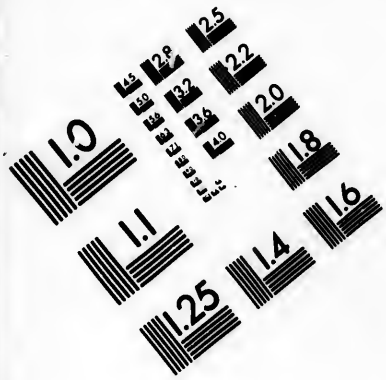

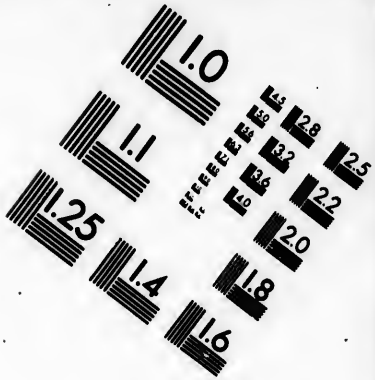

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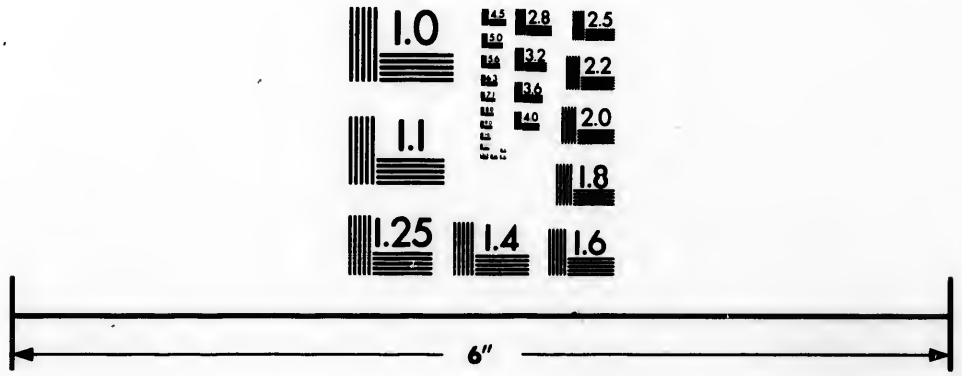

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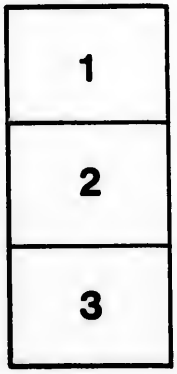

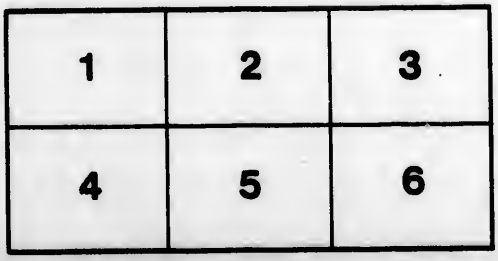

AN ANALYSIS

OF

LEAKE ON CONTRACTS

(THIRD EDITION, 1892),

AND

BENJAMIN ON SALES

(THIRD AMERICAN EDITION, 1888.)

WITH

NOTES THEREON AND COMPLETE REFERENCES TO THE REVISED STATUTES OF ONTARIO, 1893.

BY

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1893.

PREFACE.

In presenting this analysis of "Leake on Contracts," and "Benjamin on Sales," which contains a complete reference to the Revised Statutes of Ontario, the author has endeavoured to give in clear and concise language the principles of law involved. Having experienced in the course of my own reading, especially in preparing for examinations, the advantages of an analysis of this character, I venture to hope it may prove useful to all law students. No diligent student will for a moment imagine that these analyses are intended to supplant the reading of either of these most valuable works on Contracts and Personal Property, but only as companions to them with which they are to be read chapter by chapter.

T. M. H.

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BENJAMIN ON SALES.

LEAKE ON CONTRACTS.

PART I.

FORMATION OF CONTRACTS.

CHAPTER I.

SIMPLE CONTRACTS.

(1) The modes of formation of contracts distinguish them as Simple Contracts;

(2) Contracts Under Seal, and

(3) Contracts of Record.

Simple Contracts again are divided into contracts formed by agreement, and contracts arising independently of agreement, or contracts implied by law.

Agreement between two persons implies not only the same mind or intention, but communication of that intention to each other. Acts are sufficient evidence of intention, and if inconsistent with words are accepted as the more reliable of the two. No contract is made by a promise which reserves an option as to performance.

To create a legal contract, an agreement must include *consideration* for the promise, *i.e.*, anything accepted or agreed upon as a return or equivalent for the promise made. Consideration is required in order to show that the parties intended the transaction t be binding, and may be *executed* when something is given or done at the time of making the promise and in return for it, or *executory* when a promise is made in return for the promise of the other party. But a promise given in respect of something *previously* done, given, or promised, is not binding.

An *express* contract is proved by words, written or spoken, showing agreement of the parties; that is to say,

by direct evidence: *implied* contracts by circumstancial evidence of the agreement. The only difference between the two is in the mode of proof. The term "contracts implied in law" is applied to those contracts raised by law from facts and circumstances, without any actual agreement between the parties.

Agreement must include an offer on one side and acceptance on the other, communicated between the parties, and such offer and acceptance may be communicated by acts as well as by words. Bidding at an auction is an offer; the fall of the auctioneer's hammer is acceptance. The time tables of a railway company constitute an offer of a contract to carry, the taking of a ticket is the acceptance. A contract may be proved from a correspondence between the parties if there is found in it a proposal and an acceptance. Terms offered and representations made during negotiation of a contract, but not contained in the final agreement, are not included in the contract.

Acceptance in order to complete the contract must be communicated to the party making the offer, and must be absolute, unconditional, unqualified, and in the exact terms of the offer. An offer can be accepted only by the person to whom it is made. If a person represents himself as another for the purpose of inducing a contract, he cannot enforce a contract so obtained. Acceptance of office as director of a company, when certain shares have been allotted as qualification for the office, will complete the contract to take the shares. There may be a sufficient communication of acceptance of an offer when the terms of the offer are complied with, as when an order is given for goods to be delivered to a third party, and the goods are so delivered, though the person ordering is not notified yet the contract is complete.

In communications by post the post office is usually treated as agent of the sender only. But when a person making an offer *expressly or impliedly* authorizes an acceptance by post, the *posting* of the acceptance completes the contract. And the same rules apply to communication by telegraph. But a telegraph company is the sender's agent

to deliver the message only in its exact words, consequently the sender is not bound by a message altered in transmission.

An offer continues open for a reasonable time, having regard to all the circumstances, but may be expressly limited as to time. It may be revoked at any time *before acceptance* by communication to the other party of such revocation, even though it has given a fixed time for acceptance. An acceptance cannot be revoked after communication. A distinct refusal of an offer puts an end to the offer; it cannot afterwards be accepted; and the death of either party before acceptance has the same effect. A contract is in general deemed to have been made at the place of acceptance; in case of contracts made by post or telegraph, the place of the contract is determined by the place from which the acceptance is dispatched.

An executed consideration will not support a promise unless the consideration was moved by a previous request; but such request is implied by law, though not existing in fact, from the acceptance of a consideration offered. The consideration must appear not to have been intended as gratuitous or voluntary; as in the payment of money for another under circumstances implying a request to pay and a promise to repay; or the payment of money by an agent employed in business involving payment of money by him, or a request to draw or accept an accommodation bill, which implies a promise to indemnify against loss. But money paid or services rendered for another, without an express or implied request, creates no debt, though *consent* to such execution of consideration may have the effect of request or acceptance. A person obtaining a consideration even by wrong or fraud is still liable to pay on the implied contract. But where a contract has been induced by fraud, if the party defrauded chooses to affirm it, he must affirm it as it was made, and cannot set up any other contract.

If, after part performance of consideration by one party, further performance is prevented or refused *by the other*, he may be sued as upon present debt for the part per-

formed. And where it is found during performance that further performance would be illegal, the further performance may be refused, and an action will lie for the part done.

A party, himself in default in performance of a contract, without any default of the other party, cannot in general claim for the part executed; but if the latter party *voluntarily* retain the benefit of the part executed he will be liable to pay for it. So, if part only of a quantity of goods contracted for is delivered, and is retained, the buyer must pay for the part delivered. But if there is no option of accepting or rejecting the consideration, no promise to pay will be implied.

If completion is prevented by accident or without default of either party, there is usually no claim for the part of the consideration executed. And if, after partial execution, the contract is rescinded by mutual consent, there is no claim for the part executed, unless there has been some express stipulation or implied understanding to that effect.

Wrongful dismissal during a period of employment gives a claim for services rendered up to time of dismissal; but after bringing an action for the wrongful dismissal there can be no claim for services.

Contracts implied in law are divided into three classes:

(1) Debts for *money paid* for use of another;

(2) Debts for *money received* for use of another;

(3) Debts for money due upon *accounts stated.*

In each case the law imposes a debt, and also implies a promise to pay it. A debt for money paid arises when one has paid money at the request of another, but without an express promise to repay being given; or where one has been compelled to pay what another ought to pay, so that the debt of that other is discharged; or where a surety has paid the debt of the principal debtor. If one of several co-debtors pays the whole debt, or more than his share, he may claim contribution from the other debtors. And the same rule applies as between co-sureties, when one of them has paid more than his share; and between several insurers of the same risk to the same

person. An insurer of property, on paying the loss, has all the rights of the insured as to proceeding against any other party liable for the loss; and if the insured have recovered from such party the amount of his loss, the insurer is discharged. Under the head of "general average," the owner of ship or cargo, any part of which is sacrificed for the benefit of the whole, has a claim against other owners for a share of the loss. If goods of one person are distrained for the debt of another, and the debt is paid to release them, the owner so paying may recover the amount from the debtor, unless the goods were left in the place where seized voluntarily and for the benefit of their owner.

But a mere *voluntary* payment of another's debt gives no claim for the money so paid.

The debt for *money received* arises when a person has received money under circumstances such that justice requires it should be paid over to another. Money stolen or obtained by false pretences or by fraud may be claimed as a debt by the owner. So also money of another wrongfully obtained from a third party may be recovered by him to whom it is rightfully due. The owner of property wrongfully sold may claim the proceeds, but having done so he cannot afterwards bring an action for damages. Money extorted by duress of the person (by imprisonment, or threats of imprisonment or of *personal* injury), or by duress of goods can be thus recovered: or if obtained by the moral duress of undue influence. But only duress *of the person* will give a right to *avoid a contract* induced by it. Money obtained by compulsion of legal process cannot in the absence of fraud be recovered while the process stands and money obtained under a distress of goods cannot be claimed as a debt for money received: the remedy is an action of replevin or trespass. Money extorted by a person for doing what he is legally bound to do can be recovered: as in the case of a charge of excessive fees for performing the duties of an office, or excessive charges by a common carrier.

Money paid *voluntarily* and with a knowledge of all the facts though without any consideration cannot be recovered back except in case of payments under an illegal contract when the claim for repayment is made before the illegality is carried into effect.

Money paid under mistake or ignorance *of fact* may be recovered when the supposed state of fact would if really existing create a liability to pay: even though the party paying had the *means of knowledge* of the true state of facts at the time of paying. But money paid with knowledge of all the facts and in mere ignorance or mistake *of law* cannot be recovered back.

Money paid for a consideration which fails may be recovered back; as in case of goods sold when the vendor has no title, and the true owner retakes them: or sale of land when the vendor fails to make title: or purchase of securities which are forged. But if the purchaser gets what he really bargained for though it proves not so valuable as he supposed, he has no claim. And in any case the failure of consideration must be complete in order to support the claim—and must not have come through the plaintiff's own default. A principal handing money to an agent for payment to a creditor can recover it from the agent at any time before the agent has paid it over: but the creditor has no claim upon the agent for it until the agent has admitted holding it for his use.

An *account stated* is held to be only an admission of a balance due from one party to another: and a promise in law to pay it is implied. The admission must be of an *amount certain* and may be verbal or written: and if under seal constitutes a contract under seal. An account stated produces only a *prima facie* liability which may be rebutted: and its effect may be avoided by showing that the debt is claimed under a contract within the statute of frauds still executory at the time of statement of the account. An I O U is evidence of an account stated, and if no one is named to whom the amount is due then it is presumed to be in favour of the party producing it. But it is no evidence of the nature of the debt whether for money lent or

otherwise. To support an action the account stated must be made to the plaintiff or his agent and not to a stranger.

A judgment of a foreign court constitutes a *simple contract debt* in this country which may be sued upon in the courts here. It must award a sum certain to be unconditionally due immediately, and in final settlement of the cause of action. The final judgment of a foreign court is conclusive between the parties, and no defence can be pleaded which might have been raised in the original action. It may be avoided by showing want of jurisdiction in the foreign court, or that its proceedings were contrary to the general principles of justice, or that the judgment was obtained by fraud, or that errors are apparent on the face of it.

CHAPTER II.

CONTRACTS UNDER SEAL.

These derive their legal effect from the formality of the deed used to witness the agreement, and not like simple contracts, from the mere fact of agreement. A deed must be on paper or parchment, but may be in ink or pencil. Sealing is sufficient without signature, unless the latter is especially made necessary by statute or otherwise, and sealing alone is sufficient to satisfy the Statute of Frauds. A deed is inoperative until delivery, but delivery to a stranger for the other party is sufficient; and if a deed is in possession of the other party delivery will be presumed. The effect of a deed dates from delivery, and delivery is presumed to have been on the date of the deed, but the true date of delivery may be shown. Delivery may be made upon condition, and the deed is then not effective till the condition is fulfilled; the deed so delivered is called an escrow, and to have this effect the delivery may be to a third party, or by retention of the deed by the party

executing, but not by delivery to the other party to the deed. Upon performance of the condition the deed becomes effective from the date of the original delivery.

A deed delivered with a *material* part of its contents left blank or omitted is *void*, and cannot be completed by filling in the blanks without a re-delivery or acknowledgment.

Acceptance of a contract under seal is presumed if nothing contrary appear, but a disclaimer may be made by deed or may be shown from words or acts. Consequently a party to a deed may sue upon it without having executed it, or giving any evidence of acceptance. And in a deed containing mutual covenants executed by one party only, that party may be bound and the other not.

A deed may be an *indenture* when made between two or more parties, or *deed poll* when made by one party only.

A bond is a deed by which a party acknowledges himself bound or indebted to another in a certain sum of money, sometimes with a condition attached that on performance of a certain act the bond shall be void. In such case the party is held bound to perform the act, and cannot take the option of forfeiting the penalty or sum in which he is bound instead of performing the condition.

A contract under seal does not require any consideration; but if there is, in fact, an unlawful consideration, the contract is void. And equity will not enforce specific performance of a contract under seal for which there is no consideration.

The priority which debts created under seal formerly had over simple contract debts in administration does not now exist: R. S. O. 1887, c. 110, s. 32. The Statutes of Limitation do not bar the right of action on a contract under seal until twenty years; on a single contract debt the right of action is in general limited to six years.

CHAPTER III.

CONTRACTS OF RECORD.

Contracts of record comprise judgments and recognizances. Statutes, merchant and staple, formerly included, are now obsolete. A record is conclusive of its contents, and admits no evidence in contradiction. A warrant of attorney gives authority to enter judgment against the party executing it, without process. A cognovit actionem authorizes the plaintiff to enter judgment in a pending suit. These instruments may be subject to conditions controlling their operation, and Cons. Rules 733-737 govern their use.

A judgment may be enforced by execution issued upon it, or it may found a new action. The judgment alone creates no lien or charge upon the debtor's property, nor has a judgment creditor any priority over other creditors in administration. R. S. O. 1887, c. 110, s. 32.

A Recognizance is an acknowledgement of a debt made to a judge or other authorized officer, in which this debt is acknowledged to be due to the Crown or to some person with a condition to secure some object, as to keep the peace, to become bail, &c., and is not made under seal.

Debts created by statute, as a penalty imposed by a penal statute, were in general treated as specialty debts, in the operation upon them of the Statute of Limitations. Now see R. S. O. 1887, c. 60.

CHAPTER IV.

CONTRACTS IN WRITING.

Certain contracts are by statute required to be made or evidenced by writing, or the parties may agree that their contract shall be formally reduced to writing, or the contract may be contained in several writings, as corres-

pondence. The general rule regarding all these cases is that the contract contained in the writings cannot be varied by extrinsic evidence of the intention of the parties and the writing becomes the only admissible evidence of the contract. So on a sale of goods by written contract, evidence cannot be given that a sample was shown at time of sale if the writing does not mention the sample, nor that credit was to be given, a cash sale being implied if the written contract is silent on the point. A verbal agreement between the parties cannot control the operation of a bill or note, nor can a contemporaneous written agreement, except as between the parties themselves, or those taking with notice. But the rule does not apply where the contract is made partly in writing and partly by parol.

Evidence may, however, be given to show that a writing was signed for a particular purpose, or conditionally, to show the true time of its execution, though it bears another date, to prove an agreement made contemporaneously with the written contract, but not incorporated in it, if not contradictory to it, to show a usage or custom of trade, implied by binding the parties to certain usual or customary terms and conditions not mentioned in the writing. In the latter case, the evidence must not be contradictory to the written contract, and on the known usage being proved the parties will be presumed to have contracted with reference to it unless the terms of the writing exclude such presumption. Parol evidence may thus *prove* the usage, but cannot exclude it. Usage must in all cases be consistent with law. Evidence of usage can be given to show that expressions in a written contract have, in the trade or business to which the contract relates, a special or technical meaning, different from the ordinary meaning.

Where parties have contracted with reference to a foreign law, evidence is admitted of that foreign law, which must be proved as a fact, The law of the place where a contract is made is *presumed* to have been that which the parties intended to govern their contract, but if it is to be carried out in another country, it is taken to have been intended to be carried out according to the laws of the

latter country. The law of the place where the proceedings are taken regulates the *remedy*. Extrinsic evidence is admissible to show the facts and circumstances of the making of the contract, in order to assist in construing it, to identify the party contracting with the party charged, to identify the subject matter, or to explain a *latent* ambiguity. When two states of facts are shown equally to answer to the writing. But if the ambiguity be *patent*, appearing on the face of the instrument itself no evidence but the writing is admitted. And evidence may be given to avoid an agreement by showing illegality in its matter or purpose.

The construction of written contracts is for the court alone: the jury find as facts the true meaning of the words, and the surrounding circumstances, if any. Generally there is no difference in effect between printed and written words; but in case of printed form with written words added, the latter have the greater effect, as being the immediate language selected by the parties themselves to express their meaning.

The leading rule in construction of written contracts is that the words are to be construed in their ordinary, literal meaning; technical or mercantile words being given their technical or mercantile meaning, though such meaning may not have been contemplated by the parties. Particular words are to be construed with reference to the intention drawn from the whole; or so as best to carry into effect the intention of the parties, appearing from the whole agreement. Thus, recitals in an instrument, if clear, may govern an ambiguous operative clause, though, when the operative part is clear, it will prevail. General words are construed as applied to the particular purpose for which they are used; and if following specific words, they may be restricted in their meaning to things of the kind specified. If an expression be capable of two meanings, that meaning is taken which tends to support the contract; and if one meaning would make the instrument legal and the other illegal, the former is preferred. In case of ambiguity, an expression is taken most strongly against the party

using it; but this rule applies chiefly in instruments where the words may be imputed to one party only. Where the expressions are agreed to by both parties the reverse holds, and an ambiguity is construed most liberally in favour of the party promising, for only to the extent of the easier construction can it be said with certainty that he is bound.

Any words in a deed or written contract which show an *agreement* to do a thing make a contract, and constitute a *constructive covenant* or contract. The terms of a recital in a deed may import a covenant, as showing the intention and meaning of the parties.

A *covenant in law* is an agreement which the law implies from the use of certain words having a known legal operation in creating an estate, by implying an agreement to protect and preserve the estate so granted. Its operation is limited to the duration of the estate of the covenantor; while a covenant in fact, even though arising by construction only, covers the whole term granted.

CHAPTER V.

THE STATUTE OF FRAUDS.

Section 1 of the Statute of Frauds requires leases to be in writing, signed by the parties making them, or their agents authorized by writing; section 2 excepts leases for not more than three years from the making, in which a rent of at least two-thirds the full improved value is reserved. R. S. O. 1887, c. 100, s. 8, imposes the further requirement of a deed in case of leases not within the exception. A lease, ineffectual as such, because not by deed, may be effective as an agreement for a lease, and so have the same practical effect, if it satisfies the requirements of the fourth section of the Statute of Frauds.

A parol lease for less than three years, though valid, does not confer the right to sue the lessee for not taking possession. Section 3 requires assignments, grants and surrenders of interests and estates in land to be in writing, signed by the party assigning, etc., or his agent authorized by writing. Section 4, "That no action shall be brought whereby to charge any executor or administrator upon any promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him authorized."

An executor or administrator is liable to answer damages only to the extent of the assets which come to his hands, and to render him liable to pay out of his own estate his promise must comply with the conditions of the statute. And though so complying, it will not bind unless made upon consideration, mere forbearance to sue on the part of the creditor or legatee is enough.

The provision of the statute regarding promises to answer for the debt, etc., of another applies only where that other is, and remains primarily liable; and where the party promising is liable only by virtue of such promise. If the party promising were liable from the first independently of his promise, or if his promise has the effect of discharging the original debtor, then his promise may be binding though not in writing. An arrangement amounting to a *purchase* of debts is not within the statute, nor are promises made to any other than the creditor. The statute applies to promises to answer for future debts and to promises to give a guarantee for the debt of another. By a

later statute the consideration for the promise of guarantee need not appear in the writing; and by Lord Tenterden's Act (*see* R. S. O. 1887, c. 123, s. 7) written evidence is required in order to support an action upon representations of character, credit, etc.

The statute does not refer to mutual promises to marry, and no written evidence of such is required. It applies to agreements to give money, land, etc., or to make a settlement or will, in consideration of marriage. But representations, not amounting to *promises*, inducing marriage, may be actionable though not evidenced by writing.

An offer to sell and the exercise of an option to purchase land are within the statute, and must be in writing, and equitable interests as well as legal. So also is a contract for lodgings, if involving the *exclusive* possesion of a specific part of the premises. An equitable mortgage by deposit of title deeds is held not to be within statute; but an agreement to make such mortgage by deposit, the deeds not being yet deposited, is. A sale of *fructus industriales* is never within the 4th section, though it may be within the 17th as a sale of goods. But a sale of *fructus naturales* is or is not within the 4th section, according as the property in the subject matter of the sale is to pass before or after severance. In the latter case the contract may be within the 17th section. A contract for a *profit à preudre* as, *e.g.*, the sale of the feed upon a pasture to be taken by the cattle of the buyer, is within the statute; not so a contract to take in cattle to feed. And a contract for an easement over land is within the statute; but a mere license to enter not involving any interest is not, and is revocable unless coupled with a grant. A release by a tenant to his landlord or to another tenant of his right to remove fixtures does not require a note or memorandum in writing. Nor does a collateral agreement between a landlord and tenant to build or to repair, or to pay an additional sum with the rent, unless such additional sum is charged upon the land as rent. A contract of partnership is not brought within the statute merely by reason that the object of the partnership involves the possession and use

of land; and shares in joint stock companies are not within either the 4th or 17th section.

Agreements "not to be performed within a year" include those which are incapable of being fully performed on either side within the year, or in which the parties distinctly contemplate that performance on each side shall extend beyond the year; but not those which may be performed in full, or on one side completely, within the year, though performance is in the event extended beyond that time.

Section 17: "That no contract for the sale of any goods, wares, and merchandises for the price of ten pounds sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereto lawfully authorized." With this section read R. S. O. c. 123, s. 9, which extends its operation to the case of goods not ready for delivery, substitutes "value" for "price," and fixes the value here at $40. *Value* is taken as the value at the time of delivery by the seller, though including the cost of carriage. A contract for work and labour expended in making up goods is not within this section, but only those contracts which are to be performed by the delivery of a chattel, the property in which is to pass by the delivery. Whether the sale of several articles, each of a value less than $40, but together amounting to more than that sum, is within the statute depends on whether they were bought at one contract or distinct contracts. But in a sale by auction each lot sold is a distinct contract, though the parties may subsequently combine the sales of the several lots by entering them together in writing as one contract.

The "note or memorandum in writing" required by the 4th and 17th sections need not have been made at the time of the making of the contract, but it is sufficient if it come into existence at any time before action. It may

consist of several writings, provided they sufficiently refer to one another to connect them; and parol evidence may be given to identify one writing referred to in another. But there must be in the *signed* writing some reference to the other sufficient to connect them, though two documents referring independently to the same agreement, and together expressing its terms, not referring to each other, have been held to satisfy the statute.

All the material terms of the contract made must be contained in the note or memorandum, in order to satisfy either the 4th or 17th section; the parties, the consideration, the promise, and the fact of their agreement must be indicated. Description of a party as "executor" or "owner" is sufficient, though "vendor" is not; the parties meant by the former terms can be identified. If no price was in fact fixed, the writing may still be sufficient, and a sale at a reasonable price will be inferred; but if the price was agreed upon, then the writing must show it. A memorandum of an agreement to grant a lease must show the duration of the term and the time of commencement. A letter showing the terms of a parol agreement, and that the parties had agreed, but repudiating the contract, will bind the party requiring it, since it furnishes sufficient evidence that the parties had contracted. The plaintiff cannot give parol evidence of a term not mentioned in the writing; but the defendant may do so, and thus avoid the effect of the writing by showing that it does not contain all the terms of the contract actually made.

The signature may be by name, by initials, by a mark, or by a surname only; may be stamped or printed; and may be in any part of the writing if it in fact serves to authenticate the document. Signature by the party charged is enough, though the other party have not signed. Under the 1st and 3rd sections of the statute an agent, in order that his signature shall bind the principal, must be authorized in writing; under the 4th and 17th sections the authority may be verbal. An auctioneer is, by usage, the agent of both parties to sign; but this authority may be expressly negatived. Instructions to a telegraph clerk to

transmit a message are sufficient authority to him to sign, so as to bind the sender. The same person may be agent for both parties to sign; but one party to the contract cannot act as agent to sign for the other. Signature, by the agent, of his own name alone is sufficient to bind the principal, though the latter's name does not appear in the writing; and if two agents contract as principals, then the principal of one can sue the principal of the other. In the 4th section there is no provision for proving the contract without the writing; but the effect of acceptance and receipt of part of the goods, or of part payment, under the 17th section, is to dispense with the necessity for a note in writing, and let in parol evidence of the contract. The buyer may "accept and receive" the goods in such a manner as to let in parol evidence that a contract was made, and still retain the right to dispute that the contract has been performed. "Actual receipt" requires delivery and taking possession as a matter of fact; there must be delivery by the vendor, with the intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking to the possession as owner, in order to satisfy the statute and let in parol evidence of the contract. Acceptance and receipt in fact, though the terms of the contract are disputed, is sufficient; and a refusal to accept and receive, for whatever reason, leaves the buyer free. Carriers and warehousemen indicated by the buyer to receive the goods may be his agents to *receive*, not to *accept*.

If the goods are at the time of sale in the possession of the buyer as bailee for the seller, a constructive delivery and receipt may be effected by the parties agreeing to a change of possession to the buyer in his own right. And if the buyer then deals with them in a manner inconsistent with his former possession, he will be held to have accepted and received the goods. So, where the goods remain after the sale in the possession of the seller, constructive delivery and receipt may be made by agreement of the parties, the seller holding them as agent or bailee for the buyer. There is no delivery and acceptance while the seller's right

of lien remains, and his right of lien depends upon his retaining the right of possession; but there is no lien while a period of credit is running. Where the goods are in possession of a third party at the time of sale a constructive delivery and receipt is effected by the agreement of *all* the parties, seller, buyer, and actual possessor, that the goods shall be held no longer for the seller but for the buyer. Acceptance and receipt of part of the goods is sufficient to satisfy the statute; even of a sample, if treated as part of the bulk. Part payment, to be effective, must be in acknowledgment of the contract; payment for part of the goods charged, repudiating the bargain as to the rest, is not sufficient.

Though the wording of the 4th and 17th sections is different, the effect of both is held to be the same, and is not to render the contract void, but only to render certain evidence indispensable. A foreign contract, enforceable where made, cannot be enforced here if not properly evidenced. If part only of a single contract be within the statute, yet no action can be brought upon it, even though the part within the statute has been executed. Money paid under a contract unenforceable by reason of the Statute of Frauds cannot be recovered back while the other party remains willing to carry out the contract. But the contract, though unenforceable for want of writing, may be used as matter of *defence*: as, for instance, in case of action for trespass where entry has been made upon land under such a contract. Where consideration has been given under such a contract, and the party receiving the consideration repudiates the contract and refuses to perform it, an implied debt upon the executed consideration will generally arise.

Part performance of an agreement concerning an interest in land, under the 4th section is sometimes sufficient in Equity to entitle the party to specific performance, as where a tenant or purchaser has entered in pursuance of the agreement, since it is considered that a refusal of performance would operate as *a* fraud. Such entry and possession is looked upon as evidence of an agreement;

but mere continuance in possession by a tenant whose term has expired has not that effect. The principle of part performance is not extended to any contracts save those concerning land, and the part performance must consist of something done in connection with the land itself, payment of the purchase money is not sufficient.

A contract ineffectual under the 17th section passes no property in the goods to the buyer, and the buyer cannot sue the carrier to whom the goods have been delivered by his order for loss of the goods or injury to them, nor has he any insurable interest in them until the statute is satisfied.

CHAPTER VI.

CAUSES VITIATING AGREEMENT.

Causes rendering agreement void or voidable of legal effect are classed under three heads: Mistake, Fraud, and Duress or undue influence.

Mistakes may occur in matter of *law* or of *fact*. A person is in general presumed to know the law, and cannot plead ignorance of it, while he may in general allege mistake of fact.

It may be shown that there was no *intention* to do the act which was in fact done, and if not guilty of negligence in so doing it the party may avoid liability on that ground. As if a party is mistaken, without any negligence on his part, as to the contents of a document which he signs, or if intending to sign as witness he signs as a party, or if one only of two or more parts of an instrument are explained to an illiterate man, who then signs it, he is bound only as to the part explained.

When mistake occurs in *expressing* an agreement the mistake being that of one party only, the other having no notice of the mistake, the agreement is binding, though the

equitable remedy of specific performance will be refused if great hardship would result. But if the mistake of the one party is known to the other, then the latter cannot enforce the contract since he knew there was no real agreement between the parties.

Mistake in expression of agreement common to both parties is matter for the equitable relief of rectification of the contract so as to make it conform to the actual agreement. In resisting specific performance of a contract, a defendant may show that it does not express the agreement actually made. In order to rectify an instrument not only must the mistake be shown but there must be clear evidence that the parties had really agreed and what the real agreement was, and upon this being given the instrument will be rectified even at the instance of the party responsible for the error. But if it appear that there was no real agreement between the parties the instrument will not be rectified, though if necessary it may be set aside. Mistake in expression apparent on the face of the instrument will be disregarded if the context shows the intention: and the same rule holds where there has been an obvious mistake in applying the contract to the facts as in an erroneous recital of the state of a document referred to. On the same ground where the subject of contract is sufficiently ascertained, mere error in description *falsa demonstratio* is corrected.

If a contract be expressed in such general terms as to be capable of different constructions either party may allege that he took it with the construction contrary to that relied upon by the other party and so resist enforcement. If the words are certain they may still be shown to be equally applicable to two different subjects: this latent ambiguity may be explained by showing that the parties meant the same thing, but if it appears they meant different things there is no agreement.

The mistake of one party only in a collateral fact or circumstance inducing him to make the agreement, the other party not being implicated in the mistake does not vitiate the agreement: as where a seller by mistake showed

a wrong sample he was held bound by the contract made. But in such case specific performance may be refused on the ground of hardship. If the other party have caused the mistake he cannot enforce the contract: but if he merely knew of the mistake not being at all responsible for it he can still enforce it unless the contract be one of those in which it is his duty to communicate all material facts, and the utmost good faith is required.

Whether a contract made between parties both mistaken as to a fact materially inducing the agreement will be enforced, depends upon the question whether their contract was impliedly conditional upon the supposed state of facts, or was to be taken absolutely. In the former case if the supposed state of facts does not exist there is no contract, as in the destruction of the subject matter of the contract unknown to the parties before the contract was made, or an attempted sale of property actually belonging at the time to the purchaser. But if the contract was intended to be unconditional and absolute it binds notwithstanding the mistake.

Mistake of law cannot be alleged by a party in avoidance of an agreement unless the other party has been implicated in causing the mistake. Thus money paid with full knowledge of the facts, though under a mistake of law as to the party's liability to pay it, cannot be recovered back. But the rule applies only to general law and private rights though depending upon rules of law are treated as matter of facts. Yet where there is a question of doubtful rights and the parties enter into an agreement for the purpose of settling them, the agreement will be enforced though the parties were mistaken as to the law and as to the extent of their rights.

Fraud and misrepresentation by one party inducing the other to agree may furnish ground for avoiding a contract, and it is of no consequence that the misrepresentation was made with the motive of benefiting the party misled or without intention to injure, if in fact made for the purpose of inducing the agreement. The misrepresentation must be of matter of *fact*: misrepresentation of matter of law

which is equally within the knowledge of all is no ground for avoiding an agreement. But, as in mistake, matters of private right though depending upon rules of law are in general treated as matters of fact, and a statement of fact though involving a conclusion of law is still a statement of fact. A representation of intention as to some future act which is not performed though inducing the agreement is not ground for avoidance unless it can be shown that such intention did not exist at the time the representation was made. Misrepresentation of one's motive or object in making a contract does not give a right to avoid it, nor do matters of opinion nor vague and general terms of commendation of the subject matter.

Active concealment of a material fact has the same effect as misrepresentation in avoiding an agreement which it has brought about, and non-disclosure of such fact may, in some circumstances, operate in the same way as impliedly representing that the fact does not exist; but mere non-disclosure, when the circumstances do not impose a duty of giving information, is no ground for avoidance. A person selling a chattel knowing of a material *latent* defect and not disclosing it, is guilty of fraud, and the buyer has a right to rescind; but if the sale is "with all faults," then the existence of defects does not affect the sale unless the seller has actively concealed them. The existence of a *patent* defect, when the buyer has an opportunity of exercising his own judgment upon the chattel, does not affect the contract, and even an express warranty will not cover such defect.

Upon a sale of land, non-disclosure by the vendor of a material defect known to him in the title, or in the subject-matter, or non-disclosure of incumbrances upon the property, is ground of avoidance of the sale, and in the case of a lease of a house known to be wanted for immediate occupation it is an implied condition that it shall be in a habitable state though there is no such implied condition in case of lease generally. If a purchaser stands in a fiduciary position to his vendor he is bound to communicate all information concerning the value of the property which

it is material for the vendor to know. If a purchaser at auction procure a sale to him by wrongfully deterring others from bidding the vendor may avoid the sale.

A representation untrue in fact, but believed to be true by the party making it may be ground for avoiding a contract but will not support an action for damages because there is no intention to deceive. So also a mis-statement made in forgetfulness of the truth. A representation true in fact when made may become untrue to the maker's knowledge before being acted upon, and in such case if he do not correct it a contract founded upon it may be avoided.

To give the right to avoid the representation must have materially induced the contract, and if it was ambiguous the party seeking to avoid must show that he took it in the sense in which it was untrue. An agreement may be vitiated by showing misrepresentation upon one of several matters contained in it or in some material part. If the party to whom the misrepresentation is made knows the contrary there is no misleading and no right to avoid, but if he in fact relies upon the statement though he have the means of knowledge and neglect to use them he can still repudiate the agreement.

A contract obtained by an agent by fraud or misrepresentation is voidable as against the principal though the principal did not authorize or know of the fraud. And a company is in general responsible for misrepresentations of its agents and direction made in the the exercise of their offices though the directors or agents are personally liable to those whom they have deceived. An agreement cannot be avoided because induced by the fraud of a third party the other party to the agreement not being implicated, nor if brought about by the fraud of an agent acting outside the scope of his employment.

On discovering the fraud or misrepresentation, the party deceived may elect either to affirm or to avoid the contract, and the contract is valid unless he elects to avoid it. But if during his delay an innocent third party becomes interested, or even the position of the wrong-doer is altered, the right to avoid is gone. If he once elect to affirm

the contract, that election is final, even though fresh incidents of fraud are discovered. Lapse of time is evidence of election to affirm. Avoidance of a contract must be of the whole contract, and involves restitution of the parties to their original rights and property; if for any reason it cannot be so rescinded it cannot be rescinded at all. But though he has lost the right to rescind, the party defrauded may have a right of action for damages. And avoidance will be subject to any rights acquired by third parties without notice of the fraud. Where possession of goods is given without any intention to pass the property, a third party obtaining them from the transferee gets no better title than the transferee had.

In a contract of sale there may be an express or implied *warranty* of the truth of representations made, and then the intention or knowledge of the warrantor is of no consequence. Any affirmation at the time of sale is a warranty, if it appear to have been so intended. On a sale of *specific goods* there is generally no implied warranty of their quality, or fitness for a particular purpose. But in case of an article supplied for a required purpose, in pursuance of a contract to that effect, there is an implied warranty that it is reasonably fit for that purpose, and this warranty extends to latent defects.

Breach of a warranty alone does not give a right to avoid the contract and return the goods, unless the contract expressly provide for it, the remedy is in an action for damages. On a sale of goods to be delivered according to description or sample of kind or quality, and the goods when delivered, do not answer to the description, the right to reject them depends upon whether they were or were not specifically ascertained at the time of the contract; if so, then there is only a breach of warranty, and no right to reject; if not, then their answering to the description is a *condition* and the buyer may refuse them. On a sale of goods by description, there is an implied *condition*, in the absence of an express stipulation as to quality, that they shall be merchantable and saleable under that description.

In contracts of marine insurance the insured is bound to communicate to the insurer all facts within his knowledge concerning the risk, which are material for the insurer to know, and the materiality of the information depends upon whether it would influence the insurer in taking the risk. Non-disclosure of any such fact gives the insurer the right to avoid the contract, though the non-disclosure be through forgetfulness or mistake, or owing to his agent's failure to communicate the information to him. The principle does not apply to matters equally within the knowledge of both parties. When the insurance is for a voyage, there is an implied warranty or condition of the seaworthiness of the vessel at the commencement of the risk. And there is a similar warranty or condition in the contract of a shipowner for the carriage of goods. In fire and life insurance, the same duty of communicating all material facts exists, but in the latter the contract is usually founded on a written declaration by the insured, and if any part of that be untrue, whether intentionally so or not, the contract is void. Apart from this, non-disclosure must be fraudulent in order to avoid the contract. The declaration must be true up to the time of executing the policy. A guarantee is a contract of insurance, and while a person guaranteed is not bound to communicate all material facts, as in marine or fire insurance, yet there must be no express or implied misrepresentation of material circumstances.

Duress consists in obtaining the consent of one party by fear induced by violence or threats of the other. A contract so obtained is not void, but voidable, and so may be affirmed. Illegal imprisonment is duress; but legal imprisonment is not. To vitiate an agreement duress must consist in violence or threats to the person; fear of injury to property is not sufficient. But if money is paid to release goods from wrongful restraint, it may be recovered back.

Duress by a third person will not avoid a contract; it must be the act of the other party to the contract, or imposed with his knowledge and taken advantage of by him; nor

can a contract be avoided on the ground of duress imposed on a third party, unless it be the parent, wife or child of the party seeking to avoid. A contract made by an agent in order to release his principal from duress may be avoided.

In all cases of persons dealing with others toward whom they stand in a fiduciary position, a presumption of undue influence arises, and such person must show that he has taken no advantage — as parents dealing with children, trustees with beneficiaries, guardians with wards. The principle applies generally to all relations in which dominion may be exercised by one person over another.

PART II.

PARTIES TO CONTRACTS.

CHAPTER I.

PRINCIPLES OF THE LAW OF PARTIES.

There must be at least two parties to a contract; but an offer may be made generally to be accepted by any one, as in case of an advertisement offering reward. The same person cannot be both debtor and creditor; when the two characters meet in the same person the debt is in general extinguished. And a sale in which the same persons are both buyers and sellers is void.

Contracts create no right or liability except in parties to them, or those claiming or being charged through the parties. Thus, a contract between two persons that one

shall pay a sum of money to a third gives no right of action to that third party; nor can the parties by special agreement confer on another the right to bring such action. The same rule applies in equity, and in an action for specific performance, the parties to the contract are the only proper parties to the action. But if a *trust* is constituted, the *cestui que trust* may sue, though no party to the contract creating the trust. Only the persons named as parties in an indenture can sue or be sued upon it; in case of a deed poll, not formally naming the parties, any one may sue who can show that he answers the description of the covenantee. A contract may be made by a party under an assumed name, or by any description sufficiently identifying him.

Several persons may join as party to a contract on one part or the other; and where they do so as joint contractors, ~~such~~ each is liable for the whole, though on paying the full amount he has presumptively a claim upon the others for contribution. At common law, upon the death of one of several joint contractors, the liability under the contract devolved upon the survivors, and the representative of the deceased could not be sued either alone or jointly with the survivors. See now, however, R. S. O. 1887, c. 110, s. 15, altering the common law rule in that respect. Where the contract is made with several persons as joint creditors, they must all join in suing as joint plaintiffs; on the death of one, the right remains to the survivors; and on the death of the last survivor the right devolves upon his representative, as did the liability at common law upon the death of the last joint debtor. The liability incurred by a contract entered into by several parties may be *joint* only, or it may be *joint and several*, each party binding himself separately as well as jointly with the others, or it may be *several only;* which it is depends upon the intention expressed in the contract. If the writing purports that the parties bind themselves, without more, the liability is joint only; if that they bind themselves severally; several only; if that they bind themselves jointly and severally, or themselves and each of them, it is joint and several.

If a contract purports and is intended to be the joint contract of several persons, and part only sign it, their execution of it is presumed to have been conditional upon all executing it, and it is not binding until all have done so.

Two creditors cannot be entitled jointly *and* severally upon a contract; the contract will be joint if their interest be joint, and several if their interest be several. Contracts with partners are joint, and all must sue; on the death of one, the right survives, and the survivor can sue alone, though he is accountable in equity to the representatives of the deceased partner.

Persons who have contracted jointly or severally are liable, and entitled, under the contract, as between themselves, according to the relation actually existing between them, and the agreement upon which they have joined in the contract. In contracts of suretyship, the principal debtor and sureties are usually made debtors jointly and severally, in equal degree, to the creditor; but as between themselves, the principal is solely liable, and must repay any surety who has been compelled to pay any part of the debt. A surety so paying is entitled to all securities held by the creditor, whether or not he knew of them at the time of contracting: see R. S. O. c. 122, s. 1.

CHAPTER II.

PRINCIPAL AND AGENT.

An agent may be one incapable of contracting in his own right, and in general, no particular form of appointment is necessary, but if the agent is to execute an instrument under seal, the authority must also be under seal Sections 1 and 3 of the Statute of Frauds require written authority to enable an agent to bind his principal in the contracts there referred to.

Agency may be created by express terms, either by writing or by parol, or may be inferred from conduct, which may estop the party from disputing the agent's authority. The relation of partners gives to each partner an implied agency to act for the partnership in matters relating to the business. Agency sometimes arises from necessity, the master of a ship, upon necessity arising during a voyage, may pledge the owner's credit, or even sell the ship or cargo.

A party is not bound by a contract made on his behalf by one not authorized as his agent, but he may ratify it, and then it has the same effect in all respects as if the contract had been authorized. Ratification can be given only where the agent has professed to contract on behalf of the person ratifying; so a forgery cannot be ratified, as the forger represents the signature to be that of the party himself, without any agency. And the principal so ratifying must have been in existence and ascertained at the time of the contract, and must have been capable of making the contract. Ratification relates back to the original making, and the other party cannot alone rescind the contract before ratification, though he and the professed agent together may. A contract must be ratified as made if at all, it cannot be ratified in part only.

An agent may be *general*, when he has the full apparent authority due to his employment or position, or *particular* or *special*, appointed for a certain occasion or purpose, and having no authority to bind his principal by acts beyond that. The former may bind his principal by acts within his apparent authority, though contrary to his private instructions from his principal, the latter's authority is strictly limited by his instructions in this particular matter, and the principal is not bound by acts contrary to them.

If a power of attorney is given to several persons *jointly*, they must all join in exercising it, and the power will not survive; if given to them jointly and severally all must act, or each severally, but not some only. In contracts made by deed *inter partes* under a power of attorney the

principal must be named as a party, otherwise cannot sue or be sued upon it, and the deed must be signed and executed in the name of the principal. In simple contracts a principal may sue or be sued though the contract were made by an agent appearing to contract for himself, except in case of bills and notes, on which an action can be brought only by the persons appearing on the face of the instrument to be parties.

An agent in general cannot delegate his authority, but the nature of the business may impliedly authorize him to do so, or he may do so when no exercise of discretion is involved in the act to be done by the party delegated. His authority even though given under seal is in general revocable at any time before it is exercised, save where it has been given for the purpose of securing him some benefit, in which case it is irrevocable, but notice of revocation may be necessary to be given to those who have dealt with the agent, in order that the principal may not be bound by further acts. Death of the principal in all cases revokes the authority, even without notice, but see R. S. O. 1887, cap. 97.

A principal impliedly engages to idemnify his agent against all payments made and liabilities incurred in performance of his agency, but there is no idemnity against *wrongful* acts. An agent must do nothing in which his interest conflicts with his duty to his principal; if he make a profit in the course of his agency he must pay it over to his principal.

A person making a contract in his own name is personally liable; he cannot show that he was an agent and so escape liability, and if he wishes to avoid liability he must make it clear on the face of the instrument that he is contracting for another. But it may be shown that he was only an agent, for the purpose of enabling the principal to sue or be sued on the contract. Where the agent has so contracted as to make himself personally liable, the other party may elect which of them he will sue; but nothing less than proceeding to judgment against one of them will be deemed a conclusive election. An agent here

buying for a foreign principal is *presumed* to have no authority to pledge the credit of such principal, and is held exclusively liable, and the foreign principal is accordingly presumed not to be entitled to sue here upon the contract. But such agent may expressly exclude his own liability and in case of a resident partner in a foreign firm, the contract is presumed to bind the firm.

If a person deal with another as principal, who is really an agent, his right to charge the real principal on discovering him is subject to the condition that the estate of account between the principal and agent has not meantime been altered to the prejudice of the principal. And on the other side either the agent or the principal may sue on the contract, in the latter case the defendant is entitled to be placed in the same position in all respects as if the agent had been in fact the principal, and so to claim any set-off or defence which would have been available against him. But in case of bills and notes only parties therein named can sue or be sued upon them.

Where goods are entrusted to an agent as apparent owner with authority to sell in his own name, and a purchaser contracts with such agent believing him to be the real owner, he can, in an action by the principal for the price, plead payment to the agent or set-off against him. If the purchaser have notice of the agency, then the effect of payment to the agent depends upon the authority of the agent to receive payment, and he cannot claim a set-off which he has against the agent. When the principal has intervened to claim the debt, the authority of the agent is revoked, and the agent cannot afterwards sue.

It may be shown that a party who contracts as agent is himself the principal in order to charge him as such, unless another principal is expressly named in the contract. If another principal is expressly named, evidence to show that the agent was really the principal in order to entitle him to sue, would be in contradiction of the instrument and is in general inadmissible.

A person contracting as agent for another, but without authority in fact, cannot be charged with the contract,

but he will be liable on the implied warranty that he had authority so to contract to the full value of the contract. But where an authority formerly existing is terminated by the death of the principal, without the agent's knowledge, he is not liable for contracts made in ignorance of the death.

A factor is an agent entrusted with the possession of goods for sale, authorized to sell in his own name, and to receive payment, but in cash only. See, as to his power to deal with the goods entrusted to him, R. S. O. 1887, C. 128. A broker has not possession of the goods, nor authority to contract in his own name, nor to receive payment, but his business is to bring about a bargain between the principals. He is authorized to contract according to the usages of the particular trade or place, not inconsistent with his employment as a broker—and his employer will be bound. A commission agent buys goods as principal for his correspondent, and charges his correspondent with the actual cost, plus his commission on the transaction, and it is his duty to get the goods as cheaply as he reasonably can. A *del credere* agent differs from other agents in that he guarantees that the parties to whom he sells shall perform their contracts, but his guarantee is not within the statute of frauds.

An agent for sale or lease of an estate is entitled to his commission when he has procured a tenant or purchaser on the terms fixed, though the sale or lease is never completed.

The master of a ship is a general agent of the owner or person appointing him for the management of the ship; his apparent authority consequently cannot be limited by private instructions, and he may contract for whatever is reasonably necessary for maintenance of the ship and prosecution of the voyage. He may sell the ship or cargo or both if necessity requires, and he is out of communication with the owner; or he may pledge the ship and cargo by a bottomry bond, which gives no personal remedy against the owner of either, but a right of proceeding *in rem* against the property to enforce payment of the amount advanced upon the pledge.

A partner is a general agent for his co-partners *in the business of the partnership*, by virtue of the relation existing between them. Whether a person is a partner so as to constitute others his agents depends on the question whether the particular business is carried on, on his behalf; participation in the profits is evidence of it, but not conclusive; see R. S. O. 1887, c. 129. A partner has not authority to contract under seal, unless authority has been given in the same form, and can in any case bind his partners jointly only and not severally. Partners in trade can bind their firms by bills of exchange; in other business as a rule they cannot, and a partner in a mercantile firm can borrow money for the purposes of the business. A partner being a general agent of his co-partners, his authority to bind them to third parties cannot be limited by agreement among themselves. Dissolution of partnership by death or retirement of a partner revokes the authority of the others. Though a partner's dealing is fraudulent as toward the other partners, yet they are bound as between them and an innocent third party.

CHAPTER III.

CAPACITY OF PARTIES.

Foreign states or sovereigns cannot against their will be sued in this country, but may voluntarily submit to the jurisdiction, and may sue. Privilege from being sued in civil actions extends to ambassadors, their officers and domestic servants, except they engage in trade.

A subject of a foreign state has all the rights of a citizen, with respect to property or contract, except that he cannot own a British ship. An alien *enemy*, subject of a hostile state, cannot sue nor acquire new rights by contract during the war without license of the Crown, but on return

of peace his rights revive. A British subject voluntarily residing permanently or trading in an enemy's country is under the same disability as an alien enemy.

Contracts made by infants, other than for necessaries, are not binding. But an infant may after full age ratify a contract made during infancy: the ratification must be in writing, R. S. O. c. 123, s. 6. An infant procuring a contract by fraudulently representing himself of full age may still plead infancy and avoid the contract, and is not liable in an action of fraud for the fraudulent misrepresentations.

If an infant makes a contract imposing obligations upon him such as are incurred by acquiring an estate or entering into partnership, and does not disaffirm on coming of age, he will be held liable.

An infant's contract for necessaries suitable to his condition in life is binding; whether the particular articles are necessaries is a question of fact for the jury to decide, having regard to the infant's condition in life. He may bind himself by a contract of apprenticeship, but can avoid it on attaining majority, but this operates by imposing upon him a legal status towards his master, and not by way of contract. If he marry, necessaries supplied to his wife and children are looked upon as supplied to him. The debt for necessaries is binding though he had ready money and could have paid for them; not so if he were already sufficiently supplied with the articles, whether the seller knew it or not. An infant cannot bind himself by a bill or note or account stated, nor be charged for money lent, although for the purchase of necessaries, but he may by acknowledgment in writing take a debt for necessaries out of the statute of limitations. An infant's contract is not void, but only voidable at his option; and until avoided by him is binding upon the other party. If he has paid money upon a contract for which the consideration remains executory, he may on avoiding the contract recover back the money; not so if he have received any part of the consideration.

At common law a married woman could not bind herself personally by contract, but in equity she was held to have

power to contract in respect of her equitable separate estate and now R. S. O. 1887, c. 132, fixes her power to contract. Her contract is not binding unless she had at the time of the contract disposable separate estate, and a judgment against her upon a contract is effective only as against such estate though separate property acquired after the judgment may be taken in satisfaction of it. A married woman may sue or be sued in all respects as a *feme sole* and may sue her husband in respect of her separate property and may contract with him. A husband is bound to maintain his wife in a suitable manner, and if he neglect to do so or refuse without fault on her part or compel her to live apart from him without providing her with funds for her support she becomes his agent of necessity to pledge his credit for necessaries. At law, a husband was not liable for money lent to a wife and used by her for procuring necessaries, but in equity he could be charged.

If a person enter into a contract knowing that the party is so far insane as to be incapable of understanding it, he cannot enforce the contract. If he has no notice of the insanity, the contract is valid. But a contract for necessaries is binding on an insane person though the other party had notice. And a contract by an insane person made during a lucid interval is valid. Insanity of a principal revokes authority of an agent, but a third party contracting with the agent without notice of the insanity of the principal may enforce the contract. A contract to marry is rendered void by insanity of one of the parties before performance, but in general a contract is not invalidated by subsequent insanity of a party.

Intoxication such as to deprive a party of reason has in general the same effect as insanity. After the party becomes sober he may avoid or affirm the contract unless it was for necessaries, but until he has avoided it the other party is bound. And a court of equity will not set aside a contract on the ground of intoxication alone where the other party has not induced the intoxication nor taken advantage of it.

Capacity of a corporation to contract is limited expressly by the terms of its constitution or impliedly by the purpose of its existence and contracts beyond those limits are void. A company cannot legally engage in any other business or employ its property for any other purpose. It cannot borrow money unless such power is expressly or impliedly given, and its capacity to draw or accept bills and notes depends on the necessity of doing so in order to carry out its purposes. A corporation can in general bind itself only by deed under its common seal and no formal delivery is *prima facie* necessary if the seal is affixed, but it may be affixed conditionally. But binding contracts without the corporate seal may be made by a corporation established for carrying on a trade or business contracting in the course of that business, and where it is practically necessary to dispense with the seal by reason of the slight importance, or frequency or urgency of the matter. Though a contract which requires a seal has not been under seal, if the corporation has executed the consideration for the benefit of the other party, he may be sued upon the implied contract: not so, if the consideration is still executory. The equity arising from part performance applies either in favour of or against a corporation. The contract of a corporation must be made in its proper corporate name. If made in the name of its officers or members it does not bind the corporation though sealed with the corporate seal, and the corporation can sue or be sued only in its corporate name, and its officers and members are not liable nor entitled personally in respect of its contracts. A corporation can contract only through duly authorized agents, but if an instrument bears the corporate seal it is presumed to have been properly sealed. A person contracting with a corporation constituted under a public statute is taken to have notice of its capacity, and cannot charge the corporation with contracts which are *ultra vires* though sealed with the corporate seal. A person contracting with directors of a company is held to know their authority but is not fixed with notice of the company's proceedings, and is entitled to assume that the directors have been duly invested by the

corporation with the authority they are in fact allowed to exercise. A contract made without authority may be ratified by the corporation if within its power, but if *ultra vires* it is incapable of ratification. A company cannot be charged with contracts made by its promoters before its formation, nor can it ratify them since it was not in existence when the contracts were made.

PART III.

THE MATTER OF CONTRACTS.

CHAPTER I.

THE CONSIDERATION.

A promise made without a consideration is not binding, unless under seal; and bills of exchange and promissory notes differ from other simple contracts in this respect only in that consideration is presumed, and need not be proved unless disputed. Even though under seal, a voluntary promise will not be enforced by the equitable remedies of specific performance or injunction; but a declaration of trust, complete and perfected, will be enforced, though voluntary.

Consideration may be anything done, given, or suffered by the plaintiff to the benefit of the defendant or a stranger, with the consent, express or implied, of the defendant. If done by a third party at the request of the plaintiff, that is enough. The amount of the consideration is unimportant, except in some cases, as evidence of fraud or imposition. A promise based upon moral obligation only is voluntary and not binding; but in some cases a debt, from

the enforcement of which the debtor is protected by law, will support a promise to pay it; as a debtor barred by the Statute of Limitations. A promise to do what one is already legally bound to do is no consideration; but a promise *to a third party* to carry out an existing contract with another is a good consideration. Surrender of a tenancy at will is not a consideration, since it is determinable at the will of the landlord. The release of, or forbearance to press a *bona fide* doubtful claim, is good; but if the party know he has no cause of action, the staying of proceedings will not support a promise; nor will the discharge of a person from restraint known to be illegal. Marriage is a valid consideration for a promise made by the other party or by a third party. One consideration may support several promises.

CHAPTER II.

THE PROMISE.

The promise may be express; or presumed from circumstances; or implied in law; and may be absolute or conditional. An absolute promise does not depend on any event or contingency; a conditional promise is one of which performance can be required only after a lapse of time, or the happening of some event; and then the lapse of time or happening of the event are conditions precedent to liability upon it. It may also be conditional as being subject to be discharged upon some event or contingency, which is then a condition subsequent. A promise cannot be conditional on the mere will of the promiser, for then he would not be bound to anything; but a promise to pay for work on its being done to the promiser's approval is valid, and his right of approval must be exercised reasonably and in good faith. A promise to make a certain dis-

position of property by will is valid, if upon sufficient consideration.

A promise may be made conditional upon the voluntary act of third party, and if third party refuse to do that act, the condition is effectual to prevent an action on the promise, unless the third party is acting in collusion with the promisor in refusing. If a promise is conditional upon a request or demand of performance, such request or demand must be proved; and if conditional, upon notice of some event being given to the promisee, notice must be proved. But if the promise is conditional only on the *happening* of the event, then the promisor is entitled to notice of it only when he has stipulated for it, or the event lies within the peculiar knowledge of the opposite party. There is no implied condition in contracts of guarantee that notice of the debtor's default shall be given to the surety; nor in contracts of indemnity that notice of the loss shall be given; nor in contracts of insurance that the insurer shall be notified of the loss.

There are three kinds of covenants; (1) mutual and independent, where either party may sue the other for breach of his covenant, though himself in default; (2) conditional and dependent, where the performance of one of them depends upon the prior performance of another and cannot be insisted upon until the other has been performed; (3) mutual conditions to be performed at the same time, where if one party is ready and offers to perform his part, and the other neglects or refuses to perform his, the first has fulfilled his engagement and can sue the other. The rule of construction is that the precedency depends upon the order of time in which the intent of the transaction requires their performance. When mutual covenants go to the whole consideration on both sides they are mutual conditions, the one precedent to the other; but not if going only to a part of the consideration. But any intention of the parties, clearly expressed, will prevail. In contracts for sale of land, conveyance and payment are presumed to be concurrent and dependent acts; but the usual covenants in a lease by the lessor and lessee respectively are pre-

sumed to be independent, and irrespective of performance on the other side. In contracts for the sale of goods, delivery of the goods and payment of the price are presumed to have been intended to be concurrent, and readiness on both sides to perform are mutual conditions precedent; but the terms of the bargain may rebut the presumption. In a contract for sale and delivery of goods by instalments, default in delivering or accepting, or in payment for one instalment, does not release the other party as to future instalments, unless the default in payment shows an intention to repudiate the contract, or evident inability to perform it.

In indentures of apprenticeship the covenants of the master to teach and of the apprentice to serve and learn are respectively conditional upon the continued readiness and willingness of the apprentice to serve and learn and of the master to teach.

Conditions precedent must be *fully* performed and satisfied in order to render the promise absolute; but where one party has performed the contract in a *substantial* part, and the other has had the benefit of such part performance, the latter may be compelled to perform his part of the contract, and claim damages for the defective performance. Performance of a condition is excused by the refusal of the other party to accept the performance, and then the promise of the latter becomes absolute; not so when the condition consists of the act of a third party which he refuses to do. And if a party render himself unable to perform his part of a contract the performance of conditions precedent by the other is dispensed with, and the first becomes at once liable.

When a contract is expressly or impliedly terminable by lapse of time, by notice, or by the happening of an event, these operate as conditions subsequent. A contract may be terminable at the will of one of the parties, as a partnership, unless there is a fixed term. A condition in a contract for sale of land that the vendor may rescind in case of objections being made to the title which he is unable or unwilling to remove can be exercised only in

good faith and after answering all reasonable requisitions, giving the purchaser the opportunity to waive the remaining objections. A condition in a sale of goods that the buyer may, on breach of warranty, return the goods and recover the price entitles the buyer to rescind the contract on breach of the warranty, which he could not do in the absence of such condition.

In case of alternative promises, binding a party to do one of two or more things, the rule is, in the absence of a contrary intention, that the promisor may elect which he will do; but if the promisee has the power to elect he must notify the promisor of his election, as a condition precedent to his liability. An election once made is final. If the promisor does not elect, and performs neither, the damages are measured by the alternative least beneficial to the promisee.

CHAPTER III.

IMPOSSIBILITY OF PERFORMANCE.

A promise is impossible, in fact, which is contrary to the law of nature, and practical impossibility is for most purposes equivalent to impossibility, in fact. If a promise is certain and practicable, it is immaterial whether it is reasonable or not, the party is bound to perform it; and this though the matter is entirely beyond his ability or is for the act of a third person. A promise impossible in law is one which imports to have a legal effect or operation which the law does not admit.

Impossibility of performance caused by act of God excuses from performance of a duty imposed by common law, but not from performance of a contract. Impossibility of performance known to both parties at the time of contracting excludes liability since there can be no intention on one side or expectation on the other that the con-

tract will be performed. If both are ignorant of the impossibility, there is or is not liability according as the parties have made the contract absolute and unconditional or have made it impliedly conditional upon the possibility of performance. If the impossibility is known to the promisor but not to the promisee, then the promise is binding; if known to the promisee but not to the promisor, it is not binding.

Where performance becomes impossible subsequently to the making of the contract, that does not in general discharge the promise. In case of a duty imposed by common law, subsequent impossibility excuses, but where a party has expressly or impliedly undertaken absolutely to do a thing he must do it or make compensation in damages. The contract of a carrier of goods is by common law subject, impliedly subject, to the exceptions of the act of God and the Queen's enemies, and injuries caused by inherent vice of the goods carried; beyond these exceptions he is liable as an insurer of the goods. He may by stipulating that goods shall be carried at owner's risk except his liability as an insurer but not his liability for negligence. A carrier of passengers is liable only for negligence and is not an insurer of their safety; he undertake to use due care, to make the means of conveyance as safe as care and skill can make them, and to carry them within a reasonable time, and by stipulating that a passenger shall travel "at his own risk" excepts liability even for negligence. But he is an insurer of luggage delivered to his care as of goods.

In case of contracts requiring personal performance, there is an implied condition of continued life and capacity, as in contracts of marriage or for personal services, and a contract is subject to the implied condition of the continued existence of a particular thing when it is evident that the parties in making the contract must have contemplated its continued existence as the foundation of what was to be done; then if performance becomes impossible by the thing ceasing to exist without default on the part of the contractor he is excused.

If one party to the contract renders performance impossible the other may rescind and may treat the act of the first as a breach of the contract. Where the condition of a bond is clearly impossible at the time of making the bond the covenant is binding; if it is possible at the time of making, but is rendered impossible before the time for performance by the act of the obligee, the obligor is released.

A promise is excused by impossibility arising subsequently by act of law or by acts of state, but not by impossibility caused by foreign law or the act of a foreign state, except in case of mutually dependent obligations when the foreign power produces advisibility in both parties to perform. If a promise is to do one of two things, one being possible and the other impossible, that which is possible must be done. A promise which is impossible of performance at the time of making it cannot form a valid consideration; but if possible at the time of making it is sufficient, though subsequently becoming impossible.

CHAPTER IV.

+ ILLEGALITY

A matter may be illegal at common law or by statute the former prohibit generally whatever is contrary to public policy and morality, and a prohibition is presumed when a statute imposes a penalty upon an act. An agreement involving such act is illegal unless the statute can be construed as imposing the penalty for a limited and special purpose only as for the protection of the revenue and not for the purpose of prohibiting the act altogether.

A foreign contract for performance which is legal here may be enforced in our courts though it would not be legal in the foreign country, but no contract for performance which would be illegal here can be enforced. Agreements to unduly influence the legislature or involving bribery or

undue influence at elections, or for sale or resignation of public offices are illegal and void on grounds of public policy, and on the same grounds the salary of a public officer or a pension granted wholly or partly in consideration of future services cannot be assigned or charged though a pension given wholly for past services may. Agreements tending to affect the administration of justice for the commission or encouragement of crime, for compounding or compromising public offences are illegal and void, though where an offence of a public nature involves actionable damage to a party he may compound the private injury as he thinks fit. Agreements involving maintenance are illegal and void, though illegal maintenance of an action by a third party is no defence to the action itself, and an interest in the subject matter of the action or even the motive of charity justifies maintenance.

Contracts in restraint of trade are legal only so far as the restraint is reasonable but the restraint may be unlimited in point of time, and in a contract for sale of a secret process of manufacture the seller may be absolutely restrained from communicating the secret or carrying on the manufacture. So with the license to use a patent or the employment of a person in a trade or business. A combination of trades for purposes operating in unreasonable restraint of trade is void.

Trading with a public enemy is illegal at common law, and contracts involving such trading are void; so also insurance of an enemy's ships or goods, but trading with the enemy or by an enemy may be licensed by the Crown, and contracts made by or with persons so licensed are valid. Insurance on British ships in which the insured has no interest are void, as wager policies, but where there is an interest the parties may agree upon the value to be fixed in the policy, and that amount, in the absence of fraud, is conclusive, irrespective of the real value, and can be recovered on loss of the vessel. An insurance of life in which the insured has no interest is void, but it is sufficient if there is an interest at the time of the insurance, though it does not continue until the termination of

the risk. So with an insurance against fire; the insured must have an insurable interest otherwise the policy is void. Contracts of marine and fire insurance are contracts of indemnity, and the insured can recover only the amount of the actual loss. In life insurance, the whole amount of the policy is recoverable.

Restrictions on marriage are against public policy, and promises to marry must be mutual in order to be binding, as otherwise they would operate in restraint of marriage. Conditions in *general* restraint of marriage annexed to gifts of personal property are void, but when annexed to gifts of real property they are valid, as also are conditions in restraint of second marriage and partial restraint on marriage. Agreements for procuring marriage for reward are illegal and void. Agreements providing for *future* separation of husband and wife are void, but when a separation in fact takes place an agreement fixing the terms of separation may be valid, and in absence of stipulation to the contrary, return to cohabitation discharges the agreement.

An agreement legal in its terms may be void owing to the illegality of the purpose for which it is made, and agreements between British subjects for the purpose of smuggling goods into the country is void; but a foreigner selling goods abroad for this purpose can still sue here on the contract, since he is not bound to respect the revenue laws of this country. But if he actually takes part in the act of smuggling, as by packing the goods in a certain manner for that purpose he cannot sue here.

Money lent to carry out an illegal purpose cannot be recovered, nor if paid at request of another in execution of an illegal contract. But if so paid in execution of a contract which is only void, and not illegal, it may be recovered. A devise of land for the purpose of carrying on an illegal trade is void, and the lessor cannot recover the rent. On discovering that it is intended to apply a contract to an illegal purpose, a party may refuse to complete it.

Contracts made in order to defraud or injure third parties are illegal and void, and in compositions between

debtor and creditors, if a creditor fraudulently stipulate for a preference for himself he cannot enforce the stipulation nor even recover the amount of the composition, and the other creditors may repudiate the composition. If a creditor refuse to enter into a composition and the debtor make a payment to him to induce him to do so, the money may be recovered back by the debtor, as having been paid under pressure, for it is a rule that money may be recovered back, though paid in execution of an illegal agreement, when the payment is made under undue influence or pressure on the part of the receiver, for the party paying is not then *in pari delicto*.

The effect of illegality in matter or purpose is to render an agreement wholly void, and if a bond or covenant be given for a prior illegal debt the covenant is also void. Though a contract under seal does not require consideration, yet if there was in fact an illegal consideration the contract is void.

Money paid in consideration of a contract or purpose which is illegal may, upon repudiation of the transaction at any time before execution, be recovered back, not after the contract or purpose has been executed in whole or in a material part. The same rules apply to goods or the property delivered under an illegal agreement or for an illegal purpose, but if the property in the goods has passed, it cannot be recalled. An agent cannot resist the claim of his principal for money paid to him by a third party on the ground of illegality of the transaction on account of which it was paid, nor can the third party recover it from the agent. And where money is paid to one of two persons on account of both, the other may claim his share though the transaction was illegal.

If part of a consideration is illegal, and the promise is single, the whole contract is void, but if the promise is divisible and can be apportioned to the several parts of the consideration, then it is good so far as it is attributable exclusively to the valid consideration. Where a contract contains several promises, some of them being illegal, a promise not affected by the illegality is valid. If perform-

ance of a contract becomes illegal after the contract is made, as by an Act of Parliament altering the law, the contract is discharged, but illegality supervening by the law of a foreign country does not excuse from performance.

PART IV.

THE DISCHARGE OF CONTRACTS.

CHAPTER I.

RESCISSION BY NEW AGREEMENT.

A contract may be discharged at any time before performance is due, by a new and binding agreement, altering the terms of the original or rescinding it altogether. If the new agreement affects only part of the former the two may require to be construed together. And the new agreement may discharge the original conditionally only, so that the new one failing, the other regains its effect. Rescission may sometimes be implied from non-performance for such length of time or under such circumstances as indicate an intention to abandon the contract.

A party is discharged when his liability is undertaken by a third person by arrangement between such third person and the parties to the existing contract, and this is termed novation. A customer continuing to deal with a firm after notice of a change in the partners is presumed to accept the new firm as his debtors.

A new agreement to rescind or alter a prior contract, must itself be valid and binding, and requires the consent of both the parties to the former. If the prior contract was put in writing, though not required to be so, it may be varied or discharged by parol; but if it or any part of it was required by the statute of frauds to be in writing,

any alteration or partial discharge of it to be effective must also be in writing, and signed, though a *total* rescission or discharge may be effected by parol. If one party to a contract required to be in writing, being ready to perform according to its terms, forbears performance at the request of the other, that is not a variation of the contract, and he can still sue on the original contract as having been ready to perform; but if he has asked for delay, which has been granted, he cannot then sue on the original contract, as he was not ready to perform according to its terms, nor upon the variation unless it is in writing.

At common law a contract under seal could not be rescinded or varied by an agreement not under seal; but in equity this rule was not observed, and the equitable rule now prevails. A new agreement with a debtor, altering or discharging his contract, discharges a surety for his performance of it. And though the creditor has originally dealt with the surety and principal, as principals, yet when he receives notice that the relation of surety and principal actually existed between them at the time of the contract, he must treat the surety as such. But such relation must have existed at the time the debt was contracted.

CHAPTER II.

ALTERATION AND LOSS OF WRITTEN INSTRUMENT.

If a contract in writing, whether under seal or not, is altered in a material part by the promisee, or by a stranger while in the custody of the promisee, without consent of the promisor, the promisee cannot enforce it. Alteration by accident does not effect it, nor alteration by a stranger, while the instrument is not in the custody of either party or his agent, beyond the difficulty of proving its original state. An alteration is material which affects the contract or any

rights or remedies under it; an alteration or addition, which only expresses what the law would otherwise imply, is immaterial.

When an alteration affects the instrument it vitiates it altogether, and alteration of one of several covenants in a deed avoids the whole, for it is but one deed. But the rights of a party not responsible for the alteration are not affected by it. The alteration of a negotiable instrument avoids it, under the same circumstances as any other written contract, even though the holder has taken it *bonâ fide* and for value, and without notice of the alteration. But such holder may recover the consideration from the bill as between himself and the party from whom he took it.

Alteration or cancellation of a deed or lease which has already operated to pass an estate or term does not revest such estate or term, but may avoid executory covenants contained in the instrument.

A party producing an instrument which appears to have been altered in a material part must explain the alteration, so far as it is material to the issue; but an erasure or interlineation is presumed to have been made at the time of making the deed, since it would be a fraud to alter it after its execution. Alteration by consent of both parties produces a new contract, and the old one is superseded. Loss or accidental destruction does not affect a party's rights beyond the difficulty in proving the contents. But in case of *loss* of a negotiable instrument, which the holder is bound to deliver up on payment, an indemnity must be tendered when demanding payment.

CHAPTER III.

PERFORMANCE OF CONTRACT.

In order to discharge a contract, performance must be in strict accordance with its terms; but if performance is altered at the request of the other party, the latter will be

precluded from objecting to the performance actually rendered. After performance is due, a substituted performance may be agreed upon and accepted in lieu of the former; and that discharges the liability under the contract by way of "accord and satisfaction."

In contracts for sale of goods, the seller does not perform his contract by delivering a large or smaller quantity than that contracted for, and the buyer may refuse the whole. In a sale by description the seller must deliver goods answering the description, or the buyer may refuse them; and they must be delivered in such a manner as will allow the buyer to inspect them. If the contract is for the sale of a specific chattel, the property passes at once, and the contract performed by delivery of the chattel.

In contracts for sale of real estate, an agreement to make a good title is always implied, unless the vendor stipulates against it. The vendor is bound to convey property answering to the description in estate, quantity, tenure and identity: and if the nature of the estate is not expressed, it is presumed to be fee simple. He is also bound to convey it free from reservations, rights, incumbrances or restrictive covenants, unless the purchaser has notice of them.

Performance must be completed at or within the time agreed upon: if no time fixed, then within a reasonable time. Delivery of goods agreed to be delivered within a certain time, is performed if they are delivered at any time before the end of the period. In cases where specific performance of a contract is sought, courts of equity do not insist upon strict observance of the time fixed in the contract for performance, or do not treat time as "of the essence of the contract," but it may be made so by express agreement of the parties, or may be impliedly so by the nature of the property or the circumstances of the case. And it may be made so by notice to that effect, giving a reasonable time for performance.

The terms "forthwith," "immediately," &c., mean as soon as practically possible; and in computing time "from" or "after" a certain act or event, the day of

the act or event is excluded. Instruments are presumed to have been executed, signed or issued on the date they bear, but the time of actual execution or signature may be proved.

A debtor is bound to find his creditor and pay him the debt, in the absence of any stipulated time and place for payment, if a place and time are fixed, he must be ready then and there. If a place is fixed but the time is at his own option, he must notify the creditor of the time when he will pay, and the latter must then attend.

When rent is reserved upon a lessee, the lessee is bound to be ready to pay upon the land on the last day, but is not bound to go off the land to pay it; but if he has *covenanted* to pay the rent and no place is appointed, he must go to the lessor.

The *performance* of a contract is usually regulated by the law of the place of performance, though made elsewhere.

CHAPTER IV.

TENDER.

In a contract to deliver goods, tender, in accordance with the contract, is a complete discharge of the contract, and there is no further liability: but tender in payment of a debt, which is refused, does not discharge the debt, and the debtor must continue always ready to pay. If the debt is payable on a day certain, tender must be made on that day: tender on a prior day is not good.

A tender must be made at a time and in a manner sufficient for the receiver to ascertain whether it satisfies the contract: if of goods, so that he may examine them; if of money, it must be actually produced, unless the creditor dispenses with its production. A tender of money must be of the exact sum, or of a larger sum from which the proper amount can be taken without making change; tender of part is not a good tender, nor of the balance of the amount after deducting a set-off. If a claim consist of several dis-

tinct accounts payment may be tendered of any one separately; but if a sum insufficient to cover all is tendered without appropriating it to any particular account, it is not a good tender to any. A tender the acceptance of which would involve an admission that no more is due is not good, nor is a tender upon any condition which the debtor has no right to impose; but a tender "under protest" is good. Tender may be by or to an agent, or by one of joint debtors or to one of joint creditors.

CHAPTER V.

BREACH OF CONTRACT.

Breach of a contract discharges it by converting it into a right of action for damages. If a party disables himself from performance, that is a breach of the contract and gives an immediate right of action. If before the time for performance, one party give notice of his intention not to perform the contract amounting to an absolute repudiation of it, the latter may accept such notice, treat the contract as at an end and sue immediately for the breach, or he may disregard the notice, treat the contract as still existing and insist upon performance. If he take the latter course, the first party may alter his intention and complete the contract, or he may take advantage of anything subsequently occurring which would justify him in refusing to perform. Renunciation not accepted by the other party may be withdrawn at any time before performance is due. Insolvency of a party does not justify the other in treating the contract as broken nor entitle him to rescind, and he could not be required to complete until the insolvent or his representatives showed ability and readiness to complete on their part.

CHAPTER VI.

ACCORD AND SATISFACTION.

The right of action for breach of a contract may be satisfied by performance of something agreed upon to that effect, this is accord and satisfaction. Accord alone without satisfaction is no answer to the original claim. Accord and satisfaction may be supported by any legal consideration agreed upon by the parties. The consideration may be a new contract made and accepted in satisfaction, or the liability of a third party under a valid agreement of all the parties to that effect. Accord and satisfaction by one of several persons jointly or jointly and severally liable to the same creditor, discharges all.

CHAPTER VII.

PAYMENT IN SATISFACTION.

Payment or tender after breach is not performance of the contract and may be refused, but if accepted, it operates as satisfaction for the breach. Non-payment of money when due does not render the debtor liable for special damages caused by his failure to pay. The former rule, that payment of a less sum could not operate as a discharge of a larger debt, is now altered. *See* R. S. O. 1887, c. 44, s. 53, s-s. 7. Where there are debts on both sides of an account and it is agreed between the parties that the debts on one side shall be set off against the debts on the other, the transaction has the effect of payment—even to take a debt out of the statute of the "limitations.

The giving of a negotiable security on account of a simple contract debt is presumed to be a conditional payment, all remedies on the original debt are suspended until the security matures, but revive on its dishonour. But the bill or note may be accepted in satisfaction of the debt and then its dishonour does not revive the debt. A bill or note given for a specialty debt is only a collateral security and

does not affect the remedy on the other. A creditor to whom a bill on which his debtor is not, or is not primarily liable has been delivered on account of the debt must preserve all his debtors rights on the bill, if it is dishonoured, by giving due notice of dishonour, if he do not, the debtor is discharged.

The giving and taking of a cheque on account of a debt has the same effect as conditional payment until the cheque is dishonoured. But if the creditor do not present it for payment within a reasonable time and the money is lost through the delay the drawer is to that extent discharged, the holder becoming creditor of the banker to that extent.

A written receipt is *prima facie* evidence against the creditor, but is not conclusive unless under seal. It is not evidence against a third party, though it may be evidence in his favour if he has acted on the faith of it. A receipt under seal is an estoppel between the parties, but it may be explained and set aside on the ground of fraud.

Payment to one of joint creditors would at law discharge the debt as against all, but in equity joint creditors are considered as interested severally, and payment to one discharges the debt, as against him only. Payment by one of joint, or joint and several debtors, discharges all.

Authority to an agent to receive payment is *prima facie* authority to receive payment in money only; and payment to a duly authorized agent discharges the debt though the agent never pay over the money to his principal. Payment to one partner discharges a debt to the firm, as each partner is agent of the others. A solicitor authorized to sue, is authorized to receive payment.

A person paying money has a right to say to which of several debts the payment shall be applied; and if the creditor accept it he must so apply it. Appropriation by the debtor, if not expressed, may be implied as by payment of the exact amount of one of the debts. Payment by a person indebted personally and also as executor is presumed to be intended for his personal debt. In case of continuing accounts payments are referred to the earlier

items unless a contrary intention appears. A composition is applied proportionately to all the debts.

If the debtor does not appropriate his payment expressly or impliedly, the creditor may appropriate it, even to a statute-barred debt; though if part only of such debt is paid by such appropriation, the balance is not taken out of the statute. The creditor's right of appropriation may be exercised at any time while the debtor's position remains the same. But he has no right of appropriation of money received from a third party, without knowledge of the debtor.

If neither the debtor nor the creditor makes any appropriation the law appropriates the payment *prima facie* to the earlier debt, and to a legal debt rather than to an illegal one.

CHAPTER VIII.

RELEASE.

Release of a right of action must be upon consideration or under seal. But a representation made by the creditor to his debtor of his release or abandonment of the debt, upon which the debtor acts to materially alter his position, may operate as a release. Liability upon bills and notes, before or after maturity, may be discharged by the holder by parol and without consideration. A release may be conditional upon the happening of some event, and may be subject to a condition subsequently defeating it in a certain event. A covenant by a sole creditor with his sole debtor not to sue for the debt is equivalent to a release; but not so when the creditor is one of several joint creditors, or the debtor one of several joint debtors; then the debtor's remedy, if he is sued for the debt, is an action upon the covenant not to sue.

The release of one of joint, or joint and several debtors, releases all, unless qualified by a reservation of remedies against the others. Release of a principal debtor, without reservation of remedies against the surety, discharges the

surety. A release by one of co-creditors jointly entitled, discharges the debtor against all.

CHAPTER IX.

MERGER AND ESTOPPEL.

When a party holding a security or cause of action against another takes another security of a higher nature in legal operation, the former is usually merged or extinguished in the latter; as by taking a bond for a simple contract debt, or by recovering judgment upon either, the remedy upon the earlier debt is gone. In order that there be a merger, the higher security must be for the same debt and between the same parties, a covenant given by one of the makers of a joint and several promissory note does not merge the note as against the other.

Merger takes place by operation of law, without any intention of the parties, and they cannot prevent its operation. Acknowledgment in a deed of a simple contract debt may imply a covenant to pay it and so merge it. Judgment for the plaintiff in an action merges the original cause of action, and is a bar to another action for the same claim or to an action for further damages under the same claim; and a judgment against the plaintiff upon the merits operates as an estoppel, and he cannot bring another action upon the same cause. Judgment against one of joint obligors on a bond merges the joint liability on the bond and prevents action against the others; but if they are bound jointly and severally, judgment without satisfaction against one does not prevent proceedings against the others on their several liability.

The principal of estoppel operates against the parties to an action, as to matters adjudicated upon, and against those claiming in the same right. Judgment recovered in a foreign court does not merge the cause of an action here, but may be conclusive between, and operate as an estoppel upon the parties.

CHAPTER X.

ARBITRATION AND AWARD.

When a right of action is referred to arbitration and an award made upon it, the award, if good upon its face, is binding and conclusive upon the parties, until set aside, and also upon all parties claiming through or under them. It is conclusive as to all matters within the scope of the reference, whether actually brought forward or not. Award followed by performance is a complete discharge of the claim. An agreement to refer to arbitration cannot be pleaded as an answer to an action upon the cause referred, though an action will lie for the breach of agreement to refer. If parties agree that there shall be no right of action until an arbitrator has decided that there has been a breach of contract, and what damages have been sustained by it, such agreement is binding, and no action exists until the arbitrator has so decided. An action will lie for refusing to appoint an arbitrator, and where a party has given a bond conditioned to perform an award, and prevents an award being made by revoking the authority of his arbitrator, an action lies upon the bond.

The court will not grant specific performance of an agreement to refer to arbitration, and an agreement to refer does not imply any undertaking that the party appointed as arbitrator will act though it does imply an agreement to perform the award when made. An agreement to refer cannot be revoked by one of the parties without the consent of the other.

CHAPTER XI.

STATUTES OF LIMITATION.

The Statutes of Limitation which fix the limit of time within which an action is to be brought, and afford an absolute bar to an action brought beyond that time, are to be found, as to simple contract and specialty debts in

R. S. O. c. 1887, 60. Actions on simple contracts must be brought within six years from the time of the right accruing; on contracts under seal, twenty years; for recovery of a penalty given by a statute, two years.

An action upon a foreign debt may be maintained here, so long as the action is not barred by our law, though barred by the foreign law, unless the foreign law not only bars the remedy but extinguishes the right, in which case the claim has ceased to exist. But an action cannot be maintained upon such a debt here beyond the period allowed by our law, though a longer period is allowed by the foreign law.

The Statutes of Limitation do not in general run in favour of a trustee under an express trust, or a person occupying a fiduciary position, R. S. O. 1887, c. 110, s. 53; but see 54 V. c. 19, s. 13, allowing the trustee to avail himself of the lapse of time as a bar except in actions for fraudulent breach of trust, or for the recovery of trust property or the proceeds thereof.

In the cases of disability from absence, infancy, &c., mentioned in the statutes, by reason of which the time for bringing the action is extended, the disability must exist when the cause of action arises; where the statute has once begun to run no supervening disability stops it. The statutes begin to run, subject to disability, &c., from the time when the right to bring an action first accrues; upon a simple loan of money, this is from the date of the loan; upon a bill or note from the date when it is due and unpaid, and notice of dishonour given if necessary. In case of continuing covenants as covenant for title, covenant to repair, the covenant is broken afresh each day the adverse title or want of repair continues, and a cause of action is constantly arising. The statute runs in favour of the debtor though the creditor did not know of his right, unless the debtor has fraudulently concealed it.

If a cause of action accrue before the death of the debtor, his death does not stop the running of the statute, though no personal representative capable of being sued is appointed within the time of limitation; but if the debt

accrues after the debtor's death, the statute does not begin to run until there is a personal representative who can be sued. And the same rules apply in case of the death of the creditor; the statute begins to run against him at once if the debt accrues during the creditor's life, and is not stopped by his death; but if it accrues after his death the statute does not run until there is a personal representative who can sue. The time limited by the statute is reckoned exclusively of the day on which the right of action accrued.

The claim is absolutely barred after the prescribed time, whether sought to be enforced as a cause of action, or as a set-off or counter-claim. But a party wishing to avail himself of the statute must specially plead it. And though the right of action may be barred by the statute, yet if the creditor has a lien he may enforce it, or may pay himself by any lawful means, without bringing an action.

An executor or administrator may pay a barred debt owed by the deceased, and may retain a debt owed by the deceased to him, though barred. He may also set-off against a legacy, or share a debt owing to the estate by the legatee or next of kin, though barred by the statute.

The debtor may defeat the operation of the statute and renew the time of limitation by an acknowledgment of promise; by part payment; or by payment of interest. The acknowledgment must be in writing: R. S. O. 1887, c. 123, s. 1. From a simple acknowledgment a promise to pay is implied; but if a debtor, while acknowledging the debt, uses expressions which prevent the implication of a promise, the acknowledgment is ineffectual. An acknowledgment made for a special purpose is effectual only for that purpose; an offer to pay in a particular way, as by set-off, can be enforced only in that way. A promise to pay on a condition or contingency can be enforced only when the condition has been satisfied or the contingency has occurred. The renewal of liability may be by an acknowledgment given before or after the debt is barred; in the latter case the promise may be made conditional; in the former it cannot.

Payment of part of the debt, or of interest, implies an admission of a greater sum being due, and a promise to pay it, unless accompanied by expressions or circumstances which rebut that inference. Payment may be by money, or an equivalent, as by delivery of goods, by a set-off, or by the giving of a bill or note for part of the amount. A receipt for interest signed by the creditor and given to the debtor with the intention of giving him the amount, is sufficient part payment. A creditor may appropriate to a barred debt a payment made generally, but that will not revive the balance of the debt. Indorsement by or on behalf of the creditor upon a bill or note of payment made on it is not sufficient proof of the payment to take the debt out of the statute: R. S. O. 1887, c. 123, s. 4.

The acknowledgment of a specialty debt need not be given to the creditor, as in simple contract debts, since it is not necessary that a promise to pay should be implied; any acknowledgment of the debt as an existing debt, made in writing and signed, is sufficient, though made to a third party.

Acknowledgment by one of joint-contractors does not renew the liability of others: R. S. O. c. 123, s. 2. But if one partner, during the partnership, make an acknowledgment or part payment, the liability of all is renewed, for he is their agent, as well as a joint debtor with them. Payment by a principal keeps alive the liability of a surety. An executor may not only pay a barred debt, but may renew liability upon it.

CHAPTER XII.

SET-OFF AND COUNTER-CLAIM.

A set-off, strictly so-called, applied only to mutual debts, and was pleaded in answer to a claim of debt; a counter-claim was treated as a cross-action, to be decided independently of the plaintiff's cause of action. Either must be pleaded, in order to be available in an action; and

a defendant may avail himself of a counter-claim which has arisen after action brought: Cons. Rules 484, *et seq.* Set-off can be pleaded only where the debts or claims are between the same parties and in the same right.

If an agent contracts as principal, a party contracting with him on that footing will have any right of set-off against the principal when disclosed that he would have had against the agent; not so, if he knew of the agency. And a person dealing with a partner who contracts in his own name, but really on behalf of the firm, is in the same position. A trustee sueing on behalf of his *cestui que trust*, must submit to a set-off of debts due to the defendant by the *cestui que trust*. If a party sues or is sued in his own right, debts due by or to him in another right cannot be set-off; and *vice versa*.

PART V.

REMEDIES FOR BREACH OF CONTRACT.

CHAPTER I.

DAMAGES AND INTEREST.

Damages are either *general*, being the consequence of a breach of contract, irrespective of any special circumstances, or *special*, caused by the breach happening under special circumstances. If special damages are claimed they must be specially pleaded.

The measure of general damages is the pecuniary difference between the state of the plaintiff upon the breach of the contract and what it would have been had the contract been performed. This may not correspond either with the cost of performance nor with the consideration given for the contract. If the defendant was to do one

of two things, or do a thing in one of two ways at his own election, then on his failure to perform either, the amount of damages must be estimated with respect to that performance which is least beneficial to the plaintiff.

General damages extend only to the proximate and not to the remote consequences of the breach of contract. They are only such as may fairly and reasonably be considered as arising according to the usual course of things, from such breach; or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Notice of the special circumstances or purpose of one of the parties in making the contract does not render the other party liable for special consequences of a breach, or for failure of the special purpose, unless he has expressly *or impliedly* contracted to be so liable.

Damages for breach of a contract are limited to matters capable of pecuniary valuation; but in cases of breach of promise of marriage damages may be given for mental sufferings. Damages may include prospective as well as accrued loss upon a breach of contract; but not loss anticipated upon a prospective future breach or continuing breach. The plaintiff may claim as damages the cost of making good the breach at his own expense, if he has done so in a reasonable manner. He is bound to take all reasonable means to mitigate the damage caused by the other party's breach and cannot recover any part of the damage which is due to his own neglect of such means: and the defendant may give evidence of any matter which goes to mitigate the damages. The defendant cannot, however, reduce the damages by showing that an accidental benefit accrued to the plaintiff, independently of the contract.

If the plaintiff proves the breach of contract, but proves no actual damage, he is still entitled to *nominal* damages for the breach. Detention of money beyond the day of payment gives a right to nominal damages only; but detention of goods may give a right to substantial damages.

In an action against the buyer for goods sold and delivered, the damages are measured by the price fixed in the contract; if no price is fixed, then by the value of the goods at the time of delivery. If the buyer has refused to accept the goods, the measure is the difference between the price fixed and the market price at the time appointed for acceptance, and the same measure of damages applies in an action against the seller for not delivering the goods. The buyer cannot claim damages for loss of profit on a re-sale unless the seller had such notice of the re-sale as to make him liable for such risk. If one party forbears to claim or insist upon delivery at the request of the other, the damages will be regulated by the state of the market at the time the forbearance is withdrawn.

If no goods of the same kind as those contracted for can be got in the market, the buyer may, on the seller's default, procure goods as nearly similar as he can, and claim the difference in price from the seller. In an action for non-delivery of a specific article, reasonable cost of procuring another will be the measure of damages; if no other be procurable the damages are measured by the average profit made by the ordinary use of such article for the time cost in consequence of the default. If a person contracts to supply an article for a specific purpose, and it fails to answer that purpose, the loss caused by its insufficiency is recoverable; but such loss is not recoverable when the sale was of a specific article without reference to the purpose for which it is to be used.

Upon breach of warranty in a sale of a specific chattel the measure of damages if the chattel has been returned is the price which has been paid for it, if it is kept the diminution in value owing to the defect. If goods are to be delivered under a contract describing their quantity and quality and the goods when delivered do not answer the description the buyer may refuse to receive them and sue for the full value at the time appointed for delivery or for the difference between that value and the contract price according as he has or has not paid the price. If the buyer has accepted the goods he may sue for the difference

in value between the goods contracted for and those delivered, or in an action against him for the price he may prove the same difference in value in reduction of damages.

In an action against a carrier for non-delivery of goods the measure of damages is the value of the goods at the destination at the time they should have been delivered. When a special object of the sender is notified to the carrier damages may be recovered from the carrier for the natural consequences of the failure of that object, but the consequences must be such as could be reasonably anticipated as a result of the failure.

In a sale of land with covenant for title, if the purchaser is evicted by reason of a defect in the title, the damages are the value of the land, if not evicted then the loss in selling value of the land by reason of the defect. So in an action upon a covenant against incumbrances, the damages are the diminution in value by reason of the incumbrances. In an action upon a breach of a continuing covenant as a covenant to repair only damages accrued up to the time of commencement of the action can be recovered.

The parties may fix the sum to be paid as damages upon a breach of the contract, or they may fix a sum to be paid without any intention of estimating the damage, but as a penalty to secure performance. If a bond is given with a penalty the action upon the bond is for the recovery of the penalty, and no large amount can be recovered, but upon covenants and simple contracts with a penalty the action may be for the penalty, or upon the contract when the plaintiff may recover the actual damages whether more or less than the penalty.

Whether a sum agreed to be paid upon a breach is to be treated as a penalty or as liquidated damages is a question to be decided by the court upon the construction of the whole instrument. If a larger sum is agreed to be paid in default on payment of a smaller, it is *prima facie* a penalty and only the amount actually owing is recoverable, but if a smaller sum is agreed to be accepted in payment of a larger with a condition that in default the larger sum shall be payable, then upon default in payment of the smaller sum the large

is recoverable. A fixed sum agreed to be paid on breach of a contract of uncertain value is taken as liquidated damages though the amount may appear excessive. If a contract contains several stipulations some of which are of fixed and others of uncertain value, and a sum so named is payable on breach of any of them, it is treated as a penalty, but if all are of an uncertain value then it is presumptively liquidated damages. *See Wallis* v. *Smith*, 21 L. R. Chy. D.

Interest may be payable either by contract or as damages for detention of a debt. Interest depends upon the principal, so that if the action for the principal is barred there is no action for interest. Interest cannot be claimed unless there has been an agreement to pay it, or such agreement can be implied from the circumstances. It is recoverable upon bills and notes from the date of their maturity, or from the date of the instrument if so expressed. For the cases in which interest is recoverable by law. *See* R. S. O. 1887, c. 44, ss. 85-88.

CHAPTER II.

SPECIFIC PERFORMANCE AND INJUNCTION.

The equitable remedy of specific performance of a contract is not given where the remedy by damages upon the breach would be adequate, but only when more complete justice can be done. Where a contract binds a person not to do a certain thing, specific performance if granted takes the form of injunction against a breach. Though a contract be such that specific performance cannot be enforced directly, yet a party may be restrained by injunction from acts contrary to or inconsistent with his contract. A plaintiff may claim damages for breaches of the contract up to the time of action brought, and specific performance for the future, and may in some cases claim specific performance of certain parts of a contract though other parts do not admit of that remedy.

Specific performance of contracts for the sale of land is granted on the ground, that damages may not be an adequate remedy to the purchaser, for whom the land may have a special value. And on the principle that the remedy ought to be mutual a similar suit on the part of the vendor will be entertained. Specific performance of contracts for sale of goods will not be ordered, damages being a sufficient remedy, except under peculiar circumstances, as the impossibility of obtaining similar goods, or the articles having a special and peculiar value for the party entitled. And whether a sale of shares or stock will or will not be specifically enforced depends on whether the stock is limited in quantity and not always to be had in the market, or is like government stock always to be had. Agreements to lend money will not be enforced; agreements to execute security for it, will.

Contracts involving personal services, skill or confidence, will not be specifically enforced, nor will an injunction against putting an end to them be granted. And upon the same principle that the court cannot undertake to enforce contracts requiring continued supervision in their performance, contacts for buildings will not be enforced specifically unless the work is clearly defined by plans and specifications, etc. Covenants to repair will not be enforced, nor contracts for sale of the good will of a business; but an agreement for sale or lease of premises, with the good will annexed, will be enforced.

A contract to enter into partnership will not be specifically enforced; but an agreement to execute articles of partnership will be, provided the terms of the articles are definite. A contract for sale of property to be acquired, may be enforced when the property is acquired, if the nature of the property admits of the remedy. It is not necessary that the subject matter of the contract should be within the jurisdiction of the court; the exercise of its powers depends on the presence of the defendant within the jurisdiction, so that the order of the court may be enforced upon him personally.

The granting of specific performance is always discretionary with the court; so a plaintiff will be required to perform his part of a contract as a condition of specific performance being granted against the defendant. Though the part to be performed by the plaintiff would not have been a proper matter for specific performance, yet when he has performed it, specific performance will be ordered against the defendant. But it will not be granted to a plaintiff himself in default, nor where he has refused to carry out representations made to obtain the contract, or has made misrepresentations. Impossibility of performance; unreasonable hardship upon the defendant; uncertainty in the terms of the contract; want of consideration for the contract; and the presence of circumstances which would render the order useless, all are grounds for refusing an order for specific performance.

In actions in which this remedy is sought time is generally considered as not being of the essence of the contract; but the subject of the contract may make it so, or it may be made so by stipulation in the contract, or by subsequent notice to that effect.

If a contract can be substantially performed, specific performance may be ordered, with compensation for the deficiency. A condition of sale of land excluding compensation is held to apply only to slight errors. But if a defect in the property sold is material to the enjoyment of the whole, it is not a matter for compensation and specific performance will be refused. If the purchaser knows of the defect at the time of contracting, he cannot claim compensation.

A purchaser cannot be compelled to take land of a different tenure from that contracted for. He may usually compel the vendor to perform the contract so far as he is able, with compensation for any deficiency.

PART VI.

ASSIGNMENT OF CONTRACTS.

CHAPTER I.

PRINCIPLES OF ASSIGNMENT.

At common law *choses in action*, including rights arising out of contract and rights of action for breach of contract were not assignable by act of the parties, with some exceptions, among which were bills of exchange. But in Equity a chose in action could be assigned, though the action must have been brought in the name of the assignor. Now, by R. S. O. 1887, c. 122, s. 7, any debt or chose in action arising out of contract is assignable by writing, and the assignee may sue in his own name.

Contracts involving the consideration of personal skill or confidence are not assignable, nor a contract for the supply of a special quality of goods given to a particular manufacturer.

An equitable assignment of a chose in action, supported by a valid consideration, may be made by deed, writing, or parol, in any form of words expressing an intention to assign. An order by a creditor upon his debtor may operate as an equitable assignment of a debt; but such order, if delivered to the debtor, without notice to the assignee, is only an authority to pay, and is revocable. And there must be a definite fund or debt as the subject of the assignment; an order upon a person to pay a third party, without specifying any fund for payment, is not an assignment.

The assignment of a debt is valid as between assignor and assignee without notice to the debtor, but until he has notice any payment by the debtor to the assignor is valid and is a discharge of the debt *pro tanto*. When the debtor has notice, he must pay in accordance with the assignment. When the creditor has assigned the same debt to

several parties successively, they take in order of date; but if one of the later ones has taken without notice of prior assignments, he may secure priority by giving notice to the debtor first. When notices of several assignments are given at the same time, they are effective in the order of their date.

Notice may be given in any form; and if received by the debtor in any way such that he ought to attend to it, he is bound. An agent may be authorized by position or circumstances to receive notice. Notice given to one of joint debtors; partners, or trustees, is sufficient, so long as he continues in the same relation to the others; but if he dies, or retires, or is replaced, without communicating it, the others are not bound.

The assignee takes subject to all equities existing at the time of the assignment as before notice to the debtor: R. S. O. 1887, c. 122, s. 11. The equities chargeable against him are only such as arise out of the same transactions as the debt, he cannot be charged with a set-off or counter-claim arising out of an independent transaction. Any right or equity of the debtor to have the debt set aside for fraud or any other sufficient ground is also available against the assignee. But the debtor may by his own conduct estop himself from setting up equities.

CHAPTER II.

ASSIGNABLE CONTRACTS.

Bills of exchange were at common law negotiable by the custom of merchants, and promissory notes were placed on the same footing by a statute passed in the reign of Queen Anne. A banker is bound to pay a customer's cheques drawn upon him so long as he holds funds of the customer applicable to that purpose, and is liable in damages if he refuse. But a cheque is not an assignment of so much of a fund.

A bill of lading is a document signed by the master of a ship upon the shipment of goods for carriage, acknow-

ledging receipt of the goods and agreeing to deliver them according to the contract, upon the terms stipulated. By the common law, indorsement and delivery of the bill of lading by the shipper or owner transferred the property, but did not assign the contracts contained in the bill. Now, by R. S. O. 1887, c. 122, s. 5, all rights of action and all liabilities in respect of the goods pass on endorsement and delivery of the bill of lading as the contract had been made with the indorsee.

A bill of lading remains negotiable until discharged by a complete delivery of the goods to the person having the right to claim under it. If drawn in a set of two or three, which are then indorsed to different parties, the carrier is discharged by delivering the goods to the first presented without notice of another indorsement, but as between the indorsees the rights of property given by the various assignments are not affected by the delivery.

CHAPTER III.

COVENANTS RUNNING WITH LAND.

Certain covenants relating to the title or use of land "run with the land," or pass upon an assignment of the land to which they relate. At common law the *benefit* of covenants running with land, that is, the right to enforce such covenants made to the owner of an estate, passed to his grantee or assignee in all cases and the latter might sue upon them in his own name; but a covenant *by* the owner could not be annexed to the estate of the covenantor so as to cast a *burden* upon his grantee or assignee; except in the case of covenants by landlords in leases. And by statute this exception was extended to lessee, so that the assignee of either lessor or lessee takes both burden and benefit of those covenants in a lease which run with the land.

Covenants running with the land are such as *relate to the land*, as covenants for title, for quiet enjoyment, for

production of title deeds, to payment, to renew a lease (the benefit of which runs with the term, and the burden with the reversion), that the lessee will not assign, that he will repair, and covenants relating to the use and occupation of land demised. Covenants in a lease which are merely collateral, and do not relate to the land do not run with the land on the reversion at common law, as a covenant to do or not to do something upon the land, to pay a debt for which land is mortgaged, to pay money not reserved out of the demised premises.

A lessee or his assignee is estopped from denying that the lessor had an interest sufficient to grant the lease, with a reversion with which the covenants will run, but the lessee may assert that the lessor's interest has determined. If a lessor executes a lease, having at the time no interest in the land, and afterwards acquires a sufficient interest, the lease takes effect and its covenants will run with the land and the reversion as if he had had the interest at the time of making the lease.

A covenant cannot be made to run with chattels personal.

An executor of an assignee is liable and entitled upon the covenants, or an assignee of an assignee. An underlessee for the *whole* term is looked upon as an assignee, but an underlessee for a shorter term is not, as he has not the whole estate to which the covenants are annexed. A mortgagee of the term, though not in possession, has the whole legal interest and is liable as an assignee on the covenants in the lease. The person to whom the reversioner's estate passes takes his position as regards the covenants, and the grantee of the reversion in part of the demised premises is an assignee of covenants apportionable to the part granted, as covenants to repair and to pay rent. An assignee of the term in part of the premises takes the burden and benefit of covenants so far as they relate to the part assigned.

The personal liability of the original lessee on the express covenants in the lease continues after his assignment, and upon his death devolves upon his executor; but

his liability on covenants implied in law ends upon the assignment, since it depends upon privity of estate with the lessor. The liability of an assignee upon covenants running with the land, lasts only so long as he remains assignee, and he may assign for the purpose of getting rid of his liability. An assignee impliedly indemnifies his assignor against breaches of the covenants and conditions of the lease, in the absence of contrary stipulation.

Upon equitable principles, a purchaser of land with notice of a covenant restricting the use of land for the benefit of others, though such that the burden of it would not run with the land at common law, will not be allowed to use the land in a manner inconsistent with the covenant, on the ground that it would be a fraud upon the parties entitled to the benefit. But this applies only to covenants restricting the use of the land, and does not extend to covenants requiring active performance.

CHAPTER IV.

ASSIGNMENT BY MARRIAGE.

The common law rule that marriage transferred absolutely to the husband all chattels personal of the wife in possession, and all her choses in action which he might reduce into possession, is now at an end, and R. S. O. 1887, c. 132, enables the wife to retain all property to which she may be entitled, as fully as if unmarried.

CHAPTER V.

ASSIGNMENT AT DEATH.

Death operates as an assignment in law of all personal estate, rights and liabilities of the deceased to his executor or administrator, subject to the debts and liabilities of the deceased chargeable against it. Executors and administrators may sue and be sued in their representative capacity;

may indorse bills and notes of which the deceased was holder; and may complete the executory contracts of the deceased, not involving his personal liability, and recover the price for the benefit of the estate. They may sue for damages accrued to the personal estate from breaches of contracts, including a contract for sale of land; but a claim for specific performance of such a contract must be by the heir. And by R. S. O. c. 110, s. 26, when a contract for sale of land is subsisting at the owner's death, his executor or administrator is empowered to execute the conveyance.

Contracts involving personal considerations are usually terminated by death, as contracts of service, of agency, of apprenticeship; and a partnership is dissolved by death of a partner, subject to agreement to the contrary.

An executor is personally liable on all contracts made by him, unless he expressly restricts them to payment out of the estate, and may sue in his own right or as executor; and a creditor under such a contract cannot charge him as executor or acquire any claim against the estate of the deceased.

The appointment of a debtor of the testator as executor releases the debt at law, since a man cannot sue himself; but the debtor is treated as having collected the debt and as holding it as assets, unless the testator evidently intended to release him.

An executor's common law right of retaining his own debt in priority to the claims of other creditors of the estate is destroyed by R. S. O. c. 110, s. 32. He may retain or pay a debt barred by the Statute of Limitations, but not a debt unenforceable by reason of the Statute of Frauds.

BENJAMIN ON SALE OF PERSONAL PROPERTY.

BOOK I.

FORMATION OF THE CONTRACT.

PART I.

AT COMMON LAW.

CHAPTER I.

OF THE ELEMENTS AND FORM OF THE CONTRACT OF SALE.

A sale of personal property is a transfer of the absolute or general property in a thing for a price in money. There must be parties competent to contract, mutual assent, a thing the *absolute* or *general* property in which is transferred from the seller to the buyer, and a price in money paid or promised. If the consideration is not money, then the transaction is not a *sale*.

CHAPTER II.

OF THE PARTIES OF THE CONTRACT.

Only the owner, or his lawful representative, can in general convey a valid title to goods. But a valid transfer of negotiable instruments may be made by one not the owner; a person with whom goods are pledged may sell on the pledgor's default in redemption; a sheriff can give a good title to the goods of defendant taken in execution: the master of a ship, in case of necessity, has by law authority to sell the cargo; and agents entrusted with the

possession of goods or documents of title can make a valid sale (*see* R. S. O. 1887, c. 128).

Certain persons are in general incompetent to contract, but under special circumstances may make valid purchases: as infants, insane persons, married women and drunkards. Infants cannot be made liable on purchases made by them, except for necessaries. An infant's contract is not void, but voidable at his option, and he may affirm it on coming of age. He will be liable on a purchase of necessaries on credit though he had sufficient ready money. What are necessaries must be decided with regard to the infant's age, estate and social position. The court decides whether there is evidence that might reasonably satisfy the jury that the goods are necessaries; the jury find whether as a matter of fact they are so.

Necessaries supplied to an infant, or on his express or implied credit for his wife and children, are considered as purchased by him, and he is liable for them. An infant engaging in trade is not liable for purchases made for that purpose; but if he take for necessary personal use goods supplied to him as a tradesman he is liable for the goods so used.

The ratification upon coming of age of an infant's contract must be in writing; R. S. O. c. 123, s. 6. Such writing will amount to a ratification as in case of an adult party would amount to adoption of an act done by an agent. It must not only admit the correctness of an account, it must also acknowledge it as an existing liability.

Unsoundness of mind, unknown to the other contracting party, no advantage being taken of the lunatic, is no defence; and knowledge by the other party will not invalidate a contract for *necessaries* which is fair and reasonable. A drunkard is liable for necessaries, and in any case his contract is voidable only and not void, and so may be ratified when he becomes sober.

A married woman was at common law incompetent to contract, though in equity, if she had separate property, she might contract so as to make such property liable for payment of her debts. By the Married Women's Property

Act, R. S. O. 1887, c. 132, a married woman having separate property may contract with respect to and to the extent of such property as if unmarried. Her contract is *presumed* to be made with respect to her separate property, and will bind not only separate property which she then has, but any afterward acquired.

CHAPTER III.

MUTUAL ASSENT.

Assent may be expressed, or it may be implied from words or conduct, but it must be mutual and intended to bind on both sides, and must exist on both sides at the same moment of time. The acceptance of an offer must be unconditional, and a counter offer is a rejection of the first. But an inquiry whether the terms of an offer cannot be modified is not a counter-proposal and rejection. An offer can be withdrawn at *any* time before acceptance, even though the offer fixed a time within which it might be accepted. A tender to supply goods may be withdrawn at any time before an order is given upon it.

Where negotiations are carried on by post, the *posting* of the acceptance of an offer binds both parties, though the acceptance is never received; and a retraction of the offer must reach the other party before he has posted his acceptance, in order to be effectual. Death of the party making an offer is an effectual revocation, though not notified to the other party.

If a contract for sale of certain goods is made, and the goods delivered are not in accordance with the contract, but are yet retained by the purchaser, a new contract to pay their value is *implied*. If the dealer is induced to sell goods to an insolvent purchaser by the fraud of a third party, who then obtains the goods from the purchaser for his own use, the price can be recovered from such third party as upon an implied contract. A *satisfied* judgment in trover passes the property in the chattel to the defendant as on a sale.

Mutual assent being necessary to a contract where the parties have through mistake of fact, not meant the same thing, there is no contract. The same result follows if the language of the agreement is not capable of a definite meaning; but obvious mistakes may be corrected, if the meaning is plain. And whatever a party's real intention may be, his intention as manifested to another, inducing the latter to contract, is binding. A mistake by a buyer in supposing that an article will answer a special purpose, for which it fails, does not affect the validity of the contract.

Whether a mistake in the person dealt with will or will not avoid the contract, depends on the question whether the identity of the person is an element in the sale, as in respect of his responsibility, or the existence of a set-off; or whether it was immaterial with whom the contract was made. In the former case the contract may be avoided; in the latter it cannot. Where a person obtains goods by representing himself as another, there is no assent on the vendor's part, and no sale. Assent may be conditional, as in case of a sale "on trial"; and there is then no complete contract till the condition is fulfilled.

CHAPTER IV.

OF THE THING SOLD.

A contract for sale of a thing which has ceased to exist is void, on the ground of mutual mistake. Things may be sold which are not yet in existence, but are said to have a *potential existence*, as the natural product or expected increase of something *already* belonging to the vendor: but there can be no *sale*, only a valid *agreement for sale*, of a thing to be afterward acquired. In the first case the property passes, in the other it does not. In equity, however, the beneficial interest in the chattels, when acquired by the vendor, passes at once to the vendee.

CHAPTER V.

OF THE PRICE.

If no price has been agreed upon, the law implies an understanding that goods are to be paid for at what they are reasonably worth. When the parties agree that the price shall be fixed by a third party, the price when so fixed becomes a part of the contract as if at first fixed by the parties. If the valuer refuses to act, there is no contract in the case of an executory agreement; but if the goods have been delivered under the agreement, and the purchaser prevents the valuation, the vendor may recover the value of the goods, as estimated by the jury.

PART II.

SALES UNDER THE STATUTE OF FRAUDS.

CHAPTER I.

WHAT CONTRACTS ARE WITHIN THE STATUTE.

The 17th section of the Statute of Frauds provides that "no contract for the sale of any goods, wares or merchandises for the price of ten pounds sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part-payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized." The words "contracts for the sale of goods" being held in several decisions to be inapplicable to agreements for future delivery. Lord Tenterden's Act (9 Geo. IV. c. 14, s. 7, now found in R. S. O. 1887, c. 123, s. 9), with the substitution of $40 for ten pounds enacted that the provi-

sions of the 17th section "shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." This enactment has the effect of substituting the word "value" for "price" in the 17th section.

Whether a contract is one for the sale of a chattel and so requires a writing, or for work and labour in which no writing is needed is decided by this test, that when the contract is intended to result in transferring for a price from one party to another a chattel in which the latter had no previous property, it is a contract for sale of a chattel, and unless that is the intent of the contract it is not a contract of sale. A contract between an author and printer that the latter should publish a book for the former is not a contract of sale, for a part of the materials of the book, its composition already belongs to the author and cannot be sold by the printer to him. A contract to furnish materials or any moveable thing and affix them to the freehold is not a contract of sale, and the case is the same when the contract is to affix them to a chattel already in existence. Sales of goods at auction are within the statute.

CHAPTER II.

WHAT ARE GOODS, WARES AND MERCHANDISE.

The words include all *corporeal* moveable property, not shares, stock, documents of title and choses in action.

The 4th section of the Statute of Frauds enacts that "no action shall be brought whereby to charge any person upon any contract or sale of lands, or any interest in or concerning them unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be

charged therewith, or some other person thereunto by him lawfully authorized."

It is often necessary to determine whether a sale of certain articles attached to the soil falls within the 17th section as being a sale of "goods, wares and merchandise." Or within the 4th section as an "interest in land," for the 4th section requires a writing in all cases, for any value while under the 17th writing is not necessary when the value is under ten pounds or there has been part payment or part acceptance and receipt. The rules are :

(1) When the agreement is to transfer the property in anything affixed to the soil which is to be severed from the soil and converted into goods before the property passes, the agreement is for a sale of goods and within the 17th section.

(2) When the agreement vests the property at once in the buyer before severance, if it is for sale of *fructus naturales* it is within the 4th section as a contract for an interest in land, if of *fructus industriales*, it is within the 17th section as a sale of goods.

CHAPTER III.

WHAT IS A CONTRACT FOR THE PRICE, OR OF THE VALUE OF £10.

Where several articles are purchased, each of the value of less than the amount, but together amounting to more, the statute applies if the purchases were finally all included in one bargain, and does not if there were separate contracts for each. In a sale of successive lots at auction, there is a distinct contract for each lot.

If the value at the time of the bargain is uncertain, but ultimately proves to be more than £10, the statute applies, if the contract includes the sale of goods worth £10 or over, and other matters, the statute applies, and no part of the contract can be enforced unless evidenced by writing.

CHAPTER IV.

OF ACCEPTANCE AND RECEIPT.

To satisfy the statute there must be a delivery of the goods by the vendor, with the intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the vendee, with the intention of taking to the possession *as owner*.

Delivery of a sample of goods sold, and acceptance of it *as part of the bulk*, are sufficient acceptance and receipt. Acceptance may be constructive only, and whether the facts proved amount to a constructive acceptance is a question for the jury; they may infer it from any act of the buyer which he would not have a right to do except as owner; as using the article, attempting to resell, altering it. But there may be such an acceptance as will satisfy the statute, as showing that there was a contract, and so let in parol evidence of its terms, while yet the buyer may object that the goods are not such as he contracted for.

Acceptance may be before *receipt*, as where the buyer has seen the specific goods before contracting. Receipt of the goods by a carrier appointed by the purchaser is not *acceptance*, as he has authority only to receive, not to accept. Delay on the part of the purchaser to notify the vendor of his refusal to accept is evidence, more or less strong, of acceptance. Marking the goods with the purchaser's name, with his consent, is an acceptance, but not a receipt. Acceptance of part of the goods makes the contract good for the whole, though some of the goods are not yet in existence. In case of the contract providing for a re-sale to the vendor in a particular event, the acceptance by the purchaser takes the whole contract out of the statute, and makes the provision for re-sale enforceable against the vendor.

The effect of acceptance and receipt is to prove that there was a contract, and it does this though the parties dispute as to the terms. The terms are then proved by

parol evidence. But the purchaser cannot validly accept after the vendor has disaffirmed the parol contract.

Receipt implies delivery, and where the goods are at the time of the contract in possession of the purchaser, it must be shown by proving that the purchaser has done acts inconsistent with his possession as agent or bailee for the vendor.

If the goods are and remain in the hands of a third party, receipt takes place when the vendor, the purchaser, and the third party agree that the latter shall hold them for the purchaser instead of for the vendor; but all three must have agreed, otherwise there can be no receipt. If the goods are on the premises of a third person who is not bailee for the vendor, delivery may be made by the vendor putting the goods at the buyer's disposal.

Where the goods are at the time of sale in the vendor's possession, delivery to a carrier for the purchaser is a receipt by the latter. So, also, if the vendor retain them *as agent or bailee for the buyer*. But if the sale is for cash the purchaser has no right to the goods till the price is paid, and retention by the vendor meantime is not as agent or bailee for the buyer. If the parties expressly agree that the vendor shall hold as such agent, then there is no right of lien on the vendor's part, and there is sufficient receipt by the buyer, for the right of lien is inconsistent with delivery of possession.

CHAPTER V.

OF EARNEST OR PART PAYMENT.

An agreement as part of the contract of sale that the vendor should set-off against the price of goods purchased the amount of a debt due by him to the purchaser is not part payment so as to take the contract out of the statute; but if made subsequently to the sale, or by an independent contract at the same time, it might be. The actual giving of anything of value, as part satisfaction of the price, will amount to part payment.

CHAPTER VI.

OF THE MEMORANDUM OR NOTE IN WRITING.

At common law parties may make a contract partly in writing and partly by parol, and parol evidence may be given of the terms not put in writing. But when the parties have *agreed* to put their contract, or any part of it, in writing, the writing is necessary to the proof of the contract, and is the only evidence of it admissible. So a party seeking to enforce a contract within the Statute of Frauds must prove it through the evidence required by the statute, and (unless there has been part payment or part performance) no evidence of the terms of the contract can be given, except through the note or memorandum in writing. But the defendant may always show that there were terms in the contract which are not stated in the writing, and so that the writing is insufficient as being a note of only part of the contract.

Parol evidence may be given to identify the subject matter of the contract; to show the situation of the parties, and the circumstances; to show the date; to explain the language; to show usage; to prove that alterations made by one party were assented to by the other; or to explain a latent ambiguity. But there can be no valid verbal agreement to abandon the contract in part or to vary its terms.

When the defendant has consented to a substituted mode of performing the original contract, and such performance is completed, parol evidence can be given to prove the consent. And when the time for performance is extended at the verbal request of one party, the other can still sue on the original contract. If the plaintiff has been ready to deliver or accept, and performance has been postponed at the request of the defendant, the latter is estopped from denying the plaintiff's readiness to perform, and the plaintiff can recover. But if postponement has taken place at the plaintiff's request, he cannot recover on the original contract, for he cannot show that he was

ready to perform; nor on the substituted contract, unless it is in writing. A new parol agreement, itself invalid, cannot rescind a former agreement. Parol evidence can be given to show that the party signing was really an agent in order to charge his principal, not in order to exonerate the agent. But an agent here for a *foreign* principal makes himself personally liable, and cannot bind his principal, nor can such principal sue.

The note or memorandum must exist and be signed before action brought. It may be found in several papers, one only of which is signed; but if so, the papers must have been attached together when the one was signed, or the signed paper must refer to the others. Parol evidence cannot be given to *connect* them, though it may be given to identify other papers referred to in one signed, or to show that a certain paper is meant in an ambiguous reference. The statements in the different papers must be consistent.

The writing must make clear all the terms of the contract charged. The name of the party charged must be signed, and the name or a sufficient description of the other party to enable him to be identified must be given. Parol evidence may be given, if the memorandum does not state which is buyer and which is seller, to show the trade of each party and so to enable the inference to be drawn.

When a person contracts in writing for a non-existing principal he is personally bound, and where he describes himself as agent in the contract, but signs his own name, he is liable. A principal may enforce a contract made by an agent in his own name, though the principal's name is not mentioned.

If a price has been agreed upon, it must be mentioned in the writing; but if none has been fixed the law implies a promise to pay a reasonable price. All the terms of the contract made must appear in the writing; parol evidence can be given by the defendant to show that there were other terms not mentioned in the writing, and so avoid it. A letter stating the terms of the contract, but refusing to perform it, is a sufficient note in writing.

CHAPTER VII.

OF THE SIGNATURE OF THE PARTY.

The only signature necessary is that of the party against whom the contract is to be enforced. A written offer, signed by the party making it, may be enforced upon parol proof of acceptance by the other party. Signature may be by a mark, by initials, and may be written, printed or stamped; but must not consist of a description only; and may be in any part of the paper, if affixed with the intention to recognize the instrument. Though containing the names of the party written by himself in the body of the writing, it will not bind if it clearly appears that the party did not mean to be bound by it as it stands.

CHAPTER VIII.

AGENTS DULY AUTHORIZED TO SIGN.

One contracting party cannot be agent to sign for the other. Agency may be proved by parol, and as in other contracts. Whether a third person assuming to sign, is authorized to do so, is a question of fact. An auctioneer is the agent of both parties for this purpose, but only when selling at auction; when selling at private sale he is not the agent of the purchaser. And the circumstances may exclude the auctioneer's authority to sign for the purchaser, when selling at auction.

In sales by a broker, the signed entry in the broker's book is the contract, and binds both parties. The bought and sold notes do not constitute the contract, but are sufficient evidence of it, if they correspond and state all the terms of the contract; so is either of them, unless the other or the book is produced and shows a variance. If the entry varies from the notes, which correspond, the former prevails, unless the notes can be considered evidence of a new contract in place of that in the book; and the same rule applies when a bargain is made by correspon-

dence; and the notes vary from the agreement so made. If the bought and sold notes vary, and there is no other written evidence of the bargain, there is no valid contract. The notes do not vary though the language be different, if the meaning is the same. A fraudulent alteration of one of the notes, after both have been delivered, renders it invalid.

BOOK II.

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

CHAPTER I.

DISTINCTION BETWEEN CONTRACTS EXECUTED AND EXECUTORY.

In an executed contract, or bargain and sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, though it remains in possession of the seller, while in an executory contract the goods remain the property of the vendor till the contract is executed. If the goods are lost or destroyed after the contract is made, the sufferer is the buyer in the former case, the vendor in the latter. Whether the contract is a bargain and sale or an agreement to sell is to be decided by the intention of the parties in making it. When the goods are not ascertained, it can be intended only as executory; if the goods are specified and ready for delivery, it is presumed to be a sale, if they are not ready for delivery, the contract is presumed to be executory, and the transfer of the property to be dependent on the performance of the things to be done.

2.8
2.5
2.2
2.0
10

CHAPTER II.

SALE OF SPECIFIC CHATTELS UNCONDITIONALLY.

The sale of a specific chattel passes the property in it to the vendee immediately, the appropriation being equivalent to delivery by the vendor, and the assent of the vendee to take the chattel and pay the price equivalent to accepting possession.

CHAPTER III.

SALE OF SPECIFIC CHATTELS CONDITIONALLY.

Where by the agreement the vendor is to do anything to the goods in order to put them into the state in which the purchaser is bound to accept them; or where anything is to be done to them to accertain the price, as weighing, measuring or testing, the price depending on the quality or quantity, or where the buyer is bound to do anything, as a condition on which the passing of the property depends, the doing of such things is presumed to be a condition precedent to the passing of the property, though the goods have passed to the buyer's possession.

But the risk of loss may be taken by the purchaser, by express agreement though the property has not passed. Delivery at a certain place may be "a thing to be done" to goods so that the property does not pass till delivery. The property may pass though the agreement provides that something is to be done to them after their delivery to the vendee. And the rules will yield in any case where it appears to have been the clear intention of the parties that the property shall pass.

In contracts for the construction of a chattel, payment to be made by instalments regulated by the progress of the work, the property in so much of the chattel as is completed passes on payment of each instalment; but the rule is not applied to a contract for supplying materials and affixing them as repairs and alterations, and the property

passes only when the materials are actually affixed, though the value may have been paid before.

CHAPTER IV.

SALE OF CHATTELS NOT SPECIFIC.

When the agreement for sale is of a thing not specifically identified, or appropriated to the contract, the agreement is executory, and the property does not pass. The giving of earnest does not prove that the property has passed, but only that there was a binding contract.

CHAPTER V.

OF SUBSEQUENT APPROPRIATION.

An executory contract may be changed into a complete bargain and sale by specifying the particular goods which are to be taken, or *appropriating* them to the contract. The purchaser may have the right to choose the goods from the bulk, or it may be the vendor's duty to appropriate the goods to the contract, as when an order is sent for a certain quantity of goods. The rule 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 made, has authority to make the choice, in order that he may do that act, and when once he has done that act, but not till then, the election is finally determined. If the vendor is to *send* the goods, the property passes the moment the act of sending is begun. Where the vendor delivers goods to a carrier by order of the purchaser, the delivery is an appropriation and the property passes upon delivery.

There must be assent of the purchaser to the appropriation, but it may be given by a previous implied assent to such appropriation as the vendor should make, as in the sending of goods just mentioned. In case of a sale of grain, the purchaser sending sacks into which it is to be

put, the vendor has authority to appropriate the grain, and the property passes as each sack is filled. But the vendor's election must be in conformity to the contract, and if the goods sent do not conform with the contract, both in quantity and quality, the purchaser may reject them. The purchaser having rejected them, the vendor may still, if within the contract time, make a valid tender of goods complying with the terms of the contract.

CHAPTER VI.

RESERVATION OF THE JUS DISPONENDI.

Though when goods are sent in pursuance of an order the property usually passes upon the sending, yet this may be prevented by either of two modes: and it is often done in order to guard against the buyer's possible failure to pay. The vendor may take the bill of lading, making the goods deliverable to his own order or to that of his agent at the point of destination, and send it to the agent to be transferred by the latter to the buyer only on payment for the goods; or the vendor may draw a bill of exchange on the buyer, sell it to a banker, and transfer with it the bill of lading, to be delivered to the buyer on payment of the bill of exchange. In either of these cases any idea of *intention* on the vendor's part to pass the property to the buyer before payment is excluded, however fully the goods are identified as having been sent in performance of the buyer's order.

Where goods are delivered to a carrier, and a bill of lading taken that is not a delivery to the buyer, but to the carrier as bailee for delivery to the person named in the bill of lading. If the bill of lading makes the goods deliverable to the vendor's order, it is assumed that he intended to prevent the property passing to the vendee; but it may be shown that he was agent for the vendee in taking the bill of lading, and did not intend to retain control of the property; and it is a question for the jury

what his real intention was. Delivery of goods by the vendor on board the purchaser's ship is usually delivery to the purchaser and passes the property; yet this may be prevented by special terms, or by taking the bill of lading in favour of the vendor.

If a bill of exchange for the price of the goods is enclosed to the buyer for acceptance, along with the bill of lading, he cannot retain the bill of lading, and acquires no right to the goods, unless he accepts the bill of exchange. But if the vendor send to the buyer a bill of lading deliverable to the buyer's order, he loses control of the goods, and the property passes. When the vendor deals with the bill of lading only to secure the price, the property passes on tender or payment of the price by the buyer.

BOOK III.

AVOIDANCE OF THE CONTRACT.

CHAPTER I.

MISTAKE AND FAILURE OF CONSIDERATION.

Mistake may be of both parties or of one, of law, or of fact, and if of one party alone the other may or may not know of the mistake.

When there has been a common mistake as to some essential fact such that there would have been no sale if the truth had been known the sale is voidable by either party so long as the other can on avoidance of the contract be restored to his original position. If such restoration is impossible and the party seeking relief has performed his part of the contract his only relief is in damages.

Where the mistake has been that of one party only, and is unknown to the other, then in the absence of fraud or warranty the mistaken party has no relief, for by his conduct he has *shown* an intention such as has induced the other to act upon it, and cannot deny that that was his

real intention. When the mistake of one party is known to the other there is usually fraud.

Mistake of law gives no right to relief when the mistake is one of general law, but private rights of ownership are matters of fact though depending on rules of law.

A *fraudulent* misrepresentation in any particular of that which induces a party to contract, will entitle him to rescind, an *innocent* misrepresentation will not justify rescission unless it is such as to show that there is a complete difference in substance between the thing bargained for and the thing obtained, so as to amount to a failure of consideration.

There is not a failure of consideration where the buyer has got what he really intended to buy though the thing should prove worthless.

Where failure of consideration is partial only and the contract is entire, the other party may rescind the contract and recover back the price, but if he *accepts* partial performance he cannot then rescind, but must depend on his other remedies.

CHAPTER II.

FRAUD.

Fraud renders all contracts voidable by the deceived party on the ground that he has given no real assent. To constitute fraud the party must be actually deceived, there must have been on the part of the party making the representation an intention to deceive, and there must be damage to the party deceived. The mistaken belief complained of may be created by active means, or passively by mere silence, but then only when there is a duty to speak. But the effect of active misrepresentation may be produced when the withholding of a fact makes that which has been stated actually false, or when the fact withheld is impliedly represented not to exist.

When an article is offered for sale and is open to inspection by the purchaser there is no duty cast upon the vendor

to point out defects. But concealment of defects or inducing the buyer to omit inquiry or examination, is fraud.

A person is responsible for the consequences of a false representation made by him to another upon which that other acts and is injured, or upon which a *third person* acts and is injured, if it appears that the representation was made with the intent that it should be acted upon by such third person in the manner that causes the injury. The injury must be the immediate and not the remote consequence of the representation.

Where a *sale* of goods has been made to a party who has induced it by fraud, the property passes, and though the vendor, on discovering the fraud, may affirm or avoid the sale as he chooses, the contract is valid till avoided, and his right to avoid it is subject to the rights of any innocent third party who may have acquired an interest in the goods for valuable consideration prior to the avoidance. But when the mere *possession* of the goods is obtained by fraud without any intention on the part of the owner to pass the property to the person guilty of the fraud, no property passes to him, nor can any third person claim through him.

Where a person at an auction prevents others from bidding on the goods sold, he commits a fraud on the vendor, and a purchase by him is fraudulent and void. And where a vendor is induced to sell goods to an insolvent by fraudulent representations of a third party, who then obtains the goods from the insolvent, the third party will be compelled to pay for the goods, as his possession, unaccounted for, implies a contract to pay for them, and he cannot account for the possession except through his own fraud.

Representations by a third person as to the credit, etc., of a purchaser inducing a sale to him, involve no liability for fraud unless made in writing (R. S. O. 1887, c. 123, s. 7); but a representation as to the credit of a firm, made by a partner in it, is within the statute; and if there are both verbal and written representations, there is a right of action if the latter were a material part of the inducement to give credit.

A purchaser is not bound to communicate to the vendor any information showing the property to be of greater value than the latter supposed it to be.

Where a buyer has been imposed on by the fraud of the vendor, he may, upon discovery of the fraud, repudiate the contract and refuse the goods; or if they have been delivered he may return them; and if he has paid the price he may recover it back. But the right to rescind is dependent on his ability to restore the vendor to his former position, and the goods must be returned unchanged in condition. If he once acquiesces in the sale after discovering the fraud, he cannot then rescind.

When the seller has made a false representation, such as might induce the buyer to contract, it will be presumed that the buyer was induced thereby to contract, and he is not obliged to show that, in fact, he relied upon the representation: but the seller may give evidence to show that the buyer acted upon his own judgment and not upon the representation. The fact that the buyer had the means of knowledge does not deprive him of his right to relief, if he, in fact, relied on the seller's representation.

The rules of Equity, which now prevail, gave to the buyer the right to rescind upon showing that he was induced to contract by a material representation, which was false in fact, but the right of rescission could be exercised only when the parties could be restored to their original position. But *to support an action for deceit* there must be a material representation, false, in fact, to the knowledge of the defendant, or made by him recklessly, made to the plaintiff, or with the intent that he should act upon it, and he must have acted upon it, as intended, and have suffered injury.

When a purchaser has been induced to buy through the fraud of the vendor's agent, the vendor being innocent, the purchaser may rescind the contract, if the thing bought can be returned in its original condition; or bring an action of deceit against the agent; or bring such action against the principal if the fraud of the agent has been committed within the scope of his authority and the prin-

cipal has benefited by it. But a shareholder in a joint stock company who has been induced to purchase shares by the fraud of an agent of the company, cannot maintain such action against the company while he remains a member of it.

A defrauded owner, who has executed a lease, cannot treat it as a nullity, but must have it set aside. A shareholder in a company cannot escape liability to creditors of the company by showing that he was induced to take shares by the fraud of the directors.

An auctioneer is the agent of the vendor only, until the acceptance of the purchaser's bid; and either party may retract before the hammer falls. On a sale advertised to be "without reserve," the highest *bona fide* bidder is entitled to the property offered; it cannot be withdrawn after a bid has been made. Under a sale "with all faults," concealment of defects is a fraud upon the purchaser, but if there is no concealment of defects, their existence gives no right to rescind. The duty of disclosing a defect may be imposed on a vendor by usage of a trade.

In transactions attacked under the statute 13 Eliz. c. 5 (enacted to avoid "alienations, etc., of property with intent to delay, hinder, or defraud creditors"), there is always the question *of fact* whether the transfer was *bona fide*, or was with the intent mentioned in the Act. The continued possession of the goods by the vendor is evidence of fraud; while publicity of the sale, even though the vendor retain the goods, is evidence of good faith. A sale *bona fide* made for a valuable consideration will not be held fraudulent though intended to defeat the execution of a creditor. For statutory provisions relating to transfers of property without change of possession, see R. S. O. 1887, c. 125, and amending Acts.

In contracts between an insolvent and his creditors, the law insists that all shall share alike, and forbids the giving of an undue advantage to any one without the knowledge of the rest. The statutory provisions respecting this are found in R. S. O. 1887, c. 124, and amending Acts. But an unpaid vendor may exercise his right of stoppage in

transitu to gain such advantage as that will give him, and a buyer who has not "accepted and received" goods bought under a parol contract may refuse to do so, in order to allow the vendor to reclaim them.

CHAPTER III.

ILLEGALITY.

A contract of sale is void when entered into for an illegal consideration, or for purposes contrary to good morals, or prohibited by law. The thing sold may not be capable of being the subject of a valid contract of sale, as an obscene book, or an indecent picture; or, while a proper subject of sale, may be sold for a prohibited purpose, or its sale may be prohibited for revenue purposes. In either case no action can be maintained on such a sale. But if money has been paid or goods delivered under an illegal agreement, which is in other respects *executory*, the party so paying or delivering may repudiate the agreement and recover back the money or goods.

At common law the rule is invariable that no action will lie upon an illegal contract. Where part of the consideration for a contract is illegal, the whole contract is void; but if the contract is divisible into parts, and the consideration for one party only is illegal, that illegality will not prevent the legal part of the contract being enforced. If a covenant in restraint of trade is illegal because unreasonable, it will be enforced so far as reasonable, and will be held void as to the excess.

A sale otherwise objectionable is void when the subject of the sale is, to the vendor's knowledge, to be used for an improper purpose. A sale to an alien enemy is void, except when specially licensed by the sovereign. Smuggling contracts are illegal; but in case of a sale abroad of goods purchased for the purpose of being smuggled into this country, the foreign vendor is not concerned in the observance of our revenue laws, and can sue on the contract,

unless he has actively assisted in the smuggling, as by packing the goods in a particular way for that purpose.

Contracts for the sale or transfer of public offices or appointments, or their salaries or fees; and contracts for the assignment of pensions, granted, partly or wholly in consideration of *continuing* duties or services, are void as opposed to public policy. But a contract assigning a pension granted wholly in consideration of *past* services is valid.

A contract of sale, restraining the vendor *generally* from carrying on his trade, is void. And a contract in restraint of trade, unlimited as to space, is illegal and void, except where the subject of the sale is a trade secret, in which case absolute restraint is allowed. But the contract may in any case be unlimited as to *time*, such limit of *space* being allowed as is reasonably necessary for the protection of the party with whom the contract is made. The contract even though under seal, must be supported by consideration, and legal consideration being sufficient.

Champerty and maintenance being unlawful at common law, cannot be the subject of a valid contract. Taking a transfer of an interest in litigation is not illegal, and a fair agreement to supply funds to carry on an action in consideration of a share of the proceeds is not necessarily void.

When a statute prohibits or imposes a penalty for making a contract, such contract is illegal and cannot be enforced. But in deciding whether a certain contract is really *prohibited* by a statute, there is a distinction between cases in which the Legislature had in view the security of the revenue only, (when it is inferred that there was no intention to *prohibit* contracts), and those in which the legislature was seeking to promote some object of public policy, (when it is inferred that the contracts are prohibited.) If the penalty is imposed once for all on failure to comply with the statute's requirements, the former meaning is presumed, and the contract is good, if the penalty is repeated on each repetition of the dealings to which the

statute refers, the latter meaning is taken, and the contract is void.

By Statute 29, Charles II. c. 7, "no tradesman, artificer, workman, labourer, or other person whatsoever," is allowed to pursue his ordinary calling on Sunday (works of charity and necessity excepted) and a penalty is imposed for each offence, and the penalty of forfeiture of goods exposed for sale on that day is imposed upon any person so offending.

BOOK IV.

PERFORMANCE OF THE CONTRACT.

PART I.

CONDITIONS.

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 relating to it, but it is not a part of the contract, so that its untruth is not a breach of the contract. If false, it is also *fraudulent*, if made with knowledge of its untruth, or in reckless ignorance whether it is true or false.

If the statement is part of a contract, it may be either a *condition precedent*, or an *independent agreement*. A breach of the latter will not justify repudiation of the contract, but only a claim for damages. In deciding which the statement is, the evident sense and meaning of the parties governs, and the order of time in which the different parts of the transaction are to be performed. Where an act is to be done on a certain day, which may happen or is to happen before the other party's promise is to be performed, the latter may bring action at once when the day has passed, without himself performing his part; but if the day is to happen after his performance, then his per-

formance is a condition precedent. Where a promise goes only to part of the consideration, and a breach of it may be paid for in damages, it is an independent promise and not a condition; but if the mutual promises go to the whole consideration on both sides, they are mutual conditions precedent. Where each party is to do an act at the same time as the other (as in a cash sale of goods, delivery of the goods and payment of the price) these are concurrent conditions, and neither party can maintain an action against the other for breach of contract without proving his own readiness to perform. And performance by one party will or will not be considered a condition precedent according as the other party appears from a consideration of the whole instrument, to have relied upon such performance or upon his remedy for a breach.

But though a party may refuse performance till the other has complied with a condition precedent, yet if he has accepted a *substantial* part of the other's performance the condition precedent becomes a warranty, and is no defence to an action, giving only a counter claim for damages. Apart from this exception the rule is general that a condition precedent must be strictly performed before the party bound to perform it can call upon the other party for performance.

The performance of a condition precedent may be waived by the party entitled to its performance, either expressly or by preventing its performance by the party bound to perform; or by rendering himself unable to perform his own promise, or by absolutely refusing performance so that the performance of the condition would be useless. In the latter case the refusal must be distinct and absolute, and must be accepted as such by the party to whom the promise is made; if the latter insist upon performance, the contract still exists.

Inability to perform a condition is no defence, if performance be in its nature possible; but if a thing be physically impossible, or rendered impossible by act of God, performance is excused. In case of a contract of sale, passing the property in the goods, which still remain in the

vendor's hands, and which are destroyed without his default, the purchaser must pay the price, and delivery of the goods by the vendor is excused, Performance by the vendor in such case is held to depend on the continued existence of the goods, and the impossibility arising from their destruction excuses performance. And performance of a promise is excused when after the promise is made, the act to be done is made illegal.

If performance is made dependent on the act of a third person, such act must be shown to have been done before performance can be claimed; and refusal by the third party to do the act will not dispense with compliance. But if the act of the third party be prevented by the promisor, or is due to collusion between them, the promisee's action is maintainable.

The condition on which a sale depends may be the happening of some event, and if that event is peculiarly within the knowledge of the promisee he must notify the promisor of its occurrence, if it is a matter equally within the knowledge of both, no notice is necessary.

On a sale of goods "to arrive" or "on arrival" the arrival of the goods is a condition precedent to the seller's liability to deliver. And a contract may be made conditional upon the arrival of a vessel only, so that it is binding though the goods contracted for are not on board. Or it may be made conditional on the arrival of the vessel, with the particular goods on board, making a double condition precedent. A stipulation in a contract of sale that the goods shall be shipped within or during a certain time makes it a condition precedent that the goods shall be placed on board during the specified time.

In deciding whether stipulations as to time are conditions precedent, the intention of the parties, as shown by the language and circumstances, governs. In contracts for sale of goods by successive deliveries, failure or refusal to accept or deliver one instalment does not entitle the other party to refuse to deliver or accept the balance, unless such failure or refusal shows an intention altogether to abandon or repudiate the contract.

In a sale by sample a condition is implied by law that the purchaser shall have a fair opportunity to compare the bulk with the sample, and on a refusal by the vendor to allow this, the purchaser may rescind the sale. In a sale "on trial" or "on approval," the sale is complete only when the approval is given, expressly, or by keeping the goods beyond a proper time for trial. If consumption of some is necessary for trial, and more are consumed than are necessary for a fair trial, the sale is absolute. In a "sale or return" agreement, the property passes if the goods are not returned to the seller within a reasonable time. But injury to the goods during that time, without fault of the buyer, does not render him liable. Where a time is fixed for return of goods not satisfactory, they must be returned within that time, and if not so returned the purchaser has no remedy.

If an article is sold by a particular description, it is a condition precedent to the vendor's right of action, that the thing delivered or tendered should answer the description, and this holds, although the article tendered corresponds with a sample shown. And a seller of bills, notes, shares, and other securities is bound to deliver that which is genuine and not forged or counterfeit.

On a sale of goods by a manufacturer of such goods, not otherwise a dealer in them, there is an implied condition that the goods shall be those of the manufacturer's own make, and the purchaser may reject any others.

PART II.

VENDOR'S DUTIES.

CHAPTER I.

WARRANTY.

A warranty is a collateral undertaking, forming part of the contract by the agreement of the parties, express or implied. Prior representations made by the vendor, but

not forming part of the contract when concluded, are not warranties. So, a warranty given after a sale has been made, is void, unless some new consideration is given for it.

No special form of words is necessary to create a warranty. Any affirmation at the time of sale is a warranty, if it appear to have been so intended. And in finding *intention*, the test is whether the vendor undertakes to assert a *fact* of which the buyer is ignorant, in which case there is a warranty, or merely states an opinion on a matter of which he has no special knowledge, and on which the buyer may exercise his judgment, in which case there is no warranty. The intention is a question of fact for the jury.

A general warranty does not extend to defects apparent on inspection, requiring no skill to discover them, nor to defects known to the buyer. If a written sale contains no warranty, parol evidence of a warranty cannot be given; or if it contain an express warranty, parol evidence cannot be given to extend it. In case of a warranty limited for a particular time it covers only such defects as are made known within that time.

An agent is authorized to do whatever is usual to carry out the object of his agency; and if it is usual in the market to give a warranty, the agent may give such warranty in order to effect a sale, and his principal will be bound.

In an executory agreement the vendor impliedly warrants his title to the goods he agrees to sell. And a sale implies an affirmation by the vendor that goods are his, and he thereby warrants the title, unless the circumstances show that he did not intend to assert ownership, but only to transfer such interest as he had in the goods. If the vendor knows he has no title, and conceals the fact, he is liable, on the ground of fraud.

In general, no warranty of quality is implied from the fact of sale alone, but the circumstances may raise such implied warranty. The rule, "*caveat emptor*," admits of *no* exception in the case of a sale of a specific chattel

already existing and which the buyer has inspected, and on such sale there is no *implied* warranty.

Where a chattel is to be supplied to the purchaser's order, there is an implied warranty of fitness for the purpose for which it is ordinarily used, or for the special purpose intended by the buyer, if such special purpose was communicated to the seller when the order is given. But if a *specifically described* article is ordered, though stated by the purchaser to be for a particular purpose, yet if the thing described be furnished, there is no warranty that it shall answer the purpose intended. In the former case the buyer trusts to the vendor's judgment; in the latter he does not.

On a sale of goods by sample, the vendor impliedly warrants the quality of the bulk to be equal to that of the sample; there is an implied *condition* that the buyer shall have a fair opportunity to compare the bulk with the sample, and an improper refusal by the seller to allow this justifies a recission of the contract. And if a manufacturer agrees to furnish goods according to sample, the sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection and not known to the parties. If the goods supplied prove inferior to sample, the buyer may refuse them and notify the seller. And a warranty may be implied from the usuage of trade.

When goods are sold by description, and the buyer has not inspected them, there is a condition precedent that the goods shall answer the description, and an implied warranty that they shall be merchantable or saleable. This extends only to the condition of the goods when they leave the vendor's possession, and does not cover deterioration in transit.

If an article is bought for a particular purpose made known to the seller at the time of the contract, and the buyer relies upon the skill or judgment of the vendor to supply what is wanted, there is an implied warranty that the article supplied shall be fit for the specified purpose; but there is no such implied warranty when the buyer

trusts to his own judgment. The warranty in the first case extends even to undiscoverable latent defects.

And in a contract to send provisions to a dealer at a distance, there is an implied warranty that they shall be fit for use until they reach their destination, and until the consignee shall have had a reasonable opportunity of disposing of them in the usual course of business.

There is no *implied* warranty where the parties have expressed the warranty by which they mean to be bound.

CHAPTER II.

DELIVERY.

Upon completion of the contract it is the vendor's duty unless otherwise agreed to deliver the goods to the purchaser as soon as the latter has complied with the conditions precedent if any. The purchaser's right to take possession may be conditional, on a sale where nothing is said about payment, delivery of the goods and payment of the price are concurrent conditions, and the buyer cannot insist on delivery without being ready to pay, nor the vendor insist on payment without being ready to deliver. In a sale on credit, the purchaser has a right to the possession at once. But if he becomes insolvent before actually obtaining possession the vendor may exercise his vendor's lien and retain the goods until payment.

If there is no special agreement as to the delivery, the vendor is bound only to place the goods at the buyer's disposal at the place where they are when sold. If delivery is to take place upon the doing of certain acts by the purchaser, the vendor's duty to deliver does not arise till notice from the purchaser of those acts being done. If the vendor is to send the goods they must be sent within a reasonable time. If delivery is to be within a certain time, it is reckoned exclusively of the day of the contract.

If payment or delivery is to be made within a certain time, no place being fixed, the party bound must find the

other and make the payment or deliver the goods a sufficient time before midnight to allow of counting the money or examining and receiving the goods. If in addition to time, a place is fixed, the act must be done at that place, and the promisee must be there at such convenient time on the last day that the act may be completed before sunset, but if the promisor can find the promisee at the place at any other time within the time limited, he may then tender performance.

The vendor does not perform his contract by tendering or delivering either more or less than the amount contracted for, or by sending the goods mixed with other goods. If he do so the buyer may refuse such delivery, and if part is sent the buyer may, on default in sending the rest, return what has been delivered. But if the buyer retain any part he must pay for that part. When the words "about" or "more or less" are used, a reasonable variation from the amount named is allowed the vendor, but the subject matter of the contract may be so identified that the amount named will be treated as matter of estimate only, and wholly unimportant.

Where the vendor is bound to send the goods, delivery to a common carrier is delivery to the purchaser, the carrier being bailee of the receiver, but if the vendor has undertaken delivery at a distant place, the carrier is his agent.

Delivery must be such as to give the buyer an opportunity to inspect the goods, and to satisfy himself they are in accordance with the contract.

There may be symbolical delivery, as by delivering the key of a warehouse, or by the transfer of a bill of lading, delivery order, or other instrument known among merchants as representing the goods.

PART III.

BUYER'S DUTIES.

CHAPTER I.

ACCEPTANCE.

In the absence of any special agreement, the buyer must send for the goods, and he should do so within a reasonable time. He is entitled, before accepting, to an opportunity to inspect the goods, and cannot be required to select the goods bought from a larger lot.

Though a buyer has actually *received* the goods, that is not necessarily *acceptance*, and he may still reject them, but he must reject them within a reasonable time and without doing anything to them which he would not have a right to do except as owner of the goods.

CHAPTER II.

PAYMENT AND TENDER

As soon as a sale is completed, no credit being given, and the goods are ready for delivery the buyer is bound to pay, without waiting for a demand. If the property in the goods has passed, the price must be paid, though the goods be destroyed in the vendor's possession. Or, if the buyer has undertaken risk of delivery he must pay the price of the goods that are destroyed before delivery, though the property had not passed.

If payment is to be made on demand, a reasonable time for compliance with the demand must be given. Sending a post office order is not good payment, and an action may be brought without returning it. If an account has been stated between the parties, and the price of the goods is, by mutual agreement, set off against an amount due by the vendor to the buyer, that is payment by the buyer of the price of the goods.

Tender of payment must be by production and offer to the vendor of an amount of money equal to the price of the goods, or an amount from which the price can be taken without making change. Production of the money is necessary unless plainly dispensed with by the vendor. Tender of a cheque may be good, unless the vendor expressly objects to payment in that form. In any case the debtor must continue ready to pay—for refusal of a tender is not a discharge of the debt.

There can be no valid tender of part of an entire debt, though tender of the amount of one of several distinct debts will be good if the particular debt is specified; if none is specified, and the amount is not sufficient to cover all, it is not good for any. Tender of part of a debt, with an offer to set off the balance on a contra account, is not good.

A tender must be free from any condition to which the creditor has a right to object; and a tender, the acceptance of which, would involve an admission by the creditor, that no more is due, is not good, though the debtor may exclude any admission on his part that more is due. A tender under protest is good, and so is a tender by one of joint debtors or to one of joint creditors.

When a negotiable security is given for the price, it is presumed to be conditional payment, the right to the price reviving on non-payment of the security. The security may be taken in absolute payment if the parties so agree; and this will be deemed to be the intention if the buyer offers cash, and the vendor takes a negotiable security in preference. Taking a cheque in preference to cash is not considered as electing to take the cheque as absolute payment, for a cheque is considered a form of cash payment, and on non-payment of the cheque the claim of the price will revive. When a security is taken in absolute payment, there can be no action for the *price of the goods*, but only on the security.

If the buyer give in payment a bill or note of some other person on which he has put his own name, the vendor must prove dishonour of the bill or note in an action for

the price, and is bound to use due diligence in preserving all rights of the buyer upon the instrument: if he do not do so, the buyer is discharged, both as to the price of the goods and the bill or note. If the bill or note given be one to which the buyer is not a party, that is presumably intended as absolute payment; but if it be forged, counterfeited, or invalid, or known to the buyer to be worthless, the seller may rescind the sale for failure of consideration.

Payment to a duly authorized agent is payment to the principal. A factor is entitled to receive payment, a broker is not; and an employee may be authorized to receive payment in a particular place, and not elsewhere. Generally, when an agent makes a sale, either he or his principal may maintain an action for the price; and where the agent has an interest in the sale as for a lien, payment to the principal is no defence to an action by the agent, unless the agent's lien has been satisfied.

A debtor owing several debts to one creditor may, on making a payment, appropriate it to any one of the debts. If the creditor accept the money he must apply it on the debt to which the debtor has appropriated it. When a payment of the exact amount of one of several debts is made, that is strong evidence that the payment was intended for that debt. If of two debts one is owed by the debtor personally, and the other as executor, a payment will be presumed to have been upon his personal debt. In an account current between the parties payment will be appropriated to receipts in the order of time, the earlier items on one side against the earlier on the other.

If the debtor makes no appropriation, the creditor has a right to do so, and may apply the payment to a debt barred by the Statute of Limitations, or to a debt the consideration of which is illegal. But if no appropriation be made by either party and there are two debts, one legal and the other void for illegality, the law will apply the payment to the legal debt. If a third party pay money to a creditor without the debtor's knowledge, the debtor has still a right to appropriate it, and the creditor cannot deprive him of the right. If a creditor has appropriated

payments by entries in account, and has furnished the debtor with a copy of the account, his right of election is gone.

BOOK V.

BREACH OF THE CONTRACT.

PART I.

RIGHTS AND REMEDIES OF THE VENDOR.

CHAPTER I.

PERSONAL ACTIONS AGAINST THE BUYER.

Where the property in the goods has not passed to the buyer, the vendor may resell or not, as he pleases; his only action against the buyer is for the damages he has sustained, not the full price of the goods. The damages are measured by the difference between the contract price and the market price at the time of the breach. The date of breach is that at which the goods were to have been delivered, though the buyer may have repudiated the contract earlier.

The buyer's insolvency does not terminate the contract, but if he has notified the seller of his insolvency, the seller, after allowing the insolvent's representative a reasonable time for electing to complete the contract *for cash*, may treat the contract as broken, and claim against the insolvent's estate for damages. If any part of the goods have been delivered prior to the insolvency, payment for that part may be demanded before further deliveries.

When the contract is to make and supply goods, and after part have been delivered the purchaser gives notice to the vendor to send no more, the latter may treat the contract as broken, and sue at once for the breach. If the contract is for payment at a certain time, whether the goods have or have not been delivered, payment must be

made as stipulated though the property in the goods has not passed.

When the property in the goods has passed to the buyer, and he has obtained possession of them, the vendor's sole remedy is an action for the price. If a sale *on credit* is partially executed, and the buyer gives notice that he will not carry it out and yet retain the goods already sent, the vendor may treat the contract as broken, and at once bring an action on the new contract arising from the buyer's conduct, for the value of the goods delivered.

CHAPTER II.

REMEDIES AGAINST THE GOODS—GENERAL PRINCIPLES.

Where the property has passed, the right of possession passes also, defeasible on insolvency of the buyer or his non-performance of conditions precedent or concurrent. If the goods have reached the buyer's actual possession, all right on them is gone; but they may still be in possession of the vendor or his agents, or they may be in transit to the buyer, and so in the possession of neither party.

If they are still in the vendor's possession he has a lien on them for the price, unless he has agreed otherwise, as on a sale on credit. There is then no lien; but if the goods are still in the vendor's possession when the period of credit expires, and the buyer has not paid, or if the buyer become insolvent during the period of credit, the vendor's right to retain possession to secure payment of the price, revives. The law is the same even if the vendor has assented to hold the goods as bailee for the buyer, since the vendor has still actual possession. A re-sale by the buyer to a third party does not affect the vendor's right, unless the vendor, by his conduct toward the third party, has estopped himself from disputing the latter's claim. And if the vendor has given to the buyer an instrument amounting, in the usage of trade, to a document of

title, and the latter transfers the document of title to the third party on the re-sale, the third party's purchase being *bona fide*, the vendor's right as against him will be gone. But the document of title may be countermanded by the vendor at any time before the bailee of the goods attorns to the buyer.

CHAPTER III.

REMEDIES AGAINST THE GOODS—RE-SALE.

The property in the goods having passed, but the goods being still in the vendor's possession, and the buyer being in default, a re-sale by the vendor rescinds the original sale if such right of re-sale was reserved in the original sale; not otherwise. If on such re-sale the goods bring more than the former price, the vendor gets the benefit; if less the vendor may make the difference a part of his claim in his action for damages for the buyer's breach of contract. If the vendor resells without an express condition allowing it, he may sue on the original contract (which he cannot *rescind*) either for the whole price, leaving the buyer to counter-claim for damages for the re-sale, or for the loss in price and expenses, and the same rule is observed where the vendor has tortiously retaken and resold the goods after their delivery to the purchaser.

In case of a re-sale, a buyer *in default* cannot bring an action of trover against the vendor, since he has no right of possession, and he cannot, even if not in default, treat the contract as *rescinded* by the vendor's tortious re-sale, but must pay the price, his remedy being an action for damages for the wrongful re-sale. But a buyer not in default, may maintain trover upon a wrongful re-sale.

It is a breach of contract for an unpaid vendor to resell, even on the buyer's default, and the buyer may recover from him the difference, if any, between the contract price and the market price on the re-sale, or if none, then nominal damages. The title of the purchaser on the re-sale depends on whether the first buyer was in default, if not, he may maintain trover against the second purchaser.

CHAPTER IV.

REMEDIES AGAINST THE GOODS-LIEN.

A lien is a right of retaining property till a debt due to the person retaining it is satisfied, and a vendor on a sale of goods where nothing is said as to payment, has a lien for their price. The lien does not extend to charges incurred in keeping the goods to preserve the lien. The lien is abandoned when the goods are actually delivered to the purchaser, and is impliedly waived in a sale on credit, or by the vendor taking a security payable at a distant future time.

Where the goods are at the time of the contract in possession of the buyer, as agent of the vendor, the completion of the contract operates as delivery of possession, sufficient to divest the lien, unless the parties expressly stipulate the contrary. If the goods are at the time of sale in possession of a third party, an actual delivery, divesting the lien, takes place as soon as vendor, buyer and bailee agree that the latter shall hold the goods for the buyer. If the goods are in the vendor's possession at *time of sale* delivery to a common carrier for conveyance to the buyer has the same effect as delivery to the buyer.

In general, a delivery of part of the goods sold is not a delivery of the whole, so as to destroy the lien, which remains on the balance for the price of the whole, unless it appears that there was no intention to separate the part delivered from the whole, in which case the lien is gone. The *presumption* is that delivery of part is intended as a delivery of that part only. To divest the lien, there must be an actual delivery of possession. Delivery may be to the buyer in another character, not affecting the right of lien, as bailee for the vendor.

The indorsement and delivery of a bill of lading transfers the property in the goods, is a complete delivery of them, and divests the vendor's lien.

A purchaser of goods from a factor under a document of title gets a good title if the factor was really *entrusted*

with the document of title, *as agent of the owner*, though such entrustment was brought about by the fraud of the factor; but if the factor has merely possession of the document, never having been entrusted with it, he can convey no title under it.

Though the vendor has delivered the goods on board a vessel, as directed by the buyer, his lien is not lost if he takes or demands a receipt for them in his own name; for the goods are still in his control. But if the vessel belonged to the purchaser, the lien would be lost.

A lien is given only to secure the price of the goods, and a tender of the price puts an end to the lien. And if the goods are on the premises of a third person, not the agent of vendor, and the latter allows the buyer to mark the goods, and take away part of them, that is a sufficient delivery of possession to divest the lien.

CHAPTER V.

REMEDIES AGAINST THE GOODS—STOPPAGE IN TRANSITU.

If the vendor, after delivering the goods to a carrier for delivery to the buyer, finds that the buyer is insolvent, he has a right to retake the goods before they reach the buyer's possession.

The right may be exercised by the vendor; by a factor who has bought goods on his own credit, on discovering that his principal is insolvent; by an agent who is transferee of the bill of lading; by the vendor of an interest in an executory agreement for sale; and by a surety for an insolvent buyer who has paid the vendor. An agent may exercise the right on behalf of his principal; but if the agent has not at the time authority to do so, his act must be ratified by the principal before the transit ends. The right exists though the vendor has received *conditional* payment, as by notes or bills; and though he has received part of the price. But if the contract is apportionable, and part of the goods are paid for, only the goods remain-

ing unpaid can be stopped. But a consignor who is indebted to his consignee in more than the value of the shipment cannot stop in transitu.

The vendor's right of stoppage in transitu takes precedence of a carrier's lien for a general balance, but not of his lien for the charges on the particular goods.

It is only against an insolvent buyer that the vendor may exercise the right; but if he do so when the buyer is solvent, but the latter becomes insolvent before the arrival of the goods at their destination, the vendor's action is valid.

The transit lasts from the time when the vendor has made such delivery that his right of lien is gone, till the goods reach the actual possession of the buyer. The goods may be stopped as long as they remain in the hands of the carrier, as carrier, though he had been appointed by the buyer. But delivery to a servant is delivery to the master. The effect of delivery on board the buyer's own vessel may be avoided by taking a bill of lading indicating that the delivery is to the master of the vessel as agent for carriage, and not as agent for the buyer. A chartered vessel is to be considered as the buyer's only when he has obtained such control of it, that the master is his servant. If he has not, delivery on board such ship is not delivery to the buyer.

Where the goods are in the custody of a third party, as agent for the buyer to whom they have been sent by the vendor on the purchaser's orders, if the agent's duty is merely to send on the goods to their destination, which had been fixed from the time of the sale, then the transit is not ended, and the right of stoppage remains; but if the agent is to await orders from the buyer before shipping the goods anywhere, there being no further destination fixed, then the transit is ended and the vendor cannot stop the goods.

Where the goods have reached their final destination, and are still in the carrier's hands, if the latter still holds them as carrier, the transit is not ended and the goods can be stopped; but if he holds them as agent or ware-

houseman for the buyer, the transit is ended and the right of stoppage is gone. The carrier cannot, without the buyer's assent, change his character so as to become the agent of the buyer to hold the goods; and the buyer cannot make the carrier his agent to keep the goods without the carrier's assent The change can be made only by agreement between them. If the carrier asserts a claim of lien for unpaid freight, that raises so strong a presumption that he still holds as carrier, that it can be overcome only by showing an agreement between the parties that the carrier should become the buyer's agent to keep the goods while retaining his lien.

The carrier and buyer may agree together for the delivery of the goods at any place short of their destination, and such delivery defeats the right of stoppage in transitu. The transit is ended and the right of stoppage gone, when the carrier has wrongfully refused to deliver the goods to the purchaser. The mere arrival of the goods at their destination does not defeat the vendor's right; the buyer must have taken actual or constructive possession of the goods. By refusing to take such possession, an insolvent buyer, who wishes to favour the vendor, can give the vendor the opportunity to stop the goods, and protect himself.

All that is required to stop the goods is an act of the vendor countermanding delivery; usually a notice is given, stating the vendor's claim, or requiring the goods to be held subject to his orders, and if the carrier deliver the goods after such notice, he is liable to the vendor. The notice must be given to the person in possession of the goods, or if given to his employer it must be under such circumstances as to give the latter an opportunity, by using reasonable diligence, to instruct his servant. The vendor has a right to demand delivery to himself. The carrier must accede to the claim as soon as he knows it is made by the vendor, unless he is aware of a legal defeasance of it.

If bills of lading, parts of a set, get into the hands of different holders, the carrier is protected in delivering to

the apparent assignee of the bill of lading first presented to him, no matter which part it is, if he has no notice of any dealing with the other parts.

The right of stoppage *in transitu* is defeated only by the transfer of the bill of lading by the vendee, being in possession of it with the vendor's assent, to a third person who gives value for it *bona fide;* and *bona fides* means, not that he has no notice that the goods have not been paid for, but without notice of any circumstances which render the bill of lading not fairly and honestly assignable.

But the indorsement of a bill of lading can give no better right to the goods than the indorser had; it is not *negotiable* in that sense. Yet, when the vendor has *actually* transferred the bill of lading to the buyer, though induced by the latter's fraud to do so, third person's *bona fide* obtaining it from the vendee have a good title.

If the vendor transfers the bill of lading for advances, and has it re-transferred on paying the advances, all his rights and remedies under the original contract return. And where the bill of lading is transferred by the buyer as security for a debt, the vendor's right of stoppage is interfered with only so far as necessary to protect the transferee, and exists as to the buyer's further interest.

A sale of the goods, even if payment is made, will not defeat the vendor's right, unless the bill of lading is indorsed.

The effect of stoppage *in transitu* is only to restore the goods to the vendor's possession, so that he may exercise his rights as an unpaid vendor; it does not rescind the sale.

PART II.

RIGHTS AND REMEDIES OF THE BUYER.

CHAPTER I.

BEFORE OBTAINING POSSESSION OF THE GOODS.

If the contract is executory, the property not having passed to the buyer, the buyer's remedy for the vendor's breach is an action for damages; and the damages recoverable are generally the difference between the contract price and the market value of the goods at the time of the breach. *General* damages are such as are the necessary and immediate result of the breach; but *special* damages are the natural and proximate consequences of the particular breach, though not in general following as its immediate effect.

The damages which a party ought to recover for another's breach of contract should be such as may fairly and reasonably be considered either as arising naturally, according to the usual course of things, from such breach of contract, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. And where a contract is made under special circumstances, communicated by the plaintiffs to the defendants, so that the latter must be taken to have assumed the responsibility of all the damage that would follow the breach, they will be liable for all such damages.

Where delivery of goods has been postponed to a specified date by agreement of the parties, or by forbearance of one party at request of the other, damages are measured according to the market price at the postponed date. If the postponement is indefinite, damages may be assessed according to the market price at the date when the plaintiff calls upon the defendant to accept or give delivery, or at a reasonable time after the last request for postponement made by the defendant.

When goods are bought for re-sale, if at the time of sale the sub-contract is known to the seller, on the seller's default the buyer may purchase the best obtainable substitute, charging the seller with the difference in price, or may abandon the sub-contract and claim his loss of profits on the sub-sale and any penalties for which he may be liable on the sub-contract, but if the amount of the penalties was not made known to the seller, the buyer cannot claim that amount as a matter of right though the jury may give it. If the sub-contract is not made known to the seller, knowledge of the buyer's general intention to re-sell, or notice of the sub-contract given subsequently, will not render him liable for the buyer's loss of profits or such sub-contract, but his damages will be the difference between the contract price and the market price. In each case the buyer must act like a reasonable man of business, and do all in his power to mitigate the loss.

Nominal damage may be recovered for a breach of contract though no actual damage be shown.

When goods are to be delivered by instalments, a refusal to accept or deliver any particular parcel does not give the other party a right to rescind the contract but only a right of action for the breach, and the measure of damages is the difference between the contract price and the market price at the time for delivery.

Where the property in the goods has passed to the buyer so that he has the right of possession, he may, if not in default, bring an action of trover, or an action for damages for breach of the contract, or in certain cases where damages would not be adequate compensation he may compel specific performance of the contract by delivery of the goods.

After the property has passed to the buyer, if he finds the goods are not of the description bargained for, he may reject them, the *condition* that the goods shall answer the description not having been performed. But if the property has passed to him *unconditionally*, there being only a breach of *warranty*, his remedy is an action for the breach.

CHAPTER II.

AFTER RECEIVING POSSESSION OF THE GOODS.

If a warranty of title is broken, the buyer may sue for the return of the price as on a failure of consideration, or he may sue in damages for breach of the contract. If there is a breach of a warranty of quality the buyer may except in case of a specific chattel the property in which has passed to him, reject the goods and notify the seller they are at his risk, or he may accept them and sue upon the breach of warranty, or if he has not paid the price he may set off his claim for damages in the vendor's action for the price.

If a warranted chattel is sold with a condition that if it does not answer the warranty it shall be returned within a certain time, the buyer's only remedy on failure of the warranty, is by return of the chattel he cannot sue on the warranty.

Where a chattel is sold with a warranty, and the buyer re-sells it with the same warranty, upon the warranty failing and the buyer becoming liable to his vendee in damages, he may recover from the original vendor such damages as well as the difference in value of the chattel. Where a warranty is fraudulent the damages consequent upon the buyer's action, relying on the fraudulent misrepresentation, may be recovered.