law": *per* Fletcher Moulton, L.J., and Kennedy, L.J., *ibid.* The distinction is between fraud which merely induces consent to the possession, and fraud which negatives consent altogether.

(*g*) See *per* Parke, B., in *May* v. *Chapman* (1847) 16 M. & W., at 361; 73 R. R. 529; *Mehta* v. *Sutton* (1913) 109 L. T. 529, C. A. (wilful refraining from enquiry).

is not enough (*h*). "A person may have knowledge of a fact either by direct communication, or by being aware of the circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge, acquired in either of these ways, is enough to exclude a party from the benefit of the provisions of this statute" (*i*). And notice to one of several joint buyers is notice to all (*j*).

Remaining provisions of Factors Act with regard to sales summarised.

The Act contains the following subsidiary provisions (*k*), which may be thus summarized:—

Any sale which would have been otherwise valid is equally valid, after the determination of the owner's consent to the agent's possession, if the person taking under the disposition had at the time thereof no notice of such determination (*l*). Possession of documents of title to goods obtained by reason of possession, with the owner's consent, of the goods or of *other* documents of title thereto, is deemed to be with the owner's consent (*m*): and the consent of the owner is, for the purposes of the Act, generally presumed (*n*). With regard to possession, actual custody of the goods or documents by a person, or their being held by another subject to his control, or for him, or on his behalf, is deemed to be his possession (*o*). "Document of title" includes "any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented" (*p*).

(*h*) See the term discussed by Lord St. Leonards, L.C., in *Naruishaw* v. *Brownrigg* (1852) 21 L. J. Ch. 908, at 911; 95 R. R. 156; *Gobind Chunder Sein* v. *Ryan* (1861) 9 Moo. Ind. App. 140; 15 Moo. P. C. 230; 137 R. R. 41 (both decisions on the Factors Act, 1842, s. 3); and *cf. Ex parte Snowball* (1872) L. R. 7 Ch., at 549; 41 L. J. Bk. 49; and *Lord Sheffield* v. *London J. S. Bank* (1888) 13 App. Cas. 333; 57 L. J. Ch. 986, H. L.

(*i*) *Per* Lord Tenterden, C.J., in *Evans* v. *Trueman* (1830) 1 Moo. & R. 10 (on the Factors Act, 1825); discussed in *Naruishaw* v. *Brownrigg*, *supra*; *cf. Gobind Chunder Sein* v. *Ryan*, *supra*.

(*j*) *Per* Fletcher Moulton, L.J., in *Oppenheimer* v. *Frazer* [1907] 2 K. B. 50, C. A.

(*k*) S. 1 (5) also defines "pledge"; by s. 3 a pledge of documents of title (*i.e.*, by a mercantile agent: see *Inglis* v. *Robertson* [1898] A. C. 616, *post*: 67 L. J. P. C. 108) is deemed to be a pledge of the goods. S. 4 deals with a pledge for an antecedent debt.

(*l*) S. 2 (2).

(*m*) S. 2 (3).

(*n*) S. 2 (4).

(*o*) S. 1 (2).

(*p*) S. 1 (4).

"Person" includes any body of persons, corporate or unincorporate (*q*).

The consideration for a sale, etc., may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title, negotiable security, or any other valuable consideration (*r*); and an agreement made with a mercantile agent through his clerk, or other person authorised in the ordinary course of business to make contracts of sale or pledge on the agent's behalf, is deemed to be an agreement with the agent (*s*).

"The transfer of a document may be by indorsement, or where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery" (*t*).

The Act also preserves the owner's rights with respect to the recovery from the agent or his trustee in bankruptcy of the goods before a sale or pledge (*u*); and the property from the buyer of the price of the goods sold, subject to a set-off by the buyer against the agent (*v*).

Inglis v. *Robertson* (1898).

In *Inglis* v. *Robertson* (*w*), Goldsmith, a wine merchant who had purchased some whisky then stored on the premises of a warehouseman, got the whisky transferred into his own name and, by virtue of his ownership, procured a warrant (*x*) from the warehouseman, whereby the latter acknowledged the transfer in his books, and engaged to deliver to Goldsmith or his assigns by indorsement. This warrant Goldsmith indorsed and delivered to a pledgee as security for a loan. The original sellers arrested the goods under Scotch law, claiming a preferable right thereto. *Held*, that by the law of Scotland they were entitled to succeed, and that section 3 of the Factors Act, 1889, which provides that a pledge of the documents of title shall be deemed to be a pledge of the goods, applies only to a pledge by a mercantile agent, or

(*q*) S. 1 (6).
(*r*) S. 5.
(*s*) S. 6.
(*t*) S. 11.
(*u*) S. 12 (2).
(*v*) S. 12 (*c*).
(*w*) [1898] A. C. 616; 67 L. J. P. C. 108. In this case it was shown that the various headings to the groups of sections in the Factors Act are not like mere marginal notes, but are very material to the interpretation of the sections in the various groups: *cf. Young* v. *Adams* [1898] A. C., at 475; 67 L. J. P. C. 75, P. C.
(*x*) Called a "delivery order" in the report and the judgments; but the document was properly a warrant, *i.e.*, a direct acknowledgment by the bailee himself who issued the document, and not a delivery order on him issued by the owner of the goods.

buyer in the position of such an agent under section 9 of the Factors Act, which Goldsmith was not, and therefore that the pledge of the warrant could not be deemed to be a pledge of the goods.

Disposition by seller in possession of the goods or documents

The particular case of a seller who remains in possession of the goods sold, and who afterwards deals with them in fraud of the original buyer, was not provided for under the three earliest Factors Acts, or at common law, in the absence of estoppel on the original buyer. Those Acts were confined in their operation to *agents* "entrusted," a description which did not include the seller; and at common law merely passive conduct on the part of the owner of goods, whereby the person selling without authority is *enabled* to sell them, did not bar the original buyer from recovering his goods from the second buyer (*y*). The latter must have been in some way *misled* by the words or conduct of the original buyer, so as to constitute an estoppel (*z*). The position of the first buyer with regard to the goods dealt with by the seller in possession first arose for decision in 1877 in *Johnson* v. *Crédit Lyonnais Co.* (*a*), where the buyer, who had left the documents of title in the hands of the seller, who fraudulently pledged them to an innocent pledgee, was held entitled to recover the goods. Section 3 of the Factors Act, 1877 (*b*), was passed to annul the effect of that decision, and under its provisions the seller, in possession of the documents of title, could make a valid sale, pledge, or other disposition of the goods to a buyer, &c., who had no notice of the previous sale.

The corresponding section of the present Act is section 8 (*c*), which is in the following terms: —

Factors Act, 1889, s. 8.

"8.—Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith (*d*)

(*y*) *Johnson* v. *Crédit Lyonnais Co.* (1877) 3 C. P. D. 32, C. A.; 47 L. J. C. P. 241; *Farquharson* v. *King* [1902] A. C. 325; 71 L. J. K. B. 667.

(*z*) *Farquharson* v. *King*, *supra*.

(*a*) *Supra*.

(*b*) 40 & 41 Vict. c. 39.

(*c*) Identical with s. 25 (1) of the Code, except that the latter omits, after "other disposition thereof," the words "or under any agreement for sale, pledge, or other disposition thereof." The various terms employed are defined under s. 2 (1) *ante*, 39.

(*d*) Defined in s. 62 (2) of the Code as "honestly, whether . . . negligently or not."

and without notice (*e*) of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."

Under this section the seller's power of sale is based upon the possession of the goods or documents, and not, as under the Act of 1877, upon possession of the documents only. As also under that Act, he may sell, etc., so as to pass a good title, whether his possession is continuous or not, and, it would seem, whether it is tortious or not, but the transaction must be executed by delivery or transfer of the goods or documents a condition not required under the preceding Act (*f*).

Nicholson v. Harper (1895).

In *Nicholson* v. *Harper* (*g*), the plaintiff had purchased of one Goldsmith 250 dozen of wine, then stored in a warehouseman's cellars. No document of title was issued (*h*), and no notice of the sale was given to the warehouseman. Goldsmith subsequently, by signing a memorandum of charge, purported to pledge the wine to the warehouseman for advances made in good faith. Goldsmith then became bankrupt, and his trustee put up the wine for sale. *Held*, by North, J., that the plaintiff was entitled to the wine, there being no delivery of the goods themselves to the pledgee *after* the sale, as they had been continuously in his possession; and there being no transfer to him of any document of title. *Semble* that the words "delivery or transfer" in section 8 should be read distributively (*i*).

Possession must be by seller as such.

The possession under section 8 must be by the seller *as such*. The relation of buyer and seller must continue. Possession by the seller in some other capacity will not entitle him to pass a good title to a third person, as, *e.g.*, where, after delivery to the buyer, he obtains the goods on hire (*k*).

Disposition by buyer obtaining possession.

The converse case to that of a seller in possession is that of a buyer. The Factors Acts previous to that of 1877 did not provide for the case of a buyer allowed to have possession of the goods or documents of title, and it was decided that he

(*e*) As to "notice," see *ante*, 43.

(*f*) As to a resale under s. 48 (2) of the Sale, see *post*, where the effect of the two clauses is compared.

(*g*) [1895] 2 Ch. 415; 73 L. T. 19; 64 L. J. Ch. 672.

(*h*) The Law Reports say that Goldsmith gave the plaintiff a delivery order; the Law Times expressly negatives this fact; but as the plaintiff did not transfer such a document, the question seems immaterial.

(*i*) Vaughan Williams, L.J., was of opinion in *Kitto* v. *Bilbie Hobson & Co.* (1895) 72 L. T. 266, that "transfer" might apply to goods covered by deed.

(*k*) *Mitchell* v. *Jones* (1905) 24 N. Z. L. R. 982.

was not an "agent entrusted," as he held the goods or documents in his own right (*l*). The Factors Act of 1877 by section 4 gave validity to a disposition of the goods by the buyer in possession of the *documents*, but there was no provision that the transaction must be executed by a delivery or transfer, or that possession should be with the seller's consent. The Factors Act of 1889 now contains the law on the subject in s. 9 which, with a similar omission to that referred to with respect to section 8 (*m*), is identical with section 25 (2) of the Code. It provides (*n*) that:

Factors Act, 1889, s. 9.

"**9.**—Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition (*o*) thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

The only cases with which this section deals which are germane to the present Chapter are those in which a buyer transfers goods which have not yet vested in him where, in fact, he has "agreed to buy." To enable him to pass a good title there must be (1) Possession of the goods or documents with the consent of the seller; (2) Delivery or transfer; and (3) Good faith, and absence of notice on the part of the second buyer of the seller's right of property. These conditions being satisfied, the first buyer is, with regard to t seller, in the position of the seller's mercantile ag at under section 2 (1) of the Factors Act.

Where the buyer obtains a document of title in his own right, he does not "obtain" it with the consent of the seller, though the sale enables him to get it. Thus, if a man buy goods lying in a warehouse, and the warehouse-keepers are instructed by the seller to deliver, and they thereupon transfer the goods into the buyer's name, and afterwards issue him, as

(*l*) *Jenkyns* v. *Usborne* (1844) 7 Man. & G. 678; 13 L. J. C. P. 196; 66 R. R. 767; *Van Casteel* v. *Booker* (1848) 2 Ex. 691; 18 L. J. Ex. 9; 76 R. R. 729. See also *Fuentes* v. *Montis* (1868) L. R. 3 C. P. 268; 38 L. J. C. P. 95.

(*m*) *Ante*, 46, n. (*c*).

(*n*) The various terms employed are defined under s. 2 (1), *ante*.

(*o*) See on these words, *Hull Rope Works Co.* v. *Adams* (1895) 73 L. T. 446; 65 L. J. Q. B. 114, where the attachment of a warp to a fishing smack was held to be a "disposition" to the mortgagee of the smack.

owner of the goods, a warrant, the buyer obtains the warrant in his own right (*p*).

The delivery contemplated by section 9 is a physical delivery by the buyer, and not a delivery by virtue of the execution of a deed of assignment (*q*).

The effect of this section on the seller's rights of lien or stoppage in transitu is considered in subsequent Chapters (*r*).

"Agreed to buy." *Lee* v. *Butler* (1893).

In *Lee* v. *Butler* (*s*) certain furniture was let to one Lloyd under an agreement whereby Lloyd "agreed to pay as and by way of rent" the sum of £1 on May 6th, and a further sum of £26 4s. on the 1st of August. The owner had power on default in payment, or on removal of the furniture without his consent, to take possession of the goods, in which case previous sums paid should be appropriated to rent only; but if the hirer duly paid all the instalments and performed all other agreements, the rent should cease, and the goods should then, but not before, become the property of the hirer. Before all the instalments were paid Lloyd's wife sold and delivered the furniture to the defendant. *Held*, in an action by the owner's assignee for detention of the goods, that the defendant had a good title, as Lloyd had "agreed to buy" within the meaning of section 9 of the Factors Act.

Helby v. *Matthews* (1895).

With the above case should be compared *Helby* v. *Matthews* (*t*), in which the circumstances were similar, except that the hirer had the *option to return* the goods, while remaining liable for arrears of hire. *Held*, by the House of Lords, that the hirer had not "agreed to buy," and the owner could recover from the pledgee of the hirer. In this case the effect of the contract was that the owner had made an irrevocable offer to sell, but the hirer had not *bound* himself to buy, and so there was no mutuality of sale.

Thus a buyer with a mere option is not the "true owner"

(*p*) *Inglis* v. *Robertson* [1898] A. C. 629, 630; 67 L. J. P. C. 108; set out *ante*, 45. So, under the earlier Factors Acts, "entrusting" an agent with a document of title was held materially different from *enabling* him to get it: *Phillips* v. *Huth* (1840) 6 M. & W. 572; 10 L. J. Ex. 65; *Hatfield* v. *Phillips* (1842) 9 M. & W. 647; 11 L. J. Ex. 425.

(*q*) *Kitto* v. *Bilbie, Hobson & Co.* (1895) 72 L. T. 266.

(*r*) Book V., Pt. I., Chaps. III. and IV.

(*s*) [1893] 2 Q. B. 318; 62 L. J. Q. B. 591, C. A.; followed in *Thompson and Shackell* v. *Veale* (1896) 74 L. T. 130, C. A.; and *Wylde* v. *Legge* (1901) 84 L. T. 121; *Capital and Counties Bank* v. *Warriner* (1896) 12 Times L. R. 216 (pledge of warrant for unascertained goods). See also *Hull Rope Works Co.* v. *Adams* (1895) 73 L. T. 446; 65 L. J. Q. B. 114 (*ante*, 48, n. (*o*)).

(*t*) [1895] A. C. 471. See also *Edwards* v. *Vaughan* (1919) 26 Times L. R. 515, C. A. (sale or return).

of the goods under section 5 of the Bills of Sale Act 1878, Amendment Act, 1882 (*u*).

Martin v. *Whale* (1917).

In *Martin* v. *Whale* (*v*) the plaintiff agreed to buy land from P. "subject to purchaser's solicitor's approval of title," and in consideration the plaintiff agreed to sell a motor car to P., "completion of such sale to be carried out simultaneously" with the sale of the land. Shortly afterwards the plaintiff lent the car to P. who sold it to the defendants, purchasers for value and without notice of the plaintiff's title. *Held*, that the defendants had a good title. Assuming the interdependency of the contract for the land and that for the car, the plaintiff had agreed to buy the land, though conditionally on his solicitor's approval, and had not merely an option; accordingly the agreement for the car was also conditional, and a contract of sale could be conditional under section 1 (2) of the Code, and the defendants had therefore "agreed to buy."

But it is sufficient if the buyer in fact binds himself to buy, although the contract may be unenforceable against him under section 4 of the Code (*x*).

"Possession with consent." *Cahn* v. *Pockett* (1899).

In *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (*y*), Steinmann & Co., of Liverpool, contracted to sell to one Pintscher, of Altona, a quantity of copper to be delivered at Rotterdam, and paid for by his acceptance. The copper was shipped from Swansea in the defendant's steamship, and the sellers forwarded to Pintscher by letter the bill of lading, indorsed in blank with a draft for acceptance. In the meantime Pintscher had sold ten tons of copper to the plaintiffs. On arrival of the bill of lading Pintscher, who was insolvent (without accepting the draft), handed the bill of lading to his bankers to be given up to the plaintiffs on payment by them, which they duly made without notice of Steinmann & Co.'s rights. *Held*, by the Court of Appeal, in an action against the shipowners for damages for non-delivery, or in the alternative for the conversion of the copper, that Pintscher had "possession," that is, actual custody (*z*), of the bill of lading with Steinmann & Co.'s consent, they having voluntarily, and not being deceived by any trick, sent it to him: that his breach of duty in not accepting the draft, and

(*u*) *Lewis* v. *Thomas* [1919] 1 K. B. 319; 88 L. J. K. B. 275.
(*v*) [1917] 2 K. B. 480, C. A.; 86 L. J. K. B. 1305.
(*x*) *Huguil* v. *Masker* (1889) 22 Q. B. 364; 58 L. J. Q. B. 171, C. A.
(*y*) [1899] 1 Q. B. 643; 68 L. J. Q. B. 515, C. A.; reversing Mathew, J., in Commercial Court [1898] 2 Q. B. 61.
(*z*) Factors Act, ss. 1 (2), 2 (1).

the fact that no property in the goods in consequence passed to him (*a*), was immaterial and that therefore the plaintiffs had a good title to the copper. In the course of his judgment Collins, L.J., made the following pregnant observations (*b*): "It is to be noted that the words . . . are 'obtains possession' with the consent of the seller." It is therefore immaterial whether the consent was afterwards withdrawn. . . . "From the point of view of the *bonâ fide* purchaser, the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it, in the person in possession at the time of the disposition or not. But the Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner. But if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent (see *Baines* v. *Swainson* (*c*): *Sheppard* v. *Union Bank of London* (*d*)) he is able to pass a good title to a *bonâ fide* purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick (*e*), and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser."

Effect on s. 9 of ss. 4 & 5 of Factors Act.

The concluding words of section 9 would seem to have the effect of incorporating into that section the fourth and fifth sections of the Factors Act. If this be so, a pledge by the buyer for an antecedent debt (section 4) will pass to the pledgee no further right to the goods than could have been enforced by the buyer at the time of the pledge; and if he pledges in exchange for other goods, or a document of title, or negotiable security, the pledgee's interest under the pledge is limited by the value of what he delivers or transfers in exchange (*s.* 5.).

(*a*) See on this, Code, *s.* 19 (3), *post*, 394.

(*b*) [1899] 1 Q. B., at 658—660; 68 L. J. Q. B. 515. Part of these remarks are quoted by Fletcher Moulton, L.J., in *Oppenheimer* v. *Frazer* [1907] 2 K. B. 50, at 70; 76 L. J. K. B. 806, C. A.

(*c*) (1863) 4 B. & S. 270; 32 L. J. Q. B. 281; 129 R. R. 741.

(*d*) (1862) 7 H. & N. 661; 31 L. J. Ex. 154; 126 R. R. 630.

(*e*) This dictum would seem to be too broadly expressed.

The Factors Acts override ss. 21 to 24 of Code.

The Factors Acts override (*f*) the provisions of sections 21 to 24 of the Code by virtue of the enactment (*g*) that "nothing in this Act shall affect the provisions of the Factors Acts." Thus, a person, who is, with the seller's consent, in possession of goods which he has "agreed to buy," may pass a good title to a *bonâ fide* purchaser from him under s. 9 of the Factors Act, although his subsequent conviction of larceny as a bailee (*h*) would, apart from that Act, have revested the property in the original owner under section 24 (1) (*i*).

Common law powers of sale.

Among the common law powers of sale, preserved by the Code (*k*) in pursuance of which one not the owner of goods may make a valid sale of them are the following:

By pawnee.

One is that of the pawnee. He has the legal power to sell goods pledged to him, if the pawnor make default in payment at the stipulated time; and this he may do without taking any legal proceedings against the pawnor (*l*).

By public officers.

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

(*f*) *Payne* v. *Wilson* [1895] 1 Q. B. 653; 64 L. J. Q. B. 328. The judgment of the Court on this point is not affected by its reversal in the C. A. [1895] 2 Q. B. 537, which (following *Helby* v. *Matthews*, decided in the H. L. [1895] A. C. 471; 64 L. J. Q. B. 465, after the decision in *Payne* v. *Wilson* in the Q. B. D.) proceeded on the ground that there was no agreement to buy. *Cf. per* Collins, L.J., in *Cahn* v. *Pockett* [1899] 1 Q. B., at 664; 68 L. J. Q. B. 515, C. A.

(*g*) S. 21 (2) (*a*), *ante*, 10.

(*h*) As to revesting of property on conviction for larceny, see *ante*, 23 *et seqq.*

(*i*) *Payne* v. *Wilson* [1895] 1 Q. B., at 661; 64 L. J. Q. B. 328.

(*k*) S. 21 (2) (*b*), *ante*, 10.

(*l*) *Pothonier* v. *Dawson* (1816) Holt, 383; 17 R. R. 647; *Martin* v. *Read* (1862) 11 C. B. (N. S.) 730; 31 L. J. C. P. 126; 132 R. R. 730; *Johnston* v. *Stear* (1863) 15 C. B. (N. S.) 330; 33 L. J. C. P. 130; 139 R. R. 532 (premature sale); *Pigot* v. *Cubley* (1864) 15 C. B. (N. S.) 701; 33 L. J. C. P. 134; 139 R. R. 725; notes to *Coggs* v. *Bernard*, 1 Sm. L. C. 9th ed. 229; 11th ed. 173; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; 37 L. J. Ex. 174; where Willes, J., explained the difference between lien, mortgage, and pledge. The difference between pledge and equitable mortgage by deposit is discussed by Jessel, M.R., in *Carter* v. *Wake* (1877) 4 Ch. D. 605; 46 L. J. Ch. 841; followed in *Fraser* v. *Byas* (1895) 13 Rep. 452; 11 Times L. R. 481. By the above case of *Martin* v. *Read*, and by *Reeves* v. *Capper* (1838) 5 Bing. N. C. 136; 8 L. J. (N. S.) C. P. 44; 50 R. R. 634; and *Langton* v. *Waring* (1865) 18 C. B. (N. S.) 315; 144 R. R. 505; it appears that there may be a valid pledge although the goods remain in, or are returned to, the actual possession of the pawnor as trustee for the pawnee.

(*m*) *Re Thompson. Ex parte Hall* (1880) 14 Ch. D. 132, C. A.

(*n*) Anon. Dyer (1577) 363a, pl. 24; *Turner* v. *Felgate* (1663) 1 Lev. 95; *Manning's Case* (1610) 8 Co. 94b.; *Doe* dem. *Emmett* v. *Thorn* (1813) 1 M. & S. 425; 14 R. R. 485; *Doe* v. *Murless* (1817) 6 M. & S. 110; 18 R. R. 325; *Farrant* v. *Thompson* (1822) 5 B. & Ald. 826; 24 R. R. 571; *Lock* v. *Sellwood* (1841) 1 Q. B. 736; 55 R. R. 406. See Rules of the Supreme Court, O. 57, r. 12, and O. 43, rr. 8—15, as to order for sale of goods seized in execution.

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

But a sale by a sheriff is not tantamount to a sale in market overt. All that is sold is the interest, whatsoever it may be, of the judgment debtor in the goods (*p*).

By masters of ships.

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

By executors and administrators.

Again, an executor or administrator may sell to a buyer in good faith (*r*) and pass a good title to goods, forming part of his testator's estate, of which he is in possession in his capacity as such (*s*).

Statutory powers of sale.

Some instances of statutory powers of sale are the power of the landlord to sell distrained goods (*t*); of County Court bailiffs, only after five days, unless the goods are perishable, or the owner otherwise requests (*u*); of sheriffs, but only by public auction where the goods are seized for a sum exceeding £20 (including legal incidental expenses), unless Court issuing process otherwise orders (*v*); of administrators of convict's estates (*w*); of interim curators thereof, by authority

(*o*) *Lock* v. *Sellwood* (1841) 1 Q. B. 736; 55 R. R. 406.

(*p*) *Crane & Sons* v. *Ormerod* [1903] 2 K. B. 37; 72 L. J. K. B. 507.

(*q*) *The Gratitudine* (1801) 3 C. Rob. 259; *Freeman* v. *East India Company* (1822) 5 B. & Ald. 621; 24 R. R. 497; *Australasian Steam Nav. Co.* v. *Morse* (1872) L. R. 4 P. C. 222; *Acatos* v. *Burns* (1878) 3 Ex. D. 282; 47 L. J. Ex. 566, C. A. (communication with owner); *Atlantic Insurance Co.* v. *Huth* (1880) 16 Ch. D. 474, 481, C. A.

(*r*) *Doe* v. *Fallows* (1832) 2 Cr. & J. 481.

(*s*) *Vane* v. *Rigden* (1870) L. R. 5 Ch. 663, 668; 39 L. J. Ch. 797; *Attenborough* v. *Solomon* [1913] A. C. 76, 82; 82 L. J. Ch. 178.

(*t*) 2 W. & M. Sess. 1, c. 5, s. 2, and the Law of Distress Amend. Act, 1888, 51 & 52 Vict. c. 21 (which does not apply to Scotland or Ireland). See *King* v. *England* (1864) 4 B. & S. 782; 33 L. J. Q. B. 145; 129 R. R. 923.

(*u*) County Court Act, 1888 (51 & 52 Vict. c. 43), s. 154.

(*v*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 145. See also the Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. 5, c. 34), s. 15; and the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 40 (3).

(*w*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 12. See *Carr* v. *Anderson* [1903] 1 Ch. 90; 72 L. J. Ch. 534; affirmed, [1903] 2 Ch. 279, C. A.

of Court or a justice (*x*); of liquidators of companies (*y*); of pawnbrokers to sell by public auction goods pledged for more than 10s. (*z*); of an innkeeper to sell the goods of his guest for his charges by public auction at the expiration of six weeks after deposit, and one month's notice by advertisement of the sale (*a*); of the police to sell stray dogs (*b*); of a mortgagee by deed to sell the mortgaged property (*c*); of trustees of bankrupts (*d*); and of a warehouseman or wharfinger to sell goods deposited with him subject to a stop for freight, after the expiration of ninety days, or sooner if the goods are perishable, on advertisement and notice to the owner (*e*).

By the Court. Goods of a perishable nature.

The Rules of the Supreme Court (*f*) provide for the sale "of any goods, wares or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once." And the County Court Rules contain a similar provision (*g*). Under the words "other just and sufficient reason" an order may be made for the sale of goods though not perishable (*h*).

Property in Admiralty action *in rem*.

Other rules of the Supreme Court authorise the Judge, upon default of appearance by the defendant in an Admiralty action *in rem*, if satisfied that the plaintiff's claim is well founded, to pronounce for the claim, and order the property to be appraised and sold, with or without previous notice, and the proceeds to be paid into Court (*i*). Where goods seized in execution are claimed by another under a bill of sale or otherwise as security for a debt, the Court may order a sale of the goods, or part thereof, and direct the application of

Goods seized in execution and claimed by third party for a debt.

(*x*) Forfeiture Act, 1870, *supra*, s. 25.

(*y*) Companies (Consolidation) Act, 1908 (8 Edw. V, c. 69), s. 151 (2) (*a*).

(*z*) The Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 19, sch. 5.

(*a*) The Innkeepers Act, 1878 (41 & 42 Vict. c. 38).

(*b*) The Dogs Act, 1906 (6 Edw. 7. c. 32), s. 3 (4), repealing in part the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 18.

(*c*) The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. *c.* 41) (which does not extend to Scotland), s. 19 (1).

(*d*) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 55 (1).

(*e*) The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 497. See also the following local Acts: Legal Quays Act, 1846 (9 & 10 Vict. c. ccexcix.), s. 6; Meriton's and Hagen's Sufferance Wharves Act, 1857 (20 & 21 Vict. c. ix.), s. 8; Sufferance Wharves, Port of London Act, 1858 (21 Vict. c. xli.), s. 8, where similar powers are given, preserved by s. 501 of 57 & 58 Vict. *c.* 60, *supra*.

(*f*) O. 50, r. 2.

(*g*) O. 12, r. 2.

(*h*) *Bartholomew* v. *Freeman* (1878) 3 C. P. D. 316 (horse); *Coddington* v. *Jacksonville Ry.* (1878) 39 L. T. 12 (bonds); *The Hercules* (1885) 11 P. D. 10 (foreign ship); *Evans* v. *Davies* [1893] 2 Ch. 216; 62 L. J. Ch. 661 (shares); *Dangar Grant & Co.* v. *Gospel Oak Iron Co.* (1890) 6 T. L. R. 260 (iron: convenience of one party an insufficient ground).

(*i*) O. 13, r. 13.

the proceeds in such manner and upon such terms as may be just (*k*). And under s. 156 of the County Courts Act of 1888 (*l*) when a claim is made in respect of goods taken in execution by a bailiff, the bailiff must, in default of the claimant depositing or giving security for the value of the goods claimed, or depositing the bailiff's costs of possession, sell the goods as if no such claim had been made, and pay into Court the proceeds to abide the decision of the Judge (*m*). And under the Merchandise Marks Act, 1887 (*n*), the Court may order the sale of forfeited goods.

Capacity to sell of lunatics, drunkards, and married women;

The capacity to sell of lunatics, drunkards, and married women would seem not to differ from their capacity to buy; and as all the authorities are concerned only with the competency of such persons as buyers, the reader is referred to what is said on that subject in the second section of this Chapter (*o*).

and of infants.

The capacity of infants to sell generally depends upon whether the Infants' Relief Act of 1874 (*p*), which is hereafter set out and considered, has rendered contracts of sale to which an infant is a party void *in toto*, or whether it applies only to contracts in which the infant is a buyer. But an infant is not liable as seller on a trading contract (*q*).

SECTION II.—WHO MAY BUY.

Persons under disability.

There are certain classes of persons whose contractual capacity is subject to certain limitations, but who, subject to those limitations, may make valid purchases. Infants and insane persons are usually protected from liability on contracts, as also are drunkards when in such a state as to be unable to understand what they are doing; such persons being considered to be devoid of that freedom of will, combined with that degree of reason and judgment, that can alone enable them to give the *assent* which is necessary to constitute a valid engagement. And a married woman is at common law

(*k*) O. 57, r. 12. See *Forster* v. *Clowser* [1897] 2 Q. B. 362; 66 L. J. Q. B. 693, C. A. A sale may also be ordered in cases not falling within Ord. 57, r. 12: *Paquin* v. *Robinson* (1901) 85 L. T. 5, C. A. (claim under absolute bill of sale).

(*l*) 51 & 52 Vict. c. 43.

(*m*) *Goodlock* v. *Cousins* [1897] 1 Q. B. 558; 66 L. J. Q. B. 360, C. A. But the goods must belong to the judgment debtor: *Crane & Sons* v. *Ormerod* [1903] 2 K. B. 73; 72 L. J. K. B. 507.

(*n*) 50 & 51 Vict. c. 28, ss. 2 (4), 12 (3).

(*o*) *Post*, 68 *et seqq.*

(*p*) 37 & 38 Vict. c. 62, *post*, 57.

(*q*) *Cowern* v. *Nield* [1912] 2 K. B. 419; 81 L. J. K. B. 865.

generally incapable of contracting at all, the theory being that her personality is completely merged in that of her husband (*r*). The exceptions to the general disability of these persons, so far as concerns their competency to purchase, will now be considered.

Infants.

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

At common law.

The purchase by an infant, however, of other goods was not at common law absolutely void, but only voidable in his favour (*s*), the other party remaining bound. He might, therefore, avoid it during infancy, or within a reasonable time after his majority (*t*), or, on the other hand, he might, during infancy, maintain an action (*u*) against the seller, or, on arriving at majority, confirm his purchase (*v*). An action at law would not lie against an infant for fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him (*x*); nor would these facts constitute at law the basis of an action on an implied contract, or obligation *quasi ex contractu*, as for money had and received (*y*); or a good replication to a plea of infancy (*z*); nor suffice as a basis of a replication on equitable grounds (*a*), the rule being that, "where the substantial ground of action rests on promises, the plaintiff cannot, by changing the form of action, render a person liable who would not have been liable on his promise" (*b*). But an infant is liable for a tort independent of the contract (*c*); and, though he may be

(*r*) Co. Litt. 112 a.; *Marshall* v. *Rutton* (1800) 8 T. R. 545; 5 R. R. 448.

(*s*) *Holt* v. *Ward* (1732) 2 Str. 937; *Zouch* v. *Parsons* (1765) 3 Burr. 1794; *Gibbs* v. *Merrell* (1810) 3 Taunt. 307; *per* Abbott, C.J., in *The King* v. *Inhabitants of Chillesford* (1825) 4 B. & C., at 109; 3 L. J. (O. S.) Q. S. K. B. 148; *Hunt* v. *Massey* (1834) 5 B. & Ad. 902.

(*t*) Co. Litt. 380 b.

(*u*) *Warwick* v. *Bruce* (1813) 2 M. & S. 205; 14 R. R. 634 (non-delivery); affirmed (1815) 6 Taunt. 118, Ex. Ch.; *Forester's Case* (1661) 1 Sid. 41; *Holliday* v. *Atkinson* (1826) 5 B. & C. 501; 29 R. R. 299.

(*v*) Co. Litt. 2 b.; Bac. Abr. Infancy (I.), 3; *Holt* v. *Ward* (1732) Stra. 937; *Hunt* v. *Massey* (1834) 5 B. & Ad. 902.

(*x*) *Johnson* v. *Pye* (1665) 1 Sid. 258; 1 Lev. 169; 1 Keb. 913; fully cited in *Stikeman* v. *Dawson* (1847) 1 De G. & Sm. 113; 16 L. J. Ch. 205; 75 R. R. 47; *Leslie* v. *Sheill* [1914] 3 K. B. 607; 83 L. J. K. B. 1145, C. A. See also *Price* v. *Hewett* (1852) 8 Ex. 146.

(*y*) *Leslie* v. *Sheill*, *supra*.

(*z*) *Bartlett* v. *Wells* (1862) 1 B. & S. 836; 31 L. J. Q. B. 57; 124 R. R. 774; *Bateman* v. *Kingston* (1880) 6 L. R. Ir. 323.

(*a*) *Bartlett* v. *Wells* and *Leslie* v. *Sheill*, *supra*.

(*b*) *Per* Gibbs, C.J., in *Green* v. *Greenbank* (1816) 2 Marsh. 485; 17 R. R. 529 (fraudulent warranty in exchange of horses).

(*c*) *Burnard* v. *Haggis* (1863) 14 C. B. (N. S.) 45; 32 L. J. C. P. 189; 135 R. R. 593; *Re Seager* (1889) 60 L. T. 665; *cf. Jennings* v. *Rundall* (1799) 8 T. R. 335; 4 R. R. 680 (tort not independent).

sued nominally in contract, the form of the action will be disregarded if the action be in substance one in tort (*d*). But in equity the infant, though not liable in contract, will not be allowed to take advantage of his own fraud; and must surrender any benefits received, and will be bound by any acts done, on the faith of his representation (*e*). The equitable rule is, however, perhaps a rule of bankruptcy only; at any rate, it is not of general application, so as to subject the infant to any liability, such that the contract would be indirectly enforced against him (*f*).

Ratification after majority.

Before the Infants' Relief Act, 1874, an infant might, as already stated, on arriving at the age of twenty-one years, ratify and confirm a purchase made during infancy, but Lord Tenterden's Act required the ratification to be in writing (*g*).

Infants' Relief Act, 1874.

The Infants' Relief Act (*h*) now provides, with respect to the contracts of an infant, as follows:

S. 1.

"1.—All contracts whether by speciality or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or *for goods supplied or to be supplied* (other than contracts for necessaries), and all accounts stated with infants, shall be *absolutely void:* provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

S. 2.

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

S. 1 applies only to three obligations mentioned

The first section has been held (*i*) to apply only to the three classes of obligation therein specified, which, being formerly voidable by the infant, it declares to be void; the meaning of the proviso appears to be that the enactment

Meaning of proviso to s. 1.

(*d*) *Bristow* v. *Eastman* (1794) 1 Esp. 172; 5 R. R. 728; followed in *Cowern* v. *Nield* [1912] 2 K. B. 419; 81 L. J. Ex. 865.

(*e*) *Ex parte Unity J. S. Banking Assoc., re King* (1858) 27 L. J. Bk. 33; 121 R. R. 25; *Nelson* v. *Stocker* (1859) 28 L. J. Ch. 760; 124 R. R. 339; *Lempriere* v. *Lange* (1879) 12 Ch. D. 675; *Stocks* v. *Wilson* [1913] 2 K. B. 235, explained in *Leslie* v. *Sheill*, *supra*, where the doctrine of *Ex parte Unity* was discussed.

(*f*) *Leslie* v. *Sheill*, *supra*; *Levine* v. *Brougham* (1909) 25 Times L. R. 265, C. A.

(*g*) By 9 Geo. 4. c. 14, s. 5 (Lord Tenterden's Act); rep. by implication by the Infants' Relief Act, 1874, s. 2, and expressly by the S. L. R. Act, 1875.

(*h*) 37 & 38 Vict. c. 62.

(*i*) *Per* Kekewich, J., in *Duncan* v. *Dixon* (1890) 44 Ch. D. 211, at 216, who held that neither section applies to a marriage settlement; *per* Buckley, L.J., in *Nash* v. *Inman* [1908] 2 K. B. 1 at 12, C. A.

shall not be deemed to extend further, and render void any contract by an infant which was not formerly voidable (*k*).

The second of these classes gives rise to some difficulty by reason of the obscurity of the expression used; had the expression been "for *payment for* goods supplied, etc.," the meaning would have been clear (*l*). The Act being, by express enactment (*m*), an Act for the relief of infants, it is apprehended that it should be construed as applying only to contracts for goods (other than necessaries) supplied or to be supplied *to* an infant. The juxtaposition of the words referring to *necessaries* seem to aid this view. In other words, a sale of goods by an infant is not made void by this section, but is still only voidable at his option (*n*).

Semble, does not apply to infant sellers.

The third of these classes gives rise to a like difficulty, and on a similar ground it is conceived that it should be construed as applying only to accounts stated respecting debts owing *by* an infant; and that he would still be entitled to avail himself of such an admission made in his favour.

Or to accounts stated *to* an infant.

It is not clear whether, by the enactment that the three obligations should be "absolutely void," the Act intends to make a contract of sale of goods other than necessaries void also as against the seller to the infant. No authority exists on this point (*o*) But the Act, being for the protection of the infant, may not have been intended to apply to the case of the seller's liability at all, the contract being enforceable by the infant at his option, as at common law (*p*). At any rate, if the infant has paid the price, or part of it, without receiving the goods, he may recover it, as there has been a failure of consideration (*q*).

Effect of execution of void contract.

On the other hand, if the goods have been delivered to the

(*k*) See *per* Kekewich, J., in *Duncan* v. *Dixon*, *supra*.

(*l*) See *Pollock on Cont.*, 8th ed., 66.

(*m*) S. 3.

(*n*) *Cowern* v. *Neild* [1912] 2 K. B. 419; 81 L. J. K. B. 865; (trading contract).

(*o*) In *Valentine* v. *Canali* (1889) 24 Q. B. D. 166; 59 L. J. Q. B. 74; the words were decided to be subject to qualification.

(*p*) The former law was laid down in *Warwick* v. *Bruce* (1813) 2 M. & S. 205; 14 R. R. 634; aff. in Ex. Ch. (1815) 6 Taunt. 118. Curiously enough the learned author and his former editors make no reference to the judgment in the Ex. Ch.—a judgment which renders unnecessary the elaborate consideration of the dicta in *Thornton* v. *Illingworth* (1824) 2 B. & C. 824, that a trading contract was absolutely void, not merely voidable, which conflicted with the judgments in *Warwick* v. *Bruce* in the Court below. Moreover, those dicta were disapproved by Parke, B., in *Williams* v. *Moor* (1843) 11 M. & W. 258; 12 L. J. Ex. 253.

(*q*) *Corpe* v. *Overton* (1833) 10 Bing. 252; 3 L. J. (N. S.) C. P. 24; *Hamilton* v. *Vaughan-Sherrin Elect. Eng. Co.* [1894] 3 Ch. 589; 63 L. J. Ch. 795.

infant, the property in them will have passed to him (*r*), yet he clearly cannot be sued for the price. It may be that while the goods remain in existence the seller can by demanding them back revest the property in himself and sue the infant in detinue (*s*), but if they have been consumed or resold, the seller would be without remedy. If, however, the infant has already paid the price or part of it, he cannot recover the money if he has enjoyed any substantial benefit from the consideration, and the maxim *quod fieri non debet factum valet* will apply: as in *Valentini* v. *Canali* (*t*), where an infant, who had agreed to take a house, and to pay £102 for the furniture, and who had paid £68 in cash, was held not to be entitled to recover the sum, as he had occupied the house and used the furniture for some months. *Valentini* v. *Canali* (1889)

The second section applies to a ratification after the Act of a contract made before its passing (*u*); and a ratified debt cannot be used as a set-off (*v*). S. 2.

The words "any promise or contract made during infancy" are to be read in their natural and full meaning, and not as if they were "any *such* promise or contract," so as to apply only to obligations specified in the first section (*x*). "Any promise or contract."

The effect of the Act generally seems to be as follows: As section 1 makes the three classes of obligation mentioned "absolutely void," no debt can arise under any of them, and section 2 nullifies any promise to pay it made by an infant after full age (*y*). And as the latter section renders invalid any ratification made after full age of *any* promise or contract made during infancy (*z*), it follows that an infant cannot, for instance, ratify a promise to accept or pay for goods. The infant after attaining majority may make a new promise, General effect of Act.

(*r*) *Stocks* v. *Wilson* [1913] 2 K. B. 235; 82 L. J. K. B. 598. Property may pass even under an illegal contract: *per* Parke, B., in *Simpson* v. *Nichols* (1838) 3 M. & W. at 244; 7 L. J. (N. S.) Ex. 117; 49 R. R. 586; exp. in note, 5 M. & W. 702; see *post*, 562; *Ayers* v. *S. Aust. Banking Co.* (1871) L. R. 3 P. C. at 559; 40 L. J. P. C. 22.

(*s*) *Mills* v. *Graham* (1804) 1 Bos. & P. N. R. 140; 8 R. R. 767; *Burton* v. *Levey* (1891) 7 Times L. R. 248 (both cases of bailment, not sale).

(*t*) 24 Q. B. D. 166; 59 L. J. Q. B. 74. See also *Holmes* v. *Blogg* (1818) 8 Taunt. 508; 19 R. R. 445; expl. in *Corpe* v. *Overton*, *supra*; *Hamilton* v. *Vaughan-Sherrin Elect. Eng. Co.*, *supra*.

(*u*) *Ex parte Kibble*, *Re Oaslow* (1875) 10 Ch. 373; 44 L. J. Bk. 63.

(*v*) See *Rawley* v. *Rawley* (1876) 1 Q. B. D. 460; 45 L. J. Q. B. 675; C. A., which decided, under 9 G. 4, c. 14 (Lord Tenterden's Act), that a verbally ratified debt, not being actionable, could not be set off.

(*x*) *Corhead* v. *Mullis* (1878) 3 C. P. D. 439; 47 L. J. C. P. 761. See also *Holmes* v. *Brierley* (1888) 36 W. R. 693, C. A. (revg. (1888) 59 L. T. 70; all cases of promises to marry; *Smith* v. *King* [1892] 2 Q. B. 543 (debt to broker).

(*y*) See *Smith* v. *King* [1892] 2 Q. B. 543.

(*z*) *Corhead* v. *Mullis* (1878) 3 C. P. D. 439; 47 L. J. C. P. 761.

which, however, will be enforceable only if there is a fresh consideration to support it (*a*); but the existence of a fresh consideration, by the express terms of the Act, does not validate a mere ratification, as distinguished from a new promise.

Misrepresentation of full age no estoppel.

The fact that an infant has induced the other party to enter into the contract by a fraudulent representation that he is of full age does not estop the infant from relying upon the Infants' Relief Act (*b*).

Necessaries.

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

The liability for necessaries at common law was one *quasi ex contractu*, called often, but erroneously, an "implied contract" (*d*). It is recognised in section 1 of the Infants' Relief Act, 1874 (*e*); and section 2 of the Code also enacts as follows:

Code, proviso to s. 2.

"Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

"Necessaries in this section mean goods suitable to the condition in life of such infant, or minor, or other person, and to his actual requirements at the time of the sale and delivery."

Infant must be benefited.

A contract for necessaries is, however, only *primâ facie* binding on the infant. It must be also for his benefit; and it will not be binding if it contains terms which render it, considered as a whole, not for the infant's benefit (*f*).

The word "necessaries" must be regarded as a relative term, to be construed with reference to the infant's age, state and degree (*g*). They are stated (*h*) to be "his necessary

(*a*) *Per* Lindley, J., in *Ditcham* v. *Worrall* (1880) 5 C. P. D. 410, at 413: 49 L. J. C. P. 688. The question what facts amount to a ratification, and what to a new promise, is considered by Lindley, J., in the same case at 412, 413.

(*b*) *Levene* v. *Brougham* (1909) 25 T. L. R. 265, C. A.

(*c*) *Burghart* v. *Hall* (1839) 4 M. & W. 727; 8 L. J. Ex. 235; 51 R. R. 787; *Peters* v. *Fleming* (1840) 6 M. & W. 42; 9 L. J. (N. S.) Ex. 81: 55 R. R. 495.

(*d*) *Per Cur.* in *Re Rhodes* (1890) 44 Ch. D. 94; 59 L. J. Ch. 298; C. A., appd. by Fletcher Moulton, L.J., in *Nash* v. *Inman* [1908] 2 K. B. 1; 77 L. J. K. B. 626, C. A.

(*e*) *Ante*, 57.

(*f*) *Roberts* v. *Gray* [1913] 1 K. B. 520; 82 L. J. K. B. 362, C. A.; *Fawcett* v. *Smethurst* (1914) 31 T. L. R. 85.

(*g*) 2 Steph. Com. (ed. 1880) 307.

(*h*) Co. Litt. 172.

meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." But these are not the only articles that are comprehended by the term. It includes also articles purchased for real *use*, although ornamental, as distinguished from such as are *merely* ornamental, for mere ornaments can be necessary to no one (*i*); and it was said by Alderson, B., in delivering the judgment of the Court in *Chapple* v. *Cooper* (*k*), after advisement, that "articles of *mere* luxury are always excluded, though various articles of utility are in some cases allowed. . . . In all cases there must be *personal* advantage from the contract derived to the *infant himself*."

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

Articles supplied to an undergraduate at Oxford for dinners given to his friends at his rooms, fruit, confectionery, &c., were held in the absence of exceptional circumstances, such as doctor's orders, not necessaries by the Queen's Bench in *Wharton* v. *McKenzie* (*l*), and the Exchequer of Pleas, in a case exactly similar, held that there was no evidence for the jury, and that the plaintiff should be non-suited (*m*).

But where a jury had found that a purchase for the amount of £8 0s. 6d. for gold rings, a watch-chain, and a pair of breast-pins were "necessaries" for an undergraduate at Cambridge, the eldest son of a gentleman of fortune and a member of Parliament, the Exchequer refused to set aside the verdict, holding the question to be one for the jury (*n*). On the other hand, where clothes to the value of £123, including eleven fancy waistcoats, were supplied to a Cambridge undergraduate, the son of an architect of good position, with a London house and a country establishment, and who was already sufficiently provided, it was held that there was no evidence that the goods were necessaries (*o*).

(*i*) *Peters* v. *Fleming* (1840) 6 M. & W. 42; 9 L. J. Ex. 81; 55 R. R. 495.

(*k*) (1844) 13 M. & W. at 258. See also *per* Bramwell, B., in *Ryder* v. *Wombwell* (1868) L. R. 3 Ex. 90; 37 L. J. Ex. 47.

(*l*) (1844) 5 Q. B. 606; 13 L. J. Q. B. 130; 64 R. R. 584; *cf. Hart* v. *Prater* (1837) 1 Jur. 623; 49 R. R. 746 (doctor's orders).

(*m*) *Brooker* v. *Scott* (1843) 11 M. & W. 67; 63 R. R. 517.

(*n*) *Peters* v. *Fleming* (1840) 6 M. & W. 42; 9 L. J. Ex. 81; 55 R. R. 495.

(*o*) *Nash* v. *Inman* [1908] 2 K. B. 1; 77 L. J. K. B. 626, C. A.

Where the defendant, a captain in the Army, had ordered livery for his servant and cockades for some of his soldiers, the jury found both to be necessaries; but the Court, on motion for a new trial, required the plaintiff to abandon the charge for the cockades, holding that they were not necessaries, Lord Kenyon observing, that as regarded the livery, he could not say that it was not necessary for a gentleman in defendant's position to have a servant, and if so, the livery was necessary (*p*). In perilous times, Lord Ellenborough held that regimentals sold to an infant as a member of a volunteer corps enrolled for the national defence, were necessaries (*q*). But a chronometer, costing £68, was held, in the absence of proof that it was essential, not to be a necessary for an infant who was a lieutenant in the Royal Navy (*r*). A purchase of a horse by an infant may be valid if it be shown to be suitable to his rank and fortune to keep horses, or if it were rendered necessary by circumstances that he should keep one, as, if he were directed by his physician to ride for exercise (*s*). So also the purchase by an apprentice, earning a guinea a week, of a racing bicycle, the use of such being common with persons of the infant's position in the neighbourhood (*t*). Again, the purchase of a great coat by an attorney's articled clerk (*u*); and of harness and horse-clothing by an infant farm-manager (*v*), have been held to be valid. But a purchase of cigars and tobacco by an infant was held not to bind him (*x*); nor was the plaintiff allowed to recover the cost of a silver goblet sold to an infant for £15 15s., which the plaintiff knew when he supplied it to be intended by the infant for a present to a friend (*y*). Again, jewellery bought as a present for a young lady, to whom the infant was engaged without the consent of his guardian, and who did not become his bride, was held not to be necessary, at any rate in the absence of evidence of the infant's station in life (*z*). Similarly, a large number of curios, such as snuff-boxes, candlesticks, weapons,

(*p*) *Hands* v. *Slaney* (1800) 8 T. R. 578.
(*q*) *Coates* v. *Wilson* (1804) 5 Esp. 152; 8 R. R. 811.
(*r*) *Barroles* v. *Ramsay* (1815) Holt, N. P. 77; 17 R. R. 610.
(*s*) *Hart* v. *Prater* (1837) 1 Jur. 623; 49 R. R. 746.
(*t*) *Clyde Cycle Co.* v. *Hargreaves* (1898) 78 L. T. 296.
(*u*) *Brayshaw* v. *Eaton* (1839) 5 Bing. N. C. 231; 8 L. J. C. P. 517; 50 R. R. 671.
(*v*) *Hill* v. *Arbon* (1876) 34 L. T. 125.
(*x*) *Bryant* v. *Richardson* (1866) 14 L. T. 24; L. R. 3 Ex. 93, in note.
(*y*) *Ryder* v. *Wombwell* (1868) L. R. 3 Ex. 90; 37 L. J. Ex. 47; in Ex. Ch. 4 Ex. 32; 38 L. J. Ex. 8.
(*z*) *Hewlings* v. *Graham* (1901) 70 L. J. Ch. 568.

gongs, &c., have been held not to be necessaries for an infant with no means beyond a reversion within twelve months of £3,000 (*a*); nor a hunter worth £150 for an infant member of a hunt (*b*). The existence of some articles which are necessaries among a quantity of goods does not make an infant liable for those articles. The contract being entire, the question is whether substantially the whole quantity are necessaries or not (*a*).

Question of law or fact. *Ryder* v. *Wombwell* (1868).

In the case of *Ryder* v. *Wombwell* (*c*) it was finally settled, that the issue whether goods sold to an infant are necessaries is a question of fact to be left to the jury; but that in this, as in all other like questions, the modern rule is, not as formerly that a case must go to the jury if there be a scintilla of evidence, but that the Judge is to determine (subject of course to review), whether there is evidence that ought reasonably to satisfy the jury that the fact sought to be proved is established. The facts were that the defendant, the younger son of a deceased baronet, enjoyed in his own right an allowance of £500 a year during his minority, and was entitled to £20,000 on coming of age. He had no fixed residence, but lived, when in London, with his mother, and when in the country, with his eldest brother, free of charge. He pursued no business or profession, and moved in the highest society. The plaintiff sought to recover the following sums:—1st, £25 for a pair of solitaires, or sleeve-buttons, with rubies and diamonds; 2nd, £6 10s. for a smelling-bottle, ornamented with precious stones; 3rd, £15 15s. for an antique silver goblet, with an inscription; 4th, £13 13s. for a pair of coral ear-rings. The goblet was wanted, as the plaintiff was told by the defendant, for a present to a noble friend, at whose house the defendant had been frequently a guest. Kelly, C.B., rejected evidence offered by the defendant to show that at the time of the purchase of the solitaires, the infant had already purchased articles of a similar description to a large amount, no proof being offered that the plaintiff knew this. The learned Chief Baron refused to non-suit, but left it to the jury to say whether all or any of the articles were necessaries suitable to the estate and condition in life of the defendant. The jury found that the solitaires and goblet were necessaries, the ear-rings and the smelling-bottle not. Leave was reserved to move for a non-suit, or for reduction

(*a*) *Stocks* v. *Wilson* [1913] 2 K. B. 235; 82 L. J. K. B. 598.
(*b*) *Skrine* v. *Gordon* (1875) 9 Ir. R. C. L. 479.
(*c*) L. R. 3 Ex. 90; 4 Ex. 32; 37 L. J. Ex. 47; 38 L. J. Ex. 8.

f damages, if the Court should be of opinion that there was evidence for the jury that neither, or that only one of the two articles was necessary.

Bramwell, B., was of opinion that with regard to both the solitaires and the goblet the plaintiff ought to have been non-suited, or a verdict given for the defendant; and that the evidence to show that the defendant was already supplied with similar articles, ought to have been received (*d*). Kelly, C.B., delivered the judgment of the majority of the Court, holding,—first, that the evidence rejected at the trial was properly excluded; secondly, that the verdict for the price of the goblet was against evidence, and should be set aside; and thirdly, that the defendant might have a new trial *on payment of costs*, if he desired it, for the price of the solitaires.

On appeal held unanimously that the plaintiff should have been non-suited. In the opinion delivered by Willes, J., he made the following important observations: "We must first observe that the question in such cases is not whether the expenditure is one which an infant in the defendant's position could not properly incur. There is no doubt that an infant may buy jewellery or plate if he has the money to pay, and pays for it; but the question is, whether it is so necessary for the purpose of maintaining himself in his station that he should have these articles, as to bring them within the exception under which an infant may *pledge his credit* for them *as necessaries*." In reference to this question, the Court, after observing that Judges know as well as juries what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things; and that if the state of things be unusual, new, or exceptional, then a question of fact arises to be decided by a jury under proper direction, held that the Judge must determine whether the case is such as to cast on the seller the onus of proving the articles to be necessaries within the exception, and whether there is sufficient evidence to satisfy that onus; and that he was not bound, in the absence of all evidence on the subject, to take the opinion of a jury whether it is so necessary for a gentleman to wear solitaires of this description, that, though an infant, he must obtain them on credit rather than go without.

(*d*) See on this point, *post*, 65.

On the point as to the exclusion of the evidence of the infant's actual requirements on the trial, the Court of Error expressly refused to decide, reserving it for future determination. The question has now been finally settled by the definition of the necessaries above quoted (*e*). This definition adopts the law laid down in *Johnstone* v. *Marks* (*f*). The "actual requirements" are, according to the definition in the Code, to be considered "at the time of the sale and delivery," that is, when the contract becomes complete by delivery. Thus it seems to follow that the position of the seller may be prejudicially affected if between the sale and the delivery the infant becomes otherwise supplied; but it is immaterial whether the plaintiff does or does not know of the existing supply (*g*).

Onus of proof on seller that goods are necessaries.

The onus is on the seller to show that the goods supplied are necessaries within both branches of the definition: that is to say, not only that the goods are suitable to the infant's condition, but that he was not already sufficiently provided (*h*).

Married infant.

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

Infant tradesman.

An infant being considered in law as devoid of sufficient discretion to carry on a trade, is not liable on a purchase of goods supplied to him for his trade, as being necessaries, whether he be trading alone or in partnership with another (*k*). Similarly under the Infants' Relief Act, 1874, he cannot be

(*e*) Code, s. 2, *ante*, 60.

(*f*) (1887) 19 Q. B. D. 509; 57 L. J. Q. B. 6, approving *Barnes* v. *Toye* (1884) 13 Q. B. D. 410; 53 L. J. Q. B. 567. Qy. whether there would or would not be an "actual requirement" when the infant's parent had *arranged* with another tradesman to provide what was necessary? *Jones* v. *Barron* (1887) 3 Times L. R. 379.

(*g*) *Barnes* v. *Toye*, *supra*; *Foster* v. *Redgrave* (1867) L. R. 4 Ex. 35, n.

(*h*) *Nash* v. *Inman* [1908] 2 K. B. 1; 77 L. J. K. B. 626, C. A. See also *Ive* v. *Chester* (1619) Cro. Jac. 560.

(*i*) *Turner* v. *Frisby* (1719) 1 Str. 168; *Rainsford* v. *Fenwicke* (1670) Carter 215; *per Cur.* in *Chapple* v. *Cooper* (1844) 13 M. & W. at p. 259; 13 L. J. Ex. 286; 67 R. R. 586.

(*k*) *Whywall* v. *Champion* (1737) 2 Stra. 1083; *Dilk* v. *Keighley* (1796) 2 Esp. 480; *Whittingham* v. *Hill* (1618) Cro. Jac. 494; *Lovell & Christmas* v. *Beauchamp* [1894] A. C. 607; 63 L. J. Q. B. 802.

made bankrupt for a trade debt (*l*). But if he uses for necessary household purposes goods supplied to him as a tradesman, he becomes liable for what is so used (*m*).

Extent and nature of infant's liability for necessaries.

Under the Code, the liability of an infant in respect of necessaries is for a "reasonable price," and this is a question of fact (*n*). This provision agrees with the common law, which is thus stated in a work of authority (*o*): "It is also said that an infant cannot, either by parol contract, or a deed, bind himself, even for necessaries, in a sum certain: and that, should an infant promise to give an unreasonable price for necessaries, that could not bind him." And later authorities are to the same effect (*p*). Apart from the Code, this result would follow from the theory of the law that the obligation is one created *by the law*, and for the benefit of the infant.

Is he bound to accept them?

As to the nature of an infant's liability for necessaries, Lord Coke (*q*) puts the liability thus, that an infant "may bind himself to pay for" them; and Cotton, L.J., in *Rhodes* v. *Rhodes* (*r*), in speaking in carefully chosen language of the "supply" of necessaries to a lunatic, whose position is similar to that of an infant, both at common law and under the Code, refers to his quasi-contractual obligation "to pay for such necessaries out of his own property." The note running through all the judgments in that case is that the obligation arises from a benefit actually received.

Fletcher Moulton, L.J., says in *Nash* v. *Inman* (*s*): "I agree with the view expressed by the Court in *Rhodes* v. *Rhodes*. An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the word; but if a man satisfies the needs of the infant or lunatic by supplying to him necessaries, the law will imply an obligation to repay him for the services *so rendered*, and will enforce that obligation *against the estate* of the infant or lunatic. The

(*l*) Ex parte *Jones* (1881) 18 Ch. D. 109; 50 L. J. Ch. 673, C. A., overruling Ex parte *Lynch* (1876) 2 Ch. D. 227; 45 L. J. Bk. 48. See also *In re Rainys* (1880) 3 L. R. Ir. 459; and *Reg.* v. *Wilson* (1879) 5 Q. B. D. 28; 49 L. J. M. C. 13, C. C. R.

(*m*) *Turberville* v. *Whitehouse* (1823) 1 C. & P. 94.

(*n*) Code, s. 2, *ante*, 60.

(*o*) Bac. Ab. "Infancy (I)." See also *Pickering* v. *Gunning* (1628) Palmer 528; W. Jones 182; Vin. Ab. Enfant, (e) pl. 10.

(*p*) *Per Cur.* in *Walter* v. *Everard* [1891] 2 Q. B. 373, 375, 377; 60 L. J. Q. B. 738, C. A.

(*q*) Litt. 172 a.

(*r*) (1890) 44 Ch. D. 94; 59 L. J. Ch. 298, C. A.; *Re Clabbon* [1904] 2 Ch. 465; 73 L. J. Ch. 853.

(*s*) [1908] 2 K. B. 1 at 8; 77 L. J. K. B. 626, C. A. The L. J. repeats his opinion in *Re J.* [1909] 1 Ch. 574; 78 L. J. Ch. 348, C. A.

consequence is that the basis of the obligation is hardly contract. Its real foundations is an obligation which the law imposes on the infant to make a fair payment *in respect of needs satisfied. In other words, the obligation arises re and not consensu.*"

But in *Roberts* v. *Gray* (*t*) it was held that an infant, who had entered into a contract for necessary instruction, and who had repudiated it during infancy while it was only part performed, was liable in damages. The fact that the contract was for necessaries, and was also for his benefit, made the contract binding upon him, and not merely voidable, even though the contract was partly executory. No distinction is hinted at in the judgments between one kind of contract for necessaries and another (*u*), and the *ratio decidendi* is clearly put by Hamilton, L.J.: "I am unable to appreciate why a contract which is in itself binding, because it is a contract for necessaries not qualified by unreasonable terms, can cease to be binding merely because it is still executory. . . . If contract is binding at all, it must be binding for all such remedies as are appropriate to the breach of it." But it is to be observed that, to make an infant liable for non-acceptance of necessaries, being goods, renders the proviso to section 2 unnecessary, if not repugnant to the covering words declaring the general rule of capacity (*v*). The infant's liability for necessary goods is now statutory, and depends upon actual delivery.

And the liability to pay for necessaries is on simple contract, or rather quasi-contract, only, though the infant may have executed a deed.

Not liable under a deed as such, though without penalty.

Thus, Lord Coke says of an infant (*x*): "If he bind himself in an obligation, or other writing, with a penalty for the payment of any of these, that obligation shall not bind him." And Mr. Hargreaves in his note on the passage says: "Lord Coke's words imply that a single bond, that is, one without a penalty, being given for necessaries, may be good against an infant, and so it hath been frequently adjudged" (*y*). Accordingly, in *Walter* v. *Everard* (*z*), in which the previous

Walter v. *Everard* (1891).

(*t*) [1913] 1 K. B. 520; 82 L. J. K. B. 362, C. A.

(*u*) And Cozens-Hardy, M.R., expressly refers to contracts for necessaries "*including* instruction and education" at 526.

(*v*) *Ante*, 60.

(*x*) Co. Litt. 172 *a*. See also *Baylis* v. *Dineley* (1815) 3 M. & S. 477; *Martin* v. *Gale* (1876) 4 Ch. D. 428; 46 L. J. Ch. 84.

(*y*) Citing *Russell* v. *Lee* (1663) 1 Lev. 86, and Roll. Ab. Enfant. p. 729. pl. 7.

(*z*) [1891] 2 Q. B. 369; 60 L. J. Q. B. 738, C. A.

authorities were reviewed, an infant was held liable on his covenant in an apprenticeship deed to pay the premium, when teaching was a necessary, but only as if he had entered into a simple contract. "You cannot sue the infant upon his bond as a bond. But if the bond is what is called a 'single' bond, that is, if it is given only for the reasonable price of the necessaries supplied to the infant, and there is no penalty, the infant can be sued upon it. . . . In the same way an infant can be sued upon a covenant by deed for the price of necessaries, but the case must be treated just as if there had been no deed" (*a*).

Nor on account stated, nor on bill of exchange.

An infant is not liable on an account stated for the price of necessaries (*b*); nor on a bill of exchange given therefor (*c*). "It has been held in a long series of cases that an infant cannot make himself liable by the custom of merchants either by a bill of exchange, or by a promissory note. . . . It is not necessary for the protection of persons dealing with an infant that he should be liable on such a contract. The person who has supplied an infant with necessaries can always sue on that contract for the price of what he has supplied" (*d*).

Infant may enforce contract for necessaries.

An infant can enforce an agreement to sell necessaries, and the seller is accordingly liable in damages if he refuse to deliver them (*e*).

Lunatics.

As to *lunatics* and persons *non compos mentis*, the rules of law regulating their capacity to purchase do not differ materially from those which at common law governed such contracts when made by infants. There is no doubt that it is competent for the lunatic or his representatives to show that when he made the purchase his mind was so deranged that he did not know nor understand what he was doing. The contract is, therefore, as a general rule, voidable (*f*). Still, if that state of mind, though really existent, be unknown to the other party, the defence cannot prevail, whether the

(*a*) *Per* Esher, M.R., at 372, 373.

(*b*) This was so at common law: *Trueman* v. *Hurst* (1785) 1 T. R. 40; *Bartlett* v. *Emery* (1729) 1 T. R. 42, n.; *Williams* v. *Moor* (1843) 11 M. & W. 256; 12 L. J. Ex. 253, *per* Parke, B.; and see now Infants' Relief Act, 1874, s. 1, *ante*, 57.

(*c*) *In re Soltykoff* [1891] 1 Q. B. 413; 60 L. J. Q. B. 339, C. A. See Bills of Exchange Act, 1882, s. 22.

(*d*) *Per* Lord Esher, M.R., in *In re Soltykoff*, *supra*, at 415.

(*e*) *Farnham* v. *Atkins* (1670) 1 Sid. 446, cited by Buckley, L.J., in *Nash* v. *Inman* [1908] 2 K. B. 1; 77 L. J. K. B. 6[illegible], C. A.

(*f*) *Baldwyn* v. *Smith* [1900] 1 Ch. 588; 69 L. J. Ch. 336; (election by Lun. Com. to affirm).

contract be an agreement to sell, or a sale (*g*). In the cases cited in the note the authorities will be found quoted and examined (*h*).

So far as relates to supplies of *necessaries* (*i*) to a person of unsound mind, though known to be such, there was at common law no question that where no advantage is taken of his condition by the seller, the purchase will be held valid (*k*). And under section 2 of the Code, the liability of such a person to pay for necessaries sold and delivered is identical with that of an infant (*l*). The obligation, as it stood at common law, was considered by the Court of Appeal in *Rhodes* v. *Rhodes* (*m*), and shown to be a quasi-contractual obligation implied by the law on the part of the lunatic to pay out of his own property for necessaries *supplied*, the obligation being in fact a proprietary, and not a personal one.

A *drunkard*, when in a state of complete intoxication, so 's not to know what he is doing, is in respect of his general contractual capacity in the same position as a lunatic (*n*), with the difference, however, that the other party must usually Drunkards.

(*g*) *Imperial Loan Co.* v. *Stone* [1892] 1 Q. B. 597, C. A.; 61 L. J. Q. B. 449; which finally exploded the limitation, or suggested limitation, put upon the rule in *Molton* v. *Camroux*, *infra*, viz., that the contract must be executed. See *per* Fry, L.J., in the L. J. report. The old rule with regard to insanity was that a person of full age could not stultify himself by pleading insanity, though his heir might do so: Litt. Ten. s. 405; *Beverley's Case* (1603) 4 Co. 123 b.; Co. Litt. 247 b. The exception where there was knowledge by the other party of the lunacy was afterwards engrafted on the rule: *per Cur.* in *Molton* v. *Camroux*, *infra*, at 501.

(*h*) *Molton* v. *Camroux* (1848) 2 Ex. 487; and in Error (1849) 4 Ex. 17; 18 L. J. Ex. 356; 76 R. R. 669; *Imperial Loan Co.* v. *Stone*, *supra* See also *Niell* v. *Morley* (1804) 9 Ves. 478; *Beavan* v. *M'Donnell* (1851) 9 Ex. 309; 23 L. J. Ex. 94; 96 R. R. 730; *Drew* v. *Nunn* (1879) 4 Q. B. D. 661; 48 L. J. Q. B. 591, C. A., where Brett, L.J. (at 669), says: "From the mere fact of mental derangement, it ought not to be assumed that a person is incompetent to contract. Mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon the engagements into which he has entered." See, on this latter point, *per* Lord Langdale, M.R., in *Snook* v. *Watts* (1848) 11 Beav. 108; 83 R. R. 122; *Jenkins* v. *Morris* (1880) 14 Ch. D. 674; 49 L. J. Ch. 392, C. A.; and the definition of unsoundness of mind by Lord Esher, M.R., in *Imperial Loan Co.* v. *Stone* [1892] 1 Q. B. at 601; 61 L. J. Q. B. 119.

(*i*) See necessaries defined in s. 2 of Code, *ante*, 60.

(*k*) *Manby* v. *Scott* (1660) 1 Sid. 112; *Lane* v. *Kirkwall* (1838) 8 C. & P. 679; *Wentworth* v. *Tubb* (1842) 1 Y. & C., C. C. 171; 12 L. J. Ch. 61; 57 R. R. 293; *Nelson* v. *Duncombe* (1846) 9 Beav. 211; 15 L. J. Ch. 296; 73 R. R. 317; *Baxter* v. *Earl of Portsmouth* (1826) 5 B. & C. 170; *Read* v. *Legard* (1851) 6 Ex. 636; 20 L. J. Ex. 309; 86 R. R. 418 (necessaries for wife and children); *Davidson* v. *Wood* (1803) 1 De G. J. & S. 465; C. A. (wife with separate income); *Re Beavan* [1912] 1 Ch. 196; 81 L. J. Ch. 113 (right of lender of money to person maintaining lunatic).

(*l*) *Per* Fletcher Moulton, L.J., in *Re J.* [1909] 1 Ch. 571; 78 L. J. Ch. 348, C. A.

(*m*) (1890) 44 Ch. D. [illegible] L. J. Ch. 298. [illegible] But the obligation will not be implied if the facts [illegible] case show a *gift* of the necessaries: *ibid.*

know of his condition (*o*). His contract is voidable, not void, and may therefore be either repudiated or ratified by him (*p*) when he becomes sober. And when it is said that the contract is voidable, what is meant is that it is valid until avoided, not that it is void until affirmed (*q*).

With regard to *necessaries* (*r*) supplied to him while intoxicated, a drunken man was at common law, and is also under the Code (*s*) liable: and Pollock, C.B., put the ground of the liability as follows: "A contract may be *implied by law* in many cases, even where the party has protested against any contract: the law says he did contract because he ought to have done so. On that ground the creditor might recover against him when sober for necessaries supplied him when drunk" (*t*).

Paupers.

The liability of a pauper, who is maintained by the guardians, for necessaries supplied to him by them, is the same as that of an infant or lunatic. He is liable to pay a reasonable sum for the necessaries (*u*).

Lunatics and drunkards liable only for necessaries actually supplied.

Both at common law (*v*) and under the Code, the liability of a lunatic or drunkard for necessaries, as in the case of an infant, arises only when the goods are "sold and delivered."

Married woman:

The position of a married woman in respect of contracts is now, as a general rule, regulated by statute, and will be presently considered (*x*). It is, however, still necessary, before dealing with the statute law, to obtain a general idea of what was her position at common law and in equity.

1. At common law.

At common law a married woman was absolutely incompetent to enter into contracts during coverture, and had in

(*n*) *Per Cur.* in *Molton* v. *Camroux* (1848) 2 Ex. at 501; 4 Ex. at 19, Ex. Ch.: 18 L. J. Ex. 356; 18 L. J. Ex. 68; 76 R. R. 669; 80 R. R. 461.

(*o*) *Per* Alderson, B., in *Molton* v. *Camroux* (1848) 2 Ex. at 491; 18 L. J. Ex. 68; 76 R. R. 669.

(*p*) *Matthews* v. *Baxter* (1873) L. R. 8 Ex. 132; 42 L. J. Ex. 73; where the use of the word "void" in *Gore* v. *Gibson*, *infra*, is criticised; cf. *Shaw* v. *Thackray* (1853) 1 Sm. & G. 537; 96 R. R. 477 (incapacity not shown).

(*q*) *Bawlf Grain Co.* v. *Ross* (1917) 55 Can. S. C. R. 232, explaining *Matthews* v. *Baxter*, *supra*.

(*r*) See definition of necessaries in Code, s. 2, *ante*, 60.

(*s*) S. 2, quoted *ante*, 57.

(*t*) This passage is from the argument. In his judgment, Pollock, C.B., appears to put the liability on the ground of a new contract to be inferred from the drunkard's evidence in keeping the goods after he becomes sober, thus making the contract for necessaries voidable.

(*u*) *St. Mary, Islington, Union* v. *Biggendeu* [1910] 1 K. B. 105; 79 L. J. K. B. 246; where the cases are referred to.

(*v*) See *per* Pollock, C.B., in *Gore* v. *Gibson* (1845) 13 M. & W. 626; 14 L. J. Ex. 151; 67 R. R. 762, quoted *supra*; and see the general principles laid down by the C. A. in *Rhodes* v. *Rhodes* (1890) 44 Ch. D. 94; 59 L. J. Ch. 298, C. A.

(*x*) *Post*, 75.

contemplation of law no separate existence, her husband and herself forming but one person (*y*). She could not even, while living apart from her husband and enjoying a separate maintenance secured by deed, make a valid purchase on her own account, even for necessaries, and when credit was given to her there was no remedy but an appeal to her honour (*z*). The contract with her was not, as it formerly was in the case of an infant, voidable only, but was absolutely void, and therefore incapable of ratification after her coverture had ceased (*a*).

Exceptions

The common law exceptions to the general and very rigid rule as to the incapacity of a married woman to bind herself as purchaser are well defined.

(1) Queen Consort.

The first is that the wife of the King of England may sue and be sued as a *feme sole* (*b*).

(2) When husband is *civiliter mortuus*.

The second is when the husband is *civiliter mortuus*, dead in law, as when he is under sentence of penal servitude, or transportation, or banishment (*c*). The disability of the wife in such cases is said to be suspended for her own benefit, that she may be able to procure a subsistence. She may therefore bind herself as purchaser when her husband, a convict, has been sentenced to transportation, though he has not yet been sent away (*d*); but not if his absence is voluntary, as if he abscond and go abroad in order to avoid a charge of felony (*e*).

Husband, alien, resident abroad.

It was held in some early cases that where a woman's husband was an alien, and resided abroad, and she lived in England, and contracted debts here, she was liable (*f*). But this principle was held not to apply to the case of an English-

(*y*) Co. Littleton, 112 a.

(*z*) *Marshall* v. *Rutton* (1800) 8 T. R. 545; 5 R. R. 448.

(*a*) *Per Cur.* in *Zouch* v. *Parsons* (1765) 3 Burr. at 1805; *per Cur.* in *Liverpool, etc., Association* v. *Fairhurst* (1854) 9 Ex. 429; 23 L. J. Ex. 163; 96 R. R. 778; Com. Dig. "Baron and Feme (Q)."

(*b*) Co. Litt. 133 a.

(*c*) Ex parte *Franks* (1831) 7 Bing. 762; 9 L. J. (O.S.) C. P. 209; *Sparrow* v. *Carruthers* (1764—1770) cited in n., 1 T. R. 6; *per Cur.* in *De Gaillon* v. *L'Aigle* (1798) 1 Bos. & P. 357; Co. Litt. 132 b., 133 a.

(*d*) Ex parte *Franks*, *supra*. It was held in *Carrol* v. *Blencow* (1801) 4 Esp. 27; 28 R. R. 776 n., that a married woman could sue as a feme sole, though her husband's sentence had expired, if he had not returned to this country, on the ground that he had abjured the realm. But this case cannot be considered law in the light of later authorities, and seems also inconsistent with the principle stated in *Williamson* v. *Dawes*, referred to in the text, that the husband's absence must be involuntary.

(*e*) *Williamson* v. *Dawes* (1832) 9 Bing. 292; 2 L. J. C. P. 3.

(*f*) *Walford* v. *Duchesse de Pienne* (1796) 2 Esp. 554, where Lord Kenyon put the decision "on the principle of the old common law, where the husband had abjured the realm": *Franks* v. *De Pienne* (1797) 2 Esp. 587; *Burfield* v. *De Pienne* (1806) 2 Bos. & P. N. R. 380; *De Gaillon* v. *L'Aigle* (1798) 1 B. & P. 357.

man who voluntarily abandoned the country (*g*); and more modern cases show that the earlier doctrine cannot be supported, even in the case of the wife of an alien enemy who has never been in this country (*h*).

Barden v. *Keverberg* (1836).

In *Barden* v. *Keverberg* (*i*), where the defendant pleaded coverture, the plaintiff replied that the defendant's husband was an alien residing abroad who had never been within the United Kingdom, and that the debt was contracted by the defendant in England, where she was living separate and apart from her husband, as a *feme sole*, and that the plaintiff gave her credit as a *feme sole*, and that she made the promise in the declaration mentioned as a *feme sole*. There was no demurrer, but the case was tried on the facts alleged by the replication, and denied by the rejoinder, and a verdict for the plaintiff was set aside by the Court in Banco, on the ground that there was no evidence at all that the plaintiff contracted with the defendant as a *feme sole*. It was necessary to prove, not only that the defendant's husband was an alien who had never been in this country, but also that the defendant represented herself as a *feme sole*, or that the plaintiff dealt with her believing her so to be. Mr. Baron Parke, however, expressed a strong opinion with respect to the law that the cases in which a wife has been held liable, her husband being abroad, apply only where he is *civiliter mortuus*.

De Wahl v. *Braune* (1856).

In *De Wahl* v. *Braune* (*j*), where the defendant pleaded in abatement the plaintiff's coverture, the plaintiff replied that her husband was an alien residing abroad at the commencement of the action, and was at that time adhering to the Queen's enemies; that the plaintiff was then residing here separate and apart from her husband: and that the defendant became liable to her as a single woman. On

(*g*) *Farrar* v. *Countess of Granard* (1804) 1 B. & P. N. R. 80; *Marsh* v. *Hutchinson* (1800) 2 Bos. & P. 226; 28 R. R. 776 n.; *Williamson* v. *Dawes* (1832) 9 Bing. 292; 2 L. J. C. P. 3.

(*h*) *Marshall* v. *Rutton* (1800) 8 T. R. 545; 5 R. R. 448; *Boggett* v. *Frier* (1809) 11 East, 301; 5 R. R. 448; 28 R. R. 776 n.; *Kay* v. *De Pienne* (1811) 3 Camp. 123; *per* Parke, B., in *Barden* v. *Keverberg* (1836) 2 M. & W. at 64; 6 L. J. Ex. 66; *De Wahl* v. *Braune* (1856) 1 H. & N. 178; 25 L. J. Ex. 343.

(*i*) 2 M. & W. 61. See also *Stretton* v. *Busnach* (1834) 1 Bing. N. C. 139; 3 L. J. C. P. 224, where the husband had previously been in this country. Sir F. Pollock (Contr. 8th ed. 86) treats *Barden* v. *Keverberg* as an authority that the wife of an alien husband who has never resided in this country may be sued if she purport to contract as a *feme sole*.

(*j*) 1 H. & N. 178; 25 L. J. Ex. 343. *Semble* that this case overrules *Derry* v. *Duchess of Mazarine* (1697) 1 Ld. Raym. 147, if that case was not already overruled by *Marshall* v. *Rutton* (1800) 8 T. R. 545; 5 R. R. 448.

demurrer, held that the wife could not sue as a *feme sole*, whether the contract was made before or after the marriage: that the husband was not *civiliter mortuus*: and that the fact that the husband, being an alien enemy, could not sue, did not alter the case. Pollock, C.B., said that the proper proceeding was for the Crown to entitle itself to the alien enemy's rights by an inquisition, and after enforcing his right of action to give the wife the benefit of it. In this case the action was by the wife, but the reasoning of the Court would have been equally applicable if her condition had been reversed, and she had been the defendant instead of the plaintiff (*k*).

But the wife of an alien enemy, who is in this country under licence, may enforce any right individual to herself, and not arising out of any illegal act such as trading with enemy, for she lives here *sub protectione regis*, and "suing is but a consequential right of protection" (*l*).

(3) Married woman sole trader in City of London.

Apart from statute, the only remaining exception to the absolute incapacity of a married woman to bind herself as purchaser during coverture, is one which arises under the custom of London, and is confined to the City of London. By that custom, a *feme covert* may be a *sole trader*, and when so, she may sue and be sued in the City Courts, in all matters arising out of her dealings in her trade in London. In the well-known case of *Beard* v. *Webb* (*m*) this custom is elaborately considered, in connection with the general law on the subject of the wife's capacity to contract as a *feme sole* during marriage; and the custom is described in the pleadings as a custom "that where a *feme covert* of a husband useth any craft in the said city on her sole account, whereof her husband medleth nothing, such a woman shall be charged as *feme sole* concerning everything that touched her craft." This custom may be used as a defence in the superior Courts (*n*).

Beard v. *Webb* (1800)

(*k*) Mr. Dicey, however (Parties to an Action, 206), draws a distinction between cases in which the married woman is plaintiff, and those in which she is defendant, at any rate where the alien husband has never been in this country, and quotes *Waliord* v. *Duchesse de Pienne*, and *Franks* v. *De Pienne*, *ante*, 73. Sir F. Pollock agrees with the text (Contr. 8th ed. 86).

(*l*) *Wells* v. *Abrahams* (1697) 1 Salk. 46; 1 Ld. Raym. 282; followed in *Princess Thurn and Taxis* v. *Moffitt* [1915] 1 Ch. 58; 84 L. J. Ch. 220; applied in *Porter* v. *Freundenberg* [1915] 1 K. B. 857, at 874; 84 L. J. K. B. 1001.

(*m*) 2 Bos. & P. 93; 28 R. R. 776 n., where Lord Eldon, C.J., delivered the judgment of the Ex. Ch. revg. the K. B. See also *Laughan* v. *Bewett* (1627) Cro. Car. 68; *Caudell* v. *Shaw* (1791) 4 T. R. 361; and Macq. Husband and Wife, ed. 1872, 361, where this custom is set out at length, as it is also in *Lavie* v. *Phillips* (1765) 3 Burr. 1776.

(*n*) *Lavie* v. *Phillips*, *supra*.

2. In equity.

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

But the liability was not a personal one, but attached solely to the separate property (*q*).

3. By statute.

Protection order.

Previously to the Married Women's Property Acts, legislation had made considerable changes in the rules of the common law. By the Matrimonial Causes Act, 1857 (*r*), a wife deserted by her husband may obtain an order to protect her future earnings and property, the effect of which order during its continuance is to place her during such desertion "in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation." And the effect of such a decree is stated by the 26th section to be, that "the wife shall while so separated be considered as a *feme sole for the purposes of contract*, and wrongs and injuries, and *suing and being sued* in any civil proceeding" (*s*). Further provision is made by the Matrimonial Causes Act, 1858 (*t*), for the protection of persons

(*o*) *Pike* v. *Fitzgibbon* (1881) 17 Ch. D. 454; 50 L. J. Ch. 394, C. A.

(*p*) *Per* Kindersley, V.C., in *Matthewman's Case* (1866) L. R. 3 Eq. 781; 36 L. J. Ch. 90, at 787. See also *Johnson* v. *Gallagher* (1864) 3 De G. F. & J. 494; 30 L. J. Ch. 298; 130 R. R. 223; *London Chartered Bank* v. *Lempriére* 1873) L. R. 4 P. C. 572; 42 L. J. P. C. 49; *Picard* v. *Hine* (1869) L. R. 5 Ch. 274; *Pike* v. *Fitzgibbon* (1881) 17 Ch. D. 454; 50 L. J. Ch. 394, C. A.

(*q*) *Per* Brett, L.J., in *Pike* v. *Fitzgibbon* (1881) 17 Ch. D. 462; 50 L. J. Ch. 394, C. A.; *per* Cotton, L.J., in Ex parte *Jones* (1879) 12 Ch. D. 490; 48 L. J. Bk. 109, C. A.

(*r*) 20 & 21 V. c. 85, s. 21; amend. by 21 & 22 V. c. 108.

(*s*) *See Ramsden* v. *Brearley* (1875) L. R. 10 Q. B. 147; 44 L. J. Q. B. 46; *Re Hughes* [1898] 1 Ch. 529, C. A.; 67 L. J. Ch. 219; *Chenod* v. *Leslie* [1909] 1 K. B. 880; 78 L. J. K. B. 695, C. A.

(*t*) 21 & 22 V. c. 108, ss. 6-

who have obtained the order above described, and by the Summary Jurisdiction (Married Women) Act, 1895 (*a*), for the order by a court of summary jurisdiction, in cases of aggravated assaults by the husband, or desertion, persistent cruelty, or wilful neglect, that the wife need no longer cohabit, which order has the effect of a decree of judicial separation on the ground of cruelty. And the provisions of this Act have been by the Licensing Act of 1902 (*c*), and by the Summary Jurisdiction (Ireland) Act, 1908 (*x*), extended to cases of habitual drunkenness on the part of the husband.

Married Women's Property Acts, 1870 and 1871.

The Married Women's Property Acts, 1870, and 1874 (*y*), conferred upon married women a separate estate in certain specified property, and gave them a right of action to protect it. The effect of these Acts was that married women had conferred upon them the same capacity to contract with reference to the statutory separate property as they previously possessed in equity with reference to their equitable separate estate, but no general capacity *at law* to contract was conferred upon them (*z*).

Married Women's Property Act, 1882.

And now the Married Women's Property Act, 1882 (*a*), repealing the earlier Acts of 1870 and 1874, has entirely altered the position of a married woman at common law, and in some important respects her position in equity. It enables a married woman to acquire, hold and dispose of every species of property as though she were a *feme sole* (*b*), to enter into and render herself liable *in respect of and to the extent of her separate property* on any contract, and to sue and be sued either in contract, or in tort, or otherwise, in all respects as if she were a *feme sole* (*c*).

The Act in certain specified cases confers new powers upon the wife, and in others upon the husband, and gives them new remedies against one another. But it does not do more than it professes to do, and therefore the old doctrine of

(*a*) 58 & 59 V. c. 39, ss. 4, 5. See *Matthews* v. *Matthews* [1912] 3 K. B. Q. D.

(*x*) 2 Edw. 7. c. 28, s. 5.

(*x*) 8 Edw. 7. c. 24, s. 1.

(*y*) 33 & 34 V. c. 93, amend. by 37 & 38 V. c. 50.

(*z*) *Per* Jessel, M.R., in *Howard* v. *Bank of England* (1875) L. R. 19 Eq. 91; 44 L. J. Ch. 329. See *Summers* v. *City Bank* (1875) L. R. 9 C. P. 587; 43 L. J. C. P. 261.

(*a*) 45 & 46 Vict. c. 75. The Act does not extend to Scotland: s. 26.

(*b*) S. 1 (1).

(*c*) S. 1 (2).

conjugal unity (*d*) is affected only so far as is necessary under the express provisions of the Act (*e*).

Married woman buyer

The effect of the Act, as contained in the first five sections, is that, when a married woman is a buyer, the seller may now bring an action either in the Queen's Bench or the Chancery Division of the High Court against her alone, for the purpose of enforcing his claim against her separate property: but it will still be necessary to join the husband as defendant where alternative relief can be obtained against him. What will be included in the wife's separate property will depend to some extent upon the date of the marriage. It will comprise all property settled to her separate use without restraint on anticipation, and, if the marriage took place after the commencement of the Act 1st January, 1883 (*f*) all real and personal property belonging to her at the time of the marriage, or acquired by or devolving upon her after marriage (*g*): if the marriage took place before that date, "all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder," accrues after that date (*h*). Her title will be considered to "accrue" at the time when the right arises, not when the property falls into possession (*i*). And the conversion after the act of the property into money does not give a married woman a new title (*k*).

But it is necessary that there should be some *title*, which the law recognises. A mere *spes successionis* is not even a "contingent" title. Accordingly a married woman who had before the Act an expectation only of forming one of a class of "next of kin" to be ascertained at a future date, who were made legatees under a will, and the class was not

(*d*) This may still exist, *e.g.*, in some cases of legacies to husband and wife and a third person: *In re Jupp* (1888) 39 Ch. D. 148; 57 L. J. Ch. 774. *Cf. Nussey* v. *Jeffery* [1914] 1 Ch. 375; 73 L. J. Ch. 251. And a communication by husband to wife of a libel on another is no publication: *Wennhak* v. *Morgan* (1888) 20 Q. B. D. 635; 57 L. J. Q. B. 241.

(*e*) *Per* Wills, J., in *Butler* v. *Butler* (1885) 14 Q. B. D. at 836; 55 L. J. Q. B. 55: appd. by Kay, J., in *In re Jupp* (1888) 39 Ch. D. at 152, 153; 57 L. J. Ch. 774. See also *per* Cotton, L.J., in *In re March* (1884) 27 Ch. D. at 170; 54 L. J. Q. B. 143, C. A.; Crawley on Husband and Wife, 25—26.

(*f*) S. 25.

(*g*) S. 2.

(*h*) S. 5.

(*i*) *Reid* v. *Reid* (1886) 31 Ch. D. 402; 55 L. J. Ch. 294, C. A., overruling *Baynton* v. *Collins* (1884) 27 Ch. D. 604; 53 L. J. Ch. 1112; and *Re Thompson and Curzon* (1885) 29 Ch. D. 177; 54 L. J. Ch. 610; and settling a singular conflict of judicial opinion upon the point.

(*k*) *In re Bacon* [1907] 1 Ch. 475; 76 L. J. Ch. 213.

actually ascertained till after the Act, was held not to have acquired her title until after the Act (*l*).

Section 1 (2), makes the married woman's capacity to contract subject to important limitations. It exists only "in respect of and to the extent of her separate property." It followed that, under the Act of 1882, no binding contract was created unless there was some separate property, however small, in existence at the time of the contract; and the burden of proof rested on the creditor (*m*). Such proof once established, the married woman's contract to purchase was deemed, *unless the contrary was shown*, to have been made with reference to her separate property (*n*), and it also bound not only existing, but also all after-acquired *separate* property (*o*). But the Act was not to affect any settlement or agreement for a settlement before or after marriage respecting the property of a married woman, or render inoperative any restraint on anticipation attached to the enjoyment of any property or income (*p*). And the contract did not bind property which was not separate, as *e.g.*, property devolving upon a woman after coverture had ceased. The intention of the Act of 1882 was that a married woman should not incur any liability, except in respect of, and to the extent of, her *separate* property held by her during coverture without restraint or anticipation (*q*).

To amend the law, the Married Women's Property Act of 1893 (*r*), repealing the third and fourth sub-sections of section 1 of the Act of 1882, provides that:

Married Women's Property Act, 1893, s. 1.

"1.—Every contract hereafter entered into by a married woman otherwise than as agent,

"(*a*.) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(*l*) *Stockley* v. *Parsons* (1890) 45 Ch. D. 51; 59 L. J. Ch. 666; disappg. *Re Beaupré* (1888) 21 L. R. Ir. 397; foll. in *Re Green* [1911] 2 Ch. 275; 80 L. J. Ch. 623.

(*m*) *Palliser* v. *Gurney* (1887) 19 Q. B. D. 519; 56 L. J. Q. B. 546, C. A.; *In re Shakespear* (1885) 30 Ch. D. 169; 55 L. J. Ch. 44; *Stogdon* v. *Lee* [1891] 1 Q. B. 661; 60 L. J. Q. B. 669, C. A. But see now M. W. P. Act, 1893, s. 1, *infra*.

(*n*) S. 1 (3), rep. by M. W. P. Act, 1893, s. 4.

(*o*) S. 1 (4), overriding on this point *Pike* v. *Fitzgibbon* (1881) 17 Ch. D. 454; 50 L. J. Ch. 394, C. A. See also *Bursill* v. *Tanner* (1884) 13 Q. B. D. 691; 55 L. J. Q. B. 53. S. 1 (4) is rep. by M. W. P. Act, 1893, s. 4.

(*p*) S. 19. As to settlements by the husband after Jan. 1, 1908, of the wife's property, and the necessity of execution or confirmation by her, see M. W. P. Act, 1907, s. 2.

(*q*) *Per* Vaughan Williams, L.J., in *Softlaw* v. *Welch* [1899] 2 Q. B. 121; 68 L. J. Q. B. 940, C. A.

(*r*) 56 & 57 Vict. c. 63. This Act does not apply to Scotland: s. 6.

"(*b.*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

"(*c.*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

"Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

Agency a question of fact.

The agency for her husband of a married woman is a question of fact; and it is not necessary, to free her from liability, that she should purport to contract as his agent(*s*). And where a *feme sole*, who has entered into a continuing contract for the supply to her of goods, subsequently marries without the knowledge of the seller; she will be deemed to have contracted for the goods supplied to her subsequently to her marriage "otherwise than as agent" for her husband (*t*).

Effect of this section on contracts.

Under this Act, therefore, a married woman may make a contract in respect of her separate property, although she has none at the date of the contract, and every contract made by her otherwise than as agent will be deemed to be such a contract. She thereby binds all separate property which she is possessed of, or entitled to, at or after the date of the contract; and the contract is enforceable against all *property* which she may thereafter while discovert acquire, but not against any separate property which at the time of the contract or thereafter is subject to restraint.

The proviso protects the income of separate property which at the date of the contract the married woman is restrained from anticipating, although the income accrues due to her after she has become discovert (*c*).

(*s*) *Paquin* v. *Beauclerk* [1906] A. C. 159; 75 L. J. K. B. 395; affirming (the House being equally divided) the C. A., which decided the case according to the text. See also *Travers* v. *Sen* (1917) 33 T. L. R. 202 (husband abroad). If the wife contracts as agent she is not liable in this country, even though the contract is made abroad: *Beer* v. *Bell* [1906] W. N. 114. But see Dicey on the Conflict of Laws (Ed. 1896, p. 517) on the question whether the *lex loci contractus* may not govern the case.

(*t*) *Lea Bridge District Gas Co.* v. *Malvern* [1917] 1 K. B. 803; 86 L. J. K. B. 553.

(*u*) A mere acknowledgment after the act of liability on a transaction entered into before the Act, and which does not result in a debt under the Act of 1882, is not a contract under the present Act: *Re Wheeler* [1904] 2 Ch. 66; 73 L. J. Ch. 576.

(*v*) A. L. Smith, L.J., and Vaughan Williams, L.J. (the latter expressing doubt), in *Barnett* v. *Howard* [1900] 2 Q. B. 784; 69 L. J. Q. B. 955; foll. in *Brown* v. *Dimbleby* [1904] 1 K. B. 28; 73 L. J. K. B. 35, C. A.; and *Wood* v. *Lewis* [1914] 3 K. B. 73; 83 L. J. K. B. 1046. The proviso does not change

It also protects the income of property which was, at the time of the contract, subject to a restraint, notwithstanding that, before judgment against her, the income has got into the hands of the married woman or of a trustee for her. The receipt of it does not make it her free separate property (*x*).

The married woman, under these Acts, is not rendered personally liable, but, as in equity before the Act, incurs an obligation which may be discharged, not by reaching her personally, but by reaching her separate property (*y*). In the language of Bowen, L.J. (*z*), her liability is a "proprietary," as distinguished from a personal one. The proper form of the judgment against the separate estate of a married woman is set out below (*a*), as settled by the Court of Appeal in *Scott* v. *Morley*.

Feme covert's liability to be sued more extensive than her contractual capacity.

The enactment in section 1 (2) of the Act of 1882, that a married woman may sue and be sued "in all respects as if she were a *feme sole*," is not to be read only in connection with the power to contract. The power to contract is distinct from the liability to be sued; and she may be sued "in *contract*, or *in tort*, or *otherwise*." Thus, for example, a married woman, having separate estate, though she has entered into no contract, is liable to refund moneys paid to her in any case in which she would have been so liable had she been a *feme sole* (*b*). The effect of sub-section 2 "is to allow a married woman to be sued in respect of anything in respect of which a man could be sued, subject to this, that her power to contract is limited, and that the remedy is confined to her separate estate" (*c*).

Bankruptcy.

Every married woman, who carries on a trade or business, whether separately from her husband or not, is subject to

the law as it was under the Act of 1882: *Per Collins, M. R., ibid.*, citing *Pelton* v. *Harrison* [1891] 2 Q. B. 422; 60 L. J. Q. B. 742, C. A. See also as to the construction of this proviso, Lush on Husband and Wife, 2nd ed. 249.

(*x*) *Wood* v. *Lewis*, *supra*.

(*y*) *Scott* v. *Morley* (1887) 20 Q. B. D. 120; 57 L. J. Q. B. 43, C. A.; *Draycott* v. *Harrison* (1886) 17 Q. B. D. 147. See, as to cases in equity before the Act, *ante*, 74.

(*z*) In *Scott* v. *Morley*, *supra*.

(*a*) "It is adjudged that the plaintiff to recover — *l.* and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless, by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction": 20 Q. B. D. at 132.

(*b*) *Whittaker* v. *Kershaw* (1890) 45 Ch. D. 320; 60 L. J. Ch. 9, C. A.

(*c*) *Per* Fry, L.J., *ibid.* at 329.

the bankruptcy laws as if she were a *feme sole* (*d*); and a bankruptcy notice under section 1 (1) (*g*) of the Bankruptcy Act, 1914, can be served upon her, as though she were personally bound to pay the judgment debt, or sum ordered to be paid, and whether or not the final judgment or order was expressed to be payable out of her separate property (*e*).

(*d*) Bankruptcy Act, 1914 (4 & 5 G. 5. c. 59), s. 125 (1). The Act repeals s. 1 (5) of the M. W. P. Act, 1882, which subjected a married woman, being a separate trader, to the bankruptcy laws "in respect of her separate property," words now omitted. As to the meaning of "carrying on trade," see *Re Reynolds, Ex parte White Brothers* [1915] 2 K. B. 186, C. A.; 84 L. J. K. B. 1348.

(*e*) Bankruptcy Act, 1914, s. 125 (2).

CHAPTER III.

MUTUAL ASSENT.

SECTION 1. GENERAL PRINCIPLES.

Assent, express or implied.

THE assent of the parties to a contract of sale need not as a general rule (*a*) be express. It may be implied from their language (*b*), or from their conduct (*c*); may be signified by a nod or a gesture, or may even be inferred from silence in certain cases; as if a customer takes up wares off a tradesman's counter and carries them away, and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods (*d*).

Must be mutual, and given before the other party's death;

But the assent must, in order to constitute a valid contract, be *mutual*, and intended to bind both sides. It must also *co-exist at the same moment* [illegible] time. If therefore either party dies before mutual asse[illegible]iven, no contract can be formed (*e*). A mere proposa[illegible]ne man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be *unconditional*. If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer. Thus, if the offer by the intended

and unconditional.

(*a*) To this general rule there may be certain exceptions by statute: see *e.g.* the Sculpture Copyright Act, 1814 (54 G. III. c. 56), s. 4, as to purchase of sculpture with copyright by deed; the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), ss. 24—30, 65, and Sched. I., Part II., as to transfer of British ships and shares therein by bill of sale only, and form of certificate of sale; and the Code, s. 4, which reproduces s. 17 of the Statute of Frauds.

(*b*) See a curious case of what one of the Judges termed a "grumbling" assent in *Joyce* v. *Swann* (1864) 17 C. B. (N. S.) 84; 142 R. R. 258; *post*.

(*c*) By s. 3 of the Code, subject to the provisions of that Act and of any statute in that behalf, a contract of sale may be implied from the conduct of the parties. See also *Brogden* v. *Metropolitan Railway* (1877) 2 App. Cas. 666, where the parties had *acted upon* the terms of a draft proposed agreement intended to form the basis of a formal contract. See also *Dartford Union* v. *Trickett* (1889) 59 L. T. 754, C. A. (alteration not objected to).

(*d*) Bl. Com. bk. 2, ch. 30, p. 443; *Hoadley* v. *McLaine* (1834) 10 Bing. 487; 3 L. J. C. P. 162; 38 R. R. 510. *per* Tindal, C.J.

(*e*) *Per* Mellish, L.J., in *Dickinson* v. *Dodds* (1876) 2 Ch. D. 475; 45 L. J. Ch. 777; *cf.* Anson on Cont. 9th ed. 31.

seller be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is at an end, and the party to whom it was made cannot afterwards bind the intended seller by a simple acceptance of the first offer.

and communicated.

The assent must also be *communicated* to the other party, or some act must be done which the other party has expressly or impliedly offered to treat as a communication; or the assent and its communication may be inferred from the conduct of the parties (*f*); but a mere "mental assent," followed up neither by communication, nor by action, is not sufficient (*g*).

Cases.

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

No acceptance no contract. *Felthouse* v. *Bindley* (1862).

In *Felthouse* v. *Bindley* (*i*), a nephew wrote to his uncle that he could not take less than thirty guineas for a horse, for which the uncle had offered £30. The uncle wrote back saying, "Your price I admit was thirty guineas, I offered £30, never offered more, and you said the horse was mine: however, as there may be a mistake about him, I will split the difference, £30 15s., I paying all expenses from Tamworth. You can send him at your convenience between now and the 25th of March. *If I hear no more about him, I consider the horse is mine at* £30 15s." This letter was dated on the 2nd of January; on the 21st of February the nephew sold all his stock at auction, the defendant being the auctioneer, but gave special orders not to sell the horse in question, saying it was his uncle's. The defendant by mistake sold the horse, and the action was trover by the uncle. *Held*, that there had been no complete contract between the uncle and the nephew, because the latter had

(*f*) *Dartford Union* v. *Trickett* (1889) 59 L. T. 754, C. A.

(*g*) *Brogden* v. *Metropolitan Railway* (1877) 2 App. Cas. 666, at 688, 691.

(*h*) *Champion* v. *Short* (1807) 1 Camp. 53; 10 R. R. 631 (acceptance implied from retention of goods); *Routledge* v. *Grant* (1828) 4 Bing. 653; 6 L. J. (O.S.) C. P. 166; 29 R. R. 672 (acceptance not in terms of offer); *Chaplin* v. *Clarke* (1849) 4 Ex. 403 (conditional allotment of shares); *Andrews* v. *Garrett* (1859) 6 C. B. (N. S.) 262; 20 R. R. 103 (acceptance of part of offer); *English and Foreign Credit Co.* v. *Arduin* (1871) L. R. 5 H. L. 64; 40 L. J. Ex. 108 (qualified acceptance explained); *Addinel's Case* (1865) L. R. 1 Eq. 225; 35 L. J. Ch. 75; 148 R. R. 45; in H. L. sub nom. (1869) *Jackson* v. *Turquand*, L. R. 4 H. L. 305; 35 L. J. Ch. 11 (new term added to offer); *Wynne's Case* (1873) 8 Ch. 1002; 43 L. J. Ch. 138 (same); *Stanley* v. *Dowdeswell* (1874) L. R. 10 C. P. 102 (acceptance with reservation); *Bolton* v. *Lambert* (1889) 41 Ch. D. 295; 58 L. J. Ch. 425, C. A. (reference in acceptance to a formal contract not necessarily a qualification); *Bonnewell* v. *Jenkins* (1878) 8 Ch. D. 70; 47 L. J. Ch. 758, C. A. (same).

(*i*) 11 C. B. (N. S.) 869; 31 L. J. C. P. 204; 132 R. R. 784.

never communicated to the former any assent to the sale at £30 15s.; that the uncle had no right to put upon his nephew the burthen of being bound by the offer unless rejected; and that there was nothing up to the date of the auction sale to prevent the nephew from dealing with the horse as his own. The plaintiff, therefore, was non-suited on the ground that he had no property in the horse at the date of the alleged conversion (*k*).

Harvey v. *Facey* (1893).

In *Harvey* v. *Facey* (*l*), the plaintiffs telegraphed to the defendant: "Will you sell us B. estate? Telegraph lowest cash price." The defendant replied: "Lowest price for B. estate £900"; and plaintiffs then wired: "We agree to buy B. estate for £900 asked by you. Please send us your title deed in order that we may get early possession." To this defendant sent no reply. *Held*, by the Privy Council, that there was no contract. The first telegram had in effect asked two questions: the defendant had replied to the second question only as to the lowest price and an affirmative reply to the first question could not be implied. The final telegram was not the acceptance of an offer to sell, for none had been made, but was an offer to buy which was not accepted.

Philp & Co. v. *Knoblauch* (1907).

On the other hand, in *Philp & Co.* v. *Knoblauch* (*m*), Knoblauch wrote to Philp & Co. as follows: "I am offering to-day Plate linseed for January/February shipment to Leith, and have pleasure in quoting you 100 tons at 41s. 3d., usual Plate terms. I shall be glad to hear if you are buyers, and await your esteemed reply." The next day Philp & Co. telegraphed: "Accept hundred January/February Plate 41s. 3d. Leith, per steamer Leith," and on the same day wrote: "Your favour of yesterday came duly to hand, and this forenoon we wired you as per enclosed copy, thus buying from you 100 tons Plate linseed January/February steamer shipment, usual contract." *Held*, distinguishing *Harvey* v. *Facey*, that, particularly having regard to the defender's enquiry whether the pursuers were buyers, and his "awaiting reply," that the defender's letter was intended to be an offer to sell, which was accepted by the pursuers' telegram.

Apparent acceptance not intended by parties as final.

And the facts of the case may show that an *apparent*

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

(*l*) [1893] A. C. 552; 62 L. J. P. C. 127. P. C. *Cf. Croshaw* v. *Pritchard* (1899) 16 Times L. R. 45 (offer, though headed "estimate"). See also *Boyers* v. *Dake* [1904] 2 Ir. R. 617.

(*m*) [1907] S. C. 994.

acceptance was not intended by the parties to constitute a final acceptance. Thus, in the *Guardians of the Poor of Kingston-upon-Hull* v. *Petch* (*n*), plaintiffs advertised for tenders to supply meat, stating, "all contractors will have to sign a written contract after acceptance of tender." Defendant tendered, and received notice of the acceptance of his tender, and then wrote that he declined the contract. *Held*, that having regard to the terms of the proposal, and the fact that such matters as the quantities deliverable, and the times of delivery, had to be arranged, the parties did not intend that the contract should be complete till the terms were put in writing, and signed by the parties, and that consequently the defendant had the right to retract.

Kingston-upon-Hull v. *Petch* (1854).

Acceptance must be in terms of offer.

And an acceptance must also be *in the terms* of the offer, otherwise it is a counter-offer, or new proposal.

Jordan v. *Norton*

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

(1838).

Hutchison v. *Bowker*

In *Hutchison* v. *Bowker* (*p*), the defendant wrote an offer to sell a cargo of *good* barley; the plaintiff replied: "Such offer we accept, expecting you will give us *fine barley* and *full weight*." The defendant wrote back: "You say you expect we shall give you 'fine barley.' Upon reference to our offer you will find no such expression. As such, we must decline shipping the same." It was shown on the trial that *good* barley and *fine* barley were terms well known in the trade, and that *fine* barley was the heavier. The jury, although finding that there was a difference in the meaning of the two words, found a verdict for plaintiff. The Court held that it was for the jury to determine the meaning of the words, and for the Court to decide whether there had been mutual assent to the contract; and the plaintiff was non-suited, on the ground that he had not accepted the defendant's offer.

(1839).

Counter-proposal amounts to rejection.

In *Hyde* v. *Wrench* (*q*), defendant offered to sell his farm to plaintiff for £1,000. The plaintiff thereupon offered him

(*n*) 10 Ex. 610; 24 L. J. Ex. 23; 102 R. R. 728. See also *Borson* v. *Altrincham U. D. Council* (1903) 67 J. P. 397, C. A. For cases in which a merely *formal* written contract was afterwards contemplated, see *Lewis* v. *Brass* (1877) 3 Q. B. D. 677, C. A.; *Rossiter* v. *Miller* (1878) 3 App. Cas. 1124; *Bolton* v. *Lambert* (1889) 41 Ch. D. 295; 48 L. J. Ch. 10, C. A. See on this *post*, 101.

(*o*) 4 M. & W. 155.

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

(*q*) 3 Beav. 334; 52 R. R. 144

£950, which defendant refused. Plaintiff then accepted the offer at £1,000, but defendant declined to complete the bargain. *Held*, on demurrer, by Lord Langdale, that when plaintiff, instead of accepting the first offer unconditionally, answered it by a counter-proposal to purchase at a lower price, "he thereby rejected the offer," and that no contract had ever become complete between the parties.

Hyde v. *Wrench* (1840).

But an inquiry of the proposer whether he will modify his terms, is not a counter-proposal entitling him to treat his offer as rejected.

Inquiry as to terms not a rejection.

Thus, in *Stevenson* v. *McLean* (*r*), the defendant, being possessed of warrants for iron, after some correspondence with the plaintiffs, showing that the market was in an unsettled state, and that the plaintiffs were buying, not for speculation, but for immediate resale, wrote to them offering to sell the warrants for "40s. nett cash, open till Monday," a phrase by which the defendant admitted that he meant he would hold the offer open *all* Monday. On the Monday morning the plaintiffs telegraphed to the defendant, "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give." *Held*, that, having regard to the circumstances, this inquiry was not unreasonable, and (distinguishing *Hyde* v. *Wrench*) that it was not a rejection of the offer.

Stevenson v. *McLean* (1880).

It appears to be clear on principle that there cannot be an acceptance of an offer made in ignorance of the offer. Therefore, where cross-offers are made simultaneously as, for instance, offers by post to sell and to buy goods at the same price neither offer can be construed as an acceptance of the other (*s*).

Cross-offers.

Nor can an acceptance precede the offer. Thus, in *Re Northern Electric Wire Co., Ex parte Hall* (*t*), the company allotted 160 shares to Hall, who at the time had not applied for them. Eight days afterwards, being unaware of the allotment, he applied for 160 shares, and sent £80 as a deposit, and next day received notice of the previous allotment. About six weeks afterwards he withdrew his application and claimed a return of the deposit. *Held*, that the allotment, having been made before the application, was

No acceptance before communication of offer.

Re *Northern Electric Wire Co., Hall's Case* (1890).

(*r*) 5 Q. B. D. 346; 49 L. J. Q. B. 701; referred to *post*, 96.

(*s*) See *Tinn* v. *Hofmann* (1873) 29 L. T. 271, where the majority of the Ex. Ch. (Blackburn, Keating, Brett, Grove, and Archibald, JJ., *diss.* Quain and Honyman, JJ.) expressed a strong opinion on this point, without deciding it; see especially at 278, 279.

(*t*) 63 L. T. 369.

invalid, for there was never that sequence of events which is necessary to form a contract; and the applicant was entitled to his deposit.

Proposal may be retracted before acceptance.

It is clear law that under ordinary circumstances a proposer may withdraw his offer so long as it is not accepted; for if there be no contract till acceptance there is nothing by which the proposer *can* be bound (*u*).

In exceptional cases, however, an offer is irrevocable, as, for example, where it is made under seal, and there is nothing to show that an express acceptance is required (*v*); or where goods are delivered on "sale or return," or similar terms, in which case the bailor cannot revoke his offer during the period allowed the bailee for return (*x*).

Payne v. *Cave* (1789).

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

Code, s. 58 (2).

Accordingly, the Code provides that:—

"**58.** (2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid."

When it is said that the sale is "complete" on the fall of the hammer, what is meant is that it is complete if there be no conditions. Thus, where the sale is subject to a reserve price, every bid is an offer conditional on the reserve price having been reached or exceeded. The fall of the hammer is similarly conditional (*a*).

Personal liability of auctioneer on sale without reserve.

It was held in 1858 that an auctioneer advertising a sale without reserve is like a person advertising a reward, and by putting up the goods *offers* to sell to the highest *bonâ fide*

(*u*) See besides *Payne* v. *Cave*, *infra*, *Ritso's Case* (1877) 4 Ch. D. 774, C. A. (application for shares withdrawn before allotment).

(*v*) *Xenos* v. *Wickham* (1867) L. R. 2 H. L. 296; 36 L. J. C. P. 313. See especially *per* Blackburn, J., at 312.

(*x*) *Per* Lord Esher, M.R., in *Kirkham* v. *Attenborough* [1897] 1 Q. B. 201; 66 L. J. Q. B. 149, C. A.

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

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

(*a*) *McManus* v. *Fortescue* [1907] 2 K. B. 1; 76 L. J. K. B. 393, C. A.

bidder, who by bidding *accepts* conditionally on no higher bid being made (*b*).

Promise to leave proposal open not binding before acceptance, if without consideration.

Even when on making the offer the proposer expressly promises to allow a certain time for acceptance, the offer may nevertheless be retracted in the interval before acceptance, if no consideration has been given for the promise.

Cooke v. *Oxley* (1790).

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

This decision was afterwards affirmed in the Exchequer Chamber (*d*).

(*b*) *Warlow* v. *Harrison* (1858) 1 E. & E. 295; 29 L. J. Q. B. 14; 117 R. R. 219. See the subject discussed in the chapter on Fraud, *post*, *et seqq.*

(*c*) T. R. 653.

(*d*) In 1791; so stated in note at the end of the report, in 3 T. R. 653.

The Court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till four o'clock. "All that the judgment affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities, which have been supposed to conflict with *Cooke* v. *Oxley*. It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end. . . . *Cooke* v. *Oxley*, if decided the other way, would have negatived the right of the proposing party to revoke his offer" (*e*).

Cooke v. *Oxley* will be seen to involve two points. The plaintiff's action was tested by the Court on two theories first, that it was for a breach of *promise* to leave the offer open; or, secondly, that it was for a breach of a contract, that became complete by the plaintiff's acceptance of an offer that had *actually* remained open. On the first theory, it was held that the declaration was insufficient, because it alleged no consideration for the *promise*. On the second theory, it was held that the declaration was insufficient, because it did not *allege* that the defendant had actually left the offer open for acceptance as he had promised. The Court did not decide that the contract would not have been completed if the offer, *remaining open*, had been accepted; but that nothing showed that the offer was open when accepted.

That this was really the decision is shown by what was said by Mr. Justice Bayley in *Humphries* v. *Carvalho* (*f*), which has been strangely construed (*g*) into an assertion that *Cooke* v. *Oxley* was misreported. This is the language of the learned Judge: "The question in *Cooke* v. *Oxley* arose upon the record, and a writ of error was afterwards brought upon the judgment of this Court, by which it appears that the objection made was, that there was only a proposal of sale by the one

Cooke v. *Oxley* was discussed and app. in *Routledge* v. *Grant* (1828) 4 Bing. 653; 6 L. J. (O. S.) C. P. 166; 29 R. R. 672; and *Head* v. *Diggon* (1828) 3 Man. & Ry. 97; 7 L. J. (O. S.) K. B. 36; and in *Stevenson* v. *McLean* (1880) 5 Q. B. D. at 351, 352; 49 L. J. Q. B. 701; discussed and followed in *Bristol Aërated Bread Co.* v. *Maggs* (1890) 44 Ch. D. at 625; 59 L. J. Ch. 472. See also *Cartwright* v. *Hoogstoel* (1911) 105 L. T. 628.

(*e*) *Per* Lush, J., in *Stevenson* v. *McLean* (1880) 5 Q. B. D. at 351, 352; 49 L. J. Q. B. 701; citing *Routledge* v. *Grant* (1828) 4 Bing. 653; 6 L. J. (O. S.) C. P. 166; 29 R. R. 672; set out *p.* 35.

(*f*) (1812) 16 East, 45.

(*g*) See Duer on Insurance, vol. i. 118.

party, and *no allegation* that the other party had acceded to the contract of sale."

On the second point, the question whether a concluded contract had been shown, the case has been adversely criticised. It has been pointed out with great force (*h*) that the presumption of law should be that, at the time when the plaintiff gave notice of acceptance, the defendant's offer remained still open, and that the onus of proof was on the defendant to show that he had revoked it, not on the plaintiff to show that he had not. Accordingly, a good contract of sale was *primâ facie* shown in the plaintiff's declaration. Had the action, on the other hand, been for revoking the offer, the decision would have been right.

The actual decision *semble*, erroneous.

The Supreme Judicial Court of Massachusetts held in the *Boston and Maine Railroad Co.* v. *Bartlett* (*i*), on an offer to sell certain land, if accepted within sixty days, that an acceptance within the time limited, *and while the offer was in full force*, rendered the contract complete, though the parties making the offer might have withdrawn it within the specified time. *Cooke* v. *Oxley* was treated as of no authority, being understood to be a case in which there had been an acceptance while the offer remained open.

Boston and Maine R.R. Co. v. *Bartlett* (1849).

By the law of Scotland, the person making the offer would be bound to keep it open until the expiration of the time spec[illegible] (*k*).

Law of Scotland.

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

Routledge v. *Grant* (1828).

In *Head* v. *Diggon* (*m*), the defendant, on Thursday, the 17th of April, gave the plaintiff a written order in these words: "Offered Mr. Head, of Bury, the under wool, &c., &c., *with three days' grace from the above date*." These words were

Head v. *Diggon* (1828).

(*h*) *Langdell*, Sel. Ca. Sum. S. 182; Poll. on Contr., 11th ed. 28.
(*i*) (1849) 3 Cush. 221; Langdell's Cas. Contr. 103.
(*k*) Brown's Sale of Goods Act, 19; citing Bell's Com. 1. 344; Bell on Sale, 33, 38, *Marshall* v. *Blackwood* (1747), Elchie's Sale, No. 6. See also Bell's Prin. 9th ed. s. 73.
(*l*) 4 Bing. 653; 6 L. J. (O. S.) C. P. 166; 29 R. R. 672.
(*m*) 3 Man. & Ry. 97; 7 L. J. (O. S.) K. B. 36; *cf. Burton* v. *G. W. Ry.* (1854) 9 Ex. 507; 23 L. J. Ex. 184; 96 R. R. 811.

put in by the defendant expressly as a promise to wait three days for the plaintiff's acceptance of the offer. The plaintiff went on Monday to accept, but the defendant refused, saying that the three days were out the day before Sunday. Holroyd, J., non-suited the plaintiff, on the authority of *Cooke* v. *Oxley*. In the course of the argument for a new trial, Lord Tenterden said: "Must both parties be bound, or is it sufficient if only one is bound? You contend that the buyer was to be free during three days, and that the seller was to be bound." The new trial was refused, his Lordship saying: "If the contract is to be taken as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree." And Bayley, J., concurred, on the ground that "unless both parties are bound, neither is."

Offer to be accepted from time to time.

Great Northern Railway v. *Witham* (1873).

The Great Northern Railway v. *Witham* (*n*) offers a further illustration of the same principle. The plaintiff company having advertised for tenders for the supply of iron for a period of twelve months, the defendants sent in a tender to supply the iron required for that period at fixed prices, in such quantities as the company might from time to time order. The company accepted his tender, and the defendant received and executed several orders, but ultimately he refused to carry out an order which the company had given. It was argued for the defendant that the contract was void for want of mutuality, as the company did not bind itself to order any iron, and therefore the defendant could not be bound to deliver any. *Held*, that the order given by the company was a sufficient consideration for the defendant's promise, and therefore that he was bound to deliver the iron ordered.

Consequences of accepting tender.

It is submitted that the true view is that the defendant's original tender was an *offer*, which might have been withdrawn until it had been accepted by the company in such a manner as to bind it. It is true that the company was under no obligation to give any order, and no action would lie against it for not so doing (*o*), its so-called "acceptance" of the tender being merely a recognition of the offer. But as soon as an order was given although not till then there was a binding acceptance, which rendered the contract com-

(*n*) L. R. 9 C. P. 16; 43 L. J. C. P. 13. See also *Percival* v. *L. C. C. Asylums Committee* (1918) 87 L. J. K. B. 677, where the various contracts are considered.

(*o*) *Burton* v. *G. N. Ry.* (1854) 9 Ex. 507; 23 L. J. Ex. 184; 96 R. R. 811; *R.* v. *Demers* [1900] A. C. 103; 69 L. J. P. C. 5, P. C.

plete, so far, at least as concerned the instalment ordered, and both parties were bound to perform it (*p*).

When tender can be withdrawn.

Whether, after the first order had been given and executed, the defendant might by notice have declined to execute future orders would depend, it is conceived, upon whether the contract was entire or severable: in other words, whether the tender was intended by both parties to be an offer of a contract for a period, involving, if accepted, an obligation on both parties during that period, or whether the tender was merely a revocable continuing offer to be accepted from time to time by the giving of orders, there being no obligation on the one party to order, or on the other to keep his offer open (*q*). The question depends upon the construction of the contract. If the contract be divisible, the seller might execute orders only when goods were cheap: *per contra*, the buyer might naturally wish to be able to rely upon a constant supply during the period (*r*). Where the consideration for the contract is given once for all, the contract is entire, and a tender is, after acceptance, irrevocable (*s*).

Chicago and Great Eastern R.R. Co. v. Dane (1870).

In another American case (*t*), the principle under discussion received a further illustration. The defendant wrote an offer to carry for the plaintiffs "not exceeding 6,000 tons gross, in and during the months of April, May, June, July, and August, 1864, upon the terms and for the price hereinafter specified," and on the next day the plaintiffs answered: "In behalf of this company I assent to your agreement and will be bound by its terms." *Held* to be no binding contract, because the plaintiffs were not bound to furnish anything for carriage; that the offer was a mere promise of an *option* to them, for which promise no consideration was given, and that the defendant had the right to withdraw from his offer at any time before such an acceptance as imposed *some* obligation on the company as a consideration: the acceptance would have been good, if the company had agreed to furnish *any* specified

(*p*) See *Chicago and G. E. R. R* v. *Dane* (1870) 43 New York (4 Hand.) 240, set out, *infra*.

(*q*) Both Mr. Leake (Contracts, 3rd ed. 27, 30) and Sir William Anson (Contract, 14th ed. 38, 40), treat this case as deciding that the contract was severable, and that the tender might have been withdrawn as to further orders. But the Court expressly refrained from deciding this point. See and consult *Offord* v. *Davies* (1862) 12 C. B. (N. S.) 747; 31 L. J. P. C. 319, *per* Bowen, J., in *Coulthart* v. *Clementson* (1879) 5 Q. B. D. at 46; 49 L. J. Q. B. 204.

(*r*) *Per* Grantham, J., in *Islington Union* v. *Brentnall* (1907) 71 J. P. 407; 5 L. G. R. 1219. See also *Re Gloucester Mun. Election Petition* [1901] 1 K. B. 683. In both these cases the contract was treated as binding on both sides.

(*s*) *Lloyds* v. *Harper* (1880) 16 Ch. D. 290, C. A.; 49 L. J. Ch. 217.

(*t*) *Chicago and G. E. R. R. Co.* v. *Dane* (1870) 43 W. Y. 240.

quantity not exceeding the 6,000 tons to the extent of the quantity specified, but not otherwise, because the defendant could not be bound while the plaintiffs were left free. It was also held that the fact that the plaintiffs had sent some goods for carriage was not an acceptance of the contract as a whole, the plaintiffs not being bound to furnish more deliveries, and the defendant's offer being accordingly divisible. When a continuing offer is accepted within the time limited, the acceptance is effective from its date, and does not relate back to the time of the offer (*u*).

Communication of withdrawal necessary.

The withdrawal of an offer to be effectual must have been communicated to the other party before his acceptance of it. "An uncommunicated revocation is for all practical purposes and in point of law no revocation at all" (*v*). To this rule, however, there is an exception in the case of the death of the offerer before acceptance, which although it be unknown to the other party renders acceptance impossible by removing one of the two parties necessary to the forming of a contract (*x*).

Except when offerer dies.

Formal notice not necessary.

Formal notice of revocation, however, is not necessary (*y*), and if the other party has, before accepting the offer, *actual knowledge* of any act of the offerer inconsistent with the continuance of the offer—such as a sale of the property to a third person—that will constitute an effectual revocation (*z*).

Communication of acceptance necessary.

On the same principle it is clear that, as a general rule, the acceptance of an offer must have been communicated to the offerer, in order that the minds of the two contracting parties may come together (*a*). Without this there is not that *consensus*, which, according to English law, is essential

(*u*) *Cartright* v. *Hoogstoel* (1911) 105 L. T. 628.

(*v*) *Per* Lindley, J., in *Byrne* v. *Van Tienhoven* (1880) 5 C. P. D. 344; 49 L. J. C. P. 316, at 347; *cf. per* Lush, J., in *Stevenson* v. *McLean* (1880) 5 Q. B. D. 346, at 352; 49 L. J. Q. B. 701; both these cases were followed in *Henthorn* v. *Fraser* [1892] 2 Ch. 27; 61 L. J. Ch. 373, C. A.

(*x*) See *per* Mellish, L.J., in *Dickinson* v. *Dodds* (1876) 2 Ch. D. at 475; 45 L. J. Ch. 777; *cf.* Pollock on Contracts, 8th ed. 41; and Anson on Contracts, 14th ed. 37.

(*y*) *E.g.*, an application for shares may be withdrawn orally: *Re Brewers' Assets Corp., Truman's Case* [1894] 3 Ch. 272; 63 L. J. Ch. 635.

(*z*) *Dickinson* v. *Dodds* (1876) 2 Ch. D. 463; 45 L. J. Ch. 777, C. A.; *Cartright* v. *Hoogstoel* (1911) 105 L. T. 628. The statement in the head-note of *Dickinson* v. *Dodds*: "*Semble*, the sale of property to a third person would of itself amount to a withdrawal of the offer, *even although the person to whom the offer was first made had no knowledge of the sale*," was quite unwarranted by the judgments; and has now been decided not to be law: *Henthorn* v. *Fraser* [1892] 2 Ch. at 33-34; 61 L. J. Ch. 373. Accordingly, where A. dispatches separate offers to B. and C., which B. accepts first, there is nevertheless a contract between A. and C., if C., in ignorance of the contract with B., accepts A.'s offer: *Patterson* v. *Dolman* (1908) Vict. L. R. 351.

(*a*) *McIver* v. *Richardson* (1813) 1 M. & S. 557; *Felthouse* v. *Bindley* (1862) 11 C. B. (N. S.) 869; 31 L. J. C. P. 204; set out *ante*, 82; *Powell* v. *Lee* (1908) 99 L. T. 284.

to the making of a contract (*b*). In an old case of trespass (*c*), where the defendant justified on the ground that the property in certain corn passed when he saw it and was "well content with the bargain," Chief Justice Brian said: "It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the Devil himself knows not the thought of man."

But the communication of acceptance need not be by words or writing. Conduct may amount to communication, and even silence where there is a duty to dissent (*d*).

Unless dispensed with.

But the offerer may, if he pleases, dispense with notice to himself, and expressly or impliedly intimate that it will be sufficient *to act* on his proposal. In that case such acting will be an acceptance (*e*), unless the person does the act before the offer is made or in ignorance of it, in which case it is apprehended that there is no acceptance (*f*).

Acting in ignorance of offer.

Mode of acceptance indicated.

Again, if the offerer expressly or impliedly indicates a particular mode of acceptance as sufficient, as by hanging out a flag (*g*), or posting a letter (*h*), the other person can accept by following the mode indicated, although the acceptance is never in fact communicated to the offerer (*i*).

Acceptance by post or telegraph.

It cannot be laid down as an invariable rule that a person is authorised in every case to accept an offer by post. "An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual com-

(*b*) See *per* Bowen, L.J., in *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q. B. at 269; 62 L. J. Q. B. 257.

(*c*) Year Book, 17 Edw. IV., T. Pasch. Case 2 (1476); cited with approval by Lord Blackburn in *Brogden* v. *Metropolitan Railway* (1877) 2 App. Cas. at 692; and by Lord Macnaghten in *Keighley* v. *Durant* [1901] A. C. at 247; 70 L. J. K. B. 622. The whole case is translated from the Year Book and set out at length in Blackburn on Sale, 190 *et seq.*; 2nd ed. 261 *et seq.*

(*d*) *Dartford Union* v. *Trickett* (1889) 59 L. T. 754, C. A. (duty to dissent to alteration of contract); *cf. Felthouse* v. *Bindley*, *ante*, where there was no duty to dissent.

(*e*) *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q. B. at 256; 62 L. J. Q. B. 257; *per* Lord Blackburn in *Brogden's Case*, *supra*; and *cf. Re Bultfontein, &c., Mine, Ex parte Cox* (1897) 75 L. T. 669, C. A. (retention of underwriting letter); *Williams* v. *Carwardine* (1833) 4 B. & Ad. 621; 2 L. J. K. B. 101; 38 R. R. 328; *Thatcher* v. *England* (1846) 3 C. B. 254; 15 L. J. C. P. 211; 71 R. R. 340; and the cases there cited.

(*f*) *Fitch* v. *Snedaker*, 38 N. Y. 248; Langd. Sel. Ca. 118.

(*g*) See *per* Bramwell, L.J., in *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. at 233; 48 L. J. Ex. 577. In Israel in ancient times a buyer plucked off his shoe and gave it to his neighbour, as a testimony of purchase: Ruth, iv., 7—9.

(*h*) *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. 216; 48 L. J. Ex. 577, C. A.

(*i*) *Per* Bowen, L.J., in *Carlill's Case* [1893] 1 Q. B. at 269; 62 L. J. Q. B. 257.

munication to himself of the acceptance" (*k*). But the post-office is the ordinary channel of communication, and in the vast majority of cases an authority to post an acceptance, where not express, will be implied (*l*), for it is conceived that an offer made by post or by telegraph invites an answer by post or by telegraph respectively, unless the contrary is expressed (*m*). Thus, where a man who resided at Birkenhead called at the office of a building society in Liverpool, and was there handed by the secretary a written offer of some houses for sale, he was held to be authorised to accept the offer by post (*n*).

Posting of letter of acceptance in due course binds the contract.

The following cases illustrate the principles applicable to a contract by correspondence:—

Adams v. *Lindsell* (1818).

In *Adams* v. *Lindsell* (*o*), the defendants wrote on the 2nd of September to the plaintiff, offering to sell a quantity of wool on specified terms, "receiving your answer in course of post." The letter was misdirected by the defendants, so that it only reached the plaintiff on the evening of the 5th. An answer was sent on the same evening accepting the offer. This answer was received by defendants on Tuesday, the 9th, in due course. On Monday, the 8th, the defendants not having received the answer—which would have been due on Sunday, the 7th, according to the course of the post, if they had not misdirected their letter—resold the wool. Action for non-delivery, and verdict for plaintiff. On motion for a new trial, it was contended on behalf of the defendants, on the authority of *Payne* v. *Cave* (*p*), and *Cooke* v. *Oxley* (*q*), that they had a right to retract their offer until notified of its acceptance; that they could not be bound on their side until the plaintiff was bound on his. But the Court said: "If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer, when

(*k*) *Per* Thesiger, L.J., in *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. at 223; 48 L. J. Ex. 577.

(*l*) In *Henthorn* v. *Fraser* [1892] 2 Ch. at 33; 61 L. J. Ch. 373, Lord Herschell preferred to rest the rule on ordinary usage rather than on implied authority, but the result appears to be the same.

(*m*) *Cf.* Anson on Contract, 9th ed. 26; and see the observations of Baggallay, L.J., upon *Dunlop* v. *Higgins* (1848) 1 H. L. C. 381; 73 R. R. 98; in *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. at 228; 48 L. J. Ex. 577; *cf. per* Lord Esher, M.R., in *Norman* v. *Ricketts* (1886) 3 T. L. R. 182, C. A. (payment by posting cheque lost in transit).

(*n*) *Henthorn* v. *Fraser* [1892] 2 Ch. 27, at 32-33; 61 L. J. Ch. 373, C. A. See also *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. 216, C. A.: set out *post*, 95.

(*o*) 1 B. & Ald. 681; 19 R. R. 415.

(*p*) (1789) 3 T. R. 148; 1 R. R. 679.

(*q*) (1790) 3 T. R. 653; 1 R. R. 783.

accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer, and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

Dunlop v. *Higgins* (1848).

This case was cited with approval as a leading case in *Dunlop* v. *Higgins* (*r*) by Lord Cottenham, who remarked that "common sense tells us that transactions cannot go on without such a rule." In that case, a proposal, sent by mail on the 28th of January, was received on the 30th, and was duly according to mercantile usage answered on the same day, but not by the first post, by a letter erroneously dated t' ? 31st, which by reason of the slippery state of the roads reached the proposer late on the 1st of February instead of the 31st of January. In reply to this, the proposer wrote withdrawing his offer, alleging that it had not been "accepted in course." *Held*, that it was competent to the acceptor to show the true time of posting his answer: that it was in fact posted in time, and that the contract was complete by acceptance when the letter of acceptance was posted, the party accepting not being answerable for casualties at the post-office delaying or preventing the arrival of the letter of acceptance (*s*).

Although acceptance never reaches the proposer.

Household Fire Insurance Co. v. *Grant* (1879).

In *The Household Fire Insurance Co.* v. *Grant* (*t*), the defendant had applied for shares in the plaintiff company, and the letter of allotment, duly addressed and posted, never reached him. *Held*, by the majority of the Court (Baggallay, L.J. and Thesiger, L.J.), that the defendant was liable as a shareholder. Bramwell, L.J., dissented in a forcible and highly characteristic judgment; but, as was pointed out by Thesiger, L.J. (*u*), "an offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance."

Or is posted or telegraphed before revocation reaches the acceptor.

In both the above cases of *Adams* v. *Lindsell* and *Dunlop* v. *Higgins* it will be observed that the acceptance of the offer

(*r*) 1 H. L. C. 381, at 399. See also *Potter* v. *Saunders* (1846) 6 Hare, 1; 77 R. R. 1, V.C. Wigram; *Re Imperial Land Co. of Marseilles, Harris's Case* (1872) L. R. 7 Ch. 587; 41 L. J. Ch. 621; and *Wall's Case* (1872) L. R. 15 Eq. 18; 42 L. J. Ch. 372.

(*s*) On this point, see also *Duncan* v. *Topham* (1849) 8 C. B. 225; 18 L. J. C. P. 300; 79 R. R. 470.

(*t*) 4 Ex. D. 216; 48 L. J. Ex. 577, C. A.

(*u*) At 225.

was complete by the posting of the answer *before* the offer was actually retracted, in accordance with the principle which makes the bargain complete at the moment when mutual and reciprocal assent has been given. And it will equally be complete where the answer is posted after the retraction is posted but before it actually reaches the party accepting. This point was decided in America many years ago (*r*), and was first decided in this country in 1880 in the following case:

Byrne v. *Van Tienhoven*

In *Byrne* v. *Van Tienhoven* (*s*), the defendants, who carried on business at Cardiff, wrote to the plaintiffs at New York offering goods for sale. Their letter was posted on the 1st of October and received on the 11th by the plaintiffs, who accepted the offer by telegram on the same day and also by letter on the 15th. Meanwhile, on the 8th, the defendants wrote a second letter withdrawing their offer, which reached the plaintiffs on the 20th. *Held*, that the withdrawal was too late. In a considered judgment, Lindley, J., said: "I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States. . . . This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier." The learned Judge then decided that the posting of the letter of revocation could not be regarded as a communication of it to the plaintiffs, on the ground that there was no analogy between the case of posting such a letter and that of posting a letter of acceptance: and the plaintiffs had not in fact given any express or implied promise to treat the mere posting of a letter of withdrawal as equivalent to a communication to themselves.

Stevenson v. *McLean* (1880).

Two months later that decision was followed in *Stevenson*

(*r*) *The Palo Alto* (1847) Dav. (Maine) 344.
(*s*) 5 C. P. D. 344; 49 L. J. C. P. 316.

v. *McLean* (*y*), where the defendant offered to sell certain warrants for iron to the plaintiffs, and after some correspondence the plaintiffs telegraphed an acceptance. Meanwhile the defendant had sold to a third party, and informed the plaintiffs of this by a telegram dispatched shortly *before*, but not received till *after*, the dispatch of the plaintiff's telegram. *Held*, by Lush, J., that the revocation was not effectual until it reached the plaintiffs; consequently the offer was still open when the plaintiffs telegraphed their acceptance, which made the contract complete and binding on both parties.

Onus of proving acceptance was posted first lies on acceptor.

Re *London and Northern Bank*. Ex parte *Jones* (1899).

In re *London and Northern Bank*, Ex parte *Jones* (*z*), a letter of withdrawal, written on the 26th October, of an application for shares in a company reached the company's office at 8.30 a.m. on the 27th, and was opened by the secretary at 9.30. On the 26th the company had allotted the shares, and the letter of allotment with others, instead of being put into the letter-box, were before 7.30 a.m. on the 27th taken (contrary to the regulations) by a postman who was outside the General Post Office. The stamp on the envelope showed that the letter did not leave that post-office till 11 a.m., whereas if posted there by 7.30 it would have left sooner. It was contended for the company that this letter was "posted" when handed to the postman, and that the letter of withdrawal did not reach the company when opened by the secretary (*a*). Both points were overruled, and it was held that as the company had failed to prove that their letter was posted before 9.30, the application had been withdrawn in time.

Summary.

When, therefore, acceptance by post or telegraph is authorised, the posting (*b*) of a letter, or dispatch of a telegram (*c*), addressed to the offerer within due time accept-

(*y*) 5 Q. B. D. 346; 49 L. J. Q. B. 701. Both decisions have been followed in *Re Scottish Petroleum Co., Maclagan's Case* (1882) 51 L. J. Ch. 841; and *Henthorn* v. *Fraser* [1892] 2 Ch. 27; 61 L. J. Ch. 373. C. A.

(*z*) [1900] 1 Ch. 220; 69 L. J. Ch. 24, *coram* Cozens-Hardy, J.

(*a*) In the absence of the secretary, notice of withdrawal to a clerk apparently in charge of the office is sufficient notice to the company: see *Truman's Case* [1894] 3 Ch. 272; 63 L. J. Ch. 635, *coram* Wright, J.

(*b*) Handing a letter to a town postman to be posted by him is not posting: *In re London and Northern Bank, ex parte Jones, supra.*

(*c*) Involved in the decision of Lush, J., in *Stevenson* v. *McLean* (1880) 5 Q. B. D. 346; 49 L. J. Q. B. 701; set out, *supra*; see also *Cowan* v. *O'Connor* (1888) 20 Q. B. D. 640; 57 L. J. Q. B. 401, at 642, where Hawkins, J., said that a reply to the offerer by telegram "must be considered as given to him at the telegraph office from whence such reply is dispatched."

ing the offer is an acceptance. At that moment the bargain is struck, and the contract is complete, and neither party can afterwards escape from it (*d*). "As soon as the letter of acceptance is delivered to the post-office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance" (*e*). Accordingly an offer cannot be withdrawn after the acceptance has been duly posted, although it may not then have reached the offerer (*f*), or may never reach him (*g*). To be effective the withdrawal must *reach* the other party before he has duly posted his acceptance (*h*). Similarly an acceptance once posted cannot be revoked, even though the letter is lost in transit and never reaches the offerer (*i*). A telegram, or message, therefore, revoking the acceptance, though it reach the offerer before the acceptance, is inoperative.

After acceptance offer cannot be withdrawn.

Withdrawal must reach in time.

Acceptance irrevocable.

A posted letter of acceptance must be addressed to the offerer

Acceptance must be addressed to offerer.

(*d*) *Dunlop* v. *Higgins* (1848) 1 H. L. C. 381; 73 R. R. 98; expd. by James, L.J., in *Harris's Case* (1872) L. R. 7 Ch. 587, at 592; 41 L. J. Ch. 621 *Cf. per* Lord Blackburn in *Brayden* v. *Metropolitan Ry.* (1877) 2 App. Cas. at 691.

(*e*) *Per* Thesiger, L.J., in *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. at 221; 48 L. J. Ex. 577. It is conceived that in the case of a letter posted in France, where the rules permit a person who has posted a letter to recover it before actual dispatch, there would be no acceptance until dispatch: see *Ex parte Cote*, in *re Dereze* (1873) L. R. 9 Ch. Ap. 27; 43 L. J. Bk. 19.

(*f*) *Adams* v. *Lindsell* (1818) 1 B. & Ald. 681; 19 R. R. 415; set out, *ante*, 94; *Potter* v. *Sanders* (1846) 6 Hare, 1; 77 R. R. 1; *Dunlop* v. *Higgins* (1848) 1 H. L. C. 381; 73 R. R. 98.

(*g*) *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. 216; 48 L. J. Ex. 577, C. A.; *ante*, 95; overruling *British and American Telegraph Co.* v. *Colson* (1871) L. R. 6 Ex. 108; 40 L. J. Ex. 97; followed *Carta Para G. M. Co.* v. *Fastnedge* (1882) 30 W. R. 880, C. A.

(*h*) *Byrne* v. *Van Tienhoven* (1880) 5 C. P. D. 344; 49 L. J. C. P. 316; set out *ante*, 96; *Stevenson* v. *McLean* (1880) 5 Q. B. D. 346; 49 L. J. Q. B. 701; *Re Scottish Petroleum Co., Maclagan's Case* (1882) 51 L. J. Ch. 841; *Henthorn* v. *Fraser* [1892] 2 Ch. 27; 61 L. J. Ch. 373, C. A. Verbal withdrawal is sufficient, even in the case of a written offer: *Re Brewery Assets Corporation* [1894] 3 Ch. 272; 63 L. J. Ch. 635.

(*i*) This particular point has not been actually decided in our Courts, but the learned author deduced it from the decisions in *Potter* v. *Sanders* (1846) 6 Hare, 1; 77 R. R. 1; and *Duncan* v. *Topham* (1849) 8 C. B. 225; 18 L. J. C. P. 310; 79 R. R. 470; see 2nd ed. of this work, 38. It is also a necessary deduction from the grounds of the decisions. It seems clear that the decision to the contrary of the majority of the Court of Session in Scotland, reversing that of the lower Court, in *Dunmore* v. *Alexander* (1830) 9 Shaw & Dun. 190; and the *dictum* of Bramwell, L.J., in *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. at 235-236; 48 L. J. Ex. 577, cannot be supported. *Cf.* Anson on Contract, 9th ed. 30. A case similar to *Dunmore* v. *Alexander* is mentioned in Merlin's Repertoire de Jurisprudence, tit. Vente, sec. 1, art. 3, No. 11, *sub nom. S.* v. *F.*, and is reported in 1 Langdell's Cases on Cont. 156. This result might, of course, be prevented by an acceptance qualified by expressly stating that it was to hold good only if not revoked by telegram or otherwise within a fixed time. See Anson on Contract, 9th ed. 30.

or his agent. One addressed to the acceptor's agent only will not become binding until it is actually communicated to the offerer (*k*).

If the offerer expressly stipulates that an answer must be dispatched by telegraph (*l*), or by a particular post (*m*), the other party must of course comply with that stipulation. If nothing be said about time, the offer must be accepted within a reasonable time (*n*). If, according to mercantile usage, an answer should be posted on the day the offer is received, and there are several dispatches of mails on that day, it is not necessary to send it by the first dispatch (*o*). If the offerer requests an answer *by return of post*, but himself causes delay by misdirecting his letter, an acceptance posted on the day his letter arrives is in time (*p*). Such a request appears to fix the *time* and not the *manner* of accepting, so that the reply may be sent by telegram, or by any other means reaching the offerer not later than a *letter* sent by return of post (*q*). It seems that an offer by telegram is some evidence that a prompt reply by telegram is expected, and that a reply by letter may be too late (*r*). Time for accepting.

In negotiations by correspondence, or partly by correspondence and partly by word of month, it is often difficult to determine whether there is a complete contract or not. The House of Lords has laid down in *Hussey* v. *Horne-Payne* (*s*) that in such cases the whole of that which has passed between the parties must be taken into consideration. "You must not at one particular time draw a line and say: 'We will look at the letters up to this point and find in them Construction of correspondence. *Hussey* v. *Horne-Payne* (1879).

(*k*) *Re National Savings Bank, Hebb's Case* (1867) L. R. 4 Eq. 9; 36 L. J. Ch. 748; cited in *Re Imperial Land Co., Harris's Case* (1872) L. R. 7 Ch. at 592; 41 L. J. Ch. 621.

(*l*) *Horne* v. *Niver* (1897) 168 Mass. 4 (reply by letter two days later).

(*m*) See *per* Lord Cottenham, L.C., in *Dunlop* v. *Higgins* (1848) 1 H. L. C. at 398; 73 R. R. 98. *Cf. Duncan* v. *Topham* (1849) 8 C. B. 225; 18 L. J. C. P. 310; 79 R. R. 470 (goods ordered if shipped *directly*); and *Tinn* v. *Hoffmann* (1873) 29 L. T. 271, Ex. Ch. (waiting *reply by return*).

(*n*) *Ramsgate Victoria Hotel Co.* v. *Montefiore* (1866) L. R. 1 Ex. 109; 35 L. J. Ex. 90; *Re Bowron, Baily & Co., Baily's Case* (1868) L. R. 5 Eq. 428; affd. L. R. 3 Ch. 592; 37 L. J. Ch. 255 (delay of five months between application for shares and allotment held unreasonable). These cases are discussed by Kay, J., in *Re Land Loan Co., Boyle's Case* (1885) 54 L. J. Ch. 550; and by Bowen, L.J., in *Re Portuguese Mines, ex parte Badman* (1890) 45 Ch. D. at 34, 35.

(*o*) *Dunlop* v. *Higgins* (1848) 1 H. L. C. 381; 73 R. R. 98.

(*p*) *Adams* v. *Lindsell* (1818) 1 B. & Ald. 681; 19 R. R. 415; set out *ante*, 94.

(*q*) *Tinn* v. *Hoffmann* (1873) 29 L. T. 271, at 274, 278, Ex. Ch.

(*r*) *Quenerduaine* v. *Cole* (1883) 32 W. R. 185 (not a satisfactory reply); but *cf. per* Hawkins, J., in *Read* v. *Anderson* (1882) 10 Q. B. D. 100; 53 L. J. Q. B. 532.

(*s*) (1879) 4 App. Cas. 311; 48 L. J. Ch. 846.

a contract or not, but we will look at nothing beyond ' " (*t*). In that case, negotiations had been going on for the purchase by the plaintiff of the defendant's land when the defendant wrote a letter to which the plaintiff replied. These two letters, taken by themselves, appeared to constitute a complete contract, but parol evidence and subsequent correspondence showed that essential terms contemplated by both parties as to the mode of payment were still to be settled. *Held*, that there was no contract. But two letters containing respectively a definite offer and an unqualified acceptance, and *embodying all the terms* then agreed on, will constitute a contract; and this contract cannot without mutual consent be nullified or affected by subsequent correspondence or negotiations (*u*).

Where contract is concluded.

A contract will not be proved by correspondence unless all the essential terms are stated, and general expressions showing an apparent contract should not be laid hold of to make a contract for the parties when they themselves have made none (*v*).

All essential terms must be stated.

In *Love and Stewart* v. *S. Instone & Co.* (*x*), the appellants' (buyers') agent on January 22 telegraphed an enquiry whether the sellers (respondents) could supply coals. The respondents' agent replied—by a letter headed in red print "All offers are subject to strike and lock-out clauses"—that he must communicate with his principals. On the 28th the respondents' agent writes—in a letter similarly headed—"We confirm having sold you on behalf of Messrs. S. Instone & Co.," and setting out quantities and terms.

Love and Stewart v. *S. Instone & Co.* (1917).

Further correspondence and telegrams followed, in which a "sale" and "purchase," and its "confirmation" were attended to, and finally the respondents repudiated the contract. *Held*, by the House of Lords (Lords Loreburn, Shaw, Parker, Sumner, and Parmoor) that there was no completed contract, but merely negotiations which were subject to an agreement, which was never come to, on the strike and lock-out clause (*y*); and that the words "confirm," "sale,"

(*t*) *Per* Earl Cairns, L.C., 4 App. Cas. at 316; *cf. per* Jessel, M.R., in *Williams* v. *Brisco* (1882) 22 Ch. D. at 448, C. A.

(*u*) See *Bellamy* v. *Debenham* (1890) *coram* North, J., 45 Ch. D. 481; 60 L. J. Ch. 166, especially at 493-5. See also *Bristol Bread Co.* v. *Maggs* (1890) 44 Ch. D. 616, at 622—625; 59 L. J. Ch. 472 (where Kay, J., discusses *Hussey* v. *Horne-Payne*, 58 L. J. Ch. 425.

(*v*) *Per* Jessel, M.R., in *May* v. *Thomson* (1882) 20 Ch. D. 705, at 717; 51 L. J. Ch. 917, C. A.

(*x*) (1917) 33 Times L. R. 475, H. L. There was a difference of opinion on the question whether a formal contract was contemplated.

(*y*) *Cf. Oakbank Oil Co.* v. *Love & Stewart* (1918) 55 Sc. L. R. 179, H. L., where a similar clause was found to be part of the contract, the other party being fixed with notice of it, and it being unambiguous.

"purchase," and so forth referred merely to the more important terms of the negotiation.

Where formal document is contemplated.

Again, the fact that the execution of a more formal document was contemplated is very material to show that the correspondence amounted simply to negotiation (*z*). But "it does not follow that because parties intend to sign a formal document they cannot bind themselves by their letters" (*a*). The rule is that it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the latter case there is a binding contract, and the reference to the more formal document may be ignored (*b*).

Unintelligible agreements.

If the parties have expressed themselves in language so vague and unintelligible that the Court finds it impossible to affix a definite meaning to it, it cannot take effect.

Guthing v. *Lynn* (1831).

Thus, in *Guthing* v. *Lynn* (*c*) the action was on an alleged warranty on the sale of a horse, and the declaration averred the sale to have been "for a certain price, to wit, £63." The proof was of a sale for sixty guineas, *and* "if the horse was lucky to the plaintiff he was to give £5 more, or the buying of another horse." This was insisted on as a variance, since the proof showed that the *whole* consideration had not been alleged in the declaration. On motion for non-suit according to leave reserved, the Court refused to non-suit, on the ground that the substantial part of the consideration had been sufficiently alleged namely, that the plaintiff should buy and pay £63 for the horse. The additional clause was unintelligible. The contract must, therefore, be considered as proven for the price of £63, the remainder being looked upon as some honorary understanding between the parties.

No contract of sale of a chattel unknown to exist.

From the general principle that contracts can only be effected by mutual assent, it follows that there can be no

(*z*) See cases in notes (*n*), *ante*, p. 84.

(*a*) *Per* Lindley, L.J., *ibid.*

(*b*) *Per* Parker, J., in *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284; 81 L. J. Ch. 184; following *Winn* v. *Bull* (1877) 7 Ch. D. 29; 47 L. J. Ch. 139. See also *Page* v. *Norfolk* (1894) 70 L. T. 781, C. A.; *Santa Fé Land Co.* v. *Forestal Land, &c., Co.* (1910) 26 Times L. R. 534. In the first and third cases above, *North* v. *Percival* [1898] 2 Ch. 128; 67 L. J. Ch. 321, was disapproved.

(*c*) 2 B. & Ad. 232; 9 L. J. K. B. 181. See also *Langdon* v. *Goole* (1681) 3 Lev. 21; *Pearce* v. *Watts* (1875) L. R. 20 Eq. 492; 44 L. J. Ch. 492 (vague reservation on sale of real estate); *Re Vince, ex parte Baxter* [1892] 2 Q. B. 478; 61 L. J. Q. B. 836, C. A. ("fair allowance off price"); *Douglas* v. *Baynes* [1908] A. C. 477; 78 L. J. P. C. 13 (price uncertain).

contract of sale of a thing of the existence of which both parties are not aware, as, for example, of a chattel concealed in another chattel which is sold (*d*). Here there is obviously no mutual assent to a sale of the concealed chattel. It would be otherwise if the chattel were sold with its contents, if any. In such a case there would be a sale of the chattel, and an *emptio spei* of its contents. So where, by collusion between the owner of goods and a tradesman's servant, goods have been placed among the tradesman's stock and sold by him without knowledge of the fact, he cannot be charged with the price as on a contract of sale (*e*).

Misleading document.

Where the terms of a proposed sale are contained in a document delivered by one party to the other, it is no part of the duty of the party delivering the document to direct the other's attention to the terms thereof; his assent thereto will be presumed, unless the document is drawn up in a misleading manner, in which case the assent presumed will be to the document with the exclusion of terms of which the other party, as a reasonably careful business man, would not be aware (*f*).

Conditional assent.

The assent to a sale may be conditional as well as absolute, and then the formation of the contract is suspended till the condition is accomplished. Thus, if A. deliver to B. a musical box on loan or hire, on the understanding that, if it is damaged in B.'s possession, B. should pay for it, what was originally a bailment becomes a sale if and when the box is damaged (*g*). So also, if A. deliver his horse, on trial, to B., agreeing to take a specified price for him if B. approve him after trial, B. is merely bailee until the condition is accomplished, his assent to become purchaser not having been given when he obtained possession of the horse. Cases of sales "on trial," or of goods "to arrive" by a particular vessel, and the bargains known as "sale or return" (*h*) are all instances where the assent is conditional. Again, in an auction sale

"Sale or return."

(*d*) *Per Cur.* in *Merry* v. *Green* (1841) 7 M. & W. 623; 10 L. J. M. C. 154; 56 R. R. 819. See an express decision in Amer. in *Huthermacher* v. *Harris* (1861) 38 Penn. 491; a *Elwes* v. *Brigg Gas Co.* (1886) 33 Ch. D. 562; 55 L. J. Ch. 734 (prehistor hip found buried in leased farm). Counsel in arguing *Huthermacher* v. *Harris* illustrated his argument by the case of the bed of Richard III. sold at Bosworth many years after the battle, and found to contain in its frame and posts a large number of gold coins; and by that of the sale at New Orleans of a tropical bird in whose crop were found valuable stones.

(*e*) *Schutz* v. *Jordan* (1891) 141 U. S. 213.

(*f*) *Roe* v. *R. A. Naylor* (1918) 87 L. J. K. B. 958, C. A. See also *Oakbank Oil Co.* v. *Lore & Stewart* [1918] S. C. 54, H. L.

(*g*) *Bianchi* v. *Nash* (1836) 1 M. & W. 545; 5 L. J. Ex. 252. See also the Civil Law, Gains, 3, 146 (death of gladiators lent).

(*h*) As to these, see *post*.

subject to a reserve, the fall of the hammer is conditional on the reserve having been reached or passed (*i*).

It is in accordance with this principle that where two parties enter into what is apparently an absolute agreement, it is always competent to either party to show that such was not really intended (*k*). There may have been a preliminary stipulation by one party that he would not enter into a contract unless certain circumstances existed (*l*), or unless and until a certain event happened (*m*). Thus, he may sign an agreement as a kind of escrow with a verbal stipulation that it shall not operate unless the circumstances exist, or until the event happens; and upon the contingency it depends whether the written contract does or does not come into existence (*n*). And it may be shown by parol evidence that a document which purports to be an agreement is not in fact a record of an agreement, or intended by the parties to operate as one (*o*). "Whether the signature is or is not the result of a mistake is immaterial. The reasoning proceeds on this ground, that the parties never intended that the document should contain the terms of an agreement between them" (*p*).

Contract dependent on extrinsic fact, or not intended to be a record of an agreement.

In *Pym* v. *Campbell* (*q*), the plaintiff sued on an agreement signed by the defendants to purchase shares in the plaintiff's inventions, and the defendants pleaded that they did not agree, and on the trial gave evidence of an arrangement between the parties that the memorandum of sale should be drawn up and signed, but that there should be no bargain unless a certain engineer approved, and that he had disapproved. The jury, having been directed to find for the defendants if satisfied that such an arrangement had been made, found for the defendants. *Held*, a right direction.

Pym v. *Campbell* (1856).

"The production," said Mr. Justice Erle, "of a paper purporting to be an agreement by a party, with his signature

(*i*) *McManus* v. *Fortescue* [1907] 2 K. B. 1; 76 L. J. K. B. 393, C. A.

(*k*) See the cases cited in notes, *infra*.

(*l*) *Bannerman* v. *White* (1861) 10 C. B. (N. S.) 844; 31 L. J. C. P. 28; 128 R. R. 953; set out *post*, 104.

(*m*) *Pym* v. *Campbell* (1856) 6 E. & B. 370; 25 L. J. Q. B. 277; 106 R. R. 632; set out *infra*; *Lindley* v. *Lacey* (1864) 17 C. B. (N. S.) 578; 34 L. J. C. P. 7; 142 R. R. 525; and *Clerer* v. *Kirkman* (1875) 33 L. T. 672; and for the case of a lease or agreement for a lease, see *Davis* v. *Jones* (1856) 17 C. B. 625; 25 L. J. C. P. 91; 104 R. R. 819; *Gudgen* v. *Besset* (1856) 6 E. & B. 986; 26 L. J. Q. B. 36; 106 R. R. 899; and *Fattle* v. *Hornibrook* [1897] 1 Ch. 25; 66 L. J. Ch. 144.

(*n*) See cases in preceding note.

(*o*) *Rogers* v. *Hadley* (1863) 2 H. & C. 227; 32 L. J. Ex. 241, 133 R. R. 654; set out *post*, 105.

(*p*) *Per* Bramwell, B., in *Rogers* v. *Hadley* (1863) 2 H. & C. at 249; 32 L. J. Ex. 241; 133 R. R. 652.

(*q*) 6 E. & B. 370; 25 L. J. Q. B. 277; 106 R. R. 632.

attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence. . . . But, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is *not an agreement at all* is admissible" (*r*).

Bannerman v. White (1861).

In *Bannerman* v. *White* (*s*), the sale was of hops, and there was a known objectionable practice of using sulphur in their growth, and both parties knew that the merchants had notified the growers of their objection to buy such hops. At the time of the sale the buyers inquired, before asking the price, if sulphur had been used, saying *they would not even ask the price* if sulphur had been used, and the seller answered, No. The sale was then made by sample, the seller giving a written guarantee against any damage caused by the treatment of the hops. The delivery corresponded with the sample, and the buyer took possession, but afterwards rejected the contract on discovering that sulphur had been used. The jury found that the misrepresentation as to the use of sulphur was not wilful, thus repelling fraud, but that the affirmation that no sulphur had been used was understood and intended by the parties as a part of the contract, and a "warranty" to that effect. The plaintiff relied upon the written guarantee as showing that the defendant looked only to compensation in damages.

Erle, C.J., in delivering the decision of the Court, said that in deciding the effect of this finding: "We avoid the term 'warranty,' because it is used in two senses, and the term 'condition,' because the question is, whether that term is applicable. Then the effect is that the defendants required, and that the plaintiff gave, his *undertaking* that no sulphur had been used. This undertaking was a *preliminary* stipulation; and if it had not been given, the defendants *would not have gone on with the treaty* which resulted in the sale.

(*r*) *Pym* v. *Campbell*, at 373, 374.

(*s*) 10 C. B. (N. S.) 844; 31 L. J. C. P. 28; 128 R. R. 953. It is conceived, the true effect of the decision is as stated, and it is so treated by Mr. Leake, Cont. 1878, ed. 406. Mr. Benjamin, however, treated it as an ordinary case of a condition, 2nd ed. 490; 4th ed. 600. So also Sir W. Anson, Cont. 14th ed. 186. But an ordinary condition is a *term* of the contract itself, whereas in *Bannerman* v. *White* the undertaking was held to be *preliminary to the formation* of the contract.

In this sense, it was the condition upon which the defendant contracted." *Held*, that plaintiff had not fulfilled the condition, and could not enforce the sale.

Rogers v. Hadley 1863).

In *Rogers* v. *Hadley* (*t*), the plaintiff sued on a written agreement with the defendants to buy from him certain bark at £6 per ton. The defendants, having pleaded an equitable defence, supported it by parol evidence that the plaintiff, representing himself as agent for one Campbell, an officer of the Crown, sold them the bark at a price to be subsequently ascertained in a prescribed manner by Campbell, and induced them to sign the bought note now sued on, which described the plaintiff as the seller at £6 per ton, although at the time it was expressly agreed that that price was only nominal, as the real price could not then be ascertained. Byles, J., having ruled that the parol evidence was inadmissible as contradicting a contemporaneous written contract, the Court of Exchequer held that the evidence was *admissible* to show that the bought note was not intended by the parties to be a record of the contract, but was signed for some other purpose probably as a document to comply with some official requisition and entered judgment for the defendants.

SECTION II.—IMPLIED CONTRACTS OF SALE.

Implied contracts of sale.

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

Hart v. *Mills* (1846).

In *Hart* v. *Mills* (*y*), the defendant ordered *two* dozen of

(*t*) 2 H. & C. 227; 32 L. J. Ex. 241; 133 R. R. 652. See also *Bank of Australasia* v. *Palmer* [1897] A. C. 540, P. C.; 66 L. J. P. C. 105.
(*u*) See Code, s. 3, *ante*.
(*v*) *Oxendale* v. *Wetherell* (1829) 9 B. & C. 386; 7 L. J. (O.S.) K. B. 261; 33 R. R. 207; app. by the P. C. in *Colonial Insur. Co. of New Zealand* v. *Adelaide Marine Insur. Co.* (1886) 12 App. Cas. 128; 56 L. J. P. C. 19.
(*w*) *Richardson* v. *Dunn* (1841) 2 Q. B. 222; 10 L. J. Q. B. 282.
(*x*) (1830) 10 B. & C. 441; 8 L. J. (O.S.) K. B. 144; 34 R. R. 473; and see *Morgan* v. *Gath* (1865) 34 L. J. Ex. 165; 3 H. & C. 748; 140 R. R. 714.
(*y*) 15 M. & W. 85; 15 L. J. Ex. 200; 71 R. R. 578.

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

Assent to judgment for the price.

Where the buyer is sued for the price of goods, and, although the property has not passed to him, he consents to judgment, the transaction amounts to a sale of the goods (even when the judgment is not satisfied), as from the time of the judgment (*z*).

Implied sale enforced against fraudulent third person.

It has been held that a plaintiff may recover, as on an implied contract of sale from a third person who fraudulently induced him to sell goods to an insolvent purchaser, and then obtained the goods for his own benefit from the purchaser (*a*). Such cases proceed on the principle that the defendant cannot set up the supposed sale to the insolvent, as it was procured by his fraud, and so the possession of the goods being unaccounted for, the law raises an implied *assumpsit* to pay for them (*b*), or the insolvent is treated as the defendant's agent (*c*).

Sale implied without actual assent of parties.

There are also cases in which a sale takes place by the operation of certain principles of law rather than by the mutual assent of the parties, either express or implied.

Passing of property on payment of indemnity.

Thus, where under an indemnity, one person compensates another for the total loss or destruction of a thing, the transaction, on payment of the indemnity, constitutes an abandon-

(*z*) *Bradley & Cohn* v. *Ramsay & Co.* (1912) 106 L. T. 771, C. A., distinguishing *Brinsmead* v. *Harrison*, *post*.

(*a*) *Hill* v. *Perrott* (1810) 3 Taunt. 274; *Biddle* v. *Levy* (1815) 1 Stark. 20, both cases set out and discussed, *post*; *Abbotts* v. *Barry* (1820) 2 Br. & B 369.

(*b*) *Hill* v. *Perrott*, *supra*.

(*c*) *Per* Parke, B., in *Selway* v. *Fogg* (1839) 5 M. & W. 84; 8 L. J. Ex. 199.

ment by the indemnifier to the person indemnified of all rights in respect of the thing (*d*).

Again, where goods have been wrongfully taken, converted, or detained, and the owner has brought an action of trespass, trover, or detinue, upon his recovering damages the property in the goods passes in certain cases by operation of law to the defendant. The question whether it does or does not pass will depend upon the nature of the damages recovered (*e*).

The rule as regards trespass is thus stated in Jenkins (*f*): "A. in trespass against B. for taking an horse recovers damages; by this recovery and execution done thereon, the property of the horse is vested in B. *Solutio pretii emptionis loco habetur*" (*g*). Case in Jenkins. In trover.

A like rule applies where the plaintiff has first sued in trover. Thus, in *Adams* v. *Broughton* (*h*), the plaintiff having already sued Mason in trover for certain yarn and recovered damages, brought a second action of trover for the yarn against Broughton. The Court of King's Bench said: "The property of the goods is entirely altered by the judgment obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had: and this against all the world." *Adams* v. *Broughton* (1737).

Cooper v. *Shepherd* (*i*) was an action in trover for a bedstead. Plea, a former recovery by plaintiff in trover for the same bedstead in an action against W., and that the conversion by W. was not later than the conversion charged against the defendant, and that W. being possessed of the bedstead sold it to the defendant, and the taking by the defendant under such sale was the conversion complained of in the declaration. The Court held that this plea averred in effect a passing of the property in the bedstead from the plaintiff to W., who sold it to the defendant. *Cooper* v. *Shepherd* (1846).

(*d*) *Per* Lord Blackburn in *Rankin* v. *Potter* (1873) L. R. 6 H. L. 83, 118; 42 L. J. C. P. 169; and *Burnand* v. *Rodoconachi* (1882) 7 App. Cas. 333; 51 L. J. Q. B. 548. In marine insurance the abandonment dates back to the time of the total loss; *Stewart* v. *Greenock Marine Ins. Co.* (1847) 2 H. L. C. 159; 81 R. R. 91; Marine Ins. Act, 1906 (6 Edw. 7, c. 41).

(*e*) See *infra*.

(*f*) Eight centuries of Reports, 4th cent. Case 88, probably based on *Anon. Case* (1505) referred to in Keilwey, 58.

(*g*) This rule does not apply to trespass to land, so that if A. builds upon B.'s land, and B. recovers damages in trespass, so long as A. keeps the building standing, the continuing of the trespass from day to day is in law a several trespass on each day, for which B. can bring new actions of trespass: *Holmes* v. *Wilson* (1839) 10 A. & E. 503; 50 R. R. 492.

(*h*) Andr. 18; 2 Str. 1078.

(*i*) 3 C. B. 266; 15 L. J. C. P. 237; 71 R. R. 349.

No passing of property till judgment satisfied.

But an *unsatisfied* judgment in trespass (*k*), or trover (*l*), or detinue (*m*), does not pass the property (*n*), and is subject in the case of detinue to what is stated below, a mere assessment of damages, on *payment* of which the property vests in the defendant.

Dependent upon nature of damages.

The question whether the property does or does not pass depends also upon the nature of the damages recovered, which may vary according to whether the action is in the nature of trespass, or trover, or detinue. If in any case damages are assessed to include the full value of the goods, it is clear that on payment of the damages the property passes.

In trespass.

In *trespass*, if damages be assessed (as they may be) merely for the *taking* of the goods and not for their *value*, the property will remain in the plaintiff, who may subsequently sue to recover the goods or their value (*o*). But if the damages include the *value* of the goods, the property will pass; and where the damages, although not covering the full value of the goods, cover the value of the plaintiff's interest therein, it seems clear on principle that the property, at any rate to the extent of the plaintiff's interest, will pass.

Brierly v. *Kendall* (1852).

Thus, in *Brierly* v. *Kendall* (*p*), where the defendants, who were entitled under a bill of sale to seize and sell the plaintiff's goods on his making default, before such default seized and sold the goods, and were sued in trespass, it was held that the measure of damages was not the value of the goods, but the value only of the plaintiff's interest, having regard to his indebtedness to the defendants. It seems clear that in such a case on payment of the damages the property would pass (*q*).

In trover *Chinery* v. *Viall* (1860).

In *trover*, the measure of damages is in general the value of the goods (*r*), but this rule is not invariable. Thus, in *Chinery*

(*k*) See Case in Jenkins, *ante*, 107.

(*l*) *Marston* v. *Phillips* (1863) 9 L. T. 289; *Brinsmead* v. *Harrison* (1871) 6 C. P. 584; 41 L. J. C. P. 190, affd. in Ex. Ch. (1872) L. R. 7 C. P. 547.

(*m*) *Ex parte Drake* (1877) 5 Ch. D. 866; 46 L. J. Bk. 105, C. A.

(*n*) *Secus*, where the buyer assents to judgment: see *ante*, 106. The action must be brought against the person liable, not another sued by mistake: *Isaacs & Sons* v. *Salbstein* [1916] 2 K. B. 139, C. A.; 85 L. J. K. B. 143.

(*o*) *Lacon* v. *Barnard* (1626) Cro. Car. 35; *Field* v. *Jellicus* (1683) 3 Lev. 124.

(*p*) 17 Q. B. 937; 21 L. J. Q. B. 161; appd. in *Toms* v. *Wilson* (1863) 4 B. & S. at 458; 32 L. J. Q. B. 382; 129 R. R. 806, in Ex. Ch.

(*q*) *Qy.* to the *buyer* direct or to the *defendant* in the first instance?

(*r*) See *per* Tindal, C.J., in *Cooper* v. *Shepherd* (1846) 3 C. B. at 272; 15 L. J. C. P. 237; 41 R. R. 319, and generally as to damages in trover, Mayne on Damages, 7th ed. 409 *et seqq.* As to the deduction from the damages of sums the plaintiff would have had to pay, such as freight, see *Reid* v. *Payne, Douthwaite & Co.* (1888) 53 L. T. 932.

v. *Viall* (*s*), an unpaid seller of goods which were left in his custody, wrongfully resold them. *Held*, that the original buyer could recover in trover from the seller an amount covering only the actual loss sustained, and not the full value of the goods without deducting the unpaid price. On payment of damages to that amount, it is apprehended that the property in the goods passed. But where the plaintiff's actual loss includes the whole value of the goods, the recovery of less than that amount will not pass the property (*t*).

In *detinue*, the plaintiff is entitled to a return of the goods themselves and damages for their detention (*u*); but if the goods cannot be returned, the damages should include their value, and in that case upon judgment being satisfied, but not before, the property passes (*v*). In detinue.

And the rule of damages in actions of trespass, trover, or detinue, has been stated to be that "where the defendant has an interest in the goods and chattels converted, then the measure of damages is the value of the plaintiff's interest as between himself and the defendant" (*x*).

In some cases the property in goods may pass from the owner without any agreement to that effect, where he has himself brought no action. Thus, a bailee, by virtue of his right of possession, may recover from a wrongdoer the value of the goods, for *as against a wrongdoer possession is title* (*y*). And as payment to the bailee of such value is a complete defence to the wrongdoer in any subsequent action by the Passing of property where owner's bailee recovers damages.

(*s*) 5 H. & N. 288; 29 L. J. Ex. 180; 120 R. R. 588. *Cf. Mulliner* v. *Florence* (1878) 3 Q. B. D. 484; 47 L. J. Q. B. 700, C. A. (conversion by lienor), and *Johnson* v. *Lancashire and York. Ry.* (1878) 3 C. P. D. 499 (damages for full value, though the seller was unpaid).

(*t*) See judgments of Holroyd, J., and Littledale, J., in *Morris* v. *Robinson* (1824) 3 B. & C. at 206, 207; 27 R. R. 322.

(*u*) *Eberle's Hotels Co.* v. *Jonas* (1887) 18 Q. B. D. 459; 56 L. J. Q. B. 278, C. A.

(*v*) *Ex parte Drake, Re Ware* (1877) 5 Ch. D. 866; 46 L. J. Bk. 105, C. A.: *Re Scarth* (1874) L. R. 10 Ch. 234; 44 L. J. Bk. 29.

(*x*) *Per* Channell, J., in *Belsize Motor Supply Co.* v. *Cox* [1914] 1 K. B. 244; 83 L. J. K. B. 261; appd. in *Whiteley* v. *Hill* [1918] 2 K. B. 808, C. A.: 87 L. J. K. B. 1058.

(*y*) Com. Dig. Trespass B. (4), citing 2 Roll. Ab. 551, l. 31; *Armory* v. *Delamirie* (1722) 1 Str. 504; 1 Smith's L. C. 7th ed. 357; 11th ed. 356; *Rooth* v. *Wilson* (1817) 1 B. & Ald. 59; 18 R. R. 431; *per Cur.* in *The Winkfield* [1902] P. at 60; 71 L. J. P. 21; overruling *Claridge* v. *South Staff. Tramways Co.* [1892] 1 Q. B. 422; 61 L. J. Q. B. 503; and cases cited in the judgment; *Eastern Construction Co.* v. *National Trust Co.* [1914] A. C. 197 at 209—211; 83 L. J. P. C. 122. The bailee's action is barred, save in respect of damage to his own right of possession, if before action the owner has clothed the wrong-doer with ownership: S. C. See also the Code Civil of France, liv. 3, titre 20 (de la Prescription), art. 2279: "En fait de meubles, la possession vaut titre."

owner (*z*)—whose only remedy then is to recover from the bailee the proceeds as representing the goods, or the surplus over and above the value of the bailee's interest (as the case may be) (*a*)—the result follows that the owner's right of property is extinguished, whether the action by the bailee was trespass, case, trover or detinue.

Turner v. *Hardcastle* (1862).

Turner v. *Hardcastle* (*b*) was an action of trover by the assignees in bankruptcy of the bailee of goods against the sheriff who had wrongfully seized and sold them. The bailee had agreed to buy the goods from the owner and to pay for them by instalments, the owner having the right on default to take possession of the goods. The bailee made default, but the owner did not take any action, and the bailee having committed an act of bankruptcy, notice of it was served on the sheriff before the sale. *Held*, that the bailee's assignees in bankruptcy could recover the full value of the goods from the sheriff, and were accountable to the owner for the amount of his interest in the goods.

Plaintiff's election to waive tort.

If the owner of the goods, or his assignees in bankruptcy, instead of suing in respect of the tortious conversion, elect to affirm the act of the wrongdoer, the tort is thereby waived (*c*). But it would seem that it is not open to the owner in all cases to elect to treat the transaction as a sale, unless the other party assent (*d*). But if the defendant has sold the goods, or in any way admitted that the plaintiff is entitled to sue him in contract, the plaintiff may do so and waive the tort (*e*). And if the defendant has sold the goods, the inference will be drawn that he agreed to pay the plaintiff a reasonable price for them (*f*).

Ambiguous acts.

It is not always easy to determine whether the plaintiff's

(*z*) Com. Dig. *supra*, citing 2 Roll. Ab. 569, l. 22; appd. *per Cur.* in *The Winkfield* [1902] P. at 61; 71 L. J. P. 21; *per* Parke, B., in *Nicolls* v. *Bastard* (1835) 2 Cr. M. & R. at 660; 5 L. J. Ex. 7; 41 R. R. 814; where he says: "The rule is that either the bailor or the bailee may sue, and whichever first obtains damages, it is a full satisfaction."

(*a*) *Turner* v. *Hardcastle* (1862) 11 C. B. (N. S.) 683 at 708; 31 L. J. C. P. 193; 132 R. R. 714; *per* Erle, C.J., in *Swire* v. *Leach* (1865) 18 C. B. (N. S.) 492; 34 L. J. C. P. 150; 144 R. R. 579; *per Cur.* in *The Winkfield* [1902] P. at 60—61; 71 L. J. P. 21.

(*b*) *Supra*. See also *Sutton* v. *Buck* (1810) 2 Taunt. 302; 11 R. R. 585.

(*c*) *Smith* v. *Hodson* (1791) 4 T. R. 211; 2 Sm. L. C. 7th ed. 120; 12th ed. 139; 53 R. R. 93; *Foster* v. *Stewart* (1814) 3 M. & S. 191; 15 R. R. 459 (entering apprentice); *Lee* v. *Shore* (1822) 1 B. & C. 94; 1 L. J. (O.S.) K. B. 48; 25 R. R. 317 (goods taken); *Birmingham, etc., Gas Co.* v. *Ratcliff* (1871) L. R. 6 Ex. 224; 40 L. J. Ex. 136 (abstraction of gas); *Brewer* v. *Sparrow* (1827) 7 B. & C. 310; 6 L. J. (O.S.) K. B. 1.

(*d*) *Per Cur.* in *Bennett* v. *Francis* (1801) 2 Bos. & P. 550; 3 R. R. 644.

(*e*) *Ibid.*

(*f*) *Nicol* v. *Hennessey* (1896) 1 Com. Cas. 410; 12 T. L. R. 485.

acts do or do not amount to an election (*g*). The rule has been frequently stated that if the plaintiff bring an action for money had and received, that is in point of law a conclusive election to waive the tort (*h*). This, however, is not a hard-and-fast rule; for evidence may be given of the owner's intention not to waive the tort, as, for example, where he sues in tort and in the *alternative* for money had and received. This view of such an alternative claim was taken by the Court of Appeal in 1899 in *Rice* v. *Reed* (*i*), where it is also laid down that neither an application by the owner for the proceeds of goods tortiously dealt with, nor the actual receipt of part of such proceeds, is conclusive proof of election to affirm the transaction. Where "an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act, . . . the question whether the tort has been waived becomes rather a matter of fact than of law" (*k*).

SECTION III.—MISTAKE AS AFFECTING ASSENT.

Correction of manifest error on face of written document.

Where the parties have come to an agreement and an instrument is signed to express the agreement, an error or omission clearly appearing on the face of it will be corrected or supplied, where this can be done from other parts of the instrument, in furtherance of the obvious intention of the parties (*l*).

Coles v. *Hulme* (1828).

Thus, in *Coles* v. *Hulme* (*m*), a bond to pay £700 was allowed to be corrected by adding the word "pounds," the recitals in the condition showing that that must have been the meaning of the parties.

(*g*) See *e.g. Hurst* v. *Gwennap* (1817) 2 Stark. 306, affd. by K. B.; *Morris* v. *Robinson* (1824) 3 B. & C. 196; 27 R. R. 322; *Burn* v. *Morris* (1834) 2 Cr. & M. 579; 3 L. J. Ex. 193; 4 R. R. 891; *Valpy* v. *Sanders* (1848) 5 C. B. 886; 17 L. J. C. P. 249; 75 R. R. 844; *Smith* v. *Baker* (1873) L. R. 8 C. P. 350; 42 L. J. C. P. 155; *Roe* v. *Mutual Loan Fund* (1887) 19 Q. B. D. 347; 56 L. J. Q. B. 541, C. A.; *Rice* v. *Reed* [1900] 1 Q. B. 54; 69 L. J. Q. B. 33, C. A.; and the notes to *Smith* v. *Hodson* (1791) 2 Sm. L. C. 7th ed. 120; 12th ed. 139; 53 R. R. 93.

(*h*) *Lythgoe* v. *Vernon* (1860) 5 H. & N. 180; 29 L. J. Ex. 164; 120 R. R. 536; and see judgments in *Smith* v. *Baker*, *supra*; and in *Rice* v. *Reed*, *supra*

(*i*) *Supra*.

(*k*) *Per* Bovill, C.J., in *Smith* v. *Baker*, *supra*, at 355—356.

(*l*) See the authorities cited in the seven following notes.

(*m*) 8 B. & C. 568. See also *Waugh* v. *Bussell* (1814) 5 Taunt. 707; 15 R. R. 624 ("one pound" read as "one hundred"); *Mourmand* v. *Le Clair* [1903] 2 K. B. 216; 72 L. J. K. B. 496 ("seven" read as "seven pounds").

Wilson v. *Wilson* (1854).

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

Parol evidence of common mistake: rectification.

Moreover, although at common law parol evidence is inadmissible to vary the terms of a written agreement, Courts of equity will admit such evidence to show a plain mistake (*t*); so that if a contract has been "reduced into writing contrary to the intent of the parties, on proper proof that would be rectified" (*u*). To obtain rectification there must, in the absence of fraud, be mistake common to both parties (*v*); that is to say, an erroneous supposition by both parties that the document correctly expressed their common intention.

Defence of common mistake, etc., without actual rectification.

And in all cases in which the facts are such that an absolute and unconditional injunction would be granted in equity, or that an instrument would be either rectified or set aside, a defendant is entitled to plead those facts and to prove them by parol evidence; and, if proved, the Court may treat the instrument as rectified or set aside without any formal judgment to that effect (*x*).

(*n*) 5 H. L. C. 40; 23 L. J. Ch. 697; 101 R. R. 25. And see *Bird's Trusts* (1876) 3 Ch. D. 214; *Burchell* v. *Clark* (1876) 2 C. P. D. 88; 46 L. J. C. P. 115, C. A.

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

(*p*) *Anon. per* Buller, J., in *Bache* v. *Proctor* (1780) Dougl. 384.

(*q*) (1711) 10 Mod. 46.

(*r*) (1712) 4 Bro. Parl. Cas. ed. 1803, 73; vol. I., ed. 1784, 379.

(*s*) (1681) 3 Lev. 21.

(*t*) *Townshend* v. *Stangroom* (1801) 6 Ves. 328, 332, 333; 5 R. R. 312; *Re Boulter, Ex parte National Provincial Bank* (1876) 4 Ch. D. 241; 46 L. J. Bk. 11.

(*u*) *Per* Lord Hardwicke, L.C., in *Henkle* v. *Royal Exchange Assur. Co.* (1749) 1 Ves. Sen. 317. See Story's Eq. Jur. §§ 152 *et seqq.*

(*v*) See *per* Lord Romilly, M.R., in *Bentley* v. *Mackay* (1869) 31 Beav. 143, at 151; *Duke of Sutherland* v. *Heathcote* [1892] 1 Ch. 475, at 486; 61 L. J. Ch. 248, C. A.; and *per* Farwell, J., in *May* v. *Platt* [1900] 1 Ch. 616, at 623; 69 L. J. Ch. 357; *Cowen* v. *Truefitt* [1899] 2 Ch. 309, C. A.; 68 L. J. Ch. 563.

(*x*) See the cases cited in notes (*y*) and (*z*), *post*, 113; also *Mostyn* v. *West Mostyn Coal Co.* (1876) 1 C. P. D. 145; 45 L. J. Ch. 401; *Breslauer* v. *Barwick* (1876) 36 L. T. 52; Story's Eq. Jur. § 110, the last sentence of which was approved in *Wake* v. *Harrop* (1861) by Wilde, B., 6 H. & N. at 777; 30 L. J. Ex. 273, and in Ex. Ch. by Crompton, J., 1 H. & C. at 207; 31 L. J. Ex. 451: and see Bullen and Leake's Plead. 5th ed. 788, 789.

Under the Common Law Procedure Acts.

Thus, under the Common Law Procedure Acts, in an action on a charter-party the defendants were allowed to set up the equitable defence that the charter-party, contrary to the common intention, represented them as *principals* and not merely as *agents* for named principals (*y*). So, in trover for goods, the defendant was allowed to plead an equitable defence that he had bought from the plaintiff, and paid for and received possession of, the *goods* as well as certain chemical works, but that by mistake of the brokers employed the goods had been omitted from the bought and sold notes (*z*).

Under the Judicature Acts.

Under the Judicature Acts, relief in such cases can be given in all Courts (*a*).

Mistake in expressing agreement distinguished from mistake where no real agreement.

The cases which have been referred to above are instances of mistake in *expressing* the true intention of the parties where they have come to a real agreement, and those cases properly fall under the head of interpretation of contracts; but there are cases of another class in which there has been no real mutual assent.

Mistake affecting mutual assent.

Where through some mistake of fact each of the parties was assenting to a different contract, there is no real valid agreement, notwithstanding the apparent mutual assent. It is only as affecting mutual assent that mistake can affect the *formation* of a contract, for, as will hereafter be explained (*b*), mistake may affect not the reality, but the freedom, of assent, as in cases of fraud (*c*) which justifies a *repudiation* of the contract. To affect the formation of the contract mistake must relate to *essential* matters: it must *not merely* relate to some *material* fact influencing assent. There must be a difference in substance between the thing contracted for and that actually existing, so as to constitute a failure of consideration.

Kennedy v. *Panama Mail Co.* (1867).

Thus in *Kennedy* v. *Panama Mail Co.* (*d*), the plaintiff had applied for shares in the defendant company, on the faith of an innocent misrepresentation in a prospectus, which referred to the company having "a contract with the New Zealand

(*y*) *Wake* v. *Harrop* (1861) 6 H. & N. 768; 30 L. J. Ex. 273; affd. in Ex. Ch. (1862) 1 H. & C. 202; 31 L. J. Ex. 451; folld. in *Cowie* v. *Witt* (1874) 23 W. R. 76.

(*z*) *Steele* v. *Haddock* (1855) 10 Ex. 643; 24 L. J. Ex. 78. See also *Borrowman* v. *Rossel* (1844) 16 C. B. (N. S.) 58 (omission of reference to sample in bought and sold notes); *Luce* v *Izod* (1856) 1 H. & N. 245; 25 L. J. Ex. 307 (subject-matter too wide); *Nicoll* v. *Bell* (1875) 32 L. T. 815 (same).

(*a*) See J. Act, 1873, ss. 24 (2), (4), (7), and 91.

(*b*) See Fraud, *post*.

(*c*) But not misrepresentation. See on this *post*.

(*d*) L. R. 2 Q. B. 580; 36 L. J. Q. B. 260.

Government," whereas in fact there was only a contract made by the Government agent without authority, and afterwards repudiated. *Held*, that the plaintiff could not return his shares and recover the payments he had made on them, the misrepresentation being only as to a material fact affecting the shares, and its falsity not making the shares (which were of considerable value) substantially different things from what the plaintiff had applied for. Blackburn, J., states the law in this case in a considered judgment, which is set out at length hereafter (*e*).

What are essentials.

"Error in substantials, such as will invalidate consent given to a contract or obligation, must," according to Lord Watson (*f*), "be in relation to either (1) its subject-matter; (2) the persons undertaking, or to whom it is undertaken; (3) the price or consideration; (4) the quality of the thing engaged for, if expressly or tacitly essential; or, (5) the nature of the contract or engagement supposed to be entered into." To these heads should be added mistake as to the existence of an extrinsic state of circumstances which the parties contemplate as the foundation of their contract (*g*).

Meaning of essential mistake.

But when it is said that "error in substantials" must, to invalidate assent, be "in relation to" any of the essentials above defined, what is meant is that the mistake must be such as entirely to negative assent to that essential; for even common mistake as to some merely collateral fact connected with that essential, although it may materially have induced assent, will not invalidate it. Illustrations of such cases will be found on subsequent pages (*h*).

Mistake either bilateral or unilateral.

Mistake is either bilateral or unilateral. Bilateral mistakes are frequently spoken of as mutual or common; but each party may by mistake be negotiating about a different subject-matter, and the mistake made by each is then not identical. Common mistake is rare, and must generally, if not one merely of expression, be in relation to some extrinsic fact on which the contract depends, such as the existence of the

(*e*) See Chapter on Misrepresentation, *post*.

(*f*) In H. L. in *Stewart* v. *Kennedy* (1890) 15 App. Cas. 108, at 121, approving a pasage in Bell's Principles of the Law of Scotland, 8th ed., vol 1, s. 11.

(*g*) See on this *post*. Such cases may, however, be regarded as dependent on an implied contingency. S. 6 of the Code, *post*, is an instance.

(*h*) See *Wood* v. *Boynton* (1885) 54 Am. R. 610, *post*, 127; *Carter* v. *Crick* (1859) 4 H. & N. 412; 28 L. J. Ex. 238; 118 R. R. 521; *post*, 126; *Cox* v. *Prentice* (1815) 3 M. & S. 344; 16 R. R. 288; *post*, 130; *Pope & Pearson* v. *Buenos Ayres New Gas Co.* (1892) 8 Times L. R. 758, C. A.; *Gordon* v. *Street* [1899] 2 Q. B. 641; 69 L. J. Q. B. 45, C. A., *post*.

subject-matter, or some latent fact affecting it, such as its essential qualities, or its identity.

Where the essential mistake is of one party only he cannot, as a general rule, avail himself of it, and set up a want of assent, unless the error has been induced by the other party; for he is clearly not entitled to defend himself by the allegation that he understood the contract to be other than it really was (*i*).

Unilateral mistake generally ineffectual.

In former editions of this work (*k*) the question whether a mistake as to the identity of the person dealt with does or does not prevent the formation of a contract was said to depend upon whether his identity is an important element in the sale. Where such a mistake is caused by misrepresentation, it would seem that it may amount to such a misrepresentation of a material fact as at any rate to entitle the other to *avoid* the contract (*l*): but it does not follow that the mistake nullifies assent so as to prevent the *formation* of a contract.

1. Mistake as to the identity of the other party.

Pothier lays down the following rule: -

"Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract (*m*). . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand" (*n*).

It does not appear clearly from this passage whether Pothier was contemplating mistake as affecting the formation of a contract, or the right to avoid one. The passage was adopted by Fry, J., in a case of specific performance (*o*),

(*i*) *Per* Lords Herschell and Watson in *Stewart* v. *Kennedy* (1890) 15 App. Cas. 108; *Wilding* v. *Sanderson* [1897] 2 Ch. 534: 66 L. J. Ch. 684, C. A. Lord Watson restates the law in *Menzies* v. *Menzies* (1893) 20 Rettie, 108, H. L., as follows: "He cannot rescind unless his error was induced by the representations of the other contracting party, or of his agent, made in the course of negotiation, and with reference to the subject-matter of the contract."

(*k*) 2nd ed. 46; 4th ed. 63.

(*l*) See *per* A. L. Smith, L.J., and Rigby, L.J., in *Gordon* v. *Street* [1899] 2 Q. B. 641: 69 L. J. Q. B. 45, C. A.

(*m*) This passage is explained in *Phillips* v. *Brooks* [1919] 2 K. B. 243: 88 L. J. K. B. 953, as applying only where the person under mistake *did not intend* to contract with the person whose identity was mistaken.

(*n*) Pothier, Traité des Obligations, § 19.

(*o*) *Smith* v. *Wheatcroft* (1878) 9 Ch. D. 223, at 229—230; 47 L. J. Ch. 745.

and has also been approved in the Court of Appeal (*p*): but in these instances the question was whether the contract could be specifically performed, or set aside, and not whether any contract had been made. When a dispute arises as to whether a person is or is not liable on an alleged contract, it is obvious that the first thing to ascertain is whether that person is a party to it, for parties are an essential element of contract (*q*). The really material question is: To whom was the offer or acceptance addressed? If it was in fact addressed to an existing person, whether in his own name or in that of another, it is submitted that his identity is, so far as the *formation* of the contract is concerned, immaterial.

Identity of other party whether material to formation of contract.

Personal communication.

If B. goes, as he thinks, into T.'s shop, and buys a table, and then learns that T. has sold the business to S., he cannot on that ground refuse to pay for the table. He made, in fact, his offer to S., who by selling accepted it. In like manner, an erroneous belief by S. that the buyer is W. will not invalidate the sale. Pothier gives an illustration similar to the last, and explains it by saying that the identity of the buyer was a matter of indifference to the seller, who was willing to sell to anyone who would pay the price (*r*). But it is submitted that this circumstance is immaterial, and that the true explanation is that S. in fact intended to sell to B.: *Praesentia corporis tollit errorem nominis* (*s*).

If, however, B. represents to S. that he is acting as agent for C., or otherwise as an agent only, and S., relying on that representation (*t*), delivers goods to B. as buyer, the property does not pass to B., for S.'s offer or acceptance was not addressed to B. personally, but only to him as acting for C. (*u*), or some other principal. But if B. represents himself

(*p*) *Gordon* v. *Street*, *ante* 115 (*l*).

(*q*) *Per* Sir J. Mansfield, C.J., in *Champion* v. *Plummer* (1805) 1 Bos. & P. (N. R.) 252; 8 R. R. 795.

(*r*) Pothier, Traité des Obligations, § 19.

(*s*) Lord Bacon comments thus on the maxims: *Praesentia corporis tollit errorem nominis et veritas nominis tollit errorem demonstrationis*:—"There be three degrees of certainty—1, Presence; 2, Name; 3, Demonstration or Reference; whereof the presence the law holdeth of greatest dignity, the name in the second degree, and the demonstration or reference in the lowest." Bacon's Law Tracts, ed. 1737, 102. See the passage more fully quoted *post*.

(*t*) *Cf. Stoddard* v. *Ham* (1880) 129 Mass. 383, where there was merely a mistake of the seller that the buyer was acting for another, and no representation.

(*u*) *Hardman* v. *Booth* (1863) 1 H. & C. 803; 32 L. J. Ex. 105; 130 R. R. 784; *per* Brett, L.J., arg. in *Attenborough* v. *St. Katherine's Dock Co.* (1878) 3 C. P. D. 463; 47 L. J. C. P. 673, C. A.; and *per* Lord Hatherley in *Cundy* v. *Lindsay* (1878) 3 App. Cas. 469; 47 L. J. Q. B. 481; *Baillie's Case* [1898] 1 Ch. 110; 67 L. J. Ch. 81; *Consumers Ice Co.* v. *Webster & Co.* (1898)

to be C., there is *primâ facie* a contract of sale with him, as being "the person identified by sight and hearing" (*v*).

Communication in writing.

If in lieu of personal communication an offer is addressed to another in writing, as it can only be accepted by the person to whom it is addressed, the question to whom was the offer made does not depend upon actual presence, but upon the names or description of the parties shown by the writing (*x*).

Thus, if B. sends a written order for goods addressed to S. this order cannot properly be executed by T. So that if B. consumes the goods, *bonâ fide* believing them to be sent by S. in pursuance of his order, T. cannot sue B. for the price (*y*).

On the same principle, if B., falsely representing himself to be T. & Co., an *existing* firm, sends a written order for goods to S., who thereupon forwards the goods, the property in them does not pass to B., for there is no contract with anybody, since S. intended to contract with T. & Co., and not with B., and T. & Co. obviously made no contract with S. (*z*). And the result is the same if B. falsely represents that he is acting as the agent of T. & Co. (*a*).

But if B. order goods in his own name, and S. accordingly consigns them to him, a mistake by S. that B. is in fact T., an existing person with whom S. intended to deal, is ineffectual to prevent a contract arising between S. and B., for S. actually accepted B.'s offer (*b*). In the same way

32 App. Div. (N. Y.) 592; *Aborn* v. *Merchants' Despatch Co.* (1883) 135 Mass. 283; *Rodliff* v. *Dallinger* (1886) 141 Mass. 1 (reliance on agency); *Archer* v. *Stone* (1898) (8 L. T. 34 (reliance on agency, excluding particular principal).

(*v*) *Edmunds* v. *Merchants' Despatch Co.* (1883) 135 Mass. 283; folld. in *Phillips* v. *Brooks* [1919] 2 K. B. 243. See also *Phelps* v. *McQuade* (1917) 220 N. Y. 232, *post*, 118.

(*x*) See the degrees of certainty stated by Lord Bacon, *ante*, 116.

(*y*) *Boulton* v. *Jones* (1857) 27 L. J. Ex. 117; 2 H. & N. 564; 115 R. R. 695; set out *post*, 119; *Boston Ice Co.* v. *Potter* (1877) 123 Mass. 28; set out *post*, 120; *Hills* v. *Snell* (1870) 104 Mass. 173.

(*z*) *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459; 47 L. J. Q. B. 481; set out *post*; *Hardman* v. *Booth* (1863) 1 H. & C. 803; 32 L. J. Ex. 105; 130 R. R. 784; set out *post*; *Hollins* v. *Fowler* (1875) L. R. 7 H. L. 757; 44 L. J. Q. B. 169.

(*a*) *Higgons* v. *Burton* (1857) 26 L. J. Ex. 342; 112 R. R. 938; *Hollins* v. *Fowler*, *supra*.

(*b*) See *Stoddard* v. *Ham* (1880) 129 Mass. 383, where S. sold goods to B., in the belief (in no way induced by B.) that he was selling to T. through B. It was held that there was a good contract between S. and B. *Re Reed*, *ex parte Barnett* (1876) 3 Ch. D. 123; 45 L. J. Bk. 120, was a case of a mere mistake by the seller of the goods; it is, therefore, submitted that Bacon, V.-C.'s, decision that the contract was *void* cannot be supported. There the order was given by "Joseph Reed & Sons, Mincing Lane, Plymouth," and the sellers supposed it to come from one of their customers, Reed Brothers & Co., Old Town Street, Plymouth, and *sent the goods to Joseph Reed & Sons* at Mincing Lane. As, however, there was evidence of fraud in the case, Reed (who traded as Joseph Reed & Sons) being an undischarged bankrupt, the case may be supported as one in which the sellers had *disaffirmed* the contract. The report in the L. R. should be supplemented by that in the L. T.

there will ordinarily (*c*) be a contract where S. consigns goods to B., who has ordered them in the name of a person who does not exist, for S. would, in spite of fraud on the part of B., be dealing with B., though under an alias (*d*).

Summary of the law by the N. Y. Court of Appeals.

The law on this subject generally has been thus stated by the New York Court of Appeals (*e*): "Where the vendor of personal property intends to sell his goods to the person with whom he deals, then title passes, even though he is deceived as to that person's identity or responsibility. Otherwise, it does not. It is purely a question of the vendor's intention. The fact that the vendor deals with the person personally rather than by letter is immaterial, except in so far as it bears upon the question of intent. Where the transaction is a personal one, the seller intends to transfer title to a person of credit, and he supposes the one standing before him to be that person. He is deceived. But, in spite of that fact, his primary intention is to sell his goods to the person with whom he negotiates (*f*). Where the transaction is by letter the vendor intends to deal with the person whose name is signed to the letter. He knows no one else." Accordingly, in the first case supposed there is a contract; in the second, not.

New contract may be inferred from conduct of parties.

But where there is in fact originally no contract between the parties, whether they have been in communication personally or by writing, a new contract may be implied from their subsequent conduct, as where B. receives from S. goods which he has ordered from T. and uses the goods after he knows that S. has sent them (*g*).

Mitchell v. *Lapage* (1816).

Thus, in *Mitchell* v. *Lapage* (*h*), in 1816, the defendant sought to escape liability on a purchase of thirty-eight tons of hemp, on the ground that he had not contracted with the plaintiffs, but with other persons. The broker gave defendant a bought note stating the sellers to be Todd, Mitchell & Co. It turned out that, without the broker's knowledge, that firm

(*c*) Not, however, if other facts negative a contract with B., as where S refuses to sell to B. personally: *Rodliff* v. *Dallinger* (1886) 141 Mass. 1.

(*d*) *King's Norton Metal Co.* v. *Edridge* (1897) 14 Times L. R. 98, C. A.; *post*.

(*e*) In *Phelps* v. *McQuade* (1917) 220 N. Y. 232, citing (*inter alia*) *Cundy* v *Lindsay*, *post*.

(*f*) The Court were possibly not considering the case where the person present professed to be the agent of another existing person: see the word "primary."

(*g*) This passage was quoted by Kennedy, L.J., in *Ramsden & Carr* v. *Chessum & Sons* (1912) 107 L. T. 746, at 752, C. A. See S. C. in H. L. (1913) 30 Times L. R. 68.

(*h*) Holt, N. P. 253; 17 R.R. 633. See the observations on this case *infra*; and the judgment of Channell, B., in *Boulton* v. *Jones* (1857) 27 L. J. Ex. at 119; 115 R. R. 695.

had been dissolved some months before by the withdrawal of two of the partners, and succeeded by the plaintiffs' firm of Mitchell, Armistead, and Graubner, the last two taking the place of the withdrawn members of the old firm. The defendant had received a letter from the plaintiffs the new firm advising him of the arrival of the hemp, and calling upon him to fulfil his contract; and after this he had expressed to the broker a wish to be freed of his bargain, but he took no exception to the plaintiffs as sellers until later. Gibbs, C.J., told the jury: "I agree with the defendant's counsel that he cannot be prejudiced by the substitution. . . . If by this mistake the defendant was induced to think that he entered into a contract with one set of men, and not with any other; and if, owing to the broker he has been prejudiced or excluded from a set-off, it would be a good defence. But the defendant has notice, not from Todd & Co., but expressly from the plaintiffs, of the arrival of the hemp. After that notice he confers with the broker, treating the contract as subsisting. He has notice from the new firm and makes no objection." Verdict for plaintiffs.

In this judgment, as reported, there appears to be some confusion between the original contract alleged and the new contract which was implied from the defendant's conduct after he knew who the sellers were. He would, in the first instance, have had a right to repudiate the contract with the new firm, whether prejudiced by the substitution or not, and the question whether he was prejudiced would only become material in considering whether a new contract ought or ought not to be implied, and as tending to negative such implication (*i*).

Suggested ground of decision, new contract implied.

In *Boulton* v. *Jones* (*k*), the action was for goods sold and delivered. The plaintiff had bought out the stock-in-trade and business of one Brocklehurst. The defendant, ignorant of the fact, sent to the shop a written order for goods, addressed to Brocklehurst, on the very day of the transfer to the plaintiff, and the latter supplied the goods. The goods were consumed by the defendant, he not knowing that they were supplied by the plaintiff instead of Brocklehurst, against whom he had a set-off. When payment of the price

Boulton v. *Jones* (1857).

(*i*) *Mitchell* v. *Lapage* does not appear to have been cited on this point in any judgment in the English Courts, but this view of the case was taken by the Supreme Court of Massachusetts in *Boston Ice Co.* v. *Potter* (1877) 123 Mass. (9 Lathrop) 28, at 30, set out *post*, 120; and *cf.* the reference to it in *Stoddard* v. *Ham* (1880) 129 Mass. 383, at 386.

(*k*) 27 L. J. Ex. 117; 2 H. & N. 564; 115 R. R. 695.

was afterwards demanded, the defendant refused, on the ground that he had not contracted with the plaintiff. The Barons of the Exchequer were all of opinion that the action was not maintainable.

Pollock, C.B., and Martin, B., and Channell, B., based their judgments on the ground that Jones' offer was directed to Brocklehurst, and that Boulton could not accept it (*l*). Bramwell, B., on the other hand, expressly founded his judgment on the fact that it would prejudice the defendant if Boulton were allowed to succeed, as the defendant would be deprived of his set-off; and this view received some support from Pollock, C.B., who, according to one report (*m*), said: "If you propose to make a contract with A., then B. cannot substitute himself for A. without your consent, and *to your disadvantage*." Bramwell, B., also said (*n*): "When anyone makes a contract in which the personality, so to speak, of the particular party contracted with is important for any reason (*o*)—whether because it is to write a book (*p*), or paint a picture, or do any work of personal skill, or whether because there is a set-off due from that party—no one else is at liberty to step in and maintain that he is the party contracted with: that he has written the book, or painted the picture, or supplied the goods."

It is submitted that in *Boulton* v. *Jones* the proper ground of decision was that there was no contract, and not that the defendant was prejudiced. The fact that he had a set-off against Brocklehurst was, it is submitted, material only as tending to negative an implied contract with the plaintiff.

American Case.

Boston Ice Co. v. *Potter* (1877).

What is conceived to be the true principle of *Boulton* v. *Jones* (*q*) has been adopted to its full extent by the Supreme Court of Massachusetts in *The Boston Ice Co.* v. *Potter* (*r*), where the question whether the defendant had or had not a right of set-off was treated as immaterial. The defendant had previously bought ice of the plaintiffs, but being dissatisfied with them, contracted to buy it from the Citizens'

(*l*) So an offer directed to B. cannot be accepted by B. and C., or by B. as agent for B. and C.: *Lang* v. *James Morrison & Co.* (1912) 13 Austr. Com. L. R. 1.

(*m*) 27 L. J. Ex. at 118–119; 115 R. R. 695. *Cf.* also *per* Gibbs, C.J., in *Mitchell* v. *Lapage* (1816) Holt, N. P. 254; 17 R. R. 633, *ante*, 119.

(*n*) 27 L. J. Ex. at 119; 115 R. R. 695.

(*o*) See *Robson* v. *Drummond* (1831) 2 B. & Ad. 303; 9 L. J. (O. S.) K. B. 187; 36 R. R. 569.

(*p*) *Cf. per* Lord Abinger, C.B., in *Gibson* v. *Carruthers* (1841) 8 M. & W. at 344; 11 L. J. Ex. 138; 58 R. R. 713.

(*q*) Set out *ante*, 119.

(*r*) 123 Mass. 28. See also *Consumers' Ice Co.* v. *Webster* (1898) 32 App. Div. (N. Y.) 592.

Ice Co. Subsequently the plaintiffs bought the business of the Citizens' Co., and without notifying that fact to the defendant, delivered ice at his residence for a whole year. It was held that the plaintiffs could not maintain an action for the price, for, not having been informed to the contrary, the defendant had a right to assume that it was supplied by the Citizens' Company. Endicott, J., in delivering the judgment of the Court, referring to *Boulton* v. *Jones*, said: "The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual *existence of* the claim in *set-off cannot be a test* to determine that there is no implied assumpsit or privity between the parties (*s*). Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that, because it does not exist, the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it. . . . It is therefore immaterial that the defendant had no claim in set-off against the Citizens' Ice Co."

Propositions.

The following propositions may be deduced from the authorities on this branch of the law of contract:

(1) Where an offer is addressed to one person, and another attempts to accept it, as by supplying goods ordered, there is no contract; and if the offerer, thinking the goods were sent by the first person, consumes them, he is not bound to pay for them (*t*). But if the offerer discovers the facts and afterwards consumes the goods, a contract to pay for them will be implied (*u*).

(2) A mistake as to the identity of a party to an alleged contract is, so far as the *existence* of the contract is concerned, material if it shows that the offer or acceptance was not in fact addressed to him (*v*); but unless it shows this it is immaterial (*x*).

(*s*) See *Wester Moffatt Coll. Co.* v. *A. Jeffrey & Co.* (1911) S. C. 346, *post*, 137.

(*t*) *Boulton* v. *Jones*, *ante*; *Boston Ice Co.* v. *Potter*, *ante*.

(*u*) *Mitchell* v. *Lapage* (1816) Holt, N. P. 253; 17 R. R. 633; *ante*, 118; *per* Channell, B., in *Boulton* v. *Jones* (1857) 27 L. J. Ex. at 119; 115 R. R. 695.

(*v*) *Boulton* v. *Jones*, *supra*; *ante*, 119; *Boston Ice Co.* v. *Potter* (1877) 123 Mass. 28, *ante*, 120.

(*x*) *Stoddard* v. *Ham* (1880) 129 Mass. 383, *ante*, n. (*b*), 93; *King's Norton Metal Co.* v. *Edridge* (1897) 14 Times L. R. 98, C. A., *post*; *Nash* v. *Dix* (1898) 78 L. T. 445; and see authorities *passim*.

(3) Subject to the two following propositions, where the offer or acceptance is addressed to one (although under a mistake as to his identity) who is present in person, it will *primâ facie* be deemed to be actually addressed to him: *Praesentia corporis tollit errorem nominis* (*y*).

(4) Where the person addressed is using an assumed name, whether it be that of an existing person or not, it is a question of fact whether the offer or acceptance was addressed to him personally or not.

The fact that the assumed name is that of a person known to him who makes the offer or acceptance tends to show that it was not addressed to the addressee personally (*z*), and the fact that the assumed name is unknown to him who makes the offer or acceptance tends to show that it was addressed to the addressee personally (*a*).

(5) Where a person represents himself to be acting as agent for a third party, whether such third party does (*b*) or does not (*c*) in fact exist, an offer or acceptance addressed to him as such agent will not, as a general rule, be deemed to be addressed to him personally.

(*y*) *Phillips* v. *Brooks* [1919] 2 K. B. 243; *Phelps* v. *McQuade* (1917) 220 N. Y. 232. See passage in Bacon's Law Tracts, ed. 1737, 102, cited in n. (*s*), *ante*, 116.

(*z*) *Hardman* v. *Booth* (1863) 1 H. & C. 803; 32 L. J. Ex. 105; 130 R. R. 784; set out *post*; *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459; 47 L. J. Q. B. 481; set out *post*.

(*a*) *King's Norton Metal Co.* v. *Edridge* (1897) 14 Times L. R. 98, C. A. (fictitious name), *post*. There is no direct authority for the proposition that an offer or acceptance addressed to one who has assumed the name of an *existing* person who is not known to the other party to exist can be the foundation of a contract. But in principle it would seem to make no difference whether the assumed name is altogether fictitious, or is that of a person or firm that has ceased to exist, or is that of a living person of whom the offerer or acceptor has never even heard. In either case the name assumed would seem to be *primâ facie* a mere *alias* of the addressee. If in *Cundy* v. *Lindsay* the sellers had never heard of Blenkiron & Co., it is submitted that there would have been a *de facto* contract with Blenkarn.

(*b*) *Jenkins* v. *Hutchinson* (1849) 13 Q. B. 744; 18 L. J. Q. B. 274; 78 R. R. 500; *Lewis* v. *Nicholson* (1852) 18 Q. B. 503; 21 L. J. Q. B. 311; *Higgons* v. *Burton* (1857) 26 L. J. Ex. 342; 112 R. R. 938; set out *post*, 462; *Hardman* v. *Booth* (1863), *supra*.

(*c*) *Rodliff* v. *Dallinger* (1886) 141 Mass. 1; in which case, however, there was an express refusal to contract with the agent personally. It is conceived that *Kelner* v. *Baxter*, and the other cases referred to in n. (*d*), *infra*, which may be thought to conflict with the rule stated in the text, decided no more than that the parties in the special circumstances of those cases must be presumed to have *intended* that the agent should be personally liable, as the plaintiff could not reasonably have intended to contract with the alleged principal. *Kelner* v. *Baxter* is treated in 2 Sm. L. C. 7th ed. 380; 11th ed. 382 (notes to *Thomson* v. *Davenport*) as laying down a rule of construction and not of law.

From this rule must be excepted cases where it is shown:
(i.) That the contract was intended to bind him personally (*d*):

(ii.) That he was the real principal (*e*), unless the other party relied upon his character of *agent* only, in which case there is no contract (*f*).

2. Mistake as to the nature of the contract.

It has been already said that essential mistake as to the *nature of the contract* may be such as to invalidate assent (*g*).

Meaning of the nature of the contract.

With regard to the meaning of the expression "nature of the contract," Lord Watson in *Stewart* v. *Kennedy* (*h*) said: "The nature of the contract involves, in my opinion, far wider considerations than that of the legal category to which the contract is assigned by lawyers. One contract of sale may differ as essentially from another (apart from all considerations of subject, persons, price or quality of subject) as a contract of sale does from a contract of pledge or lease." And his Lordship pointed out the essential difference between an absolute contract to execute a conveyance of an estate and then to obtain the approval of the Court, and a conditional contract to sell the estate *if* the Court approves.

Bilateral mistake as to nature of contract.

Cases of mistake as to the nature of the contract, which are mistakes of intention as distinguished from mistakes of expression, are not of frequent occurrence, and as a general rule are brought about by the conduct of some third person (*i*). If, for instance, B. asks C. to procure him the loan of a book from A., and C. carelessly communicates B.'s message to A. in such terms as reasonably to lead A. to believe that B. wants to buy the book, there would be no contract of sale from A. to B., for B. would not be bound by C.'s erroneous statement of the message (*k*), and the parties would be under a bilateral mistake as to the nature of the contract.

(*d*) See cases cited by Lord Campbell, C.J., in *Lewis* v. *Nicholson* (1852) 18 Q. B. at 510; 21 L. J. Q. B. 311; *Kelner* v. *Baxter* (1866) L. R. 2 C. P. 174; 36 L. J. C. P. 94; and the observations on these cases in n. (*c*), *supra*. Cf. *Scott* v. *Fbury* (1867) L. R. 2 C. P. 255; 36 L. J. C. P. 161.

(*e*) Per Lord Denman, C.J., in *Jenkins* v. *Hutchinson* (1849) 13 Q. B. at 752; 18 L. J. Q. B. 274; 78 R. R. 540; *Schmaltz* v. *Avery* (1851) 16 Q. B. 655; 20 L. J. Q. B. 228; 83 R. R. 453, followed in *Hoggett* v. *Hogers Brothers* [1909] 2 K. B. 549; 78 L. J. K. B. 876.

(*f*) Per Cur. in *Schmaltz* v. *Avery* (1851) 16 Q. B. at 662; 20 L. J. Q. B. 228; 83 R. R. 453; *Rodliff* v. *Dallinger*, *ante* 122; *Mollins* v. *Fowler* (1875) L. R. 7 H. L. 757; 44 L. J. Q. B. 169.

(*g*) *Ante*, 114.

(*h*) (1890) 15 App. Cas. 122.

(*i*) See Anson on Contract, 9th ed. 135, *et seq.*

(*k*) The Post Office is the agent of the sender of a message only to transmit the terms of the message: *Henkel* v. *Pape* (1870) L. R. 6 Ex. 7; 40 L. J. Ex. 4. The same principle should apply to a communication through a private agent, *ad hoc*.

So also if, without the intervention of a third person, A. sends a case of wine to B., intending to sell it, but fails to communicate his intention, and B., honestly believing it to be a gift, consumes it, there is no ground for holding B. to be responsible for the price, either in law or equity, if he be blameless for the mistake (*l*).

Here too the mistake is a bilateral one, or if B.'s mistake be considered as unilateral it was induced by A.'s failure to communicate his real intention to B. (*m*).

Unilateral mistake as to nature of contract.

With regard to unilateral mistake as to the nature of the contract, Lord Watson, in the same case, without venturing to affirm that there can be no exceptions, laid it down as a safe general rule that, in the case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties, in regard to the nature of the obligations which he has undertaken, will not be sufficient to invalidate his consent, unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract, or of anyone for whose conduct he is responsible (*n*).

Where document signed is of different kind from that contemplated.

But there is an exception to this general rule if a man signs a document in the erroneous belief that it is of an entirely different *kind* from what it really is; where he is deceived, not merely as to its legal effect, but as to its actual nature (*o*). The doctrine applies to every person who is so placed as that he is incapable, by the use of such means as are open to him, of ascertaining, or is by false information deceived in a material respect as to, the contents of the document which he is asked to sign (*p*). If the party

(*l*) Case put by Mr. Benjamin: 2nd ed. 326; 4th ed. 390. See also *Ramsden and Carr* v. *Chessum & Sons* (1913) 30 Times L. R. 68, H. L. If A. is a tradesman B. is fixed with knowledge that it is not a gift: *per* Lord Dunedin, *ibid.*

(*m*) B. could, of course, when cognisant of the facts, consent to treat the transaction as a sale. See *per* Mellish, L.J., in *Hill* v. *Wilson* (1873) L. R. 8 Ch. at 896; 42 L. J. Ch. 817.

(*n*) *Stewart* v. *Kennedy* (1890) 15 App. Cas. 108, at 121–122, and 123. In the former of these passages, Lord Watson speaks of the "right to *rescind*," but in the latter it appears that what his Lordship had in mind was the right to treat the alleged contract as *void* for want of assent. See also *per* Cotton, L.J., in *National Prov. Bank* v. *Jackson* (1886) 33 Ch. D. at 10.

(*o*) See *Foster* v. *Mackinnon* (1869) L. R. 4 C. P. 704, 711–713; 38 L. J. C. P. 310 (bill of exchange); and *Lewis* v. *Clay* (1897) 67 L. J. Q. B. 224, 227, 228; 14 Times L. R. 149, 150 (promissory note). The principle is not limited to bills and notes, but is equally applicable to all written instruments, whether under seal or not; *ibid.*

(*p*) *Per* Buckley, L.J., in *Carlisle and Cumberland Banking Co.* v. *Bragg* [1901] 1 K. B. 489, at 495; 70 L. J. K. B. 472, C. A.

executes the instrument under such circumstances, the execution is of no force (*q*).

In these cases, it is true, such mistake is usually brought about by *fraud*, but the instrument "is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended" (*r*). Fraud immaterial.

Mistake as to the subject-matter of the contract of sale may relate to its existence; or to the identity of the actual thing sold; or to some quality which is an essential part of the description; or to its quantity or price. 3. Mistake as to subject-matter.

In *Strickland* v. *Turner* (*s*), the sale was of an annuity, dependent on a life that had ceased without the knowledge of either party, and the buyer paid the price. *Held*, that the sale being void, he could recover the money back as money had and received, as it had been paid without consideration. Its existence. *Strickland* v. *Turner* (1852).

In *Raffles* v. *Wichelhaus* (*t*), there was a contract for the sale of 125 bales of Surat cotton, "to arrive ex *Peerless* from Bombay," and the defendant pleaded in an action for not accepting the goods on arrival, that the cotton which he intended to buy was cotton on another ship *Peerless*, that sailed from Bombay in October, not that which arrived in a ship *Peerless* that sailed in December, the latter being the cotton which the plaintiff offered to deliver. On demurrer, *held* that on this state of facts there was no *consensus ad idem*—no contract at all between the parties (*u*). *Raffles* v. *Wichelhaus* (1864).

(*q*) *Foster* v. *Mackinnon* (1869) L. R. 4 C. P. at 711; 38 L. J. C. P. 310. The old cases are collected in 2 Roll. Abr. 28, and 4 Com. Dig. 159, *Fait*, B. 2. See also *Howatson* v. *Webb* [1908] 1 Ch. 1; 77 L. J. Ch. 32, C. A.; *Carlisle and Cumberland Banking Co.* v. *Bragg* [1911] 1 K. B. 489; 80 L. J. K. B. 472, C. A.; where Buckley, L.J., summarises the case. Where a negotiable instrument is concerned, or any question of estoppel arises, the question whether the signer was or was not negligent would be important.

(*r*) *Per Curiam* in *Foster* v. *Mackinnon* (1869) L. R. 4 C. P. at 711; 38 L. J. C. P. 310.

(*s*) 7 Ex. 208; 22 L. J. Ex. 115. See also *Hastie* v. *Couturier* (1853) 9 Ex. 102; 5 H. L. C. 673; 22 L. J. Ex. 209; 96 R. R. 598; set out, *post*; *Cochrane* v. *Willis* (1865) L. R. 1 Ch. 58; 35 L. J. Ch. 36; *Smith* v. *Myers* (1870) L. R. 5 Q. B. 429; 41 L. J. Q. B. 91; affd. in Ex. Ch. L. R. 7 Q. B. 139; and *cf.* s. 6 of the Code, *post*, 161; *Scott* v. *Coulson* [1903] 1 Ch. 453; affd. [1903] 2 Ch. 249; 71 L. J. Ch. 600; *Clark* v. *Lindsay* (1903) 88 L. T. 198.

(*t*) 2 H. & C. 906; 33 L. J. Ex. 160; 133 R. R. 853.

(*u*) See also *Smidt* v. *Tiden* (1874) L. R. 9 Q. B. 446; 43 L. J. Q. B. 199 mistake as to identity of charterparty caused by broker's fraud); *Lever* v. *Jackson* (1885) 30 Sol. J. 7 (a sale of "gas cinders" which had different meanings in Manchester and in Oldham); *Hickman* v. *Berens* [1895] 2 Ch. 638; 64 L. J. Ch. 785 (ambiguity of word "discounts" in a compromise); *Wilding* v. *Sanderson* [1897] 2 Ch. 534; 66 L. J. Ch. 684, C. A. (ambiguity of order of Court made by consent).

Thornton v. *Kempster* (1814).

In *Thornton* v. *Kempster* (*r*), the contract declared on was for ten tons of sound merchantable hemp. The seller had instructed the common broker to sell St. Petersburgh clean hemp, and the broker had by mistake delivered to the buyer a bought note describing the sale as of Riga Rhine hemp, a superior article, sending, however, to the seller a sold note for St. Petersburgh hemp. *Held*, that there had been no contract of sale for any kind of hemp, the assent of the parties not having really existed as to the same subject-matter.

Its essential quality.

Whether any quality be essential to the subject-matter of the contract will depend upon the description by which the thing was contracted for. A bar of metal may be sold as such, or may be sold as being of gold or silver, and in the latter case only will the quality of being gold or silver be essential (*s*). The following cases well illustrate this principle.

Carter v. *Crick* (1859).

In *Carter* v. *Crick* (*y*), the defendant showed the plaintiff a sample of barley, which he called "seed barley," and the plaintiff said it was a good sample of seed barley, and agreed to buy it. Both parties were mistaken as to the character of the barley. The only question decided was that there was no warranty that the barley was of any particular quality, it being sold for what it was; and that being so, it is plain that its quality was not essential, and that the common mistake with respect to it did not affect the formation of the contract.

Edgar v. *Hector* (1912).

In *Edgar* v. *Hector* (*z*), the defender bought of the pursuer, who described himself as a dealer in antiques, a number of chairs, of which he had inspected two, being induced to buy them by the statement of the defender that "he could not get such work done nowadays," and that the chairs were "too good for use, and should be put into a museum." They were also described in the receipt for the price as "antiques." They were modern imitations, but worth their price. No express warranty was given and fraud was not imputed. *Held*, by the Court of Session, that the sale

(*r*) 5 Taunt. 786; 15 R. R. 658. This case may be considered as not being strictly of mistake, but merely of an offer and an acceptance not in identical terms. The latter ground was the one adopted by the Court. See also *Caerleon Tinplate Co.* v. *Hughes* (1891) 60 L. J. Q. B. 640.

(*s*) Dig. 18. 1. 11. 15. 1. 22; *per* Lord Campbell in *Gompertz* v. *Bartlett* (1853) 2 E. & B. 854; 23 L. J. Q. B. 65; 95 R. R. 851. See also *Edgar* v. *Hector* (1912) S. C. 348 (chairs sold as antiques).

(*t*) 4 H. & N. 412; 28 L. J. Ex. 238; 118 R. R. 521.

(*z*) 1912 S. C. 348, citing *Stewart* v. *Kennedy* (1890) 15 App. Cas. 108. See also *Crabtree* v. *Hawley* (1907) 32 Quebec Sup. Ct. 46 (material of casks).

was of antiques, not copies, and that the buyer could recover the price paid. He had been induced to buy by the seller's misrepresentations which went to the essential character of the chairs, that is to say, their identity as the subject-matter of the sale, and not merely to their quality.

In the two following cases, both American, the facts were peculiar.

Wood v. *Boynton* (1885).

In *Wood* v. *Boynton* (*a*), the plaintiff, being in the shop of the defendant, a jeweller, showed him a stone, which was in fact an uncut diamond worth 700 dollars, and said that she was told it was a topaz. The defendant said it probably was a topaz, and offered to buy it. The plaintiff asked its worth, and the defendant (who was not an expert in rough diamonds) said he did not know, but would give a dollar, and keep the stone as a specimen. Some time afterwards the plaintiff sold the stone to the defendant for that price. *Held*, that there was no fraud, as both parties were equally ignorant of the value of the stone, and that the article was sold *such as it was*. Here the common mistake was as to a fact, not essential to the description of the subject-matter.

Sherwood v. *Walker* (1887).

In *Sherwood* v. *Walker* (*b*), the defendant sold to the plaintiff a specific cow, weighing 1,420 lbs., at "$5\frac{1}{2}$ cents. a lb. live weight, less 50 lbs. shrinkage." Before the sale the defendant had said that the cows on the farm were probably barren; but the cow was in fact in calf, and was worth, as a breeding cow, at least 750 dollars; as a barren cow only about 80 dollars. It was held by the majority of the Court (on the authority of *Kennedy* v. *Panama Mail Co.*) (*c*) that the cow was sold as *beef*; that the mistake of the parties was as to the substance of the transaction, and not merely as to a material quality, as a barren cow was a totally different thing from a breeding cow; and that there was no contract between the parties. Sherwood, *J.*, dissented, holding on the same authority, and on that of *Carter* v. *Crick* (*d*), that there was no misapprehension as to the substance of the transaction: that the facts did not show that the parties treated the cow as so much beef, and that the contract was for the specific cow as she was, which both parties erroneously supposed was barren.

Other illustrations.

On similar principles, where both parties supposed a bill

(*a*) 54 Am. R. 610. Stated by the reporter to be unique in America.
(*b*) 11 Am. St. R. 531 (Mich.).
(*c*) (1867) L. R. 2 Q. B. 580; 36 L. J. Q. B. 269; *ante*, 113.
(*d*) (1859) 4 H. & N. 412; 23 L. J. Q. B. 65; 95 R. R. 851; *ante*, 126.

to be genuine which turned out to be forged (*e*), or a bill to be a foreign bill which proved to be an inland bill invalid for want of a stamp (*f*), it was held that the money paid could be recovered back, there being no contract. "The case," said Lord Campbell, C.J., in *Gompertz* v. *Bartlett* (*g*), "is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent."

In some cases a certain quantity of its materials or constituent parts is essential to the description of a chattel, as, for instance, where a gold watch is contracted for as containing so many carats. Such cases range themselves under the head of mistake as to essential quality, the quality being in such a case essential to the description.

Mistake as to price or quantity.

Mistakes as to the price or quantity of the goods sold can rarely occur where the price or quantity is more or less expressly stated, except under peculiar circumstances, such as where a foreign language is employed, or one of the parties is deaf. But a mistake may occur where various prices or quantities have been discussed during negotiations, and at the conclusion the parties are only in apparent agreement, really entertaining different views as to the price or quantity which they think has been agreed upon (*h*). Or, a mistake may spring from the latent ambiguity of some term on which the price or quantity is to depend.

As to price.

Phillips v. *Bistolli* (1824).

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

Stuart v. *Kennedy* (1885).

In *Stuart* v. *Kennedy* (*k*), the plaintiffs verbally agreed to sell to the defendant 750 "feet" of coping stone at 1s. 9d. a "foot." The plaintiffs maintained that "foot" meant

(*e*) *Jones* v. *Ryde* (1814) 5 Taunt. 488; 15 R. R. 561; *Gurney* v. *Womersley* (1854) 4 E. & B. 133; 24 L. J. Q. B. 46; 99 R. R. 390.

(*f*) *Gompertz* v. *Bartlett* (1853) 2 E. & B. 849; 23 L. J. Q. B. 65; 95 R. R. 851; as to such a bill, see now s. 36 of the Stamp Act, 1891. See also *Jones* v. *Clifford* (1876) 3 Ch. D. 779; 45 L. J. Q. B. 809 (common mistake as to title).

(*g*) *Supra.*

(*h*) *Wilson* v. *Breadalbane* (1859) 21 Dunlop. 957; *West* v. *De Wezele* (1865) 4 F. & F. 596.

(*i*) 2 B. & C. 511; 2 L. J. (O. S.) K. B. 116; 26 R. R. 433.

(*k*) 23 Sc. L. R. 149.

superficial foot, according to which measurement the price would have been £142; the defendant contended that it meant lineal foot, which interpretation made the price £65. The Court held that, had the matter been *res integra*, there would have been no contract (*l*), but that the defendant having used the stone must pay the market price of it.

Hartford and New Haven R.R. Co. v. *Jackson*.

In *The Hartford and New Haven Railroad Co.* v. *Jackson* (*m*), the defendant asked the plaintiff's agent to quote freight for some laths. The agent asked how many there were, and the defendant said 50,000. The agent then asked how many bundles this would make, and was told 500, but the agent understood the defendant to say 100, and quoted a price for that number. *Held*, that there was no contract to transport 500 bundles, as the plaintiff's assent no more bound them than if the defendant had spoken in a foreign language and it had been translated

Henkel v. *Pape* (1870).

In *Henkel* v. *Pape* (*n*), the defendant telegraphed to the plaintiff to send him three rifles. By a mistake of the telegraph clerk the telegram appeared as for "the" rifles, which the plaintiff interpreted as meaning fifty, for in a previous negotiation the defendant had said that he might want as many as fifty. The plaintiff accordingly sent that number, and sued the defendant for the price of them. The defendant accepted three, and paid the price of them into Court. *Held*, that there was no contract for fifty rifles, as the defendant was not responsible for the plaintiff's mistake, the telegraph clerk being the defendant's agent only to transmit the message actually delivered to him. In this case, the plaintiff might, it is clear, have refused to sell only three rifles, as he never accepted the offer for that quantity, but no question arose with regard to these, as the plaintiff had accepted the money paid into Court. And conversely, had the defendant sent an offer for "the" rifles, meaning fifty, and the offer had been transmitted as "three," there would have been no binding contract for that quantity.

Mistake as to *interpretation* of agreed standard of price or quantity is collateral.

A mistake as to the interpretation of an agreed standard of price or quantity is not a mistake as to essentials, but only as to a collateral fact inducing actual assent. If A. thinks he is selling at £10, and B. thinks he is buying at £5, and there is no other standard of price, there is no contract.

(*l*) *Cf. Raffles* v. *Wichelhaus* (1864) 2 H. & C. 906; 33 L. J. Ex. 160; 133 R. R. 853; set out *ante*, 101.
(*m*) 24 Conn. 514 (Amer.).
(*n*) L. R. 6 Ex. 7; 40 L. J. Ex. 15.

But if A. agrees to sell and B. to buy, for example, at the same price as on the last bargain, or at a price at which C. had sold to D. similar goods, the validity of the contract would not be affected by the fact that the parties had different recollections of what that price was. So if goods are sold by weight according to a particular standard, and the weight is afterwards erroneously calculated. In these cases there is a full mutual assent as to the price or quantity, and the only mistake is as to the interpretation of the specified standard.

Cox v. *Prentice* (1815).

In *Cox* v. *Prentice* (*o*), the defendant agreed to sell to the plaintiffs a bar of silver, the quantity of silver to be determined by an assay. The bar was assayed, and stated to contain 4 oz., and the plaintiffs paid the price for that quantity. The bar contained in fact far less, and the plaintiffs, after offering to return the bar, sued the defendant for money had and received, and obtained a verdict for the excess price paid. On a motion by the defendant for a nonsuit pursuant to leave, the Court discharged the rule. Lord Ellenborough, C.J., and Le Blanc, J., compared the case with that of the sale of an article, the price of which is to be determined by weight where the price is paid according to an accidental misreckoning of the weight, in which case an action for money had and received would be maintainable. Dampier, J., said that it was a case of mutual error.

This case merely decided that the plaintiffs were entitled to recover back the money overpaid under a mistake of fact (*p*). As there was mutual assent to the price, the standard of its ascertainment having been agreed upon, and a common mistake only as to the results of the assay, there was a binding contract of sale of the bar (*q*).

Mistake of fact on which buyer's *motive* in contracting is based.

It has already been stated (*r*) that a mistake merely inducing assent is insufficient to nullify assent. Thus, a mere mistake by the buyer in supposing that the article bought by him is of a certain quality, or will answer a certain purpose for which it turns out to be unavailable, is not a mistake as to the subject-matter of the contract, but as

(*o*) 3 M. & S. 344; 16 R. R. 288.

(*p*) *Per* Collins, M.R., in *Continental, &c., Co.* v. *Kleinwort* (1904) 20 Times L. R. 403, C. A. See also *Townend* v. *Crowdy* (1860) 29 L. J. C. P. 300; *Shand* v. *Grant* (1863) 15 C. B. (N. S.) 324; *Newall* v. *Tomlinson* (1871) L. R. 6 C. P. 405; *Gosden* v. *Funnell* (1899) 15 Times L. R. 547 (slip in counting quantity).

(*q*) The case is so treated by Darling, J., in *Beevor* v. *Marler* (1898) 14 Times L. R. 289.

(*r*) *Ante*, 114

to a collateral fact, on which only his *motive* in contracting is based, and affords no ground for pretending that he did not assent to the bargain, whatever may be his right afterwards to rescind it if there were a condition, express or implied, of quality, or of fitness for a particular purpose (*s*).

Illustrations.

Thus, in *Chanter* v. *Hopkins* (*t*), *Ollivant* v. *Bayley* (*u*), and *Prideaux* v. *Bunnett* (*v*), the buyers had ordered machines of a specified kind from the patentees, and attempted to justify their refusal to pay on the ground that the machines had totally failed to answer the purpose intended; but it was held that, in the absence of an express condition, the contract was binding on the buyers, notwithstanding their mistaken belief that the machines would answer their purpose. And in *Smith* v. *Hughes* (*w*) it was held by the Court of Queen's Bench, on a contract for a specific parcel of oats, that the buyer could not refuse to pay for them *merely* because he thought that they were in fact old oats, although the seller was cognisant of this mistake, but did nothing to cause it. And other cases are to a similar effect (*x*).

Mistake as to existence of extrinsic circumstances forming the basis of the contract.

Parties may also by implication assume, as the basis of their contract, the existence of extrinsic circumstances. In such a case, the contract is void on both sides if such circumstances do not exist (*y*). But the assumption must be a common one; if it applies to one party only the contract is good as against him (*z*). Such cases of common mistake may be also regarded as illustrative of impossibility of performance existing at the date of the contract.

Quasi-mutual assent by estoppel.

Cases arise in which, although there is in fact no mutual assent, and accordingly no contract, one of the parties may be estopped by his statements or conduct from setting this up. In such cases there may be said to be a quasi-mutual assent. The rule of law is that declared in *Freeman* v. *Cooke* (*a*),

(*s*) *See* Code, s. 14, *post*.
(*t*) (1838) 4 M. & W. 399; 8 L. J. Ex. 14; 15 R. R. 650; set out *post*.
(*u*) 1848) 5 Q. B. 288; 13 L. J. Q. B. 34; 64 R. R. 501.
(*v*) (1857) 1 C. B. (N.S.) 613; 107 R. R. 824.
(*w*) (1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221; set out *post*, 134.
(*x*) *Pope and Pearson* v. *Buenos Ayres New Gas Co.* (1892) 8 Times L. R. 758, C. A. (buyer's assent to price caused by his own agent's wrongly transmitted telegram); *Herne Bay Steamboat Co.* v. *Hutton* [1903] 2 K. B. 683, C. A. (frustration of charterer's private object in chartering steamer). *Semble*, *Gordon* v. *Street* [1899] 2 Q. B. 641; 69 L. J. Q. B. 45 is similar (borrower's assent to loan influenced by lender's *alias*).
(*y*) *Clark* v. *Lindsay* (1903) 88 L. T. 198; *Griffiths* v. *Brymer* (1903) 19 Times L. R. 434; *Galloway* v. *Galloway* (1914) 30 Times L. R. 531 (separation deed assumes validity of marriage); *The Salvador* (1909) 26 Times L. R. 149 (capacity of tug hired mistaken).
(*z*) *Herne Bay Steamboat Co.* v. *Hutton*, *supra*.
(*a*) (1848) 2 Ex. 654; 18 L. J. Ex. 111; 76 R. R. 711.

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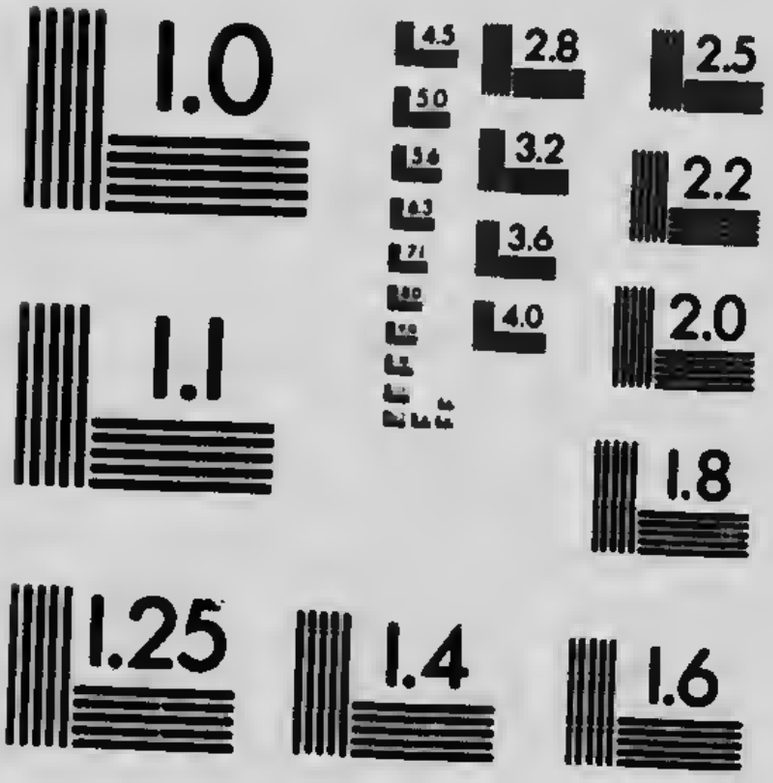

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and has been thus stated by Blackburn, J.: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms" (*b*).

Scott v. Littledale (1858).

An illustration of this principle is afforded by the case of *Scott* v. *Littledale* (*c*), where the seller sold a hundred chests of tea ex *Star of the East* by sample, but by mistake exhibited a sample of a different bulk. The action was by the buyer for non-delivery of tea ex *Star of the East*, and the seller pleaded on equitable grounds that his mistake rendered the contract void for want of mutual assent. But the Queen's Bench held that the plea was bad, as a Court of equity would not set aside the contract *at the option of the seller* (*d*).

Here the contract was in fact for a bulk ex *Star of the East* as represented by the sample; but the buyer in his pleadings chose to state it, as it apparently was, for tea ex *Star of the East* simply. Consequently the seller was estopped from asserting that this apparent contract was not the real contract. His mistake as to the identity of the bulk had become unilateral, and so, not being caused by any misrepresentation of the buyer, ineffectual.

Conversely, the party who has caused the other party to give an apparent assent is estopped from asserting that the apparent assent was in fact the real assent (*e*). Such a case was the following.

Megaw v. *Molloy* (1878).

In *Megaw* v. *Molloy* (*f*), the seller, who had exhibited a wrong sample, sued for non-acceptance. An auctioneer, having been instructed by him to sell some maize ex *Emma Peasant*, showed at the auction sale a sample of maize in

(*b*) *Per* Blackburn, J., in *Smith* v. *Hughes* (1871) L. R. 6 Q. B. at 607; 40 L. J. Q. B. 221. See also *Doe* v. *Oliver* (1829), and cases in notes, 2 Sm. L. C. 7th ed. 751; 12th ed. 745; *Carr* v. *L. & N. W. Ry.* (1875) L. R. 10 C. P. 307; 44 L. J. C. P. 109; *per* Lord Blackburn in *Harris* v. *G. W. Ry.* (1876) 1 Q. B. D. 530; 45 L. J. Q. B. 729; and in *Burkinshaw* v. *Nicolls* (1878) 3 App. Cas. 1026; 48 L. J. Ch. 179; *McKenzie* v. *British Linen Co.* (1881) 6 App. Cas. 82; *Miles* v. *McIlwraith* (1882) 8 App. Cas. 120; 52 L. J. P. C. 17, P. C.

(*c*) 27 L. J. Q. B. 201; 8 E. & B. 815; 112 R. R. 791.

(*d*) The Court appears to have treated the case as one of warranty of *quality*, rather than one of mistake as to *identity*, and in former editions of this work it is regarded from the same standpoint. But the editors of the 5th ed. in treating it as an illustration of estoppel, had the high authority of Hannen, J., in *Smith* v. *Hughes* (1871) L. R. 6 Q. B. at 609; 40 L. J. Q. B. 221. See also the weighty judgments of the C. A. in Ireland in *Megaw* v. *Molloy* (1878), set out as the next case in the text

(*e*) *Downes* v. *Ship* (1868) L. R. 3 H. L. 343; 37 L. J. Ch. 642.

(*f*) 2 L. R. Ir. 530, C. A.

bags labelled "ex *Emma Peasant*," and stated that it was a true sample, but that the seller did not guarantee it, and was not to be responsible. The defendant, after examining the sample, bought several lots, but afterwards rejected maize ex *Emma Peasant* on the ground that it was not the maize which he had bought. It was proved that the sample shown was by mistake taken from the cargo, superior in quality, of another vessel. *Held*, by the Court of Appeal in Ireland (*g*), that as the plaintiff intended to sell one bulk and the defendant to buy another, there was no contract. Although the seller had expressly negatived a condition that the bulk should correspond with the sample in quality, the mere exhibition of the sample amounted to a representation that the bulk to be sold was the bulk from which that sample was taken.

"Supposing," said Lord Chief Justice May, "an intending purchaser had gone to the store, and asked to be shown the bulk of the maize intended to be sold, and had been by mistake shown a wrong bulk, and had purchased at the sale accordingly, would not a gross, though an innocent, deception have been practised upon him, if he was obliged to accept maize of a different lot not shown to him? . . . The question is not as to the *quality* of the thing sold, but as to the *identity*. If, owing to mistake, the seller intended to sell one subject-matter, and the purchaser to buy another, no contract can exist; for the parties do not agree as to the subject-matter, the fundamental basis of the bargain" (*h*).

Lord Justice Christian pointed out that the description of the maize given at the auction was twofold:—1. It was part of the cargo of the *Emma Peasant*. 2. It was part of the same bulk out of which the sample had been taken. The maize tendered to the defendant answered the first description, but differed totally from the second. "The question arises, which of those two descriptions is the decisive and dominating one? . . . I answer, assuredly, the second of them. *Praesentia corporis tollit errorem nominis*" (*i*).

In both the preceding cases, the seller having shown a wrong sample, the parties were not really agreed as to the subject-matter. In *Scott* v. *Littledale*, the seller, who was

Observations on *Scott* v. *Littledale* and *Megaw* v. *Molloy*.

(*g*) Constituted of Ball, L.C., May, C.J., and Christian, L.J., and Deasy, B.

(*h*) 2 L. R. Ir. at 540—541.

(*i*) *Ibid.* at 543—544. His Lordship also cited the passage from Bacon's Law Tracts, ed. 1737, 102, cited n. (*s*), *ante*, 116.

sued, was estopped by his own conduct from setting up that he had entered into the apparent contract in a different sense to that in which it was understood by the buyer (*k*), from asserting he had not agreed to sell tea ex *Star of the East*. But if, on the other hand, the action had been brought by him for non-acceptance of the one hundred chests of tea ex *Star of the East*, there would have been no estoppel on the buyer, who might have shown, as in *Megaw* v. *Molloy*, that there was in fact no contract; for those chests of tea, although ex *Star of the East*, were not part of the bulk from which the sample was taken. If, however, the buyer had before the sale been aware of the seller's mistake, he, the buyer, could not enforce the apparent contract, and the seller, if sued for non-delivery of the tea from the bulk from which the sample was taken, could show that there was no contract, as the buyer would then have known that he, the seller, had not intended to enter into the contract sued upon (*l*).

Smith v. *Hughes* (1871).

In *Smith* v. *Hughes* (*m*), the action was by the plaintiff, a farmer, to recover the price of certain oats sold to the defendant, an owner and trainer of race-horses. The plaintiff's account of the transaction was that he took a sample of the oats to the defendant and asked if he wished to buy oats, to which the latter answered: "I am always a buyer of good oats." The plaintiff asked thirty-five shillings a quarter, and *left the sample* with the defendant. The defendant wrote to say that he would take the oats at thirty-four shillings a quarter, and they were sent to him by the plaintiff. But the defendant's account was that, to the plaintiff's question he answered: "I am always a buyer of good *old* oats"; and that the plaintiff then said: "I have some good *old* oats for sale." There was no difference of testimony as to the other facts; and it was further sworn by the defendant that as soon as he discovered that the oats were new, he sent them back; that trainers use old oats for their horses, and never buy new when they can get old. There was also evidence that thirty-four shillings a quarter was a very high price for new oats, more than a prudent business man would have given, and that old oats were then very scarce.

(*k*) See *per* Hannen, J., in *Smith* v. *Hughes* (1871) L. R. 6 Q. B. at 609—611; 40 L. J. Q. B. 221, cited *infra*.

(*l*) See *ibid.*; and *per* Cockburn, C.J., and Lush, J., in *Roden* v. *London Small Arms Co.* (1876) 46 L. J. Q. B. 213, at 216—217, 218.

(*m*) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221. This case is cited by the author in the Chapter on Fraud. This aspect of the case is considered *post*.

The Judge told the jury that the question was whether the word "old" had been used in the bargain as stated by the defendant, and if so, the verdict must be for him; but if they thought the word "old" had not been used, then the second question would be "whether the plaintiff believed the defendant to believe or to be under the impression that he was contracting for the purchase of old oats." If so, the verdict would also be for the defendant. The jury found for the defendant. The question for the Queen's Bench was whether the second direction to the jury was right, for they had not answered the questions separately, and it was not possible to say on which of the two grounds they had based their verdict. In testing the second question it was plainly necessary to assume that the word "old" had not been used, and on that assumption the Court ordered a new trial.

Mr. Justice Blackburn, as to the second direction to the jury, doubted whether it would bring to their minds "the distinction between agreeing to take the oats under the *belief* that they were old, and agreeing to take the oats under the belief that the plaintiff *contracted* that they were old" (*n*). In the latter case, the parties would not be *ad idem*.

Mr. Justice Hannen said (*o*): "'The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it' (*p*). . . . If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent. . . . A belief on the part of the plaintiff that the defendant was making a contract to buy the oats, of which he offered him a sample, under a mistaken belief that they were old, would *not relieve* the defendant from liability *unless his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment by him of a fact which it became his duty to communicate* (*q*). In order to relieve the defendant it was necessary that the jury should find, not merely that the plaintiff believed the defendant to believe *that he was buying old oats*, but that

(*n*) L. R. 6 Q. B. at 608.

(*o*) *Ibid.* at 610.

(*p*) This is founded on a passage in Paley's Moral and Polit. Philosophy, Bk. III., Ch. 5.

(*q*) "*Smith* v. *Hughes* was a case of estoppel by conduct": *per* Cozens-Hardy, M.R., in *Lovell* v. *Wall* (1911) 104 L. T. 85 at 87, C. A. "It is based on this: A. says something and uses words which make B. think he means something else": *per* Buckley, L.J., *ibid.*

he believed the defendant to believe *that he, the plaintiff, was contracting to sell old oats*" (*r*).

Concealment distinguished from passive acquiescence.

The conduct of the seller, in the circumstances supposed, amounted, not, in the words of Cockburn, C.J. (*s*), to a "passive acquiescence in the self-deception of the buyer" (*t*), as it would, if the seller merely knew that the buyer thought he was buying old oats, but cast a duty upon the seller to disabuse the mind of the buyer; and his silence was therefore, under the circumstances, equivalent to a representation that the oats were old.

If in *Smith* v. *Hughes* (*u*), the buyer had accepted the oats, and proved active concealment on the part of the seller, he might according to the principles of *Scott* v. *Littledale* (*v*) have sued the seller for breach of an implied warranty that the oats were old (*x*), and the seller would have been estopped from denying that there was a contract for old oats (*y*). In all these cases the estoppel is unilateral, it being open to the person misled to adopt the apparent contract according to its terms, and to rely upon the rights it gives him (*z*).

Gill v. *McDowell* (1903).

The principles enunciated in *Smith* v. *Hughes* were followed in Ireland in *Gill* v. *McDowell* (*a*). There the seller sold at a fair to the plaintiff three head of cattle, a bullock and a heifer, and a third animal which from one point of view seemed to be a bullock and from another a heifer, but which was in fact an hermaphrodite. A skilled examination only would have revealed the malformation of the animal. The seller knew of the character of the beast, and that the plaintiff thought the seller was selling either a bullock and two heifers or two bullocks and one heifer, and that the plaintiff would not have contracted had he known of the hermaphrodite. *Held*, that the plaintiff could recover back

(*r*) L. R. 6 Q. B. at 610—611; 40 L. J. Q. B. 221. See the same principle stated by Cockburn, C.J., and Lush, J., in *Roden* v. *London Small Arms Co* (1876) 46 L. J. Q. B. 213, at 216—217, 218.

(*s*) L. R. 6 Q. B. at 603; 40 L. J. Q. B. 221.

(*t*) A strong instance of such a case is *Laidlaw* v. *Organ* (1817) 2 Wheat. (U. S.) 178, where the seller's silence followed on a question asked by the buyer.

(*u*) *Supra*.

(*v*) *Ante*, 132.

(*x*) The buyer might elect to treat the breach of condition as a breach of warranty: Code, s. 11 (1) (*a*), *post*.

(*y*) See *Wilson* v. *Windsor Foundry Co.* (1901) 31 Can. S. C. Rep. 381 (mistake of identity caused by misrepresentation: party estopped bound by terms of payment).

(*z*) But, on ordinary principles of estoppel, not greater rights: *per* Channell, J., in *Corporation of Canterbury* v. *Cooper* (1908) 99 L. T. 612 at 615.

(*a*) [1903] 2 Ir. R. 463.

the price paid for the three animals, there being no consensus *ad idem*.

Scriven Brothers & Co. v. *Hindley & Co.* (1913).

In *Scriven Brothers & Co.* v. *Hindley & Co.* (*b*), an action for the price of tow, the defendant's buyer bid for bales of tow, believing that he was bidding for hemp. The catalogue mentioned tow and hemp under separate numbers, but (a most unusual practice) under the same shipping mark, SL, but did not distinguish the commodities. The defendant's manager had been shown by the foreman of the show-rooms two bales of hemp "as samples of SL goods," but his attention had not been drawn to the fact that the tow was also marked SL. He had not examined the samples with the catalogue so as to identify the lots. The jury found that the sellers intended to sell tow and the buyers to buy hemp, these being different commodities, and that the form of the catalogue, and the conduct of the foreman, and the omission of the buyer's manager to verify the lots by the catalogue, had all contributed to the mistake. *Held*, by Lawrence, J., on further consideration, that there was no contract in fact: that the sellers could not rely on the apparent contract, as the conduct of their agent had caused the mistake; and that the finding that the defendants' manager had been negligent was immaterial, as the buyers owed the sellers no duty to examine the samples and identify the lots.

Estoppel with regard to other cases of mistake.

The principle of estoppel is, of course, not limited to cases of mistake as to identity of the subject-matter. Thus, if, in *Boulton* v. *Jones* (*c*), Boulton had succeeded a person of the same name as himself, and Jones had addressed his order to "Mr. Boulton," and there was nothing to show Boulton that the order was not meant for him, Jones would have been estopped from contending that he did not intend to contract with the plaintiff (*d*).

Mistake as to identity. Estoppel. *Wester Moffatt Colliery Co.* v. *A. Jeffrey & Co.* (1911).

In *Wester Moffatt Colliery Co.* v. *A. Jeffrey & Co.* (*e*), the defenders were customers of one F., who traded as F. & Co., for coal. F. was also a partner in the unincorporated firm of the Wester Moffatt Colliery Co., from whom he bought the coal supplied to the defenders. Invoices were sent as follows: "W. Coll. Co.—Messrs. A. J. & Co. receive from F. & Co." F. also bought goods from the defenders, and,

(*b*) [1913] 3 K. B. 564; 83 L. J. K. B. 40.
(*c*) *Ante*, 119.
(*d*) See Anson on Cont., 14th ed. 166.
(*e*) (1911) S. C. 946, following *Cornish* v. *Abington* (1859) 4 H. & W. 549; 28 L. J. Ex. 262; 118 R. R. 603.

in February, 1908, owed them £70. In that month he told the defenders that the Colliery Co. was to be incorporated, and that advice notes would in future come from them, but that he would still be the seller until the £70 was liquidated. In March to May, 1908, the defenders ordered coal of F. & Co., in order to extinguish this debt, and received invoices "Received from the W. Coll. Co." and monthly accounts were sent addressed to "A. J. & Co. to the W. Coll. Co." On the receipt of the first invoice the defenders asked F. to explain, and F. said the form of the invoice was a mistake, as the Colliery Co. had nothing to do with the matter. Accordingly the defenders went on receiving the coal without objection. In an action for the price of the coal sold from February to May, *Held* that the pursuers were not responsible for the statements of F. to the defenders that misled them; that the defenders were not entitled to rely upon these statements in the face of the invoices and accounts which they had received without objection from the pursuers; and that the defenders were therefore estopped from denying that they had contracted with the pursuers.

Other instances of the application of estoppel by which a party has been precluded from asserting that an apparent assent was a real assent are mentioned in the note (*f*).

Estoppel by use of ambiguous language causing mistake.

The same principle applies where one party misleads the other by the use of ambiguous language which is reasonably interpreted in another sense by the addressee (*g*). Thus, if A. offers goods to B. under a description which may include either of two qualities of goods, but which ordinarily is interpreted as meaning only the higher quality, A. could not afterwards sue B. for non-acceptance of the inferior quality, though included in the same generic description (*h*). On the other hand, if B. chose to hold A. to A.'s interpretation of the contract, A. would be estopped from saying that there was no contract.

(*f*) *Hamilton* v. *Broad* (1863) 2 N. R. 13 (miscalculation of number of trees sold); *Webster* v. *Cecil* (1861) 30 Beav. 62; 132 R. R. 185 (catching at clerical error); and see *Gerrard* v. *Frankel* (1862) 30 Beav. 445 (wrong rent stated in lease); *Lange* v. *Barton* (1891) 7 Times L. R. 451 (mistake by seller of price); *Ewing* v. *Hanbury* (1900) 16 Times L. R. 140 (terms of offer of work); see also *Croshard* v. *Pritchard* (1899) *ibid.* 45; *Johnson* v. *Islington Union* (1909) 73 J. P. 172 (seller bound by his own statement of subject-matter); *Muirhead* v. *Dickson* (1905) S. C. 686 (nature of contract: hire or hire-purchase).

(*g*) *Ireland* v. *Livingston* (1872) L. R. 5 H. L. 395; 41 L. J. Q. B. 201. See also *Boden* v. *French* (1851) 10 C. B. 886; 20 L. J. C. P. 143; 84 R. R. 856; *Stollery* v. *Maskelyne* (1899) 16 Times L. R. 97 H. L.; *Falck* v. *Williams* [1900] A. C. 176; 69 L. J. P. C. 17. The principle is general: *Miles* v. *Haslehurst & Co.* (1906) 23 Times L. R. 142.

(*h*) See *Keele* v. *Wheeler* (1844) 7 Man. & G. 665; 13 L. J. C. P. 170.

Mistake of one party not known to the other.

The principles discussed in this Chapter show that where there is no misrepresentation, fraud, or warranty, and the mistake is that of one party only to the contract, and is not known to the other, the party labouring under the mistake must bear the consequences. If A. and B. contract for the sale of the cargo *per* ship "*Peerless*," and there be two ships of that name, and A. mean one ship and B. intend the other ship, there is no contract (*i*). But if there be but one ship "*Peerless*," and A. sell the cargo of that ship to B. the latter would not be permitted to excuse himself on the ground that he had in his mind the ship "*Peeress*," and intended to contract for a cargo by this last-named ship. Men can only bargain by mutual communication, and if A.'s proposal were unmistakable, as if it were made in writing, and B.'s answer was an unequivocal and unconditional acceptance, B. would be bound, however clearly he might afterwards make it appear that he was *thinking* of a different vessel. For the rule of law is general, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce that other party to act upon it, he will be estopped from denying that the intention as *manifested* was his *real* intention (*j*).

General rule of law where a party does not manifest his real intention.

Mistake of one party known to the other.

When the mistake of one party is known to the other, then the question resolves itself generally into one of fraud. In the case just supposed of a ship *Peerless* and a ship *Peeress*, there can be little doubt that if the seller *knew* that the buyer had a different ship in his mind from that intended by the seller, there would be no contract in fact, and the seller's knowledge of the buyer's mind would prevent him from relying upon the apparent contract (*k*). And if he not only knew the buyer's mistake, but wilfully caused it, his conduct would be fraudulent.

But, as a general rule in sales, the seller and buyer deal at arm's length, each relying on his own skill and knowledge,

(*i*) *Raffles* v. *Wichelhaus* (1864) 2 H. & C. 906; 33 L. J. Ex. 160; 133 R. R. 853; set out *ante*, 125.

(*j*) *Per* Lord Wensleydale, in *Freeman* v. *Cooke* (1848) 2 Ex. at 663; 18 L. J. Ex. 114; 76 R. R. 711; *Doe* v. *Oliver* (1829), and cases collected in notes to it, 2 Sm. L. C. 803, ed. 1887; 12th ed. 746; *Cornish* v. *Abington* (1859) 4 H. & N. 549; 28 L. J. Ex. 262; 118 R. R. 603; *In re Bahia and San Francisco Railway* (1868) L. R. 3 Q. B. 584; 37 L. J. Q. B. 176; *Carr* v. *London and North Western Railway* (1875) L. R. 10 C. P. 307, at 316, 317; 44 L. J. C. P. 109, where the rules of estoppel are enumerated by Brett, J.; *per* Lord Esher, M.R., in *Seton* v. *Lafone* (1887) 19 Q. B. D. at 70; 56 L. J. Q. B. 415. See also the rules of estoppel considered by the P. C. in *Sarat Chunder Dey* v. *Gopal Chunder Lala* (1892) 8 Times L. R. 732.

(*k*) *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 597; 40 L. J. Q B. 221; *ante*, 134.

and each at liberty to impose conditions or exact warranties before giving assent, and each taking upon himself all risks other than those arising from misrepresentation or fraud, or from the causes against which he has fortified himself by exacting conditions or warranties. Thus mere knowledge that the other party is mistaken as to some collateral fact which does not form part of the description of the thing sold, will not invalidate the contract. So that even if, on a contract for goods which are in fact cotton, but are not sold as such, the seller should know that the buyer was purchasing the goods submitted to his inspection in the mistaken belief that they were made of linen; or if the purchaser should know that the vendor was selling a valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful; neither party could avoid the contract made under the supposed mistake (*l*). The exception to this rule exists only in cases where, from the relations between the parties, some special duty is incumbent on the one to make full and candid disclosure to the other of all he knows on the subject. This topic is more fully considered in the Chapter on Fraud.

Mistake must be of fact, not law.

The mistake which will justify a party in seeking to avoid his contract must as a rule be one of fact, not of law. The general rule is *Ignorantia juris neminem excusat*. The cases illustrating this maxim are very numerous, and only a small number of them will be found in the note (*m*).

Cooper v. *Phibbs* (1867).

In *Cooper* v. *Phibbs* (*n*), Lord Westbury gave the following statement of the true meaning of the maxim just quoted: "It is said: '*Ignorantia juris haud excusat*'; but in that

(*l*) See *per* Lord Thurlow, L.C., in *Fox* v. *Mackreth* (1788) 2 Cox 320, at 321; L. C. Eq. 4th ed. I., at 138; 7th ed. II., at 717; 2 R. R. 55.

(*m*) *Bilbie* v. *Lumley* (1802) 2 East, 469; 6 R. R. 479 (money paid in ignorance of law); *Brisbane* v. *Dacres* (1813) 5 Taunt. 143; 14 R. R. 718 (same); *Stevens* v. *Lynch* (1805) 12 East, 38 (ignorance of drawer of discharge of bill by time being given); *Gomery* v. *Bond* (1815) 3 M. & S. 378 (consent by seller to take back goods in belief that he had no remedy); *East India Co.* v. *Tritton* (1824) 3 B. & C. 280; 3 L. J. (O.S.) K. B. 24; 27 R. R. 353 (payment by acceptor relying on construction of power of attorney); *Milnes* v. *Duncan* (1827) 6 B. & C. 671; 5 L. J. (O.S.) K. B. 239; 30 R. R. 498 (belief that Irish bill was an English one, mistake of fact); *per Cur.* in *Stewart* v. *Stewart* (1838) 6 Cl. & F. 965; 43 R. R. 267; *Teede* v. *Johnson* (1856) 11 Ex. 840; 25 L. J. Ex. 110 (execution of release supposed not to be general); *Platt* v. *Bromage* (1854) 24 L. J. Ex. 63; 101 R. R. 903 (mortgagor's assent under mistake of law to sale by creditor of property not mortgaged); *Eaglesfield* v. *Londonderry* (1876) 4 Ch. D. 693, C. A. (common mistake as to rank of preference stock).

(*n*) L. R. 2 H. L. 149, at 170; and see *Jones* v. *Clifford* (1876) 3 Ch. D. at 790; 45 L. J. Ch. 809; *Allcard* v. *Walker* [1896] 2 Ch. 381; 65 L. J. Ch. 660; and the illustrations given by Jessel, M.R., in *Eaglesfield* v. *Marquis of Londonderry* (1876) 4 Ch. D. 702, 703, showing the difficulty of distinguishing law and fact.

maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties—the respondents believed themselves to be entitled to the property; the petitioner believed that he was a stranger to it; the mistake is discovered, and the agreement cannot stand." The case was that of a party the real owner of a property, agreeing, in ignorance of his right, to take a lease of it from the supposed owners, who were equally ignorant that they had no title to it.

Beauchamp v. Winn (1873).

And in *Earl Beauchamp* v. *Winn* (*o*), a case where one party to an agreement was relieved from his obligation on the ground that he was mistaken as to the extent of a private right, Lord Chelmsford said, with regard to the objection taken that the mistake was one of law: "The ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake." But he also says in *Midland Great Western Railway of Ireland* v. *Johnson* (*p*): "Mistake is undoubtedly one of the grounds for equitable interference and relief; but then it must be a mistake, not of matters of law, but a mistake of facts. The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be at law" (*q*).

Rule in equity.

In equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn as by the

(*o*) L. R. 6 H. L. at 234.

(*p*) (1858) 6 H. L. C. 798 at 810, quoted by Hamilton, L.J., in *Stanley Brothers* v. *Corporation of Nuneaton* (1913) 108 L. T. 986, C. A. See also *Wilding* v. *Sanderson* [1897] 2 Ch. 534; 66 L. J. Ch. 684, C. A. Relief will, however, be given if the mistake has been induced by the other party: *ibid.*

(*q*) See also *Powell* v. *Smith* (1872) L. R. 14 Eq. 85 (legal effect of lease).

Courts of common law, and there are cases in which equity grants relief against mistakes of law, the ground for the relief being that, in the particular facts of the case, it is inequitable that the one party should profit by the mistake of the other (*r*).

Under Judicature Act.

And now under the Judicature Act, 1873 (*s*), where there is any conflict or variance between the two with reference to the same matter, the rules of equity will prevail in all Courts.

Mistake as to foreign law.

Even when the mistake is one of law it will be treated, if the law be foreign law, as one of fact only (*t*).

Mistake of law involving mistake of fact, or otherwise excluding mutual assent.

But though the general rule is, as above stated, that a party cannot defend himself on the ground of a mere mistake of law, yet it will be otherwise if the mistake be the cause of, or involve, a mistake of fact excluding mutual assent (*u*). No doubt if S. agree to sell B. the chattels on his premises, of which some are in fact fixtures, he cannot afterwards show that he thought they were not. But if S. and B. contract for the sale of chattels, as being movable, whereas they are fixtures, though the parties suppose on erroneous grounds that their mode of annexation prevents them from being such, there would, it is submitted, be in fact no mutual assent, as there was common mistake as to the subject-matter of the contract, though based upon wrong legal grounds (*v*). So also, S. and B., or S. only, but to the knowledge of B., may on wrong grounds of law suppose, in a contract for chattels, that certain articles are excluded as being fixtures.

The same principle is applicable to other cases of essential mistake (*w*).

(*r*) *Per* Turner, L.J., in *Stone* v. *Godfrey* (1854) 5 De G. M. & G. at 90; 23 L. J. Ch. 769; 104 R. R. 32; *per* James, L.J., and Mellish, L.J., in *Ex parte James* (1874) L. R. 9 Ch. at 614, 616; 43 L. J. Bk. 107; and in *Rogers* v. *Ingham* (1876) 3 Ch. D. at 355—357; 46 L. J. Ch. 322, C. A.; *per Cur.* in *Daniell* v. *Sinclair* (1881) 6 App. Cas. 181 at 190, 191; 50 L. J. P. C. 50, P. C.

(*s*) S. 25 (11).

(*t*) *Leslie* v. *Baillie* (1843) 2 Y. & C., C. C. 91.

(*u*) See *per* Lindley, L.J., in *Wilding* v. *Sanderson* [1897] 2 Ch. 534; 66 L. J. Ch. 684, C. A.

(*v*) In *Huddersfield Banking Co.* v. *Lister* [1895] 2 Ch. 273; 64 L. J. Ch. 523, C. A., the mistake was one of fact, viz., that fixtures, at the time unfixed, had been always movable. The case supposed in the text would be analogous to *Strickland* v. *Turner* (1852) 7 Ex. 208; 22 L. J. Ex. 115; 86 R. R. 619; set out *ante*, 125.

(*w*) See *e.g. per* Lord Romilly in *Powell* v. *Smith* (1872) L. R. 14 Eq. at 90; 41 L. J. Ch. 734 (knowledge by intended lessee of legal interpretation put by lessor on lease).

SECTION IV.—CIVIL LAW.

Civil law.

The principles of the common law upon the subject of mutual assent do not in general differ from those recognised in America and in countries governed by the civil law.

Quasi-contracts.

There is, however, one striking exception. The civil law permits what are termed *quasi-contracts*, and enforces obligation resulting from them. The *negotiorum gestor*, the man who voluntarily assumed to take charge of another's business in his absence, or who, without authority of law, took under his control the person and property of an infant, was held entitled to rights as well as responsible for the obligations resulting from his unauthorised interference. If he spent money usefully in the business thus assumed, he was entitled to recover it back. If he furnished supplies, he was entitled to charge the price as though a contract of sale had intervened. If he paid a debt, he took the creditor's place. The *quasi-contract*, in a word, produced the effect of creating reciprocal obligations, *ultro citroque*, in the language of the civilians.

Negotiorum gestio.

These principles of the Roman law still prevail unimpaired over Continental Europe, and are found expressly sanctioned in the French Civil Code (*x*), which is followed by the Quebec Civil Code (*y*). Pothier says that they are founded on natural equity, and bind even infants and insane persons who are incapable of consent. If, in France, a man should repair his absent neighbour's enclosure (*z*), or furnish food to his cattle, without request, he could maintain an action on the *quasi-contract* implied by the law there.

At common law, it need hardly be said that no such action would lie. The count for money paid by the plaintiff for the defendant must aver a request by the defendant, and this request, express or implied, must be proven (*a*). The principle in our law is invariable that no liability can be established against a man by the mere voluntary payment or expenditure of money in his behalf by another person; that no man can become the creditor of another without the

(*x*) Arts. 1370—1375.

(*y*) Arts. 1042—6.

(*z*) Pothier, Obl. ss. 114—115.

(*a*) An early illustration of the rule with regard to the recovery of money paid on an implied request is given in Rolle's Abridgment: see *per* Lord Kenyon, C.J., in *Child* v. *Morley* (1800) 8 T. R. at 614.

latter's knowledge or assent (*b*). It is of course otherwise where the payment is under legal compulsion or in discharge of a liability also imposed on the party paying (*c*).

The text of the Institutes laying down the principles of the Roman law on this point (*d*), was not an innovation but a condensation of the numerous texts of the pre-existing law (*e*).

Condictio indebiti.

Our action for money had and received, to recover back what has been paid by mistake, is also one of those that the Roman lawyers considered as arising *quasi ex contractu*. "Item is cui quis per errorem non debitum solvit, quasi ex contractu debere videtur" (*f*). This action was termed *condictio indebiti* (*g*). The commentators, however, are not agreed on the question whether, under the civil law, there was any distinction according as the money paid was paid under a mistake of fact or one of law (*h*). A rescript of the Emperors Constantius and Maximian (*i*) in A.D. 306 says: "Cum quis jus ignorans indebitam pecuniam solverit, cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est." On the other hand, both the Digest (*k*), and Justinian (*l*) lay down the rule without qualification. The French Code also draws no dis-

(*b*) *Stokes* v. *Lewis* (1785) 1 T. R. 20; *Child* v. *Morley* (1800) 8 T. R. 610; *Lord Galloway* v. *Matthew* (1808) 10 East, 264; 10 R. R. 289; *Durnford* v. *Messiter* (1816) 5 M. & S. 446; 1 Wms. Saund. 264, note on *Osborne* v. *Rogers* (1670); *Ruabon SS. Co.* v. *London Assurance* [1900] A. C. 6; 69 L. J. Q. B. 86.

(*c*) *Exall* v. *Partridge* (1799) 8 T. R. 308; 4 R. R. 656; *Johnson* v. *Royal Mail Steam Packet Co.* (1867) L. R. 3 C. P. 38; 37 L. J. C. P. 33; *Bradshaw* v. *Beard* (1862) 12 C. B. (N. S.) 344; 31 L. J. C. P. 273; 133 R. R. 360 (payment for defendant's wife's funeral by volunteer); *Bonner* v. *Tottenham, etc., Building Society*, where the subject is discussed. *England* v. *Marsden* (1866) L. R. 1 C. P. 529; 35 L. J. C. P. 259, in which it was decided that a person who had *voluntarily* left his goods on premises on which they were distrained could not recover the money paid to redeem them, has been overruled by *Edmunds* v. *Wallingford* (1885) 14 Q. B. D. 811; 54 L. J. Q. B. 305, C. A.; *The Orchis* (1890) 15 P. D. 38; 59 L. J. P. 31, C. A. As to an adult pauper's liability to the Guardians for necessary maintenance, see *Birkenhead Union* v. *Brookes* (1906) 95 L. T. 359.

(*d*) Inst. 3. 27. 1.

(*e*) Inst. 3, 27. 1. The *dominus rei gestæ* had a *directa actio* against the *negotiorum gestor*, and the latter an *actio contraria*, or cross action, against the *dominus*. The obligation on either side was *quasi ex contractu* because it only arose in the absence of a *mandatum*, and it was implied by the law *utilitatis causa*, in order that the affairs of persons, who had been compelled to go abroad in a hurry, should not be neglected.

(*f*) Inst. 3, 27, 6.

(*g*) Inst. 3, 14, 1. The receiver is bound by the fact of receipt—*re obligatur*.

(*h*) Lord Mackenzie's Rom. Law (3rd ed.) 238—240.

(*i*) Code, 1, 18, 10.

(*k*) Dig. 12, 6, 7.

(*l*) Inst. 3, 14, 1.

tinction between mistakes of fact and of law in this connection (*m*); nor does the Civil Code of Quebec (*n*).

Civilians, on contracts by correspondence.

The civilians do not accord with the views of English law with regard to contracts by correspondence. Pothier argues (*o*) that, even in contracts by correspondence, a simultaneous concurrence of wills between the parties is necessary; consequently that an offer to a distant seller may be revoked by dispatching a revocation before the offer has reached the seller: subject, however, to the latter's right to be indemnified for any loss or expense incurred by the revocation; and this right of indemnity extends so far as to oblige the proposer (though not as *buyer* on a contract of sale) to accept a cargo which had been bought by his correspondent before the notice of revocation was received. But it was shown in former editions of this work that Pothier's reasoning was unsatisfactory (*p*).

Pothier.

Common and civil law as to order to an agent for purchase or sale by correspondence.

Both the common and the civil law, however, concur in relation to the case where an order for purchase or sale is transmitted by correspondence to an *agent* of the writer; for in agencies, a revocation of authority by the principal cannot take effect till it reaches the agent (*q*). The civil law is express on this point:—"Si mandassem tibi ut fundum emeres, postea scripsissem ne emeres, tu antequam scias me vetuisse, emisses, mandati tibi obligatus ero, ne damno afficiatur is qui mandatum suscepit" (*r*).

Essential mistake.

The principles of the civil law with regard to mistake excluding mutual assent do not differ substantially from those of the common law. Sale being a consensual contract (*s*), error, "sive in ipsa emptione, sive in pretio, sive in quo

(*m*) Art. 1377.

(*n*) Art. 1047. The whole subject is dealt within Arts. 1047-52.

(*o*) Pothier, Contrat de Vente, No. 32; and see the judgment of Lindley, J., in *Byrne* v. *Van Tienhoven*, 5 C. P. D. at 347; 49 L. J. C. P. 316, cited *ante*, 96.

(*p*) 2nd ed. 57—59; 4th ed. 76—77; where the learned author sets out Pothier's argument at length. Mr. Story is of a contrary opinion, and lauds this doctrine as "by far the fairest and most intelligible that can be found": Sale, § 130, note.

(*q*) Story on Agency, 9th ed. § 470. *Per* Buller, J., in *Salte* v. *Field* (1793) 5 T. R. 215; 2 R. R. 568. A revocation by the death of the principal operates instantly at common law: see note to *Smart* v. *Sandars* (1848) 5 C. B. at 917; 17 L. J. C. P. 258; 71 R. R. 384. By the civil law, acts done by the agent while ignorant of the principal's death are valid, unless the other contracting party knew of the death: Dig. 17, 1, 26, 58. So also the French Code: Arts. 2008—2009. The Bank of England protects itself by special clauses in its forms of powers of attorney: *Kiddell* v. *Farnell* (1857) 26 L. J. Ch. 818. As to sales of ships by agents, see the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 44 (3).

(*r*) Dig. 17, 1, 15.

(*s*) Dig. 18, 1, 1, 2.

alio," rendered the *emptio imperfecta* (*t*). "*Non videntur qui errant consentire*" (*u*) was the general maxim. Thus there was no contract if the thing contracted for had at the time ceased to exist (*v*); and the five heads of essential error enumerated above (*w*) by Lord Watson in *Stewart* v. *Kennedy* were recognised (*x*). As regard a mistake relating to the price an exception was allowed, viz., that if the seller believed the buyer was offering him a smaller price than he really was, and agreed to sell at the price which he supposed to be offered, there was deemed to be a mutual assent to a sale at the smaller price (*y*). Although there is no authority on the point, it is conceived that a similar principle applied to a mistake with regard to quantity (*z*).

Law of Scotland.

The law of Scotland is based upon the civil law.

Law in Quebec.

Article 992 of the Civil Code of Quebec provides that "Mistake is a cause of nullity only if it goes to the very nature of the contract, to the substance of the thing which is its subject-matter, or to any thing which is a principal consideration for its making."

(*t*) Dig. 18, 1, 1, 9.
(*u*) Dig. 50, 17, 116, 2.
(*v*) Dig. 18, 1, 15 and 8.
(*w*) *Ante*, 114.
(*x*) Dig. 18, 1, 9; 12, 1, 18 (nature of transaction); 12, 1, 32 (identity of party); 18, 1, I. (subject-matter or corpus); 18, 1, 1, 9 (price); *Semble* Dig. 19, 2, 52 (quantity); 18, 1, 9, 11 (essential quality). See also on this last head *per* Blackburn, J., in *Kennedy* v. *Panama Mail Co.* (1867) L. R. 2 Q. B. 587, 588; 36 L. J. Q. B. 260.
(*y*) Dig. 19, 2, 52; Moyle's Cont. of Sale in Civil Law, 56.
(*z*) Mr. Moyle draws this inference: *ibid.* 54.

CHAPTER IV.

OF THE THING SOLD.

The Code, under the heading "Subject-matter of Contract," enacts as follows:—

Code, s. 5. Existing or future goods.

"5.—(1) The goods which form the subject of a contract of sale (*a*) may be either existing goods, owned or possessed by the seller (*b*), or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called 'future goods' (*c*).

"(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen (*d*).

"(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods."

Instances of sales of goods possessed but not owned by the sellers are sales by agents and pledgees, and also by sellers and buyers under the Factors Acts (*e*).

Sale of future goods at common law.

In relation to contracts for the sale of goods not yet belonging to the seller, Lord Tenterden held, in an early case (*f*) at Nisi Prius, that if goods be sold, to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go into the market and buy them, it is not a valid contract, but a mere wager on the price of the commodity. But this doctrine is quite exploded (*g*).

The law in relation to time bargains for the sale of chattels not belonging to the seller, when merely colourable devices

(*a*) "Contract of sale," includes sale and agreement to sell: s. 62 (1); *cf.* s. 1 (1), *ante*, 1.

(*b*) "Seller" includes a person who sells or agrees to sell: s. 62 (1).

(*c*) This definition is repeated in s. 62 (1), "Future Goods."

(*d*) See *Watts* v. *Friend* (1830) 10 B. & C. 446; 8 L. J. (O.S.) K. B. 181; 34 R. R. 477 (future crop).

(*e*) As to these, see *ante*, 38 *et seqq.*

(*f*) *Bryan* v. *Lewis* (1826) Ry. & Moo. 386.

(*g*) See *Hibblewhite* v. *McMorine* (1839) 5 M. & W. 462; 8 L. J. Ex. 271; 55 R. R. 578; *Mortimer* v. *McCallan* (1840) 6 M. & W. 58; 9 L. J. Ex. 73; 55 R. R. 503; *Ajello* v. *Worsley* [1898] 1 Ch. 274. The elements of a wager were considered by Hawkins, J., in *Carlill* v. *Carbolic Smoke Ball Co.* [1892] 2 Q. B. 484, at 490—491; 61 L. J. Q. B. 696, *post*.

for gambling in the rise and fall of prices, is treated hereafter (*h*).

Contract absolute or conditional.

As a contract of sale may be either absolute or conditional (*i*), a seller may contract unconditionally to sell goods to be afterwards acquired; or he may contract to sell goods conditionally on their acquisition, as, for example, where he sells goods "to arrive" (*k*); or, the facts of the case may show that he contracts to sell no more than a mere chance of obtaining goods, for this by English law, as by the civil law, may be the subject of a sale (*l*). The latter contract, however, necessarily involves an agreement to sell the goods if they come into existence, but the buyer must pay the price, whether they come into existence or not.

Sale of chance.

Civil law.

The distinction between a conditional contract of sale of goods and the sale of a chance is well illustrated by the difference between the *emptio rei sperate* and the *emptio spei* of the civil law. It must be pointed out, however, that the former contract was more limited in range than an English conditional contract of sale.

The *emptio rei sperate* was a contract for the sale of what might be expected in the ordinary course of nature to come into existence, as a future crop, or the young of animals. Such a contract was conditional on the thing coming into existence, and if and when it did so, the contract was complete; but neither party had any claim against the other if the subject-matter of the contract failed, subject, however, to this, that the seller would be *in culpa* if he prevented the thing coming into existence—"si id egerit venditor ne nascatur aut fiant"—in which case he could be sued *ex empto*, as according to all ordinary principles of law the condition was treated as fulfilled (*m*). Instances of such sales in English law would seem to be sales of things having a potential existence, which are considered hereafter (*n*).

The *emptio spei* was the sale of a mere expectation dependent on a chance; "quasi alea emitur; quod fit cum captus piscium, vel avium, vel missilium emitur; emptio enim

(*h*) See *post*.
(*i*) Code, s. 1 (2), *post*.
(*k*) See *post*, *et seqq*.
(*l*) *Per* Martin, B., in *Buddle* v. *Green* (1857) 27 L. J. Ex. 34; 114 R. R. 991.
(*m*) See the authorities for this statement in Dig. 18, 1, 8; 50, 17, 161 (*culpa* of seller): Moyle's Contract of Sale, 30—32; Mackenzie's Contract of Sale, 24, *et seqq*.
(*n*) *Post*, 153, *et seqq*.

contrahitur, etiamsi nihil inciderit, quia spei emptio est" (*o*). In this case the buyer took the risk of the happening of the event; his contract was an absolute one, but it was conditional on the part of the seller on the existence of the catch (*p*). In such a case the true subject-matter of the sale, the *res* which was essential to a sale, was the chance.

It has been seen from the passage quoted that the illustration usually given by the civilians of a sale of an expectation dependent on a chance is that of the fisherman who agrees to sell a cast of his net for a given price (*q*); and this is adopted by Mr. Story (*r*). The illustration is perhaps not very well chosen. The case supposed is rather one of work and labour done, than of sale. The fisherman owns nothing but the tools of his trade, *i.e.*, his net. What is in the sea is as much the property of anybody else as of himself. If a third person gives him money to throw a cast of his net for the benefit of that person, the contract is in its nature an employment of the fisherman for hire. If the contract were, that the fisherman should throw his net for a week or a month, at a certain sum per week or month, and that the catch should belong to him who paid the money, no one would call this a contract by the fisherman for the sale of his catch, but a contract of hire of his labour in fishing for an employer. It is no more a contract of sale when he is paid by the job or piece, for a single cast, than when he is paid by the month for all his casts (*s*). But though the illustration may be questioned, the rule itself is correct in principle, and might be exemplified by supposing a sale by a pearl fisherman of the chance of any pearls being found in oysters already taken by him, and which had thus become his property (*t*). Such a contract would not be a bargain and sale of goods at common law, but would be a valid executory contract binding the purchaser to pay the price even if no pearls were found; for, as was said by Lord Chief Baron Richards, in *Hitchcock* v.

(*o*) Dig. 18, 1, 8, 1.

(*p*) Dig. 19, 1, 11, 18; 18, 1, 8, 1; Moyle, *supra*.

(*q*) Dig. 18, 1, 8, de Cont. empt.; Pothier, Vente, No. 6. Plutarch (Vit. Solon. 4) mentions the case of a gold tripod brought up by the net, and claimed by the buyer of the catch, and adjudged by the Delphic oracle, not to the fisherman, nor to the buyer, but to the wisest man, which doubtless meant an ultimate reversion to the priests.

(*r*) Story on Sales, 191.

(*s*) Contracts of sale, as distinguished from contracts for work and labour, and materials furnished, are discussed *post*, 177—184.

(*t*) Another illustration would be the sale of a bureau possibly containing treasure, *with its contents*, if any. See on this, in the Chapter on Mutual Assent, u. [2] *ante*, 102.

Giddings (*u*): "If a man will make a purchase of a chance, he must abide by the consequences" (*v*).

The rules of law applicable to the sale of things immoral, noxious or illegal, are discussed hereafter (*x*).

Present sale of future goods.

Instead of merely agreeing to sell goods which he does not own or possess, a seller may purport to make a present *sale* of them. It is of course impossible for him to effect an actual sale of such goods. "It is a common learning in the law that a man cannot grant or charge that which he hath not" (*y*). "The law has long been settled that a person cannot by deed, however solemn, assign that which is not in him—in other words, that there cannot be a prophetic conveyance" (*z*).

Lunn v. *Thornton* (1845).

The case on the subject usually cited is *Lunn* v. *Thornton* (*a*), decided in 1845. The action was *trover* for bread, flour, &c. The plaintiff, in consideration of a sum lent to him, had by deed-poll "bargained, sold and *delivered* unto the defendant all and singular his goods, household furniture, &c., then remaining and being, or which should *at any time thereafter* remain and be in his dwelling-house, &c." The defendant had seized after-acquired goods brought upon the premises. Tindal, C.J., in delivering the opinion of the Court, said: "It is not a question whether a deed might not have been so framed as to have given the defendant a *power of seizing* the future personal goods of the plaintiff, as they should be acquired by him and brought on the premises, in satisfaction of the debt, but the question before us arises on a plea which puts in issue the *property* in the goods, and nothing else; and it amounts to this, whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or, at all events, which are not belonging to the grantor at the time of executing the deed." *Held*, in the negative. Subsequent cases are to the same effect.

But though the actual sale is void at law, yet it will take effect as an agreement (*b*). The property in the goods does

(*u*) (1817) 4 Price, 135; 18 R. R. 725.

(*v*) See also *per* Lord Campbell, C.J., in *Hanks* v. *Palling* (1856) 6 E. & B. at 669; 25 L. J. Q. B. 375.

(*x*) Bk. III., Ch. IV., *post*, *et seqq*.

(*y*) Perkins' Profitable Book, tit. Grant, s. 65.

(*z*) *Per* Pollock, C.B., in *Belding* v. *Read* (1865) 3 H. & C. 955, at 961; 34 L. J. Ex. 212.

(*a*) 1 C. B. 379; and see *Gale* v. *Burnell* (1845) 7 Q. B. 850; 14 L. J. Q. B. 340.

(*b*) *Per* Lord Westbury in *Vickers* v. *Hertz* (1871) 9 Macph. 65, H. L.; Code, s. 5 (3) *ante*, 147.

not therefore pass immediately, but will pass subsequently if the seller, by some act done after his acquisition of the goods, clearly shows his intention of giving effect to the original agreement, or if the buyer obtains possession under authority to seize them (*e*). This modification of the rule is recognised in the case just cited, and rests originally on the authority of the fourteenth rule in Bacon's Maxims: Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu." And where the goods can be sufficiently identified, the property may pass by agreement without any new act intervening.

Reeves v. *Barlow* (1884).

In *Reeves* v. *Barlow* (*d*) Addie, a builder, had contracted with Barlow to build houses on Barlow's land; and it was provided that "all building and other materials brought by the intended lessee upon the land should, whether affixed to the freehold or not, become the property of the intended lessor." One Reeves issued execution against Addie, and the sheriff seized a number of bricks which Addie had brought on Barlow's land. It was contended on the part of Reeves, the execution creditor, that the agreement between Addie and Barlow was a bill of sale under section 4 of the Bills of Sale Act, 1878, as being "an agreement . . . by which a right in equity to personal chattels" was conferred, and therefore it should have been registered. The Court of Appeal held that the agreement was not a bill of sale, and that Barlow was entitled to the goods.

Bowen, L.J., delivering the judgment of the Court, said (*e*): "In our judgment whatever right is conferred by the clause of the building agreement now under discussion is not a right in equity at all, but a right at law (*f*). . . . The contract was only to apply to goods when brought upon the premises, and until this happened there was no right or interest in equity to any goods at all. Upon the other hand, the moment the goods were brought upon the premises the property in them passed in law (*g*). . . . The builder's

(*c*) *Congreve* v. *Evetts* (1854) 10 Ex. 298; 23 L. J. Ex. 273; *Hope* v. *Hayley* (1856) 5 E. & B. 830; 25 L. J. Q. B. 155; *Allatt* v. *Carr* (1858) 27 L. J. Ex. 385; *Chidell* v. *Galsworthy* (1859) 6 C. B. (N. S.) 471; 120 R. R. 225.

(*d*) 12 Q. B. D. 436, C. A.; affg. Q. B. D., 11 Q. B. D. 610; 53 L. J. Q. B. 192.

(*e*) 12 Q. B. D. at 441—442; 53 L. J. Q. B. 192.

(*f*) *Cf. Ex parte Hubbard, Re Hardwick* (1886) 17 Q. B. D. 690, at 700; 55 L. J. Q. B. 490, C. A.

(*g*) *Scil.* if the property in them was then in the builder, and did not belong to a third party: *Cumberland Union Bank* v. *Maryport Co.* [1892] 1 Ch. 415; 61 L. J. Ch. 227.

agreement accordingly was at no time an equitable assignment of anything, but a mere legal contract that, upon the happening of a particular event, the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody, and which could not be identified before."

General rule different in equity.

It is well to observe that in equity a different general rule prevails on this subject; and that a contract for the sale of chattels to be afterwards acquired, transfers to the buyer the beneficial interest in the chattels, as soon as they are acquired, in all cases where they are capable of identification.

Equitable assignment of after-acquired property.

Holroyd v. *Marshall* (1862).

The whole doctrine of the present assignment of future property, both at common law and in equity, was discussed in the House of Lords in 1862 in *Holroyd* v. *Marshall* (*h*), where a person had mortgaged the chattels in his mill, with a covenant by him that all chattels added to the mortgaged chattels or substituted therefor should be bound by the mortgage. It was there held that immediately the new chattels were placed in the mill an equitable title to them vested in the mortgagee, no *novus actus interveniens* by either party being necessary to complete that title.

Collyer v. *Isaacs* (1881).

In *Collyer* v. *Isaacs* (*i*), in 1881, Jessel, M.R., thus stated the rule in a passage frequently cited: "A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future; and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value . . . to settle all such real estate as his father shall leave him by will, or purports actually to convey by the deed all such real estate, the effect is the same. It is a contract for value which

(*h*) 10 H. L. C. 191; 33 L. J. Ch. 193; 138 R. R. 108; foll. in *Leatham* v. *Amor* (1878) 47 L. J. Q. B. 581; and *Lazarus* v. *Andrade* (1880) 5 C. P. D. 318; 49 L. J. C. P. 847; see also *Bennett* v. *Cooper* (1845) 9 Beav. 252; 15 L. J. Ch. 315; 73 R. R. 347; and *Clements* v. *Matthews* (1883) 11 Q. B. D. 808; 52 L. J. Q. B. 772, C. A.; *Re Clarke* (1887) 36 Ch. D. 348; 56 L. J. Ch. 981, C. A.; and see judgment in *Reeves* v. *Whitmore* (1864) 33 L. J. Ch. 63, as to distinction between a present transfer of future property and a mere power to seize it. In *Belding* v. *Read* (1865) 3 H. & C. 955; 34 L. J. Ex. 212, the Exchequer, misapprehending the language of Lord Westbury in *Holroyd* v. *Marshall*, held that an equitable interest would attach to future goods only if so specifically described as that equity would decree specific performance; and put a wrong construction on the agreement under discussion by treating it as one indivisible contract, and as too vague to be enforced. See on this, *Re Clarke*, *supra*, at 353, 356, 357, C. A.; and *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523, at 531, 535, 544, 546; 58 L. J. Q. B. 75.

(*i*) 19 Ch. D. 342, at 351; 51 L. J. Ch. 14, C. A.

will bind the property if the father leaves any property to his son."

By a "complete assignment" the learned Judge meant an assignment in equity, not at law, so that the assignee acquires only an equitable title (*k*). But this equitable title will not prevail against a person obtaining for value the legal title without notice (*l*).

Tailby v. *Official Receiver* (1888).

And in *Tailby* v. *The Official Receiver* (*m*), Lord Macnaghten thus stated the general rule of equity (*n*): "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified."

Distinction at common law between goods in which seller has and those in which he has not a potential property.

Where a contract purported to be an immediate sale of future goods, a distinction, however, was recognised at common law between future goods in which the seller had, and those in which he had not, what was called a potential property. Things not yet existing which may be sold (that is to say, a right to which may be immediately granted) are those which are said to have *a potential existence*, that is, things which are the natural produce, or expected increase of something already owned or possessed by the seller. A man may sell the crop of hay to be grown in his field, the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming month, and similar things. Of such things there could be, according to the authorities (*o*), an immediate grant or assignment, whereas there could only be an agreement to sell where the subject

(*k*) *Per* Brett, M.R., in *Joseph* v. *Lyons* (1884) 15 Q. B. D. 280, at 284—285; 54 L. J. Q. B. 1, C. A.

(*l*) *Joseph* v. *Lyons*, *supra*: *Hallas* v. *Robinson* (1884) 15 Q. B. D. 288; 54 L. J. Q. B. 364, C. A.

(*m*) 13 App. Cas. 523; 58 L. J. Q. B. 75; revg. C. A. 18 Q. B. D. 25; and overg. *Belding* v. *Read* (1865) 3 H. & C. 955; 34 L. J. Ex. 212; and *Re D'Epineuil* (1882) 20 Ch. D. 758, and approvg. *Clarke*, *In re*, *supra*.

(*n*) 13 App. Cas. at 543; 58 L. J. Q. B. 75.

(*o*) 14 Viner's Ab. tit. Grant, 50; Shep. Touch. Grant, 241; Perk. §§ 65, 90; *Wood* v. *Foster* (1586) 1 Leon. 42; *Grantham* v. *Hawley* (1615) Hob. 132, *post*, 155; *Robinson* v. *Macdonnell* (1816) 5 M. & S. 228, *post*, 156; *Petch* v. *Tutin* (1846) 15 M. & W. 110; 15 L. J. Ex. 280; *post*, 155.

of the contract is something to be afterwards acquired, as (*p*) the wool of any sheep, or the milk of any cows, which the seller might buy within the year, or any goods to which he might obtain title within the next six months. Whether this distinction accurately expresses the real difference between these two classes of future goods will be considered presently.

Fitzwilliam v. Parson of Aresay (1443).

The earliest authority to be found in the books is the case of *Fitzwilliam* v. *The Parson of Aresay* (*q*), decided by the Court of Common Bench in 1443. In that case, the plaintiff brought an action of trespass against the defendant for carrying away the plaintiff's goods from Bentley to wit, in the year 18 of the King two carts of corn and five carts of barley, and in the year 19 four carts of corn and five carts of barley. The goods were tithes, and the plaintiff claimed them on the ground that the Abbot of Everwike, as parson of Doncaster, had sold him "all the tithable grain which was or should thereafter grow within the parish of Doncaster during the term of seven years." The defendant claimed the grain on the ground that Bentley was within the parish of Aresay, of which he was parson. Portington, as counsel, obtained a verdict for the plaintiff. Yelverton for the defendant moved in arrest of judgment on several grounds, but the plaintiff recovered judgment.

Paston, J., said: "According to my understanding one must understand several sales, and that the sale is good although it was several; for he who has a term for life can sell the profits of his lands for three or four years, and yet at the time of the sale he has not the profit of two or three years *in esse*: and if a parson of a church at the feast of Christmas in the year 18 sells to me the tithes of the sheep of his parish, by force of that sale I shall have the tithes of the sheep for the same year; and yet at the time of the sale there was none of the lambs *in esse*." In reply to the objection that the plaintiff's pleading did not allege that he had possession, Paston, J., said: "As to this point the plea is good; for by the gift which the Abbot made, the property and the possession was vested in the plaintiff."

Ascue, J., agreed that the sale was good although the seller "has not manual possession at the time of the sale."

But Newton, C.J., seems to have dissented, holding that the plaintiff could not claim tithes of the year 19 for the sale

(*p*) *Per* Mansfield, C.J., in *Reed* v. *Blades* (1813) 5 Taunt. 212, 222.
(*q*) Yr. Bk., 21 Hen. 6, 43.

made by the Abbot in the year 18; "for in the year 18 he had not any title in the tithes of the year 19 in possession or in right, for at that time the tithes of the year 19 were not *in esse*, . . . albeit that a parson sells to me his tithes in the year 18 I shall have the profit of the tithes which accrues to him within the year; yet I cannot well see how one can have a profit for the year 19 by force of a sale made in the year 18."

Plowden in his Commentaries (*r*), published in 1571, thus explains the principle of the case: "If a parson will grant to me all the wool that he will have for tithe the following year, this grant is good, and yet the quantity of the wool is uncertain at the time of the grant, but because it can be reduced to a certainty after, the grant was held good enough."

The leading case on the subject is *Grantham* v. *Hawley* (*s*), decided by the Court of Common Pleas in 1615. The controversy in that case was as to the property in a crop of corn. The plaintiff's predecessor in title, the lessor, had in demising land covenanted with the lessee, his executors and assigns, that "it should be lawful for him to take and carry away to his own use such corn as should be growing upon the ground at the end of the term." The lessee's executor sowed corn and at the end of the term sold it to the defendant. The Court decided against the plaintiff, on the ground: "that the property and very right of the corn when it hapned was past away: for it was both a covenant and a grant. . . . In this case all the colour that the plaintiff hath to it is by the land which he claims from the lessor which gave the corn. And though the lessor had it not actually in him, nor certain, yet he had it potentially, for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and *the property shall pass as soon as the fruits are extant*, as 21 Hen. 6 (*t*). A parson may grant all the tithe-wool that he shall have in such a year; yet perhaps he shall have none: but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially" (*u*).

Grantham v. *Hawley* (1615).

Grantham v. *Hawley* was followed in 1846 by the Court of Exchequer in *Petch* v. *Tutin* (*v*). There an assignment by a

Petch v. *Tutin* (1846).

(*r*) Plowd., 13 a.
(*s*) Hob. 132.
(*t*) *I.e. Fitzwilliam* v. *Parson of Arcsay*, set out *ante*, 154.
(*u*) See *Wood* v. *Foster* (1586) 1 Leon. 42.
(*v*) 15 M. & W. 110; 15 L. J. Ex. 280.

tenant for years of all his unexpired tenant-right in the farm and premises was held to include crops unsown at the date of the deed.

Robinson v. Macdonnell (1816)

On the other hand, in *Robinson* v. *Macdonnell* (*x*), the future goods did not potentially exist. There an assignment of "all the profits" of a particular ship was held not to include the whale oil made from fish subsequently captured on a voyage, as the assignor had no potential interest in the oil, the existence of which was a mere possibility. So, in America, in *Low* v. *Pew* (*y*), it was held that a present "sale of all the halibut that might be caught" by a particular schooner did not pass the property in the fish when caught, as there was a mere chance of catching halibut not coupled with any interest in the seller.

Low v. Pew. (1871).

All contracts to sell future goods are agreements to sell.

Although the authorities thus treat a present grant or assignment of goods in which the grantor has a potential property as possible, and a grant of other future goods as impossible, it is submitted that in neither case can there be an actual grant or assignment, but only an agreement to assign; the real distinction being that goods in which the seller has a potential property become the buyer's as soon as they "are extant"; whereas other future goods require some further act of appropriation—some *novus actus interveniens*. In neither case is there an immediate assignment or sale of the *goods*; although in the former case there may be said to be a sale of a present *right* to the goods so soon as they come into existence; and this is probably what is meant when the authorities speak of a present grant or assignment. The only difference therefore between the two classes of future goods seems to be in respect of the time of the passing of the property (*z*).

(*x*) 5 M. & S. 228.

(*y*) 108 Mass. 347.

(*z*) The above statement is submitted as the result of the authorities, and probably agrees with what the Author meant. Mr. Benjamin's conclusions are not expressed with his usual lucidity, and seem to contemplate the possibility of the immediate passing of property in non-existent goods; see 2nd ed. 63—64; 4th ed. 82—83.

Sir M. Chalmers expresses the opinion that: "there is no rational distinction between one class of future goods and another, and the supposed rule appears never to have been acted upon. Indeed, *Langton* v. *Higgins*, closely looked at, seems to negative it": Sale of Goods Act, 1893, 7th ed. 218—219. But the rule declared in *Grantham* v. *Hawley*, and recognised by the C. P. in 1845 in *Lunn* v. *Thornton*, *supra*, was again acted upon in the Ex. in 1846 in *Petch* v. *Tutin*, *supra*, and has been frequently acted upon in recent years in America: see *post*, 158. It is conceived that *Langton* v. *Higgins*, *infra*, was decided on the ground that the Court considered, either that the rule did not apply to an artificial product, like oil, or that a further act by the seller before the passing of the property had been contemplated.

The truth then appears to be that, as a potentially existing chattel differs from other unascertained goods by being *ipso facto* identified on coming into existence, the contract with respect to it creates what the civilians call an *obligatio certi corporis* (*a*); and, as there is no necessity for any act of appropriation by either party for the purpose of identification (*b*), an intention may (*c*) be presumed that the property shall pass when the chattel comes into existence. Historically the English rule respecting the sale of potentially existing goods was probably derived from the *emptio rei speratæ* of the civil law (*d*). True distinction.

It does not seem altogether clear whether, in the class of potentially existing goods, are comprised such goods as are produced by labour from potentially existing goods, such as butter or cheese to be made from the future milk of cows, or oil to be extracted from an unsown crop. There is authority in America for the affirmative of this proposition (*e*). But it is not unreasonable to suppose that in the case of artificial products some further act of appropriation is contemplated by the parties before the property is to pass. Are artificial products potentially existing?

In *Langton* v. *Higgins* (*f*) there was a sale of *all* the crop of peppermint oil which might be produced in 1858 *on a particular farm at a price per pound*, the buyer to advance money on account. On the same day the seller also gave to the buyer a bill of sale assigning (*inter alia*) all future crops of oil of peppermint until repayment of the advance. It was usual for the buyer to send bottles to be filled by the seller, who weighed the oil in each bottle at the time of filling. Amongst other arguments *Petch* v. *Tutin* (*g*) was cited to show that the property in the oil passed under the bill of sale on the oil coming into existence, but the real controversy was on the question what act of appropriation was necessary before the property could pass. The Court of Exchequer Intention of parties as to act of appropriation *Langton* v. *Higgins* (1859).

(*a*) See on this *per* Parke, B., in *Wait* v. *Baker* (1848) 2 Ex. at 9; 17 L. J. Ex. 307; 76 R. R. 469; and in *Laidler* v. *Burlinson* (1837) 2 M. & W. at 610; 6 L. J. Ex. 160; 46 R. R. 717; *Howell* v. *Coupland* (1874) L. R. 9 Q. B. 462; aff. 1 Q. B. D. 258; 46 L. J. Q. B. 147, C. A., *post*, 164, shows that such a sale is for certain purposes a sale of *specific* goods.

(*b*) See *per* Bowen, L.J., in *Reeves* v. *Barlow* (1884) 12 Q. B. D. 442; 53 L. J. Q. B. 192, C. A., cited *ante*, 151.

(*c*) But not necessarily: see *Langton* v. *Higgins*, *infra*, espec. *per* Bramwell, B., 28 L. J. Ex. at 254; 4 H. & N. at 409; 118 R. R. 515.

(*d*) As to this, see *ante*, 148.

(*e*) See *post*, 158. There is an opinion of Plowden to the contrary (1583), cited in Moore, 174, given, however, before *Grantham* v. *Hawley*, and based on grounds which are too wide.

(*f*) (1859) 4 H. & N. 402; 28 L. J. Ex. 252; 118 R. R. 515.

(*g*) *Ante*, 155.

decided the case on the ground that the parties intended that the property in the oils should pass on the filling of the bottles (*h*).

American law.

The principle of *Grantham* v. *Hawley* (*i*) is well recognised in America, and has been stated more frequently and in clearer terms than in English courts. Thus, the Court of Appeals of the State of New York say in *Andrew* v. *Newcomb* (*k*) of the title to a potentially existing thing: "It vests potentially from the time of the executory bargain, and actually as soon as the subject arises." And in the Supreme Court of New York, Allen, J., says in *Van Hoozer* v. *Cory* (*l*): "The right to it when it shall come into actual existence is a present vested right . . . The grant is absolute and perfect when made, vesting the property in the plaintiff, the grantee, the moment it should come into existence, or in the language of the books, 'as soon as it was extant.'" The same principle has been laid down in other cases (*m*).

The future product created by labour from the natural fruit of existing things, such as cheese or butter to be made from the milk of cows, has been treated in some cases in America as potentially existing as much as the natural fruit itself (*n*).

With regard to future emblements or *fructus industriales* there is a conflict of authority. The Supreme Court of the United States, in deciding in 1891 a case in which there was a present sale of cotton, including cotton not planted, applied the rule in *Grantham* v. *Hawley* to the latter, and expressly repudiated any distinction between a present sale of cotton planted and of cotton not planted (*o*).

But in 1894 the Supreme Court of Appeals of the State of

(*h*) Following *Aldridge* v. *Johnson* (1857) 7 E. & B. 885; 26 L. J. Q. B 296; 110 R. R. 870; *post*.

(*i*) *Ante*, 155.

(*k*) (1865) 32 N. Y. 417, at 421, follg. *Grantham* v. *Hawley*.

(*l*) (1860) 34 Barb. 9, at 12, 13 (N. Y.).

(*m*) *Per Cur.* in *Briggs* v. *U. S.* (1891) 143 U. S. 346, at 354; *McCarty* v *Blevins*, 8 Yerg. 195 (Tenn.) (unborn colt); *Farrar* v. *Smith* (1873) 64 Maine. 77 (manure of sheep); *Conderman* v. *Smith* (1863) 41 Barb. 404 (cheese from milk of cows); *Hull* v. *Hull* (1880) 48 Conn. 250 (unborn foal); *Lewis* v. *Lyman* (1839) 39 Mass. 437 (hay, fodder, and calves); *per Cur.* in *Rochester Disty. Co.* v. *Rasey* (1894) 142 N. Y. 570, at 575, cited *infra*; *Sawyer* v. *Long* (1894) 86 Maine, 541 (mortgage of substituted chattels). See the reason and scope of the principle governing assignments of potentially existing goods well explained in two rules by Davis, J., in *Morrill* v. *Noyes* (1863) 56 Maine. 458, at 466.

(*n*) *Van Hoozer* v. *Cory*, and *Conderman* v. *Smith*, *supra*. See the contrary opinion of Plowd. (1583) Moore. 174.

(*o*) *Briggs* v. *U. S.* (1891) 143 U. S. 346, at 354.

New York expressly drew such a distinction in the *Rochester Distillery Co.* v. *Rasey* (*p*). There, a mortgage had been given of all the potatoes and beans then or thereafter during the next year planted on a farm. The Court say (*q*): "There is no good reason for doubting that that which has a potential or possible existence, like the spontaneous product of the earth or the increase of that which is in existence, may properly be the subject of sale or of mortgage. The right to it when it comes into existence is regarded as a present vested right. That which is, however, the annual product of labour and of the cultivation of the earth cannot be said to have either an actual or a potential existence before a planting."

Bills of Sale Acts.

In connection with this subject, the provisions of the Bills of Sale Acts must not be overlooked. The Bills of Sale Act, 1882 (*r*), has no application to absolute assignments, which fall only within the Bills of Sale Act, 1878 (*s*). But neither Act is concerned except with "bills of sale of personal chattels," as defined by the Act of 1878 (*t*); and as these are defined as goods "capable of complete transfer by delivery," that is to say, at the time of the bill of sale, the definition seems to exclude future or after-acquired chattels; and if this view be correct, an assignment of these is altogether outside the Bills of Sale Acts (*u*).

The rules of the common law and of equity having now been discussed, it remains to consider what change, if any, has been made by the Code.

Effect of s. 5 on the common law.

The first two sub-sections of section 5 of the Code (*v*) are clearly declaratory of the common law. Sub-section 2 seems to cover both the case of an absolute contract to sell future goods, and a contract to sell only conditionally on the goods being acquired; but, as it declares the law relating to contracts of sale of "goods" only, it would seem not to deal with sales of mere chances.

Sub-section 3 renders it now no longer doubtful that all present sales of future goods are agreements to sell. The Code, however, says nothing as to the time *when* the property is to pass: this, as in all cases, depends upon the intention (*x*):

(*p*) (1894) 142 N. Y. 570.
(*q*) *Ibid.* at 575—576.
(*r*) 45 & 46 Vict. c. 43, s. 2.
(*s*) 41 & 42 Vict. c. 31.
(*t*) S. 4.
(*u*) See *per* Lord Macnaghten in *Thomas* v. *Kelly* (1888) 13 App. Cas. at 518—519; 58 L. J. Q. B. 66; citing *Brantom* v. *Griffiths* (1877) 2 C. P. D. 212; 46 L. J. C. P. 408, C. A.
(*v*) See s. 5, set out *ante*, 147.
(*x*) Code, ss. 16—19.

and there seems to be nothing in section 5 (3) to alter any pre-existing rule with regard to the passing of the property in any class of future goods.

Although equitable principles are now recognised in courts of law, yet the Judicature Acts have not abolished the distinction between a legal and an equitable title. "It was the rule at common law that the property in future-acquired goods should not pass, except, perhaps, where there was a contract that the property in them should pass: that rule still remains in force" (*y*), and it seems clear that section 5 (3) of the Code has not turned an equitable into a legal title, since the Code deals only with legal titles to goods.

Goods which have perished.

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

Strickland v. *Turner* (1852).

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

Hastie v. *Couturier* (1853).

In *Hastie* v. *Couturier* (*a*), a cargo of corn, loaded on a vessel not yet arrived, was sold on the 15th of May. It was afterwards discovered that the corn having become heated had been discharged by the master at an intermediate port, and sold on the 24th of the preceding month of April: *held*, that the sale of the 15th of May was properly repudiated by the purchaser.

These cases are sometimes treated in the decisions as dependent on an implied warranty by the seller of the existence of the thing sold: sometimes on the want of consideration for the purchaser's agreement to pay the price. Another, and perhaps the true ground, is rather that there has been no contract at all, for the assent of the parties being founded on a mutual mistake of fact was really no assent, there was no

(*y*) *Per* Cotton, L.J., in *Joseph* v. *Lyons* (1884) 15 Q. B. D. at 286; 54 L. J. Q. B. 1, C. A.; and see *per* Farwell, J., in *Manchester Brewery Co.* v. *Coombs* [1901] 2 Ch. at 617; 70 L. J. Ch. 814.

(*z*) 7 Ex. 208; 22 L. J. Ex. 115; 36 R. R. 619. See also *Cochrane* v. *Willis* (1865) L. R. 1 Ch. 58; 35 L. J. Ch. 36; *Smith* v. *Myers* (1870) L. R. 5 Q. B. 429; affd. in Ex. Ch. (1871) L. R. 7 Q. B. 139; 41 L. J. Q. B. 91; *Scott* v. *Coulson* [1903] 2 Ch. 249; 72 L. J. Ch. 600, C. A.

(*a*) 9 Ex. 102; 22 L. J. Ex. 209; 96 R. R. 598; and 5 H. L. C. 673; 25 L. J. Ex. 253; revg. the judgment in 5 Ex. 40. See also *Barr* v. *Gibson* (1838) 3 M. & W. 390; 7 L. J. Ex. 124; 49 R. R. 650.

subject-matter for a contract, and the contract was therefore never completed (*b*).

This was the principle applied by Lord Kenyon in a case where the leasehold interest which the buyer agreed to purchase turned out to be for six years instead of eight and a half; and where he held the contract void, as founded on a mistake in the thing sold, the buyer never having agreed to purchase a less term than that offered by the vendor (*c*). *Farrer* v. *Nightingal* (1798).

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

The law is now laid down by the Code in the following terms:—

"6.—Where there is a contract for the sale of specific goods (*f*), and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void." Code, s. 6. Goods which have perished.

"Perish" is not defined in the Code, but it is apprehended that the goods would have "perished," not only if they were physically destroyed, but also if they had ceased to exist in a commercial sense, that is, if their merchantable character, as such, had been lost, as dates contaminated with sewage, and therefore unsaleable as dates (*g*); or table potatoes which had sprouted (*h*); or cement which had lost, Meaning of "perish."

(*b*) See Chapter on Mutual Assent, *ante*, 125; and *per* Lindley, L.J., in *Huddersfield Bank* v. *Lister* [1895] 2 Ch. at 281; 64 L. J. Ch. 523, C. A.
(*c*) *Farrer* v. *Nightingal* (1798) 2 Esp. 639.
(*d*) Contrat de Vente, No. 4.
(*e*) Art. 1109. So also the Civil Code of Quebec, art. 991.
(*f*) "In this Act, unless the context or subject-matter otherwise requires, 'specific goods' means goods identified and agreed upon at the time a contract of sale is made": s. 62 (1).
(*g*) *Asfar* v. *Blundell* [1896] 1 Q. B. 123; 65 L. J. Q. B. 138, C. A. (insurance); *cf. Palace Shipping Co.* v. *Spillers & Bakers* (1908) Times, May 18, where the wheat, though damaged, had not lost entirely its character as such.
(*h*) *Rendell* v. *Turnbull & Co.* (1908) 27 N. Z. L. R. 1067.

through moisture, its properties as such (*i*); or a ship which is a mere congeries of timber (*k*); or has ceased to be capable of carrying a cargo (*l*); or goods which have been requisitioned by Government (*m*).

Perishing of part.

Where two or more things are sold for an entire price, or otherwise under an entire contract, and one or more of them have perished at the date of the contract, it is conceived that the contract is also void as to the remainder. This was, at least, the rule of the civil law (*n*), which says: "Si duos quis servos emerit pariter uno pretio, quorum alter ante venditionem mortuus est, neque in uno constat emptio"; and is in accordance with principle.

Perishing of specific goods after contract.

Where the specific goods perish *after* the making of the contract, their destruction affects, not, as in cases under section 6, the *formation*, but the *performance* of the contract (*o*). As will be seen later (*p*), the impossibility of performance is, as a general rule, no excuse to the party bound to perform; but this rule applies only where the contract is positive and absolute, and not subject to any condition, express or implied. And a condition subsequent excusing performance if the goods perish will be implied where, according to the intention of the parties, performance depends upon the continued existence of a given person or thing, or state of circumstances. This was first decided in *Taylor* v. *Caldwell* (*q*), which was followed and extended in *Howell* v. *Coupland* (*r*), on which latter case section 7 of the Code is based.

By that section:—

Goods perishing before sale but after agreement to sell.

"7.—Where there is an agreement to sell (*s*) specific goods, and subsequently the goods, without any fault (*t*) on the part of the

(*i*) *Duthie* v. *Hilton* (1868) L. R. 4 C. P. 138; 38 L. J. C. P. 93 (freight). *Montreal Light, &c., Co.* v. *Sedgwick* [1910] A. C. 598, P. C.; 80 L. J. P. C. 11 (insurance).

(*k*) *Per* Parke, B., in *Barr* v. *Gibson* (1838) 3 M. & W. 400; 7 L. J. Ex. 124; 49 R. R. 650.

(*l*) *Per* A. L. Smith, M.R., in *Nickoll* v. *Ashton* [1901] 2 K. B. at 133; 70 L. J. K. B. 600.

(*m*) *Re Shipton, Anderson & Co.* and *Harrison Brothers & Co.* [1915] 3 K. B. 676.

(*n*) Dig. 18. 1. 44. See also 21, 1, 34-38, of a troupe of actors, or a team of horses; and *cf.* 18, 1, 57, of a house partially destroyed by fire.

(*o*) It has, however, been thought advisable to follow the order of the Code and to discuss this question here.

(*p*) *Post, et seqq.*

(*q*) (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 129 R. R. 573; set out *post*, 163.

(*r*) (1874) 1 Q. B. D. 258; 46 L. J. Q. B. 147, C. A., set out *post*, 164.

(*s*) Defined in s. 1 (3), *ante* 3.

(*t*) *I.e.*, wrongful act or default: s. 62 (1).

seller or buyer, perish before the risk passes to the buyer (*u*), the agreement is thereby avoided."

The conjoint effect of this section and of the general rules of law appears to be that where specific goods agreed to be sold subsequently perish:—

1. If fault of either party causes the destruction of the goods, then the party in default is liable for non-delivery or to pay for the goods, as the case may be (*v*).

2. If there be no such fault, then

(*a.*) If the risk has not passed to the buyer, the agreement is avoided, and the seller is not liable for non-delivery, but on the other hand must bear the loss (*x*).

(*b.*) If the risk has passed to the buyer, he must pay for the goods, though undelivered.

For full information on the subject of the incidence of the risk, and for the liabilities of either party as a bailee of the other's goods, the reader is referred to a later Chapter (*y*).

Taylor v. *Caldwell* (1863).

In *Taylor* v. *Caldwell* (*z*), the law with regard to impossibility as an excuse for non-performance was reviewed by Blackburn, J., who gave the unanimous decision of the Court after advisement. It was an action for breach of a promise to give to the plaintiff the use of a certain music-hall for four specified days, and the defence was that the hall had been burnt down before the appointed day, so that it was impossible to perform the contract. This excuse was held valid.

His Lordship, after stating the general rule that a positive and absolute contract must be performed, though performance has become unexpectedly burdensome or even impossible, thus laid down the law (*a*): "There are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be

(*u*) Buyer includes one who agrees to buy: *ibid.*

(*v*) See Code, s. 20, *post*; and s. 27, *post*. S. 7 is subject to s. 20 (delay delivery): *Clarke* v. *Bates* [1913] 2 L. J. Ct. C. 114, *post*.

(*x*) This is the necessary result of s. 7.

(*y*) See Chapter on the Incidence of the Risk, *post*, *et seq.*

(*z*) 3 B. & S. 826; 32 L. J. Q. B. 164; 129 R. R. 573.

(*a*) 3 B. & S. at pp. 833-834; 32 L. J. Q. B. 164; 129 R. R. 573.

done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." The learned Judge then stated as an example (*b*), that "where a contract of sale is made, amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day, there, if the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible. That this is the rule of the English law, is established by the case of *Rugg* v. *Minett*" (*c*).

Appleby v. *Myers* (1867).

This case was followed in *Appleby* v. *Myers* (*d*), in the Exchequer Chamber, in which the plaintiffs had contracted to erect machinery on the defendant's premises for a price to be paid on completion. During the progress of the work the premises and machinery were consumed, without the fault of either party, by an accidental fire. *Held*, that both parties were excused from further performance; and that the plaintiffs, having contracted for an entire work for a specific sum, could not recover the value of the work actually done. To enable them to do so, the defendant must either have prevented completion, or have entered into a new contract to pay for the work partly done.

Howell v. *Coupland* (1874).

The principle of *Taylor* v. *Caldwell* (*e*) was applied in *Howell* v. *Coupland* (*f*) to a case where the contract was to sell "200 tons of potatoes grown on land belonging to the defendant in Whaplode." The potatoes were not in existence at the date of the contract, but the land, when sown, was capable in an average year of producing far more than the quantity of potatoes contracted for. There was a failure of

(*b*) 3 B. & S. at 837; 32 L. J. Q. B. 164; 129 R. R. 573.

(*c*) (1809) 11 East, 210; 10 R. R. 475.

(*d*) L. R. 2 C. P. 651; 36 L. J. C. P. 331; revg. C. P. (1866) L. R. 1 C. P. 615; 35 L. J. C. P. 295; foll. in *The Madras* [1898] P. 90; 67 L. J. P. 53; and by the P. C. in *Forman* v. *The Liddlesdale* [1900] A. C. 190; 69 L. J. P. C. 44. See also *Clifford* v. *Watts* (1870) L. R. 5 C. P. 577; 40 L. J. C. P. 36; *Anglo-Egyptian Navigation Co.* v. *Rennie* (1875) L. R. 10 C. P. 271; 44 L. J. C. P. 130; *Howell* v. *Coupland*, *infra*; *Turner* v. *Goldsmith* [1891] 1 Q. B. 544; 60 L. J. Q. B. 247, C. A. (absolute promise); *O'Neil* v. *Armstrong* [1895] 2 Q. B. 70; 65 L. J. Q. B. 7; aff. *ibid.* 418, C. A. (prevention of performance).

(*e*) *Ante*, 163.

(*f*) 1 Q. B. D. 258; 46 L. J. Q. B. 147, C. A.

the crop from disease, and the seller could deliver only 80 tons. In an action for non-delivery of the residue, the defendant was held to be excused from further performance, the Court holding that the goods were sufficiently specific, though not in existence when the contract was made, and though the contract was for part only of a specific crop. The contract, therefore, was subject to an implied condition subsequent excusing performance, as in *Taylor* v. *Caldwell* (*g*). And the Court distinguished the case of a contract *simpliciter* for a quantity of goods, although each party may have in his mind contemplated a particular crop. Such a case was the following.

Hayward Brothers v. *Daniel & Son* (1904).

In *Hayward Brothers* v. *Daniel & Son* (*h*), the defendants were market gardeners and growers of gherkins. The plaintiffs signed a bought note: "Fifty hogsheads crooked green 30s.; 150 hogsheads large green 21s.; 150 to 200 hogsheads good second flower 27s. 6d., as required: terms as usual." This offer the defendants accepted specifically in terms. The crop was a general failure, and only a quarter of what it should have been. In an action for non-delivery, it was held by Bigham, J., that the bought note contained no reference to any particular land; the sale was of a fixed quantity, not dependent on any out-turn of the defendant's crop, so that the continued existence of the crop was not the common basis of the contract. The sellers were accordingly liable for non-delivery.

Effect of s. 7 on *Howell* v. *Coupland*.

It is conceived that the potatoes in *Howell* v. *Coupland*, which were treated as specific, are also "specific goods" within the definition in the Code (*i*), as well as "future goods" (*k*). If that be not so, the principle will be preserved as embodying a common-law rule not inconsistent with the Code (*l*).

Perishing of part.

It was not decided in *Howell* v. *Coupland* whether the seller might have refused delivery of the 80 tons which he in fact delivered. Blackburn, J., and Quain, J., seemed to have thought that he was liable to deliver what he could (*m*).

(*g*) *Ante*, 163.

(*h*) (1904) 91 L. T. 319.

(*i*) S. 62 (1), cited *ante*, 161, n. (*f*). One meaning of "identity" is "to determine and establish what a given thing or who a given person is": Murray's Oxford Dict. *sub nom.* One illustration given is the picture of a bird, which "identifies" the bird, *i.e.*, not the individual, but the class.

(*k*) See s. 5 (1), *ante*, 147; and s. 62 (1).

(*l*) See s. 61 (2).

(*m*) (1874) L. R. 9 Q. B. 462; 43 L. J. Q. B. 201; citing Shep. T. 382.

On the other hand, in *Levatt* v. *Hamilton* (*n*), where goods were sold "to arrive" by a particular ship, and only a small part arrived in that ship, the Court of Exchequer held that the buyers were not entitled to it, as the contract was entire for the whole quantity (*o*). But this was a case of a condition precedent; and it is arguable that, as the seller's excuse under s. 7 is a privilege operating by way of condition subsequent (*p*), he should not be entitled to excuse himself to an extent more than is necessary. The question is one of the presumed intention of the parties. Where the subject-matter of the sale is such an indivisible whole as a number of volumes forming one work, the intention would doubtless be that the seller should be wholly discharged. The case of a mere quantity of specific goods is not so clear.

Time of avoidance.

In cases where the agreement is avoided, it seems obvious that it becomes void at the time of the perishing of the goods, and not before. Consequently, the rights of either party previously vested will not be affected (*q*); for example, where the price is payable by the contract at a date prior to the destruction of the goods, the seller can sue for the price, if unpaid, and, if paid, the buyer cannot recover it (*r*). And conversely, where the price is not then payable, the seller takes the risk, and cannot sue for the price. By the expression "avoided" is therefore meant that *future* performance by either party is excused, as at common law.

Civil law.

The rule laid down in section 7 was the same in the civil law. Thus it says (*s*): "Si Stichus, certo die dari promissus, ante diem moriatur, non tenetur promissor." And again (*t*): "Si ex legati causa, aut ex stipulatu, hominem certum mihi debeas, non aliter post mortem ejus tenearis mihi quam si per te steterit quominus vivo eo enim mihi dares: quod ita fit si aut interpellatus non dedisti, aut occidisti enim"; *i.e.*, if you delayed delivery or made it impossible. The implied exception was found in every *obligatio de certo corpore*.

(*n*) (1839) 5 M. & W. 639; 52 R. R. 865.
(*o*) See also the Civil Law; Dig. 18, 1, 44.
(*p*) See *per* Griffith, C.J., in an analogous case in *Maine* v. *Lyons* (1913) 15 Com. L. R. 671.
(*q*) *Stubbs* v. *Holywell Ry.* (1867) 2 Ex. 311; 36 L. J. Ex. 166; and cases in next note.
(*r*) *Blakeley* v. *Muller* [1903] 2 K. B. 760. n.; 88 L. T. 90; *Civil Service Co-op. Socy.* v. *General Steam Navigation Co.* [1903] 2 K. B. 756; 72 L. J. K. B. 933, C. A.; *Chandler* v. *Webster* [1904] 1 K. B. [illegible] 73 L. J. K. B. 401, C. A.; *Lloyd, &c., Société* v. *Stathatos* (1917) 33 Tim[illegible]. R. 390.
(*s*) Dig. 45, 1, 33.
(*t*) *Ibid.* 1, 23.

CHAPTER V.

OF THE PRICE.

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

When no price has been fixed, reasonable price implied.

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

(*a*) *Ante*, 3.

(*b*) See Code, s. 1 (1), *ante*, 1.

(*c*) Bk. IV., Pt. II., chap. iii., on Payment.

(*d*) See, *e.g.*, *Smith* v. *Blandy* (1825) R. & M. 257 (buyer to pay customs duty: discount); *Winks* v. *Hassall* (1829) 9 B. & C. 372; 7 L. J. (O. S.) K. B. 265 (customs duty); *Clark* v. *Smallfield* (1861) 4 L. T. 405 (customs duty deductible by trade usage); *Cannan* v. *Fowler* (1853) 14 C. B. 181; 23 L. J. C. P. 48 ("fair value": previous valuation); *Orchard* v. *Simpson* (1857) 2 C. B. (N. S.) 299; 109 R. R. 688 ("market value"); *Charrington & Co.* v. *Wooder* [1914] A. C. 71; 83 L. J. K. B. 220 ("fair market value": words discussed); *Biddell Brothers* v. *Clemens Horst Co.* [1911] 1 K. B. 934; 81 L. J. K. B. 42 ("net cash").

(*e*) (1834) 10 Bing. 376.

(*f*) (1834) 10 Bing. 482. See also *Laing* v. *Fidgeon* (1815) 6 Taunt. 108; 16 R. R. 589 ("24s. to 26s.").

(*g*) *Valpy* v. *Gibson* (1847) 4 C. B. 837; 6 L. J. C. P. 241; 72 R. R. 740; 2 Saund. 121 e., n. 2, by Williams, Serj., to *Webber* v. *Tivill* (1669).

The Code now enacts i. .. : —

Code, s. 8. Ascertainment of price.

"8.—(1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

"(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

What is meant by a reasonable price.

Thus, a reasonable price "may or may not agree with the *current price* of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes" (*h*).

Presumption of lowest value against seller.

Failing evidence of price or value, the Court will presume that goods of the lowest value of the kind delivered have been sent (*i*).

Estimate where goods destroyed.

Where the rate has been fixed, but an exact calculation of the price has become impossible by the destruction of the goods, as, for example, where the goods were to be weighed or measured to determine the price, the jury must make such an estimate as they reasonably can (*k*).

Interest

Where the goods are to be paid for by a bill or note which is not given, the buyer is liable to pay in addition a sum equal to the interest which would have accrued on the bill or note, as part of the price (*l*).

Price to be subsequently arranged by the parties.

If the parties agree that the price shall be as subsequently arranged between them, no contract of sale exists unless and until the price is fixed, for the parties have reserved to themselves an option as to the price, which is an essential element of a contract of sale (*m*), and the rule of reasonable price does not apply as the parties have impliedly excluded it. But a

(*h*) *Per Cur.* in *Acebal* v. *Levy* (1834) 10 Bing. 376; 3 L. J. C. P. 98; 38 R. R. 469.

(*i*) *Clunnes* v. *Pezzy* (1807) 1 Camp. 8.

(*k*) *Per* Cockburn, C.J., and Blackburn, J., in Ex. Ch. in *Castle* v. *Playford* (1872) L. R. 7 Ex. at 99, 100; 39 L. J. Ex. 150; and *per* Blackburn, J., in *Martineau* v. *Kitching* (1872) L. R. 7 Q. B. at 456; 41 L. J. Q. B. 227.

(*l*) *Marshall* v. *Poole* (1810) 13 East. 98; 12 R. R. 310; *Farr* v. *Ward* (1837) 3 M. & W. 25.

(*m*) *Loftus* v. *Roberts* (1902) 18 Times L. R. 532, C. A.; and cases cited; *cf. Broome* v. *Speak* [1903] 1 Ch. 586, C. A.; 72 L. J. Ch. 251. And see *Hall* v. *Conder* (1857) 2 C. B. N. S. 22, Ex. Ch., where it was the mode of payment only that was held over.

contract will exist if an intention can be inferred that at any rate a reasonable price shall be paid if the price is not fixed (*n*).

Price to be fixed by valuers.

It is not uncommon for the parties to agree that the price of the goods shall be fixed by valuers appointed by them. In such cases they are of course bound by their bargain, and the price when so fixed is as much part of the contract as if fixed by themselves. But it is essential to the formation of the contract that the price should be fixed in accordance with this agreement, and if the persons appointed as valuers fail, or refuse to act, there is no contract (*o*) in the case of an *executory* agreement, that is to say, an agreement to sell; even though one of the parties should himself be the cause of preventing the valuation (*p*); nor can the valuers delegate their authority (*q*). But if the agreement has been *executed* by the delivery of the goods, the seller will be entitled to recover the value estimated by the jury, if the purchaser should do any act to obstruct or render impossible the valuation, as in *Clarke* v. *Westrope* (*r*), where the defendant had agreed to buy certain goods at a valuation, and the valuers disagreed, and the defendant pending the valuation consumed the goods, so that a valuation became impossible.

There does not seem to be any authority to show whether, in the case of an actual *sale* at a valuation, the failure of the valuer to act would entitle the seller or the buyer to avoid the contract, and revest the property in the seller. It would probably depend upon the construction of the contract whether the provision for valuation is in this case collateral to the contract, or whether there is an implied condition subsequent justifying avoidance.

The Code enacts that:—

Code, s. 9. Agreement to sell at valuation.

"**9.**—(1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have

(*n*) *Jewry* v. *Bush* (1814) 5 Taunt. 302; *Bryant* v. *Flight* (1839) 5 M. & W. 114 (Parke, B., diss.). Parke, B.'s, dissent was, however, on the facts approved in *Roberts* v. *Smith* (1859) 28 L. J. Ex. 164.

(*o*) See *per Cur.* in *Loftus* v. *Roberts*, *ante*, 168.

(*p*) *Thurnell* v. *Balbirnie* (1837) 2 M. & W. 786, set out *post*, 170; *Vickers* v. *Vickers* (1867) L. R. 4 Eq. 529; 36 L. J. Ch. 946; *Milnes* v. *Gery* (1807) 14 Ves. 400; 9 R. R. 307; *Wilks* v. *Davis* (1817) 3 Mer. 507; *Richardson* v. *Smith* (1870) L. R. 5 Ch. 648; 39 L. J. Ch. 877. But see *Smith* v. *Peters* (1875) L. R. 20 Eq 511; 44 L. J. Ch. 613; and for the rules of equity, Fry, Spec. Perf. 3rd ed. s. 356, *et seq.*

(*q*) *Ess* v. *Truscott* (1837) 2 M. & W. 355; 6 L. J. Ex. 144; 46 R. R. 650.

(*r*) (1856) 18 C. B. 765; 25 L. J. C. P. 287; 107 R. R. 507.

been delivered to and appropriated (*s*) by the buyer he must pay a reasonable price therefor.

"(2.) Where such third party is prevented from making the valuation by the fault (*t*) of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault."

Thurnell v. *Balbirnie* (1837).

In *Thurnell* v. *Balbirnie* (*u*), the declaration averred an agreement that the defendant should purchase the plaintiff's goods "at a valuation to be made by certain persons, viz., Mr. Newton and Mr. Matthews, or their umpire," the former on behalf of the plaintiff, and the latter on behalf of the defendant: that Newton was ready and willing to value the goods, and that the defendant and Matthews, though notified and requested to proceed with the valuation, and to meet Newton for that purpose, continually neglected and refused to do so; and that the defendant was notified that Newton would meet Matthews or any other person whom the defendant might nominate for the purpose of making the valuation, but the defendant wholly neglected, &c. And the plaintiff went on to aver that Newton then proceeded to value the goods at the reasonable price of £500, which the defendant had neglected to pay. To this declaration there was a special demurrer for want of a distinct allegation that the defendant refused to permit Matthews to value on his part, and the demurrer was sustained. As the declaration stood, enough was not stated to make the buyer liable for the price.

Where the seller refused permission to the valuer appointed to enter his premises for the purpose of valuing the goods, a court of equity made a mandatory injunction to compel the seller to allow him to enter (*v*).

Where each party is to appoint a valuer, it is essential to the validity of the appointment that notice thereof should be given to the other party (*x*).

Where all the materials for a valuation are ascertained, and nothing remains to be done but a mathematical calculation, the valuation is substantially performed (*y*).

(*s*) "Appropriated" has no technical meaning, as in s. 18, but means here merely "taken as owner."

(*t*) *I.e.*, wrongful act or default: s. 62 (1).

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

(*v*) *Smith* v. *Peters* (1875) L. R. 20 Eq. 511; 44 L. J. Ch. 613. See also *Morse* v. *Merest* (1821) 6 Mad. 26.

(*x*) *Thomas* v. *Fredricks* (1847) 10 Q. B. 775; 16 L. J. Q. B. 393; 74 R. R. 502; *Teue* v. *Harris* (1847) 11 Q. B. 7; 17 L. J. Q. B. 1; 75 R. R. 270.

(*y*) *Gordon* v. *Whitehouse* (1856) 18 C. B. 747; 25 L. J. C. P. 300; 107 R. R. 495. See *Tansley* v. *Turner* (1835) 2 Bing. N. C. 151; 4 L. J. C. P. 272; 42 R. R. 564.

Where the parties have agreed to fix a price by the valuation of third persons, this is not equivalent to a submission to arbitration, within the Common Law Procedure Act, 1854 (*z*), now repealed by the Arbitration Act of 1889 (*a*), nor within the latter Act (*b*), unless the agreement is in substance a submission to an arbitrator (*c*) to decide between conflicting claims. It was therefore held in *Bos* v. *Helsham* (*d*), that where one party had appointed a valuer, and the other, after a notice in writing, had declined to do the same, as required by the contract, the thirteenth section of the former Act did not apply, so as to authorise the valuer appointed to act by himself as a sole arbitrator. The guiding principles whereby to distinguish a valuation from an arbitration were laid down by Lord Esher, M.R., in Re *Dawdy* (*e*), and in Re *Carus Wilson* (*f*), where he showed that the submission of a matter to a person's decision is an arbitration if an enquiry in the nature of a judicial enquiry is to be held, and decided upon evidence. On the other hand, there is a valuation where a person is appointed to ascertain some matter for the purpose of preventing differences from arising. He also pointed out that there may be cases of an intermediate kind, where, though disputes may have arisen, still it is not intended that there shall be a judicial enquiry. Such cases must be determined each according to its particular circumstances. Re *Carus Wilson* also shows that the fact that an umpire is to be appointed in case of disagreement does not of itself make the agreement an arbitration.

Valuation is not arbitration.

If the persons named as valuers accept the office or employment for reward or compensation, they, unlike an arbitrator, are liable in damages to the parties to the contract for neglect

Responsibility of valuers.

(*z*) 17 & 18 V. c. 125, ss. 11, 12, 13; *Collins* v. *Collins* (1858) 26 Beav 306; 28 L. J. Ch. 184; 122 R. R. 727; *Bos* v. *Helsham* (1866) L. R. 2 Ex. 72; 36 L. J. Ex. 20; *Vickers* v. *Vickers* (1867) L. R. 4 Eq. 529; 36 L. J. Ch. 946; *Turner* v. *Goulden* (1873) L. R. 9 C. P. 57; 43 L. J. C. P. 60; *Re Dawdy* (1885) 15 Q. B. D. 426; 54 L. J. Q. B. 574, C. A

(*a*) 52 & 53 V. c. 49, s. 26, and 2nd Sched.

(*b*) See s. 27; *Re Hammond* (1890) 62 L. T. 808.

(*c*) *Thomson* v. *Anderson* (1870) L. R. 9 Eq. 523; 39 L. J. Ch. 468; where the third person was to decide a difference as to the price.

(*d*) (1866) L. R. 2 Ex. 72; 36 L. J. Ex. 20. But see *Re Hopper* (1867) L. R. 2 Q. B. 367; 36 L. J. Q. B. 97; *Re Anglo-Italian Bank* (1867) L. R. 2 Q. B. 452.

(*e*) (1885) 15 Q. B. D. 426; 54 L. J. Q. B. 574, C. A.

(*f*) (1886) 18 Q. B. D. 7; 56 L. J. Q. B. 530, C. A. See also *Leeds* v. *Burrows* (1810) 12 East, 1 (valuation); *Goodyear* v. *Simpson* (1845) 15 M. & W. 16; 15 L. J. Ex. 191 (same); *Re Hammond and Waterlow* (1890) 62 L. T. 809 (same); *Turner* v. *Goulden* (1873) L. R. 9 C. P. 57; 43 L. J. C. P. 60; *Chambers* v. *Goldthorpe* [1901] 1 Q. B. 624; 70 L. J. Q. B. 482, C. A. (architect's certificate).

or default in performing their duties (*g*). But the valuer of one party is not, nor is the party appointing him, liable to the other party if the valuer does not act in the valuation (*h*). But, as provided by the Code, either party is liable to the other for wrongfully preventing the valuation (*i*). The appointment of a valuer is, unlike that of an arbitrator, irrevocable (*k*).

Price, how affected by increase or decrease of customs or excise duty.

The Finance Act, 1901 (*l*), in the case of the imposition, or increase, or repeal, or decrease of any customs, import, or excise duty on goods, and delivery of the goods after the day on which the new or increased duty, or the repeal or decrease, takes effect, as the case may be, provides, in the absence of a contrary agreement, for the recovery by the seller as an addition to the contract price, or for the deduction from the price by the purchaser if the seller had the benefit of the repeal or decrease, of a sum equal to the amount paid on account of the new duty, or the increase, or equal to the amount of the duty repealed or of the decrease, as the case may be: and in the case of a new duty any new expenses incurred, and in the case of a repealed duty any expenses saved, may be included in the addition to or deduction from the contract price respectively, the amount to be agreed upon by the parties or determined by the Commissioners of Customs or of Inland Revenue, as the case may be.

Civil law as to price.

In the civil law it was a settled rule that there could be no sale without a price certain. "It seems to be of the very essence of a sale," says Story, J., "that there should be a fixed price for the purchase. The language of the civil law on this subject is the language of common sense" (*m*). "Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest: sed et certum pretium esse debet," was the language of the Institutes (*n*). And it was a subject of long

(*g*) *Jenkins* v. *Betham* (1855) 15 C. B. 168; 24 L. J. C. P. 94; 100 R. R. 297; *Cooper* v. *Shuttleworth* (1856) 25 L. J. Ex. 114; 105 R. R. 346.

(*h*) *Cooper* v. *Shuttleworth*, *supra*.

(*i*) S. 9 (2), *ante*, 170.

(*k*) *Mills* v. *Bayley* (1863) 2 H. & C. 36; 32 L. J. Ex. 179; 133 R. R. 579.

(*l*) 1 Edw. 7. c. 7, s. 10, summarised. It repeals s. 2[2] of the Customs Consolidation Act, 1876, and s. 8 of the Finance Act, 1900, and is amended by the 2 Edw. 7. c. 7, s. 7, so as to apply to goods which "have undergone a process of manufacture or preparation, or have become a part or ingredient of other goods." As to the application of the Act, see *Conway* v. *Mulhern* (1901) 17 Times L. R. 730; *American Commerce Co.* v. *Boehm* (1919) 35 Times L. R. 224 (goods sold "duty paid"); *cf. Newbridge Rhondda Brewery Co.* v. *Evans* (1902) 86 L. T. 453; 18 Times L. R. 396; a decision under the repealed enactments.

(*m*) *Flagg* v. *Mann* (1837) 2 Sumner, 538.

(*n*) Inst. 3. 23. 1.

contest among the earlier jurisconsults whether the necessity for a *certain* price did not render invalid an agreement that the price should be fixed by a third person; but Justinian put an end to the question by positive legislation (*o*) to the same effect as in English law, that the sale, whether verbal, or in writing (*p*), was conditional on the valuation being made. "Sin autem ille qui nominatus est, vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto, nulla conjectura . . . servanda utrum in personam certam, an in boni viri arbitrium respicientes contrahentes ad haec pacta venerint" (*q*). The last words show that the civil law recognised no rule of reasonable price.

The price was no less certain, although the buyer also agreed in the contract to do some other thing, as to repair the seller's house, or to give him a lease of the property sold (*r*), or although the price fixed was in a certain event to be increased, *e.g.*, if the buyer resold at a profit (*s*). But there must be a common intention that the price was to be payable in fact as on a genuine sale (*t*).

With regard to the amount of the price, the law generally took no account of its adequacy, but left the parties to make their own bargain (*u*). But by a rescript of Diocletian and Maximian in A.D. 285 (*v*), if there were *laesio enormis*, that is to say, if a thing were sold at less than half its value (*verum pretium*) at the time of the contract, it was held equitable (*humanum*) that the seller should have the right of avoiding the sale, unless the buyer chose to make up what was wanting to the *pretium justum*, that is, the value of the thing.

(*o*) Code, 4, 38, 15.

(*p*) See Code, 4, 21, 17; Inst. 3, 23, with regard to the formalities of written contracts. The effect of the passage of the Institutes is set out *post*.

(*q*) Code, 4, 38, 15.

(*r*) Dig. 19, 1, 6, 1, and 21, 4. Mr. Moyle (Cont. of Sale, 68) points out that none of the authorities give any illustration of a *thing* being given by the buyer as well as the price. They all refer to the doing of some act by virtue of a *pactum adjucetum* not affecting the nature of the contract of sale.

(*s*) Dig. 18, 1, 7, 2.

(*t*) Code, 4, 38, 3 and 9; Dig. 18, 1, 36.

(*u*) Dig. 4, 4, 16, 4; 19, 2, 22, 3.

(*v*) Code, 4, 44, 2. See also 8. The first rescript uses the words "*rem majoris pretii*," but gives as an illustration the sale of a farm. It is doubtful whether it applied to movables. See Moyle's Contract of Sale, 180—183. It is noticeable that the French Civil Code only allows rescission *pour cause de lésion* in the case of immovables: Art. 1674.

French law.

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

PART II.

SALES UNDER S. 17 OF THE STATUTE OF FRAUDS, OR S. 4 OF THE CODE.

CHAPTER I.

WHAT IS A CONTRACT OF SALE WITHIN THESE SECTIONS.

History of the Statute of Frauds.

THE common law which recognised the validity of verbal contracts of sale of chattels, for any amount, and however proven, was greatly modified by the statute of 29 Charles 2 c. 3, passed in 1677. This celebrated enactment, known as the "Statute of Frauds" (*a*), is in force not only in England and Ireland (*b*) and most of our Colonies (*c*), but exists, with some slight variations, in almost every State of the American Union (*d*).

Its history was but imperfectly known till recent years; but the Ninth Report of the Historical Manuscripts Commission, issued in 1883, makes it clear that the true author of this important enactment was Chief Justice North, afterwards Lord Keeper Guildford. The history of the statute more in detail will be found in a note at the end of this Chapter (*e*).

The section of the statute which is specially applicable to S. 17.

(*a*) This name, by which it has long been known, was adopted by the Legislature in 1892: see the Short Titles Act, 1892, 1st Sched.

(*b*) The Irish Act, 7 W. 3. c. 12, which came into force in 1696, consists of twenty sections, of which ss. 2 and 13 correspond with ss. 4 and 17 respectively of the English Act. By some oversight the Irish s. 13 appears not to have been expressly repealed (as the Eng. s. 17 is by the Code), but it is in effect replaced by s. 4 of the Code: see *infra*.

(*c*) As to the Colonies see Note on the Application of English Law, &c., to British Possessions, *post*. It is not in force in India: see *post*.

(*d*) As to the law in Canada, see *post*, 191.

(*e*) *Post*, 193.

the subject of this treatise is the 17th (*f*), now replaced by the fourth section of the Code, and is as follows:

Statute of Frauds, s. 17.

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

What contracts embraced in it.

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

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

Until 1828 there were conflicting decisions upon the question whether the words "contracts for the sale of any goods, &c.," were applicable to agreements for future delivery—in other words, to *agreements to sell*—or only to contracts of bargain and sale—*i.e.*, actual sales (*h*); but this point was settled in 1829 by Lord Tenterden's Act (*i*), which provided that the enactment should apply to *agreements* to sell; and these

(*f*) S. 13 of the Irish Act, 7 Will. 3. c. 12, was in identical terms, except that it came into force from the 27th December, 1696. The word "their," the fifth word from the end of the section, was erroneously printed "other" in the Irish Act, but after comparison with the Statute roll this was corrected to "their": see Revised Ir. Stats. (1885) 318, note.

(*g*) See *post*, 177, n. (*k*).

(*h*) The argument that the section applied to *sales* only was largely founded on the word "*price*," which was changed in Lord Tenterden's Act to "*value*."

(*i*) 9 Geo. 4. c. 14, s. 7. The effect of this provision is now contained in s. 4 (2) of the Code, *infra*, which sub-section from the word "notwithstanding" is in identical terms.

enactments, as explained by the decisions (*k*), though repealed by the Code (*l*), are substantially re-enacted in the following terms:—

Code, s. 4. Contract of sale for ten pounds and upwards.

"4.—(1) A contract for the sale of any goods (*m*) of the value of ten pounds or upwards shall not be enforceable by action (*n*) unless the buyer shall accept (*o*) part of the goods so sold, and actually receive (*p*) the same, or give something in earnest (*q*) to bind the contract, or in part payment (*q*), or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

"(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

"(4.) The provisions of this section do not apply to Scotland."

The effect of this section is not to repeal that part of section 4 of the Statute of Frauds which deals with contracts not performable within a year. A contract of sale, like other contracts, must, if it be not so performable, be evidenced by some signed memorandum (*r*).

Distinction between sale and work and labour.

There have been numerous decisions, and much diversity and even conflict of opinion, in relation to the proper principle by which to test whether certain contracts are "contracts for the sale of goods, &c.," and therefore within section 17, or contracts for work and labour done and materials furnished. A review of some of the cases will exhibit the different lights in which the subject has presented itself to the minds of eminent Judges.

Atkinson v. *Bell* (1828).

In *Atkinson* v. *Bell* (*s*) the whole subject was much dis-

(*k*) *Scott* v. *Eastern Counties Ry.* (1843) 12 M. & W. 33; 13 L. J. Ex. 14; 67 R. R. 244; and *Harman* v. *Reeve* (1856) 18 C. B. 587; 25 L. J. C. P. 257; 107 R. R. 418, settled that the later enactment had the effect of substituting the word "value" for "price" in s. 17 of the Statute of Frands. Lord Blackburn, in *Maddison* v. *Alderson* (1883) 8 App. Cas. at 488; 52 L. J. Q. B. 737, considered it finally settled that the declaration in s. 17 that no contract should be "good" did not render a contract void or illegal, but (like the words in s. 4 "no action shall be brought") merely made it not enforceable by action.

(*l*) S. 60, and Sched.

(*m*) As defined in s. 62 (1) of the Code. See *post*.

(*n*) "Action" includes counterclaim and set-off: s. 62 (1). A person relying on s. 4 must in his pleading clearly state the point he intends to raise: *North* v. *Loomes* [1919] 1 Ch. 378; 88 L. J. Ch. 217.

(*o*) "Acceptance" is defined in s. 4 (3). See *post*.

(*p*) As to this, see *post*.

(*q*) See Chapter V., *post*.

(*r*) *Crested Miners' Co.* v. *Gardner* [1911] 1 K. B. 425; 80 L. J. K. B. 819, C. A.; *Mayor* v. *Pyne* (1825) 3 Bing. 285; 4 L. J. (O. S.) C. P. 36; 28 R. R. 625; *Boydell* v. *Drummond* (1809) 11 East, 142; 10 R. R. 450.

(*s*) 8 B. & C 277; 6 L. J. (O. S.) K. B. 258; 32 R. R. 382.

cussed. The action was in assumpsit for goods sold and delivered, goods bargained and sold, work and labour done, and materials provided. One Kay had patented a certain machine, and the defendants, thread manufacturers, wrote him *an order to procure to be made* for them as soon as possible some spinning-frames in the manner he most approved of. Kay employed Sleddon to make them for the defendants, informing Sleddon of the order received by him, and he superintended the work. After the frames were made they lay for a month on Sleddon's premises, and Kay then ordered Sleddon to make some changes in the frames, and after this was done, they were packed in boxes by Kay's directions, and remained on Sleddon's premises. On the 23rd of June, Sleddon wrote to the defendants that the frames had been ready for three weeks, and asked how they were to be sent, but got no reply. On the 8th of August, Sleddon became bankrupt, and his assignees required the defendants to take the machines; but they refused, whereupon this action was brought.

The Judges were all of opinion that the property in the goods had not vested in the defendants (*t*), and therefore that a count for goods bargained and sold could not be maintained; but that the facts might have sustained a verdict on a count for not accepting the frames. On the count for work and labour and materials, they held that these had been furnished by Sleddon for his own and not for the defendants' benefit; that is to say, that the contract was an executory agreement for sale, and not one for work, &c.

Bayley, J., said (*u*): "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials, he may maintain an action against you for work and labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work, but when the chattel has assumed the character bargained for, and the employer has accepted it, the party employed may maintain an action for goods sold and de-

(*t*) On this subject, see *post*.
(*u*) 8 B. & C. at 283—284; 6 L. J. (O. S.) K. B. 258; 32 R. R. 382.

livered; or if the employer refuses to accept, a special action on the case for such refusal; but he cannot maintain an action for work and labour, because his labour was bestowed *on his own materials, and for himself*, and not for the person who employed him."

Littledale, J., said: "The labour was bestowed, and the materials were found, *for the purpose of ultimately effecting a sale*, and if that purpose was never completed, the contract was not executed, and then work and labour will not lie. The work and labour and the materials were for the benefit of the machine-maker, and not for the defendants."

The concluding passage of the opinion of Bayley, J., is no doubt too broadly expressed. It appears to have been misunderstood (*r*), and to have been regarded as though it stated as a general proposition that an action for work and labour will not lie when performed on materials that are the property of the workman. But the learned Judge does not appear to have been laying down a universal test, but to have been speaking with reference to the particular facts of the case, where the workman was working on his own materials *and for himself*; "for the purpose," as it was put by Littledale, J., "of ultimately effecting a sale."

Smith v. *Surman* (1829).

In *Smith* v. *Surman* (*s*) an action was brought to recover the value of certain timber, under a verbal contract, by which the plaintiff agreed to sell to the defendant *at so much per foot* (*y*) the timber contained in certain trees then growing on the plaintiff's land, to be cut by the plaintiff. It was argued that this was not a contract for the sale of goods, but a mixed contract for work to be done and materials found. *Held*, that it was a contract for the sale of goods within section 17, and the plaintiff was nonsuited. Bayley, J., was of opinion, that "this was a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, was doing work *for himself*, and not for the defendant." And Littledale, J., said: "It is

(*r*) By Pollock, C.B., in *Clay* v. *Yates* (1856) 1 H. & N. 73, at 77; 25 L. J. Ex. 237, at 238; 108 R. R. 461; adopted by Mr. Benjamin, see 4th ed. 99, 106. It is submitted that the observations of Maule, J., and Erle, J., in *Grafton* v. *Armitage* (1845) 2 C. B. 336, at 339; 15 L. J. C. P. 20 (cited *post*, 180), are not opposed to the *dictum* of Bayley, J., properly understood.

(*s*) 9 B. & C. 561; 7 L. J. (O. S.) K. B. 296; 33 R. R. 259.

(*y*) This shows that the seller had to put the goods into a deliverable state before the property passed. See on this *post*, *et seqq.*; and s. 18 of the Code, rules 2 and 5 (1), *post*.

sufficient if, at the time of the *completion* of the contract, the subject-matter will be goods, wares, and merchandise."

Grafton v. *Armitage* (1845).

Grafton v. *Armitage* (*z*) was a somewhat singular case. The plaintiff was a working engineer. The defendant was the inventor of a life-buoy, in the construction of which curved metal tubes were used. The defendant employed plaintiff to devise some plan for a machine for curving the tubes. The plaintiff made drawings and experiments, and ultimately produced a drum or mandrel, which effected the object required. His action was *debt* for work, labour, and materials, and for money due on accounts stated. The particulars were "for scheming and experimenting for, and making a plan-drawing of, a machine, &c., engaged three days, at one guinea per day, £3 3s.; for workman's time in making, &c., and experimenting therewith, £2 5s.; for use of lathe for one week, 12s.; for wood and iron to make the drum, and for brass tubing for the experiments, 5s." Defendant insisted, on the authority of *Atkinson* v. *Bell*, that the action should have been *case* for not accepting the goods, not debt for work and labour, &c., citing the *dictum* at the close of Bayley, J.'s, opinion. But in the course of the argument, Maule, J., said: "In order to sustain a count for work and labour, it is not necessary that the work and labour should be performed upon materials that are the property of the *plaintiff*"—plainly meaning *defendant*—"or that are to be handed over to him." And Erle, J., said: "Suppose an attorney were employed to prepare a partnership or other deed: the draft would be upon his own paper, and made with his own pen and ink; might he not maintain an action for work and labour in preparing it?"

In delivering the decision in favour of the plaintiff, Tindal, C.J., pointed out as the distinction, that in *Atkinson* v. *Bell*, the substance of the contract was that the machines to be manufactured were to be *sold* to the defendant, but that in the case before the Court "there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered": the intention was that the plaintiff should employ his skill, labour and materials in devising for the use of the defendant a mode of attaining a given object. Coltman, J., concurred, and said that the opinion of Bayley, J., was put on "precisely the same ground" as that on which Tindal, C.J., put this case. "The claim of a tailor or a shoemaker is for the price of goods when

(*z*) 2 C. B. 336; 15 L. J. C. P. 20.

delivered, and not for the work or labour bestowed by him in the fabrication of them."

In *Clay* v. *Yates* (*a*), the subject was treated by Pollock, C.B., in 1856, as a matter entirely *res nova*. The contract was that the plaintiff, a printer, should print for the defendant a second edition of his book, the plaintiff to find the materials, including the paper. *Held*, that this was not a contract for the sale of a thing to be delivered at a future time, nor a contract for making a thing to be sold when completed, but a contract to do work and labour, furnishing the materials; and that the case was not governed by Lord Tenterden's Act. *Clay* v. *Yates* (1856).

Pollock, C.B., said: "As to the first point, whether this is an action for goods sold and delivered, and requiring a memorandum in writing within the 17th section of the Statute of Frauds, I am of opinion that this is properly an action for work and labour, and materials found. I believe it is laid down in Chitty on Pleading, that that is the count that may be resorted to by farriers, by medical men, by apothecaries, and I think he mentions surveyors distinctly, and that is the form in which they are in the habit of suing." After referring to the *dictum* of Bayley, J., in *Atkinson* v. *Bell*, above cited (*b*), and to what his Lordship treated as the answer given to it by Maule, J., in *Grafton* v. *Armitage* (*c*), Pollock, C.B., said: "It may be that in all these cases, part of the materials is found by the party for whom the work is done, and the other part found by the person who is to do the work. There may be the case where the paper is to be found by one, and the printing by the other, and so on; the ink, no doubt, is always found by the printer. But it seems to me the true rule is this: — whether *the work and labour is of the essence of the contract, or* whether it is *the materials* that are found. My impression is, that in the case of a work of art, whether it be silver or gold, or marble, or common plaster, that is a case of the application of labour of the highest description, and the material is of no sort of importance as compared with the labour, and therefore that all this would be recoverable as work and labour and materials found. I do not mean to say the price might not be recovered as goods sold and delivered if the work were completed and sent home. . . . I am rather inclined to think it is only where the

(*a*) 25 L. J. Ex. 237; 1 H. & N. 73; 108 R. R. 461.
(*b*) *Ante*, 179.
(*c*) *Ante*, 180.

bargain is *merely for goods* thereafter to be made, and not where it is a *mixed contract* of work and labour and materials found, that the Act of Lord Tenterden applies."

Alderson, B., concurred; and Martin, B., said: "There are three matters of charge well known in the law—for labour simply, for work and materials, and another for goods sold and delivered. And I apprehend every case must be judged of by itself. What is the present case? The defendant having written a manuscript, takes it to the printer to have it printed for him. . . . I think the plaintiff was employed to do work and labour, and supply materials for it, and he is to be paid for it; and it really seems to me that the true criterion is this: Supposing there was no contract as to payment, and the plaintiff had brought an action, and sought to recover the value of that which he had delivered, would that be the value of the book as a book? I apprehend not, for the book might not be worth half the value of the paper it was written on." The learned Baron also put the case (*d*): "Suppose an artist paints a portrait for three hundred guineas, and supplies the canvas for it, which is worth 10*s*., surely he might recover under a count for work and labour (*e*).

Lee v. *Griffin* (1861).

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

Crompton, J., said: "When the contract is such that a

(*d*) During the argument: see 1 H. & N. at 76; 25 L. J. Ex. 237; 108 R. R. 461.

(*e*) Mathew, J., however, in *Isaacs* v. *Hardy* (1884) 1 Cab. & E. 287, follg. *Lee* v. *Griffin*, *infra*, held that the case contemplated was a contract for the sale of goods.

(*f*) 30 L. J. Q. B. 252; 1 B. & S. 272; 124 R. R. 555.

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

Hill, J., said: "I think the decision in *Clay* v. *Yates* perfectly correct, according to the particular subject-matter of the contract in that case, which was not a case of a chattel ordered by one of another, thereafter to be made by the one, and afterwards to be delivered to the other; but when the subject-matter of the contract is a chattel to be afterwards delivered, then the cause of action is goods sold and delivered, and the seller cannot sue for work and labour. In my opinion, *Atkinson* v. *Bell* is good law, subject only to the objection to *dictum* of Bayley, J., which has been repudiated by Maule, J., and Erle, J., in *Grafton* v. *Armitage*. . . . The proposition of Bayley, J., that where a person has bestowed work and labour on his own materials he cannot maintain an action for work and labour is certainly not universally true."

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 labour 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 labour* is the proper remedy. An attorney employed to draw a deed is a familiar instance of the latter proposition, and it would be an abuse of language to say that the paper or parchment of the deed were goods sold and delivered. In *Clay* v. *Yates*, the circumstances were peculiar; but had the contract been completed, it could scarcely perhaps have been said that the result was the sale

of a chattel. . . . Here, if the teeth had been delivered and accepted, the contract for the sale of a chattel would have been complete. I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been nevertheless for the sale of a chattel."

Remarks on the cases.

In reviewing these decisions, it is surprising to find that a rule so satisfactory and apparently so obvious as that laid down by Blackburn, J., in *Lee* v. *Griffin*, in 1861, although suggested by Littledale, J., in 1828, in *Atkinson* v. *Bell*, should apparently have escaped the attention of the other eminent Judges who had been called on to consider the subject. From the very definition of a sale, the rule would seem to be at once deducible: that if the contract is intended to *result in transferring for a price* from B. to A. *a chattel in which A. had no previous property*, it is a contract *for the sale* of a chattel; and unless that be the case, there can be no sale. In several of the opinions this idea was evidently in the minds of the Judges (*g*), but it was not clearly and distinctly brought into view before the decision in *Lee* v. *Griffin*.

Materials contributed by each party.

It being, therefore, evident, according to the rule above laid down, that where a workman supplies all the materials for a chattel to be made there is a contract of sale between him and his employer, and conversely that where the workman supplies none the contract can only be for work and labour, what happens when each party supplies some of the materials? The following is an instructive case on this point, and also shows the difference between a contract of sale and the employment of a servant or agent.

Dixon v. *London Small Arms Co.* (1876).

In *Dixon* v. *The London Small Arms Co.* (*h*), the Secretary for War issued tenders for the supply of 13,875 rifles, to be made according to the plaintiff's patent, and the defendants contracted to supply them at £3 10s. each, the stock in the rough and the steel tube for the barrel being supplied *out of Government stores*, their value, 9s. 8d., to be deducted from the price. Delivery was to be at the expense of the contractors, and the Government had the right during

(*g*) See especially *per* Bayley, J., and Littledale, J., in *Atkinson* v. *Bell*, *ante*, 178, 179, and Tindal, C.J., in *Grafton* v. *Armitage*, *ante*, 180.

(*h*) (1876) 1 App. Cas. 632; 1 Q. B. D. 384; 46 L. J. Q. B. 617, C. A.; (1875) L. R. 10 Q. B. 130; 44 L. J. Q. B. 63. See also *Howard* v. *Tweedale*, (1895) 12 Times L. R. 28.

manufacture and on delivery to inspect and reject any rifles as not being according to pattern, and these were then to be removed at the contractors' expense. In the manufacture the defendants applied the plaintiff's patent to the breech-action of the rifles, and being sued for infringement of patent justified as being servants or agents of the Crown, the Crown having the right, it was contended, to use by its servants or agents a patented process without compensation to the patentee (*i*). *Held*, by the Court of Queen's Bench, that the contract was not for the employment of a servant or agent at a salary or wages, but simply an ordinary contract for the manufacture and supply of goods. On appeal, this decision was reversed by the Court of Appeal (*k*), who held that the patentee was not entitled to compensation, as the defendants had been directly employed by the Crown to manufacture the articles, and that the fact that they were also contractors, and were not working in the workshops of the Crown, was immaterial; but the decision of the Queen's Bench was unanimously restored by the House of Lords (*l*).

Lord Cairns, L.C., after quoting the provisions of the contract said (*m*): "The result of the whole is this: what I may call the raw material for the barrel, the steel tube, is supplied by the Government at a certain price; the butt or stock of the rifle is supplied by the Government at a certain price; all the other component parts of the arm have to be provided or made (for the contract is consistent with either view) by the contractors. The whole component parts have to be inspected from time to time by the officers of the Government. . . . When the whole is, to use the technical term, 'assembled,' when all the pieces of the arm are put together, then if it complies with the specification, and in that case only, it is to be taken over and accepted by the Government, and *the property in it is to pass to the Government*, and on the other hand, the price is to be paid for the article to the contractors. . . . During this process, what is the position of the person who is called the contractor? He is clearly not a servant of the Crown. . . . He is a tradesman manufacturing certain goods for the purpose of supplying

(*i*) See *Feathers* v. *The Queen* (1865) 6 B. & S. 257; 35 L. J. Q. B. 200. The House of Lords found it unnecessary to declare whether this case was properly decided, for, assuming it was, they held that the defendants were not servants or agents of the Crown: see 1 App. Cas. at 640, 655. The headnote, *ibid.* at 632, is therefore somewhat misleading.

(*k*) Kelly, C.B., James, L.J., and Mellish, L.J., and Grove, J.

(*l*) Lords Cairns, L.C., Hatherley, Penzance, O'Hagan, and Selborne.

(*m*) 1 App. Cas. at 644—645; 46 L. J. Q. B. 617.

them according to a certain standard. . . . During the time of the manufacture the property at all events, in that which concerns the present case, namely, the property in the lock, or the breech-action of the rifle is not the property of the Crown. The materials are not the materials of the Crown. . . . I find here simply the ordinary case of a person who has undertaken to supply manufactured goods. . . . I find him engaged in that work *on his own account* up to the time when the article is completed, and handed over to, and accepted by, the person who has given the order."

Lord Penzance, after pointing out that the real question to determine was whether the contract was one of agency or of sale, put certain tests (*n*), such as: If the defendants, while the breech-actions were being manufactured, had sold some to other persons, would that alone have given the Crown a cause of action? Did every piece of work as it was put upon the Government materials become the property of the Crown? Could the Crown have given special directions with regard to the work? In case of fire, would the Crown have borne the loss of the breech-actions? All these questions he answered in the negative, and showed that the incidents so negatived belonged to a contract of agency as distinguished from a contract of sale. He then proceeded: "I think the true distinction in this case is between an authority or mandate to do a thing for a money reward, in the doing of which, whether the individual is a servant or only a contractor, he is all along *acting as an agent*, and a contract for the supply and acceptance, if approved, when completed, of an article to be made by the contractor, in the making of which the contractor, though working under inspection, is all along *acting on his own behalf*, and at his own risk."

Sale distinguished from bailment.

It was not necessary for their Lordships in the preceding case to decide what was the subject-matter of the sale, whether it was the completed rifle, or the contractor's materials only. For the reasons given in the two American cases now to be considered, it is submitted that it was the completed rifle. This view renders it necessary to harmonise the principle of a sale to an employer who has furnished part of the materials with the principle that additions to a chattel bailed, as a general rule, vest by accession in the bailor. Thus, cases of joint contribution of materials give rise to difficult questions of law.

(*n*) 1 App. Cas. at 653—655; 46 L. J. Q. B. 617.

A bailment is a delivery of a thing by one person to another for a certain purpose upon the terms that the bailee shall return the same thing to the bailor, or deliver it to some one in accordance with the bailor's instructions, after the purpose has been fulfilled. Where the terms are that the bailee shall pay money or deliver some *other* valuable commodity to the bailor, and not return the identical subject-matter, either in its original or altered form, this is a transfer of property for value and not a bailment (*o*). Additions or accretions to a chattel bailed become the property of the bailor (*p*). *Res accessoria sequitur rem principalem.* Definition of bailment.

In *Merritt* v. *Johnson* (*q*), which is the leading case in America, one Travis had agreed to build a ship for an employer, who was to supply the joiner's work. When the ship was one-third completed, she was seized by the sheriff under a fi. fa. against Travis, and was sold to the defendant, who completed her. The employer had in the meantime assigned his contract to the plaintiff, who demanded the ship of the defendant, and on his refusal brought trover. *Held*, that, as Travis had supplied the timber for the frame of the ship, he had furnished the principal materials, and the vessel, therefore, in her incomplete state, including the employer's materials, was his property, and the rule of law applied that "where the materials of another are united to materials of mine by my labour, or by the labour of another, and mine are the principal materials, and those of the other only accessory, I acquire the right of property in the whole by right of accession" (*r*). *Merritt* v. *Johnson* (1811).

In *Mack* v. *Snell* (*s*), the employer delivered to the workman handles, to which the workman was to add blades and make completed articles, viz., pruning shears. Some of the shears were delivered and retained by the employer without objection for four years, and until the workman brought this action for work done and materials provided. The de- *Mack* v. *Snell* (1893)

(*o*) See *South Australian Insurance Co.* v. *Randell* (1869) L. R. 3 P. C. 101; *Powder Co.* v. *Burkhardt* (1877) 97 U. S. 110; *Bentley Brothers* v. *Metcalfe & Co.* [1906] 2 K. B. 548; 75 L. J. K. B. 891 (sale of electric power); Sweet's Law Dict., "Bailment"; Story on Bailment, § 2; Steph. Crim. L., Art. 285; and *cf. per* A. L. Smith, J., in *Reg.* v. *Ashwell* (1885) 16 Q. B. D. at 198—199; 55 L. J. M. C. 65.

(*p*) *Mack* v. *Snell* (1893) 140 N. Y. 193, *infra*.

(*q*) 7 Johns. (N. Y. Sup. Ct.) 473. See also an instructive judgment of Beardsley, J., in *Gregory* v. *Stryker* (1846) 2 Denio (N. Y. Sup. Ct.) 628.

(*r*) Citing Bracton, De Acq. Rer. Dom. ch. 2. ss. 3, 4; Pothier, Traité du Droit de Propriété, Nos. 169, 180; Dig. 6, 1, 61.

(*s*) 140 N. Y. 193, Andrews, C.J., Earl, J., Finch, J., Peckham, J., and Gray, J., *diss.* O'Brien, J., and Maynard, J.

fendant proved that the shears were not according to sample, and were worthless. It was admitted (perhaps somewhat strangely) that the handles, which were worth not more than a quarter of the completed articles, were the *principal* materials, and that the contract was one of bailment, and not of sale. *Held*, by the Court of Appeals of the State of New York that, as the workman's materials on being affixed to the employer's vested in the latter *accessione*, and not as a seller's materials vest under a contract of sale by acceptance, the employer who had merely retained his own goods was not bound to pay for worthless work.

Importance of ownership of principal materials in this connection.

To all three cases the rule is applicable that accretions and additions to the principal chattel vest by accession in the owner of that chattel (*t*). In *Dixon's Case* it was, it is apprehended, the workman who owned the principal chattel, in the two American cases it was the employer. The question which party has supplied the "principal materials," will obviously vary according to circumstances, and the relative value of the materials will not be conclusive on the point. The problem will sometimes be a difficult one to determine.

Sale by part owner.

There would seem to be a third intermediate class of case, viz., where each party furnishes part of the materials, but it is impossible to regard that furnished by either as the principal part to which the other is a mere accessory. Suppose that a jeweller, possessed of an antique brooch of great value, agrees with a customer to fix into it a gem of equal value belonging to the customer, who is to take the completed article at a fixed sum. Such a case would seem to be in the nature of a contract of sale between two part owners of the completed chattel (*u*).

Work, labour and materials by solicitor, printer, etc.

The principles already discussed have shown that a contract of sale is not constituted merely by reason that the property in materials is to be transferred to the employer. If they are simply accessory to work and labour, the contract is for work, labour, and materials (*v*). Such is the case of medicine supplied by a medical man to a patient (*w*), or by a farrier to a horse (*y*); of plans made by an architect (*z*):

(*t*) The civil law was the same: "nam proprietas totius navis carinæ consum sequitur": Dig. 6, 1, 61.

(*u*) See Code 1 (1), *ante*, 1.

(*v*) *Per* Crompton, J., in *Lee* v. *Griffin*, *ante*.

(*w*) See *per* Pollock, C.B., in *Clay* v. *Yates* (1856) 25 L. J. Ex. 237; 1 H & N. 73; 108 R. R. 461, cited *ante*, 181.

(*y*) *Clark* v. *Mumford* (1811) 3 Camp. 37.

(*z*) *Gibbon* v. *Pease* [1905] 1 K. B. 810; 74 L. J. K. B. 502.

or drafts by a solicitor (*a*). The example of an attorney employed to draw a deed, is dismissed by Blackburn, J., in *Lee* v. *Griffin* (*b*), with the simple remark that "it would be an abuse of language to say that the paper or parchment were goods sold and delivered"; and he adds that the case of a printer printing a book would most probably fall within the same category. With regard to such cases, it has been pointed out in an article by Mr. Justice Stephen and Sir Frederick Pollock (*c*) that neither the book when printed, nor the deed when drawn, is the absolute property of the printer or the solicitor. The author's copyright in the book, and the client's interest in the deed, qualify the proprietary rights of the person employed. The printer cannot sell the book to any one else (*d*), nor can the attorney lawfully destroy the deed. A book is more than a bare combination of ink and paper; and the learned writers suggest that the materials have ceased to exist as such, and that the new product is the property of the employer, subject to the printer's remedies for the price of his labour. In other words, the printer's materials on being added to those of the employer, which are the principal materials, vest in the latter *accessione*.

Another suggested test of sale or work and labour.

The following is the rule submitted by these learned writers, as a definition of a contract of work and labour in making a thing: "A contract by which one person promises to make something which when made will not be his absolute property, and by which the other person promises to pay for the work done, is a contract for work, although the payment may be called a price for the thing, and although the materials of which the thing is made may be supplied by the maker" (*e*).

Materials for chattel to be sold when completed are not goods sold.

Where a contract is made for the sale of a chattel to be manufactured, the workman cannot sue the employer for goods sold in respect of the materials used, for the contract is entire. No right to maintain *any* action vests in him during the progress of the work; on completion he may sue for the price of the completed chattel, or for non-acceptance (*f*).

(*a*) *Ex parte Horsfall* (1827) 7 B. & C. 528; 6 L. J. (O. S.) K. B. 48; 31 R. R. 266.
(*b*) (1861) 30 L. J. Q. B. at 254; 1 B. & S. at 277—278; 124 R. R. 555.
(*c*) 1 Law Quart. Rev. 9, n. (4).
(*d*) See *per* Hill, J., in *Lee* v. *Griffin*, *ante*, 182.
(*e*) 1 Law Quart. Rev. 10.
(*f*) See *per* Bayley, J., in *Atkinson* v. *Bell* (1828) 8 B. & C. 277, at 283; 6 L. J. (O. S.) K. B. 258; 32 R. R. 382; cited *ante*, 178; *Reid* v. *Macbeth and Gray* [1904] A. C. 223, 232; 13 L. J. P. C. 57.

Nor is a chattel intended to be fixed to land or to another chattel.

Where a contract is made to furnish a machine or a movable thing of any kind, and before (*g*) the property in it passes, to fix it to land (*h*) or to another chattel (*i*), it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables, as such, but to improve the land or other chattel, as the case may be. The consideration to be paid to the workman is not for a transfer of chattels, but for work and labour done and materials furnished.

The authorities which have been considered appear to support the following propositions:—

Propositions.

1. A contract whereby a chattel is to be made and affixed by the workman to land or to another chattel before the property therein is to pass, is not a contract of sale, but a contract for work, labour and materials, for the contract does not contemplate the delivery of a chattel as such (*k*).

2. When a chattel is to be made and ultimately delivered by a workman to his employer, the question whether the contract is one of sale or of a bailment for work to be done depends upon whether previously to the completion of the chattel the property in its materials was vested in the workman or in his employer (*l*).

3. Accordingly

(i.) Where the employer delivers to a workman either all or the principal materials of a chattel on which the workman agrees to do work, there is a bailment by the employer, and a contract for work and labour, or for work, labour and materials (as the case may be), by the workman (*m*).

Materials added by the workman, on being affixed to or blended with the employer's materials, thereupon vest in

(*g*) *Secus*, where there is a sale of the component parts, with an additional contract to affix: *Pritchett Co.* v. *Currie* [1916] 2 Ch. 515, C. A.; 85 L. J. Ch. 753.

(*h*) *Cotterell* v. *Apsey* (1815) 6 Taunt. 322; *Tripp* v. *Armitage* (1839) 4 M. & W. 687; 8 L. J. Ex. 107; 51 R. R. 762; *Clark* v. *Bulmer* (1843) 11 M. & W. 243; 12 L. J. Ex. 463; *Chanter* v. *Dickinson* (1843) 5 M. & G. 253; 12 L. J. C. P. 147; 63 R. R. 279.

(*i*) *Anglo-Egyptian Navigation Co.* v. *Rennie* (1875) L. R. 10 C. P. 271; 44 L. J. C. P. 130 (new boilers and machinery to a ship); *Seath* v. *Moore* (1886) 11 App. Cas. 350; 55 L. J. P. C. 54, H. L. (Sc.) (new engines for ships being built).

(*k*) See cases cited in nn. (*b*) and (*i*), *supra*.

(*l*) *Lee* v. *Griffin* (1861) 30 L. J. Q. B. 252; 1 B. & S. 272; 124 R. R. 555; *ante*, 182.

(*m*) *Mack* v. *Snell* (1893) 140 N. Y. 193, *ante*, 187; Story on Bailment, § 438.

the employer by accession, and not under any contract of sale (*n*).

(ii.) Where the workman supplies either all or the principal materials, the contract is a contract of sale of the completed chattel (*o*), and any materials supplied by the employer when added to the workman's materials vest in the workman by accession (*p*).

4. The fact that the value of the materials supplied by one of the parties exceeds the value of the materials supplied by the other does not conclusively prove that the more valuable are the principal materials (*q*).

Auction sales

It was at one time doubted whether sales of goods by public auction were embraced within the statute, but the question suggested on this point by Lord Mansfield, in *Simon* v. *Motivos* (*r*), has long been settled in the affirmative (*s*).

Law in Canada.

The English rule in *Lee* v. *Griffin* (*t*) has been followed in Upper Canada under a statute identical with Lord Tenterden's Act (*u*). The Court of Appeal of the Province of Ontario (*v*) have moreover extended it so as to cover a contract by printers and lithographers to print on their own paper bonds and coupons according to a special form.

Statute of Frauds in Quebec.

Article 1233 of the Civil Code of Lower Canada provides (*inter alia*) that "proof by witnesses is admissible (1) of every fact relating to commercial matters; (2) in every matter where the principal of the sum or the value claimed does not exceed fifty dollars." And Article 1235 adopts with modifications section 17 of the Statute of Frauds, as amended

(*n*) *Mack* v. *Snell*, *supra*; *Clark* v. *Mumford* (1811) 3 Camp. 37; *per* Crompton, J., and Blackburn, J., in *Lee* v. *Griffin* (1861) 1 B. & S. at 275—276, 278; 30 L. J. Q. B. 252; 124 R. R. 555.

(*o*) *Dixon* v. *London Small Arms Co.* (1876) 1 App. Cas. 632; 1 Q. B. D. 384; 46 L. J. Q. B. 617, C. A.; (1875) L. R. 10 Q. B. 130; 44 L. J. Q. B. 63; *ante*, 158; *Merritt* v. *Johnson* (1811) 7 Johns. (N. Y. Sup. Ct.) 473, *ante*, 187; Story on Bailment, §§ 427 a, 438.

(*p*) *Merritt* v. *Johnson*, *supra*.

(*q*) *Per* Beardsley, J., in *Gregory* v. *Stryker* (1846) 2 Denio (N. Y.) 628, at 630.

(*r*) (1766) 3 Burr. 1921; 1 W. Bl. 599. And see *per* Lord Blackburn, in *Maddison* v. *Alderson* (1883) 8 App. Cas. at 488; 52 L. J. Q. B. 737.

(*s*) *Per* Lord Ellenborough in *Hinde* v. *Whitehouse* (1806) 7 East, 558; 8 R. R. 676; *Kenworthy* v. *Schofield* (1824) 2 B. & C. 945; 2 L. J. (O.S.) K. B 175; 26 R. R. 600.

(*t*) *Ante*, 182.

(*u*) In *Wolfenden* v. *Wilson* (1873) 33 Up. Can. Q. B. 442 (tombstone). The Statute is c. 44 of Consol. St. of Up. Can. s. 11.

(*v*) In *Canada Bank Note Co.* v. *Toronto R. W. Co.* (1895) 22 Ont. App. 492. But see the judgment of Osler, J. A., which was given with great doubt; and *cf.* in *Am. Central Lithographing Co.* v. *Moore* (1889) 17 Am. St. Rep. 156 (Wisc.). The rule in that State is similar to that in Massachusetts.

by Lord Tenterden's Act, by providing that "in commercial matters, where the sum of money or the value in question exceeds fifty dollars, no action or exception is maintainable against a person, or his representatives, without a writing signed *by him*, in the case" (*inter alia*) "of any contract for the sale (*x*) of goods, unless the buyer has accepted *or* received part of them, or has given consent" (*y*). And "the rule applies even although the goods are deliverable at a future date, or are not, at the time of the contract, ready for delivery."

Civil law.

By the civil law, if the employer furnished the materials for the making of a chattel the contract was a *conductio operis faciendi* by the workman; if the workman supplied the materials the contract was *emptio et venditio*. The latter point was settled by Justinian contrary to the opinion of Cassius, who thought the contract was a mixed one of labour and of sale (*z*). Where the materials were jointly contributed, the contract was one of *locatio et conductio* if the employer's were the principal materials, and *emptio et venditio* if the principal materials were the workman's (*a*). The illustration given in the Digest is of a ship, "nam proprietas totius navis carinæ causam sequitur"; or of a house to be built on the employer's ground. In both cases the property in the accessory passed *accessione* to the principal thing.

French Civil Code.

The French Civil Code recognises the same distinction, dependent on the ownership of the materials, between sale and work and labour. By Article 1788, where the workman supplies the materials the thing is at his risk unless the employer has made default in taking delivery ("fût en demeure"); and by Article 1789, if the workman supplies only his labour and skill he is responsible only for negligence. But Article 1790 provides that, if in the case last supposed the thing perishes before delivery, even though the workman be not negligent, and the employer not in default, the workman cannot recover compensation for his work, unless the thing perished through its internal defect (*b*).

(*x*) See *Carruthers & Co.* v. *Schmidt* (1916) 54 Can. S. C. 131 (action by broker for commission maintainable).

(*y*) See *Le May* v. *Le Febre* (1912) 41 Queb. L. R. 541. Accordingly, as in England, oral evidence of acceptance or receipt can be given: *Munn* v. *Berger* (1884) 10 Can. S. C. 512. See also *Martin* v. *Galibert* (1915) 47 Quebec Super. Ct. 181.

(*z*) Inst. 3, 24, 4; Dig. 18, 1, 20; 19, 2, 2, 1.

(*a*) Dig. 6, 1, 61; 18, 1, 20; 19, 2, 22, 2.

(*b*) Pothier on this point approves of the civil law rule above stated in Dig. 19, 2, 59: Cont. de Louage, 433. Other writers are of opinion (adopted by s. 1790 of the French Code) that the loss should be divided, the employer

Note on the History of the Statute of Frauds (c).

Roger North, in his Life of Sir Francis North, Lord Keeper Guilford (vol. i., p. 108), says: "He had a great hand in the Statute of Frauds and Perjuries, of which the Lord Nottingham said that every line was worth a subsidy. But at that time the Lord Chief Justice Hale had the pre-eminence and was chief in the fixing that law: although the urging part lay upon him [*i.e.*, Sir F. North, C.J.], and I have reason to think it had the first spring from his Lordship's motion. For I find in some notes of his, and hints of amendments in the law, every one of those points which were there taken care of." Lord Mansfield, C.J., in 1757, said that the statement which had been made that the Act was drawn by Hale, C.J., was "scarce probable. It was not passed till after his death": 1 Burr. 418, which took place on Christmas Day, 1676. Lord Ellenborough, however, in 1808 speaks of him as the reputed author: 5 East, 17. Among the MSS. of Lord Nottingham, given in 1823 by Lord Eldon to Mr. Swanston, the reporter (see note to *Crowley's Case* (1818) 2 Swanst. 83), was Lord Nottingham's report of the case of *Ash* v. *Abdy* (1678) 3 Swanst. 664, Appx., in which he said on June 13th, 1678, fourteen months after the passing of the law: "I had some reason to know the meaning of that law, for it had its first rise from me, who brought in the Bill into the Lords' House, though it afterwards received some additions and improvements from the Judges and civilians." Lord Campbell in his Life of Nottingham gives him the credit of being the author of the Statute: Lives of the Chief Justices, ii. 345.

So the matter stood until the issue in 1883 of the Ninth Report of the Historical Manuscripts Commission, which dealt with the House of Lords papers (*d*). From these it appears that Lord Nottingham's claim has been put too high, and that in fact his share in the Statute was a modest one, while its real author was not Sir Matthew Hale but Sir Francis North. These papers show that the original draft of the Bill, which was first introduced in the House of Lords in 1674, was in Lord Nottingham's (then Lord Keeper Finch's) handwriting. The second clause of this draft provided that "in all actions upon the case, actions of debt, or other personal actions, . . . upon any assumpsit, promise, contract, or agreement, made or supposed to be made by parole, and whereof no memorandum, note, or memorial in writing shall be taken by the direction of the parties thereunto, no greater damages shall at any time be recovered than the sum of . . . Provided that this Act shall not extend to . . . actions . . . grounded upon contracts or agreements for wares sold, or money lent, or upon

losing his materials, the workman the value of his work and materials. See the subject discussed in Story on Bailment, §§ 426—427. The English common law follows the two civil law rules stated in the text, throwing the risk of loss by *vis major* on the employer or the workman respectively according as the contract was not or was entire. See and *cf. Menetone* v. *Athawes* (1764) 3 Burr. 1592, and *Appleby* v. *Myers* (1867) L. R. 2 C. P. 651.

(c) This Note is by the Editors of the 5th edition.

(d) The Editors of the 5th edition were indebted to Prof. Brown, of Glasgow, for calling their attention to these papers. In fact Prof. Brown may be regarded as the discoverer of the history of the statute

any *quantum meruit*, or any other assumpsits or promises which are created by the construction or operation of law." In 1675 the Judges were summoned by the committee. For Lord Finch's second clause were substituted sections 4 and 17 of the Statute, as we know it, and North, C.J., added almost verbatim the clauses from section 12 to the end of the Statute. The substance of sections 19—23, dealing with nuncupative wills, was suggested by the Judge of the Prerogative Court, Sir Leoline Jenkins, and drafted by North, and adopted. The Bill having been introduced and dropped in no less than three sessions, and having been submitted to the Lord Chief Baron, and Baron Lyttelton, who said "they did not find a word to alter," was introduced for the fourth time, and finally became law on the 16th April, 1677.

NOTE ON THE APPLICATION OF ENGLISH LAW, AND PARTICULARLY OF SECTIONS 4 AND 17 OF THE STATUTE OF FRAUDS, 1677, SECTION 7 OF LORD TENTERDEN'S ACT, 1828, AND THE CODE, 1893, TO BRITISH POSSESSIONS (*e*).

English laws in occupied Colonies.

It is a general principle that English subjects on discovering and planting uninhabited countries carry with them all such then existing English laws as are applicable to the condition of the Colony (as to which, see *per* Lord Mansfield in *R.* v. *Vaughan* (1769) 4 Burr. at 2500; *per* Lord Brougham in *Lyons* v. *East India Co.* (1836) 1 Moore P. C. at 272—273; 43 R. R. 27; *per* Lord Blackburn in *The Lauderdale Peerage* (1885) 10 App. Cas. at 744—745; *per* Lord Watson in *Cooper* v. *Stuart* (1889) 14 App. Cas. at 291—293; 58 L. J. P. C. 93, P. C., and the cases there cited; and Clark's Colonial Law (1834), 15—16).

General enactments applying English laws.

Moreover, there is express provision made in the case of many British Colonies by Order in Council, Charter, Act or Ordinance, to the effect that laws and statutes in force in England at a fixed date shall, so far as they are, or (in some cases) shall become applicable, be in force in the particular Colony: see Clark's Col. Law, under the head of the different Colonies; Tarring's Law relating to Colonies, 2nd ed. 6—9; and the valuable replies, collected by the Colonial Office, from the Colonial Governments to Lord Herschell's Paper of Questions, pub. in the *Journal of the Socy. of Comparative Legn.* from 1897 to 1901, *passim*. By virtue of these principles, the Statute of Frauds has been treated as in force in some Colonies without specific legislation, but it has not of course been thus introduced into a Colony such as Barbados, which was settled (1625) before the passing of the Statute: *per* P. C., cited by Jekyll, M.R., in 1722, 2 P. Wms. 75; and see Clark's Col. Law, Barbados, 179—180.

Specific colonial legislation.

Lastly, those provisions of the Statute of Frauds and of Lord Tenterden's Act which are under discussion, and latterly the Code of 1893, have been specifically adopted in many cases by colonial legislation.

Common law in Canada.

A good illustration of these principles is afforded by the case of Canada. In Quebec (formerly Lower Canada) the common law has,

(*e*) This Note is principally by the Editors of the 5th edition.

ever since its first settlement by the French in 1608, been the *Coutume de Paris*, save in commercial matters; and this law, modified by Quebec statutes, is now embodied in the Civil Code of Quebec, which came into force on the 1st August, 1866. In all the other provinces and Territories of the Dominion (which from the 1st September, 1880, includes all the British possessions in North America, other than Newfoundland and its dependencies: Order in Council, 31st July, 1880, prefixed to the Stats. of Can., 1881, p. ix.), and in Quebec since 1785 in commercial matters, the common law of England prevails, and was introduced as follows:—into Ontario by the first Act of the Legislature of Upper Canada (now Ontario) in 1792; into Nova Scotia in 1713, when it included Prince Edward Island (separated in 1770) and New Brunswick (separated in 1784), for although Nova Scotia (as well as Newfoundland) was by the Treaty of Utrecht *ceded* by France in 1713, it appears to have been always treated as acquired by *occupancy*; into the North-West Territories, with the charter of the Hudson's Bay Company in 1670—*i.e.*, seven years before the Statute of Frauds was passed; those Territories then included Manitoba (created a province in 1870) and Yukon (made a separate Territory in 1898); and into British Columbia on its first settlement

English laws generally have been expressly adopted in Canada by legislation, as follows:—

Canadian enactments applying English laws.

In Quebec, in commercial matters English rules of evidence then in force were adopted by Quebec Act of 1785, 25 Geo. 3, c. 2, s. 10, made perpetual by 31 Geo. 3, c. 2, and reproduced in the Civil Code of Quebec, Art. 1206; and sections 4 and 17 of the Statute of Frauds were thus introduced: *McKay* v. *Rutherford* (1848) 6 Moore P. C. 413 (as to section 4).

In Ontario, the laws of England as to property, civil rights and evidence, in force on the passing of the first Provincial Act of Upper Canada, 32 Geo. 3, c. 1, viz., on the 15th October, 1792, were adopted: Consol. Stats. U. C., 1859, c. 9.

In the North-West Territories, which became part of Canada on the 15th July, 1870, the civil and criminal laws of England existing at that date were adopted, as from the 15th February, 1887, subject to amendment: Act of Canada of 1886, 49 Vict., c. 25, ss. 3, 35.

In Manitoba, the laws of England as to property, civil rights, evidence and procedure, as existing on the 15th July, 1870, were adopted by Act of Manitoba, 38 Vict., c. 12, s. 1, on 22nd July, 1874; and a declaration to a similar effect was made in 1888 by the Dominion Parliament, 51 Vict., c. 33.

In British Columbia, English laws were declared to be in force by proclamation of 19th November, 1858, and this so far as those laws "are not from local circumstances inapplicable," and as modified by past local legislation, was confirmed by Ordinance of 6th March, 1867: Consol. Stats., 1877, c. 103.

Besides these general enactments, section 17 of the Statute of Frauds, as amended by section 7 of Lord Tenterden's Act, was adopted in both Lower and Upper Canada by the Act of Canada, 8 Vict., c. 31, in 1845, which, however, was repealed, and, as to Lower Canada only, re-enacted by 10 & 11 Vict., c. 11, in 1847 (now contained in the Civil Code of Quebec, Art. 1235), and, as to Upper Canada, was re-enacted by 13 & 14 Vict., c. 61, in 1850. And the English Sale of Goods Act

(including section 4) has been adopted by most of the Provinces of the Dominion (see *infra*).

In Grenada, sections 4 and 17 of the Statute of Frauds, as amended by Lord Tenterden's Act, have been adopted by Ordinance 21 of 1897.

Australasia.

In Australasia, English laws in force on the passing of the Act 9 Geo. 4, c. 83—25th July, 1828—by section 24 were, so far as applicable to the circumstances of the Colonies, to be applied in Van Diemen's Land (now Tasmania), and in New South Wales, which latter Colony included South Australia (separated in 1836), New Zealand (separated in 1840), Victoria (separated in 1851), and Queensland (separated in 1859). The Statute of Frauds appears to be within the purview of the Act of 1828, 9 Geo. 4, c. 83. This Act did not, however, introduce Lord Tenterden's Act, 9 Geo. 4, c. 14, which, though already passed, did not take effect until the 1st January, 1829 (section 10). For this reason the Legislature of Van Diemen's Land, by their Act 4 Will. 4, No. 12, passed on the 30th November, 1833, and that of New South Wales, by their Act 4 Will. 4, No 17, passed on the 13th June, 1834, adopted and re-enacted the whole of Lord Tenterden's Act. In New Zealand, the laws of England as existing on the 14th January, 1840, were, so far as applicable, declared to be in force by the English Laws Act, 1858, No. 1. In Western Australia, which was first settled and created a Colony in 1829 by 10 Geo. 4, c. 22, English laws, including all statutes of a general nature, in force on the 1st June, 1829, except those relating to usury, came into force: see the Declaratory Act of W. A. of 1866, 30 Vict., No. 1. In Victoria, sections 4 and 17 of the Statute of Frauds and the whole of Lord Tenterden's Act were repealed, and in substance re-enacted by the Act of 1864, 27 Vict., No. 204, ss. 2, 52, and 107—112 (now repealed). The Sale of Goods Act, 1893, has now been adopted in New Zealand and in all the States of Australia, except New South Wales (see *infra*).

Sale of Goods Act, 1893

The Sale of Goods Act, 1893, with some modifications, has been adopted in the following British possessions, by the local Acts specified:—

Alberta, Sale of Goods Ordinance, Terr. Cons. Ord. 1898, c. 39.

Bahamas, Sale of Goods Ordinance, 4 Edw. 7. c. 37. Omits sections 49 (3) and 59, as applicable to Scotch law.

Barbados, 1895, No. 9 (omits sections 4 and 22).

British Columbia, Rev. St. 1911, c. 203 (has section 4, value 50 dollars; introduces for protection of subsequent buyers, &c., special provisions as to formalities of conditional sales).

British Guiana, Sale of Goods Ordinance, 1913 (Ord. No. 26) (has section 4, value 48 dollars; has section 22, which applies to "goods sold in any public market held under the authority of the Government, or otherwise in accordance with the law, according to the usage of the market"; section 60, sub-section 2, adds to the savings the law of warranty and suretyship).

Ceylon, 1896, No. 11 (section 4 is applied to *all* contracts for the sale of goods, by omitting words limiting the value; section 22 is omitted).

Gibraltar, 1895, No. 20 (has section 4, value 250 pesetas; omits section 22).

Hong Kong, 1896, No. 7 (has section 4, value 100 dollars; has section 22 and defines market overt).

Isle of Man, 1895, Sale of Goods Act (has section 4, value £5; section 24 = Eng. section 22, but is subject to the provisions of section 26 as to revesting of property on conviction where goods are *stolen*).

Jamaica, 1895, Law 12 (omits section 22).

Manitoba, Rev. Stat. 1902, c. 152 (has section 4, value 50 dollars; omits section 22).

Newfoundland, 1899, c. 2 (has section 4, value 50 dolars; omits section 22).

New Zealand, 1895, No. 23, now Sale of Goods Act, 1908, No. 168 (section 24 = Eng. section 22, but sub-section 3 enacts that nothing in the Act "shall be construed to create a market overt *in* New Zealand").

North-West Territories of Canada, Consol. Ord. 1905, c. 39 (has section 4, value 50 dollars; omits section 22; and adopts sections 49 (3) and 59 from Scotch law).

Nova Scotia, Sale of Goods Act, 1910 (has section 4, value 40 dollars; and section 32, sub-section 3, is made to apply to "sea, lake, or river" transit).

Queensland, 1896, No. 6 (omits section 22).

Saskatchewan, Sale of Goods Act, Rev. Stat. 1909, c. 147 (has section 4 (50 dollars). The proviso to section 14, sub-section 1, is not adopted, whereas sections 49 (3) (dealing with interest on the price) and 59 (payment into Court) are adopted from Scotch law.

South Australia, 1895, No. 630.

Tasmania, 1896, No. 14, does not adopt the Scotch law declared in sections 49 (3) and 59; adds in section 51 the words "or warrant" after "writ of *fieri facias*" and before "or other writ." Section 27, sub-section 2, saves the law relating to "cattle."

Trinidad and Tobago, 1895, No. 37 (omits section 22).

Victoria, 1896, No. 1422.

Western Australia, 1895, No. 41.

Except where otherwise specified in the foregoing list, sections 4 and 22 of the Code are re-enacted in terms. It will be observed that in all the possessions above mentioned, except Barbados, section 4 is re-enacted, although the limit of value is sometimes varied, and in the case of Ceylon is omitted; while in nine cases section 22, which deals with market overt (see *ante*, 17), is omitted.

India. In India, the sale of goods is governed by c. 7, sections 76—123 of the Indian Contract Act, 1872, No. 9, which has been officially reprinted as modified up to 1st September, 1899. Before this Act, the English law of contract obtained in the Presidency towns, but it was doubtful whether the Statute of Frauds applied in the Mofussil or even in those towns, and the Act removed doubts by expressly repealing sections 1, 2, 3, 4, and 17 of the Statute: Sutherland's "Ind. Cont. Act," 1, 3. The Act extends to the whole of British India: section 1; and has been declared in force in the Santhal Parganas, the Arakan Hill District, Upper Burma (except the Shan States), and British Baluchistan: see Chron. Tables of the Indian Statutes, 1901.

CHAPTER II.

WHAT ARE GOODS?

It is now necessary to inquire precisely what is meant by the term "goods."

Code, s. 62 (1). By section 62 (1) of the Code, in that Act, "unless the context or subject-matter otherwise requires,—

Definition of "goods." **'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which (*a*) are agreed to be severed before sale or under the contract of sale."**

"Chattels personal." "Chattels personal" would, but for the words following the term, include shares (*b*). It includes ships (*c*), and water (*d*), and even an unsevered portion of a specific chattel (*e*). It also includes coins when sold merely as curiosities, and not transferred as currency (*f*).

"Things in action." "Things in action" include all personal chattels that are not in possession (*g*). Stock, shares in companies, policies of insurance and debts, are therefore not "goods."

"Emblements." The right to "emblements" is a right which the law gives in certain cases to the tenant of an estate of uncertain duration to take the crop which is growing at the determination of his estate of those vegetables produced by the labour of man, which ordinarily yield a *present annual* profit; such as corn,

(*a*) It is conceived that the antecedent to "which" is "things," and not "emblements, industrial growing crops, and things."

(*b*) See *per* Lord Blackburn in *Colonial Bank* v. *Whinney* (1886) 11 App. Cas., at 434; 55 L. J. Ch. 585. *Cf.* the definition of "personal chattels" in s. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31).

(*c*) *Meering* v. *Duke* (1828) 2 M. & Ry. 128; 6 L. J. K. B. 211; under Stamp Act, *Hazard* v. *Hodges* (1859) 7 W. R. 204.

(*d*) *West Middlesex Waterworks Co.* v. *Suwercrop* (1829) 4 C. & P. 87, a case under the Stamp Act. Electrical energy was also assumed in *County of Durham Electrical, &c., Co.* v. *Inland Revenue* [1909] 2 K. B. 604; 78 L. J. K. B. 1158, C. A.; for purposes of argument only, to be goods.

(*e*) *Marson* v. *Short* (1835) 2 Bing. N. C. 118; 4 L. J. C. P. 270; 42 R. R. 544; under Stamp Act; following *Penning* v. *Leckie* (1810) 13 East, 7 (half-share of goods).

(*f*) *Moss* v. *Hancock* [1899] 2 Q. B. 111; 68 L. J. Q. B. 357.

(*g*) See *per* Lord Blackburn in *Colonial Bank* v. *Whinney* (1886) 11 App. Cas., at 439, 440; 55 L. J. Ch. 585; and *per* Fry, L.J., in *S. C.* (1885) 30 Ch. D., at 285 *et seq.*

hemp, saffron, flax, melons, and potatoes; and it includes the right of free entry, egress and regress to cut and carry them away (*h*). This right also extends to the case of a tenant in fee, and on his death the emblements vest in his executor or administrator, and not in his heir (*i*).

"Industrial growing crops"

"Industrial growing crops" — a phrase added in Committee as a Scottish term (*k*) would appear to have a wider meaning than "emblements." This phrase will be fully discussed hereafter (*l*).

"Things attached to, or forming part of, the land"

"Things attached to, or forming part of, the land" include fixtures, buildings sold as materials, and *fructus naturales*; and a contract for the sale of them will be a contract for the sale of "goods" if they are "agreed to be severed before sale, or under the contract of sale." This part of the definition is also discussed hereafter (*m*).

Law before the Code.

Before considering in further detail the effect of the definition of "goods" in the Code, it seems desirable to state what was the law before that Act was passed, and to refer to some of the principal decisions.

S. 17 of Statute of Frauds.

Section 17 of the Statute of Frauds (*n*) applied to contracts for the sale of "goods, wares, and merchandise" words which comprehend all corporeal movable property. It did not, therefore, apply, as was decided in the cases cited in the foot-note below (*o*), to shares, stocks, documents of title, and other choses in action, and incorporeal rights and property.

Most of those decisions went upon the ground that the sales were of choses in action not properly embraced in the words

(*h*) See Co. Litt. 55 a.; Smith's L. and T., 2nd ed. 339 *et seq.*; Woodfall's L. and T., 15th ed., 790; *Graves* v. *Weld* (1833) 5 B. & Ad. 105; 2 L. J. K. B. 176; 39 R. R. 419; and see the subject discussed *post*, 214.

(*i*) 2 Bl. Com. 404.

(*k*) See Brown's Sale of Goods Act, 1893, 286; and for the law of Scotland as to growing crops, see 2 Ersk. 2, 4; Bell's Com. i., 187; ii., 2; Bell's Princ., 9th ed., ss. 1269, 1270, 1473.

(*l*) *Post*, 214.

(*m*) *Post*, 215.

(*n*) 29 Car. II., c. 3, *ante*, 150.

(*o*) *Humble* v. *Mitchell* (1839) 11 A. & E. 205; 9 L. J. Q. B. 29; 52 R. R. 318 (joint stock bank shares); *Knight* v. *Barber* (1846) 16 M. & W. 66; 16 L. J. Ex. 18 (railway scrip); *Heseltine* v. *Siggers* (1848) 1 Ex. 856; 18 L. J. Ex. 166; 74 R. R. 862 (stock of a foreign State); *Bradley* v. *Holdsworth* (1838) 3 M. & W. 422; 7 L. J. Ex. 153; 49 R. R. 670; *Duncuft* v. *Albrecht* (1841) 12 Sim. 189; 56 R. R. 16; *Tempest* v. *Kilner* (1846) 3 C. B. 249; 15 L. J. C. P. 10; 71 R. R. 337; and *Bowlby* v. *Bell* (1846) 3 C. B. 284; 16 L. J. C. P. 18; (railway shares); *Watson* v. *Spratley* (1854) 10 Ex. 222; 24 L. J. Ex. 52; 102 R. R. 541; *Powell* v. *Jessop* (1856) 18 C. B. 336; 25 L. J. C. P. 199; 107 R. R. 324 (shares in a mining company on the cost-book principle); *Lee* v. *Gaskell* (1876) 1 Q. B. D. 700; 45 L. J. Q. B. 540, set out *post*, 211 (tenant's fixtures sold to the lessor). Stock certificates have been held not to be "goods" within the meaning of the Factors Acts: *Freeman* v. *Appleyard* (1862) 32 L. J. Ex. 175; 139 R. R. 790; *per* Lindley, L.J., in *Williams* v. *Colonial Bank* (1888) 38 Ch. D. 408; 57 L. J. Ch. 826.

"goods, wares, and merchandise," but some turned upon other enactments, to which it will now be convenient to refer. These are:—first, section 4 of the Statute of Frauds; and secondly, the exemption in the Stamp Act, of agreements relating to the sale of goods, wares, and merchandise.

S. 4 of Statute of Frauds.

Section 4 of the Statute of Frauds enacts that:—

> "No action shall be brought whereby to charge . . . any person . . . *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 authorised."

Stamp Act, 1891.

The Stamp Act, 1891 (*p*), in the Schedule, title "Agreement," re-enacting the same provision in the Schedules to the Stamp Act, 1815 (*q*), and to the Stamp Act, 1870 (*r*), exempts from stamp duties (*inter alia*) an "agreement, letter, or memorandum, made for or relating to the sale of any goods, wares, or merchandise." An unstamped document, requiring to be stamped for other reasons, is admissible in evidence so far as it relates to the sale of goods (*s*).

Difference between ss. 17 and 4 of the Statute of Frauds.

It is often important to determine whether a sale of certain articles attached to the soil, such as fixtures and growing crops, fell within section 17 of the Statute of Frauds, as being a sale of "goods, wares, and merchandise," and is now governed by the Code, as being a sale of "goods," or whether it falls within section 4 of the Statute of Frauds, as a sale of an "interest in or concerning land." Though these two sections of the Statute of Frauds, on a cursory perusal, might seem to be substantially the same, both requiring some written note or memorandum, signed by the party to be charged, a more attentive consideration will show very material distinctions. Agreements under section 4 require a written note or memorandum, under all circumstances, and for any amount or value. But under section 17, the necessity for the writing does not exist when the value is under £10, and it may be dispensed with in contracts for larger sums, by proof of part acceptance or part payment by the buyer, or by the giving of something in earnest to bind the bargain. Again, a contract for sale under section 17 is exempt from

(*p*) 54 & 55 Vict. c. 39.
(*q*) 55 Geo. III. c. 184.
(*r*) 33 & 34 Vict. c. 97.
(*s*) *See Marson* v. *Short* (1835) 2 Bing. N. C. 118; 4 L. J. C. P. 270; 42 R. R. 544, and the cases there cited.

stamp duty, but if the agreement be for a sale of any "interest in or concerning land," a stamp is required. Practically, therefore, the whole controversy between the parties to an action is often finally disposed of by this test.

It will conduce to a proper understanding of the subject to transcribe the remarks of Lord Blackburn on the general principles of law involved in the question (*t*).

Common law principles stated by Lord Blackburn.

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

"It seems pretty plain upon principle that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. 4 c. 14 (*u*), if not of the 29 Car. 2 c. 3. The agreement is, that the thing shall be rendered into goods, and then in that state sold: it is an executory agreement for the sale of goods not existing in that capacity at the time of the contract. And when the agreement is, that the property is to be transferred before the thing is severed, it seems clear enough that it is *not* (*v*) a contract for the sale of goods; it is a contract for a sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case is, when do the parties intend that the property is to pass? . . . If the contract be for the sale of the things whilst they are attached to the soil and not the subject of larceny at common law, it is a contract for the sale of things, crops, fixtures, emblements, trees or minerals, which may or may not be an interest in land within the fourth section of the Statute, but are not goods, wares, and merchandise within the seventeenth section. On the whole the cases are very much in conformity with these distinctions, though there is some authority for saying that a sale of emblements or fixtures,

(*t*) On Sale, 1st ed. 9—11: 2nd ed. 4—6.
(*u*) Lord Tenterden's Act, *ante*, 176, n. (*i*).
(*v*) But see under the Code, *post*, 216.

vesting an interest in them whilst in that capacity and before severance, is a sale of goods within the meaning of the seventeenth section of the Statute of Frauds (*y*), and a good deal of authority that such a sale is not a sale of an interest in land within the fourth section, which, however, may be the case, though it is not a sale of goods, wares, and merchandise, within the seventeenth."

1. Where growing crop is to be severed before property passes.

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

2. Where property passes before severance.

The second principle is, that where there is a perfect bargain and sale vesting the property at once in the buyer *before severance*, a distinction was made between the natural growth of the soil, as grass, timber, fruit on trees, etc., etc., which at common law are part of the soil, and *fructus industriales*, fruits produced by the annual labour of man, in sowing and reaping, planting and gathering. The former, at any rate unless the buyer is to take them immediately, or within a reasonable time, so that they are to derive no benefit from their further growth in the soil (*z*), are an interest in land within the fourth section; the latter are *chattels*, for at common law a growing crop, produced by the labour and expense of the occupier of lands, was, as the representative of that labour and expense, considered an independent chattel (*a*).

Result of cases on Statute of Frauds up to 1875.

The common law on the subject of the sale of growing crops may be thus summed up, viz.: -

Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the fourth section of the Statute of Frauds.

(*y*) This, however, was not Lord Blackburn's own opinion, *post*, 203.

(*z*) This limitation was laid down in *Marshall* v. *Green* (1876) 1 C. P. D. 35; 45 L. J. C. P. 153, discussed *post*, 206.

(*a*) *Per* Bayley, J., in *Evans* v. *Roberts* (1826) 5 B. & C. 836, where the cases are reviewed; 4 L. J. (O.S.) K. B. 313; 29 R. R. 421; followed in *Jones* v. *Flint* (1839) 10 A. & E. 753; 9 L. J. Q. B. 252; 50 R. R. 527; *Parker* v. *Staniland* (1809) 11 East, 362; 10 R. R. 521; followed in *Warwick* v. *Bruce* (1813) 2 M. & S. 205; *Sainsbury* v. *Matthews* (1838) 4 M. & W. 434; 8 L. J. Ex. 1; 51 R. R. 620.

Whether the actual *sale* of *fructus industriales*, while still growing, is a sale not only of chattels, but of "goods, wares, and merchandises" within section 17, has never been directly decided. Bayley, J., and Littledale, J., in 1826 in *Evans* v. *Roberts*, and Parke, B., in *Sainsbury* v. *Matthews* (*b*), expressed an opinion in the affirmative (*c*); but Lord Blackburn regarded this as "exceedingly questionable" (*d*), and expressed his own view that they are certainly chattels and therefore not within section 4 but are not *goods* within section 17 (*e*).

Growing crops, if *fructus naturales*, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance, is governed by the fourth section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the seventeenth, and not by the fourth section of the Statute.

The following cases illustrate the principles enunciated above:—

Carrington v. *Roots* (1837).

In *Carrington* v. *Roots* (*f*) the plaintiff, in May, made a verbal agreement to buy a crop of grass growing on a certain close, to be cleared by the end of September, at £5 10s. per acre with liberty to the buyer to enter upon the land to cut and take the crop, half the price to be paid down before any of the grass was cut. *Held* by all the Judges, to be void under the fourth section. This case is in entire conformity with *Crosby* v. *Wadsworth* (*g*), where Lord Ellenborough held a similar contract to be an agreement for the sale of an interest in land, "conferring an exclusive right to the vesture of the land during a limited time and for given purposes."

Crosby v. *Wadsworth* (1805).

(*b*) (1838) 4 M. & W. 434; 8 L. J. Ex. 1; 51 R. R. 620. The learned Judge however treated the contract as executory.

(*c*) 5 B. & C. 829, at 837, 840; 4 L. J. (O. S.) K. B. 313; 29 R. R. 421. The language of Littledale, J., being unqualified, certainly seems to indicate this view, but whether the observations of Bayley, J., were not intended to be limited to executory agreements, as in the case under consideration, where the potatoes were to be dug by the seller, *quære*; see his opening remarks, *ibid.* at 831, and *per* Holroyd, J., at 839. But the Court in *Jones* v. *Flint* (1839) 10 A. & E. 753, say that the case did not depend on the fact that the seller was to dig.

(*d*) On Sale, 1st ed. 19—20; 2nd ed. 13.

(*e*) *Ibid.*, 1st ed. 17, *et seqq.*; 2nd ed. 11, *et seqq.*

(*f*) 2 M. & W. 248; 6 L. J. Ex. 95; 46 R. R. 583. The view that the contract is void under the fourth section is now overruled. See *Maddison* v. *Alderson* (1883) 8 App. Cas. *per* Lord Blackburn, at 488; 52 L. J. Q. B. 737; and *Britain* v. *Rossiter* (1879) 11 Q. B. D. *per* Brett, L.J., at 127; 48 L. J. Ex. 362.

(*g*) 6 East, 602; 8 R. R. 500.

Scorell v. *Boxall* (1827). *Teal* v. *Auty* (1820).

In *Scorell* v. *Boxall* (*h*), a parol contract for the purchase of standing underwood, to be cut down by the purchaser, and in *Teal* v. *Auty* (*i*), a similar contract for the sale of poles whilst still growing, were held to be agreements for the sale of an interest in land.

Rodwell v. *Phillips* (1842).

In *Rodwell* v. *Phillips* (*k*), a written sale of "all the crops of fruit and vegetables of the upper portion of the garden for the sum of £30," the purchaser having paid down £1 as deposit, was held to be the sale of an interest in land. The *ratio decidendi* was that it certainly was not such a contract for the sale of goods, wares, and merchandise as under the Stamp Act was exempted, and the plaintiff was nonsuited, the agreement not being stamped. It was argued for the plaintiff that the sale was of *fructus industriales;* and although no doubt this was so as regards the vegetables, the sale included *fructus naturales*, and the Court of Exchequer referred only to these in its judgment. *Smith* v. *Surman* (*l*) was distinguished by the Court as a case where the trees were sold *as timber* at so much a foot.

In all these cases it will be remarked that the distinction pointed out by Lord Blackburn in his treatise is found to prevail. In *Carrington* v. *Roots*, and *Crosby* v. *Wadsworth*, the growth of grass on the land; in *Scorell* v. *Boxall*, and *Teal* v. *Auty*, the standing undergrowth, and the growing poles: and in *Rodwell* v. *Phillips*, the crop of fruit on the trees, were all transferred to the purchasers *before severance* from the soil.

Smith v. *Surman* (1829).

On the other hand, in *Smith* v. *Surman* (*m*), the agreement was to sell standing timber, which the proprietor had begun to cut down, two trees having already been felled, at so much a foot. *Held*, to be not within the fourth, but within the seventeenth section. Bayley, J., said: "The contract was not for the growing trees, but for the timber *at so much per foot*, *i.e.*, the produce of the trees when they should be cut down and severed from the freehold." Littledale, J., and Parke, J., concurred, the latter saying: "The defendant could take no

(*h*) 1 Y. & J. 396; 30 R. R. 807.

(*i*) 2 Br. & B. 99; 22 R. R. 656; more fully reported in 4 Moo. 542. The latter report however states that the poles were felled by the *seller*, and delivered to and carried away by the buyer. If felling by the seller was one of the terms of the contract, the case should have been considered as one in which the property did not pass till after severance.

(*k*) 9 M. & W. 501; 11 L. J. Ex. 217; 60 R. R. 807.

(*l*) *Infra*.

(*m*) 9 B. & C. 561, 7 L. J. (O. S.) K. B. 296; 33 R. R. 259; and *Marshall* v. *Green* (1875) 1 C. P. D. 35; 45 L. J. C. P. 153, *post*, 205.

interest in the land by this contract, because he could not acquire any property in the trees till they were cut." Littledale, J., however, expressed the opinion (*n*) that: "If in this case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land." But Bayley, J., in referring to this case in *Earl of Falmouth* v. *Thomas* (*o*), lays stress on the fact that "the *seller* was to cut down; the timber was to be made a chattel by the *seller*."

Crop not yet sown. *Watts* v. *Friend* (1830).

Watts v. *Friend* (*p*) was the case of the sale of a crop not yet sown. The bargain was, that the plaintiff should furnish the defendant with turnip seed to be sown by the latter on his own land, and that the defendant should then sell and deliver to the plaintiff the whole of the seed produced from the crop thus raised at a guinea a bushel. The contract was held to be within the seventeenth section of the Statute of Frauds, as the thing agreed to be delivered would at the time of delivery be a personal chattel.

Washbourn v. *Burrows* (1847).

In *Washbourn* v. *Burrows* (*q*)—a case which turned on the pleadings—it became material to consider whether an assignment by way of security of certain crops of grass then growing on a particular estate, did or did not relate to an interest in land. Rolfe, B., in delivering the considered judgment of the Court, said: "Certainly, when the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel."

Marshall v. *Green* (1875).

Such being the state of the law on this point, in 1875 the case of *Marshall* v. *Green* (*r*) was decided. There the facts somewhat resembled those in *Smith* v. *Surman* (*s*). The sale was of standing timber, which was, however, to be cut down by the *purchaser* and removed by him *as soon as possible*. *Held*, that the agreement was not a contract for an interest in land within the fourth section of the Statute of Frauds, but a contract for the sale of goods within the seventeenth section;

(*n*) This dictum was followed in *Marshall* v. *Green*, *infra*.
(*o*) (1832) 1 Cr. & M. 89; 2 L. J. Ex. 57; 38 R. R. 584, *post*, 207.
(*p*) 10 B. & C. 446; 8 L. J. (O. S.) K. B. 181; 34 R. R. 477.
(*q*) 1 Ex. 107, 115; 16 L. J. Ex. 266; 74 R. R. 605.
(*r*) 1 C. P. D. 35; 45 L. J. C. P. 153.
(*s*) *Ante*, 204.

and that as there was no intention that the purchaser should derive any benefit from the continuance of the timber in the soil, it was immaterial whether the seller felled and delivered the timber to the purchaser, or the purchaser entered upon the land and felled it for himself (*t*).

In his judgment Brett, J., reviewed (*u*) the rules contained in the note to *Duppa* v. *Mayo* (*v*), and adopted the test there laid down as to whether a contract for things affixed to the soil concerned an interest in land within section 4: namely, that it depended (except in the case of *fructus industriales*) upon whether the purchaser was to derive a benefit from the things remaining in the soil or whether the land was to be considered as a mere warehouse. The learned Judge held that he would not derive such benefit if the things were to be delivered by the seller for the buyer would then have nothing to do with them before severance or if the buyer was to take them *immediately*. The rule had been qualified in the case of *fructus industriales*, which were deemed to be *goods*, although they were still to derive benefit from the soil.

Grove, J., expressed his opinion (*x*) that even if the trees were not to be cut for a month, the test would still be whether the parties really looked to the trees deriving benefit from the land, or merely intended that the land should be in the nature of a warehouse for them.

This decision seems, so far as it dealt with *fructus naturales*, open to criticism (*y*). The dictum of Littledale, J., in *Smith* v. *Surman* (*z*) appears to have been treated as an authority, but no effect was given to the *ratio decidendi* of that case—that there the buyer was to take no interest in the trees until after severance (*a*). *Marshall* v. *Green* was fully considered, and criticised from the standpoint of a real property lawyer, by Chitty, J., in *Lavery* v. *Pursell* (*b*). In that case a house had been sold *as building materials*, to be

Lavery v. *Pursell* (1888).

(*t*) This was decided in Maryland as long ago as 1853, in *Smith* v. *Bryan*, 5 Maryl. 141.

(*u*) 1 C. P. D., at 42; 45 L. J. C. P. 153.

(*v*) (1669) 1 Wms. Saund. 6th ed. 277.

(*x*) *Ibid.*, at 44.

(*y*) It has, however, been adopted by the Code: see *post*, 216. It is cited in *Summers* v. *Cook* (1880) 28 Grant's Ch. R. 179 (Can.), as "an unfortunate extension of the intelligible rule that growing trees are an interest in land."

(*z*) Cited *ante*, 205.

(*a*) See the judgments in *Smith* v. *Surman* (1829) 9 B. & C. 561; 7 L. J. (O. S.) K. B. 296; 33 R. R. 259, and the reference to the case by Bayley, J., in *Lord Falmouth* v. *Thomas* (1832) 1 Cr. & M., at 105; 2 L. J. Ex. 57; 38 R. R. 584, cited *ante*, 205.

(*b*) 39 Ch. D. 508, at 515—517; 57 L. J. Ch. 570. See in *Carr*, *Hardy* v. *Carruthers* [1894] 25 Ont. L. R. 279 (timber not to be severed at once).

removed *by the buyer* within two months, the buyer to have possession of the premises for that purpose only. Chitty, J., decided that, as the house was to be pulled down *by the buyer*, and as it was in fact a hereditament, the contract concerned an interest in land; and that the mere circumstance that the common intention was to deal with the house only as building materials could not change the nature of the property from realty to personalty.

The learned Judge, referring to *Marshall* v. *Green*, added that it was evident that "a line must be drawn somewhere, because, if this principle were carried to the full extent, there being no distinction between the timber on the land in point of law and the mines, then . . . a contract for all the coal or minerals under a man's land, with a licence to enter and get it (*c*), is not within section 4"; and he drew the line at the case then before him.

The following cases throw light on the question of the severance of things attached to or forming part of the land: —

Entire contract for interest in land and chattels. *Falmouth* v. *Thomas* 1832).

In *The Earl of Falmouth* v. *Thomas* (*d*), where a farm was leased, and the tenant had in consideration of the demise verbally agreed to take the growing crops of corn and turnips and pay for them, and for the labour and materials expended, according to a valuation, but these things were not excepted out of the demise, it was held that the whole was an entire contract for an interest in land under section 4 of the Statute of Frauds, and that as there was no memorandum in writing, the lessor could not maintain an *indebitatus* count for goods bargained and sold to recover the price of the crops according to the valuation.

Lord Lyndhurst, C.B., in delivering the judgment of the Court, said (*e*): "At the time when each of these contracts upon which the plaintiff sues is stated to have been made, the crops were growing upon the land; the defendant was to have had the land as well as the crops; and the work, labour, and materials were so incorporated with the land as to be inseparable from it. . . . The crops at the time of the bargain and sale were . . . an interest in the land" (*f*).

(*c*) But see now *Morgan* v. *Russell & Sons*, *post*, 217.
(*d*) 1 Cr. & M. 89; 2 L. J. Ex. 57; 38 R. R. 584.
(*e*) 1 Cr. & M., at 108, 109; 2 L. J. Ex. 57; 38 R. R. 584.
(*f*) See also as to entirety of contract, *Mechelen* v. *Wallace* (1837) 7 A. & E. 49; 6 L. J. K. B. 217; 45 R. R. 669 (to furnish and let house); *Vaughan* v. *Hancock* (1846) 3 C. B. 766; 16 L. J. C. P. 1; 71 R. R. 483 (to let house and sell furniture and fixtures); and *Mercier* v. *Campbell* [1907] 14 Ont. L. R. 639 (alternative separable promise), where the English, Canadian, and American cases are considered.

Mayfield v. *Wadsley* (1824).

On the other hand, in *Mayfield* v. *Wadsley* (*g*), where there was a sale of growing crops of wheat at a separate price to an incoming tenant, the majority of the Court (*h*) came to the conclusion that this contract was distinct from the contract to demise the land, and therefore the balance of the price, part of which had been paid, could be recovered.

Littledale, J., however, dissented, and held that, although the valuation of the crops was distinct, the contract was entire, and that the price of the crops was part of the consideration for the possession of the land, and therefore that it was within the fourth section. He said (*i*): "It is true that in some cases there may be a contract for the growing crops, independently of the land itself; but where the land is agreed to be sold, and the vendee takes from the vendor the growing crops, the latter are considered part of the land."

This rule seems founded on sound principles, for in such cases the acquisition of an interest in the land is part of the consideration which moves the purchaser to buy the crops. He buys an interest "*concerning* land," and that is covered by the language of the fourth section of the Statute of Frauds.

Ronayne v. *Sherrard* (1877).

Again, in *Ronayne* v. *Sherrard* (*k*) the plaintiff, the tenant from year to year under the defendant of certain land, sued for breach of contract. He set up a verbal agreement to surrender his tenancy without the usual six months' notice, on condition of being allowed to pull down a cottage on the land, and hold the materials to his own use, or of being paid their value. *Held*, that even assuming the materials to be mere chattels, yet the consideration for the defendant's promise was the surrender of the land, which brought it within the fourth section of the Statute of Frauds; and the plaintiff could not recover either damages or the value of the materials.

Industrial growing crops not being emblements.

It is sometimes a matter of doubt whether growing crops are properly comprehended in the class of *fructus industriales* or *fructus naturales*. There is an intermediate class of products of the soil: not annual—as emblements; not permanent—as grass or trees; but affording either no crop till the

(*g*) 3 B. & C. 357.

(*h*) Abbott, C.J., and Bayley, J., and Holroyd, J., *diss.* Littledale, J.

(*i*) *Ibid.*, at 366.

(*k*) Ir. R. 11 C. L. 146, reviewing the cases and following *Kelly* v. *Webster* (1852) 12 C. B. 283; 21 L. J. C. P. 163; 92 R. R. 730, which was held to have overruled *Price* v. *Leyburn* (1819) Gow, 109. See also *Cocking* v. *Ward* (1845) 1 C. B. 858; 15 L. J. C. P. 246; 68 R. R. 831; *Winstone* v. *Mehaffy* [1917] Ir. 2 L. R. 956 (buyer of goods to give mortgage of land in consideration of sale); *Smart* v. *Harding* (1855) 15 C. B. 652; 24 L. J. C. P. 76; 100 R. R. 530.

second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, etc.

Graves v. *Weld* (*l*), which was decided, after consideration, in 1833, is the only reported case on this subject. There the plaintiff was possessed of a close under a lease for ninety-nine years *determinable on three lives*. In the spring of 1830, the plaintiff sowed the land with barley, and in May he sowed broad clover seed with the barley. The last of the three lives expired on the 27th of July, 1830, the reversion being then in the defendant. In January, 1831, the plaintiff delivered up the close to the defendant, but in the meantime he had taken off, in the autumn of 1830, the crop of barley, in mowing which a little of the clover plant, that had sprung up, was cut off, and taken together with the barley. According to the usual course of good husbandry, broad clover is sown about April or May, and is fit to be taken for hay about the beginning of June of the *following year*. The clover in question was cut by the defendant about the end of May, 1831, more than a twelvemonth after the seed had been sown. The defendant also took, according to the common course of husbandry, a second crop of the clover in the autumn of the same year, 1831. The plaintiff brought trover for the clover cut in May, 1831, as being emblements, and the jury found, on questions submitted by the Judge: 1.—That the plaintiff did not receive any benefit from taking the clover with the barley straw sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. 2.—That a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would not sow clover with his barley in the spring, where there was no covenant that he should do so; and would not, in the long run, and on the average, repay himself in the autumn for the extra cost incurred in the spring.

Graves v. *Weld* (1833).

Lord Denman, in delivering the judgment of the whole Court, for the defendant, said (*m*): "In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was that the tenant should be encouraged to cultivate by being sure of receiving the fruits

(*l*) 5 B. & Ad. 105; 2 L. J. K. B. 176; 39 R. R. 419, *coram* Denman, C.J., and Littledale, J., Parke, J., and Patteson, J. See also *Kingsbury* v. *Collins* (1827) 4 Bing. 202, where teasles were treated as emblements, but the fact that they do not mature within a year was not considered.

(*m*) 5 B. & Ad., at 117—120; 2 L. J. K. B. 176; 39 R. R. 419.

of his labour; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labour, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one: for the cultivator very often looks for a compensation for his capital and labour in the produce of successive years. It was therefore admitted by each that the tenant would be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of *any* vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which *ordinarily* repays the labour by which it is produced *within the year* in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. And the latter proposition we consider to be the law."

Again: "The principal authorities upon which the law of emblements depends are Littleton, s. 68, and Coke's Commentary on that passage. The former is as follows: 'If the lessee soweth the land, and the lessor, after it is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne and shall have free entry, egresse and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him.' Lord Coke says (*n*): 'The reason of this is, for that the estate of the lessee is uncertaine, and therefore, lest the ground should be unmanured, which should be hurtfull to the commonwealth, he shall reape the crop which he sowed in peace, albeit the lessor doth determine his wil before it be ripe. And so it is if he set rootes or sow hempe or flax or any other *annual* profit, if *after the same be planted*, the lessor oust the lessee: or if the lessee dieth, yet he or his executors shall have *that yeare's crop*. But if he plant young fruit trees or yong oaks, ashes, elmes, etc., or sow the ground with acornes, etc., there the lessor may put him out notwithstanding, because they will yeeld no *present annuall* profit.' These authorities are strongly in favour of the rule contended for by the defendant's counsel; they confine the right to things yielding present *annual* profit, and to that year's crop which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though

(*n*) Co. Litt. 55 a.—55 b.

at first sight an exception, really falls within this rule. In *Latham* v. *Atwood* (*o*), they were held to be '*like* emblements,' because they were 'such things as grow by the manurance and industry of the owner, by the making of hills and setting poles': that labour and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and planting of other vegetables. . . . It may be observed that the case decided that hops, so far as relates to their annual product only, are emblements; it by no means proves that the person who *planted* the young hops would have been entitled to the first crop whenever produced."

According to the principles laid down in the various cases, a crop ordinarily coming to maturity more than a year after sowing or planting, is not emblements. Of such as mature within a year, the crop of the first year is emblements, but that of subsequent years would, it seems, be treated as *fructus naturales*, unless they would not grow at all without cultivation, such as hops, in which event each successive crop would be *fructus industriales*.

Fixtures form another class of things attached to land. They are personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them (*p*). When the chattels are thus fixed by a tenant to the freehold, they become part of it, subject to his right to separate them during the term, and thus reconvert them into goods and chattels (*q*). But whilst annexed, they may be treated for some purposes as chattels; for instance, in cases where the tenant has a right to remove them during his tenancy—*i.e.*, where the landlord has not an absolute property in them—they may be taken in execution under a *fi. fa.* as goods and chattels, thus bearing a close resemblance to emblements (*r*). Fixtures, therefore, form an exception to the old rule of the common law: *Quicquid plantatur solo, solo cedit* (*s*) Fixtures.

(*o*) (1635) Cro. Car. 515.

(*p*) *Per* Parke, B., in *Hallen* v. *Runder* (1834) 1 Cr. M. & R., at 276; 3 L. J. Ex. 260; 40 R. R. 551; appd. by Martin, B., in *Elliott* v. *Bishop* (1854) 10 Ex., at 508; 24 L. J. Ex. 33; and by Stirling, L.J., in *Re De Falbe, Ward* v. *Taylor* [1901] 1 Ch. 523, at 538; 70 L. J. Ch. 286, C. A.; affirmed in H. L. *sub nom. Leigh* v. *Taylor* [1902] A. C. 157; 71 L. J. Ch. 272; (right of the executor of a tenant for life to remove ornamental fixtures (tapestries).

(*q*) See *per* Parke, B., in *Hallen* v. *Runder* (1834) 1 Cr. M. & R., at 275; 3 L. J. Ex. 260; 40 R. R. 551. See also the distinction between chattels within the Bank Act, and severable fixtures, with regard to the degree of annexation, discussed in *Horwich* v. *Symond* [1915] 112 L. T. 1011; 84 L. J. K. B. 1083.

(*r*) *Ibid.*

(*s*) See *Re De Falbe*, *supra*, and cases there cited, as to the gradual modification of this rule.

Lee v. *Risdon* (1816).

In *Lee* v. *Risdon* (*t*), where the defendant, who on becoming tenant of the plaintiff's house had agreed to purchase from the plaintiff, the lessor, certain fixtures at a valuation, was sued in action for *goods* sold and delivered, it was held that fixtures could not be recovered in that form of action (*u*), as the fixtures were, while unsevered, part of the freehold.

Hallen v. *Runder*. (1834).

In *Hallen* v. *Runder* (*v*), the tenant, who had bought the fixtures from an outgoing tenant, was requested by the landlady, shortly before the expiration of his lease, not to remove them, and she would take them at a valuation. He quitted the house and gave her the key, and the fixtures were valued at £40, but she refused to pay for them. The tenant having sued her for the price and value of *fixtures* bargained and sold, and sold and delivered, it was held that he could recover. These fixtures were not originally the landlady's fixtures, but could during the tenancy have been removed by the tenant, or have been seized under a *fi. fa.*, and on that ground the case was distinguished from *Lee* v. *Risdon*. The sale was not of an interest in land within section 4 of the Statute of Frauds (*x*), nor of goods within section 17 (*y*). "The real nature of the contract . . . was that the plaintiff should waive his right of removal, and thereby give up to the defendant all his interest in and right to enjoy these effects as chattels" (*z*).

Lee v. *Gaskell* (1876). Tenant's fixtures.

In *Lee* v. *Gaskell* (*a*), upon a tenant's bankruptcy his trustee sold the fixtures to the plaintiff, who resold them to the defendant, the bankrupt's landlord, for £11 18s. 8d. It was argued that by the first sale they had become goods within section 17 of the Statute of Frauds; but the Court held that, as they had not in fact been severed, the first sale was immaterial; that the case was governed by *Hallen* v. *Runder* (*b*), and that the second sale did not fall within either the fourth or the seventeenth section of that statute.

(*t*) 7 Taunt. 188; 17 R. R. 484.

(*u*) See also *Nutt* v. *Butler* (1804) 5 Esp. 176 (sale of fixtures by an outgoing to an incoming tenant).

(*v*) 1 Cr. M. & R. 266; 3 L. J. Ex. 260; 40 R. R. 551. See also *Horsfall* v. *Key* (1848) 2 Ex. 778 (unsevered fixtures not "goods" under Stamp Act).

(*x*) See also *per* Hawkins, J., in *Thomas* v. *Jennings* [1896] 66 L. J. Q. B. 5; 75 L. T. 274; and *cf. Jarris* v. *Jarris*, *post*, 213, where the fixtures were the landlord's.

(*y*) That it was not within s. 17 appears to have been involved in the decision, and the Court in *Lee* v. *Gaskell*, *infra*, held that the point had been actually decided, although the headnote of both reports introduces the point with "*semble*."

(*z*) 1 Cr. M. & R., at 276; 3 L. J. Ex. 260; 40 R. R. 550.

(*a*) 1 Q. B. D. 700; 45 L. J. Q. B. 540.

(*b*) *Supra*.

Cockburn, C.J., during the argument, indicated his opinion that a sale of fixtures is only the sale of the right to sever them (*c*). In giving judgment, he said: "Fixtures, although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord *or any one else* as goods and chattels, because they are not severed from the freehold, so as to become goods and chattels. All you can do is to bargain for the sale of them as fixtures, which are subject to the right of the tenant to remove them during the term, but which right is liable to be lost if it is not exercised during the term."

Although the words italicised above in the judgment of Cockburn, C.J., were only a *dictum*, yet the view that an actual sale of fixtures while unsevered, whether to the landlord or to any one else, is nothing more than a right to sever them, and therefore that they cannot be sold even to a stranger as chattels, is in accordance with high authority (*d*). Thus Lord Blackburn argues that "if a contract for a sale of crop or fixtures to one who takes the soil is only an abandonment of a right to sever them, it seems to follow that a sale of them in their unsevered state to one who does *not* take the soil, is only a transfer of the right to sever them" (*e*). And similar definitions have been given by learned Judges (*f*). It may then be regarded as reasonably clear that a sale of unsevered fixtures to a stranger to the land is not at common law a sale of goods. Where, however, the property is to pass after severance the contract is in all cases an agreement for the sale of goods according to Lord Blackburn's first rule (*g*).

Sale of landlord's fixtures.

In the preceding cases, except *Lee* v. *Risdon*, the fixtures were tenant's fixtures. A sale of unsevered landlord's fixtures, or an agreement to sell them, where they are to remain *in situ* (*h*), would seem to be, not a contract of sale of goods, but a contract concerning an interest in land under section 4 of the Statute of Frauds (*i*).

(*c*) 1 Q. B. D., at 701; 45 L. J. Q. B. 540.

(*d*) Blackburn on Sale, 1st ed. 20; 2nd ed. 13; Amos and Ferard on Fixtures, 3rd ed. 333. See also *per Hawkins*, J., in *Thomas* v. *Jennings* (1896) 66 L. J. Q. B. 5, at 8; 75 L. T. 276.

(*e*) On Sale, 1st ed. 20; 2nd ed. 13.

(*f*) *Per* Parke, B., in *Macintosh* v. *Trotter* (1838) 3 M. & W. 184; 49 R. R. 595; and *Horsfall* v. *Key* (1848) 17 L. J. Ex. 266; *per* Amphlett, B., in *Saint* v. *Pilley* (1875) 44 L. J. Ex. 33 (sale to stranger).

(*g*) *Ante*, 202.

(*h*) *Jarvis* v. *Jarvis* (1893) 63 L. J. Ch. 10; *per Cur.* in *Hallen* v. *Runder* (1834) 1 Cr. M. & R. 266, at 268.

(*i*) See *Croker* v. *Morrison* [1914] 1 Ch. 50, C. A.; 83 L. J. Ch. 229 (hire-purchase agreement; equitable interest in land of seller).

Law under the Code.

Having now discussed the principles upon which certain things attached to or forming part of the land did or did not fall within section 17 of the Statute of Frauds, and the decisions illustrating them, it remains to consider what change, if any, has been effected by the Code.

The doubt as to whether a sale of emblements before severance is a sale of goods (*k*), has now been dispelled by section 62 (1) of the Code (*l*), which declares them to be goods.

Meaning of "industrial growing crops."

By the same section, "industrial growing crops"—which, as has been already said (*m*), is a Scottish term—are declared to be goods. What construction is to be placed upon this term?

The earlier law with regard to the vegetable products of the ground appears to have been almost, if not absolutely, identical in England and Scotland. There, as in England, those fruits of the earth not yet severed which grow for a tract of years together, without repeated culture or industry, were heritable; those annual fruits which require yearly seed and industry were movable, even before separation, from the moment they are sown or planted (*n*). The two classes have been commonly referred to as *fructus naturales* and *fructus industriales*, but these terms are not strictly accurate; for among the former are included not only those products which are indigenous to the soil, but also those which require careful planting and culture at first, but which do not need attention repeated each year in order to produce a crop, or which, at any rate, do not produce after planting a *present* profit—for example, fruit trees (*o*); whilst by the term *fructus industriales* English lawyers, at any rate, have meant those vegetables only, produced by the labour of man, which ordinarily yield a present annual profit. In other words, the real line of demarcation has been drawn between those products in which there is a right to emblements on the one hand and those in which there is no such right on the other.

It has been seen that as a general rule in order to give such right the first crop must mature within twelve months after

(*k*) See Lord Blackburn's opinion that it is not, cited *ante*, 203.
(*l*) *Ante*, 198.
(*m*) *Ante*, 199.
(*n*) 2 Ersk. 2, 4; and see Bell's Dict. Law of Scot., Fruits.
(*o*) Co. Litt. 55 b. "The distinction appears to be between annual productions raised by the labour of man, and the annual productions of nature, not referable to the industry of man, except at the period when they were first planted"; *per* Lord Abinger, C.B., in *Roduell* v. *Phillips* (1842) 9 M. & W. 501. A growing crop of peaches or other fruit requiring periodical industry has been classed as *fructus industriales* in Maryland: *Parmer* v. *Piercy* (1874) 40 Marvl. 212, at 223.

sowing or planting (*p*); but that an exception was made in the case of hops, on the ground that without *repeated* industry they would not grow at all (*q*).

Grass appears formerly to have been considered in all cases to be a "natural profit of the earth," and if a lessee sowed hay-seed and thereby increased the grass, this gave him no right to the crop (*r*). The Editor is not aware of any modern case in the English courts raising the question whether there might be a right to emblements in the first crop of artificial grass (*s*); but in Scotland it has been recognised that grass may be either natural or industrial (*t*); and where a tenant's terms of removal were "Whitsunday as to the grass," it was held that under grass was not to be included land sown for a crop of hay to be reaped in the year of removal, because that crop was not natural, but industrial (*u*). According to the modern system, labour and expense is incurred by sowing grass with grain; and the rule in Scotland has altered with the practice, and appears now to give the tenant the away-going crop of such grass (*v*).

But the question is, What meaning is now to be attached to "industrial growing crops"? The phrase is not limited by the Act to Scotland, and its meaning can hardly be limited to "emblements," which are also mentioned. It would seem to include the first crop at any rate of vegetables sown or planted, although not maturing within twelve months—such as clover and teasles—and of artificial grass. Whether the term has a more extensive meaning must remain for judicial decision (*x*).

According to the same section, as we have seen (*y*), "goods" also include "things attached to or forming part of the land," Things to be severed from the land, when "goods."

(*p*) *Graves* v. *Weld* (1833) 5 B. & Ad. 105; 2 L. J. K. B. 176; 39 R. R. 419. *ante*, 209.

(*q*) *Ibid.*

(*r*) Co. Litt. 56 a.

(*s*) The question was raised in Ireland in *Flanagan* v. *Searer* (1859) 9 Ir. Ch. R. 230, where a tenant, who had sown red clover and Italian rye-grass in April, 1857, claimed the crop in May, 1858. Cusack Smith, M.R., disallowed the claim on the ground that the case was governed by *Graves* v. *Weld*, *supra*, without expressing any opinion as to whether the right to emblements could extend to the first crop of artificial grass, if maturing within twelve months after being sown.

(*t*) Bell's Dict. Law of Scot., Grass.

(*u*) *Keith* v. *Logie's Heirs* (1825) 4 S. 267; *Lyall* v. *Cooper* (1832) 11 S. 96.

(*v*) Bell's Princ. Law of Scot., 9th ed. § 1262. Hay of the second crop from such grass has been held to be heritable in a question of succession, but industrial as between landlord and tenant: *ibid.* § 1473.

(*x*) A wider meaning would seem to be implied in the opinion that "the phrase 'industrial growing crops' is used in opposition to natural growing crops": Green's Encycl. of the Laws of Scotland, vol. 6, 432.

(*y*) *Ante*, 198.

not only when they are to be severed before sale (which was the law before the Code), but also when they are agreed to be severed "under the contract of sale," that is to say, in performance of the seller's duty to deliver or to allow the buyer to take them.

An exception will be in the very limited class of cases where either the purchaser of the land, or an incoming tenant, enters into an *entire* contract to take the land and the crops (*z*) in which cases they are still not to be deemed "goods."

Except in such cases, this enactment seems equivalent to declaring that under a contract of sale things attached to or forming part of the land, whether the property is to pass to the buyer before or after severance, are to be deemed "goods." If this construction be correct, the enactment has removed all doubt with regard to fixtures, and has certainly altered the law with regard to buildings sold as materials, and with regard to *fructus naturales*. If the parties agree that such things shall be severed, they thereby become "goods" (*a*). The conversion by mere agreement of the parties of "a thing" that is an hereditament into chattels, which was repudiated by Chitty, J., in *Lavery* v. *Pursell* (*b*), has thus received legislative sanction, and that case, as well as *Crosby* v. *Wadsworth* (*c*), and similar cases (*d*), can no longer be regarded as law. It is interesting to note that the view of the present law above suggested was anticipated in 1698 in a dictum of Treby, C.J., who said (*e*) that a sale of growing timber "might be by parol, because it is but a bare chattel," and therefore it did not fall under section 4 of the Statute of Frauds.

Accordingly there should be no contract of sale of "goods" where a landlord sells landlord's fixtures to an incoming tenant (*f*); or an outgoing tenant sells tenant's fixtures to his landlord, or to an incoming tenant, or purchaser of the

(*z*) As in *Falmouth* v. *Thomas* (1832) 1 Cr. & M. 89; 2 L. J. Ex. 57; 3 R. R. 584, *ante*, 207; *cf.* *Mayfield* v. *Wadsley* (1824) 3 B. & C. 357 (where contract was held to be *not* entire), *ante*, 208.

(*a*) This conclusion was approved by the C. A. of Manitoba in *Fredlund* v. *Glines* [1908] 19 Man. L. R. 249.

(*b*) (1888) 39 Ch. D. 508; 57 L. J. Ch. 570, *ante*, 208.

(*c*) (1805) 6 East, 602; 8 R. R. 566.

(*d*) *E.g.* *Teal* v. *Auty* (1820) 4 Moo. 542; 2 Br. & B. 99; 22 R. R. 646; *Scorell* v. *Boxall* (1827) 1 Y. & J. 396; 30 R. R. 807; *Carrington* v. *Roots* (1837) 2 M. & W. 248; 6 L. J. Ex. 95; 46 R. R. 583; and *semble* *Reading* v. *Phillips* (1842) 9 M. & W. 501; 11 L. J. Ex. 217; 60 R. R. 807 (a decision on the Stamp Act), *ante*, 204.

(*e*) Anon., at N. P., 1 Ld. Raym. 182 Powell, J. agreeing.

(*f*) As in *Lee* v. *Risdon*, *ante*.

land; or an incoming tenant or purchaser of the land (*g*) agrees to take the land together with crops or fixtures. The same principles will apply to *fructus naturales*.

A similar distinction is drawn by the Code. There must be a separate entity, or "thing," though, in a conveyancing sense, it may, at the time of the contract, form part of the land.

There must be a "thing" distinguishable from the soil.

Chitty, J., in *Lavery* v. *Pursell* (*h*), draws, as has been seen, no distinction between a thing which is an hereditament, as being attached to land, and any part of the soil itself, such as coal or minerals, to be taken under licence by the buyer.

But, in *Morgan* v. *Russell & Sons* (*i*), under the Code, on the sale of all the cinders and puddle slag or iron slag on certain lands to be taken by the buyers, the County Court Judge found that the cinders were not separate things, but had become part of the soil itself, and that the contract therefore was for the sale of land, and not for the sale of goods. On appeal this decision was affirmed, Lord Alverstone, C.J., saying: "The cinders and slag . . . were not definite or detached heaps resting, so to speak, on the ground. . . . I am clearly of opinion that this was not a contract for the sale of goods. The respondent Morgan did not contract to sell any definite quantity of mineral, nor was it a contract for the sale of a heap of earth which could be said to be a separate thing (*k*). . . . The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth *in situ* so much gravel or brick earth or coal on payment of a price per ton."

Morgan v. *Russell & Sons* (1908).

The distinction laid down in the preceding case was drawn as long ago as 1647. Thus, in *Pearworth* v. *Pierce* (*l*), Rolle J., said: "If the defendant had said 'Thou hast stolen my dung' without any other words, they would have been actionable; for dung in common parlance is understood of dung in a heap, which was agreed to be a chattel of which felony may be committed, and goeth to the executors: but if it lieth scattered upon the ground so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the freehold."

Pearworth v. *Pierce* (1647).

(*g*) Note (*z*) on p. 216.
(*h*) *Ante*, p. 211.
(*i*) [1908] 1 K. B. 357; 78 L. J. K. B. 187. See also *Smart* v. *Jones*, 1864, 15 C. B. N. S. 717; 33 L. J. C. P. 154 (under tap).
(*k*) See as to *Boileau* v. *Heath* [1898] 2 Ch. 301; 67 L. J. Ch. 529; where of the refuse of iron manufacture were decided not to be "stores and ... and *semble* not to be chattels at all.
(*l*) 1647, Aleyn, 32.

Result of preceding case.

The definition therefore includes such things, when sold as chattels, as fixtures, buildings and other erections (*m*), and *fructus naturales* (*n*). It may also include such a thing as a prehistoric boat embedded in the soil (*o*). But it does not cover a natural part of the earth, such as clay or gravel, or minerals, if the buyer is to take it. Such a contract would be concerned with an interest in land (*p*). It would be otherwise if the seller were, under the contract, bound to sever.

Time of attachment to soil.

In spite of the fact that the Code recognises contracts for the sale of "future" goods, the language of the definition of "goods" points to an attachment of the thing to the land at the time of the contract. Accordingly a contract for the sale of an unsown crop of grass, to be cut by the buyer (*q*) at maturity, would be a contract for an interest in land (*r*).

Thing attached "goods" only as between seller and buyer.

The conventional character as "goods" of a thing forming part of the land, and agreed to be severed under the contract of sale, attaches to it only for the purposes of the contract. As was resolved in *Liford's Case* (*s*), "timber trees cannot be felled with a goose-quill." This rule of the common law has not been altered by the Code (*t*). The Code is intended only to regulate the rights of the parties to the contract of sale, and not to affect the rights of third persons.

Morison v. *A. & D. F. Lockhart* (1912).

Thus, in *Morison* v. *A. & D. F. Lockhart* (*t*), where the tenant in tail in possession sold a quantity of growing timber, to be cut by the purchaser, and died before the timber was cut, *Held*, by the Court of Session (assuming that the timber was "goods") that the property had not passed, as the timber was not, at the time of the death of the tenant in possession,

(*m*) In *McManus* v. *Fortescue* [1907] 2 K. B. 1; 76 L. J. K. B. 393; a corrugated iron building resting on dwarf walls was treated as "goods" under the Code.

(*n*) *Fredkin* v. *Glines* [1908] 18 Man. L. R. 249, C. A.

(*o*) See *Elwes* v. *Brigg Gas Co.* (1886) 33 Ch. D. 562; 55 L. J. Ch. 734 Chitty, J., does not decide the point.

(*p*) *Morgan* v. *Russell*, *ante*, 217.

(*q*) The converse case is *Watts* v. *Friend*, *ante*, 205.

(*r*) So held in Canada: *Sharpe* v. *Dundas* [1911] 21 Man. L. R. 695, C. A.; *Decock* v. *Barrager* [1903] 19 *ibid.*, 34, C. A.

(*s*) (1614) 11 Co. Rep. 46 b, 50 a, where it was resolved that "although *fictione juris*, *quoad* the lessee, the tree is divided from the freehold, yet *in facto* and truth, as to all others, it is parcel of the lessor's inheritance, for it was said that timber trees cannot be felled with a goose-quill; as if tenant in tail sells the trees to another, now they are a chattel in the vendee, and his executors shall have them, and in such case *fictione juris* they are severed from the land, but if tenant in tail dies before actual severance, as to the issue in tail they are parcel of the inheritance, and shall go with it, and the vendee cannot take them; and yet *quoad* the tenant in tail himself, they were severed for a time."

(*t*) *Morison* v. *A. and D. F. Lockhart* [1912] S. C. 1017.

in a deliverable state (*u*); that the timber was at that time in fact part of the land with which the tenant in possession could not deal, and that the succeeding tenant in tail was entitled to the uncut timber.

It should be remarked that the Code in referring to severance lays down no limit of time, thus going beyond *Marshall* v. *Green* (*x*); for even if the "things" sold are to derive further benefit from the soil, and are not to be removed within a short period, provided that they are agreed to be severed "under the contract of sale," they are declared to be "goods" within the Code (*y*).

No time fixed for severance.

But even in cases where severance of a thing from the land is contemplated, if the consideration for the chattel be an interest in land, the contract will still fall within section 4 of the Statute of Frauds, as in *Ronayne* v. *Sherrard* (*z*). Such a contract, moreover, not being based on a money consideration, is not a contract of sale (*a*).

(*u*) This affects the transfer of the property.
(*x*) (1875) 1 C. P. D. 35; 45 L. J. C. P. 153, *ante*, 205.
(*y*) See *Macklow* v. *Frear* [1913] 33 N. Z. L. R. 264 a case of timber.
(*z*) (1877) Ir. R. 11 C. L. 146, *ante*, 208.
(*a*) Code, s. 1 (*1*), *ante*, 1

CHAPTER III.

THE MEANING OF THE PHRASE "OF THE VALUE OF TEN POUNDS OR UPWARDS."

THE question naturally arises whether a contract is within section 4 of the Code (*a*) where several articles are contracted for, each of less value than £10, but amounting in the aggregate to that sum or over. It is, therefore, material to inquire whether the contract is an entire one or not in its *formation*.

The question whether a contract for several things be an entire contract for all, or divisible up into as many contracts as the different articles, depends upon the intention of the parties and the circumstances of the case. The fact that the price is a lump sum, or that the things are contracted for at the same time, or are included in one account, *prima facie* shows that the contract is entire; on the other hand, the fact that the things are contracted for at different times, or that the order for some of the things is absolute, and for others conditional, tends to show that the contracts are separate. But the general presumption is "that one article would not have been furnished at one stipulated price unless the other had been agreed to be paid for at the other price" (*b*). And the fact that some of the goods are "future" goods does not affect the presumption.

Several articles sold at one time. *Baldey* v. *Parker* (1823)

In *Baldey* v. *Parker* (*c*), the defendant came to the plaintiffs' shop and bargained for several articles. A separate price was agreed for each, and no one article was of the value of £10. Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. The account as sent amounted to £70, and he demanded a discount of £20 per cent. for ready money, which was refused. The goods were then sent to his house, and he refused to take them. *Held*, that this was one entire

(*a*) *Ante*, 177.

(*b*) *Per* Parke, B., in *Elliott* v. *Thomas* (1838) 3 M. & W., at 176; 7 L. J. Ex. 129; 43 R. R. 556.

(*c*) 2 B. & C. 37; 1 L. J. (O. S.) K. B. 229; 26 R. R. 260; overruling *Hodgson* v. *Le Bret* (1808) 1 Camp. 233.

contract within the seventeenth section of the Statute of Frauds.

Bayley, J., said: "It is conceded that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than £10. Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than £10 within the seventeenth section; and I think that the circumstances of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law." Holroyd, J., said: "This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than £10, but in the course of the dealing it grew to a contract for a much larger amount. At last, therefore, it was one entire contract . . . it being the intention of the Statute, that where the contract, either at the commencement or the conclusion, amounted to or exceeded the value of £10, it should not bind, unless the requisites there mentioned were complied with." Best, J., said: "Whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account."

Where goods are of different kinds.

Elliott v. *Thomas* (1838)

In *Elliott* v. *Thomas* (*d*), there was a joint order for common steel and for cast steel. The common steel was accepted, but there was a dispute about the cast steel, and the question was, whether the acceptance of the former sufficed to make the whole contract valid, and it was so held. Parke, B., said that the presumption, in the absence of explanation, was that one article would not have been sold unless the other were also sold at the same time, and the contract was therefore entire. Alderson, B., said: "The words of the Statute appear to me quite decisive of the question. What are the goods 'so sold'? the goods sold by that contract. If the contract be for two classes of goods, does not he accept part who accepts one class?"

Scott v. *Eastern Counties Railway Co.* (1843).

In *Scott* v. *Eastern Counties Railway* (*e*), the defendants ordered a number of lamps from the plaintiff, a manufacturer, of which one, a triangular lamp, of peculiar construction,

(*d*) 3 M. & W. 170; 7 L. J. Ex. 125; 49 R. R. 558; explaining *Thompson* v. *Macconi* (1824) 3 B. & C. 1, as turning on the form of action.
(*e*) 12 M. & W. 33; 13 L. J. Ex. 14; 67 R. R. 244.

was not ready for delivery until nearly two years after the order. In the meantime, and in the same month when the order was given, all the other lamps were delivered and paid for. The defendants rejected the triangular lamp, and it was objected that their acceptance of the other lamps two years earlier, and when the triangular lamp was not in existence, could not be considered a part acceptance of the goods sold. The Court, however, held the contract entire for all the lamps, and that the acceptance and actual receipt of some of them made the contract good for all.

One account. *Bigg* v. *Whisking* (1853).

In *Bigg* v. *Whisking* (*f*), the buyer bought timber at a certain place, and then at other places distant some miles from each other bought from the seller more timber. At the last place the seller made a final memorandum of all the sales, and signed it. *Held*, following *Baldey* v. *Parker*, and *Elliott* v. *Thomas*, to be an entire contract for all the timber.

Price v. *Lea* (1823).

On the other hand, in *Price* v. *Lea* (*g*), the defendant ordered of the plaintiff's traveller some cream of tartar, and *offered to buy* some lac dye at a certain price, and the traveller said he would write to the plaintiff, and the plaintiff afterwards sent both articles. *Held*, that there were two separate contracts, and the defendant's acceptance of the cream of tartar did not render him liable for the lac dye.

Bargain for sale and resale. *Williams* v. *Burgess* (1839).

Where there was a verbal contract of sale, by the terms of which the thing was to be resold to the seller at a fixed price in a particular event, it was held that the contract was entire, and that the acceptance by the buyer in the first instance took the whole agreement out of the Statute; and he could not object, when afterwards sued on the stipulation for the resale, that this contract was not in writing, and that there had been no acceptance nor actual receipt (*h*).

Different contracts for one consideration.

Where a contract includes a sale of goods, and other matters not within the Statute, if the goods included in the contract be of the value of £10, the fourth section of the Code will apply.

Harman v. *Reere* (1856).

In *Harman* v. *Reere* (*i*), the plaintiff had sold a mare and foal to the defendant, the plaintiff undertaking to agist them

(*f*) 14 C. B. 195; 98 R. R. 585.

(*g*) 1 B. & C. 156; 1 L. J. (O. S.) K. B. 245.

(*h*) *Williams* v. *Burgess* (1839) 10 A. & E. 499; 8 L. J. Q. B. 286; 50 R. R. 489. But the goods to be resold must be the same as those sold: *Watts* v. *Friend*, *ante*, 205. The rule is the same when the buyer sues on the resale: *Lumsden* v. *Davies* (1885) 11 Ont. Ap. R. 585.

(*i*) 25 L. J. C. P. 257; 18 C. B. 587; 107 R. R. 418. See also *Wood* v. *Benson* (1831) 2 C. & J. 94; 1 L. J. Ex. 18; 37 R. R. 635; *Astey* v. *Emery* (1815) 4 M. & S. 262; 16 R. R. 460 (price including carriage).

at his own expense till Michaelmas, and also to agist another mare and foal belonging to the defendant, the whole for £30. Averment of full performance by plaintiff, and breach by defendant. It was admitted that the mare and foal agreed to be sold were above the value of £10. *Held*, that the contract for the sale was within the seventeenth section of the Statute of Frauds, and the Statute not being satisfied the plaintiff could not recover. *Semble*, however, that although the contract was entire, and the price indivisible, plaintiff might on an implied contract have recovered on a *quantum meruit* the value of the agistment of defendant's mare and foal (*k*).

Uncertain value.

Although at the time of the bargain it may be uncertain whether the thing sold will be of the value of £10, according to the terms of the contract, yet, if in the result it turn out that the value actually exceeds £10, the Statute applies. This point was touched upon by Holroyd, J., in *Baldey* v. *Parker* (*l*), and was also involved in the decision in *Watts* v. *Friend* (*m*), where the sale was of a future crop of turnip-seed which might or might not amount to £10, the price stipulated being a guinea a bushel. But the point as to the uncertainty at the date of the contract of the future value of the crop was not argued nor mentioned by counsel or by the Court (*n*).

Watts v. *Friend* (1830).

Code, s. 58 (1)

With regard to sales by auction, the Code in section 58 (1) provides that:—

Sale by auction in lots.

"Where goods are put up for sale by auction in lots, each lot is *prima facie* (*o*) deemed to be the subject of a separate contract of sale" (*p*).

(*k*) *Per* Jervis, C.J., and Williams, J., following *Wood* v. *Benson* (1831) 2 Cr. & J. 94; 1 L. J. Ex. 18; 37 R. R. 635; where, however, the contract was not entire. But *cf.* *Vaughan* v. *Hancock* (1846) 3 C. B. 766; 16 L. J. C. P. 1; 71 R. R. 483, where the entire agreement was executory; and see *Mercier* v. *Campbell* [1907] 14 Ont. L. R. 839 (divisible alternative contract), where all the cases are considered.

(*l*) (1823) 2 B. & C. 37; 1 L. J. (O. S.) K. B. 229; 26 R. R. 260, *ante*, 221.

(*m*) 10 B. & C. 446; 8 L. J. (O. S.) K. B. 181; 34 R. R. 477, set out *ante*, 205.

(*n*) The reporter in a note to *Watts* v. *Friend* points out the different construction put in that case upon the 17th section of the Statute from that put in other cases upon s. 4. From the latter section are excluded cases dependent on contingencies which may or may not happen within a year.

(*o*) See *Dykes* v. *Blake* (1838) 4 Bing. N. C. 463; 7 L. J. C. P. 282; 44 R. R. 761. Where there was a single written contract after several auction sales.

(*p*) This enactment adopts the law laid down in *Emmerson* v. *Heelis* (1809) 2 Taunt. 38; 11 R. R. 520; and *Roots* v. *Dormer* (1832) 4 B. & Ad. 77; 38 R. R. 231. See also *Couston* v. *Chapman* (1872) L. R. 2 Sc. Ap. 250.

But the nature of the contract, or of its subject-matter, or circumstances known to both seller and buyer, may show that two or more sales at auction were intended by both to be interdependent. The mere intention, however, of the buyer to regard all the sales as forming one contract is immaterial (*q*).

(*q*) *Holliday* v. *Lockwood* [1917] 2 Ch. 47; L. J. Ch. citing Fry's Sp. Pref. 3rd. ed., s. 825, and explaining *Dykes* v. *Blake*, *supra*.

CHAPTER IV.

OF ACCEPTANCE AND ACTUAL RECEIPT,

OF THE CONSTRUCTION OF THE WORDS "UNLESS THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD AND ACTUALLY RECEIVE THE SAME."

HAVING considered the meaning of the words "a contract for the sale of any goods of the value of ten pounds or upwards," so as to ascertain what contracts are within section 4 of the Code (*a*), the next step is to inquire into the several requirements of the law.

The language is that the contract "shall not be enforceable by action (*b*) unless—

1. "The buyer shall accept part of the goods so sold, and actually receive the same; or,
2. "Give something in earnest to bind the contract, or in part payment; or
3. "Unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

It is apprehended that the section in prescribing these conditions lays down a rule of *procedure* only: and that in consequence it is applicable to a contract made abroad if sued upon in this country. This is the construction which has been put upon the fourth section of the Statute of Frauds (*c*), the wording of which is very similar (*d*).

The first of the exceptions above mentioned is the subject of the present Chapter.

(*a*) *Ante*, 177.

(*b*) The effect of the words "allowed to be good" in s. 17 of the Statute of Frauds, *ante*, 176, was not to make a contract which did not comply with the provisions of that section *void*, notwithstanding the different wording of the fourth section. See *per* Lord Blackburn in ***Maddison*** v. *Alderson* (1883) 8 App. Cas. 488; 52 L. J. Q. B. 737.

(*c*) Set out *ante*, 200.

(*d*) In *Leroux* v. *Brown* (1852) 12 C. B. 801; 22 L. J. C. P. 1; 92 R. R. 889. See also *per Cur.* in *Adams* v. *Clutterbuck* (1883) 10 Q. B. D. 406; 52 L. J. Q. B. 607; *per* Lord Selborne, L.C., in *Maddison* v. *Alderson* (1883) 8 App. Cas. 474; 52 L. J. Q. B. 737; and *per Cur.* in *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196 at 207; 66 L. J. Ch. 74, C. A. See also a similar decision under s. 17 of the Statute of Frauds in *Green* v. *Lewis* (1867) 26 Up. Can. Q. B. 618.

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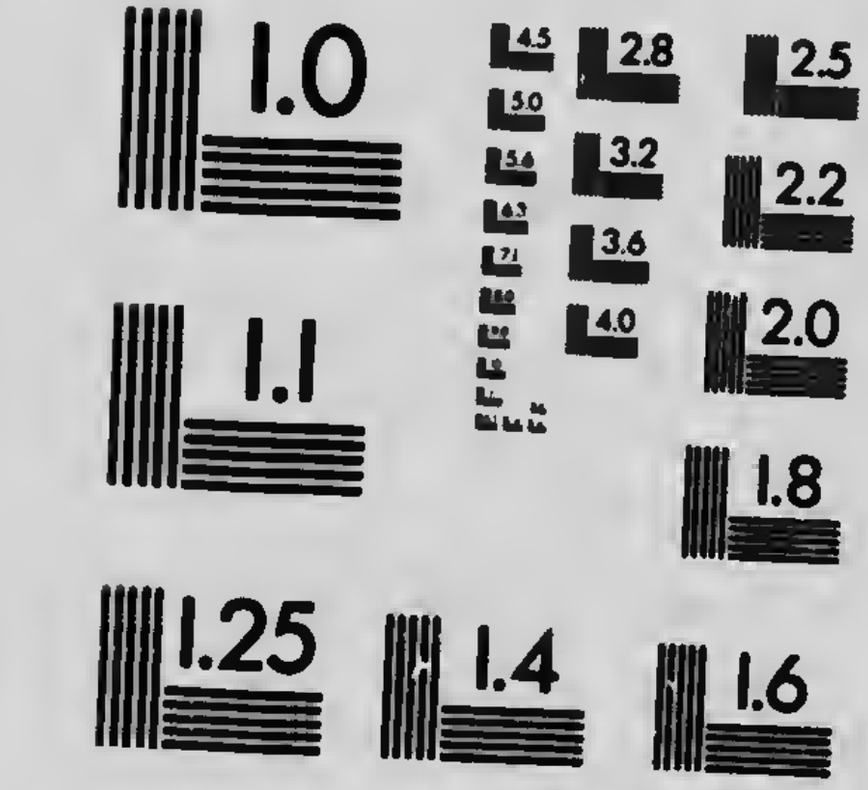

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SECTION 1.—WHAT IS AN ACCEPTANCE.

History of the views of acceptance.

Various theories.
1. That acceptance is a final acceptance by the buyer in performance of contract.
2. That acceptance may be a provisional acceptance.

Morton v. *Tibbett* (1850).

The views of Judges as to the meaning of "acceptance" within section 17 of the Statute of Frauds have undergone a remarkable process of development. Up to the year 1850, when *Morton* v. *Tibbett* (*g*) was decided, acceptance was taken to mean, what the term itself would seem naturally to imply, such conduct "as would preclude the buyer from questioning the quantity or quality of the goods, or in any way disputing that the contract had been fully performed by the vendor" (*h*).

Very deliberate consideration was given to the whole subject of acceptance by the Queen's Bench, in the important case of *Morton* v. *Tibbett* (*i*), in which the distinction now adopted by the Code between a provisional and a final acceptance was first enunciated.

In that case, on the 25th of August the defendant made a verbal agreement with the plaintiff for the purchase of fifty quarters of wheat according to sample, each quarter to be of a specified weight. The defendant sent Edgley, a general carrier, next morning to a place named, and the wheat was then and there received on board of one of the carrier's lighters, for conveyance by canal to Wisbeach, where it arrived on the 28th. In the meantime, on the 26th, the defendant resold the wheat by the same sample, and on the understanding that it was to be of the same weight per quarter as had been agreed with plaintiff, and the wheat upon arrival was examined and weighed by the second purchaser and rejected, because found to be of short weight. Defendant thereupon wrote to plaintiff on the 30th, also rejecting the wheat for short weight. The wheat remained in possession of the carrier, and neither the defendant, nor any one in his behalf, had seen it weighed. The action was debt for goods sold and delivered, and goods bargained and sold. Verdict for plaintiff, with leave reserved to move for nonsuit. The judgment of the Court, after taking time for consideration, was unanimous—the point for decision being whether the verdict was justified by any evidence that defendant had accepted the goods and actually received the same.

In the course of the argument, Lord Campbell, C.J., expressed his view, afterwards confirmed in the judgment of

(*g*) *Infra*.
(*h*) *Per* Campbell, C.J., in *Morton* v. *Tibbett* (1850) 15 Q. B. 428, at 433; 19 L. J. Q. B. 382; 81 R. R. 666.
(*i*) 19 L. J. Q. B. 382; 15 Q. B. 428; 81 R. R. 666.

the Court, thus: "The acceptance under the Statute is merely instead of a memorandum; where there is a memorandum, the buyer may repudiate the goods if they do not agree with the sample." In delivering judgment, he said that it would be very difficult to reconcile the cases on the subject, and that the exact words of the seventeenth section had not always been kept in recollection. After referring to the language, he added: "As the Act of Parliament expressly makes the acceptance and actual receipt of any *part* of the goods sold sufficient, it must be open to the buyer to object, at all events, to the quantity and quality of the *residue;* and even where there is a sale by sample, that the residue offered does not correspond with the sample. We are therefore of opinion that . . . there may be an acceptance and receipt within the meaning of the Act, without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a *different acceptance* from that which affords conclusive evidence of the contract having been fulfilled."

Distinction between enforceableness and performance of the contract.

The distinction pointed out in this last clause is important. The question presented to the Court may be, whether there was a contract, or it may be whether the contract was fulfilled. It is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold (as, for instance, the half-pound of sugar, in *Hinde* v. *Whitehouse* (*k*)), in order that the contract may "be allowed to be good" within section 17, or "be enforceable by action" within section 4 (3) of the Code; and yet the purchaser may well refuse to accept the delivery of the bulk, not because there is not a valid contract proven, but because the seller fails to comply with the contract as proven.

Lord Campbell then declared: "We are therefore of opinion that although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to Edgley was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it."

There was very plain evidence that the defendant *received* it, but the only proof of *acceptance* was the fact of the resale before examination. In order to constitute such an acceptance as would finally preclude the buyer from objecting to the

(*k*) (1806) 7 East, 558; 8 R. R. 676.

quantity or quality of the goods, he must have had an opportunity of examining and weighing them. The *ratio decidendi*, therefore, shows that acceptance under the Statute may be a conditional or provisional one, and it was so treated by Judges of the same Court in subsequent cases (*l*).

Contrary view of the Exchequer.

In the Exchequer, however, the leaning of the Judges was strongly adverse to this construction, and the view was expressed (*m*) that to constitute an acceptance the buyer must have done some act after he had had an opportunity of rejecting the goods, unless he had waived his option of rejection.

3. That acceptance is an act with reference to the goods involving an admission of the contract.

The later decisions finally settled the law, in accordance with *Morton* v. *Tibbett*, deducing from that case the principle that an acceptance under the Statute might be inferred from any act of the buyer with reference to the goods, which involves the admission of the existence of a contract (*n*). This modern theory of acceptance was first enunciated in express terms in the following case.

E.g., examination of the goods.

Kibble v. *Gough* (1878).

In *Kibble* v. *Gough* (*o*), the plaintiff verbally agreed to sell to the defendant barley, to be well dressed and equal to sample. In the defendant's absence his foreman received the barley, which was delivered in several instalments, *examined* it, and gave a receipt for each instalment, with the words, "not equal to sample." The defendant afterwards personally *examined* the barley, and rejected it as not properly dressed and not equal to sample. In an action for goods sold and delivered the jury found that there was an acceptance by the defendant of part of the barley; and that the barley was equal to sample and properly dressed.

Upon the argument of a rule for a new trial it was argued for the defendant that there was no evidence to go to the jury of acceptance under the Statute of Frauds, apparently upon the ground (*p*) that the defendant's foreman having given a receipt with the words "not equal to sample" upon

(*l*) *Per Cur.* in *Cusack* v. *Robinson* (1861) 1 B. & S. 299, at 309–310; 30 L. J. Q. B. 261; 124 R. R. 566; *per* Crompton, J., in *Currie* v. *Anderson* (1860) 2 E. & E. 592, at 600; 29 L. J. Q. B. 87; 119 R. R. 859. Cockburn, C.J., however, in *Castle* v. *Sworder* (1861) 6 H. & N. 828, at 832; 29 L. J. Ex. 235; 123 R. R. 860, disapproved of *Morton* v. *Tibbett*.

(*m*) *Per* Martin, B., in *Hunt* v. *Hecht* (1853) 8 Ex. 814; 22 L. J. Ex. 293; 91 R. R. 780; *per* Pollock, C.B., and Martin, B., and Bramwell, B., in *Coombs* v. *Bristol and Exeter Railway* (1858) 3 H. & N. 510; 27 L. J. Ex. 401; 117 R. R. 828.

(*n*) As late as 1893 however Lindley, L.J., and Kay, L.J., in *Taylor* v. *Smith*, 2 Q. B. 65; 61 L. J. Q. B. 331, C. A., *post*, 231, n. (*b*), asked the question how a buyer could be said to accept goods where he expressly rejected them.

(*o*) 38 L. T. 204, C. A.

(*p*) The report is somewhat involved.

it, could not be held to have accepted it within section 17, and that the question therefore, whether it was equal to sample or not, never arose, because there was no valid contract between the parties. All the Lords Justices (*q*) approved of the distinction laid down in *Morton* v. *Tibbett*, between a final and a provisional acceptance, and held that there was evidence for the jury of an acceptance sufficient to satisfy the Statute. That being so, the question whether the barley was equal to sample or not was clearly one for the jury to decide, and they had answered it in favour of the plaintiff.

Morton v. *Tibbett* approved.

Lord Justice Brett says: "There must be an acceptance and an actual receipt; *no absolute acceptance* but an acceptance which could not have been made except on *admission of the contract*, and that the goods were sent under it."

Cotton, L.J., says: "The object of the Statute is that, where there was no contract in writing, there must be *some overt act* to render the bargain binding. . . . All that is wanted is a receipt, and *such an acceptance* of the goods as shows *that it has regard to the contract*: but the contract may yet be left open to objection" (*r*).

Page v. *Morgan* (1885).

In *Page* v. *Morgan* (*s*), the defendant, a miller, orally bought of the plaintiff by sample eighty-eight quarters of wheat. The wheat was shipped by the plaintiff's agent on a barge, and the next morning thirty-eight of the sacks were hoisted up into the defendant's mill and examined by the defendant, who then directed the bargeman to send up no more, as the wheat was not equal to sample. The same day he told the plaintiff's agent that the wheat was not equal to sample, and that he should not take it. The defendant subsequently returned the thirty-eight sacks to the barge. In an action for the price, or for damages for non-acceptance, the jury were directed that there was evidence of an acceptance sufficient to satisfy the Statute although the defendant was not thereby precluded from rejecting the wheat, if not equal to sample. The jury found that the wheat was equal to sample, and that the defendant had accepted it within the

(*q*) Brasiwell, Brett, and Cotton.

(*r*) In *Rickard* v. *Moore* (1878) 38 L. T. 841, C. A., the defendant, who had verbally bought six bales of wool by sample, had, after unpacking the bales, rejected them as inferior to sample, and two of them were in fact found by the jury to be inferior. The right of the defendant to reject, even if he had accepted them under s. 17, being upheld by the C. A., the question whether he had accepted them became immaterial. See the case explained by Bowen, L.J., in *Page* v. *Morgan* (1885) 15 Q. B. D., at 253; 54 L. J. Q. B. 434, C. A.

(*s*) 15 Q. B. D. 228; 54 L. J. Q. B. 434, C. A.

meaning of the seventeenth section, and gave a verdict for the plaintiff.

The Queen's Bench Division refused a rule for a new trial on the ground of misdirection, and their decision was confirmed by the Court of Appeal (*t*).

Brett, M.R., in giving judgment, said: "It seems to me that the case of *Kibble* v. *Gough* (*u*) lays down the governing principle. . . . It was there pointed out that there must be under the Statute *both* an acceptance *and* actual receipt, but such acceptance need not be an absolute acceptance; all that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and that the goods were sent to fulfil that contract." And then, after pointing to the evidence in the present case, he proceeded: "I can conceive of many cases in which what is done with regard to the delivery and receipt of the goods may not afford evidence of an acceptance. Suppose that goods being taken into the defendant's warehouse by the defendant's servants, directly he sees them, instead of examining them, he orders them to be turned out, or refuses to have anything to do with them. There would there be an actual delivery, but there would be no acceptance of the goods, for it would be quite consistent with what was done that he entirely repudiated any contract for the purchase of the same. I rely for the purposes of my judgment in the present case on the fact that *the defendant examined the goods to see if they agreed with the sample*. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract."

Adopting the principle laid down in the preceding cases, the Code gives the following definition of acceptance:—

Code, s. 4 (3) Definition of acceptance.

"4.—(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not."

Points to be noticed.

Six separate points are noticeable with regard to this definition, namely:—

1. It adopts the distinction, drawn in *Morton* v. *Tibbett* (*v*), between a provisional and a final acceptance (*x*):

(*t*) Brett, M.R., Baggallay, L.J., and Bowen, L.J.
(*u*) *Ante*, 228.
(*v*) *Ante*, 226.
(*x*) Acceptance in performance is dealt with by s. 35.

2. There must be an act;
3. The act may be done, not only to, but merely in relation to, the goods;
4. The acceptance is not an acceptance of the goods, but only a recognition of the contract;
5. The contract must be pre-existing;
6. Acceptance is a different thing from actual receipt (*y*).

Abbott v. *Wolsey* (1895).

In *Abbott* v. *Wolsey* (*z*), the action was for the non-acceptance of twenty tons of hay. The hay was deliverable at the defendant's wharf by the 8th of August. On that day the hay was alongside, and the plaintiff's bargeman handed the defendant's servant a receiving note, which was not returned, and the defendant came on board and examined the hay, taking a sample, and said: "The hay is *not my sample*, and I shall not have it." In the County Court there was judgment for the plaintiffs. This was reversed in the Divisional Court, but restored in the Court of Appeal.

Lord Esher, M.R., pointed out (*a*) that no question was raised as to the actual receipt, and that the only question of law was whether there was any evidence of an acceptance within section 4 (3). After contrasting that section with section 35 of the Code, in order to show that the Code distinguishes an acceptance recognising the existence of a contract and an acceptance binding the buyer to pay for the goods, he said that here the only question was as to the existence of the former kind of acceptance. Therefore, the observations of Judges (*b*) to the effect that a purchaser cannot be held to accept goods when he says that he rejects them were beside the mark. In the present case sending the goods with a delivery note was an intimation by the seller that he was delivering goods under a contract of sale; and the defendant's keeping the note was a recognition that there was to be such a delivery. Although mere inspection might not amount to an act "which recognises a pre-existing contract," here the defendant inspected the goods, and took a sample—not merely to test the quality of the hay—for he said that it was not

(*y*) That they are separate things would seem sufficiently clear from the language of the Statute of Frauds itself, but eminent Judges have suggested doubts.

(*z*) [1895] 2 Q. B. 97; 64 L. J. Q. B. 587, C. A.

(*a*) *Ibid.* at 100.

(*b*) Alluding to those of Lindley, L.J., and Kay, L.J., in *Taylor* v. *Smith* [1893] 2 Q. B. 65; 61 L. J. Q. B. 331. This case (decided before the Code) seems to be now of dubious authority, and, in the opinion of Bigham, J., should never have been reported, as laying down no general principle: see *Taylor* v. *Great Eastern Ry. Co.* [1901] 1 K. B. 774; 70 L. J. K. B. 499.

equal to *his* sample, by which he must have meant some sample previously given to him in connection with a contract of sale. This act, as explained by the words that accompanied it, was an act which recognised a pre-existing contract; at all events, it was evidence from which such an act of recognition might properly be inferred.

Smith, L.J., and Rigby, L.J., concurred, the latter observing (*c*): "The defendant takes a sample of the hay, and inspects it, which is certainly an act done in relation to the goods; and then he explains by contemporaneous words the act he is doing. The effect of what he says is, that he is inspecting the hay in order to see whether it is equal to sample. The mere words would as such produce no effect: but an act done in relation to the goods which recognises a pre-existing contract of sale is sufficient. In this respect the provision of section 4 (3) differs from that of section 35, which deals with acceptance in performance of the contract, and provides that such acceptance may be not only by *acts*, but by *intimation* to the seller that the goods are accepted" (*d*).

Acceptance may be coupled with refusal to perform contract.

Abbott v. *Wolsey* shows that a rejection of the goods may be not inconsistent with a recognition of the *existence* of a contract. It follows that this view, repudiated by the Court of Appeal in *Taylor* v. *Smith* (*e*), has now been adopted by the Code. Anything that the buyer may say will be received in evidence as explaining his act, where it is ambiguous, so as to show whether the act recognises a pre-existing contract of sale (*f*): but if the act amount to such a recognition, a statement that the buyer will not accept is inoperative. Accordingly *Nicholson* v. *Bower* (*g*), and similar cases, are no longer on this point of authority. In fact, the law has at length assimilated the function of acceptance to that of a note or memorandum, which, if signed and containing an admission of the terms of the contract, has always been held sufficient, although the defendant may at the same time have refused, whether on good or on insufficient grounds, to perform the contract (*h*).

(*c*) [1895] 2 Q. B. at 103; 64 L. J. Q. B. 587.

(*d*) But in s. 18, rule 4 (*a*), signifying approval is by implication treated as an "act."

(*e*) [1893] 2 Q. B. 65; 61 L. J. Q. B. 331.

(*f*) *Abbott* v. *Wolsey*, *supra*.

(*g*) (1858) 1 E. & E. 172; 28 L. J. Q. . . 97; 117 R. R. 167. Bigham, J., in *Taylor* v. *Great Eastern Ry.* [1901] 1 K. B. 774, explains the case as depending on a rescission by mutual consent, the property being *revested* in the seller, being previously in the buyer, although he had not accepted.

(*h*) See *post*, 299.

Attempted resale by buyer. *Taylor* v. *G. E. Ry.* (1901).

In *Taylor* v. *The Great Eastern Railway* (*i*), the firm of Barnard Brothers had on the 19th October sold to one Sanders a quantity of barley at the price of £68 5s. on rail at Elsenham station, and had sent him an invoice. On the 24th the sellers ordered the defendants to transfer the barley to Sanders; and thereupon the defendants sent him an advice note that the barley awaited his order at the station. Sanders never inspected or sampled the bulk, but after receiving the advice note, attempted to resell the barley, using a sample obtained from the sellers. Towards the end of November he became bankrupt, and the barley having been given up by the defendants to the sellers, the plaintiff, Sanders' trustee, sued them for conversion. *Held*, by Bigham, J., in the Commercial Court that the buyer's attempt to resell was clearly an "act in relation to the goods which recognises a pre-existing contract of sale," and, therefore, an acceptance. Judgment for the plaintiff.

Contract must be pre-existing.

Furthermore, the act relied upon as an acceptance must be one in recognition of a *pre-existing* contract of sale. It follows that the consent of the buyer to purchase specific goods cannot, in addition to showing mutual assent to a sale, also operate as an acceptance under section 4. The Code requires that something additional shall be done.

Acceptance need not follow actual receipt.

But it is not necessary that acceptance should follow an actual receipt: it may precede or be contemporaneous with it. Thus, in *Cusack* v. *Robinson* (*k*), the Court found that there was evidence of acceptance where the buyer examined and selected specific firkins of butter in the seller's cellar, which were subsequently delivered to him.

Seller not buyer's agent to accept.

Although the point has never been decided in any late case (*l*), it is conceived that the seller is not ordinarily the buyer's agent to accept the goods (*m*). But it is conceived that a request by the buyer to the seller to do acts in relation to the goods may be an acceptance by the buyer.

Cases before the Code.

There is a long line of decisions at common law upon the question what does or does not constitute an acceptance under section 17 of the Statute of Frauds (*n*). As these cases, however, were determined according to the theory then prevailing that

(*i*) [1901] 1 K. B. 774; 70 L. J. K. B. 499.
(*k*) (1861) 1 B. & S. 299; 30 L. J. Q. B. 261; 124 R. R. 566.
(*l*) See *Howe* v. *Palmer* (1820) 3 B. & A. 321, decided on the old theory of acceptance.
(*m*) According to the analogy of a memorandum: see *post*, 312.
(*n*) A fairly complete list of the cases up to 1894 is to be found in a footnote to page 35 of Ker and Pearson-Gee's Sale of Goods Act, where the facts of each case are stated.

acceptance meant an acceptance of the goods (a theory now no longer tenable since *Page* v. *Morgan* (*o*) and *Kibble* v. *Gough* (*p*), and the adoption of the principle [illegible] cases by the Code), it is unnecessary to set them out. These cases should be carefully examined with reference to the wording of the Code. It may be said generally that decisions that acceptance existed are probably of authority: not so in the case of decisions to the contrary effect.

It was held that there had been acceptance where a buyer at auction had received and taken away the sample as part of the bulk of sugar sold (*q*); or had asked for and received a part of the wheat sold, though not in the deliverable state required by the contract (*r*); or had weighed a bulk of hops and compared the samples with it after the contract (*s*); or had counted a flock of sheep at the place of delivery and said: "It is all right" (*t*). On the other hand, it was held that there had been no acceptance where the buyer of jewellery at auction, being a foreigner ignorant of the language, had mistaken the price, and had returned the goods after holding them in his hands for a short time (*u*); or where the buyer had after the sale asked for and taken samples of wine and written on their labels the prices agreed on, such samples not being part of the bulk (*v*); or had on delivery examined some sponge and returned it by the same carrier as inferior to what he had ordered (*w*); or had agreed to buy bones to be separated from a number of inferior bones in the same heap, and on delivery had rejected them as not according to contract (*y*); or had promptly rejected the goods on arrival (*z*); or had on arrival on two occasions merely looked at the goods, and then rejected

(*o*) *Ante*, 229.

(*p*) *Ante*, 228.

(*q*) *Hinde* v. *Whitehouse* (1806) 7 East, 558; 8 R. R. 676. See also *Gardner* v. *Grout* (1857) 2 C. B. (N. S.) 340; 109 R. R. 706; *Klinitz* v. *Surry* (1806) 5 Esp. 267; 8 R. R. 853; *Talver* v. *West* (1816) Holt, 178.

(*r*) *Gilliat* v. *Roberts* (1850) 19 L. J. Ex. 410; 87 R. R. 889. See also *Kershaw* v. *Ogden* (1865) 3 H. & C. 717; 34 L. J. Ex. 159; 140 R. R. 694.

(*s*) *Simmonds* v. *Humble* (1862) 13 C. B. (N. S.) 258.

(*t*) *Saunders* v. *Topp* (1849) 4 Ex. 390; 18 L. J. Ex. 374; 80 R. R. 624.

(*u*) *Phillips* v. *Bistolli* (1824) 2 B. & C. 511; 2 L. J. (O.S.) K. B. 116; 26 R. R. 433.

(*v*) *Simonds* v. *Fisher*, not reported, cited in *Gardner* v. *Grout*, *supra*.

(*w*) *Kent* v. *Huskinson* (1802) 3 Bos. & P. 233; 6 R. R. 777. Serjeant Shepherd's argument in this case is a curious anticipation of the modern theory of acceptance.

(*y*) *Hunt* v. *Hecht* (1853) 8 Ex. 814; 22 L. J. Ex. 293; 91 R. R. 780.

(*z*) *Hopton* v. *McCarthy* (1882) 10 L. R. Ir. 266, following *Norman* v. *Phillips* (1845) 14 M. & W. 277, where the invoice was retained. See also *Barnett* v. *Farley* (1864) 11 L. T. 167 (objection on delivery, and rejection soon after).

them (*a*); or had ordered barley according to sample, and on its arrival at the railway station had not given directions about it, or examined it (*b*).

Acceptance may be constructive.

It was quite settled at common law that acceptance might be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one "of fact for the jury, not matter of law for the Court" (*c*). The acceptance must be clear and unequivocal, but "it is a question for the jury whether, under all the circumstances, the acts which the buyer does, or forbears to do, amount to an acceptance" (*d*). All the cases proceeded on this principle.

Question of fact, not of law.

When buyer does an act of ownership.

The constructive acceptance by the buyer might at common law properly be inferred when he dealt with the goods as owner, *i.e.*, when he did an act which he would have authority to do as owner, but not otherwise. In the language of an eminent Judge (*e*), "if the vendee does any act to the goods —of wrong if he is not owner of the goods, and of right if he is owner of the goods— the doing of that act is evidence that he has accepted them." Such an act of ownership would also clearly be an acceptance within the meaning of the definition in the Code (*f*).

Thus, where the purchaser of a stack of hay resold part of it (*g*); where the purchaser of a horse took a third person to the seller's stable, and offered to resell the horse to the third person at a profit (*h*); and where the buyer of a carriage having ordered certain alterations to be made, sent for the carriage, and took a drive, telling the seller that he intended to take it out a few times so as to make it pass for a second-hand carriage on exportation (*i*); in all these three cases an acceptance was held to be proved. And where the buyer of turnip-seed had spread it out thin, alleging that it was hot and mouldy, and that the plaintiff had authorised his so doing, both of which facts were denied by the seller: it was

(*a*) *Taylor* v. *Smith* [1893] 2 Q. B. 65.
(*b*) *Smith* v. *Hudson* (1865) 6 B. & S. 431; 34 L. J. Q. B. 145.
(*c*) *Per* Denman, C.J., in *Edan* v. *Dudfield* (1841) 1 Q. B. 302; 55 R. R. 258.
(*d*) *Per* Coleridge, J., in *Bushel* v. *Wheeler* (1844) 15 Q. B. 442; 81 R. R. 675, quoted and approved by Campbell, C.J., in *Morton* v. *Tibbett* (1850) 15 Q. B. 428; 19 L. J. Q. B. 382; 81 R. R. 666. See also *Parker* v. *Wallis* (1855) 5 E. & B. 21; 103 R. R. 341.
(*e*) Erle, J., in *Parker* v. *Wallis*, *supra*.
(*f*) *Taylor* v. *Great Eastern Ry.* [1901] 1 K. B. 774; 70 L. J. K. B. 499, a case of attempted resale; *ante*, 233.
(*g*) *Chaplin* v. *Rogers* (1801) 1 East, 192; 6 R. R. 249.
(*h*) *Blenkinsop* v. *Clayton* (1817) 7 Taunt. 597; 18 R. R. 692. See also *Taylor* v. *Great Eastern Railway Co.*, *supra*.
(*i*) *Beaumont* v. *Brengeri* (1817) 5 C. B. 301; 75 R. R. 731.

held to be a question for the jury whether the buyer's act was done for the preservation of the seed, or by the seller's authority, or whether it had been done by the buyer as owner, in which latter case there would be an acceptance (*k*).

But where the defendant ordered a wagon to be made by the plaintiff, and furnished the iron work, and sent a man to help the plaintiff in fitting the iron to the wagon, and afterwards bought a tilt, and sent it for the wagon, it was held that these were not acts of ownership, and did not amount to acceptance of the wagon, because the acts of the defendant had not been done *after* the wagon was finished and capable of delivery (*l*).

This distinction is, it is apprehended, unsound according to modern views of acceptance: an act done in relation to incomplete goods may obviously recognise a contract for their manufacture and sale when complete.

Acceptance of bulky goods.

In sales of bulky goods the same acts often go to show both an acceptance and an actual receipt. Thus, in *Chaplin* v. *Rogers* (*m*), the fact that the buyer had resold part of the stack of hay sold, and that this part had been taken away by the sub-buyer, was held to constitute an actual receipt and an acceptance, as the buyer had dealt with the whole stack as if it were in his actual possession. And in *Marshall* v. *Green* (*n*), the buyer of growing trees, who had cut down some of them and agreed to sell the tops and stumps to a third person, was held to have accepted and actually received part of the trees.

Dealing with bill of lading.

A dealing with goods, so as to justify a jury in finding a constructive acceptance, may take place as effectively with the bill of lading, which represents the goods, as with the goods themselves (*o*).

Silence and delay as proofs of acceptance.

Where there is silence and delay on the part of the buyer in notifying refusal of goods the fair deduction from the authorities at common law seems to be that delay was a

(*k*) *Parker* v. *Wallis* (1855) 5 E. & B. 21; 103 R. R. 341.

(*l*) *Maberley* v. *Sheppard* (1833) 10 Bing. 99; 2 L. J. C. P. 181; 38 R. R. 403.

(*m*) (1801) 1 East, 192; 6 R. R. 249.

(*n*) (1875) 1 C. P. D. 35; 45 L. J. C. P. 153, following *Chaplin* v. *Rogers*. *Smith* v. *Surman* (1829) 9 B. & C. 561; 7 L. J. (O.S.) K. B. 296; 33 R. R. 259, on this point would seem to be no longer of authority. The offer by the buyer to resell was held no acceptance *on the ground* that the buyer still retained his right to object to the quality of the timber, a reason no longer valid. See *Taylor* v. *Great Eastern Ry. Co.* [1901] 1 K. B. 774; 70 L. J. K. B. 499. *ante*, 233.

(*o*) *Currie* v. *Anderson* (1860) 29 L. J. Q. B. 87; 2 E. & E. 592; 119 R. R. 359; *Meredith* v. *Meigh* (1853) 22 L. J. Q. B. 401; 2 E. & B. 364; 95 R. R. 603.

question of degree; that a long and unreasonable delay would afford stringent proof of acceptance, while a shorter time would merely constitute some evidence to be taken into consideration with the other circumstances of the case (*p*).

But mere silence and delay would *prima facie* seem not to be an acceptance under section 4 (3) of the Code, because there is no "act" of the buyer "in relation to the goods which recognises a pre-existing contract of sale," since mere passivity is not usually regarded as an act. But silence and delay would be a final acceptance by the buyer under section 35, and although it is logical to say, as section 4 (3) does, that an admission of the existence of a contract is not necessarily a performance of it, it is not a logical inference that its performance in part is not an admission of its existence. Under the Code.

The rule at common law as to the effect of marking the goods is not easy to deduce from the cases (*q*). The two requirements of acceptance and actual receipt are so intermingled in the reports that it is difficult to discern how far the Judges considered marking to be evidence of acceptance as distinguished from actual receipt. It is, however, clear that marking does not constitute the latter. The text-books have also darkened counsel by referring to both requirements of the Statute under the single term of "acceptance" (*r*). Parke, B., however, said in *Bill* v. *Bament* (*s*) that the buyer's direction to the seller's agent to mark the goods was evidence *quo animo* the buyer received them; and marking, done with the intention of taking to the goods as owner, was accept- Marking the goods.

(*p*) *Bushel* v. *Wheeler* (1844) 15 Q. B. 442; 81 R. R. 675 (over five months' delay); followed in Ireland in *Hopton* v. *McCarthy* (1882) 10 L. R. Ir. 266; *Norman* v. *Phillips* (1845) 14 M. & W. 277; 14 L. J. Ex. 306 (five weeks); *Currie* v. *Anderson* (1860) 2 E. & E. 592; 119 R. R. 859 (one year); *Meredith* v. *Meigh* (1853) 2 E. & B. 364; 95 R. R. 603 (ten days).

(*q*) *Bill* v. *Bament* (1841) 9 M. & W. 36; 11 L. J. Ex. 21; 60 R. R. 658; *Baldey* v. *Parker* (1823) 2 B. & C. 37; 1 L. J. (O.S.) K. B. 229; 26 R. R. 260; *Proctor* v. *Jones* (1826) 2 C. & P. 532; 31 R. R. 693; *Boulter* v. *Arnott* (1833) 1 C. & M. 334; 2 L. J. Ex. 97, all cases of actual receipt; *Hodgson* v. *Le Bret* (1808) 1 Camp. 233, where Lord Ellenborough decided that marking the goods, with the intention of showing that they had been purchased, was both an acceptance and actual receipt, is treated as of no authority by Parke, B., and Bolland, B., in *Elliott* v. *Thomas* (1838) 3 M. & W. 177, 178; 7 L. J. Ex. 129; 49 R. R. 558; *Anderson* v. *Scot* (1806), rep. in n. to *Hodgson* v. *Le Bret* (1808) 1 Camp. at 235—in which Lord Ellenborough held, that the cutting off the pegs by which the wine in casks was tasted, and the marking of defendant's initials on the cask in his presence, was an incipient *delivery*, sufficient to take the case out of the Statute—was disapproved by Best, C.J., in *Proctor* v. *Jones*, *supra*, and by Alderson, B., in *Saunders* v. *Topp* (1849) 4 Ex. 390; 18 L. J. Ex. 374; 80 R. R. 624.

(*r*) *E.g.* Chitty on Cont. 11th ed. 375.

(*s*) (1841) 9 M. & W. at 41; 11 L. J. Ex. 81; 60 R. R. 658.

ance at common law. And it seems to be reasonably clear that, under the Code, marking the goods, subsequently to a completed contract on behalf of the buyer, and with the intention that the buyer should be owner (*t*), would be an "act which recognises a pre-existing contract of sale." And it is conceived that the effect would be the same though the subsequent marking was made pursuant to a term of the contract itself, as the act of marking would be independent of the contract (*u*).

Goods already in buyer's possession.

When the goods are at the time of the contract already in the buyer's possession the same act of ownership will constitute both an acceptance and an actual receipt. This subject is discussed hereafter (*v*).

Acceptance when goods delivered to buyer's carrier or wharfinger.

It was settled in numerous cases at common law (*x*) that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute an acceptance, these agents having authority only to receive, not to accept, the goods for their employers. This was on the ground that an acceptance could not be presumed where the buyer had had no opportunity of inspecting. Although the new theory is that an acceptance is a recognition of the contract, not an acceptance of the goods (*y*), it is submitted that under the Code, the mere receipt of goods by the buyer's carrier or other agent will not constitute an acceptance unless the buyer has done some act in relation to the goods which recognises a pre-existing contract of sale. But giving instructions to a carrier or an agent to collect goods may amount to an acceptance by the buyer himself.

Part acceptance where some of the goods are not yet in existence.

The acceptance of part of the goods bought makes the contract enforceable for the whole, even in cases where some of the goods are not yet in existence, but are to be manufactured, that is to say, are "future goods" (*z*). As illustrations, the cases in the note (*a*) may be consulted.

(*t*) *Secus*, if to identify merely: *Hart* v. *Anderson* (1892) 24 Nova Sc. R. 157.

(*u*) Payment is analogous: *post*, 256.

(*v*) *Post*, 241, *et seqq*.

(*x*) *Hanson* v. *Armitage* (1822) 5 B. & Ald. 557; 24 R. R. 478; *Johnson* v. *Dodgson* (1837) 2 M. & W. 653, at 656; 6 L. J. Ex. 135; 46 R. R. 733; *Hunt* v. *Hecht* (1853) 8 Ex. 814; 22 L. J. Ex. 293; 91 R. R. 780; *Meredith* v. *Meigh* (1853) 2 E. & B. 364; 22 L. J. Q. B. 401; 95 R. R. 605, in which *Hart* v. *Sattley* (1814) 3 Camp. 528, is overruled; *Hart* v. *Bush* (1858) E. B. & E. 494; 27 L. J. Q. B. 271; 113 R. R. 744; *Smith* v. *Hudson* (1865) 6 B. & S. 431; 34 L. J. Q. B. 145; 141 R. R. 459.

(*y*) *Kibble* v. *Gough*, *ante*, 228; *Page* v. *Morgan*, *ante*, 229.

(*z*) See Code ss. 5 (1) and 62 (1) for definition of "future goods."

(*a*) *Scott* v. *E. C. Ry.*, *ante*, 221; *Elliott* v. *Thomas*, *ibid.*

It has been shown that acceptance may precede actual receipt (*b*); but it must take place before action brought. It has been so decided with regard to the memorandum, and the reasoning equally applies to the other requirements of the Code (*c*). Time of acceptance.

It is not necessary that the act relied on as an acceptance should, like a memorandum, show the *terms* of the contract. It operates, together with actual receipt, merely as a waiver of written evidence of the contract, allowing it to be established by parol, as before the Statute of Frauds (*d*). It goes to prove that there was *a* contract of sale, although there may be a dispute between the parties as to the terms of the contract. Such dispute is to be determined on the parol evidence by the jury. Where the goods have been accepted, litigation may arise on various questions:—for instance, as to the price; whether the sale was for cash or on credit; whether notes or acceptance were to be given, &c. This point may not only be inferred from the decisions, especially that in *Morton* v. *Tibbett* (*e*), but was expressly decided in *Tomkinson* v. *Staight* (*f*). Effect of acceptance.

The defendant in that case was alleged to have bought a piano from the plaintiffs, which was delivered to him at his house, and payment demanded. He said he would not pay, insisting that the agreement was that he should retain the piano as security for some bills of exchange bought from the plaintiffs. The defendant refused to let the plaintiffs take back the piano, and kept it. It was argued for the defendant that the onus was on the plaintiffs to prove that the defendant had accepted the goods on the terms of the contract set up by the plaintiffs, otherwise there was no acceptance of the goods "so sold." The jury found that the goods had been sold, and not deposited as security. Leave was reserved to the defendant to move to enter the verdict for him on the ground that there was no sufficient evidence of acceptance. But *held*, that all that was necessary was a contract of sale, and acceptance by the buyer *in that character*; that such an acceptance being fully proven, the Statute was satisfied, and that the *Tomkinson* v. *Staight* (1856).

(*b*) *Cusack* v. *Robinson* (1865) 1 B. & S. 299; 30 L. J. Q. B. 261; 124 R. R. 596, *ante*, 233.
(*c*) *Bill* v. *Bament* (1841) 9 M. & W. 36; 11 L. J. Ex. 81; 60 R. R. 658; *Lucas* v. *Dixon* (1889) 22 Q. B. D. 357; 58 L. J. Q. B. 161, C. A.
(*d*) *Per* Lord Campbell in *Morton* v. *Tibbett* (1850) 15 Q. B. 434; 19 L. J. Q. B. 382; 81 R. R. 666.
(*e*) *Ante*, 226.
(*f*) 25 L. J. C. P. 85; 17 C. B. 697; approved by the Supreme Court of the U.S. in *Hinchman* v. *Lincoln* (1888) 124 U. S. 38.

dispute about the terms of the contract was matter of fact for decision by the jury on the parol evidence. Creswell, J., after saying there was a delivery of the piano, which the defendant had kept, proceeded: "He is precluded therefore from saying that he did not accept it upon the true terms of the bargain, whatever they were. He disputed the terms upon which he agreed to become the owner. The jury have settled that by their verdict."

So, also, section 4 (3) of the Code speaks of a recognition, not of "the," but of "*a* pre-existing contract of sale."

Acceptance after disaffirmance of the contract by seller.

It has been held that a buyer cannot accept after the seller has disaffirmed the parol contract.

Taylor v. *Wakefield* (1856).

Thus, in *Taylor* v. *Wakefield* (*g*), there was a verbal agreement between the owner of goods and his tenant, who had possession of them, that the tenant might purchase them at the end of his tenancy, but was not to take them till the money was paid. At the termination of the tenancy the buyer tendered the price, but the seller refused it, and denied the validity of the bargain. The buyer then proceeded to take away the goods, but the seller prevented him. Trover by the buyer against the seller. *Held*, no evidence for the jury of acceptance and delivery, because the seller had disaffirmed the contract before the buyer took to the goods.

Smith v. *Hudson* (1865).

So, in *Smith* v. *Hudson* (*h*), one Willden had bought of the defendant barley according to sample, and on its arrival at the railway station had not given any orders or directions about the barley, nor examined it, and had then become bankrupt, whereupon the seller gave notice to the railway company not to deliver the goods to any one but himself. They were redelivered to him, and claimed by the bankrupt's assignees, who brought trover. *Held*, that they could not succeed, the property in the barley being in the seller. In all the opinions (*i*) it was held that the countermand of the seller before the goods had been delivered according to his order, and before acceptance, put an end to the contract of the bankrupt.

The act of the buyer by way of acceptance under the Code, being an act which recognises "a pre-existing" contract of sale, would seem to be inoperative if the contract had then ceased to exist. In fact acceptance must take place by

(*g*) 6 E. & B. 765; 106 R. R. 793.
(*h*) 6 B. & S. 431; 34 L. J. Q. B. 145; 141 R. R. 459.
(*i*) Cockburn, C.J., Blackburn, J., Mellor, J., and Shea, J.

common consent (*k*). This view has been judicially taken as regards the fourth section of the Statute of Frauds, under which decisions similar to that in *Taylor* v. *Wakefield* have been given (*l*).

SECTION II.—WHAT IS AN ACTUAL RECEIPT.

This question is not free from difficulty, nor have the cases always been consistent. The circumstances in which the goods happen to be at the time of the contract afford the basis of a convenient arrangement for reviewing the authorities. The goods sold may be in possession:—

1. Of the buyer as bailee or agent of the seller;
2. Of a third person, whether he be bailee or agent of the seller or not;
3. Of the seller himself; and this is the most usual case.

1. When the goods at the time of the contract are already in possession of the buyer, it may be difficult to prove actual receipt. But wherever it can be shown that the buyer has done acts inconsistent with the supposition that his former possession has remained unchanged, these acts may be proven by parol, and it is a question of fact for the jury whether the acts were done because the buyer had taken to the goods as owner.

1. Goods already in possession of buyer.

In *Edan* v. *Dudfield* (*m*), the defendant, agent of the plaintiff, held goods of the plaintiff which he had entered at the Custom-house in his own name. He agreed to buy them, and afterwards sold them. On action for the price, it was argued for the defendant that where the goods were already in possession of the alleged buyer, there could be no valid sale under the Statute of Frauds without a writing: because, although there might be a virtual, there could not possibly be an *actual*, receipt. But the Court, after time to consider, held, that there was evidence to justify the jury in finding an actual receipt, saying: "We have no doubt that one person

Edan v. *Dudfield* (1841).

(*k*) It has been so held with regard to the requirement, under s. 4, of payment: *Davis* v. *Phillips, Mills & Co.* (1907) 24 Times L. R. 4. See also *per* Bigham, J., in *Taylor* v. *Great Eastern Railway* [1901] 1 K. B. 774; 70 L. J. K. B. 499, where the learned Judge was of opinion that, on the buyer's refusal to satisfy s. 4, the seller could reseind.

(*l*) *Crosby* v. *Wadsworth* (1805) 6 East, 602; 8 R. R. 566; explained in *Farrington* v. *Roots* (1837) 2 M. & W. 248; 6 L. J. Ex. 95; 46 R. R. 583; and cited by Lord Selborne, L.C., in *Maddison* v. *Alderson* (1883) 8 App. Cas. 467, at 475; 52 L. J. Q. B. 737. The *dicta* of the Court in the second case that the contract under s. 4 is void have been disapproved: *Britain* v. *Rossiter* (1879) 11 Q. B. D. 123; 48 L. J. Ex. 362, C. A.

(*m*) 7 Q. B. 302; 55 R. R. 258. See also *per Cur.* in *Taylor* v. *Wakefield* (1856) 6 E. & B. 765; 106 R. R. 793.

in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts, without any writing between the parties, which amount to acceptance (*n*). And the effect of such acts, necessarily to be proved by parol evidence, must be submitted to a jury."

Lillywhite v. *Devereux* (1846).

In *Lillywhite* v. *Devereux* (*o*), an action for goods sold and delivered, the plaintiff's tenant of a furnished house had agreed to buy the furniture at a valuation, which was made, but he would not pay the price fixed, and offered less. He continued to occupy the house, giving, however, continual notices to the plaintiff to remove the furniture. After a verdict for the plaintiff, on a motion for a new trial on the ground that there was no evidence of acceptance and actual receipt, the Exchequer Court observed: "No doubt can be entertained after the case of *Eden* v. *Dudfield* . . . that this is a question of fact for the jury; and that, if it appears that the conduct of a defendant in dealing with goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract . . . as, for instance, if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alters the nature of the property, or the like. But we think such facts must be clearly shown." In this case, however, the Court disagreed with the jury's verdict, as not justified by the evidence.

2. Goods in possession of a third person as bailee for seller.

2. When the goods at the time of the sale are in possession of a third person, an actual receipt takes place when the seller, the buyer and the third person agree together that the latter shall cease to hold the goods for the seller and shall hold them for the buyer. They were in possession of an agent for the seller, and therefore in contemplation of law in possession of the seller himself, and they become in the possession of an agent for the buyer, and therefore in that of the buyer himself (*p*). But all of the parties must join in this agreement, for the agent of the seller cannot be converted into an agent for the buyer without his own knowledge and consent. Therefore, if the seller have goods in possession of a warehouseman, a wharfinger, carrier, or any other bailee, the seller's order given to the buyer directing the bailee to deliver the goods or to hold them subject to the control of the buyer, will not

(*n*) *I.e.* "acceptance and actual receipt."

(*o*) 15 M. & W. 285; 71 R. R. 670. See also *Hazard* v. *Chew* (1894) 11 Times L. R. 37 (user of engine, but not as buyer).

(*p*) Blackburn on Sale, 28; 2nd ed. 25.

effect such a change of possession as amounts to actual receipt, unless the bailee accept the order, or recognise it, or consent to act in accordance with it; nor will the transfer to the buyer of a warrant, issued by the bailee himself, amount to an actual receipt by the buyer, unless the bailee has attorned to him (*q*); and until the bailee has so acted, he remains agent and bailee of the seller.

Delivery order.

Bentall v. *Burn* (1824).

In *Bentall* v. *Burn* (*r*), the King's Bench held that a delivery order given to the buyer of wine did not amount to an actual acceptance (receipt?) by him, until the warehousemen accepted the order for delivery, "and thereby assented to hold the wine as the agents of the vendee." A distinction was suggested in the case, because the warehousemen were the dock company, bound by law to transfer goods from seller to buyer, when required to do so, but the Court said: "This may be true, and they might render themselves liable to an action for refusing to do so: but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance (receipt?) of them by him until he actually took possession of them."

Warehouseman's warrant.

Farina v. *Home* (1846).

This case was followed in *Farina* v. *Home* (*s*). There, the wharfinger gave the seller a warrant making the goods deliverable to him or to his assignee by indorsement on payment of rent and charges. The seller forthwith indorsed and sent it to the buyer, who kept it ten months, and refused to pay for the goods or to return the warrant, saying he had sent it to his solicitor and intended to defend the suit, as he had never ordered the goods, adding that they would remain for the present in bond. *Held*, to be no actual receipt. The warrant was only an engagement by the wharfinger to hold the goods for the consignee or his assignee, and attornment was necessary. But the facts showed sufficient evidence of acceptance to go to the jury.

Transfer of bill of lading an actual receipt.

But a bill of lading being in the truest sense a *symbol* of the goods, a transfer of it to the buyer constitutes *ipso facto* an actual receipt. "It is the key which, in the hands of the

(*q*) *Farina* v. *Home* (1846) 16 M. & W. 119; 16 L. J. Ex. 73; 73 R. R. 433, *infra*. See the Chapter on Lien, *post*, Book V., Pt. I., Chap. III., as to the different view taken by the Courts from that taken by the Legislature of such documents as warrants, with regard to the possession of the goods.

(*r*) 3 B. & C. 423; 3 L. J. (O.S.) K. B. 42; 27 R. R. 391. See also *Lackington* v. *Atherton* (1844) 7 Man. & G. 360; 13 L. J. C. P. 140; *Bill* v. *Bament* (1841) 9 M. & W. 36; 11 L. J. Ex. 81; 60 R. R. 658; *Lucas* v. *Dorrien* (1817) 7 Taunt. 278; 18 R. R. 480; *Woodley* v. *Coventry* (1863) 2 H. & C. 164; 32 L. J. Ex. 185; 133 R. R. 633; *Harman* v. *Anderson* (1809) 2 Camp. 243; 11 R. R. 706.

(*s*) (1846) 16 M. & W. 119; 16 L. J. Ex. 73; 73 R. R. 423.

rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be" (*t*). This distinction, in cases between *seller and buyer*, as where the existence of an actual receipt is in question, is not affected by the Factors Act, 1889 (*u*), though, for certain other purposes, warrants and delivery orders, &c., are documents of title under that Act, and have the same operation as bills of lading (*v*).

Documents of title under Private Acts.

And the reader should also remark that the transfer of such documents as delivery warrants may, by virtue of a Private Act of Parliament, confer such a possession of the goods, as to constitute an actual receipt; as, *e.g.* in the case of a warrant, the transfer of which is to have the same effect as if the goods were "deposited in the transferee's own warehouse" (*x*).

Godts v. *Rose* (1855).

In *Godts* v. *Rose* (*y*), the seller had the goods transferred by his warehouseman to the buyer's order, and sent him the certificate of transfer by a clerk. The clerk handed the invoice and certificate together to the buyer, and asked for a cheque, which was refused, the buyer alleging that he was entitled to credit. He refused to give up the certificate, whereupon the seller countermanded his order on the warehouseman. *Held*, that the delivery of the certificate was conditional on the buyer's giving a cheque; that actual receipt therefore had not taken place, the tripartite contract not being complete.

Goods on premises of third persons not bailees.

But the goods may be lying on the premises of third persons, who are not bailees of them, as timber cut down and lying at the disposal of the seller on the land of the person from whom he bought it, or lying at his disposal at a free wharf: and in such cases the delivery may be effected by the seller's putting the goods at the disposal of the buyer, and suffering the latter to take actual control of them (*z*).

(*t*) *Per* Bowen, L.J., in *Sanders* v. *MacLean* (1883) 11 Q. B. D. 341; 52 L. J. Q. B. 481, C. A. See also *Currie* v. *Anderson* (1860) 2 E. & E. 592; 29 L. J. Q. B. 87; 119 R. R. 859, where, however, acceptance and actual receipt are not clearly distinguished.

(*u*) 52 & 53 V. c. 45.

(*v*) See *ante*, 48 *seqq.*, and the Chapters on Lien, and Stoppage in Transitu. *post*, Book V., Pt. I., Chaps. III. and IV.

(*x*) See Chapter on Lien, *post*, Book V., Pt. I., Chap. III.

(*y*) (1855) 17 C. B. 229; 25 L. J. C. P. 61; 104 R. R. 668. Willes, J., in this case, however, discusses the questions of the *property*

(*z*) As in *Tansley* v. *Turner* (1835) 2 Bing. N. C. 151; 4 L. J. C. P. 272; 42 R. R. 564; *Cooper* v. *Bill* (1865) 34 L. J. Ex. 161; 3 H. & C. 722; 140 R. R. 698.

In *Marshall* v. *Green* (*a*), where the buyer of timber growing on land in the possession of the seller's tenant cut down some of the trees, and agreed to sell the tops and stumps to a third person, and the seller afterwards countermanded the sale, before any of the trees had been removed from the land, it was held that there was evidence of actual receipt, as well as of acceptance, of a part of the goods, as the buyer had been allowed to deal with them as an owner in possession. Grove, J., alone attached importance to the fact that the land was throughout in the possession, not of the seller, but of his tenant.

Marshall v. *Green* (1875).

3. Usually at the time of the sale the goods are in possession of the seller himself, and it is sometimes extremely difficult to point out *à priori* at what precise period the goods sold can properly be said in all cases to have been actually received by the buyer. Of course, if he remove the goods from the seller's possession and take them into his own, there is an actual receipt. And it is necessary here to renew the observation that the inquiry is now confined to the *validity* not the *performance* of the contract, and that the actual removal by the buyer of a part, however small, of the things sold, if taken as part of the bulk and by virtue of his purchase (*c*), is an actual receipt sufficient to make the contract enforceable, although a serious question may and often does arise at a later period, whether there has been delivery of the bulk.

3. Goods in possession of seller.

The fact that the goods are in the custody of the sheriff on the seller's premises is not inconsistent with an actual receipt by the buyer (*d*).

Goods in custody of sheriff on seller's premises.

It is well settled that the delivery of goods to a common carrier, *à fortiori* to one specially designated by the buyer, for conveyance to him or to a place designated by him, constitutes an actual receipt by the buyer. In such cases the carrier is, in contemplation of law, the bailee of the person *to* whom, not of the person *by whom*, the goods are sent, the seller in employing the carrier being considered as an agent of the buyer for that purpose (*e*).

Delivery to common carrier.

(*a*) 1 C. P. D. 35; 45 L. J. C. P. 153.
(*c*) *Klinitz* v. *Surry* (1806) 5 Esp. 267; 8 R. R. 853.
(*d*) *Union Bank of London* v. *Lenanton* (1878) 47 L. J. C. P. 409.
(*e*) *Dawes* v. *Peck* (1799) 8 T. R. 330; 4 R. R. 675; *Wait* v. *Baker* (1848) 2 Ex. 1; 17 L. J. Ex. 307; 76 R. R. 469; *Fragano* v. *Long* (1825) 4 B. & C. 219; 3 L. J. (O.S.) K. B. 117; 28 R. R. 226; *Dunlop* v. *Lambert* (1838) 6 Cl. & F. 600; 49 R. R. 143; *Johnson* v. *Dodgson* (1837) 2 M. & W. 653; 6 L. J. Ex. 185; 46 R. R. 733.

It must not be forgotten that the carrier only represents the buyer for the purpose of *receiving*, not *accepting*, the goods (*f*).

Seller may become bailee of purchaser.

It is also now finally determined, that the goods may remain in the possession of the seller, *if he assume a changed character*, and yet be actually received by the buyer. It may be agreed that the seller shall cease to hold as owner, and shall assume the character of bailee or agent of the buyer.

Chaplin v. *Rogers* (1800).

The first case was that of *Chaplin* v. *Rogers* (*g*), in 1800, where a stack of hay remaining on the seller's premises was held to have been actually received by the purchaser, on the ground that he had dealt with this commodity afterwards as if it were in his actual possession by reselling part of it to a sub-buyer, who had taken away the part so purchased by him.

Nicholls v. *White* (1911).

In *Nicholls* v. *White* (*h*), the defendant sold a stack of hay to the plaintiff, the plaintiff to be at liberty to send his men at any time to tie and press the hay, and the defendant undertook afterwards to dispatch it by railway. Next day the defendant telegraphed to the plaintiff "Don't send press: am writing," and also wrote asking the plaintiff to "give up possession" as he had sold the rick to another. *Held*, that either the defendant's telegram or his letter was evidence of a constructive delivery of the hay, as they both recognised a possession in the plaintiff.

Ex parte Moffatt (1841).

In *Ex parte Moffatt; Re Tate* (*i*), teas were sold according to a custom of trade whereunder they remained in the possession of the seller, and were deemed to be in pledge for the remainder of the price unpaid. *Held*, by Lord Cottenham, L.C., that there was an actual receipt.

Elmore v. *Stone* (1809).

But the case usually cited as the leading one on this point is *Elmore* v. *Stone* (*k*), where the purchaser of horses from a dealer left them with the dealer to be kept at livery. The seller then removed the horses from his sale stables to others. Sir James Mansfield delivered the judgment of the Common Bench, holding that as soon as the dealer had consented to keep them at livery his possession was changed, and from that time he held not as owner, but as any other livery-stable keeper might have done.

Marvin v. *Wallis* (1856).

On the authority of that case, and on facts almost identical, near half a century later, in 1856, the case of *Marvin* v.

(*f*) *Ante*, 238.

(*g*) 1 East, 192, referred to with approval by Coleridge, C.J., in *Marshall* v. *Green* (1875) 1 C. P. D. at 41; 45 L. J. C. P. 153.

(*h*) (1911) 103 L. T. 800, where all the cases were cited in argument.

(*i*) (1841) 2 Mont. D. & De G. 170.

(*k*) 1 Taunt. 458; 10 R. R. 578.

Wallis (*l*) was decided by the Queen's Bench (*m*). After the completion of the bargain, the seller borrowed the horse for a short time, and, with the purchaser's assent, retained it as a borrowed horse. *Held*, that there had been an actual receipt; that there had been a change of character in the seller from owner to bailee and agent of the purchaser.

Beaumont v. *Brengeri* (1847).

So, in *Beaumont* v. *Brengeri* (*n*), the carriage bought by the defendant remained in the shop of the plaintiff, the seller, but the circumstances showed that this was at the request of the defendant, and that plaintiff had changed his character from owner to warehouseman of the carriage for the buyer. *Held*, an actual receipt.

Two cases decided in the King's Bench, in 1820 and 1822, may seem at first sight to trench upon the doctrine established in *Elmore* v. *Stone* and *Marvin* v. *Wallis*.

Tempest v. *Fitzgerald* (1820).

In the first, *Tempest* v. *Fitzgerald* (*o*), the purchaser of a horse agreed, in August, to give forty-five guineas for it and to take it away in September. The parties understood it to be a *ready-money* bargain. The purchaser returned on the 20th September, ordered the horse out of the stable, mounted and tried it, had it cleaned by his servant, ordered some change in the harness, and asked plaintiff's son to keep it for another week, which was assented to as a favour. The purchaser said he would call and pay for the horse about the 26th or 27th. He returned on the 27th with the intention of taking it, but the horse had died in the interval, and he refused to pay. *Held*, that there was no actual receipt. The ground of the decision was that defendant had no right of property in, or possession of, the horse *until* the price was paid; that if he had gone away with the horse, the seller might have maintained trover: and the case was distinguished by the Judges from *Chaplin* v. *Rogers* (*p*), and *Blenkinsop* v. *Clayton* (*q*), on this basis.

Carter v. *Toussaint* (1822).

In the second case, *Carter* v. *Toussaint* (*r*), the plaintiffs, who were farriers, sold the defendant a racehorse which required firing, and this was done in the defendant's presence and with his approbation. It was agreed that the horse should be kept by the plaintiffs for twenty days without

(*l*) 6 E. & B. 726; 25 L. J. Q. B. 369; 106 R. R. 781.
(*m*) Campbell, C.J., and Coleridge, J., and Erle, J.
(*n*) 5 C. B. 301; 75 R. R. 731.
(*o*) 3 B. & Ald. 680; 22 R. R. 526.
(*p*) (1800) 1 East, 192; 6 R. R. 249, *ante*, 236.
(*q*) (1817) 7 Taunt. 597; 18 R. R. 602, *ante*, 235.
(*r*) 5 B. & Ald. 855; 24 R. R. 589.

charge. At the end of that time, by the defendant's orders, the horse was taken by the plaintiffs to a park to be turned out to grass. It was entered in the plaintiff's name, and this was also done by the direction of the defendant, who was anxious that it should not be known that he kept a racehorse. *No time* was specified in the bargain *for the payment* of the price. *Held*, that there had been no actual receipt, because the seller, no credit having been given, was not bound to deliver the horse without payment of the price, and that he had never lost possession or control of the horse. If the horse had been put in the park-keeper's books in the name of the defendant and by his request, that would have amounted to an actual receipt of it by the purchaser; but on the facts the purchaser could not have maintained trover against the park-keeper on tendering the keep.

It is apparent, from the reasoning of the Judges, that both these cases went distinctly upon the ground that in a cash sale the seller has a right to demand payment of the price concurrently with delivery of possession; and that as nothing had been assented to by the sellers which impaired this right, there had been no actual receipt by the buyers (*s*).

Cusack v. *Robinson* (1861).

In *Cusack* v. *Robinson* (*t*), the Court treated the rule as settled that "though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone (*u*), and then there is a sufficient receipt to satisfy the Statute."

Castle v. *Sworder* (1861).

The subject was very thoroughly discussed in *Castle* v. *Sworder* (*v*), in which a unanimous decision of the Exchequer of Pleas was reversed by a decision, also unanimous, of the Exchequer Chamber (*x*). This was an action to recover £80 2s. 2d., the price of some rum and brandy, for which the defendant gave a verbal order, *with six months' credit*. The plaintiffs' clerk wrote off and transferred into the defendant's name, in the books kept in the plaintiffs' bonded warehouse,

(*s*) See also *Holmes* v. *Hoskins* (1854) 9 Ex. 753; 96 R. R. 959; and *cf. Farrer* v. *Kirkby* (1888) 4 Times L. R. 543, where there was evidence of the sellers' waiver of payment before delivery, and *Tempest* v. *Fitzgerald* was distinguished. Moreover, the horse was put in stables not belonging to the seller.

(*t*) 30 L. J. Q. B. 264; 1 B. & S. 299; 124 R. R. 566.

(*u*) This is no longer the case as regards lien: see Code, s. 41 (2).

(*v*) 29 L. J. Ex. 235; 5 H. & N. 281; 30 L. J. Ex. 310; 6 H. & N. 828; 123 R. R. 860.

(*x*) Cockburn, C.J., Crompton, J., Willes, J., Byles, J., and Keating, J., reversing Martin, B., Channell, B., and Bramwell, B.

two specific puncheons of rum and a hogshead of brandy, marked, and described in an invoice sent to the defendant, which also stated that the goods were warehoused for six months. After the transfer in the books the plaintiffs had no power to get the goods out. These packages the plaintiffs had among their goods in their own bonded cellar, of which they kept one key and the Custom-house officers another. After the credit had expired, the defendant, when applied to for payment, requested that the goods might continue a further time in bond, and asked the plaintiffs' traveller to sell the goods for him. He was referred to the plaintiffs, and wrote to them, saying: "You will oblige by informing me of the present value of the rum and brandy, that is to say, what you are willing to give for it."

On these facts, Bramwell, B., directed a nonsuit, with leave to the plaintiffs to move, the defendant having objected that there was no delivery nor acceptance to satisfy the Statute of Frauds. *Held*, by the Court of Exchequer, that there had been no delivery nor actual receipt; that as the goods remained under control of the seller, and in his possession till after the credit had expired, his lien had revived; and that in the interval while the credit was running, there had been nothing done to constitute actual receipt by the purchaser.

In the Exchequer Chamber, Cockburn, C.J., said, that "for six months the buyer was entitled to claim the immediate delivery of the specific goods appropriated to him. The question then arises, whether the possession which actually remained in the sellers, was a possession in the sellers by virtue of their original property in the goods, or whether it had become a possession *as agents and bailees* of the buyer." The Chief Justice then pointed out that there was sufficient evidence of a change of character in the possession to go to the jury, that is, that the purchaser "dealt with the goods as his own, first, in the request that the sellers would take back the goods, and failing in that request, in asking the plaintiffs to sell the goods for him."

Crompton, J., pointed out that the Court did not differ from the Court of Exchequer save on one point, namely, that "there was some evidence that the character of the plaintiffs was changed" to that of warehousemen for the buyer. And he showed that by the invoice the sellers had offered to keep the goods as warehousemen, which offer the buyer had assented to by keeping the invoice, or at any rate by the request to the

plaintiffs to resell for him, or to buy themselves. The other Judges concurred (*y*).

Dublin City Distillery v. *Doherty* (1914).

In *Dublin City Distillery* v. *Doherty* (*z*), the respondent advanced money to the appellant company on the security of whiskey bonded in a warehouse on the company's premises. One key of the warehouse was kept by the Excise officer, and one by the company, and neither could obtain access without the assistance of the other. On each advance of money, the company, purporting to pledge specific casks, issued and handed to the respondent an invoice, and a warrant, of which the following is a specimen:—

"No. 3441. Aug. 5th, 1903. Warrant for 5 butts and 4 hhds. D.C.D. pot still whiskey, bonded Jan., 1903, as per particulars underneath. Deliverable to Edward Doherty, Esq., Dublin, or assigns, by endorsement hereon, on payment of rent from and other charges from date hereof. Free storage." Then followed particulars of the whiskey. "The Dublin City Distillery, A. T. W. H., secretary. Entered, J.A., clerk."

The number of the warrant was then entered in red ink in the company's stock book opposite the numbers and particulars of the casks, and opposite this entry the respondent's name and the date of the warrant was written in pencil. The Excise officer was not notified. The company then sold the whiskey if they could find a purchaser, in which case the warrant was cancelled, and the buyer's name entered in ink, and fresh invoices and warrants for other whiskey were handed to the respondent, and similar entries made in the stock book. Sometimes the sales were made without surrender of the warrants, but no whiskey was sold without the respondent's consent. When delivery was made to a buyer the company filled up a yellow form supplied by the Crown, called a warrant, signed it, and handed it to the Excise officer, who would deliver goods only on this form. The respondent was not credited with the proceeds of the sales.

The company having gone into liquidation, the respondent claimed to be pledgee of the whiskey by virtue of the warrants and the book-entries. The following opinions were delivered in the House of Lords on the question whether there had been a constructive delivery.

(*y*) *Cf. Evans* v. *Roberts* (1887) 36 Ch. D. 196; 56 L. J. Ch. 592, where continuous possession by the seller of a stack of hay sold on credit was held to be no actual receipt by the buyer, there being no agreement by the seller to be the buyer's bailee.

(*z*) [1914] A. C. 823; 83 L. J. P. C. 265.

Lord Atkinson said there was no evidence shown of any pledge independent of the delivery of the warrant (*a*). The question was whether the delivery of the warrant, coupled with the entries in the books, was a good constructive delivery of the whiskey. But, according to Parke, B. (*b*), the warrant was merely an acknowledgment that the goods were deliverable if demanded. "Free storage" meant merely what it said, that no rent was payable till delivery. No constructive delivery had, in his opinion, been proved. And he distinguished *Castle* v. *Sworder* (*c*) on the following facts, viz., that in that case the warehouse was a general one; that the goods were entered in the rum and brandy book; that after the entry the sellers could not get the goods out; and that the buyers had requested the sellers to resell the goods (*d*).

Lord Parker (with whom Lord Halsbury agreed) was of opinion that, assuming the pledgors were in sole possession of the goods, there was a good pledge at common law by constructive delivery, apart from the book entry, which, as being a mere private record, was insufficient. The question depended upon the warrant, which, though ambiguous, he regarded (together with provision for free storage) as meaning that the whiskey was held by the company as a bailee; and that fact constituted a constructive delivery. But he was of opinion that, under the Spirits Act, 1880, the company had at most only a joint possession with the Excise officer, who had not attorned to the respondent. The invoice and the stock book he disregarded.

Lord Sumner (assuming that the Excise officer had no possession of the whiskey) held that the facts of the case pointed to a floating charge rather than a legal pledge. The company were not warehousemen, consequently, previously to the issue of the warrant, they were not holding the whiskey for anybody but themselves; moreover, the document merely imported that the whiskey *would be* delivered. The provisional entry in the stock book was no more than a private memorandum that the respondent had *some* interest in the whiskey. "Free storage" meant what the words imported, and were not an admission that the goods were being held for the respondent. And with regard to attornment he held that all that had happened was that the company "had delivered

(*a*) See *Ex parte Hubbard* (1886) 17 Q. B. D. 690; 55 L. J. Q. B. 490, C. A.

(*b*) In *Farina* v. *Home*, *ante*, 243. (*c*) *Ante*, 248.

(*d*) The learned Lord also referred to s. 62 of the Spirit Act, 1880, prohibiting more than one transfer of whiskey in bond.

a piece of paper, not shown by any mercantile custom to be a symbol of the goods, as an indorsed bill of lading for goods at sea, and had made an enigmatic entry of Mr. Doherty's name in its stock book." He held, therefore, that no constructive delivery had taken place.

Actual receipt tested by loss of seller's lien.

It will already have been perceived that in many of the cases, the test for determining whether there has been an actual receipt by the purchaser, has been to inquire whether the seller has lost his lien (*e*). Receipt implies delivery (*f*), and it is plain that so long as the seller has not delivered, there can be no actual receipt by the buyer. The subject was placed in a very clear light by Holroyd, J., in his decision in *Baldy* v. *Parker* (*g*): "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The Statute contemplates such a parting with the possession." It is thus safe to assume as a general rule, that whenever no fact has been proven showing an abandonment by the seller of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted on in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note (*h*).

Exception under Code, s. 41 (2).

Some difficulty, however, arises under the Code in cases where the seller is in possession of the goods as agent or bailee for the buyer, for it expressly provides that in such cases the seller "may exercise his right of lien" (*i*). But section 41 (2) was not intended to alter the law of actual receipt; moreover it assumes that the seller has become the bailee of the buyer. At any rate, it contains nothing to prevent an actual receipt taking place where no lien exists at the time, as where the seller has waived it by allowing a term of credit; for the fact that a lien may afterwards *revive* is immaterial to the question of actual receipt (*k*). It is therefore submitted that, in cases where the seller attorns to the

(*e*) See Chapter on Lien, *post*, Book V., Pt. I., Chap. III.

(*f*) *Per* Parke, B., in *Saunders* v. *Topp* (1849) 4 Ex. 394; 18 L. J. Ex. 371; 80 R. R. 624.

(*g*) (1823) 2 B. & C. 37, at 44; 1 L. J. K. B. 229; 26 R. R. 260.

(*h*) *Howe* v. *Palmer* (1820) 3 B. & Ald. 321; *Tempest* v. *Fitzgerald* (1820) 3 B. & Ald. 680; 22 R. R. 526; *Carter* v. *Toussaint* (1822) 5 B. & Ald. 855; 24 R. R. 589; *Baldey* v. *Parker* (1823) 2 B. & C. 67; 1 L. J. K. B. 229; 26 R. R. 260; *Smith* v. *Surman* (1829) 9 B. & C. 561; 7 L. J. K. B. 296; 33 R. R. 259; *Bill* v. *Bament* (1841) 9 M. & W. 37; 11 L. J. Ex. 81; 60 R. R. 658; *Holmes* v. *Hoskins* (1854) 9 Ex. 753; 96 R. R. 959; *Cusack* v. *Robinson* (1861) 30 L. J. Q. B. 264; 124 R. R. 566; *per* Cockburn, C.J., in *Castle* v. *Sworder* (1861) 30 L. J. Ex. 310; H. & N. 832; 123 R. R. 860.

(*i*) S. 41 (2).

(*k*) *Per* Williams, J., in *Castle* v. *Sworder* (1861) 6 H. & N. 828, at 831; 30 L. J. Ex. 310; 123 R. R. 860, Ex. Ch.

buyer, there will be an actual receipt notwithstanding the provisions of section 41 (2). An opinion in this sense has been given by a learned Judge of the Supreme Court of New Zealand (*l*).

Special interest reserved to seller after delivery.

It may be useful here to advert to two cases in which the circumstances were very peculiar. The seller, who had delivered the goods, was held, in the first case, to have retained no right in security over the goods; and in the second, to have retained a special interest, although the buyer had actually received them.

Howes v. *Ball* (1827).

In *Howes* v. *Ball* (*m*), a coach was sold for £100, to be paid for by four bills, and the buyer expressly agreed in writing that the seller should "have and hold a claim upon the coach until the debt be duly paid." The buyer died, and his administratrix delivered the coach to the seller to be repaired, and he detained it, the bills not having been paid. In trover by the administratrix the Court held that the property had passed in the thing sold, and that hypothecation not being allowed by English law, the utmost effect that could be given to the special stipulation between the parties was to construe it as a *personal* licence in favour of the seller to retake the thing sold, if not paid for at the expiration of the credit allowed, and this was not available against a transferee of the thing such as the administratrix or a sub-buyer.

Lord Blackburn referring to this case in *Sewell* v. *Burdick* (*n*), says, that, had the transaction amounted to a mortgage from the buyer to the seller, there would have been no doubt that the seller would have had as much right against the administratrix as against the buyer himself, but, there being only an agreement for a hypothec, and no delivery to the seller so as to constitute a pledge (*o*), the seizure could not be justified as against the buyer's representative.

Dodsley v. *Varley* (1840).

In *Dodsley* v. *Varley* (*p*), wool was bought from the plaintiffs by the defendant's agent. The wool had to be weighed. It was sent to the warehouse of a third person employed by the defendant's agent, was weighed, and packed up with other wools in sheeting provided by the defendant. The wool usually remained at this warehouse till paid for, and this

(*l*) *Per* Denniston, J., *obiter* in *Gardner* v. *Belcher* [1902] 22 N. Z. L. R. 27.

(*m*) 7 B. & C. 481; 6 L. J. K. B. 106; 31 R. R. 256.

(*n*) (1884) 10 A. C. 74, at 96; 54 L. J. Q. B. 126.

(*o*) See also *per eundem* in *Donald* v. *Suckling* (1866) L. R. 1 Q. B. 585, at 613; 35 L. J. Q. B. 232.

(*p*) 12 A. & E. 632; 54 R. R. 652.

wool had not been paid for. In an action for goods bargained and sold, the defendant insisted that the seller's lien remained, and that the wool therefore had not been actually received by him as buyer. But the Court held that the property had passed; that the warehouse must be considered to be the defendant's; that the goods had been delivered, and were at the buyer's risk. In relation to the seller's right, the Court said: "The plaintiff had, not what is commonly called a lien determinable on the loss of possession, but a special interest —sometimes, but improperly, called a lien—growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment. But this lien is consistent, as we have stated, with the possession having passed to the buyer, so that there may have been a delivery to, and actual receipt by him."

It is plain that there is nothing in these cases which conflicts with the rule, that there can be no actual receipt by the buyer while the seller's lien continues, for in both cases the lien was gone.

The principle of these cases is preserved by the Code, which provides that:—

Code, s. 55.

"**55.**—Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract."

CHAPTER V.

OF EARNEST OR PART PAYMENT.

Earnest and part payment distinct.

THE giving of earnest, however common in ancient times, has fallen so much into disuse, that the two expressions in this clause of the Statute of Frauds, identical with that in the Code, "give something in earnest" or "in part payment," are often treated as meaning the same thing, although the language clearly intimates that the earnest is "*something* to bind the bargain," or, "the contract," whereas it is manifest that there can be no part payment till after the bargain has been bound, or closed (*a*). Earnest may be money, or some gift or token (among the Romans usually a ring), given by the buyer to the seller, and accepted by the latter to mark the final conclusive assent of both sides to the bargain; and this was formerly a prevalent custom in England (*b*). And an earnest did not lose its character because the same thing might also avail as a part payment (*c*).

Whether giving earnest has the effect of passing the property in the thing sold will be considered subsequently (*d*), but for the present we are only concerned with the question of its effect in giving validity to a parol contract. The giving of earnest, and the part payment of the price, are two facts independent of the bargain, capable of proof by parol, and the framers of the Statute of Frauds said in effect that *either* of them, if proven in addition to parol proof of the contract itself, is a sufficient safeguard against fraud and perjury to render the contract good without a writing.

Either suffices to make the contract good.

The former of these acts—that of giving something in earnest to "bind the bargain"—has been the subject of only one reported case, that of *Blenkinsop* v. *Clayton* (*e*), in which

Something must be actually given to constitute earnest.

Blenkinsop v. *Clayton* (1817).

(*a*) The nature of earnest is considered by Fry, L.J., in *Howe* v. *Smith* (1884) 27 Ch. D. at 101-2; 53 L. J. Ch. 1055.

(*b*) Bracton, 1, 2, c. 27. Examples are found in *Bach* v. *Owen* (1793) 5 T. R. 409, and *Goodall* v. *Skelton* (1794) 2 H. Bl. 316; 3 R. R. 379, in the former of which a halfpenny, and in the latter a shilling, was given in earnest of the bargain.

(*c*) Vinnius on Inst., 3, 24; *Hall* v. *Burnell* [1911] 2 Ch. 551.

(*d*) Book II., Chap. IV.

(*e*) 7 Taunt. 597; *Goodall* v. *Skelton* (1794) 2 H. Bl. 316; 3 R. R. 379, where earnest was given, was not decided under the Statute of Frauds. The only question was that of delivery of the goods.

the buyer drew a shilling across the seller's hand, and which the witness called "striking off the bargain" according to the custom of the country; but as the buyer then returned the coin to his own pocket, instead of giving it to the seller, the Court necessarily held that the Statute had not been satisfied.

And it must be given "to bind" the contract.

As earnest is something given with the intention of "binding" the contract, it is no giving of earnest to give something in the course of the performance of the contract, as, *e.g.*, bags to be filled with potatoes sold (*f*).

Part payment.

On the subject of part payment, there are but two important decisions under this clause of the Statute; but the cases which have arisen under analogous clauses in the Statutes of Limitations and the Bankruptcy Acts may be considered with advantage in this connection.

Agreement to set off a debt due to the buyer.

Walker v. *Nussey* (1847).

In *Walker* v. *Nussey* (*g*), an agreement for the purchase of goods exceeding £10 in value, was made with the understanding, and *as part of the contract*, that the seller should deduct from the price the amount of a debt previously due by him to the buyer. The seller then sent the goods to the buyer with an invoice charging him with the price £20 18s. 11d., under which was written, "By your account against me, £4 14s. 11d." The buyer returned the goods as inferior to sample. It was contended, on behalf of the seller, that this credit of £4 14s. 11d. was a sufficient part payment of the price of the goods under the Statute. *Held*, not to be so.

Earnest or part payment must be independent of the contract.

Platt, B., said: "You rely on part of the contract itself, as being part performance of it." Pollock, C.B., said: "Here was nothing but one contract, whereas the Statute requires a contract, and if it be not in writing, something besides." Parke, B., said. "Had there been a bargain to sell the leather at a certain price, and *subsequently* an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been an equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money." Alderson, B., said: "The 17th section of the Statute of Frauds implies that to bind

(*f*) *Sumner and Leivesley* v. *John Brown & Co.* [1909] 25 T. L. R. 745. This decision may also be treated as illustrating the principle, that earnest, like part payment, should be given independently of the contract.

(*g*) 16 M. & W. 302; 16 L. J. Ex. 120; 73 R. R. 507.

a buyer of goods of £10 value without writing he must have done *two* things: first, made a contract; and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment, that term cannot alone be equivalent to part payment."

From this case it may be inferred that an agreement to set off a debt due to the buyer would be held to be a part payment, taking the case out of the Statute, if made subsequently to the sale, or by an *independent* contract at the time of the sale, such as the giving of a receipt by the buyer for the debt previously due to him.

This case was many years after followed in *Norton* v. *Davison* (*h*), where the contract was that an over-payment on a previous bargain should go in part payment, and this was held not to be a part payment within section 4 of the Code.

Part payment must be made under circumstances showing a recognition by the seller of the existence of a contract, but his acceptance of payment need not be unqualified. Thus the receipt of the money, and a refusal to carry out the contract would be a part payment, whereas a prompt return of the money *simpliciter* would not (*i*).

Analogous decisions under Statute of Limitations.

Under the Statute of Limitations, it has been held that there is part payment of the debt where there is an agreement that goods should be supplied "on account" of a debt (*k*); or that the debtor should board and lodge the creditor at a fixed price per week in deduction of the debt (*l*); or that the interest on a note should go towards the maintenance of the creditor's child (*m*).

There seems, therefore, no reason to doubt that the part payment required by the Statute of Frauds or by the Code, if it be an act in addition to the parol contract, need not be made in money, but that any thing of value which by mutual agreement is given by the buyer and accepted (*n*) by the

(*h*) [1899] 1 Q. B. 401; 68 L. J. Q. B. 265, C. A.

(*i*) *Parker* v. *Crisp & Co.* [1919] 1 K. B. 481, distinguishing *Davis* v. *Phillips, Mills & Co.*, *infra*. *Cf.* a similar doctrine in the case of a memorandum, *post*, 299.

(*k*) *Hart* v. *Nash* (1835) 2 Cr. M. & R. 337; 41 R. R. 732, in the Ex.; followed in the Q. B. in *Hooper* v. *Stephens* (1835) 4 A. & E. 71; 5 L. J. K. B. 4; 43 R. R. 306. The decisions under the Bankruptcy Acts are to the same effect: *Wilkins* v. *Casey* (1798) 7 T. R. 713; 4 R. R. 558; *Cannan* v. *Wood* (1837) 2 M. & W. 465; 6 L. J. (N.S.) Ex. 112; 46 R. R. 650.

(*l*) *Blair* v. *Ormond* (1851) 17 Q. B. 423; 20 L. J. Q. B. 444; 85 R. R. 529.

(*m*) *Bodger* v. *Arch* (1854) 10 Ex. 333; 24 L. J. Ex. 19; 102 R. R. 613.

(*n*) *Davis* v. *Phillips, Mills & Co.* [1907] 24 T. L. R. 4.

seller on account or in part satisfaction of the price will be equivalent to part payment. The transfer to the seller of a bill or note on account or in part payment, would seem also to suffice to render the bargain valid (*o*).

"Payment" not necessarily absolute payment.

It has been decided that part payment by a bill, though taken in the ordinary way in conditional satisfaction only of a debt, was a sufficient acknowledgment of the debt under the Statute of Limitations, whatever afterwards became of the bill, the word "payment" being used in Lord Tenterden's Act (*p*) (which preserves the effect of a part payment of a debt under the Statute of Limitations) in its popular, and not its legal, sense (*q*). The analogy would no doubt apply to a case under section 4 of the Code (*r*).

Payment to creditor's creditor.

It has been held to be a question for the jury whether payments made by the debtor to persons to whom the creditor was indebted were intended by both parties to be taken in part payment of the debtor's liability (*s*).

Part payment without actual transfer of anything.

Again, under the Statute of Limitations, where the transaction between a debtor and a creditor amounts substantially to a payment, it is not necessary that money or any other thing should actually pass. Thus, where there are debts on both sides, and an account is gone through, the striking of a balance operates as a payment of the smaller debt (*t*).

Amos v. *Smith* (1862).

Thus, in *Amos* v. *Smith* (*u*), where the wife's trust fund had been lent by the trustees to the husband, who paid no interest for 14 years, and it was subsequently arranged between the husband, the wife, and the trustees that the wife should give the trustees a receipt for the interest due to date, as if it had been actually paid by them to her, it was held that there had been a part payment.

Maber v. *Maber* (1867).

And, in *Maber* v. *Maber* (*v*), a debt on a promissory note had been barred by lapse of time, and the creditor and debtor met and calculated the interest due, and the debtor put his

(*o*) See *Chamberlyn* v. *Delarive* (1767) 2 Wils. 253; *Kearslake* v. *Morgan* (1794) 5 T. R. 513.

(*p*) The Statute of Frauds Amendment Act, 1828 (9 Geo. 4. c. 14).

(*q*) *Turney* v. *Dodwell* (1854) 3 E. & B. 136; *Marreco* v. *Richardson* [1908] 2 K. B. 584; 77 L. J. K. B. 859.

(*r*) Lord Tenterden's Act uses the words "payment *or* satisfaction," but this seems to make no difference.

(*s*) *Worthington* v. *Grimsditch* (1845) 7 Q. B. 479; 15 L. J. Q. B. 52; 68 R. R. 502.

(*t*) *Ashby* v. *James* (1843) 11 M. & W. 542. The striking of the balance is the important feature, not the existence of cross items: *cf. Cottam* v. *Partridge* (1842) 4 M. & G. 271; 11 L. J. C. P. 161.

(*u*) 1 H. & C. 238; 31 L. J. Ex. 423; 130 R. R. 483. *Cf. Heymes* v. *Dixon* [1900] 2 Ch. 561; 69 L. J. Ch. 609.

(*v*) L. R. 2 Ex. 153; 36 L. J. Ex. 70.

hand in his pocket to pay, but was stopped by the creditor before any money was produced. The creditor then wrote a receipt and gave it to the debtor's wife, and an endorsement of payment was made on the note. *Held*, a part payment.

Civil Law.

The Roman law on the subject of earnest was very peculiar, and the texts which govern it might readily be misunderstood. Earnest was of two kinds: one was an independent contract anterior to the agreement of sale: the other was accessory to the contract of sale after it had been agreed on, and was, like the earnest of the common law, a proof that the bargain was concluded, *argumentum contractus facti*.

The independent contract of earnest was an agreement by which a man proposed to another to give him a sum of money for what we should term the option of purchase. Such earnest has been called *arra contractu imperfecto data*. If the sale afterwards took place, the earnest money was deducted from the price. If the purchaser declined completing the purchase, he forfeited the earnest money. If the party who had received earnest did not choose to sell when the option was claimed, he was bound to return the earnest money and an equivalent amount by way of forfeiture for disappointing the other in his option (*x*).

The other species of earnest of the Roman law, which has been called *arra confirmatoria*, was the same as that of the common law. It might consist of a thing, as a ring, *annulus*, which either party, but generally the buyer, gave to the other as a sign, proof, or symbol of the *conclusion* of the bargain (*y*) —and when money was given in earnest it was considered as being in part payment of the price (*z*). A passage from the Digest (*a*) gives its true nature: "Quod sæpe arræ nomine pro emptione datur, non eo pertinet quasi sine arra conventio nihil proficiat; sed *ut evidentius probari possit convenisse de pretio*."

At a later date, however, the Emperor Justinian made by

(*x*) Cod. 4, 21, 17, de Fid. Instr.: Pothier, Vente, Nos. 497-499, 502, 503. The doctrine of the forfeiture of earnest (though not *in duplum*) still survives in English law. See *Howe* v. *Smith* (1884) 27 Ch. D. 89; 53 L. J. Ch. 1055, C. A.

(*y*) Dig. 19, 1, 11, 6, de Act. Emp. et Vend., Ulp.; Just. Inst. 3, 23. Varro gives this etymology: "Arrhabo sic dicta, ut reliquum reddatur. Hoc verbum a Græco arrabon, reliquum, ex eo quod debitum reliquit;" De Lingua Latina, lib. 5, § 175. The Greek ἀρραβών and the Latin arra are both modifications of the Hebrew 'érávón, a pledge, Gen. xxxviii. 17. This word was introduced by the Phœnicians into Greece and Italy. See Skeat's Etym. Dict. 187, ed. 1910.

(*z*) Dig. 18, 3, 8, de Lege Commissoria, Scæv.

(*a*) Dig. 13, 1, 35. See also Gai. Com. 3, 139.

statute an important change in the law of earnest. According to the view of many authorities, he provided that in all cases where it was given, whether the sale was in writing or not, and whether there was any stipulation to that effect or not, either party might rescind the sale by forfeiting the amount of the earnest money (*b*). This not only changed the antecedent law, by providing that when the parties had agreed to draw up their sale in writing, either might recede from the bargain until all the forms of a written contract had been finally completed, in derogation of the ante-Justinian law (*c*), which made the contract perfect by mutual assent before the writings were drawn up, but also according to the opinions above mentioned, by allowing either party to *rescind* the bargain by forfeiting the value of the earnest.

But the opinion that a completed contract, whether oral or written, might be rescinded on the sole penalty of the forfeiture of the *arra*, or of double its value, as the case might be, has been strenuously contested (*d*). On the other hand, the language of Justinian has been considered by some authorities (*e*) as too absolute to be explained away: these authorities hold that the *arra* had changed its character from being evidence of a contract to being by its forfeiture a mode of rescission of both oral and written contracts. In this conflict of authority a certain conclusion is not possible; but the language of the Code (*f*) and of the Institutes, and the clear reasoning of Pothier, show, it is submitted, that Justinian was not considering the case of completed contract at all, but was providing that *negotiations* might be broken off on the penalty of forfeiting the *arra* or its double value.

French Code. The French Civil Code seems to adopt Pothier's doctrine (*g*), and by Art. 1590 provides: "Si *la promesse* de vente a été

(*b*) Inst. 3, 23, 1.

(*c*) Dig. 18, 1, 2, § 1, Ulp.; Gaius, Comm. 3, § 139.

(*d*) Pothier, Vente, s. 508, who holds that the text of the Code, 4, 21, 17, and of the Institutes, 3, 23, 1, refers only to the *arra contractu imperfecto data*, and not to the *arra confirmatoria* of completed contracts. See his argument, and that of Mr. Moyle, Cont. of Sale in Civil Law, at 41-43, 48, 49.

(*e*) Ortolan, Expl. Hist. des Inst. 7th ed. vol. 3, s. 1449; Sandars Just. 8th ed. 363.

(*f*) 4, 21, 17, which uses the gerundive, "super *facienda* emptione." The phrases "ab emptione recedens" and "venditionem recusans," should, as well as the words "venditio celebrata" in the Institutes, be taken in a popular sense. Moreover, the passage in the Institutes speaking of the forfeiture of the *arra* seems to be governed by the introductory words "donec aliquid deest ex his," *i.e.* where the contract is not complete.

(*g*) Mr. Benjamin says "seems to re[illegible]." But the Civil Code speaks, not of a sale accompanied by earnest, but [illegible]romise of a sale. Mr. Moyle (Cont. of Sale, at 43) also treats Art. 1590 [illegible]eferring to the earnest given as a pledge that a contract *will be* concluded.

faite avec des arrhes, chacun des contractants est maitre de s'en départir, celui qui les a données en les perdant, et celui qui les a reçues en restituant le double." And Art. 1477 of the Quebec Civil Code is almost identical. Singularly enough, the same discussion has sprung up under this text as under that of Justinian, and the commentators are divided, Toullier, Maleville, Duranton, and some others taking the side of Pothier, while Duvergier, Coulon, Devilleneuve, and Ortolan, are of the contrary opinion (*h*).

(*h*) The references are given in Sirey & Gilbert, Codes Annotés, Art. 1590.

CHAPTER VI.

OF THE NOTE OR MEMORANDUM IN WRITING.

SECTION 1.—GENERALLY.

THE clause of section 17 of the Statute of Frauds which dealt with the note or memorandum in writing was as follows:

"Except that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto duly authorised."

The corresponding clause of section 4 of the Code says:

"Unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

Law of evidence as to written contracts not changed by the Statute.

For an accurate notion of the true extent and bearing of this clause, it is indispensable to keep constantly in view the leading principles of the law of evidence relating to written contracts. The framers of the Statute of Frauds in no way interfered with these principles. They simply said that if the parties to be charged had signed some written note or memorandum of the contract, it should be "allowed to be good"—words which were judicially interpreted as meaning "enforceable by action" (*a*). The legal effect of such a note or memorandum upon the proof of the contract was, and still is, left entirely as it was at common law.

Common law principles.

Now at common law, parties entering into any contract, may either reduce its terms to writing (*b*), or may refer to some other writing existing, as containing the terms of their agreement, and when they do so, they are bound by what is written, whether signed by them or not; and they are not allowed, except in cases in which it is open to them to show

(*a*) *Per* Williams, J., in *Bailey* v. *Sweeting* (1861) 8 C. B. (N. S.) 843, at 859; 30 L. J. C. P. 150; 127 R. R. 896; Brett, L.J., and Thesiger, L.J., in *Britain* v. *Rossiter* (1879) 11 Q. B. D. at 127, 132; 48 L. J. Ex. 362; Lord Blackburn in *Maddison* v. *Alderson* (1883) 8 A. C. 467, at 488; 52 L. J. Q. B. 737.

(*b*) A written offer verbally accepted is a contract in writing: *Coleman* v. *Upcot*, 5 Vin. Ab. 527, cited by Willes, J., in *Reuss* v. *Picksley* (1866) L. R. 1 Ex. 342, at 352; 35 L. J. Ex. 218.

a mistake (*c*), to say that they intended to agree to something different from its contents, or that both parties have always interpreted the words used in a sense different from that which they plainly bear (*d*), for the very object of putting the agreement in writing is to prevent disputes about what they intended (*e*).

This rule of law is, subject to the exception mentioned above, inflexible. If by the agreement the whole contract is reduced to writing, or by mutual assent is to be taken as embraced in a pre-existing writing, neither party is allowed to offer evidence that any additional terms were agreed to, although, when a duty or obligation of any sort results by virtue of law or local custom or the usage of a particular trade from the written stipulations, and is not inconsistent with any of the terms of the writing (*f*), such duty or obligation may not only be enforced as though it were expressly included among the written terms, but is as carefully guarded by the rule now under consideration as if expressed in the written paper, and cannot be contradicted or qualified by parol evidence (*g*).

Again, the terms used in a written contract may be *explained* by evidence of the course of dealing of the parties in previous transactions (*h*).

The common law does not prohibit parties from making contracts of which only *part* is in writing. A man may agree to build a carriage for another, and the description of the vehicle may be put in writing and the price may be agreed on by parol, or *vice versâ*, or the parties may say in substance: "We agree to what is contained in such a writing, with such additions and exceptions as we now agree upon by word of mouth": and there is no legal objection to this. Parol evidence may be used to show what were the additions and exceptions, and the writing is conclusive as to the rest (*i*).

(*c*) As to this, see *ante*, 111.

(*d*) *North Eastern Ry. Co.* v. *Lord Hastings* (1900) A. C. 260; 69 L. J. Ch. 516.

(*e*) *Countess of Rutland's Case* (1604) 5 Co. 26 *a*; *Sotilichos* v. *Kemp* (1848) 3 Ex. 105; *per* Blackburn, J., in *Burgess* v. *Wickham* (1863) 3 B. & S. 669, at 696; 33 L. J. Q. B. 17; 129 R. R. 506.

(*f*) *Abbott* v. *Bates* (1875) 45 L. J. C. P. 117.

(*g*) *Per* Blackburn, J., in *Burgess* v. *Wickham* (1863) 3 B. & S. 669, at 697; 33 L. J. Q. B. 17; 29 R. R. 506; *Fauckes* v. *Lamb* (1862) 31 L. J. Q. B. 98; 136 R. R. 846; *Tucker* v. *Linger* (1883) 8 A. C. 508; 52 L. J. Ch. 941. See now Code, s. 55, *ante*, 254.

(*h*) *Bourne* v. *Gatcliff* (1844) 11 Cl. & F. 45; 44 R. R. 723; Code, s. 55, *ante*, 254.

(*i*) Where the contract is partly in writing, it is a question for the jury what is the contract: *Moore* v. *Garwood* (1849) 4 Ex. 681; 19 L. J. Ex. 15; 81 R. R. 738.

When either a part, or the whole of an agreement, is thus made in writing, or by reference to a writing, the agreement in general cannot be proven by any other means than by adducing the writing itself in proof, so that independently of the Statute, the writing is an indispensable part of the case of him who seeks to prove the agreement. But this result only takes place when the writing is by the consent of both parties *agreed* to be that which *settles and contains their contract* in whole or in part (*k*). The case is different, if one of the parties choose to write down for himself, without the concurrence and assent of the other, or if a bystander, without the authority of both, should write out what they said. The writing of the bystander is not evidence at all in such a case, though he may use it to refresh his memory, if called as a witness; but if one of the parties had employed him to make the writing, or had admitted its accuracy, it would be evidence against that party as an admission, and the same would be the case as to what one party had written down for himself. But such writing, not binding on both, would not be indispensable for legal proof of the contract, nor, although of great weight, would it be conclusive upon him against whom it is evidence, as being his admission.

The Statute of Frauds, as does the Code, leaves all this law quite as it was before. If the contract be in writing, in whole or in part, the document must be put in evidence as containing the only legal evidence of the terms of the agreement, although it be not signed or be in some other respect not sufficient under the Statute to make the contract "good," or "enforceable," and although there be sufficient evidence of part payment or of part acceptance and receipt to establish the validity of the contract. To put in the written contract, when there is one, is as indispensable in contracts for the sale of goods of less value than £10, as in those above that limit. And where a party has signed a paper which is not a writing agreed upon between the two, as containing their agreement, his adversary may use the paper, if he please, as an admission made in his favour, but he is not bound to offer it, any more than he would be bound to prove a verbal admission of his adversary, nor is the effect of a written any greater than that of a verbal admission. In a word, it is always

(*k*) *Per Curiam*, in *Harris* v. *Rickett* (1859) 4 H. & N. 1, at 7; 21 L. J. Ex. 197; 118 R. R. 294.

necessary to distinguish whether the writing is the contract of *both* parties, or the admission of *one* (*l*).

The two cases of *Ford* v. *Yates* (*m*) and *Lockett* v. *Nicklin* (*n*) afford an illustration of the effect of the Statute of Frauds taken in connection with the common law rules of evidence.

Ford v. *Yates* 1841.

In *Ford* v. *Yates* (*m*), the memorandum of the sale said nothing as to credit; it was a sale of two pockets of hops, one of 39 pockets, and the other of five pockets, both at 78*s*. The seller delivered the smaller parcel, but refused to deliver the 39 pockets without payment; and the Court held parol evidence inadmissible to show that the hops had been sold at six months' credit, and that this had been the usual course of dealing.

Lockett v. *Nicklin* (1848).

But in *Lockett* v. *Nicklin* (*o*), where the goods were ordered in a letter containing a reference to a *conversation* between the parties, and were sent together with an invoice, nothing being said either in the letter or the invoice about the terms of payment, parol evidence was received of an agreement to give six months' credit.

The distinction made between *Ford* v. *Yates* and *Lockett* v. *Nicklin* was that in the former case the action was based on a *written* contract which could not be varied by parol evidence, while in *Lockett* v. *Nicklin* the sale was really *by parol*, and the subsequent writings were merely offered in proof of a parol bargain which had become binding by the delivery and acceptance of the goods: so that the purchaser was at liberty to supplement the proof of the bargain, by showing that there was an additional stipulation—namely, an agreement for six months' credit.

Parol evidence, when admissible where there is a written note of the bargain.

It is of course quite beyond the scope of the present treatise to enter with any minuteness into the law of evidence, but some reference may be made to the decisions which determine in what cases, for what purposes, and to what extent, parol

(*l*) The foregoing preliminary remarks are chiefly extracted from the very valuable treatise of Lord Blackburn on Sale, 43—46; 2nd ed. 40—42.

(*m*) (1841) 2 M. & G. 549; 10 L. J. C. P. 117; 58 R. R. 471; following *Reares* v. *Ashlin* (1813) 3 Camp. 426; 14 R. R. 771 (no time for delivery mentioned). *Ford* v. *Yates* has been stated to be inconsistent with *Syers* v. *Jones*: per Wilde, C.J., *arg.* in *Spartali* v. *Benecke* (1850) 10 C. B. 213, 219; 19 L. J. C. P. 293; 84 R. R. 532. But it is said to have been only questioned *on the facts* in *Lockett* v. *Nicklin* and *Spartali* v. *Benecke*: *Mahalen* v. *Dublin and Chapelizod Distillery Co.* (1877) 11 Ir. R. C. L. 83, 91, where it is treated as sound in principle.

(*n*) (1848) 2 Ex. 93, explaining *Ford* v. *Yates*.

(*o*) 2 Ex. 93; 19 L. J. Ex. 403; 76 R. R. 502. See also *Eden* v. *Blake* (1845) 13 M. & W. 614; 14 L. J. Ex. 194; 67 R. R. 757.

evidence is admissible to affect the rights of the parties, when there exists a note or memorandum in writing.

True theory of this clause of the Statute of Frauds.

It must be steadily borne in mind that the Statute of Frauds was not enacted for cases where the parties, either in person or by agents, have signed a written contract: for in those cases the common law affords quite as sufficient a guarantee against frauds and perjuries as is provided by the Statute. The intent of the Statute was to prevent the enforcement of *parol* contracts above a certain value, unless the defendant could be shown to have executed the alleged contract by partial performance, as manifested by part payment, or part acceptance, or unless his signature to *some* written *note* or *memorandum* of the bargain—not necessarily the bargain itself—could be shown (*p*). The existence of the note or memorandum, properly so called, pre-supposes an antecedent contract by parol, of which the writing is a note or memorandum (*q*).

The difference between a mere memorandum and a written contract is well put by a learned Judge (*r*): "When a memorandum in writing is to be proved as a compliance with the Statute, it differs from a contract in writing in that it may be made at any time after the contract, if before action commenced; and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only, or his agent; and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement."

Parol evidence admissible to show that the writing produced is not the record of a contract.

It is a simple deduction from this theory of the Statute that parol evidence is always admissible to show that the writing which purports to be a note or memorandum of the contract

(*p*) See the remarks of Erle, J., in *Sievewright* v. *Archibald* (1851) 17 Q. B. 124; 20 L. J. Q. B. 529; 85 R. R. 353; *post*, 328, 329; of Williams, J., in *Bailey* v. *Sweeting* (1861) 9 C. B. N. S. 843; 30 L. J. C. P. 150; 127 R. R. 896; and of Lord Wensleydale in *Ridgway* v. *Wharton* (1855) 6 H. L. C. 395; 27 L. J. Ch. 16; 108 R. R. 88. See also *per* North, J., in *Re Queensland Land and Coal Co.* [1894] 71 L. T. 118, and some very instructive observations by Lindley, L.J., and A. L. Smith, L.J., in *Re Hoyle* [1893] 1 Ch. 84, at 98, 105; 62 L. J. Ch. 182. The statement in the text is to be found *passim* in the cases on this subject; and has been expressly approved by the Supreme Court of Victoria in *Patterson* v. *Dolman* (1908) Vict. L. R. 354.

(*q*) Accordingly a writing cannot be a memorandum of a verbal contract subsequently made: *Haydon* v. *McLeod* [1901] 27 Vict. L. R. 395, where this passage is cited, and the cases considered.

(*r*) Erle, J., in *Sievewright* v. *Archibald* (1851) 17 Q. B. at 107; 20 L. J. Q. B. 529; 85 R. R. 353; set out and discussed, *post*, 329. Mr. Justice Stephen and Sir F. Pollock remark (1 L. Q. R. 17) that in its *literal* meaning the Statute of Frauds only recognises a memorandum, and not a formal contract in writing, which, as they point out, would lead to an absurdity.

is not the record of any concluded agreement at all (*s*), or does not contain the real agreement come to (*t*); for, as was said by Lord Selborne (*u*), the Statute of Frauds "is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties."

Parol evidence is admissible in order to show fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto (*x*).

Parol evidence is always admissible for the purpose of showing that the written paper is not a note or memorandum of the antecedent parol agreement, but only of part of it. Thus, if the writing offered in evidence contains no reference to the price of the goods, parol evidence is admissible to prove that a price was actually fixed (*y*); or, on a sale of wool by sample, where one of the terms of the bargain is that the wool should be in good dry condition, to show this fact, and thus to invalidate the sold note signed by the broker, which omitted that stipulation (*z*); or, where the sale is by sample, but the auctioneer's book omits to state this, to prove the fact, thus showing that the book does not contain a memorandum of the whole contract (*a*).

Also to show that the writing is not a note of the *whole* bargain

And the same principle which permits the defendant to offer parol evidence, showing that the written note is imperfect, and therefore *not* such a note as satisfies the Statute,

Inadmissible to supplement an imperfect note.

(*s*) *Pym* v. *Campbell* (1856) 6 E. & B. 370; 25 L. J. Q. B. 277; 107 R. R. 532; followed in *Pattle* v. *Hornibrook* (1897) 1 Ch. 25; 66 L. J. Ch. 144; *Wake* v. *Harrop* (1861) 6 H. & N. 768; 30 L. J. Ex. 273; 123 R. R. 816; *Rogers* v. *Hadley* (1863) 2 H. & C. 227; 32 L. J. Ex. 241; 133 R. R. 653; *Clever* v. *Kirkman* (1875) 24 W. R. 159; 33 L. T. N. S. 672; *per* Lord Cairns in *Hussey* v. *Horne-Payne* (1879) 4 A. C. 320; 48 L. J. Ch. 816; *Kompson* v. *Boyle* (1865) 3 H. & C. 763; 34 L. J. Ex. 191; 140 R. R. 725.

(*t*) *Rogers* v. *Hadley*, *supra*.

(*u*) In *Jervis* v. *Berridge* (1873) 8 Ch. at 360; 42 L. J. Ch. 518; reaffirmed in *Hussey* v. *Horne-Payne* (1879) 4 A. C. 311, at 323; 48 L. J. Ch. 846.

(*x*) This passage is taken from Stephen's Dig. Evid. Art. 90 (1), ed. 1893, pp. 95—96. The numerous authorities are cited in 1 Story's Eq. Jurisp. §§ 152 *et seqq*.

(*y*) *Elmore* v. *Kingscote* (1826) 5 B. & C. 583; 29 R. R. 341; *Goodman* v. *Griffiths* (1857) 1 H. & N. 574; 26 L. J. Ex. 145; 108 R. R. 728; *Acebal* v. *Levy* (1834) 10 Bing. 376; 3 L. J. (N. S.) C. P. 98; 38 R. R. 469.

(*z*) *Pitts* v. *Beckett* (1845) 13 M. & W. 743; 14 L. J. Ex. 73; 66 R. R. 681.

(*a*) *M'Mullen* v. *Helberg* (1879) 4 L. R. Ir. 91; on app. 6 L. R. Ir. 463.

forbids him who sets up the writing for the purpose of binding the other from supplementing it by parol proof of terms not contained in it; for it is manifest, that by offering such proof, he admits that the writing does not contain a note of the whole bargain (*b*).

But a memorandum cannot be impeached merely on the ground that it does not contain a matter mentioned at the time of the negotiations if it formed no part of the bargain. Thus, where a purchaser, in answer to an enquiry for a reference, said he would pay by a draft (*c*) on his brother, the Court held that this was no part of the bargain, and therefore need not appear in the writing (*d*).

Inadmissible to connect separate written papers.

It is in accordance with the general principle above stated that when the bargain is to be made out by separate written papers, parol evidence is not allowed to connect them. They must either be physically attached together at the time of signature, so as to show that they constitute but one instrument, or they must be connected by reference in the contents of one to the contents of the other (*e*); or, it is submitted, it is sufficient if they are regarded by the custom of merchants, or by the usage of trade, as one document, as in the case of bought and sold notes (*f*).

Admissible to explain latent ambiguity, so as to identify the subject-matter, etc.

Although parol evidence is not admissible to supply omissions or introduce terms, or to contradict, alter, or vary a written instrument, it is admissible for the purpose of explaining a latent ambiguity for example, in order to identify the subject-matter to which the writing refers (*g*). Thus, where the plaintiff, in conversation with the defendant's agent, had stated that he had wool for sale, partly of his

(*b*) *Boydell* v. *Drummond* (1809) 11 East, 142; 10 R. R. 450; *Fitzmaurice* v. *Bayley* (1860) 9 H. L. C. 78; 27 L. J. Q. B. 143; 131 R. R. 48; *Holmes* v. *Mitchell* (1859) 7 C. B. N. S. 361; 28 L. J. C. P. 201; 121 R. R. 536; *Harnor* v. *Groves* (1855) 15 C. B. 667; 24 L. J. C. P. 53; 100 R. R. 535. The statement of the law in the text was approved by O'Brien, J., in the Irish case of *M'Mullen* v. *Helberg* (1879) 4 L. R. Ir. at 110.

(*c*) But see, as to payment by a bill, *Mahalen* v. *The Dublin and Chapelizod Distillery Company* (1877) 11 Ir. R. C. L. 83.

(*d*) *Sarl* v. *Bourdillon* (1856) 26 L. J. C. P. 78; 1 C. B. N. S. 188; 107 R. R. 624.

(*e*) *Hinde* v. *Whitehouse* (1806) 7 East, 558; 8 R. R. 676; *Kenworthy* v. *Schofield* (1824) 2 B. & C. 945; 2 L. J. K. B. 175; 26 R. R. 600; *Pierce* v. *Corf* (1874) L. R. 9 Q. B. 210; 43 L. J. Q. B. 52; *Rishton* v. *Whatmore* (1878) 8 Ch. D. 467; 57 L. J. Ch. 629. This subject is considered later at 274–276.

(*f*) See *per* Patteson, J., in *Sievewright* v. *Archibald* (1851) 17 Q. B. 103, at 118; 20 L. J. Q. B. 529; 85 R. R. 353; cited *post*, 328.

(*g*) *Bateman* v. *Phillips* (1812) 15 East, 272; *Shortrede* v. *Cheek* (1834) 1 A. & E. 57; 3 L. J. N. S. (K. B.) 125; 40 R. R. 258; *Mumford* v. *Gething* (1859) 7 C. B. N. S. 305; 29 L. J. C. P. 105; 121 R. R. 50; *Chambers* v. *Kelly* (1873) 7 Ir. R. C. L. 231.

own clip, and partly purchased, and the defendant's written letter contained an agreement to purchase "your wool," parol evidence was admitted to apply the letter, and to show what was meant by "your wool," *i.e.*, all the lots (*h*). And where there was a written contract for the sale of "candlesticks complete," parol evidence was held to be admissible to show that by this phrase was meant candlesticks furnished with a gallery to carry a shade (*i*). On the other hand, on a contract for "ware potatoes," evidence was held inadmissible to show that the buyer had contracted for a particular quality of wares, known as "Regent's wares," as such proof contradicted the writing (*k*).

Or to show common mistake as to subject-matter.

Parol evidence is also admissible to explain a latent ambiguity in order to show that the subject-matter intended by one party is not identical with that intended by the other —and thus to establish a mistake defeating the contract for want of a *consensus ad idem*. Thus, where a contract was made for the sale of cotton, "to arrive ex *Peerless* from Bombay," parol evidence was held to be admissible to show that there were two ships *Peerless* from Bombay, and that the ship *Peerless* intended by the seller was a different ship *Peerless* from that intended by the buyer (*l*).

Also to show situation of parties and to explain terms, etc.

Parol evidence is also admitted to show the situation of the parties at the time the writing was made, and the circumstances (*m*); [illegible]nt to any alterations in the document after signature (*n*) [illegible]he date when the bargain was made (*o*); and to explain [illegible]ne language, as for instance, to show that the bought and sold notes have the same meaning among

(*h*) *Macdonald* v. *Longbottom* (1859) 28 L. J. Q. B. 293; S. C. on appeal, 1 E. & E. 977; 29 L. J. Q. B. 256. See also *Shardlow* v. *Cotterell* (1881) 20 Ch. D. 90; 51 L. J. Ch. 353, C. A., under the 4th section of the Statute of Frauds, where the word "property" was held to be a sufficient description; *Hunt* v. *Bourne* (1897) 2 Ch. 281; 66 L. J. Ch. 643; *Bank of N. Z.* v. *Simpson* [1900] A. C. 182; 69 L. J. P. C. 22.

(*i*) *Sarl* v. *Bourdillon* (1856) 26 L. J. C. P. 78; 1 C. B. (N. S.) 188; 107 R. R. 624.

(*k*) *Smith* v. *Jeffryes* (1846) 15 M. & W. 561; 15 L. J. Ex. 325; 71 R. R. 761.

(*l*) *Raffles* v. *Wichelhaus* (1864) 2 H. & C. 906; 35 L. J. Ex. 160; 133 R. R. 553; *ante*, 125.

(*m*) *Per* Tindal, C.J., in *Sweet* v. *Lee* (1841) 3 M. & G. 466; 60 R. R. 546; *Newell* v. *Radford* (1867) 3 C. P. 52; 37 L. J. C. P. 1.

(*n*) *Stewart* v. *Eddowes* (1874) L. R. 9 C. P. 311; 43 L. J. C. P. 204; *post*, 304. See *Dartford Union* v. *Trickett* (1889) 59 L. T. 756.

(*o*) *Edmunds* v. *Downs* (1834) 2 C. & M. 459; 3 L. J. (N. S.) Ex. 98; 39 R. R. 813; *Hartley* v. *Wharton* (1840) 11 Ad. & E. 934; 9 L. J. (N. S.) Q. B. 260; 52 R. R. 547; *Lobb* v. *Stanley* (1844) 5 Q. B. 574; 13 L. J. Q. B. 117; all cases of acknowledgment of debt.

merchants, though the language seems to vary (*p*): or that, *e.g.*, on a contract for "pitch pine timber ex *Ion* from Savannah of fair average quality," there was a difference in quality between Savannah and Darien pitch pine, so that the words meant a fair average of Savannah pitch pine, and not a fair average of that and Darien (*q*); or to show that a sale of fourteen pockets of Kent hops, at 100s., meant 100s. per cwt., according to the usage of the hop trade (*r*); or to show the meaning of "bales" (*s*); and of "good" as distinguished from "fine" barley (*t*); also what proportion of inferior oil was by usage allowable on a contract for "best oil" (*u*).

Evidence must be clear and consistent.

But it should be remembered that when the evidence in support of a trade usage seeks to alter the natural meaning and construction of the words as written, it must in every case be clear and consistent (*x*).

Evidence as to liability where agent signs in his own name.

The law with regard to the admissibility of parol evidence to charge an undisclosed principal, where the agent contracts in his own name, or to make the agent in such a case personally liable by usage of trade, is hereafter discussed (*y*).

Admissible to show mistake in omitting goods in bought and sold notes.

Parol evidence is also admissible to show a mistake in drawing up the bought and sold notes (whereby certain goods were omitted), in an action of trover by the sellers against the buyer for the goods so omitted (*z*).

Also to show that writing was only to take effect conditionally.

Also, to show that a written document, purporting to be an agreement, and signed by the parties, was executed, not with the intention of making a present contract, but like an escrow, or writing to take effect only on condition of the happening of a future event (*a*). But it is not admissible in defeasance

(*p*) *Bold* v. *Rayner* (1836) 1 M. & W. 343; 5 L. J. (N. S.) Ex. 172; 46 R. R. 322; *per* Erle, J., in *Sievewright* v. *Archibald* (1851) 17 Q. B. 124; 20 L. J. Q. B. 529; 85 R. R. 353; *Kempson* v. *Boyle* (1865) 3 H. & C. 763; 34 L. J. Ex. 191; 140 R. R. 725.

(*q*) *Jones* v. *Clarke* (1858) 2 H. & N. 725; 27 L. J. Ex. 165; 115 R. R. 769.

(*r*) *Spicer* v. *Cooper* (1841) 1 Q. B. 424; 10 L. J. Q. B. 241; 55 R. R. 208.

(*s*) *Gorrissen* v. *Perrin* (1857) 2 C. B. (N. S.) 681; 27 L. J. C. P. 29; 109 R. R. 830.

(*t*) *Hutchinson* v. *Bowker* (1839) 5 M. & W. 535; 9 L. J. (N. S.) Ex. 24; 52 R. R. 821.

(*u*) *Lucas* v. *Bristow* (1858) E. B. & E. 907; 27 L. J. Q. B. 364; 113 R. R. 944.

(*x*) *Bowes* v. *Shand* (1877) 2 A. C. 455; 46 L. J. Q. B. 561.

(*y*) *Post*, 289, 290.

(*z*) *Steele* v. *Haddock* (1855) 10 Ex. 643; 24 L. J. Ex. 78.

(*a*) *Pym* v. *Campbell* (1856) 6 E. & B. 370; 25 L. J. Q. B. 277; 106 R. R. 632; followed in *Pattle* v. *Hornibrook* (1897) 1 Ch. 25; 66 L. J. Ch. 144; *Furness* v. *Meek* (1858) 27 L. J. Ex. 34; 114 R. R. 993; *Davis* v. *Jones* (1856) 25 L. J. C. P. 91.

of a written contract, that is to say, to show that in certain events it is not to be operative according to its terms (*b*).

Or to show an agreement collateral to the writing.

And parol evidence may also be given to show an oral agreement collateral to the written agreement—in other words, an agreement separate from, and consistent with, the written agreement—in cases where the parties did not intend the document to be a complete and final statement of the whole of the transaction between them (*c*).

Or to show commercial usage.

Parol evidence is admissible in commercial transactions of custom or usage to annex incidents to a written contract where such incidents are not repugnant to or inconsistent with the express terms of the contract (*d*). The principle upon which this is allowed, as has been explained by Mr. Baron Parke in *Hutton* v. *Warren* (*e*), is that it is presumed that "in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."

Parol evidence as to subsequent agreement to alter or annul note.

After a contract has been proven by the production of a written note or memorandum sufficient to satisfy the Statute, the question often arises as to the admissibility of parol evidence of a subsequent agreement to change or annul it.

At common law, after an agreement (not under seal) has been reduced to writing and signed, it is competent to the parties, at any time before breach of it, to make a fresh parol agreement, either to waive the written bargain altogether, to dissolve and annul it, or to subtract from, vary, or qualify

(*b*) *Hoare* v. *Graham* (1811) 3 Camp. 57; 13 R. R. 752; *Wallis* v. *Littell* (1861) 11 C. B. W. S. 369; 31 L. J. C. P. 100; 132 R. R. 591; *New London Credit Syndicate* v. *Neale* (1898) 2 Q. B. 487; 67 L. J. Q. B. 825, C. A. If the evidence would support a plea of the general issue, it is admissible: *per* Vaughan Williams, L.J., *ibid.*

(*c*) *Morgan* v. *Griffith* (1871) L. R. 6 Ex. 70; 40 L. J. Ex. 46. See also *Erskine* v. *Adeane* (1873) 8 Ch. 756; 42 L. J. Ch. 835; and *Angell* v. *Duke* (1875) 32 L. T. 320; and S. C. (on demurrer) L. R. 10 Q. B. 174; 44 L. J. Q. B. 78; *De Lassalle* v. *Guildford* [1901] 2 K. B. 215; 70 L. J. K. B. 533, C. A. *Edward Lloyd, Lim.* v. *Sturgeon Falls Pulp Co.* [1901] 85 L. T. 162. See also Stephen's Dig. of Evid., Art. 90 (2), ed. 1893, p. 96; and the Chapter on Express Warranties.

(*d*) See the authorities collected in the notes to *Wigglesworth* v. *Dallison* (1779) in 1 Sm. L. C. 11th ed. 545, *et seqq.*; and Stephen's Dig. Evid., Art. 90 (5), ed. 1893, p. 96. An arbitrator has jurisdiction to decide on the existence of a custom, having jurisdiction to determine the contract: *Produce Brokers Co.* v. *Olympia Oil and Cake Co.* [1916] A. C. 314, overruling on this point, *Hutcheson* v. *Eaton* [1884] 13 Q. B. D. 861, C. A.; and *Re N. W. Rubber Co.* v. *Huttenbach* [1908] 2 K. B. 907, C. A. As to where the incidents are inconsistent with terms which would otherwise be implied by law, see and *cf. Spartali* v. *Benecke* (1850) 10 C. B. 212; 19 L. J. C. P. 293; 84 R. R. 532; and *Field* v. *Lelean* (1861) 6 H. & N. 617; 30 L. J. Ex. 168; 123 R. R. 729; both set out, *post*, Book V., Pt. I., Chap. III.

(*e*) (1836) 1 M. & W. 466, at 475; 5 L. J. (N. S.) Ex. 234; 46 R. R. 368; quoted by Lord Sumner in *Produce Brokers Co.* v. *Olympia Oil and Cake Co.* *supra*.

its terms, and thus to make a new contract, to be proven partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what is left of the written agreement (*f*).

But this principle of the common law is not applicable to a contract required to be evidenced by writing by sections 4 or 17 of the Statute of Frauds, or by section 4 of the Code. No verbal agreement to abandon it *in part*, or to add to, or omit, or modify any of its terms, is admissible (*g*).

Thus, parol evidence is not admissible to show an agreement to change the place of delivery fixed in the writing (*h*), or the time for (*i*), or mode of (*k*), delivery; or to prove a partial waiver of a promise to furnish a good title (*l*); or a modification of a stipulation for a valuation (*m*); or a change in any of the terms of the contract; for the Court can draw no distinction between stipulations that are material and those that are not (*n*).

But the rule applies only to completed contracts: written evidence is not required of matters occurring during negotiation, as, for example, of an agreement that an acceptance out of time of a written offer shall be treated as good, or that the time for acceptance shall be extended (*o*). Nor is written evidence required of any time which is for the benefit of the plaintiff only, and which he waives (*p*).

(*f*) *Per* Denman, C.J., in *Goss* v. *Lord Nugent* (1833) 5 B. & Ad. at 65; 2 L. J. (N. S.) K. B. 127; 39 R. R. 392; *per eandem* in *Stead* v. *Dawber* (1839) 10 A. & E. at 65; 9 L. J. Q. B. at 102; 50 R. R. 327.

(*g*) *Morris* v. *Barron & Co.* [1918] A. C. 1. H. L.; 87 L. J. K. B. 145.

(*h*) *Moore* v. *Campbell* (1854) 10 Ex. 323; 23 L. J. Ex. 310; 102 R. R. 604.

(*i*) *Stowell* v. *Robinson* (1837) 3 Bing. N. C. 928; 6 L. J. (N. S.) C. P. 326; 43 R. R. 861; *Stead* v. *Dawber* (1839) 10 A. & E. 57; 9 L. J. Q. B. 102; 50 R. R. 327; *Marshall* v. *Lynn* (1840) 6 M. & W. 109; 9 L. J. (N. S.) Ex. 126; 55 R. R. 534; *Noble* v. *Ward* (1866) L. R. 2 Ex. 135; 36 L. J. Ex. 91. See these cases reviewed in *Hickman* v. *Haynes* (1875) 10 C. P. 598; 44 L. J. C. P. 358; and the remarks of Blackburn, J., on *Stead* v. *Dawber* and *Marshall* v. *Lynn* in *Ogle* v. *Vane* (1867) L. R. 2 Q. B. at 282; 36 L. J. Q. B. 175.

(*k*) *Hill* v. *Blake* (1884) 97 N. Y. 216.

(*l*) *Goss* v. *Lord Nugent* (1833) 5 B. & Ad. 58; 2 L. J. (N. S.) K. B. 127; 39 R. R. 392.

(*m*) *Harvey* v. *Grabham* (1836) 5 A. & E. 61; 5 L. J. (N. S.) K. B. 235; 44 R. R. 374.

(*n*) *Per* Parke, B., in *Marshall* v. *Lynn*, *supra*. See also *Emmet* v. *Dewhirst* (1851) 21 L. J. Ch. 497; 87 R. R. 209. But see *Hoadly* v. *McLaine* (1834) 10 Bing. 482, at 489; 3 L. J. (N. S.) C. P. 162; 38 R. R. 510; where parol evidence of alterations ordered by the buyer of a carriage contracted to be built for him was admitted, Gaselee, J., saying that, "otherwise every building contract would be avoided by every addition." This remark is criticised by Bramwell, B., in *Sanderson* v. *Graves* (1875) L. R. 10 Ex. 234, at 237; 44 L. J. Ex. 210; who says that parol evidence should be allowed in all cases or in none.

(*o*) *Morrell* v. *Studd* [1913] 2 Ch. 648; 83 L. J. Ch. 114; distinguishing *Goss* v. *Nugent*, *supra*.

(*p*) *North* v. *Loomes* [1919] 1 Ch. 378; L. J. Ch. distinguishing *Goss* v. *Nugent*.

Parol evidence is admissible to show a subsequent agreement for a waiver and abandonment altogether of the whole contract proved by a written note or memorandum; and such a waiver may be either in express terms, or by the implication resulting from the inconsistency of the terms of the new agreement with those of the old (*q*). What is essential is that an intention should be shown in any event completely to extinguish the first formal agreement, not merely a desire to make some alteration, however sweeping, which should yet leave it subsisting.

Morris v. *Barron & Co.* (1918).

Thus, in *Morris* v. *Barron & Co.* (*q*), where a written contract for the sale of serge by the respondents to the appellants was made in September, and signed by both parties, and in April a new contract, unsigned by the appellants, was made in materially different terms, it was held by the House of Lords that the respondents could not sue upon the contract in April, as it was invalid against the appellants, nor on the original contract, as the parties had by implication rescinded it.

Parol evidence to show total rescission of contract.

In equity it has long been settled that a contract within section 4 of the Statute of Frauds may be rescinded *simpliciter* by parol; and waiver by mutual parol agreement, therefore furnishes a sufficient defence to an action for specific performance (*r*).

Voluntary postponement of performance.

While evidence is inadmissible to show an oral agreement to vary or enlarge the time of performance of a contract requiring to be proved by writing, yet parol evidence may be given of a *voluntary* forbearance by the one party at the request of the other—for example, to account for delay in delivery or acceptance—and the party who has forborne may at any moment determine such forbearance, and revert to his rights under the original contract (*s*). The whole subject of such voluntary forbearance is hereafter considered (*t*).

(*q*) *Morris* v. *Barron & Co.* [1918] A. C. 1; 87 L. J. K. B. 145; explaining *Noble* v. *Ward*, *supra*.

(*r*) Fry on Spec. Perf. §§ 1021—1024, 4th ed. p. 443. See also *Goman* v. *Salisbury* (1684) 1 Vern. 240; *per* Lord Hardwicke in *Bell* v. *Howard* (1742) 9 Mod. 305; *Vezey* v. *Rashleigh* [1904] 1 Ch. 634; 73 L. J. Ch. 422.

(*s*) *Ogle* v. *Vane* (1867) L. R. 2 Q. B. 275; 36 L. J. Q. B. 175; aff. L. R. 3 Q. B. 272; 37 L. J. Q. B. 77; *Hickman* v. *Haynes* (1875) L. R. 10 C. P. 598; 44 L. J. C. P. 358; in which the previous cases are considered; *Plevins* v. *Downing* (1876) L. R. 1 C. P. D. 220; 45 L. J. C. P. 695; *Tyers* v. *Rosedale &c.* (1875) L. R. 10 Ex. 195; 44 L. J. Ex. 130, reversing S. C., L. R. 8 Ex. 305; 42 L. J. Ex. 185. The distinction drawn by Brett, J., in *Plevins* v. *Downing*, between a request made by a plaintiff and one made by a defendant seems difficult to maintain.

The cases above mentioned may have restored the authority of *Cuff* v. *Penn* (1813) 1 M. & S. 21; 14 R. R. 384, previously said to have been overruled by *Stead* v. *Dawber* and *Marshall* v. *Lynn*, *ante*, 272, n. (*i*), *Cuff* v. *Penn*

Parol evidence to prove completion of substituted mode of performance.

E.g., delivery by altered route.

Parol evidence is also admissible to prove, not a substituted contract, but the assent of the defendant to a substituted mode of performance when that performance is completed. Thus, in *The Leather Cloth Co.* v. *Hieronimus* (*w*), the contract was for the sale of goods to be forwarded to the purchaser by Ostend, and the goods were afterwards forwarded by Rotterdam, and, in an action for goods sold and delivered, evidence was admitted to show that the defendant by his conduct had assented to the substituted mode of delivery.

We may now proceed to the examination of this clause of the Statute of Frauds, and of the Code, dividing the inquiry into two sections:—

1. What constitutes a note or memorandum in writing?
2. What is a sufficient note or memorandum?

SECTION II.—WHAT CONSTITUTES A NOTE OR MEMORANDUM IN WRITING?

Must be made before action brought.

It may be premised that the note or memorandum must be one made and signed before the action brought. To satisfy the Code there must be an enforceable contract in existence at the time of action brought (*x*).

Need not be written at one time nor on one piece of paper.

But the whole of the terms of the contract need not be agreed to at one time, nor be written down at one time, nor on one piece of paper; accordingly it is settled, that where the memorandum is contained in separate pieces of paper, and these papers contain the *whole* bargain, they form together a sufficient memorandum, provided the contents of the subsequent (*y*) *signed* paper make such reference to the other written paper or papers, as to enable the Court to construe the whole of them together as constituting all the terms of the bargain; or, the documents are regarded by the custom of merchants, or by usage of trade, as forming one document.

being regarded as a case of voluntary forbearance only. But the difficulty remains that the seller obtained a verdict on counts which alleged a mutual *agreement* for substituted dates of performance. The case is treated as law in a note to 14 R. R. 384. See also the earlier cases of *Warren* v. *Stagg* (1787) cited in *Littler* v. *Holland* (1790) 3 T. R. 590; and *Thresh* v. *Rake* (1793) 1 Esp. 53.

(*t*) *Post*, 791-794.

(*u*) (1875) L. R. 10 Q. B. 140; 44 L. J. Q. B. 54.

(*x*) *Bill* v. *Bament* (1841) 9 M. & W. 36; 11 L. J. Ex. 81; 60 R. R. 658; *Lucas* v. *Dixon* (1889) 22 Q. B. D. 357; 58 L. J. Q. B. 161, C. A., where the previous authorities are discussed by Bowen, L.J. The memorandum may be made after breach: *Welch* v. *Crawford*, [1905] 25 N. Z. L. R. 561, C. A.

(*y*) *Per* Jessel, M.R., in *Williams* v. *Jordan* (1877) 6 Ch. D. 517; 46 L. J. Ch. 681.

as in the case of bought and sold notes (*z*). And the same result will follow if the other papers were attached or fastened to the signed paper *at the time of the signature*; or, if it appears from the nature of the signed paper that it must have been intended to be subsequently attached to, or enclosed in, some other paper which is a necessary concomitant of it, as a letter to be enclosed in an envelope (*a*).

Separate papers cannot be connected by parol.

But where there is no such attachment, and no such custom or usage exists, and no internal evidence in the contents of the signed paper showing a reference to, or connection with, the unsigned papers, then the several papers taken together do not constitute a memorandum *in writing* of the bargain, for parol evidence for the purpose of connecting the papers is not admissible (*b*).

Lord Westbury, in 1863, stated the general principle, in a case (*c*) which arose under a similar clause in the Railway and Canal Traffic Act, in these words: "In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference, the writing itself becomes part of the instrument it refers to" (? which refers to it).

Parol evidence admissible to identify document referred to.

Where the reference contained in the signed paper is ambiguous, the general rule as to latent ambiguity applies, and parol evidence will be admitted to explain the ambiguity and to identify the document to which the signed paper must and does refer. It is no longer necessary for the signed paper to refer to any unsigned paper as such; it is sufficient to show that a particular unsigned paper and nothing else can be referred to, and parol evidence is admissible for this purpose.

Long v. *Millar* (1879).

In *Long* v. *Millar* (*d*), Thesiger, L.J., says: "When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument, signed by the party to be charged, that reference is made to another document, and this omission cannot be supplied by verbal

(*z*) See *per* Patteson, J., in *Sievewright* v. *Archibald* (1851) 17 Q. B. 103, at 118; 20 L. J. Q. B. 529; 85 R. R. 353; cited *post*, 328.

(*a*) *Pearce* v. *Gardner* (1897) 1 Q. B. 688; 66 L. J. Q. B. 457, C. A.; *post*, 279.

(*b*) See *ante*, 268.

(*c*) *Peek* v. *North Staffordshire Railway Company* (1863) 10 H. L. C. 472, at 568; 32 L. J. Q. B. 241; 138 R. R. 250.

(*d*) 4 C. P. D. 450; 48 L. J. C. P. 596, C. A., at 456.

evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of the rule is given in *Ridgway* v. *Wharton* (*e*). There 'instructions' were referred to. Now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity."

Reference to document should be direct.

But the word or words relied upon as showing a reference must be capable of indicating another document. It is not sufficient if the reference be merely to a transaction in which another document may have been made.

***Thomson* v. *McInnes* (1912).**

This has been held by the High Court of Australia (*f*), where a receipt in the following terms: "Received the sum of fifty pounds, being a deposit and first part purchase-money," was held to contain no reference to any document, as "purchase-money" did not necessarily imply any written agreement for sale, as "purchase" did in *Long* v. *Millar*.

Some cases in which parol evidence was held to be admissible to identify documents referred to by particular expressions are cited in the note below (*g*).

The authorities will now be considered. In citing them it will be observed that some of the cases were under the 4th section of the Statute of Frauds, the language of which on this subject is almost identical with that of the 17th and with the 4th section of the Code. This clause of section 4 of Statute of Frauds is as follows:—

Clause of s. 4 of Statute of Frauds.

"Unless the agreement on which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

(*e*) (1856) 6 H. L. C. 238.

(*f*) In *Thomson* v. *McInnes* [1912] 12 C. L. R. 562.

(*g*) *Ridgway* v. *Wharton* (1856) 6 H. L. C. 238; 27 L. J. Ch. 46; 108 R. R. 88 ("instructions"); *Baumann* v. *James* (1868) 3 Ch. 508 ("terms agreed upon"); *Long* v. *Millar* (1879) 4 C. P. D. 450; 48 L. J. C. P. 596, C. A. ("purchase"); *Care* v. *Hastings* (1881) 7 Q. B. D. 125; 50 L. J. Q. B. 575 ("our arrangement"); *Shardlow* v. *Cotterill* (1881) 20 Ch. D. 90; 51 L. J. Q. B. 353 C. A. ("purchased"); *Oliver* v. *Hunting* (1890) 44 Ch. D. 205; 59 L. J. Ch. 255 ("purchase money of F. Estate"); *Studds* v. *Watson* (1884) 28 Ch. D. 305; 54 L. J. Ch. 626 ("balance"). The last decision seems to go further than the earlier ones, one of the points decided by North, J., being that two documents, not referring to one another, but both referring to the same parol contract, are sufficiently connected. But *cf.* *Potter* v. *Peters* [1895] 72 L. T. 624; and *Thomson* v. *McInnes*, *supra*.

The leading case in which it was held that the intention of the signer to connect two written papers, not physically joined, and not containing internal evidence of his purpose to connect them, could not be proven by parol, occurred early in the last century. Cases reviewed.

Hinde v. *Whitehouse* (*i*), in 1806, was the case of a sale by auction. The auctioneer, who, as will be shown hereafter (*k*), is by law an agent authorised to sign for both parties, had a catalogue, headed: "To be sold by auction, for particulars apply to Thomas Hinde," and wrote down opposite to the several lots on the catalogue the name of the purchaser. The auctioneer also had a separate paper containing the terms and conditions of the sale, which he read, and placed on his desk. The catalogue contained no reference to the conditions. *Held*, that the signature to the catalogue was not sufficient to satisfy the Statute, on the ground that it did not contain the terms of the bargain, nor refer to the other writing containing those terms. *Hinde* v. *Whitehouse* 1806).

The first reported case decided in banc, in which a signed paper referring to another writing was deemed sufficient, was that of *Saunderson* v. *Jackson* (*l*), in 1800. There, the defendants, the sellers, delivered to the buyer a bill of parcels as follows: "Bought of Jackson and Hankin, 1,000 gallons of gin, 1 in 5 gin, 7s., £350." A month after the defendants wrote to the plaintiff: "We wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder; must request you to return our pipes; Jackson and Hankin." This letter, in the opinion of the Court, referred to the bill of parcels, but the case does not state how this connection between the two papers was made apparent, although it has been constantly quoted as authority for the general proposition, that the memorandum may be made up of different pieces of paper. *Saunderson* v. *Jackson* 1800).

In *Allen* v. *Bennet* (*m*), decided in 1810, the agent of the defendant sold rice to the plaintiff, and entered all the terms of the bargain in the plaintiff's book, but did not mention the plaintiff's name. Subsequently, the defendant wrote to his agent, mentioning the plaintiff's name, and authorising *Allen* v. *Bennet* 1810).

(*i*) 7 East, 558; 8 R. R. 676; and see *Kenworthy* v. *Schofield* (1824) 2 B. & C. 945; 2 L. J. K. B. 175; 26 R. R. 600; decided in the same way in precisely the same circumstances; and *Peirce* v. *Corf* (1874) L. R. 9 Q. B. 210; 43 L. J. Q. B. 52; *post*, 278.

(*k*) *Post*, 315.

(*l*) 2 B. & P. 238; 5 R. R. 580.

(*m*) 3 Taunt. 169; 12 R. R. 633.

his agent to give the particular credit mentioned in the memorandum in the plaintiff's book, saying, also, that to prevent dispute he sent a "sample of the rice." *Held*, that the letter referred to the memorandum of the bargain sufficiently to render the two together a signed note of the bargain.

Jackson v. Lowe (1822).

In *Jackson* v. *Lowe* (*n*), the Common Pleas, in 1822, held it perfectly clear that a contract for the sale of flour was fully proven within the Statute by two letters, the first from the plaintiff to the defendants, reciting the contract, and complaining of the defendants' default in not delivering flour of proper quality, and the second from the defendants' attorney in reply, beginning: "I have your letter of the 24th September, directed to Messrs. Lowe and Lynam," and saying that the defendants had "performed their contract with you, as far as it has gone, and are ready to complete the remainder," and threatening action unless "the flour" was paid for within a month.

Peirce v. Corf (1874).

In *Peirce* v. *Corf* (*o*), the auctioneer had a sales ledger, which was headed "Sales by auction, 28th March, 1872," in which the mare was described, and numbered 49. This was also her number in the catalogue, which bore the same date and contained the conditions of sale. The catalogue and conditions were not annexed to the sales ledger nor referred to therein. The mare was put up for sale and knocked down to one Thomas Maguire for thirty-three guineas. Thereupon the auctioneer's clerk wrote opposite the lot in the columns of the sales ledger, the name of the buyer and the price. The buyer afterwards refused to take the mare. *Held*, that the catalogue and sales ledger were not sufficiently connected to form a memorandum. The identity of dates and numbers in the sales ledger and the catalogue did not amount to a reference from the one to the other, as it did not follow the mare was sold on the conditions annexed to the catalogue.

Taylor v. Smith (1893).

In *Taylor* v. *Smith* (*p*), the sellers sent to the buyer an invoice in the following form: "Mr. John Smith. Bought from Messrs. Charles Taylor, Sons, and Co., 1,060 spruce deals. Free to flat, £100 11s. 4d." (*i.e.*, free on board the barge); and an advice note was also sent, mentioning 1,060 spruce deals, and the plaintiffs, the sellers, as consignors, but stating no price, nor referring to any other document

(*n*) 1 Bing. 9; 25 R. R. 567.

(*o*) L. R. 9 Q. B. 210; 43 L. J. Q. B. 52. See also *McCaul* v. *Strauss* (1884) Cab. & El. 106; and *Rishton* v. *Whatmore* (1878) 8 Ch. D. 468; 47 L. J. Ch. 629.

(*p*) (1893) 2 Q. B. 65; 61 L. J. Q. B. 331, C. A.

The defendant, the buyer, wrote across the advice note and signed a memorandum: "Rejected; not according to representation." He also wrote a letter referring to "the spruce deals" rejected. *Held*, by the Court of Appeal, that the memorandum on the advice note, and the defendant's letter, were not a sufficient memorandum, as they did not set out the terms of the contract, and, not referring to any other document, could not be connected with the invoice.

Pearce v. Gardner (1897).

In *Pearce* v. *Gardner* (*q*), the defendant agreed to sell to the plaintiff some gravel, and wrote him a letter beginning "Dear Sir," but not mentioning the name of the plaintiff, or otherwise identifying him (*r*). At the trial the plaintiff proved that the letter came by post in an envelope addressed to him. *Held*, by the Court of Appeal, that as the envelope was a necessary part of the letter, the two constituted one document; that the envelope could be identified by parol evidence, and when it was identified the case was the same as if the plaintiff's name had been written in or on some part of the letter itself, and there was in consequence a sufficient memorandum. Chitty, L.J., was also of opinion that if the letter and envelope were to be regarded as separate documents, the letter referred to the envelope, which, therefore, on the authority of *Long* v. *Millar* (*s*), might be identified by parol evidence.

Separate papers must be consistent.

Further, when the memorandum relied on consists of separate papers, which it is attempted to connect, these separate papers must be consistent and not contradictory in their statement of the terms of the contract, for otherwise it would be impossible to determine what the bargain was without the introduction of parol testimony to show which of the papers stated it correctly.

Cooper v. Smith (1812).

In 1812, *Cooper* v. *Smith* (*t*), was distinguished from *Saunderson* v. *Jackson* (*u*), because the defendant's letter, offered as a memorandum of the contract entered on the plaintiff's books, falsified instead of confirming the entry which mentioned no time for delivery, by stating that the

(*q*) (1897) 1 Q. B. 688; 66 L. J. Q. B. 457, C. A.; followed in *Last* v. *Hucklesby* [1914] W. N. 157, C. A. See also *Freeman* v. *Freeman* (1891) 7 T. L. R. 431, where Charles, J., treated a letter and its envelope as being physically connected. *Cf. Kronheim* v. *Johnson* (1877) 7 Ch. D. 60; 47 L. J. Ch. 132; where Fry, J., held that a signed and an unsigned document were not connected by being contained in the same envelope.

(*r*) For the necessity of this, see *post*, 284, *et seqq*.

(*s*) (1879) 4 C. P. D. 450; 48 L. J. C. P. 596, C. A., *ante*, 275.

(*t*) 15 East, 103; 13 R. R. 397.

(*u*) (1800) 2 B. & P. 238; 5 R. R. 580; *ante*, 277.

bargain was for delivery within a specified time. Le Blanc, J., tersely said: "The letter of the defendant referred to a different contract from that proved on the part of the plaintiff, which puts him out of Court, instead of being a recognition of the same contract, as in a former case."

Smith v. *Surman* (1829).

In *Smith* v. *Surman* (*x*), the written memorandum set up was contained in two letters, one from the seller's attorney, who wrote to ask for payment "for the ash timber which you purchased of him," and a reply from the defendant, alleging that the timber was "to be sound and good." It was held by the Court that, as the two letters were not consistent, there was no sufficient memorandum. Bayley, J., said: "The contract as described in the two letters differs essentially as to the quality of the things to be sold. . . . What the real terms of the contract were is left in doubt, and must be ascertained by verbal testimony. The object of the Statute was that the note in writing should exclude all doubt as to the terms of the contract, and that object is not satisfied by the defendant's letter." The other Judges concurred (*y*).

Haughton v. *Morton* (1855).

In *Haughton* v. *Morton* (*z*), an unsigned entry in the seller's book: "B. Haughton, about 800 barrels G. wheat ex L. at 38s., payable half in cash, and half bill at three months," was held to be inconsistent with a letter of the defendant, the seller, in which he stated that the alleged contract was subject to the essential condition of the arrival of the wheat in Dublin.

Cases such as the preceding must be carefully distinguished from those in which the memorandum signed by the party to be charged embodies the terms of the contract, but the signer puts his own construction on them, or repudiates the contract. These cases will be considered presently (*a*).

The leading case under the *fourth* section of the Statute

(*x*) 9 B. & C. 561; 7 L. J. K. B. (O. S.) 296; 33 R. R. 259; see also *Archer* v. *Baynes* (1850) 5 Ex. 625; 20 L. J. Ex. 54; 82 R. R. 792; *Caregan* v. *Richards* (1866) 15 L. T. 252 (sale by sample set up).

(*y*) See also *Buxton* v. *Rust* (1871) L. R. 7 Ex. 1; 41 L. J. Ex. 173; aff. in Ex. Ch. *ibid.* 279. *Richards* v. *Porter* (1827) 6 B. & C. 437; 5 L. J. K. B. 175; 30 R. R. 392; set out in previous editions, has been omitted. As reported, it is difficult to reconcile with the other cases it professes to follow, such as *Cooper* v. *Smith*, *supra*. See the explanation of it given by Erle, C.J., in *Wilkinson* v. *Evans* (1866) L. R. 1 C. P. 407; 35 L. J. C. P. 224. The case seems also in conflict on another point with *Bailey* v. *Sweeting* (1861) 9 C. B. (N. S.) 843; 30 L. J. C. P. 150; 127 R. R. 896; *post*, 300.

(*z*) 5 Ir. C. L. Rep. 329 (*diss.* Lefroy, C.J.), following *Cooper* v. *Smith* and other cases.

(*a*) *Post*, 299—302.

of Frauds is *Boydell* v. *Drummond* (*b*), decided in the King's Bench in 1809. The defendant was sued as one of the annual subscribers for the celebrated Boydell prints of scenes in Shakespeare's plays, and the terms of the subscription were set out in a prospectus. The proof offered was the defendant's signature in a book entitled "Shakespeare's Subscribers, their Signatures." But there was nothing in the book referring to the prospectus, and it was impossible to connect the book with the prospectus showing the terms of the bargain without parol testimony. Some letters of the defendant were also offered, but equally void of reference to the terms of the bargain. The plaintiff was non-suited at Nisi Prius, and the non-suit was confirmed by the unanimous opinion of the Judges.

Cases under the Statute of Frauds, s. 4.

Boydell v. *Drummond* 1809).

In *Dobell* v. *Hutchinson* (*c*), in 1835, the plaintiff had bought certain land at auction, and had signed a written contract on the back of the conditions of sale, the names of the defendants, the sellers, not being shown therein. Several letters passed between the parties, the defendants' letters, referring to "the conditions of sale," calling on the plaintiff to perform *the contract*, and speaking of *their* sale to the plaintiff. Under these circumstances the King's Bench held under the 4th section of the Statute of Frauds, that the clause of the Statute was completely satisfied, because no parol evidence of any kind was requisite to show the contract, except proof of handwriting, which is necessary in all cases.

Dobell v. *Hutchinson* (1835).

So, in *Laythoarp* v. *Bryant* (*d*), in 1836, the Exchequer of Pleas held that the defendant, who had signed a memorandum of his purchase at auction, was bound by it, although imperfect in itself, because it referred to the conditions of sale, and those conditions were on the same paper, the agreement having been written on the back of a paper containing the terms and conditions.

Laythoarp v. *Bryant* (1836).

As all that is required is written *evidence* of the time of the contract, any writing embodying those terms and duly signed is sufficient. Thus, the note or memorandum need not pass between the parties, but may be addressed to a third

Any written admission of the terms of the contract is sufficient.

(*b*) 11 East, 142; 10 R. R. 450, *coram* Lord Ellenborough, C.J., and Grose, J., Le Blanc, J., and Bayley, J. See also *Fitzmaurice* v. *Bailey* (1860) 9 H. L. C. 78; 131 R. R. 48; and *Crane* v. *Powell* (1868) L. R. 4 C. P. 123; 38 L. J. C. P. 43 ("contract in writing" under 4 G. 4, c. 34, s. 3).

(*c*) 3 A. & E. 370; 4 L. J. (N. S.) K. B. 201; 42 R. R. 408; folld. in Canada in *O'Donohue* v. *Stammers* (1884) 11 Can. Sup. C. R. 3581.

(*d*) 2 Bing. N. C. 735; 5 L. J. (N. S.) C. P. 217; 42 R. R. 709.

person; for example, a letter written by the defendant to his own agent, admitting the terms of the contract (*e*).

The rule has been thus judicially stated: "The Court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose" (*f*). "A letter to a third party has been held enough; an affidavit made in a different matter has been held to suffice; and I should say that an entry in a man's own diary, if it were signed by him, and its contents were sufficient, would do. The question is not, what is the intention of the person signing the memorandum, but is one of fact, viz., is there a note or memorandum?" (*g*).

Writing in pencil.

No case has arisen under the Statute of Frauds on the question whether the writing is required to be in ink, but there seems no reason to doubt that the common law rule would apply, and that a writing in pencil would be held sufficient to satisfy the 17th section (*h*); and also the 4th section of the Code.

SECTION III.—WHAT IS A SUFFICIENT NOTE OF MEMORANDUM.

After the production and proof (by the party seeking to enforce the contract) of a written note or memorandum, whether contained in one or several pieces of paper, the next inquiry which arises is, whether the contents of the writing so proven form a *sufficient* note "of the bargain" or "contract."

S. 4 of Statute of Frauds rigorously construed.

Wain v. *Warlters* (1804).

So far as the 4th section of the Statute of Frauds (*i*) is concerned, a very rigorous interpretation was placed on it in an early case, and is now the settled rule. In *Wain* v. *Warlters* (*j*), which was the case of a promise in writing to

(*e*) *Gibson* v. *Holland* (1865) L. R. 1 C. P. 1; 35 L. J. C. P. 5; 148 R. R. 616. This case was decided principally on the authority of Sugden's V. and P., 14th ed., 139, par. 39. See also 1 S. L. C., 11th ed., 312.

(*f*) *Per* Bowen, L.J., in *Re Hoyle* [1893] 1 Ch. 84, at 99; 62 L. J. Ch. 182, C. A. See also *Evans* v. *Prothero* (1852) 1 De G. M. & G. 572; 21 L. J. Ch. 772; 91 R. R. 175 (receipt); *McBlain* v. *Cross* (1871) 25 L. T. 804 (telegram); *Godwin* v. *Francis* (1870) 5 C. P. 295; 39 L. J. C. P. 121 (same); *Gregg* v. *Holland* [1902] 86 L. T. 542, C. A. (recital in deed).

(*g*) *Per* A. L. Smith, L.J., *ibid.* at 100. *Cf. per* Lord Eldon, C.J., in *Saunderson* v. *Jackson* (1800) 2 B. & P. at 239; 5 R. R. 580.

(*h*) See *Geary* v. *Physic* (1826) 5 B. & C. 234; 4 L. J. K. B. 147; 29 R. R. 225; and in America *Brown* v. *Butchers' Bank* (1844) 6 Hill (N. Y.) 443.

(*i*) *Ante*, 276.

(*j*) 5 East, 10; 1 Sm. L. C., 11th ed., 323; 7 R. R. 645; *coram* Lord Ellenborough, C.J., and Grose, J., Lawrence, J., and Le Blanc, J.

pay the debt of a third person, but where the consideration for the promise was not stated in the writing, it was held that parol proof of the consideration was inadmissible under the Statute, and the promise was therefore held void as *nudum pactum*. The case turned on the construction of the word "agreement," which was held to include all the stipulations of the contract, showing what *both* parties were to do, not the mere promise of what the party to be charged undertook to do. The consideration was therefore held to be a part of the "agreement," and as the Statute required the whole agreement, or some note or memorandum of it, to be in writing, the Court inferred that a memorandum which showed no consideration must either be the whole agreement, and in that case void as *nudum pactum*, or part only of the agreement, and in that case insufficient.

Although this case was strongly controverted, chiefly in the courts of equity (*k*), it was upheld and followed in subsequent cases (*l*), and the law now remains settled as it was propounded in *Wain* v. *Warlters*, except so far as guarantees are concerned (*m*).

But under the 17th section of the Statute the decisions did not maintain so rigorous a construction, and the Judges have repeatedly referred to the distinction between the word "agreement" in the 4th section and "bargain" in the 17th, the latter term being interpreted to mean only the *promise* of the party to be charged. But the point is now one of purely historical interest in countries which have adopted the Code, as the Code has changed the word "bargain" into "contract" (*n*). Some cases in which the distinction above referred to was made are quoted in the note below (*o*).

S. 17 more liberally construed.

The cases will now be considered with reference to the

(*k*) See the argument of Taunton, as counsel, in *Phillips* v. *Bateman* (1812) 16 East, 356, at 370.

(*l*) *Saunders* v. *Wakefield* (1821) 4 B. & Ald. 595; 23 R. R. 409; *Jenkins* v. *Reynolds* (1821) 3 B. & B. 14; and *Lyon* v. *Lamb* (1807) there cited at 22; *Morley* v. *Boothby* (1825) 3 Bing. 107; *Fitzmaurice* v. *Bayley* (1860) 9 H. L. C. 79; 131 R. R. 48. And see the authorities under the 4th section collected in Sugden's V. & P., 14th ed., 134.

(*m*) Special provision is made in such cases by the M. L. Am. Act, 1856 (19 & 20 V., c. 97), s. 3.

(*n*) See these enactments printed, *ante*, 176, 177.

(*o*) *Egerton* v. *Matthews* (1803) 6 East, 307; 8 R. R. 489; *per* Tindal, C.J., and Park, J., in *Laythoarp* v. *Bryant* (1836) 2 Bing. N. C. 735; 5 L. J. (N. S.) C. P. 217; 42 R. R. 709; *Sarl* v. *Bourdillon* (1856) 1 C. B. (N. S.) 188; 26 L. J. C. P. 78; 107 R. R. 624; *per* Alderson, B., in *Marshall* v. *Lynn* (1840) 6 M. & W. 108; 9 L. J. (N. S.) Ex. 126; 55 R. R. 534; *per* Willes, J., in *Gibson* v. *Holland* (1865) 1 C.P. 1, at 7; 35 L. J. C. P. 5; 148 R. R. 616; *per* Stephen, J., in *McCaul* v. *Strauss* (1883) Cab. & El. at 111.

inquiry whether and to what extent, it is necessary that the writing should show: 1. The names of the parties to the sale; 2. The terms and subject-matter of the contract (*p*).

1. Names or descriptions of parties must be shown.

On the first point, it is settled to be indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favour he is charged. The name of the party to be charged is required to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown.

Champion v. *Plummer* (1805).

In *Champion* v. *Plummer* (*q*), the plaintiffs' agent wrote down in a memorandum-book the terms of a verbal sale to the plaintiffs by the defendant, and the defendant signed the writing, but the words were simply "Bought of W. Plummer, etc.," without mentioning any buyer. Sir James Mansfield, C.J., said: "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any *other* person as well as to the plaintiffs."

Williams v. *Lake* (1859).

In *Williams* v. *Lake* (*r*), which was under the 4th section of the Statute of Frauds, the defendant wrote a note binding himself as guarantor, and gave it to a third person for delivery. But the name of the person to whom the note was addressed was not written in the note. *Held*, by all the Judges, insufficient.

Sarl v. *Bourdillon* (1856).

In *Sarl* v. *Bourdillon* (*s*), the defendant signed an order for goods in the plaintiff's order-book, and the plaintiff's name was on the fly-leaf of his order-book in the usual way, and this was held sufficient.

Jones v. *Joyner* (1900).

And a similar decision has been given in a case where the order-book was contained, but not bound, in a leather cover stamped with the seller's name, from which it was removable at will (*t*).

(*p*) See *post*, 296—299.

(*q*) 1 B. & P. N. R. 252; 8 R. R. 795. See also *Allen* v. *Bennet* (1810) 3 Taunt. 169; 12 R. R. 633; *ante*, 277; and *Jacob* v. *Kirke* (1839) 2 M. & R. 222.

(*r*) 2 E. & E. 349; 29 L. J. Q. B. 1; 119 R. R. 758; app. and foll. in *Williams* v. *Byrnes* (1863) 1 Moo. P. C. C. (N. S.) 154; 138 R. R. 487.

(*s*) 26 L. J. C. P. 78; 1 C. B. (N. S.) 188; 107 R. R. 624.

(*t*) *Jones* v. *Joyner* [1900] 82 L. T. 768, *coram* Darling, J., and Bucknill, J., following *Sarl* v. *Bourdillon*.

Names must appear as seller and buyer.

Vandenburgh v. *Spooner* (1866).

In *Vandenburgh* v. *Spooner* (*u*), the plaintiff had purchased a quantity of marble at the sale of a wreck. He sold it to the defendant, the amount being more than £10. The defendant signed this memorandum: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenburgh, now lying at the Lyme Cobb, at 1s. per foot." *Held* (Martin, B., doubting), that this note, although it contained the plaintiff's name, only mentioned it as a part of the description of the goods so as to identify them, but did not mention the plaintiff as *seller* of the goods, and was therefore insufficient.

Newell v. *Radford* (1867).

In *Newell* v. *Radford* (*v*), the defendant was a flour-dealer, and the plaintiff a baker. The defendant's agent entered in the plaintiff's book the following words:—"Mr. Newell, 32 sacks, culasses, at 39s. 280 lbs. To await orders. John Williams." The defendant insisted, on the authority of *Vandenburgh* v. *Spooner*, that as it was impossible to tell from this memorandum which was buyer and which was seller, the memorandum was insufficient. But the Court held that parol evidence had been properly admitted to show the trade of each party, and thus to create the inference from the circumstances of the case that the flour-dealer was the seller and the baker the buyer of the flour. And *Vandenburgh* v. *Spooner* (which, however, Willes, J., said he had difficulty in understanding) was distinguished on this ground. There was also some correspondence referred to, showing who was the buyer and who the seller.

Re *Cox & Co.* and *Hoare & Co.* (1906).

In *Re Cox, McEuen & Co.* and *Hoare, Marr & Co.* (*w*), the documents relied on by the buyers as a memorandum of a parol contract by Hoare, Marr & Co. to sell to Cox, McEuen & Co. 3,000 bales of jute, bore the words "Bought for account of Cox, McEuen & Co. of Messrs. Shrager Brothers," and were signed: "Hoare, Marr & Co., *per* C. Patterson." *Held*, by Bray, J., and by the Court of Appeal, that there was no sufficient memorandum of the verbal contract between Cox, McEuen & Co. and Hoare, Marr & Co.

Dewar v. *Mintoft* (1912).

In *Dewar* v. *Mintoft* (*x*), the auctioneer, on the sale by auction of a farm, wrote on the particulars (which formed one document with the memorandum of agreement and conditions

(*u*) L. R. 1 Ex. 316; 35 L. J. Ex. 201.
(*v*) L. R. 3 C. P. 53; 37 L. J. C. P. 1; see in Am. *Butler* v. *Thomson* (1875) 92 U. S. 412.
(*w*) [1906] 95 L. T. 121; aff. [1907] 96 L. T. 719.
(*x*) [1912] 2 K. B. 373; 81 L. J. K. B. 885.

of sale, and contained the name of the seller as seller, and a description of the property) the words: "Mr. Mintoft, £1,500." These words were written at the side of a statement of the outgoings of the property. *Held*, by Horridge, J., that the memorandum was not sufficient, as not showing that the name written was that of the purchaser as such.

Description of parties suffices instead of name.

But although the authorities require that the memorandum should show who are the parties to the contract, it suffices if this appear by description. If one party is not designated at all, plainly the whole contract is not in writing, for "it takes two to make a bargain." In such a case the common law would permit parol testimony to show who the other is, but this is forbidden by the Statute of Frauds and by the Code. But if the writing show by description with whom the contract was made, then the Statute is satisfied, and parol evidence is admissible to *apply the description*: that is, not to show with whom the bargain is made, but who is the person described, so as to enable the Court to understand the description. This is no infringement of the Statute, for in all cases where written evidence is required by law there must be parol evidence to apply the document to the subject-matter in controversy.

The real question is: Is there that degree of certainty in the description itself which is described in the legal maxim, *Id certum est quod certum reddi potest?* (*y*). A description in itself insufficient is not made sufficient by the fact that the other party knows who is meant by it (*z*). If the parties to a contract are so indicated by description or reference as to be ascertained, or clearly ascertainable, the exigency of the Statute in that respect is satisfied (*a*). The description is then a statement of matter of fact, as to which there is certainty. The parties are sufficiently described if their identity cannot be fairly disputed (*b*). The difficulty lies in determining the sufficiency of the description in each particular case. There have been numerous decisions on this point (*c*).

(*y*) *Per* Lord Cairns in *Rossiter* v. *Miller* (1878) 3 A. C. 1124, at 1140, 1141; 48 L. J. Ch. 10.

(*z*) *Jarrett* v. *Hunter* (1886) 34 Ch. D. 182; 56 L. J. Ch. 141.

(*a*) *Per* Lord O'Hagan, in *Rossiter* v. *Miller*, at 1147.

(*b*) *Per* Jessel, M.R., in *Potter* v. *Duffield* (1874) L. R. 18 Eq. 4; 43 L. J. Ch 472.

(*c*) Under the Statute of Frauds, s. 4, the following descriptions were held sufficient: "Proprietor." *Sale* v. *Lambert* (1874) L. R. 18 Eq. 1; 43 L. J. Ch. 470; and *Rossiter* v. *Miller* (1877) 46 L. J. Ch. 228; 5 Ch. D. 648, C. A.; S. C. 3 A. C. 1124; 48 L. J. Ch. 470; revg. the C. A. upon another point. See also *Catling* v. *King* (1877) 5 Ch. D. 660; 46 L. J. Ch. 384, C. A. ("trustee"); *Butcher* v. *Nash* (1889) 61 L. T. 72 ("owner"); "vendors" stated to be a

In every case there must be sufficient evidence to identify from the description, and, to use the language of Jessel, M.R. (*d*), "the Court ought to be careful not to manufacture descriptions, or to be astute to discover descriptions which a jury would not identify."[1]

The cases in which the principle that parol evidence is admissible to show to whom the description applies, has been most clearly illustrated are those where an agent signs a contract in his own name and without mentioning his principal.

Where agent signs his own name instead of principal's

It is settled that, though it is not competent for the agent thus contracting to introduce parol evidence to show that he did not intend to bind himself, because this would be to contradict what he had written (*e*), it is competent for the other party to show that the contract was really made with the principal who had chosen to describe himself by the name of his agent, just as it would be admissible to show his identity if he had used a feigned name (*f*).

But the name of the agent will not be a sufficient description of the undisclosed principal unless the agent is personally liable on the contract; for otherwise the memorandum would not be a memorandum of any agreement at all (*g*).

Agent for foreign principal.

But a commission agent who acts here for a foreign principal is by trade usage presumed, in the absence of a contrary intention, to be the contracting party, and therefore *prima facie* is not entitled to pledge the foreign principal's credit. In such a case the agent renders himself personally liable, and the foreign principal cannot sue or be sued upon the contracts entered into by the agent (*h*). This apparent excep-

company in possession and working on the property: *Commins* v. *Scott* (1875) 20 Eq. 11; 44 L. J. Ch. 563. Lessee described as the person who had paid £50. *Carr* v. *Lynch* [1900] 1 Ch. 613; 69 L. J. Ch. 345.

On the other hand the following descriptions have been held insufficient: "Principal"—*Per* Lord Cairns in *Rossiter* v. *Miller*, *supra*; but see *Cropper* v. *Cook* (1868) 3 C. P. 194, at 200. "Landlord"—*Coombs* v. *Wilkes* (1891) 3 Ch. 77; 61 L. J. Ch. 42. "Vendor"; "client," "friend" of a named agent—*Potter* v. *Duffield* (1874) 18 Eq. 4; 43 L. J. Ch. 472; *Jarrett* v. *Hunter* (1886) 34 Ch. D. 182; 56 L. J. Ch 141. See the *dicta* of the judges in *Thomas* v. *Brown* (1876) 1 Q. B. D. 714; 45 L. J. Q. B. 811; as to the difficulty of reconciling *Sale* v. *Lambert* and *Potter* v. *Duffield*, and the remarks of Jessel, M.R., dissenting therefrom in *Rossiter* v. *Miller*, 46 L. J. Ch. 228, at 232.

(*d*) In *Commins* v. *Scott* (1875) L. R. 20 Eq. at 16; 44 L. J. Ch. 563.

(*e*) *Higgins* v. *Senior*, *post*, 289.

(*f*) *Trueman* v. *Loder*, *post*, 288.

(*g*) *Lovesy* v. *Palmer* [1916] 2 Ch. 233; 85 L. J. Ch. 481, distinguishing *Filby* v. *Hounsell* [1896] 2 Ch. 737; 65 L. J. Ch. 852.

(*h*) *Armstrong* v. *Stokes* (1872) L. R. 7 Q. B. 598; 41 L. J. Q. B. 253; *per Cur.*, at p. 605; *Elbinger Co.* v. *Claye* (1873) L. R. 8 Q. B. 313; 42 L. J. Q. B. 151; *Hulton* v. *Bullock* (1873) *ibid.* 331, aff. in Ex. Ch., L. R. 9 Q. B. 572. *Per* Lord Watson in *Kaltenbach* v. *Lewis* (1885) 10 A. C. 617, at 627; 55 L. J. Ch. 58.

tion to the general rule arises from the peculiar character of the relationship between the commission agent and his foreign constituent, which is analogous to that of seller and buyer (*i*). Thus the agent may exercise the right of stoppage in transitu as against his foreign principal (*j*). But the presumption, which is not an absolute one (*k*), may be rebutted (*l*), and doubts have been expressed whether the trade usage still exists, at any rate, whether it applies except where the foreign principal is a buyer (*m*). Apart from usage, however, the fact that the seller or the buyer is a foreign principal is a fact to be taken into consideration in determining the question whether the agent intended to contract personally (*n*). And the rule does not obtain if both agent and principal are living abroad (*o*); or if the foreign principal is really carrying on business in the name of the agent, as in the following case.

Trueman v. *Loder* (1840).

In *Trueman* v. *Loder* (*p*), the defendant was sued on a broker's sold note in these words: "London, 28th April, 1835. Sold for Mr. Edward Higginbotham, etc., etc." The proof was, that in 1832 the defendant, a merchant of St. Petersburgh, had established Higginbotham to conduct the defendant's business in London in the name of Higginbotham, which was painted outside the counting-house and employed in all the contracts. The agent had no business, capital, nor credit of his own, but did everything with the defendant's money and for his benefit under his instructions, and was known to

(*i*) See the position of a commission agent considered by Blackburn, J. in *Ireland* v. *Livingston* (1872) L. R. 5 H. L. at 408; 41 L. J. Q. B. 201, quoted *post*, 810—813, and his language explained in *Cassaboglou* v. *Gibb* (1883) 11 Q. B. D. at 803, 807; 52 L. J. Q. B. 538, C. A.

(*j*) See the Chapter on Stoppage in Transitu, *post*, Book V., Pt. I., Chap. IV.

(*k*) *Per* Bray, J., in *Miller, Gibb & Co.* v. *Smith* [1917] 2 K. B. 141, C. A.; 86 L. J. K. B. 1259.

(*l*) *Malcolm Flinn & Co.* v. *Hoyle* [1893] 63 L. J. Q. B. 1, C. A. (intervention of foreign principal); *Harper & Sons* v. *Keller Bryant & Co.* [1915] 84 L. J. K. B. 1696; 113 L. T. 175 (contract expressly as agent); *Miller, Gibb & Co.* v. *Smith*, *supra* (written contract inconsistent with usage); *Mercer* v. *Wright* [1917] 33 Times L. R. 343 (same).

(*m*) In *Miller, Gibb & Co.* v. *Smith*, *supra*, Bray, J.'s doubt whether the usage applies except where the foreign principal is buying, is not borne out by Blackburn, J.'s. statement in *Armstrong* v. *Stokes*, *supra*.

(*n*) *Per* Bray, J., in *Miller, Gibb & Co.*, *supra*, *per* Scrutton, L.J., in *H. O. Brandt & Co.* v. *H. N. Morris & Co.* [1917] 2 K. B. 784, at 797, C. A.

(*o*) *Maspons* v. *Mildred* (1882) 9 Q. B. D. 530; 51 L. J. Q. B. 604, C. A.; 8 A. C. 874; 53 L. J. Q. B. 33.

(*p*) 11 A. & E. 589; 9 L. J. (N. S.) Q. B. 165; 52 R. R. 451, *coram* Denman, C.J., and Patteson, Williams, and Coleridge, JJ. See notes to *Thomson* v. *Davenport* (1829) 2 Sm. L. C. 11th ed., at 407 *et seqq.*, where the subject is fully treated; and also *Calder* v. *Dobell* (1871) L. R. 6 C. P. 486, 499; 40 L. J. C. P. 224.

represent him. The Judges took time to consider, and Lord Denman delivered the opinion of the Court. On the question made that the name of the defendant was not in the written contract, the Court said: "Among the ingenious arguments pressed by the defendant's counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, . . . but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it (*q*). Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him *in a name not his own*."

When agent is personally responsible.

The leading case for the converse proposition, namely, that the agent who has contracted in his own name will not be allowed to offer parol evidence for the purpose of proving that he did not intend to bind *himself*, but only his principal, is *Higgins* v. *Senior* (*r*), decided in the Exchequer in 1841, in which Parke, B., delivered the judgment of the Court after advisement. The question submitted was: "Whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself on an issue on the plea of *non assumpsit*, by proving that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time when the agreement was made and signed." *Held*, in the negative. The learned Baron then proceeded to lay down the principles as follows: "There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand

Higgins v. *Senior* (1841).

(*q*) Subject to the parol evidence not contradicting a written contract: *Formby Brothers* v. *Formby* [1910] 102 L. T. 116, C. A. (agent expressly contracting as principal: latter not liable).

(*r*) 8 M. & W. 834; 11 L. J. Ex. 199; 58 R. R. 884; *coram* Parke, Alderson, Gurney and Rolfe, BB. See also *Filby* v. *Hounsell* [1896] 2 Ch. 737; 65 L. J. Ch. 852.

to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing, by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal. But, on the other hand, to allow evidence to be given, that the party who appears on the face of the instrument to be personally a contracting party (*s*), is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done."

Agent's liability by usage of trade.

Humfrey v. *Dale* (1858).

Where the broker bought expressly for his principals, but without disclosing their names in the sold note, he was held liable to the seller on evidence of usage in the oil trade that the broker was liable personally when the name of the principal was not disclosed within a reasonable time after the contract was made (*t*).

Fleet v. *Murton* (1871).

In *Fleet* v. *Murton* (*u*), the contract note was:- "We have this day sold for your account to our principal, etc.," (Signed "M. & W., Brokers." The brokers were held personally liable on proof of usage in the London fruit trade making them liable if the principal were not disclosed on the face of the contract, on the authority of *Humfrey* v. *Dale*. Evidence was given of a similar usage in the London Colonial market.

Somewhat similar customs have been alleged and proved to exist in the shipping trade, in the case of a charter-party (*v*), in the London dry goods market (*w*), in the London rice (*x*), hide (*y*), and hop trade (*z*). An attempt to prove a

(*s*) *I.e.*, where the instrument is intended to be a *contract* in writing, and not, for example, a mere invoice: *Holding* v. *Elliott* (1860) 5 H. & N. 117; 29 L. J. Ex. 13; 120 R. R. 504.

(*t*) *Humfrey* v. *Dale* (1857) 7 E. & B. 266; 26 L. J. Q. B. 137; 110 R. R. 587; aff. in Ex. Ch. (1858) E. B. & E. 1004; 27 L. J. Q. B. 390. See also *Tetley* v. *Shand* (1872) 20 W. R. 206; 25 L. T. (N. S.) 658.

(*u*) L. R. 7 Q. B. 126; 41 L. J. Q. B. 49.

(*v*) *Hutchinson* v. *Tatham* (1873) L. R. 8 C. P. 482; 42 L. J. C. P. 260, following the two preceding cases. The reasons for the existence of such a custom are explained by Bovill, C.J., at p. 485.

(*w*) *Imperial Bank* v. *London and St. Katharine's Dock Co.* (1877) 5 Ch. D. 195; 46 L. J. Ch. 335.

(*x*) *Bacmeister* v. *Fenton Lery* (1883) Cab. & El. 121 (no disclosure on *contract note*, though disclosure made orally).

(*y*) *Barrow* v. *Dyster* (1884) 13 Q. B. D. 635. In this case the custom was held inconsistent with the contract.

(*z*) *Pike* v. *Ongley* (1887) 18 Q. B. D. 709; 56 L. J. Q. B. 373, C. A. (no disclosure at the time of making the contract). The Court of Appeal held that it was not inconsistent with the contract to *superadd* the liability of the broker to that of the principal.

similar custom upon the London Stock Exchange, fell short of satisfying a special jury (*a*). And an alleged custom in the hop trade that a merchant dealing with a hop factor was entitled, even when the name of the factor's principal was disclosed, to regard the factor as the only principal, and to settle with him by payment or set-off, as against the principal, has been held unreasonable (*b*).

Cropper v. *Cook* (1868).

In *Cropper* v. *Cook* (*c*), it was proven that a special usage exists in the wool trade in Liverpool that the buyer's broker may contract in the name of the principal, or at his discretion without disclosing the principal's name, thus making himself personally responsible, if requested to do so by the seller; and that the broker may do this, without communicating the fact to the buyer. The Court held this usage reasonable and valid.

The question in all these cases turns upon whether the evidence of usage was explanatory or contradictory of the written document, and in *Humfrey* v. *Dale*, in the Exchequer Chamber, there was much difference of opinion among the learned Judges on this point, it being conceded that, if explanatory, it was admissible: if contradictory, inadmissible (*d*).

It is clear that, in the absence of satisfactory evidence of usage, the law is that a broker as such, merely dealing as a broker, makes a contract between the buyer and seller, and does not render himself liable either as buyer or seller of the goods (*e*).

Usage cannot change the intrinsic character of a contract.

But a usage of trade, though it may control the performance, cannot change the intrinsic character of a contract (*f*). Thus, a broker employed to buy goods for his principal cannot rely upon a usage of trade allowing him to convert himself into a principal and to sell him goods which he has bought on his own account, as is shown by the following case.

(*a*) *Wildy* v. *Stephenson* (1882) Cab. & El. 3.

(*b*) *Cooper* v. *Strauss* [1898] 14 Times L. R. 233.

(*c*) L. R. 3 C. P. 194.

(*d*) (1858) E. B. & E. 1004; 27 L. J. Q. B. 390. See this case and *Fleet* v. *Murton* (1871) L. R. 7 Q. B. 126; 41 L. J. Q. B. 49, explained and discussed by Jessel, M.R., in *Southwell* v. *Bowditch* (1876) 1 C. P. D. at 377, 378; 45 L. J. Q. B. at 632. See also *Barrow* v. *Dyster* (1884) 13 Q. B. D. 635 (arbitration clause contradictory to usage).

(*e*) *Fairlie* v. *Fenton* (1870) L. R. 5 Ex. 169; 39 L. J. Ex. 107; *Fleet* v. *Murton* (1871) L. R. 7 Q. B. 126; 41 L. J. Q. B. 49, *per* Blackburn, J., at 131; *Southwell* v. *Bowditch* (1876) 1 C. P. D. 374; 45 L. J. Q. B. 632, C. A.; revg. the Div. Court, *ibid.* 100; 45 L. J. Q. B. 374, 630. The judgment of Jessel, M.R., is given more fully in the L. J.

(*f*) *Per* Willes and Keating, JJ., in *Mollett* v. *Robinson* (1870) L. R. 5 C. P. at 656; 39 L. J. C. P. 290; *per* Mellor, J., in S. C., in giving his opinion in the H.L. (1875) L. R. 7 H. L. at 816; 44 L. J. C. P. 362.

Mollett v. *Robinson* (1875).

In *Mollett* v. *Robinson* (*g*), the plaintiffs, tallow brokers, were employed by the defendant to purchase 50 tons of tallow in the London market, and had like orders from other purchasers. The plaintiffs bought *on their own account* tallow enough for all the orders which they had received, and divided it among the principals who had employed them, sending to the defendant a bought note, signed by themselves as "sworn brokers," stating 50 tons of tallow to have been bought "for his account," with quality, price, etc., but no seller's name was given. There was no corresponding sold note delivered to any one, and *no such purchase* as was represented in the bought note. Proof was given that the execution of the defendant's order in this manner was in accordance with the usage of the London market; but the defendant was not aware of the usage, and refused to accept the tallow when he learned how the business had been conducted. *Held*, in the Common Pleas, by Bovill, C.J., and Montague Smith, J., that the defendant was bound to accept; by Willes and Keating, JJ., that usage could not be invoked to change the character of the contract, and that the broker could not make himself the principal in the sale to the defendant without the latter's consent, and there was no other principal than the plaintiffs. In the Exchequer Chamber, opinions were also evenly divided, and the verdict for the plaintiffs accordingly stood.

The judgments of both Courts were unanimously reversed by the House of Lords, and the defendant was held not to be bound to accept, as the usage of trade set up was such as to alter the *intrinsic character* of the contract, by converting the broker employed to buy for his employer into a principal to sell to him, and such usage would not bind a principal who, *ignorant of its existence*, employs a broker to transact business for him in the particular market where it prevails (*h*). In such a case the broker, in breach of the usual duty of a broker, fails to establish privity of contract between his principal and the seller of the goods (*i*).

Scope of this case.

But *Robinson* v. *Mollett* decides no more than is stated in the text. The mere fact that the orders of the broker's various principals are lumped in one transaction with the

(*g*) (1870) L. R. 5 C. P. 646; 39 L. J. C. P. 290; (1872) L. R. 7 C. P. 84, Ex. Ch., rev. in H. L. *sub. nom. Robinson* v. *Mollett* (1875) L. R. 7 H. L. 802; 44 L. J. C. P. 362. Of the learned Judges summoned by the H. L. the opinion of Brett, J., will well repay perusal.

(*h*) *Per* Lord Chelmsford, L. R. 7 H. L. at 836; *Perry* v. *Barnett* (1885) 15 Q. B. D. 388; 54 L. J. Q. B. 466, C. A.

(*i*) *Per* Lord Chelmsford, L. R. 7 H. L. at 837; 44 L. J. C. P. 362.

seller, or the buyer, as the case may be, and even where the broker includes his own purchases or sales, does not prevent privity of contract being established between each of the broker's principals and the seller or the buyer, where the facts show a mutual intention of the broker and the seller or buyer to effect privity with each principal (*k*). And a usage of trade to the same effect is reasonable and valid (*k*).

In what cases broker can sue or be sued personally

Where a broker gives a contract note describing himself as acting for a named principal, he cannot sue personally on the contract (*l*). And even if the principal is undisclosed, the rule is the same provided the agent contract merely as agent (*m*).

But if the broker contract in his own name, even though he is known to be an agent, he may sue or be sued on the contract (*n*). And the same rules apply to auctioneers (*o*).

If a broker employed by another be really acting for himself, his signature, though made as broker, will not bind his principal, and he cannot sue him on the contract, for an agent cannot convert himself, as against his principal, into a principal; moreover one party to a contract under section 4 of the Code is not the agent of the other to make a memorandum (*p*). But a broker, purporting, in a contract

(*k*) See generally *Scott and Horton* v. *Godfrey* [1901] 2 K. B. 726; 70 L. J. K. B. 954, where *Robinson* v. *Mollett* is considered; folld. in *Consolidated Gold Fields of S. A.* v. *Spiegel & Co.* [1909] 100 L. T. 351.

(*l*) *Fawkes* v. *Lamb* (1862) 31 L. J. Q. B. 98; 136 R. R. 806; *Fisher* v. *Marsh*, (1865) 6 B. & S. 416, *per* Blackburn, J., 34 L. J. Q. B. 178; 141 R. R. 447; *Bramwell* v. *Spiller* (1870) 21 L. T. 672; *Fairlie* v. *Fenton* (1870) L. R. 5 Ex. 169; 39 L. J. Ex. 107; *Jurdeson & Co.* v. *London Hardwood Co.* [1914] 110 L. T. 666; 34 L. J. Q. B. 177; *cf. Brandt & Co.* v. *Morris & Co.* [1917] 2 K. B. 784, C. A.; 87 L. J. K. B. 101, where the reference to the principal was intended to declare the destination of the goods according to law.

(*m*) *Sharman* v. *Brandt* (1871) L. R. 6 Q. B. 720; 40 L. J. Q. B. 312, in Ex. Ch.; *per Cur.* in *Fleet* v. *Murton* (1871) L. R. 7 Q. B. 126; 41 L. J. Q. B. 49.

(*n*) *Short* v. *Spackman* (1831) 2 B. & Ad. 962; *Jones* v. *Littledale* (1837) 6 A. & E. 486; 6 L. J. K. B. 169; 45 R. R. 512; *Reid* v. *Dreaper* (1861) 6 H. & N. 813; 30 L. J. Ex. 268; 123 R. R. 850; *Hutcheson* v. *Eaton* (1884) 13 Q. B. D. 861, C. A.; and in *Southwell* v. *Bowditch* (1876) 1 C. P. D. 374 at 379; 45 L. J. C. P. 630, Mellish, L.J., says that if the principal is undisclosed "bought of you for my principals" shows a personal liability on the agent. If the agent be described in a written contract as principal, his undisclosed principal cannot sue on the contract: *Formby* v. *Formby* [1910] 102 L. T. 116, C. A. (agent described as "proprietor"); distd. in *Drughorn* v. *Rederi-aktie Bolaget Transatlantic*, [1919] A. C. 203; 88 L. J. K. B. 233, H. L. (agent described as charterer).

(*o*) *Franklyn* v. *Lamond* (1847) 4 C. B. 637; 16 L. J. C. P. 321; 72 R. R. 671; *Fisher* v. *Marsh* (1865) 6 B. & S. 411; 34 L. J. Q. B. 177; 141 R. R. 447; *Woolfe* v. *Horne* (1877) 2 Q. B. D. 355; 46 L. J. Q. B. 534; *Wood* v. *Baxter* (1883) 49 L. T. 47. The position of an auctioneer is considered by Collins, J., in *Consolidated Co.* v. *Curtis* [1892] 1 Q. B. 499; 61 L. J. Q. B. 325.

(*p*) *Sharman* v. *Brandt*, *supra*, and *Fairlie* v. *Fenton*, *supra*, distd. from *Schmaltz* v. *Avery* (1851) 16 Q. B. 655, by Pickford, J., in *Harper & Co.* v. *Vigers Brothers* [1909] 2 K. B. 549.

with another, to act as broker for an undisclosed principal, and being himself in fact the principal, may sue the other party to the contract, subject to section 4 of the Code being satisfied, unless the other party relied, in making the contract, on the broker being only an agent (*q*).

An agent acting on behalf of the Crown or Government is, in the absence of an express contract in that behalf, or unless he was appointed with capacity to sue or be sued, not personally liable on any contract made in his capacity as such agent, even though he would be liable in similar circumstances if he were a private agent (*r*).

Effect of signature of contract by agent.

With regard to the effect of the *signature* of an agent upon his personal liability, there has been a long series of decisions which are not altogether consistent. According to some of the earlier authorities, it required very strong internal evidence to rebut the presumption of liability arising from an unqualified signature to the contract, even where in the body of it the agent purported to contract on behalf of a principal (*s*). But the later authorities, as well as some of the earlier ones, warrant the proposition that, in the absence of usage, the question is one of the construction of the contract as a whole, together with all the surrounding circumstances, and that the signature being made without qualification is only one fact, though a strong one, to be considered in construing the contract (*t*).

Where the signature of the agent is qualified as where he signs "for," or "on account of," or "on behalf of" his principal, or "*as* agent" it would require very strong language in the body of the contract, to fix him with liability (*u*). And the case is the same where an unqualified

(*q*) *Schmaltz* v. *Avery* and *Harper & Co.* v. *Vigers Brothers*, *ante*, 293.

(*r*) *Dunn* v. *Macdonald* [1897] 1 Q. B. 555; 66 L. J. Q. B. 420, C. A.; *Macbeath* v. *Haldimand* (1786) 1 T. R. 172; 1 R. R. 177; *Graham* v. *Public Works Commissioners* [1901] 2 K. B. 781; 70 L. J. K. B. 860. See also *Roper* v. *Public Works Commissioners* [1915] 1 K. B. 45; 84 L. J. K. B. 219.

(*s*) *Appleton* v. *Binks* (1804) 5 East, 147; 7 R. R. 672; *Burrell* v. *Jones* (1819) 3 B. & A. 47; 22 R. R. 296; *Tanner* v. *Christian* (1855) 4 E. & B. 591; 24 L. J. Q. B. 91; 99 R. R. 637; *Parker* v. *Winlow* (1857) 7 *ib.* 942; 27 L. J. Q. B. 49; 110 R. R. 904; but *cf.* *Downman* v. *Williams* (1845) 7 Q. B. 103 ("I undertake on behalf of E."), where the fact of agency was supported by other parts of the contract.

(*t*) *Green* v. *Kopke* (1856) 18 C. B. 549; 25 L. J. C. P. 297; 107 R. R. 494; *Gadd* v. *Houghton* (1876) 1 Ex. D. 357; 46 L. J. Ex. 71, C. A.; *Haigh* v. *Suart & Co.* (1890) 7 Times L. R. 134, C. A.; and see other cases cited in n. (*z*), *infra*.

(*u*) *Deslandes* v. *Gregory* (1860) 2 E. & E. 602; 29 L. J. Q. B. 93; 119 R. R. 865; S. C. in error, *ibid.* 610; 31 L. J. Q. B. 36; 119 R. R. 869 ("for S. F. . . . G. Brothers, as agent").

signature is appended to a contract in which the agent contracts merely as agent (*x*). But where the body of the contract does not show that he is contracting only as agent, and he does not qualify his signature, the mere addition to his signature of a word such as "agent" or "broker" is regarded as merely a word of description, and does not qualify his personal liability (*y*). It is beyond the scope of this treatise to discuss the subject at length, but in the footnote below will be found the principal later decisions relating thereto (*z*).

Agents for non-existing principal.

Where a party contracts in writing as agent for a non-existent principal he will be personally bound, and no subsequent ratification by the principal afterwards coming into existence can change this liability, nor is evidence admissible to show that a personal liability was not intended. Thus, in *Kelner* v. *Baxter* (*a*), the plaintiff wrote to the three defendants, addressing them "on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited," proposing to sell certain goods for £900, which offer the defendants accepted by a letter signed by themselves, "on behalf of the Gravesend Royal Alexandra Hotel Company, Limited," proposing to sell

Kelner v. *Baxter* (1866).

(*x*) *Per* Mellish, L.J., Quain and Archibald, JJ., in *Gadd* v. *Houghton* (1876) 1 Ex. D. 357; 46 L. J. Ex. 71; C. A., at 360; *per* Mellish, L.J., in *Concordia Chemische Fabrik* v. *Squire* (1876) 34 L. T. 824, at 827; *per Cur.* in *Haigh* v. *Suart & Co.*, *supra*.

(*y*) *Hutcheson* v. *Eaton* (1884) 13 Q. B. D. 861, C. A.

(*z*) *Green* v. *Kopke* (1856) 18 C. B. 548; 25 L. J. C. P. 297; 107 R. R. 404 ("sold on behalf of R. . . . H. K. as agent"); *Deslandes* v. *Gregory*, *ante*, 294; *Fairlie* v. *Fenton* (1870) L. R. 5 Ex. 169; 39 L. J. Ex. 107 (principal named); *Concordia Chemische Fabrik* v. *Squire*, *supra*; *Southwell* v. *Bowditch* (1876) 1 C. P. D. 374, C. A; 45 L. J. Q. B. 630 ("sold for your account to my principals"; unqualified signature); *Gadd* v. *Houghton* (1876) 1 Ex. D. 357; 46 L. J. Ex. 71, C. A. ("sold to you on account of M. & Co."; unqualified signature); *Hutcheson* v. *Eaton*, *supra*: *Ogden* v. *Hall* (1879) 40 L. T. 751; *Hick* v. *Tweedy* (1891) 33 L. T. 765 (unqualified signature not rebutted); *Stewart* v. *Shannessy* (1900) 2 Fraser (Sc.) 1288 (unqualified signature); *H. O. Brandt & Co.* v. *H. N. Morris & Co.* (1917) 2 K. B. 784, C. A.; L. J. K. B. (unqualified signature not rebutted). In *Southwell* v. *Bowditch* Kelly, C.B., and Mellish, L.J., draw a distinction between "sold for you to my principals" and "bought of you for my principals," the last words showing in their opinion a personal liability. In *Ogden* v. *Hall*, Huddleston and Pollock, BB., held (*diss.* Kelly, C.B.) the words "on behalf of" identical with "on account of" a principal. The decision in *Gadd* v. *Houghton* appears to be inconsistent with *Tanner* v. *Christian* (1855) 4 E. & B. 591; 24 L. J. Q. B. 91; 99 R. R. 637; *Lennard* v. *Robinson* (1855) 5 *ib.* 125; 24 L. J. Q. B. 275; 103 R. R. 402; *Parker* v. *Winlow* (1857) 7 *ib.* 942; 27 L. J. Q. B. 49; 110 R. R. 904; and *Weidner* v. *Hoggett* (1876) 1 C. P. D. 533. *Paice* v. *Walker* (1870) L. R. 5 Ex. 173; 39 L. J. Ex. 109, is of no authority: *per* L. J. in *Brandt & Co.* v. *Morris & Co.* [1917] 2 K. B. 784, C. A.; 87 L. J. K. B. 101; and the five other cases above mentioned must be looked upon as of doubtful authority. *Tanner* v. *Christian* is, however, cited by Parker, J., in *Chapman* v. *Smith* [1907] 2 Ch. 97; 76 L. J. Ch. 394, without disapproval.

(*a*) L. R. 2 C. P. 174; 36 L. J. C. P. 94; app. in *Natal Land, &c., Co.* v. *Pauline Colliery Syndicate* [1904] A. C. 120; 73 L. J. P. C. 22. See also *Wilson & Co.* v. *Baker, Lees & Co.* (1901) 17 Times L. R. 473.

certain goods for £900, which offer the defendants accepted by a letter signed by themselves, "on behalf of the Gravesend Royal Alexandra Hotel Company, Limited," and the goods were thereupon delivered and consumed by the company, which was not incorporated till after the date of the contract, and which ratified the purchase made on its behalf. It was held that the defendants were personally liable on the contract, because there was no principal existing at the date of the contract for whom they could by possibility be agents, and that for the same reason no ratification was possible (*b*): that the company might have bound itself by a *new* contract (*c*) to buy and pay for the goods, but such new contract would require the assent of the seller, who could not be deprived of his recourse against those who dealt with him by any action of the company to which he was no party; and that parol evidence was not admissible to affect the inference of personal liability legally resulting from the written contract.

2. What written note of the terms of the contract suffices.

Having now dealt with the necessity for the *parties* to the contract being named or described in the note or memorandum, we come to the second point of the inquiry, and must consider to what extent it is necessary that the writing should contain the terms and subject-matter of the contract in order to be deemed a sufficient note or memorandum "of the bargain" or "contract."

Price not stated where agreed on. *Elmore* v. *Kingscote* (1826).

In *Elmore* v. *Kingscote* (*d*), there had been a verbal sale of a horse for 200 guineas, but the only writing was a letter from the defendant to the plaintiff, in the following words: "Mr. Kingscote begs to inform Mr. Elmore that if the horse can be proved to be five years old on the 13th of this month in a perfectly satisfactory manner, of course he shall be most happy to take him; and if not most clearly proved, Mr. K. will most decidedly have nothing to do with him." The Court held this insufficient, saying: "The price agreed to be paid constitutes a material part of the bargain."

Ashcroft v. *Morrin* (1842).

In *Ashcroft* v. *Morrin* (*e*), defendant ordered certain goods to be sent him, saying: "Let the quality be fresh and good,

(*b*) See also on this point *per* Jessel, M.R., and James, L.J., in *Empress Engineering Co.* (1880), 16 Ch. D. 128, 130; *per* Lord James in *Keighley* v. *Durant* [1901] A. C. 240, at 251; 70 L. J. K. B. 622; *North Sydney Investment &c., Co.* v. *Higgins* [1899] A. C. 263; 68 L. J. P. C. 42.

(*c*) See also *per* H. L. in *Natal Land, &c., Co.* v. *Pauline Colliery Syndicate*, *ante*, 295. In equity the acceptance of benefits does render a company liable: *Re English and Col. Produce Co.* [1906] 2 Ch. 435; 75 L. J. Ch. 831.

(*d*) 5 B. & C. 583; 29 R. R. 341.

(*e*) 4 Man. & G. 450; 11 L. J. C. P. 265; 61 R. R. 559.

and on moderate terms." On objection made that the price was not stated, the Court said: "The order here is to send certain quantities of porter and other malt liquor, on 'moderate terms.' Why is not that sufficient? That is the contract between the parties." And the nonsuit was set aside according to leave reserved.

Acebal v. *Levy* (1834).

In *Acebal* v. *Levy* (*f*), there was a special count alleging an agreement for the sale of a cargo of "nuts, at the then shipping price at Gijon, in Spain," and the parol evidence was to that effect. The plaintiff attempted to support his case by a letter which did not state the price, and by insisting that a contract of sale was valid without a statement of price, because the law would imply a promise to pay a reasonable price. But the Court, declining to determine how this would be if no price had really been agreed on, held that where there had been an actual agreement as to price shown by parol, the written paper, which did not contain that part of the bargain, was insufficient.

Price not stated where it had not been agreed on.

Hoadley v. *M'Laine* (1834).

In *Hoadley* v. *M'Laine* (*g*), the same Court decided the point left undetermined in *Acebal* v. *Levy*. The defendant gave the plaintiff an order in these words: "Sir Archibald M'Laine orders Mr. Hoadley to build a new, fashionable, and handsome landaulet, with the following appointments, &c. . . the whole to be ready by the 1st of March, 1833." Nothing was said about price. The Judges were all of opinion that as the writing contained *all that was agreed on*, it was a sufficient note of the bargain. Tindal, C.J., said: "This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth." Park, J., said: "It is only necessary that price should be mentioned in the memorandum, when price is one of the ingredients of the bargain."

Goodman v. *Griffiths* (1837).

In *Goodman* v. *Griffiths* (*h*), the plaintiff showed defendant an invoice of his prices, and then agreed verbally to sell to him at a deduction of twenty-five per cent. on those prices for cash, whereupon defendant wrote and signed an order: "Please to put in hand for my account four mechanical binders." *Held*, that as there had been a parol agreement as

(*f*) 10 Bing. 376; 3 L. J. C. P. 98; 38 R. R. 469; and see *Jeffcott* v. *North British Oil Co.* (1873) 8 Ir. R. C. L. 17.

(*g*) 10 Bing. 482; 3 L. J. C. P. 162; 38 R. R. 510.

(*h*) 26 L. J. Ex. 145; 1 H. & N. 574; 108 R. R. 728. The second point decided in this case, *viz.*, that the defendant's letter returning the plaintiff's invoice which mentioned the price, did not satisfy the statute, as being a repudiation, is not now sustainable: see *post*, 299.

to price, which was not mentioned in the defendant's written order, the Statute was not satisfied.

General rule as to price.

The rule of law, then, is that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. But the law only does this in the absence of an agreement, and therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in writing; and parol evidence is admissible to show that a price was actually agreed on, in order to establish the insufficiency of a memorandum which is silent as to price.

Mode or time of payment. *Valpy* v. *Gibson* (1847).

The same principles apply to the mode or time of payment, for, as was said by the Court in *Valpy* v. *Gibson* (*i*): "The omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances." And the Court held, in the case before it, that the contract was of the nature above described, and was valid.

Mahalen v. *Dublin Distillery Company* (1877).

In *Mahalen* v. *The Dublin Distillery Company* (*k*), there had been a parol agreement for the purchase of whiskey, the purchaser to have the option of paying in cash *or* by his acceptance at four months, and the exact quantity of the whiskey was to be ascertained by re-dip. Invoices were made out which represented the sales to be for "net cash," and of an ascertained quantity of whiskey. It was held by the Court of Queen's Bench in Ireland that the invoices did not contain the material terms of the bargain.

Sarl v. *Bourdillon* (1856).

In *Sarl* v. *Bourdillon* (*l*), the Court came to the conclusion that the mode of payment, viz., a cheque to be given by a third person, though mentioned at the time of the contract, was not intended to be a term of the contract, and so need not appear in the memorandum.

Quantity of goods.

The quantity of the goods is also a material term of the contract, and must be shown in the memorandum (*m*).

(*i*) 4 C. B. 837; 6 L. J. C. P. 241; 72 R. R. 740.
(*k*) 11 Ir. R. C. L. 83. See also *McCaul* v. *Strauss* (1883) Cab. & El. 106
(*l*) 1 C. B. (N. S.) 188; 26 L. J. C. P. 78; 107 R. R. 624.
(*m*) *Mahalen* v. *The Dublin Distillery Co.*, *supra*.

As to the other terms of the contract, it is necessary that they should so appear by the written papers as to enable the Court to understand what they actually were.

Other terms of the contract must be so expressed as to be intelligible.

In *Pitts* v. *Beckett* (*n*), the defendant had agreed to buy of the plaintiff some wool, to be delivered in good, dry condition. The broker sent to the plaintiff a sold note omitting this condition, and sent no note to the defendant. *Held*, that, assuming that the broker had authority from the buyer to sign the sold note, his authority was to sign a note correctly stating the contract, and consequently there was no sufficient memorandum.

Quality of goods.

Pitts v. *Beckett* (1845).

In *Archer* v. *Baynes* (*o*), the Court held the correspondence between the parties an insufficient note, because not containing all the terms of the contract. The Court say of the defendant: "It is clear from the letters that he had bought the flour from the plaintiff upon some contract or other, but whether he had bought it on a contract that he should take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a sample which had been delivered to him on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties does not appear to be settled by the contract in writing."

Archer v. *Baynes* (1850).

In *McLean* v. *Nicoll* (*p*), the defendant had ordered of the plaintiff, a looking-glass manufacturer, several looking-glasses, and it was agreed that the glass should be plate glass of the best quality. The plaintiff sent an invoice describing the goods as glasses, with their dimensions and prices, and the defendant replied acknowledging the receipt of the invoice. *Held*, that the invoice and letter were not sufficient as a memorandum, as not mentioning a material term, viz., the quality of the glass.

McLean v. *Nicoll* (1861).

It has already been shown that where the terms of the contract are contained in different pieces of paper, the several writings which are offered as constituting the bargain must be consistent, and not contradictory (*q*). But provided that the several parts of a memorandum, whether consisting of one or more documents, are consistent with one another, it is immaterial that it also contains a repudiation of the contract

A repudiation contained in a memorandum does not necessarily invalidate it.

(*n*) 13 M. & W. 743; 14 L. J. Ex. 358; 67 R. R. 798. See in America, *Peltier* v. *Collins* (1830) 3 Wend. 459.

(*o*) 20 L. J. Ex. 54; 5 Ex. 625; 82 R. R. 792. *Haughton* v. *Morton* (1855) 5 Ir. R. C. L. 329, set out *ante*, 280.

(*p*) 7 Jur. N. S. 999; 123 R. R. 953. See also *McCaul* v. *Strauss* (1883) Cab. & Ell. 106.

(*q*) *Ante*, 279.

by the party to be charged, as the question is not one of the intention of the person signing the document, but one merely of evidence against him (*r*). Accordingly, it was decided in the following case (*s*), that a letter repudiating a contract may be so worded as to furnish a sufficient note of the bargain.

Bailey v. *Sweeting* (1861).

In *Bailey* v. *Sweeting* (*t*), the letter produced was as follows: "In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was the chimney-glasses, amounting to £38 10s. 6d., which goods I have never received, and have long since declined to have, for reasons made known to you at the time, &c., &c." Erle, C.J., in his opinion, said the letter "in effect says this to the plaintiffs: 'I made a bargain with you for the purchase of chimney-glasses at the sum of £38 10s. 6d., but I decline to have them because the carrier broke them.' Now the first part of that letter is unquestionably a note or memorandum of the bargain. It contains the price and all the substance of the contract, and there could be no dispute that if it had stopped there, it would have been a good memorandum of the contract within the meaning of the Statute. . . because the defendant says therein: 'I made the contract for the goods.'" And Williams, J., said: "The intention to abandon or not the contract can have nothing to do with the question whether there is a sufficient memorandum" (*u*).

Wilkinson v. *Evans* (1866).

In *Wilkinson* v. *Evans* (*x*), the defendant also refused the goods, writing on the back of the invoice: "The cheese came to-day, but I did not take them in, for they were very badly crushed; so the candles and the cheese is returned." *Held*, that this was evidence for the jury that the invoice contained all the stipulations of the contract, and that defendant's objection was not to the plaintiff's statement of the contract, but related to the performance of it. Nonsuit set aside.

(*r*) *Per* Bowen, L.J., in *Re Hoyle* [1893] 1 Ch. 84, at 99; 62 L. J. Ch. 182, C. A. See in Can. *Martin* v. *Haubner* [1896] 26 Can. Sup. C. R. 142.

(*s*) In opposition to the opinion intimated in Blackburn, on Sale, 66; 2nd ed. 63. In *Buxton* v. *Rust* (1871) L. R. 7 Ex. at 282; 41 L. J. Ex. 173, in Ex. Ch., Blackburn, J., assented to the rule as laid down in *Bailey* v. *Sweeting*, and *Wilkinson* v. *Evans*, *infra*, as being, in his opinion, as logical and more convenient than that suggested by himself.

(*t*) 30 L. J. C. P. 150; 6 C. B. (N. S.) 843; 127 R. R. 896. *Cf. Thirkell* v. *Cambi* [1919] 35 T. L. R. 654, C. A., *post*, 301, where the defendant's letter set out no terms.

(*u*) The same principle now applies to an acceptance. See *ante*, 232.

(*x*) L. R. 1 C. P. 407; 35 L. J. C. P. 224. *Richards* v. *Porter* (1829) 6 B. & C. 437; 5 L. J. (O. S.) K. B. 175; 30 R. R. 392; *Cooper* v. *Smith* (1812) 15 East. 103; 13 R. R. 397; *ante*, 244; and *Smith* v. *Surman* (1829) 9 B. & C. 561; 7 L. J. (O. S.) K. B. 296; 33 R. R. 259, *ante*, 244; were distinguished as cases in which the defendant's letters had falsified the document set up by the plaintiff.

Buxton v. *Rust* (1872).

In *Buxton* v. *Rust* (*y*), the plaintiff on January 11th bought wool of the defendant "to be cleared in about twenty-one days," and handed him a memorandum containing all the terms of the bargain. On February 8th the defendant wrote: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days. . . . I shall consider the deal off as you have not completed your part of the contract." On February 9th, in answer to a request by the plaintiff for a copy of the contract, the defendant wrote: "I beg to enclose copy of your letter of the 11th of January." The plaintiff made an application for delivery of the wool, of which the defendant took no notice. The jury found that the plaintiff had performed his part of the contract, though twenty-one days had elapsed. *Held*, by the Exchequer Chamber, affirming the Court of Exchequer, that the letters of the 8th and 9th of February taken with the enclosure were a good memorandum of the contract, as being an unequivocal recognition of it, though coupled with an erroneous construction of its terms, and a repudiation.

Thirkell v. *Cambi* (1919).

In *Thirkell* v. *Cambi* (*z*), the appellant agreed to sell the respondent a number of straw hats, and sent him a sale note stating the marks and number of the hats and describing them, and saying that payment was to be by acceptance, but saying nothing of the mode of delivery. An invoice was sent subsequently, referring to the sale note, and accompanied by drafts to be accepted. The respondent refused to accept the bills, on the ground that the goods were to be delivered at his factory in Hertfordshire. This the appellant denied. Further letters were written by the appellant, requesting the return of the drafts accepted; and saying that, on the receipt of them, the goods would be forwarded to the factory, but that as the original terms were cheque against delivery order, the carriage to that place was at the respondent's charge. The appellant wrote that the goods might be inspected at a warehouse in London, and that the respondent would receive a delivery order against his acceptances. Finally, on January 2, the respondent's solicitor wrote to the appellant's solicitors: "Your letters to my client relating to this matter have been handed to me. I am instructed to inform you that the terms

(*y*) (1871) L. R. 7 Ex. 1; 41 L. J. Ex. 173; aff. in Ex. Ch. (1872) *ibid.* 379. See also *Dewar* v. *Mintoft* [1912] 2 K. B. 373; 81 L. J. K. B. 885, following the three cases in the text; *Elliott* v. *Dean* (1884) Cab. & Ell. 283.

(*z*) [1919] 2 K. B. 590, C. A.; 89 L. J. K. B. 1.

upon which the goods were agreed to be purchased were not carried out by your client. My client therefore declined to accept the bills in payment." The plaintiff, in an action for non-acceptance, relied upon the sale-note and invoice and the letters he had written, as constituting the contract, and on the solicitor's letter as the signed document. *Held*, by the Court of Appeal that there was no signed memorandum of the contract set up by the plaintiff.

Bankes, L.J., assumed that there was a completed contract, and that parol evidence was admissible to identify the appellant's letters as the letters referred to in the letter of January 2, and said: "Assuming that Mr. Carr's letter of January 2 refers to a note or memorandum in writing, does it recognise the note or memorandum as containing the terms of the agreement? *Bailey* v. *Sweeting*, *Wilkinson* v. *Evans*, and *Buxton* v. *Rust* establish clearly that, unless it does so, it is not a sufficient memorandum. It is impossible to extract any sufficient recognition from the letter of January 2. On its face it shows a refusal to recognise that the appellant's letters contain the terms of the contract, and an assertion that in those letters the appellant is insisting on a term which never was part of the contract."

Scrutton, L.J., said: "It is necessary to prove two things . . . a signed admission that there was a contract, and a signed admission of what that contract was. Subject to the question of the solicitor's authority, I think Mr. Bevan can point to a signed admission that there was a contract; but he has no signed admission of what that contract was. . . . the term, the mode of the delivery of the goods against payment, is not mentioned in the written statements of the contract."

Eve, J., said: "I take it to be the law that the person who signs as an agent must be authorised to sign a memorandum of a contract of the nature of that on which the plaintiff relies. . . I think it is clear that the letter is not a recognition of the contract on which the appellant relies."

A mere proposal may be a memorandum.

A note or memorandum is sufficient although it contain a mere proposal, if supplemented by parol proof of acceptance (*a*); for "the whole evidence of an agreement need not be in writing, but only all the terms along with the signature

(*a*) *Reuss* v. *Picksley* (1866) L. R. 1 Ex. 242; 35 L. J. Ex. 218; following *Warner* v. *Willington* (1856) 3 Drew. 523; 25 L. J. Ch. 662; 106 R. R. 416; *Smith* v. *Neale* (1857) 2 C. B. (N. S.) 67; 26 L. J. C. P. 145; 109 R. R. 611; and *Liverpool Boro. Bank* v. *Eccles* (1859) 4 H. & N. 139; 28 L. J. Ex. 122. See also *Clarke* v. *Gardiner* (1861) 12 Ir. C. L. 472.

of the party to be charged" (*b*). This is in accordance with the principle of *Bailey* v. *Sweeting*. On the same grounds a verbal acceptance of one of two alternative offers may be shown (*c*).

(*b*) *Per Curiam* in *Reuss* v. *Picksley*, L. R. 1 Ex. at 353. See also judgments in *Re Hoyle* [1893] 1 Ch. 84, at 98—100, C. A.
(*c*) *Lever* v. *Koffler* [1901] 1 Ch. 543; 70 L. J. Ch. 395.

CHAPTER VII.

OF THE SIGNATURE OF THE PARTY TO BE CHARGED.

Signature of the party to be charged alone is sufficient.

THE 17th section of the Statute of Frauds required the writing to be "signed by the *parties* to be charged, &c.," and the fourth section, and now section 4 of the Code, requires that of "the *party* to be charged, &c." Under both sections it is well settled that the only signature required is that of the party *against* whom the contract is to be enforced. The contract, by the effect of the decisions (*a*), is good or not at the election of the party who has not signed.

Contract good or not at election of party who has not signed.

Previous signature may be appropriated to document after alteration.

Stewart v. *Eddowes* (1874).

A signature affixed to a document containing the terms of a proposed contract may be appropriated by the signer to the document when its terms are finally settled, and such an appropriation may be proved by parol. Thus, in *Stewart* v. *Eddowes* (*b*), the seller of a ship drew up a note of the terms of sale and sent it to the buyer, who made certain alterations, signed the document and returned it to the seller. The latter struck out the alterations, and himself made others, and then signed the document and returned it to the buyer, who verbally agreed to the document as it stood. *Held*, that parol evidence was admissible to show the buyer's appropriation of his previous signature to the contract when complete.

The name of a Frenchman affixed in its English translation, as "Seam" for "Couture," has been held in America a good signature, at any rate when the signer was known by both names (*c*).

Signature of party to be charged purporting to be as witness.

When a party to a contract, knowing the contents of a document embodying the terms of the contract, signs the document in form as a witness, his signature is good as that of the party to be charged; for, as was said by Lord Eldon in *Cole*

(*a*) *Allen* v. *Bennet* (1810) 3 Taunt. 169; 12 R. R. 633; *Thornton* v. *Kempster* (1814) 5 Taunt. 786; 15 R. R. 658, both on s. 17; *Laythoarp* v. *Bryant* (1835) 2 Bing. N. C. 735; 5 L. J. C. P. 217; 42 R. R. 709; *Reuss* v. *Picksley* (1866) L. R. 1 Ex. 342; 35 L. J. Ex. 218, on s. 4.

(*b*) L. R. 9 C. P. 311; 43 L. J. C. P. 204. See also *Bluck* v. *Gompertz* (1852) 7 Ex. 862; 21 L. J. Ex. 278; 86 R. R. 860 (additions by signer to signed paper); *Guardians of Dartford Union* v. *Trickett* (1889) 59 L. T. 751; *Jones* v. *Victoria Graving Dock Co.* (1877) 2 Q. B. D. 314; 46 L. J. Q. B. 219 (identity of document signed).

(*c*) *Augur* v. *Couture* (1878) 68 Maine, 427.

v. *Trevothick* (*d*), "Where a party, or principal, or person to be bound, signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal."

Actual subscription not necessary.

The signature required is not confined to the actual subscription of his name by the party to be charged.

Mark sufficient, or pen held by a third person.

Thus, a mark made by a party as his signature is sufficient, if so intended. And in *Baker* v. *Dening* (*e*), where the question arose under the fifth section of the Statute, which relates to wills and devises, the Court held, that it was not necessary to show that the party signing by a mark was unable to write his name: and the Judges expressed the opinion, that a mark would be a good signature even if the party signing was able to write his name.

Baker v. *Dening* (1838).

Reynolds v. *Hooper* (1902).

In *Reynolds* v. *Hooper* (*f*), the sign "do." for "ditto," written against a lot sold at auction under a proper signature of the auctioneer's name against another lot, was held a good signature.

Helshaw v. *Langley* (1841).

In *Helshaw* v. *Langley* (*g*), the signature of a party was decided to be sufficient, when he, being unable to write, held the top of the pen, while another person wrote his signature.

Description of the writer insufficient.

But still there must be a signature, or a mark intended as such; and a description of the signer, though written by himself at the foot of the paper, is by itself insufficient. Thus, a letter by a mother to her son, beginning, "My dear Robert," and ending merely, "Your affectionate mother," with a full direction containing the son's name and address, was held not a sufficient signature by the mother (*h*).

Initials.

Whether a signature by initials would suffice seems not to have been expressly decided under the Statute of Frauds, but there seems to be no doubt that if the initials be intended as a signature by the party who writes them, this shall suffice, but not otherwise (*i*).

Figures.

Marking, by a person able to write, of the figures "1, 2, 8,"

(*d*) (1804) 9 Ves. 234, at 251; 7 R. R. 167. See another instance of such a case in *Welford* v. *Beazely* (1747) 3 Atk. 470, *post*, the facts of which are stated by Kindersley, V.C., in *Barkworth* v. *Young* (1856) 26 L. J. Ch. at 158.

(*e*) 8 A. & E. 94; 7 L. J. Q. B. 137; 47 R. R. 502, followed in *The Case of Blewitt* (1880) 5 P. D. 116; 49 L. J. P. 31. See also *Harrison* v. *Elwin* 1842) 3 Q. B. 117; 11 L. J. Q. B. 197; 61 R. R. 153.

(*f*) 19 T. L. R. 33.

(*g*) 11 L. J. Ch. 17; 57 R. R. 297.

(*h*) *Selby* v. *Selby* (1817) 3 Mer. 2; 17 R. R. 1.

(*i*) See remarks of Lord Westbury in *Caton* v. *Caton* (1867) L. R. 2 H. L. 127, 143; 36 L. J. Ch. 886; *Chichester* v. *Cobb* (1866) 14 L. T. (N. S.) 433; *Re Blewitt* (1880) 5 P. D. 116; Sugden V. & P. 14th ed. 144. See also *per* Bigelow, C.J., in *Sanborn* v. *Flagler* (1864) 9 Allen (Mass.) 474.

on a bill of exchange has been held in America to be a good endorsement, if intended as such (*k*).

Signature may be in print or by stamp, and in the body of the paper, or at beginning or end. When not subscribed, a question of fact.

The signature may be in writing, and the writing may be in pencil (*l*), or in print (*m*), or by stamping the name (*n*); and it may be in the body of the writing, or at the beginning (*o*) or end of it. But when the signature is not placed in the usual way at the foot of the written or printed paper, it becomes a question of intention, a question of fact, whether the name so written or printed in the body of the instrument was appropriated by the party to the recognition of the contract.

Saunderson v. *Jackson* (1800).

In *Saunderson* v. *Jackson* (*p*), the plaintiff, on giving to the defendants an order for goods, *received from them* a bill of parcels. The heading of the bill was printed as follows: "London: Bought of Jackson and Hankin, distillers, No. 8, Oxford Street," and then followed in writing: "1,000 gallons of gin, 1 in 5 gin, 7s., £350." There was also a letter, signed by the defendants, in which they wrote to plaintiff, about a month later: "We wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder. Must request you to return our pipes." Lord Eldon said: "The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name, as well as by his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the Statute of Frauds." Thus far the case would not amount to much as an authority on the point under discussion. His Lordship went on to say: "It has been decided (*q*), that if a man draw up an agreement in his own handwriting, beginning 'I,

(*k*) *Brown* v. *Butchers' Bank* (1844) 6 Hill (N. Y.) 443, follg. *Baker* v *Dening* (1838) 8 A. & E. 94; 7 L. J. Q. B. 137; 47 R. R. 502, *ante*, 305.

(*l*) *Geary* v. *Physic* (1826) 5 B. & C. 234; 4 L. J. K. B. 147; 29 R. R. 225; *Lucas* v. *James* (1849) 7 Hare, 410; 18 L. J. Ch. 329. So also in Amer., *Merritt* v. *Clason* (1815) 12 Johns. (N. Y.) 102; *Clason* v. *Bailey* (1827) 14 Johns. 484; *Brown* v. *Butchers' Bank* (1844) 6 Hill (N. Y.) 443; 7 Hare 419; 18 L. J Ch. 329; 82 R. R. 147. But a signature in pencil may be only deliberative: *Lucas* v. *James*, *supra*.

(*m*) *Brydges* v. *Dix* (1891) 7 T. L. R. 215.

(*n*) *Bennett* v. *Brumfitt* (1867) L. R. 3 C. P. 28; 37 L. J. C. P. 35; *De Beaurais* v. *Green* [1906] 22 T. L. R. 816.

(*o*) This was decided, with regard to the signature to wills under the Statute of Frauds, as long ago as 1682 in *Lemayne* v. *Stanley*, 3 Lev. 1. See also *Hilton* v. *King* (1683) *ib.* 86.

(*p*) 2 B. & P. 238; 5 R. R. 580.

(*q*) The case referred to by his Lordship is *Knight* v. *Crockford* (1794) 1 Esp. N. P. 190. See also *Lobb* v. *Stanley* (1844) 5 Q. B. 574; 13 L. J. Q. B. 117; 130 R. R. 446; and *per* Maule, J., in *Hubert* v. *Treherne* (1842) 3 M. & G. 743; 11 L. J. C. P. 78; 60 R. R. 600, *post*, 308.

A. B., agree,' and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the Statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed. The last case is stronger than the one now before us."

Schneider v. Norris (1814).

In *Schneider* v. *Norris* (*r*), the circumstances were exactly the same as in the preceding case, except that the name of the plaintiff as buyer was written, in the bill of parcels rendered to him, in the defendant's own handwriting, and all the Judges were of opinion that this was an adoption or appropriation by the defendant of his own name, printed on the bill of parcels, as his signature to the contract. Lord Ellenborough said: "If this case had rested merely on the printed name, unrecognised by and not brought home to the party, as having been printed by him or by his authority, so that the printed name had been inappropriated to the particular contract, it might have afforded some doubt, whether it would not be intrenching upon the Statute to have admitted it. But here there is a signing by the party to be charged, by words recognising the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written 'Norris & Co.' with his own hand. He has, by his handwriting, in effect, said: I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract." Le Blanc, J., compared the case to one, where a party should stamp his name on a bill of parcels. Bayley and Dampier, JJ., put their opinion on the ground that the defendant by writing the plaintiffs' names as buyers on a paper in which his own printed name appeared as the seller, recognised his name sufficiently to make it a signature.

Johnson v. Dodgson (1837).

In *Johnson* v. *Dodgson* (*s*), the defendant wrote the terms of the bargain in his own book, beginning with the words: "Sold John Dodgson," and *required the seller to sign* the entry. The Court held this to be a signature by Dodgson, Lord Abinger saying: "The cases have decided that although

(*r*) 2 M. & S. 286; 15 R. R. 250; foll. in *Evans* v. *Hoare* [1892] 1 Q. B. 593; 61 L. J. Q. B. 470.

(*s*) 2 M. & W. 653; 6 L. J. Ex. 185; 46 R. R. 733. See also *Bleakley* v. *Smith* (1840) 11 Sim. 150; 54 R. R. 342.

the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury whether the party not having signed it regularly at the foot meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." Parke, B., concurred, on the authority of *Saunderson* v. *Jackson*, and *Schneider* v. *Norris*, which he recognised and approved (*t*). He said: "Here the entry was written by the defendant himself, and required by him to be signed by the plaintiff's agent. That is amply sufficient to show that he *meant it to be a memorandum* of contract between the parties (*u*).

Hubert v. *Treherne* (1842).

In *Hubert* v. *Treherne* (*x*), which arose under the 4th section of the Statute of Frauds, it appeared that a company accepted a tender from the plaintiff for conveying coals for a period of three years. A draft of agreement was prepared by the order of the directors, and a minute entered as follows: "The agreement between the company and Mr. Thomas Hubert for carrying our coals, etc., was read and approved, and a fair copy thereof directed to be forwarded to Mr. Hubert." The articles began by reciting the names of the parties, Thomas Hubert of the one part, and Treherne and others, trustees and directors, etc., of the other part; and closed, "As witness our hands." The articles were not signed by anybody, but the paper was maintained by the plaintiff to be sufficiently signed by the defendants, because the names of defendants were written in the document by their authority. On motion to enter nonsuit, all the Judges held that the instrument on its face, by the concluding words, showed that the *intention* was *that it should be subscribed*. Maule, J., said (*y*): "The articles of agreement do not seem to me to be a memorandum signed by anybody. . . . If a party writes, 'I, A. B., agree, etc,' with no such conclusion as is found here, 'as witness our hands,' it may be that this is a sufficient signature within the Statute to bind A. B. (*z*) . . . But it would be going a great deal further than any of the cases have hitherto gone to hold that this was an agreement signed

(*t*) See also *Durrell* v. *Evans* (1861) 1 H. & C. 174; 31 L. J. Ex. 337; 130 R. R. 446; *post*, 313, Ex. Ch., where the same two cases, and *Johnson* v. *Dodgson*, were approved and followed.

(*u*) See also *Evans* v. *Hoare* [1892] 1 Q. B. 593; 61 L. J. Q. B. 470, where the facts were similar.

(*x*) 3 M. & G. 743; 11 L. J. C. P. 78; 60 R. R. 600.

(*y*) *Ibid.* at 755—756.

(*z*) See *Knight* v. *Crockford*, *ante*, 306.

by the party to be charged. This is no more than if it had been said by A. B. that he *would* sign a particular paper."

Tourret v. *Cripps* (1879).

In *Tourret* v. *Cripps* (*a*), under the 4th section of the Statute of Frauds, the defendant, who had written a letter containing proposed terms of a contract between him and the plaintiff upon paper bearing a printed heading: "Memorandum from Richard L. Cripps," and sent it to the plaintiff, was held to have recognised the printed name as his signature, so as to make the memorandum a sufficient note in writing to charge him.

Hucklesby v. *Hook* (1900).

In *Hucklesby* v. *Hook* (*b*), the defendant, the seller, took a sheet of letter paper bearing at the top his printed name and address, and handed it to the purchaser, who wrote thereon an offer to purchase, and returned it to the defendant. *Held*, by Buckley, J., that the defendant, not having written any part of the document, had not appropriated the printed name as a signature; and *Schneider* v. *Norris* and *Evans* v. *Hoare* (*c*) were distinguished on this ground, and *Tourret* v. *Cripps* on the ground that the seller in that case wrote and sent the document to the plaintiff. "These cases," said the learned Judge, "proceed upon the principle that signing for the purposes of the Statute does not necessarily mean writing your name, but means ratifying by writing in some form or other the document which contains the contract. . . . It may be a signature in writing within the Statute for a person to take a document and hand it to another, and say, the document being in his writing: 'That is the document which I ask you to take as forming the contract that you are going to sign.'"

Caton v. *Caton* (1867).

The most full and authoritative exposition of the law on this subject is to be found in *Caton* v. *Caton* (*d*), decided in the House of Lords in 1867. The paper there relied on was a memorandum of the terms of a proposed marriage settlement, drawn up in the handwriting of the future husband. There were numerous clauses, in some of which the name "Mr. Caton" was written in the body of the paper, and in others the initials "Rev. R. B. C.," and some contained neither name nor initials, and two of its clauses were struck through with a pen. It was held that, although to satisfy the Statute of Frauds it is not necessary that the signature

(*a*) 48 L. J. Ch. 567.
(*b*) 82 L. T. 117.
(*c*) *Supra*.
(*d*) L. R. 2 H. L. 127; 36 L. J. Ch. 886.

of a party should be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate *every material part* of the instrument; and that where, as in the case before the Court, the name of the party in the instrument appeared in such a way that it referred in each instance only to the particular part where it was found, and not to the whole instrument, it was insufficient. The language of Lord Westbury was as follows (*e*): "What constitutes a sufficient signature has been described by different Judges in different words. In the . . . case most frequently referred to as of the earliest date, that of *Stokes* v. *Moore* (*f*), the language of the learned Judge is that the signature must authenticate every part of the instrument: or, again, that it must give authenticity to every part of the instrument . . . be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument. The language of Sir William Grant, in *Ogilvie* v. *Foljambe* (*g*), is (as his method was) much more felicitous. He says it must govern every part of the instrument. It must show that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the Statute, and to give authenticity to the whole of the memorandum . . . An ingenious attempt was made at the bar to supply that defect by fastening on the antecedent words, 'In the event of marriage the undernamed parties,' and by the force of these words of reference to bring up the signature subsequently found and treat it as if it were found with the words of reference. My Lords, if we adopted that device, we should entirely defeat the Statute. You cannot by words of reference bring up a signature and give it a signification and effect different from that which the signature has in the original place in which it is found . . . you would be taking a signature intended only to have a limited and particular effect and by force of the reference to a part of that document, you would be making it applicable to the whole of the document to which the signature in its original condition was not

(*e*) At 142–144.
(*f*) (1786) 1 Cox, 219; 1 R. R. 24.
(*g*) (1817) 3 Mer. 53; 17 R. R. [illegible]

intended to apply, and could not, by any fair construction, be made to apply."

Signature may be referred, from what is signed to what is unsigned; not the reverse.

The effect of these principles seems to be substantially that the reference to connect two papers or two clauses so as to make one signature apply to both, must be from what is signed to what is unsigned, not the reverse.

Signature affixed *alio intuitu*.

Jones v. *Victoria Graving Dock Co.* (1877).

Provided, however, that the signature be meant to authenticate the document, the object in contemplation of which it is affixed is immaterial. This was expressly decided, under the 4th section of the Statute of Frauds, in *Jones* v. *Victoria Graving Dock Co.* (*h*), where the signature of the chairman of a company to the minutes embodying a resolution to employ the plaintiff as manager for five years was held to be a sufficient signature to a memorandum, although put *alio intuitu*, viz., to record the proceedings of the Board under the Companies Act of 1862 (*i*). In this case, *Eley* v. *The Positive Assurance Co.* (*k*), a contrary decision under the same section, was not cited, and the two cases appear to be irreconcileable. The reasoning upon which *Jones'* Case proceeds, that the requirements of the 4th section of the Statute of Frauds relate only to the *evidence* of the contract (*l*), is unquestionably sound (*m*), and the decision has been referred to by the Court of Appeal as "undoubted law" (*n*). The principle is equally applicable to a signature under section 4 of the Code, and *Eley's* Case must on this point be considered as overruled.

(*h*) 2 Q. B. D. 314; 46 L. J. Q. B. 219. See also *Daniels* v. *Trefusis* [1914] 1 Ch. 788; 83 L. J. Ch. 579.

(*i*) 25 & 26 Vict. c. 89, s. 67.

(*k*) (1875) 1 Ex. D. 20; 45 L. J. Ex. 451; affd. on another point (1876) 1 Ex. D. 88.

(*l*) *Per* Lush, J., in delivering the judgment of the Court, 2 Q. B. D. at 323. See *Re Hoyle* [1893] 2 Ch. 84; 62 L. J. Ch. 182, C. A.

(*m*) In *John Griffiths Cycle Corp.* v. *Humber Cycle Co.* [1899] 2 Q. B. 414, 418; 68 L. J. Q. B. 959, C. A.

CHAPTER VIII.

AGENTS DULY AUTHORISED TO SIGN.

SECTION I.—AGENTS GENERALLY.

It is not within the scope of this treatise to enter into the general subject of the law of agency. The agency may be proven by parol as at common law, and may be shown by subsequent ratification as well as by antecedent delegation of authority (*a*). But such ratification is only possible in the case of a principal in existence when the contract was made (*b*), and where the agent professed at the time to be acting on behalf of a principal (*c*).

Agent must be a third party.

It is necessary that the agent be a third person, and not the other contracting party (*d*).

What evidence sufficient to prove authority.

The decisions as to the sufficiency of evidence to prove authority for the agent's signature have not been numerous under the 17th section of the Statute of Frauds.

Graham v. *Musson* (1839).

In *Graham* v. *Musson* (*e*), the plaintiff's traveller, Dyson, sold sugar to the defendant, and in the defendant's presence, and at his request, entered the contract in the defendant's book in these words: "Of North & Co., thirty mats Manila at 71s.: cash, two months. Fenning's Wharf. Joseph Dyson." It was contended that this was a note signed by the defendant, and that Joseph Dyson was his agent for signing: but the Court held on the evidence that Dyson was the agent of the seller, and that the request by the purchaser that the seller's agent should sign a memorandum was no proof of agency to sign the purchaser's name: that the purpose of the buyer was probably to fix the seller, not to appoint an agent to sign his own name. The case might have been

(*a*) *Maclean* v. *Dunn* (1828) 4 Bing. 722; 6 L. J. C. P. 184; 29 R. R. 714; *Cosbell* v. *Archer* (1835) 2 A. & E. 500; 4 L. J. (N. S.) K. B. 78; 41 R. R. 475. *Acebal* v. *Levy* (1834) 10 Bing. 378; 3 L. J. (N. S.) C. P. 98; 38 R. R. 469. *Fitzmaurice* v. *Bayley* (1856) 6 E. & B. 868; 26 L. J. Q. B. 114; 106 R. R. 827.

(*b*) *Ante*, 295.

(*c*) *Keighley* v. *Durant* [1901] A. C. 240; 70 L. J. K. B. 622, H. L., rev. C. A. *sub. nom. Durant* v. *Roberts* [1900] 1 Q. B. 629; 69 L. J. Q. B. 382.

(*d*) *Sharman* v. *Brandt*, in Ex. Ch. (1871) L. R. 6 Q. B. 720; 40 L. J. Q. B. 720; 40 L. J. Q. B. 312.

(*e*) 5 Bing. N. C. 603; 8 L. J. (N. S.) C. P. 324; 50 R. R. 807; *coram* Tindal, C.J., and Vaughan, Coltman, and Erskine, JJ.

different had the traveller signed the *defendant's* name without his dissent (*f*).

The preceding case was followed by the same Court in 1841 in *Graham* v. *Fretwell* (*g*), an almost identical memorandum being written by the buyer, and signed, as in *Graham* v. *Musson*, by the seller's agent in his own name. *Graham* v. *Fretwell* (1841).

The whole subject was fully discussed in *Durrell* v. *Evans* in the Exchequer in 1861 (*h*), reversed by the unanimous judgment of the Exchequer Chamber in 1862 (*i*). The plaintiff, Durrell, had hops for sale in the hands of his factor, Noakes. The plaintiff and the defendant went together to Noakes's premises, and there concluded a bargain in his presence. Noakes made a memorandum of the bargain in his book, which contained a counterfoil, on which he also made an entry. He then tore out the memorandum and delivered it to the defendant, who kept it and carried it away, having previously requested that the date might be altered from the 19th to the 20th of October (the effect of this alteration, according to the custom of the trade, being to give to the defendant an additional week's credit). The plaintiff and Noakes assented, and the alteration was accordingly made. The memorandum was:— *Durrell* v. *Evans* (1861).

"Messrs. Evans.

"Bought of J. T. & W. Noakes.

"Bags.	Pockets.	T. Durrell.	
	33	Ryarsh & Addington.	£16 16s.

"Oct. 20th, 1860."

The entry on the counterfoil was as follows:—

"Sold to Messrs. Evans,

"Bags.	Pockets.	T. Durrell.	
	33	Ryarsh & Addington.	£16 16s.

"Oct. 20th, 1860."

On the trial, before Pollock, C.B., the plaintiff contended that the name "Messrs. Evans" written on the counterfoil

(*f*) As in *Bird* v. *Boulter* (1833) 4 B. & A. 443; 38 R. R. 285. The case is so explained by Bramwell, B., in *Mews* v. *Carr* (1856) 1 H. & N. 484; 26 L. J. Ex. 39; 108 R. R. 683; and by Crompton and Blackburn, JJ., in *Durrell* v. *Evans* (1862) 1 H. & C. at 183, 188; 31 L. J. Ex. 337; 130 R. R. 446; *infra*.

(*g*) 3 M. & G. 368; 11 L. J. (N. S.) C. P. 41.

(*h*) 30 L. J. Ex. 254; 130 R. R. 446; S. C. *nom.* *Durrell* v. *Evans*, 6 H. & N. 660; 30 L. J. Ex. 397; 130 R. R. 446; *coram* Pollock, C.B., and Bramwell and Wilde, BB.

(*i*) 31 L. J. Ex. 337; 1 H. & C. 174; 130 R. R. 446; *coram* Crompton, Willes, Byles, Blackburn, Keating, and Mellor, JJ.

was so written by Noakes as the defendant's agent; and that if written by the defendant himself, it would have been a sufficient signature according to the authority of *Johnson* v. *Dodgson* (*k*).

The Court of Exchequer were unanimously of opinion that Noakes throughout had acted solely in behalf of the seller, and that the request of the defendant that the memorandum should be changed from the 19th to the 20th, was to obtain an advantage from the seller, but in no sense to make Noakes the agent of the buyer. The buyer was in the position of a person who had merely asked for an invoice. They therefore made absolute a rule for a nonsuit.

The Court of Exchequer Chamber, with equal unanimity, distinguished the case from *Graham* v. *Musson* (*l*), on the ground that in that case the clerk had signed his own name, and not the defendant's, and had signed as his employer's agent only. They held, that there was evidence to go to the jury that Noakes was the agent of the defendant, as well as of the plaintiff, in making the entries; and, if so, that the writing of the defendant's name on the counterfoil was a sufficient signature.

Crompton, J., said (*m*) that the document delivered to the defendant was not merely an invoice. On the contrary, there was plenty of evidence that Noakes was the agent of both parties to make a record of a binding contract between them, and he pointed out that the memorandum was in duplicate, one "sold," the other "bought," made in the defendant's presence; that the latter took it, read it, had it altered, and adopted it, all of which facts he considered as evidence that Noakes was the agent of both parties.

Byles, J., took the same view on similar grounds.

Blackburn, J., pointed out, that although Noakes was not originally acting as broker between the parties (*n*), nor did he purport to deliver bought and sold notes, there was plenty of evidence, particularly, the request for an alteration, from which the jury might have inferred that the document was written out, not as an invoice, but as a memorandum on behalf of both parties, and that the case was identical with *Johnson* v. *Dodgson*, except that the defendant did not write the name

(*k*) (1837) 2 M. & W. 653; 6 L. J. Ex. 185; 46 R. R. 733, *ante*, 307
(*l*) *Ante*, 312.
(*m*) These opinions are epitomised. The author quotes them *verbatim*.
(*n*) The defendant did not employ Noakes to buy the goods; he negotiated with the seller directly.

himself. In *Graham* v. *Musson*, the name "Dyson" was not intended to represent the defendant's name, but was merely equivalent to "for or *per pro* North & Co., J. Dyson."

Murphy v. *Boese* (1875).

In *Murphy* v. *Boese* (*o*), the plaintiff's traveller in the defendant's presence wrote out the order for the goods, with the defendant's name and address, in duplicate upon paper headed with the plaintiff's name and address in print, and handed to him the duplicate memorandum and retained the original. *Held*, that there was no evidence that the traveller had authority to sign the memoranda as the defendant's agent. The Court distinguished *Durrell* v. *Evans*, upon the ground that in that case there was some evidence of the factor's authority to sign on the defendant's behalf as the buyer, by his request for an alteration, had in some sort assisted in the preparation of the contract; whereas, in the present case, as was said by Pigott, B., "there was nothing done by the defendant to show that he constituted the traveller his agent. All he did was to give an order, and when it was written out to take possession of it. . . . *None of the facts were different from what they would have been if the traveller had been only the plaintiff's agent.*" At the same time, Bramwell, B., who was a party to the judgment, afterwards reversed, of the Exchequer in *Durrell* v. *Evans*, and Pollock, B., expressed their doubts of the correctness of the view taken by the Exchequer Chamber.

Murphy v. *Boese* has been held in Canada to show that the seller's traveller or salesman is presumably not the buyer's agent to make and sign a memorandum of the sale (*p*).

Agent need not be authorised to record the contract.

It is not necessary that the agent should be authorised to sign a record, as such, of the terms of the contract. All that is necessary is that there should be authority to sign the document which is a memorandum (*q*).

Auctioneer is agent of both parties at a public sale for signing the note.

It has long been established law that an auctioneer is an agent for both parties at a *public sale*, for the purpose of signing (*r*). Sir James Mansfield, in *Emmerson* v. *Heelis* (*s*).

(*o*) L. R. 10 Ex. 126; 44 L. J. Ex. 40.

(*p*) *Imperial Cap Co.* v. *Cohen* [1906] 11 Ont. L. R. 382.

(*q*) *John Griffiths Cycle Corp.* v. *Humber* [1899] 2 Q. B. 414; 68 L. J. Q. B. 959, C. A.; *Daniels* v. *Trefusis* [1914] 1 Ch. 788; 83 L. J. Ch. 579.

(*r*) *Hinde* v. *Whitehouse* (1806) 7 East, 558; 8 R. R. 676; *Emmerson* v. *Heelis* (1809) 2 Taunt. 38; 11 R. R. 520; *White* v. *Proctor* (1811) 4 Taunt. 209; 13 R. R. 580; *Kenworthy* v. *Schofield* (1824) 2 B. & C. 945; 2 L. J. K. B. 175; 26 R. R. 600; *Durrell* v. *Evans* (1862) 31 L. J. Ex. 337; 1 H. & C. 174; 130 R. R. 446; *per* Romer, J., in *Sims* v. *Landray* [1894] 2 Ch. 318; 63 L. J. Ch. 535. The authority is one to sign only a correct memorandum: *Van Praagh* v. *Everidge* [1903] 1 Ch. 434; 71 L. J. Ch. 598, C. A.

(*s*) *Supra*; quoted by Stirling, J., in *Bell* v. *Balls* [1897] 1 Ch. 663, at 671; 66 L. J. Ch. 397.

thus gave the reasons for the decisions: "By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots. Therefore, he writes the name by the authority of the purchaser, and he is an agent for the purchaser."

But this authority on behalf of the buyer is limited to the time of the sale, so that a signature affixed by the auctioneer, otherwise than as part of the transaction of sale, is not binding (*t*). But the auctioneer's authority on behalf of the seller is wider; accordingly, a signature by the auctioneer the day after the sale is good, as being part of the transaction of sale (*u*).

A contract signed by an auctioneer on behalf of an undisclosed principal, who is sufficiently identified—as where he is referred to as the "proprietor"—is a valid contract under the Statute (*x*).

But of seller alone at private sale.

It follows from Sir J. Mansfield's reasoning in *Emmerson* v. *Heelis* that the rule does not apply in a case where the auctioneer on behalf of the buyer signs a memorandum otherwise than as part of the transaction of a public sale, as where he sells the goods of his principal at a private sale, for then he is the agent of the seller alone, and in no sense that of the purchaser. And such was accordingly the decision of the Exchequer Court in *Mews* v. *Carr* (*y*).

Auctioneer's agency for buyer at public sale may be disproved.

Moreover, the circumstances of the case may rebut the general inference that the auctioneer is agent to sign the name of the highest bidder as purchaser, according to the conditions of the sale.

Bartlett v. *Purnell* (1836).

Thus, in *Bartlett* v. *Purnell* (*z*), the defendant bought goods at public auction, under an agreement with the plaintiff, who was the executor of the defendant's deceased husband, that the defendant should be at liberty to buy, and that the price should go towards payment of a legacy to her under her husband's will of £200. The conditions of the sale were,

(*t*) *Bell* v. *Balls*, *ante*, 315, quoting *Buckmaster* v. *Harrop* (1807) 13 Ves. 456, 473; 6 R. R. 132.

(*u*) *M'Meekin* v. *Stevenson* [1917] Ir. R. 1 Ch. 348.

(*x*) See *per* Malins, V.-C., in *Beer* v. *London and Paris Hotel Co.* (1875) 20 Eq. 412, 426; and *per* Jessel, M.R., in *Rossiter* v. *Miller* (1878) 46 L. J. Ch. 228, 231; and S. C. in H. L. (1879) 3 A. C. 1124; 48 L. J. Ch. 470.

(*y*) (1856) 26 L. J. Ex. 39; 1 H. & N. 484; 108 R. R. 683.

(*z*) 4 A. & E. 792; 5 L. J. (N. S.) K. B. 169; 43 R. R. 484.

that the purchasers were to pay a certain percentage at the sale, and the rest on delivery. The auctioneer put the defendant's name on his catalogue as the highest bidder, and it was contended that he was her agent for that purpose, and that she was therefore bound by the written conditions. But the Court held, that the real purchase was not at the auction, but was made before the auction; that the public bidding was only used for the purpose of settling the price of the goods under the antecedent bargain; and that the auctioneer was not the agent of the buyer.

Auctioneer's agency for buyer only begins when the hammer falls.

But the agency of the auctioneer for the buyer only begins when the contract is completed by knocking down the hammer. Up to that moment he is the agent of the seller exclusively. It is only when the bidder has become the buyer, that the agency arises; and until then the bidder may retract, and the auctioneer may do the same in behalf of the seller (*a*).

Auctioneer's clerk.

An auctioneer's clerk also may have authority conferred upon him by the buyer. Thus, where on the fall of the hammer the auctioneer's clerk said to the defendant: "Mr. Boulter, it is your wheat," whereupon the defendant *nodded*, and the clerk then made the entry in view of the defendant, it was held to be sufficient (*b*). A similar decision was given where the clerk asked the buyer his name and address, and the buyer came up to the auctioneer's table, and stood by while the clerk filled in a memorandum of the sale beginning with the buyer's name (*c*). But in the absence of special circumstances from which an authority may be inferred the auctioneer's clerk is not the buyer's agent (*d*).

Telegraph Co.'s clerk.

The signature of a clerk of a telegraph company to a despatch, where the original instructions to the company had been signed by the defendant, has been held to be sufficient (*e*).

Signature by an agent as a witness.

The signature required by the Statute is that of the party to be charged, or his agent. If, therefore, the signature be not that of the agent, *quâ* agent, but only in the capacity of witness to the writing, it will not suffice. But a signature

(*a*) *Per Cur.* in *Warlow* v. *Harrison* (1858) 28 L. J. Q. B. 18; 1 E. & E. 295; 117 R. R. 219, *post*, 550.

(*b*) *Bird* v. *Boulter* (1833) 4 B. & Ad. 443; 38 R. R. 285.

(*c*) *Sims* v. *Landray* [1894] 2 Ch. 318; 63 L. J. Ch. 535.

(*d*) *Peirce* v. *Corf* (1874) L. R. 9 Q. B. 210; 43 L. J. Q. B. 52, *per* Blackburn, J., at 215; *Bell* v. *Balls* [1897] 1 Ch. 663; 66 L. J. Ch. 397. See also *McMullen* v. *Helberg* (1879) 4 L. R. Ir. 91, *per* O'Brien, J., at 105. But see Fry on Sp. Perf., 3rd ed., s. 531.

(*e*) *Godwin* v. *Francis* (1870) L. R. 5 C. P. 295; 39 L. J. C. P. 121. See also *McBlain* v. *Cross* (1872) 25 L. T. 804.

which is in form merely as a witness, may be in reality intended to authenticate the contents of a document.

Welford v. *Beazely* (1747).

In *Welford* v. *Beazely* (*f*), where a person subscribed in form as a witness a deed containing, as she knew, the contract into which she had verbally entered, Lord Hardwicke, L.C., decided that her signature was good to bind her as the party to be charged under section 4 of the Statute of Frauds, saying: "The meaning of the Statute is to reduce contracts to a certainty . . . and therefore, both in this Court, and in the Courts of common law, where an agreement has been reduced to such a certainty, and the substance of the Statute has been complied with in the material part, the forms have never been insisted on."

Wallace v. *Roe* (1903).

It has, accordingly, been held in Ireland in *Wallace* v. *Roe* (*g*), where an auctioneer, who was the seller's agent to sell land by private contract, and who had sold it to the plaintiff, witnessed the plaintiff's signature to a memorandum of the sale, that the auctioneer's signature bound the defendant, the seller, for it was affixed "in authentication of the whole contract as stated in the paper that he signed," the word "witness" being otherwise meaningless, as the document did not require attestation.

A further question may arise whether the person signing as witness was the defendant's agent or not.

Coles v. *Trecothick* (1804).

Thus, in *Coles* v. *Trecothick* (*h*), the defendant, the vendor of some land, who had assented to the clerk of an auctioneer, named Smith, conducting his business in Smith's absence, was held by Lord Eldon, L.C., to have authorised the clerk to sign as his agent, and to be bound by the clerk's signature to a memorandum of the sale in the following form: "Witness Evan Phillips, for Mr. Smith, agent for the seller." In his judgment Lord Eldon said (*i*): "Smith was the agent of the trustees and Mr. Trecothick; and Mr. Trecothick had authority to decide for the trustees what person's signature should be equivalent to the signature of Smith; and his agreement makes Phillips's signature, though in this form, equivalent."

Gosbell v. *Archer* (1835).

In *Gosbell* v. *Archer* (*k*), where an auctioneer's clerk, who had authority to act for his master, signed a memorandum of

(*f*) 3 Atk. 503, app. by Kindersley, V.-C., in *Barkworth* v. *Young* (1856) 26 L. J. Ch. 153, at 158, where he sets out the facts.

(*g*) [1903] 1 Ir. Rep. 32.

(*h*) 9 Ves. 234; 7 R. R. 167. See observations on this case in Sugd. V. & P. (14th ed.), 143.

(*i*) *Ibid.* at 251.

(*k*) 2 A. & E. 500; 4 L. J. (N. S.) K. B. 78; 41 R. R. 475.

the sale of some land as witness to the signature of the purchaser, an attempt was made to set up the clerk's signature as that of a duly authorised agent of the vendor. The attempt was unsuccessful, on the ground that an agent's clerk has not authority to sign for the agent's principal unless the principal assents. In the present case too the clerk did not even purport to sign as agent, but as witness to the purchaser's signature.

Intention of signature as witness may be shown by parol.

Where it is doubtful whether a signature, purporting to be as witness, was made in attestation of another signature only, or to authenticate the document, the actual intention may be enquired into, and is explainable by parol evidence (*l*).

SECTION II.—BROKERS.

Brokers.

There is a class of persons who make it their business to act as agents for others in the purchase and sale of goods, known to the common law as brokers.

Their position explained by Lord Blackburn.

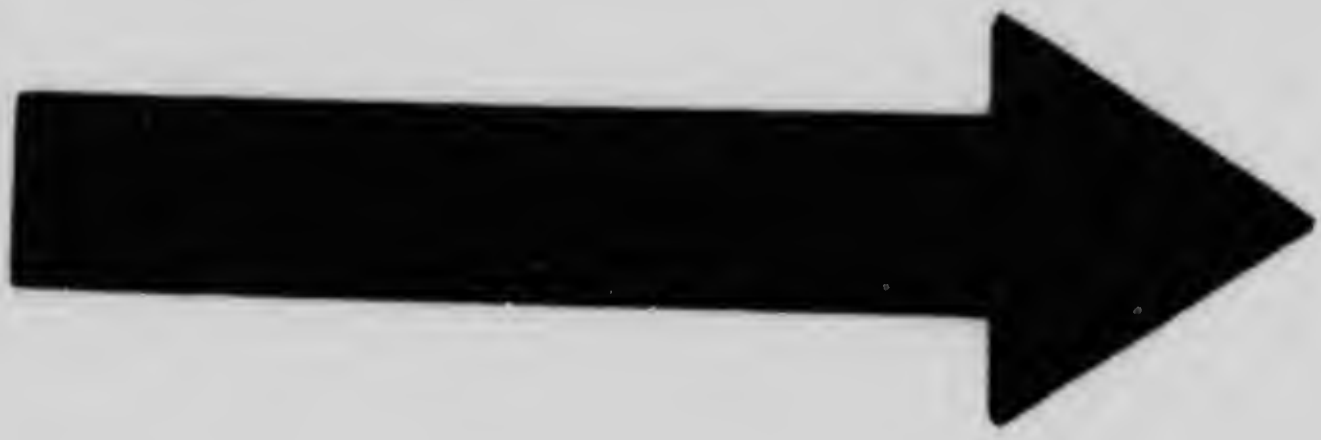
A broker for sale has been defined as "a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them" (*m*). Lord Blackburn says in the passage from which this definition is taken: "Though in exercising any discretion as to the terms of the contract, the broker must be agent for one party exclusively, there is nothing to prevent his still being agent for both parties on those points where their interests are the same. The broker who is trusted to sell at the best price he can get must be the vendor's agent, and his only, in settling what the price is to be; but when that is agreed upon, he may well be agent for both buyer and seller in seeing that the terms of the contract are clearly understood and made binding in law."

Broker's authority to sign memorandum.

In some cases a broker may be employed by both parties to manage a contract of sale between them, or to record such a contract made by the parties themselves; and then, in either case, as soon as the bargain is concluded and he has made

(*l*) See *Young* v. *Schuler* (1883) 11 Q. B. D. 651, C. A.

(*m*) Blackb. on Sale, 81; 2nd ed. 78; founded on Story on Ag., §§ 28, 31; and adopted by Hannen, J., in *Mollett* v. *Robinson* (1872) L. R. 7 C. P. 84, at 97; 39 L. J. C. P. 290. See also Termes de la Ley, Tit. Broker; Com. Dig. Merchant (*c*); *Milford* v. *Hughes* (1846) 16 M. & W. 174; 16 L. J. Ex. 40. See the position of a broker explained by Brett, J., in *Fowler* v. *Hollins* (1872) L. R. 7 Q. B. 623; 41 L. J. Q. B. 277, *et seqq.*, and distinguished from that of a commission agent by Hannen, J., in *Mollett* v. *Robinson* (1872) L. R. 7 C. P. 84, at 99; 39 L. J. C. P. 299, and by Blackburn, J., in S. C., L. R. 7 H. L. 802, at 810; 44 L. J. C. P. 362.



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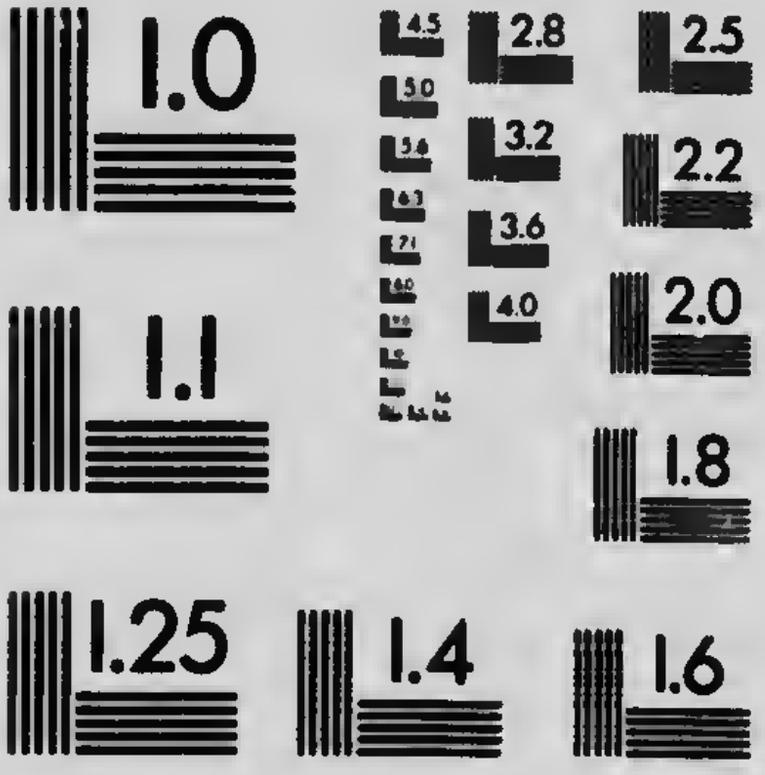

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and signed a memorandum of its terms, this will be sufficient to bind both parties (*n*). But usually a broker, like an auctioneer, is employed in the first instance by one party only, and then he does not become the agent of the other party until the terms of the bargain are definitely settled. But as soon as the bargain is struck, he is, as a general rule, the agent of both parties to make and sign a memorandum of the terms (*o*).

If, then, one party to a contract of sale employ a broker, and the other party treat with the broker and enter into a contract with him, knowing him to be acting as broker, he "does by that very act apparently confer on him authority to bind the contract in the manner in which brokers do usually bind it" (*p*). The party may contend that he did not agree to the terms stated by the broker in his memorandum—but, if it be proved that he did agree, he cannot, in the absence of special circumstances, contend that the broker had no authority to make the memorandum or to sign it on his behalf (*q*).

A broker, being properly a middleman or mere negotiator between the parties, if he sign the contract or a memorandum of it, his signature has no effect as his, but is effectual only because it is in contemplation of law the signature of one or of both of the principals (*r*).

Broker's general authority.

The authority of a broker to bind his principal may by special agreement be carried to any extent that the principal may choose, but the customary authority of brokers is for

(*n*) *Chapman* v. *Partridge* (1805) 5 Esp. 256; 8 R. R. 852; *Pitts* v. *Beckett* (1845) 13 M. & W. 743; 14 L. J. Ex. 358; 67 R. R. 798, *post*, 335.

(*o*) *Per* Lord Kenyon, in *Rucker* v. *Cammeyer* (1794) 1 Esp. 105; *Hicks* v. *Hankin* (1802) 4 Esp. 114; *per* Lord Ellenborough, C.J., in *Hinde* v. *Whitehouse* (1806) 7 East, 558, at 569; 8 R. R. 676; *per* Alexander, C.B., and Garrow, B., in *Henderson* v. *Barnewall* (1827) 1 Y. & J. 387, at 393, 394; 30 R. R. 799; *per* Parke, B., in *Thornton* v. *Charles* (1842) 9 M. & W. at 804; 11 L. J. Ex. 302; 60 R. R. 896. Story on Ag., §§ 28, 31; Blackburn on Sale, 81—84; 2nd ed. 78—80. The position of the party dealing with the other party's broker is similar to that of a buyer with regard to an auctioneer on the fall of the hammer: *per* Lord Kenyon in *Rucker* v. *Cammeyer*, *supra*. In *Thompson* v. *Gardiner* (1876) 1 C. P. D. 777, at 779, Brett, J., in delivering a considered judgment of the C. P. D. is reported to have said: "The authorities are conclusive to show that the broker acting for one of the contracting parties, making a contract for the other, is not authorised by both to bind both." The Editor is unable to discover any authorities sustaining this proposition. Although the result in *Thompson* v. *Gardiner* cannot be questioned, the judgment seems to be unsatisfactory, and parts of it very obscure and difficult to follow.

(*p*) Blackburn on Sale, 83; 2nd ed. 79.

(*q*) *Thompson* v. *Gardiner* (1876) 1 C. P. D. 777, as to which see n. (*o*), *supra*.

(*r*) See *per* Brett, J., in *Fowler* v. *Hollins* (1872) L. R. 7 Q. B. 616, at 623; 41 L. J. Q. B. 277, Ex. Ch. The broker, however, may of course show by the form of the contract including the signature that he is personally liable as well as his principal. As to this, see *ante*, 293.

the most part so well settled, as to be no longer a question of fact dependent upon evidence of usage, but a constituent part of that branch of the common law known as the law-merchant, or the custom of merchants. There may, however, still be some points on which the limits of their authority are not fully determined, and on which evidence of usage would have a controlling influence in deciding on the rights of the parties (*s*). Apart from express agreement, the terms on which a broker is employed may be varied by the custom of the particular trade in which he deals, so as to impose on the broker greater duties and liabilities, and to give him fuller powers than would be implied by law from his employment, for his employment as broker under such circumstances is taken to be, unless there be something to show the contrary, on the customary terms (*t*).

Custom of trade.

When a broker has succeeded in making a contract, he usually delivers to each party written notes containing the terms. In the City of London, he was formerly—but is no longer—bound (*u*) to enter them in his book, and to sign the entry. What he delivers to the seller is called the sold note: to the buyer the bought note (*x*). No particular form is required, and from the cases it seems that there are four varieties used in practice.

Bought and sold notes.

1. The first is where on the face of the notes the broker professes to act for both the parties whose names are disclosed in the note. The sold note then in substance, says: "Sold for A. B. to C. D.," and sets out the terms of the bargain: the bought note begins: "Bought for C. D. of A. B.," or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker.

2. The second form is where the broker does not disclose in the bought note the name of the seller, nor in the sold note the name of the buyer, but still shows that he is acting as broker, not principal. The form then is simply: "Bought for C. D.;" and "Sold for A. B."

(*s*) See, *e.g.*, *Dickinson* v. *Lilwall* (1815) 4 Camp. 279; *Baines* v. *Ewing* (1866) L. R. 1 Ex. 320; 35 L. J. Ex. 194. But the usage must not be such as to change the intrinsic nature of the broker's employment: *Robinson* v. *Mollett* (1875) L. R. 7 H. L. 802; 44 L. J. 362, *ante*, 292.

(*t*) *Per* Blackburn, J., in *Mollett* v. *Robinson* (1872) L. R. 7 C. P. 84, at 103; 39 L. J. C. P. 290.

(*u*) See the Statutes regulating the business of brokers in London referred to, *post*, 323, n. (*u*).

(*x*) This use of these names, although now usual, has not always been adopted in the cases, and Story calls the note delivered to the *seller* the bought note, and *vice versa*: Ag. § 28. This variation seems to be accounted for by the variations in the forms, which are set out, *infra*.

3. The third form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note: "Bought for you by me," he gives it in this form: "Sold to you by me." By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal, and to make this principal responsible (*y*).

4. The fourth form is where the broker professes to sign as a broker, but is really a principal (*z*), in which case his signature does not bind the other party, and he cannot sue on the contract, except perhaps on proof of such usage as was shown to exist in *Robinson* v. *Mollett* (*a*), which is known to his principal.

According to either of the first two forms, the party who receives and keeps a note, in which the broker tells him in effect: "I have bought for you," or "I have sold for you," plainly admits that the broker acted by his authority, and as his agent, and the signature of the broker is therefore the signature of the party accepting and retaining such a note (*b*). But according to the third form, the broker says, in effect: "I myself sell to you," and the acceptance of a paper describing the broker as the principal who sells, plainly repels any inference that he is acting as agent for the party who buys, and in the absence of other evidence, the broker's signature would not be that of an agent of the party retaining the note. By the fourth form, the language of the written contra is at variance with the real truth of the matter.

Variance between the different documents.

Where the bought and sold notes and the entry in the broker's book all correspond, no dispute can arise as to the real terms of the bargain; but it sometimes happens that the bought and sold notes differ from each other, and even that neither corresponds with the entry in the book. It then becomes necessary to determine the legal effect of the variance, and there has not only been great conflict in the decisions of

(*y*) See on this, *ante*, 289.

(*z*) As in *Sharman* v. *Brandt* (1871) L. R. 6 Q. B. 720; 40 L. J. Q. B. 312. Ex. Ch.; and *Robinson* v. *Mollett* (1875) L. R. 7 H. L. 802; 44 L. J. C. P. 362; revg. Ex. Ch. (1872) L. R. 7 C. P. 84; 39 L. J. C. P. 290; and C. P. (1870) L. R. 5 C. P. 646; 39 L. J. C. P. 290; *ante*, 193, 292.

(*a*) *Ante*, 292.

(*b*) See *Thompson* v. *Gardiner* (1876) 1 C. P. D. 777, where, however, the form of the note is not given in the report.

the Courts, but sometimes great change in the opinions of the same Judge. As regards the signed entry in the broker's book, it has been held at different times that it did, and that it did not, constitute the contract between the parties (*c*); and it has also been held that it was not even admissible in evidence (*d*), or at all events not without proof that the entry was either seen by the parties when they contracted, or was assented to by them (*e*).

Entry in broker's book —conflict of opinion as to its effect.

On a review of the authorities it was submitted in previous editions of this work (*f*), that the better opinion was that the broker's entry in his book was *the written contract* between the parties, but that it was competent to the parties, by accepting notes varying from the entry, to enter into a *new* contract on the terms of the notes. But it must be remembered that the broker was, at the time when those cases were decided, bound by law to enter the terms of the contract in his book, and this fact was regarded by the Courts as very material to show that the parties intended the entry to be conclusive between them (*g*). As this obligation no longer exists (*h*), the question, it is conceived, is one to be solved

(*c*) That the entry in the book was the contract: *per* Lord Ellenborough in *Heyman* v. *Neale* (1807) 2 Camp. 337; *per* Parke, B., in *Thornton* v. *Charles* (1842) 9 M. & W. 802, at 807; 11 L. J. Ex. 302; 60 R. R. 896; *per* Lord Campbell, C.J., Wightman, J., and Patteson, J., in *Sievewright* v. *Archibald* (1851) 17 Q. B. 103, at 124, 115; 20 L. J. Q. B. 529; 85 R. R. 353. *Contra, per* Gibbs, C.J., in *Cumming* v. *Roebuck* (1816) Holt, 172; Abbott, C.J., in *Thornton* v. *Meux* (1827) M. & M. 43; 31 R. R. 711; Lord Denman, C.J., in *Townend* v. *Drakeford* (1843) 1 C. & K. 20; Lord Abinger, C.B., in *Thornton* v. *Charles*, *supra*.

(*d*) *Thornton* v. *Meux*, *supra*.

(*e*) *Per* Lord Abinger, in *Thornton* v. *Charles* (1842) 9 M. & W. 802, at 809; 11 L. J. Ex. 302; 60 R. R. 896.

(*f*) 2nd ed. 221; 4th ed. 268.

(*g*) See *per* Parke, B., in *Thornton* v. *Charles* (1842) 9 M. & W. 802, at 804; 11 L. J. Ex. 302; 60 R. R. 896; and in *Pitts* v. *Beckett* (1845) 13 M. & W. 743, at 746; 14 L. J. Ex. 358; 67 R. R. 798.

(*h*) The brokers in London have from the earliest times been subject to the control of the Corporation: Blackburn on Sale, 84; 2nd ed. 80; Liber Albus, transl. by Riley (1861). The form of oath required at that date is also set out *ibid.* 273. The later statutes regulating brokers in London were 6 Anne, c. 16; 10 Anne, c. 19, s. 121; and 57 Geo. 3, c. LX (Local); see 1 Chitty's Stat. ed. 1880, at 450. These Statutes defined the powers of the Corporation, and under them the City required a bond and an oath (whence the name "sworn broker"), the form of which required up to 1818 is given in *Kemble* v. *Atkins* (1817) 7 Taunt. 260; 17 R. R. 658; Holt, 427, at 431. The bond is also set out in the same case, more fully in Holt's report. One of the conditions of the bond was that the broker should "keep a book or register intituled the Broker's Book, and therein truly and fairly enter all such contracts, bargains and agreements on the day of the making thereof," with the names of the parties, the terms of the contract, etc. As late as 1876 such an entry signed by the broker was held to be a sufficient memorandum: *Thompson* v. *Gardiner* (1876) 1 C. P. D. 777. By the London Brokers' Relief Act, 1870, 33 & 34 V., c. 60, the bonds were no longer to be required, and the rules and regulations were no longer to be enforced, and brokers were required only to be admitted by the Corporation. And

by ordinary legal principles, whether the document was intended to be the contract in writing, or, if the contract was verbal, whether it is a memorandum? It is now the usual practice of a broker to make any entry (except for his own private information), and it also appears to be almost universal, so far as enquiries have extended, to consider the bought and sold notes to be the proper evidence of the contract. On the whole it seems doubtful at the present day whether, if a broker make and sign an entry in his book, this being a private entry and not made under any legal obligation, it would, in the absence of special circumstances, be held that the parties had by such entry agreed or intended that that writing should be their agreement (*i*); on the other hand, it seems clear that, if not contradicted by other documents, it would be a sufficient memorandum (*k*); and that in case the bought and sold notes varied *inter se*, such an entry (unless it were proved that it did not truly represent the terms of the contract) would, on principle, be a sufficient memorandum (*l*).

It has been seen that it is customary for the broker to send a sold note to the seller and a bought note to the buyer (*m*). When the names of both parties are disclosed on each note, each is a complete memorandum of the bargain, and the only question is the broker's agency for the party to be charged (*n*). When one note discloses only the name of one party and the other note the name of the other, the two notes may be treated as one memorandum (*o*). Yet it is usually sufficient for a party suing to put in evidence only one of the notes either that sent to himself (*p*) or that sent to the defendant (*q*)

by the London Brokers' Relief Act, 1884, 47 V., c. 3, the control of the Corporation over brokers was finally done away with. The history of London brokers from the earliest times may be found in a report of a Committee of the Corporation, appointed in 1815 to enquire into the practice and conduct of the City brokers.

(*i*) See *per Curiam* in *Harris* v. *Rickett* (1859) 4 H. & N. 1, at 7; 21 L. J. Ex. 197; 118 R. R. 294; and also *per* Lord Abinger, in *Thornton* v. *Charles* (1842) 9 M. & W. 802, at 809; 11 L. J. Ex. 302; 60 R. R. 896. It has been lately decided in America, that a broker has no authority to make a written contract, only memoranda: *Hobart* v. *Lubarsky* [1913] 215 Mass. 525.

(*k*) *Thompson* v. *Gardiner* (1876) 1 C. P. D. 777.

(*l*) Parke, B., in *Thornton* v. *Charles* (1842) 9 M. & W. at 808; 11 L. J. Ex. 302; 60 R. R. 896, suggests this view without deciding the point.

(*m*) *Ante*, 321.

(*n*) Blackburn on Sale, 90; 2nd ed. 85.

(*o*) *Trueman* v. *Loder* (1840) 11 A. & E. 589, at 594; 9 L. J. (N. S.) Q. B. 165; 52 R. R. 451; *per* Patteson, J., in *Stevewright* v. *Archibald* (1851) 17 Q. B. 103, at 117; 20 L. J. Q. B. 529; 85 R. R. 353.

(*p*) As in the first trial of *Hawes* v. *Forster* (1834) 1 Moo. & R. 368; 42 R. R. 803.

(*q*) As in *Parton* v. *Crofts* (1864) 16 C. B. (N. S.) 11; 33 L. J. C. P. 189; 139 R. R. 387.

for the presumption is that both notes correspond (*r*). If, however, the notes vary *inter se*, they do not constitute a sufficient memorandum (*s*); but even then a sufficient memorandum may be proved, as, for example, where a complete contract can be gathered from correspondence signed by the defendant's broker (*t*), or (as has been already stated (*u*)) by an entry signed by the broker in his book. In other words, although bought and sold notes are *primâ facie* evidence of the contract, where some other writing constitutes the contract, that writing can be put in evidence to prove the contract, notwithstanding that the bought and sold notes may conflict with each other, or may both be shown not to contain the real terms of the contract (*x*); or, where an oral contract is proved to have been made, any writing shown to contain the terms of it and signed by the defendant or his agent will be a sufficient memorandum. In forward contracts, a formal contract is generally made which supersedes the notes (*y*).

Whether the broker's book or the notes are the proper evidence of the contract.

In the first four editions of this work a number of cases were set out, showing a great conflict of judicial opinion upon the subject of entries in the broker's book and bought and sold notes, and upon the question whether the entry or the notes were the proper evidence of a contract made by a broker; and the fifth edition contained (*z*) a short summary of these cases.

At the present day, when, as has been seen, there is no longer an obligation on brokers to make an entry in their book and the practice has generally fallen into disuse, it has been thought unnecessary to set these cases out in this edition. Those later cases, however, which discuss the subject of bought and sold notes are here fully considered.

Variance in the notes.

In 1851, the subject of brokers' notes was elaborately considered in the Queen's Bench, in the case of *Sievewright* v.

(*r*) *Parton* v. *Crofts*, *post*, 330.

(*s*) *Sievewright* v. *Archibald* (1851) 17 Q. B. 103; 20 L. J. Q. B. 529; 85 R. R. 353, *infra*. In case of variance between the notes, or any dispute, it is practically universal to arrange the matter in a friendly way or to arbitrate; and every formal contract which the Editor has seen contains an arbitration clause.

(*t*) *Heyworth* v. *Knight* (1864) 17 C. B. (N. S.) 298; 33 L. J. C. P. 298; 142 R. R. 355.

(*u*) *Ante*, 324.

(*x*) *Heyworth* v. *Knight* (1864) 17 C. B. (N. S.) 298; 33 L. J. C. P. 298; 142 R. R. 355, *post*, 330.

(*y*) The Editors of the 5th ed. after enquiries among various trade associations in the City, were informed that this is the usual practice.

(*z*) At 289.

Sievewright v. *Archibald* (1851).

Archibald (*a*). In an action by the seller for non-acceptance, the declaration set out an alleged *sold* note, and contained a count for goods bargained and sold. A variance was afterwards discovered between the bought and sold notes, the sold note being in this form: "Sold C. D. Archibald, Esq., for Messrs. Sievewright & Co., 500 tons *Messrs Dunlop & Co.'s* pig iron," and the bought note, which was sent to the defendant, was in identical terms, except that it was for "500 tons of *Scotch* pig iron." The broker proved an order from the plaintiff to sell 500 tons of Dunlop & Co.'s iron; that their iron was Scotch iron, and that they were manufacturers of iron in Scotland; and that the defendant agreed *verbally* with the broker to buy 500 tons of *Dunlop & Co.'s* iron, Sievewright & Co.'s name being mentioned as the sellers. There was *no entry* in the broker's books signed by him.

The cause was tried at Guildhall before Lord Campbell, C.J., who thought the variance between the notes material, and that, there being no entry in the broker's book, the variance was fatal to the plaintiff's case; but an amendment declaring on the *bought* note was allowed, it being stated that the plaintiff could give evidence of a subsequent ratification by the defendant. The Chief Justice left the question to the jury, whether the defendant had ratified the contract as contained in the bought note, and the jury found that he had. A verdict was entered for the plaintiff, with leave reserved to move to enter a verdict for the defendant if the Court should hold that there was not any evidence to prove the declaration as amended. It was contended by the defendant: first, that in cases where a contract has been made by a broker, and bought and sold notes have been delivered, they alone constitute the contract; and that all other evidence of the contract is excluded; and that, if they vary, the contract is disproved; and that the notes now in question did vary: and, secondly, that, if evidence was in such cases admissible, there was no evidence to go to the jury to prove the ratification of the contract alleged (*b*). The Court (Erle, J., dissenting) made the rule absolute to enter a nonsuit, but on various grounds.

(*a*) 20 L. J. Q. B. 529; 17 Q. B. 115; 15 Jur. 947; 85 R. R. 353; *coram* Lord Campbell, C.J., and Erle, Patteson, and Wightman, JJ. The arguments are set out in the Jurist. See also *Gregson* v. *Ruck* (1843) 4 Q. B. 737; 62 R. R. 475 (notes varying as to time of payment); *Fissenden* v. *Levy* (1863) (separate sold notes, one bought, and varying).

(*b*) These contentions are taken from the judgment of Erle, J., 17 Q. B. at 105; 20 L. J. Q. B. 529; 85 R. R. 353.

Although the views of the Judges differed widely, the case is so important that it seems desirable to transcribe their observations at considerable length. *Sievewright v. Archibald* (1851).

Opinion of Lord Campbell and Wightman, J.

Lord Campbell (*c*), in a judgment which was concurred in by Wightman, J., held first, that there was not sufficient evidence that the defendant had ratified the contract expressed in the bought note, as he was not aware of the variance between the notes till after action; nor had the plaintiff assented to the terms of the bought note, and he actually sued on the sold note. Next, with regard to the allegation by the plaintiff of a *parol* agreement of which the *bought* note was a memorandum, his Lordship held that the parties intended that the agreement itself should be in writing and understood that it was. What passed between the defendant and the broker previous to the making of the notes amounted only to an authority to the broker to make a contract. His Lordship then said: "But assuming that the parol agreement was the contract . . . can this (the bought note) be said to be a true memorandum of the agreement? . . . If the bought note can be considered a memorandum of the parol agreement, so may the sold note, and which of them is to prevail?. . . If these agree, they are held to constitute a binding contract; if there be *any material variance* between them, they are *both nullities*, and there is *no binding contract*. . . . In the present case, there being a material variance between the bought and sold note, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient mention of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with."

Patteson, J.'s opinion.

Patteson, J. (*cc*), said that the memorandum need not be the contract itself, but that a contract might be by parol, and if a memorandum were afterwards made, embodying the contract, and signed by the party to be charged, or his agent, the Statute was satisfied. Still, if the original contract were in writing, signed by both parties, *that* would be the binding instrument, and no subsequent memorandum signed by *one* party could have any effect. In the present case, the contract was made by the broker, acting for both parties, but *was not in writing* signed by him or them, and the Statute therefore could not be satisfied unless there was some *subsequent* memorandum. His Lordship then continued: "There are

(*c*) *Ibid.*, at 122—127.
(*cc*) 17 Q. B. at 114—119; 20 L. J. Q. B. 529; 85 R. R. 353.

Sieveright v. Archibald (1851).

subsequent memoranda in writing signed by the broker, namely, the bought and sold notes. Which of these, if either, is the memorandum in writing signed by the defendant or his agent? . . . If the bought and sold notes together be the memorandum, and they differ materially, it is plain that there is no memorandum. . . . If, on the other hand, one only of these notes is to be considered as the memorandum . . . which of them is to be so considered? . . . There is no case in which they have varied, in which the Court has upheld the contract, plainly showing that *the two together* have been considered to be *the memorandum* binding both parties; the reason of which is, to my mind, I confess, quite unsatisfactory; but I yield to authority. . . . It seems to me therefore, that the only question to be determined in this case is: Do the bought and sold notes differ in any material point? Now, the one is 'Dunlop's Scotch iron,' the other 'Scotch iron' generally. . . . How is it possible to read the two notes together and say that they mean the same thing? (*d*) . . . The question is *not* whether *either* of the notes *corresponds with the contract originally made by word of mouth* but whether either of the notes *separately, per se*, be a signed *memorandum* binding upon either party."

Erle J. (*e*), said: "I assume that *sufficient parol evidence of a contract* in the terms of the bought note delivered to the defendant has been tendered, and that *the point is whether such evidence is inadmissible*, because a sold note was delivered to the plaintiff; in other words, *whether bought and sold notes, without other evidence of intention, are by presumption of law a contract in writing*. I think they are not. If bought and sold notes which agree are delivered, and accepted without objection, such acceptance without objection is evidence for the jury of mutual assent to the terms of the notes; but the assent is to be inferred by the jury from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof if they constituted a contract in writing. . . . The form of the instrument is strong to show that they are not intended to constitute a contract in writing, but to give information from the agent to the principal of that which has been done on his behalf: the buyer is informed of his purchase, the seller of his sale; and experience

Erle, J.'s opinion.

(*d*) The learned Judge quoted *Thornton* v. *Kempster* (1814) 5 Taunt. 786; 15 R. R. 658; *ante*, 126 ("Riga" hemp and "Petersburgh" hemp in respective notes).

(*e*) 17 Q. B. at 104—114; 20 L. J. Q. B. 259; 85 R. R. 353.

shows that they are varied as mercantile convenience may dictate. . . . No per[illegible]sinted with legal consequences would intend to make [illegible]a contract depend on separate instruments, sent at sepa[illegible] times, in various forms, neither party having seen both instruments. . . . It seems to me, therefore, that upon principle, the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree." The learned Judge then pointed out the distinction between proof of a contract and proof of a compliance with the Statute of Frauds, saying: "Where a memorandum in writing is to be proved as a compliance with the Statute, it differs from a contract in writing, in that it may be made at any time after the contract, if before the action commenced: and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only, or his agent; and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement." The learned Judge then, after reviewing the cases, proceeded to consider whether there was sufficient evidence to sustain the verdict for the plaintiff, and held that the jury were warranted in inferring that the bought note was a correct statement of the terms of the bargain; that the defendant had acquiesced in it, and had assumed that he was bound by it (*f*).

Sievewright v. Archibald (1851)

It must be confessed that the elaborate but conflicting judgments in this case do not throw as much light as could be desired on the vexed subject under discussion. The Court was divided equally on the question whether a broker has *primâ facie* authority to make a verbal contract. The opinion of Lord Campbell and Wightman, J., was that his authority is presumably one to make a written contract. But the contrary has been decided in America (*g*). The case, however, establishes this, that the two notes together constitute one document, whether they are a contract in writing, or a memorandum of a verbal contract, and that, if they materially vary, no written contract or memorandum is proved (*h*). Erle, J., in directing his argument to the question whether bought and sold notes are, in presumption of law, a contract in writing, does not satisfactorily meet the argument of

(*f*) The learned Judge also held that the notes did not substantially vary, any apparent discrepancy being explainable by parol.

(*g*) *Hobart* v. *Lubarsky* [1913] 215 Mass. 523.

(*h*) By all the Judges except Erle, J.

Patterson, J., that the two notes should *agree* if they are to be a memorandum of a verbal contract. If parol evidence is to be admissible to show which of two conflicting notes represents the verbal contract, it would seem that the evils of oral evidence, against which the Statute was intended to guard, are admitted.

One note prima facie presumed to agree with the other.

Parton v. *Crofts* 1864.

In *Parton* v. *Crofts* (*i*), an action for non-acceptance, the seller put in the note sent by the brokers for both parties to the buyer, and proved that a corresponding note had been sent to him, the plaintiff, but the latter note was not produced. The defendant objected that the note put in was not a sufficient memorandum of the contract in the absence of the other note. *Held*, that the one note produced was sufficient; that the presumption was that the bought and sold notes did not vary; and that if they did, it was for the defendant to prove the variance by calling for and putting in evidence the note sent to the plaintiff.

Subsequent notes varying from a written contract.

Heyworth v. *Knight* (1864).

In *Heyworth* v. *Knight* (*ii*), the same Court decided that where the contract appears in a correspondence to have been completed between the brokers, and the bought and sold notes show a variance from that contract, the parties are bound by the agreement contained in the correspondence, and that the bought and sold notes are to be disregarded. Accordingly, the purchaser was held to be bound by the agreement made in the correspondence in accordance with the authority given to his broker, although the broker had signed without authority a different contract in the bought and sold notes.

No variance that principals are *named* in one note and not in the other.

It is not a variance between the bought and sold notes that the bought note shows the names of the two principals, and the sold note states: "Sold to our principals, &c.," without naming the buyers; for the principals being referred to can be identified by parol (*k*).

Difference in language no variance, if meaning is the same.

A mere difference in the *language* of the bought and sold notes will not constitute a variance, if the *meaning* be the same, and evidence of mercantile usage is admissible to explain the language and to show that the meanings of the two instruments correspond (*kk*).

(*i*) 16 C. B. (N. S.) 11; 33 L. J. C. P. 189; 139 R. R. 387.

(*ii*) 17 C. B. (N. S.) 298; 33 L. J. C. P. 298; 142 R. R. 355. In this case the decision of the P. C. in *Cowie* v. *Remfry* (1846) 5 Moore, P. C. C. 232; 70 R. R. 47, was strongly disapproved by Willes, J. See *post*, 333.

(*k*) *Cropper* v. *Cook* (1868) L. R. 3 C. P. 194.

(*kk*) *Bold* v. *Rayner* (1836) 1 M. & W. 342; 5 L. J. (N. S.) Ex. 172; 46 R. R. 322; and *per* Erle, J., in *Sievewright* v. *Archibald* (1851) 17 Q. B. 115; 20 L. J. Q. B. 529; 85 R. R. 353; *Kempson* v. *Boyle* (1865) 3 H. & C. 763; 34 L. J. Ex. 191; 140 R. R. 725.

And where the contract made by the broker was one for the exchange of goods, and he wrote out the contract in the shape of bought and sold notes, giving to each party on a single sheet a bought note for the goods he was to receive, and a sold note for the goods he was to deliver, it was held no variance that the day of payment was specified at the end of both notes on one sheet, and at the end of the bought note only on the other (*l*). *Mackeon* v. *Dunn* 1828

And where a broker had, reluctantly and after urgent persuasion by the seller, made an addition to the sold note, after both the bought and sold notes had been delivered to the parties and taken away, the seller's contention that this addition was simply inoperative and that the original contract stood was overruled, and the Court held that the buyer's note not having been produced, the only evidence of the contract was the seller's note, and that the fraudulent alteration of this note destroyed its effect, so that the seller could not recover on it (*m*). And the effect would be the same in the case of a material alteration even not fraudulent (*n*). Subsequent alteration of sold note.

The authority of the broker may, of course, like that of any other agent, be revoked by either party before he has signed on behalf of the party so revoking (*o*); but after the signature of the duly authorised broker is once affixed to the bargain, the only case in which the party can be allowed to recede appears to be one regulated by usage, where a credit sale has been made to an unnamed purchaser (*p*) Revocation of broker's authority.

In 1810, in *Hodgson* v. *Davies* (*q*), the sale was through a broker, who rendered bought and sold notes, showing that Usage allowing seller to object to sufficiency of buyer.

(*l*) *Mackeon* v. *Dunn* (1828) 4 Bing. 722; 6 L. J. C. P. 184; 29 R. R. 714.

(*m*) *Powell* v. *Divett* (1812) 15 East, 29; 13 R. R. 358; *White* v. *Benekendorf* (1873) 29 L. T. 475.

(*n*) *Mollett* v. *Wackerbarth* (1847) 5 C. B. 181; 17 L. J. C. P. 47; 75 R. R. 341 (alteration by the buyer). The correction of a clerical error is not material: *Re Howgate and Osborn's Contract* [1902] 1 Ch. 451; 71 L. J. Ch. 279; an instrument which has been altered may, however, be looked at to see what were the rights of the innocent party: *Pattinson* v. *Luckley* (1875) L. R. 10 Ex. 330; 44 L. J. (N. S.) Ex. 180. The leading case on the subject of alterations in a document is *Pigot's Case* (1614) 11 Co. 26 b, where it was held that any alteration of a deed by the obligee, or a material alteration by a stranger, avoided the instrument. The rule as to material alterations has "since been extended to all instruments comprehending words of contract": *per* Williams, J., in *Mollett* v. *Wackerbarth*, *supra*. See on the subject generally the notes to *Master* v. *Miller* (1793) 1 Sm. L. C., 7th ed. 871; 11th ed. 767; 2 R. R. 399.

(*o*) *Farmer* v. *Robinson* (1805) 2 Camp. 339 n.; *Warwick* v. *Slade* (1811) 3 Camp. 127; 13 R. R. 772.

(*p*) *Hodgson* v. *Davies*, *infra*.

(*q*) 2 Camp. 530; 11 R. R. 789. This case seems to have been disapproved in *Humfrey* v. *Dale* (1857) 7 E. & B. 266, but is, it is submitted, not inconsistent with the principles laid down in that case. The usage went to show an implied condition precedent to the liability of the seller: see *Wallis* v. *Littell* (1861) 11 C. B. (N. S.) 369.

Hodgson v. *Davies* (1810).

payment was to be by bills at two and four months. Five days afterwards the defendant objected to the sufficiency of the plaintiff, and refused to perform the contract. Lord Ellenborough thought at first that the contract concluded by the broker was absolute, unless his authority was limited by writing of which the purchaser had notice. But the special jury said that unless the name of the purchaser had been previously communicated to the seller, if the payment was to be by bill, the seller was always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract. Lord Ellenborough allowed this to be a valid and reasonable usage, but left it to the jury whether the delay of five days in objecting was not unreasonable according to usual practice, and the jury found that it was.

One note or other document, when binding.

Although it is customary to contract by two notes, yet the facts of the case may show that one of the notes, or that any other document, is intended by the parties to contain the terms or the contract. If such a document be duly signed, a variance in the notes is immaterial, as is shown by the three following cases.

Rowe v. *Osborne* (1815).

In *Rowe* v. *Osborne* (*r*), the contract was made through a broker who delivered to the plaintiff, the seller, a sold note in the following form: "Bought of Rowe & Co. through Thomas Penny, etc.," and this note was signed *by the defendant* himself; and to the defendant the broker sent a bought note varying therefrom. The plaintiff declared upon the sold note, and it was objected that there was a variance. *Held*, by Lord Ellenborough, that the sold note signed by the defendant contained the real contract.

Commenting on this case in *Cowie* v. *Remfry* (*s*), Dr. Lushington, delivering the judgment of the Privy Council, says: "The principle upon which Lord Ellenborough so ruled is not stated, but we apprehend it must have been this, that the signature clearly evidenced the consent of the purchaser to buy on the terms stated in the document. . . . The vendor having assented to those terms, there was a complete contract between the two parties; and the very fact of such a signature by a party being contrary to the custom of buying by bought and sold notes (which are signed by the

(*r*) 1 Stark. 140; 18 R. R. 754. See also *Higgins* v. *Senior* (1841) 8 M. & W. 834; 11 L. J. Ex. 199; 58 R. R. 884; *Ex parte Thomas, Re Thorp* (1865) 11 L. T. 586 (bought note only, but acted on).

(*s*) (1846) 5 Moo. P. C. 232, at 250; 70 R. R. 47.

broker) showed that he relied upon himself . . . and not upon the broker, or on any note to be hereafter delivered to him."

Cowie v. *Remfry* (1846).

In *Cowie* v. *Remfry* (*t*), the respondents (plaintiffs) through a broker, who was the common agent, sold to the appellants a quantity of indigo, and the broker sent a sold note to one of the respondents, who objected to a word, and required it to be struck out. The broker then took the note to one of the appellants, who struck out the word and initialled the alteration. The note was then re-delivered to the respondents. On the following day the broker delivered to the appellants a bought note, materially varying from the sold note. In an action for non-acceptance the respondents put in evidence the sold note, and the appellants, who put in the bought note, contended that, as the two notes differed, there was no contract in writing. It was proved that the custom at Calcutta was to contract by means of two notes. It was, nevertheless, held by the Supreme Court, following *Rowe* v. *Osborne*, that the sold note only was intended to contain the contract between the parties. On appeal, it was held by the Privy Council that the evidence was not sufficient to displace the custom to contract by two notes; that what was done by the appellants did not amount to an assent to be bound by the sold note only, but was merely an assent to the expunging of a particular word; accordingly, that the contract should have been contained in the two notes, and that, as these varied, there was on the authority of *Thornton* v. *Kempster* (*u*), no contract.

Disapproved by Willes, J.

But in *Heyworth* v. *Knight* (*x*), Willes, J., strongly disapproved of this decision, holding that a common law Court would have decided, as the Supreme Court did, that the document having been assented to by the seller, and corrected and initialled by the buyer, the contract was contained in that note only, though a subsequent note somewhat differing had been delivered, and notwithstanding the custom to contract by two notes (*y*).

Moore v. *Campbell* (1854).

In *Moore* v. *Campbell* (*z*), a broker employed by the plaintiff to purchase hemp made a contract with the defendant, and sent him a sold note. The defendant replied in writing: "I

(*t*) 5 Moo. P. C. 232; 70 R. R. 47. Dr. Lushington adopted a course never now taken in the P. C. by mentioning that this was the judgment of the majority of the Board, and that one of their Lordships, Mr. Pemberton Leigh (afterwards Lord Kingsdown), inclined to a different view.

(*u*) (1814) 5 Taunt. 786; 1 Marsh. 355; 15 R. R. 658; *ante*, 126.

(*x*) (1864) 17 C. B. (N. S.) 298, at 311; 33 L. J. C. P. 298; 142 R. R. 355.

(*y*) See also *Williams Brothers* v. *Agius*, *post*.

(*z*) 23 L. J. Ex. 310; 10 Ex. 323; 102 R. R. 604.

have this day sold through you to Mr. Moore, etc." The terms stated in this letter varied from those in the sold note sent to the defendant. The plaintiff declared on the defendant's letter. The plaintiff's counsel, citing *Rowe* v. *Osborne* and *Cowie* v. *Remfry*, contended that the defendant's letter constituted the contract, and must be taken to be his own correction of the sold note made by the broker, and binding on him. But the Court held that although this would be true if the intention of the parties had been that this letter should constitute the contract, yet if the defendant never intended to be bound as seller unless the plaintiff were also bound as buyer, and meant that the plaintiff should also sign a note to bind himself, there would be no valid contract. The case was therefore remanded for the trial of this question of fact by the jury.

The question in the case was, in fact: Was the defendant's letter an absolute offer of a contract which could be accepted by the plaintiff, or was it only an offer conditional on the plaintiff's acceptance by signing a bought note? (*a*).

Williams Brothers v. *Ed. T. Agius* (1914).

In *Williams Brothers* v. *Ed. T. Agius* (*b*), the respondent agreed in June to sell to the appellants a quantity of coal. In October the appellants resold the coal to Ghiron through a broker who sent Ghiron a sold note dated the 28th. On the 31st the appellants, being notified of the sale, signed and sent to Ghiron a formal sold note, setting out the subject of sale and the price in the same terms as those in the broker's sold note, but containing an additional term exempting them from liability if they did not get delivery from the respondent. Ghiron then signed and sent to the appellants an identical bought note. The matter having gone to arbitration, the arbitrator found that the contract was contained in the broker's note of the 28th, as being the earlier one. Bailhache, J., held that the contract was constituted by the subsequent formal notes (*c*). On appeal, the Court of Appeal treated the arbitrator's finding as a finding of fact which was binding on them (*d*). On appeal to the House of Lords, Lord Atkinson and Lord Moulton were of opinion (*e*) that the arbitrator's

(*a*) See *per* Alderson, B., in 23 L. J. Ex. at 312; 102 R. R. 604. *Cf. Alderton* v. *Archer* (1884) 14 Q. B. D. 1; 54 L. J. Q. B. 12, where the signature was not conditional on the signature of a counterpart.

(*b*) [1914] A. C. 510; 83 L. J. K. B. 715.

(*c*) [1912] 29 Times L. R. 101.

(*d*) [1913] 108 L. T. 906, C. A.

(*e*) Citing *Hunt* v. *S. E. Ry. Co.* (1875) 45 L. J. Q. B. 87, H. L.; *Palmore* v. *Colburn* (1834) 1 C. M. R. 65; 3 L. J. (N. S.) Ex. 314; and *Thornhill* v. *Neats* (1860) 8 C. B. (N. S.) 831; 125 R. R. 902.

finding was, having regard to the reason given, a finding of law, and was erroneous, as the principle is that the subsequent contract is the effective contract between the parties, Lord Moulton saying that "it was precisely because the principals, subsequently to the original negotiation, elected to draw up and sign the formal contract that it was conclusive." Lord Dunedin inclined to the same opinion.

Broker agent to record contract only. *Pitts* v. *Beckett* (1845)

Where a broker is employed to record the contract made by the parties themselves, this confers on him a special authority, and such authority must be strictly pursued, for the defendant will not be bound by any inaccurate memorandum. Thus, for example, where the bargain was for wool "in good dry condition," and the sold note signed by the broker omitted this stipulation, it was held that this did not bind the defendant (*f*).

Agent to make memorandum cannot delegate. *Henderson* v. *Barnewall* (1827).

In *Henderson* v. *Barnewall* (*g*), where the parties contracted in person in presence of the broker's clerk, and one, in the hearing of the other, dictated to him the terms of the agreement, it was held by all the Barons of the Exchequer that the agency of the clerk was personal, and that neither an entry of the bargain in the broker's books nor a sale note signed by the broker would satisfy the Statute, because the clerk could not delegate the agency to his employer.

Party not bound by signature of broker believed to be a principal.

Where a broker makes a contract of sale with a person who does not deal with him as broker, as, where he believes the broker to be a principal and has no reason to know that he is acting as broker, the broker has of course no implied authority to sign on his behalf, and if the broker send one of the ordinary broker's notes to him and the other to the broker's undisclosed principal, the party so contracting will not be bound unless he himself sign one of the notes or some other sufficient memorandum.

McCaul v. *Strauss* (1883).

Thus, in *McCaul* v. *Strauss* (*h*), the plaintiffs employed one Sanford, a broker, to sell tin, and the defendants, who had had previous dealings with Sanford as a principal, believing him to be acting as a principal, bought the tin. Sanford sent the defendants a bought note, signed by him, which was accepted by them, and which had in the corner the words: "Sanford & Co., Metal Brokers," and was in the form: "We have this day sold to Messrs. Strauss & Co., etc." He also sent a sale note, which varied in material respects, to the

(*f*) *Pitts* v. *Beckett* (1845) 13 M. & W. 743; 14 L. J. Ex. 358; 67 R. R. 798.
(*g*) 1 Y. & J. 387; 30 R. R. 799.
(*h*) Cab. & El. 106.

plaintiffs. Sanford having suspended payment, the plaintiffs informed the defendants that Sanford had been acting as their broker, but the defendants declined to recognise them. In an action for the price, the plaintiffs put in the note sent to the defendants. Stephen, J., in a considered judgment, held that the contract was formed by this note, but that as the defendants dealt with Sanford as a principal, his signature did not bind them.

General propositions deduced from the authorities.

The following propositions are submitted as fairly deducible from the authorities (*i*).

1. When a broker is employed by one party to negotiate a contract of sale, and the other party deals with him as broker, as soon as the terms are settled, he has the authority of both parties to make and sign a memorandum of an oral contract, unless an oral contract is unauthorised (*k*).

Where, however, a party does not deal with a broker as such, but believes him to be the principal, the broker has no authority to make and sign any memorandum of the contract on behalf of that party (*l*).

2. Whether a broker's authority, in the absence of special instructions, is limited to making a contract in writing, would seem to be doubtful (*m*).

3. A contract in writing or a memorandum of a contract is usually made by a broker by bought and sold notes signed by him (*n*). A signed entry by the broker of the terms of the contract in his book is also a good memorandum, or in some cases may constitute a contract in writing (*o*).

4. Where the contract has been reduced to writing, it will not be affected by subsequent bought and sold notes containing other terms, unless the parties have agreed to make a *new* contract in accordance with the terms of the notes (*p*).

(*i*) The reader is also referred to a digest of the authorities on brokers' books and notes contained in an Article on Section 17 of the Statute of Frauds, by Mr. Justice Stephen and Prof. Pollock, 1 Law Quart. Rev. at 18, 23.

(*k*) Story on Agency, s. 28; Blackburn, 81—84; 2nd ed. 78—80. See also authorities in note (*o*), *ante*, 320.

(*l*) *McCaul* v. *Strauss* (1883) Cab. & El. 106, *ante*, 301. See also the third form of note, *ante*, 322.

(*m*) In *Sievewright* v. *Archibald*, *ante*, 326—329, Lord Campbell, and Wightman, J., held that his authority was so limited, Patteson, J., and Erle, J., that it was not. To the latter effect is also *Hobart* v. *Lubarsky* [1913] 215 Mass. 523.

(*n*) See *ante*, 324 *et seq.*

(*o*) *Per* Parke, B., in *Thornton* v. *Charles* (1842) 9 M. & W. 802; at 807, 808; 11 L. J. Ex. 302; 60 R. R. 896; *per* Lord Campbell, Wightman and Patteson, JJ., in *Sievewright* v. *Archibald* (1851) 17 Q. B. at 124, 115; 20 L. J. Q. B. 529; 85 R. R. 353; *Thompson* v. *Gardiner* (1876) 1 C. P. D. 777.

(*p*) *Heyworth* v. *Knight* (1864) 17 C. B. (N. S.) 298; 33 L. J. C. P. 298; 142 R. R. 355; *ante*, 333; *Hawes* v. *Forster* (1834) 1 Moo. & R. 368; 42 R. R. 803, as explained by Parke, B., in *Thornton* v. *Charles*, *supra*. See also *Lewis* v. *Brass* (1877) 3 Q. B. D. 667, C. A.

But evidence of an intention (which may be inferred from the course of dealing between the parties or the usage of trade) to contract only by means of two notes is relevant to show that what is apparently a concluded contract in writing was not intended as such (*q*).

5. The bought and sold notes are deemed to constitute a single document (*r*). If, therefore, they materially differ, they are nullities (*s*), unless the parties have assented to one as containing the terms of the contract, in which case the difference is immaterial (*t*).

6. The bought and sold notes are *prima facie* presumed to agree. If, therefore, one is put in evidence, the other will be presumed to correspond with it, until the contrary is shown (*u*).

7. If a sale on credit be made by a broker to a buyer previously unknown to the seller, a custom that the seller shall have a reasonable time after receipt of the sold note to object to the sufficiency of the buyer, is reasonable (*x*).

Law in America on signature by a broker.

The following statement of the law in America on the subject is here quoted as a useful summary of English law. Mr. Story (*y*) says: "Primarily a broker is the agent of the person who employs him, but as soon as he negotiates with any person as vendee he becomes also the agent of the latter for the purpose of receiving and transmitting propositions. So, also, he is the agent of both parties for the purpose of making the memorandum required by the Statute of Frauds. . . . Either the entry or the book or the bought and sold notes, if signed by the broker, would be a sufficient memorandum within the Statute of Frauds, unless they either of them omit sufficiently to state the terms, or unless they disagree with one another. . . . If the broker be only employed to arrange preliminaries and bring the parties together, and the contract

(*q*) *Heyworth* v. *Knight*, *supra*; *Cowie* v. *Remfry* (1846) 5 Moo. P. C. 232; 70 R. R. 47, *ante*, 333; *Moore* v. *Campbell* (1854) 10 Ex. 323; 23 L. J. Ex. 310; 102 R. R. 604, *ante*, 333.

(*r*) *Sievewright* v. *Archibald* (1851) 17 Q. B. 103; 20 L. J. Q. B. 529; 85 R. R. 353, *ante*, 325; *Grant* v. *Fletcher* (1826) 5 B. & C. 436; 29 R. R. 286; *Goom* v. *Aflalo* (1826) 6 B. & C. 117; 5 L. J. K. B. 31; 30 R. R. 262. The principle runs through all the cases.

(*s*) By the majority of the Court in *Sievewright* v. *Archibald*, *diss.* Erle, J., *ante*, 325; 62 R. R. 475; *per* Willes, J., in *Caerleon Tin-Plate Co.* v. *Hughes* [1891] 65 L. T. 118, at 119; 60 L. J. Q. B. 640.

(*t*) *Rowe* v. *Osborne* (1815) 1 Stark. 140; 18 R. R. 754; *Moore* v. *Campbell* 1854) 10 Ex. 323; 23 L. J. Ex. 310; 102 R. R. 604. It is submitted that such should have been the decision of the P. C. in *Cowie* v. *Remfry* (1846) 5 Moo. P. C. 232; 70 R. R. 47; see *ante*, 333.

(*u*) *Hawes* v. *Forster* (1834) 1 Moo. & R. 368; 42 R. R. 803; *Parton* v. *Crofts* (1864) 16 C. B. (N. S.) 11; 33 L. J. C. P. 189; 139 R. R. 387, *ante*, 330.

(*x*) *Hodgson* v. *Davies* (1810) 2 Camp. 530; 11 R. R. 789, *ante*, 331.

(*y*) On Sale, § 87.

be made by the parties themselves, he would not be an agent so as to bind them by his entry in his books " (*z*).

On the subject of the agency of the broker, employed by one party, to bind the other party with whom he negotiates by signing a memorandum, the following instructive remarks were made by Bigelow, C.J., in *Coddington* v. *Goddard* (*a*), a case in which the broker employed by the plaintiff had bought copper of the defendant: "The broker was not the general agent of the defendant. He had no authority to bind him, except such as was derived from the verbal contract into which he entered for the sale of the copper. . . . A broker, from the very nature of his employment, has only a limited authority, when it appears, as it does in the present case, that he had no relation to a party other than what is derived from a single contract of sale. When he applies to a vendor to negotiate a sale, he is not his agent. He does not become so until the vendor enters into the agreement of sale. It is from this agreement that he derives his authority, and it must necessarily be limited by its terms and conditions. He is then the special agent of the vendor to act in conformity with the contract to which his principal has agreed, but no further " (*b*).

(*z*) *Aguirre* v. *Allen* (1850) 10 Barb. (N. Y.) 74.
(*a*) (1860) 82 Mass. 436, at 445—446.
(*b*) See also *Hobart* v. *Lubarsky* [1913] 215 Mass. 523.

CHAPTER IX.

OF THE MEANING OF THE PHRASE "NOT ENFORCEABLE BY ACTION."

If the requirements of the fourth section of the Code (*a*) be not satisfied, that section says that the contract "shall not be enforceable by action." The seventeenth section of the Statute of Frauds (*b*) said that the contract should not be "good"; but judicial opinions had been repeatedly given (*c*) that this did not mean that the contract was absolutely void *ab initio*, but that it became enforceable when the necessary conditions had been carried out. Lord Blackburn, in *Maddison* v. *Alderson*, said (*d*): "I think it is now fairly settled that the true construction of the Statute of Frauds—both the fourth and the seventeenth sections—is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract."

Analogy of s. 4 of the Statute of Frauds.

As a contract under section 4 of the Code is not "enforceable by action," if informal, *ex vi termini* no remedy other than by action is affected. Thus, a seller can appropriate to an unenforceable debt payments made to him generally by the buyer (*e*). Where, however, he is the buyer's executor or administrator, other rules of law come into play, and he cannot retain such debts out of the assets, as such a retainer would be a devastavit (*f*). Similarly, the buyer's executor or administrator cannot pay to the seller the price of the goods sold under an unenforceable contract, as such a payment, being unnecessary, would be also a devastavit (*g*).

(*a*) *Ante*, 177.
(*b*) *Ante*, 176.
(*c*) *Bailey* v. *Sweeting* (1861) 9 C. B. (N. S.) 859; 30 L. J. C. P. 150; 127 R. R. 896; *per* Williams, J.; approved by Bowen, L.J., in *Lucas* v. *Dixon* (1889) 22 Q. B. D. 360, at 361; 58 L. J. Q. B. 161, C. A.; *per* Brett, L.J., and Thesiger, L.J., in *Britain* v. *Rossiter* (1879) 11 Q. B. D. 123, at 127, 132; 48 L. J. Ex. 362, C. A.; *per* Bowen, L.J., in *Hugill* v. *Masker* (1889) 22 Q. B. D. 364, at 371; 58 L. J. Q. B. 171, C. A.
(*d*) (1883) 8 A. C. 467, at 488; 52 L. J. Q. B. 737.
(*e*) *Semble*, on the analogy of the Tippling Acts: *Philpott* v. *Jones* (1834) 2 A. & E. 41; 4 L. J. (N. S.) K. B. 65; 41 R. R. 371; *Cruickshanks* v. *Rose* (1831) 1 Moo. & R. 100; 38 R. R. 788; or the Dentists Act, 1878: *Seymour* v. *Pickett* [1905] 1 K. B. 715; 74 L. J. K. B. 413, C. A.
(*f*) *In re Rownson* (1885) 29 Ch. D. 358; 54 L. J. Ch. 950, C. A.
(*g*) *In re Rownson*, *supra*.

Points decided under s. 4 of Statute of Frauds.

It has been repeatedly decided that contracts unenforceable under section 4 of the Statute of Frauds may be looked at for any collateral purpose. And the same rule, it is apprehended, applies under section 4 of the Code. Thus, where by the contract the price is to be furnished by a third person, the contract can probably be looked at to show that the money, if received by the buyer, is held to the use of the seller (*h*). So, also, it may be looked at to establish a licence in excuse of a trespass (*i*), or to show that money has been paid by one person at the request of another (*k*). An unenforceable contract can also be looked at to show want of consideration, by reason of which an indorsee of a bill or note cannot sue his indorser (*l*), or that the consideration for a payment made by the plaintiff under the contract has failed (*m*). And it is conceived that the fact that a verbal contract is unenforceable will not protect a third person who maliciously induces the buyer to break it (*n*).

Any benefit received under a contract of sale of goods which is also unenforceable under section 4 of the Statute of Frauds may be a good consideration for a new contract to be implied, or a quasi-contract. Thus, the subscriber to a series of books, to be delivered over a period of more than a year, is liable for the value of the copies retained by him (*o*). And it is conceived he would be liable on an account stated (*p*).

Effect on property of contract not being enforceable.

With regard to section 17 of the Statute of Frauds, one result of a contract not being "allowed to be good" was that no property in the goods passed to the buyer (*q*), and he was

(*h*) On the principle of *Griffith* v. *Young* (1810) 12 East, 513; 11 R. R. 478.

(*i*) *Carrington* v. *Roots* (1837) 2 M. & W. 248; 6 L. J. (N. S.) Ex. 95; 46 R. R. 583. See also in Canada *Hardy* v. *Carruthers* [1894] 25 Ont. R. 279.

(*k*) *Pawle* v. *Gunn* (1838) 4 Bing. N. C. 445; 7 L. J. (N. S.) C. P. 206; 44 R. R. 745; *Rosewarne* v. *Billing* (1863) 15 C. B. (N. S.) 316; 33 L. J. (N. S.) C. P. 55; *Knowlman* v. *Bluett* (1874) L. R. 9 Ex. 307; 43 L. J. (N. S.) Ex. 151. Ex. Ch. The first case was under s. 17 of the Statute of Frauds.

(*l*) *Wilkinson* v. *Unwin* (1881) 50 L. J. Q. B. 338, C. A.

(*m*) *Pulbrook* v. *Lawes* (1876) 1 Q. B. D. 284; 45 L. J. Q. B. 178; doubting *Hodgson* v. *Johnson* (1858) E. B. & E. 685; 28 L. J. Q. B. 88; 113 R. R. 830; *cf. Thomas* v. *Brown* (1876) *ib.* 714; 45 L. J. Q. B. 811, where the consideration was held not to have failed. The plaintiff in the case suggested must neeessarily be the seller, as payment by the buyer would make the contract enforceable.

(*n*) See *Quinn* v. *Leathem* [1901] A. C. 495; 70 L. J. P. C. 76.

(*o*) *Mavor* v. *Payne* (1825) 3 Bing. 285; 4 L. J. C. P. 36; 28 R. R. 625. See also *Gray* v. *Hill* (1826) R. & M. 420; 27 R. R. 766; *Savage* v. *Canning* (1867) Ir. Rep. 1 C. L. 434; *Pulbrook* v. *Lawes*, *supra*.

(*p*) *Knowles* v. *Michel* (1811) 13 East, 249. See also *Cocking* v. *Ward* (1845) 1 C. B. 858; *Earl of Falmouth* v. *Thomas* (1832) 1 C. & M. 89; and *Ex parte Co.* v. *Heathcote* [1918] 1 K. B. 418, C. A.; 87 L. J. K. B. 593.

(*q*) *Smith* v. *Hudson* (1865) 6 B. & S. 431; 34 L. J. Q. B. 145; 141 R. R. 459; *per* Parke, B., in *Wait* v. *Baker* (1848) 2 Ex. 1, at 7; 17 L. J. Ex. 357. 76 R. R. 469; *Stockdale* v. *Dunlop* (1841) 6 M. & W. 224; 9 L. J. (N. S.) Ex.

unable to maintain any action which depended upon this right. Thus, he could not sue a carrier for non-delivery (*r*); or the seller or a third person for their conversion (*s*); or an insurer of the goods under an insurance policy, as he had no insurable interest at the time of the loss (*t*). Nor could he, by satisfying the Statute after the event, acquire a right of action retrospectively (*u*). On the other hand, however, he was able, having received a document of title from the seller, to pass a good title to a second buyer under section 4 of the Factors Act, 1877 (*x*), a *de facto* contract of sale with the seller being sufficient by the policy of that Act.

Such being the previous law, the question arises whether the substitution of the words "shall not be enforceable by action" for "shall not be allowed to be good" effects any alteration in this respect. What is the effect of the oral contract on the right of property in the goods? The single authority on this point in this country (*y*) is a judgment of Bigham, J., in *Taylor* v. *Great Eastern Railway Co.* (*z*), a case in which the buyer's trustee in bankruptcy sued the carriers for the conversion of the goods. As the learned Judge was of opinion that the requirements of section 4 of the Code had been satisfied, his remarks were made *obiter*, but they were strongly expressed. He said: "I think that the absence of a memorandum in writing, and of the other conditions mentioned in section 4 (1) of the Sale of Goods Act does not

Dictum of Bigham, J.

83; 55 R. R. 592. See also *Re Roberts* (1887) 36 Ch. D. 196, where Kay, J., held that the memorandum (there being no acceptance or actual receipt) was an "assurance of personal character" under the Bills of Sale Act.

(*r*) *Coombs* v. *Bristol and Exeter Ry. Co.* (1858) 3 H. & N. 510; 27 L. J. Ex. 401; 117 R. R. 828. See also *Coats* v. *Chaplin* (1842) 3 Q. B. 483; 11 L. J. Q. B. 315; 61 R. R. 267.

(*s*) *Alexander* v. *Comber* (1788) 1 H. Bl. 20; *Felthouse* v. *Bindley* (1862) 11 C. B. (N. S.) 869; L. J. C. P. 204; 132 R. R. 784; *Nicholson* v. *Bower* (1858) 1 E. & E. 172; 28 L. J. Q. B. 97; 117 R. R. 167.

(*t*) *Stockdale* v. *Dunlop* (1841) 6 M. & W. 224; 9 L. J. (N. S.) Ex. 83; 55 R. R. 592.

(*u*) By Lord Abinger, C.B., in *Morgan* v. *Sykes* (unreported), cited in *Coats* v. *Chaplin*, *supra*, at 486, and confirmed by the Court of Exchequer; *Felthouse* v. *Bindley* (1862) 11 C. B. (N. S.) 869; 31 L. J. C. P. 204; 132 R. R. 784.

(*x*) 40 & 41 Vict. c. 39; *Hugill* v. *Masker* (1889) 22 Q. B. D. 364; 58 L. J. Q. B. 171, C. A. It is conceived that the altered language of the F. A. 1889 has not changed the law. The same principle should apply to a seller in possession under section 8.

(*y*) It has been held in Canada that a buyer under an unenforceable contract can set up his common law title against the seller's subsequent mortgagee: *Bernhart* v. *McCutcheon* (1899) 12 Man. L. R. 394.

(*z*) [1901] 1 K. B. 774, at 778, 779; 70 L. J. K. B. 499. *Nicholson* v. *Bower*, *supra*, was doubted, but explained as a case in which there had been a mutual rescission.

make a contract void, or even voidable. The contract is good. The only effect of the non-fulfilment of the statutory conditions is that it is unenforceable. And, the contract being good, all the legal consequences of a contract follow; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer. It may be asked: What happens if the buyer, after making the purchase, refuses to fulfil any of the statutory conditions which alone will make the contract enforceable against him? The property in the goods has passed to him, and it may be that he has received the goods themselves, yet he cannot be sued for the price. My answer is that the seller may call on the buyer to pay for the goods, and if he fails to comply, the seller may treat the contract as rescinded. The effect of such rescission would be to revest the property in the seller, and to entitle him to resume possession."

Difficulties on this view.

These remarks were made in a case in which the buyer's trustee recovered £68 as damages in trover against a railway company, being the full value of the goods which the company had redelivered to the seller under an indemnity. The buyer had satisfied the requirements of section 4; but the learned Judge was apparently of opinion (*a*) that the action against the third party would have lain even if the buyer had not satisfied section 4, as the property in the goods was in him. It will be instructive to consider the results of this view. The company, on payment of the full value of the goods (for which, as being strangers to the contract, they were liable), would, as between them and the buyer, become the owners of the goods (*b*), and this right of property would go to feed the seller's possession. So that the seller in effect would repurchase his goods by payment of the indemnity to the company, and the buyer, not having paid, or being liable to pay, a farthing of the price, would put £68 into his pocket, a very inequitable result. The same result would follow if the goods were lost in transit, and the buyer recovered their value from the carrier.

It may also be observed that, under section 4 of the Statute of Frauds, which uses language in substance identical with

(*a*) The learned Judge's *dictum* was so interpreted by Chapman, J., in *Wood* v. *Kennedy* [1907] 27 N. Z. L. R. 344, as meaning that the buyer could sue third parties, and not merely that the buyer had the property as against the seller.

(*b*) As to this, see *ante*, 107.

that of section 4 of the Code (*c*), it has been held that a verbal sale of an interest in land confers no property on the buyer to enable him to sue in trespass, either the seller (*d*), or a third person (*e*).

These difficulties (and others might be suggested) go to show that the question must still be regarded as doubtful.

(*c*) See the two compared, *ante*, 200, 177.
(*d*) *Carrington* v. *Roots* (1837) 2 M. & W. 248; 6 L. J. (N. S.) Ex. 95; 46 R. R. 583.
(*e*) *Scorell* v. *Boxall* (1827) 1 Y. & J. 396; 30 R. R. 807.

BOOK II.

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

CHAPTER I.

DISTINCTION BETWEEN SALES AND AGREEMENTS TO SELL.

After a contract of sale has been formed, the first question which suggests itself is naturally, What is its effect? When does the bargain amount to an actual sale, and when is it a mere executory agreement, or, as it is now called, an agreement to sell?

Preliminary remarks.

We have already seen (*a*) that the distinction consists in this, that in a sale, the thing which is the subject of the contract becomes the property of the buyer (under the contract, that is to say), the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the seller, whereas in the agreement to sell, the property is to pass at a future time or subject to the fulfilment of some condition (*b*), and the goods remain the property of the seller till the contract is executed. In the one case, A. sells to B.: in the other, he only promises to sell. In the one case, as B. becomes the owner of the goods themselves, as soon as the contract is completed by mutual assent, if they are lost or destroyed, he is, unless otherwise agreed (*c*), the sufferer: on the other hand, he is entitled to all accretions and profits incident to the goods (*d*), and has, subject to any special contract in that

(*a*) *Ante*, 8.

(*b*) Cod., s. 1 (2) and (3). "Condition" in this section includes not only promises, but also collateral events; see Chapter on Conditions and Warranties, *post*, 635.

(*c*) See s. 20, *post*, 451.

(*d*) *Per* Blackburn, J., in *Sweeting* v. *Turner* (1872) L. R. 7 Q. B. 310; 41 L. J. (N. S.) Q. B. 58; *The Vindobala* (1887) 13 P. D. 42; 57 L. J. P. 37.

behalf with the seller (*e*), full power to deal with them (*f*). In the other case, as he does not become the owner of the goods, he cannot claim them specifically; he is not the sufferer if they are lost, cannot maintain trover for them, and has ordinarily (*g*) no other remedy for breach of the contract than an action for damages.

Both these contracts being equally legal and valid, it is obvious that whenever a dispute rises, the question is one rather of fact than of law. The agreement is just what the parties intended to make it. If that intention be clearly and unequivocally manifested, *cadit quæstio*. But parties very frequently fail to express their intentions, or they manifest them imperfectly, and the Courts have then applied certain rules of construction which in most instances furnish conclusive tests.

When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory contract, *i.e.*, an agreement to sell. If A. buys from B. ten sheep generally, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A. is to select them, or B. is to choose which he will deliver, or any other mode of separating the ten sheep be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract*; that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B., and to have become the property of A.

In accordance with these principles, the Code provides:

Code s. 16. Goods must be ascertained.

"**16.** Where there is a contract for the sale of unascertained goods no property (*h*) in the goods is transferred to the buyer unless and until the goods are ascertained."

The ascertainment of the goods is one of the conditions (*i*) on which the transfer of the property depends.

(*e*) *Dodsley* v. *Varley* (1840) 12 A. & E. 632; 54 R. R. 652; *Elliman* v. *Carrington* [1901] 2 Ch. 275; 70 L. J. Ch. 577. Such a contract does not bind a subsequent buyer, even with notice, as conditions do not run with goods: *Taddy* v. *Sterious* [1904] 1 Ch. 358; 73 L. J. Ch. 191; Co. Litt. 223; *Spencer's Case* (1583) 5 Co. 16a (3rd resolution). Where, however, the goods are the subject of a patent, a buyer with notice must take them subject to the terms imposed by the patentee: *National Phonograph Co. of Australia* v. *Menck* [1911] A. C. 336; 80 L. J. P. C. 105, where the cases are considered.

(*f*) *Per* P. C. in *National Phonograph Co. of Australia* v. *Menck*, *supra*. *Ajello* v. *Worsley* [1898] 1 Ch. 274; 67 L. J. Ch. 172.

(*g*) But see s. 52 as to specific performance of a contract to deliver specific or ascertained goods.

(*h*) *I.e.*, the general, as distinguished from a special property: s. 62 (1).

(*i*) Under s. 1 (3) and (4).

But, on the other hand, the goods sold may be specific, that is, "identified and agreed upon at the time a contract of sale is made" (*k*). As was said in the year 1478 by Brian, C.J. (*l*): "If I have a black deer amongst others in my park, I can grant him, and the grant is good; and if I have two amongst the others known, and I grant one or both of them, the grant is good, for this, that it is ascertained what thing is granted." So A., instead of agreeing to buy of B. ten sheep generally, may agree to buy B.'s flock which consists of only ten sheep. In such a case, on the one hand, there may remain nothing to be done to the sheep, and the bargain may be for immediate delivery; or, on the other, it may be that the seller is to have the right to shear them before delivery (*m*), or may be bound to fatten them, or furnish pasture for a certain time before the buyer takes them; or, again, they may be sold at a certain price, by weight, or other circumstances may occur that leave it doubtful whether the real intention of the parties is that the sale is to take effect after the sheep have been sheared, or fattened, or weighed, as the case may be, or whether the sheep are to become at once the property of the buyer, subject to the seller's right to take the wool, or to his obligation to furnish pasturage, or to his duty to weigh them. And difficulties arise in determining such questions, not only because parties fail to manifest their intentions, but because not uncommonly they *have* no definite intentions: because they have not thought of the subject.

When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, if the specific thing be agreed on, and it be ready for immediate delivery; but that the contract is only executory when the goods have not been ascertained (*n*), or if, when ascertained, something remain to be done to them by the seller, either to put them into a deliverable state (*o*), or to ascertain the price (*p*). In the former case, there is no reason for imputing any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they

(*k*) Code, s. 62 (1).
(*l*) Y. B. 18 Edw. 4, 14.
(*m*) See *Morris* v. *Mogg* [1917] Vict. L. R. 462.
(*n*) S. 16, *ante*, 346.
(*o*) S. 18, rule 2, *post*, 355.
(*p*) S. 18, rule 3, *ibid.*

intended to make the transfer of the property dependent upon the performance of those things, as a condition precedent. Of course, these presumptions yield to proof of a contrary intent (*q*), and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery, is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the seller's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn, in bulk, sold at a certain price per pound, or per bushel.

Division of the subject.

The authorities (*r*) will now be reviewed, there being thus placed before the reader the means of arriving at an accurate knowledge of this important branch of the law relating to the sale of personal property. They will be considered in five Chapters following.

(*q*) Ss. 17, 18, *post*, 351. The context shows the author is referring to specific goods. He does not mean that the *property* can pass in unascertained goods. The passage seems to have been misunderstood in *Inglis* v. *Richardson* [1913] 29 Ont. R. 229.

(*r*) In *Heilbutt* v. *Hickson* (1872) L. R. 7 C. P. 438; 41 L. J. C. P. 225, Bovill, C.J., laid down the general law on the subject, substantially as it is stated in the text.

CHAPTER II.

THE UNCONDITIONAL SALE OF SPECIFIC GOODS.

Common law rules in Shepherd's Touchstone.

SHEPHERD's Touchstone (*a*) gives the common law rules as follows: "If one sell me a horse, or any other thing, for money or any other valuable consideration, and, *First*, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or, *Secondly*, all; or, *Thirdly*, part of the money is paid in hand; or, *Fourthly*, I give earnest money (albeit it be but a penny), to the seller; or, *Lastly*, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment; in all these cases there is *a good bargain and sale of the thing* . . . *alter the property thereof*. And in the *first* case I may have an action for the thing, and the seller for his money; in the *second* case, I may sue for and recover the thing bought; in the *third*, I may sue for the thing bought, and the seller for the residue of the money; in the *fourth* case, where earnest is given, we may have reciprocal remedies, one against another; and in the *last* case, the seller may sue for his money."

In Noy's Maxims.

In Noy's Maxims (*b*), the rules are given thus: "In all . . . agreements there must be *quid pro quo presently*, except a day be expressly given for the payment, or else it is nothing but communication. . . . If the bargain be that you shall give me ten pounds for my horse, and you gave me one penny in earnest, which I accept, this is *a perfect bargain*, you shall have the horse by an action on the case and I shall have the money by an action of debt. If I say the price of a cow is four pounds, and you say you will give me four pounds and do not pay me presently, you cannot have her afterwards, except I will; for it is *no contract*. But if you begin directly to tell your money, if I sell her to another, you shall have your action on the case against me. . . . If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered; yet the property of the horse is by the bargain in the bargainee or buyer; but

(*a*) At 224—225.
(*b*) At 87—89.

if he presently tender me my money, and I refuse it, he may take the horse, or have an action of detinue. And if the horse die in my stable, between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer."

Modern rules the same with one exception.

The rules given by these ancient authors remain substantially the law of England to the present time, with but one exception (*c*). The maxim of Noy, that unless the money be paid "presently" there is no sale except a day be *expressly* given for the payment, as exemplified in the supposed case of the sale of the cow, is not the law in modern times. The consideration for the sale may have been, and probably was, in those early days the actual payment of the price, but it has since been held to be the purchaser's obligation to pay the price, where nothing shows a contrary intention. In *Simmons* v. *Swift* (*d*), Bayley, J., said: "Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, *the property passes immediately*, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods (*e*); although he cannot take them away without paying the price" (*f*). So in *Dixon* v. *Yates* (*g*), Parke, J., said: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. . . . Where there is a sale of goods *generally*, no property in them passes till delivery (*h*), because until then the very goods sold are *not ascertained*. But where by the contract itself, the vendor appropriates to the vendee a *specific* chattel (*i*), and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very *appropriation* of the chattel is *equivalent to delivery* by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price

Consideration for transfer is the promise to pay, not the actual payment of price.

On sale of specific chattels, title generally vests in buyer immediately.

(*c*) The other statement of Noy that no action of debt will lie till delivery, is not in all cases correct, but is still the general rule. But it may be modified by an express agreement that the price shall be payable before delivery: see s. 28 of the Code, *post*, 683.

(*d*) (1826) 5 B. & C. at 862; 5 L. J. K. B. 10; 29 R. R. 438.

(*e*) Code, s. 18, rule 1, *post*, 351.

(*f*) Code, s. 41.

(*g*) (1833) 5 B. & Ad. 313, at 340; 2 L. J. (N. S.) K. B. 198; 39 R. R. 489.

(*h*) Or rather, appropriation. See the different meanings put upon the word "delivery" in the Chapter on Delivery, *post*, 779.

(*i*) The appropriation here is a mental one: *per* Lord Atkinson in *Badische Anilin und Soda Fabrik* v. *Hickson* [1906] A. C. 419, at 424; 75 L. J. Ch. 621

is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

In *Gilmour* v. *Supple* (*k*), Sir Cresswell Cresswell, in giving an elaborate judgment of the Privy Council, says: "By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties." In *The Calcutta Company* v. *De Mattos* (*l*), in 1863, Blackburn, J., pronounced this to be "a very accurate statement of the law."

Gilmour v. *Supple* (1858).

Calcutta Co. v. *De Mattos* (1863).

The principles so clearly stated by these eminent Judges were undoubted law at the date of the passing of the Code; and are embodied in section 18 in the first rule for ascertaining *primâ facie* the intention of the parties, which rule, however, is subordinate to the more general proposition stated in the following section:

Code, s. 17. Property passes when intended to pass.

"17.—(1.) Where there is a contract for the sale of specific (*m*) or ascertained (*n*) goods the proper (*o*) in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

The first rule under section 18, provides that, "unless a different intention appears" (*p*):

Code s. 18. Rule I.

"Rule 1.—Where there is an unconditional (*q*) contract for the sale of specific (*m*) goods, in a deliverable state (*r*), the property (*o*) in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

In *Tarling* v. *Baxter* (*s*), the defendant agreed to sell to the

Tarling v. *Baxter* (1827).

(*k*) 11 Moo. P. C. 566; 117 R. R. 97.

(*l*) 32 L. J. Q. B. 322, 328; 139 R. R. 752. See also *per* Lord Blackburn, in *Seath* v. *Moore* (1886) 11 App. Cas. at 370; 55 L. J. P. C. 54.

(*m*) Defined in s. 62 (1) as "goods identified and agreed upon at the time a contract of sale is made."

(*n*) For the probable meaning of this word, see *post*, Book V., Pt. II., Chap. I., Sect. II.

(*o*) *I.e.*, the general and not merely a special property: s. 62 (1).

(*p*) These are the opening words of s. 18.

(*q*) This word is unnecessary, having regard to the covering words of s. 18.

(*r*) Defined in s. 62 (4) as "such a state that the buyer would under the contract be bound to take delivery."

(*s*) 6 B. & C. 360; 5 L. J. K. B. 164; 30 R. R. 355, followed by the similar cases of *Martindale* v. *Smith* (1841) 1 Q. B. 389; 10 L. J. Q. B. 155; 55 R. R. 285; and *Gurr* v. *Cuthbert* (1843) 12 L. J. Ex. 309. See also *Hinde* v. *Whitehouse* (1806) 7 East, 558; 8 R. R. 676; *per Curiam* in *Spartali* v. *Benecke* (1850) 10 C. B. 223; 19 L. J. C. P. 293; 84 R. R. 532; and *Wood* v. *Bell* (1856) 5 E. & B. 791, 792; 25 L. J. Q. B. 148; 103 R. R. 735; *per* Bovill, C.J., in *Heilbutt* v. *Hickson* (1872) 7 C. P. 449; 41 L. J. C. P. 228; *per* Blackburn, J., in *Sweeting* v. *Turner* (1872) L. R. 7 Q. B. 313; 41 L. J. Q. B.

plaintiff a certain stack of hay for £145, payable on the ensuing 4th of February, the stack to be allowed to stand on the premises until the first day of May. This was held to be an immediate, not a prospective sale, the goods being specific and in a deliverable state, although there was also a stipulation that the hay was not to be cut till paid for. Bayley, J., said: "The rule of law is that where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee."

CHAPTER III.

THE CONDITIONAL SALE OF SPECIFIC GOODS.

CASES will now be considered in which contracts for the sale of specific goods are conditional, the property not passing till the condition be fulfilled.

The specific goods may, for instance, be sold by description. If the specific existing chattel be sold by description, and do not correspond with that description, the seller fails to comply, not with a warranty or collateral agreement, but with the contract itself, by breach of a condition precedent (*a*). Chattels sold by description.

The question in such cases is whether the descriptive statement, or part of it, is an identification of the goods, or whether it amounts only to a collateral warranty, or is a mere representation. For example, if a man "says he will sell a four-year-old horse in the last stall, and there is a horse in the stall, but it is not a four-year-old, the property would not pass. But if he says he will sell a four-year-old horse, and there is a four-year-old horse in the stall, and he says that the horse is sound, this last statement would only be a collateral warranty" (*b*).

Thus, in *Varley* v. *Whipp* (*c*), the plaintiff offered to sell to the defendant a particular second-hand self-binding reaping machine then at Upton, *and which the defendant had not seen*. It was described as nearly new, having been used to cut only fifty to sixty acres. The defendant said he would take it on the plaintiff's description that the machine was practically new. *Held*, that the seller's statement went to the identification of the machine, and was not a mere warranty; that the defendant, not having seen the machine, had expressly relied upon those statements; accordingly that the sale was not of the particular machine, but of a machine by description, and was conditional on the description being correct, and, the machine being an old one, the property did not pass by the contract. *Varley* v. *Whipp* (1900).

(*a*) See Code, s. 13, set out *post*, 695.

(*b*) *Per* Channell, J., in *Varley* v. *Whipp* [1900] 1 Q. B. 513, at 516; 69 L. J. Q. B. 333. As to sales by description, *see post*, 695 *et seqq*.

(*c*) [1900] 1 Q. B. 513; 69 L. J. Q. B. 333 (the better report), *coram* Channell, J., and Bucknill, J.

Common law meaning of "description" extended.

The Court in this case seem to have given the words "by description" a wider application than would have been given them at common law. At common law a specific chattel was not sold by description, so as to imply a *condition*, unless the description was essential to the identity of the chattel in the sense that its falsity made the chattel something quite different from what was contracted for, so as to constitute a failure of consideration (*d*). Whether the difference between a reaper stated to be practically new, but sold as second hand, and an old reaper, would at common law have been held to constitute a failure of consideration, seems to be open to doubt (*e*). In this connection the following case may be usefully compared.

Parsons v. *Sexton* (1847).

In *Parsons* v. *Sexton* (*f*), the defendants, after some correspondence relative to an engine of the plaintiff's, sent their foreman to inspect it. Afterwards the plaintiff offered "to provide a fourteen-horse engine," and the defendants replied, agreeing to buy "a certain fourteen-horse engine which our foreman has inspected." The foreman had seen the machine in parts, all the parts being present for his inspection, and he was able to form a judgment of the machine. The defendants refused to pay for it on the ground that it was not a fourteen-horse engine, but of much less power. *Held*, that the contract was an absolute one for the specific engine, and was not conditional on its being of the specified power (though there might be a warranty that it would work with the requisite power), and the buyer must pay for it.

In this case the machine had been inspected, and the Court laid stress upon this fact, as showing that the defendants intended to buy the specific engine. But if the subject matter of the sale be *in esse* and specific, the fact that a buyer has not inspected it does not necessarily show that he may not have agreed to take it such as it is (*g*).

Entire contracts for the sale of goods and for the assignment of an interest in land.

Assuming that the goods conform to their description, further conditions precedent to the passing of the property may be, expressly or by inference, agreed on. Thus, for example, the contract for the sale of the specific goods may be part of an entire contract for the sale or assignment also

(*d*) See the subject discussed, *post*, 697.

(*e*) See *Chalmers* v. *Harding* (1868) 17 L. T. 571, where a similar representation by the seller of a specific reaper was in the circumstances decided to be not even a warranty.

(*f*) 4 C. B. 899; 16 L. J. C. P. 181.

(*g*) Chitty on Cont., 10th ed. 420, citing (*inter alia*) *Chanter* v. *Hopkins* (1838) 4 M. & W. 399; 8 L. J. (N. S.) Ex. 14; 51 R. R. 650; and *Cutter* v. *Bayley* (1843) 5 Q. B. 288; 13 L. J. Q. B. 34; 64 R. R. 501.

of an interest in land. In such a case the presumed intention is that the passing of the property in the goods shall be conditional on the passing of the interest in the land.

Lanyon v. *Toogood* (1844).

Thus, in *Lanyon* v. *Toogood* (*h*), the plaintiff let a house and furniture to one Douglas for six months, and during the term agreed to sell the house and furniture to him for a lump sum of £900, to be paid on the completion of a good title. The purchase was never completed and no rent was ever paid by Douglas. The sheriff then seized the furniture on a fi. fa. at the suit of the defendant. *Held*, that the property in the furniture was not in Douglas, and the sheriff was not entitled to seize it.

A similar decision was given by Lord Ellenborough at Nisi Prius in a case where the goods were sold at a separate price (*i*).

Primâ facie rules.

Certain rules existed at common law for ascertaining *prima facie* the time when the property in specific goods was intended to pass. Some of these rules are adopted by section 18. That section provides:

Code, s. 18. Rules for ascertaining intention.

"18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

The first rule deals with unconditional contracts for specific goods in a deliverable state, and has already been quoted (*k*). Two other rules are the following:

Rule 2.

"Rule 2.—Where there is a contract for the sale of specific goods (*l*) and the seller is bound to do something to (*m*) the goods, for the purpose of putting them into a deliverable state (*n*), the property (*o*) does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.

"Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to (*m*) the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof."

And the first sub-section of section 19 adds a fourth rule, viz.:

Code, s. 19 (1). Reservation of right of disposal.

"19.—(1.) Where there is a contract for the sale of specific goods (*l*)

(*h*) 13 M. & W. 27; 13 L. J. Ex. 273. See also *Sleddon* v. *Cruikshank* (1846) 16 M. & W. 71; 16 L. J. (N. S.) Ex. 61.

(*i*) *Neal* v. *Viney* (1808) 1 Camp. 471. See also *Salmon* v. *Watson* (1819) 4 Moore, 73. But the buyer must pay for the goods if he appropriates them: *Sleddon* v. *Cruikshank*, *supra*.

(*k*) *Ante*, 3.

(*l*) Defined in s. 62 (1), n. (*m*), *ante*, 351.

(*m*) The difference of language in these two rules should be noticed.

(*n*) Defined in s. 62 (4), n. (*r*), *ante*, 351.

(*o*) Defined in s. 62 (1), n. (*o*), *ante*, 351.

or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation (*p*), reserve the right of disposal (*q*) of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."

Rules 2 and 3 of section 18 are substantially identical with the first two propositions quoted in former editions of this work (*r*) from Lord Blackburn's treatise (*s*). And the rule in section 19 (1) (so far as it refers to specific goods) embodies the Author's third rule (*t*), which was in the following terms: "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

Buyer must have notice of acts done by seller.

Cases illustrative of the effect on the passing of the property of acts done by the seller will now be considered; but it must be borne in mind by the reader that it is now necessary that *the buyer should have notice* of these acts. This provision is an addition to the common law. As the Code does not provide that the seller shall *give* notice, but that the buyer shall *have* notice, it is apprehended that "notice" means "knowledge."

Weighing. *Hanson* v. *Meyer* (1805).

In *Hanson v. Meyer* (*u*), the defendant sold a specific parcel of starch at £6 per cwt., and directed the warehouseman to weigh and deliver it. Part was weighed and delivered, and then the purchaser became bankrupt, whereupon the seller countermanded the order for delivery of the remainder, and took it away. In an action for trover, brought by the assignees of the bankrupt purchaser, Lord Ellenborough said, that the act of weighing was in the nature of a condition precedent to the passing of the property by the terms of the contract, because "the price is made to depend upon the weight."

(*p*) It is conceived that the words "contract" and "appropriation" should not, *reddendo singula singulis*, be referred to "specific goods" and "subsequently appropriated" respectively.

(*q*) The term "right of disposal" is not the most apt word to employ in laying down a general rule with regard to the passing of the property. It is a translation of the words "*jus disponendi*," used in cases where goods are sold on shipboard. The section appears simply to mean that the seller may retain the property in the goods.

(*r*) 2nd ed. 235—236; 4th ed. 281—282.

(*s*) On Sale, 151—152; 2nd ed. 235.

(*t*) 2nd ed. 236; 4th ed. 282.

(*u*) 6 East, 614; 8 R. R. 572.

Filling casks.

Rugg v. *Minett* (1809).

In *Rugg* v. *Minett* (*x*), a quantity of turpentine, in casks, was put up at auction, in twenty-seven lots. By the terms of the sale, twenty-five lots were to be filled up by the sellers out of the turpentine in the other two lots, so that the twenty-five lots would each contain a certain specified quantity, and the last two lots were then to be measured and paid for. The plaintiff bought the last two lots, and twenty-two of the others. The three lots sold to other parties had been filled up and taken away, and nearly all of those bought by plaintiff had been filled up, but they had not been gauged by the Custom House officers, which it was the *buyer's* duty to get done. A few remained unfilled, and the last two lots had not been measured, when a fire occurred and consumed the goods. The buyer sued to recover back a sum of money paid by him on account of his purchase. The Court held, that the property had passed in those lots only which had been filled up, because, as Lord Ellenborough said: "Everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state." And Bayley, J., said, that it was incumbent on the buyer "to make out that something still remained to be done to the goods by the sellers at the time when the loss happened. But with respect to those casks which had been filled up, nothing remained to be done but the gauging by the officer; and as that was to be done by the buyers . . . therefore nothing more remaining to be done by the sellers, the property passed. But with respect to the other casks, something did remain to be done by the sellers, namely, the filling them up."

Counting.

Zagury v. *Furnell* (1809).

In *Zagury* v. *Furnell* (*y*), the property was held not to have passed, in a sale of "289 bales of goat-skins, from Mogadore, per *Commerce*, containing five dozen in each bale, at the rate of 57*s.* 6*d.* per doz.," because, by the usage of trade, it was the seller's duty to count the bales over, to see whether each bale contained the number specified in the contract, the number in each bale being uncertain, and this had not been done when the goods were destroyed by fire.

Weighing.

Simmons v. *Swift* (1826).

In *Simmons* v. *Swift* (*z*), the sale was of a specified stack

(*x*) 11 East, 210; 10 R. R. 475.

(*y*) 2 Camp. 240; 11 R. R. 704. After the plaintiff's nonsuit, he brought another action in the Common Pleas, and was again nonsuited. Sir James Mansfield, C.J., concurring in opinion with Lord Ellenborough. See also *Withers* v. *Lyss* (1815) 4 Camp. 237; 16 R. R. 781, where the case is incorrectly treated as depending on the right of stoppage *in transitu*.

(*z*) 5 B. & C. 857; 5 L. J. K. B. 10; 29 R. R. 438. *Cf. Kershaw* v. *Ogden* (1865) 3 H. & C. 717; 34 L. J. Ex. 159; 140 R. R. 694; *post*, 362; and see the

of bark, at £9 5s. per ton, to be weighed by the seller's and the buyer's agents. Part was weighed and taken away, and paid for. Bayley, J., and Holroyd, J.—the majority of the Court—(Littledale, J., doubting,) held, that the property had not passed in the unweighed residue, although the specific thing was ascertained, because it was to be weighed, "and the concurrence of the seller in the act of weighing was necessary."

Swanwick v. *Sothern* (1839).

In *Swanwick* v. *Sothern* (*a*), one Turner had sold to Marsden oats in the warehouse of the defendants, and had given him a delivery order on the defendants to weigh over and deliver to Marsden "1,028 bushels oats Bin 40, o.w." Marsden sold the oats to the plaintiffs with a similar order. The oats were transferred in the defendants' books to the plaintiffs, but without weighing. There were no oats in Bin 40 but the quantity mentioned. Marsden became insolvent, and the defendants delivered the oats to Turner on an indemnity. In an action of trover by the plaintiffs, *held*, that the identity of the goods and the quantity being known, weighing was not necessary to fix the identity or price, and could only be for the buyer's satisfaction, and the property had passed.

Measurement.

Logan v. *Le Mesurier* (1847).

In *Logan* v. *Le Mesurier* (*b*), the sale was on the 3rd of December, 1834, of a quantity of red-pine timber, stated to consist of 1,391 pieces, measuring 50,000 feet, more or less, to be delivered at a certain boom in Quebec, on or before the 15th of June then next, and to be paid for by the purchasers' notes, at the rate of 9½d. per foot, measured off. If the quantity turned out more than 50,000 feet, the purchasers were to pay for the surplus, on delivery, at 9½d., and if it fell short, the difference was to be refunded by the sellers. The purchasers paid for 50,000 feet, before delivery, according to the contract. The timber did not arrive in Quebec till after the day prescribed in the contract, and when it did arrive, the raft was broken up by a storm, and a great part of the timber lost before it was measured and delivered. *Held*, that the former part of the contract whereby an ascertained chattel was sold for an ascertainable sum, was controlled by the latter part providing for admeasurement and adjust-

comments on *Simmons* v. *Swift* of Cockburn, C.J., and Blackburn, J., in *Martineau* v. *Kitching* (1872) L. R. 7 Q. B. at 456, 454, 456; H. L. [illegible] Q. B. 227.

(*a*) 9 A. & E. 895; 48 R. R. 740.

(*b*) 6 Moo. P. C. 116; 79 R. R. 10.

ment of the price on delivery at Quebec, and accordingly that the property was not transferred until measured, and that the purchasers could recover back the price paid for all timber not received, and damages for breach of contract.

Gilmour v. Supple (1858).

In *Gilmour* v. *Supple* (*c*), on facts identical with the preceding, as regards the sale of a raft of timber, which was broken up by a storm, the words of the contract were: "Sold Allan, Gilmour, and Co., a raft of timber, now at Caronge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove booms. Price for the whole $7\frac{3}{4}$d. per foot." The raft had been measured for the seller by a public officer, and his specification showing the contents of each log, and the total, had been given to the buyer before the contract. The raft *was delivered* to the buyers' servant, at the appointed place, and broken up by a storm the same night. The Court held, in this case, that the property had passed, because the raft *had been measured before delivery*, and it was not to be measured again by the seller. The buyer was at liberty to measure it for his own satisfaction, as in *Swanwick* v. *Sothern* (*d*), but the seller had lost all claim on the timber, and all lien for price, and there was nothing further for him to do, either alone, or concurrently with the purchaser.

Goods measured for buyer's satisfaction only.

Severance.

Acraman v. Morrice (1849).

In *Acraman* v. *Morrice* (*e*), the defendant had contracted for the purchase of the trunks of certain oak trees from one Swift. The course of trade between the parties was, that after the trees were felled, the purchaser measured and marked the portions he wanted. Swift was then to cut off the rejected parts, and deliver the trunks at his own expense, conveying them from Monmouth to Chepstow. The timber had been bought, measured, and paid for, but the rejected portions had not yet been severed by Swift when he became bankrupt, and the felled trees then lay on his premises. The *defendant* afterwards had the rejected portions severed by his own men, and carried away the trunks for which he had paid. Action in trover by the assignees of the bankrupt. *Held*, that the property had not passed to the buyer, Wilde, C.J., saying that: "Several things remained to be done. . . . It became the seller's duty to sever the selected parts from the rest, and to convey them to Chepstow, and deliver them at the purchaser's wharf."

(*c*) 11 Moo. P. C. 551; 117 R. R. 97.
(*d*) (1839) 9 A. & E. 895; 48 R. R. 740; *ante*, 358.
(*e*) 8 C. B. 449; 19 L. J. C. P. 57; 70 R. R. 568.

Tansley v. *Turner* (1835).

But in *Tansley* v. *Turner* (*f*), the sale by the plaintiff was as follows: "1833. Dec. 26. Bargained and sold Mr. George Jenkins all the ash on the land belonging to John Buckley, Esq., at the price per foot cube, say 1s. 7½d. Payment on or before 29 Sept., 1834. The above Geo. Jenkins to have power to convert on the land. The timber is now felled"; and some trees were measured and taken away on the 27th. The remaining trees were marked and measured some time afterwards, and the number of cubic feet in the several trees was taken, and the figures put down on paper by the plaintiff's servant, but the whole was not then added up, and the plaintiff said he would make out the statement and send it to Jenkins. This was not done, but it was held that the property had passed, the admeasurement being complete, and the mere adding up of the items was not a thing remaining to be done by the seller to the thing sold.

Effect of a provisional estimate of the price.

The rules given by the Code, being only rules for ascertaining *primâ facie* the intention of the parties, will yield to any contrary intention. Thus, the parties may intend that, although the price is not exactly calculated, yet the property shall pass, and the fact that they fix upon a provisional estimate is evidence of such an intention (*g*), though, as in *Logan* v. *Le Mesurier* (*h*), this presumption also may be rebutted by evidence showing that the parties contemplated a subsequent *final* adjustment of the price.

Goods sold to be paid for on delivery at a particular place.

A statement is made by the learned editors of Smith's Leading Cases (*i*), that "it was held in a modern case in the Court of Exchequer (which seems not to have been reported) that the property in a specified chattel bought in a shop to be paid for upon being sent home did not pass before delivery;" and in accordance with this is the *dictum* of Cockburn, C.J., in *The Calcutta Company* v. *De Mattos* (*k*), that "if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was to be *in the meantime* at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers

(*f*) 2 Scott, 238; 2 Bing. N. C. 151; 4 L. J. (N. S.) C. P. 272; 42 R. R. 564. See also *Cooper* v. *Bill* (1855) 34 L. J. Ex. 161; 3 H. & C. 722; 140 R. R. 698.

(*g*) *Per* Cockburn, C.J., in *Martineau* v. *Kitching* (1872) L. R. 7 Q. B. at 449—451; 41 L. J. Q. B. 227. App. in Amer. in *Farmer's Phosphate Co.* v. *Gill* (1888) 69 Maryl. 537. See also *Shealy* v. *Edwards* (1882) 49 Am. Rep. 43.

(*h*) (1847) 6 Moo. P. C. 116; 79 R. R. 10; *ante*, 358.

(*i*) 1 Sm. L. C. 7th ed. 154; 9th ed. 166.

(*k*) 32 L. J. Q. B. at 335; 139 R. R. 752.

it accordingly; " that is, " the property would remain in the seller and the thing would be at his risk." And this is in accordance with the law as laid down by Lord Herschell in *The Badische, etc. Fabrik* v. *The Basle Chemical Works* (*l*): in which a buyer in England had ordered goods to be sent by post from Switzerland. His Lordship said: " If the goods were according to the order to be delivered by the seller in England, the sale would not have been constituted and complete in Switzerland. Until the goods had been delivered in London there would have been no sale. The property in the goods would not have passed to the purchaser."

In these instances, as in *Acraman* v. *Morrice* (*m*), something remained to be done by the seller to the thing sold in order to make the agreement an executed contract or sale.

Where something is to be done to the goods by seller *after* delivery.

As the thing to be done by the seller is to put the goods into a *deliverable* state, it follows that *primâ facie* the property in goods will pass, even though something remain to be done by the seller in relation to the goods sold, after their delivery to the buyer.

Hammond v. *Anderson* (1804).

Thus, in *Hammond* v. *Anderson* (*n*), where specific goods were sold for a lump sum, and by the custom of the trade if the goods sold continued to lie at the wharf after the sale, the seller was bound to pay for the warehousing during fourteen days: *held*, that this did not prevent the property from passing from the moment of the contract.

Greaves v. *Hepke* (1818).

And in *Greaves* v. *Hepke* (*o*), goods in a warehouse had been sold, and a delivery order given to the buyer, whereunder he was entitled to obtain immediate possession; but he might leave the goods in the warehouse, and in that event, by the usage at Liverpool the seller was bound to pay warehouse rent for two months after the sale, and the goods were distrained during that interval for rent due by the warehouseman to his lessor. This risk, it was decided, must be borne by the purchaser, the property having passed to him on the receipt of the delivery order.

The decision would no doubt be the same in other familiar cases, as if a seller should engage to keep in good order for a

(*l*) [1898] A. C. 207; 67 L. J. Ch. 141. See also *Sanders* v. *Sadler* [1907] 95 L. T. 872; *Walker* v. *Langdale's Chemical Manure Co.* (1873) R. Macpherson, 906; *Ullock* v. *Reddelein* (1828) Dans. & Lloyd, 6; 5 L. J. (O. S.) K. B. 208.

(*m*) (1849) 8 C. B. 449; 19 L. J. C. P. 57; 70 R. R. 568, *ante*, 359.

(*n*) 1 B. & P. N. R. 59; 8 R. R. 763.

(*o*) 2 B. & Ald. 131; 20 R. R. 381. See also *Hinde* v. *Whitehouse* (1806) 7 East, 558; 8 R. R. 676; *North British Ins. Co.* v. *Moffatt* (1871) L. R. 7 C. P. 25; 41 L. J. C. P. 1. with respect to customs duties.

certain time after the sale a watch or clock sold; or, to do certain repairs to a ship after the sale and delivery.

Where something is to be done by the buyer.

Where the acts to be done to make the goods deliverable, or to ascertain the price, are to be done *by the buyer*, the rules above quoted do not apply, and the passing of the property will ordinarily not be postponed until those acts are done. A strong opinion that this was also the common law rule was expressed in the following case, though the point was not actually decided.

Turley v. *Bates* (1863).

In *Turley* v. *Bates* (*p*), the jury found that the bargain between the parties was for an *entire* heap of fire-clay, at 2s. per ton. The buyer was, at his own expense, to load and cart it away, and to have it weighed at a certain machine which his carts would pass. All the authorities were reviewed by the Court, and it was held that the property had passed by the contract, great doubt being expressed whether the general rule could be made to extend to cases where something remains to be done to the goods, *not* by the *seller*, *but* by the *buyer*. Without determining this point, the conclusion was drawn that the intention of the parties was that the property should pass, and this was what the Court must look to, in every case (*q*).

Kershaw v. *Ogden* (1865).

In *Kershaw* v. *Ogden* (*r*), the defendants purchased four specific stacks of cotton waste, at 1s. 9d. per lb., the defendants to send their own packer and sacks and cart to remove it. The defendants sent their packer with eighty-one sacks, and he, aided by plaintiff's men, packed the four stacks into the sacks. Two days afterwards twenty-one sacks were weighed and taken to defendants' premises. The rest were not weighed. The same day the twenty-one sacks were returned by the defendants, who objected to the quality. The cart loaded with the waste was left at the plaintiff's warehouse, and he put the waste into the warehouse to prevent it spoiling. *Held*, in an action for goods bargained and sold, and goods sold and delivered, that the plaintiff was entitled to recover. Pollock, C.B., saying the case was not distinguishable in principle from *Turley* v. *Bates*; and Martin, B., saying "the jury have found the contract was that the defendants agreed

(*p*) 2 H. & C. 200; 33 L. J. Ex. 43; 133 R. R. 639; S. C. *sub nom.* *Furley* v. *Bates*, 33 L. J. Ex. 43. See also *Rugg* v. *Minett* (1809) 11 East 210 (buyer to get casks gauged).

(*q*) See also *per Curiam* in *Logan* v. *Le Mesurier* (1847) 6 Moo. P. C. 116, at 132; 79 R. R. 10; and *Hinde* v. *Whitehouse* (1806) 7 East, 558, at 571; 8 R. R. 676.

(*r*) 34 L. J. Ex. 159; 3 H. & C. 717; 140 R. R. 694. See also *Woodburn* v. *Andrew Motherwell* [1917] S. C. 533 (ricks to be baled by buyer).

to buy from the plaintiff four stacks of cotton waste specifically mentioned, more or less, taking them for better or worse. . . . The result was, the property in the four stacks became the property of the buyers, and the plaintiff became entitled to the price in an action for goods bargained and sold."

Young v. *Matthews* (1866).

In *Young* v. *Matthews* (*s*), Moxon, being indebted to Northen, applied to him for further assistance, which Northen only consented to give, if Moxon sold him 1,300,000 bricks, and an invoice of the sale was made out, stating that the price was "settled for acceptances at three and four months." Northen, the buyer of the bricks, sent his agent to the seller's brickfield to take delivery, and the seller's foreman said that the bricks were under distraint for rent, but if the man in possession were paid out, he would be ready to deliver; and he pointed out three clumps from which he should make delivery, of which one was of finished bricks, the second of bricks still burning, and the third of bricks moulded, but not burnt. The buyer's agent then said: "Do I clearly understand that you are prepared and will hold and deliver this said quantity of bricks?" to which the answer was, "Yes." This was held a sufficient appropriation to pass the property, although the bricks were neither finished nor counted out; Erle, C.J., saying: "What passed amounted to this: Northen's agent said, 'Are *all these* appropriated to my principal?' and the seller's agent said 'Yes.'" The Court also laid stress on other circumstances, namely, the indebtedness of the seller to the buyer, and his embarrassed position to show that it was the intention of the parties that the creditor should at once, as security, have all the bricks that could be appropriated to him. This case is only reconcileable with the authorities on the ground that as *matter of fact*, the proof showed an intention of the parties to take the case out of the general rule.

The Court in fact treated the appropriation between the parties as of the whole contents of the clumps, thus making the goods specific, and further held that no act by the seller was contemplated to put the bricks into a deliverable state.

Reservation of right of disposal. Rule in s. 19 (1).

Bishop v. *Shillito* 1819).

The third proposition stated earlier in this Chapter, namely, that a seller may by the terms of the contract reserve the right of disposal (*t*), is well illustrated by *Bishop* v. *Shillito* (*u*). It was trover for iron that was to be delivered under

(*s*) L. R. 2 C. P. 127; 36 L. J. C. P. 61.
(*t*) For the meaning of this word see n. (*q*), *ante*, 356.
(*u*) 2 B. & Ald. 329, n. (*a*); 20 R. R. 457*n*. *Cf. Ex parte Middleton* (1864) 3 De G. J. & S. 201, *infra*.

a contract, which stipulated that certain bills of the plaintiff then outstanding were to be taken out of circulation. The defendant failed to comply with his promise after the iron had been in part delivered, and the plaintiff thereupon stopped delivery, and brought *trover* for what had been delivered. Abbott, C.J., left it to the jury to say whether the delivery of the iron and the re-delivery of the bills were to be contemporary, and the jury found in the affirmative. Scarlett contended that trover would not lie; that the only remedy was case for breach of contract. *Held*, on the facts as found by the jury, that the delivery was conditional only, and the condition being broken, trover would lie. Bayley, J., added: "If a tradesman sold goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser."

Loeschman v. Williams (1815).

The case contemplated by Bayley, J., had been actually decided in *Loeschman* v. *Williams* (*x*). There a manufacturer of pianos brought trover for a piano which he had sold to a third person, to be delivered at the house of the defendant, a packer, and to be paid for in ready money. The plaintiff's servant had delivered the piano at the defendant's premises, and had asked for payment, but the defendant was stated to be from home, and the piano was left on the understanding that it was to be paid for before it was delivered to the buyer. The defendant afterwards shipped it to the buyer without payment. *Held*, that the delivery was conditional, and the action would lie.

Other illustrations of the same rule are found in cases where the seller in shipping goods reserves the right of disposal by taking the bill of lading to his own order; but these cases are principally concerned with unascertained goods, and are referred to later on (*y*). Such a case was *Brandt* v. *Bowlby* (*z*), where it was held that the property in a cargo ordered by one Berkeley did not pass to him, because by the terms of the bargain he was to accept bills for the price as

Brandt v. Bowlby (1831).

(*x*) 4 Camp. 181; 16 R. R. 772. This case, though argued as a case of stoppage *in transitu*, was dependent on the right of property. The phrase "stoppage *in transitu*" was often loosely applied in early cases. See also *Cohen* v. *Foster* (1892) 61 L. J. Q. B. 643; 66 L. T. 616 (payment before delivery); and *cf. Ex parte Catling* (1873) 29 L. T. 431 (where no condition of acceptance of a bill in payment was inferred).

(*y*) Chap. VI., *post*, 419.

(*z*) 2 B. & Ad. 932; 1 L. J. (N. S.) K. B. 14; 36 R. R. 796. And see *Shepherd* v. *Harrison* (1869) L. R. 4 Q. B. 196, 493; 38 L. J. Q. B. 195; (1871) L. R. 5 H. L. 116; 40 L. J. Q. B. 148—more fully referred to *post*, 441.

a condition concurrent with the delivery, and had refused to perform this condition.

Barrow v. *Coles* (1811).

To the same effect was the judgment of Lord Ellenborough in *Barrow* v. *Coles* (*a*). This was trover for 100 bags of coffee shipped by Norton and FitzGerald, of Demerara. They drew for the value upon one Voss, in favour of Barrow, the plaintiff, and sent to the latter the bill of exchange attached to the bill of lading. The bill of lading was endorsed so as to make the coffee deliverable to Voss if he should accept *and pay* the draft; if not, to the holder of the draft. Voss accepted the bill of exchange, which was returned to the plaintiff, but detached the bill of lading, which he endorsed to the defendant for a valuable consideration. He did not pay the bill of exchange. Lord Ellenborough said that the coffees were deliverable to Voss only conditionally; that the defendant had notice of this condition by the endorsement on the bill of lading, and that by the dishonour of the bill of exchange the property vested in the holder of the bill of exchange, not in Voss or his assigns.

Mires v. *Solebay* (1677).

In a very old case, *Mires* v. *Solebay* (*b*), the agreement was that one Alston should take home some sheep and pasture them for the owner at an agreed price per week till a certain date, and if at that date Alston would pay a fixed price for the sheep he should have them. Before the time arrived the owner sold the sheep, which were still in Alston's possession, to Mires, the plaintiff, and the Court held that the property had not vested in Alston, the condition of payment not having been performed, and that Mires could maintain trover for them under his purchase.

Cases such as the preceding ones must be distinguished from those where the facts show an absolute sale but the seller controls the possession only until the fulfilment of some condition (*c*). The subject is considered hereafter (*d*).

Thing attached to land to be severed by buyer.

A contract for the sale of a specific thing which forms part of, or is affixed to the soil or to another bulk, and which is to be severed by the buyer, is conditional on severance, and the property *primâ facie* passes when severance is made (*e*).

(*a*) 3 Camp. 92; 13 R. R. 763. See also *Saks* v. *Tilley* (1915) 32 T. L. R. 148, C. A. (course of trade to pay by acceptance); and Code, s. 19 (3), *post*, 440.

(*b*) 2 Mod. 242. See also *Walker* v. *Clyde* (1861) 10 C. B. (N. S.) 381; 98 R. R. 755 (organ to be paid for by instalments).

(*c*) *Browne* v. *Hare* (1858) 4 H. & N. 822; 28 L. J. (N. S.) Ex. 6; *Ex parte Middleton* (1867) 3 De G. J. & S. 201; 33 L. J. (N. S.) Bk. 36, distinguishing *Bishop* v. *Shilleto*.

(*d*) *Post*, 444.

(*e*) *Jones & Sons* v. *Tenkerville* [1909] 2 Ch. 440; 78 L. J. Ch. 675. Such a case falls under s. 17 of the Code only; see *ante*, 351.

Particular event determining property.

Sometimes a contract may provide, expressly or by implication, that on the happening of a particular event, the property shall pass (*f*). And this event may take the form of an option to either party. Thus, for example, a bailment may be made on the terms that, if the goods are damaged in the buyer's possession, the seller may treat them as sold (*g*); or that, on the buyer's default in paying the price, the seller may, instead of rescinding the contract, sue the buyer for the price (*h*). On the seller's election in either of these cases, the property passes, unless it be otherwise agreed.

Agreement for hire and conditional sale.

Under the now common form of agreement for the hire and conditional sale of furniture, the price to be paid by instalments, the property in the furniture does not pass until all the instalments have been paid.

Ex parte *Crawcour* (1878).

Thus, in Ex parte *Crawcour* (*i*), where there was an agreement between Crawcour and one Robertson for the hire of some furniture, under which, if Robertson paid certain instalments of money month by month the furniture was to become his property, he undertaking at the same time to deposit with Crawcour, as collateral security, promissory notes to the full amount of the instalments to be paid; it was *held*, that until the payment of all the instalments, the property in the furniture did not pass to Robertson.

It should be noted that the agreement in question expressly provided that the property should not pass until the payment of all the instalments, but it is submitted that the result would have been the same, even in the absence of such a provision.

Rationale of such contracts.

Such contracts must, however, be construed *as a whole*: and the property in a hired chattel may pass in spite of an express provision that it shall not, if such a provision be qualified by other parts of the contract. As Lord Herschell says in *McEntire* v. *Crossley* (*k*), "it might be necessary to hold that the property had passed, although the parties have

(*f*) *Reeves* v. *Barlow* (1884) 12 Q. B. D. 436; 53 L. J. Q. B. 192, C. A.

(*g*) *Bianchi* v. *Nash* (1836) 1 M. & W. 545; 5 L. J. (N. S.) Ex. 252.

(*h*) *McEntire* v. *Crossley Brothers* [1895] A. C. 457, 464; 64 L. J. P. C. 129.

(*i*) 9 Ch. D. 419; 47 L. J. Bkcy. 94, C. A. As to the effect of a power of seizure on the right to sue for arrears of hire, see *Brook* v. *Beirnstein* [1909] 1 K. B. 98; 78 L. J. K. B. 243; *Harison* v. *Ricketts* (1894) 63 L. J. Q. B. 711. The custom of hotel keepers to hire furniture is judicially recognised: *Crawcour* v. *Salter* (1881) 18 Ch. D. 30; 51 L. J. Ch. 495, C. A.; and *Ex parte Brooks* (1883) 23 Ch. D. 261, C. A.; *Ex parte Turquand* (1885) 14 Q. B. D. 636; 54 L. J. Q. B. 242, C. A. It has not been generally established with regard to pianos: *Chappell & Co.* (1910) 103 L. T. 594.

(*k*) [1895] A. C. 457, at 463; 46 L. J. P. C. 129. Such a transaction, if colourable only, may be a bill of sale: *ibid.*; *Maas* v. *Pepper* [1905] A. C. 102; 74 L. J. K. B. 452.

said that their intention was that it should not, because they have provided that it shall. No doubt any provisions which were inconsistent with the intention that the property should not pass would be given effect to in preference to a mere expression of intention in words—that is a proposition I should not dispute for a moment."

The position of the owner of the goods under a hire-purchase agreement is that of a man who has made an irrevocable offer to sell (*l*).

The provision for payment by instalments is ordinarily inserted in such contracts for the benefit of the buyer. Accordingly he has *prima facie* a right to anticipate the payments, so as to vest the property in the goods in him on full payment (*m*); and this right may of course be given expressly (*n*).

Among the rules stated in section 18 for ascertaining *prima facie* the intention of the parties with regard to the passing of the property is another:

Code, s. 18, Rule 4. Goods delivered on approval, etc.

"Rule 4.—When goods are delivered to the buyer (*o*) on approval or 'on sale or return' or other similar terms the property (*p*) therein passes to the buyer:

"(*a.*) When he signifies his approval or acceptance to the seller (*q*) or does any other act adopting the transaction:

"(*b.*) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time (*r*) is a question of fact."

The acts above mentioned may have a double operation. The approval or other act which passes the property may be also an acceptance by a bailee of the bailor's offer to sell by delivering the goods. This offer is irrevocable, the seller's only remedy being to sue for the price or value of the goods retained (*s*).

Instances of sales "on similar terms," are sales on trial,

(*l*) *Per* Lord Herschell in *Helby* v. *Matthews* [1895] A. C. 471, at 477; 64 L. J. Q. B. 465.
(*m*) *Lancashire Waggon Co.* v. *Nuttall* (1880) 42 L. T. 465, C. A.
(*n*) *Taylor* v. *Wylie and Lochhead* [1912] S. C. 978.
(*o*) The word "buyer" must here be interpreted as "bailee": *Percy Edwards* v. *Vaughan* (1910) 26 T. L. R. 545, C. A.
(*p*) *I.e.*, the general property: s. 62 (1).
(*q*) Seller includes one who agrees to sell: Code, s. 62 (1).
(*r*) See also s. 56.
(*s*) *Per* Lord Esher, M.R., in *Kirkham* v. *Attenborough* [1897] 1 Q. B. 201, at 203; 66 L. J. Q. B. 149.

or on approbation. A number of the decisions at common law are quoted in the note (*t*).

Position of buyer who rejects terms of bailment.

If the bailee, after a delivery on sale or return, reject the terms of the bailment, as where he refuses to agree to the price, Rule 4 is excluded, and the bailee is no longer a bailee under that rule, but becomes a bailee for custody only (*u*). Accordingly, he has no option of becoming owner unless what amounts to a redelivery is made to him.

Statutory terms essential.

The first point to be noticed by the reader is that, to bring a case under Rule 4, the circumstances must show that the buyer has an *option* to become the owner of the goods *on the statutory terms*, that is to say, in the events mentioned. If the contract specify any other event as essential to the passing of the property, the covering words of section 18 apply, and "a different intention appears." This fact is important if the goods get into the hands of a third person who claims them.

Weiner v. *Gill* (1906).

Thus, in *Weiner* v. *Gill* (*x*), the plaintiff, a manufacturing jeweller, had delivered to Huhn some jewellery on the terms of the following memorandum: "On approbation. On sale for cash only or return. Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged." Huhn delivered the jewellery to Longman on his representation that he had a customer, and Longman pledged it with the defendant, who received the articles in good faith. *Held*, that the plaintiff could recover, as the goods were not delivered to Huhn on statutory terms, but only on the terms that the property should pass if he paid cash or was charged with the goods, and he could therefore pass no title to the defendant.

So again, if the goods are delivered on the terms that *the bailor* should have the option of treating the transaction as a

(*t*) *Ellis* v. *Mortimer* (1805) 1 B. & P. N. R. 257 (trial); *Elphick* v. *Barnes* (1880) 5 C. P. D. 321; 49 L. J. C. P. 698 (sale or return); *Gibson* v. *Bray* (1817) 8 Taunt. 76; 19 R. R. 460 (reasonable time not elapsed); *Harrison* v. *Allen* (1824) 2 Bing. 4; 2 L. J. C. P. 97 (same: time fixed); *Ex parte White. Re Nevill* (1870) 6 Ch. 397; 40 L. J. Bkcy. 73 (sale or return); *Beverley* v. *Lincoln Gas Co.* (1837) 6 A. & E. 829; 7 L. J. (N. S.) Q. B. 113; 45 R. R. 629 (same); *Johnson* v. *Kirkaldy* (1840) 4 Jur. 988 (return in three months); *Moss* v. *Sweet* (1851) 16 Q. B. 493; 20 L. J. Q. B. 167; 83 R. R. 560 (same); *Humphries* v. *Carvalho* (1812) 16 East, 45; 14 R. R. 280 (approval); *Swain* v. *Shepherd* (1832) 1 M. & R. 223; 42 R. R. 782 (same); *Blanckensee* v. *Blaiberg* (1885) 2 Times L. R. 36 (approbation); *Marsh* v. *Hughes-Hallett* (1900) 16 Times L. R. 376 (week's approval: no rejection).

(*u*) *Bradley & Cohn* v. *Ramsay & Co.* (1912) 106 L. T. 771, C. A., where the Court differed as to the construction to be put on the bailee's conduct.

(*x*) [1906] 2 K. B. 574; 75 L. J. K. B. 916, C. A. See also *Percy Edwards* v. *Vaughan* (1910) 26 T. L. R. 545, C. A. (cash); *Truman* v. *Attenborough* (1910) *ibid.* 601 (invoice).

sale if the goods are not returned, the option is with him, and not with the buyer, and the case is not within Rule 4. The property will then pass when the option is exercised (*y*). Again, a *sale* subject to a right of the buyer to rescind it, if the goods are not approved, is equally outside the Act (*z*).

"Act adopting transaction": *Kirkham* v. *Attenborough* (1897).

In *Kirkham* v. *Attenborough* (*a*), the plaintiff had delivered a quantity of pieces of jewellery to one Winter on sale or return. Winter pledged them with the defendant, and the plaintiff claimed their return, or value. *Held*, by the Court of Appeal, that he could not recover, as Winter, by putting it out of his power to return the goods, had adopted the transaction, and the property had passed to him, and he had transferred it to the defendant. Lord Esher, M.R., thus explained the words "act adopting the transaction": "The transaction mentioned cannot mean the delivery of the goods on sale or return, because that had been done already, and it must mean that part of the transaction which makes the buyer the purchaser of the goods in other words, *the transaction adopted is that the goods have been sold* to and bought by the person who received them originally on sale or return. There must be some act which shows that he adopts the transaction: but any act which is consistent only with his being the purchaser is sufficient." And Lopes, L.J., said: "If the recipient of the goods . . . does something inconsistent with the exercise of his option to return them," he "thereby adopts the transaction."

Genn v. *Winkel* (1912).

In *Genn* v. *Winkel* (*b*), the plaintiff on January 4 delivered to the defendant a parcel of diamonds on sale or return, no time being mentioned for return. The same day the defendant delivered them to one Gutwirth on the same terms. Gutwirth on January 6 delivered them to a fourth person, but there was no evidence to show on what terms. The goods were lost in the possession of the fourth person. In an action for the price of the goods, *held* that the defendant had adopted the transaction, and was liable.

Vaughan-Williams, L.J., decided the case on the ground that, as the defendant, by voluntarily parting with the goods, had put it out of his power to return them, he was *prima facie* liable, and he had given no reason or excuse to displace this *prima-facie* liability.

(*y*) *Manders* v. *Williams* (1849) 4 Ex. 339; 18 L. J. Ex. 437; 80 R. R. 588.
(*z*) *Head* v. *Tattersall* (1871) L. R. 7 Ex. 7; 41 L. J. (N. S.) Ex. 4; *Poulton* v. *Mallow and Lien* [1912] Sess. Cas. 112.
(*a*) [1897] 1 Q. B. 201; 66 L. J. Q. B. 149, C. A.
(*b*) (1912) 107 L. T. 434, C. A.

Fletcher Moulton, L.J., agreed, but put the case also on other grounds, with which Buckley, L.J., agreed. He found that a reasonable time for the return of the goods was twelve days. A mere delivery over on sale or return was not necessarily an adoption of the transaction by the original bailee, for the bailee's power to return the goods might not be hindered thereby. In the case in question the delivery to Gutwirth (being immediate) was not an adoption by the defendant of the transaction. But when Gutwirth, two days after, handed the goods to the fourth person he adopted the transaction with the defendant, but he could not (owing to his delay in delivery over) return the diamonds to the defendant at the expiration of twelve days. Gutwirth must therefore be taken to have bought the diamonds from the defendant, and the defendant, having sold the goods, had therefore adopted the transaction with the plaintiff.

A delivery of the goods to a third person is not an act adopting the transaction where such delivery is, expressly or by implication, authorised by the terms of the original bailment (*c*).

Absolute discretion of bailee on approval.

When goods are delivered on approval, or similar terms the bailee may reject the goods for any reason, if he *bona fide* does not approve of them, and is not compelled to base his rejection on defects in the goods themselves (*d*).

When trial involves consumption of what is tried.

Where a party is entitled to make trial of goods, and the trial involves the consumption or destruction of what is tried, it is a question of fact for the jury whether the quantity consumed was more than necessary for trial, for if so, the sale will have become absolute by the approval implied from thus accepting a part of the goods (*e*).

Whether goods used more than is necessary for trial, question for jury.

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

In sales "on trial," the mere failure to return the goods

(*c*) *Per* Lord Alverstone, C.J., in *Weiner* v. *Gill* [1906] 2 K. B. 574, at 578; 75 L. J. K. B. 916; *Genn* v. *Winkel*, *supra*.

(*d*) *Berry & Son* v. *Star Brush Co.* (1915) 31 Times L. R. 603, C. A.

(*e*) *Per* Parke, B., in *Elliott* v. *Thomas* (1838) 3 M. & W. 170; 7 L. J. (N. S.) Ex. 129; 49 R. R. 558, approved by the Court in Banc. See also *per* Martin, B., and Bramwell, B., in *Lucy* v. *Mouflet* (1860) 5 H. & N. 229; 29 L. J. Ex. 110; 120 R. R. 555.

(*f*) (1815) 1 Starkie, 107; 18 R. R. 752; and see *Street* v. *Blay* (1831) 2 B. & Ad. 456, at 463, 464; 36 R. R. 626.

within the time specified for trial, makes the sale absolute (*g*), but the buyer is entitled to the full time agreed on for trial, as he is at liberty to change his mind during the whole term, and this right is not affected by his telling the seller in the interval that the price does not suit him, if he still retains possession of the thing (*h*).

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

The bargain called "sale or return" was explained by the Queen's Bench, in *Moss* v. *Sweet* (*i*), to mean a sale with a right on the part of the buyer to return the goods at his option, within a reasonable time, and it was held in that case that the property passes, and an action for goods sold and delivered will lie, if the goods are not returned (*k*) to the seller within a reasonable time.

"Sale or return." *Moss* v. *Sweet* (1851).

The distinction between a contract of sale or return and a *del credere* agency was discussed by the Lords Justices in *Ex parte White* (*l*). In that case Alfred Nevill was a partner in a firm of Nevill & Co. He also did business *on his individual account* with Towle & Co., cotton manufacturers. Towle & Co. consigned goods to him with a price list, and he sent to them monthly accounts of the goods sold, debiting himself *with the price according to the price list*, giving no particulars as to his sales; and in the next month he paid according to these accounts. He frequently had the goods dyed or bleached at his own expense before selling them, but he gave no account of this to Towle. By an arrangement between Nevill and his partners [illegible] did to the credit of the firm's general account the money [illegible]ived by him from the sale of Towle & Co.'s goods. Nevill dealt with his own firm as *his* bankers; he had a private account with them of all monies paid in and drawn out in matters not relating to the partnership, and this account included many entries not at all connected with the goods of Towle & Co. Nevill & Co became

Sale or return of goods consigned, or *del credere* agency. Ex parte *White* 1870).

(*g*) *Humphries* v. *Carvalho* (1812) 16 East, 45; 14 R. R. 280.
(*h*) *Ellis* v. *Mortimer* (1805) 1 B. & P. N. R. 257. See also *per Curiam*, *Elphick* v. *Barnes* (1880) 5 C. P. D. 321, at 324; 49 L. J. C. P. 698, 16 Q. B. 493; 20 L. J. Q. B. 167; 83 R. R. 560; overruling *Iley* v. *Frankenstein* (1844) 8 Scott, N. R. 839, and disapproving *Lyons* v. *Barnes* (1817) 2 Stark. 39, which Lord Denman in *Johnson* v. *Kirkaldy* ((1840) 4 Jur. 686; 4 L. J. K. B. 290. See also, on sale or return, *Ex parte Wingfield* (1879) 10 Ch. D. 591, C. A.

(*k*) But see remarks, *post*, at 374, on the altered wording of the Code, which speaks, not of a *return* of the goods, but of a notice of rejection.

(*l*) *Re Nevill*, L. R. 6 Ch. 397; 40 L. J. Bkcy. 73; *sub nom. Towle* v. *White* by H. L., 21 W. R. 465. See also *Ex parte Bright* (1879) 10 Ch. D. 566; 48 L. J. Bkcy. 81, C. A. *Cf. Sturm* v. *Boker* [1893] 150 U. S. 312, where the facts showed a bailment of goods only, and not a "sale or return," and the distinction is enunciated by the Court.

bankrupt, and there was a balance in favour of Alfred Nevill on their books in the above-mentioned private account, and Towle & Co. claimed that this was trust money improperly paid by Nevill to his firm, with knowledge by the latter of the trust; and it was not disputed that the balance in Nevill's favour on the private account arose chiefly from the proceeds of the goods received from Towle & Co.

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

James, L.J., said that Nevill's unquestioned authority to deal with the goods as above described, was "quite inconsistent with the notion that he was acting in a fiduciary character in respect of those goods. If he was entitled to alter them, to manipulate them, to sell them at any price that he thought fit after they had been so manipulated, and was still only liable to pay for them *at a price fixed beforehand*, without any reference to the price at which he had sold them, . . . it seems to me impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of vendor and purchaser existed between Towle & Co. and the different persons to whom he sold the goods."

Mellish, L.J., was of the same opinion, and after stating the fact that Nevill's purchase was at a fixed price and fixed time for payment, said: "Now, if it had been his duty to sell to his customers at that price, and to receive payment from them at that time, then the course of dealing would be consistent with his being merely a *del credere* agent. . . and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them. . . . But if the consignee is at liberty . . . to sell at any price he likes, and receive payment at any time he likes, but is to be bound if he sells the goods to pay the consignor for them at a fixed price and a fixed time in my opinion, whatever the parties may think, their relation is not that of principal and agent. . . . In point of law, the alleged agent in such a case is making on *his own account* a contract of purchase with his alleged principal and is again reselling."

In determining the question whether a bailment is one on sale or return or to an agent, the whole agreement must be looked to. The use of the words "sale or return" or "agent" is not conclusive. Distinction between "sale or return" and agency.

Thus, in *Weiner* v. *Harris* (*m*), the goods were received on the terms of the following memorandum, addressed to the bailor: "The goods mentioned are your property, and to remain so until sold or paid for, they being only left with me for the purpose of sale or return, and not to be kept as my own stock. The goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one half the profit." Fisher, the author of the memorandum, pledged the goods with the defendant, a pawnbroker. *Held*, that the plaintiff could not recover the goods pledged, as the terms of the bailment, particularly the terms as to remuneration, and the provision that the goods were not to be kept as Fisher's own stock, showed that Fisher was an agent, and not a buyer; and, as he was a "mercantile agent" under the Factors Act (*n*), he could pass a good title to the defendant. *Weiner* v. *Harris* 1909.

On the other hand, in the *Kronprinzessin Cecilie* (*o*), where goods were consigned to a company, who were appointed sole "selling agents" for the sellers, on the terms that the sellers received, not the sub-buyer's money less the agents' commission, but a sum calculated according to the average prices of all sales under a pool, which sum might be more or less than what their goods sold for, the sellers receiving on consignment a provisional price, after which they had nothing more to do with the goods, it was held by the Privy Council that the transaction was not an agency, but a sale to the "agents," and a resale by them to the sub-buyer. *The Kronprinzessin Cecilie* 1917.

In determining what is a reasonable time for the return of goods, the conduct of the seller may be taken into consideration, as where by a subsequent misrepresentation he has induced the buyer to prolong the trial (*p*). And as time is given to the buyer to enable him to try the goods the time runs from their receipt by him, and not from their delivery to the carrier for transmission (*q*). Reasonable time.

The retention of the goods by the buyer should be either a voluntary act on his part, from which an intention to "adopt Retainer should be voluntary.

(*m*) [1910] 1 K. B. 285; 79 L. J. K. B. 342, C. A.
(*n*) On this see *ante*, 39.
(*o*) (1917) 33 Times L. R. 292, P. C.
(*p*) *Per* Bovill, C.J., in *Heilbutt* v. *Hickson* (1872) L. R. 7 C. P. 452; 41 L. J. C. P. 228, quoting *Adam* v. *Richards* (1795) 2 H. Bl. 573.
(*q*) *Jacobs* v. *Harbach* (1885) 2 Times L. R. 419.

the transaction " should be inferred or presumed, or the result of some act or omission for which the buyer is responsible (*r*). Accordingly, if from causes over which the buyer has no control, the goods perish, the transaction will not, it is apprehended, be treated under the Code as a sale. This was so at common law, which applied the rule in *Taylor* v. *Caldwell* (*s*) to such cases. In other words, the continued existence of the goods in a condition in which they can be returned was held to be a condition precedent to any liability of the buyer to return them; so that if the goods were no longer in such a condition his obligation was discharged (*t*).

Goods perishing.

Elphick v. *Barnes* (1880).

Thus, in *Elphick* v. *Barnes* (*u*), the buyer of a horse on sale or return had eight days in which to return the animal, and it died within the time without his fault. It was held that the seller could not recover the price of the horse in an action for goods sold and delivered, the death of the horse not having deprived the defendant of his option, and thus the sale not being complete. But in *Ray* v. *Barker* (*x*), the Court of Appeal inclined strongly to the opinion that the buyer would be liable if his inability to return the goods was caused by the fraudulent act of a third person to whom he had delivered them.

But a bailee may be liable for the price of the goods, though they perish without his fault, by express agreement (*y*), or custom of trade (*z*).

Effect of words " without giving notice of rejection."

The Code, by providing that the property shall pass if the goods are " retained without notice of rejection," has probably altered the law. All the Judges in *Moss* v. *Sweet* (*a*) speak of the property passing if the goods are not " returned." It seems that under the Code the buyer may prevent the passing of the property by merely giving notice of rejection without sending the goods back. An actual return may of course be provided for by agreement (*b*).

(*r*) See *Genn* v. *Winkel*, *ante*, 369.

(*s*) (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 129 R. R. 573, *ante*, 163.

(*t*) *Head* v. *Tattersall* (1871) L. R. 7 Ex. 7; 41 L. J. Ex. 4, which, however, was, strictly speaking, the case of a condition subsequent; *Chapman* v. *Withers* (1888) 20 Q. B. D. 824; 57 L. J. Q. B. 457.

(*u*) 5 C. P. D. 321; 49 L. J. C. P. 698.

(*x*) (1879) 4 Ex. D. 279; 48 L. J. Ex. 569, C. A.

(*y*) *Bianchi* v. *Nash* (1836) 1 M. & W. 545; 5 L. J. Ex. 252.

(*z*) *Berington* v *Dale* [1902] 7 Com. Cas. 112.

(*a*) *Ante*, 371.

(*b*) *Ornstein* v. *Alexandra Furnishing Co.* (1895) 12 T. L. R. 128, where Collins, J., seems to think the law changed, as he quotes the covering words of s. 18.

CHAPTER IV.

THE SALE OF UNASCERTAINED GOODS.

This is an executory agreement.

WHEN the agreement for sale is of a thing not specified, in other words, of "unascertained goods," as of an article to be manufactured, or acquired, that is to say "future goods" (*a*), or of a certain quantity of goods in general, without a specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is an agreement to sell, and the property does not pass. There is but little difficulty in the application of this rule, which is adopted by the Code in the following terms:

Code, s. 16. Goods must be ascertained before property passes.

"16. Where there is a contract for the sale of unascertained goods no property (*b*) in the goods is transferred to the buyer unless and until the goods are ascertained."

The ascertainment is a necessary condition to the agreement to sell becoming a sale (*c*). But other conditions to the passing of the property after ascertainment may be imposed (*d*). Ascertainment by appropriation is provided for by a later clause, which will be hereafter referred to (*e*).

Wallace v. *Breeds* (1811).

In *Wallace* v. *Breeds* (*f*), the sale was of fifty tons of Greenland oil, "allowance for foot-dirt and water as customary." The sellers gave an order on the wharfingers for delivery to the purchasers of "fifty tons of our Greenland oil, ex ninety tons." The purchasers became insolvent on the day after this order was sent to the wharfingers, and the order was then countermanded by the sellers, nothing having been done on it. *Held*, that the property had not passed.

Busk v. *Davis* (1814).

So in *Busk* v. *Davis* (*g*), the seller had about eighteen tons of Riga flax, in mats, lying at the defendant's wharf, and

(*a*) Code, s. 5 (1), *ante*, 147, and s. 62 (1).
(*b*) *I.e.*, general property: Code, s. 62 (1).
(*c*) S. 1 (3) and (4), *ante*, 8.
(*d*) *Wait* v. *Baker* (1848) 2 Ex. 1, 9; 17 L. J. Ex. 307; 76 R. R. 469; Code, s. 19 (1), *ante*, 355.
(*e*) S. 18, Rule 5 (1); see Chapter V., *post*, 385.
(*f*) 13 East, 522; 12 R. R. 423. The Court treated the case as one in which acts had to be done by the seller, *i.e.*, searching out and filling up the casks to put the oil into a deliverable state, and *Whitehouse* v. *Frost* (1810) 12 East, 614; 11 R. R. 491, was distinguished on this ground. The true ground of decision is as stated in the text: and see Blackburn on Sale, 157; 2nd ed. 178.
(*g*) 2 M. & S. 397; 15 R. R. 288.

sold ten tons of it, giving an order to the purchaser on defendant, which the defendant entered in his books, for "ten tons Riga PDR flax, ex *Frow Maria*." A mat varies in weight from 3 to 6 cwt., and so in order to ascertain what portion of the flax was to be appropriated to this order, it was necessary to weigh, and even to break up, the mats, and this had not been done, when the buyer became insolvent, and the seller thereupon countermanded the order. *Held*, that the property had not passed.

Similar cases.

In *White* v. *Wilks* (*h*), the sale was of twenty tons of oil, out of the seller's stock in his cisterns; in *Austen* v. *Craven* (*i*), the sale was by sugar refiners, of fifty hogsheads of sugar, double loaves, no particular hogsheads being specified: in *Shepley* v. *Davis* (*k*), of ten tons of hemp out of thirty: in *Boswell* v. *Kilborn* (*l*), of five tons of hops out of a larger quantity: in *Snell* v. *Heighton* (*m*), of 60,000 bricks out of 117,000: in *Sharp* v. *Christmas* (*n*), of so many potatoes as would not pass through a sieve of a certain fineness; in *Platt* v. *Campbell* (*o*), of one jar of beer in a cart containing other jars; and the contracts were all held to be agreements to sell, no property passing.

Of the cases cited, *Bush* v. *Davis* and *Shepley* v. *Davis* show that, so long as the goods are unascertained, the fact that an order for delivery is entered, and the goods sold are transferred to the buyer's name in the warehouseman's books, has no effect on the transfer of the property (*p*).

Gillett v. *Hill* (1834).

In *Gillett* v. *Hill* (*q*), Bayley, B., stated the law very perspicuously as follows: "Those cases may be divided into two classes: one in which there has been a sale of goods, and something remains to be done by the vendor, and until that is done, the property does not pass to the vendee, so as to entitle him to maintain trover. The other class of cases is where there is a bargain for a certain quantity, *ex.* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit: then the right to them does not pass to the vendee, until the vendor has made his selection, and trover

(*h*) (1811) 5 Taunt. 176; 14 R. R. 735.
(*i*) (1812) 1 Taunt. 644; 13 R. R. 714
(*k*) (1814) 5 Taunt. 617; 15 R. R. 598.
(*l*) (1862) 15 Moo. P. C. 309; 137 R. R. 86.
(*m*) (1883) 1 Cab. & Ell. 95
(*n*) (1892) 8 Times L. R. 687, C. A.
(*o*) [1895] 2 Q. B. 229; 64 L. J. M. C. 225.
(*p*) See also *Hayman & Sons* v. *McClintock* [1908] S. C. 936.
(*q*) 2 Cr. & Mee. 530, at 535; 3 L. J. Ex. 145; 39 R. R. 833. See also *Campbell* v. *Mersey Docks Company* (1863) 14 C. B. N. S. 412; 15 R. R. 72

is not maintainable before that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is *no individuality* until it has been divided."

When, therefore, the individuality of the goods depends upon their being weighed, separated, counted, or having similar acts done in relation to them, the doing of such an act is the first condition precedent to the passing of the property. Goods to be weighed, etc.

In *R.* v. *Tideswell* (*r*), Tideswell had been in the habit of buying from a company residual products. When the company had an accumulation they sent for Tideswell, who arranged with the managing director to buy what he required at a price per ton, the quantities purchased to be defined by weighing. The company's weigher, in collusion with Tideswell, weighed and delivered to him one and a half tons more than was entered in the company's books. *Held* that, on these facts, Tideswell was rightly convicted of the larceny of that surplus quantity, as there was no contract of sale of the one and a half tons, the weigher having authority to deliver only such a quantity of ashes as was correctly defined by weighing and so entered in the weight book; but that there would have been no larceny had the contract been for all the heap of ashes, though there might have been subsequent fraud with respect to the quantity to be paid for. *R.* v. *Tideswell* (1905).

In *Gabarron* v. *Kreeft* (*s*), the sale was of all the iron ore, the produce of a certain mine in Spain. The price was to be paid by the defendants' acceptances, to be given on a certificate that there was enough ore in stock to load the vessel chartered; and, on being so paid for, *the property* in the ore so drawn for *should rest* in the defendants. In carrying out the contract the defendants' acceptances at a particular time exceeded the amount of all the ore already shipped or to be shipped in the vessels chartered, so that the defendants were entitled without payment to a further quantity of the ore, as to which, however, no certificate had been given. *Held*, that there was nothing to distinguish the ore paid for from that not paid for: that the ore in stock was not earmarked as the cargo of any particular vessel: so that, in the absence of any *Gabarron* v. *Kreeft*. (1867).

(*r*) [1905] 2 K. B. 273; 74 L. J. K. B. 725; *cf. Swanwick* v. *Sothern* (1839) 9 A. & E. 895; 48 R. R. 740. *ante*, 358, where weighing was not necessary to identify.

(*s*) L. R. 10 Ex. 274; 44 L. J. Ex. 238, more fully considered, *post*.

specific appropriation of the ore by the seller, no property in any of the ore in stock could vest in the defendants (*t*).

Event identifying goods.

The contract may provide that on the occurrence of a specified event sufficient to identify (*u*) the goods contracted for the property should *ipso facto* pass. Thus it is competent to parties to contract that fruit as it falls from the tree, or building materials as they are brought upon land by a builder (*x*), or certified by an engineer (*y*), should become the property of the buyer: and many other instances may be imagined.

The cases in which those contracts are considered by which the seller agrees to make and deliver a chattel are reviewed in the next Chapter, on Subsequent Appropriation (*z*).

Does giving of earnest alter property?

This seems to be an appropriate occasion for considering whether earnest has any, and what, effect in altering the property.

In former times when the dealings between men were few and simple, and consisted for the most part, where sale was intended, in the transfer of specific chattels, it was said that by the giving of earnest, the property passed. Thus we have seen that Shepherd's Touchstone contains this rule (*a*): "If one sell me a horse, or any other thing, for money, . . . and I give earnest money, (albeit it be but a penny,) to the seller, . . . there is a good bargain and sale of the thing to alter the property thereof." And Noy says (*b*): "If the bargain be that you shall give me ten pounds for my horse, and you give me one penny in earnest, which I accept, this *is a perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action of debt." But the context of both these passages shows plainly that the authors were considering the different modes in which a bargain for the sale of a specific chattel could be completed, and were pointing out that the mere agreement of A. to buy, and B. to sell, did not constitute a bargain and sale, but that something further must be done "to bind the bargain." As soon as the bargain for the sale of the specific chattel was completed, *in*

(*t*) The Author here proceeds to consider *Whitehouse* v. *Frost* (1810) 12 East, 614; 11 R. R. 491, which conflicts with the principle of the other cases. As it has been frequently disapproved, though followed in America, it may be treated as of no authority here.

(*u*) *Secus*, where the event does not identify, as in the preceding case in the text.

(*x*) *Reeves* v. *Barlow* (1884) 12 Q. B. D. 436; 53 L. J. Q. B. 192. C. A.

(*y*) *Banbury and Cheltenham Railway* v. *Daniell* (1884) 54 L. J. Ch. 265

(*z*) *Post*, 383, *et seqq*.

(*a*) *Ante*, 349.

(*b*) *Ante*, 349.

whatever form, the property passed, and the giving of earnest is included among the modes of binding the bargain, so that neither could retract, and then the passing of the property was the result, not of giving the earnest, but of the bargain and sale.

So in *Bach* v. *Owen* (*c*), the plaintiff claimed a mare under a bargain in which "the defendants, to make the agreement the more firm and binding, paid to the plaintiff one halfpenny in earnest of the bargain." The contract was that the plaintiff should give a colt and two guineas for the mare, and the defendant demurred to the declaration for want of an averment that the plaintiff was ready and willing, or offered, to deliver the colt; but Buller, J., said: The payment of the halfpenny vested the property of the colt in the defendant," and the tender of it by the plaintiff was therefore unnecessary. This, again, was a perfect bargain and sale of a specific chattel, which altered the property as soon as the earnest given prevented either party from retracting. *Bach* v. *Owen* (1793).

In *Hinde* v. *Whitehouse* (*d*), Lord Ellenborough, in considering the mode of passing the property in the sugar sold, said: "I think that the sale . . . was complete, so as to cast the subsequent risk of loss upon the buyer. . . . Besides, after earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and, therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person." His Lordship, after quoting this *dictum* from Holt, C.J. (*e*), and Noy's Maxims (*f*), continued: "On this latter ground, therefore, I do not think that the sale is incomplete." *Hinde* v. *Whitehouse*. (1806).

This, again, was the sale of a specific chattel, and the mind of that great Judge was plainly intent on the question whether there had been a "complete sale," and the authorities on the subject of earnest were invoked solely to show that the bargain had been closed. Blackstone, also (*g*), if his remarks be carefully considered, as well as the authorities to which he refers, contemplates earnest as a mode of binding the bargain, and thus furnishing proof of such a complete contract of sale as

(*c*) 5 T. R. 409.
(*d*) 7 East, 558, at 571; 8 R. R. 676.
(*e*) In *Langfort* v. *Administratrix of Tiler* (1705) Salk. 113.
(*f*) "If I sell my horse for money, etc.," *ante*, 349.
(*g*) 2 Black. Com. 447—449.

suffices to pass property in a specific chattel. And Fry, L.J., in *Howe* v. *Smith* (*h*), speaks of the giving of earnest as being merely "to signify the conclusion of the contract."

No case has been found in the books in which the giving of earnest has been held to pass the property in the subject matter of the sale, where the completed bargain, if proved by writing or in any other sufficient manner, would not equally have altered the property. In the cases of *Logan* v. *Le Mesurier* (*i*), and *Acraman* v. *Morrice* (*k*), it was held, as we have already seen, that where the *whole* purchase-money had been paid at the time of the contract, the property did not pass in the timber which was to be afterwards measured on delivery, and it is scarcely conceivable that a penny, delivered under the name of "earnest," could be more effective.

Submitted that it does not.

It is therefore submitted that the true legal effect of earnest is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding on both (*l*).

Grain-elevator cases.

Cases in which grain stored in elevators, or other public warehouses, is sold are looked upon in Canada and the United States in a light peculiar to themselves. When various owners voluntarily mix their goods by delivery to an elevator, the warehouseman is regarded as their common agent. They have become, by agreement, inferred from the method of storage and trade usage, tenants in common of the whole mass, each being entitled to such a proportion thereof as the quantity stored by him bears to the whole. A sale by such an owner is the sale of his interest in the undivided mass. Separation of the goods sold from the bulk, or actual delivery thereof to the buyer, is not necessary to pass that interest, which vests in the buyer by the seller's orders on the warehouseman to deliver the quantity sold to the buyer, and an acceptance of the order by the warehouseman. The rule is the same whether the various proprietors are numerous, or whether the seller and the buyer are the only two owners (*m*). And the interest so vested is sufficient to enable

(*h*) (1884) 27 Ch. D. 89, at 101; 53 L. J. Ch. 1055.

(*i*) (1847) 6 Moo. P. C. 116; 79 R. R. 10; *ante*, 358.

(*k*) (1849) 8 C. B. 449; 19 L. J. C. P. 57; 70 R. R. 568; *ante*, 359.

(*l*) This view of the effect of earnest was adopted by the Supreme Court of the U. S. in *The Elgee Cotton Cases* (1874) 22 Wall. 180.

(*m*) *Inglis* v. *Richardson & Sons* (1913) 29 Ont. L. R. 229, App. Div. quoting *Cushing* v. *Breed* (1867) 96 Mass. 376, where the law and practice is explained by Chapman, J., to the above effect; *Coffey* v. *Quebec Bank* (1870) 20 Can. C. P. 555, C. A.; *Warren* v. *Milliken* (1869) 57 Maine, 97; *Ittner* v. *Chicago and R.I.R. Co.* (1883) 61 Iowa 648. See an instructive article on the subject attributed to Mr Justice Holmes in Amer. L. Rev., vol. 6, 450.

the buyer to bring trover for the undivided quantity against the seller or warehouseman (*n*).

Thus in *Inglis* v. *James Richardson & Sons* (*o*), the plaintiff bought 4,000 bushels of wheat of the defendants, who had 20,000 bushels stored in the Canadian Pacific Railway Elevator. The price was settled and paid, and the defendants gave the plaintiff orders on the elevator agent to deliver the wheat on presentation of the orders. One of these orders was presented, and 1,000 bushels taken. In giving the orders the defendants deducted 4,000 bushels from their books, and also notified the insurers, so that insurance of 4,000 bushels was cancelled. They also deducted from the price which the plaintiff would have to pay to the owners of the elevator for delivery, and thereby delegated to them the duty of measuring out the 3,000 bushels, and to the plaintiff the duty of paying the sums due. A fire afterwards damaged all the wheat in the elevator. *Held*, by the Appellate Division of the Supreme Court of Ontario, that the plaintiff could recover in trover against the defendants, who had refused after the fire to deliver the balance of the wheat. The course of dealing showed that, short of physical separation of the wheat, everything in the way of appropriation had been done. Both parties treated the duty of the defendants as at an end. When everything has been done, on the one hand to part with the dominion over the goods, and on the other to accept the right to demand the goods from a third party in lieu of actual present delivery, the intention to pass the property will be presumed, and accordingly it passed before the fire.

Inglis v. *James Richardson & Sons* (1913).

Where the warehouseman, by agreement with the various owners, or by trade usage, is entitled to sell any part of the grain stored with him on condition of his substituting an equal quantity of similar grain, either of his own, or belonging to other parties, the case is more difficult. Such a transaction amounts to a sale, and not a bailment, by each owner to the warehouseman (*p*), and the owner's interest would seem to be merely in a chose in action. It has been suggested (*q*), however, that, as the bailors regard themselves

(*n*) *Inglis* v. *Richardson & Sons*, *supra*. See also *Woodley* v. *Coventry* (1863) 2 H. & C. 164; 32 L. J. Ex. 185; *Knights* v. *Wiffen* (1870) L. R. 5 Q. B. 660; 40 L. J. Q. B. 51.

(*o*) (1913) 29 Ont. L. R. 229. See also *Coffey* v. *Quebec Bank* (1870) 20 Up. Can. C. P. 555, C. A.

(*p*) *South Australian Ins. Co.* v. *Randell* (1869) L. R. 3 P. C. 101. See also *Chase* v. *Washburn*, 1 Ohio N. S. 244, set out 6 Amer. L. Rev. 450.

(*q*) In the article in Amer. L. Rev., referred to in n. (*m*), *supra*.

in such cases as *owners* of the grain, the true view should be that the warehouseman is "a bailee to keep, with power to change the bailor's tenancy in severalty into a tenancy in common of a proportionately larger mass, and back again, and also with a continuous power of sale, substitution, and resale," and that "at any given moment holders of receipts are tenants in common (*r*) of the amount in store in the proportion of their receipts."

(*r*) See *per* Blackburn, J., in *Harper* v. *Godsell* (1870) L. R. 5 Q. B. 422, 39 L. J. Q. B. 185.

CHAPTER V.

OF SUBSEQUENT APPROPRIATION.

BEFORE considering the subject of subsequent appropriation, it should be remarked that there is a class of future goods intermediate between specific and unascertained goods, and partaking for some purposes of the nature of specific goods, as, for example, the future crop of a specified field or orchard. Such goods are partly future, but for some purposes are specific, *e.g.*, they are subject to the rule in *Taylor* v. *Caldwell* (*a*), and the seller is excused from delivery if they perish without his default (*b*).

Class of goods intermediate for some purposes between specific and unascertained.

Contracts for the sale of such goods are generally ordinary agreements to sell, for one party or the other may have to do some act by way of appropriation, as by gathering or despatching the crop (*c*). But when such acts are not provided for, and are not necessary, the property may pass on the happening of some other event, as where the goods are potentially existing goods, the subject of what purports to be an immediate sale, which ordinarily pass to the purchaser on their coming into existence so as to be identified (*d*): though the happening of some other event may by agreement constitute *ipso facto* an appropriation (*c*). The general rule, however, applicable to agreements to sell unascertained goods is as follows.

After an agreement to sell has been made, it may be converted into a complete sale by specifying the goods to which the contract is to attach, or in legal phrase, by the *appropriation* of goods specifically to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time: but it is none the less one contract, namely, a sale of goods. As was said by Holroyd, J., in *Rohde* v.

Executory agreement converted into sale by subsequent appropriation.

(*a*) Set out *ante*, 163.

(*b*) *Howell* v. *Coupland* (1876) 1 Q. B. D. 248; 46 L. J. Q. B. 147. C. A., set out *ante*, 164.

(*c*) As in *Langton* v. *Higgins* (1859) 4 H. & N. 402; 28 L. J. Ex. 252; 118 R. R. 515, *ante*, 157.

(*d*) According to the rule in *Grantham* v. *Hawley* (1615) Hob. 132. See the subject discussed *ante*, 153, *seqq.*

(*e*) See the reasoning of the C. A., in *Reeves* v. *Barlow* (1884) 12 Q. B. D. 436, at 442; 53 L. J. Q. B. 192.

Thwaites (*f*): "The selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes." And the question whether the one party has adopted the selection made by the other is a question of fact (*g*).

When seller is to appropriate the goods.

The only difficulty that can arise on this question is in cases where the seller only has made the subsequent appropriation. If the purchaser is to select out of the bulk belonging to the seller, it is not easy to raise a controversy, but the cases in which the ablest Judges have been much perplexed are those where the seller is, by the express or implied terms of the contract, entitled to make the selection, that is, where the buyer has given a previous implied assent to the seller's appropriating. A very common mode of doing business is for one merchant to *give an order to another to send* him a certain quantity of merchandise. Here it becomes the seller's duty to *appropriate the goods to the contract*. The difficulty is to determine what constitutes the appropriation: to find out at what precise point the seller is no longer at liberty to change his intention. It is plain that his act in simply selecting such goods as he *intends* to send cannot change the property in them. He may lay them aside, and change his mind afterwards: or he may sell them to another purchaser without committing a wrong, because they do not yet belong to the first purchaser, and the seller may set aside other goods for him (*h*). It is a question *of law* whether the selection made by the seller in any case is a mere revocable manifestation of his intention, or a determination of his right conclusive on him (*i*).

Rule in *Heyward's Case* as to determination of election.

The rule on the subject of election is that, when from the nature of an agreement an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may be able to do that first act, and when once he has done that act, the election has been irrevocably determined, but till then he may change his mind (*k*).

(*f*) (1827) 6 B. & C. 388; 5 L. J. K. B. 163; 30 R. R. 363.

(*g*) Blackburn on Sale, 128; 2nd ed. 129.

(*h*) See *per* Lord Penzance in *Dixon* v. *London Small Arms Co.* (1876) 1 A. C. 632, at 653; 46 L. J. Q. B. 617.

(*i*) Blackburn on Sale, 128; 2nd ed. 129.

(*k*) *Heyward's Case* (1595) 2 Co. Rep. 37a; Comyn's Dig. Election. Blackburn on Sale, 128; 2nd ed. 130. See also *per* Lord Blackburn in *Scott* v. *Jardine* (1882) 7 A. C. 345, at 360, 361; 51 L. J. Q. B. 612.

For example, suppose A. sell out of a stack of bricks one thousand to B., who is to send his cart and *fetch* them away. Here B. is to do the first act, and cannot do it till the election is determined. He therefore has authority to make the choice, but he may choose first one part of the stack and then another, and repeatedly change his mind until he has done the act which determines the election, that is, until he has put them in his cart to be fetched away; when that is done his election is determined, and he cannot put back the bricks and take others from the stack. So, if the contract were that A. should *load* the bricks into B.'s carts, A.'s election would be determined as soon as that act was done, and not before.

Point of time at which property passes.

"It follows from this," says Lord Blackburn, "that where from the terms of an executory agreement to sell unspecified goods the vendor is to despatch the goods, or to do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the despatch or other act has commenced, for then an appropriation is made finally and conclusively by the authority conferred in the agreement, and in Lord Coke's language, 'the certainty, and thereby the property, begins by election' (*l*). But however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until he act has actually commenced the appropriation is not final, for it is not made by the authority of the other party, nor binding upon him" (*m*).

These principles of the common law are adopted by the Code. The first clause of Rule 5 of section 18 (*n*) is as follows:

Code, s. 18, Rule 5 (1).

"Rule 5.—(1.) Where there is a contract for the sale of unascertained or future (*o*) goods by description (*p*), and goods of that

(*l*) *Heyward's Case* (1595) 2 Co. Rep. 36a.

(*m*) Blackburn on Sale, 128; 2nd ed. 130. The accuracy of this statement of the law was attested by Erle, J., in *Aldridge* v. *Johnson* (1857) 7 E. & B. 885, 901; 26 L. J. Q. B. 296; 110 R. R. 875.

(*n*) S. 17, quoted *ante*, 351, seems also applicable, if the word "ascertained" is interpreted, not as synonymous with "specific" (which would be redundant, as "specific" is defined in s. 62 (1)), but as meaning "subsequently ascertained." This interpretation was put upon s. 17 by the Lord Justice-Clerk and Lord Trayner in *Carmichael* v. *MacBeth* [1901] 4 Fraser, 345. The reversal of the case on other grounds in the H. L. *sub nom. Reid* v. *MacBeth* [1904] A. C. 223; 73 L. J. P. C. 57, *post*, 415, does not seem to affect the expression of this opinion. See s. 52.

(*o*) Defined in ss. 5 (1) and 62 (1) as "goods to be manufactured or acquired by the seller after the making of the contract of sale."

(*p*) As the goods are *ex hypothesi* unascertained, the word "description" seems to refer to goods of a certain class or kind. "Description" as applied to specific goods may have a wider meaning. See *post*, 699, *et seqq.*

description and in a deliverable state (*q*) are unconditionally (*r*) appropriated to the contract, either by the seller (*s*) with the assent of the buyer (*t*), or by the buyer with the assent of the seller, the property (*u*) in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

Review of the authorities.

A review of the authorities will show the subtle distinctions to which this subject gives rise, and the infinite diversity of circumstances under which its application becomes necessary in commercial dealings. The considerations that govern it are rendered still more complex when the seller, although appropriating the goods to the contract by despatching them, still retains control (*x*) by taking the bills of lading or other documents of title in his own name, in order to secure himself against loss in the event of the buyer's insolvency or refusal to pay. The decisions in cases where the seller, although appropriating the goods, has reserved expressly or by implication the property in them, will be separately examined (*y*).

Rohde v. *Thwaites* (1827).

In *Rohde* v. *Thwaites* (*z*), the appropriation by the seller was subsequently assented to by the buyer. The buyer bought twenty hogsheads of sugar out of a lot of sugar in bulk belonging to the seller. Four hogsheads were filled and delivered. Sixteen other hogsheads were then filled up and appropriated by the seller, who gave notice to the buyer to take them away which the latter promised to do. *Held*, that this was an implied subsequent assent to the appropriation of the sixteen hogsheads; that the contract was thereby converted into a sale, and the property passed.

Pignataro v. *Gilroy* (1919).

In *Pignataro* v. *Gilroy* (*a*), the plaintiff on February 12 bought of the defendant 140 bags of rice to be delivered in 14 days. Of these 15 were to be delivered at the defendant's place of business. On the 27th the plaintiff sent a cheque for all the rice, and asked for a delivery order. On the 28th the defendant sent a delivery order for 125 bags, and wrote that the 15 were ready for delivery at his premises. The plaintiff delayed till March 15, and in the meantime the rice

(*q*) Defined in s. 62 (4) as "in such a state that the buyer would under the contract be bound to take delivery of them."

(*r*) See s. 1 (2). The appropriation may be conditional: s. 19 (1). For specific instances, see s. 19 (2) and (3), *post*, 420, 440.

(*s*) "Seller" includes one who agrees to sell: s. 62 (1).

(*t*) "Buyer" includes one who agrees to buy: s. 62 (1).

(*u*) *I.e.*, the general property: s. 62 (1).

(*x*) *I.e.*, by reserving the "right of disposal": see s. 19, *ante*, 355.

(*y*) See Chapter VI., *post*, 419.

(*z*) 6 B. & C. 388; 5 L. J. K. B. 163; 30 R. R. 363.

(*a*) [1919] 1 K. B. 459.

was stolen. *Held*, without deciding whether the plaintiff's request for a delivery order was an authority to the seller to appropriate, and on assent thereto, that the buyer had by his conduct subsequently assented to the seller's appropriation. Had he, in answer to the defendant's letter of the 25th, said he would remove the rice, the case would have been identical with *Rohde* v. *Thwaites*, and that the plaintiff's conduct was tantamount to an assent.

Alexander v. *Gardner* (1835).

In *Alexander* v. *Gardner* (*b*), the contract was as follows: "Oct. 11, 1833, 200 firkins Murphy & Co.'s Sligo butter at 71s. 6d. per cwt. free on board; payment, bill at two months from the date of landing; to be shipped this month." On the 11th of November the plaintiff, the seller, received from Murphy an invoice and bill of lading for these butters, which had not been shipped till the 6th of November. The defendant waived the delay, and consented to retain the invoice and bill of lading, which described the butter, the weights and marks of the casks, &c., and which had been delivered to them on the 12th. The butter was afterwards lost by shipwreck. *Held*, that the subsequent appropriation was complete by mutual assent: that the property had passed, and the buyer must suffer the loss.

Sparkes v. *Marshall* (1836).

The same principle governed *Sparkes* v. *Marshall* (*c*). Bamford, a corn-merchant, sold to plaintiff "500 to 700 barrels of prepared black oats, at 11s. 9d. per barrel, to be shipped by Thomas John and Son, of Youghal." The oats were to be delivered at Portsmouth. Some days afterwards Bamford informed plaintiff that Messrs. John and Son had engaged "room in the schooner *Gibraltar* Packet of Dartmouth to take about 600 barrels of black oats on your account." The plaintiff next day ordered insurance, "£400 on oats per the *Gibraltar* Packet of Dartmouth, &c." In this action against the underwriters it was contended by them that the property had not passed, but the Court held the contrary. Tindal, C.J., said that Bamford's letter to the plaintiff "was an unequivocal appropriation of the oats on board the *Gibraltar* Packet," and "this appropriation is assented to and adopted by the plaintiff, who, on the following day, gives

(*b*) 1 Bing. N. C. 671; 4 L. J. (N. S.) C. P. 223; 41 R. R. 651, decided directly on the authority of *Rohde* v. *Thwaites*, *supra*, and *Fragano* v. *Long* (1825) 4 B. & C. 219; 3 L. J. K. B. 177; 28 R. R. 226, *post*, 394. See also *Wilkins* v. *Bromhead* (1844) 6 M. & G. 963; 13 L. J. (N. S.) C. P. 74; S. C., 7 Scott, N. R. 921.

(*c*) 2 Bing. N. C. 761; 5 L. J. (N. S.) C. P. 286; 42 R. R. 725.

instructions to his agent in London to effect the policy on oats per *Gibraltar* Packet."

Appropriation by mistake.

Campbell v. *The Mersey Docks* (1863).

In 1863, *Campbell* v. *The Mersey Docks* (*d*), was decided in the Common Pleas. A cargo of five hundred bales of cotton, ex *Bosphorus*, arrived in the defendants' docks in September, 1862. The plaintiff was the broker for them, and had himself bought two hundred and fifty bales, and sold the remainder to other parties. All the cargo had one mark, but the numbers were only affixed by the defendants when the bales were landed and weighed. On the 13th of September, a certificate or warehouse warrant was sent to the plaintiff for two hundred and fifty bales, described as being numbered from 1 to 250, "entered by J. P. Campbell, on the 10th of September, 1862, rent payable from the 15th of September." The plaintiff thereupon paid for the two hundred and fifty bales, getting the warrant endorsed to him with a delivery order, "for the above-mentioned goods," dated the 15th of September. On the 7th of October, the plaintiff resold the cotton, and sent the warrant, endorsed by him, with a delivery order for the cotton therein mentioned. The buyer repudiated the contract, on the ground that the cotton was not equal to the samples. The plaintiff then demanded back the warrant, and was told by the defendants, for the first time, that two hundred of the bales numbered from 1 to 250 had been inadvertently delivered on the 11th and 13th of September to other persons. They offered him a fresh warrant for other numbers. He declined, and brought trover for the value of the two hundred and fifty bales. On the trial, the defendants insisted that the appropriation by the Company of that number out of the larger number, was not sufficient to vest the property in those specific bales in the plaintiff, without his assent, as from the 10th of September, and Keating, J., sustained this view, it being argued on the other side that no subsequent assent was necessary. One of the jury then asked if the plaintiff's indorsement of the warrant (on the re-sale) did not amount to such assent, and the learned Judge said, it was not conclusive, but that the Company might show that the appropriation was a mistake on the part of one of their clerks. The verdict was for the defendants, and the Court refused a new trial. Erle, C.J., with reference to the question whether the defendants' acts were intended as an appropriation, said: "There certainly was some evidence of appropriation, and the question

(*d*) 14 C. B. (N. S.) 412; 13 R. R. 752.

left to the jury upon that was, whether the evidence of that appropriation did not arise from a mistake on the part of the Company's clerk. The learned Judge is not dissatisfied with the finding of the jury upon that question." Willes, J., also said: "The real question was whether the appropriation of Nos. 1 to 250 was not a mistake. The jury found in substance that it was. No property in the goods, therefore, ever vested in the plaintiff" (*e*).

This case was a decision that the sellers could show that the acts relied upon as an appropriation *by them* were done under a mistake, and so were ineffectual. It therefore became unnecessary to decide whether or not the buyers had assented thereto. But both the learned Judges expressed an extra-judicial opinion upon this point, confessedly "not material." Erle, C.J., said: "It has been established by a long series of cases, of which it will be enough to refer to *Hanson* v. *Meyer* (*f*), *Rugg* v. *Minett* (*g*), and *Rohde* v. *Thwaites* (*h*), that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to both by vendor and vendee. Nothing passes until there is an assent, expressed or implied, on the part of the vendee." Willes, J., assented to this statement of the law, and said: "Perhaps the case of *Godts* v. *Rose* (*i*), is even more in point to show that there must not only be an appropriation, but an appropriation assented to by the vendee. The assent of the vendee may be given prior to the appropriation by the vendor; it may be either express or implied, and it may be given by an agent of the party, by the warehouseman or wharfinger, for instance."

Observations on *dictâ*.

Care must be taken not to misconceive the true sense of these *dicta*. They do not mean that a *subsequent* assent by the buyer to the appropriation made by the seller is always necessary (*k*). Willes, J., states this plainly, and Erle, C.J., says that there must be an assent of the buyer express or implied. The assent of the buyer is implied, as shown in *Aldridge* v. *Johnson* (*l*), and in several of the cases already quoted, where by the terms of the contract the seller is vested

Buyer's subsequent assent not necessary where seller has authority to appropriate.

(*e*) As to mistake, see also *R.* v. *Middleton* (1873) L. R. 2 C. C. 38, at 45; 42 L. J. (N. S.) M. C. 73

(*f*) (1805) 6 East, 614; 8 R. R. 572.

(*g*) (1809) 11 East, 210; 10 R. R. 475.

(*h*) (1827) 6 B. & C. 688; 5 L. J. K. B. 163; 30 R. R. 363.

(*i*) (1854) 17 C. B. 229; 25 L. J. C. P. 61; 104 R. R. 668, *post*, 393.

(*k*) See s. 18, Rule 5 (1), *ante*, 385.

(*l*) *Post*, 390.

with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do till an appropriation was made.

Harvey v. *Harris* (1873).

A common mistake as to the identity of the goods appropriated is, of course, ineffectual. Thus, where a buyer bought a quantity of goods at auction under the denomination of class 2, and certain packages were subsequently appropriated by both parties as the buyer's purchase, whereas they contained, unknown to the parties, goods of class 1, it has been held that no property passed to the buyer (*m*).

Denny v. *Skelton* (1916).

But where a common intention to appropriate exists, a mistake by the agent receiving the goods as to the particular buyer for whom they are delivered is immaterial. Thus where each buyer of 500 quarters of oats out of a cargo sent the same lighterman to receive the parcels, and the lighterman intended to take delivery for S. and D. respectively, whereas the shipping clerk delivered on behalf of D. and S. respectively, and the parcel which the seller intended to deliver to S. was lost, it was held that, as both D. and the seller intended the parcel received by the lighterman for S. to be appropriated to D., D. was entitled to it (*n*).

Aldridge v. *Johnson* (1857).

In *Aldridge* v. *Johnson* (*o*), in 1857, the plaintiff agreed to take from one Knight one hundred quarters of barley out of the bulk, which he had inspected and approved, in Knight's granary at £2 3s. a quarter, in exchange for thirty-two bullocks, at £6 apiece. The difference to be paid to Knight in cash. The bullocks were delivered. The plaintiff was to send his own sacks, which *Knight was to fill*, to take to the railway, and to place upon trucks free of charge. Each quarter of barley would fill two sacks, and the plaintiff sent two hundred sacks, some of them with his name marked on them, and Knight filled one hundred and fifty-five sacks, leaving in the bulk more than enough to fill the other forty-five, but Knight could not succeed in obtaining trucks. The plaintiff requested that the one hundred and fifty-five sacks should be sent to him. He afterwards complained to Knight of the delay, and was assured that the barley would be put on the rail that day, but this was not done; and Knight finding

(*m*) *Harvey* v. *Harris*, 112 Mass. 32.

(*n*) *Denny* v. *Skelton* (1916) 115 L. T. 305.

(*o*) 26 L. J. Q. B. 296; 7 E. & B. 885; 110 R. R. 875. Foll. by the Ex. in *Langton* v. *Higgins* (1859) 4 H. & N. 402; 28 L. J. Ex. 252; 118 R. R. 515, set out *ante*, 157. Both cases were approved by Lord O'Hagan in *Anderson* v. *Morice* (1876) 1 A. C. 713, at 740; 46 L. J. C. P. 11, *post*, 457.

himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again.

The action was detinue and trover, against the assignees of Knight for the barley and the sacks. *Held*, that the property in the barley in the one hundred and fifty-five sacks, had passed, but not in the barley which had not been filled into the other forty-five sacks. Campbell, C.J., said: "As soon as each sack was filled with barley, *eo instanti* the property in the barley in the sacks vested in the plaintiff. I conceive there was here an *à priori* assent; not only was there a sale of barley, but it was a sale of part of a specific bulk, which the plaintiff had seen, and he sends his sacks to be filled out of that bulk, and out of that only could the vendee's sacks be filled. No subsequent assent was necessary, if the sacks were properly filled." His Lordship then showed that there was also a subsequent assent, by the order that the sacks should be sent on, and added: "Nothing whatever remained to be done by the vendor, for he had actually appropriated a portion of the bulk to the vendee." Erle, J., said (*p*): "Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. Here it is vested in the vendor only, the bankrupt. When he had done the outward act which showed which part was to be the vendee's property, his election was made and the property passed. That might be shown by sending the goods by the railway; and in such case the property would not pass till the goods were despatched. But it might also be shown by other acts. Here was an ascertained bulk, of which the plaintiff agreed to buy about half. It was left to the bankrupt to decide what portion should be delivered under that contract. As soon as he does that his election has been indicated; the decisive act was *putting the portion into the sacks*. If it were necessary to rest the decision on the assent of the vendee in addition to this, I am of opinion that there is abundant evidence of such assent, for the vendee demanded over and over again the portion which had been put into the sacks."

Jenner v. *Smith* (1869).

In *Jenner* v. *Smith* (*q*), the sale was made by sample, and was of two pockets of hops out of three that were lying at a specified warehouse at £7 15s. a cwt. The buyer requested that the two pockets should not be sent till he wrote for them. Shortly afterwards the seller instructed the warehouseman to

(*p*) 7 E. & B. 885 at 901; 26 L. J. Q. B. 296; 110 R. R. 675.
(*q*) L. R. 4 C. P. 270.

set apart two out of the three pockets for the buyer, and the warehouseman thereupon placed on two of them a "wait-order card," that is a card on which was written, "to wait orders," and the name of the buyer: but no alteration was made in the warehouseman's books, and the seller remained liable for the storage. The seller then sent an invoice with the numbers and weights to the buyer of these two pockets, with a note at the foot: "The two pockets are lying to your order." In reply the buyer repudiated the whole transaction. *Held*, distinguishing *Aldridge* v. *Johnson*, that the property had not passed, because the buyer had not made the seller his agent for appropriating the goods to the contract, not having abandoned his right of comparing the bulk with the sample, or of verifying the weight. There was neither previous authority nor subsequent assent to the appropriation.

The reason assigned for the decision that the buyer had not previously given the seller authority to appropriate, viz., *because* he had not waived his right of comparing the bulk with the sample or of verifying the weight, must not be regarded as a general rule, for a buyer, who has given such an authority, may, nevertheless, subsequently reject the goods if not according to contract, the seller being bound, in order to make an appropriation binding on the buyer, to execute his authority with respect to goods that conform to the contract (*r*). But the fact that the bulk had not been inspected was treated as *evidence* to show that the buyer had given no previous authority to appropriate.

Noblett v. *Hopkinson* (1905).

In *Noblett* v. *Hopkinson* (*s*), two men went to a public-house on Saturday, and asked for half a gallon of beer to be delivered on Sunday. They paid for the liquor, which was drawn and put in a bottle, which was corked and put on the counter, whence it was taken to a stable within the curtilage. It was afterwards delivered on the Sunday. *Held*, that there was not sufficient evidence of any previous assent by the buyers to the appropriation of the beer, so as to constitute a sale on Saturday. What the seller did was on his own responsibility, and not as agent for the buyers. If the bottle had been broken before delivery the seller must have supplied other beer.

The appropriation by the seller may be conditional (*t*).

(*r*) See on this *post*, 400.

(*s*) [1905] 2 K. B. 214; 74 L. J. K. B. 544. See also *Pletts* v. *Campbell* [1895] 2 Q. B. 229; 64 L. J. M. C. 225. These two cases were decided under the Licensing Acts, but well illustrate the Code.

(*t*) Code, s. 18, Rule 5 (1), *ante*, 385; 19 (1), *ante*, 355.

In *Godts* v. *Rose* (*u*), in 1854, there was a conditional (*t*) appropriation, and the buyer did not comply with the condition. The sale was of five tons of oil, "to be free delivered and paid for in fourteen days." The plaintiff, the seller, sent to his wharfinger an order to transfer eleven specified pipes to the buyer, and took the wharfinger's acknowledgment, addressed to the buyer, that these eleven pipes were transferred to the buyer's name. The plaintiff then sent this acknowledgment, with an invoice, to the buyer by a clerk, who asked for a cheque in payment. This was refused, on the ground that payment was only to be made in fourteen days. The clerk then demanded that the wharfinger's acknowledgment should be returned, and this was refused. The buyer then sent immediately to the wharfinger, and got possession of part of the oil, but before the delivery of the rest, the seller countermanded his order on the wharfinger. The latter, however, delivered the whole to the buyer, whom the seller then sued in trover. All the Judges were of opinion that the property had not passed, because the order for its transfer was conditional on payment, the jury having found as a fact that the plaintiff's clerk did not intend to part with the oil or the transfer order without the cheque, and that he said so at the time.

Conditional appropriation.

Godts v. *Rose* (1854).

With regard to appropriation by delivery, the second subsection of Rule 5 of section 18 provides (*x*):

"(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (*y*) (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal (*z*), he is deemed to have unconditionally appropriated the goods to the contract."

Code, s. 18, Rule 5 (2).

Appropriation by delivery.

Instances of delivery to the buyer are *Greaves* v. *Hepke* (*a*), *Ogle* v. *Atkinson* (*b*), hereafter discussed, and *Studdy* v. *Sanders* (*c*).

With respect to delivery to a carrier, in 1803, in the case of *Dutton* v. *Solomonson* (*d*), it was treated as already settled

Delivery to carrier.

Dutton v. *Solomonson* (1803).

(*u*) 17 C. B. 229, and 25 L. J. C. P. 61; 104 R. R. 668.
(*x*) Subject to the covering words, "unless a different intention appears."
(*y*) This is a Scotch legal term, corresponding to bailee.
(*z*) See for one instance of such a reservation, s. 19 (2), and Chapter VI., *post*, 419.
(*a*) (1818) 2 B. & A. 329, n. (*a*); 20 R. R. 381; *ante*, 361.
(*b*) (1814) 5 Taunt. 759; 15 R. R. 647, *post*, 433.
(*c*) (1816) 5 B. & C. 628.
(*d*) 3 B. & P. 582; 7 R. R. 833, *per* Lord Alvanley, C.J.; and see *Cork Distilleries Co.* v. *Great Southern, &c. Ry. Co.* (1874) L. R. 7 H. L. 269; and *Johnson* v. *Lancashire and Y. Ry. Co.* (1878) 3 C. P. D. 499.

law that where a seller delivers goods to a carrier by order of the purchaser, the appropriation is determined; the delivery to the carrier is a delivery to the buyer, and the property vests immediately. And where the intention finally to appropriate the goods is clear, and the carrier assents, it is immaterial by what documents the consignment is effected (*e*).

The rule, however, applies only where the carrier is, as he generally is, the buyer's agent to take delivery. If the facts show, as, for example, where the seller exercises a right of disposal (*f*), or where he agrees to deliver the goods at their destination (*g*), that the carrier is the seller's agent, delivery is not a final appropriation. In such cases under the Code "a different intention appears."

Fragano v. *Long* (1825).

In 1825, in *Fragano* v. *Long* (*h*), the plaintiff sent an order from Naples to M. and Sons at Birmingham, for merchandise "*to be despatched* on insurance being effected. Terms to be three months' credit *from the time of arrival*." The goods were sent from Birmingham, marked with the plaintiff's name, to the agents of the sellers in Liverpool, with orders to ship them to the plaintiff. Insurance was made in the plaintiff's name. The goods were injured by the carrier while loading them, and the action was assumpsit against him. It was contended by the defendant that the property had not passed to the plaintiff, because the vessel's receipt expressed that the goods were received from the Liverpool shippers, the agents of the sellers, and they would therefore have been entitled to the bill of lading. But the Court held that the Liverpool shippers were the agents of the owner of the goods in shipping them, and that, in spite of the provision for payment after arrival, (which applied only if the goods arrived,) the property had passed to the plaintiff from the time the goods left the seller's warehouse. Holroyd, J., said the principle was that "when goods are to be delivered at a distance from the vendor, *and no charge is made by him for the carriage*, they become the property of the buyer as soon as they are sent off."

Where seller pays for the carriage.

The words above printed in italics suggest that where the seller pays the charges it is presumed that he retains the property in the goods. But this fact is not decisive on the

(*e*) *Per* Parke, B., in *Bryans* v. *Nix* (1839) 4 M. & W. 775 at 781; 8 L. J. (N. S.) Ex. 137; 51 R. R. 819.

(*f*) Under s. 19 (1), *ante*, 355.

(*g*) *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* [1898] A. C. 200; 67 L. J. Ch. 141.

(*h*) 4 B. & C. 219; 3 L. J. K. B. 177; 28 R. R. 226.

question in whom the property is vested, though it is to be taken into consideration (*i*).

Bryans v. *Nix* (1839).

In *Bryans* v. *Nix* (*k*), one Tempany, in Longford, was in the habit of consigning grain to the plaintiffs at Liverpool, as his factors for sale, and from time to time drawing upon them against such consignments. On the 1st of February Tempany drew a bill of exchange on the plaintiffs, against two cargoes of oats, *per* boats Nos. 604 and 54, both hired by Tempany, represented by two boat receipts or bills of lading, whereby the masters of the boats acknowledged to have received the oats on board, deliverable in Dublin to the plaintiffs' agents. The plaintiffs received, on the 4th of February, a letter from Tempany, dated the 2nd, containing these two boat receipts for 480 and 530 barrels respectively, dated the 31st of January, and the bill of exchange, and they thereupon accepted and returned the bill of exchange which Tempany stated in the letter to be drawn *against these oats*. In point of fact, boat No. 604 had received its full cargo, but the loading of boat 54 was only begun on the 1st of February, and on the 6th it had received only about 400 barrels out of the 530 barrels. On that day, the 6th, Tempany, pressed by the defendant, to whom he was largely indebted, gave him an order for both the boat-loads, addressed to Tempany's agent in Dublin, and the latter on the 8th accepted the order and agreed to forward the cargoes to the defendant in London. The loading of boat No. 54 was completed on the 9th of February. The defendant obtained possession of the oats in Dublin, and the plaintiffs brought trover on his refusal to deliver them. After elaborate argument and time for advisement, Parke, B., delivered the judgment of the Exchequer of Pleas, holding, that the property in the cargo No. 604 had vested in the plaintiffs, but not that in the cargo No. 54.

In relation to the first cargo, his Lordship said: "The true question here is, what is the meaning and effect of the two documents . . . coupled with the letter from Tempany of the 2nd of February, followed by the acceptance by the plaintiffs of Tempany's draft? It seems to us to be clearly this,—that Tempany agrees that the oats therein specified shall be held from that time by the boatmasters for the plaintiffs, in their own right, provided they accept the bill,

(*i*) See the elaborate judgment of Lord Cottenham in *Dunlop* v. *Lambert* (1838) 6 Cl. & F. 600, at 620, 621, 626, 627; 49 R. R. 143; *King* v. *Meredith* (1811) 2 Camp. 639 (property passed: seller paying freight); *Wheeler* v. *Pearson* (1857) 5 W. R. 227 (no property passed till delivery at destination).

(*k*) 4 M. & W. 775; 8 L. J. (N. S.) Ex. 137; 51 R. R. 819.

Bryans v. *Nix* explained.

as a security for its payment,—that the masters agree so to hold them, and that by the plaintiffs' assent and acceptance of the bill the conditional agreement becomes absolute. . . . In our opinion, therefore, the plaintiffs had a complete title to the cargo of the boat 604, at least on the 7th of February when they complied with the condition by accepting the bill: and before the 7th no other title to the oats intervened; for the order to deliver them to Walker (*l*), given on the 6th, was clearly executory only."

In relation to the cargo of No. 54, however, the ground was that there were no specific chattels appropriated to it. The reasoning on this part of the case does not seem at first sight reconcileable with *Aldridge* v. *Johnson* (*m*), so far as regards the 400 barrels that had actually been put on board, destined for the plaintiffs, *before* Tempany gave an order for them in favour of the defendant. The learned Baron said: "At the time of the agreement, proved by the bill of lading or boat receipt of the 31st January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board, and consequently no *specific chattels* which were held for them. . . . the master's receipt no more attached to them than to any other quantity of oats belonging to Tempany. If, indeed, *after* the 31st of January, these oats so prepared, or any other like quantity, had been put on board to the amount of 530 barrels, or less (*n*), *for the purpose* of fulfilling the contract, and received by the master *as such*, before any new title to these oats had been acquired by a third person, we should have probably held that the property in these oats passed to the plaintiffs. . . . But before the complete quantity of 530 barrels was shipped, and when a small quantity of oats only were loaded (*o*), and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant, to put on board for him a full cargo for No. 54, by way of satisfaction for the debt due to him. . . . Until the oats were appropriated by some new act, both contracts were executory: on the 9th this appropriation took place by the boat receipt

(*l*) The defendant's agent, who received on the 6th from Miles Tempany the order on Tempany's agent at Dublin who did not attorn to the defendant till the 8th.

(*m*) *Ante*, 390.

(*n*) As to these two words, see remarks, *post*, 397.

(*o*) But the reporter's statement, at 778, is that on the 6th of February, when defendant's agent first pressed Tempany for security, "boat 54 was still in the canal harbour at Longford, partly loaded, the loading having begun on the 1st of February, and *about* 400 *barrels* being then on board.

for the 530 barrels *then on board*, which was signed by the master, at the request of Tempany, whereby the master was constituted the agent of the defendant to hold these goods; and this was the first act by which *these oats* were specifically appropriated to any one."

The learned Author finds a difficulty in receiving this decision as satisfactory, chiefly having regard to the case of *Aldridge* v. *Johnson* (*p*), and the finding of the jury "that at the time the receipts were given the cargo for boat 54 was specially designated, although the loading was not complete." But this finding may have meant no more than that Tempany *intended* to ship the oats for the plaintiffs (*q*), and had not finally appropriated what he shipped. And it is submitted that the contract was, as in *Anderson* v. *Morice* (*r*), a contract for boat-loads or cargoes, and not for a mere quantity of oats sufficient to load the boats (*s*). Against this interpretation is the *dictum* of the Court that the property might have passed in a less number than 530 barrels; but the Court were probably referring to a smaller number *constituting a boat-load*. It must also be remembered that Tempany, being the hirer of the boats, was delivering during the loading to his own agent (*t*).

Tregelles v. *Sewell* (1862).

In *Tregelles* v. *Sewell* (*u*) the purchaser bought "300 tons Old Bridge rails, at £5 14s. 6d. per ton, *delivered at Harburg*, cost, freight, and insurance: payment by net cash in London, less freight, upon handing bill of lading and policy of insurance. A dock company's weight note, or captain's signature for weight, to be taken by buyers as a voucher for the quantity shipped." *Held*, by all the Judges in the Exchequer, and afterwards in the Exchequer Chamber, that by the true construction of this contract, the words "delivered at Harburg" referred to the *price* of the goods, and not to their delivery; that the contract was to be completed in London, consequently, that the seller was not bound to make delivery of the goods at Harburg, but only to ship them for Harburg at his own

(*p*) (1857) 7 E. & B. 885; 26 L. J. Q. B. 296; 110 R. R. 875, set out *ante*, 390.

(*q*) So suggested by Alderson, J., *arg.*, as reported in 1 H. & H. 480.

(*r*) (1876) 1 A. C. 713; 46 L. J. C. P. 11, set out *post*, 454. See also *Rochester, &c., Co.* v. *Hughes* (1867) 56 Penn. (Am.) 322; and *Hays* v. *Pittsburgh, &c., Packet Co.* (1888) 33 Fed. Rep. 552, both cases where the contract was for complete barge-loads. In the latter case too the barge was the buyer's.

(*s*) *See New Zealand Shipping Co.* v. *Adelaide Mar. Ins. Co.* (1887) 12 A. C. 128, P. C.; 56 L. J. P. C. 19, set out *post*, 457.

(*t*) As in *Anderson* v. *Morice*, *supra*.

(*u*) (1862) 7 H. & N. 574; 126 R. R. 558.

cost, free of any charge against the purchaser, and that the property passed as soon as the seller handed the bill of lading and policy of insurance to the purchaser (*x*).

Ex parte *Pearson* (1868).

In Ex parte *Pearson* (*y*), the buyer Pearson had ordered on the 9th of November, of a manufacturing company at Birmingham, 200 tons of iron *to be delivered at Wednesbury*, and had paid for them. The company was to pay the carriage. The company between the 12th and the 16th loaded on their own trucks 148 tons addressed to the buyer at Wednesbury, and the trucks were moved on to the railway, and, with the exception of a small part which had reached the destination, the iron was in the custody of the railway on the 16th, on which day a winding-up order was made against the company. Cairns, L.J., reversing Stuart, V.-C., decided that on the 16th the sellers, and not the buyer, were the owners of the iron. Cairns, L.J., pointed out that no delivery orders, invoices, or other documents had been sent communicating to the buyer the appropriation; that the iron was in the trucks of the sellers, who were also paying the carriage, and they might have countermanded the delivery.

A rehearing was ordered, and fresh evidence was adduced, namely, invoices sent between the 12th and 16th specifying the various consignments, and a notice on the 16th by the railway company of the arrival of the first small consignment, and a statement that it remained at Pearson's risk. Selwyn, L.J., delivering the judgment of himself and Page Wood, L.J., quoted from the judgments of Parke, B., in *Bryans* v. *Nix* (*z*), and *Wait* v. *Baker* (*a*), and of Holroyd, J., in *Fragano* v. *Long* (*b*), and said: "Before the date of the winding-up order . . . the whole of the iron was in existence, and had been *despatched* by the company *in pursuance of the contract*, and notices specifying the particular parcels of iron so despatched had been sent to the purchaser, and there has never been any question as to the quantity, quality, or description of the goods so despatched. It appears, therefore, so far as the company were concerned, that before the date of the winding-up order, *everything had been done on their part which was necessary to complete the contract.*" The order

(*x*) See also *per Cur. in Crozier Stephens & Co.* v. *Auerbach* [1908] 2 K.B. 162, C. A.
(*y*) 3 Ch. 443; 37 L. J. Ch. 554.
(*z*) (1839) 4 M. & W. at 791; 8 L. J. (N. S.) Ex. 137; 51 R. R. 819.
(*a*) (1848) 2 Ex. 1, at 7; 17 L. J. Ex. 307; 76 R. R. 469.
(*b*) *Ante*, 394.

of Cairns, L.J., was discharged, and the buyer was held to be entitled to the iron.

The Court appear to have disregarded the circumstance that the sellers contracted to *deliver the iron at Wednesbury*, a fact which would ordinarily suspend the passing of the property till delivery there (*c*). Consequently the railway company were the seller's agents, and did not receive the iron on account of the buyer. It is therefore not easy to perceive how the sellers had done "everything on their part which was necessary to complete the contract."

Summary of cases on delivery to carrier.

The rule of law to be gathered from the preceding cases may be thus stated: Delivery to a carrier is *prima facie* an appropriation of the goods, but the seller may contract to deliver them to the buyer at their destination, in which case the property does not pass till such delivery (*d*). The case of *The Calcutta Co.* v. *De Mattos* (*e*) also shows that an intermediate state of things may arise by agreement, viz., an appropriation of the goods by delivery to the carrier, the payment of the price being nevertheless contingent on the arrival of the goods.

Stock v. *Inglis* (1882).

Appropriation of goods in the aggregate to answer several contracts.

In *Stock* v. *Inglis* (*f*), the plaintiff sued on a marine policy on sugar. There had been two separate contracts made with the plaintiff and another purchaser for the sale to them of sugar f.o.b. Hamburg, and the seller had shipped bags of sugar *in the aggregate* to answer both contracts, but had not specifically appropriated the sugar as between the two contracts prior to the loss. Field, J., decided that, as the seller had not appropriated the sugar between the plaintiff's and the other contract, the property had not passed to the plaintiff, and that he had no insurable interest. The decision of the Court of Appeal and that of the House of Lords were in favour of the plaintiff upon the distinct ground of insurable interest, irrespective of the property, the sugar being at his risk, but Lindley, L.J., agreed with Field, J., that no property had passed to the plaintiff. Lord Selborne (*g*), however, seems to have been of opinion that the title of the sellers had been divested by the appropriation of the goods to the aggregate of the two contracts, and that the property had passed to the

(*c*) *Per* Lord Cottenham, C., in *Dunlop* v. *Lambert* (1838) 6 C. & F. 600, at 621; 49 R. R. 143; *per* Lord Herschell in *The Badische Anilin Fabrik* v. *Basle Chemical Works* [1898] A. C. 200, at 207; 67 L. J. Ch. 141.

(*d*) This statement of the law was approved by the C. A. of Manitoba in *Whitman Fish Co.* v. *Winnipeg Fish Co.* (1908) 17 Man. R. 620.

(*e*) (1863) 32 L. J. Q. B. 322; 139 R. R. 752, *post*, 460.

(*f*) 10 App. Cas. 263; 54 L. J. Q. B. 582; 12 Q. B. D. 564; 53 L. J. Q. B. 356, C. A.; 9 Q. B. D. 708; 52 L. J. Q. B. 30.

(*g*) 10 App. Cas. at 267—268; 54 L. J. Q. B. 582.

respective purchasers in an undivided portion of the goods: but this view is, it is submitted, doubtful (*h*).

Seller's election must be in conformity with the contract.

Before leaving this branch of the subject, it is well to notice that the property does not pass even when the seller has the power to elect, unless he exercise it in conformity with the contract.

Like every other authority, the authority to appropriate must be duly pursued, otherwise it is not binding on the other party (*i*). And so Rule 5 (1) of section 18 of the Code, above quoted (*k*), provides that the appropriation shall be of goods "of the description" contracted for, and "in a deliverable state." For example, in *Vigers* v. *Sanderson* (*l*), the plaintiffs had contracted to sell to the defendant two parcels of sawn laths, to be shipped at Wasa for Hull, and to be of particular specified lengths; and it was expressly provided that the *property should pass on shipment*. It was nevertheless held by Bigham, J., that the latter provision only applied to laths of the description contracted for, and the seller not having supplied laths of that description, was unable to recover the price.

Vigers v. *Sanderson* (1901).

Cannot elect more than contract requires and leave buyer to select.

So also the seller cannot send a larger quantity of goods than those ordered, and throw the selection on the purchaser (*m*). Thus, in *Cunliffe* v. *Harrison* (*n*), it was *held* that where an order was given for ten hogsheads of claret, and the seller sent fifteen, the action for goods sold and delivered would not lie against the purchaser (who refused to keep any of the hogsheads), on the ground that no specific hogsheads had been appropriated to the contract, and thus no property had passed. And in *Levy* v. *Green* (*o*), the goods sent in excess of those ordered were articles entirely different, but packed in the same crate: the order being for certain earthenware teapots, dishes, and jugs, to which the plaintiff had added other earthenware articles of various patterns not

Cunliffe v. *Harrison* (1851).

Levy v. *Green* (1859).

(*h*) See *Healy* v. *Howlett & Sons* [1917] 1 K. B. 337, where the appropriation was held to be bad, and where Ridley, J., refers to the criticism in the text.

(*i*) *Borrowman* v. *Free* (1878) 4 Q. B. D. 500; 48 L. J. Q. B. 65, C. A.; *per* Parke, B., in *Wait* v. *Baker* (1848) 2 Ex. 1, at 7; 17 L. J. Ex. 307, 76 R. R. 469.

(*k*) *Ante*, 385.

(*l*) [1901] 1 Q. B. 608; 70 L. J. K. B. 383.

(*m*) Code, s. 30 (2), (3), *post*, 799.

(*n*) 6 Ex. 903; 20 L. J. Ex. 325; 86 R. R. 543. See also *Hart* v. *Mills* (1846) 15 M. & W. 85; 15 L. J. Ex. 200; 71 R. R. 578; *Dixon* v. *Fletcher* (1837) 3 M. & W. 146; 49 R. R. 543; and Code, s. 30 (2).

(*o*) 1 E. & E. 969; 27 L. J. Q. B. 111; 28 L. J. Q. B. 319; 117 R. R. 552; *Tarling* v. *O'Riordan* (1878) 2 L. R. Ir. 82 C. A.; Code, s. 30 (3).

ered. In the Court below, there was an equal division of Judges; but in the Exchequer Chamber, Martin, B., mwell, B., and Watson, B., and Willes, J., and Byles, J., e unanimous in holding with Lord Campbell and Wight-n, J., that the property had not passed, and that the chaser had the right to reject the whole.

n the same principle, if a particular mode of transmission expressly or impliedly prescribed by the contract, as, for mple, delivery to a specified carrier (*p*), or by a particular e, the goods must be delivered to that carrier, or by that e.

Particular mode of transmission prescribed.

hus, it was held by Lord Tenterden at Nisi Prius in *ck* v. *Reddelein* (*q*), where claret of a particular quality been ordered by the plaintiffs, merchants in London, from defendant, a merchant at Lubec, and the defendant, ead of shipping it at Lubec, as was usual, sent it overland Hamburg and there shipped it, and it was, after arrival, d to be unmerchantable, that the risk of the transit from ec to Hamburg rested with the defendant. It being rtain whether the wine had become unmerchantable re or after shipment, it rested with the seller to prove that goods were merchantable when shipped at Hamburg. ere was no delivery to the purchaser," said Lord Tenter- "until the wine was put on board." The seller had the unusual, and therefore unauthorised, course of ng the goods partly overland, and he was bound to show the deterioration had not occurred during the land it.

Ullock v. *Reddelein* (1828).

Gath v. *Lees* (*r*), the defendants agreed to buy from the tiff cotton "to be delivered *at seller's option* in August ptember, 1864, payment within ten days from date of e," and the invoice to be dated from the date of notice e cotton being ready for delivery. The plaintiff after- gave notice to the defendants that the cotton was ready elivery on a certain day in August, and that the invoice be dated from that day. The defendants assented, and rards made a sub-contract for the sale and delivery in st of the cotton. *Held*, that the plaintiff, having exer-

Seller's election to appropriate, when revocable.

Gath v. *Lees* (1865).

Delivery to a carrier must be "in pursuance of the contract": s. 18, 2), *ante*, 393.

Dans. & Ll. 6. See also *Sutro & Co.* v. *Heilbut, Symons & Co.* [1917] 348, C. A.; 86 L. J. K. B. 1226 (goods to be sent by sea; sent partly by nd in *Wheelhouse* v. *Parr* (1886) 141 Mass. 593 (shipment by "next "): *Hills* v. *Lynch* (1864) 26 N. Y. Sup. Ct. 42 (transmission by rail of ship).

3 H. & C. 558; 140 R. R. 606.

.s.

cised his option, was bound to deliver the cotton in August: and that the non-delivery in that month was a good equitable defence to an action against the defendants for not accepting the cotton (*s*). Martin, B., said during the course of the argument: "The seller could not give two notices. When the notice was given, the buyer was bound to be ready with the money, which he might have had difficulty in getting: then is the seller to say: 'I will not deliver the cotton according to my notice, but will put you off until next month.'"

Irregular appropriation unaccepted may be withdrawn within the contract time.

But an appropriation and tender of goods, not in accordance with the contract, and in consequence rejected by the purchaser, is revocable, and the seller may afterwards, within the contract time, appropriate and tender other goods which are according to contract

Borrowman v. *Free* (1878).

In *Borrowman* v. *Free* (*t*), the plaintiffs, the sellers, tendered a cargo of maize which was rejected by the defendants as not being in accordance with the contract, and afterwards, and within the contract time, the plaintiffs tendered a cargo which was in accordance with the contract, and it was held that this second tender was good. *Gath* *Lees* was distinguished by Bramwell, L.J., upon the grou that there the seller's option was exercised in a proper manner, and had been assented to by the buyers; and by Brett, L.J., and Cotton, L.J., on the ground that there the buyers, acting upon the seller's notice, had altered their position for the worse. With reference to that case, Cotton, L.J., said that "a contract had been arrived at which was acceptable to both parties, and it could not be altered without the assent of both parties." Brett, L.J., observed that *Gath* v. *Lees* was no authority for the proposition that the seller could not have withdrawn his offer to deliver in August had the buyer's position remained unchanged.

It is submitted that in *Gath* v. *Lees*, the seller, having duly made and communicated his choice, was bound by it, unless the buyer himself had dissented; and that in *Borrowman* v. *Free*, the buyer's objection would have given the seller a *locus penitentiæ* even if his first tender had been valid (*u*). It remains open for decision whether the buyer can, by

(*s*) It was also a good legal defence: see *per* Cotton, L.J., in *Borrowman* v. *Free* (1879) 4 Q. B. D. 500, at 506, C. A.; 48 L. J. Q. B. 65, at 70.

(*t*) 4 Q. B. D. 500; 48 L. J. Q. B. 65, at 70, C. A. See also *Thornton* v. *Simpson* (1816) 6 Taunt. 556.

(*u*) See the principles of election declared by Lord Blackburn in *Scarf* v. *Jardine* (1882) 7 A. C. 345, at 360—361; 51 L. J. Q. B. 612; and the rule in *Heyward's Case*, stated *ante*, 385.

assenting to an appropriation not in conformity with the contract, render that appropriation irrevocable (*x*). But it is apprehended that an irregular appropriation, being simply an offer of a new contract, can, like any other offer, be accepted (*y*).

When the seller is to manufacture the goods for the buyer the rule is that *prima facie* the property will not pass till the goods are completely made and are appropriated with mutual assent.

Subsequent appropriation of chattel to be manufactured.

The decisions as to subsequent appropriation in cases where the agreement was for the delivery of a chattel to be manufactured, that is to say, an article of the class of "future goods" (*z*), begin in 1803.

In *Mucklow* v. *Mangles* (*a*), Pocock ordered a barge from one Royland, a barge-builder, and advanced him some money on account, and paid more as the work proceeded, to the whole value of the barge. When it was nearly finished, Pocock's name was painted on the stern, but by whom and under what circumstances is not stated. The barge was finished, and seized in execution against Royland two days *afterwards*, but before he had delivered it up to Pocock, and the sheriff's officer delivered it to Pocock under an indemnity. Royland had committed an act of bankruptcy *before* the barge was finished, and the action was trover by his assignees against the sheriff's officer. *Held*, that the property had not passed. Heath, J., saying: "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser of the goods so sold."

Mucklow v. *Mangles* (1803).

In *Bishop* v. *Crawshay* (*b*), it was held by the Queen's Bench, in 1824, that no property passed to the defendant in goods of the value of £167 which he had ordered to be made by a manufacturer in the country, and on account of which he had accepted a bill of exchange for £400, the defendant being in the habit of accepting bills before the delivery of goods

Bishop v. *Crawshay* (1824).

(*x*) *Per* Brett, L.J., 4 Q. B. D. at 505; 48 L. J. Q. B. 65 at 70.

(*y*) See *per* Parke, B., in *Cunliffe* v. *Harrison* (1851) 6 Ex. 903, at 906; 20 L. J. Ex. 325; 86 R. R. 543; *Richardson* v. *Dunn* (1841) 2 Q. B. 218; 10 L. J. (N. S.) Q. B. 282.

(*z*) Code, ss. 5 (1) and 62 (1), *ante*, 147.

(*a*) 1 Taunt. 318; 9 R. R. 784. See also *Wilkins* v. *Bromhead* (1844) 6 M. & G. 963; 13 L. J. (N. S.) C. P. 74; *Carruthers* v. *Payne* (1828) 5 Bing. 270; 7 L. J. C. P. 84; 30 R. R. 592.

(*b*) 3 B & C. 415; 3 L. J. K. B. 65.

ordered. The manufacturer had received the order on the 26th of January, had committed an act of bankruptcy not known to the defendant on the 5th of February, and on the 6th drew the above-mentioned bill of exchange. On the 8th the goods were completed and loaded on barges to be forwarded to the defendant, and a few days afterwards the bill was accepted. On the 15th a commission issued against the bankrupt, by whose assignees the action of trover was brought. Holroyd, J., said: "The bill was not drawn specifically for the price of these goods, and although it was accepted in the confidence that the order given for the goods would be executed, yet so long as that order was not executed, but only in a course of execution, no property in the goods passed to the defendants. . . . The goods were made, but until the money paid was appropriated to these particular goods the defendant could not have maintained trover for them, if they had been even sold to another person."

In other words, it was incumbent on the defendant to show that the drawing and the acceptance of the bill of the 6th was a mutual assent to an appropriation of the goods in their incomplete state.

Atkinson v. *Bell* (1828)

In *Atkinson* v. *Bell* (*c*), already explained, the buyer had ordered the machines; they had been made and packed under his agent's superintendence, and the boxes made ready to be sent, and the seller had written to ask the buyer by what conveyance they were to be sent, but had received no answer, when the seller became bankrupt. His assignees then brought an action against the buyer (who refused to take the goods) for goods *bargained and sold*, this form of action not being maintainable where the property has not passed. *Held*, that the form of action should have been for not accepting the goods the property had not passed, for although the seller *intended* them for the purchaser, his right to revoke that intention still existed, and he might have sold the goods to another, at any time before the buyer assented to the appropriation.

Remarks on this case.

This case was criticised by the learned Author (*d*) on the ground that the approval by Kay of the machines, which had been altered and packed according to his directions, following, as it did, the intimation by the seller that the goods were ready, was an assent by the buyer through his agent Kay of

(*c*) 8 B. & C. 277; 6 L. J. K. B. 258; 32 R. R. 382; *ante*, 177. See also *Oldfield* v. *Lowe* (1829) 9 B. & C. 73; 7 L. J. K. B. 142 (goods ordered of A and completed by B); *Werner* v. *Humphreys* (1841) 2 M. & G. 853 (same).

(*d*) 2nd ed. 286; 4th ed. 360.

the seller's appropriation. But, even on the assumption that the seller's conduct amounted to an appropriation (which the Court thought it did not), yet there was nothing in the case to show that the buyer had made Kay his agent to assent to it. "There could not be any sale," says Littledale, J., "unless there was an assent by the defendants to take the articles. Here there was no assent." And this point of view of the case has been approved (*e*).

Elliott v. *Pybus* (1834).

In *Elliott* v. *Pybus* (*f*), in 1834, a machine was ordered by defendant, no price being agreed upon, and he deposited with plaintiff £4 on account. When completed, he saw it, paid £2 more on account, but made no final settlement. In reply to a demand for £10 19s. 8d., the balance of the account, defendant admitted that the machine was made according to his order, and asked plaintiff to send it to him before it was paid for. The plaintiff refused, and the defendant then complained of the price, and said he would not pay, but subsequently returned, and said he would "endeavour to arrange it if they would give him time." This was held an assent to the appropriation, and a count for goods bargained and sold was maintained.

Bellamy v. *Davey* (1891).

In *Bellamy* v. *Davey* (*g*), the plaintiff had contracted with a company to build and erect on the premises of third persons two tanks, to be "*finished and left ready to test* with water in the usual way," for the price of £765 payable in certain instalments *after* completion and readiness for testing. The plaintiff began to construct the tanks, which were built up of steel plates on a concrete foundation, and resting by their own weight. One of the tanks was nearly completed, but the other only began when the company became insolvent. *Held*, by Romer, J., that the tanks were not fixtures (*h*); that the contract was for the sale and delivery of a complete tank ready for testing, and that till the tank was so completed and delivered up no property passed.

The general rule being then, as above stated (*i*), that the property in an article to be made does not pass until it be

(*e*) By Willes, J., in *Xenos* v. *Wickham* (1867) L. R. 2 H. L. 296, at 316; 36 L. J. C. P. 313.

(*f*) 10 Bing. 512; 3 L. J. (N. S.) C. P. 182; 38 R. R. 532.

(*g*) [1891] 3 Ch. 540; 60 L. J. Ch. 778. See also *Armitage* v. *John Haigh & Sons* (1893) 9 Times L. R. 287, C. A. (spinning machine to be "set up" [or to be accustomed to working]); and *cf. Pritchett* v. *Currie* [1916] 2 Ch. 515, C. A.; 85 L. J. Ch. 753 (sale of component parts of storage battery).

(*h*) See as to the title to chattels affixed to land, *Reynolds* v. *Ashby & Son* [1904] A. C. 466; 73 L. J. K. B. 946.

(*i*) *Ante*, 403.

completed and appropriated with mutual assent on completion, it is nevertheless competent to the parties to agree that the articles may be so appropriated and the property pass *before* completion. These cases will now be considered.

Woods v. *Russell* (1822).

In *Woods* v. *Russell* (*k*), in 1822, Paton, a ship-builder had contracted with defendant to build a ship for him and to complete her in April, 1819; the defendant was to pay for her by four instalments, at specified stages of construction; the ship was measured *with the builder's privity*, while yet unfinished, *in order that defendant might get her registered in his name;* the builder *signed the certificate* necessary for her registry, and the ship was registered in defendant's name on the 26th of June, and he paid the third instalment. On the 30th the builder committed an act of bankruptcy, and on the 2nd of July the ship was taken possession of by the defendant before she was completed. The defendant had also in the previous March appointed a master, who superintended the building, had advertised her for charter in May, and on the 16th of June had chartered her, *with the ship-builder's privity*, for a voyage. In trover by the assignees of the bankrupt, it was held that the property had passed, "because here Paton signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and by that act consented, as it seems to us, that the general property in the ship should be considered *from that time* as being in the defendant."

Mucklow v. *Mangles* (*l*) was distinguished on the ground that the advances in that case were not regulated according to the progress of the work, and the builder could have substituted another barge, and the painting of the buyer's name on it was no more than evidence of a *revocable* intention to appropriate the barge to the buyer.

Clarke v. *Spence* (1836).

In *Clarke* v. *Spence* (*m*), in February, 1832, one Brunton had agreed to build a ship (not the one in question in the action) for the plaintiff, according to certain specifications, under the superintendence of an agent appointed by plaintiff, for £3,250 payable by five instalments at specified stages of construction. In July he agreed to build another vessel, of specified dimensions, for £3,400, to be finished like the

(*k*) 5 B. & Ald. 942; 24 R. R. 621.

(*l*) (1803) 1 Taunt. 318; 9 R. R. 784; *ante*, 403.

(*m*) 4 A. & E. 448; 5 L. J. (N. S.) K. B. 161; 43 R. R. 395. See *Read* v. *Fairbanks* (1853) 13 C. B. 692; 22 L. J. C. P. 206; 93 R. R. 6[illegible] (absolute bill of sale of incomplete ship as security).

previous ship, and "the vessel to be launched in the month of December next, and to be paid for in the same way" as the first vessel, "Mr. Heward (plaintiff's agent) to superintend the building and to be paid £40 for the same." Brunton proceeded to build the vessel, and before his bankruptcy the ship was rammed and timbered, and the first two instalments had become payable, and had been paid accordingly. £200 were also paid by anticipation on account of the third instalment. When Brunton became bankrupt, £1,002 11s. had been paid him on account, and the frame of the vessel was then worth £1,601 13s. 7d.

The case was held under advisement, and Williams, J., delivered the judgment. Much stress had been laid, in argument, on a passage in the opinion delivered by Bayley, J., in *Atkinson* v. *Bell* (*n*), in which he said that "the foundation of the decision in *Woods* v. *Russell* (*o*), was, that as by the contract, given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price, the ship was irrevocably appropriated to the person paying the money; that was a purchase of the specific articles of which the ship was made." In commenting upon this *dictum*, Williams, J., showed that in *Woods* v. *Russell* (*o*), the decision did not turn upon any such point, although there were extra-judicial expressions of Abbott, C.J., strongly tending to that view, and he continued: "If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, *of itself* vests the property in the person who gives the order, the proposition in so general a form may be doubtful. . . . Until the last of the necessary materials be added, the vessel is not complete; the thing contracted for is not in existence; for the contract is for a complete vessel, not for parts of a vessel, and we have not been able to find any authority for saying that whilst the thing contracted for is not in existence as a whole and is incomplete, the general property in such parts of it as are from time to time constructed, shall vest in the purchaser, except the above passage in the case of *Woods* v. *Russell*."

Provision for payment by instalments.

The Court, however, held, that the passage cited from *Woods* v. *Russell*, was "founded on the notion that provision for the payment regulated by particular stages of the work is

(n) (1822) 6 B. & C. 277, at 282; 6 L. J. K. B. 258; 32 R. R. 382.
(o) (1822) 5 B. & A. 942; 24 R. R. 622.

made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that on payment of the first instalment, the general property in so much of the vessel as is then constructed shall vest in the purchaser." The Court deliberately adopted this *dictum* from *Woods* v. *Russell*, as a *rule of construction* by which, in similar ship-building contracts, the parties are held to have by implication evinced *an intention* that the property shall pass, notwithstanding the general rule to the contrary. The law thus established has remained unshaken to the present time (*p*).

Laidler v. *Burlinson* (1837).

The next case was *Laidler* v. *Burlinson* (*q*), in the Exchequer, in 1837. In this case the payments under the contract were not specifically appropriated to particular stages of the work. A ship-builder having a vessel in his yard about one-third completed, a paper was drawn up describing her build and materials, ending with the words, "for the sum of £1,750, and payment as follows, opposite to each respective name." This was signed by James Laing, the ship-builder. Then followed these words: "We, the undersigned, hereby engage to take shares in the before-mentioned vessel, as set opposite to our respective names, and also the mode of payment." This was signed by seven parties at different times, four of whom set down the modes of payment opposite their names, but the other three did not, the plaintiff being one of the latter, and signing, simply "Thomas Laidler, one-fourth." The whole number of shares was not made up till after the ship-builder had committed an act of bankruptcy. The plaintiff proved some payments made on account, and the ship-builder became bankrupt while the vessel was still unfinished. *Held*, that there was nothing in this contract to show an intention to vest the property before the ship was completed. Lord Abinger also said: "There is no occasion to qualify the doctrine laid down in *Woods* v. *Russell* (*r*), or *Clarke* v. *Spence* (*s*). I consider the principle which those cases establish to be, *that a man may purchase a ship as it is in progress of building*, and by the terms employed there, the contract was of that character; a superintendent was appointed, and money paid at particular stages. The Court

(*p*) *See per* Mellish, L.J., in *Ex parte Lambton* (1873) 10 Ch. 405, at 414, 44 L. J. Bkcy. 81; and *per* Lord Bramwell, in *Seath* v. *Moore* (1886) 11 App. Cas. 350, at 385, 55 L. J. P. C. 41.

(*q*) 2 M. & W. 602; 6 L. J. N. S. Ex. 160, 46 R. R. 717.

(*r*) (1822) 5 B. & A. 942; 24 R. R. 621; *ante*, 406.

(*s*) (1826) 4 A. & E. 448; 5 L. J. N. S. K. B. 161, 43 R. R. 395; *ante*, 406.

held that that was evidence of an intention to become the purchaser of the particular ship, and that the payment of the first instalment vested the property in the purchasers. . . . A party may agree to purchase a ship when finished, or as she then stands." Parke, B., said: "If a man bargain for a specific chattel, though it is not delivered, the property passes, and an action lies for the non-delivery, or of trover (*t*). But it is equally clear that a chattel which is to be delivered *in futuro* does not pass *by the contract*. . . . Is it a contract for an article to be finished? In that case the article must be finished before the property vests. . . . It was an entire contract to purchase the ship when finished, and no property passed till then."

Wood v. *Bell* (1856).

In *Wood* v. *Bell* (*u*), in 1856, the plaintiff contracted with Joyce, a ship-builder, for a steamer to be built by the latter for £16,000. The price was payable, £4,000, in four equal parts, on days named in March, April, May, and June; £3,000 on the 10th August, 1854, "providing the vessel is plated and decks laid"; £3,000 on the 10th October, "providing the vessel is ready for trial"; £3,000 on the 10th January, 1855, "providing the vessel is according to contract, and properly completed"; and £3,000 on the 10th March, 1855, or by bill of exchange, dated 10th January. The building was begun in March, and continued till December, 1854, when Joyce became bankrupt. The ship was then on the slip in frame, not decked, and about two-thirds plated. The instalments were paid by the plaintiff in advance. The plaintiff's superintendent supervised the building, objected to materials, and ordered alterations. In July, the plaintiff ordered his name to be punched on the keel, in order to secure the vessel to himself, and this object was known to Joyce, and he consented that this should be done, but it was delayed, because the keel was not sufficiently advanced, till October, and then the *plaintiff's name was*, on a second requisition by him, *punched* by Joyce, on a plate riveted to the keel of the ship. In November the plaintiff urged Joyce to execute an assignment of the ship, but the latter objected on the ground "that he would be thereby signing himself and his creditors out of everything he possessed"; but he admitted that the ship was the plaintiff's property. On these facts the Court of Queen's Bench, and the Exchequer Chamber, on writ of error, held

(*t*) Citing *Langfort* v. *Tiler* (1705) 1 Salk. 113; Shepp. T. 224, 225.
(*u*) 5 E. & B. 772; 25 L. J. Q. B. 148; 103 R. R. 735; and S. C. in Ex. Ch. 6 E. B. 355; 25 L. J. Q. B. 321; 103 R. R. 735.

that the property in the vessel had passed to the plaintiff, Lord Campbell, C.J., in giving the judgment of the Court of Queen's Bench, saying that the terms which made the payments dependent on the vessel's being built to certain specific stages on the days appointed, were "as an indication of intention, substantially the same as if the days had not been fixed, but the payments made to be due expressly when those stages had been reached." The case was determined mainly on the authority of *Woods* v. *Russell* (*x*), and *Clarke* v. *Spence* (*y*), the Court, however, laying particular stress on two facts as of the greatest importance, viz., the punching of the plaintiff's name, and Joyce's admission of the property in the vessel.

Clarkson v. *Stevens* (1882).

In *Clarkson* v. *Stevens* (*z*), one Stevens had agreed to build a steamer for the United States Government. The Government was to appoint an agent to receive and give receipts for all materials delivered on Stevens' premises for the vessel, and on the giving of the receipts the materials were to become the property of the United States, and were to be marked "U. S." Stevens was to execute a mortgage of his building-yard and its contents as security for the performance of his contract, with power for the United States to enter on the premises and sell the vessel. On completion and acceptance the balance of the price was to be paid, and the mortgage surrendered, but before final payment a certificate had to be given signed by nominees of Stevens and the Government respectively that the work had been properly performed. In consideration of the security given by Stevens instalments of the price, not less than $5,000, were to be advanced to him. Stevens died without completing the ship. *Held*, by the Supreme Court of the United States, that the property in the unfinished ship remained in Stevens. The Court, after referring to *Wood* v. *Bell* (*a*), as showing that the question was one of intention, declined to lay down an arbitrary rule that the payment of the instalments, or the examination of the accounts by the employer's agent, vested the property. The instalments were to keep the builder in funds, and the agent could not judge of the *quality* of the work. The marking of the materials as the property of the United

(*x*) (1822) 5 B. & A. 942; 24 R. R. 621; *ante*, 406. See *Anglo-Egyptian Navigation Company* v. *Rennie* (1875) L. R. 10 C. P. 271; 44 L. J. C. P. 130.

(*y*) (1836) 4 A. & E. 448; 5 L. J. (N. S.) K. B. 161; 43 R. R. 395; *ante*, 406.

(*z*) (1882) 106 U. S. 505.

(*a*) *Ante*, 409.

States did not show that they remained the property of the United States when incorporated with the ship, and were probably inserted as a safeguard against their getting into unauthorised hands; moreover, the fact that the *materials* were to be the property of the States was rather an indication that the bulk of the corpus was not intended to pass. Two provisions in the contract were in the opinion of the Court conclusive of the question, namely, that providing for a mortgage, which contemplated the possibility of a final rejection of the ship; and that for an examination of her before final payment was made.

Seath v. *Moore* (1887).

In *Seath* v. *Moore* (*b*), in 1887, the foregoing authorities of *Woods* v. *Russell* (*c*), *Clarke* v. *Spence*, and *Wood* v. *Bell* are fully recognised, and the principle they established is stated in the following terms by Lord Watson (*d*): "Where it appears to be the intention, or in other words the agreement of the parties, to a contract for building a ship, that at a particular stage of its construction the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will *accessione* become his property (*e*). . . . Such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser, or some one on his behalf. I do not think it is indispensable in order to sustain that inference that there shall be a stipulation for payment of an instalment in the original contract, or that the stipulated instalment shall have been actually paid. The absence of these considerations, which are in themselves of great importance, might in my opinion be supplied by other circumstances" (*f*). And Lord Watson says in another passage (*g*):

(*b*) 11 A. C. 350; 55 L. J. P. C. 54. See also *Reid* v. *Macbeth* [1904] A. C. 223; 73 L. J. P. C. 57, *post*, 415.

(*c*) Except as to the rudder and cordage. See on this point, *post*, 414, *et seqq.*

(*d*) 11 A. C. at 380; 55 L. J. P. C. 54.

(*e*) This fact is, however, not inconsistent with a right of rejection if the completed ship is disconform to contract: see *post*, 868.

(*f*) See the principles governing such contracts also stated by Bigelow, C.J., in *Briggs* v. *A Light Boat* (1863) 89 Mass. 287.

(*g*) 11 A. C., at 380; 55 L. J. P. C. 54.

"I see no reason why the principles applicable to the sale of part of a ship should not equally apply to the sale of part of a marine engine, or other *corpus manufactum* in course of construction."

It is a question depending upon the construction of the contract at what stage of the manufacture of an article the property therein is intended to pass, and a question of fact whether that stage has been reached (*h*).

Sir James Laing & Sons v. Barclay Curle & Co. (1907).

In *Sir James Laing & Sons* v. *Barclay, Curle & Co.* (*i*), the respondents contracted to build for an Italian company two steamers according to certain specifications. The contract contained the following clause: "The vessels when completed to have steam trial or trials at sea off the port of Greenock and adjacent coast. . . . Delivery to be deemed completed after the satisfactory official trial provided for as follows: After the steam trial off the coast of Greenock the boats are again to undergo the official trial off the Italian coast." The cost of transportation, trial, coal, etc., was to be borne by the buyers. The clause went on: "The vessels will not be considered as delivered to and finally accepted by the purchasers until the said ships have passed the official trial trip in Genoa, have been approved in Genoa by the Italian emigration authorities, and all conditions of the contract have been fulfilled. On completion of such of the steamers at Greenock upon the terms and conditions aforesaid the builders shall, in exchange for the purchase money due to them up to and including delivery instalment, and for a bank guarantee for the final instalment, hand over to the purchasers or their representative" the usual certificates. "The purchasers are entitled to appoint an expert to superintend the construction of the vessels and the machinery. The steamers shall be at the risk of the builder until they finally leave the Port of Greenock, up to which date the builders shall keep them insured against fire and other risks to an amount equal to the purchase-money paid in advance." The contract then provided for the payment of instalments on the signature of the contract, and at specified stages of the building. After several instalments had been paid, the appellants arrested the ships for a debt due to them from the Italian company. The Court of Session discharged the arrestments on the ground that there was no evidence that the property in the ships, while

(*h*) *Per* Lords Blackburn and Bramwell, 11 A. C., at 370, 385; 55 L. J. P. C. 54.

(*i*) [1908] A. C. 35; 77 L. J. P. C. 33.

unfinished, had passed to the Italian company. On appeal to the House of Lords, with regard to one of the ships, it was argued, according to the opinion of Lord Watson in *Seath* v. *Moore* (*j*), that there was nothing to contradict the presumption that the payment of the instalments, coupled with the provision for inspecting, passed the property in the ship, so far as it was built, to the buyers. But it was held, affirming the Court of Session, that these facts were not conclusive; that the contract was for a completed ship; that the risk lay with the builders until delivery, and that there was no intention to make delivery, or to part with the property until the vessel was completed.

When property passes in materials provided for completing unfinished chattel.

It is necessary now to revert to this series of decisions on another point, namely, the effect of such contracts in passing property in the *materials* provided and the *parts prepared* for executing them, but not yet affixed to the ship or vessel, or other corpus.

Tripp v. *Armitage* (1839).

In *Tripp* v. *Armitage* (*k*), in 1839, there was a contract for building an hotel, and certain sash frames intended for the building were sent to it, examined, and approved by the superintendent, who then sent the frames back to the builder's shop, together with some iron pulleys, belonging to the hotel owners, with directions to fit the pulleys into the sashes. This was done, but before the sashes, with the pulleys affixed, were taken away, the builder became bankrupt. The Court held, that the property in the frames had not passed out of the builder. Lord Abinger put it on this ground: "This is not a contract for the sale and purchase of goods as moveable chattels; it is a contract to make up materials and to fix them, and until they are fixed, by the nature of the contract the property will not pass" (*kk*). His Lordship put as a test, that if the sashes had been destroyed by fire, the builder would have lost them, for the hotel-owners were not bound to pay for anything till put up and fixed. Parke, B., said, also: "In this case there is no contract at all with respect to these particular chattels: it is merely parcel of a larger contract."

Wood v. *Bell* (1856).

In *Wood* v. *Bell* (*l*), steam-engines were designed for the ship, and several parts which had been made so as to fit each other, forming a considerable portion of a pair of steam

(*j*) *Ante*, 411.
(*k*) 4 M. & W. 687; 8 L. J. (N. S.) Ex. 107; 51 R. R. 762.
(*kk*) See *Seath* v. *Moore*, *post*, 414, and *Reid* v. *MacBeth*, 415.
(*l*) 5 E. & B. 772; 6 E. & B. 355; 25 L. J. Q. B. 148, 321; 103 R. R. 735.

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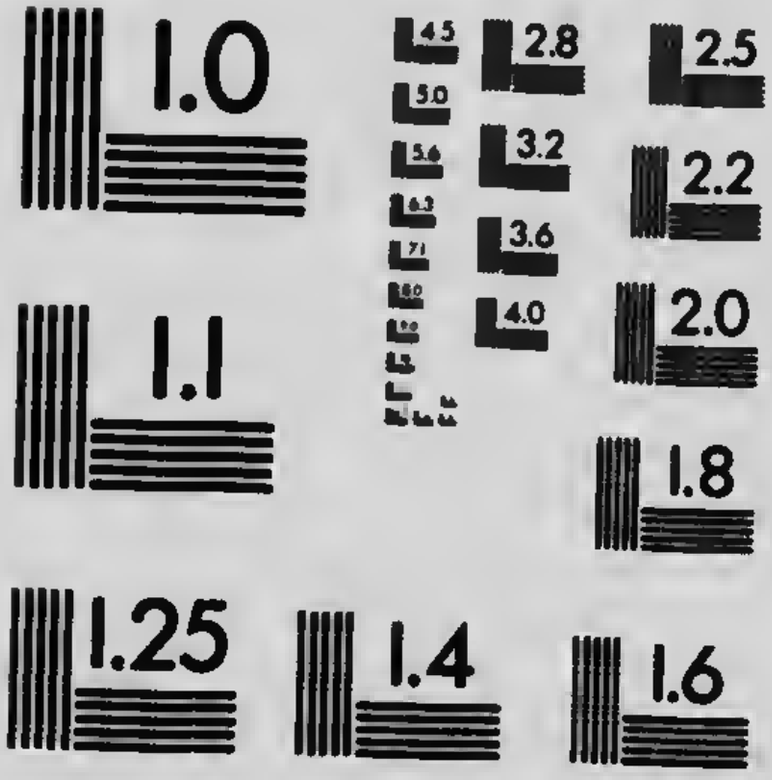

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engines, were spoken of constantly by the builder, before his bankruptcy, as belonging to the "*Brittania*" engines. There was also a quantity of iron plates and iron angles specially made and prepared to be riveted to the ship, lying partly at her wharf and partly elsewhere, as well as other materials in like condition, intended, manufactured and prepared expressly for the ship, but not yet fixed or attached to her. The Queen's Bench, after holding that the property in the ship had passed, simply added: "And if this be so, it was scarcely contended but that the same decision ought to be come to with respect to the engines, plates, irons, and plankings, designed and in course of preparation for her, and intended to be fixed in her. The question as to these last seems to be governed by the decision as to the rudder and cordage in *Woods* v. *Russell*" (*m*). But in the Exchequer Chamber (*n*) the decision on this point was reversed, Jervis, C.J., giving the judgment of the Court. It was held that it did not at all follow because the ship as constructed from time to time became the property of the party paying for her construction, that therefore the materials destined to form a part of the ship also passed by the contract. The Chief Justice said (*o*): "The question is, What is the contract? The contract is for the purchase of a ship, not for the purchase of everything in use for the making of the ship. I agree that those things which have been *fitted to and formed part of the ship* would pass, even though at the moment they were not attached to the vessel. But I do not think that those things which had merely been bought for the ship and *intended for* it would pass to the plaintiff." The other Judges concurred in these principles, which must now be taken to be the settled law on the point under consideration (*p*).

Seath v. *Moore* (1887).

In *Seath* v. *Moore* (*q*), in 1887, the principle was stated by

(*m*) (1822) 5 B. & A. 942; 24 R. R. 621, now overruled.

(*n*) 6 E. & B. 355; 25 L. J. Q. B. 321; 103 R. R. 735, *coram* Jervis, C.J., Pollock, C.B., Alderson, B., and Bramwell, B., and Creswell, J., Crowder, J., and Willes, J.

(*o*) 25 L. J. Q. B. at 324; 103 R. R. 735.

(*p*) See *Baker* v. *Gray* (1856) 17 C. B. 462; 25 L. J. C. P. 161; 104 R. R. 756, where the property was to pass on user; *Brown* v. *Bateman* (1867) L. R. 2 C. P. 272; 36 L. J. C. P. 134; *cf.* also *Anglo-Egyptian Nav. Co.* v. *Rennie* (1875) L. R. 10 C. P. 271; 44 L. J. C. P. 130; *Banbury and Cheltenham Ry. Co.* v. *Daniel* (1884) 54 L. J. Ch. 265, where the property in unfixed materials was to pass on a certificate being given. *Woods* v. *Russell* (1822) 5 B. & A. 942; 24 R. R. 621; *supra*, on this point (*i.e.*, as to rudder and cordage), and *Goss* v. *Quinton* (1842) 3 M. & G. 825; 12 L. J. C. P. 173; 60 R. R. 616, (rudder) were doubted in *Wood* v. *Bell* (1856) 6 E. & B. 355; 25 L. J. Q. B. 324; 102 R. R. 725, In Ex. Ch., and can no longer be supported.

(*q*) 11 App. Cas. 350, at 381; 55 L. J. P. C. 54.

Lord Watson: "Materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as 'sold,' unless they have been affixed to or in a reasonable sense made part of the corpus."

Reid v. *MacBeth* (1904).

In *Reid* v. *MacBeth* (*r*), a case decided under the Code, an agreement was made between Carmichael MacLean & Co. of Greenock, who were called "the builders," and MacBeth and Gray of Glasgow, who were called "the purchasers," whereby the builders agreed to build for the purchasers a vessel and engines of the class 100 A 1 Lloyd's for the price of £34,200, half in cash on delivery, and the balance by the purchasers' acceptances at six months payable in London, but the builders had the option of drawing on the purchasers during construction for a portion of the price at certain stages of the work. Clause 4 of the agreement provided that "the vessel, as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building-yard, workshop, river, or elsewhere, shall *immediately as the same proceeds* become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase money." At the date of the ship-builders' bankruptcy various iron and steel plates intended for the ship were lying at different railway stations at Greenock to their order. These were claimed by their trustee in bankruptcy, and also by the purchasers. The plates had been passed by Lloyd's surveyor, had been marked with the number of the vessel, and with other marks indicating their proposed position in the vessel, and the builders had in writing admitted that they were the property of the purchasers. The Lord Ordinary, Lord Low, held that the words "immediately as the same proceeds" showed that, in order that the property in the plates should pass, they must not only be intended for the ship, but also have been applied in its construction, and become part of its structure. The Court of Session, reversing this decision, held that actual use in the construction of the vessel was not necessary.

In the House of Lords this decision was reversed, and the view of Lord Low upheld, on the authority of *Seath* v.

(*r*) [1904] A. C. 223; 23 L. J. P. C. 57; revg. Ct. of Sess. *sub nom.* *Carmichael & Co.'s Trustees* v. *MacBeth* [1901] 4 Fraser, 345.

Moore (*s*). On the appeal it was contended for the buyers that, as the ship to be built was to be 100 A 1 at Lloyd's, the passing of the plates by Lloyd's surveyor was an appropriation with mutual assent under section 18, rule 5 (1) of the Code, or that the plates, by being passed, had become "specific" under section 17, and that the intention was that the property in them should then pass. It was also contended that the property had passed under clause 4 of the contract when the plates had been sent from the works (*t*). But it was held that the contract was for the sale of the vessel and engines when complete, and not for the sale of the materials, and that the trustee was entitled to the plates. Lord Halsbury, L.C., also said that it was an abuse of language to say that Lloyd's, who merely approved the goodness of the plates, were the buyers' agents to accept them as their property. Lord Davey said that sections 16, 17, and 18, rule 5 (1) of the Code did not apply, as there was no contract for the sale of the materials *separatim*, but only one contract for the sale of the ship. And with reference to the words "as the same proceeds" in clause 4, he said that, whether the words meant as the ship proceeds, or as the construction of the ship proceeds, it was clear that the materials were only to become the property of the purchasers from time to time as progress was made in the construction of the ship, and when the materials became part of her structure (*u*). Lord Robertson (with whom Lord Halsbury agreed) said that clause 4, which did not purport to effect a sale, was intended to give the buyers a security under section 61 (4) of the Code, and that the inclusion of such a clause in a contract for the sale of a ship did not constitute a sale of the materials.

It follows from this decision that the various rules in the Code as to the passing of the property in goods do not apply, in the absence of a contrary intention, unless the materials are contracted for *separatim*, and not merely as part of the larger corpus which is the subject-matter of the contract. The property in them will *primâ facie* pass when the property passes in the larger corpus itself.

The principle governing the transfer of the property in a chattel to be manufactured is also *primâ facie* applicable to cases where a quantity of goods is contracted for as an

(*s*) *Ante*, 414.

(*t*) On the authority of *Reeves* v. *Barlow* (1884) 12 Q. B. D. 436; 53 L. J. Q. B. 192, C.A., *ante*, 151.

(*u*) See *Benney* v. *Clyde Shipbuilding Co.* [1919] 56 Sc. L. R. 258.

undivided whole, as, for instance, a cargo. The property in the goods constituting the cargo will ordinarily not pass until the whole cargo is made up and appropriated on completion. Such cases seem properly to fall under section 18, rule 5 (1) of the Code (*x*), the "goods" in such a case being the entire quantity contracted for. *Bryans* v. *Nix*, already set out (*y*), is, it is conceived, an illustration of such a contract.

Passing of property where an undivided quantity of goods contracted for.

Anderson v. *Morice* (1876).

Thus, in *Anderson* v. *Morice* (*z*), the plaintiff had contracted to buy "the cargo of new crop Rangoon rice per *Sunbeam* . . . payment by seller's draft on purchaser at six months *with documents attached.*" The ship (of which the *sellers* were the charterers) and cargo became before completion of the shipment a total loss. In an action by the plaintiff against the underwriters, it was held by the Exchequer Chamber, reversing the Common Pleas, that the plaintiff had no insurable interest, as the cargo was not at his *risk* until it was complete; and this decision was upheld by the House of Lords, their Lordships being, however, equally divided in opinion. It was not necessary to determine the question of *property*, but the Exchequer Chamber and Lords Chelmsford and Hatherley agreed that the property would not pass till the completion of the cargo, so as to enable the shippers, by getting the shipping documents, to call upon the buyer to accept and pay. Lord Hatherley made the following remarks (*a*) on the position of the buyer: "The property would not pass until that thing was brought into existence which he had bought. Now the thing he had bought was I think confessedly . . . a whole and complete cargo of rice to be shipped by the *Sunbeam*. The vendors could not have sent him half a cargo; or if it had been sent, he might have had the option of saying, I will take it; but he had not bought it. . . . I apprehend that until he had got the thing which was contracted to be sold, namely, a full and complete cargo (*b*), he had not got anything that could possibly vest in him,

(*x*) *Ante*, 385.

(*y*) *Ante*, 395.

(*z*) L. R. 1 A. C. 713; 46 L. J. C. P. 11. set out fully, *post*, 454. See in Amer., *Rochester and Neapolis Oil Co.* v. *Hughey* (1867) 56 Penn. 322: *Sneathen* v. *Grubbs* (1878) 88 Penn. 147; *Hills* v. *Pittsburgh* (1888) 33 Fed. R. 552.

(*a*) At 730. See also *per* Bramwell, B., Pollock, B., and Amphlett, B., in S. C. in Ex. Ch., L. R. 10 C. P. 609, at 622, 623; 44 L. J. C. P. 10, 341.

(*b*) "A boat-load or cargo, described as containing a certain quantity, is as definite, indivisible, and entire, as an animal of a certain weight, strength, or speed": *per* Robertson, C.J., in *Flanagan* v. *Demarest* (1865) 26 N. Y. Super. Ct. 173, at 188.

whatever might be said of the whole cargo when completed . . . before he received the bills of lading and other documents together with the drafts." Lord O'Hagan, on the contrary, was of opinion, on the authority of *Aldridge* v. *Johnson* (*c*), and *Langton* v. *Higgins* (*d*), that the property in such portion of the cargo, as it was shipped, vested in the plaintiff. Lord Selborne was of opinion that the *risk* then vested.

Where, however, goods are contracted for simply as being a certain quantity of goods, the ordinary rule of appropriation will apply, and the property in the portion from time to time despatched or loaded will *primâ facie* pass to the buyer. In such a case the separate instalments are the "goods" contracted for under section 18, rule 5 (1). Instances of such separate appropriations are *Aldridge* v. *Johnson* (*c*) and *Langton* v. *Higgins* (*d*), already noticed, and *The Colonial Insurance Co. of New Zealand* v. *The Adelaide Marine Insurance Co.* (*e*), to be considered hereafter. The latter case shows that this inference may properly be drawn where deliveries are to extend over a period, so that earlier instalments may perhaps be consumed or dealt with before later ones are received. The case also shows that the word "cargo" does not in all cases mean an undivided quantity of goods. The reader should also be reminded that the fact that the property may pass in a portion of the quantity contracted for does not affect the seller's obligation to complete the quantity, or the buyer's right to reject what he has received, if he have not consumed it, where the whole quantity is not made up (*f*)

(*c*) *Ante*, 390.
(*d*) *Ante*, 157.
(*e*) (1866) 12 A. C. 128; 56 L. J. P. C. 19, *post*, 457.
(*f*) See on this, *post* 816, *et seqq*.

CHAPTER VI.

RESERVATION OF THE RIGHT OF DISPOSAL.

Preliminary observations on this subject.

It has already been shown (*a*) that the rules for determining whether the property in goods has passed from seller to buyer, are general rules of *construction* for ascertaining the real intention of the parties, when they have failed to express it. Such rules cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the seller, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation.

The list of cases to be considered shows that the property in goods may vest in the buyer by the transfer to him, during the voyage (*b*), of a bill of lading, made according to the tenor of the bill (*c*), and with the intention of passing the property (*d*). And where the bill of lading is made out in parts, the property, if intended to pass, passes to the first transferee (*e*). But the transfer of such documents as delivery orders, warrants, certificates, does not *per se* pass the property as between seller and buyer (*f*). Possession of the goods obtained thereby will however pass the property in any case where possession of the goods apart from any such document would pass it.

The law governing the right of disposal is now contained

(*a*) *Ante*, 346.

(*b*) The voyage continues so long as the goods are held by the master of the vessel, and until possession has been taken by the proper consignee: *Barber* v. *Meyerstein* (1870) L. R. 4 H. L. 317; 39 L. J. C. P. 187. After that the bill of lading is inoperative: *ibid.*

(*c*) As to the mode of transfer, see the F. A., s. 11, *ante*, 45.

(*d*) *Sewell* v. *Burdick* (1884) 10 A. C. 74; 54 L. J. Q. B. 156. But a transfer is not essential: the passing of the property may be proved otherwise: *Meyer* v. *Sharpe* (1813) 5 Taunt. 74; *per Cur.* in *Fowler* v. *Knoop* (1878) 4 Q. B. D. 299, C. A.; 48 L. J. Q. B. 333; *McKelvie* v. *Wallace* [1919] 2 Ir. R. 250, C. A.

(*e*) *Barber* v. *Meyerstein*, *supra*.

(*f*) *Per* Jessel, M.R., in *Imperial Bank* v. *London, &c., Docks Co.* (1877) 5 Ch. D. 195, at 200, 202; 46 L. J. Ch. 335. As between the seller and a sub-buyer, etc., the property may pass under the Factors Act: see *ante*, 48, *et seq.*

in section 19 of the Code, sub-sections 1 and 2 of which (*g*) are as follows:

Code, s. 19.

Reservation of right of disposal: (1) Generally.

"19.—(1.) Where there is a contract for the sale of specific goods (*h*) or where goods are subsequently appropriated to the contract, the seller (*i*) may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery (*k*) of the goods to the buyer (*l*), or to a carrier or other bailee or custodier (*m*) for the purpose of transmission to the buyer, the property (*n*) in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) By taking bill of lading to seller's order.

"(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal."

The first of these two sub-sections is of general application, and is not confined to cases of sea-carriage. Illustrations of the reservation of the right of disposal in cases which would fall under this clause have already been given (*o*).

The cases which illustrate the reservation of the right of disposal arise chiefly where parties at a distance from each other contract by correspondence, and where the seller wishes to secure himself against the insolvency or default of the buyer. If A. in New York orders goods from B. in Liverpool without sending the money for them, B. may execute the order in one of two modes, without assuming risk. B. may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A. except on payment for the goods. Or B. may draw a bill of exchange for the price of the goods on A., and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods, to be delivered to A. on due payment of the bill of exchange (*p*). Now in both these modes of doing business,

(*g*) Sub-s. 3 is set out *post*, 440.
(*h*) Defined in s. 62 (1), *ante*, n. (*m*), 351.
(*i*) "Seller" includes one who agrees to sell: s. 62 (1).
(*k*) *I.e.*, voluntary transfer of possession: *ibid.*
(*l*) "Buyer" includes one who agrees to buy: *ibid.*
(*m*) A Scottish term for bailee.
(*n*) *I.e.*, the general, not merely a special, property: s. 62 (1).
(*o*) *Bishop* v. *Shillito* (1819) 2 B. & A. 329 a, *ante*, 363; *Loeschman* v. *Williams* (1815) 4 Camp. 181; 16 R. R. 772, *ante*, 364; *Godts* v. *Rose* (1855) 17 C. B. 229; 25 L. J. C. P. 61; 104 R. R. 668, *ante*, 393. The clause itself was also set out, *ante*, 355.
(*p*) This is called "selling the exchange." The seller's power to do so, however, not *primâ facie* a condition precedent to the continuance of the contract: *Comptoir Commercial Anversois* v. *Power, Son & Co.* [1920] 1 K. B. 868. The banker is, by English law, under no liability to the buyer to refund the price paid by the latter if the bill of lading be a forged one, as he does not

it is impossible to infer that B. had the least idea of passing the property to A., at the time of appropriating the goods to the contract. So that, although he may write to A., and specify the packages and marks identifying the goods, and although he may accompany this with an invoice, stating that these specific goods are shipped for A.'s account, and in accordance with A.'s order, making his election final and determinate, the property in the goods will nevertheless remain in B. till the bill of lading has been endorsed and delivered up to A. And a third course is now, under the Code (*q*), available to the seller. He may draw upon the buyer a bill of exchange for the price, and may send it, together with the bill of lading, *direct* to him. In such a case, however, he trusts the buyer. We shall see that in this class of cases it is often a matter of great nicety to determine whether or not the seller's intention was really to reserve a right of disposal.

Cotton, L.J., in *Mirabita* v. *Imperial Ottoman Bank* (1878).

The case upon which section 19 of the Code is principally founded is *Mirabita* v. *The Imperial Ottoman Bank* (*r*), decided in 1878; where the principles of this branch of law are expressed in a very clear and instructive manner by Cotton, L.J. After stating the general rule of appropriation, and showing that shipment may be an appropriation, the learned Lord Justice said: "If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so, not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers (*s*). When the vendor on shipment takes the bill of lading to his own order, he has the power of *absolutely* disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Wait* v. *Baker* (*t*), *Ellershaw* v. *Magniac* (*u*), and *Gabarron* v. *Kreeft* (*x*), (in each of which cases the vendors had dealt with the bills of lading for their own benefit,) the decisions were that the purchaser had no property

warrant or represent to the buyer its genuineness; *secus*, by American law: *Guaranty Trust Co. of N. Y.* v. *A. Hannay & Co.* [1917] 33 T. L. R. 559. *Selig. Leather* v. *Simpson* (1871) 11 Eq. 398; 40 L. J. Ch. 277.

(*q*) S. 19 (3).

(*r*) 3 Ex. D. 164 at 172; 47 L. J. Ex. 418, C. A., set out *post*, 431.

(*s*) S. 19 (1) and (2).

(*t*) (1848) 2 Ex. 1; 17 L. J. Ex. 307; 76 R. R. 469, *post*, 425.

(*u*) (1843) 6 Ex. 570; 86 R. R. 398n. *post*, 425.

(*x*) (1875) L. R. 10 Ex. 274; 44 L. J. Ex. 238, *post*, 429.

in the goods, though he had offered to accept bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order *to secure* the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser (*y*); and so it was decided in *Turner* v. *Trustees of Liverpool Docks* (*z*), *Shepherd* v. *Harrison* (*a*), and *Ogg* v. *Shuter* (*b*). But if the bill of lading has been dealt with *only* to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made . . . and in my opinion, under such circumstances the property does, on payment or tender of the price, pass to the purchaser."

The reference by Cotton, L.J., to "directions" shows that the case contemplated by him, in which the seller secures the contract price, is one in which the seller sends the bill of lading *to his own agent*. The same effect will now follow on the transmission of it to the buyer *direct*.

Lord Sumner's statement of the law where the bill of lading is pledged by seller.

Lord Sumner, in the *Prinz Adalbert* (*d*), thus states the general law where the seller pledges the bill of lading with a banker: "The delivery of an indorsed bill of lading made out to the shipper's order while the goods are afloat is equivalent to delivery of the goods themselves, and is effectual to transfer ownership, if made with that intention. . . . When a shipper takes his draft, not as yet accepted, but accompanied by a bill of lading indorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as drawer, and he further makes the goods which the bill of lading represents security for its payment. If in turn the discounting banker surrenders the bill of lading to the acceptor against

(*y*) Code, s. 19 (3); s. 18, Rule 5 (2).
(*z*) (1851) 6 Ex. 543; 20 L. J. Ex. 393; 86 R. R. 377, *post*, 427.
(*a*) (1869) L. R. 4 Q. B. 196, 493; 38 L. J. Q. B. 105, 177; L. R. 5 H. L. 116; 40 L. J. Q. B. 148, post, 441.
(*b*) (1875) 1 C. P. D. 47; 45 L. J. C. P. 45, C. A.; *post*, 442.
(*c*) *Post*, 440.
(*d*) [1917] A. C. 586, P. C.; 86 L. J. P. C. 165, *post*, 432.

his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the [illegible] of the shipper and drawer. Possession of the indorse[illegible]aning enables the acceptor to get possession of the goo[illegible]n the ship's arrival. If the shipper, being the owner of the goods, authorises and directs the banker, to whom he is himself liable, and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when that is done, but intends also to remain the owner until this has been done . . . the general law infers under these circumstances that the ownership in the goods is transferred when the draft drawn against them is accepted." He also points out that "particular arrangements made between shipper and consignee may modify or rebut these inferences."

It is proposed to discuss the cases under three heads:

Review of cases under three heads.

I. Where the seller reserves the right of disposal (*e*);
II. Where the seller's intention to make such reservation is rebutted by the circumstances of the case (*f*);
III. Where a bill of exchange accompanies the bill of lading (*g*).

Retention by seller of mate's receipt.

Craven v. *Ryder* (1816).

In *Craven* v. *Ryder* (*h*), the plaintiffs agreed to sell to French and Co. twenty-four hogsheads of sugar, free on board a British ship, two months being the usual credit. They sent it by a lighter, taking a rece[illegible] from the ship "for and on account of the plaintiffs," which gave the shipper command of the goods till exchanged for the bill of lading. French and Co. resold, and the defendant, the master, gave a bill of lading to the buyer from French and Co. without the plaintiffs' privity. French and Co. stopped payment without paying the price of the sugar, and plaintiffs claimed it, but the defendant refused to deliver to them on the ground that the bill

(*e*) *Infra*.

(*f*) *Post*, 432.

(*g*) *Post*, 440. This arrangement of the cases has been adopted by the Editor as being of more practical use since the codification of the law, as illustration of the Code. Mr. Benjamin adopted here, as elsewhere, a strictly chronological arrangement.

(*h*) 6 Taunt. 433; 16 R. R. 644. *Cf. Cowasjee* v. *Thompson* (1845) 5 Moo. P. C. 165; 70 R. R. 27; *post*, 435. *Ruck* v. *Hatfield* (1822) 5 B. & A. 632; 24 R. R. 507, on similar facts, was decided in conformity with *Craven* v. *Ryder*. See also *Schuster* v. *McKellar* (1857) 7 E. & B. 704 (payment against mate's receipt); 26 L. J. Q. B. 281; 110 R. R. 385

of lading already signed for it in favour of the buyer from French and Co. had been assigned to another buyer, who had in turn paid for it in good faith. The jury found that the receipt given to the plaintiffs was "*restrictive*," and that they had done nothing to alter their right of possession of the goods. The Court held that the person in possession of the receipt was the person entitled to the bill of lading; consequently the plaintiffs "might refrain from delivering the goods, unless under such circumstances as would enable them to recall the goods if they saw occasion," and that they had exercised that right. This seems to be but another mode of describing a reservation of the right of disposal.

Falk v. Fletcher (1865).

In *Falk* v. *Fletcher* (*i*), the plaintiff, a merchant of Liverpool, acted on behalf of De Mattos of London, chartered from the defendant a vessel to load a complete cargo of salt for Calcutta. The plaintiff used to buy such cargoes for De Mattos, and charge him no commission, but only an advance on the cost of the salt; the plaintiff always paid for the salt, loaded it at his own expense, and took the mate's receipt in his own name, exchanging it afterwards for a bill of lading also in his own name, which he sent endorsed, together with a draft for acceptance, and invoices to De Mattos and received the acceptances of the latter for the cost. The plaintiff had put on board about 1,000 tons of salt, for which he took receipts (*k*) in his own name, when De Mattos failed, and the plaintiff declined to continue loading, whereupon the defendant filled up the vessel for his own account, and refused to deliver to the plaintiff bills of lading for the 1,000 tons, on the ground that they belonged to De Mattos. *Held*, that the plaintiff, though for some purposes De Mattos' agent, was also a seller to him, and it was, under the circumstances, a question of intention for the jury, whether the plaintiff intended to part with the property in the salt or to reserve it, and a verdict in favour of the plaintiff that he had not parted with the goods was maintained. "Here," said Willes, J., "the mate's receipts were given in the plaintiff's name. It is clear, therefore, that he meant . . . to have the bill of lading made deliverable to himself or order, that he might make use of it for his further security"

(*i*) 18 C. B. N. S. 403; 34 L. J. C. P. 146; 144 R. R. 542.

(*k*) These receipts are valueless after the bill of lading is signed, and the master may sign the bill of lading without production of the receipt, if he is satisfied that the goods are on board: *Hathesing* v. *Laing* (1873) 17 Eq. 102, 103; 43 L. J. Ch. 233. See also Maude & Pollock's Shipping, 4th ed. 136, 338.

It is noticeable that in this case the seller's intention to reserve the right of disposal at the time of shipment was upheld, although it was his practice *afterwards* to pass the property by transmitting the documents *direct* to De Mattos.

Bill of lading taken to order, pledged by seller.

Ellershaw v. *Magniac* (1843).

In *Ellershaw* v. *Magniac* (*l*), the plaintiff, a merchant at Leeds, had contracted with C. and Co., of London and Odessa, for the purchase of 1,700 quarters of Odessa linseed, had paid part of the price, and had sent the *Woodhouse*, a vessel chartered by himself, "to take on board, from agents of the said freighter, about 1,700 quarters of linseed, in bulk;" and a quantity of linseed was put on board the vessel at Odessa. The payments made by the plaintiff considerably exceeded the value of the linseed shipped. The Odessa partner afterwards took a bill of lading for the cargo, and made it deliverable "to order or assigns," and got advances by transferring the bills of lading to the defendant. *Held*, that the shippers, by making the linseed deliverable to order by the bill of lading, clearly showed the intention to preserve the right of property and possession in themselves, until they had made an assignment of the bill of lading to some other person.

Pledge by seller after tender by buyer.

Wait v. *Baker* (1848).

In *Wait* v. *Baker* (*m*), which is a leading case, decided in 1848, the defendant at Bristol bought from one Lethbridge 500 quarters of barley free on board at Kingsbridge, payment to be made in cash on receipt of the bill of lading, or acceptance at two months. Lethbridge forwarded copy of the charter-party which he had taken on behalf of the defendant, but in his own name; and advised the commencement of the loading. The bills of lading for the cargo were to the "order of Lethbridge or assigns, paying the freight as per charter." Lethbridge took them to Bristol, and left at the defendant's counting-house, early in the morning, an *unendorsed* bill of lading. At a later hour the defendant objected to the quality of the cargo, but offered to take it, and *tendered the amount* (*n*) in money, saying that he should sue for eight shillings a quarter difference. Lethbridge refused to accept the money or to endorse the bill of lading, and obtained an advance from the plaintiffs, on endorsing the bill of lading

(*l*) 6 Ex. 570; 86 R. R. 398n., *coram* Lord Abinger, C.B., and Parke, B., and Alderson, B. The case (not reported till 1851) is referred to in *Van Casteel* v. *Booker* (1848) 2 Ex. 691; 18 L. J. Ex. 9; 76 R. R. 729; *post*, 435. See also *Bruce* v. *Wait* (1837) 3 M. & W. 15; 7 L. J. (N. S.) Ex. 13 (right of disposal reserved wrongfully as against consignee under advances).

(*m*) 2 Ex. 1; 17 L. J. Ex. 307; 76 R. R. 469.

(*n*) *Cf. Mirabita's Case*, *post*, 431.

to them. The defendant obtained part of the barley from the ship before the plaintiffs presented their bill of lading, and the action was trover for the portion of the cargo so delivered. The jury found that the defendant did not refuse to accept the barley from Lethbridge, and that the tender was unconditional.

Thereupon Williams, J., at Nisi Prius, directed a verdict to be entered for the plaintiffs, reserving leave to the defendant to enter a verdict for him. Parke, B., gave the reasons on which the rule was discharged. After saying that the goods being unascertained, the original contract could not pass the property, and stating the general rule that where goods sold are to be dispatched by a carrier, their delivery to a carrier, if they agree with the contract, and the Statute of Frauds be satisfied, passes the property, the learned Judge proceeded: "In this case it is said that the delivery of the goods on ship-board is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery *to the captain* of the vessel, *to be carried under a bill of lading*, and that bill of lading *indicated the person* for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods therefore still continued in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. . . . The act of delivery therefore in the present case did not pass the property. Then what subsequent act do we find which had that effect? It is admitted . . . that the property does not pass unless there is a subsequent appropriation of the goods." Then, after showing that in the case there was no appropriation except in the sense that *the seller* has made his election to deliver those 500 quarters of corn, he proceeded: "The next question is, whether the circumstances which occurred at Bristol afterwards, amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was to have the contract repudiated. . . . There is a contract to deliver a cargo on board, and

probably for an assignment of that cargo by endorsing the bill of lading to the defendant; but there was *nothing* which amounted to an *appropriation in the sense* of that term *which alone would pass the property.*"

This conclusion of the learned Judge is substantially a statement that, though the determination of election by the seller was complete, and the appropriation therefore perfect in one sense, yet the reservation of the right of disposal prevented it from being complete "in that sense of the term which alone would pass the property."

Delivery on buyer's ship. Goods "owner's property." *Turner* v. *Trustees of Liverpool Docks* (1851).

In *Turner* v. *The Trustees of Liverpool Docks* (*o*), a cargo of cotton had been purchased in Charleston, on the order of Higginson and Dean, of Liverpool, and put on board their own vessel. Bills of exchange for the price were drawn by Menlove and Co., the sellers, on the buyers, and sold to Charleston bankers, to whom were transferred, as security, the bills of lading. These made the goods deliverable at Liverpool "to order, or to our (Menlove and Co.'s) assigns, he or they paying freight, *nothing, being owner's property*"; and the invoice sent stated that the goods were shipped for account and risk of the buyers. On the 23rd October Menlove and Co. wrote advising the buyers of the sale of the bills of exchange, and indorsement of the bill of lading to the bankers. The question was, whether by delivery on board the buyers' own vessel, and by the statement in the bill of lading that the cotton was owner's property, the title had so passed as to render inoperative the transfer of the bill of lading to the Charleston bankers. The decision of the Court after consideration was given by Patteson, J., who said: "There is no doubt that the delivery of goods on board of the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms, restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool, to their order or assigns, and there was not, therefore, a delivery of the cotton to the purchasers *as owners*, although there was a delivery on board their ship. The vendors still reserved to themselves, at the time of delivery to the captain, the *jus disponendi* of the goods, which he by signing the bill of lading acknowledged. . . . The plaintiffs in error rely upon the

(*o*) 6 Ex. 543; 20 L. J. Ex. 393; 86 R. R. 377, *coram* Patteson, J., Coleridge, J., Wightman, J., Erle, J., Williams, J., and Talfourd, J. See also *Schotsman* v. *Lancaster and Y. Ry. Co.* (1867) 2 Ch. 332; 36 L. J. Ch. 361, and other cases cited in Book V., Part I., Ch. IV., on Stoppage in Transitu.

terms of the invoice and the expression in the bill of lading, that the cotton is free of freight, being owner's property, as showing that the delivery on board the ship was with intention to pass the property absolutely; but the operative terms of the bill of lading, as to the delivery of the goods at Liverpool, and the letter of Menlove and Co., of the 23rd of October, show too clearly for doubt, that notwithstanding the other terms of the bill of lading and the invoice, Menlove and Co. had no intention, when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts" (*p*).

Stamped and unstamped bills of lading.

Moakes v. *Nicholson* (1865).

In *Moakes* v. *Nicolson* (*q*), one Josse sold to Pope for cash against bill of lading in the hands of the seller's agent in London a quantity of coal, parcel of a heap lying in Josse's yard, to be shipped on board of a vessel chartered by Pope in his own name and on his own behalf, to carry it to London. The coal was shipped by Josse, who took three bills of lading, making the coal deliverable to "Pope or order." Only one of the three bills was stamped, and that was kept by Josse, but the second, with invoice and letter of advice, was sent to Pope on the 19th of December, and received by him on the 20th. Josse sent the stamped bill to his agent, the defendant. In the meantime, on the 13th of December, Pope had sold the coal before it had been separated from the heap in Josse's yard, to the plaintiff, who paid for the coals. The defendant induced the captain of the vessel to refuse delivery to the plaintiff, and took possession of the coal himself. The plaintiff brought trover. *Held*, *first*, that the plaintiff had no better right than his seller, Pope, because at the time of the plaintiff's purchase the goods were not ascertained and no bills of lading had been given, so that the sale had not been made by a transfer of documents of title; *secondly*, that no title had passed to Pope from Josse on the shipment, because the retention of the stamped bill of lading by the latter was a clear indication of his intention to reserve the right of disposal until he was paid cash. But *semble*, that if Pope's sale had been made *after* his receipt of the bill of lading by endorsing it over, although unstamped, to a *bona fide* purchaser, the result might have been different. And it is apprehended that

(*p*) The learned Judge cited as authorities *Van Casteel* v. *Booker* (1848) 2 Ex. 691; 18 L. J. Ex. 9; 76 R. R. 729; *post*, 435; and *Wait* v. *Baker* (1848) 2 Ex. 1; 17 L. J. Ex. 307; 76 R. R. 469; *ante*, 425.

(*q*) 34 L. J. C. P. 273; 19 C. B. (N. S.) 290; 147 R. R. 600. See also *Sheridan* v. *New Quay Co.* (1858) 4 C. B. (N. S.) 618; 28 L. J. C. P. 38; 114 R. R. 873 (cash against bill of lading).

in such a case Pope at the present day would be in the position of a buyer who had obtained with the consent of the seller possession of the bill of lading, and could pass a good title to the plaintiff (*r*).

Bill of lading taken to order of fictitious person.

Gabarron v. *Kreeft* (1875).

In *Gabarron* v. *Kreeft* (*s*), the defendants had bought from one Munoz all the ore of a mine in Spain to be shipped by Munoz f.o.b. at Cartagena, on ships to be chartered by the defendants, or by Munoz. The ore was to be paid for by acceptances against bills of lading, or on the execution of a charter-party, in which latter case a certificate that there was enough ore in stock to load the ship was to accompany the drafts. *On payment* the ore was to become the property of the defendants. Various vessels had been loaded, and others chartered, and in March, 1872, when the *Trowbridge*, chartered by the defendants, arrived at Cartagena, advance payments had been made, exceeding the price of all the ore shipped and to be shipped in all the vessels. Instead of shipping the ore, Munoz picked a quarrel with the defendants, telegraphed that he would not load the *Trowbridge* on their account, and then loaded her, taking bills of lading expressing *the shipment to be by one Sabadie* (a fictitious person), and *the cargo deliverable to Sabadie's order*. He then endorsed Sabadie's and his own name on the bills of lading, and pledged them for value with the plaintiffs. No certificate in relation to this ore was given by Munoz to the defendants. The captain was justified in giving the bills of lading, as the charter-party contained a clause authorising him "to sign bills of lading as presented." It was agreed that at the time of shipment Munoz had no intention to ship the ore for the defendants. The question was whether the property became vested in the defendants, either upon the ore being paid for, as the contract provided it should, or upon shipment on the defendants' chartered vessel. The Court of Exchequer held that the property did not vest in the defendants at either time.

Bramwell, B., and Cleasby, B., relied upon the following grounds: That the payment of the price could not *per se* transfer to the defendants the property in ore unseparated from the bulk; that there was no evidence of a specific appropriation of the ore previous to shipment (*t*); and that shipment

(*r*) Code, s. 25 (2), and Factors Act, 1889, s. 9, *ante*, 48; *Cahn* v. *Pockett* [1899] 1 Q. B. 643; 63 L. J. Q. B. 515, C. A., *ante*, 50.
(*s*) L. R. 10 Ex. 274; 44 L. J. Ex. 238.
(*t*) See this case set out on this point, *ante*, 377.

on board a vessel chartered by the defendants did not vest the property in them, when the shipper had taken bills of lading in a form authorised by the charter-party, and these reserved to him the right of disposal. Kelly, C.B., came to the same conclusion upon a quite distinct ground, viz.: that as the defendants by the terms of the charter-party had authorised the master to sign bills of lading as presented, they were estopped from disputing plaintiffs' title as *bona fide* indorsees for value (*u*).

In the absence of appropriation *previous* to shipment, the question was: Did the property pass *on* actual shipment, the shipper having no right to ship, except to pass the property, and having no lien? After commenting on previous cases, Bramwell, B., says (*x*): "The cases seem to me to show that the act of shipment is not completed till the bill of lading is given (*y*); that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him." And Cleasby, B. (*z*), referring to *Turner* v. *The Trustees of the Liverpool Docks* (*a*), and *Shepherd* v. *Harrison* (*b*), says: "The effect of these is that the delivering of goods contracted for, on board a ship when a bill of lading is taken, is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and that this may equally apply when the ship is the ship of the vendee."

Bill of lading in blank retained by seller.

"Cheque against documents."

The Miramichi (1915).

In the *Miramichi* (*c*), Muir & Co., American shippers, contracted in June, 1914, to sell a quantity of 8,000 bushels of wheat to George Fries & Co., of Colmar, c.f.i., payment by cheque against documents. To fulfil their contract Muir & Co. bought the wheat from one Fox, who in July shipped it at Galveston for Amsterdam. The bill of lading was given in favour of Fox, and was made out to the order of one Davis.

(*u*) Code, s. 21 (1).

(*x*) L. R. 10 Ex. at 281; 44 L. J. Ex. 238.

(*y*) *I.e.*, where a bill of lading is to be given, for a bill of lading is not essential to shipment: *per* Lord Blackburn in *Bowes* v. *Shand* (1877) 2 A. C. 455, at 483; 46 L. J. Q. B. 561; *Evans* v. *Nichol* (1841) 3 M. & G. 514; 11 L. J. (N. S.) C. P. 6.

(*z*) At 285

(*a*) (1851) 6 Ex. 543; 20 L. J. Ex. 393; 86 R. R. 377, *ante*, 427.

(*b*) (1869) L. R. 4 Q. B. 196, 493; 38 L. J. Q. B. 105, 177; *ib.*, 5 H. L. 116; 40 L. J. Q. B. 148, *post*, 441.

(*c*) [1915] P. 71; 84 L. J. P. 105. The shipments in this case being *ante bellum*, the case, with regard to liability to capture, depended on the right of property.

or his or their assigns. It was indorsed generally, and Muir & Co., having paid Fox, obtained it, but did not indorse it to their own buyers, on whom they drew a bill of exchange which they discounted with bankers in New York. The bill of lading and certificates of insurance were deposited with the bankers, to be delivered to the buyers on their payment through a Berlin bank of the bill of exchange. The buyers refused on September 3 to take over the documents, or to accept the bill of exchange, on the alleged ground of delay in the tender. In the meantime, war having broken out, the wheat was seized on September 1 as enemy's property by the British Government. *Held*, by Evans, P., in the Prize Court, that the sellers had reserved the right of disposal; accordingly that the goods remained their property until the shipping documents had been tendered to, and taken over by the buyers, and the bill of exchange paid. The wheat therefore belonged to the claimants, Muir & Co. and the New York bank.

Condition on which the right of disposal is dependent fulfilled.

In the following cases the condition on which the right of disposal was made by the seller to depend was fulfilled by the buyer, and the property accordingly passed.

Mirabita v. *Imperial Ottoman Bank* (1878).

In *Mirabita* v. *Imperial Ottoman Bank* (*d*), the sellers shipped a cargo of umber on board a ship chartered for the plaintiff, and took bills of lading making the cargo deliverable "to order or assigns." They drew a bill of exchange for the price upon the plaintiff, which they discounted with the defendant bank, handing over to them the bills of lading, to be given up to the plaintiff upon his meeting the bill of exchange. A fresh bill of exchange was afterwards substituted and transferred to the bank in exchange for the original bill. On the arrival of the cargo the plaintiff at first declined to accept the bill, but he *subsequently tendered* the amount for which it was drawn, and demanded the delivery of the bills of lading. The defendants refused to accept the amount of the bill and sold the cargo. The question was, whether the property in the goods had passed to the plaintiff so as to entitle him to maintain an action of trover against the defendants (*e*). The Court of Appeal was unanimously of opinion that it had.

(*d*) 3 Ex. D. 164; 47 L. J. Ex. 418, C. A.; *The Miramichi* [1915] P. 71; 84 L. J. P. 105. In *Jenkyns* v. *Brown* (1849) 14 Q. B. 496; 19 L. J. Q. B. 286; 80 R. R. 287; the statement by the Court that the *general* property was in the buyer, as distinguished from the *special* property of the banker pledgee in the bill of lading, would seem no longer tenable.

(*e*) The action was commenced before the Judicature Acts, and therefore dealt with as a legal question, and not upon the equitable rights of the parties. See *per* Cotton, L.J., 3 Ex. D. at 171; 47 L. J. Ex. 418.

Ratio decidendi of this case.

Here the sellers did not attempt to use their power of disposition under the bill of lading for the purpose of *entirely withdrawing* the cargo from the contract, as the seller did in *Ellershaw* v. *Magniac* (*f*), *Gabarron* v. *Kreeft* (*g*), and in particular in *Wait* v. *Baker* (*h*), but only dealt with it to *secure* payment of the price; accordingly, their intention was that the property should vest in the plaintiff on acceptance of the bill or payment or tender of the price, and therefore the defendants were bound to give up the bills of lading to the plaintiff. Cotton, L.J., gave a clear exposition of the principles running through the cases (*i*).

The Prinz Adalbert (1917).

In the *Prinz Adalbert* (*k*), an American company shipped two parcels of lubricating oil of 86 and 290 barrels respectively on a German steamer and consigned them to the M. Co. of Hamburg, as agents for sale. Two bills of lading were taken out making the oil deliverable to the sellers' order at Hamburg, and these were indorsed in blank, and attached to drafts, drawn by the shippers on the M. Co., and discounted in the United States with a bank, which forwarded the documents to Germany. On the 5th of August the steamer was captured by the British. The draft representing the 86 barrels was accepted by the M. Co. on August 1; the other was said to have been accepted about August 10. The shippers on August 18, 1914, claimed the oil in the Prize Court as being their property. *Held*, by the Privy Council, reversing, on more complete statement of facts, the judgment of Evans, P., that whether the M. Co. were buyers or agents for sale, it was the shippers intention that the property should pass on the drafts being accepted (*l*); that the claimants were the owners of the oil until then, but no longer; therefore that the first parcel had become the property of the M. Co. on August 1; and, as regards the second, that the claimants had not shown they were the owners at the time of claim, viz., August 18.

II. Presumption of intention to reserve right of disposal rebutted.

In the following series of cases the presumption that the seller intended to reserve the right of disposal was rebutted.

In *Walley* v. *Montgomery* (*m*), the plaintiff had ordered a cargo of timber from Schumann and Co., and they informed

(*f*) (1843) 6 Ex. 570, *ante*, 425.
(*g*) (1875) L. R. 10 Ex. 274, *ante*, 429.
(*h*) (1848) 2 Ex. 1, *ante*, 425.
(*i*) See his judgment quoted *ante*, 421.
(*k*) [1917] A. C. 586, P. C.; 86 L. J. P. C. 165.
(*l*) See the law stated by Lord Sumner, *ante*, 422.
(*m*) 3 East, 585; 7 R. R. 526.

him by letter that they had chartered a vessel for him, and afterwards sent him in another letter the bill of lading, indorsed in blank, and invoice, advising (*n*) that they had drawn on him at three months, "for the value of the timber." The invoice was of a cargo of timber, "shipped by order, and for account and risk of Mr. T. Walley, at Liverpool," and the bill of lading was made "to order or assigns, he or they paying freight, etc." Schumann and Co. sent at the same time another bill of lading, with bills of exchange drawn on the plaintiff for the price, to the defendant, who was their agent, and he got the cargo from the captain. The plaintiff applied to the defendant for the cargo, offering to accept the bills of exchange, but the latter insisted on immediate payment; and on the plaintiff's refusal, sold the cargo, under direction of Schumann and Co. Trover was brought, and Lord Ellenborough at first nonsuited the plaintiff, who did not prove a tender of the freight, but afterwards joined the other Judges in setting aside the nonsuit, on the ground that the property passed by the invoice (*o*) and bill of lading sent to the buyer, and that the seller had lost all rights over the goods, save that of stoppage *in transitu*.

Two bills of lading, one to buyer, one to seller's agent.

Advice of bill of exchange drawn

Walley v. *Montgomery* (1803).

In *Ogle* v. *Atkinson* (*p*), the property passed, notwithstanding the seller's attempted reservation of a right of disposal, but the attempt was fraudulent. The plaintiff ordered goods from Smidt & Co. at Riga, in return for wine consigned to them for sale the previous year, and sent his own ship for the goods, which were delivered to the captain, who received them in behalf of the plaintiff, and as being the plaintiff's own goods, according to the statement of Smidt & Co., themselves. They afterwards, by fraudulently misrepresenting that the form of the bills was immaterial, as the goods were to be delivered to the owner, obtained from the captain bills of lading in blank, and sent them to their agent with orders to transfer them to a third person, unless the plaintiff would accept certain bills of exchange which Smidt & Co. drew in favour of that third person. At the same time they enclosed a letter to the plaintiff advising him of the shipment, and containing invoices stating that the goods were shipped for account and risk of the plaintiff, but making no mention of any bills of exchange to be accepted. *Held*, that,

Bill of lading obtained by seller by fraud.

Ogle v. *Atkinson* (1814).

(*n*) As to the effect of mere advice, see *post*, 439.

(*o*) On which the C.J. relied; but this is not conclusive: *Shepherd* v. *Harrison*, *post*, 442.

(*p*) 5 Taunt. 759; 1 Marsh. 323; 15 R. R. 647.

the shipment being unconditional, the property had passed by the delivery to the plaintiff's agent, the captain, and was not divested nor affected by the subsequent acts of Smidt & Co. The form of the bills of lading was either immaterial, as stated by Smidt & Co.; or if it was material, there was a fraud on the plaintiff.

Banker's draft to be sent against bill of lading: condition subsequent.

Wilmshurst v. *Bowker* (1841).

In *Wilmshurst* v. *Bowker* (*q*), the plaintiffs bought wheat from the defendant on a contract by which they promised to pay for it in a banker's draft, *on receipt* of invoice and bill of lading. The wheat was shipped, and the invoice and bill of lading, to order or assigns and *endorsed* to the plaintiffs, were forwarded to them in a letter, in which the defendant requested them to remit him the amount of the invoice. The plaintiffs remitted a draft, which was not a banker's draft, and the defendant sent it back by return of post, and got back the cargo and disposed of it. The plaintiffs had already failed in an action in trover (*r*), and the present action was case for non-delivery. The defendant's plea contained no averment that the sending of the draft was a condition precedent to the right of property or of possession. The lower Court, in giving judgment for the defendant, held (*s*) that the *property* in the wheat passed to the plaintiffs, but that the intention of the parties was that the consignors should retain the power of withholding the actual delivery of the wheat in case the consignees failed in remitting the banker's draft on the receipt of the bill of lading.

But on error to the Exchequer Chamber, this decision was unanimously reversed upon the pleadings (*t*), the Court saying that, though a jury might have been justified in inferring from the facts that the remitting of the banker's draft was a condition precedent to the vesting of the property or right of possession in the plaintiffs, yet they could not agree with the Court below in drawing that inference from *the record*. Lord Abinger, C.B., said: "The delivery of the bill of lading and the remitting the banker's draft could not be simultaneous acts: the plaintiffs must have received the bill of lading and

(*q*) 2 M. & G. 792; 10 L. J. C. P. 161; 66 R. R. 808. See also *Key* v. *Cotesworth* (1852) 7 Ex. 595; 22 L. J. Ex. 4; 86 R. R. 750; *Ex parte Catling* (1873) 29 L. T. 431.

(*r*) (1839) 5 Bing. N. C. 541; 8 L. J. C. P. 309; 66 R. R. 808. This decision was practically overruled by the decision in the Ex. Ch. on the other counts.

(*s*) The Author's statement is here summarised.

(*t*) (1843) 12 L. J. Ex. 475; 7 M. & G. 882, 66 R. R. 806; *coram* Lord Abinger, C.B., Parke, B., Alderson, B., and Rolfe, B., and Patteson, J., Coleridge J., and Wightman, J. The report in 7 M. & G. is obscure. That in the L. J. is much clearer.

invoice before they could send the draft. The plaintiffs have omitted to perform one part of their engagement, and are liable for not performing it; but this is a condition subsequent, the breach of which does not rescind the contract." In the course of the argument Parke, B., said: "The defendants should either have retained the wheat in their possession, or have endorsed the bill of lading specially to the plaintiffs—'they giving a banker's draft, &c., in payment.'"

This case, in effect, decides that the transfer of a bill of lading to the buyer on the terms that he shall *after* receipt thereof send a draft, or pay for the goods, *prima facie* does not amount to the reservation of the right of disposal. And this conclusion is in accordance with principle (*u*).

Wrongful retention by seller of mate's receipt.

Cowasjee v. *Thompson* (1845).

In *Cowasjee* v. *Thompson* (*x*), goods were sold to be paid for by a bill drawn by the sellers or cash, at the option of the buyers. The buyers elected to pay by a bill which was duly drawn and accepted. The goods were shipped on the buyer's vessel, the sellers taking the mate's receipts which they retained in their possession. The master, some days after the shipment, and without requiring the delivery of the receipts, signed bills of lading describing the goods as shipped by the buyers. *Held*, by the Privy Council, that the property in, and possession of the goods had passed to the buyers notwithstanding the retention of the receipts, as it was the duty of the sellers when the goods were delivered and paid for to surrender the receipts.

Bill of lading to order endorsed and sent to buyer. Goods shipped "on account and at risk" of buyer.

Van Casteel v. *Booker* (1848).

In *Van Casteel* v. *Booker* (*y*), the goods had been placed by the seller on board of a vessel sent for them by the buyers, and a bill of lading taken for them deliverable "to order or assigns," and showing that they were "freight free," and the bill of lading was endorsed in blank by the seller and sent to the buyers with an invoice stating the goods to have been shipped "on account and risk" of the buyers. On the different questions arising in the case, which were numerous, it was held:

First, that the decisions in *Ellershaw* v. *Magniac* (*z*), and *Wait* v. *Baker* (*a*) had been correct in holding that the fact

(*u*) See Rule 1 in *Pordage* v. *Cole* (1669) 1 Wms. Saund. 320, b, quoted *post*, 638. But *cf.* the case where a bill of lading and a bill of exchange drawn by seller are sent together under s. 19 (3) of the Code, *post*, 440.

(*x*) 5 Moo. P. C. 165; 70 R. R. 27; distg. *Craven* v. *Ryder* (1816) 6 Taunt. 433; 16 R. R. 644, *ante*, 423, and *Ruck* v. *Hatfield* (1822) 5 B. & A. 632; 24 R. R. 507.

(*y*) 2 Ex. 691; 18 L. J. Ex. 9; 76 R. R. 729.

(*z*) (1843) 6 Ex. 570; 86 R. R. 398n., *ante*, 425.

(*a*) (1848) 2 Ex. 1; 17 L. J. Ex. 307; 76 R. R. 469, *ante*, 425.

of making the bill of lading deliverable to the order of the consignor, was decisive to show that *no property* passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods *till he did a further act*.

Secondly, that notwithstanding the *form* of the bill of lading, the contract may be really made by the consignor as agent of the buyer, and it was a question for the jury what under all the circumstances—such as the form of the bill of lading on the one hand; and, on the other, the words "freight free," the language of the invoice, and the immediate transfer of the bill of lading—was the real intention of the consignors or sellers. On the new trial, the jury found that the goods were put on board for, and on account of, and at the risk of, the buyers, and the Court refused to set aside a general verdict for the defendants (*b*).

Bill of lading taken to order by seller as buyer's agent only.

***Joyce* v. *Swann* (1864).**

In *Joyce* v. *Swann* (*c*), McCarter, of Londonderry, on the 14th of February, 1863, ordered one hundred tons of guano, from Seagrave & Co., of Liverpool. On the 26th he was informed that the *Anne and Isabella* had been engaged to carry about one hundred and fifteen tons, and "we presume we may value upon you at six months from the date of shipment at £10 per ton. . . . Please say if you purpose effecting insurance at your end." On the 2nd of March, McCarter ordered Joyce, the plaintiff, an insurance broker, to insure for him, "£1,200, on guano, valued at £1,200, per *Anne and Isabella*, from Liverpool to Derry." Then, on the 3rd of March, McCarter wrote to Seagrave & Co., grumbling as to the price, and the letter ended with a request to send him some flowering shrubs, "in charge of captain." Seagrave & Co. received this letter on the 4th of March, and fearing that McCarter would not accept the cargo, insured it in their own name and took a bill of lading "to order of Seagrave & Co., or their assigns." They also on the same day made out an invoice of "the particulars of guano delivered to account of McCarter by Seagrave & Co. per *Anne and Isabella*." The senior partner of Seagrave & Co., on the evening of Saturday, the 7th of March, went on a friendly visit to McCarter's private house, and there told him that he had received the invoice and bill of lading from his partners, who feared that McCarter was not satisfied. McCarter said he was quite willing to take the cargo, and on Monday morning at

(*b*) See s. 19 (2) of Act, "*primâ facie* deemed to reserve the right." *ante*, 420.

(*c*) 17 C. B. (N. S.) 84; 142 R. R. 258.

McCarter's office Seagrave endorsed the bill of lading to him and obtained an acceptance for the price. After this, and on the same day, they heard that the *Anne and Isabella* had been wrecked on the *evening of Saturday the 7th*. The action was on the policy effected by Joyce in behalf of McCarter, and was defended by the underwriters on the ground that there had been no complete contract as to price between Seagrave & Co. and McCarter so as to pass the property to the purchaser, and that he had therefore no insurable interest.

Erle, J., charged the jury that it was not a necessary condition of the passing of the property that the price should be agreed on; that there might be a contract of sale, leaving the price to be afterwards settled; that if the guano was appropriated to McCarter when put on board by Seagrave & Co. with the intention of passing the property, they must find for plaintiff; but if they intended to keep it in their own hands and under their own control till a final arrangement took place as to the terms of the bargain, they must find for defendant. The verdict was for plaintiff, and was sustained by the Court on the ground that the jury were warranted in assuming, in spite of the form of the bill of lading and its transmission not to McCarter but to the sellers' agent, that the guano was shipped in fulfilment of the contract. And with regard to the question whether there was a contract, the Judges treated McCarter's letter as "a grambling assent."

Although the shipper took the bill of lading to his own order (*d*), yet the property had passed when the goods were put on board. In some former cases (*e*) the shipper had taken the bill of lading to his own order, for the purpose of *retaining control* of the goods for his own security; but in *Joyce* v. *Swann*, the shippers and sellers had no purpose nor desire to keep any control of the goods. They were doubtful of the buyer's meaning, but were acting as his agents, and intended to *reserve* no right of disposal if his meaning was that he assented to the price. The buyer had really meant to take the goods even at the price of £10, and that being so, the sellers were his agents in taking the bills of lading. Observations on this case.

In Ex parte *Banner* (*f*), Christiansen & Co., who carried on

(*d*) See Code, s. 19 (2). "seller is *primâ facie* deemed to reserve," etc., *ante*, 420.

(*e*) *Turner* v. *Liverpool Docks*, *ante*, 427; *Wait* v. *Baker*, *ante*, 425.

(*f*) 2 Ch. D. 278; 45 L. J. Bkcy. 73, C. A.; revg. Bacon, C.J., in Bkcy. See also *Key* v. *Cotesworth* (1852) 7 Ex. 595; 22 L. J. Ex. 4; 86 R. R. 750; *Coze* v. *Harden* (1803) 4 East, 211; 7 R. R. 570, included in previous editions, has been omitted. It was adversely criticised by the Author, and has probably

Bill of lading to buyer's order sent direct to him with advice of bill of exchange.

Ex parte *Banner* (1876).

business at Para, acted as commission agents in the purchase and consignment of goods for Tappenbeck & Co., at Liverpool. By the course of dealing, Christiansen & Co. drew bills of exchange on Tappenbeck & Co. which they discounted at Para. They then purchased goods with the proceeds, and shipped them for Liverpool, and sent the bills of lading making the goods *deliverable to Tappenbeck & Co.*, and the invoices post direct to that firm, advising them of the bills drawn upon them. Both firms stopped payment. At the time of Tappenbeck & Co.'s failure goods were in transit to Liverpool, and on their arrival were taken possession of by the trustee in their liquidation. Some of the bills were accepted, and others refused acceptance by Tappenbeck & Co., but none of them were paid at maturity. *Held*, by the Court of Appeal, that on the shipment of the goods and the posting of the bill of lading, the property in the goods had passed unconditionally to Tappenbeck & Co., and that therefore the creditors of Christiansen & Co. were not entitled to have the goods or their proceeds appropriated to meet the bills drawn in respect of them. *Shepherd* v. *Harrison* (*g*) was distinguished on the ground that there the consignor had taken the precaution to make the goods deliverable to his own order, and to forward the endorsed bill of lading, together with the bill of exchange, *to an agent* of his own.

Mellish, L.J., in delivering the judgment of the Court, said (*h*): "We conceive it is perfectly settled that if a consignor in such a case wishes to prevent the property in the goods, and the right to deal with the goods, whilst at sea, from passing to the consignee, he must by the bill of lading make the goods deliverable to his own order (*i*), and forward the bill of lading *to an agent of his own*." And, with reference to an argument that, even if the property passed to Tappenbeck & Co., it *revested* when the bills of exchange were refused acceptance, Mellish, L.J., showed that *Shepherd* v. *Harrison* was no authority for that proposition (*k*).

The law above declared has been, as will be seen later (*l*),

been overruled. No notice was taken by the Court of the fact that the bill of lading was sent to the seller's agent to secure the price, though the fact was stated in italics in the report. The facts, moreover, are not by any means clear.

(*g*) *Post*, 441.

(*h*) 2 Ch. D. at 288; 45 L. J. Bkcy. 73.

(*i*) Or that of his agent: Code, s. 19 (2), *ante*, 420.

(*k*) This argument was also rejected in *Key* v. *Cotesworth* (1852) 7 Ex. 595; 22 L. J. Ex. 4; 86 R. R. 750.

(*l*) *Post*, 443.

altered by the Code, which suspends the vesting of the property even where there has been a direct transmission of the two documents to the buyer. But as both these documents were not in Ex parte *Banner* transmitted together to the buyer, that case is unaffected by section 19 (3) of the Code. The case also shows that the mere advice of the drawing of the bill of exchange does not cut down the effect of the bill of lading (*m*). This point was also expressly decided in the following case.

König v. *Brandt* (1901).

In *König* v. *Brandt* (*n*), the defendants, the correspondents in this country of P. & Co. of Buenos Ayres, sold in their own name as principals consignments of goods forwarded to them by P. & Co., who drew bills of exchange upon the defendants against the goods. In advising drafts drawn upon the defendants, P. & Co. specified the particular consignments against which the bills were drawn; but the defendants had the right of treating all shipping documents as cover for the whole amount between them and P. & Co. P. & Co. instructed the defendants to sell at a specified price two lots of linseed respectively; and this the defendants did in their own names, "to arrive." Subsequently P. & Co. advised them of certain (specified) drafts for £9,000 drawn on them by P. & Co. in favour of third persons. The linseed was shipped, and the bills of lading, indorsed to the order of the defendants, were sent to them, and they took possession of the bills of lading and satisfied the contracts into which they had entered so far as was possible, but, fearing P. & Co.'s insolvency, refused to accept the bills of exchange when presented. *Held*, by Buckley, J., and by the Court of Appeal, that, having regard to the personal liability of the defendants on the contracts and the method of dealing between the parties, no agreement could be inferred that the acceptance of the bills should be a condition precedent to the transfer of the property to the defendants, and that there was no inference of law to that effect, the bills of lading having been endorsed and sent to the defendants without qualification, and the mere advice of the bills of exchange being ineffectual. *Shepherd* v. *Harrison* (*o*) was distinguished on the ground that in that case the

(*m*) See also *Walley* v. *Montgomery* (1803) 3 East, 585; 7 R. R. 526, *ante*, 432; *Gurney* v. *Behrend* (1854) 3 E. & B. 623; 23 L. J. Q. B. 265; 97 R. R. 687.

(*n*) 84 L. T. 748, C. A.; 9 Asp. M. L. Cas. 199.

(*o*) (1869) L. R. 4 Q. B. 196, 493; 38 L. J. Q. B. 105, 177; 5 H. L. 116; 40 L. J. Q. B. 148, *post*, 441.

bills of lading had not been endorsed to the buyer, and had been sent to the seller's agent.

III. Transmission to buyer of bill of exchange with bill of lading.

The third class of cases is where the seller transmits, either directly to the buyer, or to his own agent, to be presented to the buyer, a bill of lading accompanied with a bill of exchange for the price.

At common law the question whether the property passed to the buyer depended upon whether the seller had sent the bill of lading in the first instance to his own agent with directions to hand it over to the buyer on acceptance or payment of the bill of exchange; or whether he had sent it direct to the buyer (*p*). In the first case, the presumed intention was that the property should not pass until acceptance or payment. In the second case, the proper inference was that there was left to the buyer, as a matter of obligation only, the duty of acceptance of payment (*q*).

The clause of section 19 of the Code dealing with this subject is as follows:

S. 19 (3). "19.—(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him."

This clause is limited in range, and lays down no general principle applicable to all cases where payment is to be made against a bill of lading, or even to all cases in which payment is to be made by a bill of exchange which is transmitted together with the bill of lading. The only case covered is that in which the bill of lading and the bill of exchange are transmitted to the buyer together, the bill of exchange being drawn by the seller on the buyer, these documents being sent together with the intention of securing payment, and not unconditionally. For other cases authority must be sought at common law.

In *Brandt* v. *Bowlby* (*r*), one Berkeley of Newcastle ordered wheat from the plaintiffs, Brandt & Co. of St. Petersburg, desiring them to draw upon Harris & Co. A dispute arose between Berkeley and E. H. Brandt, the plaintiffs' agent,

(*p*) *Ex parte Banner* (1876) L. R. 2 Ch. D. 278; 45 L. J. Bkcy. 73, C. A.; *per* Cotton, L.J., in *Mirabita* v. *Imperial Ottoman Bank* (1878) 3 Ex. D. 164, at 172; 47 L. J. Ex. 418, C. A., quoted *ante*, 422.

(*q*) *Per* Cockburn, C.J., in *Shepherd* v. *Harrison* (1869) L. R. 4 Q. B. 196, at 203, 204; 38 L. J. Q. B. 105, 177.

(*r*) B. & Ad. 932; 1 L. J. (N. S.) K. B. 14; 36 R. R. 776.

and the former countermanded all his orders. In the meantime, however, the plaintiffs had bought a cargo for him, and they put it on board the defendants' ship *Helena*, which Berkeley had chartered. They wrote on the 26th August requesting Berkeley's approval, and enclosed him "invoice and bill of lading of 770 chests wheat shipped for your account and risk per the *Helena*. . . . An *endorsed* bill of lading we have this day forwarded to Messrs. Harris & Co., of London, at the same time drawing upon them for £673 15s., and for the balance remaining in our favour, viz., £136 9s. 5d., we value on you," etc., etc. An *unendorsed* bill of lading was enclosed to Berkeley, together with an invoice of "wheat bought by order and for account of J. Berkeley, Esq., Newcastle, and shipped at his risk to London to the address of R. Harris & Sons there per the *Helena*." The *endorsed* bill of lading was in fact forwarded by the plaintiffs to E. H. Brandt, their agent, together with bills of exchange. Berkeley having refused to accept, and ordered Harris & Co. not to accept, E. H. Brandt gave Harris & Co. the endorsed bill of lading, and desired them to accept for *his* account, which they did. Berkeley then was notified by E. H. Brandt that he should retain the whole of the wheat for the plaintiffs. Afterwards Berkeley offered to pay the price of the wheat and charges, but this was refused. The defendants delivered the wheat to Berkeley, instead of Harris & Co. as required by the bill of lading, and when sued in assumpsit sought to defend themselves by maintaining that the property in the wheat had passed to Berkeley. The Court held the contrary, Parke, J., saying: "That depends entirely on the intention of the consignors. It is said that the plaintiffs by the very act of shipping the wheat in pursuance of Berkeley's order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct, for, looking to the letter of the 26th of August, it manifestly appears that they intended that the property should not vest in Berkeley unless the bills were accepted." The learned Judge also pointed out the significance of an *un*endorsed bill of lading having been sent to Berkeley.

Unendorsed bill sent to buyer, and endorsed bill to seller's agent.

Brandt v. *Bowlby* (1831).

In *Shepherd* v. *Harrison* (*s*), Paton, Nash & Co., merchants of Pernambuco, bought for the plaintiff, a merchant of Manchester, cotton, and shipped it on the defendant's steamship

(*s*) (1869) L. R. 4 Q. B. 196; 38 L. J. Q. B. 105, 177; in Ex. Ch. *ibid.* 493; in H. L. (1871) L. R. 5 H. L. 116; 40 L. J. Q. B. 148. See also *Rein* v. *Payne, Douthwaite & Co.* (1886) 53 L. T. 932.

Bill of lading together with bill of exchange transmitted to seller's agent.

Shepherd v. *Harrison* (1871).

Olinda, taking a bill of lading to their own order. Then they wrote to the plaintiff, saying, "Enclosed please find invoice *and bill of lading* of 200 bales cotton shipped per *Olinda*, s.s." The letter also announced that a draft had been drawn for the price in favour of George Paton & Co., the agents in Liverpool of Paton, Nash & Co., "to which we beg your protection." The invoice was headed "Invoice, etc., on account and risk of Messrs. John Shepherd & Co." (the purchaser). The bill of lading, however, was *not* enclosed in the letter to the plaintiff, but after being endorsed in blank was, together with the bill of exchange, enclosed to George Paton & Co., the agents, who at once sent a letter to the plaintiff enclosing the bill of lading and the bill of exchange drawn on him, and stating: "We beg to enclose bill of lading for 200 bales cotton shipped by Messrs. Paton, Nash & Co., per *Olinda*, s.s. on your account. We hand also their draft on your good selves for cost of the cotton to which we beg your protection." The plaintiff refused to accept the bill of exchange, but retained the bill of lading, and demanded the cotton from the master of the ship, who however delivered the goods to George Paton & Co., on a duplicate bill of lading held by them. The plaintiff's action was trover against the master, but all the Courts were unanimous in favour of the defendant, and it was held in the House of Lords: 1st. That the right of disposal had been reserved by the sellers; 2ndly. That where a bill of exchange for the price of goods is enclosed to the buyer (*t*) for acceptance, together with the bill of lading which is the symbol of the property in the goods, the buyer cannot lawfully retain the bill of lading without accepting the bill of exchange; that if he do so retain it, he thereby acquires no right to the bill of lading or the goods.

Ogg v. *Shuter* (1875).

In *Ogg* v. *Shuter* (*u*), the plaintiffs had contracted for the purchase of 20 tons of potatoes, free on board at Dunkirk, price to be paid in cash against bill of lading, and the plaintiffs were to pay part of the price in earnest of the bargain. The potatoes were shipped in the *plaintiffs' own sacks* under a bill of lading made out to the seller's order, and the plaintiffs paid £30 in part payment. The seller

(*t*) The words "to the buyer" must be interpreted by the circumstances of the case mentioned in the text. The bill of lading was endorsed in blank and sent to *the seller's agent*. See *Ex parte Banner*, *ante*, 437. The law on this point has now been altered so as to cover the case of a direct transmission to the buyer. See *Cahn* v. *Pockett* [1898] 2 Q. B. 61; 67 L. J. Q. B. 627; [1899] 1 Q. B. 643; 68 L. J. Q. B. 515, C. A., *infra*.

(*u*) 1 C. P. D. 47; 45 L. J. C. P. 45, C. A., reversing S. C. L. R. 10 C. P. 159; 44 L. J. C. P. 161.

endorsed the bill of lading to the defendant, his agent in London, who presented to the plaintiffs a draft for the balance of the purchase-money with the bill of lading annexed. The plaintiffs, believing that the shipment was short, declined to accept the draft for the full amount, and thereupon the defendant sold the potatoes. In an action against the defendant for conversion, it was held by the Court of Common Pleas that the property in the potatoes had passed to the plaintiffs, as the contract provided for delivery "free on board" and for part payment of the price, and delivery was made into the plaintiffs' own sacks.

The decision was reversed, the Court of Appeal holding, *first*, that the retention by the seller in his agent's hands of the bill of lading in the form in which it was taken was effectual to reserve the right of disposal; and *secondly*, that the right so reserved was not merely a seller's lien on the goods, but involved the right to *dispose of* the goods by sale or otherwise, so long at least as the buyer remained in default (*x*).

Direct transmission of both documents to buyer.

Cahn v. *Pockett* (1898).

Cahn v. *Pockett* (*y*) was decided under section 19 (3) of the Code. In that case, Steinmann & Co., of Liverpool, contracted to sell to Pintscher, of Altona, ten tons of copper, deliverable c.i.f (*z*) at Rotterdam, and to be paid for by the buyer's acceptance at thirty days from the date of the bill of lading. The sellers forwarded *to the buyer* a bill of lading endorsed in blank, accompanied by an invoice and a draft for his acceptance, in a letter in which they requested his acceptance of the draft and its return as soon as possible. In the meantime Pintscher had sold ten tons of copper to the plaintiffs. On the receipt of Steinmann & Co.'s letter he handed the bill of lading to his bankers to be delivered to the plaintiffs on payment by them, which was duly made, and the bill of lading was transferred to them. Pintscher never accepted the seller's draft. In the Commercial Court, Mathew, J., on these facts held, in an action by the plaintiffs against the shipowners for non-delivery, that under section 19 (3) of the Code it was the buyer's duty to return the bill of lading if he did not accept the draft, and that as he had not done so, no

(*x*) See on this second point, in the Chapter on Resale, *post*, Book V., Pt. I., Chap. V.

(*y*) [1898] 2 Q. B. 61; 67 L. J. Q. B. 625; [1899] 1 Q. B. 643; 68 L. J. Q. B. 515, C. A. See also *The Charlotte* [1908] P. 206, C. A. (cash or acceptance in exchange for bill of lading).

(*z*) *I.e.*, price to cover cost, insurance, freight.

property in the goods passed to him. On appeal, the correctness of this view was not doubted by the Court of Appeal, who, however, reversed the decision on other grounds (*a*).

This case shows that, whether such a result was contemplated by the Legislature or not, the words in section 19 (3), "transmits to the buyer" are to be read literally, and cover a direct transmission to the buyer of an endorsed bill of lading together with a draft. The result is to alter the common law rule.

S. 19 (3) is subject to any contrary intention of the parties.

Section 19 (3) does not declare a hard-and-fast rule, but is subject to any contrary intention (*b*) of the parties with regard to the passing of the property.

Seller's intention to secure the price by controlling the possession only.

In some cases a seller, even though he may transmit the bill of lading and the bill of exchange to his agent to be presented to the buyer, intends to control not the property, but only the possession of the goods, in other words to preserve his lien.

Lord Parker's statement of the law.

On this subject Lord Parker, in delivering the opinion of the Privy Council in the *Parchim* (*bb*), says: "If the seller deals with the bill of lading only to secure the contract price . . . the *prima facie* presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case."

General and special property.

Jenkyns v. *Brown* (1849).

In *Jenkyns* v. *Brown* (*c*), Klingender, a merchant at New Orleans, had bought a cargo of corn on the order of the plaintiffs, and had taken a bill of lading for it deliverable to his own order. He then drew bills for the cost of the cargo on the plaintiffs and sold the bills to the defendant, a New Orleans banker, for their full value, to whom he also endorsed the bill of lading. They sent invoices and a letter of advice to the plaintiffs showing that the cargo was bought and shipped on their account. *Held*, in an action of trover by the plaintiffs against the banker, that on shipment the cargo continued the property of Klingender & Co., as there was no

(*a*) Arising under s. 9 of the Factors Act (s. 25 (2) of the Code). See *ante*, 50.

(*b*) See Code, s. 55.

(*bb*) *Post*, 447.

(*c*) (1849) 14 Q. B. 496; 19 L. J. Q. B. 286. See also *The Odessa* [1916] A. C. 145; 85 L. J. P. 49, where general and special property are considered.

evidence of an intention that it should then pass, and the taking of the bill of lading deliverable to their own order was nearly conclusive evidence that it did not pass; that Klingender & Co., by delivering the endorsed bill of lading to the buyer of the bills of exchange had conveyed to him a "special property" in the cargo; and by afterwards sending the invoice and letter of advice to the plaintiffs had passed to them the "general property" subject to this special property, so that the plaintiffs' right of possession of the goods would not arise until the bills of exchange had been paid by them.

Brown v. *Hare* (1858).

In *Brown* v. *Hare* (*d*), the defendants at Bristol bought from the plaintiffs, merchants, of Rotterdam, through the plaintiffs' broker at Bristol, "ten tons of the best refined rape oil, to be shipped *free on board* at £48 15s. a ton, to be paid for, on delivery to the defendants of the bills of lading, by bill of exchange to be accepted." The plaintiffs wrote to the broker on the 19th of April that they had secured ten tons for the defendants, deliverable in September, and the defendants wrote back, "Send them by next steamer." On the 7th of September the plaintiffs wrote to the broker to inform the defendants (which he did) that they had shipped five tons of rape oil for the defendants, and on the 8th they forwarded *to him* the invoice, the bill of lading, and the bill of exchange. The bill of lading was for delivery to the plaintiffs' "order or assigns," and was endorsed by them to the order of Hare & Co., the defendants. The invoice specified the casks by marks and numbers; and the bill of lading similarly identified them. The letter to the broker, containing the three documents, reached him on the 10th after business hours, and on the 11th he sent them to the defendants. The ship was then actually lost, and the broker knew it, but the defendants did not hear of the loss till about two hours after receiving the bill of lading, and they then immediately returned it to the broker.

The jury found a verdict for the plaintiffs, saying that, in their opinion, according to mercantile usage, the risk of the loss of the oil was on the defendants. On the argument of a rule to enter the verdict for the defendants, Bramwell, B., dissenting, thought that there had been no appropriation to pass the property, but Pollock, C.B., d r-

(*d*) 3 H. & N. 484; 27 L. J. Ex. 372; 117 R. R. 811 (better report, in Ex. Ch. 4 H. & N. 822; 29 L. J. Ex. 6; 118 R. R. 786.

ing the judgment of the majority of the Court, held that the property had passed, and that the buyers must bear the loss: on the ground, *first*, that the contract to deliver "free on board" meant that it was to be for account of the defendants as soon as delivered on board (*e*); *secondly*, that taking the bill of lading to the shippers' own order, and then endorsing it to the defendants, was precisely the same in effect as taking the bill of lading to the order of the defendants: *thirdly*, that the bill of lading having been forwarded to the broker only that he might get the defendants' acceptance on handing it over, as provided in the contract, and with the intention not of preventing the passing of the property, but of controlling the possession only, the property passed; and the goods represented by the bill of lading were in the same legal state as if in a warehouse of the seller, being actually sold to the buyer, but not to be taken by him without payment of the price. "This case," said Pollock, C.B., "on principle is to be governed by the view that would be taken if a person bought goods in a warehouse, particularising special goods, to be paid for on his applying to take them away. . . . The property would pass, and all that the vendor would obtain would be an undoubted right of lien."

In error to the Exchequer Chamber (*f*), this judgment was unanimously affirmed. Erle, J., in giving the opinion, said: "The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to, and under that we think the property passed when the goods were placed 'free on board' in performance of the contract. . . . If the bill of lading had made the goods 'to be delivered to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus, the real question has been on the intention with which the bill of lading was taken in this form: whether the consignor shipped the goods in performance of his contract to place them 'free on board,' or for the purpose of retaining a control over them and continuing to be owner contrary to the contract, as in the

(*e*) See also *per* Brett, M.R., in *Stock* v. *Inglis* (1884) 12 Q. B. D. at 573, *post*, 459; and *per* Lord Brougham in *Cowasjee* v. *Thompson* (1845) 5 Moo. P. C. 165, at 173.

(*f*) Erle, J., Williams, J., Crompton, J., Crowder, J., Wilies, J., and Hill, J.

case of *Wait* v. *Baker* (*g*), and as is explained in *Turner* v. *The Trustees of the Liverpool Docks* (*h*), and *Van Casteel* v. *Booker* (*i*). The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the Court below or before us being, whether the mode (*j*) of taking the bill of lading *necessarily* prevented the property from passing. In our opinion it did not under the circumstances" (*k*).

The Parchim (1918).

In the *Parchim* (*l*), a German firm at Hamburg on July 13 sold to a Dutch firm "the whole cargo of Chile saltpetre" to be loaded on the *Parchim*, of which the sellers were the charterers, at a South American port. The buyers were to take over the charter, and if they cancelled it, according to option given, because of the ship's delay in arrival at the port of loading, they were to ship the saltpetre by some other vessel, paying any excess freight, and also the cost of intermediate storage and of fire insurance. The goods were to be insured by the sellers on the buyers' account on the invoice value (including war risk), plus premium, plus ten per cent. for imaginary profit, and to be charged at 62s. 6d. per cent., and the buyers were to accept the policy against payment of premium and costs. Should the ship be lost before the loading was completed, the contract was to be cancelled for so much of the cargo as was not then laden. The price was payable ninety days after the receipt of the first bill of lading, or, in case the vessel arrived within the ninety days, against acceptance of the documents.

The loading was completed on August 6, and three sets of bills of lading taken out by the sellers' agents, who were in ignorance of the contract, and indorsed in blank. On September 9 the sellers deposited the first set with their bankers at Amsterdam. On December 6 the ship was captured by the British. On December 9 the buyers, not knowing of the capture, deposited the price with the bankers, instructing them not to part with the money until all parts of the bill of lading had been received. All the bills of lading came to hand by January 25, on which day the bankers handed the price to the sellers, and the shipping documents to the buyers.

(*g*) (1848) 2 Ex. 1, *ante*, 425.
(*h*) (1851) 6 Ex. 543, *ante*, 427.
(*i*) (1848) 2 Ex. 691, *ante*, 435.
(*j*) To the seller's order.
(*k*) See Code, s. 19 (2) "*prima facie* deemed to reserve," etc., *ante*, 420.
(*l*) [1918] A. C. 157, P. C.; 87 L. J. P. 18. See also *London J. S. Bank* v. *British Amsterdam Mar. Agency* [1911] 104 L. T. 143 (bill of lading to buyer's order, but to be retained by sellers against payment).

The buyers claimed the cargo in the Prize Court. Evans, P., held that they were not entitled. This decision was reversed in the Privy Council, who held that the property in the cargo had passed to the buyers on shipment, subject only to the sellers' lien.

Their Lordships showed that the sale was of the whole cargo of a named ship; that, by the general tenor of the contract, the risk attached to the buyer on shipment, or at least on notification thereof, and the property, according to Blackburn, J.'s, doctrine in *Martineau* v. *Kitching* (*m*), *prima facie* followed the risk. The buyer had to pay whether the cargo arrived after shipment or not, the contract being cancelled only as regards any portion not shipped. The cargo also was insured on the buyer's account at the arrived value, including their profit; and the buyers had to take over the charter-party and name the port of discharge. The only fact that seemed to point to an intention to reserve the property was the form in which the bill of lading was taken. But this form was determined by the seller's agent in ignorance of the contract, and with no particular instructions; and the way in which the seller subsequently dealt with the bills of lading pointed rather to an intention to preserve only his lien. They were placed at the buyer's disposal subject only to payment. These bills were deposited with the bankers *in medio*; they were not returnable to the seller except on the buyer's default, and on payment the latter was to be entitled to them. The seller therefore retained his lien only.

Principles deduced from the review of the authorities.

The following seem to be the principles established by the foregoing authorities:

1. Where goods are delivered by the seller in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the buyer to receive it, and the delivery to him being equivalent to a delivery to the buyer (*o*).

2. Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the seller is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of

(*m*) (1872) L. R. 7 Q. B. 436; 41 L. J. Q. B. 227, *post*.

(*o*) Code, s. 18, R. 5 (2); *Wait* v. *Baker*, *ante*, 425. See also *Dawes* v. *Peck* (1799) 8 T. R. 330; 4 R. R. 675; *Dutton* v. *Solomonson* (1803) 3 B. & P. 582; 7 R. R. 883; *Dunlop* v. *Lambert* (1839) 6 Cl. & Fin. 600; 49 R. R. 143.

lading, as the one for whom they are to be carried (*p*). And this rule equally applies to the buyer's own ship, even in cases where the bills of lading show that the goods are free of freight, because owner's property (*q*).

3. An entry in the invoice stating that the goods are shipped on account and at the risk of the buyer is not conclusive proof of the property being in the buyer, but may be controlled by the reservation by the seller of the right of disposal (*r*).

4. The fact that the goods are by the bill of lading made deliverable to the order of the seller, or of his agent, is *prima facie* a reservation of the right of disposal, so as to prevent the property from passing to the buyer (*s*).

5. The conclusion that *prima facie* the seller reserves the right of disposal, when the bill of lading is to his order or that of his agent, may be rebutted by proof that in so doing he 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 (*t*). Thus the facts of the case evincing generally an intention to transfer the property, and in particular the fact that the seller puts the bill of lading at the disposal of the buyer, subject only to payment of the price, may show that the seller's intention is merely to preserve his lien (*u*).

6. Where a bill of exchange for the price of goods drawn by the seller on the buyer is transmitted to the buyer together with the bill of lading to secure acceptance or payment of the bill of exchange, the buyer cannot retain the bill of lading unless he accepts the bill of exchange: and if he refuse acceptance or payment, as the case may be, he acquires no right to the bill of lading or the goods of which it is the symbol (*x*). And the seller may exercise his right of disposal

(*p*) This principle runs through all the cases. It is clearly enunciated by Parke, B., in *Wait* v. *Baker*, *ante*, 425; by Bramwell, B., and Cleasby, B., in *Gabarron* v. *Kreeft*, *ante*, 429; and by Cotton, L.J., in *Mirabita's Case*, *ante*, 431. The statement of the law in the text was approved by Lord Chelmsford in *Shepherd* v. *Harrison* (1871) L. R. 5 H. L. 116, at 127, 128; 40 L. J. Q. B. 148.

(*q*) *Turner* v. *Liverpool Docks*, *ante*, 427; *Schotsman* v. *L. and Y. Railway Co.* (1867) 2 Ch. 332; 36 L. J. Ch. 361; *Gabarron* v. *Kreeft*, *supra*; *Gumm* v. *Tyrie* (1865) 34 L. J. Q. B. 124, Ex. Ch.

(*r*) *Per* Lord Chelmsford, Lord Westbury, and Lord Cairns in *Shepherd* v. *Harrison* (1871) L. R. 5 H. L. 116, at 127, 129, 131; *Turner* v. *Trustees of Liverpool Docks*, *sup*

(*s*) S. 19 (2); *Ex parte* [illegible] v. *Magniac*, *ante*, 425; *Ex parte Banner*, *ante*, 437; *Ogg* v. *Shuter*, *ante*, 442.

(*t*) S. 19 (2); *Van Casteel* v. *Booker*, *ante*, 435; *Browne* v. *Hare*, *ante*, 445; *Joyce* v. *Swann*, *ante*, 436.

(*u*) *The Parchim* [1918] A. C. 157, P. C.; 87 L. J. P. 18.

(*x*) Code, s. 19 (3); *Shepherd* v. *Harrison* (1869) L. R. 4 Q. B. 196; in Ex. Ch., *ibid.* 493; (1871) 5 H. L. 116, *ante*, 441; *Ogg* v. *Shuter*, *ante*, 442; *Rew* v. *Payne* (1885) 53 L. T. 932; *Cahn* v. *Pockett*, *ante*, 443.

by selling or otherwise disposing of the goods, so long at least as the buyer remains in default (*y*).

7. Where the seller transmits direct to the buyer a bill of lading making the goods deliverable to the buyer's order, unaccompanied by a bill of exchange, whether drawn by the seller or not, the property in the goods *prima facie* vests unconditionally in the buyer, and does not revest on dishonour of the bill (*z*). The same result follows where the buyer is in return for the bill of lading to pay cash, or to send a banker's draft, or to make a promissory note (*a*). The fact that, on the transmission of the bill of lading, the buyer is advised of the drawing of the bill of exchange does not suspend the passing of the property (*b*).

8. When the seller deals with the bill of lading only to secure the contract price and not with the intention of entirely withdrawing the goods from the contract (*c*), as, *e.g.*, by depositing it with bankers who have discounted the bill of exchange, then the property vests in the buyer upon the payment or tender by him of the contract price (*d*).

(*y*) *Ogg* v. *Shuter*, *ante*, 442.

(*z*) *Ex parte Banner*, *ante*, 4[illegible], distinguishing *Shepherd* v. *Harrison*, *ante*, 441; *Key* v. *Cotesworth* (1852) 7 Ex. 595; 22 L. J. Ex. 4; *König* v. *Brandt*, *ante*, 439.

(*a*) *Wilmshurst* v. *Bowker*, *ante*, 434. See also the reasoning of Cockburn C.J., in *Shepherd* v. *Harrison* (1869) L. R. 4 Q. B. 196, at 203, 204.

(*b*) *Gurney* v. *Behrend* (1854) 3 E. & B. 623; 23 L. J. Q. B. 265; 97 R. R. 687; *Ex parte Banner*, and *König* v. *Brandt*, *supra*.

(*c*) As in *Wait* v. *Baker*, *ante*, 425, where such was the seller's intention.

(*d*) *Mirabita* v. *Imperial Ottoman Bank*, *ante*, 431, determining a point left undecided by the C. A. in *Ogg* v. *Shuter*, *ante*, 442.

CHAPTER VII.

OF THE INCIDENCE OF THE RISK.

With regard to the incidence of the risk to which the goods are subject, the Code provides:

"**20.** Unless otherwise agreed, the goods remain at the seller's (*a*) risk until the property (*b*) therein is transferred to the buyer (*c*), but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery (*d*) has been made or not. Code, s. 20.

"Provided that where delivery has been delayed through the fault (*e*) of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

"Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party."

"As a general rule," says Blackburn, J., in *Martineau* v. *Kitching* (*f*), "*res perit domino*, the old civil law maxim, is the maxim of our law; and when you can show that the property passed, the risk of the loss *prima facie* is in the person in whom the property is. If, on the other hand, you go beyond that, and show that the risk attached to one person or the other, it is a very strong argument for showing that the property was meant to be in him (*g*). But the two are not inseparable. It may very well be that the property shall be in the one and the risk in the other."

The corollary to the rule that the risk *prima facie* attaches to the ownership of the goods, is that any accretion or benefit to them also attaches (*h*).

The general rule, then, being that the risk attaches to the ownership of the goods, the parties may by agreement evince a different intention. And an agreement that one or other Risk by agreement.

(*a*) "Seller" includes one who agrees to sell: s. 62 (1).
(*b*) *I.e.*, "the general property": s. 62 (1).
(*c*) "Buyer" includes one who agrees to buy: s. 62 (1).
(*d*) *I.e.*, "voluntary transfer of possession": s. 62 (1).
(*e*) *I.e.*, "wrongful act or default": s. 62 (1).
(*f*) (1872) L. R. 7 Q. B. 453, 454; set out *post*, 453.
(*g*) But see for a contrary inference, *per* Cockburn, C.J., in *Martineau* v. *Kitching* (1872) L. R. 7 Q. B. 436, *post*, 453; *per Cur.* in *The Elgee* .ton *Cases* (1874) 22 Wall. 180, *post*, 453.
(*h*) *Per* Blackburn, J., in *Sweeting* v. *Turner* (1871) L. R. 7 Q. B. 313; 41 L. J. Q. B. 58; *Black* v. *Homersham* (1878) 4 Ex. D. 24; 48 L. J. Ex. 79 (dividend on shares).

shall bear the risk may be inferred from their course of dealing, or by usage binding on both (*i*). But an intention that the buyer shall assume the risk before the property has vested in him must be either expressed, as in the two following cases, or clearly to be inferred from the circumstances.

Castle v. *Playford* (1872).

In *Castle* v. *Playford* (*k*) the contract was for the sale of a cargo of ice to be shipped, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof the said purchaser *takes upon himself all risks* and dangers *of the seas*, rivers, and navigation of whatever nature or kind soever, and the said Playford agrees to *buy and receive the said ice on its arrival at ordered port* . . . and to pay for the same in cash on delivery at 20s. per ton, *weighed on board during delivery*." Declaration for the price by the sellers, and plea that the cargo did not arrive at the ordered port, and the plaintiffs were not willing and ready to deliver. On demurrer to the declaration and the plea, Martin, B., and Channell, B., gave judgment for the defendant, being of opinion that the property did not pass by the terms of the contract, and would not pass till weighing on board; that the time for payment had not arrived; that the defendant was not liable; and that the provision with regard to risk was to protect *the seller* from liability for non-delivery caused by dangers of the sea. Cleasby, B., dissented, holding that the risk attached to the buyer after the shipment and the forwarding of the bills of lading, and that he must pay for the goods.

In the Exchequer Chamber (*l*) the judgment was unanimous for the plaintiffs, Cockburn, C.J., Willes, J., and Blackburn, J., expressing a very decided opinion that the property passed on shipment and delivery of the bill of lading; Cockburn, C.J., basing his opinion (in which Willes, J., concurred) on the stipulation as to the risk falling on the purchaser at that time. But the case was decided on the ground that, whether the property passed or not, the defendant undertook to pay for it if delivery was prevented by dangers of the sea; and that where property is to be paid for on or after delivery, and where the risk of delivery is assumed by the purchaser, if the destruction of the property prevents the delivery, the pay-

Where buyer assumes risk of delivery, price must be paid, even if property does not pass, if goods destroyed before delivery.

(*i*) See s. 55, *ante*, 254.

(*k*) (1870) L. R. 5 Ex. 165; 39 L. J. Ex. 150; (1872) L. R. 7 Ex. 98; 41 L. J. Ex. 44.

(*l*) *Coram* Cockburn, C.J., Willes, J., Blackburn, J., Mellor, J., Brett, J., and Grove, J.

ment is still due (*m*), based upon an estimate of the value of the cargo at the time of loss.

Martineau v. Kitching (1872).

Similar questions were involved in *Martineau* v. *Kitching* (*n*). In that case 1,000 sugar loaves, or "titlers," comprised in four specific batches or "fillings," marked and lying apart in a warehouse, were sold by the manufacturer to a broker. Each titler weighed from 38 to 42 lbs., and was according to usage, weighed on being taken away by the buyer. The terms were, "Prompt at one month: goods at *seller's risk for two months*." The goods had been marked and paid for in advance of being weighed, at an approximate sum, which was to be afterwards definitely settled when the goods came to be weighed on delivery; and part of them had been taken away by the purchaser. The residue was destroyed by fire *after* the lapse of the two months, and before being weighed. *Held*, by Cockburn, C.J., that the property had passed to the purchaser, the parties having, by fixing upon a provisional estimate of the price, shown an intention that the property should not depend upon the weighing to fix the exact amount, and the goods being specific. Moreover, the provision that the goods should be at the seller's risk for two months showed an intention that the property should be in the buyer, as otherwise such a provision would be unnecessary. Lush, J., concurred that the property passed at the time of the sale, and Blackburn, J., seemed to agree with him, but the case was decided on the same ground as that of *Castle* v. *Playford*, the parties having impliedly agreed that, after the expiration of two months, the buyer should assume the risk.

Semble, assumption of risk by seller is evidence that property has passed.

The inference from the judgment of Cockburn, C.J., is that, where the risk is expressly assumed by a party who is at the time of the contract the owner of the goods, as a seller who has agreed to sell, this fact is evidence that it is not intended that he shall remain owner.

The Supreme Court of the United States (*o*), approving this judgment of Cockburn, C.J., have inferred from a stipulation that *the buyer* should take the risk that it was *not* intended that the property should pass to him. They say: "It needs no agreement that the buyer shall take the risk if it is intended the ownership shall pass to him. . . . Why introduce a provision totally unnecessary?"

(*m*) See *Alexander* v. *Gardner* (1825) 1 Bing. N. C. 671; 4 L. J. (N. S.) C. P. 225; 41 R. R. 651; *Fragano* v. *Long* (1825) 4 B. & C. 219; 3 L. J. K. B. 177; 28 R. R. 226.

(*n*) L. R. 7 Q. B. 436; 41 L. J. Q. B. 227.

(*o*) In *The Elgee Cotton Cases* (1874) 22 Wall. 180, at 194, 195.

But no inference of the transfer, or of the retention of the ownership, can be drawn except from provisions by which the risk is expressly assumed. Where its incidence is to be gathered from the general tenor of the contract the ordinary rule, whereby the ownership *prima facie* attends the risk, will apply (*p*).

Provision for insurance.

The fact that one party or the other is to insure the goods is material to the determination of the question on whom the risk is to fall.

Fragano v. *Long* (1825).

Thus, in *Fragano* v. *Long* (*q*), the facts of which have been already stated, it was contended by the defendant, the shipowner, that the provision in the contract making the price payable *after* arrival of the goods showed that the seller was to bear the risk of transit. But the Court held otherwise, Bayley, J., saying: "If the goods were not to be paid for unless they arrived, why should the plaintiff insure them? That shows that arrival was not considered as a condition precedent to the payment. If the goods arrived, three months from the arrival was to be the period of credit; if they did not arrive, still the plaintiff would be bound to pay in a reasonable time after the arrival became impossible."

Insurance of an undivided quantity of goods.

In the following case the effect of an insurance was considered under a contract for an undivided quantity of goods.

Anderson v. *Morice* (1876).

In *Anderson* v. *Morice* (*r*), the plaintiff sought to recover the value of a cargo of rice which he had insured with the defendant. The plaintiff had bought under a contract, dated the 2nd February, the material parts of which were as follows: "Bought *the cargo* of Rangoon rice, per *Sunbeam*, at 9s. 1½d. per cwt., cost and freight. Payment by sellers' draft on purchaser at six months' sight, *with documents attached*." The sellers on the 6th March advised the plaintiff to effect insurance, but the plaintiff had on the 3rd February already effected a policy of insurance with the defendant, which described the adventure as: "At and from Rangoon by the *Sunbeam*, upon any kind of goods and merchandise, beginning the adventure upon the said goods, etc., from the loading thereof aboard the said ship, and shall so continue and endure during her abode there." The *Sunbeam*, of which the *seller*

(*p*) By the P. C. in *The Parchim* [1918] A. C. 157, P. C.; 87 L. J. P. C. 9.

(*q*) 4 B. & C. 219; 3 L. J. K. B. 177; 28 R. R. 226, set out *ante*, 394. *Alexander* v. *Gardner* (1835) 1 Bing. N. C. 671; 4 L. J. (N. S.) C. P. 22; 41 R. R. 651, *ante*, 387, is to the same effect.

(*r*) 1 App. Cas. 713; 46 L. J. C. P. 11; in Ex. Ch. (1875) L. R. 10 C. P. 609; 44 L. J. C. P. 10, 341; S. C. (1874) *ib.* 58.

were the charterers, had taken on board at Rangoon 8,878 bags of rice, the remaining 400 bags, which would have completed her cargo, being in lighters alongside, when she sank and was lost with her cargo. The captain afterwards signed bills of lading for the cargo shipped, which were endorsed to the plaintiff, and the sellers drew bills of exchange for the price, which were both accepted and met by the plaintiff after notice of the loss. It was held in the Exchequer Chamber (*s*), and afterwards affirmed by the House of Lords (the Lords being, however, equally divided in opinion), reversing an unanimous decision of the Common Pleas:

1. That the plaintiff had contracted to buy a *complete* cargo, and the property did not pass till the cargo was complete, that is, till the completion of the loading, so that shipping documents could be made out, this being a thing to be done by the seller to put the goods in a deliverable state.

2. That, apart from the question of the property, the same reasoning applied to the assumption of the risk, and that the plaintiff had only taken the risk of *that which he had contracted to buy, a complete cargo*, and so had no insurable interest in the part shipped.

Judgment of Blackburn, J., and Lush, J.

Blackburn, J., in the judgment of himself and Lush, J., said that the plain intention of the parties was that from the time the lading was complete, at least, the risk was to be the buyer's. The learned judge continued (*t*): "But there remains the disputed question whether each *separate bag* was at the risk of Anderson from the time it was put on board the *Sunbeam*. . . . There is nothing to prevent the parties from agreeing that, as the goods are shipped bag by bag each bag shall be at the risk of Anderson, though the payment be postponed till the whole is on board; and if they have sufficiently expressed such an intention, then *Castle* v. *Playford* (*u*) is an express authority in this Court that Anderson must bear the loss, though it occurred before the stipulated time for payment arrived. . . . On the other hand, *Appleby* v. *Myers* (*x*) is an express authority that if from the contract it appears that the intention of the parties is that the payment is to be only on the completion, nothing can be recovered, though that completion is prevented by an accident for which

(*s*) Blackburn, J., and Lush, J., Bramwell, B., Pollock, B., and Amphlett, B.; Quain, J., dissenting.
(*t*) L. R. 10 C. P. at 617, 619; 44 L. J. C. P. 10, 341.
(*u*) *Ante*, 452.
(*x*) (1867) L. R. 2 C. P. 651; 36 L. J. C. P. 331, *ante*, 164.

neither party is to blame. Both decisions are binding on us, even if we disapproved of them, but we agree with both." Then saying that the real question was, whose was the *risk*, and not in whom was the property, he went on: "We proceed on the ground that the *prima facie* rule of construction is that the parties intended that the risk should become that of the buyer, Anderson, *when and not till the whole lading was complete*, so as to enable the shippers by getting the shipping documents, to call on the buyer to accept and pay for the cargo; and that there is nothing in this contract to rebut the presumption that such was the intention."

Of Bramwell, B., Pollock, B., and Amphlett, B.

Bramwell, B., said, on behalf of himself and Pollock, B., and Amphlett, B.: "The plaintiff was to have the cargo of the *Sunbeam*, and to pay for it by acceptances at six months with the bills of lading attached. It is manifest, therefore, that until the cargo was completed, and the bills of lading could be given, the plaintiff by the mere bare words of the contract was not liable for its price, and had no property in any part of it that might be on board, except contingently on the cargo being completed. The cargo never was completed. But it was suggested that as the completion of the cargo became impossible through no default of the sellers there arose by implication a right . . . to be paid by the buyer for so much as had been loaded. For this contention we see no ground in reason or principle. The plaintiff also was in no default. . . . Further, we consider this concluded by authority. *Appleby* v. *Myers* is in point. . . . Then it is said that the contract of purchase shows that the plaintiff is to insure, and that consequently the rice was at the plaintiff's risk, which involved that he was to pay for it, and *Castle* v. *Playford* was cited. We entirely agree with that case. But the argument assumes that the rice was to be at the plaintiff's risk *before* the cargo was completed, and begs the question" (*y*).

Of Quain, J.

Quain, J., relied, in his dissenting judgment, on *Fragano* v. *Long*, and said: "I infer from the fact that it was intended that the plaintiff should insure, that the goods were intended to be at his risk in order to enable him to effect a valid insurance; and as nothing was said as to the time from which he was to effect the insurance, I infer that it was intended that

(*y*) *I.e.*, the plaintiff did not intend to insure anything but a complete cargo, therefore his insurance did not show that an incomplete cargo was at his risk.

he should insure by an ordinary policy *beginning the risk from the loading.*"

In the House of Lords, Lord Chelmsford held that, as payment was to be made only on the completion of the cargo, no interest in the goods passed to the buyer till the cargo was complete. Lord Hatherley held that the property in the goods would not pass till the completion of the cargo; that the insurance was intended to be on a complete cargo; and thus that the buyer did not intend to take the risk of the goods bag by bag. Lords O'Hagan and Selborne agreed with Quain, J., and the Court of Common Pleas, that the risk was to attach to the buyer on the loading of each bag. Lord O'Hagan further held, on the authority of *Aldridge* v. *Johnson* (*z*) and *Langton* v. *Higgins* (*a*), that the property passed in each bag as it was placed on board. In H.L.

Anderson v. *Morice* was carefully distinguished in *The Colonial Insurance Co. of New Zealand* v. *The Adelaide Marine Insurance Co.* (*b*), before the Privy Council in 1886. In that case, Morgan Connor and Glyde, the *buyers*, chartered a vessel, *The Duke of Sutherland*, and agreed to buy a cargo of wheat for her at Aimaru in New Zealand, "at 4s. 7d. free on board," from the New Zealand Grain Agency. The plaintiffs having agreed with the buyers to insure the cargo, reinsured with the defendants. Before the shipment of the wheat at Timaru was completed the vessel with the wheat already shipped was lost. The buyers paid the sellers for the wheat which they had already delivered on board, and the plaintiffs, having paid the buyers for the loss of the wheat, claimed indemnity from the defendants. The defendants contended *inter alia* that the plaintiffs had no insurable interest. This depended upon whether the buyers had an insurable interest or not. Great stress was laid upon the decision in *Anderson* v. *Morice*. The Privy Council, however, while admitting its authority, considered that it was not applicable, and decided that the plaintiffs had an insurable interest. Insurance of a quantity not entire. *Colonial Insurance Co.* v. *Adelaide Insurance Co.* (1886).

It will be observed that in both cases the insurance was effected upon a "cargo," but it was pointed out that the word is susceptible of different meanings according to the nature of the particular contract. In *Anderson* v. *Morice* the word "cargo" meant the full loading of the ship contracted for

(*z*) (1857) 7 E. & B. 885; 26 L. J. Q. B. 296; 110 R. R. 875, *ante*, 390.
(*a*) (1859) 4 H. & N. 402; 28 L. J. Ex. 252; 118 R. R. 515, *ante*, 157.
(*b*) 12 App. Cas. 128; 56 L. J. C. P. 19.

as an undivided whole for payment was to be made by draft against the shipping documents; the sellers being the charterers were, on putting the rice on board, delivering it to the master as *their* own agent, and for the purpose of making up the cargo; and the buyer's right to the cargo was to depend on the documents which were to be under the direction of the sellers. In the case under consideration, "cargo" simply meant a quantity of goods equal to the capacity of the vessel, but not an entire thing; for the sellers had merely agreed to supply a quantity of wheat; on shipping it they were delivering it to *the buyers'* agent, the buyers being the charterers. The Court therefore held that the delivery of the wheat from time to time was a delivery to the buyers, vesting in them the right of possession as well as the right of property, and that at the time of the loss the wheat was therefore at the buyers' risk.

Propositions.

The principles to be gathered from the three preceding cases would seem to be as follows:

1. A provision that either party shall insure the goods contracted for is strong evidence that the risk of loss was intended to be assumed by him (*c*).

2. When the goods contracted for are a quantity, it is a question depending upon the terms of the contract and the circumstances of the case whether the insurance covers, and the risk accordingly attaches to, the quantity of goods when completed only, or also to each separate instalment when delivered.

"c.f.i." contracts.

A common instance of a contract whereunder the risk attaches to the buyer is one in which the goods are to be shipped, and the price is to include the freight and the insurance of the goods, or as it is called a "cost, freight, and insurance" or "c.f.i." contract. Under such a contract, which will be explained more in detail hereafter (*d*), the buyer is in effect the insurer, and the risk *prima facie* attaches to him on and after shipment (*f*), subject however to

(*c*) See also *per* Blackburn, J., in *Allison* v. *Bristol Marine Ins. Co.* (1876) A. C. 209, at 229.

(*d*) *Post*, 810.

(*e*) Subject, however, to a contrary intention, as where the seller takes the risk of delivery: *Calcutta Co.* v. *De Mattos*, set out *post*, 460; *Dupont* v. *British South Africa Co.* (1901) 18 Times L. R. 24. Or the risk may be cast upon him by law, as where, in breach of his contract, he retains the right of disposal after shipment: *Corby* v. *Williams* (1881) 7 Can. S. C. R. 470.

(*f*) *Tregelles* v. *Sewell* (1862) 7 H. & N. 574; 126 R. R. 558. Ex. Ch. set out *ante*, 397; *per* Kennedy, L.J., in *Biddell Brothers* v. *E. Clemens Horst Co.* [1911] 1 K. B. 934; 81 L. J. K. B. 42, C. A.; *Wancke* v. *Wingren* (1889) 58 L. J. Q. B. 519.

the seller's obligation, which is a condition precedent, to tender such valid and effective shipping documents as are contemplated by the contract, or as are usual (*g*).

Contract f.o.b.

Stock v. *Inglis* (1885).

The question of the buyer's assumption of the risk of delivery, apart from the transfer of the property in the goods, was involved in the case of *Stock* v. *Inglis* (*h*), in relation to a contract for the sale of sugar "free on board" at Hamburg. In that case the sellers had contracted to sell to the plaintiff 200 tons of sugar to be shipped f.o.b. from Hamburg at so much a hundredweight, payment by cash in London in exchange for the bill of lading. According to the course of business, they shipped the sugar, together with other sugar to satisfy other contracts, without any separate appropriations. The sugars were lost at sea. *Held*, by the Court of Appeal, reversing the judgment of Field, J., in an action against the underwriter, that, though no property in the sugar had passed to the plaintiff, it was at his risk on shipment, and he was liable to pay for it against the bill of lading, and consequently he had an insurable interest. Brett, M.R., said it was admitted that, had the goods been specific, the words "free on board" would have thrown the risk on the buyer, and that there was nothing, either in business or in law, to confine the operation of the words to specific goods. Baggallay, L.J., concurred, and Lindley, L.J., said that a buyer might agree to assume the risk though the goods had not been appropriated to him on shipment. The judgment was unanimously affirmed in the House of Lords.

Time or mode of payment as grounding an inference of seller's risk.

The cases just considered show that the risk during transit is not cast upon the seller merely because the price is payable on the transfer of shipping documents (*i*), or at a time after the arrival of the goods (*k*), or their actual delivery to the buyer (*l*), or is to be ascertained by some act done in relation

(*g*) *C. Groom* v. *Barber* [1915] 1 K. B. 316; 84 L. J. K. B. 318 (goods sunk by enemy: loss not covered by policy or bill of lading); *Re Weis & Co. and Credit Colonial* [1916] 1 K. B. 346 (goods captured: same); *Arnhold Karberg & Co.* v. *Blythe & Co.* [1916] 1 K. B. 495; 85 L. J. K. B. 665, C. A. (documents avoided by war).

(*h*) 10 App. Cas. 263; 54 L. J. Q. B. 582; (1884) 12 Q. B. D. 564, C. A.; 53 L. J. Q. B. 356; (1882) 9 Q. B. D. 708; 52 L. J. Q. B. 30. It is right to point out that the judgment of the C. A. turned largely upon the course of dealing between the parties, and that of the H. L. proceeded upon different grounds: *per* Lord Blackburn, 10 A. C. at 275; 54 L. J. Q. B. 582. Lord Selborne, at 267, seems to have been of opinion that the property had, under the circumstances of the case, passed to the purchaser. The case was considered, *ante*, 399.

(*i*) *Anderson* v. *Morice*, *ante*, 454.

(*k*) *Fragano* v. *Long*, *ante*, 394.

(*l*) By the J.C. in *Houlder Brothers* v. *Public Works Commissioner* [1908] A. C. 276, at 290—1; 77 L. J. P. C. 58.

to them after their arrival (*m*). Such provisions may be intended only to regulate the time of payment, or the amount of the price, if the goods are not lost.

The following case was marked by great diversity of opinion both in the Queen's Bench and in the Exchequer Chamber.

Calcutta Co. v. De Mattos (1864).

In *The Calcutta Company* v. *De Mattos* (*n*), the action was by the seller to recover the balance of the price, and there was a cross action by the buyer to recover back the part of the price prepaid, and damages for non-delivery. On the 1st of May, 1860, the defendant wrote to the company, proposing to supply them with "1,000 tons of any of the first-class steam-coals on the Admiralty list, at my option, delivered over the ship's side at Rangoon at 45s. per ton of 20 cwt. Payment of one-half of each invoice value in cash, on handing you bills of lading and policy of insurance to cover the amount, and balance by like payment on delivery," &c., &c. The reply of the 4th of May accepted the tender with the following modifications and additions: "The selection of the particular description to be at the company's option . . . half the quantity, say not less than 500 tons, to be shipped not later than 10th June prox., and the remainder in all that month . . . payment one-half of each invoice value by bill at three months on handing bills of lading and policy of insurance to cover the amount, or in cash under discount at the rate of £5 per centum per annum, at your option, and the balance in cash at the current rate of exchange at Rangoon." The contract was closed upon these conditions, and the defendant chartered the ship *Waban* for Rangoon, the company being no party to the charter, and loaded her with 1,166 tons of coal, taking a bill of lading which expressed that the coal was shipped by him, and was to be delivered at Rangoon to the agent of the company or to his assigns, freight to be paid by the charterer as per charter-party. The defendant also effected insurance for £1,400, and handed the bill of lading and policy to the company. The company paid half the value of the coals to the defendant, and the vessel sailed but never arrived, nor were the coals delivered.

The question was, what was the effect of the contract as regards the property in the goods and the right to the price, from the time of the handing over the shipping documents and paying half the invoice value.

(*m*) *Castle* v. *Playford*, *ante*, 452; *Boyd* v. *Siffkin* (1809) 2 Camp. 326; 11 R. R. 721.

(*n*) (1863) 32 L. J. Q. B. 322; 139 R. R. 752; (1864) 33 L. J. Q. B. 214. Ex. Ch.

The Judges in the Queen's Bench were equally divided in opinion.

Opinion of Blackburn, J., and Mellor, J.

The opinion of Blackburn, J. (with whom Mellor, J., agreed, but withdrew his opinion), was the basis of the final judgment of the Exchequer Chamber. It is so instructive on the whole subject, as to justify copious extracts. The learned Judge said: "There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is in such cases at an end when he has delivered the goods to the carrier, and if the goods perish in the carrier's hands, the vendor is discharged, and the purchaser is bound to pay him the price. See *Dunlop* v. *Lambert* (*o*). If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination. See *per* Lord Cottenham, C., delivering judgment in the House of Lords in *Dunlop* v. *Lambert* (*p*). But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract, if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that they shall then be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might, if they pleased, contract that the price should not be payable unless

Parties may agree:
1. That property shall vest and risk attach on shipment;

2. Or only on delivery at destination;

3. Or, that property shall vest on shipment, but that price shall not be payable until arrival of goods.

(*o*) (1838) 6 Cl. & Fin. 600; 49 R. R. 143.
(*p*) *Ibid.* at 621.

a particular tree fall, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall." The learned Judge proceeded to remark: "It is clear that the coals are to be shipped in this country, on board a vessel to be engaged by De Mattos, to be insured, and the policy of insurance and the bill of lading and invoice to be handed over to the company. As soon as De Mattos, in pursuance of these stipulations, gave the company the policy and bill of lading, he *irrevocably appropriated to this contract* the goods which were thus shipped, insured, and put under the control of the company. . . . In construing this contract, the *prima facie construction* is that the parties intended that the *property in the coals vested in the company*, and the right to the price in De Mattos, *as soon as it came to relate to specific ascertained goods*, that is, on the handing over of the documents. . . . As to one-half of the price, . . . the intention that it should only be paid 'on completion of delivery at Rangoon,' seems to me as clearly declared as words could possibly declare it. . . . But consistently with this there might be an intention that there should be a complete vesting of the property in the goods in the company, and a complete vesting of the right to the half of the price in De Mattos . . . so that the goods were sold and delivered, though the payment of half the price was contingent on the delivery (at Rangoon) (*q*). And this I think is the true legal construction of the contract." And with reference to the clause in the contract that the coals were to be delivered at Rangoon, and the balance of the price payable on delivery, the learned Judge drew attention to the provision for insurance, and for the handing over of the policy, as showing an intention that the risk should attach to the buyer.

Opinion of Wightman, J.

Wightman, J., was of opinion that the whole cargo remained the *property of the seller, and at his risk*: that he was bound to deliver the whole at Rangoon, and that the transfer of the policy and bill of lading to the company was a *security* to protect the company in recovering back their advance of one-half the price in the event of De Mattos' failure to make delivery.

Opinion of Cockburn, C.J.

Cockburn, C.J., thought that the ordinary rule, that the property in goods deliverable at a particular place does not pass till delivery, was modified by agreement; accordingly, that, in this case, the *property* in the coals *passed to the com-*

(*q*) See *Dupont* v. *British South Africa Co.* (1901) 18 Times L. R. 24, a decision to a similar effect.

pany, subject to the seller's lien, for the payment of the price; that the coals, when shipped, were specifically appropriated to the company, and that by the transfer of the bill of lading they obtained dominion of the cargo, and could have disposed of it at their pleasure. But that De Mattos remained bound to make delivery in Rangoon, and by breach of that contract was bound to return the half of the price already paid, and lost his claim for the remainder.

In the Exchequer Chamber the majority of the Court (*r*) agreed with the opinion of Blackburn, J., as to the true meaning and effect of the contract; and in the result judgment was given for the defendant in both cases.

Risk where delivery by the seller is contingent on some event.

When delivery by the seller is by agreement, or by implication of law, contingent on the occurrence of some specified event, and the seller is accordingly excused from delivering if the event becomes impossible, the risk of loss or destruction of the goods, not caused by the seller's fault, attaches to the buyer, or not, according as the price was (*s*) or was not due respectively at the time when the contingency becomes impossible (*t*). But the rule applies only where future performance by the seller is excused by the terms of the contract, or implications of law; it does not apply where the contract is void *ab initio*, as by reason of mutual mistake (*u*).

Risk of deterioration during transit.

When the goods are to be sent to a buyer at a distance, the incidence of the risk of deterioration during transit depends, in the absence of express agreement (*x*), on one or more of several factors, viz., the ownership of the goods during the transit, the cause of the deterioration, and the character of the goods themselves. The subject is considered in the chapter on Delivery.

Where by the terms of the contract the buyer is allowed an

(*r*) Erle, C.J., Willes, J., and Channell, B.

(*s*) In such a case delivery is not a condition precedent to payment: Rule 1 of *Pordage* v. *Cole* (1669) 1 Wms. Saund. 320 b, *post*, 638.

(*t*) This principle governs various contracts. See *Chandler* v. *Webster* [1904] 1 K. B. 493, C. A.; 73 L. J. K. B. 401; *Clark* v. *Lindsay* (1903) 88 L. T. 198 (both Coronation seat cases); *Anglo-Egyptian Nav. Co.* v. *Rennie* (1875) L. R. 10 C. P. 271; 44 L. J. C. P. 130 (work and labour); *Whincup* v. *Hughes* (1871) L. R. 6 C. P. 78; 40 L. J. C. P. 104 (apprenticeship); *Price* v. *Williams* (1888) 58 L. T. 680 (tuition); *Byrne* v. *Schiller* (1871) L. R. 6 Ex. 319, Ex. Ch.; 40 L. J. Ex. 177 (advanced freight). The principle is the same under s. 7 of the Code, *ante*, 162.

(*u*) *Per* Channell, J., in *Blakeley* v. *Muller* [1903] 2 K. B. 760n.; *Clark* v. *Lindsay*, *supra*; *The Salvador* (1909) 26 Times L. R. 149.

(*x*) Under s. 55 of the Code. See *Dickson* v. *Zizinia* (1851) 10 C. B. 602; 20 L. J. C. P. 73; 84 R. R. 793; *Crozier, Stephens & Co.* v. *Aucrbach* [1908] 2 K. B. 161; 77 L. J. K. B. 873 (c.f.i.), C. A. See also in Australia, *Bowden Brothers & Co.* v. *Little* (1907) 4 Com. L. R. 1364 (onions).

Risk where the buyer may rescind the sale.

option to *rescind* the sale by the return of the goods, it follows from the principle of *Head* v. *Tattersall* (*y*) and *Chapman* v. *Withers* (*z*), that the risk of the destruction of, or any injury to, the goods while in the buyer's possession, and occurring without his fault, does not attach to the buyer by reason of his inability to return them, or to return them in the same state, although for the time being he may be the owner. The risk attaches to the person "who is eventually entitled to the property in the chattel" (*a*).

Second clause of s. 20. Delivery delayed by fault of either party.

In his judgment in *Martineau* v. *Kitching* (*b*), Blackburn, J., with reference to the facts of that case, says: "The delay in weighing is quite as much the fault of the purchaser as of the sellers. When the prompt day (*c*) comes the sellers have a right to require that the goods should be weighed at once, so as to ascertain the price, and have it paid to the last farthing. . . . Now by the civil law it always was considered that, if there was any weighing, or anything of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being in *mora*, and it was his default, though the *emptio* is not *perfecta*, yet if it is clearly shown that the party was *in mora*, he shall have the risk just as if the *emptio* was *perfecta* . . . because the non-completion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed."

It should be observed that the second clause of section 20 of the Code, already quoted (*d*), is not identical with Blackburn, J.'s, proposition. He speaks of *mora* delaying the transfer of the *property*, whereas the Code refers to a delay in delivery, *i.e.*, in the transfer of *possession* (*e*), and, though in many instances the same acts operate to transfer both, yet this is not always the case. It would therefore seem that the law, as laid down by the learned Judge, has been extended by the Code. Moreover, the risk to be borne by the party in fault is the risk of any loss which "might" (*f*) not otherwise

(*y*) (1871) L. R. 7 Ex. 7; 41 L. J. Ex. 4; *post*, Book V., Part II., Ch. II.
(*z*) (1888) 20 Q. B. D. 624; 57 L. J. Q. B. 457, *post*, Book V., Part II., Ch. II.
(*a*) *Per* Cleasby, B., in *Head* v. *Tattersall*, *supra*.
(*b*) (1872) L. R. 7 Q. B. at 456; 41 L. J. Q. B. 227.
(*c*) *I.e.*, the day appointed by agreement or usage of trade for payment.
(*d*) *Ante*, 451.
(*e*) "Delivery" means voluntary transfer of possession from one person to another: s. 62 (1).
(*f*) The original Bill contained the word "would." This was altered in its passage through the House of Lords.

have occurred; and this provision seems to throw on the party in fault the onus of showing positively that the loss would have occurred independently of his fault. The case is of course stronger where the loss would not have happened had there been no delay (*g*).

McConihe v. *N. Y. & Lake E. R.R. C.* (1859).

The following case, decided in America, may throw some light on these words. In *McConihe* v. *The New York and Lake Erie Rail Road Co.* (*h*), the plaintiff had agreed to build for the defendant company fifteen lumber cars, to be fitted with certain special boxes which the defendants only could supply, and which they agreed to furnish. The cars were to be completed within a certain time. The defendants, though repeatedly requested to do so, never furnished the boxes, and the cars were never completed; but seven of them were completed so far as they could be without the boxes, and, more than two months after the date when all the cars were to have been finished, the seven cars were destroyed by an accidental fire on the plaintiff's premises for which the plaintiff was not responsible. *Held*, that the property in the cars had not passed to the defendants, as not being complete; and the risk had not passed either, as the fire was not the *necessary* consequence of the defendants' delay. Moreover, had the cars been burnt on the defendants' premises after delivery, while the plaintiff was completing them, the risk would not have been on the defendants.

Under the Code, it would seem that in a similar case the buyers would be liable, as the loss "might" not have occurred had the cars been delivered. Their default in furnishing the boxes, by delaying delivery, rendered the loss by fire possible.

Third clause of s. 20.

Duties of either party as a bailee of the other's goods.

The third clause of section 20 (*i*) presupposes that the party in possession is not the owner of the goods. Thus, the seller may be in possession of the goods after the property has passed until the time for delivery has arrived; or the buyer may be in possession under a contract which postpones the transfer of the property, *e.g.*, till the price is paid. The case of a bailee on sale or return or on approval is not affected by the present clause, as the bailee not having "agreed to buy," is not a "buyer" (*k*).

(*g*) *Rogers* v. *Van Hoosen* (1815) 12 Johns. (Am.) 221 (fish); *Clarke* v. *Bates* [1913] 2 L. J. Ct. C. 114 (potatoes ruined by flood). This case shows that s. 7, *ante*, 162, must be read subject to the second clause of s. 20.

(*h*) 20 N. Y. 495.

(*i*) *Ante*, 451.

(*k*) See definition of "buyer" in s. 62 (1); and *Edwards* v. *Vaughan* (1910) 26 T. L. R. 545, C. A.

Extent of liability.

On principle it would seem that a seller in possession of the buyer's goods is, until the expiration of the period limited for delivery, in the position of a bailee for reward, and is liable for ordinary negligence only, as the price of the goods should include their custody by the seller till the time fixed for delivery, or for a reasonable time. Afterwards he would be a gratuitous bailee. So, the buyer in possession of the seller's goods, as under a hire-purchase contract, would seem to be also a bailee for reward. If, however, he has the right to repudiate the contract and require the seller to remove the goods, he would seem to be a gratuitous bailee after the seller has been notified, and a reasonable time has elapsed for the removal (*l*).

Thus the law has been declared (*m*) to be that "the seller shall deliver the thing sold, and he shall keep it safe till it is delivered, which he is bound to do with the same care as if it were a thing lent to him; for the seller had, or is presumed to have, a benefit by the sale; but this care of keeping is only for a reasonable time, for, after a faulty neglect of the buyer, if the thing be lost the seller is not liable unless it was lost *dolo malo*."

In America, the position of a seller has been explained in accordance with these principles. Haight, J., says, in *Koon* v. *Brinkerhoff* (*n*), that, after the passing of the property, the seller "is bound to that degree of care and diligence which men of common prudence generally bestow on their own property. The rule, however, is limited to cases where the buyer is under no obligation to remove the goods. For if a time be fixed for actual delivery, and it has elapsed, or if, no time having been fixed, the vendee receives notice to take away the goods, the obligation of the seller is simply to observe good faith, and he is responsible only in case of fraud, or gross negligence simulated to fraud . . . he is only liable in like manner as a depository or mandatory in case of fraud or gross negligence, the custody of the goods being solely for the advantage of the vendee" (*p*).

(*l*) Bayley, J., says in *Okell* v. *Smith* (1815) 1 Stark. 107; 18 R. R. 752, that, after notice of rejection, the goods are at the seller's risk. The learned Judge probably referred to accidents.

(*m*) 3 Salk. 61. See also Dig. 18, 6, 17.

(*n*) (1886) 39 Hun, 130. See also *per* Ritchie, C.J., and Fournier, J., and Taschereau, J., in *Ross* v. *Hannan* (1891) 19 Can. Sup. C. R. 227; Story on Sales, ss. 300a, 300b, 393, and *per Cur.* in *McCandlish* v. *Newman* (1854) 22 Penn. 465.

(*p*) See also the reasoning of the Court in the case of a carrier, in *Cairns* v. *Robins* (1841) 8 M. & W. 258; 10 L. J. Ex. 452; 58 R. R. 695; Dig. 18, 1,

And if the party in possession agree to keep the goods in a specified place, or to deal with them in a particular way, and break his contract in this respect, he will be liable for any loss of, or injury to, the goods, unless he can show that the loss or injury would have happened in any event (*q*).

Civil and French law on risk.

The provisions of the civil law with regard to the *periculum rei* are considered in the following Chapter. It was also part of that law that the party who took the risk should also have the profit: "Post perfectam emptionem omne commodum et incommodum quod rei venditæ contingit ad emptorem pertinet" (*r*); and Justinian gives the reason: "Nam et commodum ejus esse debet cujus periculum est" (*s*).

The French Civil Code has a similar provision: "The thing sold must be delivered in the state in which it is at the moment of the sale. After that day all the fruits belong to the buyer" (*t*). And "The obligation to deliver the thing includes its accessories, and everything that is intended for its perpetual use (destiné à son usage perpétuel)" (*u*).

By that Code also a person bound to deliver a specific chattel is discharged if the thing perishes, ceases to be an article of commerce, or is totally lost, without his default and before he is *en demeure*, and even where he is *en demeure*, if he is not liable for accidents and can prove that the thing would equally have perished if it had been delivered (*x*).

Scotch law.

"The separation of the risk from the property was established in Scotland at least as far back as the seventeenth century, the rule being that, as soon as the contract was complete, specific goods were at the risk of the buyer, though undelivered, and though no property had passed" (*y*). There is now a uniform rule laid down for both countries by the Code.

s. 4; 18, 6, 11; and the analogous case of a vendor in possession of land before conveyance: *Clarke* v. *Ramuz* [1891] 2 Q. B. 456; 60 L. J. Q. B. 679, C. A.

(*q*) On the principle of *Davis* v. *Garrett* (1830) 6 Bing. 716; 8 L. J. C. P. 253; 31 R. R. 524; and *Lilley* v. *Doubleday* (1881) 7 Q. B. D. 510; 51 L. J. Q. B. 310. See also *Roberts* v. *McDougall* (1887) 3 Times L. R. 666.

(*r*) Code, 4, 48, 1.

(*s*) Inst. 3, 23, 3.

(*t*) Art. 1614.

(*u*) Art. 1615.

(*x*) Art. 1302. *Cf.* s. 20 of Code, *ante*, 464.

(*y*) Prof. Brown's Sale of Goods Act, 6, 106. See also *per* Lord Blackburn and Lord Watson in *Seath* v. *Moore* (1886) 11 A. C. at 371, 378, 380; 55 L. J. P. C. 54.

CHAPTER VIII.

EFFECT OF A SALE BY THE CIVIL, FRENCH, AND SCOTCH LAW.

An attempt must now be made to give a summary, necessarily very imperfect, of the principles of the Civil Law, in regard to the nature of the contract of sale and its effect in passing the property. The doctrines are subtle and technical, requiring for elucidation at least some general idea of the mode in which the Romans entered into contracts at different periods.

Discovery of the Institutes of Gaius.

The civilians of the present generation have enjoyed an immense advantage over their eminent predecessors, Pothier and d'Aguesseau, Cujas and Vinnius, Domat and Dumoulins. The Digest, Code and Institutes of Justinian, compiled in the sixth century, during the reign of that emperor (A.D. 527—565), formed up to the year 1816, the almost exclusive source from which was derived a knowledge of Roman jurisprudence; and in that famous *corpus juris civilis*, the name of Gaius was confounded with those of the other eminent jurists, whose responses (or as we should call them opinions on cases submitted), were adopted by the imperial law-giver as a part of the statutory law of the empire. It was, however, known that the Institutes of Justinian were modelled on those of Gaius, who lived nearly four centuries earlier. But the works of Gaius were believed to be irretrievably lost (*a*) till the year 1816, when Niebuhr discovered in a convent at Verona a parchment manuscript of Roman law, of which the original text had been partially obliterated to give place to a theological work of one of the fathers, St. Jerome (*b*). Savigny recognised the old writing to be the text of Gaius, and the original manuscript was restored almost in its integrity, thus giving to the civilians a succinct and methodical treatise on the whole body of the Roman law as it existed in the second century. By means of this invaluable addition to former

(*a*) One folio, however, of the 4th book (ss. 136—144), which had become detached, had been published in 1740, by Maffei in his Istoria Teologica, and was republished by Haubold in 1816.

(*b*) See a very interesting account of this discovery in the preface to the first edition of Gaius, and in the Introduction to Mears' Institutes of Gaius, iii. *et seqq.*

sources of information, the modern German and French commentators have been able to pour a flood of light on many questions formerly obscure.

Sale the offspring of exchange.

Sale was considered as the offspring of exchange, and it was long disputed whether there was any difference in the nature of these contracts. "Origo emendi, vendendique a permutationibus cæpit, olim enim non ita erat nummus; neque aliud *merx*, aliud *pretium* vocabatur" (*c*). And in the earliest period of the republic, when the laws of the Twelve Tables sufficed for the simple dealings of a rude peasantry, or of the poor city clients of the Roman patricians, the contracts were formed solely by means of actual exchange made on the spot, as the very names evince; for the things were either exchanged by the *permutatio*, or *given* for a price by the *venumdatio*.

Dare, facere, præstare.

Afterwards, when the idea of binding one party to another by consent, and thus forming an obligation (*juris vinculum*), was entertained, the whole body of possible engagements was included in the three expressions, *dare*, *facere*, *præstare*: *dare*, to give, that is, to transfer ownership: *facere*, to do, or even abstain from doing an act: *præstare*, to furnish or warrant an enjoyment or advantage or benefit to another. And these three classes of engagements might arise out of three classes of obligations, only two of which gave a right of action, the third being available only for defence in some special cases. The three classes of obligation were *civil* obligations, which gave a right of action at law: *prætorian* or *honorary* obligations, which gave the right to sue in equity, that is, to invoke the equitable jurisdiction of the prætor (*d*): and *natural* obligations, for which there was no action at law or in equity, but which might be used in defence, as in *compensatio* or set-off: "etiam quod natura debetur, venit in compensationem" (*e*); and which were recognised in other ways (*f*).

Civil, prætorian and natural obligations.

The buyer then had certain actions which alone he was permitted to institute against the seller. The Institutes of Gaius give us the form of declaration in an action *in personam*. "In personam actio est, quotiens cum aliquo, qui nobis vel ex contractu, vel ex delicto obligatus est con-

(*c*) Dig. 18, 1, 1, De Contrah. Emptione. And see *ante*, 8.

(*d*) For these two classes giving rights of action, see Justin. Inst. 3, 13, 1.

(*e*) Dig. 16, 2, 6, Ulp.

(*f*) Thus a *naturalis obligatio* might be the consideration for an *hypotheca*: Dig. 20, 1, 5; or for a suretyship: Inst. 3, 20, 1. And money paid under such an obligation could not be recovered by a *condictio indebiti*: Dig. 12, 6, 51.

tendimus; id est, cum intendimus (*g*), dare, facere, præstare oportere" (*h*).

Four stages in mode of making sales in Rome.

Now, the mode of forming contracts of sale in Rome passed through four successive stages after the primitive one of actual exchange.

Nexum.

1. First, the *nexum*, effected *per æs et libram*, which consisted in weighing out in the presence of five male witnesses, Roman citizens, and a balance-holder, or libripens, a certain weight of brass, and using certain solemn words, *nuncupatio*, which operated together as a symbol to form a perfect sale (at a period when men had not learned to write), termed *nexum*, *mancipium*, *mancipatio*, *alienatio per æs et libram*—all of which had fallen into disuse and derision long before the time of Gains, who says, "in odium venerunt" (*i*).

Stipulatio.

2. Secondly, the sale by certain sacramental words alone, and dispensing with the *æs et libram:* this was the *stipulatio* (*k*) which bound only *one side*, from its very nature, because it consisted in a promise made in response to the *stipulator*. A stipulation, therefore, might bind the seller or the buyer; it required *two* stipulations to bind both. The rigorous solemnities and sacramental formulæ of the old law of the Quirites, were upheld with strictness by the Patricians and Priests, so that by an exaggerated technicality, the particular words "Spondes? Spondeo," forming a stipulation, were not allowed to be used by any but Roman citizens (*l*)—foreigners and barbarians being compelled to adopt other words, as "Promittis." "Dabis," "Facies," for the same purpose, these latter expressions being deemed *juris gentium*.

(*g*) *I.e.*, in the *intentio*, "ea pars formulæ qua actor desiderium suum concludit:" Gai. Com. 4, 41.

(*h*) Gai. Com. 4, § 2.

(*i*) Gai. Com. 4, 30.

(*k*) The etymology of this word is doubtful: Paulus derives it from *stipulus*, an old word, meaning firm: Sent. 5, 7, § 1. So also Justinian, in Inst. 3, 15; and Isidor of Seville (lib. 5, Orig. c. 24), says: "Dicta stipulatio a stipula. Veteres enim quando sibi aliquid promittebant, stipulam, tenentes frangebant, quam iterum jungentes, sponsiones suas agnoscebant." The second is adopted by many authorities, including Trench, Wedgwood, Littrè, and Todd (Johns. Dict.), the latter quoting Sadler's Rights of the Kingdom, of 1649, to show that the practice of using a straw in sign of the completion of a contract actually obtained in the Isle of Man. Skeat (Etym. Dict.) and the Oxford Dictionary adopt the first derivation above mentioned, the latter citing Justinian, *supra*, and adding: "The old story about *stipula*, a straw, noticed in Trench, Study of Words, is needless; stipulate simply keeps the sense of the root." Whichever etymology be adopted, we ultimately return to the root *stip*, "to make firm," whence *stipes*, *stipula*, stub, stolid, etc., are derived.

(*l*) Gai. Com. 3, 93. And not even by Roman citizens in a Greek translation; *ibid.* That the Romans attached a peculiar sanctity to the word *spondeo* is shown by the fact that in one case only could it be used to or by a foreigner, *i.e.*, when in the course of a negotiation for peace: Gai. 3, 94.

But Justinian tells us that this form of contract was obsolete in his day (*m*).

Literarum obligatio, or Expensilatio.

3. The third step in the progress of the law naturally occurred when men had learned generally to write, and every Roman citizen kept a book called a register or account-book (*tabulæ*, *codex accepti et expensi*). The law declared that an entry made in this book in certain terms, admitting the price to be considered as weighed out and given, should be equivalent to the actual ceremony *per æs et libram*, and should constitute not simply a proof of the sale, but the written contract itself, *literarum obligatio*. This book was carefully written out once a month from a diary or memorandum-book (*adversaria*), and was treated as a proof of the highest character, Cicero saying of the *tabulæ*, that they are "æternæ, sanctæ, quæ perpetuæ existimationis fidem et religionem amplectuntur" (*o*). This contract, which was confined to Roman citizens, was said also to be an *expensilatio*, from the entries in these books, the party who paid money entering it under this head, as *pecunia expensa lata*, and the one who received it, as *pecunia accepta relata*. An entry in the creditor's book only was sufficient, if made with the consent of the debtor, which could be shown otherwise than by an entry in the debtor's book; but Cicero says that it was no less base for the debtor to omit to enter a sum due than for the creditor to enter what was not due (*p*). This form of obligation had also become obsolete by the time of Justinian (*q*).

There was also another form of *obligatio literarum* by means of *chirographæ* and *syngraphæ* ("id est, si quis debere se aut daturum se scribat"), or written acknowledgments of debt or promises to pay, and made by the debtor only or by both parties respectively. These were peculiar to the *peregrini* (*r*).

Mutual consent.

4. The fourth and last stage (*s*) was the contract by mutual consent alone; and it is again a remarkable instance of the

(*m*) Inst. 3, 15, 1. The formality of the words was abolished by Leo in A.D. 469. See Cod. 8, 38, 10. In future the fact of mutual assent was the governing factor in all agreements.

(*o*) Pro Roscio Com., 3, § 2.

(*p*) *Ibid.* 1, § 2. Cicero shows the practice with regard to the *adversaria* in c. 3, and says: "Quid est quod negligenter scribamus adversaria? Quid est quod diligenter conficiamus tabulas? Qua de causa? Quia hæc sunt menstrua, illæ sunt æternæ; hæc delentur statim, illæ servantur sancte. . . . Itaque adversaria in judicium protulit nemo": c. 2. The whole speech will repay perusal. See Val. Max. for an instance of *expensilatio*, 8, 2, 2.

(*q*) Inst. 3, 21.

(*r*) Gai. 3, 134.

(*s*) Real contracts, such as *mutuum* (loan), *pignus* (pledge), and *depositum* (deposit), came, however, in historical sequence before consensual contracts. See Maine's Anc. Law, Ch. 9.

Four contracts *juris gentium*.

strict technicality of the Roman law (*t*), that it allowed but four contracts to be made in this manner, on the ground that they were contracts *juris gentium*, while all others were still required to be made with the formalities of the Roman municipal statutes. These four contracts are: sale (*emptio venditio*), letting for hire (*locatio-conductio*), partnership (*societas*), and agency or mandate (*mandatum*). They are also the only contracts of the Roman law that were termed bilateral, or synallagmatic: that is, binding the parties *mutually* (*ultro-citroque*), every other form of contract being unilateral, *i.e.*, binding one party only, and requiring to be repeated in the reverse form in order to bind the other, as in the *stipulatio*.

Bilateral or synallagmatic.

Distinction between sale in Rome and at common law.

The sale being at last permitted by mutual consent, its elements were the same as at the English common law, with the following exceptions.

Price must be certain.

1st. The price was to be *certain*, either absolutely or in a manner that could be determined, as for *centum aureos*; or for what it cost you, *quantum tu id emisti*; or for what money I have in my coffer, *quantum pretii in arca habeo* (*u*). The common law rule, that in the absence of express agreement a reasonable price is implied, did not exist in the Roman law.

Sale was not a transfer of ownership.

2ndly. It was a received maxim in the Roman law that the seller did not bind himself to transfer to the buyer the property in the thing sold (*x*); his contract was not *rem dare*, but *præstare emptori rem habere licere*. The texts abound in support of this statement. "Qui vendidit, necesse non habet fundum emptoris facere," unless he made a special and unusual stipulation to that effect, for the text goes on to say, "ut cogitur qui fundum stipulanti spopondit" (*y*). If the seller were owner, the property passed by virtue of his promise to guarantee possession and enjoyment, but if not, the sale was still a good one, and its effect was simply to bind the seller to indemnify the buyer, if the latter was "evicted," that is, dispossessed *judicially* at the suit of the true owner. Ulpian's explanation is entirely lucid. "Et in primis ipsam rem præstare venditorem oportet, id est, tradere. Quæ res, si quidem dominus fuit venditor, facit et emptorem dominum;

(*t*) Gaius thus complains: "Namque ex nimia subtilitate veterum qui tunc jura condiderunt, eo res perducta est ut vel qui minimum errasset, litem perderet."—Com. 4, § 30.

(*u*) Dig. 18. 1, De Contrab. Empt. 7, § 1. See further on the question of the certainty of the price, *ante*, 172.

(*x*) It was otherwise in *permutatio*, which was a *real* contract: Dig. 19, 4, 1, 3.

(*y*) Dig. 18, 1, 25, § 1, Ulp.

si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum, aut eo nomine satisfactum" (*z*). It resulted, therefore, that on the completion of a contract of sale, the seller was bound simply to deliver possession, and the buyer had no right to object that the seller was not owner. But the possession thus to be transferred, was something more than the mere manual delivery, and the Romans had a special term for it: it must be *vacua possessio*, a free and undisturbed possession, not in contest when delivered; "vacua possessio emptori tradita non intelligitur, si alius in ea, legatorum fideive commissorum servandorum causa in possessione sit: aut creditores possideant. Idem dicendum est si venter in possessione sit. Nam et ad hoc pertinet vacui appellatio" (*a*). And if the seller knew that he was not the owner and made a sale to a buyer ignorant of that fact, so as wilfully to expose the latter to the danger of eviction, the seller's conduct was deemed fraudulent, and the buyer was authorised to bring an equitable suit, *ex empto*, without waiting for the eviction. "Si sciens alienam rem ignoranti mihi vendideris, etiam priusquam evincatur, utiliter (*b*) me ex empto acturum putavit (Africanus) in id, quanti meâ intersit, meam esse factam. Quamvis enim alioquin verum sit, venditorem hactenus teneri ut rem emptori habere liceat, non etiam ut ejus faciat, quia tamen dolum malum abesse præstare debeat, teneri eum, qui sciens alienam, non suam, ignoranti vendidit" (*c*).

Seller was bound only to deliver possession.

Where seller knew he was not owner.

The eviction against which the seller was bound to warrant the buyer, was the actual dispossession effected by means of a judgment in an action by a third person, and it was not enough that judgment was rendered if not executed. In Pothier's edition of the Pandects, he thus states the rule, and cites a response of Gaius: "Cum ea res evicta dicatur, quæ per judicem ablata est, hinc non videbitur evicta, si condemnatio exitum non habuit, et adhuc rem habere liceat. Exemplum affert Gaius. Habere licere rem videtur emptor, et si is qui emptorem in evictione rei vicerit, ante ablatam vel

What was meant by eviction.

(*z*) Dig. 19, 1, 11, § 2, Ulp.

(*a*) Dig. 19, 1, 2, § 1, Paulus. See also 19, 1, 11, 13.

(*b*) *Utiliter*, that is, in equity, before the Prætor.

(*c*) Dig. 19, 1, 30, § 1. The text may be thus translated for the benefit of those not familiar with the technical terms of the Roman law: "If you, knowing a thing to be another's, sell it to me, who am ignorant of the fact, Africanus was of opinion that even before eviction, an equitable suit *ex empto* might be maintained by me for damages (literally, for as much interest as I had, that the thing should become mine). For, although it is otherwise true that the seller is only bound to guarantee possession to the buyer, not also that the thing should become the buyer's, yet because he ought also to warrant the absence of fraud, a man is held responsible who, knowing the thing to be another's, not his own, has sold it to one ignorant of that fact."

abductam rem sine successore decesserit, ita ut neque ad fiscum bona pervenire possint, neque privatim a creditoribus distrahi, tunc enim nulla competit emptori ex stipulatu actio, quia rem habere ei licet" (*d*).

It was also necessary that the ground for the eviction should exist at the date of the sale, and should not arise subsequently (*e*); and that the eviction was not attributable to the buyer's own *culpa* or negligence (*f*), or to the judges' incompetency (*g*), or to violence (*h*).

Remedies of evicted purchaser:—1. Actio ex empto.

The evicted purchaser had two actions, in addition to his right to withhold the unpaid price if the title was in dispute (*i*). One action was *ex empto* which was the *actio directa*, in which the recovery was for damages consisting of the value of the thing at the *date of eviction*, and any expenses incurred in relation to it, and not merely the price paid. "Quanti tua interest rem evictam non esse, non quantum pretii nomine dedisti," was the rule of damages (*k*). Thus, if the thing had depreciated since the sale the loss was the buyer's (*l*), the risk of any increase being on the seller (*m*), unless it was so excessive that it could not reasonably have been in the contemplation of the parties at the time of sale, in which case it was limited to double the amount of the price (*n*). The true principle in this action was to restore the buyer to the condition in which he would have been, not if he had never bought, but if he had not been dispossessed (*o*).

2. Actio De stipulatione duplæ.

The second action was *De stipulatione duplæ*, and arose out of a custom of stipulating that the buyer, in case of eviction, should receive, as an indemnity, double the price given. This stipulation became so general, that under an Edictum Ædilium Curulium, it was considered to be implied in all sales, unless expressly excluded: "Quia assidua est duplæ stipulatio, idcirco placuit ex empto agi posse si duplam

(*d*) Pothier, Pandectæ Justinianæ, lib. 21, tit. 2, 57, De Evict. Pars 2. No. XII. So strict was the rule, that the buyer had no remedy if evicted under the sentence of an arbitrator, or by compromise.—*Ib.* No. XVI.; Dig. 21, 2, 56, 1.

(*e*) Dig. 21, 2, 3, and 11.

(*f*) Dig. 21, 2, 29, 1; 21, 2, 63, 2.

(*g*) Cod. 8, 45, 8, and 15: Dig. 21, 2, 51 pr.

(*h*) Cod. 4, 49, 17.

(*i*) Dig. 18, 6, 18, 1; Cod. 8. 45, 24.

(*k*) Cod. 8, 45, 23; Dig. 21, 2, 70.

(*l*) Dig. 21, 2, 70.

(*m*) Pothier, 132.

(*n*) Dig. 19, 1, 43 and 44; Code, 7. 47.

(*o*) The texts are collected in Pothier, Pand. Just. lib. 19. tit. 1. ch. 1. Nos. 43 to 47, under the head—"Quanti teneatur venditor emptori, evictionis nomine, hac actione ex empto."

venditor mancipii non caveat. Ea enim quæ sunt moris et consuetudinis, in bonæ fidei judiciis debent venire" (*p*). But the seller, it would seem, was only bound to this obligation in the case of things of special value, such as jewels, silk garments, slaves, etc. (*q*).

Seller was bound as *auctor* to make good his warranty.

In consequence of the peculiar obligation of the seller as warrantor against eviction, he was called the *auctor*, bound *auctoritatem præstare*, to make good his warranty: and the form of procedure was, that whenever the buyer was sued by a person claiming superior title to the thing sold, it was his duty to cite his seller, and make him party to the action, so as to give him an opportunity of urging any available defence. This proceeding was termed *litem denuntiare;* or *auctorem laudare; auctorem interpellare;* and the buyer who failed to cite in warranty his seller, without a legal excuse for his default,—as, for instance, a waiver by the seller of notice (*r*), or the buyer's ignorance of his whereabouts (*s*), or the seller evading notice (*t*)—lost his remedy. "Emptor fundi, nisi auctori aut heredi ejus denuntiaverit, evicto prædio, neque ex stipulatu, neque ex dupla, neque ex empto actionem contra venditorem vel fidejussorem ejus habet" (*u*).

Buyer's risk before delivery, although the property had not passed, if *emptio* were *perfecta*.

It would seem the natural consequence of these principles, that a seller who did not even profess to transfer title, must necessarily suffer the loss, if the thing sold perished before delivery, on the maxim that *res perit domino*. But the contrary rule was explicitly laid down, as appears from the following passage in the Digest: "Necessario sciendum est quando perfecta est emptio; tunc enim sciemus cujus periculum sit; nam perfecta emptione periculum ad emptorem respiciet. Et si id quod venierit appareat, quid, quale, quantum sit, et pretium, et pure veniit, perfecta est emptio" (*x*). The reasoning by which this result was reached in the Roman law is explained by an eminent French jurist (*y*).

Where the contract was in its inception conditional, the

(*p*) Dig. 21, 1, 31, 20, Ulp. De Ædil. Edict.; *ib.* 21, 2, 2, and 37, 1. The whole of the second title of the 21st Book of the Digest is devoted to this subject, De Evictionibus et Duplæ Stipulatione.
(*q*) Dig. 21, 2, 37, 1.
(*r*) Dig. 21, 2, 63.
(*s*) Ib. 21, 2, 56, 6.
(*t*) Ib. 21, 2, 55, 1, and 56, 5.
(*u*) Cod. 8, 45, 8.
(*x*) Dig. 18, 6, 8.
(*y*) Ortolan, Explic. Hist. des Inst., 7e éd., Tome 3, p. 282, § 1470. The learned author's lengthy quotation is omitted from considerations of space.

When sale perfect in particular cases.

emptio was not *perfecta* till the condition was fulfilled (*z*): but if it were afterwards fulfilled the buyer took the risk of any intermediate *partial* loss (*a*). If the subject-matter of the contract were things sold by number, weight, or measure (*res fungibiles*) the sale was not perfect till numbering, etc. (*b*). Till then the seller took the risk (*c*). It was otherwise with respect to things sold *en bloc* (*per aversionem*). Here the ordinary rule applied, and the sale was perfect as soon as the price was determined, as in the case of a specific thing (*d*). If the seller had the option to deliver one of two things, and one perished, he was bound to deliver the other: if both perished, and whether the option were the seller's or the buyer's, the risk was in the latter, and he had to pay the price (*e*).

Buyer's right to profits.

Conversely, from the time of the sale being *perfecta* the buyer was entitled to all the profits of the thing sold, and all accretions thereto (*f*).

Seller was bound *præstare custodiam*.

But although the risk of loss before delivery was thus imposed on the buyer, it was on condition that the seller should make no default in taking care of the thing before delivery, for an accessory obligation of the seller was *præstare custodiam*. "Et sane periculum rei ad emptorem pertinet dummodo custodiam venditor ante traditionem præstet" (*g*). And the nature of the custody required is thus defined: "Si nihil appareat convenisse, talis custodia desideranda est a venditore qualem bonus paterfamilias suis rebus adhibet" (*h*). But this liability was increased or diminished according as he or the buyer was *in mora*, that is to say, made default in making or accepting delivery. "Illud sciendum est, cum moram emptor adhibere cœpit, jam non culpam, set dolum malum tantum præstandum a venditore" (*i*); that is, the seller was liable, not for ordinary negligence, but only for fraud or gross negligence. On the other hand, if he himself were *in mora*, he was in general liable for any loss or damage to the goods, though arising from causes beyond his control (*k*). And *mora* by one party was cured by subsequent

(*z*) Dig. 18, 6, 8 pr.; Cod. 8, 48, 5.
(*a*) Dig. 18, 6, 8.
(*b*) Dig. 18, 1, 35, 5, and 7; Cod. 4, 48, 2.
(*c*) Dig. 18, 1, 35, 6.
(*d*) Dig. 18, 1, 62, 2; 18, 1, 35, 5.
(*e*) Dig. 18, 1, 34, 6.
(*f*) Dig. 19, 1, 13, 18; Inst. 3, 23, 3.
(*g*) Dig. 47, 2, De furtis, 14, pr. Ulp.
(*h*) Dig. 18, 1, 35, 4.
(*i*) Dig. 18, 6, 17; 18, 6, 5 and 12.
(*k*) Dig. 18, 6, 4, pr., and 15; Cod. 4, 48, 4, and 6.

mora of the other, if nothing had in the meantime happened to the goods (*l*).

French law.

Such were the leading principles of the Roman law as to the effect of sale in passing title, and such was the law of the continent of Europe wherever based on the civil law, till the adoption and spread of the Code Napoleon. The French Code says in a few emphatic words, "La vente de la chose d'autrui est nulle:" Art. 1599; and would thus seem to have swept away at once the entire doctrine dependent upon the Roman system, which was based on a principle exactly the reverse. But unfortunately the definitions of the nature and form of the contract in the Arts. 1582 and 1583, gave some countenance to the idea that such was not the intention of the authors. Instead of defining a sale to be a transfer of the property or ownership, the language is, in Art. 1852: "La vente est une convention par laquelle l'un s'oblige à *livrer* une chose, et l'autre à la payer;" and in 1583: "Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur *à l'égard du vendeur*, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé." The consequence of this almost literal adoption of the texts of the Roman law was, that not only an eminent jurist, but the Court of Cassation itself, will be found to furnish authority for the position that a sale transfers only a right of possession, not a title of ownership. Toullier, one of the most accredited commentators, is of this opinion (*m*); and there is a decision of the highest court in France in conformity with it (*n*). But this view seems to be now exploded, and all the recent writers insist that the modern idea of the transfer of ownership is what was really intended by the authors of the Civil Code (*o*). M. Fréméry adds his authority to that of the great body of French jurists in support of the position that the modern civil law is on this point opposite to that of the Corpus Juris Civilis (*p*).

In other respects the French Code largely follows the civil law. Thus, where things are sold by weight, number, or measure, and not *en bloc*, weighing, etc., is necessary to make

(*l*) Dig. 18, 6, 17; 19, 1, 51, 1.

(*m*) Tome, 14, No. 240 *et seqq.*

(*n*) Sirey, 3e éd., p. 391.

(*o*) Sirey, 3e éd., 391; Favart, Vente, s. 1, 1, n. 3; Duranton, t. 16, No. 18; Troplong, Vente, tit. 1, Nos. 4 *et seqq.*; tit. 2, add au. même No.; Duvergier, tit. 1, Nos. 10 *et seqq.*; Championnière et Rigaud, Dr. d'Enreg. t. 3, No. 1743; Zachariæ, t. 2, § 349.

(*p*) Etudes de Droit Commercial, 5. See his exposition quoted in previous editions of this work; 2nd ed. 318; 4th ed. 382.

the sale perfect, so as to throw the risk on the buyer: Arts. 1585, 1586. There is no sale (il n'y a point de vente) in the case of wine, oil, and other things usually tasted, until the buyer has tasted and approved: Art. 1587. Sales on trial (à l'essai) are always presumed to be subject to a suspensive condition: Art. 1588.

The provisions of the French law with regard to eviction are hereafter quoted (*q*).

Quebec Civil Code.

The Quebec Civil Code does not altogether follow the terminology of the French Code. Thus, Art. 1472 declares: "La vente est un contrat par lequel une personne donne une chose à une autre, moyennant un prix en argent que la dernière s'oblige de payer. Elle est parfaite par le seul consentement des parties, quoique la chose ne soit pas encore livrée" . . . By Art. 1476: "La simple promesse de vente n'équivaut pas à vente." . . . But by Art. 1478: "La promesse de vente avec tradition et possession actuelle équivaut à vente." And Art. 1487 declares: "La vente de la chose qui n'appartient pas au vendeur est nulle, sauf les exceptions contenues dans les trois articles (*r*) qui suivent."

Scotch law.

In Scotland the common law was founded on the civil law, and the contract of sale, although it may have been an *emptio perfecta*, did not pass the property till delivery. In the meantime the risk nevertheless attached to the buyer, who had only a *jus ad rem*, enabling him, so long as the seller was *sui juris*, to enforce delivery; but his right was liable to be defeated by the seller's creditors issuing diligence and seizing the goods, or by the bankruptcy of the seller, under which the goods passed to the trustee in the sequestration, who had, moreover, an option to enforce the contract. By section 1 of the Scotch Mercantile Law Amendment Act of 1856 (*s*), this power of the seller's creditors or trustee to defeat the buyer's right to demand delivery was, so soon as the *emptio* was *perfecta*, taken away, the result being that, though the Act did not change the law which required a delivery to pass the property, yet the buyer was under the Act in substantially the same position as a buyer in England, in whom the property had vested (*t*). And by section 2 of

(*q*) *Post*, 694.

(*r*) Art. 1488 (commercial matters); 1489 (lost or stolen thing *bona fide* bought in market, etc.); 1490 (sales under authority of law).

(*s*) 19 & 20 Vict. c. 60.

(*t*) See *per* Lord Blackburn and Lord Watson in *McBain* v. *Wallace* (1881) 6 A. C. 588, and *Seath* v. *Moore* (1886) 11 A. C. 350; 55 L. J. P. C. 54, from whose judgments the above statement is summarised. The Scotch law was

the same Act the seller was bound, on intimation to him of a subsequent sale, and on payment of the price and performance of the conditions of the contract, to deliver to a sub-buyer in the same way.

These two sections have now been repealed by the Code; and the respective laws of England and Scotland affecting the contract of sale, and the passing of the property, have been assimilated.

Exchange under civil and French law.

Before leaving the subject it may be interesting to contrast the provisions of the civil and of the modern French law with regard to the contract of exchange.

By the civil law *permutatio* was not a consensual contract, but an innominate contract arising *re*, that is, by performance by one party or the other. A mere promise of exchange was not binding (*u*). Accordingly it was essential that either party should vest in the other the *property* in the thing given (*x*), and such property vested on delivery, and not on performance of his part by the other party (*y*). Each was bound to give a good title to the thing delivered by him (*z*). On eviction from the thing received in exchange there arose an *actio in factum* (*a*), and if the thing to be given perished before the property passed, the consideration could be recovered (*b*). The party giving was liable for undisclosed defects of the thing he gave, as in the case of a sale (*c*); and after a performance of his part by either, if the other did not deliver the equivalent the remedy was not an action for damages, but a *condictio* for a return of the consideration (*d*).

By the French Civil Code exchange is a consensual contract (*e*). The ownership of the thing given is essential to the obligation of the other party to deliver the equivalent, but the latter must return what he received (*f*). On eviction from the thing received the receiver may sue for damages or for a return of what he gave (*g*). The contract cannot be rescinded

also stated by Lord President Inglis in *Black* v. *Bakers of Glasgow* (1867) 6 Macpherson, quoted in previous editions: 2nd ed. 320; 4th ed. 384.

(*u*) Dig. 19, 4, 1 pr.; Cod. 4, 64, 5.
(*x*) Dig. 19, 4, 1, 3; 12, 4, 16.
(*y*) Code, 4, 64, 4.
(*z*) Dig. 19, 4, 1, 3.
(*a*) Dig. 19, 4, 1, 1. This was an equitable action, a sort of action on the case.
(*b*) Dig. 12, 4, 16.
(*c*) Dig. 21, 1, 19, 5.
(*d*) Dig. 19, 4, 1, 4
(*e*) Art. 1703.
(*f*) Art. 1704.
(*g*) Art. 1705.

pour cause de lésion (*h*). In other respects the rules applicable to sales under the Civil Code apply (*i*).

The Quebec Civil Code contains similar provisions (*k*).

(*h*) Art. 1708. *Lésion* was the *læsio enormis* of the civil law, that is to say, gross inadequacy of price received by the seller. Under the French Civil Code it applies only to sales of immovables. See Arts. 1674—1685.

(*i*) Art. 1707.

(*k*) Bk. 3, tit. 6.

BOOK III.

AVOIDANCE OF THE CONTRACT.

CHAPTER I.

FAILURE OF CONSIDERATION.

Recovery by buyer of money paid when the consideration for payment has failed.

A BUYER who has paid money under a contract of sale may recover it back when the consideration on which it was paid has failed, for in that event it is unconscientious for the seller to retain it without consideration, and the money is in consequence in the eye of the law received by the seller to the use of the buyer (*a*). This right of the buyer is preserved by the Code, which enacts:

"54. Nothing in this Act shall affect the right of the buyer or the seller . . . to recover money paid where the consideration for the payment of it has failed."

Where title to goods fails.

Thus, as a condition on the part of the seller is *prima facie* implied in every contract of sale that he has a good title (*b*), a buyer may recover the price paid to the seller, when the goods for which the money was paid turn out to have been stolen, and the buyer has been compelled to deliver them up to the true owner (*c*). And the same right exists in favour of the buyer where he has paid money for forged scrip in a railway (*d*), or forged bills or notes (*e*), or for an article different from that which was described in the sale (*f*), or where there has been the breach of a condition of quality of fitness (*g*).

Forged securities, goods not answering description, etc.

(*a*) See the general principle stated by the P. C. in *Royal Bank of Canada* v. *Rex* [1913] A. C. 283, at 296; 82 L. J. P. C. 33.

(*b*) Code, s. 12 (1), *post*, 686.

(*c*) *Eichholz* v. *Bannister* (1864) 17 C. B. (N. S.) 708; 34 L. J. C. P. 105; 142 R. R. 594, *post*, 689; *Edwards* v. *Pearson* (1890) 6 Times L. R. 220.

(*d*) *Westropp* v. *Solomon* (1849) 8 C. B. 345; 19 L. J. C. P. 1; 79 R. R. 330.

(*e*) *Jones* v. *Ryde* (1814) 5 Taunt. 488; 15 R. R. 561; *Gurney* v. *Womersley* (1854) 4 E. & B. 133; 24 L. J. Q. B. 46; 99 R. R. 390; *per Cur.* in *Woodland* v. *Fear* (1857) 7 E. & B. 519; 26 L. J. Q. B. 202; 110 R. R. 707.

(*f*) *Post*, 695, *et seqq.*

(*g*) Under ss. 14 and 15, *post*, 712; *secus*, where no condition has been broken: *Fortune* v. *Lingham* (1810) 2 Camp. 416.

Purchase of shares in a projected company.

Where money was paid for shares in a projected joint-stock company, and the undertaking was abandoned, and the projected company not formed, the buyer was held entitled to recover back his money as paid on a consideration which had failed (*h*). So, also, where a buyer has paid for a bill of exchange which proves to be invalid, having been avoided by a material alteration (*i*); or for an unstamped bill of exchange that purports to be a foreign bill, and turns out to be worthless because really a domestic bill, invalid without a stamp (*k*); or for a bond not recognised by the Government because unstamped (*l*), or because it was not lawfully issued (*m*).

Invalid bill.

Unstamped security.

Money paid by mistake.

A buyer may also recover money paid under the influence of an essential mistake (*n*), as, for example, the price of specific goods which at the time of the contract had ceased to exist (*o*).

Recovery of money paid for specific goods which perish after the contract.

Where, however, the specific goods perish after the contract and before delivery, the question whether the buyer can recover the price or any part of it depends upon whether the goods perished by the fault of the seller. Failing such fault, the buyer cannot recover the price if he took the risk, as he does where the price was due before the destruction of the goods (*p*).

Failure of state of things on which contract based.

So also, where the contract is dependent upon the existence of a state of things in the future which *both* parties have treated as the basis of the contract, the buyer cannot recover the price paid if he took the risk, by the price being made payable before the determination of the event (*q*). And there is no failure of consideration in any case where a state of

(*h*) *Kempson* v. *Saunders* (1826) 4 Bing. 5; 5 L. J. C. P. 6; *Walstab* v. *Spottiswoode* (1846) 15 M. & W. 501; 15 L. J. Ex. 193; 71 R. R. 740.

(*i*) *Burchfield* v. *Moore* (1854) 3 E. & B. 683; 23 L. J. Q. B. 261.

(*k*) *Gompertz* v. *Bartlett* (1853) 2 E. & B. 849; 23 L. J. Q. B. 65; 95 R. R. 851.

(*l*) *Young* v. *Cole* (1837) 3 Bing. N. C. 724; 6 L. J. (N. S.) C. P. 201; 43 R. R. 783.

(*m*) *Meyer* v. *Richards* (1895) 163 U. S. 385.

(*n*) *The Salvador* (1909) 26 Times L. R. 149. As to Mistake, see *ante*, 113, *et seqq.*

(*o*) See *Strickland* v. *Turner* (1852) 7 Ex. 208; 22 L. J. Ex. 115; 86 R. R. 619, *ante*, 125; Code, s. 6, *ante*, 161.

(*p*) *Blakeley* v. *Muller* [1903] 2 K. B. 760 (n.); *Hobson* v. *Pattenden* [1903] *ibid.*; *Civil Service Co-operative Society* v. *General Steam Navigation Co.* [1903] 2 K. B. 756; 72 L. J. K. B. 933, C. A.; *Chandler* v. *Webster* [1904] 1 K. B. 493; 73 L. J. K. B. 401, C. A. See also *Stubbs* v. *Holywell Ry. Co.* (1867) L. R. 2 Ex. 311; 36 L. J. Ex. 166. See the subject considered *ante*, 162, and law stated by Atkin, J., in *Lloyd Royal, &c.* v. *Stathatos* (1917) 33 T. L. R. 390 (prepaid freight).

(*q*) See cases in previous note.

things fails which the buyer alone contemplated as his motive in contracting (*r*).

No failure of consideration where buyer gets what he intended to buy, though worthless.

Lamert v. *Heath* (1846).

There is not a failure of consideration when the buyer has received that which he really intended to buy, although the thing should turn out worthless. Thus, where a buyer bought railway scrip, and the directors of the company subsequently repudiated it as issued without their authority: upon proof offered that the scrip was the only known scrip of the railway, and had been for several months the subject of sale and purchase in the market, *held*, that the buyer had got what he really intended to buy; and could not rescind the contract on the ground of a failure of consideration (*s*).

Phosphate Sewage Co. (1875).

And so where a person bought the exclusive right of using a patent in a foreign country, being aware that no exclusive right to use the process there could be obtained, but desiring an ostensible grant of the exclusive right, with the object of floating a company: it was held, that what he intended to buy was the right, whether exclusive or not, and that having obtained what he desired, he could not recover the purchase-money (*t*).

Failure by plaintiff's own fault.

A buyer cannot, however, recover moneys paid where the failure of the consideration was his own fault, as where he buys and pays for shares, and neglects to take the steps necessary to registration, and the company afterwards fails (*u*); or where he is himself in default in the performance of the contract, as where he wrongfully refuses to accept the goods (*x*); or repudiates a contract unenforceable against him under section 4 of the Code, where the seller is willing to carry it out according to its terms (*y*).

Nor can a buyer recover moneys paid in performance of an illegal contract, unless he can show that he is not *in pari delicto* with the seller, as where the seller is fraudulent, or

(*r*) *Herne Bay Steamboat Co.* v. *Hutton* [1903] 2 K. B. 683; 72 L. J. K. B. 879, C. A.

(*s*) *Lamert* v. *Heath* (1846) 15 M. & W. 487; 15 L. J. Ex. 297; 71 R. R. 738. See also *Lawes* v. *Purser* (1856) 6 E. & B. 930; 26 L. J. Q. B. 25; 106 R. R. 868.

(*t*) *Begbie* v. *Phosphate Sewage Co.* (1875) L. R. 10 Q. B. 491; 44 L. J. Q. B. 233; aff. 1 Q. B. D. 679, C. A.

(*u*) *Stray* v. *Russell* (1859) 1 E. & E. 888, 916; 29 L. J. Q. B. 115; 117 R. R. 506, Ex. Ch. See also *per* Buller, J., and Grose, J., in *Straton* v. *Rastall* (1788) 2 T. R. 366, at 370, 371.

(*x*) *Fitt* v. *Cassanet* (1842) 4 M. & G. 898; 12 L. J. C. P. 70; *Hall* v. *Burnell* [1911] 2 Ch. 551. In such a case the contract is still, as against the buyer, "open," *i.e.*, unrescinded. See the principle stated by Bowen, L.J., in *Boston Deep Sea Fishing Co.* v. *Ansell* (1888) 39 Ch. D. 339, at 364, C. A.

(*y*) *Thomas* v. *Brown* (1876) 45 L. J. Q. B. 811; 1 Q. B. D. 714.

there is duress or oppression, or a fiduciary relationship between the parties (*z*). And, as the action for money had and received is based upon the fiction of a promise on the part of the person sued, no such action lies in any case in which an actual promise to repay would be unenforceable (*a*).

Moneys paid are recoverable when the contract is rescinded.

Moneys paid to the seller by the buyer are also recoverable as on a total failure of consideration when the whole contract is rescinded, either by agreement to that effect (*b*), or under a condition subsequent, express or implied, in favour of the buyer (*c*), or where the buyer is entitled to treat a default by the seller as an offer to rescind and rescinds accordingly (*d*). The general rule of the common law is that moneys paid under a contract may be recovered as moneys had and received to the use of the plaintiff when the whole (*e*) contract is rescinded, but not while it remains open (*f*). As Buller, J., says in *Towers* v. *Barrett* (*g*): "Where the plaintiff is entitled to recover his whole money, he must show that the contract is at an end (*h*); but if it continues open, he can only recover damages, and then he must state the special contract and the breach of it."

Weston v. *Downes* (1778).

Thus, in *Weston* v. *Downes* (*i*), the defendant sold to the plaintiff a pair of coach horses, agreeing to take them back if they were disapproved and returned within a month. The plaintiff paid for the horses, and returned them within the month, and took another pair without any fresh agreement. These he also returned, and obtained another pair which he also claimed to return, but the defendant refused to receive them. *Held*, that the plaintiff could not recover the price

(*z*) *Harse* v. *Pearl Life Ins. Co.* [1904] 1 K. B. 558, C. A.; 73 L. J. K. B. 373; *Vandyck* v. *Hewitt* (1800) 1 East, 96; 5 R. R. 516.

(*a*) *Sinclair* v. *Brougham* [1914] A. C. 398, at 414-417, 433, 440, 452, where the history of the action for money had and received is discussed. See also *Baylis* v. *London (Bishop)* [1913] 1 Ch. 127, C. A.

(*b*) *Caswell* v. *Coare* (1809) 1 Taunt. 566; 10 R. R. 606; *Gomery* v. *Bond* (1815) 3 M. & S. 378; *Long* v. *Preston* (1828) 2 M. & P. 262; 7 L. J. C. P. 14.

(*c*) *Head* v. *Tattersall* (1871) L. R. 7 Ex. 7; 41 L. J. Ex. 4.

(*d*) *Walstab* v. *Spottiswoode* (1846) 15 M. & W. 501; 15 L. J. Ex. 193; 71 R. R. 740. As to the last ground of rescission, see *post*, 485.

(*e*) But part of the consideration may by agreement be retained: *Hurst* v. *Orbell* (1838) 8 A. & E. 107; 7 L. J. (N. S.) Q. B. 138; *U. S.* v. *Pelly* (1899) 15 Times L. R. 166.

(*f*) *Weston* v. *Downes* (1778) 1 Dongl. 23, *infra*; *Towers* v. *Barrett* (1786) 1 T. R. 133. But money had and received is not maintainable against an infant unless the cause of action is *ex delicto*: *Cowern* v. *Nield* [1912] 2 K. B. 419; 81 L. J. K. B. 865.

(*g*) *Supra*.

(*h*) The same principle applies to cases in which a part of the money is claimed on the rescission of part of a contract which has been severed. See *post*, 488.

(*i*) *Supra*. See also *Payne* v. *Whale* (1806) 7 East, 274.

paid. The original contract had been rescinded, and a new contract substituted which did not contain the term that any substituted pair of horses might be returned, and this substituted contract the defendant had not agreed to rescind. Ashurst, J., however, said that the price would have been recoverable if it had been demanded on the return of the first pair of horses, as the contract would then have been rescinded by mutual assent. And the case suggested arose, and was so decided, in *Towers* v. *Barrett* (*k*).

Giles v. *Edwards* (1797).

In *Giles* v. *Edwards* (*l*), the defendant agreed to sell to the plaintiffs all the cordwood growing at a particular place at 11s. 6d. a cord, ready cut, the wood to be coaled and cleared off the premises by Michaelmas, 1792, and the money to be paid on the previous 1st of March. It was the custom for the seller to cut off the boughs and trunks, and then to cord the wood, and for the buyer to record it, after which it became the property of the buyer. The defendant cut sixty cords, ten of which he corded, and the plaintiffs recorded half a cord and measured the rest. On the 8th of March the plaintiffs paid twenty guineas, but the defendant neglected to cord the rest of the wood, and the plaintiffs sued him for the twenty guineas. It was held that the plaintiffs were entitled to sue on the common count for money had and received, and need not sue specially, as the contract was entire and its performance was prevented by the defendant's fault which the plaintiffs could treat as a repudiation.

Partial failure of consideration.

Where the failure of consideration is only partial, the buyer's right to recover the price paid will depend on the question whether the contract is entire or not. And here a distinction is drawn between a failure of part of the consideration and a partial failure of the consideration. A failure of part of an entire consideration is a failure of the whole consideration, unless part performance has been accepted, in which case it becomes a partial failure of the whole consideration, and the rule of law is in such cases that "where a sum of money has been paid for an entire consideration, and there is only a partial failure of consideration, neither the whole, nor any part of such sum can be recovered" (*m*). On the

(*k*) (1786) 1 T. R. 133.

(*l*) 7 T. R. 181; 4 R. R. 414. See also *Hudson* v. *Robinson* (1816) 4 M. & S. 475; and *cf. Cooke* v. *Munstone* (1805) 1 B. & P. N. R. 351. But *qy.* whether this case was rightly decided.

(*m*) *Per* Brett, J., in *Whincup* v. *Hughes* (1871) L. R. 6 C. P., at 86; 40 L. J. C. P. 104; *Anglo-Egyptian Nav.* v. *Rennie* (1875) 10 C. P. 271; 40 L. J. C. P. 130. As to express agreement, see *Derby* v. *Humber* (1867) L. R. 2 C. P. 247.

other hand, if the consideration be originally severable a failure of part is a *total* failure of that part, but of that part only, and the buyer's rights are unaffected by his acceptance of the other parts of the consideration. According to these principles, where the contract is entire, as in *Giles* v. *Edwards* (*n*), and the buyer is not willing to accept a partial performance, he may reject the contract *in toto*, and recover back the price. But if he has accepted a partial performance, he cannot afterwards repudiate the contract, but must seek his remedy in some form of action other than for money had and received. Thus, in *Harnor* v. *Groves* (*o*), a purchaser of twenty-five sacks of flour having, after delivery, used half a sack, and then two sacks more, and sold one sack, was held not to be entitled to recover the price paid on the ground of a failure of consideration, although he had complained of the quality as inferior as soon as he had tried the first half sack.

Where consideration is entire, buyer may reject the whole contract.

But not if he has accepted part.

Harnor v. *Groves* (1855).

In *Miner* v. *Bradley* (*p*), a cow and 400 pounds of hay had been sold for a lump sum of 17 dollars to the plaintiff, who paid the price. The cow was duly delivered, but the seller refused to deliver the hay as he had consumed it, and the buyer sued him for a sum equal to the value of the undelivered hay. *Held*, that he was not entitled to do so, as, the price for the cow and the hay being entire, the contract was entire, and the buyer had accepted part performance. He should either have repudiated the contract by returning the cow, in which case he might have recovered the 17 dollars, or if he retained the cow, he should have sued for damages.

Miner v. *Bradley* (1839).

The consideration will be obviously entire, if the thing sold is such in its nature as not to be severable. If the buyer has enjoyed any part of the consideration for which the price was paid, he is no longer at liberty to repudiate the contract.

Where thing sold is in its nature not severable.

Thus, in *Taylor* v. *Hare* (*q*), where the plaintiff purchased from the defendant the use of a patent right, and had made use of it for some years, and then discovered the defendant not to be the inventor, it was held that, having enjoyed the consideration, he could not maintain an action for return of the price, on the ground of failure of consideration: and this case was followed by the King's Bench half a century later in *Lawes* v. *Purser* (*r*), where the facts as pleaded were almost identical with those in *Taylor* v. *Hare*.

Taylor v. *Hare* (1805).

Lawes v. *Purser* (1856).

(*n*) *Ante*, 485.
(*o*) 15 C. B. 667; 24 L. J. C. P. 53; 100 R. R. 535.
(*p*) 39 Mass. 457, following *Giles* v. *Edwards*, *ante*, 485.
(*q*) 1 B. & P. N. R. 260; 8 R. R. 797.
(*r*) 6 E. & B. 930; 26 L. J. Q. B. 25; 106 R. R. 868.

But in *Chanter* v. *Leese* (*s*), a case decided on demurrer, where six patents, five of which were valid while one was void, were sold for a lump sum of £400 a year, it was contended, in an action by the patentee for the price, that the buyer must pay the £400 a year, as, five patents being valid, the contract had been partly performed, and could not be repudiated *in toto*. But the Exchequer Chamber held that there had been an *entire* failure of consideration, on the ground that the money payable had not been apportioned by the contract to the different parts of the consideration, and the pleadings did not show that the patents had been enjoyed in part by the buyer. "We see, therefore," said the Court, "that the consideration is entire, and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which being entire, *by failing partially, fails entirely;* and it follows that no action can be maintained for the money."

Entire consideration not accepted in part.

Chanter v. *Leese* (1839).

It follows that, if the buyer had paid any part of the £400 a year he could, if the facts of the case were as appeared upon the pleadings, have recovered it back.

In *Johnson* v. *Johnson* (*t*), a house and a parcel of land, which had been separately valued at £300 and £700 respectively, were sold for £1,000 to the plaintiff. The plaintiff, who had received no conveyance (*u*), was subsequently evicted from the house by reason of a defect of title, and brought an action for the return of the purchase-money of the house, but he refused to relinquish the possession of the land. *Held*, that, although both the house and the land were contracted for at the same time, yet, as they were distinct, and had been separately valued, and it was not shown that each was necessary for the occupation of the other, the bargain was in effect two contracts, and the plaintiff could recover without surrendering the land.

Severable contract.

Johnson v. *Johnson* (1802).

In this case the contract was a severable contract from the first. A contract, however, though originally entire, may be rescinded in part, and money paid for the unperformed part recovered, where the contract is capable of severance, and the parties have by their subsequent conduct given an implied assent to its severance; as, for example, by the delivery on the one part, and the acceptance on the other, of a portion

(*s*) 5 M. & W. 698. See also *Scurfield* v. *Gowland* (1805) 6 East, 241.

(*t*) 3 B. & P. 162; 6 R. R. 736. See also *Cripps* v. *Reade* (1796) 6 T. R. 606; 3 R. R. 273.

(*u*) After conveyance the buyer must depend on covenants for title: *Clare* v. *Lamb* (1875) L. R. 10 C. P. 339; 44 L. J. C. P. 177.

only of the goods sold (*x*). This is, like the preceding case, in its nature a *total* failure of consideration for part of the price paid; not, as in the case of the flour (*y*), a *partial* failure of the whole, for in the latter case there was no mutual assent to severance, and the consideration remained entire. And when it is said that an entire contract is capable of severance, this refers to cases only in which the price can be mathematically apportioned to the different parts of the consideration.

The principle has been well put by an American Judge (*z*): "The entirety may be broken by the concurrent act of both parties so that a partial rescission may be effected. Thus, where part only of the goods have been delivered upon a contract like the present, and one party refuses to complete it by delivering or accepting the remainder, the other party may then elect to treat such refusal as a repudiation or rescission of the unfulfilled part of the contract. If the seller refuses to deliver the purchaser may recover back any excess of purchase-money that has been paid by him beyond the price of what has been delivered. . . . The principle is applicable to a defendant resisting payment as well as to a plaintiff seeking to recover back what has been overpaid."

Thus, if the buyer has paid for a certain quantity of goods sold at a certain rate of payment and the seller has delivered only part, and makes default in delivering the remainder, the buyer may repudiate the contract for the deficiency, and recover the price paid for the quantity deficient.

Devaux v. *Connolly* (1849).

This was held, in *Devaux* v. *Connolly* (*a*), where the plaintiff, the buyer, had paid for two parcels of *terra japonica*, one of 25 tons, and the other of 150 tons, and the parcels turned out to be only 24 tons and 132¾ tons respectively. The plaintiff had ordered the two parcels at a limit of 18s. a cwt., all charges included, and had received the goods, but he immediately wrote claiming a return of the difference in price calculated according to the deficiency in the weights. *Held*, that his conduct showed he had not intended to accept the weights delivered as a due execution of his order, and that he was entitled to recover the difference in price as on a failure of consideration.

(*x*) As in *Devaux* v. *Connolly* (1849) 8 C. B. 640; 19 L. J. C. P. 71; 79 R. R. 659; *infra*.

(*y*) *Harnor* v. *Groves*, *ante*, 486.

(*z*) Wells, J., in *Mansfield* v. *Trigg* (1873) 113 Mass. 350, at 354.

(*a*) 8 C. B. 640; 19 L. J. C. P. 71; 79 R. R. 659. See also *Cox* v. *Prentice* (1815) 3 M. & S. 344; 16 R. R. 288; *ante*, 130.

In *Biggerstaff* v. *Rowatt's Wharf* (*b*), a firm bought of a company 7,000 barrels out of the company's general stock at 3s. 6d. each, and paid for all of them. Only 2,784 barrels were delivered, the company being unable to deliver more, and shortly afterwards the company went into liquidation. The firm owed the company a debt on another account, and claimed in the liquidation to set off against this debt their claim against the company for short delivery. It was contended against them that their only right against the company was a claim for unliquidated damages. *Held*, by the Court of Appeal, reversing the decision of North, J., that the firm's claim was a liquidated claim for 3s. 6d. for each barrel short delivered, there being as to each barrel a total failure of consideration.

Biggerstaff v. *Rowatt's Wharf* (1896).

Where, however, the price is incapable of severance no such subsequent agreement to sever the contract and confine it only to the goods delivered can be inferred. Thus, in *Miner* v. *Bradley* already set out (*c*), the buyer would, under ordinary circumstances, have been entitled to consider the seller's refusal to deliver the hay as an offer to rescind the contract in part, which he might have accepted, had not the price of the hay been indistinguishable from the price of the cow.

Where price not capable of severance.

A buyer may, of course, expressly agree to take the risk of the quantity for which he has paid being more than the quantity delivered, and no failure of consideration in respect of the quantity undelivered will arise. An instance of such an agreement was *Coras* v. *Bingham* (*d*), which will be noticed hereafter.

Buyer taking the risk of the quantity deliverable.

Money paid on a consideration which has failed does not carry interest (*e*), except where the contract has been induced by fraud (*f*), or there is a fiduciary relation between the parties (*g*).

(*b*) [1896] 2 Ch. 93, C. A.; 65 L. J. Ch. 536.
(*c*) *Ante*, 486.
(*d*) (1853) 2 E. & B. 836, set out *post*, 814.
(*e*) *Walker* v. *Constable* (1798) 1 B. & P. 306; *De Bernales* v. *Fuller* (1810) 2 Camp. 426.
(*f*) *Johnson* v. *Rex* [1904] A. C. 817, P. C.; 73 L. J. P. C. 113; *Crockford* v. *Winter* (1807) 1 Camp. 129, should be treated as no longer law.
(*g*) *Phillips* v. *Homfray* (1890) 44 Ch. D. 694. See, as to the discretion of the Court, *Burland* v. *Eade* [1905] A. C. 590, P. C.; 71 L. J. P. C. 1.

CHAPTER II.

MISREPRESENTATION.

Misrepresentation important where mistake is unilateral.

If the parties to a contract are under a bilateral mistake as to an essential fact, it is of no matter whether there has been express misrepresentation by one of the parties or not. But if the mistake be unilateral, the circumstance of misrepresentation becomes all-important, for a party under mistake is not discharged *merely* because of the existence of even an essential mistake (*a*). Thus if B. buys from S. a bar which is in fact of brass but which B. alone believes to be of gold, the contract will as a rule hold good, but if B.'s mistake was induced by the representation of S. or his agent, this, being as to an essential fact, will invalidate B.'s assent.

Misrepresentation inducing contract.

But how stands the case where, though the contract exists, the assent of one party has been induced by the *innocent* misrepresentation of the other as to some *unessential*, though material, fact?

Representations part of, or external to, contract.

Representations (*b*) are of two kinds, those that are part of, and those that are external to, the contract (*c*).

When part of contract, may be a condition or a warranty.

A representation forming part of the contract is an engagement that the fact is as represented; and it may be either a *condition*, or a *warranty* in the strict sense. The non-fulfilment of a condition is available as a defence to the other party, and justifies his repudiating the contract, or at his option is a ground for an action for damages; while the breach of a warranty is a ground for an action for damages only.

Representations forming part of the contract are treated subsequently under the heads of conditions (*d*) and warranties (*e*).

Representation external to contract of three kinds:

A representation external to the contract (*f*) may be one of four kinds:—

1. It may be a *preliminary stipulation* on the truth of which

(*a*) *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221, set out *ante*; *Stewart* v. *Kennedy* (1890) 15 A. C. 108.

(*b*) See definition, *post*, 636.

(*c*) See *per* Ex. Ch. in *Behn* v. *Burness* (1863) 3 B. & S. 751, at 754; *British Equitable Assurance Co.* v. *Baily* [1906] A. C. 35, at 40, 41; 75 L. J. Ch. 73.

(*d*) *Post*, Book IV., Part I., 635, *et seqq*.

(*e*) *Post*, *ibid.*; and 750, *et seqq*.

(*f*) Of which therefore oral evidence can be given, even when the contract is written: *Brett* v. *Clowser* (1880) 5 C. P. D. 376

the formation of the contract is by agreement made to depend, and if it be untrue, there is no contract (*g*). 1. A preliminary stipulation.

2. It may be the *inducement* to enter into the contract, and the representation must have been material to the inducement (*h*); and in this case if the representation prove untrue, and be fraudulent, the party misled may repudiate the contract, which, as a rule, is voidable only, and recover any money he has paid thereunder. And if the fraudulent misrepresentation have been relied upon, and damage have resulted therefrom to the other party, it will also be a ground for an action of deceit (*i*). But no action for damages lies in respect of the falsity of an innocent misrepresentation (*k*). 2. The inducement. Action of deceit.

3. Without giving a cause of action, it may be the ground of an *estoppel*, which is merely a rule of evidence that prevents a person from denying that the fact is as represented (*l*). 3. Merely a ground of estoppel.

4. It may, whether fraudulent or not, cause a unilateral mistake, that is to say, the misrepresentation by one party may mislead the other into a mistake as to a matter essential to the contract, and so nullify his assent thereto (*m*). 4. Causing essential mistake.

At common law innocent misrepresentation external to the contract, did not of itself give rise, as a general rule (*n*), to any right or liability, unless it misled the other party into error as to an *essential matter*, in which case, as has been seen, it invalidated his assent (*o*).

The common law as to misrepresentation of fact was thus stated by Blackburn, J., in *Kennedy* v. *The Panama Mail Company* (*p*). "There is a very important difference between

(*g*) *Bannerman* v. *White* (1861) 10 C. B. (N. S.) 844; 31 L. J. C. P. 28; 128 R. R. 953; set out *ante*, 104.

(*h*) See *per* C. A. in *Gordon* v. *Street* [1899] 2 Q. B. 641, at 645; 69 L. J. Q. B. 45.

(*i*) *See post*, 507, *et seqq.*

(*k*) *Whittington* v. *Seale-Hayne* (1900) 82 L. T. 49; *Schroeder* v. *Mendl* (1877) 37 L. T. 452, C. A.; *Manners* v. *Whitehead* (1898) 1 F. 171; *per* Lord Moulton in *Heilbutt, Symons & Co.* v. *Buckleton* [1913] A. C. 30, at 48.

(*l*) *Per* Lord Esher, in *Setton* v. *Lafone* (1887) 19 Q. B. D. 68, at 70; 56 L. J. Q. B. 415, C. A.; [illegible] *per* Lindley, L.J., and Bowen, L.J., in *Low* v. *Bouverie* [1891] 3 Ch. [illegible], 105; 60 L. J. Ch. 594, C. A.; *Henderson* v. *Williams* [1895] 1 Q. B. 521, [illegible].

(*m*) This head is really an in[illegible]ration of 3. *supra*, but it is convenient to treat it separately.

(*n*) *Derry* v. *Peek* (1889) 14 A. C. 337; 58 L. J. Ch. 864, H. L.; revg. C. A. *sub nom. Peek* v. *Derry* (1887) 37 Ch. D. 541; 57 L. J. Ch. 347; *Angus* v. *Clifford* (1891) 2 Ch. 449; 60 L. J. Ch. 443, C. A. There are, however, one common law, and some statutory exceptions. An agent may be liable for warranting that he has authority from his principal; and by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84, directors, &c., are liable for untrue statements in a prospectus, in the absence of reasonable belief of their truth. See also section 81 (6) of the same Act.

(*o*) *Ante*, 115.

(*p*) L. R. 2 Q. B. 580, at 587; 36 L. J. Q. B. 260.

Innocent, as distinguished from fraudulent, misrepresentation at common law.

Blackburn, J., in *Kennedy* v. *Panama Mail Co.* (1867).

cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded (*q*) on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission (*r*) unless it is such as to show *that there is a complete difference in substance* between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a *fraudulent representation* as to the horse's soundness, the contract may be rescinded. If it was induced by an *honest misrepresentation* as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty (*r*); and even if there was a warranty, he cannot return the horse and claim back the whole price unless there was a condition to that effect in the contract, *Street* v. *Blay*" (*s*). The learned Judge then quotes the authorities from the civil law to the effect that if there be misapprehension as to the substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding (*t*); and he concludes the passage by saying (*u*): "And as we apprehend, the principle of our law is the same as that of the civil law; and the difficulty in every case is, to determine whether the mistake or misapprehension is *as to the substance of the whole consideration*, going as it were, to the root of the matter, or only to some point,

(*q*) The passages from the civil law quoted by the learned Judge show that by using the words "rescinded" and "rescission" in this connection he did not mean that the contract was voidable only as distinguished from void.

(*r*) The question whether this statement of the law, and the decision of the case itself, is, having regard to the decisions since the Judicature Acts, in accordance with law at the present day, is discussed, *post*, 495, *et seqq*.

(*s*) (1831) 2 B. & Ad. 456; 36 R. R. 626.

(*t*) Dig. 18, 1, 9 pr.: "Cum in corpore dissentianius apparet nullam esse emptionem"; 18, 1, 9, 2 (error in substantia, *e.g.*, aes pro auro, acetum pro vino); 18, 1, 10 (error in quality or accident); 18, 1, 11. 1 (sale of female slave as puer. or as virgo). The learned Judge incorrectly attributes the statement of Ulpian in 18, 1, 14, "si aes pro auro veneat non valet." to Paulus.

(*u*) L. R. 2 Q. B. at 588; 36 L. J. Q. B. 260.

even though a material (*x*) point, an error as to which does not affect the substance of the whole consideration."

Rule in equity.

The rule in equity has been thus concisely stated: "A contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts, although such misrepresentations may not have been fraudulent" (*y*). And other definitions to the same or similar effect have been given (*z*). Relief was only granted as a general rule, where *restitutio in integrum* was possible (*a*), and where the buyer had elected to rescind within a reasonable time after discovering that the representation was false (*b*).

The grounds of the equitable doctrine. *Redgrave* v. *Hurd* 1881).

The doctrine in equity was thus stated by Jessel, M.R., in the Court of Appeal in *Redgrave* v. *Hurd* (*c*): "According to the decisions of Courts of Equity it was not necessary in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, 'a man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; *he ought to have found that out before he made it.*' The other way of putting it was this: 'Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements'" (*d*).

(*x*) *I.e.*, to induce assent.

(*y*) *Per* Lindley, M.R., in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* [1899] 2 Ch. 392, at 423, C. A.; 68 L. J. Ch. 699.

(*z*) *Per* Cotton, L.J., in *Schroeder* v. *Mendl* (1877) 37 L. T. 452, C. A.; and *Re Metropolitan Coal Consumers' Association, Wainwright's Case* (1891) 63 L. T. 429, C. A.; *per* Lords Bramwell and Herschell in *Derry* v. *Peek* (1889) 14 A. C. at 347, 359; 58 L. J. Ch. 864; *per* Lindley, L.J., in *Karberg's Case* (1892) 3 Ch. 1, at 13, C. A.; *per* Lord Shaw of Dunfermline in *Mair* v. *Rio Grande Rubber Estates* [1913] A. C. 853, at 870.

(*a*) As to *restitutio in integrum*, see *post*, 503.

(*b*) *Lagunas Nitrate Co.* v. *Lagunas Syndicate* [1899] 2 Ch. 392; 68 L. J. Ch. 699, C. A. The principles governing the doctrine of *laches*, or "lying by," are stated in *Lindsay Petroleum Co.* v. *Hurd* (1874) L. R. 5 P. C. 239, quoted and approved by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 A. C. at 1279; 48 L. J. Ch. 73.

(*c*) 20 Ch. D. 1, at 12—13; 51 L. J. Ch. 113.

(*d*) Cited with approval by Bowen, L.J., in *Newbigging* v. *Adam* (1886) 34 Ch. D. at 593. See also *per* Lord Blackburn in *Brownlie* v. *Campbell* (1880) 5 A. C. at 950, as to the duty of a person to correct an innocent misrepresentation when discovered to be false.

Several points are here noticeable (*e*). In the first place, the learned Judge is comparing *fraud* in equity and at law as a ground of rescission, with reference to the necessity of knowledge, actual or imputed; *secondly*, no definition is given of "material"; and *lastly*, the facts of *Redgrave* v. *Hurd* themselves aptly illustrate the rule in Kennedy's case, the misrepresentation which entitled the purchaser of a house to repudiate the contract of sale being as to the value of a partnership which was the entire consideration for the purchaser's agreement to purchase the house, the business being represented as being worth £300 a year, and being in fact practically worthless.

Party making representation cannot set up the other's negligence.

"If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say: 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them. . . .' Not only as regards specific performance but also as regards rescission, this is not an answer, unless there is such delay as constitutes a defence under the Statute of Limitations . . . the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence" (*f*).

Effect of enquiry into facts represented.

It is not incumbent on that person to make enquiry into the truth of the assertions, but if he does so that fact tends to show that he relied only on his own judgment (*g*).

Contract set aside, not rectified.

Where a person has been induced to enter into a contract by a material misrepresentation of the other party, he is entitled to have the contract set aside, and not merely rectified (*h*).

Equitable principles apply to contracts of sale of goods.

The equitable principles with regard to misrepresentation are now, if they conflict with common law, by virtue of

(*e*) Bowen, L.J., in *Newbigging* v. *Adam* (1886) 34 Ch. D. at 594, C. A.; 56 L. J. Ch. 275; in citing Jessel, M.R.'s, judgment, adds: "If the mass of authority . . . were gone through I think it would be found that there is not so much difference as is generally supposed between the view taken at common law and the view taken in equity as to misrepresentation."

(*f*) *Per* Jessel, M.R., in *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1, at 13, 14; 51 L. J. Ch. 113.

(*g*) *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1, C. A.; *Central Railway of Venezuela* v. *Kisch* (1867) L. R. 2 H. L. 99; 36 L. J. Ch. 849. See the same rule in the case of a *fraudulent* misrepresentation, *post*, 560.

(*h*) *Rawlins* v. *Wickham* (1859) *cor.* Knight, L.J., Bruce, L.J., and Turner, L.J., 3 De G. & J. 304; 28 L. J. Ch. 188; 121 R. R. 134; app. in *Betjemann* v. *Betjemann* [1895] 2 Ch. 474; 64 L. J. Ch. 641, C. A.

the Judicature Acts (*i*), the rule in all Courts, and may be preserved by the Code (*k*).

Two questions therefore arise in this connection, viz., Is the equitable rule different from that at common law? and, if so, is there any conflict between law and equity as regards sales of goods? The equitable rule discussed.

The phrase "material" has led to great confusion. The term is ambiguous, and may mean (as in cases of fraud) "material to induce assent" (*l*), or (as in cases of mistake) "material to the existence of assent." In the first case assent exists in fact, but has been influenced; in the second it does not exist at all, as its existence was dependent on the truth of the representation. Some text writers (*m*), misled by the ambiguity, have considered the rule in equity as different from, and as abrogating, the common law rule stated in *Kennedy's Case*, apparently treating the law of misrepresentation as being (for purposes of rescission at least) as a branch of the same head of law as fraud, instead of its falling (as it is conceived it should do) under the head of mistake.

Where a purchaser of land seeks in equity rescission of the contract, and a return of his purchase money, the rule (originally laid down in *Flight* v. *Booth* (*n*), a purely common law action,) has been repeatedly followed, that a purchaser is entitled to rescission, notwithstanding that the contract may provide for compensation for errors of description, if he does not get in substance what he agreed to buy (*o*). And the equitable doctrine was thus stated by Story, J., in *Daniel* v. Misrepresentation on sales of land.

(*i*) Jud. Act, 1873, s. 25 (11).

(*k*) S. 61 (2). It has, however, been held that "the rules of the common law" which are preserved by this section do not include the rules of equity: *Bethlehem* v. *Warren*, set out, *post*, 500. For this use of "common law" as meaning *lex non scripta*, see 1 Bl. Com. 63; 1 Steph. Com., 7th ed. 40, 80.

(*l*) *Per* Lord Blackburn in *Smith* v. *Chadwick* (1884) 9 A. C. 187, at 196. See the subject discussed in the next chapter.

(*m*) See Anson on Cont., 13th ed., 182, 184; Halsbury's Laws of England, vol. 20, 738 (k); Bower on Actionable Misrepresentation, 231; Moncrieff on Fraud and Misrepresentation (ed. 1891), 313. The same view was taken in the 5th ed. of the present work: see at 440-1. See on the other hand Fry on Spec. Perf., 3rd ed., s. 747, citing *Kennedy's Case*, and *Torrance* v. *Bolton*, *post*; Kerr on Fraud, 4th ed., 110, 385, 489. Prof. Pollock appears to doubt: Encycl. of Laws of Engl., Tit. Contract, 543.

(*n*) (1834) 1 Bing. N. C. 370; 4 L. J. C. P. 66. See also *Dobell* v. *Hutchinson* (1835) 3 A. & E. 355; 4 L. J. K. B. 201; and *Dykes* v. *Blake* (1838) 4 Bing. N. C. 463; 7 L. J. C. P. 482.

(*o*) Dart's V. and P., 6th ed., 151; Fry on Sp. Perf., 3rd ed., s. 1240; *Fawcett and Holmes' Contract* (1889) 42 Ch. D. 150, C. A.; 58 L. J. Ch. 763; *Puckett* v. *Smith's Contract* [1902] 2 Ch. 258, C. A.; 71 L. J. Ch. 666; and cf. *Brewer and Hankin's Contract* (1899) 80 L. T. 127, C. A.; *Sheppard* v. *Croft* [1911] 1 Ch. 521; 80 L. J. Ch. 170. See also *Jacobs* v. *Revell* [1900] 2 Ch. 858; 69 L. J. Ch. 879, where the cases are reviewed.

Mitchell (*p*): "Nothing is more clear in equity than the doctrine that a bargain founded in a mutual mistake of the facts constituting the very basis or essence of the contract, or founded upon misrepresentation of the sellers material to the bargain, *and constituting the essence thereof*, although made by innocent mistake, will avoid it. Mistake, as well as fraud, in any representation of a fact material to the contract furnishes a sufficient ground to set it aside, and to declare it a nullity."

Torrance v. *Bolton* (1872).

An illustration of a contract being rescinded, where one party had misled the other, is afforded by the case of *Torrance* v. *Bolton* (*q*), in which it was held that where the plaintiff, a bidder at an auction, was misled by the particulars advertised as to the property exposed for sale, which was described as an absolute reversion in a freehold estate, and being deaf he did not hear the conditions, which were read out at the sale but were not otherwise circulated, in which the property was stated to be subject to mortgages, he was not bound by the contract made under such misleading particulars, which had induced him to believe that he was buying the absolute reversion and not an equity of redemption. No fraud was shown, but the Court said, that the description in the particulars was "improper, insufficient, and not very fair" (*r*), and "calculated, if not intended, to entrap." The buyer was buying an immediate liability for £500, and one or two Chancery suits, and "he never did know what he was buying" (*s*). The onus was therefore on the vendor to show that the purchaser was not actually misled, and, as he had failed to do so, the plaintiff was entitled to have the contract rescinded and his deposit returned. In this case it is clear that the misrepresentation went to the substance of the contract.

Gardiner v. *Tate* (1876).

And in *Gardiner* v. *Tate* (*t*), the purchaser at an auction had bought the residue of an equitable term of fifty-four

(*p*) (1840) 1 Story, 172. See similar statements in *Doggett* v. *Emerson* (1845) 3 *ib.* 700; and *Hough* v. *Richardson* (1845) 3 *ib.* 700. He says in the last case that, apart from fraud, if the buyer relies on "misrepresentations, made by mistake, *going to the essence of the bargain*, and is deceived, he does not buy what he intended."

(*q*) 14 Eq. 124; 41 L. J. Ch. 643; approving *Stanton* v. *Tattersall* (1853) 1 Sm. & Giff. 529; 96 R. R. 471 (situation of house sold); aff. 8 Ch. 118; 42 L. J. Ch. 177.

(*r*) *Per* James, L.J., 8 Ch. at 123; 42 L. J. Ch. 177.

(*s*) See also *Mahomed* v. *A. V. Harperink* (1908) 25 T. L. R. 180, P. C. where the representation led to the belief that the worthless equity of redemption sold was an unencumbered freehold.

(*t*) (1876) 10 Ir. Rep. C. L. 460, citing *Torrance* v. *Bolton*.

years in certain premises, being misled by the particulars and conditions of sale into the belief that he was purchasing a remaining term of fifty-four years, being the residue of a legal term. The materiality of the misdescription was shown by, among other facts, the circumstance that, when the true state of affairs was known, the premises were resold for £440 less than the £1,210 which the purchaser had bid. *Held*, that there was *no contract*. "The purchaser," said Fitzgerald, J., "was induced to think he was purchasing *a different thing* from that which the plaintiffs had to convey. . . . The minds of the two parties *had not agreed* on the subject-matter of the contract."

Thus, with regard to sales of land at least, equity, in cases of rescission (*u*), applies a doctrine identical with that at common law (*x*), the purchaser being compelled, where he gets substantially what he contracted for, to resort to compensation, if such be provided for, just as a buyer of goods may be compelled to rely upon a warranty, and not upon rejection of the goods (*y*).

No case has been found where a contract for the sale of goods has been rescinded where the facts showed a purely innocent misrepresentation not going to the substance of the contract (*z*). And the rule in *Kennedy's Case* has been applied in Ireland in the case of a sale of lands (*a*); and it has been doubted by Scottish Judges (*b*) whether, by English law, any innocent misrepresentation, not causing essential mistake, is sufficient to invalidate a contract. The only direct authorities as affecting goods are the three following Australasian cases. Having regard to the difficulty of the subject, full extracts may be given.

In *Picturesque Atlas Publishing Co.* v. *Phillipson* (*c*) the

(*u*) A purchaser may resist specific performance for a less serious mistake; *per* Lindley, L.J., in *Terry and White's Contract* (1886) 32 Ch. D. 14, C. A.: 55 L. J. Ch. 345.

(*x*) In such a case the contract is "treated as if it had never existed"; *per* Lord Esher, M.R., in *Terry and White's Contract*, *supra*. See also *per Cur.* in *Dimmock* v. *Hallett* (1866) 2 Ch. 21; 36 L. J. Ch. 146.

(*y*) As to this, see *post*, 644.

(*z*) *Wharr* v. *Devenish* (1904) 20 T. L. R. 385, was really (though not so treated) a case of fraud, the former ownership of the horse being wilfully misrepresented; see *Bexwell* v. *Christie* (1776) 1 Cowp. 395. In *Hindle* v. *Brown* (1908) 98 L. T. 791, C. A., the action was on a cheque given to an auctioneer; moreover, the misrepresentation went to the root of the contract. In *Seddon* v. *E. Salt Co.* [1905] 1 Ch. 326, the contract was executed. And in *Schroder* v. *Mendl* (1877) 37 L. T. 352, C. A., Cotton, L.J., gives no definition of "material"; and no question of rescission arose.

(*a*) *Lecky* v. *Walter* [1914] 1 Ch. 378, Ir.

(*b*) By Lord Kyllachy in *Wood* v. *Tulloch* (1893) 20 Ret. 477.

(*c*) (1890) 16 Vict. L. R. 675. See also *Civil Service Co-op. Society* v. *Fluth* (1914) 17 Austr. C. L. R. 601.

Australasian cases.

Picturesque Atlas Co. v. *Phillipson* (1890).

buyer, intending to buy part only of an atlas to be published in parts, informed the sellers' agent of his intention, and the agent appeared to make a note of it in his book. The buyer then, without reading it, signed an order, being assured that it was "the usual form." The order stated that subscriptions were received only for the entire work in forty-two parts, and that no agent had authority to alter the terms of subscription. The buyer accepted, and paid for, the seven parts he had intended to subscribe for, and refused to accept any more, but he did not return the seven parts received. In an action for the price of the remaining thirty-five parts, it was held by the Full Supreme Court of Victoria, on the authority of Blackburn, J.'s, statement of the law in *Kennedy's Case*, that the buyer was liable. The mistake induced by the conduct of the sellers' agent went to part only of the consideration, and not "to the root of the thing which formed the subject of negotiation." Accordingly, there was a contract, though the buyer had misunderstood it. The Court held also that, had the mistake gone to the substance, the buyer could not have relied upon it, as he had not restored the sellers to their original position by returning the parts received.

Hynes v. *Byrne* (1899).

Opinion of Griffith, C.J., that the rule is the same at law and in equity.

In *Hynes* v. *Byrne* (*d*), where there had been an innocent misrepresentation of the number and value of the stock on a station, and where the purchasers sought rescission of the contract, Griffith, C.J., after saying that, if the representation had been embodied in the written contract, it would not have been a condition, and moreover, as the things sold were specific, and the property had passed, the purchaser could not avoid the contract, and that it would be "a singular result" that greater effect could be given to an oral representation external to the contract, proceeded: "It is contended, however, that there is a different rule in equity. . . . I am not aware of any authority for the proposition that the law of contracts, as recognised by Courts of Equity, differed from the same law as known by Courts of Law. There was indeed a difference in the kind of contracts which came under notice in the respective Courts, and a difference in the form of relief given (*e*). But I have always understood that Courts of

(*d*) (1899) 9 Queensl. L. J. 154.

(*e*) "I doubt myself, though such a thing is suggested in the Judicature Act, 1873, s. 25, sub-s. 11, whether there are any principles of law which were differently affirmed in the old Court of Equity and the old Courts of Common Law. Those Courts dealt with the same matters for the purpose of different remedies": *per* Lord Esher, M.R., in *Re Terry and White's Contract* (1886), 32 Ch. D. 14 at 21.

Equity followed the law on questions of the law of contracts. . . . The doctrine supposed to be peculiar to Courts of Equity is that a person induced to enter into a contract by a representation which is incorrect in fact, although innocently made, may repudiate the contract, provided that the representation was 'material.' If the rule means that the error was such as to amount to a complete difference in substance in the subject-matter of the contract, the rules are identical." Then after explaining that, by reason of the idea that there were two kinds of fraud, legal and equitable (a notion exploded by *Derry* v. *Peek* (*f*)), writers on fraud and misrepresentation had treated the two matters of fraud and misrepresentation as branches of the same subject, he said that, according to the principles laid down in *Derry* v. *Peek*, there was "an essential difference between a fraudulent and an innocent misrepresentation, not only in morals, but in legal effect, and that the two matters ought no longer to be treated as connected," he went on: "The term 'misrepresentation' cannot, in my judgment, be properly applied to a statement which, though erroneous in fact, is made with an honest belief in its truth. The proper word to describe such a statement is 'mistake.' If both the parties to a contract erroneously believe in the existence of a particular state of facts, and make the contract under that belief, there is a case of mutual mistake, which may or may not give rise to a right of rescission. Whether it does or does not depends upon the nature of the mistake, and, so far as my researches have enabled me to discover, the principle on which Courts of Equity dealt with such cases are substantially the same as the rule laid down in *Kennedy* v. *Panama Co.* . . . I have not indeed found any case in which a contract induced by an 'innocent misrepresentation' has been set aside in which there was not in fact such an error as falls within the rule as to mistake." The Chief Justice then proceeded to show that Jessel, M.R., in *Redgrave* v. *Hurd* (*g*), and Lords Bramwell and Herschell in *Derry* v. *Peek* (*h*), were not enunciating any new doctrine; and that Bowen, L.J., in *Newbigging* v. *Adam* (*i*), regarded the common law and equitable doctrine

(*f*) (1889) 14 A. C. 337, set out *post* 540. The C.J. also regarded *Low* v. *Bouverie* [1891] 3 Ch. 82, C. A., as establishing that "an error in a statement made honestly in the course of a negotiation does not, unless it be a warranty, give rise to liability," and he considered the risk of rescission as a liability

(*g*) Quoted *ante*, 493

(*h*) (1889) 14 A. C. 337, at 347, 359.

(*i*) (1886) 34 Ch. D. 582 at 592

as the same. "In my judgment," he went on, "the word 'material' as used in the passages I have cited was not intended to suggest that, in the case of an erroneous statement honestly made, any fact should be treated as material which would not be so treated in any other case of mutual mistake." He concluded by saying: "I am therefore of opinion that the rules of law and equity in this regard are substantially the same."

Was there a conflict between law and equity?

If, however, it be assumed that equity has her own doctrine with regard to innocent misrepresentation, is that doctrine confined to the particular contracts dealt with in equity, or is it also applicable to contracts for the sale of goods? With regard to these, is there any "conflict or variance" between law and equity (*k*)? The only authority which has been discovered is the following case.

Opinion of the C.A. of N.Z.

Riddiford v. _Warren_ (1901) that the equitable doctrine did not apply to sales of goods.

In *Riddiford* v. *Warren* (*kk*), the sellers of lambs claimed to be discharged on the ground that the partner negotiating the sale had been induced, by an innocent misrepresentation by the buyer that the other partner had quoted a certain price, to agree to a sale at that price. The Court of Appeal decided that there had been in fact no misrepresentation, but the question of law was elaborately argued, the sellers contending that a misrepresentation *merely inducing* assent was, since the Judicature Act, sufficient; the buyer that the rule in *Kennedy's Case* still applied, and that the misrepresentation, if it was made, did not go to substance.

Williams, J., treated the rule in equity as wider than that of the common law, but was of opinion that section 61 (2) of the Sale of Goods Act, in saving the rules of common law, did not mean the rules of law as distinguished from statute law (thus including equity), otherwise it would have said "the existing rules of law." It was therefore a statutory declaration that, at the commencement of the act, the rules of the common law existed (*l*), as applicable to sales of goods, to which the equitable doctrine did not apply.

Denniston, J., agreed. He held that there was no conflict between law and equity in contracts of sale of goods, and

(*k*) Under the Judicature Act, 1873, s. 25 (11).

(*kk*) [1901] 20 N. Z. L. R. 572, C. A.

(*l*) Stress had been laid in the argument on the words "continue" apply." And Prof. Anson, replying to the criticism in *Riddiford* v. *Warren* his statement that the equitable rule now applies to all contracts, is of opinion that "rules of common law" means these rules as modified by equity: th Cont., 14th ed., 188.

that section 11 of the Law Amendment Act (*m*) left the law as it was. Jessel, M.R., was, in his opinion, enunciating in *Redgrave* v. *Hurd* (*n*) only general principles, and was not thinking of exceptions. No case had been found in which a contract of sale of goods had been set aside for an innocent misrepresentation which did not go to the root of the contract (*o*). Moreover, if equitable principles were to apply to such contracts, the result would be to change the law of warranty, and enable a buyer to rescind the contract for a breach of a mere warranty, which the Sale of Goods Act expressly says a buyer cannot do. Thus a buyer, in such a case as *Hopkins* v. *Tanqueray* (*p*), would be able to avoid the contract.

The other Judges concurred, and the opinion of the Court was that an innocent misrepresentation, not going to the substance of the consideration, even though it induces assent to the contract, does not entitle the party misled to repudiate it.

Difficulty with regard to the law of warranty.

The difficulty in relation to the law of warranty pointed out by Denniston, J., is apparent from the fact that, if the supposed rule exists, a buyer of a horse on the seller's assurance, given independently of the contract, that the animal is sound, may reject it, if unsound; whereas, if the buyer were to rely upon a warranty in the contract itself, he could not. This result would seem to be a *reductio ad absurdum*.

Proposition.

It would appear, therefore, as the result of the authorities, that the rules of equity and of common law are the same, and that an innocent misrepresentation has no effect upon the validity of the contract unless the existence of the contract is expressly based upon the truth of the representation, or unless it induces mistake in an essential matter. If this view be correct, the contract is void (*q*), subject however to the

(*m*) No. 31 of 1882. S. 11 substantially corresponds with s. 25 (11) of the English J. A., 1873.

(*n*) *Ante*, 493.

(*o*) The same opinion was given by the C. A. in *Johnston* v. *McRae* [1906] 26 N. Z. L. R. 239, C. A.: "Misrepresentation of an existing fact, going to the root of the value of the thing sold, made without fraud, may clearly be a ground for avoiding an executory agreement: *Redgrave* v. *Hurd*."

(*p*) *Post*, 752.

(*q*) Either in fact, or by virtue of an estoppel on the representor. Indeed it will be seen that the law of innocent misrepresentation is in reality a branch of the law of estoppel: see *per* the Lords in *Downes* v. *Ship* (1868) L. R. 3 E. & I. 343. Text writers and Judges often speak of the contract being *voidable*, a term which generally means [illegible] see *per* Joyce, J., in [illegible] v. *N. E. Salt Co.* [1905] 1 Ch. 326 at 334. The question has never

right of the party misled to affirm it as against the representor, who is estopped from treating the contract as non-existent. The distinction might be important where the rights of third persons supervene.

For example, suppose A. sells to B. a bowl on B.'s innocent misrepresentation that it is modern work, and the bowl is sold as being modern, whereas it is a valuable antique. B., discovering this fact, sells it as an antique to C., a buyer in good faith. Before (*r*) it is delivered to C., A. demands a return of the bowl. Here it is conceived that, if the contract between A. and B. were void, C. gets no title; if it were voidable by A., C. does (*s*) get a good title.

Misrepresentation as applicable to completed transactions.

There is also a settled doctrine of equity applicable, at least to misrepresentation on the sale of land, and interests therein, that a contract cannot be rescinded where it has been executed on both sides, so that the parties cannot be restored to their original position (*t*), in the absence of fraud, or essential mistake (*u*), or fiduciary relationship between the parties (*x*). This doctrine has been extended to leases by deed (*y*), and sales of shares (*z*).

But no case has been found in which this doctrine has been applied to a sale of goods, and it seems wholly inapplicable to it (*a*). Moreover, if the true view of the effect of innocent

been tested; and in most cases the difference is immaterial. Contracts for shares are peculiar; for the protection of creditors, such contracts are really voidable: see Poll. on Cont., 8th ed.

(*r*) After delivery to B., C. might get a title under s. 9 of the Factors Act, 1889, *ante*, 48.

(*s*) At common law: *Babcock* v. *Lawson* (1880) 5 Q. B. D. 284, C. A.; 48 L. J. Q. B. 524; and under s. 23 of the Code, *ante*, 36.

(*t*) *Per* Pickford, J., in *Hindle* v. *Brown* (1907) 98 L. T. 44.

(*u*) *Per* Lord Campbell in *Wilde* v. *Gibson* (1848) 1 H. L. C. 605 at 625, 633; *per* Lord Selborne in *Brownlie* v. *Campbell* (1880) 5 A. C. 925 at 937, 938. As to essential mistake see *Bingham* v. *Bingham* (1748) 1 Ves. Sen. 126; *Jones* v. *Clifford* (1876) 3 Ch. D. 779; *Debenham* v. *Sawbridge* [1901] 2 Ch. 98 at 109; *Scott* v. *Coulson* [1903] 2 Ch. 249, C. A.; 72 L. J. Ch. 600 (policy on life); *Cole* v. *Pope* (1898) 29 Can. S. C. R. 291, where the rule of executed contracts is discussed.

(*x*) *Armstrong* v. *Jackson* [1917] 2 K. B. 822; 86 L. J. K. B. 1375.

(*y*) *Anstell* v. *Jay* [1911] 1 K. B. 666; *Milch* v. *Coburn* (1910) 27 T. L. R. 170.

(*z*) *Seddon* v. *North Eastern Salt Co.* [1905] 1 Ch. 326; 74 L. J. Ch. 199. In this case Joyce, J., quotes Blackburn, J., in *Kennedy's Case*. But that learned Judge was not contrasting completed and incomplete transactions, but partial with total failure of consideration.

(*a*) Otherwise curious results followed. A contract of sale of goods is "executed" by delivery and payment. If then a twenty-four hour clock is by innocent mistake represented in a shop as an eight-day clock, has the buyer lost all remedy immediately he has paid and taken the article away, although it is obvious he cannot judge of it except by use? Or would the transaction be deemed not "executed" till the buyer had been able to judge of it? McCardie, J., in *Armstrong* v. *Jackson*, *supra*, seems to incline to the opinion that the doctrine applies to transactions completed by "formal conveyance, or

misrepresentation be that, to be effectual, it must produce essential mistake, contracts of sale of goods are within the exception to the rule.

Restitutio in integrum.

It has been stated above (*b*) that a repudiation of a contract on the ground of misrepresentation is only competent to the party misled where *restitutio in integrum* is possible (*c*), that is, where the parties can be restored to their original position as before the contract, for it is a general rule that "where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*" (*d*). Thus, any thing received under the contract must be returned or tendered to the other party. But the rule must not be taken too literally, and as imposing an absolute obligation in all events to restore the other party fully to his original position. The *status quo ante* may have been changed or modified, either by some cause for which the party seeking relief is not responsible (*e*), or by the legitimate exercise of the rights given him by the contract (*e*), as by reasonable, but not excessive, trial of the goods to see whether they are in accordance with the contract (*f*).

Adam v. *Newbigging* (1888).

In *Adam* v. *Newbigging* (*g*), the House of Lords decided that a person who had been induced by misrepresentation to enter into a partnership in a business which was at the time insolvent did not lose his right to avoid the contract by reason of the business having by its own inherent defect further deteriorated since.

formal" delivery, as by deed. He says: "It is curious that the doctrine should cease to apply when the formal instrument of transfer has been executed, or the formal delivery of a chattel has taken place. In many cases the misrepresentation cannot, or may not, be discovered until the purchaser has secured his legal title."

(*b*) *Ante*, 493.

(*c*) The same principle applies in Scotland: *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 H. L., Sc. 145; see *per* Lord Cranworth, at 164; *Glasgow and S. W. Ry. Co.* v. *Boyd and Forrest* [1915] A. C. 526.

(*d*) *Per* Lord Ellenborough in *Hunt* v. *Silk* (1804) 5 East, 449, at 452; 7 R. R. 739; *Clarke* v. *Dickson* (1858) E. B. & E. 148; 27 L. J. Q. B. 223; 113 R. R. 583; app. by P. C. in *Urquhart* v. *Macpherson* (1878) 3 A. C. 831.

(*e*) *Per* Bramwell, B., in *Head* v. *Tattersall* (1871) L. R. 7 Ex. 7, at 11—12; 41 L. J. Ex. 4. See also *Chapman* v. *Withers* (1888) 20 Q. B. D. 824.

(*f*) *Lucy* v. *Mouflet* (1860) 5 H. & N. 229; 29 L. J. Ex. 110; 120 R. R. 555; *Poulton* v. *Lattimore* (1829) 9 B. & C. 259; 8 L. J. K. B. 135; 32 R. R. 313; *Harnor* v. *Groves* (1855) 15 C. B. 667; 24 L. J. C. P. 53; 100 R. R. 535; *Hopkins* v. *Appleby* (1816) 1 Stark. 477. See also Code, s. 34, and s. 35.

(*g*) 13 A. C. 308; 57 L. J. Ch. 1066. This case seems to dispose of the doubt expressed by Thesiger, L.J., in *Waddell* v. *Blockey* (1878) 4 Q. B. D. at 683; 48 L. J. Q. B. 517, whether a buyer who has been defrauded in the purchase of shares could return them to the seller if they had since depreciated in the market. See also *per* Lord Cranworth in *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 H. L., Sc. 145, at 166.

Indemnity of person avoiding contract.

The party who himself claims to rescind a contract, although he cannot be placed always *in statu quo* in the sense that he can recover such damages as he might have recovered in an action of deceit, yet is entitled to be put *in statu quo* so far as possible. Thus, he is entitled to a return of any money he has paid, with interest (*h*), and to be so far indemnified as to be relieved from all the obligations and consequences which result from the avoided contract (*i*).

Law in Scotland.

In Scotland the law of misrepresentation of fact is identical with the civil law, and the English common law, as declared by Blackburn, J., in Kennedy's case (*k*).

Misrepresentation of law.

The representation which, if untrue, justifies a repudiation of the contract by the party to whom the representation is made, must, like mistake, be as to fact, and not as to law (*l*).

A misrepresentation as to the *legal effect* of an instrument by which a party is induced to execute it, or to act upon it, does not therefore entitle him to repudiate it, or to give him a right of action, or ground of defence (*m*). But if the representation be, not of the legal effect of a document, but of its essential character, as, for example, where a bill of exchange is represented to be a guaranty, this would be a representation of fact causing essential mistake (*n*).

A representation that an instrument has been interpreted in a particular sense by a Court may be one of fact (*o*). And

(*h*) *Karberg's Case* [1892] 3 Ch. 1; 61 L. J. Ch. 741, C. A.

(*i*) *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1; 51 L. J. Ch. 113, C. A.; *Newbigging* v. *Adam* (1886) 34 Ch. D. 582; 56 L. J. Ch. 275, C. A. In the last case the nature and effect of the right of indemnity on rescission is fully considered by the C. A. On appeal the H. L. did not touch upon this point; 13 A. C. 308; 57 L. J. Ch. 1066. See also *Whittington* v. *Seale-Hayne* (1900) 82 L. T. 49; a case decided upon the distinction between damages and an indemnity against the liabilities of a contract (lease).

(*k*) *Wood* v. *Tulloch* [1893] 20 R. 477; *Edgar* v. *Hector* [1912] F. 38; *Boyd and Forrest* v. *Glasgow and S. W. Ry. Co.* [1914] S. C. 472. The reversal of this case in [1915] A. C. 526, H. L., does not affect the principle.

(*l*) Fry on Spec. Perf., 3rd ed., ss. 682, 799, citing *Beattie* v. *Ebury* (1872) 7 Ch. 777; 41 L. J. Ch. 801; aff. (1874) L. R. 7 H. L. 102; 44 L. J. Ch. 20; *Legge* v. *Croker* (1811) 1 Ball & B. 506; 12 R. R. 49; *Rashdall* v. *Ford* (1866) L. R. 2 Eq. 750; 35 L. J. Ch. 769; *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K. B. 558; 73 L. J. K. B. 373, C. A.

(*m*) *Lewis* v. *Jones* (1825) 4 B. & C. 506; 3 L. J. K. B. 270; 28 R. R. 330 (agreement to accept composition); *Rashdall* v. *Ford* (1866) L. R. 2 Eq.; 35 L. J. Ch. 769 (company "legally issued" Lloyd's Bonds); *Upton* v. *Tribilcock* (1875) 91 U. S. 45 (effect with regard to calls, of share-certificate); *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K. B. 558, C. A.; 73 L. J. K. B. 373 (validity of policy though no insurable interest).

(*n*) See as to this, *ante*, 124. The phrase "actual contents" used in the cases is somewhat misleading. According to the context it may mean the nature of the document, or only its provisions.

(*o*) *Jones* v. *Edney* (1812) 3 Camp. 285. Qy., if the auctioneer had avowedly based his statement that the public-house was a "free house" on an inference from a perusal of Lord Ellenborough's judgment it would or would not

a representation may also be one of fact, though it be based on wrong grounds of law, provided it do not amount to the statement of an opinion as to the law (*p*).

Beattie v. *Ebury* (1872).

In *Beattie* v. *Lord Ebury* (*q*), there is an elaborate discussion of the law on this subject in its application to the case of an agent honestly representing himself to have an authority which he does not possess, and Mellish, L.J., in delivering the judgment of the Court, expressed a very strong opinion, that if in such a case the written authority of the agent was asked for, and shown by him, he would not be personally responsible for the innocent misrepresentation of its legal effect; and he laid down the general proposition that where there is no representation in point of fact, but merely one in point of law, that is to say, if the person who deals with the agent is fully aware what the extent of the authority of the agent is in point of fact, but makes a mistake as to its sufficiency in point of law, the agent is not liable for misrepresentation of authority.

Representation apparently only of law.

Many representations, too, which appear to be representations of law may involve representations of fact, and are treated as such. Thus, for example, a representation, express or implied, of the ability of a company to borrow, or to issue stock, may in reality be a statement that certain facts exist which by law authorise a company to do so (*r*). A statement of law, being only the statement of an opinion (*s*), may contain within itself by implication a statement of fact (*t*). The difficulty of distinguishing between the two classes of statement has been well pointed out by Jessel, M.R. (*u*): "A misrepresentation of law is this: When you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of

have been a representation of fact? See case in next note. In *Upton* v. *Tribilcock* (1875) 91 N. S. 45, the statement that counsel's opinion had given a certain meaning to a document was decided to be a misrepresentation of law.

(*p*) *Wanton* v. *Coppard* (1899) 1 Ch. 92; 68 L. J. Ch. 8 (statement that land sold was not subject to restrictive covenants).

(*q*) 7 Ch. 777, at 800—804; 41 L. J. Ch. 804.

(*r*) See *Richardson* v. *Williamson* (1871) L. R. 6 Q. B. 276; 40 L. J. Q. B. 145; and *Cherry* v. *Col. Bank of Australasia* (1869) L. R. 3 P. C. 24; 38 L. J. P. C. 49; as explained by Mellish, L.J., in *Beattie* v. *Ebury*, *supra*; *Firbank's Executors* v. *Humphreys* (1886) 18 Q. B. D. 54; 56 L. J. Q. B. 57, where the ability to issue stock was exhausted, and was impliedly represented to continue.

(*s*) *Per Cur.* in *Upton* v. *Tribilcock* (1875) 91 N. S. 45, at 50.

(*t*) See on this, *post*, 511, 533.

(*u*) In *Eaglesfield* v. *Londonderry* (1876) 4 Ch. D. 693, at 702, 703.

law, that is still a statement of fact and not a statement of law. . . . It is not the less a fact because that fact involves some knowledge or relation of law." But where a misrepresentation, even of law, is fraudulent, the ordinary rule does not apply (*x*).

Representation as to effect of private rights.

A representation as to private rights, though dependent on rules of law, as of the effect of a private Act of Parliament *e.g.*, that it confers certain powers—will be treated as a representation of fact and not of law (*y*).

Misrepresentation of law causing failure of consideration.

Want of consideration for a promise may be shown notwithstanding the promise was induced by a misrepresentation of law, for "want of consideration is altogether independent of knowledge either of the facts or of the law" (*z*). This matter was carefully considered by the Common Pleas in *Southall* v. *Rigg* and *Forman* v. *Wright* (*a*), in which cases the mistake went, in the language of Blackburn, J., above quoted, "to the substance of the whole consideration." This want of consideration was held to be available as a defence between the parties to a negotiable instrument: the misrepresentation being in the first case one of law, that an infant was liable for the debt for which, when of full age, he gave the promissory note; and in the second case, one of fact, that the amount of the debt for which the note was given was larger than it really was.

(*x*) *Per* Mellor and Lush, JJ., in *Hirschfield* v. *London, Brighton and S. C. Ry.* (1876) 2 Q. B. D. 1; 46 L. J. Q. B. 94; *per* Bowen, L.J., in *West London Com. Bank.* v. *Kitson* (1884) 13 Q. B. D. 360; 53 L. J. Q. B. 345, C. A.; *British Workman's Assurance Co.* v. *Cunliffe* (1902) 18 Times L. R. 502, C. A.; consd. and reconciled with *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K. B. 558; 73 L. J. K. B. 373, C. A., in *Phillips* v. *Royal London, Etc., Ins. Co.* (1911) 105 L. T. 136. See also *Hughes* v. *Liverpool, Etc., Friendly Society* [1916] 2 K. B. 482, C. A.; 85 L. J. K. B. 1643.

(*y*) *West London Com. Bank* v. *Kitson, supra.* See also *per* Lord Westbury in *Cooper* v. *Phibbs* (1867) L. R. 2 H. L. 149.

(*z*) *Per* Jervis, C.J., in *Forman* v. *Wright* (1851) 11 C. B. 481, at 492; 20 L. J. C. P. 145. The passage quoted is widely stated, and should not be misunderstood. Thus, for example, money paid with knowledge of the facts upon an illegal contract, though induced by misrepresentation of fact or of law, is not recoverable; *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K. B. 558, C. A., nor is it generally in any case if the effect would be to validate an illegal or void transaction: see *Sinclair* v. *Brougham* [1911] A. C. 398, at 417, 452; *Branson* v. *Crooks* (1911) 106 L. T. 264.

(*a*) Both reported in 11 C. B. 481; 20 L. J. C. P. 145; 87 R. R. 731. See also *Coward* v. *Hughes* (1855) 1 K. & J. 443; 103 R. R. 172.

CHAPTER III.

FRAUD.

SECTION I.—IN GENERAL.

Fraud renders contracts voidable.

Fraud by itself renders all contracts *voidable ab initio* both at law and in equity. No man is bound by a bargain into which he has been deceived by a fraud, because assent is necessary to a valid contract, and there is no free assent where fraud and deception have been used as instruments to control the will and influence the assent. The common law rules relating to the effect of fraud are expressly saved by the Code (*a*). But fraud may bring about an independent cause of nullity, as where it causes an essential mistake, which nullifies assent; in which case the contract is void, and not merely voidable (*b*). But it is not the fraud which invalidates the contract: it is the independent cause of nullity.

It was stated in the preceding chapter that a contract induced by innocent material misrepresentation affords no ground of action for damages by the person misled. It is in this respect that an innocent misrepresentation differs from a fraudulent one, inasmuch as the latter gives a ground for an action of tort—viz., an action of deceit—where there has been damage to the person deceived. "Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies," was the maxim laid down by Croke, J. (*c*), and quoted with approval by Buller, J., in the leading case of *Pasley* v. *Freeman* (*d*), and by Lord Halsbury, L.C., and Lord Herschell in the House of Lords in *Derry* v. *Peek* (*e*). The two effects of fraud were thus well stated by Lord Wensleydale in *Smith* v. *Kay* (*f*): "Fraud gives a *cause of action* if it leads to any sort of damage; it *avoids contracts* only where it is the ground of the contract,

(*a*) S. 61 (2).

(*b*) See *per* Jeune, P., in *Moss* v. *Moss* [1897] P. 263; 66 L. J. P. 154, where the learned Judge distinguishes "such fraud as induces consent," and "such fraud as procures the appearance without the reality of consent."

(*c*) (1615) 3 Bulstr. 95.

(*d*) (1789) 3 T. R. 51; 2 Sm. L. C. 9th ed. 74; 11th ed. 66; 1 R. R. 634. The whole doctrine on the subject was much discussed in the H. L. in *Attwood* v. *Small* (1835) 6 Cl. & F. 232; 8 L. J. Ch. 145; 44 R. R. 115.

(*e*) (1889) 14 A. C. 337, at 343, 363; 58 L. J. Ch. 804.

(*f*) (1859) 7 H. L. C. at 775—776; 115 R. R. 367.

and where, unless it had been employed, the contract would never have been made." In the latter case therefore the contract may be rescinded without proof of damage (*g*).

Definitions of fraud.

Although fraud has been said to be "every kind of artifice employed by one person for the purpose of deceiving another," courts and lawgivers have alike wisely refrained from any attempt to define with exactness what constitutes a fraud, it being so subtle in its nature, and so Protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade.

Roman jurisconsults.

The Roman jurisconsults attempted definitions, two of which are here given: "Dolum malum SERVIUS quidem ita definit: machinationem quandam alterius decipiendi causa, cum aliud simulatur et aliud agitur. LABEO autem, posse et sine simulatione id agi ut quis circumveniatur: posse et sine dolo malo aliud agi, aliud simulari; sicuti faciunt qui per ejus modi dissimulationem deserviant, et tuentur vel sua vel aliena. Itaque ipse sic definit; dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est" (*h*).

Civil Code of France.

The Civil Code of France, without giving a definition, provides in Art. 1116, that: "Fraud is a ground for avoiding a contract when the devices (les manœuvres) practised by one of the parties are such as to make it evident that without these devices the other party would not have contracted."

Essential elements of fraud.

The fraud must have been relied upon.

However difficult it may be to define what fraud is in all cases, it is easy to point out some of the elements thereof which must necessarily exist. In the first place it is essential that the means used should be successful in *deceiving*: that it should have brought about the contract (*i*): that it should be *fraus dans locum contractui*. However false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they will not entitle that other to relief if he knows the truth, and sees through the artifices or devices. *Haud enim decipitur qui scit se decipi.* Or the other party, though unaware of the true facts, may have contracted without having been induced thereto by the other's fraud. If a contract is made under such circum-

(*g*) This seems to be involved in the judgment last referred to, and also in the decision, *e.g.*, of the H. L. in *Central Ry. Co. of Venezuela* v. *Kisch* (1867) L. R. 2 H. L. 99; 36 L. J. Ch. 849.

(*h*) Dig. 4, 3, 1, 2.

(*i*) In the language of the old pleading he must show the *fidem exhibuit* a communication: *Leakins* v. *Clissel* (1663) 1 Sid. 146.

stances, the inducement or motive for making it is *ex concessis*, not the false or fraudulent representations, which are not believed or are not relied upon, but some other independent motive.

No fraud without dishonest intention: no *legal* fraud.

Next, it is now well settled that there can be no fraud without dishonest intention, no such fraud as was formerly termed a *legal fraud* (*k*). Therefore, however false may be the representation of one party to another to induce him to make a contract, there is no *fraud*, if the party making the representation *honestly* believed it to be true; although other remedies are sometimes available to the deceived party, as for example, a total failure of consideration, or breach of warranty, or avoidance of the contract for simple misrepresentation.

To constitute *fraud* there must be a representation, not only false in fact, but also made fraudulently, that is to say, made with knowledge of its falsity, or without belief in its truth, or made recklessly with a carelessness whether it be true or false (*l*). And the absence of a reasonable ground for belief is not an element of fraud *per se*, but is evidence tending to negative the genuineness of the belief (*l*).

Mistaken belief may be caused actively or passively.

The mistaken belief as to facts may be created by the seller by active means, as by fraudulent concealment (*suppressio veri*), or knowingly false representation (*suggestio falsi*); or passively, by mere silence when it is a duty to speak. But it is only where a party is under some pledge or obligation to reveal facts to another that mere silence will be considered as a means of deception (*m*).

Where the fraud consists in fraudulent representation, the

(*k*) It is the distinction between the moral complexion and the legal consequences of a statement that gave rise to the unfortunate expressions "legal fraud" or "constructive fraud"—expressions which were denounced by Bramwell, L.J., in *Weir* v. *Bell* (1878) 3 Ex. D. at 343; 47 L. J. Ex. 704: "I do not understand legal fraud. It has no more meaning than legal heat or legal cold, legal light or legal shade." See *Joliffe* v. *Baker* (1883) 11 Q. B. D. 255, 270; 52 L. J. Q. B. 609; and *Derry* v. *Peek* (1889) 14 A. C. 337; 58 L. J. Ch. 864; *Tackey* v. *McBain* [1912] A. C. 186, P. C.; 81 L. J. P. C. 130.

(*l*) *Derry* v. *Peek* (1889) 14 A. C. 337; 58 L. J. Ch. 864; revg. C. A. *sub nom. Peek* v. *Derry* (1887) 37 Ch D. 541; 57 L. J. Ch. 347.

(*m*) *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 224; *post*, 556; and see an interesting case before the Supreme Court of the U. S., *Laidlaw* v. *Organ* (1817) 2 Wheat. 178; and other cases cited *post*, 556—560. Cicero De Off. 3, 15, distinguishes between silence and concealment: "Neque enim id est celare quicquid reticeas, sed eum quod tu scias id ignorare emolumenti tui gratia velis eos quorum intersit id scire"; and he puts the arguments pro and con of Diogenes of Rhodes and Antipater, the latter taking the strictly moral view that everything should be revealed, the former thinking that no more than "vitia" should be disclosed. Cicero also puts an interesting case of fraud by active means on the sale of a villa at Syracuse, the seller hiring a number of fishermen to fish before his windows, and stating that all the fish in Syracuse were to be found there, in consequence of which the buyer bought the property.

test of falsity, according to Lord Halsbury, L.C. (*n*), is not whether any specific allegation can be proved to be untrue, but whether taking the whole thing together there was fraudulent representation (*o*). "If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue. . . . You cannot weigh the elements by ounces" (*p*).

A statement made by a third person which is communicated by one person to another with intent that the latter should act upon it, and without his being warned that the accuracy of the statement is not guaranteed, or otherwise that the statement is not put forward as a representation by the person communicating it, will be deemed to be a representation by him (*q*).

Silence may be equivalent to active misrepresentation.

Non-disclosure of a material fact may sometimes be equivalent to active misrepresentation, for such non-disclosure may make that which is stated absolutely false (*r*); or the fact not disclosed may be such that it is impliedly represented not to exist (*s*). And when a party has honestly made a statement which he afterwards finds out to be untrue, it is a fraudulent concealment for him to maintain silence and thereby allow, or still more induce, the other party to go on with the transaction in the belief that the statement is true (*t*).

Even a statement, apparently only of intention, purpose, or opinion, may amount to a statement of fact, as where a

(*n*) *Aaron's Reefs* v. *Twiss* [1896] A. C. 273, at 281; 65 L. J. P. C. 54.

(*o*) See *Delany* v. *Keogh* [1904] 2 Ir. Rep. 267, C. A., where a statement was literally true, but led to a false inference, which was not corrected, that it would remain true.

(*p*) *Per* Lord Halsbury, L.C., in *Arnison* v. *Smith* (1889) 41 Ch. D. 348, at 369; 58 L. J. Ch. 645, C. A.

(*q*) *Mair* v. *Grand Rubber Estates* [1913] A. C. 853, P. C.; 83 L. J. P. C. 35; *Re Paragua Rubber Co.* [1914] 1 Ch. 542; 83 L. J. Ch. 432; *per* Turner, L.J., and Cairns, L.J., in *Re Reese River Mining Co.* (1867) L. R. 2 Ch. 604; 36 L. J. Ch. 618.

(*r*) *Per* Lord Cairns in *Peek* v. *Gurney* (1873) L. R. 6 H. L. at 403; 43 L. J. Ch. 19; app. and illust. by James, L.J., in *Arkwright* v. *Newbold* (1881) 17 Ch. D. at 317; 50 L. J. Ch. 372, C. A.; and by Jessel, M.R., in *Smith* v. *Chadwick* (1882) 20 Ch. D. at 58; 51 L. J. Ch. 597, C. A.; *Coverley* v. *Burrell* (1821) 5 B. & A. 257; 24 R. R. 350 (sale of annuity not stated to be redeemable).

(*s*) *Per* Blackburn, J., in *Lee* v. *Jones* (1864) 17 C. B. (N. S.) at 506; 34 L. J. C. P. 131; 142 R. R. 467; repeated in *Phillips* v. *Foxall* (1872) L. R. 7 Q. B. at 679; 41 L. J. Q. B. 293; *per* Lord Selborne, L.C., in *Peeks* v. *Boswell* (1886) 11 A. C. 232, at 236.

(*t*) See *per* Lord Blackburn in *Brownlie* v. *Campbell* (1880) 5 A. C. 925, at 950; and *per* Jessel, M.R., in *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1, at 12–13; 51 L. J. Ch. 113, C. A., cited *ante*, 493.

person fraudulently misrepresents his intention in doing a particular act (*u*). And an act may itself amount to an implied statement of intention (*x*). So also the statement of an opinion may involve by implication a statement that the party making it is not aware of any facts to negative it (*y*).

Caveat emptor is general rule.

In general, where an article is offered for sale, and is open to the inspection of the buyer, the common law did not permit the latter to complain that the defects, if any, of the article are not pointed out to him. The rules were *Caveat emptor* and *Simplex commendatio non obligat*. The buyer is always anxious to buy as cheaply as he can, and is prone to find imaginary fault, and the seller is equally at liberty to praise his merchandise in order to enhance its value if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspection, and no means are used for hiding the defects. If the buyer be unwilling to bargain on these terms, he can protect himself against his own want of care or skill by requiring from the seller a warranty. But the use of any device by the seller to induce the buyer to omit inquiry or examination of the thing sold is as much a fraud as an active concealment by the seller himself.

Buyer can exact warranty if unwilling to deal on the general rule.

The principle of *caveat emptor* is also the general rule under the Code, but as will be seen *infra* (*z*), it has been largely modified, even in the case of specific goods, by the implication of various conditions of quality or fitness binding on the seller.

The authorities on which the foregoing preliminary remarks are based will be referred to in the detailed investigation which it is proposed to make of the subject, divided for convenience into three parts; namely, first, fraud on the seller (*a*); second, on the buyer (*b*); third, on third persons, especially creditors (*c*).

But it will be useful first to point out that a man may make himself liable in an *action, founded on tort* for deceit or negligence in respect of a contract, brought by parties with

Action of deceit or negligence in favour of strangers to the contract.

(*u*) *Edgington* v. *Fitzmaurice* (1885) 29 Ch. D. 459, C. A.; *per* Bowen, L.J., in *Ingus* v. *Clifford* [1891] 2 Ch. 449, at 470; 60 L. J. Ch. 443, C. A.

(*x*) *Load* v. *Green* (1846) 15 M. & W. 216; 15 L. J. Ex. 113; 71 R. R. 627 buying goods an implied representation of intention to pay); *per* Mellish, L.J., in *Re Shackleton* (1875) 10 Ch. 446, at 449; 44 L. J. Bkcy. 91 (same).

(*y*) *Smith* v. *Land and House, etc., Property Corp.* (1885) 28 Ch. D. 7, C. A. See *post*, 534.

(*z*) See the Chapter on Conditions implied by law, *post*, 712, *et seqq.*

(*a*) *Post*, 519.

(*b*) *Post*, 535.

(*c*) *Post*, 561

whom he has not contracte by a stranger, that is to say, by any one of the public at large who may be injured by such deceit or negligence (*d*).

Lord Hatherley in *Barry* v. *Croskey* (1861).

The principles by which the limits of responsibility for a false representation are to be ascertained, were laid down by Lord Hatherley (then Wood, V.-C.) in *Barry* v. *Croskey* (*e*), as follows:

"Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and so acting, is injured or damnified . . . provided it appear that such false representation was made *with the intent that it should be acted upon by such third person* in the manner that occasions the injury or loss. . . . The injury . . . must be the *immediate* and not the remote consequence of the representation thus made."

Langridge v. *Levy* (1837).

The case usually cited as the leading one on this point is *Langridge* v. *Levy* (*f*), where the defendant offered for sale a gun, on which he put a ticket in these terms: "Warranted. this elegant twist gun, by Nock, with case complete, made for his late Majesty, George IV.: cost 60 guineas; only 25 guineas." The gun was sold to the plaintiff's father, who told the defendant that it was wanted "for the use of himself and his sons." It was warranted to be good, safe, and secure gun, and to have been made by Nock. The gun burst in the hands of the plaintiff, injuring him severely, and it was proven not to be of Nock's make. The plaintiff brought an action on the case, alleging that the warranty was false and fraudulent, and the jury awarded him £400 damages. On a rule for a nonsuit, it was argued for the defendant that, there being no privity of contract between him and the plaintiff, no duty to the plaintiff could result from the contract with his father.

(*d*) *Langridge* v *Levy* (1837) 2 M. & W. 519; 6 L. J. (N. S.) Ex. 137; 46 R. R. 689; (1838) 4 M. & W. 337, Ex. Ch.: set out *infra*; as exp. and com. on by Wood, V.-C., in *Barry* v. *Croskey* (1861) 2 J. & H. 117, 118, 123; 134 R. R. 91; and by Lord Cairns in *Peek* v. *Gurney* (1873) L. R. 6 H. L. 377, at 412; 43 L. J. Ch. 19; see also *Hosegood* v. *Bull* (1877) 36 L. T. (N. S.) 617; *Salaman* v. *Warner* (1891) 65 L. T. 132, C. A (no representation to plaintiff).

(*e*) 2 J. & H. at 22; 134 R. R. ..; adopted by Lord Cairns in *Peek* v. *Gurney* (1873) L. R. 6 H. L. 412—413; 43 L. J. Ch. 19.

(*f*) 2 M. & W. 519; 6 L. J. (N. S.) Ex. 137; 46 R. R. 689; in error (1838) 4 M. & W. 337. Fourteen years afterwards in *Longmeid* v. *Holliday* (1851) 6 Ex. at 766; 20 L. J. Ex. 430; 86 R. R. 459, Parke, B., and in many later cases other eminent Judges, referred to this decision with approval: see *e.g. per* Lord Cairns in *Peek* v. *Gurney*, *supra*. It was, however, treated by Brett, M.R., in *Heaven* v. *Pender* (1883) 11 Q. B. D. at 511; 52 L. J. Q. B. 702, C. A., as "a wholly unsatisfactory case to act on as an authority."

Parke, B., delivered the judgment of the Court, after time taken for consideration.

After pointing out that the plaintiff clearly could not sue on the *warranty*, to which he was not a party, the Court held that he was entitled to recover in an action on the case. While declining to lay it down as a principle that, even in the case of articles dangerous in themselves, the seller would be responsible for injury to *any* person into whose hands they might pass; or, that, if an article not dangerous in itself, such as an unloaded gun, had been *simply* delivered even to the plaintiff himself without any contract or representation on the part of the seller, the plaintiff could have sued him in respect of injury sustained by using it; his Lordship proceeded: "But if it had been delivered by the defendant *to the plaintiff* for the purpose of being so used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain upon the principle of a numerous class of cases, of which the leading one is that of *Pasley* v. *Freeman* (*g*); which principle is that *a mere naked falsehood* is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit."

Pasley v. *Freeman* (1789).

In the Exchequer Chamber the judgment was affirmed on the ground stated by Parke, B., "that as there is fraud, and damage, the result of that fraud—not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results—the party guilty of the fraud is responsible to the party injured."

In *Pilmore* v. *Hood* (*h*), the defendant agreed to sell a

(*g*) 3 T. R. 51, and 2 Sm. L. C., 9th ed. 74, 11th ed. 66; 1 R. R. 634, where all the authorities are collected.

(*h*) 5 Bing. N. C. 97; 8 L. J. C. P. 11; 50 R. R. 622.

Pilmore v. *Hood* (1838).

public house to Bowmer, and fraudulently represented to him that the receipts were £180 a month. Bowmer, finding himself unable to complete, transferred his bargain to the plaintiff, telling him of the defendant's representation. The defendant, knowing this communication had been made, conveyed the house to the plaintiff. *Held*, that the defendant, although he had not authorised the communication to the plaintiff, had subsequently adopted it in his contract with the plaintiff, and was liable in damages.

False prospectus.

Gerhard v. *Bates* (1853).

In *Gerhard* v. *Bates* (*i*), the defendant was promoter and managing director of a company, in which the plaintiff had bought shares. The first count alleged a false *promise* by the defendant to the bearers of these shares, and that the plaintiff became a bearer; and the second count charged in effect that the defendant, meaning to deceive the plaintiff and to induce him to purchase shares, induced him, by fraudulently delivering to him a prospectus containing a false representation, to purchase shares whereby he suffered loss. *Held*, on demurrer, that the first count was bad, as there was no privity of contract between the parties; and that the second count was good.

False report of company.

Scott v. *Dixon* (1859).

In *Scott* v. *Dixon* (*k*), the declaration alleged that the defendant was a director of a banking company, and that, intending to deceive the plaintiffs and induce them and others to purchase shares at a greater price than the real value, the defendant published a report whereby he fraudulently misrepresented to the plaintiffs the financial condition of the company and induced them to buy shares whereby they suffered loss. The report was addressed to the shareholders, but copies of it were left at the bank and *were to be had by any person applying* with a view to the purchase of shares, and the plaintiffs had obtained a copy through their broker. It was contended that the representation was not made to the plaintiffs, but the Court of Queen's Bench held that, though the report was addressed to the shareholders, it was meant for the information of any person likely to deal in the shares, and therefore was a representation made to the plaintiffs

In *Peek* v. *Gurney* (*l*), it was decided by the House of

(*i*) 2 E. & B. 476; 22 L. J. Q. B. 364; 95 R. R. 655. And *cf. Playford* v. *U. K. Tel. Co.* (1869) L. R. 4 Q. B. 706; 38 L. J. Q. B. 249; *Dickson* v. *Reuter Tel. Co.* (1877) 3 C. P. D. 1; 47 L. J. C. P. 1, C. A.

(*k*) 29 L. J. Ex. 62, n. (3); 121 R. R. 873; appd. by Lord Chelmsford in *Peek* v. *Gurney* (1873) L. R. 6 H. L. at 397—398; 43 L. J. Ch. 19.

(*l*) L. R. 6 H. L. 377; 43 L. J. Ch. 19. In this case, *Seymour* v. *Bagshaw* (1856) 29 L. J. Ex. 62, n. (2); and *Bedford* v. *Bagshaw* (1859) 29 L. J. Ex. 59; 4 H. & N. 538; were expressly overruled; and *Scott* v. *Dixon*, *supra*; *Gerhard*

Lords that the responsibility of directors who issue a prospectus for an intended company misrepresenting actual and material facts, and concealing facts material to be known, does not, *as of course*, follow the shares on their transfer from an allottee to one who afterwards purchases them from him upon the market.

False prospectus. *Peek* v. *Gurney* (1873).

The prospectus in this case was in the usual form addressed to the general public, with a form of application appended. The plaintiff did not, however, originally take up shares, but bought them subsequently on the Stock Exchange; and it was held that when the allotment was completed, *the office of the prospectus was exhausted*, and the directors were not liable for subsequent dealings in the shares. The prospectus after allotment was no longer addressed to the plaintiff.

But a prospectus is not necessarily addressed only to persons applying to the company for original shares, as, for example, where it is issued with the object of inducing persons either to apply for shares or to buy them in the market (*m*).

Action of deceit for inducing buyer to believe seller would not fulfil contract. *Benton* v. *Pratt* (1829).

The following action was held to be maintainable in the State of New York (*n*). A. had agreed to bring certain animals for sale and delivery to B., at a specified place. A third person, desirous of making a sale to B., falsely represented to him that A. had abandoned all intention of fulfilling his contract, thereby inducing B. to supply himself by buying from that third person. A. was put to expense and loss of time in bringing the animals to the appointed place and otherwise disposing of them. In an action for damages for the deceit against the third person by A., it was not only held that he was entitled to recover, but that it was no defence to the action that the contract between A. and B. was one that could not have been enforced.

There is a very close connection between cases of false

v. *Bates*, *supra*; *Langridge* v. *Levy*, *ante*, 512; and *Barry* v. *Croskey*, *ibid*; were explained and adopted by Lord Chelmsford, L. R. 6 H. L. at 396—400; 43 L. J. Ch. 19, and by Lord Cairns at 412—413. See also *New Brunswick Ry. Co.* v. *Conybeare* (1862) 9 H. L. C. 712; 31 L. J. Ch. 297; 131 R. R. 415; *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 Sc. 145; *Henderson* v. *Lacon* (1867) L. R. 5 Eq. 249.

(*m*) *Andrews* v. *Mockford* [1896] 1 Q. B. 372; 65 L. J. Q. B. 302, C. A. As to the liability, apart from fraud, of a director, etc., of a company for statements in a prospectus inviting subscriptions for shares or debentures, see now the Companies Consolidation Act, 1908, s. 84.

(*n*) *Benton* v. *Pratt*, 2 Wend. 385. See notice of this case by Colt, J., in *Pandall* v. *Hazleton* (1866) 94 Mass. 412, at 417. *Benton* v. *Pratt* was followed in *Rice* v. *Manley* (1876) 66 N. Y. 82, in which a third person procured a sale to himself by a telegram purporting to come from the original buyer to the seller that he could resell. See also *Green* v. *Button* (1835) 2 C. M. & R. 707; 5 L. J. Ex. 81; 41 R. R. 818 (making a claim of lien knowingly false).

Actions of negligence, arising out of contract, at suit of third person.

representation and certain cases of negligence, to which the same principles are applicable; for an untrue representation may be made through negligence.

Thomas v. *Winchester* (1852).

In America, *Thomas* v. *Winchester* (*o*) is generally referred to as an extreme case on this question; but it appears to be fully in accord with the principle illustrated by Parke, B., in *Longmeid* v. *Holliday* (*p*), and with the authorities cited below (*q*). In that case, Winchester, a dealer in drugs, sold to one Aspinwall, a chemist, who again sold to a country doctor, who sold to the plaintiff, extract of belladonna, a deadly poison, which had been wrongly labelled by Winchester's assistant as extract of dandelion, a harmless drug, the two preparations closely resembling one another. The plaintiff's wife was rendered dangerously ill. It was held that the dealer was liable to the plaintiff in an action for negligence. Ruggles, C.J., said: "The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label. . . . The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. . . . The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison mislabelled into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion by some person then unknown" (*r*).

George v. *Skivington* (1869).

In *George* v. *Skivington* (*s*), the plaintiffs, Joseph George and Emma, his wife, claimed damages of the defendant, a chemist, for selling to the husband a bottle of chemical compound to be used by the wife, *as the defendant then knew*, for washing her hair. The declaration charged a representation that the compound could be used for washing the hair

(*o*) 6 N. Y. 397. Brett, M.R., in *Heaven* v. *Pender* (1883) 11 Q. B. D. at 514; 52 L. J. Q. B. 702, says: "I doubt whether it does not go too far." But it is cited by the P. C. in *Dominion Natural Gas Co.* v. *Collins* [1909] A. C. 640; 79 L. J. P. C. 13.

(*p*) (1851) 20 L. J. Ex. 430, at 432—433; 6 Ex. 761, at 767; 86 R. R. 459. The case is set out, *post*, 518.

(*q*) *Clarke* v. *Army and Navy Co-op. Socy.* [1903] 1 K. B. 155; 72 L. J. K. B. 153, C. A. (sale of tin of chemicals likely to explode, without warning buyer). And see also *Dixon* v. *Bell* (1816) 5 M. & S. 198; 17 R. R. 308 (injury to stranger from loaded gun).

(*r*) See *Lynch* v. *Nurdin* (1841) 1 Q. B. 29; 10 L. J. Q. B. 73; 55 R. R. 191; and *Illidge* v. *Goodwin* (1831) 5 C. & P. 190; 38 R. R. 798, both cited by the Court.

(*s*) L. R. 5 Ex. 1; 39 L. J. Ex. 8. This case was followed by Lord Johnston in *Rosen* v. *Stephen* (1907) 14 Sc. L. T. 784, where a chemist prescribed butter of antimony for a child's ringworm.

personal injury to the person using the same, and also unskilfulness and negligence of the defendant in making the said compound, and alleged personal injury to the wife resulting from the use of it. On demurrer, *held*, a good cause of action, on the ground that there was a duty on the chemist towards the plaintiff, Emma, for whose use, as he knew, the article was bought, to use ordinary skill and care in compounding it.

As decided on the ground of negligence, this case has been much criticised, and may be treated as on this particular point practically overruled (*t*). But it may be supported if it be treated as proceeding on the ground of a fraudulent misrepresentation (*u*), as in *Langridge* v. *Levy*, which it professed to follow.

Heaven v. *Pender* (1883).

In *Heaven* v. *Pender* (*x*), in 1883, an action brought by a workman employed by a contractor in a dock against the dock owner for negligence in erecting a defective staging.

Cotton, L.J., with whom Bowen, L.J., concurred, cited *Langridge* v. *Levy* (*y*) as depending on *fraud*. At the same time they distinctly recognised the principle that "any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who, without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act" (*z*).

No action lies for negligence unless a duty on defendant to plaintiff.

Yet no action can be maintained for negligence unless there is some duty owing from the defendant to the *plaintiff* (*a*). If, therefore, the duty arises solely out of contract, the right to sue for breach of the duty is limited to those who are parties

(*t*) As pointed out by Hamilton, J., in *Blacker* v. *Lake*, *infra*. It is inconsistent with *Winterbottom* v. *Wright* (1842) 10 M. & W. 109, 11 L. J. Ex. 415; 62 R. R. 534.

(*u*) *Per* Hamilton, J., in *Blacker* v. *Lake* (1912) 106 L. T. 533, 539. And Lush, J., says in the same case at p. 541, that it might well have been treated as a case of a sale of a dangerous article known to be dangerous

(*x*) 11 Q. B. D. 503; 52 L. J. Q. B. 702.

(*y*) (1837) 2 M. & W. 519; 6 L. J. Ex. 137; 46 R. R. 689; (1838) 4 M. & W. 337, Ex. Ch.; set out *ante*, 512.

(*z*) See an express decision of the C. A. to this effect in *Clarke* v. *Army and Navy Co-op. Socy.* [1903] 1 K. B. 155; 72 L. J. K. B. 153; *post*, 727; *cf.* *Bates* v. *Batey & Co.* [1913] 3 K. B. 351; 82 L. J. K. B. 963 (ginger-beer bottle not known to be defective).

(*a*) *Collis* v. *Selden* (1868) L. R. 3 C. P. 495; 37 L. J. C. P. 233; app. in C. A. in *Heaven* v. *Pender* (1883) 11 Q. B. D. at 513; 52 L. J. Q. B. 702; *Le Lievre* v. *Gould* [1893] 1 Q. B. 491; 62 L. J. Q. B. 353, C. A.

to the contract (*b*). In other words an action of tort, which in substance depends upon a breach of contract, cannot be brought by one who is a stranger to the contract (*c*).

Longmeid v. *Holliday* (1851).

Thus, in *Longmeid* v. *Holliday* (*d*), the defendant sold to the plaintiff for the use of himself and his wife a lamp of defective construction, but the defendant did not make any representation. The lamp exploded and injured the wife. In an action on the case by the husband and wife, alleging a fraudulent warranty to the husband, the jury found that there was no fraud, as the defendant did not know of the defect. *Held*, that the plaintiffs could not recover, there being *no misfeasance independently of the contract*, and the wife not being a party to the contract. "It would be going much too far to say that . . . if a machine, not in its nature dangerous, a carriage for instance, but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it." The husband might have sued alone upon an implied warranty (*e*) that the lamp was fit for use in respect of any damage sustained by him.

The following propositions may be deduced from the authorities:

1. The seller of an article is responsible for any injury immediately caused to a third person by the use of the article by reason of his reliance on a *fraudulent* misrepresentation of the seller made with the intent that it should be acted upon by that person in the manner which causes the injury (*f*).

2. The seller is not responsible for the consequences of a mere negligent misrepresentation, unless he owed a duty to the third person to exercise due care in making it (*g*).

(*b*) *Winterbottom* v. *Wright* (1842) 10 M. & W. 102; 11 L. J. Ex. 415; 62 R. R. 734; folld. in *Earl* v. *Lubbock* [1905] 1 K. B. 253; 74 L. J. K. B. 121, C. A.; *Longmeid* v. *Holliday* (1851) 6 Ex. 761; 20 L. J. Ex. 430; 86 R. R. 459; *Playford* v. *U. K. Tel. Co.* (1869) L. R. 4 Q. B. 706; 38 L. J. Q. B. 249; *Alton* v. *Midland Ry. Co.* (1865) 19 C. B. (N. S.) 213; 34 L. J. C. P. 292; 147 R. R. 563; with which *cf. Meux* v. *G. E. Ry. Co.* [1895] 2 Q. B. 387; 64 L. J. Q. B. 657, C. A.; *Cavalier* v. *Pope* [1906] A. C. 428; 75 L. J. K. B. 609; *Blacker* v. *Lake* (1912) 106 L. T. 533, where the cases are considered.

(*c*) See Dicey's Parties, 370.

(*d*) 20 L. J. Ex. 430; 6 Ex. 761; 86 R. R. 459. See also *Bates* v. *Batey & Co.* [1913] 3 K. B. 351; 82 L. J. K. B. 963.

(*e*) The report states that he did, and recovered.

(*f*) *Langridge* v. *Levy*, *ante*, 512; *per* Wood, V.-C., in *Barry* v. *Croskey*, *ante*, 512; *Le Lièvre* v. *Gould* [1893] 1 Q. B. 491; 62 L. J. Q. B. 353, C. A.

(*g*) *Per* Parke, B., in *Longmeid* v. *Holliday*, *supra*; *per* Cotton and Bowen, LL.JJ., in *Heaven* v. *Pender*, *supra*, *ante*, 517; *Clarke* v. *A. & N. Co-op. Socy.*

3. Such a duty will exist when without warning he supplies for the use of the third person an article which he knows, or ought to know, to be in such a condition as to be likely to cause danger not necessarily incident to its use (*g*); but it is otherwise where he merely supplies an article dangerous in fact, but which he does not, and is under no obligation to know, to be such (*h*).

4. The question whether an article is dangerous in itself is one of law for the Court, not of fact for a jury (*i*).

It remains to consider the subject of fraud as specially applied in cases of sale.

SECTION II.—FRAUD ON THE SELLER.

Effect of fraud on the seller in passing property.

It was not until 1866 that it was finally settled whether the property in goods passes by a sale which the seller has been fraudulently induced to make, but there is now no room for further question; for it is established by the cases cited (*k*), that whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his *possession*. In other words, we must ask whether the owner intended to transfer both the property in, and the possession of, the goods, or to deliver nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case.

Depends on seller's intention to transfer possession and ownership, or possession only.

In the former case the contract is *voidable* at the election of the seller, not void *ab initio*. It follows, therefore, that the seller may affirm and enforce it, or may rescind it. He may sue in assumpsit for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it. If he affirm, he must affirm the contract on all its terms (*l*). But in the meantime and until he elects, if the buyer transfer the goods in whole or in part, whether the transfer be of a general or of a special property in them, to an innocent third person for a valuable consideration, the

Contract not *void* ab initio, but *voidable*.

Rights of bonâ fide third persons protected, if acquired before avoidance.

[1903] 1 K. B. 155; 72 L. J. K. B. 153, C. A., *post*, 727; *Blacker* v. *Lake* [1912] 106 L. T. 533; *Dominion Nat. Gas Co.* v. *Collins* [1909] A. C. 640, P. C.; 79 L. J. P. C. 13.

(*h*) *Longmeid* v. *Holliday*, *supra*; *Emmens* v. *Pottle* (1885) 16 Q. B. D. 354; 55 L. J. Q. B. 51, C. A.; *Vizetelly* v. *Mudie's Select Library* [1900] 2 Q. B. 170; 69 L. J. Q. B. 645, C. A.; *Bates* v. *Batey & Co. supra*.

(*i*) *Blacker* v. *Lake* (1912) 106 L. T. 533.

(*k*) See cases 521 *seqq.*, and *Urquhart* v. *Macpherson* (1878) 3 A. C. 831, P. C.

(*l*) *Strutt* v. *Smith* (1834) 1 C. M. R. 312 (price not due).

Not protected where seller only transferred possession.

rights of the original seller will be subordinate to those of such innocent third person (*m*). If, on the contrary, the intention of the seller be not to pass the property, but merely to part with the *possession* of the goods, there is no *sale*, and he who obtains such possession by fraud can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner.

The early cases, however, are not universally in accord with the principles above stated (*n*), and in more than one of them the property was held not to have passed, although it was very plainly the intention of the seller to transfer the title, as well as the possession, of the goods.

Intention not to pay for the goods.

Load v. *Green* (1846).

But in *Load* v. *Green* (*o*), in 1846, where the buyer purchased goods on the 1st of July, which were delivered on the 4th, and where a *fiat* in bankruptcy issued on the 8th, the jury found that the buyer purchased with the fraudulent intention of not paying for the goods (*p*); and it was held, that even assuming the act of bankruptcy to have been committed after the purchase, "the plaintiff had a right to disaffirm it, to *revest* the property in the goods, and recover their value in trover against the bankrupt."

Parker v. *Patrick* (1793).

In the early case of *Parker* v. *Patrick* (*q*), the King's Bench held, in 1793, that where goods had been obtained on false pretences, and *the guilty party had been convicted*, the title of the original owner could not prevail against the rights of a pawnbroker, who had made *bonâ fide* advances on them to the fraudulent possessor, the 21 H. 8, c. 11 only applying to *stolen* goods. This case has been much questioned, but the only difficulty in it may be overcome by adopting a suggestion

(*m*) *Attenborough* v. *London and St. Katherine's Dock Co.* (1878) 3 C. P. D. 450; 47 L. J. C. P. 673, C. A.; *Babcock* v. *Lawson* (1880) 5 Q. B. D. 284; 49 L. J. Q. B. 408, C. A. This principle is confirmed by s. 23 of the Code, dealing with voidable titles.

(*n*) Among the cases cited in previous editions as "very doubtful authorities" (2nd ed. 345; 4th ed. 415) were *Duff* v. *Budd* (1822) 3 B. & B. 177; 23 R. R. 609; and *Stephenson* v. *Hart* (1828) 4 Bing. 476; 6 L. J. C. P. 97; 29 R. R. 602, in both of which it was decided that the property did not pass because of the fraud. But the facts of the former case were very similar to those in *Cundy* v. *Lindsay* (1878) 3 A. C. 459; 47 L. J. Q. B. 481, and the decision seems correct, though the reasons do not. The latter case was similar to *King's Norton Metal Co.* v. *Edridge* (1897) 14 T. L. R. 98, C. A., *post*, and seems incorrect, as the seller had intended to contract with the person calling himself J. West. See the doubting judgment of Gaselee, J., approved by Bramwell, B., in *M'Kean* v. *M'Ivor* (1870) L. R. 6 Ex. 36, at 39.

(*o*) 15 M. & W. 216; 15 L. J. Ex. 113; 71 R. R. 627. See also *Ex parte Whittaker* (1875) L. R. 10 Ch. 446; 44 L. J. Bk. 91. In *Tilley* v. *Bowman* [1910] 1 K. B. 745; 79 L. J. K. B. 547 (sale avoidable even after receiving order against buyer).

(*p*) The purchase, or at any rate the delivery, being an implied representation of an existing intention to pay.

(*q*) 5 T. R. 175.

made by Parke, B., in *Load* v. *Green* (*o*), namely, that the false pretences were successful in causing the owner to make a *sale* of the goods, in which event an innocent third person would be entitled to hold them against him. Several of the Judges made remarks on the case, in *White* v. *Garden* (*r*), and it was cited by the Court as one of the acknowledged authorities on the subject in *Stevenson* v. *Newnham* (*s*), and, as so explained, it is good law under section 24 (2) of the Code. Remarks on it.

In *White* v. *Garden* (*r*), the innocent purchaser from a fraudulent buyer was protected against the seller, and all the Judges expressed approval of the opinion given by Parke, B., in *Load* v. *Green*. *White* v. *Garden* (1851).

In *Stevenson* v. *Newnham* (*s*), in 1853, Parke, B., again gave the unanimous opinion of the Exchequer Chamber, that the effect of fraud "is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The *fraud only gives a right to rescind*. In the first instance, *the property passes* in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indefeasible title to it though it is *voidable* between the original parties." *Stevenson* v. *Newnham* (1853).

This decision was not impugned, when the Exchequer Chamber, in *Kingsford* v. *Merry* (*t*), in 1856, held that the defendant, an innocent third person, who had made advances on goods, could not maintain a defence against the plaintiffs, the true owners. In that case, the party obtaining the advances had procured the delivery of the goods by the original seller to himself by falsely representing that a sale had been made to him by the buyer, the Court saying on these facts that the original seller and the fraudulent party "never did stand in the relation of vendor and vendee of the goods, and there was no contract between them which the plaintiffs might either affirm or disaffirm." This decision reversed the judgment of the Exchequer of Pleas (*u*), but it has been explained (*x*) that this was only by reason of a changed state *Kingsford* v. *Merry* (1856).

(*r*) (1851) 20 L. J. C. P. 167; 10 C. B. 919.

(*s*) (1853) 13 C. B. 285; 22 L. J. C. P. 110; and see *Moyce* v. *Newington* (1878) 4 Q. B. D. 35, *ante*, 24 n. (*m*).

(*t*) 1 H. & N. 503; 26 L. J. Ex. 83; 108 R. R. 694.

(*u*) 11 Ex. 577; 25 L. J. Ex. 166.

(*x*) *By* Bramwell, B., in *Higgons* v. *Burton* (1857) 26 L. J. Ex. 342; 112 R. R. 938; set out *post*, 525; by Lord Chelmsford, L.C., in *Pease* v. *Gloahec* (1866) L. R. 1 P. C. 219, at 230; 35 L. J. C. P. 66; see *infra*. *Cf. Henderson* v. *Williams* [1895] 1 Q. B. 521; 64 L. J. Q. B. 308, C. A. (where Lindley, L.J., at 532, doubted whether the facts were distinguishable from those of *Kingsford* v. *Merry*); and *Farquharson* v. *King* [1902] A. C. 325; 71 L. J. K. B. 667.

of facts, and that the principles on which both Courts proceeded were really the same.

Pease v. *Gloahec* (1866).

In 1866, *Pease* v. *Gloahec* (*y*), on appeal from the Admiralty Court, was twice argued by very able counsel. After advisement, the Privy Council (*z*), delivered a unanimous decision.

General principles laid down.

There the principle laid down in *Kingsford* v. *Merry*, as stated by the Court of Exchequer (and not affected by the reversal of their judgment in the Exchequer Chamber), was affirmed to be the true rule of law, viz.: "When a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor" (*a*).

Clough v. *L. & N. W. Ry. Co.* (1871).

In *Clough* v. *The London and North Western Railway Company* (*b*), the Exchequer Chamber gave an important decision. The facts were that the London Pianoforte Company sold certain goods to one Adams, for which he paid £68 in cash, and gave his acceptance at four months for £135 8s., the residue of the price. He directed the sellers to forward the goods by the defendants' railway to the address of the plaintiff at Liverpool, whom he represented to be his shipping agent. On the arrival of the goods the defendants could not find Clough at the address given, and in a letter to the sellers the defendants stated this fact and asked for instructions. Almost at the same time the sellers learned that Adams was a bankrupt, and at 9.30 A.M., on the 22nd of May, they sent notice to the defendants *in London*, to stop the goods in transitu: but before this notice reached *Liverpool*, the plaintiff had *there* demanded the goods, and the defendants had agreed to hold them as warehousemen for him, thus putting an end to

(*y*) L. R. 1 P. C. 219; 3 Moo. P. C. (N. S.) 556; 35 L. J. P. C. 66. And see *Oakes* v. *Turquand* (1867) L. R. 2 H. L. 325; 36 L. J. Ch. 949; Code, s. 23.

(*z*) Lord Chelmsford, L.C., Knight Bruce and Turner, LL.JJ., Sir J. T. Coleridge, and Sir E. V. Williams.

(*a*) See a similar statement in *United Shoe Machinery Co. of Canada* v. *Brunet* [1909] A. C. 330, at 339; 78 L. J. P. C. 101, P. C.

(*b*) L. R. 7 Ex. 26; 41 L. J. Ex. 17. The judgment was prepared by Blackburn, J., though delivered by Mellor, J. So stated to the author by Mellor, J., in the presence of Blackburn, J., on the argument of a case in the Exchequer Chamber.

the transitus. The sellers nevertheless gave an indemnity to the defendants, and obtained delivery of the goods, so that they were the real defendants in the case. The plaintiff demanded the goods of the defendants, and brought his action on the 2nd of June, in three counts: 1. trover; 2. against them as warehousemen; 3. as carriers. Up to the date of the trial, the sellers were *treating the contract as subsisting*, and relying on the right to stop in transitu; but at the trial the defendants elicited sufficient facts to show a strong case of concerted fraud between the plaintiff and Adams to get possession of the goods without paying for them. They were allowed to file a plea to that effect, and the jury found that the fraud was proved.

The Exchequer of Pleas decided in favour of the plaintiff, on the grounds that the sellers had not elected to set aside the contract, nor offered to return the cash and acceptance, before delivering their plea of fraud, and had up to that time treated the contract as subsisting; and further, that the rescission came too late after the plaintiff had acquired a vested cause of action.

But this decision was reversed in the Exchequer Chamber, where it was held:—

Rules which govern the seller's right of election.

1. That the property in the goods passed by the contract of sale: that the contract, though induced by fraud, was not void, but only voidable at the election of the defrauded seller.

2. That the defrauded seller has the right to this election at any time after knowledge of the fraud, until he has affirmed the sale by express words or unequivocal acts.

3. That the seller *may keep the question open* as long as he does nothing to affirm the contract; and that so long as he has made no election he retains the right to avoid it, subject to this—that if while he is deliberating an innocent third party has acquired an interest in the property (*c*), or if, in consequence of his delay, the position even of the wrongdoer is affected, he will lose his right to rescind.

4. That lapse of time without a rescission is evidence of affirmation, and where great would probably be treated as conclusive (*d*).

5. That in this case the seller had before filing the plea of fraud done no act affirming the contract or otherwise determining his election.

6. That the seller's election was properly made by a plea

(c) See s. 23 of Code, *ante*.
(d) See *United Shoe Machinery Co. of Canada* v. *Brunet*, *ante*, 522.

claiming the goods on the ground that he had been induced to part with them by fraud, and there was no necessity for any antecedent declaration or act *in pais*.

7. That the seller was not bound in his plea to tender the return of the money and acceptance, because they had been received, not from the plaintiff, but from Adams, who was no party to the action.

And, finally, that on the whole case the defendants were entitled to the verdict (*e*).

Babcock v. *Lawson* (1879).

Babcock v. *Lawson* (*f*), where the plaintiffs were pledgees, illustrates the same principle. The plaintiffs had made advances to Denis Daly and Sons on the security of certain flour, warehoused in the plaintiffs' name. The defendants subsequently made advances to Denis Daly and Sons on the pledge of the same flour, in ignorance of the plaintiffs' rights, and Denis Daly and Sons, by a fraudulent representation that they had sold the flour to the defendants, obtained a delivery order for it, which they gave to the defendants. The defendants accordingly obtained possession of the flour, and, their advances not being repaid, sold it. The plaintiffs sued the defendants for conversion:—*Held*, that assuming the plaintiffs, as pledgees, to have ever had a special property in the flour, they must be taken to have intended to revest the whole property in Denis Daly and Sons, in order that they might transfer it to the defendants as purchasers; and that, although the plaintiffs might have revoked the delivery order, so long as the flour remained in the hands of Denis Daly and Sons, yet when the property in the flour had been transferred to the defendants for good consideration, the title of the latter was indefeasible. Cockburn, C.J., held the analogy between the case under consideration and one where a seller is induced to part with the property by fraud to be complete; and the decision of the Queen's Bench Division was affirmed on appeal.

No judgment necessary to effect a rescission.

It is not necessary that there should be a judgment of Court in order to effect the avoidance of a contract, when the deceived party repudiates it. The rescission is the legal consequence of his election to reject it, and takes date from the time at which he announces this election to the opposite party.

(*e*) These principles were re-affirmed by the Ex. Ch. in *Morrison* v. *The Universal Marine Ins. Co.* (1873) L. R. 8 Ex. 197; 42 L. J. Ex. 115, revg. the Ex., *ib.* 40.

(*f*) 4 Q. B. D. 394; 48 L. J. Q. B. 524; aff. 5 Q. B. D. 284; 49 L. J. Q. B. 408, C. A.

Thus, in *The Reese River Company* v. *Smith* (*g*), the House of Lords held the defendant entitled to have his name removed from the list of contributory shareholders in the plaintiff company, although his name was on the register when the company was ordered to be wound up; on the ground that he had, prior to the winding-up order, notified his rejection of the shares, and commenced proceedings to have his name removed. On this ground the case was distinguished from *Oakes* v. *Turquand* (*h*). *Reese River Co.* v. *Smith* (1869).

In the following cases the fraud was of such a nature as to nullify assent to a contract altogether. Fraud nullifying assent to contract.

In *Higgins* v. *Burton* (*i*), a discharged clerk of one of plaintiffs' customers fraudulently obtained from plaintiffs goods in the name and as being for the customer, and sent them at once to defendant, an auctioneer, for sale. *Held*, that there had been no sale, but a mere obtaining of goods from plaintiff on false pretences; that no property passed, and that defendant was liable in trover. Plainly in this case the plaintiffs, although delivering the possession, had no intention of transferring the property to the clerk, and the latter, therefore, could transfer none to the auctioneer. Identity of buyer. *Higgins* v. *Burton* (1857).

In *Hardman* v. *Booth* (*k*), the plaintiff went to the premises of Gandell & Co., a firm not previously known to him, but of high credit, to make sale of goods, and was there received by Edward Gandell, a clerk, who passed himself off as a member of the firm, and ordered goods, which were supplied, but which Edward Gandell sent to the premises of Gandell and Todd, in which he was a partner. The plaintiff knew nothing of this last-named firm, and thought he was selling to "Gandell & Co." The goods were pledged by Gandell and Todd with the defendant, an auctioneer, who made *bonâ fide* advances on them. All the Judges held that there had been no contract with anybody, that the property had not passed out of the plaintiff, and that the defendant was therefore liable for conversion. *Hardman* v. *Booth* (1863).

(*g*) L. R. 4 H. L. 64; 39 L. J. Ch. 849; L. R. 2 Ch. 604; 36 L. J. Ch. 618; 47 L. J. Q. B. 481.

(*h*) (1867) L. R. 2 H. L. 325; 36 L. J. Ch. 949.

(*i*) 26 L. J. Ex. 342; 112 R. R. 938; appd. in *Great Western Ry.* v. *London and County Banking Co.* [1901] A. C. 414; 70 L. J. K. B. 615 (no title to cheque).

(*k*) 1 H. & C. 803; 32 L. J. Ex. 105; 130 R. R. 784; app. in *Hollins* v. *Fowler* (1875) L. R. 7 H. L. 757; 44 L. J. Q. B. 169; *Re Reed, Ex parte Barnett* (1876) 3 Ch. D. 123; 45 L. J. Bk. 120. But see criticism of the latter case, *ante*, 117, n. (*b*).

Cundy v. *Lindsay* (1878).

And in *Cundy* v. *Lindsay* (*l*), the two preceding cases were approved and followed. A person named Alfred Blenkarn had hired a room in a house looking into Wood Street, Cheapside, and from there had written to the plaintiffs, proposing to purchase goods of them. The letters were headed "37, Wood Street, Cheapside," and the signature, "Blenkarn & Co.," was *written so as to resemble the name "Blenkiron & Co."* There was a firm of W. Blenkiron and Son, of good repute at 123, Wood street. The plaintiffs, who knew of the reputation of W. Blenkiron and Son, but not the number of their house of business, sent the goods addressed to "Messrs. Blenkiron & Co., 37, Wood Street, Cheapside." Blenkarn resold some of the goods to the defendants, *bonâ fide* purchasers, who resold them in the ordinary course of business. Blenkarn was afterwards convicted of the fraud. In an action for the conversion of the goods, it was held by the House of Lords, affirming the decision of the Court of Appeal, that as the plaintiffs had no knowledge of, and never intended to deal with, Blenkarn, no contract of sale had ever existed between them; that the only persons with whom they had intended to deal were the well-known firm of Blenkiron & Co.; that the property in the goods remained therefore in the plaintiffs, and the defendants were liable for their value. Lord Cairns, L.C., showed that the case was exactly the same as if Blenkarn had forged Blenkiron & Co.'s signature to the application for the goods, and had then intercepted the goods.

King's Norton Metal Co. v. *Eldridge* (1897).

The following case may be usefully compared with the preceding. In the *King's Norton Metal Co.* v. *Eldridge* (*m*), one Wallis, by means of elaborately prepared letter paper representing that "Hallam & Co." had a large factory with various depots and agencies, induced the plaintiffs to consign to him some goods which he did not pay for. Before disaffirmance of the contract by the plaintiffs the goods were resold to buyers in good faith. In an action of trover against them, it was held by the Court of Appeal that there was a *de facto* contract of sale between the plaintiffs and the writer of the letters, and that the defendants had a good title. But that it would have been otherwise, and the case would have

(*l*) 3 App. Cas. 459; 47 L. J. Q. B. 481; affg. C. A., 2 Q. B. D. 96; 45 L. J. Q. B. 381; revg. Q. B. D., 1 Q. B. D. 348; 45 L. J. Q. B. 381. *Dyer* v. *Budd* (1822) 3 B. & B. 117; 23 R. R. 609, doubted in previous editions (2nd ed. 345; 4th ed. 415) seems a similar case, and to have been rightly decided. See remarks on this case, *ante*, 520, n. (*n*).

(*m*) 14 Times L. R. 98, C. A.: *Stephenson* v. *Hart* (1828) 4 Bing. 476; 6 L. J. C. P. 97; 29 R. R. 602, would seem to be a similar case. See remarks on this case, *ante*, 520, n. (*n*); and *Gordon* v. *Street*, *post*, 527.

been similar to *Cundy* v. *Lindsay*, *had there been a separate entity called Hallam & Co.*, and another entity called Wallis. In the case in question those entities were identical, and the plaintiffs had *intended* to contract with Wallis under the alias of Hallam & Co.

Hengh v. *L. & N. W. R. Co.* (1870).

In *Hengh* v. *The London and North Western Railway Company* (*n*), goods were ordered of the plaintiffs by one Nurse in the name of former customers, a company which had at the time, unknown to the plaintiffs, ceased to carry on business. The goods were consigned to the company at their premises, and were there refused by the caretaker. Nurse afterwards obtained possession of the goods in the name of the company from the defendants. The only question decided by the Court was that there was evidence from which the jury might find that the defendants had acted with reasonable care in delivering the goods to Nurse, but it was assumed by the Court, and stated by Martin, B., that the property had never passed out of the plaintiffs. In this case (*n*) the plaintiffs plainly intended to contract only with their former customers, the company.

Concealment by buyer of his identity where it is material.

Gordon v. *Street* (1899).

Even where there is a contract between a seller and a particular person as buyer it follows from the principles laid down in *Gordon* v. *Street* (*o*), that, where the identity of the buyer is so far important that its concealment forms a material inducement to the seller to enter into the contract, and the buyer fraudulently conceals his identity, the seller can, on discovering who the buyer is, repudiate the sale. The case cited was that of a moneylender notorious for his harsh and unscrupulous methods of dealing, who had concealed his real name under an alias, knowing that the defendant would otherwise not have borrowed of him. The Court of Appeal also, citing a passage from Pothier (*p*) with regard to error as to the person contracted with, expressed the opinion *obiter* that the case would have been the same even in the absence of fraud.

It is a fraud on the seller to prevent other persons from bidding at an auction of the goods sold. Thus, where, on the sale by the Sheriff of a barge which had been taken in execu-

(*n*) L. R. 5 Ex. 51; 39 L. J. Ex. 48; see also *McKean* v. *McIvor* (1870) L. R. 6 Ex. 36; 40 L. J. Ex. 30, where the seller consigned the goods to his own agent as such, though under an *alias*.

(*o*) [1899] 2 Q. B. 641; 69 L. J. Q. B. 45, C. A.; folld. in *Lewis* v. *O'Keefe* [1900] 2 Ir. R. Q. B. 628, where the borrower knew that the name given was an *alias*, but not the lender's identity.

(*p*) Traité des Obligations, s. 19, set out, *ante*, 115.

It is a fraud on seller to prevent others from bidding at auction sale.

tion, the maker of the barge, by an address to the company at the auction, saying that he had not been paid for the barge by the judgment debtor, and was nearly ruined, persuaded the company not to bid against him, and the barge, worth £150, was knocked down to him for £53, it was held that he could not maintain trover against the auctioneer (*q*).

American case.

And on similar principles, the Supreme Court of the United States (*r*) has held that where property was sold by auction without the owner's knowledge under a judicial sale and much under its value to the owner's tenant, who had persuaded the company at the auction that he was buying only to protect the owner, the owner was entitled to a reconveyance by the purchaser and an account of the profits. So, also, the sale is voidable if the buyer deters intending buyers by misrepresenting the incumbrances on the property sold (*s*).

But it is not necessarily fraudulent for one person to persuade another, even for a money payment, not to bid against him (*t*).

Combinations between intending buyers to stifle competition.

Rule stated in *Kearney* v. *Taylor* (1853).

The law has been thus stated by the Supreme Court of the United States in 1853 in *Kearney* v. *Taylor* (*u*): "We must look beyond the mere fact of an association of persons formed for the purpose of bidding at this sale, as it may be, not only unobjectionable, but oftentimes meritorious, if not necessary, and examine into the object and purposes of it; and if upon such examination it is found that the object and purpose are, not to prevent competition, but to enable, or as an inducement to, the persons composing it to participate in the biddings, the sale should be upheld—otherwise if for the purpose of shutting out competition, and depressing the sale, so as to obtain the property at a sacrifice. Each case must depend upon its own circumstances."

Where the fraud on the seller consists in the defendant's inducing him by false representations to sell goods to an insolvent third person, and then obtaining the goods from that

(*q*) *Fuller* v. *Abrahams* (1821) 3 B. & B. 116; 6 Moore, 316; 23 R. R. 626 (the better report). The view of the Court seems to have been that the sale was void; but the case was decided at a time when the modern doctrine as to the effect of fraud had not been developed. *Cf. Story on Sale*, s. 484; *per* Allen, J., in *People* v. *Stevens* (1878) 71 N. Y. 545. An analogous form of fraud is mentioned by Cicero, according to the reading generally accepted. He says the buyer must not suborn some one to bid lower than the last bid so as to give the impression that the thing is not worth the bid: De Off. 3, 15.

(*r*) *Cocks* v. *Izard* (1853) 7 Wall. 559.

(*s*) *Jackson* v. *Morter* (1876) 82 Penn. 291.

(*t*) *Galton* v. *Emuss* (1844) 13 L. J. Ch. 388; *In re Carew's Estate* (1858) 28 L. J. Ch. 218; 26 Beav. 187; *Heffer* v. *Martyn* (1867) 36 L. J. Ch. 372.

(*u*) (1853) 15 How. 494, at 520, 521.

third person. The price may be recovered from the defendant as though he had bought directly in his own name, for his possession of the seller's goods unaccounted for implies a contract to pay for them, and he cannot account for his possession, save through his own fraud, which he is not permitted to set up in defence (*x*).

Where seller is induced by fraud to sell to an insolvent third person.

In *Biddle* v. *Levy* (*y*), the defendant told plaintiff that he was about to retire from business in favour of his son, who was a youth of seventeen years of age, but would watch over him. He then introduced his son to the plaintiff, who sold to the son goods to the value of £800. The representations were false and fraudulent, and Gibbs, C.J., held an action *for goods sold and delivered* to be maintainable against the father.

Biddle v. *Levy* (1815).

These two cases probably rest on the principle that the nominal purchasers were secret agents buying for the parties committing the fraud, who were really the undisclosed principals (*z*).

Where, however, the fraud on the seller is effected by means of assurances given by a third person of the buyer's solvency and ability, the proof that such assurances were made must be in writing, as required by Lord Tenterden's Act (*a*), which provides "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurances (*b*) made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain *credit*, money, or *goods* upon (*c*), unless such

Fraudulent misrepresentations by third person of buyer's solvency must be proven by writing.

(*x*) *Hill* v. *Perrott* (1810) 3 Taunt. 274. See also *Abbotts* v. *Barry* (1820) 2 B. & B. 369.

(*y*) 1 Stark. 20.

(*z*) See *per* Parke, B., in *Selway* v. *Fogg* (1839) 5 M. & W. at 84; 8 L. J. N. S.) Ex. 199; 52 R. R. 650; *Wilson* v. *Hart* (1817) 7 Taunt. 295; explained n *Higgins* v. *Senior* (1841) 8 M. & W. 834; 11 L. J. Ex. 199; 58 R. R. 884; and notes to *Thomson* v. *Davenport* (1829) 2 Sm. L. C., 7th ed. 387; 11th ed. 400.

(*a*) 9 G. 4, c. 14, s. 6. This section applies only to fraudulent representations: *Banbury* v. *Bank of Montreal* [1918] A. C. 626; 87 L. J. K. B. 1158. A similar provision, but in wider terms, is found in the Merc. Law (Scotland) Am. Act. 1856, s. 6, which says that the writing should be "subscribed" by the person making the representation, *or his agent*, otherwise the same shall "have no effect." See *Clydesdale Bank* v. *Paton* (1896) A. C. 381; 65 L. J. P. C. 73; *contra*.

(*b*) Which must be fraudulent in the ordinary legal sense; *Parsons* v. *Barclay & Co.* (1910) 103 L. T. 196, C. A.

(*c*) This word "upon" is perhaps a mistake for "thereupon"; perhaps the words ought to be "money or goods upon credit." See remarks of the Judges in *Lyde* v. *Barnard* (1836) 1 M. & W. 101; 5 L. J. (N. S.) Ex. 117; 46 R. R. 269, in which the construction of the section was much considered. The case had no relation to a sale of goods.

representation or assurance be made in writing, signed by the party (*d*) to be charged therewith."

Haslock v. Fergusson (1837).

In *Haslock v. Fergusson* (*e*), the action was for money had and received, and was founded on an alleged fraudulent verbal declaration by the defendant to the plaintiff that one Barnes was of fair character, by which representation the plaintiff was induced to sell goods to Barnes, the proceeds of which were partly applied to the benefit of the defendant. The Court held that parol evidence of the alleged representation was inadmissible, on the ground that the representation was not merely evidence of fraud, a mere medium of proof, but that the fraud was entirely based on the representation. The Court thus overruled a distinction which the plaintiff's counsel attempted to support, that the gist of the action in the case was not the misrepresentation of character, but the wrongful acquisition of property by the defendant."

Representor inducing credit for an ulterior purpose.

Clydesdale Bank v. Paton (1896).

And in *Clydesdale Bank v. Paton* (*f*), it was held by the House of Lords, on the Scottish Act drawn in substantially the same terms as Lord Tenterden's Act (*g*), that the Act is in perfectly general terms, and a case is not taken out of its provisions, so that parol evidence can be given of a representation by the fact that the representation was made with a further and fraudulent purpose beyond inducing the representee to give credit or money to a third person. In that case it was alleged that the bank's agent, knowing of the insolvency of a customer of the bank, who was largely indebted to them by an oral representation as to the customer's credit, fraudulently enabled the customer to get from the plaintiffs accommodation acceptances with the view of the bank's applying them to the reduction of the overdraft.

Representation by partner of credit of his firm.

A representation made by a partner of the credit of his firm is a representation of the credit of "another person" within the meaning of this statute (*h*).

"Person" includes corporation.

The word "person" here includes a corporation (*i*).

Where there are both verbal and written representations, an

(*d*) Not by an agent: *Swift v. Jewsbury* (1874) L. R. 9 Q. B. 301; 43 L. J. Q. B. 56.

(*e*) 7 A. & E. 86; 6 L. J. (N. S.) K. B. 247.

(*f*) (1896) A. C. 381; 65 L. J. P. C. 73.

(*g*) The Mercantile Law (Scotland) Amendment Act. 1856, s. 6, cited n. (*a*), *ante*, 529.

(*h*) *Devaux v. Steinkeller* (1839) 6 Bing. N. C. 84; 9 L. J. (N. S.) C. P. 30; 54 R. R. 734.

(*i*) *Hirst v. West Riding Union Bank* (1901) 2 K. B. 560; 70 L. J. K. B. 828, C. A.

action will lie if the written representations were the substantial and main part of the inducement to give credit (*k*).

Representations both verbal and written.

The effect of concealment or false representations made by the buyer with a view to induce the owner to take less for his goods than he would otherwise have done, does not appear to have been often considered by the Courts. Chancellor Kent states the duty of disclosure by either party of material facts unknown to the other in broader terms than are deemed tenable by the later editors of his Commentaries (*l*). Under the head of "Mutual Disclosures," he lays down, in relation to sales, the proposition that, "as a general rule, *each party* is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation."

False representations by buyer in order to get goods cheaper.

The Courts of Equity even fall far short of this principle, and both Lord Thurlow and Lord Eldon held that a *purchaser* was not bound to acquaint the vendor with any latent advantage in the estate. In *Fox* v. *Mackreth* (*m*), Lord Thurlow was of opinion that the purchaser was not bound to disclose to the seller the existence of a mine on the land, *of which he knew the seller was ignorant*, and that a Court of Equity could not set aside the sale, though the estate was purchased for a price of which the mine formed no ingredient. Lord Eldon approved this ruling in *Turner* v. *Harvey* (*n*); but he also held that if the least word be dropped by the purchaser to *mislead* the vendor (*o*) in such a case, the latter will be relieved. The facts were that the purchaser of a reversionary

In equity, purchaser not bound to acquaint vendor with latent advantages of thing sold.

But purchaser must not *mislead* vendor in such a case.

(*k*) *Tatton* v. *Wade* (1856) Ex. Ch. 18 C. B. 371; 25 L. J. C. P. 240; 107 R. R. 336. See also *Swan* v. *Phillips* (1838) 8 A. & E. 745; 7 L. J. (N. S.) Q. B. 200; 47 R. R. 626 (statement of possession of title-deeds); and cf. *Bishop* v. *Balkis Co.* (1890) 25 Q. B. D. 512; 59 L. J. Q. B. 565, C. A.; *Hamar* v. *Alexander* (1806) 2 B. & P. N. R. 241 (verbal guarantee added); *Pearson* v. *Seligman* (1883) 48 L. T. 842, C. A. (defendant's purpose in making representation immaterial); *Turnley* v. *McGregor* (1843) 6 M. & G. 46; *Pasley* v. *Freeman* (1789) 3 T. R. 51; 1 R. R. 634.

(*l*) 2 Kent, 12th ed. 483.

(*m*) (1788) 2 Bro. C. C. 400; 2 Wh. & T. L. C. Eq., 7th ed. 709; 2 R. R. 55. For the judgment of Lord Thurlow, see 2 Cox, Eq. Cas. 320. See also *Turner* v. *Green* (1895) 2 Ch. 205; 64 L. J. Ch. 539.

(*n*) (1821) Jacob. at 178; 23 R. R. 15. It was also approved by Lord Campbell, L.C., in *Walters* v. *Morgan* (1861) 3 De G. F. & J. 718; 130 R. R. 309; cf. *Phillips* v. *Homfray* (1871) 6 Ch. 770, where the buyer concealed the fact that he had actually worked the coal.

(*o*) See also *Walters* v. *Morgan*, *supra*, where Lord Campbell says: "A single word, or (I may say) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be a sufficient ground for a Court of Equity to refuse a decree for a specific performance."

interest had concealed from the seller that a death had occurred by which the value of the reversionary interest was materially increased.

At common law.

At common law, the only case decided in banco that has been found on this point is *Vernon* v. *Keys* (*p*), in which the declaration was in case, and a verdict was given for the plaintiff on the third count which alleged that the plaintiff, being desirous of selling his interest in the business, stock-in-trade, &c., in which he was engaged with defendant, was deceived by the fraudulent representation of the defendant, pending the treaty for the sale, that the defendant was about to enter into partnership to carry on the business with other persons *whose names defendant refused to disclose*, and that *these persons* would not give plaintiff a larger price than £4,500, the truth being that these persons were willing that the defendant should give as much as £5,291 8s. 6d. The judgment in favour of plaintiff was arrested; and Lord Ellenborough, in giving the opinion of the Court after advisement, said that the cause of action as alleged amounted to nothing more than a *false reason* given by the defendant for his limited offer. "Is a buyer liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers? . . . It appears to be a false representation in a matter merely *gratis dictum* by the bidder, in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely."

Vernon v. *Keys* (1810).

In the Exchequer Chamber, counsel in argument insisted that the false representation made by defendant was on a matter of *fact*, not of *opinion*; but the Court would hear no reply, and at once confirmed the judgment, Sir James Mansfield, C.J., simply saying: "The question is whether the defendant is bound to disclose the highest price he chooses to give, or whether he be not at liberty to do that as a purchaser which every seller in this town does every day who tells every falsehood he can to induce a buyer to purchase."

In *Jones* v. *Keene* (*q*), *coram* Rolfe, B., at Nisi Prius, an action of *trover*, the plaintiffs, assignees of a bankrupt, owned a policy for £999 on the life of one George Laing, and early

Jones v. *Keene* (1841).

(*p*) 12 East, 632; 11 R. R. 499; and in Ex. Ch. (1812) 4 Taunt. 488; 11 R. R. 409.

(*q*) 2 Moo. & R. 348; 62 R. R. 804.

in 1840 had vainly endeavoured to sell it for £40. Defendant knew this fact. On the 15th of August Laing became suddenly very ill, and he died on the 20th. On the 18th defendant employed one Cook, an insurance agent, to buy the policy for the defendant, and to give as much as sixty guineas for it. The seller asked Cook what he thought it would be worth, and Cook said that it was not worth more, perhaps, than three-fourths of a year's premium, or about sixty guineas. Cook and the defendant both knew that Laing was in imminent danger, but did not inform the seller, who was ignorant of it, and sold the policy at that price, supposing Laing to be in good health. Lord Thurlow's opinion in *Fox* v. *Muckreth* (*r*) was relied upon by the defendant. Rolfe, B., said: "There could be no doubt such conduct was grossly dishonourable. But he had no difficulty in going further than this, and telling the jury that if they believed the facts as stated on the part of the plaintiffs, the defendant's conduct amounted to legal fraud, and he could not set up any title to the policy so acquired."

Vernon v. *Keys* and *Jones* v *Keene* discussed.

On this case the learned Author remarks: "It does not seem possible to reconcile this case with *Vernon* v. *Keys*. In both cases the purchasers made a false representation But in *Vernon* v. *Keys* the falsehood was *volunteered*, and misrepresented a *fact;* whereas in *Jones* v. *Keene* the buyer's statement, through his agent, that the policy was worth about sixty guineas, was only made in answer to a question of the seller as to his *opinion*, and according to Lord Ellenborough, the buyer was under no legal duty " or obligation to the seller for the precise accuracy of his statement," and the seller could maintain no action for the consequences of his own indiscretion in relying on it."

It is submitted that the representation in *Vernon* v. *Keys* should have been treated as a representation of an existing fact, the intention of the buyer's principals. A statement of an existing intention may be a statement of fact (*s*). But, treating it merely as the statement of an opinion as to the seller's chance of making a more profitable sale, did it not involve the statement of fact that the buyer *knew of no facts to negative the opinion?* "In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expres-

(*r*) (1788) 2 Bro. C. C. 400; 2 R. R. 55; *ante*, 531

(*s*) *Edgington* v. *Fitzmaurice* (1885) 29 Ch. D. 459, C. A.; *R.* v. *Gordon* (1889) 23 Q. B. D. 354; 58 L. J. M. C. 117.

sion of opinion. The statement of such opinion is in a sense a statement of a fact about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are *not equally known* to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for *he implicitly states that he knows facts which justify his opinion*" (*t*). Tried by this test, the representation of the agent in *Vernon* v. *Keys* was tantamount to a false statement that he knew the state of his principals' mind to be such as he represented it. On the same ground, it is submitted that *Jones* v. *Keene* was rightly decided. Cook's opinion amounting to this, that he knew of no facts to show that the life would not continue many years.

Lindsay Petroleum Co. v. *Hurd* (1874).

In *Lindsay Petroleum Co.* v. *Hurd* (*u*), it was held by the Privy Council to be fraudulent for the owners of property to arm an agent with a document to be shown to intending purchasers, purporting to be an offer to sell the property to the agent at a fictitious price, the owners having in fact contracted to sell the property to the agent for less.

The following cases afford good illustrations of the principle previously cited, as laid down by Lord Eldon in *Turner* v. *Harvey* (*x*), that a buyer must not drop a word to mislead the seller, though he may simply maintain silence as to material facts within his knowledge.

Beach v. *Sheldon* (1852).

In *Beach* v. *Sheldon* (*y*), the plaintiff had lost some sheep which were afterwards found by another person who informed the defendant, who then went to the plaintiff and asked him if he had found his sheep. On his saying he had not, the defendant said that "he supposed he never would find them," and offered to buy them on speculation, and bought them for ten dollars. The defendant then got the sheep from the finder, and was sued for his fraud by the plaintiff and cast in eighty dollars damages. It was held that there was no duty on the defendant to disclose the fact that the sheep had been found, but that his conduct *by reason of his remark to*

(*t*) *Per* Bowen, L.J., in *Smith* v. *Land and House Prop. Corp.* (1885) 28 Ch. D. 7, at 15. See also *Kettlewith* v. *Refuge Assurance Co.* [1909] A. C. 243; 77 L. J. K. B. 421 (implied representation of existing practice); *Pritty* v. *Child* (1902) 71 L. J. K. B. 512 (probability of finding water); but *cf.* *Leakins* v. *Clissel* (1663) 1 Sid. 146, where a statement that J. S. "would have given so much" is treated as an opinion.

(*u*) (1874) L. R. 5 P. C. 221

(*x*) *Ante*, 531.

(*y*) In Supreme Court of State of New York, 14 Barb. 67; citing Lord Thurlow in *Fox* v. *Mackreth*, and Lord Eldon in *Turner* v. *Harvey*, *ante*, 531.

the plaintiff amounted to a fraudulent concealment of fact. The object of his observation was "clearly to discourage the plaintiff from making further search or enquiry for his property: to induce him to sell it, as property which might never be discovered, for a mere nominal price. . . . It was equivalent to saying: 'I have not found them, and do not know of any one who has, and am of opinion that you will not be able to find them.'"

Lange v. *Barton* (1891).

And in *Lange* v. *Barton* (*z*), the defendant, having an offer from one Waddell of a crane at the price, as he thought, of £200, agreed to sell it to the plaintiff for £250. The plaintiff went to see the crane, but Waddell's foreman told him that the defendant had mistaken the price, which was £450. The plaintiff at once went to the defendant, and agreed to buy the crane for £250, saying nothing of what he had heard, but *adding the remark* that Waddell's foreman wanted to enter into the question of price, but that he, the plaintiff, had declined to discuss it. *Held*, that the concealment of the truth, coupled with the untruth, disentitled the plaintiff to sue the defendant for non-delivery, as the defendant was misled into the belief that he was selling a £200 crane, whereas he was selling a £450 one.

In America, buyer's concealment of insolvency.

The Supreme Court of the United States has decided that a purchaser of goods, who, without making any fraudulent representations as to his solvency, conceals from the seller his insolvent condition, and thereby induces him to sell the goods on credit, is guilty of such a fraud as entitles the seller to disaffirm the contract and recover the goods, if in the meantime no innocent person has acquired an interest in them (*a*).

SECTION III. FRAUD ON THE BUYER.

Buyer defrauded by seller may avoid the sale.

In every case where a buyer has been imposed on by the fraud of the seller he has a right correlative to that of a defrauded seller to avoid the contract. The buyer under such circumstances 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 with interest (*b*) on

Before or after delivery.

(*z*) (1891) 7 T. L. R. 451. *Semble*, that the case would be the same, apart from the misrepresentation, as a case of apparent assent to a price, the unreality of the assent being known to the plaintiff. See MISTAKE, *ante*, 139.

(*a*) *Donaldson* v. *Farwell* (1876) 93 U. S. (3 Otto.) 631. See also *Root* v. *French* (1835) 13 Wendell. 570.

(*b*) *Johnson* v. *Rex* [1904] A. C. 817; 73 L. J. P. C. 113. P. C.

offering to return the goods in the same state in which he received them (*c*). And this ability to restore the thing purchased unchanged in condition is, as a general rule, indispensable to the exercise of the right to rescind, so that if the buyer has innocently changed that condition while ignorant of the fraud he cannot rescind (*d*). But this rule must be taken subject to the qualification that the buyer does not lose his right to return the goods, though in a changed condition, where the change has been brought about by some cause for which he is not responsible—*e.g.*, by the act of God, or by the legitimate exercise of the rights given him by the contract, as, for example, by testing the goods in a reasonable manner (*e*).

Election by buyer.

But the contract is *only voidable, not void*, and if after discovery of the fraud the buyer acquiesce in the sale by express words or by any unequivocal act, such as treating the property as his own, his election will be determined, and he cannot afterwards reject the property, though he retains the right to sue the seller in an action of deceit (*f*). Mere delay also may have the same effect, if, while deliberating, the position of the seller has been altered (*g*); and the result will not be affected by the buyer's subsequent discovery of a new incident in the same fraud, for this would not confer a new right to rescind, but would merely confirm the previous knowledge of the fraud.

Cambell v. *Fleming* (1834).

These principles are well illustrated in the case of *Campbell* v. *Fleming* (*h*). The plaintiff, deceived by false representations of the defendant, purchased shares in a mining company. He afterwards discovered that the whole scheme of the

(*c*) *Clarke* v. *Dickson* (1858) E. B. & E. 148; 27 L. J. Q. B. 223; 11 R. R. 583; *Murray* v. *Mann* (1848) 2 Ex. 538; 17 L. J. Ex. 256; 76 R. R. 680; *Street* v. *Blay* (1831) 2 B. & Ad. 456, at 462; 36 R. R. 626; *Urquhart* v. *Macpherson* (1878) 3 A. C. 831, P. C.

(*d*) *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 Sc. App. 145; *Hunt* v. *Silk* (1804) 5 East, 449; 7 R. R. 739; *Blackburn* v. *Smith* (1848) 2 Ex. 783; 18 L. J. Ex. 187; 76 R. R. 785; *Sully* v. *Frean* (1854) 10 Ex. 535; *Clarke* v. *Dickson*, *supra*: *Savage* v. *Canning* (1867) 16 W. R. 133, Ir. R. 1 C. L. 434.

(*e*) See *Head* v. *Tattersall* (1871) L. R. 7 Ex. 7, at 11—12; 41 L. J. Ex. 4; and the subject discussed in the Chapter on Misrepresentation, 503.

(*f*) *Per* Cotton, L.J., in *Arnison* v. *Smith* (1889) 41 Ch. D. 371; 58 L. J. Ch. 645, C. A.; *per* Cairns, L.C., in *Houldsworth* v. *City of Glasgow Bank* (1880) 5 A. C. at 323; *United Shoe Machinery Co. of Canada* v. *Brunet* [1909] A. C. 330; 78 L. J. P. C. 101; P. C.

(*g*) *Clough* v. *L. & N. W. Ry. Co.* (1871) L. R. 7 Ex. 26; 41 L. J. Ex. 17; *ante*, 522.

(*h*) 1 A. & E. 40; 3 L. J. (N. S.) K. B. 136; 33 R. R. 194. See also *White-house's Case* (1867) 3 Eq. 790; *Law* v. *Law* [1905] 1 Ch. 140; 74 L. J. Ch. 150, C. A.

company was a deception, and brought an action to recover the purchase-money. But it appeared that subsequently to the discovery of the fraud, the plaintiff had treated the shares as his own, by consolidating them with other property in the formation of a new company, in which he sold shares. The plaintiff then endeavoured to get rid of the effect of this confirmation of the contract by showing that at a still later period he had discovered another fact, namely, that only £5,000, and not £35,000, as had been represented to him, had been paid for the purchase of property by the mining company. The plaintiff was nonsuited by Lord Denman, and on the motion for new trial all the Judges (*i*) held the nonsuit right. Parke, J., said: "After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; and the fraud could do no more than entitle him to rescind." Patteson, J., concurred, and said: "Long after this . . . he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud: and *it cannot revive the right of repudiation which has been once waived.*" Lord Denman, C.J., said: "There is no authority for saying that a party must know all the incidents of a fraud before he deprives himself of the right of rescinding" (*k*).

Separate frauds.

But the rule in *Campbell* v. *Fleming* does not apply where, after affirmance of the contract as regards part of the purchased property, the buyer discovers the falsity of separate representations with regard to other parts (*l*).

Boulter v *Stocks* (1913).

Thus where the plaintiff bought a farm on the faith of an advertisement containing three distinct misrepresentations, viz., of the acreage, of the state of the farm, and of the number of the trees in an orchard upon it, and afterwards leased the orchard to another, a lease which he afterwards cancelled, and then discovered the dimensions, and the state of the soil of the farm, it was held by the Supreme Court of Canada that, assuming that the lease of the orchard was otherwise an affirmance of the contract, yet that the plaintiff could rely upon the other two misrepresentations relating to the other part of the property. And *Campbell* v. *Fleming* was distinguished as a case where the buyer had affirmed the contract after the discovery of a single entire fraud.

(*i*) Lord Denman, C.J., and Littledale, Parke, and Patteson, JJ.
(*k*) As to election, see *ante*, 523; and *Clough* v. *L. & N. W. Ry. Co.* (1871) L. R. 7 Ex. 26; 41 L. J. Ex. 17, there cited.
(*l*) *Boulter* v. *Stocks* [1913] 47 Can. S. C. R. 440, distinguishing *Campbell* v. *Fleming*.

Essential elements of fraud.

The rules of law defining the elements which are essential to constitute *fraud* were long in doubt, and there was a marked conflict of opinion between the Courts of Queen's Bench and Common Pleas on the one hand and the Exchequer on the other (*m*), until the decisions of the Exchequer Chamber in *Collins* v. *Evans* (*n*), in 1844, and *Ormrod* v. *Huth* (*o*), in 1845, established the true principle to be that a representation, false in fact, gives no right of action if innocently made by a party who believes the truth of what he asserts; and that in order to constitute fraud, there must be a false representation made without an honest belief that it is true. These decisions bring back the law almost exactly to the point at which it was left by the King's Bench in the great leading cases of *Pasley* v. *Freeman* (*p*), and *Haycraft* v. *Creasy* (*q*), decided in 1789 and 1801.

Pasley v. *Freeman* (1789).

In *Pasley* v. *Freeman* (*p*) it was held, that a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit; and that such action will lie, though the defendant may not benefit by the deceit, nor collude with the person who is to benefit by it. *Pasley* v. *Freeman* was an action brought against a party for damages for falsely representing a third person to be one whom the plaintiff could safely trust, the defendant *well knowing* that this was not true.

Haycraft v. *Creasy* (1801).

In *Haycroft* v. *Creasy* (*q*) it was held, that an action of deceit would not lie upon similar false representations, though the party affirmed that he spoke of his own knowledge, if the representations were made *bona fide* with a *belief in their truth*.

Motive unimportant.

Foster v. *Charles* (*r*) and *Polhill* v. *Walter* (*s*) show that if the one party has incurred actual damage by relying on the misrepresentation of the other, it is unnecessary to prove that the latter has been actuated by a motive of gain to himself

(*m*) The cases are set out and discussed at length in the first four editions of this work, but it has been thought sufficient at the present day to state shortly the result.

(*n*) 5 Q. B. 820; 13 L. J. Q. B. 180; 64 R. R. 656; unanimously reversing the Q. B., *ibid.* 804.

(*o*) 14 M. & W. 650; 14 L. J. Ex. 366.

(*p*) 3 T. R. 51; 2 Sm. L. C., 8th ed. 66, 11th ed. 66; 1 R. R. 634.

(*q*) 2 East, 92; 6 R. R. 480.

(*r*) (1830) 6 Bing. 396; 8 L. J. C. P. 118; 31 R. R. 146; (1831) 7 Bing. 105; 9 L. J. C. P. 32; 31 R. R. 543.

(*s*) (1832) 3 B. & Ad. 114; 1 L. J. (N. S.) K. B. 92; 37 R. R. 314.

or of injury to the former (*t*). Commenting upon *Foster* v. *Charles*, Lord Herschell, in *Derry* v. *Peek* (*u*), said: "Wilfully to tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made."

Reckless statements.

A statement made recklessly without regard to its being true or false is deemed to be fraudulent, for the person making it can have no genuine belief in its truth.

Evans v. *Edmonds* (1853).

The law was thus stated in 1853 by Maule, J., in a passage which has now become classical (*x*): "If a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood the representation may still have been fraudulently made." And as Lord Herschell says, in commenting on this passage in *Derry* v. *Peek* (*y*), "Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it *knows*, yet at least that he *believes* it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true."

Careless misstatements.

But a reckless statement must be distinguished from one which is merely careless. A person who makes the former is one who has no real belief in the truth of what he asserts, but carelessness may be consistent with such belief. "I cannot assent," says Lord Herschell, in *Derry* v. *Peek* (*z*), disapproving of a dictum of Jessel, M.R., in *Smith* v. *Chadwick* (*a*), "to the doctrine that a false statement made through care-

(*t*) See also *per* Lord Campbell in *Wilde* v. *Gibson* (1848) 1 H. L. 605, at 633; 73 R. R. 191; *per* Lord Cairns in *Peek* v. *Gurney* (1873) L. R. 6 H. L. 377, at 403; 43 L. J. Ch. 19; *per* Lord Blackburn in *Smith* v. *Chadwick* (1884) 9 A. C. 187, at 201; 53 L. J. Ch. 873.

(*u*) (1889) 14 A. C. 337, at 365; 58 L. J. Ch. 864.

(*x*) *Evans* v. *Edmonds*, 13 C. B. 777, at 786; 22 L. J. C. P. 211, at 214; 93 R. R. 732.

(*y*) (1889) 14 A. C. 337, at [illegible] L. J. Ch. 864; *cf.* per Lord Cairns in *Reese River S. M. Co.* v. *Smith*, L. R. 4 H. L. 64, at 79—80; 39 L. J. Ch. 849.

(*z*) (1889) 14 A. C. 337, at 373, 375; 58 L. J. Ch. 864.

(*a*) (1882) 20 Ch. D. 27, at 44; 51 L. J. Ch. 597.

lessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. . . . Making a false statement through want of care falls far short of, and is a very different thing from, fraud" (*b*).

General principles of fraud.

Derry v. *Peek* (1889).

The whole law on the subject of actions for deceit was considered by the House of Lords in 1889 in the great case of *Derry* v. *Peek* (*c*). A special Act incorporating a tramway company had provided that the carriages might be moved by animal power, or, if the Board of Trade assented, by steam power. The directors issued a prospectus stating without qualification, and contrary to the fact, that by the special Act the company had power to use steam, and on the faith of the prospectus the plaintiff took shares, and afterwards brought an action of deceit against the directors. The Board of Trade had refused their consent to the use of steam power after the issue of the prospectus. It was proved, however, that the directors *honestly believed* that this consent to the use of steam had been practically obtained, the plans of the works having been passed by the Board who had raised no objection to the passing of the Bill. *Held*, that the directors were not liable, in an action of deceit, as they had honestly believed the statement made, and were therefore not guilty of fraud; and the decision of the Court of Appeal (*d*) that the directors were liable, having been guilty of fraud, *as their belief was based on no reasonable grounds*, was overruled.

Express term against liability for fraud.

S. Pearson & Son v. *Dublin Corporation* (1907).

It has been held by the House of Lords in *S. Pearson & Son* v. *Dublin Corporation* (*e*) that no man can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them, but must satisfy himself by enquiry. Such a clause will be a good protection against honest mistake or miscalculation, but fraud vitiates every contract, and every clause in it. And it would seem that a term that fraud should not vitiate a contract would also be invalid at law on the ground of illegality (*f*).

Elements essential to action of deceit.

By way of summary, it may be stated that the following circumstances must concur in order to support an action of deceit:

(*b*) So decided since in *Angus* v. *Clifford* (1891) 2 Ch. 449; 60 L. J. Ch. 443, C. A.

(*c*) 14 A. C. 337; 58 L. J. Ch. 864.

(*d*) (1887) 37 Ch. D. 541; 57 L. J. Ch. 347, C. A.

(*e*) [1907] A. C. 351; 77 L. J. P. C. 1. See also *per* Lindley, M.R., *Greenwood* v. *Leather Shod Wheel Co.* [1900] 1 Ch. 421, at 436-7; 69 L. J. Ch. 131.

(*f*) *Per* Lords James of Hereford and Atkinson, *ibid.* at 462, 465.

1. The representation must be made to the plaintiff, or with the direct intent that it shall be communicated to him, and that he shall act upon it (*g*).

2. It must be untrue in fact. An untrue representation of an existing intention may be equivalent to an untrue representation of fact (*h*).

3. It must be untrue to the knowledge of the defendant: or there must be an absence of belief in its truth. If made recklessly, that is to say, if the defendant was careless, whether it was in fact true or untrue, he could have had no real belief in its truth. If he had no reasonable ground for believing it to be true, that would be only evidence, though strong evidence, that he did not believe it (*i*).

4. It must be the cause inducing the contract (*dans locum contractui*); for which purpose it must be material; and the plaintiff must have acted upon the faith of it, and thereby suffered damage (*k*). Whether it is capable of being material is a question of law (*l*).

(i.) Where the representation is one which from its nature *may* induce the plaintiff to enter into the contract, it is a fair inference of fact (*m*) that he was actually induced thereby; and the onus of proving that the plaintiff was *not* so induced lies on the defendant (*n*). This inference may be displaced by evidence that the plaintiff either knew the representation to be untrue, or showed by his words or conduct that he did not rely upon the representation.

(ii.) Where the plaintiff *has* relied on the representation,

(*g*) *Barry* v. *Croskey* (1861) 2 J. & H. 1, at 22; 134 R. R. 91; *ante*, 512; *Salaman* v. *Warner* [1891] 65 L. T. 132; 60 L. J. Q. B. 624, C. A.; *Tackey* v. *McBain* [1912] A. C. 186; 81 L. J. P. C. 130.

(*h*) *Edgington* v. *Fitzmaurice* (1885) 29 Ch. D. 459, at 479, C. A.

(*i*) See the elaborate judgment of Lord Herschell in *Derry* v. *Peek* (1889) 14 A. C. 337, at 374—376; 58 L. J. Ch. 864; where, after reviewing all the authorities, he sums up the law.

(*k*) See *per* Lord Wensleydale, in *Smith* v. *Kay* (1859) 7 H. L. 750, at 775; 115 R. R. 357; *per* Cotton, L.J., in *Arkwright* v. *Newbold* (1881) 17 Ch. D. at 324; 50 L. J. Ch. 372; *per* Lord Blackburn, in *Smith* v. *Chadwick* (1884) 9 A. C. 187, at 196; 53 L. J. Ch. 873; and *per* Lord Selborne, L.C., *ibid.* at 190, adopted by Lord Halsbury, L.C., in *Arnison* v. *Smith* (1889) 41 Ch. D. 348, at 368; 58 L. J. Ch. 645, C. A.; *Wasteneys* v. *Wasteneys* [1900] A. C. 146; 69 L. J. P. C. 83, P. C.

(*l*) *Gordon* v. *Street* [1899] 2 Q. B. 641; 69 L. J. Q. B. 45, C. A.

(*m*) Jessel, M.R., is reported to have stated that the inference was one of law; see *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1, at 21; 51 L. J. Ch. 113, C. A.: as this opinion was repudiated by Lord Blackburn in *Smith* v. *Chadwick*, *supra*. See also *per* Lord Halsbury, L.C., in *Aaron's Reefs* v. *Twiss* [1896] A. C. 273, at 280; 65 L. J. P. C. 54.

(*n*) *Per* Lord Chelmsford, C., in *Smith* v. *Kay* (1859) 7 H. L. 759; 115 R. R. 357.

he is not deprived of his right to relief because he had the means of discovering that the representation was untrue (*o*), or was by the contract required to satisfy himself whether they were true (*p*), or because he was also influenced by his own mistake (*q*), or by other motives as well (*r*).

(iii.) Where the representation is ambiguous, it is for the plaintiff to show that he was justified in understanding it, and did understand it, in the untrue sense (*s*).

Finally, it is important to remember that the action of deceit is a common law action, and will be decided upon the same principles, whether it is brought in the Chancery or in the Queen's Bench Division (*t*).

Liability of Seller for Fraud of Agent.

Hern v. *Nichols* (1708).

In *Hern* v. *Nichols* (*u*), an action on the case for deceit was brought by one Hern against a merchant named Nichols. The complaint was in effect that one kind of silk was represented to be sold as such, and another and an inferior kind of silk was supplied. Not guilty was pleaded, and it appeared that there was no actual deceit by the defendant, but deceit by his factor beyond sea, and the doubt was whether this should charge the defendant; and Holt, C.J., was of opinion that the merchant was accountable for the deceit of his factor, though not *criminaliter*, yet *civiliter*, "for seeing somebody must be the loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

In *Ludgater* v. *Love* (*x*), it was decided that a principal is

(*o*) (1881) 20 Ch. D. 1; 51 L. J. Ch. 113, C. A. *Per* Lord Chelmsford in *Central Ry. Co. of Venezuela* v. *Kisch* (1867) L. R. 2 H. L. 99, at 120—121; 36 L. J. Ch. 849; *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1; 51 L. J. Ch. 113, C. A. The rule is otherwise in cases of mere non-disclosure, where there is no duty to speak: *per* Lord Chelmsford in *New Brunswick Ry. Co.* v. *Conybeare* (1862) 9 H. L. C. 711, at 742; 31 L. J. Ch. 297; 131 R. R. 415.

(*p*) *S. Pearson & Son* v. *Dublin Corporation* [1907] A. C. 351; 77 L. J. P. C. 1.

(*q*) *Edgington* v. *Fitzmaurice* (1885) 29 Ch. D. 459, C. A.

(*r*) *Peek* v. *Derry* (1887) 37 Ch. D. 541; 57 L. J. Ch. 347, C. A.; overruled in another point in H. L., 14 A. C. 337; 58 L. J. Ch. 864; *p.* ... rd Wensleydale in *Smith* v. *Kay* (1859) 7 H. L. 750, at 775; 115 R. R. 35; ... (1882) 20 Ch. D. 27, at 44; 51 L. J. Ch. 597, C. A.

(*t*) *Per* Cotton, L.J., in *Arkwright* v. *Newbold* (1881) 17 Ch. D. at 320; 50 L. J. Ch. 372; adopted by Lord Blackburn in *Smith* v. *Chadwick*, 9 A. C. at 193; 53 L. J. Ch. 873.

(*u*) (1708) 1 Salk. 289; see also *Grammer* v. *Nixon* (1725) 1 Str. 652.

(*x*) 44 L. T. (N. S.) 694, C. A.

guilty of fraud if he has purposely employed an innocent agent with a view to his making the representation (*y*). In that case, the defendant's agent had innocently represented that certain sheep which he sold to the plaintiff were sound. The defendant had previously instructed his son, the agent, to represent that the sheep were sound, knowing that they were affected with disease, but fraudulently withholding from his son knowledge of the truth. *Held*, by the Court of Appeal, that the defendant was liable in an action for deceit.

Intentional employment of innocent agent.

Ludgater v. *Love* 1881.

On the general question of the liability of an innocent principal for the fraud of his agent, the following is the leading authority.

Where agent is fraudulent.

In *Barwick* v. *The English Joint Stock Bank* (*z*), the fraud was committed by the manager of the defendant bank acting in the course of his business, and the third count in the declaration was for fraud and deceit by the defendants, to which they pleaded not guilty. *Held*, that the fraud committed by the manager was properly charged in the declaration, as the fraud of the defendants, and that the defendants were liable for the fraud of their agents. The fraud committed was the giving of a guarantee by the manager in behalf of the bank, *he* knowing and intending that the guarantee should be unavailing, and fraudulently concealing from the plaintiff the facts which would make it so.

Barwick v. *English J. S. Bank* 1867.

Willes, J., in delivering the judgment, thus stated the general rule (*a*):

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." He then proceeds to illustrate the application of the principle to various cases, and adds: "In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner

(*y*) See also *per* Lord St. Leonards in *Nat. Exch. Co.* v. *Drew* (1855) 2 Macq. 103.

(*z*) L. R. 2 Ex. 259; 36 L. J. Ex. 147: *coram* Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.

(*a*) L. R. 2 Ex. at 265.

in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

Agent and principal one.

S. Pearson & Son v. *Dublin Corporation* 1907).

And in *S. Pearson & Son* v. *Dublin Corporation* (*b*), Lord Halsbury thus states the law: "It matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge, or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation, or which is the person who has the guilty knowledge."

The statement of the law by Willes, J., above cited, has been constantly referred to as adequate and satisfactory . . . but the words "and for his master's benefit" have been misunderstood as implying that the master is not answerable for a wrong committed by the servant in the course of the master's business, if it were committed for the servant's own benefit. This inference has been lately held to be erroneous.

Meaning of "for his master's benefit."

Lloyd v. *Grace Smith & Co.* (1912).

In *Lloyd* v. *Grace Smith & Co.* (*d*), where a solicitor's managing clerk being consulted, as the firm's representative, by a client, induced her to hand over her title deeds, and to execute conveyances to him (which were not explained), nominally for the purpose of a sale of the property, and the calling in of a mortgage, and thereupon disposed of the property for his own benefit, it was *held*, by the House of Lords, that the principal of the clerk was liable, although the fraud was committed for the benefit of the agent, he having acted within the scope of his authority, and the general rule

(*b*) [1907] A. C. 351, 359; 77 L. J. P. C. 1; approving and amplifying Lord Loreburn, L.C.'s statement to same effect. Accordingly, *Cornfoot* v. *Fowke* (1840) 6 M. & W. 358; 9 L. J. (N. S.) Ex. 297; 55 R. R. 655; is decided that the responsibility could be divided between principal and agent so that where the agent, who made the representation, was innocent, whereas the principal who knew the facts made no representation, neither is liable: no longer law: *per* Lord Halsbury, *ibid.*

(*c*) In *Mackay* v. *Commercial Bank of New Brunswick* (1874) L. R. 5 P. C. 394; 43 L. J. P. C. 31; *per Cur.* at 111, 112; *Swire* v. *Francis* (1877) 3 L. R. 3 A. C. 106, at 113; 47 L. J. P. C. 18; *per* Lord Selborne in *Houldsworth* v. *City of Glasgow Bank* (1880) L. R. 5 A. C. 317, at 326; *per* Lord Brampton, in *Whitechurch* v. *Cavanagh* [1902] A. C. 117, at 140; 71 L. J. K. B. 400; *per* P. C. in *Citizen's Life Assur. Co.* v. *Brown* [1904] A. C. 423; 73 L. J. P. C. 102.

(*d*) [1912] A. C. 716; 81 L. J. K. B. 1140; overruling the same case in [1911] 2 K. B. 489; 80 L. J. K. B. 959, C. A., and the *dicta* of Bowen, L.J., in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714, at 718; 55 L. J. Q. B. [illegible] and of Lord Davey in *Ruben* v. *Great Fingall Consolidated* [1906] A. C. [illegible] at 116; 75 L. J. K. B. 843; and *Malcolm* v. *Brunker & Co.* v. *Batchelor, & Sons* [1908] 24 Times L. R. 854. See also *Hambro* v. *Burnand* [1904] 2 K. B. 10, C. A.; 73 L. J. K. B. 669 (agent's motive immaterial).

was stated that "a principal must be liable for the fraud of his agent committed in the course of his agent's employment, and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not."

Lord Macnaghten, in a judgment in which the authorities were reviewed, said: "It was contended that Barwick's case is an authority for the proposition that a principal is not liable for the fraud of his agent unless the fraud is committed for the benefit of the principal. . . . It was, I think, in reference to the facts of the particular case under review, where the fraud, if committed, must have been committed for the benefit of the principal, that Willes, J., expressed himself in the language which has been misunderstood. . . . The only difference in my opinion between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground, and also on the ground that, by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate."

Action of deceit against a company by a shareholder not maintainable. *Houldsworth* v. *City of Glasgow Bank* (1880).

In *Houldsworth* v. *The City of Glasgow Bank*, decided in 1880 (*e*), the plaintiff had in 1877 bought from the bank, a registered company with unlimited liability, £4,000 of its stock. He was registered as a shareholder, received dividends, and acted as a shareholder until the liquidation in October, 1878, when he was entered on the list of contributories and paid calls. In December, 1878, he brought this action, in the nature of an action of deceit, against the bank and its liquidators for the fraudulent misrepresentations and concealments of the manager and directors, claiming damages in respect of the sums paid for the stock and for calls, and the estimated amount of future calls. He admitted that after the winding up had commenced it was too late for him to claim rescission of his contract and *restitutio in integrum*. *Held*, by the House of Lords, that the action was not maintainable. The distinction between a shareholder in a company, who is a partner in it, and an ordinary purchaser of chattels, was pointed out, and it was shown that any attempt, while he remains a partner, to throw his loss upon the assets and the other contributories was at variance with his contract with

(*e*) 5 A. C. 317, appg. *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 Sc. Ap. 145. See also *Re Addlestone Linoleum Co.* (1887) 37 Ch. D. 191; 57 L. J. Ch. 249, C. A.

his partners, viz., that the assets and contributions shall be applied in payment of the debts and liabilities of the company. That contract he had, by remaining in the company until its liquidation, chosen to affirm.

Shareholder's only remedy is rescission of the contract.

The effect of the decisions of the House of Lords in *The Western Bank of Scotland* v. *Addie* (*f*) and *Houldsworth* v. *The City of Glasgow Bank* (*g*), is that the only remedy of a shareholder in a joint stock company, who has been induced to purchase shares by the fraud of the agent of the company, is rescission of his contract and *restitutio in integrum*. And such a remedy will, on ordinary principles of law, not be competent to him after the company has failed, or has been ordered to be wound up (*h*); or is being voluntarily wound up (*i*), or has stopped payment (*k*), or where a winding-up petition has been presented (*l*). In such cases, there is no other remedy open to him except to bring a personal action against the agent who has been actually guilty of the fraud.

Principles established in cases where a buyer has been defrauded by seller's agent.

The result of the authorities is then that where a purchaser has been induced to buy through the fraud of an agent of the seller, the latter being innocent, the purchaser may—

Rights of buyer.

1. Rescind the contract, if he can return the thing bought in the condition in which he received it (*m*), but not otherwise;

or

2. Maintain an action for deceit against the agent personally;

or

3. Maintain an action of deceit against the innocent principal, where the fraud of the agent has been committed within the scope of the agent's authority (*n*); and it makes no difference whether the principal be a corporation (*o*), quasi-

(*f*) (1867) L. R. 1 Sc. Ap. 145.
(*g*) (1880) 5 A. C. 317, *ante*, 545.
(*h*) *Oakes* v. *Turquand* (1867) L. R. 2 H. L. 325; 36 L. J. Ch. 949; *Bentley's Case* (1880) 49 L. J. Ch. 541.
(*i*) *Stone* v. *City & County Bank* (1877) 3 C. P. D. 282; 47 L. J. C. P. 681, C. A.
(*k*) *Tennent* v. *City of Glasgow Bank* (1879) 4 A. C. 615.
(*l*) *Kent* v. *Freehold Land Co.* (1868) 3 Ch. 493; 37 L. J. Ch. 653; *In re General Ry. Syndicate* [1899] 1 Ch. 770; 69 L. J. Ch. 250.
(*m*) But see the qualification to be put on these words, *ante*, 536.
(*n*) *Barwick* v. *English J. S. Bank* (1867) L. R. 2 Ex. 259, *ante*, 54[illegible]; *Lloyd* v. *Grace Smith & Co.* [1912] A. C. 716.
(*o*) *Mackay's Case* (1874) L. R. 5 P. C. 394; 43 L. J. P. C. 31; *Houldsworth* v. *City of Glasgow Bank* (1880) 5 A. C., *per* Lord Selborne, at 329 (was at one time doubted whether a corporation, as it has no mind, could be liable in any action for a wrong. But the question has been set at rest in *Edwards* v. *Midland Ry. Co.* (1880) 6 Q. B. D. 287; 50 L. J. Q. B. 281, followed in *Cornford* v. *Carlton Bank* [1899] 1 Q. B. 392; 68 L. J. Q. B. [illegible] [1900] 1 Q. B. 22; 68 L. J. Q. B. 1029, C. A., both cases of malicious prosecution; *Kimber* v. *Press Association* [1893] 1 Q. B. 65; 62 L. J. Q. B. 152, C. A. (libel); *Citizens' Life Ass. Co.* v. *Brown* [1904] A. C. 423; 73 L. J. P. C. [illegible] P. C. (libel).

corporation, or unincorporate body (*p*), or an individual, or whether the principal is benefited, or not (*q*).

4. But a shareholder in a joint-stock company, who has been induced to buy his shares by the fraud of an agent of the company, cannot bring an action of deceit against the company so long as he is a member of it (*r*).

Buyer's remedies for innocent misrepresentation.

It must not be concluded that the buyer, who has been induced by misrepresentations to make the contract, is always without remedy because the seller was innocent of any fraud. The cases reviewed only establish that the seller has committed no *wrong*, and is therefore not liable in an action of *deceit*, or any other action founded on tort. But a representation made by the seller may amount in law to a warranty or condition (*s*), and when this is the case, the purchaser has remedies on the contract, for breach of the warranty, or may reject the goods for a breach of the condition. Moreover, he may, as already explained (*t*), avoid the contract, if an innocent representation by the seller as to an essential fact has proved untrue.

Surreptitious dealing between seller, or his agent, and buyer's agent.

Attention may here be drawn to the principle that any surreptitious dealing between the seller and a person who the seller knows is, or will be the buyer's agent to purchase, done with intent to influence, or such as naturally would influence, the mind of the buyer's agent in favour of the seller, is in the eye of the law a bribe, and renders the contract voidable by the buyer (*u*), who may recover from the seller (*x*), or from his own agent (*y*), the amount of the bribe. That the agent's mind was influenced is an irrebuttable presumption of fact (*z*). Moreover, the motive of the seller (*z*), or, where the dealing

(*p*) *Kush* v. *Williams* (1858) 3 H. & N. 308; 27 L. J. Ex. 357; 117 R. R. 697; *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* [1901] A. C. 426; 70 L. J. K. B. 905. The Trade Dispute Act does not affect the principle of the last case.

(*q*) *Lloyd* v. *Grace Smith & Co.*, *supra*.

(*r*) *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 Sc. Ap. 145; *Houldsworth* v. *City of Glasgow Bank* (1880) 5 A. C. 317.

(*s*) Sec Code, s. 1 (2). For the rules of law by which to determine when a representation is a warranty, and what are the rights of the buyer for a breach of this warranty, when the representation is false, see *post*, 636, *et seqq.*, 750.

(*t*) *Ante*, 494.

(*u*) *Harrington* v. *Victoria Graving Dock Co.* (1878) 3 Q. B. D. 549; 47 L. J. Q. B. 594; *Panama* v. *Indiarubber Works Co.* (1875) 10 Ch. 515; 45 L. J. Ch. 121; *Shipway* v. *Broadwood* [1899] 1 Q. B. 369, C. A.; *Hovenden* v. *Millhoff* [1900] 83 L. T. 41, C. A.; *Great West. Ins. Co.* v. *Cunliffe* (1874) 9 Ch. 525; 43 L. J. Ch. 741 (future agent); *Grant* v. *Gold Exploration Syndicate* [1900] 1 Q. B. 233, C. A.; 69 L. J. Q. B. 150 (same).

(*x*) *Hovenden* v. *Millhoff*, *supra*; *Cohen* v. *Kuschke* [1900] 83 L. T. 103.

(*y*) *Andrews* v. *Ramsay* [1903] 2 K. B. 635; 72 L. J. Q. B. 865.

(*z*) *Hovenden* v. *Millhoff*, *supra*, *per* Romer, L.J.

is one between his agent and the buyer's, his want of knowledge of the transaction, is immaterial (*a*).

Devices which have been held fraudulent against buyer.

It would be an onerous and scarcely useful task to enumerate the various devices which have been held by the Courts to be frauds on buyers. The principles stated in this Chapter have been illustrated in numerous decisions (*b*). Some of those which have most frequently occurred in practice will be presented as examples.

Puffers at auctions.

Bexwell v. *Christie* (1776).

In *Bexwell* v. *Christie* (*c*), it was held to be fraudulent in the seller to bid by himself or agents at an auction sale of his own goods, where the published conditions were "that the highest bidder shall be the purchaser, and if a dispute arise, to be decided by a majority of the persons present." Lord Mansfield in that case also held it to be a fraud on the public, and therefore on the buyer, for the seller falsely to describe his goods offered at auction as "the goods of a gentleman deceased, and sold by order of his executor."

The foregoing case was highly eulogised, and followed by Lord Kenyon and the King's Bench in *Howard* v. *Castle* (*d*), where Grose, J., pointed out that the seller might with fairness announce a reserved price, or reserve one bidding for himself, or declare that a particular person might bid on his behalf, and the employment of "puffers" as they are termed, that is, persons engaged to bid in behalf of the seller in order to force up the price against the public, was at common law ever afterwards held fraudulent (*d*).

Sales by auction may be classified under the three following heads (*e*):

(*a*) *Barry* v. *Stoney Point Canning Co.* [1917] 55 Can. S. C. R. 51, where Anglin, J., exhaustively considers the English cases.

(*b*) *Early* v. *Garrett* (1829) 9 B. & C. 928; 8 L. J. K. B. 76; 32 R. R. 371 (statement by vendor of land that no rent had been paid for it); *Duke of Norfolk* v. *Worthy* (1808) 1 Camp. 340 (land sold falsely described as "one mile from Horsham"); *Hill* v. *Gray* (1816) 1 Stark. 434; 18 R. R. 8[illegible], set out post, 558; *Jones* v. *Bowden* (1813) 4 Taunt. 847; 14 R. R. 683 (omission to state, as usual, that drugs sold were sea damaged); *Barber* v. *Morris* (1831) 1 Mood. & R. 62; 9 L. J. K. B. 179 (sale of terminable policy, not stated to be such); *Tapp* v. *Lee* (1803) 3 B. & P. 367 (false character given to insolvent); *Corbett* v. *Brown* (1831) 8 Bing. 33; 1 L. J. (N. S.) C. P. 13; 34 R. R. 615 (false representation to tradesman that customer had private property).

(*c*) 1 Cowp. 395.

(*d*) (1796) 6 T. R. 642; 3 R. R. 296. See also *Crowder* v. *Austin* (1824) 3 Bing. 368; 4 L. J. C. P. 118; 28 R. R. 646; *Wheeler* v. *Collier* (1827) M. & M. 123; *Rex* v. *Marsh* (1829) 3 Y. & J. 331; 32 R. R. 813; *cf. Rex* v. *Marsh* (1831) 1 C. & J. 306; 32 R. R. 813; *Thornett* v. *Haines* (1846) 15 M. & W. 367; 15 L. J. Ex. 230; 71 R. R. 714; *Green* v. *Baverstock* (1863) 14 C. B. (N. S.) 204, and 32 L. J. C. P. 180; 135 R. R. 657; *Parfitt* v. *Jepson* (1877) 46 L. J. C. P. 529. The rule bound the Crown at common law: *Rex* v. *Marsh*, *supra*, in 3 Y. & J. *Qy.* whether the Crown is now bound by the Code?

(*e*) This statement is mainly taken from the judgment of Lindley, J., in *Parfitt* v. *Jepson*, *supra*.

1. Sale without reserve. In such a case, the employment of a puffer rendered the sale voidable both at law and in equity.

2. Sale with a condition that the highest bidder shall be the purchaser, nothing being said about a reserve. This was at common law deemed to be a sale without reserve; but in sales of land under the order of a Court of Equity, the vendor was formerly permitted to employ a single puffer, in order to prevent a sale at a ruinous price (*f*). The sale of Land by Auction Act, 1867 (*g*), abrogated this rule in equity, and confirmed the common law rule.

3. Sale with a right expressly reserved to bid by or on behalf of the seller.

The Code now enacts as follows:

"58.—(3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer. Code, s. 58 (3) and (4).

"(4.) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

"Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction."

The secret employment of even a single puffer is therefore fraudulent, unless a right to bid is expressly reserved, in which case the secret employment of a second puffer is now treated as fraudulent.

An auctioneer is a special agent and has no ostensible authority to sell without reserve (*h*).

It has been decided that fictitious biddings made *without the privity* of the seller does not prevent the vendor of land from getting the sale specifically enforced against his purchaser (*k*).

(*f*) As to this rule in equity, see *per* Willes, J., in *Green* v. *Baverstock* (1863) 14 C. B. (N. S.) 202, at 206, 208; 32 L. J. C. P. 180; 135 R. R. 657; and *per* Lord Cranworth, L.C., in *Mortimer* v. *Bell* (1865) 1 Ch. Ap. 10; 35 L. J. Ch. 25.

(*g*) 30 & 31 Vict. c. 48, s. 4.

(*h*) *Per* Fletcher Moulton, L.J., in *McManus* v. *Fortescue* [1907] 2 K. B. 1; 76 L. J. K. B. 393, C. A. The L.J. goes on to say: "*Rainbow* v. *Howkins* [1904] 2 K. B. 322; 73 L. J. K. B. 641, so far as it is inconsistent with this view, cannot be regarded as in harmony with well-established principles." In *Rainbow* v. *Howkins* it was held that an auctioneer had ostensible authority to sell without reserve, though his actual authority was to sell subject to reserve, this fact not being notified.

(*k*) *Union Bank* v. *Munster* (1887) 37 Ch. D. 51; 57 L. J. Ch. 124. See also *Wright* v. *Buchanan* [1917] S. C. 73, where *bona fide* biddings on his own account by one of several creditors selling under a power of sale were upheld.

Where the right to bid once is expressly reserved, the seller cannot bid more than once, and if he do so the sale is voidable (*l*).

Personal liability of auctioneer to buyer, where sale is without reserve.

Warlow v. *Harrison* (1858).

In *Warlow* v. *Harrison*, decided in the Queen's Bench, and afterwards in the Exchequer Chamber (*m*), the law on the subject of the auctioneer's responsibility was examined. The defendant was an auctioneer, having a horse repository, and he advertised for sale a mare, "the property of a gentleman, *without reserve*." The plaintiff bid sixty guineas, and another person bid sixty-one guineas. The plaintiff, being informed that this last person was the owner, declined to bid further, and the horse was knocked down to the owner as buyer at sixty-one guineas. The plaintiff at once informed the defendant and the owner that he claimed the mare as the highest *bona fide bidder*, the sale having been advertised "without reserve." The owner refused to let him have the mare, and he thereupon tendered to the defendant, the auctioneer, sixty guineas in gold, and demanded the mare. The plaintiff had notice of the conditions of the sale, which contained the following terms: "1. The highest bidder to be the buyer. 8. Any lot ordered for this sale and sold by private contract by the owner, or advertised 'without reserve,' and bought by the owner, to be liable to the usual commission of £2 per cent." The plaintiff's declaration, after alleging the advertisement for sale without reserve, went on to aver that he attended the sale and *became the highest bidder*, "and thereupon and thereby *the defendant became and was the agent of the plaintiff to complete the contract*"; and then charged a breach of the defendant's duty to the plaintiff *as the plaintiff's agent* in failing to complete the contract in behalf of the plaintiff (*n*). The defendant pleaded: 1. Not guilty. 2. That the plaintiff was not the highest bidder. 3. That the defendant did not become the plaintiff's agent as alleged.

At the trial, a verdict was entered for the plaintiff, and leave was given to amend the declaration if the Court should think fit, while leave was also given to the defendant to move to enter a nonsuit.

Lord Campbell, C.J., delivering the unanimous judgment

(*l*) *Parfitt* v. *Jepson* (1877) 46 L. J. C. P. 529; *R.* v. *Marsh* (1829) 1 Y. & J. 331; 32 R. R. 813.

(*m*) 1 E. & E. 295; 28 L. J. Q. B. 18; 29 L. J. Q. B. 14; 117 R. R. 219.

(*n*) In his argument the plaintiff quoted Cic., De Off. 3, 15, and Huberus 18, 2, 7. See also Cicero's joke on his employment of a puffer, in Epp. ad Fam. 7, 2.

of the Queen's Bench, ordered a nonsuit to be entered, holding—

1. That it was unsound in point of law to contend, as the plaintiff did, that, as soon as the plaintiff had bid, the auctioneer became his agent to complete the contract, and that, the sale being without reserve, the bid was an acceptance, and the bidder was the absolute purchaser unless there was a *bona fide* higher bidding. On the contrary, according to *Payne* v. *Cave* (*o*), until acceptance, which is shown by the fall of the hammer, the auctioneer is exclusively the agent of the seller; and after acceptance, he becomes the buyer's agent for the purpose only of signing a memorandum of agreement.

2. That both parties may retract till the hammer is knocked down (*o*); and that the auctioneer cannot be bound when both the seller and bidder remain free.

3. That the bidder has no remedy against the auctioneer, whose authority to accept the offer of the bidder has been determined by the seller before the hammer has been knocked down.

The Court of Exchequer Chamber (*p*), while affirming the decision that the defendant was entitled to judgment on the third plea, as the allegation that the auctioneer was "the agent of the plaintiff to complete the contract" had not been sustained, unanimously held that the plaintiff should have been allowed to amend his declaration so as to determine the real question in controversy, although the Judges did not entirely agree as to what the amendment should be.

Martin, B., in delivering the judgment of the majority (*q*), said: "Upon the facts of the case, it seems to us that the plaintiff is entitled to recover. . . . In this, as in most cases of sales by auction, the owner's name was not disclosed: he was a concealed principal. The name of the auctioneers . . . alone was published, and the sale was announced by them to be '*without reserve*.' This, according to all the cases both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not: *Thornett* v. *Haines* (*r*). We cannot distinguish the case of an auctioneer

Auctioneer in sale "without reserve" contracts with the highest bona fide bidder, that he shall become purchaser.

(*o*) *Payne* v. *Cave* (1789) 3 T. R. 148; 1 R. R. 679; *ante*, 86. See also Code, s. 58 (2), set out *ibid.*

(*p*) Martin, Bramwell, and Watson, BB., and Willes and Byles, JJ.

(*q*) Martin and Watson, BB., and Byles, J.; 1 E. & E. at 316—317; 28 L. J. Q. B. 18; 717 R. R. 219.

(*r*) (1846) 15 M. & W. 367; 15 L. J. Ex. 230; 71 R. R. 714.

putting up property for sale upon such a condition from the case of the loser of property offering a reward; or that of a railway company publishing a time-table, stating the times when and the places to which the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him (*s*). Upon the same principle it seems to us, that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve . . . and that this contract is made with the highest *bona fide* bidder; and in case of a breach of it, that he has a right of action against the auctioneer. The case is not at all affected by the 17th section of the Statute of Frauds, which relates only to direct sales, and not to contracts relating to or connected with them. . . . We entertain no doubt that the owner may at any time before the contract is legally complete, interfere and revoke the auctioneer's authority; but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

In reference to the conditions of sale, the learned Baron further said, as to the *first*, that the owner could not be the buyer, and the auctioneer ought to have refused his bid, and given for a reason, that the sale was without reserve; and that the Court were inclined to differ with the Queen's Bench, and to consider that the owner's bid was not a revocation of the auctioneer's authority. The *eighth* condition was construed as providing simply that, if the owner acted contrary to the conditions, he must pay the auctioneer's commission.

Willes, J., and Bramwell, B., while not dissenting from this judgment, preferred to rest their decision on the ground that the facts furnished strong evidence to show that the auctioneer had received *no authority* from the owner to advertise a sale "without reserve"; and that the plaintiff ought to be allowed to amend by adding a count, alleging an undertaking by the auctioneer that he had such authority, and a breach of that undertaking.

The judgment of the Queen's Bench was therefore affirmed unless the parties should elect to enter a *stet processus* (*t*), or the plaintiff should amend his declaration, in which case there would be a new trial.

Although technically *Warlow* v. *Harrison* may not have

(*s*) *Denton* v. *G. N. Ry. Co.* (1856) 5 E. & B. 860; 25 L. J. Q. B. 129.
(*t*) This they ultimately did: 29 L. J. Q. B. at 16.

been an actual decision, yet the case has been subsequently treated as actually deciding (*u*) that an announcement that a sale will be without reserve, or will be made to the highest bidder, is an offer of a contract with the highest *bona fide* bidder, and accepted by his bid; and that when an auctioneer acting for an undisclosed principal makes such an announcement, he thereby offers to contract personally. On the second point, however—the personal liability of the auctioneer acting for an undisclosed principal—the case was doubted by Cockburn, C.J., and Shee, J., in *Mainprice* v. *Westley* (*x*), because the employment of an auctioneer necessarily involves the character of agent only, and therefore *prima facie* he does not contract personally. Blackburn, J., however (without actually dissenting from this view), said he would pause before deciding on that ground; and the point was not decided, *Warlow* v. *Harrison* being distinguished on the ground that the principal in *Mainprice* v. *Westley* was disclosed (a distinction since held to be immaterial (*y*)).

It has been suggested by a learned writer (*z*) that *Warlow* v. *Harrison* involves the theory that bidding at an auction, advertised to be without reserve, is not, as in other cases (*a*), a mere offer, but a *conditional acceptance*, the condition being that no higher bidder presents himself. But the case is not inconsistent with the common law declared in *Payne* v. *Cave* (*b*), and now enacted in section 58 (2) of the Code (*a*), to the effect that the sale is not "complete" until the fall of the hammer, so that until then neither party is bound. The contract with the highest bidder would seem to be one collateral to the contract of sale itself, or, in the language of Martin, B.'s, judgment, to be one merely "relating to or connected with" it.

Liability of seller to bidder.

Johnston v. *Boyes* (1899).

On the same principle as *Warlow* v. *Harrison*, a seller who offers for sale by auction property on certain conditions of sale, is liable to a member of the public, who accepts the offer

(*u*) On the first point the case was treated as an authority by Cairns, L.J., in *Re Agra and Masterman's Bank* (1867) 2 Ch. at 397; 36 L. J. Ch. 222; and was expressly followed by Cozens-Hardy, J., in *Johnston* v. *Boyes* [1899] 2 Ch. 73; 68 L. J. Ch. 425; and Willes, J. (one of the two Judges in *Warlow* v. *Harrison*) in *Spencer* v. *Harding* (1870) L. R. 5 C. P. at 563; 39 L. J. C. P. 332, restates the point (without however referring to *Warlow* v. *Harrison*) in similar terms. See also Blackburn, J., in *Harris* v. *Nickerson* (1873) L. R. 8 Q. B. at 288; 42 L. J. Q. B. 171.

(*x*) (1865) 6 B. & S. at 429; 34 L. J. Q. B. 229; 141 R. R. 452.

(*y*) *Rainbow* v. *Howkins* [1904] 2 K. B. 322; 73 L. J. K. B. 641, follg. *Woolfe* v. *Horne* (1877) 2 Q. B. D. 355 at 534.

(*z*) Pollock on Cont., 8th ed. 19.

(*a*) See *ante*, 86.

(*b*) (1789) 3 T. R. 148; 1 R. R. 679; *ante*, 86.

by complying with the conditions if they are violated by the seller (*c*).

On the subject of the personal liability of an auctioneer to the buyer, attention should be drawn to the provision in the Code (*d*) that, where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, "it shall not be lawful" for an auctioneer knowingly to take any bid from the seller, or from a puffer on behalf of the seller. This provision casts a *duty* upon the auctioneer, and such a duty is enforceable by action (*e*), and, it is conceived, at the suit of the highest *bona fide* bidder.

A duty is by the Code also imposed on the seller not to employ any puffer, and it would seem to be similarly enforceable by the highest *bona fide* bidder.

Conduct of seller or auctioneer must amount to an offer.

It is necessary, in order that the principle involved in the first point in *Warlow* v. *Harrison* (*f*) should apply, that the announcement made by the auctioneer or the seller should be made under circumstances showing that it is an *offer* of a contract to sell, and not a simple declaration of an existing intention to sell. Such declarations are, in the words of Bowen, L.J., in *Carlill* v. *Carbolic Smoke Ball Co.* (*g*), mere "offers to negotiate."

Harris v. *Nickerson* (1873).

Thus, in *Harris* v. *Nickerson* (*h*), it was held that an auctioneer who advertised in the London papers that he would on a future day sell at Bury St. Edmunds certain brewing plant and office furniture, and who on the third day of the sale withdrew the furniture without putting it up, was not liable to an intending buyer of the furniture for his loss of time and expenses.

Particular falsehoods.

As to the ownership of horses.

The Queen v. *Kenrick* (1843).

In *The Queen* v. *Kenrick* (*i*), the fraud on the purchaser, for which the defendant was convicted as being guilty of false pretences, was telling the buyer that the horses offered for sale had been the property of a lady deceased, were then the property of her sister, and never had been the property of

(*c*) *Johnston* v. *Boyes* [1899] 2 Ch. 73; 68 L. J. Ch. 425, follg. *Warlow* v. *Harrison*.

(*d*) S. 58 (3), set out *ante*, 549.

(*e*) S. 57.

(*f*) *Ante*, 550.

(*g*) [1893] 1 Q. B. at 268; 62 L. J. Q. B. 257, C. A. See also *per* C. A. in *Canning* v. *Farquhar* (1886) 16 Q. B. D. 727; 55 L. J. Q. B. 225.

(*h*) L. R. 8 Q. B. 286; 42 L. J. Q. B. 171. See also *Rooke* v. *Dawson* [1895] 1 Ch. 480; 64 L. J. Ch. 301 (announcement of scholarship examination); *Rainford* v. *James Keith and Blackman Co.* [1905] 1 Ch. 296; 74 L. J. Ch. 521 (warning to holder of share certificate).

(*i*) 5 Q. B. 49; 12 L. J. M. C. 135; folld. in *R.* v. *Sanders* [1919] 1 K. B. 550. See also *Whurr* v. *Devenish* [1904] 20 T. L. R. 385.

a horse-dealer, and that they were quiet and tractable; all these statements being false, and the seller knowing that nothing but a belief in their truth would induce the buyer to make the purchase.

Receipts of a public-house. *Dobell* v. *Stevens* (1825).

In *Dobell* v. *Stevens* (*k*), the fraud consisted in falsely telling the buyer that the receipts for spirits sold of a public-house were £160 per month, and the quantity of porter sold seven butts per month, and that the tap was let for £82 per annum, and two rooms for £27 per annum, whereby the plaintiff was induced to buy; and similar deceits were employed in *Lysney* v. *Selby* (*l*), *Pilmore* v. *Hood* (*m*), and *Fuller* v. *Wilson* (*n*).

Vessel sold with "all faults." *Baglehole* v. *Walters* (1811).

In *Baglehole* v. *Walters* (*o*), a vessel was sold, "hull, masts, yards, standing and running rigging, *with all faults*, as they now lie." The seller, although knowing the latent defects, used no means for concealing them from the buyer. Lord Ellenborough was decided in his rejection of the purchaser's attempt to repudiate the sale.

Schneider v. *Heath* (1813).

In *Schneider* v. *Heath* (*p*), a vessel was sold under exactly the same description, "with all faults." There was, however, a false statement, that "the hull was nearly as good as when launched," and means were also taken to conceal the defects that the seller knew to exist. This was held by Sir James Mansfield to be a fraud on the purchaser on both grounds.

The two cases last cited (both approved in the Court of Appeal in *Ward* v. *Hobbs* (*q*)) bring into clear relief the different results of active concealment and mere non-disclosure by a seller who is under no duty to reveal defects. In *Schneider* v. *Heath*, the vessel was taken from the ways and kept afloat in order to conceal her defects, and this act of the sellers was held to amount to a representation that they

(*k*) 3 B. & C. 623; 5 D. & R. 490; 3 L. J. K. B. 89; 27 R. R. 441.

(*l*) (1705) 2 Lord Raymond, 1118.

(*m*) (1838) 5 Bing. N. C. 97; 8 L. J. (N. S.) C. P. 11; 50 R. R. 622; set out *ante*, 513.

(*n*) (1842) 3 Q. B. 58; 11 L. J. (N. S.) Q. B. 251.

(*o*) 3 Camp. 154. This case expressly overruled *Mellish* v. *Motteux* (1792) Peake, 115 (in which Lord Kenyon held that the seller of a ship "*with all faults*" was bound to disclose secret faults); and was followed by the C. P. in *Pickering* v. *Dowson* (1813) 4 Taunt. 779; and by the K. B. in *Bywater* v. *Richardson* (1834) 1 A. & E. 508; 3 L. J. (N. S.) K. B. 164; 40 R. R. 349.

(*p*) 3 Camp. 506; 14 R. R. 825; app in C. A. in *Ward* v. *Hobbs* (1877) 3 Q. B. D. at 162; 47 L. J. Q. B. 90. See also *Fletcher* v *Bowsher* (1819) 2 Stark. 561 (ship sold with all faults, but age misrepresented).

(*q*) (1877) 3 Q. B. D. 150; 47 L. J. Q. B. 90, *per* Brett, L.J., at 161–162; in H. L. (1878) 4 A. C. 13; 48 L. J. C. P. 261, at 27. This case is set out *post*, 556

did not know of the defects. Had they taken no active step to conceal them, their conduct, however dishonest, would not have entitled the buyer to repudiate the sale of the vessel sold "with all faults," or to recover the purchase money.

Mere silence. *Smith* v. *Hughes* (1871).

In *Smith* v. *Hughes* (*r*), the plaintiff, a farmer, sued for the price of certain oats sold to the defendant, an owner and trainer of racehorses. The defendant had rejected the oats as being new oats, whereas he had intended to buy only old oats. After a verdict for the defendant, the Court of Queen's Bench, in giving judgment for a new trial, assumed as the basis of their judgment that the oats had been sold *simpliciter* as "oats," no word "old" being used, though the buyer intended to buy, and thought he was in fact buying old oats.

Cockburn, C.J., said, that assuming the seller to know that the buyer believed the oats to be old oats, but that he had done nothing directly or indirectly (*s*) to bring about that belief, but simply offered his oats, and exhibited his sample, the passive acquiescence of the seller in the *self-deception* of the buyer did not entitle the latter to rescind the sale. It would have been different had the buyer asked the question whether the oats were new or old, or had said anything to intimate his understanding that the seller was selling old oats, or even had said anything which showed that he assumed as the foundation of the contract that the oats were old. In such a case the silence of the seller, as a means of misleading the buyer, might have amounted to a fraudulent concealment justifying the buyer in avoiding the contract.

Blackburn, J., concurred, saying that, "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.

Pigs "with all faults." *Ward* v. *Hobbs* (1878).

In *Ward* v. *Hobbs* (*t*), the defendant sold a number of pigs in Newbury market, subject to the conditions that the lots were to be sold "with all faults"; that no warranty would be given, and that as they were open to inspection before the sale,

(*r*) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221. The case is set out in detail, *ante*, 134, where another aspect of the case is considered, viz. whether there was a contract at all. See also, on the question of fraud, *Scott, Fell & Co.* v. *Lloyd* [1906] 4 Com. L. R. (Austr.) 379 (buyer's silence as to destination of goods); and *Laidlaw* v. *Organ* (1817) 2 Wheat. 178, before the Supreme Court of the United States, where it was held that the buyer's silence in answering to a question was not necessarily an implied representation.

(*s*) See *Delany* v. *Keogh* [1904] 2 Ir. Rep. 267, C. A., where a statement, true on the face of it, led to a false inference that the statement would remain true.

(*t*) 4 A. C. 13; 48 L. J. C. P. 281; affg. C. A. (1877) 3 Q. B. D. 150; 47 L. J. Q. B. 90; revg. Q. B. D., 2 Q. B. D. 331.

compensation would be made in respect of any fault. The pigs were bought by the plaintiff, and immediately after the sale showed symptoms of typhoid fever, from which they shortly afterwards died. The Contagious Diseases (Animals) Act of 1869 (*u*) in effect enacts, that any person commits an offence who exposes in any market an animal affected with an infectious disease, unless he proves that he did not know of the same being so affected. The plaintiff brought an action for damages, alleging a warranty that the pigs were free from infectious disease, and a false representation that the seller did not know that they were so infected. At the trial the jury found that the defendant knew that the pigs were diseased, and returned a verdict for the plaintiff, leave being reserved to enter a non-suit on the ground that there was no warranty, and no fraud, and no evidence of the defendant's guilty knowledge. It was contended on the part of the buyer that the fact of sending diseased pigs to market, as it was an offence, was tantamount to a representation by the seller that the animals were not diseased, or at least that he believed they were not. This view was adopted by the Queen's Bench Division, but their decision was reversed by the Court of Appeal in a judgment which was affirmed by the House of Lords. It was there held that, as the pigs were sold "with all faults," and a warranty and also compensation were expressly negatived, the mere fact of exposing the pigs in a public market, even when that was an offence, did not amount to a representation by conduct that they were free from infectious disease.

Earl Cairns, L.C., while declining to state his own view, referred (*x*) to an opinion which had been very strongly expressed by Blackburn, J. (*y*), that such a representation would be implied, if no statement were made by the seller negativing warranty or stipulating as to faults.

His Lordship also laid it down as undoubted law (*z*) that if a seller, while expressly negativing a warranty and selling "with all faults," were further to declare, contrary to the fact, that he believed the goods to be free from a particular fault, the latter statement would render him liable to an action for deceit.

In *Horsfall* v. *Thomas* (*a*), the defence to an action on a bill

(*u*) 32 & 33 Vict. c. 70, s. 57.
(*x*) 4 A. C. at 22; 48 L. J. C. P. 281.
(*y*) In the Q. B., in *Bodger* v. *Nicholls* (1873) 28 L. T. 441, at 445.
(*z*) 4 A. C. at 20—21; 48 L. J. C. P. 281.
(*a*) 1 H. & C. 90; 31 L. J. Ex. 322; 130 R. R. 394.

Fraud not inducing contract.

Horsfall v. *Thomas* (1862).

of exchange was that the buyer had been defrauded in the purchase of a steel cannon, for which he had accepted the plaintiffs' bill. The gun was made by defendant's order, and he was informed when it was ready, and, *without making any examination of it*, he accepted the bill of exchange on the 2nd July. On the 17th the sellers wrote to the defendant: "The gun is of the best metal all through, and has no weak points that we are aware of." There was a defect in the gun and a metal plug had been inserted, concealing the defect. It was received by the defendant, fired several times, answered the purpose as long as it was entire, but afterwards burst in consequence of the defect. *Held*, that the defendant had not been induced to accept the bill by the artifice used, for he had never examined the gun; and the mere statement by the plaintiffs to the defendant that the gun was ready for him, even if they knew the existence of the defect which would make the gun worthless, and failed to inform him of it, was not a fraud. Bramwell, B., who delivered the judgment, said that "fraud must be committed by the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true, and which it is the duty of the party to make known." In the case there was no affirmance; and there was no duty on the part of the maker to point out a defect where the buyer has an opportunity of inspection, and does not choose to avail himself of it.

In *Smith* v. *Hughes* (*b*), Cockburn, C.J., dissents from *Horsfall* v. *Thomas*, yet the actual decision in that case seems in accordance with principle on the ground that, however fraudulent the act of the sellers was, it was not fraud *dans locum contractui*.

Hill v. *Gray* (1816).

Ownership of a picture.

Hill v. *Gray* (*c*) would seem to conflict with the general rule in relation to non-disclosure. There the plaintiff's agent to sell a picture was pressed by the defendant to tell him whose property it was: the agent refused. The same agent was at the time selling also pictures for Sir Felix Agar, and the defendant, "misled by circumstances, erroneously supposed that the picture in question was also the property of Sir Felix Agar," and under this misapprehension bought it for £1,000. The agent "knew that the defendant laboured under this delusion, but did not remove it." The picture was said to

(*b*) (1871) L. R. 6 Q. B. 597, at 605; 40 L. J. Q. B. 221. This dissent has not been followed, or generally approved: see note to *Shepherd* v. *Croft* [1911] 1 Ch. 521, at 530; 80 L. J. Ch. 170.

(*c*) *Coram* Lord Ellenborough, C.J., at N. P. 1 Stark. 434.

be a Claude, and proof was offered that it was genuine, and that, after the defendant knew that it was not one of Sir Felix Agar's pictures, he had objected to paying only on the ground that it was not a genuine Claude. Lord Ellenborough said: "Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have *let in a suspicion* on the part of the purchaser which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and *yet he did not remove it.*" The language of Lord Ellenborough has been explained (*d*) as intimating that there "had been a positive aggressive deceit," and showing "something like an act done." It is, indeed, quite possible that it was the *act* of the agent in putting the picture with those of Sir Felix Agar that created the belief, which the agent perceived, and did not remove (*e*).

In *Patterson* v. *Landsberg & Son* (*f*), the defender sold to the pursuer as antiques a quantity of jewellery, stating, with respect to one, a necklace containing a miniature of Flora Macdonald, that it had been given to her by one of the Stuarts in token of her devotion to the Stuart cause, and with respect to another of Queen Victoria, and a miniature of General Monk, that he did not know their history. These articles had all been painted and set by one Soper on the order of the defender. *Held*, by the Court of Session, that the positive statements of the defender were fraudulent, and that the pursuer could rescind the sale, and recover the price. Lord Kincairney said that when a seller is aware of a buyer's false impression "he certainly must take care not to go a step beyond what the law does not prevent," and here there had been "active, direct, aggressive falsehood." The other Judges concurred, Lord Kyllachy adding *obiter* the following remarks: "The appearance of age and other appearances presented by these articles constituted by themselves mis-

Jewellery. *Patterson* v. *Landsberg & Son* (1905).

(*d*) By the C. P. in *Keates* v. *Cadogan* (1851) 10 C. B. 591, at 600; 20 L. J. C. P. 76; 84 R. R. 715. On the other hand Vaughan and Coltman, JJ., in *Pilmore* v. *Hood* (1838) 5 Bing. N. C. 97; 8 L. J. (N. S.) C. P. 11; 50 R. R. 622, treat the case as one of non-disclosure. And see *per* Lord Chelmsford, in *Peek* v. *Gurney* (1873) L. R. 6 H. L. at 390; 43 L. J. Ch. 19, who doubts whether the mere silence of the agent could be so interpreted, but attributes the explanation of the C. P. to the anxiety of the Court to reconcile the case with the established principle that mere non-disclosure is not fraud.

(*e*) See *Gill* v. *McDowell* [1903] 2 Ir. R. 463.

(*f*) (1905) 7 S. C. 675.

representations; in short the case is one of *res ipsa loquitur*: this being so, the defender was not entitled to leave, as he says he did, the articles to speak for themselves, but was bound to displace the inferences which the appearance of the articles was to his knowledge bound to suggest; and the defender not only failed to do this, but by the use of equivocal language and assumption of airs of mystery and otherwise indorsed and helped to encourage the inferences which the appearance of the articles suggested." It is conceived that the case might well have been decided on the latter ground (*g*).

Where seller merely passive, buyer must rely on his own observation.

It will have been seen from the cases which have been considered, that the rule, that a person who has been guilty of fraudulent misrepresentation or active concealment of material facts cannot defend himself by the assertion that the party deceived might have known the truth by proper enquiry, does not apply to cases of mere non-disclosure where there is no duty to disclose the facts. "When the fact is not misrepresented, but concealed" (*h*), says Lord Chelmsford in *New Brunswick, etc., Co.* v. *Conybeare* (*i*), "and there is nothing done to induce the other party not to avail himself of the means of knowledge within his reach, if he neglects to do so he may have no right to complain, because his ignorance of the fact is attributable to his own negligence."

Jones v. *Bowden* (1813).

Duty by usage to declare damage.

In the early case of *Jones* v. *Bowden* (*k*), an action upon the case for deceit in a sale, the defendants bought pimento at an auction sale, as sea-damaged. It is *usual* in such sales of this article to declare it to be sea-damaged, and when nothing is said, it is supposed to be sound. Defendants then repacked it, and it was included in a catalogue of the auction sale, as "187 bags of pimento, bonded," and at the foot was stated, "the goods to be seen as specified in the catalogue, and remainder at No. 36, Camomile Street." Defendants drew fair samples, which were exhibited to the bidders, by which the article appeared to be dusty, and of inferior quality; but no one could tell from the samples that the goods had been sea-damaged or repacked, either of which facts depreciates the value in the market. The catalogues were not distributed till the day before the sale, and no one had inspected the goods. The auctioneer made no addition to nor comment

(*g*) So the exhibition of a sample with a latent defect may amount to a representation of merchantable quality: *Drummond* v. *Van Ingen* (1887) 12 A. C. 284; 56 L. J. Q. B. 563. See *post*, 742.

(*h*) *I.e.*, not disclosed.

(*i*) (1862) 9 H. L. C. 711, at 742; 31 L. J. Ch. 297; 131 R. R. 415.

(*k*) 4 Taunt. 847.

on what was stated in the catalogue, and the plaintiffs became the purchasers at 13d. per pound, which was not more than a reasonable price, after taking into consideration the fact that it had been sea-damaged and repacked. The jury said that the state of the goods ought to have been communicated by the defendants to the plaintiffs and found a verdict for them, subject to the point whether the action was maintainable under a count which charged that the defendants "did fraudulently sell the same as and for pimento not damaged." A rule to set aside the verdict was discharged. The grounds are not very intelligibly given, but it may be fairly inferred from the language of Sir James Mansfield, C.J., and Heath, J., that they considered the verdict of the jury as establishing a *usage* which imposed on the sellers the *duty* of disclosing the defect, their silence being under the circumstances equivalent to an implied representation that sea-damage did not exist. The case thus explained is in accordance with general principle.

SECTION IV.—FRAUD ON THIRD PERSONS, AND HEREIN OF FRAUD ON CREDITORS.

Contracts fraudulent on third person voidable.

ALL contracts are voidable which involve a fraud upon a third person (*l*).

Fraud on third person by collusion between seller and buyer.

In the following very exceptional case, decided in 1790, where the fraud of the seller was committed not on the buyer, but by collusion between the seller and the buyer on another person, the seller was not permitted to recover against the buyer, notwithstanding the general rule of law that no man is allowed to set up his own fraud as both parties were *in pari delicto* (*m*).

Jackson v. *Duchaire* (1790

In *Jackson* v. *Duchaire* (*n*), the plaintiff agreed to sell the goods in a house to the defendant for £100, if she could raise the money; as she could not do so, she applied to a friend, Welch, to aid her, and he agreed to buy them for her from the

(*l*) See *Harrington* v. *Victoria Graving Dock Co.* (1878) 3 Q. B. D. 549; 47 L. J. Q. B. 594; *Panama, etc., Tel. Co.* v. *India Rubber, etc., Works Co.* (1875) 10 Ch. 515; 45 L. J. Ch. 121; *Walker* v *Nightingale* (1726) 4 Bro. P. C. 193; all cases of actions for commission corruptly earned. The principle is, however, a general one. See also *Wright* v. *Tallis* (1845) 1 C. B. 893; 44 L. J. C. P. 283; 68 R. R. 852 (title page and preface falsely stating author); *Beghie* v. *Phosphate Sewage Co.* (1875) L. R. 10 Q. B. 491; 44 L. J. Q. B. 233 (invention); *Scott* v. *Brown* [1892] 2 Q. B. 724; 61 L. J. Q. B. 738, C. A. (rigging share-market); *Bile Beans Mfg. Co.* v. *Davidson* [1906] 8 S. C. 1181 (ingredients falsely stated); *Post* v. *Marsh* (1880) 16 Ch. D. 395; 50 L. J. Ch. 287 (author of book falsely stated on title page).

(*m*) See *Montefiori* v. *Montefiori*, *post*, 568.

(*n*) 3 T. R. 551. See also *Smith* v. *Sorby* (1875) 3 Q. B. D. 552, as compared with *Harrington* v. *Victoria Graving Dock Co.*, and *Walker* v. *Nightingale*, *supra* (puffer suing for commission).

plaintiff for £70, which he did, taking a bill of sale to himself for that sum. By a secret agreement between the plaintiff and the defendant, she was to pay the extra £30 to him, in two promissory notes, of £15 each. On action brought by the plaintiff on one of the two notes, Lord Kenyon at the trial and the Court in Banc afterwards, held the transaction to be a fraud on Welch, who had paid the £70 in aid of the defendant and in confidence that that sum was the full purchase money, and that the plaintiff could not recover. The principle was the same as that on which secret agreements to give one creditor an advantage over others as an inducement to sign a composition in insolvency, are held fraudulent and void (*o*).

Sales in fraud of creditors.

Sales made by debtors in fraud of creditors are usually regarded as being governed by the statute 13 Eliz. c. 5, and the decisions made under it; but other statutes had been previously passed on the same subject, and in 1776 Lord Mansfield, in *Cadogan* v. *Kennett* (*p*), said that "the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4. The former of these statutes relates to creditors only; the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud."

Alienations with intent to delay creditors.

13 Eliz. c. 5 (1570).

The statute 13 Eliz. c. 5 (*q*), (which merely declared the common law (*r*)) provided among other things that all alienations of goods and chattels made to the intent "to delay, hinder or defraud creditors" should, only as against creditors, their representatives and assigns, so delayed, etc., be "clearly and utterly void," saving always assurances upon good consideration (*s*) and *bona fide* of any interest in goods and chattels to any person not having any notice of the fraud.

Fraud depends on intention: a question of fact.

On the construction of this statute it was decided that a continuance by the seller in possession of the goods after the conveyance was only evidence of fraud, but not fraud *per*

(*o*) *Cockshott* v. *Bennett* (1788) 2 T. R. 763; 1 R. R. 617; *Daughish* v. *Tennent* (1866) L. R. 2 Q. B. 49; 36 L. J. Q. B. 10; *Ex parte Mayer* (1887) 15 Q. B. D. 605; 54 L. J. Q. B. 425, C. A.

(*p*) (1776) Cowp. 432, at 434.

(*q*) Confirmed by 14 Eliz. c. 11, s. 1, and made perpetual by 29 Eliz. c. 5, s. 2. Ss. 4 and 6, which had become obsolete, were repealed by the S. L. R. Act, 1863.

(*r*) *Twyne's Case* (1601) 3 Co. 80a; 1 Sm. L. C., 7th ed. at 7, 11th ed. at 1.

(*s*) *I.e.*, valuable: *Twyne's Case*, *supra*; not necessarily *full* consideration: *Nunn* v. *Wilsmore* (1800) 8 T. R. 521; cited by Plumer, V.-C., in *Copis* v. *Middleton* (1817) 2 Madd. 410, at 430; 17 R. R. 226.

se (*t*); and the general rule has been laid down that the question whether a conveyance is fraudulent under this statute is in each particular case a question of fact, whether under all the circumstance. there was an *intention* to delay, hinder or defraud creditors, and that, if there was in fact no such intention, the conveyance is not fraudulent in law (*u*).

The intent is a question of fact. Want of consideration for a conveyance or assignment is relevant, but not conclusive, to prove an illegal intent. On the other hand, the existence of consideration does not conclusively disprove it (*x*).

It is well settled that the mere intention to defeat the execution of a creditor will not avoid a sale as fraudulent, if it be made *bona fide* for a valuable consideration (*y*). Nor is it a fraud to mortgage personal property for money actually lent to the mortgagor, even though the mortgagor's intention may be thus to defeat the expected execution of a judgment creditor (*z*). Nor is it fraudulent to prefer a creditor (*a*), as, for example, to confess a judgment in f- ..ur of one creditor for the purpose of giving him a preference over another, who is on the eve of issuing execution on a judgment previously obtained (*b*). And it is not necessarily fraudulent to convey the whole of the debtor's property. If the conveyance be in

(*t*) *Kidd* v. *Rawlinson* (1800) 2 B. & P. 59; 5 R. R. 540; *Latimer* v. *Batson* (1825) 4 B. & C. 652; 4 L. J. K. B. 25; *Martindale* v. *Booth* (1832) 3 B. & Ad. 498; 1 L. J. (N. S.) K. B. 166; 37 R. R. 485; *per* Kindersley, V.-C., in *Hale* v. *Metrop. Omnibus Co.* (1861) 30 L. J. Ch. 777. The earlier decision in *Edwards* v. *Harben* (1788) 2 T. R. 587; 1 R. R. 548, which appears to conflict with the statement in the text, and with the authorities cited in the following note, cannot now be regarded as law in this country, although it is so regarded in some of the United States.

(*u*) See *Alton* v. *Harrison* (1869) 4 Ch. 622; 38 L. J. Ch. 669 (assignment to some creditors); *per* Lord Blackburn in *Cookson* v. *Swire* (1884) 9 A. C. at pp. 664–665; 54 L. J. Q. B. 249; *per* P. C. in *Godfrey* v. *Poole* (1888) 13 A. C. 497, at 503; 57 L. J. P. C. 78; appg. *per* Kindersley, V.-C., in *Thompson* v. *Webster* (1859) 4 Drew. 632; 28 L. J. Ch. 700; *Ex parte Mercer, Re Wise* (1886) 17 Q. B. D. 290; 55 L. J. Q. B. 558, C. A.; *Morris* v. *Morris* (1895) 72 L. T. 879, P. C. (unregistered bill of sale . possession not taken); *Gregg* v. *Holland* [1902] 2 Ch. 360; 71 L. J. Ch. 518, C. A.; *Glegg* v. *Bromley* [1912] 3 K. B. 474; 81 L. J. K. B. 1081, C. A.

(*x*) *Per* Parker, J., in *Glegg* v. *Bromley* [1912] 3 K. B. 474, at 492; 81 L. J. K. B. 1081, C. A.

(*y*) *Wood* v. *Dixie* (1845) 7 Q. B. 892; 68 R. R. 590; considered in *Edmunds* v. *Edmunds* [1904] P. 362; 73 L. J. P. 97; *Darvill* v. *Terry* (1862) 6 H. & N. 807; 30 L. J. Ex. 355; *Hale* v. *Metropolitan Omnibus Co.* (1859) 28 L. J. Ch. 777; 4 Drew. 492.

(*z*) *Darvill* v. *Terry* (1861) 6 H. & N. 807; 30 L. J. Ex. 355; 123 R. R. 545; follg. *Wood* v. *Dixie*, *supra*.

(*a*) *Middleton* v. *Pollock* (1876) 2 Ch. D. 104; 45 L. J. Ch. 293. "There is no law which prevents a man in insolvent circumstances from preferring one of his creditors to another, except the bankruptcy law. . . . The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or privity amongst the creditors of the debtor": *per* Jessel, M.R., at 108.

(*b*) *Holbird* v. *Anderson* (1792) 5 T. R. 235.

good faith, and be not a mere cloak for retaining a benefit to the grantor, it is valid (*c*). "The covinous assignments" says Fletcher-Moulton, L.J., in *Glegg* v. *Bromley* (*d*), "referred to in 13 Eliz. are mock assignments, whereby, in some form or other, the assignor reserves some benefit to himself; but an out-and-out assignment by way of charge to secure an actually existing creditor is not within the class of assignments affected by the statute."

Statute does not avoid transfer as against parties, or strangers other than creditors.

Under this statute it was held in various cases that, as the transfer was good, not only between the parties (*e*), but as against strangers other than creditors, the sheriff would be held liable as a trespasser if he seized the goods in execution against the seller, unless he put in evidence the writ (*f*) and judgment (*g*) to show that he was duly acting for a creditor.

Bills of Sale Acts.

The rule, by which whenever the grantor continued in possession of goods after their assignment his intention had to be determined, led to much expense and perjury (*h*); and in order to remedy this the first of a series of Acts, called the Bills of Sale Acts, was passed in 1854 (*i*).

Its object, as appears by the preamble, was to put an end to frauds which were frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons were enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale had the power of taking possession of the property of such persons to the exclusion of the rest of the creditors. The chief means by which it effected its object was to require bills of sale to be registered.

Later Bills of Sale Acts followed, those at present in force being mentioned in the note below (*k*).

(*c*) *Per* Giffard, L.J., in *Alton* v. *Harrison* (1869) 4 Ch. 622, at 626; 38 L. J. Ch. 669.

(*d*) [1912] 3 K. B. 474, at 485; 81 L. J. K. B. 1081. See also *Ex parte Games* (1879) 12 Ch. D. 314, C. A.

(*e*) *Hawes* v. *Leader* (1611) Cro. Jac. 270; Yelv. 196; app. by Holroyd, J., in *Doe* v. *Roberts* (1819) 2 B. & Ald., at 369; 20 R. R. 477.

(*f*) *Doe* v. *Roberts* (1819) 2 B. & Ald. 367; 20 R. R. 477; *Glare* v. *Wentworth* (1842) 6 Q. B. 173, n.

(*g*) *White* v. *Morris* (1852) 11 C. B. 1015; 20 L. J. C. P. 185; 87 R. R. 854; overg. *Bessey* v. *Windham* (1844) 6 Q. B. 166; 14 L. J. Q. B. 7; 66 R. R. 336.

(*h*) See the history and policy of the Bills of Sale Acts discussed by Lord Blackburn in *Cookson* v. *Swire* (1884) 9 A. C., at 664; 54 L. J. Q. B., at 234.

(*i*) 17 & 18 Vict. c. 36.

(*k*) In England, the Bills of Sale Acts, 1878 (41 & 42 Vict. c. 31) and 1882 (45 and 46 Vict. c. 43) which do not extend to Scotland or Ireland; and two later Acts of 1890 (53 & 54 Vict. c. 53) and 1891 (54 & 55 Vict. c. 35) which exclude from the operation of the earlier Acts certain securities on imported goods. The Act of 1878 repealed (s. 23) the earlier Acts of 1854 (17 & 18 Vict. c. 36) and

Contracts of sale will also be avoided as fraudulent against creditors when made in furtherance of an attempt to disturb the principles of the bankrupt and insolvent laws of the country, the object of these laws being to secure an equal rateable distribution of the debtor's property among his creditors. All contracts, including that of sale, are voidable as fraudulent when made for this purpose. In all contracts between an insolvent and his creditors, the law imports a tacit stipulation that all shall share alike, *pari passu*; and that it shall not be competent for any one of them, without the knowledge of the rest, to secure any benefit or advantage in which they have no share (*l*).

Sale for purpose of disturbing equality among creditors.

Where a contract infringes the principle of equality above stated, neither that contract nor the secret bargain which formed the consideration for it (*m*), is enforceable between the parties to the secret bargain.

It is in accordance with this principle of equality that an insolvent buyer cannot rescind a sale, and return the goods to the seller, if the effect of the transaction would create a fraudulent preference under the bankruptcy laws (*n*). But if he has not obtained possession of the goods he may reject them, and so prolong the seller's right of stoppage *in transitu* (*o*); or, if he has only agreed to buy, and the property

Insolvent buyer cannot revest the property so as to prefer the seller.

1866 (29 & 30 Vict. c. 96). In Ireland, the Registration of Bills of Sale Act, 1854 (17 & 18 Vict. c. 55) is still in force as regards bills executed before 1st Nov., 1879, but is otherwise repealed (s. 23) by the Bills of Sale (Ireland) Act, 1879 (42 & 43 Vict. c. 50); and the latter Act is amended by the Act of 1883 (46 Vict. c. 7).

(*l*) *Cockshott* v. *Bennett* (1788) 2 T. R. 763; 1 R. R. 617; *Dauglish* v. *Tennent* (1866) L. R. 2 Q. B. 49; 36 L. J. Q. B. 10; *Ex parte Milner* (1885) 15 Q. B. D. 605; 54 L. J. Q. B 425, C. A.; *Farmers' Mart* v. *Milne* (1915) 111 L. T. 871; 84 L. J. P. C. 33, H. L. See also *Nunes* v. *Carter* (1866) L. R. 1 P. C. 342, at 348; 36 L. J. P. C. 12, for an instructive opinion of the P. C. delivered by Lord Westbury on the construction of statutes setting aside sales made in contemplation of bankruptcy; and on the history of the law as to protected transactions. The law as to fraudulent preferences in England is now governed by ss. 1 (1) (*c*) and 44, of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), and in Ireland by ss. 21 (2) and 53 of the Bankruptcy (Ireland) Amt. Act, 1872 (35 & 36 Vict. c. 58); and the earlier authorities are only guides in construing those sections: see *per* C. A. in *Ex parte Griffith* (1883) 23 Ch. D. 69; 52 L. J. Ch. 717.

(*m*) *Howden* v. *Haigh* (1840) 11 A. & E. 1033; 9 L. J. (N. S.) Q. B. 198; 52 R. R. 579; *Higgins* v. *Pitt* (1849) 4 Ex. 312; 18 L. J. (N. S.) Ex. 488; 80 R. R. 566. See also *Ex parte Myers* [1908] 1 K. B. 941; 77 L. J. K. B. 386.

(*n*) *Barnes* v. *Freeland* (1794) 6 T. R. 80; 3 R. R. 125; *Neate* v. *Ball* (1801) 2 East 116; 6 R. R. 401; *Stephens* v. *Wilkinson* (1831) 2 B. & Ad. 320; 9 L. J. K. B. 231; *Re Johnson* (1908) 99 L. T. 305; *Ex parte Suffolk* (1891) 9 Morr. 8. See also *Lauritzen* v. *Carr* (1894) 72 L. T. 56.

(*o*) *Per* Brett, L.J., in *Ex parte Cooper* (1879) 11 Ch. D. 68, 73; 48 L. J. Bkcy. 49, C. A.; *Bartram* v. *Farebrother* (1828) 4 Bing. 579; 6 L. J. C. P. 125; 29 R. R. 639; *James* v. *Griffin* (1837) 2 M. & W. 623; 6 L. J. (N. S.) Ex. 241; 42 R. R. 243; *cf. Heinekey* v. *Earle* (1857) 8 E. & B. 427; 28 L. J. Q. B. 79; 112 R. R. 627; Ex. Ch. As to the duration of transit under such circumstances,

has not passed to him, he may safely refuse to complete the contract by acceptance of the goods (*p*); and in neither of these cases does he make any "conveyance or transfer of property," or do any other act amounting to a fraudulent preference (*q*).

Dixon v. *Baldwen* (1804).

The reader is also referred to a very singular case, that of *Dixon* v. *Baldwen* (*r*), where the King's Bench decided that, although the transit was at an end, and although both the property and possession were confessedly in the buyers, yet under the special circumstances of the case, the buyers had not committed a fraudulent preference by rescinding the contract, because it was done by advice of counsel, after a statement of their intention so to do made to creditors, and not dissented from by them, and not done with the voluntary intention of giving an undue advantage. The Judges were not unanimous, and the question was considered by the majority rather as one of fact than of law. The jury had found that the rescission of the contract was in good faith.

The law respecting fraudulent conveyances, fraudulent preferences and bills of sale has only an indirect bearing on the subject-matter of this work, and the reader is therefore referred to the standard works on these subjects (*s*).

see Code, s. 45 (4); and *Bolton* v. *Lanc. & Y. Ry. Co.* (1866) L. R. 1 C. P. 431; 35 L. J. C. P. 137. For a curious illustration of stoppage *in transitu* held by the C. A. to be valid, where the buyer had made an ineffectual attempt to give undue preference to the seller by sending back the bills of lading, see *Re O'Sullivan, Ex parte Baller & Co.* (1892) 61 L. J. Q. B. 228; 66 L. T. 619; rev. in C. A., 67 L. T. 464; 61 L. J. Q. B. 228. See also *Re Johnson*, *supra*.

(*p*) *Atkin* v. *Barwick* (1719) 1 Stra. 165, as explained in *Barnes* v. *Freeland*, *supra*; *Nicholson* v. *Bower* (1858) 1 E. & E. 172; 28 L. J. Q. B. 97; 117 R. R. 167; *Booker* v. *Milne* (1870) 9 Macph. 314. *Cf. Ex parte Cote, Re Deveze* (1873) 9 Ch. Ap. 27; 43 L. J. Bkcy. 19. The principle for which *Nicholson* v. *Bower* is here cited is not affected by the changed conception of the effect of an unenforceable contract under s. 4 of the Code as contrasted with a contract which is not "good" under s. 17 of the Statute of Frauds.

(*q*) See fraudulent preference defined by s. 44 (1) of the Bankruptcy Act, 1914 (4 & 5 G. 5, c. 59). This paragraph summarises the Author's statement.

(*r*) (1804) 5 East 175; 7 R. R. 681. The case has been explained as one in which the debtors rescinded the contract under pressure of apprehension of legal proceedings: Williams on Bank., 16th ed., 304.

(*s*) See also notes on *Twyne's Case* (1601) 1 Sm. L. C. 1 (fraudulent conveyances); and on *Worseley* v. *De Mattos* (1758) Tnd. L. C. Merc. Law, 3rd ed. 755 (bankruptcy, fraudulent preference); and on *Mace* v. *Cadell* (1774) ibid. 686 (reputed ownership).

CHAPTER IV.

ILLEGAL, VOID, AND UNENFORCEABLE AGREEMENTS.

Contract of sale void when tainted with illegality.

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

Contracts, not illegal, but void or unenforceable by action.

Again, contracts of sale may be void without being illegal, or they may be both legal and valid, but simply made by statute unenforceable by action. As between the original parties there is no distinction between an illegal and a void contract; both are equally unenforceable. Where, however, the rights of third persons are concerned, the distinction may become important, as, for example, where a negotiable instrument is given for the price, and an indorsee is suing upon the instrument (*b*). Where a contract of sale is only unenforceable by action, no right arising under it can be directly or indirectly enforced by action; but no other remedy is affected, and the contract is recognised as valid for collateral purposes (*c*). The most notable instances of such contracts are those already considered (*d*) under section 4 of the Code.

The subject of this Chapter will be considered in two parts: First, with reference to the common law; Secondly, with reference to statute law (*e*).

(*a*) This, however, is subject to some qualification: see *post*, 569.

(*b*) *Fitch* v. *Jones* (1855) 5 E. & B. 238; 24 L. J. Q. B. 293; 103 R. R. 455; *Belfast Banking Co.* v. *Doherty* (1879) 4 L. R. Ir. 124 (illegal consideration); *Lilley* v. *Rankin* (1887) 56 L. J. Q. B. 248 (void consideration); Bills of Exchange Act, 1882, s. 30 (2).

(*c*) Pollock on Cont., 8th ed. 694; *Britain* v. *Rossiter* (1879) 11 Q. B. D. 123; 48 L. J. Ex. 362, C. A.

(*d*) *Ante*, 340, *et seqq.*

(*e*) As to such agreements, see SECTION II., *post*, 606, *et seqq.*

SECTION I.—AT COMMON LAW.

At common law the rule is invariable: *Ex turpi causâ non oritur actio.* And this principle applies, not only to actions directly founded upon an illegal contract, but also to demands which grow out of it, or are connected therewith, the test whether such a demand can be enforced being whether the plaintiff requires to show the illegal transaction in order to establish his case (*f*). Thus, for example, the general rule is that moneys paid under an illegal contract by one party to the other cannot be recovered back unless the plaintiff can show that he is not *in pari delicto* with the defendant (*g*). Accordingly, where the plaintiff and the defendant made an illegal wager with B., who lost, and the plaintiff advanced to the defendant his share of the winnings, and B. never paid the bet, it was held that the plaintiff could not recover back what he had advanced (*h*).

Illegality as a defence.

A principle analogous to the maxim above quoted is applicable to a defence. It was said by Lord Mansfield in *Montefiori* v. *Montefiori* (*i*), "no man shall set up his own iniquity as a defence any more than as a cause of action." But this language must be confined to cases in which the plaintiff is not *in pari delicto* with the defendant, for illegality may be pleaded where the parties are *in pari delicto* (*k*), though the defendant thereby takes advantage of his own wrong, for the paramount rule of public policy prevails that illegal contracts should not be enforced.

It is not always necessary for a defendant to plead the

(*f*) *Simpson* v. *Bloss* (1816) 7 Taunt. 246; 17 R. R. 509; approved in *Farmers' Mart* v. *Milne* (1915) 111 L. T. 871; 34 L. J. P. C. 337, H. L.; *Taylor* v. *Chester* (1869) L. R. 4 Q. B. 309; 38 L. J. Q. B. 225; *Scott* v. *Brown & Co.* (1892) 2 Q. B. 724; 61 L. J. Q. B. 738, C. A.; *Fisher* v. *Bridges* (1854) 3 E. & B. 642; 23 L. J. Q. B. 276; 97 R. R. 701, Ex. Ch.; *Gordon* v. *Chief Commissioner* [1910] 2 K. B. 10, Sc.; 79 L. J. K. B. 957, C. A.

(*g*) *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K. B. 558; 73 L. J. K. B. 373, C. A.

(*h*) *Simpson* v. *Bloss*, *supra*. See also *Thistlewood* v. *Cracroft* (1813) 1 M. & S. 500.

(*i*) (1762) 1 Wm. Bl. 363. *Doe* v. *Roberts* (1819) 2 B. & A. 367; 20 R. R. 477, cited in previous editions of this work as a confirmation of the proposition of Lord Mansfield, seems to be of dubious authority, and to conflict with *Doe* v. *Ford* (1835) 3 A. & E. 649; 4 L. J. K. B. 268, and other cases. The decision has been explained as resting on the ground that the conveyance was good, as between the parties, to convey the land, though illegal for other purposes: *Bessey* v. *Windham* (1844) 6 Q. B. 166, at 172; 14 L. J. Q. B. 7; 66 R. R. 39; *Phillpotts* v. *Phillpotts* (1850) 10 C. B. 85, at 97; 20 L. J. C. P. 11; 84 R. R. 460. See also *Alexander* v. *Owen* (1786) 1 T. R. 225 (payment in bad money, when good).

(*k*) *Per* Park, J., in *Richardson* v. *Mellish* (1824) 2 Bing. 229, at 250; 3 L. J. C. P. 265; 27 R. R. 603; *Bement* v. *Nat. Harrow Co.* (1901) 186 U. S. 70.

illegality which is the foundation of the plaintiff's claim. "If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causâ*, or the transgression of the positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff" (*l*).

Neither party can maintain an action on a contract of sale, if, for example, the thing sold be contrary to good morals or public decency. Sales of an obscene book (*m*) and of indecent or libellous prints or pictures (*n*), have been held illegal and void at common law (*o*).

Property may pass under an illegal contract of sale.

It has been stated above that an illegal contract of sale is "void." This term should not be misunderstood. The meaning is that the Court will not assist either of two parties: *in pari delicto potior est conditio possidentis* vel *defendentis*. It results from this maxim that the property in goods sold under an illegal contract may pass (*p*), and if in addition the goods have been delivered, the buyer's title is indefeasible, for there is no person who can impeach it; though the buyer cannot be sued for the price. "If the illegal contract," said Parke, B., in *Scarfe* v. *Morgan* (*q*), "is executed, and a property, either general or special, has passed thereby, the property must remain." Accordingly, it will be recognised as against a third person, who has wrongfully interfered with it, in any case where the plaintiff does not require (*r*) to set up this illegal contract as the foundation of his right (*s*).

(*l*) *Per* Lord Mansfield in *Holman* v. *Johnson* (1775) Cowp. 341. See also *per Curiam* in *Scott* v. *Brown & Co.* [1892] 2 Q. B. 724; 61 L. J. Q. B. 738, C. A.; *Gedge* v. *Royal Exchange Assurance* [1900] 2 Q. B. 214; 69 L. J. Q. B. 506; *North Western Salt Co.* v. *Electrolytic Alkali Co.* [1913] 3 K. B. 422, C. A. The general rule, however, is that, to prevent surprise, illegality must be pleaded: R. S. C., O. 19, rr. 15, 20.

(*m*) *Poplett* v. *Stockdale* (1825) Ry. & Moo. 337; 31 R. R. 662.

(*n*) *Fores* v. *Johns* (1802) 4 Esp. 97; 6 R. R. 840.

(*o*) As to immoral considerations, see *per* Lord Selborne in *Ayerst* v. *Jenkins* (1873) 16 Eq. 275, at 282.

(*p*) *Elder* v. *Kelly* [1919] 2 K. B. 179; 88 L. J. K. B. 1253 (sale on Sunday).

(*q*) (1838) 4 M. & W. 270, at 281; 76 L. J. (N. S.) Ex. 324; 51 R. R. 568. See also *per eundem* in *Simpson* v. *Nicholls* (1838) 5 M. & W. 702; 7 L. J. (N. S.) Ex. 117; 49 R. R. 586; *Ayerst* v. *Jenkins* (1873) 16 Eq. 275; *Ayers* v. *South Australian Bank. Co.* (1871) L. R. 3 P. C. 548, at 559; 40 L. J. P. C. 22; *In re Maplebeck* (1876) 4 Ch. D. 150; 46 L. J. Bk. 14, C. A.; *St. Louis Hay Co.* v. *U. S.* (1903) 191 U. S. 159, at 163.

(*r*) *Secus*, where he does: *Fergusson* v. *Norman* (1838) 5 Bing. N. C. 76 (pawnbroker's lien).

(*s*) *Gordon* v. *Chief Commissioner* [1910] 2 K. B. 1080; 79 L. J. K. B. 957, C. A.; *cf. Tayler* v. *Chester* (1869) L. R. 4 Q. B. 309; 38 L. J. Q. B. 225; where the plaintiff had to set up the illegality.

Feret v. *Hill* (1854).

In *Feret* v. *Hill* (*t*), the plaintiff brought ejectment to recover possession of premises from which he had been ejected by the defendant, the lessor. The plaintiff, at the time of the agreement, intended to use the premises as a brothel, and had induced the defendant to make the agreement by fraudulent misrepresentation as to his character, and as to the purpose for which he wanted the premises. Held that he could recover, on the ground that the misrepresentation was one of fact *collateral* to the agreement, Jervis, C.J., saying that there was no misrepresentation "as to the legal effect of the instrument which he (the defendant) executed, nor as to what he was doing, or that he was doing one thing, when in fact he was doing another." The defendant intended to demise the premises to the plaintiff, the plaintiff entered under that demise, and became possessed of the term and his title to maintain the ejectment could not be impeached.

References to case in *Gordon* v. *Chief Commissioner* (1910).

Referring to this case in *Gordon* v. *Chief Commissioner of Metropolitan Police* (*u*), Buckley, L.J., says (*x*): "The plaintiff there acquired the premises, and used the premises for immoral purposes, but he succeeded in ejectment in maintaining his title to the premises because the property was in him, inasmuch as the estate had passed by the lease. The purposes for which he had acquired the property were not a matter which he had to prove to establish his cause of action." And Vaughan Williams, L.J., says (*y*): "The decision of the Court was based upon the proposition that the estate, having passed by the lease, could not be divested by a collateral fraud, or by the immoral intention of the plaintiff at the time he became lessee, or by immoral use made by him of the premises after he got possession.

Plaintiff not *in pari delicto*. When he may sue.

An action may, however, be maintainable by a plaintiff who is not *in pari delicto*. Thus, a party who has paid money under an illegal contract in circumstances of oppression may recover it back (*z*); or, if he be one of a class of persons who are protected by any statute creating the illegality, as, for

(*t*) (1854) 15 C. B. 207; 23 L. J. C. P. 185; 100 R. R. 318. See also *Doe* v. *Roberts*, *ante*, 568, n. (*i*).

(*u*) [1910] 2 K. B. 1080; 79 L. J. K. B. 957, C. A.

(*x*) At 1099. The L.J. is considering the case from the point of view, not of fraud, but of illegality.

(*y*) At 1089.

(*z*) *Per* Lord Mansfield in *Smith* v. *Bromley* (1760) 2 Doug. 670 (n.); *Smith* v. *Cuff* (1817) 6 M. & S. 160; 18 R. R. 340 (oppression); *per Cur.* in *Kearley* v. *Thompson* (1890) 24 Q. B. D. 742, at 745, 746; 39 L. J. Q. B. 28, C. A.; *per Cur.* in *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K. B. 558; 73 L. J. K. B. 373, C. A.

example, the old statutes against usury or lotteries (*a*). In such cases *delictum non est par*. Another case (*b*), which seems a true exception to the maxim above quoted, is where money has been paid, or goods have been delivered under an unlawful agreement, which remains in all other respects *executory*, the party paying the money or delivering the goods may, by giving notice of disaffirmance (*c*), repudiate the transaction, and recover his money or goods. The action is then founded, not upon the unlawful agreement, but upon its disaffirmance.

Taylor v. *Bowers* (1876).

Thus, in *Taylor* v. *Bowers* (*d*), the plaintiff had delivered goods to one Alcock for the purpose of defrauding his (the plaintiff's) creditors. Alcock, without the plaintiff's assent, executed a bill of sale of the goods to the defendant, who was aware of the illegal transaction. Before the plaintiff's creditors had been paid, or settled with, the plaintiff demanded the goods. It was held that he was entitled to repudiate the transaction, and recover his goods from the defendant, who was in no better position than Alcock. Mellish, L.J., said: "If money is paid, or goods delivered, for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action."

Contract capable of lawful and unlawful performance

Where the immediate object of a contract is illegal, it is immaterial whether the parties were or were not aware of the law, or intended to break it (*e*). But where a contract can be performed either in a lawful or in an unlawful manner, as illegality in such a case is not presumed (*f*), the contract is not

(*a*) *Per Cur. in Kearley* v. *Thompson*, *supra*; *Browning* v. *Morris* (1778) 2 Cowp. 790.

(*b*) The C. A. *in Kearley* v. *Thompson* say, however, that this principle may require future consideration. But, *in* the opinion of the P. C., the authority of *Taylor* v. *Bowers* and similar cases has not been shaken by these observations: *Petherpermal Chetty* v. *Muniandy Servai* (1908) 21 Times L. R. 462, P. C. And the principle was laid down in early cases: *Hastelow* v. *Jackson* (1828) 8 B. & C. 221; 6 L. J. K. B. 318; 32 R. R. 369; *Hodson* v. *Terrill* (1833) 1 C. & M. 804; 2 L. J. (N. S.) Ex. 282; 38 R. R. 765.

(*c*) *Palyart* v. *Leckie* (1817) 6 M. & S. 290; 18 R. R. 381; *per* Stirling, J., in *Barclay* v. *Pearson* [1893] 2 Ch. 154, at 169; 62 L. J. Ch. 636.

(*d*) 1 Q. B. D. 291; 45 L. J. Q. B. 163, C. A.; and see *Symes* v. *Hughes* (1870) 9 Eq. 475, 479; 39 L. J. Ch. 304; *Kearley* v. *Thompson* (1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288, C. A.; *Herman* v. *Jeuchner* (1885) 15 Q. B. D. 561; 54 L. J. Q. B. 340, C. A.; *Hermann* v. *Charlesworth* [1905] P. 123; 74 L. J. K. B. 620, C. A.; *Tappenden* v. *Randall* (1801) 2 B. & P. 467; 5 R. R. 662.

(*e*) *Per Cur. in Wilkinson* v. *Loudonsack* (1814) 3 M. & S. 117, at 126; 15 R. R. 438.

(*f*) *Hire Purchase Furnishing Co.* v. *Richens* (1887) 20 Q. B. D. 387, C. A.

void unless a performance in an unlawful manner was contemplated. In such a case, knowledge of what the law is becomes of great importance, for it is necessary to show that the parties had the wicked intention to break the law (*g*).

Consideration illegal in part.

Even where part only of the consideration of a contract—that is to say, for a single promise—is illegal, the whole contract is void and cannot be enforced. This has been treated as established law (*h*).

Featherston v. *Hutchinson* (1590).

Thus, in *Featherston* v. *Hutchinson* (*i*), the declaration alleged that, whereas the plaintiff had taken the body of one H. in execution at the suit of J. S. by virtue of a warrant directed to him (the plaintiff) as special bailiff, the defendant, in consideration he (the plaintiff) would permit him (H.) to go at large, *and of two shillings* to the defendant paid, etc., promised to pay the plaintiff all the money in which H. was condemned. Upon *non assumpsit*, it was found for the plaintiff. It was moved in arrest of judgment that the consideration was not good, being contrary to the Statute of 23 Hen. 6, c. 9 (respecting the duties of sheriffs and bailiffs), and that a promise and an obligation was all one. And though it be joined with another consideration of two shillings, yet being void and against the statute for part, it was void in all.

Separable contract.

But where the contract is in its nature separable into distinct parts, that is to say, when it consists of distinct promises based on considerations, some of which are illegal, if the promises based on legal considerations can be separated from the others, they are enforceable. "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part, and retain the good" (*k*).

The sale of a thing in itself an innocent article of commerce

(*g*) *Waugh* v. *Morris* (1873) L. R. 8 Q. B. 202; 42 L. J. Q. B. 57; *Lewis* v. *Davison* (1839) 4 M. & W. 654; 8 L. J. (N. S.) Ex. 78 (alternative contract); *Thwaites* v. *Coulthwaite* [1896] 1 Ch. 496; 65 L. J. Ch. 238.

(*h*) By Tindal, C.J., in *Waite* v. *Jones* (1835) 1 Bing. N. C. 656; 4 L. J. (N. S.) C. P. 184 (on the authority of *Featherstone* v. *Hutchinson* (1590) Cro. El. 199, *infra*); affirmed by all the Judges who delivered opinions in the Ex. Ch. in *Jones* v. *Waite* (1839) 5 Bing. N. C. 341; 8 L. J. (N. S.) Ex. 305; 37 R. R. 705; and in H. L. (1842) 9 Cl. & F. 101; 50 R. R. 717.

(*i*) Cro. El. 199.

(*k*) *Per* Willes, J., in *Pickering* v. *Ilfracombe Ry. Co.* (1868) L. R. 3 C. P. at 250; 27 L. J. C. P. 118. See also *Pigot's Case* (1614) 11 Co. Rep. 27 b; *Odessa Tramways* v. *Mendel* (1878) 8 Ch. D. 235; 47 L. J. Ch. 505, C. A.; *Kearney* v. *Whitehaven Coll. Co.* [1893] 1 Q. B. 700; 62 L. J. M. C. 129, C. A.

is void when the seller sells it, knowing that it is intended to be used for an immoral or illegal purpose. In several of the earlier cases (*l*) something more than this mere knowledge was held necessary, and evidence was required of an intention on the seller's part to aid in the illegal purpose or profit by the immoral act. The later decisions overrule this doctrine.

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

Even, however, as early as 1801, Eyre, C.J., in his celebrated judgment in *Lightfoot* v. *Tenant* (*m*), laid down the true principle on the broad ground of knowledge of the illegal or immoral purpose.

Lightfoot v. *Tenant* (1801).

In *Lightfoot* v. *Tenant* goods were sold, to be delivered in London, for ultimate shipment to the East Indies, contrary to 7 Geo. 1, c. 21, s. 2, which rendered void all contracts made by His Majesty's subjects for the loading or supplying any ship in the service of foreigners and designed to trade in the East Indies with a cargo or lading. In giving judgment for the defendant, the buyer, who pleaded the illegality, Eyre, C.J., said: "Upon the principles of the common law the consideration of every valid contract must be meritorious. The sale and delivery of goods, nay the agreement to sell and deliver goods, is *prima facie* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. . . . I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases . . . will differ in shade more or less from this strong case; but the body of the colour is the same in all. *No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them.*"

Bourry v. *Bennet* (1808).

In 1808, in *Bourry* v. *Bennet* (*n*) before Lord Ellenborough, a prostitute was sued for the value of clothes furnished, and pleaded that the plaintiff well knew her to be a woman of the town, and that the clothes in question were for the purpose of enabling her to pursue her calling. The evidence of the plaintiff's knowledge of the defendant's way of life was very slight. His Lordship said: "It must not only be shown that

(*l*) *Faikney* v. *Reynous* (1767) 4 Burr. 2070; *Petrie* v. *Hannay* (1789) 3 T. R. 418; disapproved in *Booth* v. *Hodgson* (1795) 6 T. R. 405; *Aubert* v. *Maze* (1801) 2 B. & P. 371; 5 R. R. 624; and *Mitchell* v. *Cockburne* (1794) 2 H. Bl. 379.

(*m*) 1 B. & P. 551; 4 R. R. 735.

(*n*) 1 Camp. 348; 10 R. R. 697; explained in *Pearce* v. *Brooks*, *post*, 576. See also *Lloyd* v. *Johnson* (1798) 1 B. & P. 340; 4 R. R. 822; *Appleton* v. *Campbell* (1826) 2 C. & P. 347. And *cf.* *Girardy* v. *Richardson* (1793) 1 Esp. 13; *Jennings* v. *Throgmorton* (1825) R. & M. 251; 27 R. R. 746.

he had notice of this (*o*), but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it. In that case the contract was corrupt and illegal . . . but it was not to be considered of this description from the *mere circumstance* of the defendant being a prostitute, *even within the plaintiff's knowledge*."

Langton v. *Hughes* (1813).

Langton v. *Hughes* (*p*), also before Lord Ellenborough at Nisi Prius, was an action for the price of drugs sold to the defendants, who were brewers, the plaintiffs knowing that defendants intended to use the drugs for mixing with beer, a use prohibited by statute. His Lordship charged the jury that the plaintiffs in selling drugs to the defendants, *knowing* that they were to be used contrary to the statute, were aiding them in the breach of that act, and therefore not entitled to recover. He, however, reserved the point. The ruling was maintained by all the Judges, and it was distinctly asserted as the true principle, that "parties who seek to enforce a contract for the sale of articles, which in themselves are perfectly innocent, but which were sold with a knowledge that they were to be used for a purpose which is prohibited by law, are not entitled to recover" (*q*).

Cannan v. *Bryce* (1819).

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

(*o*) *I.e.*, of the defendant's way of life.

(*p*) 1 M. & S. 593; 14 R. R. 531. See also *Gas Light Co.* v. *Turner* (1839) 5 Bing. N. C. 666; 9 L. J. (N. S.) C. P. 75; 54 R. R. 808. *Hodgson* v. *Temple* (1813) 5 Taunt. 181; 14 R. R. 738, cited in previous editions, as criticised by the Author, is omitted, as conflicting with later cases.

(*q*) *Per* Le Blanc, J., 1 M. & S. at 597; 14 R. R. 531; and see the strong observations of Eyre, C.J., in *Lightfoot* v. *Tenant* (1801) 1 B. & P. 551; 4 R. R. 735, *ante*, 573.

(*r*) 3 B. & Ald. 179; 22 R. R. 342, practically overrunning *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, *ante*, 573, n. (*l*).

object to which they were to be applied, and for the *express purpose of accomplishing* that object." The money lent was, therefore, held not recoverable. *Langton* v. *Hughes* was approved and followed, and the distinction between *malum prohibitum* and *malum in se* pointedly repudiated.

McKinnell v. *Robinson* (1838).

In *McKinnell* v. *Robinson* (*s*), in the Exchequer in 1838, it was held that money knowingly lent for gambling at hazard, a game prohibited by law, could not be recovered, being lent for the express purpose of a violation of the law. *Cannan* v. *Bryce* was referred to by the Court as finally settling the law.

Pearce v. *Brooks* (1866).

In *Pearce* v. *Brooks* (*t*), a leading case in 1866, and similar to *Bowry* v. *Bennet*, the accuracy of the ruling laid down by Lord Ellenborough in that case came under discussion. In this case, the plaintiff had supplied a brougham to a prostitute, who pleaded in the action that the brougham was hired for the purpose of her trade, as the plaintiff knew, and in the expectation by the plaintiff that the hire of the brougham would be paid out of the receipts of her trade. The plaintiff knew the defendant to be a prostitute, but there was no direct evidence that he knew that the brougham was intended to be used for the purpose of enabling the defendant to follow her vocation; and there was *no* evidence that plaintiff expected to be paid out of the wages of prostitution. Bramwell, B., put it to the jury that, in some sense, everything which is supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street-walker; and that the things supplied must be not merely such as would be necessary or useful for ordinary purposes, and might also be applied to an immoral one; but that they must be such as would under the circumstances not be required except with that view. The jury found that the defendant did hire the brougham for the purpose of her prostitution, and that the plaintiff *knew* it was supplied for that purpose. It was held: 1. not necessary to show that plaintiff expected to be paid from the proceeds of the immoral act; 2. that the knowledge by the plaintiff that the woman was a prostitute being proven, the jury were authorised in *inferring* that the plaintiff also knew the purpose for which

(*s*) 3 M. & W. 434; 7 L. J. (N. S.) Ex. 149; 49 R. R. 672. But money lent abroad for gambling purposes abroad, where gambling is not illegal, may be recovered in England: *Saxby* v. *Fulton* [1909] 2 K. B. 208; 78 L. J. K. B. 781, C. A.; following *Quarrier* v. *Colston* (1842) 1 Phill. 147; 12 L. J. (N. S.) Ch. 57; 65 R. R. 351, L. C.

(*t*) L. R. 1 Ex. 212; 35 L. J. Ex. 134; followed in *Upfill* v. *Wright* [1911] 1 K. B. 506; 80 L. J. K. B. 254, where a flat was let to a kept mistress. See also *Taylor* v. *Chester* (1869) L. R. 4 Q. B. 309; 38 L. J. Q. B. 225; *Smith* v. *White* (1866) L. R. 1 Eq. 626; 35 L. J. Ch. 454.

she wanted the brougham; and 3, that this knowledge was *sufficient to render the contract void*, the law being settled by *Cannan* v. *Bryce*.

Piggott, B., and Bramwell, B., both pointed out that the Court was not overruling anything that Lord Ellenborough had said in *Bowry* v. *Bennet* (*u*), the former Judge saying that Lord Ellenborough was not stating a rule of law, but only giving an illustration of what would amount to a participation by the plaintiff in the immorality.

As above explained, Lord Ellenborough's language in *Bowry* v. *Bennet* (*u*), it is apprehended, was accurate, and must be taken to mean that, where goods such as ordinary clothing, which have no special connection with the trade or character of a prostitute, are supplied, some evidence of a direct furtherance by the seller of the buyer's immoral purpose must be shown (*x*). The degree of knowledge possessed by the seller is only *evidence* of this. If knowledge of the buyer's purpose be expressly shown, such evidence is conclusive proof of the furtherance of an illegal object (*y*); where it is to be inferred from the circumstances of the case it may or may not be sufficient (*z*). And the nature of the goods supplied is material to show whether the seller should or should not be fixed with knowledge (*a*).

Innocent seller may repudiate contract on discovering buyer's illegal object.

It follows, from the principle that a person will not be assisted in suing on a contract with an illegal object that a seller who has contracted to supply goods, which the buyer in fact wants for such an object, may on discovering the facts and without any liability refuse to deliver the goods (*b*).

Sale to an alien enemy.

It is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country, and such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament (*c*). It is under this principle that at common law (*d*) a contract

(*u*) (1803) 1 Camp. 348; 10 R. R. 697, *ante*, 573.

(*x*) *Per Cur.* in *Waugh* v. *Morris* (1873) L. R. 8 Q. B. 202, at 207; 42 L. J. Q. B. 57.

(*y*) *Cannan* v. *Bryce* (1819) 3 B. & A. 179; 22 R. R. 342, *ante*, 574.

(*z*) *Pearce* v. *Brooks* (1866) L. R. 1 Ex. 212; 35 L. J. Ex. 134, *ante*, 575; *Upfill* v. *Wright* [1911] 1 K. B. 506; 80 L. J. K. B. 254.

(*a*) *Bowry* v. *Bennet* (1808) 1 Camp. 348; 10 R. R. 697, *ante*, 573. See also the ruling of Bramwell, B., in *Pearce* v. *Brooks*, *supra*, *ante*, 575. *Per* Pollock, C.B., and Martin, B., *ibid.* at 221, 219; *Bagot* v. *Arnott* (1865) Ir. Rep. 2 C. L. 1.

(*b*) *Cowan* v. *Milbourn* (1867) L. R. 2 Ex. 230; 36 L. J. Ex. 124.

(*c*) *Per* Lord Alvanley in *Furtado* v. *Rogers* (1802) 3 B. & P. 191, at 198.

(*d*) See also the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5. c. 87) and the Amendment Acts of 1915 (5 Geo. 5. c. 12; and 5 & 6 Geo. 5. c. 79).

of sale between a British subject and an alien enemy is void, all commercial intercourse being strictly prohibited with an alien enemy, save only when specially licensed by the Sovereign (*dd*). And the same prohibition attaches to the citizens of an allied State as upon the subjects of a belligerent State (*e*).

Meaning of "alien enemy."

"Alien enemy" in its natural interpretation means the subject of a State at war with the King (*f*). But, with reference to civil rights, the test is not nationality, or domicil, but the place of residence or business (*g*). Thus a British subject, or a neutral, voluntarily residing or carrying on business in hostile territory, is regarded in this connection as an alien enemy, as adhering to the King's enemies (*h*). Conversely the subject of a hostile State is not an alien enemy if he neither reside nor carry on business in the enemy's territory (*i*). And if he be in this country by permission of the Crown, he is *sub protectione Regis*, and in the same position as an alien friend (*k*). So, also, is the subject of a neutral State, who, while engaged in the service of the enemy, has been taken prisoner of war, for his temporary allegiance to the enemy is determined by his capture (*l*).

Contracts with alien enemies not made under Royal licence (*m*) cannot be enforced after the conclusion of

(*dd*) *The Hoop* (1799) 1 C. Rob. 196; *Brandon* v. *Nesbitt* (1794) 6 T. R. 23; 3 R. R. 109; *Potts* v. *Bell* (1800) 8 *ib.* 548; 5 R. R. 452, Ex. Ch.

(*e*) *The Panariellos* (1915) 84 L. J. P. 140; 112 L. T. 777.

(*f*) C. Litt. 129 B; *Sylvester's Case* (1702) 7 Mod. 150; *per Cur.* in *Porter* v. *Freundenburg* [1915] 1 K. B. 857, C. A.; 84 L. J. K. B. 1001.

(*g*) *Per* Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, at 505; 71 L. J. K. B. 857; *per Cur.* in *Porter* v. *Freundenburg*, *supra*.

(*h*) *McConnell* v. *Hector* (1802) 3 B. & P. 113; 6 R. R. 724; *Sorensen* v. *Reg.* (1857) 11 Moo. P. C. 141; *cf. Roberts* v. *Hardy* (1815) 3 M. & S. 533; 16 R. R. 347, where no voluntary residence was shown. Mere possession of territory by the enemy's forces does not convert the invaded territory into hostile territory. See the subject discussed in *Cremidi* v. *Powell* (1857) 11 Moo. P. C. 88, at 96 *et seqq.*

(*i*) *Per Cur.* in *Porter* v. *Freundenburg*, *supra*; *Re Mary Duchess of Sutherland* (1915) 31 Times L. R. 248.

(*k*) *Caseres* v. *Bell* (1799) 8 T. R. 166; *Porter* v. *Freundenburg*, *supra*; *Princess Thurn and Taxis* v. *Moffitt* [1915] 1 Ch. 58; 84 L. J. Ch. 220.

(*l*) *Sparenburgh* v. *Bannatyne* (1797) 1 B. & P. 163; 4 R. R. 772.

(*m*) *Vandyck* v. *Whitmore* (1801) 1 East, 475; *Usparicha* v. *Noble* (1811) 13 East, 332; 12 R. R. 360; *Morgan* v. *Oswald* (1812) 3 Taunt. 554; Trading with the Enemy Act, 1914 (4 & 5 Geo. 5. c. 87); Trading with the Enemy Amendment Act, 1915 (5 Geo. 5. c. 12); Trading with the Enemy Amendment Act, 1915 (5 & 6 Geo. 5. c. 79). A licence will be literally construed: *Flindt* v. *Scott* (1814) 5 Taunt. 674, Ex. Ch. Registration under the Aliens Restriction Act, 1914 (4 & 5 Geo. 5. c. 12), has the effect of a licence: *Porter* v. *Freundenburg*, *supra*; and the internment under it of an alien enemy resident in this country is not a revocation: *Schaffenius* v. *Goldberg* (1915) 32 Times L. R. 133, C. A. Mere presence in this country does not prove a licence: *Boulton* v.

peace (*n*). And where an executory contract (including one between a British subject and a neutral) involves in its performance trading or intercourse with the enemy it is dissolved on both sides by the declaration of war (*o*). Nor can an alien enemy during war enforce a contract made before the war: his rights are suspended until the conclusion of the war (*p*). But he may, in such a case, be sued by a British subject, and may then appear and conduct his defence (*q*).

Smuggling contracts.

Biggs v. *Lawrence* (1789).

Smuggling contracts are also illegal. Thus, where a party in England sent an order to Guernsey for goods, which were delivered there by the seller in half ankers (*r*), ready slung, for the purpose of being smuggled into this country, the Court held that the plaintiffs, who were Englishmen, residing here, and partners of the seller in Guernsey, were not entitled to recover (*s*).

This case was followed, on similar facts, in *Clugas* v. *Penaluna* (*t*).

Sale completed abroad.

Holman v. *Johnson* (1775).

But where the plaintiff, a foreigner, sold and delivered goods abroad to the defendant, knowing his intention to smuggle them, but having no concern in the smuggling scheme itself, the Court of King's Bench held, that the sale was complete abroad; was governed by foreign law; was not immoral nor illegal *there*, because no country takes notice of the revenue laws of another, such being *positivi juris* only; but that if the goods were sold to be delivered in England (*u*), or if the plaintiff had been concerned in the

Dobree (1808) 2 Camp. 162; *Alciator* v. *Smith* (1812) 3 Camp. 245. The onus of proof is on the alien. See also the Aliens Restriction Act, 1914 (4 & 5 Geo. c. 12).

(*n*) *Willison* v. *Patteson* (1817) 7 Taunt. 439; 18 R. R. 525.

(*o*) *Esposito* v. *Bowden* (1857) 7 E. & B. 763; 27 L. J. Q. B. 17; 110 R. R. 822; *Ertel Bieber & Co.* v. *Rio Tinto Co.* [1918] A. C. 260; 87 L. J. K. B. 531. And a clause in the contract suspending the contract for the duration of the war between the countries of the parties is void as against public policy, as tending to the advantage of the enemy's country and to the detriment of this: *ibid.*

(*p*) *Alcinous* v. *Nigren* (1854) 4 E. & B. 217; 24 L. J. Q. B. 19; 99 R. R. 435; *Le Bret* v. *Papillon* (1804) 4 East, 502; 7 R. R. 618; *Wolf & Sons* v. *Carr, Parker & Co.* (1915) 31 Times L. R. 407, C. A. *Held*, however, by Lords Finlay, Haldane, and Parmoor in *Rodriguez* v. *Speyer Brothers* [1919] A. C. 59 that the rule is not unqualified, and does not apply if no mischief in view public policy is involved. Lords Atkinson and Sumner held the rule absolute.

(*q*) *Robinson & Co.* v. *Cont. Ins. Co. of Mannheim* [1915] 1 K. B. 155; 84 L. J. K. B. 238; *Porter* v. *Freundenburg*, *supra*.

(*r*) Shipment of foreign spirits in vessels containing less than 60 gallons was illegal.

(*s*) *Biggs* v. *Lawrence* (1789) 3 T. R. 454; 1 R. R. 740.

(*t*) (1791) 4 T. R. 466; 2 R. R. 442.

(*u*) In which case the *lex loci solutionis* would apply: *Grell* v. *Levy* (1864) 16 C. B. (N. S.) 573; 139 R. R. 414; *Moulis* v. *Owen* [1907] 1 K. B. 746; 76 L. J. K. B. 396, C. A.

smuggling, it would have been different. The plaintiff was therefore entitled to recover (*x*).

Sale abroad, where seller assists the smuggler. *Waymell* v. *Reed* (1794).

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

Distinction in sales made in foreign countries, when seller does or does not aid the smuggler. *Pellecat* v. *Angell* (1835).

In *Pellecat* v. *Angell* (*z*), the subject again came before the Exchequer Court, on facts similar to those in *Holman* v. *Johnson*, and the previous decisions were followed, the Court laying down the following as the true distinction: That where the foreigner himself breaks the revenue laws of this country, as by taking *an actual part* in the illegal adventure—*e.g.* by packing the goods in prohibited parcels, or otherwise—the contract will not be enforced; but that the mere sale (*a*) of goods by a foreigner in a foreign country, made with knowledge that the buyer intends to smuggle them into this country, is not illegal, and may be enforced (*b*).

The reasoning of the Court in *Pellecat* v. *Angell* has, however, been adversely criticised. Mr. Justice Story says (*c*) it is difficult to reconcile with the strong and masculine reasoning of Lord Chief Justice Eyre in *Lightfoot* v. *Tenant* (*d*), where he enunciates the principle that "no man ought to furnish another with the means of transgressing the law, knowing that he intended to make that use of them." And the same learned Author says (*e*): "The question is not whether it is part of the contract with the Frenchman that the goods shall be smuggled, but whether he does not knowingly co-operate *by the very sale*, as far as in him lies, to accomplish the illegal intention of a British subject to smuggle his goods contrary to the laws of his country. Can a British tribunal be called upon to enforce such a contract?" But *Pellecat* v. *Angell* has been approved

(*x*) *Holman* v. *Johnson* (1775) 1 Cowp. 341, citing Hub. De Confl. Legum. 2. 539.

(*y*) 5 T. R. 599; 2 R. R. 675. See also *Bernard* v. *Reed* (1794) 1 Esp. 91.

(*z*) 2 C. M. & R. 311; 4 L. J. Ex. 326; 41 R. R. 723.

(*a*) Note, however, that the Court treated the goods as also delivered abroad.

(*b*) See the cases discussed in Westlake's Private International Law, 3rd ed., § 214; and in Foote's Priv. Internat. Juris., 2nd ed., 367 *et seqq.*; Dicey's Conflict of Laws, 560, 599.

(*c*) Conflict of Laws, 8th ed., ss. 253, 254.

(*d*) (1796) 1 B. & P. 551, at 556; 4 R. R. 735, quoted *ante*, 573.

(*e*) Conflict of Laws, 8th ed., s. 254, note (5). See also Foote's Priv. Internat. Juris., 2nd ed., 369.

and followed (*f*). At the present day the question is whether or not the contract would be considered to conflict with public policy; the rule being that a contract conflicting with essential public or moral interests will not, though it be made abroad, and is to be performed there, and is valid by the foreign law, be enforced in this country (*g*). It is, however, submitted that the seller abroad of goods delivered abroad may recover the price in this country, in spite of knowledge that the buyer contemplated smuggling, if he in no way assist the buyer's purpose.

Fraudulently raising the price of things bought as against the public.

An agreement between two persons that one shall buy for the other shares in the market at a fictitious premium with a view to induce the public to believe that there was a real market for the shares, and that they were of greater value than was the fact, is a fraud upon the public and an indictable conspiracy, and the buyer cannot recover back from the agent the moneys he had paid him (*h*). On the same principle, to hold a mock auction, that is to say, an auction with sham biddings, with intent to sell goods at prices much above their value, is a fraud upon the public, and an indictable conspiracy at common law (*i*).

Contracts against public policy.

At common law certain contracts are also prohibited as being against public policy. But this doctrine is one which must be applied with caution.

Opinion of Best, C.J.,

Thus, Best, C.J., in *Richardson* v. *Mellish* (*k*), pointed out the danger of Courts, in particular cases, taking upon themselves to decide doubtful questions of policy. But he said: "I admit that if it be clearly put upon the contravention of public policy, the plaintiff cannot succeed: but it must be unquestionable—there must be no doubt." Burrough, J., joined in the protest of the Chief Justice

and of Burrough, J.

(*f*) By Lord Cottenham, C., in *Sharp* v. *Taylor* (1849) 2 Ph. 801. See also *per Cur.* in *Seymour* v. *London, etc., Insurance Co.* (1872) 41 L. J. P. C. 193.

(*g*) Westlake's Priv. Int. Law., 3rd ed., s. 215, quoted and approved by Lords Atkinson and Parker in *Dynamit Actien-Gesellschaft* v. *Rio Tinto* [1915] A. C. 292, where the cases are considered. See also *per* Turner, L.J., in *Hope* v. *Hope* (1857) 8 De G. M. & G. 731, at 743; 26 L. J. Ch. 417, 114 R. R. 306; *per* Fry, J., in *Rousillon* v. *Rousillon* (1880) 14 Ch. D. 351 at 369; 49 L. J. Ch. 338 (restraint of trade); *Kaufman* v. *Gerson* [1904] 1 K. B. 591, C. A.; 73 L. J. K. B. 320 (contract procured by coercion); *Surman* v. *Fitzgerald* [1904] 1 Ch. 573, C. A. (mere invalidity by English law insufficient); *Sarba* v. *Fullon* [1909] 2 K. B. 208, C. A.; 78 L. J. K. B. 781 (money lent abroad for gaming there).

(*h*) *Scott* v. *Brown & Co.* [1892] 2 Q. B. 724; 61 L. J. Q. B. 738, C. A. See also *R.* v. *De Berenger* (1814) 3 M. & S. 67; 15 R. R. 415; and *R.* v. *Lewis* (1869) 11 Cox C. C. 404 (mock auction).

(*i*) *R.* v. *Lewis* (1869) 11 Cox C. C. 404.

(*k*) (1824) 2 Bing. 242; 3 L. J. (O. S.) C. P. 265; 27 R. R. 603.

"against arguing too strongly upon public policy: it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

Of Lord Campbell.

And Lord Campbell in *Hilton* v. *Eckersley* (*l*) showed how Judges had differed in opinion on questions of political economy, and said: "I cannot help thinking that where there is no illegality in bonds and other instruments at common law, it would have been better that our Courts of Justice had been required to give effect to them, unless where they are avoided by Act of Parliament."

Of Jessel, M.R.

In a case decided in 1875, Jessel, M.R., said: "It must not be forgotten that you are not to extend arbitrarily those rules, which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting. . . . Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract" (*m*).

Of Lord Halsbury, L.C.

And Lord Halsbury, L.C., in *Janson* v. *Driefontein Consolidated Mines*, said *obiter* (*n*) that it was not left at large to each tribunal to find that a particular contract was against public policy. And he denied that any Court could invent a new head of public policy.

Of the Privy Council.

On the other hand, the Privy Council say, in *Eranturel* v. *Eranturel* (*o*): "The determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion."

And Lord Halsbury's *dictum* has been doubted by a learned

(*l*) (1855) 24 L. J. Q. B. 353; 6 E. & B. 47; 106 R. R. 507.

(*m*) *Printing and Numerical Co.* v. *Sampson* (1875) L. R. 19 Eq. at 465; 44 L. J. Ch. 705; adopted by Fry, J., in *Rousillon* v. *Rousillon* (1880) 14 Ch. D. at 365; 49 L. J. Ch. 339.

(*n*) [1902] A. C. 484, at 491, 492; 71 L. J. K. B. 857; appd. by Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co.* [1918] A. C. 260, at 273; 87 L. J. K. B. 531.

(*o*) (1874) L. R. 6 P. C. 1, at 29, quoted by Vaughan Williams, L.J., in *Wilson* v. *Carnley* [1908] 1 K. B. 729, at 738; 77 L. J. K. B. 594, C. A. See also *per* Bowen, L.J., in *Maxim-Nordenfeldt* v. *Nordenfeldt* [1893] 1 Ch. 630; 62 L. J. Ch. 749.

Judge (*p*), who points out that in recent years three new heads of public policy have been laid down; that the principles remain the same, though their application may be novel; and that the principle stated by Tindal, C.J., in *Horner* v. *Graves* (*q*) remains, viz., that "whatever is injurious to the interests of the public is void on the grounds of public policy."

Forestalling, regrating and engrossing.

An illustration of the change of view is to be found in the radical change of public opinion (*r*), and of the law, upon the subjects of forestalling, regrating, and engrossing, which were reprobated by the common law as against public policy, and punished as crimes. *Forestalling* was the buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there. *Regrating* was the buying of corn or any other dead victual in any market and selling it again in the same market, or within four miles of the place. *Engrossing* was the getting into one's possession or buying up large quantities of corn or other dead victuals with intent to sell them again (*s*).

The King v. *Waddington* (1880).

In *The King* v. *Waddington* (*t*), the defendant was sentenced to a fine of £500 and four months' imprisonment (*i.e.*, a further term of one month in addition to his previous confinement of three months), for the offence of trying to raise the price of hops in the market by telling sellers that hops were too cheap, and planters that they had not a fair price for their hops; and contracting for one-fifth of the produce of two counties when he had a stock in hand and did not want to buy, but merely to speculate how he could enhance the price (*u*).

(*p*) McCardie, J., in *Naylor, Benzon & Co.* v. *Krainische Ind. Gesellschaft* [1918] 1 K. B. 331. So also Shearman, J., in *Montefiore* v. *Medway Components Co.* [1918] 1 K. B. 241; 87 L. J. K. B. 907.

(*q*) *Post*.

(*r*) Recent experiences during and since the war may yet result in a return, in part at least, to the policy of the common law.

(*s*) 4 Black. Com. 159; and Mr. Chitty's note, ed. 1844. The definitions are taken from 5 & 6 Edw. 6. c. 14, declaratory of the common law.

(*t*) (1800) 1 East, 143; 6 R. R. 238. In these days the remarks of Grose, J., would seem to have special significance: "The Court has been repeatedly and strongly addressed upon the freedom of trade; as if it were requisite to support the freedom of trade that one man shall be permitted for his own private emolument to enhance the price of commodities become necessaries of life. . . The freedom of trade, like the liberty of the press, is one thing: *the abuse that freedom*, like the licentiousness of the press, is another."

(*u*) The Lex Julia de Annona imposed a penalty "adversus eum qui e[x] annonam fecerit, societatemve coierit quo annona carior fiat"; and the same law provided "ne quis navem nautamve retineat, aut dolo malo faciat quo navis

These common law offences were abolished in 1844 by statute (*x*).

Common law offences abolished in 1844.

Nevertheless, it is beyond doubt that there are various well-defined cases where contracts of sale are still held illegal at common law as being violative of public policy and the interests of the State. These are chiefly 1st. Contracts for the sale of offices or the fees or emoluments of office; 2nd. Contracts of sale in restraint of trade; and 3rd. Contracts for the sale of law-suits, or interests in litigation.

Contracts for the sale or transfer of public offices or appointments, or the salary, fees, or emoluments of office, have in many cases been prohibited by statute, as will presently be shown (*y*); but by the previous common law such sales were held to be subversive of public policy, as opposed to the interests of the people and to the proper administration of government. Nullâ aliâ re magis Romana respublica interiit, quam quod magistratûs officia venalia erant (*z*). The Courts have reprobated every species of traffic in public offices, and of bargains in relation to the profits derived from them.

Contracts for sale of offices.

Thus, in *Garforth* v. *Fearon* (*a*), the Common Pleas held, in 1787, in an action for money had and received, that an agreement, whereby the defendant promised to hold a public office in the Customs in trust for the plaintiff, and to permit the plaintiff to appoint the deputies and receive all the emoluments of the place, was illegal and void. Lord Loughborough observing that the effect was to make the plaintiff "the real officer, but not accountable for the due execution of it; he may enjoy it without being subject to the restraints imposed by law on such officers, for he does not appear as such officer." Judgment for the defendant.

Garforth v. *Fearon* (1787).

defendatur": Dig. 48, 12, 2. Such persons were called Dardanarii: Dig. 47, 11, 6. It was also illegal by the law of Athens in a mercantile contract to ship a cargo of corn abroad for any port but Athens, as tending to create a scarcity.

(*x*) 7 & 8 Vict. c. 24, which, however, by s. 4, makes it an offence "knowingly to spread, or to conspire to spread, any false rumour with intent to enhance or decry the price of any goods or merchandise, or to prevent or endeavour to prevent by force or threats any goods, wares, or merchandise being brought to any fair or market." The repeal of this Act by the 55 & 56 Vict. c. 19, does not affect this proviso: see 52 & 53 Vict. c. 63, s. 38 (2). Cases may be imagined in which engrossing contracts may yet be held, contrary to public policy, as being against the public interests. See the remarks (on restraint of trade) of Bowen, L.J., in *Maxim-Nordenfeldt* v. *Nordenfeldt* [1893] 1 Ch. 630, at 668; 62 L. J. Ch. 273, C. A.; and of Lord Herschell in S. C. [1894] A. C. 535, at 549; 63 L. J. Ch. 908.

(*y*) *Post*, 625, *et seqq.*

(*z*) Co. Litt. 234 a.

(*a*) 1 Bl. Hy. 328.

Parsons v. *Thompson* (1790).

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

Relief in equity.

In equity, a perpetual injunction was granted against enforcing a bond for the purchase of an office, as opposed to public policy, although the sale was not within the prohibitions of the statutes (*c*). So also equity relieved against a bond as being illegal, by which a party covenanted to pay £10 per annum, as long as he enjoyed an office in the excise, to a person who by his interest with the commissioners had obtained the office for him (*d*).

Blachford v. *Preston* (1799).

In *Blachford* v. *Preston* (*e*), it was held that the sale by the owner of a ship in the East India Company's service of the place of master of the vessel was illegal, as being in violation of the laws and regulations of the company and of public policy, and that the plaintiff could not sue on a promise by the defendant to repay the price if another captain were afterwards appointed instead of the plaintiff, an event which happened. Lord Kenyon said: "There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori*: on principles of public policy, no money consideration ought to influence the appointment to such offices."

Card v. *Hope* (1824).

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

(*b*) 1 Bl. Hy. 322; 2 R. R. 773. See also *Waldo* v. *Martin* (1825) 4 B. & C. 319; 28 R. R. 289, case of a secret contract relative to an appointment in the Petty Bag Office.

(*c*) *Hanington* v. *Du Chatel* (1783) 1 Bro. C. C. 124; *Methwold* v. *Walbanc* (1750) 2 Ves. Sen. 238. *Cf. Savill Brothers* v. *Langman* (1898) 79 L. T. 13. C. A., where there was no sale of a recommendation.

(*d*) *Law* v. *Law* (1735) 3 P. Wms. 391.

(*e*) 8 T. R. 89; 4 R. R. 598. See also *Hartwell* v. *Hartwell* (1799) 4 Ves. 811.

(*f*) 2 B. & C. 661, 2 L. J. (O. S.) K. B. 96; 26 R. R. 503.

Hanington v. *Du Chatel* (1783).

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

Corporation of Liverpool v. *Wright* (1859).

In *The Corporation of Liverpool* v. *Wright* (*h*), the defendant was appointed clerk of the peace by the plaintiffs, under the Municipal Corporations Act, which made the tenure of the office dependent only on good behaviour, and fixed the fees attached to the office. The Municipal Council agreed to appoint, and the defendant to accept, under an arrangement which, in substance, bound the defendant to pay over to the borough fund all his fees in excess of a certain annual amount. On demurrer to a bill, filed to enforce this agreement, Vice-Chancellor Wood held it void, as against public policy, on two grounds:—1. because a person accepting an office of trust can make no bargain in respect of such office; 2. because where the law assigns fees to an office, it is for the purpose of upholding the dignity and performing properly the duties of that office; and the policy of the law will not permit the officer to bargain away a portion of those fees to the appointor or to anybody else.

Mayor of Dublin v. *Hayes* (1876).

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

Assignment of the salary, etc., of a public office illegal.

On similar principles of public policy, the salary and emoluments of a public office cannot be assigned by the holder, for they are considered to have been appropriated for the performance of the duties of the office and the maintenance of its dignity (*k*).

Thus, in *Palmer* v. *Bate* (*l*), the Court of Common Pleas

(*g*) 1 Bro. C. C. 124.
(*h*) 28 L. J. Ch. 868; Johnson, 359; 123 R. R. 151.
(*i*) 10 Ir. R. C. L. 226, follg. *Corp. of Liverpool* v. *Wright*, *supra*.
(*k*) *Per* Lord Langdale, M.R., in *Grenfell* v. *Dean of Windsor* (1840) 2 Beav. 544; 50 R. R. 279; *Davis* v. *Duke of Marlborough* (1818) 1 Swanst. 79; 53 R. R. 29; *Hill* v. *Paul* (1810) 8 C. & F. 295; *Cooper* v. *Reilly* (1829) 2 Sim. 560 (assistant Parliamentary counsel).
(*l*) 2 Bro. & B. 673. See also *McCreery* v. *Bennett* [1904] 1 Ir. R. 69 (salary of petty sessions clerk). *Cf. Feistel* v. *King's College* (1847) 16 L. J. Ch. 329 (assignment of the income of a college fellowship), and *In re Mirams* [1891] 1 Q. B. 594; 60 L. J. Q. B. 397 (assignment of the income of the chaplain to a workhouse), where the assignments were held to be valid, as the offices were not public ones.

Palmer v. *Bate* (1821).

certified to the Vice-Chancellor that an assignment of the income, emolument, produce, and profits of the office of the Clerk of the Peace for Westminster (after deducting the salary of the deputy for the time being), is not a good or effectual assignment, nor valid in the law.

The same restriction attaches to payments made in part to maintain the receiver in the position to return to the public service when called upon to do so (*m*). But payments made exclusively in consideration of past services, such as a retiring pension, are assignable in the absence of any statutory provision to the contrary (*n*). On this subject Jessel, M.R., says in *Ex parte Huggins* (*o*): "There are no doubt some salaries and pensions which are not assignable. But where this is so it is always referable to one of two grounds. It is said to be contrary to public policy that payments made to induce persons to keep themselves ready for the service of the Crown, as the half-pay of officers in the Army or Navy, or payments for actual service rendered to the Crown, should be assigned. The other class of cases is that of pensions, like the retiring allowance of a beneficed clergyman, which are by statute expressly made not assignable."

In *Wells* v. *Foster* (*p*), Parke, B., explained the principle of the cases as follows: "The correct distinction made in the cases is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life or merely during the pleasure of others. In such a case the assignee acquires a title to it, both in equity and at law, and may recover back any sums received in respect of it by the assignor after the date of the assignment. But where the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable."

According to the principles previously stated, the pay of a

(*m*) *Per* Lord Langdale, M.R., in *Grenfell* v. *Dean of Windsor*, *supra*; *per* Lord Cranworth, V.-C., in *Price* v. *Lovett* (1851) 20 L. J. Ch. 270.

(*n*) *Per* Parke, B., in *Wells* v. *Foster* (1841) 8 M. & W. 149; 10 L. J. Ex. 216; 58 R. R. 650, *infra*; *Spooner* v. *Payne* (1852) 1 D. M. & G. 383, at 388; *Willcock* v. *Terrell* (1878) 3 Ex. D. 323, where the proper order to enforce the sequestration of a pension is considered; *per* Lindley, L.J., in *Lucas* v. *Harris* (1886) 18 Q. B. D. 127, at 135, 136; 56 L. J. Q. B. 15, C. A.

(*o*) (1882) 21 Ch. D. 85, at 91; 51 L. J. Ch. 935.

(*p*) (1841) 8 M. & W. 149; 10 L. J. Ex. 216; 58 R. R. 650.

military or naval officer is not a legal subject of sale (*q*). Nor is the half-pay, which is granted in order that the officer may be able to maintain himself till he is called upon again to serve (*r*). Nor is a pension or annuity to a civil officer, unless exclusively for past services, as was held in *Wells* v. *Foster* (*p*), where a retired allowance, granted to a clerk in the Audit Office until he might be called upon to serve again in the public service, was held not to be assignable. But the doctrine applicable to the assignment of pay or half-pay does not apply to a lump sum received by way of difference, upon an officer's retirement on half-pay (*s*), or as a commutation of part of his retired pay (*t*), for the reason of the restriction does not apply in such a case.

Sale of pension illegal, unless exclusively for past services.

Wells v. *Foster* (1841).

The retiring pension of an officer of His Majesty's forces, even where it has been granted exclusively in respect of past services, has now been rendered inalienable by the Army Act, 1881 (*u*), which provides as follows:—"Every assignment of, and every charge on, and every agreement to assign or charge, any deferred pay, or military reward payable to any officer or soldier of any of Her Majesty's forces, or any pension, allowance, or relief payable to any such officer, or soldier, or his widow (*v*), child, or other relative, or to any person in respect of any military service shall, except so far as the same is made in pursuance of a royal warrant for the benefit of the family of the person entitled thereto, or as may be authorised by any Act for the time being in force, be void." But sums receivable as pension moneys cease to be such as soon as they are received, and are accordingly then attachable and assignable like any other money (*x*).

Officers' retiring pension inalienable by statute.

Permanent alimony under the Divorce Act, 1857, in cases

(*q*) *Barwick* v. *Reade* (1791) 1 Bl. Hy. 627; 2 R. R. 808; *Apthorpe* v. *Apthorpe* (1887) 12 P. D. 192 (naval surgeon).

(*r*) *Flarty* v. *Odlum* (1790) 3 T. R. 681; 1 R. R. 794; *Lidderdale* v. *Montrose* (1791) 4 T. R. 248; 2 R. R. 375; *per* Lindley, L.J., in *Lucas* v. *Harris* (1886) 18 Q. B. D. 127, at 135, 136; 56 L. J. Q. B. 15, C. A.

(*s*) *Price* v. *Lovett* (1851) 20 L. J. Ch. 270.

(*t*) *Crowe* v. *Price* (1889) 22 Q. B. D. 429; 58 L. J. Q. B. 215.

(*u*) 44 & 45 Vict. c. 58, s. 141. This Act, by s. 193, repeals a previous enactment to the same effect of 47 Geo. 3, sess. 2, c. 25, s. 4. See also the Indian Pensions Act (No. 23 of 1871), s. 12, and *In re Saunders* [1895] 2 Q. B. 421; 64 L. J. M. C. 232, C. A. See also *Lucas* v. *Harris* (1886) 18 Q. B. D. 127; 56 L. J. Q. B. 15, C. A., where *Dent* v. *Dent* (1867) 1 P. & D. 366; 36 L. J. Mat. 61, was distinguished, and *Birch* v. *Birch* (1883) 8 P. D. 163; 52 L. J. P. 86, preferred and followed: *Crowe* v. *Price* (1889) 22 Q. B. D. 429; 58 L. J. Q. B. 215, C. A.

(*v*) "Wife" is added before this word by the Army Amendment Act (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 58), s. 1; and "dependant" is substituted for "relative."

(*x*) *Jones & Co* v. *Coventry* [1909] 2 K. B. 1029; 79 L. J. K. B. 41.

Alimony or maintenance in cases of divorce or separation.

of judicial separation, is inalienable (*y*). So also is permanent maintenance ordered under the Divorce Act, 1866, in cases of divorce (*z*), and maintenance in cases of separation under the Summary Jurisdiction (Married Women) Act, 1895 (*a*).

Sale of recommendation of another to servants of Crown.

On similar principles a contract whereby one person contracts for value to use his influence with the servants of the Crown in the interest of another is the sale of a recommendation of that other to the servants of the Crown, and is void as being against public policy (*b*).

Restraint of trade.

A covenant or promise in a contract of sale, by the terms of which either party is unreasonably restrained in the carrying on of his trade, is against public policy, and is void. Accordingly, the validity or invalidity of the contract, being one of public policy, is a question of law for the Court, not of fact for the jury (*c*). These cases arise usually where tradesmen or mechanics sell their business, including the goodwill, and where the buyer desires to guard himself against the competition in trade of the person whose business he is purchasing. The rule in its present shape, however, is of recent development. The original principle of the common law was that all restraints of trade were contrary to public policy and void. This was laid down as long ago as the Year Book of 2 Henry V. (*d*), where a bond given by one John Dyer, the condition of which was that he should not use the dyer's craft for half a year, was held void, the reason given by Hull, J., with great warmth of expression (*e*), being, that such a condition was against the common law.

Dyer's Case (1415).

Colgate v. *Bacheler* (1601).

And in *Colgate* v. *Bacheler* (*f*), which was an action of debt under an obligation, the condition being that the defendant should not "either as apprentice or servant, or for himself as master, or otherwise, use the trade of a haberdasher within the county of Kent, the cities of Canter-

(*y*) *Per* Farwell, L.J., in *Paquine* v. *Suary* [1909] 1 K. B. 688; 78 L. J. K. B. 361, C. A.

(*z*) *Watkins* v. *Watkins* [1896] P. 222; 65 L. J. P. 75.

(*a*) *Paquine* v. *Suary*, *supra*.

(*b*) *Montefiore* v. *Medway Components Co.* [1918] 2 K. B. 211; 87 L. J. K. B. 907.

(*c*) *Dowden* v. *Cook* [1904] 1 K. B. 45; 73 L. J. K. B. 38, C. A. The point was really decided at least as far back as *Chesman* v. *Nainby* (1726) 2 Str. 739.

(*d*) 2 Henry V., 5 b, pl. 26.

(*e*) Hull, J.'s, oath has passed into history: "Et pur Dieu si le plaintif fut icy, il ira al prison tanque ill ust fait fine au roy."

(*f*) Cro. El. 872.

bury or Rochester," it was resolved by the Court that "this condition is against law, to prohibit or restrain any to use a lawful trade at any time, or at any place; for as well as he may restrain him for one time or one place he may restrain him for longer times and more places, which is against the benefit of the commonwealth; for being freemen, it is free for them to exercise their trade in any place."

Ipswich Tailors' Case (1614).

A similar resolution was come to by the Court in *The Ipswich Tailors' Case* (*g*), where *Dyer's Case* was approved. The action was by the Master, Wardens, and Society of the Tailors of Ipswich against one William Sherwood for penalties, due under their constitution, for having exercised the trade of a tailor at Ipswich, without having proved that he had served as an apprentice for seven years in the said trade, and before he had been admitted by the Society to be a sufficient workman. The defendant had served seven years as an apprentice, as provided by 5 Eliz. c. 4, but had not presented himself to the Society for their admission. It was resolved "that the said restraint of the defendant for more than the said Act of 5 Eliz. was made was against law"; and "that the said ordinance cannot prohibit him from exercising his trade till he has presented himself before them, or till they allow him to be a workman." The language of the Court in dismissing the action shows broadly that the law set its face against restraint of trade (*h*).

The preceding cases show that, up to the end of the reign of Elizabeth and the middle of that of James I., all restraints of trade, whether they were general, that is, extending all over the kingdom, or partial, limited to a particular place, were thonght to be contrary to public policy. But the inconveniences arising from so rigid a rule caused it to be gradually relaxed, and it came to be recognised that all partial restraints might be good, though it was thought that general restraints must be had, because nobody imagined in those days that a general restraint could be reasonable (*i*).

The severity of the common law doctrine had already begun to be mitigated in 1620.

Broad v. *Jollyfe* (1620).

In *Broad* v. *Jollyfe* (*k*), the plaintiff, who kept a mercer's shop at Newport in the Isle of Wight, had bought of the

(*g*) 11 Co. Rep. 53 a.
(*h*) *Per* Bowen, L.J., in *Davies* v. *Davies* (1887) 36 Ch. D. 359, at 390; 57 L. J. Ch. 962, C. A.
(*i*) *Per* Lord Macnaghten in *Nordenfeldt* v. *Maxim-Nordenfeldt* [1894] A. C. 535, at 564; 63 L. J. Ch. 908.
(*k*) Cro. Jac. 596. See also *Rogers* v. *Parry* (1613) 2 Bulstr. 136.

defendant, who kept a similar shop in that town, all his old stock. An excessive price was given in consideration of the defendant's promise no longer to keep a mercer's shop at Newport. The defendant still continuing to trade, the plaintiff brought *assumpsit* in the King's Bench, and was held entitled to succeed (Houghton, J., dissenting, on the authority of *Dyer's Case*). It was resolved that "upon a valuable consideration one may restrain himself that he shall not use his trade in such a particular place; for he who gives that consideration expects the benefit of his customers; and it is usual here in London for one to let his shop and wares to his servant when he is out of his apprenticeship; as also to covenant that he shall not use that trade in such a shop, or in such a street." This decision was afterwards affirmed in error by all the Justices and the Barons of the Exchequer.

Mitchel v. *Reynolds* (1711).

The leading case on this subject is *Mitchel* v. *Reynolds* (*l*), in the Queen's Bench in 1711. The action was debt on a bond. The condition recited that defendant had assigned to the plaintiff the lease of a messuage and bakehouse in Liquorpond Street, parish of St. Andrews, for five years, and the defendant covenanted that he would not exercise the trade of a baker within that parish during the said term under penalty of £50. The defendant pleaded that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law *per quod* he did trade, *prout ei bene licuit*. Demurrer in law. *Held*, a valid bond. In an elaborate judgment, Parker, C.J., laid down, as settled rules, that voluntary restraints of trade by agreement of parties were either:—1. general, and, in such cases, void, whether by bond, covenant, or promise; whether with or without consideration, and whether of the party's own trade or not; or 2. particular, as to places or persons, and these latter were either without consideration, in which case they are void, by what sort soever of contract created; or with consideration. In this latter class they are valid when made upon a good and adequate (*m*) consideration, so as to make them proper and useful contracts.

The reasons given by the Chief Justice for the distinction which he drew between general and particular restraints are

(*l*) 1 P. Wms. 181; 1 Sm. L. C., 11th ed. 406. See also *Master Gunmakers* v. *Fell* (1742) Willes, 388; *Chesman* v. *Nainby* (1740) 2 Str. 739 and 1 Bro. P. C. 234; *Gale* v. *Reed* (1806) 8 East, 80; 9 R. R. 378; 1 C. v. *Timmins* (1831) 1 C. & J. 331; 9 L. J. Ex. 68.

(*m*) Overruled as to adequacy of consideration, *post*, 600.

important, as recent developments of the law have given great significance to his reasoning. He said: "Wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these *must* be void, *being of no benefit to either party*, and only oppressive." And with reference to the uselessness to the obligee of general restraints, the Chief Justice also says: This "holds in all cases of general restraint throughout England; *for what does it signify to a tradesman in London what another does at Newcastle?* and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other."

Horner v. *Graves* (1831).

In *Horner* v. *Graves* (*n*), the defendant contracted with the plaintiff, a surgeon-dentist, at York, for five years to learn the business of dentistry, and covenanted with him under penalty that he would not, at the expiration or sooner determination of the term, if the plaintiff were still practising, exercise the profession of a dentist within the radius of 100 miles of York. The plaintiff sued for the penalty, and after a verdict in his favour, the Court of Common Pleas arrested the judgment on the ground that the covenant was unreasonable and void. Tindal, C.J., after referring to *Mitchel* v. *Reynolds*, and saying that the restraint in question was only partial, said: "The question is whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. . . . In the case above referred to, Chief Justice Parker says: 'A restraint to carry on a trade throughout the kingdom must be void: a restraint to carry it on within a particular place is good': which are *rather instances and examples* than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to the particular case. . . . No certain, precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive."

Test of reasonableness the fair protection of the promisee.

(*n*) 7 Bing. 735; 9 L. J. C. P. 192; 33 R. R. 635.

business carried on by the company, was too wide, but upheld it with regard to the gun and ammunition business.

On appeal upon the latter point, the decision was affirmed by the House of Lords, who held that, having regard to the nature of the company's business, the wide area of its extent, and the limited number of its customers, the restraint, though general, was not wider than the plaintiff's protection required nor was it injurious to the public interests. Both Lord Herschell, L.C., and Lord Ashbourne guarded themselves from being supposed to lay it down that a general restriction, in other respects reasonable, would be valid where it was injurious to the public interest (*z*). And Lord Macnaghten expressly stated (*a*) the test of reasonableness as being adequate protection to the party in whose favour the restraint was imposed, and at the same time absence of injury to the public (*b*).

Lord Herschell, L.C., after stating his opinion that there was at one time a rule that particular restraints should be the only exception to the principle that contracts in restraint of trade are invalid, proceeded (*c*): "It appears to me that a study of Lord Macclesfield's judgment (*d*) will show that, if the conditions which prevail at the present day had existed in his time, he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reason by which he justified that distinction would have been unfounded in point of fact. . . . When once it is admitted that, whether the covenant be general or particular, the question of its validity is *alike* determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law. . . . It seems to me that if there be occupations where a sale of the goodwill would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would

(*z*) [1894] A. C. at 549, 559; 63 L. J. Ch. 908. It would ... illustrations of covenants injurious to the public interest may be supp... be afforded in the case of trusts and syndicates which, in ... Bowen, L.J., in the Court below, [1893] 1 Ch. at 668; 62 L. J. ... a pernicious monopoly in articles for English use ... a point ... some day or other become extremely important." See also *per* W... *Tirell*, *Manchester* v. *Colley* [1904] 20 Times L. R. 457, at 458.

(*a*) At 565.

(*b*) For an instance of a contract unreasonable on ... *Hanley's Case*, *post*, 598.

(*c*) At 548.

(*d*) In *Mitchel* v. *Reynolds*, *ante*, 590.

arise if the goodwill were in such cases rendered unsaleable. I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner* v. *Graves*, in considering whether the agreement was reasonable." And with reference to a restraint extending beyond the limits of the United Kingdom, Lord Herschell said (*e*): "In laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad." Lord Watson and Lord Ashbourne concurred.

Restraints beyond the United Kingdom.

Lord Macnaghten, in the same case, in an exhaustive judgment reviewing the history of the law, showed that the original view (*f*) that all restraints of trade were bad had been relaxed, though it was thought that general restraints—that is, restraints of general application extending throughout the kingdom—must be bad. "Why," he asked (*g*), "was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases." He summed up the law in these words (*h*): "I think the only true test in all cases, *whether of partial or general restraint*, is the test prepared by Tindal, C.J.: What is a reasonable restraint with reference to the particular case?"

In the same judgment Lord Macnaghten said (*i*) that "Different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business dissolution of partnership on the other," and that "there is obviously more freedom of contract between buyer and seller than between master and servant, or between an employer and a person seeking employment." As between buyer and seller, there is "a larger scope for freedom of contract, and a correspondingly large restraint in freedom of trade" (*k*). To invalidate a covenant in restraint of trade on

More freedom in restraint in seller and buyer cases.

(*e*) [1894] A. C. at 550; 63 L. J. Ch. 908.
(*f*) *See Colgate* v. *Bachelor* (1601) Cro. El. 872, *ante*, 588.
(*g*) [1894] A. C. at 564; 63 L. J. Ch. 908.
(*h*) At 571.
(*i*) [1894] A. C. at 565.
(*k*) Per Lord Shaw of Dunfermline in *Mason* v. *Provident, etc., Co.* [1913] A. C. 724, at 738, quoting Lord Macnaghten, *supra*.

a sale of goodwill would in some cases enable a vendor to derogate from his own grant, and public interest cannot be invoked to render such a bargain nugatory (*l*). Without a covenant by the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell (*m*).

The cases governed by the principles stated above are, as a rule, those where the buyer is to be protected against the seller. But cases occur in which the reverse happens. Thus it is not in unreasonable restraint of trade for a brewer, who sells a piece of land, to require a covenant from the buyer to take from the seller all the beer required by any public-house erected on the land (*n*).

Restraints limited as to space.

In the following cases a restraint limited as regards space has been held to be reasonable and legal:—By an assistant with his master, not to carry on business as a surgeon for fourteen years within ten miles of a particular place where the master resided (*o*); by an attorney selling his practice, not to practise as attorney within London and 150 miles from thence (*p*); by the seller of a horsehair manufacturing business, not to carry on trade as a horsehair manufacturer within 30 miles of Birmingham (*q*); by the servant of a milkman, not to carry on trade as a milkman for twenty-four months within five miles of Northampton Square (*r*); by the seller of a lease and goodwill, not to supply bread during the term assigned to the customers then dealing at a baker's shop of which the lease and goodwill were sold (*s*); by a butcher who sold his lease and goodwill not, at any time thereafter, by himself, or as agent or journeyman, to carry on, or be employed in, the trade of a butcher within five miles of the premises (*t*); by a common carrier selling such part of his business as extended to certain places not at any time thereafter to exercise the trade of a common carrier to and from those places (*u*); by a commercial traveller, not to travel for any other commercial firm in the same trade as that of the employers, within

(*l*) *Per curiam*, in *Herbert Morris* v. *Saxelby* [1916] 1 A. C. 688; 85 L. J. Ch. 210.
(*m*) *Per* Lord Parker in last case, at 709.
(*n*) *Catt* v. *Tourle* (1869) 4 Ch. 654; 38 L. J. Ch. 665.
(*o*) *Davis* v. *Mason* (1793) 5 T. R. 118; 2 R. R. 562.
(*p*) *Bunn* v. *Guy* (1803) 4 East, 190; 7 R. R. 560.
(*q*) *Harms* v. *Parsons* (1863) 32 L. J. Ch. 247.
(*r*) *Pemberton* v. *Sargent* (1840) 2 M. & G. 20; 10 L. J. C. P. 34, 38 R. R. 382. *Evans* v. *Ware* [1892] 3 Ch. 502; 62 L. J. Ch. 250.
(*s*) *Hannis* v. *Irvine* (1844) 7 M. & G. 969; 14 L. J. C. P. 10; 66 R. R. 82.
(*t*) *Elves* v. *Crofts* (1850) 10 C. B. 241; 19 L. J. C. P. 385; 84 R. R.
(*u*) *Archer* v. *Marsh* (1837) 6 A. & E. 959.

the district for which the traveller was employed (*x*); by a retiring partner in a coachowners' firm, not to run a coach within certain specified hours upon a particular road (*y*); and by a house-agent, on a dissolution of partnership, not for ten years to carry on a similar business within one mile of the partnership premises (*z*).

Mode of measuring the space.

Where there is a partial restraint as to space, the distance is to be measured from the place designated in a straight line on the map (*a*), in the absence of any expressions indicating the intention of the parties to adopt a different mode of measurement (*b*).

Sale of a trade secret.

Where the subject-matter of a sale is a trade secret, a restraint on the seller unlimited in regard to space may not be unreasonable (*c*). If a trader is to sell to advantage he must of necessity be able to undertake not to retain the right of destroying the value of what he sells; and such a transaction is not against public policy as creating a monopoly, for that exists already, and it also stimulates instead of curtailing the supply of commodities (*d*).

Other cases of restraints general as to space are mentioned in the footnote (*e*).

Restraints as to time.

A restraint may be general or limited in respect of time as well as space. With regard to restrictions unlimited as to time, in *Hitchcock* v. *Coker* (*f*), the Exchequer Chamber held that the restraint might be indefinite as to time, might extend to the whole lifetime of the party, when the restriction was

(*x*) *Mumford* v. *Gething* (1859) 7 C. B. (N. S.) 305; 29 L. J. C. P. 105, 121 R. R. 501.

(*y*) *Leighton* v. *Wales* (1838) 3 M. & W. 545; 7 L. J. (N. S.) Ex. 145. For other authorities see a tabular statement of reasonable and unreasonable restriction with details, and the cases, annexed to *Avery* v. *Langford* (1854) Kay, 667—668; 23 L. J. Ch. 837; 101 R. R. 800 (cases from 1711 to 1854), and a continuation in Pollock on Cont., 6th ed. 345—347.

(*z*) *Hadsley* v. *Dayer Smith* [1914] A. C. 979; 83 L. J. Ch. 770.

(*a*) *Mouflet* v. *Cole* (1870) L. R. 7 Ex. 70; (1872) 8 Ex. 32; 42 L. J. Ex. [illegible] in Ex. Ch. See *Cattle* v. *Thorpe*, W. N. [1900] 83, for the measurement of distance "within 10 miles of" a particular town.

(*b*) *Per* Parke, B., in *Atkyns* v. *Kinnier* (1850) 4 Ex. 776; 14 L. J. Ex. 132; 80 R. R. 767; *Leigh* v. *Hind* (1829) 9 B. & C. 779; 7 L. J. K. B. 313; 33 R. R. 323.

(*c*) *Leather Cloth Co.* v. *Lorsont* (1869) 9 Eq. 345; 39 L. J. Ch. 86; *Hagg* v. *Darley* (1878) 47 L. J. Ch. 567; *Bryson* v. *Whitehead* (1822) 1 Sim. & St. 74.

(*d*) *Per* Bowen, L.J., in *Maxim-Nordenfeldt* v. *Nordenfeldt* [1893] 1 Ch. 630, at 666; 62 L. J. Ch. 273.

(*e*) *Badische Anilin* v. *Schott* [1892] 3 Ch. 447; 61 L. J. Ch. 698; *Underwood* v. *Barker* [1899] 1 Ch. 300; 68 L. J. Ch. 201, C. A.; *William Robinson* v. *Heuer* [1898] 2 Ch. 451; 67 L. J. Ch. 644, C. A.

(*f*) (1837) 6 A. & E. 438; 6 L. J. (N. S.) Ex. 266, 45 R. R. 522. See also *Pemberton* v. *Vaughan* (1847) 10 Q. B. 87; 16 L. J. Q. B. 161; 74 R. R. 211; *Haynes* v. *Doman* [1899] 2 Ch. 13; 68 L. J. Ch. 419, C. A.

otherwise reasonable; and in *Mumford* v. *Gething* (*g*), the Judges considered this point as settled law, Erle, C.J., saying: "I argued most strenuously in *Hitchcock* v. *Coker* that a restriction, indefinite in point of time, avoided the contract, but the Court of Error decided against me." And in *Hayes* v. *Doman* (*h*), Lindley, L.J., says: "It is very remarkable that no case can be found in which an agreement in restraint of trade, free from objection in other respects, has been held void simply because its duration was not restricted." But the existence of a restraint unlimited in time is a factor in the case to determine whether the restraint, as a whole, is reasonable (*i*).

Restraint general as to space modified by limitation of time.

In spite of *dicta* of eminent Judges to the effect that a restraint of trade general in point of space cannot be made good by its being limited in time (*k*), it may now be considered as settled law that the reasonableness of such a restraint depends, as in all cases, upon the reasonableness of the contract as a whole, the limitation of time being merely an element in the determination of the question (*l*). But, if the area of restraint be clearly unreasonable, a covenant in restraint of trade cannot be saved *merely* because of its reasonableness as to time (*m*).

Restraint unlimited in space and time.

Monopoly.

Tipperary Creamery Society v. *Hanley* (1912).

The Tipperary Creamery Society v. *Hanley* (*n*), affords an instance of a restriction unreasonable as between the parties, and also injurious to the public, as being unlimited both in space and time. It was an action for penalties brought by a society against one of its members. By a rule of the society

(*g*) (1859) 29 L. J. C. P. 104; 7 C. B. (N. S.) 305; 121 R. R. 594. See *Catt* v. *Tourle* (1869) 4 Ch. 654; 38 L. J. Ch. 665, *per* Selwyn, L.J., at 659.

(*h*) [1899] 2 Ch. 13, at 23; 68 L. J. Ch. 419, C. A. See also *Archer* v. *Marsh*, and *Elves* v. *Crofts*, *ante*, 596.

(*i*) *Sir W. C. Leng & Co.* v. *Andrews* [1909] 1 Ch. 763; 78 L. J. Ch. 80, C. A.; *Eastes* v. *Russ* [1914] 1 Ch. 468; 83 L. J. Ch. 329, C. A., both cases of service.

(*k*) *Per* Parke, B., in *Ward* v. *Byrne* (1839) 5 M. & W. 548, at 562; 9 L. J. Ex. 14; *per* Tindal, C.J., in *Proctor* v. *Sargent* (1840) 2 M. & G. 20, at 33; 1 L. J. C. P. 34.

(*l*) *Rousillon* v. *Rousillon* (1880) 14 Ch. D. 351; 49 L. J. Ch. 339; *per* Lord Macnaghten in *Nordenfeldt* v. *Maxim-Nordenfeldt Guns Co.* [1894] A. C. 535, at 571, 572; 63 L. J. Ch. 908; *Badische Anilin* v. *Schott* [1892] 3 Ch. 447; 61 L. J. Ch. 698. For instances of such cases, see *Whittaker* v. *Howe* (1841) 3 Beav. 383; 52 R. R. 162; approved by Lord Macnaghten in *Nordenfeldt* v. *Maxim-Nordenfeldt Guns Co.*, *supra*, at 573; *Pilkington* v. *Scott* (1845) 15 M. & W. 657; 15 L. J. Ex. 329; *Jones* v. *Lees* (1856) 1 H. & N. 189; 26 L. J. Ex. 98; 108 R. R. 512.

(*m*) *Per* Sargant, J., in *S. V. Nevanas & Co.* v. *Walker* [1914] 1 Ch. 41, at 423; 83 L. J. Ch. 380.

(*n*) [1912] 2 Ir. Rep. 586, C. A.; approved in *M'Ellistrim* v. *Ballignacarrigott, etc., Society*, where the facts were not substantially different from those in *Hanley's Case*. *Coolmoyne* v. *Bulfin* [1917] 2 Ir. Rep. 107, C. A., was disapproved.

a member who owned cows was bound, under a penalty of one shilling per cow per day, to sell to the society all the milk produced by his cows and not required for his own consumption. By the same rule the society was bound, under a similar penalty, to accept all the milk. There was no provision in the rules for the withdrawal of a member except by a sale of his shares, a transfer of which required the society's consent. *Held*, by the Court of Appeal, that the contract under the rule was in unreasonable restraint of trade. It was wider than was necessary for the plaintiffs' protection, being unlimited in space, and so applying to the whole of the country; and unlimited in time, as the defendant had no power of terminating his membership, which they might endure for the whole of his life. The contract was also hurtful to the public, as it bound the defendant to confine himself, in the case of such a necessary article as milk, to one customer only, and at that customer's price, to the exclusion of all other persons.

Contracts and conditions regulating the price of goods, etc.

Cases occur in which contracts are made between the various manufacturers or sellers of a particular article, regulating the price at which the article shall be sold by each of them, or restricting the output. Such cases may fall within the general rule as to restraint of trade; and may not be enforceable by the parties *inter se* if the restraint be unreasonable, or injurious to the public as, for example, by creating a monopoly (*o*). And such a contract has been upheld by the House of Lords (*p*).

Kekewich, J., has held that it is not in restraint of trade for a manufacturer to exact from the wholesale dealer a contract that the latter will not resell below a fixed price, and will also require on a resale a similar contract from the retail trader (*q*). The law cannot be regarded as settled on this point, but it has been laid down by the Privy Council (*r*) that "there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to

(*o*) *Urmston* v. *Whiteley* [1901] 7 Times L. R. 295, affirming on different grounds the Div. Court in 63 L. T. 455; distinguished in *Care* v. *Daly* [1910] 1 Ir. R. 306. See also *per* Lords Bramwell and Hannen in *Mogul S. S. Co.* v. *McGregor* [1892] A. C. 25, at 46, 58; *Wickens* v. *Evans* (1829) 3 Y. & J. 318, 32 R. R. 806 (agreement to divide trade districts); *Collins* v. *Locke* (1879) 4 A. C. 674; 48 L. J. P. C. 68 (agreement to divide work at port); *N. W. Salt Co.* v. *Electrolytic Alkali Co.* [1914] A. C. 461; 83 L. J. K. B. 530; *Att.-Gen. of Australia* v. *Adelaide S. S. Co.* [1913] A. C. 781, P. C.

(*p*) *Taniop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* [1915] A. C. 79; 83 L. J. K. B. 1574.

(*q*) *Elliman* v. *Carrington* [1901] 2 Ch. 275; 70 L. J. Ch. 577.

(*r*) *Att.-Gen. of Australia* v. *Adelaide S. S. Co.* [1913] A. C. 781, at 796.

produce. . . a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent." But the onus is on the party alleging the illegality, and it is "no light one" where the contract is reasonable as between two parties.

Such a restriction will not, however, bind a sub-buyer, though he may have notice thereof, and although the original seller may have marked the goods with a statement that any subsequent buyer should be deemed to have purchased the goods through the agency of the original buyer, for there is no contract in fact between the seller and the subsequent buyer, and, apart from contract, conditions cannot be attached to goods (*s*), even although they may be patented goods, unless the sub-buyer buy with notice thereof (*t*). A sub-buyer may, however, be liable in tort to the original seller if he have procured a violation by the buyer of his contract with the seller (*u*).

Courts will not inquire into adequacy of consideration.

Mitchel v. *Reynolds* (1711) overruled on this point.

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

The earlier cases went upon this doctrine, and the Courts took into contemplation the *adequacy* of the consideration for the restraint (*y*). But it was held in *Archer* v. *Marsh* (*z*) that *Hitchcock* v. *Coker* (*a*) had settled the law on the principle that the parties must act on their own views as to the adequacy of the compensation (*b*). It is, therefore, sufficient for the

(*s*) *Taddy & Co.* v. *Sterious & Co.* [1904] 1 Ch. 354; 73 L. J. Ch. 191 approved in *McGruther* v. *Pitcher* [1904] 2 Ch. 306, C. A.; 73 L. J. Ch. 653; *Dr. Miles Med. Co.* v. *John D. Park & Sons, Co.* [1911] 220 U. S. 373; *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* [1915] A. C. 847; 84 L. J. K. B. 1680. See *Spencer's Case* (1583) 5 Co. 16a (3rd resolution). Some conditions seem to have run with goods by the Civil Law: Dig. 18, 1, 56.

(*t*) *National Phonograph Co. of Australia* v. *Menck* [1911] A. C. 336; 80 L. J. P. C. 105, P. C., where the law is elaborately considered, and the cases reviewed.

(*u*) *National Phonograph Co.* v. *Edison Bell, etc., Co., supra*. The doctrine of liability for procuring a breach of contract is laid down by Lord Macnaghten in *Quinn* v. *Leathem* [1901] A. C. 495, at 510; 70 L. J. P. C. 76.

(*x*) (1711) 1 P. Wms. 181; *ante*, 590.

(*y*) *Young* v. *Timmins* (1831) 1 Cr. & J. 331; 9 L. J. Ex. 4. "If *Young* v. *Timmins* turned on the question of consideration, it must be treated as overruled by *Hitchcock* v. *Coker*": *per* Jessel, M.R., in *Gravely* v. *Barnard* (1874) 18 Eq. at 521; 43 L. J. Ch. 659.

(*z*) (1837) 6 A. & E. 959, 967; 6 L. J. (N. S.) K. B. 244; 45 R. R. 655.

(*a*) *Infra*.

(*b*) *Per* Alderson, B., in *Pilkington* v. *Scott* (1846) 16 M. & W. 657, 15 L. J. Ex. 329; 71 R. R. 781; *per Cur.* in *Hitchcock* v. *Coker* (1837) 6 A. & E.

plaintiff to show that he gave any consideration, however small, and in the case of a bond, the consideration, if not actually expressed, may be inferred from the terms of the instrument (*c*).

Restraint larger than necessary for protection of buyer renders contract void as to excess, if severable.

Several of the cases already considered (*d*) have shown that, if a contract be capable of severance, it will be valid as regards any restraint which is necessary to the reasonable protection of the promisee or covenantee, but void as regards the excess. But an excess is not severable where it forms part of the main purport and substance of the clause; for a Court will not be ingenious to carve out of a void covenant the maximum of what the covenantee might validly have required (*e*). Again, a contract is not capable of severance merely because a restriction unlimited in regard to space, time, or subject-matter, is susceptible of a merely mental severance, as, for instance, a period of twenty years, which is mathematically divisible; or the word "business," which is mentally severable into different classes of business; for the parties have not made the severance themselves in terms, and to divide the contract in this way is to make a new contract for them (*f*).

Contract valid if good when made.

Where the contract is reasonable at the time when it is made, subsequent change of circumstances will not affect its validity (*g*).

Covenant not to carry on business under a particular name valid.

On the sale of a business, a covenant, though unlimited with regard to space, by the seller not to carry on business under a particular name or style is not in restraint of trade, as it does not restrain the seller from carrying on business, but merely restrains him from using a particular name (*h*).

Restrictions on seller implied by sale of a goodwill

In accordance with the principle, whereby covenants in reasonable restraint of trade are supported, is the rule that the seller of the goodwill of a business is under an implied obligation not to trade under the old name, or to canvass the

Ass; 6 L. J. Ex. 266; 45 R. R. 522. See also *per Cur.* in *Sainter* v. *Ferguson* 1849) 7 C. B. 716; 18 L. J. C. P. 217; 78 R. R. 804.

(c) *Gravely* v. *Barnard* (1874) 18 Eq. 518; 43 L. J. Ch. 659; *Middleton* v. Brown (1878) 47 L. J. Ch. 411, C. A.; 38 L. T. 331.

(d) See *Mahan* v. *May*, *ante*, 592; and *Nordenfeldt* v. *Maxim-Nordenfeldt* Guns Co., *ante*, 593; *Nicholls* v. *Stretton* (1847) 10 Q. B. 346; 74 R. R. 320. 1745; 82 L. J. K. B. 1153.

(e) *Per* Lord Moulton in *Mason* v. *Provident Clothing Co.* [1913] A. C. 724,

(f) *Baker* v. *Hedgecock* (1888) 39 Ch. D. 520; 57 L. J. Ch. 889. See also Perks v. *Saulfield* (1892) 2 Ch. 149, C. A.; 61 L. J. Ch. 409; *Dubowski* v. *Goldstein* 1896) 2 Q. B. 478, C. A.; 65 L. J. Q. B. 807.

(g) *Ellis* v. *Crofts* (1850) 10 C. B. 241; 19 L. J. C. P. 385; *Jones* v. *Lees* (1856) 1 H. & N. 189; 26 L. J. Ex. 9; 108 R. R. 512; *per* Lord Macnaghten in *Nordenfeldt* v. *Maxim-Nordenfeldt Guns Co.* [1894] A. C. 535, at 574; 63 L. J. Ch. 498.

(h) *Vernon* v. *Hallam* (1886) 31 Ch. D. 748; 56 L. J. Ch. 115.

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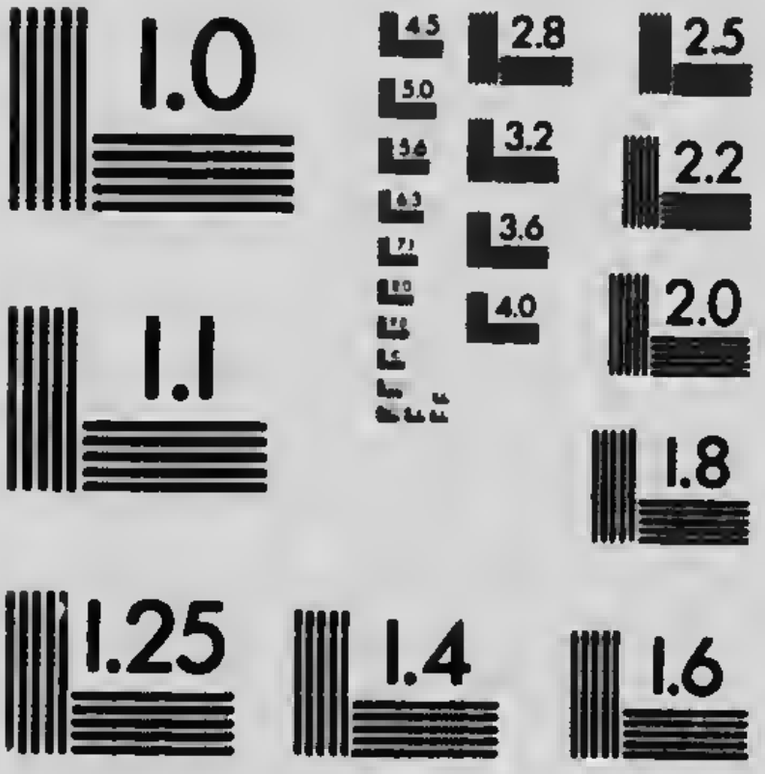

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customers of the business he has sold, though he does not, by reason only of the sale, come under an implied restriction not to carry on a competing business (*i*). And the rule against solicitation extends to existing customers of the old firm, who may have voluntarily become customers also of the seller (*k*). But the sale of a bankrupt's business by his trustee does not prevent the bankrupt from setting up a rival business, and soliciting old customers, for the obligation to the contrary is personal to the seller himself, and is not an incident of property (*l*).

Sales of lawsuits.

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

Champerty and maintenance.

Champerty (*campi partitio*) is a contract for the purchase of another's suit or right of action: or a bargain by which a person agrees to carry on a suit at his own expense for the recovery of another's property on condition of dividing the proceeds. Its relation to maintenance is that of a species to the genus. Both are offences at common law (*m*), and cannot, therefore, form the subject of a valid contract. *Maintenance*, according to Lord Coke (*n*), "is derived of the verb *manutenere*, and signifieth in law a taking in hand, bearing up of

(*i*) *Trego* v. *Hunt* [1896] A. C. 7; 65 L. J. Ch. 1; *Gillingham* v. *Beddow* [1900] 2 Ch. 242; 69 L. J. Ch. 527; *Re Dumbarton Steamboat Co.* [1896] 34 Sc. L. R. 771. See also *Seddon* v. *Senate* (1810) 13 East, 63 (sale of proprietary medicine: implied covenant not to compete).

(*k*) *Curl Brothers* v. *Webster* [1904] 1 Ch. 685; 73 L. J. Ch. 540.

(*l*) *Walker* v. *Mottram* (1881) 19 Ch. D. 355, C. A.; appd. by Lord Macnaghten in *Trego* v. *Hunt*, *supra*; *cf. Clarkson* v. *Edge* (1863) 33 L. J. Ch. 43 (express agreement to contrary).

(*m*) The various statutes against champerty are declaratory of the common law: *Pechell* v. *Watson* (1841) 8 M. & W. 691. These are 3 Edw. 1, c. 25, relating to officers of the king; applied to a solicitor in *Danzey* v. *Metr. Bank* [1912] 28 T. L. R. 327; extended to all persons by 28 Edw. 1, c. 11. Champerty is defined in 33 Edw. 1, st. 3. Other statutes are 3 Edw. 1, c. 28, against maintenance by clerks to Justices or Sheriffs; 13 Edw. 1, c. 49, dealing with champerty in lawsuits; 1 Edw. 3, c. 14, generally against maintenance, as also 1 Rich. 2, c. 4. The 7 Rich. 2, c. 15, confirms previous statutes; and 32 Hen. 8, c. 9, deals with "pretensed titles" to land.

(*n*) Co. Lit. 386 b; In 4 Black. Com. 135, it is defined as "an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it." A fuller definition is given in Termes de la Ley, quoted in *Bradlaugh* v. *Newdigate* (1883) 11 Q. B. D. at 5—6; 52 L. J. Q. B. 454: "Maintenance is when any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do; then the party grieved shall have a writ against him called a writ of maintenance." See also *British Cash, etc., Conveyors* v. *Lamson Store Service Co.* [1908] 1 K. B. 1006; 77 L. J. K. B. 649, C. A., where Buckley, L.J., quotes other definitions; and *Neville* v. *London Express Newspaper* [1919] A. C. 368; 88 L. J. K. B. 282, where the history of maintenance is considered.

upholding of quarrels and sides, to the disturbance or hindrance of common right."

The relation between champerty and maintenance is shown by Lord Coke in the same passage, where he says that one division of maintenance is "to maintaine to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit, and this is called cambipartia, champertie." And a second division is "when one maintaineth the one side without having any part of the thing in plea or suit." From this definition it appears that, though there may be maintenance without champerty, yet the legal offence of champerty cannot exist without maintenance (*o*).

Stanley v. Jones (1831).

In *Stanley* v. *Jones* (*p*), an agreement by a man, who had evidence in his possession respecting a matter in dispute between third persons, and who professed to be able to procure more, to purchase from one of the contending parties, at the price of imparting this evidence, and also of *procuring such further evidence* as might be requisite to substantiate the claims of the defendant, a share of the money to be recovered by it, was held to be champertous; and champerty was defined to be the unlawful *maintenance* of a suit, in consideration of some bargain to have part of the thing in dispute or some profit out of it. "The object of the law was not so much to prevent the purchase or assignment of a matter then in litigation, as the purchase or assignment of a matter in litigation for the purpose of maintaining the action." And the Court held that, in this restricted sense, the offence of champerty remains the same as formerly.

Sprye v. Porter (1856).

In accordance with these principles, the Court of Queen's Bench, in *Sprye* v. *Porter* (*q*), held that a declaration merely setting up a contract to supply information then in the plaintiff's possession showing conclusively the defendant's title to property, and stipulating for a share of the property if recovered, but not providing for any litigation, or binding the plaintiff to assist in any way in recovering the property, did not show a contract savouring of champerty or maintenance. But on demurrer to a plea which alleged that in fact the plaintiff agreed to supply *such evidence as should enable* the defendant *successfully* to recover the property, in

(*o*) *Per* Kay, J., in *Jones* v. *Kerr* (1889) 40 Ch. D. 456.

(*p*) 7 Bing. 369; 9 L. J. C. P. 51; 33 R. R. 513.

(*q*) 7 E. & B. 58; 26 L. J. Q. B. 64; 110 R. R. 493. See also *Rees v. De Bernardy* [1896] 2 Ch. 437; 65 L. J. Ch. 656; *Wedgerfield* v. *De Bernardy* [1908] 25 Times L. R. 21, C. A.

consideration of a share in the property, the Court held, on the authority of *Stanley* v. *Jones*, that the plaintiff had bargained for litigation, and undertook to maintain the defendant, in consideration of a share of the property recovered.

Relaxation of the rule.

The law has from the earliest times countenanced some relaxation of the utmost strictness of the rule, and some particular cases have been specifically allowed as constituting excuses for interference in the suit of another (*r*). Thus motives of charity are sufficient (*s*), or the existence of a common interest (*t*), *i.e.*, an actual valuable interest in the result of the suit, present, contingent, or future; or consanguinity or affinity to the suitor; or an interest arising from the connection of the parties, as of master and servant (*u*). And there may possibly be other exceptions.

The Judicial Committee of the Privy Council have given it as their opinion (*x*) that a fair agreement to supply funds for a suit in consideration of a share in the property recovered, ought not to be regarded as against public policy, as such an agreement might be in furtherance of right and justice, as where a suitor with a just title and no other means than the property in dispute. But that it would be otherwise if the agreement were unconscionable or extortionate or not in *bona fide* assistance of a just claim, but for improper objects, as gambling or oppression, or the encouragement of litigation.

Hutley v. *Hutley* (1872).

In *Hutley* v. *Hutley* (*y*), it was held that mere relationship between the parties, or even some collateral interest in the subject-matter of the litigation, could not render valid an agreement otherwise *champertous*, for dividing the proceeds of an action, though it might make valid an agreement by way of maintenance only.

An assignment of property is not invalid on the ground of champerty, even although the property is not recoverable

(*r*) *Per* Lord Esher, M.R., in *Alabaster* v. *Harness* [1895] 1 Q. B. 339, C. A.; 64 L. J. Q. B. 76.

(*s*) *Harris* v. *Brisco* (1886) 17 Q. B. D. 504, C. A.; 55 L. J. Q. B. 423; *Holden* v. *Thompson* [1907] 2 K. B. 489 (religious motives).

(*t*) *Alabaster* v. *Harness*, *supra*; *British, etc., Conveyors* v. *Lamson Store* [1908] 1 K. B. 1006, C. A.; 77 L. J. K. B. 649; *Oram* v. *Hutt* [1914] 1 Ch. 98, C. A.; 83 L. J. Ch. 161.

(*u*) *Per* Lord Coleridge, C.J., in *Bradlaugh* v. *Newdigate* (1883) 11 Q. B. D. 1 at 11; 52 L. J. Q. B. 454, quoted and appd. by Lord Esher, M.R. in *Alabaster* v. *Harness*, *supra*.

(*x*) In *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876) 2 A. C. 186.

(*y*) L. R. 8 Q. B. 112; 42 L. J. Q. B. 52.

without litigation (*z*). The distinction is between an assignment of property with an incidental remedy for its recovery, and an assignment of a base right to bring an action unconnected with the transfer of the property (*a*). The latter is champertous, the former is not. But, on general grounds of public policy, a solicitor cannot purchase, during the conduct of the suit, the subject-matter thereof (*b*). But his merely (*c*) taking a transfer of an interest in litigation as a security, at any rate for an existing debt, is not champertous, and is a valid contract (*d*).

Transfer of an interest in litigation.

Taking an interest in litigation as a security not champertous.

It is not necessary, in order that an agreement should be held to be void, that it should amount to the *criminal* offence of champerty or maintenance (*e*).

The doctrine of maintenance is confined to civil actions. Accordingly the maintenance of criminal proceeding is not illegal (*f*).

For further authority on the subject of champerty and maintenance, the cases in the footnote may be referred to (*g*).

(*z*) *Per Cur.* in *Dawson* v. *Great N. and City Ry.* [1905] 1 K. B. 260, at 271, C. A.; 74 L. J. K. B. 190; *Dickinson* v. *Burrell* (1866) L. R. 1 Eq. 337; *Fitzroy* v. *Cave* [1905] 2 K. B. 364; 74 L. J. K. B. 829 (assignment of debts good); *Glegg* v. *Bromley* [1912] 3 K. B. 474, C. A.; 81 L. J. K. B. 1081; *Williams* v. *Prothero* (1829) 5 Bing. 309, Ex. Ch.; 30 R. R. 608.

(*a*) *Per* Parker, J., in *Glegg* v. *Bromley*, *supra*: *Prosser* v. *Edmonds* (1835) 1 Y. & C. Ex. 481; 41 R. R. 322; *De Hoghton* v. *Money* (1866) L. R. 2 Ch. 164.

(*b*) *Davis* v. *Freeth* (1890) 24 Q. B. D. 519, C. A.; 59 L. J. Q. B. 318; follg. (1866) L. R. 2 Ch. 164; *Simpson* v. *Lamb* (1857) 7 E. & B. 84; 26 L. J. Q. B. 121; 110 R. R. 507.

(*c*) *Cf. James* v. *Kerr* (1888) 40 Ch. D. 449, where the mortgage was champertous.

(*d*) *Anderson* v. *Radcliffe* (1858) E. B. & E. 806; in error (1860), *ib.* 819; 28 L. J. Q. B. 82; 29 L. J. Q. B. 128; 113 R. R. 899.

(*e*) *Per* Romer, J., in *Rees* v. *De Bernardy* [1896] 2 Ch. 437, at 446; 65 L. J. Ch. 656; quoting Knight-Bruce, L.J., in *Reynell* v. *Sprye* (1852) 1 D. M. & G. at 677; 21 L. J. Ch. 633; 91 R. R. 228.

(*f*) *Grant* v. *Thompson* [1895] 72 L. T. 264.

(*g*) *Findon* v. *Parker* (1843) 11 M. & W. 675; 12 L. J. Ex. 444; *Earle* v. *Hopwood* (1861) 9 C. B. (N. S.) 566; 30 L. J. C. P. 217; 127 R. R. 783 (solicitor's stipulation for extra fees if successful); *Pince* v. *Beattie* (1863) 32 L. J. Ch. 734; 139 R. R. 376 (same); *Grell* v. *Levy* (1864) 16 C. B. (N. S.) 73; 139 R. R. 414 (champertous agreement abroad performable in England); *Ball* v. *Warwick* (1881) 50 L. J. Q. B. 382 (loan for purposes of suit repayable only out of damages); *Bradlaugh* v. *Newdigate* (1883) 11 Q. B. D. 1; 52 L. J. Q. B. 454 (law of maintenance considered); *Guy* v. *Churchill* (1888) 40 Ch. D. 481; 58 L. J. Ch. 345 (common interest: no m. no ch.); *Bulli Coal Mining Co.* v. *Osborne* [1899] A. C. 351, P. C.; 68 L. J. P. C. 49 (common interest, lessor and lessee); *Re a Solicitor* [1912] 1 K. B. 302; 81 L. J. K. B. 245 (solicitor financing debt-collecting agency); *Re a Solicitor* [1913] 29 Times L. R. 354 (same); *Danzey* v. *Metrop. Bank* [1912] 28 Times L. R. 327 (solicitor to be paid only out of damages).

SECTION II.—AGREEMENTS ILLEGAL, VOID, OR UNENFORCEABLE BY STATUTE.

Prohibition of contract express or implied.

Implied whenever penalty is imposed.

When contracts are prohibited by statute, the prohibition is sometimes express, and at other times implied. Wherever the law imposes a penalty for making a contract, it impliedly forbids parties from making such a contract, and when a contract is prohibited, whether expressly or by implication, it is illegal, and cannot be enforced (*h*). Of this there is no doubt (*i*).

Distinction between statutes passed for revenue purposes and others.

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

Johnson v. *Hudson* (1809).

The leading case on this point is *Johnson* v. *Hudson* (*k*), decided by the King's Bench in 1809. Different statutes had provided: first, that all persons dealing in tobacco should, before dealing therein, take out a licence under penalty of £50; and secondly, that no tobacco, except Spanish or Portuguese, should be imported, either wholly or in part manufactured, under penalty of forfeiture of the tobacco, the package, and the ship. In this state of the law, the plaintiffs, who had never before dealt in that article, received a consignment of tobacco manufactured into cigars, which they *duly entered* at the Custom House, and then sold to defendant without taking out a licence. The Court *held* that the action for the price was maintainable, observing "that here there was no fraud upon the revenue, on which ground the smuggling cases (*l*) had been decided; nor any clause making the contract of sale *illegal*, but, at most, it was the breach of a mere *revenue* regulation which was protected by a specific penalty; and they also doubted whether this plaintiff could

(*h*) *Per* Holt, C.J., in *Bartlett* v. *Vinor* (1692) Carth. 252.

(*i*) *Bensley* v. *Bignold* (1822) 5 B. & Ald. 335; 24 R. R. 401; *Forster* v. *Taylor* (1834) 5 B. & Ad. 887; 3 L. J. K. B. 137; 39 R. R. 698; *Cope* v. *Rowlands* (1836) 2 M. & W. 149; 6 L. J. Ex. 63; 46 R. R. 532; *Chambers* v. *Manchester and Milford Ry. Co.* (1864) 5 B. & S. 588; 32 L. J. Q. B. 268; 136 R. R. 684; *In re Cork and Youghall Ry Co.* (1869) 4 Ch. 748; 39 L. J. Ch. 277.

(*k*) 11 East, 180; 10 R. R. 465.

(*l*) *Ante*, 578—580.

be said to be a dealer in tobacco within the meaning of the Act."

Brown v. Duncan (1829).

Next, in 1829, *Brown* v. *Duncan* (*m*) came before the same Court. The statutes provided: First, that no distiller should, under penalty, deal in the retail sale of spirits within two miles of the distillery; and secondly, that in taking out a licence for distilling, the names of the persons taking out the licence should be inserted. One of five partners in a distillery was engaged in the retail trade within two miles of the distillery, and his name was, it seems, intentionally omitted in taking out the distillers' licence. The partners then appointed an agent to sell their whiskey in London, and the defendant guaranteed the fidelity of the agent. In the action by the partners on the guaranty, the illegality of the sale was pleaded. The Court held that the plaintiffs could recover on the authority of *Johnson* v. *Hudson*, saying: "There has been no fraud on the part of the plaintiffs on the revenue, although they have not complied with the regulations . . . for the benefit of the revenue. . . . These cases are very different from those where the provisions of Acts of Parliament have had for their object *the protection of the public*, such as the Acts against stock-jobbing and the Acts against usury. It is different, also, from the case where a sale of bricks required by Act of Parliament to be of a certain size was held to be void because they were under that size (*n*). There the Act of Parliament operated as a protection to the public as well as to the revenue, securing to them bricks of the particular dimensions. Here the clauses of the Act of Parliament had not for their object to protect the public, but *the revenue only*."

Cope v. Rowlands (1836).

In 1836, *Cope* v. *Rowlands* (*o*) was decided in the Exchequer, and it was held that a City of London broker could not maintain an action for his commission in buying and selling stock, unless duly licensed according to the 6 Anne, c. 16, s. 4, which provides that if any person should act as a broker in

(*m*) 10 B. & C. 93, at 98; 8 L. J. K. B. 60. See also *Wetherell* v. *Jones* (1832) 3 B. & Ad. 221; 1 L. J. K. B. 139.

(*n*) *Law* v. *Hodson* (1809) 11 East, 300; 10 R. R. 513; *post*, 611.

(*o*) 2 M. & W. 149; 6 L. J. (N. S.) Ex. 63; 46 R. R. 532; and see *Ferguson* v. *Norman* (1838) 5 Bing. N. C. 76; 8 L. J. (N. S.) C. P. 3; 50 R. R. 613; and *Taylor* v. *Crowland Gas Co.* (1854) 10 Ex. 293; 10 L. J. Ex. 254; 102 R. R. 586; appg. *Cope* v. *Rowlands*; *Barton* v. *Piggott* (1874) L. R. 10 Q. B. 86; 44 L. J. M. C. 5; *Melliss* v. *Shirley Local Board* (1885) 16 Q. B. D. 446; 55 L. J. Q. B. 143, C. A.; *Learoyd* v. *Bracken* [1894] 1 Q. B. 114; 63 L. J. Q. B. 96, C. A. (broker omitting stamped contract). See also *Whiteman* v. *Sadler* [1910] A. C. 514; 79 L. J. K. B. 1050, where illegality by statute is discussed.

making sales, etc., without such licence, be shall forfeit £2[illegible] "for every such offence." The Court took the case under consideration, and the decision was delivered by Baron Parke, who said: "It may be safely laid down, notwithstanding some *dicta* apparently to the contrary, that if *the contract* is rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute *means to prohibit the contract*." Notwithstanding this statement, the learned Baron went on to say that the question before the Court was whether the statute under discussion "is meant *merely* to secure a revenue to the city, . . . or whether *one* of its objects be the protection of the public, and the prevention of *improper* persons acting as brokers. On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; on the latter it is." The Court then decided that the benefit and security of the public formed *one* object of the statute, and that the plaintiff was not entitled to recover.

Smith v. *Mawhood* (1845).

Again, in 1845, the same point was discussed in the same Court in *Smith* v. *Mawhood* (*p*), where the defence in an action for goods sold and delivered was based on the allegation that the goods were tobacco, and that the plaintiff had not complied with the law requiring him to have his name painted on his house of business, and to take out a licence, in the manner specified in the law, under penalty of £200. *Held*, that the plaintiff could maintain his action. Parke, B., on the question of the licence, said (*q*): "I think the object of the Legislature was not to prohibit a contract of sale by dealers who have not taken out a licence pursuant to the Act of Parliament. If it was, they certainly could not recover, although the prohibition were merely for the purpose of revenue. But, looking at the Act of Parliament, I think its object was not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purpose of the revenue." And on the other ground he said: "The Legislature did not intend to vitiate the contract by reason of a non-compliance with the requisites of the 26th section, but only to render the party carrying on trade upon such premises liable to a penalty. I quite agree that if it be shown that the Legislature intended to prohibit any contract, then *whether this were for purpose of revenue or not*, the contract is illegal

(*p*) 14 M. & W. 452; 15 L. J. Ex. 149; 69 R. R. 724.
(*q*) At 463.

and void, and no right of action can arise out of it." The other Judges concurred, and on the first point, Alderson, B., pointed out, as a controlling circumstance in construing the Statute, that the penalty was for "carrying on the trade in a house in which these requisites are not complied with; and there is no addition to his criminality if he makes fifty contracts for the *sale* of tobacco in such a house."

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

Cundell v. *Dawson* (1847).

In the Court of Common Pleas, in 1847, all the foregoing cases were cited and considered in *Cundell* v. *Dawson* (*r*). After advisement, for the purpose of considering all the cases and *dicta*, the Chief Justice delivered the opinion of the Court. The action was for the price of coals, and the defence was that the plaintiff had violated a local statute (*s*), by failing to deliver to the defendant a ticket as required by that statute, stating the quantity and description of the coals delivered. The penalty, in case of default, was £20 "for every such offence." The Chief Justice said: "The statutes which have given rise to the question of the right to recover the price of goods by sellers who have not complied with the terms of such statutes, are of two classes the one class of statutes having for their object the raising and protection of the revenue; the other class of statutes being directed either to the protection of buyers and consumers, or to some object of public policy. The present case arises upon a statute included in the latter class." The Court then held, on the authority of *Little* v. *Poole* (*t*), that the Coal Acts were intended to prevent fraud in the delivery of coals; to protect the buyer; and judgment was therefore given for the defendant.

In 1848, the same Court adverted to the same distinction

(*r*) 4 C. B. 376; 17 L. J. C. P. 311; 72 R. R. 621.

(*s*) The City Coal Act, 1 & 2 Vict. cap. ci. (local and personal). This Act does not apply where coals are unloaded directly from the *vessel* in which they were shipped on to the wharf of the purchaser: *Blandford* v. *Morrison* (1850) 15 Q. B. 724; 19 L. J. Q. B. 533. The sale of coal is now regulated by the Weights and Measures Act, 1889.

(*t*) (1829) 9 B. & C. 192; 7 L. J. K. B. 158; 32 R. R. 630.

Ritchie v. *Smith* (1848).

in *Ritchie* v. *Smith* (*u*). The case was a very clear one. It was a bargain between lessor and lessee, by which the lessee was to be enabled to carry on a retail trade in spirits on part of the lessor's premises, under the lessor's licence, so as to make one licence cover both trades. The statute (*x*) inflicted a penalty, when liquor was sold to be drunk on the premises without such licence, of not more than £20 nor less than £5 "for every such offence." Wilde, C.J., said that "it is impossible to look at this agreement without seeing that the parties contemplated doing an illegal thing, in the infraction of a law enacted not simply for revenue purposes, but for the safety and protection of the public morals." All the Judges (Coltman, Maule, and Williams, put the judgment on the same ground (*y*).

Melliss v. *Shirley Local Board* (1885).

Lord Esher, M.R., thus summed up the law in *Melliss* v. *Shirley Local Board* (*z*): "I think that this rule of interpretation has been laid down, that, although a statute contains no express words making void a contract which it prohibits, yet when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law."

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

The propositions (*a*) that seem fairly deducible from the authorities are the following:

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

2. When the question is *whether* a contract has been prohibited by statute, it *is* material to ascertain whether the

(*u*) 6 C. B. 462; 18 L. J. C. P. 9; 77 R. R. 369.

(*x*) 9 Geo. 4, c. 61, s. 18. This has been repealed by the Licensing (Consolidation) Act, 1910 (10 Edw. 7, c. 24), and the penalties now in force for the sale of intoxicating liquors without licence are those imposed by that Act, ss. 63 *et seqq.*

(*y*) It was not a fraud on the revenue, nor illegal, under 9 Geo. 4, c. 61, to sell to an unlicensed person beer which was to be retailed by a licensed person at a public-house: *Brooker* v. *Wood* (1834) 5 B. & Ad. 1052; 3 L. J. (N. S.) K. B. 96.

(*z*) 16 Q. B. D. 446; 55 L. J. Q. B. 143. C. A.

(*a*) They are stated in accordance with the first three propositions by Buckley, J., in *Victorian Daylesford Syndicate* v. *Watt* [1905] 2 Ch. 621; 74 L. J. Ch. 673.

Legislature had in view *solely* the security and collection of the revenue, or in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts; in the latter, that it was (*b*).

3. In seeking for the meaning of the law-giver, it is material also to inquire whether the penalty is imposed once for all, or whether it is recurring. In the latter case, the statute is intended to prevent the dealing, *to prohibit the contract*, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced.

4. It is also material to consider, together with the other facts, whether the amount of the penalty is in reasonable proportion to the possible value of any contract, so as to be a proper deterrent to any person wishing to make the contract. If it be much less than such value, the inference may be that the Legislature did not regard the penalty as merely the price for the contract, but intended to prohibit it altogether (*c*).

Acts relative to printers.

Bensley v. *Bignold* (1822).

It is quite in accordance with these principles that, in *Bensley* v. *Bignold* (*d*), it was held by the Common Pleas that a printer who had omitted to affix his name to a book, in violation of a statute (*e*), which punished such omission by a penalty of £20 *for every copy published*, could not recover for work and labour done, and materials furnished. The statute was declared to have been enacted for public purposes.

Acts relative to sales of butter;

So, also, in *Forster* v. *Taylor* (*f*), a farmer was held not entitled to recover the price of butter sold, because he had packed it in firkins, not marked, in violation of statutory prohibition (*g*); and in *Law* v. *Hodson* (*h*), a seller failed in

(*b*) *Per* McCardie, J., in *Brightman & Co.* v. *Tate* [1919] 1 K. B. 463; 88 L. J. K. B. 921.

(*c*) *Per* Esher, M.R., in *Mellis* v. *Shirley Local Board* (1885) 16 Q. B. D. 446, at 452; 55 L. J. Q. B. 143, C. A.

(*d*) 5 B. & Ald. 335; 24 R. R. 401.

(*e*) 39 Geo. 3, c. 79, s. 27, rep. by 32 & 33 Vict. c. 24, which re-enacts 2 & 3 Vict. c. 12, s. 2, to the same effect. As to placards, etc., relating to parliamentary or municipal elections, see the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 18; and the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 14.

(*f*) (1834) 5 B. & Ad. 887; 3 L. J. (N. S.) K. B. 137; 39 R. R. 698.

(*g*) 36 Geo. 3, c. 86, s. 3, rep. by 7 & 8 Vict. c. 48. See now the Margarine Act, 1887 (50 & 51 Vict. c. 29), ss. 4 and 6, and the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), ss. 1, 5, 6, 11; and the Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), ss. 5, 8.

(*h*) (1809) 11 East, 300; 10 R. R. 513. See also *Stevens* v. *Gourley* (1859) 7 C. B. (N. S.) 99; 29 L. J. C. P. 1; 121 R. R. 397.

or of bricks:

his action because his bricks had been sold of smaller dimensions than permitted by statute (*i*). In both statutes (now repealed) a penalty was imposed *for every offence*.

of provisions to parliamentary candidates;

So also an innkeeper has been debarred from recovering from a parliamentary candidate the price of provisions illegally supplied to voters after the teste of the writ (*j*). And the same principle would apply under Acts regulating

or of coal

the sale of other commodities, as *e.g.*, coal (*k*), or bread (*l*).

East India Trade Acts.

In *Lightfoot* v. *Tenant* (*m*), the sale was of lawful goods, but they were sold knowingly for the purpose of being shipped on board of foreign ships trading to the East Indies, and by an Act now repealed (*n*), all contracts for loading or supplying such ships with cargo were declared void. The plaintiff was held not entitled to recover.

Weights and Measures Acts.

There have been numerous decisions, also, under the various statutes which have been passed, modified, and repealed from time to time, for ascertaining and establishing uniformity of weights and measures, all of which are quite in accordance with those above reviewed (*o*).

Game laws.

Under a statute, now repealed, which absolutely prohibited the buying of pheasants, it was held in *Helps* v. *Glenister* (*p*), that a buyer could not maintain over against the seller for the birds which he had bought, and which were undelivered.

The Game Act, 1831 (*q*), prohibits the purchase or sale, whether by a licensed or unlicensed person, of birds of game

(*i*) 17 G. 3, c. 42, rep. by 19 & 20 Vict. c. 64.

(*j*) *Ribbans* v. *Crickett* (1798) 1 B. & P. 264. See now 46 & 47 Vict. c. 51.

(*k*) The Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), prescribes a penalty for every sale otherwise than by weight except where, by written consent of buyer, coal is sold by boat-load from colliery or by wagons or tubs delivered into the buyer's works: s. 20; and provides, under a penalty, for the delivery of a ticket on sales exceeding two cwt.: s. 21; and against fraud as to quantity where the amount is deficient: s. 24.

(*l*) See the Bread Act, 1836 (6 & 7 Will. 4), ss. 4, 6, 7, with regard to the sale of bread outside the city of London, and ten miles from the Royal Exchange; and the 3 Geo. 4, c. cvi., with regard to sales within those limits.

(*m*) (1796) 1 B. & P. 551; 4 R. R. 735; *ante*, 573.

(*n*) 7 Geo. 1, c. 21, s. 2, repealed by S. L. R. Act, 1867 (30 & 31 Vict. c. 59).

(*o*) See *Tyson* v. *Thomas* (1825) M'Cl. & Y. 119; *Watts* v. *Friend* (1838) 10 B. & C. 446; 8 L. J. K. B. 181; 34 R. R. 477; *Owens* v. *Denton* (1838) 1 C. M. & R. 711; 4 L. J. (N. S.) Ex. 68; 40 R. R. 692; *Hughes* v. *Humphrey* (1854) 23 L. J. Q. B. 356; 3 E. & B. 954; *Jones* v. *Giles* (1854) 23 L. J. Ex. 292; 10 Ex. 119; and in Ex. Ch. (1855) 24 L. J. Ex. 259; 11 Ex. 303. The law of weights and measures is now consolidated by the Weights and Measures Acts, 1878 (41 & 42 Vict. c. 49), 1889 (52 & 53 Vict. c. 21), and 1904 (4 Edw. 7, c. 28). See also the Weights and Measures (Metric System) Act, 1897 (60 & 61 Vict. c. 46).

(*p*) (1828) 8 B. & C. 553; 7 L. J. K. B. 117, under 58 Geo. 3, c. 75.

(*q*) 1 & 2 Will. 4, c. 32, s. 4. It originally applied to England only, but was extended (so far as relates, *inter alia*, to penalties and the selling of game by or to dealers) to the U. K. by the 23 & 24 Vict. c. 90, s. 13.

after the expiration of ten days from the respective days in each year on which it becomes unlawful under the Act to kill or take such birds (*r*). But by the Revenue Act, 1911 (*s*), this provision is not to apply where the game is live game, and the buyer or seller is keeping or intending to keep the game solely for breeding purposes, or for sale alive, and either is licensed at the time to deal in game, or is the holder of a certificate or licence to kill game in force at the time. Save as modified by the above Act, the Game Act includes live game (*t*). The 17th section authorises every person who shall have obtained a game certificate, to sell game to a licensed dealer, with a proviso that no gamekeeper shall sell any game, except for account and on the written author[illegible] of his master, whenever his game certificate has cost less than (*u*) £3 13s. 6d. The 25th section prohibits, under penalty of not more than £2 for each head of game, the offence of selling game (*x*) by an unlicensed person, who has not obtained a game certificate, or of selling, even when possessed of a game certificate, to any other person than a licensed dealer; but by the 26th section, the prohibition does not extend to an innkeeper or tavern-keeper who sells to his guests, for consumption in his house, game bought from a licensed dealer. The 27th section imposes penalties on the buyer of game, not being a licensed dealer, who buys from one not a licensed dealer, unless the purchase be made *bona fide* at a shop or house where a board is affixed to the front, purporting to be the board of a licensed dealer in game.

The Ground Game Act, 1880 (*y*), confers upon the occupier of land the same power to sell ground game killed by him, or by persons authorised by him, as if he had a licence to kill game.

(*r*) The sale in the close season of game birds killed abroad and imported is not within this clause, as the killing of such birds was not unlawful within the Act: *Guyer* v. *Reg.* (1889) 23 Q. B. D. 100; 58 L. J. M. C. 81. The provisions as to licences to deal in game are now extended to such foreign birds by the Customs and Inland Rev. Act, 1893 (56 Vict. c. 7), s. 2.

(*s*) 1 Geo. 5, c. 2, s. 10; overriding (so far as it applies, at least, to s. 4), *Cook* v. *Trevener* [1911] 1 K. B. 9; 80 L. J. K. B. 118; a decision that s. 27 of the Act *infra*, like s. 4, applies to live game, whether tame or wild.

(*t*) *Loome* v. *Bayly* (1860) 3 E. & E. 444; 30 L. J. M. C. 31, under s. 4; 122 R. R. 784; but see also *Porritt* v. *Baker* (1855) 10 Ex. 759; 102 R. R. 815; which, however, turned upon a point of pleading. *Loome* v. *Bayly* was followed in *Cook* v. *Trevener* [1911] 1 K. B. 9; 80 L. J. K. B. 118, *supra*, a decision under s. 27 *infra*.

(*u*) Now £3: Game Licences Act (23 & 24 Vict. c. 90), s. 13.

(*x*) This provision does not apply to a constable directed by Justices to sell poached game which has been seized: Poaching Prevention Act (25 & 26 Vict. c. 114), s. 2.

(*y*) 43 & 44 Vict. c. 47, s. 4; extended by the Ground Game (Amendment) Act, 1906 (6 Edw. 7, c. 21).

Gaming contracts.

Gaming Act of 1845;

The Gaming Act, 1845 (*z*), section 18, provides: "That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void (*a*); and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person, to abide the event on which any wager shall have been made."

and of 1892.

And by the Gaming Act, 1892 (*b*), it is enacted that: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void" by the Act of 1845, "or to pay any sum of money by way of commission, fee, reward, or otherwise, in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

At common law, wagers that did not violate any rule of public decency or morality, or any recognised principle of public policy, were not prohibited (*c*). Since the Gaming Act, 1845, however, cases have arisen, which present the question whether an executory contract for the sale of goods may not be a device for indulging in gaming. It has already been shown that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them (*d*). But such a contract is only valid where the parties really intend and agree that the goods are to be delivered and the price paid. If under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes a wager, and is null and void under the Statute of

(*z*) 8 & 9 Vict. c. 109.

(*a*) But not illegal; accordingly a bill or note given for a gambling debt may be sued upon by a holder for value, even with notice of the transaction: *Lilley* v. *Rankin* (1887) 55 L. T. 814; 56 L. J. Q. B. 248; *Fitch* v. *Jones* (1855) 5 E. & B. 238; 24 L. J. Q. B. 293; 103 R. R. 455.

(*b*) 55 & 56 Vict. c. 9, s. 1.

(*c*) *Sherbon* v. *Colebach* (1690) 2 Vent. 175; *per Cur.* in *Dalby* v. *India Life Assur. Co.* (1854) 15 C. B. 365, at 387; 24 L. J. C. P. 2, at 6; 100 R. R. 389; *per* Lord Campbell in *Ramlall* v. *Soojumnull* (1848) 6 Moo. P. C. 310; 79 R. R. 62.

(*d*) *Ante*, 147.

1845 (*e*). And it is a question for the jury to decide, on all the circumstances, what the real intent of the parties was. And where the real intent is that no goods shall be delivered, but differences only paid, the contract does not cease to be a gambling contract merely because it contains a term that delivery of or payment for the goods may be required, such a provision being considered to be a mere cloak to hide a wager (*f*).

Grizewood v. *Blane* (1851).

In *Grizewood* v. *Blane* (*g*), the contract was for the future delivery of railway shares. The plaintiff, a jobber on the Stock Exchange, alleged a purchase of shares from the defendant; a subsequent agreement before the settling day that the bargain should be rescinded, and in lieu thereof the plaintiff should sell to the defendant the same number of similar shares at an enhanced value, and that the defendant should pay the difference. Jervis, C.J., left it to the jury to say what was the common intention at the time of making the contract, whether either party really meant to purchase or to sell the shares in question, telling them, that if they did not, the contract was, in his opinion, a gambling transaction, and void. The ruling was held to be correct (*h*). "The evidence," said Cresswell, J., "abundantly warranted the jury in coming to the conclusion that there was no real contract of sale."

Essential elements of a wagering contract.

Carlill v. *Carbolic Smoke Ball Co.* (1892).

The principles governing this class of case were explained by Hawkins, J., in *Carlill* v. *Carbolic Smoke Ball Co.* (*i*), afterwards affirmed in the Court of Appeal, who considered it as too clear for argument in that case that there had been no gaming contract. There the defendants, the proprietors of a

(*e*) The statement of the law contained in the last three sentences was approved by the Sup. Ct. of the U. S. in *Irwin* v. *Williar* (1883) 110 U. S. 499, at 508.

(*f*) *Universal Stock Exchange v. Strachan* [1896] A. C. 166; 65 L. J. Q. B. 428; affg. the C. A. in L. R. [1895] 2 Q. B. 329; 65 L. J. Q. B. 178; and *semble* overrg. *Universal Stock Exchange* v. *Stecens* (1892) 66 L. T. 612; *In re Giere* [1899] 1 Q. B. 794; 68 L. J. Q. B. 509, C. A.; *cf. Philp* v. *Bennett & Co.* (1901) 18 T. L. R. 129, where the buyer *agreed* to accept the stock bought.

(*g*) 11 C. B. 526; 21 L. J. C. P. 46. The decision was (apparently) disapproved by Bramwell, B., in *Martin* v. *Gibbon* (1875) 33 L. T. (N. S.) 561, at 563. See the same case as to the pleadings in 21 L. J. C. P. 46. It was distinguished by the C. A. in *Thacker* v. *Hardy* (1878) L. R. 4 Q. B. D. 685; 48 L. J. Q. B. 289; *post*, 617, but the findings of the jury on the facts were criticised by Brett, L.J., at 695, and by Cotton, L.J., at 696. See also *Cooper* v. *Neil* (1878) 27 W. R. 159.

(*h*) See also *Higginson* v. *Simpson* (1877) 2 C. P. D. 76; 46 L. J. C. P. 192; and *Universal Stock Exchange* v. *Strachan* [1896] A. C. 166; 65 L. J. Q. B. 428.

(*i*) [1892] 2 Q. B. 484; 61 L. J. Q. B. 696; aff. [1893] 1 Q. B. 256; 62 L. J. Q. B. 257, C. A.

medical preparation called the "carbolic smoke ball," issued an advertisement offering to pay £100 to any person who, after using one of these balls in a particular way and during a specified period, contracted influenza. The plaintiff, having purchased and used one as directed, contracted influenza, and sued the company for £100. The defendants contended that the contract was a wager. This contention was overruled, and the plaintiff recovered the £100.

Mr. Justice Hawkins said (*k*): "According to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. *It is essential to a wagering contract that each party may under it either win or lose*, whether he will win or lose being dependent on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract. It is also essential that there should be mutuality in the contract. For instance, if the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance, those of one party being such as if agreed in by the other would make the contract a wagering one, whilst those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract, and leave it enforceable by law as an ordinary one (*l*). . . . One other matter ought to be mentioned, namely, that in construing a contract with a view to determining whether it is a wagering one or not, the Court will receive evidence in order to arrive at the substance of it, and will not confine its attention to the mere words in which it is expressed, for a wagering contract may be sometimes concealed under the guise of language which, on the face of it, if words were only to be considered, might constitute a legally enforceable contract." After referring to *Brogden*

Extrinsic evidence to show real transaction.

(*k*) [1892] 2 Q. B. at 490—492; 61 L. J. Q. B. 696.
(*l*) *Grizewood* v. *Blane*, *ante*, 615; *Thacker* v. *Hardy* (1878) 4 Q. B. D. 678; 48 L. J. Q. B. 289, C. A.; *post*, 617; *Blaxton* v. *Pye* (1766) 2 Wils. 309.

v. *Marriott* (*m*) as an illustration of his proposition, the learned Judge continued: "Of course, if in any case it is suggested that a contract, good on the face of it, was a mere device to elude the operation of the statute, the question would be one for a jury to solve (*n*). In the present case an essential element of a wagering contract is absent. The event upon which the defendants promised to pay the £100 depended upon the plaintiff's contracting the epidemic influenza after using the ball; but on the happening of that event the *plaintiff alone* could derive benefit. On the other hand, if that event did not happen, the defendants could gain nothing, for there was no promise on the plaintiff's part to pay or do anything if the ball had the desired effect."

Other definitions of a wager.

A wagering contract was thus defined by Cotton, L.J., in *Thacker* v. *Hardy* (*o*): "The essence of gaming and wagering is that one party is to win, and the other to lose, upon a future event which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win." And it has been defined in America (*p*) as "a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss."

Three tests of a wagering contract.

In the luminous judgment of Hawkins, J., three tests are laid down. To constitute a wagering contract: (1) The intention to gamble must be common to both parties; (2) each party must be liable to win or lose according to the event; and (3) the parties should have no interest in the contract except the money or other stake.

In the two following cases the first element was wanting.

First test. No common intention. *Thacker* v. *Hardy* (1878).

In *Thacker* v. *Hardy* (*q*), the defendant had employed the plaintiff, a broker, to buy and sell for him on the Stock Exchange. It was never intended between the parties that the defendant should take up the contracts, but the plaintiff was so to arrange matters that nothing but "differences"

(*m*) (1836) 5 L. J. C. P. 302; 3 Bing. N. C. 88; 43 R. R. 599; *post*, 619, decided under 9 Anne, c. 14.

(*n*) See also *Hill* v. *Fox* (1859) 4 H. & N. 359; *Grizewood* v. *Blane*, *ante*, 615.

(*o*) (1879) 4 Q. B. D. 685; 48 L. J. Q. B. 289. The definition is however probably not exhaustive: *per* Channell, J., in *Richards* v. *Starck*, *post*, 618, n. (*u*).

(*p*) By Hare, P.J., in *Fareira* v. *Gabell* (1879) 89 Penn. 90; app. by the Supreme Court in the same case.

(*q*) 4 Q. B. D. 685, C. A.; 48 L. J. Q. B. 289. See in Amer. *Roundtree* v. *Smith* (1882) 108 U. S. 269; *Irwin* v. *Williar* (1883) 110 U. S. 499.

should be actually payable to or by the defendant. The plaintiff knew that, failing such an arrangement, the defendant could not take up the contracts. The plaintiff accordingly entered into contracts on the defendant's behalf, thereby making himself by the rules of the Stock Exchange personally liable, and sued the defendant for commission and for indemnity against his liability. *Held*, by the Court of Appeal, affirming Lindley, J., and distinguishing *Grizewood* v. *Blane*, that the agreement between the plaintiff and defendant was not a wagering contract within the Gaming Act of 1845, and that the plaintiff could recover. The contract was one of mandate to the plaintiff to make real contracts with the jobbers; and this contract was not a wagering contract, as the plaintiff had no interest in the event which determined the defendant's loss, but looked only to his commission.

It will be noticed that this case is not affected by the Gaming Act of 1892. The contracts made by the broker with the jobbers being real contracts, any moneys paid by the broker to the jobbers would not be paid "under or in respect of any contract rendered null and void" by the Act of 1845, nor was the broker's commission due "in respect of any such contract" (*r*).

Forget v. *Ostigny* (1895).

A similar decision was given by the Privy Council in *Forget* v. *Ostigny* (*s*), where *Thacker* v. *Hardy* was approved, the broker's claim in the case being held not to be "money claimed under a gaming contract or bet" within the meaning of section 1927 of the Civil Code of Lower Canada. Lord Herschell, in delivering the judgment of the Board, showed that the same principles apply whether the subject-matter of the sale be goods or stocks and shares.

Second test.

The second test is illustrated by the case of *Carlill* v. *Carbolic Smoke Ball Co.* itself, as is pointed out by Hawkins, J., in the extract already quoted (*t*).

Hirst v. *Williams* (1895).

And in *Hirst* v. *Williams* (*u*), where the plaintiff subscribed to a financial operation conducted by the defendant, on the terms that if certain stocks went up, the plaintiff would be entitled to the profit, and if no profit resulted, to a return of

(*r*) See *H. W. Franklin* v. *Dawson*, *post*, 621, n. (*h*).
(*s*) [1895] A. C. 318; 64 L. J. P. C. 62, P. C.
(*t*) *Ante*, 616.
(*u*) [1895] 12 T. L. R. 128, C. A. But *cf. Richards* v. *Starck* [1911] 1 K. B. 296; 80 L. J. K. B. 213, where Channell, J., held that the loss of interest on his money was sufficient loss to make the contract a gambling one. *Hirst* v. *Williams* was not referred to.

his subscription, the transaction was held by the Court of Appeal, affirming Charles, J., not to be, as between the plaintiff and the defendant, a gaming and wagering contract within the Act of 1845, on the ground that the transaction was in effect an advance, towards the defendant's own speculations, of money, which the defendant agreed to repay.

Third test.

The third test may be illustrated by a contract of sale of goods to be delivered at a future date at the market price of the date of delivery (*x*). Here by the contract the parties may respectively win or lose according to the determination of a future uncertain event, *i.e.*, the future market price, but neither of them is in the position described by Hawkins, J., of "having no other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration," for the contract is *ex hypothesi* a genuine contract for the sale and delivery of the goods, the determination of the future uncertain event merely ascertaining the price.

The case may be the same though the price is fixed by the contract.

Illustrated by an American Judge.

The principles are well stated by an American Judge (*y*): "Let us suppose that A. agrees with B. to buy a thousand bushels of wheat at two dollars per bushel, to be delivered and paid for at the end of thirty days. If wheat rises in value, A. will be a gainer, and if it goes lower, he will lose: but inasmuch as the apparent object of the contract is an actual sale of the wheat, it is not a gaming contract."

Ascertainment of price involving a wager.

In the following cases the ascertainment of the price of goods sold involved a wager, rendering the whole contract void.

Brogden v. *Marriott* (1836).

In *Brogden* v. *Marriott* (*z*), the defendant agreed to sell his horse to the plaintiff for £200, provided that he trotted eighteen miles in an hour; if he failed to do so the horse was to be the plaintiff's for one shilling. The animal failed in the test, and the plaintiff demanded him of the seller for a shilling. The defendant refused to deliver. After a verdict for the plaintiff, judgment was arrested on the ground that this mode of ascertainment of the price was a wager within 9 Anne, c. 14, the stake being on the one side £200, and on the other one shilling.

(*x*) Case suggested by Bramwell, L.J., and Cotton, L.J., in *Thacker* v. *Hardy* (1878) 4 Q. B. D. 685, at 692, 696; 48 L. J. Q. B. 289, C. A.

(*y*) Hare, J., in *Ferreira* v. *Gabell* (1879) 89 Penn. at 90, app. by the S. C. in the same case.

(*z*) 5 L. J. C. P. 302; 3 Bing. N. C. 88; 43 R. R. 599; Gaselee, J., *diss*

Rourke v. *Short* (1856).

In *Rourke* v. *Short* (*a*), the plaintiff and defendant, while discussing the terms of a bargain for the sale of a parcel of rags, differed as to their recollection of the price in a previous bargain, and then agreed to a sale on these terms, viz., that the rags should be paid for at six shillings a cwt. if the plaintiff's, but only three shillings a cwt. if the defendant's, statement as to the former sale should turn out to be correct, six shillings being more and three shillings being less than the value of the goods per cwt. It was held, that although the goods were really to be delivered and the price to be paid, yet the terms of the bargain included a wager that rendered it void, and the plaintiff could not recover the price. Coleridge, J., said: "Had they merely meant to determine the price by the former price they would have simply said: Let us ascertain what that price was; and then no one could have said that this was anything more than a mode of ascertaining the price for the new sale. But . . . they make the new price a vehicle for a risk upon the former event. . . . There clearly was no reference to the value of the former goods as a mode of ascertaining the value of the present goods."

Crofton v. *Calgan* (1859).

On the other hand, in *Crofton* v. *Colgan* (*b*), where the plaintiff agreed to exchange a race-horse for a horse of the defendant's of less value on the terms that he should receive half the winnings of his former horse in the first two races, it was held that the contract was not a gaming one, as it was simply an agreement to give an increased price if an event occurred which would enhance the value of the animal. The case was the same as if a job-horse had been sold for half its earnings. And *Rourke* v. *Short* was distinguished as a case where the price was to vary upon an event unconnected with the value of the goods.

Principle of last three cases.

The three preceding cases show that a test to determine whether a transaction is a contract of sale at an uncertain price or a wager is to consider whether there is any proper relation between the event and the true value of the goods.

Moneys recoverable under new contract.

Moneys payable under a wagering contract may, however, be recoverable from the loser under a new contract, for good consideration (*c*).

(*a*) 5 E. & B. 904; 25 L. J. Q. B. 196; 103 R. R. 798. *Cf. Wilson* v. *Cox* (1877) 36 L. T. 703, where the wager was treated as separable from the contract, as being concerned only with the determination of an addition to the price, for which the plaintiff did not sue.

(*b*) (1859) 10 Ir. C. L. R. 133.

(*c*) *Hyams* v. *Stuart King* [1908] 2 K. B. 696, C. A.; 77 L. J. K. B. 734. Mere forbearance to sue on the original consideration is insufficient: *Chapman*

It had been decided and was settled law under the Gaming Act of 1845 that an agent who had paid money for his principal under a gaming transaction, could recover it, as he was not deprived by the Act of an agent's ordinary right to an indemnity (*d*). Similarly he was liable to hand over any winnings received (*e*). An agent is still accountable for winnings since the Act of 1892 (*f*), but that Act has deprived him of his right to an indemnity for money paid, or to be paid, or to recover his commission in respect of a wagering contract (*g*). But an agent entering into a valid contract on behalf of his principal may recover an indemnity, notwithstanding that, to the knowledge of the agent, the principal's intention was to gamble (*h*).

Position of agent under the Gaming Acts.

The second clause of section 18 of the Act of 1845 (*i*) "only applies to actions brought by the winner of a wager, either against a stake-holder or against the loser, to recover his winnings, and does not prevent either party from revoking the authority of the stake-holder before the money is paid over to the winner, and suing to recover his stakes" (*k*). The law is the same since the Act of 1892, money so deposited not being "paid" (*l*). And the money is equally recoverable, though the stake-holder be the other party to the gaming contract (*m*). It cannot, however, be claimed after the money has been appropriated to the purpose for which it was deposited (*m*).

Action to recover money or thing deposited to abide event of wager.

Securities or money deposited with the other party for a wager *as security* for a due performance by the depositor are not deposited "to abide the event" of the wager, as the property in them does not *ipso facto* pass on the determination

v. *Franklin* (1905) 21 T. L. R. 515; *Hyams* v. *Coombes* (1912) 28 T. L. R. 423; and see *Wilson* v. *Conolly* (1911) 104 L. T. 94, C. A.

(*d*) *Read* v. *Anderson* (1884) 13 Q. B. D. 779; 53 L. J. Q. B. 502, C. A.; *Knight* v. *Lee* [1893] 1 Q. B. 41; 62 L. J. Q. B. 28.

(*e*) *Bridger* v. *Savage* (1885) 15 Q. B. D. 363; 54 L. J. Q. B. 464, C. A.

(*f*) *O'Sullivan* v. *Thomas* [1895] 1 Q. B. 698; 64 L. J. Q. B. 398; *De Mattos* v. *Benjamin* (1894) 63 L. J. Q. B. 228.

(*g*) *Levy* v. *Warburton* [1901] 70 L. J. K. B. 708, where it was held that "paid" included "to be paid"; *Gasson* v. *Cole* (1910) 26 T. L. R. 468.

(*h*) *H. W. Franklin & Co.* v. *Dawson* (1913) 29 T. L. R. 479, at N. P. The position of the agent was the same under the Act of 1845; see *Thacker* v. *Hardy*, *ante*, 617.

(*i*) *Ante*, 614.

(*k*) Stutfield on Bets, Time Bargains and Gaming, 3rd ed., 55, app. by A. L. Smith, L.J., in *Strachan* v. *Universal Stock Exchange* [1895] 2 Q. B. 329; 65 L. J. Q. B. 178; *Busk* v. *Walsh* (1812) 4 Taunt. 290; 13 R. R. 589.

(*l*) *Burge* v. *Ashley* [1900] 1 Q. B. 744; 69 L. J. Q. B. 538, C. A.

(*m*) *Tappenden* v. *Randall* (1801) 2 B. & P. 467; 5 R. R. 662; *Strachan* v. *Universal Stock Exchange* [1895] 2 Q. B. 697; 65 L. J. Q. B. 178, C. A. See also *Keen* v. *Price* [1914] 2 Ch. 98; 83 L. J. Ch. 865 (accounts between book-maker partners).

of the event (*n*). Accordingly the money or securities can be recovered at any time while they are in the possession of the stake-holder as such (*o*).

Moneys lent or paid in respect of gambling transactions.

Moneys lent to one party to a gambling transaction to be repaid only if he wins, are not a loan, but are under the Gaming Act of 1892, paid "in respect of" a contract void under the Gaming Act of 1845 (*p*). And this is obvious, as repayment depended upon the ascertainment of a fact or uncertain event involving a wager.

With regard to moneys paid at the request of another, a distinction was drawn previously to the Act of 1892 between moneys paid in discharge of bets already lost, and moneys lent to enable bets to be made, the latter being irrecoverable, the former recoverable (*q*). But it was held in *Tatam* v. *Reeve* (*r*), where sums were, at the debtor's request, directly paid to the defendant's gambling creditor, that, under the Act of 1892, the moneys were paid, if not "under," at any rate "in respect of," a void contract. In this case the character of the debt was known to the payer, but Willes, J. said *obiter* that it was immaterial whether the person paying was or was not aware that the money was paid in discharge of bets. This decision was approved in *Saffery* v. *Meyer* (*s*), where, however, the facts were different, the money being furnished on a joint account to enable bets to be made, a distinction which, in the opinion of Cozens-Hardy, M.R., in *Ex parte Lancaster* (*t*), which followed *Ex parte Pyke* (*q*), is a "vital" one. In *Ex parte Lancaster* (*t*), Lancaster had guaranteed an overdraft at the debtor's bank to enable the debtor to pay past gambling debts, and the transaction was regarded by the Court of Appeal as a simple loan to the debtor; and Kennedy, L.J., pointed out that in *Tatam* v. *Reeve* the plaintiff had directly paid the money to the gambling creditor.

In *Hyams* v. *Stuart King* (*u*), Moulton, L.J., repudiated Willes, J.'s, dictum in *Tatam* v. *Reeve*, being of opinion

(*n*) *Re Cronmire, Ex parte Waud* [1898] 2 Q. B. 383; 67 L. J. Q. B. 62[illegible] C. A.; *Strachan* v. *Universal Stock Exchange* [1895] 2 Q. B. 329; 65 L. J. Q. B. 178, C. A.; affd. [1896] A. C. 166; 65 L. J. Q. B. 428.

(*o*) *Universal Stock Exchange* v. *Strachan* [1896] A. C. 166; 65 L. J. Q. B. 429.

(*p*) *Carney* v. *Plimmer* [1897] 1 Q. B. 634; 66 L. J. Q. B. 415, C. A.

(*q*) *Ex parte Pyke* (1878) 8 Ch. D. 754; 47 L. J. Bkcy. 100, C. A.; foll. in *Ex parte Lancaster, infra.*

(*r*) [1893] 1 Q. B. 44; 62 L. J. Q. B. 30.

(*s*) [1901] 1 Q. B. 11; 70 L. J. K. B. 145, C. A.

(*t*) [1911] 2 K. B. 981; 81 L. J. K. B. 70, C. A.

(*u*) [1908] 2 K. B. 696; 77 L. J. K. B. 794, C. A.

that the words "paid under or in respect of any contract void" refer to the payer, and imply a knowledge on his part of the contract under which the payment is made, and do not include payments made by an innocent third person.

The result seems to be on the whole that *Tatam* v. *Reeve* should be regarded as a case dependent on the fact that the person paying the money was aware of the character of the claim that was discharged.

Tippling Act.

By the statute of 1751, usually termed the Tippling Act (*x*), as amended by an Act of 1862 (*y*), no person shall be entitled to recover the price of spirituous liquors, unless sold at one time *bona fide*, to the amount of 20s. or upwards, except in cases when they are sold to be consumed elsewhere than at the place of sale, and delivered at the residence of the purchaser, in quantities not less at any one time than a reputed quart.

County Court Act, 1888, s. 182.

And now, by the County Court Act of 1888 (*z*), it is provided that: "No action shall be brought or be maintainable in any county or other court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry, which was consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given for, in or towards the obtaining of" the said articles.

These Acts do not make the sale illegal, but bar the remedy for the price of the liquors (*a*).

Decisions under Tippling Acts.

In construing the Tippling Act, it has been held by the Court of Queen's Bench that the prohibition extends to sales made to a retail dealer who bought for the purpose of resale to his customers (*b*); and in *Burnyeat* v. *Hutchinson* (*c*) the Queen's Bench, in 1821, refused to except from the operation of the statute a sale made to one who was not himself the consumer, and where the spirits formed part of an entertainment given at the buyer's expense to third persons, the Court holding that the "prohibition was general and absolute," and could not be confined "to sales to the consumer, or to cases in which the spirituous liquors were sold apart from other goods. These cases must be taken to have overruled *Spencer* v.

(*x*) 24 Geo. 2, c. 40, s. 12. Its proper name is the Sale of Spirits Act, 1750.
(*y*) Sale of Spirits Act, 1862 (25 & 26 Vict. c. 38), which enacts the exception above stated.
(*z*) 51 & 52 Vict. c. 43, s. 182, repealing and re-enacting 30 & 31 Vict. c. 142, s. 4.
(*a*) *Per Cur.* in *Sheehy* v. *Sheehy* [1901] 1 Ir. Rep. 239, C. A., *post*, 625.
(*b*) *Hughes* v. *Done* (1841) 1 Q. B. 294; 10 L. J. Q. B. 65; 55 R. R. 253; overruling *Jackson* v. *Attrill* (1793) Peake, 181.
(*c*) (1821) 5 B. & A. 241; 24 R. R. 345.

Smith (*d*), in which Lord Ellenborough would not allow the defence of the statute to prevail, where a bill of exchange for £6 had been given by a lieutenant in the recruiting service for spirits supplied to him at different times, not for consumption at the house of the seller, but for use elsewhere by recruits and others under the officer's command. *Burnyeat* v. *Hutchinson* was not brought to the notice of Lord Abinger in 1835, when he held, in *Proctor* v. *Nicholson* (*e*), at Nisi Prius, that the enactment did not apply to the case of spirits supplied by an hotel-keeper to a guest lodging in the house, and *Proctor* v. *Nicholson* can hardly be considered an authority in the light of the decision in *Burnyeat* v. *Hutchinson*, and the observations of the Court in *Hughes* v. *Done* (*f*).

If quantities of spirits of different kinds be sold and delivered *at one time*, the quantity of each being less than 20s. in value, but the whole amounting to more than that sum, the sale is enforceable under the Tippling Act (*g*).

If the seller of liquor contrary to the Act is also a debtor to the buyer on other accounts, and the parties settle an account by set-off, the buyer cannot plead the Act if sued by the seller for the balance, for the set-off is a payment, and the buyer, if he had paid for the liquors, could not afterwards recover it (*h*).

Scott v. *Gillmore* (1810).

In *Scott* v. *Gillmore* (*i*), a bill of exchange was held void where part of the consideration was for spirits sold in violation of the Tippling Act. The bill had been given by the drawer to the seller of the liquors, and was for the balance of a debt for spirits and for money lent. The action was against the acceptor. Mansfield, C.J., said: "The statute does not in terms indeed avoid the security, but it makes the consideration illegal, not merely void; and the security is entire, and cannot be apportioned, and since it is partly given for an illegal consideration the whole bill is void."

But in *Crookshank* v. *Rose* (*k*), where the action was brought on a promissory note and a bill of exchange given at the

(*d*) (1811) 3 Camp. 9.
(*e*) (1835) 7 C. & P. 67; 48 R. R. 762.
(*f*) (1841) 1 Q. B. 294; 10 L. J. Q. B. 65; 55 R. R. 253.
(*g*) *Owens* v. *Porter* (1830) 4 C. & P. 367.
(*h*) *Dawson* v. *Remnant* (1806) 6 Esp. 24. But the transaction must amount to a payment: *Re Cranmire* [1898] 2 Q. B. 383, C. A.; 67 L. J. Q. B. 620; *Re Bayley-Worthington* [1909] 1 Ch. 648, at 665; 78 L. J. Ch. 351.
(*i*) 3 Taunt. 226; 12 R. R. 641. The Act extends to spirits mixed with water: *ib.*
(*k*) 5 C. & P. 19; 1 Moo. & Rob. 100; 38 R. R. 788. See in Amer. *Warren* v. *Chapman* (1870) 105, Mass. 87.

same time in payment of a sailor's bill to his landlord, in which were items for spirits sold contrary to the Act, it appeared that the whole amount of the charge for spirits was *less* than either of the two securities; and Lord Tenterden held that one security might be recovered because the plaintiff had the right to appropriate the other to all the charges for spirits, which it was more than sufficient to cover. *Crookshank v. Rose* (1831).

In this case Lord Tenterden followed *Scott v. Gillmore*, but seemed to disapprove of it, as he says, "The Act does not avoid the security, but the authority cited goes to that extent." And the case has been doubted by text writers (*l*), and has recently been disapproved in the following case in Ireland.

In *Sheehy v. Sheehy* (*m*), a mortgage for £56, of which £1 represented the price of spirits sold contrary to the Irish Tippling Act (*n*), was held by the Irish Court of Appeal good as a security for £55, the two parts of the consideration being severable. On the point that the consideration was severable (*o*), the decision is directly contrary to *Scott v. Gillmore* (*p*). On the other point the Court also disapproved of that case, showing that the Tippling Act merely made the debt for spirits unenforceable by action, and not illegal. *Sheehy v. Sheehy* (1901).

Some cases in which the price of spirits sold in contravention of the Tippling Acts formed only part of the consideration of the contract sued on, are cited in the note (*q*).

By the Sale of Offices Act, 1551 (*r*), "bargains, sales, promises, bonds, agreements, covenants, and assurances," whereby "any office or offices or deputation of any office or offices, or any part or parcel of any of them" are sold directly or indirectly, are void; and the seller forfeits his interest in the said office or deputation, and the buyer is disabled to hold it. An enumeration of various offices is given to which the Sales of offices. 5 & 6 Edw. 6, c. 16.

(*l*) Pollock on Cont., 8th ed. at 717.

(*m*) [1901] 1 Ir. Rep. 359.

(*n*) 55 Geo. 3, c. 104, s. 15, rep. (except as regards spirits con the premises) by the Licensing Act (Ireland), 1874 (37 & 38 Vict. c. 69 ...

(*o*) "Where the consideration consists of two parts, one bad, the other good, the bill should stand as to what is good": *per* Lord Loughborough in *Ex parte Mather* (1797) 3 Ves. 373. See also *Ex parte Bulmer* (1807) 13 Ves. 313.

(*p*) Unless, as suggested by Mr. Leake, on Cont., 3rd ed., 677, that case depended on the fact that, the bill being given for a *balance*, the separate charges could not be identified, and so severed.

(*q*) *Philpott v. Jones* (1834) 2 Ad. & E. 41; 4 L. J. (N. S.) K. B. 65; 41 R. R. 371 (appropriation of payments); *Gaitskill v. Greathead* (1822) 1 Dow. & Ry. 359 (bill of exchange); *Gilpin v. Rendle* (1805) Selw. N. P. 61.

(*r*) 5 & 6 Edw. 6, c. 16, ss. 2, 3.

Act applies (*s*); and offices held by an estate of inheritance, and offices of partnership or of the keeping of any house, garden, &c., are excepted (*t*). By the Sale of Offices Act, 1809 (*u*), which amended and enlarged the earlier Act, both Acts are declared to extend to Scotland and Ireland (*x*). An additional list of offices to which the Act applies is given (*y*) and it is declared to be a misdemeanour to sell, or bargain for the sale of, or to give or agree to give money, &c., for "any office, commission, place, or employment specified in the said recited Act or this Act, or for any deputation thereto, or for any part . . . of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents . . . of any person . . . to any such appointment, nomination, or resignation" (*y*). By sections 9, 10, and 11, certain exceptions to the general provisions are declared (*z*).

49 Geo. 3, c. 126.

Under the Sale of Offices Act, 1551, it was held that a contract by A. to resign an office with the intent that B should obtain the appointment was void (*a*).

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

Godolphin v. *Tudor* (1705).

In *Godolphin* v. *Tudor* (*b*), under the same Act, it was held that a deputation to an office with a reservation of a certain lesser sum out of the salary was good; and that, even where the profits are uncertain, a deputation with the reservation of a certain sum *out of the profits* was good, for the deputy will not be obliged to pay anything beyond the amount of the

(*s*) *Ibid.* s. 2. They are all public offices, such as those concerned with the administration of justice, the King's revenue, etc. Certain provisions with regard to offices in the customs were repealed by 6 Geo. 4, c. 105.

(*t*) S. 4. S. 7, which saves offices given or granted by the Chief Justices of the K. B. and C. P., or Justices of Assize, is repealed by the S. L. R. Act 1863.

(*u*) 49 Geo. 3, c. 126. Certain portions of ss. 1 and 9, and ss. 7, 8, 12, and 15, were repealed by the S. L. R. Act (No. 2) of 1872.

(*x*) *Ibid.* s. 1. They are all public offices, such as offices in the gift of the Crown, civil, military, and naval commissions, etc.

(*y*) S. 3. *See R.* v. *Pollman* (1809) 2 Camp. 229.

(*z*) S. 9 excludes offices in the gift of a person holding an office for life and legally saleable at date of the Act; s. 10 excludes lawful deputations to an office, and lawful payments made out of the profits of the office to such deputy; s. 11 excludes any annual charge on the profits of the office in favour of the preceding holder, and contracts, etc., for securing the same, provided the charge is stated in the instrument of appointment of the successor who pays or secures the charge.

Mr. Benjamin set out these Acts at great length.

(*a*) *Sir Arthur Ingram's Case*, Co. Litt. 234 a.; 3 Inst. 154 (escheator of treasurer). See also *Huggins* v. *Bambridge* (1741) Willes, 241 (Warden of the Fleet). By the Regimental Exchanges Act, 1875 (38 & 39 Vict. c. 16), the Army Brokerage Acts (defined by s. 3 as those Acts of Edw. 6 and Geo. 3 which are now known as the Sale of Offices Acts, 1551 and 1809) do not extend to regimental exchanges authorised by regulation.

(*b*) 2 Salk. 468; 6 Mod. 234; Willes, 575, n.; in H. L., 1 Bro. P. C. 138. See also *Gulliford* v. *De Cardonell* (1695) 2 Salk. 466.

profits received. It is otherwise where the reservation is of a certain sum to be absolutely paid, without reference to the profits (*c*).

What offices are within the Statute.

The following officers have been held to come within the provisions of the Sale of Offices Act, 1551, as their offices touch the administration or execution of justice: officers of spiritual Courts, as chancellor, registrar, and commissary (*d*), clerk of the fines to a justice in Wales (*e*), surrogate, or registrar (*f*), gaolers (*g*), undersheriffs (*h*), stewards of court-leets (*i*), but not the bailiff of a hundred (*k*), or of the Liberty of the Savoy (*l*), or the undermarshal of the City of London (*m*), as these offices do not concern the administration or execution of justice.

The sale of a law-stationer's business, he being also sub-distributor of stamps and collector of assessed taxes, has been held void under the same statute, the office being one touching the receipt or controlment of the revenue (*n*). So also the sale of the office of supervisor of customs in the City of London (*o*).

The position of private secretary to a nobleman has been held not to fall within this statute (*p*). So also the situation of a clerk to the Deputy Registrar in the Prerogative Court of Canterbury is not an "office," he being "a mere clerk, assisting the Deputy Registrars, receiving emoluments for business done at the pleasure of his superiors" (*q*).

The Sale of Offices Act, 1551, does not apply to a colony acquired by capture, such as Jamaica (*r*). The later Act, by

(*c*) See *Juxton* v. *Morris*, 2 Ch. Cas. 42, cited by Lord Loughborough in *Garforth* v. *Fearon* (1790) 1 Bl. H. 327, at 332, 2 R. R. 778.

(*d*) *Dr. Trevor's Case* (1611) Cro. Jac. 269; *Robotham* v. *Trevor* (1610) 2 Brownl. 11. In the report of the same case in 12 Co. 78, Coke, as showing that corruption is worse in an ecclesiastical than in a temporal Judge, quaintly says: "The temporal Judge commits the party convict to the gaoler, but the spiritual Judge commits the person excommunicate to the devil."

(*e*) *Walter* v. *Walter* (1593) Goulds. 180.

(*f*) *Jurton* v. *Morris* (1680) 2 Ch. Ca. 42 (corrected rep. in 1 H. Bl. 332); *Woodward* v. *Foxe* (1690) 3 Lev. 289; *Layng* v. *Paine* (1745) Willes, 571.

(*g*) *Stockwith* v. *North* (1601) Moore, 781; *Huggins* v. *Bambridge* (1741) Willes, 241. The first case was decided under 4 Hen. 4 c. 5, now repealed, which prohibits a sheriff from letting his bailiwick to farm.

(*h*) *Browning* v. *Halford* (1671) Free. 19; and see 50 & 51 Vict. c. 55, s. 27.

(*i*) *Williamson* v. *Barnsley* (1614) 1 Brownl. 70.

(*k*) *Godbold's Case* (1578) 4 Leon. 33.

(*l*) *Nelson's Case* (1676) Free. 428.

(*m*) *Ex parte Butler* (1749) 1 Atk. 210.

(*n*) *Hopkins* v. *Prescott* (1847) 4 C. B. 578; 16 L. J. C. P. 259; 72 R. R. 647.

(*o*) *Lee* v. *Coleshill* (1596) Cro. El. 529.

(*p*) *Harrington* v. *Kloprogge* (1784) 2 B. & B. 678, n.; 23 R. R. 539, n.

(*q*) *Aston* v. *Gwinnell* (1829) 3 Y. & J. 136.

(*r*) *Blankard* v. *Galdy* (1693) 2 Salk. 411; 4 Mod. 222. As to the application of English law to British possessions, see note thereon, *ante*, 194, *et seqq.*

Application of later Act to the Colonies.

its express provisions, applies to "His Majesty's dominions, colonies, or plantations" (*s*). The principles established in *Godolphin* v. *Tudor* under the Sale of Offices Act, 1551, are also applicable to transactions falling under the Amending Act of 1809, and a deputation to an office, such as that of Colonial Secretary of a Colony, in consideration of a certain sum to be paid absolutely, is void (*t*).

Cadetships in East India service.

A cadetship in the East India service is embraced within the words "place or employment" in section 1 of the Sale of Offices Act, 1809, and receiving money for the nomination is an indictable offence (*u*).

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

A bargain by which the officers of a regiment in the East India Company's service subscribed a sum to induce the major to retire, and thus create a step for promotion in the regiment, was held to be a sale of his office by the major, and void under the same statute (*x*).

Other offices expressly prohibited to be sold.

Other offices, the sale of which is expressly illegal by statute, are those of clerk of the peace (*y*); clerk of assize or nisi prius, or judge's registrar in Ireland (*z*); treasurer, clerk of the peace, surveyor, or other office or employment mentioned in the Grand Jury Acts in Ireland (*a*); and the office of under-sheriff, deputy sheriff, bailiff, or any other office or place appertaining to the office of sheriff (*b*).

Partnership with holder of office.

A partnership contract extending to the emoluments of offices held by one of the partners does not amount to the sale of the offices (*c*).

Goods delivered without permit

By the Excise Permit Act, 1832 (*d*), the buyer may resist payment of the price of goods (spirits), for the removal of which a permit is required by that statute, by pleading and proving that the goods were delivered without a permit.

(*s*) 49 Geo. 3, c. 126, s. 1.

(*t*) *Greville* v. *Atkins* (1829) 9 B. & C. 462.

(*u*) *R.* v. *Charretie* (1849) 13 Q. B. 447; 18 L. J. M. C. 100.

(*x*) *Graeme* v. *Wroughton* (1855) 11 Ex. 146; 24 L. J. Ex. 265, 105 R. R. 456. See also *Eyre* v. *Forbes* (1862) 12 C. B. N. S. 191; 133 R. R. 325.

(*y*) 1 W. and M. c. 21, s. 8. See also *Hughes* v. *Statham* (1825) 4 B. & C. 187; 3 L. J. K. B. 179 (Sale of recommendation by clerk of peace and 22 Geo. 2, c. 46, s. 14.

(*z*) 1 & 2 Geo. 4, c. 54, s. 7.

(*a*) Grand Jury (Ireland) Act, 1836 (6 & 7 Will. 4, c. 116), s. 87; amended by the County Dublin Grand Jury Act, 1844 (7 & 8 Vict. c. 106), s. 11; both amended by the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), s. 110, and made subject to Orders in Council. See s. 105 & Sch. 5 of the last Act, and Stat. R. & O., 1899, No. 44.

(*b*) 50 & 51 Vict. c. 55, s. 27.

(*c*) *Sterry* v. *Clifton* (1850) 9 C. B. 110; 19 L. J. C. P. 237; 82 R. R. 330.

(*d*) 2 Will. 4, c. 16, ss. 1, 7. See *Nicholson* v. *Hood* (1842) 9 M. & W. 736; 12 L. J. Ex. 114; 60 R. R. 759. See also, as to permits for spirits, Spirits Act, 1880, ss. 100, 105–107; am. by the Revenue Act, 1909 (9 Edw. 7, c. 13, s. 3).

The sale, too, of a permit as tending to enhance the price of the commodity to the detriment of the public, is also illegal on grounds of public policy (*e*). Sale of permit.

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

By the Sunday Observance Act, 1677 (*g*), s. 1, it is enacted that: "No tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted), and that every person being of the age of fourteen years or upwards, offending in the premises, shall for every such offence forfeit the sum of five shillings; and that no person or persons whatsoever shall publicly cry, show forth, or expose to sale any wares, merchandises, fruit, herbs, goods, or chattels whatsoever upon the Lord's Day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or showed forth, or exposed to sale" (*h*). 29 Car. 2, c. 7, s. 1.

And by section 3: "Nothing in this Act contained shall extend to the prohibiting of . . . selling of meat in inns, cookshops, or victualling houses, for such as otherwise cannot be provided (*i*); nor to the crying or selling of milk before nine of the clock in the morning, or after four of the clock in the afternoon." S. 3.

The first reported case under this statute seems to have been *Drury* v. *Defontaine* (*k*), in 1808, more than one hundred and thirty years after its passage. There the *private* sale of a Decisions under this Statute.

(*e*) *Sykes* v. *Bridges, Routh & Co.* [1919] 35 T. L. R. 364.

(*f*) 1808) 1 Taunt. 131, citing *R.* v. *Brotherton* (1726) 1 Str. 702.

(*g*) 29 Car. 2, c. 7. As to this Act generally see the Ninth Report (1883) of the Hist. MSS. Commission, Part II. App. p. 83.

(*h*) As to the mode of instituting proceedings for offences under this Act, see the Sunday Observation Prosecution Act, 1871 (34 & 35 Vict. c. 87), continued till the 31st December of the following year by the annual Expiring Laws Continuance Acts—*e.g.* till the 31st December, 1920, by the E. L. C. Act, 1919 (9 & 10 Geo. 5, c. 39). See also *Thorpe* v. *Priestnall* [1897] 1 Q. B. 159; 66 L. J. Q. B. 248 (proceedings begin with information); *R.* v. *Halkett* [1910] 1 K. B. 50; 79 L. J. K. B. 12 (consent of Chief Officer of Police). The holding of an Excise licence for the sale of refreshments does not protect the holder from a prosecution under the Act: *Amorette* v. *James, infra.*

(*i*) See *R.* v. *Cox* (1759) 2 Burr. 787; followed in *R.* v. *Younger* (1793) 5 T. R. 449; 2 R. R. 638; and *Bullen* v. *Ward* [1905] 74 L. J. K. B. 917. The word "meat" must be liberally construed. It is not confined to flesh, but includes fish and potatoes: *Bullen* v. *Ward, supra* *Qy.* whether it includes ice cream? See *Amorette* v. *James* [1915] 1 K. B. 124; 84 L. J. K. B. 563.

(*k*) 1 Taunt. 131.

Drury v. *Defontaine* (1808).

horse on a Sunday, made by a horse-auctioneer, was held valid, as not within the ordinary calling of the seller, his business being to sell at public, not private, sale.

Bloxsome v. *Williams* (1824).

Next, in 1824, in *Bloxsome* v. *Williams* (*l*), an action for breach of warranty of a horse sold by a *horse-dealer* on Sunday, but not delivered till the Tuesday, Bayley, J., expressed his entire concurrence in the above decision of the Common Pleas, but, while doubting whether the Act applied at all to work not *visibly* laborious, such as manual labour, or the keeping of open shops, decided the case on two grounds: 1. that in the case before him the sale was not complete on the Sunday within the Statute of Frauds (*m*); and 2. that, the penalty being on the *offender*, it was not competent for the defendant, the guilty party, who was violating the statute by exercising his own ordinary calling of a horse-dealer on Sunday, to set up his own contravention of the law against the plaintiff, an innocent person, *who was ignorant of the fact that the defendant was a horse-dealer*. Holroyd, J., and Littledale, J., concurred.

Fennell v. *Ridler* (1826).

In 1826, *Fennell* v. *Ridler* (*n*), was decided by the same Judges. Plaintiffs were horse-dealers, who bought a horse with warranty on Sunday; and the action was for breach of warranty. The plaintiffs were nonsuited, Bayley, J., again delivering the opinion, and saying that he had given too narrow a construction to the Act in the previous case, and that it was intended to regulate private conduct as well as to promote public decency. "It seems to us," he said, "that every species of labour, business, or work, whether public or private, in the ordinary calling of a tradesman, artificer, workman, labourer, or other person is within the prohibition of the statute" (*o*).

Meaning of "ordinary calling."

In *Rex* v. *Whitnash* (*p*), it was held by the Court of King's Bench that the words "ordinary calling" govern each of the words "work, labour, or business," and with reference to the meaning of the words "ordinary calling," Bayley, J.,

(*l*) 3 B. & C. 232; 2 L. J. K. B. 224; 27 R. R. 337. The second point in this case has been approved by McCardie, J., in *Brightman & Co.* v. *Tate* [1919] 2 K. B. 463; 88 L. J. K. B. 921; and by the S. C. of the U. S. in *Gibbs and Sterrett Co.* v. *Brucker* (1884) 111 U. S. 597. See also *Strongutharm* v. *Lukyn* (1795) 1 Esp. 389.

(*m*) See also *Begbie* v. *Levi* (1830) 1 C. & J. 180; 9 L. J. Ex. 51; *Norton* v. *Powell* (1842) 4 M. & G. 42; 11 L. J. N. S. C. P. 202; *Beaumont* v. *Brengeri* (1847) 5 C. B. 301; 75 R. R. 731.

(*n*) 5 B. & C. 406; 4 L. J. K. B. 207; 29 R. R. 278.

(*o*) See also *per eundem* in *R.* v. *Whitnash* (1827) 7 B. & C. at 60 6 L. J. M. C. 26.

(*p*) *Supra*.

said (*q*) that they did not mean "that without which a trade or business cannot be carried on, but that which the ordinary duties of the calling bring into continued action. Those things which are repeated daily or weekly in the course of trade or business are parts of the *ordinary calling* of a man exercising such trade or business."

Scarfe v. *Morgan* (1839).

In *Scarfe* v. *Morgan* (*r*), the defendant, a farmer, in an action of trover for a mare, claimed a lien for the services of his stallion in covering the plaintiff's mare under a contract made and executed on Sunday, and the plaintiff set up illegality under the statute; but this contention was overruled, the lien was held to be good, as the defendant was not exercising his ordinary calling in letting the services of his stallion; and, even if he were, the contract had been executed, and *in pari delicto melior est conditio possidentis*.

Definition of "tradesman," etc.

In *Palmer* v. *Snow* (*s*), Channell, J., and Bucknill, J., held that a "tradesman" was one who buys and sells; an "artificer" one who makes a thing; and a "workman" or "labourer" one who is employed by another; and that the concluding words "or other person" must be confined to persons *ejusdem generis* with those specifically mentioned (*t*).

Decisions of High Court of Australia.

The High Court of Australia have, however, decided (*u*), under an Act imposing a penalty upon any person who (*inter alia*) "trades or deals on Sunday," that the Act under these words strikes at offences involving human labour or attention (*x*), and that no offence had been committed by a person who had kept open on Sunday a slot cigarette machine. Isaacs, J., dissented, and held that the Legislature had adopted a previous decision (*y*) that trading meant "selling," and had rejected the test of personal labour. Accordingly, in his opinion an offence had been committed, there having been a sale on Sunday.

Sunday contract informal under s. 4 of the Code.

Where a verbal contract of sale was made on Sunday and the terms of section 17 of the Statute of Frauds were satisfied on a subsequent week-day, there were conflicting decisions at

(*q*) At 601.

(*r*) 4 M. & W. 270; 7 L. J. N. S. Ex. 324; 51 R. R. 568.

(*s*) [1900] 1 Q. B. 725; 69 L. J. Q. B. 356. See also *Reg.* v. *Cleworth* (1864) 4 B. & S. 927; 129 R. R. 979, where it was held that a farmer is not within the Act; and *Hawkey* v. *Stirling* [1918] 1 K. B. 63 (amusement caterer supplying materials for shooting, etc., for prizes).

(*t*) See also, on the last point, *Sandiman* v. *Breach* (1827) 7 B. & C. 96; 5 L. J. K. B. 298; 31 R. R. 69; and *R.* v. *Whitnash*, *supra*.

(*u*) In *Spence* v. *Ravenscroft* [1914] 18 Com. L. R. 349, *coram* Griffith, C.J., and Gavan Duffy, J., Rich, J., and Isaacs, J.

(*x*) See Bayley, J.'s, first opinion in *Bloxsome* v. *Williams*, *ante*.

(*y*) *Ex parte* Rogerson (1888) 9 N. S. W. L. R. 30.

common law on the question whether the verbal contract was invalid under the Sunday Observance Act, or whether the contract must be considered as made on the subsequent day. In *Bloxsome* v. *Williams*, already cited (*z*), the King's Bench in 1824 decided that the latter was the true view, whereas in the following case a contrary decision was given.

Smith v. *Sparrow* (1827).

In 1827, in *Smith* v. *Sparrow* (*a*), in the Common Pleas, the plaintiff's broker made an agreement on Sunday for a sale to the defendant, and gave him a bought note, *in which the seller's name was not mentioned*. The broker also entered the sale on his book on Sunday, with a blank for the seller's name. On Monday the blank was filled up before the broker had seen the seller, or informed him of the sale. The plaintiff's action was for damages for breach of this contract, and he was held not entitled to recover, as the contract, so far as it affected the defendant, was completed on the Sunday by the delivery of the bought note. According to the Law Journal the Court said: "It is immaterial whether a contract be completed on a Sunday or not. If part of it be entered into or negotiated on that day it is sufficient to bring it within the terms of the statute. . . . Any serious proceeding or course of negotiation for a contract falls within the provisions of the Act. If the foundation for a contract be laid on a Sunday it is sufficient."

No later case has been reported to throw any light upon this point (*b*). Having regard to the words "contract" and "enforceable by action" in section 4 of the Code, an opinion has been expressed (*c*) that a contract under section 4 is good in all respects except that it is unenforceable by action. If this view be sustained a contract of sale on a Sunday by a person exercising his ordinary calling will, it is conceived, be void under the Sunday Observance Act, independently of section 4 of the Code, and cannot be rendered valid by the provisions of that section being afterwards satisfied.

In *Williams* v. *Paul* (*d*), decided in 1830, it was held that

(*z*) *Ante*, 630.

(*a*) 12 Moore, 266; 5 L. J. C. P. 80; 4 Bing. 84; 29 R. R. 514. All the reports should be consulted. In America a sale, though begun on a Sunday, is not held invalid if it be not completed till another day, nor is it invalid merely because it grows out of a transaction on Sunday: *Stackpole* v. *Symonds* (1851) 23 New. H. 229; *Gibbs and Sterrett Manufacturing Co.* v. *Brucker* (1884) 111 U. S. 597, 602.

(*b*) The point was not decided in *Beaumont* v. *Brengeri* (1851) 5 C. B. 301; 75 R. R. 731.

(*c*) *Per* Bigham, J., in *Taylor* v. *Great Eastern Ry. Co.* [1901] 1 K. B. 774; 70 L. J. K. B. 499, set out *ante*, 341.

(*d*) 6 Bing. 653; 8 L. J. C. P. 280; 31 R. R. 512.

where a bargain was made on Saturday, subject to the buyer's approval of the goods, and the approval was given on Sunday, the sale was made on Sunday, but as the buyer retained the thing bought, and afterwards made a new promise to pay, he was liable, not for the price agreed on in the void bargain, but for a *quantum meruit* on the new promise.

Retention of the goods, and a new promise.

Williams v. *Paul* (1830).

But in *Simpson* v. *Nicholls* (*e*), Parke, B., expressed the opinion that the decision in *Williams* v. *Paul* could not be supported in law. That case, he said, depended upon the express promise to pay, and he doubted the decision on the ground that, though the contract was void as being made on Sunday, yet, as the property in the goods passed by delivery, the promise made on the following day to pay for them was made without consideration.

But the buyer will be liable to pay for the goods on a new promise made after the Sunday for good consideration (*f*).

By a Scotch statute of 1579, c. 70, it is enacted that "no handy-labonring or working be used on the Sunday"; and a statute of 1690, c. 7, excepts "the duties of necessity or mercy." The trade of a barber has been held to be within the Act (*g*), and therefore the shaving of a customer on Sunday, not being a work of necessity or mercy, but a mere convenience, to be illegal (*g*).

Scotch Sunday Act.

The Licensing (Consolidation) Act, 1910 (*h*), renders penal the sale of intoxicating liquors on Sunday except within specified hours.

Licensing (Consolidation) Act, 1910.

The Revenue Act, 1889 (*i*), prohibits, under a heavy penalty for each offence, the sale of methylated spirits between the hours of ten on Saturday night and eight on Monday morning.

Revenue Act, 1889.

And by the Bread Act, 1836 (*k*), no baker beyond the limits of the City of London and the weekly bills of mortality, and ten miles of the Royal Exchange, may make any bread, etc., on Sunday, or sell bread, etc., after half-past one in the afternoon of Sunday, but he may deliver bread up to that hour. And the Bread Act, 1822 (*l*), prohibits the baking by

Bread Act, 1836.

(*e*) (1838) 3 M. & W. 7 L. J. N. S. Ex. 27; 49 R. R. 586, corrected in 5 M. & W. 702.

(*f*) *Winchell* v. *Carey* 115 Mass. 560.

(*g*) *Philipps* v. *Innes* (1874) 4 Cl. & F. 234; 42 R. R. 19; *cf.* in England *Palmer* v. *Snow* [1900] 1 Q. B. 725; 69 L. J. Q. B. 356.

(*h*) 10 Edw. 7 and 1 Geo. 5, c. 24, ss. 54, 61. The lawful hours are stated in Sch. 7. The Act applies to England and Wales. As to Ireland, see the Intoxicating Liquors (Ireland) Act, 1906 (6 Edw. 7, c. 39); and as to Scotland, the Licensing (Scotland) Act, 1903 (3 Edw. 7, c. 25), ss. 53, 60, 76, Sch. 6.

(*i*) 52 & 53 Vict. c. 42, s. 26.

(*k*) 6 & 7 Will. 4, c. 37, s. 14, not extending to Scotland.

(*l*) 3 Geo. 4, c. cvi., s. 16.

any master or mistress baker or journeyman *within* the above-mentioned limits of bread at any hour on Sunday, and its sale or exposure for sale except between nine in the forenoon and one in the afternoon, but a master or mistress baker may deliver to customers any bakings up to half-past one (*m*).

Other statutes regulating sales.

It is impossible to refer to all the numerous statutes regulating the sale of particular goods. The reader must therefore be referred to the various Acts (*n*).

French Code Civil.

The French Civil Code, art. 1133, provides that "the consideration (*la cause*) is unlawful when it is prohibited by law, when it is contrary to good morals or to public order." Under this Article the decisions are very much the same as those in our own reports, and they are collected by Sirey in his Code Civil Annoté (*o*). One of the cases establishes the illegality of a bargain not likely to occur in England: that by which an organiser of dramatic successes (*un entrepreneur de succès dramatiques*) engages to ensure, by means of hired applauders (*claqueurs*), the success of actors or of pieces performed by them (*p*).

Quebec Civil Code.

The Quebec Civil Code by art. 989 provides that "the contract without consideration, or founded on an illegal consideration is void"; and by art. 990 that "the consideration is illegal when it is prohibited by law, or contrary to good morals, or to public order."

Civil law on illegality.

The following passage is contained in a rescript of the Emperors Theodosius and Valentinian with respect to illegal contracts: "Non dubium est in legem committere eum qui verba *legis* amplexus contra legis nititur voluntatem. Nec pœnas insertas legibus evitabit qui se contra juris sententiam saeva prærogativa verborum fraudulenter excusat. Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum qui contrahunt lege contrahere prohibente" (*q*).

Poison.

With regard to the sale of poisons, Justinian ruled that the sale was lawful if, by admixture of other substances, the poisons could be changed into antidotes, or salutary medicines: otherwise the sale was illegal (*r*).

(*m*) Prosecutions under this Act are not subject to the provision in s. 1 of the Sunday Observation Prosecution Act, 1871, requiring the consent of the Chief Officer of Police, etc.: *R.* v. *Mead* [1902] 2 K. B. 212; 71 L. J. K. B. 871. See also *R.* v. *Bros* [1902] 85 L. T. 581 (Jewish baker selling on Sunday).

(*n*) There is a long list of Acts at pp. 550-1 of the 5th ed.

(*o*) Under Arts. 900 and 1133 of the Code, 3e éd. at 527 *et seqq.*, 724 *et seqq.*

(*p*) Sirey, at 731, note 166 to Art. 1133.

(*q*) Code 1, 14, 5.

(*r*) Dig. 18. 1. 35. 2.

BOOK IV.

PERFORMANCE OF THE CONTRACT.

PART I.

CONDITIONS AND WARRANTIES.

CHAPTER I.

CONDITIONS AND WARRANTIES: GENERAL PRINCIPLES.

THE Code provides in general terms:

"1.—(2.) A contract of sale may be absolute or conditional."

Code, s. 1 (2).

Contract of Sale absolute or conditional.

No definition of a condition is given. Now, conditions may in law be either statements or promises to be made good or performed by the party by whom they are made, or collateral events or contingencies, there being no promise that the event or contingency shall happen (*a*). And conditions of either kind may be also in the terminology of the civil law, suspensive or resolutive, or, as they are called in the common law, precedent or subsequent; the former class being such that the existence of the obligation, or the performance of the promise of the other party, depends upon their fulfilment: the latter class, on the other hand, dissolving that obligation or discharging the liability to perform the promise.

Various kinds of conditions at common law.

Except in the statement above quoted, the Code contains no enactment respecting conditions generally; but it contains provisions with regard to certain conditions to be performed by the seller (*b*), and stipulations with respect to time (*c*).

(*a*) *Per* Brantwell, B., in *Jackson* v. *Union Marine Insurance Co.* (1874) 10 C. P. 125, at 144-5; 44 L. J. N. S. C. P. 27; Ex. Ch. See Contingent Contracts defined, and their effect stated, in the Indian Contract Act (9 of 1872), ss. 31-36, which represent English law.

(*b*) Ss. 11—15.

(*c*) S. 10, *post*, 674.

Illustrations of contingent contracts are to be found every day in various contracts of insurance. They are also well illustrated by contracts for the sale of goods "to arrive," which are hereafter considered (*d*).

Preliminary remarks.

With regard to conditions in the sense of promises:

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

General principles and definitions.

The subjects of representation, warranty, conditions, and fraud, run so closely together that it is very difficult to treat each separately; and it will be convenient here, although these different topics need independent consideration, to give an outline of the general principles applicable to the whole subject.

Representation.

A *representation* is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it. A representation, even though contained in a written instrument, is *not an integral part of the contract*. Hence it follows, that even if it be untrue, the contract in general is not broken, nor is the untruth any cause of action, unless made fraudulently (*f*), or unless it be material, in which case its untruth may justify, as has been already seen, a rescission of the contract (*g*). To this general rule there is a special exception, in the case of marine policies of insurance, founded on reasons which need not be here discussed. The false representation becomes

(*d*) *Post*, 666, *et seqq.*

(*e*) For the general subject, see the notes to *Pordage* v. *Cole* (1669) 1 Wms. Saund. 320, and to *Peeters* v. *Opie* (1671) 2 Wms. Saund. 352; *Cutter* v. *Powell* (1795) 2 Sm. L. C. 1; 3 R. R. 185; and the numerous authorities in the notes; Leake, Dig. of the Law of Contract, ed. 1892, Part III., Chap. 2, p. 550, *et seqq.*

(*f*) *Derry* v. *Peek* (1889) 14 A. C. 337; 58 L. J. Ch. 864; *ante*, 540; *Angus* v. *Clifford* [1891] 2 Ch. 449; 40 L. J. Ch. 443, C. A.

(*g*) Chapter on Misrepresentation, *ante*, 491.

a *fraud*, and has been already explained (*h*), when the untrue statement was made with a knowledge of its untruth, or without belief in its truth, or recklessly, with a carelessness whether it were true or false (*i*). When the representation is made in writing, instead of words, it is plain that its *nature* is not thereby altered, but in either case a question may arise whether the statement be not something more than a mere representation, whether it be not *part of the contract*. On a written instrument this is a question of construction, one of law for the Court (*k*), but it may be necessary to take the opinion of the jury on matters of fact which throw light on the construction (*l*). Whenever it is determined, that a statement is a substantial part of the contract, then comes the nice and difficult question, Is it a *condition precedent?* or is it an *independent agreement?* a breach of which will not justify a repudiation of the contract, but only a cross action or counter-claim for damages.

In deciding this question, the contract must be looked at in the light of surrounding circumstances, with a view to determining whether the intention of the parties will best be carried out by treating the promise as a condition, or as an independent agreement, that is, a mere warranty; and one of the first things to be considered is to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out (*m*). The cases show distinctions of extreme nicety on this point, of which a striking example is afforded in charterparties, where a statement that a vessel is "now at Liverpool, ready to-morrow" (*n*), or is to sail or to be ready to receive cargo on a given day (*o*), has been decided to be a condition, but a stipulation that she shall sail immediately (*p*), or with all convenient speed, or within a reasonable time, is held to be an independent agree-

(*h*) Chapter on Fraud, *ante*, 509, 541.
(*i*) *Derry* v. *Peek*, *supra*.
(*k*) *George D. Emery & Co.* v. *Wells* [1906] A. C. 515; 75 L. J. P. C. 104, P. C.
(*l*) Per Bowen, L.J., in *Bentsen* v. *Taylor* [1893] 2 Q. B. 280; 63 L. J. Q. B. 15.
(*m*) *Per eundem* in S. C.
(*n*) *Compagnie Chemin-de-Fer Paris-Orleans* v. *Leeston Sh. Co.* [1919] 36 T. L. R. 68.
(*o*) *Glaholm* v. *Hays* (1841) 2 M. & G. 257; 10 L. J. C. P. 98; 58 R. R. 396; *Oliver* v. *Fielden* (1849) 4 Ex. 135; 18 L. J. Ex. 253; 80 R. R. 492; *Crookewit* v. *Fletcher* (1857) 1 H. & N. 893; 26 L. J. Ex. 153; 108 R. R. 882; *Seeger* v. *Duthie* (1860) 8 C. B. N. S. 45; 29 L. J. C. P. 253; 125 R. R. 570; *Bentsen* v. *Taylor* [1893] 2 Q. B. 274; 63 L. J. Q. B. 15—C. A.
(*p*) *Forest Oak S.S. Co.* v. *Richard* [1899] 5 Com. Cas. 100.

ment (*q*), except as regards such delay as would frustrate the object of the voyage (*r*).

In determining whether a representation or statement is a condition or not, the rule laid down by Lord Mansfield, in *Kingston* v. *Preston* (*s*), remains unchanged, "that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." And the rules for discovering the intention are mainly these:

Rules of construction for discovering intention.

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

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

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

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

(*q*) *Tarrabochia* v. *Hickie* (1856) 1 H. & N. 183; 26 L. J. Ex. 2[illegible] 108 R. R. 508; *Dimech* v. *Corlett* (1858) 12 Moo. P. C. C. 199; 124 R. R. 2[illegible] *Clipsham* v. *Vertue* (1843) 5 Q. B. 265; 13 L. J. Q. B. 2; 64 R. R. 8[illegible] *M'Andrew* v. *Chapple* (1865) 35 L. J. C. P. 281; L. R. 1 C. P. 643.

(*r*) *Jackson* v. *Union Marine Ins. Co.* (1873) L. R. 8 C. P. 572; 42 L. J. C. P. 254; in Ex. Ch. (1874) L. R. 10 C. P. 125; 45 L. J. C. P. 27; Williams, J. in *Behn* v. *Burness* (1863) 3 B. & S. 758, shows that an independent agreement cannot be turned into a condition by matter *ex post facto*, but that the cases cited in the previous note mean that the parties *ab initio* intended that excessive delay should amount to the breach of a condition, as frustrating the adventure. See also *Scottish Navigation Co.* v. *W. A. Souter & Co.* [191[illegible] 33 Times L. R. 7 C. A.; and the same doctrine applied to a contract of [illegible] by Lord Shaw in *Wallis, Son and Wells* v. *Pratt and Haynes* [1911] A. C. 394.

(*s*) (1773) cited in *Jones* v. *Barkley* (1781) 2 Doug. 685; and see also per Blackburn, J., in *Bettini* v. *Gye* (1876) 1 Q. B. D. 187; 45 L. J. Q. B. 289. See also the most instructive judgment of Bowen, L.J., in *Bentsen* v. *Taylor Son & Co.* [1893] 2 Q. B. 280; 63 L. J. Q. B. 15; and the judgment of the same Judge in *The P[illegible]ck* (1889) 14 P. D. 68; 58 L. J. P. 73, on implied warranties, or covenants in law, quoted *post*, 682.

(*t*) *Per* Parke, B., in *Graves* v. *Legg* (1854) 9 Ex. 709, 716; 23 L. J. Ex. 228; 96 R. R. 931; *Bettini* v. *Gye* (1876) 1 Q. B. D. 183; 45 L. J. Q. B. 209.

(*u*) See *Glazebrook* v. *Woodrow* (1799) 8 T. R. 366; 4 R. R. 700; *Jackson* v. *Union Insurance Co.* (1874) L. R. 10 C. P. at 141; 45 L. J. C. P. 3[illegible] *Poussard* v. *Spiers* (1876) 1 Q. B. D. 410; 45 L. J. Q. B. 621; *Bachin* v. *Bidwell* (1881) 18 Ch. D. 238, where the cases from the year 1589 under Rules 2 and 3 are reviewed.

concurrent conditions, and neither party can maintain an action for breach of contract, without averring that he performed or offered to perform what he himself was bound to do (*x*).

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

In applying these rules of construction, the circumstances under which the contract was made, and the purpose for which it was made, are, as has been already stated, to be taken into consideration. The same statement may, under certain circumstances, be merely a description or representation, and under others the most substantial stipulation in the contract; as, for instance, if a vessel were described in a charterparty as a "French vessel," these words would be merely a description in time of peace, but if England were at war, and France at peace, with America, they would form a condition precedent of the most vital importance (*z*).

Condition precedent treated as warranty by acceptance of partial performance

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 (*a*) of that which was to be performed in his favour, the condition precedent must be treated (*b*) as if it had become a warranty, or independent agreement, affording no defence to an action, but giving right to a cross action or counter-claim for damages (*c*). The reason is, that it would be unjust under

(*x*) These rules are (on substance) given in notes to *Pordage* v. *Cole* (1669) 1 Wms. Saund. 320 *b*. and adopted in notes to *Cutter* v. *Powell* (1795) 2 Sm. L. C. 1; 3 R. R. 185. Rule 4 is adopted in s. 28 of the Code. The general statement of the law applicable to conditions in the preliminary remarks in this Chapter is mainly based on the judgment of the Ex. Ch. in *Behn* v. *Burness* (1863) 3 B. & S. 751; 32 L. J. Q. B. 204.

(*y*) *Per* Jervis, C.J., in *Roberts* v. *Brett* (1856) 18 C. B. 561; 25 L. J. C. P. 280; and see the opinions of the Lords in this case in 11 H. L. C. 337.

(*z*) *Behn* v. *Burness* (1863) 3 B. & S. 751, *per* Williams, J.; see also *Oppenheim* v. *Fraser* (1876) 34 L. T. N. S. 524 ("now at Rangoon").

(*a*) Note, however, that s. 41 (6) (*c*) of the Code *post*, speaks only of a part.

(*b*) The condition is not *also* a warranty *ab initio*; it is treated as having so become solely for remedial purposes: *Wallis* v. *Pratt and Haynes* [1911] A. C. 394; 80 L. J. K. B. 1058, where Lord Shaw of Dunfermline disapproves that part of the judgment in *Ellen* v. *Topp*, *infra*, which speaks of a condition precedent changing its character by the promisee accepting less.

(*c*) *Ellen* v. *Topp* (1851) 6 Ex. 424; 20 L. J. Ex. 241; 86 R. R. 353; *Behn* v. *Burness* (1863) 3 B. & S. 751; 32 L. J. Q. B. 204.

such circumstances, that a party who has received a part of the consideration should keep it and pay nothing because he did not receive the whole. The law, therefore, obliges him to perform his part of the agreement, and leaves him to his action or counter-claim for damages against the other side for the imperfect performance of the condition (*d*).

Specific goods sold with a warranty.

A familiar instance illustrating these principles at common law was afforded by a contract of sale of specific goods with a warranty. The rule is thus stated by Williams, J., delivering the judgment of the Exchequer Chamber in *Behn* v. *Burness* (*e*): "If a specific thing has been sold, with a warranty of its quality, *under such circumstances that the property passes by the sale*, the vendee, having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special stipulation to that effect in the contract (*f*)), but must have recourse to an action of damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed."

Condition precedent must be strictly fulfilled before performance can be required from the other.

Apart from this modification of the principle, where one party has accepted a portion of the benefit of the condition in his favour, and has thus *ex post facto* changed his remedy, the rule is uniform that the condition precedent must be truly and strictly performed before the party on whom its fulfilment is incumbent can call on the other to comply with his promise. And this rule applies although non-performance is caused by the condition being at the time of the contract, or (except

(*d*) *Ellen* v. *Topp*, *supra*; *White* v. *Beaton* (1861) 7 H. & N. 42; 30 L. J. Ex. 373; 126 R. R. 319, particularly *per* Bramwell, B.; *Carter* v. *Scargill* (1875) L. R. 10 Q. B. 564; *per Cur.* in *Behn* v. *Burness*, *supra*. See also *Graves* v. *Legg* (1854) 9 Ex. 709; 23 L. J. Ex. 228; 96 R. R. 931; *Past* v. *Dowie* (1863) 5 B. & S. 20; 32 L. J. Q. B. 179; 136 R. R. 42; *Dimech* v. *Corlett* (1858) 12 Moo. P. C. 199; 124 R. R. 26; *Bradshaw* v. *Williams* (1872) L. R. 7 Ex. 259; 41 L. J. Ex. 64; 1 Wms. Saund. 320 notes to *Pordage* v. *Cole* (1669).

(*e*) (1863) 3 B. & S. 751, at 755—756. See also *per* Parke, B., in *Mondel* v. *Steel* (1841) 8 M. & W. 858, at 870; 10 L. J. Ex. 426; 58 R. R. 880.

(*f*) *Bannerman* v. *White* (1861) 10 C. B. N. S. 844; 31 L. J. C. P. 2; 128 R. R. 953.

where it is by the fault of the promisor (*g*)), subsequently becoming, impossible of performance (*h*).

Performance may be waived.

But the necessity for performing the condition precedent may be *waived* by the party in whose favour it is stipulated, either expressly or tacitly, by inference from his acts or conduct, as, for example, where he leads the other party to suppose that the contract is still binding, and that the breach of the condition will be treated only as a breach of a warranty (*i*). This waiver is implied by law in all cases in which the party entitled to exact performance either hinders or impedes the *other party* in fulfilling the condition, or incapacitates *himself* from performing his own promise, or absolutely refuses performance, so as to render it idle and useless for the other to fulfil the condition.

Divisible condition.

No authority is needed, of course, to show that the party in whose favour the condition has been imposed may expressly waive it.

The cases, however, are numerous in illustration of *implied* waiver.

Waiver of condition implied in certain cases.

If a man offer to perform a condition precedent in favour of another, and the latter refuse to accept performance, or hinder or prevent it, this is a waiver, and the latter's liability becomes fixed and absolute. As long ago as 1787, Ashurst, J., in delivering the opinion of the King's Bench in *Hotham* v. *East India Company* (*k*), said that it was evident from common sense that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant, "it is equal to performance" (*l*).

Performance obstructed or rejected.

Thus, in *Mackay* v. *Dick* (*m*), the defender agreed to buy for £1,115 a steam excavator, on the condition that it should be found capable on a fair trial of excavating 350 cubic yards

Mackay v. *Dick* (1881).

(*g*) *Mackay* v. *Dick*, *post*.

(*h*) *Nerot* v. *Wallace* (1789) 3 T. R. 17; *Harvy* v. *Gibbons* (1675) 2 Lev. 161; *Sharp* v. *Christmas* [1892] 8 T. L. R. 687, C. A.; *Crookewit* v. *Fletcher* (1857) 1 H. & N. 893; 26 L. J. Ex. 153; 108 R. R. 882 (Act of God); Leake on Cont., ed. 1878, 719.

(*i*) *Per* C. A. in *Bentsen* v. *Taylor* [1893] 2 Q. B. 274; 63 L. J. Q. B. 15.

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

(*l*) See also *City of London* v. *Greyme* (1607) Cro. Jac. 182; *Pontifex* v. *Wilkinson* (1845) 1 C. B. 75; *Holme* v. *Guppy* (1838) 3 M. & W. 387; 49 R. R. 647; *Laird* v. *Pim* (1841) 7 M. & W. 474; 10 L. J. Ex. 259; 56 R. R. 758; *Cort* v. *Ambergate Ry. Co.* (1851) 17 Q. B. 127; 20 L. J. Q. B. 460; 85 R. R. 369; *Thornhill* v. *Neats* (1860) 8 C. B. N. S. 831 (penalties waived); 125 R. R. 902; *Russell* v. *Bandeira* (1862) 13 C. B. N. S. 149 (same); 32 L. J. C. P. 68; 134 R. R. 488; *Mackay* v. *Dick* (1881) 6 A. C. 251, *infra*; *Braithwaite* v. *Foreign Hardwood Co.* [1905] 2 K. B. 543, C. A.; 74 L. J. K. B. 688; *Worcester College* v. *Oxford Canal Navigation* [1911] 105 L. T. 501; 81 L. J. Ch. 1.

(*m*) *Mackay* v. *Dick* (1881) 6 A. C. 251, H. L. (Sc.).

of clay a day on a properly opened-up "face" of a certain railway cutting which the defender was constructing, and the defender failed to provide a properly opened-up face, as it was his part to do, notwithstanding repeated requests of the pursuers, the sellers, in consequence of which the machine was never fairly tried, and broke down. *Held*, that the defender was bound to pay for the machine, as the sellers had implemented the condition of trial to the best of their ability.

The principle also applies to cases where both parties have to concur in the doing of some act, as was shown by Lord Blackburn (*n*) on the authority of a case decided in 1469. "As a general rule," said his Lordship, "where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

Where the other party refuses or renders himself incapable to perform his promise.

On the same principle, a positive absolute refusal by one party to carry out the contract, or his conduct in incapacitating himself from performing his promise, is in itself a complete breach of contract on his part, and dispenses the other party from the useless formality of tendering performance of the condition precedent: as, if A. engage B. to write articles for a specified term in a periodical publication belonging to A., and before the end of the term A. should discontinue the publication; or if he agree to sell to B. a specified ox, and before the time for delivery should kill and consume the animal; or to load specified goods on board a vessel on a day fixed, and before that day should send them abroad on a different vessel; it is plain that it would be futile for B., in the cases supposed, to tender articles for insertion in the discontinued publication, or the price of the ox already consumed, or to offer to receive on his vessel goods already sent out of the country; and *lex neminem ad vana cogit* (o

(*n*) In *Mackay* v. *Dick*, *supra*, at 263, citing Y. B. 9 Edw. 4, E. T. 4 a.

(*o*) Refusal:—*Jones* v. *Barkley* (1781) Dougl. 684; *Laird* v. *Pim* (1841) 7 M. & W. 474; 10 L. J. Ex. 259; 56 R. R. 768; *Ripley* v. *McClure* (1849) 4 Ex. 345; 18 L. J. Ex. 419; 80 R. R. 593; *Cort* v. *Ambergate Ry. Co.* (1851) 17 Q. B. 127; 20 L. J. Q. B. 460; 85 R. R. 369; *Bank of China* v. *Am. Trading Co.* [1894] A. C. 266; 63 L. J. P. C. 92; *Braithwaite* v. *For Hardwood Co.*, *ante*, 641; *General Billposting Co.* v. *Atkinson* [1909] A. C. 118; 78 L. J. Ch. 77.

Incapacitation:—*Sir Anthony Main's Case* (1596) 5 Co. Rep. 21 a.; *Bedwell* v. *Parsons* (1808) 10 East, 359; *Amory* v. *Brodrick* (1822) 5 B. & A. 73; *Planche* v. *Colburn* (1831) 8 Bing. 14; 1 L. J. C. P. 7; 34 R. R. 613; *Short*

For conduct amounting to a repudiation of a contract *as a whole* is in law a waiver of all conditions precedent (*p*). And a condition definitely waived is waived once for all. Accordingly, the party waiving cannot revoke the waiver and rely on the non-performance of any condition, because he subsequently discovers that the party liable to perform it was in fact unable or unwilling to do so (*q*). Where, however, the condition is divisible, to be fulfilled from time to time with reference to separate acts of performance by the other party, a waiver can be recalled, and the condition be insisted on in the future; but subject to this, that the party waiving cannot repudiate the contract without reasonable notice to the other to enable him to fulfil the condition in future (*r*).

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

But a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal refusal to perform the promise, and must be treated and acted upon as such by the other party; for if he afterwards continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end (*s*).

The principles already stated in this Chapter are now embodied in the Code, except that the conditions mentioned in the Act are only conditions to be performed by the seller, or for which he has made himself responsible. The Code provides:

Stone (1846) 8 Q. B. 358; 15 L. J. Q. B. 143; 70 R. R. 514; *Lovelock* v. *Franklyn* (1846) 8 Q. B. 371; 15 L. J. Q. B. 146; 70 R. R. 520; *Caines* v. *Smith* (1846) 15 M. & W. 189; 15 L. J. Ex. 106; *Inchbald* v. *West. Neilgherry Coffee Co.* (1864) 17 C. B. N. S. 733; 34 L. J. C. P. 15; 142 R. R. 603; *Measures Brothers* v. *Measures* [1910] 2 Ch. D. 248; 79 L. J. Ch. 707, C. A.

(*p*) *Jurcidini* v. *National British Insurance Co.* [1915] A. C. 499; 84 L. J. K. B. 640.

(*q*) *Braithwaite* v. *Foreign Hardwood Co.* (*supra*). See also the reasoning of the Q. B. in *Hochster* v. *De la Tour* (1853) 2 E. & B. 678; 22 L. J. Q. B. 455.

(*r*) *Panoutsos* v. *Raymond Hadley Corporation of N. Y.* [1917] 2 K. B. 473, C. A.; 86 L. J. K. B. 1325 (contract by instalments, each a separate contract).

(*s*) Absolute refusal:—*Ripley* v. *McClure*, *ante*, 642; *Hochster* v. *De la Tour* (1853) 2 E. & B. 678; 22 L. J. Q. B. 455; 95 R. R. 747; *Danube Co.* v. *Xenos* (1862) 13 C. B. (N. S.) 825; 31 L. J. C. P. 284; *Leeson* v. *North British Oil Co.* (1874) 8 Ir. Rep. C. L. 309. Not acted on: *Avery* v. *Bowden* (1856) 6 E. & B. 953; 26 L. J. Q. B. 3; *Reid* v. *Hoskins* (1855) 5 E. & B. 729; 24 L. J. Q. B. 315; 103 R. R. 703; *Johnstone* v. *Milling* (1886) 16 Q. B. D. 460; 55 L. J. Q. B. 162, C. A. Mere assertion of inability: *Barrick* v. *Buba* (1857) 2 C. B. (N. S.) 563; 26 L. J. C. P. 280; *Avery* v. *Bowden* (1855) 5 E. & B. 714; 26 L. J. Q. B. 49; 103 R. R. 695; *Reid* v. *Hoskins* (1855) *ib.* 729; 24 L. J. Q. B. 315; 103 R. R. 703; *Johnstone* v. *Milling*, *supra*; *Gucret* v. *Audouy* (1863) 62 L. J. Q. B. 633. A. L. Smith, L.J., in *Gucret* v. *Audouy*, *supra*, and the Supreme Court of the U. S. in *Smoot* v. *U. S.* (1872) 15 Wall. 36, at 48, have cited the preceding paragraph in the text as a correct statement of the law. The authorities are collected and considered in the notes to *Cutter* v. *Powell*, 2 Sm. L. C. 11th ed. 1; 3 R. R. 185.

Code, s. 11 (1) and (3).

"11.—(1.) In England or Ireland (*t*)—

"(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty (*u*), and not as a ground for treating the contract as repudiated.

"(b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty (*u*), the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

"(c) Where a contract of sale is not severable (*x*), and the buyer has accepted (*y*) the goods, or part thereof, or where the contract is for specific goods (*u*) the property (*u*) in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty (*u*), and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

"(3.) Nothing in this section shall affect the case in any condition or warranty (*z*), fulfilment of which is excused by law by reason of impossibility or otherwise."

Waiver under s. 11 (1) (*a*) and (*c*).

Clause (a) deals only with a voluntary waiver on the part of the buyer, where he determines an election, still competent to him, by not insisting upon the condition, or by treating it as a warranty. Clause (c), on the other hand, is only concerned with cases of compulsory waiver, where the buyer no longer has the option.

S. 11 (1) (*c*).

The provisions of clause (c), so far as they relate to the entirety of contracts, mean that, after part acceptance of the benefit of an entire consideration, the buyer cannot repudiate the contract as a whole, and refuse to pay for the goods, or to accept the residue (*a*). This was the rule at common law, where a party who had accepted part performance, so that the parties could not be put *in statu quo*, could not repudiate the contract, and recover back any money he had paid (*b*). But, in order that the buyer's conduct should have this effect, it must amount to an acceptance, as distinguished from a mere

(*t*) The law of Scotland is dealt with by sub-s. (2), printed *post*, 646.
(*u*) Defined in s. 62 (1).
(*x*) See, as to the entirety of contracts, *ante*, 220, and s. 31 (1), *post*, 647.
(*y*) Defined in s. 35, *post* 856.
(*z*) Defined in s. 62 (1), *post*, 751.
(*a*) *Purcell* v. *Bacon* [1914] 19 Com. L. R 241 (Austr.).
(*b*) *Hunt* v. *Silk* (1804) 5 East, 449; 7 R. R. 739. See also *Past* v. *Dowie* (1863) 32 L. J. Q. B. 179; 34 *ibid.* 127; *Harnor* v. *Groves* (1855) 15 C. B. 667; 24 L. J. C. P. 53; 100 R. R. 535; *ante*, 486.

receipt of the goods. For example, there is no acceptance by merely retaining part of the goods delivered by instalments where each instalment is not to be separately paid for (*c*).

Difficulties of this clause where it deals with specific goods.

Some difficulty arises in the interpretation of this clause, so far as it deals with "specific goods the property in which has passed to the buyer." If there be an unfulfilled condition in the proper sense, the property can never pass to the buyer by the contract (*d*), though it may pass by the buyer's subsequent acceptance. By the common law the existence in the contract of a "warranty" (*e*), that is to say, a stipulation as to some quality or incident of the goods, not forming part of their description and consequently not a condition, but collateral to the main purpose of the contract (*f*), did not prevent the property passing, if otherwise it would pass (*g*): and when it passed, the buyer, having been benefited by becoming the owner of the goods, could not afterwards reject them for breach of warranty, and repudiate the contract, unless there was an express agreement to that effect (*h*). Accordingly, a contract of sale specific goods was ordinarily a bargain and sale. But cl. though evidently intended to enact this law, uses the word "condition." The case, it would seem, contemplated by the clause is one where the property passes by the buyer's *subsequent* acceptance of the goods by a waiver of the right of rejection. But the logical arrangement of section 11 is thereby destroyed, for the suggested waiver is a voluntary one—a case already dealt with by clause (a)—whereas clause (c) deals only with compulsory waiver.

Construction of clause (c). Difficulties.

The words "impossibility or otherwise" in section 11 (3) are wide enough to cover the three cases of implied waiver of conditions already mentioned, viz., hindrance by the promisor of performance of conditions, and his own refusal to perform his promise, or his disabling himself. And it is apprehended that there those cases are the only ones embraced in section 11 (3) in connection with *conditions*, for in no other case can impossibility be an excuse of performance of a condition as such. And the clause is in the nature of a proviso to the

Impossibility S. 11 (3).

(*c*) *Waddington* v. *Oliver* (1805) 2 B. & P. N. R. 61; 9 R. R. 614; *post*, 800.
(*d*) Code, s. 18, Rule 1, *ante*; *Varley* v. *Whipp*, *ante*, 353.
(*e*) For the different meanings of "warranty," see Anson on Cont., 9th ed. 314 n.
(*f*) *Parker* v. *Palmer* (1821) 4 B. & A. 387; 23 R. R. 313.
(*g*) *Per Cur.* in *Heilbutt* v. *Hickson* (1872) L. R. 7 C. P. 438, at 449; 41 L. J. C. P. 228.
(*h*) *Per Cur.* in *Behn* v. *Burness* (1863) 5 B. & S. 751, Ex. Ch.; 32 L. J. Q. B. 204, *ante*.

preceding clauses, which apply only to conditions to be performed by the seller.

Meaning of "warranty" in Scotland.

The meaning of "warranty" in Scotland is different from that obtaining in England and Ireland. By the definition in the Code (*i*), in Scotland "a breach of warranty shall be deemed to be a failure to perform a material part of the contract"; and in section 11 it is enacted:

Code, s. 11 (2). Rights of the buyer in Scotland.

"11.—(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

By the Scotch common law, the buyer's only remedy on a breach of warranty was to reject the goods; if he retained them, he was liable for the full contract price (*k*). By virtue of sub-section (2) he has now a third remedy, adopted from English law, viz., to retain the goods and to recoup his loss in damages. The subject is hereafter further considered (*l*).

This subsection is also subject to the provisions already quoted (*m*) of sub-section 3 with regard to performance being excused by impossibility or otherwise.

Prospective breach by promisor.

The principle that a promisor by a refusal to perform, or by incapacitating himself from performing, waives the fulfilment of any condition precedent to his promise, applies also to cases in which the promisor has disabled himself from performing, or has refused to perform, the contract *before* the time appointed for performance.

With regard to disability, it was laid down as early as 1481 in the Year Books (*n*) by Choke, J., that "if a day be limited to perform a condition (*o*), if the obligor once disables himself to perform it, though he be enabled again before the day, yet the condition is broken, as if the condition be to enfeoff another before Michaelmas; if before the feast he enfeoff another, though he after repurchases, yet he cannot perform

(*i*) S. 62 (1).

(*k*) *Padgett* v. *McNair* (1852) 15 Dunlop, 76, cited by Lord Moncreiff in *Lupton* v. *Schulze* (1900) 2 Fraser, at 1122; Prof. Brown's Sale of Goods Act, 253.

(*l*) *Post*, Book V., Pt. II., Chap. II.

(*m*) *Ante*, 644.

(*n*) 21 Edw. 4, 54 b., 55 a., pl. 26, cited in Vin. Ab., Vol. V., at 224, Condition (B.c.), pl. 1, 2.

(*o*) By "condition" the learned Judge meant a condition in a bond, that is to say, an obligation, or promise, and not a condition precedent.

the condition." And this ruling was followed in later cases (*p*).

But it was doubtful whether the same principle governed a mere *refusal* to perform, for where the promisor had not disabled himself, he might yet be at the appointed date willing to perform; and the question was whether the promisee was bound to await that date before suing. *Hochster* v. *De la Tour* (*q*) was the first case in which it was decided that a prospective refusal amounted to an *immediate* breach, of which the promisee could at once take advantage if he chose. The whole law on this subject was re-examined and conclusively settled in the Exchequer Chamber in *Frost* v. *Knight* (*r*). Cockburn, C.J., in an exhaustive judgment (*s*), which has been frequently quoted, shows that the promisee has the option either of accepting the promisor's refusal to perform as an immediate breach of contract, or of refusing to accept the repudiation, in which case he treats the contract as an existing one, not only for his own benefit, but also for that of the promisor.

Hochster v. *De la Tour* (1853).

Frost v. *Knight* (1870).

Lord Wrenbury made the following pregnant observations (*t*) on the subject of what is called "anticipatory breach":

Rationale of "anticipatory breach" *per* Lord Wrenbury.

"The expression is, I think, unfortunate. . . . There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. . . . His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future."

The learned Lord explains in the same case that the conduct

(*p*) *Bowdell* v. *Parsons* (1808) 10 East, 359; *Planche* v. *Colburn* (1831) 8 Bing. 14; 1 L. J. C. P. 7; 34 R. R. 613; *Ford* v. *Tiley* (1827) 6 B. & C. 325; 5 L. J. (O. S.) K. B. 169; 30 R. R. 339; *Short* v. *Stone* (1846) 8 Q. B. 358; 15 L. J. Q. B. 143; 70 R. R. 514; *Lovelock* v. *Franklyn* (1846) *ib.* 371; 15 L. J. Q. B. 146; 70 R. R. 520; *Synge* v. *Synge* [1894] 1 Q. B. 466; 63 L. J. Q. B. 202, C. A.

(*q*) 2 E. & B. 678; 22 L. J. Q. B. 455; 95 R. R. 747; see notes to *Cutter* v. *Powell* (1795) in 2 Sm. L. C. 7th ed. at 42; 11th ed. at 43; 3 R. R. 185.

(*r*) L. R. 5 Ex. 322; 7 Ex. 111; 41 L. J. Ex. 78. See also *Michael* v. *Hart* [1902] 1 K. B. 482; 71 L. J. K. B. 265, C. A.

(*s*) See L. R. 7 Ex. at 112—114. Keating, J., and Lush, J., concurred in this judgment.

(*t*) In *Bradley* v. *Newsom, Sons & Co* [1919] A. C. 16; 88 L. J. K. B. 35.

of the party repudiating is an offer to rescind, so that, if the other party agree, the contract is rescinded by mutual *consent*, subject only to a right in damages of the party not in fault.

The Court of Appeal in *Johnstone* v. *Milling* (*u*) intimated a strong opinion that the doctrine of *Hochster* v. *De la Tour* does not extend to cases where the party suing would have no right to throw up the *whole* contract upon a breach by the other party at the date appointed for performance. And Collins, M.R., in *Michael* v. *Hart & Co.* (*x*), says that, to enable the party not in fault to repudiate the contract, the anticipatory breach by the other party must be one "going to the whole consideration." In other words, the right of repudiation for an anticipatory breach by the promisor can stand on no higher ground than a breach at the time of performance.

Conditions are also generally promises.

It has been shown then that a condition must be strictly performed by the plaintiff, unless performance has been waived by the defendant, before the latter can be liable. But a condition (not being a merely collateral event or contingency) is also a promise by the party liable to perform it, and as such it must be performed, unless excused, as, for instance, in some cases by the impossibility of its performance.

Impossibility as an excuse.

With regard to impossibility in fact as an excuse for non-performance, the law has thus been stated in the House of Lords: "No Court has an absolving power; but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted. . . . The language used as to 'frustration of the adventure' merely adapts it to the class of cases in hand" (*y*). Thus "the principle . . . is one of contract law, depending on some term or condition to be implied in the contract itself, and not or something entirely *dehors* the contract which brings the contract to an end" (*z*).

In accordance with these principles the general rule is that it is no excuse for the non-performance of a promise that it is impossible for the promisor to fulfil it, if the performance be *in its nature possible* (*a*). But if a thing be physically

(*u*) (1886) 16 Q. B. D. 460; 55 L. J. Q. B. 162, C. A. See also *per Cur.* in *Roper* v. *Johnson* (1873) L. R. 8 C. P. 167; 42 L. J. C. P. 65.
(*x*) [1902] 1 K. B. 482, at 490; 71 L. J. K. B. 265, C. A.
(*y*) *Per* Earl Loreburn in *F. A. Tamplin SS. Co.* v. *Anglo-Mexican Petroleum, etc., Co.* [1916] 2 A. C. 397, at 404; 85 L. J. K. B. 1389.
(*z*) *Per* Lord Parker in last case at 422.
(*a*) *Ashmore* v. *Cox* [1899] 1 Q. B. 436; 68 L. J. Q. B. 72; *post*.

impossible, *quod natura fieri non concedit* (*b*), or be rendered impossible by the death or failure of health of the promisor in contracts where his personality is of the essence; or by the perishing, without the promisor's default, of a specific thing, the continued existence of which is assumed as the foundation of the contract (*c*), or by the failure of a state of circumstances similarly assumed (*d*), the obligation is at an end (*e*)—as, if A. agree to sell and deliver his horse, Eclipse, to B. on a fixed future day, and the horse die in the interval. In such cases the contract is treated, not as an absolute one, but as subject to the implied condition that performance shall be excused if it be rendered impossible in fact by the failure of that which is contemplated as the basis on which the parties contracted.

But the dependency of the contract must be by virtue of a common intention. The intention of one party only is ineffectual (*f*), for motive is not the same thing as consideration (*g*). Thus, if A. should buy of B. a gun with the intention of competing at a shooting-match, he could not refuse to pay for it because the match never came off, unless the seller also agreed that he should in that event be excused.

Contract dependent on continued existence of specific thing, or circumstances.

In *Nickoll* v. *Ashton & Co.* (*h*), the defendants in October contracted to sell to the plaintiffs a cargo of cotton seed to be shipped at Alexandria during January per steamship *Orlando*, deliverable in the United Kingdom. The ship stranded in the Sound in December, and shipment in January

(*b*) Leake, Dig. Cont., ed. 1878. 682; *Faulkner* v. *Lowe* (1848) 2 Ex. 595; 76 R. R. 697.

(*c*) Such events have been called the acts of God; but the occurrence of an act of God is not necessarily an excuse. When it is said that the act of God is an excuse, what is meant is that the parties never contemplated the impossibility of the event, which is accordingly deemed to be impliedly excepted from the contract. See the instructive judgment of Hannen, J., in *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. at 185—186; 38 L. J. Q. B. 98: quoting *Shelley's Case* (1581) 1 Co. Rep. at 98 a. The term "act of God" is also considered by Cockburn, C.J., in *Nugent* v. *Smith* (1876) 1 C. P. D. 423; 45 L. J. C. P. 697, where the corresponding terms of the civil law are explained.

(*d*) *Clark* v. *Lindsay* [1903] 88 L. T. 198; *Griffith* v. *Brymer* [1903] 19 Times L. R. 434.

(*e*) *Per Cur.* in *Taylor* v. *Caldwell* (1863) 3 B. & S. 834—838; 32 L. J. Q. B. 164; 129 R. R. 573; *Boast* v. *Firth* (1868) L. R. 4 C. P. 9; 38 L. J. C. P. 1; Shep. Touch. 173, 382; Co. Lit. 206 a.; *Laughter's Case* (1594) 5 Co. Rep. 1 b.; *Tasker* v. *Shepherd* (1861) 6 H. & N. 575; 30 L. J. Ex. 207; 123 R. R. 697; and *cf.* with the last case *Phillips* v. *Hull Alhambra Palace Co.* [1901] 1 Q. B. 59; 70 L. J. K. B. 26.

(*f*) See *Herne Bay Steamboat Co.* v. *Hutton* [1903] 2 K. B. 683; 72 L. J. K. B. 879, C. A.; and *cf. Elliott* v. *Crutchley* [1906] A. C. 7; 75 L. J. K. B. 147 (express agreement).

(*g*) *Per* Jessel, M.R., in *Besant* v. *Wood* (1879) 12 Ch. D. 605, at 617; 48 L. J. Ch. 497.

(*h*) [1901] 2 K. B. 126; 70 L. J. K. B. 600, C. A.

Nickoll v. *Ashton & Co.* (1901).

became impossible. In an action for failure by the defendants to ship a cargo under the contract, it was held by the Court of Appeal (*i*), affirming Mathew, J., on the authority of *Taylor* v. *Caldwell* (*k*) and *Howell* v. *Coupland* (*l*), that the contract was subject to an implied condition that if at the time for its performance the ship should, without default on the defendants' part, have ceased to exist as a ship fit for the purpose of shipping the cargo, then the contract should be treated as at an end; that there was a perishing within the meaning of the rule laid down in those cases; and that the action was therefore not maintainable.

Impossibility caused by promisor.

Impossibility caused by the promisor is not a breach of contract where he exercises a power, expressly or by implication reserved to him by the contract, of controlling the happening of the event upon which performance was to depend (*m*), so that his contract is in reality not absolute but conditional (*n*). Whether or not he has such a power depends upon the construction of the contract, and the particular facts of each case, and no such power will be held to exist where the result would be to cause a failure of consideration to the other party (*o*).

Hamlyn & Co. v. *Wood* (1891).

Thus, in *Hamlyn & Co.* v. *Wood* (*p*), where a brewer contracted to sell all the grains *made by him* within a certain period, to be paid for *from time to time* on delivery, and within the period sold the brewery, he was held not liable for non-delivery, for in effect he only contracted to sell such grains as he should make as a brewer.

If the buyer in the preceding case had paid down a lump sum, the case would have been otherwise, as the buyer would have suffered a failure of consideration, for the principle applicable to such cases is that "where the consideration which one of the parties is to receive depends on the other party continuing in the same condition, there is an implied obliga-

(*i*) A. L. Smith, M.R., and Romer, L.J. (Vaughan Williams, L.J., dis.

(*k*) (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 129 R. R. 573; *ante*, 163.

(*l*) (1874) 1 Q. B. D. 258; 46 L. J. Q. B. 147, C. A.; *ante*, 164.

(*m*) *Beswick* v. *Swindells* (1835) 3 A. & E. 868; 5 L. J. Ex. 287; 53 R. R. 196; *Parker* v. *Cunliffe* (1899) 15 Times L. R. 335, C. A.

(*n*) *Hamlyn* v. *Wood*, *infra*.

(*o*) See the principle stated by Cockburn, C.J., in *Stirling* v. *Maitland* (1864) 5 B. & S. at 852; 34 L. J. Q. B. 1; 136 R. R. 776; see also *McIntyre* v. *Belcher* (1863) 14 C. B. (N. S.) 654; 32 L. J. C. P. 254; 135 R. R. 860; and *Ogdens* v. *Nelson* [1904] 2 K. B. 419, C. A.; and the result of the cases summarised by Scrutton, J., in *Lazarus* v. *Cairn Line* (1912) 106 L. T. 378.

(*p*) [1891] 2 Q. B. 488; 60 L. J. Q. B. 734, C. A. See also *Rhodes* v. *Forwood* (1876) 1 A. C. 256; 47 L. J. Ex. 396; *Mineral Residues Syndicate* v. *Levant Mine Adventures* [1891] 7 T. L. R. 654; C. A.

tion on the part of the latter to keep in existence the conditions out of which his ability to make a return for the benefit received by him arises" (*q*). Another instance is the sale of a business where part of the consideration is part of the profit of the business. In such a case the buyer obviously cannot relieve himself from liability by selling the business (*r*).

Legal impossibility.

A party is equally excused from the performance of his promise when a *legal impossibility* supervenes. If, for instance, after promise made, an Act of Parliament is passed, or act of State is done, or event happens, rendering the performance illegal, the promise is at an end, and the promisor no longer bound (*r*).

Impossibility in fact caused by British laws.

Again, performance of a contract may be legally impossible in another sense. Without its having been made illegal, it may be rendered impossible in fact by the legislation or other act of State of the country (*s*). The highest judicial authority has declared that the excuse of performance is based, like other instances of such an excuse, upon the implication in the contract of a condition (*t*), but it would seem to be simpler to regard this class of case as explainable by the maxim *Lex non cogit ad impossibilia* (*u*).

Effect of a suspension provided for.

But it is necessary that performance should have become impossible, instead of being merely temporarily suspended. Where, however, the interruption is of such a character and duration as to make the contract when resumed a different contract from the contract when broken off, the contract will

(*q*) *Per* Collins, M.R., in *Ogdens* v. *Nelson* [1904] 2 K. B. 410, at 418; 74 L. J. Q. B. 433. See also *Telegraph Despatch Co.* v. *McLean* (1873) 8 Ch. 658, C. A.; *Shrewsbury* v. *Gould* (1819) 2 B. & A. 487; 21 R. R. 367.

(*r*) *Brewster* v. *Kitchell* (1698) 1 Salk. 198; 1 Ld. Raym. 317; *Davis* v. *Cary* (1850) 15 Q. B. 418; 20 L. J. Q. B. 48; *Wynn* v. *Shropshire Union Ry. Co.* (1850) 5 Ex. 420; *Brown* v. *Mayor of London* (1861) 9 C. B. (N. S.) 726; 31 L. J. C. P. 280; 127 R. R. 853; *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. 180; 38 L. J. Q. B. 98, where the whole subject is elaborately discussed in the decision of the Q. B. delivered by Hannen, J., and the principle of exemption explained as resting on an implied exception from the contract; *Newby* v. *Sharpe* (1877) 8 Ch. D. 39; 47 L. J. Ch. 617; *Newington Local Board* v. *Cottingham Local Board* (1879) 12 Ch. D. 725; 48 L. J. Ch. 226; *Karberg & Co.* v. *Blythe & Co.* [1915] 2 K. B. 379, C. A.; 84 L. J. K. B. 1673 (trading with enemy); *Ertel Bieber & Co.* v. *Rio Tinto Co.* [1918] A. C. 260; 87 L. J. K. B. 531; *Andrew Millar & Co.* v. *Taylor & Co.* [1916] 1 K. B. 402; 85 L. J. K. B. 346 (temporary prohibition); *Smith, Coney and Barrett* v. *Becker, Gray & Co.* [1915] 84 L. J. Ch. 865, C. A. (alternative promise; one branch legal).

(*s*) *Horlock* v. *Beal* [1916] 1 A. C. 486; 85 L. J. K. B. 602; *Re Shipton Anderson & Co. and Harrison Bros. & Co.* [1915] 3 K. B. 676, C. A.; *Bank Line* v. *Capel & Co.* [1919] A. C. 435; 88 L. J. K. B. 211; 84 L. J. K. B. 2137, 85 L. J. K. B. 1389.

(*t*) *F. A. Tamplin SS. Co.* v. *Anglo-Mexican, etc., Co.* [1916] 2 A. C. 397; 85 L. J. K. B. 1389.

(*u*) See McCardie, J.'s, judgment in *Blackburn Bobbin Co.* v. *T. Allen & Sons* [1918] 1 K. B. 540; 87 L. J. K. B. 1085; *post*, 652, where he classifies the cases.

be dissolved on both sides on the ground of impossibility (*x*). The same result will follow where the clause of suspension is an express one (*y*). Such a clause is deemed to apply only to such effects of the event provided for as are limited in range, and consistent with the ultimate performance, as originally contemplated, of the contract (*z*).

Analysis of cases of impossibility in fact by McCardie, J.

McCardie, J., makes in *Blackburn Bobbin Co.* v. *T. W. Allen & Sons* (*a*) a valuable analysis of the various cases in which performance not having become illegal, a change of circumstances (not due to the default of either party) will cause a dissolution of the contract. They are classified as follows:

1. Where British legislation or Government intervention has removed the specific subject-matter of the contract from the scope of private obligation (*b*);
2. Where, apart from such legislation or intervention, the specific subject-matter has ceased to exist (*c*);
3. Where a specific set of facts directly affecting the specific subject-matter has ceased to exist (*d*);
4. Where a specific set of facts only *collaterally* affecting the specific subject-matter, but yet constituting the basis of the contract, has ceased to exist (*e*);
5. Where British administrative intervention has so directly operated upon the performance of a contract for a specific work as to transform the conditions of performance contemplated by the contract (*f*).

Mere anticipation of an event that would excuse performance.

The reasonable apprehension of the happening of an event which, if it happened, would, by agreement or by law, excuse the performance of a contract, is in itself insufficient to

(*x*) *Horlock* v. *Beal* [1916] 1 A. C. 486; 85 L. J. K. B. 602; *F. A. Tamplin SS. Co.* v. *Anglo-Mexican, etc., Co.* [1916] 2 A. C. 397; 85 L. J. K. B. 1384.

(*y*) As to the legality of such a clause where alien enemies are concerned see *Horlock* v. *Beal*, *supra*.

(*z*) *Per* Lord Haldane in *F. A. Tamplin SS. Co.* v. *Anglo-Mexican, etc., Co.*, *supra*; *Metr. Water Board* v. *Dick, Kerr & Co.* [1918] A. C. 119; 87 L. J. K. B. 370.

(*a*) [1918] 1 K. B. 540; 87 L. J. K. B. 1085; affd. [1918] 2 K. B. 467, C. A.; 87 L. J. K. B. 1085.

(*b*) *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; *Re Shipton, Anderson & Co.* v. *Harrison* [1915] 3 K. B. 676; 84 L. J. K. B. 137 (requisition of specific good

(*c*) *Taylor* v. *Caldwell* (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; *Horlock* v. *Beal* [1916] 1 A. C. 486; 85 L. J. K. B. 602.

(*d*) *Jackson* v. *Union Marine Insurance Co.* (1874) L. R. 10 C. P. 125; 45 L. J. C. P. 27; *Scottish Nar. Co.* v. *Souter & Co.* [1917] 1 K. B. 222; 86 L. J. K. B. 336.

(*e*) *Nickoll* v. *Ashton* [1901] 2 K. B. 126; 70 L. J. K. B. 666; *Krell* v. *Henry* [1903] 2 K. B. 740, C. A.; 72 L. J. K. B. 794.

(*f*) *Met. Water Board* v. *Dick, Kerr & Co.* [1918] A. C. 119; 87 L. J. K. B. 370.

discharge the promisor. The event must be actual and operative, not merely expected and contingent (*g*).

Thing possible in itself.

But if the thing promised be possible *in itself*, and performance be not excused by any implied condition (*h*), it is no excuse that the promisor became unable to perform it by causes beyond his own control, even amounting to *vis major* or what is generally called an act of God (*i*), for it was his own fault to run the risk, if he undertook *unconditionally* to fulfil a promise, when he might have guarded himself by the terms of his contract (*k*). The following cases illustrate this proposition.

Kearon v. *Pearson* (1861).

Thus, in *Kearon* v. *Pearson* (*l*), an action by a shipowner against the charterer for demurrage, the defendant undertook to deliver a cargo of coals on board of the vessel with the "usual despatch." There was no mention in the contract of the place from which the goods were to come, or of the method of loading. The defendant commenced delivery, but a sudden frost occurred, so that no more coal could be brought from the colliery by the "flats" navigating the canal. Delivery was thus delayed about thirty days. The Court was unanimous in holding that "usual despatch" meant despatch under ordinary circumstances; that this time had been exceeded; and though the frost was an event beyond the control of the defendant, yet, having made an unconditional contract to load with the usual despatch, he was not excused from performing his promise, and was liable for demurrage.

Ashmore v. *Cox & Co.* (1899).

In *Ashmore* v. *Cox & Co.* (*m*), the defendants agreed to sell to the plaintiffs 250 bales of Manila hemp, to be shipped from a port in the Philippines, *not* by any *particular* ship, but by "sailer or sailers" between specified dates. The outbreak of the Spanish-American war prevented shipment between those dates, but a shipment by steamer was subsequently made and tendered, but (as the Court held) rightly refused. In an action for breach of contract to ship in proper time it was

(*g*) *Atkinson* v. *Ritchie* (1809) 10 East, 530 (restraint of princes); *per* Swinfen Eady, L.J., in *Mitsui & Co.* v. *Watts, Watts & Co.* [1916] 2 K. B. 826; 85 L. J. K. B. 1721 (same).

(*h*) *Ante*, 648.

(*i*) *Per* Mellish, L.J., in *Wear Commissioners* v. *Adamson* (1876) 1 Q. B. D. 548; 47 L. J. Q. B. 193; and *per Cur.* in *Lloyd* v. *Guibert* (1865) L. R. 1 Q. B. 121; 35 L. J. Q. B. 74.

(*k*) *Per Cur.* in *Taylor* v. *Caldwell* (1863) 3 B. & S. 833; 32 L. J. Q. B. 164; 129 R. R. 573; *ante*, 163; and in *Baily* v. *De Crespigny*, *supra*. The leading authority is *Paradine* v. *Jane* (1648) Aleyn, 26, where the distinction is drawn between obligations imposed by law and those assumed by contract.

(*l*) 7 H. & N. 386; 31 L. J. Ex. 1; 126 R. R. 473. *Cf. Postlethwaite* v. *Freeland* (1880) 5 A. C. 599; 49 L. J. Ex. 30 (qualified contract); *Isis S.S. Co.* v. *Bahr Behrend* [1900] 69 L. J. Q. B. 660; 82 L. T. 571, H. L.

(*m*) [1899] 1 Q. B. 436; 68 L. J. Q. B. 72. See also *Splidt* v. *Heath* (1809) 2 Camp. 57, n.; 11 R. R. 663.

held by Lord Russell of Killowen in the Commercial Court (distinguishing *Howell* v. *Coupland*) (*n*) that there was no implied condition that it should be possible to make shipments by sailers between the given dates, and that the defendants were liable, having made an unconditional contract to ship the hemp.

Unascertained goods. Delivery prevented by war. *Blackburn Bobbin Co.* v. *T. W. Allen & Sons* (1918).

In the *Blackburn Bobbin Co.* v. *T. W. Allen & Sons* the defendants, timber merchants at Hull, agreed to sell to the plaintiffs Finland birch timber deliverable free on rail at Hull during the months June to November, 1914. Prior to the war the practice was to load timber at Finland ports for direct sea-carriage to England, but this practice was unknown to the plaintiffs, who also were not aware that merchants did not keep Finland timber in stock. On the outbreak of war the German Government declared timber to be contraband, imports from Finland ceased at once, and all transport was paralysed. The defendants claimed that the contract had been dissolved by the outbreak of war on the ground that both parties contemplated, as the basis of the contract, that the normal method of supply should continue. *Held*, by the Court of Appeal, affirming McCardie, J., that no such condition could be implied. The contract was simply a contract for the sale of unascertained goods which the sellers agreed to deliver at Hull, and it was no concern of the buyers how the sellers intended to get the timber there. Although the sellers intended to ship the timber in the ordinary way direct from a Finnish port, the continuance of the normal method of delivery was not a matter contemplated by both parties (*p*).

Jones v. *St. John's College* (1870).

A strong illustration of the rigour of the rule of liability to perform a promise deliberately made is furnished by *Jones* v. *St. John's College* (*q*), where a builder had contracted to do certain works by a specified time, as well as any alterations ordered by named persons within the same time, and the plaintiff attempted to excuse himself for delay by averring that the alterations ordered were such, and the orders given for them were received at so late a time, that it was impossible for him to complete them within the period specified in the contract, *as the defendant well knew when he gave the orders*, but the Court held that if he chose to bind himself by his promise to do unconditionally a thing which he could not

(*n*) (1874) 1 Q. B. D. 258; 46 L. J. Q. B. 147, C. A.; *ante*, 161.

(*o*) [1918] 2 K. B. 467; 87 L. J. K. B. 1085, C. A.; approving *Ashmore* v. *Cox*, *supra*.

(*p*) As in *Krell* v. *Henry* [1903] 2 K. B. 740; 72 L. J. K. B. 794, C. A.

(*q*) L. R. 6 Q. B. 115; 40 L. J. Q. B. 80. See also *Thorn* v. *Mayor &c., of London* (1876) 1 A. C. 129, where it was held that an employer does not warrant to a contractor that the work can be successfully carried out.

possibly perform, under a penalty for not doing it, he was bound by the bargain and liable to the penalties stipulated for breach.

But a contract so onerous must be expressed in plain language; if it be at all ambiguous the Court will not adopt an unreasonable construction of the contract, and the general principle may apply that impossibility caused by the promisee will excuse performance by the promissor (*r*).

English contract to be performed abroad.

Impossibility by foreign law.

The principle illustrated by the preceding cases is equally applicable to an English contract to be performed abroad. Impossibility caused by foreign law is treated as impossibility in fact and will form no excuse, although it may be recognised as such by the foreign law at the place of performance, except where English law also recognises it, or where it may be gathered from the contract that the parties intended that any excuse of performance admitted by foreign law should apply (*s*). But the defence that performance has, by foreign law, become *illegal*, will, it seems, be recognised (*ss*).

Barker v. *Hodgson* (1814).

Thus, in *Barker* v. *Hodgson* (*t*), the defendant attempted to excuse himself for not furnishing a cargo in a foreign port, on the ground that a pestilence broke out in the port, and all communication between the vessel and the shore was interdicted by the authorities, so that it was unlawful and impracticable to send the cargo on board, and Lord Ellenborough said: "If the performance of this contract had been rendered unlawful by the Government of this country (*u*), the contract would have been dissolved on both sides. . . . But if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages."

So, in *Kirk* v. *Gibbs* (*x*), the charterers of a vessel agreed

(*r*) *Holme* v. *Guppy* (1838) 3 M. & W. 387; 49 R. R. 647; *Russell* v. *Bandeira* (1862) 13 C. B. (N. S.) 149; 32 L. J. C. P. 68; 134 R. R. 488; *Dodd* v. *Churton* [1897] 1 Q. B. 562, C. A., where *Jones* v. *St. John's College* was distinguished, and it was pointed out that the proceedings were by demurrer, and the statement on the pleadings that the builder had entered into the agreement was admitted. See also *Worcester College* v. *Oxford Canal Navigation* [1911] 105 L. T. 501 (prevention by promisee)

(*s*) *Jacobs* v. *Crédit Lyonnais* (1884) 12 Q. B. D. 589; 53 L. J. Q. B. 156, C. A.; expld. in *Ralli Bros.* v. *Compania Naviera* [1920] 1 K. B. 614.

(*ss*) Dicey's Conflict of Laws, 2nd ed. 554, approved by Bailhache, J., in *Ralli Bros. Case*, *supra*.

(*t*) 3 M. & S. 267. See also *Spence* v. *Chadwick* (1847) 10 Q. B. 517; 16 L. J. Q. B. 313; 74 R. R. 417 (goods confiscated by foreign customs).

(*u*) As where it involves trading with the enemy: *Esposito* v. *Bowden* (1857) 7 E. & B. 763; 27 L. J. Q. B 17; 110 R. R. 822.

(*x*) 1 H. & N. 810; 26 L. J. Ex. 209; 108 R. R. 838. See also *Atkinson*

Kirk v. *Gibbs* (1857).

to furnish to the captain at Pisco, in Peru, the pass necessary to enable him to load a cargo of guano "free of expense within twenty-four hours of his application." The charterers having loaded an insufficient cargo, pleaded, in an action against them by the owners, that by the laws of Peru no guano could be loaded without a pass from the Government, and that on inspection of the vessel the Government refused a pass, and that on the plaintiffs repairing the vessel a pass was granted for only a limited quantity, which was loaded, and that no more could be loaded without exposing both vessel and cargo to seizure. On demurrer, this plea was held bad. But the insufficiency of the plea consisted in this, that it did not allege that the owners of the vessel were in default, or that the vessel was not really fit to carry a full cargo, or that both parties were prevented, but only that the Government officers refused the permit; and the charterers had made an absolute promise to procure it, and to furnish a full cargo.

Both parties prevented by foreign law.

But where *both* parties are prevented by foreign law from performing mutually dependent promises, neither party is in default, and so cannot sue the other, as, *e.g.*, where both a ship owner and a charterer are prevented from loading a vessel (*y*).

The vendor curious in legal ambiguities may here be referred to two old cases in which the seller took advantage of the buyer's ignorance of arithmetic to impose a promise practically impossible of performance (*z*).

Effect of impossibility on promises implied by law.

The rule of law that impossibility generally affords an excuse for non-performance of a promise where the party has unconditionally bound himself has no application to promises implied by law, for *lex non cogit ad impossibilia* where there has been no default (*a*). Thus, a seller, who is bound by law

v. *Ritchie* (1809) 10 East, 530; 10 R. R. 372 (fear of embargo); *Sjoerds* *Luscombe* (1812) 16 East, 201 (embargo).

(*y*) *Cunningham* v. *Dunn* (1878) 2 C. P. D. 443; 48 L. J. C. P. 62. C. *Ralli Bros.* v. *Compania Naviera* [1920] 1 K. B. 614.

(*z*) In *Thornborow* v. *Whitacre* (1706) 27 Ld. Raym. 1164, the defendant in consideration of 2s. 6d. paid by plaintiff and a promise to pay £4 17s 6 agreed to deliver to the plaintiff two grains of rye corn on the follow Monday, four grains on the next Monday, and so on *quolibet alio die lunæ* a year. The defendant demurred to the plaintiff's declaration in case, on ground that it was impossible to perform the contract, as "all the rye in world would not make so much." The action was compromised, but opinion of the Court was against the defendant. In *James* v. *Morgan* (16 1 Lev. 111, the action was "assumpsit to pay for a horse a barleycorn a n doubling it every nail." There being thirty-two nails, the sum total was quarters of barley. Hyde, C.J., directed the jury to give in damages £8, value of the horse, and the Court gave judgment for the plaintiff, but reasons were given for the decision.

(*a*) *Paradine* v. *Jane* (1648) Alleyn, 26; *Hick* v. *Raymond* [1893] A. 22; 62 L. J. Q. B. 98; affg. C. A. *sub nom. Hick* v. *Rodocanachi* [189

to deliver within a reasonable time, where no time is mentioned, may show that he was delayed by causes beyond his control beyond the usual time of delivery, so as to show that he delivered within a reasonable time under the circumstances (*b*). Similarly, in an action for non-acceptance of the goods he would be able to prove the same facts so as to show that he performed the condition of being ready and willing to deliver (*c*) within a reasonable time.

Alternative promises.

When one of two alternative promises, of which the promisor has the option (*d*), is at the date of the contract impossible, the promisor is bound to perform the other (*e*). Where the promisor has elected to perform one alternative, which subsequently becomes impossible, the case is the same as if he had originally contracted to perform the alternative selected (*f*); and if the promisor have allowed the date of performance of one alternative to elapse he is deemed to have elected to perform the other (*g*). When one branch of an alternative at the option of the promisor becomes before election impossible from some cause other than the act of either party, no absolute rule can be laid down. Lord Coke, speaking of *bonds*, allows in such a case subsequent impossibility by the act of God as an excuse, "for the condition is made for the benefit of the obligor, and shall be taken beneficially for him, and he hath election to perform the one or the other for the saving of the penalty of his bond" (*h*). But he was speaking of a particular subject-matter, and was, moreover, not reporting the grounds of the decision in *Laughter's Case*, but was giving his own reasons; and it has been judicially stated (*i*) that "the rule and reason of *Laughter's Case* ought not to be taken so largely as Coke

Q. B. 626; 61 L. J. Q. B. 42, where the cases are exhaustively considered by Fry, L.J. For a case where the promisor was in default, see *Hill* v. *Idle* (1815) 4 Camp. 327; 16 R. R. 797.

(*b*) The rule is a general one: *per* Lord Watson in *Hick* v. *Raymond*, *supra*. See also the reasoning of the Court in *Ellis* v. *Thompson* (1838) 3 M. & W. 445; 7 L. J. Ex. 185; 49 R. R. 679.

(*c*) For this condition see Code, s. 28, *post*.

(*d*) *A fortiori* if the election be with the promisee.

(*e*) *Da Costa* v. *Davis* (1798) 1 B. & P. 242; 4 R. R. 795; 1 Shep. Touch. 382; *Wharton* v. *King* (1831) 2 B. & Ad. 528; 9 L. J. K. B. 271; 36 R. R. 643; *Stevens* v. *Webb* (1835) 7 C. & P. 60; 48 R. R. 759 (legal impossibility); *Simmonds* v. *Swaine* (1809) 1 Taunt. 549 (award).

(*f*) *Brown* v. *Royal Ins. Co.* (1859) 1 E. & E. 853; 28 L. J. Q. B. 275; 117 R. R. 492.

(*g*) *Price* v. *Nixon* (1813) 5 Taunt. 338; *Reed* v. *Kilburn Co-op. Soc.* (1875) 44 L. J. Q. B. 126. See also *per* Walmsley, J., in *More* v. *Morecomb* (1602) Cro. El. 864.

(*h*) *Laughter's Case* (1594) 5 Co. 21 b.

(*i*) *Per Cur. in Studholme* v. *Mandell* (1697) 1 Ld. Raym. 279.

hath reported it, but according to the nature of the case," that is, according to the intention of the parties (*k*). And Coke's statement is directly contradicted by a case (*l*) quoted by Treby, C.J., in *Studholme* v. *Mandell* (*m*).

Act of God.

The rule applicable in alternative contracts to subsequent impossibility caused by the act of God was thus stated by Kindersley, V.C., in *Barkworth* v. *Young* (*n*): "The principle to be applied in each case is that it must depend upon the intention of the parties . . . to be collected from the nature and circumstances of the transaction, and the terms of the instrument. And this at least, I think, will hardly admit of contradiction, that if the Court is satisfied that the clear intention of the parties was that one of them should do a certain thing, but he is allowed, at his option, to do it in *one or other of two modes*, and one of those modes becomes impossible by the act of God, he is still bound to perform in the other mode."

And Bowen, L.J., in *Anderson* v. *Commercial Union In. Co.* (*o*), a case, however, in which no act of God came into question, stated the general rule to be clear that it was a question of intention whether the obligor was bound to perform the alternative, or was discharged altogether. The question to be solved would therefore appear to be: Has the promisor contracted in the alternative only conditionally on his always having an option? or has he in fact warranted that he will do one or the other? (*p*). Here it is material to consider whether an absolute discharge of the promisor would cause the promisee a failure of consideration (*q*).

It was thus ruled in an old case (*r*): "Popham, Chief Justice, said there will be a difference between disjunctive absolute and disjunctive contingent; as if a man be bound

(*k*) See to the same effect *per Cur.* in *Drummond* v. *Duke of Bolton* (1755) Sayer, 243.

(*l*) 1 Salk. 170, quoted by Stirling, J., in *McIlquham* v. *Taylor* [1895] 1 Ch. 53, at 62; 63 L. J. Ch. 758. The case was this: A., in consideration of £100, bound himself in a bond with a condition either to make a lease for the life of the obligee before such a day, or to pay him £100, and the obligee having died before the day, yet it was adjudged that the obligor should pay the £100. Here a different construction would have deprived the obligee's estate of £100.

(*m*) (1697) 1 Ld. Raym. 279.

(*n*) (1856) 26 L. J. Ch. 153; 4 Drew. 1, where the previous authorities are collected.

(*o*) (1886) 55 L. J. Q. B. 146, at 150. C. A.

(*p*) See *Marquis of Bute* v. *Thompson* (1844) 13 M. & W. 487; 14 L. J. Ex. 95; 67 R. R. 688; and in Amer. *Drake* v. *White* (1875) 117 Mass. 10 (agreement by pledgee to redeliver chattel pledged or pay its value).

(*q*) *Drummond* v. *Duke of Bolton* (1755) Sayer, 243.

(*r*) *Anon.* (1601) Gouldsb. 192; Vin. Ab. Condition. R. b. pl. 2.

to pay ten pound, or to enfeoff one upon the returne of I. S. from Rome; there, if I. S. dye before he return from Rome, then the obligation is saved, although the ten pound be never payed: but, if it be a voluntarie act, as to pay you ten pound, or to enfeoff you before Michaelmas, there, if the obligor dye before Mic., yet his executors ought to pay the money."

Discharge of promisor where by impossibility he loses an option.

Anon. Gouldsb. (1601).

Here, in the first case put, the promisor had an option which he was entitled to leave undetermined until I. S. returned from Rome, so that, to hold him liable on the alternative would be to hold him liable on a single promise, which he never made. In the second case, he had made an absolute promise to do one thing or the other, and it was not unreasonable to hold that he should have exercised his option in his lifetime.

If one alternative, of which the promisor has the option, becomes before election impossible by the act of the promisee, the promisor is discharged (*s*); if it becomes impossible by the act of the promisor (*t*), or of a stranger (*u*), the promisor must perform the other, *à fortiori* if the promisee have the option.

Promises not strictly alternative.

A promise, not to do A. or B., but to do A., and if A. be not performed, then to do B., confers no option on the promisor, and so is not, strictly speaking, alternative. In such a case the promisor is bound absolutely to do A., and to do B. only contingently on his not doing A. This distinction is important, as, in the case of a promise simply in the alternative when neither branch is performed, the promisor is liable in damages only for a breach of the less burdensome alternative: whereas in the case now put, if he have not performed A., he is liable in damages caused by the breach of B. (*x*). Again, the subsequent impossibility by law of performing A. will not affect the validity of the promise to perform B. (*y*). Moreover, the promisor cannot, against the will of the promisee, discharge himself from liability as to

(*s*) *Basket* v. *Basket* (1677) 2 Mod. 200; Com. Dig. Condition K. 2; Shep. T. 382.

(*t*) *Mellquham* v. *Taylor* [1895] 1 Ch. 53; 63 L. J. Ch. 758; Shep. T., *supra*.

(*u*) *Per Cur.* in *Basket* v. *Basket*, *supra*; Com. Dig., *supra*, quoting *Topham* v. *Pannel* (1680) T. Raym. 373; Shep T., *supra*.

(*x*) *Dererill* v. *Burnell* (1873) L. R. 8 C. P. 475; 42 L. J. C. P. 214; *diss.* Bovill, C.J., who thought the contract to be a strictly alternative one, and the damages nominal; *Lowe* v. *Peers* (1768) 4 Burr. 2225. See also *per* Popham, C.J., in *Greningham* v. *Ewer* (1596) Cro. El. 396, 539.

(*y*) *Smith, Coney, and Barrett* v. *Becker, Gray & Co.* [1915] 84 L. J. Ch. 865, C. A.; 112 L. T. 914.

A. by performing B. (*z*). It is not easy in such a case to determine what the real contract is, the use of the word "or" not being conclusive. The question depends upon the circumstances of the case, and a business meaning must be given to the contract, though not strictly in accordance with the rules of grammar (*a*).

Alternative conditions.

As in the case of promises, so in that of alternative conditions, the one selected becomes after election a single condition, and must be performed before the promisor is liable. If the election be with the party liable to perform the condition, he must give the promisor notice of the determination of his election (*b*). If it be with the promisor, and have not been made, the other party must show that he was ready and willing to perform either branch (*c*). And if, in the case last supposed, one alternative is at the date of the contract impossible of performance, or has since the contract become impossible, it is conceived that the contract is void *ab initio*, or the promisor is discharged (as the case may be), as it is reasonable to suppose that he contracted only on the assumption that he should have an option.

(*z*) *National Prov. Bank* v. *Marshall* (1888) 40 Ch. D. 112, C. A.; 58 L. J. Ch. 229.

(*a*) *Deverill* v. *Burnell*, *supra*.

(*b*) *Per* Bramwell, L.J., and Baggallay, L.J., in *Honck* v. *Muller* (1881) 7 Q. B. D. 92, at 97, 101; 50 L. J. Q. B. 529, C. A.; *Shepard* v. *Kearne* (1583) Cro. Eliz. 119.

(*c*) *Fordley's Case* (1587) 1 Leon. 68. See also *Raynay* v. *Alexander* (1605) Yelv. 76.

CHAPTER II.

EXPRESS CONDITIONS.

THE conditions most frequently expressed in contracts of sale will now be considered.

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

It is not uncommon to make the performance of a sale dependent on an act to be done by a third person. Such conditions must be complied with before rights dependent on them can be enforced, and if the third party refuse, even unreasonably, to perform the act, this will not dispense with such compliance.

Brogden v. *Marriott* (1836).

Thus, in *Brogden* v. *Marriott* (*a*), the seller sold a horse for one shilling cash, which was paid, and a further payment of £200 provided the horse should trot eighteen miles within one hour, the task to be performed within one month, and "J. N. to be the judge of the performance." It was held to be no defence to the buyer's action for the delivery of the horse that J. N. refused to be present at the trial, and Tindal, C.J., said that the defendant should have shown that the horse trotted eighteen miles an hour to the satisfaction of J. N.; the trial of the horse was a condition subsequent to the sale, and therefore it was a "condition which the defendant should have shown to have been performed, or that the performance was prevented by the fault of the opposite party."

Valuation of goods.

So also it may be agreed that the price of goods contracted for shall be determined by the valuation of a third person. This subject has been considered in a previous Chapter (*b*).

The party who claims must show performance of condition.

On the same principle it has been held, in other contracts on conditions of this kind, that the party who claims must show the performance of the condition on which his claim depends, or that the opposite party prevented or waived the performance. On an agreement to do work which is to be settled for according to the measurement of a named person, the measurement by that person is a condition precedent to

(*a*) 2 Bing. N. C. 473; 5 L. J. C. P. 302; 43 R. R. 591. Judgment was given for the plaintiff, but was subsequently arrested on the ground that the contract was a mere wagering contract. See S. C. (1836) 3 Bing. N. C. 88, *ante*, 619; and *per* Hawkins, J., in *Carlill* v. *Carbolic Smoke Ball Co.* [1892] 2 Q. B. at 492; 61 L. J. Q. B. 696; *ante*, 616.

(*b*) *Ante*, 169 *et seqq.*

the claim for payment (*c*); and on an agreement to sell goods of a certain quality to the satisfaction of a third party, the satisfaction of that person is similarly a condition (*d*); on an insurance where the claim for payment was made to depend on a certificate from the minister of the parish, that the insured was of good character, and his claim for loss *bona fide*, it was held, that the insured could not recover without the certificate, even though the minister unreasonably refused to give it (*e*); and where building work was to be paid for on a certificate in writing by an architect that he approved the work, no recovery could be had until the certificate was given (*f*).

Fraud in procuring, or in preventing, fulfilment of condition.

Shipway v. *Broadwood* (1899).

But collusion between the person bound to prove performance of the condition and the third person is a fraud, and will invalidate any certificate given by the latter. Thus, in *Shipway* v. *Broadwood* (*g*), the defendant agreed to buy a pair of horses from the plaintiff provided they were passed as sound by the defendant's veterinary surgeon. The surgeon certified them to be sound, and the defendant thereupon paid the plaintiff by cheque, which he afterwards stopped on discovering that the horses were unsound. The plaintiff sued on the cheque, and it was proved that he had offered the surgeon a sum of money if the horses were sold, and that the offer had been accepted. It was held by the Court of Appeal that the plaintiff could not recover on the cheque, as the certificate was invalid, and consequently also the contract which depended upon it.

Batterbury v. *Vyse* (1863).

In *Batterbury* v. *Vyse* (*h*), where an employer colluded with an architect, upon whose certificate the builder's claim for payment depended, so that the builder was prevented from getting the certificate, in an action by the builder for the balance due, a declaration setting forth that fact in terms

(*c*) *Mills* v. *Bayley* (1863) 2 H. & C. 36; 32 L. J. Ex. 179; 133 R. R. 579.
(*d*) *Gratton* v. *Eastern Counties Ry. Co.* (1853) 8 Ex. 699; 91 R. R. 772; *Clarke* v. *Watson* (1865) 34 L. J. C. P. 148 (certificate wrongfully withheld).
(*e*) *Worsley* v. *Wood* (1796) 6 T. R. 720; 3 R. R. 323.
(*f*) *Morgan* v. *Birnie* (1833) 9 Bing. 672; 35 R. R. 653; *Clarke* v. *Watson* (1865) 18 C. B. (N. S.) 278; 34 L. J. C. P. 148; 144 R. R. 491; *Roberts* v. *Watkins* (1863) 14 C. B. (N. S.) 592; 32 L. J. C. P. 291; 135 R. R. 827; *Goodyear* v. *Mayor of Weymouth* (1865) 35 L. J. C. P. 12; 148 R. R. 62; *Richardson* v. *Mahon* (1879) 4 L. R. Ir. 486.
(*g*) [1899] 1 Q. B. 369; 68 L. J. Q. B. 360, C. A. And the seller is liable to the buyer to refund the amount of the bribe, as being the sum by which the price of the goods has been enhanced to the buyer: *Horsfall* v. *Milhoff* [1900] 83 L. T. 41, C. A. But where interest and duty do not conflict, the receipt by an agent of a secret commission does not invalidate the contract: *Rowland* v. *Chapman* [1901] 17 Times L. R. 669.
(*h*) 2 H. & C. 42; 32 L. J. Ex. 177; 133 R. R. 582.

sufficient to aver fraud was held maintainable by all the Barons of the Exchequer.

Sales dependent on approval of buyer.

Sometimes a contract of sale is made conditional on the goods to be supplied being approved by the buyer. Here the performance of the condition is dependent upon the will of one party, who is, as it were, a judge in his own cause. On the one hand, it is reasonable that the buyer should not be compelled to pay for what he did not honestly approve; on the other, it may be unjust that the seller, who may have performed his part to the satisfaction of any reasonable person, should not be remunerated. The rule applicable was thus stated by Cockburn, C.J., in *Stadhard* v. *Lee* (*i*): "The duty of a Court in such cases is to ascertain and give effect to the intention of the parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not." Accordingly, in the case in question, in an action for work done, a replication by the workman that the employer's dissatisfaction was unreasonable, improper, and capricious was held insufficient, no *mala fides* being alleged, and the contract being to do the work "to the entire satisfaction" of the employer (*k*).

Rule stated by Cockburn, C.J., in *Stadhard* v. *Lee* (1863).

For the determination of this question it is very material to consider whether the interpretation of the approval as an absolute one is not destructive of the object the parties have in view (*l*).

Andrews v. *Belfield* (1857).

In *Andrews* v. *Belfield* (*m*), the plaintiff, a coachmaker, being applied to by the defendant to build him a carriage of a particular description, sent a drawing which was disapproved of, and he then wrote that every attention would be paid by him to any particulars the defendant should think proper. The defendant then proceeded to give his order "in general terms only," and on the assumption that the plaintiff under-

(*i*) 3 B. & S. 364, at 372; 32 L. J. Q. B. 75; 129 R. R. 357.

(*k*) See also *Diggle* v. *Ogston Motor Co.* [1915] 84 L. J. K. B. 2365; 112 L. T. 1029, where the cases are considered.

(*l*) *Dallman* v. *King* (1837) 4 Bing. N. C. 105; 7 L. J. (N. S.) C. P. 6; 44 R. R. 661, where Tindal, C.J., recognised the analogy of conditions repugnant to a grant. See also *Braunstein* v. *Accidental Death Ins. Co.* (1861) 1 B. & S. 782; 31 L. J. Q. B. 17; 124 R. R. 745.

(*m*) 2 C. B. (N. S.) 779; 109 R. R. 885. See also *Moffatt* v. *Dickson Steamship Co.* [1901] 17 Times L. R. 265; 93 R. R. 634; *Repetto* v. *Friary Co.* [1905] 10 Com. Cas. 67, C. A.

took to execute it "in a manner which should meet his approval, not only on the score of workmanship, but also that of convenience and taste." The defendant rejected the carriage. Willes, J., asked the jury whether the parties intended that the defendant might reject the carriage if not built in conformity with his taste, and whether the carriage were one a reasonable man ought to have objected to. The jury found for the plaintiff. A rule was afterwards made absolute for a nonsuit, on the ground that the facts showed the plaintiff had taken the risk of satisfying the fastidious taste of the defendant, and no *mala fides* of the latter was shown.

In *Bird* v. *Smith* (*n*), it was held that a stipulation that the goods should be approved by the buyer's agent did not necessarily exclude the seller's liability on an express warranty of quality. And the converse holds good, and conformity of the goods to warranty or condition does not prove that the third party is satisfied (*o*).

Civil law.

In contracts of sale under the civil law the buyer's approval was interpreted to mean a reasonable approval. "Placent veteribus magis in viri boni arbitrium id collatum videri quam domini" (*p*).

Sale dependent on other event within buyer's control.

On similar principles, a contract of sale may be made conditional on any other act within the buyer's control, as for example, where he buys a horse, and agrees to pay an additional price if he races him and the horse wins (*q*). It would depend upon the construction of the contract whether a term should not be implied that the buyer will do nothing wilfully to prevent the occurrence of the event, *i.e.*, the racing of the horse, so as to make the contract conditional only on the single event of the horse winning (*q*).

Sale dependent on happening of event.

The condition on which a sale depends may be the happening of some event, and then the question arises as to the duty of the obligee to give notice that the event has happened.

Duty to give notice.

As a general rule, a man who binds himself to do anything on the happening of a particular event is bound to take notice at his own peril, and to comply with his promise when the

General rule of law.

(*n*) (1848) 12 Q. B. 786; 17 L. J. Q. B. 309. See also *Ripley* v. *Lord* (1860) 2 L. T. 154; *Rombay, &c., Trading Corporation* v. *Aga, &c., Sharas* [1911] L. R. 38 Ind. Ap. 169.

(*o*) *Grafton* v. *E. C. Railways Co.* (1853) 8 Ex. 699; 91 R. R. 712.

(*p*) Dig. 18, 1, 7. The rule was otherwise with regard to the fixing of price: Cod. 4, 38, 15.

(*q*) *Parker* v. *Cunliffe* [1899] 15 T. L. R. 335, C. A.; *cf. Bealey* v. *Stu* (1862) 7 H. & N. 753; 31 L. J. Ex. 281; 126 R. R. 681, where the buy promise was absolute.

event happens (*r*). But there are cases in which, from the very nature of the transaction, the party bound on a condition of this sort is entitled to notice from the other of the event; for example, if the obligee has reserved any option to himself by which he can control the event on which the duty of the obligor depends, or if the event be one peculiarly within his own cognisance (*s*), then he must give notice of the event.

Thus, in *Haule* v. *Hemyng* (*t*), it was held, that the seller, who had sold certain weys of barley, to be paid for at as much as he should sell for to any other man, could not maintain an action against the buyer before giving him notice of the price at which he had sold to others, the reason being that the persons to whom the plaintiff might sell were perfectly indefinite, and at his own option. But no notice is necessary where the particular person whose action is made a condition of the bargain is named; as if in *Haule* v. *Hemyng* the bargain had been that the buyer would pay as much as the seller should get for the barley from J. S. (*u*); for the party bound in this event is sufficiently notified by the terms of his contract that a sale is or will be made to J. S., and agrees to take notice of it. *Haule* v. *Hemyng* (1617).

And the rule that no notice is necessary applies where a specific act is to be done even by the obligee himself—as, to marry a particular person (*x*).

In *Vyse* v. *Wakefield* (*y*), where the defendant had covenanted to appear at any time or times thereafter, at an office or offices, for the insurance of lives within London or the bills of mortality, and answer such questions as might be asked respecting his age, etc., in order to enable the plaintiff *Vyse* v. *Wakefield* (1840).

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

(*s*) Vin. Ab. Vol. XVI. at 5, Notice A. (2), pl. 12; *Clerke* v. *Child* (1678) Freeman, 254; *per* Abinger, C.B., in *Vyse* v. *Wakefield* (1840) 6 M. & W. 442, at 453; 9 L. J. Ex. 274; 55 R. R. 675.

(*t*) Viner's Abr. Vol. V. 271, Condition A. d. pl. 15; *sub nom. Henning's Case*, Cro. Jac. 432; cited in 6 M. & W. at 454, in the opinion delivered by Parke, B., in *Vyse* v. *Wakefield*, from which the doctrine in the text is chiefly extracted.

(*u*) Viner's Ab. Vol. V. 271, Condition A. d. pl. 15; *Powle* v. *Hagger* (1605) Cro. Jac. 492.

(*x*) *Per* Parke, B., in *Vyse* v. *Wakefield* (1840) 6 M. & W. at 450; 9 L. J. Ex. 274; 55 R. R. 675, referring to *Bradley* v. *Toder* (1609) Cro. Jac. 228; and *Fletcher* v. *Pyasett* (1605) *ibid.* 102.

(*y*) 6 M. & W. 442; 9 L. J. Ex. 274; 55 R. R. 675. See *Makin* v. *Watkinson* (1870) L. R. 6 Ex. 25; 40 L. J. Ex. 33; *Stanton* v. *Austin* (1872) (N. S.) 666; *Armitage* v. *Insole* (1850) 14 Q. B. 728; 19 L. J. Q. B. 202; 80 R. R. 388; *Hugall* v. *McLean* (1885) 53 L. T. 94, C. A.; *Tredway* v. *Machin* [1904] 91 L. T. 310, C. A. (repairs); *L. and S. W. Railway* v. *Flower* (1876) 1 C. P. D. 77; 45 L. J. C. P. 54 (statutory obligation dependent on implied notice).

to insure his life, and *would not afterwards do any act to prejudice the insurance*, the declaration alleged that the defendant did, in part performance of his covenant, appear at a certain insurance office, and that the plaintiff insured the defendant's life, and that the policy contained a proviso, by which it was to become void if the defendant went beyond the limits of Europe. Breach, that the defendant went beyond the limits of Europe, to wit, to Canada. Special demurrer, for want of averment, that the plaintiff had given notice to the defendant, that he had effected an insurance on the life of the defendant, and that the policy contained the proviso alleged in the declaration. *Held*, that the declaration was bad on the grounds taken by the defendant.

Sale of goods "to arrive."

A not unfrequent contract among merchants is a sale of goods "to arrive" (*z*). It is not always easy to determine whether the language used in such cases implies a condition or not, or what the real condition is. The earlier cases were at Nisi Prius, but in more recent times these contracts multiplied.

Such cases may fall within section 5 (2) . the Code as when the goods have not been acquired by the seller at the time of the contract.

Boyd v. *Siffkin* (1809).

In *Boyd* v. *Siffkin* (*b*), the sale was of "32 tons, more or less, of Riga Rhine hemp on arrival per *Fanny and Mary*, etc.," and the vessel arrived, but without the hemp. *Held* that the sale was conditional on the arrival, not of the vessel, but of the hemp and the seller was not liable for non-delivery. And the same conclusion was adopted by the Court in *Hawes* v. *Humble* (*c*), where the sale was thus expressed: "I have this day sold for and by your order on arrival 100 tons, etc."

Hawes v. *Humble* (1809).

Idle v. *Thornton* (1812).

In *Idle* v. *Thornton* (*d*), the contract was for "200 casks first sort yellow candle tallow, at 68s. per cwt. on arrival: if it should not arrive on or before the 31st of December next, the bargain to be void: to be taken from the King's landing scale, etc., ex *Catherina Evers*." The vessel, with the tallow on board, was wrecked off Montrose, but the greater part of the tallow was saved, and might have been forwarded to London by the 31st of December, but was not so forwarded, and was sold at Leith. Lord Ellenborough held that the

(*z*) As to the meaning of the word "arrive" in a contract, see *Mont-gomery* v. *Middleton* (1862) 13 Ir. C. L. R. 173.
(*a*) *Ante*, 147.
(*b*) 2 Camp. 326; 11 R. R. 721.
(*c*) 2 Camp. 327, n.; 11 R. R. 722, n.
(*d*) 3 Camp. 274; 13 R. R. 799.

contract was conditional on the arrival of the tallow in London in the *ordinary* course of navigation, and that the seller was not bound, after the shipwreck, to forward it to London; at all events, not without a request and offer of indemnity by the buyer.

Lovatt v. *Hamilton* (1839).

In *Lovatt* v. *Hamilton* (*e*), the contract was, "We have sold you 50 tons of palm oil, to arrive per *Mansfield*, etc. In case of non-arrival, or the vessel's not having so much in after delivery of former contracts, this contract to be void." During the voyage a part of the cargo of the *Mansfield* was transhipped by an agent of the sellers into another of their vessels, but without their knowledge, and the oil arrived safely on *that* vessel. The *Mansfield* also arrived safely with the small residue. The question was whether the arrival of all the oil in the *Mansfield* was a condition precedent to the buyer's right to claim the delivery, and the Court held the affirmative to be quite clear.

Mewyn v. *Pryor* (1826).

In *Mewyn* v. *Pryor* (*f*), the sale was of "all the oil on board the *Thomas* . . . on arrival in Great Britain; to be delivered by sellers on a wharf in Great Britain to be appointed by the buyers with all convenient speed, but not to exceed the 30th day of June next, etc." The vessel did not arrive till the 4th of July, and the purchaser refused to take the oil, and sued for breach of contract. *Held*, that the arrival by the 30th of June was a condition precedent to the sale, and not a warranty by the sellers of arrival at that date, but that if the oil had not arrived by then, the buyer was not bound to accept it.

Johnson v. *Macdonald* (1842).

In *Johnson* v. *Macdonald* (*g*), the sale was of 100 tons of nitrate of soda "to arrive ex *Daniel Grant*," and there was a memorandum at foot, "Should the *vessel* be lost, this contract to be void." The vessel arrived without any nitrate of soda, and in an action by the buyer it was contended that the expression "to arrive," when coupled with the stipulation in the memorandum, showed the meaning to be an undertaking by the seller that the soda should arrive, and that he would deliver it if the *vessel* arrived safely. But all the Judges were of opinion that there was a *double* condition precedent, that is to say, if the vessel arrived, *and* if on arrival the soda was on board.

(*e*) 5 M. & W. 639; 52 R. R. 865. See also *Wyllie* v. *Povah* [1907] 12 Com. Cas. 317, where the contract was mutually abandoned on the loss of the ship.

(*f*) Ry. & M. 406; 27 R. R. 763.

(*g*) 9 M. & W. 600; 12 L. J. Ex. 99; 60 R. R. 838.

Harrison v. *Fortlage* (1896).

With the three preceding cases should be compared *Harrison* v. *Fortlage* (*h*), decided by the Supreme Court of the United States. In that case, the plaintiffs had agreed to sell to the defendants 2,500 tons of Iloilo sugar from the Philippines "to be shipped per steamship *Empress of India*, no arrival no sale." The ship named brought 1,800 tons, the remaining 700 having been transhipped at Bermuda into the *Trinidad*, the *Empress of India* having been exposed to perils of the sea. The *Trinidad* also arrived with the 700 tons, but the buyers refused both consignments as not having arrived by the *Empress of India*. *Held*, that the mention of the name of the ship was in connection with the *shipment* only of the sugar, and that the word "arrival" must refer to the cargo only. And the three preceding cases were distinguished on this ground.

Gorrissen v. *Perrin* (1857).

In *Gorrissen* v. *Perrin* (*i*), the sale was of "1170 bales gambier, *now on passage* from Singapore, and expected to arrive in London, viz., per *Ravenscraig* 805 bales, per *Lady Agnes Duff* 365 bales." Both vessels arrived with the specified number of packages, but the contents were far short of the agreed number of *bales*, the latter word meaning in the trade a compressed package of two hundredweight. There was also on board a quantity of gambier consigned to other parties, sufficient to make up the whole quantity sold. The plaintiff, who had bought the goods, claimed in two counts, the first, on a *warranty* that there were 1,170 bales actually on the passage; the second count, on the theory that, even if it was a double condition precedent that the vessels should arrive and that that quantity should be on board, the condition had been fulfilled, although part of the goods belonged to third persons. The Court held, on the first count, that the contract plainly contained an absolute assurance — a warranty — that the goods were on the passage, and therefore the verdict for the plaintiff must stand. On the second count, as to which a decision had become unnecessary, the Court, reviewing *Fischel* v. *Scott* (*k*), distinguished it from the case before them. In that case a party sold oil expected to arrive, some of which did arrive, but he had supposed it would come consigned to him, whereas it turned out that it had been consigned to some one else, and inasmuch as he had intended and

Fischel v. *Scott* (1854).

(*h*) 161 U. S. 57.
(*i*) 27 L. J. C. P. 29; 2 C. B. (N. S.) 681; 109 R. R. 830. See also *Long* v. *Massey* (1873) L. R. 8 C. P. 395; 42 L. J. C. P. 153.
(*k*) (1854) 15 C. B. 69; 100 R. R. 235.

tracted to sell the very oil which arrived, and the Court could not add a further condition, viz., that the goods on arrival should prove to be his, a very different thing from saying that when a man sells his own specific goods contingent on their arrival, and they do not arrive, the arrival of other similar goods, with which he never affected to deal (*l*), shall by him with the same consequences as if his own goods had arrived (*m*).

Vernede v. *Weber* (1856).

In *Vernede* v. *Weber* (*n*), the contract was for the sale of "the cargo of 400 tons, *provided the same be shipped for seller's account*, more or less, *Aracan Necrensie rice*, . . . per British vessel *Minna*, . . . at 11s. 6d. per cwt. for Necrensie, or 11s. for Larong, the latter quality not to exceed 50 tons, or else at the option of buyers to reject any excess, etc." By the pleadings it appeared that the vessel arrived without any Arracan Necrensie rice at all, but with 285 tons of Larong rice, and 159 tons of *Latoorie* rice. The buyer sued non-delivery of this cargo. It was held by the Court: (1) that the contract did not contain a warranty that any particular rice should be put on board, but the sale was conditional on such a cargo as was described being shipped; (2) that the buyer was not entitled to the *entire* cargo that arrived, because no Latoorie rice had been sold; and (3), though with some hesitation (*o*), that the buyer had no right to the Larong rice, because the contract was entire: it contemplated the sale of a whole cargo of Necrensie rice; the Larong rice was to be a mere subsidiary portion of the cargo, which was described as one of Necrensie rice (*p*); that the seller could not have compelled the buyer to take a cargo of which no part corresponded with the description in the contract, and that he could not be bound to deliver what he could not have compelled the buyer to take.

In *Simond* v. *Braddon* (*q*), the sale was "of the following

(*l*) See also *Thornton* v. *Simpson* (1816) 6 Taunt. 556.

(*m*) See also, on this point, *Hayward* v. *Scougall* (1809) 2 Camp. 56; 11 R. R. 662, where only the hemp *loaded by the agents* of the concern was sold; cf. *Splidt* v. *Heath* (1809) 2 Camp. 57, n.; 11 R. R. 663, where the contract was absolute to ship.

(*n*) 1 H. & N. 311; 25 L. J. Ex. 326; 108 R. R. 587. See *Simond* v. *Braddon*, next case, *infra*.

(*o*) This third point seems, however, to rest on grounds quite as solid and indisputable as the two preceding.

(*p*) See to the same effect in Amer., on a sale of "250 tons No. 1 hay" containing an excessive admixture of Nos. 2 and 3, *Bloomingdale* v. *Hewitt* (1859) 40 Ap. Div. 208, affd. 170 N. Y. 568.

(*q*) 2 C. B. (N. S.) 324; 26 L. J. C. P. 198; 109 R. R. 697; foll. by Sup. Ct. of N. Y. in *Dike* v. *Reitlinger* (1886) 23 Hun, 241, where the warranty was express.

Warranty by Seller.

Simond v. *Braddon* (1857).

cargo of Aracan rice per *Severn*, . . . *now on her way to Akyab, viâ* Australia. The cargo to consist of fair average Necrensie rice, the price of which is to be 11s. 6d. per cwt. with a fair allowance for Larong or any other inferior description of rice (if any); but the seller engages (*r*) to deliver what is shipped on his account, and in conformity with his invoice, etc." The cargo was taken on board at Akyab, and consisted of Necrensie rice of inferior quality. This was held to be a *warranty* by the defendant to ship a cargo of fair average Necrensie rice, and he was held liable for a breach of it. The stipulations for allowance, and the seller's engagement to deliver, were held to be terms inserted for the benefit of the buyer, and allowing him the option of taking the cargo containing an admixture of Larong rice.

Hale v. *Rawson* (1858).

In *Hale* v. *Rawson* (*s*), the declaration alleged an agreement by the defendant to sell to the plaintiff fifty cases of East India tallow, "to be paid for in fourteen days after the landing thereof, to be delivered by the defendant to the plaintiff on safe arrival *of a certain ship* or vessel called *The Countess of Elgin*, then alleged to be on her passage from Calcutta to London"; that the sale was by sample, that the vessel had arrived, etc., etc., and that the defendant refused to deliver. Plea, that neither the tallow nor any part thereof arrived by *The Countess of Elgin*, whereby, etc. Demurrer and joinder. *Held*, that the contract for the sale was conditional on the arrival of the *vessel* only, notwithstanding the stipulation for payment after the landing of the tallow, which merely regulated payment if the goods arrived. In this case the language of the contract plainly imported an assurance or warranty that the tallow was on board the ship.

Smith v. *Myers* (1869).

In *Smith* v. *Myers* (*t*), the contract was for the sale of "about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor* at 12s. 9d. per cwt. Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." The sellers, the defendants, when the contract was made on the 8th of September, had been informed by their Valparaiso correspondents of the purchase of 600 tons nitrate and of the charter of the *Precursor* on account of the sellers. Before the date of the

(*r*) The word "only," which was improperly inserted before "engages" after the sold note was signed, and was not in the bought note, was disregarded by the Court.

(*s*) 4 C. B. (N. S.) 85; 27 L. J. C. P. 189; 114 R. R. 632.

(*t*) L. R. 5 Q. B. 429; L. R. 7 Q. B. 139; 41 L. J. Q. B. 91, in Ex. Ch.

contract, but without the sellers' knowledge, an earthquake had destroyed the greater part of the nitrate; and the charter of the vessel had been cancelled by the Valparaiso house. Afterwards the Valparaiso correspondents, hearing of the contract and not knowing its precise terms, determined as a measure of precaution to buy another cargo of 600 tons, and obtained an assignment of the charter of the same *Precursor* from another house, and on the 23rd of December this second cargo was shipped to the defendants, who in January sold it "to arrive" to other parties. On the arrival of the cargo in May the plaintiffs claimed it, and on refusal of delivery by the defendants brought their action. It was held that the contract referred to a cargo "*expected* to arrive per *Precursor*" on a particular voyage, and that the destruction of *that* cargo was provided for by the contract in the stipulation that the contract in such event should "be void." It was a mere coincidence that the second cargo bought had come on the *Precursor*, and there would have been no pretext for the plaintiffs' demand, if it had come on a vessel of a different name.

Abe Stein Co. v. *Robertson* (1901).

In *Abe Stein Co.* v. *Robertson* (*u*), there was a contract for goatskins of specified quality, "expected to arrive from China." The goods were "*to be shipped* immediately by steamer or steamers to New York, any question of quality to be decided by selling brokers, and their decision to be final." It was also added by letter "no arrival, no sale." The goods arrived, and were decided by the brokers not to be in accordance with the contract, and the buyer rejected them. In an action for non-delivery, the sellers contended that the words "expected to arrive" and "no arrival, no sale," protected them if no goods of contract quality arrived. *Held*, by the Court of Appeals of the State of New York, that the words in question referred to the risks of navigation or transportation. There were no doubt cases in which such words were intended to make the contract contingent on the arrival of goods of contract quality, but the words could not have that effect when there was an express warranty by the seller that the goods had been shipped, or (as in the present case) an express engagement to ship.

Barnett v. *Javeri & Co.* (1916).

In *Barnett* v. *Javeri & Co.* (*x*), the defendants agreed to sell the plaintiff "about four tons of hematine crystals ex Liverpool, net cash against invoice, and subject to safe

(*u*) (1901) 167 N. Y. 101.
(*x*) [1916] 2 K. B. 390; 85 L. J. K. B. 1703.

arrival," the goods on arrival at Liverpool to be forwarded at plaintiff's expense to London. Defendants had bought from one W. in Alexandria the crystals under a similar contract. W., not having received the crystals from his seller, could not deliver, and accordingly the defendants could not deliver to the plaintiff. *Held*, by Bailhache, J., in the Commercial Court, that the word "safe" showed that the event provided against was the non-arrival of the goods at their destination *after* shipment: accordingly, that there was an absolute engagement to ship, or to see that the goods were shipped, and the sellers were liable for non-delivery.

Result of the decisions in sales "to arrive."

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

1. Where goods are sold "on arrival per ship A. or ex ship A." or "to arrive per ship A. or ex ship A." (for these two expressions mean precisely the same thing (*y*)), the terms import a *double condition precedent*, viz., that the ship named shall arrive, *and* that the goods sold shall be on board on her arrival.

2. The contract may, however, show that the words "arrival" or "to arrive" are used only in connection with the *goods*. This is only a *single condition precedent*, viz. the arrival of the goods. And *semble* that "to be shipped," or "on shipment per ship A. on arrival," or "to arrive," import such a single condition (*z*).

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

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

5. Where the sale describes the expected cargo to be of particular description, as "400 tons Aracan Necrensie rice

(*y*) *Per* Parke, B., in *Johnson* v. *M'Donald* (1842) 9 M. & W. 600–6
12 L. J. Ex. 99: 60 R. R. 838.
(*z*) *Harrison* v. *Fortlage* (1896) 161 U. S. 57.

and the cargo turns out on arrival to be rice of a different description (*a*), the condition precedent is not fulfilled, and neither party is bound by the bargain.

"The goods to be taken from the quay." *Neill* v. *Whitworth* (1865).

In *Neill* v. *Whitworth* (*b*), an attempt was made to convert a stipulation introduced in the seller's favour into a condition precedent which he was bound to fulfil. A sale was made of cotton, "to arrive in Liverpool," and a clause was inserted: "The cotton to be taken *from the quay*: customary allowance of tare and draft, and the invoice to be dated from date of delivery of last bale." On arrival the goods were warehoused; but the sellers offered delivery orders for the cotton from the warehouse at quay weights and free of expense, or to cart the cotton back to the quay and there to deliver; but the plaintiffs, the buyers, contended that the cotton should have been delivered from the quay on arrival, and not warehoused, and refused to take it, and sued the sellers for non-delivery. The clause in question was taken to mean that the cotton was to be at the buyer's charge when landed on the quay, the purpose being probably to save warehouse charges, as by the dock regulations in Liverpool goods must be removed from the quay within twenty-four hours, in default whereof they are warehoused by the dock authorities.

Stipulations as to *time*.

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

(*a*) As to the implied condition of description, see *post*, 695.

(*b*) 18 C. B. (N. S.) 435; 34 L. J. C. P. 155; aff. in Ex. Ch. L. R. 1 C. P. 684; 35 L. J. C. P. 304.

(*c*) This statement of the law was cited with approval by Folger, J., in delivering the opinion of the Court of Appeals of New York in *Higgins* v. *The Delaware R. R. Co.* (1875) 60 N. Y. at 557. The Judicature Act, 1873, provides that: "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity," s. 25, sub-s. 7. But the effect of this Act is not to extend to a sale of goods the rule of equity which provides that in a contract for the sale of *land*, unless a contrary intention appears, time is not presumed to be an essential condition. To apply this rule to mercantile contracts would be "dangerous and unreasonable": *per* Cotton, L.J., in *Reuter* v. *Sala* (1879) 4 C. P. D. at 249; 48 L. J. C. P. 492. Even in equity, time, which is not originally of the essence of the contract, may be made so by an express notice providing for a reasonable time for performance by the other party: *Compton* v. *Bagley* (1892) 1 Ch. 313; 61 L. J. Ch. 113. See the principles governing the implication of due conditions in mercantile contracts stated by Brett, M.R., in *Sanders* v. *MacLean* (1883) 11 Q. B. D. 336—337; 52 L. J. Q. B. 481.

Adopting these principles, the Code provides that:

Code, s. 10.

"10.—(1.) Unless a different intention appears from the terms of the contract (*d*), stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

"(2.) In a contract of sale 'month' (*dd*) means *prima facie* calendar month."

Time of payment. *Martindale* v. *Smith* (1841).

In *Martindale* v. *Smith* (*e*), six specific stacks of oats had been sold by Smith to Martindale, to be paid for on July 16. Smith afterwards told Martindale that if he failed to pay on the very day he should not have the oats. Martindale did not pay on July 16, but tendered the price shortly afterwards. Smith, however, subsequently sold the oats to another person. *Held*, that Martindale's mere failure to pay on the 16th did not justify Smith in repudiating the contract; he was not bound to deliver without a tender of the price, but this condition having been fulfilled, the subsequent resale was tortious, and he was liable in trover.

Woolfe v. *Horne* (1877).

In *Woolfe* v. *Horne* (*f*), the plaintiff bought goods at auction, one of the conditions of sale being that the lots should be cleared within three days, and that all lots unclaimed should be resold. The plaintiff claimed the goods two days late and found that they had been delivered to another person. *Held*, that the sellers were liable for non-delivery, prompt clearance of the goods not being a condition precedent.

Seller to give notice in sales "to arrive."

In sales of goods "to arrive," it is quite a usual condition that the seller shall give notice of the name of the ship on which the goods are expected as soon as it becomes known to

(*d*) *Ebbw Vale, &c., Co.* v. *Blaina Iron, &c., Co.* [1901] 6 Com. Cas. C. A.

(*dd*) This definition of "month" alters, with regard to contracts of sale, the ordinary common law rule that "month" means *prima facie* lunar month *Lacon* v. *Hooper* (1795) 6 T. R. 224; *per Cur.* in *Simpson* v. *Margitson* 11 Q. B. 23, at 31; 17 L. J. Q. B. 81; 75 R. R. 278. But the context document or the surrounding circumstances might show that calendar was intended: *Bruner* v. *Moore* [1904] 1 Ch. 305; 74 L. J. Ch. 377. See the Bills of Exchange Act, 1882, s. 14 (4); and, as to statutes after 1850, Interpretation Act, 1889, s. 3. For a trade meaning of "month," see *Re* v. *Beard* (1873) 28 L. T. 746.

(*e*) 1 Q. B. 389; 10 L. J. Q. B. 155; 55 R. R. 285. See also *per* Blackburn in *Mersey Steel Co.* v. *Naylor* (1884) 9 A. C. 434, at 444; 53 L. Q. B. 497.

(*f*) L. R. 2 Q. B. D. 355; 46 L. J. Q. B. 534. See also *Paton & Son* *Payne & Co.* (1897) 35 Sc. L. R. 112. H. L. (time of delivery of pr machine); *cf. Sharp* v. *Christmas* (1892) 8 Times L. R. 657. C. A. (f goods); *Wimshurst* v. *Deeley* (1845) 2 C. B. 253 (time of delivery of en for ship); *Thames Sack Co.* v. *Knowles & Co.* 88 L. J. K. B. 585 C contract"); *Harrington* v. *Browne* (1917) 23 Com. L. R. 297 (Austr.) (del of sheep "on or before" a date).

him, and a strict compliance with this promise is a condition precedent to his right to enforce the contract (*g*).

Busk v. *Spence* (1815).

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

Graves v. *Legg* (1854).

This point seems not to have occurred again until 1854, when it was carefully considered as a new question, and determined in the same way, in the Exchequer, in *Graves* v. *Legg* (*i*), no reference being made to *Busk* v. *Spence*. In this case, the plea averred that the seller knew the goods were bought for resale, and *unsalcable* until the time of shipment was declared. To this plea the plaintiff demurred, and after the decision on the demurrer to the above effect there was a trial on the merits, in which it was proven that the vessel was named to the buyer's broker, who had made the contract, in Liverpool, and that, by the usage of that market, such notice to the broker was equivalent to notice to his principal, and the Court of Exchequer, as well as the Exchequer Chamber, held that this was a compliance with the condition (*k*).

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

Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time. It is then a condition precedent that the goods shall be so shipped, the time of shipment forming part of the description of the goods (*l*). Some difficulty has been found in the interpretation of the expressions "to be shipped" or "ship-

(*g*) *Per* Thesiger, L.J., in *Reuter* v. *Sala* (1879) 4 C. P. D. 239, at 246; 48 L. J. C. P. 492. The posting of a notice in time may sometimes be insufficient, if it be received out of time: *Steinhardt* v. *Bingham* (1905) 182 N. Y. 326.

(*h*) 4 Camp. 329.

(*i*) 3 Ex. 709; 23 L. J. Ex. 228; 96 R. R. 931.

(*k*) (1856) 11 Ex. 642; 26 L. J. Ex. 316; 105 R. R. 702. See also *Gilkes* v. *Leonino* (1858) 4 C. B. (N. S.) 485; 114 R. R. 815.

(*l*) And therefore a condition under section 13 of the Code, *post*, 695. See also section 10 (1) (stipulations as to time), *ante*, 674.

ment" within a certain time. They may be construed to mean either that the goods shall be placed on board ship during the time specified, or that the shipment shall be completed before that time expires. The former has now been decided by the highest authority to be the natural meaning of the words, in the absence of any trade usage.

Alexander v. *Vanderzee* (1872).

In *Alexander* v. *Vanderzee* (*m*), the defendant had contracted for the purchase of 10,000 quarters of Danubian maize, for shipment *in June and* [*or*] *July*, 1869 (old style), seller's option. Two cargoes of maize were tendered to the defendant, the bills of lading being dated respectively the 4th and 6th of June. The loading of the two cargoes began on the 12th and 16th of May, and was completed on the 4th and 6th of June, rather more than half of each cargo having been shipped in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped in June, but it does not appear from the report that any evidence of usage to affect the ordinary meaning of the words was tendered (*n*). The defendant rejected the cargoes. At the trial it was left to the jury to say whether the cargoes in question were "June shipments" in the ordinary business sense of the term, and they found that they were, and the majority of the Court of Exchequer Chamber held, affirming the decision of the Court of Common Pleas, that the question was rightly left to the jury, and that their verdict, therefore, disposed of the case. In the Exchequer Chamber, the majority of the Court (*o*) were of opinion that the words "June and [or] July shipment" were ambiguous, and might mean either that the shipment was to be completed in one of those months, *i. e.* that the whole quantity of grain was to be put on board within those months, and that it was properly left to the jury to decide. Kelly, C.B., on the other hand, thought that, in the absence of any suggestion of a technical meaning, the construction of the words was for the Judge, and that their natural meaning was that the cargoes should be put on board in June or July, not partly in May, particularly upon the evidence as to the heating of a May shipment. But he declined to differ from the rest of the Court.

But the authority of this case is shaken by the later decision

(*m*) L. R. 7 C. P. 530.

(*n*) The argument, however, of counsel in *Bowes* v. *Shand* (1877) 2 A. C. at the foot of 460; 46 L. J. Q. B. 561, states that such evidence was given.

(*o*) Martin, B., Blackburn, Mellor, and Lush, JJ.

of the House of Lords in *Bowes* v. *Shand* (*p*). The contract was for the sale of 600 tons of "Madras rice to be shipped at Madras or coast during the months of March and [or] April, 1874, per *Rajah of Cochin*." By far the larger portion of the rice was put on board in February, and bills of lading for various portions were given upon the 23rd, 24th, and 28th, and the 3rd of March, but all except a very small portion of the parcel shipped under this last bill of lading also had been put on board in February. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March and [or] April. There was no evidence tendered on behalf of the plaintiffs to show that the words "to be shipped during the months of March and [or] April" had in the trade any special or technical meaning; and, on the other hand, the defendants called evidence to prove that the words were understood in the trade in their ordinary meaning. It was held that the natural meaning of the stipulation as to shipment was that *the whole* of the rice should be put on board *during* the months mentioned; and that, in the absence of any trade usage to affect the meaning of the words, it was for the Court to construe the contract.

Bowes v. *Shand* (1877).

Lord Cairns, L.C., and Lord Blackburn distinguished *Alexander* v. *Vanderzee* on the ground that there the shipment of the parcel of goods in question had been begun before the end of the month of May, and had been proceeded with *continuously* with reasonable despatch and in the ordinary way, but the shipment having been completed in June, although commenced in May, and a bill of lading having been given in June for the whole quantity shipped, it might therefore well be a question for the jury whether it was a May or a June shipment. In the case under consideration, nearly nine-tenths of the goods had been put on board during February, the shipment of that portion had been completed and bills of lading taken during that month, and therefore as to the great bulk of the goods it was a February shipment.

Opinion of Lord Cairns, L.C., and Lord Blackburn.

It is submitted, however, that *Alexander* v. *Vanderzee*, although not expressly overruled by *Bowes* v. *Shand*, cannot, after that decision, possess any authority. It would seem that

(*p*) 2 A. C. 455; 46 L. J. Q. B. 561, affg. the Div. Court, *sub nom. Shand* v. *Bowes* (1876) 1 Q. B. D. 470; 45 L. J. Q. B. 507; and revg. the C. A. (1877) 2 Q. B. D. 112. See also *Ashmore* v. *Cox* [1899] 1 Q. B. 436; 68 L. J. Q. B. 72; *ante*, 653, and the older case of *Cox* v. *Todd* (1825) 4 L. J. (O. S.) K. B. 34 (goods deliverable "in April or sooner"). As to where a reshipment after landing is nevertheless not a new shipment out of time, see *Re Carter & Co. and Sassoon & Co.* [1912] 17 Com. Cas. 59.

in *Alexander* v. *Vanderzee* no evidence of trade usage was given (*q*), and *Bowes* v. *Shand* decides that, in the absence of such usage, it is for the Court to construe the words, while at the same time it settles what the true construction of them is.

In treating of the fulfilment of the description given by the contract as a condition precedent, Lord Cairns, L.C., says (*r*), with reference to the plaintiff's contention that the failure to ship was a breach of a *warranty* only, and did not justify a rejection of the goods: "I cannot think that there is any foundation whatever for that argument. . . . What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. . . . The plaintiff who sues upon that contract has not launched his case until he has shown that he has tendered that thing which has been contracted for." And Lord Blackburn makes the following valuable observations (*s*): "It was argued, or tried to be argued, on one point that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject-matter of the contract went, its being shipped at another and a different time being (it was said) only a breach of stipulation, which could be compensated for in damages. But I think that that is quite untenable. I think—to adopt an illustration which was used a long time ago by Lord Abinger (*t*), and which always struck me as being a right one . . . that if you contract to sell peas, you cannot oblige a party to take beans; if the description of the article tendered is different in any respect (*u*) it is not the article bargained for, and the other party is not bound to take it. . . . The parties have chosen, for reasons best known to themselves, to say: 'We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship'; and . . . it must be shown not merely that it is equally good, but that it is the *same* article as they have bargained for, otherwise they are not bound to take it."

The contract in this case was an agreement to sell an unascertained bulk of rice, but it is apprehended that the same decision would now be given in the case of a *specific* cargo (*x*).

(*q*) See, however, n. (*n*), *ante*, 676.
(*r*) 2 A. C. at 467—468; 46 L. J. Q. B. 561.
(*s*) 2 A. C. at 480; 46 L. J. Q. B. 561.
(*t*) In *Chanter* v. *Hopkins* (1838) 4 M. & W. 399; 8 L. J. Ex. 14; 51 R. R. 650; quoted, *post*, 695.
(*u*) *Semble*, what the learned Lord means is that no part of the *description* should fail, not that the failure of any incident or stipulation would necessarily be a failure of part of the description.
(*x*) Under section 13, *post*, which covers specific goods.

A like decision was given in America in *Cleveland Rolling Mills* v. *Rhodes* (*y*). The contract there was for the sale of iron to be made of iron ore, and to be "shipped in vessel cargoes as rapidly as possible during the season of navigation of 1880, such portion of the product of the ores as is made after the close of navigation of 1880 to be shipped at the opening of navigation of 1881, or as near the opening as possible." It was held by the Supreme Court of the United States to be a contract (so far as related to iron shipped in 1881) for iron already made and ready for shipment at the opening of the navigation of 1881, and then shipped as rapidly as possible, and the buyer could reject the *whole* shipment of 1881, of which part had not been made and shipped till two months after the opening of navigation.

Cleveland Rolling Mills v. *Rhodes* (1886).

On similar principles, a stipulation that the bill of lading on shipment shall bear or bears a certain date is a condition precedent, and the buyer may reject the shipment if the bill of lading tendered bears a date out of time, even although the goods were in fact shipped in time (*z*).

Date of bill of lading a condition.

The extract from Lord Blackburn's opinion above quoted shows that the place or mode of shipment may be as material a part of the description of the goods as the time.

Place and mode of shipment are also conditions.

Accordingly, it has been decided by the Supreme Court of the United States (*a*), on a contract for the sale of "500 tons No. 1 Shott's (Scotch) pig iron, shipment from Glasgow as soon as possible," that iron shipped at Leith, though it arrived earlier than iron shipped at Glasgow would have done, was rightly rejected, and Gray, J., stated the law to be that "in a mercantile contract 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 as a warranty or condition precedent." So also, if the goods are to be shipped by sailing vessel or by steamer, the mode of shipment is part of the description (*b*). But if the goods are otherwise

Filley v. *Pope* (1885).

(*y*) 121 U. S. 255. See also *Norrington* v. *Wright* (1885) 115 U. S. 188, *post*, 833; *Hill* v. *Blake* (1884) 97 N. Y. 216; and *Welsh* v. *Gossler* (1882) 89 N. Y. 540.

(*z*) *Re General Trading Co. and Van Stolk's Commissiehandel* [1911] 16 Com. Cas. 95. *Gattorno* v. *Adams* (1862) 12 C. B. (N. S.) 560; 133 R. R. 445, would seem, having regard to the increased practice of reselling cargoes by means of the documents, to be no longer of authority. There it was held, on a contract for the sale of a specific cargo shipped on a particular vessel "as per bill of lading dated Sept. or Oct.," that there was no representation that the cargo had been shipped at the date of the bill of lading, but that such a representation, if made, would not have been a condition.

(*a*) *Filley* v. *Pope*, 115 U. S. 213.

(*b*) *Ashmore* v. *Cox & Co.* [1899] 1 Q. B. 436; 68 L. J. Q. B. 72; *ante*, 653; *Hill* v. *Blake* (1884) 97 N. Y. 216.

according to contract as to shipment, a shipment by the seller himself is not essential (*c*).

Transhipment. New voyage.

If the conditions of time, etc., of shipment are satisfied, no further condition will ordinarily be implied that the goods shall come by any particular route, or without transhipment (*d*). But a transhipment may constitute the commencement of a new voyage; in which case it may be necessary to satisfy the conditions anew. Whether a new voyage has commenced is a question of fact depending on the intention of the shipowner; and the fact that the goods are carried throughout under the original bill of lading is a strong, though not conclusive, circumstance to negative a new voyage (*e*).

"Clearance" by a certain time.

Another stipulation as to time when goods are to be shipped is that the ship should be "cleared" by a particular date. Clearance means a compliance with customs regulations so that the vessel is authorised to sail.

***Thalmann* v. *Texas Star Flour Mills* (1900).**

Thus, in *Thalmann* v. *Texas Star Flour Mills* (*f*), a buyer of Colorado wheat, to be shipped at Galveston by a particular steamer for Havre, "clearance not later than May 31," and who had paid for the wheat, was held not entitled to recover back the price, it being proved that, though the cargo had not been completely shipped till June 2, yet a certificate of clearance had been granted, according to the custom of the port, though not according to law, on May 28, when the cargo was alongside. But it was intimated that the decision might have been otherwise had the stipulation been that the ship should *sail* by May 31.

Time of delivery of specification of goods. *Kidston & Co.* v. *Monceau Ironworks Co.* (1902).

In *Kidston & Co.* v. *Monceau Ironworks Co.* (*g*), where the defendants agreed to sell to the plaintiffs 1,000 tons of iron, to be delivered, cost and freight, Japan, "direct port specification to be given in the beginning of May, time of shipping May and June from Antwerp," and the plaintiffs gave the specification in several parts between May 12 and 15, whereupon the defendants repudiated the contract, it was held by Kennedy, J., in the Commercial Court that delivery of the specification by the time mentioned was not in the circumstances a condition precedent incumbent on the plaintiffs, as both parties knew that the specification had to

(*c*) *Per* Lord Russell in *Ashmore* v. *Cox & Co.* at 439, 440, 442; *Cunningham* v. *Judson* (1885) 100 N. Y. 179.

(*d*) *Burns, Philp & Co.* v. *Louis Phillips & Co.* (1913) 13 Stat. R. (N.S.W.) 461.

(*e*) *Re Carver & Co. and Sassoon & Co.* [1911] 17 Com. Cas. 59.

(*f*) 82 L. T. 833; 5 Asp. M. C. 87, C. A.

(*g*) 86 L. T. 556; 7 Com. Cas. 82; 18 Times L. R. 320.

come from Japan to Antwerp, and its arrival would therefore be subject to contingencies; moreover, as the time allowed to the defendants for delivery was elastic, being two months, and as the defendants could manufacture in eight days, they were not prevented from producing the iron within the proper time, and so had not been deprived of the benefit of the contract. It would have been otherwise if the specification had been delayed so late as to prevent the defendants from shipping in May or June.

CHAPTER III.

CONDITIONS IMPLIED BY LAW.

Principle on which the implication of conditions is based stated by Bowen, L.J.

THE principle governing the implication of a condition [illegible] thus stated by Bowen, L.J., in *The Moorcock* (*a*): "A[n] implied warranty, or, as it is called, a covenant in law, [illegible] distinguished from an express contract or express warranty really is in all cases founded on the presumed intention of th[e] parties, and upon reason. The implication which the law draws from what must obviously have been the intention [of] the parties the law draws with the object of giving efficac[y] to the transaction and preventing such a failure of consider[a]tion as cannot have been within the contemplation of either side. . . . In business transactions . . . what the law desire[s] to effect by the implication is to give such business efficac[y] to the transaction as must have been intended at all events by both parties, who are business men; not to impose on one side all the perils of the transaction (*b*), or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

Though the learned Judge speaks of an implied warranty it is obvious from his language, especially from his reference to failure of consideration, that he is really speaking of an implied condition, which in the case under consideration has become a warranty.

Such being the general principle, the conditions ordinarily implied in contracts of sale will now be considered.

Rule in executory agreements that delivery and payment are concurrent conditions.

The general rule in executory agreements for the sale of goods is that the obligation of the seller to deliver and that of the buyer to pay are implied concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing

(*a*) (1889) L. R. 14 P. D. 64, at 68; 58 L. J. P. 73; approved by Lord Esher, M.R., in *Hamlyn* v. *Wood* (1891) 2 Q. B. 488, at 491, 492; 60 L. J. Q. B. 734, C. A. See also, *per* Bowen, L.J., in *Oriental S.S. Co.* v. *Tylor* [1893] 2 Q. B. 518, at 527; 63 L. J. Q. B. 128, C. A.

(*b*) See *Lyttelton Times Co.* v. *Warners* [1907] A. C. 476; 76 L. J. P. C. 100, P. C.

performance (*c*), or offer to perform, or averring readiness and willingness to perform his own promise (*d*). And the words "ready and willing" imply, not only the disposition, but the capacity to do the act (*e*).

Accordingly, the Code enacts:

Code, s. 28.

"**28.** Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

An "exchange" of the possession of the goods and the price means an exchange in a business sense, having regard to the nature of the contract. It does not necessarily mean an immediate exchange (*f*).

Mutual agreement for cross sale. *Atkinson* v. *Smith* (1845).

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

In *Bankart* v. *Bowers* (*h*), there was a written agreement,

(*c*) *Morton* v. *Lamb* (1797) 7 T. R. 125; 4 R. R. 395; *Waterhouse* v. *Skinner* (1801) 2 B. & P. 447; *Rawson* v. *Johnson* (1801) 1 East, 203; 6 R. R. 252 (no tender of price necessary); *Wilks* v. *Atkinson* (1815) 1 Marsh. 412 (demand of delivery); *Withers* v. *Reynolds* (1831) 2 B. & Ad. 882; 1 L. J. K. B. 30; 36 R. R. 782, *post*, 826 (express refusal); *Lawrence* v. *Knowles* (1839) 5 Bing. N. C. 399; 8 L. J. (N. S.) C. P. 210; 50 R. R. 721 (buyer's insolvency); *Mess* v. *Duffus & Co.* [1901] 6 Com. Cas. 165 (same); *Jackson* v. *Allaway* (1844) 6 M. & G. 942; 13 L. J. C. P. 84 (no tender of delivery necessary); *King* v. *Reedman* (1883) 49 L. T. (N. S.) 473 (contrary agreement). As to fraud by the buyer in taking goods other than those sold, see *Lewis* v. *Clifton* (1854) 11 C. B. 245; 23 L. J. C. P. 68.

(*d*) *Rawson* v. *Johnson*, *supra*; *Jackson* v. *Allaway*, *supra*; *Boyd* v. *Lett* (1845) 1 C. B. 222; 14 L. J. C. P. 111.

(*e*) *Per* Lord Abinger, C.B., in *De Medina* v. *Norman* (1842) 9 M. & W. 820, at 827; 11 L. J. Ex. 370; 60 R. R. 912; *Lawrence* v. *Knowles*, *supra*; *Measures Brothers* v. *Measures* [1910] 2 Ch. 248; 79 L. J. Ch. 707, C. A.

(*f*) *Ryan* v. *Ridley & Co.* [1902] 8 Com. Cas. 105. As to exchange without inspection of the goods by the buyer, see Sc., and *E. Clemens, Horst & Co.* v. *Biddell Brothers* [1912] A. C. 18; 81 L. J. K. B. 42.

(*g*) 14 M. & W. 695; 15 L. J. Ex. 59. See also *Minshull* v. *Brinsmead* (1883) Cab. & Ell. 97.

(*h*) L. R. 1 C. P. 484.

Bankart v. *Bowers* (1865).

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

Contrary agreement.

Parker v. *Rawlings* (1827).

Parker v. *Rawlings* (*i*), which was, strictly speaking, a case of exchange, and not of sale (*k*), affords an instance of a contrary agreement negativing the *prima facie* rule of the concurrency of the conditions of delivery and payment. In that case, the plaintiff had bought sponge of the defendant, no time being fixed for delivery, and had agreed to pay for it in yellow ochre *deliverable on the 24th of April*. *Held*, he could not sue for non-delivery of the sponge without having delivered the ochre.

Buyer's insolvency.

Notwithstanding that section 28 may be excluded by the "contrary agreement" that the buyer should be entitled to credit, yet, if the buyer become insolvent, the provision for credit therefore becomes by law excluded (*l*).

Quality of goods.

The seller must be ready and willing to deliver goods of the stipulated quality, for "the goods" referred to in section 28 are the goods contracted for.

Time of performance of concurrent condition of payment.

As stipulations with regard to the time of payment are not *prima facie* conditions (*m*), a buyer may in law be ready and willing to pay although he makes default in payment on the particular day stipulated, provided he is ready and willing to pay within a reasonable time thereafter (*n*).

Quantity of goods.

A contract for the sale of a quantity of goods being *prima facie* an entire contract for that quantity, and no less (*o*), complete delivery by the seller is ordinarily a condition precedent to the buyer's obligation to accept and pay for

(*i*) 4 Bing. 280; 5 L. J. (O. S.) C. P. 174. See the first rule in *Peri* v. *Cole* (1669), set out *ante*, 638; and *cf. Smith* v. *Woodhouse* (1868) 2 P. N. R. 233, Ex. Ch. (performance of consideration not to precede payment

(*k*) The principle stated in the text is equally applicable to contracts sale and of barter where they are executory.

(*l*) *Ex parte Chalmers* (1873) 8 Ch. 389; 42 L. J. Bkcy. 2; *Ex parte Car forth Hæmatite Iron Co.* (1876) 4 Ch. D. 108; 45 L. J. Ch. 11, C. A.

(*m*) Code, s. 10, *ante*, 674.

(*n*) *Martindale* v. *Smith* (1841), *ante*, 674; and *Woolfe* v. *Horne* 18 *ibid.*

(*o*) *Ante*, 220, and *post*, 799, *et seqq.*

any of them, even though the goods may be deliverable by instalments (*p*). Where, however, the instalments are to be *separately* paid for, the delivery of any instalment will ordinarily be a condition precedent only to payment for that particular instalment, but not to acceptance of and payment for the residue of the goods (*q*). Similar principles apply to the buyer's readiness and willingness to accept and pay for the goods (*r*). In other words, section 28 must, in the case of such instalment contracts, be construed subject to section 31 (2).

Voluntary postponement of delivery or of acceptance.

Postponement by the seller of delivery at the request, or with the consent (*s*), of the buyer, is not inconsistent with readiness and willingness to deliver the goods according to the terms of the contract, unless the postponement is not a mere gratuitous concession by the seller, but made under a substituted contract, in which latter case the seller must be ready and willing to deliver the goods according to the terms of the substituted contract (*t*). The same rule applies, *mutatis mutandis*, to a voluntary postponement by the buyer of acceptance at the request or with the consent of the seller (*u*).

Concurrent condition may be itself dependent.

A concurrent condition may itself be dependent on a condition precedent, as, for instance, where goods are deliverable "as directed," or on similar terms; in which case the buyer must give directions, and the seller must then be ready and willing to deliver (*x*).

Conditions as to title.

In regard to conditions as to *title*, inasmuch as it is an essential element of the contract of sale that there should be a transfer of the absolute or general property in the thing from the seller to the buyer, it would seem naturally to follow that by the very act of selling the chattel the seller undertakes to transfer the *property* in the thing, and thus warrants his title or ability to sell, and it is believed that such was the true

(*p*) *Per* Parke, J., in *Oxendale* v. *Wetherell* (1829) 9 B. & C. 386; 7 L. J. K. B. 264; 3 R. R. 207.

(*q*) *Per* Lord Selborne in *Mersey Steel Co.* v. *Naylor* (1884) 9 A. C. 434, at 439; 53 L. J. Q. B. 497. See Code, s. 31 (2), *post*, 825. The subject is further considered in the chapter on Delivery, *post*, 816.

(*r*) *Kingdom* v. *Cox* (1848) 5 C. B. 522, 526; 17 L. J. (N. S.) C. P. 155.

(*s*) But see *Plevins* v. *Downing* (1876) 1 C. P. D. 220, and the remarks on the case, *ante*, 273, n. (*s*) and *post*, 794 (*a*).

(*t*) *Hickman* v. *Haynes* (1875) L. R. 10 C. P. 598; 44 L. J. C. P. 358; set out *post*, 792.

(*u*) *Ogle* v. *Vane* (1868) L. R. 3 Q. B. 272, Ex. Ch.; 37 L. J. Q. B. 77; set out *post*, 791.

(*x*) *Great Northern Railway Co.* v. *Harrison* (1852) 12 C. B. 576, 600, Ex. Ch.; 22 L. J. C. P. 49; 92 R. R. 786.

rule of the common law, but the question was open to doubt, as will presently be shown.

The Code now provides:

Code, s. 12 (1).

"12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

Implied condition as to title.

"(1.) An implied condition on the part of the seller that in the case of a sale (*y*) he has a right to sell the goods, and that in the case of an agreement to sell (*y*) he will have a right to sell the goods at the time when the property is to pass."

This clause settles the law, which was in an uncertain state, though *Eichholz* v. *Bannister* (*z*) had gone far towards the establishment of a satisfactory rule. The rules at common law were thus stated by the learned Author:—

Rules at common law.

"1. It is well settled that in an executory agreement the seller warrants, by implication, his title in the goods which he promises to sell. If A. promised to sell 100 quarters of wheat to B., the contract would plainly not be fulfilled by the transfer, not of the *property* in the wheat, but of the *possession* of another man's wheat.

Affirmation, express or implied, of ownership, by seller.

"2. It is also conceded that in the sale of an ascertained specific chattel an affirmation by the seller that the chattel *his* is equivalent to a warranty of title; and that this affirmation may be *implied* from his conduct, as well as from his words, and may also result from the nature and circumstances of the sale.

In absence of such affirmation, *quære*?

"3. But it has been said that, in the absence of such implication, and where no express warranty is given, the seller, by the mere sale of a chattel, does not warrant his title and ability to sell; though all again admitted—

Concealment, a fraud.

"4. That if in such case the seller *knew* he had no title, and concealed that fact, he would be liable on the ground of *fraud*.

One question only that was controverted.

"The one controverted question is thus narrowed to the point, whether in the sale of a chattel an innocent seller *the mere act of sale* asserts that he is owner, for, if so, he warrants according to the second of the foregoing rules."

After an exhaustive review of the decisions, the rule was stated in the second edition of this work (*a*) in terms followed by the Code:

"A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the

(*y*) Defined in section 1 (3), *ante*, 8.

(*z*) (1864) 17 C. B. (N. S.) 708; 34 L. J. C. P. 109; 142 R. R. 589.

(*a*) At 523, app. in *Raphael* v. *Burt* (1884) Cab. & Ell. 32; *post*,

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 chattels sold."

Meaning of "right to sell."

Monforts v. *Marsden* (1895).

In *Monforts* v. *Marsden* (*b*), Lord Russell of Killowen, C.J., thus explained the words "right to sell" in section 12 (1). That was an action for the price of a patent machine which the patentee had sold to the defendant, and the use of which had been restrained by an injunction, as being an infringement of another person's patent. After saying that "right to sell" could not be read as if there followed the words "so that the buyer shall be able legally to work the machine," he showed that "right to sell" therefore means "that the man had a right to sell the thing as it was, in the sense of being able to pass the property in the thing to the vendee, and in the sense that nobody had a title superior to that of the vendor, so that the possession of the vendee might be disturbed: in other words, it is a warranty of good title to the thing: it is not a covenant as to the quality of the thing, as to the workability of the thing, or that the machine shall be delivered under circumstances in which the vendee shall be entitled to work it."

It is apprehended that the implied condition as to title will follow the analogy of a covenant for title *sensu stricto*, that is of a covenant of right to convey, as distinguished from a covenant for quiet enjoyment, and will be broken, if at all, at the time when the property was intended to pass, and without any eviction of the buyer (*c*). The distinction between different covenants for title is thus stated by Lord Ellenborough (*d*): "The covenant for title is an assurance to the purchaser that the grantor *has* the very estate in quantity and quality which he purports to convey. . . . *The* covenant for quiet enjoyment is an assurance against *the* consequences of a defective title, and of any disturbances thereupon."

As in the case of other conditions, the buyer may, on a breach, either sue for a return of the price as on a total failure of consideration where he has been compelled to surrender the chattel to the true owner, or he may elect to treat

(*b*) [1895] 2 Pat. Cas. 266. The interpretation of "right to sell" thus [illegible] of patents, the same as in *Hall* v. *Conder*, *post* [illegible] 170; *Kingdon* v. *Nottle* (1815), 4 M. & S. 53; Day, Conv. 4th [illegible] 193; 16 R. R. 379; *Turner* v. *Moon* [1901], 2 Ch. 825; 70 L. J. [illegible]

(*c*) In *Howell* v. *Richards* (1810), 11 East, 633 at 642; 11 R. R. 287, as explained by Lord Russell of Killowen, C.J., in *Baynes* v. *Lloyd* [1895] 1 Q. B. [illegible] 921; 64 L. J. Q. B. 787.

the condition as a warranty and sue for unliquidated damages for its breach (*e*).

The Legislature having declared the existence of an implied condition of title in all cases, both in agreements to sell and in sales, an exhaustive examination of the previous cases is unnecessary. Some of them may, however, be mentioned as showing what the law was before the Code, and what it still remains with regard to sales of such personal property as does not fall under the denomination of "goods."

Sale of unredeemed pledge.

Morley v. *Attenborough* (1849).

In *Morley* v. *Attenborough* (*f*) there was an auction sale by order of a pawnbroker, of unredeemed pledged goods, *eo nomine*, and in an action against the pawnbroker by the buyer for breach of warranty of title the Court decided that in the absence of an express warranty, all that the pawnbroker asserted by his offer to sell was, that the thing had been pledged to him and was unredeemed, and that he was not cognisant of any defect of title, not that the pawnor had a good title; the pawnbroker, not professing to sell *as owner*, did not warrant ownership.

Parke, B., after saying that, with respect to executory contracts of sale, where the subject is unascertained, it would probably be implied that both parties meant that a good title should be conveyed, thus stated the law with respect to bargains and sales of specific chattels: "The result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of *caveat emptor* applies to both; but if the vendor *knew* that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality (*g*). . . . At all times, however, the vendor was liable if there was a warranty *in fact*: and at an early period the affirming those goods to be his own by a vendor in possession appears to have been deemed equivalent to a warranty. Lord Holt, in *Medina* v. *Stoughton* (*h*), says that 'where one in possession of a personal chattel sells it

(*e*) Code, ss. 11 (1) (*a*) and 53 (1).

(*f*) 3 Ex. 500; 18 L. J. Ex. 149; 18 L. J. Ex. 148; 77 R. R. 700. See *Payne* v. *Elsden* (1900) 17 Times L. R. 161 (sale by auctioneer of goods entrusted); and *Burrows* v. *Barnes* (1900) 82 L. T. 721 (title of buyer to goods sold at auction under the Pawnbrokers Act).

(*g*) The learned Baron cited Co. Litt. 102 *a*.; 3 Co. Rep. 22 *a*; Noy's Maxims, 42; Fitz. N. Brev. 94 *c*.; *Springwell* v. *Allen* (1615, Aleyn, 91, by Littledale, J., in *Early* v. *Garrett* (1829) 9 B. & C. 932; 2 M. & R. 610; 33 R. R. 371; *Williamson* v. *Allison* (1802) 2 East, 449.

(*h*) (1700) 1 Salk. 210; Ld. Raymond, 593.

the bare affirming it to be his own amounts to a warranty.' And Mr. Justice Buller, in *Pasley* v. *Freeman* (*i*), disclaims any distinction between the effect of an affirmation when the vendor is in possession or not, treating it as equivalent to a warranty in both cases. . . . From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal in *Ormrod* v. *Huth* (*k*), it would seem that there is no *implied* warranty of title on the sale of goods, and that if there be no fraud a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by *declarations or conduct*. . . . Usage of trade . . . would of course be sufficient to raise an inference of such an engagement (*l*); and without proof of such usage, the very nature of the trade may be enough to lead to the conclusion, that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons. . . . We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title. But, in the case now under consideration . . . the question is, whether on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed." *Held*, that the latter was the true meaning of the contract.

Sale in a shop. *Eichholz* v. *Bannister* (1864).

In *Eichholz* v. *Bannister* (*m*), the plaintiff went to the warehouse of the defendant, a "job-warehouseman," in Manchester, and bought certain goods which the defendant said were "a job-lot just received by him." The price was paid, and the goods delivered, but they had been stolen, and the buyer was compelled to restore them to the true owner, and brought action on the common money counts, to which the defendant pleaded never indebted. The defendant insisted at the trial that he had not warranted title, and the point was reserved. *Held*, that there was a condition as to title.

(*i*) (1789) 3 T. R. 57; 1 R. R. 634. The rule is also so laid down without qualification by the Court in *Eichholz* v. *Bannister* (1864) 17 C. B. (N. S.) 708; 34 L. J. C. P. 105; 142 R. R. 594, *infra*.

(*k*) (1845) 14 M. & W. 664; 14 L. J. Ex. 366.

(*l*) See Code, s. 55, *ante*, 254.

(*m*) 34 L. J. C. P. 105; 17 C. B. (N. S.) 708; 142 R. R. 594. See also *L'Apostre* v. *L'Plaistrier* (1708) cited in 1 Peere Wms. 318, as explained by C. J. in *Ryall* v. *Rowles* (1749) 2 Wh. & Tud. Eq. 6th ed. 803.

Erle, C.J., said that the rule was taken on a point of law that "a vendor of personal chattels does not enter into warranty of title, but that the purchaser takes them at his peril, and the rule of *caveat emptor* applies. . . . I decide in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirm that he is the owner, *or by his conduct* give the purchaser to understand that he is such owner, then it forms part of the contract and if it turn out that in fact he is not the owner, the consideration fails, and the money so paid by the purchaser can be recovered back." His Lordship continued: "I think where the sale is as it was in the present case, the shopkeeper does *by his conduct* affirm that he is the owner of the article sold, and he therefore contracts that he is such owner; and if he be not in fact the owner, the price paid for the purchase can be recovered back from him." His Lordship then, after citing *Morley* v. *Attenborough* (*n*), *Chapman* v. *Speller* and *Hall* v. *Conder* (*p*), said: "In all these cases I think that the conduct of the vendor expressed that the sale was a sale of *such title only as the vendor had;* but in all ordinary sales the party who undertakes to sell exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and would, therefore, as I think, commonly lead a purchaser to believe that he was the owner of the chattel."

Byles, J., and Keating, J., concurred.

Remarks on this case.

It is impossible to read the judgment of Erle, C.J., in this case without yielding assent to the assertion that in modern times, in all ordinary sales, the seller, by exercising the highest act of dominion over the thing in offering it for sale, thereby leads a purchaser to believe that he is owner, and the dictum is fully supported by the report by Lee, C.J., of the decision given in *L'Apostre* v. *L'Plaistrier* (*q*). This being equivalent to a warranty, the result would be, in modern times, that as a general rule the mere sale of a chattel implies at common law a warranty of title, that is to say, a condition as to title, whereas the old rule is accounted for by Parke, B., in *Morley* v. *Attenborough* (*r*), on the ground that in the olden days the question of title did not enter into men's minds or intentions, because the sales were commonly made in market

(*n*) (1849) 3 Ex. 500; 18 L. J. Ex. 148; 77 R. R. 709; *ante*, 688.
(*o*) (1850) 14 Q. B. 621; 19 L. J. Q. B. 239; 80 R. R. 342; *post*, 691
(*p*) (1857) 2 C. B. (N. S.) 22; 26 L. J. C. P. 138, 288; 109 R. R. 8
post, 692
(*q*) (1768) cited in 1 Peere Wms. 318. See *ante*, 689, n. (*m*).
(*r*) (1849) 3 Ex. 500, at 511; 18 L. J. Ex. 148; 77 R. R. 709.

overt, where the title obtained by the buyer was good against everybody but the Sovereign. It should also be remembered that there formerly existed statutory provisions, now long grown obsolete. The laws of Ethelbert and Edgar specially prohibited the sale of anything above the value of 20d. unless in open market, and directed every bargain and sale to be made in the presence of credible witnesses (*s*).

Transfer by buyer of his bargain, such as it is.

Chapman v. *Speller* (1850).

In *Chapman* v. *Speller* (*t*), the plaintiff gave the defendant £5 profit "to stand in his shoes" on a purchase made by the defendant at a sheriff's sale under a writ of *fi. fa.*, and the defendant handed to the plaintiff the auctioneer's receipt in order to enable the plaintiff to claim the goods. The goods were afterwards taken under a superior title, and the plaintiff brought action, alleging a warranty of title by the defendant, and claiming a return of the price; but the Court refused to consider the point of law, saying that the defendant had only sold "the right, whatever it was, that he had acquired by his purchase at the sheriff's sale," and that the consideration had not failed.

Sale by master of ship.

Page v. *Cowasjee* (1866).

The question was alluded to by Lord Chelmsford, L.C., in delivering the opinion of the Privy Council in *Page* v. *Cowasjee Eduljee* (*u*), where, in the case of the sale of a stranded vessel by the master, he said: "But supposing the plaintiff to have acted upon a mistaken view of the necessity (*x*) of the case, the defendant could not insist upon there being any implied warranty of title. The plaintiff sold the vessel in the special character of master *and not as owner*, and acted upon a *bona fide* belief of his authority to sell."

Sale by a sheriff.

In *Peto* v. *Blades* (*y*), it was decided that on a sale by a sheriff there is an implied undertaking by him that he does not *know* that he has no right to sell.

And in *Dorab Ally Khan* v. *Abdool Azeez* (*z*), a case in which the sheriff had sold goods out of his jurisdiction, the

(*s*) Wilkins' Leg. Anglo-Sax. LL. Ethel. 10, 12; Eadg. 80.

(*t*) 14 Q. B. 621; 19 L. J. Q. B. 241; 14 L. J. Q. B. 239; 80 R. R. 342. See also *Bagueley* v. *Hawley* (1867) L. R. 2 C. P. 625; 36 L. J. C. P. 328.

(*u*) L. R. 1 P. C. at 144; 3 Moo. P. C. (N. S.) 499.

(*x*) The master having no authority to sell except in case of necessity.

(*y*) (1814) 5 Taunt. 657; 15 R. R. 609. The sheriff gives no absolute warranty: *per* Mellish, L.J., in *Ex parte Villars* (1874) 9 Ch. 432, at 437; 48 L. J. Bky. 76. See in Am. *Bashore* v. *Whisler* (1835) 3 Watts (Penn.) 490; *per Cur.* in *Hoe* v. *Sanborn* (1860) 21 N. Y. 556. *Peto* v. *Blades*, *supra*, is so badly reported that it does not appear clearly whether the defendant was the sheriff or his auctioneer; but it would seem, from an interlocutory observation of Parke, B., in *Morley* v. *Attenborough*, as reported in 18 L. J. Ex. 148, at 150, that it was the sheriff: *per* Hamilton, L.J., in *Baylis* v. *London* [1913] 1 Ch. 127, at 140; 82 L. J. Ch. 61.

(*z*) (1878) L. R. 5 Ind. Ap. at 116.

Judicial Committee of the Privy Council, after quoting *Eichholz* v. *Bannister* (*a*), and recognising the rule that a sheriff, when he sells property in the exercise of his jurisdiction, does not warrant title, yet gave it as their opinion that he "may reasonably be held to undertake by his conduct that he is acting within his jurisdiction." And on that ground the buyer was held entitled to a right of action.

Sale of personal property not being goods.

In the following cases the existence of a condition of title to personal property other than goods came into question. In both there was what purported to be an express affirmation of title.

Hall v. *Conder* (1857).

In *Hall* v. *Conder* (*b*), the written sale stated that the plaintiff had obtained a certain patent in this country, and had already sold "an interest of one-half of the said English patent, and is desirous of disposing of the remaining half, to which he hereby *declares that he has full right and title*," and he thereupon conveyed to the defendant "the above-mentioned one-half of the English patent hereinbefore referred to." In an action for the price the defendant pleaded, *first*, that the alleged invention was worthless, of no public utility, and not new in England; and, *secondly*, that the plaintiff was not the true and first inventor thereof. The Court held that there was no warranty that the patent right was a *good* right, saying: "Did the plaintiff *profess to sell*, and the defendant to buy, a good and indefeasible patent right? or was the contract merely to place the defendant in the same situation as the plaintiff was in with reference to the alleged patent?" *Held*, that the latter was the true nature of the contract, as each party knew what the invention was, and had equal means of ascertaining its value. In this case, the express warranty was held to mean that the patent, *such as it was*, belonged to the plaintiff, not that the patent was free from intrinsic defects that might make it defensible.

Smith v. *Neale* (1857).

So, in *Smith* v. *Neale* (*c*), the same Court, on facts almost identical with those of the preceding case, held, that a contract for the sale or assignment of a patent involves no warranty that the invention is new, but merely that Her Majesty had granted to the seller the letters patent, which were the thing sold.

(*a*) *Ante*, 689.

(*b*) 2 C. B. (N. S.) 22; 26 L. J. C. P. 138, 288; 109 R. R. 590. See to the same effect *Monforts* v. *Marsden* (1895) 12 Pat. Cas. 266, *ante*, 687. And *Sims* v. *Marryat* (1851) 17 Q. B. 281; 20 L. J. Q. B. 454; 85 R. R. 42[illegible] there was an express warranty of good title to a book.

(*c*) 2 C. B. (N. S.) 67; 26 L. J. C. P. 143; 109 R. R. 611.

In *Raphael* v. *Burt* (*d*), the plaintiffs, foreign bankers, had contracted with the defendants for the sale of certain United States bonds. These bonds, which were known as "called" bonds, the United States Government having given notice that they would be paid on presentation, were dealt with in England for the purpose of making remittances to America. By the course of business, the contract was not for the sale of any particular bonds, but the seller subsequently supplied the buyer with bonds or coupons to the specified amount. It was afterwards proved that the bonds delivered had been stolen from American holders, and the United States Government refused payment. The defendants acted throughout in good faith. The American Court of Claims held that the defendants could not give a good title to the bonds, and that they were liable in the holders' hands to any infirmity of title. The plaintiffs sued to recover the price of the bonds upon the ground of a total failure of consideration, and of a breach of an implied warranty of title. Stephen, J., held that they were not entitled to succeed on the first ground, as the plaintiffs had got the bonds they bargained for. On the second point he treated the rule as established both as regards personal chattels, and other kinds of personal property, that in a sale, as well as in an executory agreement for sale, there is an implied warranty of title by the seller, which may in all cases be rebutted by circumstances. *Raphael* v. *Burt* (1884).

Before leaving this subject, it should be noted that in *Dickenson* v. *Naul* (*e*), and in *Allen* v. *Hopkins* (*f*), it was decided that where a party had bought and received delivery of goods from one not entitled to sell, and had afterwards paid the price to the true owner, he was not liable to an action by the first seller for the price. These decisions are directly opposed to a maxim in Noy (*g*). Payment of price to true owner discharges buyer.

By the civil law the warranty against eviction exists in all cases. The Digest gives the maxim in the words of Pomponius as follows (*h*): "Ratio possessionis quæ a venditore fieri debet talis est ut si quis eam possessionem jure avocaverit, tradita possessio non intelligatur." Civil law.

Pothier gives the rule in these words (*i*): "The vendor's

(*d*) Cab. & El. 325.
(*e*) (1833) 4 B. & Ad. 638.
(*f*) (1844) 13 M. & W. 94; 13 L. J. Ex. 316.
(*g*) "If I take the horse of another man and sell him, and the owner take[s] it again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and *caveat emptor*": Noy's Maxims, c. 42.
(*h*) Dig. 19, 1, 3 pr. See also 21, 2, 1.
(*i*) Vente, Part II. Ch. 1, s. 2, No. 82.

Pothier. obligation is not at an end when he has delivered the thing sold. He remains responsible after the sale to warrant and defend the buyer against eviction from that possession. This obligation is called warranty."

French Code. In the French law so deeply implanted is the obligation of warranty against eviction that it exists to compel return of the price, even though it has been expressly agreed that there shall be no warranty. The articles of the Code Civil (*k*) are as follows:

1625. The warranty due by the seller to the buyer has two objects: *first*, the peaceful possession of the thing sold: *secondly*, the concealed defects of this thing, or its redhibitory vices.

1626. Although at the time of sale there has been no stipulation as to warranty, the seller is legally bound to warrant the buyer against suffering total or partial eviction from the thing sold, or from liens asserted on the thing (*charges prétendues sur cet objet*), and not mentioned at the time of the sale.

1627. The parties may, by special conventions, add to this legal obligation, or diminish its effect, and may even stipulate that the seller shall not be liable to any warranty.

1628. Although it be stipulated that the seller shall be liable to no warranty, he remains bound to a warranty against his own act; any contrary agreement is void.

1629. In the same case of a stipulation of no warranty, the seller, in the event of eviction, remains bound to return the price, unless the buyer knew, when he bought, the danger of eviction, or unless he bought at his own risk and peril.

Other articles provide that the buyer may demand back the whole price, although the thing has been diminished in value or considerably deteriorated at the date of the eviction whether by the buyer's negligence, or by *force majeure*. Art. 1631; subject, however, to a deduction by the seller of an amount equal to the profit made by the buyer by reason of deterioration caused by him (*dégradations par lui faites*). Art. 1633. And the seller must also reimburse the buyer all increase in the value of the thing over the contract price though caused independently of any act of the buyer. Art. 1633.

Quebec Civil Code. The Civil Code of Quebec contains similar provisions to the above stated (*l*).

(*k*) See also the chapter on Sale by the Civil Law, etc., *ante*, 472. *et seq.*
(*l*) Arts. 1506—1514. See generally Bk. 3, tit. 5, Ch. 4, s. 3.

When the seller sells an article by a particular description, it is a condition *precedent* to his right of action that the thing which he offers to deliver, or has delivered, should answer the description. The rule applies to a contract for the sale by description either of a specific chattel, or of unascertained goods. If a specific existing chattel is sold by description, and does not correspond with that description, the seller fails to comply, not with a mere collateral warranty, but with the contract itself, by breach of a condition precedent.

Sale by description involves condition precedent;

even in the case of specific goods.

Lord Abinger protested against the confusion which arose from the habit of treating such cases as cases of warranty, saying (*m*): "A good deal of confusion has arisen in many of the cases on this subject from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of a contract, and though part of the contract, yet *collateral* to the express object of it (*n*). But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil: as if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas, the *contract* is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."

There can be no doubt of the correctness of this distinction. If the sale be of a described article, the tender of an article answering the description is *a condition precedent* to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or if he has paid for it, to recover the price as money had and received for his use; whereas, in case of a mere warranty, the rules are very different (*o*).

Adopting this principle, the Code provides:—

"13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the

Code, s. 13.

(*m*) In *Chanter* v. *Hopkins* (1838) 4 M. & W. 399, at 404; 8 L. J. Ex. 14; 51 R. R. 650, referred to by Lord Blackburn in *Bowes* v. *Shand* (1877) 2 A. C. 455, at 489; 46 L. J. Q. B. 561.

(*n*) See "warranty" defined by the Code: s. 62 (1) *post*, 750.

(*o*) *Post*, 750.

Sale by description.

description; and if the sale be by sample, as well as by description, it not sufficient that the bulk of the goods corresponds with the sampl if the goods do not also correspond with the description."

What was the meaning of a sale of goods "by description" at common law, and what is the meaning of that term unde the Code?

Contracts of sale by description at common law of unascertained goods;

At common law, the most usual instance of a contract o sale of goods "by description" was an agreement to se unascertained or future goods *of* a certain description, *i.e kind* or *class*. In *Heyworth* v. *Hutchinson* (*p*), a case whe specific bales of wool were sold "guaranteed about similar t samples," and the question was as to the right of the buye to reject them for inferiority of quality, Blackburn, J., said "Generally speaking, when the contract is as to *any* good such a clause is a condition going to the essence of the co tract, but when the contract is as to specific goods, the clau is only collateral to the contract" (*q*). In such cases th description of the goods is shown by the terms of the orde and the accuracy of the description is necessarily a conditio as it is for goods of that kind and quality only that the buy contracts.

or of specific goods.

A specific chattel could also be sold by description at co mon law. Here, however, a distinction existed. Unasce tained goods can have no description but what is given the by the contract, but a specific chattel had also a physic identity, either corporeally present in the sight of the buye or mentally identified by him. The question then ari whether the buyer bought simply the particular thing whi he saw or identified, or whether he bought it only on conditi that it conformed to the description given. A buyer mig of course, *expressly* stipulate that he had bought only on su a condition; but otherwise his intention had to be discover from the circumstances; and, as a general rule, a contract the sale of a specific article was a contract for that article it was (*r*). The property passed by the contract, and a superadded description was either a mere representat having no legal effect (except where it was fraudulent, being material, justified the buyer in repudiating the c

(*p*) (1867) L. R. 2 Q. B. 447, at 451; 36 L. J. Q. B. 270. This case is cussed *post*, Bk. V., Part ii., ch. i.

(*q*) See also the rule stated in the notes to *Chandelor* v. *Lopus*, Sm. L 7th ed. Vol. I.; 185—186; 11th ed. Vol. II., 62.

(*r*) *Per* Brett, L.J., in *Robertson* v. *Amazon Tug Co.* (1881) 7 Q. B 598, at 606; 51 L. J. Q. B. 68, C. A.

tract on the ground of misrepresentation (*s*) or was at most a warranty or collateral engagement (*t*) entered into by the seller in consideration of the contract of sale, on breach of which he was liable in damages. The maxims governing such cases were: *Præsentia corporis tollit errorem nominis* and *Veritas nominis tollit errorem demonstrationis*. "Another certainty put to another thing which was of certainty enough before is of no manner of effect," says Plowden (*u*). And Lord Bacon, commenting on the two maxims, says (*x*): "There be three degrees of certainty: presence; name; and demonstration or reference: whereof the presence the law holdeth of greatest dignity; the name in the second degree; and the demonstration or reference in the lowest: and always error or falsity in the less worthy shall not control nor frustrate sufficient certainty and verity in the more worthy. . . . If I say to J. S.: 'Here I give you my ring with the ruby,' and deliver it with my hand, and the ring bear a diamond and no ruby; this is a good gift, notwithstanding I named it amiss: so had it not been if by word or writing, without the delivery of the ring itself, I have given the ring with the ruby; although I had none such, but only one with a diamond, which I meant, yet it would not have passed."

Thus, in *Parsons* v. *Sexton* (*y*), a contract for a specific engine, described as a "fourteen-horse engine," and which had been inspected by the buyer's agent, was held to be a contract for the particular engine without any condition (though there might be a warranty) that it would do work equal to that of fourteen horses.

But if the circumstances of the case showed that the description given to specific goods was *essential to their identity* as the subject-matter of the contract, in other words, that the buyer contracted for them *as described*, so that the falsity of the description made the goods substantially different things from those that were described, so as to constitute a failure of consideration, the sale was by description (*z*). "Si acs pro auro veneat, non valet; aliter atque si

(*s*) See the Chapter on Misrepresentation, *ante*, 491, 501.

(*t*) Which, if not a mere representation, it *prima facie* is: *per* Bailhache, J., in *Harrison* v. *Knowles* [1917] 2 K. B. 606; 86 L. J. K. B. 1490.

(*u*) Plowd. 191. *Cf.* the Digest, 33, 4, 1, 8, "*quicquid demonstratæ rei additur satis demonstratæ frustra est.*"

(*x*) Legal Maxims, Reg. 24; Law Tracts, ed. 1737, 102.

(*y*) (1847) 4 C. B. 899; 16 L. J. C. P. 181. See also *per* Byles, J., in *Hopkins* v. *Hitchcock* (1863) 14 C. B. (N. S.) 65, at 72; 32 L. J. C. P. 154; 135 R. R. 605.

(*z*) *Per* Blackburn, J., in *Kennedy* v. *Panama Mail Co.* (1867) L. R. 2 Q. B. 580; 36 L. J. Q. B. 260, quoted *ante*, 491; *Kirkpatrick* v. *Gowan* (1875) 9 Ir. R. C. L. 521 (specific stack of coal described as of particular coal).

aurum quidem fuerit, deterius autem quam emptor exis
maret; tunc enim emptio valet" (*a*). In such a case t
accuracy of the description was a condition, and the goo
might be rejected if the description were not correct. Th
in *Lomi* v. *Tucker* (*b*), Lord Tenterden decided that a buy
who had bought two pictures described as "a couple
Poussins" could reject the pictures if not genuine works
that artist.

Illustration of the rule of *caveat emptor* where the thing sold answers the description.

Barr v. *Gibson* (1838).

A severe application of the rule of *caveat emptor* where t
thing sold answers the description, together with a lu
statement of the law, and the distinction between warranty
quality and description of the specific thing, may be found
the decision of the Exchequer of Pleas delivered by Parke,
in *Barr* v. *Gibson* (*c*). The defendant sold to the plaint
for £4,200, on the 21st of October, 1836, "all that ship
vessel called *The Sarah*, of Newcastle, etc.," covenanting
the deed-poll by which the conveyance was made that he "h
good right, full power, and lawful authority" to sell.
turned out that the ship had got ashore on Prince of Wal
Island eight days before the sale; her masts were standi
but she was strained, and on a survey it was recommen
that she should be sold as she lay, because, under the circ
stances, the ship could not be got off so as to be repaired th
Had the time of year and facilities been favourable, she mi
possibly have been got off. At the sale the hull produ
only £10. Patteson, J., left it to the jury to say whether
the time of the sale to the plaintiff, the vessel was or was
a *ship* or a mere bundle of timber, and the jury found
was *not* a ship.

On a rule to set aside the verdict for the plaintiff, Parke,
said: "The question is not what passed by the deed, but w
is the meaning of the covenant contained in it. . . . In
bargain and sale of an existing chattel, by which the prop
passes, the law does not, in the absence of fraud, imply
warranty of the good quality or condition of the chatte
sold (*d*). The simple bargain and sale, therefore, of the
*does not imply any contract that it is then seaworthy, or
serviceable condition;* and the express covenant that
defendant had full power to bargain and sell . . . does
create any further obligation in this respect. But the ba

(*a*) Dig. 18, 1, 14, *et* 10.
(*b*) (1829) 4 C. & P. 15; 34 R. R. 769.
(*c*) 3 M. & W. 390; 7 L. J. Ex. 124; 49 R. R. 650.
(*d*) See s. 14, *post*, 712.

and sale of a chattel, as being of a particular description, *does imply a contract that the article sold is of that description*, for which the cases of *Bridge* v. *Wain* (*e*), and *Shepherd* v. *Kain* (*f*), and other cases are authorities; and therefore the sale in this case of a *ship* implies a contract that the subject of the transfer did exist in the character of a ship; and the express covenant that the defendant had power to make the bargain and sale of the subject before mentioned must operate as an express covenant to the same effect. That covenant, therefore, was broken if the subject of the transfer had been, at the time of the covenant, physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character, there was no breach of the covenant in question, although the ship was damaged, unseaworthy, or incapable of being beneficially employed. . . . Here the subject of the transfer had the form and structure of a ship, although on shore, with the possibility, though not the probability, of being got off. She was still *a ship*." New trial ordered.

Under the Code.

The Code now provides generally (*g*) that a condition that the goods shall correspond with the description given shall be implied in all cases where there is a contract for the sale of goods "by description." The goods are not only to be described, but they must be *contracted for* by description; that is to say, the buyer must rely on the description. No definition of what constitutes a description being given, ordinary common law principles will apply. The following case, however, shows that a less rigid interpretation may perhaps be put upon the term "description," as applicable to specific goods under the Code, than would have been placed on it at common law, according to the principles declared by Blackburn, J., in *Kennedy's Case* (*h*).

Varley v. *Whipp* (1900).

In *Varley* v. *Whipp* (*i*), the plaintiff met the defendant at Huddersfield, and there contracted to sell to him a "self-binder" reaping machine at Upton, which he described as having been used one season, and having cut only about fifty to sixty acres. The defendant, who had not seen the machine, said he would take it on the plaintiff's word, as, according to the plaintiff's description, the machine was practically new.

(*e*) (1816) 1 Stark. 504; 18 R. R. 815.
(*f*) (1822) 5 B. & A. 240; 24 R. R. 344; *post*, 707.
(*g*) S. 13, *ante*, 695.
(*h*) *Kennedy* v. *Panama Mail Co.* (1867) L. R. 2 Q. B. 580, 587, 588; 36 L. J. Q. B. 260; *ante*, 491.
(*i*) 69 L. J. Q. B. 333; [1900] 1 Q. B. 513. But *cf. Chalmers* v. *Harding* (1868) 17 L. T. (N. S.) 571.

The statement that the machine had cut only fifty to si
acres was untrue. The defendant rejected the reaper, writ
to the plaintiff: "It is not what I expected, it is a very
one, and has been mended. It will be no use to me, a
don't care about old things, and especially machinery."
plaintiff sued for the price, and it was contended on his be
that the contract was for a specific self-binder at a partic
place; that section 13 of the Code applied only to sales
unascertained goods, but that if it applied to specific go
the machine was a self-binder, and therefore answered
description; and that whether it had been used or not wa
mere question of quality. *Held*, that the description gi
was not a mere collateral warranty, but an identification
the machine; that, as the defendant had not seen the machi
he relied upon the description; and that the sale was there
"by description," and the defendant was not liable.

Opinion of Channell, J.

Channell, J., said: "The question is, How much of
statement was identification and description of the thing s
and how much a collateral warranty? It is clear that i
person says: 'I will sell you a black horse now in the
stall of my stable,' and there is no horse there, or there
cow, no property would pass. If he says: 'I will sell
my four-year-old in the last stall,' and there is no four-y
old, but a horse of a different age, I do not think that
property would pass any more than it would if, instead
a horse, there was a cow. If he had said: 'I will sell
a four-year-old horse in my M stall, and he is sound,'
latter part of the statement would be a collateral warra
These are all illustrations, and show that the question whet
words are part of the description or merely a collate
warranty is rather a fine one. The term 'sale of goods
description' must apply to all cases where the purchaser
not seen the goods, but is relying on the description alone
Does section 13 of the Sale of Goods Act, 1893, apply to s
a case as the present; and what is the meaning of a contr
for the sale of goods by description? I think it applies to
cases where the purchaser has *not seen* the article sold
relies on the description given to him by the vendor. I th
it would most frequently apply to unascertained goods,
it does not follow that it may not, in some cases, apply
specific goods."

(*k*) This sentence is taken from the Law Reports. The statement that
buyer must rely on the description alone is too wide: *per* Bray, J., in *Thor*
and Fehr v. *Bears & Son* [1919] 1 K. B. 486; 88 L. J. K. B. 684. In
opinion a buyer may partly rely on the description of goods he has seen.

The Court in this case were therefore of opinion that the seller's description of the unseen article *identified* it. It would, however, seem to be doubtful whether at common law (*l*) such a statement, being applicable to a specific thing, would have been held to be more than a warranty.

A sale by description may be inferred from the circumstances of the case.

A sale "by description" may be inferred.

Wren v. *Holt* (*m*) was an action for breach of warranty on the sale of beer. The defendant kept a tied house, and sold only Holden & Co.'s beer, and the plaintiff had been in the habit for some years of buying beer of the defendant because he preferred Holden's beer. He, however, only asked for beer generally (*n*). The beer supplied contained latent quantities of arsenic, which made the plaintiff ill. The jury found that the plaintiff did not rely on the defendant's skill or judgment under section 14 (1) of the Code (*o*). Wills, J., entered judgment for the plaintiff under section 14 (2) (*p*), the beer being unmerchantable, and it having been bought by the description of Holden's beer. *Held*, by the Court of Appeal (*q*), that he was right in so doing, as the beer was bought by that description. Vaughan Williams, L.J., while concurring, said *obiter*: "Speaking generally, I do not think that, according to the accepted meaning of the expression 'buying by description' in the ordinary course of trade, a sale of goods over the counter to a customer who comes in and asks for the goods is a sale of goods by description (*r*). But whatever may be generally true, there is a peculiarity about this case by reason of the finding of the jury. . . . The reason of the jury for coming to the conclusion that the plaintiff did not rely on the skill or judgment of the publican was because he was asking for beer of a specific description—that is, Holden's beer. In those circumstances, in this particular case, the sale, although a sale of beer in a beerhouse, was, in my judgment, a sale of beer by description."

Wren v. *Holt* (1903).

In *Wallis* v. *Russell* (*s*), Fitzgibbon, L.J., was of opinion (*t*) that a sale of specific crabs at a shop to a buyer who asked for "nice fresh crabs for tea" was a sale by description.

(*l*) See *Parsons* v. *Sexton*, *ante*, 697.
(*m*) 72 L. J. Q. B. 340; [1903] 1 K. B. 610, C. A.; 88 L. T. 282.
(*n*) This fact is expressly stated in the L. J. report.
(*o*) See *post*, 712.
(*p*) See *post*, 712.
(*q*) Vaughan Williams, L.J., Stirling, L.J., and Mathew, L.J.
(*r*) On this point Mathew, L.J., disagreed, as reported in the L. R.
(*s*) (1902) 2 Ir. R. 585, C. A., set out *post*, 718, *et seqq.*
(*t*) At 616.

But Holmes, L.J., said in the same case (*u*): "Wh customer, buying an article in a shop, gives no descripti it beyond asking for it by its usual name, and the article asked for is delivered and carried away, such a purcha ordinary parlance, would not be a purchase of good description. If the crabs in this case were sold by descri no sale otherwise than by description would be possible."

General result under s. 13.

Sales by description may, it seems, be divided into sal

1. Of unascertained or future goods, as being of a c kind or class, or to which otherwise a "descriptio the contract is applied.
2. Of specific goods, bought by the buyer in reliand least in part, upon the description given, or tacitly inferred from the circumstances, and identifies the goods.

So far as any descriptive statement is a mere warra only a representation, it is no part of the description (*x* is clear that there can be no contract for the sale of un tained or future goods except by some description (*y* follows that the only sales not by description are sal specific goods *as such* (*z*). Specific goods may be sold as when they are sold without any description, expre implied; or where any statement made about them i essential to their identity; or where, though the good described, the description is not relied upon, as when buyer buys the goods such as they are.

Attwater v. *Kinnes* (1906).

Thus, in *Attwater* v. *Kinnes* (*a*), where a specific bu Arctic mica, lying in the rough, as it came from the q on the seller's premises, was on two occasions exhibited t inspected by the buyers, who agreed to buy the lot, desc as "all the block mica in stock," and also as "the stock of the mica in blocks as they lie," it was held b Lord Ordinary (Lord Pearson) that it was certainly a sa description, for the subject sold was described. Bu Second Division of the Inner House reversed this dec holding that the sale was an ordinary sale of specific

(*u*) At 631.

(*x*) See *Taylor* v. *Bullen* (1850) 5 Ex. 779; 20 L. J. Ex. 21; 82 R. (barque described as "teak-built, A1"); *Boys* v. *Rice*, *infra*.

(*y*) *Per* Way, C.J., in *Kidman* v. *Fisken Bunning & Co.* (1907) A. L. R. 101.

(*z*) See *Boys* v. *Rice* (1908) 27 N. Z. L. R. 456, where the sub considered.

(*a*) [1906] unreported. A short report in the House of Lords app the *Scotsman* of May 29. See also *Prosser* v. *Hooper* (1817) 1 Moore, R. R. 530 (article called "saffron" bought as such).

of the bulk as it lay—without warranty or condition, and not a sale by description. And this decision was affirmed by the House of Lords.

A statement of quality may be part of a description.

Where a statement of quality is added to the ordinary commercial denomination of the goods sold (for example, "extra quality gambier," or "fair usual quality Jelutong rubber" (*b*)), a question may arise whether the statement of quality does not form part of the description. If it does form a part, then section 14 (*c*) is not required, and the buyer may reject the goods if not of that quality, without having to prove that they are unfit for his purposes or unmerchantable. If, however, the statement of quality refer only to some particular state or condition of the goods—for example, dryness it would seem not to form part of the description (*d*), and the buyer would have to prove a breach of one of the implied conditions mentioned in section 14.

Cases at common law.

The following cases illustrate the common law:

Allan v. *Lake* (1852).

In *Allan* v. *Lake* (*e*), it was held that a sale of turnip-seed as "Skirving's swedes" was not a sale with a mere representation, not part of the contract, but by description of the article, and that the contract was not satisfied by the tender of any other seed than "Skirving's swedes."

Wieler v. *Schilizzi* (1856).

In *Wieler* v. *Schilizzi* (*f*), the sale was of "Calcutta linseed, *tale quale*." There was evidence that all linseed imported contained an admixture of from two to three per cent. of other seeds, but the article delivered contained an admixture of

(*b*) *Re North Western Rubber Co. and Huttenbach & Co.* [1908] 2 K. B. 907; 78 L. J. K. B. 51, C. A.

(*c*) S. 14 (set out *post*, 712) declares the implied conditions as to fitness for the buyer's purpose communicated to the seller, and as to merchantable quality.

(*d*) By s. 62 (1) "state or condition" is included in the definition of "quality."

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

(*f*) 17 C. B. 619; 25 L. J. C. P. 89; 104 R. R. 815; and see *Kirkpatrick* v. *Gowan* (1875) 9 Ir. R. C. L. 521 ("Cumberland and Welsh coal mixed"); *Fogarty* v. *Dickson* (1913) 47 Ir. L. T. 281 (spring wheat); and in America *Gossler* v. *Eagle Sugar Refinery* (1869) 103 Mass. 331. It is common in contracts for seed to agree expressly that a certain admixture of foreign substances shall be allowed, the standard of admixture being generally three or four per cent., and to provide for an analysis by some trade association of an average sample of the bulk. The form of contract for Calcutta linseed is on a four per cent. basis; in East India rape seed contracts on a three per cent. basis. A La Plata linseed contract states that if an admixture be less than four per cent., the difference shall be *added* to the price. In some contracts the sample is to be taken "jointly by the buyer's and seller's agents at the port of discharge." It is common to provide in seed contracts that "where a shipment of seed bearing one mark is divided between two or more buyers, the analysis of the sample or samples representing the entire shipment of such mark shall be accepted as the final analysis of each delivery." Cotton seed contracts apparently contain no provision for analysis, being presumably not liable to admixture in the same way.

fifteen per cent. of mustard. It came, however, from Ca
and the plaintiff had sold it, and it had been used as li
It was left to the jury to say whether the article ba
"its distinctive character," so as not to be saleable as Ca
seed. The jury so found, and the purchaser succee
his action. This was an action for breach of warrant
although maintained as such, it is plain that, on pri
the purchaser might before resale have rejected the co
in toto.

Hopkins v. *Hitchcock* (1863).

In *Hopkins* v. *Hitchcock* (*g*), the plaintiffs, Hopkins
had succeeded to the firm of Snowden and Hopkins
manufacturers, who were in the habit of stamping thei
"S. & H." with a crown. The defendants applied to pu
"S. & H." iron through a broker, and were informe
all iron made by the firm was now marked "H. & Co."
defendants then ordered sixty-seven tons of the iron, a
broker made the bought note for "67 tons S. & H.
common bars." The iron on delivery was marked "H. &
and rejected by the defendants. The jury found the va
in the brand to be of no consequence, and gave a verdi
the plaintiffs. On motion for new trial, the Court refu
set aside the verdict, holding that, under the special fac
circumstances of the case, the letters "S. & H." did not
that the contract was for iron of any particular *brand*
showed the *quality* as being the same as that formerly
by Snowden and Hopkins, and the jury having negative
the mark was of any consequence, the plaintiffs had del
the goods in conformity with the description in the contra

Condition of accordance with description where sample used or there is inspection of bulk.

The implied condition that goods bought under a spe
commercial description should conform therewith i
excluded by the fact that the sale is by sample (*i*), or
after an inspection (*k*) of the bulk. A sample is looked
such cases as a mere expression of the quality of the a
and not of its essential character, and notwithstandin
bulk be fairly shown, or agree with the sample, yet i

(*g*) 14 C. B. (N. S.) 65; 32 L. J. C. P. 154; 135 R. R. 605. *Cf. Po*
Horton (1836) 2 Bing. N. C. 668; 5 L. J. C. P. 204; 42 R. R. 689; *post*.

(*h*) See also *Parsons* v. *N. Z. Shipping Co.* [1901] 1 Q. B. 548; 7
K. B. 404, C. A., where it is shown that marks may be material, o
identifying the goods dealt with by the contract, or immaterial, as bein
for identification for purposes of delivery; and *cf. Hedstrom* v. *Toron*
Wheel Co. (1883) 8 Ont. Ap. R. 627, where the brand was held to be *prim*
part of the description.

(*i*) Code, s. 13; *ante*, 695.

(*k*) But inspection of the bulk may negative a sale by description: *H*
v. *Kinnes*, *ante*, 702.

bu. does not reasonably answer to the description, the seller is liable (*l*).

In *Josling* v. *Kingsford* (*m*), the sale was of oxalic acid, and the bulk had been examined and approved, and a great part of it used by the purchaser, and the seller declined to warrant quality. On analysis, it was afterwards found to be chemically impure, from adulteration with sulphate of magnesia, a defect not visible to the naked eye, nor likely to be discovered even by experienced persons. There were two counts in the declaration, one for breach of contract to deliver "oxalic acid," the other for breach of warranty that the goods delivered were "oxalic acid." Erle, C.J., told the jury that there was no evidence of a warranty, and that the question was whether the article delivered came under the denomination of oxalic acid in commercial language. The jury found for the plaintiff. *Held*, in banc, that the direction was right. *Josling* v. *Kingsford* (1863).

In *Nichol* v. *Godts* (*n*), the sale was of "foreign refined rape oil, warranted only equal to samples." The oil tendered corresponded with the sample, but was adulterated with hemp oil. The jury found that such an admixture was not commercially known as "foreign refined rape oil," but that the buyer knew what he was buying. *Held*, that evidence was not admissible to show that the parties as between themselves understood the samples to be of foreign refined rape oil; that a sale by sample has reference only to *quality;* and that the purchaser was not bound to receive what was not the article described. Pollock, C.B., said in answer to the argument that there was no warranty the oil should be refined rape oil: "It is not exactly a warranty, but if a man contracts to buy a thing, he ought not to have something else delivered to him.." *Nichol* v. *Godts* (1854).

In *Azémar* v. *Casella* (*o*), the plaintiff sold specific bales of cotton to the defendants through a broker, by a contract in the following words: "Sold, by order and for account of *Azémar* v. *Casella* (1866).

(*l*) *Per* Willes, J., in *Mody* v. *Gregson* (1868) L. R. 4 Ex. 49, at 55—56; 38 L. J. Ex. 12.

(*m*) 13 C. B. (N. S.) 447; 32 L. J. C. P. 94; 134 R. R. 596. See also *Bostock & Co.* v. *Nicholson* [1904] 1 K. B. 725; 73 L. J. K. B. 524 (sulphuric acid commercially free from arsenic); *Jeffé* v. *Ritchie* (1860) 23 Sess. Cas. 242 ("flax yarn" mixed with jute).

(*n*) 10 Ex. 191; 23 L. J. Ex. 314; 102 R. R. 523. A contract for linseed oil issued by the Produce Brokers' Co. contains the following clause: "In all cases where a specific make or brand of oil be contracted for, and the sellers are unable to deliver by reason of fire or *force majeure*, then the sellers shall deliver and the buyers receive oil of recognised equally good quality in fulfilment of this contract, or the buyers may have the option to settle at the market price of the day, to be declared on receiving notice of the sellers' inability to deliver."

(*o*) L. R. 2 C. P. 431; *ibid.* 677, aff. in error; 36 L. J. C. P. 124, 263.

Messrs. J. C. Azémar & Co., to Messrs. A. Casella & Co., following cotton, viz., "128 bales at 25*d.* per pound, expec to arrive in London per Cheviot, from Madras. The cot *guaranteed equal to sealed sample* in our possession, & The sealed sample was a sample of "Long-staple Sal cotton"; the cotton turned out, when landed, to be not accordance with the sample, being "Western Madras." T contract contained a clause: "should the quality pr inferior to the guarantee, a fair allowance to be made" It was admitted that Western Madras cotton is inferio Long-staple Salem, and requires machinery for its ma facture *different* from that used for the latter. *Held*, this was not a case of inferiority of *quality*, in which case clause as to allowance would have applied, but of differenc *kind*; that the description of cotton contracted for was *species* of the sample; and so there was a condition precede and not simply a warranty, and the defendants were not bou to accept.

Where sample the only description.

In some cases, however, a sample is given, not as an exp sion of the *quality* of the goods, but as the *only descripti* so as to constitute the sole touchstone of the contract. If, instance, a person dealing, not in an article known to c merce, but in some white mineral of which he had foun vein, were to produce a sample and sell by the general descr tion of "the stuff of which this is a sample," he would bound only to deliver stuff the same as the sample, as buyer has not stipulated for anything but stuff identical w the sample, whatever it might turn out to be (*q*).

Carter v. *Crick* (1859).

Thus, in *Carter* v. *Crick* (*r*), the sale was by sample of article which the seller called seed barley, but said he did know what it really was, and the bulk corresponded with sample. *Held*, that the buyer took at his own risk, whet it was seed barley or some other kind of barley, the sell warranty being confined to a correspondence between the b and the sample.

Qualifying stipulations added to condition.

The implied condition that the goods shall answer to description under which they are sold is not excluded by express but not inconsistent warranty or condition in

(*p*) It is now usual in many contracts to provide that if the goods be " equal to warranty, or be sea-damaged or out of condition," they shall be t with an allowance to be settled by agreement, or by the brokers, or by arb tion.

(*q*) *Per* Willes, J., in *Mody* v. *Gregson* (1868) L. R. 4 Ex. 49, at 53- 38 L. J. Ex. 12.

(*r*) 28 L. J. Ex. 238 (better report); 4 H. & N. 412; 118 R. R 521.

contract (*s*); or by a provision negativing any responsibility on the part of the seller (*t*); or stipulating for an allowance for inferiority in quality (*u*); or excluding a right of rejection; or providing for arbitration in case of dispute (*x*). No such stipulation will be construed so as to nullify or qualify the description under which the goods are sold (*y*), although it may be construed so as to show that the goods were not in fact sold under any particular description (*z*).

Shepherd v. *Kain* (1822).

In *Shepherd* v. *Kain* (*a*), a vessel was advertised for sale as a "copper-fastened" vessel," on the terms that she was to be "taken with all faults, without allowance for any defects whatsoever." She was only partially copper-fastened, and would not be called in the trade a copper-fastened vessel. *Held*, that the seller was liable for the misdescription, the Court saying that the words "with all faults" meant all faults which the vessel might have "consistently with it being the thing described," *i.e.*, a copper-fastened vessel.

Taylor v. *Bullen* (1850).

But in the very similar case of *Taylor* v. *Bullen* (*b*), where the vessel was described as a "barque, A1, teak-built," and the terms were "with all faults, . . . and without any allowance for any defect or *error* whatever," it was held that the addition of the word "error" distinguished the case from *Shepherd* v. *Kain*, and that the word meant "unintentional misdescription" (*c*), that the only binding description of the vessel sold was "barque," and therefore the buyer could not recover, although the vessel was not teak built.

In *Vigers* v. *Sanderson* (*d*), the plaintiff agreed to sell to

(*s*) *Code*, s. 14 (4), *post*, 746.

(*t*) *Howcroft* v. *Laycock* (1898) 14 Times L. R. 460; *Wallis, Son & Wells* v. *Pratt and Haynes*, *infra*; both cases of seed.

(*u*) *Azémar* v. *Casella*, *ante*, 705; *Vernede* v. *Weber* (1856) 1 H. & N. 311; 25 L. J. Ex. 326; 108 R. R. 587 (rice), *ante*, 669; *Simond* v. *Braddon* (1857) 2 C. B. (N. S.) 324; 26 L. J. C. P. 198; 109 R. R. 697 (rice), *ante*, 669; *Lucas* v. *Bristow* (1858) E. B. & E. 907; 27 L. J. Q. B. 364; 113 R. R. 944 (oil); *Gorton* v. *McIntosh* (1883) W. N. 103, C. A.

(*x*) *Vigers* v. *Sanderson* [1901] 1 K. B. 608; 70 L. J. K. B. 383, *infra*.

(*y*) See cases in text; and *Gorton* v. *McIntosh & Co.* (1883) W. N. 103, C. A. ("imperfection"); *Re Green & Co. and Balfour Williamson & Co.* (1890) 63 L. T. 325, C. A. (arbitrator to decide quality only). A trade usage excluding rejection for nonconformity to description accordingly cannot be incorporated in a written contract: *Re North Western Rubber Co. and Huttenbach & Co.* [1908] 2 K. B. 907; 78 L. J. K. B. 51, C. A.

(*z*) *Carter* v. *Crick*, *ante* 706. *Howcroft* v. *Perkins* (1900) 16 T. L. R. 217 (seed) seems to be a similar case. If so, it is not overruled by *Wallis* v. *Pratt* in the text.

(*a*) 5 B. & A. 240; 24 R. R. 344; and see *Kain* v. *Old* (1824) 2 B. & C. 627; 2 L. J. K. B. 102; 26 R. R. 497.

(*b*) 5 Ex. 779; 20 L. J. Ex. 21; 82 R. R. 875.

(*c*) See also *Harrison* v. *Knowles* [1918] 1 K. B. 608, C. A.; 87 L. J. K. B. 680; where "not accountable for errors" was similarly not part of the contract.

(*d*) [1901] 1 K. B. 608; 70 L. J. K. B. 383; *coram* Bigham, J.

Vigers v. *Sanderson* (1901).

the defendants two parcels of sawn laths "of about the spe
fication" mentioned, which was for one parcel of laths n
two and a half to four and a half feet long, and for the seco
parcel of laths from two feet to four and a half feet, but
more than 3 per cent. were to be of two feet. There wa
clause that the buyers should not, in case of dispute, rej
the laths, but that the matter should be referred. The sh
ment of the first parcel contained 33 per cent. of laths
feet long, and of the second parcel 60 per cent. of laths
feet long. Laths two feet long were practically worthl
and those five feet long difficult to sell. *Held*, that the a
tration clause applied only to goods substantially of
description contracted for, and the buyers could reject
goods, as not being of such description.

Wallis, Son & Wells v. *Pratt & Haynes* (1911).

In *Wallis, Son & Wells* v. *Pratt & Haynes* (*e*), the resp
dents contracted to sell by sample to the appellants a quan
of seed described as "common English sainfoin," and delive
giant sainfoin, a different kind of seed, the difference
being discoverable except by sowing, and the defect
existing in the sample. The appellants sold the seed
sub-buyer, who sowed it, and it produced a crop of g
sainfoin, an entirely different article. In the contract of
by the respondents was contained a clause that "the se
gave no *warranty* express or implied as to growth, descript
or any other matters." *Held*, by the House of Lords, i
action for breach of warranty, reversing the Court of App
that this clause did not protect the sellers. They had excl
their liability for breach of *warranty* only, and a warra
and a condition were *ab initio* entirely different thi
although, in an action for the breach (as in the case in q
tion), a condition might be treated for remedial purposes
it had become a warranty.

Observations on this case.

It being admitted that the subject-matter of the con
was English sainfoin seed, the only point to be considered
the effect of the clause excluding liability for warra
Might it not, however, have been reasonably argued
taking the contract as a whole, the subject-matter of the
was "seed" only? (*f*). When commercial men are de
with such a commodity, the parties do not draw fine tech

(*e*) [1911] A. C. 394; 80 L. J. K. B. 1058; *coram* Lords Lorcburn,
Ashbourne, Alverstone, and Shaw of Dunfermline, adopting the dissentin
ment of Moulton, L.J., in the C. A. [1910] 2 K. B. 1003; 79 L. J. K. B.

(*f*) As in *Howcroft* v. *Perkins* [1909] 16 Times L. R. 217, the prac
which is *semble* not affected by *Wallis* v. *Pratt*. See also *Taylor* v.
ante 707 ("barque A1 teak-built"); and *Carter* v. *Crick*, *ante*, 706.

distinctions. Does not the seller say, in a commercial sense, as in *Carter* v. *Crick*, "Here is a seed which I call, and believe to be, English sainfoin. But seeds are hard to distinguish; so I am not to be responsible if the seed turns out to be a different seed. I sell only seed believed to be English sainfoin"?

Place of origin.

The place of origin of the goods may also constitute part of the description of the goods (*g*).

Implied condition by a manufacturer that goods are of his own make.

Johnson v. *Raylton* (1881).

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

Description by way of estoppel.

Cases may occur in which the parties are under a common mistake as to the subject-matter of the contract, and yet one party may be estopped from contending that the description of the goods contracted for was not as contemplated by the other party. The goods may thus bear, as against the party estopped, what may be called a description by way of estoppel. The principles applicable to such cases have already been discussed under *Smith* v. *Hughes* (*k*).

Books and maps sold according to prospectus.

Lord Tenterden held, in two cases (*l*), at Nisi Prius, that a seller could not recover for books or maps sold by a description or prospectus, if there were any material difference between the book or map furnished and that described in the prospectus.

Under this head may also be included the class of cases in which it has been held that the seller of bills of exchange,

(*g*) *Jones* v. *Clarke* (1858) 2 H. & N. 725; 27 L. J. Ex. 165; 115 R. R. 769, *post*, 758.

(*h*) 7 Q. B. D. 438; 50 L. J. Q. B. 753, C. A. See also *Starey* v. *Chilworth Gunpowder Co.* (1889) 24 Q. B. D. 90; 59 L. J. M. C. 13.

(*i*) *West Stockton Iron Co.* v. *Neilson* (1880) 7 Rettie 1055; *Johnson* v. *Nicholl* (1881) 8 Rettie 437. It has been suggested by a learned author (Prof. Brown's Sale of Goods Act, 65) that by s. 14 (set out *post*, 712) the Scotch rule has been made applicable to both countries. But s. 14 deals only with conditions or warranties of *quality or fitness*, and the condition of home manufacture does not seem covered by the words. And *Wren* v. *Holt* [1903] 1 K. B. 610; 72 L. J. K. B. 340, C. A. (set out *ante*, 701), lends colour to the view that such a condition may still exist; but it is possible that s. 61 (2) preserves the Scotch rule in that country.

(*k*) (1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221. See Chapter on Mutual Assent, *ante*, 134, *et seqq.*

(*l*) *Paton* v. *Duncan* (1828) 3 C. & P. 336; and *Teesdale* v. *Anderson* (1830) 1 C. & P. 198.

Sale of securities, implied condition that they are genuine.

notes, shares, certificates, and other securities is bound not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it (*m*).

Jones v. *Ryde* (1814).

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

Young v. *Cole* (1837).

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

Westropp v. *Solomon* (1849).

In *Westropp* v. *Solomon* (*p*), the same rule was recognised, and it was also held that in such cases nothing further was recoverable from the seller than the purchase-money he had received, and that he was not responsible for the value of genuine shares.

Gompertz v. *Bartlett* (1853).

In *Gompertz* v. *Bartlett* (*q*), the sale was of a foreign bill of exchange; it turned out that the bill was not a foreign bill, and therefore worthless, because unstamped. The purchaser was held entitled to recover back the price, because the thing sold was not of the kind described; the Court, however, saying that the decision would have been otherwise had the defect been one consistent with the character of a bill.

(*m*) See *Meyer* v. *Richards* (1895) 163 U. S. 385, where the cases set out in the text are approved; and the English common law and the American law are shown to be identical, though put on different grounds.

(*n*) 5 Taunt. 488; 15 R. R. 561.

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

(*p*) 8 C. B. 345; 19 L. J. C. P. 1; 79 R. R. 530.

(*q*) 2 E. & B. 849; 23 L. J. Q. B. 65; 96 R. R. 851. The Stamp Act, 1891 (54 & 55 V. c. 39), s. 36, provides that every bill of exchange or promissory note, *purporting* to be drawn or made out of the United Kingdom, is, for the purpose of determining the mode in which the stamp duty thereon is to be denoted, to be deemed to have been so drawn or made. *Cf.* the definition of foreign and inland notes in s. 83 (4) of the Bills of Exchange Act, 1882.

Pooley v. *Brown* (1861).

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

Gurney v. *Womersley* (1854).

In *Gurney* v. *Womersley* (*t*), a bill of exchange, purporting to have been accepted by N. & Co., was sold to the plaintiffs, on which all the signatures were forged except that of the last indorser, who had forged all the preceding names, and Bramwell, for defendant, made a strenuous effort to distinguish the case, on the ground that in *Jones* v. *Ryde*, and *Young* v. *Cole* (*u*), the thing sold was *entirely* false and valueless: whereas in this case the last indorser's signature was genuine, and the bill therefore of *some* value. But it was held that what was sold was a genuine acceptance of N. & Co., and this being forged, there was a failure in substance in the description of the bill; and that a party offering a bill for sale offers in effect an instrument drawn, accepted, and indorsed according to its purport.

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

Mitchell v. *Newhall* (1846).

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

Thus, in *Mitchell* v. *Newhall* (*x*), the sale was of "fifty shares" in a foreign railway company. The buyer refused to receive from the plaintiff, his stockbroker, delivery of a *letter of allotment* for fifty shares. *Held*, that he was bound by his bargain, proof having been made that no shares in the railway had yet been issued, and that these letters of allotment were commonly bought and sold as shares on the Stock Exchange.

(*r*) 11 C. B. (N. S.) 566; 31 L. J. C. P. 134; 132 R. R. 675.
(*s*) 17 & 18 V. c. 83, s. 5. See now the Stamp Act, 1891, ss. 8, 34, 35.
(*t*) 4 E. & B. 133; 24 L. J. Q. B. 46; 99 R. R. 390; and see also *Woodland* v. *Fear* (1857) 7 E. & B. 519; 26 L. J. Q. B. 202; 110 R. R. 707; and the remarks of Blackburn, J., on the principle of the decisions in these cases, in *Kennedy* v. *Panama Mail Company* (1867) L. R. 2 Q. B. at 587; 36 L. J. Q. B. 260.
(*u*) *Supra*.
(*x*) 15 M. & W. 308; 15 L. J. Ex. 292.

Lamert v. *Heath* (1846).

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

Implied conditions as to quality or fitness.

The section of the Code dealing with implied warranties or conditions as to quality or fitness, is section 14 (*z*). Its first two sub-sections (*a*) provide as follows:—

Code, s. 14 (1) and (2).

"**14.** Subject to the provisions of this Act and of any statute in that behalf (*b*), there is no implied warranty or condition as to the quality (*c*) or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

Implied condition as to fitness;

"(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose (*d*):

and merchantable quality.

"(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality (*e*); provided that if the buyer has examined the goods, there shall be no implied condition

(*y*) 15 M. & W. 486, at 488; 15 L. J. Ex. 297; 71 R. R. 738.

(*z*) See a summary of the law under ss. 14 and 15, where the buyer has examined the goods, *post*, 745.

(*a*) Sub-s. 3 is considered *post*, and sub-s. 4 *post*.

(*b*) See *e.g.*, the Merchandise Marks Acts, 1887, 1891, *post*, 775; Sale of Food and Drugs Acts, 1875—1907, *post* 776; Fertilisers and Feeding Stuffs Act, 1906, s. 1; Anchors and Chain Cables Act, 1899, s. 2 (1), *post*, 775; Hops (Prevention of Frauds) Act, 1866, s. 18; *Johnson* v. *Gaskain* (1891) 8 T. L. R. 70.

(*c*) "Quality of goods" include their state or condition: s. 62 (1).

(*d*) Considered *post*, 715 *et seqq.*

(*e*) See *supra*, n. (*c*), and *post*, 730

as regards defects which such examination ought to have revealed (*f*).

Caveat emptor, general rule.

The maxim of the common law, *caveat emptor*, is the general rule applicable to sales so far as quality is concerned. The buyer, in the absence of fraud, purchases at his own risk, unless the seller has given an express warranty, or unless a condition or warranty be implied from the nature and circumstances of the sale.

A representation anterior to the sale, and forming no part of the contract when made, is, as will be shown (*g*), no condition or warranty, though by express agreement the existence of the contract may depend upon its truth (*h*), and if it be false, it may be a ground for rescinding the contract as having been effected through fraud or misrepresentation.

No exception at common law where an existing specific chattel has been inspected by buyer.

So far as an ascertained specific chattel already *existing*, and which the buyer has *inspected*, is concerned, the rule of *caveat emptor* admitted at common law of no exception by implied warranty of quality (*i*).

The common law rules on the subject of implied condition or warranty of quality or fitness were stated, and the cases were classified, by Mellor, J., in delivering the judgment of the Queen's Bench in *Jones* v. *Just* (*k*), giving this as the result: "The cases . . . may, we think, be classified as follows: "*First*.—Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer (*l*). The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in the case of a sale in a market of meat which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not

(*f*) Considered *post*, 719.
(*g*) *Post* 751.
(*h*) *Bannerman* v. *White* (1861) 10 C. B. (N. S.) 844; 31 L. J. C. P. 28; 128 R. R. 953. See the remarks on this case and similar cases *ante*, 103—105.
(*i*) *Parkinson* v. *Lee* (1802) 2 East, 314; 6 R. R. 429; *Chanter* v. *Hopkins* (1838) 4 M. & W. 399; 8 L. J. Ex. 14; 51 R. R. 650; and cases cited *post*, 714; nn. (*m*), (*n*), and (*o*).
(*k*) (1868) L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.
(*l*) *Parkinson* v. *Lee* (1802) 2 East, 314; 6 R. R. 429.

apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim *caveat emptor* applied (*m*). *Secondly.*—Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty (*n*). *Thirdly.*—Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer (*o*). *Fourthly.*—Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied (*p*). In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own (*q*). *Fifthly.*—Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but (*r*) which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article (*s*). And this doctrine has been held to apply to the sale by the builder of an existing barge, which was afloat, but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use (*t*)."

The principles above stated may be resolved into the

(*m*) *Emmerton* v. *Mathews* (1862) 7 H. & N. 586; 31 L. J. Ex. 139; 126 R. R. 567; *post*, 722.

(*n*) *Borr* v. *Gibson* (1838) 3 M. & W. 390; 7 L. J. Ex. 124; 49 R. R. 650; *onte*, 698.

(*o*) *Chanter* v. *Hopkins* (1838) 4 M. & W. 399; 8 L. J. Ex. 14; 51 R. R. 650; *post*, 725; *Ollivant* v. *Bayley* (1843) 5 Q. B. 288; 13 L. J. Q. B. 34; 64 R. R. 501.

(*p*) *Brown* v. *Edgington* (1841) 2 M. & G. 279; 10 L. J. C. P. 66; 58 R. R. 408; *Jones* v. *Bright* (1829) 5 Bing. 533; 7 L. J. (O. S.) C. P. 213; 30 R. R. 78

(*q*) See *Drummond* v. *Van Ingen* (1887) 12 App. Cas. 284; 56 L. J. Q. B. 563; *post*, 742; *Randoll* v. *Newson* (1877) 2 Q. B. D. 102; 46 L. J. Q. B. 259; C. A. See also *Johnson* v. *Raylton* (1881) 7 Q. B. D. 438; 50 L. J. Q. B. 758; C. A., *onte*, 709, as to an implied condition by a manufacturer that the goods are *his own make*.

(*r*) But see now s. 14 (2), as to this qualification.

(*s*) *Laing* v. *Fidgeon* (1815) 4 Camp. 169; 6 Taunt. 108; 16 R. R. 589.

(*t*) *Shepherd* v. *Pybus* (1842) 3 M. & G. 368; 11 L. J. C. P. 101. *post*, 730.

proposition (also applicable to sales by sample) that a condition or warranty as to fitness or quality is implied only so far as a buyer does not buy on his own judgment. The buyer buys on his own judgment if he selects or defines the specific chattel or class of goods he requires, although he may state the purpose for which he is buying. He buys on the seller's judgment if the seller agrees to "supply" goods (*u*), and there is no opportunity, or no genuine opportunity, of inspecting them. If the buyer's purpose be communicated to the seller, the seller's obligation is to supply goods fit for that purpose; if the goods are bought under a commercial description, his duty is to supply merchantable goods. Where the goods are bought by sample, the buyer trusts to his own judgment (having inspected or been able to inspect the sample) as regards any merchantable or other quality of the bulk which the sample would reveal on a reasonable examination, but on the seller's judgment as regards the correspondence of the bulk with the sample (*x*).

Summary of the common law.

The Code having adopted the three implied conditions as to fitness, merchantable quality, and correspondence with sample, these conditions will now be considered in their order. The implication of any of these conditions may, however, be negatived or varied by express agreement, by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties (*y*).

Implied conditions may be negatived or varied by agreement, etc

First, with regard to the condition as to fitness.

S. 14 (1).

A "particular purpose" is not some purpose necessarily distinct from a general purpose; for example, the general purpose for which all food is bought to be eaten, and this would also be the particular purpose in any specific instance (*z*). A particular purpose is, in fact, the purpose, expressly or impliedly communicated to the seller, for which the buyer buys the goods; and it may appear from the very description of the article, as, for example, "coatings" (*a*) or a "hot-water bottle" (*b*). But where an article is capable of being

What is a "particular purpose."

(*u*) A comparison of the terms in which the different rules in *Jones* v. *Just* are laid down by Mellor, J., seems to show that he used the word "supply" advisedly.

(*x*) See *Mody* v. *Gregson* (1868) L. R. 4 Ex. 49; 38 L. J. Ex. 12; *post*, 741; and *Drummond* v. *Van Ingen* (1887) 12 A. C. 284; 56 L. J. Q. B. 563; *post*, 742.

(*y*) Code, s. 55, *ante*, 254. *Re Walkers and Shaw* [1904] 2 K. B. 152; 73 L. J. K. B. 325.

(*z*) *Wallis* v. *Russell* [1902] 2 Ir. R. K. B. 585, C. A., set out *post*, 718; *Preist* v. *Last* [1903] 2 K. B. 148; 72 L. J. K. B. 657, C. A., *post*, 721.

(*a*) *Drummond* v. *Van Ingen*, *supra*.

(*b*) *Preist* v. *Last*, *supra*.

applied to a variety of purposes the buyer must particularise the specific purpose he has in view (*c*).

Knowledge of purpose how acquired.

The purpose need not necessarily appear in the contract itself, but may be proved by evidence of matters *ab extra* the contract, even when it is in writing, if such evidence does not contradict the contract. The purpose intended "may be gathered from the course pursued by the parties, and from their conduct and acts and writings antecedent, but leading up to the contract itself" (*d*).

Whether buyer relies on seller's skill, etc., now a question of fact in all cases.

The distinction taken at common law between cases where the buyer had an opportunity of examining the goods and those in which he had none (a distinction which clearly appears from the language of Rule 1 when contrasted with that of 3 and 4 of Mellor, J.'s classification in *Jones* v. *Just*) has been abrogated by the Code. Instead of a presumption that a buyer, who might have inspected the goods, bought on his own judgment, in future whether he so bought or not will be a question of fact, and an opportunity of examination and even an actual examination will be immaterial (*e*). And no distinction is drawn by the Code between contracts of sale of specific as distinguished from those of unascertained goods (*f*). At common law the buyer of a specific thing for a particular purpose took the risk of the fitness of the thing bought (*g*).

Seller must deal in goods of the kind sold.

The seller must also deal in the class of goods sold. If he does not, the buyer plainly buys on his own judgment. An instance of such a case is *Turner* v. *Mucklow* (*h*), where the buyer, who had ordered "spent madder," which was merely the refuse product of the seller's manufacture, and was sold as such, intending out of it to produce garrancine, which it failed to produce, was held bound to take the risk of the goods producing the desired result.

(*c*) *Per* Collins, M.R., *ibid.* at 153; *per* Lord Herschell in *Drummond* v. *Van Ingen* (1887) 12 A. C. at 293; 56 L. J. Q. B. 563; *Jones* v. *Padgett* (1890) 24 Q. B. D. 650; 59 L. J. Q. B. 261, C. A., *post*, 723.

(*d*) *Per* Lord Russell of Killowen, C.J., in *Gillespie* v. *Cheney* [1896] 2 Q. B. 63; 65 L. J. Q. B. 552. See also *per* Tindal, C.J., in *Shepherd* v. *Pybus* (1842) 3 M. & G. 878; 11 L. J. C. P. 101. The same law has been declared by the H. L. in *Jacobs* v. *Scott* [1899] 2 Fraser, 70, set out *post*, 717. See especially *per* Lord Halsbury at 76.

(*e*) *Per* Palles, C.B., and Andrews, J., in *Wallis* v. *Russell* [1902] 2 Ir. R. 585, C. A., *post*, 719, where the previous law and the effect of s. 11 (1) and (2) of the Code are discussed.

(*f*) See *per* Holmes, L.J., in *Wallis* v. *Russell* (1902) 2 Ir. R. 585, C. A., quoted *post*, 721.

(*g*) *Per* Brett, L.J., in *Robertson* v. *Amazon Tug Co.* (1881) 7 Q. B. D. 606; 51 L. J. Q. B. 68, C. A.

(*h*) (1862) 8 Jur. (N. S.) 870; 6 L. T. (N. S.) 690; 131 R. R. 800, *post*, 730; *Jackson* v. *Harrison* (1862) 2 F. & F. 782; *Wilson* v. *Dunville* (1879) 2 L. R. Ir. 249.

If all the essential facts exist to found the condition as to fitness, the seller will be liable to fulfil it, "whether he be the manufacturer or not." These words do not confine section 14 (1) to the case of manufactured goods only; they mean that the seller's liability is in his character of dealer, though he may be also the manufacturer (*i*).

That defects are latent no excuse.

The seller's liability to supply goods that are "reasonably fit" is an absolute one. Consequently he is not discharged by reason that the defects in the goods are latent ones. This was also the rule at common law (*k*).

Macfarlane v. *Taylor* (1868).

In *Macfarlane* v. *Taylor* (*l*), the House of Lords decided, under the 5th section of the Mercantile Law Amendment (Scotland) Act (*m*), that a seller was responsible in damages under the following facts. Taylor & Co. bought of Macfarlane & Co., distillers, of Glasgow, a quantity of spirits, intended by the buyers to be used in barter with the natives on the coast of Africa, which purpose was communicated to the distillers, and they agreed to give the spirits a specified shade of colour to make them resemble rum. In producing this colour they made use of logwood, which, although not proved to cause any positive injury to health, dyed the secretions of those drinking it so as to make them of the colour of blood, and so to alarm the natives that the spirits were unsaleable. *Held*, that this was a breach of the implied warranty that the goods should be fit for the specified purpose.

Jacobs v. *Scott* (1899).

In *Jacobs* v. *Scott* (*n*), decided under the Code, the plaintiff had contracted to supply the Glasgow Tramway Co. with 2,100 tons of "best Canadian Timothy hay, small quantities of clover not to be objected to." To implement this contract he made a contract in writing with the defendants for the supply of 900 tons "good sound Canadian hay, understood to mean No. 1 export hay of fair average quality," and the defendants knew that the hay was bought for the purposes of the plaintiff's contract with the tramway company. On the plaintiff's order the defendants delivered consignments of hay to the tramway company, who accepted some deliveries, but rejected the remainder as disconform to their contract with the plaintiff. It was proved that the Glasgow market required

(*i*) *Wallis* v. *Russell* [1902] 2 Ir. R. 585; *post*, 718.
(*k*) *Frost* v. *Aylesbury Dairy Co.* [1905] 1 K. B. 608; 74 L. J. K. B. 386, C. A.; *Randall* v. *Newson* (1877) 2 Q. B. D. 102; 46 L. J. Q. B. 259, C. A.
(*l*) (1868) L. R. 1 Sc. Ap. 245.
(*m*) 19 & 20 Vict. c. 60, ss. 1 to 5 are repealed by the Code.
(*n*) 2 Fraser, 70, H. L. See also *Gillespie* v. *Cheney* [1896] 2 Q. B. 59; 65 L. J. Q. B. 552 (bunkering coal).

a higher quality of No. 1 export hay than would be accepted in London or Bristol, and that the hay delivered was not No. 1 export hay *as understood at Glasgow*. The plaintiff sued Scott & Co. for a return of the price paid for the deliveries rejected, and for loss of profit. *Held*, by the House of Lords, affirming the Lord Ordinary and reversing the Second Division of the Court of Session, that he was entitled to succeed, as, first, there was an implied condition that the hay delivered should be No. 1 export hay *as understood at Glasgow*; and, secondly, the purpose for which the goods were required need not be mentioned in the written contract, but might be proved *aliunde*.

Wallis v. *Russell* (1902).

The interpretation of section 14 (1) was much considered in the two following cases.

Wallis v. *Russell* (*o*) was an action for a breach of warranty on the sale of crabs. The plaintiff sent a girl to the defendant's shop, a fishmonger's, for two crabs. The girl told the defendant's manager that the plaintiff wanted "two nice fresh crabs for tea." The manager told her he had no live, but that he had boiled ones, and he took up two crabs. The girl pointed to another crab, and said, "Don't you think that is a better crab?" The shopman took it up and felt it, and said, "You should judge by the weight and not by the size," and he put it down. The girl then asked, "Were they nice fresh crabs?" and the manager said they were. The two crabs were then paid for and taken. Subsequently the plaintiff was made seriously ill by eating the crabs, but no specific cause of the illness could be traced. The jury found (among other things) that there was no express warranty of the crabs, that the plaintiff relied upon the defendant's judgment, that the defendant honestly believed them to be good, and that the girl had had a reasonable opportunity of examining them, and found for the plaintiff.

On appeal to the Divisional Court it was contended for the defendant that section 14 (1) of the Code applied only to manufactured goods; that at any rate it did not apply to a sale of specific goods capable of inspection; and that consumption of the crabs at tea was not a "particular purpose," but merely the general purpose for which all articles of food are supplied. *Held*, by the Divisional Court (*p*), that the sub-section applied to all kinds of goods, the words "whether

(*o*) (1902) 2 Ir. R. 585, C. A. See also *Jackson* v. *Watson & Sons* [1909] 2 K. B. 193; 78 L. J. K. B. 587, C. A. (tinned salmon).

(*p*) Palles, C.B., and Andrews, J.

he be the manufacturer or not" meaning only that the seller was liable merely as a dealer; and that specific goods were not excluded. On the other point they held that "particular purpose" was "not so much particular purpose as distinct from general purpose; but it is purpose stated to the seller as distinct from absence of purpose stated to the seller." The plaintiff was held entitled to recover on the implied warranty.

Condition as to fitness may be implied though buyer has examined goods.

Palles, C.B., made the following observations on the question of the applicability of section 14 (1) to specific goods capable of inspection (*q*): "It is plain that the former law excluding the warranty mentioned in sub-section (1) in cases where there was an opportunity of examination has been altered as to cases within that sub-section. . . . The existence of an opportunity, and even the fact of an examination, is declared to be insufficient to exclude the warranty mentioned in sub-section (1), if the circumstances are such as to show the vendor that his judgment or skill were relied upon by the purchaser. In fact, the view of the Legislature appears to have been that, instead of the law, as theretofore, presuming that the buyer relied upon his own judgment where there was an opportunity of inspection, for the future, *whether he relied upon his own judgment or not* should be *a question of fact*. In cases within sub-section (2), if he has examined the goods, he is to be held to have relied upon his own judgment so far, but so far only, as regards defects observable upon examination. But in cases within sub-section (1), in cases in which the vendor is aware that his judgment and skill are relied on by the buyer, opportunity of examination or the fact of examination is thenceforth to be immaterial." Andrews, J., concurred.

On appeal this judgment was unanimously affirmed. Lord Ashbourne, L.C. (*r*), said: "The plaintiff could see and inspect the crabs, but she relied on the defendant to select crabs which should be nice and fresh and fit for tea." His Lordship also held that whatever was said or disclosed at the time of the buying was a particular purpose.

Lord Justice Fitzgibbon said (*s*): "The buyer here 'expressly made known to the seller' that the crabs were required for her own eating on the evening of the sale. . . . Was the purpose thus made known a 'particular purpose' within the meaning of the Act? . . . I find it impossible 'exclude any purpose which is 'made known to the s

(*q*) (1902) 2 Ir. R. at 596, 597.
(*r*) *Ibid.* at 603.
(*s*) At 611, 613, 615—616.

. . . I am satisfied that the test whether a sale comes under section 14 (1) or not is not to be found in the divisibility of the class of goods bought into *genera* and *species*; but that is to be found in the question whether the purchase, being made for a definite purpose known to the seller, has been made in reliance on his skill and judgment to select or to supply goods fit for that purpose. . . . It was contended that a decision against the defendant here would leave no case to which *caveat emptor* could apply. My answer is that *caveat emptor* does not apply, and that the buyer's 'opportunity of inspection' is immaterial in any case in which the skill or judgment of the seller is relied on to supply goods required for a purpose which is made known to him at the time of the sale, *i.e.*, in any case within section 14 (1) or in any case within section 14 (2) or section 15. *Caveat emptor* does not mean—in law or Latin—that the buyer must 'take *chance*,' it means that he must 'take *care*.' It applies to the purchase of specific things, *e.g.*, a horse or a picture, upon which the buyer can, and usually does, exercise his own judgment: it applies also whenever the buyer voluntarily chooses what he buys; it applies also where, by usage or otherwise, it is a term of the contract, express or implied, that the buyer shall not rely on the skill or judgment of the seller. But it has no application in any case in which the seller has undertaken and the buyer has *left it to the seller, to supply* goods to be used for a purpose known to both parties at the time of the sale."

Walker, L.J., referring to the argument of the defendant's counsel, on the authority of the first rule of Mellor, J.'s classification in *Jones* v. *Just* (*t*), that where the goods are *in esse* and may be inspected the rule of *cavvat emptor* applies, said (*u*): "The question is whether the first of Mellor, J.'s rules applies where the facts are as they are found to be in this case to be. The two cases most relied upon for the defendant (*x*) contain the element that the purchaser bought on his own judgment and inspection, and not on the judgment and selection of the seller. . . . Do the cases of *Emmerton* v. *Mathews* (*x*) and *Smith* v. *Baker* (*x*) apply to a case where the purchase of a specific article—and an article of food is only an illustration—is made on the judgment of the seller

(*t*) *Ante*, 713—714.

(*u*) (1902) 2 Ir. R. at 624, 625.

(*x*) *Emmerton* v. *Mathews* (1862) 7 H. & N. 586; 31 L. J. Ex. 139; R. R. 527; *post*, 722; *Smith* v. *Baker* (1878) 40 L. T. 261.

appealed to and trusted by the buyer? . . . It is true that he has an opportunity for the exercise of his (the purchaser's) judgment which was not unveiled of; but if crabs for food are asked for, and the seller selects them as suitable for the purpose, the purchaser does not get what he trusted the seller to give him."

Holmes, L.J., said (*y*): "It has been argued that the provision does not apply to goods *in esse* passing by delivery at the time of sale; but the only answer that need be given to this proposition is to read the clause which *prima facie* refers to all sales of goods, and which contains nothing to suggest a limitation that would be in my opinion arbitrary and artificial."

Preist v. *Last* (1903).

In *Preist* v. *Last* (*z*), the plaintiff, a draper, went to the shop of the defendant, a retail chemist, and asked for a hot-water bottle. He was shown and examined an article, and he told the defendant that he wanted it for a special case (which, however, he did not explain), and he asked whether it would stand boiling water. The defendant said it would not stand boiling water, but that it was meant for hot water. The plaintiff purchased the bottle, but after five days' use it burst and scalded the plaintiff's wife. In an action for the breach of an implied warranty that the bottle was fit for the purpose for which it was sold, it was contended for the defendant, first, that there was no condition as to fitness in the case of a specific chattel bought over the counter which the buyer had an opportunity of examining, and, secondly, that the use of the general trade name of the article, viz., "hot-water bottle," was not a communication by the buyer of a particular purpose. The jury found that the bottle was unfit for use as a hot-water bottle, and that this was the cause of its bursting, and awarded £40 damages. An application by the defendant for judgment or for a new trial was dismissed, the Court of Appeal holding that there was a contract of sale of an article required for the particular purpose of holding hot water, and that the very description of the article showed that it was bought for that purpose.

Collins, M.R., said (*a*): "There are many goods which have in themselves no special or peculiar efficacy for any one particular purpose, but are capable of general use for a multitude of purposes. In the case of a purchase of goods

(*y*) (1902) 2 Ir. R. at 633, 635.
(*z*) [1903] 2 K. B. 148; 72 L. J. K. B. 657, C. A.
(*a*) At 153, 154.

of that kind, in order to give rise to the implication of a warranty, it is necessary to show that, though the article sold was capable of general use for many purposes, in the particular case it was sold with reference to a particular purpose. But in a case where the discussion begins with the fact that the description of the goods by which they were sold points to one particular purpose only it seems to me that the first requirement of the sub-section is satisfied, namely, that the particular purpose for which the goods are required should be made known to the seller. . . . The sale is of goods which, by the very description under which they are sold, appear to be sold for a particular purpose."

Necessary concomitants of the goods sold.

Goods that are essentially necessary to the delivery and use of the goods sold, though they may not be themselves sold, are "supplied under the contract of sale," and the conditions in section 14 apply to them (*aa*).

The following cases were decided at common law.

Common law cases.

Burnby v. *Bollett* (1847).

In *Burnby* v. *Bollett* (*b*), in 1847, the defendant, a farmer, bought a pig exposed for sale by a butcher; the plaintiff, another farmer, went to the defendant and offered to purchase the pig which the latter had just bought, and the sale was made without any express warranty. The meat turned out to be diseased, and it was held that there was no implied warranty that it was fit for food (although the seller must have known it was intended for that purpose), because he was *not a dealer* in meat, did not know that it was unfit for food, and the case was not that of a person to whom an order is sent, and who is bound to supply a good and merchantable article. Here, plainly, the purchaser bought on his own judgment.

Emmerton v. *Mathews* (1862).

Emmerton v. *Mathews* (*c*) was decided in 1862. There the defendant, the seller, was a general dealer—a salesman in Newgate Street, selling, on commission, meat consigned to him—and the plaintiff was a butcher or retailer of meat. The plaintiff bought a carease from the defendant, which appeared to be good meat. The plaintiff saw it exposed for sale, bought it on his own inspection, and there was no express warranty. The defect was such that it could not be detected till the meat was cooked, and then it proved to be unfit for human food.

(*aa*) *Geddling* v. *Marsh* [1920] 1 K. B. 668; *cf. Gower* v. *Van Dedalzen*, *post*, 735.

(*b*) 16 M. & W. 644; 17 L. J. Ex. 190; 73 R. R. 667.

(*c*) 7 H. & N. 586; 31 L. J. Ex. 139; 126 R. R. 527; app. and foll. by the C. P. D. in *Smith* v. *Baker* (1878) 40 L. T. 261. *Burnby* v. *Bollett* and *Emmerton* v. *Mathews* show that the maxim of *caveat emptor* may apply to cases of provisions sold even by a general dealer.

The Court held, that there was no implied warranty, the sale being of a specific article, and the buyer having had an opportunity to examine and select it.

The first of the two preceding cases is no doubt good law under the Code, as the seller was not a dealer in meat; moreover, the buyer did not rely on the seller's skill or judgment to supply a fit article. The authority of the second case depends on the question whether the buyer bought on his own judgment or not. The case is explained by the Judges in *Wallis* v. *Russell* (*d*) as one in which the buyer selected the meat himself, and if so, it is still law (*e*).

Sale in public market of diseased animals.

Ward v. *Hobbs* (1878).

It may be useful to refer here to the case of a sale in a public market of animals suffering from disease. It was decided by the House of Lords in *Ward* v. *Hobbs* (*f*), that a person who sends animals to a public market for sale, and expressly declines to warrant them, but sells them "with all faults," does not impliedly represent that they are free from contagious disease dangerous to animal life, and will not be liable in an action either for breach of warranty or for false representation. The mere act of sending the infected animals to the market, although a statutory offence under the Contagious Diseases (Animals) Act (*g*), does not amount to a representation by conduct on the seller's part that the animals are in fact free from disease.

General and special purposes.

The following case shows that if the seller know of a general purpose to which the goods may be applied, but not of a special purpose contemplated by the buyer, he fulfils his contract by supplying goods fit for the general purpose only. It also shows how closely cases under section 14 (1) and (2) run into one another (*h*).

Jones v. *Padgett* (1890).

In *Jones* v. *Padgett* (*i*), the plaintiff, a wool merchant and also a tailor, ordered of the defendants, woollen manufacturers, "indigo blue cloth," according to sample. He wanted the cloth *as a tailor* to make into liveries, but the defendants did not know he was a tailor, nor did they know his particular purpose. The cloth supplied proved unfit for liveries, though it was merchantable for other purposes, and was in accordance

(*d*) (1902) 2 Ir. R. 585, C. A., at 604, 616, 617, 624.

(*e*) But *cf. Cointat* v. *Myham* [1913] 2 K. B. 220; 82 L. J. K. B. 551, where on similar facts the jury found that the buyer had relied on the seller's judgment.

(*f*) 4 A. C. 13; 48 L. J. C. P. 281, set out *ante*, 556.

(*g*) 32 & 33 V. c. 70, s. 57.

(*h*) Best, C.J., in *Jones* v. *Bright* (1829) 5 Bing. 533, at 544; 7 L. J. C. P. 213; 30 R. R. 728; defines merchantableness as "fitness for *some* purpose."

(*i*) 24 Q. B. D. 650; 59 L. J. Q. B. 261, C. A. See also *Shepherd* v. *Pybus* (1842) 3 M. & G. 868; 11 L. J. C. P. 101; *post*, 731.

with the sample. The plaintiff having sued the defendants for a breach of the implied warranty of merchantableness, the County Court Judge left to the jury the question whether the cloth was merchantable *as supplied to a woollen merchant*, and refused to leave the question whether an ordinary and usual use of such cloth was the making of it into liveries. *Held*, by the Court of Appeal, that the defendants, having no knowledge that the plaintiff was a tailor, had fulfilled their contract by supplying goods which were merchantable as supplied to a woollen merchant, and a further condition could not be implied that the goods were fit to be made into liveries.

Other illustrations of section 14 (1) are referred to in the note (*k*).

Alterations or materials suggested by buyer or provided for in contract.

When goods are ordered of a manufacturer to be made for a particular purpose, the buyer does not the less rely upon the seller's skill or judgment by reason only that the buyer suggests alterations in the mode of manufacture, or the use of particular materials, if such alterations or materials, even where they are the cause of the unfitness, are adopted without objection by the manufacturer (*l*). But where it is part of the contract that the goods shall be made according to a certain plan, or according to a certain style, shape, or form, or of specified materials, the buyer relies upon his own judgment as to the sufficiency of the plan, style, etc., or of the materials for effecting the purpose contemplated (*m*). The only liability then of the manufacturer is to execute the work according to the plan, etc., and in a workmanlike manner, and to exercise due care and skill in the selection and testing of the materials (*m*), in the absence of an express engagement on his part to produce goods which will be adapted to the buyer's purpose (*n*).

Seller not liable in tort for negligent advice.

A buyer, who communicates his requirement to the seller, and on his advice purchases an article for his purpose which

(*k*) *Brown* v. *Edgington* (1841) 2 M. & G. 279; 10 L. J. C. P. 66; 58 R. R. 508 (rope); *Camac* v. *Warriner* (1845) 1 C. B. 356 (roofing); *Stancliffe* v. *Clarke* (1852) 7 Ex. 439; 21 L. J. Ex. 129 (beer supplied to publican); *Osborn* v. *Hart* (1871) 23 L. T. 851 (port for laying down); *Strongitharm* v. *North Lonsdale Iron Co.* (1905) 21 Times L. R. 357, C. A.; *Chaproniere* v. *Mason* (1905) 21 Times L. R. 633, C. A. (bath bun); *Bentley Bros.* v. *Metcalfe & Co.* [1907] 2 K. B. 548, C. A.; 75 L. J. K. B. 891 (supply of power); *Crichton* v. *Stevenson* (1908) Sess. Cas. 818 (bunkering coal); *Dominion Coal Co.* v. *Dominion Iron & Co.* [1909] A. C. 293, P. C.; 78 L. J. P. C. 115 (coal for steel manufacture); *Bristol Tramways Co.* v. *Fiat Motors* [1910] 2 K. B. 831, C. A.; 79 L. J. K. B. 1107 (omnibus).

(*l*) *Hall* v. *Burke* (1886) 3 T. L. R. 165, C. A.

(*m*) *Per Cur.* in *Hall* v. *Burke*, *supra*; *Cunningham* v. *Hall* (1862) 86 Mass. 268, where the ship was to be built of pine, which was the cause of unseaworthiness. The judgment of the Court will repay perusal.

(*n*) *Hydraulic Engineering Co.* v. *Spencer* (1886) 2 Times L. R. 554, C. A.

is unfit, cannot hold the seller liable for negligent advice, as on a tort independent of contract. His only right, if he does not reject the article, is to sue for damages for breach of warranty (*o*).

Proviso to s. 14 (1).

Article sold under its trade name.

It has already been explained (*p*) that where a buyer defines the specific article or the class of goods he requires to fulfil his purpose, he buys on his own judgment, although he communicate to the seller the particular purpose for which he wants the goods, and he must take the risk of their adaptability. *Veritas nominis tollit errorem demonstrationis.* In such a case the buyer's purpose is not an essential element of the sale, but is merely his motive in purchasing. This principle has b n specially adopted by the Code, with regard to a limited class of goods (*q*), in the proviso to section 14 (1) (*r*). This proviso and the wide principle of which it is a part are ed on the following case.

Chanter v. *Hopkins* (1838).

In *Chanter* v. *Hopkins* (*s*), the plaintiff was the patentee of a furnace and stove having an apparatus constructed to consume its own smoke. The defendant, a brewer, wrote to him: "Send me your patent hopper and apparatus to fit up my brewing copper with your smoke-consuming furnace." The furnace and apparatus were sent, and proved a failure in defendant's brewery. From the very terms of the order and from conversations with the defendant the plaintiff knew that the apparatus was to be used in a brewery. *Held*, that, though the machine had failed in its object, the plaintiff could recover the price of it, having supplied what was ordered. Parke, B., after showing the distinction between an order for an undescribed and unascertained thing for a particular purpose and an order for a particular thing, said of the case under consideration: "The purchase is of a defined and well-known machine. The plaintiff has performed his part of the contract by sending that machine."

A similar decision has been given, since the Code, in Scotland (*t*).

Chanter v. *Hopkins* shows that it is not necessary that the

(*o*) *Rowe* v. *Crossley* (1912) 108 L. T. 11. C. A.

(*p*) *Ante*, 715.

(*q*) Of course it underlies the general provisions of s. 14 (1).

(*r*) *Ante*, 712. As to the relation of this proviso to s. 14 (2), see *post*, 727.

(*s*) 4 M. & W. 399; 8 L. J. Ex. 14; 51 R. R. 650. See also *Ollivant* v. *Bayley* (1843) 5 Q. B. 288; 13 L. J. Q. B. 34; 64 R. R. 501; *Prideaux* v. *Bunnett* (1857) 1 C. B. (N. S.) 613; 107 R. R. 824; *Mallan* v. *Radloff* (1864) 17 C. B. N. S.) 588; 142 R. R. 532; *Chalmers* v. *Harding* (1868) 17 L. T. 571.

(*t*) *Paul* v. *Corporation of Glasgow* (1900) 3 Fraser 119. A case previous to the Code is *Rowan* v. *Coats & Co.* (1885) 12 Ret. 395.

thing ordered should be a specific existing thing. It is sufficient if it be an unascertained article of a defined kind, a "*specified* article" (*u*). Lord Russell, C.J., states the scope of the proviso to section 14 (1) in *Gillespie* v. *Cheney* (*x*). It is "intended to meet the case, not of the supply of what may call for this purpose raw commodities or materials, but for the supply of manufactured articles—steam ploughs or any form of invention which has a known name, and is bought and sold under its known name, patented or otherwise."

Meaning of "patent or other trade name."

And Farwell, L.J., in *Bristol Tramways, &c. Co.* v. *Fiat Motors* (*y*), thus explains the scope of the proviso to section 14 (1): "This must, in my opinion, be confined to articles which have in fact a patent or trade name under which they can be ordered. By A.'s patent shaving machine I mean a known article dealt in under that name. It is one thing to order an article known as a Fiat omnibus, an order which is intelligible only if there be such an article known to the public or the trade; it is quite another thing to order an omnibus to be made by the Fiat Company, although in the latter case that company might adopt patterns and devices which were its own exclusive property: the former is within the proviso, the latter is not. An omnibus made by the Fiat Company may well be described as a Fiat omnibus, but such nomenclature does not necessarily constitute a trade name within the Act: if it did, a manufacturer could always get the benefit of the proviso by labelling all the goods made by him with his own name. A trade name has to be acquired by user, and whether it has or has not been so acquired is a question of fact in each case."

Bristol Tramways, etc., Co. v. *Fiat Motors* (1910).

In accordance with this principle it was held in the above case, where the plaintiffs ordered of the defendants "the 24/40 h.p. Fiat omnibus" which they had inspected, and "six 24/40 h.p. Fiat omnibus chassis," that the omnibus was not sold under its "patent or trade name," it being shown that there was no definite uniformly constructed article known to the market under such a name; and that the defendants had merely contracted to provide, under section 14 (1) and (2), an omnibus and chassis that would work at Bristol: and not having provided a sufficient article, were liable in damages.

Express condition as to fitness of patent article.

There may, of course, be an express engagement by the seller to supply a patent article to be fit for the buyer's

(*u*) See Mellor, J.'s, third rule, *ante*, 714.
(*x*) [1896] 2 Q. B. 59, at 64; 65 L. J. Q. B. 552.
(*y*) [1910] 2 K. B. 831; 79 L. J. K. B. 1107, C. A.

purpose, as, for example, where he knows the buyer's purpose and volunteers to supply the article to effect it (*z*).

Must also be merchantable.

And, apart from any such warranty, an article bought under its patent or other trade name must be of merchantable quality under the description under which it was sold (*a*). And the terms of the proviso show that it does not apply except to the patent or trade article *itself*. A condition of the fitness of articles supplied which are necessary to the use of the patent article, may sometimes be implied.

Fitness of articles sold for use of patent article.

Thus where the patentee of a particular gas installed a gas plant, but miscalculated the size of the plant, so that the lighting and heating was wholly insufficient in quantity, but there was no failure in the quality of the gas itself, it was held that a condition should be implied as to the fitness of the plant, and the proviso to section 14 (1) did not apply (*b*).

Warranty not implied in favour of third person.

The condition or warranty as to fitness is not, of course, implied in favour of a third person not a party to the contract of sale, between whom and the seller there is no privity of contract. To render the seller responsible to a third person, the latter must show either fraud on the part of the seller, or a *duty* to him to take care that the thing sold is fit. The reader is referred to *Longmeid* v. *Holliday*, already set out (*c*), and the discussion in the previous part of this work as to the rights of third parties in respect of the seller's fraud or negligence (*d*).

Seller's liability in tort to buyer for knowingly selling dangerous article.

Apart from condition or warranty, a seller of goods may be liable in tort to the buyer when he sells an article which he knows to be of such a character as to be likely to be dangerous to the buyer, and does not warn the buyer of the fact.

Clarke v. *Army and Navy Co-op. Socy.* (1903).

Thus, where the plaintiff bought from the defendants a tin of chlorinated lime for disinfecting purposes, and on being opened the contents of the tin unexpectedly flew out and injured the buyer's eyes, the defendants were held liable for negligence in not warning the buyer, it being proved that

(*z*) *Per* Lord Abinger, C.B., in *Chanter* v. *Hopkins* (1838) 4 M. & W. at 405; 8 L. J. Ex. 14; 51 R. R. 650; *Hydraulic Eng. Co.* v. *Spencer* (1886) 2 Times L. R. 554, C. A.

(*a*) *Bristol Tramways, etc., Co.* v. *Fiat Motors* [1910] 2 K. B. 831; 79 L. J. K. B. 1107, C. A.; *per* Fitzgibbon, L.J., in *Williamson* v. *Rover Cycle Co.* 1901) 2 Ir. R. 615, at 620, C. A.

(*b*) *Paterson* v. *Newman* (1908) 28 N. Z. L. R. 218.

(*c*) (1851) 6 Ex. 761; 20 L. J. Ex. 430; 86 R. R. 459; *ante*, 518. See also *Winterbottom* v. *Wright* (1842) 10 M. & W. 1 ; 11 L. J. Ex. 415; 62 R. R. 534; *Preist* v. *Last* (1903) Times L. R. 278; . J. K. B. 657; in the Court below.

(*d*) *Ante*, 511 *et se*

they knew a similar accident had happened in previous sa to other persons (*e*).

S. 14 (2). Condition as to merchantable quality.

With regard to the merchantable quality of goods c tracted for (*f*), the common law rule was first clearly sta by Lord Ellenborough in *Gardiner* v. *Gray* (*g*), where defendant made a sale of twelve bags of "waste silk." declaration contained counts charging the promise to be t the silk should be of a good and merchantable quality. L Ellenborough said: "Under such circumstances the purcha has a right to expect a *saleable* article, answering the desc tion in the contract. Without any particular warranty, is an implied term in every such contract. Where there is opportunity to inspect the commodity, the maxim of *ca emptor* does not apply (*h*). He cannot, without a warra insist that it shall be of any particular quality or finen but the intention of both parties must be taken to be tha shall be saleable in the market under the denomination m tioned in the contract between them. The purchaser ca be supposed to buy goods to lay them on a dunghill."

Rule at common law.

Gardiner v. *Gray* (1815).

Jones v. *Just* (1868).

This rule was followed in a long series of decisions (*i*), the law on the subject was reviewed (*k*), and the c classified, in *Jones* v. *Just* (*l*), decided in the Queen's Be in 1868. The plaintiffs in that case bought from the de dant certain "bales Manilla hemp," expected to arrive ships named. The vessels arrived, and the hemp delivered, damaged, so as to be unmerchantable, but b still properly described as Manilla hemp. *Held*, that seller was liable, and that in every contract to supply g of a specified description, which the buyer has had no op tunity (*m*) to inspect, the goods must not only answer

(*e*) *Clarke* v. *Army and Navy Co-op. Soc.* [1903] 1 K. B. 155; 72 K. B. 153, C. A. See also *Blacker* v. *Lake* (1912) 106 L. T. 533, whe cases are reviewed; *White* v. *Steadman* [1913] 3 K. B. 340; 82 L. J. K. B

(*f*) Under s. 14 (2), set out *ante*, 712. (*g*) 4 Camp. 144; 16 R. R

(*h*) Actual inspection and discoverable defects must now concur to ex the condition; see *post*, 729.

(*i*) *Jones* v. *Bright* (1829) 5 Bing. 533; 7 L. J. (O. S.) C. P. 213; 30 728 (copper sheathing); *Laing* v. *Fidgeon* (1815) 4 Camp. 169; 6 Taunt. 16 R. R. 589; *Brown* v. *Edgington* (1841) 2 M. & G. 279; 10 L. J. C. P. 58 R. R. 408; *Shepherd* v. *Pybus* (1842) 3 M. & G. 868; 11 L. J. C. P. *Camac* v. *Warriner* (1845) 1 C. B. 356; *Stancliffe* v. *Clarke* (1852) 7 Ex. 21 L. J. Ex. 129; *Bigge* v. *Parkinson* (1862) 7 H. & N. 955; 31 L. J. Ex. 126 R. R. 783; in Ex. Ch.; *Gorton* v. *Macintosh & Co.* (1883) W. N. 188 C. A., revg. the Div. Court (1882) 31 W. R. 232, where it was held that a tion that there should be "no allowance for imperfections" did not overri implied condition that the goods should be merchantable. See Code, s. 1 *post*, 786.

(*k*) See the summary set out *ante*, 713.

(*l*) L. R. 3 Q. B. 197; 37 L. J. Q. B. 89

(*m*) See, however, now *infra*.

description, but must be saleable or *merchantable* under that description.

Where, therefore, the goods contracted for were inaccessible to inspection, merchantable quality was at common law *part of the description* of the goods (*n*). This rule was an inference from the character of the transaction that the parties were dealing, not for the mere semblance or shadow of the thing designated, but for *the thing itself* as understood in commerce, with the essential qualities which make it worth buying to a person who wants an article of that designation; in other words, that the parties *prima facie* intend to buy and sell respectively a merchantable article of the designated kind (*o*).

Under the Code.

Under the Code, if the goods are bought "by description" (a phrase which has already been shown not to be necessarily synonymous with kind or class (*p*)) the condition of merchantable quality will be excluded, not, as at common law, by the existence of an opportunity of examination, but only by an actual examination, and then only as regards discoverable defects (*q*). No condition will be implied unless the seller deal in goods of that description, *i.e.*, kind (*r*).

Examination. *Thornett & Fehr* v. *Beers & Son* (1919).

In *Thornett & Fehr* v. *Beers & Son* (*s*), the defendants bought glue of the plaintiff. Before the contract the defendants' agents were offered every facility of inspecting the goods at the plaintiff's warehouse. Being pressed for time, they did not ask for the barrels to be opened, but they inspected the outside only. They afterwards admitted they had inspected the goods. *Held*, by Bray, J., that the buyer having partly relied on the description had bought the glue "by description," and must be held to have examined it. They were satisfied by their inspection of the barrels, which, if opened, would have shown the condition of the glue, and they were willing to take the risk, the price being low. Moreover, under the Code a full examination was not necessary. Accordingly, no condition of merchantable quality could be

(*n*) *Per* Brett, L.J., in *Randall* v. *Newson* (1877) 2 Q. B. D. 101, at 109; 46 L. J. Q. B. 259, C. A.

(*o*) *Per* Willes, J., in *Mody* v. *Gregson* (1868) L. R. 4 Ex. 49, at 52; 38 L. J. Ex. 12.

(*p*) *Ante*, 696, 699.

(*q*) *Per* Palles, C.B., and Andrews, J., in *Wallis* v. *Russell* (1902) 2 Ir. R. at 596, 597; *ante*, 719.

(*r*) The difference of language on this point in s. 14 (2) as compared with s. 14 (1) should be noticed. S. 14 (1) says, "and the goods are of a description which it is in the course of the seller's business to supply"; s. 14 (2) says "a seller who deals in goods of that description." But the two expressions no doubt mean the same thing.

(*s*) [1919] 1 K. B. 486; 88 L. J. K. B. 684.

implied. The learned Judge also said there was a questi (which he did not decide) whether the defendants were estopped by their admission that they had "inspected" glue.

Furthermore, the goods must be of merchantable qual *in fact*; the circumstance that the buyer has obtained a sou price for them on a resale will not prove them to be mercha able, for the defect may be latent (*t*).

Definition of "merchantable quality."

Goods are of merchantable quality if they are of s quality and in such condition that a reasonable man, acti reasonably, would, after a full examination, accept th under the circumstances of the case in performance of offer to buy them, whether he buys for his own use or sell again (*u*).

Latent defects.

To exclude the condition of merchantable quality wh the goods have been inspected, the inspection must be a one, for "the object and use of either inspection of bulk sample alike are to give information, disclosing direc through the senses what any amount of circumlocution mi fail to express" (*x*). Consequently, if the defects be late the examination is unreal, and the condition is so far excluded.

S. 14 (2) applies to specific goods.

It will be observed that there are no words in section 14 to confine its operation to unascertained or future goo indeed, the fact that the sub-section contemplates the po bility of the goods having been actually examined shows t specific goods are not excluded (*y*).

Seller must be a dealer.

Turner v. *Mucklow* (1862).

In *Turner* v. *Mucklow* (*z*), there was a sale of a boat-load "spent madder," the refuse of madder roots which the se had used in dyeing goods. From this spent madder could extracted a dye called garrancine, which the buyers ma factured, and this was the only known use of spent madd but the buyers found the madder delivered to be useless that purpose. *Held* that the sellers had performed their c

(*t*) See *Wieler* v. *Schilizzi* (1856) 17 C. B. 619; 25 L. J. C. P. 89; R. R. 815; *ante*, 703.

(*u*) *Per* Farwell, L.J., in *Bristol Tramways, etc., Co.* v. *Fiat Motors* [19 2 K. B. 831, at 841; 79 L. J. K. B. 1107, C. A.

(*x*) *Per* Willes, J., in *Mody* v. *Gregson* (1868 R. 4 Ex. at 53; 38 L Ex. 12, quoted and app. by Lord Herschell in *Dr nd* v. *Van Ingen* 1 12 A. C. 294; 56 L. J. Q. B. 563.

(*y*) S. 14 (1) was decided to apply to specific goods by the Irish C. A *Wallis* v. *Russell* [1902] 2 Ir. R. 585, *ante*, 701; and s. 14 (2) by the S. C South Australia in *Kidman* v. *Fisher Bunning & Co.* (1907) South A. L. 101, where the above passage was cited.

(*z*) 8 Jur. (N. S.) 870; 6 L. T. (N. S.) 690. See also *Wilson* v. *Dun* (1879) 6 L. R. Ir. 210; *Ipswich Gas Co.* v. *King & Co.* (1886) 3 T. L. R. C. A.

tract by delivering spent madder, although it was unmerchantable, as they did not manufacture it for sale (*a*).

Shepherd v. Pybus (1842).

In *Shepherd* v. *Pybus* (*b*), there was a sale in writing by the *builder* of a barge then nearly completed, and described as "a new barge now lying at Thomas Pybus' wharf." The purchaser had inspected it after it was built, but he had had no opportunity of inspecting it during its progress. It was held that there was an implied warranty by the seller, as the manufacturer, against such defects, not apparent by inspection, as rendered the barge unfit for use as an ordinary barge, but that there was no implied warranty that the barge was fit for the precise use for which the buyer intended it, but which was not communicated by him to the seller (*c*).

Further illustrations of the rule of merchantable quality will be found in *Wren* v. *Holt* (*d*), *Jones* v. *Padgett* (*e*), *Drummond* v. *Van Ingen* (*f*), and *Jackson* v. *Rotax Motor, &c. Co.* (*g*).

Deterioration of goods in transit to buyer

When the seller agrees to despatch the goods to the buyer, or to deliver them to the buyer at a particular place, the merchantable quality of the goods on arrival may be affected by the duration of the transit. On this subject the Code enacts:

Code, s. 33.

"**33.** Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit."

Where the seller agrees to deliver the goods at a particular place, *prima facie* he takes the risk during the transit, as the property does not pass till delivery (*h*). The present

(*a*) The judgments show that the *ratio decidendi* was as stated in the text. The case is explained by Mellor, J., in *Jones* v. *Just* (1868) L. R. 3 Q. B. at 206; 37 L. J. Q. B. 89, also on the ground that the madder was open to the buyer's inspection. This ground is not noticed by any of the Judges.

(*b*) 3 M. & G. 868; 11 L. J. C. P. 101; cited by Farwell, L.J., in *Bristol Tramways, etc., Co.* v. *Fiat Motors* [1910] 2 K. B. 831, at 841; 79 L. J. K. B. 1107, C. A., as illustrating his definition (quoted *ante*, 730) of merchantable quality.

(*c*) The reporter at 871 and Tindal, C.J., at 877, both state that the defendant knew the purpose for which the buyer wanted the barge; but the learned Judge afterwards (at 881) says that there was not "any evidence of distinct notice, or of a declaration to the defendant at the time the plaintiff inspected the barge or entered into the contract, of the *precise* service or use for which the barge was purchased."

(*d*) [1903] 1 K. B. 610; 72 L. J. K. B. 340, C. A.; *ante*, 701.

(*e*) (1890) 24 Q. B. D. 650; 59 L. J. Q. B. 261; *ante*, 723.

(*f*) (1887) 12 A. C. 284; 56 L. J. Q. B. 563; *post*, 742.

(*g*) [1910] 2 K. B. 937; 80 L. J. K. B. 38, C. A.

(*h*) *Per* Lord Herschell in *The Badische* v. *Basle Chem. Works* [1898] A. C. 200, at 207; 67 L. J. Ch. 141. See also *Ullock* v. *Reddelein* (1828) Dans. & Ll. 6; 5 L. J. (O. S.) K. B. 208; *set out ante*, 401; *Walker* v. *Langdale's Chem. Manure Co.* (1873) 11 C. of S. 3rd s. 906; Code, s. 20, set out *ante*, 451.

section qualifies the seller's risk by throwing on the buyer risk of necessary deterioration.

Bull v. *Robison* (1854).

In *Bull* v. *Robison* (*i*), there was a sale of hoop iron, sent from Staffordshire, the place of making it, to Liverp where the seller agreed to deliver it in January and Febr The iron was clean and bright when it left the sel premises to be forwar'ed by canal boats, vessels, and and was rusted before it reached Liverpool, but not mo than was the necessary result of the transit. *Held*, tha seller was not responsible if it thereby became unmerchan to that extent when received in Liverpool, but that, ha contracted to deliver the iron at a distant place, he w have been liable to take the risk of any extraordinar unusual deterioration.

Beer v. *Walker* (1877).

In *Beer* v. *Walker* (*k*) (in which *Bull* v. *Robison* wa cited), the seller agreed only to *despatch* the goods. was a contract by the plaintiff, a wholesale provision d to *send* rabbits weekly by rail from London to Brighto the defendant, a retail dealer there. The rabbits were *when delivered to the railway company* in London, but for food when they reached the defendant. It was p that they were sent in the ordinary course of business, that nothing exceptional had occurred in the transit. held by Grove, J., and Lopes, J., on the authority of v. *Parkinson* (*l*), that there was an implied condition tha rabbits should be fit for human food, and further, that condition extended, if nothing happened out of the ord course, until the rabbits reached the defendant at Brig and he had had a reasonable opportunity of dealing with in the usual way of business.

Winnipeg Fish Co. v. *Whitman Fish Co.* (1909).

In *Winnipeg Fish Co.* v. *Whitman Fish Co.* (*m*) respondents sold to the appellants by sample a car-load to be shipped from Canso, Nova Scotia, "f.o.b. Winni The fish arrived frozen, and was kept by the appellants s weeks under atmospheric conditions which would deteriorate the fish by thawing. On resale it was found unfit for food, and was condemned. In an action fo

(*i*) 10 Ex. 342; 24 L. J. Ex. 165; 102 R. R. 620. A better rep 2 C. L. R. 1276. See in Amer. *Lord* v. *Edwards* (1889) 148 Mass. 476.

(*k*) 46 L. J. C. P. 677; folld. in *Burrows* v. *Smith* (1894) 10 T. L. where, however, the partridges must have been unmerchantable when s See also *B* v. *Waugh* (1906) 41 Nov. Sc. R. 38 (freezing of o exceptional e); *Mayhew* v. *Scott Fruit Co.* (1915) 30 West. L. R. (freezing of potatoes exceptional).

(*l*) (1862) 7 H. & N. 955; 31 L. J. Ex. 301; 126 R. R. 783; *post*, 74

(*m*) (1909) 41 Can. S. C. R. 45.

price with a counterclaim for breach of warranty, it was held by the Supreme Court of Canada that the seller had agreed to deliver the fish at Winnipeg, and consequently the property did not pass until arrival; that under section 33 the sellers took all risks except that of necessary depreciation in transit; that the depreciation of the fish had not been shown to be necessary, but must have arisen from some unusual or exceptional cause, the risk of which fell on the seller, who accordingly could not recover the price as the buyers had not accepted the fish, and was liable for breach of warranty. *Beer* v. *Walker* was distinguished as being a case where the seller contracted merely to despatch the goods.

Ollett v. *Jordan* (1918).

In *Ollett* v. *Jordan* (*n*), the buyer at Eastbourne ordered fish from the seller at Hull. The fish was sent off by rail at 6 p.m. in sound condition, and was delivered to the buyer at 1 p.m. the next day. At that time it had an unpleasant smell. The next morning it was inspected by the inspector of nuisances, and condemned. The question in the case was whether the seller had exposed the fish for sale at Eastbourne, and whether the seller was at the time of the exposure the owner. *Held*, that the seller was liable to conviction. There was no sale until the buyer had accepted the fish, as, according to *Beer* v. *Walker*, the contract was subject to an implied condition, not only that the fish should be merchantable when sent off, but also should be merchantable for a reasonable time after arrival; and, as the buyer had rejected the fish, the seller was the owner at Eastbourne.

This case considered.

This decision does not seem to be satisfactory. No case on the particular point but *Beer* v. *Walker* was cited, nor was any attempt made in argument to contend that the property had passed to the buyer; and, the controversy not being one between buyer and seller, the attention of the Court was not drawn to the results of their decision in cases of sale. If the property, in cases similar to *Beer* v. *Walker*, be suspended until the buyer accepts the goods at the end of the transit, the consequence *prima facie* follows that the risk of the loss or destruction of the goods in transit attaches to the seller, as great a liability being thus forced upon him as if he had agreed to deliver the goods at their destination—an unfair consequence.

It may also be observed that Avory, J.'s, proposition that "if the purchaser had the right to inspect and reject, and she did inspect and reject, the property had never passed," is not

(*n*) [1918] 2 K. B. 41; 87 L. J. K. B. 934.

an absolute test, for a buyer sometimes, as will be expl hereafter (*o*), has a right to reject what has becom property. And it is with diffidence submitted that *Be W'alker* was an illustration of this rule. And so it has held in Canada (*p*). *Beer* v. *Walker* seems to be the thetical case put by Blackburn, J., in *Calcutta* Navigation Co. v. *De Mattos* (*q*). The parties, he "may bargain that the property shall vest in the pur as owner as soon as the goods are shipped, that they shall be both sold and delivered, and yet that the price (in wh in part) shall be payable only on the contingency of the arriving."

Rule deducible from such cases.

The rule deducible from the authorities is, it is subm as follows: The goods despatched, if they are perishable will not be merchantable unless they can so stand the jo in the ordinary course of transit to the buyer as to be chantable (saving *necessary* deterioration (*r*)) on arrival until the buyer has a reasonable opportunity of dealing t with in the ordinary way of business (*s*). Of deterio arising from exceptional or accidental causes the owner take the risk (*t*); that is to say, the seller if he contract deliver the goods at their destination (*u*), or has othe retained the right of disposal until the arrival of the good or the buyer if the goods were merely to be sent off (*y*). rule is, of course, subject to any contrary intention as t incidence of the risk (*z*).

(*o*) In the Chapter on Acceptance, *post*.

(*p*) This follows from the language of the Court in *Barnes* v. W *ante*, 732, n. (*k*).

(*q*) *Ante*, 461.

(*qq*) All the cases are concerned with articles of food. *Qy*. whether th is wider?

(*r*) *Bull* v. *Robison*; Code, s. 33, *ante*, 731.

(*s*) See Platt, B.'s, charge to the jury in *Bull* v. *Robison*, 10 Ex. a 24 L. J. Ex. 165; 102 R. R. 620; and *per* Alderson, B., 10 Ex. at 346; and v. *Walker*, 46 L. J. C. P. 677.

(*t*) See Code, s. 20, set out *ante*, 451. This, it is submitted, is the me of Alderson, B.'s language in *Bull* v. *Robison*, 10 Ex. at 346; 24 L. J. Ex 102 R. R. 620; where the property in the goods remained in the seller delivery at Liverpool.

(*u*) *Per* Lord Herschell in *The Badische* v. *Basle Chem. Works*, *ante*

(*x*) *Dickson* v. *Zizinia* (1851) 10 C. B. 602; 20 L. J. C. P. 73; 84 R. R (goods warranted sound on shipment only) *post*; *Crozier* v. *Auerbach* [2 K. B. 161, C. A.; 77 L. J. K. B. 873 (c.i.f. contract); overruling *Barr Myers* (1888) 4 T. L. R. 441 (apples); *Bowden Brothers & Co.* v. *Little* 4 Com. L. R. (Austr.) 1364 (c.i.f., onions).

(*y*) See Code, s. 18, Rule 5 (2), set out *ante*, 393. These two parag were approved by the Sup. Ct. of Nova Scotia in *Barnes* v. *Waugh* (190 Nov. Sc. R. 38. But see observations on *Ollett* v. *Jordan* in text.

(*z*) *Corby* v. *Williams* (1881) 7 Can. S. C. R. 470 (c.i.f.: wrongful r tion of right of disposal).

The definition of "quality" in the Code including "state or condition" (*a*), the buyer may reject the goods if the receptacle in which they are contained prevents their being merchantable.

Receptacle of the goods as affecting merchantable quality.

In *Gower* v. *Van Dedalzen* (*b*), the dispute arose out of a sale of a cargo of oil, alleged in the declaration to be good merchantable Gallipoli oil, *the said cargo consisting of* 240 *casks*, and the defendant, the buyer, in an action for non-acceptance, did not deny that the oil was merchantable, but pleaded that the casks "were not well seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the agreement." On special demurrer, the plea was held ill, as the contract was for oil and not casks, Tindal, C.J., saying, however: "I can conceive cases in which the state of the receptacle of the article sold might furnish a defence, as if it were a pipe of wine in bottles, with the cork of every bottle oozing: but in such a case the plea would be that the wine was not in a merchantable state."

Gower v. *Van Dedalzen* (1837).

Accordingly, in *Makin* v. *The London Rice Mills Co.* (*c*), where the plaintiff bought for shipment to America rice described as "best Siam rice in double bags," that is, in gunny bags, and it was proved that rice in double bags was more saleable in New York, and that double bags were considered absolutely essential to the transit of rice to the West, it was held that the mode of packing affected the quality and description of the goods, and that the buyer could reject rice in single bags, although they were of an improved construction, equal to gunny bags for the preservation of the rice, and although the rice in fact arrived in perfect condition.

Makin v. *London Rice Mills Co* (1869).

With regard to sale by sample, the Code provides:—

Sale by sample. Code, s. 15.

"15.—(1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect (*d*).

(*a*) S. 62 (1).

(*b*) 3 Bing. N. C. 717; 6 L. J. C. P. 198; 43 R. R. 776; *Geddling* v. *Marsh*, *ante*, 722. A clause in a linseed oil contract issued by the Produce Brokers' Co. provides for "good, strong iron-bound barrels"; and also that "should the oil be required for export the barrels shall be fit for shipment."

(*c*) 20 L. T. 705; 17 W. R. 768. See also *Mambre Saccharine Co.* v. *Corn Products Co.* [1918] 1 K. B. 198; 88 L. J. K. B. 402, where it was held that the size of the bags was part of the description of the goods. A form of contract for Calcutta linseed, issued by the Incorp. Oil Seed Ass., provides for delivery "ex ship in London including the usual double gunny, or Borneo Company's double bags, or bags equal in value thereto. . . . If only single bags are delivered, buyer to be allowed one shilling per 410 lbs." There is a similar provision in the East Indian rape seed contract, with an allowance of one shilling per 416 lbs.

(*d*) This clause is considered *post*, 737.

"(2.) In the case of a contract for sale by sample—

"(a) There is an implied condition that the bulk shall correspo with the sample in quality (*e*):

"(b) There is an implied condition that the buyer shall have reasonable opportunity of comparing the bulk with t sample (*f*):

"(c) There is an implied condition that the goods shall be free fr any defect, rendering them unmerchantable, which would n be apparent on reasonable examination of the sample" (*g*).

Each of these clauses will now be separately considered.

We have already seen that the bulk, if sold by descriptio must correspond with the description (*h*). By the clause (2) (a above cited, the bulk must also correspond with the samp in quality (*e*).

At common law.

The rule is so universally taken for granted that it is hard necessary to give direct authority for it. The cases are ve numerous in which it has been applied as a matter of course (*i* In *Parker* v. *Palmer* (*k*), Abbott, C.J., stated it in th language: "The words 'per sample,' introduced into th contract, may be considered to have the same effect as if th seller had in express terms warranted that the goods sol should answer the description of a small parcel exhibite at the time of the sale." And in *Parkinson* v. *Lee* (*l* Lawrence, J., in a sale of hops by sample, said that th contract was "no more than that the bulk should agree wit the sample," and the latter is the phrase used by the Judge *passim*. And that this so-called warranty was even a common law really a condition appears clearly from Lor Ellenborough's language with regard to a sale by sample i *Hibbert* v. *Shee* (*m*), where he says: "If I buy a commodity wholly discordant to that which is promised me, I am no bound to accept of a compensation for the dissimilarity. Thi is not a performance of the contract."

As in the case of the implied conditions as to fitness and a

(*e*) "'Quality of goods' includes their state or condition": s. 62 (1). Th clause is considered *infra*.

(*f*) This clause is considered *post*, 740. See also s. 34 (1), *post*, 750.

(*g*) This clause is considered *post*, 741.

(*h*) *Ante*, 695.

(*i*) See, for example, *Borrowman* v. *Rossel* (1864) 16 C. B. (N. S.) 58 33 L. J. C. P. 111; 139 R. R. 409 (petroleum: equitable plea); *Heilbutt* v *Hickson* (1872) 7 C. P. 438; 41 L. J. C. P. 228 (boots), set out *post*; *Meller* v *Japing* (1889) 5 T. L. R. 574 (wrong colour of cloth); *Wells* v. *Hopkins* (183 5 M. & W. 7; 52 R. R. 611 (non-accordance of bulk with sample a failure consideration).

(*k*) (1821) 4 B. & A. 387; 23 R. R. 313.

(*l*) (1802) 2 East, 314; 6 R. R. 429.

(*m*) (1807) 1 Camp. 113; 10 R. R. 649. See also *Wells* v. *Hopkins supra*; and *per* Smith, J., in *Azemar* v. *Cassela* (1867) 2 C. P. 446; 36 L. J C. P. 263.

to merchantable quality, there are no words in section 15 to confine its operation to unascertained goods; accordingly, even in the case of a *specific* bulk of goods bought by sample, a condition that the bulk is according to sample will be implied.

Semble, the section covers specific goods.

It must not be assumed that in all cases where a sample is exhibited the sale is a sale "by sample." The seller may show a sample, but decline to sell by it, and require the buyer to inspect the bulk at his own risk; or the buyer may decline to trust to the sample and the implied condition, and require an express condition or warranty, in which case there is none implied, for "*expressum facit cessare tacitum*" (*n*), or the contract may be in writing (*o*), making no mention of any sample, as in the two following cases.

Code, s. 15 (1). All sales where sample shown not necessarily sales "by sample."

In *Tye* v. *Fynmore* (*p*), where the seller exhibited a sample of "sassafras wood," and the buyer inspected it, and had skill in the article, and the seller then in the sale note described the goods to be "fair merchantable sassafras wood," it was held not to be a sale by sample, but a sale by description, with express condition that the wood should be what was understood by "sassafras wood."

Tye v. *Fynmore* (1813).

So, in *Gardiner* v. *Gray* (*q*), the sale was of goods described in the sale note (which did not refer to any sample) as "waste silk." A sample was shown, but Lord Ellenborough said it was not a sale by sample. "The written contract containing no such stipulation, I cannot allow it to be superadded by parol. . . . The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity."

Gardiner v. *Gray* (1815).

So where, in *Meyer* v. *Everth* (*r*), the sold note was in writing for "fifty hogsheads of Hambro' sugar loaves" simply, without reference to quality, the buyer was not permitted by Lord Ellenborough to show that a sample had been exhibited to him before he bought, because it was not a sale "by sample." But such evidence might have been given had the buyer declared in case for a fraudulent misrepresentation of quality (*s*).

Meyer v. *Everth* (1814).

(*n*) And see *per* May, C.J., in *McMullen* v. *Hellberg* (1879) 4 L. R. Ir. 184.

(*o*) Subject, however, to usage of trade, showing that the sale was by sample: *Syers* v. *Jonas* (1848) 2 Ex. 111; 76 R. R. 515. See Code, s. 14 (3), *post*, 746, and s. 55, *ante*, 254.

(*p*) 3 Camp. 462; 14 R. R. 809. See also *Ginner* v. *King* (1890) 7 T. L. R. 140, C. A. (sugar).

(*q*) 4 Camp. 144; 16 R. R. 764.

(*r*) (1814) *ib.* 22; 15 R. R. 722.

(*s*) And even without fraud being charged where the sample is used to explain the unintelligible description of the goods sold: *per* Griffith, C.J., in

Russell v. *Nicolopulo* (1860).

In *Russell* v. *Nicolopulo* (*t*), there was a written sale London of a cargo of wheat, which the buyer had n[ot] se[en] then lying in Queenstown. The contract closed with th[e] words: "The above cargo is accepted on the report a[nd] samples of Messrs. Scott & Co., of Queenstown." Mellish, arguing a demurrer to the declaration, which was for a brea[ch] of warranty, insisted that this clause only warranted that t[he] report of Scott & Co. was a genuine report, and that t[he] samples were genuine samples, but was not a warranty eith[er] that the statements in the report were true, or that the ca[rgo] was equal to the samples. But all the Judges held that t[he] warranty suggested would have been valueless to the buy[er] that the true meaning of the clause was that the samp[les] shown to the buyer were really samples drawn from the carg[o] as represented in the report of Scott & Co.; and that the b[ulk] corresponded with the samples so drawn.

Towerson v. *Agricultural Aspatria Society* (1872).

And in a sale of guano, where the buyer had asked fo[r] "guaranteed analysis" to accompany the sample, and [a] printed analysis signed by the seller had been sent with t[he] sample, the seller was held to have warranted not only th[at] the bulk was equal to sample, but that the analysis, [at] the time it was made, was a fair analysis of the bulk out [of] which the guano was supplied (*u*).

Sale only after examination by buyer.

In the following case the seller did not sell by sample, b[ut] agreed to sell only if the buyer examined the bulk for himse[lf].

Barnard v. *Kellogg* (1870).

In *Barnard* v. *Kellogg* (*x*), in the Supreme Court of t[he] United States, the appellant, a commission merchant [in] Boston, instructed his brokers to sell some foreign w[ool] received, but not to sell unless the purchaser came to Bost[on] and *examined the wool for himself*. The brokers sent to t[he] respondents in Hartford, at their request, samples of t[he] wool, and the latter offered to purchase it at fifty cents [a] pound, all round, if equal to the samples furnished, and th[at] offer was accepted, *provided* that the respondents examin[e] the wool on the succeeding Monday, and reported on th[at] day whether or not they would take it. The responden[ts] agreed, and went to Boston and examined four bales as fu[r]

W. & J. Sharp v. *Thomson* (1915) 20 Com. L. R. 137 (Austr.). Isaacs, J., h[el]d ever, dissented, with regard to written contracts, on the authority of Lord Ell[en]borough's ruling.

(*t*) 8 C. B. (N. S.) 362; 125 R. R. 683.

(*u*) *Towerson* v. *Agricultural Aspatria Soc.*, 27 L. T. 276, Ex. Ch., [re]Court of Exchequer on the question whether there was any warranty of the b[ulk] being equal to the analysis. See also *Clark* v. *Schwartz* (1853) 2 W. R. [Ir.]

(*x*) (1870) 10 Wall. 383.

as they desired, and were offered an opportunity, which they declined, to examine all the bales and to have them opened for inspection. Some months afterwards, on opening the bales, it was found that some were falsely packed by placing in the interior rotten and damaged wool and tags, concealed by an outer covering of fleeces in good condition. The purchasers, therefore, demanded indemnity for the loss. It was conceded that the seller knew nothing of the false packing.

On action brought by the respondents there were three counts: (1) upon sale by sample; (2) upon a promise, express or implied, that the bales should not be falsely packed; (3) upon a promise, express or implied, that the inside of the bales should not differ from the samples by reason of false packing. It was held (*y*) by the Supreme Court, reversing the lower Court, that the sale was not by sample, as shown by the fact that the purchaser went to Boston to inspect the goods for himself, which was unnecessary if the sale was by sample,—and had assented to the condition that the sale was only to take place aft[illegible]his own examination.

Average sample.

Where an average [illegible] was taken of a large quantity of goods (beans) contai[illegible] a number of packages by drawing samples from all the packages and then mixing them together, it was held by the Court of Appeal of the State of New York, in *Leonard* v. *Fowler* (*z*), that the purchaser could not reject any of the packages on the ground that *they* were inferior to the average, nor recover for the difference in value on that ground; that the true test w[illegible]s whether, if the contents of all the packages delivered were mixed together, the quality of the bulk so formed was equal to that of the average sample drawn.

New York decision. *Leonard* v. *Fowler* (1871).

Massachusetts decision. *Schnitzer* v. *Oriental Print Works* (1873).

And in Massachusetts, on a contract for twenty-six bags of Persian berries by a sample drawn from three to five of the bags, where the buyer had claimed to reject some of the goods on the ground that they were inferior to the sample, evidence was held admissible to prove a custom that, upon a sale of berries in bags by sample, the sample represented the average quality of the entire lot, and not the quality of the amount contained in each bag taken separately (*a*).

(*y*) The S. C. also held that, the buyer having inspected the goods, *caveat emptor* applied, and that trade usage could not be shown to imply a warranty of quality, especially as the parties had no knowledge of it. As to the first point, see now s. 14 (2) of the Code.

(*z*) 44 N. Y. 289.

(*a*) *Schnitzer* v. *Oriental Print Works*, 114 Mass. 123. In some contracts in England it is common to provide that the stipulated quality of the goods

Code, s. 15 (2), (*b*).

Opportunity of comparing bulk.

In a sale of goods by sample it is a condition implied law that the buyer shall have a reasonable opportunity comparing the bulk with the sample, and an improper ref by the seller to allow this is a breach which justifies buyer in rejecting the contract (*b*).

Lorymer v. *Smith* (1822).

In *Lorymer* v. *Smith* (*c*), the purchaser by sample of parcels of wheat of 700 and 1,400 bushels respectively a to look at the bulk. He was shown the 700 bushels, and a refusal by the seller to shew the other parcel he said would not take the wheat. A few days afterwards the s expressed his readiness then to show the bulk, and to m delivery on payment of the price. *Held*, by the Ki Bench, that, the buyer's request having been made at a pr and convenient time and refused, he had the right to re the sale of both lots. In this case a usage was shown the buyer had the right of inspection when demanded, Abbott, C.J., said that even without the usage the law w give him that right.

Ss. 15 (2) (*b*) and 34 (1) contrasted.

Clause (b) of section 15 (2) seems to cover wider gro than section 34 (1). The latter specifies the buyer's righ examine the goods on delivery for the purpose of ascertai whether they are in conformity with the contract, w *Lorymer* v. *Smith* (on which section 15 (2) (b) is based) sh that the buyer may repudiate the contract if inspection refused *before* delivery. The reader is referred to wha said on section 34 (1) in the Chapter on Acceptance (*d*).

Waiver of right of comparison.

The right of comparison of bulk may, like any other imp right, be excluded by an express agreement (*e*). Thus, if terms of the contract are that the price is payable in excha for shipping documents, the right is waived, although buyer retains his right of subsequent inspection (*f*) rejection if the goods are not according to contract (*g*).

At common law on a sale by sample no condition a merchantable, or as to any particular quality is ordina implied, for "the use of a sample, which to a person

contracted for shall be tested by a "standard average," which is an av sample of each month's shipment of similar goods from the particular port, kept by a trade association for purposes of comparison. This obtains example, in the oil and seed trades.

(*b*) Section 15 (2) (*b*), *ante*, 736. See also sectio 34 (1), *post*, 856.

(*c*) 1 B. & C. 1; 1 L. J. (O. S.) K. B. 7: *cf. Pettitt* v. *Mitchell* (1842 & G. 819; 12 L. J. C. P. 9; *post*, 843.

(*d*) *Post*, 856.

(*e*) Under section 55.

(*f*) Under section 34 (1), *post*, 856.

(*g*) *Polenghi Brothers* v. *Dried Milk Co.* (1904) 10 Com. Cas. 4 *Clemens Horst Co.* v. *Biddell Brothers* [1912] A. C. 18; 81 L. J. K. B

ordinary diligence and experience would disclose the want of that quality, negatives the implication, because it expresses to the buyer a different intention on the part of the seller" (*h*). It is conceived that the Code has made no alteration in this respect. Clause (c) of section 15 (2) (*i*) excludes a condition of merchantable quality as regards discoverable defects, and the seller in such a case will fulfil his contract under clause (a) if the goods are according to sample, though unmerchantable (*j*).

Use of a sample ordinarily negatives any condition as to merchantable or other particular quality.

But although goods sold by sample are not in general deemed to be sold with an implied condition that they are merchantable, the facts of the case may justify the inference that this implied condition is superadded to the contract.

Thus, the defect which prevents the goods from being merchantable may be latent. As the object and use of either inspection of bulk or of sample alike is to give information, if the sample be deceptive, so as apparently to represent a merchantable article, which is in fact not such, the ordinary presumption that the mere correspondence of the bulk with the sample satisfies the contract is negatived (*k*). This rule is enacted in the Code (*i*).

Otherwise where defects are latent. Code, s. 15 (2) (*c*).

In *Mody* v. *Gregson* (*kk*), the defendants agreed to manufacture and supply 2,500 pieces of grey shirting according to sample at 18s. 6d. per piece, each piece to weigh seven pounds. The goods were manufactured, delivered, and accepted by the plaintiffs' agent as being according to sample, and they probably were so, although the fact did not very distinctly appear. But the goods contained china clay to the extent of 15 per cent. of their weight, introduced into their texture for the *purpose only of making them weigh the seven pounds*, and the goods, which otherwise would not have reached the

Mody v. *Gregson* (1868).

(*h*) *Per* Willes, J., in *Mody* v. *Gregson* (1868) L. R. 4 Ex. 49, at 53; 38 L. J. Ex. 12. The principle has been applied to a case where a sample of alkali, delivered by a dealer in alkali to a glass company, was found to produce good glass, whereas the bulk sold was found to be useless in the manufacture of glass. The jury found that the bulk was according to sample, and the Court of Exchequer refused to disturb the verdict on the ground that, even if the bulk were useless, the buyer must pay the price if the sample had been fairly taken from the bulk: *Sayers* v. *London and Birmingham Flint Glass Co.* (1858) 27 L. J. Ex. 294; S. C. at N. P., 1 F. & F. 63.

(*i*) Set out *ante*, 736, and considered *infra*.

(*j*) See also section 14 (2), *ante*, 712.

(*k*) *Per* Willes, J., in *Mody* v. *Gregson* (1868) L. R. 4 Ex. 49, at 53; 38 L. J. Ex. 12, adopted by Lord Herschell in *Drummond* v. *Van Ingen* (1887) 12 A. C. 284, at 294; 56 L. J. Q. B. 565. See also *per* Lord Macnaghten, *ibid.*, quoted *post*, 745.

(*kk*) L. R. 4 Ex. 49; 38 L. J. Ex. 12. See also *Heilbutt* v. *Hickson* (1872) L. R. 7 C. P. 438; 41 L. J. C. P. 228, set out *post*, 755 *et seqq.*; *Haines, Batchelor & Co.* v. *Firminger* (1885) 2 Times L. R. 107 (sardines).

required weight, were thus rendered unmerchantable. T
defect was discovered on their arrival at Calcutta, but wh
the goods were accepted in Manchester the purchasers co
not tell, by examination or inspection, whether they, or t
samples, contained any foreign ingredient. Under the
circumstances the sellers insisted, in defence to an action f
breach of warranty of merchantable quality, on the gener
proposition that "upon a sale of goods by sample no warran
that they were merchantable could be implied." The Co
held that neither inspection of bulk nor use of samp
absolutely excludes an inquiry whether the thing suppli
was otherwise in accordance with the contract; that if t
sellers in this case had *expressly* agreed to deliver *merchan*
able grey shirting according to sample, without disclosi
that the goods were rendered unmerchantable by the mixtu
of the foreign ingredient, they would have been liable: a
that the facts that the goods were not specific, ascertaine
nor inspected, and that the sample did not disclose the defe
but, on the contrary, falsely represented on its face
merchantable article, taken in connection with the stipulati
that the goods should be of a specified weight, which,
properly complied with, would have ensured a merchanta
article, amounted altogether to a contract *describing* t
goods, and asserting their merchantable quality. The sell
were held bound, the opinion (by Willes, J.) containing th
further significant observations (*l*): "The contract, if tr
fulfilled, would have given the buyer a merchantable artic
and we need not consider whether it (the direction to
jury) might not also be sustained upon the ground that
seller himself made the sample, and must be taken to h
warranted that it was one which, so far as his (the seller
knowledge went, the buyer might safely act upon."

Drummond v. *Van Ingen* (1887).

The same principle received the sanction of the House
Lords in *Drummond* v. *Van Ingen* (*m*). This case affo
the most authoritative exposition of the state of the law
this subject previously to the Code.

In that case, the defendants, cloth merchants, had orde
from the plaintiffs, worsted cloth manufacturers at Bradfo
goods described as "mixt worsted coatings," which were to
in "quality and weight" equal to certain numbered samp

(*l*) At 57. See also judgments in *Drummond* v. *Van Ingen*, *infra*.
(*m*) 12 App. Cas. 284; 56 L. J. Q. B. 563. In the latter report the j
ments in the C. A. are given.

The goods were well known in the trade as "corkscrew twills." The defendants' object, as the plaintiffs knew, was to sell them to clothiers in the United States, and they were returned upon the defendants' hands by their customers as not being suitable. In an action for the price, the defendants counterclaimed for damages, on the ground that the goods were not merchantable. The goods in fact corresponded exactly with the samples, but there was a defect to which both the goods and the samples were subject, namely, "slipperiness;" *i.e.*, such a want of cohesion between the warp and the weft as caused them to give way under the strain of ordinary wear when made up. This defect was not apparent or discoverable upon such inspection as was ordinary and usual in sales of worsted cloths of this class. Day, J., sitting without a jury, found the facts substantially as above stated, and that there was an implied warranty that the cloth should be merchantable as worsted coatings, and should be suitable for being made up into coats. The Court of Appeal declined to interfere with these findings, on the ground that on all the issues there had been a conflict of evidence, with which Day, J., who saw the witnesses, was most competent to deal.

In the House of Lords (*n*) it was contended for the appellants that the findings were wrong upon the evidence, that no warranty would be implied by law, and that the respondents had bought on their own judgment as to the fitness of the cloth. But the decision of the Courts below was unanimously affirmed. Upon the questions of fact, viz., the existence of the alleged defect in the cloth and the latent character of that defect, their Lordships considered themselves bound by the decision of Day, J., and their opinions were directed entirely to the question of implied warranty.

Opinion of Lord Selborne.

Lord Selborne (*o*) admitted that the defect was one of quality. If it had been known to Van Ingen & Co. when they gave the order, or if they had had means, which they ought to have used, of discovering it from the samples, he would have held that the defect was covered by the word "quality" in the contract, and that there was no implied warranty against it. But he held that the word "quality" ought to be restricted to such qualities as were patent or discoverable. He said (*p*): "While the doctrine of implied warranty ought not to be unreasonably extended, so as to require manufac-

(*n*) Lords Selborne, Herschell, and Macnaghten.
(*o*) 12 A. C. at 287; 56 L. J. Q. B. 563.
(*p*) At 288.

turers to be conversant with all the specialities of all the c and businesses which they do not carry on . . . yet I think it does extend to such a case as the present, if the goods, being of a class known and understood, between merchant and manufacturer, as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them when supplied a defect practically new, not disclosed by the samples, but depending on the method of manufacture, which renders them unfit for the market for which they were intended. If it would be unreasonable on the one hand to expect from the manufacturer a more exact knowledge than in the ordinary course of business would be likely to reach him of the processes and modes of treatment through which manufactured goods may pass, in the hands of the merchant or his customers, before being adapted to their ultimate uses, it would be not less unreasonable to expect from the merchant an exact knowledge, not only of the sort of article which he wants, but also of the processes by which it is to be manufactured. He has a right to presume that the manufacturer understands his own business." And he then proceeded to consider the nature of the defect in the present case, and pointed out that the application of some kind of test to the samples would have been necessary.

Of Lord Herschell.

Lord Herschell (*q*), after approving *Mody* v. *Gregson* (*r*), proceeded (*s*) to say that apart from the samples, upon an order for "worsted coatings" given by a merchant to a manufacturer, the designation of the goods showed the purpose for which they were required, and that he thought "that upon such an order the merchant trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used." He agreed that a manufacturer is not bound to know all the purposes to which his goods might be applied. He then considered whether the furnishing of samples made any difference, and held that "when a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the

(*q*) At 290.
(*r*) (1868) L. R. 4 Ex. 49; 38 L. J. Ex. 12; *ante*, 741.
(*s*) 12 A. C. at 293, 294; 56 L. J. Q. B. 563.

manufacturer just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty."

Of Lord Macnaghten.

Lord Macnaghten (*t*) said: "A manufacturer who agrees to supply goods to order, knowing the purpose for which they are required, thereby impliedly undertakes to supply goods fit for the purpose in view." Referring to the argument raised on the plaintiffs' behalf that the goods corresponded to sample, and that therefore any implied warranty was excluded, he described the nature and purpose of a sample in the following language (*u*): "Does this exact correspondence, when it is found to involve an unforeseen and unsuspected defect, relieve the seller from his obligation to supply goods fit for the purpose for which they were intended? After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract, which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests, which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country. . . . In matters exclusively within the province of the manufacturer the merchant relies on the manufacturer's skill."

The nature and purpose of a sample.

Summary of law under ss. 14 and 15.

The law under sections 14 and 15 applicable to cases where the goods are defective, and the buyer has examined them, or the sample, may be thus stated:—

1. If the defect be discoverable, its existence is not a breach of the condition of merchantable quality (*x*), but the goods, if sold by sample, must conform thereto.

(*t*) At 295.
(*u*) At 296—297.
(*x*) This is, no doubt, the meaning of the provision in section 14 (2) that "there shall be no implied condition *as regards defects* which such examination ought to have revealed."

2. If the defect be latent, a condition of merchantabl quality is implied, and the goods, if sold by sample must also conform thereto.
3. The buyer's examination of the goods will not exclud a condition as to fitness for the buyer's particular an communicated purpose, unless by such examination h intended in fact to rely upon his own judgment; bu the condition will be excluded only as regards discove able defects (*y*).

Code, s. 14 (3) Condition or warranty implied from usage.

Section 14 enacts that:

"(3.) An implied warranty or condition as to quality or fitness f a particular purpose may be annexed by the usage of trade."

Jones v. *Bowden* (1813).

In *Jones* v. *Bowden* (*a*), an action for breach of a warran of quality, it was shown that in auction sales of certain drug as pimento, it was usual to state in the catalogue whether th were sea-damaged or not, and, in the absence of a statem that they were sea-damaged, they would be assumed to free from that defect. Fair samples had been shown, b sea-damage could not be detected by examination. The Co held, on this evidence, that freedom from sea-damage was implied warranty in the sale. And Heath, J., in that c mentioned a Nisi Prius decision by himself (*b*) that wh sheep were sold as stock there was an implied warranty t they were sound, proof having been given that such was custom of the trade; and said that this ruling was questioned when the case was argued before the Quee Bench.

Syers v. *Jonas* (1848).

Similarly, on a sale of tobacco whose only description the bought and sold notes was "fifty-one bales tobacco *Lucretia*," and of which samples had been shown, in action for the price evidence was held to be admissible, tho the contract was in writing, of a usage in the tobacco t that, where samples had been exhibited, the sale was un stood to be by sample (*c*).

Code, s. 14 (4).

The Code by section 14 enacts:

"(4.) An express warranty or condition does not negative a warr or condition implied by this Act unless inconsistent therewith."

(*y*) This limitation is, so far as the Editor is aware, nowhere laid do express terms, but follows from principle and the close analogy of th dition of merchantable quality. See also *Jones* v. *Bright* (1829) 5 Bing 7 L. J. (O. S.) C. P. 213; 30 R. R. 728, particularly *per* Park, J., at 548
(*a*) 4 Taunt. 847; 14 R. R. 683. See also *Curtis* v. *Peek* (1861) 13 330, Ex. Ch. ("goods lying at bonded warehouse").
(*b*) Probably *Weall* v. *King* (1810) 12 East, 452; 11 R. R. 445.
(*c*) *Syers* v. *Jonas*, 2 Ex. 111; 74 R. R. 515.

With regard to the effect *of* an express condition or warranty on those implied by law, Willes, J., says in *Mody* v. *Gregson* (*e*): "The doctrine that an express provision excludes implication . . . does not affect cases in which the express provision appears . . . to have been *superadded* for the benefit of the buyer."

Effect of express condition or warranty on those implied.

In *Bigge* v. *Parkinson* (*f*), in the Exchequer Chamber, the defendant, a provision dealer, had made a written offer to the plaintiff in these words: "I hereby undertake to supply your ship, *The Queen Victoria*, to Bombay, with troop stores, viz., dietary, mess utensils, coals, etc., at £6 15s. 6d. per head, guaranteed to pass survey of the Honourable East India Company's officers, and also guarantee the quantities (*g*) as per invoice." The plaintiff accepted this offer, which was made under an advertisement in which the plaintiff invited tenders for the supply of provisions and stores for troops which he had contracted with the East India Company to convey from London to Bombay. In an action by the plaintiff against the defendant for supplying stores not reasonably fit for consumption by the troops, it was contended by the defendant that the express condition in the contract excluded any implied condition; but this was overruled, the Court holding it to be an express condition annexed to that ordinarily implied for the benefit of the buyer to guard himself against any rejection of the goods by the officers of the East India Company, but that it would be otherwise if it could be gathered from the contract that the provisions were to be supplied to the satisfaction of the East India Company's officers, *so that they were to be the sole judges* whether the provisions were fit for the purpose intended, for such a condition would be inconsistent with the absolute condition as to fitness implied by law (*h*).

Bigge v. *Parkinson* (1862).

But no condition or warranty is implied where the parties have expressed in words, or by acts, the warranty by which they mean to be bound, as where the contract contains an express condition or warranty inconsistent with that implied by law (*i*).

Implied excluded by express inconsistent condition.

(*e*) (1868) L. R. 4 Ex. 49, at 53; 38 L. J. Ex. 12.

(*f*) 7 H. & N. 955; 31 L. J. Ex. 301; 126 R. R. 783. Ex. Ch., *coram* Cockburn, C.J., and Wightman J., Crompton, J., Byles, J., and Keating, J. See also *Johnson* v. *Raylton* (1881) 7 Q. B. D. 438; 56 L. J. Q. B. 753, C. A. ship-plates to pass Lloyd's survey).

(*g*) "Qualities" in the L. J. and some other reports.

(*h*) See a decision to this effect in *M'Clelland* v. *Stewart* (1883) 12 L. R. Ir. 125, *post*, 748.

(*i*) Code, s. 14 (4), *ante*, 746.

Dickson v. Zizinia (1851).

In *Dickson* v. *Zizinia* (*k*), where there was an exp warranty that a cargo of Indian corn should be equal to average of the shipments of Salonica of that season, should be *shipped* in good and merchantable condition, was held that this warranty could not be extended by impli tion, so as to make the seller answerable that the corn wa a good and merchantable condition *for a foreign voya* although the contract stated that the corn was bought for t purpose. *Expressum facit cessare tacitum.*

De Witt v. Berry (1890).

And in *De Witt* v. *Berry* (*l*), it was decided by the Supr Court of the United States on a contract for "turpentine c varnish" and "turpentine japan dryer," to be "of exa the same quality as we make for the De Witt Wire Cloth and as per sample delivered," that a warranty of merchanta quality was excluded by the express warranty, and that buyer could not recover damages against the seller, it being proved that the goods supplied were not of the sa quality as supplied to the wire cloth company, or were infe to sample.

M'Clelland v. Stewart (1883).

In *M'Clelland* v. *Stewart* (*m*), the defendants, tim merchants at New Brunswick, contracted to sell to the plain timber described as "wood goods of the undermentio assortment, as classified by official surveyors at port of sh ment." The assortment mentioned was "about St. Petersb standard of bright, fresh spruce deals, averaging sec quality." In an action for breach of warranty of quali the defendants pleaded that the goods delivered had, p viously to their shipment, been duly classified and assorted determine their quality, and were on delivery bright a fresh, and of proper quality *as classified*. *Held*, by Exchequer Division in Ireland: 1. that the contract was an absolute contract to deliver bright, fresh spruce deals, only bright, fresh spruce deals *as classified* by the offic surveyors; and 2. that this express warranty was inconsiste with any implied warranty that the timber should in fact of merchantable quality under the description of brig fresh spruce deals. *Bigge* v. *Parkinson* (*n*) was distinguish by Dowse, B., on the ground that the contract in that c provided for stores "guaranteed to pass survey," and stores "*as* guaranteed." That express condition, therefo

(*k*) 10 C. B. 602; 20 L. J. C. P. 72; 84 R. R. 719.
(*l*) 134 U. S. 306.
(*m*) 12 L. R. Ir. 125, *coram* Dowse, B., and Andrews, J.
(*n*) (1862) 7 H. & N. 955; 31 L. J. Ex. 301, Ex. Ch.; *ante*, 747.

did not form part of the description of the goods, but was superadded to the implied condition that the goods were to be fit for the purpose intended.

CHAPTER IV.

EXPRESS WARRANTIES.

What is a warranty.

A WARRANTY in a sale of goods is not one of the essent elements of the contract, for a sale is none the less compl and perfect in the absence of a warranty. But it is undertaking collateral to the main purpose of the contra *forming part thereof* by agreement of the parties, expr or implied (*a*). In this more general sense the warranty m operate as a condition, as in agreements to sell future unascertained goods (*b*), the quality or incident warrant being part of the description of the goods; but, like eve stipulation which is a condition, it may be also treated as warranty by the person entitled to the performance of t condition, or he may be compelled so to treat it, and then i available merely as a warranty, a breach of which sounds on in damages (*c*). But "warranty" is also used in another a narrower sense, and the ambiguity has caused much confusio In this stricter sense, in which it is peculiarly applicable specific goods (*d*), a warranty is not only an engageme collateral to the main purpose of the contract, but it is in nature such that its breach goes only to part of the consider tion, and so sounds only in damages. In this sense it *ab initio* contrasted with a condition. The narrower sense h

(*a*) *Parker* v. *Palmer* (1821) 4 B. & A. 387; 23 R. R. 313; *Chanter Hopkins* (1838) 4 M. & W. 399; 8 L. J. Ex. 14; 51 R. R. 650; *Street Blay* (1831), 2 B. & Ad. 456; 36 R. R. 626; *Mondel* v. *Steel* (1841) 8 M W. 858; 10 L. J. Ex. 426; 58 R. R. 890; and see *per* Martin, B., in *Stuc* v. *Baily* (1862) 1 H & C. 405; 31 L. J. Ex. 483; and *Camac* v. *Warri* (1845) 1 C. B. 356.

(*b*) *Per cur.* in *Heyworth* v. *Hutchinson* (1867) L. R. 2 Q. B. 447; L. J. Q. B. 270. The Author uses the term "warranty" in this etymological correct sense of guarantee, which is the same word: *cf.* ward and guard, w and guise, war and guerre, the Teutonic *w* passing in the Romance languag into *gu*. The Low Latin was *warrantum*. Just as a surety guarantees p ment by the principal debtor, so the seller of goods may guarantee or warra some quality or incident: *cf.* Shak. "Before Emilia here I give thee warra of thy place." The Author's treatment of the subject of warranty is, howeve not always easy to follow, as he seems to fluctuate between the two meanin of warranty.

(*c*) *Per* Brett, J., in *Stanton* v. *Richardson* (1872) 7 C. P. 436; 45 L. C. P. 78; Code, s. 11 (1) (c), *ante*, 644, and s. 53 (1).

(*d*) Even in agreements to sell. See the discussion of *Heyworth* v. *Hutchi son*, *post*, Bk. V., Part ii., ch. i. And query, whether, even in the case of agreement to sell future or unascertained goods, *everything* said of them necessarily a condition, as being part of the description? The Editor is awa of no authority on this point.

been adopted, and is thus defined by section 62 (1) of the Code:—

"**62.** (1.)—In this Act, unless the context or subject-matter otherwise requires,— Code, s. 62 (1).

"'Warranty' as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated" (*e*). Warranty defined.

In this Chapter the term is used in the general sense of a collateral engagement.

As a warranty is an agreement forming part of the contract, it follows that antecedent representations made by the seller as an *inducement* to the buyer, but not forming part of the contract when concluded, though if material and untrue they may justify a rescission of the contract (*f*), are not warranties (*g*) It is not, indeed, necessary that the representation, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain, but only that it should be made during the course of the dealing which leads to the bargain, *and* should then—such being the intention (*h*) enter into the bargain as part of it (*i*). Antecedent representations.

Thus, Holt, C.J., says in *Lysney* v. *Selby* (*k*): "As to *warrantizando vendidit*, that will be so, though the warranty be before the sale; as if, upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand the price, and the seller should set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price: though the warranty here was before the sale, yet this will be well,

(*e*) The clause continues: As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract." The various senses in which "warranty" is used are stated in Anson on Cont. 9th ed. 314, n.

(*f*) See the Chapter on Misrepresentation, *ante*, 490, *et seqq.*, and on Fraud, *ante*. 535.

(*g*) *Heilbut Symons & Co.* v. *Buckleton*, *post*, 754; *Schawel* v. *Reade*, *post*, 752.

(*h*) The naked proposition that a representation "being made in the course of dealing, and before the bargain was complete, amounted to a warranty," as made by Bayley, J., in *Cave* v. *Coleman* (1828) 3 M. & Ry. 2, is "far too sweeping": *per* Lord Moulton in *Heilbut Symons & Co.* v. *Buckleton*, *supra*. The representation must be intended to enter into the bargain.

(*i*) *Mew* v. *Russel* (1683) 2 Show. 289; *Cowdy* v. *Thomas* (1877) 36 L. T. 22; *per* A. L. Smith, M.R., in *De Lassalle* v. *Guildford* (1901) 2 K. B. 221; 70 L. J. K. B. 533.

(*k*) (1705) 2 Lord R. 1118; folld. in *Dobell* v. *Stevens* (1825) 3 B. & C. 623; 3 L. J. K. B. 89; 27 R. R. 441.

because the warranty is the *ground of the treaty*, and this is *warrantizando rendidit*. But it is otherwise if the warranty be after the sale; as if a man sells goods and afterwards warrants them; such a warranty is not good. But in the other case the warranty is part of the contract."

Hopkins v. *Tanqueray* (1854).

Of the general principle a good illustration is given in *Hopkins* v. *Tanqueray* (*l*), where the plaintiff bought a horse sold at auction, without warranty. On the day before the sale, while the plaintiff was examining the horse at Tattersall's stables, the defendant said to him: "You have nothing to look for: I assure you he is perfectly sound in every respect," to which the plaintiff replied: "If you say so, I am satisfied," and desisted from the examination. The horse was unsound, but the seller did not know it, so that there was no fraud; the buyer stood simply on the point that the conversation was a private warranty to *him*, although the auctioneer put up the horse without warranty. But all the Judges held, that the antecedent representation was *no part of the contract* which was made by the buyer when he bid for the horse; that it was therefore a representation of the seller's opinion and judgment, for which he could not be made responsible, if he were honest.

Schawel v. *Reade* (1912).

In *Schawel* v. *Reade* (*m*), the plaintiff, requiring a stallion for stud purposes, on March 22 went to the defendant's stable to look for a horse. When he was proceeding to inspect one the defendant said: "You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse I would tell you." The plaintiff then ceased his examination, and a few days afterwards the price was agreed on, but the horse was not actually bought till April 1. The horse was totally unfit for stud purposes. At the trial the jury found that there was no fraud, but that a representation of fitness had been made *for the purpose of sale*. It was held by the House of Lords (*n*), reversing the Court of Appeal

(*l*) 15 C. B. 130; 23 L. J. C. P. 162; 100 R. R. 271. See also *Stucley* *Baily* (1862) 1 H. & C. 405; 31 L. J. Ex. 483; 130 R. R. 588; and *Cam* *Warriner* (1845) 1 C. B. 356; and in Scotland *Malcolm* v. *Cross* (1898) 35 L. R. 794. *Cf. Percival* v. *Oldacre* (1865) 18 C. B. (N. S.) 398; 144 R. R. where a similar assurance was intended to be part of the contract. *Hopkins* *Tanqueray* should, however, be compared with *Bannerman* v. *White* 10 C. B. (N. S.) 844; 31 L. J. C. P. 28; 128 R. R. 953, *ante*, 104, in which very similar antecedent representation was expressly made a condition precedent to the *formation* of the contract; and the facts of any particular case may possibly show by implication that the truth of the representation was such a condition.

(*m*) [1913] 2 Ir. Rep. 81, H. L.

(*n*) Lords Macnaghten, Atkinson, and Moulton.

that there was a warranty, although the word "warranty" had not been put to the jury, nor so found by them; there was a representation made for the purpose of sale, and the plaintiff had acted upon it; and these facts constituted a warranty. And Lord Moulton said: "It would be impossible, in my mind, to have a clearer example of an express warranty where the word "warranty" was not used. The essence of such warranty is that it becomes plain by the words and the action of the parties that it is intended that in the purchase the responsibility of the soundness shall rest upon the vendor; and how in the world could a vendor more clearly indicate that he is prepared and intends to take upon himself the responsibility of the soundness than by saying: 'You need not look at that horse, because it is perfectly sound,' and sees that the purchaser thereupon desists from his immediate independent examination?"

These cases reconcileable.

These two cases are quite reconcileable. In *Schawel* v. *Reade*, the representation was clearly intended to form part of the contract afterwards concluded, and so was intended as a warranty; in *Hopkins* v. *Tanqueray* it was known by both parties that the contract of sale would, if made, be made at the auction without a warranty, so that the defendant's representation was neither intended nor understood to be more than an expression of opinion.

Warranty after sale requires new consideration.

It also follows that a warranty given after a sale is void, unless some new consideration be given for the warranty. The consideration already given is exhausted by the transfer of the property in the goods without a warranty, and the subsequent agreement to warrant must be supported by new consideration given (*o*).

No warranty of quality implied by mere fact of sale.

Caveat emptor.

It further follows that no warranty of the *quality* of a chattel is implied from the mere fact of sale (*p*). The rule in such cases is *caveat emptor*, by which is meant that when the buyer has required no warranty, he takes the risk of quality upon himself (*q*), and has no remedy if he chose to rely on the bare representation of the seller, unless indeed he can show that representation to be fraudulent, or to be material

(*o*) *Roscorla* v. *Thomas* (1842) 3 Q. B. 234; 11 L. J. Q. B. 214; 61 R. R. 216.
(*p*) Code, s. 14, *ante*, 712.
(*q*) *Sprigwell* v. *Allen* (1648) Aleyn, 91, and 2 East, 448, n.; *Parkinson* v. *Lee* (1802) 2 East, 314; 6 R. R. 429; *Williamson* v. *Allison* (1802) 2 East, 446; *Morley* v. *Attenborough* (1849) 3 Ex. 500; 18 L. J. Ex. 148; 77 R. R. 709; *Ormrod* v. *Huth* (1845) 14 M. & W. 664; 14 L. J. Ex. 366.

Many exceptions to this rule.

to the assent to the contract (*r*). To this rule there are n exceptions (*s*).

No special form of words needed to create warranty.

No special form of words is necessary to create a warra It is more than two hundred years since Lord Holt first se the rule, in *Cross* v. *Gardner* (*t*) and *Medina* v. *Stoughton* which Buller, J., in 1789, laid down in the opinion give him in the famous leading case of *Pasley* v. *Freeman* (*x* follows: "It was rightly held by Holt, C.J., and has uniformly adopted ever since, that an affirmation at the of a sale is a warranty, provided it appear on evidence to been so intended" (*y*).

Heilbut Symons & Co. v. *Buckleton* (1912).

In *Heilbut Symons & Co.* v. *Buckleton* (*z*), the respon applied through the telephone to one Johnston, the man of the appellants, a firm of rubber merchants of high stand who had underwritten a number of shares in a rubber produce company, saying: "I understand you are brin out a rubber company," and received the reply: "We a He then asked for a prospectus, and was told there were n The respondent then asked "if it was all right," and answered: "We are bringing it out," whereupon he s "That is good enough for me." He then applied to appellants for shares, which they agreed to secure for and he subsequently applied to the company for an allotm which the appellants procured for him. It was afterw found that a large number of the rubber trees mentione the prospectus did not exist, and the shares became value In an action against the underwriters for a breach of warr (collateral to the main contract by the respondent to shares) that the company was a "rubber company," that say, a company dealing wholly or mainly in rubber, the found that it could not properly be so described, but th warranty to that effect had been given by Johnston. Judg

(*r*) See the effect of misrepresentation discussed *ante*, 490 *et seqq.*

(*s*) See *ante*, 712 *et seqq.*, 735 *et seqq.*

(*t*) (1689) Carthew, 90; 3 Mod. 261; 1 Show. 68.

(*u*) (1700) 1 Lord Raym. 593; Salk. 220.

(*x*) (1789) 3 T. R. 51, at 57; 1 R. R. 634; 2 Sm. L. C. 11th ed., at 72.

(*y*) Appd. in *Heilbut Symons & Co.* v. *Buckleton* [1913] A. C. 30, at 4 82 L. J. K. B. 245. See also *Power* v. *Barham* (1836) 4 A. & E. 473 ("pic Canaletti"), *post*, 756; *Freeman* v. *Baker* (1833) 5 B. & Ad. 797; 3 K. B. 17; 30 R. R. 651 ("copper-fastened" description in document in porated with written contract); *Taylor* v. *Bullen* (1850) 5 Ex. 779; 20 L. 21; 82 R. R. 875 ("teak-built"; express saving for "defect or er *Hopkins* v. *Hitchcock* (1863) 14 C. B. (N. S.) 65; 32 L. J. C. P. 154 ("S (crown) common bars"); *Stucley* v. *Baily* (1862) 1 H. & C. 405; 31 Ex. 483; 139 R. R. 588 ("masts sound": not included in writing; v. *Thomas* (1877) 36 L. T. 22 ("tubes are copper": representation bef incorporated in contract).

(*z*) [1913] A. C. 30; 82 L. J. K. B. 245.

was given for the respondent, and this was affirmed in the Court of Appeal. On appeal to the House of Lords, the judgment was unanimously reversed, it being held that there was no evidence to be submitted to the jury of any warranty. The facts of the case showed that the inducement to the respondent to take the shares was the assurance that a firm of high standing was bringing out the company, and that the respondent's questions were really directed to this point; moreover, that the appellants did not intend to warrant that the company was a "rubber" company, nor did the respondent's conduct show that he had asked for a warranty, or at the time accepted Johnson's statement as such; and that the case resolved itself into a mere ineffectual representation, prior to the respondent taking shares.

T. & J. Harrison v. *Knowles* (1918).

In *Harrison* v. *Knowles* (*a*), the defendants, being desirous of selling two steamships, prepared written particulars, and placed them before the plaintiffs, the steamers being described as having a dead-weight capacity of 460 tons all told. The document also contained the words "Not accountable for errors of description." Some weeks afterwards a written contract was made and signed by the parties, but the contract made no reference to the particulars. It was afterwards discovered that the ships had a dead-weight capacity of only 340 and 360 tons respectively, and their value was accordingly reduced from £10,000 to £5,500. The plaintiffs brought an action for breach of warranty. *Held*, by the Court of Appeal, that the particulars formed no part of the contract; accordingly the so-called warranty was reduced to an innocent misrepresentation, which might perhaps have enabled the plaintiffs to rescind the contract, but which was no foundation for an action for damages.

Test for deciding whether representation amounts to warranty.

In determining whether warranty was intended, a valuable, though not decisive, test is whether the seller assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the seller has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment (*b*).

(*a*) [1918] 1 K. B. 608, C. A.; 87 L. J. K. B. 680; affg. on a different ground Bailhache, J., in [1917] 2 K. B. 606; 86 L. J. K. B. 1490.

(*b*) *Per* Buller, J., in *Pasley* v. *Freeman* (1789) 3 T. R. 57; 1 R. R. 634; 2 Sm. L. C. 7th ed., at 73; 11th ed., at 72; *Power* v. *Barham* (1836) 4 A. & E. 473; 5 L. J. K. B. 88; 43 R. R. 406; *post*, 756; *Jendwine* v. *Slade* (1797) 2 Esp. 572; 5 R. R. 754, *post*, 756; and *see per* Bramwell, B., in *Stueley* v. *Daily* (1862) 1 H. & C. 405; 31 L. J. Ex. 483; 130 R. R. 528; *Carter* v. *Crick* (1859) 4 H. & N. 412; 28 L. J. Ex. 238. *Per* Visc. Haldane and Lord Moulton

Chalmers v. *Harding* (1868).

Thus, in *Chalmers* v. *Harding* (*c*), where a statement
made to a farmer by the seller, who was the patentee's ag
for sale of an agricultural machine, that "he had a very g
second-hand Wood's reaper; it had only cut about fifty ac
and was not one penny the worse—in fact, you would har
know it from a new one. He had sold more than thirty
these machines, all of which were doing well, so he co
confidently recommend it. It would cut any grain
efficiently"; this was held by the Court of Exchequer to
not a warranty of the particular machine, but a mere puff
Wood's reapers, and a statement of the seller's belief tha
would do as well as other Wood's reapers.

Whether warranty was intended fact for the jury.

This intention is a question of fact for the jury, to
inferred from the nature of the sale and the circumstances
the particular case, as will appear *passim* in the authori
to be reviewed (*d*).

Interpretation of express warranties.

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

Jendwine v. *Slade* (1797).

In *Jendwine* v. *Slade* (*e*), two pictures were sold at auc
by a catalogue in which one was said to be a sea piece
Claude Lorraine, and the other a fair by Teniers. L
Kenyon held that, as the pictures were by old artists, th
was no way of tracing them, and there was no warranty
the pictures were genuine works of these masters, but me
an expression of opinion by the seller.

Power v. *Barham* (1836).

But in *Power* v. *Barham* (*f*), where the seller sold by a
of parcels "four pictures, views in Venice, Canaletti," it
held that the jury should decide whether the defendant me
to warrant that the pictures were the genuine works
Canaletti. Lord Denman, C.J., distinguished the case fr

in *Heilbut Symons & Co.* v. *Buckleton*, *supra*, disapproving the statem
the law by A. L. Smith, M.R., in *De Lassalle* v. *Guildford* [1901] 2 K
at 221.

(*c*) 17 L. T. 571; see, however, *Varley* v. *Whipp* [1900] 1 Q. B.
69 L. J. Q. B. 333, *ante*, 353, 699.

(*d*) See especially *Stucley* v. *Baily* (1862) 1 H. & C. 405; 31 L. J. Ex.
130 R. R. 588.

(*e*) 2 Esp. 572.

(*f*) 4 A. & E. 473. See also *Hyslop* v. *Shirlaw* [1905] Sess. Cas.
(representation only).

Jendwine v. *Slade* by the suggestion that Canaletti (*g*) was a comparatively modern painter, of whose works it would be possible to make proof as a matter of *fact*, but that in the case of very old painters the assertion was necessarily a matter of opinion.

The following case shows that such a representation, being an essential part of the *description* of a specific article, is originally a condition.

Lomi v. *Tucker* (1829).

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

Wood v. *Smith* (1829).

In *Wood* v. *Smith* (*i*), the action was *assumpsit*, and the proof was that the defendant, in reply to the plaintiff's question, had said that a mare sold was "sound to the best of his knowledge," and on further question had refused to warrant, saying, "I never warrant; I would not even warrant myself." The mare was unsound, and the defendant knew it. Gurney, for defendant, insisted that the action should have been *tort*, for there was an express refusal to warrant. But Lord Tenterden at the trial, and the Court in banco, afterwards held, that on these facts there was a *qualified* warranty that the mare was sound to the best of the defendant's knowledge, and that the action was therefore well brought in *assumpsit*.

Interpretation of express warranties by usage of trade.

An express warranty may be interpreted by the usage of trade, if not inconsistent with the express words, or by the surrounding circumstances of the case; or the contract itself may show what meaning is to be attached to the warranty.

Powell v. *Horton* (1836).

Thus, in *Powell* v. *Horton* (*k*), the sale by the sold note was "of mess pork, of Scott & Co.," and the defendant attempted to show that the pork delivered by him was really mess pork, consigned to him by Scott & Co.; but proof was received to show that those words meant in the trade mess pork *manufactured* by Scott & Co., which was worth more in the market than the article delivered by the defendant, and

(*g*) Canaletti died in 1768, Claude Lorraine in 1682, Teniers the younger in 1694.

(*h*) 4 C. & P. 15. Poussin died in 1665. See also *De Sewhanberg* v. *Buchanan* (1832) 5 C. & P. 343.

(*i*) M. & M. 539; 5 Mann. & R. 124.

(*k*) 2 Bing. N. C. 668.

the Court held the defendant bound by a warranty that t
pork was of that manufacture.

Yates v. *Pym* (1816).

But in *Yates* v. *Pym* (*l*), the Court refused to admit par
evidence of the usage of trade to qualify an express warrant
The sale was of bacon described in the sale note as "prim
singed bacon"; and evidence was offered that, as bacon is
article necessarily deteriorating from its first manufacture,
usage of the trade was established that a certain average tai
was allowed before the article ceases to be considered "prim
bacon," but the evidence was held rightly rejected.

Lucas v. *Bristow* (1858).

In *Lucas* v. *Bristow* (*m*), where the contract was for "b
palm oil, wet, dirty, and inferiar oil, if any, at a f
allowance," evidence was tendered by the plaintiffs, the selle
that "best oil" did not by mercantile usage imply any p
ticular proportion of best oil; that the word "best" was u
only as a standard of price; and that the contract was compl
with if the oil delivered contained, at all events, a substant
portion of best oil. The defendant was held bound to acc
oil containing about a fifth of best oil, the four-fifths be
palm nut oil, an inferior quality, the jury having found t
the plaintiffs had delivered "best oil" as explained by
usage. "The parties," said Hill, J., "are silent as to w
proportion of wet, dirty, and inferior oil the cargo
contain. But it appears that there is an established us
. . . as to what proportions will satisfy a contract to deli
'best' palm oil. . . . Evidence of this usage is admiss
to explain that which is left undefined in the contract."

In *Yates* v. *Pym*, "prime" was not a term of trade,
the usage not only contradicted the contract, but was unrea
able. In *Lucas* v. *Bristow*, "best oil" was a technical te
and could be *explained* by usage.

The surrounding circumstances.

Jones v. *Clarke* (1858).

In *Jones* v. *Clarke* (*n*), the contract was for "400 load
pitch-pine timber, deliverable in London, ex *Ion*, f
Savannah, warranted of fair average quality." It was pr
by the seller, the plaintiff, that Darien pitch pine was supe
to that from Savannah, and that the pitch pine tendered
a fair average quality of Savannah pitch pine. The b

(*l*) 6 Taunt. 446. *Cf. Johnson* v. *Raylton* (1881) 7 Q. B. D. 438, C
where evidence of a custom to supply goods of the seller's own manufactur
held not to contradict the contract. Here there was no express warranty
(*m*) (1858) E. B. & E. 907; 27 L. J. Q. B. 364. See also *Hutchins*
Bowker (1839) 8. M. & W. 535 ("good" and "fine" barley).
(*n*) 2 H. & N. 725; 27 L. J. Ex. 165. The former report treats the a
one by the seller for non-acceptance; the Law Journal treats it as an
for breach of warranty. Possibly there were cross actions, though this
stated, nor are the names of the parties transposed.

claimed that he was entitled to receive pitch pine of fair average quality irrespective of the place of origin. *Held*, that the plaintiff's evidence showed that the words "from Savannah" referred to the place of production of the goods, and not to the place of shipment, and that the parties had therefore contracted only for a fair average quality of Savannah pitch pine.

Warranty explained by contract itself.

For an illustration of a case in which the terms of an express warranty were explained by a standard of quality mentioned in the contract itself, the reader is referred to *M'Clelland* v. *Stewart* (*o*), already noticed.

Context of written warranties.

The context of the words in written contracts may show whether or not any statement in the writing is a warranty or a mere representation. Thus, in the sale of "a horse, five years old; has been constantly driven in the plough, warranted," the warranty was held to refer to soundness only (*p*); and where the sale was in these words: "Received £10 for a grey four-year-old colt, warranted sound in every respect," the warranty was also confined to soundness (*q*). And where the sale was thus worded: "Received £100 for a bay gelding got by Cheshire Cheese, warranted sound," it was held that there was no warranty that the horse was of the breed named (*r*). And again, in another case where the warranty was contained in the following receipt: "Received from C. Anthony, Esq., £60 for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon," it was held that there was no warranty that the horse was quiet to ride and drive (*s*). And where a vessel was described as "the fine teak-built barque, A1, and well adapted for a passenger ship," but she was sold, "as she lies, with all faults, and without any allowance for any defect or error whatever," it was held that the subject-matter of the sale was the specific ship, being a barque, but that by the use of the word "error" the seller had guarded himself from giving any warranty of the qualities of the vessel. All other statements concerning her were therefore mere representations having no effect (*t*).

(*o*) (1883) 12 L. R. Ir. 125; *ante*, 748.
(*p*) *Richardson* v. *Brown* (1823) 1 Bing. 344; 8 Moore, 338; 2 L. J. C. P. 7; 25 R. R. 618.
(*q*) *Budd* v. *Fairmaner* (1831) 8 Bing. 48; 1 L. J. C. P. 16; 34 R. R. 619.
(*r*) *Dickenson* v. *Gupp* (1821) quoted in *Budd* v. *Fairmaner*, 8 Bing. at 50; 1 L. J. C. P. 16; 34 R. R. 619.
(*s*) *Anthony* v. *Halstead* (1877) 37 L. T. (N. S.) 433.
(*t*) *Taylor* v. *Bullen* (1850) 5 Ex. 779; 20 L. J. Ex. 21. See the case also, *ante*, 707.

Parol evidence inadmissible to prove or extend warranty in written sales.

Where a writing intended by the parties to be the record of the terms of the contract of sale contains warranty, or expresses the warranty that is given by the se parol evidence is inadmissible to prove the existence warranty in the former case, or to extend it in the latter inference or implication (*u*).

Powell v. *Edmunds* (1810).

In *Powell* v. *Edmunds* (*x*), the defendant bought at an a particular lot of timber, and signed a contract for that lo the back of the conditions of sale, agreeing to abide ther These conditions had been publicly read, but they described the time and place of sale and the number and of trees in each lot, and did not specify the weight of tim *Held*, that the defendant could not give evidence to show the auctioneer had verbally warranted that the weigh timber in the lot bought was eighty tons.

Smith v. *Jeffryes* (1846).

In *Smith* v. *Jeffryes* (*y*), the defendant agreed in writin sell the plaintiff "sixty tons of ware potatoes." It was sh that there were three qualities of potatoes, known as wa middlings, and chats, of which wares were the best, and best quality of wares were "Regent's wares." The defen offered to deliver an inferior quality wares, called kid wares. *Held*, that the term "ware potatoes" was ambiguous, and that parol evidence was not admissible show that the plaintiff contracted for Regent's wares.

Dickson v. *Zizinia* (1851).

In *Dickson* v. *Zizinia* (*z*), there was an express warranty writing that a cargo of Indian corn, sold to the plain should be equal to the average shipments of Salonica of season, and should be *shipped* in good and merchanta condition, and the Court refused to allow the warranty t extended by evidence or implication, so as to render defendant answerable that the corn should be in fit condi for a foreign voyage.

Eden v. *Blake* (1845).

But in *Eden* v. *Blake* (*a*), where the defendant bought auction a dressing case stated in the catalogue to be silv fitted, but which the auctioneer sold to the defendant as hav only plated fittings, the catalogue being, as the auction said, incorrect, the plaintiff, the seller, was held entitled prove this verbal correction of the auctioneer, and to rec

(*u*) *Per* Bowen, L.J., in *Palmer* v. *Johnson* (1884) 13 Q. B. D. 351, at 53 L. J. Q. B. 348, C. A.; *per Cur.* in *Lloyd* v. *Sturgeon Falls Co.* (1 85 L. T. at 165, 166; *Bank of N.Z.* v. *Simpson* [1900] A. C. 182, P. C.

(*x*) 12 East, 6; 11 R. R. 316.

(*y*) (1846) 15 M. & W. 561; 15 L. J. Ex. 325; 71 R. R. 761.

(*z*) 10 C. B. 602; 20 L. J. C. P. 72; 84 R. R. 719. See also *Harmo Groves* (1855) 15 C. B. 667; 24 L. J. C. P. 53; 100 R. R. 535.

(*a*) 13 M. & W. 614; 14 L. J. Ex. 194; 67 R. R. 757.

the price. No written contract in fact having been made, the sale was held to be by parol. "The sole question," said Alderson, B., "is, What were the terms upon which this article was sold? Are those terms in writing? If they are, they cannot be varied by parol testimony; but if they exist only in parol, they, of course, may be varied by parol" (*b*).

And where the written paper was in the nature merely of an informal receipt for the price, it was held that parol evidence of a warranty was admissible (*c*). And again, where letters written by the seller, not intended to constitute a written contract, were capable of being construed as containing a warranty, parol evidence of the surrounding circumstances was held admissible to show that no warranty was intended (*d*).

Proof of collateral warranties.

Parol evidence may also be given to prove a warranty if it be *collateral* to the written contract, that is to say, if the parties did not intend that the writing should contain all the terms of the contract, and the warranty contradicts no term of the writing (*e*); or if the warranty, its terms not being inconsistent with the written com[illegible], is independent of, and given in consideration of the making of the written contract (*f*).

Rule stated by A.L. Smith, M.R., in *De Lassalle* v. *Guildford* (1901).

A valuable statement of the law applicable to collateral warranties is to be found in the judgment of the Court of Appeal in *De Lassalle* v. *Guildford* (*g*). The question in that case was whether a verbal warranty that the drains of a house were in order was collateral to the lease of the house so as to enable the tenant to sue upon it. A. L. Smith, M.R., in delivering the judgment of the Court (*h*), said: "The question is, Was the warranty collateral to the lease so that it might be given in evidence and given effect to? It appears to me in this case clear that the lease did not cover the whole ground,

(*b*) *Cf. Gunnis* v. *Erhart* (1789) 1 H. Bl. 289; 2 R. R. 769; and *Shelton* v. *Livius* (1832) 2 C. & J. 411; 1 L. J. (N. S.) Ex. 139; 37 R. R. 746, where the contract was in writing.

(*c*) *Allen* v. *Pink* (1838) 4 M. & W. 140; 7 L. J. Ex. 206; 51 R. R. 503.

(*d*) *Stucley* v. *Baily* (1862) 1 H. & C. 405; 31 L. J. Ex. 483; 130 R. R. 588.

(*e*) *Per* Bowen, L.J., in *Palmer* v. *Johnson* (1884) 13 Q. B. D. 351, at 357; 53 L. J. Q. B. 348; *De Lassalle* v. *Guildford* [1901] 2 K. B. 215; 70 L. J. K. B. 533, C. A.

(*f*) See these two forms of collateral contract explained by Vaughan-Williams, L.J., in *Newman* v. *A. & S. Gatti* (1907) 24 Times L. R. 18, C. A.; citing *Lindley* v. *Lacey*, *infra*; and *per Cur.* in *Lloyd* v. *Sturgeon Falls Pulp Co.* (1901) 85 L. T. 162, at 165, disapproving *Kain* v. *Old* (1824) 2 B. & C. 627.

(*g*) *Supra*. See also *Lindley* v. *Lacey* (1864) 17 C. B. (N. S.) 578; 34 L. J. C. P. 7; 142 R. R. 525; *Harris* v. *Rickett* (1859) 4 H. & N. 1; 28 L. J. Ex. 47. The use of the word "collateral" in the cases has somewhat darkened counsel. A warranty is generally said to be collateral if it be subsidiary to the main purpose of the contract. With regard to contracts in writing it may mean no more than a stipulation independent of and not inconsistent with the writing.

(*h*) A. L. Smith, M.R., Collins, L.J., and Romer, L.J., at 222.

and that it did not contain the whole of the contract betwe the parties. . . . There is nothing in the lease as to the t condition of the drains—*i.e.*, at the time of the taking of lease, which was the vital point in hand. Then why is the warranty collateral to anything which is to be found the lease? The present contract or warranty by the defend was entirely independent of what was to happen during tenancy. It was what induced the tenancy, and it in no w affected the terms of the tenancy. . . . The warranty in way contradicts the lease, and without the warranty the le never would have been executed" (*i*).

Cases in which an express warranty has been held not inc sistent with a warranty implied by law have been alre considered (*k*).

Warranty limited to defects pointed out within fixed time.

Bywater v. *Richardson* (1834).

In *Bywater* v. *Richardson* (*l*), there was a written warra of soundness, but the purchase was made at a repository, wh there was a rule painted on a board fixed to the wall tha warranty of soundness, when given there, was to remain force only until twelve o'clock at noon on the day next af the sale, after which the seller's responsibility would e and the Court held, on proof of the buyer's knowledge of rules (*m*), that the warranty was limited to such defects o as might be pointed out within twenty-four hours.

Chapman v. *Gwyther* (1866).

And in *Chapman* v. *Gwyther* (*n*), on a sale of a horse, words "warranted sound for one month" were also constr as a limitation of the seller's responsibility to such faults were pointed out within the month, and as not covering defect not discovered till more than a month had elapsed.

Warranty of future event.

But the terms of the warranty and the facts of the case m show an intention that the limitation of time stipulated for connection with the warranty should refer, not to the per of the seller's responsibility, as in the two preceding cas but to the continuance during the time of the quality w ranted (*o*). Such would naturally be the case where s things as food, pianos, or watches are warranted (*p*).

(*i*) See also *Morgan* v. *Griffith* (1870) L. R. 6 Ex. 70; 40 L. J. Ex *Erskine* v. *Adeane* (1873) 8 Ch. 756; 42 L. J. Ch. 835; *Angell* v. *Dun* L. R. 10 Q. B. 174; 44 L. J. Q. B. 78 (on demurrer); S. C. (1875) 32 L. T. (*k*) *Ante*, 746.

(*l*) 1 A. & E. 508; 3 L. J. K. B. 164; 40 R. R. 349. See also *Smart* v. *H* (1841) 8 M. & W. 723; 10 L. J. Ex. 479; 58 R. R. 867; *Gorton* v. *McIn* (1883) 31 W. R. 232, overruled on another point in W. N. 1883, 103.

(*m*) As to cases in which knowledge will be presumed, see *Watkins* *Rymill* (1883) 10 Q. B. D. 188, 189; 52 L. J. Q. B. 121.

(*n*) L. R. 1 Q. B. 463; 35 L. J. Q. B. 142. See *Mesnard* v. *Aldridge* (1 3 Esp. 271; *Buchanan* v. *Parnshaw* (1788) 2 T. R. 745.

(*o*) *Per* Lush, J., in *Chapman* v. *Gwyther*, *supra*. See in V *Schoemacher Man. Co.* (1881) 44 Am. Rep. 509.

(*p*) See *Johnston* (*J. Barre*) *& Co.* v. *Oldham* (1895) 11 T. L. R. 401, P.

Blackstone indeed says: "The warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*, as that a horse is sound at the buying of him, not that he will be sound two years hence" (*q*). But the law is now different, as is explained by Mr. Justice Coleridge in his notes on this passage. Lord Mansfield also, in a case (*r*) where this passage was cited, said: "There is no doubt but you may warrant a future event."

Interpretation of express warranty by nature of subject matter.

An express warranty must be construed, and, if necessary, qualified by reference to the nature of the subject-matter to which it is applied. Accordingly, an express warranty in unqualified terms (*s*) is not deemed to extend to cover any defect in the goods to which the warranty would otherwise apply where the other terms of the contract, and the circumstances of the case, show, expressly or by implication, that the goods were sold subject to such defect.

Ducondu v. *Dupuy* (1883).

Thus in *Ducondu* v. *Dupuy* (*t*), where a licensee from the Crown of a right to cut timber on specified land (a licence which was by statute expressly given subject to any prior right of other licensees) sold all his right, title, and interest under the licence, and gave the buyer a general warranty (garantie de tous troubles généralement quelconques) against disturbance, it was held by the Privy Council that, the subject-matter of the sale being in effect the seller's rights under the licence as limited by any prior right, the warranty therefore did not cover a disturbance by a prior licensee.

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

It is on this principle that a general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer. But the warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect. The rule is an ancient one (*u*).

(*q*) 3 Bl. Com. 166.

(*r*) *Eden* v. *Parkenson* (1781) 2 Doug. 733, at 735.

(*s*) The warranty may of course be expressly qualified: *Jones* v. *Conway* (1825) 4 B. & C. 445; 3 L. J. K. B. 263; *Wood* v. *Smith* (1829) 5 M. & Ry. 124; 1 L. J. K. B. 50; 34 R. R. 599, *ante*, 757.

(*t*) (1885) 9 A. C. 150; 52 L. J. P. C. 12; *cf.* *Milch* v. *Coburn* (1911) 27 Times L. R. 372, C. A. (warranty against all the world).

(*u*) *Per* Doddridge, J., and Houghton, J., in *Baily* v. *Merrel* (1615) 3 Bulstr. 94 (obvious purple warranted scarlet), citing Y. B. 14 Ed. 4; Kitchin on Courts, ed. 1675, p. 347; *Butterfeild* v. *Burroughs* (1706) 1 Salk. 211 (horse with one eye); *Smith* v. *O'Bryan* (1864) 13 W. R. 79; 11 L. T. 346 (splint of horse: intention to warrant). *See* also in Equity *Jennings* v. *Broughton* (1854) 5 De G. M. & G. 126, 131; 23 L. J. Ch. 999, C. A.; and in the Civil Law Dig., 18. 1. 43. 1. Under written contracts parol evidence that the defect was pointed out is not admissible: *per* Bramwell, B., in *Smith* v. *O'Bryan*, *supra*; but see *contra* in Am. *Schuyler* v. *Russ* (1804) 2 Caines, 202.

Liddard v. *Kain* (1824).

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

Margetson v. *Wright* (1832).

Margetson v. *Wright* (*y*), which was twice tried, is instructive. The sale was of a racehorse, which had broken down in training, was a crib-biter, and had a splint on the off foreleg. The horse, sound in other respects, would have been worth £500 if free from the defects. He was sold by the defendant to the plaintiff, after disclosure of these defects, for £90. The defendant refused to give a warranty that the horse would stand training, and only signed a warranty that the horse was "sound wind and limb," with the addition of the words "at this time." Six months afterwards the horse broke down in training, and Parke, J., told the jury that the addition of the words, "at this time," was probably intended to exclude a warranty that the horse would stand training: that the question was whether the horse was at the time of the warranty sound for ordinary purposes, the express warranty rendering the defendant responsible for the consequences of the splint, though it was known to the purchaser. On motion for a new trial, the second branch of this ruling was held erroneous, Tindal, C.J., saying: "The older books lay it down that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud, and originally the mode of proceeding on a breach of warranty was by an action of deceit, grounded on a supposed fraud. There can, however, be no deceit where a defect is so manifest that both parties discuss it at the time. A party, therefore, who should buy a horse knowing it to be blind in both eyes, could not sue on a general warranty of soundness. In the present case, the splint was known to both parties, and the learned Judge left it to the jury to say whether the horse was fit for ordinary purposes. His direction would have been less subject to misapprehension if he had left them to consider whether the horse was at the time of the bargain sound wind and limb, *saving those manifest defects contemplated by the parties*."

On the new trial then ordered, the plaintiff proved to the satisfaction of the jury that there were two kinds of splints,

(*x*) 2 Bing. 183; 3 L. J. C. P. 246; 27 R. R. 582.
(*y*) 7 Bing. 603; 8 Bing. 454; 1 L. J. C. P. 128; 33 R. R. 582, 585.

some of which cause lameness, and others do not, and that the splint in question did cause a subsequent lameness, and they found that the horse, at the time of the sale, "had upon him the seeds of unsoundness arising from the splint." *Held*, that this result not being apparent at the time, and the buyer not being able to tell whether the splint was one that would cause lameness, was protected by the warranty that the horse was then sound.

But the fact that an express warranty of any particular quality or description has been given is very material to the determination of the question whether the defect is so patent that the buyer is bound to take notice of it, as the buyer "might naturally exercise less vigilance than he would exercise where he had not a warranty to rely on" (*z*).

Tye v. *Fynmore* (1813).

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

Seller's hindering inspection.

And a general warranty will also cover defects which would be discoverable on examination if the seller use any artifice to prevent an examination, or an effective one (*b*).

Meaning of "soundness" in warranty of animals.

The meaning of the word "sound," when used in the sale of horses, has been the subject of several decisions, and it is settled that the interpretation of this warranty depends on custom and usage, as well as upon the circumstances of the particular case.

(*z*) *Per* Lord Campbell, C.J., in *Holliday* v. *Morgan* (1858) 1 E. & E. at 4; 28 L. J. Q. B. 9; 117 R. R. 111 (convexity of cornea of the eye in a horse). The principle was applied in *Mowbray* v. *Merryweather* [1895] 2 Q. B. 640; 65 L. J. Q. B. 50, C. A. So in equity "the vendor cannot be allowed to say: 'You were not entitled to give credit to my statement.' It is not sufficient therefore to say that the purchaser had the opportunity of investigating the real state of the case": *per* Jessel, M.R., in *Redgrave* v. *Hurd* (1881) 20 Ch. D. at 14; 51 L. J. Ch. 113.

(*a*) 3 Camp. 462; 14 R. R. 809.

(*b*) *Dorrington* v. *Edwards* (1620) 2 Roll. 188; *Kenner* v. *Harding* (1877) 28 Am. R. 615. The rule is well stated in *Chadsey* v. *Greene* (1856) 24 Conn. Rep. 562.

Kiddell v. *Burnard* (1842).

The rule was fully considered in *Kiddell* v. *Burnard* (c). A verdict was given at Nisi Prius in favour of the plaintiff, who had purchased, with a warranty of soundness, some bullocks at a fair. Erskine, J., told the jury that the plaintiff was bound to show that at the time of the sale the beasts had some disease or the seeds of some disease in them which would render them unfit, or in some degree less fit, for the ordinary use to which they would be applied. On the motion for a new trial, Parke, B., in refusing a rule, said: "The rule I laid down in *Coates* v. *Stevens* (d) is correctly reported, and I am there stated to have said: 'I have always considered that a man who buys a horse warranted sound must be taken as buying him for immediate use, and has a right to expect one capable of that use and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease which either actually does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure that either actually does at the time, or in its ordinary effect will, diminish the natural usefulness of the horse, such horse is unsound. If the cough actually existed at the time of the sale as a disease, so as actually to diminish the natural usefulness of the horse at that time and to make him then less capable of immediate work, he was then unsound; or if you think the cough, which, in fact, did afterwards diminish the usefulness of the horse, existed at all at the time of the sale you will find for the plaintiff. I am not now delivering a opinion formed at the moment on a new subject; it is the result of a full previous consideration.' That is the rule I have always adopted and acted on in cases of unsoundness although in so doing I differ from the contrary doctrine laid down by my brother Coleridge in *Bolden* v. *Brogden* (e) . . . I think the direction of the Judge in this case was perfectly correct." All the Judges, Alderson, B., Gurney, B.

(c) 9 M. & W. 668; 11 L. J. Ex. 268; 60 R. R. 857; and see *Holliday* *Morgan* (1858) 1 E. & E. 1; 28 L. J. Q. B. 9; 117 R. R. 111.

(d) (1838) 2 Moo. & Rob. 157; 62 R. R. 785.

(e) (1838) 2 Moo. & Rob. 113. In this case, overruled in *Kiddell* v. *Burnard*, Coleridge, J., had told the jury that the question on such a warranty was whether the animal had upon him a disease calculated *permanently* to render him unfit for use, or *permanently* to diminish his usefulness. See also *Ousel* v. *Eames* (1817) 2 Stark. 81; 19 R. R. 680, and *Garment* v. *Barrs* (1 2 Esp. 673, which seem also to be overruled by *Kiddell* v. *Burnard*

and Rolfe, B., concurred in this exposition, the first named saying: "The doctrine laid down by my brother Parke to-day, and in the case of *Coates* v. *Stevens*, is not new law; it is to be found recognised by Lord Ellenborough (*f*) and other Judges in a series of cases."

Defects which have been held to constitute unsoundness.

It may be convenient to state some of the defects which have been held to constitute unsoundness. Any *organic* defect, such as that a horse has been *nerved* (*g*); bone-spavin in the hock (*h*); ossification of the cartilages (*i*); the navicular disease (*k*), and thick wind (*l*) have been held to constitute unsoundness in horses, and goggles in sheep (*m*). But roaring has been held not to be (*n*), and in a later case to be (*o*), unsoundness. Crib-biting (*p*) has been held to be not unsoundness, but to be covered by a warranty against vices (*q*).

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

Holliday v. *Morgan* (1858).

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

(*f*) *Elton* v. *Brogden* (1815) 4 Camp. 281; *Elton* v. *Jordan* (1815) 1 Stark. 127; 18 R. R. 754.
(*g*) *Best* v. *Osborne* (1825) Ry. & Moo. 290.
(*h*) *Watson* v. *Denton* (1835) 7 Car. & P. 85; 48 R. R. 764.
(*i*) *Simpson* v. *Potts* (1847) Oliphant, Law of Horses, 4th ed. (by C. E. Lloyd), 467, Appx.
(*k*) *Matthews* v. *Parker* (1847) Oliphant, Law of Horses, 4th ed. 471, Appx.; and *Bywater* v. *Richardson* (1834) 1 A. & E. 508; 3 L. J. K. B. 164; 40 R. R. 349.
(*l*) *Atkinson* v. *Horridge* (1847) Oliphant, Law of Horses, 4th ed. 472, Appx.
(*m*) *Joliff* v. *Bendell* (1824) Ryan & Moo. 136; 27 R. R. 737.
(*n*) *Bassett* v. *Collis* (1810) 2 Camp. 523; 11 R. R. 786.
(*o*) *Onslow* v. *Eames* (1817) 2 Stark. 81; 19 R. R. 680.
(*p*) *Brennenburgh* v. *Haycock* (1817) Holt, N. P. 630; 17 R. R. 682.
(*q*) *Scholefield* v. *Robb* (1838) 2 Mood. & Rob. 210; 62 R. R. 794.
(*r*) *Dickinson* v. *Follett* (1833) 1 M. & Rob. 299; 42 R. R. 801.
(*s*) *Brown* v. *Elkington* (1841) 8 M. & W. 132; 10 L. J. Ex. 336; 58 R. R. 645.
(*t*) *Bailey* v. *Forrest* (1845) 2 Car. & K. 131; 80 R. R. 829.
(*u*) 1 E. & E. 1; 28 L. J. Q. B. 9; 117 R. R. 111.

ness." All the Judges held this direction correct, and

True test of unsoundness.

concurred in the doctrine of *Kiddell* v. *Burnard* (*x*) that the true test of unsoundness is, as expressed by Hill, J., "whether the defect complained of renders the horse less than reasonably fit for present use" (*y*).

Warranties by agents.

Warranties are sometimes given by agents without express authority. In such cases the question arises as to the power of an agent, who is authorised to sell, to bind his principal by a warranty.

General rule.

The general rule is, as in all contracts, that the agent is authorised to do whatever is necessary or usual to carry out the object of his agency, and this is a question of fact (*z*). If it be usual in the market to give a warranty, the agent may give that warranty in order to effect a sale.

Alexander v. *Gibson* (1811).

Thus, in *Alexander* v. *Gibson* (*a*), a servant who was sent to sell a horse *at a fair*, and receive the price, was held by Lord Ellenborough to be authorised to give a warranty of soundness, because "this is the common and usual manner in which the business is done."

Dingle v. *Hare* (1859).

In *Dingle* v. *Hare* (*b*), an agent selling guano for a dealer in artificial manures was held authorised to warrant it to contain 30 per cent. of phosphate of best quality, the jury having found as a fact that ordinarily these manures were sold with such a warranty.

Servant of seller who is not a dealer in horses has no implied authority to warrant.

Brady v. *Todd* (1861).

In *Brady* v. *Todd* (*c*), the Common Pleas had before it the subject of warranty of a horse by a servant authorised to sell, and Erle, C.J., gave the unanimous decision of the Judges after advisement. The facts were, that the plaintiff applied to the defendant, who was *not a dealer in horses*, but a trader man in London, having also a farm in Essex, in order to buy the horse, and the defendant thereupon sent his farm bailiff with the horse to the plaintiff, with authority to sell, *but not to warrant*. The bailiff warranted the horse to be sound and quiet in harness; and it was contended that "an authority

(*x*) (1842) 9 M. & W. 668; 11 L. J. Ex. 268; 60 R. R. 857.

(*y*) On this subject the reader is referred to Oliphant's Law of Horses, 6th ed. 71, *et seqq.*

(*z*) *Per* Byles, J., in *Dingle* v. *Hare* (1859) 7 C. B. (N. S.) 145; 29 L. J. C. P. 144; 121 R. R. 424, *infra*; *Bayliffe* v. *Butterworth* (1847) 1 Ex. 425; 17 L. J. Ex. 78; *Graves* v. *Legg* in Ex. Ch. (1857) 2 H. & N. 210; 26 L. J. Ex. 316; 115 R. R. 497.

(*a*) (1811) 2 Camp. 555; 11 R. R. 797. This ruling, by Lord Ellenborough at N. P., decides, in effect, the point which was afterwards expressly left open by the Court of C. P. in *Brady* v. *Todd*, *infra*, and subsequently decided by *Brooks* v. *Hassall* (1884) 49 L. T. 569, *post*, 770. See also *Helyear* v. *Hawke* (1808) 5 Esp. 72.

(*b*) 7 C. B. (N. S.) 145; 29 L. J. C. P. 144; 121 R. R. 424.

(*c*) 9 C. B. (N. S.) 592; 30 L. J. C. P. 223; 127 R. R. 797.

to an agent to sell and deliver imports an authority to warrant," which the Court held to be an undecided point.

After referring to *Helyear* v. *Hawke* (*d*), *Alexander* v. *Gibson* (*e*), and *Fenn* v. *Harrison* (*f*), the learned Chief Justice said: "We understand those Judges to refer to a *general* agent employed for a principal to carry on his business, that is, the business of horse-dealing, in which case *there would be by law the authority* here contended for. . . . It was also contended that a *special* agent without any express authority in fact might have an authority by law to bind his principal, as where a principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is concluded from denying this authority as against the party who believed what was held out and acted on it (see *Pickering* v. *Busk*) (*g*), but the facts do not bring the defendant within this rule. The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that in the usual course of selling is required to complete a sale, and that the question of warranty is, in the usual course of a sale, required to be answered; and that, therefore, the defendant by implication gave to Greig (the farm bailiff) an authority to answer that question, and to bind him by his answer. It was a part of this argument that an agent authorised to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point, also, the plaintiff has, in our judgment, failed. . . . If we laid down for the first time that the *servant of a private owner*, intrusted to sell and deliver a horse on *one particular occasion*, is therefore by law authorised to bind his master by a warranty, we should establish a precedent of dangerous consequence . . . an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master. We therefore hold that the buyer taking a warranty from *such an agent as* was employed *in this case* takes it at the risk of being able to prove that he had the principal's authority (*h*), and if there was no authority in fact, the law from the circumstances does not in our opinion create it. When the facts

(*d*) (1803) 5 Esp. 72.
(*e*) (1811) 2 Camp. 555; 11 R. R. 797, *ante*, 768.
(*f*) (1790) 3 T. R. 757, at 760.
(*g*) (1812) 15 East 38; 13 R. R. 364.
(*h*) See *Waters* v. *Madeley* (1885) 2 T. L. R. 2, where the facts showed such an authority.

raise the question, it will be time enough to decide liability created by such a servant as a foreman alleged t a general agent, or such a special agent as a person intru with the sale of a horse in a fair or other public mart."

Aliter where the sale is at a fair.

Brooks v. *Hassall* (1884).

In *Brooks* v. *Hassall* (*i*), the servant of a private owner, was not a dealer in horses, was held to have an imp authority to warrant where the sale was *at a fair*, thus decid one of the points left open in *Brady* v. *Todd*.

Or the master is a horse-dealer.

Howard v. *Sheward* (1866).

In *Howard* v. *Sheward* (*k*), the general rule that the a of a horse-dealer has an ostensible authority to warrant so ness when making sale of a horse was recognised, and it further held, that this authority could not be negatived private instructions not to warrant; and that evidence was admissible to show a custom of horse-dealers not to warra cases where a horse sold has been examined by a compe veterinary surgeon, and pronounced sound, such evid being *res inter alios acta*.

Selling horses from time to time not sufficient.

But the rule stated in the last case is applicable onl horse-dealers; that is to say, to persons whose business deal in horses. It is not applicable to such as merely ma living out of horses, and who may from time to time horses which are not required for his business, such as ci proprietors, cab-owners, brewers, or carriers.

Baldry v. *Bates* (1885).

Thus, in *Baldry* v. *Bates* (*l*), the proprietor of a rid school was held not to be liable upon a warranty given by servant to the plaintiff, a livery-stable keeper, there being evidence given that the defendant usually dealt in horses, the question of fact not having been submitted to the j and Huddleston, B.'s, finding of law that the defendant w horse-dealer was set aside, as not being within his power.

The servant, even of a horse-dealer, merely authorise deliver a horse sold, has no implied authority to wa it (*m*).

Horse-dealers co-partners.

A warranty given by a member of a firm of horse-dealer a sale of a horse is binding on the firm, though the part have agreed among themselves not to warrant (*n*).

(*i*) 49 L. T. 569

(*k*) L. R. 2 C. P. 148; 36 L. J. C. P. 42. See also *per* Lord Eldon. *arg.* in *Bank of Scotland* v. *Watson* (1813) 1 Dow. 40. at 45, H. L.

(*l*) (1885) 1 T. L. R. 558, reversing 52 L. T. 620. There being no refe in the L. T. that the case was overruled, and the report in T. L. R. overlooked, the law was incorrectly stated in the 4th and 5th editions.

(*m*) *Woodin* v. *Burford* (1834) 2 C. & M. 391; 3 L. J. (N. S.) Ex. R. R. 802. In this case the point that the warranty was given after the and so required fresh consideration, was not mooted.

(*n*) *Sandilands* v. *Marsh* (1819) 2 B. & A. 673, at 679. *per* Abbott, C.J.

Auctioneers.

An auctioneer has no implied authority to warrant the quality or title of goods sent to him for sale at public auction. He is simply an agent to sell (*o*).

(*o*) *Payne* v. *Leconfield* (1882) 51 L. J. Q. B. 642; *Wood* v. *Baxter* (1884) 49 L. T. 48.

CHAPTER V.

WARRANTIES IMPLIED BY LAW.

Implied conditions also implied warranties.

It has been already explained that every express stipulati in a contract of sale which is a condition may also, it t buyer elect or be compelled so to treat it, be treated as express warranty (*a*). In the same way every implied c dition may also be treated as an implied warranty. But the two cases just mentioned the condition is only treated a warranty to enable the buyer to recover damages, and is *ab initio* a warranty, as defined by the Code, that is to say collateral engagement which sounds only in damages (*b*).

But though conditions are for remedial purposes only a warranties, the converse does not hold good. A warranty the strict sense of the term is not, and can never be, trea as a condition (*b*).

Semble, the common law will not imply warranties *ab initio* as distinguished from conditions.

On the question whether the common law will imply warranty, *as distinguished* from a condition, no authority been found. If the reason judicially given for the impli tion of conditions is to be regarded as the essential basis making any implication of law, viz. that the implicatio made "with the object of giving efficacy to the transac and preventing such *a failure of consideration* as cannot h been within the contemplation of either side" (*c*), the would seem that the common law will not imply a warra for *ex hypothesi* a breach would not cause a failure of sideration.

The Code, however, enacts that a warrant or condition be implied by usage of trade (*d*); and has provided that warranties of title shall *prima facie* be impl by enacting

Code, s. 12, (2) and (3).

"**12.** In a contract of sale, unless the circumstances of the con are such as to show a different intention, there is—

(*a*) *Ante*, 750.

(*b*) See definition of "warranty" in s. 62 (1) of the Code, *ante*, 750; *Wallis Son & Wells* v. *Pratt & Haynes* [1911] A. C. 394; 80 L. J. K. B. 1058.

(*c*) *Per* Bowen, L. J., in *The Moorcock* (1889) L. R. 14 P. D. 64, a 58 L. J. P. 73, quoted *ante*, 682.

(*d*) Section 14 (3), *ante*. The Editor is not aware of any such trade Section 14 (3) appears to have been borrowed from the Indian Contrac (9 of 1872), s. 110, which, however, speaks only of "warranty," and not strict sense of the term.

"(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

"(3.) An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made" (*e*).

Implied warranties of quiet possession and against incumbrances.

The implied warranty of quiet possession, if the analogy of covenants for quiet possession under leases be a sound one, is a warranty against disturbance, and is not broken unless and until a disturbance takes place (*f*). As it is couched in wide terms it should receive a reasonable construction, and, like all contracts for a general indemnity, should not be construed to extend to the tortious acts of strangers (*g*).

Thus, in *Chantflower* v. *Priestley* (*h*), the report says: "Covenant, for that the testator sold the plaintiff twenty ton of copperas, and agreed with the plaintiff that if he failed of the payment of such a sum at such a day, that he might quietly have and enjoy the said twenty ton of copperas; and alledgeth in fact that the money was not paid at the day, *et quod non potuit habere et gaudere* the said twenty ton of copperas; wherenpon he brought the action, and judgment was against the defendant by a *nihil dicit*, and a writ of enquiry of damages awarded, and £260 damages found and returned. And it was now moved in arrest of judgment, that the declaration was not good, in that he assigns not a sufficient breach of the covenant, *quod non potuit habere et gaudere*, &c., without shewing how and by whom he was disturbed, is not sufficient, for it ought to appear to the Court that it was a lawful disturbance, otherwise there is not any cause of action; for, the goods being sold unto him, if he be illegally disturbed he hath a sufficient remedy, and is not to maintain an action of covenant—and of that opinion was the whole Court."

Chantflower v. *Priestley* (1603).

But this remedy does not seem to be of much value in English law, which already implies a condition of *title*, and where a buyer has also a remedy by action of trespass or trover. Under the civil law (from which s. 12 (2) is borrowed) the warranty against eviction gave a very necessary and

(*e*) Section 12 (1) is set out *ante*, 686.

(*f*) *Per* Lord Ellenborough, C.J., in *Howell* v. *Richards* (1809) 11 East, 642; 11 R. R. 287; *Baynes* v. *Lloyd* [1895] 1 Q. B. 824; 64 L. J. Q. B. 787; Lord Halsbury's Laws of England, vol. 25, p. 466.

(*g*) *Foster* v. *Mapes* (1591) Cro. El. 212; *Perry* v. *Edwards* (1720) 1 Stra. 400; *Dudley* v. *Folliott* (1790) 3 T. R. 584; 1 R. R. 772; *per* Lord Ellenborough, C.J., in *Nash* v. *Palmer* (1816) 5 M. & S. 379, 380; 17 R. R. 364.

(*h*) (1603) Cro. El. 914.

practical remedy, as the seller did not profess to transfe ownership, but only undisturbed possession (*i*).

Scope of s. 12 (2) stated in *Montforts* v. *Marsden* (1895).

And the scope of section 12 (2) is thus stated, in accordanc with this principle, by Lord Russell of Killowen, C.J., i *Montforts* v. *Marsden* (*k*): "What that undoubtedly meant i that nobody shall interfere with the possession of the goods b reason of want of title of the vendor, or of any act done o committed by any one having authority from the vendor. I is little more than a covenant for title. It is a warranty tha the vendor shall not, nor shall anybody claiming under superior title, or under his authority, interfere with the quie enjoyment of the vendee."

The second implied warranty is one, not that the goods ar free from undisclosed incumbrances, but that the goods *shal be* free from them, in effect that the buyer's possession shal not be disturbed by reason of the existence of such incum brances (*l*). A breach of this warranty will occur when th buyer discharges the amount of the incumbrance (*m*).

These warranties new.

This warranty seems to be founded, so far as English law is concerned, upon a passage of this work in which Mr Benjamin, after showing that delivery of the goods by th seller may be made by the transfer of documents of title said (*n*): "The transfer of such documents would of cours not be a sufficient delivery by the vendor if the goods repre sented by the documents were subject to liens or charges i favour of the bailees." But the Author was not speaking o any *warranty*, but of the seller's duty to deliver, which is condition. The same observation applies to *Playford* v *Mercer* (*o*), which has been referred to in this connection (*p* There it was held that the seller of goods "from the deck" mus pay all charges necessary to enable the buyer to remove th goods from the deck, such as harbour dues; and if the buye paid them, he might plead payment to that extent to an actio for the price. It is obvious that, if the seller had sued fo non-acceptance of goods, and the buyer had pleaded that th seller was not ready and willing to deliver because the due

(*i*) See *ante*, 472, *et seqq*.
(*k*) [1895] 12 Pat. Cas. 266.
(*l*) Lord Halsbury's Laws of England, vol. 25, p. 466; *Vane* v. *Lord Barnar* (1708) Gilb. 6.
(*m*) *Collinge* v. *Heywood* (1839) 9 A. & E. 633; 8 L. J. (N. S.) Q. B. 9 48 R. R. 616. See also *Hughes-Hallett* v. *Indian Mammoth Gold Mines* (188 22 Ch. D. 561; 52 L. J. Ch. 418; *per* Neville, J., in *Nottidge* v. *Dering* (190 2 Ch. 647, at 656; 79 L. J. Ch. 439; Dav. Conv., 4th ed., Vol. II., Part I 19
(*n*) 2nd ed. 574; 4th ed 705.
(*o*) (1870) 22 L. T. 41, *post*, 798.
(*p*) Apparently by Mr. Chalmers, Sale of Goods Act, 7th ed., 40, n.

were unpaid, the seller could not have replied that payment of the dues was a mere collateral warranty, and no part of the seller's duty to deliver. Similarly, when goods are sold "*ex* ship," the seller has to pay the freight, or otherwise to release the shipowner's lien, and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay (*q*).

In *Sanders* v. *MacLean* (*r*), Brett, M.R., was of opinion, with which the other Lords Justices did not disagree, that, on the sale of a cargo by a bill of lading, there is no implied stipulation that the bill of lading shall be sent forward to the buyer so as to reach him before charges are incurred in respect of the goods at the port of discharge.

Warranties implied by particular statutes.

Implied warranties arising under particular statutes are expressly saved by the Code (*t*). One is implied as against a seller by section 17 of the Merchandise Marks Act, 1887 (*u*), as follows: —

50 & 51 Vict. c. 28, s. 17.

Sale of goods to which a trade-mark, mark, or trade description has been applied.

"On the sale or in the contract for the sale of any goods to which a trade-mark or mark or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade-mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor, and delivered at the time of the sale or contract to and accepted by the vendee."

There are no reported decisions under this section, and, the subject generally not being germane to the present work, the reader is referred to the ordinary text-books.

By the Anchors and Chain Cables Act, 1899 (*x*), every con-

(*q*) *Per* P. E. in *Yang-tsze Ins. Association* v. *Lukmanjee* [1918] 34 T. L. R. 320.

(*r*) (1883) 11 Q. B. D. 327, at 337, C. A. The decision was that such a stipulation could not be a condition, but the learned M.R. said that it is equally impossible that "even a stipulation ought to be implied."

(*t*) Section 14, *ante* 712.

(*u*) 50 & 51 Vict. c. 28. Sections 3, 4, and 5 of the Act define carefully the meaning of the expressions "goods," "trade-mark," "trade description," "false trade description," "forging of a trade-mark," "the application of a trade-mark or mark or trade description," and "the false application of a trade-mark or mark to goods," used in s. 17. These sections are of great length, and the definitions are given with great minuteness, and it is not thought necessary to set them out at length here. They supersede ss. 19 and 20 of the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), which was rep. by s. 23 of the Act of 1887. By the Merchandise Marks Act, 1891 (54 Vict. c. 15), s. 1, the customs entry of imported goods is deemed to be a trade description applied to the goods.

(*x*) 62 & 63 Vict. c. 23, s. 2 (1). And by s. 3 the maker of or dealer in anchors or chain cables and a shipowner or other person remains subject to any responsibility in respect of any anchor or chain cable made, sold, or used by him, to which he would have been subject but for the Act.

Implied warranty on sale of anchors and chain cables.

tract for the sale of a chain cable or of an anchor exceed in weight 168 pounds, shall, in the absence of an exp stipulation to the contrary, be deemed to imply a warra that the anchor or cable has before delivery been proved accordance with the Act (*y*). The burden of proving existence of any such express stipulation and the testing stamping lies, in case of dispute, on the seller (*z*).

Other instances.

Other instances of implied warranties are to be found in Hops (Prevention of Frauds) Act, 1866 (*a*), and the Fertili and Feeding Stuffs Act, 1906 (*b*). And in this connec may be mentioned the Flax and Hemp Seed (Ireland) Act which enacts no statutory warranty, but provides that action shall be brought as a warranty of flax seed or h seed, unless the warranty be in writing signed by the p to be charged or his authorised agent.

Sale of Food and Drugs Acts 1875 to 1907.

The Statute Book contains a number of Acts imposing sellers of various classes of goods a stututory responsib other than on an implied warranty. Two instances be given. By the Sale of Food and Drugs Act, 1875 (*c* penalty is, by the 6th section, inflicted upon any person sells, to the prejudice of the purchaser, any article of foo any drug which is not of the nature, substance, or qualit the article demanded by such purchaser, but allows hi defend himself by proving (*inter alia*) a written warr given by his own seller (*e*), provided he gives notice of defence within seven days, and sends the purchaser a cop the warranty (*f*). It is a misdemeanour to forge warra or certificates (*g*), or to apply a written warranty to an article of food or drug (*h*), and an offence, punishabl summary conviction, to give a false warranty in the ab

(*y*) See the facts amounting to proof in s. 10 (2). The Act simplifie amends the law, and repeals the previous Chain Cables and Anchors Acts to 1874 (27 & 28 Vict. c. 27; 34 & 35 Vict. c. 10; 37 & 38 Vict. c. 51). implied warranty applies to all sales, and not merely to the sale of a cab use in a British ship: *Hall* v. *Billingham* (1885) 54 L. T. 387, under s Act of 1874.

(*z*) Section 2 (2).

(*a*) 29 & 30 Vict. c. 37, s. 18.

(*b*) 6 Edw. 7. c. 27, ss. 1, 10. This Act repeals 56 & 57 Vict. c. 56.

(*c*) 50 Geo. 3. c. 82.

(*d*) 38 & 39 Vict. c. 63, am. by 42 & 43 Vict. c. 30. See also the Mar Act, 1887 (50 & 51 Vict. c. 29), the Sale of Food and Drugs Act, 1899 (62 Vict. c. 51), and the Butter and Margarine Act, 1907 (7 Edw. 7. c. 21).

(*e*) Section 25.

(*f*) 62 & 63 Vict. c. 51, s. 20 (1).

(*g*) Forgery Act, 1913 (3 & 4 Geo. 5. c. 27), s. 4. This Act repeals the Food and Drugs Act, 1875, s. 27.

(*h*) 38 & 39 Vict. c. 63, s. 27.

of proof that there was reason to believe the truth of the warranty (*i*).

And by the Fabrics (Misdescription) Act, 1913, the sale, exposure, or possession for sale, of textile fabrics under a misleading description as to their inflammability is prohibited (*k*). But the seller is protected if he purchased from a seller in the United Kingdom under a warranty of inflammability, and took reasonable steps to ascertain, and did in fact believe in, the accuracy of the statement warranted (*l*). Possession of the fabric is *prima facie* deemed to be for sale (*m*).

(*i*) 62 & 63 Vict. c. 51, s. 20 (6). See *Lever Supply Co.* v. *Houghton* [1911] 106 L. T. 220 (reason to believe truth); *Oliver* v. *Freeth* [1911] 2 K. B. 832 (company may be liable).
(*k*) 3 & 4 Geo. 5. c. 17, s. 1.
(*l*) *Ibid*, s. 3.
(*m*) *Ibid*, s. 4.

PART II.

DELIVERY, ACCEPTANCE, AND PAYMENT.

CHAPTER I.

DELIVERY.

Seller's first duty is delivery.

After the contract of sale has been completed, the chief and immediate duty of the seller, in the absence of contrary stipulations, is to deliver the goods to the buyer as soon as the latter has complied with the conditions precedent, if any, incumbent on him.

Accordingly the Code enacts:—

Code, s. 27.

"27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale."

Duty of seller to deliver, of buyer to accept and pay.

Code, s. 62 (1).

"62.—(1.) In this Act, unless the context or subject-matter otherwise requires,—

"'Delivery' means voluntary transfer of possession from one person to another."

"Delivery."

Different senses in which the word "delivery" is used.

There is no branch of the law of sale more confusing than that of delivery. The word is unfortunately used in very different senses, and these should be borne in mind.

1. The word delivery is sometimes used with reference to the passing of *the property in* the chattel (*a*), sometimes to the change of *its possession*; in a word, it is used in turn to denote transfer of *title* or transfer of *possession*.

2. Even where "delivery" is used to signify the transfer of *possession*, it is employed both with reference to the *formation* of the contract, and to its *performance*. When questions arise as to the "actual receipt" (*b*) in a parol contract for the sale of chattels exceeding £10 in value, the Judges constantly use

(*a*) As, for instance, in the opinion of Parke, J., in *Dixon* v. *Yates* (1833) 5 B. & Ad. 313, 340.

(*b*) As to this, see the Chapter on Acceptance and Actual Receipt, *ante*, 241, *et seqq.*

the word "delivery" as the correlative of that "actu receipt." But after the sale has been proven to *exist* b delivery and actual receipt, there may arise a distinct co troversy upon the point whether the seller has *performed* h completed bargain by delivery of possession of the bulk.

3. Even when the subject is the seller's delivery possession in *performance* of his contract, there arises a fres source of confusion in the different meanings of "possession. In general it would be perfectly technical to speak of th buyer of goods on credit as being in possession of them although the actual custody may have been left with th seller. The buyer owns the goods, has the right of possessio may take them away, sell or dispose of them, and mainta trover for them. Yet, if he become insolvent, the seller said to have retained possession. Again, if the seller h delivered the goods to a carrier for conveyance to the buye he is said to have lost his lien, because the goods are in th buyer's possession, the carrier being the buyer's agent: b if the seller claim to exercise the right of stoppage in transit during the transit, the goods are said to be only in th *constructive, not* in the *actual, possession* of the buyer.

Delivery in the various senses above mentioned is discuss in other parts of this work.

Delivery in performance, the present subject.

This Chapter is confined to a consideration of the seller duty of delivering the goods in *performance* of his contrac so as to enable him to defend an action by the buyer f non-delivery.

Seller's duty to deliver is only *primâ facie*, and may depend on conditions.

Delivery conditional on payment.

Generally the buyer, where the property has passed, entitled to take possession of it, and it is the seller's du to deliver it. But it may well be bargained that the possessi shall remain with the seller until the fulfilment of certa conditions precedent by the buyer. Where nothing has be said as to payment, the law presumes that the parties intend to make the payment of the price and the delivery of th possession concurrent conditions (*c*). The seller cannot insi on payment of the price without alleging that he is ready a willing to deliver the goods; the buyer cannot demand deliver of the goods without alleging that he is ready and willi to pay the price.

But it constantly happens that there is a contrary stipul tion (*d*), and that the parties agree that the buyer is to tak

(*c*) This is expressly enacted by the Code, s. 28, *ante*, 683; where the subj is discussed in Book IV., Chap. III., Conditions Implied by Law.

(*d*) Code, s. 28, *ante*, 683; and s. 55, *ante*, 254

possession of the goods before paying for them, or, in the usual phrase, that the goods are sold on credit. The legal effect then is, that there has been an actual transfer of *title*, and an actual transfer of the *right of possession*, so that in pleading, and for all purposes save that of the seller's lien for the price, the buyer is considered as being in possession, by virtue of the general rule of law that "the property of personal chattels draws to it the possession" (*e*). But although the buyer has thus acquired the right of possession, the seller may refuse to part with the goods, and may exercise his lien as seller to secure payment of the price, if the purchaser has *become insolvent* before obtaining *actual* possession (*f*).

Effect of sale on credit is to pass title and *right* of possession.

Seller may refuse delivery, notwithstanding this right, on buyer's insolvency.

The law on this whole subject was very perspicuously stated in the case of *Bloxam* v. *Sanders* (*g*), the leading case.

Bloxam v. *Sanders* (1825).

There, one Saxby bought several parcels of hops of the defendants in August, 1823, the bought notes being as follows: "Mr. J. R. Saxby, of Sanders, eight pockets, at 155s., 8th of August, 1823." Part of the hops were weighed, and an account delivered to Saxby of the weights; and samples were given, and invoices delivered, in which he was made debtor for six different parcels, amounting to £739. The usual time of payment in the trade was the second Saturday after a purchase. On the 6th of September the defendants wrote to Saxby a notice that if he did not pay for the hops before the next Tuesday they would resell and hold him bound for any deficiency in price. They did accordingly resell some parcels with Saxby's express assent, and refused to deliver another parcel (that Saxby himself sold) without being paid. Saxby became bankrupt in November, and the defendants sold other hops afterwards on his account, and delivered account sales of them, charging him commissions, and *warehouse rent from the 30th of August*. The plaintiffs, the bankrupt's assignees, demanded of the defendants the hops remaining in their hands, tendering the warehouse rent and charges, and the action was trover not only for the hops remaining unsold, but for the proceeds of all those resold.

Bayley, *J.*, who delivered the judgment, said "Where goods are sold, and nothing is said as to the time of the

(*e*) 2 Wms. Saund. 47, n. 1.

(*f*) [illegible] s. 41 (1) (c).

(*g*) 3 A. & E. 944. See further, as to the effect of the buyer's insolvency, *Ex parte Chalmers* (1873) 8 Ch. 289 (seller's right to withhold future deliveries till previous ones paid for); *Higgons* v. *Bernstein* (1874) L. R. 9 C. P. (the buyer's insolvency when an offer to re-sell); *Morgan* v. *Bain* (1874) L. R. 10 C. P. 15 (the same); *Ex parte Stapleton* (1879) 10 Ch. D. 586, C. A. (right of buyer's trustee to tender cash); Book V., Part I., Chap. I., *post*.

delivery, or the time of payment, and everything the sell has to do with them is complete, the property vests in t buyer, so as to subject him to the risk of any accident whi may happen to the goods, and the seller is liable to deliv them whenever they are demanded *upon payment of the pri* but the buyer has no right to have possession of the goo *till he pays the price* . . . payment or a tender of the price a *condition precedent* on the buyer's part; and until he mak such payment or tender he has no right to the possession. goods are sold upon credit, and nothing is agreed upon as the time of delivering the goods, the vendee is immediate entitled to the possession, and the *right of possession* and t *right of property* vest at once in him: but his right possession is not absolute; it is liable to be defeated if becomes insolvent before he *obtains* possession (*h*). . . . T buyer, or those who stand in his place, may still obtain t right of possession if they will pay or tender the price, or th may still act upon their right of property if anythi unwarrantable is done to that right. . . . But they can ma tain no action in which right of property and right possession are *both* requisite, unless they have both th rights (*i*). Trover is an action of that description. requires right of property and right of possession to supp it. . . . If the defendants were forced to keep the hops their warehouse longer than Saxby had a right to requ them, they were entitled to charge him with that expense but that charge gave him no better right of possession th he would have had if that charge had not been made. . Then, as to the non-rescinding of the sale, what can be effect? It is nothing more than insisting that the defenda will not release Saxby from the obligation of his purcha but it will give him no right beyond the right his purch gave, and that is a right to have the possession on payme of the price" (*l*).

Lord v. *Price* (1874).

And, in accordance with this view, it was held in *Lord Price* (*m*), that the buyer of goods which remain in t seller's possession, subject to his lien, cannot maintain action of trover against one who has wrongfully remov them.

(*h*) *Tooke* v. *Hollingworth* (1793) 5 T. R. 215.
(*i*) *Gordon* v. *Harper* (1796) 7 T. R. 9.
(*k*) Code, s. 37.
(*l*) See also *per Cur.* in *Spartali* v. *Benecke* (1850) 10 C. B. 212; 19 L. C. P. 293.
(*m*) L. R. 9 Ex. 54.

We will now inquire what the seller is bound to do where no legal ground exists for refusing to deliver.

The Code in section 29 lays down the rules as to delivery. By the first sub-section:—

Code, s. 29. Rules as to delivery. General, and in particular as to place.

"29.—(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery (*n*) 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 (*o*) 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" (*p*).

Agreed act as delivery.

Delivery may be made by means of any act of the seller or the buyer which it is agreed shall be treated as a delivery (*q*).

Seller [illegible] only to p[illegible] goods at buyer's di[illegible]posal, not to [illegible]l that

In the absence of a contrary agreement, the seller is *not* bound to *send* or *carry* the goods to the buyer. He may leave or place the goods at the buyer's disposal, so that the latter is able to remove them (*r*).

Delivery when conditional or [illegible]ce from [illegible]r

And if the delivery by the seller is to take place upon the doing of certain acts by the buyer, the seller is not in default for non-delivery until notice from the buyer of the performance of these acts.

Thus, if the seller agree to deliver on board the buyer's ship as soon as the latter is ready to receive the goods, the buyer must name the ship and give notice of his readiness to receive the goods on board before he can complain of non-delivery (*s*).

Where goods are deliverable to buyer on request"

If the contract provided for the delivery of the goods to the buyer on request, it is a condition precedent to the buyer's right of action that he should make this request either personally

(*n*) "'Delivery' means voluntary transfer of possession from one person to another": s. 62 (1).

(*o*) "'Specific goods' mean goods identified and agreed upon at the time a contract of sale is made": s. 62 (1).

(*p*) Sub-section (1) is illustrated *infra*.

(*q*) *Per* Bramwell, B., in *Castle* v. *Sworder* (1860) 5 H. & N. 281; 29 L. J. Ex. 235; *Bull* v. *Sibbs* (1799) 8 T. R. 327.

(*r*) *See per* Holroyd, J., in *Smith* v. *Chance* (1819) 2 B. & A. 753, at 755. The proposition formerly made in this work (2nd ed. 558; 4th ed. 682), that the buyer should be able to remove the goods "without lawful obstruction," is somewhat misleading. Parke, B., says in *Tuel* v. *Hinton* (1855) 1 W. R. 26, that a buyer is not bound to bring trover. *See* also *Buddle* v. *Green* (1857) 27 L. J. Ex. 33.

(*s*) *Armitage* v. *Insole* (1850) 14 Q. B. 728; *Sutherland* v. *Allhusen* (1866) 14 L. T. 666; *Stanton* v. *Austin* (1872) L. R. 7 C. P. 651; *Forrestt & Son* v. *Tramays* (1900) 83 L. T. 335, C. A.; *Knox* v. *Mayne* (1873) 7 Ir. R. C. L. 557.

or "as required."

or by letter (*t*), unless there has been a waiver of compliance with this condition, resulting from the seller's having declared his inability to deliver (*u*), or having incapacitated himself from delivering by consuming, or reselling, or otherwise so disposing of the goods as to render a request idle and useless (*x*). Where the time for the buyer's request is undefined, the general rule is that the seller is not discharged by the mere fact that the buyer has not made any request within a reasonable time after the contract (*y*). The seller must, at the expiration of such a reasonable time, give the buyer notice to make his requirement, and is discharged if, on a reasonable time thereafter, the buyer does not make it (*z*). What is a reasonable time may be shown by trade usage (*a*).

This general rule is, however, subject to other general principles of law (*b*). Thus, if it would be unfair to the seller that the buyer should delay in requiring the goods, as, for example, where the seller is not in possession of the goods, or cannot easily acquire them, the buyer cannot prejudice the position of the seller by delay (*c*). Accordingly, if the buyer does not make request within a reasonable time, and in the meantime the seller is unable to deliver the goods, or any other ground of excuse of delivery supervenes, the seller is *ipso facto discharged* (*c*).

So also excessive delay by the buyer, nothing being said on either side, may show a mutual abandonment of the contract, or the buyer may by his words or conduct induce the seller to believe that the contract no longer exists, and so be estopped from setting it up (*d*).

Place of delivery.

As to the *place* where delivery is to be made, this will generally be regulated by agreement, which is usually binding on both parties (*e*); but when nothing is said about it,

(*t*) *Birks* v. *Trippet* (1666) 1 Wms. Saund. 33 b.; *Bach* v. *Owen* (1795) 5 T. R. 409, exp. in *Radford* v. *Smith* (1838) 3 M. & W. 254.

(*u*) *Lesson* v. *North British Oil Co.* (1874) 8 Ir. R. C. L. 309.

(*x*) *Bowdell* v. *Parsons* (1808) 10 East, 359; *Amory* v. *Brodrick* (1822) 5 B. & A. 712. See the Chapter on Conditions and Warranties: General Principles, *ante*, 641.

(*y*) For the ordinary rule of reasonable time is excluded, the buyer having unless hastened by the seller's notice, all his life to ask for the goods: Shep T. 378; *Jones* v. *Gibbons* (1853) 8 Ex. 920; 22 L. J. Ex. 347; 91 R. R. 841

(*z*) *Jones* v. *Gibbons*, *supra*.

(*a*) *Ross* v. *Shaw & Co.* (1917) 2 Ir. Rep. K. B. 367, explaining *Jones* v. *Gibbons*.

(*b*) *Pearl Mill Co.* v. *Ivy Tannery Co.* (1919) 1 K. B. 78; 88 L. J. K. B. 13

(*c*) *Ross* v. *Shaw & Co.*, *supra*.

(*d*) *Pearl Milk Co.* v. *Ivy Tannery Co.*, *supra*.

(*e*) *Maine Spinning Co.* v. *Sutcliffe & Co.* (1917) 34 Times L. R. 154, 87 L. K. B. 282 ("Fash, Liverpool"), following *Wackerbarth* v. *Masson* (18

seems to be taken for granted at common law that the goods are to be at the buyer's disposal at the place where they are when sold. As was said by Chancellor Kent (*f*), "the store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made when the contract is to pay upon demand and is silent as to the place" (*g*).

The Editor is not aware of any authority to support the proviso to sub-section (1); it would seem that the sub-section generally goes somewhat further than the common law, so far at least as it has ever been laid down.

Goods to be taken by buyer from seller's premises.

When the goods are to be taken by the buyer from the seller's land or premises, a licence is implied for the buyer to enter to take the goods (*h*). Such a licence is irrevocable, at least with respect to any part of the goods which have become the buyer's property (*i*).

Contracts for delivery f.o.b.

In many mercantile contracts it is stipulated that the seller shall deliver the goods "f.o.b.," *i.e.*, "free on board." The meaning of these words is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped; delivery is made, and the goods are at the risk of the buyer, from the time when they are so put on board (*k*).

In a contract of sale "ex ship," the seller makes a good

3 Camp. 270 ("f.o.b. a foreign ship"). *Secus*, where the place of delivery is for the benefit of one party only.

(*f*) 2 Kent's Com. 12th ed. 505.

(*g*) The rule was stated to the same effect by the Supreme Court of the U. S. in *Hatch* v. *Oil Co.* (1879) 10 Otto, at 134. As to the duty of a *debtor* who is bound by bond or feoffment to deliver such things as wheat or timber, see Co. Litt. 210 b.

(*h*) *Liford's Case* (1614) 11 Co. 46 B, 52 A; *Jones* v. *Tankerville*, *infra*. The licence is valid, even under section 4 of the Statute of Frauds, until revoked, if revocable: *Carrington* v. *Roots* (1837) 2 M. & W. 248; 6 L. J. Ex. 95; 46 R. R. 583.

(*i*) *Wood* v. *Manley* (1839) 11 A. & E. 34; 9 L. J. Q. B. 27; 52 R. R. 271; *Thomas* v. *Sorrell* (1673), Vaughan 330, at 351, Ex. Ch. Query, whether the licence is irrevocable *ab initio*? See *per* Parker, J., in *Jones* v. *Tankerville* (1909) 2 Ch. 440; 78 L. J. Ch. 674, referring to *Marshall* v. *Green* (1875) 1 C. P. D. 35; 45 L. J. C. P. 153. It seems to have been so treated in *Hardy* v. *Carruthers* (1894) 25 Ont. R. 279. American Courts treat the licence as divisible: see *Fletcher* v. *Livingstone* (1891) 153 Mass. 388.

(*k*) *Per* Pollock, C.B., in *Browne* v. *Hare* (1858) 3 H. & N. 484; 27 L. J. Ex. 372; in Ex. Ch. (1859) 4 H. & N. 822; 29 L. J. Ex. 6; *Ogg* v. *Shuter* (1875) L. R. 10 C. P. 159; (1876) 1 C. P. D. 47, C. A.; *per* Brett, M.R., in *Stock* v. *Inglis* (1884) 12 Q. B. D. 564, at 573, C. A., set out *ante*, 459. In the last case the M.R. expressed his opinion that the same meaning will be attributed to the words whether the contract is or is not one for the sale of specific goods. *Corcoran* v. *Thompson* (1845) 5 Moo. P. C. C. 165; *Wimble* v. *Rosen berg* (1913) 3 K. B. 773, C. A.; 82 L. J. K. B. 1251; *H. O. Brandt & Co.* v. *H. N. Morris & Co.* (1917) 2 K. B. 784, C. A. (buyer's risk as to export licence).

Delivery "ex ship."

delivery if, when the vessel has arrived at the port of deliver and has reached the usual place of delivery therein for t discharge of such goods, he pays the freight, and furnish the buyer with an effectual direction to the ship to deliver

Code, s. 29 (2).

The Code in section 29 (2) lays it down as a rule that

Seller's duty when he agrees to send goods.

"(2.) Where under the contract of sale the seller is bound to send goods to the buyer, but no time for sending them is fixed, the seller bound to send them within a reasonable (*m*) time."

Where time is not expressed in contract, reasonable time.

This is declaratory of the common law rule. If nothing said as to time, the seller must send within a reasonable tim and when the sale is in writing, if nothing is said as to tim parol evidence is admissible of the facts and circumstanc attending the sale in order to determine what is a reasonal time.

Ellis v. *Thompson* (1838).

Thus, in *Ellis* v. *Thompson* (*n*), where there was a sale lead, deliverable in London, parol evidence was admitted show that the defendant had asked the broker whether t lead was ready for shipment, and before the bought and so notes were made out had been informed that it was, and th Gloucester and Liverpool were the usual ports of shipment London. It was held that, having regard to the conversatio what was a reasonable time must be calculated from t contemplated place of shipment, and that the defendant w relieved from the obligation of receiving delivery by reas of a long delay in getting the lead in barges from the mi down the Severn to Gloucester.

But in written sales, not mentioning the time of delivery parol evidence is not admissible to show that a particula time for delivery was verbally agreed on (*o*).

Where the contract expresses the time.

Where the contract expresses the time, the question is o of construction, and therefore one of law for the Court, not fact for the jury (*p*).

"Month": its meaning.

The word "month," although at common law it generall means a *lunar* month, is in mercantile contracts, in the City

(*l*) *Yang-tsze Ins. Ass.* v. *Lukmanjee* (1918) 34 T. L. R. 320, P. C.

(*m*) The rule applies to all contracts universally: *per* Lord Watson in *Hu* v. *Raymond* (1893) A. C. 22, at 32. "Where by this Act any reference is mad to a reasonable time, the question what is a reasonable time is a question fact," s. 56.

(*n*) 3 M. & W. 445; and see *Jones* v. *Gibbons* (1853) 8 Ex. 920; *Sansom* *Rhodes* (1840) 6 Bing. N. C. 261; 8 Scott, 544.

(*o*) *Greaves* v. *Ashlin* (1813) 3 Camp. 426. See also *Ford* v. *Yates* (18 2 M. & G. 549.

(*p*) See Chapter on Express Conditions, *ante*, at 673–4

London at any rate, understood to mean a *calendar month* (*q*). And the Code expressly declares that such shall *prima facie* be the meaning in a contract of sale (*r*).

But this presumption may of course be rebutted. Thus, "month" may mean an "ironmaster's month," that is to say, the complete calendar month following a contract of sale, reckoning from the 1st, and not so many days reckoning from the contract (*s*).

"Days" how counted.

Where a certain number of "days" are allowed for delivery, they are to be counted as consecutive days, and include Sundays, unless the contrary be expressed (*t*), or a usage to that effect be shown (*u*). The odd day in Leap Year is a separate day, and is not to be counted with the preceding as one day, as it formerly was under a Statute of 1256 (*x*), which was not repealed until 1879.

Leap Year.

Webb v. *Fairmaner* (1838).

And the rule, though long in doubt, seems now to be settled by *Webb* v. *Fairmaner* (*y*), that if a certain number of days is allowed for the delivery, they must be counted exclusively of the day of the contract. A promise to deliver goods in two months *from* the 5th of October is fulfilled by delivery at any time on the whole day of the 5th of December, so that an action against the seller would be premature, if brought before the 6th. Where, however, the last day of the period is a Sunday, it would seem to be doubtful whether it should not be excluded, where delivery on that day would be a violation of the Sunday Observance Act, 1677 (*z*).

(*q*) *Per* Erle, C.J., in *Turner* v. *Barlow* (1863) 3 F. & F. 946, at 949, quoted by Farwell, J., in *Brunner* v. *Moore* (1904) 1 Ch. 305, at 311.

Whether there was at common law a *general* exception of mercantile contracts from the ordinary rule that "month" *prima facie* means a lunar month does not seem so clear. It has been so stated in the text-books; and there is a dictum to this effect of Littledale, J., in *Reg.* v. *Chawton* (1841) 1 Q. B. 217, at 230, and a direct ruling by Pollock, C.B., in *Hart* v. *Middleton* (1845) 2 C. & K. 9, at 10, where the Chief Baron says: "In commercial matters a 'month' always means a calendar month." On the other hand, the rule has been stated as one of intention, depending upon the construction of the contract, the surrounding circumstances, and any usage of the trade, business, or place: *Lang* v. *Gale* (1813) 1 M. & S. 111; *Reg.* v. *Chawton*, *supra*; *Simpson* v. *Margitson* (1847) 11 Q. B. 23; and this has very recently been held to be the true rule in all cases: *Brunner* v. *Moore*, *supra*, a case of the sale of a patent.

(*r*) S. 10 (2), *ante*, 674.

(*s*) *Bissell* v. *Beard* (1873) 28 L. T. 740. By s. 55 of the Code *(ante*, 254) usage modifies the rights of the parties.

(*t*) *Brown* v. *Johnson* (1842) 10 M. & W. 331.

(*u*) *Cochran* v. *Retberg* (1803) 3 Esp. 121. See also *Nielson* v. *Wait* (1885) 16 Q. B. D. 67, C. A.

(*x*) 40 H. III. (Stat. Bissex.), now repealed by 42 & 43 Vict. c. 59. The statute is cited in Ruffhead as 21 H. III. (De Anno et Die Bissextili).

(*y*) (1838) 3 M. & W. 473; and see *Lester* v. *Garland* (1808) 15 Ves. 248; *Pellew* v. *Wonford* (1829) 9 B. & C. 134; *Young* v. *Higgin* (1840) 6 M. & W. 49; *Blunt* v. *Heslop* (1838) 8 A. & E. 577; *Isaacs* v. *Royal Insur. Co.* (1870) L. R. 5 Ex. 296; *South Staff. Tramways* v. *Sickness Assur.* (1891) 1 Q. B. 402.

(*z*) See *Child* v. *Edwards* (1909) 2 K. B. 753; 78 L. J. K. B. 1061; *Milch* v. *Frankau & Co.*, *ibid.* 100; 78 L. J. K. B. 560.

Coddington v. *Paleologo* (1867).

In *Coddington* v. *Paleologo* (*a*), where the contract was t the delivery of goods, "delivering *on* April 17th, comple 8th of May," the Court of Exchequer was equally divide on the question whether the seller was bound to commen delivery on the 17th of April.

Cox v. *Todd* (1825).

In *Cox* v. *Todd* (*b*), a contract to deliver barley "alongsi a sloop or warehouse in all April or sooner" was held not have been fulfilled by the seller bringing the barley into do on the 29th, four days being required for complete deliver

In relation to the hour at which a seller can make a val delivery, section 29 provides that:—

Code, s. 29 (4). "At a reasonable hour."

"29.—(4.) Demand or tender of delivery may be treated as ineffect unless made at a reasonable hour. What is a reasonable hour i question of fact."

This enactment abrogates, so far as sales of goods concerned, a number of artificial rules of *law* for determin the reasonableness of the hour for doing an act. These ru were discussed in 1844 in *Startup* v. *Macdonald* (*c*) in Exchequer Chamber (*d*).

Rules of law as to reasonable hour for tender stated by Parke, B. in *Startup* v. *Macdonald* (1844).

In that Court Parke, B., gave an instructive statement the whole law on the subject to the following effect: A pa who is by contract to pay money, or to do to another a th *transitory—i.e.*, anywhere—on a certain day, or on one several days, has the whole of that day, or of all of the d respectively, for performance. He must find the other at peril (*e*), and within the time limited, if the other be wi the four seas (*f*), and must do all that, without the concurre of the other, he can do, and at a convenient time, hav regard to the nature of the act, *before midnight*. "Theref if he is to pay a sum of money, he must tender it a suffic time before midnight for the party to whom the tende made to receive and count; or if he is to deliver goods, must tender them so as to allow sufficient time for examina and receipt. . . . But where the thing to be done is t performed *at a certain place* on or before a certain da another party to a contract, there the tender must be to

(*a*) L. R. 2 Ex. 193. See also *Bergheim* v. *Blaenavon Iron Co.* (1875) 10 Q. B. 319, where the Judges of the Q. B. showed a like difference of as to the time when delivery ought to take place.

(*b*) 7 D. & R. 131; 4 L. J. K. B. 34.

(*c*) (1844) 6 M. & G. 593, at 623, *et seqq.*

(*d*) This case and the judgment of Parke, B., in the Ex. Ch were s length in some previous editions: 2nd ed. 563 *et seqq.*; 4th ed. 687 *et seq*

(*e*) *Kidwelly* v. *Brand* (1551) Plowden, 71.

(*f*) Shep. Touch. 136.

other party *at that place*" (*g*): and as the attendance of that party at that place is necessary to complete the act, the law fixes a particular part of the day for his presence, and "it is enough if he be at the place at such a convenient time *before sunset* on the last day as that the act may be completed by daylight." But this being a rule made only for the convenience of both parties, "if it happen that both parties meet at the place at any other time of the last day, or upon any other day within the time limited, and a tender is made, the tender is good" (*h*).

Delivery "directly."

Duncan v. *Topham* (1849).

In *Duncan* v. *Topham* (*i*), the declaration alleged an order for goods to be delivered to the defendant within a *reasonable time*, but the proof showed a written order for "five tons, etc.; but it must be put on board *directly*," to which the plaintiff replied, "I shall ship you five tons, etc., to-morrow." *Held*, that the proof did not support the declaration, and that a reasonable time was a more protracted delay than directly.

"As soon as possible."

Attwood v. *Emery* (1856).

In *Attwood* v. *Emery* (*k*), the agreement of the seller, a *manufacturer*, to deliver goods "as soon as possible," was construed to mean "as soon as the sellers could," with reference to *their* ability to furnish the article ordered, consistently with the execution of prior orders in hand. A written order by a cooper for a large quantity of iron hoops "as soon as possible," sent on the 30th of November, was held to be reasonably complied with by tender in the February following.

Hydraulic Engineering Co. v. *McHaffie* (1878).

But the facts of the particular case may show that a stricter interpretation should be put upon the words "as soon as possible." Thus, in *The Hydraulic Engineering Co.* v. *McHaffie* (*l*), where the sellers contracted in July to make what was called "a gun," being part of a machine which the buyer was under contract to deliver to a third person by the end of August, as the sellers knew, the words "as soon as possible" were interpreted to mean within a reasonable time, with an undertaking to do it in the shortest practicable time. "By the words 'as soon as possible,'" said Cotton, L.J., "the defendants must be taken to have meant that they would make

(*g*) Subject to fixing of the place, and a demand, if two or more places are at the option of the promisee: *Thorn* v. *City Rice Mills* (1889) 40 Ch. D. 361; 58 L. J. Ch. 297; *cf. Re Harris Calculating Machine Co.* (1914) 1 Ch. 920; 83 L. J. Ch. 545.

(*h*) See 7 Bac. Ab. 529, "Tender," D.; Co. Lit. 202 a. 211; 5 Co. Rep. 114.

(*i*) 8 C. B. 225.

(*k*) 1 C. B. N. S. 110; 26 L. J. C. P. 73.

(*l*) 4 Q. B. D. 670, at 676, 677, C. A.

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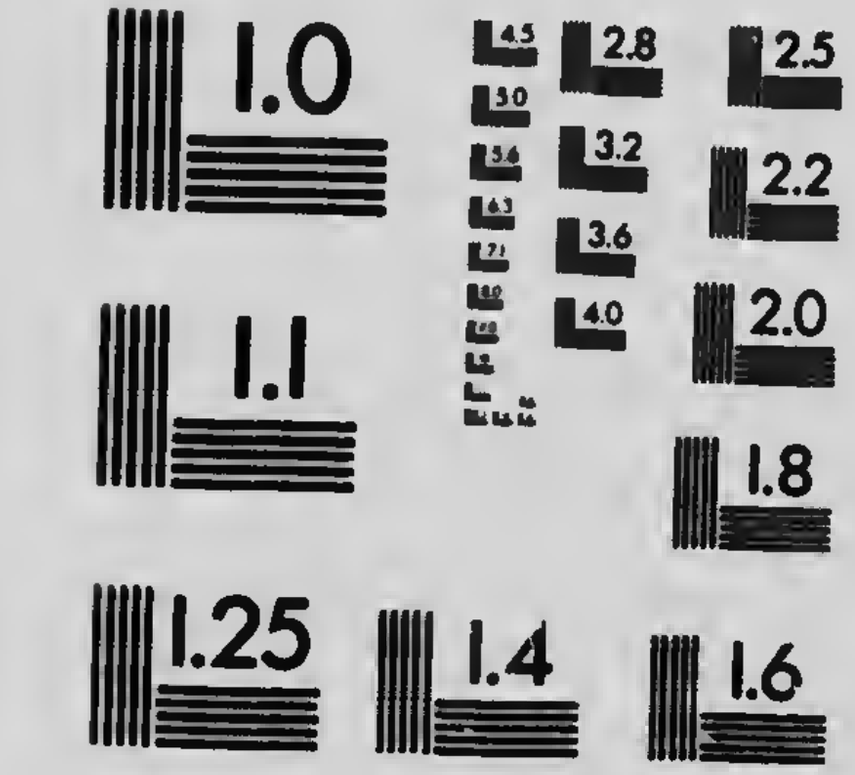

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the 'gun' as quickly as it could be made in the larg establishment with the best appliances. . . . The surround circumstances must be looked at, and they plainly show t the plaintiffs required the defendants to supply the 'gun' quickly as it could be supplied if they were provided with proper appliances." The delay arose solely from the selle want of a competent workman, and he was held liable fo breach of contract; and *Attwood* v. *Emery* was distinguish as deciding merely that the seller was not bound to set as the execution of all prior orders. With this proposition t Court agreed.

"Immediately on demand," or "on notice."

Where an act is to be performed "immediately on demand or "on demand," or "on notice," the promisor is entitled a reasonable time after demand or notice in which to comp with his promise (*m*).

"Not later than—."

Re *Lockie and Craggs* (1901).

Where a ship was to be built in a shipbuilder's yard soon as a suitable berth became available, and was expres deliverable "not later than June 30th, due allowance bei made for delays" through specified causes, "or other circu stances beyond the builder's control," and delivery w delayed by a previous ship being unavoidably delayed completion in a particular berth, which was the first availab berth for the ship first mentioned, it was held by Wright, that the delay caused by the previous ship was an except delay within the meaning of the contract (*n*).

"Forthwith," and payment within fourteen days.

Where the contract was to deliver goods "forthwith," t price being made payable within fourteen days after t contract, it was held manifest that the goods were intended be delivered within the fourteen days (*o*). And generally t construction of the contract may show that "forthwith means no more than "without delay or loss of time," it bei a less strict term than "immediately" (*p*).

Where contract provides for suspension or cancellation of delivery.

The seller may by express agreement be entitled to suspe or cancel delivery in some specified event, in which case it a question of fact, and of the construction of the contra whether the event has happened (*q*).

(*m*) Com. Dig. Vol. III., 102, Condition, G (5). See this principle appl to payment in *Brighty* v. *Norton* (1862) 3 B. & S. 305, and *Toms* v. Wil (1862) 4 B. & S. 442; *post*, in Chapter on Payment; and *Moore* v. *Shell* (1883) 8 A. C. 285, 293; P. C.; 52 L. J. P. C. 35.

(*n*) Re *Lockie and Craggs* (1901) 7 Com. Cas. 7; 86 L. T. 388. See a *Matsoukis* v. *Priestman & Co.* [1915] 1 K. B. 681: 84 L. J. K. B. 967 (del *force majeure*).

(*o*) *Stainton* v. *Wood* (1851) 16 Q. B. 638.

(*p*) *Roberts* v. *Brett* (1865) 11 H. L. C. 337; 34 L. J. C. P. 241: *Simpson* *Henderson* (1829) M. & M. 300.

(*q*) *Ford & Sons* v. *Henry Leetham & Sons* [1915] 84 L. J. K. B. 2101; Com. Cas. 55 (cancellation); *Bolckow, Vaughan & Co.* v. *Compania Mine*

Sometimes the time of delivery stipulated for by the contract has been postponed at the request either of the seller or the buyer. Such a postponement, unless amounting to a contract, in which case it may have to be reduced to writing under the Statute of Frauds, or section 4 of the Code, is a mere forbearance by the one party at the request of the other, and either may at any time insist upon his rights under the original contract (*r*). Postponed delivery.

In *Ogle* v. *Earl Vane* (*s*), the defendant contracted to sell to the plaintiff 500 tons of iron, delivery to extend to the 25th of July, 1865. Owing to an accident to the defendant's furnaces, he had delivered none of the iron *by that date*. After negotiations between the parties, in February, 1866, the plaintiff went into the market. The price of iron had risen since July, and the plaintiff sought to recover the difference between the contract and the market price in *February*. The defendant paid into court the difference between the contract and the market price in July. The Judge left it to the jury to say whether the defendant had held out that he should be able to deliver the iron, and the plaintiff had waited accordingly, in which case they might return a verdict for damages beyond the amount paid into court. The jury returned a verdict for the full amount claimed. *Ogle* v. *Vane* (1868).

Upon the argument of a rule to enter the verdict for the defendant, on the ground that there was no evidence for the jury of the plaintiff being entitled to more damages than the sum paid into court, the defendant objected that, as the plaintiff was suing on the original contract for a breach in July, the amount of the damages was fixed at that time, and that, to recover damages calculated in February, the plaintiff must rely upon an agreement to postpone the time of delivery, and that such an agreement should be in writing to satisfy the Statute of Frauds; but it was held by the Court of Queen's Bench, and affirmed by the Exchequer Chamber: 1. that there was evidence that the plaintiff's delay in going into the market was at the defendant's request, and 2. that as the evidence went to show, not a new contract, *but simply a*

(1916) 33 T. L. R. 111, C. A. (war); *Ebbw Vale Steel Co.* v. *MacLeod & Co.* (1917) 33 T. L. R. 268, H. L. ("war or other event beyond personal control"); *Tennants* v. *C. E. Wilson & Co.* [1917] A. C. 495, H.L.; 86 L. J. K. B. 1191 ("contingencies hindering delivery: customers to be equally treated").

(*r*) See *ante*, 273.

(*s*) L. R. 3 Q. B. 272; 37 L. J. Q. B. 77, in Ex. Ch., affirming Q. B., L. R. 2 Q. B. 275

voluntary forbearance by the plaintiff at the request of defendant, the Statute of Frauds did not apply.

Hickman v. *Haynes* (1875).

The cases bearing upon this point are considered in judgment of the Court of Common Pleas in *Hickman Haynes* (*t*), an action for non-acceptance of iron. The contract was for the sale by the plaintiff to the defendant 100 tons of pig-iron by monthly deliveries of twenty-five in March to June, 1873. Seventy-five tons of iron delivered during March, April, and May respectively, early *in June* the defendants verbally requested the plain and the plaintiff consented, to postpone delivery of the resi In August the plaintiff tendered the residue, but defendants then refused to accept it. The defendants plea that the plaintiff was not ready and willing to deliver u the original contract, and that he must therefore rely a new verbal contract to deliver at a later date; but the C held that the original contract still subsisted, and that plaintiff had merely *voluntarily forborne* to require accepta of the goods, consequently that the plaintiff was ready willing to deliver in June.

Plevins v. *Downing* (1876).

On the other hand, in *Plevins* v. *Downing* (*u*), the plain contracted to deliver 100 tons of pig-iron, "25 tons at and 75 tons in July next." By the end of July the plain had delivered, and the defendant had accepted, 75 tons in There was no evidence that the defendant had requested plaintiffs, *before* th end of July, to withhold delivery of remaining 25 tons, but there was evidence that in *Oct* the defendant verbally requested the plaintiffs to forwar tons, which, when forwarded, he declined to accept. *H* that the plaintiffs could not sue on the original contract, b unable to prove that they were ready and willing to del the 25 tons at the end of July, and had only withheld deli at the defendant's request, neither could they rely upon defendant's request to deliver in October, as that would constituted a new contract, which was by parol only.

The distinction between the last two cases is clear. *Hickman* v. *Haynes*, the plaintiff could explain the delivery within the contract time by showing that "the completion of the contract was not the fault of the plain and that he was disposed and able to complete it" (*x*). *Plevins* v. *Downing* the non-delivery was unexplained.

(*t*) L. R. 10 C. P. 598; 44 L. J. C. P. 358.
(*u*) 1 C. P. D. 220; 45 L. J. C. P. 695.
(*x*) *Per* Lord Campbell, C.J., in *Cort* v. *Ambergate Ry. Co.* (1851) 17 at 144; 20 L. J. Q B. 460

Tyers Rosedale Iron Co. (1875).

In *Tyers* v. *The Rosedale Iron Co.* (*y*), the defendants were the sellers and the plaintiffs the purchasers of iron, deliverable in monthly quantities over 1871. The defendants withheld delivery of various monthly quantities at the plaintiff's request. Afterwards, in December, 1871, *the last month* for delivery, the plaintiffs demanded immediate delivery of the whole of the residue of the iron. The defendants refused to deliver any more than the monthly quantity for December. In an action by the plaintiffs for non-delivery the defendants pleaded: 1. That the plaintiffs were not ready and willing to accept the iron, and 2. That there was a mutual rescission of the contract to the extent of the iron undelivered during the months of postponement. In the Exchequer, Kelly, C.B., and Pigott, B., agreed with the defendants on the second point; but Martin, B., dissented, holding that there was merely a postponement of delivery, and that, as a matter of law, there was no difference between a request for postponement made by a plaintiff and one made by a defendant, and that the defendants were liable for non-delivery in December. In the Exchequer Chamber the judgment of Martin, B., was approved, and the decision was reversed, the Court holding that the defendants were not entitled to refuse to deliver more than the monthly quantity. It became unnecessary to decide whether the defendants were bound to deliver in December all the residue, or whether they had a reasonable time within which to deliver, because the plaintiffs agreed to have the damages assessed at the market price of iron in December, and, as the market was rising, this arrangement was more favourable to the defendants. The opinion of the Exchequer Chamber was evidently in favour of their having a reasonable time.

Propositions respecting postponement of delivery.

The following propositions may be deduced from the authorities:

1. Where one party has within the contract time requested a postponement of delivery or acceptance, and the other party assents, such assent need not be in writing under section 4 of the Code. It is not a new contract, but merely a voluntary and revocable forbearance (*z*).

(*y*) (1875) L. R. 10 Ex. 195; 44 L. J. Ex. 130, Ex. Ch., reversing Ex. (1873) L. R. 8 Ex. 305. *Cf. Barr* v. *Waldie* (1893) 21 Ret. (Sc.) 224, where there was no agreement to postpone deliveries; and *Higgin* v. *Pumpherstone Oil Co.* [1893] 20 Ret. 532, where each delivery was to be a separate contract. In the last case the Court thought that the parties by not tendering or requiring delivery had abandoned the contract.

(*z*) *Ogle* v. *Vane* (1868) L. R. 3 Q. B. 272; 37 L. J. Q. B. 77; *ante*, 791; *Hickman* v. *Haynes* (1875) L. R. 10 C. P. 598; 44 L. J. C. P. 358, *ante*, 792.

2. It is immaterial whether the request has been mad... the plaintiff or by the defendant, by the seller or by t... buyer (*a*); for such a request is consistent with readiness a... willingness to deliver or accept within the contract time (*b*...

3. If, without some arrangement come to within the co... tract time, either party has made default in delivery ... acceptance, a subsequent verbal agreement to allow him ... complete the contract is not binding, and he cannot sue eith... on the original contract, not being ready and willing ... perform it, or on the later agreement, since it is not ... writing (*c*).

Code, s. 29 (3). Goods in possession of third person.

The third sub-section of section 29 of the Code provides:

"(3) Where the goods at the time of sale (*d*) are in the possession ... third person, there is no delivery by seller to buyer unless and u... such third person acknowledges to the buyer that he holds the goods ... his behalf, provided that nothing in this section shall affect the op... tion of the issue or transfer of any document of title (*e*) to goods."

Salter v. *Woollams* (1841).

In *Salter* v. *Woollams* (*f*), the defendants, auctioneers, s... on the 24th July a rick of hay, then on the premises of ...

(*a*) Brett, J., in *Plevins* v. *Downing* (1876) 1 C. P. D. 220; 45 L. J. ... 695, *ante*, 792, draws a distinction between a request made by a plaintiff ... one made by a defendant as being the test whether a mere "arrangeme... exists as to the mode of performing a contract, or there is a new contract; ... says that, where the request comes from the plaintiff, he cannot from the m... of the case aver and prove that he is ready and willing to perform his ... The real distinction, however, is between a *binding* contract and a mere v... tary dispensation of performance; moreover, the suggested distinction ... inconsistent with *Tyers' Case*, in which the request came from the pla... who was nevertheless held entitled to succeed; and is answered by the re... made *urguendo* by Blackburn, J. (L. R. 10 Ex. at 197), in reply to an argu... of the defendant's counsel that the plaintiffs were bound to show they ... ready and willing to receive the iron. The answer is," said the le... Judge, "'We were ready to receive the iron when you were ready to d... it, but we requested you not to require us to receive it, and you consent... To the same effect is the judgment of Martin, B., in the Court below (L. ... Ex. at 318).

(*b*) *Per* Martin, B., in *Tyers* v. *Rosedale Co.* (1873) L. R. 8 Ex. 305, at ... 44 L. J. Ex. 139, and *per* Blackburn, J., in Ex. Ch. (1875) L. R. 10 Ex. ... at 197. *Cf. per* Lord Campbell in *Cort* v. *Ambergate Ry. Co.* (1851) 17 ... at 144; 20 L. J. Q. B. 460, quoted *ante*, 792, *contra* Brett, J., in *Plev... Downing*, *supra*.

(*c*) *Plevins* v. *Downing*, *supra*.

(*d*) *I.e.*, where the property passes: Code, s. 1 (3), *ante*. An attorn... previously to the passing of the property is ineffectual, except by way of estop... *Busk* v. *Davis* (1814) 2 M. & S. 397; 15 R. R. 288.

(*e*) Document of title to goods has the same meaning as it has in the F... Acts: s. 62 (1). Section 29 (3) adopts *Bentall* v. *Burn* (1824) 3 B. & C... 3 L. J. K. B. 42; 27 R. R. 391, and *Farina* v. *Home* (1846) 16 M. & W... 16 L. J. Ex. 73; 73 R. R. 433.

(*f*) 10 L. J. C. P. 145; 2 M. & G. 650; 58 R. R. 513. See also W... *Baxter* (1833) 49 L. T. 45; and *cf. Smith* v. *Chance* (1819) 2 B. & A... 21 R. R. 485, for an *incomplete* delivery in a similar sale. As ... irrevocable nature of a licence, see *Wood* v. *Manley* (1840) 11 A. & ... 9 L. J. Q. B. 27; 52 R. R. 271; *Wood* v. *Leadbitter* (1845) 13 M. & W... 14 L. J. Ex. 161; 67 R. R. 831; *Taplin* v. *Florence* (1851) 10 C. B...

Jackson, to the plaintiff. One of the defendants had procured Jackson's licence that the hay should remain on the premises till the 28th of September if the buyer wished. This licence was indorsed on the conditions of sale, and was read at the auction, and the auctioneers delivered to the plaintiff a note addressed to Jackson, requesting him to permit the plaintiff to remove the hay. Jackson refused, and the plaintiff sued the auctioneers for non-delivery. *Held*, that an auctioneer who sells agrees to deliver what he sells (*g*), but that the delivery contemplated by the parties under the circumstances of the case was complete.

Tindal, C.J., said: "I think this case may be decided on its particular circumstances without entering into wider inquiry. . . . It appears to me that such delivery as was contemplated by the parties at the time has taken place. . . . One of the conditions of the sale was that the hay should be taken away at the expense of the buyer. It seems to me that all that would fall on the auctioneers was to give to the purchaser such an authority as was in their power to enable him to receive it." Bosanquet, J., said: "Jackson indorses on the conditions of sale his consent that the hay shall remain on the premises till September. That consent is read aloud at the sale, which then proceeds. . . . It appears to me the same as if the auctioneer or his clerk had gone immediately after the sale to Jackson's premises, pointed out to the plaintiff the rick which he had purchased, and it had then been agreed between Jackson and the plaintiff that it should remain where it was for some time longer. This would clearly have been a delivery, and I do not think it makes any difference that the order to deliver was at another time." Erskine, J., said: "It seems to me that the auctioneer only agreed to give the purchaser full legal authority to remove the hay, and that he has done."

It might seem (*h*) at first sight that *Salter* v. *Woollams* is in conflict with the class of decisions exemplified in *Bentall* v. *Burn* (*i*), in which the principle is established that there is no delivery where the goods are in possession of a third person,

20 L. J. C. P. 137; 84 R. R. 773. See also *ante*, 785. For the right of action for revocation, see *Kerrison* v. *Smith* [1897] 2 Q. B. 445; 66 L. J. Q. B. 762.

(*g*) *Williams* v. *Millington* (1788) 1 H. Bl. 81; 2 R. R. 724; *Woolfe* v. *Horne* (1877) 2 Q. B. D. 355; 46 L. J. Q. B. 534.

(*h*) This is the Author's explanation: 2nd ed. 559—560; 4th ed. 683—684.

(*i*) (1824) 3 B. & C. 423; 3 L. J. K. B. 42; 27 R. R. 391, discussed *ante*, 243. See now s. 29 (3) of the Code, *ante*, 794.

unless that third person assent to attorn to the buyer become his bailee instead of that of the vendor. But the really no such conflict; for in *Salter* v. *Woollams* the t person, although refusing to deliver to the buyer on vendor's order *after* the sale, had assented *in advance* of sale to become bailee for any person who might buy, and Court held this assent not to be revocable *after the sale*. consequence then was that the third person in posse became, by the completion of the sale, bailee for the bu and his refusal to deliver to the buyer was not a refus *become* bailee, but to do his duty as bailee after assentin assume that character.

But this explanation is difficult to reconcile with principle that the necessity of an attornment by the bail not taken away by the fact that he has issued a warran the goods, though it may be in terms transferable (*l*) there be a prior attornment in the case of a licence, why of a transferable warrant? It is therefore safer to re *Salter* v. *Woollams* as dependent on particular circumsta *i.e.*, an agreement by the parties that the hand ng of licence to the buyer should be deemed to be a delivery. with reference to a statement made by Tindal, C.J., Bosanquet, J., in the case that the buyer might have m tained trover against Jackson, it may be pointed out tha fact that a buyer can bring trover cannot be relied on by seller as evidence that he has made delivery (*m*).

Wood v. *Tassell* (1844).

In *Wood* v. *Tassell* (*n*), the plaintiffs sued for non-del of certain hops sold to them by the defendant. The hops pareel of a larger quantity lying at the warehouse of Fridd, where they had been deposited by a former ow who sold them to the defendant. After the sale to plaintiffs they were informed that the hops were at Fri and went there, *had them weighed, and took away* When the plaintiffs sent for the remainder, they were

(*l*) *Farina* v. *Home* (1846) 16 M. & W. 119; 16 L. J. Ex. 73; 73 R. R *ante*, 243; and remarks of Parke, B., in *Thol* v. *Hinton* (1855) 4 W. cited in n. (*m*), *infra*. In *Hallgarten* v. *Oldham* (1883) 135 Mass. 1, Holm refers to Mr. Benjamin's explanation of *Salter* v. *Woollams*, without whether it be sound or not, but he says that there would be no prior attor in the case of a warehouseman's receipt, which is *not* transferable.

(*m*) Such an argument was repudiated by the Court of Exchequer in v. *Hinton*, *supra*. There the seller had transferred to the buy warehouseman's warrant. Parke, B., said: "If the warrant enable at once to get possession of the goods it would be a delivery; but in thi the warrant did not enable him to get them, for the man who had them not deliver them, and he is not bound to bring an action of trover against

(*n*) 6 Q. B. 234; 66 R. R. 374.

having been claimed and taken away by a creditor of the seller to the defendant. *Held*, that the defendant had done all that he was bound to do in making delivery.

Lord Denman said: "The plaintiffs knew that the hops were lying at Fridd's to their use, and might, by applying to Fridd, have obtained the remnant now in dispute, as they had the other part. The defendant had done all he was bound to do, and cannot be responsible for Fridd's wrongful delivery of them to another. . . . Under the circumstances Fridd held the hops as agent for the plaintiffs."

Mutual duties to obtain acknowledgment.

The acknowledgment by the third person must be given with the consent of all three parties (*o*), and the buyer and the seller must do all that is necessary to obtain it (*p*). If the buyer, having fulfilled his part, cannot obtain the acknowledgment, he may repudiate the contract (*q*). Conversely, if the failure to obtain the acknowledgment is the buyer's fault only, the seller may treat the delivery as duly made (*r*).

Section 29 of the Code in sub-section (5) enacts that:—

Code, s. 29 (5). Expenses in connection with delivery.

"29.—(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state (*s*) must be borne by the seller."

This provision will, in the absence of an agreement to the contrary, disable the seller from charging the buyer with the expenses mentioned, and will enable the buyer, if he is compelled to pay them, to recover them from the seller. And it is apprehended that payment of these expenses forms part of the seller's duty to deliver the goods, that is to say, part of a condition precedent incumbent on him, so that if he fail to pay them he may be unable to aver and prove that he is ready and willing to deliver, so that the buyer is not bound to accept the goods (*t*).

Section 29 (5) does not deal with the expenses of delivery itself. With regard to these the rule is that the expenses

(*o*) *Poulton & Son* v. *Anglo-American Oil Co.* (1911) 27 Times L. R. 216, C. A. (seller does not assent); *Godts* v. *Rose* (1855) 17 C. B. 229; 25 L. J. C. P. 61; 104 R. R. 668, set out *ante*, 244 (no assent by buyer).

(*p*) *Smith* v. *Chance* (1819) 2 B. & A. 753; 21 R. R. 485 (seller's default); *Winter* v. *Hassall* (1829) 9 B. & C. 372; 7 L. J. K. B. 265 (customs dues payable by buyer); *Buddle* v. *Green* (1857) 27 L. J. Ex. 33; 114 R. R. 991 (presentation of delivery order).

(*q*) *Pattison* v. *Robinson* (1816) 5 M. & S. 105, 110.

(*r*) *Bartlett* v. *Holmes* (1853) 13 C. B. 630; 22 L. J. C. P. 182; 93 R. R. 658 (presentation of warrant).

(*s*) *I.e.*, "in such a state that the buyer would under the contract be bound to take delivery of them": s. 62 (4).

(*t*) See remarks in the Chapter on Warranties Implied by Law, *ante*, 774.

incidental to making delivery fall on the seller; of prep for, or receiving, delivery on the buyer (*u*).

Cargo sold "from the deck."

Playford v. *Mercer* (1870).

In *Playford* v. *Mercer* (*x*), the seller sued for the bala un account. The defendant bought a cargo of ice fro plaintiff before it came into harbour, the ice to be taken the deck" by the buyer. The defendant was compel pay six guineas as harbour dues before he could get the and pleaded a set-off and payment of this amount. that a contract for the sale of goods "from the deck" that the seller should pay all that was necessary to the buyer to remove the goods from the deck, and th pleas of set-off and payment were good.

Law in America.

In a case in one State of Vermont (*y*), where wool in bulk on the seller's premises was sold, payable on d by weight, the seller was not allowed, in the absence express agreement, to recover the cost of labour, e putting the wool into sacks furnished by the buyer, th not having been weighed till after being put into the s

Cost of labour in putting goods sold by weight into packages.

Robinson v. *The United States* (1871).

In *Robinson* v. *The United States* (*z*), the Supreme of the United States held parol evidence admissible to on a contract for the sale of 100,000 bushels of barley, to deliver in *sacks*, not *in bulk*, the contract being sile the mode of delivery. In that case the seller, after del several instalments in sacks, had tendered a further inst loose in waggons. This being refused, he repudiat contract. *Held*, that the tender was bad, and that th was liable for non-delivery.

The seller does not comply with his contract by the or delivery of either more or less than the exact q contracted for (*a*), or by sending the goods sold mixe

(*u*) *Acme Woodflooring Co.* v *Sutherland Innes Co.* [1904] 9 Com. ("c.f.i. to buyer's wharf"); *Re Shell Transport, etc. Co.* v. *Co Petroleum Co.* (1904) 20 Times L. R. 517 (preparation of place of *White* v. *Williams* [1912] A. C. 814; 82 L. J. P. C. 11 stevedoring"), *Neill* v. *Whitworth* (1866) L. R. 1 C. P. 684; 35 L. J. Ex. Ch., set out *ante*. The French Civil Code is the same: Art. 1 also, as to contracts "f.o.b.," *Cowasjee* v. *Thompson* (1845) 5 Moo. P 173; 70 R. R. 27; *per* Bacon, C.J., in *Ex parte Rosevear China Clay* 11 Ch. D. 560; 48 L. J. Bkcy. 100; *Stock* v. *Inglis* (1884) 12 Q. B. 54 L. J. Q. B. 582. C. A.; and as to "c.f.i." contracts, Blackbur *Ireland* v. *Livingston* (1872) L. R. 5 H. L. 595, 406; 41 L. J. Q. B. out *post* 810, *et seqq.*; *Wancke* v. *Wingren* (1880) 58 L. J. Q. B. 519

(*x*) 22 L. T. 41. See also *Yang-tsze Ins. Association* v. *Lukman* 34 Times L. R. 320, P. C., at 321 ("ex ship").

(*y*) *Cole* v. *Kew* (1848) 20 Vt. 21.

(*z*) 13 Wallace, 363.

(*a*) The rule is less rigid where goods are ordered from a correspon is an *agent* for buying them. See *Ireland* v. *Livingston* (1872) L. R. 395; 41 L. J. Q. B. 201, set out *post*, 809, *et seqq.* *Johnston* v. (1867) L. R. 2 Ex. 82; 36 L. J. Ex. 44.

other goods. Thus the Code, representing the common law, provides:—

Code, s. 30. Delivery of less or more or of goods mixed with other goods not ordered.

"30.—(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

"(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

"(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

"(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties" (*b*).

Delivery of less.

Entire contract for delivery of goods by instalments.

Buyer must pay for what he keeps.

If the contract be an entire contract for a specified quantity to be delivered in parcels from time to time, the buyer may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the seller's delivery of less than the whole quantity sold (*c*). But the buyer is bound to pay for any part that he accepts; and after the time for delivery has elapsed he must either return or pay for the part received, and cannot insist on retaining it without payment until the seller makes delivery of the rest. As Parke, J., says in *Oxendale* v. *Wetherell* (*d*), in a passage frequently quoted, "where there is an *entire* contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the *price* of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the *value* (*e*) of the goods which he has so delivered" (*f*).

(*b*) See also s. 55, *ante*, 254.

(*c*) *Per* Parke, J., in *Oxendale* v. *Wetherell* (1829) 9 B. & C. 386, at 387—388; 7 L. J. K. B. 264; 3 R. R. 207, set out *infra*, app. by the P. C. in *Colonial Ins. Co. of N. Z.* v. *Adelaide Mar. Ins. Co.* (1886) 12 A. C. 128, at 138, 140; 56 L. J. P. C. 19; *Harland & Wolff* v. *Burstall & Co.* [1901] 84 L. T. 324. Where the deficiency is negligible, the Court applies the principle *De minimis*: *Jackson* v. *Rotax Motor & Cycle Co.* [1910] 2 K. B. 937; 80 L. J. K. B. 38, C. A.

(*d*) *Supra*.

(*e*) *Cf.* the language of s. 30 of Code, "at the contract *rate*"; and see also per Bayley, J., in *Shipton* v. *Casson* (1826) 5 B. & C. 378, at 383, 4 L. J. K. B. 199.

(*f*) See also *Hungerford* v. *Hallsford* (1626) 3 Bulstr. 325: "A. promises B.

Waddington v. Oliver (1805).

Thus, in *Waddington* v. *Oliver* (*g*), the plaintiff deli on the 12th of December twelve bags of hops in part formance of a contract to deliver 100 bags on or befor 1st of January, no time for payment being mentioned, a demanded immediate payment for them, and brough action on the buyer's refusal. *Held*, that no such action be maintained *prior* to the expiration of the time fixe delivery of the remainder.

Oxendale v. Wetherell (1829).

But in *Oxendale* v. *Wetherell* (*h*), the plaintiff was entitled to recover for 130 bushels of wheat delivere *kept* by the buyer on a similar contract for the sale o bushels in an action brought *after* the expiration of the fixed for the delivery of remainder.

Morgan v. Gath (1865).

In *Morgan* v. *Gath* (*i*), the purchase was of 500 pic cotton, and only 420 were delivered. The jury having on the facts that the buyer had consented to receive th piculs, and had had them weighed, and accepted the was held that he could no longer object that the whol piculs had not been delivered.

The language of Parke, J., in the passage above quote states the rule as applicable to entire contracts. N contract for a quantity of goods is entire when the cons tion on both sides is entire, that is to say, when delive all, and acceptance of all, are mutual conditions precede they will be where the price is made payable on con delivery, or—which is the same thing—where there agreement that it shall be paid before (*l*). And even instalments are to be separately paid for the con may be entire, and it will certainly be so where its su matter is an indivisible thing, such as a machine or a deliverable, and to be paid for, in parts. Here con delivery is vital; and the buyer cannot be relegated to a right to recover damages as for a partial breach, but he if full delivery be not made, return the parts delivered recover the price paid for them. Conversely, the seller

£20 *on delivery* of twenty quarters of corn by him; B. delivers ten qu B. shall not have action on the case for the promise before he has de all": *per* Crew, C.J. See also Hale, C.B.'s ruling at the Norwich in 1662 in *Baker* v. *Sutton*: 1 Com. Dig. 147, Action (F).

(*g*) 2 B. & P. N. R. 61; 9 R. R. 614.

(*h*) 9 B. & C. 386. See also *Shipton* v. *Casson* (1826) 5 B. & C 4 L. J. K. B. 199.

(*i*) 3 H. & C. 748; 34 L. J. Ex. 165. See also *Richardson* v. *Dunn* 2 Q. B. 218; 10 L. J. (N. S.) Q. B. 282.

(*k*) *Ante*, 799.

(*l*) See Rules 1 and 3 in *Pordage* v. *Cole*, *ante*, 638.

insist on the buyer's acceptance of all, and, on the buyer's default, may recover the parts delivered.

Beckh v. Page (1859).

In *Beckh* v. *Page* (*n*), the plaintiff contracted to sell to the defendants a quantity of hides. The bought note was thus expressed: "P.B. 326/425, 100 bales containing 15,600; H.B. 1/15, 15 ditto containing 2,340 (or any less number that may arrive) East India hides." Sixteen bales P.B. and two bales H.B. were damaged at sea and resold, and the seller tendered the remaining 97 to the defendants, who rejected them on the ground that they were not bound to accept less than 115 *bales*, though the contents of the bales might amount to less than 17,940 *hides*. *Held*, by the Court of Common Pleas and by the Exchequer Chamber (*o*), that the defendant was bound to accept the 97 bales. The qualifying words applied both to bales and hides, Wightman, J., pointing out in the Court above that it could make no difference to the buyer whether the number of bales were right and the hides short, or whether the number of bales were short.

Gorissen v. Perrin (1857).

Gorissen v. *Perrin* (*p*) may be usefully compared. There the defendants had contracted to sell to the plaintiffs 1,170 bales of gambier "now on passage from Singapore and expected to arrive at London"; 1,170 packages of gambier arrived, but they were not bales, but a third of the size, a bale being a compressed package weighing about 2 cwt. The plaintiffs accepted the packages without prejudice to their claim, and sued the sellers for non-delivery of "bales." *Held*, that the defendants, having contracted absolutely (*q*) to sell bales, were liable for non-delivery.

Acceptance of quantity delivered cannot be divided.

As the delivery of a less quantity of goods than was ordered under an entire contract amounts to an offer by the seller of a new contract contined to that quantity, the buyer cannot divide his acceptance, unless the seller agree thereto. The buyer must reject all the quantity delivered, or accept all (*r*).

Champion v. Short (1807).

Thus, in *Champion* v. *Short* (*s*), the defendant ordered of the plaintiff half a chest of French plums, two hogsheads of

(*n*) 5 C. B. (N. S.) 708; 28 L. J. C. P. 164; 116 R. R. 834; affd. 7 C. B. N. S.) 861; 28 L. J. C. P. 341; 116 R. R. 839, Ex. Ch. See also *Graham v. Jackson* (1811) 14 East, 498.

(*o*) Wightman, J., Erle, J., and Crompton, J., and Martin, B., Bramwell, B., Watson, B., and Channell, B.

(*p*) 2 C. B. (N. S.) 681; 27 L. J. C. P. 29; 109 R. R. 830.

(*q*) A question was also raised whether the sellers had bound themselves absolutely to deliver, and not conditionally "on arrival." On this latter aspect, see the case set out, *ante* 668.

(*r*) Code, s. 30 (1), *ante*, 799.

(*s*) 1 Camp. 53; explained in *Tarling* v. *O'Riordan* (1878) 2 L. R. Ir. 82, set out *post*, 817; *Aitken Campbell & Co.* v. *Boullen and Gatenby* [1908] Sess. Cas. 490, under s. 30 (3).

raw sugar, and 100 lumps of white sugar. Only the sugar and the plums were delivered. The defendant accepted the plums, but refused to pay for the raw sugar, as the sugar had not been delivered. *Held*, that by accepting the plums the defendant had consented to a new contract for the plums and the raw sugar, and must pay for both. It follows from the principle of this case that, had the plaintiff acquiesced in the defendant's refusal to pay for the raw sugar, the new contract would have been confined to the plums only (*t*).

Where the delivery is more than required by the contract.

As a general rule, the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed upon, and the seller has no right to insist upon the buyer's accepting them all, or upon the buyer's selecting out of a larger quantity the quantity delivered (*u*). But the buyer may select the goods ordered, or may, under a new contract, accept the whole delivery, or any part or not part of it, unless that part is the quantity contracted for (*x*). If he accept the whole he is not bound to pay the contract price as such, but (at common law) merely the *value* of the goods (*y*), or, as the Code expresses it, "he must pay for them at the contract rate" (*z*).

Dixon v. *Fletcher* (1837).

In *Dixon* v. *Fletcher* (*a*), the declaration alleged an agreement by defendant for the purchase on his account of 200 bales of cotton, and a shipment to him of 206 bales, and the defendant's refusal to receive said cotton, or "any part thereof." The Court allowed the plaintiffs to amend their declaration, holding it to be insufficient for want of an averment that the plaintiffs were ready and willing to deliver the 200 bales.

Hart v. *Mills* (1846).

So in *Hart* v. *Mills* (*b*), where an order was given for a dozen of wine, and four dozen were sent, it was held that the whole might be returned.

Cunliffe v. *Harrison* (1851).

In *Cunliffe* v. *Harrison* (*c*), a purchase was made of ten hogsheads of claret and the seller sent fifteen. *Held*, that the contract was not performed, "for the person to whom they are sent cannot tell which are the ten that are to be his."

(*t*) See *Hart* v. *Mills*, *ante*, 105, and *infra*.
(*u*) *Rylands* v. *Kreitman* (1865) 19 C. B. (N. S.) 351; *Reuter* v. *Salamon* 4 C. P. D 239; 48 L. J. C. P. 492, C. A. Here, too, the principle *De minimis* applies: *Shipton Anderson & Co.* v. *Weil Brothers* [1912] 1 K. B. 574; 81 K. B. 910.
(*x*) See the terms of s. 30 (2), *ante*, 799.
(*y*) *Per* Bayley, J., in *Shipton* v. *Casson* (1826) 5 B. & C. 378, at 4 L. J. K. B. 199, speaking, however, of a defective delivery.
(*z*) Section 30 (2), *ante*, 799.
(*a*) 3 M. & W. 146; 49 R. R. 543.
(*b*) 15 M. & W. 85; 15 L. J. Ex. 200; 71 R. R. 578.
(*c*) 6 Ex. 903; 20 L. J. Ex. 325; 86 R. R. 543.

it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him. . . . The delivery of more than ten is a proposal for a new contract " (*d*).

Rylands v. *Kreitman* (1865).

In *Rylands* v. *Kreitman* (*e*), the plaintiff agreed to sell, and deliver to the defendant in June, 500 piculs of China cotton, deliverable by trade usage in one or several instalments within the contract time, and tendered, as part of the cotton, twenty bales, of which five were then unmerchantable, and were not made merchantable till July. *Held*, that the defendant was entitled to receive twenty merchantable bales, and was not bound to select the fifteen out of the twenty (*f*), and could reject the whole of the tender.

Qualifying words added to quantity stated, *e.g.* "about" or "more or less."

The quantity to be delivered is, however, sometimes stated in the contract with the addition of words, such as "about," or "more or less," which show that the seller is to be allowed a certain moderate and reasonable latitude in the performance.

Moore v. *Campbell* (1854).

In *Moore* v. *Campbell* (*g*), the sale was of fifty tons of hemp in a warehouse, and the seller offered the buyer two delivery orders from the warehouse for "about" thirty tons and "about" twenty tons respectively, which the buyer declined, unless the seller would guarantee that the whole quantity amounted to fifty tons. The seller refused, and on the trial offered evidence that it was the usage of trade (*h*) in Liverpool to insert the word "about" in delivery orders of goods warehoused. *Held*, that if this evidence had been offered in reference to the purchase of fifty tons of goods contracted to be sold and delivered simply, the evidence would be inadmissible (*i*); but if the contract were to sell and deliver *goods in a warehouse*, and there were a known usage of the place that warehousemen would not accept delivery orders in any other form, lest they should make themselves responsible for any particular quantity, delivery warrants in that form would, if tendered, be a sufficient compliance with the seller's duty.

Where qualifying words are used with regard to a specified

(*d*) *Per* Parke, B., at 906. This seller, being in default, cannot treat the contract as rescinded, and sue on a *quantum valetant*. He must show a new contract: *per* Bowen, L.J., in *Boston Deep Sea Fishing Co.* v. *Ansell* (1888) 39 Ch. D. 359, at 364—365, C. A.

(*e*) (1865) 19 C. B. (N. S.) 351.

(*f*) Such a case is not within s. 30 (3); see *Aitken Campbell & Co.* v. *Boullen*, *post*, 816.

(*g*) 10 Ex. 323; 23 L. J. Ex. 310; 102 R. R. 604.

(*h*) See Code, s. 30 (4), *ante*, 799.

(*i*) See also *Harland* v. *Burstall* [1901] 84 L. T. 324; *Tancred* v. *Steel Co. of Scotland* (1890) 15 A. C. 125; *post*, 805.

Such words in instalment contracts.

quantity of goods deliverable by stated instalments, i
question of construction whether the words qualify the
amount contracted for, or the amount of such instalmen

Special trade meaning of qualifying words.

The construction of qualifying words in a written c
is one for the Court, and parol evidence is not admiss
explain their general meaning. But where they have ac
a special meaning by the usage of any particular
market, or locality, parol evidence of such special m
may be given (*l*).

Qualifying words may involve a mere estimate.

A statement of quantity with the addition of qual
words may by the context of the contract be shown t
mere collateral estimate of the quantity, and not part
contract. This happens where other parts of the c
contain a standard of quantity fixing the amount deliv

"Say from—." *Gwillim* v. *Daniel* (1835).

Thus, in *Gwillim* v. *Daniel* (*m*), the defendant agr
sell all the naphtha which he might make during two
"say from 1,000 to 1,200 gallons a month." The p
received 3,000 gallons, being all that the defendant
Held, that the defendant was not liable to deliver mo

"Say about—." *McConnell* v. *Murphy* (1873).

And in *McConnell* v. *Murphy* (*n*), where the sale
"all the spars manufactured by A, say about 600, ave
sixteen inches; the above spars will be *out of* the lot
factured by J. B.," the Court held that a tender of 496
which were all of the specified lot that averaged
inches, was a substantial performance of the contract
seller. These words "say about 600" were held to be
of expectation and estimate only, not amounting to an
standing that the quantity should be 600, the contract
only for *so many* of the spars as averaged sixteen
Gwillim v. *Daniel* (*m*) was approved and followed: a
effect of the word "say," when prefixed to the word "a
was considered as marking the seller's purpose to guar
self against having made any absolute promise as to qu

In *Leeming* v. *Snaith* (*o*), the defendant sold to the

(*k*) *Société Anonyme* v. *Scholefield* [1902] 7 Com. Cas. 114, C. A.

(*l*) *Ibid.* ("about"=5 per cent. more or less in Newcastle coal trad
also s. 30 (4), *ante*, 799; and s. 55, *ante*, 254; *Lomas & Co.* v. *Bar*
17 T. L. R. 437; rev. on another point in *ib.*, 461, C. A.; *Lister and*
Barry & Co. (1886) 3 T. L. R. 99 ("garden" weights of tea). *Cf. Ho*
Burstall (1901) 84 L. T. 324, where the special meaning was not
exist.

(*m*) 2 C. M. & R. 61; 5 Tyr. 644; 4 L. J. (N. S.) Ex. 174; 41 R.
See also *Barker* v. *Windle* (1856) 6 E. & B. 675; 25 L. J. Q. B. 349; 1
762.

(*n*) L. R. 5 P. C. 203. See also *Hayward* v. *Scougall* (1809) 2 C
11 R. R. 662.

(*o*) 16 Q. B. 275; 20 L. J. Q. B. 164; 83 R. R. 448.

tiffs all the combing skin which he might pull up to the 6th January, "say not less than 100 packs." *Held*, that the words "not less than" distinguished the case from *Gwillim* v. *Daniel*, and amounted to an absolute contract to deliver 100 packs at least.

"Not less than—."

Leeming v. *Snaith* (1851).

In *McLay* v. *Perry* (*p*), the plaintiffs' agent, Scott, seeing in the defendants' yard a heap of scrap iron, said: "You seem to have about 150 tons there," to which one of the defendants replied: "Yes, or more." The defendants were not dealers in iron. The plaintiffs afterwards wrote to the defendants: "We are buyers of good wrought scrap iron. . . We understand from Mr. Scott that you have for sale about 150 tons. We can offer you 80s. per ton." The defendants wrote: "We accept your offer for old iron, viz., 80s. per ton." The defendants only delivered forty-four tons, which was the weight of the heap. *Held*, in an action for non-delivery, that the words "about 150 tons" were words of estimate only, and that the subject-matter of the contract was the specific heap.

Specific heap of goods.

McLay v. *Perry* (1881).

In *Tancred* v. *The Steel Co. of Scotland* (*q*), it was held by the House of Lords as too clear for argument that on a contract to supply "the whole steel required" for the Forth Bridge, the "estimated" quantity being "understood to be 30,000 tons more or less," the contractor was entitled to tender the whole of the steel required, though it exceeded the quantity mentioned, as the parties, had they intended to contract for a particular amount of steel, would have simply mentioned the quantity. And their Lordships held that parol evidence could not be given of a custom in the iron and steel trade of Glasgow that such a contract was considered to be a contract for the estimated quantity only.

"All that is required."

Tancred v. *Steel Co. of Scotland* (1890).

But the seller, under such a contract, cannot force upon the buyer the estimated quantity of his requirements where the goods are *bona fide* not required, as, for example, where the buyer has discontinued business. This was held by Walton, J., on a contract for "all requirements during twelve months, estimated at 500 and 750 tons" for each class of goods contracted for (*r*).

Berk v. *National Explosives Co.* (1901).

(*p*) 44 L. T. 152. See also *Goldsborough Mort & Co.* v. *Carter* (1914) 19 Com. L. R. 429 (specific flock of sheep overestimated); *Tebbitts Bros.* v. *Smith* (1917) 33 T. L. R. 508, C. A. ("quantity salved, estimated").

(*q*) 15 A. C. 125.

(*r*) *Berk* v. *National Explosives Co.*, 7 Com. Cas. 20; *cf. Bealey* v. *Stuart* (1862) 7 H. & N. 753; 31 L. J. Ex. 281; 126 R. R. 681 (absolute quantity not measured by requirements). See also *Eastern Counties R. Co.* v. *Philipson* (1855) 16 C. B. 2; 24 L. J. C. P. 142; 100 R. R. 592 (independent covenants by seller and buyer for absolute quantity, and for requirements).

And conversely the buyer cannot enforce delivery of that are not required (*s*).

Blacklock & McArthur v. *Kirk* (1918).

In *Blacklock and McArthur* v. *Kirk* (*t*) the defendan a glazier and the plaintiffs putty makers, and there contract to supply the defendant's "usual requirement putty for a year. During the five years preceding th tract the defendant's requirements had varied from 88 tons, and these had been supplied. In the contract 189 tons were *bona fide* required by the defendant, b plaintiffs refused to deliver more than 81, and defendan to buy elsewhere, at a higher price. *Held*, by the Co Session that "usual requirements" meant *bona fide* re ments of a business unaltered, and whether it was expa stationary, or decreasing. The amounts in previous varied much, and—no quantity being mentioned—the took their chance. And the Court pointed out tha *Mehren's Case* (*tt*) was one of a factitious business.

Wheeler Co. v. *Mendleson* (1917).

In *Wheeler Co.* v. *Mendleson* (*u*) the plaintiffs, on N ber 1, 1914, contracted with the defendants for "their su of caustic soda and lye during the whole of 1915. The tiffs gave no orders until November 30, 1915, when ordered 50,000 lbs. At that time the price of the artic largely increased. The plaintiffs also at the time of th had in hand 2,000 lbs. remaining of a previous purch August, 1914. *Held*, that there was no evidence th amount was necessary to the plaintiffs' trade in the last of the contract period. In the absence of such eviden onus being on the plaintiffs) the conclusion was irre that the plaintiffs wanted to speculate because of the price. And the Court say: "In an executory contract

Where quantity indefinite mutual good faith required.

is indefinite as to the quantity of goods to be furnish obligation of good faith and fair dealing towards eac is implied, and a party to a contract has no right to us a purpose not within the contemplation of the parties, speculative as distinguished from regular and o business purposes."

Comprehensive words may be explained.

Comprehensive words may be limited and explai usage of trade and the circumstances of the case. Thu requirements" may be shown to be limited to the ments of the business of the buyer at the date of the c

(*s*) *Wood* v. *Copper Miners Co.* (1854) 14 C. B. 428, 468; 23 L. J. C 98 R. R. 688. *Cf. Tolhurst* v. *Ass. Portland Cement Manufacture* A. C. 414; 72 L. J. K. B. 834 (requirements for particular works).
(*t*) (1918) 56 Sc. L. R. 84.
(*tt*) *Infra.*
(*u*) (1917) 180 Ap. Div. (N. Y.) 9.

and not to extend to whatever he may choose to demand to supply customers at places where he had at that time never traded (*x*).

When "required" means "if demanded."

Contracts for goods to satisfy the requirements of a buyer must be distinguished from cases where the word "required," or any similar word, is equivalent only to "ordered," or "demanded," cases in fact in which no bilateral contract exists, but where the seller makes a continuing offer to deliver *if required*, and where there is no liability on the buyer to order any (*y*).

Quantity specified may be shown not to be an absolute quantity.

The quantity of goods mentioned in a contract may without the use of qualifying words, such as "more or less," &c., or words of estimate, be shown not to be an absolute quantity, but to be only the *maximum* of the quantity deliverable. Thus, on a contract for "100 bales, containing 15,600 hides or any less number that may arrive," the seller fulfils his contract if he deliver a less number of bales or a less number of hides than what was specified, being all that arrived (*z*). On a contract for "300 tons of Campeachy logwood of real merchantable quality, such as may be determined to be otherwise by impartial judges to be rejected," the buyer has been held to be bound to accept a tender of 284 tons of logwood, being all that fulfilled the description (*a*). Similarly on a contract for 154 bales of cotton the buyer was bound to accept a tender of 152 where the terms of the contract showed by implication that 154 was mentioned as the maximum after a previous contract had been fulfilled (*b*).

"Carload." *Hanley* v. *Canadian Packing Co.* (1894).

In *Hanley* v. *Canadian Packing Co.* (*c*), the defendant agreed to buy a "car-load" of hogs, and the seller sent the hogs in a double-decked car. The defendant refused to pay for more hogs than could be contained in a single-decked car. There was no trade usage or previous course of dealing to attach any special meaning to the phrase, but it was shown that hogs were consigned per single-decked or double-decked cars. *Held*, that the seller had the option to send a single

(*x*) *Von Mehren* v. *Edinburgh Roperie Co.* (1901) 4 Fraser, 232, *coram* Lord President Balfour and Lord Adam, Lord McLaren, and Lord Kinnear; Code, s. 30 (4), *ante*, 799; s. 55, *ante*, 254; *cf. Whitehouse* v. *Liverpool New Gas Co.* (1848) 5 C. B. 798; 17 L. J. C. P. 237.

(*y*) *A. G.* v. *Stewards & Co.* (1901) 18 T. L. R. 131, H. L.; *Moon* v. *Mayor of Camberwell* (1904) 89 L. T. 595, C. A. See the subject discussed, *ante*, 90—92.

(*z*) *Beckh* v. *Page* (1859) 5 C. B. (N. S.) 708; 28 L. J. C. P. 164; 116 R. R. 884. *ante*, 801.

(*a*) *Graham* v. *Jackson* (1811) 14 East, 498.

(*b*) *Arbuthnot* v. *Streckheisen* (1866) 35 L. J. C. P. 305.

(*c*) [1894] 21 Ont. Ap. R. 119.

or a double-decked car, and the buyer was bound to pay all the hogs sent.

Sales of "cargo."

The word "cargo" is a word of variable meaning, acc ing as it occurs in a charter-party, a policy of insurance, contract of sale (*d*), and even in the latter its meaning vary according to circumstances.

Kreuger v. *Blanck* (1869).

In *Kreuger* v. *Blanck* (*e*), the defendant, at Glouce sent an order to the plaintiffs, at Calmar in Sweden, on 14th of August, for "a small cargo (of lathwood) of a the following lengths, &c., &c., in all about sixty fathoms, which you will please to effect on opportunity fo account, at £6 15s. c.f. and i. (*f*) per cubic fathom, discha to the Bristol Channel." On the 6th September the plai wrote: "It is very difficult to get a *suitable vessel* fo lathwood, . . . as they are either *too large or too small* should you be willing to allow us to increase the lot by 20 fathoms, we have a *vessel*." The defendant did not to this, and the plaintiffs, being unable to get a vessel o exact size for such a cargo, chartered a ship and loaded with eighty-three fathoms, and on the arrival of the the plaintiffs' agent measured and set apart the amount o defendant's order, and tendered him a bill of lading for quantity, but the defendant declined to accept on the gr that "the cargo" was in excess of the order. *Held*, by K C.B., and Cleasby, B. (Martin, B., *diss.*), that "ca meant a whole cargo, and was so interpreted in the spondence, and that the plaintiffs had not complied wit order and could not maintain the action.

Borrowman v. *Drayton* (1876).

In *Borrowman* v. *Drayton* (*g*) the contract was fo cargo of from 2,500 to 3,000 barrels (sellers' option) of p leum, to be shipped from New York." The sellers, plaintiffs, chartered a vessel and loaded her with 3,000 ba and filled her up with 300 other barrels for other per separately marked and under separate bills of lading. N of shipment was given to the defendant, and the plai were ready to deliver either the 3,000 barrels or the

(*d*) *Per* Lord Bramwell in *Colonial Ins. Co. of N. Z.* v. *Adelaide Mar Co.* (1886) 12 A. C. 128, at 129; 56 L. J. P. C. 19. See also and *cf. Ca Aldridge* [1895] 2 Q. B. 648; 64 L. J. Q. B. 736, C. A., and *Jardine Ma & Co.* v. *Clyde Shipping Co.* [1910] 1 K. B. 627; 79 L. J. K. B. 631, both of charterparties.

(*e*) L. R. 5 Ex. 179; 39 L. J. Ex. 160. See also *Sergent* v. *Reed* 2 Str. 1228.

(*f*) *I.e.*, "cost, freight, and insurance." See the meaning explained next case.

(*g*) 2 Ex. D. 15; 46 L. J. Ex. 273, C. A. See also *Anderson* v. *Morice* 1 A. C. 713; 46 L. J. C. P. 11; *ante*, 454.

quantity of 2,750 barrels, but the defendant refused to accept any. *Held*, by the Court of Appeal, practically affirming *Krueger* v. *Blanck* (*h*), that, as the 3,300 barrels were in excess of the quantity ordered, the plaintiffs could not recover unless the defendant was bound to accept a part cargo; that he was not so bound, as some effect must be given to the word *cargo* as distinguished from the specified quantity (*i*); and that the natural meaning of "cargo" was the entire quantity of goods loaded on board a vessel on freight for a particular voyage.

Where seller is a commission agent.

The following case shows that, where the seller is acting as a commission agent for the buyer, the word "cargo" may not receive so rigid an interpretation.

Ireland v. *Livingston* (1872).

In *Ireland* v. *Livingston* (*k*), the contract was in a letter of the 25th of July from the defendants to the plaintiffs in the following words: "My opinion is that, should the beet crop prove less than usual, there may be a good chance of so. . . thing being made by importing cane sugar at about the limit I am going to give you as a maximum, say 26s. 9d. for Nos. 10 to 12, and you may ship me 500 tons to cover cost, freight, and insurance, 50 tons more or less of no moment if it enables you to get *a suitable vessel*. You will please to provide insurance, and draw upon me for the cost thereof, as customary, attaching documents. . . . I should prefer the *option of sending vessel* to London, Liverpool, or the Clyde, but if that is not compassable, you may ship to either Liverpool or London." And a telegram was sent the next day to say that "the insurance is to be done with average, and, if possible, *the ship* to call for orders for a good port in the United Kingdom." The plaintiffs answered on the 6th of September: "We take due note that . . . you authorise us to purchase and ship on your account *a cargo of about* 500 *tons*, provided we can obtain Nos. 10 to 12 D S, at a cost not exceeding 26s. 9d. per cwt. free on board, including cost, freight, and insurance; and your remarks regarding the *destination of the vessel* have also our attention. . . . If prices come within your limits, and we can lay in a good *cargo*, we shall not fail to operate for you."

In September the plaintiffs received an offer from a partly loaded vessel to take 7,000 or 8,000 bags of sugar at a freight

(*h*) (1869) L. R. Ex. 179; 39 L. J. Ex. 160; *ante*, 808.
(*i*) See also *Leri* v. *Berk & Co.* (1886) 2 Times L. R. 898, C. A.
(*k*) (1866) L. R. 2 Q. B. 99; 36 L. J. Q. B. 50; (1870) 5 Q. B. 516; 39 L. J. Q. B. 284; (1872) 5 H. L. 395; 41 L. J. Q. B. 201.

Ireland v. *Livingston* (1872).

of £2 10s. per ton for a voyage direct to London at a freight sufficiently low to enable them to purchase the so as to bring the cost, freight, and insurance within the It was impossible to buy in one lot from the same person the plaintiffs purchased fourteen distinct parcels. The tiffs used due diligence, but could not obtain more than bags, weighing about 392 tons, within the limits, and re their own commissions by a sum of £163 19s. 4½d., in not to exceed the limit. They shipped this quantity defendants, and being unable to fill up the vessel wit further quantity on the defendants' account, they shipp their own account about 150 tons of inferior quality. 26th of October they received from the defendants a co mand of the order. The defendants refused to accept t tons, and the plaintiffs brought their action.

In the Queen's Bench (*l*), it was held that the tru struction of the order was to buy sugar for the defe according to the usage of the market at the Mauritius, the sugar could only be bought in several parcels different persons, and that, as each lot was bought i suance of the order, it was appropriated to the order, defendants were bound to accept it, and had themsel countermanding the order, prevented its execution entire quantity. The question as to the shipment bei of a cargo, and *not a cargo*, was not mooted.

In the Exchequer Chamber the judgment of the Bench was reversed by the majority of the Court (*m*), ground that the order was for a single shipment of on by a single vessel. The dissenting Judges held that the dant's instructions with regard to the "vessel" a "cargo" were mere directions, and not essential part order, which was in substance for 500 tons of sugar according to the usage, could be bought in parcels, for one cargo.

In the House of Lords there was a great differ opinion among the Judges. The opinion of Blackb (in behalf of himself and Hannen, J.), is so instructi justify a full extract.

Opinion of Blackburn, J.

Mr. Justice Blackburn said (*n*): "The terms at a p cover cost, freight, and insurance, payment by accep

(*l*) Cockburn, C.J., Mellor, J., and Shee, J.
(*m*) Kelly, C.B., Martin, B., Channell, B., and Keating, J. Smith, J., and Cleasby, B., *diss.*).
(*n*) L. R. 5 H. L. 395, at 406; 41 L. J. Q. B. 201, *et seqq.*

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

Ireland v. *Livingston* (1872).

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

"If the consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight, and insurance, the amount inserted in the invoice is the agreed price, and no commission is charged. In such a case it is obvious that if freight is high, the consignor gets the less for the goods he supplies; if freight is low, he gets the more. . . . On the other hand, if, owing to the fall in prices in the port of shipment or of freight, the bargain is a good one, the consignee still must pay the full agreed price. This results from the contract being one by which the one party *binds himself absolutely* to supply the goods in a vessel such as is stipulated for *at a fixed price*, to be paid for in the customary manner, that is, part by acceptance on receipt of the customary documents and part by paying the freight on delivery, and the other party binds himself to pay that fixed price. Each party there takes upon himself the risk of the rise or fall in price, and there is *no contract of agency* or trust between them, and therefore no commission is charged.

Consignor's and consignee's obligations respectively on such order.

"But it is also very common for the consignor to be an agent who . . . merely accepts an order, by which he binds himself *to use due diligence* to fulfil the order. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the *actual cost*

Commission agent's duty on such order.

Ireland v. *Livingston* (1872).

and charges at which the goods are procured by the consignor with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature. It would be a positive *fraud* if, having bought the goods at a price including all charges below the maximum limit fixed in the order, he (the commission merchant), instead of debiting his correspondent with that actual cost and commission, should debit him with the maximum limit. . . .

"The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering them, the freight being in no ways an element in the limit. But when, as in the present case, the limit is made to include cost, freight, and insurance, the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order; if it does, the principal is not bound to take the goods. . . . The agent therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission, because there is *a contract of agency*. . . . It is quite true that the agent who in thus executing an order, ships goods to his principal in contemplation of law *a vendor to him*. The persons who supply goods to a commission merchant sell them to *him*, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. . . . The legal effect of the transaction between the commission merchant and the consignee who has given him the order is a contract of sale passing the property from the one to the other; and, consequently, the commission merchant is a vendor, and has the right of one as to stoppage in transitu (*o*).

"My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs there was a contract of agency, by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property

(*o*) This dictum of Lord Blackburn was explained by the C.A. in *Cassaboglou* v. *Gibb* (1883) 11 Q. B. D. 797; 52 L. J. Q. B. 538. Both Brett, M.R., and Fry, L.J., stated the contract between a commission agent and his foreign principal to be not one of seller and buyer *ab initio*, but a contract and transfer thereto, placing the commission agent *after shipment* of the goods in the position of a *quasi*-vendor for certain purposes. Accordingly they held that upon breach of an executory contract by a commission agent to supply his correspondent with goods of a specific description, the damages were to be assessed as between principal and agent, and not as between seller and

at the netmd cost, with the addition of the commission; but that this *superadded sale* is *not* in any way *inconsistent with* the *contract of agency* existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could."

Ireland v. *Livingston* (1872).

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

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

When, in addition to the word "cargo," a specific quantity of goods is mentioned, the governing word is *primâ facie* "cargo," and the statement of the quantity will be treated as only an estimate (*r*). But the facts may show that the governing words are those specifying quantity.

Quantity added to "cargo."

Thus, in *Bourne* v. *Seymour* (*s*), a contract for "about" 500 tons of nitrate of soda stated: "It is understood that the above nitrate is to form the full and complete cargo of the *J. P.*," and provided that, in the event of the *J. P.* "getting ashore or being unable to prosecute her voyage," then the sellers should deliver "another cargo or cargoes of equal quantity," and that the loss of the vessel should be the only ground of excuse for non-delivery. The *J. P.* arrived with much less than 500 tons, being all she could carry. *Held*, on demurrer, that the seller was liable for non-delivery, there being an absolute contract for 500 tons. The Court principally relied on the clause providing for a substituted cargo, as showing that the quantity mentioned was material.

Bourne v. *Seymour* (1855).

(*p*) *Coram* Lord Chelmsford, Lord Westbury, and Lord Colon
(*q*) *Per* Lord Chelmsford, L. R. 5 H. L. at 416. As an illustr[illegible] such a case, see *Falck* v. *Williams* [1900] A. C. 176; 69 L. J. P. C. 1 [illegible]. The principle itself obtained in 1641 Noy's Maxims, 91.
(*r*) *Leri* v. *Berk & Co.* (1886) 2 Times L. R. 898, C. A.; followed in *Harrison* v. *Micke* [1917] 1 K. B. 755; 86 L. J. K. B. 573 ("remainder of cargo, more [illegible]ees, about"). See also *Tebbitts Bros.* v. *Smith* (1917) 33 T. L. R. 508, C. A. ("quantity salved, estimated 8/10 tons").
(*s*) (1855) 16 C. B. 337; 24 L. J. C. P. 202; 100 R. R. 744.

Rules as to quantity laid down in America.

Brawley v. *The United States* (1877).

In America, the question of the quantity deliverable discussed before the Supreme Court of the United Stat in 1877, and three rules were laid down for the guidan the Courts:—

1. Where the g s are identified by reference to ind dent circumstances, *e.g.*, all the goods deposited in a warehouse, or all that may be manufactured by the sel a certain establishment, or are to be shipped in certain v and the quantity is named with the qualification of "al or "more or less" or words of like import, the contract to the specific goods, and the naming of the quantity in the nature of a warranty, but is only an estima reference to which good faith is all that is required party making it.

2. Where no such independent circumstances are re to, the quantity specified is material. The additi qualifying words only provides against accidental vari arising from slight and unimportant excesses or defici in number, measure, or weight.

3. But qualifying words may be supplemented by stipulations or conditions, *e.g.*, "as much as the seller manufacture or the buyer shall require"; and they wi govern the contract.

Parties may agree that estimate shall bind them.

Although a statement of quantity in a contract ma mere estimate, yet the parties may agree that the good be paid for accordingly, the parties taking the risk excess or deficiency in the quantity actually delivered.

"Quantity to be taken from the bill of lading."

Covas v. *Bingham* (1853).

In *Covas* v. *Bingham* (*u*), a sale was made by the defe to the plaintiff of a cargo not yet arrived. The sale wa in Liverpool of "the cargo per *Prima Donna* now at town as it stands, consisting of about 1,300 quarters Indian corn, at the price of 30s. per imperial quart *quantity to be taken from the bill of lading*, and calculated at 220 quarters equal to 100 kilos., paymen on handing shipping documents and policy of insu When the contract was made the bill of lading and of insurance were not in Liverpool, but were received 19th of November, and the bill of lading then appe be for 758 kilos., with a memorandum at foot signed

(*t*) *Brawley* v. *The United States*, 96 U. S. 168; app. in *Steel Co. of* v. *Tancred* (1889) 26 Sc. L. R. 305; *Moore* v. *U. S.* (1904) 196 U. S. 1 the buyer sought to rely upon the word "about" as a defence.

(*u*) 2 E. & B. 836; 23 L. J. Q. B. 26; 95 R. R. 842. See also *Hud Co.* v. *Canada Shipping Co.* (1882) 13 Can. Sup. C. R. 402, where the the option of taking the bill of lading, or of having the goods re-weig

master, "quantity and quality unknown to me." The defendants sent the plaintiff an invoice for 1,667 3-5th quarters, being the proper number, calculated according to the terms of the contract as applied to the bill of lading, and the plaintiff paid the price thus calculated. The cargo on delivery was found to measure only 1,614½ quarters, and the action was brought to recover back the excess of price paid. It was held that, having regard to the words "the quantity to be taken from the bill of lading," there was no condition or warranty as to quantity, and that the effect of the contract was to put the buyer in the place of the seller as owner of the cargo according to the face of the bill of lading, with all the chances of excess or deficiency in the quantity on board.

Case in America. *Heller* v. *Allentown Manufacturing Co.* (1886).

A similar decision has been given in America in a case (*x*) where 300 to 400 tons raw kainit had been sold, "to be shipped from German ports to port of New York," at so much per ton on foreign invoice weights, "terms cash against German analysis and European weight return." It was held that the buyer must pay according to the quantity shown by these documents, and that he took the risk (there being good faith on the part of the seller) of the actual quantity delivered being less.

Mixed delivery.

The following cases were cases of a mixed delivery. Here the buyer's option is the same as under section 30 (2) (*y*).

Levy v. *Green* (1857).

In *Levy* v. *Green* (*z*), the goods ordered were sent, but they were packed in a crate with other goods not ordered, though perfectly distinguishable, the articles in excess being crockery-ware of a *different* pattern. Coleridge, J., and Erle, J., considered that the case was distinguishable on that ground from *Hart* v. *Mills* and *Cunliffe* v. *Harrison*; but Campbell, C.J., and Wightman, J., thought it clear that the seller had no right to impose on the purchaser the onus of unpacking the goods and separating those that he had bought from the others; and this latter view was held right by the unanimous decision of the Exchequer Chamber.

Nicholson v. *Bradfield Union* (1866).

In *Nicholson* v. *Bradfield Union* (*a*), the plaintiffs, under a contract for the sale of Ruabon coals, sent one lot of 15 tons

(*x*) *Heller* v. *Allentown Manufacturing Co.* (1886) 39 Hun, 547.
(*y*) *Ante*, 799.
(*z*) 8 E. & B. 575; 27 L. J. Q. B. 111; in Ex. Ch. 28 L. J. Q. B. 319; 112 R. R. 699. See also *Shannon* v. *Barlow* (1864) 15 Ir. R. C. L. 478; *Imp. Ottoman Bank* v. *Cowan* (1874) 31 L. T. 336, Ex. Ch. (one bill of lading); *Tarling* v. *O'Riordan* (1878) 2 L. R. Ir. 82, C. A., set out *post*, 817; *Jackson* v. *Rotax Motor & Cycle Co.* [1910] 2 K. B. 937; 80 L. J. K. B. 38, C. A. (mixed instalment).
(*a*) L. R. 1 Q. B. 620; 35 L. J. Q. B. 176.

9 cwt. of real Rnabon coals on the 1st of July, and anot
lot of 7 tons 8 cwt. of coals, which were not Rnabon coals,
the 2nd of July, and the two parcels were shot into one he
and it was held a bad delivery.

The mixture must be with goods of a different kind.

The word "description" in section 30 (3) is to be stric
construed. Thus, where goods of the kind ordered w
delivered, but some of them were of inferior *quality*, he
that the case was not within section 30 (3), and the bu
could not accept such part only of the goods as was accord
to the contract, and reject the rest: his remedy is to ac
or to reject all (*b*).

Seller's right to make a second tender in due time.

Borrowman v. *Free* (1878).

In *Borrowman* v. *Free* (*c*), it was decided that the s
has a right, within the time limited by the contract, to te
a second delivery, although the first tender has been prop
rejected by the buyer as being not in accordance with
contract.

Code, s. 31 (1). Instalment deliveries.

Section 31 of the Code deals with instalment delive
Subsection (1) enacts as follows:

"31.—(1.) Unless otherwise agreed, the buyer of goods is not b
to accept delivery thereof by instalments."

This provision is the corollary to the rule (*e*) that a b
is not bound to accept less than the whole quantity contr
for, and conversely he cannot call for an instalment
Where there is an agreement (which may be inferred
delivery by instalments, the contract is not split up
separate contracts for each instalment; the contract is
an entire contract for the whole quantity, though it is div
in performance (*g*). The seller is, therefore, liable
fail to make up the complete quantity, and cannot re
any part of the price (*h*) unless there be a provision
instalments are to be separately paid for. If there be
a provision, he may recover the price of any insta
delivered, and the buyer is bound to accept any insta
tendered in due course of performance (*i*). But the

(*b*) *Aitken Campbell & Co. v. Boullen & Gatenby* [1908] Sess. Cas.
(*c*) 4 Q. B. D. 500, C. A.; 48 L. J. Q. B. 65.
(*e*) Code, s. 30 (1), *ante*, 799.
(*f*) *Kingdom* v. *Cox* (1848) 5 C. B. 522; 17 L. J. C. P. 155.
(*g*) *Per* Lord Selborne in *Mersey Steel Co.* v. *Naylor* (1884) 9 A.
at 439; 51 L. J. Q. B. 576; *per* Bramwell, L.J., in *Honck* v. *Mull*
7 Q. B. D. 92, at 100; 50 L. J. Q. B. 529, C. A.
(*h*) *Waddington* v. *Oliver*, 9 R. R. 614, and *Oxendale* v. *Wetherell*.
K. B. 264; 3 R. R. 207, *ante*, 800.
(*i*) *Brandt* v. *Lawrence*, *infra*; *Tarling* v. *O'Riordan*, *post*; *Pa*
Atlas Co. v. *Bradbury* [1893] 19 Vict. L. R. 439 (book in parts).

still remains liable to make up the complete quantity of the goods contracted for, though the fact that he makes a partial default may not justify the buyer in repudiating the contract (*k*).

Brandt v. *Lawrence* (1876).

In *Brandt* v. *Lawrence* (*l*), there were two contracts, each for the sale by the plaintiff to the defendant of 4,500 quarters of Russian oats (10 per cent. more or less), *shipment by steamer or steamers* during February. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after reopening of the navigation at Revel. Payment was to be made for any shipment by cash on receipt of, and in exchange for, shipping documents (*m*). The plaintiff shipped on board one steamer 4,511 quarters to answer the first contract, and 1,139 quarters to answer in part the second contract, and tendered them to the defendant. The defendant refused to accept the whole quantity, on the ground that the shipment had not been made immediately after the opening of the navigation. The plaintiff afterwards shipped on board another steamer a sufficient quantity of oats to complete the second contract.

In an action for non-acceptance the jury found that the shipment on the first steamer was made in time, and that on the second too late. *Held*, that the words "by steamer or steamers" showed an intention that the shipment should be made in different parcels, and that the buyer was bound to accept them as they came if they were in time; he was not entitled to wait in order to see whether the whole was in time. The defendant, therefore, was bound to accept the 4,511 quarters, and also the 1,139 quarters in part fulfilment of the second contract, notwithstanding that afterwards the remaining shipment in respect of that was made too late, as the seller, in making the tender, was acting in strict accordance with the contract, and there was nothing at the time of the tender to show that he was not prepared to fulfil it in its entirety.

Tarling v. *O'Riordan* (1878).

In *Tarling* v. *O'Riordan* (*n*), the plaintiff, a wholesale clothier in London, obtained from the defendant, a retail dealer in Cork, an order for a quantity of clothing, consisting

(*k*) On this last point see s. 31 (2), *post*, 825.

(*l*) 1 Q. B. D. 344, C. A.; 46 L. J. Q. B. 237; folld. in *Osborne & Co.* v. *Davidson* [1911] Vict. L. R. 416 ("shipment spread over Jan. and Feb.").

(*m*) These additional facts as to the terms of payment are supplied by the judgment of Cotton, L.J., in *Reuter* v. *Sala* (1879) 4 C. P. D. 239, at 250; 48 L. J. C. P. 492, C. A. See that case set out *post*, 818, *et seqq.*

(*n*) 2 L. R. Ir. 82; followed in *Jackson* v. *Rotax Motor & Cycle Co.* [1910] 2 K. B. 937; 80 L. J. K. B. 38, C. A.

of coats, vests, trousers, and knickerbockers, accordin prescribed measurements and directions. Some of the were already made; others were to be manufactured. plaintiff sent two bales of goods, one on the 26th of Nove the other on the 8th of December. The goods in the bale were in conformity with the other, and were taken stock by the defendant; but the second bale contained not of the size ordered; the clothing of the other kinds, ever, agreed with the order. The defendant returned second bale. The majority of the Court of Queen's Ben Ireland (*o*) held that he should have kept those goods w agreed with his orde . On appeal this judgment was reve and the verdict, pursuant to leave reserved, entered fo defendant (*p*).

Ball, L.C., pointed out that if the second bale had bee whole extent of the original order, the buyer clearly according to *Lery* v. *Green* (*q*), have returned the wh the goods on finding that about half in value were according to order; and the present case ought not distinguished; each of the different classes of goods was taken as sold under a separate contract, and that class which was not according to order could be rejected. Lordship held, distinguishing *Champion* v. *Short* (*r*), tha defendant's acceptance of the first bale, which conform the order, did not amount to an assent by him to accep second bale, which deviated: whereas in *Champion* v. the buyer's acceptance of one article of the two deli was a waiver of his right to insist that three should been delivered. His duty was to accept or reject both.

Morris, C.J., after referring to *Champion* v. *Short*, sai "In the present case . . . it was never contemplated the delivery of all the goods was to be at one time: o contrary, the inference is that deliveries were to be at int as the goods were ready. The defendant here accepte first bale, and used it, finding it was correct; at the ti so accepted it he could not contemplate that the rema goods would not be sent also correctly."

In *Reuter* v. *Sala* (*t*), the contract, made on the 29

(*o*) May, C.J., Fitzgerald, J., and Barry, J., O'Brien, J., *diss.*
(*p*) *Coram* Ball, L.C., Morris, C.J., and Christian, L.J., and Deasy
(*q*) (1857) 8 E. & B. 575; 26 L. J. Q. B. 111; in Ex. Ch. 2
Q. B. 319; 112 R. R. 699, set out *ante*, 815.
(*r*) (1807) 1 Camp. 53; 10 R. R. 631, set out *ante*, 801.
(*s*) 2 L. R. Ir. at 89.
(*t*) 4 C. P. D. 239, C. A.; 48 L. J. C. P. 492. The facts are take
the judgment of Thesiger, L.J.

December, 1876, was for the sale by the plaintiffs to the defendants of about twenty-five tons (more or less) Penang black pepper, October and/or November shipment from Penang to London, per sailing vessel or vessels, the *name of the vessel or vessels*, marks, and full particulars, *to be declared* to the buyer in writing within sixty days from date of bill of lading. On the 19th of January, 1877, the plaintiffs declared by a vessel called the *Borga* 500 bags of Penang black pepper, weighing about twenty-five tons, the subject of three bills of lading, two, dated the 29th of November, for 285 and 110 bags respectively, and one, dated the 11th of December, for 105 bags. The defendants, having learned that the 105 bags under the bill of lading of the 11th of December were in fact shipped in December, wrote on the 30th of January that they did not accept the declaration, as it was not for the full quantity. On the 5th of February the plaintiffs substituted in respect of the 105 bags a new declaration of another 105 bags by the same vessel under a bill of lading of the 29th of November. The defendants pointed out that more than sixty days had now elapsed since the date of the bill of lading. On the 26th of June samples of the pepper covered by the declaration of the 19th of January, as altered by that of the 5th of February, being all of it shipped in November, were tendered, but the defendants rejected the whole of these samples, and this action was brought for non-acceptance. *Reuter* v. *Sala* (1879).

Lord Coleridge, C.J., sitting without a jury, held that, the plaintiffs not having declared the whole of the pepper according to the contract within the stipulated time, the defendants were not bound to take the twenty-five tons or any part thereof.

In the Court of Appeal, it was held by the majority of the Court (*u*), affirming the judgment of Lord Coleridge, that the plaintiffs could not recover, on the ground that the contract was not divisible, but was an entire contract for the sale of twenty-five tons, subject to a moderate margin under the words "about" and "more or less"—which would not cover five tons—and that the plaintiffs, having declared and tendered *as one entire whole* a shipment which was only partly in accordance with the contract, could not, *when the time limited for declaring had expired*, make a new declaration and tender, nor could they compel the defendants to accept so much of the pepper contained in the original declaration and tender as was shipped in November, and that

(*u*) Thesiger, L.J., and Cotton, L.J., Brett, L.J., *diss.*

Reuter v. *Sala* (1879).

the defendants were entitled to reject the whole. *Bran* *Lawrence* (*x*) was distinguished on the ground that ther sellers had elected to ship and tender the goods by sep vessels, and the contract in that case was divisible; a time of the buyers' refusal the sellers were acting in accordance with their contract, and there was nothi indicate that the contract would not be performed by th its entirety (*y*).

Opinion of Thesiger, L.J.

Lord Justice Thesiger, after referring to that case, sa that in the present case the facts were very different. first place, the declaration of the pepper named but one and the pepper tendered did in fact arrive by one ship the second place, there had not been at any time eit declaration or a tender of the twenty tons of pepper the plaintiffs contended that the defendants were bou accept apart from the five tons which they admitted th defendants were not bound to accept. If the declarati the 19th of January were relied upon, it was invali including five tons which were not of October or Nov shipment. If the declaration of the 5th of February relied upon, it was, in regard to the added five tons, in as out of time; and even if those five tons had not been a the declaration of the twenty tons as a separate parcel seem only to date from that day, and would, therefore be too late. In mercantile contracts like the present making within a given time of a declaration or declara upon which the buyers may act is an essential feature of contracts (*a*). He concluded: "Where the shipment prised in one declaration is in part good and in part bad although the good and bad parts are separable, yet the adhere to the declaration as a whole, and tender the ship as a whole, the buyers must have a right to reject ditionally both the declaration and the whole of the tendered under it; and further the defendants would bound to accept the part of the shipment which in complied with the terms of the contract if after the decla and tender, and after it was apparent that the sellers' co could not be performed in its entirety by delivery o whole of the goods contracted to be sold, the sellers sepa

(*x*) (1876) 1 Q. B. D. 344; 46 L. J. Q. B. 237, C. A., *ante*, 817.
(*y*) 4 C. P. D. at 245, 250; 48 L. J. C. P. 492.
(*z*) *Ibid.* at 245—248.
(*a*) See *Graves* v. *Legg* (1854) 9 Ex. 709; 23 L. J. Ex. 228; 96 R. R. in Ex. Ch. (1857) 11 Ex. 642; 26 L. J. Ex. 316; 115 R. R. 497, *ante*, 675.

the good portion of the shipment from the bad, and made a fresh tender of the former for acceptance." *Reuter* v. *Sala* (1879).

Lord Justice Cotton said (*b*) that to apply the equitable rule with regard to time to mercantile contracts would be dangerous and unreasonable (*c*); therefore the time within which the pepper was to be declared was an essential condition of the contract. That the words "per sailing vessel or vessels" showed that the contract was divisible in the sense that the twenty-five tons might be delivered in several parcels, and possibly might arrive in England at different times. But they did not show that it was divisible in the sense that the buyers were bound to take any substantial portion of the twenty-five tons, although *the plaintiffs were unable or unwilling to supply the balance* of the stipulated quantity. *Brandt* v. *Lawrence* laid down no general rule of construction, but merely decided that the contract in that case, having regard to the words "vessel or vessels," was divisible. Of Cotton, L.J.

Lord Justice Brett, on the other hand, dissented. The Lord Justice cited *Jonassohn* v. *Young* (*d*) and *Simpson* v. *Crippin* (*e*), and was of opinion that no sufficient reason had been shown why damages would not be a compensation for the breach by the plaintiffs as to the five tons. *Brandt* v. *Lawrence* showed that the buyers in the present case were bound to accept that part of the goods which was shipped, and declared in time, "because the contract says that the shipment is to be—that is, may be—in 'sailing vessel or vessels.'" The general principle was that in an instalment contract a breach by the party suing is a breach of only a part of the consideration moving from him: that such a breach can be compensated in damages without any necessity for annulling the whole contract. And he concluded: "I am of opinion that the plaintiffs are entitled to recover in respect of twenty tons, leaving the defendants to a cross action in respect of five tons." Of Brett, L.J., dissenting.

It is conceived that the explanation of the difference of opinion in this case, in which the sellers originally had the option of delivering in instalments or by a single delivery, Discussion of *Reuter* v. *Sala*.

(*b*) *Ibid.* at 249—250.

(*c*) *I.e.*, there is no presumption in mercantile contracts that time is not of the essence. Whether it is or is not of the essence depends on the terms of the contract. See . 674, and s. 1:) of the Code, *ibid.*: and *cf. per* Crompton, J., *sohn* v. *Young* (1863) 4 B. & S. 296; 32 L. J. Q. B. 385; 129 R. R. and *per* Brett, M.R., in *Sanders* v. *MacLean* (1883) 11 Q. B. D. at 387; 52 L. J. Q. B. at 484.

(*d*) (1863) 4 B. & S. 296; 32 L. J. Q. B. 385; 129 R. R. 750, set out *post*, 826.

(*e*) (1872) L. R. 8 Q. B. 14, 42 L. J. Q. B. 28, set out *post*, 831

Reuter v. *Sala* (1879).

arose from the different views of the effect of the s declaration. Thesiger, L.J., and Cotton, L.J., held th their declaration of the 19th of January, 1877, the elected to deliver at one time; that no other declaratio made in due time (*f*); and therefore that the contract m treated as a non-instalment contract. On the other Brett, L.J., held that the declaration of the 19th of Ja did not bind the sellers conclusively, although they had no other in due time, so that it still remained open to th treat the contract as an instalment contract. It will hav noticed that his Lordship cites three cases, all of th *instalment contracts*. As this had become a *non-inst contract*, it is submitted that those principles wer applicable.

"Average" instalments.

Where the amount of each instalment is an "ave proportion for each specified unit of the period within the whole delivery is to take place, the rule would seem that a deficiency at the end of one unit of time may be up in the succeeding unit, provided that at the expira any particular time (to be determined by the jury) th no obvious deficiency in the sum of the instalments deli In that latter event the seller will have committed a of contract, and the deficiency cannot be made up afte by thrusting on the buyer the arrears. These principle laid down by the Court of Exchequer in *Barningh Smith* (*g*), in which the goods were to be delivered " fair average rate of twenty waggons a day." But th "average" has sometimes been explained as meaning equal monthly quantities (*h*).

When each instalment to be a separate contract.

Sometimes an instalment contract provides that delivery should constitute a separate contract (*i*). I a case each delivery stands by itself, and the buyer enforce delivery of arrears, it being his duty to buy in a the seller on the occasion of each separate breach (*i* conversely the seller cannot thrust upon the buyer the a

(*f*) As to the *locus penitentiæ*, see *Borrowman* v. *Free* (1878) 4 Q 500, C. A.; 48 L. J. Q. B. 65, set out *ante*, 402, and cited *ante*, 816 election generally, *Heyward's Case* (1595) 2 Co. Rep. 37 a., cited *ante*, 3

(*g*) (1874) 31 L. T. 540. See also *Nederlandsche Cacao Fabrik* v. (1898) 14 Times L. R. 322.

(*h*) *Ireland* v. *Merryton Coal Co.* [1894] 21 S. C. 989.

(*i*) *Higgins* v. *Pumpherston Oil Co.* [1893] 20 Ret. 532. Such is now found in many contracts, *e.g.*, in cotton seed contracts, acce the form approved by the Hull Incorporated Chamber of Comm Shipping and by the Incorporated Oil Seed Association, and in linseed issued by the Produce Brokers' Co.

But it is conceived that, even on such a contract, a voluntary postponement of delivery, as in *Tyers' Case* (*j*), would have the effect of extending the time of each separate delivery.

Where amount of instalments not specified.

Where the amount of the instalments is not specified, the *prima facie* rule would seem to be that the deliveries should be rateably distributed over the contract period; but if it can be gathered from the terms of the contract or the circumstances that rateable deliveries were not intended, it then becomes a question for the jury whether the tender of, or demand for, delivery is a reasonable one (*k*).

Calaminus v. Dowlais Iron Co. (1878).

In *Calaminus* v. *The Dowlais Iron Co.* (*l*), the defendants on the 9th May contracted to buy from the plaintiff "from 5,000 to 6,000 tons" of iron ore, deliverable during the four months from June to September, discharging at the rate of 200 tons a day for steamers and fifty to sixty tons for sailing vessels. The defendants knew that the plaintiff had arranged with correspondents at Carthagena for the shipment of the ore. Several of the ships having made exceptionally quick voyages, by the 28th of July the plaintiff had delivered cargoes containing 4,623 tons not expected to arrive till August. Another ship then arrived with 767 tons after an equally quick voyage, and on the 30th July the cargo was tendered to the defendants, who refused to receive any further quantities before September, on the ground that the contract contemplated equal monthly deliveries. The plaintiff had to pay £150 for demurrage, and sought to recover that amount as damages for non-acceptance of the cargo when tendered. *Held*, by Lush, J., on further consideration, that the plaintiff was entitled to recover. As the option was given to one party or the other, exercisable not at any given time, whether in the first or in any of the other three months, to deliver or to demand either 5,000 *or* 6,000 tons, it was quite clear that equal monthly deliveries were not contemplated. But even supposing the contract had specified 5,000 tons only, still the circumstances showed that the parties could not have contemplated equal monthly deliveries, for the ore had to be procured at Carthagena, and shipped in many different vessels, either steamers or sailing vessels, varying in the length of the voyage. It was a question for the jury whether the tender

(*j*) (1875) L. R. 10 Ex. 195; 44 L. J. Ex. 130, Ex. Ch., *ante*, 793.
(*k*) *Calaminus* v. *Dowlais Iron Co.* (1878) 47 L. J. Q. B. 575; per *Curiam* in *Brandt* v. *Lawrence* (1876) 24 W. R. 749; 46 L. J. Q. B. 237; *Wright, Stephenson & Co.* v. *Adams & Co.* [1908] 28 N. Z. L. R. 193 ("portion each month").
(*l*) *Supra*.

of the 767 tons on the 30th July was reasonable, and the
found that it was. The defendants had therefore been
of unreasonable delay in discharging the ship.

Default a discharge of contract *pro tanto*.

The effect of a breach by either party in the delive
acceptance of an instalment is to strike that instalment
the contract, which is *pro tanto* discharged. Conseq
the delivery of the instalment cannot afterwards be en
or demanded (*m*).

Delivery postponed in specified event.

The delivery of one or more instalments may be postpon
in any event specified in the contract. In such case it
subject to any contrary intention (*o*), be delivered or ac
within a reasonable time after the specified event has
to operate, as the case may be (*p*). And if the event con
to be operative beyond a reasonable time, having regard
contemplated duration of the contract, and the
circumstances of the case, the contract is discharged o
sides (*p*).

De Oleaga v. *West Cumberland Iron Co.* (1879).

Thus, in *De Oleaga* v. *West Cumberland Iron Co.*
action for non-acceptance, the plaintiffs, merchants at
on February 15, 1872, contracted to supply the defe
at Workington, Cumberland, with about 30,000 t
Sommorostro ore, to be paid for by cash on delivery
shipment, the deliveries to be at the rate of 800 to 1,3
a month, provided the sellers were able to procure tonn
or under a certain rate. The contract also provided t
sellers were not to be responsible should they be pre
from delivering all or any part of the ore through (*int*
any circumstances beyond their control. Up to July
deficient quantities of ore were delivered at irregular
the plaintiffs being during part of that time unable to
tonnage at the limit stated. From July, 1873, to Fe
1876, warlike operations round Bilbao prevented del
In the latter month they ceased, and the plaintiffs g
defendants notice of resumption of delivery. The defe
refused to accept on the ground that the contract ha
to an end. *Held*, that the plaintiffs were entitled to
the quantities withheld by reason of fr't being ab

(*m*) *Per* Blackburn, J., in *Simpson* v. *Crippin* (1872) 42 L. J. Q.
(*n*) As to postponement by subsequent request, see *ante*, 791, *et seq*
(*o*) Thus, for example, the contract may be expressly limited to
period, and the time may run out during suspension: *Stephens, Maw*
v. *G. W. Colliery Co.* (1899) 14 Times L. R. 432.
(*p*) *De Oleaga* v. *West Cumberland Iron Co.* (1879) 4 Q. B.
48 L. J. Q. B. 753. If the seller may suspend wholly or partially
do so wholly, although able to make partial deliveries: *Belgaard*
(1908) Times, Nov. 26.

limit, but not those which they were prevented by *vis major* from delivering. The object of the delivery clause was to regulate the mode of performance. So long as freights ranged high the sellers could withhold delivery, but the contract remained in force for the quantities undelivered, which should be delivered within a reasonable time, which is a question of fact. If that time elapsed without the sellers being able to deliver, the contract was discharged. The object of the clause exempting the seller from responsibility was different. It was to provide for a discharge of the contract in the events mentioned, not to suspend performance.

Repudiation for a partial breach by the other party of an instalment contract.

A contract for the delivery of goods by instalments, though the instalments are to be separately paid for, and the contract is in consequence so far divisible, is, like all other contracts, one that may be repudiated by either party if the other party refuse to perform it. But the question often arises whether a mere partial breach by either party justifies the other in repudiating the unfulfilled part of the contract. The rule at common law is that, in the absence of an express refusal, the question is whether the conduct of the party in fault amount to an implied refusal to perform the contract, for it is not every breach by one party which gives to the others the right of rescission (*q*). The breach must be in a matter going to the root of the contract (*q*). Such a breach negatives the readiness and willingness of the party in fault to be bound by the contractual relation any further, and may be accepted as an offer to rescind.

Code, s. 31 (2). Whether breach of a contract providing for instalments to be separately paid for is a repudiation or a severable breach depends on terms and circumstances.

With regard to this branch of the law, section 31 (2) (*r*) of the Code provides that: —

"31.—(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation (*s*), but not to a right to treat the whole contract as repudiated."

(*q*) *Per* North, J., in *Rhymney Ry. Co.* v. *Brecon Ry. Co.* (1900) 83 L. T. 111, at 114; 69 L. J. Ch. 813; *per* C. A. in S. C. at 117, follg. Lord Blackburn in *Mersey Steel Co.* v. *Naylor* (1884) 9 A. C. 434, at 442, 443; 53 L. J. Q. B. 497, and disting. the two grounds of rescission stated by him, viz. express and implied refusal. See also *per* Jessel, M.R., in S. C. (1882) 9 Q. B. D. at 657; 51 L. J. Q. B. 576, C. A.; and *per* Collins, L.J., in *Cornwall* v. *Henson* [1900] 2 Ch. 298, at 300; 69 L. J. Ch. 581, C. A.

(*r*) Sub-s. (1) is set out *ante*, 816.

(*s*) This word is intended to cover the price of an instalment as well as damages: *per* Farwell, L.J., in *Workman, Clark & Co.* v. *Lloyd Brazileno* [1908] 1 K. B. 968, at 979; 77 L. J. K. B. 953, C. A.

Criticism of s. 31 (2).

This clause is not a full statement of the law app on this particular point to instalment contracts. The by the seller is described as a *defective* delivery, the bre the buyer as neglect or refusal to take delivery or The following cases do not fall within the enactmen are still governed by common law principles:

1. Where the seller *omits* to make any delivery at a
2. Where the seller *refuses* to make a delivery.
3. Where the price of the instalments is not sep payable (*x*).
4. Where the amount of the instalments is not state

Where each instalment to be a sepa[rate] cont[ract].

The rule stated in section 31 (2) applies notwiths that the contract of sale provides that each deliver constitute a separate contract. Such a provision d prevent the party not in fault from repudiating the on a breach by the other party with regard to one instalments, if, apart from such a provision, he w so (*y*).

Withers v. *Reynolds* (1831).

In *Withers* v. *Reynolds* (*z*), the defendant agreed to the plaintiff with wheat straw, sufficient for his use a keeper, from the 20th of October, 1829, till the 24th 1830, at the rate of three loads in a fortnight, "at load for each load of straw so delivered on his premi this day till the 24th of June, 1830." The plaintiff in arrear for several loads, paid the defendant for loads except the last, saying that he should always load in hand. The defendant refused to deliver a straw. *Held*, that the plaintiff was bound to pay load on delivery, and as he had expressly said in eff he would not pay on delivery, the defendant was not b continue the supply.

Jonassohn v. *Young* (1863).

In *Jonassohn* v. *Young* (*a*), the agreement was for of coal by the plaintiffs to the defendant, as much

(*u*) See *Coddington* v. *Paleologo* (1867) L. R. 2 Ex. 193; 36 L. set out *post*, 827; also *Bergheim* v. *Blaenavon Iron Co.* (1875) L. R. 319; 44 L. J. Q. B. 92.

(*x*) See *Roper* v. *Johnson* (1873) L. R. 8 C. P. 167; 42 L. J. C. *Shinn* v. *Bodine* (1869) 60 Penn. 182, and *West Republic Mining C* (1884) 108 Penn. 55, for instances.

(*y*) *Berk & C* *Day & White* (1897) 13 Times L. R. 475.

(*z*) 2 B. & Ad. 82; 1 L. J. K. B. 30; 36 R. R. 782. See also *Bowron* (1892) 8 Times L. R. 641; and *cf. Clarke* v. *Burn* (1866) 439; *Carcoran* v. *Proser* (1873) 22 W. R. 22 (Ir. Ex. Ch.); *Dickinso shaw* (1892) 8 T. L. R. 271, C. A. (refusal not amounting to repud

(*a*) 4 B. & S. 296; 32 L. J. Q. B. 385; 129 R. R. 750. See also v. *Williams* (1872) L. R. 7 Ex. 259; 41 L. J. Ex. 164.

steam vessel could convey in nine months, plying between Sunderland and London, the coals to be equal to a previous cargo supplied on trial, and the defendant to send the steamer for them. In an action for refusing to send the vessel to fetch divers cargoes, and for non-acceptance, the defendant pleaded that the plaintiffs had first broken the contract—1. By shipping very inferior coal; 2. By detaining the vessel on divers occasions a long and unreasonable time, far beyond that permitted by the contract, before loading her, wherefore the defendant immediately, on notice of the plaintiff's default, refused to go on with the execution of the contract. A demurrer to these pleas was held good on the ground that the plaintiff's breaches went to part only of the consideration moving from them. Crompton, J., said: "The argument for the defendant must go this length, that the supply of one chaldron of coal of an inferior quality, or the unnecessary detention of the defendant's vessel for one hour, would entitle him to put an end to the contract. In *Hoare* v. *Rennie* (*b*) we must take it that time was of the essence of the contract."

Coddington v. *Paleologo* (1867).

In *Coddington* v. *Paleologo* (*c*), the plaintiffs contracted to sell to the defendants 900 white L cloths, "delivering on April 17th, complete 8th May." No goods were delivered on the 17th, and on the 18th the defendants repudiated the contract. Deliveries amounting to 900 cloths were afterwards tendered on the 23rd, 26th, and 30th of April and 3rd of May, and were refused. After a verdict for the plaintiffs, leave being reserved to the defendants to move to have a verdict entered for them, it was held by the Court of Exchequer that, if the seller was bound to commence delivering on the 17th of April, the buyers were justified in repudiating the contract, and Bramwell, B., and Martin, B., held (Kelly, C.B., and Pigott, B., dissenting), that the sellers were so bound. The Court being equally divided, the rule dropped.

Bloomer v. *Bernstein* (1874).

In *Bloomer* v. *Bernstein* (*d*), the defendants, merchants at Antwerp, contracted to sell to the plaintiff "from 3,650 to 5,110 tons of old iron rails, delivery to take place during 1872, and to be completed in December of that year, payment net cash, in London, against bill of lading and sworn weigher's certificate." Under such a contract the practice was to deliver monthly. The plaintiff duly paid for the first parcel, but did

(*b*) (1859) 5 H. & N. 19; 29 L. J. Ex. 73; 120 R. R. 453, set out *post*, 831.
(*c*) L. R. 2 Ex. 193; 36 L. J. Ex. 73.
(*d*) L. R. 9 C. P. 588; 43 L. J. C. P. 375. See also *Morgan* v. *Bain* (1875) 10 C. P. 15; 44 L. J. C. P. 47; *Mess* v. *Duffus* (1901) 6 Com. Ca. 165; *Phœnix Bessemer Steel Co., Re.* (1876) 4 Ch. D. 108; 46 L. J. Ch. 115, C. A.

not take up the bill of lading for the second parcel, and
some negotiation the defendants' agent finally wrote
14th of February that he must consider the contract can
Upon the 22nd of February the plaintiff went into liquid
and on agreeing to pay a composition of 2s. 6d. in the
his estate was reassigned to him, and he then brough
action for non-delivery of the iron. The jury found in
that the plaintiff was insolvent; that he had intended
repudiate the contract, and had by his conduct comman
these facts to the defendants. The Court held th
findings of the jury concluded the matter in favour
defendants, and brought the case directly within the au
of *Withers* v. *Reynolds* (*f*).

Freeth v. *Burr* (1874).

In *Freeth* v. *Burr* (*g*), the defendant contracted to
the plaintiffs 250 tons of pig iron, half to be delivered
remainder in four weeks, payment net cash fourteen da
delivery of each parcel. The delivery of the first p
125 tons was not completed for nearly six months, in
repeated demands by the plaintiffs. The plaintiffs th
refused to pay for it, erroneously claiming to set off
against any possible liability of the defendant; but th
urged delivery of the second parcel. The defendant
the refusal to pay as an abandonment of the contra
declined to deliver any more. The price of the firs
was ultimately paid, and it was not suggested that th
tiffs were unable to pay. The plaintiffs sued for
delivery of the second parcel. On these facts the
Common Pleas held that the refusal to pay was not, u
circumstances, sufficient to justify the defendant in
the contract as abandoned by the plaintiffs, and he w
for non-delivery of the second instalment.

Test proposed by Coleridge, C.J.

Coleridge, C.J., said: "In cases of this sort, w
question is whether the one party is set free by the
the other, the real matter for consideration is whether
or conduct of the one do or do not amount to an intim
an *intention to abandon* and altogether *to refuse per*
of the contract. I say this in order to explain the
upon which I think the decisions in these cases must r
I think it may be taken that the fair result of the
have stated. . . . Now, non-payment on the one
non-delivery on the other, may amount to such an ac

(*e*) For the importance of this fact in cases of insolvency see *Mc*
(1901) 6 Com. Ca. 165.
(*f*) *Ante*, 826.
(*g*) L. R. 9 C. P. 208; 43 L. J. C. P. 91.

be evidence for a jury of an intention wholly to abandon the contract and set the other party free."

Keating, J., drew attention to the circumstances attending the plaintiffs' refusal, such as a rising market, and their remonstrances on the defendant's default, and the demand for the second parcel, as showing that the plaintiffs never intended to abandon the contract.

Mersey Steel and Iron Co. v. Naylor (1884).

In 1884 the question was considered by the House of Lords in *The Mersey Steel and Iron Co.* v. *Naylor* (*h*). The action was brought by the plaintiff company for the price of goods delivered, and the defendants counterclaimed for damages for non-delivery. The defendants had agreed to purchase from the plaintiffs 5,000 tons of steel blooms, "delivering 1,000 tons monthly, commencing January next, payment net cash within three days after receipt of shipping documents." The plaintiff company delivered about half of the first instalment, but before payment became due a winding-up petition was presented. Thereupon the defendants, acting under a mistake of law, refused, pending the bankruptcy petition, to pay for the steel already delivered. The plaintiffs thereupon informed the defendants of their intention to treat the refusal to pay as a breach of contract releasing them from any obligation to make further deliveries. The defendants were neither unable nor unwilling to pay the amount due to the plaintiffs, but erroneously considered that they could not safely do so. They afterwards offered to accept and pay for all further deliveries subject to a right of set-off which they claimed. The plaintiffs, however, declined to make further deliveries, and brought their action for the price of the steel delivered. *Held*, by the House of Lords, affirming the decision of the Court of Appeal. 1. That on the construction of the contract payment for a previous delivery was not a condition precedent to the right to claim subsequent deliveries; 2. That the defendants had not by postponing payment under mistaken advice acted so as to show an intention to repudiate the contract and thereby to release the plaintiff company from further performance.

All their Lordships, as well as the Lords Justices, accepted the principle stated by Lord Coleridge in *Freeth* v. *Burr* (*i*) as the true test; or, as it was expressed in the words of Lord

(*h*) 9 A. C. 434; 53 L. J. Q. B. 497, affirming C. A. (1882) 9 Q. B. D. 648; 51 L. J. Q. B. 576.
(*i*) *Ante*, 828.

Whether a partial breach is a repudiation is a question of fact in each case.

Selborne (*k*): "You must look at the actual circumstan the case in order to see whether the one party to the co is relieved from its future performance by the conduct other. You must examine what that conduct is, so as whether it amounts to a renunciation, to an absolute r to perform the contract, such as would amount to a res if he had the power to rescind, and whether the other may accept it as a reason for not performing his part."

Lord Blackburn approved the decision in *Withers* v. *nolds* (*l*) that conduct by either party which amounts in to a notice of refusal to perform justifies the other in diating the contract, and adopted the rule laid down notes to *Pordage* v. *Cole* (*m*) that the failure to perform go to the root of the contract.

Dominion Coal Co. v. *Dominion Iron & Steel Co.* (1909).

In *Dominion Coal Co.* v. *Dominion Iron and Steel C* the coal company agreed to supply the steel company "all the coal the steel company might require for use works," and all the coal supplied "should be freshly and of the grade known as run-of-mine, reasonably free stone and shale." After the contract had been carrie for some time, the steel company then requiring 80,000 month, 153 car-loads of coal were rejected as not accord contract, and the steel company wrote to the coal co that "the coal contained an undue percentage of shal slate and sulphur, and was unsuitable for their require and was not in accordance with the contract," and th company was notified that all coal delivered must be f mined run-of-mine coal suitable for the steel company's poses. To which the coal company replied: "Your co in refusing to accept delivery of coal furnished and to b nished constitutes a clear repudiation on your part of obligations under the contract, and renders further per ance on our part impossible. We therefore formally you that the contract mentioned is at an end." *Held*, b Privy Council, affirming the Supreme Court of Nova S that the coal delivered was not according to contract, and rightly rejected, and that the coal company was not en to repudiate the contract, but that the steel company entitled to repudiate it. Here, it will be observed, all the buyers did was rightly to reject the coal delivered, a

(*k*) 9 A. C. at 438; 53 L. J. Q. B. 497.
(*l*) (1831) 4 B. & Ad. 882; 1 L. J. K. B. 30; 36 R. R. 782, *ante*, 82
(*m*) (1669) 1 Wms. Saund. at 320 *b*, *et seqq.*, set out *ante*, 638.
(*n*) [1909] A. C. 293; 78 L. J. P. C. 115, P. C.

point out to the sellers that future deliveries should be conformable to contract. In other words, as the buyers committed no breach, the seller's repudiation was wrongful.

In *Millar's Karri and Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (*o*), on a contract for the sale of blue gum timber deliverable by two shipments, where the first instalment was not according to the contract, it was held by Bigham, J., and Walton, J., that if a partial breach "is of such a kind, or takes place in such circumstances, as reasonably to tend to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may then and there be regarded as repudiated, and may be rescinded," whether the breach be in payment by the buyer, or delivery by the seller. Walton, J., also pointed out that a repudiation may be inferred from acts, notwithstanding that the party committing the breach contended that he was performing the contract, and might in fact be intending to perform the remainder of it.

Future breaches when to be inferred from existing ones.

Millar's Karri & Jarrah Co. (1902), v. *Weddel, Turner & Co.* (1909).

Such being the general principles, three cases remain around which has gathered a perplexing amount of controversy. They all possess the common feature that the breach was committed at the outset of the contract.

Breach at the outset.

In *Hoare* v. *Rennie* (*p*), 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 to be paid for at £15 10s. a ton, delivered on arrival in London. The plaintiff shipped only twenty-one tons in June, which the defendant refused to accept as part compliance with the contract, and it was held, that on these facts the plaintiff could not maintain an action against the defendant for not accepting the twenty-one tons, and that the defendant could repudiate the contract as regards the residue.

Hoare v. *Rennie* (1859).

Pollock, C.B., said that neither a Court nor a jury had a right to make a different contract for the parties; at any rate, if the seller at the outset tendered, not one-fourth of the quantity, but very much less, the buyer was entitled to say, "This is no performance." In this case the seller, instead of tendering a fourth, tendered less than a thirtieth of the whole contract quantity.

In *Simpson* v. *Crippin* (*q*), the defendants had agreed to

(*o*) 1909) 100 L. T. 128; 14 Com. Cas. 25. See also *Berk & Co.* v. *Day & White* (1897) 13 Times L. R. 475.
(*p*) 5 H. & N. 19; 29 L. J. Ex. 73; 120 R. R. 453.
(*q*) L. R. 8 Q. B. 14; 42 L. J. Q. B. 28.

Simpson v. *Crippin* (1872).

supply the plaintiff with 6,000 to 8,000 tons of coal, delivered in the plaintiff's waggons "in equal monthly tities during the period of twelve months from the 1st o next, terms cash monthly, less $2\frac{1}{2}$ per cent. disc During the first month, July, the plaintiff sent wagg 158 tons only, and on the 1st of August the defendant that the contract was cancelled on account of the pla failure to send for the full monthly quantity. The p declined to allow the contract to be cancelled, and the was brought on the defendants' refusal to go on w *Held*, that although the plaintiff had committed a bre the contract by failing to send waggons in sufficient the first month, the breach was a good ground for con tion, but did not justify the defendants in rescindi contract under the rules established by *Pordage* v. *Co* Two of the Judges, Blackburn, J., and Lush, J., that they could not understand *Hoare* v. *Rennie*, and to follow it.

Honck v. *Muller* (1881).

In *Honck* v. *Muller* (*r*), the plaintiff had bought f defendant 2,000 tons of iron to be delivered in "Nove equally over November, December, and January" increased price, "payment net cash against bills of l The plaintiff failed to take delivery of *any* iron in No and the defendant thereupon cancelled the contract action by the plaintiff for non-delivery in Decem January, it was held by the majority of the Court of on the assumption that the plaintiff had elected to iron in equal quantities over the three months (*s*), plaintiff's refusal to accept in *November* justified the d in refusing to continue to carry out the contract, for o the plaintiff, having undertaken to accept 2,000 ton be able to demand delivery of two-thirds only, or o tons.

Hoare v. *Rennie* was approved, Bramwell, L.J., dist ing *Simpson* v. *Crippin* on the ground of the part per in that case (*t*), and Baggallay, L.J., frankly prefe former decision, which he could not reconcile with v. *Crippin*. Brett, L.J., dissented, and was of opi it was immaterial whether the breach was in respe

(*qq*) *Ante*, 638. (*r*) 7 Q. B. D. 92; 50 L. J. Q. B.

(*s*) The majority thought that the plaintiff could not recover on that he should have elected in November whether he wanted all only one-third, in that month.

(*t*) Bramwell, L.J., seems to have regarded the twenty-one tons the first month in *Hoare* v. *Rennie* as negligible.

first or any other delivery. He assented to the doctrine laid down in *Simpson* v. *Crippin*, and contained in the notes to *Pordage* v. *Cole* (*u*), resting his judgment mainly upon the fact that where merchants have so contracted by separating the price as, in case of failure of any delivery, to give an adequate remedy in damages, they do not intend that a non-delivery should put an end to the contract (*x*).

In this remarkable conflict of opinion it is impossible to speak with any certainty with regard to the relative authority of the preceding three cases, but there seems to be some justification for the view that a substantial breach of contract *at the outset* of performance may afford a ground for repudiation by the other party. This view is in accordance with the opinion of the Court of Exchequer in *Coddington* v. *Paleologo* (*y*), and is supported by *Millar's Karri and Jarrah's Case* (*yy*), and it has been adopted in America (*z*).

Norrington v. Wright (1885).

In *Norrington* v. *Wright* (*a*), the action was for damages for non-acceptance of goods. The contract was for 5,000 tons of iron rails for shipment from a European port or ports at the rate of about 1,000 tons per month during the five months February to June inclusive, the whole quantity to be shipped by August 1st. The seller shipped only 400 tons in February, and 885 in March. The defendant received and paid for the February shipment, but before receiving more was for the first time informed of the amounts shipped in February and March, and at once refused to accept any more. On these facts the defendant was held to be entitled to a verdict.

The view of the Supreme Court was that the time of shipment was part of the description of the goods, on the authority of *Bowes* v. *Shand* (*b*), and so was a condition precedent; that in mercantile contracts both time and quantity are of the essence; and that "when the goods are to be shipped in certain proportions monthly the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had

(*u*) (1669) 1 Wms. Saund. at 320 *b*., *et seqq*., set out *ante*, 638.

(*x*) In *Reuter* v. *Sala* (1879) 4 C. P. D. 239, at 256; 48 L. J. C. P. 492, at 503. Brett, L.J., did not limit the doctrine to cases in which the instalments are to be separately paid for.

(*y*) (1867) L. R. 2 Ex. 193; 36 L. J. Ex. 73, set out *ante*, 827.

(*yy*) *Ante*, 851.

(*z*) *King Philip's Mills* v. *Slater* (1878) 34 Amer. Rep. (Rh. Isl.) 603, following *Hoare* v. *Ronnie*; *Norrington* v. *Wright*, *infra*; *Pope* v. *Porter* (1886) 102 N. Y. 366.

(*a*) (1885) 115 U. S. 188, approved in *Cleveland Rolling Mills* v. *Rhodes* (1886) 121 U. S. 255; *Pope* v. *Porter* (1886) 102 N. Y. 366.

(*b*) (1877) 2 A. C. 435; 46 L. J. Q. B. 561; set out *ante*, p. 677.

been agreed that all the goods should be delivered at
Upon a review of all the English decisions, the rule laid
in the earlier cases of *Hoare* v. *Rennie* (*c*) and *Cod*
v. *Paleologo* (*d*), as well as in the later cases of *Re*
Sala (*e*), and *Honck* v. *Muller* (*f*), appeared to the Cou
be supported by a greater weight of authority than th
stated in the intermediate cases of *Simpson* v. *Cripp*
and *Brandt* v. *Lawrence* (*h*), and to accord better wi
general principles affirmed by the House of Lords in *P*
Shand (*i*), while it in nowise contravenes the decision
tribunal in *Mersey Co.* v. *Naylor*" (*j*).

This case considered.

Some of the reasons given for this decision do not
be altogether satisfactory. *Reuter* v. *Sala* had, in the
that occurred, become a non-instalment contract, so th
question for decision was whether the seller, having ag
deliver twenty-five tons in one lot, could tender only
which of course he could not do. Again, the ground
decision in the *Mersey Co.'s Case* was treated as "app
only to the case of a failure of the buyer to pay for, a
to that of a failure of the seller to deliver, the first
ment," whereas a perusal of the opinions shows th
distinction was suggested between the two cases. *Br*
Lawrence, too, seems to have been treated as laying
different rule than that in *Reuter* v. *Sala*, although
latter case the majority of the Court were care
explain that the cases were quite in harmony.
in *Brandt* v. *Lawrence*, at the time when the
rejected the wheat, tendered in part fulfilment of the co
the seller seems to have been treated as in default, a
case is considered as conflicting with *Reuter* v. *Sala*, al
in the latter case the majority of the Court of Appe
careful to explain their reason for distinguishing it,
in which the seller was *not* in default.

S. 30 (1) reconciled with s. 31 (2).

It is not at first sight apparent how the rule, that th
of either party to repudiate an instalment contract
partial breach by the other depends upon circumstanc
be reconciled with the rules that the seller must deli
full quantity contracted for, and must ship at the sti
place and time. The explanation seems to be that the
by providing for instalments to be separately paid fo
declared an intention that the consideration for the

(*c*) *Ante*, 831.
(*d*) *Ante*, 827.
(*e*) *Ante*, 818.
(*f*) *Ante*, 832.
(*g*) *Ante*,
(*h*) *Ante*,
(*i*) *Ante*,
(*j*) *Ante*,

of either party should be treated as so far divisible that a partial breach by the other should be compensated in damages (*k*), unless the partial breach can in fact be shown to go to the root of the contract. The apparent conflict between section 30 (1) (*l*) and section 31 (2) (*m*) should be reconciled by reading the former sub-section as subject to the latter (*n*), which is in the nature of a proviso to section 30 (1). Construction of s. 30 (1) and s. 31 (2).

The following propositions are submitted:—

1. Every contract for a quantity of goods is an entire contract for that quantity, though the goods may be deliverable by instalments (*o*), and a full delivery is *prima facie* a condition precedent to the liability of the buyer to pay any part of the price (*p*). Propositions respecting instalment contracts.

2. An instalment contract may be implied from the terms of the contract, or may be inferred from the circumstances. Thus, for example, it is implied when the goods are deliverable "as required," or on similar terms (*q*).

Where also there is a contract for a quantity of goods some of which are existing, while others are to be manufactured, and no particular time is specified for delivery, the inference is that the goods are to be delivered by instalments (*r*).

Without such an inference, acceptance by the buyer of an instalment is a waiver by him of any objection that the goods were not delivered at one time (*s*).

3. Where the amount of the instalments is not specified, they must *prima facie* be distributed rateably over the contract period; otherwise the amount of goods demanded or tendered as an instalment must be reasonable (*t*).

(*k*) *Per* Thesiger, L.J., in *Reuter* v. *Sala* (1879) 4 C. P. D. at 246; 48 L. J. C. P. at 497.

(*l*) *Ante*, 799.

(*m*) *Ante*, 825.

(*n*) It is noticeable, if this was intended, that the expression "subject to the provisions of this Act" (frequently used elsewhere in the Code, sometimes with perplexing results) has not been introduced into s. 30 (1).

(*o*) *Per* Lord Selborne in *Mersey Steel Co.* v. *Naylor* (1884) 9 A. C. 434, at 439; 58 L. J. Q. B. 497.

(*p*) *Per* Parke, B., in *Oxendale* v. *Wetherall* (1829) 9 B. & C. 386, at 387—388; 7 L. J. K. B. 264; *per Curiam in Colonial Ins. Co.* v. *Adelaide Mar. Ins. Co.* (1886) 12 A. C. 128, at 138, 140; 56 L. J. P. C. 19. See Code, s. 28, *ante*, 683; s. 30 (1), *ante*, 799.

(*q*) *Jackson* v. *Rotax Motor Co.* [1910] 2 K. B. 937; 80 L. J. K. B. 38, C. A. *Per* Ball, L.C., in *Tarling* v. *O'Kiordan* (1878) 2 L. R. Ir. 82, at 86, 87; *per* Morris, C.J., *ibid.* at 89; *ante*, 818.

(*r*) *Per* Ball, L.C., *ubi supra*. See also *Leidermann* v. *Gray* (1857) 26 L. J. Ex. 162, Ex. Ch.

(*s*) *Calaminus* v. *Dowlais Iron Co.* (1878) 47 L. J. Q. B. 575.

4. Where, by agreement, deliveries are subject t
suspended in a specified event, they must be resumed w
a reasonable time after the event has ceased to operate, u
the change of circumstances is such that, to treat the co
as subsisting, would be to force upon the parties a substan
different contract. In the latter event the contra
dissolved on both sides (*u*).

5. Where the price of goods deliverable by instalme
not payable until the whole supply is completed, the
receipt by the buyer of any one or more instalments is n
acceptance thereof, and the instalments may afterwa
returned if the whole quantity be not delivered (*x*). Bu
buyer must pay for any instalment he may have in the
time dealt with as owner (*y*), and for any of the goo
retains *after* the period stipulated for complete delivery

6. The same principles apply, although the price m
payable separately for each instalment, where a co
delivery goes to the whole of the consideration for the b
contract, so that a partial failure in delivery constit
partial failure of an *entire* consideration, which is equi
to a *total* failure of consideration (*z*).

7. Where the instalments are to be separately pai
readiness and willingness to deliver or to accept accord
the contract any instalment—

(a) is a condition concurrent with the other
liability to accept or deliver that instalment

(b) is not as a rule a condition precedent to the
party's liability to accept or to deliver any
instalment (*b*).

But the absence of such readiness and willingness may
an intention of the party in default to repudiate the co
and such an intention will be inferred where the breac
a vital point (*b*).

(*u*) *De Oleaga* v. *West Cumberland Iron, &c., Co.*, *ante*, 824
politan Water Board v. *Dick, Kerr & Co.* [1918] A. C. 119; 87 L. J. K
(*x*) *Oxendale* v. *Wetherell* (1829) B. & C. 386; 7 L. J. K. B. 264; 3 R
ante, 800; *Waddington* v. *Oliver* (1905) 2 B. & P. N. R. 61; 9 R. R. 6
800.
(*y*) This follows from principle. See *Nicholson* v. *Bradfield Uni*
L. R. 1 Q. B. 620; 35 L. J. M. C. 176.
(*z*) See the principle stated by the Court in *Chanter* v. *Lee*
5 M. & W. 698; 9 L. J. Ex. 372; 51 R. R. 584, cited *ante*, 487.
(*a*) *Brandt* v. *Lawrence* (1876) 1 Q. B. D. 344, C. A.; 46 L. J. Q
set out *ante*, 817; *Tarling* v. *O'Riordan* (1878) 2 L. R. Ir. 82, C.
See Code, s. 27, *ante*, 779; s. 28, *ante*, 683.
(*b*) *Mersey Steel Co.* v. *Naylor* (1884) 9 A. C. 434; 53 L. J. Q.
ante, 829. See especially the reasoning of Lord Selborne, L.C.,

8. Where a quantity of goods is deliverable by instalments which are to be separately paid for, the buyer is bound to accept and pay for each instalment which is tendered in due course of performance (*c*).

A subsequent default by the seller in respect of a further instalment does not excuse the buyer for having rejected a previous instalment duly tendered as a step towards its entire performance (*d*). On the other hand, the fact that the buyer has accepted previous instalments duly tendered does not prevent him from rejecting subsequent instalments if otherwise entitled to do so (*e*).

9. Where the seller has an option to deliver either by a single delivery or by instalments, the following Rules apply:

i. Where the seller is required to declare to the buyer which mode of delivery he will adopt, he must make his declaration within due time (*f*), and must tender the goods accordingly.

If, therefore, the declaration be for a single delivery, the contract becomes a non-instalment contract (*g*).

ii. Where no such declaration is required, then the seller may make his election by tendering either the whole quantity of the goods or an instalment within due time.

iii. Where the goods comprised in one declaration or tender are only partly in accordance with the contract, although the two parts are separable, if the seller adhere to his declaration or tender, tendering the goods *as a whole*, the buyer has a right to reject the whole of the goods (*h*).

With regard to delivery to a carrier, the Code enacts as follows:—

Code, s. 32. Delivery to carrier.

"32.—(1.) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer (*i*).

(*c*) *Brandt* v. *Lawrence* (1876) 1 Q. B. D. 344, C. A.; 46 L. J. Q. B. 237, set out *ante*, 817, exp. in *Reuter* v. *Sala*, *ante*, 818.

(*d*) See *per* Thesiger, L.J., in *Reuter* v. *Sala* (1879) 4 C. P. D. 239, at 245, 246; 48 L. J. C. P. at 497.

(*e*) *Tarling* v. *O'Riordan* (1878) 2 L. R. Ir. 82, C. A.: foll. in *Jackson* v. *Rotax Motor and Cycle Co.* [1910] 2 K. B. 937; 80 L. J. K. B. 38, C. A.

(*f*) *Reuter* v. *Sala*, set out *ante*, 818.

(*g*) *Per* Thesiger, L.J., and Cotton, L.J. (Brett, L.J., dissenting on this point), in *Reuter* v. *Sala*, *supra*.

(*h*) See *per* Thesiger, L.J., in *Reuter* v. *Sala* (1879) 4 C. P. D. 239, at 247, 248; 48 L. J. C. P. at 498.

(*i*) Sub-s. (1) is illustrated *post*, 838.

"(2.) Unless otherwise authorised by the buyer, the seller mu
such contract with the carrier on behalf of the buyer as may be
able, having regard to the nature of the goods and the other
stances of the case. If the seller omits so to do, and the goods
or damaged in course of transit, the buyer may decline to t
delivery to the carrier as a delivery to himself, or may h
seller responsible in damages (*k*).

"(3.) Unless otherwise agreed, where goods are sent by the
the buyer by a route involving sea transit under circumstances i
it is usual to insure, the seller must give such notice to the buyer
enable him to insure them during their sea transit, and if t
fails to do so, the goods shall be deemed to be at his risk dur
sea transit" (*l*).

S.3 2 (1). Delivery to carrier *prima facie* delivery to buyer.

The rule laid down in sub-section (1) was well esta
at common law, namely, that delivery to a common
and *à fortiori* to one specially designated by the buy
delivery to the buyer himself; the carrier being, in cont
tion of law, the bailee of the person *to* whom, not of the
by whom, the goods are sent; the latter when employ
carrier being regarded as the agent of the former f
purpose (*m*).

Presumption when rebutted.

But the presumption may be rebutted. Thus, th
may reserve the right of disposal (*n*), as by taking a
lading to his own or a third person's order, in which
delivery is not to the buyer, but to the person indicated
bill of lading (*o*). So also if the seller should sel
undertaking to make the delivery himself at a place oth
that where they are when sold, thus assuming the
carriage, the carrier is the seller's agent (*p*), but "th
must nevertheless, unless otherwise agreed, take any
deterioration in the goods *necessarily* incident to the
of transit" (*q*).

Bull v. *Robison* (1854).

Where hoop-iron was sold in Staffordshire deliver
Liverpool in the winter, the seller was held to have
good delivery, although the iron was rusted and unme

(*k*) Sub-s. (2) is discussed *post*, 839.

(*l*) Sub.-s. (3) is adopted from Scotch law, and seems to have been
in some respects. See *post*, 839.

(*m*) *Badische Anilin Fabrik* v. *Basle Chemical Works* [1898] A.
67 L. J. Ch. 141, H. L.; *Dawes* v. *Peck* (1799) 8 T. R. 330; 1 R.
Dunlop v. *Lambert* (1838) 6 Cl. & F. 600; 49 R. R. 143, H. L. Th
is good although the carrier tortiously refuses to deliver to the buye
seller retakes them: *Groning* v. *Mendham* (1816) 5 M. & S. 189.

(*n*) Code, s. 19 (1); *ante*, 420.

(*o*) *Per* Cleasby, B., in *Gabarron* v. *Kreeft* (1875) L. R. 10 Ex
285; 44 L. J. Ex. 238; *per* Parke, B., in *Wait* v. *Baker* (1848) 2
7, 8; 17 L. J. Ex. 307; 76 R. R. 469.

(*p*) *Dunlop* v. *Lambert* (1838) 6 Cl. & F. 600; 49 R. R. 143. H.

(*q*) Code, s. 33; *ante*, 731.

able when delivered in Liverpool, on proof that this deterioration was the *necessary* result of the transit, and that the iron was bright and in good order when it left Staffordshire (*r*).

Seller should deliver to the carrier named.

The words in sub-section (1) of section 32 "whether named by the buyer or not" should be read subject to the preceding words, "in pursuance of the contract," so that if the buyer name a particular carrier the seller must deliver to him, otherwise there will be no proper delivery (*t*). But even where the seller delivers to the wrong carrier it is apprehended that the buyer may, by his negligence, be compelled to treat the delivery as valid, *e.g.*, where he makes an unreasonable delay in notifying to the seller the non-arrival of the goods by the carrier named (*u*).

S. 32 (2).

Seller bound to take usual precautions to ensure safe delivery.

Clarke v. *Hutchins* (1811).

But the seller is bound, when delivering to a carrier, to take the usual precautions for ensuring safe delivery to the buyer (*x*).

Thus, in *Clarke* v. *Hutchins* (*y*), the seller, in delivering goods to a trading vessel, neglected to apprise the carriers that the value of the goods exceeded £5, although the carriers had published, and it was notorious in the place of shipment, that they would not be answerable for any package above that amount unless entered and paid for as such. The package was lost, and on the seller's action for goods sold and delivered it was held by the King's Bench, Lord Ellenborough giving the decision, that the seller had not made a delivery of the goods, not having "put them into such a course of conveyance as that, in case of a loss, the defendant might have his indemnity against the carriers."

S. 32 (3).

Where goods to be sent by sea.

Duty of seller.

Sub-section (3) of section 32 (*z*) expressly negatives in the particular case contemplated the ordinary presumption that the risk attaches to the ownership of the goods (*a*). It extends to cases of a partial carriage by sea. The rule embodied in the sub-section is borrowed from Scotch law, and possibly has been extended. The rule of the Scotch common law, based on the decided cases (the latest of which, however, seems to

(*r*) *Bull* v. *Robison* (1854) 10 Ex. 342; 24 L. J. Ex. 165; 102 R. R. 620. This case is also considered *ante*, 732-734.

(*t*) *Vale* v. *Bayle* (1775) 1 Cowp. 294; *Ullock* v. *Reddelein* (1828) Dans. & Ll. 6; 5 L. J. (O. S.) K. B. 208, *ante*, 401; in Amer. *Hills* v. *Lynch* (1864) 25 N. Y. Superior Crt. 42; *Wheelhouse* v. *Parr* (1886) 141 Mass. 593.

(*u*) *Cooke* v. *Ludlow* (1806) 2 B. & P. N. R. 119.

(*x*) Code, s. 32 (2), *ante*, 838.

(*y*) 14 East, 475; 13 R. R. 283. See also *Buckman* v. *Levi* (1813) 3 Camp. 414; *Cothay* v. *Tute* (1811) 3 Camp. 129; 13 R. R. 774.

(*z*) *Ante*, 838.

(*a*) Code, s. 20, *ante*, 451.

be as far back as 1857), has been thus stated (*b*): "It seen that the seller's duty was fulfilled if he posted (*c*) day of the shipment a notice to the buyer contain necessary particulars for insurance."

Sub-ss. 2 and 3 contrasted with regard to insurance.

Sub-section (2) of section 32 contemplates cases in wh obligation is on the seller to make a reasonable contra the carrier, which may include an insurance on behal buyer; and sub-section 3 cases where it is usual for th himself to effect the insurance with the carrier or an

Inapplicable to a c.i.f. contract.

Section 32 (3) is inapplicable to a c.i.f. contract time of peace, for that contract itself specifies the ins and this is to be effected by the seller. And even w the time of the contract, war is imminent, it does not the seller any new obligation by reason of war risks perhaps such insurance is usual (*d*).

Applicable to a f.o.b. contract.

The third clause of section 32 should be read togeth the first, that is to say, as applicable only to cases wh seller is "authorised or required to send the goods. meaning of these words, and the general effect of 32 (3), was considered in the following case.

Wimble Sons & Co. v. *Rosenberg & Sons* (1913).

In *Wimble, Sons & Co.* v. *Rosenberg & Sons* contract was for 200 bags of Araean rice, "f.o.b. A to be shipped as required by buyers, cash against lading." On August 9 the buyers instructed the s ship to Odessa. The goods were shipped on August ship sailed on the 25th, and was lost on the 26th. 29th the bill of lading was presented, which was intimation of the shipment the buyers received. In a for the price, the buyers set up the term of section having received no notice to insure. *Held*, by Bailha that in any ordinary f.o.b. contract, which he held tract to be, that is to say, where shipment is to be ma ship nominated by the buyer, no notice to insure is ne as, in his opinion, in such a contract the seller "authorised or required to send" the goods to the The seller performs his duty when he puts the g board.

(*b*) Brown's Sale of Goods Act, 1893, 164. See the Scotch cas at 161—164.

(*c*) Prof. Brown shows (*ubi supra*) that the Court in *Hastie* v. (1857) 19 Dunlop 557, contemplated the fact that the use of the then in its infancy, might afterwards become incumbent on the se use became more comm

(*d*) *Law and Bonar* v. *British Am. Tob. Co.* [1916] 2 K.B. 605; K B. 1714.

(*e*) [1913] 1 K. B. 279; [1913] 3 K. B. 743; 83 L. J. K. B. 125

On appeal this construction of sub-section 3 was dissented from by the majority of the Court of Appeal, though the case was affirmed on other grounds. The Lord Justices all agreed that sub-section (3) was in the nature of a proviso to sub-section (1), and that "send" was equivalent to "forward" or "dispatch," but they were not in agreement on other points.

Vaughan-Williams, L.J., held that the natural meaning of sub-section 3 did not exclude an f.o.b. contract. Goods were "sent" even after shipment, although shipment was a delivery to the buyer passing the property. On the words "enable him to insure" he held that the contract of sale itself was not a notice, as not giving sufficient information, and also because the obligation of the seller was absolute, and was not discharged by the fact that the buyer had, from other sources, sufficient information to enable him to insure.

Buckley, L.J., held that sending was contrasted in both clause (1) and (3) with delivering. These goods were "sent" when they were put on board. As to the words "unless otherwise agreed," in sub-section 3, he held that the terms of an f.o.b. contract did not contain any contrary agreement, for nothing is said in such a contract as to notice. The effect generally of sub-sections (1) and (3) was that, where goods are to be sent, delivery to a carrier is a delivery to the buyer, passing the risk, except that the risk remains with the seller he do not satisfy sub-section (3). He held also (dissenting from the view of Vaughan-Williams, L.J.) that the seller's obligation to give notice was satisfied. The buyers knew the particulars of the goods, the port of shipment, and the port of discharge; as to the name of the ship, they had waived information, having left it to the seller to select the vessel. Accordingly, no notice to "enable" the buyer was wanted, for already he had ability. Independently of these details, the contract was a sufficient notice, as giving the buyer knowledge of all the necessary particulars, other than knowledge which rested with himself or was determinate by himself.

Hamilton, L.J., dissenting, held that sub-section (3) does not include an f.o.b. contract, on the ground (amongst others) that the very nature of an f.o.b. contract excludes the application of sub-section (3). Under such a contract the risk is the buyer's, as explained in *Stock* v. *Inglis* (*f*); accordingly that clause is excluded by contrary agreements. And, with

(*f*) (1884) 12 Q. B. D. 564, 573; 53 L. J. Q. B. 356, C. A.; affd. (1885) 10 A. C. 263, 271, 273; 54 L. J. Q. B. 582; *ante*, 459.

regard to the argument that, as sub-section (3) is a prov
sub-section (1), f.o.b. contracts, which are within sub-s
(1), must be also within sub-section (3), he replied tha
section (1) includes other contracts as well as f.o.b. one
the proviso applies to them. On the word "enable
held that the buyer had sufficient information; the co
too, was sufficient notice.

Northern Steel Co. v. *John Batt & Co.* (1918).

In *Northern Steel Co.* v. *John Batt & Co.* (*g*), the de
of the majority in the preceding case that section 32 (3)
f.o.b. contracts was with doubt followed, and on the f
the case it was held that there had been no failure on th
of the sellers. On August 26 they had informed the
of the sailing of the ship on the 24th, and the buyers
this fact on September 6, twelve days before the loss
goods. At that date they knew all facts material to insu
and the evidence showed they could have insured. An
in the opinion of Buckley, L.J., and Hamilton, L.
Wimble v. *Rosenberg*, was sufficient.

Section 34 (*h*) of the Code deals with the buyer's ri
examine the goods. Sub-section (2) provides that:

Code, s. 34 (2). Seller must give buyer opportunity of examining goods.

"**34.**—(2.) Unless otherwise agreed, when the seller tenders
of goods to the buyer, he is bound on request to afford the
reasonable opportunity of examining the goods for the purpose
taining whether they are in conformity with the contract."

Isherwood v. *Whitmore* (1843).

This was the rule at common law. Thus, in *Ish*
v. *Whitmore* (*i*), the defendants, having received noti
the goods were at a certain wharf ready for delivery
ment of the price, went there, but on application to
the goods were shown two closed casks said to contain
The persons in charge refused to allow the casks to be
Held, that the plaintiff had not made a valid offer of de

Chalmers v. *Paterson* (1897)

This principle has been extended in Scotland to a
which previously to the sale the goods *had* been ins
but were to be kept by the seller subject to the buyer's
and in good condition. On a subsequent refusal by th
to allow inspection the buyer was held to be entitled to
to take delivery of the goods (*k*).

(*g*) (1917) 33 T. L. R. 516, C. A.

(*h*) Section 34 contains two sub-sections. Sub-section (1) is set o
Chapter on Acceptance, *post*, 856.

(*i*) 11 M. & W. 347; 12 L. J. Ex. 318; 63 R. R. 624; and *per* P
in *Startup* v. *Macdonald* (1843) 6 M. & G. 593, at 610; 12 L. J. C
64 R. R. 816.

(*k*) *Chalmers* v. *Paterson* (1897) 34 Sc. L. R. 768.

But in *Pettitt* v. *Mitchell* (*l*), it was held that under the special circumstances the buyer had not the right to *measure* goods sold by the yard. The sale was at auction, and the conditions were that the purchasers were to pay an immediate deposit of 5*s.* in the pound and the balance *before* delivery, that the lots must be taken away with all "faults, imperfections, or errors of description," by the following Saturday; and the catalogue also announced that "the stock comprised in this catalogue has been measured to the yard's end, and will be delivered with all faults and errors of description. All the small remnants must be cleared at the measure stated in the catalogue." The goods remained open for public inspection two days before the sale. The defendant bought several lots, and went on the proper day to take the goods, but claimed a right to inspect and measure them before paying, which was refused. The action was for damages in special assumpsit, and the defendant pleaded a breach by plaintiff of conditions precedent, to wit, that the purchaser should be entitled "to inspect and examine the lot purchased by him for the purpose of ascertaining whether the same was of the proper quantity, quality, and description," etc., etc., and in another plea breach of a condition that the purchaser "should be entitled to measure the lot."

Right to measure goods sold by the yard.

Pettitt v. *Mitchell* (1842)

Held, by Tindal, C.J., that, considering the purchase was of a definite measurement which the buyer could inspect before sale and the inconvenience of implying such a condition in an auction of 488 lots, the law did not imply the conditions stated in the pleas, and by the Court that, under the contract as made, the buyer was bound to pay before delivery, but that he had the right after delivery, and before taking away the goods, to measure them and claim an allowance for deficient measure, if any.

So also the right of inspection is excluded in a c.i.f. contract, where payment is to be made against the delivery of the shipping documents. The seller is under no obligation to afford the buyer an opportunity of examination before payment on tender of the documents, for delivery of the bill of lading is delivery of the goods themselves, and the seller's only obligation is to tender the bill within a reasonable time, and he is not bound to await the arrival of the ship or landing of the goods (*m*).

C.I.F. contract: cash against documents.

(*l*) 4 M. & G. 819; 12 L. J. C. P. 9.

(*m*) *E. Clemens Horst Co.* v. *Biddell Brothers* [1912] A. C. 18; 81 L. J. K. B. 42; set out *post*, 857. See also *Polenghi Brothers* v. *Dried Milk Co.* [1904] 92 L. T. 64.

Symbolical delivery.

There may be a symbolical delivery of goods, divo the seller's possession and lien. Lord Kenyon said in in *Chaplin* v. *Rogers* (*n*): "Where goods are ponderou incapable of being handed over from one to another need not be an actual delivery, but it may be done by which is tantamount, such as the delivery of the key warehouse in which the goods are lodged (*o*), or by de of other *indicia* of property." And he had expressed th view in 1789 in *Ellis* v. *Hunt* (*p*). On this principl delivery of the grand bill of sale of a vessel at sea has a been held to be a delivery of the vessel (*q*).

Delivery by transfer of bill of lading.

So the transfer to the buyer of bills of lading, as repres the goods, forms a good delivery in performance contract, so as to defeat any action by the buyer again seller for non-delivery (*r*). But the transfer of bills of is not a sufficient delivery by the seller if the goods whic represent are subject to liens or charges in favour bailees which the buyer has not agreed to discharge (*s*

Yet section 12 (3) of the Code (*t*), which enacts a *wa* against incumbrances, seems to create a difficulty. explanation probably is that the covering words of sec apply, and a "contrary intention" is inferred, viz. freedom from incumbrances shall be, as at common condition.

Delivery by other documents of title.

Other mercantile documents, such as delivery orders (*u* and wharf warrants, and warehousemen's and wharf certificates, and *a fortiori* informal documents, su

(*n*) (1801) 1 East, 192, at 195; 6 R. R. 249.

(*o*) Sir F. Pollock (On Possession, 60 *et seqq.*) shows that deliv key is not really a symbolical delivery in the sense that the key r the goods, but is, in the words of Lord Hardwicke in *Ward* v. *Turn* 2 Ves. Sen. 431, "the way of coming at the possession, or to mak the thing." The buyer has *actual* possession in law, and this alth seller has other keys and may fraudulently intend to use them. S keys are necessary, both must be delivered: *per* Lord Atkinson in *Du Distillery* v. *Doherty* [1914] A. C. 823, at 843; 83 L. J. P. C. 265.

(*p*) (1789) 3 T. R. 468; 1 R. R. 743.

(*q*) *Atkinson* v. *Maling* (1788) 2 T. R. 462; 1 R. R. 524.

(*r*) *Meredith* v. *Meigh* (1853) 2 E. & B. 364; 22 L. J. Q. B. 401; 603; *Sanders* v. *MacLean* (1883) 11 Q. B. D. 327; 52 L. J. Q. C. A. See especially *per* Bowen, L.J., at 341.

(*s*) *Prevost* v. *Compagnie de Fives-Lille* (1885) 10 A. C. 643; P. C. 34, P. C.

(*t*) *Ante*, 773. See the difficulties of the construction of s. 12 (3) *ante*, 774.

(*u*) This term is constantly misapplied to such documents as war delivery order is "an order from the vendor to the warehouseman the goods to the vendee": *per* Martin, B., in *Morgan* v. *Ga* 3 H. & C. 760; 34 L. J. Ex. 165; 140 R. R. 714. A warrant is a issued by the bailee himself. See further on these documents, *pos* Chapter on Lien.

"undertakings" to deliver, do not, like bills of lading, *represent* the goods, so far as delivery by the seller in performance is concerned, so as when endorsed to transmit the possession itself, but are mere "tokens of an authority to receive possession" (*x*) in the future; consequently in the case of these documents the attornment of the bailee is necessary, or possession of the goods must be taken by the buyer (*y*).

By the proviso to section 29 (3) of the Code (*z*), nothing in that section "shall affect the operation of the issue or transfer of any document of title to goods." There is, therefore, nothing in section 29 (*z*) to alter the common law distinction between the transfer of a bill of lading and that of other documents so far as regards performance of the contract.

Such documents not negotiable.

Documents other than bills of lading are also not, though they may purport to be so, negotiable instruments, so as to pass on to the transferee any right of action possessed by the transferor. Accordingly the transferee can claim delivery of the goods only from his immediate transferor, or person that issued to him the document. But this rule is subject to any usage of trade, and also to the provisions of the Factors Act (*a*).

Dixon v. *Bovill* (1856).

Thus, in *Dixon* v. *Bovill* (*b*), Balls & Son purchased from Benjamin Smith & Son 1,000 tons of Scotch pig iron, and received from the brokers the following document: "Bought for Thomas Balls & Son of Benjamin Smith & Son one thousand tons of Scotch pig iron No. 1, as per Dixon's undertaking (copy at foot)." The undertaking was: "I will deliver one thousand tons No. 1 pig iron, free on board here when required, to the party lodging this document with me, f.o.b. in Glasgow. For William Dixon, John Campbell." It was shown that in practice such undertakings passed from hand to hand, but no general mercantile usage to treat them as negotiable instruments was shown. *Held*, that the buyer could not under the undertaking enforce delivery of the iron from the maker of the document, as it created a floating right of action which was contrary both to Scotch and English law.

The law as to the indorsement and delivery of bills of lading

(*x*) Blackburn on Sale, 302; 2nd ed. 418.
(*y*) See as to this, *ante*, 242, *et seqq.*
(*z*) *Ante*, 794.
(*a*) *Gilbertson & Co.* v. *Anderson* (1901) 18 Times L. R. 224 (del. ord.); *Farmeloe* v. *Bain* (1876) 1 C. P. D. 445; 45 L. J. C. P. 264 (undertaking). Such documents are like bills of lading before the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111); *Thompson* v. *Dominy* (1845) 14 M. & W. 403; 14 L. J. Ex. 320.
(*b*) (1856) 3 Macq. 1, H. L.

Law as to indorsement and delivery of bills of lading.

was thus stated by Lord Justice Bowen (*c*): "A cargo at while in the hands of the carrier is necessarily incapabl physical delivery. During this period of transit and voy the bill of lading by the law merchant is universally re nised as its symbol, and the indorsement and delivery of bill of lading operates as a symbolical delivery of the ca Property in the goods passes by such indorsement and deli of the bill of lading whenever it is the intention of the pa that the property should pass, just as under similar circ stances the property would pass by an actual delivery of goods. And for the purpose of passing such property in goods and completing the title of the indorsee to possession thereof, the bill of lading until complete del of the cargo has been made on shore to some one right claiming under it remains in force as a symbol, and ca with it not only the full ownership of the goods, but al rights created by the contract of carriage between the sh and the shipowner. It is a key which in the hands rightful owner is intended to unlock the door of the warel floating or fixed, in which the goods may chance to be.

When delivery is to be made by a bill of lading, the is that the seller makes a good delivery if he forward t buyer, as soon as he reasonably can after the shipment, of lading, whereunder the buyer can obtain delivery duly indorsed and effectual to pass the property in the g made out in terms consistent with the contract of sale purporting to represent goods in accordance with the con and which are in fact in accordance therewith (*e*).

Seller must deliver bill of lading within reasonable time after its receipt.

Barber v. *Taylor* (1839).

In *Barber* v. *Taylor* (*f*), where the seller was to deli the purchaser a bill of lading for the cargo which had bought on the purchaser's orders, it was held that the de of the bill of lading within a reasonable time after its re and without reference to the unloading of the *cargo* incumbent on the seller, and that the buyer was justi rejecting the purchase on the refusal to deliver the lading.

In *Sanders* v. *MacLean* (*g*), the plaintiffs contracted

(*c*) In *Sanders* v. *MacLean* (1883) 11 Q. B. D. 327, at 341. C. A.; Q. B. 481, at 486.

(*d*) *Lecky & Co.* v. *Ogilvy Gillanders & Co.* (1897) 3 Com. Cas. 2 (bill to wrong port); *W. T. Sargant & Sons* v. *East Asiatic Co.* (1915) K. B. 277.

(*e*) This statement is principally based on the cases set out *infra*, a appeared in the 5th ed., was cited by Cooper, J., in *Nash* v. *George & Co.* (1911) 30 N. Z. L. R. 1122, as "amply supported by authority

(*f*) 5 M. & W. 527; 9 L. J. Ex. 21; 52 R. R. 814.

(*g*) 11 Q. B. D. 327, C. A.; 52 L. J. Q. B. 481.

to the defendants 2,000 tons of iron rails, c.i.f. to Philadelphia, payment to be made in cash in London in exchange for bills of lading of each cargo or shipment. The rails were shipped at Sebastopol for Philadelphia on account of the plaintiffs, the master signing three bills of lading, which were handed to the shipper, who retained one, which he did not deal with, and sent the other two to the plaintiffs, who tendered them duly indorsed to the defendants. The defendants refused to accept them or to pay for the rails on the ground that one bill of lading was outstanding. *Held*, by the Court of Appeal, that, as the third of the set had not been dealt with, the other two were effectual to pass the property (*h*), and the tender was good. *Sanders* v. *MacLean* (1883).

In 1859 two cases of *Tamvaco* v. *Lucas* were decided, both in favour of the purchaser, on the ground that the sellers' proffer of delivery was not in accordance with the conditions of the contract. *Tamvaco* v. *Lucas* (1859).

In the first case (*i*), the sale was of a cargo of wheat "of about 2,000 quarters, say from 1,800 to 2,200 quarters, . . . to be shipped between the 1st of September and the 12th of October. . . . Sellers guarantee delivery of invoice weights, sea accidents excepted, *buyers to pay for any excess of weight*, unless it be the result of sea damage or heating, the measure for the sake of invoice to be calculated at the rate of 100 chetwerts, equal to 72 quarters, . . . payments cash in London *in exchange for usual shipping documents, etc.*" In an action for non-acceptance, the declaration alleged that the plaintiffs offered to deliver "the usual shipping documents according to the contract, . . . in exchange for the invoice price, according to contract." The defendants pleaded in substance that the shipping documents offered to them were for a cargo of wheat of 2,215 quarters, and that the invoice wrongly stated that the cargo was only 2,200 quarters; that when the bill of lading was tendered, and the invoice made out, the vessel was at sea, and neither party knew the actual quantity on board; and that the defendants were therefore entitled to reject the offer, as they had done, as not being in conformity with the contract. The plaintiffs replied that the cargo offered was *really* a cargo of more than 1,800 and less than 2,000 quarters, as shown by the number of quarters No. 1.

(*h*) As to the passing of the property by one bill of a set, see *Barber* v. *Meyerstein* (1870) L. R. 4 H. L. 317; 39 L. J. C. P. 187, *ante*, 419 and *post*, 849.
(*i*) 1 E. & E. 581; 28 L. J. Q. B. 150; 115 R. R. 355. See also *Re Keighley and Bryan* (1894) 70 L. T. 155, C. A., *post*, 848; and *R. Saloman Co. and Naudszus* (1899) 81 L. T. 325.

delivered from the ship. On demurrer to this replic the Court held, after advisement, that the buyer wa bound to accept the offer made on the tender of the shipping documents; that the clause providing for pay for excess weight applied only to an excess within prescribed limits; and that the buyer had no power to the part he agreed to purchase and reject the rest; that had accepted he would have been bound to pay for the su if any; and that the seller had no right to make out an i otherwise than in accordance with the bill of lading.

No. 2. The second case (*k*), on a contract similar to the presented the converse of the facts. The bill of represented a cargo which was in conformity with the co but the defendants' plea alleged that the quantity of actually on board was less than 1,800 quarters, and thi was held good on demurrer.

The contracts in the two cases were held to mean su tially that the seller was to supply in each case a ca "about 2,000 quarters"; that an excess or deficiency quarters should form no objection; that the purc promise to pay for any excess of weight applied to within the stipulated limits; and that the seller was in if he either tendered shipping documents for a car in accordance with the contract, or shipping doc erroneously describing a cargo as being within the cont

Re *Keighley and Bryan* (1894). In *Re An Arbitration between Keighley, Maxted & Bryan, Durant & Co.* (*l*) there was a contract for "abou tons of wheat (10 per cent. more or less), to be ship steamer." Shipment was to be made and the b lading to be dated July or August, and payment was t cash in London within seven days of the delivery invoice in exchange for the bill of lading. The sell the option of shipping less or more than the minimu maximum respectively. In the former case, the price quantity shipped short of the medium quantity wa settled at the value at the date of appropriation; in the the excess over the medium quantity was to remain sellers' account. The sellers shipped 3,800 tons, and priated 3,000 to the buyers, sending them an invoice fo tons. Bills of lading were taken, two for 1,450 tons ea

(*k*) *Tamvaco* v. *Lucas* (1859) 1 E. & E. 592; 28 L. J. Q. B. 301; 360.

(*l*) 70 L. T. 155, C. A., *coram* Lord Halsbury, L.C., Lopes, Davey, L.J.

two for 250 tons each, and the sellers offered to tender the two first only or all the bills. The buyers rejected the tender. *Held*, by the Court of Appeal, that they were entitled to do so, as the contract had, by the sellers' appropriation, become one for 3,000 tons, and the bills of lading did not correspond with that quantity. Davey, L.J., pointed out that the special clause in the contract with respect to maximum and minimum quantities had no reference to the bill of lading, and did not mean that the sellers might give a bill of lading for more than the amount purchased, *i.e.*, in the events which had happened, 3,000 tons.

No condition implied that bill of lading shall be sent in time to meet vessel.

It is the seller's duty to make every reasonable exertion to send forward the bill of lading as soon as possible after he has destined the cargo to the buyer. But there is no condition implied that a seller shall deliver to the buyer a bill of lading in time to enable the buyer to send it on to meet the arrival of the vessel, or in time to arrive at the port of discharge before charges on the goods are there incurred (*m*); or that a tender of the cargo shall be accompanied at the time by the bill of lading, even though payment is eventually to be made in exchange for the shipping documents (*n*).

Barber v. *Meyerstein* (1870).

In *Barber* v. *Meyerstein* (*o*), the House of Lords decided that the indorsement and transfer, with intent to pass the property, of *one* bill of lading out of the set of three, passes the property in the goods which the bill of lading represents, and that any subsequent indorsement of any other bill of the set is ineffective for that purpose.

Glyn, Mills & Co. v. *East and West India Dock Co.* (1882).

This was confirmed in *Glyn, Mills & Co.* v. *East and West India Dock Co.* (*p*), where it was decided that, though the holder of the first bill of lading could sue the person who held the goods because of his right of property, yet he could not sue the captain or shipowner who had innocently delivered the goods to the holder of a subsequently indorsed bill.

Sanders v. *MacLean* (1883).

And in *Sanders* v. *MacLean* (*q*) it was decided that, where by the terms of the contract payment is to be made against bills of lading, the buyer is bound to accept a duly indorsed bill of lading effective to pass the property in the goods,

(*m*) *Sanders* v. *MacLean* (1883) 11 Q. B. D. 327. C. A.: 52 L. J. Q. B. 481. 65. C. A. See also *Barber* v. *Taylor*, *ante*, 846.

(*n*) *Per Cur.* in *Borrowman* v. *Free* (1878) 4 Q. B. D. 500: 48 L. J. Q. B. Lien.

(*o*) L. R. 4 H. L. 317; 39 L. J. C. P. 187, set out *post* in the Chapter on Stoppage in Transitu; and see the remarks of Brett, M.R., in *Sanders* v. *MacLean* (1883) 11 Q. B. D. at 335 *et seqq.*; 52 L. J. Q. B. at 484.

(*p*) 7 App. Cas. 591; 52 L. J. Q. B. 146, set out *post* in the Chapter on

(*q*) *Supra*, set out *ante*, 846.

although the other bills of the set have not been tendere
accounted for. If the seller should already have fraudul
dealt with the other bills, the buyer's rejection will be just
because the tender is a bad one, the bill of lading tend
being ineffectual to pass the property, but in refusin
accept the bill of lading and pay for the goods the buyer
so at his own risk.

Tender of other shipping documents.

Similarly, when by the terms of the contract other ship
documents are deliverable to the buyer, the tender is not
unless all the documents specified, or otherwise all such a
customary, are tendered, the same being made out in p
form, and in terms not inconsistent with the provisions o
contract, and legally valid and effective (*r*). The que
whether any document is a customary one is a questio
fact (*s*).

If no place be specified in the contract for the tend
shipping documents, they must *prima facie* be tendered
residence or place of business of the buyer (*t*).

Relation of buyer to seller's insurance.

The buyer is not entitled to the benefit of any insu
which at the time of the contract has been, or is there
effected by, or available to, the seller, unless he contra
it (*u*). He may, however, contract for the purchase of
as then insured, or to be insured. If the amount o
insurance be not specified the buyer is entitled
insurance to such an amount as will afford him subst
protection, having regard to the nature of his risk (*x*).
entitled to the full benefit of any existing insurance on

(*r*) *Imperial Bank* v. *Cowan* (1874) 31 L. T. 336, Ex. Ch. (bill o
including other goods); *Hickox* v. *Adams* (1876) 34 L. T. 304, C. A.
covering more than contract goods,; *Mambre Saccharine Co.* v. *Corn*
Co. [1919] 1 K. B. 198; 88 L. J. K. B. 402 (same); *Re Rainhol*
and Hansloh (1896) 12 T. L. R. 422 (certificate not identifying goo
Saloman & Co. and Naudszus (1899) 81 L. T. 325 (altered documents
with unaltered); *Re Goadsby & Co.* (1899) 82 L. T. 484, C. A. ("
port": documents exclude unsafe port); *Burstall & Co.* v. *Grimsdal*
(1906) 11 Com. Cas. 280 (customary documents: certificate of ins
Strass v. *Spillers* [1911] 2 K. B. 759; 80 L. J. K. B. 1218 (policy ind
of contract); *Landauer* v. *Craven* [1912] 2 K. B. 94; 81 L. J. K. B.
thraugh bill of lading); *Orient Co.* v. *Brekke* [1913] 1 K. B. 531;
K. B. 427 (no policy affected, but no loss); *Karberg & Co.* v. *Blyth*
[1915] 2 K. B. 379; 84 L. J. K. B. 1673 (illegal documents); *Ro*
Zeyen & Co. (1919) 35 T. L. R. 299 ("clean" dock warrants).

(*s*) *Tamvaco* v. *Lucas* (1862) 3 B. & S. 89; 31 L. J. Q. B. 296. Ex

(*t*) *Per* Lord Atkinson in *Johnson* v. *Taylor Bros. & Co.* [1920] A
at 155; 89 L. J. K. B. 227.

(*u*) *Pawles* v. *Innes* (1843) 11 M. & W. 10; *Rayner* v. *Presto*
18 Ch. D. 1; 50 L. J. Ch. 472, C. A.; *Yang-tsze Ins. Ass.* v. L
(1918) 34 Times L. R. 320, P. C. ("payment cash against document
also Marine Insurance Act (6 Edw. 7 c. 41), ss. 15, 51.

(*x*) *Tamvaco* v. *Lucas*, *supra*.

which he has purchased as insured (*y*), and also of any insurance which the seller has in fact transferred to him in performance of the contract (*z*), although in either case the value of the insurance may exceed the contract price; but he is not entitled to any insurance effected by the seller for his own behoof independently of the contract (*a*).

"C.f.i." contracts.

Whether the buyer has contracted for the benefit of insurance, and if so to what extent, depends on the construction of the contract (*b*). A common instance of such a contract is a "c.f.i.," or "cost, freight, and insurance" contract, the nature of which was explained at length by Blackburn, J., in a passage already quoted (*c*), and has been also shortly stated by Hamilton, J., as follows (*d*):

"A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn, J., in *Ireland* v. *Livingston* (*e*), or in some similar form: and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment (*e*). It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance,

(*y*) *Ralli* v. *Universal Marine Ins. Co.* (1862) 4 De G. F. & J. 1; 31 L. J. Ch. 313; 135 R. R. 1 (existing policy).

(*z*) *Landauer* v. *Asser* [1905] 2 K. B. 184; 74 L. J. K. B. 659.

(*a*) *Harland* v. *Burstall & Co.* (1901) 84 L. T. 324 (seller's policy on profit); *Strass* v. *Spillers*, *ante*, 850 (*r*) (seller's "honour policy" on increased value).

(*b*) *Ionides* v. *Herford* (1859) 29 L. J. Ex. 36 (c.f.i. to place B.; policy to further point); *Birkitt Sperling & Co.* v. *Engholm & Co.* (1871) 10 S. ss. Cas. 170 (war risks); *Yuill* v. *Robson* [1908] 1 K. B. 270, C. A.; 77 L. J. K. B. 259 ("all risks"); *Vincentelli & Co.* v. *Rowlett & Co.* (1911) 105 L. T. 411; 16 Com. Cas. 310 ("all risks"); *Cantiere* v. *Constant* (1912) 17 Com. Cas. 182 (valid policies).

(*c*) *Ante*, 810.

(*d*) In *Biddell Brothers* v. *E. Clemens Horst Co.* [1911] 1 K. B. 214; 81 L. J. K. B. 42. See also an excellent summary by counsel in S. C. in C. A., *ibid.* 934; and by Lord Atkinson in *Johnson* v. *Taylor Bros. & Co.* [1920] A. C. 144; 89 L. J. K. B. 227.

(*e*) And *prima facie* the property passes: *Crozier Stephens & Co.* v. *Auerbach* [1908] 2 K. B. 161; 77 L. J. K. B. 873, C. A.; *De Laurier* v. *Wyllie* (1889) 17 Sess. Cas. 167.

which completes delivery in accordance with the agreem
the buyer must be ready and willing to pay the price " (

Policy must exist and be tendered.

Under a c.f.i. contract the buyer is entitled to have a p
tendered to him; a mere assertion by the seller that a p
exists is insufficient (*g*). So is also a broker's cover-note,
certificate of insurance (*gg*). And the fact that the
arrive safely does not excuse the seller for not having eff
or tendered a policy (*h*).

A c.i.f. not a sale of documents.

A c.i.f. contract is not a mere sale of documents, so
cast upon the buyer the risk of the documents remaining
after shipment. It is still a sale of goods, though the
deliverable by means of documents, and the documents
accordingly be proper and valid at the time of tender (*i*
they are so, the buyer must pay upon them, although it
be obvious at that time that actual delivery of the goo
impossible in fact, for *prima facie* the buyer, as betwee
and the seller, assumes all risks of delivery affectin
goods themselves (*k*).

(*f*) Although he may not have inspected the goods: *E. Clemens Ho*
v. *Biddell Brothers* [1912] A. C. 18. See on s. 34 (1), *post*, 856.
(*g*) *Mambre Saccharine Co.* v. *Corn Products Co.* [1919] 1 K
88 L. J. K. B. 402.
(*gg*) *Wilson Holgate & Co.* v. *Belgian Grain Co.* [1920] 2 K. B. 1
(*h*) *Orient Co.* v. *Brekke* [1913] 1 K. B. 531; 82 L. J. K. B. 42
(*i*) *Karberg & Co.* v. *Blythe & Co.* [1916] 1 K. B. 495, C.
L. J. K. B. 665 (tender of enemy documents after war), where th
disapproves of a *dictum* in Scrutton, J., in the same case [1915] 2 K
at 388; 84 L. J. K. B. 1673; *Schneider* v. *Burgett*, *ibid.*, C. A. (sa
(*k*) *Groom* v. *Barber* [1915] 1 K. B. 316; 84 L. J. K. B. 318; *Re*
Co. and Credit Colonial [1916] 1 K. B. 346; 85 L. J. K. B. 553; *Oly*
Co. v. *Produce Brokers Co.* [1917] 1 K. B. 320; 86 L. J. K. B. 42
(custom to pass on declaration though goods lost good).

CHAPTER II.

ACCEPTANCE.

Buyer's duty to accept and pay.

The seller having done or tendered all that his contract requires, it becomes the buyer's duty to comply in his turn with the obligations assumed. In the absence of express stipulations imposing other conditions, the buyer's duties are performed when he *accepts* and *pays* the price in accordance with the terms of the contract of sale (*a*).

Acceptance is a taking of the goods by the buyer with the intention of becoming owner (*b*).

The question of acceptance does not arise where the property in the goods has passed to the buyer (*c*). For if the buyer has selected specific goods, or the seller, having authority to appropriate the goods, has duly pursued that authority by appropriating goods according to the contract, the buyer is deemed to have already accepted the goods which have become his. But in some cases the buyer has, under a condition subsequent, express or inferred from the circumstances, a right of subsequently *rejecting* goods which have become his property (*d*).

Buyer must fetch goods bought.

When the seller has tendered delivery, if there be no stipulated place and no special agreement that the seller is to send the goods, the buyer must fetch them; for it is settled law that the seller ordinarily need not aver nor prove anything more than his readiness and willingness to deliver on payment of the price (*e*). But the seller must of course perform any

(*a*) Code, s. 27, *ante*, 779.

(*b*) *Howe* v. *Palmer* (1820) 2 B. & A. 321, a case under the Statute of Frauds.

(*c*) This follows from principle. See the instructive judgment of Willes, J., in *Bog Lead Mining Co.* v. *Montague* (1861) 10 C. B. (N. S.) 481; 30 L. J. C. P. 380; 128 R. R. 797, on the question of acceptance as applicable to specific or to unascertained goods. In Amer. see *Nichols* v. *Morse* (1868) 100 Mass. 523.

(*d*) See *post*, 867.

(*e*) *Jackson* v. *Allaway* (1844) 6 M. & G. 942; 13 L. J. C. P. 84; *Boyd* v. *Lett* (1845) 1 C. B. 222; 14 L. J. C. P. 111; *Lawrence* v. *Knowles* (1839) 5 Bing. N. C. 399; 8 L. J. (N. S.) C. P. 210; 50 R. R. 721 (contract for sale of shares); *De Medina* v. *Norman* (1842) 9 M. & W. 820; 17 L. J. Ex. 370; 60 R. R. 912 (contract to grant lease); *Cort* v. *Ambergate Ry. Co.* (1851) 17 Q. B. 127; 20 L. J. Q. B. 460, where the meaning of readiness and willingness is defined by Lord Campbell, C.J., 17 Q. B. at 144; *Baker* v. *Firminger* (1859) 28 L. J. Ex. 130; 118 R. R. 904; *Cutter* v. *Powell* (1795) 2 Sm. L. C. 1, and notes; Code, s. 28, *ante*, 683.

condition precedent to acceptance. Thus, in a contract for the sale of goods "ex quay or warehouse," there is an implied condition that the seller shall give notice to the buyer of the place of storage, and until such notice has been given the buyer is not in default for non-acceptance (*f*).

With regard to default by the buyer when the seller requires him to take delivery of goods which have become the property (*g*), the Code enacts that:—

Code, s. 37. Liability of buyer for neglecting or refusing delivery of his goods.

"37. When the seller is ready and willing to deliver the goods, requests the buyer to take delivery (*h*), and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss (*i*) occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods (*k*). Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract."

Reasonable time a question of fact.

Contract to deliver "as required."

Jones v. *Gibbons* (1853).

The question of what is a reasonable time is one of fact. In *Jones* v. *Gibbons* (*m*), it was held no defence to an action by the buyer for non-delivery "as required" that he had merely not requested delivery within a reasonable time after the contract; for, under such a contract, the time of delivery being indefinite, and within the buyer's option, the question of reasonable time in the first instance was excluded. But the seller wanted to get rid of his obligation because of unreasonable delay in taking the goods or in requiring delivery, and for him to offer delivery, or to inquire of the buyer when he would take the goods, and he had no right to treat the contract as repudiated by mere delay. But he might rescind the contract if the buyer failed to call for delivery within a reasonable time after such request (*n*).

(*f*) *Daries* v. *McLean* (1873) 21 W. R. 264.

(*g*) The reference to a charge for care and custody shows, it is conceived, that s. 37 is confined to cases where the property has passed. It is significant that the seller's request is not for acceptance, but for the delivery of *possession*.

(*h*) "'Delivery' means voluntary transfer of possession from one person to another": s. 62 (1).

(*i*) *E.g.*, damage to grass where cocks of hay are sold, and not removed: Vin. Ab. Actions, P., pl. 19.

(*k*) Section 37 without the proviso thus adopts the opinion of Lord Tenterden in *Greaves* v. *Ashlin* (1813) 3 Camp. 426; 14 R. R. 771 and *per* Bayley, J., in *Bloxam* v. *Sanders* (1825) 4 B. & C. 941; 28 R. R. 418, cited *ante*, 782.

(*l*) *Buddle* v. *Green* (1857) 27 L. J. Ex. 33; 114 R. R. 991: Cod. *ante*, 786 (*m*).

(*m*) 8 Ex. 920; 22 L. J. Ex. 347; 91 R. R. 841. It appears from the report that the goods were specific.

(*n*) See this case also explained *ante*, 784, and a similar case in *Chapman* v. *Lerin* (1879) 4 Can. Sup. C. R. 349, set out *post*, under 1067 and 1544 of the C. C.

It has already been seen (*o*) that the buyer is entitled before acceptance to a fair opportunity of inspecting the goods, so as to see if they correspond with the contract. He is not bound to accept goods in a closed cask which the seller refuses to open (*p*), and may repudiate the contract if the seller refuse to let him compare the bulk with the sample when the demand is made at a proper and convenient time (*q*). So also he is not bound to accept a tender of delivery unless made at a reasonable hour, and what is a reasonable hour is a question of fact (*r*); nor to accept less than the quantity contracted for (*s*); nor to select the goods bought out of a larger quantity, or a mixed lot that the seller has sent him (*t*). In a word, as delivery and acceptance are concurrent conditions (*u*), it is enough to say that the buyer's duty of acceptance depends altogether upon the sufficiency or insufficiency of the delivery offered by the seller. Buyer has right to inspect before acceptance.

Thus, in *Makin* v. *The London Rice Mills Company* (*x*), on a sale of rice in "double bags," the buyer was held not bound to accept the goods in single bags. In this case there was proof that this mode of packing rice made a difference in the sale. *Makin* v. *London Rice Mills Co.* (1869).

When goods are sent to a buyer in performance of the seller's contract, the buyer is not precluded from objecting to them by merely *receiving* them, for receipt is one thing, and acceptance another (*y*). But receipt will become acceptance if the right of rejection be not exercised within a reasonable time (*z*), or if any act be done by the buyer which he would have no right to do unless he were owner of the goods (*a*). Mere receipt is not acceptance.

Where the goods are deliverable by instalments the contract is divisible in performance, and the acceptance of one or more

(*o*) In the Chapter on Delivery, *ante*, 842.

(*p*) *Isherwood* v. *Whitmore* (1842) 10 M. & W. 757 (on demurrer); (1843) 11 M. & W. 347; 12 L. J. Ex. 318; 63 R. R. 624; Code, s. 34 (2); *ante*, 842.

(*q*) *Lorymer* v. *Smith* (1822) 1 B. & C. 1; 1 L. J. K. B. (O. S.) 7; *Toulmin* v. *Headley* (1845) 2 C. & K. 157; 80 R. R. 836; Code, s. 15 (2) (b), *ante*, 740.

(*r*) Code, s. 29 (4), *ante*, 788.

(*s*) Code, s. 30 (1), *ante* 799.

(*t*) Code, s. 30 (2) and (3), *ante* 799.

(*u*) Code, s. 28, *ante*, 683.

(*x*) 20 L. T. 705, set out *ante*, 735. See also *Mambre Saccharine Co.* v. *Corn Products Co.* [1919] 1 K. B. 198; 88 L. J. K. B. 402.

(*y*) *Per* Alderson, B., in *Hardman* v. *Bellhouse* (1842) 9 M. & W. 600; 11 L. J. Ex. 135.

(*z*) *Bianchi* v. *Nash* (1836) 1 M. & W. 545; 5 L. J. Ex. 252; *Beverley* v. *Lincoln Gas Light Co.* (1837) 6 A. & E. 829; 7 L. J. Q. B. 113; 45 R. R. 626; *Couston* v. *Chapman* (1872) L. R. 2 (H. L.) Sc. 250; Code, s. 35, *infra*.

(*a*) Adopted by the Code, s. 35, *post*, 856.

instalments does not preclude the buyer from refusi
accept the remainder (*b*).

Two rules are laid down by the Code, following the co
law as above stated. Section 34 by the first sub-section
as follows:-

Code, s. 34 (1). Buyer's right of examining the goods.

"**34.**—(1.) Where goods are delivered to the buyer which he
previously examined, he is not deemed to have accepted them
and until he has had a reasonable opportunity of examining th
the purpose of ascertaining whether they are in conformity w
contract" (*c*).

For as "no acceptance can be properly said to take
before the purchaser has had an opportunity of rejectio
"no complete and final acceptance, so as irrevocably t
the property in the buyer, can take place before h
exercised or waived that right" of inspection (*d*). Th
is the corollary of that already quoted with reference
duty of the *seller* when tendering delivery to enable the
to examine the goods (*e*), and deals with the facts fr
point of view of the *buyer*.

The second rule is enacted by section 35 of the Co
these terms:

Code, s. 35. What constitutes acceptance.

"**35.** The buyer is deemed to have accepted the goods when he in
to the seller that he has accepted them, or when the goods ha
delivered (*f*) to him, and he does any act in relation to them w
inconsistent with the ownership of the seller, or when, after th
of a reasonable time (*g*), he retains the goods without intima
the seller that he has rejected them."

The difference between an acceptance *in performance*
this section and an acceptance necessary to render the c
enforceable by action under section 4 of the Code (to
section 17 of the Statute of Frauds) has been
explained (*h*). Section 4 requires an *act* to be done
buyer (*i*); under section 35 an *intimation* of acceptanc
be sufficient (*k*).

(*b*) *Jackson* v. *Rotax Motor and Cycle Co.* [1910] 2 K. B. 937.
K. B. 34, C. A. *Secus*, where the contract is entire: here part-acce
acceptance of all: Code, s. 11 (1) (c), *ante*, 644.

(*c*) See also s. 15 (2) (b), *ante*, 736, as to the implied condition
buyer shall have a reasonable opportunity of comparing the bulk
sample in the case of a contract for sale by sample.

(*d*) *Per* Willes, J., in *Bog Lead Mining Co.* v. *Montague* (1861
(N. S.) 481; 30 L. J. C. P. 380; 128 R. R. 797.

(*e*) Section 34 (2), set out in the Chapter on Delivery, *ante*, 842.

(*f*) "'Delivery' means voluntary transfer of possession from one
another": s. 62 (1).

(*g*) What is a reasonable time is a question of fact: s. 56.

(*h*) *Ante*, 227, *et seqq.*

(*i*) Section 4 (3), *ante*, 230.

(*k*) Section 35, *supra*; and *per Curiam* in *Abbott* v. *Wolsey* [1895]
97; 64 L. J. Q. B. 587, C. A.; *ante*, 231.

Section 35 contemplates a later stage of the transaction than section 34 (1). Under section 34 (1), where the buyer has not previously examined the goods, he is *not* deemed to have accepted them until he has been able to examine them. By section 35 it is necessary to prove some further fact in order to show that the buyer *has* accepted them.

Waiver of examination c.i.f. contract

E. Clemens Horst Co. v. *Biddell Brothers*

The effect of sections 34 (1) and 28 (*l*) were considered in *E. Clemens Horst Co.* v. *Biddell Brothers* (*m*). That was an action for non-delivery of hops, with a counter-claim for non-acceptance. The appellants, the E. Clemens Horst Co., agreed to sell to C. Vnux & Sons, a quantity of hops, to be shipped. Payment was to be made "at the rate of ninety shillings sterling for 112 lbs., c.i.f. to London Liverpool, or Hull. Terms net cash." C. Vnux & Sons assigned their contract to the respondents. The appellants declined to pay for the hops except against delivery and an examination of each bale. Hamilton, J. (*n*), held that, under a c.i.f. contract, the buyers were bound to pay in exchange for the shipping documents, even where payment was not expressed to be made "against documents." The Court of Appeal (*o*) (Kennedy, L.J., dissenting) reversed this judgment. The majority of the Court held that the *prima facie* rule of law (now embodied in section 34 (1) of the Sale of Goods Act) was to have inspected goods against payment, and that this right could not be taken away except by some contract, express or implied, which in the case, in their opinion, did not exist.

Kennedy, L.J., said that the question was whether a contract "c.i.f. net cash," without the addition of the words "against documents" meant that the price was to be paid against documents, or after inspection of the goods by the buyer. He held that "net cash" meant simply "no credit and no deductions." With regard to tender, he asked how it was to be made when the goods were afloat? By the bill of lading, which, being a symbol of the goods, according to the doctrine of Bowen, L.J., in *Sanders* v. *MacLean* (*p*), gave constructive possession. And, if it was asked what there was in a c.i.f. contract to deprive the buyers of their option to pay against an examination of the goods, instead of on tender of the shipping documents, he replied that, if the seller were bound

(*l*) *Ante*, 683.

(*m*) [1912] A. C. 18; 81 L. J. K. B. 42. *Coram* Lords Loreburn, L.C., Atkinson, Gorell, and Shaw of Dunfermline. See also *Pieman* v. *Brooks*, *post*, 863.

(*n*) [1911] 1 K. B. 934; 81 L. J. K. B. 214; 81 L. J. K. B. 42.

(*o*) [1911] 1 K. B. 934; 81 L. J. K. B. 42, C. A. *Coram* Vaughan-Williams, L.J., Farwell, L.J., and Kennedy, L.J.

(*p*) (1883) 11 Q. B. D. 327; 52 L. J. Q. B. 481, *ante*, 846.

to tender the bill of lading within a reasonable time, th
must be a corresponding obligation on the buyer to
against tender. The buyer got constructive possession,
could deal with the goods *instanter*. If the buyer were
bound to pay against tender of the documents, the seller n
either surrender the bill of lading without payment, wh
would be unreasonable, or retain it, and land and wareh
the goods himself, thereby incurring charges beyond what
had by the contract agreed to pay, viz., the freight
insurance. Again, if the buyer were bound to pay
against examination of the goods, if the goods were lost
need not pay. Where then was the necessity of an insura
Referring to sections 28 (*q*) and 34, the Lord Justice wa
opinion that the seller's readiness and willingness to del
the goods was satisfied by his being ready and willing
deliver the bill of lading; at any rate the parties ha
agreed. He also found a contrary agreement under se
34 (2) (*r*). And with regard to section 34 (1) (*s*), he
that it was not disputed that the buyers, even after paym
retained the right to reject the goods, if competent so to
He further pointed out that the contention that the se
could demand payment only after an examination of the g
by the buyer involved the proposition that the sellers
bound to deliver the goods themselves in this country, w
would be inconsistent with a c.f.i. contract (*t*).

In the House of Lords, the judgment of the Court of Ap
was reversed, and the judgment of Kennedy, L.J., in
Court of Appeal adopted, on the ground that section
the Sale of Goods Act says in effect that payment is
against delivery, and that, when goods are afloat, the del
of the bill of lading can be treated as delivery of the
themselves. The seller was entitled to tender the bi
lading at any reasonable time, and was not bound to dete
tender until the ship arrived, still less until the goods
landed, inspected, and accepted.

The following cases illustrate acceptance, in additi
some of the authorities already cited (*u*):—

Express intimation of acceptance.

Varley v. *Whipp* (1900).

In *Varley* v. *Whipp* (*x*), the plaintiff agreed to sell
defendant a second-hand self-binder reaping machine

(*q*) *Ante*, 683. (*r*) *Ante*, 842. (*s*) *Ante*,
(*t*) *Parker* v. *Schuller* (1901) 17 Times L. R. 299, C. A.
(*u*) See the Chapter on Acceptance and Actual Receipt, Section I., an
et seqq.
(*x*) [1900] 1 Q. B. 513; 69 L. J. Q. B. 333, *coram* Channell,
Bucknill, J. Other aspects of this case are considered in the Chapter

at Upton, described as nearly new, and which the defendant had not seen. On the 28th June the plaintiff consigned the machine by rail to the defendant. On the 2nd July the defendant wrote saying that the machine was very old, and had been mended, and would be of no use to him, but that he would be at Huddersfield the next week, and would see the plaintiff. *Held*, that, the machine having been sold by description (*y*), the property did not pass by the contract, but could pass only by subsequent acceptance, and that the buyer had not accepted the machine, and the seller could not recover the price.

Dealing with goods as owner.

Parker v. *Palmer* (1821).

In *Parker* v. *Palmer* (*z*), the buyer after he had seen fresh samples drawn from the bulk of rice bought by him, which were inferior in quality to the original sample, offered the rice for sale at a limited price at auction, but the limit was not reached, and the rice not sold. He then rejected it as inferior to sample; but *held*, that by dealing with the rice as owner, after seeing that it did not correspond with the sample, he had waived any objection on that score.

Chapman v. *Morton* (1843).

In *Chapman* v. *Morton* (*a*), a cargo of oilcake was shipped by the plaintiffs from Dieppe to the defendant, a merchant at Wisbeach. On its arrival in December, 1841, the defendant made complaint that it did not correspond with the sample. He, however, landed a part for examination, and considering it not equal to sample, landed the whole, lodged it in the public granary, and on the 24th January, 1842, wrote to the plaintiffs that it lay there at their risk, and required them to take it back, which they refused to do. Some intervening negotiations took place without result, and in May, 1842, the defendant wrote to the plaintiffs that the oilcake was lying in the granary at their disposal, and that, if no directions were given by them, he would sell it for the best price he could get, and apply the proceeds in part satisfaction of his damage. The plaintiffs replied that they considered the transaction closed. In July following, the defendant advertised the cargo for sale in his own name, and sold it *in his own name* to a third person. On these facts it was held that the defendant had accepted the cargo.

Lord Abinger said: "We must judge of men's intentions

Conditional Sale of Specific Goods. *ante*, 353. and in that on Conditions Implied by Law, *ante*, 699.

(*y*) See this point considered in the Chapters mentioned in the preceding note.

(*z*) 4 B. & A. 387; 23 R. R. 313.

(*a*) 11 M. & W. 534; 12 L. J. Ex. 292; 63 R. R. 669.

by their acts, and not by expressions in letters which a contrary to their acts. If the defendant intended to renoun the contract, he ought to have given the plaintiffs distin notice at once that he repudiated the goods, and that on su a day he should sell them by such a person for the benefit the plaintiffs (*b*). The plaintiffs could then have called up the auctioneer for the proceeds of the sale. Instead of taki this course, the defendant has exposed himself to the impu tion of playing fast and loose, declaring in his letters that will not accept the goods, but at the same time preventing plaintiffs from dealing with them as theirs."

Parke, B., thought that there was no acceptance by defendant down to the month of May, "but the subsequ circumstances of his offering to sell and selling the cargo his own name are very strong evidence of his taking to goods, which will not deprive him of his cross-remedy fo breach of warranty, but whereby the property in the go passed to him, which may be considered as having been ag offered to him by the plaintiffs' letter in the month of Ma

Alderson, B., and Rolfe, B., concurred.

Resale by buyer not necessarily an act of ownership.

The two preceding cases show that a resale by the bu *after* he has had an opportunity of exercising an option ei of accepting or of rejecting the goods delivered is acceptance, for by reselling he is presumed to have determ his election. But a resale is not necessarily an accepta for the facts may show that no such determination o election can be presumed, as where the buyer resells be he has had an opportunity of examining the goods, and sub-buyer has not taken to the goods (*c*). This appears the case of *Morton* v. *Tibbett*, already set out (*d*), where Court treated it as clear that the buyer, who had resold b the time of delivery, might have subsequently rejected goods.

Mecham & Sons v. *Bow, McLachlan & Co.* (1910).

In *Mechan & Sons* v. *Bow, McLachlan & Co.* (*e*), v shipbuilders contracted for two tanks for a tug which

(*b*) But a sale of the goods by the buyer as the seller's agent dangerous course to pursue, and never ought to be resorted to v necessity": Smith's Merc. Law, 9th ed. 527; 10th ed. 660. The safer is simply to give notice to the seller of rejection: *Grimoldby* v. *Wells* L. R. 10 C. P. 391; 44 L. J. C. P. 203.

(*c*) See *Wallis* v. *Pratt* [1911] A. C. 394; 80 L. J. K. B. 1058. T sentences in the text are referred to by Duff, J., and Anglin, J., in *Bo The King* [1910] 43 Can. Sup. Ct. R. 61.

(*d*) (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 81 R. R. 666, set out 226. See also *Perkins* v. *Bell* [1893] 1 Q. B. 193, C. A.; 62 L. J. Q. *post*, 862.

(*e*) (1910) S. C. 758; 47 Sc. L. R. 650.

were building for the Admiralty, the tanks to be made "to British Admiralty latest tests and requirements," and the tanks were delivered without having been tested, whereupon, without enquiry, the buyers built the tanks into the tug, they were held liable for the price.

Excessive trial of goods. *Harnor* v. *Groves* (1855).

In *Harnor* v. *Groves* (*f*), a buyer of twenty-five sacks of flour who had, after he had discovered that the flour was not according to contract, used two sacks of it, and sold half a sack, was held to have accepted it.

Delay. *Sanders* v. *Jameson* (1848).

In *Sanders* v. *Jameson* (*g*), it was proven that by the custom of the Liverpool corn-market, the buyer was only allowed one day for objecting that corn sold was not equal to sample, after which delay the right of rejection was lost. Rolfe, B., held that this was a reasonable usage, binding on the buyer.

Seller by his conduct may extend the time for acceptance.

In determining what is a reasonable time for rejecting goods, the conduct of the seller may be taken into consideration; as, where by a subsequent misrepresentation he has induced the buyer to prolong the trial (*h*); or where by his silence he has acquiesced in the buyer's delay (*i*).

Lucy v. *Mouflet* (1860).

In *Lucy* v. *Mouflet* (*i*), the defendant, who had bought by sample a hogshead of cider on the 28th of May, wrote to the plaintiff, the seller, that the cider was unsaleable, and that "should this continue" he would be obliged to return it. The seller did not reply till the 24th of July, when he wrote demanding payment. At that time twenty gallons had been consumed. *Held*, that the seller had by his silence consented to a further trial, and that the defendant had not accepted the cider.

Place of inspection not limited to place of delivery.

The buyer's opportunity of inspection *prima facie* arises at the place of delivery; but it need not necessarily be that place (*k*), for the contract may expressly or by implication provide that the time for inspection shall be subsequent to delivery or the place of inspection different from that of

(*f*) 15 C. B. 667; 24 L. J. C. P. 53; 100 R. R. 535.
(*g*) 2 C. & K. 557; 80 R. R. 857. See also *Morrison* v. *Clarkson* [1898] 25 Sess. Cas. 427 (trial of pump: delay in rejection); *Hyslop* v. *Shirlaw* [1905] 7 F. 875 (same: pictures). The time may be specified in the contract: *Sharp* v. *G. W. R. Co.* (1841) 9 M. & W. 7; 11 L. J. Ex 17; 60 R. R. 647.
(*h*) *Per* Bovill, C.J., in *Heilbutt* v. *Hickson* (1872) 7 C. P. 438, at 452; 41 L. J. C. P. 228, at 235, quoting *Adam* v. *Richards* (1795) 2 Bl. H. 573; 3 R. R. 508; *Munro & Co.* v. *Bennett & Son* (1911) S. C. 337.
(*i*) *Lucy* v. *Mouflet* (1860) 5 H. & N. 229; 29 L. J. Ex. 110; 120 R. R. 555. See also *Okell* v. *Smith* (1815) 1 Stark. 107; 18 R. R. 752.
(*k*) *Perkins* v. *Bell* [1893] 1 Q. B. 193, C. A.; 62 L. J. Q. B. 91, set out *post*, 862.

delivery (*l*). And where the defect is a latent one, discoverable at the place of delivery, the contract wil construed as if the place in which an effective inspection first possible were the place of inspection mentioned in contract (*l*).

Grimoldby v. Wells (1875).

In *Grimoldby* v. *Wells* (*m*), the plaintiff sold tares to defendant, and delivered them into the defendant's cart way between their respective houses. The defendant st them in his barn, and there examined and rejected them. was held that he was entitled to do so, Brett, J., sayi "There is here a contract for the sale of goods, and by ag ment they are to be delivered before a fair opportunity inspection arises; for it cannot properly be said that it w be reasonable to hold the defendant bound to examine t when they were delivered to him at half way of the jour . . . When there is a sale by sample, and the time inspection is subsequent to delivery, and the place of inspec different from that of delivery, then if the goods are fo on such inspection not to be equal to sample, the purch has a right to reject them then and there, and it is the du the vendor to get them back thence."

Perkins v. Bell (1893).

In *Perkins* v. *Bell* (*n*), the plaintiff, a farmer, sold to defendant, a corn-dealer, barley by sample, deliverabl Theddingworth railway station, near the plaintiff's f The plaintiff knew that the barley was bought for resale, did not know when or to whom. The defendant resold barley by the same sample to a brewing company. barley was afterwards delivered at the station, and a sa of the bulk was sent by the stationmaster to the defendan his request. Having inspected this sample, the defen told the stationmaster to send on the barley to the brew They rejected the barley as not being equal to the orig sample, which was the only sample shown to them, and defendant then claimed to reject the barley. The pla sued him for goods sold and delivered. *Held*, that there nothing to displace the ordinary presumption that Thedd worth station was the place of inspection, it being possib examine the bulk there. The plaintiff knew of no destination for the goods, and to hold that he consente any other place of inspection would, by virtue of the prop

(*l*) *Per* Brett, J., in *Grimoldby* v. *Wells* (1875) L. R. 10 C. P. 3 396; 44 L. J. C. P. 203, reaffirming his opinion in *Heilbutt* v. *Hickson* L. R. 7 C. P. 438, at 456; 41 L. J. C. P. 228. See *post*, 866.

(*m*) L. R. 10 C. P. 391; 44 L. J. C. P. 203.

(*n*) [1893] 1 Q. B. 193, C. A.; 62 L. J. Q. B. 91.

remaining in him, be to cast upon him the risk of loss or damage to the goods during their transit to an unknown sub-buyer, and (if the sub-buyer rejected them) back again. When, therefore, the buyer, having had a reasonable opportunity of inspecting the barley at Theddingworth station, there took possession of it, and ordered it to be sent on to the sub-buyers, he accepted it, and the property in the barley passed to him.

American case. *Pierson* v. *Crooks* (1889).

In *Pierson* v. *Crooks* (*o*), the plaintiffs sought to recover the price paid and the expenses incurred on an executory contract for the sale to them of iron of a particular description, to be manufactured according to their specifications, which was to be *shipped f.o.b.* from Liverpool to New York, and to be paid for by bills at sixty days in exchange for the shipping documents in New York. The plaintiffs had no agent at Liverpool. The defendants, the sellers, admitted that the iron was not according to contract, but contended that the plaintiffs should have inspected the iron at Liverpool, the place of delivery to the carrier, and not having done so must be taken to have accepted it, and also that, even if New York were the place of inspection, the plaintiffs had accepted there. *Held*, by the Court of Appeals of New York, that the plaintiffs could recover. The fact that the buyers had no agent at Liverpool, and that the sellers could ship on board vessels selected by themselves without notice to the buyers of the name of the ship or the time of shipment, showed that Liverpool was not the place of inspection; for the *prima facie* rule is that where a seller undertakes to deliver goods of a particular quality to a carrier to be forwarded to the buyer at a distant place, to be paid for on arrival, the right of inspection *prima facie* continues till the goods arrive, and are accepted at their ultimate destination (*p*). And as the plaintiffs were to pay for the goods in exchange for documents delivered *before* an opportunity of inspection of the goods arose, the plaintiffs had not by such payment waived their right to withhold acceptance (*q*).

Latent defect.

In the following case the defect in the goods was latent,

(*o*) 115 N. Y. 539; *cf. Trent Valley Co.* v. *Oelrichs* (1894) 23 Can. Sup. C. R. 682 (seller in N. Y. to buyer in Ontario: delivery in N. Y.). See also *Molling* v. *Dean* (1902) 18 Times L. R. 217, *coram* Lord Alverstone, C.J., Darling, J., and Channell, J. (books ordered for America, and to be specially packed for transit; place of inspection, America).

(*p*) See *Delaware R. R. Co.* v. *U. S.*, *post*, 867.

(*q*) See also, on this second point, *E. Clemens Horst Co.* v. *Biddell Brothers* [1912] A. C. 18; 81 L. J. K. B. 42, set out *ante*, 857.

and was contained also in the sample furnished by manufacturer.

Heilbutt v. *Hickson* (1872).

In *Heilbutt* v. *Hickson* (r), the plaintiffs, merchant London, contracted on behalf of correspondents at Lill France, with the defendants, manufacturers of shoes, to purchase of 30,000 pairs of black army shoes, *as per sa* to be delivered free at a wharf in weekly quantities: *inspected and quality approved before shipment;* payme cash on each delivery. Both parties knew that the shoes required for the French army for a winter campaign, that they would have to be passed by the authoritie sample shoe was deposited. The plaintiffs appointed a s person to inspect the shoes. A number were rejected, large number inspected and approved. On the inspectio soles were not opened, it not being usual to do so: but wi opening it could not be known of what substance the of the soles had been made. Before the first delivery plaintiffs' agent at the wharf asked that a shoe might open to see if there was any paper in the sole; and the dants' foreman assented. One shoe was accordingly cut and no paper was found in it, and many assurances were by the defendants. The plaintiffs accordingly accepte paid for 4,950 pairs, which were shipped to Lille, whe arrived.

In the meantime the plaintiffs had sent in advance t one pair, which was there found to contain pasteboard soles. Several more pairs were opened and found not tain paper, but it was found that the sample shoe *did* paper in the sole. Thereupon (the plaintiffs having meantime declined to receive further deliveries), sev the cut pairs which did *not* contain paper fillings, a sample shoe which did, were taken to Lille by the pla agent, and the agent on the 10th of February telegra the plaintiffs: "Pay for and ship all of Hickson's good at wharf and warehouse." The plaintiffs accordingly a and paid for a further quantity. After some discussi defendants signed a letter dated the 11th of F addressed to the plaintiffs, agreeing to take back an rejected by the French authorities as containing paper, understood that they could not take back any large if paper should be found in only a few pairs. Upon this letter, the plaintiffs accepted and paid for

(r) L. R. 7 C. P. 438; 41 L. J. C. P. 228, *coram* Bovill, C.J., and Brett, J.

deliveries, amounting to over 12,000 pairs. On the 28th of February, when the entire quantity of shoes was tendered to the French authorities, some were opened and found to contain paper, and the whole were rejected.

The plaintiffs brought an action for the return of their purchase-money, expenses and loss of profit on the quantities delivered and undelivered. From an examination made after the commencement of the action of a number of the shoes, it appeared that a large proportion were found to contain paper, canvas shavings, or asphalte roofing-felt in the soles; and other similar examinations showed the same result. The jury found that the shoes delivered and those ready for delivery were *not equal to sample*, and that the defects *could not have been discovered by any inspection* which ought reasonably to have been made. And a verdict was entered for damages in respect of all the items claimed, amounting to £4,214 5s., leave being reserved to the defendants to move to reduce the damages. The Court of Common Pleas upheld the verdict for the full amount.

Opinion of Bovill, C.J., and of Byles, J.

Bovill, C.J., who delivered the judgment of himself and of Byles, J., said: "The defendants contended that the plaintiffs had accepted the goods, and were not at liberty afterwards to reject them. . . . The plaintiffs on the other hand contended that they were entitled to reject the goods, and to throw them on the defendants' hands at *Lille* . . . leaving the shoes the property of the defendants, and at their risk." Then he said that, if the case had rested on the original contract, they would have thought that there had been an appropriation and acceptance of the 12,000 pairs of shoes, and that the property would have passed to the plaintiffs, who could not have subsequently rejected the shoes, and recovered back the price, but only damages. Referring, however, to the letter of the 11th of February, his Lordship said that it must be treated as adding terms to the original contract, and entitling the plaintiffs to reject the goods at Lille.

Upon the point in relation to the sample shoe, the Chief Justice said: "The fact of the improper paper fillings in the sole of the sample shoe was *a hidden defect*, and appears to have been unknown to all parties. It could not be seen or discovered by any ordinary examination of the shoes (*s*), and the letter of the 11th of February was expressly directed to

(*s*) See on this point *Drummond* v. *Van Ingen* (1887) 12 App. Cas. 284; 56 L. J. Q. B. 563, *ante*, 742, *et seqq.*; and now s. 15 (2) (c) of the Code, *ante*, 736.

the point of paper being in the shoes, and in our opinion ga
the right to reject the shoes, on that ground, and entitles t
plaintiffs to recover the loss of profit which would have accru
if the shoes had been accepted by the French authorities."

Of Brett, J.

The judgment delivered by the Chief Justice was then
on the interpretation of the original contract as subsequen
modified by the letter of the 11th of February; but Brett,
while agreeing with this judgment, was unable to agree
holding that the rights of the plaintiffs would not have b
the same under the original contract. Speaking of a cont
of sale by sample, he said: "Such a contract always conta
an implied term that the goods may under certain circ
stances be returned. . . . If the time of inspection, as agr
upon, be subsequent to the time agreed for the delivery of
goods, or if the place of inspection, as agreed upon, be diffe
from the place of delivery, the purchaser may, upon inspec
at such time and place, if the goods be not equal to sam
return them *then and there* on the hands of the seller
Otherwise the right of inspection given to the purchaser w
fail in its primary object. The time of inspection agreed
in this contract was before delivery, and the place was Lo
If by any reasonable care, or exercise of reasonable
thought, the plaintiffs could have had before delivery a
London an inspection which would by reasonable care or
have been effective, I should have thought that they coul
have rejected the goods at Lille. . . . By the nece

Inspection, if ineffective from seller's default, is no inspection.

inefficacy of the inspection in London an inefficacy c
by this kind of fault viz., a secret defect of manufa
which the defendants' servants committed the app
inspection in London could be of no more practical
than no inspection at all. . . . There could not . .
effective, and therefore any real practical i . ection u
inspection at Lille. . . . It seems to me th . uch insp
was by the acts of persons for whose acts the . efendant
responsible, *substituted for the first inspection* stipulat
by the contract, and that the rights of the plaintiffs a
upon that inspection as if it was the first, and therefo
were entitled to throw the shoes upon the hands
defendants *at Lille*."

The opinion of Brett, J., is confirmed by the followi

(*t*) Aff. and re-stated by Brett, J., in *Grimoldby* v. *Wells* (1875)
C. P. at 396; 44 L. J. C. P. at 208, *ante* 862. See also *per* C. A.
v. *Bell* [1893] 1 Q. B. 193; 62 L. J. Q. B. 91, *ibid.*, and the follo
in the text.

In *Delaware Railroad Co. v. U. S.* (*u*), the V. Co. agreed to sell to the Railway Co. 3,000 tons No. 1 Timothy hay f.o.b. Buffalo, the hay to be transported by the buyers to various parts of their line to be determined by the buyers, at which places the buyers were to have the right of inspection, the hay to be accepted if found to be of the kind specified, and to be paid for within thirty days after acceptance. The hay was delivered to the company at Buffalo, and they consigned it to themselves at Scranton. After arrival there it was inspected, accepted, and used.

Buyer can sometimes reject what he has provisionally accepted. *Delaware Railroad Co. v. U.S.* (1913).

The question being whether the company while transporting the hay was transporting its own property, or not, it was argued that the property did not pass till inspection and acceptance at Scranton. But the Court said (*x*): "There are two kinds of acceptance—one of quality, and the other of title. They are not necessarily contemporaneous. There may be an acceptance of quality before delivery, as where goods are selected by the purchaser—delivery and transfer of title being postponed until a later time. Or there may be an acceptance of title without an acceptance of quality; so that in many cases, after the title has passed, the purchaser may recover damages if the goods upon inspection prove to be of a quality inferior to that ordered. Again, though there may be such an acceptance as will transfer the title, the purchaser may, under the contract of sale, have the right to rescind, as for a condition subsequent, if the goods do not correspond with the specifications. Such was the case here. When the goods were received by the purchaser at Buffalo there was such an acceptance as to transfer title to the Railroad, which accordingly took possession, and exercised control in fixing when and to what point on their line the hay should be shipped. . . . The contract . . . meant that the title should pass when delivery was accepted by the defendant at Buffalo, but that the Railroad Company might rescind if, on later inspection, the quality was found to be different from what had been described in the contract of sale. But after such delivery and before such rescission the title was in the Railroad Company."

The Court further pointed out that, to postpone the transfer of the property until inspection of the goods at their ultimate destination, would cast upon the seller "the risk of unknown dangers, at unknown points, for an indefinite time."

(*u*) (1913) 231 U. S. 363.

(*x*) At pp. 372-3.

Suggested rule.

Where, then, the place or time of inspection is diffe
from that of delivery, a receipt of the goods by the buyer
be, according to circumstances, either a mere receipt
possession without an acceptance of the ownership, or it
be both, subject to a right subsequently to reject the g
and revest the property in the seller if the goods are
according to contract. And the fact that suspension of
vesting of the ownership in the buyer would expose the
to unreasonable risk in the meantime tends to show tha
property vests on delivery (*y*).

Nelson v. *Chalmers & Co.* (1913).

In accordance with these principles it has been decide
the Court of Session, on a contract for the manufacture
sale of a ship on the terms that the property in the incom
ship should vest in the buyer when he paid the first instal
of the price, that the buyer could reject the ship on
pletion, if disconform to contract. It had been contend
behalf of the . ller that materials from time to time
in the buyer *accessione*, when added to the ship (*z*), and
the buyer could not reject his own property (*a*).

Buyer's risk of rejection being impossible.

Rejection by the buyer of goods which have becor
property being a privilege operating by a condition subse
the buyer takes the risk of rejection becoming impossib

Maine v. *Lyons* (1913).

In *Maine* v. *Lyons* (*b*), the condition was express.
case the respondents, in Tasmania, sold to the appellant p
on the terms that the appellant's acceptance of the p
should be subject to their being passed by the inspec
the Tasmanian and other Australian Governments; an
if they were not passed within fourteen days after deli
the appellant, and the appellant gave the respondents
of the fact within forty-eight hours of his himself re
notice, the sale should be void as regards any portion
potatoes not passed. The potatoes were delivered, and
by the Tasmanian inspector, and shipped to Melbourne
appellant. In the meantime, the Victorian Governm
prohibited the import of Tasmanian potatoes altoge
that they never were inspected. *Held*, by the Hig
of Australia, that the appellant took the risk of the im
being impossible, and the sale was absolute. "The sul
for inspection," said Griffith, C.J., " . . . was a
conferred upon the purchaser – a condition upon wh

(*y*) See to the same effect *per Cur.* in *Perkins* v. *Bell*, *ante*.
(*z*) As to this, see *ante*, 412.
(*a*) (1913) Sess. Cas. 441.
(*b*) (1913) 15 Com. (Austr.) L. R. 671.

sale might be avoided. But it was a condition subsequent. If that condition was not fulfilled, the contract was absolute."

Heilbutt v. *Hickson* also shows that, where the place of inspection is different from the place of delivery and the buyer is to transport the goods to the place of inspection, he may, after a rejection of the goods duly made at the latter place, recover, in addition to any other damages to which he may be entitled, the cost of or incidental to such transport. He may also, when he is compelled to bring them back as, for example, when they are rejected by a sub-buyer recover the cost of or incidental to bringing them back (*c*).

Buyer's expenses in forwarding goods to place of inspection.

The buyer's duty to accept where the time of delivery stipulated by the contract has been by mutual assent postponed at the request of either party has been already considered in relation to the correlative duty of the seller to deliver (*d*).

Acceptance when time of delivery has been postponed.

The buyer may, by contract express or implied, exclude his right of rejection, or this right may be excluded by trade usage, if not inconsistent with a written contract (*e*). But no such contract or usage is deemed to apply to goods not being of the description contracted for, as it would make the contract nugatory to exclude the right of rejection if the goods delivered are of a different description (*f*).

Exclusion of right of rejection by contract, &c.

As to the mode of rejection by the buyer, the Code enacts that:—

"**36.** Unless otherwise agreed (*g*), where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them" (*h*).

Code, s. 36.

Buyer not bound to return rejected goods.

(*c*) *Molling* v. *Dean* (1902) 18 T. L. R. 217. But the buyer may, as between himself and the seller, leave it to the seller to get the goods back; s. 36; *per Curiam* in *Perkins* v. *Bell* [1893] 1 Q. B. 193, C. A.; 62 L. J. Q. B. 91.

(*d*) In the Chapter on Delivery, *ante*, 791, *et seqq.*

(*e*) *Heyworth* v. *Hutchinson* (1867) L. R. 2 Q. B. 447; 36 L. J. Q. B. 270; *Morgan* v. *Gates* (1865) 3 H. & C. 748; 34 L. J. Ex. 165; 140 R. R. 714; *Sanders* v. *Jameson* (1848) 2 C. & K. 557; 80 R. R. 857; (usage): *Leary & Co.* v. *Briggs & Co.* (1905) 6 F. 857; *Vickery's Patents* v. *Hill* (1917) 33 T. L. R. 536 (usage inconsistent).

(*f*) *Shepherd* v. *Kain* (1821) 5 B. & A. 240; 24 R. R. 344 ("With all faults, and without allowance"), *ante*, 707; *cf. Taylor* v. *Bullen* (1850) 5 Ex. 779; 20 L. J. Ex. 21; 82 R. R. 875; *ibid. Vigers* v. *Sanderson* [1901] 1 K. B. 608; 70 L. J. K. B. 583; *ibid. Re North Western Rubber Co. and Huttenbach & Co.* [1908] 2 K. B. 907; 78 L. J. K. B. 51, C. A. (usage); *Wallis, Son & Wells* v. *Pratt & Haynes* [1911] A. C. 394; 80 L. J. K. B. 1058. See also *Re Green & Co.* and *Balfour, Williamson & Co.* (1890) 63 L. T. 325, C. A. (arbitrator to decide quality only).

(*g*) See *Mellor* v. *Street* (1866) 15 L. T. 223.

(*h*) S. 36 adopts the law of *Grimoldby* v. *Wells* (1875) L. R. 10 C. P. 391; 44 L. J. P. C. 203, *ante*, 862.

But the buyer, being a bailee of the goods, thoug
involuntary one, must exercise reasonable care of the goo
Subject to this obligation, the risk is with the seller (*k*).

(*j*) See *Heugh* v. *London & N.W. Ry. Co.* (1870) L. R. 5 Ex. 51
Ex. 48 (carrier).
(*k*) *Per* Bayley, J., in *Okell* v. *Smith* (1815) 1 Stark. 107; 18 R. R.

CHAPTER III.

PAYMENT.

Payment, absolute or conditional.

The chief duty of the buyer in a contract of sale is to pay the price in the manner agreed on, or, in the language of the Code, "in accordance with the terms of the contract of sale" (*a*). The terms of the sale may require, first, an *absolute* payment in cash; and this is always implied when nothing is said; or, secondly, a *conditional* payment in promissory notes or acceptances; or, thirdly, it may be agreed that credit is given for a stipulated time, without payment, either absolute or conditional. In the first two cases, the buyer is bound to pay, if the seller be ready to deliver the goods, as soon as the contract is made; in the last case he has a right to demand possession of the goods without payment.

Where bill is not given according to contract.

If the terms be that the goods are to be paid for by a bill or note which is not given, the buyer is nevertheless entitled to credit till the time when the bill, if given, would have matured, unless credit was made conditional on the giving of the security; but the seller may sue the buyer for not giving the bill (*b*) (which, it would seem, the seller must draw and tender), and he may recover any loss incurred (*c*). In this connection may be pointed out the distinction between "cash less discount at a fixed date, with option of bill," and "bill, so many months, with option of cash less discount." In the former case the price is due at the date fixed, but the buyer may extend the credit by giving the bill; in the latter, the

"Cash with option of bill" or, "bill with option of cash."

(*a*) Code, s. 27, *ante*, 779.

(*b*) *Mussen* v. *Price* (1803) 4 East, 147; *Paul* v. *Dod* (1846) 2 C. B. 800; 15 L. J. C. P. 177; *Day* v. *Picton* (1829) 10 B. & C. 120; *Nickson* v. *Jepson* (1817) 2 Stark. 227 (credit conditional on bill); *Rugg* v. *Weir* (1864) 16 C. B. (N. S.) 471; 139 R. R. 582; *Helps* v. *Winterbottom* (1831) 2 B. & Ad. 481; 9 L. J. K. B. 258; 36 R. R. 609; *Schneider* v. *Foster* (1857) 2 H. & N. 4; 115 R. R. 397; *Rabe* v. *Otto* (1904) 89 L. T. 562.

(*c*) *Rabe* v. *Otto*, *supra*; *per Curiam* in *Mussen* v. *Price*, *supra*. The price is not the measure of damages: *ibid.*; *per* Lord Tenterden, C.J., and Littledale, J., in *Helps* v. *Winterbottom*, *supra*; but *cf. Read* v. *Hutchinson* (1813) 3 Camp. 329. On the question whether the seller or the buyer must tender the bill, the balance of authority is in favour of the former course, and it was so decided in *Reed* v. *Mestaer* (1804), reported in Comyn on Contract, 2nd ed., 181; see to the same effect *Spaeth* v. *Hare* (1842) 1 Dowl. N. S. 595; *per* Lord Ellenborough, C.J., in *Green* v. *Haythorne* (1816) 1 Stark. 117; but *cf. per* Blackburn, J., in *Foster* v. *Eades* (1860) 2 F. & F. 103.

buyer has credit till the date when the bill would
matured (*d*). But if the buyer, having the option to pay
or to give a bill payable *in futuro*, make a part-payme
cash, he is deemed to have irrevocably elected to pay cash

Cash against bill of lading.

Again, payment has often to be made in exchange for
of lading. In such cases the buyer is bound to pay wh
duly indorsed bill of lading, effectual to pass the proper
the goods, is tendered to him, although the bill of lading
been drawn in triplicate, and all three bills of the set are
then tendered or accounted for (*f*).

Notice of amount of price, when necessary.

Where the amount of the price is to be regulated by
fact within the special cognizance of the seller, the pri
not payable until the buyer receives notice of the am
ascertained (*g*).

At common law, a man bound to pay may not wait for demand.

The common law rule is that a debtor has no right to
till demand made, but must pay as soon as the money is
under peril of being sued (*h*), and it has already been stat
that the seller, in the absence of a stipulation to the cont
is not bound to send or carry the goods, nor to prove
action against the buyer anything more than a readiness
willingness to deliver. It follows that as soon as a s
completed by mutual assent, if no time is given, the
ought at once to pay, if the goods are ready for deli
without waiting for a demand, and that he may be sue
the price if he fail to do so (*k*).

Buyer must pay even if goods destroyed before delivery where property has passed;

Where the property has passed, the buyer must pa
price according to the agreed terms, even if the good
destroyed in the seller's possession (*l*). The goods are a

(*d*) See summing up of Cockburn, C.J., in *Anderson* v. *Carlisle*
Clothing Co. (1870) 21 L. T. 760, based upon *Mussen* v. *Price* and *R*
Weir, *ante*, 871, note (*b*).

(*e*) *Schneider* v. *Foster*, *ante*, 871, note (*b*); *per* Willes, J., in *R*
Weir, *supra*.

(*f*) *Sanders* v. *Maclean* (1883) 11 Q. B. D. 327; 52 L. J. Q. B. 48

(*g*) *Holmes* v. *Twist* (1614) Hob. 51, Ex. Ch.; *Henning's Case*
Cro. Jac. 432; *Makin* v. *Watkinson* (1870) L. R. 6 Ex. 251; 40 L.
33; *Brown* v. *G. E. Ry. Co.* (1877) 2 Q. B. D. 406; 46 L. J. M. C. 23
the general principles governing notice, see *Clerke* v. *Child* (1678) Free
Fyse v. *Wakefield* (1840) 6 M. & W. 442; 9 L. J. Ex. 271; 55 R.
ante, 665.

(*h*) *Birks* v. *Trippet* (1667) 1 Wms. Saund. 33 b; *per* Parke,
Walton v. *Mascall* (1844) 13 M. & W. at 458; 14 L. J. Ex. 54; 67 R
It is shown in the former case that even when a debt is expressly pay
demand, a distinction is drawn between a promise to pay a present
demand, in which case a demand is not a condition, and a promise t
collateral sum on request, *e.g.* promise by surety, in which case a re
necessary. See *Brown* v. *Brown* [1893] 2 Ch. 300; 62 L. J. Ch. 695;
Birks v. *Trippet* was applied. See also *Crawshaw* v. *Hornstadt*
Times L. R. 426, C. A. (payment "at convenience").

(*i*) *Ante*, 783, 853.

(*k*) 1 Wms. Saund. 33 b, n. 2.

(*l*) *Ante*, 852

buyer's risk; they are *his* goods from the moment the property passes, and the price is due to the seller, who simply holds the goods as bailee for the buyer (*m*). And even where the property has not passed, and the price is payable only on delivery, yet if the buyer has assented to assume the risk of delivery, he must pay the price if the goods are destroyed before delivery (*n*).

or if he has assumed risk of delivery.

But the contract sometimes provides that the payment is only to be made after demand or notice, and when this is the case the creditor must make demand, which may be made on the debtor wherever he is to be found (*o*), but a reasonable time must be allowed for the buyer to fetch the money.

Where price is payable only after demand reasonable time allowed.

In *Brighty* v. *Norton* (*p*), where a bill of sale provided that payment should be made in ten years, or "at such earlier day or time as the defendant should appoint by notice in writing sent by post, or delivered to the plaintiff or left at his house or last place of abode," it was held that a notice served at noon to make payment in half an hour was not a reasonable notice. The Judges, however, agreed that it was difficult to say in general what would be a reasonable time.

Brighty v. *Norton* (1862).

In *Toms* v. *Wilson* (*q*), it was held by the Queen's Bench, and in error by the Exchequer Chamber, that a promise to pay "immediately on demand" could not be construed so as to deprive the debtor of an opportunity to get the money; and Blackburn, J., quoted Comyn's Digest: "Where a condition is to be performed immediately, he shall have a reasonable time to perform it, according to the nature of the thing to be done. So if it be to be performed upon demand" (*r*).

Toms v. *Wilson* (1862).

In *Massey* v. *Sladen* (*s*), where the promise was to pay "instantly on demand and without delay on any pretence whatever," and demand might be made by giving or leaving verbal or written notice for him at his place of business, *held*, that, in the party's absence, reasonable time must be given for the notice left at his place of business to reach him.

Massey v. *Sladen* (1868).

(*m*) *Rugg* v. *Minett* (1809) 11 East, 210; 10 R. R. 475, *ante*, 357.
(*n*) *Castle* v. *Playford* (1870) L. R. 5 Ex. 165; L. R. 7 Ex. 98; 39 L. J. Ex. 150; 41 L. J. Ex. 44; *Martineau* v. *Kitching* (1872) L. R. 7 Q. B. 436; 41 L. J. Q. B. 227; *Stock* v. *Inglis* (1884) 9 Q. B. D. 708; 52 L. J. Q. B. 30; 12 Q. B. D. 564; 53 L. J. Q. B. 356, C. A.; 10 App. Cas. 263; 54 L. J. Q. B. 582. See these cases, and s. 20 of Code, in the Chapter on the Incidence of the Risk, *ante*, 452, *et seqq.*
(*o*) *Per* Lord Esher, M.R., in *Bell & Co.* v. *Antwerp, &c. Law.* [1891] 1 Q. B. 103, at 107; 60 L. J. Q. B. 270, C. A.
(*p*) 32 L. J. Q. B. 38; 3 B. & S. 305; 129 R. R. 337.
(*q*) 1 B. & S. 442, 455; 32 L. J. Q. B. 33, 382; 129 R. R. 806.
(*r*) Condition (G. 5).
(*s*) L. R. 4 Ex. 13; 38 L. J. Ex. 34.

Demand by agent.

And where the demand is made by the creditor's agent, t
debtor must have a reasonable opportunity of inquiring in
the agent's authority (*t*).

Place of payment.

Where a certain *place* and time are appointed for payme
payment must be made at that place and time; and the buy
who has not in fact paid, will not be in default, if the se
does not attend at that place and time to receive the money
Where no place of payment is specified, the general rule
that the buyer must pay the seller wherever the latter m
happen to be, even though the seller may be abroad, if
seller were not in this country at the date of the contract
But, if the seller go abroad subsequently, the buyer may aw
his return (*y*).

Time of payment.

Where the time of payment is specified by reference to
occurrence of an event, such, for example, as the deliver
the goods to the buyer, or their arrival, and such event su
quently fails, the buyer, if he be liable to make payment
must pay the price within a reasonable time after the tai
of the event (*a*).

The intention of the parties as to the time of payment m
in the absence of express agreement, be gathered from t
usage (*b*), or the parties' own course of dealing under
same, or similar contracts (*c*).

When a longer and a shorter period of credit is state
way of estimate in the contract, it is a question of fact wh
at any date between these periods the credit has, in a
mercial sense, expired (*d*). In the absence of such
estimate, the buyer has the option, and is deemed to
elected for the longer period when he does not pay the
at the expiration of the shorter (*e*).

(*t*) *Toms* v. *Wilson*, *ante*, 874; *Moore* v. *Shelley* (1883) 8 A. C. 285
P. C. 35, P. C.

(*u*) Shep. Touch. 136; *Thorn* v. *City Rice Mills* (1890) 40 Ch. D.
L. J. Ch. 297; *Re Escalera Silver Lead Mining Co.* (1908) 25 Times L.

(*x*) *Per* Lord Esher, M.R., in *The Elder* [1893] P. 119 at 131, 62 L
65, C. A.; *Robey* v. *Snaefell Mining Co.* (1887) 20 Q. B. D. 152.
Q. B. 134; *Anger* v. *Vasirier* (1902) 18 Times L. R. 596; *Shrews*
Shrewsbury (1907) 23 Times L. R. 277 (creditor's reque
English Bank).

(*y*) *Fessard* v. *Magnier* (1865) 18 C. B. (N. S.) 286, 34 L.

(*z*) As having taken the risk.

(*a*) *Fragano* v. *Long* (1825) 4 B. & C. 219; 3 L. J.
28 R. R. 226; see also an analogous case of *Barnes* v. *Bloom* 1915
L. R. 639.

(*b*) *Raitt* v. *Mitchell* (1815) 4 Camp. 146; 16 R. R. 765; *Clark* v.
(1861) 4 L. T. 405; *R.* v. *Jones* [1898] 1 Q. B. 119, 67 L. J. Q. B. 41

(*c*) *King* v. *Reedman* (1883) 49 L. T. 473.

(*d*) *Ashforth* v. *Redford* (1873) L. R. 9 C. P. 20; 43 L.
(a eight weeks").

(*e*) *Price* v. *Nixon* (1814) 5 Taunt. 338 ("six or nine

As to the *mode* of payment, the buyer will be discharged if he pay in accordance with the seller's request, even if the money never reach the seller's hands, as if it be transmitted by post in compliance with the seller's directions and be lost or stolen (*f*). Payment good if made in mode requested by seller.

In *Eyles* v. *Ellis* (*g*), both parties kept an account at the same banker's, and the plaintiff directed the amount to be paid there. The defendant ordered the banker to put the amount to the plaintiff's credit on Thursday, which was done, and the defendant so wrote to the plaintiff on Friday, but the plaintiff did not get the letter till Sunday. On Saturday the banker failed. *Held*, a good payment although the defendant, when the money was transferred on the banker's books, had already overdrawn his account, as the plaintiff might have drawn for it on the Thursday. *Eyles* v. *Ellis* (1827).

In *Gordon* v. *Strange* (*h*), the defendant sent a post-office order *without any direction* from the plaintiff, his creditor. The order, by mistake, was made payable to Frederick Gordon instead of Francis Gordon. The plaintiff did not get it cashed, although he was told by the person who kept the post-office that the money would be paid to him if he would sign the name of the payee, as there was no one of the same name in the neighbourhood. The plaintiff brought action, without returning the post-office order. The sheriff told the jury that the plaintiff's having kept the order, with a knowledge that he might get the money for it at any time, was evidence of payment, although he was not bound, when he first received it, to put any name on it but his own. *Held*, a wrong direction. "The defendant had no right to give the plaintiff the trouble of sending back a piece of paper which he had no right to send him" (*i*). *Gordon* v. *Strange* (1847).

In *Caine* v. *Coulton* (*k*), the plaintiff's attorney wrote to the defendant to *remit* the balance of the account due with 13*s.* 4*d.* costs. The defendant remitted by post a banker's bill payable *Caine* v. *Coulton* (1863).

(*f*) *Warwicke* v. *Noakes* (1791) Peake, 3rd ed. 98; 3 R. R. [illegible]. See also the dissenting judgment of Brantwell, L.J., in *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. 216, at 233; 48 L. J. Ex. 577, *et seqq.*; cf. Lord Kenyon (1791) that a direction to send by post was not complied with by the [illegible] with the remittances enclosed, to the bellman or postman in the street who should have been put *into* the general post-office or a receiving [illegible] to receive letters with money. *Hawkins* v. *Rutt* (1793) Peake, 248.

(*g*) 1 Y. & J. 112. See also *Bolton* v. *Richard* (1795) 6 T. R. 139.

(*h*) 1 Ex. 477; 74 R. R. 727.

(*i*) *Per* Parke, B., *ibid.*, at 478.

(*k*) 32 L. J. Ex. 97; 1 H. & C. 764; 130 R. R. 765. And see *Hardman* v. *Bellhouse* (1842) 9 M. & W. 596; 11 L. J. Ex. 105 (receipt of bill not [illegible] in satisfaction).

at sight for the amount without the costs. The next day attorney wrote refusing to accept the bill unless the £3 were also remitted. The defendant refused, and action brought: but the attorney kept the banker's bill, although did not cash it. The jury found that the attorney had w any objection to the remittance not having been made in and only objected because the costs were not paid. *Held*, the payment was good: it was the attorney's duty to r the banker's bill if he did not choose to receive it in pay Martin, B., said of the attorney's conduct, "He say thing, but he does another; he kept the banker's draft seems to me to be common sense to look at what is done not at what is said." Pollock, C.B., said that the diffe between *Gordon* v. *Strange* (*l*) and this case was of the essence of the question. Here the debtor was request remit the money, and he did remit it, whereas both in *G* v. *Strange* and in *Hough* v. *May* (*m*), there was no request, and the document remitted was irregular in to

Implied request to transmit payment by post.

Norman v. *Ricketts* (1886).

In *Norman* v. *Ricketts* (*n*), the creditor in London wr the debtor in Suffolk, saying: "The favour of a cheque w a week will oblige." The debtor accordingly sent by po open cheque payable to the creditor's order. The cheque stolen in transit and paid by the debtor's bankers to the *Held*, by the Court of Appeal, that the reasonable int from the creditor's letter was that the money should b by post, and the posting of the letter was payment.

Comber v. *Leyland* (1898).

In *Comber* v. *Leyland* (*o*), where by the contract mone to be "remitted" from abroad in bank bills, it was h the House of Lords as clear that "remitting" meant th bills should be sent in the ordinary course, and in the or manner in which such documents are sent by commercia and that, as soon as that had been done, all liability debtor ceased, and was not extended until the arrival bills.

Pennington v. *Crossley* (1897).

In *Pennington* v. *Crossley* (*p*), the Court of Appeal de to draw the inference of a request to send by post f course of dealing under which the defendants at Halifa for twenty years been in the habit of transmitting by the plaintiff at Bradford, without objection by the

(*l*) *Ante*, 875.
(*m*) (1836) 4 A. & E. 994; 5 L. J. K. B. 186; 43 R. R. 530, set out
(*n*) (1886) 3 Times L. R. 182, C. A.; followed in *Thairlwall* v.
Co. [1910] 2 K. B. 509; 79 L. J. K. B. 924.
(*o*) [1898] A. C. 524; 67 L. J. Q. B. 884.
(*p*) 77 L. T. 43, C. A.

cheques in payment of goods sold, holding that this was merely a convenient way of doing business. The fact that the defendants' letter enclosed a form of receipt in the terms, "Received in settlement of account," showed, in the opinion of A. L. Smith, L.J., and Rigby, L.J., that the parties understood there was no payment till the cheque was received.

Usual mode of transmission imperative.

Even when transmission by post is authorised, transmission must be made in the usual way in which such sums as are sent are transmitted, having regard to the amount of the payment or otherwise.

Mitchell-Henry v. Norwich Union, 1918.

In *Mitchell-Henry* v. *Norwich Union Life Insurance Society* (*q*), mortgagees sent the mortgagor a notice asking him to pay the first instalment off the mortgage, or £48, and to "return the notice when remitting." The mortgagor sent the money in a registered packet containing Treasury notes, and this was delivered to the lift-boy in the building where the mortgagees had their premises, and the boy stole the money. *Held*, by Bailhache, J., that transmission by post in a usual manner was authorised by virtue of the word "remitting," but that it was not usual to send so large a sum by Treasury notes, and that in consequence the payment was not good. And this decision was affirmed by the Court of Appeal.

Mode to be arranged.

Where the mode of payment is to be arranged subsequently to the contract, and the buyer refuses or neglects to make an arrangement, the price is payable as it would have been payable if no arrangement had been provided for (*r*).

Set-off in account stated, the same as payment.

An account stated with the seller in which the seller has, by mutual agreement, received credit for the amount of the goods sold, as a set-off against items admitted to be due from him to the buyer, is equivalent to an actual cash payment by the buyer. The principle was thus explained by Lord Campbell (*s*): "The way in which an agreement to set one debt against another of equal amount, and discharge both, proves a plea of payment is this: If the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the cross debt, both would be paid. When the parties agree to consider both debts

(*q*) [1918] 2 K. B. 67; 87 L. J. K. B. 695, C. A.

(*r*) *Hall* v. *Conder* (1857) 2 C. B. (N. S.) 22, affirmed in Ex. Ch. *ibid.* 26 L. J. C. P. 138, 258.

(*s*) *Laingstone* v. *Whiting* (1850) 15 Q. B. 722; 19 L. J. Q. B. 528; Co. Litt. 212 a. The principle is as old as 11 Rich. II. See the cases quoted in *Callandar* v. *Howard* (1856) 10 C. B. 292, 19 L. J. C. P. 312; 84 R. R. 575.

discharged without actual payment it has the same effect
The cases establishing the above principle as to accounts stat
are quite numerous (*t*); but the rule is not applicable
ordinary accounts current, with no agreement to set off
items (*u*).

Rule not applicable to ordinary accounts Current.

Payment may also be made in any manner agreed upo
Thus, in *Page* v. *Meek* (*x*), a plea by the buyer, in an acti
for the price, that there was a dispute as to the quality of
goods delivered, and that it was agreed that the price sho
be paid less £40, which should be deposited with a stakehol
against settlement, and that the settlement was still pendi
and there had been no default by the buyer with reg
thereto, was held a good plea of special payment.

Special mode of payment agreed upon.

Page v. *Meek* (1862).

With regard to payment by a third person, it has been
down that if a debt be paid without the debtor's knowledg
a third person, a stranger to the contract, this does
discharge the debtor (*y*); and in 1855 Mr. Baron Parke
citing the cases of *Jones* v. *Broadhurst* (*a*), *Belshaw*
Bush (*b*), and *James* v. *Isaacs* (*c*), stated the law to be "
established " that the payment is not sufficient to dischar
debtor unless it is made by the third person as agent *for*

Payment by a stranger.

Opinion of Parke, B.

(*t*) *Owens* v. *Denton* (1835) 1 Cr. M. & R. 711; 4 L. J. Ex. 6
R. R. 692; *Callander* v. *Howard* (1850) 10 C. B. 290; 19 L. J. C. P.
84 R. R. 575; *Ashby* v. *James* (1843) 11 M. & W. 542; 12 L. J. Ex
63 R. R. 676; 71 R. R. 786; *Sutton* v. *Page*, (1846) 3 C. B. 204; 15
C. P. 249; 13 L. J. C. P. 133; 66 R. R. 844; *Scholey* v. *Walton* (18
M. & W. 510; 13 L. J. Ex. 122; 67 R. R. 414; 15 L. J. Q. B. 52; 68
502.

(*u*) *Cottam* v. *Partridge* (1842) 4 M. & G. 271; 11 L. J. C. P. 16
see the Chapter on Earnest or Part Payment, *ante*, 258.

(*x*) 3 B. & S. 259; 32 L. J. Q. B. 4; 129 R. R. 323. See also *Comm*
Bank of Australia v. *Official Assignee of Wilson & Co.* [1893] A. C.
L. J. P. C. 61 (suspense account with power to creditor to appropr
debt); *Edmondson* v. *Mayor of Longton* (1902) 19 T. L. R. 15 (penny
slot meter).

(*y*) *Edgcombe v. Rodd* (1804) 5 East, 294; 7 R. R. 700, following
v. *Blofield* (1594) Cro. El. 541; *Kemp* v. *Balls* (1854) 10 Ex. 607; 24
Ex. 47; 102 R. R. 725; *Lucas* v. *Wilkinson* (1856) 1 H. & N. 420; 2
Ex. 713; 108 R. R. 657; *Purcell* v. *Henderson* (1885) 16 L. R. I
affirmed *ibid.* 466, C. A.; and the cases referred to in the four following
The earlier authorities are Fitzh., Ab., Barre, pl. 166 (11. T. 36 H
Co. Litt. 206 b. The passages in Fitzh., Ab., Dette, pl. 83, and F
121 M. (with Lord Hale's note), refer to obligations given by a strang
collateral security, and not in extinguishment of the original debt.

(*z*) In *Simpson* v. *Eggington* (1855) 10 Ex. 845, at 847, 848; 2
Ex. 212; 102 R. R. 867.

(*a*) (1850) 9 C. B. 173. This exhaustive judgment, where th
authorities are discussed, was prepared by Wilde, C.J.: *per* Williams
Cook v. *Lister* (1863) 13 C. B. (N. S.) at 586.

(*b*) 1851) 11 C. B. 191; 22 L. J. C. P. 24.

(*c*) 1852) 12 C. B. 791; 22 L. J. C. P. 73. In this case not only
agreement which was pleaded as a satisfaction of the debt made wit
authority of the original debtors, but it was not alleged to be made
behalf so as to entitle them to ratify it.

on account of the debtor, and with his prior authority or subsequent ratification."

It has also been held that a debtor can after action ratify an unauthorised payment by a stranger by putting a plea of payment on the record (*d*). As the payment does not, according to the rule above stated, operate as a payment by the debtor till ratification, it follows that in the meantime the payment may be withdrawn by agreement between the stranger and the creditor. This was decided in *Walter* v. *James* (*e*), where Martin, B., declared the true rule to be that if a payment be made by a stranger, not as making a gift for the benefit of the debtor, but as an agent who intended to claim reimbursement, without authority from the debtor at the time of payment, it is competent for the creditor and the person paying to annul the payment at any time before ratification by the debtor, and thus to prevent his discharge.

On the other hand, Willes, J., in *Cook* v. *Lister* (*f*), dissented from the proposition that, until the debtor assents, payment by a stranger is no payment at all, as being contrary to the rule of the civil law, *Debitorem ignarum seu etiam invitum solvendo liberare possumus* (*g*), and also contrary to the well-known rule of mercantile law as to payment, that if a stranger pay a part of the debt in discharge of the whole, the debt is gone, because it would be a fraud on the stranger to proceed (*h*). And, with respect to the necessity for showing the assent of the debtor, he referred to the well-known principle of law by which a benefit conferred upon a man is presumed to be accepted by him until the contrary is proved (*i*).

Dissenting view of Willes, J.

As a debtor can ratify a payment made by a stranger by pleading payment in the creditor's action, the only case likely to arise in which it would be important to determine which of the two views is correct is the case in which a payment has been annulled before ratification, as in *Walter* v. *James* (*j*).

(*d*) *Simpson* v. *Eggington* (1855) 10 Ex. 845; 24 L. J. Ex. 212; 102 R. R. 807; *per* Martin, B., in *Walter* v. *James* (1871) L. R. 6 Ex. 124, at 127; 40 L. J. Ex. 104.

(*e*) *Supra*.

(*f*) (1863) 13 C. B. (N. S.) 543, at 594–595; 32 L. J. C. P. 121; 131 R. R. 642.

(*g*) See also Dig. 46, 3, 53, and 17; 3, 5, 39.

(*h*) See on this *Welby* v. *Drake* (1825) 1 C. & P. 557; 28 R. R. 787; *Hiracband Punamchand* v. *Temple* [1911] 2 K. B. 330; 80 L. J. K. B. 1155, C. A., *post*, 881.

(*i*) *Butler and Baker's Case* (1591) 3 Co. Rep. 25 a; *Atkin* v. *Barwick* (1719) 1 Stra. 165; *Standing* v. *Bowring* (1885) 31 Ch. D. 282; 55 L. J. Ch. 218, 535; 57 L. J. Q. B. 601, C. A.

(*j*) (1871) L. R. 6 Ex. 124; 40 L. J. Ex. 104.

If the payment be good *per se* it cannot, of cour
subsequently rescinded.

Year Book 36 H. 6.

The earliest English authority is a case in the Year B
36 H. 6, reported by Fitzherbert (*k*). It is stated as fo
"If a stranger does trespass to me, and one of his p
or any other, gives anything to me for the same tresp
which I agree, the stranger shall have advantage of
bar me; for if I be satisfied, it is not reason that I be
satisfied. *Quod tota curia concessit.*"

Grymes v. *Blofield* (1594).

The leading case is *Grymes* v. *Blofield* (*l*), which
unsatisfactorily reported (*m*). The report in Croke
follows: "Debt upon an obligation of twenty pounds
defendant pleads that J. S. surrendered a copyhold te
to the use of the plaintiff in satisfaction of that twenty p
which the plaintiff accepted. ? was therenpon demu
Popham and Gawdy held it to be no plea; for J. S. is
stranger, and in no sort privy to the condition of the
tion; and therefore satisfaction given by him is no
Vide 36 Hen. 6. 'Bar,' 166. 7 Hen. 4, pl. 31. Afte
in Easter Term, 31 (? 36) Eliz., by Popham and
cæteris justiciariis absentibus, it was adjudged f
plaintiff."

Lord Coke.

Lord Coke, in his comment upon a passage in Littlet
regard to the receipt by a feoffee in mortgage of the mo
money at the hands of a stranger having no interest
land, says (*n*): "And note that Littleton saith that h
bound to receive it at a stranger's hand. But if any st
in the name of the mortgagor or his heir (without his
or privity), tender the money, and the mortgagee a
it, this is a good satisfaction, and the mortgagor, or h
agreeing thereunto, may re-enter into the land.
ratihabitio retrotrahitur et mandato æquiparatur.
mortgagor, or his heir, may disagree thereunto if he

(*k*) Title Barre, pl. 166.

(*l*) Cro. Eliz. 541; 1 Rolle's Ab. 471; 5 Vin. Ab. 297; 1 Com.
These authorities do not agree with one another. Rolle quotes th
deciding that the plea of payment was good. Viner cites the opinion o
C.J., and Gawdy, J., that the plea was bad. Comyn cites only the
Popham, C.J., and Gawdy, J., for the proposition that paym
stranger is bad. In the Hargrave MSS., No. 7, vol. 2, 251, it is s
Clench, J., and Fenner, J., dissented from the opinion of Popham,
Gawdy, J., and held the plea to be good. Lord Macnaghten says in
v. *Durant* [1901] A. C. 240, at 248; 70 L. J. K. B. 622, referring to
earlier than 1850: "Why should an obscure report be taken for gos
because it is old?"

(*m*) See the result of the searching of the rolls stated by the Court
v. *Broadhurst* (1850) 9 C. B. 173, at 196.

(*n*) Co. Litt. 206 b.

This passage has been interpreted (*o*) as laying down the necessity of a ratification by the debtor; but Coke, citing the 36 H. 6 in the margin, expressly says that the satisfaction is good, and the concluding words of the passage may merely indicate that it is competent to the mortgagor to dissent.

Hirachand Punamchand v. *Temple* (1911).

In *Hirachand Punamchand* v. *Temple* (*p*), where the father of a debtor on a promissory note, being, at the debtor's suggestion, applied to by the creditor, wrote to the creditor enclosing a banker's draft for an amount less than the debt in full settlement, which the creditor cashed, retaining the proceeds, and then sued the debtor for the balance, it was held by the Court of Appeal that the creditor could not recover.

Vaughan-Williams, L.J., based his judgment principally on the ground that, on the cashing by the creditor of the draft, the creditor would hold any sums received by him on the promissory note as trustee for the father, and that the debtor could defend himself at law by showing these facts, and that the relationship of the parties negatived the idea that the father expected the son to pay the note. The fact that the sum sent was less than the debt made no difference, as the plaintiffs had, by cashing the draft, consented, for good consideration, to receive that amount in satisfaction. At the same time he did not dissent from Willes, J.'s, proposition in *Cook* v. *Lyster*, that the debt was gone, as otherwise the father would be defrauded.

Fletcher Moulton, L.J., held that the correspondence showed clearly that the draft was offered in full settlement and the cashing by the creditor of the draft was an acceptance of the father's terms, and the debt was extinct, and he agreed with Willes, J., in *Cook* v. *Lyster*. If the debt were not extinct, he held alternatively that it would be an abuse of the process of the Court to allow the creditor to sue. And, with regard to the amount of the money paid, he held that, where the payment was made by a stranger, it was immaterial whether the payment was of the full amount of the debt or not, so long as it was paid in full settlement.

Farwell, J., agreeing with Willes, J., was of opinion that the debt was extinct; but if the debtor's assent were necessary, the transaction might be regarded as a tripartite arrangement (*q*). But, whether that was technically correct or not was immaterial at the present day. The creditor could only

(*o*) By Martin, B., in *Walter* v. *James* (1871) L. R. 6 Ex. 124, at 125; 40 L. J. Ex. 104.

(*p*) [1911] 2 K. B. 330; 80 L. J. K. B. 1155, C. A.

(*q*) Citing *Lewis* v. *Jones* (1825) 4 B. & C. 506; 3 L. J. (O. S.) K. B. 270.

accept the payment, though less than the debt, being by a stranger, on the terms offered. If there was any diffi in formulating a defence at law, a Court of Equity w hold the creditor disentitled to sue except as trustee fo father, and would restrain such an action.

Technically this case decides no more than that a cr who has for good consideration accepted in full discharge a stranger a part of the debt cannot sue for the balance. the *dicta* go to show that the debt is discharged by stranger's payment.

Payment must be of a debt.

But a payment of money by a stranger must be mad account of a debt, and not be made from other motive *e.g.*, a gift (*qq*).

Position of the parties on payment by stranger.

An extremely instructive survey of the relative right obligations of the three parties has been made by an Ame Judge (*r*). After stating the law that payments by a str is not valid unless it be ratified by the debtor, he proc to show that, if the debtor did not ratify, the legal rig action remained with the creditor, but that, as he had re full payment from the stranger, he would be under an im obligation in equity to assign the debt to the stranger equity would regard the stranger as the equitable owner otherwise the creditor would be paid twice. Moreove hold otherwise would be contrary to the implied understan at the time of payment, for the stranger made the credit gift. The stranger could accordingly sue the debtor in eq He could also, in the name of the creditor, sue the debt law; and, although this action might be defeated by debtor's plea ratifying the payment (which ratification w relate back to the time of payment), yet this very fact w entitle the stranger to sue for money paid on request.

The learned Judge also pointed out that the stranger m without the consent of the debtor, take from the credi formal assignment of the debt; and that, even without an assignment, the agreement would constitute an assign in equity.

Payment of less than the debt.

Payment by the debtor of a sum less than the whole am due is not a good discharge of the whole debt, unless the some consideration for the creditor's acceptance of the l sum; but if there be any consideration, however small, t creditor, the acceptance of the smaller sum in satisfacti

(*qq*) *Ex parte Derenburg & Co.* [1901] 2 K. B. 483; 73 L. J. K. B. C. A.

(*r*) Green, P., in *Neely* v. *Jones* (1880) 16 West Virg. 625.

the whole debt will be a good discharge, and the Court will not inquire into the adequacy of the consideration (*s*).

Pinnel's Case (1602).

The law was laid down to this effect by the Court of Common Pleas in 1602 in *Pinnel's Case* (*t*), where the Court resolved (1) that "payment of a lesser sum *on the day*, in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum"; (2) that "the gift of a horse, hawk, or robe, etc., in satisfaction is good," on the ground that such an article might be more beneficial to the plaintiff than the money. For a like reason, the plea in that case that a smaller sum had been accepted in full satisfaction of a larger sum *before* the day when it became due was held to be good.

Dilatory pleas.

One result of this decision was that at one time sham pleas alleging that some chattel—a beaver hat (*u*), or a pipe of wine (*x*)—had been given and accepted in satisfaction of the debt were frequently used for the purpose of delay. "No one for a moment supposed that a beaver hat was really given and accepted; but every one knew that the law was that if it was really given and accepted, it was a good satisfaction" (*y*).

Negotiable security for lesser sum

Another curious result is that, although less than the full amount of the debt cannot be taken in satisfaction in actual money, the acceptance of a negotiable security, even the defendant's own promissory note (*z*) or cheque (*a*), for a lesser sum may be a satisfaction of the debt.

Payment at different place, or compromising action

On the same principle, acceptance of a smaller sum from a stranger (*b*), or in satisfaction of a debt payable at a different place (*c*), or by way of compromise of an action for debt (*d*),

(*s*) See notes to *Cumber* v. *Wane* (1719) 1 Sm. L. C. 7th ed. 311, 11th ed. 338.

(*t*) 5 Co. Rep. 117 a. See also Co. Litt. 212 b.

(*u*) *Young* v. *Rudd* (1695) 5 Mod. 86.

(*x*) 3 Chit. Pl. 7th ed. 92. "A piece of paper, or a stick of sealing-wax," was sufficient: *per* Alderson, B., in *Sibree* v. *Tripp* (1846) 15 M. & W. at 38; 15 L. J. Ex. 318; 71 R. R. 515.

(*y*) *Per* Lord Blackburn in *Foakes* v. *Beer* (1884) 9 A. C. 605, at 618; 54 L. J. Q. B. 130.

(*z*) *Sibree* v. *Tripp* (1846) 15 M. & W. 23; 15 L. J. Ex. 318; 71 R. R. 515. (*a*) *Goddard* v. *O'Brien* (1882) 9 Q. B. D. 37; *Bidder* v. *Bridges* (1887) 37 Ch. D. 406, at 419; 57 L. J. Ch. 300, C. A. (solicitor's cheque). *Goddard* v. *O'Brien* was, however, *on the facts*, doubted by Fletcher Moulton, L.J., in *Hirachond Punamchand* v. *Temple* [1911] 2 K. B. 330, C. A. In *Goddard* v. *O'Brien* the debtor's cheque was accepted "in settlement on said cheque being honoured," so that, as pointed out by the Lord Justice, the creditor accepted a less amount than his debt in conditional payment only, *i.e.*, as cash.

(*b*) *Hirachand Punamchand* v. *Temple*, *supra*.

(*c*) *Pinnel's Case*, *supra*.

(*d*) *Cooper* v. *Parker* (1855) 15 C. B. 822; 24 L. J. C. P. 68; 100 R. R. 556, Ex. Ch.

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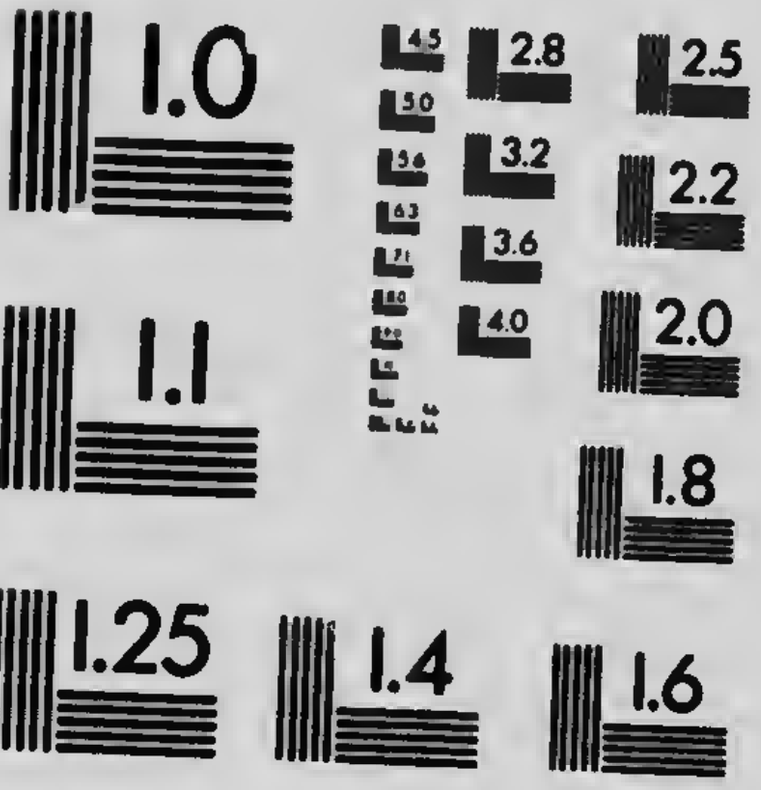

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Payment of part and gift of residue.

is a good satisfaction for the whole debt. And althoug
ment of part of a debt is not deemed to be *satisfaction*
whole, it may under certain circumstances be evidenc
gift of the remainder (*e*).

Discussion of doctrine that acceptance of smaller sum is no satisfaction of debt.

The first resolution in *Pinnel's Case* (*c*) was much di
in 1884 in the House of Lords in *Foakes* v. *Beer* (*f*),
Lord Blackburn, after pointing out that it was only a *d*
expressed the opinion that, although adopted by Lord C
and other great Judges, the dictum was founded on a m
view of fact, as it was Lord Blackburn's conviction "
men of business, . . . act on the ground that prompt pa
of a part of their demand may be more beneficial to the
it would be to insist on their rights and enforce payn
the whole." His Lordship added that he had per
himself that there was no such long-continued action
dictum as to render it improper in that House to rec
the question, but as his reasons for so thinking w
satisfactory to the other learned Lords, he did not pe
them (*h*).

Foakes v. *Beer* (1884).

Accordingly, in *Foakes* v. *Beer* (*i*), the first resolu
Pinnel's Case (*k*), although disapproved of by Lord S
L.C. (*l*), and Lord Fitzgerald (*m*), as well as b
Blackburn, having been assumed to be law for over 28
was eventually followed (*n*).

Tender is equivalent to payment.

In the absence of any special mode of payment, i
buyer's duty, under the contract, to make actual
in cash, or a tender of payment, which is as
performance as an actual payment.

In what coin tender must be made.

A tender must, at common law, be made in the curr
of the realm (*o*), or foreign money legally made cu
proclamation (*p*). But a tender not originally valid

(*e*) *Per* Parke, B., in *Sibree* v. *Tripp* (1846) 15 M. & W. at 3
Ex. 318; 71 R. R. 545; *per* Holroyd, J., in *Thomas* v. *Heath*
2 B. & C. 477, at 481—482.
(*f*) 9 A. C. 605; 54 L. J. Q. B. 130.
(*g*) Co. Litt. 212 b.
(*h*) (1884) 9 A. C. 605, at 617—618, 622—623; 54 L. J. Q. B. 13
(*i*) 9 A. C. 605; 54 L. J. Q. B. 130.
(*k*) (1602) 5 Co. Rep. 117 a, *ante*, 883.
(*l*) 9 A. C. at 613; 54 L. J. Q. B. 130.
(*m*) *Ibid.* at 630.
(*n*) See also *Underwood* v. *Underwood* [1894] P. 204; 63 L.
C. A.
(*o*) *Wade's Case* (1601) 5 Co. Rep. 114 a.
(*p*) Bac. Ab. Tender (B) 2; *Wade's Case*, *supra*; *Case of Mi*
(1604) Davis, 18; Co. Litt. 207 b.

one made in country bank notes (*q*), or by a cheque (*r*)—may at common law become good, if the creditor does not at the time object to the *nature* of the tender.

By the Coinage Act, 1870 (*s*), section 4, a tender of payment in coin is declared to be legal— Coinage Act. (1870).

In the case of gold coins for a payment of any amount.

In the case of silver coins for a payment not exceeding forty shillings.

In the case of bronze coins for a payment not exceeding one shilling.

By the same section it is also declared that "nothing in this Act shall prevent any paper currency which under any Act or otherwise is a legal tender from being a legal tender."

By section 6 of the same Act, every contract, sale, payment, etc., "shall be made, executed, entered into, done, and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done, or had according to the currency of some British possession, or some foreign State."

By the Bank of England Act, 1833 (*t*), section 6, tenders (except by the Bank itself or its branches) are valid for all sums in excess of five pounds, if made in notes of the Bank of England, payable to bearer on demand, so long as the Bank continues to pay on demand its notes in legal coin. Bank of England notes.

By the Currency and Banknotes Act, 1914 (*u*), section 1 (1), currency notes for one pound and for ten shillings are made as current as sovereigns and half-sovereigns, and are to be legal tender for the payment of any amount; and by the same Act, section 4, banknotes issued by a bank of issue (*i.e.*, a bank having power for the time being to issue banknotes: section 5 (1)) in Scotland or Ireland are made legal tender for the payment of any amount in those countries respectively, except for the payment by the head office of the bank of its own notes. Currency notes.

The defence of tender consists in the defendant having been always ready and willing to pay the debt and having tendered it before action to the plaintiff, who refused to accept it. It is a performance of the contract on the part of the Defence of tender.

(*q*) *Polglass* v. *Oliver* (1831) 2 Cr. & J. 15; 1 L. J. Ex. 5; 37 R. R. 623, cited *post*, 887.

(*r*) *Jones* v. *Arthur* (1840) 8 Dowl. 442; 59 R. R. 833; and see *Caine* v. *Coulton* (1863) 32 L. J. Ex. 97; 1 H. & C. 764; 130 R. R. 765, set out *ante*, 875.

(*s*) 33 Vict. c. 10.

(*t*) 3 & 4 Will. 4, c. 98. This provision does not extend to Ireland: 8 & 9 Vict. c. 37, s. 6; or to Scotland: 8 & 9 Vict. c. 38, s. 15.

(*u*) 4 & 5 Geo. 5, c. 14.

defendant so far as he could perform it, and was not prevented by the plaintiff's refusal (*x*).

Time for making tender.

As a general rule, a tender is good if made before action (*y*). but if payment on a day certain be a condition of the contract, the money must be tendered on or before that day (*z*), as in the case of payment by the acceptor of a bill of exchange payable on a particular day (*a*), for "in strictness a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract" (*b*).

Requisites of tender.

A tender is only validly made when the buyer produces and offers to the seller an amount of money not less than the price of the goods. A mere statement by a creditor that he is ready to pay the debt, without producing any money, is therefore no tender (*c*). And even where the debtor offered to pay, and put his hand into his pocket, but before he could take out the money the creditor left the room and got away. Lord Tenterden, C.J., held there was no tender (*d*).

Creditor must have opportunity of examining and counting money.

The tender must be made in such a manner as will enable the creditor to examine and count the money, but it may be produced in a purse or bag ready to be counted by the creditor if he choose, provided the sum be the correct amount (*e*).

Alexander v. *Brown* (1824).

In *Alexander* v. *Brown* (*f*), where the person who made tender of £29 19s. 8d. had in his hand two banknotes twisted up and enclosing four sovereigns and 19s. 8d. in change making the precise sum, and told the plaintiff what it was, but did not open it before him, it was objected that he ought to have *shown* him the money; but Best, C.J., ruled that this was sufficient, adding that if the debtor had not mentioned the amount, he thought that the tender would not have been sufficient.

Waiver of production of the money.

The actual production of the money, however, may be dispensed with by the creditor. Whether there be evidence of such dispensation is a question of law; if there be some evidence of it, the question whether the creditor in

(*x*) Bull. and L. Plead. 3rd ed. 693.

(*y*) *Briggs* v. *Calverley* (1800) 8 T. R. 629; *Smith* v. *Manners* 5 C. B. N. S. 632; 28 L. J. C. P. 220; 116 R. R. 802.

(*z*) 2 Wms. Saund. 48, 48 b (i).

(*a*) *Hume* v. *Peploe* (1807) 8 East, 168; 9 R. R. 399; *Poole* v. *Tum* (1837) 2 M. & W. 223; 6 L. J. Ex. 74; 46 R. R. 579; and see *post*, p

(*b*) *Per* Lord Ellenborough, C.J., in *Hume* v. *Peploe*, *supra*.

(*c*) *Dickinson* v. *Shee* (1801) 4 Esp. 67; *Thomas* v. *Evans* (1808) 10 101; 10 R. R. 229.

(*d*) *Leatherdale* v. *Sweepstone* (1828) 3 C. & P. 342; 33 R. R. 67

(*e*) *Isherwood* v. *Whitmore* (1843) 11 M. & W. 347; Co. Litt. 12 L. J. Ex. 318; 63 R. R. 624.

(*f*) 1 C. & P. 288.

dispensed with the production of the money is for the jury (*g*).

Thus, the creditor may object to the tender on some ground other than that the money was not produced, for a specific objection is an implied waiver of any other objection. This principle has long been established with regard to tenders by cheque or other negotiable instrument (*h*). For example, an objection that the amount is not sufficient is a waiver of the objection that the tender was not in cash.

Statement of law by Bayley, B.

In 1831, an eminent authority on mercantile law, Mr. Baron Bayley, in *Polglass* v. *Oliver* (*i*), stated the law respecting tender in these terms:—"To make a tender good, it should be made in the coin of the realm, and the money ought to be produced; but the party to whom the tender is made may make good what would otherwise be insufficient by relying on a different objection. If he claim a larger amount, and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced, nor can he object that it was offered in paper."

Black v. *Smith* (1791).

In *Black* v. *Smith* (*k*), tried in 1791, where the debtor offered money which he had ready to pay to his creditor, and the latter refused to receive it on the ground that more was due, and the money was therefore not produced, Lord Kenyon said that in such a case there was no occasion to produce the money, and the verdict was entered for the defendant.

Thomas v. *Evans* (1808).

In *Thomas* v. *Evans* (*l*), the plaintiff called at his attorney's office to receive money, and was told by the clerk that the attorney had left with him £10 to give to the plaintiff. The plaintiff, who wrongly supposed that a larger sum had been collected for him, said he would not receive the £10. The clerk did not produce or even offer to pay the money. *Held*, there was no evidence of tender or of a dispensation.

Douglas v. *Patrick* (1790).

In *Douglas* v. *Patrick* (*m*), the debtor said he had eight guineas and a half in his pocket for the purpose of satisfying the demand, and the creditor said "he need not give himself the trouble of offering it, for he would not take it, as the

(*g*) See the judgments in *Finch* v. *Brook* (1834) 1 Bing. N. C. 253; 4 L. J. C. P. 1; 41 R. R. 595. *post*, 888

(*h*) See *post*, 888.

(*i*) (1831) 2 Cr. & J. 15; 1 L. J. Ex. 5; 37 R. R. 623, set out *post*, 889.

(*k*) 1 Peake, 121; 3 R. R. 661, at N. P. But *cf. per eundem* in *Dickinson* v. *Shee* (1791) (1801) 4 Esp. 67, at 68, at N. P.; appd by Bayley, J., in *Thomas* v. *Evans*, *infra*.

(*l*) (1808) 10 East, 101, at 103.

(*m*) 3 T. R. 683; 1 R. R. 793.

matter was in the hands of his attorney." *Held*, that statement dispensed with the production of the money, verdict having been entered for the plaintiff, this was aside, and a new trial ordered.

Finch v. *Brook* (1834).

In *Finch* v. *Brook* (*n*), the debtor's attorney called creditor to pay him the debt, and mentioned the precise and put his hand in his pocket, but did not actually pr the money, whereupon the creditor said: "I can't ta the matter is now in the hands of my attorney." The found these facts on a special verdict, adding that whet not upon the whole matter there had been a tender jurors were altogether ignorant, and therefore praye advice of the Court." The County Court gave judgme the defendant, but this was reversed by the Court of Co Pleas on the ground that there was no actual product the money, and the jury had not found as a fact that was an implied dispensation, although in the opinion judges the jury might have so found.

Ex Parte *Danks* (1852).

In *Ex parte Danks* (*o*), the facts were similar to those two preceding cases, the debtor having the money in his and offering to pay that amount, and the creditor sa "You are wasting your time. I will have nothing to d it; you have come too late; you must go to my solic The Lords Justices held that this was clearly a dispen with the production of the money.

Harding v. *Davis* (1825).

In *Harding* v. *Davis* (*p*), at an interview betwe parties the defendant was willing to pay the plaintif and the witness who lodged in the house offered to go up where she had the money, and fetch it, and the plaintif "she need not trouble herself, for he could not tak Best, C.J., said: "I think the witness has proved a tender. I agree that it would not do if a man said, ' got the money, but must go a mile to fetch it.'"

Waiver of objection to the quality of the tender.

When a tender is actually made, but in a currency di from that required by the law, the Courts are less rigor inferring a dispensation from a strict legal tender t cases where no money is produced. If the buyer shoul

(*n*) 1 Bing. N. C. 253; 4 L. J. C. P. 1; 41 R. R. 595.

(*o*) 2 De G. M. & G. 936; 22 L. J. Bank. 73, *coram* Knight Bru and Lord Cranworth, L.J.

(*p*) 2 C. & P. 77; 31 R. R. 654. In *Read* v. *Goldring* (1813) 2 M. 14 R. R. 594, where the debtor's agent pulled out his pocket-book and creditor, whom he met in the street, that if he would go into a neig public-house with him, he would pay him £4 10s., and the creditor would not take it," it was assumed to be a tender of the money, argument for the plaintiff turned entirely upon the question of agency

his seller a country bank note, or a cheque, or silver coin for a debt exceeding 40s., and the seller should refuse to receive payment, alleging any other reason than the *quality* of the tender, as if he should say that more was due to him, and he would not accept the *amount* tendered, the inference would be readily admitted that he dispensed the buyer from offering coin or Bank of England notes.

Polglass v. *Oliver* (1851).

In *Polglass* v. *Oliver* (*q*), the earlier cases were reviewed, and it was held that a tender was valid which was made in country bank notes where the plaintiff made no objection on that account, but said: "I will not take it, I claim for the last cargo of soap." Bayley, B., gave as a reason: "If you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money, and making a good and valid tender; but by not doing so, and claiming a larger sum, you delude him."

Tender of more than is due.

A tender of more than is due is a good tender, for *omne majus continet in se minus*, and the creditor ought to take out of the sum tendered him as much as is due to him (*r*). A tender, therefore, of £20 9s. 6d. in bank notes and silver proves a plea of tender of £20 (*s*). So where the debtor put down 150 sovereigns on the attorney's desk, and told him to take out of it what was due to him, *held*, a good tender for £108 (*t*).

Wade's Case (1601).

Tender with demand for change.

But a tender of a larger sum than is due, with a demand for change, is not a good tender if the creditor object to giving change (*u*). Yet the creditor will be deemed to have waived this objection if he refuse the tender merely because the amount offered is not enough (*x*).

No valid tender of part of entire debt

It is now settled that there can be no valid tender of part of an *entire* debt, though a debtor may make a valid tender of one of several distinct debts if he specify the debt on account of which he makes the tender; and if he make a tender without

(*q*) 2 Cr. & J. 15; 1 L. J. Ex. 5; 37 R. R. 623; follg. *Lockyer* v. *Jones* (1796) Peake, 239, n; 3 R. R. 682, n. See also *Jones* v. *Arthur* (1840) 8 Dowl. P. R. 449; 59 R. R. 833; *Caine* v. *Coulton* (1863) 1 H. & C. 764; 32 L. J. Ex. 97; 130 R. R. 765, *ante*, 875.

(*r*) *Wade's Case* (1601) 3rd res., 5 Co. Rep. 115 a.

(*s*) *Dean* v. *James* (1833) 4 B. & Ad. 546; 2 L. J. K. B. 94.

(*t*) *Bevans* v. *Rees* (1839) 5 M. & W. 306; 8 L. J. Ex. 263; 52 R. R. 727; and see *Douglas* v. *Patrick* (1790) 3 T. R. 683; 1 R. R. 793; *Black* v. *Smith* (1791) 1 Peake, 121; 3 R. R. 661.

(*u*) *Watkins* v. *Robb* (1799) 2 Esp. 711; and *Betterbee* v. *Davis* (1811) 3 Camp. 70; 13 R. R. 755, in which cases a five-pound note was tendered in payment of £4 19s. 6d. and £3 10s. respectively. See also *Robinson* v. *Cook* (1815) 6 Taunt. 336; 16 R. R. 624.

(*x*) *Tudman* v. *Lubbock* (1824) 1 C. & P. 366, n., K. B.; *Bevans* v. *Rees* (1839) 5 M. & W. 306; 8 L. J Ex. 263; 52 R. R. 727.

specifying which of several debts he tenders, and the
be insufficient to cover all, it will not be good for *any*

Dixon v. *Clarke* (1848).

In *Dixon* v. *Clarke* (*y*), the authorities were all re
and Wilde, C.J., gave a lucid exposition of the whole
of tender. The argument involved the general q
whether a tender of part of an entire debt is good.
consideration the Court were of opinion that upon p
such a tender is bad. In delivering judgment, the
Justice said:

Requisites of a valid tender stated by Wilde, C.J.

"In actions of debt and assumpsit the principle of t
of tender in our apprehension is that the defendant ha
always ready (*toujours prist*) to perform entirely the
on which the action is founded, and that he did perfo
far as he was able by tendering the requisite mon
plaintiff himself precluding a complete performan
refusing to receive it. And as in ordinary cases the
not discharged by such tender and refusal, the plea m
only go on to allege that the defendant is still ready
prist), but must be accompanied by a *profert in curia*
money tendered. If the defendant can maintain thi
although he will not thereby bar the debt, or that w
inconsistent with the *uncore prist* and *profert in curia*
he will answer the action in the sense that he will
judgment for his costs of defence against the plain
which respect the plea of tender is essentially differe
that of payment of money into Court. And as the
thus to constitute an answer to the action, it must,
ceive, be deficient in none of the requisite qualities of
plea in bar.

"With respect to the averment of *toujours prist*,
plaintiff can falsify it, he avoids the plea altogether.
fore if he can show that an *entire* performance of the
was demanded, and refused *at any time*, when by the t
it he had a right to make such a demand, he will av
plea. Hence, if a demand of the whole sum origina
is made and refused, a subseque[illegible] tender of part of it
notwithstanding that by part payment or by other me
debt may have been reduced in the interim to th
tendered. And this is the principle of the decision of
v. *Godwin* (*z*). If, however, the demand were of a
sum than that originally due under the contract, a re

(*y*) 5 C. B. 365; 15 L. J. C. P. 237; 75 R. R. 747.
(*z*) (1840) 7 M. & W. 147; 10 L. J. Ex. 243.

pay it would *not* falsify the *tonjours prist*, even though the account demanded were made up of the sum due under the contract and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of *Brandon* v. *Newington* (*a*) and *Hesketh* v. *Faucett* (*b*), which appear to overrule *Tyler* v. *Bland* (*c*).

"This principle, however, we think, is only applicable where the larger sum is demanded *generally*, and can hardly be enforced where it is explained to the defendant at the time how the amount demanded is made up; for in such case the transaction appears to be nothing less than a simultaneous demand of the several debts, so as to falsify the averment of *tonjours prist* as to *each*.

"But, besides the averment of *readiness* to perform, the plea must aver an actual *performance* of the entire contract on the part of the defendant, as far as the plaintiff would allow. And it is plain that where by the terms of it the money is to be paid on a future *day certain*, this branch of the plea can only be satisfied by alleging a tender *on the very day*. And this is the principle of the decisions of *Hume* v. *Peploe* (*d*) and *Poole* v. *Tumbridge* (*e*). It is also obvious that the defect in the plea in this respect cannot be remedied by resorting to the previous averment of *tonjours prist*. Consequently, a plea by the acceptor of a bill or the maker of a note of a tender *post diem* is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always *ready* to pay, not only from the time of the tender (as the plea was in *Hume* v. *Peploe*), but also from the time when the bill or note became payable. On the same reasoning it appears to us that this branch of the plea can only be satisfied by alleging a tender of the whole sum due under the contract, for that a tender of part of it only

(*a*) (1842) 3 Q. B. 915; 12 L. J. Q. B. 20; 61 R. R. 436.
(*b*) (1843) 11 M. & W. 356; 12 L. J. Ex. 326; 63 R. R. 629.
(*c*) (1842) 9 M. & W. 338; 11 L. J. Ex. 257.
(*d*) (1807) 8 East, 168; 9 R. R. 399, where Lord Ellenborough asked the defendant's counsel "if he could show any case where an averment of *touts temps prist* was holden not to be necessary in a plea of tender. . . . It is no answer to show that at a day subsequent he was ready to have paid it, unless he were *always* ready to have paid it from the time when it first became due." And he calls this principle one of the landmarks of pleading, and refers to *Giles* v. *Hartis* (1697) 1 Ld. Raym. 254.
(*e*) (1837) 2 M. & W. 223; 6 L. J. Ex. 74; 46 R. R. 579. In this case Parke, B., puts it tersely: "The plea must state, not only that the defendant was ready to pay on the day of payment, but that he tendered on that day."

is no averment that the defendant performed c
contract as far as the plaintiff would allow."

Tender of less than total amount of several debts.

Hardingham v. _Allen_ (1848).

This exposition of the subject was followed by th
decision in *Hardingham* v. *Allen* (*f*) by the sam
deciding that where a demand was made of £1 7s. f
matters, including 10s. for a particular contract, a
19s. 6d., without specifying the appropriation to be
it, did not sustain a plea of tender of 10s. on the
contract. "If the 19s. 6d. tendered," said Colt
"was sufficient to cover the plaintiff's entire demand
be a good tender as to the 10s.; but if it was insu
cover the entire demand, then, inasmuch as it
specifically applied to any portion of it, it does n
the replication."

Searles v. _Sadgrave_ (1855).

Tender of balance due, after set-off, not allowable.

In *Searles* v. *Sadgrave* (*g*), the defendant plea
£55 6s., parcel, etc., tender. Plaintiff replied tha
sum was due than the amount tendered as *one entire*
on *one entire contract*, which larger sum the
demanded at the time of the tender, and the
refused. Rejoinder, that though a larger sum wa
the plaintiff at that time was and still is indebted to
dant in an amount equal to the whole of the la
except the said sum of £55 6s., parcel, etc., for
able, etc., which amount, etc., the defendant was
ready to set off, etc. Demurrer and joinder. The
was sustained, as set-off is the creature of statute
Act (*h*) authorised set-off only after action brou
defendant should have pleaded his set-off, and paid
into Court, and he was allowed to amend by doing
usual terms.

A payment or tender, by one of several joint
to one of several joint creditors, is valid (*i*).

(*f*) 5 C. B. 793; 17 L. J. C. P. 198; 75 R. R. 839. See also
Ward (1846) 8 Q. B. 920; 15 L. J. Q. B. 271.

(*g*) 5 E. & B. 639; 25 L. J. Q. B. 15; 103 R. R. 658; *Philp*
(1862) 10 W. R. Ex. 135.

(*h*) 2 Geo. 2, c. 22, s. 13. This Act was repealed as to the
in 1879 by 42 & 43 Vict. c. 59, ss. 2, 4, and generally by the S. L.
(46 & 47 Vict. c. 49), ss. 4, 7. Set-off and counterclaim are no
R. S. C., O. 19, r. 3, but a set-off remains precisely what it
statute 2 Geo. 2, c. 22. See Annual Pract., 1913, 360 *et seqq.*
found an exhaustive note on set-off and counterclaim.

(*i*) Joint debtors: *Beaumont* v. *Greathead* (1846) 2 C. B.
C. P. 130; *Thorne* v. *Smith* (1851) 10 C. B. 659; 20 L. J. C. P.
743. Joint creditors: *Douglas* v. *Patrick* (1790) 3 T. R. 683;
Wallace v. *Kelsall* (1840) 7 M. & W. 264; 10 L. J. Ex. 12;
Cooper v. *Law* (1859) 6 C. B. N. S. 502; 28 L. J. C. P. 282;
Brandon v. *Scott* (1857) 7 E. & B. 234; 26 L. J. Q. B. 163;

Tender must be unconditional.

A tender must be unconditional, or at all events free from any condition to which the creditor may rightfully object. It is a question of law for the Court whether an unambiguous tender was conditional or not, but if there be ambiguity, the question is properly left to the jury; as where a debtor said he had called to tender £8 in *settlement* of an account, and Lord Denman, C.J., left it to the jury whether that meant simply in *payment*, or involved a condition, and this was held right by the King's Bench (*k*).

Debtor cannot demand admission that no more is due, but may exclude presumption against himself.

The condition which the debtor is the most apt to impose, is one which the law does not permit. The debtor has no right to insist that the creditor shall admit that no more is due than the sum tendered. He may exclude any presumption against himself that he admits the payment to be only for a part, but can go no further, and his tender will not be good if he add a condition that the creditor shall acknowledge that no more is due (*l*).

Mitchell v. *King* (1833).

In *Mitchell* v. *King* (*m*), a tender by the debtor, who said, "I do not admit of its being taken in part, but as a settlement," was held no tender.

Sutton v. *Hawkins* (1838).

In *Sutton* v. *Hawkins* (*n*), the money was tendered as "all that was due," and this was held bad.

Hough v. *May* (1836).

In *Hough* v. *May* (*o*), the tender was by a cheque, in these words: "Pay Messrs. Hough & Co., balance account railing, or bearer, £8 11s." This was held no tender, because, as Coleridge, J., put it, "suppose this cheque had been presented, and it had been afterwards a question for a jury whether the plaintiffs had been paid in full, they would see that before the action was brought, the plaintiffs had accepted and made use of a cheque professedly given for the then balance"; and this condition vitiated the tender.

The rule that payment of a joint debt to one of the joint creditors is good is not affected by the rules of equity: *per* Farwell, J., in *Powell* v. *Brodhurst* [1901] 2 Ch. at 164; 70 L. J. Ch. 587.

(*k*) *Eckstein* v. *Reynolds* (1837) 7 A. & E. 80; 6 L. J. K. B. 198; 45 R. R. 676; *Marsden* v. *Goode* (1845) 2 C. & K. 133.

(*l*) *Bowen* v. *Owen* (1847) 11 Q. B. 130; 17 L. J. Q. B. 5; 75 R. R. 306. See also *Evans* v. *Judkins* (1815) 4 Camp. 156 (express condition of acceptance in full); *Strong* v. *Harvey* (1825) 3 Bing. 304; 4 L. J. (O. S.) C. P. 57 ("in full of all demands"); *Huxham* v. *Smith* (1809) 2 Camp. 19; 11 R. R. 651; *Cheminant* v. *Thornton* (1825) 2 C. & P. 50 (tender "in full"); *Griffiths* v. *Hodges* (1824) 1 C. & P. 419 (receipt in full demanded); *Finch* v. *Miller* (1848) 5 C. B. 428; 75 R. R. 774 (the same); *Read* v. *Goldring* (1813) 2 M. & S. 86; 14 R. R. 594 ("to settle the business," point not raised).

(*m*) 6 C. & P. 237; 40 R. R. 810.

(*n*) 8 C. & P. 259.

(*o*) 4 A. & E. 954; 5 L. J. K. B. 186; 43 R. R. 530.

Henwood v. *Oliver* (1841).

But in *Henwood* v. *Oliver* (*p*), where the defendant p the money, saying: "I am come with the amount bill," and the plaintiff refused the money, saying: not take that. It is not my bill"; the tender was hel ditional and good. Patteson, J., said: "The defend makes a tender always means that the amount tendered less than the plaintiff's bill, is all that he is entitled to in respect of it. How then would the plaintiff preclu self from recovering more by accepting an offer of pay panied by expressions which are *implied* in every tend If the defendant when he paid the money had called i the amount of the plaintiff's bill, he would there admitted that more was due, and the effect of the tend have been defeated."

Bull v. *Parker* (1842).

Henwood v. *Oliver* was followed by Wightman, J., v. *Parker* (*q*), where the witness who proved the tend "I offered him £4, and I said I went, by the dir Mr. C. Parker, to pay him £4 in full discharge of his I did not say, 'I will pay the money, if you will acc full discharge.'" The learned Judge held that there such condition annexed to the offer as amounted to "Unless you accept this money in full discharge, I pay it at all."

Bowen v. *Owen* (1847).

In *Bowen* v. *Owen* (*r*), a tenant sent a person to his with a letter, saying: "I have sent with the bearer sum of £26 5s. 7½d., to settle one year's rent of *Vaux* The messenger told the landlord that he had the mo him to pay, but the latter refused, saying more was du messenger went away, and returned, saying, he ha pounds more in his pocket to pay in addition £26 5s. 7½d., certain arrears of duties, but the landl refused, saying there was more due. It was objec these offers, coupled with the plaintiff's letter, were than a conditional tender, and Rolfe, B., so ruled. King's Bench held that the letter did not contain a c Erle, J., stating the general rule as follows: "Th making a tender has a right to exclude presumption himself by saying, 'I pay this as the whole that is d if he requires the other party to accept it as all tha that is imposing a condition; and when the offer is the creditor may refuse to consider it as a tender."

(*p*) 1 Q. B. 409; 10 L. J. Q. B. 158.
(*q*) 2 Dowl. N. S. 345; 12 L. J. Q. B. 93.
(*r*) 11 Q. B. 130; 17 L. J. Q. B. 5; 75 R. R. 306.

In *Jones* v. *Bridgman* (*s*), a tender of rent with the words, "Here is your quarter's rent," was held: be good as not imposing any condition on the receipt. *Jones* v *Bridgman* (1878).

A tender accompanied by a protest that the amount is not due is a good tender (*t*). As was said by Bowen, L.J., in *Greenwood* v. *Sutcliffe* (*u*): "A conditional tender is not an effectual tender in law, but a tender under protest is quite right. A man has a right to tender money reserving all his rights, and such a tender is good, provided he does not seek to impose conditions." Tender with protest that the amount is not due.

Nor is a tender vitiated because the debtor says he considers it all that is due (*x*).

Whether or not the debtor was entitled at common law (*y*) to demand a receipt for money tendered seems to be considered an open question.

In *Cole* v. *Blake* (*z*), Lord Kenyon said that it had been determined that a party tendering money could not in general demand a receipt for the money, and quoted one case in which he said that it had been held that the King's Receiver, as an exception to the general rule, was obliged to give a receipt. And in *Laing* v. *Meader* (*b*), where the defendant asked for a *stamped* receipt, Abbott, C.J., said: "This is no proof of a tender; the offer of the money must be unconditional. A party has no right to say: 'I will pay you the money if you will give me a stamped receipt'; but he ought, according to the 43 Geo. III. c. 126 (*c*), to bring a receipt with him, and require the other party to sign it." Can a debtor demand a receipt?

(*s*) 39 L. T. 500, follg. *Bowen* v. *Owen*, *supra*, which was held to be inconsistent with *Hastings* v. *Thorley* (1838) 8 C. & P. 573, where the plaintiff claimed £23 for rent, and a tender of £21 "in payment of the half-year's rent, due at Lady Day last," was held bad by Lord Abinger, C.B., as putting on the creditor the condition of admitting that no more rent was due.

(*t*) *Manning* v. *Lunn* (1845) 2 C. & K. 13; 80 R. R. 822; *Scott* v. *Uxbridge Ry. Co.* (1866) L. R. 1 C. P. 596; 35 L. J. C. P. 293, folld. in *Greenwood* v. *Sutcliffe* [1892] 1 Ch. 1; 61 L. J. Ch. 59, C. A. Lord Ellenborough was of a contrary opinion in *Simmons* v. *Wilmot* (1800) 3 Esp. 91, but this case must now be considered as overruled.

(*u*) [1892] 1 Ch. 1, at 11; 61 L. J. Ch. 59.

(*x*) *Robinson* v. *Ferraday* (1839) 8 C. & P. 752.

(*y*) Kennedy, J., says in *Shrewsbury* v. *Shrewsbury* (1907) 23 Times L. R. 277, that the older cases are now not very applicable, having regard to the terms of the Stamp Acts.

(*z*) (1793) 1 Peake, 238; 3 R. R. 681.

(*a*) (1741) Bunbury, 348.

(*b*) (1821) 1 C. & P. 257.

(*c*) Under s. 5 of this Act the debtor was entitled to provide and tender a stamped form of receipt, and demand a receipt and payment for the stamp. The Act was repealed by 33 & 34 Vict. c. 99. As to giving a stamped receipt now, see the provisions of the Stamp Act, 1891, referred to on next page.

Jones v. *Arthur* (1840).

In *Jones* v. *Arthur* (*d*), where the tender was mad cheque in a letter which requested a receipt in retu request was held not to invalidate the tender, the mere not imposing any condition.

Richardson v. *Jackson* (1841).

In *Richardson* v. *Jackson* (*e*), the Court held t creditor could not object to the tender on the ground receipt was asked, because at the time of the offer refused it on the ground that a larger sum was due But Alderson, B., and Rolfe, B., were careful in g themselves against countenancing the rule that a m pays money is not entitled to demand a receipt, Ro saying: "I should be sorry to hold this to be a bad te account of the receipt having been mentioned. I shou to encourage all prudent people to take receipts."

Stamp Act, 1891.

The statute 43 Geo. III. c. 126 has been repealed receipt stamps are now regulated by the Stamp Act, 1 Any person giving any receipt liable to duty and n stamped, or when a receipt would be liable to duty ref give a receipt duly stamped, incurs a penalty of This, in effect, throws the obligation of paying the am the duty (*i*) upon the creditor; and it is submitted that regard to the terms of the Stamp Act, 1891, and to t going authorities, a tender merely accompanied with a for a stamped receipt is not conditional. But it seem be altogether clear whether a tender made expre *condition* that a receipt be given is not conditional (*k*

Tender can be pleaded to liquidated claim only.

Tender can be pleaded only to a liquidated claim, to a claim for damages (*l*).

Defence of tender.

With a defence setting up a tender before action, of money alleged to have been tendered must be brou Court (*m*). If, therefore, the money is not brought in

(*d*) 8 Dowl. 442; 59 R. R. 833, *coram* Coleridge, J.
(*e*) 8 M. & W. 298; 10 L. J. Ex. 303.
(*f*) By 33 & 34 Viet. c. 99.
(*g*) 54 & 55 Viet. c. 39, ss. 101—103.
(*h*) *Ibid.* s. 103.
(*i*) Receipt given for, or upon the payment of, money amoun or upwards, 1d., with certain exemptions: 1st Sched. to Act.
(*k*) It was held in *Bavius* v. *L. & S. W. Bank* (1899) 16 Time C. A., that an order for the payment of money, "provided" a recei thereto was signed by the payee, was not a cheque, *i.e.*, not an un order for payment.
(*l*) *Dearle* v. *Barrett* (1834) 2 A. & E. 82; 3 Dowl. P. C. 13 *Richardson* (1888) 20 Q. B. D. 722; 21 Q. B. D. 202; 57 L. J. Q. B.
(*m*) R. S. C., O. 22, r. 3. This was also the rule at common & L. Pl. 3rd ed. 694; *per* Wilde, C.J., in *Dixon* v. *Clarke* (1848) 5 at 377; 16 L. J. C. P. 237; 75 R. R. 747, cited *ante*, 890. For the payment into Court, see *per* Crompton, J., in *James* v. *Vane* (1850) 883, at 888—889; 29 L. J. Q. B. 169; 119 R. R. 988.

the plea will be ineffectual, and the plaintiff may apply to the Court or a Judge for judgment for the amount alleged to have been tendered (*n*).

It has been seen that a tender of part of one entire and indivisible demand is bad (*o*); and if the plaintiff succeeds in an action on one indivisible claim, although the defendant has in fact tendered part, and pleaded tender of the amount and paid it into Court, the plaintiff will, it seems, be deemed to have recovered the whole amount (*p*).

But where the claim is made up of an aggregate of separable items, and the defendant pleads and proves a tender in respect of some of them (*q*), and has paid the amount into Court, if the plaintiff recover more, he is deemed to have received only the excess (*r*). So also if on such a claim the defendant pay into Court a sum of money with a plea of tender as to some of the items, and a further sum in satisfaction or with denial of liability, and the plaintiff take both sums out of Court, he is deemed to have recovered only the excess above the tender (*s*).

This question is of no small practical importance, as the plaintiff's right to costs and the scale of costs depend upon the amount *recovered*.

Payment by bill or note: absolute or conditional.

Presumed conditional, unless contrary intention shown.

The payment for goods may by the contract be agreed to take effect in a negotiable security, as in a promissory note or bill of exchange, and the agreement may be that the payment thus made is absolute or conditional. In the absence of any agreement, express or implied, to the contrary, a payment of this kind is always understood to be conditional, the seller's right to the price reviving on non-payment of the security (*t*).

(*n*) This seems to be a necessary inference from the rule, and it was so at common law: *Chapman* v. *Hicks* (1834) 2 Cr. & M. 633; 3 L. J. (*N. S.*) Ex. 219. As to an application for judgment upon admissions of fact, see R. S. C., O. 32, r. 6.

(*o*) *Dixon* v. *Clarke* (1848) 5 C. B. 365; 16 L. J. C. P. 237; 75 R. R. 747, *ante*, 890.

(*p*) See *per* Cockburn, C.J., in *James* v. *Vane* (1860) 2 E. & E. 883, at 887; 29 L. J. Q. B. 169, at 171; 119 R. R. 988.

(*q*) If the defendant tender *less* than the whole amount due *generally*—*i.e.*, without appropriating the tender to any specific items—this will not be a good tender in respect of any item: *Hardingham* v. *Allen* (1848) 5 C. B. 793; 17 L. J. C. P. 198; 75 R. R. 839, set out *ante*, 892.

(*r*) *James* v. *Vane*, *supra*, overrg. *Cooch* v. *Maltby* (1854) 23 L. J. Q. B. 305, and affg. *Dixon* v. *Walker* (1840) 7 M. & W. 214; 10 L. J. Ex. 43.

(*s*) *Scott's Standard Tyre Co.* v. *Northern Wheeleries Cycle Co.* [1899] 2 I. R. 34; and see Bull. & L. Pl. 3rd ed. 694.

(*t*) The seller is then deemed to be an "unpaid seller" within the meaning of the Code: s. 38, set out *post* 951. The rule of conditional payment applies only to *negotiable* instruments: *James* v. *Williams* (1845) 13 M. & W. 828; 14 L. J. (N. S.) Ex. 220; aff. in Ex. Ch. (1848) 2 Ex. 798. As to what instruments are negotiable, see the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 8 (bills), 73 (cheques), 89 (notes). It is conceived that cheques crossed

But if a dispute arise as to the intention of the parties question is one of fact for the jury (*u*).

Where creditor would lose a higher remedy.

But it has been said that the legal implication o creditor's assent that a negotiable instrument shall oper conditional payment does not arise where, if it did, the cr would be deprived of a superior remedy to that on the i ment, as, *e.g.*, where the debt arises under seal (*x*).

The intention to take a bill in absolute payment for sold must be clearly shown, and not deduced from ambi expressions, such as that the bill was taken "in payment the goods (*y*), or 'in discharge" (*z*), or "in settlement of the price. Lord Kenyon said, in *Stedman* v. *Gooc* that "the law is clear that if in payment of a debt the cr is content to take a bill or note payable at a future da cannot legally commence an action on his original debt such bill or note becomes payable, and default is made payment; but if such bill or note is of no value, as i example, drawn on a person who has no effects of the dr in his hands, and who therefore refuses to accept it, in case he may consider it as waste paper, and resort original demand (*b*), and sue the debtor"; and this

Payment does not necessarily mean satisfaction and discharge.

was quoted by Tindal, C.J., in *Maillard* v. *The Du Argyle* (*c*), to show that the word "payment" does not sarily mean payment in satisfaction and discharge.

The authorities in support of the rule that, in the a of stipulation to the contrary, the negotiable security i considered to be a conditional payment, defeasible dishonour of the security, need not be reviewed, as ther conflict on the point (*d*).

"Not negotiable" (B. of E. Act, s. 76) are negotiable instruments wi rule: see ss. 8 and 81; and Butterworth's Bankers' Advances, 8.

(*u*) *Goldshede* v. *Cottrell* (1836) 2 M. & W. 20; 6 L. J. Ex. Langdale, M.R., in *Sayer* v. *Wagstaff* (1842) 5 Beav. 423; 13 L. J. 59 R. R. 540; *Burliner* v. *Royle* (1880) 5 C. P. D. 354.

(*x*) *Per* Maule, J., in *Belshaw* v. *Bush* (1851) 11 C. B. 191; C. P. 25, quoted by Farwell, L.J. *obiter*, in *Henderson* v. *Arthu* 1 K. B. 10, C. A.; 76 L. J. K. B. 22; followed in *Re J. Defries & Son* 2 Ch. 423; 78 L. J. Ch. 720, where Warrington, J., explains *Palmer* v. [1895] 2 Q. B. 405, C. A., as a case where the creditor agreed to security. But see *Baker* v. *Walker* (1845) 14 M. & W. 465; 14 L. J. where the Court drew no distinction between judgment and other de *Re A Debtor* [1908] 1 K. B. 344, C. A.; 77 L. J. K. B. 409.

(*y*) *Stedman* v. *Gooch* (1793) 1 Esp. 5; *Maillard* v. *Duke of Argy* 6 M. & G. 40.

(*z*) *Kemp* v. *Watt* (1846) 15 M. & W. 672.

(*a*) *Re Romer and Haslam* [1893] 2 Q. B. 286; 62 L. J. Q. B. 610

(*b*) See also *Hickling* v. *Hardey* (1817) 1 Moo. 61; 7 Taunt. 312.

(*c*) *Supra*.

(*d*) *Kearslake* v. *Morgan* (1794) 5 T. R. 513; *Puckford* v. *Maxw* 6 T. R. 52; *Owenson* v. *Morse* (1796) 7 T. R. 64; *Simon* v. *Llo*

Validity of payment until defeasance.

The payment takes effect from the delivery of the bill (*e*), but is defeated by the happening of the condition, *i.e.*, non-payment at maturity (*f*).

"The title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that . . . a negotiable security given for such a purpose is a conditional payment of the debt (*g*), the condition being that the debt revives if the security is not realised. This is precisely the effect which both parties intended the security to have, and the doctrine is as applicable to one species of negotiable security as to another, to a cheque payable on demand as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person" (*h*).

Where seller elects to take bill instead of cash, payment absolute.

If the seller take a negotiable security in preference to payment in cash, and whether cash has been offered or not, the security is deemed to be taken as an absolute, not a conditional, payment (*i*).

Taking a cheque is not such an election.

But a man who prefers a cheque (*k*) on a banker to payment in money is not considered as electing to take a security

2 C. M. & R. 187 (blank for drawer); *Sard* v. *Rhodes* (1836) 1 M. & W. 153; 5 L. J. (N. S.) Ex. 91 (absolute payment); *Sibree* v. *Tripp* (1846) 15 *Ibid.* 23; 15 L. J. Ex. 318; 71 R. R. 545 (same); *James* v. *Williams* (1845) 13 M. & W. 828; 14 L. J. (N. S.) Ex. 220; *Belshaw* v. *Bush* (1851) 11 C. B. 191; 22 L. J. C. P. 24; 87 R. R. 639 (third party's bill); *Valpy* v. *Oakley* (1851) 16 Q. B. 941; 20 L. J. Q. B. 380; 83 R. R. 786; *Crowe* v. *Clay* (1854) 9 Ex. 604; 23 L. J. Ex. 150; 96 R. R. 867; *Griffiths* v. *Perry* (1859) 1 E. & E. 680; 28 L. J. Q. B. 204; 117 R. R. 397; *Currie* v. *Misa* (1875) L. R. 10 Ex. 153; 44 L. J. Ex. 94, *per Cur.* at 163; *Cohen* v. *Hale* (1878) 3 Q. B. D. 371; 47 L. J. Q. B. 496 (payment by a cheque).

(*e*) Sending half a bank-note, with the intention of sending the other half later, is an inchoate act, and does not amount to payment: *Smith* v. *Mundy* (1860) 3 E. & E. 22; 29 L. J. Q. B. 172.

(*f*) *Belshaw* v. *Bush supra*; *Turney* v. *Dodwell* (1854) 3 E. & B. 136; 23 L. J. Q. B. 137; 97 R. R. 409; *Ex parte Matthew* (1884) 12 Q. B. D. 506, C. A.; *Felix, Hadley & Co.* v. *Hadley* [1898] 2 Ch. 680; 67 L. J. Ch. 694.

(*g*) Therefore a debt for which a cheque has been given cannot be attached while the cheque is unpresented: *Elwell* v. *Jackson* (1885) 1 T. L. R. 454, C. A.; *cf. Cohen* v. *Hale* (1878) 3 Q. B. D. 371.

(*h*) *Per* Lush, J., in delivering the judgment of the Ex. Ch. in *Currie* v. *Misa*, *supra*.

(*i*) *Marsh* v. *Pedder* (1815) 4 Camp. 257 (offer of cash); *Strong* v. *Hart* (1827) 6 B. & C. 160; 5 L. J. (O. S.) K. B. 82; 30 R. R. 272 (no offer of cash necessary); *Smith* v. *Ferrand* (1827) 7 B. & C. 19; 5 L. J. K. B. 355 (offer of cash); *Robinson* v. *Read* (1829) 9 B. & C. 449; 7 L. J. K. B. 236 (creditor has no option); *Anderson* v. *Hillies* (1852) 12 C. B. 499; 21 L. J. C. P. 150; 92 R. R. 775 (creditor refuses cheque; takes letter of credit); *Lichfield Union* v. *Greene* (1857) 1 H. & N. 884; 26 L. J. Ex. 140; 108 R. R. 877; *The Huntsman* [1894] P. 214 (principle stated).

(*k*) For definition of cheque, see B. of E. Act, 1882, s. 73.

instead of cash, for a cheque is accepted as a particular f
of *cash* payment, and if dishonoured, the seller may reso
his original claim on the ground that there has bee
defeasance of the condition on which it was taken (*l*).

When cheque not presented in time.

But if a cheque received in payment is not pres
within a reasonable time (*m*), and the debtor is injure
the delay, the cheque will operate as an *absolute* payme
the debt (*n*). At common law, the holder in such a case ha
lost his remedy on the cheque, and the drawer was absol
discharged from liability thereon, although he
eventually receive from his banker a dividend of eig
shillings in the pound (*o*). But now by virtue of the B
Exchange Act, 1882 (*p*), the drawer is discharged to the
only of the actual damage which he has suffered throu
delay—*i.e.*, to the extent to which he is a creditor of his b
to a larger amount than he would have been had such
been paid—and to the extent of such discharge the hol
the cheque is given a remedy against the banker by
declared to be a creditor in lieu of the drawer of such b
from whom the holder is entitled to recover the amount.

If, however, the drawer of the cheque suffer no dama
is not discharged from his liability on the cheque by an
short of six years (*q*).

Bill or note taken absolutely is payment of the price.

Whenever it can be shown to be the intention of the
that a bill or note should operate as absolute payment, t
buyer will no longer be indebted for the *price* of the
although he may be responsible on the security (*r*).

Seller suing for price must account for bill or note, even when received conditionally.

But although a bill or note be taken only as condition
ment, yet as it is *prima facie* evidence of payment, th
must account for it before he can revert to the original
and demand payment of the price.

(*l*) *Everett* v. *Collins* (1810) 2 Camp. 515; 11 R. R. 875; *Smith*
(1827) 7 B. & C. 19, at 24, 25; 5 L. J. K. B. 355; *Anderson* v. *H*
899 (i); *Cohen* v. *Hale* (1878) 3 Q. B. D. 371; 47 L. J. Q. B. 496.

(*m*) As to reasonable time for presenting a cheque, see B. of E.
s. 74 (2).

(*n*) *Hopkins* v. *Ware* (1869) L. R. 4 Ex. 268; 38 L. J. Ex. 14

(*o*) *Alexander* v. *Burchfield* (1842) 7 M. & G. 1061; 11 L.
C. P. 253; *Bailey* v. *Bodenham* (1864) 33 L. J. C. P. 252.

(*p*) 45 & 46 Vict. c. 61, s. 74 (1) and (3).

(*q*) *Laws* v. *Rand* (1857) 3 C. B. (N. S.) 442; 27 L. J. C. P. 76
739.

(*r*) *Sibree* v. *Tripp* (1846) 15 M. & W. 23; 15 L. J. Ex. 318; 7
Lichfield Union v. *Greene* (1857) 1 H. & N. 884; 26 L. J. Ex. 14
877; *Sard* v. *Rhodes* (1836) 1 M. & W. 153; 5 L. J. (N. S.) Ex. 91;
Allenby (1827) 6 B. & C. 381; 5 L. J. K. B. 95; 30 R. R. 358; *Lew*
(1835) 2 C. M. & R. 704.

In *Price* v. *Price* (*s*), the defendant pleaded to an action of debt that he had given his promissory note at six months to the plaintiff, who took and received it "for and on account" of the debt. Replication, that the time had expired before the commencement of the action, etc., and that the defendant had not paid. Special demurrer, assigning for causes that the replication did not show that the plaintiff held the note, and that it was consistent with the replication that the note might have been indorsed away, and payable to some other person. Joinder in demurrer. *Held* after consideration, Parke, B., giving the judgment of the Court, that it lay on the defendant to make the first averment that the note had been indorsed away, it being *his own note*, which he was bound to pay, and not on the plaintiff to aver the negative in his replication; but *secus*, if it had been the note of a third person. *Price* v. *Price* (1847).

In the case of the debtor's own note, he must show either that the note is not due, or (the presumption being that it remains in the creditor's hands) that it is outstanding in the hands of a third person.

It will be perceived that it was taken for granted in the above case that the seller could not recover the price if he had parted with the negotiable security, and the reason is obvious, for the buyer would thus be compelled to pay twice, once to the seller and again to the holder of the bill; and the seller would thus receive payment twice, once when he passed away the bill and again when he obtained the price. Reason why seller must account for the security.

The rule has been thus stated in a recent case: "It is perfectly true that taking a bill is only a conditional payment. It is a payment if the bill is paid, and, if it is in your hands when it becomes due and is dishonoured the debt revives. But if you have availed yourself of the character of the bill as a negotiable instrument, and have passed it out of your possession, so that the right to proceed on that bill is vested in some one else, and not in you, at the date of the dishonour, the suspension of the debt continues just as much as if the bill was not overdue. . . . The satisfaction or suspension lasts only so long as the bill is not overdue, unless you have parted Rule stated by Moulton, L. J.

(*s*) 16 M. & W. 232; 16 L. J. Ex. 99; 73 R. R. 476, overrg. *Mercer* v. *Cheese* (1842) 4 M. & G. 804; 12 L. J. C. P. 56. See also *National Savings Bank* v. *Tranah* (1867) L. R. 2 C. P. 556; 36 L. J. C. P. 260 (note overdue held for creditor); *Hadwen* v. *Mendizabel* (1825) 10 Moore 477; 3 L. J. C. P. 198 (same).

with it, so that another person is *dominus* of the bill, a
it lasts until you have got it back into your possession

And the rule has been so strictly interpreted as to
the seller suing for the price of goods for which
received a bill when the bill was in the hands of a thir
at the date of the commencement of the action, though
in the seller's hands at the time of trial (*u*). So, also
the bill was outstanding at the time of a bankruptcy
against the debtor, but in the creditor's hands when
sented his petition, the bankruptcy notice was held
invalid (*x*). But where the buyer's acceptance had g
into his hands and had not been paid by him, it was h
the seller might recover on the original consideration, a
the bill was not produced (*y*).

Notice of dishonour to drawer and indorsers.

It is not proposed to discuss here the rules of the la
chant with respect to giving notice of dishonour to the
of a bill or to an indorser of a negotiable instrumen
those rules the reader is referred to the various well
treatises on the law of bills of exchange, and to the pr
of the Bills of Exchange Act, 1882 (*z*). The genera
quence of neglecting to give due notice is that th
entitled to receive it is discharged from all liability
on the instrument or on the consideration (*a*).

A person may perhaps in some cases be entitled to
dishonour, although he is not himself a party to the
ment (*aa*).

Where bill or note given by buyer is not his own.

If the bill or note given in conditional payment
buyer be not his own, but that of some third person,
lies upon the seller to allege and prove the dishonour
an action against the buyer for the price (*b*); and th
in such a case is bound to use due diligence in taking

(*t*) *Per* Fletcher Moulton, L.J., in *Re A Debtor* [1908] 1 K
77 L. J. K. B. 409, C. A.

(*u*) *Davis* v. *Reilly* [1898] 1 Q. B. 1; 66 L. J. Q. B. 844, *coram* V
and Kennedy, J.

(*x*) *Re A Debtor, ex parte The Debtor, supra.* This case, se
rules *Burden* v. *Hatton* (1828) 4 Bing. 454; 6 L. J. C. P. 61, which
to *Davis* v. *Reilly, supra.* See also *Re Raatz* [1897] 2 Q. B. 89;
Q. B. 501.

(*y*) *Widders* v. *Gorton* (1857) 1 C. B. (N. S.) 576; 26 L. J.
107 R. R. 800, not cited in *Davis* v. *Reilly.*

(*z*) 45 & 46 Vict. c. 61, ss. 48—50 (bills), s. 73 (cheques), s. 8

(*a*) *Bridges* v. *Berry* (1810) 3 Taunt. 130; 12 R. R. 618; *Peac*
sell (1863) 14 C. B. (N. S.) 728; 32 L. J. C. P. 266; 135 R. R. 87
Act, s. 48.

(*aa*) See *Smith* v. *Mercer, post*, 9

(*b*) *Price* v. *Price* (1847) 16 M. & W. 232, at 241; 16 L. J.
R. R. 476, *ante*, 901.

steps necessary to obtain payment of the security (*c*), and to preserve the rights of the buyer, if a party to the instrument, against all the parties thereto who were liable for its payment to the buyer when he passed it to the seller: and, in default of the performance of this duty, the buyer is discharged from the obligation of paying either the price of the goods or the bill or note given as conditional payment (*d*).

Seller must show due diligence in collecting it, or buyer will be discharged from payment of price.

The leading case on this subject is *Camidge* v. *Allenby* (*e*). The buyer gave the seller in payment for goods sold at York on Saturday, the 10th of December, country bank-notes of a bank at Huddersfield. The notes were given at three o'clock in the afternoon, and the bank had stopped payment at eleven o'clock the same morning, neither party knowing the fact when the payment was made. The seller did not circulate the notes, nor present them to the bankers for payment (*f*), nor did he give the buyer notice that the bank was insolvent, and that he would look to him, the buyer, to pay the amount. On the following Saturday, the 17th, the seller asked the buyer to pay him the amount of the notes, offering at the same time to return them. *Held*, that the notes were either taken as money, in which case the risk of everything but forgery was assumed by the party receiving them (*g*), or that they were received as negotiable instruments, in which case the seller had discharged the buyer by his laches (*d*), in keeping the notes a week after he had heard of the stoppage, without notice to the defendant of the bank's insolvency (*h*).

Camidge v. *Allenby* (1827).

(*c*) Presentment for payment not being necessary as against the maker of a note, of acceptor of a bill accepted generally, so a buyer, not being a party to the note or such a bill of a third person, is not discharged by non-presentment: *Goodwin* v. *Coates* (1832) 1 M. & Rob. 221; *Walton* v. *Mascall* (1844) M. & W. 452; 14 L. J. Ex. 54; 67 R. R. 671; B. of E. Act, s. 54 (1).

(*d*) See *Bridges* v. *Berry* (1810) 3 Taunt. 130; 12 R. R. 618; *Anderton* v. *Beck* (1812) 16 East, 248; 14 R. R. 344; *Soward* v. *Palmer* (1818) 8 Taunt. 277; 19 R. R. 515; *Peacock* v. *Pursell* (1863) 14 C. B. (N. S.) 728; 32 L. J. C. P. 266; 135 R. R. 875. See, however, *Bishop* v. *Rowe* (1815) 3 M. & S. 362 (defendant no party to bill given).

(*e*) 6 B. & C. 373; 5 L. J. (N. S.) 95; 30 R. R. 358. See also *Henderson* v. *Appleton* (1827) Chitty on Bills, 11th ed., 259, n. (*u*), more fully in 9th ed. 356, n. (*t*); *Rogers* v. *Langford* (1833) 1 Cr. & M. 637, at 642; *Turner* v. *Stones* (1843) 1 D. & L. 122; 12 L. J. Q. B. 303; 67 R. R. 846; *Robson* v. *Oliver* (1847) 10 Q. B. 704; 16 L. J. Q. B. 437; 74 R. R. 477.

(*f*) Presentment was, however, unnecessary, the bank being insolvent: *Turner* v. *Stones* and *Robson* v. *Oliver*, *supra*.

(*g*) See on this point *Lichfield Union* v. *Greene* (1857) 1 H. & N. 884; 26 L. J. Ex. 140; 108 R. R. 877.

(*h*) The ground of the decision is so summarised by Bayley, B., in *Henderson* v. *Appleton*, *supra*; and by the Court in *Turner* v. *Stones* (1843) 1 D. & L. 122, at 129; 12 L. J. Q. B. 303; 67 R. R. 846.

In this case the instrument delivered in payment was a
payable to bearer on demand, of which the buyer was
holder, and so a party thereto (*i*). In the three follo
cases, the buyer was a complete stranger to the instru
and in such cases it will be seen that it is very difficult
under what circumstances the buyer is entitled to noti
dishonour.

Swinyard v. *Bowes* (1816).

In *Swinyard* v. *Bowes* (*k*), the buyer of goods, to whom
Chesner owed money, arranged that the sellers should d
bill payable at two months to their order on Chesner.
accepted it. At maturity the bill was dishonoured
that the sellers could recover the price of the goods, and
the buyer, who had not indorsed the bill, was not entit
notice of dishonour. Bayley, J., moreover, pointed out
according to the evidence, Chesner never could have pai
bill, and therefore the buyer could not have suffered da
from want of notice.

Van Wart v. *Woolley* (1824).

Swinyard v. *Bowes* was recognised as an authority in
Wart v. *Woolley* (*l*), where the buyers, who had sent to
agent a bill drawn and accepted by strangers, payable
agent's order, were held not to be entitled to notice o
honour, they not having indorsed the bill.

Abbott, C.J., in delivering the judgment of the
Bench, said (*m*): "If a person deliver a bill to another
out indorsing his own name upon it, he does not subject
self to the obligations of the law merchant; he cannot b
on the bill either by the person to whom he delivers it,
any other. And as he does not subject himself to the
tions, we think he is not entitled to the advantages."
Lord Chief Justice also dwelt on the absence of any ev
that the buyers had sustained any damage by the w
notice.

Smith v. *Mercer* (1867).

On the other hand, in *Smith* v. *Mercer* (*n*), the buyer
held to be entitled to notice of dishonour, although they
not parties to the bill, nor had they been holders of i
that case, Curry & Co., the buyers' brokers (who had

(*i*) "Holder" is defined by the B. of E. Act, 1882. s. 2, as "t
or indorsee of a bill or note who is in possession of it, or the bearer th
(*k*) 5 M. & S. 62; 17 R. R. 274. See also *per* Bayley, J., in *Ho*
Wilkins (1822) 1 B. & C. 10, at 12; 1 L. J. (O. S.) K. B. 11; 25 R.
and in *Camidge* v. *Allenby* (1827) 6 B. & C. 373, at 381; 5 L. J. K
30 R. R. 358; *Warrington* v. *Furbor* (1807) 8 East. 242 (guaranty
Hitchcock v. *Humfrey* (1843) 5 M. & G. 559; 12 L. J. C. P. 235;
401; (guaranty of price); *Walton* v. *Mascall* (1844) 13 M. & W.
L. J. Ex. 74; 67 R. R. 671 (guaranty of note).
(*l*) 3 B. & C. 439; 3 L. J. (O. S.) K. B. 51.
(*m*) At 445—446 (*n*) L. R. 3 Ex. 51; 37 L. J. E

selves received cash from the buyers), gave the sellers a bill drawn by Burned's Bank in Liverpool on London, on the 20th of February, payable to the order of Curry & Co., and indorsed by them in blank. The sellers put it in circulation, and the bill was not presented for acceptance in London till the 23rd of April, when it was dishonoured, Burned's Bank having failed on the 19th of April. Due notice of dishonour was given to Curry & Co., but not to the buyers. In an action for the price, it was held that, not having received due notice of dishonour, the buyers were discharged, on the ground that their liability was not more extensive than if they had indorsed the bill. And Bramwell, B. (with whom Pigott, B., agreed), said that, either the plaintiffs had taken the bill for better or worse, in which case the plaintiffs were paid, or—as the plaintiffs might have called on the defendants to indorse the bill—with recourse to the defendants, but only as if they had indorsed it, in which case the defendants were entitled to notice of dishonour.

In *Camidge* v. *Allenby* (*o*), as has been already seen, the buyer had been a party to the instrument, and on that ground the case was distinguished from *Swinyard* v. *Bowes* (*p*), and is distinguishable from *Van Wart* v. *Woolley* (*q*). Neither of the two last-mentioned cases was cited in *Smith* v. *Mercer* (*r*), with which they appear to be irreconcilable, and it seems difficult to follow the reasoning of the Judges in the later case (*s*).

Unsettled state of the law.

The cases on the subject are very confused, and it seems impossible to lay down a definite rule as to when a buyer who has made conditional payment by a negotiable instrument to which he is not a party, and of which he was not the holder, will be discharged from liability for the price unless he receives due notice of dishonour.

Seller's duty on taking bank notes in payment.

If the seller takes bank notes in payment, he must present them, or forward them for presentment, or circulate them within a reasonable time—*i.e.*, generally the day after he receives them—in order to enable him, in the event of the bank failing, to sue the buyer (*t*). If, however, before that

(*o*) (1827) 6 B. & C. 373; 5 L. J. K. B. 95; 30 R. R. 358; *ante*, 903.
(*p*) (1816) 5 M. & S. 62; 17 R. R. 274; *ante*, 904.
(*q*) (1824) 3 B. & C. 439; 3 L. J. (O. S.) K. B. 51; *ante*, 904.
(*r*) (1867) L. R. 3 Ex. 51; 37 L. J. Ex. 24, *supra*.
(*s*) See *per* Stuart, V.-C., in *Re British and American S. N. Co., Pearse's Claim* (1869) L. R. 8 Eq. 506, at 508.
(*t*) *Per* Bayley, J., in *Camidge* v. *Allenby* (1827) 6 B. & C. at 282; 5 L. J. K. B. 95; 30 R. R. 358; and see *Lichfield Union* v. *Greene* (1857) 1 H.

time expires, and before the seller has parted with th
he learns that the bank has stopped ; ayment, it is not n
for him to present the notes at the bank, but he m
prompt notice to the buyer and tender him the n
Such notice must be given within a reasonable ti
learning the fact, not necessarily before the expiratio
time for presentment (*r*). If the seller fail in pe
these duties, he will be considered to have made the
own; in other words, the conditional payment for t
will have become absolute.

Effect of loss of bill

The conditional payment inferred from the deliv
negotiable security being defeasible only if the bill b
at maturity, and also be in the creditor's hands, it
that the seller cannot recover the price of the goods s
he has lost the acceptance given by the buyer an
return it (*y*). And the debtor, if sued for the price,
upon this defect in the seller's title, without also alle
the bill is not yet due (*z*). Of course, if the lost
afterwards found, the right would revive (*a*).

If the instrument be negotiable in form, there c
recovery on the original contract without produ
instrument, even though it was drawn payable to th
order (*b*) and lost without having been indorsed by
therefore could not be negotiated (*c*). But if the bil
was not negotiable in form, it would be no defence
its loss (*d*).

& N. 884, at 890—891; 26 L. J. Ex. 140; 108 R. R. 877; Byles on
ed. 282.

(*u*) *Per* Bayley, J., in *Camidge* v. *Allenby*, *ante*, 903; *Henders*
ton (1827) Chitty on Bills, 9th ed. 356, n. (*t*); 11th ed. 259, n. (*o*)
Stones (1843) 1 D. & L. 122; 12 L. J. Q. B. 305; 67 R. R. 846
Bills, 11th ed. 258—259.

(*x*) *Robson* v. *Oliver* (1847) 10 Q. B. 704; 16 L. J. Q. B. 43
477.

(*y*) *Crowe* v. *Clay* (1854) 9 Ex. 604; 23 L. J. Ex. 150; 96 R.
Ch.; revg. Crt. of Ex. (1853) 8 Ex. 295.

(*z*) *Ibid.*

(*a*) *Dent* v *Dunn* (1812) 3 Camp. 296; 13 R. R. 809.

(*b*) See B. of E. Act, 1882, s. 8 (4), under which a bill pa
simply is equivalent to a bill payable to A. or order.

(*c*) *Ramuz* v. *Crowe* (1847) 1 Ex. 167; 16 L. J. Ex. 280; 74
follg. *Hansard* v. *Robinson* (1827) 7 B. & C. 90; 5 L. J. K. B. 24
166; and overrg. *Rolt* v. *Watson* (1827) 4 Bing. 273; 5 L. J. C.
R. R. 563.

(*d*) See *Wain* v. *Bailey* (1839) 10 A. & E. 616; 50 R. R. 514
Crowe, *supra*; *Hansard* v. *Robinson*, *supra*; and *per* Jervis, C.J.,
v. *Grundy* (1854) 14 C. B. 608, at 614; 23 L. J. C. P. 121; 98
See also B. of E. Act, 1882, s. 52 (4), as to the holder of a bi
it up on its payment.

Although the seller who has ' ' a negotiable bill or note given him cannot sue on the original contract, he may bring an action on the bill or no'e, and a Judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to his satisfaction against the claims of any other person upon the instrument (*e*). And where the seller has lost a bill before it is overdue, he will be entitled, on giving security against any claims in respect of the lost bill, to insist upon the drawer's giving him a duplicate bill (*f*). These remedies afforded to the loser of a bill, now given by statute, were formerly only given in equity (*g*).

Seller may sue on lost bill.

The seller loses his right to recover against the buyer either on the bill or on the consideration by materially (*h*) altering the acceptance of a third party given in payment s as to vitiate it, and thus destroying the buyer's recourse against antecedent parties (*i*). But where the buyer is the party *primarily* liable, so that he is not injured by losing recourse to any antecedent parties in consequence of the alteration, the seller may recover on the original contract after the term of credit has expired, notwithstanding the alteration (*k*).

Effect of material alteration of bill.

When the price of goods sold is to be paid by a negotiable security to which the buyer is no party, and without recourse to him in case of dishonour of the security, this may be considered as a species of barter, as was said by Lord Ellenborough in *Read* v. *Hutchinson* (*l*). Or the bills given by the buyer may be deemed to have passed as cash, just as if they were Bank of England notes (*m*). If the securities thus passed,

Where bills to which the buyer is no party are given for the price without recourse to the buyer.

Where such securities are forged, or known by the buyer to be worthless.

(*e*) B. of E. Act, 1882 (45 & 46 Vict. c. 61), s. 70; C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 87, still unrepealed.

(*f*) B. of E. Act, 1882, s. 69.

(*g*) See *Hansard* v. *Robinson* (1827) 7 B. & C. 90; 5 L. J. K. B. 242; 31 R. R. 166; and *Crowe* v. *Clay* (1854) 9 Ex. 604, at 607; 23 L. J. Ex. 150, at 151; 96 R. R. 837.

(*h*) "Any alteration seems to me material which would alter the business effect of the instrument if used for any ordinary business purpose" : *per* Brett, L.J., in *Suffell* v. *Bank of England* (1882) 9 Q. B. D. 555, at 568; 51 L. J. Q. B. 401, C. A.

(*i*) *Alderson* v. *Langdale* (1832) 3 B. & Ad. 66[illegible] K. B. 273; 37 R. R. 513 (time of payment). See further, as to [illegible] of a material alteration of a bill. B. of E. Act, 1882, s. 64, and [illegible] particular material alterations mentioned in sub-section 2. The question o[illegible] materiality is one of law : *Vance* v. *Lowther* (1876) 1 Ex. D. 176; 45 L. J. Ex. 200.

(*k*) *Atkinson* v. *Hawdon* (1835) 2 A. & E. 628; 4 L. J. (N. S.) K. B. 85; [illegible] R. 493.

(*l*) (1813) 3 Camp. 352. See also *Fenn* v. *Harrison* (1790) 3 T. R. 757.

(*m*) As was said in *Camidge* v. *Allenby* (1827) 6 B. & C. 373; 5 L. J. K. B. 95; 30 R. R. 358; and in *Lichfield Union* v. *Greene* (1857) 1 H. & N. 884; 26 L. J. Ex. 140; 208 R. R. 877. See also *Fydell* v. *Clark* (1796) 1 Esp. 447.

however, ere forged or counterfeited, or not what face they purport to be—as if they appeared to be bills needing no stamp, but were really domestic bill for want of a stamp—the seller would have the right t the sale for failure of consideration (*n*). And if the though genuine, were known to the buyer to be when he passed them, his conduct would be deemed lent (*o*), and the seller would be entitled to rescind and bring trover for the goods (*p*).

Seller's duty, where bill is given as collateral security.

If a bill or note be indorsed and given by the buy seller merely as a collateral security, the seller's du same as if the bill had been given in conditional and if he neglect to present, or to give notice of dish the buyer, the buyer will be discharged from liabili bill, and the laches will operate so as to constitute absolute payment *pro tanto* of the original debt (*q*).

Where buyer in a sale for cash gave seller his own dishonoured note.

In one case where goods were sold for cash, t refused to pay cash, and gave the seller his own dis acceptance, past due, and, in the absence of fraud, ment was held to be absolute. But the decision pro the ground of an implied assent to this mode of pay the seller, who had not returned his dishonoured a when sent to him in lieu of cash (*r*).

Sale for bills or for approved bills.

Hodgson v. _Davies_ (1810).

In *Hodgson* v. *Davies* (*s*), Lord Ellenborough be a sale was made on credit for bills at two and four m

1. That the seller must accept or reject the bil within a reasonable time, and five days were long a time to reserve the right of rejection
2. That a sale for bills does not mean *approved* parol evidence to that effect is not admissi the written contract mentions "bills" only
3. That an *approved bill* means a bill to which n able objection could be made, and which ou approved (*t*).

(*n*) See *ante*, 482.

(*o*) *Read* v. *Hutchinson* (1813) 3 Camp. 352; *Noble* v. A 7 Taunt. 59; 17 R. R. 445; *Hawse* v. *Crowe* (1826) R. & Mo Bayley, J., in *Camidge* v. *Allenby* (1827) 6 B. & C. 373, at 382; 5 95; 30 R. R. 358.

(*p*) See *ante*, 519, *et seqq*.

(*q*) *Peacock* v. *Pursell* (1863) 14 C. B. (N. S.) 728; 32 L. J. 135 R. R. 875. See the B. of E. Act, 1882, ss. 45, 46 (presentm ment), and ss. 48—50 (notice of dishonour).

(*r*) *Mayer* v. *Nias* (1823) 1 Bing. 311; 1 L. J. (O. S.) C. P.

(*s*) 2 Camp. 530; 11 R. R. 789.

(*t*) See also *per* Kelly, C.B., in *Smith* v. *Mercer* (1867) L. R. L. J. Ex. 24; *Reid* v. *Snowball Co.* (1905) 7 F. 35.

Payment to agents.

Payment properly made to the seller's duly authorised agent is, of course, the same as if made to the seller himself. Without entering into the general doctrines of the law of agency, it may be convenient to point out that in contracts of sale certain agents have been held entitled to receive payment from their known general authority. Thus, a factor is an agent of a general character, entitled to receive payment and give discharge for the price (*u*); but a broker is not, for he is not entrusted with the possession of the goods (*x*). If, however, he be allowed by his principal to sell the goods *as his own*, the buyer may pay him in any way which would have been sufficient if he had been in fact owner (*y*).

Who are agents to receive price.

Factors are,

brokers not

Shopman.

In *Kaye* v. *Brett* (*z*), Parke, B., delivering the judgment of the Court, said: "If a shopman, who is authorised to receive payment over the counter only, receives money elsewhere than in the shop, that payment is not good." In *Barrett* v. *Deere* (*a*), Lord Tenterden held that payment to a person sitting in a counting-room, and appearing to be entrusted with the conduct of the business, is a good payment; and a tender under similar circumstances is valid (*b*).

Person with apparent authority.

But where the person conducting the business disclaims authority to receive the money, his ostensible authority is negatived, and the payment or tender is made at the risk of there being no actual authority to receive it (*c*).

Finch v. *Boning* (1879).

In *Finch* v. *Boning* (*d*), a tender to a clerk in a solicitor's office of a debt due to the solicitor was held by Lord Coleridge, C.J., to be a good tender, on the ground that the clerk's refusal to receive the money because he had "no instructions" in the matter did not amount to a disclaimer of his authority to receive it, and so did not negative the apparent authority he possessed. Denman, J., however, held

(*u*) *Drinkwater* v. *Goodwin* (1775) Cowp. 251; *Hornby* v. *Lacy* (1817) 6 M. & S. 166; 18 R. R. 345; *per* Wilde, C.J., in *Fish* v. *Kempton* (1849) 7 C. B. 687; 18 L. J. C. P. 206; 78 R. R. 798.

(*x*) *Baring* v. *Corrie* (1818) 2 B. & Ald. 137; 20 R. R. 383; *Campbell* v. *Hassel* (1816) 1 Stark. 233. Stockbrokers, however, appear to be excepted from this rule, and duly authorised to receive payment. Their practice of dealing as principals, according to Stock Exchange usage and rules, is probably the reason for this. As to these rules, see Melsheimer and Gardner's Law and Customs of the London Stock Exchange.

(*y*) *Coates* v. *Lewis* (1808) 1 Camp. 444; 10 R. R. 725. See also *Cooke* v. *Eshelby* (1887) 12 A. C. 271; 56 L. J. Q. B. 505; *post*, 915.

(*z*) (1850) 5 Ex. 269; 19 L. J. Ex. 346; 82 R. R. 659.

(*a*) (1828) Moo. & Mal. 200; 31 R. R. 730.

(*b*) *Willmott* v. *Smith* (1828) M. & M. 238; 31 R. R. 732.

(*c*) *Per* Coleridge, C.J., in *Finch* v. *Boning* (1879) 4 C. P. D. 143.

(*d*) *Supra*. See also *Moffatt* v. *Parsons* (1814) 5 Taunt. 307; 15 R. R. 506.

that the clerk's authority was a disclaimer (as it is sul
it was), and that the case was, therefore, on all fou
Bingham v. *Allport* (*e*), where the clerk had said "he
authority."

Kirton v. *Braithwaite* (1836).

In *Kirton* v. *Braithwaite* (*f*), a tender to a boy
creditor's office was held a good tender, but only on the
that the creditor by requiring payment at his office at
ticular time, had constituted the person there present
time an agent to receive the debt, and the boy was t
person then present at the office. It was agreed by
learned Barons that otherwise the boy would have
authority.

Auctioneers.

An auctioneer employed to sell goods for ready mo
in general authority to receive payment for them (*g*).
conditions of the sale may be such as show that th
intended payment to be made to himself, and in such
payment to the auctioneer would not bind the seller (
it is plain that if the auctioneer act as a mere crier, or
for a principal who has retained the possession of th
the auctioneer has no implied authority to receive pay
the price.

A wife.

A wife has no general authority to receive paymer
husband, and a payment to her, even of money ea
herself, would at common law not bind the husband,
proof of authority express or implied (*i*). But the
payment to the wife of money earned by herself, wh
held to be bad in *Offley* v. *Clay* (*i*) (an action by the h
would, since the Married Women's Property Acts, be
defence in such an action, as under those statutes th
ings of a married woman are made her separate prope
her receipt alone is a good discharge for the same (*k*).

A firm.

A firm has *prima facie* no authority to receive paym
private debt due to one of its partners (*l*).

(*e*) (1833) 1 Nev. & Man. 398; 2 L. J. (N. S.) K. B. 86; 22 R.
(*f*) 1 M. & W. 310; 5 L. J. (N. S.) Ex. 165; 22 R. R. 413; *cf.*
Hetherington (1843) 1 C. & K. 36; 70 R. R. 775, where the princip
payment to himself.
(*g*) *Williams* v. *Millington* (1788) 1 Hy. Bl. 81; 2 R. R. 724; *per*
in *Sykes* v. *Giles* (1839) 5 M. & W. 645; 9 L. J. Ex. 106; 52 R. R.
(*h*) *Sykes* v. *Giles* (1839) 5 M. & W. 645; 9 L. J. Ex. 106;
870; see *Capel* v. *Thornton* (1828) 3 C. & P. 352; 33 R. R. 678; W
Millington, *supra*; *Williams* v. *Evans* (1866) L. R. 1 Q. B. 352;
Q. B. 111, *post*, 912.
(*i*) *Offley* v. *Clay* (1840) 2 M. & G. 172.
(*k*) M. W. P. Acts, 1882 (45 & 46 Vict. c. 75), ss. 1, 2; and 189
Vict. c. 63), s. 1.
(*l*) *Powell* v. *Brodhurst* (1901) 2 Ch. 160; 70 L. J. Ch. 587.

The general rule of law is, that an agent who makes a sale may maintain an action against the buyer in respect of his privity where he has contracted, or is deemed to have contracted, personally, and the principal may also maintain an action in respect of his interest (*m*); but where the agent has himself an interest in the sale, as, for example, a factor or auctioneer for his lien, a plea of payment to the principal or a set-off against him, is no defence to an action for the price by the agent, unless it show that the lien of the agent has been satisfied (*n*).

Purchaser from agent cannot pay principal so as to defeat agent's lien.

In *Catterall* v. *Hindle* (*o*), a full exposition of the law as to the authority to receive payment conferred on agents to sell was given in the decision pronounced by Keating, J. The principles were thus stated: "That a broker or agent employed to sell has *prima facie* no authority to receive payment otherwise than in money, according to the usual course of business, has been well established (*p*); and it seems equally clear that if, instead of paying money, the debtor writes off a debt due to him from the agent, such a transaction is not payment as against the principal, who is no party to the agreement, though it may have been agreed to by the agent. See the judgment of Abbott, C.J., *Russell* v. *Bangley* (*q*); *Todd* v. *Reid* (*r*), the authority of which, upon this point, is not

Payment to agent must be in money in usual course of business.

(*m*) *Per* Lord Abinger in *Sykes* v. *Giles* (1839) 5 M. & W. at 650; 9 L. J. Ex. 106; 52 R. R. 870. It seems that the proposition must be qualified as in the text.

(*n*) *Williams* v. *Millington* (1788) 1 H. Bl. 81; 2 R. R. 724; *Drinkwater* v. *Goodwin* (1775) Cowp. 251; *Robinson* v. *Rutter* (1855) 4 E. & B. 954; 24 L. J. Q. B. 250; 99 R. R. 849, in which *Coppin* v. *Walker* (1816) 7 Taunt. 237; 17 R. R. 505; and *Coppin* v. *Craig* (1816) *ibid.* 243; 17 R. R. 508, are reviewed, and it is pointed out by Lord Campbell, C.J., that the first part of the headnote in *Coppin* v. *Walker* is not borne out by the decision. Both cases were apparently decided on the ground of an estoppel on the plaintiff, the auctioneer, who had sold A.'s goods as being B.'s to the defendant, who had a set-off against B. See also *Grice* v. *Kendrick* (1870) L. R. 5 Q. B. 340; 39 L. J. Q. B. 175 (lien satisfied); *Manley & Sons* v. *Berkett* (1912) 2 K. B. 329; 81 L. J. K. B. 1232 (same).

(*o*) (1866) L. R. 1 C. P. 186; 35 L. J. C. P. 161. The decision was reversed on appeal, the Exchequer Chamber being of opinion that the case involved a question of fact which had not been submitted to the jury: (1867) L. R. 2 C. P. 368.

(*p*) *Sweeting* v. *Pearce* (1859) 7 C. B. (N. S.) 449; 29 L. J. C. P. 265; 121 R. R. 584; aff. (1861) 9 C. B. (N. S.) 534; 30 L. J. C. P. 109; 127 R. R. 766. See also *Pape* v. *Westacott* (1894) 1 Q. B. 279; 63 L. J. Q. B. 222. C. A.; *Scott* v. *Irving* (1830) 1 B. & Ad. 605, 614; 9 L. J. K. B. 89; 35 R. R. 396; *Hine Brothers* v. *Steamship Insurance Syndicate* (1895) 72 L. T. 79, C. A. If, however, payment is made by cheque, and the cheque is duly honoured, that is payment in cash: *Bridges* v. *Garrett* (1870) L. R. 5 C. P. 451; 39 L. J. C. P. 251; foll. in *Walker* v. *Barker* (1900) 16 Times L. R. 393; *Pearson* v. *Scott* (1878) 9 Ch. D. 198; 47 L. J. Ch. 705, where the cases on the authority of an agent to receive payment are reviewed by Fry, J.

(*q*) (1821) 4 B. & A. 398.

(*r*) (1821) 4 B. & A. 210.

affected by the correction as to a fact by Parke, B., in S
v. *Aberdein* (*s*). It has also been held by this Court,
case of *Underwood* v. *Nicholls* (*t*), that the return
agent of his cheque, cashed for him by the debtor a fe
before, was not part payment as against the principa
amounts to no more,' said Jervis, C.J., 'than the
seeking to discharge his debt to the principal, by writ
a debt due to him from the agent, which he has no r
do.' We think the present case the same in princip
Underwood v. *Nicholls*. . . .

Del credere commission does not change agent's authority in this respect.

"It is right to notice, though it was not pressed i
ment as creating a distinction, that Armitage acted
del credere commission from the plaintiff. We thi
makes no material difference as to the question raise
case. The agent selling upon a *del credere* commis
receives an additional consideration for extra risk i
but is not thereby relieved from any of the obligatio
ordinary agent as to receiving payments on account
principal" (*x*).

Auctioneer has no authority to receive an acceptance as cash.

Williams v. *Evans* (1866).

In *Williams* v. *Evans* (*y*), the terms of an aucti
that the purchaser should pay down into the hands
auctioneer a deposit of 5*s*. in the pound in part pay
each lot, remainder on or before the delivery. The
on the 2nd of November, and the goods were to
away by the evening of the 3rd. A purchaser of so
goods having failed to comply with the conditions, hi
resold for 47*l*. 7*s*. on the 4th on the same conditi

(*s*) (1838) 4 M. & W. 224; 7 L. J. (N. S.) Ex. 292; 51 R. R
(*t*) (1855) 17 C. B. 239; 25 L. J. C. P. 79; 104 R. R. 675.
(*u*) A *del credere* commission was defined by Lord Ellenborou
v. *Cleasby* (1816) 4 M. & S. 566; 16 R. R. 544, as "the premi
given by the principal to the factor for a guarantee." Disap
expressed by his Lordship of the *dicta* in *Grove* v. *Dubois* (1786) 1
16 R. R. 664, n.; and in *Houghton* v. *Matthews* (1803) 3 Bos.
R. R. 815. See also Story on Agency, ed. 1882, § 33, p. 36; *Hor*
(1817) 6 M. & S. 166; 18 R. R. 345; *Couturier* v. *Hastie* (1852) 8
L. J. Ex. 97 (no guaranty under s. 4 of Statute of Frauds); *Ex*
(1870) 6 Ch. 397; 40 L. J. Bkcy. 73; (1873) in H. of L., 21
(agency and sale distinguished); *Thomas Gabriel & Sons* v. *Chu*
1 K. B. 449; 83 L. J. K. B. 491 (agent's liability stated).
(*x*) See also *Bartlett* v. *Pentland* (1830) 10 B. & C. 760; 8
264; 34 R. R. 560; insurance broker: usage to set off agent's
policy moneys; *Underwood* v. *Nicholls* (1855) 17 C. B. 239; 25 L.
104 R. R. 675 (payment to agent by returning his cheque); *Faren*
(1809) 11 East, 36; 10 R. R. 425 (apportionment of general paym
different principals); *Pearson* v. *Scott* (1878) 47 L. J. Ch. 705;
(payment by credit in account with agent); Story on Agency, § 9
evidence required of an agent's authority to take a bill in
Hogarth v. *Wherley* (1875) L. R. 10 C. P. 630; 44 L. J. C. P.
(*y*) L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

bought by the defendant, and delivered to him on the 7th. On that day the plaintiffs, the sellers, doubting the auctioneer's solvency, told the defendant not to pay him any money. The defendant proved that he had paid the auctioneer on the 4th 32*l.* in money, and had given him for the remainder a bill of exchange for 15*l.* 7*s.* on the 5th of November, accepted by a third person, which was paid on the 9th, and that the auctioneer had agreed to take this bill as cash. The jury found the payment to be a good one. A rule was made absolute to enter a verdict for the plaintiffs for 15*l.* 7*s.* on the ground that the auctioneer had no authority to give credit. The delivery of the bill was not a good payment for the 15*l.* 7*s.*, the auctioneer having no authority to accept the bill as cash, but *semble*, in accordance with the dictum of Holt, C.J., in *Thorold* v. *Smith* (*z*), the jury might have found it a good payment if made by cheque, it being customary to pay by cheque (*a*).

Semble, secus as to cheque.

Even where an agent has no actual authority to receive cash, he may have an ostensible authority by virtue of an estoppel on his principal.

Traveller.

Thus in *International Sponge Importers* v. *Andrew Watt & Sons* (*b*), the respondents had for some years dealt with the appellants through the appellants' traveller. It was the duty of the traveller to forward to his principals particulars of the bargain, and the appellants then sent an invoice, and every month a statement of account, containing notices that cheques must be crossed and made payable to the appellants, and that no receipt would be valid except on the printed form attached. On the top of the statement of account were the words "Terms 2½ per cent. discount for prompt cash," and on some of the documents sent the words "terms strictly net," and "cheques to be crossed 'National Provincial Bank of England—account payees.'" The traveller persuaded the respondents on two occasions to pay him by cheque payable to him and uncrossed, and on the third in notes and gold, which he fraudulently appropriated. *Held* by the House of Lords

International Sponge Importers v. *Andrew Watt & Sons.* (1911).

(*z*) (1708) 11 Mod. 87. See also *per* Holt, C.J., in *Ward* v. *Evans* (1703) 2 Ld. Raym. 930.

(*a*) See *per Cur.* in *Pape* v. *Westacott* [1894] 1 Q. B. 272; 63 L. J. Q. B. 222, C. A., where the Court say that some proof must be given that taking a cheque is the usual course of business, as in *Russell* v. *Hankey* (1794) 6 T. R. 12; 3 R. R. 102; and they show that *Bridges* v. *Garrett* (1870) 5 C. P. 451; 39 L. J. C. P. 251, turned on the cheque having been *paid*; but see *Farrer* v. *Lacy, Hartland & Co.* (1885) 31 Ch. D. 42; 55 L. J. Ch. 149, C. A.

(*b*) [1911] A. C. 279; 81 L. J. P. C. 12.

that the payments made by the respondents were valid a
the appellants.

Lords Loreburn, L.C., and Atkinson held that the r
dents had no express notice that the traveller w
authorised to receive cash, the directions on the f
account being equivocal, and admitting of the const
that he might receive cash; at any rate, that the tr
held a wide authority, and on previous occasions had r
cheques payable to his order and uncrossed, as to wh
complaint had been made by the appellants.

Lord Shaw of Dunfermline held also that the respo
had not been clearly fixed with notice of any limitation
traveller's authority, and that the respondents might
ably infer that an agent having possession of the goo
trusted to collect moneys, might have authority t
better terms for his employers by accepting cash,
equivalent, a cheque payable at once, and that they
good faith so believe.

Set-off against agent may be good against principal by estoppel.

So too a set-off of an agent's debt to the buyer (w
ordinarily no payment to the principal), yet may
so by way of estoppel, as where the principal has so
to enable the agent to sell in the character of a princi
is not sufficient, to make the set-off available, that th
should have sold in his own name, for that is consist
agency; the buyer must have been induced by the co
the principal to believe, and must in fact have believ
the agent was selling on his own account (*c*).

Agent in possession representing himself as owner. *Ramazotti* v. *Bowring* (1860).

In *Ramazotti* v. *Bowring* (*d*), the plaintiff, in an a
debt, gave evidence that he was the owner of a
carried on under the name of "The Continental Wi
pany," and that the goods had been delivered
company to the defendants. It was proven, howev
one Nixon, the plaintiff's clerk and manager, had
defendants that the business was his own, and had a
furnish the goods to the defendants in part payment
of his own to the defendants. An invoice for the
"From the Continental Wine Company, J. Ramazot
signed as received by one of the defendants. Invoi
sent for the wine, *not* containing the plaintiff's n
headed "The Continental Wine Company," and in

(*c*) *Cooke* v. *Eshelby* (1887) 12 A. C. 271; 56 L. J. Q. B. 505
Clagett (1797) 2 S. L. C. 8th ed. 118; 11th ed. 138; 4 R. R. 462;
Forwood (1893) 2 Q. B. 350, C. A.

(*d*) 29 L. J. C. P. 30; 7 C. B. (N. S.) 851; 121 R. R. 750.

words "J. Nixon, Manager," were written underneath. The learned Common Serjeant left to the jury the question whether Nixon or the plaintiff was the owner of the business, telling them that if Nixon were the owner, the verdict should be for the defendants, but that if the plaintiff were the owner, he was entitled to recover. The Court held this a misdirection, Erle, C.J., saying: "The proper question to have asked the jury would have been, whether they were of opinion that the plaintiff had enabled Nixon to hold himself out as being the owner of these goods, and whether Nixon did in fact so hold himself out to the defendants as such owner. Then . . . I am of opinion that an undisclosed principal, adopting the contract which the agent has so made, must adopt it *in omnibus*, and take it, therefore, subject to any right of set-off which may exist" (*e*).

Pratt v. *Willey* (1826).

In *Pratt* v. *Willey* (*f*), the defendant, a tailor, made a bargain with one Surtees to furnish him clothes on credit, for which Surtees agreed to furnish the defendant on credit coals, which he represented as belonging to himself, and gave a card, on which was written, "Surtees, coal merchant, etc." The coals really belonged to the plaintiff, who had employed Surtees as his agent to sell them, and when the coals were sent, the name *of the plaintiff* was on the tickets as the seller. On these facts, Best, C.J., told the jury that the defendant ought to have made inquiries into the nature of the situation of Surtees, and should not after that have dealt with him as principal. The question of liability was left to the jury, who found for the plaintiff for the price of the coals.

Cooke v. *Eshelby* (1887).

In *Cooke* v. *Eshelby* (*g*), Livesey & Co., cotton brokers at Liverpool, on behalf of Maximos, sold in their own names to Cooke & Sons a quantity of cotton. Maximos authorised Livesey & Co. not to mention his name, but he did not forbid them to do so or authorise them to contract as principals. The buyers knew that the brokers acted sometimes for principals and sometimes on their own account, and in this transaction had no belief as to the character filled by the

(*e*) The Judges, however, all intimated that there had been no contract of sale at all, that the goods had been misappropriated by the agent, and that the plaintiff . . . have recovered . . . over for the tort. See also on the general que . . . *menza* v. *Lainsley* (1865) 18 C. B. (*N. S.*) 467; 34 L. J. C. P. 161; . . . t. 573 (knowledge of agency, but not of principal); *Drake-ford* v. *Pier* . . . , 7 B. & S. 515; *Borries* v. *Imperial Ottoman Bank* (1873) L. R. 9 C. P. . . ; 43 L. J. C. P. 3; *Ex parte Dixon* (1876) 4 Ch. D. 133; 46 L. J. Bk. 20, C. A. (sale by factor; principal bound by set-off).

(*f*) 2 C. & P. 350. See also *Cooper* v. *Strauss & Co.* (1898) 14 Times L. R. 233 (hop trade; custom alleged to treat agent as being principal).

(*g*) 12 A. C. 271; 56 L. J. Q. B. 505.

brokers, but dealt with them as principals. In an acti
the price by the trustee of Maximos, who had faile
buyers claimed to set off Livesey & Co.'s indebtedness t
on a general balance of account. *Held*, by the C
Appeal and by the House of Lords, that the seller
entitled to succeed, as they had not induced the bu
believe, nor had the buyers in fact believed, that the
were selling as owners. The principle was thus sta
Lord Watson (*h*): "In order to sustain the defence
by the appellants, it is not enough to show that the ag
the goods in his own name. It must be shown *that*
the good as his own, or, in other words, that the circum
attending the sale were calculated to induce, and did
in the mind of the purchaser a reasonable belief (*i*)
agent was selling on his own account, and not for a
closed principal; and it must also be shown that th
was enabled to appear as the real contracting party
conduct, or by the authority, express or implied, of t
cipal. The rule . . . rests upon the doctrine of esto

Appropriation of payments.

Where the buyer owes more than one debt to th
and makes a payment, it is his right, at the time of
to apply, or, in technical language, appropriate, the pa

Buyer has the right to make the appropriation.

whichever debt he pleases (*k*). If the seller be unw
apply it to the debt for which it is tendered, he mu
it, and stand upon his rights, whatever they might
it makes no difference that the creditor may say he
accept the payment as offered, if he actually receiv
the law regards what he *does*, not what he *says*
creditor may, however, on receipt of the money,
counter-proposal as to its appropriation; and if the d
or do nothing by way of showing any objection, the
evidence that he has acquiesced in the suggested a
tion (*m*).

(*h*) 12 A. C. at 278; 56 L. J. Q. B. 505.

(*i*) And means of knowledge is only evidence of actual kno
need not be negatived in the plea: *Borries* v. *Imp. Ott. Bank* (18
C. P. 38; 43 L. J. C. P. 3.

(*k*) *Peters* v. *Anderson* (1814) 5 Taunt. 596; 15 R. R. 592
Ingham (1823) 2 B. & C. 65; 1 L. J. K. B. 234; 26 R. R. 2
Fowkes (1839) 5 Bing. N. C. 455; 8 L. J. C. P. 276; 50 R. R. 7
Macnaghten in *The Mecca* [1897] A. C. at 293; 66 L. J. P. 86.

(*l*) *Anon.* (1585) Cro. El. 68; *Croft* v. *Lumley* (1855) 5 E.
L. J. Q. B. 73; 103 R. R. 663; and in error (1856) 27 L. J. Q.
(1858) 6 H. L. C. 672; 108 R. R. 252; *per* Byles, J., in *Kitchin*
(1866) L. R. 2 C. P. 31; *Davenport* v. *The Queen* (1877) 3 A.
L. J. P. C. 8, P. C.

(*m*) *Ackroyd* v. *Smithies* (1886) 54 L. T. 180. See also in
sylvania Coal Co. v. *Blake* (1881) 85 N. Y. 226.

If money be received by the creditor on account of the debtor without the latter's knowledge, the right of the debtor to appropriate it cannot be affected by the creditor's attempt to apply it as he chooses before the debtor has an opportunity of exercising his election (*n*).

Money received by creditor on debtor's account without his knowledge.

The debtor's election of the debt to which he applies a payment may be shown by any medium of proof. An express declaration is not necessary (*o*); the election may be proved otherwise than by express words (*p*). A payment of the exact amount of one of several debts was said by Lord Ellenborough (*q*) to be "irrefragable evidence" to show that the payment was intended for that debt; and in the same case, where the debtor owed one debt past due, and another not yet due, but the latter was guaranteed, these facts, connected with proof of an allowance of discount by the creditor on a payment made within the period of credit, were held conclusive to show that the debtor intended to favour his surety, and to appropriate the payment to the debt not yet due.

Appropriation by debtor may be shown by implication from circumstances.

So also if payment of one of two debts be applied for by the creditor, and a payment be made generally, the payment is presumably made in discharge of the debt claimed (*r*). Or where there is one acknowledged debt and also one disputed, a payment will be *prima facie* attributed to the former (*s*). And a general payment will be appropriated first to the payment of interest, and then towards the principal (*t*). So if a debtor owe a sum personally, and another as executor, and make a general payment, he will be presumed to have intended to pay his personal debt (*u*).

Presumption with regard to appropriation of payments.

Where the debts are not separate debts, but are part of an account current kept between parties, as a banking account, the rule applicable, where there is no specific appropriation by either party, is that declared in *Clayton's Case* (*x*), in which Sir William Grant, the Master of the Rolls, said: "There is no room for any other appropriation than that which arises from the order in which the receipts and pay-

Rule of appropriation where account current is kept between the parties.

Rule in *Clayton's Case* (1816).

(*n*) *Waller* v. *Lacy* (1840) 1 M. & G. 54.
(*o*) *Waters* v. *Tompkins* (1835) 2 C. M. & R. 723; 5 L. J. Ex. 61; 41 R. R. 827; *Parker* v. *Guinness* (1910) 27 Times L. R. 129.
(*p*) *Peters* v. *Anderson*, *ante*, 916; *Newmarch* v. *Clay* (1811) 14 East, 239.
(*q*) *Marryatts* v. *White* (1817) 2 Starkie 101.
(*r*) *Shaw* v. *Picton* (1825) 4 B. & C. 715; 4 L. J. K. B. 29; 28 R. R. 455.
(*s*) *Burn* v. *Boulton* (1846) 2 C. B. 476; 15 L. J. C. P. 97; 69 R. R. 508.
(*t*) *Chase* v. *Box* (1702) Freem. (Ch.) 261; *Crisp* v. *Black* (1673) Ca. temp. Finch, 89.
(*u*) *Goddard* v. *Cox* (1742) 2 Str. 1194.
(*x*) 1 Mer. 572, 608; Tud. Merc. L. C. 2nd ed. at 15.

ments take place, and are carried into the accoun
sumably it is the sum first paid in that is first drawn
is the first item on the debit side of the account tha
charged or reduced by the first item on the credit si
appropriation is made by the very act of setting the
against each other. Upon that principle all account
are settled, and particularly cash accounts."

The principle is "that where a creditor, having a
appropriate moneys paid to him generally, and not sp
appropriated by the person paying them, carries the
particular account in his books, he *prima facie* app
them to that account, and the effect of that is that
ments are *de facto* appropriated according to the pr
order of the entries on the one side and on the othe
account. It is, of course, absolutely necessary
there should be one unbroken account . . . and th
avoid the application of *Clayton's Case*, where th
other principle in question, is to break the account an
new and distinct account (*y*).

Clayton's Case was followed and approved in *Bod
Purchas* (*z*), but although the rule was recognised
in *Simson* v. *Ingham* (*a*) and *Henniker* v. *Wigg* (*b*
held that the circumstances of the case may afford
for inferring that the transactions of the parties
intended to come under the general rule. For th
Clayton's Case is a presumption of fact, and this pre
may be rebutted (*c*).

Thus, when a trustee pays into his private acco
bank money which is partly his own and partly trus
it is to be inferred that he intends to draw against
fund, and not against the trust fund, and this in
sufficient to exclude the application of the rule (*d*).

So also the evidence may show, even in the ca
account current, that the creditor appropriated spe

(*y*) *Per* Lord Selborne, L.C., in *Re Sher* (1883) 25 Ch. D.
(*z*) (1818) 2 B. & A. 39; 20 R. R. 342. See also *Hooper* v.
1 Q. B. D. 178.
(*a*) (1823) 2 B. & C. 65; 1 L. J. (O. S.) K. B. 234; 26 R. R. 2
(*b*) (1843) 4 Q. B. 792; 62 R. R. 489. See also *Storeld* v.
4 Bing. 154; 5 L. J. C. P. 85; *City Discount Co.* v. *McLean* (18
C. P. 692; 43 L. J. C. P. 344, Ex. Ch.; *Taylor* v. *Kymer* (1822)
320; 1 L. J. (O. S.) K. B. 114; 37 R. R. 433; *Re Hallett's Esta*
Ch. D. 696; 49 L. J. Ch. 415, C. A. (trust and private account ble
The Mecca [1897] A. C. 286; 66 L. J. P. 86, *infra*.
(*c*) *Per* Lord Atkinson in *Deeley* v. *Lloyds Bank* [1912] A. C.
81 L. J. Ch. 697.
(*d*) *Re Hallett's Estate* (1879) 13 Ch. D. 696; 49 L. J. Ch. 4

ments to a specific debt (*e*). Where there is no appropriation by the debtor, the appropriation will be governed by the intention of the creditor, express or implied.

The rule in *Clayton's Case* was much considered in *The Mecca* (*f*). There the creditors, who were the holders of four dishonoured bills of exchange, given for necessaries supplied to two ships, the *Mecca* and the *Medina*, had received £900 on account, and had agreed to take no steps against the ships for three months. On receipt of the £900 they sent the debtors an account as follows: "April 7th, the *Medina*, £267 14s.; April 26th, the *Mecca*, £176 5s.; April 27th, the *Mecca*, £194 8s.; and the *Medina*, £630." The total with expenses was added up, making £1,307 2s. 9d.; a line was drawn, and the £900 deducted, leaving a balance of £401 2s. 9d. This not being paid, the £900 was appropriated by the creditors to the bills and expenses in connection with the *Medina*, and an action was brought against the *Mecca*. The debtors contended that the £900 discharged the earlier items, thus freeing the *Mecca*. *Held*, by the House of Lords:—1. That there was no account current, with a setting off of items, between the parties at all, but merely separate transactions on one piece of paper; 2. That it could not have been the intention of the creditors, when they sent in the account in the form mentioned, to release either of the ships.

The Mecca (1897).

The cases already cited also establish the rule that whenever a debtor makes a payment without appropriating it expressly or by implication he thereby yields to his creditor the right of election in his turn. And this right he may exercise up to the very last moment, and he is not bound to declare his election in express terms. He may declare it by bringing an action, or even in the witness-box (*g*), or in any way that makes his meaning and intention plain (*h*).

If debtor does not appropriate, creditor may.

What is "the last moment" depends upon the circumstances of each case (*i*). It may be stated generally that the creditor retains his right of election so long as circumstances do not exist showing that he has already in effect elected, or rendering it inequitable that he should make his election (*k*).

(*e*) *Mutton* v. *Peat* [1899] 2 Ch. 556; 68 L. J. Ch. 668.
(*f*) [1897] A. C. 286; 66 L. J. P. 86.
(*g*) *Seymour* v. *Pickett* [1905] 1 K. B. 715; 74 L. J. K. B. 413, C. A.
(*h*) *Per* Lord Macnaghten in *The Mecca* [1897] A. C. 286, at 294; 66 L. J. P. 86; *per* Tindal, C.J., in *Mills* v. *Fowkes* (1839) 5 Bing. N. C. 455; 8 L. J. C. P. 276; 50 R. R. 750.
(*i*) *Per* Romer, L.J., in *Seymour* v. *Pickett*, *supra*.
(*k*) *Per* Stirling, L.J., *ibid.* Thus the creditor cannot appropriate after an order of Court directing an account excluding statute-barred debts: *Smith*

Appropriation by creditor lawful even to a debt not recoverable by action.

In the exercise of this right, the creditor may ap payment to an equitable debt (*l*), or to a debt which h not recover by action against the defendant—*e.g.*, barred by limitation (*m*), or a debt contracted in viol the Tippling Acts (*n*), or under the Dentists Act, 1 And on the same principle, it is apprehended that could appropriate moneys paid generally by the buye price of goods sold which is not recoverable by actio s. 4 of the Code (*o*).

But he cannot appropriate moneys paid general claim for goods sold to an infant, for such a claim constitute a debt (*q*).

Arnold v. *Mayor of Poole* 1842).

In *Arnold* v. *The Mayor of Poole* (*r*), it was held attorney who had done work for a corporation wi retainer under seal, and also work with such a retain appropriate moneys paid by the corporation with appropriation to the satisfaction of the items of his cl respect of which there had been no retainer under Court saying that "the claim of the plaintiff was a equitable claim, although, from the absence of a under seal, it could not be made the subject of an And *Wright* v. *Laing* (*s*), where one contract was ill distingnished.

If no appropriation be made by either party in a c there are two debts, one legal and the other void for i

v. *Betty* [1903] 2 K. B. 317; 72 L. J. K. B. 853, C. A.; or afte bankruptcy amounting to a previous election communicated to t *Friend* v. *Young* [1897] 2 Ch. 421; 66 L. J. Ch. 737.

(*l*) *Bosanquet* v. *Wray* (1816) 6 Taunt. 597; 16 R. R. 677.

(*m*) *Mills* v. *Fowkes* (1839) 5 Bing. N. C. 455; 8 L. J. C. R. R. 750; *Williams* v. *Griffith* (1839) 5 M. & W. 300; 4 L. J 129; 41 R. R. 685; *Ashby* v. *James* (1843) 11 M. & W. 542; 12 L. 63 R. R. 676.

(*n*) 24 G. 2, c. 40, s. 12; *Dawson* v. *Remnant* (1806) 6 Esp. in *Re Laycock* v. *Pickles* (1863) 4 B. & S. 507; 33 L. J. Q. B. 4 827; *Philpott* v. *Jones* (1834) 2 A. & E. 41; 4 L. J. K. B. 65; 4 *Crookshank* v. *Rose* (1831) 5 C. & P. 19; 38 R. R. 788; S. C. 1 100. See also the County Court Act, 1888, s. 182, *ante*, 623, w unenforceable sales.

(*o*) 41 & 42 Vict. c. 33, s. 5. See *Seymour* v. *Pickett*, *ante*,

(*p*) See *Re Laycock* v. *Pickles*, *supra*, a case of account stat *mour* v. *Pickett*, *supra* (dentist's fees).

(*q*) *Keeping* v. *Broom* (1895) 11 Times L. R. 595.

(*r*) 4 M. & G. 860; 12 L. J. C. P. 97; 61 R. R. 664. Th approved by the Q. B. in *Clarke* v. *Cuckfield Union* (1852) 21 L. J and was referred to without dissent by Farwell, L.J., in *Brou* [1913] 2 K. B. 553, C. A.; 82 L. J. K. B. 1006. The contra *Lamprell* v. *Billericay Union* (1849) 3 Ex. 283; 18 L. J. Ex. 2 dubious authority. See *per Cur.* in *Clarke* v. *Cuckfield Union*, *sup ford* v. *Billericay Rural Council* [1903] 1 K. B. 772, C. A.; 72 554. See on the subject of executed contracts with corporati *Mackay & Co.* v. *Toronto Corporation* [1920] A. C. 208; 88 L. J.

(*s*) *Infra*.

as where one debt was for goods sold, and the other for money lent on a usurious contract, the law will apply the payment to the legal contract (*t*).

So also, where some of several debts are barred by the Statute of Limitations, the law will, in the absence of appropriation, appropriate any general payment to the debts not barred (*u*).

Where one of the debts is guaranteed.

The fact that one of several debts is guaranteed does not take away from the debtor or the creditor their respective powers of appropriation where there is no contract in that behalf with the surety. Thus, where there was another pre-existing debt at the time of the guaranty, a creditor was held to be entitled to apply the debtor's payments to the previous unguaranteed debt, although it was not made known to the surety at the time of the guaranty (*x*).

Creditor's election not determined till communicated to debtor.

It was held by the King's Bench, in *Simson* v. *Ingham* (*y*), that creditors who had appropriated a payment by entries in account in their own books were at liberty to change the appropriation if they had not rendered accounts in the interval to the debtor, their right of election not being determined by such entry till communicated.

Aliter if communicated.

It follows that if the creditor has appropriated payments by entries in an account current, and has furnished the debtor with a copy of the account, his right of election is gone.

Hooper v. *Keay* (1875).

Thus, in *Hooper* v. *Keay* (*z*), creditors for goods sold to a firm had after the dissolution of the firm supplied goods to one of the partners who continued the business, and had received payments from him without any appropriation, and had then sent him an account blending the transactions with his late firm and those with himself, and he made subsequent payments generally. *Held*, that the creditors had elected to

(*t*) *Wright* v. *Laing* (1824) 3 B. & C. 165; 27 R. R. 313. See also *Ribbans* v. *Crickett* (1798) 1 B. & P. 264 (payment into Court appropriated by law to the legal claim); and *Ex parte Lancaster* [1911] 2 K. B. 981; 81 L. J. K. B. 70, C. A. (payments under the Gaming Act, 1892).

(*u*) *Mills* v. *Fowkes* (1839) 5 Bing. N. C. 455; 8 L. J. C. P. 276; 50 R. R. 750; *Merritt* v. *Boswell* [1906] 2 Ch. 359; 75 L. J. Ch. 234. *Qy.*, whether the appropriation will be to the earlier of the non-barred debts, or to all rateably? S. C.; see also *per* Erle, J., in *Walker* v. *Butler* (1856) 6 E. & B. 506, 510; 25 L. J. Q. B. 377; 106 R. R. 691.

(*x*) *Kirby* v. *Duke of Marlborough* (1813) 2 M. & S. 18; 14 R. R. 573; *Plomer* v. *Long* (1816) 1 Stark. 153; *Williams* v. *Rawlinson* (1825) 3 Bing. 71; 3 L. J. C. P. 164; 28 R. R. 584. The first and third cases were approved by the C. A. in *Re Sherry* (1883) 25 Ch. D. 692; 53 L. J. Ch. 404. See also *Wright* v. *Laing* (1866) L. R. 2 C. P. 199; 36 L. J. C. P. 40.

(*y*) (1823) 2 B. & C. 65; 1 L. J. (O. S.) K. B. 234; 26 R. R. 273.

(*z*) 1 Q. B. D. 178. See also *Bank of Scotland* v. *Christie* (1840) 8 Cl. & F. 214; 54 R. R. 43; and *per* Bayley, J., in *Simson* v. *Ingham* (1823) 2 B. & C. 65, at 72; 1 L. J. K. B. 234; 26 R. R. 273.

treat the two accounts as one; that the rule in *Clayt* *ipso facto* applied, and the payments went in discharg earliest items on the debit side.

Pro rata appropriation of payment.

Favenc v. *Bennett* (1809).

In *Favenc* v. *Bennett* (*a*), the buyer had bought broker two parcels of goods belonging to different pa and had, without specific appropriation, made a pay the broker on account, larger than either debt, sufficient to pay both. *Held*, that on the insolvenc broker the loss must be borne proportionately by his cipals, and that the appropriation must be made b tioning the payment *pro rata* between them accordi amount due to them respectively, leaving to each against the buyer for the unpaid balance of the pri own goods.

Payment and tender in Scotland.

In Scotland oral evidence of payment is not except in cash transactions, or up to 100 Scots (£8 where the debt is not constituted by writing (*b* tender is confined to coinage, Scotch bank notes bei to the Currency and Bank Notes Act, 1914, exclu now by section 4 of that Act (but subject to revoc Proclamation) bank notes of Scotch banks of issue tender for the payment of any amount in Scotl section 1 of the same Act currency notes are also lega In other respects legal tender is the same as in Engla the Coinage Act of 1870 (*c*).

French law of novation by the creation of a new debt.

By the French Civil Code, Art. 1271, it is decl "novation" takes place "when a debtor contracts to creditor a new debt which is substituted for the old is extinguished, or by the creation of a new debtor or Novation is included in Chapter V. of Book III., T of the Civil Code, as being one of the modes by wh become extinct. Under Articles 1271 and 1273, of which provides that "novation is not presu the intention to novate must result clearly from there has been quite a divergence of opinion among mentators on the Code, and a conflict in the judicial as to the effect of giving a negotiable instrument for of goods sold where the seller has given an unqualifi for the price; but, in the absence of an unreserved a

(*a*) 11 East, 36; 10 R. R. 425. See also *Martin* v. *Brockwell* & S. 39; 14 R. R. 579.

(*b*) Ersk. Inst. Bk. 4, tit. 2, 21; *ibid.* Bk. 3, tit. 4. 7; Bel 1882, "Payment," and "Evidence."

(*c*) Brown's Sale of Goods Act, at 41. Bank of England n legal tender in Scotland: 8 & 9 Vict. c. 38, s. 15.

dutional receipt, all agree that the buyer's obligation to pay the price is not novated (*d*).

Payment by a stranger.

Payment of a debt may, by Art. 1236, be made by a co-debtor or a surety, or even by a third person with no interest in it, provided that he act in the name and in discharge of the debtor, or that, if he act in his own name, he be not subrogated to the rights of the creditor.

Appropriation of payments.

The French Code gives the debtor the right to "impute" a payment to the debt that he chooses: Art. 1253; but he cannot apply money towards payment of the capital of a debt while arrears of interest are due, and if a general payment be made on a debt bearing interest, the excess only, after satisfying interest already due, will be appropriated to payment of the capital: Art. 1254. And where no appropriation is made at the time of payment, the law applies the money to that debt, amongst such as are equally due, which the debtor is most interested in discharging; but to a debt due in preference to one not yet due, even if the debtor has a greater interest in discharging the latter than the former. If the debts are of the same nature, the appropriation is made to the oldest; if all are of the same nature and the same date, the appropriation is made proportionably (Art. 1256).

No right of appropriation is given in terms to the creditor; but, by Art. 1255, if the debtor accept a receipt whereunder the creditor has made a particular appropriation, he cannot afterwards disagree to it, in the absence of fraud or surprise on the part of the creditor.

Tender under the French law.

The law of tender is quite different on the Continent from our law. When the creditor refuses to accept payment the debtor may make a tender (*offre réelle*). A tender, if validly made, followed by a *consignation*, discharges the debtor. A tender to be valid must, *inter alia*, be made at the place appointed for payment, and be proper in amount, and must be made by the proper official, such as a notary, or a Court usher or tipstaff. If the tender be refused the debtor may "consign," that is, deposit the amount which he admits to be due in the public treasury in a special department, termed Caisse des Consignations. This is as much an actual payment as if made to the creditor in person, and the money thus deposited bears interest at a rate fixed by the State. This deposit, or *consignation*, is made extra-judicially, but the

(*d*) See the cases and authors cited and compared in Sirey, Code Civ. Annoté, ed. 1889, Art. 1271, Vol. II. at 36, *et seqq.*

debtor must cite his creditor to appear at the public t
at a fixed time, and notify him of the amount he is a
deposit; and the public officer draws up a report, or
verbal, of the deposit, stating the nature of the thi
dered, his creditor's refusal to receive it, and the depo
if the creditor is not present, sends him a notice to c
withdraw it (*e*). This system is derived from the Rom
in which the word *obsignatio* had the same meaning
French *consignation*.

Law of Quebec as to payment.

The Civil Code of Quebec on the subject of payme
substance the same as the French Civil Code. The
provisions as to payment (a term which includes perfo
generally) are contained in Book 3, Title 3, chapter 8
deals with the extinction of obligations. In particul
ment may be made by any one, even by a stranger, w
without the knowledge of the debtor, make a tender
tender by a stranger must be to the advantage of the
and not merely with the object of creating a new c
Art. 1141. A creditor is not bound to accept part ev
divisible debt, nor can a Court without the creditor's
decree payment by instalments: Art. 1149. In the
of agreement as to the time and place of payment, t
must be paid at the time and place of delivery of the
Art. 1533. Imputation of payments is dealt with in
1158 to 1161, which correspond substantially with
1253 to 1256 of the French Civil Code, above set o
tender and consignation by articles 1162 to 1168 to t
effect as the French Code. Novation takes place
creation of a new debt to the creditor; or of a new deb
former debtor being discharged; or of a new contract
under a new creditor is substituted for the old one: A
Novation is not presumed: Art. 1171.

Roman law.

The ancient civil law rules bore a strong resemb
those of the common law in regard to payment and
Whenever the sum due was fixed and the date of the
specified either by the law or by force of the contract
the debtor's duty to pay without demand, according
maxim that in such cases *lex interpellat pro homine*:
default of payment (*mora*) was said to arise *ex re* (
in all other cases a demand (*interpellatio*) by the cred
necessary, which was required to be at a suitable t

(*e*) Arts. 1257, *et seqq.*, which see generally.
(*f*) Dig. 40, 5, De Fidei-com. Libert. 26, s. 1, Ulp.; Voet, Com.
lib. 22, tit. 1, 26, 27.

place, of which the judge (or praetor) was to decide in case of dispute, and the default in payment on such demand was said to arise *ex personâ* (*g*).

On the refusal of the creditor to receive (*creditoris mora*) when the debtor made a tender (*oblatio*), the discharge of the debtor took place by his payment of the debt (*obsignatio*) into certain public offices or to certain ministers of public worship: "Obsignatione totius debitæ pecuniæ solemniter facta, liberationem contingere manifestum est" (*h*). The *obsignatio* was made in *sacratissimas ædes*, or if the debtor preferred, he might apply to the prætor to name the place of deposit (*i*).

Payment could be made by stranger.

And payment, by *whomsoever made*, liberated the debtor. "Nec tamen interest quis solvat utrum ipse qui debet, an alius pro eo; liberatur enim et alio solvente, sive sciente debitore sive ignorante vel invito solutio fiat" (*k*). But payment must have been made on account of the debtor, and not by the stranger merely *suo nomine* (*l*).

Imputation of payments.

The civil law as to the imputation of payments (*m*) was that the debtor had to elect at the time of payment; if he made no appropriation the election passed to his creditor (*n*). If neither elected, the debtor's presumed intention was regarded. Thus a payment was appropriated to the more burdensome debt, and if the debts were equal, to that which was first contracted (*o*). And a payment was imputed first to arrears of interest, and then to the principal.

Acceptilatio, or fictitous payment and release.

There was a very singular sham or imaginary payment used in Rome, as a substitute for a common law release, known as *acceptilatio*. "Est autem acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, id si velit Titius remittere, poterit sic fieri, ut patiatur hæc verba debitorem dicere: *Quod ego tibi promisi, habesne acceptum?* et Titius respondeat, *Habeo*. . . . Quo genere, ut diximus, tantum hæ obligationes solvuntur quæ ex verbis consistunt, non etiam cæteræ. Consentaneum enim visum est, verbis factam obligationem, posse aliis verbis dissolvi. Sed et id

(*g*) Voet, *supra*, tit. 1, 26, 27.
(*h*) Code, 8, 43, 9.
(*i*) Code, 4, 32, 19.
(*k*) Inst. 3. 29, 1; Dig. 46, 3, 53.
(*l*) Dig. 46, 3, 17.
(*m*) See the judgment of Grant, M.R., in *Clayton's Case* (1816) 1 Mer. 606; 15 R. R. 161.
(*n*) Code, 8, 43, 1.
(*o*) Dig. 46, 3, 5. See generally tit. 3, ss. 1—8, and Code, 8, 43, 1.

quod ex alia causa debetur potest in stipulationem deb
per acceptilationem dissolvi (*p*).

These last words show that obligations other than
ones could be turned by a *stipulatio* into verbal oblig
and then be got rid of by an *acceptilatio*. An
acceptilatio, though it did not operate as a payment i
could constitute an *exceptio*, or equitable plea (*q*), there
a *pactio* enforceable by the prætor by virtue of his eq
jurisdiction: "quia iniquum est contra pactionem
damnari; defenditur per exceptionem pacti conventi (

Mr. Smith, in his Mercantile Law, points out (
though this sort of sham payment was applicable on
debt due by express contract, "an acute person,"
Gallus Aquilius, devised a comprehensive formula by
of which all other contracts were converted into expr
tracts to pay money, and then they were got rid of
acceptilatio, a device termed, in honour of its inven
Aquiliana stipulatio (*t*). This "acute person" was
eminent lawyer, the colleague in the prætorship and f
Cicero (*collega et familiaris meus*) (*u*), and of great a
among the jurisconsults of his day, "ex quibus
maximæ auctoritatis apud populum fuisse Servius dic
especially for his ingenuity in devising means of eva
strict rigour of the Roman law,—which was quite as t
as the common law ever was,—and of tempering
equitable principles and remedies (*y*).

The discharge by *acceptilatio* could not be condi
executory (*z*).

Novation.

By the Roman law the taking of a new obligati
novatio of the original obligation. But as the int
novate was not always clear, the Roman lawyers l
various presumptions of law, in consequence
Justinian, by a constitution of A.D. 530, enacted tha
obligation should, unless it was expressly discharge
also: "Nihil penitus prioris cautelæ innovari, sed
stare, et posteriora incrementum illis accedere,

(*p*) Inst 3, 29, 1.
(*q*) Dig. 2, 14, 27, 9.
(*r*) Inst. 4, 13, 3.
(*s*) 9th ed., at 535, n. (*e*).
(*t*) Inst. 3, 29, 2, where the form of the *stipulatio*, compreh
kind of obligation, is set out.
(*u*) De Officiis, lib. 3, s. 14.
(*x*) Dig. 1, 2, De Orig. Jur. 2, s. 42, Pomp.
(*y*) See, for another example, Dig. 28, 2, 29, pr. f. Scævola.
(*z*) Dig. 46, 4, 4 and 5.

specialiter remiserint quidem priorem obligationem (*a*). And the law is thus stated in the Digest (*b*): "Omnes res transire in novationem possunt. Quodcunque enim, sive verbis contractum est, sive non verbis, novari potest, et transire in verborum obligationem ex quacunque obligatione, dummodo sciamus novationem ita demum fieri, si hoc agatur ut novetur obligatio; cæterum si non hoc agatur duæ erunt obligationes."

(*a*) Code, 8, 42, 8.

(*b*) Dig. 46, 2, 2.

BOOK V.

BREACH OF THE CONTRACT.

PART I.

RIGHTS AND REMEDIES OF THE SELLER.

CHAPTER I.

PERSONAL ACTIONS AGAINST THE BUYER.

SECTION 1.—WHERE THE PROPERTY HAS NOT PASSED.

Where the property has not passed, seller's sole remedy is action for damages.

When the seller has not transferred to the buyer the property in the goods—as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery—the breach by the buyer of his promise to accept and pay can only affect the seller by way of damages. The goods are still is. He may resell or not at his pleasure. But his only action against the buyer under the contract of sale as a general rule (*a*) is for damages for non-acceptance. He can in general only recover the damage that he has sustained, not the full price of the goods (*b*).

Presumptive rule of damages for non-acceptance.

The ordinary measure of the seller's loss, with the reason for it, was thus stated by Tindal, C.J., in delivering the opinion of the Exchequer Chamber in *Barrow* v. *Arnaud* (*c*):

(*a*) As to when the seller may sue for the price, though the property has not passed, see s. 49 (2), *post*, 941.

(*b*) *Per* Parke, B., in *Laird* v. *Pim* (1841) 7 M. & W. 474, at 478; 10 L. J. Ex. 285; 56 R. R. 768; quoted *post*, 941; *Atkinson* v. *Bell* (1828) 8 B. & C. 277; 6 L. J. K. B. 258; 32 R. R. 382, set out *ante*, 177; *Boswell* v. *Kilborn* (1862) 15 Moo. P. C. 309; 137 R. R. 86.

(*c*) (1846) 8 Q. B. 604, at 609—610; 70 R. R. 568. See also *Phillpotts* v. *Evans* (1839) 5 M. & W. 475; 9 L. J. Ex. 33; 52 R. R. 802; *Gainsford* v. *Carroll* (1824) 2 B. & C. 624; 2 L. J. K. B. 112; 26 R. R. 495; *Boorman* v. *Nash* (1829) 9 B. & C. 145; 7 L. J. K. B. 150; 32 R. R. 607; *Valpy* v. *Oakley* (1851) 16 Q. B. 941; 20 L. J. Q. B. 381; 83 R. R. 786; *Griffiths* v. *Perry* (1862) 15 Moo. P. C. C. 309; 137 R. R. 86.

"Where a contract to deliver goods at a certain p
broken, the proper measure of damages in general
difference between the contract price and the market p
such goods at the time when the contract is broken,
the purchaser, having the money in his hands, may
the market and buy (*d*). So, if a contract to accept a
for goods is broken, the same rule may be properly a
for the seller may take his goods into the market and
the current price for them."

Only a branch of the general rule.

But the rule above stated is only a rule of presu
Where the presumption does not arise, the gener
remains that the seller may, subject to the rules as to
ness of damage, recover the amount of his actu
Accordingly the Code enacts:—

Code, s. 50.
Damages for non-acceptance.

"50.—(1.) Where the buyer wrongfully neglects or refuses
and pay for the goods, the seller may maintain an action ag
for damages for non-acceptance.

"(2.) The measure of damages is the estimated loss dir
naturally resulting, in the ordinary course of events, from th
breach of contract.

"(3.) Where there is an available market for the goods in
the measure of damages is *prima facie* to be ascertained
difference between the contract price and the market or cur
at the time or times when the goods ought to have been accep
no time was fixed for acceptance, then at the time of the
accept."

And, with regard to special damages, another
enacts:—

Code, s. 54.
Interest and special damages.

"54.—Nothing in this Act shall affect the right of the bu
seller to recover interest or special damages in any case wh
interest or special damages may be recoverable, or to rec
paid where the consideration for the payment of it has fa

Meaning of "market."

"What I understand by a market in such a case
says James, L.J., with reference to a contract for t
by colliery lessees of a quantity of coal by week
ments (*e*), "is, that when the defendant refused t
300 tons the first week or the first month, the plain
have sent it in waggons somewhere else where they
it, just as they sell corn on the Exchange, or cotton
pool; that is to say that there was a fair market w

(*d*) But special circumstances may show that the seller i
greater damages. See the rule in *Hadley* v. *Baxendale* (1854) 9
L. J. Ex. 179; 96 R. R. 742, set out *post*, 1098, and s. 54, *infra*.
(*e*) *Dunkirk Colliery Co.* v. *Lever* (1878) 9 Ch. D. 20, at 25.

could have found a purchaser, either by themselves, or through some agent at some particular place" (*f*).

When there is no market for the goods, section 50 (3) of the Code does not apply, and the case must be governed, so far as ordinary damages are concerned, by section 50 (2). Under this clause, however, the question is really the same as under the third sub-section, viz., What is the difference between the contract price and the *value* of the goods which ought to have been accepted? This must be arrived at in other ways than by the criterion of a market. Thus the price at which the goods were in fact resold by the seller is good presumptive evidence of such value (*g*).

Date of breach prima facie the date appointed for delivery.

The provision of the Code that the damages should be measured "at the time or times, etc.," shows that the time contemplated is the time expressly or by implication appointed for delivery. Accordingly the damages are fixed at that date, whether or not the seller resell the goods. If he resell, he is bound, by way of minimising the buyer's loss, to obtain the best price he can, and generally to act reasonably, *at the date of the breach* of contract. He is under no obligation to postpone the resale in the hope of obtaining better prices; if however he do so, and obtain better prices than ruled at the date of the breach, the buyer is not entitled to the benefit; on the other hand, the buyer is not subjected to a greater loss if the course of the market is downward since the breach (*h*).

Delivery at "such times as required by buyer."

Chapman v. *Larin* (1879).

In *Chapman* v. *Larin* (*i*) the times of delivery were indefinite, and at the option of the buyer. He had on May 7 agreed to buy 500 tons of hay f.o.b. a propeller on the canal "at such times and in such quantities" as he should order, each lot to be paid for on delivery. The buyer took delivery of 147 tons, and then refused to accept any more. After several requests by the seller, the plaintiff, a formal request was on July 28 made by the plaintiff, who brought his action on November 11. *Held* that the action lay for the difference in value in respect of all the undelivered residue, as the defendant was

(*f*) In *Marshall & Co.* v. *Nicoll & Son* (1919) S. C. 244; 56 Sc. L. R. 178, an action for non-delivery, it was held by the majority of the Court of Session that the fact that the market for a class of goods specially made was limited does not exclude s. 51 (3), if a seller could have been found, and that the absence of a fixed, current market does not prove there is no market. But Lord Salvesen's strong dissenting judgment should be consulted.

(*g*) See *Stroud* v. *Austin* (1883) Cab. & E. 119, a converse case of non-delivery.

(*h*) *Jamal* v. *Moolla Dawood, Sons & Co.* [1916] 1 A. C. 175. P. C.; 85 L. J. P. C. 29.

(*i*) (1879) 4 Can. S. C. R. 349.

bound to order the hay (*k*) at reasonable times, and
able time for delivery of the residue was July 28,
new hay crop was coming in the market.

But the time appointed for delivery may or may not
with the date of the buyer's breach of contract. For
the buyer may, in advance, intimate his intentio
accept the goods, in other words repudiate the cont
the seller may or may not accept the repudiati
immediate breach (*l*).

Law as to anticipatory breach stated by Cockburn, C.J., in *Frost* v. *Knight* (1872).

The law with respect to prospective breaches of
and the measure of damages, was thus stated by
C.J., in his celebrated judgment in *Frost* v. *Kn*
"The promisee, if he pleases, may treat the notice of
as inoperative, and await the time when the contra
executed, and then hold the other party responsib
the consequences of non-performance; but in that
keeps the contract alive for the benefit of the othe
well as his own; he remains subject to all his own
and liabilities under it, and enables the other part
to complete the contract, if so advised, notwithsta
previous repudiation of it, but also to take advanta
supervening circumstance which would justify him
ing to complete it. On the other hand, the promis
he thinks proper, treat the repudiation of the other
wrongful putting an end to the contract, and ma
bring his action as on a breach of it; and in such
will be entitled to such damages as would have a
the non-performance of the contract at the appoi
subject, however, to abatement in respect of an
stances which may have afforded him the means of
his loss."

In the three following cases the buyer's declarati
accepted as a prospective repudiation.

Boorman v. *Nash* (1829).

In *Boorman* v. *Nash* (*n*), decided in the King's
plaintiff, in November, 1825, sold goods to the
deliverable in the months of February and March
The defendant became bankrupt in January. The
tendered and not accepted at the dates fixed by t

(*k*) The S. C. distinguished the case from *G. W. R. Co.* v
out *ante*, 90, where the buyer did not bind himself to order.

(*l*) *Per Cur.* in *Frost* v. *Knight* (1872) L. R. 7 Ex. 111, a
L. J. Ex. 78, quoted *infra*; *per* Lord Esher, M.R., in *Roth* v.
12 Times L. R. 211, C. A.

(*m*) L. R. 7 Ex. 111, at 112—113; 41 L. J. Ex. 78.

(*n*) 9 B. & C. 145; 7 L. J. K. B. 150; 32 R. R. 607. See
Muller (1872) L. R. 7 Ex. 319; 41 L. J. Ex. 214.

and resold at a heavy loss. The loss would have been much smaller if the goods had been sold in January, on the buyer's bankruptcy. *Held*, that the contract was not rescinded by the bankruptcy, that the assignees would have had the right to adopt it, that the seller was not bound to resell before the time for delivery, and that the damages were to be calculated according to the market price at the dates fixed by the contract for performing the bargain.

Phillpotts v. *Evans* (1889).

In *Phillpotts* v. *Evans* (*o*), the plaintiffs, merchants at Gloucester, early in January contracted to sell to the defendant a quantity of wheat deliverable at Birmingham "as soon as vessels could be obtained." The market began to fall, and on the 26th the defendant gave notice to the plaintiffs that he would not accept the wheat. The wheat was then on its way to Birmingham, and on arrival was tendered to the defendant and rejected. In an action for non-acceptance it was contended by the defendant that the damages should be calculated according to the difference between the contract and the market price on the 26th January, by the plaintiffs that the difference should be calculated at the time of the tender. *Held*, that the latter was the proper measure of damages, the time of the tender being the time of performance (*p*).

Instalments. Buyer's waiver of conditions precedent. *Braithwaite* v. *Foreign Hardwood Co.* (1905).

In *Braithwaite* v. *Foreign Hardwood Co.* (*q*), there was a contract for rosewood deliverable by instalments during the year, and to be paid for by cash against bill of lading. Before the arrival of the first instalment the buyers repudiated the contract. On its arrival the bill of luding was tendered, and the buyers repeated their refusal, and the seller resold. The second instalment was similarly tendered, and refused, and resold. The buyers subsequently discovered that the first instalment was somewhat inferior to contract quality. In an action for non-acceptance the buyers contended that the seller had elected to keep to the contract, and not to accept the buyer's repudiation; accordingly he had to show he was ready and willing to deliver goods according to contract which he could not do with regard to the first instalment, so

(*o*) 5 M. & W. 475; 9 L. J. Ex. 33; 52 R. R. 802. See also *Leigh* v. *Paterson* (1818) 8 Taunt. 540; 20 R. R. 552; *Ripley* v. *M'Clure* (1849) 4 Ex. 345; 18 L. J. Ex. 419; 80 R. R. 593; *Boswell* v. *Kilborn* (1862) 15 Moo. P. C. 309; 137 R. R. 86. The reason given by the Court in *Phillpotts* v. *Evans*, that the defendant's notice was not an immediate breach, must not be taken too literally. It was not a breach because the seller had not accepted it as such: see *per* Lord Campbell, C.J., in *Cort* v. *Ambergate R. Co.* (1851) 17 Q. B. 127; 20 L. J. Q. B. 460; 85 R. R. 369, *post*, 938.

(*p*) See to the same effect *Michael* v. *Hart* [1902] 1 K. B. 482; 71 L. J. K. B. 265, C. A.

(*q*) [1905] 2 K. B. 543; 74 L. J. K. B. 688, C. A.

that damages could be claimed only for non-acceptan
second instalment. But *held* by the Court of App
assuming the seller had elected to keep the contract
was excused from performing conditions precedent w
buyers waived (*r*), and that the buyers' subsequent k
did not help them; accordingly the damages sh
assessed upon the footing that the first instalment wa
ing to contract, and the seller could recover the diff
value with regard to both instalments.

Damages fixed at date of acceptance of repudiation.

The acceptance by the seller of the prospective re
by the buyer of the contract amounts to a mutual
of the contract, subject, on ordinary principles, to th
right to damages. Accordingly, as already stated
party can take advantage of subsequent events to
or to diminish the damages recoverable, or to excu
performance (*s*).

Birchgrove Steel Co. v. *Shaws Brow Iron Co.* (1891).

In *Birchgrove Steel Co.* v. *Shaws Brow Iron Co*
was sold in January, deliverable by weekly instalm
the end of June at a price (including a maximum) b
the averages of certain official quotations, and,
remaining very high, the appellants, the buyers,
repudiated the contract after a partial delivery, and
the sellers, the respondents, to resell the tin.
respondents did in that month at a loss of £136. It
by the House of Lords, affirming the Courts below,
buyers could not reduce the damages to nominal by
that, because of a heavy fall in the price subsequent
resale, the sellers had incurred no loss, as they wo
received, as the price of the tin, no portion of the sur
had the contract been duly performed by the buye
respondents were, said their Lordships, "entitled t
the amount of the loss sustained by them by the re
by the appellants of their contract," the contentio
appellants that they were entitled to the benefit of
prices after their repudiation being "a novel princi

(r) As to waiver, see *ante*, 641.

(s) *Per* Bailhache, J., in *Melachrino* v. *Nickoll* [1920] 1 K. B
L. T. 545. See also *Jamal* v. *Moolla Dawood, Sons & Co.* [1916] 1
ante, 931.

(t) (1891) 7 Times L. R. 246, *coram* Lord Halsbury, L.C., L
Bramwell, Herschell, Macnaghten, and Hannen, affirming the C
6 Times L. R. 50. The judgment in the H. L. is very short.
based their decision largely on the request to the sellers to re-sell.
of view was relied on in the respondent's case on appeal to the
the other hand, one of the appellant's reasons followed the langu
Court in *Frost* v. *Knight*, so both points of view were before the
also the *dicta* of the C. A. in *Tredegar Coal and Iron Co.* v. *Hawth*
post, 935.

As already stated, the seller, if he accept the buyer's repudiation as an immediate breach, must act reasonably by way of minimising the loss caused thereby. Whether or not he acts reasonably is a question of fact (*u*).

Seller's duty to minimise the loss when he accepts repudiation.

Thus, in *Roth* v. *Taysen* (*x*), Grant & Co. agreed to buy of Roth & Co. a cargo of maize to be shipped from the Argentine Republic about 15th July to a safe port in the United Kingdom or the Continent. The ship was expected to arrive at St. Vincent, her port of call, about the 5th September, and her port of discharge was Plymouth. On the 28th May the buyers repudiated the contract, and on the 24th July the sellers brought their action. In the meantime the market had been continuously falling. Had the sellers resold on the 28th May, their loss would have been £680; on the 24th July it would have been £1,557, whereas they did not sell till the 5th September, when the loss was £3,870. *Held*, by Mathew, J., that, though *prima facie* the measure of damages must be calculated with reference to the market price when the contract ought to have been performed, yet the sellers, having on the 24th July accepted the buyers' repudiation, could not allow the damages to be aggravated on a falling market, and should have resold at once, and the damages were accordingly the loss on the 24th July. And this judgment was affirmed by the Court of Appeal (*y*).

Roth v. *Taysen* (1896).

Repudiation by buyer. Performance impossible.

But the seller is not bound to accept the buyer's repudiation, even when it is obvious that the buyer cannot carry out the contract at the date fixed.

Thus in *Tredegar Iron & Coal Co.* v. *Hawthorn Brothers & Co.* (*z*), where coal was sold only for export, deliverable during February, and the buyer, no shipping being procurable, repudiated the contract in that month, at which time the seller could have resold without loss, it was held by the Court of Appeal, reversing Phillimore, J., that the seller was not bound to minimise the buyer's loss by accepting the repudiation in February, but might stand by his bargain; and having resold in March at a loss of a shilling a ton might recover that deficiency. Mathew, L.J., said: "Repudiation was of no effect unless it was acted upon by the other party. If acted on . . . there was what was called an anticipatory breach of contract, and damages were to be calculated *as on*

Tredegar Iron & Coal Co. v. *Hawthorn Brothers & Co.* (1902).

(*u*) *Per* Mathew, J., in *Roth* v *Taysen*, *infra*, citing *Wilson* v. *Hicks* (1857) 26 L. J. Ex. 242.
(*x*) 73 L. T. 628.
(*y*) (1896) 12 Times L. R. 211, C. A.
(*z*) (1902) 18 Times L. R. 716, C. A.

the date of the acceptance of the repudiation as if the tract had then run out. The argument came to this, that Court ought to hold . . . that either party should liberty to terminate the contract when he chose, estimate the damages as on that date. If that were business of the country could not be carried on, a part entitled to rely upon his contract."

Seller's right to treat a notice of the buyer's insolvency as a repudiation of the contract.

Although the buyer's insolvency (*a*) does not *per se* end to the contract, yet if the buyer has given to the seller a *notice* of his insolvency as amounts to a declaration inability or unwillingness to pay for the goods (*b*), the is justified in treating the notice as a repudiation of t tract, and, after the lapse of a reasonable time to al buyer's trustee and also, it would seem, a sub-buyer t insolvent (*c*), to elect to complete the contract by pay price *in cash*, the seller may, without tendering the the trustee, consider the contract as broken, and against the insolvent's estate for the damages (*d*).

Purchaser's bankruptcy after partial delivery.

If goods be deliverable by successive instalme trustee of the bankrupt purchaser cannot adopt the and claim further deliveries under it without pay price of the goods delivered before the bankruptcy (

Morgan v. *Bain* (1874).

In *Morgan* v. *Bain* (*f*), the plaintiffs, on the February, contracted with the defendants for the s the latter of 200 tons of pig iron, deliverable in instalments of 25 tons. By the usage of the iron first instalment would not have become due until t April, and the course of business was to deliver demand. The plaintiffs were insolvent at the dat contract, but it was not until the 14th of March gave the defendants notice of their intention to sus ment. On the 16th of March they filed a liquidation At the first meeting of the creditors, on the 5th o composition was accepted. The contract with the was known to the creditors present, but it was no

(*a*) Nor the voluntary liquidation of a buying company: *Tol ciated Portland Cement Manufacturers* [1903] A. C. 414; 72 L. J. (*b*) *Re Phœnix Bessemer Steel Co.* (1876) 4 Ch. D. 108; 46 L C. A., *post*, 810. Mere notice of insolvency is not sufficient: M (1901) 6 Com. Cas. 165.

(*c*) *Per Cur.* in *Ex parte Stapleton* (1879) 10 Ch. D. 586, C L.J., at 294; *Ex parte Stapleton* (1879) 10 Ch. D. 586, C. A.; in *Morgan* v. *Bain* (1874) L. R. 10 C. P. 15, at 25—26; 44 L. J. (*d*) *Ex parte Chalmers* (1873) L. R. 8 Ch. 289; 42 L. J. Bk. (*e*) *Ex parte Chalmers* (1873) L. R. 8 Ch. 289; 42 L. J. Bk. (*f*) L. R. 10 C. P. 15; 44 L. J. C. P. 47; see also *Bloome* (1874) L. R. 9 C. P. 588; 43 L. J. C. P. 375.

in the plaintiffs' statement of affairs, nor was any claim made in respect of it. On the 13th of May the plaintiffs wrote to the defendants claiming delivery of the iron, when the defendants at once repudiated all liability. Before that date the plaintiffs had never demanded delivery, and no delivery had been made. *Held*, that the contract had been rescinded before the 13th of May; that the plaintiffs' insolvency, and the notice of it given to the defendants, justified the latter, in the absence of any steps on the plaintiffs' part to enforce the contract, in concluding that they had abandoned it; and that the defendants' consent to the abandonment was established by their having made no deliveries of iron in April and May, and having at once repudiated their liability when called upon to deliver.

Re Phœnix Bessemer Steel Co. (1876).

In *Re Phœnix Bessemer Steel Co.* (*g*), a company which had contracted to buy goods by instalments, being short of working capital, but having large assets, had called a meeting of a few of their principal creditors, and had asked for an extension of the time of credit. This was refused, whereupon the sellers declined to make any further deliveries except for cash. The company continued to carry on their business, but were eventually compelled, by the sudden failure of a firm who were largely their debtors, to wind up. *Held*, by Jessel, M.R., and by the Court of Appeal, that the facts did not show that the buyers had in effect, at the time of the sellers' refusal, declared their unwillingness or inability to pay for the iron, but merely showed that they were embarrassed; consequently that the sellers were not justified on their side in repudiating the contract, and could not prove in the buyers' bankruptcy for damages.

Power of Court to rescind contracts with bankrupt, and of trustee to disclaim.

As to the power of the Court to rescind a contract with the bankrupt on equitable terms (*h*), and that of a trustee to disclaim unprofitable contracts (*i*), the reader is referred to the authorities cited in the notes.

Goods to be manufactured or produced.

The rules of law applicable where the buyer of goods to be manufactured gives notice before they are made that he will not receive them were fully discussed in *Cort* v. *Ambergate Railway Co.* (*k*). It was an action for damages by manu-

(*g*) 4 Ch. D. 108; 46 L. J. Ch. 115, C. A.
(*h*) B. Act, 1914, s. 54 (5); Williams' Bkcy., 6th ed. 242; Robson's Bkcy., 7th ed. 473.
(*i*) B. Act. 1914, s. 54 (1) and (4); *Ex parte Davis* (1876) 3 Ch. D. 463; 45 L. J. Bk. 137, C. A.: 45 L. J. Bank. 137; *Re Bastable* [1901] 2 Q. B. 518; 70 L. J. K. B. 784, C. A.; Williams' Bkcy. and Robson's Bkcy., *supra*.
(*k*) 17 Q. B. 127; 20 L. J. Q. B. 460; 85 R. R. 369; and see *Hochster* v. *De*

Seller may accept breach without making and tendering.

Cort v. *Ambergate Railway Co.* (1851).

factnrers against a railway company for breach of a
to accept and pay for certain railway chairs. Parts
delivered, when the plaintiffs received orders from th
dants to make and send no more. The plaintiffs t
discontinued making them, although they were able
time the supply. They had snb-contracted for the
of a part of the goods, and were compelled to pay
their seller to be released, and had contracted for th
of the necessary iron, and had built a large foundry
manufacture of the chairs. Two questions were p
1. Whether the plaintiffs could recover without
making and tendering the remainder of the goods, th
tion alleging that they were *ready and willing* to
their contract, and that the defendants had wholly a
fully prevented and discharged the plaintiffs from
the said residue; 2. What was the proper measure of

Lord Campbell said, in relation to *Phillpotts* v. *
that it had been properly decided, but that the Exc
Pleas had not determined in that case that the sel
not have had the right of treating the bargain as
he had chosen to do so, as soon as the buyer gave h
that he would not accept the goods, without being
afterwards to make a tender of them; and that the
decided in *Ripley* v. *McClure* (*m*), was that a refu
buyer to accept in advance of the arrival of the car
agreed to purchase was not necessarily a breach of
but that, if unretracted down to the time when th
was to be made, it showed a *continuing refusal*,
the seller from the necessity of making tender
Lordship then said that a like continuing refusal, u
appeared in the present case, and laid down the
rule (*o*):—

"Upon the whole, we think we are justified, o
. . . in holding that when there is an executory c
the manufacturing and supply of goods from time
be paid for after delivery, if the purchaser, havin
and paid for a portion of the goods contracted for,

la Tour (1853) 2 E. & B. 678; 22 L. J. Q. B. 455; 95 R. R. 747; *F*
(1870) L. R. 5 Ex. 322; (1872) 7 Ex. 111, Ex. Ch.; 41 L. J. Ex.
(*l*) (1839) 5 M. & W. 475; 9 L. J. Ex. 33; 52 R. R. 802, *a*
(*m*) (1849) 4 Ex. 345; 18 L. J. Ex. 419; 80 R. R. 593; and
Bowden (1856) and *Reid* v. *Hoskins* (1856) 6 E. & B. 953, 961; 2
49, 55; 26 *ib.* 3, 5; 103 R. R. 703.
(*n*) See also *per* Lindley, J., in *Byrne* v. *Van Tienhoven* (18
350; 49 L. J. C. P. 316.
(*o*) 17 Q. B. at 148; 20 L. J. Q. B. 460; 85 R. R. 369.

to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract, and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them."

Meaning of readiness and willingness.

On the subject of readiness and willingness to perform his Lordship laid down this rule: "In common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract *was not the fault of the plaintiffs*, and that they were disposed and able to complete it if it had not been renounced by the defendants."

Measure of damages in such case the loss of profits.

On the question of damages Coleridge, J., had told the jury at Nisi Prius that the plaintiff ought to be put in the same position as if he had been permitted to complete the contract. This direction was approved, the learned Chief Justice saying that "the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which the defendants refused to accept (*p*).

And the measure of damages in such a case would ordinarily be the difference between the cost of production and delivery and the contract price, that is to say, the seller's profit.

Silkstone Coal Co. v. *Joint Stock Coal Co.* (1877).

Thus, in *Silkstone Coal Co.* v. *Joint Stock Coal Co.* (*q*), where the buyers of a quantity of coal, to be taken from the pit month, had made default in taking delivery, and it was proved that coal deteriorated if raised, and that it was not customary to raise it except to fulfil existing contracts, it was held that the proper measure of damages was not the difference between the market value of the coal when raised (the sellers not being bound to raise it) and the contract price (*r*), but the difference between the contract price and the value to the sellers of the coal at the place of delivery, the pit's mouth, this value being the cost of raising the coal added to the value of the unraised coal, as the sellers should be put in the same position as if they had fulfilled their contract.

(*p*) See also in Amer. *Collins* v. *Delaposte* (1874) 115 Mass. 158.

(*q*) 35 L. T. 668, followed in Amer. in *Todd* v. *Gamble* [1896] 148 N. Y. 382. See also *Tredegar Coal and Iron Co* v. *Gilgud* (1883) Cab. & E. 27; *Hinckley* v. *Pittsburgh Bessemer Steel Co.* (1886) 121 U. S. 264.

(*r*) Such being the ordinary measure of damages in the absence of special circumstances. See code, s. 50 (3), *ante*, 930.

Profit on other contracts as affecting damages.

Re Vic Mill (1913).

In *Re Vic Mill* (*s*), a company ordered of a firm of e
a number of spinning machines, and afterwards w
voluntary liquidation. The engineers claimed to
£1,167, being their estimated loss of profit. At the
the winding up only a few of the machines had been
the claimants, and these had been altered and sold
customers at a price less than the contract price.
aforesaid, there was no market for the goods. The
of damages having been referred to him, the district
certified that, with regard to the machines that
made, they had been resold for £23 less than the
price, and had cost £5 to alter, and that the damag
ingly were £28. With regard to the machines w
not been made, he certified that the loss of profit o
tract with the company should be reduced by the
the profits made on other contracts, making a net l
£250. And with regard to two of the machines wh
have been purchased by the claimants, and not mad
he certified the damages to be as claimed, *i.e.*, the
between the sum the claimants paid for them and t
price, or £2 15s. 3d.

On the last item there was no controversy. But
varied the certificate, holding the claimants entitle
profits they had claimed. The claimants should
the same position as if the contract had been
The profits on the unmade machines were accordin
able, as also that on the goods made, there being
for them.

On appeal this decision was affirmed, the Cou
with reference to the view of the registrar that t
on the unmade goods should be reduced by th
other contracts, that this view assumed that th
other contracts could not have been made if the c
the company had been carried out (*t*), whereas
prima facie showed that the claimants' works an
sufficiently large to fulfil all. The same observa
to the profits on the goods made, which had been
resold at a loss of £28. The claimants might
adapting the machines, have made other machi

(*s*) [1913] 1 Ch. 183; affirmed *ib.* 465, C. A.; 82 L. J.
(*t*) *Cf. Hill & Sons* v. *Edwin Showell & Sons* [1918] 87 L
H. L.; 119 L. T. 65, an action for non-delivery, where h
admissible that, in consequence of defendants' breach, the plain
to execute other orders and make a profit. Lord Dunedin diss

other customers, and so might have performed both contracts, in which case they would have made two profits.

Voluntary postponement of delivery.

When the time of delivery has been voluntarily postponed by the seller at the request of the buyer, and the seller sues for non-acceptance, the damages must be estimated according to the market price at the expiration of a reasonable time after the request or the last request, as the case may be, of the buyer to withhold delivery (*u*).

Seller may sometimes recover the price though the property remains vested in himself.

Although in general the seller's recovery in damages is limited to the difference between the price fixed in the contract and the market value on the day appointed for delivery, according to the rule as stated by Parke, B., in *Laird* v. *Pim* (*x*), that "a party cannot recover the full value of a chattel unless under circumstances which import that the *property has passed* to the defendant, as in the case of goods sold and delivered where they have been absolutely parted with and cannot be sold again,"—there may be special terms agreed on, in conflict with this rule. A seller may well say to a buyer: "I want the money on such a day, and I will not sell unless you agree to give me the money on that day, whether you are ready or not to accept the goods"; and if these terms be accepted, the seller may recover the whole price of goods although the property remains vested in himself (*y*). In such a case the buyer would be driven to his cross action if the seller, after receiving the price, should refuse delivery of the goods.

Accordingly, the Code by section 49, sub-section 2 enacts as follows:—

Code, s. 49 (2).

"49.—(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

Stein, Forbes & Co. v. *County Tailoring Co.* (1916).

In *Stein, Forbes & Co.* v. *County Tailoring Co.* (*z*), the defendants agreed to buy from the plaintiffs certain shipments of sheepskins, the skins to be paid for in "net cash against documents on arrival of the steamer." The first two instalments were duly accepted and paid for; in the case of the

(*u*) See the effect of voluntary postponement discussed in the Chapter on Delivery, *ante*, 791, *et seqq.*, and, as affecting damages, in Book V. Part II. Ch. I. *post*, 1100, espec. *Hickman* v. *Haynes* (1875) L. R. 10 C. P. 598; 44 L. J. C. P. 358, *post*, 1101.

(*x*) (1841) 7 M. & W. 474, at 478; 10 L. J. Ex. 285; 56 R. R. 768.

(*y*) *Dunlop* v. *Grote* (1845) 2 C. & K. 153; 80 R. R. 834.

(*z*) [1916] 86 L. J. K. B. 448; 115 L. T. 215.

third instalment the defendants refused to take up ments. In an action by the sellers for the price: *Held* J., that the price was not recoverable although the d had broken their contract. The property in the g not passed to the defendants, and the price was no "on a day certain irrespective of delivery," it bein expressly against delivery on the arrival of the vesse

Section 49 (2) applies to instalments of the price as a lump sum. Accordingly it applies to an instalmen where the price of each instalment is separately pay

Seller electing to rescind after partial execution may recover value of goods delivered.

When the seller, under an executory contract par formed, is entitled to consider the contract as res the buyer's conduct, and rescinds it accordingly (b recover on a *quantum valebant* for the goods delivered.

Bartholomew v. *Markwick* (1863).

Thus, in *Bartholomew* v. *Markwick* (c), the pla contracted to supply the defendant with such furn should require to the amount of £600 or £700, pa in cash and half by bill at six months. After a pa the plaintiffs asked for payment or security in res goods delivered, whereupon the defendant became and wrote to the plaintiffs: "I now close all furt and desire what I have not purchased may be ta premises. I will not be responsible for them, The defendant kept goods of the value of £88 17 on action brought for goods sold and delivered in the plaintiffs ought to have declared specially, and recover on the common counts before the expiratio months for which a bill was to have been given (d by the whole Court that the defendant's letter was tion of the contract, and, on the authority of *Hoc la Tour* (e), that the plaintiffs on receiving that l right to elect if they would treat the contract as and to sue for the fair value of the goods whic delivered and kept.

(a) *Workman, Clark & Co.* v. *Lloyd Brazileño* [1908] 1 L. J. K. B. 953, C. A.

(b) Where he does not rescind, any allowance of credit is b even where the buyer is fraudulent: *Ferguson* v. *Carrington* (1 59; 7 L. J. K. B. 139; *Strutt* v. *Smith* (1834) 1 C. & M. 312; 3

(c) 15 C. B. (N. S.) 711; 33 L. J. C. P. 145; 137 R. R. *Mavor* v. *Pyne* (1825) 3 Bing. 285; 4 L. J. C. P. 36; 28 R. R. *Slowey* [1904] A. C. 442; 73 L. J. P. C. 82, P. C.

(d) See *Paul* v. *Dod* (1846) 2 C. B. 800; 15 L. J. C. P. 177.

(e) 2 E. E. & B. 678; 22 L. J. Q. B. 455; 95 R. R. 747; and *Western Neilgherry Coffee Co.* (1864) 17 C. B. (N. S.) 733; 34 and the Chapter on Conditions and Warranties: General Princi

Wayne's Merthyr Coal Co. v. *Morewood* (1877).

In *Wayne's Merthyr Coal Co.* v. *Morewood* (*f*), the plaintiffs had contracted to supply the defendants with coke bars of iron by successive deliveries, payment for each delivery to be made in cash for discount within a month, or by bills at four months, at the defendants' option. The plaintiffs delivered coke bars inferior to sample; but it was only after the defendants had worked all the bars delivered up into plates that they discovered their inferior quality, and they then refused to accept the residue. Before the discovery the defendants had elected, and were ready, to pay for the bar by bill. The plaintiffs thereupon, and within the period of credit, brought an action for the price of goods sold and delivered. It was contended, on the authority of *Bartholomew* v. *Markwick*, that they were entitled to treat the original contract as rescinded, but the Court held, distinguishing that case, that, as the defendants had elected to take credit, and it was owing solely to the plaintiff's fault in delivering inferior goods that the defendants had withheld the bill for the price, the defendants had not repudiated the contract, and the plaintiffs were not entitled before the expiration of the credit to sue on a *quantum valebant* for the value of the goods delivered, but might recover damages for the defendants' refusal to accept the residue of the goods.

These two cases discussed.

The plaintiffs in both these cases had to prove that the contract was no longer *open*, *i.e.*, unrescinded, for the general rule is that "no action of *indebitatus assumpsit* or upon a *quantum meruit* can be brought for anything done under a special agreement which remains open (*g*). In *Bartholomew* v. *Markwick*, the contract was no longer open, for the defendant had clearly repudiated it, and the seller had accepted the repudiation. In *Wayne's Case*, the defendants had not repudiated the contract at all, and thus there was no election on their part to keep the goods delivered under a new implied contract to pay for them at once. The goods had been delivered by the sellers, and received by the buyers as deliverable under the contract, and it was the fault of the sellers that they did not get the bill payable at a future date. But the defendants were liable for their breach of contract in refusing to accept the residue of the goods, an allowance of credit not being pleadable in such an action (*h*).

(*f*) 46 L. J. Q. B. 746. The point of view taken is not easy to follow in the report, but seems to have been as stated in the text.

(*g*) 2 Sm. L. C. 7th ed. 11; 11th ed., 9; in notes to *Cutter* v. *Powell* (1795) T. R. 320; 3 R. R. 188; Bullen and Leake's Plead. 3rd ed. 37. See *ante*, 484.

(*h*) See on this latter point *Foster* v. *Eades* (1860) 2 F. & F. 103.

Trover or detinue by the seller.

Where the property has not passed, the seller h
right of action in trover or detinue against the bu
the buyer has dealt with the goods in a manner in
with the seller's right of property or possession (*i*).
an action he may recover damages to an amount eq
value of the goods at the time of the conversion or
less, however, sums, such as freight, landing cha
properly paid by the buyer (*k*). But he cannot r
amount of any increased value subsequently add
goods by the buyer (*l*).

SECTION II.—WHERE THE PROPERTY HAS PAS

In relation to the seller's rights where the pr
passed, the Code provides:—

Code, s. 49 (1). Action for price when the property has passed.

"49.—(1.) Where, under a contract of sale, the pro
goods has passed to the buyer, and the buyer wrongfull
refuses to pay for the goods according to the terms of the
seller may maintain an action against him for the price

This is the seller's only remedy after delivery.

Whenever the property has passed and the
reached the actual possession (*m*) of the buyer,
sole remedy is by personal action. He stands in
of any other creditor to whom the buyer may owe
special remedies in his favour *quâ* seller are gone

Cannot rescind sale for simple delay in payment of price.

By the law of England, in this respect agreei
civil law (*n*), mere delay by the buyer in payi
will not justify the rescission of the contract by
unless the right to rescind be expressly reserve
principle at common law is, that the goods have
property of the buyer, and that the seller has ag

(*i*) See *Bishop* v. *Shillito* (1818) 2 B. & A. 329 (*n*); *Reid* v.
waite & Co. (1885) 53 L. T. 932; in both of which cases the d
ditional, and the buyer had wrongfully dealt with the goods.

(*k*) See last case in previous note, and the speech of Lord
Peruvian Guano Co. v. *Dreyfus Brothers & Co.* [1892] A. C
seqq.; 61 L. J. Ch. 748.

(*l*) *Reid* v. *Fairbanks* (1853) 13 C. B. 692; 22 L. J. C. P. 20
per Lord Macnaghten, *supra*; *Livingstone* v. *Rawyards Coal C*
25, 32.

(*m*) As to the seller's rights where the goods have not re
possession of the buyer, see the Chapter on the Unpaid S
against the Goods, *post*, 948, *et seqq.*

(*n*) Cod. 4, 38, 8 and 9; 4, 44, 14; *per* Lord Denman, C.J.,
Smith (1841) 1 Q. B. 389, at 396; 10 L. J. Q. B. 155; 55 R. R
might be an express condition that on default in payment th
voidable by the seller (*lex commissoria*): Dig. 18, 3, 2 and 3.
law see Code Civ. Arts. 1654, 1657.

(*o*) As in *Lamond* v. *Davall* (1847) 9 Q. B. 1030; 16 L. J. Q
502, *post*, 1077. See also Code, s. 48 (1), *post*, 1066; and (4),

for them the buyer's *promise* to pay the price. The seller's remedy is limited to an action for the breach of that promise, the damages being the amount of the price promised, to which may be added interest in certain cases (*p*).

Martindale v. Smith (1841).

The leading case on the subject is *Martindale* v. *Smith* (*q*), in which Lord Denman, C.J., delivering the opinion of the Queen's Bench after advisement, said: "Having taken time to consider of our judgment, owing to the doubt excited by a most ingenious argument whether the vendor had not a right to treat the sale as at an end, and reinvest the property in himself, by reason of the vendee's failure to pay the price *at the appointed time*, we are clearly of opinion that he had no such right, and that the action (trover) is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods if they remain in his possession till that price be paid. But that default of payment does not rescind the contract. . . . In a sale of chattels time is not of the essence of the contract, unless it is made so by express agreement (*r*).

Cannot rescind because of buyer's bankruptcy.

It has already been shown (*s*) that the bankruptcy of the buyer gives to the seller no right of rescission, because the assignee has by law the right either to disclaim, or to adopt and carry out the contracts of the bankrupt (*t*).

Different forms of claim in personal action against buyer.

It is not proposed to enter into questions of procedure, but it may be stated generally that the seller may recover the price of goods sold, either where the goods have been *sold and delivered* to the buyer, or where they have been only *bargained and sold* to him. The latter form of action is applicable where the property has passed, and the contract has been completed in all respects except delivery, and delivery is not part of the consideration for the payment of the price, or a condition precedent to its payment (*u*), as

(*p*) Interest cannot as a general rule be given in an action for goods sold: see *post*, 947; *sed aliter* in Scotland: *ibid.*

(*q*) 1 Q. B. 389, at 395, set out *ante*, 674; approved by the P. C. in *Page* v. *Courajee Eduljee* (1866) L. R. 1 P. C. 127 at 145.

(*r*) See Code, s. 10 (1), *ante*, 674. Lord Denman's language must, however, be interpreted by the facts of the case, where the buyer had merely delayed payment two or three days. For continued default might be evidence of an intention by the buyer to repudiate the contract, in which case the seller might rescind.

(*s*) *Ante*, 936, 937.

(*t*) Bankruptcy Act, 1914 (4 & 5 G. 5 c. 59), s. 54.

(*u*) Bullen and Leake's Plead. 3rd ed. 39; *Scott* v. *England* (1844) 14 L. J. Q. B. 43; 69 R. R. 868. See also *Forbes* v. *Smith* (1863) 11 W. R. 574.

where payment is by agreement to be made irresp
delivery (*x*), or where the condition of delivery
waived by the buyer's refusal to take or receive del
or by his conduct in preventing it (*z*); or has beer
by the perishing of the goods which are at the ri
buyer (*a*). These principles are by implication
by section 49 (1) of the Code. The seller can, u
clause, sue for the price where the buyer "wr
neglects or refuses to pay, that is to say, where the
performed or offered to perform all conditions precede
ment, as *e.g.*, a settlement of an account, showing
due for goods (*b*), or delivery, where the price is n
till after delivery. Where the property has not p
seller's claim must, as a general rule (*c*), be s
damages for non-acceptance (*d*).

The claim must also be special where the payme
made by bill or note, or partly in cash and partly b
the buyer refuses to give either (*e*), for, as the
entitled to credit, an immediate action for the pri
lie (*f*). In such a case the damages are not the p
goods, the price not being yet due, but the seller's
ever that may be (*g*). But if the giving of the b
be the condition to credit being allowed at all (
example, where the goods are sold for "cash with
bill" (*i*), in that case, if the bill be not given, the
sue at once for the price. A seller may also, wit
specially, wait until the time of credit has expired

(*x*) Code, s. 49 (2), *ante*, 941.
(*y*) *Hankey* v. *Smith* (1795) Peake, 42, n.
(*z*) *Studdy* v. *Sanders* (1826) 5 B. & C. 628; *Mackay* v. *Dick*
251.
(*a*) *Alexander* v. *Gardner* (1835) 1 Bing. N. C. 671; 4 L. J.
223; 41 R. R. 651; *ante*, 387.
(*b*) *Garey* v. *Pyke* (1839) 10 A. & E. 512; *cf. Smith* v. W
C. B. 487 (no balance due).
(*c*) See s. 49 (2), *ante*, 941.
(*d*) *Atkinson* v. *Bell* (1828) 8 B. & C. 277; 6 L. J. K. B. 258
set out *ante*, 177—179.
(*e*) *Paul* v. *Dod* (1846) 2 C. B. 800; 52 L. J. C. P. 77; M
(1803) 4 East, 147; *Rabe* v. *Otto* [1904] 89 L. T. 562.
(*f*) *Hoskins* v. *Duperoy* (1808) 9 East, 498.
(*g*) *Helps* v. *Winterbottom* (1831) 2 B. & Ad. 431; 9 L. J.
R. R. 609; *per* Lawrence, J., in *Mussen* v. *Price* (1803) 4 I
Kennedy, J., in *Rabe* v. *Otto* [1903] 89 L. T. 562. In Am
appears to be that the damages are the price: Sedgw. on
Rinehert v. *Oldwine* (1843) 5 W. & S. 157; *Hanna* v. *Mills* (183
(*h*) *Nickson* v. *Jepson* (1817) 2 Stark. 227.
(*i*) *Rugg* v. *Weir* (1864) 16 C. B. (N. S.) 471; 139 R. R. 58

case he can then recover the full price of the goods, or the sum which was to be paid in cash (*k*).

Interest on the price when payable.

Where the goods are to be paid for by a bill which is not given, the seller is also entitled to interest on the price from the time when the bill would have matured (*l*). Ordinarily he is not entitled to any interest, even when the sale is on credit, and a particular date is fixed for payment (*m*), but he may be entitled by express or implied agreement (*n*).

Where the buyer has given a bill in payment, the seller must account for the bill if dishonoured, and cannot recover the price if the bill be outstanding (*o*).

With regard to Scotland, section 49 (3) provides that:—

Seller's right in Scotland to recover interest on price.

"49.—(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be."

The Scotch common law is that interest is always payable from the date when the price is payable (*p*).

In cases where the goods have been warranted, the Code provides:—

Payment into Court in Scotland when breach of warranty alleged.

"59.—In Scotland where a buyer has elected (*q*) to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an act on (*r*) by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof."

The Courts, however, have rarely exercised this power in ordinary actions for the price of goods (*s*).

(*k*) *Brooke* v. *White* (1805) 1 B. & P. N. R. 330; *Hoskins* v. *Duperoy* (1808) 9 East 498; *per Cur.* in *Dutton* v. *Solomonson* (1803) 3 B. & P. N. R. 582; 7 R. R. 883.

(*l*) *Marshall* v. *Poole* (1810) 13 East, 98; 12 R. R. 310; *Farr* v. *Ward* (1837) 3 M. & W. 25. See also Code, s. 54, *ante*, 930.

(*m*) *Gordon* v. *Swan* (1810) 2 Camp. 429; 11 R. R. 758 n. in the K. B.; *Calton* v. *Bragg* (1812) 15 East 223; *Higgins* v. *Sargent* (1823) 2 B. & C. 348; 2 L. J. K. B. 33; 26 R. R. 379.

(*n*) *Willmott* v. *Gardner* [1901] 2 Ch 548; 70 L. J. Ch. 810, C. A.

(*o*) *Re A Debtor* [1908] 1 K. B. 344; 77 L. J. K. B. 409, C. A.; *ante*, 901.

(*p*) Brown's Sale of Goods Act, 237. See also 1 Bell's Com. 694.

(*q*) Under s. 11 (2), *ante*, 646. As to the position, with regard to compensation for a breach of warranty, of a buyer in Scotland whose rejection of the goods is invalid as compared with that of a buyer in England or Ireland, see *post*, 1142.

(*r*) By s. 62 (1) of the Code, "action" includes in Scotland "condescendence and claim" (a phrase applicable to an action of multiple poinding, *Anglicè* interpleader), and "compensation" (which is set off).

(*s*) Brown's Sale of Goods Act, 268.

CHAPTER II.

UNPAID SELLER'S REMEDIES AGAINST THE GOODS GENERAL PRINCIPLES.

WHERE the property in goods has passed by a s *right of possession* also passes, but is, as we ha defeasible on the insolvency of the buyer, or the non- ance of conditions precedent or concurrent imposed by the contract (*a*).

Goods may be either in possession of the buyer,

or of the seller,

or in transit for delivery to buyer.

If the goods have been delivered into the *actual p* of the buyer, all right over them is gone (*b*): but delivered, the goods may be placed in two different c of fact as regards their actual custody. They may in the actual possession of the seller (or of his a bailees, which amounts to the same thing), or they been put *in transit* for delivery to the buyer, and th *actual possession* of neither party. When they ar transit, the law gives the unpaid seller the right cepting them, and thereby of preventing them from the actual possession of an *insolvent* buyer. This is known right of *stoppage in transitu*.

Seller has at least a lien for unpaid price on goods while in his possession unless waived.

Sale on credit.

When the goods have not yet left the actual po the seller, he has at common law *at least* a lien for price, because he is always presumed to contract, contrary be expressed, on the condition that he is his money when he parts with his goods. But he to sell on credit, that is, to give the buyer immedi sion of the goods, and trust to his promise to pay *in futuro*. Such an agreement amounts plainly t of the lien (*c*), and if the buyer then exercise his take away the goods, nothing is left but a perso against him. But if we now suppose that, after in which the lien has thus been unequivocally w buyer for his convenience, or any other motive, l goods in the custody of the seller until the credit h

(*a*) See the Chapter on Delivery, *ante*, 780—781.
(*b*) *Ante*, 944.
(*c*) *Per* Hobart, C.J., in *Cowper* v. *Andrews* (1612) Hob. Edw. 4, 5, and 14 H. 8, 22.

and has then made default in payment, or has become insolvent *before* the credit has expired, what are the seller's rights? He has agreed to relinquish his lien, and the goods are not yet in transit. Does his lien revive, on the ground that the waiver was conditional on the buyer's maintaining himself in good credit? Or can the seller exercise a quasi right of stoppage in transitu—a right that might perhaps be termed a stoppage *ante transitum* (*d*).

Meaning of the word "delivery" in this connection.

Attention must be recalled to the different meanings of the words "delivery" and "possession," as already pointed out (*e*). For the seller is frequently considered by the Courts as being in actual possession of the goods when he has made so complete a delivery as to be able to maintain an action for goods sold and delivered. Thus, for instance, where delivery has been effected by the seller's assuming the changed character of bailee for the buyer, the unpaid seller is still deemed to be in the *actual possession* of the goods for the purpose of exercising his remedies on them, and this even where he gives a written paper acknowledging that he holds the goods for the buyer, and subject to the buyer's orders (*f*).

Nature and extent of unpaid seller's claim on the goods.

Bloxam v. *Sanders* (1825).

In the leading cases of *Bloxam* v. *Sanders* (*g*) and *Bloxam* v. *Morley* (*h*), decided in 1825, which were said by Blackburn, J., in 1866 (*i*), to be still correct expositions of the "peculiar law" as to unpaid sellers, Bayley, J., stated the principles as follows: "The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. . . . If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains posses-

(*d*) This question was answered in the affirmative in Scotland, as in England, though the theory of Scotch law was, not that the seller had a right of *lien* on the buyer's goods, but that he had a right of retention springing out of his own undivested right of *property*, and based upon the theory that there was "an exemption from performance of the personal obligation to deliver so long as the counter-obligation to pay is unperformed": *per* Lord Curriehill in *Wyper* v. *Harveys* (1861) 23 D. 620. But the result was the same as in England: *per* Lord Young and the Lord Justice Clerk in *Fleming* v. *Smith* (1881) 8 Ret. 548. See the subject of the right of retention considered *post*, 998.

(*e*) Chapter on Delivery, *ante*, 779.

(*f*) *Townley* v. *Crump* (1836) 4 A. & E. 58; 5 L. J. K. B. 14; 43 R. R. 300, *post*, 961.

(*g*) 4 B. & C. 941; 7 D. & R. 396; 28 R. R. 519; *ante*, 781.

(*h*) 4 B. & C. 951; 28 R. R. 519.

(*i*) In *Donald* v. *Suckling* (1866) 35 L. J. Q. B. 232, at 237.

sion (*k*). . . . If the seller has despatched the g
buyer, and insolvency occurs, he has a right, in v
original ownership, to stop them in transitu. Wh
the *property* is vested in the buyer so as to subject
risk of any accident; but he has not an indefensi
the *possession*, and his insolvency, without paym
price, defeats that right. And if this be the case
despatched the goods, and whilst they are in
fortiori is it when he has never parted with the
when no transitus has begun. The buyer, or thos
in his place, may still obtain the right of possess
will pay or tender the price, or they may still act
right of property, if anything unwarrantable is d
right. If, for instance, the original vendor sel
ought not, they may bring a special action agai
the injury they sustain by such wrongful sale,
damages to the extent of that injury (*l*); but they
tain no action in which right of property an
possession are both requisite unless they have
rights." The assignees of the insolvent buyer we
held not entitled to maintain trover against the u
who had sold the goods on credit, but who still h
his own warehouse.

Bankrupt's trustee cannot maintain trover against unpaid seller in possession.

The section of the Code which declares generally
seller's rights over the buyer's goods is the followi

Code, s. 39. Unpaid seller's rights

"**39.**—(1.) Subject to the provisions of this Act (*n*).
statute in that behalf (*o*), notwithstanding that the pr
goods may have passed to the buyer (*p*), the unpaid sel
such, has by implication of law (*q*)—

"(a.) A lien on the goods or right to retain (*r*) them
while he is in possession of them;

(*k*) *Tooke* v. *Hollingworth* (1793) 5 T. R. 215; 2 R. R. 513.

(*l*) The view of the Court on the subject of resale is not ea
they meant that a seller cannot resell merely because the buyer
to the possession, the statement is undoubted law; but if the
resale without the buyer's authority is in all cases wrongful,
overruled in *Maclean* v. *Dunn* (1828) 4 Bing. 722; 6 L. J. C. P.
714, *post*, 1075.

(*m*) As to the specific remedy in Scotland by attachment o
s. 40, *post*, 999.

(*n*) Ss. 25 (1) and (2), and 47 (substantially identical with
respectively of the Factors Act, 1889); 41–43 (lien); 44–46 (
(resale); and s. 55, *ante*, 254. S. 47 is printed *post*, 985.

(*o*) Ss. 8, 9, and 10 of the F. Act, 1889. S. 8 is set out
ante, 49.

(*p*) This is a very unfortunate phrase. A lien presupposes th
has passed. See sub-s. 2, *infra*, and *per* Buller, J., in *Lickba*
(1793) 6 East, 21, at 27, n.; 1 R. R. 425, quoted *post*, 1002

(*q*) These rights may be rebutted: s. 55, *ante*, 254.

(*r*) This is a term of Scotch law, and is discussed *post*, 998

"(b.) In case of the insolvency (*s*) of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them (*t*);

"(c.) A right of resale as limited by this Act (*u*).

"(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies (*x*), a right of withholding delivery similar to and co-extensive with his rights of lien in stoppage in transitu where the property has passed to the buyer."

The unpaid seller is thus defined:—

"38.—(1.) The seller of goods is deemed to be an 'unpaid seller' within the meaning of this Act— Code, s. 38 (1). Unpaid seller defined.

"(a.) When the whole of the price (*y*) has not been paid or tendered (*z*);

"(b.) When a bill of exchange or other negotiable instrument has been received as conditional payment (*a*), and the condition on which it was received has not been fulfilled by reason of the dishonour (*b*) of the instrument or otherwise" (*c*)

And the term "seller" with regard to this part of the Code is further defined (*d*):—

"38.—(2.) In this part of this Act (*e*) the term 'seller' includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price." Code, s. 38 (2).

A seller in possession of goods may, therefore, exercise the right of lien or of resale when the buyer has made default in payment of the price (the dishonour of a negotiable instrument given in conditional payment being included), and when out of possession may on such default stop the goods in transitu, in case of the buyer's insolvency. The seller's rights of stoppage and of resale will be considered in subsequent

(*s*) Defined in s. 62 (3), set out *post*, 1012.

(*t*) See s. 44, *post*, 1003.

(*u*) In s. 48 (3) and (4), *post*, 1082.

(*x*) Under s. 49 (2), *ante*, 941; and s. 50, *ante*, 930.

(*y*) The price may, however, be apportioned: see *post*, 956.

(*z*) These words read literally include the case of a seller who has given credit before the credit has expired. But the price must be *due*, *per* Lord Ellenborough in *Raitt* v. *Mitchell* (1815) 4 Camp. 146; 16 R. R. 765. During the term of credit the seller has waived the lien under s. 43 (1) (*c*), *post*, 964.

(*a*) See on this, the chapter on Payment, *ante*, at 897 *et seqq.*

(*b*) Previously to dishonour the seller would be paid, though only conditionally: *Valpy* v. *Oakeley* (1851) 16 Q. B. 941; 20 L. J. Q. B. 380; 83 R. R. 786, *post*, 958.

(*c*) "Otherwise" includes insolvency.

(*d*) This sub-section is considered with regard to stoppage in transitu, *post*, 1001—1007.

(*e*) *I.e.* Part IV., dealing with rights of unpaid seller against the goods, ss. 38—48.

Chapters (*f*). In the next Chapter will be discussed his of lien, and his right, analogous to that of lien, of wit ing delivery when the property has not passed.

The unpaid seller's rights as against the sub-buyer, etc.

The rights of the unpaid seller were not at commo and (subject to the provisions of the Factors Act, 188 are not now, affected by a resale to a third person, unl seller has by his conduct *estopped* himself from asserti own rights.

Cases illustrating this principle will be hereatte sidered (*h*). This right of the unpaid seller agains buyers or pledgees has been adopted by section 47 of th hereafter set out (*i*).

The effect on the contract of the exercise of the rights is thus declared:

Code, s. 48 (1). Contract of sale not rescinded by seller's exercise of rights of lien, retention, or stoppage.

"**48.**—(1.) Subject to the provisions of this section (*k*), a of sale is not rescinded by the mere exercise by an unpaid selle right of lien or retention or stoppage in transitu."

As an unpaid seller exercises his right of lien wh price is due and unpaid, or the buyer is insolvent, a right of stoppage when the buyer is insolvent, section says in effect that the mere default by the buyer in p will not justify the seller in rescinding the contract, *a* the defaulting buyer cannot do so; for he cannot take tage of his own wrong (*l*). This is in accordance w common law. The sub-section thus leaves open the right to rescind the contract where the buyer's delay ment amounts to a repudiation on his part, and is ot declaratory of the common law as laid down in *Martin Smith* (*m*). For example, the trustee of an insolven may elect to hold by the contract, and in that event is within a reasonable time to tender the seller *cash*, wh the seller would be bound to deliver the goods (*n*).

(*f*) Ch. IV., *post*, 1002, *et seqq.*, and Ch. V., *post*, 1072. respectively.

(*g*) The first statutory provisions on the subject were s. 4 of the F of 1877 (40 & 41 V. c. 39), to substantially the same effect as s. 9 of th Act of 1889, and s. 25 (2) of the Code, *ante*, 49; and s. 5, which in lik is substantially re-enacted in s. 10 of the Factors Act and the provis of the Code, *post*, 985.

(*h*) *Post*, 984, *et seqq.* (*i*) *Post*, 985.

(*k*) Sub-ss. 2—4 dealing with the seller's right of resale.

(*l*) *Roberts* v. *Wyatt* (1810) 2 Taunt. 268; 11 R. R. 566; *Malins* v (1838) 4 Bing. N. C. 395; 7 L. J. (N. S.) C. P. 212; 44 R. R. 737.

(*m*) (1841) 1 Q. B. 389; 10 L. J. Q. B. 155; 55 R. R. 285, set out See also Lord Denman, C.J.'s judgment in that case, set out *ante*, 94

(*n*) *Per Cur.* in Ex parte *Stapleton* (1879) 10 Ch. D. 586, C. A.

seller himself would be entitled to maintain an action for goods bargained and sold, if he were ready to deliver on payment (*o*).

Unpaid seller's title as against wrongdoer.

The unpaid seller, having either the possession of the goods, or (where he has duly stopped them in transit) the right to their possession, has a possessory title or special property in the goods, and may accordingly on general principles bring case, trespass, detinue, or trover against a wrongdoer who interferes with such title or property (*p*).

(*o*) *Kymer* v. *Suwercropp* (1807) 1 Camp. 109; 10 R. R. 646.

(*p*) *Heydon and Smith's Case* (1610) 13 Co. Rep. 69, where the rule is stated that "clearly the bailee or he who hath a special property shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over"; *Armory* v. *Delamirie* (1722) 1 Sm. L. C. 7th ed. 357; 11th ed. 356; *The Winkfield* [1902] P. 42; 71 L. J. P. 21, C. A., where the cases are cited and considered, and the reason given in *Heydon and Smith's Case* for the rule is shown not to be essential; *Eastern Construction Co.* v. *Nat. Trust Co.* [1914] A. C. 197, P. C.; 83 L. J. P. C. 122. See also *ante*, 109, and cases cited in note (*y*), *ibid.* There are no English cases of actions by sellers, but there are two cases in America: *Young* v. *Mertens* (1867) 27 Maryl. 114; *Tuthill* v. *Skidmore* [1891] 124 N. Y. 148.

CHAPTER III.

REMEDIES AGAINST THE GOODS—LIEN.

The circumstances in which the unpaid seller may his right of lien are thus declared by the Code:—

Code, s. 41 (1). Seller's lien.

"41.—(1.) Subject to the provisions of this Act (*a*), th seller (*b*) of goods who is in possession of them is entitled possession (*c*) of them until payment or tender of the pr following cases, namely:—

"(a.) Where the goods have been sold without any stipula credit;

"(b.) Where the goods have been sold on credit, but th credit has expired;

"(c.) Where the buyer becomes insolvent" (*d*).

The effect of section 41 (1) may be summed up in position that a lien is exercisèable when the price is unpaid (*e*).

Lien defined.

A lien in general may be defined to be a right of property until a debt due to the person retainin been satisfied (*f*); and as the rule of law is, that in goods, where nothing is specified as to delivery or the seller has the right to retain the goods until pa the price (*g*), he has in all cases a lien, unless he has

Meaning of "possession."

The lien then is dependent on the seller's possess goods. And a seller will be in possession, notwit that some degree of control is given to the buyer, the seller has not done anything to allow the goo into the *uncontrolled* possession of the buyer. Thu preserves his lien over goods stored in a place to

(*a*) Ss. 42 (part delivery), *post*, 971; 43 (1) (termination of lie *et seqq*; 47 (disposition by buyer), *post*, 985; 55 (express agreemen 254.

(*b*) Defined s. 38 (1), *ante*, 9

(*c*) This expression covers both the lien in England and Ire "right to retain" in Scotland, which, however, is now probably the lien. See *post*, 998.

(*d*) Defined s. 62 (3), *post*, 1012.

(*e*) Otherwise there can be no lien: *Raitt* v. *Mitchell* (1815) 16 R. R. 765; *per* Lord Esher, M.R., in *The Eider* [1893] P. L. J. P. 65.

(*f*) *Per Curiam* in *Hammonds* v. *Barclay* (1802) 2 East, 235

(*g*) *Per* Bayley, B., in *Miles* v. *Gorton* (1834) 2 C. & M. 511 155; 39 R. R. 820.

buyer has access, but from which he cannot remove the goods without the seller's consent, as, for example, where the buyer has the inner, but the seller the outer, key (*h*).

But this lien extends only to the *price*. If by reason of the buyer's default the goods are kept in warehouse, or other charges are incurred in detaining them, the lien does not extend to such a claim, and the seller's remedy is personal against the buyer (*i*).

Extends only to price, not to charges, etc.

In *Somes* v. *The British Empire Shipping Company* (*k*), it was held by the unanimous judgment of the Queen's Bench, the Exchequer Chamber, and the House of Lords, that a shipwright who, in order to preserve his lien against the owner of a ship, kept the ship in his dock after repairing her, could not include in his lien dock charges for the time that elapsed between the completion of the repairs and the delivery of the ship, notwithstanding the owner's default in payment. In the House of Lords, Lord Wensleydale said (*l*): "I am clearly of opinion that no person has by law a right to add to his lien upon a chattel a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit." Lord Cranworth, who concurred, said (*m*): "The short question is only this, whether Messrs. Somes, retaining the ship, not for the benefit of the owners of the ship, but *for their own benefit*, in order the better to enforce the payment of their demand, could then say: 'We will add our demand for the use of the dock during that time to our lien for the repairs.' The two Courts held, and as I think correctly held, that they had no such right."

Somes v. *The British Empire Shipping Co.* (1858).

In *Crommelin* v. *The New York and Harlem R. R. Co.* (*n*) the Court of Appeals of New York held, in like manner, that a railway company had no lien for a claim in respect of the delay of a consignee in taking away goods; that the lien was for freight only, and the claim for demurrage was only personal.

In America. *Crommelin* v. *New York and Harlem R. R. Co.* (1868).

(*h*) *Milgate* v. *Kebble* (1841) 3 M. & G. 100; 10 L. J. C. P. 277; 60 R. R. 475; *Ex parte Willoughby* (1881) 16 Ch. D. 604; *Great Eastern Railway* v. *Lord's Trustee* [1908] A. C. 109; 78 L. J. K. B. 160. See a most instructive judgment of Fletcher-Moulton, L.J., in S. C. [1908] 2 K. B. 54, on the whole question of possession under a lien.

(*i*) See as to this s. 37 of the Code, *ante*, 854.

(*k*) E. B. & E. 353; 27 L. J. Q. B. 397; in Ex. Ch. (1859) E. B. & E. 367; 28 L. J. Q. B. 220; in H. L. (1860) 8 H. L. C. 338; 30 L. J. Q. B. 229. See also *Hartley* v. *Hitchcock* (1816) 1 Stark. 408; 18 R. R. 790.

(*l*) 8 H. L. C. at 345.

(*m*) *Ibid.*, at 344.

(*n*) 4 Keyes, 90. See also *Phillips* v. *Rodie* (1812) 15 East, 547; 13 R. R. 528 (dead freight); *Birley* v. *Gladstone* (1814) 3 M. & S. 205; 15 R. R. 465 (demurrage).

Unless otherwise agreed.

This rule is, of course, subject to an agreement to trary. Thus, certain charges, *e.g.*, customs duties, agreement be treated as part of the price, in which lien will attach to them (*o*).

Seller's lien is as a rule indivisible.

Furthermore, as every contract for a number of *prima facie* an entire or indivisible contract for that although the goods may be deliverable by instalment in consequence the buyer is not entitled to the poss any part of the goods unless he be ready and willing and pay for all (*p*), it follows that the seller's lien over every part of the goods for the price of the w But *cessante ratione cessat ipsa lex*. If by agreem instalment be treated as a separate contract the sel is apportionable accordingly. And even where the such provision, when the instalments are to be separa for, the contract will be treated as apportionable. ingly the seller cannot retain the instalments paid reason of the non-payment of the price of the resid goods (*r*), though he may, on the buyer's insolvenc any instalment unpaid for till he is paid the price of of any other instalment previously delivered, as revives by implication of law (*s*).

This indivisibleness of the lien seems to be recog the Code, enacting section 42 (*t*) that the unpaid s exercise "his right of lien," after a part delivery, remainder of the goods; and section 38 (1) (a) tha seller is 'unpaid'' unless the *whole* of the price has or tendered.

A lien may exist, even under an illegal contract. been executed by the passing of the property, as, for

(*o*) *Winks* v. *Hassall* (1829) 9 B. & C. 372; 7 L. J. K. B.
(*p*) Code, s. 28, *ante*, 683.
(*q*) See the reasoning of Holroyd *arguendo* in *Hanson* v. *Me* East, 614, at 622; 8 R. R. 572, and the case there cited of a c *Sodergren* v. *Flight*, decided in 1796. See also *Ford* v. *Baynton* (1 P. C. 357, and *per* Parke, B., in *Wentworth* v. *Outhwaite* (1842) 436, at 442; 12 L. J. Ex. 172; 62 R. R. 624; and *Ex parte Cha* L. R. 8 Ch. 289; 42 L. J. Bk. 37, set out *post*, 963.
(*r*) *Merchants' Banking Co.* v. *Phœnix Bessemer Steel Co.* D. 205; 46 L. J. Ch. 418.
(*s*) *Ex parte Chalmers* (1873) L. R. 8 Ch. 289; 42 L. J. Bk. 37, solvency. Query whether, there being no insolvency, the seller ma lien over an undelivered instalment unpaid for for the price of a previously delivered?
(*t*) Set out *post*, 971.
(*u*) Set out *ante*, 951.

one made on a Sunday (*x*); or in respect of a debt barred by the Statute of Limitations (*y*).

Tender of price divests lien.

As the seller's lien is a right solely for the purpose of securing payment of the price, it follows that a tender of the price puts an end to the lien even if the seller decline to receive the money; and this was the decision in *Martindale* v. *Smith* (*z*).

S. 41 (1) (a). No stipulation as to credit.

The law applicable where there is no provision as to credit was thus stated by Bayley, B., in *Miles* v. *Gorton* (*a*): "The general rule of law is, that where there is a sale of goods, and nothing is specified as to delivery or payment, although everything may have been done so as to devest the property out of the vendor, and so as to throw upon the vendee all risk attendant upon the goods, still there results to the vendor out of the original contract a right to retain the goods until payment of the price."

S. 41 (1) (b). Credit expired without buyer's insolveney.

When goods have been sold on credit, and remain in the seller's possession till the credit has expired, the seller's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent. The point was directly decided, in 1828, in *New* v. *Swain* (*b*), and by Littledale, J., at *Nisi Prius*, in 1832, in *Bunney* v. *Poyntz* (*c*), and has ever since been treated as settled law.

S. 41 (1) (c). Buyer's insolvency.

The third case in which a seller is entitled to retain possession is that of the buyer's insolvency (*d*). And here it should be remarked that, the provision in clause (*c*) being perfectly general, the seller's lien will revive even when the period of credit has not expired at the time when the buyer becomes insolvent. This is according to common law (*e*).

Revival of seller's lien on dishonour of bills given in payment, or the buyer's insolvency.

The two following cases show that during the currency of the bill given in payment the seller is paid; but that, on its dishonour, or the buyer's insolvency, the seller becomes unpaid, and his lien revives.

(*x*) *Scarfe* v. *Morgan* (1838) 4 M. & W. 270; 7 L. J. Ex. 324; 51 R. R. 568, and *cf. Fergusson* v. *Norman* (1838) 5 Bing. N. C. 76; 8 L. J. C. P. 3.

(*y*) *Spears* v. *Hartly* (1800) 3 Esp. 81; 6 R. R. 814; *Re Broomhead* (1847) 5 Dowl. & L. 52; 16 L. J. Q. B. 355; 79 R. R. 839.

(*z*) (1841) 1 Q. B. 389; 10 L. J. Q. B. 155; 55 R. R. 285. *ante*, 674.

(*a*) (1834) 2 C. & M. 504, at 511; 3 L. J. Ex. 155; 39 R. R. 820.

(*b*) (1828) 1 Dans. & L. 123; 34 R. R. 767.

(*c*) (1833) 4 B. & Ad. 568; 2 L. J. K. B. 55; 38 R. R. 309.

(*d*) Defined Code, s. 62 (3), *post*, 1012. See also *In re Phœnix Bessemer Steel Co.* (1876) 4 Ch. D. 108; 46 L. J. Ch. 115, C. A.

(*e*) *Per Cur.* in *Bloxam* v. *Sanders* (1825) 4 B. & C. 941, at 948; 28 R. R. 519, quoted *ante*, 949; *Miles* v. *Gorton* (1833) 2 C. & M. 504; 3 L. J. Ex. 155; 38 R. R. 820, *post*, 961; *Grice* v. *Richardson* (1877) 3 A. C. 319; 47 L. J. P. C. 48, P. C.

Valpy v. *Oakeley* (1851).

In *Valpy* v. *Oakeley* (*f*), the defendant sold 500 to
to one Boydell, to be delivered in three parcels, and
for by Boydell's acceptance of the seller's bills draw
The bills he accepted and returned to the seller. *D*
currency of the credit the seller made default by
only a part of the iron. The first bill was paid; the
were not paid, and subsequently to their maturity
became bankrupt. This action was brought by
assignees in assumpsit for non-delivery. A breach
tract being admitted, the only question argued
principle on which the damages were to be assessed.
rupt's assignees claiming the full value of t
undelivered, as the breach had taken place during the
of the bills, which were at that time payment, and
was then entitled to the possession. *Held*, that the
could only recover such damages as the bankrupt m
recovered; and that, as at the time of the dishono
bills the seller's lien revived, and he was then *un*
bankrupt could only have recovered the difference be
contract price and the market price, and only nomina
where no such difference is proven. The *ratio de*
this case was distinctly that, on the dishonour of
the parties were placed in the same condition as if
had never been given, and the contract had been
ready money, and this fact, though it did not affect
rupt's vested right of action, should be taken into
tion as affecting the damages.

Wightman, J., said: "As long as the bills were
they may be taken to have been *prima facie* payment
were dishonoured before the iron was delivered, a
case I have no doubt *that the vendor's lien attaches*
he may retain his goods until he is paid."

Griffiths v. *Perry* (1859).

This point came again before the same Court, but
of different Judges, in *Griffiths* v. *Perry* (*g*), in 18
the previous case, the sellers had committed a brea
tract during the currency of the credit, and before
became bankrupt or was in default, and the question
the amount of damages. Crompton, J., said: "W
are left in the hands of a vendor, it cannot properly
be a stoppage in transitu, for it is one of those case
the transitus has not commenced. . . . I think it

(*f*) (1851) 16 Q. B. 941; 20 L. J. Q. B. 380; 83 R. R. 755.
(*g*) 28 L. J. Q. B. 204; 1 E. & E. 680; 117 R. R. 397, *coram* C
and Hill, J.

established in a great many cases that there is a similar right where the transitus has not commenced; and although no right to a strict lien has ever existed (*h*), yet where goods remain in the party's hands, and insolvency occurs, and the bill is dishonoured, there a right analogous to that of stoppage in transitu arises, and there is a right to withhold the delivery of the goods." It was accordingly held (1), in accordance with *Valpy* v. *Oakeley*, that the plaintiff was only entitled to nominal damages; (2) that it makes no difference with regard to the seller's lien whether the sale is of specific chattels, or an executory contract to supply goods (*i*).

Whether sale is of specific chattels or of goods to be supplied is immaterial.

It has been explained (*k*) that where a seller receives, as conditional payment, a negotiable instrument, he cannot sue for the price while the instrument is outstanding in the hands of a third person, for otherwise the buyer would be compelled to pay twice, once to the seller and once to the holder of the instrument. But no such rule is applied where the seller's *lien* is in controversy. Here the only question is, Has the seller been in fact paid or not? and except where the seller has negotiated *without recourse* the instrument received, that is to say, has sold it, the circumstance that it is outstanding in the hands of a third person at the time when the lien is claimed is immaterial; for, as the condition on which the seller received the instrument is at that time unfulfilled, he is still unpaid (*l*). Thus, in *Miles* v. *Gorton* (*m*), it was held that on the bankruptcy of the buyer the lien of the unpaid seller revived, Bayley, B., saying, in answer to the argument, that the note was outstanding, that the *only* question was whether the seller had the right to hold the goods till the price was paid, and that it had not been paid, the note having been dishonoured. *Gunn* v. *Bolckow* (*n*) is a decision to the same effect.

Seller's lien not lost merely because bill or note taken in payment is outstanding.

In *Bunney* v. *Poyntz* (*o*) the dealings with the negotiable instrument had the same effect as if the seller had negotiated it without making himself liable, so as to convert the conditional into an absolute payment. His agent for sale, who

Conditional payment by bill converted into absolute payment.

Bunney v. *Poyntz* (1833).

(*h*) Because it has been originally waived by the granting of credit.

(*i*) See on this second point, *Ex parte Chalmers*, *post*, 963, and Code, s. 39 (2), *ibid.*

(*k*) *Ante*, 901.

(*l*) Code, s. 38 (1) (*b*), *ante*, 951.

(*m*) (1831) 2 C. & M. 504; 3 L. J. Ex. 155; 39 R. R. 820. *post*, 961.

(*n*) (1875) L. R. 10 Ch. 491; 44 L. J. Ch. 732. See also *Ex parte Willoughby* (1881) 16 Ch. D. 604.

(*o*) 2 L. J. K. B. 55; 1 N. & M. 229; 4 B. & Ad. 568. All the reports should be consulted.

had, by the terms of the contract, received the buyer
£70 in payment payable to his own order, discount
the agent's bankers, the plaintiffs, to whom he en
The seller was no party to the note and did not indor
agent did not hand over to his principal the proce
note, and became bankrupt, and the note was dishc
the buyer. By subsequent agreement with the pla
buyer sold the hay to them for £75, the face value
being taken in part payment, and the balance of £5
paid by the plaintiffs. They then claimed the ha
seller set up his lien. *Held*, in an action of trove
seller had received payment and had lost his lien.
observed that the note had in fact been satisfied by

Observations on *Bunney* v. *Poynts*.

This case has been treated by the learned Auth
by some other text-writers (*q*), as showing that a se
if he receive a negotiable instrument in payment an
it without rendering himself liable thereu
undoubtedly, had the note been payable to the selle
negotiated by him without recourse, or had the a
case so negotiated it, the seller would have been
case, it is submitted, must depend upon the fa
transactions subsequent to the receipt of the not
payment to the seller (*r*). The buyer, if he had b
the price, could successfully have pleaded the
satisfaction with the plaintiffs as payment; and
seller nor the agent was liable to the plaintiffs
because he was not a party to the note, and the ag
the principal debtor, the buyer, had discharged it

Retention of lien where seller is buyer's bai'e..

When the seller had attorned to the buyer, th
had agreed to hold the goods sold as his ... t, the
common law gone, for it had been waive...). N
if the buyer became *insolvent*, the lien revive
law would not compel the seller to deliver to a

(*p*) 2nd ed. 601; 4th ed. 736.

(*q*) *E.g.*, Smith's Merc. Law, 9th ed. 541; 10th ed. 672; 1

(*r*) Mr. Benjamin adds this comment on the case: "Plainly
had been allowed to recover" (? to retain his lien), "the buyer
remained liable to pay a second time to the banker who held h
ed. 601; 4th ed. 736; but he takes no note of the accord and s
speaks of the note as not paid.

(*s*) Accordingly, it is submitted that the case is not inconsis
v. *Bolckow* (1875) L. R. 10 Ch. 491; 44 L. J. Ch. 732, by wh
have been overruled. See *Re J. Defries* [1909] 2 Ch. 423; 78 L

(*t*) *Per* Blackburn, J., in *Cusack* v. *Robinson* (1860) 1 B. &
30 L. J. Q. B. 261; 124 R. R. 566, quoting Holroyd, J., in B
(1823) 2 B. & C. 37, at 44; 1 L. J. K. B. 229; 26 R. R. 260, an

buyer (*u*). The law has now been extended so as to cover all cases of lien. The provision of the Code is as follows:

"41.—(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier (*x*) for the buyer." Code, s. 41 (2).

If the buyer be solvent, and entitled to credit, he can of course during the currency of the credit call upon his agent, the seller, to deliver the goods, for at that time there is no "right of lien" for the seller to exercise (*y*).

In 1833, *Miles* v. *Gorton* (*z*) was decided in the Exchequer. The seller sold hops on credit, and kept them in his warehouse *on rent* charged to the buyer. The buyer afterwards accepted the bill for the price, which was negotiated by the seller. The buyer dealt with the hops as his own, and sold part of them, which were delivered to the sub-buyer. The buyer then became bankrupt, and the bill was subsequently dishonoured. His assignees brought trover for the remainder in the seller's warehouse. *Held*, that as against them the seller had the right to retain possession till payment of the price, for, the seller being in *actual* possession, the payment of warehouse rent to him did not amount to a constructive delivery, though it might have done so had the warehouseman been a third person. In answer to the argument that the seller's lien, once gone, was gone for ever, Bayley, B., said *arguendo*: "That may perhaps be so in some cases where the possession of the goods has been parted with, but it does not apply to the case where the goods remain in the possession and under the control of the vendor, in which case the lien may be suspended by circumstances, and may afterwards *revive*." *Miles* v. *Gorton* (1833).

To the same effect was *Grice* v. *Richardson* (*a*), before the Privy Council, where the facts were substantially identical. Issue of warrant to buyer.

In *Townley* v. *Crump* (*b*), the defendants, wine merchants in Liverpool, sold to one Wright a parcel of wine in their own bonded warehouse there for an acceptance at three *Townley* v. *Crump* (1836).

(*u*) *Per* Mellish, L.J., in *Gunn* v. *Bolckow* (1875) 10 Ch. 491, at 501; 44 L. J. Ch. 732; *Townley* v. *Crump* (1836) 4 A. & E. 58; 5 L. J. K. B. (N. S.) 14; 43 R. R. 200, *infra*; *Grice* v. *Richardson* (1877) 3 A. C. 319; 47 L. J. P. C. 48, P. C.

(*x*) A Scotch term for bailee.

(*y*) *Per* Bayley, J., in *Bloxam* v. *Sanders* (1825) 4 B. & C. 941; 28 R. R. 519, quoted *ante*, 949; Code, s. 43 (1) (*c*).

(*z*) 2 C. & M. 504; 3 L. J. Ex. 155; 39 R. R. 820.

(*a*) (1877) 3 A. C. 319; 47 L. J. P. C. 48.

(*b*) 4 A. & E. 58; 5 L. J. (N. S.) K. B. 14; 43 R. R. 200; cited by Lord Atkinson in *Dublin City Distillery* v. *Doherty* [1914] A. C. 823, at 847; 83 L. J. P. C. 265.

months, and gave him an invoice describing th
marks and numbers, and handed him the followi
order (*c*):—"Liverpool, 29th of September,
Benjamin Wright.—We *hold to your order* 39
1 hhd. red wine marked J C J M. No. 41a 67
pipes, No. 105 hhd., *rent free* to 29 November
Crump & Co." The bill accepted by Wrigh
honoured; a fiat in bankruptcy issued against hi
assignees brought trover against the sellers. It w
"that the invariable mode of delivering goods s
warehouses in Liverpool is by the vendors han
vendees delivery orders." Lord Abinger, C.B., a
pool Assizes, refused to receive evidence that t
question was equivalent to a delivery order acce
sellers, or that the witness (a broker and merch
bonded vaults in Liverpool) would consider the
such an order as possession of the property, bu
him to say that, in his opinion, the possession
would obtain credit for the holder with a purchase
as a matter of custom, the goods specified in su
would be considered the property of the person
order. His Lordship directed a nonsuit, which
Bench, in Banc, refused to set aside, Lord Den
the opinion of the Court (*d*) in these words: "
total failure of proof that where a vendor, who is
warehouseman, sells to a party who becomes ban
the goods are removed from the warehouse, the d
operates by reason of this custom to prevent
attaching, and I think it is not contended that
general usage which could devest this right in
upon the insolvency of the vendee (*e*). Cases hav
but none where the question arose between the ori
and vendee."

It is impossible to imagine a clearer case of
agreement to change the character of his possess
of bailee for the buyer; but this sort of deliv
allowed so to operate as to force the seller to give
to the buyer's assignees in bankruptcy. Yet th
done all that he was bound to do in performance

(*c*) This document, which is called in the case a "del
properly a warehouse-keeper's certificate, and is in the nature
(*d*) Lord Denman, C.J., Patteson, J., Williams, J., and
(*e*) As already pointed out, the rule under s. 41 (2) is not
insolvency: *ante*, 961.

tract before the buyer's insolvency, and could have sued for goods sold and delivered.

It will be shown hereafter (*f*) that, had the warrant been transferred to a *sub-buyer*, the seller might have lost his lien. But the case itself is not affected by the Factors Act, the warrant not being a "document of title" *as between seller and buyer*.

Quasi-lien where the property has not passed.

Where the property in the goods has not passed to the buyer, the seller has a right of withholding delivery, which may be described as a quasi-lien, for a true lien can only be exercised upon the property of another. This right is thus declared by the Code:—

Code, s. 39 (2)

"39.—(2.) Where the property in goods has not passed to the buyer (*g*), the unpaid seller has, in addition to his other remedies (*h*), a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer."

As the right of withholding delivery is to be coextensive with the rights of lien and of stoppage, it arises when the price is due and unpaid, or the buyer becomes insolvent.

The cases at common law in which the right of quasi-lien was recognised were all cases in which the buyer was insolvent (*i*), but the rule is now laid down generally. The following is the leading case:

Ex parte *Chalmers* (1873).

In Ex parte *Chalmers* (*k*), Hall & Co. had contracted to sell goods to Edwards by monthly instalments, payment to be by cash in fourteen days from the date of each delivery. Deliveries were made and duly paid for. Edwards became insolvent, and there was then one instalment delivered which was unpaid for, and a final instalment undelivered. Hall & Co., upon notice of the insolvency, refused to deliver the remaining instalment, whereupon Edwards' trustees in bankruptcy sued them for non-delivery. *Held*, that Hall & Co. had a right to refuse delivery of the goods until the price of *both* instalments had been paid.

In delivering the opinion of the Court (*l*), Mellish, L.J., reviewed the authorities, and decided, in accordance with

(*f*) *Post*, 985, *et seqq.*, and 994.
(*g*) "Buyer" includes one who agrees to buy: Code, s. 62 (1).
(*h*) Under s. 49 (2), *ante*, 941, and s. 50, *ante*, 930.
(*i*) See, *e.g.*, *Griffiths* v. *Perry* (1859) 1 E. & E. 680; 28 L. J. Q. B. 204; 117 R. R. 397, *ante*, 958.
(*k*) 8 Ch. 289; 42 L. J. Bk. 37. See also *Morgan* v. *Bain* (1874) L. R. 10 C. P. 15; 44 L. J. C. P. 47.
(*l*) Lord Selborne, L.C., James, L.J., and Mellish, L.J.

Griffiths v. *Perry* (*m*), that the seller's right exists n
an agreement to sell goods to be delivered by instal
on a sale of specific goods.

With respect to the termination of the seller's
Code, following the common law, enacts as follows:

Code, s. 43. Termination of lien.

"43.—(1.) The unpaid seller of goods loses his lien or righ
tion (*n*) thereon—

"(a.) When he delivers the goods to a carrier or other
custodier (*o*) for the purpose of transmission to
without reserving the right of disposal (*p*) of the

"(b.) When the buyer or his agent lawfully obtains p
the goods;

"(c.) By waiver thereof.

Not lost by judgment for price.

"(2.) The unpaid seller of goods, having a lien or right
thereon, does not lose his lien or right of retention by reaso
he has obtained judgment or decree (*q*) for the price of the

S. 43 (1) (a). Delivery to carrier.

First, as regards delivery to a carrier. The ord
is that a delivery of the goods to a common carrie
veyance is such a delivery of actual possession to
through his agent, the carrier, as suffices to put an
seller's lien (*s*). The seller, may, however, undertake
the goods to the buyer at the destination, and the
then the seller's agent (*t*). This was the rule at co
and it has not been altered by the Code. The selle
reserve the right of disposal, which he *prima facie*
on shipment, he takes a bill of lading making
deliverable to the order of himself, or of his agent
reserves, not only the right of property, but also the
for such a delivery is not a delivery to the buyer,
captain of the vessel on behalf of the person indic
bill of lading (*x*), and it is by the indorsement a

(*m*) *Ante*, 958.

(*n*) The Scotch equivalent for lien discussed *post*, 998.

(*o*) A Scotch term for bailee.

(*p*) See on this *ante*, 363—365, and Book II. Ch. VI., *ante*
especially 423—432.

(*q*) A Scotch term for judgment.

(*r*) The common law authorities for this sub-section ar
Desanges (1818) 2 Stark. 337; 20 R. R. 692, and *Scrivener* v.
Ry. Co. (1871) 19 W. R. 388. But if the seller gets the goods
tion, he loses his lien, the possession passing to the Sheriff: *J*
(1828) 5 Bing. 130; 6 L. J. C. P. 243.

(*s*) *Ellis* v. *Hunt* (1789) 3 T. R. 464, 469; 1 R. R. 743;
(1799) 8 T. R. 330; 4 R. R. 675; *Wait* v. *Baker* (1848) 2 Ex.
307; 16 R. R. 469; *Fragano* v. *Long* (1825) 4 B. & C. 219; 3 I
28 R. R. 226; *Dunlop* v. *Lambert* (1838) 6 Cl. & F. 600; 49 R.

(*t*) *Dunlop* v. *Lambert*, *supra*; *Badische* v. *Basle Chemica*
A. C. 200; 67 L. J. Ch. 141.

(*u*) Code, s. 19 (2), *ante*, 420.

(*x*) *Per* Parke, B., in *Wait* v. *Baker*, *supra*.

only of the bill of lading that a symbolical delivery of the cargo is effected (*y*).

Seller's lien not lost by delivering goods f.o.b. if he takes receipt in his own name

The seller's lien is not lost by sending goods on board of a vessel on the buyer's instructions, even though by the contract the goods are to be delivered free on board to the buyer, if the seller on delivery take (*z*) or demand (*a*) a receipt for them in his own name, for this is evidence that he has not yet parted with his control; the possession of the receipt entitles him to the bill of lading and the goods, represented by their symbol, the bill of lading, are still in his possession.

Possession of receipt by seller not conclusive.

Yet the seller, though he is in possession of the receipt, may have lost his lien. Thus where a delivery was made on the ship indicated by the buyers, and the buyers, having the option to pay by bill, had given their acceptance, and by the custom of London on a sale of goods f.o.b. the buyer was considered to be the shipper, it was held in the Privy Council that, as the sellers had taken the acceptance which was only to be given by the buyer on the delivery of the goods, and so were in substance paid, and also having regard to the custom, the delivery was completed, and the retention by the sellers of the mate's receipt was wrongful and did not prolong their lien (*b*).

S. 43 (1) (b). Lawful possession by buyer or agent.

Secondly, as regards the case where the buyer "lawfully obtains possession" of the goods. The addition of the qualifying adverb shows that the possession must not be obtained tortiously as against the seller (*c*).

Lien abandoned by delivery of the goods to the buyer.

As soon as a bargain and sale are completed, the buyer becomes at once vested with the ownership and the *right of possession*, but *actual possession* does not pass by the mere contract (*d*). Something further is required, unless, indeed, the buyer had been previously in actual possession as bailee of the seller, in which case, of course, the seller's assent that the buyer shall thenceforth possess in his own right as proprietor of the thing would make a complete delivery for all purposes.

The "actual receipt" required by the Statute of Frauds, and now by section 4 of the Code, being possible only when

(*y*) *Per* Bowen, L.J., in *Sanders* v. *Maclean* (1883) 11 Q. B. D. 341; 52 L. J. Q. B. 481, quoted *ante*, 846.
(*z*) *Craven* v. *Ryder* (1816) 6 Taunt. 433; 16 R. R. 644, *ante*, 423.
(*a*) *Ruck* v. *Hatfield* (1822) 5 B. & Ald. 632; 24 R. R. 507.
(*b*) *Cowasjee* v. *Thompson* (1845) 5 Moo. P. C. 165; 70 R. R. 27.
(*c*) See *Wallace* v. *Woodgate* (1824) R. & M. 193. The original Bill contained the words "obtains possession" without qualification. It was amended in Committee.
(*d*) *Ante*, 780.

the seller has made delivery, our present inquiry
anticipated to some extent (*e*). But that inquiry had
to the *formation* of the contract. The question now
mine is when the delivery by the seller is so far adva
he has lost his lien, and may maintain a count for g
and delivered.

Delivery to divest lien not the same as to satisfy s. 4. of the Code.

As there must always be a delivery of possession
the goods at least to satisfy the clause of the S
Frauds, and now of the Code, which relates to "actual
it would seem to be a natural inference that acts held
under that Statute to constitute an actual receipt
done in respect of the *whole* of the goods sold, deter
seller's lien, and justify an action for goods sold and

This view of the law is believed to be sound as re
ability of the seller to maintain an action for goods
delivered. The seller's attornment to the buyer
an actual receipt, and is a delivery in performance,
also at common law a divesting of the lien in
instance (*f*), (the lien, however, reviving on the
insolvency) (*g*). But by section 41 (2) (*h*) of the Code
in all cases "may exercise his right of lien" notwith
that he is the buyer's bailee, so that his attornme
buyer is no longer a test of the lien being divested.

Where goods are already in possession of the buyer.

Where the goods are at the time of the contract
possession of the buyer, as agent of the seller, the
pletion of the contract operates as a delivery of
There is nothing further that can be done to tra
actual possession. After a sale has been shown to
goods being already in *actual* possession, and the eff
contract being to transfer the *right of possession*
that of property, the delivery becomes complete of
without further act on either side (*i*), though of
parties may, by agreement, provide that this effect
take place. If A. has consigned to B. goods for sal
nothing in the law to prevent a subsequent contract
A. sells the goods to B., coupled with a stipulation

(*e*) *Ante*, 241, *et seqq*.

(*f*) Blackburn on Sale, 224; 2nd ed. 335—336; *per* Blackburn,
v. *Robinson* (1861) 30 L. J. Q. B. 261, at 264; 30 L. J. Q. B. 264;

(*g*) *Miles* v. *Gorton* (1833) 2 C. & M. 504; 3 L. J. Ex. 155;
ante, 961; *Townley* v. *Crump* (1836) 4 A. & E. 58; 5 L. J.
43 R. R. 200, *ibid*.

(*h*) *Ante*, 961.

(*i*) See *Cain* v. *Moon* [1896] 2 Q. B. 283; 65 L. J. Q. B.
gift subsequent to delivery; *Morris* v. *Delobbel-Flipo* [1892] 2
61 L. J. Ch. 518 (pledge by agent).

possession shall continue to be that of a bailee for A. until the price is paid (*k*), or that the seller might retake the goods (*l*).

Where goods are in possession of seller's bailee.

When the goods are at the time of sale in possession of a third person, as bailee for the seller, an actual delivery of possession takes place, and the lien is lost as soon as the seller, the buyer, and the third person agree together that the latter shall become the agent of the buyer in retaining custody of them (*m*). The cases have been reviewed under the head of "Actual Receipt" (*n*).

Loss of lien where goods are lying on premises of a third person not bailee of seller, and the buyer is allowed to take actual control.

Where the seller allows the purchaser to deal as owner with—for example, to mark or spend money upon—the goods sold which are lying at a public wharf, or on the premises of a third person, not the bailee of the seller, especially where the buyer is allowed to take away part of the goods, this is so complete a delivery of possession as to divest the lien, although the seller might, under the same circumstances, have had the right to retain the goods, if they had been on his own premises (*o*).

Where goods are in possession of seller at time of sale.

The goods are generally in the seller's possession at the time of sale, and the modes by which delivery can be effected are so various as to justify Chancellor's Kent's reference (*p*) to "the labyrinth of cases that overwhelm and oppress this branch of the law." Many points, however, are free from doubt.

Effect of marking goods or putting them in packages.

A delivery of goods sufficient to divest the lien is not effected by the mere marking them in the buyer's name (*q*),

(*k*) *See Dodsley* v. *Varley* (1840) 12 A. & E. 632; 54 R. R. 652, Code, s. 55.

(*l*) *Richards* v. *Symons* (1845) 8 Q. B. 90; 15 L. J. Q. B. 35.

(*m*) *Harman* v. *Anderson* (1809) 2 Camp. 243; 11 R. R. 706; *Bentall* v. *Burn* (1824) 3 B. & C. 423; 3 L. J. K. B. 42; 27 R. R. 391; *Lackington* v. *Atherton* (1844) 7 M. & G. 360; 13 L. J. C. P. 140; *Farina* v. *Home* (1846) 16 M. & W. 119; 16 L. J. Ex. 73; 73 R. R. 433; *Godts* v. *Rose* (1855) 17 C. B. 229; 25 L. J. C. P. 61; 104 R. R. 668; *Grigg* v. *National Guardian Assurance Co.* [1891] 3 Ch. 206; 61 L. J. Ch. 11 (pledge); *cf. Poulton & Son* v. *Anglo-American Oil Co.* [1911] 27 T. L. R. 216, C. A. (mere notice by seller to bailee of sale).

(*n*) *Ante*, 242—244.

(*o*) *Tansley* v. *Turner* (1835) 2 Bing. N. C. 151; 4 L. J. (N. S.) C. P. 272; 42 R. R. 564; *Cooper* v. *Bill* (1865) 3 H. & C. 722; 34 L. J. Ex. 161; 140 R. R. 698. See also *Marshall* v. *Green* (1875) 1 C. P. D. 35; 45 L. J. C. P. 153, *ante*, 245, where, however, Brett, J., held (*dubit.* Grove, J.) that, with regard to an "actual receipt," it was immaterial whether the trees sold were in the possession of the seller or of a third person.

(*p*) 2 Kent, Com. ed. 1873, 510.

(*q*) *Proctor* v. *Jones* (1826) 2 C. & P. 532; 2 R. R. 693; *Dixon* v. *Yates* (1833) 5 B. & Ad. 313; 2 L. J. K. B. 198; 39 R. R. 489; *Holderness* v. *Shackels* (1828) 8 B. & C. 612; 7 L. J. K. B. 80; 32 R. R. 496. See also the Civil Law: Dig. 18, 6, 1, 2.

or setting them aside (*r*), or packing them up by t
chaser's orders in his cloths or boxes (*s*), so long as th
holds the goods, and has not agreed to give credit on t

Conditional delivery.

If the seller consent to give delivery to the buyer on
condition, it is of course incumbent on the buyer to
the condition before he can claim the possession, as
seller gave the buyer an order for goods lying in a
warehouse, with the understanding that the buyer wa
the duties, it was held that on the buyer's insolve
assignees could not take possession of the goods
refunding the duties which the seller had advanced on
of the buyer (*t*).

Revesting of lien.

A lien once lost is not revested by the mere fact
seller afterwards obtains possession of the goods (*u*).

Seller's resumed possession.

sion must be obtained with an intention on the pa
buyer that the right of lien shall revest (*x*).

S. 43 (1) (c). Lien may be waived when contract is formed or abandoned afterwards.

Thirdly, as regards waiver. The seller's lien may
be waived expressly. It may also be waived by im
at the time of the *formation* of the contract when t
show that it was not contemplated that the seller shou
possession till payment; and it may be abandoned d
performance of the contract by the seller's actually
with the goods before payment.

Lien waived by sale on credit,

The lien is waived by implication when time is
payment, and nothing is said as to delivery: in oth
when goods are sold on credit. And the very cir
of the case, where nothing is said, may show that
given (*y*). The parties may of course agree expr
goods sold on credit are not to be delivered till pa

unless special agreement or usage to the contrary.

unless this special agreement or an established us
the same effect can be shown, selling goods on cre
ex vi termini that the buyer is to take them into h

(*r*) *Simmons* v. *Swift* (1826) 5 B. & C. 857; 5 L. J. K. B
29 R. R. 438; *Townley* v. *Crump* (1835) 4 A. & E. 58; 5 L. J. N
43 R. R. 200); *Holderness* v. *Shackels*, *ante*, 967.

(*s*) *Goodall* v. *Skelton* (1794) 2 Bl. H. 316; 3 R. R. 37
Arnott (1833) 1 C. & M. 333; 2 L. J. Ex. 97.

(*t*) *Winks* v. *Hassall* (1829) 9 B. & C. 372; 7 L. J. K. B.
Payne v. *Shadbolt* (1809) 1 Camp. 427 (giving a bill

(*u*) *Jacobs* v. *Latour* (1828) 5 Bing. 130; 6 L. J. C. P.
Gibson (1847) 4 C. B. 837; 16 L. J. C. P. 241; 72 R. R. 7
next note.

(*x*) *Valpy* v. *Gibson*, *supra*; *Jones* v. *Pearle* (1723) 1 Str.
Jones v. *Thurloe* (1723) 8 Mod. 172 (same); *Hartley* v. *Ha*
Stark. 408; 18 R. R. 790 (work); *Sweet* v. *Pym* (1809) 1 E.
497 (same).

(*y*) As, *e.g.*, where a meal is taken at a restaurant
1 Q. B. 219; 67 L. J. Q. B. 41.

(*z*) See Code, s. 55, *ante*, 254.

sion, and the seller is to trust to the buyer's promise of payment at a future time.

Spartali v. Benecke 1850.

In *Spartali* v. *Benecke* (*a*), the sale was of thirty bales of wool, "to be paid for by cash in one month, less 5 per cent. discount." In an action for non-acceptance, the buyers pleaded that the sellers were not ready and willing to deliver. The sellers contended that, on the true construction of the contract, the goods were to be paid for on delivery, but that the buyers were not bound to take them until the expiration of the month. The buyers contended that they were entitled to delivery at any time within the month, but were not bound to pay until the end of the month. Talfourd, J., agreeing that this contention was sound, the sellers then tendered evidence of usage of the wool trade that under such a contract the sellers were not bound to deliver without payment. This evidence was rejected, and the plaintiffs were nonsuited. The opinion of the learned Judge was upheld by the Court in Banc, on the grounds—1. That it was "clear law that where by the contract the payment is to be made at a future day, the lien for the price . . . is waived . . . upon the ground that the lien would be inconsistent with the stipulation in the contract for a future day of payment" (*b*); and 2. That parol evidence of usage was inadmissible to contradict the terms of the written contract, which implied that delivery was to be made before payment.

Evidence of usage admissible to show that in a sale on credit delivery was to be concurrent with payment

Field v. Lelean 1861.

But on this second point *Spartali* v. *Benecke*, according to the interpretation placed on the usage there relied on by the Exchequer Chamber in *Field* v. *Lelean* (*c*), has been overruled. There the sale was by one broker in mining shares to another. The contract was "Bought, Thomas Field, Esq., 250 shares, etc., at £2 5s. per share, £562 10s. for payment, half in two, half in four months." It was held by the Court unanimously that parol evidence was admissible of a usage among dealers in such shares that the delivery was to take place concurrently with, and at the time agreed on for, payment. Wightman,

(*a*) 10 C. B. 212; 19 L. J. C. P. 293, 84 R. R. 532. See also *Ford* v. *Yates* (1841) 2 M. & G. 549; 10 L. J. C. P. 117; 58 R. R. 471. *Lockett* v. *Nicklin* (1848) 2 Ex. 93; 19 L. J. Ex. 403; 76 R. R. 502; both discussed *ante*, 965; *Greaves* v. *Ashlin* (1813) 3 Camp. 426; 14 R. R. 771; and *cf.* *Colts* v. *Rose* (1855) 17 C. B. 229, 25 L. J. C. P. 61; 104 R. R. 668, *ante*, 393. *Chase* v. *Westmore* (1816) 5 M. & S. 180; 17 R. R. 301. *Crawshay* v. *Thompson* (1820) 4 B. & Ald. 50; 22 R. R. 618; *Cowell* v. *Simpson* (1809) 16 Ves. Jr. 275; 10 R. R. 181.

(*b*) 6 H. & N. 617; 30 L. J. Ex. 168; 123 R. R. 729, *coram* Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., Blackburn, J., and Keating, J. See also cases cited in notes to *Wigglesworth* v. *Dallison* (1779) 1 Sm. L. C. 7th ed. 598; 11th ed. 545.

J., in delivering the judgment of the Court, r
Spartali v. *Benecke* as hardly distinguishable from
case, and said that the decision proceeded on the
ground that the introduction of a custom as to t
delivery would alter or vary the time fixed for
whereas the time of payment would not be altere
custom would only affect the time of delivery, as to
written contract was silent.

But although that case must be treated as overr
point respecting admissibility of evidence of the
authority of *Spartali* v. *Benecke* is unshaken in su
principle that a sale on credit, in the absence of
stipulation express or implied from usage, is a wa
seller's lien.

Lien when waived by taking bill of exchange or other security.

A seller also waives his lien by taking from the
of exchange or other security payable at a distan
for taking such a security amounts to the giving
during the currency of the instrument. It is thu
ponement of payment which is the essential p
security as affecting the right of lien. The mere
security does not displace the lien; the security mu
sistent with it (*e*).

S. 43 (1) (c) should be read as subordinate to s. 41 (1) (b) and (c).

Section 43 (1) (c) (*f*) of the Code, as to *loss*
waiver, should, in cases where the seller "waives
by accepting credit, be read subject to section 41
(c) (*g*). Otherwise the lien would not revive when
of credit expires, or the buyer becomes insolvent,
mon law (*h*).

Waiver by seller's wrongful repudiation of contract, or claim of possession on other grounds.

The lien is also waived by implication where
repudiates the contract by wrongfully refusing (
ing himself unable (*k*), to deliver the goods, or
dealing with them in a manner inconsistent with a

(*d*) *Hewison* v. *Guthrie* (1836) 2 Bing. N. C. 755; 3 Scott
(N. S.) C. P. 283; 42 R. R. 720; *Horncastle* v. *Farran* (1820
497; 22 R. R. 461; *Alsager* v. *St. Katharine's Dock Co.* (1845
794; 15 L. J. Ex. 34; 69 R. R. 827.

(*e*) *Angus* v. *McLachlan* (1883) 23 Ch. D. 330; 52 L. J.
Kay, J.; *Bank of Africa* v. *Salisbury Gold Mining Co.* [1892
61 L. J. P. C. 34.

(*f*) *Ante*, 964.

(*h*) See *Miles* v. *Gorton* (1833) 2 C. & M. 504; 3 L. J. Ex.
820, *ante*, 961; and *Townley* v. *Crump* (1836) 4 A. & E. 58; 5
K. B. 14; 43 R. R. 200, *ibid.*

(*i*) *Jones* v. *Tarleton* (1842) 9 M. & W. 675; 11 L. J. Ex.
803; *Kerford* v. *Mendel* (1859) 28 L. J. Ex. 303; *Davies* v.
Q. B. 443; 14 L. J. Q. B. 30; 66 R. R. 457.

(*k*) *Jones* v. *Cliff* (1833) 1 C. & M. 540; 2 L. J. (N. S.) Ex.
686; *Gurr* v. *Cuthbert* (1843) 12 L. J. Ex. 369; 61 R. R. 7
Florence (1878) 3 Q. B. D. 184; 47 L. J. Q. B. 703, C. A.

of possession, as, for example, by consuming them (*l*). So also where he does not rely upon a right of lien, but claims to keep the goods upon some other ground (*m*). In all these cases the seller dispenses with payment or tender of the price (*n*).

With regard to the effect on the lien of part delivery, the Code enacts:

Code, s. 42. Part delivery.

"42.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention."

In other words, a delivery of part is *prima facie* only a delivery of that part. This adopts the common law rule, which was stated by Mr. Benjamin as follows:

"Generally a delivery of part of the goods sold is not equivalent to a delivery of the whole, so as to destroy the vendor's lien (*o*). He may, if he choose, give up part, and retain the rest: and then his lien will remain on the part retained in his possession for the price of *the whole* (*p*): but there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of part operates as a delivery of the whole, and puts an end to the vendor's possession, and consequently to his lien."

Illustrations of part delivery. *Slubey* v. *Heyward* (1795).

In *Slubey* v. *Heyward* (*q*), a case of stoppage in transitu, the defendant being in possession, as sub-buyer of a cargo of wheat, of bills of lading which had been indorsed to him by the buyer, had ordered the vessel to Falmouth, with the seller's consent, and there had begun receiving the cargo from the master, and had already taken out 800 bushels, when

(*l*) *Gurr* v. *Cuthbert* and *Mulliner* v. *Florence*, *supra*.

(*m*) *Boardman* v. *Sill* (1808) 1 Camp. 410 (*n*); recognised in *Yangtsze Insurance Association* v. *Traesemann* [1893] 67 L. T. 642, C. A.; *cf.* *White* v. *Garner* (1824) 2 Bing. 23; 2 L. J. C. P. 101; *Morley* v. *Hay* (1828) 3 M. & Ry. 396; 7 L. J. K. B. 191; *Cannee* v. *Spanton* (1844) 18 L. J. C. P. 23; 66 R. R. 817; *West* v. *Goode* (1859) 6 C. B. (N. S.) 367; 120 R. R. 164.

(*n*) *Jones* v. *Cliff* and *Jones* v. *Tarleton*, *ante*, 970.

(*o*) *Per* Lord Blackburn in *Kemp* v. *Falk* (1882) 7 A. C. at 586; 52 L. J. Ch. 167; *Ex parte Cooper* (1879) 11 Ch. D. 68; 48 L. J. Bk. 49, C. A. The rule was stated conversely by Parke, J., in *Dixon* v. *Yates* (1833) 5 B. & Ad. at 341; 2 L. J. K. B. 198; 39 R. R. 489, where he said "that if part be delivered with intent to separate that part from the rest, it is not an inchoate delivery of the whole," and by Taunton, J., in *Betts* v. *Gibbins* (1834) 2 A. & E. at 79; 4 L. J. (N. S.) K. B. 1; 41 R. R. 381; but these dicta were strongly questioned by Pollock, C.B., in *Tanner* v. *Scovell* (1845) 14 M. & W. at 37; 14 L. J. Ex. 321; 69 R. R. 644.

(*p*) See as to the indivisible nature of the lien *ante*, 958.

(*q*) 2 H. Bl. 504; 5 R. R. 486.

the original seller attempted to stop the further delive
his buyer had become insolvent. *Held*, that "the
was ended by the delivery of the 800 bushels of wh
must be taken to be a delivery of the whole, there
no intention, either previous to or at the time of the
to separate part of the cargo from the rest."

Hammond v. *Anderson* (1803).

Hammond v. *Anderson* (*r*) followed in the same
was the case of goods sold when lying at a wha
delivery order for all the goods given to the
Possession had been taken by him of part, he ha
viously weighed the whole, at the wharfinger's pre
the seller countermanded the delivery order. Rooke
"The whole of the goods was paid for by one bill;
order was given for the delivery of the whole, and the
under that order went and took away a part. How
more effectually change the possession?" Chambr
the view that there had been an *actual* physical deli
the goods, as the bankrupt had had actual manual
of every article, weighed them all, and separated t
case has been subsequently explained on each
grounds (*s*).

It seems very plain that in these two cases th
delivery of the whole, not because a part was ca
but because the seller's agent and bailee in eac
attorned to the buyer. There was in each case an
between the seller, the buyer, and the bailee, tha
named should thenceforth hold for account of the
And in *Hammond* v. *Anderson* there was the
circumstance that the buyer had had actual phys
sion of the whole.

In *Bunney* v. *Poyntz* (*u*), the buyer of a par
asked the seller's *permission* to take a part, an
granted, and it was held not to be a delivery of
"Here," said Parke, J., distinguishing *Hammon*
son, "the intention of both parties was to separa

(*r*) 1 B. & P., N. R. 69; 8 R. R. 763. See also *Tansley* v
2 Bing. N. C. 151; 4 L. J. (N. S.) C. P. 272; 42 R. R. 564.

(*s*) In *Ex parte Cooper* (1879) 11 Ch. D. 68; 48 L. J.
Brett, L.J., explained the case on the first ground of attornment
L.J., took the view of Chambre, J. Parke, J., in *Bunney* v.
4 B. & Ad. at 571; 2 L. J. K. B. 55; 38 R. R. 359, also agreed w
Bramwell, L.J., in *Ex parte Falk* (1880) 14 Ch. D. 455, treat
Anderson as a case of attornment.

(*t*) See the preceding note.

(*u*) (1833) 4 B. & Ad. 568; 2 L. J. K. B. 55; 38 R. R. 359.

delivered from the residue, and the vendee took possession of part only."

So, in *Dixon* v. *Yates* (*x*), the delivery by the seller of two puncheons of rum out of a larger quantity was held not to be a delivery of the whole, the seller having refused a delivery order for the whole.

In *Simmons* v. *Swift* (*y*), the delivery of part of a stack of bark was held not to be a delivery of the whole, but the decision was on the ground that the sale was by weight, and the part remaining had not been weighed.

Miles v. *Gorton* (1834).

In *Miles* v. *Gorton* (*z*), the sellers sold a parcel of hops consisting of two kinds: twelve pockets of Kent hops and ten pockets of Sussex hops. They rendered one invoice for the whole, which expressed that the goods remained at rent for account of the buyer. A bill of exchange was given in payment. The buyer sold the ten packets, and they were delivered to his sub-buyer. He afterwards became bankrupt, his acceptance was not paid, and his assignees brought trover against the sellers for the twelve pockets remaining on hand. Follett, for the plaintiffs, insisted that the intention was to deliver the whole, for the delivery was made by a seller who held the goods at one entire rent, and who would have delivered all the goods if he had been requested. It was held by all the Judges that the delivery of part did not constitute delivery of the whole, not being so intended by both parties. *Harmand* v. *Anderson* (*a*) was distinguished on the ground that the goods were in the possession of a *third person*, who had attorned to the buyer, Bayley, B., saying: "Where the goods are in the hands of a third person, such third person becomes by the delivery order the agent of the vendee instead of the vendor (*b*), and it may then well be said that the warehouse is the warehouse of the vendee as between him and the vendor. I do not think that the payment of warehouse rent to the vendor has the effect of a constructive delivery of the whole in a case where the goods remain in the possession of the vendor."

Tanner v. *Scovell* (1845).

In *Tanner* v. *Scovell* (*c*), one McLaughlin bought of

(*x*) (1833) 5 B. & Ad. 313; 2 L. J. K. B. 198; 39 R. R. 489.
(*y*) (1826) 5 B. & C. 857; 5 L. J. K. B. (O. S.) 10; 29 R. R. 438, *ante*, 20. See also *Hanson* v. *Meyer* (1805) 6 East, 614; 8 R. R. 572, *ante*, 356. *Richardson* (1878) 3 App. Cas. 319; 47 L. J. P. C. 48.
(*z*) 2 Cr. & M. 504; 3 L. J. Ex. 155; 39 R. R. 820; and see *Grice* v. (*a*) (1806) 2 Camp. 243; 11 R. R. 706.
(*b*) *I.e.* after he has attorned to the vendee.
(*c*) 14 M. & W. 28; 14 L. J. Ex. 321; 69 R. R. 644. See also *Jones* v. *Jones* (1841) 8 M. & W. 431; 10 L. J. Ex. 481; 58 R. R. 765; *Wentworth* v.

Boutcher & Co. certain goods, "delivered alon wharf." The sellers gave the following order, ad the defendants: "Please weigh and deliver McLaughlin forty-eight bales glue pieces." The d weighed and sent a return of the weight to Boutch who thereupon sent an invoice to McLaughlin. month later the defendants delivered five of these sub-buyer of McLaughlin on the latter's order. (3 arrived with further goods, which were treated in way by handing delivery orders to McLaughlin, and the goods weighed, and invoices sent to him. But n of any of the goods was made on the defendants' McLaughlin, nor was any rent charged to him. partial delivery was made to a sub-buyer of McLaug the sellers then notified the defendants to make deliveries, McLaughlin bei[ng] then in debt to th £700. McLaughlin became bankrupt, and his brought this action in trover against the defendan first, that the evidence failed to show that the defe agreed to become bailees for the buyer; and, seco the delivery of the part removed from the whar intended to be, and therefore did not operate as, a the whole, but was a separation for the purpose o only.

No case where part delivery holds a delivery of residue in seller's custody.

No case has been met with where the delivery been held to constitute a delivery of the remainder in the *seller's own custody* (*d*).

Part delivery under instalment contracts.

Ex vi terminorum, section 42 presupposes that existing "right of lien" at the time when the deli remainder of the goods is claimed after a par Accordingly, for example, if the goods are deli instalments which are not to be separately paid f ment is due only on full delivery, the seller has *initio*, and the buyer can claim delivery of all the such a lien will arise if the buyer's conduct an declaration that he will be unable or unwilling to of them, as, *e.g.*, in the case of his insolvency (*e*).

Outhwaite (1842) 10 M. & W. 436; 12 L. J. Ex. 172; 62 R Willes, J., in *Bolton* v. *Lancashire and Yorkshire Railway Co* 1 C. P. 431; 35 L. J. C. P. 137; *Ex parte Cooper* (1879) 11 L. J. Bk. 49, C. A. See the subject further considered under transitu."

(*d*) See *Payne* v. *Shadbolt* (1808) 1 Camp. 427; and as to delivery on the carrier's lien see *Moeller* v. *Young* (1855) 5 L. J. Q. B. 217; in Ex. Ch. 25 L. J. Q. B. 94; 103 R. R. 716.

(*e*) *Per* Jessel, M.R., in *Ex parte Carnforth Hæmatite* 4 Ch. D. 108, at 113; 45 L. J. Ch. 11, C. A.; Code, s. 41 (1) (c)

Buyer may be let into possession as bailee of seller.

In order that the seller's lien may be divested, the possession taken by the buyer must be taken in his capacity of buyer. For the buyer may be let into possession of the goods for a special purpose, or in a different character from that of buyer. Thus A. might refuse to deliver a horse sold to B. *qua* purchaser, but lend it to him for a day or a week (*f*); might sell his horse to the stable-keeper; who already has the horse at livery, and stipulate that the buyer's possession should continue that of bailee until payment of the price. On a like principle, in *Reeves* v. *Capper* (*g*), where a watch was lent by the pawnees to the pawnor, it was held that the pawnor possessed as agent of the pawnees, and that they could recover the watch in trover against third persons, to whom the pawnor had pledged it a second time. And in the *North Western Bank* v. *Poynter* (*h*), pledgees of a bill of lading who had handed it to the pledgors to enable the latter to sell the cargo on account of the pledgees were held by the House of Lords not to have lost their security, the pledgors' possession being only that of the pledgees' agents for a special purpose (*h*).

Special right analogous to lien created by agreement or course of dealing.

Sometimes, by virtue of agreement, express or to be inferred from the course of dealing (*i*), the seller is entitled to retain over the goods a right analogous to a lien, although the goods have been delivered into the buyer's actual possession. A special interest is thus created (*j*). Such was the decision in *Dodsley* v. *Varley* (*k*), which arose under the Statute of Frauds, and the facts of which have already been stated (*l*).

Dodsley v. *Varley* (1840).

Delivery by transfer of documents of title.

It is now necessary to examine the question of the effect on the seller's lien of the transfer and indorsement to the buyer of documents of title.

(*f*) *Tempest* v. *Fitzgerald* (1820) 3 B. & A. 680; 22 R. R. 526, *ante*, 247; *Marvin* v. *Wallis* (1856) 6 E. & B. 726; 25 L. J. Q. B. 369; 106 R. R. 784, *ante*, 246.

(*g*) (1838) 5 Bing. N. C. 136; 8 L. J. (N. S.) C. P. 44; 50 R. R. 634. See also *Nyberg* v. *Handelaar* [1892] 2 Q. B. 202; 61 L. J. Q. B. 709.

(*h*) [1895] A. C. 56; 64 L. J. P. C. 27, where it is shown that the law of Scotland on this point is identical with that of England.

(*i*) See Code, s. 55, *ante*, 254.

(*j*) The S. C. of the U. S. in *Gregory* v. *Morris* (1877) 96 U. S. 619 treat the seller's interest as in the nature of a mortgage; but see *per* Lord Blackburn in *Sewell* v. *Burdick* (1884) 10 A. C. 74, at 95—6; 54 L. J. Q. B. 126, citing *Howes* v. *Ball* (1827) 7 B. & C. 481; 6 L. J. K. B. 106; 31 R. R. 256, whence it would seem to be a personal right only, and not a right in security, there being no possession in the seller. See also in this connection *Re Hamilton Young & Co.* [1905] 2 K. B. 772; 74 L. J. K. B. 905, C. A. (equitable charge of goods in third person's possession).

(*k*) 12 A. & E. 632; 54 R. R. 652.

(*l*) *Ante*, 253.

The effect of these documents independently of th
Acts will first be considered, and afterwards their
under the Factors Act, 1889 (*m*).

Bills of lading: their nature and effect.

Bills of lading by the law merchant are represen
the property for which they have been given; and th
ment and delivery of a bill of lading transfers the p
a complete legal delivery (*n*), *divests the seller's lie*
now by the Bills of Lading Act (*o*), quoted below, t
effect of vesting in the buyer all the seller's rights
against the ship, master, and owner. But though t
lien is thus divested by the complete delivery of t
of property, he may, if the goods have not yet re
actual possession of the buyer, and if no third pe
acquired rights by obtaining a transfer of the bill
from the buyer, intercept the goods in the event of
insolvency before payment by the exercise of the
stoppage in transitu. These principles in relati
effect of a bill of lading were first established in
great case of *Lickbarrow* v. *Mason* (*p*), on the a
which very numerous decisions have since been
this mode of delivery the law is free from doubt.

Bills of Lading Act, 1855.

The Bills of Lading Act, 1855 (*q*), after recit
preamble that, "by the custom of merchants, a bil
of goods being transferable by indorsement, the
the goods may thereby pass to the indorsee, but
all rights in respect of the contract contained in
lading continue in the original shipper or owner
ceeds to enact by section 1 that "every consignee
named in a bill of lading and every *indorsee* of a bi
to whom *the* property (*t*) in the goods therein men
pass, upon or by reason of such consignment or in

(*m*) 52 & 53 V. c. 45, extended to Scotland in 1890 by 54 &
(*n*) "It is a key which in the hands of a rightful owner
unlock the door of the warehouse, floating or fixed, in which
chance to be": *per* Bowen, L.J., in *Sanders* v. *Maclean* (1883
at 341; 52 L. J. Q. B. 481, quoted *ante*, 846.
(*o*) 18 & 19 V. c. 111, set out *infra*.
(*p*) (1789) 2 T. R. 63; 1 H. Bl. 357; 6 East, 20; 1 Sm. L.
11th ed. 693; 1 R. R. 425.
(*q*) 18 & 19 V. c. 111.
(*r*) Referring to *Thompson* v. *Dominy* (1845) 14 M. & W.
Ex. 320.
(*s*) A consignee who retains the bill of lading for goods,
with the beneficial interest in them, is still a "consignee" with
of the Act: *Fowler* v. *Knoop* (1878) 4 Q. B. D. 299; 48 L. J. Q
(*t*) *I.e.* the general property. The section does not apply
the bill of lading who has only a *special* property in the go
Burdick (1884) 10 App. C. 74; 54 L. J. Q. B. 126, reversing jud
13 Q. B. D. 159; 52 L. J. Q. B. 428, and restoring that
Q. B. D. 363; 52 L. J. Q. B. 428.

shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself" (*u*).

Delivery orders.

Delivery orders are orders given by the seller on a bailee who holds possession as agent of the seller. A delivery order, properly so called, is, until it is acted upon, a mere "promise to deliver" (*x*), and the delivery is not complete until the bailee attorn to the buyer, and thus become the latter's agent as custodian of the goods (*y*). It was also decided at common law that a delivery order differed in effect from a bill of lading: that the indorsement of it by a buyer to a sub-buyer was unavailing to oust the possession of the original seller: and that his lien remained unaffected when neither the first buyer nor the sub-buyer had procured the acceptance of the order, nor taken actual possession of the goods before the order was countermanded (*z*). But the law, so far as it affects sub-buyers, has now been altered by the Factors Act (*a*).

Their effect.

Warrants and certificates

A warrant is a document issued by a wharfinger, dock-owner, or warehouseman, stating that certain goods therein mentioned are deliverable to a person therein named or his assigns by indorsement (*b*). A wharfinger's or warehouseman's certificate, when it is not in the form of a warrant, is simply an acknowledgment that goods described therein are deposited at the wharf or in the warehouse, and is generally expressed to be not transferable (*c*). Both a warrant and a certificate may be subject to conditions.

Remarks in Blackburn on Sale.

In treating of the effect of indorsing and delivering dock warrants, wharfingers' receipts, delivery orders, and similar documents, Blackburn, J., remarks (*d*): "When goods are at sea the purchaser who takes the bill of lading has done all

(*u*) It was decided in the case of *The Freedom* (1871) L. R. 3 P. C. 594, that under the above statute the transferee of a bill of lading might sue in his own name for damage to the goods under the 6th section of the Admiralty Act, 1861 (24 V. c. 10), but this case is criticised in *Sewell* v. *Burdick*, *supra*, by Lord Selborne 10 A. C. at 88, and by Lord Blackburn at 93.

(*x*) *Per* Lord Esher, M.R., in *Gillmann* v. *Carbutt* (1889) 61 L. T. 281, C. A. The term "delivery order" is often used inaccurately as synonymous with warrant.

(*y*) See Chapter on actual receipt, *ante*, 242—244.

(*z*) *McEwan* v. *Smith* (1849) 2 H. L. C. 309; 81 R. R. 166; *Griffiths* v. *Perry* (1859) 1 E. & E. 680; 28 L. J. Q. B. 208; 117 R. R. 397.

(*a*) 52 & 53 V. c. 45, s. 9. The first enactment that altered the law was the Factors Act, 1877 (40 & 41 V. c. 39), s. 5.

(*b*) See Sweet's Law Dictionary, 288.

(*c*) See forms of warehouse-keepers' certificates in Butterworth's Bankers' Advances on Mercantile Securities, 34—35.

(*d*) Blackburn on Sale, 297—298, 302; 2nd ed. 415, 418. For definitions and forms of these documents, see Butterworth's Bankers' Advances, 29, *et seqq.*

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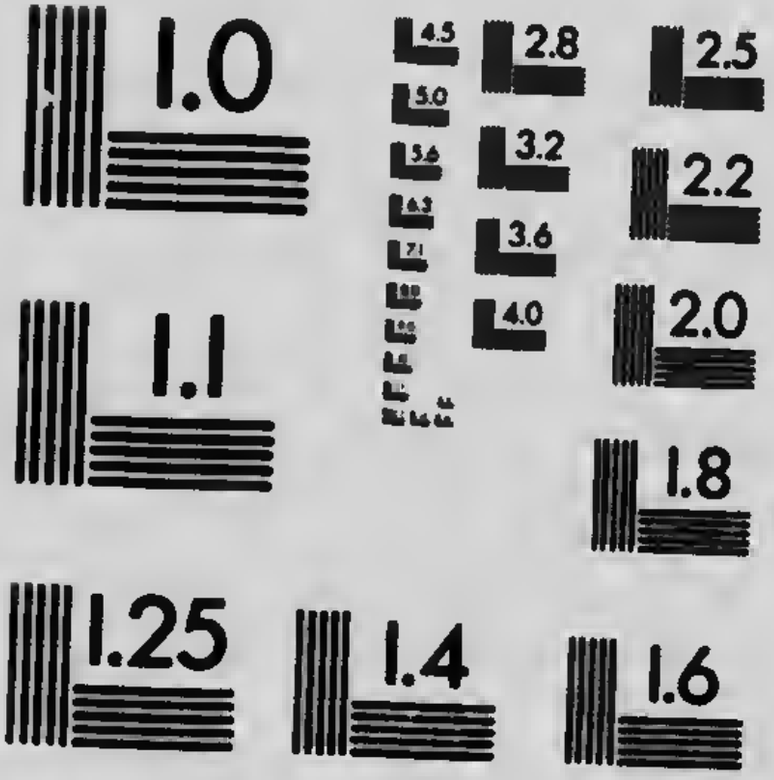

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that is possible in order to take possession of the goods . . . but when the goods are on land there is no reason why th person who receives a delivery order or dock warrant shoul not at once lodge it with the bailee, and so take actual o constructive possession of the goods."

Then, after pointing out that "bills of lading are ancien mercantile documents, which may be subject to the law mer chant, whilst the other class of documents are of moder invention, and no custom of merchants relating to them ha ever been established," the learned author concluded b saying: "It is therefore submitted that the indorsement of delivery order or dock warrant has not, independently of th Factors Acts, any effect beyond that of a *token of an authorit to receive possession.*"

His views confirmed by subsequent cases.

Farina v. *Home* (1846).

This view of the law was confirmed in *Farina* v. *Home* (e There the defendant had kept for many months a deliver warrant, signed by a wharfinger, whereby the goods wer made deliverable to the consignee (agent of the plaintiff, th seller) *or his assignee by indorsement* on payment of rent an charges from the 25th of July; the document was date on the 21st of July, and forthwith indorsed by the con signee to the defendant as buyer; but the latter refused take the goods or return the warrant, saying that he had nev ordered the goods. *Held*, that there had been an acceptanc but no actual receipt of the goods, no delivery to the defe dants. Parke, B., in giving the judgment of the Court, said "This warrant is no more than an *engagement* by th wharfinger to deliver to the consignee, or any one he ma appoint; and the wharfinger holds the goods as the agent the consignee (*f*), who is the vendor's agent, and his possessi is that of the consignee, until an assignment has taken plac and the wharfinger *has attorned*, so to speak, to the assigne and agreed with him to hold for him. . . . In the meantim the warrant, and the indorsement of the warrant, is nothi more than *an offer* to hold the goods as the warehouseman the assignee.

Effect on a shipowner's claim for freight of the issue of a wharfinger's warrant, etc.

The two following statutes declare the effect on a sh owner's claim for freight of the issue by a wharfinger of warrant for the goods imported, or of his attornment to delivery order presented to him by the owner or consignee

(*e*) 16 M. & W. 119; 16 L. J. Ex. 73; 73 R. R. 453, quoting *Bental Burn* (1824) 3 B. & C. 423; 3 L. J. (O. S.) K. B. 42; 27 R. R. 391.

(*f*) This word is printed "consignor" in the report—an obvious mispr

By an Act entitled "An Act for the Regulation of the Legal Quays within the Port of London" (*g*), and another Act entitled "An Act for the Regulation of certain Sufferance Wharves in the Port of London" (*h*), regulations are provided for the unloading by the master or owner of ships in the port of London into warehouses, at the wharves, whenever the importer, proprietor, or consignee of the goods fails to make entry at the custom-house within forty-eight hours after due report, and for the preservation of the lien of the shipowner or master, or of any other person interested in the freight, for the freight. Shortly stated, the statutes provide that a wharfinger is required, upon due notice in writing in that behalf given by a master, or shipowner or other person interested in the freight, to detain the goods for freight, together with wharfage, rent, and other charges (*i*). Such notice to detain any goods for payment of freight must be given before the issue by the said wharfinger of a delivery warrant for the goods, or a delivery order is given by the importer, proprietor, or consignee, or his agent, to and accepted by the wharfinger, and if a notice shall have been given, the wharfinger cannot issue a warrant, or accept a delivery order, until the importer, proprietor, or consignee of the goods has produced a withdrawal in writing of the order of stoppage for freight from the owner or master of the ship, or his broker or agent, which withdrawal the said master or owner is required to give on payment or tender of the freight (*k*).

Legal Quays in London Act.

Sufferance wharves in London.

It will be remarked that in these Acts the wharfinger's *warrant* for the delivery of the goods is treated, as between the shipowner and the person claiming the goods, as equivalent to an *accepted* delivery order.

Other Sufferance Wharves Acts contain identical provisions applicable to the particular wharves mentioned therein (*l*).

The scope of the operation of a bill of lading as representing the goods, and as contrasted with the wharfinger's warrant under the Sufferance Wharves Acts, and in particular the effect of each part where it is drawn in a set, were considered

Bill of lading represents goods *after* being landed at London wharves until replaced by wharfinger's warrant.

(*g*) 9 & 10 V. c. cccxcix., made perpetual by 10 & 11 V. c. cc.

(*h*) 11 V. c. xviii. This Act and the two others, although published among the local Acts, are declared by a clause in each to be public Acts, that are to be judicially noticed.

(*i*) S. 4 of both Acts.

(*k*) S. 5 of both Acts.

(*l*) Mcriton's and Hagen's Sufferance Wharves Act, 1857 (20 & 21 V. c. ix.), ss. 6, 7; Sufferance Wharves, Port of London, Act, 1858 (21 V. c. xli.), ss. 6, 7. These two Acts are *not* declared to be Public.

Meyerstein v. *Barber* (1870).

in the great case of *Meyerstein* v. *Barber* (*m*), decided by House of Lords in 1870. The consignee of certain cot which arrived on the 31st of January, 1865, entered it at custom-house, to be landed at a sufferance wharf, with a for freight, under the Sufferance Wharves Act (*n*); and cotton was so landed. On the 4th of March the consig obtained an advance from the plaintiff on the pledge of tw the bills of lading, the plaintiff (who did not know that vessel had arrived) believing that the third was in captain's hands. The consignee fraudulently pledged third bill on the 6th of March to the defendant, and on day the stop for freight was removed, and the defen obtained the wharfinger's warrant, sold the cotton, received the proceeds. The action was for money had received, and in trover. The defendants contended goods are not represented by bills of lading after they been landed, and the master has performed his contract: the bill of lading ceases to be negotiable after this is d and upon this contention the case turned. The Judges in lower Courts had, however, held unanimously that the of lading continued to represent the goods at the suffer wharf *until replaced by the wharfinger's warrant;* and the plaintiff was therefore entitled to retain his ver Martin, B., in delivering the judgment of the Exche Chamber, said: "For many years past there have been *symbols* of property in goods imported, the one the bi lading, the other the wharfinger's certificate or warr Until the latter is issued by the wharfinger, the fo remains the *only symbol* of property in the goods." T dicta, however, which would seem, at least so far as London quays and sufferance wharves are concerned, to b opposition to the ruling in *Farina* v. *Home* in relation to effect of documents of title, must be taken in connection the fact that Blackburn, J., who was a member of the C is reported to have said, when the passage from the Tre on Sale above quoted (*o*) was cited in argument: 'That published twenty-two years ago, and I have not changed opinion. But," he added, "it has no bearing on question," *i.e.*, under the Sufferance Wharves Act.

(*m*) (1866) L. R. 2 C. P. 38; (1867) *ibid.* 661, Ex. Ch.; 36 L. J. C. and 289; in H. L. *sub nom. Barber* v. *Meyerstein* (1870) L. R. 4 H L 39 L. J. C. P. 187.

(*n*) *Ante*, 979.

(*o*) *Ante*, 977.

In the House of Lords the judgment was also unanimous in affirmance of that given in the Exchequer Chamber. The reasons were thus put by Lord Hatherley, L.C. (*p*): "In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them; therefore the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of them. When they have arrived at the dock, until they are delivered to some person who has the right to hold them, the bill of lading still remains the only symbol that can be dealt with by way of assignment, or mortgage, or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery), then those symbols replace the symbol which before existed. Until that time bills of lading are effective representations of the ownership of the goods, and their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it."

Effect of transferring parts of one set of bill of lading to different persons.

It was also held that the person who first gets *one* bill of lading out of the set of *three* (the usual number) gets the property which it represents, and need do nothing further to assure his title, which is complete, and to which any subsequent dealings with the other bills of the set are subordinate.

As to the position of the shipowner or wharfinger with regard to delivery to the holder of one of several bills of lading, see *Glyn* v. *The East and West India Dock Company* (*q*), the facts of which are set out in the Chapter on Stoppage in Transitu (*r*), where the law relating to bills of lading is further discussed.

Remarks on the opposite construction by Courts and law givers.

Farina v. *Home* (*s*) has never been overruled, and it is useful to remember how opposed to each other are the interpretations put on such documents as warrants by the Courts and the lawgivers. As between seller and buyer, the Judges construe these documents as mere "tokens of authority to receive possession," as mere "offers" by the warehouseman to hold the goods for an indorsee of the warrant, inchoate and incomplete till the buyer has obtained the warehouseman's assent to attorn to him.

(*p*) At 329—330.
(*q*) (1882) 7 A. C. 591; 52 L. J. Q. B. 146; (1880) 6 Q. B. D. 475, C. A.; 5 Q. B. D. 129.
(*r*) *Post*, 1051.
(*s*) *Ante*, 243 and 978.

The Le[g]islature, on the other hand, as will be shown after (*t*), has based the Factors Acts on the assumpti "dock warrants, warehouse-keepers' certificates, warra orders for the delivery of goods," are "*documents used ordinary course of business as proof of the possession or of goods*," or as "authorising the *possessor* of the do to transfer or receive *goods thereby represented*" (*t*), the further assumption, in cases within the Legal Qua Sufferance Wharves Acts (*u*), that a wharfinger's *warr* the delivery of goods is equivalent in effect to an *a* delivery order. In a word, the Legislature deals with documents, in the Acts above referred to, as *symbols* goods.

No doubt a warehouseman or wharfinger in posses goods is the bailee of the owner alone from whom he re them, and cannot be forced to become the bailee of a else without his own consent. But what is there in the prevent this assent from being given in *advance* (*x*), prohibit the bailee from giving *authority* to the owner goods to assent in the bailee's behalf to a change in th ment? If a warehouseman give a written paper to the saying: "I hold ten hogsheads of sugar belonging to y authorise you to assent in my behalf that I will be the of any one else to whom you may sell these goods, and indorsement on this paper shall be taken as my assent," submitted that there is no principle of law which woul vent this paper from taking effect according to its impor truth, special juries of London merchants have repe volunteered statements that this is what they understan paper to mean: that it is not a mere *offer* or *token of aut* to receive possession, but is meant by the parties to *actual* transfer of the possession (*y*). But the law was s in opposition to this construction.

Other Private Acts.

Certain other Private Acts of Parliament contain prov with respect to the issue and effect of warrants and certifi By the London and St. Katherine's Dock Acts, 1864 (z

(*t*) F. Act, 1889, s. 1 (4), *ante*, 44.

(*u*) *Ante*, 979. These statutes seem to have no bearing on the view Legislature with regard to these documents in cases between seller and or sub-buyer.

(*x*) In *Salter* v. *Woollams* (1841), set out *ante*, 794, *et seqq.*, Tindal said that Jackson had, in advance, "attorned to the sale." But th seems to have depended on its peculiar circumstances. See Mr. Benj suggested parallel between the delivery in *Salter* v. *Woollams* and the a transferable warrant criticised *ante*, 795.

(*y*) *Per* Dallas, J., in *Lucas* v. *Dorrien* (1817) 7 Taunt. 278.

(*z*) 27 & 28 V. c. clxxviii.

company may issue certificates for goods having been warehoused, and warrants for delivery (*a*). The effect of the latter is thus stated (*b*): "Every such warrant for delivery shall be transferable by indorsement, and shall entitle the person named therein, or the last indorsee thereof named in the indorsement, to the goods specified therein, and the goods so specified shall *for all purposes be deemed his property.*"

Certain firms of warehousemen have also, by private Acts, power to issue transferable certificates and delivery warrants (*c*). The effect is stated to be that "every such certificate or warrant shall be deemed to be a document of title, . . . and any holder of such certificate or warrant . . . shall *have the same right to the possession and property of such goods as if they were deposited in his own warehouse.*"

Warrant must be surrendered before goods will be delivered. *Bartlett* v. *Holmes* (1853).

It was held, in *Bartlett* v. *Holmes* (*d*), that a warrant by which a warehouseman acknowledged that he held goods deliverable to A.'s order, "on the *presentation* of this document duly indorsed by you," did not authorise the indorsee to claim the goods by merely *showing* the order, but that he must deliver it up to the warehouseman *before* the latter could be required to part with the goods. The reasoning of the Court in this case would seem to cover all "documents of title." The grounds given by the Court were two: 1. That confidence must be placed by one of the parties in the other, it being impossible that the exchange of the goods for the document should be simultaneous; 2. That if the party having the goods were to make the delivery before receiving the document, he would expose himself to the risk of the document's being transferred to third persons by a second sale.

Transfer of a warrant when a conversion. *Johnson* v. *Stear* (1863).

In *Johnson* v. *Stear* (*e*), the action was trover by the assignee of one Cumming, who had pledged goods to the defendant by delivering him the dock warrant, with authority to sell the goods, if the loan for which they were pledged was not repaid on the 29th of January. In the middle of January, Cumming became bankrupt, and the defendant, Stear, sold the goods on the 28th, and handed over the dock warrant to the buyers on the 29th, and the latter took the goods on the

(*a*) S. 106.
(*b*) S. 108.
(*c*) The Editors of the 5th edition were indebted for this information to an article by Mr. Carter in the Law Q. Rev., Vol. VIII. 303, 304, where the clauses are set out.
(*d*) 13 C. B. 630; 22 L. J. C. P. 182; 93 R. R. 658.
(*e*) 15 C. B. (N. S.) 330; 33 L. J. C. P. 130; and *Belsize Motor Supply Co.* v. *Cox* [1914] 1 K. B. 244; 83 L. J. K. B. 261.

30th. The Court (*f*) held this a conversion by Ste
defendant, Erle, C.J., saying: "The sale alone might
a conversion (*g*), yet by delivering over the dock war
the vendees . . . he interfered with the right which Ca
had of taking possession on the 29th if he repaid the l
which purpose the dock warrant would have been an in
instrument." Williams, J., said: "The handing ove
dock warrant to the vendees before the time had arr
which the brandies could be properly sold, according
terms on which they were pledged, constituted a con
inasmuch as it was *tantamount to a delivery*. Not t
warrant is to be considered in the light of *a symb*
because, according to the doctrine applied to cases o
tiones mortis causâ, it is the *means* of coming at the po
of a thing which will not admit of corporal delivery (*h*

Effect of transfer of warrants, etc., on seller's lien at common law.

The authorities at common law had therefore settl
the issue by the seller to a buyer of a delivery order
indorsement and transfer of a dock warrant, wa
certificate (*i*), or other like document of title, by a sel
buyer was not such a delivery of possession as dives
seller's lien. Whether, *as between seller and buye*
result would be affected by proof of *usage* in the pa
trade that the delivery of such documents is intended
parties to constitute a delivery of *actual possession*, is
that does not seem to have arisen since the decision in
v. *Home*, and may perhaps be deemed still an open q
Nor prior to the Factors Act, 1877 (*k*), did the tra
such documents by the buyer to a *bona fide* holder fo
enlarge their effect, except by way of estoppel on pro
by the usage of the trade and the intention of the part
documents in question were meant to be negotiable (*l*).

Legislation affecting lien in cases between seller and sub-buyer or pledgee.

The reader's attention must now be directed to the
tion affecting the seller's lien in cases in which the cont
is between him and a sub-buyer or pledgee.

(*f*) Erle, C.J., Williams, J., Byles, J., and eating, J.

(*g*) As passing no property: *Lancashire Waggon Co.* v. *Fitzhug*
6 H. & M. 502; 30 L. J. Ex. 231.

(*h*) See *Ward* v. *Turner* (1751) 2 Ves. Sen. 431.

(*i*) *i.e.*, one equivalent to a warrant; not such as in *Gunn* v.
post, 991.

(*k*) 40 & 41 V. c. 39, ss. 4 and 5, now repealed, but sub
re-enacted by ss. 9 and 10 respectively of the Factors Act, 1889 (52
c 45). S. 10 is substantially identical with the proviso to s. 47 of
post, 985.

(*l*) See *Merchant Banking Co. of London* v. *Phœnix Bessemer*
5 Ch. D. 205; 46 L. J. Ch. 418, *post*, 862. As to the materiality of s
when the documents are not documents of title, see *Gunn* v. *Bolcko*
L. R. 10 Ch. 491; 44 L. J. Ch. 732, *post*, 991.

The Factors Act of 1877 (*m*) was the first statute that enabled the buyer who had transferred a document of title to a sub-buyer, or other transferee for value, to confer a title free from the seller's lien. That Act was repealed by the Factors Act of 1889 (*n*), which by section 9, already quoted (*o*), re-enacts and extends section 5 of the earlier Act. Section 9, which is substantially identical (*p*) with section 25 (2) of the Code, confers on a buyer who has obtained possession, with the seller's consent, of the goods or of a document of title (*q*), a power of disposition in favour of a *bona fide* disponee without notice of the seller's "lien or other right," as if the buyer were the seller's mercantile agent (*r*). Factors Act, (1889)

Moreover, under the heading, "Dispositions by Mercantile Agents," the Factors Act contains a number of other provisions (*s*), and although these are by virtue of that heading primarily limited to dispositions by such agents (*t*), yet, since a delivery or transfer by a buyer falling under section 9 is to have the same effect as if made by a mercantile agent in possession of the goods or documents of title (*u*) with the owner's consent, such a transaction will, it is conceived, be governed by those provisions so far as they may be applicable.

Section 9 of the Factors Act is, in cases of lien, necessarily inapplicable where the buyer is in possession of the goods in his own right, or similarly the holder of a bill of lading. Accordingly section 9 can only apply where the buyer is in possession with the seller's consent of some document of title other than a bill of lading, or holds it, or the goods themselves, subject to some special right of the seller, as in *Dodsley* v. *Varley* (*x*).

Section 47 of the Code also in the proviso enacts (though in greater detail) the same law as is contained in section 10 of the Factors Act.

"47.—Subject to the provisions of this Act (*y*), the unpaid seller's (*z*) right of lien, or retention, or stoppage in transitu is not affected by Code, s. 47. Effect of subsale or pledge by buyer.

(*m*) 40 & 41 V. c. 39, ss. 4 and 5.
(*n*) 52 & 53 V. c. 45, repealing all previous Factors Acts.
(*o*) *Ante*, 48.
(*p*) It contains the additional words "or under any agreement for sale, pledge, or other disposition," which the Code omits.
(*q*) Defined, by F. A. s. 1 (4), set out *ante*, 44.
(*r*) Defined in F. A. s. 1 (1), *ante*, 39. The disposition by a mercantile agent under the Factors Act is to be "as valid as if he were expressly authorised by the owner to make the same": s. 2 (1) of F. A., 1889, quoted *ante*, 39.
(*s*) See *ante*, 39, 44-5.
(*t*) *Inglis* v. *Robertson* [1898] A. C. 616; 67 L. J. P. C. 108.
(*u*) "Document of title" in the Code has the same meaning: S. 62 (1).
(*x*) *Ante*, 253.
(*y*) *I.e.*, to s. 25 (2), substantially identical with s. 9 of the F. Act, *ante*, 48.
(*z*) "Unpaid seller" is defined by s. 38, *ante*, 951.

any sale or other disposition of the goods which the buyer may h
made, unless the seller has assented thereto.

Provided that where a document of title (*a*) to goods has been
fully transferred (*b*) to any person as buyer or owner of the goods,
that person transfers the document to a person who takes the d
ment in good faith (*c*) and for valuable consideration, then if
last-mentioned transfer was by way of sale, the unpaid seller's r
of lien, or retention, or stoppage in transitu is defeated, and if
last-mentioned transfer was by way of pledge or other disposition
value, the unpaid seller's right of lien, or retention, or stoppage
transitu can only be exercised subject to the rights of the transferee

Scope of the proviso.

From its terms the proviso to section 47 can only apply
cases where the seller retains a lien as against the buyer
withstanding the transfer by him to the buyer of a "do
ment of title." Accordingly the buyer must be the transf
of a document of title other than a bill of lading, for
transfer of the latter divests the lien.

Ss. 9 and 10 of Factors Act contrasted.

It will have been observed that section 9 of the Factors A
on the one hand, and the proviso to section 47 of the Code,
the other, cover much of the same ground. The follow
points are noticeable:—

1. Under section 9 the *buyer* "obtains" possession of
document of title; under section 47 it must be "l
fully transferred" to him.
2. Under section 9 the seller's consent to the buyer's pos
sion is expressly required; his consent to the trans
under section 47 seems to be implied, or
unnecessary.
3. Under both sections the buyer must transfer the do
ment to a third person, and the controversy must
between the original seller and such person.
4. In such cases, provided however the seller's lien surv
as against the buyer (*d*), there is no distinct
between one document of title, as defined by sect
1 (4) of the Factors Act, and another.
5. Under section 9 the transferee must be without notice
the seller's lien; under section 47 of the Code not
is immaterial, as not being inconsistent with g
faith (*e*).

Consent good although obtained by fraud.

If the seller have in fact consented to the buyer's pos

(*a*) Has the same meaning as in the Factors Act: Code, s. 62 (1). definition, *ante*, 44.

(*b*) See F. Act, s. 11, *ante*, 45.

(*c*) "Honestly, whether negligently or not": Code, s. 62 (2).

(*d*) See observations *ante*, 985.

(*e*) See the definition of "good faith," n. (*c*), *supra*, and *Cumming Brown* (1808) 9 East, 506; 9 R. R. 603.

sion, it is immaterial that such consent was obtained by fraud, or that some condition was to be fulfilled by the buyer subsequent to the receipt of the document, as *e.g.*, sending an acceptance (*f*).

Interpretation of definition of "document of title."

The use of the expression "any *other* document" in the concluding words of the statutory definition of document of title (*g*) shows that the remaining words of the clause, "used," etc., qualify each of the particular documents mentioned as well as any other document. Therefore a warehouse-keeper's certificate, or any similar document, will not be a "document of title" unless it be "used in the ordinary course of business" as representing the goods. If it purport to be a delivery warrant, making the goods deliverable to "A. B. or his assigns by indorsement or otherwise," the warrant or certificate then represents the goods, and is used as proof of the possession or control of them. This was the form of certificate in *Farina* v. *Home* (*h*). If, on the other hand, the document be in form only a certificate that the goods are lying at the wharf and *ready for delivery*, it does not and is not intended to represent the goods; it does not authorise or purport to authorise the holder to receive them; it is, therefore, not a document of title, and no alleged custom of trade can make it one. This was the form of certificate in *Gunn* v. *Bolckow* (*i*).

Wharfinger's certificate.

Cases considered as affecting sub-buyers.

The following cases illustrate the general rule that the seller's lien is good against the sub-buyer, unless the seller has assented to the sub-sale; and in particular show the effect of the transfer to sub-buyers of documents which are either not "documents of title" at all, or are not "obtained" in the first instance by the buyer, or "transferred" to him by the seller. Accordingly these decisions are not affected by the Factors Act, or by the Code.

Seller's assent to sub-sale. *Stove'd* v. *Hughes* (1811).

Without referring specially to the early cases (*k*), we may pass to the decision of the King's Bench in *Stoveld* v. *Hughes* (*l*) in 1811. There the defendants had sold timber lying at their wharf to one Dixon, and the timber was marked

(*f*) *Cahn* v. *Pockett* [1899] 1 Q. B. 643; 68 L. J. Q. B. 515, C. A.: *ante*, 50.

(*g*) F. Act, 1889, s. 1 (4), *ante*, 844.

(*h*) (1846) 16 M. & W. 119; 16 L. J. Ex. 73; 73 R. R. 437; *ante*, 243, and 978.

(*i*) *Post*, 991.

(*k*) *Slubey* v. *Heyward* (1795) 2 H. Bl. 504; 3 R. R. 486; *ante*, 971; *Hammond* v. *Anderson* (1803) 1 B. & P. N. R. 69; 8 R. R. 763, *ante*, 972; *Green* v. *Haythorne* (1816) 1 Stark. 447; 18 R. R. 805.

(*l*) 14 East, 308; 12 R. R. 523, *coram* Lord Ellenborough, C.J., and Grose, J., Le Blanc, J., and Bayley, J. See a similar decision in Scotland with regard to the right of retention: *Fleming* v. *Smith* (1881) 8 Ret. 548.

by mutual assent with the initials of the buyer; and th
dants promised to send it to Shoreham. The buye
acceptances at three months for the price. A small p
delivered, and the remainder, still lying on the defe
premises, was sold by Dixon to the plaintiff, who p
price. The plaintiff's agent informed Hughes, one
defendants, of the sale by Dixon, to which he an
"Very well"; and the plaintiff and Hughes then went t
on the defendant's wharf, and the plaintiff's agen
marked the timber with the plaintiff's own initials a
Hughes to send no more of the timber to Dixon, and
made no objection. Dixon became insolvent, h
were protested, and the defendants refused delivery
Ellenborough said on these facts: "The defendants w
only persons who could contravene the sale and deliver
plaintiff from the Dixons; and when that sale was made
to the defendant Hughes, he assented to it by saying
well," and to the marking of the timber by the pl
agent, which took place at the same time. If that be
executed delivery, I know not what is so." The other
concurred.

No assent by seller to sub-sale. Bill of lading.

Craven v. *Ryder* (1816).

In *Craven* v. *Ryder* (*m*), in 1816, the sellers under
deliver the goods free on board to a buyer. They d
the goods on board, and took a receipt in their own
thereby entitling themselves to demand the bill of
The purchaser resold and received payment, and
insolvent without paying the price. The sub-buyer
a bill of lading, *without the assent* of the original sell
it was held that he had acquired no rights against t
sellers, who had never delivered the property out of th
control.

Various acts done by sub-buyer.

Dixon v. *Yates* (1833).

A leading case is *Dixon* v. *Yates* (*n*), decided in 183
plaintiffs, Dixon & Co., the sellers, had bought a larg
ber of puncheons of rum belonging to Yates, and lying
latter's warehouse at Liverpool. They paid for ther
becoming possessors as well as owners. They afterwa
forty-six puncheons, parcel of his purchase, to one t
Yates's clerk, and gave him an invoice specifying the
and marks of each puncheon, and took Collard's accep
By usage in Liverpool, the mode of delivering goods sol
in warehouse is that the seller hands to the buyer a
order. When Collard applied for delivery orders, Dixo

(*m*) 6 Taunt. 433; 16 R. R. 644, *ante*, 423.
(*n*) 5 B. & Ad. 313; 2 L. J. K. B. 198; 39 R. R. 489.

refused, but said, if he wanted one or two puncheons, they would let him have them. Collard then drew two orders on Dixon & Co. for one puncheon each, and the latter gave corresponding orders on Yates, and these two puncheons were delivered to a purchaser from Collard. One of Collard's bills became due on the 16th of November, and was dishonoured; and Dixon & Co. on the 18th of November gave notice to Yates not to deliver the remaining forty-four puncheons to any one but themselves. Collard had had samples of the rum, which were taken on the quay when the rum was landed, and had also had the puncheons which he bought coopered at Yates's warehouse, and marked with the letter C. On the 28th of October, before his bill was due, Collard sold twenty-six puncheons of the rum bought from Dixon & Co. to one Kaye. On the 31st of October Kaye's cooper went to Yates's premises, and got Yates's warehouseman to go with him to the warehouse, and there marked the casks (which were described in Collard's invoice to Kaye by marks and numbers) with the letters J. A. K., and got the casks ready for Kaye's gauger, who gauged them, and the casks were then coopered by Kaye's cooper. When the gauger first came to Yates's office, a clerk of Yates repeatedly refused permission that he should gauge the casks for Kaye, but Collard came afterwards, and had it done. Collard had taken samples of the rum when first landed on the quay, but not after it was in the warehouse.

It was held by all the Judges that the possession of the sellers, Dixon & Co., had never been divested, *not* by Collard's *taking the samples*, for they were not taken as part of the bulk; *not* by his *taking possession of the two puncheons* which were actually delivered to him, because it is only when delivery of part is intended to operate as delivery of the whole that it can have that effect; *not* by the *marking*, for that is an equivocal act, and may be merely for the purpose of identifying the goods, besides which usage required delivery orders, which had been expressly refused; *not* by the *coopering and gauging*, because that had been objected to by Yates's clerk, and was only accomplished through the unauthorised interference of Collard, availing himself of his position as clerk. Parke, J., in delivering his opinion, said: "There was no delivery to the sub-vendees; and the rule is clear that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee, under

whom he claims: he gets the title defeasible on non-pay
of the price by the first vendee (*o*).

Delivery order issued by buyer to sub-buyer.

Seller's assent.

Pearson v. *Dawson* (1858).

In *Pearson* v. *Dawson* (*p*), the defendant sold sugar i
own bonded warehouse to one Askew, and took an accep
for the price. Askew resold twenty hogsheads of the sug
the plaintiffs, and gave them a delivery order in the follo
words:—"Mr. John Dawson.—Please deliver to M
Pearson & Hampton, or order, twenty hogsheads of suga
Orontes" (here were specified the marks, numbers, et
"James Askew." This order was handed by the plainti
the defendant, who without the plaintiff's knowledge wro
pencil on his "sugar book" the plaintiff's name opposit
particular hogsheads resold. No one could take the
heads out of the warehouse without paying duty, an
plaintiffs having sold two of the hogsheads, gave their
delivery order to the defendant for them, and the defe
gave the plaintiffs an order to his warehouseman to de
them, and the plaintiffs paid the duty and took them a
In like manner other hogsheads, making altogether eigh
of the twenty, had been taken from the warehouse by
plaintiffs when Askew became insolvent; his bills were
honoured, and the defendant then claimed his lien on
twelve remaining hogsheads. But the Judges (*q*) were u
mously of opinion that the original seller was bound to
to the plaintiffs his objections, if he had any, to recogni
the delivery order given by Askew when made known to
and that, having by his conduct given an implied asse
the resale, he had lost possession and right of lien.

Mordaunt Brothers v. *British Oil & Cake Mills* (1910).

In *Mordaunt Brothers* v. *British Oil & Cake Mills*
Crichton Brothers bought oil from the defendants, and
part of it to the plaintiffs, giving them a delivery order
time to time, directing the defendants to deliver su
quantity of oil "ex our contract." The plaintiffs endo
the order "please wait our orders" or "please deliver as
instructions herewith," signed it, and sent it to the defend
who either sent word that it was in order, or made no comm
but entered the plaintiffs' name in their books. Deliv
were from time to time made to the plaintiffs, or their
buyers. Then Crichton Brothers fell into arrear with

(*o*) 5 B. & Ad. at 342—343; 2 L. J. K. B. 198; 39 R. R. 489. c
Craven v. *Ryder*, *ante*, 988.
(*p*) E. B. & E. 448; 27 L. J. Q. B. 248; 113 R. R. 724.
(*q*) Lord Campbell, C.J., Coleridge, J., and Erle, J.
(*r*) [1910] 2 K. B. 502; 79 L. J. K. B. 967. See also *Poulton & Se*
Anglo-American Oil Co. (1910) 27 T. L. R. 38.

payments, and the defendants refused further deliveries. *Held*, by Pickford, J., that the defendants had not lost their lien on the undelivered oil, as they had not assented to the sale to the plaintiffs under section 47 of the Code. The defendants' answer to the plaintiffs' enquiry amounted to no more than this, that the defendants were willing to perform their contract with Crichton Brothers by delivering to the plaintiffs. "In my opinion," said the learned Judge, "the assent which affects the seller's right of lien must be such an assent as in the circumstances shows that the seller *intends to renounce his rights* against the goods. It is not enough to show that the fact of a sub-contract has been brought to his notice and that he has assented to it merely in the sense of acknowledging the receipt of the information." And, without deciding that section 47 does not apply to unascertained goods, he held, distinguishing *Stoveld* v. *Hughes* and *Pearson* v. *Dawson*, that an assent would more readily be inferred from the acceptance of a delivery order and the entry in the seller's books of the sub-buyer's name where the goods were specific than where they were unascertained (*s*).

Assent must amount to renunciation of seller's rights.

This case, and *Stoveld* v. *Hughes* (*t*), show that the seller's assent to the sub-sale is not revocable even where the original buyer becomes insolvent.

Assent not revocable.

In the two following cases the documents dealt with were not documents of title at all.

Documents dealt with not documents of title.

In *Gunn* v. *Bolckow* (*u*), the defendants had contracted to make and sell to the Aberdare Iron Company, for shipment to Russia, iron rails, and delivered to the Aberdare Company, in exchange for their acceptances, wharfingers' certificates in the following form: "I hereby certify that there are lying at the works of Messrs. Bolckow, Vaughan & Co., Limited, of Middlesbrough, . . . tons of iron rails which are ready for shipment, and which have been rolled under contract dated . . . between the said company and the Aberdare Iron Company. — W. ROE, *Wharfinger*." The Aberdare Company pledged to the plaintiff these certificates, which they treated as warrants. Subsequently they filed a liquidation petition, and their acceptances were dishonoured. The plaintiff claimed a charge on the rails mentioned in the certificates, upon the ground that they were warrants or documents of title divesting the seller's lien, and were negotiable according to the

Wharfinger's certificate that goods are "ready for delivery."

Gunn v. *Bolckow* (1875).

(*s*) See on this extra point, *Uncin* v. *Adams* (1858) 1 F. & F. 312.
(*t*) *Ante*, 987.
(*u*) L. R. 10 Ch. 491; 44 L. J. Ch. 732.

custom of the iron trade. But this contention was repudi
by the Court of Appeal in Chancery. "To say that,"
James, L.J. (*x*), "is in truth to say a thing which canno
No custom of the trade can make a certificate a bil
exchange or a warrant. What is evidently meant by
allegation . . . is that people deposit the certificates
they were warrants." And Mellish, L.J., says (*y*): "
utterly impossible, in my opinion, to make that out to
document of title. A document of title is something w
represents the goods, and from which, either immediate
at some future time, the possession of the goods ma
obtained. In this way a bill of lading represents the
while they are at sea. . . . So also a delivery order
represents the goods." He went on to show that posse
of the goods could not have been obtained by the certif
as the goods were deliverable at Cronstadt, and if a b
lading were given, that, and not the certificate, would
sent the iron, and entitle the holder to the possession
There was, therefore, no question of the sellers being est
by any assent to the pledge by the buyer, and the genera
applied that the seller's lien revived on the buyer's insolv

"Undertakings" of a form not known to merchants.

Farmeloe v. *Bain* (1876).

In *Farmeloe* v. *Bain* (*z*), the defendants, the sellers
hundred tons of zinc, gave to the buyers, Messrs. Burrs
four undertakings in the following form: "We hereby
take to deliver to your order, indorsed hereon, twen
tons merchantable sheet zinc off your contract of this
The contract was not for the sale of any specific zinc.
plaintiffs bought from Burrs & Co. fifty tons on the fa
these documents, which were indorsed to them, but wh
was admitted, were not documents known among mer
Burrs & Co. failed, and the defendants refused to deli
the plaintiffs, whereupon the plaintiffs brought detin
trover. They contended that the defendants had by th
of the undertaking *represented* to the plaintiffs "th
goods therein mentioned were the property of Burrs
free from all lien or claim whatsoever on the part
defendants." But *held*, that these "undertakings" n
construed as any other written instruments, and did n
tain any representation of fact—either that the goods w
goods of Burrs & Co., or that they were free from lie
only representation was that there was a contract, a

(*x*) *Ibid.* at 499.
(*y*) *Ibid.* at 502.
(*z*) 1 C. P. D. 445; 45 L. J. C. P. 264.

the sellers were willing (subject to their rights) to deliver twenty-five tons. The defendants, therefore, were not estopped from setting up that the goods were not the property of the plaintiffs (*a*), or their own right as unpaid sellers, to withhold delivery (*b*).

Seller estopped from denying his assent.

Issue of documents negotiable by custom and intention.

Merchant Banking Co. v. *Phœnix Bessemer Steel Co.* (1877).

In *The Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.* (*c*), the defendants, under a contract of sale to Messrs. Smith & Co. for steel rails to be delivered in monthly quantities, invoiced the rails to Smith & Co., and at their request sent in addition warrants for the monthly quantities in the following form, *mutatis mutandis*: —

"The undermentioned iron will not be delivered to any party but the holder of this warrant.

"PHŒNIX BESSEMER STEEL CO., LIMITED.

"No. 88. Dec. 19, 1874.

"Stacked at the works of the Phœnix Bessemer Steel Co., The Ickies, Sheffield. Warrant for 403 tons 2 qrs. 9 lbs. steel rails. Iron deliverable (f.o.b.) to Messrs. Gilead Smith & Co. of London, *or to their assigns by indorsement hereon.*"

Smith & Co., by way of pledge, indorsed the warrants to the plaintiffs, who claimed a first charge upon the iron. The defendants claimed their lien as unpaid sellers. It was proved that, by the usage of the iron trade, warrants in the above form passed from hand to hand without notice being given to the person issuing the warrant, and were taken to give to the holders for value a title *free* from any seller's *lien* (*d*). Jessel, M.R., drew the inference that the sellers must have intended the warrants to be used for the purpose of sale or pledge, because, with knowledge of the custom, they had issued them in addition to the ordinary invoices of the goods. He held, therefore, that they were estopped from afterwards setting up their claim as unpaid sellers.

This decision marks the distinction between a delivery warrant which is a document of title transferable by indorsement and which is intended to represent the goods, and a

(*a*) On this aspect of the case see *Woodley* v. *Coventry* (1863) 2 H. & C. 164; 32 L. J. Ex. 185; 130 R. R. 633, *ante*, 14.

(*b*) As the goods were unascertained, the seller's right (though called a lien in the case) was not a *lien*, but a right to withhold delivery, similar to a lien. See Code, s. 39 (2), *ante*, 963.

(*c*) 5 Ch. D. 205; 46 L. J. Ch. 418.

(*d*) The form of the warrants had been settled by eminent counsel in 1866. Jessel M.R., suggested that it would have been better to have stated on the face of the warrant that it was free from any seller's lien.

wharfinger's certificate that the goods are "ready delivery," as in *Gunn* v. *Bolckow* (*e*).

Propositions.

According to the foregoing authorities, an unpaid sel actual possession of the goods sold, even where he has quished his lien by the terms of his contract, has the foll rights, of which he is not deprived by assenting to ho goods as bailee of the buyer:--

1. If the controversy be between the unpaid seller a insolvent buyer or his trustee, the seller may ref give up possession of the goods without payment price (*f*), including the price of an instalment a delivered and not paid for (*g*). The seller h analogous right where the property in the goo not passed to the buyer (*h*).

2. The seller's remedy will not be impaired by his given a delivery order for the goods or other doc of title, not being a bill of lading, unless the bai attorned to the buyer (*i*).

3. The right of the unpaid seller is the same against buyer, or pledgee, or other disponee as again original buyer (*k*), unless

   (a.) The seller be precluded by the estoppel re from his assent, express or implied, to t sale, or pledge, or other disposition, informed of it (*l*); or

   (b.) The sub-buyer, pledgee, or other dispo the transferee, in good faith and for va

(*e*) *Ante*, 991.

(*f*) *Bloxam* v. *Saunders* (1825) 4 B. & C. 941; 28 R. R. 519, *a* *Miles* v. *Gorton* (1834) 2 Cr. & M. 504; 3 L. J. Ex. 155; 39 R. R. 9 963; *Townley* v. *Crump* (1836) 4 A. & E. 58; 5 L. J. (N. S.) K. B. 14; 200, *ibid*; *Valpy* v. *Oakeley* (1851) 16 Q. B. 941; 20 L. J. Q. 83 R. R. 786, *ante*, 958; *Griffiths* v. *Perry* (1859) 1 E. & E. 680; 28 L. 204; 117 R. R. 397; *ibid*; *Grice* v. *Richardson* (1877) 3 App. C 47 L. J. P. C. 48, *ante*, 960; Code, s. 38, *ante*, 951; s. 39; *ante*, 950, *ante*, 954.

(*g*) Ex parte *Chalmers* (1873) 8 Ch. 289; 42 L. J. B. K. 37.

(*h*) Ex parte *Chalmers*, *supra*; Code, s. 39 (2), *ante*, 951.

(*i*) *McEwan* v. *Smith* (1849) 2 H. L. C. 309; 81 R. R. 166; *G* *Perry*, *supra*; see also *Pooley* v. *G. E. Ry. Co.* (1876) 34 L. T. 5 it was argued that the attornment was on the facts conditional, but held otherwise.

(*k*) *Craven* v. *Ryder* (1816) 6 Taunt. 433; 16 R. R. 644, *ante*, 98 v *Yates* (1833) 5 B. & A. 313; 2 L. J. K. B. 198; 39 R. R. 4 *McEwan* v. *Smith* and *Griffiths* v. *Perry*, *supra*; Code, s. 47, *ante*, 98

(*l*) *Stoveld* v. *Hughes* (1811) 14 East, 308; 12 R. R. 323, *a* *Pearson* v. *Dawson* (1858) E. B. & E. 448; 27 L. J. Q. B. 248; 113 R *ante*, 990; *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.* (18 D. 205; 46 L. J. Ch. 418, *ante*, 993; Code, s. 47, *ante*, 985.

a document of title which has been lawfully transferred to the buyer (*m*); or

(c.) The sub-buyer, pledgee, or other disponee, be the transferee, in good faith and without notice of any lien of the seller, of a document of title, possession of which was obtained by the buyer with the seller's consent (*n*).

4. The seller's assent to a subsale or pledge must amount to a renunciation of his rights over the goods (*o*). It may be given by the language or conduct of the seller before the subsale or other disposition has taken place (*p*); but an anticipatory assent will not be inferred from the mere fact that the seller has issued to the buyer a document containing merely a statement that the goods are ready for delivery (*q*), or an engagement to deliver them (*r*), or similar statements, which document is not otherwise a document of title (*q*), or which does not contain some representation that the goods are free from lien, so as to create an estoppel (*r*).

Warehousemen may make themselves liable as bailees to both parties.

Principle on which estoppel rests.

On the subject of estoppel, attention may be directed to the cases in which it has been applied to warehousemen and bailees, who may by their conduct make themselves responsible to buyers and sub-buyers without relieving themselves of liability towards the unpaid seller. The principle was thus stated by Lord Denman in *Pickard* v. *Sears* (*s*): "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And in *Freeman* v. *Cooke* (*t*) Parke, B., said: "By the term 'wilfully,' however, in that rule we must understand, if not that the

(*m*) F. Act, s. 10, *ante*, 855; Code, s. 47, *ante*, 985. For the meaning of "lawfully transferred," see s. 11 of F. Act, and *Cahn* v. *Pockett* [1899] 1 Q. B. 643; 68 L. J. Q. B. 515, C. A., set out *post*, 918. Whether the word "transferred" is applicable to the original *issue* of a document of title from the seller to the buyer—*e.g.* a delivery order—*quære*.

(*n*) F. Act, s. 9; Code, s. 25 (2), *ante*, 48.

(*o*) *Mordaunt Brothers* v. *British Oil & Cake Mills* [1910] 2 K. B. 502; 79 L. J. K. B. 967.

(*p*) *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.* (1877) 5 Ch. D. 205; 46 L. J. Ch. 418, *ante*, 993.

(*q*) *Gunn* v. *Bolckow* (1875) L. R. 10 Ch. 491; 44 L. J. Ch. 732, *ante*, 991.

(*r*) *Farmeloe* v. *Bain* (1876) 1 C. P. D. 445; 45 L. J. C. P. 264, *ante*, 992.

(*s*) (1837) 6 A. & E. at 474; 45 R. R. 538. For the doctrine of estoppel in general the reader is referred to the notes to *Doe* v. *Oliver* (1830) 2 Sm. L. C. 9th ed. 829, *et seqq.*; 11th ed. 724; 8 L. J. K. B. 137; 34 R. R. 358, *et seqq.*

(*t*) (1848) 2 Ex. 654, at 663; 18 L. J. Ex. 114; 76 R. R. 711.

party represents that to be true which he knows to be unt
at least that he means his representation to be acted u
and that it is acted upon accordingly; and if, whatev
man's real intention may be, he so conducts himself th
reasonable man would take the representation to be true,
believe that it was meant that he should act upon it, and
act upon it as true, the party making the representation w
be equally precluded from contesting its truth; and con
by negligence or omission, where there is a duty cast up
person, by usage of trade or otherwise, to disclose the t
may often have the same effect" (*u*).

The word "wilfully" is therefore opposed to "inv
tarily," and not to "unintentionally," Parke, B., inte
to show that, if the effect on the mind of the hearer was c
voluntarily, the party was estopped, although the parti
effect was not intended (*x*).

Warehouseman estopped from setting up the rights of unpaid seller after attornment.

Stonard v. *Dunkin* (1809).

In *Stonard* v. *Dunkin* (*y*), the defendant, a warehouse
at the request of one Knight, the owner, gave a w
acknowledgment that he held a parcel of malt for the plai
who had advanced money on a pledge of it by Kn
Knight became bankrupt, and the defendant attempte
an action of trover, to show that the malt had not
remeasured, which by a usage of trade was necessary to
the property, and that the property therefore passe
Knight's assignees; but Lord Ellenborough said: "Wha
the rule may be between buyer and seller, it is clear tha
defendants cannot say to the plaintiff, 'The malt is not y
after acknowledging to hold it on his account. By so
they attorned to him, and I should entirely overse
security of mercantile dealings were I now to suffer th
contest his title."

This case was followed by *Hawes* v. *Watson* (*z*) i
King's Bench, and by *Gosling* v. *Birnie* (*a*) in the Co

(*u*) See also the rules of estoppel *in pais* digested by Brett, J., in
ing the judgment of the C. P. in *Carr* v. *L. and N. W. R. Co.* (1875) L
C. P. 316—318; 44 L. J. C. P. 109. The separate rules do not, howeve
to be mutually exclusive. See also *Coventry* v. *G. Eastern Ry. Co.*
11 Q. B. D. 776; 52 L. J. Q. B. 694, C. A.; *Seton* v. *Lafone* (1887) 19 Q
68; 56 L. J. Q. B. 415, C. A.; *per* Lord Blackburn in *Burkinsh*
Nicholls (1878) 3 A. C. 1026; 48 L. J. Ch. 179.

(*x*) *Per* Pollock, C.B., in *Cornish* v. *Abington* (1859) 4 H. & N.
555; 28 L. J. Ex. 262; 118 R. R. 603; *per* the P.C. in *Sarat Chunder*
Gopal Chunder Lala (1892) 8 Times, L. R. 732, P. C.

(*y*) 2 Camp. 344; 11 R. R. 724. See also *Attenborough* v. *St. Kat*
Dock Co. (1878) 3 C. P. D. 450; 47 L. J. C. P. 673, C. A., and *Re Otto*
Diamond Mines [1893] 1 Ch. 618; 62 L. J. Ch. 166, C. A.

(*z*) (1824) 2 B. & C. 540; 2 L. J. (O. S.) K. B. 83; 26 R. R. 448.

(*a*) (1831) 7 Bing. 339; 9 L. J. C. P. 105; 33 R. R. 497.

Pleas, the assent of the wharfinger in the latter case being by parol. Tindal, C.J., said: "The defendant is estopped by his own admissions, for unless they amount to an estoppel, the word estoppel may as well be blotted out from the law."

The rule has since been recognised and applied in very many cases, some of which are cited in the note (*b*).

But the estoppel ceases where the bailment on which it is founded is determined, without default of the bailee towards the bailor, by what is equivalent to an eviction by title paramount (*c*). In such a case the bailee can defend himself against the bailor, if he rely upon the right and title (*d*), and the authority in that behalf, of the person having the superior title, and is accordingly discharged from his promise to hold the goods for the bailor, unless he has made a special contract with him, or is in some way to blame for his loss (*e*).

Bailee's eviction by title paramount. *Ross* v. *Edwards & Co.* (1895).

In *Ross* v. *Edwards & Co.* (*f*) E. & Co. sold to H. a quantity of deals then stored in their yard. H. sold part to L. and gave him a delivery order on E. & Co., which the latter accepted. L. pledged the order with R. & Co., and endorsed the delivery order "Please hold the within-mentioned quantity of deals subject to the order of R. & Co." E. & Co. indorsed the order "Will hold within deals subject to order of R. & Co.," and returned it to R. & Co. with a letter accepting the transfer of the deals from L. to them. L. suspended payment not having paid H., who notified E. & Co. not to deliver any more deals on the order given to L. Both H. and R. & Co. claimed the deals, and E. & Co. interpleaded. It was found by the Courts below that R. & Co. did not advance his money on the faith of E. & Co.'s acceptance of the indorsement in

(*b*) *Gillett* v. *Hill* (1834) 2 C. & M. 530; 3 L. J. Ex. 145; 39 R. R. 833; *Holt* v. *Griffin* (1833) 10 Bing. 246; 3 L. J. C. P. 17; 38 R. R. 417; *Lucas* v. *Dorrien* (1817) 7 Taunt. 278; 18 R. R. 480; *Woodley* v. *Coventry* (1863) 2 H. & C. 164; 32 L. J. Ex. 185; 133 R. R. 633, *ante*, 14; *Henderson* v. *Williams* [1895] 1 Q. B. 521; 64 L. J. Q. B. 308, C. A., *ante*, 15. Recognised in *Swanwick* v. *Sothern* (1839) 9 A. & E. 895; 48 R. R. 740; *Biddle* v. *Bond* (1865) 6 B. & S. 225; 34 L. J. Q. B. 137; 141 R. R. 387; *Knights* v. *Wiffen* (1870) L. R. 5 Q. B. 660; 40 L. J. Q. B. 51, *ante*, 14; *Ross* v. *Edwards & Co.*, *infra*.

(*c*) *Shelbury* v. *Scotsford* (1602) 1 Yelv. 23; followed in *Biddle* v. *Bond*, *supra*; *Ross* v. *Edwards*, *infra*.

(*d*) Accordingly the defence of *jus tertii* will be unavailable if the third party also is estopped: *Henderson* v. *Williams* [1895] 1 Q. B. 521, C. A.; 64 L. J. Q. B. 308.

(*e*) *Per* Lord Macnaghten in *Ross* v. *Edwards* (1895) 73 L. T. 100, *infra*; *Ketteley* v. *Read* (1843) 4 Q. B. 511 (*tertius* abandons right); *per* Pollock, C.B., in *Thorne* v. *Tilbury* (1858) 3 H. & W. 524, at 537; 27 C. J. Ex. 407; 117 R. R. 844; *Rogers, Son & Co.* v. *Lambert & Co.* [1891] 1 Q. B. 318; 60 L. J. Q. B. 187, C. A. (*jus tertii* not set up). See also cases in last note. The bailee is not discharged if he elect to act upon the bailment with knowledge of the adverse claim: *Ex parte Davies* (1881) 19 Ch. D. 86, C. A.

(*f*) (1895) 73 L. T. 100, P. C.

their favour. *Held* by the Privy Council, following
v. *Bond* (*g*), that the title of H., the unpaid seller to
paramount to that of R. & Co as pledgees, and E. & Co
protect themselves by H.'s title.

Distinction between estoppel and cause of action.

In considering cases in which an estoppel is alleged,
be borne in mind that estoppel does not in itself give
of action; it is only a rule of evidence which prevents
from denying a certain state of facts which, *if true*,
cause of action (*h*). Thus, for example, the fact t
bailee is estopped from denying the title of the bail
not make the bailor in fact the owner (*i*). The first
ascertain is whether a cause of action exists, suppos
facts cannot be disputed. Thus, the warehouseman wa
in *Stonard* v. *Dunkin*, because the owner of goods is
to call upon his agent to deliver them, and the wareho
having admitted the plaintiffs' title, could not aft
deny it In point of fact, the case seems to show tha
from estoppel, the plaintiff could not have sued, as he
the owner.

Seller's right of retention. at common law in Scotland.

Black v. *Bankers of Glasgow* (1867).

On the subject of the seller's right of retention, th
common law was stated by Lord President Inglis in
ber, 1867, in the case of *Black* v. *Bakers of Glasgo*
follows: "Unless the seller has parted with the posses
remedy is not stoppage in transitu, but in Scotland
and in England an exercise of the seller's right of li
The seller of goods in Scotland (notwithstanding the
contract of sale) remains the *undivested owner* of t
whether the price be paid or not, *provided the goo*
delivered; and the property of the goods cannot pass
delivery, actual or constructive. The necessary con
is, that the seller can never be asked to part with t
till the price is paid. Nay, he is entitled to reta
against the buyer and his assignees till *every debt*
payable to him by the buyer is paid or satisfied.
seller's right of retention thus being grounded on an u

(*g*) (1865) 6 B. & S. 225; 34 L. J. Q. B. 137.
(*h*) *Per* Lord Esher, M.R., in *Seton* v. *Lafone* (1887) 19 Q. B
L. J. Q. B. 415, C. A.; *per Cur.* in *Low* v. *Bourerie* [1891] 3 C
112; 60 L. J. Ch. 594, C. A.; *per* Bowen, L.J., in *Re Ottos Kop*
Mines [1893] 1 Ch. 618; 62 L. J. Ch. 166, C. A. See the subje
in Butterworth's Bankers' Advances on Merc. Securities at 147. e
(*i*) *Per* Lord Herschell in *Balkis Consol. Co.* v. *Tomkinson*
396, at 407; 63 L. J. Q. B. 134.
(*k*) 40 Scottish Jurist, 77; 6 Macpherson, 140. See also Bell
ed. 1872, §§ 86, 1300; Brown on Sale, Ed. 1821. 3; and *Melros*
(1851) 13 Dunlop, 880.

right of *property*, cannot possibly be of the nature of a lien, for one can have a lien only over the property of another."

The seller's right of retention, therefore, being more than a mere lien, or right of possession of a *res aliena*, was rather a right of exemption from the performance of a personal obligation to deliver so long as the counter-obligation to pay is unperformed (*l*). The right of retention for a general balance was by the second section of the Mercantile Law Amendment (Scotland) Act of 1856 (*m*) (now repealed by the Code) done away with as against a sub-buyer who had given notice to the seller of the subsequent sale; and the seller was bound to make delivery to him on payment of the price of the goods or performance of the terms of the original sale, and could not retain them "for any separate debt or obligation alleged to be due to such seller by the original purchaser."

Now identical with the English lien.

As the Code now expressly says that the unpaid seller has "a right to retain the goods *for the price*" (*n*), it has assimilated the right of retention in Scotland to lien in England and Ireland.

The seller in Scotland has a further remedy, namely, that of attachment. The Code provides:—

Code, s. 40. Attachment by seller in Scotland.

"40.—In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party."

This section reproduces section 3 of the Mercantile Law Amendment (Scotland) Act of 1856 (which the Code repeals), with the omission, however, after the word "poinding," where first used, of the words "at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller."

Arrestment and poinding defined.

"'Arrestment,' when it is considered as a diligence competent to a creditor, may be defined: The command of a Judge by which he who is debtor in a movable obligation to the arrester's debtor is prohibited to make payment of his debt or perform his obligation till the debt due to the arrester who uses the diligence be paid or secured. The arrester's debtor is usually called the common debtor, because where there is a number of competing creditors he is debtor to all of them.

(*l*) *Per* Lord Curriehill in *Wyper* v. *Harveys* (1861) 23 Dunlop. 606, at 620.

(*m*) 19 & 20 V. c. 60.

(*n*) Code, s. 39 (1), *ante*, 950. See also s. 41 (1), *ante*, 954, where no distinction is drawn between lien and right of retention.

He in whose hands the diligence is used is style
arrestee" (*o*). "Poinding," on the other hand, "is
diligence by which the property of the debtor's movable
jects is transferred directly to the creditor who use
diligence." It is real or personal. "Personal poindi
used by creditors in personal obligations" (*p*).

Where, as contemplated by section 40, the goods are
seller's possession, poinding would seem, according t
definitions given above, to be the proper diligence, an
arrestment (*q*), for the latter is properly a remedy *in per*
against third persons, whereas poinding, being *in rem*
be exercised on goods in the poinder's own possessio
Either right, however, is liable to be defeated by a dispo
by the buyer of a document of title under section 9 or s
10 of the Factors Act (*s*).

Two cases decided under section 3 of the Mercantil
Amendment (Scotland) Act, 1856, are cited in the footno

French Codes on lien.

The French Civil Code provides: "The seller is not
to deliver the thing, if the buyer does not pay its pric
the seller has not given him time for payment (*u*). N
he be bound to deliver, even though he has given ti
payment, if the buyer since the sale has become bank
(*est tombé en faillite*)" or insolvent" (*en état de décon*
" so that the seller is in imminent danger of losing the
unless the buyer gives him security" (*caution*) "for pa
at the expiration of the credit" (*au terme*) (*x*). A
Code of Commerce also provides that, in cases of bank
the seller "may retain goods sold by him, which ha
been delivered to the bankrupt, or which have not ye
forwarded to him or to an agent for his account" (
"the trustees may, under the authority of the *jug*
missaire, enforce delivery of the goods by paying to th
the price agreed upon between him and the bankrupt"

The Civil Code also provides that "if the buyer d
pay the price, the seller may demand the rescission

(*o*) Ersk. Inst. 5th ed. (1812) Vol. I Bk. 3, tit. 6, s. 2. See a
Dict. of Law of Scot., by Watson (1882), 56, 57.
(*p*) Erskine, *supra*, s. 20. See also Bell's Dict. 736.
(*q*) Brown's Sale of Goods Act, 189.
(*r*) *Per* Lord Kinnear in *Lockhead* v. *Graham* (1883) 11 Ret.
(*s*) See *Inglis* v. *Robertson* [1898] A. C. 616; 67 L. J. C. P. 10
(*t*) *Wyper* v. *Harveys* (1861) 23 Dunlop, 606; *Brown* v. *Ainslie*
Ret. 173.
(*u*) Art. 1612.
(*x*) Art. 1613.
(*y*) Art. 577, translated by Mayer, 1887.
(*z*) Art. 578.

sale (*a*). This is in accordance with the general provision of the Code applying to all contracts in which something is to be done on both sides (*contrats synallagmatiques*), whereby a resolutive condition is implied by virtue of which one party has on the default of the other the choice either enforcing the contract or of demanding a rescission of it, subject to his right to damages (*b*). But the rescission must be demanded in judicial proceedings (*en justice*), and the Court may grant the defendant time according to circumstances (*c*).

(*a*) Art. 1654. (*b*) Art. 1184. (*c*) *Ibid*

CHAPTER IV.

REMEDIES AGAINST THE GOODS—STOPPAGE IN TRANSIT

Stoppage in transitu exists only when buyer is insolvent.

ANOTHER remedy which an unpaid seller has against goods is stoppage in transitu. This right arises solely the *insolvency* of the buyer, and is based on the plain of justice and equity that one man's goods shall not be a to the payment of another man's debts (*a*). If, the after the seller has delivered the goods out of his own sion, and put them in the hands of a carrier for deliv the buyer (which, as we have seen in the preceding Cl is such a constructive delivery as divests the seller's lie discover that the buyer is insolvent, he may retake the if he can, before they reach the buyer's possession.

and the goods have become his.

The reason given above that one man's goods shall applied to the payment of another man's debts should misunderstood. Strictly speaking, stoppage in transitu place only where the goods have become the property buyer. Where they remain the property of the selle latter may withhold them by virtue of his ownership, b is not stoppage in transitu by the law merchant. Speak the rights of lien and of stoppage, Buller, J., says in d ing his opinion to the House of Lords in *Lickbarr Mason* (*b*): "Neither of them is founded on property they necessarily suppose the property to be in some person. . . . It is a contradiction in terms to say a m a lien upon his own goods, or a right to stop his own go transitu." The principle is also clearly stated by Blackburn (*c*): "The right of stoppage in transitu is a to interfere, and prevent the buyer from taking actual sion, *which he would otherwise have a right to take*, unde the effect of an unconditional delivery to an ag forward. This power does not exist except in the c insolvency."

(*a*) *Per* Lord Northington (then Lord Henley), L.C., in *L'A Lambert* (1761) 2 Eden, at 77; Amb. 399.

(*b*) (1793) 6 East, 21, at 27, n.; 1 S. L. C. 7th ed. 800; 11th 1 R. R. 425.

(*c*) Cont. of Sale, 264; 2nd ed. 380.

The seller's right of stoppage is declared by section 39 (1) (b) of the Code, already quoted (*d*), and is defined by the following section:

Code, s. 44.

"**44.**—Subject to the provisions of this Act (*e*), when the buyer of goods becomes insolvent (*f*), the unpaid seller (*g*) who has parted with the possession of the goods has the right of stopping them in transitu; that is to say, he may resume possession of the goods as long as they are in course of transit (*h*), and may retain (*i*) them until payment or tender of the price."

History given by Lord Abinger.

The history of the law of stoppage in transitu is given very fully by Lord Abinger in *Gibson* v. *Carruthers* (*k*), to which the reader is referred. It now prevails almost universally among commercial nations, and may best be considered by dividing the inquiry into the following sections: I. Who may exercise the right (*l*)? II. Against whom may it be exercised (*m*)? III. When does the transit begin? when does it end (*n*)? IV. How is the seller to exercise the right (*o*)? V. How may the right be defeated when the goods are represented by a bill of lading, or other document of title (*p*)? VI. What is the legal effect of the exercise of the right (*q*)?

SECTION I.—WHO MAY EXERCISE THE RIGHT?

Right does not spring out of lien.

The right of stoppage in transitu does not depend on the fact that the seller, having had a lien and parted with it, may get it back again if he can stop the goods in transit, but is a

(*d*) *Ante*, 950.

(*e*) Ss. 45 and 46, regulating and explaining the exercise of the right, *post*, 880—911; s. 47, *ante*, 985, showing the effect on the right of a sub-sale or pledge by the buyer; s. 48 (1), *ante*, 952, giving the effect of stoppage on the sale.

(*f*) Defined by s. 62 (3) *post*, 1012.

(*g*) Explained in s. 38, *ante*, 951.

(*h*) Explained in s. 45, *post*, 1014.

(*i*) *I.e.*, resume his lien.

(*k*) (1841) 8 M. & W. 337; 11 L. J. Ex. 138; 58 R. R. 713. The right of stoppage in transitu was originally part of the custom of merchants. The earliest reported case in which the right is recognised is *Wiseman* v. *Vandeputt* (1690) 2 Vern. 202, in Chancery. It became settled as an equitable doctrine by the subsequent cases of *Snee* v. *Prescot* (1743) 1 Atk. 245, and *D'Aquila* v. *Lambert* (1761) 2 Eden, at 77; Amb. 399, and was introduced as such into the Courts of common law by Lord Mansfield in 1759; *Barghall* v. *Howard*, 1 Bl. Hy. 366 n. (*a*).

(*l*) *Infra*.

(*m*) *Post*, 1012.

(*n*) *Post*, 1013.

(*o*) *Post*, 1045.

(*p*) *Post*, 1053. As to other documents of title, see Factors Act, 1889, s. 10, (Code, s. 47), *ante*, 985.

(*q*) *Post*, 926.

right arising out of his relation to the goods *qua* seller, whi is greater than a lien. Other persons, therefore, entitled liens—*e.g.*, fullers who have fulled cloths (*r*) have no rig to stop in transitu after having lost possession. But stoppa in transitu is so highly favoured, on account of its intrin justice, that it has been extended by the Courts to qua sellers to persons in a position similar to that of sellers (s

Persons in position similar to that of sellers may stop.

E.g., Agent indorsee of bill of lading.

It was held to be the law, even before the Bills of Lading A of 1855 (*t*), that the transfer of the bill of lading by the sel to his agent vests a sufficient property, that is to say, right the possession (*u*), in the latter to entitle him to stop in trans in his own name (*x*).

Consignor who has bought with his own money or on credit.

In *Feise* v. *Wray* (*y*), the Court of King's Bench held t right to exist in favour of a consignor who had bought goo on account and by order of his principal, on the factor's c credit, in a foreign port, and had shipped the goods to Lond drawing bills on the merchant here, who had ordered t goods and become bankrupt during the transit. The ban rupt's assignee contended that the factor was but an *age* with the lien, but the Court held that he might be consider as a seller who had first bought the goods, and then sold the to his correspondent at cost, plus his commission.

The principle of this case has been recognised in subsequ decisions (*z*).

(*r*) *Sweet* v. *Pym* (1800) 1 East, 4; 5 R. R. 497. In some former editio *Kinloch* v. *Craig* (1789) 3 T. R. 119, in H. L. *ib.* 786. 4 Bro. P. C. 47; 1 R. 664, was quoted as an authority that a factor has no right of stoppage; b the remarks of Eyre, C.B., 3 T. R. at 787, that "stoppage in transitu w out of the question," referred to the rights of the principal and not of factor. See the case *infra*.

(*s*) See s. 38 (2) quoted *ante*, 951, which gives the two instances *infra*.

(*t*) 18 & 19 V. c. 111, *ante*, 976.

(*u*) Best, C.J.'s, remarks in *Morison* v. *Gray*, *infra*, about "propert in the agent are not to be taken literally, and *Morison* v. *Gray* should treated as a decision that the indorsement of the bill of lading to the ag conferred on him a sufficient right of *possession* to enable him to stop goods. In so far as it decided that the agent could bring trover, it seems to inconsistent with *Waring* v. *Cox* (1808) 1 Camp. 369, and *Cox* v. *Har* (1803) 4 East, 211: See *Burgos* v. *Nascimento* (1908) 100 L. T. 71, where subject is discussed.

(*x*) *Morison* v. *Gray* (1824) 2 Bing. 260; 3 L. J. C. P. 261; 27 R. R. 6

(*y*) (1802) 3 East, 93; 6 R. R. 551.

(*z*) *The Tigress* (1863) 32 L. J. Adm. 97; *Tucker* v. *Humphrey* (18 4 Bing. 516; 6 L. J. C. P. 92; *Hawkes* v. *Dunn* (1831) 1 C. & J. 519 Tyrwh. 413; 9 L. J. (O. S.) Ex. 184; *Ireland* v. *Livingston* (1872) L. 5 H. L. 395; 41 L. J. Q. B. 201, *per* Blackburn, J., at 408; *Cassaboglou* *Gibb* (1883) 11 Q. B. D. 797; 52 L. J. Q. B. 538, C. A.; *Ex parte Miles* (1 15 Q. B. D. 39; 54 L. J. Q. B. 566, C. A.; *Ex parte Francis* (1887) 56 L. 577. In *Cassaboglou* v. *Gibb*, *supra*, it was shown by the C. A. that agent who buys on his own credit is in the position of a seller with rep to his principal for some purposes only, *e.g.* so far as regards the passing the property in the goods to the principal, and as regards stoppage in trans by the agent; but that in other respects the contract remains one of agency

Principal consigning to factor on joint account.

So also a seller who consigns goods to a factor on joint account, and draws a bill on him for half the price, may stop the goods on the insolvency of the factor (*a*). But a principal consigning goods to a factor who is under advances on the faith of the consignment, and afterwards obtaining them from the carrier, does not stop in transitu, as there is no relationship of seller and buyer between the parties, but he prevents possession being obtained by the factor whereon to base a general lien on the *principal's* goods (*b*).

Secus where consignment is made to factor under advances.

A person who, having agreed to buy, resells his executory interest may stop the goods.

A person who has agreed to buy goods, and who resells the goods before the property has passed to him (*c*), may also stop the goods.

Jenkyns v. *Usborne* (1844).

In *Jenkyns* v. *Usborne* (*d*), the plaintiff was agent of a foreign house which had shipped a cargo of beans to London on the order, through the plaintiff, of Hunter & Co., of London. One bill of lading had been taken for the whole cargo, and sent to Hunter & Co. They had in fact ordered only a portion of the cargo. By arrangement with Hunter & Co., subsequently ratified by the sellers, the plaintiff agreed to take the surplus of the cargo, and Hunter & Co. gave to the plaintiff a letter acknowledging that 1,442 sacks of the beans were his property, together with a delivery order, addressed to the master of the vessel, requesting him to deliver to bearer 1,442 sacks out of the cargo. Before the arrival of the vessel plaintiff sold these 1,442 sacks, on credit, to one Thomas, giving him the letter and delivery order of Hunter & Co. Thomas obtained an advance from the defendant on this delivery order and letter, together with other securities. Thomas stopped payment before the arrival of the vessel and before paying for the goods, and the plaintiff gave notice to the master, on the arrival of the goods, not to deliver them. *Held*, that although at the time of the stoppage the property in the 1,442 sacks had not vested in the plaintiff, the goods being then unascertained, yet the interest of the plaintiff in the goods was sufficient to entitle him to exercise the seller's rights of stoppage.

(*a*) *Newson* v. *Thornton* (1805) 6 East, 17; 8 R. R. 278.

(*b*) *Kinloch* v. *Craig* (1789) 3 T. R. 119; 1 R. R. 664; in H. L. 786. See especially *per* Eyre, C.B., at 787. The principal in such a case stops *his own* goods.

(*c*) "Seller" in the Code includes one who agrees to sell: s. 62 (1).

(*d*) 7 M. & G. 678; 8 Scott, N. R. 505; 13 L. J. C. P. 196; 66 R. R. 767. This case would seem to fall under s. 39 (2), *ante*, 963, rather than under s. 44, *ante*, 1003.

Stoppage by firm as against a partner.

A firm may exercise the right of stoppage as against a ber of the firm (*e*).

May surety exercise the right.

It was said by Lord Ellenborough, in *Siffken* v. *Wr* that a mere surety for the buyer had no right to s transitu; but if a surety for an insolvent buyer should p seller, he may now have the right of stoppage in tran not in his own name, at all events in the name of the by virtue of the provisions of the Mercantile Law Amen Act (*g*), which provides that "every person who, being for the debt or duty of another, or being liable with a for any debt or duty, shall pay such debt or perfor duty, shall be entitled to have assigned to him or to a for him every judgment, speciality, or other security shall be held by the creditor in respect of such debt o whether such judgment, speciality, or other security s shall not be deemed at law to have been satisfied by th ment of the debt or performance of the duty, and such shall be entitled to *stand in the place of the creditor*, *use all the remedies*, and, if need be, and upon a indemnity, to *use the name* of the creditor, in any ac other proceeding, at law or in equity, in order to obtai the principal debtor or any co-surety, co-contractor, debtor, as the case may be, indemnification for the ac made and loss sustained by the person who shall have such debt or performed such duty, etc. (*h*).

Imperial Bank of London v. *London and St. Katharine Dock Co.* (1877).

The opinion submitted in the text is confirmed decision of Jessel, M.R., in the case of *The Imperial* *The London and St. Katharine Dock Co.* (*i*). Goods ha purchased by a broker without disclosing the name principals. By the custom of the market, the broker bu er's default became personally liable to the seller price. The buyers stopped payment, and the broker upon paid the sellers the price, and obtained from delivery order for the goods. *Held*, that, by reason custom of the trade, the broker stood in the position o

(*e*) *Ex parte Cooper* (1879) 11 Ch. D. 68; 48 L. J. Bk. 49, C. A.
(*f*) (1805) 6 East, 371.
(*g*) 19 & 20 V. c. 97, s. 5.
(*h*) The only decisions met with as to the construction of this s *Lockhart* v. *Reilly* (1857) 1 De G. & J. 464; 25 L. J. Ch. 54; 118 R *Batchellor* v. *Lawrence* (1861) 9 C. B. (N. S.) 543; 30 L. J. C. P. 39; 773; *Brandon* v. *Brandon* (1859) 28 L. J. Ch. 150; *De Wolf* v. *Linds* L. R. 5 Eq. 209; 37 L. J. Ch. 293; *Phillips* v. *Dickson* (1860) 8 C. B. (N 29 L. J. C. P. 223; 125 R. R. 699; *Imperial Bank* v. *L. and St. Kath.* (1877). *infra*; *Russell* v. *Shoolbred* (1885) 29 Ch. D. 254, C. A.; *Morg* [1894] 3 Ch. 400; 64 L. J. Ch. 6, C. A. (rights of co-sureties *inter se*
(*i*) 5 Ch. D. 195; 46 L. J. Ch. 335.

for the buyers, and that, having regard to the terms of the Mercantile Law Amendment Act, and to the justice of the case, the lien of the unpaid sellers was a "security" which subsisted for the benefit of the surety, so as to entitle him to the possession of the goods as against the buyers' pledgees.

The position of the agent in the preceding case is strictly covered by the language of section 38 (2) of the Code, for he was "an agent who had himself paid the price." And it may well be that a surety, who has paid the seller the price of the goods, is a "person who is in the position of a seller," for his position is analogous to that of consignor or agent who has paid the price, but whether a surety, who has paid the seller, is subrogated to the seller's right of lien or stoppage under the Mercanti. Law Amendment Act does not seem to be altogether clear, in spite of Jessel, M.R.'s judgment. That learned Judge treated a lien as a "security" within the meaning of the Act. But the Act seems to contemplate securities that can be *assigned* or *satisfied* (*k*). It has been held that a right of distress is neither a "security" nor a "remedy" (*l*). The later words of the section, "stand in the place of the creditor," may, however, be wide enough to cover the case of a surety (*m*).

Stoppage by an alien enemy.

A licence from the Crown to a British subject to buy goods of an alien enemy by implication authorises the alien enemy to sell them, and he may sue for the price of the goods or stop them in transitu (*n*).

Agent of seller may stop.

An agent of the seller may make a stoppage on behalf of his principal (*o*), but attempts have been made occasionally by persons who had no authority, and whose acts were subsequently ratified, and the cases establish certain distinctions.

Ratification of unauthorised stoppage when good.

Where the stoppage in transitu is effected on behalf of the seller by one who has at no time had any authority to act for him, a subsequent ratification of the seller will be too late if made after the transit is ended, the principle of the law of agency being that a ratification to be valid must be made at a time and in circumstances in which the person ratifying could himself do the act ratified (*p*).

(*k*) *Per Cur.* in *Russell* v. *Shoolbred* (1885) 29 Ch. D. 254, C. A.
(*l*) *Russell* v. *Shoolbred*, *supra*.
(*m*) See *Lightbown* v. *McMyn* (1886) 33 Ch. D. 575; 55 L. J. Ch. 845, *coram* Chitty, J.
(*n*) *Fenton* v. *Pearson* (1812) 15 East, 419.
(*o*) *Whitehead* v. *Anderson* (1842) 9 M. & W. 518; 11 L. J. Ex. 157; 60 R. R. 819.
(*p*) *Audley* v. *Pollard* (1597) Cro. El. 561; *Dibbins* v. *Dibbins* [1896] 2 Ch. 348; 65 L. J. Ch. 724; *per Cur.* in *Lyell* v. *Kennedy* (1887) 18 Q. B. D. 796, at 814, C. A.

Bird v. *Brown* (1850).

In *Bird* v. *Brown* (*q*), the holder of bills of exchange, drawn by the seller on the purchaser for the price of the goods, assumed to act for the seller in stopping the goods in transitu, and the assignees of the bankrupt buyer also demanded the goods. *After* this demand by the assignees the seller adopted and ratified the stoppage, but the Court held that the right to the possession of the goods had vested in the assignees by their demand of delivery which determined the transit, and this right could not be altered retrospectively by the seller's subsequent ratification.

Hutchings v. *Nunes* (1863).

In *Hutchings* v. *Nunes* (*r*), the stoppage was made by the defendants, merchants at Kingston, Jamaica, who had close business relations with the sellers, merchants at Baltimore, and acted in some matters as the seller's agents, although the extent of the authority to act as agents was not very clear on the evidence. The defendants had on the 26th of March written to the sellers informing them of the insolvency of the buyer, and the sellers, on receipt of that letter, on the 16th of April posted to the defendants a power of attorney to act for them. The defendants on the 21st of April, before receiving this power and before they were aware of its existence, assumed to act for the sellers and effected the stoppage. Later on the same day the plaintiff, the buyer's official assignee, demanded the goods. *Held*, by the Privy Council, distinguishing the case from *Bird* v. *Brown*, that taken together with, if not independently of, the evidence of general agency, the power actually despatched by the sellers *before* the 21st of April was sufficient to warrant the stoppage by the defendants on that day.

Seller's right generally not affected by partial payment.

The seller's right generally exists notwithstanding partial payment of the price (*s*). When, however, the contract is apportionable, as where the goods are deliverable by stated instalments to be separately paid for, and payment has been made in respect of an instalment, the seller is in respect thereof paid, and can only exercise his right of stoppage over the goods which remain unpaid for (*t*). Nor is the seller's right lost by his having received *conditional* payment by bills of

Right not affected by conditional payment by bill.

(*q*) 4 Ex. 786; 19 L. J. Ex. 154; 80 R. R. 775.

(*r*) 1 Moo. P. C. (N. S.) 243; 38 R. R. 511.

(*s*) Code, s. 38 (1) (*a*), *ante*, 951; *Hodgson* v. *Loy* (1797) 7 T. R. 440; 4 R. R. 483; *Feise* v. *Wray* (1802) 3 East, 93; 6 R. R. 551; *Edwards* v. *Brewer* (1837) 2 M. & W. 375; 5 L. J. Ex. 135; 46 R. R. 626; *per* Parke, B., in *Van Casteel* v. *Booker* (1848) 2 Ex. 702; 18 L. J. Ex. 9; 76 R. R. 729.

(*t*) *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.* (1877) 5 Ch. D. 205; 46 L. J. Ch. 418.

exchange or other securities (*u*), even though he may have negotiated the bills so that they are outstanding in third hands, unmatured (*x*). It has, however, been already shown (*y*) that a seller is not unpaid if he have taken bills or securities in *absolute* payment. He must then seek his remedy on the securities, having no further right over the goods.

Running account between the parties. Is the seller unpaid?

The question whether a seller is unpaid is not always easy to decide. Thus there may be an unadjusted running account between the seller and the buyer, and it may not be certain at the time of the stoppage to which side the balance of indebtedness inclines. As long ago as 1768 Lord Mansfield laid down the rule (*z*) as settled that "if a man send bills of exchange or consign a cargo, and the person to whom he sends them has paid the value before, though he did not know of the sending them at that time, the sending of them to the carrier will be sufficient to prevent the assignees (of the consignor) from taking these goods back in case of an intervening act of bankruptcy."

Wood v. *Jones* (1825).

In *Wood* v. *Jones* (*a*), the plaintiffs, merchants at Quebec, had received from Brightman, a merchant in England, goods of the value of £1,500 for sale on account of Brightman. In return for these goods, but before sale, the plaintiffs shipped to Brightman three cargoes of timber of about the value of £1,500, and sent him bills of lading. Two of these cargoes were duly delivered. While the third was in transit the plaintiffs drew a bill for £500 on Brightman *specifically against this cargo*. The bill was dishonoured during the transit, Brightman having become insolvent, and the plaintiffs stopped the cargo. In an action of trover, it was held that, as the consignor's bill had been specifically drawn against the cargo, they were not deprived of their right of stoppage although they had in their own hands goods of the consignee unaccounted for, and the account current between them had not been adjusted, and the balance was uncertain.

Consignment made specially on account of balance against consignor.

In the preceding case the consignor was *quâ* the particular cargo in the position of an unpaid seller. Where, however,

(*u*) Code, s. 38 (1) (*b*). *ante*, 951; *Dixon* v. *Yates* (1833) 5 B. & Ad. 945; 2 L. J. K. B. 198; 39 R. R. 489; *Feise* v. *Wray*, *supra*; *Edwards* v. *Brewer*, *supra*.

(*x*) *Feise* v. *Wray*, *supra*; *Patten* v. *Thompson* (1816) 5 M. & S. 350; 17 R. R. 350; *Edwards* v. *Brewer*, *supra*; *Mitchell* v. *Gorton* (1834) 2 Cr. & M. 504; 3 L. J. Ex. 155; 39 820.

(*y*) *Ante*, 900.

(*z*) In *Alderson* v. *Temple* (1768) 4 Burr. 2235, at 2239. See also *Alley* v. *Hotson* (1815) 4 Camp. 35.

(*a*) 7 D. & R. 126.

the consignment made by the consignor is specifically appro priated to the discharge of, or as security for, a balance o account at the time of shipment, the consignor is not in th position of a seller at all, and cannot stop the goods if, b reason of the insolvency of the consignee, the balance o indebtedness become reversed.

Vertue v. *Jewell* (1814).

Thus, in *Vertue* v. *Jewell* (*b*), it was held by Lo Ellenborough at Nisi Prius, and confirmed by the Court i Banc, that a consignor who was indebted to the consignees o a balance of accounts in which were included acceptances o the consignees outstanding and unmatured, and who, und these circumstances, shipped a parcel of barley *on account o that balance*, had no right of stoppage on the insolvency of t consignees, although the acceptances were afterwards di honoured, and the consignees then owed the consignor £2,00 Lord Ellenborough said that "the circumstance of Bloom (t consignor) being indebted to them on the balance of accoun divested him of all control over the barley from the mome of the shipment. The non-payment of the bills of exchan cannot be considered." The Court held, in Banc, that und these circumstances the consignees were to be considered purchasers of the goods for valuable consideration.

Explanation of *Vertue* v. *Jewell*.

This case has never been overruled, and has been various explained (*c*). Lord Blackburn, in the Treatise on Sa suggests that the transaction was really a pledge of the co signment, so that the position of the consignor was not su as to allow him to be considered as a seller, and that the c would therefore be an authority for the proposition that t right of stoppage is peculiar to a seller (*d*).

When this case was pressed on the Court by counsel *Patten* v. *Thompson* (*e*), Lord Ellenborough said: "I ha also looked into the case of *Vertue* v. *Jewell*, and find t there the bill of lading was indorsed and sent by the consig on account of a balance due from him, including seve

(*b*) 4 Camp. 31. See also *Evans* v. *Nichol* (1841) 3 M. & G. 614; 11 L C. P. 6.

(*c*) The learned Author calls *Vertue* v. *Jewell* "as reported very ques able law": 2nd ed. 694; 4th ed. 849. Discussing Lord Blackburn's criti given in the text, he lays stress upon the language of the Court in Banc that consignees were "purchasers of the goods for a valuable consideration." says that this showed that, in the opinion of the Court, the transaction *was* of sale, which would show the right of stoppage to exist; for *Feise* v. (1802) 3 East, 93; 6 R. R. 551, had shown that the receipt of accepta unmatured at the time of the stoppage did *not* oust the right of stoppage. this phrase of the Judges seems to have another meaning, as stated in the *infra*.

(*d*) Cont. of Sale, 220; 2nd ed. 331.

(*e*) 5 M. & S. 350, at 360; 17 R. R. 350.

acceptances then running, so that it was in the nature of a *pledge to cover these acceptances.*"

It is submitted that Lord Ellenborough's and Lord Blackburn's explanation of the case was the true one, viz., that the transaction was not one between seller and buyer, but was one between debtor and creditor. What the Court in Banc probably meant was that on the consignment of the goods a special property vested in the consignees as pledgees. The view above taken is supported by the following cases.

This case not a case of sale at all.

In *Smith* v. *Bowles* (*f*), one Turner in Cornwall, being indebted to Staples & Co., bankers in London, consigned to them a parcel of dollars in part payment of his debt. The defendants, who were also creditors of Turner, obtained, with Turner's consent, possession of the dollars while in the hands of the carrier. Staples & Co. went bankrupt, and their assignees brought trover against the defendants. *Held* by Lord Kenyon that the dollars were not countermandable. Had the dollars been sent on any particular account, and described as such they might have been stopped; but a general remittance from a debtor to a creditor appropriated to a debt could not be countermanded.

Smith v. *Bowles* (1797).

In *Clark* v. *Mauran* (*g*), the consignor had had extensive commercial dealings with the consignee, and at a particular date was indebted to him in 7,000 dollars, for payment of which the consignee applied. The consignor then shipped a parcel of doubloons to the consignee, informing him of the fact, and requesting him to place the funds to his credit, and transmitting a bill of lading. The consignor became bankrupt, and his assignee and the consignee both claimed the doubloons. *Held*, by Walworth, C., that the right of stoppage "can never apply to a consignment to a creditor to whom the consignor is indebted to the full value of the goods," that the consignment was a specific appropriation of the doubloons for the payment of the balance due, and that the consignee on shipment obtained a "specific lien" on them.

Clark v. *Mauran* (1832).

Subject to any agreement to the contrary between the seller and the carrier (*h*), the unpaid seller's right of stoppage takes

Seller's right of stoppage paramount to *general* lien of carrier, or to attachment by buyer's creditor;

(*f*) (1797) 2 Esp. 578.

(*g*) 3 Paige (N. Y. Ct. of Chan.) 373. This and *Smith* v. *Bowles* are the only authorities similar to *Vertue* v. *Jewell* that have been found. See also Story on Sale, ss. 323, 327; *per Cur.* in *Stanton* v. *Eager* (1835) 33 Mass. 467, at 475; *per Cur.* in *Wood* v. *Roach* (1792) 1 Yeates (Penn.) 177, at 179.

(*h*) *United States Steel Products Co.* v. *Great Western Railway Co.* [1916] A. C. 189; 85 L. J. K. B. 1.

precedence of a carrier's lien for a *general balance* (*i*), thou
not of his lien for the special charges on the goods carried
and he may also maintain his claim as paramount to that
creditor of the buyer who has attached the goods whilst
transit by process out of the Mayor's Court of the City
London (*l*).

and in certain cases to demand for freight.

Mercantile and Exchange Bank v. *Gladstone* (1868).

In *The Mercantile and Exchange Bank* v. *Gladstone*
it was held that the seller's right of stoppage was paramo
to a demand for freight under the following circumstan
The goods were ordered by Fernie & Co., of Liverpool,
the defendants' house in Calcutta, and were shipped on b
of Fernie & Co.'s own vessel, the master signing bills of la
"freight for the said goods free on owners' account."
bill of lading was such as the master had authority from
owners to sign, but *before* it was signed in Calcutta the ow
in Liverpool had, without the knowledge of the consigno
of the captain when the bills of lading were signed,
ferred the vessel to the plaintiffs with "all the profits an
the losses, as the case might be." On the insolvenc
Fernie & Co. the defendants stopped the goods, and cla
delivery of them freight free. The plaintiffs, how
claimed freight at the current rate. It was held, under
circumstances, that the seller's right of stopping the
"free of freight" could not be affected by a sale in Eng
unknown to him; that the master had authority to sig
bill of lading freight free till he heard of the chan
ownership, and that the plaintiffs were bound by his act

SECTION II.—AGAINST WHOM MAY IT BE EXERCISED?

Only against bankrupt or insolvent buyer.

The seller can only exercise the right against an *ins*
or *bankrupt* buyer.

The Code thus defines insolvency:—

Code, s. 62 (3). Definition of "insolvency."

"62.—(3.) A person is deemed to be insolvent within the mea
this Act who either has ceased to pay his debts in the ordina
course of business, or cannot pay his debts as they become due,

(*i*) *Oppenheim* v. *Russell* (1802) 3 B. & P. 6 R. R. 604; *Richa*
Goss (1802) 3 B. & P., 119; 6 R. R. 727 See in er. *Potts* v. *N. Y.*
(1881) 131 Mass 455. See also *Nicholls* v. *Le Feuvre* (1835) 2 Bing. N
5 L. J. (N. S.) C P. 281 (shipping agent's general lien).

(*k*) *Morley* v. *Hay* (1828) 3 M. & Ry. 396; 7 L. J. K. B. 104.

(*l*) *Smith* v. *Goss* (1808) 1 Camp. 282; 10 R. R. 684.

(*m*) L. R. 3 Ex. 233; 37 L. J. Ex. 130. See also *per* Lord Per
Keith v. *Burrows* (1877) 2 A. C. at 651; 46 L. J. C. P. 801.

(*n*) *Semble*, a refusal by an alien enemy buyer to pay because of t
not a failure in the ordinary course: *per* Evans, P., in The Felicia
59 Sol. J. 546.

he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt (*o*) or not."

So, at common law, by "insolvency" is meant a general inability to pay one's debts (*p*); and of this inability the failure to pay one just and admitted debt would probably be sufficient evidence (*q*). And in a number of the cases the fact that the buyer or consignee had "stopped payment" has been considered, as a matter of course, to be such an insolvency as justified stoppage in transitu (*r*). At common law. What is insolvency?

If the seller stop in transitu before the buyer has become insolvent, he does so at his peril. If, on the arrival of the goods at destination, the buyer is then insolvent, the premature stoppage will avail for the protection of the seller; but if the buyer remain solvent, the seller would be bound to deliver the goods, with an indemnification for expenses incurred (*s*). Seller stops at his peril in advance of buyer's insolvency.

In *The Tigress* (*t*), Dr. Lushington, in delivering judgment, said: "Whether the vendee is insolvent may not transpire till afterwards" (*i.e.*, after the stoppage), "when the bill of exchange for the goods becomes due, for it is, as I conceive, clear law that the right to stop does not require the vendee to have been found insolvent."

SECTION III.—WHEN DOES THE TRANSIT BEGIN AND END?

The transit is held to continue from the time the seller parts with the possession until the purchaser acquire it; that is to say, from the time when the seller has so far made delivery that his right of lien (as described in the antecedent Chapter) is gone to the time when the goods have reached the *actual* possession of the buyer. Duration of transit.

(*o*) This is a Scotch term. A notour bankrupt is a person who is not only insolvent, but whose insolvency is made known to the public by steps of legal diligence having been taken against him for the recovery of debts: Brown's Sale of Goods Act, 288.

(*p*) *Parker* v. *Gossage* (1835) 2 C. M. & R. 617; 5 L. J. (N. S.) Ex. 4; *Biddlecombe* v. *Bond* (1835) 4 A. & E. 322, 696; 5 L. J. K. B. 47; 43 R. R. 351; *Billson* v. *Crofts* (1873) 15 Eq. 314; 42 L. J. Ch. 531; *per* James, L.J., in *Re Phœnix Steel Co.* (1876) 4 Ch. D. at 120, 121; 46 L. J. Ch. 115; *Nixon* v. *Verry* (1885) 29 Ch. D. 196; 64 L. J. Ch. 736; and see a discussion by Willes, J., as to the meaning of "insolvency" in *The Queen* v. *The Sadlers' Co.* (1863) 10 H. L. C. 404, 425; 32 L. J. Q. B. 337; 138 R. R. 217.

(*q*) Sm. Merc. Law, ed. 1877, 550, n.

(*r*) *Vertue* v. *Jewell* (1814) 4 Camp. 31; *Newsom* v. *Thornton* (1805) 6 East. 17; 8 R. R. 278; *Dixon* v. *Yates* (1833) 5 B. & Ad. 313; 2 L. J. K. B. 198; 39 R. R. 489; *Bird* v. *Brown* (1850) 4 Ex. 736; 19 L. J. Ex. 154; 80 R. R. 775.

(*s*) *Per* Lord Stowell in *The Constantia* (1807) 6 Rob. Adm. R. 321.

(*t*) (1863) 32 L. J. Adm. 97.

The following definition in the Code of the transit accordance with these principles:

Code, s. 45 (1).

"**45.**—(1.) Goods are deemed to be in course of transit from th when they are delivered to a carrier by land or water, or other or custodier (*u*) for the purpose of transmission to the buyer, or buyer, or his agent in that behalf (*x*), takes delivery (*y*) of ther such carrier or other bailee or custodier" (*z*).

The right arises after seller has parted with title and actual possession.

And here the reader must be again reminded that the s right in the goods is very frequently not ended on their a at their ultimate destination because of his having re the *property* in them, through the reservation of the ri disposal—*i.e.*, of the *title* to the goods (*a*). The stoppa transitu is called into existence for the seller's benefit the buyer has acquired *title* and *right of possession*, and *constructive*, though not yet *actual*, possession.

Meaning of "constructive" and "actual possession" of the buyer.

The constructive possession above alluded to is the p sion of the buyer through his agent, *the carrier*. The te also used to mean a possession which (unlike constru possession in the sense above mentioned) *divests* the s right of stoppage, viz., the possession of the buyer's agen to carry, but to *hold*, the goods at the disposal of the b

Statement by Brett, L.J., in *Kendal* v. *Marshall* (1883).

In this connection the following extract from the judg of Brett, L.J., in *Kendal* v. *Marshall* (*b*), is instructive

"Where the goods have been appropriated by the ve and have been delivered by him to a carrier to be transm to the vendee, a constructive possession exists in the ve nevertheless, whilst the goods are in the hands of the ca they are in the course of transit, and the right of stoppage arise. There is another kind of constructive possession b vendee; that is, when the goods have been delivered by carrier, and have reached the hands of an agent to the ve *to be held* at his disposal. . . . But . . . the goods may have reached the end of the transit as originally contempl they may have come only to an intermediate stage. think that the definition of the transitus is well give Abbott on Merchant Ships and Seamen (*c*). The princip

(*u*) Being the agent of the buyer, see *infra*.
(*x*) being an agent to hold at the buyer's disposal; see *infra*.
(*y*) "'Delivery' means voluntary transfer of possession from one p to another": s.
(*z*) A Scotch n for bailee.
(*a*) *Ante*, 419, *et seqq*. See also as to the quasi-right of stoppage s. 39 (2) of Code, *ante*, 963.
(*b*) (1883) 11 Q. B. D. 356, at 364—365; 52 L. J. Q. B. 313, C. A.
(*c*) 5th ed., part 3, ch. 9, 374, 12th ed., part 4, ch. 10, 409.

there stated in the following terms: 'Goods are deemed to be in transitu not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee, but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee.' It is clear that the author, in the latter part of this definition, is alluding to the second kind of constructive possession. If the wording of the latter clause may be enlarged, I should prefer it to stand thus: 'but also when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purposes of transmission and delivery, until they arrive at the actual possession of the consignee, or at the possession of his agent, who is to hold them at his disposal and to deal with them accordingly.'"

General principles as stated by Parke, B. in *James* v. *Griffin* (1836).

In *James* v. *Griffin* (*d*), which was twice before the Exchequer of Pleas, Parke, B., giving his opinion on the second occasion, thus stated the general principles: "The delivery by the vendor of goods sold to a carrier of any description either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be *his agent to take possession of and keep the goods for him*, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession. . . . The actual delivery to the vendee or his agent, which puts an end to the transitus, or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods (*e*), or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself (*f*); or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination."

Stoppage in transitu distinguished from a countermand to seller's agent of delivery.

These two statements of the law show that genuine cases of stoppage in transitu must be distinguished from others,

(*d*) (1836) 1 M. & W. 20; (1837) 2 M. & W. 623, at 632–633; 6 L. J. Ex. 241; 46 R. R. 703.

(*e*) *Scott* v. *Pettit* (1803) 3 B. & P. 469; 7 R. R. 804; *Rowe* v. *Pickford* (1817) 8 Taunt. 83; 19 R. R. 466.

(*f*) *Dixon* v. *Baldwen* (1804) 5 East, 175; 7 R. R. 681.

sometimes inaccurately called cases of stoppage (*g*). seller, having reserved the right of disposal, recla goods from the person in possession, the buyer not become the owner (*h*); or having instructed his ow to deliver countermands the order (*i*), or himself delivery, or, having despatched goods to his own a factor, countermands the delivery by the carrier to the so as to prevent the agent acquiring a lien (*k*). In suc a *lien*, and not a right of stoppage, comes in question

It is obvious that each case must be determined accor its own circumstances. An attempt will be made to the cases so as to afford examples.

Goods may be stopped in hands of carrier even though named by buyer.

Goods are liable to stoppage as long as they rem possession of the carrier *qua carrier* (*l*) — a qualificatio kept in view, for he may become bailee for the buyer a houseman or wharfinger after his duties as carrier hav discharged and it makes no difference that the carri been named or appointed by the buyer (*m*).

Goods in passage on the buyer's own cart or vessel are not in transitu.

But the delivery of goods to a servant is delivery i actual possession of the master. If, therefore, the buye his own cart or his own vessel for the goods, they hav rule reached the buyer's *actual possession* as soon as the has delivered them into the cart or vessel (*n*).

(*g*) *E.g.* in *Hawes* v. *Watson* (1824) 2 B. & C. 540; 2 L. J. (O. S.) K 26 R. R. 448; *Stoveld* v. *Hughes* (1811) 14 East, 308; 12 R. R. 523.

(*h*) *Moakes* v. *Nicolson* (1865) 19 C. B. (N. S.) 290; 34 L. J. C. 147 R. R. 600; *Cahn* v. *Pockett* [1899] 1 Q. B. 643; 68 L. J. Q. B. 515.

(*i*) *McEwan* v. *Smith* (1849) 2 H. L. C. 309; 81 R. R. 166.

(*k*) *Kinloch* v. *Craig* (1790) 3 T. R. 783; 1 R. R. 661, H. L.

(*l*) *Mills* v. *Ball* (1801) 2 B. & P. 457; 5 R. R. 653; *James* v. *Griffi* 2 M. & W. 633; 6 L. J. Ex. 211; 46 R. R. 213; *Lickbarrow* v. *Mason* Sm. L. C. 9th ed., 737; 11th ed. 693; 1 R. R. 425, and notes, and the stoppage *passim*.

(*m*) *Hodgson* v. *Loy* (1797) 7 T. R. 440; 4 R. R. 483; *Jackson* v. (1839) 5 Bing. N. C. 508; 8 L. J. (N. S.) C. P. 294; 50 R. R. 777; *per* Bu in *Ellis* v. *Hunt* (1789) 3 T. R. 469; 1 R. R. 743; *Stokes* v. *La Riviere* reported by Lawrence, J., in giving the judgment of the Court in *Bohtli Inglis* (1803) 3 East, 397; 7 R. R. 490; *Berndtson* v. *Strang* (1867) 4 E 36 L. J. Ch. 879; (1868) 3 Ch. 588; 37 L. J. Ch. 665; *Ex parte Rosevear Clay Co.* (1879) 14 Ch. D. 560; 48 L. J. B. K. 100, C. A.; *Bethell* v. *Clark* 20 Q. B. D. 615; 57 L. J. Q. B. 302, C. A.

(*n*) Blackburn on Sale, 242; 2nd ed. 351; *Ogle* v. *Atkinson* (1814) 5 759; 15 R. R. 647; *per Cur.* in *Turner* v. *Trustees of Liverpool Docks* 6 Ex. 565; 20 L. J. Ex. 391; 86 R. R. 377; *Van Casteel* v. *Booker* (1848) 691, at 708; 18 L. J. Ex. 9; 76 R. R. 729; *per* Wood, V.C., in *Berndt Strang* (1867) 4 Eq. 481, at 489; 36 L. J. Ch. 879. In *The Merchant B Co. of London* v. *Phœnix Bessemer Steel Co.* (1877) 5 Ch. D. 205, at 2 L. J. Ch. 418; Jessel, M.R., however, expresses the opinion that the dete tion of the transit does not follow, as a proposition of law, from the fact purchaser having sent his own cart for the goods, and received them in th but is a question of inference as to what the real intention of the parties wa this would seem to follow from the analogy of the buyer's ship. See text *post*

But if the seller desire to restrain the effect of a delivery of goods on board the buyer's own vessel, he may do so by taking bills of lading so expressed as to indicate that the delivery is to the master of the vessel as an *agent for carriage*, not an agent to receive possession for the purchaser, as where the seller takes the bill of lading to his own order, or to that of his agent, whereby he reserves the right of disposal (*o*).

Seller may restrain the effect of delivery on the buyer's vessel by the bill of lading.

This point was decided in *Turner* v. *Trustees of the Liverpool Docks* (*p*), and that case was recognised as settled law in *Schotsmans* v. *Lancashire and Yorkshire Railway Co.* (*q*), decided by the full Court of Chancery Appeals. There the seller took the bill of lading *to the buyer's order*, retaining three copies in his own possession, the fourth being in the hands of the master. Lord Cairns, then Lord Justice, said: "The *Londos* was the ship of Cunliffe, and indicated as such for the delivery of the goods. The master was his servant. No *special* contract was entered into by the master to carry the goods for or to deliver them to any person other than Cunliffe, the purchaser. In point of fact, no contract of affreightment was entered into. . . The essential feature of a stoppage in transitu, as has been remarked in many of the cases, is that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor, who has parted with, and the purchaser, who has not yet received them. It was suggested here that the master of the ship was a person filling this character, but the master of the ship is the servant of the owner; and if the master would be liable because of the delivery of the goods to him, the same delivery would be a delivery to the owner, because delivery to the agent is delivery to the principal." Lord Chelmsford, L.C., gave an opinion to the same effect, and pointed out that, if the seller had desired to restrain the effect of the delivery, he should have taken a bill of lading with the proper indorsement, as was established in *Turner* v. *Trustees of Liverpool Docks* (*r*); and he also held that the fact that the seller had retained three of the bills was immaterial, as they gave no authority over the delivery of the goods.

Schotsmans v. *Lancashire and Yorkshire Railway Co.* 1867).

In the foregoing case it was further held by both the learned Lords, reversing Lord Romilly's judgment at the Rolls (*s*), that there was no difference in the effect of

No distinction in the effect of delivery on buyer's ship sent expressly for the goods, or on his general ship.

(*o*) Under Code, s. 19 (2), *ante*, 420.
(*p*) (1848) 6 Ex. 543; 20 L. J. Ex. 391; 86 R. R. 377; *ante*, 417.
(*q*) 2 Ch. 332; 36 L. J. Ch. 361 (1).
(*r*) Where also the ship was the buyer's: see *ante*, 427.
(*s*) (1865) 1 Eq. 349; 36 L. J. Ch. 361.

the delivery whether the buyer's ship were expressly
for the goods, or whether it were a general ship belongin
the buyer, and the goods were put on board without
previous special arrangement.

Buyer's cart. It is conceived that the same principles apply to a deli
to the buyer's own cart or waggon, and that the effect of
delivery may be restrained by the seller (*t*).

With regard to a delivery on board the buyer's chart
ship the Code provides: -

Code, s. 45 (5) Delivery on ship chartered by buyer.

"**45.**—(5.) When goods are delivered to a ship chartered by the
it is a question depending on the circumstances of the particular
whether they are in the possession of the master as a carrier,
agent to the buyer."

Whether a vessel chartered by the buyer is to be consi
his own ship, depends on the nature of the charter-party
the charterer is, in the language of the law merchant,
for the voyage, that is, if the ship has been demised to him
he has employed the captain, so that the captain is his ser
then a delivery on board of such a ship would be a delive
the buyer; but if the owner of the vessel has his own ca
and men on board, so that the captain is the servant
owner, and the effect of the charter is merely to secure
charterer the exclusive use and employment of the
then a delivery by the seller of goods on board is
delivery to the buyer, but to an agent for carriage.
pure question of intention in every case, to be determin
the terms of the charter-party (*u*).

Berndtson v. *Strang* (1867). With regard to the second point, the interposition
master as a carrier, in *Berndtson* v. *Strang* (*x*) the

(*t*) Lord Ellenborough, C.J., in *Trinity House* v. *Clark* (1815) 4 M. &
points out the analogy between a ship and a ca See also Jessel,
opinion cited in note (*n*) of 1016, *ante*.

(*u*) Blackburn on sale, 242; 2nd ed. 352; *Fowler* v. *McTaggart* o
(1797) cited 7 T. R. 442, and 1 East, 522, and 3 East, 396; 7 R. R. 49
v. *Usherwood* (1801) 1 East, 515; *Bohtlingk* v. *Inglis* (1803) 3 East, 381;
490. See the cases collected in Maude and Pollock on Shipping, ed. 188
418, and a further discussion of the subject in *Saudeman* v. *Scurr* (1866)
Q. B. 86; 36 L. J. Q. B. 58, and *Omoa Coal Co.* v. *Huntley* (1877) 2
464. As to what amounts to a demise of a ship, see *Frazer* v. *Marsh*
East, 238 (chartered for several voyages); *Meiklereid* v. *West* (1870) 1
428; 45 L. J. M. C. 91; *Baumwoll Manufactur von Scheibler* v. *Furnes*
A. C. 8; 62 L. J. Q. B. 201 (demise); *Sir John Jackson* v. *Steamship*
(*Owners of*) [1908] A. C. 126 (same) *cf. Weir* v. *Union S.S. Co.* [190
525; 69 L. J. Q. B. 809 (no demise); *Saville* v. *Campion* (1819) 2 B.
(no express words of demise).

(*x*) 4 Eq. 481; 36 L. J. Ch. 879; (1868) 3 Ch. 588; 37 L. J. Ch.
see also *Fraser* v. *Witt* (1868) 7 Eq. 64; and *Ex parte Rosevear China*
(1879) 11 Ch. D. 560; 48 L. J. K. B. 100, C. A., *post*, 1029.

was elaborately discussed, and all the cases reviewed, by Lord Hatherley (then Vice-Chancellor). The buyer had sent a chartered vessel for the goods (the original contract, however, having provided that the seller was to send them on a vessel, delivered f.o.b.), and the seller took a bill of lading, deliverable to "order or assigns," and indorsed the bill of lading to the buyer in exchange for the buyer's acceptances for the price. It was held that the effect of taking the bill of lading in that form from the master of the chartered ship was to interpose him, as a carrier, between the seller and the buyer, and to preserve the right of stoppage to the former.

The following instructive passages are extracted from the opinion of the learned Vice-Chancellor: "Does then the shipping of goods in the name of the vendor, and indorsing over the bill of lading, show an animus on the part of the vendor to part with his lien and abandon his right of stoppage in transitu? . . . If a man sends his own ship, and orders the goods to be delivered on board his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery, and the transitus is at an end just as much, as was said in *Van Casteel* v. *Booker* (*y*), as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further transitus after the goods are in the purchaser's own cart (*z*). . . . The next thing to be looked to is, whether there is any *intermediate person* interposed between the vendor and the purchaser. Cases no doubt may arise where the transitus may be at an end, although some person may intervene between the period of actual delivery of the goods and the purchaser's acquisition of them. The purchaser, for instance, may require the goods to be placed on board a ship chartered by himself, and about to sail *on a roving voyage* (*a*). In that case, when the goods are on board the ship everything is done, for the goods have been put in the place indicated by the purchaser, and there is an end of the transitus. But here, where the goods are to be delivered in London, the plaintiff, for greater security, takes the bill of lading in his own name, and being content to part with the *property* in the goods, subject or not, as the case

(*y*) (1848) 2 Ex. 691; 18 L. J. Ex. 9; 76 R. R. 729.

(*z*) But see *per* Jessel, M.R., in *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.* (1877) 5 Ch. D. at 219; 46 L. J. Ch. 418, *ante*, 1016, n. (*n*).

(*a*) The Vice-Chancellor was probably referring to the case of *Fowler* v. *McTaggart* or *Kymer* (1797), cited in 3 East, 396; 7 R. R. 499, and elsewhere referred to by name in his judgment.

may be, to this right of stoppage in transitu, he hands the bill of lading in exchange for the bill of exchange. that ordinary case of chartering it appears to me that *captain or master is a person interposed* between vendor purchaser, in such a way that the transitus is not at an . . . until the voyage is terminated, and the freight according to the arrangement in the charter-party. . . *Schotsmans* v. *Lancashire and Yorkshire Railway Co.* (*b*) ship was the ship of the vendee, and the vendor did not the precaution of preserving his right of stoppage in tran by making the goods deliverable to his order or assigns, goods by the bill of lading being made deliverable to the chaser or assigns. The whole case here appears to me to upon whether or not it is the man's own ship that rece the goods, or whether he has contracted with some one *qui carrier* to deliver the goods."

Insurance money due to purchaser on goods cannot be stopped.

On the appeal in this case (*c*), it was affirmed on the po argued before the lower Court, but the decree was varied new point. The goods were injured in transit, and were made to contribute to a general average, and for these claims the purchaser was entitled to indemnity from un writers under policies effected by him. The seller claime right of stoppage as to the insurance money thus accruing the purchaser, which had been brought into Court, but L Cairns, L.C., held the pretension to be utterly untenable "The right to stop in transitu," said the Lord Chancell "is a right to stop the goods (*e*) in whatever state t arrive."

Where seller takes a receipt for goods in his own name lien not lost,

Before a bill of lading is taken the seller preserves his l if he have taken or demanded the receipts for the goods in own name, though this state of facts is sometimes treated giving ground for the exercise of the right of stoppage If, however, the vessel were the purchaser's own vessel, a he have paid for the goods and received the bill of ladi and the receipt contained nothing to show that a bill of ladi

unless the vessel belonged to purchaser, and no further control contemplated.

(*b*) (1867) 2 Ch. 332; 36 L. J. Ch. 361, *ante*, 1017.

(*c*) (1868) 3 Ch. 588; 37 L. J. Ch. 665.

(*d*) This distinction between the right to goods and to the proceeds o policy of insurance effected upon them was also recognised in *Latham* v. *Chartered Bank of India* (1873) 17 Eq. 205, 216; 43 L. J. B. K. 612. And the distinction between the right to goods and to the proceeds of their sale sub-sale, see *Phelps* v. *Comber* (1885) 29 Ch. D. 814; 54 L. J. Ch. 1017, *post*, 1048, and *Kemp* v. *Falk* (1882) 7 App. Cas. 573; 52 L. J. Ch. 167, *post* 10

(*e*) Or the proceeds when sold by the carrier for charges: *Northern Gra Co.* v. *Wiffler* [1918] 223 N. Y. 169.

(*f*) *Craven* v. *Ryder* (1816) 6 Taunt. 433; 16 R. R. 644, *ante*, 423. 9 988; *Ruck* v. *Hatfield* (1822) 5 B. & Ald. 632; 24 R. R. 507.

was to be delivered by which the seller's control over the goods was to be retained, the seller's retention of the receipt would be wrongful, the principle in *Schotsmans* v. *Lancashire and Yorkshire Railway Co.* (*g*), would be applied, and the delivery would be held complete so as to divest both lien and right of stoppage (*h*).

Transitus not ended till the buyer or his agent takes delivery.

As the transit continues from the time of the delivery of the goods to the carrier or other bailee "for the purpose of transmission to the buyer," *and* "until the buyer takes delivery" (*i*), goods may be still in transit, though lying in a warehouse to which they have been sent by the seller on the purchaser's orders. Goods sold in Manchester to a merchant in New York may be still in transit while lying in a warehouse in Liverpool. The sole question for determining whether the transitus is ended is: In what capacity are the goods held by him who has the custody? Is he the buyer's agent to *keep* the goods, or the buyer's agent to *forward* them to the destination intended at the time the goods were put in transit? If, in the case supposed, the goods in the Liverpool warehouse are there awaiting shipment to New York, in pursuance of the purchaser's original order to send him the goods to New York, they are still in transit, even though the parties in possession in Liverpool may be the general agents of the New York merchant for selling as well as forwarding goods. But if the buyer ordered his goods to Liverpool only, and they are kept there awaiting his further instructions, they are no longer in transit. They are in his own possession, being in possession of his agent, and may be disposed of at the will and pleasure of the buyer. And it is well observed by Lord Blackburn that (*k*) "it becomes then a question depending upon what was done, and what was the intention with which it was done"; and that (*l*) "the acts accompanying the transport of goods are less equivocal, less susceptible of two interpretations as to the character in which they are done, than are those accompanying a deposit of goods. The question, however, is still the same: Has the person who has the custody of the goods got possession as an agent to *forward* from the vendor to the buyer, or as an agent to hold for the buyer?"

Test: Does the carrier or agent hold the goods to forward them on original transit or not?

(*g*) (1867) 2 Ch. 332; 26 L. J. Ch. 361, *ante*, 1017.
(*h*) *Cowasjee* v. *Thompson* (1845) 5 Moo. P. C. C. 165; 70 R. R. 27, *ante*, 965. The facts assumed in the judgment do not in all respects agree with those stated in the report, and the point of view of the Board is not always easy to follow.
(*i*) S. 45 (1), *ante*, 1014.
(*k*) On Sale, 224; 2nd ed. 335. (*l*) On Sale, 244; 2nd ed. 353.

Lord Esher, M.R., in *Bethell* v. *Clark* (*m*), upon this says: "Where the transit is a transit which has been c either by the terms of the contract or by the directio the purchaser to the vendor, the right of stoppage in tra exists; but if the goods are not in the hands of the carri reason either of the terms of the contract or of the dire of the purchaser to the vendor, but are in transitu after in consequence of *fresh* directions given by the purchas a new transit, then such transit is no part of the or transit, and the right to stop is gone. So also if the purc gives orders that the goods shall be sent to a particular there to be kept till he gives fresh orders as to their de tion to a new carrier, the original transit is at an end they have reached that place, and any further transi fresh and independent transit."

Cases of transit ended.

A few of the cases offering the most striking illustrati the distinction will now be presented.

Leeds v. *Wright* (1803).

In *Leeds* v. *Wright* (*n*), the London agent of a Pari had in the packer's hands in London goods sent there seller from Manchester, under the agent's orders; appeared that the goods were, at the agent's discretion, sent where he pleased, and not for forwarding to Pari it was held that the transitus was ended.

Scott v. *Pettit* (1803).

In *Scott* v. *Pettit* (*o*), the goods were sent to the h the defendant, a packer, who received all of the buyer's the buyer having no warehouse of his own; and there *ulterior* destination. *Held*, that the packer's wareho the buyer's warehouse, the packer having no agency ex hold the goods subject to the buyer's orders.

Dixon v. *Baldwen* (1804).

In *Dixon* v. *Baldwen* (*p*), Battier & Son, of London, goods of the defendants at Manchester, to be forward Metcalfe & Co. at Hull to be shipped for Hamburg as the Battiers' course of dealing being to ship to Ha The goods were sent to Hull as directed. The became bankrupt, and the sellers stopped the goods a including four bales actually shipped for Hamburg

(*m*) (1888) 20 Q. B. D. 615, at 617; 57 L. J. Q. B. 302, C. A.

(*n*) 3 B. & P. 320; 7 R. R. 779.

(*o*) 3 B. & P. 469; 7 R. R. 804. See also *Rowe* v. *Pickford* (1817) 83; 19 R. R. 466; *Allan* v. *Gripper* (1832) 2 C. & J. 218; 1 L. J. Ex. 71 682; *Wentworth* v. *Outhwaite* (1842) 10 M. & W. 436; 12 L. J. Ex R. R. 664; *Dodson* v. *Wentworth* (1842) 4 M. & G. 1080; 12 L. J. 61 R. R. 761; *Jobson* v. *Eppenheim & Co.* (1905) 21 Times L. R. 468.

(*p*) 5 East, 175; 7 R. R. 681, *coram* Lord Ellenborough, C.J., Law and Le Blanc, J., Grose, J., *diss.*, app. by Brett, M.R., in *Ex parte M* 15 Q. B. D. 39, at 44; 54 L. J. Q. B. 566.

were re-landed on the sellers' application, they giving an indemnity to Metcalfes. One of the latter firm, as witness, said that at the time of the stoppage they held the goods for the Battiers, *and at their disposal;* that they accounted with the Battiers for the charges. The witness described his business to be merely an expeditor agreeable to the directions of the Battiers—a stage, and mere instrument between buyer and seller; saying that the bales were to remain at his warehouse for the orders of Battier & Son, and he had no other authority than to forward them; that at the time the goods were stopped he was waiting for the orders of the Battiers; that he had shipped the four bales, expecting to receive such orders, and re-landed them because none had arrived. *Held*, on these facts, that "the goods had so far gotten to the end of their journey, that they *waited for new orders* from the purchaser to put them again in motion, to communicate to them *another* substantive destination, and that without such orders they would continue stationary."

Valpy v. *Gibson* (1847).

In *Valpy* v. *Gibson* (*q*), the goods were ordered of the Manchester sellers, and sent to a forwarding house in Liverpool by order of the buyer, to be forwarded to Valparaiso; but the Liverpool house had no authority to forward *till receiving orders* from the buyer. The buyer ordered the goods to be re-landed after they had been put on board, and sent them back to the sellers, with orders to re-pack them into eight packages, instead of four; and the sellers accepted the instructions, writing: "We are now re-packing them in conformity with your wishes." *Held*, that the right of stoppage was lost, that the transitus was at an end when the goods reached the forwarding agents (*r*), and that the re-delivery to the sellers for a new purpose could give them no lien.

Kendal v. *Marshall* (1883).

In *Kendal* v. *Marshall* (*s*), the sellers, Ward & Co., of Bolton, sold bales of cotton waste to Leoffler, nothing being said at the time as to the place of delivery. Leoffler afterwards arranged with Marshall & Co., carriers and forwarding agents at Garston, that the goods should be sent to them from Bolton to be shipped to Rouen at a through rate from Bolton to Rouen. Afterwards, on Ward & Co.'s inquiry, Leoffler

(*q*) 4 C. B. 837; 6 L. J. C. P. 241; 72 R. R. 740.

(*r*) Technically this was only a dictum, as the Court also relied on the buyer's acts of ownership; but the case has always been treated as a decision on this particular point: *per* Brett, M.R., in *Ex parte Miles* (1885) 15 Q. B. D. at 46; 54 L. J. Q. B. 566, C. A.

(*s*) 11 Q. B. D. 356, C. A., *revg.* Mathew, J.; 52 L. J. Q. B. 313, where a fuller report of the judgments will be found. See also a note upon this case and *Ex parte Miles*, *post*, 1024, by Mr. Cohen, Q.C., Law Q. Rev. Vol. I. 397.

ordered the goods to be sent to Marshall & Co. at Ward & Co. thereupon delivered the goods at the station at Bolton to be forwarded to Marshall & Co., Leoffler the same day advised Marshall & Co. that th had been sent to them, and directed that they should warded to Rouen. Upon the arrival of the goods at the railway company gave to Marshall & Co. the usua that the goods had arrived, and that if delivery was n in due course, they would hold the goods as warcho and charge rent. Leoffler stopped payment while th were lying in the railway company's goods shed at and Ward & Co. gave them notice to stop delivery.

On these facts it was held by the Court of Appeal, re the decision of Mathew, J., that the only contract the sellers and the buyer was for delivery of the g Marshall & Co. at Garston; therefore that the transit an end from the moment when the goods were under trol of Marshall & Co., they being agents of and re their orders solely from the purchasers; that the trans Garston to Rouen was a *new* journey directed by th within the meaning of *Dixon* v. *Baldwen*; and (*per* Bret and Cotton, L.J.) that it was immaterial whether the order to Marshall & Co. to send the goods to Rouen wa or after the order to the sellers to despatch them, order of the buyer did not affect the question what transit as between the sellers and the buyer.

Ex parte Rosevear China Clay Co. (*t*), which was upon by the defendants, was carefully distinguish Cotton, L.J., who pointed out that there the good shipped by the sellers themselves, the master of the receiving them only as carrier to a further point, and t *shipping was an indication that they were to go on a* which was not only unfinished, but not even begu further that Brett, L.J., and he himself had in th expressly said that the decision might have been differe the contract been to deliver to the buyer at the shipment.

Ex parte Miles (1885).

In *Ex parte Miles* (*u*), the bankrupt, a commission a London, was employed by Morrice & Co., of Ki

(*t*) (1879) 11 Ch. D. 560; 48 L. J. Bk. 100, C. A., *post*, 1029.

(*u*) 15 Q. B. D. 39; 54 L. J. Q. B. 567. See also *Ex parte Franc* 56 L. T. 577; and *cf. Kemp* v. *Ismay, Imrie & Co.* (1909) 100 L. T. 9 the seller had authority to direct shipment. In *Bethell* v *Clar* 19 Q. B. D. at 562; 52 L. J. Q. B. 302, Cave, J., says that he is u reconcile *Ex parte Rosevear China Clay Co.*, *post*, 1029, with some of in *Ex parte Miles*. See remarks on these two cases, *post*, 1030.

Jamaica, to buy boots and shoes for them from Turner & Co., Northampton. In July, 1883, the bankrupt gave two orders to Turner & Co. for boots "for this mark E.M., Kingston, Jamaica." From previous dealings with the bankrupt, Turner & Co. knew the mark was that of Morrice & Co. Upon the 11th of September the bankrupt instructed Turner & Co. by letter to forward the boots in numbered packages bearing this mark to Dunlop & Co., Southampton, for shipment per *Moselle*, and to advise Dunlop & Co. with particulars for clearance. Turner & Co. accordingly forwarded the goods, instructing Dunlop & Co. to "forward them as directed," and gave them particulars describing the goods as bearing the mark above mentioned, *with destination and consignee in blank*, and paid the carriage to Southampton. They also sent the invoices to the bankrupt, who instructed Dunlop & Co. that the consignees were Morrice & Co., and the destination Jamaica. The bankrupt was described in the bill of lading as consignor, and Morrice & Co. consignees. Turner & Co. heard that the bankrupt had suspended payment while the goods were at sea, and had the goods stopped at Kingston.

It was held by the Court of Appeal that, the bankrupt being a commission agent, Turner & Co. stood in the relation of sellers to him; that it was not the business interpretation of the mark which was to be placed on the goods that Turner & Co. were to *forward* them to Jamaica; that the order given by the bankrupt was an order to forward the goods not to Jamaica, but to Dunlop & Co., Southampton; and that Turner & Co. had taken this view of the transaction because they had left blank the columns for destination and consignee in the particulars, and had instructed Dunlop & Co. to forward them *as directed;* consequently that the only transitus as between Turner & Co. and the bankrupt was that from Northampton to Dunlop & Co. at Southampton; therefore that the journey between Southampton and Jamaica was a fresh transit within the meaning of *Dixon* v. *Baldwen*, and the right to stop in transitu had gone.

Brett, M.R.'s, interpretation of "destination" in a business sense.

Brett, M.R., (*x*), pointed out that, although it was clear that the goods were ultimately to go to Jamaica, that was not their "destination" as between seller and buyer. In order to constitute a "destination" in the business sense of that term, the seller must know not only the particular place to which, but also the name of the particular person to

(*x*) 15 Q. B. D. at 43; 54 L. J. Q. B. 567.

whom, they are to be sent, and in this case the name
Morrice & Co. as the consignees had not been mentioned
the sellers. But this observation cannot be regarded as
of universal application (*y*).

Cases of transit not ended. Delivery to buyer's forwarding agent.

Reference will now be made to some of the cases in wh
the transitus was considered *not* at an end, where the go
had reached the custody of the buyer's agent to forward.

Smith v. *Goss* (1808).

In *Smith* v. *Goss* (*z*), the buyer at Newcastle wrote to
seller at Birmingham to send him the goods by way
London or Gainsborough. "If they are sent to Lond
address them to the care of J. W. Goss, *with directions*
send them by the first vessel for Newcastle." The goods w
stopped while in Goss's possession. Lord Ellenborough
that "the goods were merely at a stage upon their trans
and the seller's right of stoppage remained.

Coates v. *Railton* (1827).

In *Coates* v. *Railton* (*a*), the course of business was,
Railton at Manchester should purchase goods on accoun
Butler, of London, and forward them to a branch of But
house in Lisbon, by whom the goods were ordered through
London house; neither of the Butler firms had any wareh
at Manchester; and the seller was *told that the goods we*
be sent to Lisbon as on former occasions. The goods
delivered at the warehouse of Railton, who had
calendared and made up, and was then to forward the
Liverpool for shipment to Lisbon. *Held*, that the transi
not ended by the delivery to Railton. Bayley, J., said
is a general rule that where goods are sold to be sent to
ticular *destination named by the vendee* the right o
vendor to stop them continues until they arrive at that
of destination." After reviewing previous cases (*b*)
learned Judge said: "The principle to be deduced from
cases is, that the transitus is not at an end until the
have reached the *place named by the buyer to the seller*
place of their destination. Here the place named

(*y*) See, *e.g.* *Ex parte Rosevear China Clay Co.* (1879) 11 Ch. D.
L. J. K. B. 100, C. A., *post*, 1029, where the "destination" of the g
Glasgow, although neither the place itself nor the name of the consi
known to the seller. See a note by Mr. Arthur Cohen, Q.C., in 1 La
1022; *Dixon* v. *Baldwen* (1804) 5 East, 175; 7 R. R. 681, *ibid.*

(*z*) 1 Camp. 282; 10 R. R. 684.

(*a*) 6 B. & C. 422; 5 L. J. (O. S.) K. B. 209; 30 R. R. 385, c
upon by Brett, L.J., in *Kendal* v. *Marshall* (1883) 11 Q. B. D. a
L. J. Q. B. 313, where he says that "it is somewhat difficult of expla
but neither Cotton, L.J., nor Bowen, L.J., express any disapproval,
quote the principle laid down by Bayley, J.

(*b*) *Rowe* v. *Pickford* (1817) 8 Taunt. 83; 19 R. R. 466 (carrier's
treated as the buyer's); *Leeds* v. *Wright* (1803) 3 B. & P. 320; 7 R. R.
1022; *Dixon* v. *Baldwen* (1804) 5 East, 175; 7 R. R. 681, *ibid.*

buyer to the seller was Lisbon, and not the defendant's warehouse." In this case it will be remarked that Railton's agency from the beginning was to buy and forward to Lisbon to the buyer; and the goods were not to be held by him to await orders, or any other disposal of them.

Jackson v. *Nichol* (*c*) illustrates the same principle. There the plaintiff at Newcastle had sold to Maltby & Co., of London, through one Crawhall, a number of pieces of old lead, no place of delivery being specified. Some months afterwards Crawhall asked for delivery, and the goods were placed by the sellers at the disposal of Crawhall by a delivery order. Crawhall was a general agent of the buyers, who had been in the habit of receiving goods for them and awaiting their orders, but in this particular instance had received instructions to forward the goods to the buyers in London: and on receiving the delivery order he at once indorsed it to a warfinger, "to go on board the *Esk*," and the wharfinger gave the order to a keelman, who went for the goods and put them on board the *Esk*. The *Esk* arrived in the port of London with the goods, and while moored in the Thames the goods were put on board a lighter sent for them by the defendants, the wharfingers of the *Esk*, and the stoppage was made while the goods were on the lighter. *Jackson* v. *Nichol* 1839).

Tindal, C.J., in delivering the judgment of the Court, said: "If the lead had been delivered into the possession of Crawhall as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, such possession of Crawhall would have been the constructive possession of the buyers themselves, and the right to stop in transitu would have been at an end." But upon the facts stated the Court held that the lead never came into the actual possession of Crawhall, the agent; that each of the series of acts done at Newcastle was but "a link in the chain of the machinery by which the lead was put in motion (*d*), and in a course of transmission from the seller's premises in Newcastle to the buyers in London," and "the goods in the lighter were still in a course of *transitus* (*e*) in order to be delivered, and were not actually delivered to the buyer, notwithstanding the defendants undertook the delivery by the order of Maltby & Co."

There may be an actual bargain between the buyer and the Particular transit by express agreement.

(*c*) 5 Bing. N. C. 508; 8 L. J. C. P. 294; 50 R. R. 777. For another point in this case, see *post*.

(*d*) See also *Bethell* v. *Clark* (1887) 19 Q. B. D. 553; 20 Q. B. D. 615; 57 L. J. Q. B. 202, C. A., *post*, 1030.

(*e*) See on this Point, s. 45 (6) of the Code *post*, 1039.

seller as to the destination of the goods, and the transit then continue until the goods have reached that destinat

Ex parte Watson (1877).

Thus in *Ex parte Watson* (*f*), one Love, a China mer in London, and Watson, a Yorkshire manufacturer, agreed that Watson should from time to time supply with goods, Watson drawing upon Love, and Love acce bills of exchange for the invoice price. Love was to shi goods to his correspondents, Rothwell, Love & Co Shanghai, for sale on his account, sending the bills of l to them, to whose order they were to be made out. W was to have a lien upon the bills of lading and each shi of goods in transit outwards or its proceeds, which lien v extend only to the particular shipment, and was to cease the bills of exchange given for that shipment had been In pursuance of the agreement, Love ordered a parcel of from Watson. The goods were packed by Watson's p who forwarded them by rail to London in bales m "*Shanghai*," and addressed to the *Gordon Castle*, a designated by Love, and loading for Shanghai. The ca to London was paid by Watson. The packer, in ad Love of the despatch of the goods, stated that they wer his disposal." Love accepted a six months' bill of exc drawn upon him by Watson for the price. The railway pany, at Poplar Dock station, sent an advice-note to informing him that the goods were there at his orde held by the company as warehousemen as his risk, a however:—"Will be sent to the *Gordon Castle*." The were afterwards shipped on board that vessel. The l lading were, by Love's directions, made out to the or himself or assigns, but were retained by the shipown the freight was not paid by Love. Love became ba while the goods were at sea, and Watson telegrap Rothwell, Love & Co. at Shanghai requesting them to the goods to his agents there, he also demanded the lading from the shipowners in London. It was held Court of Appeal on this state of facts: 1. That the continued, and was intended to continue, from the station in Yorkshire up to Shanghai, inasmuch as could have obtained an injunction to restrain Love fro

(*f*) 5 Ch. D. 35; 46 L. J. Bk. 97, C. A., follg. *Rodger* v. *The d'Escompte de Paris* (1867) L. R. 2 P. C. 393; 38 L. J. P. C. 30. *Watson* is explained in *Ex parte Miles* (1885) 15 Q. B. D. 39, at 4 L. J. Q. B. 566. Brett, M. R., treats it as depending on the fact that instructed the seller to se to Shanghai, and no new directions by were required after despatch. Lindley, L.J., explains it as in th depending on the express agreement with regard to the transit.

ing the goods to any other destination; 2. That the terms of the railway company's advice-note, having regard to the fact that they knew that the goods were to be forwarded by them to Shanghai, did not show that the company were agents to hold the goods for the buyer; and 3. That the demand by Watson of the bills of lading from the shipowners was a valid exercise of the right of stoppage.

Demand by seller of bill of lading a good stoppage

In *Ex parte Rosecear China Clay Co.* (*g*), the sellers had contracted to deliver a cargo of china clay f.o.b. a vessel in the harbour of Fowey. The destination of the cargo was not disclosed at the date of the contract. The cargo was delivered by the sellers at Fowey on board a vessel chartered by the purchaser for the purpose of being carried to Glasgow. Before the vessel left the harbour the sellers gave the ship's master notice to stop the cargo, the buyer having absconded. *Held*, by the Court of Appeal, that the transit was not at an end.

Delivery to shipowner at a specified place.

Seller's ignorance of vessel's destination.

Ex parte Rosecear China Clay Co. (1879).

The Court adopted the test stated by Lord Cairns in *Berndtson* v. *Strang* (*h*), and laid down by Rolfe, B., in *Gibson* v. *Carruthers* (*i*), viz. whether the goods put on board were "in the custody of some third person intermediate between the seller, who has parted with, and the buyer, who has not yet acquired, actual possession." James, L.J., said (*k*): "The authorities show that the vendor has a right to stop in transitu until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent . . . not a mere intermediary." Brett, L.J., quoted the judgment of Parke, B., in *James* v. *Griffin* (*l*), and said: "The vendors were bound to put the clay on board that ship to be carried to Glasgow; it was not the purchaser's own ship, but that of the shipowner. . . The clay was placed on board the ship for the purpose of being carried to Glasgow; it was in the actual possession of the shipowner, and only in the constructive possession of the purchaser."

It was contended that, as the vessel itself was the only destination for the cargo communicated to the sellers, the transit ceased upon shipment. The Court, however, refused to draw this distinction. The contract was, not to deliver *to*

Immaterial that the destination of the goods is not disclosed at time of contract.

(*g*) 11 Ch. D. 560, C. A.; 48 L. J. Bk. 100; *cf. Kendal* v. *Marshall* (1883) 11 Q. B. D.; 52 L. J. Q. B. 313, *ante*, 1023, follg. in *Brindley* v. *Cilgwyn Slate Co.* (1885) 55 L. J. Q. B. 67.

(*h*) (1868) L. R. 3 Ch. 588, at 590; 37 L. J. Ch. 665.

(*i*) (1841) 8 M. & W. 321, at 328; 11 L. J. Ex. 138; 58 R. R. 713.

(*k*) 11 Ch. D. at 568; 48 L. J. K. B. 100.

(*l*) *Ante*, 1015.

the buyer at Fowey (*m*) (in which case there would have
no transit beyond that port), but was a contract by the s
to deliver f.o.b. at Fowey, that is, a contract by the s
to deliver *on board a ship for a voyage to a further de
tion*, and the mere circumstance of the destination not h
been disclosed at the time when the contract was made
immaterial.

The facts of this case run very close to those of *Ex
Miles* (*n*). But in *Ex parte Rosevear* by the very ter
the contract the goods were deliverable to a carrier as
in *Ex parte Miles* they were deliverable to the shipping a
of the buyer, who was to wait for fresh directions fro
principal, and that principal might even have ordered
to be sent elsewhere than to Jamaica. The case ther
fell within the authority of *Dixon* v. *Baldwen* (*o*).

Bethell v. *Clark* (1887).

In *Bethell* v. *Clark* (*p*), the bankrupts, Tickle & C
London, ordered goods from Clark & Co., of Wolverham
saying nothing as to the destination of the goods, but
afterwards sent to Clark & Co. a consignment note: "P
consign the ten hogsheads hollow ware to the *Darling D*
to Melbourne, loading in the East India Docks h
Clark & Co. delivered the goods to the railway compan
Wolverhampton to be put on board. The railway com
notified to Tickle & Co. that the goods had been forward
Poplar Station for shipment per *Darling Downs*, and
goods were afterwards shipped by a lighter company empl
by the railway company. The mate's receipt was sent by
railway company to Tickle & Co. Clark & Co. were info
that Tickle & Co. had stopped payment, and they at once
notice to the railway company at Wolverhampton to
shipment. The railway company notified the lighter
pany, but too late to prevent the delivery of the good
board. No bills of lading were applied for in exchange
the mate's receipt.

On these facts the Court of Appeal, affirming the dec
of the Divisional Court, held that the true construction o
consignment note sent by the purchasers was that the g
were to be delivered on board the *Darling Downs* to be ca

(*m*) See *Ex parte Hughes, Re Gurney* (1892) 67 L. T. 508 (delivery to
Co. as buyer's warehousemen).

(*n*) (1885) 15 Q. B. D. 39; 54 L. J. Q. B. 567, *ante*, 1024. See also *J*
v. *Eppenheim* (1905) 21 Times L. R. 468, a case similar to *Ex parte Mile*

(*o*) (1804) 5 East, 175; 7 R. R. 681, *ante*, 1022.

(*p*) 19 Q. B. D. 553; 20 Q. B. D. 615; 57 L. J. Q. B. 302, C. A. Se
Kemp v. *Ismay, Imrie & Co.* (1909) 100 L. T. 996.

to Melbourne, and not that they were delivered on board ship as a warehouse subject to the orders of the buyer, as the captain had no authority to receive goods except for carriage; consequently that the original transit prescribed by the purchasers was from Wolverhampton to Melbourne; and that the railway company, the lightermen, and the shipowners were all agents to receive the goods for transmission to Melbourne.

Bill of lading taken in buyer's name immaterial where goods in possession of a carrier. *Lyons* v. *Hoffnung* (1890).

In *Lyons* v. *Hoffnung* (*q*), one Clare had bought goods from Hoffnung & Co., and had instructed them to mark the goods "W. C., K.," that is, William Clare, Kimberley, and to send them to Howard Smith & Co.'s wharf at Sydney for shipment to Kimberley, where he was going with the goods. The sellers sent them to the wharf to be shipped by the *Gambier*, and received a receipt describing Hoffnung & Co. as the shippers, and Clare as the consignee, and the destination Kimberley, and these receipts were handed by Hoffnung & Co. to Clare, who obtained a bill of lading in his own name. *Held*, that on Clare's insolvency the sellers could stop the goods on the voyage. Lord Herschell, delivering the judgment of the Board, said (*r*): "The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale. . . . The goods . . . were still in the hands of the carrier as such and for the purposes of the transit. . . . If the goods were received by Howard Smith & Co. to be carried to Kimberley, . . . it is immaterial whether a fresh bill of lading was obtained by Clare, or whether that bill of lading contained the name of Clare or of the defendants as shippers."

Goods sent by separate routes. Effect of stoppage on one route.

The reader's attention may here be directed to another rule, viz. that, where the goods are consigned, partly by one route, and partly by another, and those sent by one route are effectively stopped in transit, the stoppage does not revest in the seller the right to the possession of the goods sent by the other route, the transit whereof has ended (*s*). But, the seller's *lien* being entire (*t*), he may exercise it over the goods stopped for the price of all the goods (*s*).

(*q*) 15 A. C. 391; 59 L. J. P. C. 79, P. C. See also *Bradley* v. *Edgwyn Slate Co.* (1885) 55 L. J. Q. B. 67, where the bill of lading was taken by the sellers to the buyer's order, the ship being chartered by the sellers.

(*r*) At 396—398.

(*s*) *Wentworth* v. *Outhwaite* (1842) 10 M. & W. 436; 12 L. J. Ex. 172; 60 R. R. 664.

(*t*) See on this *ante*, 956.

Where goods have reached destination, but are still in carrier's possession.

Next come the cases where the goods have reached their destination, and the controversy is whether they still remain in the hands of the carrier *quâ carrier*, or, if landed, whether the wharfinger or warehouseman is the agent of the buyer to receive them and hold them for the buyer's account. Lord Blackburn has this passage (*u*): "The question was one of fact, viz., in what capacity did the different agents hold possession? This question becomes still more difficult to answer where the party holding the goods acts in two capacities, as, for instance, a carrier who also acts as a warehouseman, . . . or a wharfinger who sometimes receives the goods as agent of the shipowner, and sometimes as agent of the consignee. . . . If the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the transitus is at an end; but I apprehend that both these intents must concur, and that neither can the carrier of his own will, convert himself into a warehouseman, so as to terminate the transitus, without the agreeing mind of the buyer (*x*), nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever to retain possession against the buyer" (*y*).

Both buyer and carrier must agree before the carrier can be converted into bailee to keep the goods for the buyer.

This view of the law has received full confirmation in subsequent cases (*z*), and is adopted by the Code, which enacts:

Code, s. 45 (3) and (4).

"45.—(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier (*a*) acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

"(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is deemed to be at an end, even if the seller has refused to receive them back."

The word "destination" in sub-section (3) has a *legal* signification. The "appointed destination" is the place which *under the contract* the goods are to be consigned (*b*).

(*u*) Contract of Sale, 248; 2nd ed. 363—364.

(*x*) *James* v. *Griffin* (1837) 2 M. & W. 623; 6 L. J. Ex. 241; 46 R. R. *infra*.

(*y*) *Jackson* v. *Nichol* (1839) 5 Bing. N. C. 508; 8 L. J. C. P. 294; 50 R. 777, *post*, 1035.

(*z*) See the statement of the law by the C. A. in *Ex parte Cooper* (11 Ch. D. 68; 48 L. J. B. K. 49.

(*a*) A Scotch term for ba

(*b*) *Per Cur.* in *Mechan* v. *N. E. Ry. Co.* (1911) S. C. 1348; 48 Sc. L 987, *post*. 1038.

the "further destination" is the place to which the buyer intends for his own purposes that the goods shall go, and with which the seller has no concern. It will be shown later that the "appointed destination" does not necessarily mean the end of the transit, for the buyer or his agent must also take delivery there.

Buyer's assent.

James v. *Griffin* (1837).

In *James* v. *Griffin* (*c*), the buyer, knowing himself to be insolvent, determined not to receive a cargo of lead that he had not paid for, but on its arrival at the wharf, where he had been in the habit of leaving his lead with the wharfingers as his agents, it became necessary to unload it, in order to set the vessel free. He therefore told the captain to put it on the wharf, but did not tell the wharfingers of his intention not to receive the lead; and they probably deemed themselves his agents to hold possession. After this the goods were stopped. Parke, B., Bolland, B., and Alderson, B., held the transit not ended, and that, the buyer's intention not to receive being proven, the wharfingers could not receive as his agents without his assent. Abinger, C.B., dissented, on the ground that, the intention of the buyer not having been communicated to the wharfingers, the agency of the latter could not be affected by it, and that the transit was therefore ended. But all agreed that the sole questio. was whether the wharfingers were in possession *quâ* agents of the buyer.

Bolton v. *Lancashire and Yorkshire Railway Co.* (1866).

The question was considered by the Common Pleas in the singular case of *Bolton* v. *The Lancashire and Yorkshire Railway Co.* (*d*), which specially illustrates section 45 (4). There Wolstencroft, of Manchester, sold to Parsons, of Brierfield, eleven skips of twist lying warehoused at the defendants' station at Salford, and sent the buyer an invoice, and delivered three skips. Parsons then wrote refusing to take any more on account of the alleged bad quality. Wolstencroft had, on the same day, ordered the defendants to deliver another four skips to Parsons, and some days afterwards he wrote to the latter that he had done so, "according to your wish, the other four are lying at Salford Station waiting your instructions." Parsons wrote back returning the invoice, and refusing the goods, saying: "We shall not have any more of it." Wolstencroft then demanded payment of all the goods undelivered, and sent an order to the railway company, the

(*c*) 2 M. & W. 623; 6 L. J. Ex. 241; 46 R. R. 243.

(*d*) L. R. 1 C. P. 431; 35 L. J. C. P. 137. This case seems to illustrate rather the seller's lien than his right of stoppage in transitu; see the view of Willes, J., in the text. But it is in point on the particular question under consideration.

defendants, to deliver the rest of the goods to Parsons. So of the goods were taken by the carter of Parsons from station at Brierfield without the knowledge of Parsons, a he at once returned them, and ordered all the goods to be s back to Wolstencroft. The latter refused to receive the and ordered them back to Parsons. The defendants th wrote to Parsons asking what they were to do with the goo and Parsons replied: "We shall have nothing to do w them; they belong to Wolstencroft." Parsons afterwa became bankrupt, and the seller sent a stoppage order to defendants, who delivered the goods to the seller. The act was trover by the buyer's assignees against the carrie *Held*, that the transitus was not at an end.

Erle, C.J., said: "As to the remaining eight skips, I am opinion that they did not cease to be in transitu by being the Brierfield station. . . . The goods being *rejected* both the vendor and by Parsons, remained in the hands of defendants. . . . It is clear, from the case of *James Griffin* (*e*), that the intention of the vendee to take possess is a material fact. So in *Whitehead* v. *Anderson* (*f*), Par B., says: 'The question is *quo animo* the act is done. notion has always been that the question is whether the c signee has taken possession, not whether the captain intended to deliver it.' . . . It was urged by Mr. Holker th being repudiated by both parties to the contract, the goo remained in the hands of the railway company as warehou men for *the real owner*, that is, for Parsons. There is doubt but that the carrier may, and often does, become warehouseman for the consignee; but that must be by vir of some *contract or course of dealing* between them that, wh arrived at their destination, the character of carrier sh cease, and that of warehouseman supervene."

Willes, J., thought that the seller's *lien* had never be divested, laying stress on the circumstance that the goo were, at the time of the sale, in possession of the railway co pany as warehousemen and bailees of the seller. He thou that this agency had never ended, because the order delivery to the buyer must be considered as subject to condition "if he will receive them." And on the main qu tion of stoppage in transitu the learned Judge said: "T right to stop in transitu upon the bankruptcy of the bu remains, even when the credit has not expired, until the goo

(*e*) (1837) 2 M. & W. 623; 6 L. J. Ex. 241; 46 R. R. 243. *ante*, 1033.
(*f*) (1842) 9 M. & W. at 529; 11 L. J. Ex. 137; 60 R. R. 819. *infra*.

have reached the hands of the vendee, or of one who is his agent as a warehouseman, or a packer, or a shipping agent, to give them a new destination. . . . The arrival which is to divest the vendor's right of stoppage in transitu must be such as that the buyer has taken *actual or constructive possession* of the goods, and that cannot be so long as he repudiates them."

This case is a complete confirmation of the principle that the carrier cannot change his character, so as to become the buyer's agent to keep the goods for him, without the buyer's assent (*g*).

Carrier's assent.

Whitehead v. *Anderson* (1842).

The case of *Whitehead* v. *Anderson* (*h*), a leading one on this subject, is as direct an authority for the converse principle that the buyer cannot force the carrier to become his bailee to keep the goods without the carrier's assent. In that case, the buyer having become bankrupt, his assignee on the arrival of the vessel with a cargo of timber went on board and told the captain that he had come to take possession, and went into the cabin into which the ends of the timber projected, and saw and touched the timber. The captain made no answer at first to the assignee's statement, but afterwards told him at the same interview that he would deliver him the cargo when he was satisfied about his freight. They then went ashore together. The seller then went on board and gave notice of stoppage to the mate in charge. *Held*, that no *actual* possession had been taken by the assignee, and that, as the captain had not contracted to hold as his agent, there was no constructive possession.

Jackson v. *Nichol* (1839).

So, in *Jackson* v. *Nichol* (*i*), repeated demands were made by the buyers' clerk for the goods after the arrival of the *Esk* in the Thames before there was a stoppage, but the master of the vessel refused delivery, and the Court of Common Pleas held that the goods had not come into possession of the buyer. Nothing was here wanting to possession but the carrier's assent to put an end to the transit (*k*), and the principle seems

(*g*) See also *Taylor* v. *G. E. Ry. Co.* [1901] 17 Times L. R. 394, where the buyer's assent was presumed from his silence and delay; and *Ex parte Barrow* (1877) 6 Ch. D. 783; 46 L. J. Bk. 71, where the buyer had absconded before the carrier's agent received the goods on arrival, and so could not assent to the carrier's holding the goods on his behalf.

(*h*) 9 M. & W. 518; 11 L. J. Ex. 157; 60 R. R. 819; Tud. L. C. on Merc. Law, 3rd ed. 411.

(*i*) 5 Bing. N. C. 508; 8 L. J. C. P. 294; 50 R. R. 777, *ante*, 1027.

(*k*) See *Foster* v. *Frampton* (1826) 6 B. & C. 107; 5 L. J. K. B. 71; 30 R. R. 255, where the assent of both parties was given.

to be exactly that of *Bentall* v. *Burn* (*l*) and the class of ca like it (*m*).

Coventry v. *Gladstone* (1868).

In *Coventry* v. *Gladstone* (*n*), the consignee on the arri of the vessel obtained an overside order for the goo Under this he was entitled to an immediate delivery if t were possible; if not, the goods would be left on board convenience, the voyage being treated as at an end. He g the order to a lighterman, who took a barge for the goods, a was told that they could not be got at, but that they would delivered to him when they could be got at. Lord Hather (then Vice-Chancellor) held that, though the voyage might considered to be at an end, no actual or constructive possess had been taken by the consignee, what happened not amou ing to an attornment by the carrier to the consignee; co sequently that the character of the former as carrier was changed into that of agent to keep the goods for the consign and that the goods were still liable to stoppage.

Carrier *may* become agent to keep goods for buyer while retaining his own lien.

The carrier's change of character is not at all inconsiste with his right to retain the goods in his custody till his li upon them for carriage or other charge is satisfied (*o*). Nothi prevents an agreement by the master of a vessel or oth carrier to hold the goods after arrival at destination as age of the buyer, though he may at the same time say: "I sha not let you take them till my freight is paid." The questi is one of intention, and in *Whitehead* v. *Anderson* (*p*) t captain was held not to have intended such an agreement telling the assignee that he *would* deliver him the cargo wh he was satisfied about the freight, Parke, B., saying: "The is no proof of any such contract. A promise by the capta to the agent of the assignees is stated, but it is no more tha a promise without a new consideration to fulfil the *origin* contract. . . . *After* the agreement he remained a mere age for expediting the cargo to its original destination."

But retention of lien raises presumption against such agency.

But the existence of the carrier's lien for unpaid freigh raises a strong presumption that the carrier continues to ho

(*l*) (1824) 3 B. & C. 423; 3 L. J. K. B. 42; 27 R. R. 391, *ante*, 243.

(*m*) See *ante*, 243—244.

(*n*) L. R. 6 Eq. 44; 37 L. J. Ch. 492. For cases where the transit w held to have ceased upon notice of the arrival of the goods being given by t carrier to the purchaser, see *Ex parte Catling, Re Chadwick* (1873) 29 L. 431; and *Ex parte Gouda, Re Millo* (1872) 20 W. R. 981. In both these cas there was evidence that the purchaser assented to the carrier no longer holdi as carrier, but as warehouseman for him.

(*o*) *Allan* v. *Gripper* (1832) 2 Cr. & J. 218; 1 L. J. Ex. 71; 37 R. R. 68 *per* Lord Blackburn in *Kemp* v. *Falk* (1882) 7 A. C. 573, at 584; 52 L. J. C 167.

(*p*) (1842) 9 M. & W. 518; at 535; 11 L. J. Ex. 157; 60 R. R. 819.

the goods as carrier, and not as a warehouseman; and, in order to rebut this presumption, there must be proof of some agreement between the buyer and the carrier that the latter should, while retaining his lien, become the agent of the buyer to keep the goods for him (*q*).

Buyer may anticipate the end of the transit.

In relation to the anticipation by the buyer of the termination of the transit, it is thus enacted in the Code:

Code, s. 45 (2).

"45.—(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination (*r*), the transit is at an end."

The question whether the buyer may anticipate the end of the transit, and thus put an end to the seller's right of stoppage in transitu, was treated by most of the books (*s*) as settled in the affirmative. And in *Whitehead* v. *Anderson* (*t*), in which the judgment was prepared after advisement, Parke, B., expressed no doubt upon the subject. He said: "The law is clearly settled that the unpaid vendor has a right to retake (*u*) the goods *before* they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own before their arrival, *with or without the consent* of the carrier, there seems to be no doubt that the transit would be at an end, though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action." There was, however, no direct decision on the point, and it rested on dicta till the case of *The London and North-Western Railway Company* v. *Bartlett* (*x*), in which the Exchequer of Pleas held

(*q*) *Crawshay* v. *Eades* (1823) 1 B. & C. 181, *post*, 1040; 1 L. J. (O. S.) K. B. 90; 25 R. R. 348; *Edwards* v. *Brewer* (1837) 2 M. & W. 375; 6 L. J. Ex. 135; 46 R. R. 626, *ibid*; *Ex parte Barrow* (1877) 6 Ch. D. 783; 46 L. J. Bk. 71; *Ex parte Cooper* (1879) 11 Ch. D. 68; 48 L. J. Bk. 49, C. A.; *per* Lord Blackburn in *Kemp* v. *Falk* (1882) 7 App. Cas. at 584; 52 L. J. Ch. 167. The statement of Bayley, J., in *Crawshay* v. *Eades* that nothing but the divesting of the carrier's lien can deprive the seller of his right of stoppage must be taken to refer to the particular facts of the case, in which there was no evidence of an assent by the carrier to waive his lien, and no actual delivery.

(*r*) For the meaning of "appointed destination" see *ante*, 1032.

(*s*) 1 Sm. L. C. 9th ed. 806; Tudor's L. C. Merc. Law, 3rd ed. 445; Houston on Stoppage in Transitu, 130, *et seqq.*; 1 Griffith & Holmes on Bankruptcy, 352. Lord Kenyon and the King's Bench had decided the contrary in one case, *Holst* v. *Pownall* (1794) 1 Esp. 240.

(*t*) (1842) 9 M. & W. 518, at 534; 11 L. J. Ex. 157; 60 R. R. 819.

(*u*) Scrutton, J., in *Booth S.S. Co.* v. *Cargo Fleet Co.* [1916] 2 K. B. 570, at 601, C. A.; 85 L. J. K. B. 1577, explains that this word must not be taken literally, but only in the sense of "preventing delivery to the buyer."

(*x*) (1861) 7 H. & N. 400; 31 L. J. Ex. 92. See also *Wright* v. *Lawes* (1802) 4 Esp. 82; *Cork Distilleries Co.* v. *Great S. and W. Ry. Co.* (1874)

that the carrier and consignee might agree together fo
delivery of goods at any place they pleased (*y*).

The agent mentioned in section 45 (2) is the buyer's
to take delivery so as to determine the transit, not an
for transmission to the appointed destination.

Mechan v. *N. E. R. Co.* (1911).

In *Mechan* v. *North Eastern Railway Company* (*z*)
Pursuer had agreed to build two life-boats deliverable i
customer's yard. The Pursuer consigned the boats by
defendants' railway, and on arrival at the arrival statio
of the boats was handed over to a firm of independent ca
who were employed generally by the customer to cart
from the station, and this boat was delivered at the
Before the second boat was handed to the carters the defe
received no ce of stoppage from the pursuer, but
delivered the oat to the buyer. *Held* by the Court of Se
that the "appointed destination" was not the arrival sta
but the customer's yard, that place having been agreed
by the parties as the place of delivery; that the carters
not the buyer's agents to anticipate delivery by receivin
boats at the station, but carriers to a further point, and
stoppage was good, and the defenders liable for mis-deli

Anticipation of delivery by carrier's attornment.

As, under section 45 (3), after, so, under section 45
before arrival, at the appointed destination, the buyer
"obtain delivery" of the goods by the carrier's attornme
him during the transit. And a test of such an attornm
when the goods are intercepted by the buyer, is whether
will again be set in motion without fresh orders of the b
If they will not, the transit is ended (*zz*).

But not against the will of the carrier.

In Blackburn on Sale (*a*), the learned author does not
assent to that passage in the opinion of Parke, B., a
quoted, in which it is intimated that the buyer can imp
his position by a tortious taking of actual possession ag
the will of the carrier in cases where the carrier has a rig
refuse to allow the buyer to take possession (*b*). The d
thus suggested seems to be justified by the decision in *Bi*
Brown (*c*), which is just the converse of the case supposed

L. R. 7 H. L. 269; and *per* Bowen, L.J., in *Kendal* v. *Marshall* (188
Q. B. D. at 369; 52 L. J. Q. B. 313.

(*y*) And see now *Reddall* v. *Union Castle Mail Co.* [1914] 84 L. J.
360; 112 L. T. 910, *infra*.

(*z*) [1911] Sess. Cas. 1348; 48 Sc. L. R. 987.

(*zz*) *Reddall* v. *Union Castle Co.* [1915] 84 L. J. K. B. 360; 112 L. T.

(*a*) At 259; 2nd ed. 375.

(*b*) See Broom's Legal Maxims, 6th ed. 273, *et seqq.*; Phillimore on J
prudence, 224.

(*c*) (1850) 4 Ex. 786; 19 L. J. Ex. 154; 80 R. R. 775, *ante*, 1008.

tortious taking of possession by the purchaser from the carrier. In that case, the carrier tortiously refused possession to the purchaser when the goods had arrived at their destination; and the Exchequer Court held, after advisement, that the purchaser's rights could not be impaired by the carrier's wrongful refusal to deliver, that the transit was at an end, and the right of stoppage gone.

Carrier's wrongful refusal to deliver at termination of the transit.

The law declared in that case has been adopted by the Code, which enacts:

"45.—(6.) Where the carrier or other bailee or custodier (*d*) wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end."

Code, s. 45 (6).

This clause assumes that the buyer is entitled to obtain delivery, and the proper inference is that, if the carrier rightfully refuse delivery, the transit is not deemed to be at an end. The same inference may be drawn from the terminology of section 45 (1) (*e*), under which the transit ends when the buyer "takes delivery," *i.e.*, when there is a *voluntary* transfer of possession (*f*). And section 43 (1) (b) (*g*) also says, with regard to *lien*, that it is divested when the buyer "lawfully" obtains possession. It is therefore clear that a tortious seizure of the goods by the buyer does not determine the transit.

And as a buyer cannot, any more than a seller, anticipate the end of the transit by demanding the possession of the goods, unless the carrier attorn to him, it follows that a carrier does not wrongfully refuse delivery merely because he refuses to deliver on the buyer's demand made during the transit. And such was the decision in *Jackson* v. *Nichol* (*h*).

Buyer's demand of goods during the transit when ineffectual.

Conversely, the unpaid seller cannot demand actual possession of the goods during the transit against the will of the carrier, or direct the carrier to deliver to him except at the place of destination; for the contract of affreightment is not cancelled by a stoppage, except in so far as delivery at the destination to the consignee is stopped by the unpaid seller, and other delivery there is ordered by him. The seller's right is to "stop," *i.e.*, to resume possession by the carrier holding the goods on his behalf (*i*).

Seller cannot demand actual possession during the transit.

(*d*) For transmission.
(*e*) S. 45 (1), *ante*, 1014.
(*f*) See Code, s. 62 (1), defining "delivery," printed *ante*, 779.
(*g*) *Ante*, 964.
(*h*) *Ante*, 1035.
(*i*) *Per* Scrutton, J., in *Booth S.S. Co.* v. *Cargo Fleet Co.* [1916] 2 K. B. 570, at 600, C. A.; 85 L. J. K. B. 1577.

Right of stoppage continues after arrival at destination until buyer "takes delivery."

What is constructive possession?

Of course the mere arrival of the goods at their des will not suffice to defeat the seller's rights. The tra tinues until the buyer or his agent "takes delivery" f carrier. The buyer must take actual, if he has not constructive (*k*), possession.

In *Whitehead* v. *Anderson* (*l*), it was held, as we ha that going on board the vessel and touching the tim not taking it into possession, and *per Curiam*: "It ap "s to be very doubtful whether an act of marking o samples or the like, without any removal from the p of the carrier, so as though done with the intention possession, would amount to a constructive possession accompanied with such circumstances as to denote t carrier was intended to keep, and assented to keep, th in the nature of an agent for custody."

Crawshay v. *Eades* (1823).

In *Crawshay* v. *Eades* (*m*), the goods were on delive weighed to ascertain the freight, and this had not bee The carrier having reached the consignee's premises unloading, and put a part of the goods on his wharf, b ing that the consignee had absconded and was bankru them back again on board the barge; and it was held right of stoppage remained, and that there had delivery of any part of the goods, the buyer not being to the possession without payment or tender of the and there being no intention by the carrier to deliver payment.

Edwards v. *Brewer* (1837).

So, in *Edwards* v. *Brewer* (*n*), goods were deliverabl Thames, and on arrival the captain informed the buyer that, if the goods were not taken, he should land the wharf off which his ship was lying, and the clerk s goods had better be landed there on the buyer's accou the goods, by the captain's direction, were entered wharfinger's books without any mention of any particu signee, and subject to "freight and charges," the mea such an entry being that the wharfinger should rece freight and charges for the captain before delivery. that the buyer had not taken actual possession of the the wharf not being his wharf or that of his agent,

(*k*) The goods being *ex hypothesi* in the hands of the carrier, structive possession here referred to is the possession of an agent to the buyer. See the various meanings of "constructive possession" sta 1014.

(*l*) (1842) 9 M. & W. 518, at 535; 11 L. J. Ex. 157; 60 R. R. 819, a

(*m*) 1 B. & C. 181; 1 L. J. K. B. 90; 25 R. R. 348. See also *Cooper* (1879) 11 Ch. D. 68; 48 L. J. Bk. 49, C. A.

(*n*) 2 M. & W. 375; 6 L. J. Ex. 135; 46 R. R. 626.

captain not having intended to deliver without payment of freight and charges.

On the other hand, in *Allan* v. *Gripper* (*o*), where the usual course of business was shown to be for the carrier to deposit the goods in his warehouse until the buyer or his customers wanted them, in which case goods which were less recently stored were delivered, and not the later deposits, it was held that the carrier's warehouse was the place of final destination of the goods, being in effect the buyer's warehouse, and that the transit ended on arrival, although the carrier refused to deliver to any one until he was paid his charges. *Allan* v. *Gripper* (1832).

These three cases are accordingly thus distinguishable. In *Crawshay* v. *Eades* and *Edwards* v. *Brewer* the carriers did not intend to deliver until freight and charges were paid, and the buyer had no possession at all: in *Allan* v. *Gripper* the buyer had constructive possession; but his actual possession depended on his discharge of the carrier's lien. These three cases distinguished.

Whether delivery of part, when not retracted under the peculiar circumstances shown in *Crawshay* v. *Eades* (*p*), amounts to delivery of the whole, is always a question of intention, as already shown, and the general rule at common law was that a delivery of part is not a delivery of the whole, unless the circumstances show that it was intended so to operate (*q*). Delivery of part is not delivery of the whole unless it be shown that it was so intended.

Thus the Code provides, in terms substantially the same as those in section 42 (*r*) respecting lien:—

"**45.**—(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement (*s*) to give up possession of the whole of the goods." Code, s. 45 (7).

It rests with the party who relies on the part delivery as a constructive delivery of the whole to prove an intention to that effect. This proof may be established: (1) from the circumstances under which the delivery took place—*e.g.*, the purchaser may at the time with the carrier's consent express his intention to take the whole of the goods, although he actually take only a part (*t*); or may with such consent, take

(*o*) (1832) 2 C. & J. 218; 1 L. J. (N. S.) Ex. 71; 37 R. R. 682.
(*p*) *Ante*, 1040. (*q*) *Ante*, 971. (*r*) *Ante*, 971.
(*s*) Between the carrier and the consignee: *Ex parte Cooper* (1879) 11 Ch. D. 68, 78; 48 L. J. Bk. 49, C. A. But in *Meehan* v. *N. E. Ry. Co.* [1911] Sess. Cas. 1348; 48 Sc. L. R. 987, *post*, 1038, the Ct. of Sess. treated the agreement as one between seller and buyer.
(*t*) *Per* Cotton, L.J., in *Ex parte Cooper* (1879) 11 Ch. D. 68; 48 L. J. Bk. 49, C. A.

part expressly in the name of the whole (*u*); intention to take all may be inferred from the char which the person takes part delivery, as where he is the assignee for his creditors (*x*)—or (2) from the intrinsic of the goods delivered—as, *e.g.*, where the cargo consis entire machine, and an essential portion of it is deliv the purchaser (*y*).

Buyer's bankruptcy no bar to his taking delivery so as to end transit.

The bankruptcy of the buyer not being in law a re of the contract (*z*), and the trustee being vested with rights, the delivery of the goods into the buyer's wa after his bankruptcy, or an actual possession of them t his trustee, will suffice to put an end to the transit, determine the right of stoppage (*a*).

Insolvent buyer may rescind the contract, if executory; or otherwise refuse possession.

Where the buyer has become insolvent after his p he has a right to rescind the contract, while it is as agreement to sell only, with the assent of his seller; a the subsequent delivery of the goods into the buyer's sion cannot affect the seller's rights, because the *pro* the goods will not be in the buyer: or where the prop passed the buyer may refuse to take *possession*, and th unimpaired the right of stoppage in transitu (*b*), un seller be anticipated in getting possession by the trustee. The subject has already been sidered (*c*).

Effect of void rescission on seller's rights.

But, although a revesting of the property in the sel rescission of the sale is void where it is a fraudulent ence, yet it probably does not affect the unpaid seller against the goods. The buyer's trustee cannot approb reprobate, by treating the transaction as void against as a transfer of property, and yet valid to oust the right of stoppage (*d*).

(*u*) As the seller did in *Hutchings* v. *Nunes* (1863) 1 Moo. P R. R. 511.

(*x*) *Jones* v. *Jones* (1841) 8 M. & W. 431; 10 L. J. Ex. 481; 58 *Cf. Tanner* v. *Scovell* (1845) 14 M. & W. 28; 14 L. J. Ex 321; 69 *ante*, 973, where the buyer intended to separate the part taken fro

(*y*) *Per* Cotton, L.J., in *Ex parte Cooper*, *infra*. (*z*) See

(*a*) *Ellis* v. *Hunt* (1789) 3 T. R. 464; 1 R. R. 743; *Scott* v. *Pe* 3 B. & P. 469; 7 R. R. 804; *per Cur.* in *Inglis* v. *Usherwood* (180 515; *Bohtlingk* v. *Inglis* (1803) 3 East, 381; 7 R. R. 490.

(*b*) *Per* Brett, L.J., in *Ex parte Cooper* (1879) 11 Ch. D. 68, L. J. Bk. 49, C. A.

(*c*) *Ante*, 565. See also s. 45 (4), *ante*, 1032, and *Van Booker* (1848) 2 Ex. 691; 18 L. J. Ex. 9; 76 R. R. 729.

(*d*) *Per* Collins, J., in *Re O'Sullivan, Ex parte Ferd. Ballet &* 61 L. J. Q. B. 228; *approved obiter per* Bigham, J., in *Re Johnson Wright* [1908] 99 L. T. 305. But see *contra per* Vaughan Willia *Re O'Sullivan*, *supra*.

Propositions.

The following propositions are deducible from the authorities on the question of the continuance of the transit:—

1. Goods are in transit while they are in the possession of the carrier as such (*e*).
2. They are in the possession of the carrier as such
   (a.) While they are in motion on their journey to the appointed destination, that is to say, the destination contemplated by both the seller and the buyer (*f*); or
   (b.) while they are lodged in any place in the course of transmission to such destination (*g*), and until they have been actually delivered into the possession of the buyer or his agent (*g*).

   The appointed destination may be specified in the contract of sale itself, or by subsequent directions by the buyer to the seller (*h*).
3. When the goods are lodged in any place, the fact that they await fresh orders from the buyer or the seller, as the case may be, is relevant to prove or disprove respectively that they have reached their appointed destination, and have been delivered to the buyer (*i*).
4. A destination for the goods contemplated by the buyer may be either (a.) the appointed destination, or (b.) a further destination.

   In the latter case, the transit between the appointed and the further destination is a fresh transit, to which no right of stoppage can apply (*k*).
5. The destination contemplated by the buyer will, even though it be unknown to the seller, be identical with the appointed destination, if the seller is to deliver

(*e*) *Ex parte Rosevear China Clay Co.* (1879) 11 Ch. D. 560; 48 L. J. Bk. 100, C. A., *ante*, 1029; Code, s. 45 (1), *ante*, 1014.

(*f*) *Per* Brett, L.J., in *Kendal* v. *Marshall* (1883) 11 Q. B. D. 356; 52 R. R. 313, C. A.; *per Cur.* in *Ex parte Cooper* (1879) 11 Ch. D. 68, at 78; 48 L. J. Bk. 49, C. A.

(*g*) *Smith* v. *Goss* (1808) 1 Camp. 282; 10 R. R. 684, *ante*, 892; *Coates* v. *Railton* (1827) 6 B. & C. 422; 5 L. J. (O. S.) K. B. 209; 30 R. R. 385, *ante*, 1026; *Bethell* v. *Clark* (1887) 20 Q. B. D. 615; 57 L. J. Q. B. 302, C. A., *ante*, 1030; *per* Brett, L.J., in *Kendal* v. *Marshall*, *supra*; Code, s. 45 (1), (2), and (3), *ante*, 1014, 1037, 1032.

(*h*) *Per* Brett, L.J., in *Ex parte Rosevear China Clay Co.*, *supra*, and (as Lord Esher, M.R.) in *Bethell* v. *Clark*, *supra*.

(*i*) *Per* Lord Esher, M.R., in *Bethell* v. *Clark*, *supra*; *Dixon* v. *Baldwen* (1804) 5 East, 175; 7 R. R. 681, *ante*, 1022.

(*k*) *Dixon* v. *Baldwen*, *supra*.

the goods to a carrier as such, who is to convey goods to that destination by order of the buyer (*l*).

6. A destination contemplated by the buyer is not, me because the seller is aware of it, the appoi destination (*m*); nor is it such destination where seller has no authority to forward, or to instruct person in possession to forward the goods to destination contemplated by the buyer (*n*).

7. Shipment on board a ship owned or chartered by buyer is a delivery to a carrier as such, if the s reserve the right of disposal, even though he a wards transfers the bill of lading to the buyer It is otherwise if the bill of lading is taken o the name of the buyer (*p*).

The fact that the master of the buyer's ship, in rece the goods as carrier only, exceeds his authorit immaterial (*q*).

8. Shipment on board a carrier's ship is a delivery int possession of the carrier as such, although the b lading be taken in the name of the buyer (*r*) o buyer (*s*), or, having been taken to the seller's is afterwards transferred to the buyer (*t*).

9. Similar principles apply to the delivery of the goo the buyer's own or hired cart or other vehicle. seller may, it is submitted, control the terms delivery (*u*).

(*l*) *Ex parte Rosevear China Clay Co.*, *ante*, 1029; *cf. Jobson* v. *Ep* [1905] 21 Times L. R. 468.

(*m*) *Ex parte Miles* (1885) 15 Q. B. D. 39; 54 L. J. Q. B. 566, *a*

(*n*) *Per* Brett, L.J., in *Kendal* v. *Marshall*, *ante*, 1023; *Ex part supra*; *Jobson* v. *Eppenheim*, *supra*.

(*o*) *Berndtson* v. *Strang* (1867) L. R. 4 Eq. 481; 36 L. J. Ch. 8 588; 37 L. J. Ch. 665, *ante*, 1018.

(*p*) *Scholsmans* v. *L. and Y. Ry. Co.* (1867) 2 Ch. 332; 36 L. J. *ante*, 1017.

(*q*) *Turner* v. *Liverpool Docks* (1851) 6 Ex. 543, 565; 20 L. J. 86 R. R. 377.

(*r*) *Lyons* v. *Hoffnung* (1890) 15 A. C. 391; 59 L. J. P. C. 79, *a*

(*s*) *Ex parte Golding* (1880) 13 Ch. D. 628, C. A., *post*, 1060.

(*t*) *Brindley* v. *Cilgwyn Slate Co.* (1885) 55 L. J. Q. B. 67.

(*u*) A cart and a ship are analogous: *per* Lord Ellenborough *House* v. *Clark* (1815) 4 M. & S. 288, at 299. See an express opinion M.R., of the proposition in the text in *Merchant Banking Co. of L Phœnix Bessemer Steel Co.* (1877) 5 Ch. D. 205, at 209; 46 L. J. referred to *ante*, 1016 n. (*n*).

SECTION IV.—HOW IS THE RIGHT EXERCISED?

On this branch of the subject the Code provides that: Code, s. 46 (1), first clause

"**46.**—(1.) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are" (*x*). How stoppage in transitu is effected

At common law no particular form or mode of stoppage was held necessary; and Lord Hardwicke once said that the seller was so much favoured in exercising it as to be justified in getting his goods back by any means not criminal before they reached the possession of an insolvent buyer (*y*). All that is required is some act or declaration of the seller countermanding delivery. The usual mode is a simple notice to the carrier stating the seller's claim, forbidding delivery to the buyer, or requiring that the goods shall be held subject to the seller's orders. But the seller need not prove his title to the carrier, that is to say, the existence of facts justifying a stoppage. He takes the risk of the stoppage being justified (*z*). No particular mode of stoppage required. Notice to carrier forbidding delivery to buyer.

In *Litt* v. *Cowley* (*a*), where notice had been given to the carrier not to deliver the goods to the buyer, the carrier's clerk by mistake delivered the package to the buyer, who opened it and sold part of the contents, and then became bankrupt. The assignees claimed to hold the goods, but were unsuccessful. Gibbs, C.J., in delivering judgment, said: "In the present case, the plaintiffs gave notice to the carriers at the place from whence the boat sailed, and it would be monstrous to say that after such notice a transfer made by their mistake should be such as to bind the plaintiffs, and to vest a complete title in the bankrupts and their representatives. . . . As soon as the notice was given *the property returned to the plaintiffs*, and they were entitled to maintain trover, not only against the carriers, but against the defendants (assignees of the bankrupts) or any other person." So far as the dictum is concerned that the effect of the stoppage was to revest the *property*, the law is now otherwise (*b*); but that it revests the *possession*, so as to restore to the seller his lien, is undoubted. *Litt* v. *Cowley* (1816).

(*x*) The code being in permissive terms, the two methods of stoppage mentioned are probably not exhaustive. In other words, s. 46 (1) should be considered as illustrative only of the general right declared by s. 44.

(*y*) *Snee* v. *Prescot* (1753) 1 Atk. 245, at 250. See also *per* Gibbs, C.J. in *Litt* v. *Cowley*, *infra*.

(*z*) *The Tigress* (1865) Br. and Lush. 38, cited *post*, 1050.

(*a*) 2 Marsh. 457; 7 Taunt. 169; 17 R. R. 482.

(*b*) See on this *post*, 1065.

In *Bohtlingk* v. *Inglis* (*c*), a demand for the goods ma
the seller's agent on the master of the ship was held a suf
stoppage; and in *Ex parte Walker and Woodbridge* (*d*),
decided that an entry by the seller of the goods at the cu
house on the arrival of the vessel, in order to pay the d
was a valid stoppage as against the assignees of the ban
purchaser, who afterwards got forcible possession of the
when landed.

Northey v. *Field* (1798).

In *Northey* v. *Field* (*e*), wine bought by the bankrup
landed and put in the King's cellars, according to the
law, where it was to remain until the owner paid dut
charges, but if these were not paid within three months,
to be sold, and the excess of the proceeds, after payme
duty and charges, to be paid to the owner. The assi
petitioned to have the wine, which was also claimed b
seller's agent while in the King's cellars, but it was s
the end of the three months under the law. Lord K
held that the seller's claim was a good stoppage in tra
as the bankrupt had no right to the possession of the wi
the duties were paid; till then the wine was *quasi in cu
legis* (*f*).

Code, s. 46 (1), second clause.

With regard to notice of stoppage, the Code declar
section 46 (1) (*g*) : —

Notice to the employer in time to enable him to send notice to his servant not to deliver.

"Such notice may be given either to the person in actual pos
of the goods or to his principal. In the latter case the notice,
effectual, must be given at such time and under such circumstance
the principal, by the exercise of reasonable diligence, may commu
it to his servant or agent in time to prevent a delivery to the buy

This provision is in accordance with the common law, w
was declared, in terms similar to those in section 46 (1), b

Whitehead v. *Anderson* (1842).

Court of Exchequer in *Whitehead* v. *Anderson* (*h*). In
case the seller attempted to effect a stoppage of a carg
timber while on its voyage from Quebec to Port Fleetwoo
Lancashire, by giving notice to the shipowner in Mont
who thereupon sent a letter to await his captain's arriv
Fleetwood. The captain did not receive the letter til

(*c*) (1803) 3 East, 381; 7 R. R. 490.
(*d*) (1755) cited in Cooke's Bankrupt Law, 402.
(*e*) 2 Esp. 613.
(*f*) See *Nix* v. *Olive* (1805) Abbott on Ship. 14th ed. 839; and *cf.* *Murdoch* (1851) 2 Ir. C. L. 9, where the buyer had received possession, as a the seller, though the duties were not paid, under the seller's delivery which made no condition of payment of duty.
(*g*) The first part of this sub-section is set out *ante*, 1045.
(*h*) 9 M. & W. 518, at 533; 11 L. J. Ex. 157; 60 R. R. 819; *Bet Clark* (1887) 19 Q. B. D. at 560; 57 L. J. Q. B. 302, *per* Mathew, J.

agent of the bankrupt's assignees had attempted to take possession of the cargo. Parke, B., delivering the judgment, said: "To hold that a notice to a principal at a distance is sufficient to revest the property (*i*) in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible from the distance and want of means of communication to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery, and in the present case such diligence was used."

Duty of shipowner to transmit notice of stoppage.

As the seller has the *right* to stop the goods by a timely notice to the principal of the agent in possession, it seems to follow that the Code recognises the duty of the shipowner to transmit the notice to the agent with reasonable diligence. This adopts the opinion of Lord Blackburn in *Kemp* v. *Falk* (*k*). If such a duty exist, and if the shipowner make default, and the goods are in consequence delivered to the insolvent buyer, the shipowner would be liable to an action (*l*).

Notice to other persons than the carrier or shipowner.

The power of the seller to stop the goods by a notice sent to the consignee, and not to the master or owner of the ship, was doubted in *Phelps* v. *Comber* (*m*), but the question was left undecided. It has been decided in the State of New York that a notice sent to the buyer is insufficient; but there is a decision to the contrary effect in the State of Pennsylvania (*n*).

Demand by seller of bill of lading retained by shipowner.

It has been held that the unpaid seller may effectually exercise his right of stoppage by demanding the bills of lading

(*i*) These words must not be taken literally. See *post*, 1065.

(*k*) (1882) 7 A. C. at 585; 52 L. J. Ch. 167, disapproving the contrary opinions of James, L.J., and Bramwell, L.J., in *Ex parte Falk* (1880) 14 Ch. D. at 450, 455.

(*l*) He would be liable for conversion (see *post* 1049), and *semble* also for a breach of duty in not transmitting the notice to his agent, for the case appears to fall within the equity, if not within the words, of s. 57 of the Code, which declares that: "Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action."

(*m*) (1885) 29 Ch. D. 813; 54 L. J. Ch. 1017, C. A.

(*n*) *Mottram* v. *Heyer* (1846) 5 Denio, 629; *contra Bell* v. *Moss* (1840) 5 Whart. (Penn.) 189. The two decisions seem perfectly logical according to the respective points of view taken. The New York Court treated a notice as "a substitute for an actual resumption of the custody of the goods by the vendor," and therefore having to be served on the person having that custody. The Pennsylvanian Court thought the object of the demand on the carrier was chiefly to affect the consignee through the master, and the consignee (the buyer in the case) could not complain of a demand made directly to himself. They also said that it had never been decided that stoppage could only be made in any particular manner, and held that any "notorious act of reclamation" would do, as in ***Ex parte Walker and Woodbridge***, *ante*, 1046.

from the shipowner when the latter has retained them i possession as security for the unpaid freight (*o*).

Stoppage must be in assertion of seller's paramount right to the goods.

The stoppage to be effectual must be on behalf of the in the assertion of his rights as paramount to those o buyer (*p*), and must be done by an act showing an intent resume possession, though the act may in fact be done the buyer's consent (*q*). Thus, a direction by the seller t consignees to hold the proceeds of the goods to his order i a valid stoppage (assuming a valid notice could be direct the consignee (*r*), as it implies that the goods themselves be delivered to the buyer, but is only a direction how the ceeds shall be dealt with after delivery (*s*).

Duty of seller stopping in transit towards carrier.

A seller who stops in transitu, and persists in the stopp is under an obligation to the carrier to take, or give direc as to the, delivery of the goods and to discharge the frei and if he repudiate this obligation he is responsible t carrier in damages for any loss incurred by the latte reason of the non-completion of the transit. These dam will, if the conduct of the seller prevent the goods goin their ultimate destination, amount to the whole freight o voyage to that destination, which would otherwise have completed.

Booth S.S. Co. v. *Cargo Fleet Iron Co.* (1916).

Thus in *Booth Steamship Co.* v. *Cargo Fleet Iron Co.* (*t* defendants, the sellers, on the instructions of the buy delivered the goods to the plaintiffs for carriage to Paranal in Brazil. On the voyage to Paranahyba the ocean trans ended at Tutoya, and the carriage up the river to Paranal was by means of lighters. During the ocean voyage the de dants, hearing that the buyers were in financial difficul gave a notice of stoppage to the plaintiffs. On the recei the notice, and before the ship arrived at Tutoya, plaintiffs' agents there asked the defendant to pay the fre and take up the bills of lading which were in the age hands. The defendants declined to do so. On the arriva the ship at Tutoya the plaintiffs' agents informed the def

(*o*) *Ex parte Watson* (1877) 5 Ch. D. 35; 46 L. J. Bk. 97, C. A., *ante*, See also *Kemp* v. *Ismay, Imrie & Co.* [1909] 100 L. T. 996.

(*p*) *Siffken* v. *Wray* (1805) 6 East, 371; *Mills* v. *Ball* (1801) 2 B. & P. 5 R. R. 653.

(*q*) *Mills* v. *Ball* (1801) 2 B. & P. 457; 5 R. R. 653; *Nicholls* v. *Le F* (1835) 2 Bing. N. C. 81; *per Cur.* in *Phelps* v. *Comber* (1885) 29 Ch. D. at 822, 824, 826; 54 L. J. Ch. 1017.

(*r*) *Supra.*

(*s*) *Phelps* v. *Comber, supra.*

(*t*) *Booth S.S. Co.* v. *Cargo Fleet Iron Co.* [1916] 2 K. B. 570, C. A L. J. K. B. 1577.

ants that the goods would be landed for their account, and asked for specific instructions, but the defendants declined all responsibility for the landing. The plaintiffs then offered to forward the goods by lighter to Paranahyba, but insisted that the defendants were liable for all attendant charges, including freight and customs duties. The defendants repudiated all liabilities except for expenses after the landing of the goods on their behalf. The plaintiffs thereupon deposited the goods at Cajueiro, an island in the bay of Tutoya, according to ordinary practice. *Held* that the defendants were liable in damages for their failure to take actual possession of the goods and to pay freight, and that the damages were the amount of the proper freight; and that, as the defendants' repudiation of liability to pay duty, freight, and expenses was the cause of the carriage of the goods not being continued to Paranahyba, the damages were the total freight to that place.

The carrier's duty when he receives a notice of stoppage is thus declared:—

Code, s. 46 (2). Duty of carrier on stoppage.

"46.—(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller."

This section reproduces the common law (*u*).

If the carrier, after a valid notice of stoppage, refuse to redeliver to the seller, or deliver to the buyer, he is guilty of a conversion. This was the rule at common law (*x*); and now under section 57 of the Code (*y*) the duty of the carrier to redeliver to the seller is enforceable by an action. Such an action, whether technically an action of trover or not, will be founded on tort, and not on contract, and the costs recoverable will be regulated accordingly (*z*).

The seller also possesses a remedy by injunction (*a*), or by arrest of the ship, if the goods are in the possession of a carrier by water (*b*).

(*u*) See *per* Dr. Lushington in *The Tigress*, *infra*. See also, under the Code, *Booth S.S. Co.* v. *Cargo Fleet Co.*, *supra*.

(*x*) *Jackson* v. *Nichoil* (1839) 5 Bing. N. C. 508; 8 L. J. (N. S.) K. B. 294; 50 R. R. 777; *Litt* v. *Cowley* (1816) 7 Taunt. at 170; 17 R. R. 482; *Pontifex* v. *Midland Ry. Co.* (1877) 3 Q. B. D. 23; 47 L. J. Q. B. 28.

(*y*) Quoted *ante*, 1047, n. (*l*).

(*z*) *Pontifex* v. *Midland Ry. Co.*, *supra*. See also *Mechan* v. *N. E. Ry. Co.* [1911] S. C. 1348; 48 Sc. L. R. 987.

(*a*) *Per Cur.* in *Schotsmans* v. *Lancashire Ry. Co.* (1867) 2 Ch. at 340: 36 L. J. Ch. 361.

(*b*) *The Tigress* (1863) 32 L. J. Adm. 97, *post*, 1050.

Expenses of redelivery.

The last sentence of section 46 (2), which declar incidence of the expenses of delivery, is quite in acc with common law principle (*c*), although no decision same effect has been found.

The mode of exercising the right of stoppage und careful investigation in the Admiralty Court in the *The Tigress* (*d*), a proceeding by the sellers to recover, arrest of the ship, damages for the refusal to deliver th to them. It was there determined by Dr. Lushington—

Master must refuse delivery to buyer of goods stopped.

1. That a seller's notice to stop makes it the duty master of the vessel to refuse delivery to the buye indorsee of a bill of lading.

Claim by seller *quâ* seller sufficient.

2. That all that is necessary to a notice of stoppage i the vendor to assert his claim as vendor and owner," need not prove that all conditions necessary to stoppag been fulfilled; consequently a notice is sufficient witho representation that the bill of lading has not been trans by the buyer, such not being a matter ordinarily with seller's cognisance.

Master must deliver unless aware of legal defeasance of seller's claim.

3. That stoppage is at the seller's peril, and the must give effect to a claim as soon as he is satisfied tha made by the seller, unless he is *aware of a legal defe* of the seller's claim;

Master must deliver to seller or interplead.

4. That the seller's right includes the right of dema *delivery to himself*, and that the carrier has no right that he will retain the goods for delivery to the true after the conflicting claims have been settled. But the can always protect himself by interpleading;

Admiralty jurisdiction.

5. That the master's refusal to acquiesce in the s claim of stoppage is a breach of duty, giving jurisdict the Admiralty Court (*e*).

Master's duty as between conflicting claims.

Apart from any question of stoppage in transitu, the dants in that case had contended that the buyer was th person entitled to sue the master, as one of the bills of had been indorsed to him before a duplicate bill had indorsed to the sellers, the plaintiffs. But Dr. Lushi quoted the authority of Lee, C.J., in *Fearon* v. *Bowe*

(*c*) See *Somes* v. *British Empire Shipping Co.* (1858) 8 H. L. C. L. J. Q. B. 229, *ante*, 955. The sentence was an addition in Parlia the original Bill.

(*d*) (1863) 32 L. J. Adm. 97.

(*e*) Under s. 6 of the Admiralty Court Act, 1861 (24 Vict. c. 10). Th note in the L. J. to *The Tigress* wrongly substitutes for that Act the M Shipping Act, 1854.

(*f*) Decided in 1753, and reported in the notes to *Lickbarrow* v. *Mason* 1 H. Bl. 364; 1 Sm. L. C. 9th ed. 737; 11th ed. 715; 1 R. R. 425.

for the proposition (which, however, he said was unnecessary to the decision) that, if bills of lading are presented to the master by two different holders, he "was not concerned to examine the best right in the different bills of lading; all he had to do was to deliver the goods upon one of the bills."

This cannot, however, without qualification, be considered to be law; for it is well settled that a bailee delivers at his peril (*g*), that he is bound to decide between conflicting claimants, that he is liable in trover if he delivers to the wrong person, and that his only mode of protecting himself is to take an indemnity and, if that be refused, to interplead (*h*).

But if the master have no knowledge of any fact making it wrong on his part to do so, he may deliver the goods to the holder of that part of the bill of lading which is first presented to him. This point did not arise for decision in *Barber* v. *Meyerstein* (*i*), where, however, Lord Westbury intimated an opinion in accordance with the proposition above stated; but it was first actually decided in the following important case.

Glyn v. *East and West India Dock Co.* (1882).

In *Glyn* v. *The East and West India Dock Company* (*k*), the action was for conversion of a cargo of sugar, consigned to Cottam & Co. The shipmaster signed a set of three bills of lading, marked "first," "second," and "third" respectively, by which the goods were deliverable "to Cottam & Co., or their assigns, freight payable in London, one of the bills being accomplished, the others to stand void." During the voyage Cottam & Co., by way of pledge, indorsed the bill of lading marked "first" to the plaintiffs. The plaintiffs had not inquired for, nor obtained the other two bills of the set. Upon arrival in London, the goods were placed in the custody of the defendants, a dock company, the master lodging with them a notice, under section 68 (*l*) of the Merchant Shipping Act, 1862, to detain the cargo for freight. Cottam & Co. then produced to the defendants the bill of lading marked "second," unindorsed, and the defendants entered Cottam & Co. in their books as owners of the goods. The stop for freight being afterwards removed, the defendants *bonâ fide*, and

(*g*) Blackburn on Cont. of Sale, 266; 2nd ed. 381—382.

(*h*) *Wilson* v. *Anderton* (1830) 1 B. & Ad. 450; 9 L. J. K. B. 48; 35 R. R. 348; *Batut* v. *Hartley* (1872) L. R. 7 Q. B. 594; 41 L. J. Q. B. 273; *per* Willes, J., in *Meyerstein* v. *Barber* (1866) L. R. 2 C. P. at 55; 39 L. J. C. P. 187.

(*i*) (1870) L. R. 4 H. L. 317; 39 L. J. C. P. 187, set out *ante*, 980.

(*k*) 7 App. Cas. 591; 52 L. J. Q. B. 146; *affirming* C. A. (1881) 6 Q. B. D. 475; *reversing* Field, J., (1880) 5 Q. B. D. 129. See also the case discussed in Butterworth's Bankers' Advances on Mercantile Securities, at 17—19.

(*l*) The corresponding provision now in force is s. 494 of the Merchant Shipping Act of 1894 (57 & 58 V., c. 60).

without notice or knowledge of the plaintiffs' claim, delive the goods to other persons upon delivery orders signed Cottam & Co.

The majority of the Court of Appeal, reversing Field, held that the defendants had disposed of the goods accor to the terms on which they had received them, having notice of any claim, title or right, other than that of person from whom they received them, and could not, th fore, be held guilty of a conversion. Bramwell, L.J. expressed the view that the defendants were in the s position as the master; and, on the authority of *Fearo Bowers* (*n*), and on the ground that it was the undou practice to deliver without inquiry to one who produces a of lading, he held that the master would not have been li Baggallay, L.J. (*o*), agreed that the defendants were ent to the rights of the master. With regard to the positio the latter, he preferred to adopt the guarded suggestio Lord Westbury in *Barber* v. *Meyerstein* (*p*), that the owner, who is *in ignorance of any previous dealing* wit bill of lading, may be justified in delivering the goods t party presenting one part of the set.

Master having no knowledge of prior dealing with other bills may deliver under bill first presented.

The House of Lords affirmed the decision of the Cou Appeal (*q*). The *ratio decidendi* of their judgment is the master is excused for delivering goods according t contract to the person appearing to be the assign of the b lading which is first produced to him, no matter which it is, so long as he has *no notice or knowledge* of any de with either of the other two parts; and that the defen were for this purpose in the same position as the master. master, in this case, had received no notice, and it was fore unnecessary to decide what his duty would be in su event; but Lord Blackburn takes occasion to say (*r*): "W he (the maste., has notice, or probably even knowledge other indorsement, I think he must deliver at his peril rightful owner, or interplead." And Lord Fitzgerald sai "I entirely concur in the condemnation of the law laid in *Fearon* v. *Bowers* (if it was so laid down there) that i of presentation to the captain of two or more parts of th

(*m*) 6 Q. B. D. at 492; 52 L. J. Q. B. 146.
(*n*) (1753), note to *Lickbarrow* v. *Mason* (1790) 1 Bl. H. 364; 1 Sm 9th ed. 737; 11th ed. 715; 1 R. R. 425.
(*o*) 6 Q. B. D. at 504; 52 L. J. Q. B. 146.
(*p*) (1870) L. R. 4 H. L. at 336; 39 L. J. C. P. 187, *ante*, 980.
(*q*) (1882) 7 App. Cas. 591; 52 L. J. Q. B. 146.
(*r*) At 611, 614.
(*s*) At 616.

of lading, by parties claiming to be holders and adversely to each other, the captain was not bound to look into the merits of the particular claims, but had a right to deliver to which of the claimants he thought proper." Their Lordships, therefore, adopted the view taken by Baggallay, L.J., in the Court of Appeal, and the *dictum* of Lord Westbury in *Barber* v. *Meyerstein*, and affirmed the authority of *Fearon* v. *Bowers* to that extent only.

This case does not affect the right of property in the goods.

This decision merely shows that in certain circumstances the shipowner or master is not liable, and does not alter the law with regard to the passing of the property by the transfer of a bill of lading, viz., that the first copy of a set properly indorsed, with intent to pass the property, passes the property accordingly, and that no other copy subsequently indorsed can displace this title; and that the first indorsee can, by virtue of his right of property ordinarily sue any person who deals with the goods (*t*).

SECTION V.—HOW MAY IT BE DEFEATED?

In relation to this question, the Code provides:

Code, s. 47. Effect of sub-sale or pledge by buyer.

"**47.**—Subject to the provisions of this Act (*u*), the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

"Provided that where a document of title (*x*) to goods has been lawfully transferred (*y*) to any person (*z*) as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith (*a*) and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien (*b*) or retention (*c*) or stoppage in transitu (*d*) is defeated, and if

(*t*) *Per* Brett, M.R., and Bowen, L.J., in *Sanders* v. *MacLean* (1883) 11 Q. B. D. at 335, 344; 52 L. J. Q. B. 481.

(*u*) *I.e.*, to s. 25 (2), substantially identical with s. 9 of the Factors Act, 1889, *ante*, 848, and s. 55 (express agreement, etc.), *ante*, 254.

(*x*) As defined in the Factors Act: Code, s. 62 (1). See definition in s. 1 (4) of F. Act, *ante*, 44. In *Kemp* v. *Falk* (1882) 7 App. Cas. 573; 52 L. J. Ch. 167, *post*, 1061, it was argued that cash receipts given by buyers to their sub-purchasers, upon the presentation of which the latter received the goods from the master of the ship in which the goods lay, were documents of title under the F. Act, 1877, as being equivalent to delivery orders: but the suggestion was repudiated by Lord Blackburn (at 584).

(*y*) See s. 11 of the F. Act, 1889, *ante*, 845, and the definition of "delivery" in s. 62 (1) of the Code, *ante*, 779, which are to be read together; *per* Collins, L.J., in *Cahn* v. *Pockett* (1899) 1 Q. B. at 655; 68 L. J. Q. B. 515, C. A.

(*z*) Includes any body of persons corporate or unincorporate: F. A. s. 1 (6).

(*a*) "Honestly, whether negligently or not": Code, s. 62 (2).

(*b*) This right is regulated by s. 39 (1), *ante*, 950, and ss. 41—43 of Code; *ante*, 954, 961, 964.

(*c*) Scotch term equivalent to lien.

(*d*) Regulated by s. 39 (1) (*b*), *ante*, 950, and ss. 44—46, *ante*, 1003 *et seqq.*

such last-mentioned transfer was by way of pledge (*e*) or other d
tion for value, the unpaid seller's right of lien or retention or st
in transitu can only be exercised subject to the rights of the trans

Effect on right of stoppage of seller's assent to sub sale by buyer.

It has already been explained that an assent by the
to a sub-sale or pledge is a renunciation of the seller's rig
lien as against the sub-buyer or pledgee (*f*); and on prin
it seems unreasonable that a seller should, after suc
assent, be able by a subsequent stoppage to resume
which he had parted with *absolutely*. The Editor is not
of any direct common law authority on the point (*g*),
the following case.

Merchant Banking Co. v. *Phœnix Bessemer Steel Co.* (1877).

In *The Merchant Banking Co.* v. *Phœnix Bessemer Co.* (*h*), the facts of which have been already state
sellers had, by issuing to the buyers a warrant which
custom treated as a representation that the goods wer
from any seller's lien, assented to the buyers dealing wi
goods. Part of the goods, at the time of the buyers'
veney, were still at the sellers' works, and part had bee
by rail and warehoused by the railway company in the
of the buyers' agents. The sellers gave the railway co
notice not to deliver the goods. The indorsees of the w
claimed a charge on all the goods. *Held*, by Jessel,
that the sellers, after issuing the warrant, could not set
claim for unpaid purchase-money. "Any man who giv
warrant," said the learned Judge, "understands that i
pass from hand to hand for value by indorsement, an
the indorsee is to have the goods free from *any* vendor's
for purchase-money. He is not to be asked whether
a claim or not; if he chooses to issue it in this shape
all the trade *that they may safely deal on the faith*
warrant. . . . Having given it as a statement on the
the warrant that the holder for value by indorsement
have the goods free from the lien, and having given th
rant for the purpose of its being so dealt w . . I thi
clear on general principles of equity that suc defenc
the sellers were unpaid) could not be set up."

(*e*) Defined in F. A. s. 1 (5); as to the consideration for a dispos
ibid., s. 5.

(*f*) *Ante*, 991.

(*g*) There are some remarks by Lord Campbell, C.J., in *Pearson* v
(1858) E. B. & E. at 457; 27 L. J. Q. B. 248; 113 R. R. 724, which see
that stoppage *in transitu* may be divested by an acknowledgment
buyer's title, but his Lordship was probably alluding to cases of lien
Stoveld v. *Hughes* (1811) 14 East, 308; 12 R. R. 523, *ante*, 987.

(*h*) 5 Ch. D. 205; 46 L. J. Ch. 418, *ante*, 993. See the same
applied in *London and County Bank* v. *Fulford* (1886) 2 Times L
(liability of wharfinger to pledgee of warrant).

In this statement of the law, Jessel, M.R., seems to have made no distinction between lien and right of stoppage in transitu, for he proceeds to consider, only on the supposition that his view was wrong, whether the *transit* of the goods was at an end, and he held that it was. This view of the law has now been adopted by the Code.

Seller's right formerly defeasible only by transfer of bill of lading to a *bonâ fide* indorsee for value.

The usual way, however, in which the seller's right of stoppage in transitu was at common law defeasible was when the goods are represented by a bill of lading, which is a symbol of property, and when the buyer, being in possession of the bill of lading with the seller's assent, transfers it to a third person, who *bonâ fide* gives value for it. But it is necessary that there should be a transfer *by the buyer* of the bill of lading. Thus, the right of stoppage was not at common law, and is not now, affected by a transfer of the bill of lading by the seller to the buyer (*i*), or by the fact that it is issued in the first instance by the carrier to the buyer (*k*), or at any rate without the privity of the seller (*l*) to a sub-buyer (*m*).

All documents of title now on the same footing.

The Factors Act, 1877 (*n*), assimilated to bills of lading in their operation to defeat the right of stoppage "any document of title to goods . . . lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods," and by that person transferred to a *bonâ fide* indorsee. This Act was repealed by the Factors Act of 1889 (*o*), which contains in section 10 a similar provision, which is also substantially identical (*p*) with the proviso to section 47 of the Code above quoted. The effect of this legislation is, therefore, that, with regard to their efficacy under section 47, when transferred by the buyer, to defeat stoppage in transitu, all documents of title are put upon the same footing as bills of lading at common law.

Right of stoppage also defeasible under s. 9 of Factors Act.

The unpaid seller's right of stoppage is also affected by section 9 of the Factors Act, 1889. By that section, already quoted (*q*), a transfer of a document of title by a person who

(*i*) *Per* Dr. Lushington in *The Tigress* (1863) 32 L. J. Adm. 97.

(*k*) *Lyons* v. *Hoffnung* (1890) 15 A. C. 291; 59 L. J. P. C. 79, *ante*, 1031.

(*l*) Qy., however, whether such an issue with the seller's privity would be an assent to the sub-sale, divesting the right of stoppage under s. 47, *ante*, 1053?

(*m*) *Ex parte Golding* (1880) 13 Ch. D. 628, C. A., *post*, 1060.

(*n*) 40 & 41 Vict. c. 39, s. 5, repealed by F. Act, 1889.

(*o*) 52 & 53 Vict. c. 45.

(*p*) The proviso to s. 47 of the Code, *ante*, 1053, gives the effect in detail of the transfer of the document of title, crossing the t's and dotting the i's, as it were, of s. 10 of the F. Act.

(*q*) *Ante*, 48. It is substantially identical with s. 25 (2) of the Code.

has "bought or agreed to buy" goods, and who has the documents with the consent of the seller, is effectual as if he were a "mercantile agent" (*r*) in p of the goods or documents with the consent of the ow is to say (as provided by section 2 (1) of the Factors "as if he were expressly authorised by the owne goods." The buyer may accordingly defeat the selle of stoppage, either under section 47 of the Code, section 9 of the Factors Act of 1889. But section 9 that the transferee of the document of title should not only in good faith, but also without notice of " or other right" of the seller, a provision not cont section 47 of the Code. We are not at present concer the matter of lien; but the "other right" of the sell a right of property as against the original buyer, as by the following case.

Cahn v. *Pockett* (1899).

In *Cahn* v. *Pockett* (*t*), the facts of which have alre stated, it was contended on behalf of the defendants owners, that although the plaintiffs, the sub-bu indorsees of the bill of lading from Pintscher, migh statutory title to the copper under section 9 of the Act, and section 25 (2) of the Code (*u*), Pintscher hav in possession, that is, in actual custody, of the doc title with Steinmann & Co.'s consent, yet that t nothing in the sections mentioned to exclude the sell of stoppage, it being the intention of those sections buyer's "disposition" should be valid *subject* to th right of stoppage. Moreover, it was contended that s of the Factors Act, and the proviso to section 47 of were the only sections which declared the terms on stoppage in transitu might be defeated, and that un sections the bill of lading had not been "lawfully tran to Pintscher, as he was not intended to have any r till he accepted the draft which had been sent with the Court of Appeal held that the plaintiffs were e the goods, as by the conjoint effect of sections 9 and the Factors Act, Pintscher was in the position of a m agent in possession of the document of title with S & Co.'s consent, and, since the plaintiffs had no

(*r*) "Mercantile agent" is defined for the purposes of that Act set out *ante*, 39.

(*s*) Set out *ante*, 39.

(*t*) [1899] 1 Q. B. 643; 68 L. J. Q. B. 515. C. A., set out *ante*

(*u*) This aspect of the case has been already considered, *ante*,

Steinmann & Co.'s right of property as against Pintscher, and acted in good faith, his disposition was as valid as if Steinmann & Co. had authorised it. They held, moreover that the bill of lading had been "lawfully transferred" to Pintscher, having been transferred in one of the ways contemplated by section 11 of the Factors Act (*x*), that is to say, by the indorsement and delivery of the bill by Steinmann & Co. to Pintscher, and it had been transferred by him to the plaintiffs, who gave value and acted in good faith. Collins, L.J., said further, with regard to the argument that section 47 declares the only terms on which stoppage in transitu may be defeated, that that section was expressly made subject to the other provisions of the Code, including section 25 (2), that is, section 9 of the Factors Act.

Cahn v. *Pockett* was not a case of stoppage in transit in a strict sense, but one of withholding delivery under section 39 (2) of the Code, for the goods were *ex hypothesi* at the time the property of the sellers. But its principle will apply, where the facts allow, where the property has passed.

Buyer's pledge for antecedent debt.

There is no decision to determine the effect, under section 9 of the Factors Act, of a pledge by the buyer for an antecedent debt.

Section 4 of the Factors Act, 1889, provides that "where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge." This section forms part of that division of the Act which was decided by the House of Lords in *Inglis* v. *Robertson* (*y*) to apply only to a "mercantile agent." If by this decision they meant to include in the term "mercantile agent" a buyer who was *in the position* of such an agent by having received a document of title under section 9 with the consent of the seller, then it would seem that the rights of the buyer's pledgee for an antecedent debt must be subordinate to the seller's right of stoppage, or at any rate if the buyer be insolvent at the time of the pledge.

The case under section 10 of the Factors Act is different. Here there are no words assimilating the buyer's position to that of a mercantile agent, and the section expressly says, without qualification, that the pledgee's rights are superior to those of the unpaid seller. The result under these two sections

(*x*) Set out *ante*, 45.
(*y*) [1898] A. C. 616; 67 L. J. P. C. 108, set out *ante*, 45.

respectively is accordingly somewhat curious, as lead
different decisions on a state of facts often identical.
however possible that section 4 of the Factors Act may
effect a second proviso to section 10.

It is not within the province of this treatise to exam
general law in relation to bills of lading, for whi
authorities are collected in the notes to *Lickbar*
Mason (*z*), or in relation to other documents of title, h
the effect of transferring these documents in defeati
right of stoppage.

Bill of lading not negotiable like a bill of exchange.

The first point is, that a bill of lading or other docu
title must be "lawfully transferred" (*a*). The do
must therefore be transferred in the manner appropr
the instrument, as by indorsement and delivery or b
delivery, as the case may be. The second point is t
transferor should have a right to transfer it, for even a
lading, and *a fortiori* any other document of title,
negotiable in the same sense as a bill of exchange, an
fore the mere honest *possession* of a bill of lading ind
blank, or in which the goods are made deliverable
bearer, is not such a title to the goods as the like posse
a bill of exchange would be to the money promised to
by the acceptor.

Transferee has no better title than indorser.

The indorsement of a bill of ladi
no better right to the goods than the indorser himse
(except in cases where a mercantile agent, or person
position of such agent, may transfer it to a *bona fid*
under the Factors Act), so that if the owner should
have stolen from him a bill of lading indorsed in bl
finder or the thief could confer no title upon an
third person (*b*).

Indorsement to holder for value is *prima facie* evidence of ownership.

In *Dracachi* v. *The Anglo-Egyptian Navigation Co*
plaintiff proved that the consignor had indorsed the
lading to A., and that A. had indorsed it to the plai
value, so as to pass the property; and it was objected b
dant that there was no proof that the first indorsement
value *so as to pass the property* under the first sectio
Bills of Lading Act; but the Court held that there wa

(*z*) 1 Sm. L. C. 9th ed. 737; 11th ed. 715; 1 R. R. 425.

(*a*) F. Act, s. 11. See *Cahn* v. *Pockett*, *supra*; *The Argentina* (
1 A. & E. 370.

(*b*) *Gurney* v. *Behrend* (1854) 3 E. & B. 622; 23 L. J. Q. B. 26
687; *per* Collins, L.J., in *Cahn* v. *Pockett* [1899] 1 Q. B. at 658, 65
Q. B. 515, C. A.; and see Blackburn on Sale, 279; 2nd ed. 391, and
cited. The nature and effect of a bill of lading is well put by M
Pollard v. *Vinton* (1881) 105 U. S. 7, at 8.

(*c*) (1868) L. R. 3 C. P. 190; 37 L. J. C. P. 71.

prima facie evidence that the property had passed to the plaintiff.

Bona fide transferee of voidable title to bill of lading may hold the goods.

But the title of *bona fide* third persons will prevail against the seller who has *actually* transferred the bill of lading to the buyer, although he may have been induced by the buyer's fraud to do so (*d*), because, as we have seen (*e*), a transfer obtained by fraud is only voidable not void. And the same result is also effected in such a case by section 9 of the Factors Act, and section 25 (2) of the Code (*f*).

Effect of pledge by buyer of document of title.

The seller's right of stoppage in transitu may be defeated in part only, for the bill of lading or other document of title may be transferred as a pledge or security for the debt (*g*), and then in general the *property* in the goods remains in the buyer; but even if by agreement the *property* in the goods has been assigned as well as the *possession*, it is only a *special* property that is thus transferred, and the *general* property remains in the buyer (*h*). On these grounds, therefore, the seller's right of stoppage will remain so far as to entitle him to any surplus proceeds after satisfying the secured creditor (*i*).

This rule was established by *Re Westzinthus* and *Spalding* v. *Ruding* (*i*) the principle being that, although the transfer of a bill of lading by the buyer by way of pledge or security defeats any legal right of the seller to the possession of the goods, since the transferee of the bill has the right to the possession of them, yet the unpaid seller has by virtue of the attempted stoppage an *equitable* title to the goods, subject to that right.

Seller may compel pledgee to marshal the assets.

The seller will have the further equitable right of insisting on marshalling the assets; that is to say, of forcing the creditor to exhaust any other securities held by him towards satisfying his claim before proceeding on the goods of the unpaid seller (*k*).

(*d*) *Pease* v. *Gloahec* (1866) L. R. 1 P. C. 219; 35 L. J. P. C. 66.

(*e*) *Ante*, 507, *et seqq*.

(*f*) *Ante*, 51.

(*g*) Code, s. 47 *ante*, 1053. The words in s. 9 of the F. Act are "pledge or other disposition."

(*h*) See on this point *Sewell* v. *Burdick* (1884) 10 App. C. 74; 13 Q. B. D. 159; 52 L. J. Q. B. 428, C. A.; (1883) 10 Q. B. D. 363; 54 L. J. Q. B. 126; where it was decided that the transfer of a bill of lading by way of pledge did not pass "the property," that is, the general property, in the goods under s. 1 of the Bills of Lading Act. 18 & 19 Vict. c. 111.

(*i*) *Re Westzinthus* (1833) 5 B. & Ad. 817; 3 L. J. K. B. 56; 39 R. R. 665; *Spalding* v. *Ruding* (1843) 6 Beav. 376; 12 L. J. Ch. 503; 63 R. R. 120; on App. (1846) 15 L. J. Ch. 374; 63 R. R. 120; and see the note to *Berndtson* v. *Strang* (1867) 4 Eq. 486; 36 L. J. Ch. 879. In *Kemp* v. *Falk* (1882) 7 App. Cas. 573; 52 L. J. Ch. 167, the principle established by *Re Westzinthus* and *Spalding* v. *Ruding*, is approved and adopted by the H. L., *post*, 1061.

(*k*) *Re Westzinthus*, *supra*. See also, as to marshalling assets in equity,

Buyer's indebtedness to pledgee on general account.

The pledgee of the document of title has the rig
against the unpaid seller stopping in transitu, to be pa
sum for which the document of title was specifically pl
but he cannot claim to be paid also a balance due fr
buyer on a general account (*l*).

Sub-sale of goods during the transit.

Sub-buyer's unpaid purchase-money.

Ex parte Golding (1880).

In *Ex parte Golding* (*m*), the principle that where
has been a pledge of the bill of lading by the buyer, the
may still render his right of stoppage effectual, so far
does not thereby interfere with the special property
pledgee in them, was applied to the case of a *sub-sa*
though made *without* the transfer of the bill of lading
sub-buyer. The buyers had entered into a contract to
the goods, and the bill of lading had been made out
name of, *but not transferred to*, the sub-buyers, and ha
delivered to the buyers, who had retained it in their
sion. The sellers gave notice of stoppage before the
had terminated. *Held*, by the Court of Appeal, tha
sellers were equitably entitled to intercept, to the ext
their own unpaid purchase-money, the purchase-money
was due from the sub-buyers to the original buyers. A
Lords Justices held the true principle to be that the
can exercise his right of stoppage, *provided* only such ex
does not interfere with the rights of third persons (*n*).

Although the actual decision in this case can be supp
on the ground that the seller had given timely notice of
page, and that his right had not been defeated, the
lading not having been *transferred* by the buyers, y
reasoning of the Court seems to be open to objection.
not in accordance with the judicial opinion which has
frequently expressed, that all that the buyer is able to
to a sub-buyer (except in cases where a document of ti
transferred) is a right *subject to* the seller's rig
stoppage (*o*).

Ex parte Alston (1868) 4 Ch. 168; *Ex parte Salting* (1883) 25 Ch. D.
L. J. Ch. 415; and the notes to *Aldrich* v. *Cooper* (1802) W. & T. L. C.
6th ed., Vol. II., 82, 95; 7th ed., Vol. I., 36; 7 R. R. 86.

(*l*) *Spalding* v. *Ruding*, *ante*, 1059 (i).

(*m*) 13 Ch. D. 628, C. A.

(*n*) James, L.J., quotes the remarks of Best, J., to this effect in *Ha*
Watson (1824) 2 B. & C. at 546; 2 L. J. (O. S.) K. B. 83; 26 R. R. 448,
the seller had attempted to resume his *lien* by a countermand of a delive
after the bailee had attorned to a sub-buyer. The language of Best, J.,
it is conceived, be limited to the facts of the case, and not be given a
application.

(*o*) See *per* Lord Selborne, L.C., in *Kemp* v. *Falk* (1882) 7 A. C.
577; 52 L. J. Ch. 167; and *per* Lord Blackburn, at 528, both quoted, *post*

Ex parte Falk (1880).

In *Ex parte Falk* (*p*) the buyer of goods, which had been shipped by the seller, consigned them abroad, and indorsed the bill of lading to a bank by way of security for an advance. The consignees sold the goods "to arrive" to sub-purchasers who paid their purchase-money, but only took, as it afterwards appeared (*p*), *cash receipts* in exchange. The buyer became bankrupt, and the unpaid seller thereupon during the transit gave the ship's master notice to stop the goods in transitu.

It was held by the Court of Appeal, approving *Ex parte Golding*, that, although the seller, through the resale, accompanied (according to an erroneous statement of the facts) by the transfer to the sub-purchasers of *delivery orders* (*q*) had lost the right to stop the actual goods, yet that having given a notice to stop during the transit, he was entitled to intercept, to the extent of his own unpaid purchase-money, but subject to the bank's claim, so much of the sub-buyer's purchase-money as had not reached the buyer's hands when the notice to stop was given.

Distinction between *Ex parte Golding* and *Ex parte Falk*.

But this important distinction, it is submitted, exists between *Ex parte Golding* and *Ex parte Falk*, viz., that in the former case the seller's right of stoppage was effectually exercised; in the latter, according to the facts as stated to the Court of Appeal, it had been defeated. A right of stoppage has always been considered to be one against the goods themselves (*r*), and enables the seller to resume his right of lien. If, then, this right has been defeated on a sub-sale, there would seem to be nothing to which any equitable right of the seller can attach.

Kemp v. *Falk* (1882) in H. L.

In the House of Lords (*s*) the statements of fact in *Ex parte Falk* were amended. It appeared that the documents transferred by the buyer to the sub-buyers were not delivery orders or other documents of title, but mere cash receipts (*t*). Upon this ground the House of Lords affirmed the decision of the Court of Appeal. The mere fact that there had been sub-sales

Right of stoppage defeated only when sub-sale accompanied by transfer of document of title.

(*p*) 14 Ch. D. 446, C. A. The facts are taken from the agreed statement before the C. A., as modified by the supplementary statement laid before the H. L. 7 App. Cas. at 574. The statement of facts before the Court of Appeal was inaccurate as to the form of the documents given by the consignees to the sub-purchasers.

(*q*) The transfer of these had, by s. 5 of the Factors Act, 1877 (40 & 41 Vict. c. 39), the same effect as that of a bill of lading.

(*r*) *Per* Lord Cairns, L.C., in *Berndtson* v. *Strang* (1877) 3 Ch. 588; 37 L. J. Ch. 665, quoted *ante*, 1020; *per* Lord Selborne, L.C., in *Kemp* v. *Falk* (1882) 7 A. C. 573, at 578.

(*s*) *Sub nom. Kemp* v. *Falk* (1882) 7 A. C. 573; 52 L. J. Ch. 167.

(*t*) See note (*x*) *ante*, 1053.

did not displace the right of stoppage, for that righ
be defeated only by the absolute transfer of the bill o
(or other document of title) for valuable consideratio
right of stoppage, therefore, remained, subject only,
ing to the principle of *Re Westzinthus*, and *Spal
Ruding*, to the satisfaction of the bank's claim.

In this view it was unnecessary for their Lordship
press any opinion as to the correctness of the decisio
parte Golding, as Lord Blackburn and Lord Watson (
out. Lord Selborne, L.C. (*x*), without expressly me
that case, distinctly states his opinion to be, that, wh
buyers get a good title as against the right of stoppag
can be no such right as against the purchase-money
by them to the buyer, for the right of stoppage e
against the *goods* only. But he pointed out (probab
reference to *Ex parte Golding*) that when the right of s
exists, effect may well be given to it, and also to the ri
sub-buyers, by the sub-buyers paying to the original s
much of the purchase-money on the sub-sale as repres
amount of the original purchase price.

Opinion of Lord Selborne, that there is no right of stoppage as against sub-buyer's purchase-money.

And as to the effect of a sub-sale, Lord Blackburn sa
"No sale, even if the sale had been actually made wi
ment, would put an end to the right of stoppage in t
unless there were an indorsement of the bill of lading"

Semble, no right of intercepting sub-buyer's purchase-money under Code.

Such being the view submitted of the common law, th
seems to have made no change. The proviso to section
states when, or to what extent, the right is "defeated
there is nothing in its terms to suggest that the seller,
right of stoppage has been defeated, has a right to in
the sub-buyer's purchase-money. Again, under section
(section 9 of the Factors Act) (*b*), the disposition by the
is to have the same effect as if the buyer were a mer
agent in possession with the seller's consent, *i.e.*, as if
been expressly authorised by the seller; and here again,
are no words conferring on the seller, who is deemed t
authorised a sub-sale, and has thus lost all right of st
the goods, any right to call upon the sub-buyer to pa
amount of the original price to him. To enable him to
such a right would be to enable him to assert the ri

(*w*) 7 A. C. at 581, 588; 52 L. J. Ch. 167.
(*x*) At 577
(*y*) At 582.
(*z*) Lord Fitzgerald, however, reserved his opinion on this point
(*a*) *Ante*, 1053.
(*b*) *Ante*, 48.

stoppage which has been ousted by the operation of the Factors Act (*c*).

Transfer of bill of lading when indorsee knows that goods are unpaid for.

The transfer of the bill of lading, or other document of title, in order to affect the seller's right of stoppage in transitu, must be, both by the statute (*d*) and the common law, to a third person who takes it in good faith. A thing is done "in good faith" within the meaning of the Code if done honestly, whether negligently or not (*e*). This means, not without notice that the goods have not been paid for, because a man may be perfectly honest in dealing for goods that he knows not to have been paid for (*f*), but without notice of such circumstances as render the bill of lading *not fairly and honestly assignable* (*g*). Thus in *Vertue* v. *Jewell* (*h*), where Lord Ellenborough held that the seller had no right of stoppage, he said expressly that if such a right had existed against the consignee, he would have enforced it against Ayres, the indorsee of the bill of lading, because Ayres took the assignment of the bill of lading with a *knowledge of the insolvency* of the consignee.

Transfer must be for value.

The second condition is that the transferee of the document of title should give value for it.

Patten v. *Thompson* (1816).

In *Patten* v. *Thompson* (*i*), the buyers were in the habit of consigning goods to their factors for sale, and the factors used to accept bills drawn by the buyers in respect of a general account between them. The buyers indorsed to these factors a bill of lading received from the sellers, and representing goods of less value than the acceptances of the factors then current, but they made no appropriation of the bill of lading to any specific draft or balance. *Held*, that on the buyers' insolvency the sellers' right of stoppage had not been defeated by the indorsement of the bill of lading, as it was transferred to the factors without reference to any balance due to them.

(*c*) See *per* Lord Esher, M.R., in *Hugill* v. *Masker* (1889) 22 Q. B. D. 364, at 369; 58 L. J. Q. B. 171, C. A., a case under s. 1 of the F. A., 1877, corresponding to s. 9 of the F. A. of 1889, in which such a contention by the unpaid seller was negatived.

(*d*) S. 47 *ante*, 1053.

(*e*) Code, s. 62 (2). *Cf.* a similar definition in the Bills of Exchange Act, 1882, s. 90; and as to "good faith" see *per* Lord Blackburn in *Jones* v. *Gordon* (1877) 2 A. C. at 628–629; 47 L. J. Bk. 1; and *per* Lord Herschell in *London Joint Stock Bank* v. *Simmons* [1892] A. C. at 221, 229; 61 L. J. Ch. 723; and the subject discussed at length in Hutterworth's Bankers' Advances on Merc. Sec., 166, *et seqq.*

(*f*) *Cuming* v. *Brown* (1808) 9 East, 506; 9 R. R. 603.

(*g*) *Ib.*: *Salomons* v. *Nissen* (1788) 2 T. R. 674; 1 R. R. 592. See also *Rosenthal* v. *Dessau* (1877) 11 Hun, (N. Y.) 49 (collusion between buyer and third person to defeat right of stoppage).

(*h*) (1814) 4 Camp. 31. See also *Wright* v. *Campbell* (1767) 4 Burr. 2046, 5 M. & S. 350; 17 R. R. 359.

and therefore to them not as pledgees, but to enable them obtain possession of the cargo *quâ* factors only.

Transfer for antecedent debt good.

Rodger's Case (1868).

It was decided, by the Privy Council in *Rodger* v. *Comptoir d'Escompte* (*k*), that the forbearance or release o antecedent claim is not a good consideration for the tran of a bill of lading so as to defeat the right of stoppage transitu; on the ground that there is no advance made or v given *upon the faith of the documents*.

Leask v. *Scott* (1877).

But in *Leask* v. *Scott* (*l*), the Court of Appeal disse from this decision. There the defendants had sold a carg nuts to Geen & Co., who were largely indebted to the plai for past advances. Geen & Co. asked the plaintiff for a fur advance, which the plaintiff consented to make upon promise to cover their account (*i.e.*, to deposit securities). Geen & Co.'s undertaking to do so, but not mentioning particular securities, the plaintiff made the advance. *days after* Geen & Co. deposited (among other securities) the plaintiff the bill of lading for the nuts. Geen & having stopped payment, the defendants claimed the rig stop the nuts in transitu. The jury found that the pla received the bill of lading fairly and honestly. It was tended on behalf of the defendants, on the authority of *R* v. *The Comptoir d'Escompte*, that the equitable right of page must prevail against a legal title acquired by rece the bill of lading for a consideration, no part of which given *on the faith of* the bill of lading. The Court adm that the *ratio decidendi* of that case justified this conten but declined to adopt it. They held, therefore, that defendants' right of stoppage was defeated by the transf the bill of lading to the plaintiff, a *bonâ fide* holder for v and expressed a further opinion, that, from the nature case, such a consideration, although past in time, has a practically a present operation in "staying the hand o creditor," *i.e.*, in inducing the plaintiff to forbear to en his debt.

According to later cases, the last explanation is the true Thus it has been decided that an antecedent debt is not consideration for an assignment (*m*). Some further consi tion must be shown, as, *e.g.*, forbearance on the part creditor. But forbearance will be readily implied, and

(*k*) L. R. 2 P. C. 393; 38 L. J. P. C. 30; *cf. Chartered Bank of I Henderson* (1874) L. R. 5 P. C. 501, where the consideration was a prese

(*l*) 2 Q. B. D. 376; 46 L. J. Q. B. 576, C. A. See to the same eff *Emilien Marie* (1875) 44 L. J. Adm. 14.

(*m*) *Wigan* v. *English, etc. Corporation, post*, 1005 (n).

even be presumed, as where the assignment is communicated to the creditor, who could otherwise sue for the debt, and he accordingly does in fact forbear.

"I think," says Parker, J., in *Glegg* v. *Bromley* (*n*), "that where a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security." The case is stronger where the assignment is given in consequence of pressure (*n*).

But ante cedent debt must be agreed to be the consideration of transfer.

But, although an antecedent debt may be the basis of a good consideration for the transfer of a document of title, yet to defeat the unpaid seller's rights, the facts connected with the transfer must show that it was *agreed* that such debt should be the consideration. Thus the transfer will be ineffectual if the transfer be unknown to the transferee (*n*). And the pledge of a bill of lading specifically for a definite sum does not entitle the pledgee, as we have seen, to hold the goods against the seller *also* in respect of the pledgee's general balance of account against the buyer, even although the pledgee be the buyer's factor (*o*).

SECTION VI.—WHAT IS THE EFFECT OF A STOPPAGE IN TRANSITU?

Effect is to restore the goods to seller's possession, not to rescind the sale.

There can no longer be a reasonable doubt that at common law the true nature and effect of this remedy of the seller is simply to restore the goods to his *possession*, so as to enable him to exercise his rights as an unpaid seller, not to rescind the sale (*p*). The point, however, has never been directly decided, because the circumstances are rarely such as to raise the question. But the strongest ground for holding the question to be at rest was that Courts of Equity assumed regular jurisdiction of bills filed by sellers to assert their rights of stoppage *in transitu*, a jurisdiction totally incompatible with the theory of a rescission of the contract: for if the contract

(*n*) *Glegg* v. *Bromley* [1912] 3 K. B. 474; 81 L. J. K. B. 1051, C. A., *approving Wigan* v. *English and Scottish Law Life Assurance Corporation* [1909] 1 Ch. 291; 78 L. J. Ch. 120; *Leask* v. *Scott* was cited in neither case.

(*o*) *Spalding* v. *Ruding* (1843) 3 Beav. 376; 12 L. J. Ch. 503; 63 R. R. 120; *ante*, 1060.

(*p*) See *Wentworth* v. *Outhwaite* (1842) 10 M. & W. 436; 12 L. J. Ex. 172; 62 R. R. 664 (Abinger, C.B., *diss.*); *Martindale* v. *Smith* (1841) 1 Q. B. 389; 10 L. J. Q. B. 155; 55 R. R. 285, *ante*, 945; *Re Humberston* (1846) De G. 262; 15 L. J. (N. S.) B. K. 10; *per* Cairns, L.J., in *Scholsmans* v. *Lanc. & Y. Ry. Co.* (1867) 2 Ch. at 340; 36 L. J. Ch. 361; *per* Cotton, L.J., in *Phelps* v. *Comber* (1885) 29 Ch. D. at 821; 54 L. J. Ch. 1017; *per* Lord Blackburn in *Kemp* v. *Falk* (1882) 7 A. C., at 581; 52 L. J. Ch. 167.

were rescinded, there would be no privity in a Court o between the parties (*q*).

This view has now been confirmed by the Code declares that: –

Code, s. 48 (1). "**48.**—(1.) Subject to the provisions of this section (*r*), a of sale is not rescinded (*s*) by the mere exercise by an unpaid his right of lien or retention or stoppage in transitu."

The effect of a stoppage is further shown by section be that the seller "may *resume possession* of the goo and may *retain* them until payment or tender of the In other words, a stoppage in transitu enables the resume his *lien*. He may, therefore, after a stopp the expiration of the credit, maintain an action for go gained and sold (*u*).

Quasi-right of stoppage. It has been shown that section 39 (2) (*x*) gives th where the property has not passed, "a right of wit delivery similar to and co-extensive with his rights of stoppage in transitu." Thus the unpaid seller has n *quasi-lien*, but also what may be called a *quasi-right page*. He may, therefore, when the property has not pa the buyer has become insolvent, give a notice to the c withhold delivery. Of course, if the buyer has faile form some condition precedent to his right to posses seller may, on general principles, and without the a of this clause, take back the goods by virtue of his o and right of possession, without committing any b contract. But section 39 (2) seems in this connection to meet the case where the buyer would be entitle possession were it not for his insolvency.

Civil law. It was a well-known rule of the civil law that on goods for ready money the property in them did no the buyer, even after delivery, until he had paid or h

(*q*) This was pointed out by Lord Cairns in *Schotsmans* v. *L. & way Co.*, *ante*, 1065 (*p*). See also *Cross* v. *O'Donnell* (1871) 44 N

(*r*) *I.e.*, the provisions declaring the title of a buyer on resale by sub-s. 2; right of resale of perishable articles, etc., subs. 3; right of power expressly reserved sub-s. 4. See the Chapter on Resale, *post*, 10

(*s*) *I.e.* cannot be treated by the seller as rescinded, for the not so treat it in his own wrong: *Malins* v. *Freeman* (1838) 4 Bing. 7 L. J. (N. S.) C. P. 212; 44 R. R. 737.

(*t*) Set out *ante*, 1003.

(*u*) *Kymer* v. *Suwercropp* (1807) 1 Camp. 109; 10 R. R. 6 speaking, this was a case in which the seller exercised his right of *l* right is called in the report, as frequently happens, a right of sto same principles apply to both classes of right.

(*x*) Set out *ante*, 951.

security for the price unless credit was given (*g*). The unpaid and unsecured seller might pursue and retake the goods as his own property out of the possession of the buyer, or even of third persons who had *bonâ fide* given value for them (*z*). And even where the sale was on credit (and credit might be presumed from a delivery to the buyer) although the property in the goods passed to the buyer from the time of delivery, the seller might still be protected by a *pactum adjectum*, an express term (*a*) in the contract, *e.g.*, a *pactum reservati dominii*, whereby he retained the property in himself until payment, even after a delivery, and so could bring a *vindicatio* for the goods on the buyer's default (*b*), or a *lex commissoria*, which was a resolutive condition making the sale voidable at the seller's option on the buyer's failure to pay at the expiration of the credit (*c*). So also there might be a *pactum reservatæ hypotheca* whereunder the seller reserved a right in security over the goods, entitling him to resume possession in the event of non-payment (*d*).

Modified in European States.

These rules were the general basis upon which was founded the old law of France, Spain, Italy, Germany, Holland, and in fact of nearly all the States of the Continent. With the growth of commerce and credit, however, it was found necessary to modify the established law. Merchants were liable to be deprived of goods for which they had paid, by some original seller who remained unpaid, and were exposed to ruin by giving credit on the faith of a large stock-in-trade, which was possibly subject to the latent but preferable claim of original sellers. Hence towards the end of the eighteenth, and early in the nineteenth century, the right of stoppage in transitu was incorporated in the municipal codes of commercial states, and became a part of the mercantile law of Europe.

(*g*) The rule was as old as the Twelve Tables. "Venditæ vero res et traditæ non aliter emptori adquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit veluti expromissore aut pignore dato. *Quod caretur quidem etiam ex lege XII. Tabularum*, tamen recte dicitur et jure gentium, id est jure naturali, id effici. Sed si is qui vendidit fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri": Inst. 2. 1. 41. See also Dig. 14. 4. 5. 18; 18. 1. 19.

(*z*) Abbott on Ship., 5th ed. 365; 14th ed. 812, quoted in Blackburn on Sale, 202; see also 203; 2nd ed. 314—315.

(*a*) Bowen, L.J., in *Kendal* v. *Marshall* (1883) 11 Q. B. D. 356, at 368; 52 L. J. Q. B. 313. C. A., says that the civil law allowed the seller to retake the goods even after a sale on credit and delivery, if the buyer became insolvent. Mr. Moyle points out (Cont. of Sale in Civil Law, 155) that no authority has been found for this proposition, and that the Lord Justice was probably thinking of an express reservation of the *dominium*, or of a *hypotheca*.

(*b*) Dig. 43. 26. 20; Moyle's Contract of Sale in the Civil Law, 154.

(*c*) Dig. 18, 3, 1, 2, and 3; Code. 4. 54, 1.

(*d*) Moyle's Cont. of Sale, *supra*.

Ancient and modern French law.

The ancient law of France is thus stated in a w
authority (*e*). "By the general law of France, in the
insolvency, 'the seller who has sold a thing, and still
of the money which he was to have for it, if he finds th
that he sold in the hands of the buyer, may seize on it,
is not obliged to share it with the other creditors
buyer.'" And the seller retained this right even the
had given credit, the French law being in this respe
favourable to the seller than the civil law: on the othe
he could not, as he might have done under that law
the goods into the hands of a sub-buyer (*f*).

The unpaid seller's rights under the modern French
now regulated by certain articles of the Civil Code an
Code of Commerce. His right of lien (*retention*),
demanding the rescission of the sale, on the buyer's de
payment, have been already stated in the Chapter on I
Other rights are as follows:—

When the goods have been delivered, the unpaid s
in certain cases a preferential claim over the other cre
the buyer (*privilége*), and also a right to demand re-
of the goods. These rights are declared by Articles 2
2102 (4) of the Civil Code, but the latter clause
repealed in cases in which the buyer is bankru
privileged debts are:—

1. In respect of articles of food supplied to the de
his family during the preceding six months
traders, such as bakers and butchers, or du
preceding year by the landlord of the boardi
(*pension*) and wholesale traders. This priv
however, subject to certain other debts,
law court charges (*frais de justice*),
expenses, &c. (*h*).

2. In respect of the price of movable effects not pa
they are still in the possession of the de
whether they were bought on credit or for
terme ou sans terme); but subject to the cla
owner of the house or farm, unless it be pr
such owner knew that the movables and oth
furnishing the house or farm did not belo
tenant (*i*).

(*e*) Abbott on Ship., 5th ed. 365, citing Domat Civ. L., Bk. 1
art. 3; 14th ed., 812, quoted in Blackburn on Sale, 202; 2nd ed. 3
(*f*) Blackburn on Sale, 203; 2nd ed. 315.
(*g*) *Ante*, 1000. (*h*) Art. 2101. (*i*) Art.

The seller may also, if the sale be without credit, claim re-delivery (*revendiquer*) of the movable effects so long as they are in the possession of the buyer, and may restrain their resale, provided the claim be made within eight days after delivery, and the effects are in the same state as on delivery (*j*).

The seller who reclaims the goods recovers possession of the goods as security for payment, and without prejudice to the sale, which is still valid, and may be enforced as well against the seller as against the buyer (*k*).

The above provisions are general ones. In the case of the buyer's bankruptcy they are modified. In that case the seller loses both his preferential claim on the goods in the bankrupt's possession, and his right of demanding re-delivery, and stands on the same footing as the other creditors of the bankrupt (*l*). If the bankrupt, however, were not the buyer of the goods, but the goods had been consigned to him as bailee (*à titre de dépôt*) or for sale on commission, they may be reclaimed so long as they exist in specie (*en nature*), wholly or in part. If the goods have been sold by the bankrupt, the consignor may intercept so much of the price due from the purchaser to the bankrupt as has not been paid, settled by security, or set off in an account current between the bankrupt and the buyer (*m*). If the goods have been forwarded by the seller to the bankrupt buyer, the seller may stop them so long as they are still in transit, and have not been delivered into the bankrupt purchaser's warehouse, or into the warehouse of his commission agent. They cannot, however, be stopped, if before arrival they have been sold without fraud upon the faith of invoices, bills of lading, or way-bills (*sur factures, et connaissements ou lettres de voiture*), signed by the consignor. The seller, if he exercise the right, must repay to the bankrupt's estate any sums received on amount of the price, as well as all advances actually made by the bankrupt on account of the freight, carriage, commission, insurance, or other expenses, and must also pay what remains due on account of these charges (*n*). The committee of the bankrupt's creditors (*les syndics*) have the right, under the authority of the *juge commissaire*, to demand delivery of the goods on payment of the price (*o*).

(*j*) *Ibid.*

(*k*) Code of Commerce, by Goirand, 2nd ed. [1898], 385.

(*l*) Code of Com., Art. 550, repealing, so far as regards the bankruptcy of the buyer, the Civil Code Art. 2102 (4).

(*m*) Code of Com., Art. 575.

(*n*) Code of Com., Art. 576. The last clause seems to assume that the effect of the exercise of the right is to rescind the sale. (*o*) *Ibid.* Art. 578.

Scotland.

The right of stoppage in transitu was introduced i
law of Scotland just a century after its recognition (*p*)
English Courts. Down to the year 1790 the doctrine
sumptive fraud, which was based upon the right of th
under the civil law to reclaim the goods even after deli
non-payment of the price, and which empowered the
seller to retake possession of the goods if the buyer
bankrupt within a period of three days (*intra triduum*
their delivery, seems to have prevailed (*q*). This rig
based on the assumption that the buyer must have
known of his impending bankruptcy and fraudulent
cealed it. In the year 1790 the House of Lords, in d
an appeal from the Court of Session in Scotland (*r*), ov
the doctrine of presumptive fraud, and asserted that th
of stoppage in transitu was conformable to the law of Sc
Since then the doctrine has been established in Sc
though the nature of the remedy was up to the year 184
McEwan v. *Smith* (*s*) was decided, apparently not fully
stood, and it was regarded as springing out of the
original right of property, which accompanied the goo
ing the transit, and enabled the seller to withhold
delivery (*t*). Lord President Inglis, however, in 1867 (
down the law of Scotland on this question in term
formable with the English authorities.

Stoppage in transit under Quebec Civil Code.

By Article 1492 of the Civil Code of Lower Canada d
is defined as "the transfer of the thing sold into the
and possession of the buyer." And by Article 1497
seller is no longer liable to the delivery, although he
have granted credit for payment, if since the sale the
have become insolvent so that the seller finds himse

(*p*) In *Wiseman* v. *Vandeputt* (1690) 2 Vern. 202.

(*q*) See *Inglis* v. *Royal Bank* (1736) Mor. 4936.

(*r*) The noted case of *Jaffrey* (*Stein's Creditors*) v. *Allan, Stewart* (1790) 3 Paton, 191. The judgment of the House was based on the op
Lord Thurlow.

(*s*) (1849) 2 H. L. C. A. 309; 81 R. R. 166.

(*t*) *Per* Lord Justice Clerk Hope in *Louson* v. *Craik* (1842) 4 D.
The Court of Session in *McEwan* v. *Smith* based their opinions on the
right of stoppage. Lord Campbell in the House of Lords said that stop
transitu had no more to do with the case (which was one of lien) th
tingent remainders. The Court of Session in *Melrose* v. *Hastie* (1851)
880), retorted with justice by saying that they had been misled by the
the term in English cases similar to *McEwan* v. *Smith*, such as *Ha*
Mangles (1808) 1 Camp. 452; 10 R. R. 727, and *Storeld* v. *Hughes* (1
East, 308; 12 R. R. 523, where the term was inaccurately used.

(*u*) In *Black* v. *Incorporation of Bakers* (1867) 6 Macph. 156, at 14
on the subject generally Brown's Sale of Goods Act, at 204—207, from
some of the foregoing remarks have been derived.

imminent danger of losing the price, unless the buyer give him security for payment at the expiration of the credit."

Commenting on these articles De Lorimier, J., says in *Abinovitch* v. *Ehrenbach* (*x*): "Whether the English doctrine of stoppage in transitu has, or has not, been recognised by our Courts as being the law of this Province, there can be no doubt that, under the provisions of Articles 1492 and 1497 of the Civil Code, the unpaid vendor has substantially the same right, and may recover goods, either by judicial proceedings, or with the consent of the forwarding agent or carrier, so long as the goods have not actually come into the power and possession of the buyer who has become insolvent. The English authorities on the subject, in defining the duration of the transit, would therefore apply."

(*x*) [1911] 4 Queb. L. R. 55, where the English cases are cited.

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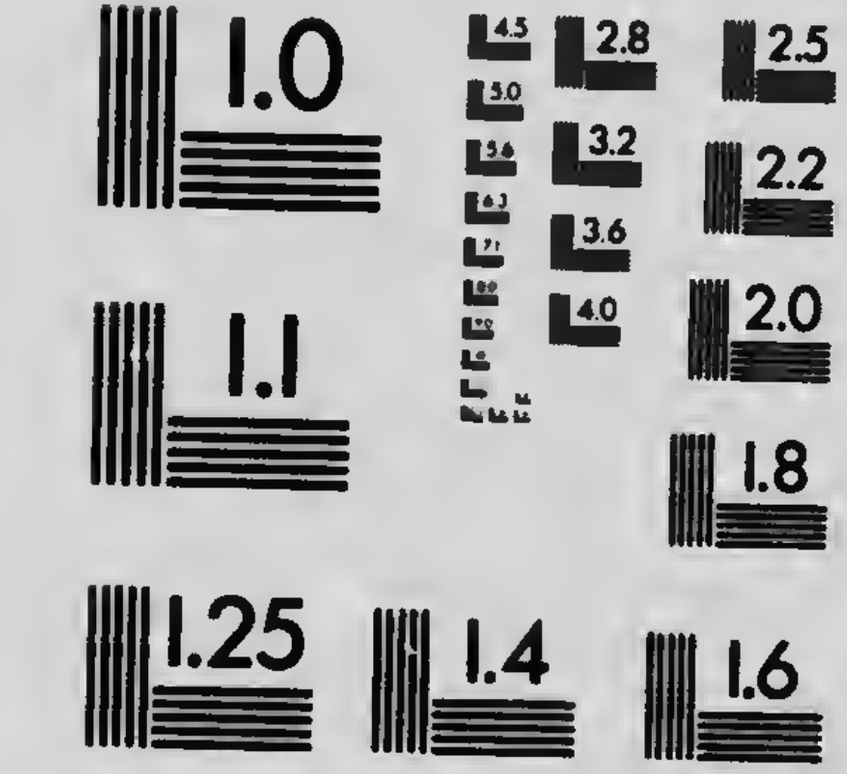

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CHAPTER V.

REMEDIES AGAINST THE GOODS—RESALE.

Where the buyer has failed to perform a condition precede
to his right to the possession of the goods—*e.g.*, by delayi
payment where punctual payment is a condition—the sell
may revest the property in himself and resell the goods
owner (*a*). But we have seen that the seller has no right
rescind the sale when the buyer is merely in default for t
payment of the price, where, as is usually the case, punctu
payment is not a condition precedent (*b*). This suggests
once other important questions. What is a seller to do
the buyer, after notice to take the goods and pay the pri
remain in default? Must he keep them until he can obta
judgment against the buyer and sell them on execution? Wh
if the goods be perishable (*c*), like a cargo of fruit, or expe
sive to keep, as cattle or horses?

May seller resell if buyer continues in default?

The seller may, of course, request the buyer to take delive
of his goods, and on the buyer's failure to do so charge hi
any loss occasioned thereby, and the reasonable expenses
the care and custody of the goods (*d*). But what are t
seller's rights if he does not take that course? Can he resel
And what is the effect of a resale?

Statement by the Privy Council in *Page* v. *Cowasjee* (1866).

In *Page* v. *Cowasjee* (*e*), in 1866, Lord Chelmsford
delivering the judgment of the Privy Council thus stated t
common law:—

"*Martindale* v. *Smith* (*f*) and other cases have determin
that where there is an agreement to purchase property, to
paid for at a future time, and the money is not paid *at t*
day, the property remaining in the possession of the vend

(*a*) See *per* Lord Abinger, C.B., in *Wimshurst* v. *Bowker* (1843) 12 L.
Ex. 475; 66 R. R. 806, at 476, Ex. Ch.; and the S. C. in the C. P. (18
2 M. & G. 792.

(*b*) *Ante*, 674 and 945; Code, s. 10 (1), *ante*, 674. See also s. 48
ante, 1066.

(*c*) As to the sale of perishable goods, see *post*, 941, 955.

(*d*) *Per* Lord Ellenborough in *Greaves* v. *Ashlin* (1813) 3 Camp. 426;
R. R. 771; Code, s. 37, *ante*, 854.

(*e*) (1866) L. R. 1 P. C. 127, at 145—146; 3 Moo. P. C. (N. S.) 499, at 52

(*f*) (1841) 1 Q. B. 389; 10 L. J. Q. B. 155; 55 R. R. 285. *ante*, 674. a
945.

he has no right to sell it, and if he does the purchaser may maintain trover against him (*g*). There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price after receiving express notice from the vendor that, if he fail to do so, the goods will be resold. But the authorities are uniform on this point, that if before actual delivery the vendor resells the property while the purchaser is in default, the resale will not authorise the *purchaser* to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it (*h*) which may be still due."

What default of buyer will justify a resale.

It becomes, therefore, essential to consider what kind of default on the part of a buyer justifies a resale by the seller. Up to 1875 no attempt appears to have been made by Judges at a definition. In that year Keating, J., in *Ogg* v. *Shuter* (*i*), laid down the law that the seller's right of resale depends upon whether there has been an absolute refusal by the buyer to perform his part; in other words, whether there has been a repudiation, so as to entitle the seller to rescind the contract and resell the goods. The view that the right of resale rests wholly upon the buyer's repudiation has been endorsed by the Court of Appeal in *Cornwall* v. *Henson* (*k*), an action relating to the sale of land, where the buyer's conduct was alleged to amount to an implied repudiation (*l*).

Two tests whether seller may by resale rescind the contract.

Two test questions may be put which, if answered in the negative, go far to show that a seller by reselling rescinds the contract:—1. Is the buyer still liable for the price? 2. Is he entitled to any profits realised? The first question has been answered in the negative in *Chinery* v. *Viall* (*m*); and although there is no authority which supplies an answer to the

(*g*) That is, if before action the buyer tenders the price.

(*h*) The expression "balance of the price" in this connection is not to be taken literally. After such resale the seller could not in any form of action recover the price, but only damages for the injury sustained by him: *Chinery* v. *Viall* (1860) 5 H. & N. 288, at 294; 29 L. J. Ex. 180; 120 R. R. 588, *post*, 1079.

(*i*) (1875) L. R. 10 C. P. 159, at 165, *post*, 1080.

(*k*) [1900] 2 Ch. 298, C. A., *post*, 1078.

(*l*) This theory is supported by the rules laid down in New York and other States of America as to the seller's option to "keep the property as his own." See the third rule in *Dustan* v. *McAndrew* (1870) 44 N. Y. 72. This rule has been drawn by the New York Judges as a logical deduction from the early English cases, and from their own leading case of *Sands* v. *Taylor* (1810) 5 Johns. (N. Y.) 395, which is in all material respects identical with *Maclean* v. *Dunn* (1828) 4 Bing. 722, *post*, 1075, the leading case on the law of resale in England.

(*m*) (1860) 5 H. & N. 288; 29 L. J. Ex. 180; 120 R. R. 588, *post*, 1079.

second, it is submitted that it also should be answered i
negative (*n*).

Review of authorities.

It will be convenient to consider—A. Cases where the
resells the goods *before* delivery; and B. Cases wher
seller tortiously takes the goods back *after* delivery an
sells them (*o*).

A. Resale of goods before delivery.

I. Actions on contract.

The first authority to be found in the books, and the
classicus on the subject both in England and America,
ruling of Lord Holt in the following case (*p*).

Langfort v. *Tiler* (1704).

In *Langfort* v. *Tiler* (*q*), Holt, C.J., ruled, in 1704,
"after earnest given, the vendor cannot sell the goo
another without a default in the vendee; and therefore,
vendee does not come and pay and take the goods, the v
ought to go and request him; and then, if he does not
and pay and take away the goods in convenient time,
agreement is dissolved (*r*), and he is at liberty to sell the
any other person."

For the price. *Hore* v. *Milner* (1797).

In *Hore* v. *Milner* (*s*), the plaintiff had sold potatoes
taken away in a month. A month having elapsed wi
delivery, the plaintiff resold the potatoes and sued for
bargained and sold. Lord Kenyon, at Nisi Prius in 1797,
"that the plaintiff, having resold the commodity, had by
act abandoned his right to insist on the defendant takin
goods; he had not considered them as the property of
defendant, . . . and therefore could only recover damage
the breach of the agreement." The seller could, there
no longer treat the contract as a bargain and sale, but he
still rely upon it as an agreement to sell.

(*n*) See *post*. This view is taken by s. 107 of the Indian Co
(No. 9) of 1872). See also *per* Lord Eldon in *Ex parte Hunter* (1801)
94 (Sale of land), where the power was express.

(*o*) *Post*, 1086.

(*p*) But over two centuries before, in a case in the reign of Edw. 4.
Y. B. Edw. 4, pl. 1, 2, several of the Judges used as an argument, to sho
the property had *not* passed, the fact that, if it had passed, and the pric
not paid, the seller would have to keep the goods "for ever" against hi
thus by implication negativing the right of resale. See the case transla
Blackburn on Sale, at 190—195; 2nd ed. 261—265. See also *ibid.* 317
2nd ed. 452—453.

(*q*) 1 Salk. 113; 6 Mod. 162; Holt, 96; cited by Lord Ellenboro
Hinde v. *Whitehouse* (1806) 7 East, 558, at 571; 8 R. R. 676, a
Littledale, J., in *Bloxam* v. *Sanders* (1825) 4 B. & C. 945; 28 R. R. 5

(*r*) For the meaning of this word, see Van Ness, J., in the leading
Sands v. *Taylor* (1810) 5 Johns. (N. Y.) 395; 963, who interprets Lord
language as referring to a rescission subject to the seller's right to da
and not to a *restitutio in integrum*. And that the conduct of the buye
templated by Lord Holt was a repudiation is the view of *Langfort* v. *Tiler*
in 1 Sm. L. C. 7th ed. 816—817; 11th ed. 741.

(*s*) Peake, 58, n. It seems clear that Lord Kenyon's language do
bear out Lord Blackburn's comment (Cont. of Sale, 330; 2nd ed. 463—464
"Lord Kenyon seems to have considered a resale absolutely tortious."

For non-acceptance. *Maclean* v. *Dunn* (1828).

In *Maclean* v. *Dunn* (*t*), in 1828, which is the leading case on the subject, the seller resold the goods at a loss after repeated requests that the buyer should take them, and a final notice of resale for a specified day. In an action for non-acceptance to recover this loss, it was objected for the defendants that the resale rescinded the contract *for all purposes*, and thus deprived the plaintiff of any right to sue for a breach of it.

Best, C.J., after advisement, gave the decision of the Court that the resale did not "rescind" the contract, and that the buyers might be sued in assumpsit on the original contract. The reasoning was as follows: "With regard to the resale, it seems clear to me that it did not rescind the contract. It is admitted that *perishable articles* may be resold. It is difficult to say what may be esteemed perishable articles and what not, but if articles are not perishable *price is*, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it except on the authority of decided cases. . . . It is clear, and must certainly be admitted, that, to entitle the vendor to recover against the purchaser the full amount of the price agreed to be paid for the articles in the first instance, he must show that they continue in his possession ready to be delivered: not so when he sues for a breach of contract only (*u*). If he sues for *damages* . . . it is not necessary that he should retain dominion over the goods: he merely alleges that a contract was entered into for the purchase of certain articles, that it has not been fulfilled, and that he has sustained damage in consequence (*x*). . . . It is not inconvenient that when a party refuses to take goods he has purchased they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept, and at all events there is the risk of the price becoming lower."

All that it was necessary to decide, and that was decided, in

(*t*) (1828) 4 Bing. 722; 6 L. J. C. P. (O. S.) 184; 1 M. & P. 761. Treated in America as overruling *Greaves* v. *Ashlin* (1813) 3 Camp. 426; 14 R. R. 771: *per* Sandford, J., in *Crooks* v. *Moore* (1848) 1 Sandf. 297 (N. Y. City Sup. Crt.).

(*u*) This sentence is taken from the L. J. report. The report in 1 M. & P. at 781, is put in equally certain terms. See also *Chinery* v. *Viall* (1860) 5 H. & N. 288, at 294; 29 L. J. Ex. 180; 120 R. R. 588.

(*x*) See also *per Cur.* in *Acebal* v. *Levy* (1834) 10 Bing. 376; 3 L. J. C. P. 98; 38 R. R. 469

this case was that the contention of the buyers that t
effe[illegible]d a *restitutio in integrum*, depriving the sell
right of action, was incorrect. In that sense the con
Scope of the decision. not "rescinded" (*y*). In 1828 the modern view th
one of the parties to a contract has repudiated it the o
treat it as rescinded, and yet sue for damages arising
breach had not been developed (*z*).

Return of purchase-money. *Fitt* v. *Cassanet* (1842). In *Fitt* v. *Cassanet* (*a*), the buyer sued for money
received to recover the deposit of £22 paid upon a pu
£8 a ton of a specific bulk of thirteen tons of
scrapings by sample. Five tons were delivered, and
buyer gave the seller notice to take away the casks d
as not being according to sample, and to repay the
The seller resold the remainder of the scrapings at
ton, but it did not clearly appear whether he did so
after the buyer's notice. After a verdict for the defe
was contended by the buyer, on the argument of a r
new trial, that by reason of the resale he was entit
matter *of law* to consider the sale as rescinded. *H*
the buyer was bound to prove that the seller had reso
the notice to remove the goods, and this he had faile
that the fair inference was that the resale was made
notice repudiating the contract, and, that being so, t
was entitled to resell, and the resale could not be tr
the *buyer* as a rescission of the contract; consequently
action for money had and received would not lie (*b*);
had the seller resold before the buyer's default, th
might have treated the contract as at an end, and r
the deposit.

Buyer not in default. *Wilmshurst* v. *Bowker* (1844). In *Wilmshurst* v. *Bowker* (*c*), already noticed, th
of wheat were to transmit a banker's draft on receip
invoice and bill of lading. They failed to do so,
sellers at once got the wheat back from the carrier a
it at a profit. In an action on the case for non-deliv
Exchequer Chamber held that the pleadings were c
with the view that the sending of the draft by the bu

(*y*) The use of this word without explanation in s. 48 (4) of th
led to difficulties of interpretation. See *post*, 1083.

(*z*) See rescission discussed by Bowen, L.J., in *Boston Deep Se*
v. *Ansell* (1888) 39 Ch. D. 339, C. A.; 59 L. T. 345.

(*a*) 12 L. J. C. P. 70; 4 M. & G. 898. See also *Howe* v. *Smith*
Ch. D. 89, C. A.

(*b*) See also *Smith* v. *Butler* [1900] 1 Q. B. 694; 69 L. J. Q. B.

(*c*) (1841) 10 L. J. C. P. 161; 2 M. & G. 792; in Ex. Ch. (1844
Ex. 475; 7 M. & G. 882; 66 R. R. 806, *coram* Lord Abinger, C.B.,
Alderson, B., and Rolfe, B., and Patteson, J., Coleridge, J., and
J., *ante*, 434.

not a condition precedent, but that it might be done *after* they received the bill of lading, as a matter of obligation only, and that the sellers were accordingly liable on the record. This was in effect equivalent to holding that on the record the resale was wrongful.

Effect of resale under express power.

Lamond v. *Davall* (1847).

In *Lamond* v. *Davall* (*d*), in 1847, the seller brought assumpsit for shares bargained and sold, and sold and delivered. At an auction the defendant had bought, at £79 certain shares, one of the conditions of the sale being that the goods might be resold unless the purchase-money was paid on the following day, the bidder so making default to be answerable for the loss on the resale. The seller resold for £63, and sued for the full price of £79. Erle, J., nonsuited the plaintiff, on the ground that the power of resale was in effect a condition for making void the sale on default of the buyer, and that the actual resale had rescinded the original contract, so that assumpsit could not be maintained on it. On motion to enter a verdict for the plaintiff it was contended on his behalf that the original sale was absolute, and that the plaintiff had resold as the defendant's agent, but the nonsuit was upheld after advisement.

Lord Denman, C.J., said: "It appears to us that a power of resale implies a power of annulling the first sale, and that therefore the first sale is *on a condition*, and not absolute. There might be inconvenience to the vendor if the resale was held to be by him *as agent* for the defaulter (*e*), and there is injustice to the purchaser in holding him liable for the full price of the goods sold, though he cannot have the goods, and though the vendor may have received the full price from another purchaser. This inconvenience and injustice would be avoided by holding that the sale is conditioned to be void in case of default, and that the defaulter in case of resale is liable for the difference and expenses. The ruling at Nisi Prius in *Mertens* v. *Adcock* (*f*) is contrary to the opinion of Gibbs, C.J., in *Hagedorn* v. *Laing* (*g*); and in *Maclean* v. *Dunn* (*h*) the action for *damages* for the loss on resale is spoken of as the proper course where the power of resale is exercised without an express stipulation for it."

(*d*) 9 Q. B. 1030; 16 L. J. Q. B. 136; 72 R. R. 502.

(*e*) See also *Simmonds* v. *Miller & Co.* [1898] 15 T. L. R. 100, where a buyer repurchasing, on the seller's default, under express power, was treated as purchasing on his own account, and could retain profit.

(*f*) (1813) 4 Esp. 251.

(*g*) (1815) 6 Taunt. 162; 1 Marsh. 514.

(*h*) (1828) 4 Bing. 722; 6 L. J. C. P. (O. S.) 184. *ante*, 1075.

This case an authority though there be no express power.

It is submitted that the inference that, whereas a under an express power rescinds the contract, a rightful where there is no express power does not rescind it, properly be drawn from the judgment in *Lamond* v. No distinction is drawn by the Court, who cite *Hagedo Laing* (*i*), where there was express power to resell, and *M* v. *Dunn* (*k*), where there was no such power, as alike su ing their decision, and in *Chinery* v. *Viall* (*l*), where was no express power of resale, the Court of Exc followed *Lamond* v. *Darall*, without regard to any distinction.

Buyer's repudiation essential.

Cornwall v. *Henson* (1900).

In *Cornwall* v. *Henson* (*m*), the plaintiff agreed to pu a parcel of land for £150. He paid £40, and agreed the balance by quarterly instalments, and entered into sion, and cultivated the land for some time, but did not profitable. He paid all the instalments except the la then disappeared entirely for a considerable time, leav land in a derelict state, and not worth the instalment the fences were broken down, the road not made, and th and tithe unpaid. The defendant, the seller, entere possession, and, after attempting to resell it, let it fo years to a tenant with an option of purchase. The p then reappeared, and offered to pay the last instalment, settlement was made. *Held*, by the Court of A *reversing* Cozens-Hardy, J., that the plaintiff's cond not amount to repudiation, and that repudiation was t ground on which the defendant could base any right with the land, and, therefore, that the defendant was l damages.

II. Actions in tort.

In relation to the cases in which the buyer sued in for a tortious resale by the seller, *Martindale* v. *Sm* may be at once distinguished by the circumstance t

Resale when buyer not in default.

resale in that case was made *after* the buyer had w reasonable time *tendered the price*, a proceeding to w countenance has been given by any dictum or any decid To the later cases of *Chinery* v. *Viall* (*o*) and *C Foster* (*p*) the same remark applies, the seller having before the buyer was in default.

(*i*) (1815) 6 Taunt. 162; 1 Marsh. 514.
(*k*) (1828) 4 Bing. 722; 6 L. J. C. P. (O. S.) 184; 1 M. & P. 761, o
(*l*) (1860) 5 H. & N. 288; 29 L. J. Ex. 160; 120 R. R. 588, *post*.
(*m*) [1899] 2 Ch. 710; *revd.* in C. A. [1900] 2 Ch. 298; 69 L. J. C
(*n*) (1841) 1 Q. B. 389; 10 L. J. Q. B. 155; 55 R. R. 285, *ante*
(*o*) (1860) 5 H. & N. 288; 29 L. J. Ex. 180; 120 R. R. 588, exam another point, *infra*.
(*p*) [1892] 61 L. J. Q. B. 643.

In *Milgate* v. *Kebble* (*q*), the defendant sold to the plaintiff his crop of apples, for £38, to be paid by instalments *before* the buyer took them away. The buyer paid £33 on account, and gathered the apples on the 1st of October, leaving them in the defendant's kiln. On the 27th of December the defendant wrote to the plaintiff a notice to pay the £5 due and take the apples away, and again on the 9th of January he wrote that the apples were spoiling, and that he should resell them unless they were removed by the 11th. This not being done, the defendant resold the apples for £6 on the 22nd of January. The jury found that a reasonable time had not elapsed before the resale, and gave a verdict for £5 damages to the plaintiff. On leave reserved, a motion for a nonsuit was successful, on the ground that the seller's right of *possession* was not lost so as to enable the plaintiff to maintain *trover* against him. Tindal, C.J., said the buyer was in the condition of a pledgor, who cannot bring trover.

Buyer cannot maintain trover unless entitled to possession. *Milgate* v. *Kebble* 1841).

This case usefully illustrates the distinction between the default on the part of the buyer which bars an action of trover and that which bars an action on the contract. The finding of the jury in *Milgate* v. *Kebble* that a reasonable time had not elapsed before the resale shows that the buyer would have been able to prove that he was ready and willing to accept and pay for the goods, and might have sued the seller for non-delivery, as in *Woolfe* v. *Horne* (*r*).

In *Chinery* v. *Viall* (*s*), in 1860, in the Exchequer of Pleas, the defendant had before delivery made a tortious resale of certain sheep sold by him to the plaintiff *on credit*. The buyer's declaration contained two counts: one on the contract, for non-delivery, and the other in trover. On the first count there was a verdict for £5, being the excess in the market value of the sheep over the contract price; on the second count there was a formal verdict for £118 19s., the whole value of the sheep, without deducting the unpaid price, with leave reserved to the defendant to move for a verdict in his favour on that count, or to reduce the damages. The Court held the count in trover maintainable, the buyer having at the time of the resale been entitled to possession; but on the question of

Chinery v. *Viall* (1860).

(*q*) 3 M. & G. 100; 10 L. J. C. P. 277; 60 R. R. 475. *Cf. Chinery* v. *Viall* (1860) 5 H. & N. 288; 29 L. J. Ex. 180; 120 R. R. 588, *infra*. As to the plaintiff's right of possession in trover, see *Gordon* v. *Harper* (1796) 7 T. R. 9; 4 R. R. 369; *Bradley* v. *Copley* (1845) 1 C. B. 685; 14 L. J. C. P. 222.

(*r*) (1877) 2 Q. B. D. 355; 46 L. J. Q. B. 534, *ante*, 674.

(*s*) 5 H. & N. 288; 29 L. J. Ex. 180; 120 R. R. 588. See remarks on this case in *Gillard* v. *Brittan* (1841) 8 M. & W. 575; 11 L. J. (N. S.) Ex. 133, *post*, 1087.

damages it was held that as the seller, on *Lamond* v. *Davall* (*t*), could not sue for the ... plaintiff could only recover the actual loss sustained ... whole value of the sheep for which he had not paid ... damages were reduced to £5 (*x*).

After a resale seller cannot sue for price.

This decision finally settled in the negative the ... whether a seller who has, without express power, re... delivery may sue for the price of the goods. For, ... seller, who has not at the time of action made deli... sometimes, without delivery, maintain a count for ... gained and sold (*y*), yet in order to do so he must ... position *ultimately* to deliver the goods (*z*), except ... single case where the goods have perished and the r... the buyer (*a*). The point is more important than ... first sight, for it may sometimes be necessary to ... whether the buyer is *indebted* to the seller (*b*).

Opinion of Keating, J., in *Ogg* v. *Shuter* (1875).

In *Ogg* v. *Shuter* (*c*), the facts of which have be... set out, Keating, J., said (*d*): "If one party to th... refuses to perform his part, the other may rescind. ... if the defendant had a right to sell, the plaintiffs ... recover in this action; but if he had not such right ... was a conversion. . . . The question is, Had the ... such right? I agree that he had not, because to ent... do so he must have a *right to rescind* the contract ... could be only on an absolute refusal by the pla...

(*t*) (1847) 9 Q. B. 1030; 16 L. J. Q. B. 72 R. R. 502, *ante*, 10...

(*u*) He could not sue for goods sold and delivered, as he had ... nor for goods bargained and sold, as, the sale being on credit, de... condition precedent to payment. See *Forbes* v. *Smith* (1863 11 W...

(*x*) On the point decided that the measure of damages in an a... version not always the full value of the goods, and that a party c... more by suing in tort than on contract, the case was followed in *Stear* (1863) 15 C. B. (N. S.) 330; 33 L. J. C. P. 130; 137 R. R. 53... itself followed in *Donald* v. *Suckling* (1866) L. R. 1 Q. B. 585; 35... 232, and *Halliday* v. *Holgate* (1868) L. R. 3 Ex. 299; 37 L. J. ... cases of actions by a pawnor against a pawnee for wrongful deal... thing pledged. See also *Mulliner* v. *Florence* (1878) 3 Q. B. D. 4... Q. B. 700, C. A., where pledge was distinguished from lien with... the damages recoverable by the owner of the goods.

(*y*) See Bullen and Leake's Pleading, 3rd ed. 39, n. (*a*), and ...

(*z*) See *Maclean* v. *Dunn* (1828) 4 Bing. 722, at 728; 1 M... 6 L. J. (O. S.) C. P. 184, *ante*, 1075.

(*a*) As in *Alexander* v. *Gardner* (1835) 1 Bing. N... 4 L. J. (N. S.) C. P. 223; 41 R. R. 651, *ante*, 387.

(*b*) *E.g.*, can the buyer's liability be attached? See *Jones* v... (1858) E. B. & E. 63; 27 L. J. Q. B. 234; 113 R. R 545. If a del... the subject of *set-off*. This may affect the costs.

(*c*) 44 L. J. C. P. 161, 167; L. R 10 C. P. 159, *coram* Lord Co... and Grove, J., Denman, J., and Keating, J., *ante*, 442.

(*d*) The statement that failing a right of resale there was a... must be interpreted by the view taken that the plaintiff was ... possession

form their part of the contract. Here there had been no such refusal, . . . and therefore the sale was a conversion."

Where there has been a resale, the title of the second buyer at common law—that is to say, apart from the provisions of section 8 of the Factors Act, 1889 (*e*), and of section 48 (2) of the Code (*f*)—depends upon whether he can successfully defend himself against an action by the first buyer; and this again depends upon the form which that action takes (*g*). If it be for trespass or conversion, the first buyer, who has not at the time of the resale paid or tendered the price, has no right to the possession, and cannot therefore complain of the resale. The effect is that the second buyer gets a good title (*h*). If, however, the first buyer sue in detinue, it is sufficient that the plaintiff should have the right, arising out of an absolute or special property, to the possession of the goods at the time of commencing the action (*i*), for the injurious act is the wrongful detention of the goods, and not the original taking or obtaining of the possession (*i*). If, therefore, after a resale the buyer within the time allowed pay or tender the price to the seller, and then demand the goods of the second buyer, and delivery be refused, the second buyer is liable in detinue (*k*). It will be seen presently that he is not so liable under the Code (*l*).

Title of second buyer at common law.

The question whether a notice of resale was at common law essential to the seller's right is not easy to determine. In none of the cases is it laid down in express terms that a notice is necessary, and in support of their opinion that not only perishable, but also non-perishable, goods may be resold, the argument of the Court in *Maclean* v. *Dunn* (*m*), that, "if articles are not perishable, price is, and may alter in a few days, or a few hours," seems to indicate that in some cases—*e.g.*, where there is a rapidly fluctuating or steadily falling

Notice of resale at common law.

(*e*) Printed *ante*, 46. It is practically identical with s. 25 (1) of the Code, as to which see *post*, 10 .

(*f*) *Post*, 1082.

(*g*) Mr. Benjamin says it depends on the ability of the first buyer to sue in trover: 2nd ed. 655; 4th ed. 805. He does not mention detinue.

(*h*) *Secus* if the first buyer be not in default: *McGregor* v. *Whalen* [1914] 31 Ont. L. R. 543. The subject was touched on in *Gosling* v. *Birnie* (1831) 7 Bing. 339; 9 L. J. C. P. 105; 33 R. R. 497, which went off on the point of estoppel, so that nothing was decided on it. But Tindal, C.J. said "he was far from satisfied" that the property was in the original buyer.

(*i*) Bull. & Leake's Plead. 3rd ed. 312; 5th ed. 408.

(*k*) See *per* Blackburn, J., in *Donald* v. *Suckling*, *ante*, 1080 (*x*); *Livington* v. *Higgins* (1859) 28 L. J. Ex. 252; 118 R. R. 515; and *cf. per* Amphlett, B., in *Lord* v. *Price* (1874) L. R. 9 Ex. 54; 43 L. J. Ex. 43.

(*l*) *Post*, 1082.

(*m*) *Ante*, 1075.

market—the seller would be justified in acting pru as to minimise the buyer's loss; and this he might no to do if he were bound to give the buyer notice. Ma seller be justified, like an agent of necessity (*n*), what is reasonable in the interest of both parties?

Right of resale under the Code.

Having now dealt with the subject of resale at comm we come to the provisions of the Code.

It has been seen that s. 39 (1) (*c*) of the Code (*o*) unpaid seller (*inter alia*) a right of resale "as limited Code. The clauses declaring this right are sub-ss. and (4) of s. 48 (*p*), which are as follows:—

Code, s. 48.

"(2.) Where an unpaid seller who has exercised his right retention or stoppage in transitu resells the goods, the buyer good title thereto as against the original buyer.

"(3.) Where the goods are of a perishable nature, or where t seller gives notice to the buyer of his intention to resell, and does not within a reasonable time (*q*) pay or tender the unpaid seller may resell the goods and recover from the origi damages for any loss occasioned by his breach of contract.

"(4.) Where the seller expressly reserves a right of resal the buyer should make default, and on the buyer making defa the goods, the original contract of sale is thereby rescinded, bu prejudice to any claim the seller may have for damages."

Effect of s. 48.

Under section 48 (1) (*p*), the mere fact that the b failed to pay, or is insolvent, and the goods have been in transit, does not entitle the seller to rescind the cont Sub-section (2), however, declares that in such circu the seller may pass a good title to a second buyer; but untouched any remedy the first buyer may possess in of the resale. As against the second buyer he has n he cannot sue him for trespass, or for the conversion after tender he could at common law) for the detention the goods, for the second buyer has a statutory title; he sue the seller for trespass or conversion, as he is not to the possession. But under this sub-section, as at law, if the buyer, within the time allowed, is ready and to accept and pay for the goods, he can after a resale seller for non-delivery (*s*); or if within such time he te

(*n*) The position of the seller was so regarded by several of the the leading case in America of *Sands* v. *Taylor* (1810) 5 Johns. (N There, however, the seller had given notice.

(*o*) Set out *ante*, 951.

(*p*) Subs. 1 has already been quoted, *ante*, 1066.

(*q*) What is a reasonable time is a question of fact; s. 56, set 786 (*m*).

(*r*) *Ante*, 1066.

(*rr*) As to this, see *ante*, 1081.

(*s*) *Rawson* v. *Johnson* (1801) 1 East, 203; 6 R. R. 252.

price and demand the goods, he can sue the seller for their detention (*t*), it being no defence in the latter action to say that the defendant has parted with the possession of the goods (*u*). The third and fourth sub-sections declare in what circumstances the seller may by law resell the goods.

Effect of a resale under s. 48 (3).

Under section 48 (4), which is founded on *Lamond* v. *Davall* (*x*), the effect of a resale is to rescind the contract. But what is the effect of a resale authorised by sub-section (3) —*i.e.*, where there is no express power to resell? Is it to *rescind* the contract, subject only to the seller's right to recover damages, so that he revests the property in himself and resells as owner; or, does he resell as the buyer's agent or as a quasi-pledgee?

As sub-section (4) declares the contract to be rescinded by a resale, and sub-section (3) contains no such declaration especially as by section 39 (1) (c) (*y*) the seller has only a right of resale "as limited by this Act" the natural inference is that a resale falling under section 48 (3) does not rescind the contract. If this be so, is the buyer still the owner of the goods so as to be liable for the price under section 49 (1) (*z*), and entitled to any profits on the resale?

The point must be left for judicial interpretation. Subject thereto, it is submitted that the remedy given to the seller who resells under section 48 (3) may supply the key to the problem. This remedy is the recovery of *damages* for any loss. Now, in the construction of a contract of sale such a provision goes to show an intention of the parties that the property in the goods should remain in the seller (*a*); and it may be that the similar enactment in the Code indicates an intention on the part of the Legislature that the seller should be entitled to resell the goods *as owner*. If this be the true construction a resale in exercise of a right, whether express or given by law, will then rescind the contract; the seller will resell as owner; he will not be able to sue for the price, but can recover damages for any loss occasioned by the buyer's breach of con-

(*t*) *Jones* v. *Dowle* (1841) 9 M. & W. 19; 11 L. J. Ex. 52; 60 R. R. 652; *Yungmann* v. *Briesemann* [1892] 67 L. T. 642 C. A.

(*u*) *Jones* v. *Dowle*, *supra*; *Reeve* v. *Palmer* (1858) 5 C. B. (N. S.) 84; 28 L. J. C. P. 168; 116 R. R. 573.

(*x*) (1847) 9 Q. B. 1030; 16 L. J. Q. B. 136, *ante*, 1077.

(*y*) *Ante*, 951.

(*z*) *Ante*, 944. It may be observed that s. 39 (1), *ante*, 951, which declares the right of resale, is expressed to be "subject to the provisions of this Act."

(*a*) *Per* Lord Herschell, L.C., in *McEntire* v. *Crossley Brothers* [1895] A. C. 457, 465; 64 L. J. P. C. 129, where he shows the distinction between a debt for the price of goods, the property in which has passed, and damages for breach of a contract to buy, a provision that damages should be recoverable implying that the property is in the seller.

tract. If on the resale there is a net profit, the selle entitled to retain it. It is conceived that, if the resale not been made in good faith or with due care, the buyer w have a right of action for any loss to himself occasi thereby, or might prove the facts in reduction of damag an action brought against him by the seller (*b*).

Is part payment of price ever recoverable?

Some difficult questions may arise as to the right of buyer to recover a part payment of the price where the re has been made at a *profit*, that is to say, for a sum gre than the contract price added to the expenses. A *deposit* i doubt not recoverable, for a deposit is a guarantee that buyer shall perform his contract, and is forfeited on failure to do so (*c*); but what of a simple part payment? not the ordinary rule apply that a person who rescinds—in case supposed, the seller—must return what he has receive as to effect a *restitutio in integrum* (*d*)? Or is the bu barred from recovering by the fact that he cannot show he was ready and willing to perform his contract (*e*)? question was treated as an open one by Collins, L.J., *Cornwall* v. *Henson* (*f*). It may be argued that, in circumstances supposed, the ordinary consequences of a re sion should follow, and the seller be liable to return the of the price paid (*g*), or so much of it as is not needed to him a complete indemnity; that the buyer is bound to se

(*b*) See *Davis* v. *Hedges* (1871) L. R. 6 Q. B. 687; 40 L. J. Q. B. 376, 1134.

(*c*) *Howe* v. *Smith* (1884) 27 Ch. D. 89; 53 L. J. Ch. 1055, C. A.; *Spr* v. *Booth* [1909] A. C. 576; 78 L. J. P. C. 164, P. C.; *Hall* v. *Burnell* [1 2 Ch. 551. As to the effect of a condition that a deposit shall be forfeited *Ockenden* v. *Henley* (1858) E. B. & E. 485; 27 L. J. Q. B. 36; 113 R. R. *Hinton* v. *Sparkes* (1868) L. R. 3 C. P. 161; 37 L. J. C. P. 81; *Lea* v. *Whit* (1872) L. R. 8 C. P. 70; and *Soper* v. *Arnold* (1887) 35 Ch. D. 384; 56 L. J. 456; *aff.* 37 Ch. D. 96, C. A. For cases where there was no express provi as to forfeiture, see and *cf. Palmer* v. *Temple* (1839) 9 A. & E. 508; 8 L. J. Q 179; 48 R. R. 568; *Howe* v. *Smith* (1884) 27 Ch. D. 89; 53 L. J. Ch. 1 C. A.; *Cornwall* v. *Henson* [1899] 2 Ch. 710, at 715; and in C. A. [1900] 2 298, at 302; 69 L. J. Ch. 581.

(*d*) See *per Curiam* in *Clough* v. *N. W. Ry. Co.* (1871) L. R. 7 Ex. 2 37; 41 L. J. Ex. 17, Ex. Ch.; *per* Lord Ellenborough, C.J., in *Hunt* v. (1804) 5 East, 449; 7 R. R. 739; and see also *ante*, 503, 536.

(*e*) See *per* Tindal, C.J., in *Fitt* v. *Cassanet* (1842) 4 M. & G. 898, at The learned Judge was perhaps speaking only with reference to the case b him. The same view was taken in a similar case by Cozens-Hardy, J., *C wall* v. *Henson* [1899] 2 Ch. 710, at 715, but in that case there was part formance.

(*f*) [1900] 2 Ch. 298, at 305; 69 L. J. Ch. 581, C. A.; and see Webster, M.R., *ibid.* at 302.

(*g*) Farwell, J., in *Hart* v. *Porthgain Harbour Co.* [1903] 1 Ch. 72 L. J. Ch. 426, said *obiter* that it was "not an unreasonable constructi of the contract that, when a building owner had completed the works on builder's default, the builder should be able to recover the plant and mate brought on the ground by him, and which had previously vested in the buil

the seller against loss, but not bound, even though in default, to secure him a profit (*h*).

"Of a perishable nature." S. 48 (3).

It is presumed that goods will be considered as of a perishable nature, not only when they are such as to deteriorate physically by being kept, but also when they are such as to be subject to deterioration in a commercial sense, so as to be likely to become unmerchantable as such (*i*). But the fact that they are likely to deteriorate in value by reason of a fall in the market price does not, it is apprehended, make them of a perishable nature under the Code (*k*), although at common law a close resemblance has been judicially discerned between the perishable quality of the goods themselves and of their price (*l*).

Notice of resale.

A notice of resale would seem to be essential where the goods are not perishable, for, the right of resale given by the Code being one "as limited by this Act" (*m*)—*i.e.*, by section 48 (3) and (4)—it is conceived that the provisions of section 48 (3) should be strictly followed.

"Reasonable time."

It is obvious that the condition in section 48 (3) that the buyer shall tender the price within a reasonable time applies both where the goods are perishable and where the seller gives notice of resale. What is a reasonable time is a question of fact (*n*), and in the case of perishable goods it should, it seems, be measured from the date of the contract, if no time for delivery be provided, and otherwise from that time. Where the seller give a notice of resale reasonable time will no doubt be calculated from the date of the notice, and the reasonableness of any period specified in the notice will depend upon whether there was or was not undue delay previous thereto (*o*).

Protection of second buyer under s. 25 1).

The second buyer is protected not only by section 48 (2), but

owner: *cf.* however, *per* Farwell, L.J. (speaking however of a deposit) in *Workman, Clark, & Co.* v. *Lloyd Brazileno* [1908] 1 K. B. 968, at 979, C. A.

(*h*) The question is an interesting one. Suppose a sale for £1,000, and a resale for £1,200, and £100 of the price paid. Expenses of resale £50. Is the seller bound to diminish his £200 profit by paying the expenses out of it, and to return the buyer £100, or may he pay the expenses out of the £100, returning the buyer £50? Or, again, if in such a case the resale was for £1,020 only, there would actually be a loss of £30. Is the seller entitled to retain the whole of the £100, or can the buyer recover at any rate the balance—£70?

(*i*) See "perished" discussed under s. 6, *ante*, 161; and *Asfar* v. *Blundell* [1896] 1 Q. B. 123; 65 L. J. Q. B. 138, C. A., and the learned judgment of the C. P. delivered by Willes, J., in *Dakin* v. *Oxley* (1864) 15 C. B. (N. S.) 646; 33 L. J. C. P. 115; 137 R. R. 698.

(*k*) This fact would probably be sufficient to justify an order by the Court for a resale on the application of a party to an action: R. S. C., 1883, O. 50, r. 2.

(*l*) By the C. P. in *Maclean* v. *Dunn* (1828) 4 Bing. 722, at 728, 729; 6 L. J. (O. S.) C. P. 184, quoted *ante*, 1075.

(*m*) S. 39 (1) (*c*), *ante*, 951. (*n*) Code, s. 56, printed *ante*, 786 (*m*).

(*o*) See the reasonableness of a notice considered by Romer, J., in *Compton* v. *Bagley* [1892] 1 Ch. 320, 321; 61 L. J. Ch. 113.

Its provisions compared with s. 48 (2).

also by section 25 (1) (*p*). But under this provision—1. Th transaction must be *completed* by the delivery or transfer (*q* by the seller in possession of the goods or documents to th second buyer; and 2. The original buyer need not be i default; but 3. The second buyer must act in good faith an without notice of the previous sale. In these three respect the section differs from the common law, and from section 4 (2) of the Code.

Law under the Code summarised.

To sum up the previous discussion of the provisions of sec tion 48 of the Code. Sub-sections (1), (2), and (4) are i accordance with the common law, and it is submitted tha sub-section (3) is also, that is to say, that a resale by th unpaid seller under the provision, when the buyer does no within a reasonable time pay or tender the price, is a rescissio of the contract, subject only to the seller's right to recove damages. If this view be incorrect, it would seem that th buyer is still the owner of the goods, and that the seller resel as his agent, or as a quasi-pledgee of the goods. But th view leads, as has been pointed out (*r*), to difficulties construction.

Having now discussed the law where the seller resells *befo* delivery, we come to the case of a resale by him *after* he ha delivered the goods.

B. Tortious resale of goods *after* delivery.

Where an unpaid seller, *after* delivery of the goods to th buyer, the property having passed, tortiously retakes an resells them, the law is well settled that the contract is no rescinded, and the seller may still recover the price, while th buyer may maintain an action in trover for the conversio In these cases neither party can set up his own right as *defence* in an action by the other, but must bring his cros action or set up a counter-claim (*s*).

Stephens v. *Wilkinson* (1831).

In *Stephens* v. *Wilkinson* (*t*), to an action on a bill exchange the defence was that the bill had been given f goods sold which the plaintiff had tortiously retaken from th defendant two months after delivery. This defence was he bad, because the tortious retaking did not authorise the buy to consider the contract as rescinded; he must pay the pric and seek his remedy by action in trespass, inasmuch as t

(*p*) S. 25 (1) is practically identical with s. 8 of the Factors Act, 1889, out *ante*, 46.

(*q*) *Semble*, these words should be construed *reddendo singula singu* "delivery" applying to goods, and "transfer" to documents: *per* North, J., *Nicholson* v. *Harper* [1895] 2 Ch. 418; 64 L. J. Ch. 672. (*r*) *Ante*, 108

(*s*) The Judicature Act has not abolished the distinction between set-off a counterclaim: *Stumore* v. *Campbell* [1892] 1 Q. B. 314; 61 L. J. Q. B. 463, C.

(*t*) (1831) 2 B. & Ad. 320; 9 L. J. (O. S.) K. B. 231.

consideration for the bill of exchange had not wholly failed, the buyer having enjoyed the consideration for some time after the sale. Parke, J., said: "In point of law the situation is this: the vendee has had all he was entitled to by the contract of sale, and he must therefore pay the price of the goods. He may bring trespass against the vendors for taking possession of them again, and may recover the actual value of the goods at the time they were taken."

Gillard v. *Brittan* (1841).

The converse of this case came before the Exchequer in 1841. In *Gillard* v. *Brittan* (*u*) the buyer brought trespass *de bonis asportatis*. The defendant, to whom the plaintiff was indebted for goods sold, went in pursuit of the latter (who had sold off his furniture and left his home secretly), and having, accompanied by the police, traced him, retook some of the goods. Wightman, J., at Nisi Prius, told the jury that, in estimating the damages, they must consider the plaintiff's debt to the defendant which would be reduced *pro tanto* by the value of the goods retaken. The jury found for the defendant. This ruling was held wrong. Lord Abinger, C.B., said: "It would tend to the consequences that a party may set-off a debt due in one case against damages in another. The verdict in this case does not at all affect the right of the defendant to recover the whole £67 due to him from the plaintiff."

The distinction between *Gillard* v. *Brittan* and *Chinery* v. *Viall* (*x*) should be noticed. These two cases are quite distinguishable. In *Gillard* v. *Brittan* each party was entitled to his action: the seller for the price, the buyer for damages for trespass to the goods, which had passed into his ownership and actual possession. But in *Chinery* v. *Viall* the *ratio decidendi* was that the seller could not, by reason of his conversion *before* delivery, maintain an action for the price, not being able to give the buyer the consideration, and therefore *ex necessitate* it must be allowed for in calculating the buyer's damages in his action, for otherwise the buyer would get the goods for nothing (*y*).

Page v. *Cowasjee* (1866).

In *Page* v. *Cowasjee* (*z*) the cases were all reviewed, and the Court, after determining as a fact that the buyer of a vessel was not in default, and that the seller had acted

(*u*) (1841) 8 M. & W. 575; 11 L. J. (N. S.) Ex. 133.
(*x*) (1860) 5 H. & N. 288; 29 L. J. Ex. 180; 120 R. R. 588, *ante*, 1079.
(*y*) Denman, J., in *Johnson* v. *L. and Y. Ry. Co.* (1878) 3 C. P. D. 499, at 507, thought *Gillard* v. *Brittan* and *Chinery* v. *Viall* were difficult to reconcile; but it is submitted that the distinction given in the text is sound.
(*z*) (1866) L. R. 1 P. C. 127; 3 Moo. P. C. 499.

tortiously in retaking the vessel, and reselling it, held
legal effect to be that the contract was not rescinded, that
seller could recover the price, and that the buyer could
set up the resale as a defence, but must bring his cross-ac
for damages, which would probably be measured by the
obtained at the resale.

Retaking of goods the property in which has not passed.

The principle on which *Stephens* v. *Wilkinson* was dec
is, from the nature of the case, inapplicable where the s
retakes goods which have not become the property of
buyer, as under a hire-purchase agreement which binds
buyer to pay the instalments of the hire. In such a ca
retaking of the goods by the seller, even under an ex
power, destroys the consideration for the payments, and e
a rescission of the contract *ab initio*. The seller cannot,
the retaking, sue for arrears of hire, and must, unless
otherwise agreed, return the instalments paid (*a*). But v
the contract is one of hire simply, though it may giv
buyer an *option* of purchase (*b*), the letter may, after ret
the goods, sue for arrears, and may retain sums previ
paid, unless the facts of the case show that, by retaking
letter of the goods has destroyed the consideration fo
rent (*c*).

Full value of goods recoverable against a mere stranger.

The qualification, laid down in *Chinery* v. *Viall*,
primâ facie rule of damages in an action of trover doe
apply where the defendant is a mere stranger to the pla
Thus, the buyer may, as against a defendant who ha
contracted with the seller to supply the goods, and ha
verted them, recover their full value without a deduct
the price payable by the seller to the defendant, there
no contractual relation between the plaintiff and the
dant. Nor is such relation constituted by a subs
tripartite arrangement, that as a mere matter of conve
the plaintiff should pay the price direct to the def
instead of to the seller (*d*).

Measure of damages where the goods are returned.

If, after the conversion, a return, or the equivalen
return, of the goods has been made to the plaintiff,

(*a*) *Hewison* v. *Ricketts* [1894] 63 L. J. Q. B. 711; see also *A*
Playter [1892] 22 Ont. R. 608.

(*b*) As in *Helby* v. *Matthews* [1895] A. C. 471; 64 L. J. Q. B. 465,

(*c*) *Brooks* v. *Beirnstein* [1909] 1 K. B. 98; 78 L. J. K. B.
tinguishing Hewison v. *Ricketts*, *supra*. It is conceived that, even in
simple hire, if the letter were to retake the goods before the hirer had
enjoyment of them, the contract would be reseinded *ab initio*: see *per*
J., in *Brooks* v. *Beirnstein* at 102.

(*d*) *Johnson* v. *Lanc. and York. Ry. Co.* (1878) 3 C. P. D. 499,
cases are reviewed by Denman, J.

only recover the damages sustained by the wrongful act, and not the full value of the goods (*e*).

The following propositions with regard to the resale by the seller of goods which have become the property of the buyer are submitted as deducible from the authorities (*f*) and the Code (*g*):— Propositions.

A. Before Delivery of the Goods.

Where there is no express power of resale, "default" is conduct inconsistent with readiness and willingness to pay the price (*h*).

Where there is an express power of resale, "default" means such a breach as justifies a resale under the terms of the power (*i*).

1. A resale by the seller without the buyer's default is wrongful, and the buyer may elect either to sue him for non-delivery (*k*), or to treat the resale as a repudiation of the contract by the seller, and rescind it himself accordingly (*l*), and recover any part of the price paid, as well as damages for non-delivery. And if the buyer is at the time entitled to the possession of the goods, such a resale is a conversion (*m*). The seller is also liable in detinue if the buyer within the contract time tender the price and demand the goods (*n*).

2. The seller may, on the buyer's default:—

(i.) Without reselling, keep the goods for the buyer and sue him for the price (*o*), and exercise the rights mentioned in section 37 (*p*).

(*e*) *Hiort* v. *London and N. W. Ry. Co.* (1879) 4 Ex. D. 188, C. A.

(*f*) The Editors of the fifth edition found themselves unable to agree with Mr. Benjamin's general theory on the subject of resale, for, with great respect for the learned Author's opinion, that theory appeared to them to have been based upon a misconception of the cases. And the present Editor has, from considerations of space, felt compelled to omit his propositions.

(*g*) The propositions represent both the common law and the law under the Code, except when otherwise mentioned.

(*h*) See the cases *passim*, and especially *Martindale* v. *Smith* (1841) 1 Q. B. 389, *ante*, 674 and 945, and *Woolfe* v. *Horne*, *infra*, *ante*, 674. And under the Code the default contemplated by s. 48 (3) is a failure to pay or tender the price within a reasonable time. See *ante*, 1082.

(*i*) On general principles, and see s. 48 (4) *ante*, 1082.

(*k*) *Bowdell* v. *Parsons* (1808) 10 East, 359; *Woolfe* v. *Horne* (1877) 2 Q. B. D. 355; 46 L. J. Q. B. 534.

(*l*) *Per Cur.* in *Fitt* v. *Cassanet* (1842) 4 M. & G. 898, *ante*, 1076.

(*m*) *Martindale* v *Smith* (1841) 1 Q. B. 389; 10 L. J. Q. B. 155; *Chinery* v. *Viall* (1860) 5 H. & N. 288; 29 L. J. Ex. 180; *cf. Wilmshurst* v. *Bowker* (1839) 5 Bing. N. C. 541, where the buyer was not entitled to possession.

(*n*) See *ante*, 1083 (*t*).

(*o*) On ordinary principles. See s. 49 (1) of Code, *ante*, 944. The action will be for goods bargained and sold, the delivery of the goods having been waived by the buyer's default: *ante*, 945.

(*p*) *Per* Lord Ellenborough in *Greaves* v. *Ashlin* (1818) 3 Camp. 426; Code, s. 37, *ante*, 854.

(ii.) Resell the goods without express power where the g
are perishable, or where he gives notice of the inte
resale (*q*).

(iii.) Resell under an express power, provided that he
follow the terms of the power (*r*).

3. On a resale, whether under an express power (*s*
without (*t*), the contract is rescinded, the property reves
the seller, and he resells as owner. He may, therefore, r
any profit realised (*u*), on the other hand he can recove
deficiency on the resale (after allowing credit for any pa
the price paid) and the expenses of the resale (*x*).

After a resale of undelivered goods, the buyer is no l
liable for the price (*y*).

4. A buyer in default cannot set up that the contrac
been rescinded by the resale as a defence against the s
action for damages for his loss, or (subject to the p
hereunder stated) as entitling the buyer to recover any
payment of the price (*z*).

Provided that where part of the price has been paid,
wise than as a deposit (*a*), and the goods have been res
a profit over the contract price added to the expenses
resale, the buyer may perhaps be entitled to recover th
of the price paid (*b*).

Similarly, where the goods have been resold at less
the contract price, the buyer may perhaps be entitle

(*q*) *Maclean* v. *Dunn* (1828) 4 Bing. 722, *ante*, 1075, in which,
no mention is made of notice: Code, s. 48 (3), *ante*, 1082. None of t
at common law say that notice is essential. It depends upon the con
of s. 48 (3) whether notice is necessary under the Code. See the sub
cussed *ante*, 1085.

(*r*) *Lamond* v. *Davall* (1847) 9 Q. B. 1030, *ante*, 1077; Code, s
ante, 1082.

(*s*) See note (*r*), *supra*.

(*t*) This part of the proposition is submitted.

(*u*) On general principles. See especially as to express powers,
Eldon in *Ex parte Hunter* (1801) 6 Ves. 94; Sugd. on V. and P., 14th

(*x*) On general principles. See *Edwardes* v. *Noble* (1877) 5 Ch.
385; and as to express powers, *Lamond* v. *Davall*, *supra*; *Ockenden*
(1858) E. B. & E. 485; 27 L. J. Q. B. 361.

(*y*) *Hore* v. *Milner* (1797) Peake, 58 n., *ante*, 1074; *per Cur.* in *M*
Dunn (1828) 4 Bing. 722; 6 L. J. (O. S.) C. P. 184, *ante*, 1075, *C*
Viall (1860) 5 H. & N. 288; 29 L. J. Ex. 180; 120 R. R. 588, *ante*, 1
the subject discussed *ante*, 1080.

(*z*) *Maclean* v. *Dunn*, *supra*; *Fitt* v. *Cassanet* (1842) 4 M. & G
L. J. C. P. 70, *ante*, 1076; *per* P. C. in *Page* v. *Cowasjee* (1866) L. R
127, at 145, quoted *ante*, 1072. See also *Howe* v. *Smith* (1884) 27 C
C. A.; 53 L. J. Ch. 1055.

(*a*) Qy. whether, in resales at a profit, there is any distinctio

(*b*) Submitted. See the subject considered *ante*, 1084. The
cited in the preceding note do not, however, suggest any such excep
contained in this proviso.

return of so much of his payment as is not required to afford the seller a full indemnity (*c*).

B. After Delivery of the Goods.

1. A seizure and resale of the goods by the seller after delivery is tortious, and the buyer, even if he have committed a breach of contract, may sue the seller for conversion or in trespass or detinue, and may recover as damages the full value of the goods (*d*). In such action the seller cannot set off the unpaid price, but may sue or counterclaim for it (*e*).

2. Such resale cannot be treated by the buyer as a rescission of the contract. Accordingly he cannot recover back any part of the price paid, or refuse to pay the remainder of it or the whole price, as the case may be, when due (*f*).

3. Where, however, the property in the goods has not passed to the buyer, a seizure of them by the seller after delivery operates as a rescission of the contract, even although the seizure were pursuant to an express power in that behalf exercisable on the buyer's default (*g*).

(*c*) Also submitted.

(*d*) *Per Cur.* in *Stephens* v. *Wilkinson* (1831) 2 B. & Ad. 320; 9 L. J. (O. S.) K. B. 231; *Gillard* v. *Brittan* (1841) 8 M. & W. 575; 11 L. J. Ex. 133; *per* P. C. in *Page* v. *Cowasjee* (1866) L. R. 1 P. C. 127, at 146—147.

(*e*) *Gillard* v. *Brittan*, *supra*. As to counter-claim, see *ante*, 1086, n. (*s*).

(*f*) See cases in the two preceding notes.

(*g*) *Howison* v. *Ricketts* [1894] 63 L. J. Q. B. 716; and see also the reasoning of the Court in *Stephens* v. *Wilkinson* [1831] 2 B. & Ad. 320; 9 L. J. K. B. 231; and *cf. Brooks* v. *Beirnstein* [1909] 1 K. B. 98; 78 L. J. K. B. 243, a case of hire.

PART II.

RIGHTS AND REMEDIES OF THE BUYER.

CHAPTER I.

BUYER'S REMEDIES BEFORE DELIVERY OF THE GOODS.

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 tendered or delivered; there may be a breach of the principal contract for the transfer of the property and delivery of possession, or of a condition or warranty either of quality or title.

The buyer's rights in cases of mistake and his right to *avoid* the contract for failure of consideration, misrepresentation, fraud, or illegality, have been discussed in the First and Third Books of this treatise. There remain, therefore, for consideration the remedies of the buyer: 1. Before obtaining possession of the goods, whether where the contract is only an agreement to sell, or where the property has passed; 2. After having taken actual possession.

SECTION 1.—WHERE THE CONTRACT IS AN AGREEMENT TO SELL.

Only remedy is action for the breach of contract.

Where the property has not passed to the buyer, it is obvious that his remedy for the breach of the seller's promise to deliver is the same as that which exists in all other cases of breach of contract. He may recover damages for the breach, but has no special remedy growing out of the relation of seller and buyer.

What damages buyer may recover.

The damages which the buyer may recover in such an action are in general the difference between the contract price and the market value of the goods at the time when the contract is broken, as explained by Tindal, C.J., in the opinion delivered in *Barrow* v. *Arnaud* (*a*), and numerous instances of the

(*a*) (1846) 8 Q. B. 604, at 609—610; 70 R. R. 568, *ante*, 929.

application of this rule are to be found in the re
cases (*b*).

Thus the Code provides:—

Code, s. 51. "51.—(1.) Where the seller wrongfully neglects or refuses to
the goods to the buyer, the buyer may maintain an action agai
seller for damages for non-delivery.

"(2.) The measure of damages is the estimated loss direct
naturally resulting, in the ordinary course of events, from the
breach of contract.

"(3.) Where there is an available market for the goods in q
the measure of damages is prima facie to be ascertained by the
ence between the contract price and the market or current price
goods at the time or times when they ought to have been deliver
if no time was fixed, then at the time of the refusal to deliver."

As in the case of the measure of damages for non-a
ance (*c*), the rule laid down in the third clause is a presu
rule which forms a branch of the more general one sta
the second.

Statement of law by P. C. The principle of damages, with special reference to bre
damages for non-delivery, has been thus stated (*d*) b
Privy Council:—

"It is the general intention of the law that, in g
damages for breach of contract, the party complaining sh
as far as it can be done by money, be placed in the
position as he would have been if the contract had been
formed (*e*). The rule which prescribes as a measu
damages the difference in market prices at the respective
above mentioned is merely designed to apply this
ciple. . . . But it is intended to secure only an inden
The market value is taken because it is presumed to b
true value of the goods to the purchaser. In the case of
delivery, where the purchaser does not get the goods he

(*b*) *Leigh* v. *Paterson* (1818) 8 Taunt. 540; 20 R. R. 552 (
repudiation not accepted); *Gainsford* v. *Carroll* (1824) 2 B. & C. 624; 2
K. B. 112; 26 R. R. 495; *Shaw* v. *Holland* (1846) 15 M. & W. 136; 15
Ex. 87; 71 R. R. 596 (shares); *Valpy* v. *Oakeley* (1851) 16 Q. B. 94
L. J. Q. B. 381; 83 R. R. 786; *Peterson* v. *Eyre* (1853) 13 C. B. 353; 23
(N. S). C. P. 129; 93 R. R. 373 (existence of market excludes special dam
Griffiths v. *Perry* (1859) 1 E. & E. 680; 28 L. J. Q. B. 204; 117 R. R
Chinery v. *Viall* (1860) 5 H. & N. 288; 29 L. J. Ex. 180; 120 R. R
Josling v. *Irvine* (1861) 6 H. & N. 512; 30 L. J. Ex. 78; 123 R. R
Ashmore v. *Cox* [1899] 1 Q. B. 436, 443; 68 L. J. Q. B. 72 (no time of d
mentioned); *Williams Brothers* v. *Agius* [1914] A. C. 510; 83 L. J. K. B.

(*c*) S. 50, *ante*, 930.

(*d*) *Wertheim* v. *Chicoutimi Pulp Co.* [1911] A. C. 301, at 307; 80
P. C. 91.

(*e*) *Irvine* v. *Midland Ry. Co.* (1880) 6 L. R. Ir. 55, at 63; *appro*
Palles, C.B., in *Hamilton* v. *Magill* (1883) 12 L. R. Ir. 186, at 202.

chased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead, he could obtain them in that market at that price. In such a case, the price at which the purchaser might in anticipation of delivery have resold the goods is properly treated, where no question of loss of profit (*f*) arises, as an entirely irrelevant matter (*g*). The purchaser, not having got his goods, should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market.

Damages fixed at time of breach.

Whether it is the seller or the buyer that is in default damages are, as a general rule, fixed at the moment of default, and are not increased or lessened by subsequent circumstances (*h*).

Time for delivery.

The time for delivery is "fixed," not only when it is definitely stated, but also where it is stated with reference to the happening of an event, although the time of the event may be uncertain (*i*).

Delivery manner contemplated. C.i.f. contract.

The words "time or times" mean the time or times when the goods ought to be delivered according to the mode of delivery contemplated. Thus in a c.i.f. contract, as the delivery intended is a constructive delivery by means of a bill of lading and other shipping documents, the time of performance is the time when the documents would come forward, the seller using all reasonable diligence to forward them, and not the time of the arrival of the goods themselves (*k*).

Time for delivery concealed by seller.

When the time of delivery is not stated, and is within the control of the seller, and the seller conceals the date of breach from the buyer, it seems that the buyer may treat the date of

(*f*) As to which, see *post*, 1113. A resale price may, however, be evidence of value, in the absence of a market: *Stroud* v. *Austin* (1883) Cab. & Ell. 119.

(*g*) *Rodocanachi* v. *Milburn* (1886) 18 Q. B. D. 67, C. A.; 56 L. J. Q. B. 202; *approved* in *Williams Brothers* v. *Agius* [1914] A. C. 511; 83 L. J. K. B. 715.

(*h*) *Di Ferdinando* v. *Simon, Smith & Co.* [1920] 2 K. B. Times L. R. 797, C. A., approving *Barry* v. *Van den Hurk* [1920] 36 Ti 3. For an exception see *Ogle* v. *Vane*, *post*, 1100.

(*i*) *Melachrino* v. *Nickoll* [1920] 1 K. B. 693 L. T. 545.

(*k*) *Sharpe & Co.* v. *Nosawa & Co.* [1917] 2 K. B. 814; 87 L. J. K. B. 33. *Cf. Produce Brokers Co.* v. *Weiss & Co.* [1918] 87 L. J. K. B. 472, where default took place when the provisional invoice should have been delivered.

his discovery of the breach as the date at which damages to be calculated (*l*).

Price at other markets, when taken.

Where there is no market at the place of delivery, market price at the nearest place, or in a contro market (*m*), o a place which according to a course of ing between the parties is the destination of the goods (*n*), the cost in each case of transportation thither, may be tak

With regard to a market, it is immaterial whether a ri price is occasioned by scarcity, or increased demand, or other cause (*o*). And it has been laid down in America t market price may be ascertained "as well by offers to se the ordinary course of business as by actual sales. A list stating the price at which a manufacturer will sel statements of dealers in answer to enquiries, are comp evidence of the market price of a marketable commodity, a common way of ascertaining or establishing a ma price" (*p*).

Meaning of "market."

"Available market." *Marshall & Co.* v. *Nicoll & Son* (1919).

In *Marshall & Co.* v. *Nicoll & Son* (*q*) the majority o Court of Session held that the fact that a market was a lir one, not regular and fixed like the Stock Exchange or the duce market, does not prevent there being "an avai market" under section 51 (3). But Lord Salvesen in a st dissenting judgment held that a market exists when commodity can be bought or sold freely any day in market"; and that "the mere fact that the commodit capable of being bought or sold, as the case may be, doe prove that there is a market price. The article must be which is kept in stock, and may at any time be bought i market, in contrast to an article which is to be mad specification," as in the case under consideration.

Effect of payment of price before delivery.

Payment of the price, without a reservation of a rig damages, is not of itself a waiver of that right (*r*). I ruled by Byles, J., in *Elliot* v. *Hughes* (*s*) that, where goods undelivered had been paid for, the buyer's damage

(*l*) *Wilson* v. *London and Globe Financial Corporation* [1897] 14 T. 15, C. A.

(*m*) *Grand Tower Co.* v. *Phillips* (1874) 90 U. S. 471; *Cohen* v. *Platt* 69 N. Y. 348, 352.

(*n*) *Wertheim* v. *Chicoutimi Pulp Co.* [1911] A. C. 301; 80 L. J. P. P. C.

(*o*) *Per* Wilde, B., in *Joslin* v. *Irvine* (1861) 6 H. & N. 512, at 5 L. J. Ex. 78; 123 R. R. 653.

(*p*) *Per* Andrews, J., in *Harrison* v. *Glover* (1878) 72 N. Y. 453, 45

(*q*) [1919] S. C. 344; 56 Sc. L. R. 178.

(*r*) *Clyde Bank Eng. Co.* v. *Don Jose Castaneda* [1905] A C L J. P. C. 1.

(*s*) (1863) 3 F. & F 387; but see *Startup* v. *Cortazzi* (1835) 2 C. M. 4 L. J. (N. S.) Ex. 218; 41 R. R. 710.

non-delivery should be measured by the difference between the contract price and the price ruling at the time of the trial, on the ground that the buyer no longer has in his hands money for the purchase of similar goods in the market (*t*). In this case the market price had increased since the breach of contract. Some Courts in America also adopt this principle (*u*). The analogy followed is actions for the non-replacement of stock (*x*). It would seem however that the buyer is not entitled to the highest market price in the interval between the breach and the trial (*y*), as it is not to be presumed that the buyer would have resold at that particular time.

Accidental circumstances not regarded in estimating damages.

It is an established principle of the law of damages that circumstances not arising naturally out of the transaction, but peculiar to the plaintiff, will not be taken into consideration so as to enhance or to diminish the damages payable by the defendant. Such circumstances are *res inter alios acta*. "It is well settled," says Lord Esher, M.R., in *Rodocanachi* v. *Milburn* (*z*), "that in an action for non-delivery or non-acceptance . . . the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods."

Damages general or special.

But the law distinguishes the damages which may be claimed on a breach of contract, and allows not only *general* damages, that is, such as are the necessary and immediate result of the breach (*a*), but *special* damages, which are such as are a natural and proximate consequence of the breach, although not in general following as its immediate effect (*b*). Special damage is the particular damage which results from the special circumstances of the case, which, if properly pleaded, may be superadded to the general damage which the law implies in any breach of contract (*c*). It is by reason of

Special damages must be alleged in statement of claim.

(*t*) See the principle stated *ante*, 930.

(*u*) *West* v. *Wentworth* (1824) 3 Cowen 82; *Clark* v. *Pinney* (1827) 7 *ib.* 681, where the authorities are discussed; see also the opinion of Marshall, C.J., in *Shepherd* v. *Hampton* (1818) 3 Wheat. 200.

(*x*) *Shepherd* v. *Johnson* (1802) 2 East, 211; *Downes* v. *Back* (1816) 1 Stark. 318.

(*y*) *McArthur* v. *Seaforth* (1810) 2 Taunt. 257. It was, however, so ruled with regard to shares at N. P. by Wills, J., in *Michael* v. *Hart* [1901] 2 K. B. 867; 70 L. J. K. B. 1000.

(*z*) (1886) 18 Q. B. D. 67; 56 L. J. Q. B. 202, C. A. *approved* in *Williams Brothers* v. *Agius* [1914] A. C. 510; 83 L. J. K. B. 715. See also *Williams* v. *Reynolds* (1865) 6 B. & S. 495; 34 L. J. Q. B. 221

(*a*) *Boorman* v. *Nash* (1829) 9 B. & C. 145; 7 L. J. K. B. 150; 32 R. R. 607.

(*b*) *Hadley* v. *Baxendale*, *infra*.

(*c*) *Per* Bowen, L.J., in *Ratcliffe* v. *Evans* [1892] 2 Q. B. 524, at 528; 61 L. J. Q. B. 535, C. A.

this distinction that damages of the latter class are not able, unless alleged in the statement of claim with s particularity to enable the defendant to prepare hims evidence to meet the demand, while those of the form are sufficiently particularised by the very statement breach (*d*). This right to special damages is expres served by the Code (*e*).

Rule in *Hadley* v. *Baxendale* (1854).

The rule on the subject of the measure of d both general and special, on breach of contract w laid down in *Hadley* v. *Baxendale* (*f*): "Whe parties have made a contract which one of them has the damages which the other party ought to receive in of such breach of contract should be such as may fa reasonably be considered, either arising naturall according to the usual course of things—from such b contract itself, or such as may reasonably be supposed been in the contemplation of both parties at the ti made the contract as the probable result of the brea Now if the special circumstances under which the cont actually made were communicated by the plaintiffs defendants, and thus known to both parties, the resulting from the breach of such a contract which the reasonably contemplate would be the amount of injur would ordinarily follow from a breach of contract und special circumstances so known and communicated (*g* on the other hand, if these special circumstances were unknown to the party breaking the contract, he, at t could only be supposed to have had in his contempla amount of injury which would arise generally, and great multitude of cases not affected by any special stances, from such a breach of contract."

Amendment of rule suggested by Palles, C.B.

Criticising the language in which the second branc rule is expressed, on the ground that parties to cont not contemplate a breach of the contract at all or the result of a breach (*h*), Palles, C.B., says in *Ham*

(*d*) *Smith* v. *Thomas* (1835) 2 Bing. N. C. 372; 1 Wms. Saun n. (2); 5 L. J. (N. S.) C. P. 52; 42 R. R. 617; *per* Lord Halsbury *The Mediana* [1900] A. C. 113, at 117—118; 69 L. J. P. 35; *Bank of N. Z.*, *ibid.* 577, P. C. See also R. S. C., 1883, O. 19. r.

(*e*) S. 54, printed *ante*, 930.

(*f*) 9 Ex. 341, at 354—355; 23 L. J. Ex. 179, at 182—183; 96 R.

(*g*) This sentence is, according to Lord Esher, M.R., in *Ha Bussey* (1887) 20 Q. B. D. 79, at 88; 57 L. J. Q. B. 58, C. A., " sidered rather as a valuable exemplification of the rule, an illustra circumstances under which the second branch of the rule would appl part of the rule itself."

(*h*) See also *per* Cotton, L.J., in *McMahon* v. *Field* (1881) 7 Q. at 597; 50 L. J. Q. B. 552, C. A.

Magill (*i*) that the rule as a whole would be more accurately expressed by stating that the damages recoverable were "such as might arise naturally, —*i.e.*, according to the usual course of things—from such breach of contract itself, or from such breach committed *under circumstances in the contemplation* of both parties at the time of the contract": in other words, "circumstances by reason of which the breach (if there were one) would result in a loss greater than the normal one."

Mere notice of special circumstances not sufficient.

It is not a proper inference from the language of the judgment in *Hadley* v. *Baxendale* that the *mere* communication of special circumstances made by one party to the other would impose on the latter an obligation to indemnify the former for all the damages that would ordinarily follow from the breach (*k*). Proof is required of an *assent* by the latter to assume such a responsibility.

As was said by Willes, J., in *British Columbia Sawmill Co.* v. *Nettleship* (*l*), "the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it (*m*).

It is nevertheless true that, where the real situation of the parties is disclosed by the buyer to the seller at the time of the contract, there may be a fair inference of fact that the special damages were intended to be recouped (*n*).

Some of the cases affording illustrations of the mode in which the Courts deal with the difficult question of damages will be given, but for a full discussion of the principles on which damages are measured the reader must be referred to the recognised authorities on the subject (*o*).

(*i*) (1883) 12 L. R. Ir. 186, at 202.

(*k*) *Per Curiam* in *Elbinger* v. *Armstrong* (1874) L. R. 9 Q. B. 473, at 478—479; 43 L. J. Q. B. 211.

(*l*) (1868) L. R. 3 C. P. 499, at 509; 37 L. J. C. P. 235, *post*, 1103; *affirmed* by him in *Horne* v. *Midland Railway Co.* (1872) L. R. 7 C. P. 583, at 591; 42 L. J. C. P. 59, and *approved* by Martin, B., and Cleasby, B., and Blackburn, J., and Lush, J., in S. C. in Ex. Ch. (1873) L. R. 8 C. P. 131. See also *per* Brett, M.R., in *Grébert-Borgnis* v. *Nugent* (1885) 15 Q. B. D. 85, at 89, C.A.

(*m*) See the law laid down to the same effect by the S. C. of the U. S. in *Globe Refining Co.* v. *Landa Cotton Oil Co.* [1903] 190 U. S. 540, at 545.

(*n*) *Per* Bowen, L.J., in *Grébert-Borgnis* v. *Nugent*, *supra*, at 93; 54 L. J. Q. B. 511, C. A. Brett, M.R., puts the case more strongly, and says (at 90) that where a sub-contract is fully made known to the seller the "proper inference" is that he contracted to be liable for all the consequences caused by the buyer's failure to perform the sub-contract

(*o*) Mayne on Damages, 7th ed. Chap. II., and (with special reference to the rule in *Hadley* v. *Baxendale*) at 11—42; for American law Sedgwick on Damages, where a valuable note on the rule in *Hadley* v. *Baxendale* will be found, 7th ed. Vol. I. 218; 8th ed. Vol. I. 203—211; H. D. Sedgwick's Eng. and Amer. cases on the Measure of Damages (1878), particularly at 220—350.

Where delivery is delayed at request.

Ogle v. *Earl Vane* (1868).

In *Ogle* v. *Earl Vane* (*p*), where the defendant failed make delivery of 500 tons of iron according to contract o to an accident to his furnaces, the rule of general damages not applied, because the plaintiff's delay in buying other to replace that not delivered, had taken place at the d dant's request. The plaintiff was therefore entitled to the largely increased damages caused by a rise in price i market during the delay (*q*).

Tyers v. *Rosedale Iron Co.* (1875).

In *Tyers* v. *The Rosedale Iron Company* (*r*), the defend under contract to deliver monthly quantities of iron over had consented to withhold delivery of various monthly tities at the request of the plaintiffs. In December, 1871 last month, the plaintiffs demanded delivery of the who the residue. The defendants refused to deliver more tha December monthly quantity, and the plaintiffs sued fo non-delivery of the 2,000 tons. Kelly, C.B., and Pigott held that the defendants were discharged altogether. M B., dissenting, held, on the authority of *Ogle* v. *Vane*, the defendants were not justified in refusing absolute deliver the residue of the iron. He held, on the authority, that the damages should be the difference bet the contract price and the market price at the date o refusal to deliver, viz., December, and not, upon the prin of *Brown* v. *Muller* (*s*), the sum of the differences betwee contract price and the market price on the last day of month during 1871.

The case in the Exchequer Chamber.

In the Exchequer Chamber, which adopted the vie Martin, B., on the main question as to liability, the poi to damages was not taken by the defendants' counsel, a seems to have been assumed that, if the damages were be assessed at the market price in December, they were assessed at the market price at later dates, the Court seem

(*p*) L. R. 3 Q. B. 272; 37 L. J. Q. B. in Ex. Ch.; *affirming* Q. B. L. R. 2 Q. B. 275. See also *Wilson* v. *London and Globe Finance Corp* [1897] 14 Times L. R. 15, C. A.

(*q*) For another aspect of this case under s. 4 of the Code, see *ant* It has been held in the S. C. of New Zealand in *Raymond & Co.* v. *Fric Bros.* [1905] 25 N. Z. L. R. 371, that the principle of *Ogle* v. *Vane* impli a plaintiff, who has postponed performance at the defendant's request still be ready and willing to perform the contract, according to its ter the extended time; otherwise he can recover only the measure of d calculated at the contract time. But this view seems to confound a me of damages with performance. And qy. whether this view is consisten *Braithwaite* v. *Foreign Hardwood Co.* [1905] 2 K. B. 543, C.A.; 74 L. J. 688 (waiver of conditions precedent), *ante*, 933.

(*r*) L. R. 8 Ex. 305; S. C. in Ex. Ch. L. R. 10 Ex. 195; and *cf. Hi Pumpherstone Oil Co.* [1893] 20 Rettie 532, where each instalment wa a separate contract.

(*s*) (1872) L. R. 7 Ex. 319; 41 L. J. Ex. 214, *post*, 1117.

being of opinion that the defendants would remain liable to deliver at reasonable dates after December, 1871. As, however, the market was a rising one, the defendants agreed to pay the damages as assessed in December.

Hickman v. *Haynes* (1875).

In *Hickman* v. *Haynes* (*t*), the plaintiff, under contract to deliver 100 tons of iron by monthly deliveries of twenty-five tons, in March, April, May, and June, 1873, postponed delivery of the last twenty-five tons at the request of the defendant made in June and again in August, and finally in October brought an action for non-acceptance of the twenty-five tons. The Court of Common Pleas held that the defendant was entitled to treat the contract as broken on the 30th of June; but that, on the authority of *Ogle* v. *Vane*, the damages should be assessed upon the difference between the contract price and the market value at the end of a reasonable time from the defendants' last request for postponement of delivery.

Ex parte Llansamlet Tin Plate Co. (1873).

In *Ex parte Llansamlet Tin Plate Company* (*u*), iron was deliverable by monthly instalments. The seller had made defective deliveries, and at the time he filed his petition all the iron should have been delivered. The buyers sought to prove for the difference between the contract and the market price at the date of the petition. *Ogle* v. *Vane* was distinguished, there being no evidence that the postponement of delivery had taken place at the seller's request, and, on the other hand, the purchasers having in some cases bought iron in the market to supply monthly deficiencies. The damages were therefore assessed on the principle of *Brown* v. *Muller* (*x*) and *Roper* v. *Johnson* (*y*), according to the difference between the contract and market prices of the respective instalments at the respective dates appointed for delivery.

Delay in delivering a chattel.

Probable profits of its use.

Fletcher v. *Tayleur* (1855).

In *Fletcher* v. *Tayleur* (*z*), the plaintiffs claimed special damages for the late delivery of a ship which the defendant had agreed to deliver not later than the 1st of August, 1854. The ship was intended for a passenger ship to Australia, and the defendant knew this. She was not delivered till March, 1855, and she sailed in the following May. If the ship had been delivered at the contract time, the plaintiffs would have made a profit of more than £7,000 on the voyage, but, in consequence of the fall in freight, they made only £4,280. The

(*t*) L. R. 10 C. P. 598; 44 L. J. C. P. 358.
(*u*) L. R. 16 Eq. 155.
(*x*) (1872) L. R. 7 Ex. 319; 41 L. J. Ex. 214, *post*, 1117.
(*y*) (1873) L. R. 8 C. P. 167; 42 L. J. C. P. 65, *post*, 1117.
(*z*) 17 C. B. 21; 25 L. J. C. P. 65; 104 R. R. 557. See also *The Argentino* (1889) 14 A. C. 519; 59 L. J. P. 17.

jury gave the plaintiffs £2,750 damages, being the differ between the probable profits of the voyage had the ship able to sail at the time appointed and her actual earnings. motion for a new trial counsel insisted that the probable pr of a voyage were too vague a criterion of damages, but Court refused to interfere, on the ground that both parties agreed that the question for the jury was: What was the in fact sustained by the non-delivery of the ship at the stipulated for?

Profits of the ordinary use of a chattel.

Cory v. *Thames Ironworks Co.* (1868).

In *Cory* v. *Thames Ironworks Company* (*a*) the defend were not made aware of the special purpose which the b had in view. The plaintiffs claimed damages for the delivery at the specified time of the hull of a floating h derrick, which they intended to put to an entirely nove namely, to work machinery in the discharge of coals: bu defendants believed that the hull was wanted only for storage of coals, its most obvious use. The defendants tended that no damages were due, because the two parties not in contemplation the same results from the breach, but Court held this an inadmissible construction of the rul *Hadley* v. *Baxendale* (*b*); that the true rule is that the s is always liable for such damages as result from the buy being deprived of the ordinary use of the chattel, but is liable for the further special damage caused to the buye the failure of some special and unusual purpose not n known to the seller when he contracted.

Re Trent and Humber Co. (1868).

In *Re Trent and Humber Company* (*c*), where dam were claimed for the breach of a contract to repair a within an agreed period, Cairns, L.C., held the measur damages to be *primâ facie* the sum which would have earned in the ordinary course of employment of the ship ing the delay (*d*).

Threshing machine. Damage to crops.

Smeed v. *Foord* (1859).

In *Smeed* v. *Foord* (*e*), the defendant had contracted the plaintiff, a farmer to furnish, within three weeks after 24th of July, a steam threshing engine, which was wan as he knew, for the purpose of threshing the plaintiff's wh so that it could be sent at once to market. He did deliver the engine until the 11th of September, but from t

(*a*) L. R. 3 Q. B. 181; 37 L. J. Q. B. 68. See also *De Mattos* v. *Steamship Co.* (1885) Cab. & E. 489.

(*b*) *Ante*, 1063.

(*c*) L. R. 6 Eq. 396; 4 Ch. 112; 38 L. J. Ch. 38.

(*d*) The same principle has been applied to a case where a steam was detained by reason of negligence in executing repairs: *Wilson* v. *Screw Collier Co.* (1877) 47 L. J. Q. B. 239.

(*e*) 1 E. & E. 602; 28 L. J. Q. B. 178; 117 R. R. 365.

to time repeatedly assured the plaintiff that it was coming shortly. The plaintiff was therefore obliged to carry the wheat home and stack it. As he had no straw to thatch his stacks, the wheat was injured by the weather, and it was necessary to kiln-dry a part of it, and its market value was deteriorated. Moreover, there was a further loss by reason of a fall in prices. *Held*, that the defendant was responsible for the plaintiff's loss by the deterioration of the wheat and his expenses of carting, stacking, and kiln-drying, but not for the fall in the market price, as this loss could not have been reasonably anticipated by the parties as the probable result of delay in delivery.

Special circumstances. Sub-contract not communicated. *Portman* v. *Middleton* (1858).

In *Portman* v. *Middleton* (*f*), the plaintiff had contracted to repair by harvest time, or about the end of July, a steam threshing machine for one Sheaf, and as a new fire-box was wanted, he had in June employed the defendant to make it, and had paid him £12. The box was to be delivered in about a fortnight. The defendant was not told of the sub-contract. The defendant did not deliver the box till the 3rd of September, and also failed to carry out the plaintiff's instructions, whereby the box was useless, and the plaintiff had to procure another fire-box, at a cost of £20. By reason of the delay the threshing engine was not ready until November, and Sheaf sued the plaintiff, who had to pay him £20. The jury gave the plaintiff a verdict for £12, the price paid, £8, the increased cost of the fire-box, and £20, paid to Sheaf. *Held*, by the Court of Common Pleas (there being no dispute about the two first items), that the £20 was not recoverable. It clearly could not be recovered as general damages, not being the natural result of the breach, and it could not be recovered as special damages, as the sub-contract was unknown to the defendant.

Non-delivery of mill machinery; stoppage of mill. *British Columbia Sawmill Co.* v. *Nettleship* (1868).

In the *British Columbia Sawmill Company* v. *Nettleship* (*g*), the plaintiff sued for damages for breach of contract for the carriage to Vancouver's Island of cases of machinery intended for the erection of a sawmill; one of the cases, which contained essential parts of the machinery was missing when the vessel arrived. The defendant knew that the cases contained machinery. The plaintiff was obliged to send to England to replace the missing parts and was delayed twelve months in the erection of his mill. *Held*, that the measure of damages was the cost of replacing the missing parts, including freight,

(*f*) 4 C. B. (N. S.) 322; 27 L. J. C. P. 231; 114 R. R. 743.
(*g*) L. R. 3 C. P. 499; 37 L. J. C. P. 235.

and interest on the money spent for the twelve mont
that the plaintiff could not recover for the loss of the
the sawmill for twelve months, as the defendant had n
apprised that the cases contained such machinery as co
be replaced at Vancouver's Island, nor that the cases
delivered would be useless without the missing part,
Willes, J., *semble*, that even with knowledge of these f
defendant would not have been liable without some pr
he assented to become responsible for these consequen

Sub-contract at an exceptional price.

Horne v. *Midland Railway Co.* (1872).

In *Horne* v. *The Midland Railway Company* (*h*), a
against a carrier (*i*), the plaintiffs had sold a quantity
at an unusually high price, in consideration of deli
London by the 3rd of February, 1871. The goo
delivered to the defendants for carriage in time for
London in the usual course on the afternoon of the
the company had notice of the contract of the plaint
that the goods would be rejected and thrown on their
not delivered on the day fixed, but the defendants
informed that the goods had been sold at an *exceptiona*
price and not at the market rate. The goods w
tendered for delivery till the 4th, and were rejecte
buyer on that ground, and the question was, whe
damages payable by the defendants were to be measu
reference to the price at which the plaintiffs would h
paid for them if delivered in time, or to the market p

It was held in the Common Pleas that the latter
true measure of damages, the defendants not havi
notified of the exceptional price contracted for; and t
ment was affirmed in the Exchequer Chamber (*k*).

Enhanced price for speedy delivery.

Admissibility of oral evidence.

Brady v. *Oastler* (1864).

In *Brady* v. *Oastler* (*l*), the Barons of the Exchequ
majority decided, in an action for damages for non
of 7,000 knapsack slings within a specified time under
contract, that oral evidence was inadmissible to show
view to estimate the damages, and that the contract
been enhanced to the amount of £320 above the mark
in consideration of an unusually short time being al
delivery of the articles.

(*h*) L. R. 7 C. P. 583; L. R. 8 C. P. 131; 42 L. J. C. P. 59. F
of an exceptional price in an action of trover, see *France* v. *Gaudet*
6 Q. B. 199; 40 L. J. Q. B. 121, *post*, 1113.

(*i*) The seller's duty to deliver is, so far as damages are concern
cases governed by the same rules as that of a carrier.

(*k*) By Kelly, C.B., Blackburn, J., and Mellor, J., and Mar
Cleasby, B., *diss.* Lush, J., and Pigott, B.

(*l*) 33 L. J. Ex. 300, 3 H. & C. 112, *coram* Pollock, C.B., and B
and Channell, B., Martin, B., *diss.*

The seller had in a previous action recovered the whole contract price, and the buyer now sued to recover back the £320. Brumwell, B., at the trial refused to allow the plaintiff to give oral evidence to the effect above stated, and a verdict was entered for the defendant. A rule for a new trial was discharged, Martin, B., dissenting.

Buyer's resale of substituted goods without loss.

Erie County Natural Gas Co. v. *Carroll* (1911).

In *Erie County Natural Gas Company* v. *Carroll* (*m*) the defendants were under contract to supply the plaintiffs with sufficient gas to operate their plant. The defendants afterwards cut off the gas, and refused the plaintiffs a further supply. The plaintiffs in consequence obtained from other persons the right to sink gas wells in gas-bearing lands, sank wells, and executed the necessary works, and so supplied themselves with gas. These wells and works they eventually sold for more than they had cost. The market value of the substituted gas which the plaintiffs had consumed amounted to a large sum, and this sum the Court of Appeal of Ontario held that the plaintiffs were entitled to recover. On appeal to the Privy Council, *Held* that the plaintiffs were in the same position as if they had contracted to purchase unascertained goods; that, having chosen to perform in a reasonable way the defendants' contract for them by supplying themselves with a substituted article, the measure of damages was the cost of procuring that article (*n*), and not its market value if it had been sold by the plaintiffs; consequently the plaintiffs could recover only the nett cost of the production of the substituted gas. They had failed to show that the substituted article had not in the result been obtained free of cost. They were therefore entitled only to nominal damages. And the principle was declared (*o*) that "where the contract is one for the sale of goods one of the modes in which a party to it may, on the default of the party bound to perform it, perform it for him is by going into the market and buying goods of a description and quality similar to those contracted for," and that "the same rule must apply whether the substituted goods or commodities are manufactured, or mined for, or otherwise produced, or purchased in the open market. In the latter case

Plaintiff may perform the contract for the defendant.

(*m*) [1911] A. C. 105; 80 L. J. P. C. 59.

(*n*) *Per* Alderson, B., in *Hamlin* v. *G. N. Ry. Co.* (1856) 26 L. J. Ex. 20, at 23; *Le Blanche* v. *L. and N. W. Ry. Co.* (1876) 1 C. P. D. 286; 45 L. J. C. P. 521, C. A. See in Austr. *Hasell* v. *Bagot, Shakes and Lewis* [1911] 13 Com. L. R. 374 (cost of substituted article is cost at source, added to carriage and importer's profit).

(*o*) At 117—118.

the cost of procuring the goods is the price at which th
bought; in the former cases the cost of procuring then
cost of their production. The method adopted to proce
cannot make any difference."

Delayed delivery.

Resale by buyer at more than market price.

Wertheim v. *Chicoutimi Pulp Co.* (1911).

In *Wertheim* v. *Chicoutimi Pulp Company* (*p*),
delivery was delayed, the Privy Council were of opini
the value of the goods at the time of actual delivery
price at which the buyer had resold the goods, tha
their value to him, and, as this price was much high
the market price at the time of delivery, the buyer's
were held to be the difference between the resale price
market price at the time appointed for delivery, and
difference between the latter price and the market pri
time of actual delivery.

Although this case was distinguished in *Williams* v. *Agius* (*q*) and *Slater & Co.* v. *Hoyle* (*r*) from cases
delivery, yet it is difficult to reconcile it with the pri
Rodocanachi v. *Milburn* (*s*), according to which th
price should have been regarded as an immaterial fac
the learned L.JJ. in *Slater & Co.* v. *Hoyle* were evi
opinion *obiter* that the decision was a wrong one.

Breach by seller in anticipation of date of performance.

The buyer is as a general rule entitled, in the san
the seller, according to the principles laid down in
Knight (*t*), to wait till the date of performance bef
the seller for non-delivery, and he need not accept as
a repudiation by the seller before that date. The
the buyer has notice that a future performance by
has become impossible, does not, it would seem, co
to accept the repudiation; so that he can wait on
market for the day appointed for performance, a
bound to mitigate his loss as soon as practicable (*u*).

If the buyer accept the seller's repudiation he
his action at once whether he buys against the sell
But he must, like the seller in the converse case,

(*p*) [1911] A. C. 301; 80 L. J. P. C. 91
(*q*) [1914] A. C. 510; 83 L. J. K. B. 71
(*r*) [1920] 2 K. B. 11; 89 L. J. K. B. 401,
(*s*) (1886) 18 Q. B. D. 67; 56 L. J. Q. B. 202, C. A.; *approved*
Brothers v. *Agius*, *supra*. See the principle stated *ante*, 1097.
(*t*) (1872) L. R. 7 Ex. 111; 41 L. J. Ex. 78; set out *ante*, 9
Michael v. *Hart* [1902] 1 K. B. 482; 71 L. J. K. B. 265, C.
(*u*) *Tredegar Coal and Iron Co.* v. *Hawthorn Brothers* [19
L. R. 716, C. A., set out *ante*, 935, where Collins, M.R., shows
J.,'s apparently contrary *dicta* in *Nickoll* v. *Ashton* [1900] 2 Q
L. J. Q. B. 640; had reference only to a case where the pa
accepted the repudiation, in which case he was bound to mitigat

reasonable way to mitigate the effects of the breach (*x*). Thus, if a reasonable opportunity offer, he must go into the market against the seller, in which case damages under section 51 (3) will be assessed with reference to the market price at the date of the repurchase; and if he do not perform this duty the seller is none the less entitled to have damages assessed as at the date when a fresh contract might and ought to have been made.

Melachrino v. Nickoll (1920).

In *Melachrino* v. *Nickoll* (*y*) the plaintiffs agreed to sell to the defendants half a cargo of Egyptian cotton seed, to be shipped from Alexandria per steamship *Isaos*, expected to load during December. Payment was to be made fourteen days from the seed being ready for delivery in exchange for shipping documents. Either party had a right of resale or of repurchase, as the case might be, on notice in case of default. On December 14 the sellers repudiated the contract, and the buyers the same day accepted the repudiation. The buyers gave no notice of repurchase to the sellers, and did not buy in against them.

The case having gone to arbitration, the arbitrators found that the seed might have been expected to be delivered at any time between January 10 and February 10; that the market price was above the contract price on December 14, but below it during the whole period from January 10 to February 10. The sellers contended that, as the buyers had not bought in, damages fell to be assured at the time when the seed should have been delivered; the buyers contended that the proper date was that of their acceptance of the sellers' repudiation. *Held*, by Bailhache, J., on a special case, that the sellers' contention was right. The time for delivery being stated with reference to the happening of an event, the arrival of the seed, was "fixed" within the meaning of section 51 (3) of the Code; and (the buyer not having bought in) there was nothing in the case to displace the ordinary rule in that clause, which applied to breaches by anticipation. Had the buyers bought in, or had the sellers shown that they acted unreasonably in not doing so, damages would have been assessed at the date of the repurchase, or at the time when it ought to have been made. He also pointed out that, if the damages were assessed at the date of the sellers' repudiation, the buyers in the case in

(*x*) *Wilson* v. *Hicks* (1857) 26 L. J. Ex. 242; *per* Bailhache, J., in *Melachrino* v. *Nickoll* [1920] 1 K. B. 693. Accordingly, he may be bound to accept a reasonable offer made by the seller: *Payzu* v. *Saunders* [1919] 2 K. B. 581; 89 L. J. K. B. 17.

(*y*) *Supra*.

question would make a profit from the breach, the market price having fallen since December, whereas the contract, had it been duly performed, would have shown a loss, the buyer thus being given more than an indemnity.

Special damages recoverable by a buyer who has resold.

Cases reviewed.

In the following cases the buyer who had contracted for the purpose of fulfilling a sub-contract of sale claimed to recover from the seller damages caused by the seller's breach of the original contract. The question whether such damages are recoverable depends upon whether the second branch of the rule laid down in *Hadley* v. *Baxendale* (*z*) is applicable.

Loss of profits of sub-sale where no market.

Borries v. *Hutchinson* (1865).

In *Borries* v. *Hutchinson* (*a*), the plaintiff had bought from defendant seventy-five tons of caustic soda, deliverable in three equal parts, in June, July, and August. The buyer at the time made a like contract for resale at a profit to Heitmann, a St. Petersburg merchant. The latter in his turn made a sub-sale at a profit to Heinburger in St. Petersburg. The seller, at the time of the contract, knew that the soda was bought for sale on the Continent, and was to be shipped from Hull, but there was no evidence that he then knew that it was to be shipped to Russia. None of the soda was delivered till between the 16th of September and the 26th of October, when a portion of it was received by the plaintiff in Hull, and shipped to St. Petersburg, at which season the rates of freight and insurance are always raised, so that plaintiff was put to increased cost in making delivery. The soda was an article manufactured by the seller, and there was *no market* in which the buyer could have supplied himself at the date of the breach. The plaintiff had paid £159 to Heitmann, his vendee, as damages for non-delivery to him, and for his loss of profit on his sub-sale to Heinburger. *Held*, that the buyer was entitled to recover as damages:—1. his lost profits on the resale, and 2. all his additional expenses for freight and insurance; but 3. not the damages paid to Heitmann, his vendee, for the latter's loss on the sub-sale, those being too remote, as the seller did not, at the time of making the contract, know of the sub-sale to Heinburger. *Held*, also, *per* Willes, J., that, even had he known, he could not be taken to have contracted to be responsible for such remote consequences.

(*z*) *Ante*, 1098.

(*a*) 18 C. B. (N. S.) 445; 34 L. J. C. P. 169; 144 R. R. 563. See also, as to diminution in value by late delivery, *Wilson* v. *Lanc. and Y. Ry. Co.* (1865) 9 C. B. (N. S.) 632, 30 L. J. C. P. 232; 127 R. R. 814; *Schulze* v. *G. E. R. Co.* (1887) 19 Q. B. D. 30; 56 L. J. Q. B. 442, C. A.

There being no market for the soda at the time fixed for the delivery, the buyer could not go into the market with the money which he had prepared for paying the first seller, and replace the goods, subject only to damages arising out of the difference in price (*b*).

Hydraulic Engineering Co. v. *McHaffie* (1878)

In *The Hydraulic Engineering Company* v. *McHaffie* (*c*), the plaintiffs, being under a contract with Justice for the supply of a peculiar machine by the end of August, 1878, contracted with the defendants to make a part of the machine as soon as possible. The defendants were expressly informed of the plaintiffs' contract with Justice and that the machine was wanted by Justice at the end of August, but did not complete their part of it until the end of September. Justice then refused to accept the machine, which was unsaleable in the plaintiffs' hands. Under these circumstances the plaintiffs were held entitled to recover damages for: 1. loss of profit on their contract with Justice; 2. expenditure uselessly incurred in making other parts of the machine; and 3. cost of painting it to preserve it, and of warehousing it.

Damages payable to sub-buyer.

Elbinger Co. v. *Armstrong* (1874).

In the *Elbinger Company* v. *Armstrong* (*d*), the defendant had agreed to supply the plaintiffs with certain sets of wheels and axles during the months of February to April, 1872. This contract was subsidiary to one which the plaintiffs had made to supply a Russian railway company with waggons by two deliveries in May of the same year, under penalties for delay. The defendant had notice of this sub-contract, but not of the date of delivery, or of the *amount* of the penalties. By reason of the defendant's delay in delivery of the goods, which were not obtainable in the market, the plaintiffs had to pay £100 to the Russian company as penalties. *Held*, that the plaintiffs were not entitled, as a matter of law, to recover the amount of the penalties as such (*e*), but that the jury might reasonably assess the damages at that amount, the proper direction for the jury being "that the plaintiffs were entitled to such damage as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the

(*b*) See, on this point, two cases of carriers: *Rice* v. *Baxendale* (1861) 7 H. & N. 96; 30 L. J. Ex. 371; 126 R. R. 348; *O'Hanlan* v. *Great Western Railway Co.* (1865) 6 B. & S. 484; 38 L. J. Q. B. 154; 141 R. R. 482.

(*c*) 4 Q. B. D. 670, C. A. See also *Wilson* v. *General Screw Collier Co.* (1877) 47 L. J. Q. B. 239.

(*d*) L. R. [illegible] B. 473; 40 L. J. Q. B. 211.

(*e*) "Penalties are not the natural consequence of a breach": *per* Cotton, L.J., in *Hydraulic Engineering Co.* v. *McHaffie* (1878) 4 Q. B. D. at 678, C. A.

defendant's default of that contract to which, as
parties knew, the defendant's contract with the plaintiff
subsidiary " (*f*).

Loss of profit. Damages payable to sub-buyer. *Grébert-Borgnis* v. *Nugent* (1885).

In *Grébert-Borgnis* v. *Nugent* (*g*), the defendants contr
to deliver to the plaintiff by instalments skins of a part
quality, shape, and description, at certain prices. The
dants knew at the time that the plaintiff had made a
contract with a French customer on substantially si
terms, except as to price. The defendants failed to de
and there being no market for such goods, the sub-purc
recovered damages against the plaintiff. *Held*, by the
of Appeal, that, there being no market, the plaintif
entitled to recover damages not only in respect of his l
profit, but also in respect of the damages paid to his
purchaser. In estimating these damages, the rule laid
in the *Elbinger Co.* v. *Armstrong* (*h*) was cited with app
and the amount of damages awarded to the sub-purcha
the French Court was treated as a reasonable one at wh
assess the plaintiff's damages.

Brett, M.R. (*i*), states the result of the cases as follo
" Where a plaintiff under such circumstances as the pre
seeking to recover for some liability which he has in
under a contract made by him with a third person, he
show that the defendant, at the time he made his co
with the plaintiff, knew of that contract, and *contrac
the terms of being liable* if he forced the plaintiff to a
of that contract. . . . If there be no market for the
then the sub-contract by the plaintiff, although not bro
the knowledge of the defendant, the original vendor, n
put in evidence in order to show what was the real va
the goods, and so enable the plaintiff to recover the dif
between the contract price and the real value. But wh
sub-contract was fully made known to him in all its te
my opinion the defendant would be liable, and the
inference, and one which the jury might infer, would
he had contracted . . . upon the terms that if he bre
contract he should be liable for all the consequence
failure by the plaintiff to perform his sub-contract.
however, it seems to me, according to what has been d
that the original vendor, in such a case as this, is only

(*f*) This ruling of Blackburn, J., was approved by the C. A. in
Borgnis v. *Nugent* (1885) 15 Q. B. D. 85; 54 L. J. Q. B. 511. C. A.
(*g*) *Supra.*
(*h*) *Supra.*
(*i*) 15 Q. B. D. at 89—90.

in the case of a breach of contract for the natural consequences of *so much* of the sub-contract *as was made known* to him."

When there is no market for the goods buyer may procure substitute. *Hinde* v. *Liddell* (1875).

In *Hinde* v. *Liddell* (*k*), the defendants had contracted to supply the plaintiff with grey shirtings by the 20th of October. They were informed generally that the shirtings were intended for shipment, but had no notice of the plaintiff's sub-contract. On the 15th the defendants told the plaintiff that they would be unable to deliver in time. There being no market for the kind of shirting contracted for, the plaintiff procured superior shirtings at a higher price, the nearest in quality and price that could be obtained in the market for delivery by the 20th of October, but he received no advance in price from his own buyer. *Held*, that the plaintiff was entitled to recover the difference between the price paid for the substituted shirtings and the defendants' contract price, and was not bound to credit the seller with the increased value of the goods substituted, as the buyer had obtained no advantage from it. Blackburn, J., said during the argument: "There was no market for this particular description of shirtings, and therefore no market price; in such a case the measure of damages is *the value* of the thing at the time of the breach of contract, and that must be the price of the *best substitute* procurable. *Borries* v. *Hutchinson* (*l*) is directly in point. How does this differ from the case of a carrier who fails to carry a passenger to a given place, in which case the passenger has been held over and over again to be entitled to take the best substitute in the shape of a conveyance he can get, no matter that it costs much more than the fare?"

Buyer's general intention to resell.

Damages and costs paid to sub buyer. *Hammond* v. *Bussey* (1887).

In *Hammond* v. *Bussey* (*m*), the defendant undertook to deliver to the plaintiffs coals warranted to be steam-coals. The defendants knew that the plaintiffs intended to resell the goods to shipowners as coal of the same description, but did not know of any particular sub-contract. No sub-contract had in fact been entered into at the time. The defendant delivered coals not equal to warranty. A sub-purchaser sued the plaintiffs on their warranty, and the plaintiffs, after proposing to the defendant that he should join in the defence of

(*k*) L. R. 10 Q. B. 265; 44 L. J. Q. B. 105.

(*l*) *Ante*, 1108.

(*m*) 20 Q. B. D. 79; 57 L. J. Q. B. 58. See also *Prince of Wales Dry Dock Co.* v. *Fournes Forge Co.* [1904] 90 L. T. 527, C. A. *Hammond* v. *Bussey* was an action for damages for breach of warranty, but, having regard to the nature of the damages here claimed, no distinction is to drawn between an action for non-delivery or for breach of warranty. See *Agius* v. *Great West. Coll. Co.* [1899] 1 Q. B. 413; 68 L. J. Q. B. 312, C. A., an action for delay in delivery, which followed *Hammond* v. *Bussey*.

the action and be bound by the result—a proposal which th defendant repudiated—defended the action, and were com pelled to pay damages and costs. *Held*, by the Court o Appeal, that they were entitled to recover these costs (as wel as the damages) from the defendant. The quality of the coa could only be detected by use, and the plaintiffs had only th sub-purchaser's word as to its defects; they had, moreover given notice to the defendant of the action. The plaintiffs therefore, had acted reasonably in defending the action; an applying the *second* branch of the rule in *Hadley* v. *Baxen dale* (*n*), the action of the sub-purchaser, and its consequences might reasonably be supposed to be in the contemplation o the parties at the time of making the contract as a probabl consequence of the breach of it. The application of the rul is for the Court, and not for the jury.

Lord Esher, M.R,, quoted the rule in *Hadley* v. *Baxendale* and with reference to the passage above set out (*n*), statin the effect of the communication to the other party of th special circumstances under which the contract was made said: "I do not think that there is anything in those word to show that the second branch of the rule must be confine to the case of a sub-contract already actually made at the tim of the making of the contract, and would not apply to the cas of a sub-contract not yet actually made, but which wil probably be made" (*o*). I think that this sentence must b looked upon as intended to be an exemplification of the secon branch of the rule already stated rather than as part of it and in any case it seems to me clear that the rule would appl to the case of a sub-contract which within the knowledge o the defendant was in the ordinary course of business sure t be made.

McNeill v. *Richards* (1899).

In *McNeill* v. *Richards* (*p*), the plaintiff, a timber mer chant, bought of the defendant growing timber which, a defendant at the time of the contract knew, the plaintif intended to resell in the course of his business. The plaintiff however, had not any particular sub-contract in view. Th defendant refused to allow the plaintiff to take away th timber. The market for growing timber was a limited one there was no possibility, on the seller's breach, of procurin such timber in the vicinity of the defendant's residence; an

(*n*) *Ante*, 1098.

(*o*) Having regard to this judgment, *Williams* v. *Reynolds* (1865) 6 B & S. 495; 34 L. J. Q. B. 221; 141 R. R. 488, and *Thal* v. *Henderson* (188 8 Q. B. D. 457, would seem to be of doubtful authority.

(*p*) [1899] 1 Ir. R. 79.

the plaintiff had no reasonable opportunity of supplying himself with similar timber elsewhere. He was held to be entitled to recover the difference between the contract price, added to the expenses of cutting, removing, and making the timber marketable, that is to say, the cost to the buyer, and the value of the timber, that is to say, the sum for which he might have resold it in the way of his trade such difference being his expected profit, but not the loss of ten guineas which he had spent in going to see the timber, as he would have spent that even if he had not bought the timber.

Relevancy of sub-sale price even where sub-contract is not known to seller.

The cases reviewed have shown that where the goods are bought, to the knowledge of the seller at the time of making the contract, for resale, and no market exists for the goods, the buyer may recover as special damages the difference between the contract price and the sub-sale price, *i.e.*, the profits as such of the sub-sale; for, as the buyer cannot supply himself elsewhere, the loss of profits naturally results from the seller's breach of contract under the special circumstances. But even where the sub-contract is not known to the seller, the price at which the buyer, in the absence of a market price, resells the goods to a sub-buyer is relevant to the measure of damages, as being some evidence of the value of the goods at the date appointed for delivery (*q*), and if the jury regard this evidence as satisfactory, they may award the buyer the difference between the contract price and the sub-sale price as general damages.

Action in tort for damages caused by non-delivery.

Reference may here be made to the measure of damages in tort recoverable by a buyer who has resold the goods and is, by the seller's wrongful act, prevented from making delivery.

France v. *Gaudet* (1871).

In *France* v. *Gaudet* (*r*), the plaintiff had bought champagne and resold it at a profit of 10s. a dozen, and was prevented by the seller, the defendant, from making delivery, and, no similar goods being procurable in the market, he lost the benefit of the resale. In an action for conversion the question was whether damages were to be measured by the fair usual market profit of 4s. a dozen, or by the exceptional profit of 10s. *Held*, that the true rule is to ascertain *in cases of tort* the actual value of the goods at the time of the conversion, and that, the plaintiff having made an actual *bona fide* sale at 10s. profit, the goods had acquired the special value of the resale price. And *held* also that no notice of the special

(*q*) *Per* Brett, M.R., in *Grébert-Borgnis* v. *Nugent* (1885) 15 Q. B. D. 85, at 89—90: 54 L. J. Q. B. 511, C. A., *ante*, 1110; *Stroud* v. *Austin* (1883) Cab. & E. 119; *Engell* v. *Fitch* (1869) L. R. 4 Q. B. 659; 38 L. J. Q. B. 304, Ex. Ch.

(*r*) (1871) L. R. 6 Q. B. 199; 40 L. J. Q. B. 121.

circumstances was necessary, as the actual value was fixe
circumstances at the time of the demand, and no notice
could affect it.

So, also, a buyer who fails to obtain delivery by reas
a fraudulent representation by a third person to the s
e.g., that the third person had a lien on the goods for m
lent to the buyer, may recover damages for the fraud (*s*

Propositions. The following propositions as to the measure of damag
non-delivery are submitted:—

1—(a.) The measure of general damages for non-deliv
the difference between the contract price and
value of the goods at the date fixed for deliver

(b.) The measure of general damages for late deliv
the difference between the value of the goods a
date fixed for delivery and their value
delivered (*u*).

The value of the goods is *prima facie* their m
price (*t*); when there is no market, their value ma
otherwise determined (*x*) —*e.g.*, by the price of the
substitute procurable.

2. When the buyer has accepted a repudiation by the
of the contract before the date for delivery it i
duty to mitigate the damages by buying in the g
if a reasonable opportunity offer. If he buy in, dam
are assessed according to the market price at the
of the repurchase. If the buyer do not buy in, alth
a reasonable opportunity has occurred, the sell
entitled to have the damages assessed at the time
the repurchase might and ought to have been made

Subject as aforesaid, damages for an anticipatory b
are assessed as at the time appointed for delivery
that time had expired (*y*).

3. An anticipatory breach accepted is a rescission o
contract. Accordingly the seller cannot take adva

(*s*) *Green* v. *Button* (1835) 2 C. M. & R. 707; 5 L. J. Ex. 8
R. R. 818.

(*t*) *Per Cur.* in *Elbinger Co.* v. *Armstrong* (1874) L. R. 9 Q. B.
476—477; 43 L. J. Q. B. 211; *Hinde* v. *Liddell* (1875) L. R. 10 Q. B. 2
L. J. Q. B. 105, *ante*, 1111.

(*u*) *Per* Willes, J., in *Borries* v. *Hutchinson* (1865) 18 C. B. (N. S.
34 L. J. C. P. 160; 144 R. R. 563; *Wertheim* v. *Chicoutimi Pulp Co.*
A. C. 301; 80 L. J. P. C. 91.

(*x*) See the cases in the three preceding notes.

(*y*) See the summary of the law by Bailhache, J., in *Melachrino* v.
[1920] 1 K. B. 693; 122 L. T. 545.

of any subsequent events that might have excused non-performance if the contract had not been rescinded (*z*).

4. Where the goods, at the time when the contract is made, have been sub-sold, or are bought for sub-sale, the following rules apply: –

A. Where there is a market.

When there is a sub-sale (whether the seller, when he made the contract, did or did not know of it, or of the buyer's intention to resell) the buyer must, as between himself and the seller, buy the goods in the market to supply the sub-buyer (*a*), and the seller is liable (in the absence of special damage) only for the difference in price, as general damages.

B. Where there is no market.

(1.) Where the seller at the time when he made the contract knew that the goods had been sub-sold, or were bought for sub-sale –

(a.) The buyer may buy the best substitute procurable for the goods, and if the sub-buyer accept them, charge the seller the difference in price, as general damages (*b*); or

may recover as special damages the loss of his actual or anticipated profits (*c*), together with a reasonable indemnity against the buyer's liability to the sub-buyer (*d*), and costs reasonably incurred (*e*).

(i.) *Semble*, that exceptional profits of a sub-sale are not recoverable, unless the seller, when he made the contract, knew of their amount, and accepted the contract with this special responsibility attached (*f*).

(*z*) *Per* Bailhache, J., *supra*: *Birchgrove Steel Co.* v. *Shaws Brow Iron Co.* [1891] 7 Times L. R. 246, *ante*, 934.

(*a*) *Per* Brett, M.R., in *Grébert-Borgnis* v. *Nugent* (1885) 15 Q. B. D. at at 89—90; 54 L. J. Q. B. 511.

(*b*) See *Hinde* v. *Liddell*, *ante*, 1111.

(*c*) *Hydraulic Engin. Co.* v. *McHaffie* (1878) 4 Q. B. D. 670, C. A., *ante*, 1109; *Grébert-Borgnis* v. *Nugent*, *ante*, 1110; *McNeill* v. *Richards* [1899] 1 Ir. R 79, *ante*, 1110.

(*d*) *Elbinger Co.* v. *Armstrong* (1874) L. R. 9 Q. B. 473; 43 L. J. Q. B. 211, *ante*, 1109; *Grébert-Borgnis* v. *Nugent*, *supra*.

(*e*) *Hammond* v. *Bussey* (1887) 20 Q. B. D. 79; 57 L. J. Q. B. 58, C. A., *ante*, 1111; *Agius* v. *G. W. Coll. Co.* [1899] 1 Q. B 413; 68 L. J. Q. B. 312, C. A.

(*f*) *Per* Willes, J., in *British Columbia Sawmill Co.* v. *Nettleship* (1868)

(ii.) The buyer cannot recover, as such, the amount of any damages or penalties payable to the sub-buyer where such amount was unknown to the seller when he made the contract; but the amount is evidence of what is a reasonable indemnity (*g*).

(2.) When the seller at the time when he made the contract did not know that the goods had been sub-sold, or were bought for sub-sale—

(a.) The buyer may buy the best substitute procurable, and charge the seller the difference in price as general damages, as under Rule B., (1.) (a.); or

(b.) may charge the seller the difference between the contract price and the value of the goods as general damages (*h*). Some evidence of such value is afforded by the sub-sale price (*i*), or the price of the goods at the market nearest to the place of delivery (*k*), or at a distant market added to the expense of transportation to the place of delivery (*l*), or their price at the market in the place of delivery at a time other that that fixed by the contract for delivery (*m*).

Measure of damages in contracts for future deliveries in instalments.

As to the effect of a breach of contract of sale where the goods are to be delivered *in futuro* by instalments. It has already been shown (*n*) that a partial breach of the contract by a refusal to accept or to deliver any particular parcel of the goods may give only a right to a compensation in damages for the partial breach.

The measure of the buyer's damages on the breach of such

L. R. 3 C. P. 499; 37 L. J. C. P. 235, *ante*, 1103; and in *Horne* v. *Midland* Co. (1872) L. R. 7 C. P. 583; 42 L. J. C. P. 59. See also in Amer. *Booth* *Spuyten Duyvil Mill Co.* (1875) 60 N. Y. 487.

(*g*) *Elbinger Co.* v. *Armstrong*, and *Grébert-Borgnis* v. *Nugent*, *a* 1109, 1110.

(*h*) See Rule 1, *ante*, 1114.

(*i*) *Per* Brett, M.R., in *Grébert-Borgnis* v. *Nugent*, *supra*; *Stroud* *Austin*, *infra*

(*k*) *Wemple* v. *Stewart* (1856) 22 Barb. (N. Y.) 154; *Gregory* v. *McDo* (1832) 8 Wend. (N. Y.) 435; *Price* v. *Manley* (1876) 66 N. Y. 82.

(*l*) *Per* Bradley, J., in *Grand Tower Co.* v. *Phillips* (1874) 23 Wall. (U 471, at 479—480; *Cahen* v. *Platt* (1877) 69 N. Y. 348; *Wemple* v. *Ste* *supra*; *Wertheim* v. *Chicoutimi Pulp Co.* [1911] A. C. 301; 80 L. J. P 91, P. C.

(*m*) *Stroud* v. *Austin* (1883) Cab. & E. 119.

(*n*) *Ante*, 825, *et seqq.*; Code, s. 31 (2), *ibid.*

a contract has been determined in two principal cases: one in which the action was brought after the time fixed for the final delivery, and the other where the action was brought after partial breach but *before* the time fixed for the last delivery.

Brown v. *Muller* (1872).

In *Brown* v. *Muller* (*o*), the contract was for the delivery of 500 tons of iron in about equal proportions in September, October, and November, 1871, and action was brought in December by the buyer. The defendant had given notice soon after the contract that he "considered the matter off," and that he regarded the contract as cancelled. The plaintiff did not reply, but in October claimed delivery of 200 tons "as per contract," and on the 30th of November bought 500 tons elsewhere at an increased price of £237. If the plaintiff had bought at the date of the defendant's repudiation, the difference would have been £25. The plaintiff claimed £237, but it was held that the proper measure of damages was £109, being the sum of the difference between the contract and market prices of one-third of 500 tons on the 30th of September, the 31st of October, and the 30th of November respectively. In this case the plaintiff had not elected to consider the defendant's repudiation of the contract as a breach (*p*).

Roper v. *Johnson* (1873).

In *Roper* v. *Johnson* (*q*), the defendants had contracted to sell to the plaintiffs 3,000 tons of coal, "to be taken during the months of May, June, July, and August"; and the plaintiffs having taken no coals in May, the defendants on the 31st of that month wrote to the plaintiffs to consider the contract cancelled. The plaintiffs on the next day replied, refusing to assent to this, and sent to take coal under the contract on the 10th of June, when the defendant positively refused delivery, and the action was commenced on the 3rd of July, and was tried on the 13th of August.

It was held: 1. That, on the authority of *Simpson* v. *Crippin* (*r*), the defendants had no right to rescind the contract by reason of the plaintiffs' default in not sending to take the May delivery; 2. That the plaintiffs had elected to treat the positive refusal of the defendants on the 10th of June as a

(*o*) L. R. 7 Ex. 319; 41 L. J. Ex. 214. See also *Ex parte Llansamlet Co.* (1873) L. R. 16 Eq. 155; *Barningham* v. *Smith* (1874) 31 L. T. 540; and *Michael* v. *Hart* [1903] 1 K. B. 482; 71 L. J. K. B. 265, C. A., where the damages were assessed upon the same principle.

(*p*) *See Hochster* v. *De la Tour* (1853) 2 E. & B. 678; 22 L. J. Q. B. 455; 95 R. R. 747; *Frost* v. *Knight* (1872) L. R. 7 Ex. 111; 41 L. J. Ex. 78.

(*q*) L. R. 8 C. P. 167; 42 L. J. C. P. 65.

(*r*) (1872) L. R. 8 Q. B. 14; 42 L. J. Q. B. 28, *ante*, 831; Code, s. 31 (2), *ante*, 825.

breach of the contract *on that day*; but although that w the date of the breach, it was also held:—3. That, in t absence of any evidence which had not been given, on the pa of *the defendants* that the plaintiffs could have gone into t market and obtained another similar contract on such terms would mitigate their loss, the measure of damages was t sum of the differences between the contract price and t market price at the several periods for delivery, although t last period fixed for delivery had not arrived when the actio was brought, or the cause tried. The jury were to estimat as best they could the probable difference in respect of t future deliveries.

"Average" or rateable instalments.

The same measure of damages is applicable where the goo are deliverable by "average" instalments of a certai quantity per day, week, or month. But the damages are to calculated, not necessarily with reference to each of th stipulated units of time provided for, but with reference periods when it is obvious that a fair average has not bee delivered, so that the plaintiff would be entitled to buy in th market (*s*). It is a question for the jury when a breach ha occurred. The same rule would seem applicable where th quantity of the instalments is not specified. It has alread been shown (*t*) that *prima facie* the instalments are to be rat ably distributed over the contract period. Where, however a rateable distribution is not contemplated, it will be a que tion for the jury when each several breach takes place, an the damages will be calculated at the date of each severa breach (*u*).

Rights of buyer rejecting goods as not according to contract.

Where the seller delivers goods which, in quantity, descrip tion, or quality, are not in accordance with the contract, an which in consequence the buyer refuses to accept, the seller unless he have a *locus penitentiæ* and be able within the con tract time to make a second sufficient tender (*x*), is in the sam position as if he had totally failed to deliver any goods at all and the buyer may recover damages accordingly. And where

(*s*) *Barningham* v. *Smith* (1874) 31 L. T. 540. See also *Ireland* v. *Merryto Coal Co.* (1894) 21 Ret. (Sc.) 989; and *Wright, Stephenson & Co.* v. *Adams Co.* (1908) 28 N. Z. L. R. 193 ("portion each month"), where the whole of th paragraph in the text is quoted.

(*t*) *Ante*, 823.

(*u*) In *Bergheim* v. *Blaenavon Iron Co.* (1875) L. R. 10 Q. B. 319 44 L. J. Q. B. 92, where goods were deliverable between certain dates, with penalty for delay in delivery, Mellor, J., and Field, J., expressed differen opinions on the question when the goods were deliverable, while Blackburn, J. expressed no opinion. But all the Court agreed that the penalty ran from th expiration of the period.

(*x*) As to this, see *ante*, 402, 816.

the goods are, to the knowledge of the seller, for a sub-buyer, and there is no reasonable opportunity of inspection on the delivery of the goods to the buyer, the buyer's damages, on the rejection of the goods by the sub-buyer, will include the cost of transit to the sub-buyer and back again, and other expenses necessarily incurred (*yi*). Thus, in *Heilbutt* v. *Hickson* (*z*), where the buyers had contracted with the defendants for a supply of boots which the defendants knew were for the use of the French army in a winter campaign, and the buyers had rejected the boots as not being merchantable, the buyers were held to be entitled to recover, not only the price they had paid for the boots, and their profits on their contract with the French Government, but the expenses of transit, warehousing, packing and insuring the boots.

Measure of damages in Scotland.

In *Watt* v. *Mitchell* (*a*), in 1839, Lord Medwyn, after review of the early authorities in Scotland, stated the Scottish law at that date to be that the measure of damages is in all cases a question for the jury, who are to estimate the amount which will properly compensate the pursuer. This rule, with reference to actions for non-delivery, he derived from the maxim of the civil law (*b*): "Si res vendita non tradatur, in id quod interest agitur, hoc est, quod rem habere interest emptoris. Hoc autem interdum pretium egreditur, si pluris interest quam res valet vel empta est."

Lord Medwyn's statement was treated as an authority on the law of Scotland by the House of Lords in *Dunlop* v. *Higgins* (*c*), where it was decided that the purchaser might recover as damages any profit that he would have made on a resale, without reference to the market value at the time of the breach, or proof of any special damage (*d*). This decision went exclusively on the Scotch authorities as showing what was the law of Scotland, where the contract was made. At the same time the rule of the English Courts was mentioned with severe disapproval by Lord Cottenham (*e*).

(*y*) *Van den Hurk* v. *Martens & Co.*, *infra*.

(*z*) (1872) L. R. 7 C. P. 438; 41 L. J. C. P. 228, set out *ante*, 864; *Molling* v. *Dean* (1901) 18 Times L. R. 217; *Van den Hurk* v. *Martens & Co.* [1920] 1 K. B. 850.

(*a*) (1839) 1 Dunlop, 1157. (*b*) Dig. 19, 1, 1.

(*c*) (1848) 1 H. L. C. 381; 73 R. R. 98.

(*d*) The language of Lord Cottenham's judgment is quite unqualified.

(*e*) See the criticism of this case in Mayne on Damages, 7th ed. 64, *app.* by Crompton, J., and Blackburn, J., in *Williams* v. *Reynolds* (1865) 6 B. & S. at 501, 506; 34 L. J. Q. B. 221; 141 R. R. 488, and by Willes, J., in *Borries* v. *Hutchinson* (1865) 18 C. B. (N. S.) at 452; 34 L. J. C. P. 160; 144 R. R. 563. It seems that it has rarely, if ever, been cited as an authority in Scotland: see *per* Lord Macnaghten in *Ströms Brucks Aktie Bolag* v. *Hutchison* [1905] A. C. 515; 74 L. J. P. C. 130, at 523, H. L.

Later cases, however, show that the Scottish rule of d
afterwards approximated to that prevailing in Engla
A uniform provision as to all classes of damage has n
laid down for both England and Scotland (*g*).

SECTION II.—WHERE THE PROPERTY HAS PASSED.

Where the contract broken by the seller is one in wh
property has passed to the buyer, there arise in favou
latter the rights of an owner; of one who has not o
property in the goods, but (unless he be in default in
ing with his duty of accepting and paying for them) t
of possession also. A buyer, who at the commencemen
action (*h*) is entitled to the possession of the goods,
course the right to sue for damages for breach of c
discussed in the preceding section, for that is a right
to all parties to contracts of every kind. He can als
detinue, and although before the Common Law Procedu
1854, the defendant under the judgment in detinue
option to deliver the goods or to retain them and
value assessed (*i*), by that Act (*k*) the Court was empo
take away that option and order execution to issue
return of the goods detained; and now, under the Ju
Act and the County Courts Act, a similar order
enforced by writ of delivery (*l*).

Buyer's remedies at common law.

Specific performance in equity.

In equity the Courts would in certain cases com
seller to deliver the specific chattel sold. The rule i
as deduced from the authorities has been stated i
words: "The question in all cases where the specific p
ance of an agreement relative to personalty was sou
this: Would damages at law afford an adequate co
tion for breach of the agreement? If they would, there
occasion for the interference of equity (*m*); the remedy
was complete: if they would not, specific performanc

(*f*) See *Duff* v. *Iron, etc., Fencing Co.* (1891) 19 Ret. 199 (non-
an
Warin v. *Forrester* (1877) 4 Ret. 190; *affd.* in H. L., 4 Ret.
(non-acceptance).
(*g*) Code, s. 51, *ante*, 1094.
(*h*) See *Woolfe* v. *Horne*, *ante*, 674.
(*i*) *Phillips* v. *Jones* (1850) 15 Q. B. 859; 19 L. J. Q. B. 371.
(*k*) 17 & 18 Vict. c. 125, s. 78, *rep.* by S. L. R. Act, 1883.
(*l*) See note (*r*), *post*, 1121.
(*m*) See *Fothergill* v. *Rowland* (1873) 43 L. J. Ch. 252 (sale of co

agreement, as in the case of an agreement relating to realty, would be enforced " (*n*).

And now it is provided by the Code that:

Specific performance under the Code. S. 52.

"**52.**—In any action for breach of contract to deliver specific (*o*) or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff (*p*), by its judgment or decree (*q*), direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree (*r*).

"The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement (*s*) in Scotland."

Meaning of "or ascertained."

This section substantially re-enacts section 2 of the Mercantile Law Amendment Act 1856 (*t*), but that section was applicable only to "specific" goods. It seems to confer on the Courts a statutory power of enforcing, at the instance of the buyer, specific performance of a contract for the sale of ascertained goods, whether or not the property has passed (*u*). Accordingly a Court of Equity has jurisdiction to restrain by injunction a breach of contract by the seller; and it may also at its discretion award damages (*x*). But the meaning of the additional words in the Code "or ascertained" is not clear. The word "ascertained" either may be synonymous with "specific," in which case it is unnecessary, as "specific" is

(*n*) Wh. & Tud. L. C. Eq. 7th ed. Vol. II. 423. See the cases collected in the notes to *Cuddee* v. *Rutter* (1719) *ibid.* 416, *et seqq.* See also Fry on Spec. Perf. 3rd ed. 35—40; and the opinion of Kindersley, V.-C., in *Falcke* v. *Gray* (1859) 4 Drew. 651, at 658; 29 L. J. Ch. 28; 113 R. R. 493, in which he held that a contract for the purchase of articles of unusual beauty, rarity, and distinction, such as objects of vertu, will be specifically enforced; and *Donnell* v. *Bennett* (1883) 22 Ch. D. 835; 52 L. J. Ch. 414 (sale of chattels; injunction to restrain the breach of a negative stipulation). See also *James Jones & Sons* v. *Tankerville* [1909] 2 Ch. 440; 78 L. J. Ch. 674.

(*o*) Defined s. 62 (1), *ante*, 161, n. (*f*).

(*p*) "Plaintiff" includes, *inter alia*, defendant counterclaiming: s. 62 (1).

(*q*) Scotch term for judgment.

(*r*) As to the writ of delivery, see R. S. C., 1883, O. 48, r. 1. This Order does not provide for the specific delivery of the chattels sought to be recovered, but only gives a power of distress until delivery: *Wyman* v. *Knight* (1888) 39 Ch. D. 165; 57 L. J. Ch. 886. For actual delivery a writ of assistance is required: *ibid.* For form of writ of delivery, see O. 48, r. 2, and Appendix to R. S. C., H. Nos. 10—11. As to the power of County Courts to order delivery, see C. C. R., 1903, O. 25, rr. 69 and 70 (which are substantially identical with the S. C. Rules, O. 48, rr. 1 and 2), and Forms 292—297; *Winfield* v. *Boothroyd* (1886) 54 L. T. 574; and *Bailey* v. *Gill* [1919] 1 K. B. 41; 88 L. J. K. B. 591.

(*s*) See on this, Brown's Sale of Goods Act, 250. It is an ordinary legal remedy in Scotland: *Stewart* v. *Kennedy* (1890) 15 A. C. 75, at 95, 102, 105.

(*t*) 19 & 20 Vict. c. 97. Ss. 1 and 2 are repealed by the Code.

(*u*) *Per* Parker, J., in *James Jones & Sons* v. *Tankerville*, *supra*.

(*x*) See preceding case.

defined; or it may mean "subsequently ascertained" similar ambiguity occurs in section 17 (1) (*y*).

Thames Sack and Bag Co. v. Knowles & Co. (1919).

In *Thames Sack and Bag Company* v. *Knowles & Co.* (*z*), where there was a contract for the sale of ten bales of bags, the seller merely delivered an invoice giving the and numbers of the bales as "10.30 *ex* 6762/6806." J., held that the buyer was not entitled to specific performance as the goods were not "ascertained." It was intended that they were "specific" within the definition the Code. The goods were not, he held, ascertained contract. Did then the invoice, that stated the parcel from which the goods sold were to be taken, as them? After referring to the suggestions of text-writers "ascertained" meant, either "specific," or "ascertained the contract," Sankey, J., said: "I rule that "ascertained means that the individuality (*b*) of the goods must in way be found out, and when it is then the goods have ascertained." Then, after pointing out that the invoice not refer to ten individual bags, but only ten out of four said: "That is not ascertainment of the individual the bags, at most it says buyers were entitled to some bags of a particular parcel." The ruling of the learned seems equivalent in effect to a ruling that "ascertained means "made specific *after* the contract," for there can logical distinction between specific goods and goods individuality has been ascertained.

Buyer may also maintain trover.

The buyer to whom the property has passed, if not in at the time of the conversion, that is to say, if he were entitled to possession, may maintain an action in trover damages for the conversion on the seller's wrongful refusal deliver (*bb*), as well as an action on the contract; but he recover greater damages by thus suing in tort than by suing the contract. If, therefore, the seller's conversion were delivery, so that he cannot maintain an action for the price, *e.g.*, if he has resold the goods to a third person—the damages recoverable would be only the difference between the contract price and the market value (*c*). But if the seller's ri

Rule of damages for conversion by seller before delivery.

After delivery.

(*y*) *Ante*, 351.
(*z*) (1919) 88 L. J. K. B. 585.
(*a*) *Ante*, 161 (*f*).
(*b*) As in *Gillett* v. *Hill*, *ante*, 376.
(*bb*) In trover the refusal must be "in disregard of the plaintiff's *per* Blackburn, J., in *Holling* v. *Fowler* (1875) L. R. 7 H. L. 757, at L. J. Q. B. 169.
(*c*) *Chinery* v. *Vial* (1860) 5 H. & N. 288; 29 L. J. Ex. 180; 120 R *ante*, 1079, 1087.

action for the recovery of the price were not thus lost, as if he had delivered the goods and afterwards tortiously retaken and converted them, the buyer's right of recovery in trover is for the whole value, and the seller is driven to his cross-action (*d*) or counterclaim (*e*) for the price.

Buyer's right to refuse the goods offered.

After the property in the goods has passed to the buyer, it may happen that he discovers them to be different in quality (*f*) from that which he had a right to expect according to the agreement. If the goods do not conform to their description, or if any *condition*, express or implied, of quality be broken, *the property will not have passed*, and the buyer will, as already explained, have a right to refuse to accept them (*g*). But the breach may be of a *warranty* (*h*) only, a breach of which does not allow the buyer to refuse to accept.

The reason for this difference is, that in the one case the contract itself depends on the performance of the condition precedent incumbent on the seller, while in the other the principal contract has been performed, and the breach is only of the collateral undertaking of warranty.

Where the property has passed the buyer cannot reject the goods for breach of warranty of quality.

When, therefore, the property in the goods has passed to the buyer, the law gives him no right to rescind the contract in the absence of an express stipulation to that effect, except in certain special cases (*i*), and the property remaining in him, he is bound to pay the price, subject, however, to diminution in respect of the breach of warranty (*k*), even if he reject the goods, which still remain his (*l*). His proper remedy, therefore, is to receive the goods, and to exercise his rights as explained in the next Chapter. And even when the property has not passed, the buyer cannot, because of the breach of a mere collateral warranty, refuse acceptance of the goods, as is shown by the following case.

Heyworth v. *Hutchinson* (*m*) principally turned on the

(*d*) *Gillard* v. *Brittan* (1841) 8 M. & W. 575; 11 L. J. Ex. 133, *ante*, 1087.

(*e*) As to counterclaim, see *ante*, 1086, n. (*s*), and *post*, 1028, n. (*p*).

(*f*) "Quality" includes under the Code, "state or condition": s. 62 (1). The learned Author says in this passage "*kind* or quality": 2nd ed. 741; 4th ed. 934. His view is not clear. If the goods are not of the description contracted for, the property does not pass at all. See *ante*, 353.

(*g*) *Ante*, 855.

(*h*) "Warranty" defined in Code, s. 62 (1), set out *ante*, 751.

(*i*) *Ante*, 867; *post*, 1131.

(*k*) Code, s. 53 (1) (*a*), *post*, 1127.

(*l*) *Street* v. *Blay* (1831) 2 B. & Ad. 456; 36 R. R. 626; *Gompertz* v. *Denton* (1832) 1 C. & M. 207; 2 L. J. Ex. 82; *Parsons* v. *Sexton* (1847) 4 C. B. 899; 16 L. J. C. P. 181; *Dawson* v. *Collis* (1851) 10 C. B. 530; 20 L. J. C. P. 116; notes to *Cutter* v. *Powell* (1795) 2 Sm. L. C. 7th ed. 1; 11th ed. 1; 3 R. R. 185; Code, s. 53 (1), *post*, 1127. Lord Eldon's decision to the contrary, in *Curtis* v. *Hannay* (1800) 3 Esp. 83, was overruled by the later cases.

(*m*) L. R. 2 Q. B. 447; 36 L. J. Q. B. 270.

Breach of a mere warranty no excuse for non-acceptance.

Heyworth v. *Hutchinson* (1867).

special terms in the written contract providing for a
award; but the language of the Judges implies that th
decision would be given in the case of any executory
for the sale of specific goods. The defendant bought a
lot of wool, "413 bales greasy Entre Rios, at 10¼d. *per*
to arrive *ex Stige*, the wool to be guaranteed about sir
samples; and if any dispute arises it shall be decided
selling brokers, whose decision shall be final," etc
brokers found that the wool was not as good as the s
and the buyer on inspection refused to take it, and w
notice to and under protest from him, the brokers
that he should take it under certain allowances. T
count of the declaration was general for non-acceptanc
second alleged the brokers' decision as an award a
arbitration. The defendant was held bound to accep
the award.

Blackburn, J., as to the clause of warranty, said
"Now such a clause may be a simple guarantee or warr
it may be a condition. Generally speaking, when the
is as to *any* goods, such a clause is a *condition* goin
essence of the contract; but when the contract is as t
goods, the clause is only *collateral* to the contract, a
subject of a cross-action, or matter in reduction of da

Cockburn, C.J., and Lush, J., expressed similar op

Mr. Benjamin's argument on this case.

On this case the Author argues that the cases in
has been held that on the sale of a specific chattel th
remedy is confined to a cross-action or to a defence b
reduction of the price are all cases of the *bargain an*
a special chattel unconditionally (*n*), where, consequ
property had become vested in the buyer; but that n
case of an *executory contract* had been found, no case
the buyer was held bound to accept goods which,
case, required to be weighed before delivery (*o*), (and
therefore, the property remained in the seller), if t

(*mm*) The same learned Judge in *Azémar* v. *Casella* (1867) L.
677, Ex. Ch.; 36 L. J. C. P. 263, *ante*, 705, distinguished *Heyworth*
son as being a case in which the goods were inferior to the contract
but in quality only.

(*n*) *Weston* v. *Downes* (1778) Doug. 23; *Gompertz* v. *De*
1 C. & M. 207; 2 L. J. Ex. 82; *Murray* v. *Mann* (1848) 2 Ex. 53
Ex. 256; 76 R. R. 686; *Parsons* v. *Sexton* (1847) 4 C. B. 899; 16
181; *Dawson* v. *Collis* (1851) 10 C. B. 523; 20 L. J. C. P. 116; *Pay*
(1806) 7 East, 274. See also the judgment of the Q. B. in *Street* v
2 B. & Ad. 456; 36 R. R. 626. To the same effect is the judgment
in *Heilbutt* v. *Hickson* (1872) L. R. 7 C. P. 438, at 449; 41 L. J. C
in *Behn* v. *Burness* (1863) 3 B. & S. at 755—756; 32 L. J. Q. B. 20

(*o*) See s. 18, Rule 3, *ante*, 355.

not equal in quality to the sample by which they were bought. So long as the contract is merely executory, there seemed to be no difference between a contract for the sale of 100 bales of unascertained wool, guaranteed to be equal to sample at 10d. a pound, and a contract for the sale of 100 bales specifically earmarked at 10d. a pound, and similarly guaranteed. And he cited the following case: –

Foulmin v. *Hedley* (1845).

In *Foulmin* v. *Hedley* (*p*), it was held by Cresswell, J., at Nisi Prius, that the defendant, who had agreed to purchase a *specific cargo* of guano "at £7 10s. a ton, to be delivered in bags, to be weighed at the quay beams," had a right to inspect it on arrival and reject it, if not equal in quality to "average imports from Ichaboe" as warranted; and this ruling was afterwards approved by the Court of Exchequer.

And the Author further observes that in *Mondel* v. *Steel* (*q*) the well-considered opinion of the Court, as delivered by Parke, B., gives the reason why a purchaser is driven to a cross-action on a warranty that he has "the property vested in him indefensibly: . . . he has all that he stipulated for as a condition of paying the price."

Mr. Benjamin submitted, therefore, that the dicta of the learned Judges, in *Heyworth* v. *Hutchinson*, must be taken as referring to cases of *bargain and sale*, not to *executory contracts* (*r*), unless there be something in the terms of the agreement to show that the buyer had consented to take the goods at a reduced price, if they turned out to be inferior to the quality warranted.

Mr. Benjamin's view criticised.

But it is submitted that the view (*s*) taken by the Court of Queen's Bench was logical and correct. The seller, having tendered the specific bales *ex Stige*, had *tendered the goods contracted for*, and was entitled to have them accepted by the buyer, the remedy of the latter were it not that this remedy was barred by the provision as to an allowance off the price being to sue for damages for breach of warranty. The cases cited by the Author show only that the buyer, having in fact accepted the goods, and so become owner, could not of his own motion *rescind* the sale; they do not show that he is not bound to accept, merely because the property has not passed.

(*p*) 2 C. & K. 157; 80 R. R. 836.

(*q*) (1841) 8 M. & W. 858, at 870; 10 L. J. Ex. 426; 58 R. R. 890, quoted *post*, 1132. See also *per eundem* in *Syers* v. *Jonas* (1848) 2 Ex. 111, at 117; 76 R. R. 515.

(*r*) The learned editor of Chitty on Contracts seems to take a different view: 11th ed. 425; 12th ed. 505.

(*s*) Whether *obiter* or not is not altogether clear. The Court do not clearly distinguish the two counts.

Toulmin v. *Hedley* was, it is submitted, either a v
decision, or more probably the stipulation that the
should be equal to the average exports from Ichaboe wa
sidered as the *description* of the cargo, and so a conditio

Law under the Code.

But, whatever may be the common law on this poin
definition of "warranty" in sub-sections 11 (1) (b) and
of the Code has solved the problem. A warranty is "an
ment with reference to goods collateral to the main purp
of the contract, *such* that its breach does not give ris
right to reject the goods (*t*). The inability of the bu
reject the goods is thus *part of the statutory definitio*
warranty. And the character of the agreement "is d
by the contract itself, and not by matters subsequent
contract" (*u*), such as the passing of the property. N
main purpose of a contract of sale is the sale and deliv
goods answering the description in the contract (*x*).
definition therefore says in effect that the buyer
refuse to accept goods for the breach of any stipulation
does not form part of their description. The only qu
then, in a case like *Heyworth* v. *Hutchinson*, would to-d
was the stipulation part of the description? The goods
specific, and their description being as a rule their pl
identity (*y*), any collateral stipulation would ordinarily
warranty only (*z*).

Heyworth v. *Hutchinson* was a case of specific goods.
its principle equally applies to an agreement to sell u
tained goods, so far as relates to any stipulation not
to the whole consideration for the buyer's promise to
and pay.

(*t*) See the definition more at large, *ante*, 751.

(*u*) *Per* Moulton, L.J., in *Wallis* v. *Pratt* [1910] 2 K. B. 1003,
79 L. J. K. B. 2031. See also by Lord Shaw in S. C. [1911] A. C. 394,
80 L. J. K. B. 1058.

(*x*) *Per* Moulton, L.J., in *Wallis* v. *Pratt*, *supra*.

(*y*) See on this *ante*, 696.

(*z*) The reader is, however, reminded that accordance with sampl
a condition: Code, s. 15 (2) (*a*). But the general principle is unaffe

CHAPTER II.

BUYER'S REMEDIES AFTER DELIVERY OF THE GOODS.

AFTER the goods have been delivered into the actual possession of the buyer the performance of the seller's duties may still be incomplete by reason of the breach of some of the conditions or warranties, express or implied, whether as to title, or quality, or fitness, to which he has bound himself by the contract.

Breach of condition or warranty as to title, etc.

If the breach be of a condition as to title, the buyer may either refuse to pay the price, or, if it have been paid, bring his action for the return of it, on the ground of failure of the consideration for its payment (*a*), or he may sue in damages for breach of the seller's promise, treating the breach of the implied condition that the seller has the right to sell as a breach of warranty o... (*b*). On a breach, however, of the implied *warranty* of quiet possession o" of freedom from incumbrances (*c*), the buyer's only remedies are to bring an action or counterclaim for damages, or to set up the breach in diminution or extinction of the price in the seller's action, as is hereinafter explained (*d*).

Breach of condition or warranty as to quality.

Where the goods delivered are not of quality according to contract, the buyer's rights depend in this case also on whether the breach was of a condition or of a warranty. The breach of a condition justifies the buyer in rejecting the goods. When the breach is of a warranty, or of a condition which is, or must be, treated as a warranty only, the law is thus declared by the Code:—

Code, s. 53 (1) and (4). Remedy for breach of warranty.

"**53.**—(1.) Where there is a breach of warranty (*e*) by the seller, or where the buyer elects (*f*), or is compelled (*g*), to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer

(*a*) As in *Eichholz* v. *Bannister* (1864) 34 L. J. C. P. 105; 17 C. B. (N. S.) 708; 142 R. R. 594, *ante*, 689.

(*b*) Code, s. 11 (1) (*a*), *ante*, 644; s. 53 (1), *infra*.

(*c*) S. 12 (2) and (3), *ante*, 773.

(*d*) *Post*, 1128, 1132.

(*e*) "Warranty" is defined in s. 62 (1), *ante*, 752.

(*f*) Under s. 11 (1) (*a*), *ante*, 644.

(*g*) See s. 11 (1) (*c*), *ante*, 644, where, as regards specific goods, certain difficulties of construction are discussed.

Code, s. 53 (1) and (4).

is not by reason only of such breach of warranty entitled to re goods; but he may

"(a.) set up against the seller the breach of warranty in din or extinction of the price, or

"(b.) maintain an action (*h*) against the seller for damages breach of warranty.

* * * * *

"(4.) The fact that the buyer has set up the breach of warr diminution or extinction of the price does not prevent him fro taining an action for the same breach of warranty if he has further damage" (*i*).

The rule above stated is not confined to warran quality. But, with the exception of the two implie ranties of title introduced by section 12 (2) and (3) warranties are mentioned in the Code, and as reason already been given for the view that at common law warranty is not implied (*l*), it follows that the only war to which the opening words of section 53 (1) can apply than those contained in section 12 (2) and (3), are warranties.

The words "by reason only" in sub-section (1) prese right of the buyer to reject the goods for breach of wa by virtue of express agreement, as *e.g.*, under a co subsequent (*m*), or under a condition precedent to the tion of the contract (*n*), or on the ground of fraud representation.

Buyer has three remedies.

The buyer has, then, three remedies:—

1. He may reject the goods, except where the breach mere warranty, or where he has accepted part of the under a non-severable contract which contains no express or implied, enabling him to reject them (*o*).

2. He may accept the goods and bring an action or c claim (*p*) for the breach of warranty (*q*).

(*h*) By s. 62 (1) "action" includes counterclaim. The action framed in contract or in tort, and in the latter case no *scienter* need be or proved: *Williamson* v. *Allison* (1802) 2 East, 446; *Wood* v. *Smit* 5 M. & Ry. 124; *Shippen* v. *Bowen* (1887) 122 U. S. 575.

(*i*) See *Mondel* v. *Steel* (1841) 8 M. & W. 858; 10 L. J. Ex. 426; 890, *post*, 1132.

(*k*) *Ante*, 773.

(*l*) *Ante*, 772.

(*m*) *Street* v. *Blay* (1831) 2 B. & Ad. 456; 36 R. R. 626; *Head* v. T (1871) L. R. 7 Ex. 7; 41 L. J. (N. S.) Ex. 4.

(*n*) *Bannerman* v. *White* (1861) 10 C. B. (N. S.) 844; 31 L. J. C 128 R. R. 953, *post*, 1139.

(*o*) Code, s. 11 (1) (*c*), *ante*, 644; and see *post*, 1129.

(*p*) By R. S. C., 1883, O. 19, r. 3, and O. 21, r. 17, a defendant may his whole damages by way of counterclaim, and obtain judgment for the should it prove to be in his favour.

(*q*) See *post*, 1132, 1242, *et seqq.*

3. If he have not paid the price, he may plead the breach of warranty in reduction or extinction of the price in the seller's action, and may also maintain an action or set up a counterclaim for any further damage he may have suffered (*r*).

1. Right to reject the goods.

1. That the buyer, *where the property has not passed* to him, may reject the goods if they do not correspond in quality, fitness, or description with the contract is the necessary result of the principles established in the Chapters on Delivery (*s*) and Acceptance (*t*). The buyer's obligation to accept depends on the compliance by the seller with his obligation to deliver (*u*). In an executory agreement, or, as it is called in the Code, "an agreement to sell," with a stipulation as to quality, it is part of the seller's promise to furnish goods conforming to the contract—*e.g.*, in a contract for sale by sample, to furnish a bulk equal in quality to the sample; and this is a condition precedent (*x*). If the contract, however, be for specific goods, a stipulation as to quality or fitness *prima facie* is an independent contract, collateral to the principal bargain, and only giving rise to an action for damages (*y*). But where the buyer has agreed to buy goods which are not then in existence, or are unascertained, on the seller's contracting that they are of a specified quality or fitness, nothing seems clearer than that this warranty is as a rule not an independent contract, but is a part of the original contract, operating as a condition, and what the buyer intends when accepting the offer is: "I agree to buy *if* the goods are equal to the quality you warrant" (*z*).

And even where the subject-matter of a contract of sale is a specific existing chattel a statement as to some quality possessed by or attached to such chattel will be a condition where the absence of such quality, or the possession of it to a smaller

(*r*) See *post*, 1132—1136.

(*s*) *Ante*, 779, *et seqq.*

(*t*) *Ante*, 855, *et seqq.*

(*u*) Code, s. 28, *ante*, 683; *Hannuic* v. *Goldner* (1843) 11 M. & W. 849.

(*x*) Code, s. 15 (2) (*a*), *ante*, 736; *Wells* v. *Hopkins* (1839) 5 M. & W. 7; 52 R. R. 611; *Hibbert* v. *Shee* (1807) 1 Camp. 113; 10 R. R. 649. The same principle applies to other stipulations as to quality or fitness; see the Code, s. 14, *ante*, 712, and s. 28, *ante*, 683.

(*y*) *Per* Bailhache, J., in *Harrison* v. *Knowles* [1917] 2 K. B. 606; 86 L. J. K. B. 190; see also *Heyworth* v. *Hutchinson*, *ante*, 1123.

(*z*) Mr. Benjamin (2nd ed. 749; 4th ed. 941) also treats the fact that goods are inaccessible to inspection as clear proof that the stipulation as to quality is not collateral, but a condition precedent. In Chitty on Conts., 8th ed. 425; 12th ed. 505, a contrary opinion is expressed, that where the chattel is specific and *in esse* at the time of the contract a breach of warranty does not entitle the buyer to reject the article, and the fact that the buyer has not seen it is immaterial. This statement of the law was approved by Kay, J., in *Re Green and Balfour* (1890) 63 L. T. 97.

extent, makes the thing sold different *in kind* from th
as described in the contract (*a*).

Rules at common law as to warranty and condition.

The learned author of the Leading Cases thus expres
rules deduced from the authorities (*b*): "A warranty, p
so called, can only exist where the subject-matter of t
is ascertained and existing, so as to be capable of
inspected at the time of the contract, and is a co
engagement (*c*) that the specific thing so sold possesses
qualities; but, the property passing by the contract
a breach of the warranty cannot entitle the vendee to
the contract and *revest* the property in the vendor with
consent (*d*). . . . But where the subject-matter of the
not in existence, or not ascertained at the time of the co
an engagement that it shall, when existing or ascer
possess certain qualities, is not a mere warranty, but
dition, the performance of which is precedent t
obligation upon the vendee under the contract, becau
existence of those qualities, being part of the descrip
the thing sold, becomes *essential to its identity*, a
vendee cannot be obliged to receive and pay for a
different from that for which he contracted."

In the absence, therefore, of some such express stipu
as was contained in *Heyworth* v. *Hutchinson* (*e*), it is
plete defence for the buyer to show that the delivery
was not in acordance with the promise (*f*). And the
may, unless the terms of the contract negative such rig
even reject the goods if the seller refuse him an oppor
for inspection when demanded at a reasonable time, alt
the seller shortly afterwards offer them for inspection

(*a*) *Per* Bailhache, J., in *Harrison* v. *Knowles*, *ante*, 1129 (*y*).

(*b*) 2 Sm. L. C. 7th ed. 30; 11th ed. 28.

(*c*) This is the sense in which the term is used in the Code. See d
in s. 62 (1), *ante*, 751.

(*d*) The learned Author's reference to the passing of the property
that he is considering here only whether the buyer can *return* the good
a similar statement in the notes to *Chandelor* v. *Lopus* (1603) Sm.
7th ed., vol. 1, 185; 11th ed., vol. 2, 62. *Heyworth* v. *Hutchinson* (the
on which see *ante*, 1125) shows that the buyer may be bound to accep
although the property has *not* passed.

(*e*) *Ante*, 1123.

(*f*) *Per Curiam* in *Street* v. *Blay* (1831) 2 B. & Ad. 463; 36 R.
Sanders v. *Jameson* (1848) 2 C. & K. 557; 80 R. R. 857; *Cooke* v. *Ri*
(1844) 1 C. & K. 561; *per* Bovill, C.J., in *Heilbutt* v. *Hickson* (1872)
7 C. P. 438, at 451; 41 L. J. C. P. 228; Code, s. 28, *ante*, 683. Such a
is also available in an action on a bill given for the price: *Wells* v. *H*
(1839) 5 M. & W. 7; 52 R. R. 611; and *cf. Warwick* v. *Nai n* (1855)
762; 102 R. R. 818, where the plea was only that the goods were of less v

(*g*) *Polenghi* v. *Dried Milk Co.* (1905) 92 L. T. 64; 21 T. L. R. 118.

(*h*) *Lorymer* v. *Smith* (1822) 1 B. & C. 1; 1 L. J. (O. S.) K. B. 7
740; Code, s. 15 (2) (*b*), *ante*, 736. S. 15 (2) (*b*) applies only to sa

In actual practice, the only difficulty which arises grows out of controversies whether the buyer has actually accepted the goods, and thus become owner. On this point the cases show that acceptance does not take place by mere retention of the goods for the time necessary to examine or test them, nor by the consumption of so much as is necessary for such examination and testing; it is always a question of fact for the jury whether the goods were kept longer, or whether a larger quantity was consumed than was requisite (*i*).

When buyer may reject goods which are his own.

It was shown in a former chapter (*j*) that there are cases where, under an implied condition subsequent, the buyer may reject goods although they have become in the meantime his property. Such are cases where an interval elapses between the time of delivery and the time when it has to be determined whether the seller has performed his contract, and they are referable to the principle that it would be onerous to the seller, by suspending the transfer of the property, to cast upon him the ordinary risks of ownership for an indefinite time, and possibly in places where he can exercise no control (*k*). Accordingly, the presumed intention is that the property shall pass subject to the buyer's subsequent right of rejection. Thus, where goods—at any rate perishable goods—are to be despatched to the buyer at a distance the buyer may reject them if they are unmerchantable on or shortly after arrival (*l*). And the case would, it is conceived, be the same, though the buyer himself took delivery, if the goods were contracted for as being goods for use or consumption by the buyer at a distance from the place of delivery. Again it is apprehended the buyer could reject goods which are to be despatched by the seller so as to arrive at a particular time made of the essence of the contract (*ll*), and which arrive late. Again a quantity of goods may be contracted for as an entire whole, though to be appropriated by instalments, such as a book deliverable in parts (*m*), or a cargo, or a machine. The buyer may, if the

sample, but s. 34 (2), *ante*, 842, may have the effect of extending the principle to all cases. This principle seems to be a general one at common law, and not confined to sales by sample. See *Chalmers* v. *Paterson* (1897) 34 Sc. L. R. 768, *ibid.*

(*i*) See *ante*, 861.

(*j*) See Chapter on Acceptance, *ante*, 867.

(*k*) *Per Cur.* in *Delaware R. R. Co.* v. *U. S.* (1913) 231 U. S. 363, quoted ante, 867. See also *Nelson* v. *W. Chalmers & Co.* [1918] S. C. 441.

(*l*) This principle does not apply to *necessary* deterioration. See the subject discussed in the Chapter on Conditions, *ante*, 731, *et seqq.* The proposition that the buyer is the owner of the goods previously to rejection is, however, based on the assumption that *Ollett* v. *Jordan*, *ante*, 733, was wrongly decided.

(*ll*) Code, s. 10 (1), *ante*, 674.

(*m*) *Per* Lord Dundas in *Nelson* v. *W. Chalmers & Co.*, *supra*.

full quantity or parts be not made up, subsequentl
the parts delivered, paying, however, for such as he m
dealt with as owner (*n*). Or the property may, by agr
pass, previously to its completion, in a ship, or other
to be manufactured, and yet the buyer may reject t
and revest the property, if on completion the ship
according to contract (*o*).

The condition subsequent being a term of the cont
the benefit of the buyer, he takes the risk of the e
which the condition is to arise becoming impossible.
if the goods perish, and inspection become impossi
contract is absolute (*p*).

2. The buyer's action for damages after acceptance of goods.

2. The second proposition, that the buyer may
receiving and accepting the goods, bring his action o
his counterclaim (*q*) for damages for breach of w
of quality needs no authority. It is so enacted
Code (*r*), and there is nothing to create an exception f
general rule that an action for damages lies in every c
breach of promise made by one man to another for a g
valuable consideration (*s*).

3. Breach of warranty as defence in action for price, and as ground for further damages.

Mondel v. *Steel* (1841).

3. The third remedy of the buyer, with an exposi
the whole law on the subject as it was before the Code,
now, cannot be better presented than by extracts fr
lucid decision given by Parke, B., in *Mondel* v. *Steel*

In that case the action was by the buyer for dama
breach of an express warranty of the quality of a shi
under written contract. The defendant pleaded in effe
the buyer had already recovered damages by setting
breach of warranty in defence when sued for the price
ship. This reduction was in respect of the differe
the time of delivery between the ship as she was and w

(*n*) Code, s. 30 (1), *ante*, 799; *per Cur.* in *Col. Ins. Co.* v. *Adela*
Ins. Co. (1886) 12 A. C. 128, at 138, 140, P. C. The case contemplated
a contract for a quantity contracted for as an indivisible whole, a
appropriated as such, as in *Anderson* v. *Morice* (1876) 1 A. C. 713, set
417. In such a case the property does not pass provisionally in the p
(*o*) *Nelson* v. *W. Chalmers & Co.*, *ante*, 1131.
(*p*) *Maine* v. *Lyons* (1913) 15 Com. L. R. (Austr.) 671, where the
was express, *ante*, 868.
(*q*) *Per* Brett, L.J., in *Thomson* v. *S. E. Ry. Co.* (1882) 9 Q. B.
at 330; 51 L. J. Q. B. 322.
(*r*) S. 11 (1) (*a*), *ante*, 644, and s. 53 (1), *ante*, 1127.
(*s*) See the opinions of the Judges in *Poulton* v. *Lattimore* (1829) 9
259; 7 L. J. (O. S.) K. B. 225; 32 R. R. 673. The same view has be
by the American Courts: *Day* v. *Pool* (1873) 52 N. Y. 416.
(*t*) 8 M. & W. 858, at 870—871; 10 L. J. Ex. 426; 58 R. R. 890.
Towerson v. *Agricultural Aspatria Society* (1872) 27 L. T. (N. S.) 276
see the observations of Willes, J., on the report of Parke, B.'s, judgm
M. & W.); *Rigge* v. *Burbidge* (1846) 15 M. & W. 598; 15 L. J. Ex. 30

ought to have been according to the contract: but the damages claimed in the present action were special, and such as could not have been allowed in the former action, being in respect of subsequent necessary repairs, so that the plaintiff was deprived of the use of the vessel. A general demurrer to the plea was sustained.

The Court said: "Formerly it was the practice where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract (*u*). . . . In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant . . . has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten* v. *Butter* (*v*), a different practice . . . began to prevail, and . . . has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value. . . . The rule is, that it is competent for the defendant . . . 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.*"

Accordingly a reduction or extinction of the price under the rule in *Mondel* v. *Steel* is not a set-off (which is based upon statute) (*w*). But the rule applies only to cross claims

(*u*) As in *Broom* v. *Davis* (1794) 7 East, 481 (n).
(*v*) (1806) 7 East, 479.
(*w*) *Bright* v. *Rogers* [1917] 1 K. B. 917; 86 L. J. K. B. 804. Nor is it a statutory defence under C. C. R., Ord. 10, r. 18: *ibid.*

under the same contract. A buyer therefore cannot himself against the seller by a cross claim arising different contract (*x*).

Buyer has the option of reducing the price or of suing.

In *Davis* v. *Hedges* (*y*), the Queen's Bench followed v. *Steel*, and further held that the buyer was not b reduce the price in the seller's action, but had the o setting up the defective quality as a defence or of mai a separate action in respect of it.

The Judicature Acts have not affected these right buyer, for in giving a defendant a right to set off o by way of counterclaim any right or claim (*yy*) they abolish the distinction between a defence and a cros but had it in view only to prevent circuity of actio Acts deal with procedure only (*z*). Accordingly wh those Acts would have been a ground of defence may set up as a defence, and what would have been the s a cross-action will now be raised by a counterclaim strict meaning of the term (*zz*).

If, instead of counterclaiming, the buyer bring action, one of the two actions is liable to be staye s. 24 (5) of the Judicature Act of 1873; but it will n sarily be the buyer's action, as being second in point The question is one for the discretion of the Court, w be exercised in the way most conducive to a fair tri issues between the parties (*a*).

Buyer's remedies under s. 53 (1) (*a*) and (*b*) strictly alternative.

The remedies given to the buyer under section 53 (Code are not cumulative, but alternative; and he therefore, after having reduced or extinguished t recover the ordinary difference of value in an action o claim for damages, but he may recover further dama

(*x*) *Bow, McLachlan & Co.* v. *The Ship "Camosun"* [1909] 79 L. J. P. C. 17, P. C.

(*y*) (1871) L. R. 6 Q. B. 687; 40 L. J. Q. B. 276, overruling borough's opinion in *Fisher* v. *Samuda* (1808) 1 Camp. 190, and ex language of Parke, B., in *Mondel* v. *Steel* ("to the extent that capable of obtaining an abatement").

(*yy*) R. S. C., 1883, O. 19, r. 3; O. 21, r. 17. See Note on Counterclaim in Ann. Pract., 1905, Vol. I. 281, *et seqq.*

(*z*) *Per Curiam* in *Stumore* v. *Campbell* [1892] 1 Q. B. 314; 61 463, C. A.

(*zz*) See *Lowe* v. *Holme* (1883) 10 Q. B. D. 286; 52 L. J. *Mackay* v. *Bannister* (1885) 16 Q. B. D. 174; 55 L. J. Q. B. 106; *Laing* (1888) 20 Q. B. D. 334; 57 L. J. Q. B. 195, C. A.; *Stumore* v *supra*; *Atlas Metal Co.* v. *Miller* [1898] 2 Q. B. 500; 67 L. J. Q. B. It appears that it is usually the best course now to plead the diminut by way of defence *pro tanto*, and to make a counterclaim for the spe See Bullen & L. Plead. 5th ed. 813; and also *ibid.* 356.

(*a*) *Thomson* v. *S. E. Ry. Co.* (1882) 9 Q. B. D. 320; 51 L. J. C. A.

if in either action it be decided, either that there was no warranty, or that it was not broken, the case is *res judicata*, and no other action or counterclaim lies for either general or special damage (*b*).

A question may arise whether the words of section 53 (4) "has set up" cover only the case where the action for further damages is subsequent to the action in which the breach of warranty was set up by the buyer in defence. At common law it has been decided by the Supreme Court of Canada that the sequence of the actions is immaterial (*c*).

Defence in extinction of price. *Poulton* v. *Lattimore* (1829).

In *Poulton* v. *Lattimore* (*d*), the buyer's defence in an action for the price was successful for the *whole* amount of the price. The seller sued to recover the price of seed, warranted to be good new growing seed, part of which the buyer had sowed himself, and the remainder was sold by him to other persons, who proved that the seed was worthless; and that they neither paid, nor would pay for it.

Return of goods not necessary, nor notice to seller of breach before action.

It was further held in this case that the buyer might insist on his defence without returning, or offering to return, the seed (*e*). And the cases cited in the note are authorities to the effect that not only may the breach of warranty be so used in defence, but that a direct action by the buyer may be maintained for damages for the breach without notice to the seller (*f*).

But buyer's failure in this respect raises a presumption against him.

It has been said, however, by eminent Judges that the failure either to return the goods or to notify the seller of the defect in quality raises a strong presumption that the complaint of defective quality is not well founded (*g*).

Waiver of right of action.

Like every other right, a right of action for breach of warranty may be waived, expressly or by implication, or under trade usage (*h*). Thus it will be waived where the

(*b*) *Creaven* v. *Miller* (1899) 18 N. Z. L. R. 65.

(*c*) In *Church* v. *Abell* (1877) 1 Sup. Ct. Rep. 442, Strong, J., *dissenting*.

(*d*) 9 B. & C. 259. See also *King* v. *Boston* (1789), 7 East, 481, n.; *Dicken* v. *Neale* (1836) 1 M. & W. 556; 5 L. J. (N. S.) Ex. 265 (reduced value paid).

(*e*) See also *Groundsell* v. *Lamb* (1836) 1 M. & W. 352; 5 L. J. (N. S.) Ex. 154.

(*f*) *Fielder* v. *Starkin* (1788) 1 H. Bl. 17; 2 R. R. 700; *Buchanan* v. *Parnshaw* (1788) 2 T. R. 745; *Pateshall* v. *Tranter* (1835) 3 A. & E. 103; 4 L. J. (N. S.) K. B. 162; 42 R. R. 334.

(*g*) *Per* Lord Ellenborough in *Fisher* v. *Samuda* (1808) 1 Camp. 190; *per* Lord Loughborough in *Fielder* v. *Starkin*, *supra*; *Poulton* v. *Lattimore* (1829) 9 B. & C. 259; 7 L. J. (O. S.) K. B. 225; 32 R. R. 673; *Prosser* v. *Hooper* (1817) 1 Moo. 106; 19 R. R. 530. Lord Ellenborough's ruling in *Hopkins* v. *Appleby* (1816) 1 Stark. 477, and *Groning* v. *Mendham* (1816) *ibid.* 257, as to the necessity for notice, must be taken to have been overruled in *Poulton* v. *Lattimore*, *supra*; *per* Bayley, B., in *Allen* v. *Cameron* (1833) 1 C. & M. 833, 838; 2 L. J. (N. S.) Ex. 263.

(*h*) S. 55 of Code, *ante*, 354.

buyer's remedy is intended to be acceptance or rejection such an intention will not be implied from the mere fa the price is payable "after inspection of goods imme on arrival (*i*).

Special provision for the return of goods sold.

It is not unusual, especially in contracts for the horses, to find in the contract a provision for the return a specified time of the thing sold if not answering warranty. Where a return of the thing is *obligatory* buyer his only remedy is to return the thing and to back his purchase-money, and he cannot sue for *bre warranty*, whether he return the thing or not (*k*). If, other hand, the contract merely confer *power* on the to return it if faulty, the better opinion is that the buy the remedy of return super. dded to his other rights, a return the thing and receive back his purchase-mon retain it and sue for breach of warranty (*l*).

Adam v. *Richards* (1795).

In *Adam* v. *Richards* (*m*), the Common Pleas hel where a horse had been sold with express warranty, a seller had expressly agreed to take him back and retu price if he were found faulty, it was incumbent on th chaser to return the horse as soon as the faults were disc unless the seller by subsequent misrepresentation indu purchaser to prolong the trial; and that the buyer, w kept the horse six months, could not recover. Counsel plaintiff had co'tended, on the authority of *Fiel Starkin* (*n*), that a return of the horse was not necessar the Court held that, there being an agreement to ta horse back if he were found to be faulty, a ·turn was bent on the plaintiff, and *Fielder* v. *Sta n*, though sound law, was not applicable.

The report of this case is very unsatisfactory. buyer's only remedy were to return the horse and receiv his purchase-money, the decision is no doubt quite in ance with that of the Court of Appeal nearly a hundre later in *Hinchcliffe* v. *Barwick* (*o*). But if by the c it was intended that the buyer was to be *at liberty* to

Khan v. *Duchè* (1905) 10 Com. Cas. 87.

Mesnard v. *Aldridge* and *Hinchcliffe* v. *Barwick*, set out *infra*, that *Chapman* v. *Withers* (1888) 20 Q. B. D. 824; 57 L. J. Q. B. 457, at an action for breach of warranty, was in reality one for the retur price.

(*l*) See *Magrane* v. *Loy* (1339) 1 Craw. & Dix., Ir. Circt. C. 28 *Douglass Axe Co.* v. *Gardner* (1852) 64 Mass. 88, *infra*; *Wallace* v. (1817) 2 Stark. 162, *infra*.

(*m*) 2 Bl. H. 573; 3 R. R. 508.

(*n*) (1788) 1 Bl. H. 17; 2 R. R. 700.

(*o*) *Infra*.

the horse if it had faults (and this, is submitted, was its true construction), then it is conceived that the decision was not correct, but that the buyer was entitled to sue for breach of warranty without returning the horse. From this point of view it has been severely criticised in America (*p*).

Mesnard v. *Aldridge* (1801).

In *Mesnard* v. *Aldridge* (*q*), where the condition was that horses purchased, in case of any unsoundness, "*were required to be returned* before the evening of the second day after the sale," the buyer, who had returned the horse as unsound on the third day, brought an action on the warranty, and was nonsuited by Lord Kenyon, on the ground that under the special agreement a return of the horse was obligatory on the buyer.

Wallace v. *Jarman* (1817).

In *Wallace* v. *Jarman* (*r*) it was decided by Lord Ellenborough at Nisi Prius that the buyer of a watch warranted "to go well," with an option to exchange it, if disapproved, for another of equal value, could return the watch if it would not go, and recover the price, and was not bound to take watches in exchange until he was suited.

Hinchcliffe v. *Barwick* (1880).

In *Hinchcliffe* v. *Barwick* (*s*), the plaintiff bought a horse warranted a good worker. The condition of sale was that horses warranted good workers, not answering such warranty, *must be returned* before five o'clock of the day after the sale, and that they should then be tried by a competent person, whose decision should be final. The buyer, who had not returned the animal within the time, sued on the warranty. *Held*, by the Court of Appeal on demurrer, that the buyer's only remedy was to return the horse within the time. The object of the condition was to provide an immediate and final settlement of all disputes. The Court laid special stress upon the imperative terms of the condition of the sale.

Magrane v. *Loy* (1839).

In *Magrane* v. *Loy* (*t*), the respondent sold a horse to the appellant, and warranted him. He also agreed that if the appellant did not like the horse he should be *at liberty to return* him at any time before the Tuesday following the sale, and receive back his purchase-money. The horse was not returned, and died three weeks after the sale from a complication of diseases, and the appellant brought an action for

(*p*) See the trenchant criticism on this case in *Douglass Axe Co.* v. *Gardner* (1852) 64 Mass. 88, cited, *post*, 1136.

(*q*) 3 Esp. 271. See also *Buchanan* v. *Parnshaw* (1788) 2 T. R. 745; *Bush* v. *Freeman* (1887) 3 Times L. R. 449.

(*r*) (1817) 2 Stark. 162.

(*s*) 5 Ex. D. 177, C. A.; 49 L. J. Ex. D. 495.

(*t*) 1 Craw. & Dix., Ir. Circt. C. 286.

money had and received. The respondent contended th
action did not lie, as the appellant had not returned the
Held, by Pennefather, B., that the contract gave the
lant the power to return the horse, whether sound o
within a limited time, but that stipulation did not affe
right of action on the warranty (*u*).

Douglass Axe Co. v. *Gardner* (1852).

In *Douglass Axe Co.* v. *Gardner* (*x*), an action on th
for breach of warranty, the defendant agreed to deliv
tons of iron within one month, warranted to be suitabl
specified purpose; "if it was not, to be returned at the
dant's expense." The Court interpreted this provis
giving the buyers a power to return the iron, but not a
ing them to do so, and held that the buyers could sue v
returning the iron. Referring to the report of *Ad*
Richards (*y*), Metcalf, J., said: "If by 'action
warranty' is here meant an action to recover damag
breach of the warranty, we cannot assent to the de
When a seller, in addition to a warranty of property, m
promise to take it back if it does not conform to the wa
we cannot hold that such superadded promise rescin
vacates the contract of warranty. We are of opinion
such case the buyer has . . . a choice of remedies, a
either return the property within a reasonable time or
and maintain an action for breach of the warranty. A
are not convinced that the contrary was decided in *Ad*
Richards. . . . The action may have been 'on th
runty' and yet have been brought to recover back th
chase-money, and not to recover damages for breach
warranty. . . . If such was the claim made . . .
understand the decision, and see the force of the reaso
for it by the Court, namely, that the plaintiff had not
ably returned the horses. But if the action was broug
to recover back the purchase-money, but to recover d
for breach of the warranty, and if the decision thereu
that such action could not be maintained, we cannot
legal ground for such a decision."

Right of trial to test fulfilment of warranty.

Cranston v. *Mallow* (1912).

In *Cranston* v. *Mallow* (*z*) a horse was sold warra
good worker, and sound in wind, and the buyer was

(*u*) Although the learned Baron speaks of warranty, the action w
one for the return of the price, the actual return of the horse being
by the fact of its condition, as in *Chapman* v. *Withers* (1888) 20 Q. B
57 L. J. Q. B. 457, *ante*, 464, 1136, n. (*k*).

(*x*) 64 Mass. 88.

(*y*) (1795) 2 Bl. H. 573; 3 R. R. 508, *supra*.

(*z*) [1912] S. C. 112.

a week's trial of him. The horse was returned within the week as being unsound in *limb*. The seller sued for the price. *Held* he could recover. The sale was a sale with a warranty, and not a bailment of the horse on approbation (in which case no warranty was necessary). Had it been a bailment the horse might have been returned on any ground. Being a sale with a warranty, the buyer had to prove the horse did not answer to the warranty, and this he had not shown.

Accident to or perishing of the thing sold

Head v. *Tattersall* 1871).

In *Head* v. *Tattersall* (*a*), a horse was bought warranted to have been hunted with the Bicester hounds, with liberty to the buyer to return the animal if not answering the description, up to the Wednesday evening following the sale. While in the buyer's possession the horse, without the buyer's default, met with an accident which depreciated its value. The buyer returned the horse as not answering the warranty, and sought to recover his purchase-money. In an action for breach of warranty, and for money had and received, it was held by the Exchequer that the right to return the horse for breach of warranty under the express power was not affected by an accident to the horse after the sale without any default in the buyer, and that the buyer was entitled to recover.

If the thing sold perish in the buyer's possession without his default, he may recover the price, whether a return of the thing is optional or obligatory on him; in the former case, because he should not be deprived of his option without his fault (*b*); in the latter, because he is excused from returning the thing (*c*), according to the principle of *Taylor* v. *Caldwell* (*d*). And the case is the same although the contract says that a failure to return shall be a bar to any claim on account of a breach of warranty (*e*).

Buyer loses his right of returning goods by any act equivalent to acceptance, but not his other remedies.

The buyer will also lose his right of returning goods delivered to him under a condition as to description or quality, if he have shown by his conduct an acceptance of them, as where he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership, *e.g.*,

(*a*) L. R. 7 Ex. 7; 41 L. J. Ex. 4.

(*b*) *Per* Bramwell, B., in *Head* v. *Tattersall*, *supra*.

(*c*) *Chapman* v. *Withers* (1888) 20 Q. B. D. 824; 57 L. J. Q. B. 457; *see ante*, 1136, n. (*k*). *Cf. Elphick* v. *Barnes* (1880) 5 C. P. D. 321; 49 L. J. C. P. 698, where the property had not passed at the time of the death of the horse, which was delivered on sale or return, and it was held that the buyer was not liable for the price.

(*d*) (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 129 R. R. 573, *ante*, 463.

(*e*) *Chapman* v. *Withers*, *supra*.

by offering to resell them (*f*); all of which acts show an ment to accept the goods (*g*), but do not constitute an aba ment of his remedy by cross-action or counterclaim, right to insist in defence upon a reduction in price (*h*).

Buyer cannot set up breach of warranty in defence to a negotiable security given for the price.

The buyer's right to insist on a reduction of price breach of warranty cannot be made available if he have a negotiable security for the price, and the action be br on the security. He is driven in such a case to a cross- or counterclaim (*i*) as his only remedy. The law doe permit an unliquidated and uncertain claim to be set *defence* against the liquidated demand represented by a note (*k*). But he may set up in defence a total failure sideration, as where a condition of quality or descriptio not been performed (*l*).

Rights of buyer in breach of warrantyin Scotland.

The common law of Scotland with regard to the b rights when the goods delivered are disconform to contra thus stated by Lord President Inglis in *McCorm Rittmeyer* (*m*): "When a purchaser receives delivery of as in fulfilment of a contract of sale, and thereafter find the goods are not conform to order, his only remedy reject the goods and rescind the contract. If he has pa price his claim is for repayment of the price, tend redelivery of the goods. If he has granted bill for the his claim is for redelivery of the bill in return for the redelivery of the goods. If any portion of the good before their rejection been consumed or wrought up so be incapable of redelivery *in forma specifica*, then th value (not the contract price) of that portion of the must form a deduction from the purchaser's claim for ment of the price. The purchaser is *not* entitled to reta goods and *demand an abatement from the contract*

(*f*) The reader is here reminded that a resale is not *necessarily* a ownership, for example where it takes place before the buyer has rece goods. It is such an act where the buyer has had an opportunity of re as in the text. See *ante*, 860.

(*g*) *Ante*, 855, *et seqq*.

(*h*) *Mondel* v. *Steel* (1841) 8 M. & W. 858; 10 L. J. Ex. 426; 58 R. *Street* v. *Blay* (1831) 2 B. & Ad. 456; 36 R. R. 626; *Allen* v. *Camero* 1 C. & M. 832; 2 L. J. Ex. 260; Code, s. 53 (1), *ante*, 1127.

(*i*) R. S. C., 1883, O. 19, r. 3; O. 21, r. 17. The counterclaim in case is purely an independent action, and not a *defence*.

(*k*) *Warwick* v. *Nairn* (1855) 10 Ex. 762; 102 R. R. 818. See the ex of the law and citation of authorities in Byles on Bills, 16th ed. 156; *Masterman's Bank* v. *Leighton* (1866) L. R. 2 Ex. 56; 36 L. J. Ex. 33; *Nix* (1824) 9 Moo. C. P. 159; 2 L. J. C. P. 133; 27 R. R. 708; and 1086.

(*l*) *Wells* v. *Hopkins* (1839) 5 M. & W. 7; 52 R. R. 611 (sample).

(*m*) (1869) 7 Macpherson, 854, at 858. See also *Padgett* v. *McNai* 15 Dunlop, 75.

corresponding to the disconformity of the goods to order, for this would be to substitute a new and different contract, . . . or it would resolve into a claim of the nature of the *actio quanti minoris* which our law entirely rejects. Just as little is the purchaser entitled, while rescinding the contract, to retain the goods in security of a claim of damages for breach of contract."

In *Couston* v. *Chapman* (*n*), where there had been a sale by sample, the following comparison between the law of England and Scotland, with reference to a buyer's right of rejection of goods which do not conform to the contract, was made by Lord Chelmsford, who said: "Reference has been made to the difference between the law of England and the law of Scotland as to the right of a purchaser to rescind a contract. . . . In England, if goods are sold by sample, and they are delivered *and accepted* by the purchaser, he cannot return them; but if he has not completely accepted them, that is, if he has taken the delivery conditionally, he has a right to keep the goods a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample, he is then entitled to return them. As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample, he has an absolute right to return them."

Under the Scotch common law, therefore, a buyer possessed rights in some respects larger, and in some respects smaller, than a buyer in England or Ireland. He could reject the goods, even after doing acts which in these countries would amount to an acceptance, if he rejected timeously" (*o*). On the other hand, if he accepted, he was liable for the whole price without deduction, for his alternatives were rejection or unconditional acceptance.

Such being the law previously to the Code, section 53, which as has been seen (*p*), declares the rights of a buyer to compensation or damages on a breach of warranty, provides that:—

"53.—(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act."

The buyer's right of rejection in Scotland is declared by section 11 (2), already quoted (*q*). It arises upon "failure by the seller to perform any material part of a contract of sale."

(*n*) (1872) L. R. 2 Sc. App. 250.
(*o*) *Couston* v. *Chapman*, *supra*.
(*p*) *Ante*, 1127.
(*q*) *Ante*, 646.

that is to say, upon a breach of warranty in the Scotch
Under that clause the buyer has the option on suc
" either within a reasonable time after delivery (*s*)
the goods and treat the contract as repudiated, or to
goods and treat the failure to perform such mate
as a breach which may give rise to claim for compe
(that is to say, for abatement or extinction of the pr
section 53 (1) (a) (*t*) by way of defence) " or damag
The buyer's right alternative to rejection is one acc
his *voluntary acceptance* of the goods. The Code do
terms attach to an *involuntary* acceptance, as in En
Ireland (*x*), a right to compensation or damages. T
stands once for all on his right as determined by
tion (*y*). It has accordingly been decided in Scotl
the buyer's rights are only such as are laid down in
section 11 (2) of the Code; that he must once for
which alternative he will pursue; and that, if he elect
the goods, he takes the risk of his rejection being inv
of being compelled (as under the old law) to pay t
price of the goods without compensation (*z*).

Measure of damages on breach of warranty.

In relation to the measure of damages which the
entitled to recover for breach of warranty, the genera
the same as that which governs in the case of the
breach of his obligation to deliver.

In accordance with this principle, the Code in se
provides that:

Code, s. 53 (2)

"**53.**—(2.) The measure of damages for breach of warran
estimated loss directly and naturally resulting, in the ordinary
events, from the breach of warranty."

In the case of the breach of a warranty of quality
of presumption is laid down by way of further defi

(*r*) By s. 62 (1) a breach of warranty in Scotland is " a failure
a material part of the contract."

(*s*) It will be noticed that s. 11 (2) (*ante*, 646) expressly gives t
right of election after delivery. No time is mentioned, with regard t
election in England or Ireland, in s. 11 (1) (*a*), *ante*, 644, or s. 53 (1),

(*t*) *Ante*, 1128.

(*u*) *British Motor Body Co.* v. *Thomas Shaw* (1914) 51 Sc. L. R.
in delivery).

(*x*) Under s. 53 (1), *ante*, 1127. See also s. 11 (1) (*c*), *ante*, 644.

(*y*) See also s. 59, which speaks of a buyer in Scotland having
accept goods which he might have rejected " : *ante*, 947.

(*z*) *Electric Construction Co.* v. *Hurry* (1897) 34 Sc. L. R. 295,
President Robertson, and Lords McLaren and Adam, *diss.* Lord Kinn
in *Groom and Arthur* v. *Stewart & Co.* (1905) 7 F. 563; *Lupton* v
(1900) 2 Fraser, 1118; 37 Sc. L. R. 839, *coram* Lord Justice Clerk M
and Lords Trayner and Moncrieff. Lord Moncrieff, in the second case,
there might be exceptional cases in which a rejection might be recalle
agreed that the general rule was as stated in the text.

the damages "directly and naturally resulting in the ordinary course of events."

"(3.) In the case of breach of warranty of quality (*a*) such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty." Code, s. 53 (3).

Scope of s. 53 (2) and (3).

Both of these sub-sections deal with the measure of damages in cases falling under section 53 (1), those cases only where the buyer is not entitled to reject the goods, but elects, or is compelled, to rely on breach of warranty (*b*). A buyer who either has never received the goods, or has rejected a delivery as not in accordance with the contract, must proceed under section 51 (*c*) for damages for non-delivery, and, if he have paid for them, under section 54 (*d*) for a return of his purchase-money (*e*).

The reader should notice that sub-section (3) covers only cases of breaches of warranty of quality. In the case of the breach of a warranty of description, or of fitness (*f*), the buyer's damages are regulated by sub-section (2) only (*g*).

In *Dingle* v. *Hare* (*h*), where twenty tons of superphosphates were sold at five guineas a ton, guaranteed to contain 30 per cent. of phosphate of lime, it was held that the jury had properly allowed the purchaser the difference between the value of the article delivered and that of the article as warranted, that is to say, the difference between five and two guineas a ton. And in *Jones* v. *Just* (*i*), the same rule was applied to a sale of Manila hemp, and the plaintiff recovered as damages £756, although by reason of a rise in the market the inferior hemp sold for nearly as much as the price given in the original sale.

Damages measured at a date subsequent to delivery.

As the measure of damages declared by section 53 (3) is the difference calculated at the date of delivery, if it sought to calculate this difference at another date, resort must be had to section 53 (2). The two following cases illustrate this proposition.

(*a*) "Quality" includes "state or condition"; s. 62 (1).
(*b*) Compare the damages in an action in tort for fraud, *post*, 1153.
(*c*) *Ante*, 1094.
(*d*) *Ante*, 930.
(*e*) See *Heilbutt* v. *Hickson* (1872) L. R. 7 C. P. 438; 41 L. J. C. P. 228, set out *ante*, 864, *et seqq.*
(*f*) *Ante*, 712.
(*g*) So decided, as to warranties of description, by Bruce, J., in *Bostock* v. *Nicholson* [1904] 1 K. B. 725; 73 L. J. K. B. 524, *post*, 1147.
(*h*) (1859) 7 C. B. (N. S.) 145; 29 L. J. C. P. 143; 121 R. R. 424.
(*i*) (1868) L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.

Loder v. *Kekulé* (1857).

In *Loder* v. *Kekulé* (*k*), the buyer had contract "Russian prime Ukraine Y.C." tallow, and had p advance for it. The tallow was found on delivery to inferior quality, so that the amount of the damages ou have been fixed with reference to the market price o day. The buyer, however, did not resell the tallow ti time afterwards, when the market price had fallen; t Court being of opinion that the delay was due to the c of the seller, and the jury having found that the buy resold the tallow as soon as he reasonably could, the recovered as damages the difference between the marke of tallow according to the contract at the date of the and the price subsequently obtained on the resale of the delivered.

Ashworth v. *Wells* (1898).

In *Ashworth* v. *Wells* (*l*), the plaintiff had bou auction an orchid described as "Cattleya Acklandia seven bulbs, three leaves, the only known plant," a paid twenty guineas for it, a *white* Cattleya Ack being previously unknown. After careful cultivatio years afterwards it produced a purple flower, and was about 7s. 6d. In an action for breach of warran defendant, the seller, paid into Court twenty guinea a sum for interest. There was evidence that a g white Cattleya would be worth from 100 to 150 g but to give the County Court jurisdiction the clai reduced to £50. The County Court Judge found tha the flower showed its real nature nobody would given more than the twenty guineas paid into Court, a judgment for the defendant. On appeal, the Divisiona ordered a new trial. On appeal by the defendant to th of Appeal, it was contended by him that the pla damages were the amount of his loss *at the time of de* that is to say, calculated according to the value of a which had not yet flowered; substantially, a return purchase-money. But it was held by the Court of (*dubitante* Collins, L.J.) that, as the warranty was of a event, viz., that if the plant flowered it would flower there was no breach till the plant had flowered; th plaintiff was entitled to wait till then to prove the valu plant; and that when it flowered, as £50 was to be take

(*k*) 3 C. B. (N. S.) 128; 27 L. J. C. P. 27; 111 R. R. 575. The found that the buyer had rejected the tallow, but the Court, having the form of action, treated it as one for breach of warranty after accept

(*l*) 78 L. T. 136, C. A.; 14 Times L. R. 227.

the value of a plant according to warranty, he was entitled to recover that sum, including the amount paid into Court.

Value of goods as warranted, how calculated.

The value of goods as warranted is under section 53 their intrinsic value, and not any special value which they may have to the buyer. To apply the latter standard would enable the buyer to recover special damages without having brought to the seller's knowledge the particular circumstances which may give to the goods their special value. The buyer's loss, in the case supposed, would not result "in the ordinary course of events" from the breach of warranty within the meaning of sub-section (2). But special circumstances, such as a sub-sale known to the seller, and the absence of a market, may give the goods an exceptional value.

Hamilton v. *Magill* (1883)

Thus in *Hamilton* v. *Magill* (*m*), where the plaintiffs bought from the defendant No. 1 iron c.f.i. to Philadelphia at £6 5s. a ton, and resold it at £6 10s., and the iron delivered was No. 2 iron, and was rejected by the sub-buyer, and then sold by the plaintiffs for £975, it was held that the plaintiffs, in an action for breach of warranty, were not limited to the difference between this sum, which the jury found was the value of the iron delivered, and £2,055, which they found to be the value of iron according to contract, but could recover the difference between £975 and £2,990, the sub-sale price. The seller knew that the iron was bought to enable the plaintiffs to accept the sub-buyer's offer, and the plaintiffs could not in time purchase other goods to supply his sub-buyer. Accordingly, the ordinary measure of damages was excluded, and damages should be measured according to the value of the iron *to the plaintiffs*.

Damages under s. 53 (2)

The following cases fall under the more general rule of damages laid down in section 53 (2) (*n*):

Warranties of the soundness of animals.

Mullett v. *Mason* (1866).

In *Mullett* v. *Mason* (*o*), the plaintiff, a farmer, placed with other cattle a cow bought from the defendant, which was fraudulently warranted to be sound, although known by the seller to be affected with an infectious disease. He was held entitled to recover as damages the value of such of his own cattle as had died from the disease communicated to them by the infected animal, as the plaintiff had a right to rely upon the representation that the cow was sound, and the direct

(*m*) (1883) 12 L. R. Ir. 186; *cf. Slater & Co.* v. *Hoyle* (1920) 2 K. B. 32; 89 L. J. K. B. 401, where the sellers had no knowledge of the sub-sale. Meagher, J., at the trial of *Graham* v. *Bigelow* (1912) 46 Nov. Sc. R. 116, affirmed by the S. C. of Canada, referred to the rule in the text as it appeared in the 5th ed.

(*n*) *Ante*, 1142.

(*o*) L. R. 1 C. P. 559; 35 L. J. C. P. 299.

result of such reliance would be that he would place h
other cows; and the Court refused to reduce the dam
the value of the cow bought. The Court distinguis
case from *Hill* v. *Balls* (*p*), on the ground that in th
case there had been simply the sale of a horse which h
to be glandered, without any misrepresentation or war
induce the buyer to put the horse in the same stal
others.

Smith v. *Green* (1875).

A similar decision was given in *Smith* v. *Green* (*q*
the facts were similar, except that the warranty
fraudulent. Archibald, J., had directed the jury th
might take into consideration the loss arising from th
tion of the other cows, if they thought the defendan
or ought to have known, that the buyer was a farm
would in the ordinary course of business place the c
others. The jury gave damages for the loss incurred
infection, and the Court afterwards refused to re
damages to the price of the cow. The direction that
should find whether the seller knew that the cow was
be placed with other cows would seem to have spru
great caution, as it is conceived that the simple fact
seller knew the plaintiff was a farmer would ha
sufficient (*r*).

Breach of a condition of description.

In the three following cases there was the breach
dition of description.

Randall v. *Raper* (1858).

In *Randall* v. *Raper* (*rr*), the plaintiffs had boug
from the defendant as Chevalier seed barley, and in
way of their trade as corn-factors, they, believing
Chevalier seed barley, resold it with a warranty th
such. The sub-buyers sowed the seed, and the pro
barley of a different and inferior kind, whereupon t
claim upon the plaintiffs for compensation, w
plaintiffs had agreed to satisfy, but no particular
fixed, and nothing had yet been paid by the plaint
difference in the value of the barley sold by the defe
the barley as described was £15, but the plaintiffs

(*p*) (1857) 2 H. & N. 299; 27 L. J. Ex. 45; 115 R. R. 547. T
decided on demurrer, and the decision largely depended on the
pleadings. The rule of *caveat emptor* was held to apply. Bramwel
held that the damage alleged, viz., the contamination of another
plaintiff's stable, was too remote. *Sed quære.* On the main poi
v. *Hobbs* (1878) A. C. 13; 48 L. J. C. P. 281, *ante*, 556.

(*q*) 45 L. J. C. P. 28; L. R. 1 C. P. 92.

(*r*) See Mayne on Dam. 7th ed. 22. The learned Judge probab
mind *Hill* v. *Balls* (1857) 2 H. & N. 299; 27 L. J. Ex. 45; 115 R. R

(*rr*) E. B. & E. 84; 27 L. J. Q. B. 266; 113 R. R. 554.

£261 7s. 6d., the excess being for such damages as the plaintiffs were deemed by the jury liable to pay to their sub-buyers on account of the smaller value of the crops produced. All the Judges of the Queen's Bench held the damages payable to the sub-buyers to be the necessary and immediate consequence of the defendant's breach of contract. "The warranty is," said Erle, J., "that the barley sold should be Chevalier barley. The natural consequence of the breach of such a warranty is that, the barley which has been delivered having been sown and not being Chevalier barley, an inferior crop has been produced. This damage naturally results from the breach of the warranty; and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from Chevalier barley" (*s*).

Wilson v. *Dunville* (1879).

In *Wilson* v. *Dunville* (*ss*), the plaintiff, a dairy farmer, had bought from the defendants, distillers, a quantity of grains, which the defendants warranted to be "distillers' grains," and which were ordinarily used for feeding cattle, though the sale to the plaintiff was not expressly made for that purpose. The grains contained an admixture of lead, and several of the plaintiff's cattle were poisoned and died. The warranty was not fraudulent. The jury found that the substance did not reasonably answer the description of "distillers' grains." It was argued for the defendants that they could not be liable for the consequences of a breach of contract so unforeseen as the admixture of lead in the grains. But the Court held the defendants to be liable for the value of the cattle which had died, as their death was the natural consequence of the defendants' breach of warranty, saying that, to make the defendants liable for damages which in the ordinary course flowed from the breach, it was not necessary that the particular breach which ensued should have been within the contemplation of the parties. The defendants' ignorance of the nature of the thing delivered could not excuse their act in delivering poison as food.

Bostock v. *Nicholson* (1904).

In *Bostock* v. *Nicholson* (*t*), decided under the Code, the defendants contracted to sell to the plaintiffs sulphuric acid.

(*s*) Bruce, J., points out in *Bostock* v. *Nicholson*, *infra*, that there was no allegation in the declaration in *Randall* v. *Raper* that the defendant knew that the barley was bought for resale, or indeed that he knew that the plaintiffs were corn-factors; and that therefore the case did not depend upon what was in the contemplation of the parties.

(*ss*) 6 L. R. Ir. 210; S. C. 4 L. R. Ir. 249. See the reference to this case in *Bostock* v. *Nicholson*, *infra*.

(*t*) [1904] 1 K. B. 725; 73 L. J. K. B. 524.

The plaintiffs were sugar refiners and manufacturers ing sugars in the shape of invert and glucose; but the for which the sulphuric acid was required was *nev municated* to the defendants. The order given to th dants was for "B.O.V.," or brown oil of vitriol. S acid made from free sulphur does not contain any app quantity of arsenic, but acid made from pyrites arsenic, unless it has undergone a process of separatio defendants delivered acid containing arsenic, wh manufactured by the plaintiffs into glucose and sup brewers for the manufacture of beer. Many pers drank the beer became ill, and some died, and the became unable to carry on their business, and liabl damages to the brewers. In an action against the de for breach of warranty, Bruce, J., who tried the case a jury, found that "B.O.V." meant sulphuric ac mercially free from arsenic, and that there had bee by that description under s. 13 of the Code (*u*).

The learned Judge subsequently decided the qu damages. After showing that s. 14 (1) (*x*) did not the case, as the defendants were not aware of the p purpose for which the goods were supplied, nor s. 53 which applies only to breaches of warranty of qual not of description, nor s. 54 (*z*), for no special circu had been communicated to the seller as the founda special damages, he decided that the case fel s. 53 (2) (*a*) only. The question therefore was, W the damages "directly and naturally resulting, in t nary course of events, from the breach of warranty question did not depend upon any knowledge of th dants. He held that the plaintiffs could recover (1) paid, because, the acid being worthless, there was failure of consideration for its payment (*b*); (2) the the materials used for making glucose and i ort, and worthless by being mixed with the acid a time plaintiffs were ignorant of its poisonous n ure, th the direct and natural result of the breach of contra the plaintiffs had applied the acid to one of its ordin And the learned Judge showed that *Wilson* v. *Du* did not depend upon the defendants' *knowledge*

(*u*) *Ante*, 695.
(*x*) *Ante*, 712.
(*y*) *Ante*, 1143.
(*z*) *Ante*, 930.
(*a*) *Ante*, 1142.
(*b*) See on this a
(*c*) *Ante*, 1147.

ordinary use of distillers' grains was to feed cows. But he held that the plaintiffs could not recover (3) compensation for the loss of their goodwill, because the damage to the plaintiffs' credit was not a loss "directly and naturally resulting from the breach of warranty." It did not arise directly from the act of the defendants (who did not supply glucose), but from the act of the plaintiffs in manufacturing it. Nor could the plaintiffs recover (4) the damages recoverable from them by their customers, because these contracts had not been brought to the defendants' knowledge (*d*).

In the five following cases the breach of a warranty of fitness was involved.

Holden v. *Bostock* (1902).

In *Holden* v. *Bostock* (*e*), on a sale by the same manufacturers of brewing sugars of invert sugar, for use by the buyers, who were brewers, in the manufacture of beer which had to be destroyed because of the presence of arsenic in the sugar, it was held by the Court of Appeal that the buyers were entitled to recover, as part of their damages (*f*), (1) the market value of the beer destroyed on the day when it was destroyed, as representing its value to them on that day, and not merely its cost of production; (2) the cost of advertising to the buyers' customers the materials to be used in the manufacture of their beer in future.

Provisions. Death from eating. *Jackson* v. *Watson & Sons* (1909).

In *Jackson* v. *Watson & Sons* (*g*) the plaintiff, whose wife had died from eating tinned salmon supplied by the defendants, was held entitled to recover, in an action for a breach of the implied warranty under s. 14 (1) of the Code that the salmon was fit for food, the expenses of medical attendance, the wife's funeral expenses, and a sum in respect of the loss of the wife's services, it having become necessary on her death to engage extra servants (*h*).

Defective carriage-pole. Injury to horses. *Randall* v. *Newson* (1877).

In *Randall* v. *Newson* (*i*) the plaintiff bought of the defendant, a coach-builder, a pole for his carriage. The pole broke, and the horses became frightened, and were injured

(*d*) See on these last two heads the notes to *Vicars* v. *Wilcocks* (1806) 8 East, 1, in 2 S. L. C. 7th ed. 534; 11th ed. 521; 9 R. R. 361.

(*e*) 50 W. R. 323, C. A.; 18 T. L. R. 317

(*f*) Two sums, in respect of payments to analysts, and the extra cost of beer purchased after the destruction of stock, were allowed in the Court below, and not appealed against.

(*g*) [1909] 2 K. B. 193; 78 L. J. K. B. 587, C. A. See also *Frost* v. *Aylesbury Dairy Co.* [1905] 1 K. B. 608; 74 L. J. K. B. 386, C. A. (typhoid germs in milk).

(*h*) See, with regard to this last head, the relevancy of the maxim "*Acto personalis meritur cum persona*," discussed in the case.

(*i*) (1877) 2 Q. B. D. 102; 46 L. J. Q. B. 259, C. A. See also *Borradaile* v. *Brunton* (1818) 8 Taunt. 535 (defective cable: loss of anchor).

to the extent of £130. The price of a new pole wu
Held, by the Court of Appeal, that the plaintiff was e
to recover the £3, and also the £130 if the jury w
opinion that the injury to the horses was the natura
sequence of the defect in the pole.

Buyer's expenses where goods rejected by distant sub-buyer.

Molling v. *Dean* (1901).

In *Molling* v. *Dean* (*k*) the plaintiffs, colour print
Germany, supplied the defendant with a large num
toy books, which, as they knew, the defendant had re
a profit to a New York publisher for sale in America
plaintiffs packed the books specially for carriage to A
and the defendant, without opening the cases, sent th
The American sub-buyer rejected the books as being
printed, and reshipped them to the defendant in L
Held, that, as America was the place of inspection
defendant was entitled to reject the books after their re
by the sub-buyer; and was entitled to recover the exp
sending the books to America, and of their return, a
Customs duties at New York, and also his loss of pr
the sub-sale.

Loss of custom.

Swain v. *Schieffelin* (1892).

In *Swain* v. *Schieffelin* (*m*) druggists had sold
manufacturer of ice-creams a liquid called "carlet
to be employed, as the sellers knew, as the colouring
of ices and creams. The liquid contained arsenic, an
of the buyers' customers were made ill. *Held*, by th
York Court of Appeals, that the buyers could recover
value of the ices and creams destroyed; (2) damages
of custom; both heads of damage naturally flowing fr
sellers' breach of contract.

The distinction between *Swain* v. *Schieffelin* and
v. *Nicholson*, on the head of damage claimed for
custom, should be noticed. In the English case the
did not supply glucose, and were, moreover, not awa
the sulphuric acid which they did supply was to be
the manufacture of glucose. In the American case th
knew that the "carlet red" which they supplied wa
used in the manufacture of ices and creams to be sol
public.

Act by buyer in mitigation of loss to be taken into account.

A buyer complaining of a breach of warranty mus
other cases, act reasonably by way of mitigating the
the breach. But, although he is not bound to take an

(*k*) (1901) 18 T. L. R. 217. (*l*) On this point see *am*
(*m*) 134 N. Y. 471, followed, on the head of loss of custom, by Col
in *Cointat* v. *Myham* [1913] 2 K. B. 220; 82 L. J. K. B. 553, where
are reviewed. *Cointat* v. *Myham* was reversed on another point in
L. T. 749, C. A

which a reasonable and prudent man would not take in the ordinary course of business, yet any action which in fact he does, and reasonably might, take connected with the transaction, and which lessens his loss, whether he is bound to take it or not, will be relevant on the question of damages.

British Westinghouse Co. v. *Underground Railways* (1912).

Thus in *British Westinghouse Co.* v. *Underground Railways* (*n*) the buyers of electric machines, which failed in respect of power and economy of coal consumption, ultimately replaced them by Parsons machines of greater capacity and less steam consumption, the substituted machines being so superior to the contract machines that, according to an arbitrator's finding, it would have paid the buyers to instal them even if the contract machines had been according to contract. In an action for breach of warranty the buyers contended that they were entitled to recover the cost of the installation of the Parsons machines as minimising their loss in the future; the sellers contended that the commercial life of the contract machines had ended; accordingly that no damages for the future after the installation of the Parsons machines (including the cost of the installation) were recoverable. *Held*, by the House of Lords, that the installation of the Parsons machines was not *res inter alios acta*; that the advantage to the buyers by the use of these machines should be brought into account in estimating the damages; and that the sellers were right, and the buyers wrong, in their respective contentions. Apart from the breach of contract lapse of time had rendered the appellants' machines obsolete, and men of business would be doing the only thing they could properly do in replacing them with new and up-to-date machines.

Propositions.

The following propositions seem to follow from the preceding case:—

1. On a breach of warranty of a working machine the difference in value is measured by the loss caused by the increased expense of working, and the failure of other matters relating to its efficiency as such.
2. A buyer cannot "run" a loss against a seller (*o*).
3. *Semble*, the warranty does not cover defects occurring or continuing after the termination of the machine's commercial life (*p*).

(*n*) [1912] A. C. 673; 81 L. J. K. B. 1132; *coram* Viscount Haldane, and Lords Ashbourne, Macnaghten, and Atkinson.

(*o*) See also *Speak* v. *Taylor* (1894) 10 T. L. R. 221. Qy. whether it may not be gathered from this case (decided, however, on another point) that, even in the case of an article expressly warranted during a period, the buyer is bound to mitigate the loss once for all if the article is worthless?

(*p*) This proposition was not laid down in words in the case.

Engine unfit. Loss of buyer's crop. Special damages. *Gull* v. *Saunders* (1913).

In *Gull* v. *Saunders* (*q*) the plaintiff bought of the
dants an engine and pump for the purpose of irrigat
lands, which were to be sown with lucerne, and
required water. The defendants knew these facts, and
to supply an engine of sufficient power to irrigate the
The engine and pump supplied were deficient in pow
the plaintiff, being ignorant of machinery and relying
defendants' assurances, continued to use the plant fo
years, and lost his crop. *Held* by the High Court of A
that he could recover special damages for loss of
addition to general damages. The loss of the crop
result which the sellers knew would probably resul
engine of deficient power were supplied, and the bu
relying on the sellers' assurances and refraining
sequence from purchasing another engine, had
reasonably.

Where the inferiority of the goods should have been detected by the buyer before use.

To enable a buyer, who has resold or otherwise dea
the goods, to recover consequential damages for a br
warranty over and above the ordinary measure of the di
in values, it is necessary that the buyer should not ha
negligent in failing to detect the inferiority of th
before he resells or deals with them, for otherwise the
claimed do not "directly and naturally" result fr
seller's breach of warranty, but are due to the buye
negligence (*r*). The circumstance that the defect in t
is not readily discoverable is of course very material

Hammond v. *Bussey* (1887).

Thus, in *Hammond* v. *Bussey* (*t*), already notic
inferiority of the coal could not be discovered by ins
but only when it came to be used, and the seller h
notice of the sub-buyers' claim insisted that the
according to warranty (*u*).

(*q*) (1913) 17 Com. L. R. 82 (Austr.).

(*r*) See *Wrightup* v. *Chamberlain* (1839) 7 Scott, 598; 50 R. R. 8
on the ground of the buyer's negligence from *Lewis* v. *Peake* (1816)
153; 17 R. R. 475, *infra*, n. (*u*), by Parke, B., in *Walker* v. *Hat*
10 M. & W. 255; 11 L. J. Ex. 361; 62 R. R. 600; *Hammond* v. *Bus*
20 Q. B. D. 79; 57 L. J. Q. B. 58, C. A., *infra*.

(*s*) *Mowbray* v. *Merryweather* [1895] 2 Q. B. 640; 65 L. J. Q. B.
where the defect in a chain sold was capable of discovery, yet could
been discovered by a minute examination. See *per* Lord Esher, M.
642. The Court held that the buyer had not been negligent. This
really inconsistent with *Wrightup* v. *Chamberlain*. See *also* *Vogan*
(1899) 81 L. T. 435, C. A.

(*t*) 20 Q. B. D. 79, C. A., *ante*, 1111.

(*u*) *Lewis* v. *Peake* (1816) 7 Taunt. 153; 17 R. R. 475, was set
text in previous editions, but having been decided before *Hadley* v.
(1854) *ante*, 1098; 23 L. J. Ex. 179; 69 R. R. 742, it is of little v
authority: *per* Lord Esher, M.R., in *Hammond* v. *Bussey*, *supra*.
was explained by Parke, B., in *Walker* v. *Hatton* (1842) 10 M. &

Wagstaff v. *Shorthorn Dairy Co.*, 1904.

And in *Wagstaff* v. *Shorthorn Dairy Co.* (*x*), it was held by Cave, J., at Nisi Prius, on a contract for the sale of twelve tons "early Don Regent" seed potatoes, that, if the buyer should have examined the inferior potatoes delivered before planting them, the damages should be the difference between the value of the twelve tons as warranted and the twelve tons delivered; but if he acted reasonably in planting them, the damages should be the difference between the value of the thirty-five tons produced and a crop of thirty-five tons of "early Don Regents" (*y*).

Measure of damages where goods are returned, or are valueless.

Where the thing sold has been returned to the seller by subsequent agreement; or where, the buyer having the right of return, he returns or offers to return it (*z*), or the thing perishes without his default (*a*), or where the buyer, not being bound to return it, retains it, but it becomes absolutely valueless (*b*); the price paid is the measure of general damages for the breach of warranty. The buyer cannot recover the expenses of the keep of the thing unless he offer to return it (*c*). If he do so, and the seller refuse to take it back, the buyer may recover the expenses of keep incurred after such offer for such a reasonable time as is necessary for him to keep it in order to sell the thing to the best advantage (*c*).

Ordinary damages: fraudulent misrepresentation.

Mention may here be made of the measure of ordinary damages when the buyer sues the seller in an action of tort for deceit in giving a fraudulent warranty. In such a case the *prima facie* measure of ordinary (*d*) damages is the difference between the *price* paid and the real value of the goods at the time of delivery (*e*), not, as in actions on contract for breach

255; 11 L. J. Ex. 361; 62 R. R. 600, as depending upon the buyer's ignorance of any unsoundness when he resold, so that his defence of the sub-buyer's action was no doubt reasonable. But there is nothing in the report to show that the seller was aware that the horse was bought for resale at all.

(*x*) Cab. & E. 324.

(*y*) As in *Randall* v. *Raper*, *ante*, 1146.

(*z*) *Caswell* v. *Coare* (1809) 1 Taunt. 566; 11 R. R. 668.

(*a*) *Chapman* v. *Withers* (1888) 20 Q. B. D. 824; 57 L. J. Q. B. 457; see *ante*, 1138, n. (*u*).

(*b*) *Magrane* v. *Loy* (1839) 1 Craw. & Dix. Ir. Circ. C. 286, *ante*, 1137. See also *Poulton* v. *Lattimore* (1829) 9 B. & C. 259; 7 L. J. (O. S.) K. B. 225; 32 R. R. 673, *ante*, 1135.

(*c*) *Caswell* v. *Coare*, *supra*, and 2 Camp. 82; *Chesterman* v. *Lamb* (1831) 2 A. & E. 129; 41 R. R. 397; *Ellis* v. *Chinnock* (1835) 7 C. & P. 169; 48 R. R. 778.

(*d*) For special damages see *ante*, 1145.

(*e*) *Waddell* v. *Blockey* (1879) 4 Q. B. D. 678; 48 L. J. Q. B. 517; *per* Cotton, L.J., in *Peek* v. *Derry* (1887) 37 Ch. D. 541, at 578, C. A.; 57 L. J. Ch. 317; *McConnel* v. *Wright* [1903] 1 Ch. 546; 72 L. J. Ch. 317, C. A.; *Broome* v. *Speak* [1922] 1 Ch. 596; 72 L. J. Ch. 251, C. A. The rule is the same in the U. S.: *Sigafus* v. *Porter* (1900) 179 U. S. 116; *Smith* v. *Bolles* (1889) 132 U. S. 125. So also in Canada: *Rosen* v. *Lindsay* (1907) 17 Man. L. R. 251, C. A.; and in Australia: *Holmes* v. *Jones* (1907) 4 C. L. R. 1692.

of warranty, the difference between the *value* of the
represented and their real value (*f*). In the latter
action is on a promise that the goods are as represe
the buyer's loss is the difference in value, the price p
an immaterial factor. But the action for deceit is
wrong done in tricking the buyer out of his money
question is what the buyer has lost, not what he m
gained. Accordingly the measure of ordinary da
based upon the price paid, diminished by the value,
the goods received. In ascertaining the real valu
goods at the time of delivery subsequent events may
into consideration so far, but so far only, as they th
on the value of the goods at the date of delivery; th
be looked at to enhance the damages, as, *e.g.*, where
have further depreciated since the date of delivery (

Sale of Food and Drugs Act, 1875.

The Sale of Food and Drugs Act, 1875 (*i*), provid
recovery by the buyer of any food or drug, who has
victed under the Act, from the seller, of any pena
costs which the buyer has been compelled to pay, in
to any other damages recoverable by him (*k*).

(*f*) *Ante*, 1143.
(*g*) *Per* Collins, M.R., in [illegible]*nnel* v. *Wright*, *ante*, 1153.
(*h*) *Per* Cotton, L.J., in [illegible] v. *Derry*, *ibid*; *Waddell* v. *Bl*
(*i*) 38 & 39 Vict. c. 63, s. 28.
(*k*) The Fertiliser and Feeding Stuffs Act, 1893 (56 & 57 Vict. c.
contained a similar provision. But this Act was repealed by the Fe
Feeding Stuffs Act, 1906 (6 Edw. 7. c. 27), which does not reprodu
sion, but enacts the offence of sale "without prejudice to any civil
s. 6 (1).

e of the goods as
ne latter case the
represented, and
e price paid being
deceit is one for
money (*g*). The
at he might have
nary damages is
value, if any, of
eal value of the
nts may be taken
they throw light
ery; they cannot
, where the goods
livery (*h*).
provides for the
who has been con-
ny penalties and
pay, in addition
.

1153.
dell v. *Blockey*, *ibid.*

57 Vict. c. 56), s. 3 (3),
by the Fertilisers and
t reproduce the provi-
any civil liability":

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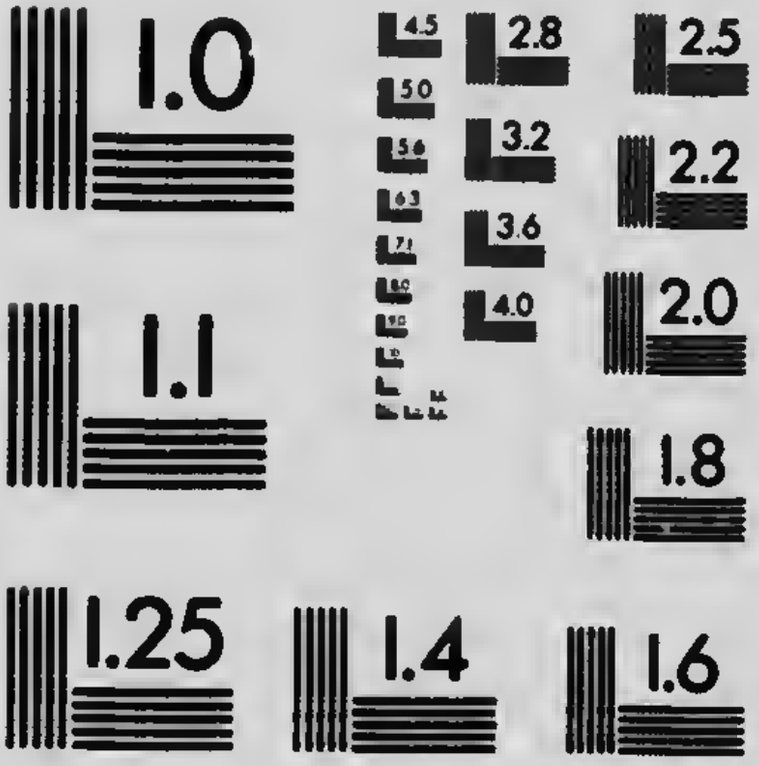

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