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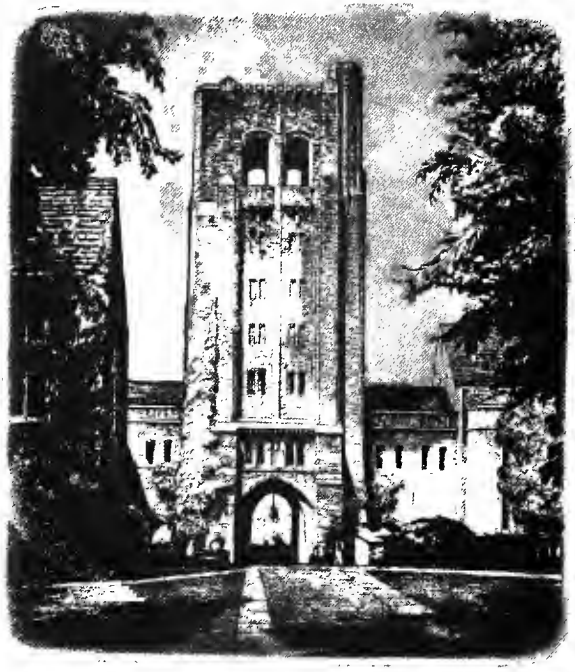

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THE

SALE OF GOODS ACT, 1893,

INCLUDING

THE FACTORS ACTS, 1889 & 1890.

BY

HIS HONOUR JUDGE CHALMERS
(DRAFTSMAN OF THE ACT).

SECOND EDITION, REVISED.

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INTRODUCTION.

It is difficult to know whether to call this little book a first edition or a second edition. It is a first edition of the Sale of Goods Act, 1893, but it is a reproduction of my book on the Sale of Goods, published in 1890, which was in substance a commentary on the Sale of Goods Bill. The clauses of the Bill, with a few verbal alterations, formed the large type propositions of the book. But though the language of the propositions remains the same, its effect is now very different. Those propositions were only law in so far as they were correct and logical inductions from the decided cases. Now the position is reversed. The propositions have become sections in the Act, and the decided cases are only law in so far as they are correct and logical deductions from the language of the Act. Each case, therefore, must be tested with reference to the Act itself. But it may be none the less useful to the reader to call his attention to the decisions which formed the basis of the various sections, and which were intended to be reproduced in the Act. In so far as the law is unaltered, they are still in point as illustrations.

The history of the Act is as follows: The Bill was originally drafted by me in 1888. I then settled it in consultation with Lord Herschell, who kindly consented

to take charge of it. In 1889, Lord Herschell introduced it in the House of Lords, not to press it on, but to get criticisms on it. In 1890 there was no opportunity of proceeding with it, but in 1891 the Bill was again introduced in the Lords, and referred to a Select Committee. It had in the mean time been criticised by Lord Bramwell, Mr. Walter Ker, and other friends, and the Bar Committee had submitted a valuable memorandum on it. In the Lords it was carefully considered by a Select Committee, consisting of Lords Herschell, Halsbury, Bramwell, and Watson. A question arose as to its extension to Scotland, so the Bill stood over till 1892. It was then again introduced in the Lords, and extended to Scotland, on the advice of Lord Watson, who had consulted various Scotch legal authorities. Professor Richard Brown and Mr. Spens of Glasgow took an infinity of pains to suggest the necessary amendments. In 1893 the Bill was again passed through the Lords in the form in which it was settled in 1892. It was then considered by a Select Committee of the House of Commons and further amended. The Committee consisted of Sir Charles Russell, A.G., Sir R. Webster, Q.C., Mr. Asher, Q.C. (the Scotch Solicitor-General), Mr. Shiress Will, Q.C., Mr. Bousfield, Q.C., Mr. Ambrose, Q.C., and Mr. Mather. Some of the amendments introduced by the Commons were modified on its return to the Lords, and it was finally settled in its present form.

The Bill, in its original form, was drafted on the same lines as the Bills of Exchange Bill. On Lord Herschell's advice, it endeavoured to reproduce as exactly as possible the existing law, leaving any amendments that might seem desirable to be introduced in Committee on the authority of the Legislature. So far as England is

concerned, the conscious changes effected in the law have been very slight. They are pointed out in the notes to the various sections. As regards Scotland, in some cases the Scottish rule has been saved or enacted for Scotland, in others it has been modified, while in others the English rule has been adopted. These points are noted under the sections as they arise. Scotch law differs from English law mainly by adhering to the Roman law in matters where English law has developed a rule of its own. The Mercantile Law Commission of 1855 reported on this question, and recommended that on certain points the Scotch rule should be adopted in England, while on other points the English rule should be adopted in Scotland. The recommendations of the Commission were partially embodied in the English and Scotch Mercantile Law Amendment Acts of 1856. The result was curious. Either by accident or design certain rules were enacted for England which resembled, but did not reproduce, the Scotch law, while other rules were enacted for Scotland which resembled, but did not reproduce, the English law. The present Act has carried the process of assimilation somewhat further. It is perhaps to be regretted that the process has not been completed; but future legislation may accomplish that. It is always easier to amend an Act than to alter common law. Legislation, too, is cheaper than litigation. Moreover, in mercantile matters, the certainty of the rule is often of more importance than the substance of the rule. If the parties know beforehand what their legal position is, they can provide for their particular wants by express stipulation. Sale is a consensual contract, and the Act does not seek to prevent the parties from making any bargain they please. Its object is to lay down clear

rules for the cases where the parties have either formed no intention, or failed to express it.

As regards this edition, I have not attempted to expound or criticise the mass of cases which illustrate or are modified by the Act. Such a work could hardly be undertaken with any prospect of success until the Act has been for some time in operation. I have only sought to indicate the sources of the various provisions in the Act, and to elucidate the general principles of the law of sale by citations from eminent judges. Our common law is rich in the exposition of principles, and these expositions lose none of their value now that the law is codified. A rule can never be appreciated apart from the reasons on which it is founded.

I have compared the main propositions of the English law with the corresponding provisions of the Code Napoleon, which is the model on which most of the Continental Codes have been framed. On the one hand, the scope and effect of a principle are often best brought out by contrast; on the other hand, where any rule of municipal law is found to be generally adopted in other countries, there is a strong presumption that the rule is founded on broad grounds of expediency, and that its application should not be narrowed. The Roman lawyers were justified in attaching a peculiar value to those rules of law which were *juris gentium*. I have also made frequent reference to Pothier's *Traité du Contrat de Vente*. Although published more than a century ago—for Pothier died in 1772—it is still, probably, the best reasoned treatise on the Law of Sale that has seen the light of day. "The authority of Pothier," says Best, C.J., "is as high as can be had next to the decision of a court

of justice in this country."[1] This statement must obviously be taken with the qualification that it only holds good when Pothier is discussing some principle of general application; for the law he was particularly dealing with was French law, as modified by the custom of Orleans, before the Code Napoleon.

The references to the Civil Law need little comment. It is the foundation of the Scottish law, and it is an inexhaustible store of legal principles. There is hardly a judgment of importance on the law of sale in which reference is not made to the Civil Law. "The Roman law," says Tindal, C.J., "forms no rule binding in itself on the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law—the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe."[2] My task of reference in this edition has been much facilitated by Dr. Moyle's excellent monograph on the *Contract of Sale in the Civil Law.*

To facilitate reference to contemporaneous reports, the date of each case cited has been given. To the list of cases cited I have added a table of cases overruled, doubted, or explained by subsequent decisions. This table has no pretension to completeness, but it may be useful as far as it goes.

M. D. CHALMERS.

Birmingham,
1894.

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[1] *Cox* v. *Troy* (1822), 5 B. & Ald. 481; *cf. M'Lean* v. *Clydesdale Bank* (1883), 9 App. Cas., at p. 105, per Lord Blackburn.

[2] *Acton* v. *Blundell* (1843), 12 M. & W., at p. 324.

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Morley v. *Attenborough* (1849), 3 Exch. 500, discussed, SIMS *v.* MARRIOT (1851), 17 Q. B. 281, at p. 290, and EICHOLZ *v.* BANNISTER (1864), 34 L. J. C. P. 105, at p. 107; *Benjamin on Sale*, 4th ed., p. 624.

Morton v. *Tibbetts* (1850), 15 Q. B. 428, discussed, PAGE *v.* MORGAN (1885), 15 Q. B. D. 228, at p. 232, and TAYLOR *v.* SMITH (1893), 2 Q. B. 65, C. A.

Moyce v. *Newington* (1878), 4 Q. B. D. 32, overruled, BENTLEY *v.* VILMONT (1887), 12 App. Cas. 471. But see now sect. 24.

Noble v. *Ward* (1867), L. R. 2 Ex. 135, distinguished, HICKMAN *v.* HAYNES (1875), L. R. 10 C. P. 598, at p. 604.

Ogle v. *Earl Vane* (1868), L. R. 3 Q. B. 272, distinguished, HICKMAN *v.* HAYNES (1875), L. R. 10 C. P. 598, at p. 606.

Ogg v. *Shuter* (1875), L. R. 10 C. P. 159; reversed by Court of Appeal (1875), 1 C. P. D. 47.

Page v. *Morgan* (1885), 15 Q. B. D. 228, C. A., discussed and distinguished, TAYLOR *v.* SMITH (1893), 2 Q. B. 65, C. A. See now sect. 4 (3), *post*, p. 13.

Parkinson v. *Lee* (1802), 2 East, 314, criticised, JONES *v.* BRIGHT (1829), 5 Bing. 533, distinguished, MODY *v.* GREGSON (1868), L. R. 4 Ex. 49, at p. 54, disapproved, RANDALL *v.* NEWSON (1877), 2 Q. B. D., at p. 106, C. A.

Paterson v. *Tash* (1743), 2 Sh. 1178, overridden by Factors Acts, COLE *v.* NORTH WESTERN BANK (1875), L. R. 10 C. P. 354, at p. 370, Ex. Ch.

Phillips v. *Huth* (1840), 6 M. & W. 572, overridden by Factors Acts, COLE *v.* NORTH WESTERN BANK (1875), L. R. 10 C. P. 354, at pp. 367, 370, Ex. Ch.

Pickard v. *Sears* (1837), 6 A. & E. 469, considered, JOHNSON *v.* CRÉDIT LYONNAIS (1877), 3 C. P. D. 32, at p. 40, C. A.

Rickard v. *Moore* (1878), 38 L. T. N.S. 841, discussed, PAGE *v.* MORGAN (1885), 15 Q. B. D. 228.

Rodger v. *Comptoir d'Escompte* (1869), L. R. 2 P. C. 393, dissented from, LEASK *v.* SCOTT (1877), 2 Q. B. D. 376, C. A.

Roper v. *Johnson* (1873), L. R. 8 C. P. 167, discussed, JOHNSTONE *v.* MILLING (1886), 16 Q. B. D. 460, at p. 471, C. A.

Ryder v. *Wombwell* (1868), L. R. 3 Ex. 90, and L. R. 4 Ex. 32, dissented from, JOHNSTONE *v.* MARKS (1887), 19 Q. B. D. 509.

Salter v. *Woollams* (1841), 2 M. & Gr. 650, explained, *Benjamin on Sale*, 4th ed., p. 683.

Shepherd v. *Harrison* (1871), L. R. 5 H. L. 116, distinguished, *Ex. p.* BANNER (1876), 2 Ch. D. 278, at p. 288, C. A., MIRABITA *v.* OTTOMAN BANK (1878), 3 Ex. D. 164, at p. 173, C. A.

Shepherd v. *Kain* (1821), 5 B. & Ald. 240, distinguished, TAYLOR *v.* BULLEN (1850), 5 Exch. 779, at p. 784.

Slubey v. *Hayward* (1795), 2 H. Bl. 504, distinguished, *Ex p.* COOPER (1879), 11 Ch. D. 68, C. A.

Smith v. *Surman* (1829), 9 B. & C. 561, explained, MARSHALL *v.* GREEN (1875), 1 C. P. D., at pp. 40–44.

Spalding v. *Ruding* (1843), 12 L. J. Ch. 503, discussed and approved, KEMP *v.* FALK (1882), 7 App. Cas. 573.

Spartali v. *Benecke* (1850), 10 C. B. 212, overruled on second point, FIELD *v.* LELEAN (1861), 30 L. J. Ex., at p. 169, Ex. Ch., distinguished, GODTZ *v.* ROSE (1855), 17 C. B. 229, at p. 234.

Taylor v. *Kymer* (1832), 3 B. & Ad. 320, overridden by Factors Acts, COLE *v.* NORTH WESTERN BANK (1875), L. R. 10 C. P. 354, at p. 370, Ex. Ch.

Tregelles v. *Sewell* (1861), 7 H. & N. 574, discussed, CALCUTTA Co. *v.* DE MATTOS (1863), 32 L. J. Q. B. 322, at pp. 330, 335.

Tripp v. *Armitage* (1839), 4 M. & W. 687, discussed, SEATH *v.* MOORE (1886), 11 App. Cas. 350, 381.

Tyers v. *Rosedale Co.* (1873), L. R. 8 Ex. 305; reversed by Exchequer Chamber (1875), L. R. 10 Ex. 195.

Valpy v. *Oakeley* (1851), 16 Q. B. 941, considered, *Ex p.* CHALMERS (1873), L. R. 8 Ch. App. 289, at p. 292.

Vickers v. *Hertz* (1871), L. R. 2 H. L. Sc. 113, explained, COLE v. NORTH WESTERN BANK (1875), L. R. 10 C. P. 354, at p. 374, Ex. Ch.

Wait v. *Baker* (1848), 2 Exch. 1, distinguished, MIRABITA *v.* OTTOMAN BANK (1878), 3 Ex. D. 164, at p. 170, C. A.

Warlow v. *Harrison* (1858), 28 L. J. Q. B. 18, distinguished, MAINPRICE *v.* WESTLEY (1865), 34 L. J. Q. B. 229.

Ex p. Watson (1877), 5 Ch. D. 35, distinguished, *Ex p.* MILES (1885), 15 Q. B. D. 39, C. A.; KENDAL *v.* MARSHALL (1883), 11 Q. B. D. 356, at p. 369, C. A.

Wentworth v. *Outhwaite* (1842), 10 M. & W. 436, considered, *Ex p.* CHALMERS (1873), L. R. 8 Ch. App. 289, at p. 292.

Re Westzinthus (1833), 5 B. & Ad. 817, discussed and approved, KEMP *v.* FALK (1882), 7 App. Cas. 573.

Whitehouse v. *Frost* (1810), 12 East, 614, questioned, AUSTEN *v.* CRAVEN (1812), 4 Taunt. 645, explained; BUSK *v.* DAVIS (1814), 2 M. & S. 397, at p. 404, and *Benjamin on Sale*, 4th ed., p. 313.

Wilkinson v. *King* (1809), 2 Camp. 335, discussed, COLE *v.* NORTH WESTERN BANK (1875), L. R. 10 C. P. 354, at p. 364, Ex. Ch.

Woods v. *Russell* (1822), 5 B. & Ald. 942, overruled on one point, SEATH *v.* MOORE (1886), 11 App. Cas. 350.

THE SALE OF GOODS ACT, 1893.

(56 & 57 Vict. c. 71.)

An Act for codifying the Law relating to the Sale of Goods. [20th February 1894.] A. D. 1893.

[*Note.*—Scotch technical terms, which were inserted in the Bill when it was applied to Scotland, are printed in square brackets.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

Formation of the Contract.

Contract of Sale.

Sale and agreement to sell.

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

Part owners.

(2.) A contract of sale may be absolute or conditional.[2]

[1] *Blackburn on Sale*, p. 3; *Benjamin on Sale*, 4th ed., pp. 1, 273; Indian Contract Act (Act IX. of 1872), § 77; Indian Transfer of Property Act (Act IV. of 1882), § 54.

[2] *Benjamin on Sale*, 4th ed., p. 282.

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

(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.[2]

This section appears to be purely declaratory. By sect. 62, *post*, p. 109, "contract of sale" includes an agreement to sell as well as a sale; and "sale" includes a bargain and sale as well as a sale and delivery; and "property" means the general property in goods and not merely a special property. The general property or ownership in a thing must be distinguished from a merely special property, such as that of a bailee. See *post*, p. 113; and see the right of property in a thing distinguished from the right to the possession of it, *post*, p. 113. See "goods" defined by sect. 62, *post*, p. 111; and as to the "price," see sects. 8 and 9, *post*, p. 18.

Nature of sale.

Sub-sect. 1. The essence of sale is the transfer of the property in a thing from one person to another for a price. Hence it has been said that if a man purchase his own goods there is no sale. *Suæ rei emptio non valet, sive sciens, sive ignorans emerit.*[3] But one co-owner may sell to another, and there are clearly certain quasi-exceptions to the rule; for instance, when a man's goods are sold under an execution or distress he may himself become the purchaser.

Pothier, writing before the Code Napoleon, objects to sale being defined as a transfer of the property in a thing, because, he says, a

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[1] *Blackburn on Sale*, pp. 3, 4; *Benjamin on Sale*, 4th ed., p. 273 *et seq.*; *cf. Heilbutt* v. *Hickson* (1872), L. R. 7 C. P., at p. 449.

[2] *Blackburn on Sale*, pp. 120, 167; *Bishop* v. *Shillito* (1819), 2 B. & Ald. 329, n. (special condition); *Rohde* v. *Thwaites* (1827), 6 B. & C. 388, at p. 393 (appropriation of goods to contract); *Bianchi* v. *Nash* (1836), 1 M. & W. 545 (special condition); *Ex p. Crawcour* (1878), 9 Ch. D. 419, at p. 424, C. A. (hire purchase agreement); *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436, at p. 442, C. A. (building contract). See further, sects. 16–20, *post*, p. 36.

[3] 2 *Black. Com.*, 450; Pothier, *Contrat de Vente*, No. 8; *cf. Scotson* v. *Pegg* (1861), 30 L. J. Ex., at p. 226.

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man may in good faith sell a thing which is not his own, and if this be so the buyer cannot complain until his possession is disturbed. The seller, he says, merely contracts with the buyer, "de lui faire avoir librement, à titre de propriétaire, une chose pour le prix d'une certaine somme d'argent." In this view he followed the Civil Law, *Hactenus tenetur ut rem emptori habere liceat, non ut ejus faciat.*[1] The objection seems hypercritical, for, as between the parties to the contract, sale is a transfer of the property in the goods sold. The purport of the contract is that the seller divests himself of all proprietary right in the thing sold in favour of the buyer.[2]

The framers of the Code Napoleon have adopted this opinion, and in France, as in England, an unconditional sale passes the property in the thing sold, so far as the parties to the contract are concerned.[3]

Cognate contracts.

Whether a given contract be a contract of sale or some other kind of contract is a question of substance and not of form. Thus it depends on the real meaning and nature of a contract whether it is to be construed as a contract of sale or a mere guarantee for the price;[4] as a contract of sale or a bailment on trust;[5] as a contract of "sale or return," or a contract of del credere agency;[6] as a contract of sale or a contract of loan on security or mortgage;[7] as a contract of sale or a contract for work and materials.[8]

The question whether a given contract be a contract of sale or some other allied form of contract, though often difficult to determine, is of practical, and not merely of theoretical importance.

Work and materials.

A contract for work and materials does not come within sect. 17 of the Statute of Frauds, now reproduced in sect. 4 of this Act; but if in writing it must be properly stamped, whereas contracts of sale are exempt from stamp duty. Opinions have differed much as to the test for distinguishing between these two contracts, but since the case of *Lee* v. *Griffin*, decided in 1861, the rule seems to be "that if the contract is intended to result in transferring for a price from A to B an

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[1] Pothier, *Contrat de Vente*, No. 1 and No. 48; Moyle's *Sale in the Civil Law*, pp. 3, 108.

[2] *Walker* v. *Mellor* (1848), 11 Q. B. 478.

[3] French Civil Code, art. 1583; Italian Commercial Code, art. 59.

[4] *Hutton* v. *Lippert* (1883), 8 App. Cas. 309, P. C.

[5] *South Australian Ins. Co.* v. *Randell* (1869), L. R. 3 P. C. 101.

[6] *Ex p. White*, Re *Nevill* (1870), L. R. 6 Ch. App. 397; *cf. Ex p. Bright* (1879), 10 Ch. D. 566, C. A.

[7] *Ex p. Harvey & Co.* (1890), 7 Morrell, 138; Re *Watson* (1890), 25 Q. B. D. 27, C. A.; *cf.* sect. 61 (4), *post*, p. 108.

[8] *Lee* v. *Griffin* (1861), 30 L. J. Q. B. 252.

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article in which B had no previous property," it is a contract of sale.[1]

Gift.

Where goods are transferred by one person to another without any price or other consideration being given in return, the transaction is called a gift.

Where a gift of goods is not effected by deed, it is incomplete and ineffectual until delivery to the donee of the thing intended to be given. The intention to transfer the property is of no avail. The distinction between sale and gift in this respect has lately been elaborately discussed by Lord Bowen.[2]

Exchange of goods or barter.

Where the consideration for the transfer of the property in goods from one person to another consists of other goods, the contract is not a contract of sale, but is a contract of exchange or barter.[3] But if the consideration for such transfer consists partly of goods and partly of money, it seems that the contract is a contract of sale.[4]

When a statute refers in terms to contracts of sale (as, for instance, the Statute of Frauds and the Stamp Act), it seems clear that it would have no application to contracts of exchange. Sect. 5 of Factors Act, 1889, *post*, p. 126, for its special purpose, draws a distinction between sales and exchanges. But, apart from statute, it seems that rules of law relating to sales apply in general to contracts of barter or exchange; but the question has been by no means fully worked out.[5]

The Bill originally contained a clause applying its provisions *mutatis*

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[1] *Benjamin on Sale*, 2nd ed., p. 84; *Lee* v. *Griffin* (1861), 30 L. J. Q. B. 252, at p. 254, per Blackburn, J.; *cf. Anglo-Egyptian Navigation Co.* v. *Rennie* (1875), L. R. 10 C. P. 271, and *Law Quarterly Review*, vol. i. p. 8. The difficulty is an old one, and was much debated by the Roman lawyers. See *Inst. III.*, 24-4, and Moyle's *Sale in the Civil Law*, pp. 6-8.

[2] *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, C. A.; *Law Quarterly Review*, vol. vi. p. 446; *Kilpin* v. *Ratley* (1892), 1 Q. B. 582.

[3] Bullen and Leake, *Prec. of Plead.*, 3rd ed., p. 151; *Benjamin on Sale*, 2nd ed., p. 2; *Harrison* v. *Luke* (1845), 14 M. & W. 139; French Civil Code, art. 1702.

[4] *Aldridge* v. *Johnson* (1857), 27 L. J. Q. B. 296; *Sheldon* v. *Cox* (1824), 3 B. & C. 420, where the goods had been delivered and the action was brought for the money balance. *Cf. Forsyth* v. *Jervis* (1816), 1 Stark. 437; *Bull* v. *Parker* (1842), 12 L. J. Q. B. 93; *Harman* v. *Reeve* (1856), 25 L. J. C. P. 257; *South Australian Ins. Co.* v. *Randell* (1869), L. R. 3 P. C. 101 (alternative consideration).

[5] *Cf. Fairmaner* v. *Budd* (1831), 7 Bing. 574; *Emanuel* v. *Dane* (1812), 3 Camp. 299 (warranty); *La Neuville* v. *Nourse* (1813), 3 Camp. 350 (caveat emptor); Pothier, *Contrat de Vente*, No. 620, citing the rule *permutatio vicina est emptioni*; French Civil Code, arts. 1702–1707.

mutandis to exchanges, but the clause was cut out by the Commons Select Committee. Sect. 1.

The distinction between sale and exchange seems a universal one. Its effects in France are discussed at length by Pothier.[1] In Roman law the matter was long a subject of controversy, but it was eventually settled by imperial rescripts.[2]

"It is important," says Mr. Moyle, speaking of Roman law, "to distinguish between sale (*emptio venditio*) and exchange (*permutatio*), for they belong to different classes of contract, and their respective *vincula juris* are imposed by different *causæ*. *Permutatio* is one of the innominate contracts; there is no *obligatio* till one of the two exchanging parties has done what he has promised; but in sale which is consensual, the *obligatio* is independent of part performance. It is not, however, necessary that the whole price shall be in money (Dig. 18, 1, 79); and if after the contract is concluded the vendor changes his mind and agrees to take goods in lieu of the purchase money, it remains sale, and does not become exchange.[3]

Relation of sale to contract generally.

Pothier points out that the contract of sale is consensual, bilateral (*synallagmatique*), and commutative.[4] In part it is governed by principles peculiar to itself, and in part by principles common to all contracts of the description above referred to. The Act, except incidentally, deals only with the first-mentioned principles. The principles of law which govern the contract of sale, in common with all other consensual contracts, are outside its scope. But they are expressly saved by sect. 61, *post*, p. 108. If the law of contract were codified, the present Act would form a single chapter in the code. The present work is limited in the same manner as the Act. The contract of sale must be founded on mutual consent, and it may be avoided for fraud or illegality. But as regards these matters, and such matters as substituted performance, rescission, or what constitutes a valid tender, the reader is referred to general works on the law of Contract.

Conditional contracts of sale.

Sub-sect. 2. As the contract of sale is consensual, it follows that it may be either absolute or conditional, as the parties may please. The

[1] Pothier, *Contrat de Vente*, No. 620, and see arts. 1702–1707 of the French Civil Code, which now regulate the matter.

[2] Moyle's *Sale in the Civil Law*, pp. 3–5; Moyle's *Justinian*, p. 420.

[3] Moyle's *Justinian*, p. 420. By art. 1703 of the French Civil Code, the contract of exchange is made consensual like sale. As to the origin of sale in exchange, and how the two contracts were differentiated, see Dig. 18, 1, 1.

[4] See also Moyle's *Sale in the Civil Law*, pp. 1–3.

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conditions inserted by the parties may be either conditions precedent or conditions subsequent. In the more apt phraseology of the French lawyers, a contract of sale may be either a sale pure and simple, transferring the property absolutely to the buyer, or it may be subject to a "suspensive" or "resolutive" condition.[1] The division of conditions into those which are suspensive and those which are resolutive is convenient, because those terms mark clearly the distinction between an agreement for sale which is to become an actual sale on the fulfilment of a particular condition, and an actual sale passing the property to the buyer, but subject to defeasance on the happening of some specified event. When goods are sold by weight or measure, the weighing and measuring are suspensive conditions, and if goods be sent on approval, the approval of the buyer constitutes a suspensive condition (see sect. 18, *post*, pp. 39, 40). But if goods be sold by auction with a condition that they may be re-sold if not paid for within twenty-four hours, the condition is resolutive.[2] Cave, J., has pointed out that a sale with a condition for re-sale to the original seller may be quite distinct from a mortgage.[3]

Sale and agreement to sell distinguished.

Sub-sect. 3. The term contract of sale includes both actual sales and agreements for sale. It is important to distinguish clearly between the two classes of contracts. An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple; whereas a sale, or, as it is called for distinction, an executed contract of sale, is a contract plus a conveyance.[4] By an agreement to sell a *jus in personam* is created, by a sale a *jus in rem* is transferred. Where goods have been sold, and the buyer makes default, the seller may sue for the contract price, but where an agreement to buy is broken, the seller's remedy is an action for unliquidated damages. If an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes; they may be taken in execution for his debts, and, if he becomes bankrupt, they pass to his trustee, who may disclaim the contract. But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller, but also

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[1] French Civil Code, arts. 1583, 1584; *cf.* Moyle's *Sale in the Civil Law*, p. 165.

[2] See *Lamond* v. *Davall* (1847), 9 Q. B. 2030; *Head* v. *Tattersall* (1871), 7 L. R. Ex. 7. For a peculiar resolutive condition containing a term for novation, see *Grissell* v. *Bristowe*, L. R. 4 C. P. 36.

[3] *Beckett* v. *Tower Assets Co.* (1891), 1 Q. B., at p. 25; *cf.* sect. 61 (2).

[4] *Cf.* Austin's *Jurisprudence*, p. 1001.

the usual proprietary remedies in respect of the goods themselves, such as the actions for conversion and detinue. In many cases, too, he can follow the goods into the hands of third parties. Again, if there be an agreement for sale, and the goods are destroyed, the loss, as a rule, falls on the seller, while, if there has been a sale, the loss, as a rule, falls upon the buyer, though the goods have never come into his possession.

Agreement to sell passing into sale.

Sub-sect. 4. By sect. 62, *post*, p. 114, the term "sale" includes a bargain and sale, as well as a sale and delivery.[1] According to the Civil Law which, with some statutory modifications, prevailed in Scotland before the Act, the property in the goods sold did not pass to the buyer until delivery.[2] But English law has rejected the objective test of delivery, and has adopted the rule that the property in the goods may be transferred by the contract itself if the parties so intend.[3] The parties may make whatever bargain they please, and the law will give effect to it. When the parties express their intention clearly no difficulty arises. The contract may pass the property at once, or at a future time, or contingently on the performance of some condition.[4] But in many cases the parties either form no intention on the point, or fail to express it. To meet such cases the Courts worked out a series of more or less artificial rules for determining when the property is to be deemed to pass, according to the imputed intention of the parties. These rules are now reproduced in sect. 18 of the Act, *post*, p. 38.

M. Viollet, in an interesting chapter in his "History of French Law," traces the steps by which French lawyers gradually discarded delivery as the means of passing the property, and arrived at a rule similar to our own.[5]

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[1] As to the old distinction between the action for goods bargained and sold and the action for goods sold and delivered, see Bullen and Leake, *Prec. of Plead.*, 3rd ed., pp. 8, 9.

[2] See *post*, p. 38, and Moyle's *Sale in the Civil Law*, p. 110.

[3] See *Blackburn on Sale*, pp. 187–197, who finds traces of the rule as far back as the time of Edward 4. The history of the question is treated exhaustively in the judgment in *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, C. A.

[4] See *Blackburn on Sale*, p. 167; *Johnson* v. *Macdonald* (1842), 9 M. & W. 600.

[5] Viollet, *Histoire du Droit Français*, pp. 515-523. See now French Civil Code, art. 1583.

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Quasi-Contracts of Sale.

The Act deals only with contracts of sale, properly so called. But there are certain quasi-contracts of sale which require to be noted. By a quasi-contract of sale is meant a transaction to which, independently of the will of the parties, the law annexes consequences similar to those which result from a sale.[1] For example:—

Satisfied judgment in trover, trespass, or detinue.

(1.) Where in an action for trespass to, or the conversion or wrongful detention of goods the plaintiff recovers the full value of the goods as damages, and the defendant satisfies the judgment, the transaction operates as a sale of the goods from the plaintiff to the defendant as from the time when the judgment is satisfied.[2]

"The theory of the judgment in an action of detinue," says Jessel, M.R., "is that it is a kind of involuntary sale of the plaintiff's goods to the defendant. The plaintiff wants to get his goods back, and the Court gives him the next best thing, that is the value of the goods. If he does not get that value then he does not lose his property in the goods."[3] It has been suggested that when the judgment is satisfied the defendant's title relates back to his wrongful act,[4] but the doctrine of relation is not in accordance with the general principles of English law. An unsatisfied judgment does not transfer the property.

Sale induced by fraud.

(2.) Again, it has been held that where a plaintiff has been induced, by the fraud of a third person, to sell goods to an insolvent buyer, and such third person has afterwards obtained the goods himself, the plaintiff may waive the tort, and treat the transaction as a sale to such third person.[5]

Sale by estoppel.

(3.) So, too, there may be a sale by estoppel. Suppose a defendant sells specific goods to one person, and the documents of title to the goods to another person, he would be liable to both, though a doubt might arise as to which person would be entitled to the goods. So

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[1] As to quasi-contracts, see *Anson on Contract*, 6th ed., p. 357.

[2] Jenkins' *4th Cent. Cas.*, No. 88, as to trespass, citing the maxim "*Solutio pretii emptionis loco habetur*"; *Cooper* v. *Shepherd* (1846), 3 C. B. 226, 15 L. J. C. P. 237; *Brinsmead* v. *Harrison* (1871), L. R. 6 C. P. 584, at p. 588, as to trover or conversion; *Ex p. Drake* (1877), 5 Ch. D. 866, C. A., as to detinue; *cf. Eberle* v. *Jonas* (1887), 18 Q. B. D., at p. 468.

[3] *Ex p. Drake* (1877), 5 Ch. D. 866, at p. 871, C. A.

[4] *Addison on Torts*, 4th ed., p. 969. No case in point.

[5] *Benjamin on Sale*, 4th ed., p. 58; *Hill* v. *Perrott* (1810), 3 Taunt. 274; Roscoe's *N. P.*, 15th ed., p. 493.

too a person by holding himself out as the buyer may be liable as such.[1]

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Capacity of Parties.

Capacity to buy and sell.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.[2]

Provided that where necessaries are sold and delivered to an infant [or minor] or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.[3]

"Necessaries" in this section mean goods suitable to the condition in life of such infant [or minor] or other person,[4] and to his actual requirements at the time of the sale and delivery.[5]

Capacity to contract must be distinguished from authority to contract. Capacity means power to bind oneself; authority means power to bind another. Capacity is part of the law of status; authority is part of the law of principal and agent. Capacity is usually a question of law; authority is usually a question of fact. As regards authority to buy or sell on behalf of another there appears to be nothing peculiar to the contract of sale, except the provisions of the Factors Acts, *post*, p. 118. On this subject, therefore, the reader is referred to general works on the law of Agency and Partnership.

The term "minor" is the Scotch equivalent of our term infant. The section is probably declaratory. As Cotton, L.J., has pointed out, when necessaries are supplied to a person who is incompetent to contract, the obligation to pay for them arises really *quasi ex contractu*.[6] He cannot bind himself to pay for them, but it is for his benefit that

[1] *Cornish* v. *Abington* (1859), 28 L. J. Ex. 262. As to property by estoppel see *Blackburn on Sale*, 2nd ed., p. 190; *Coventry* v. *Great Eastern Railway Co.* (1883), 11 Q. B. D. 776 (two delivery orders for same goods).

[2] See *Pollock on Contracts*, 4th ed., pp. 49-94; *Benjamin on Sale*, 4th ed., pp. 23-41.

[3] *Ryder* v. *Wombwell* (1868), L. R. 4 Ex. 32, at p. 38, Ex. Ch.

[4] *Ibid.*; *Peters* v. *Fleming* (1840), 6 M. & W. 42, at p. 46, per Parke, B., and p. 48, per Alderson, B.; *Pollock on Contracts*, 4th ed., p. 71.

[5] *Barnes* v. *Toye* (1884), 13 Q. B. D. 410; *Johnstone* v. *Marks* (1887), 19 Q. B. D. 509, C. A.

[6] Re *Rhodes* (1890), 44 Ch. D. 94, at pp. 105-107, C. A. (lunatic).

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he should have them, and the law therefore will see that they are fairly paid for. The obligation to pay arises *re* and not *consensu*.

Lunatic.

As a rule a contract made with an insane person, known to be insane, cannot be enforced against him; but his estate is held liable for necessaries supplied to him.[1]

Drunken man.

A contract made by a drunken man, known to be drunk, is, as a rule, voidable;[2] but, as Pollock, C.B., says, a drunkard is liable "when sober for necessaries supplied to him when drunk."[3]

Infant or minor.

By sect. 1 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), "all contracts . . . for goods supplied, other than contracts for necessaries, and all accounts stated with infants shall be absolutely void."[4] The language of that Act is consistent with the view that an infant might be liable on an executory contract to supply him with necessaries, but an infant has never been held liable for breach of contract to accept necessaries, or for necessaries bargained and sold, but not delivered. The Law Lords thought the present section merely declaratory. As the law makes the contract for the infant, and for his benefit, he is only liable to pay a reasonable price, and not any price he may have been led to agree to.[5]

Married woman.

Under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman has full capacity to acquire and dispose of property and to contract. As promisee under a contract she has the same rights as a man, but her liability as promisor is peculiar. She is not personally liable. Her contracts are only enforceable against her in so far as she has separate estate free from restraint on anticipation. Moreover, it must be shown that she had available separate estate at the time she made the contract.[6] But as to the latter point see now the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63).

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[1] *Leake on Contracts*, 3rd ed., p. 501; Re *Rhodes* (1890), 44 Ch. D. 94, C. A. (necessaries); *Imp. Loan Co.* v. *Stone* (1892), 1 Q. B. 599, C. A. (contract).

[2] *Leake on Contracts*, 3rd ed., p. 505.

[3] *Gore* v. *Gibson* (1845), 13 M. & W., at p. 625.

[4] The term "absolutely void" is inapt, because a person of full age is bound by his contract with an infant. The effect of the Act is to make an agreement by an infant irrevocably voidable at the option of the infant, even after he attains majority.

[5] As to infants' contracts in general, see *Leake on Contracts*, 3rd ed., p. 466.

[6] *Palliser* v. *Gurney* (1887), 19 Q. B. D. 519; *Leak* v. *Duffield* (1890), 24 Q. B. D. 98; *Leake on Contracts*, 3rd ed., p. 480. As to debts contracted before marriage, see *Jay* v. *Robinson* (1890), 25 Q. B. D. 467. As to liability after husband's death for debts contracted during marriage, see *Pelton* v. *Harrison* (1891), 2 Q. B. 422.

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Power of wife to bind husband.

In certain cases a husband may be liable for necessaries supplied on the order of his wife. When husband and wife are living together the power of the wife to bind her husband is somewhat indefinite. "A married woman," says Mr. Leake, "is *presumptively* invested with a certain authority to contract as agent for her husband. It is a delegated, not an inherent authority; the wife can bind her husband only as agent, and a party seeking to charge him with a contract of the wife, *must prove* the authority. The authority may be referred to two sources: cohabitation, during which the wife is presumptively authorised to manage the domestic affairs of the husband; and necessity, caused by the husband refusing or failing to maintain his wife."[1] The italicised propositions seem somewhat inconsistent, and there is authority in support of both. When a wife is separated from her husband, through his misconduct, and he does not make proper provision for her maintenance, she has, by implication of law, authority to bind him for necessaries.[2]

Master of ship.

The master of a ship has an implied authority to bind the owner for the price of necessaries supplied for the ship.[3]

The section, it is to be noticed, deals only with the question of capacity to buy and sell. The saving of the law of principal and agent by sect. 61 (2) covers the cases where one person has an implied authority to act on behalf of another.

Formalities of the Contract.

Contract of sale, how made.

3. Subject to the provisions of this Act and of any statute in that behalf,[4] a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth,[5] or may be implied from the conduct of the parties.[6]

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[1] *Leake on Contracts*, 3rd ed., p. 493.

[2] *Leake on Contracts*, 3rd ed., p. 494; *Wilson* v. *Glossop* (1888), 20 Q. B. D. 354, C. A.

[3] *Mackintosh* v. *Mitchison* (1849), 4 Exch. 175; and *Leake on Contracts*, 3rd ed., p. 448.

[4] See next section reproducing the Statute of Frauds, and see the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 55–65, transfer of British ships and shares therein by bill of sale only; and *Atkinson* v. *Maling* (1788), 2 T. R. 462. As to sale of sculpture with copyright, see 54 Geo. 3, c. 56.

[5] *Blackburn on Sale*, pp. 43–45; *Benjamin on Sale*, 4th ed., p. 180; *Lockett* v. *Nicklin* (1848), 2 Exch. 98, 19 L. J. Ex. 403.

[6] *Brogden* v. *Metropolitan Ry. Co.* (1877), 2 App. Cas. 666, H. L.; *cf.*

Sect. 3.

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

A written offer to sell goods may be verbally accepted, and *vice versâ*.[1] If, however, the parties have put a contract of sale into writing, the ordinary rules of evidence apply. Parol or oral evidence is inadmissible to contradict the terms of the written instrument; but such evidence is admissible to explain it, and, in explaining it, to annex incidents thereto.[2]

Oral evidence is of course admissible to avoid a contract, whether in writing or not, as for instance to show that it was induced by fraud, or founded on such mistake as to prevent what appears to be a contract ever having been a contract at all.[3]

In some cases by common law, and in others by statute, a corporation can only contract by instrument under seal.[4] The proviso saves this rule.

Contract of sale for 10*l.* and upwards [29 Car. 2, c. 3. s. 17. and 9 Geo. 4, c. 14. s. 7.]

4.—(1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such

Beverley v. *Lincoln Gas Co.* (1837), 6 A. & E. 829; *Cornish* v. *Abington* (1859), 28 L. J. Ex. 262.

[1] As to the construction of such contracts, see *Watkins* v. *Rymill* (1878), 10 Q. B. D. 178, 188 (sale at horse repository).

[2] *Taylor on Evidence*, §§ 1058, 1067; Stephen's *Law of Evidence*, art. 90. As to incidents annexed by usage, see *Syers* v. *Jones* (1848), 2 Exch. 111, usage to sell by sample; *Brown* v. *Byrne* (1854), 3 E. & B. 703, usage to deduct discount; *Field* v. *Lelean* (1861), 30 L. J. Ex. 168, Ex. Ch., usage not to deliver till time of payment arrives. See further notes to *Wigglesworth* v. *Dallison*, 1 Smith, L. C., 9th ed., p. 569.

[3] As to fraud, see *Chanter* v. *Hopkins* (1838), 4 M. & W., at p. 406; *Kennedy* v. *Panama Co.* (1867), L. R. 2 Q. B. 580. As to mistake, see *Boulton* v. *Jones* (1858), 27 L. J. Ex. 117; *Raffles* v. *Wichelhaus* (1864), 33 L. J. Ex. 160; *Smith* v. *Hughes* (1871), L. R. 6 Q. B. 597.

[4] *Leake on Contracts*, 3rd ed., p. 506.

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[9 Geo. 4, c. 14. s. 7.]

contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.[1]

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

This section reproduces the provisions of the Statute of Frauds. That Act never applied to Scotland, and Scotchmen never appear to have felt the want of it. Its policy has frequently been severely criticised in England.[2]

Statute of Frauds.

Sub-sect. (1.) This sub-section reproduces the 17th sect. of the Statute of Frauds[3] in somewhat altered language. The alterations in its language were made (*a*) to make it harmonise with the language of the rest of the Act; (*b*) to give effect to its construction with the amending Lord Tenterden's Act; (*c*) to give effect to certain decisions which have placed an unexpected interpretation upon some of its terms. The repealed 17th section is set out in the Appendix, *post*, p. 143, with a note of the more important decisions upon it.

As regards alterations in language, "value" is substituted for "price" to give effect to cases which held such was the operation of the construction of Lord Tenterden's Act with the 17th sect.[4] The words "enforceable by action" are substituted for "allowed to be good" to give effect to cases which held that the words in question were the equivalent of "no action shall be brought" in the 4th section, and that they did not make the contract void, but merely

[1] *Page* v. *Morgan* (1885), 15 Q. B. D. 228, C. A.; *Benjamin on Sale*, 4th ed., p. 149.

[2] See *Law Quarterly Review*, vol. i. p. 1, by Mr. Justice Stephen and Sir F. Pollock.

[3] Printed as sect. 16 in the Statutes Revised.

[4] *Harman* v. *Reeve* (1856), 25 L. J. Q. B. 257.

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unenforceable.[1] The word "contract" in line 7 is substituted for the word "bargain" because it is clear since Lord Tenterden's Act that the term "bargain" was equivalent to the term "contract" used in the earlier part of the section. The words "party to be charged" are substituted for "parties to be charged" because it had been held that they must be so construed to make the enactment uniform with the 4th sect.[2] The substitution of "his agent" for "their agents" is consequential.[3]

Sub-sect. (2.) This sub-section reproduces the repealed sect. 7 of Lord Tenterden's Act (9 Geo. 4, c. 14); the object of which was to make it clear that the Statute of Frauds applied to executory as well as executed contracts of sale.

Sub-sect. (3) is necessary to preserve the effect of the decisions reproduced by it, because for other purposes a definition of "acceptance" is given by sect. 35 of the Act, *post*, p. 67. The sub-section adopts the language of Lord Bowen in *Page* v. *Morgan*,[4] and perhaps disposes of the doubt expressed by Lord Herschell in *Taylor* v. *Smith*,[5] where he observes that "acceptance is not used in the statute in its common acceptation, and in what precise sense it is used has never been determined." The curious refinements resorted to by successive generations of judges to exempt particular cases from the operation of the statute constitute a strong argument against its policy.

Subject-matter of Contract.

Existing or future goods.

5.—(1.) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."[6]

(2.) There may be a contract for the sale of goods, the

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[1] *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, at p. 488, and see *post*, p. 144. The amendment was made in the Commons Committee. See "action" defined by sect. 62.

[2] *Reuss* v. *Pixley* (1866), L. R. 1 Ex. 342, Ex. Ch.

[3] *Cf. Graham* v. *Musson* (1839), 5 Bing. N. C. 603.

[4] *Page* v. *Morgan* (1885), 15 Q. B. D. 228, at p. 233, C. A.

[5] *Taylor* v. *Smith* (1892), 2 Q. B. 62, at p. 71, C. A.

[6] *Watts* v. *Friend* (1830), 10 B. & C. 446 (crop not yet sown); *Hibblewhite* v. *M'Morine* (1839), 5 M. & W. 452 (goods which seller can only acquire by purchase); Pothier, *Contrat de Vente*, No. 5.

acquisition of which by the seller depends upon a contingency which may or may not happen.[1] Sect. 5.

(3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.[2]

See the terms "contract of sale," "future goods," "goods," and "specific goods" defined by sect. 62, *post*, p. 109.

Sub-sect. (1.) The Roman lawyers doubted whether an agreement to sell "future goods" constituted a contract of sale, but it is long since any such question has been raised in English law.[3] The term "future goods" is not a very happy one, but the alternative "after-to-be-acquired goods" was impossible.

Sub-sect. (2.) "Une simple espérance," says Pothier, "peut même être l'objet d'un contrat de vente; c'est pourquoi, si on vend à quelqu'un son coup de filet pour un certain prix, c'est un vrai contrat de vente."[4] There is very little English authority on the point. "No doubt," says Martin, B., "a man may buy the chance of obtaining goods," but he then goes on to say that in the case he was dealing with the plaintiff bought the goods themselves.[5] Perhaps the doubtful case of *Bagueley* v. *Hawley* may be explained on the ground that the plaintiff there bought another man's bargain at an auction for what it was worth, and not the goods themselves.[6] Emptio spei.

The purchase of a chance was known in the Civil Law as *emptio spei*. "If the intention of the parties is that the purchase-money shall be paid in any case, whether the hoped-for equivalent comes to anything or not, it is commonly called for the sake of distinction *emptio spei simplicis*. If it is, that it shall not be paid unless something at any rate is forthcoming, or shall only be paid in proportion to what the purchaser actually gets, it is termed *emptio rei speratæ*."[7]

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[1] *Benjamin on Sale*, 4th ed., p. 87; Pothier, *Contrat de Vente*, Nos. 6–9; *cf. Watts* v. *Friend* (1830), 10 B. & C. 446 (crop not yet sown); *Hale* v. *Rawson* (1858), 27 L. J. C. P. 189 (goods to arrive by ship).

[2] *Benjamin on Sale*, 4th ed., p. 82; *Lunn* v. *Thornton* (1845), 1 C. B. 379, 14 L. J. C. P. 161 (trover for furniture).

[3] Moyle's *Sale in the Civil Law*, p. 29; *Hibblewhite* v. *M'Morine* (1839), 5 M. & W. at 466. Sect. 7 of Lord Tenterden's Act, at any rate, concluded the question in England.

[4] Pothier, *Contrat de Vente*, No. 6.

[5] *Buddle* v. *Green* (1857), 27 L. J. Ex., at p. 34.

[6] *Bagueley* v. *Hawley* (1867), L. R. 2 C. P. 625; see, too, *Chapman* v. *Speller* (1850), 14 Q. B. 621 (sale by sheriff and sub-sale).

[7] Moyle's *Sale in the Civil Law*, p. 30.

Sect. 5.

Assignment of after-acquired property.

Sub-sect. (3.) The conditions under which an ordinary agreement to sell becomes a sale are dealt with in sect. 1, and sects. 16–20, *post*, p. 36. But sometimes a contract purports presently to assign goods to be acquired in the future.[1] In such case the legal property in the goods does not pass to the buyer unless and until the seller does some act irrevocably appropriating them to the contract,[2] or the buyer takes possession of them under a licence to seize, which is equivalent to a delivery by the seller.[3] But if the goods be sufficiently described to be identified on acquisition by the seller, the equitable interest in them passes to the buyer as soon as they are acquired:[4] "A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."[5] It is only the equitable interest which passes to the buyer by the contract, hence his rights are liable to be defeated, if, before he gets the legal property in the goods, the seller disposes of them to a second purchaser without notice, who thus first obtains the legal estate.[6]

There was one case in which it was supposed at common law that future goods could be assigned. It was said that a man might sell future goods which had a "potential existence," and that then the legal property in them would pass to the buyer as soon as they came into actual existence. Goods were supposed to have a potential existence if they would naturally grow out of anything already owned by the seller. For instance, it was said a man might sell the wool to be grown on sheep which he then had, but not the wool on sheep which he was going to buy.[7] But there is no rational distinction between one class of future goods and another, and the supposed rule appears never to have been acted upon. Indeed, *Langton* v. *Higgins*, closely

[1] See such a contract distinguished from an agreement to sell *plus* a license to seize, *Reeves* v. *Whitmore* (1864), 33 L. J. Ch. 63.

[2] *Langton* v. *Higgins* (1859), 28 L. J. Ex. 252.

[3] *Congreve* v. *Evetts* (1854), 10 Exch. 298; 23 L. J. Ex. 273; *Hope* v. *Hayley* (1856), 25 L. J. Q. B. 155.

[4] *Holroyd* v. *Marshall* (1862), 10 H. of L. Cas. 191; 33 L. J. Ch. 193; *cf. Tailby* v. *Official Receiver* (1888), 13 App. Cas., at p. 546.

[5] *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342; see at pp. 351, 354, C. A.

[6] *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280, C. A.; *Hallas* v. *Robinson* (1885), 15 Q. B. D. 288, C. A.

[7] *Grantham* v. *Hawley* (1603), Hobart Rep. 132, 2 Roll. 48, pl. 20; *Benjamin on Sale*, 4th ed., p. 82. This was the *emptio rei speratæ* of the Roman lawyers.

looked at, seems to negative it.[1] The sub-section may therefore be regarded as declaratory. Sect. 5.

Goods which have perished.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.[2]

By sect. 62, *post*, p. 114, unless the context or subject-matter otherwise requires, "specific goods" mean goods identified and agreed upon at the time a contract of sale is made.

The rule may be based either on the ground of mutual mistake, or on the ground of impossibility of performance. It is confined to the case of specific goods. Generic goods, that is to say, goods defined by description only, come within the maxim *genus numquam perit.*

Art. 1601 of the French Civil Code provides that, in case of partial loss, the buyer may either rescind the contract or have the price reduced by valuation. English law recognises no such rule. The only question is whether the article has been so far destroyed as no longer to answer to the description of it given by the contract.[3]

Thus where a specific cargo of corn was sold at sea, and it turned out afterwards that before the sale the ship had stranded and the corn had been so damaged as not to answer to its description under the contract, the sale was held to be void.[4] But if a man contracts to sell five dozen of a particular brand of champagne, it would be immaterial if unknown to him his whole stock of wine had been destroyed by fire. He must procure five dozen of that champagne elsewhere or pay damages. A mixed case might arise which is not covered by the section. Suppose a man contracts to sell to B "five dozen of the '74 champagne now in my cellar," not knowing that all but three dozen had been destroyed by fire. The question has not been decided, but probably the contract would be void.

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[1] *Langton* v. *Higgins* (1859), 28 L. J. Ex. 252 (contract to buy next crop of oil of peppermint, bottles sent by buyer and filled by seller).

[2] *Couturier* v. *Hastie* (1856), 5 H. of L. Cas. 673; 25 L. J. Ex. 253; *cf. Clifford* v. *Watts* (1870), L. R. 5 C. P. 577; *Smith* v. *Myers* (1870), L. R. 5 Q. B. 429, in Ex. Ch. L. R. 7 Q. B. 139; *Benjamin on Sale*, 4th ed., p. 81; Pothier, *Contrat de Vente*, No. 4; Pollock's *Law of Contract*, 4th ed., p. 370; French Civil Code, art. 1601; Moyle's *Sale in the Civil Law*, p. 21; *Story on Sale*, § 149.

[3] *Barr* v. *Gibson* (1838), 3 M. & W. 390 (stranded ship).

[4] *Couturier* v. *Hastie*, supra.

Sect. 7.

Goods perishing before sale but after agreement to sell.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.[1]

See "specific goods" defined by sect. 62, *post*, p. 114. The definition is only a *primâ facie* definition. See "fault" defined, *post*, p. 111.

It is to be noted that the rule applies to specifically described goods, whether in existence at the time the contract is made or not. In a case where there was a contract to supply 200 tons of potatoes to be grown on a particular farm, and the crops failed, Mellish, L.J., said:—"This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy 200 tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be, and may be called specific things; therefore neither party is liable if the performance becomes impossible."[2]

By special agreement goods may be at the buyer's risk before he acquires the property in them. See sect. 20, *post*, p. 46.

The Price.

Ascertainment of price.

8.—(1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price.[3] What is a reasonable price is a question of fact dependent on the circumstances of each particular case.[4]

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[1] *Howell* v. *Coupland* (1874), L. R. 9 Q. B. 462, at p. 465, per Blackburn, J., and in C. A. (1876), 1 Q. B. D. 258, at p. 262, per Mellish, L. J.; *Pollock on Contracts*, 4th ed., p. 370; *cf. Appleby* v. *Myers* (1867), L. R. 2 C. P. 651; *Elphick* v. *Barnes* (1880), 5 C. P. D. 821.

[2] *Howell* v. *Coupland*, supra.

[3] *Acebal* v. *Levy* (1834), 10 Bing. 376; *Hoadly* v. *M'Laine* (1834), 10 Bing. 482; *Valpy* v. *Gibson* (1847), 4 C. B. 837, 864.

[4] *Acebal* v. *Levy* (1834), 10 Bing. 376, at p. 383, per Tindal, C. J. Such price may or may not be the market price according to circumstances.

Sect. 8.

An alternative price, if in the nature of a wager, avoids the contract.[1]

Reasonable price.

"Goods may be sold," says Wilde, C.J., "and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances."[2] The clause originally provided that the price might "be left to be fixed by subsequent arrangement," but these words were struck out in Committee. Presumably if the price was subsequently fixed by the parties, the Court would hold that it was a reasonable price. Marine policies are now often effected "at a premium to be arranged." The same question arises there.

A case that seems hardly covered by the above rules is put by Blackburn, J., who says, "When the price is not ascertained, and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser by ascertaining the amount as nearly as you can."[3] Perhaps, however, the case falls within the rule of reasonable price.

The doctrine of implied or reasonable price seems to be an original development of English law. The rule of Roman law was that the price, or the mode of fixing it, must be expressed in the contract itself. *Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest; sed et certum pretium esse debet.*[4]

Deposit.

Sometimes part of the price is prepaid by way of security, when the contract is entered into. The money so prepaid is called a deposit. The return of the deposit in case the sale goes off is usually a matter of agreement, but in the absence of a different agreement the deposit is forfeited if the sale goes off through the buyer's fault.[5]

As to action for price, see *post*, p. 91.

[1] *Rourke* v. *Short* (1856), 25 L. J. Q. B. 196; cf. *Brogden* v. *Marriott* (1836), 3 Bing. N. C. 88.

[2] *Valpy* v. *Gibson* (1847), 4 C. B., at p. 864; *Joyce* v. *Swan* (1864), 17 C. B. N.S., at p. 93.

[3] *Martineau* v. *Kitching* (1872), L. R. 7 Q. B., at pp. 455, 456 (sugar shipped at buyer's risk at so much per cwt. and destroyed before it could be weighed).

[4] *Inst.*, lib. iii., tit. 23; Moyle's *Sale in the Civil Law*, pp. 68, 69. To like effect, Pothier, *Contrat de Vente*, No. 23; French Civil Code, arts. 1592, 1593. If the price was not fixed, the contract was innominate and not sale.

[5] *Howe* v. *Smith* (1884), 27 Ch. D. 87, C. A. See the history of the law of earnest and deposit traced by Fry, L.J., at p. 94. For a definition of deposit by Lord Macnaghten, see *Soper* v. *Arnold* (1887), 14 App. Cas., at p. 435: "The deposit serves two purposes; if the purchase is carried out

Sect. 9.

Agreement to sell at valuation.

9.—(1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided;[1] provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.[2]

(2.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.[3]

In a case where one of the parties prevented the valuer from acting, Page Wood, V.C., refused specific performance, apparently on the ground that there was no complete contract, saying that the Court had adopted this principle from the Civil Law.[4] See *Inst.*, lib. iii., tit. 23, where it is said, "*Sin autem ille qui nominatus est vel non potuerit vel noluerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto.*"

In some cases the party in fault might be restrained from preventing the valuer from acting.[5] See "fault" defined by sect. 62, *post*, p. 114.

Conditions and Warranties.

Stipulations as to time of payment.

10.—(1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale.[6]

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it goes against the purchase-money; but its primary purpose is this, it is a guarantee that the purchaser means business."

[1] *Thurnell* v. *Balbirnie* (1837), 2 M. & W. 786 (damages); *Vickers* v. *Vickers* (1867), L. R. 4 Eq. 529 (specific performance); *Benjamin on Sale*, 4th ed., p. 90. [2] *Clarke* v. *Westrope* (1856), 25 L. J. C. P. 287.

[3] *Cf. Thomas* v. *Fredericks* (1847), 10 Q. B. 775. See "fault" defined by sect. 62. [4] *Vickers* v. *Vickers* (1867), L. R. 4 Eq. 529, at p. 535.

[5] See *Fry on Specific Performance*, 4th ed., p. 523.

[6] *Martindale* v. *Smith* (1841), 1 Q. B. 389, see at p. 395, nonpayment on appointed day: *cf.* sect. 31, *post*, p. 63; and *Mersey Steel and Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434, at p. 444. As to time of payment being essential, see *Bishop* v. *Shilleto* (1829), 2 B. & Ald. 329; *Benjamin on Sale*, 4th ed., pp. 290, 304.

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Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2.) In a contract of sale "month" means primâ facie calendar month.[1]

As regards stipulations other than those relating to the time of payment, time is usually of the essence of the contract, at any rate in mercantile transactions.[2] Thus, where there was a contract for the sale of twenty-five tons of pepper, "name of vessel or vessels, marks and particulars to be declared within sixty days of date of bill of lading," Cotton, L.J., says, "It was argued that the rules of Courts of equity are to be regarded in all Courts, and that equity enforced all contracts though the time fixed therein for completion had passed. This was in the case of contracts, such as purchases and sales of land where, unless a contrary intention could be collected from the contract, the Court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable. We must therefore hold that the time within which the pepper was to be declared was an essential condition of the contract."[3]

Conditions and warranties in general.

The present subdivision of the Act deals with conditions and warranties peculiar to the law of sale. But the Act must be regarded as a single chapter in the general law of contract, and it therefore does not attempt to deal with the law of representations, conditions, and warranties, in so far as they are governed by considerations common to the whole field of contract. In so far as sale is regulated by the general law of contract, the rules which apply are saved by sect. 61 (2), *post*, p. 108. No definition of condition precedent is given, but the matter is discussed in Note A., *post*, p. 164. "Warranty," however, is defined by sect. 62, and it is contrasted with "condition" in sect. 11. This was requisite, because its proper meaning in the law of sale was much disputed; see Note A., *post*, p. 168. It must be borne in mind that many stipulations, which are commonly spoken of as warranties, are really conditions precedent, and have always been given effect to as such. But whether a given stipulation is a condition or a warranty as defined by the Act, is not a question of name, but of the true construction of the contract. See sect. 11 (1), (*b*), *post*, p. 23.

By sect. 55, *post*, p. 103, any implied condition or warranty may be negatived or varied by express agreement, course of dealing, or usage.

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[1] *Webb* v. *Fairmaner* (1838), 3 M. & W. 473; *cf.* 45 & 46 Vict. c. 61, s. 14 (4).

[2] *Bowes* v. *Shand* (1877), 2 App. Cas. 455, at p. 463, per Ld. Cairns; *Reuter* v. *Sala* (1879), 4 C. P. D., at pp. 246, 249, C. A.

[3] *Reuter* v. *Sala*, suprà.

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As regards express stipulations the following points may be noted:

A warranty may be either included in the contract of sale,[1] or may be given after the contract of sale is completed.[2]

Express stipulations.

Where a warranty is given after the contract of sale is completed, it must be supported by fresh consideration.[3]

The warranty in such case is a supplemental contract. In Scotland, consideration is not necessary to support a simple contract, so there a warranty might be added without fresh consideration.

Any affirmation made at the time of sale may amount to a warranty provided it is intended as such—that is to say, if it is intended to form part of the contract.[4] If, however, the contract be reduced into writing, evidence of a contemporaneous verbal warranty would not be admissible.[5] A representation, anterior to the contract, does not constitute a warranty,[6] though it may give rise to an action for deceit if made fraudulently.

Representations made during a contract of sale may be of four kinds:—

Representations classified.

1. The representation may be a mere expression of opinion or mere commendation by the seller of his wares. It is then inoperative, for *simplex commendatio non obligat.*[7]

2. The representation may amount to a warranty.

3. The representation may constitute part of the description of the thing sold, or be an essential term of the contract. It is then a condition going to the root of the contract.[8]

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[1] *Hopkins* v. *Tanqueray* (1854), 15 C. B. 130; 23 L. J. C. P. 162; *cf. Bannerman* v. *White* (1861), 31 L. J. C. P. 28; *Stucley* v. *Baily* (1862), 31 L. J. Ex. 483.

[2] *Roscorla* v. *Thomas* (1842), 3 Q. B. 234; *cf. Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438.

[3] *Roscorla* v. *Thomas* (1842), 3 Q. B. 234; *Benjamin on Sale*, 4th ed., p. 608.

[4] *Pasley* v. *Freeman* (1789), 3 T. R. 51; 2 Smith, Lead. Cas., 9th ed., p. 87, per Buller, J.; *Stucley* v. *Baily* (1862), 31 L. J. Ex., at p. 489.

[5] *Harnor* v. *Groves* (1855), 15 C. B. 667; *aliter* if the writing be a mere memorandum of the contract; *Allen* v. *Pink* (1838), 4. M. & W. 140.

[6] *Hopkins* v. *Tanqueray* (1854), 15 C. B. 130; 23 L. J. C. P. 162; but see *Bannerman* v. *White* (1861), 31 L. J. C. P. 28, where the representation constituted the basis on which the parties subsequently entered into the contract. In such case the untruth of the representation may avoid the contract altogether.

[7] *Benjamin on Sale*, 4th ed., p. 610; *Power* v. *Barham* (1836), 4 A. & E. 473; *cf. Chandelor* v. *Lopus* (1603), 2 Croke 2; 1 Smith, Lead. Cas., 9th ed., p. 186; *Budd* v. *Fairmaner* (1831), 8 Bing. 52; *Bannerman* v. *White* (1861), 31 L. T. Q. B. 28.

[8] See sects. 11 to 15.

4. The representation may be false and fraudulent. In that case, even if it only goes to part of the consideration, the contract may be avoided according to the rule *Fraus omnia vitiat*,[1] and the person who makes it may be liable to exemplary damages—in some cases even when the party damnified was not a party to the contract.[2]

11.—(1.) In England or Ireland—

When condition to be treated as warranty.

(*a.*) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.[3]

(*b.*) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract.[4] A stipulation may be a condition, though called a warranty in the contract:

(*c.*) Where a contract of sale is not severable,[5] and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any

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[1] *Cf. Kennedy* v. *Panama Mail Co.* (1867), L. R. 2 Q. B., at p. 587.

[2] *Levy* v. *Langridge* (1838), 4 M. & W. 337, Ex. Ch.; and see the note to *Pasley* v. *Freeman*, 2 Smith, L. C., 9th ed., p. 74.

[3] *Ellen* v. *Topp* (1851), 6 Exch. 424, at p. 431; *Behn* v. *Burness* (1862), 32 L. J. Q. B. 204, Ex. Ch.; *Benjamin on Sale*, 4th ed., p. 546; and sect. 53, *post*, p. 98.

[4] *Graves* v. *Legg* (1854), 9 Exch. 709; 28 L. J. Ex. 228; *Behn* v. *Burness* (1863), 32 L. J. Q. B. 204, at p. 205, Ex. Ch.; *Woolfe* v. *Horne* (1877), 2 Q. B. D., at pp. 360, 361.

[5] As to severable contracts, see *Simpson* v. *Crippen* (1872), L. R. 8 Q. B. 14; *Brandt* v. *Lawrence* (1876), 1 Q. B. D. 344; and sect. 31, *post*, p. 63.

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condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated,[1] unless there be a term of the contract, express or implied, to that effect.[2]

(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated,[3] or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.[4]

See "warranty" defined in accordance with this section by sect. 62, *post*, p. 114.

The Act throughout, so far as it relates to England, draws a distinction between the terms "condition" and "warranty." This distinction has often been insisted on, but seldom observed by judges and text writers. As used in the Act, "condition" is the equivalent of the old term "dependent covenant," while "warranty" is equivalent to the old term "independent covenant." See the question discussed at length in Note A, *post*, pp. 164, 168.

In Scotland, no distinction has been drawn between conditions and warranties, and the right of rejection has been much larger than in England. This right is preserved by the Act. On the other hand the *actio quanti minoris* has been much restricted in Scotland, and when the buyer could return the goods he has not been allowed to keep

[1] *Graves* v. *Legg* (1854), 9 Exch. 709, at p. 717; 23 L. J. Ex. 228, at p. 231; *Behn* v. *Burness* (1863), 32 L. J. Q. B. 204, Ex. Ch.; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P., at p. 450; *Benjamin on Sale*, 4th ed., p. 450. Notes to *Williams' Saunders* ed. of 1871, vol. i. p. 554, cited in *Heilbutt* v. *Hickson*, supra. [2] *Bannerman* v. *White* (1861), 31 L. J. C. P. 28.

[3] *Couston* v. *Chapman* (1872), L. R. 2 Sc. App. 254.

[4] *Hale* v. *Rawson* (1858), 27 L. J. C. P. 189, at p. 191; and see sects. 6 and 7, *ante*, p. 17; *cf. Baily* v. *De Crespigny* (1869), L. R. 4 Q. B., at p. 185.

them and sue for damages. Now he has this right, but it is safeguarded by sect. 59 (consignation into Court), *post*, p. 107.

Waiver.

A party may always waive a stipulation which is for his own benefit.[1] The rule is *Cuilibit licet renunciare juri pro se introducto.* Where the fulfilment of a condition by one party is prevented by the other the condition is waived.[2]

Implied undertaking as to title, &c.

12.—In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1.) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass:[3]

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:[4]

(3.) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

See "warranty" and "contract of sale" defined by sect. 62; and as to the distinction between a condition and warranty, see sect. 11, and note thereto, and *post*, p. 168. As to negativing implied terms, see sect. 55, *post*, p. 103.

Formerly the rule was stated to be that on a sale of specific goods there was no implied warranty of title, and that, in the absence of fraud, the seller was "not liable for a bad title unless there was an express warranty, or an equivalent to it by declaration or conduct."[5] But as Lord Campbell said, in 1851, "the exceptions have well-nigh eaten up the rule;"[6] and Mr. Benjamin, after reviewing the whole of the cases, argues that the true rule is that stated in the text.

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[1] *Leake on Contracts*, 3rd ed., p. 752.

[2] *Mackay* v. *Dick* (1881), 6 App. Cas. 251 H. L.

[3] *Benjamin on Sale*, 4th ed., p. 643; *Eichholz* v. *Bannister* (1864), 34 L. J. C. P. 105 (goods sold by job-warehouseman); *cf.* French Civil Code, arts. 1603, 1625, 1626; Pothier, *Contrat de Vente*, No. 81; Indian Contract Act, 1872, § 109.

[4] *Ibid.*

[5] Per Parke, B., in *Morley* v. *Attenborough* (1849), 3 Exch. 500, at p. 512; 18 L. J. Ex. 148, at p. 152 (auction sale of forfeited pledges).

[6] *Sims* v. *Marryat* (1851), 17 Q. B. 281, at p. 291 (sale of copyright).

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On a sale of leaseholds, which are chattels, there was always a warranty of title implied;[1] and by sect. 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which it is to be noted applies to "conveyances" of personalty, a covenant for title and quiet possession is always imported unless expressly negatived. The cases in which an implied warranty of title has been negatived appear all to have arisen out of sales by sheriffs or forced sales by public auction, where the circumstances were such as to indicate that the seller was only selling such right as he might have in the goods. A sheriff selling an execution debtor's goods gives no implied undertaking as to title.[2] He is only responsible if he *knows* that he has no title to sell.[3]

"According to the Roman law," says Parke, B., "and in France and Scotland, and partially in America, there is always an implied contract that the vendor has the right to dispose of the subject which he sells."[4] But, strictly speaking, the implied engagement of the seller in French and Civil Law is not a warranty of title. It consists of (*a*) an obligation to deliver and (*b*) a guarantee against eviction. It is the equivalent of a covenant for quiet possession rather than the equivalent of a covenant for title.[5]

Mr. Benjamin suggested that in the case of breach of a warranty of title, the buyer might sue for unliquidated damages, and not merely recover the price, if paid, as on a failure of consideration; but there appears to be no decision in point.[6] The Act adopts this suggestion.

Freedom from charges.

Before the Act there was probably an implied warranty on the part of the seller that the goods were free from any charge or lien thereon at the time of sale, but there appears to be no English decision in point.[7]

In Scotland, France, and Italy, the implied warranty of freedom from

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[1] *Souter* v. *Drake* (1834), 5 B. & Ad. 992.

[2] *Exp. Villars* (1874), L. R. 9 Ch. App. 434, at p. 437; *cf.* Bankruptcy Act, 1883, s. 46 (3).

[3] *Peto* v. *Blaydes* (1814), 5 Taunt. 657 (sale by sheriff's auctioneer).

[4] *Morley* v. *Attenborough* (1849), 3 Exch., at p. 510, citing Domat, bk. i., tit. 2, s. 2, the French Civil Code, art. 1625; and as to Scotland, *Bell on Sale*, p. 94.

[5] See Pothier, *Contrat de Vente*, Nos. 48, 82.

[6] *Benjamin on Sale*, 4th ed., p. 634.

[7] *Benjamin on Sale*, 4th ed., p. 705; *cf.* Conveyancing Act, 1881, s. 7, and see *passim*, *Playford* v. *Mercer* (1870), 22 L. T. N.S. 41 (goods to be taken "from the deck"). The stipulation, if implied, is a warranty, not a condition: see per Lord Esher in *Sanders* v. *Maclean* (1883), 11 Q. B. D., at p. 337.

encumbrance is clearly recognised.[1] "C'est une suite de l'obligation de livrer la chose vendue," says Pothier, "que le vendeur doit faire à ses frais ce qui est nécessaire pour satisfaire à cette obligation. C'est pourquoi si la chose vendue se trouvait engagée à quelque créancier du vendeur qui l'eut en sa possession le vendeur serait obligé de la dégager à ses frais pour la livrer." He then proceeds to quote the Civil Law, and to give various other illustrations.[2] Sect. 12.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description;[3] and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.[4] Sale by description.

The principle is a universal one. *Si æs pro auro veneat, non valet.*[5] Thus, where there was a contract to purchase rice to be shipped at Madras in March $\frac{\text{or}}{\text{and}}$ April, it was held that the buyer was not bound to accept a cargo of rice, part of which was shipped in February, and Lord Blackburn said, "If you contract to sell peas you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it."[6]

"Suppose," says Montague Smith, J., "a contract were made for the sale of 'ten casks of spirits' guaranteed to be equal to a sample produced, with a stipulation for an allowance should the quality prove inferior to the guarantee, and the sample being brandy, the bulk

[1] Bell's *Law of Sale*, pp. 79, 95; French Civil Code, arts. 1608, 1626, and Italian Civil Code, arts. 1467, 1482. [2] *Contrat de Vente*, No. 42.

[3] *Josling* v. *Kingsford* (1863), 32 L. J. C. P. 94 (sale of oxalic acid after inspection and without warranty), approved; *Mody* v. *Gregson* (1868), L. R. 4 Ex., at p. 56; *Borrowman* v. *Drayton* (1876), 2 Ex. D. 15, C. A. (cargo of petroleum); *Randall* v. *Newson* (1877), 2 Q. B. D., at p. 109, C. A.; *Bowes* v. *Shand* (1877), 2 App. Cas. 455; *Pollock on Contracts*, 4th ed., p. 436.

[4] *Nichol* v. *Godts* (1854), 10 Exch. 191 (foreign refined rape oil); 23 L. J. Ex. 314; *Azémar* v. *Casella* (1867), L. R. 2 C. P. 677, Ex. Ch.; see at p. 678 (long staple Salem cotton).

[5] Cited from Digest, in *Kennedy* v. *Panama Co.* (1867), L. R. 2 Q. B., at p. 588 (shares).

[6] *Bowes* v. *Shand* (1877), 2 App. Cas. 455, at p. 480 (rice).

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tendered were to consist of rum, could the allowance clause be applied?" and he proceeds to show that the same rule must apply to cotton of a different *kind* (not quality) from the sample.[1]

Where, however, the article tendered answers to the description, the buyer must, apart from warranty, express or implied, take the risk as to its quality and condition.[2] Where there was a contract for the sale of Calcutta linseed, Willes, J., said, "The purchaser had a right to expect, not a *perfect* article, but an article which would be saleable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he bargained for. As if a man buys an article as gold, which every one knows requires a certain amount of alloy, he cannot be said to get 'gold' if he gets an article so depreciated in quality as to consist of gold only to the extent of one carat."[3]

Where the parties are agreed on the thing sold, a misdescription of it in the contract may be immaterial, for *falsa demonstratio non nocet*.[4]

This section must be read with sect. 14, which supplements it by dealing with the conditions and warranties implied by law.

Rule of caveat emptor.

14. Subject to the provisions of this Act and of any statute in that behalf,[5] there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—[6]

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(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose

[1] *Azémar* v. *Casella* (1867), L. R. 2 C. P., at p. 447.

[2] *Barr* v. *Gibson* (1838), 3 M. & W. 390 (ship); *cf. Ward* v. *Hobbs* (1878), 4 App. Cas. 13 (pigs sold with all faults).

[3] *Wieler* v. *Schilizzi* (1856), 17 C. B. 619; 25 L. J. C. P. 89.

[4] *Budd* v. *Fairmaner* (1831), 8 Bing. 48; *Hopkins* v. *Hitchcock* (1863), 32 L. J. C. P. 154 (iron with trade mark).

[5] See, for example, the Chain Cables and Anchors Act, 1874 (37 & 38 Vict. c. 51), s. 4; the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 17; *cf.* the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63).

[6] *Benjamin on Sale*, 4th ed., p. 404; *Barr* v. *Gibson* (1838), 3 M. & W. 390 (ship sold at sea); *Chanter* v. *Hopkins* (1838), 4 M. & W. 399 (smoke consuming furnace); *Ormrod* v. *Huth* (1845), 14 M. & W. 651, 663, Ex. Ch. (cotton); *Horsfall* v. *Thomas* (1862), 31 L. J. Ex. 322 (defective gun); *Jones* v. *Just* (1868), L. R. 3 Q. B. 197, at pp. 202–204; *Ward* v. *Hobbs* (1878), 4 App. Cas. 13, at p. 26.

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quality or fitness.

for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose,[1] provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:[2]

(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:[3]

(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.[4]

[1] *Jones* v. *Bright* (1829), 5 Bing. 533 (copper sheathing for vessel); *Jones* v. *Just* (1868), L. R. 3 Q. B., at p. 203 (manilla hemp); *Randall* v. *Newson* (1877), 2 Q. B. D. 102, C. A., reviewing all the previous cases (carriage-pole specially ordered for plaintiff's carriage). *Cf. Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284, at p. 290, per Lord Herschell (worsted coatings).

[2] *Chanter* v. *Hopkins* (1838), 4 M. & W. 399 (order for a known trade article) followed; *Ollivant* v. *Bayley* (1843), 5 Q. B. 288; 13 L. J. Q. B. 34. By sect. 115 of the Indian Contract Act, 1872, "Upon the sale of an article of a well-known ascertained kind there is no implied warranty of its fitness for any particular purpose."

[3] *Jones* v. *Just* (1868), L. R. 3 Q. B. 197 (contract for manilla hemp), reviewing all the previous cases; *Beer* v. *Walker* (1877), 46 L. J. C. P. 677 (rabbits); *cf. Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284, at p. 290, per Lord Herschell; *Jones* v. *Padgett* (1890), 24 Q. B. D. 650 (blue cloth).

[4] *Benjamin on Sale*, 4th ed., p. 652; *Jones* v. *Bowden* (1813), 4 Taunt.

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(4.) An express warranty or condition does not negative a warranty or condition implied by this Act[1] unless inconsistent therewith.

See the terms "buyer," "contract of sale," "quality," "seller," and "warranty" defined by sect. 62; and see "condition" and "warranty" contrasted by sect. 11, *ante*, p. 23. As to negativing a condition or warranty implied by law, see sect. 55, *post*, p. 103.

History of section.

This section was again and again considered and amended in Committee, and finally settled by the Law Lords in its present form. Subsect. (2) was originally confined to cases where the buyer "had no opportunity of examining the goods." The present narrower proviso was inserted in the Commons, and agreed to by the Lords with a verbal amendment.

The clause originally provided in addition that where there was a contract for the sale of goods by a manufacturer, as such, there was an implied warranty that the goods were of the seller's own manufacture. This was the law in England,[2] but not in Scotland. This provision was cut out by the Lords' Select Committee, perhaps on the ground that the Merchandise Marks Act, 1887, gave sufficient protection to purchasers.

The dicta in the decisions cited below must be carefully considered with reference to the language of the section, which probably narrows somewhat the already restricted rule of *caveat emptor*.

Caveat emptor.

The rule of *caveat emptor* probably owes its origin to the fact that in early times nearly all sales of goods took place in market overt.[3] Its policy has been defended on the ground that it tends to diminish litigation,[4] but the distinct tendency of modern cases is to limit its scope. In a case where a ship was bought while on a voyage, and had stranded, though she was not a total wreck, Lord Wensleydale says: "In the bargain and sale of an existing chattel, by which the property passes, the law does not, in the absence of fraud, imply any warranty of the good quality or condition of the chattel so sold."[5]

847; *cf. Syers* v. *Jonas* (1848), 2 Exch. 111 (tobacco); Indian Contract Act, 1872, § 110.

[1] *Bigge* v. *Parkinson* (1862), 31 L. J. Ex. 301; *cf. Mody* v. *Gregson* (1868), L. R. 4 Ex., at p. 53 (grey shirtings).

[2] *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, C. A., Lord Bramwell dissenting.

[3] *Morley* v. *Attenborough* (1849), 3 Exch., at p. 511, per Parke, B.

[4] Mercantile Law Commission, 1855, 2nd Report, p. 10.

[5] *Barr* v. *Gibson* (1838), 3 M. & W. 390, at p. 399; but now the implied condition of fitness for a particular purpose may apply to specific goods.

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And in a subsequent case Lord Blackburn gives the following illustration: "Where a horse is bought under the belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse, and were in error, yet the purchaser must pay the whole price unless there was a warranty; and even if there was a warranty he cannot return the horse and claim back the whole price unless there was a condition to that effect in the contract."[1] In *Jones* v. *Just*, in 1868, where the previous cases were reviewed and classified, the Court say: "We are aware of no case in which the maxim *caveat emptor* has been applied where there has been no opportunity of inspection or where that opportunity has not been waived."[2]

Exceptions to caveat emptor.

The most important exceptions to the rule are the implied conditions of fitness for a particular purpose and merchantableness. In the first case in which implied conditions or warranties were distinguished from false representations, Best, C.J., says: "It is the duty of the Court in administering the law to lay down rules calculated to prevent fraud, to protect persons necessarily ignorant of the qualities of a commodity they purchase, and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied." . . . "I wish to put the case on a broad principle. If a man sells an article he thereby warrants that it is merchantable—that is, fit for some purpose. If he sells it for some particular purpose he thereby warrants it fit for that purpose."[3] The implied terms of merchantableness and fitness for a particular purpose are nearly always spoken of as warranties, but in a recent case in the Court of Appeal, where it was held that the maker of a carriage-pole for the plaintiff's carriage was liable for a latent defect in it, they were clearly regarded as conditions forming part of the essential description in the contract. Lord Esher, in giving the judgment of the Court, says: "The fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. . . . If the subject-matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description—that is to say, shall

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[1] *Kennedy* v. *Panama Co.* (1867), L. R. 2 Q. B., at p. 587 (shares).

[2] *Jones* v. *Just* (1868), L. R. 3 Q. B., at p. 204 (manilla hemp).

[3] *Jones* v. *Bright* (1829), 5 Bing. 533, at p. 542 (action for deceit, but fraud negatived and warranty implied).

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be that article, saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description—that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. . . . If the article or commodity does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent or discoverable."[1]

It was formerly thought that where provisions were sold by a dealer in provisions there was always an implied condition or warranty that they were fit for food,[2] but it was afterwards held that there was no distinction between provisions and any other goods. For instance, if a man selected and bought a carcase in the market he took it at his own risk.[3] This class of case will require careful reconsideration with reference to sub-sect. (1), *ante*, p. 29.

In Scotland formerly, as in France now, it was held that the seller guaranteed the buyer against all latent defects.[4] But by sect. 6 of the Mercantile Law Amendment (Scotland) Act, 1856, it was provided that if the seller did not know the goods to be defective or of bad quality, the goods, with all faults, should be at the risk of the purchaser unless there was an express warranty or unless the goods were expressly sold for a particular and specified purpose. This enactment was intended to assimilate Scottish to English law, but it laid down a narrower rule for the former country. Now a uniform rule is laid down for both countries.

Sale by Sample.

15.—(1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2.) In the case of a contract for sale by sample—

(*a.*) There is an implied condition that the bulk shall correspond with the sample in quality:[5]

[1] *Randall* v. *Newson* (1877), 2 Q. B. D. 102, at p. 109, C. A. (carriage pole).

[2] *Benjamin on Sale*, 4th ed., p. 672.

[3] *Ibid.*, and *Emmerton* v. *Matthews* (1862), 31 L. J. Ex. 139; *Smith* v. *Baker* (1878), 40 L. T. N.S. 261. But as to provisions bought by *description*, see *Bigge* v. *Parkinson* (1862), 31 L. J. Ex. 301.

[4] Bell's *Princ. Law of Scotland*, 9th ed., p. 78; French Civil Code, arts. 1641–1644.

[5] *Parker* v. *Palmer* (1821), 4 B. & Ald. 387, at p. 391 (East India rice); *Syers* v. *Jonas* (1848), 2 Exch., at p. 117 (tobacco); *Carter* v. *Crick* (1859), 28 L. J. Ex. 238 (seed barley).

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(*b.*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample: [1]

(*c.*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.[2]

Sale by sample.

Sub-sect. (1.) Evidence of usage is admissible to shew that a sale was by sample though the written contract may be silent on the point.[3] On the other hand, the exhibition of a sample during the making of the contract does not necessarily make it a contract for sale by sample.[4]

"The office of a sample," says Lord Macnaghten, "is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way, and with the knowledge possessed by merchants of that class at the time." [5]

Implied conditions.

Sub-sect. (2.) By sect. 62, *post*, p. 113, "quality of goods" includes their state or condition. As to negativing implied terms, see sect. 55, *post*, p. 103. In *Parkinson* v. *Lee*,[6] it was held that the seller, who

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[1] *Lorymer* v. *Smith* (1822), 1 B. & C. 1 (wheat); *Benjamin on Sale*, 4th ed., p. 592; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P., at p. 456 (shoes for French army); but see *Heyworth* v. *Hutchinson* (1867), L. R. 2 Q. B. 447 (wool).

[2] *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438, at p. 456; *Mody* v. *Gregson* (1868), L. R. 4 Ex. 49; *Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284 (worsted coatings); and see a Scotch case, *Macfarlane* v. *Taylor* (1868), L. R. 1 Sc. App. 245 (whiskey).

[3] *Syers* v. *Jonas* (1848), 2 Exch. 111, approved *Harnor* v. *Groves* (1855), 24 L. J. C. P., at p. 56.

[4] *Hill* v. *Smith* (1812), 4 Taunt. 520; see at p. 532 Ex. Ch.; *Meyer* v. *Everth* (1814), 4 Camp. 22; *Gardiner* v. *Gray* (1815), 4 Camp. 144; *Benjamin on Sale*, 4th ed., p. 641.

[5] *Drummond* v. *Van Ingen* (1887), 12 App. Cas., at p. 297; *cf. Mody* v. *Gregson* (1868), L. R. 4. Ex., at p. 53, per Willes, J.

[6] *Parkinson* v. *Lee* (1802), 2 East, 314 (hops).

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Implied conditions on sale by sample.

was a merchant and not the manufacturer, was not responsible for a latent defect which examination of the sample failed to disclose. But Lord Esher expressed an opinion that that case was no longer law,[1] and the Act now draws no distinction between a manufacturer and anybody else. Take the case suggested by Willes, J., namely "brandy sold by sample, coloured with some new stuff which turned out to be a violent purgative, but the effect of which could not be discovered by tasting in the usual way."[2] Should it be any answer to say the seller was a wine merchant and not the manufacturer?

Text writers and the older cases always speak of the term that the bulk shall agree with the sample as a warranty, collateral to the contract.[3] But Blackburn, J., in a case where goods were guaranteed "about equal to sample," says: "Generally speaking, when the contract is as to any goods such a clause is a *condition* going to the essence of the contract, but when the contract is as to specific goods the clause is only collateral to the contract, and is the subject of a cross action, or matter in reduction of damages."[4] Mr. Benjamin, after reviewing the cases, argues that the buyer may always reject the goods if the bulk do not correspond with the sample, unless (1) he has finally accepted them, or (2) the contract relates to specific goods the property in which has passed to him.[5] The Act adopts this view by describing the term as a condition and not a warranty. See sect. 11 (1) (*c*), *ante*, p. 23.

Primâ facie the place of delivering is the place for compariug the bulk with the sample.[6] But this presumption may be rebutted, and Lord Esher has expressed the opinion that "such a contract always contains an implied term that the goods may under certain circumstances be returned, that such term necessarily contains certain varying or alternative applications, and amongst others the following, that if the time of inspection as agreed upon be subsequent to the time agreed for the delivery of the goods, or if the place of inspection as agreed upon be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal

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[1] *Randall* v. *Newson* (1877), 2 Q. B. D., at p. 106 (carriage pole).

[2] *Mody* v. *Gregson* (1868), L. R. 4 Ex., at p. 53 (grey shirtings).

[3] *Benjamin on Sale*, 4th ed., p. 640; *Parker* v. *Palmer* (1821), 4 B. & Ald., at p. 391, per Ld. Tenterden (East India rice).

[4] *Heyworth* v. *Hutchinson* (1867), L. R. 2 Q. B. 447, at p. 451; *cf. Syers* v. *Jonas* (1848), 2 Exch. 111, at p. 117, per Parke, B.

[5] *Benjamin on Sale*, 4th ed., p. 936.

[6] *Perkins* v. *Bell* (1893), 1 Q. B. 193, C. A (barley).

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to sample, return them then and there on the hands of the seller."[1] This certainly seems to be the law in Scotland,[2] but the question perhaps requires further consideration in England.

When the goods are specifically described by the contract, they must answer to their description as well as correspond with the sample. See sect. 13, *ante*, p. 27. Thus where there was a contract for foreign refined rape oil equal to sample, a tender of oil which was not foreign refined rape oil, though equal to sample, was held insufficient.[3]

[1] *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438, at p. 456; *cf. Grimoldby* v. *Wells* (1875), L. R. 10 C. P. 391, at p. 395, per Brett, J. (tares).

[2] *Couston* v. *Chapman* (1872), L. R. 2 Sc. App. 250, at p. 254, per Lord Chelmsford (wine sold by auction).

[3] *Nichol* v. *Godts* (1854), 10 Exch. 191.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

Sect. 16.

Goods must be ascertained.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.[1]

"In the case of executory contracts," says Bovill, C.J., "where the goods are not ascertained or may not exist at the time of the contract, from the nature of the transaction, no property in the goods can pass to the purchaser by virtue of the contract itself; but where certain goods have been selected and appropriated by the seller, and have been approved and assented to by the buyer, then the case stands as to the vesting of the property very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain."[2]

Generic goods.

Unascertained or generic goods, that is to say, goods defined by description only, must be distinguished from specific goods, that is to say, goods identified and agreed upon at the time when the contract is made. Suppose A. agrees to sell to B. "fifty Southdown sheep," no property in any sheep can pass to B. till the sheep are appropriated to the contract. A. fulfils his contract by delivering at the appointed time any fifty Southdown sheep. But if he agreed to sell "the fifty

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[1] For statement of rule, see *Dixon* v. *Yates* (1833), 5 B. & Ad., at p. 340; *Aldridge* v. *Johnson* (1857), 26 L. J. Q. B. 296, at p. 299, per Ld. Campbell; *Mirabita* v. *Imp. Ottoman Bank* (1878), 3 Ex. D., at p. 172. For examples, see *Rohde* v. *Thwaites* (1827), 6 B. & C. 388, 393; *Campbell* v. *Mersey Docks* (1863), 14 C. B. N.S. 412; *Jenner* v. *Smith* (1869), L. R. 4 C. P. 270; *cf.* French Civil Code, art. 1585; Pothier, *Contrat de Vente*, No. 308.

[2] *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438, at p. 449, per Bovill, C.J., and Byles, J.

Southdown sheep now in my field" he could not keep his contract by delivering any others, and the property might pass at once if the parties so intended. Sect. 16.

An agreement for the sale of unascertained goods was known in Roman law as *emptio generis*.[1]

Property passes when intended to pass.

17.—(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.[2]

(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.[3]

By English law the property may pass by the contract itself, if such be the intention of the parties. In other words, the contract may include a conveyance. "Where, by the contract itself," says Lord Wensleydale, "the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."[4] Whether this be a satisfactory explanation or not, the rule is undoubted, and is as old as the year books.[5]

Foreign rules.

By the Civil Law, the property in goods did not pass by virtue of a contract of sale until delivery, the rule being *Traditionibus et*

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[1] Moyle's *Sale in the Civil Law*, p. 28, where the effects of this contract are discussed.

[2] *Seath* v. *Moore* (1886), 11 App. Cas. 350, at p. 370, per Ld. Blackburn, and at p. 380, per Ld. Watson; *cf. Shepherd* v. *Harrison* (1871), L. R. 5 H. L., at p. 127.

[3] *Ogg* v. *Shuter* (1875), L. R. 10 C. P., at p. 162; *cf. Young* v. *Matthews* (1866), L. R. 2 C. P. 127.

[4] *Dixon* v. *Yates* (1833), 5 B. & Ad. 313, at p. 340, per Parke, J.

[5] For a discussion of its policy, see 2nd Report of Mercantile Law Commission, 1855, pp. 9, 42; *Blackburn on Sale*, pp. 187–197; and for its history, see *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, C. A.

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usucapionibus dominia rerum, non nudis pactis, transferuntur.[1] But though the property did not pass, as soon as the parties were agreed on the subject-matter and the price, there was an *emptio perfecta*, the result of which was that the risk passed to the buyer, and he acquired a *jus ad rem*, though not a *jus in re*. The Scotch common law followed this rule, but by the 19 & 20 Vict. c. 60, s. 1, when goods had been sold but not delivered, the seller's creditors could not attach them, and a sub-vendee was entitled to demand the goods subject to satisfying the seller's lien for the price. The effect was, that when in England the property in goods would pass to the buyer, the same results followed in Scotland, though those results were arrived at in a different manner.[2] Now, under the Act, the same rule applies to both countries.

France and Italy have also departed from the principle of the Civil Law, and have adopted a rule substantially the same as that of English law.[3]

Rules for ascertaining intention.

18. Unless a different intention appears,[4] the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional[5] contract for the sale of specific goods, in a deliverable state,[6] the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.[7]

[1] Moyle's *Justinian*, p. 200, citing Cod. 2, 3, 30.

[2] *M'Bain* v. *Wallace* (1881), 6 App. Cas. 588, at p. 618; *Seath* v. *Moore* (1886), 11 App. Cas., at pp. 370, 380. See, too, *Blackburn on Sale*, pp. 187–197.

[3] French Civil Code, art. 1583; Italian Civil Code, art. 1448. For the history of this departure, see Viollet, *Histoire du Droit Français*, pp. 515–523.

[4] *Blackburn on Sale*, pp. 147, 167; *Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B., at p. 329; *Furley* v. *Bates* (1863), 33 L. J. Ex. 53; *Young* v. *Matthews* (1866), L. R. 2 C. P. 127.

[5] As to contracts which are in terms conditional, see *ante*, pp. 1 and 5.

[6] Deliverable state = state in which buyer is bound to accept. *Blackburn on Sale*, p. 152, and sect. 62, *post*, p. 116.

[7] *Blackburn on Sale*, pp. 147–150; *Benjamin on Sale*, 4th ed., p. 277;

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done,[1] and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done,[2] and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer:—

(*a.*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction:[3]

Tarling v. *Baxter* (1827), 6 B. & C. 360; Tudor's *Merc. Cases*, 3rd ed., p. 308, and notes; *Dixon* v. *Yates* (1833), 5 B. & Ad., at p. 340; *Barr* v. *Gibson* (1838), 3 M. & W. 390; *Martindale* v. *Smith* (1841), 1 Q. B., at p. 395; *Gilmour* v. *Supple* (1858), 11 Moore, P. C., at p. 556; *Joyce* v. *Swann* (1864), 17 C. B. N.S., at p. 102 (price not fixed); *Sweeting* v. *Turner* (1871), L. R. 7 Q. B. 310, at p. 313; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P., at p. 449. See the rule stated and contrasted with the Civil law and Scotch common law; *Seath* v. *Moore* (1886), 11 App. Cas., at p. 370.

[1] *Blackburn on Sale*, p. 152; *Rugg* v. *Minett* (1809), 11 East, 210; *Tansley* v. *Turner* (1835), 2 Bing. N. C. 151; *Laidler* v. *Burlinson* (1837), 2 M. & W. 602; *Acraman* v. *Morrice* (1849), 8 C. B. 449; 19 L. J. C. P. 57; *Boswell* v. *Kilborn* (1862), 15 Moore, P. C. 309; 8 Jur. 443; *Young* v. *Matthews* (1866), L. R. 2 C. P. 127; Pothier, *Contrat de Vente*, Nos. 308, 309; *Anderson* v. *Morice* (1875), L. R. 10 C. P. 609, at p. 618, Ex. Ch. affirmed, 1 App. Cas. 713; *Seath* v. *Moore* (1886), 11 App. Cas., at p. 370.

[2] *Furley* v. *Bates* (1863), 33 L. J. Ex. 43, criticising *Blackburn on Sale*, p. 152; *Hanson* v. *Meyer* (1805), 6 East, 614; *Zagury* v. *Furnell* (1809), 2 Camp. 239; *Simmons* v. *Swift* (1826), 5 B. & C. 857; Pothier, *Contrat de Vente*, Nos. 308, 309.

[3] *Swain* v. *Shepherd* (1832), 1 M. & Rob. 223; *Blackburn on Sale*, p. 167; *Bell on Sale* (Scotland), p. 111.

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Rules for ascertaining intention.

(*b.*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.[1]

Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.[2] Such assent may be express or implied, and may be given either before or after the appropriation is made :[3]

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee [or custodier] (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal,

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[1] *Moss* v. *Sweet* (1851), 16 Q. B. 493; 20 L. J. Q. B. 167; *cf. Beverley* v. *Lincoln Gas Co.* (1837), 6 A. & E. 829; *Ex p. White* (1870), L. R. 6 Ch. App. 397; *Ray* v. *Barker* (1879), 4 Ex. D. 279, C. A.; *Elphick* v. *Barnes* (1880), 5 C. P. D. 321.

[2] For statement of principle, see *Blackburn on Sale*, p. 127; *Benjamin on Sale*, 4th ed., p. 318; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P., at p. 449. See, in illustration, *Busk* v. *Davis* (1814), 2 M. & S. 397; *Rohde* v. *Thwaites* (1827), 6 B. & C. 388, see at p. 393; *Aldridge* v. *Johnson* (1857), 26 L. J. Q. B. 296; *Langton* v. *Higgins* (1859), 28 L. J. Ex. 252; *Boswell* v. *Kilborn* (1862), 15 Moore, P. C. 309; 8 Jur. 443.

[3] *Campbell* v. *Mersey Docks* (1863), 14 C. B. N.S. 412, at p. 415, per Willes, J.; *cf. Godts* v. *Rose* (1855), 17 C. B. 229, at p. 237; *Aldridge* v. *Johnson* (1857), 26 L. J. Q. B. 296; *Jenner* v. *Smith* (1869), L. R. 4 C. P. 270.

he is deemed to have unconditionally appropriated the goods to the contract.[1] Sect. 18.

The term "custodier" is the Scotch equivalent of bailee. See "specific goods" and "future goods" and "deliverable state" defined by sect. 62, *post*, p. 109. As to generic goods, see *ante*, p. 36.

As the English Courts have rejected the objective test of delivery for marking the time when the property is to pass, they have been forced to lay down more or less arbitrary rules for fixing the moment when the property is to be held to pass in cases where the parties have either formed no intention on the point, or failed to express it.

Rule 1.—See note to last section, *ante*, p. 37. The first three rules deal only with specific goods.

Rule 2.—The final words, "and the buyer has notice thereof," were added in Committee on a suggestion from Scotland that it was unfair that the risk should be transferred to the buyer without notice. It is to be noted that this rule is negative. The case of an article, which the seller is to manufacture for the buyer, is sometimes treated as coming under this rule, but it generally comes under Rule 5. If a man orders a watch to be specially made for him, it is clear that the watchmaker may, if he likes, make two such watches, and that he keeps his contract by delivering either of them.[2] Lord Wensleydale has pointed out that there may be an intermediate state of things. Specific goods.

An article may be in course of manufacture, and the parties may have so far agreed upon it that there arises what the Roman lawyers called an *obligatio certi corporis*. The seller would break his contract if he delivered any other article, but there may be no intention that the property in it should pass before its completion.[3] Unless a different intention be clearly shewn, the rule is that the property in an article,

[1] For statement of principle, see *Wait* v. *Baker* (1848), 2 Exch., at p. 7, per Parke, B.; *Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B., at p. 328, per Blackburn, J.; *Joyce* v. *Swann* (1864), 17 C. B. N.S. 84, at p. 102, per Willes, J. As to delivery to buyer, *Greaves* v. *Hepke* (1818), 2 B. & Ald. 131; *Ogle* v. *Atkinson* (1814), 5 Taunt. 759. Delivery to carrier by land, *Dutton* v. *Solomonson* (1803), 3 B. & P. 582. To canal boat, *Fragano* v. *Long* (1825), 4 B. & C. 219; *Bryans* v. *Nix* (1839), 4 M. & W. 775; on board ship, *Alexander* v. *Gardner* (1835), 1 Bing. N. C. 671; *Tregelles* v. *Sewell* (1862), 7 H. & N. 574, Ex. Ch.; *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex. D. 164, C. A.

[2] *Cf. Atkinson* v. *Bell* (1828), 8 B. & C. 277; and *Xenos* v. *Wickham* (1867), L. R. 2 H. L., at p. 316, per Willes, J.

[3] *Laidler* v. *Burlinson* (1837), 2 M. & W., at p. 610; *Wait* v. *Baker* (1848), 2 Exch., at pp. 8, 9.

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which the seller is to make or complete for the buyer, does not pass until the article is delivered in a finished state, or until it is ready for delivery and is approved by the buyer in that state.[1]

At one time the Courts seemed inclined to reverse the presumption in the case of shipbuilding contracts, where the ship was to be paid for by stated instalments as the work progressed;[2] but in a recent case in the House of Lords it was held that there was no sound distinction between the case of a ship and any other *corpus manufactum*.[3]

Rule 3.—As to the concluding words, "and the buyer has notice thereof," see note to last rule. Lord Blackburn, in his work on Sale, states this rule without confining its operation to acts to be done by the seller, and regards it as a rule arbitrarily adopted from the Roman law, where it was a logical deduction from the principle that there could be no sale until the price was fixed. But the Court of Exchequer in 1863 reviewed the cases, and came to the conclusion that the rule should be qualified, as in the text, by confining it to acts to be done by the seller.[4] This construction brings the rule into line with Rule 2.

ale or eturn, etc.

Rule 4.—This rule, like the others, is merely a primâ facie rule. In some trades the usage is that when goods are delivered on fourteen days' approval, the property does not pass to the buyer on the expiration of that time, but the seller at any time after the fourteen days can call on the buyer either to take or to return the goods at once. When goods are sent on trial, or on approval, or on sale or return, the clear general rule is that the property remains in the seller till the buyer adopts the transaction,[5] but it is quite competent to the parties to agree that the property shall pass to the buyer on delivery, but that, if he does not approve the goods, the property shall then revest in the seller.[6] To use the language of the continental lawyers, the

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[1] *Clarke* v. *Spence* (1836), 4 A. & E., at p. 466, reviewing the previous cases. As to an article commenced by one person and finished by another, see *Oldfield* v. *Lowe* (1829), 9 B. & C. 73, and *cf. Beaumont* v. *Brengeri* (1847), 5 C. B. 301.

[2] *Woods* v. *Russell* (1822), 5 B. & Ald. 942; *Ex p. Iambton* (1875), L. R. 10 Ch. App., at p. 414.

[3] *Seath* v. *Moore* (1886), 11 App. Cas., at pp. 370, 380; *Story on Sale*, § 316a.

[4] *Furley* v. *Bates* (1863), 33 L. J. Ex. 43, commenting on *Blackburn on Sale*, p. 152.

[5] *Swain* v. *Shepherd* (1832), 1 M. & Rob. 223; *cf. Re Jones* (1889), 6 Morrell, at p. 197; *cf.* Bédarride, *Des Achats et Ventes*, § 156.

[6] *Cf. Head* v. *Tattersall* (1871), L. R. 7 Ex. 7. The Roman law was similar; see Moyle's *Justinian*, vol. i. p. 423.

condition on which the goods are delivered may be either suspensive or resolutive.

Generic goods.

Rule 5.—The term "future goods" includes goods to be acquired and goods to be made by the seller after the formation of the contract of sale. As to a special article to be made for the buyer, see note to Rule 2. As to a present sale of future goods, see sect. 5, *ante*, p. 16.

When there is a contract for the sale of unascertained goods, and the goods are afterwards selected by the buyer, or if selected by the seller are approved by the buyer, no difficulty arises. The difficulty arises when the seller makes the selection pursuant to an authority derived from the buyer; and it is often a nice question of law whether the acts done by the seller merely express a revocable intention to appropriate certain goods to the contract, or whether they shew an irrevocable determination of a right of election. "The general rule seems to be that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement; when once he has performed the act the choice has been made and the election irrevocably determined; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice."[1] The expression that the property in the goods passes by their "appropriation to the contract," though consistently used in the modern cases, is not a fortunate one. In the first place, as Lord Wensleydale has pointed out, the term is used in two senses. It may mean that the goods are so far appropriated that the seller would break his contract by delivering any other goods, though they still remain his property, or it may, and usually does, mean that the goods are finally appropriated to the contract so as to pass the property in them to the buyer.[2] In the second place, if the decisions be carefully examined, it will be found that in every case where the property has been held to pass, there has been an actual or constructive delivery of the goods to the buyer. If the term "delivery" had been substituted for "appropriation," probably less difficulty would have arisen; and it seems a pity that this was not done by the Act. The commonest form of appropriating goods to the contract is by delivering them to a carrier, and then, if there be

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[1] *Blackburn on Sale*, p. 128, citing *Heywood's Case*, 2 Coke, 36, where it is said "the certainty and thereby the property begins by election." *Cf. Rankin* v. *Potter* (1873), L. R. 6 H. L., at p. 119.

[2] *Wait* v. *Baker* (1848), 2 Exch., at p. 8, per Parke, B.

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authority to so deliver them, and the seller does not reserve the right of disposal, "the moment the goods which have been selected in pursuance of the contract are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and the vendee, either by note in writing, or part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract."[1] The qualifying reference to the Statute of Frauds, of course, only applies where the value of the goods is £10 or upwards.

Reservation of right of disposal.

19.—(1.) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee [or custodier] for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.[2]

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is primâ facie deemed to reserve the right of disposal.[3]

(3.) Where the seller of goods draws on the buyer for

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[1] *Wait* v. *Baker* (1848), 2 Exch., at p. 8.

[2] For statement of principle, see *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex. D. 164. In illustration, see as to delivery to buyer, *Brandt* v. *Bowlby* (1831), 2 B. & Ad. 932; *Godts* v. *Rose* (1855), 17 C. B. 229; 25 L. J. C. P. 61. As to delivery on board ship, *Wait* v. *Baker* (1848), 2 Exch. 1; *Van Casteel* v. *Booker* (1848), 2 Exch. 691, 18 L. J. Ex. 9; *Turner* v. *Liverpool Docks* (1851), 6 Exch. 543, Ex. Ch.; 20 L. J. Ex 293; *Gabarron* v. *Kreeft* (1875), L. R. 10 Ex. 274.

[3] *Ogg* v. *Shuter* (1875), 1 C. P. D. 47, C. A.; *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex. D., at p. 172, C. A. See *Joyce* v. *Swann* (1864), 17 C. B. N.S. 84, where inference was negatived.

the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.[1]

In a case in the Court of Appeal, where the previous decisions were reviewed, Lord Bramwell seems to think that the seller may retain a *jus disponendi*, even when the property has passed to the buyer; but Cotton, L.J., sums up the law as follows: "In the case of such a contract (*i.e.* a contract for the sale of unascertained goods), the delivery by the vendor to a common carrier, or, unless the effect of the shipment is restricted by the terms of the bill of lading, shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser. . . . If the vendor deals with, or claims to retain the bill of lading, in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser."[2]

With reference to Lord Bramwell's doubt, it seems that, though the property in goods may be intended to pass to the buyer, they may be delivered to his agent on such terms as to prolong the right of stoppage *in transitu*, and in that sense a limited right of disposal may be said to be reserved.[3]

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[1] *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116, see at p. 133, per Lord Cairns.

[2] *Mirabita* v. *Imp. Ottoman Bank* (1878), 3 Ex. D., at p. 172. See at p. 170, per Ld. Bramwell. *Cf. Ex p. Banner* (1876), 2 Ch. D. 278.

[3] *Cf. Schotsmans* v. *Lancashire Railway* (1867), L. R. 2 Ch. App., at p. 335.

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Risk primâ facie passes with property.

20. Unless otherwise agreed,[1] the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.[2]

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.[3]

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee [or custodier] of the goods of the other party.[4]

"Custodier" is the Scotch equivalent of bailee. The expression "*might* not have occurred" was substituted for "*would* not have occurred" in the first proviso at the instance of Lord Watson. It shifts the onus on to the party in fault.

"As a general rule," says Blackburn, J., "*res perit domino*, the old Civil law maxim, is a maxim of our law, and, when you can shew that the property passed, the risk of the loss is *primâ facie* in the person in whom the property is. If, on the other hand, you go beyond that, and shew that the risk attached to one person or the other, it is a very strong argument for shewing that the property was meant to be in him, but the two are not inseparable. . . . By the Civil law it was always considered that if there was any weighing, or anything of the

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[1] *Martineau* v. *Kitching* (1872), L. R. 7 Q. B. 436; *Castle* v. *Playford* (1872), L. R. 7 Ex. 98, at p. 100, Ex. Ch.; *Anderson* v. *Morice* (1875), L. R. 10 C. P. 609, at p. 619; affirmed 1 App. Cas. 713.

[2] For examples of seller's risk, see *Simmons* v. *Swift* (1826), 5 B. & C. 857; *Head* v. *Tattersall* (1871), L. R. 7 Ex. 7, see at p. 14; *Elphick* v. *Barnes* (1880), 5 C. P. D. 321, see at p. 326. For example of buyer's risk, see *Rugg* v. *Minett* (1809), 11 East, 210; *Fragano* v. *Long* (1825), 4 B. & C. 219; *Tarling* v. *Baxter* (1827), 6 B. & C. 360; Tudor's *Merc. Cases*, 3rd ed., p. 308, and notes; *Sweeting* v. *Turner* (1871), L. R. 7 Q. B. 310.

[3] *Martineau* v. *Kitching* (1872), L. R. 7 Q. B. 436, at p. 456; per Blackburn, J.

[4] Assumed in such cases as *Head* v. *Tattersall* and *Elphick* v. *Barnes*, supra, but not expressly stated.

sort which prevented the contract from being *perfecta emptio*, whenever that was occasioned by one of the parties being *in morâ*, and it was his default, he shall bear the risk just as if there was *emptio perfecta*. That is good sense and justice, though not necessary to the decision of the present case."[1]

The rule of the Civil law was *Mora debitoris non debet esse creditori damnosa*. Pothier, in discussing it, says: "If I sell you a horse, and make default in delivery, and it is struck by lightning in my stables, the loss falls on me, because the accident would not have happened if I had duly delivered the horse. But if the horse dies from a disease, which would have killed him in any case, I am not liable."[2] The distinction drawn by Pothier has been adopted by arts. 1302, 1303 of the French Civil Code.

When the seller remains in possession of the goods after the property in them has passed to the buyer, or when the buyer gets possession of the goods, before the property passes, as in the case of goods on trial, it seems clear the party in possession is in each case a bailee. But there appears to be no decision defining the nature of such bailment. Pothier has discussed the position of the seller at some length.[3] Until the time for delivery has arrived, he must use ordinary diligence in taking care of the thing sold. *In contractibus in quibus utriusque contrahentis utilitas versatur, levis culpa, non etiam levissima, præstatur.* But, if the buyer makes default in taking delivery, the seller is only liable for *dolus*, which includes *culpa lata* or gross negligence. See, too, French Civil Code, arts. 1136–1138.

Lord Blackburn's citation of the maxim *Res perit domino* is a little misleading as to the Roman law, because the law of sale formed an exception to the general rule. By Roman law the property in goods did not pass until delivery, but as soon as the parties were agreed on the specific article, and the price, there was an *emptio perfecta*. The risk, unless otherwise agreed, passed to the buyer though the property did not. *Cum autem emptio et venditio contracta sit periculum rei venditæ statim ad emptorem pertinet tametsi adhuc ea res emptori tradita non sit.*[4] The rule of Roman law was followed in Scotland, and it may be stated broadly that when the facts would shew a bargain and sale in England passing the property and risk, in Scotland the buyer acquired a *jus ad rem specificam*, though not the property, and

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[1] *Martineau* v. *Kitching* (1872), L. R. 7 Q. B., at pp. 454, 456.

[2] *Contrat de Vente*, No. 58; *cf.* Moyle's *Sale in the Civil Law*, p. 90.

[3] *Contrat de Vente*, Nos. 53–55; *cf.* Moyle's *Sale in the Civil Law*, p. 87.

[4] Moyle's *Justinian*, p. 420; Pothier, *Contrat de Vente*, Nos. 307–309.

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the risk would be in him. Thus by different routes English and Scotch law arrived at practically the same results.[1] The Act now lays down a uniform rule for both countries.

This section is supplemented by the special provisions of sects. 32 (2) (3) and 33, *post*, p. 65, which deal with particular cases; namely, goods sent by carriers by land or sea, and inevitable deterioration due to transit.

Accessories.

The converse of the rule *res perit domino* also holds good, and any fruits or increase of the thing sold belong to the party who has the property in it. "Any calamity befalling the goods after the sale is completed must be borne by the purchaser, and, by parity of reasoning, any benefit to them is his benefit, and not that of the vendor."[2]

Transfer of Title.

Sale by person not the owner.

21.—(1.) Subject to the provisions of this Act,[3] where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had,[4] unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.[5]

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

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[1] Bell's *Prin. Law of Scotland*, §§ 87, 88.

[2] *Sweeting* v. *Turner* (1871), L. R. 7 Q. B. 310, at p. 313, per Blackburn, J.; French Civil Code, arts. 1614, 1615; Dig. 19, 1, 13.

[3] See sects. 22 to 25, *post*, p. 51.

[4] For principle, see *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426, at pp. 435, 436, per Lord Blackburn. For illustrations, see *Cooper* v. *Willomatt* (1845), 1 C. B. 672; 14 L. J. C. P. 219; *Langton* v. *Higgins* (1859), 28 L. J. Ex. 252 (wrongful resale by seller in possession, which must henceforth be taken subject to s. 8 of the Factors Act, 1889); *Lee* v. *Bayes* (1856), 18 C. B. 599; 25 L. J. C. P. 249 (stolen goods sold by auction); the *Telegrafo* (1871), L. R. 3 P. C., at p. 685 (goods taken piratically); *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459 (goods obtained by fraud and resold); *cf.* Indian Contract Act, 1872, s. 108.

[5] *Pickard* v. *Sears* (1837), 6 A. & E. 469; *Gregg* v. *Wells* (1839), 10 A. & E. 90; *Freeman* v. *Cooke* (1848), 2 Exch. 654; 18 L. J. Ex. 114; *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660; *cf. Seton* v. *Lafone* (1887), 19 Q. B. D. 68, C. A.

(*a.*) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;[1]

(*b.*) The validity of any contract of sale under any special common law, or statutory, power of sale, or under the order of a court of competent jurisdiction.[2]

Sub-sect. (1). "The general rule of law," says Willes, J., "is undoubted, that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet.*"[3]

In a case under the Factors Act, 1842, Blackburn, J., says: "At common law a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt (sect. 22), and an apparent exception where the person in possession had a title defeasible on account of fraud (sect. 23, *post*, p. 52). But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shewn that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bonâ fide* to act on the faith of that apparent authority,

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[1] See the Factors Act, 1889, *post*, p. 118; and the Factors (Scotland) Act, *post*, p. 135; and see the Bills of Lading Act (18 & 19 Vict. c. 111); the Bankruptcy Act, 1883, s. 44 (reputed ownership), and for certain purposes the Bills of Sale Act, 1878; *cf.* Indian Contract Act, 1872, s. 108.

[2] As to pawnee, see *Martin* v. *Reid* (1862), 31 L. J. C. P. 126, at p. 128, per Willes, J.; *Pigot* v. *Cubley* (1864), 33 L. J. C. P. 134. As to distrainor, see Woodfall's *Landlord and Tenant*, 13th ed., pp. 479–481. As to sheriff, see *Doe* v. *Donston* (1818), 1 B. & Ald. 230 (sale after expiration of office); *cf. Batchelor* v. *Vyse* (1834), 4 M. & Sc. 552 (excessive sale); *Manders* v. *Williams* (1849), 4 Exch. 339; 18 L. J. Ex. 437 (goods on sale or return). As to master of ship, *Page* v. *Cowasjee* (1866), L. R. 1 P. C., at p. 144, and *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D., at p. 473. As to order of Court, see R. S. C. Or. L. rule 2. As to goods left with innkeeper, see 40 & 41 Vict. c. 38.

[3] *Whistler* v. *Forster* (1863), L. J. C. P. 162, at p. 164.

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from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited."[1]

Sale by person not the owner.

The rule of the civil law seems to have been in accord with the common law. *Nemo plus juris in alium transferre potest quam ipse habet;* or as Ulpian puts it, with special reference to the law of sale, *Rem alienam distrahere quem posse nulla dubitatio est nam emptio est et venditio; sed res emptori auferri potest.* See Pothier, *Contrat de Vente*, No. 7. By art. 1599 of the French Civil Code, "La vente de la chose d'autrui est nulle;" but this provision must be read subject to art. 2279, which provides that, "En fait de meubles possession vaut titre." There are special provisions about lost or stolen goods, but, with these exceptions, it seems that an innocent purchaser of goods is always protected.

Special power.

Sub-sect. (2). One person is sometimes invested by law with a special power to dispose of another person's property. For instance, a pawnbroker may sell unredeemed pledges; and a landlord, who has duly distrained for rent, may sell the goods so distrained. So, too, the master of a ship may, in case of necessity, dispose of the ship and cargo. See the authorities collected in the footnote to (2) (*b*), *ante*, p. 49.

Conflict of laws.

An English statute only operates in the United Kingdom, so sales in foreign countries are in general regulated by the law of the country where the sale takes place. Subject to certain qualifications, the rule is that if personal property be disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere. Thus where the master of a ship wrongfully sold the cargo by auction in Norway, but under such circumstances as to give a good title in Norway, the sale was held valid, although the cargo subsequently came to England.[2] *Locus regit actum* is a rule of wide application.

Joint owners.

By sect. 108 (2) of the Indian Contract Act, 1872, "If one of several joint-owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint-owner in good faith, and under

[1] *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, at p. 362; approved *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426, at pp. 435, 436 (reputed ownership); *cf. City Bank* v. *Barrow* (1880), 5 App. Cas., at p. 677, as to Roman and old French law, and Canadian law.

[2] *Cammell* v. *Sewell* (1860), 29 L. J. Ex. 350, Ex. Ch.; Westlake's *Private International Law*, 3rd ed., p. 181.

circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them." Probably, in England, a joint owner, in the absence of estoppel or authority from the other co-owners, could only transfer his own share.[1] Sect. 21.

22.—(1.) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.[2] Market overt.

(2.) Nothing in this section shall affect the law relating to the sale of horses.[3] Horses.

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

The rules of market overt do not apply in Scotland or the United States, and in England they only apply to a limited class of retail transactions. All shops in the city of London are market overt, for the purposes of their own trade, but a wharf in the city is not market overt,[4] and a sale by sample is not within the custom because the whole transaction must take place in the open market, and not merely the formation of the contract.[5] So, too, a sale of jewelry to a tradesman in his show-room is not within the custom.[6] Outside the city of London markets with the custom of market overt may exist either by grant or prescription, but it seems that the custom does not apply to a market established by a local Act.[7]

[1] *Cf. Ex p. Barnett, Re Tamplin* (1890), 7 Morrell, 70. As to partners, who *primâ facie* are agents for each other, see *Pollock on Partnership*, 5th ed., pp. 31, 32.

[2] *The Case of Market Overt* (1596), 5 Coke R. 83 b; Tudor's *Merc. Cases*, 3rd ed., p. 274, and notes; *Crane* v. *London Dock Co.* (1864), 33 L. J. Q. B. 224; see per Blackburn, J., at p. 229, as to the usage of the market; *Benjamin on Sale*, 4th ed., p. 9; *cf. Vilmont* v. *Bentley* (1886), 18 Q. B. D. 322, at p. 331.

[3] See the 2 & 3 Phil. & Mar. c. 7, and 31 Eliz. c. 12, set out, *post*, p. 136; also *Moran* v. *Pitt* (1873), 42 L. J. Q. B. 47. The practical effect of these Acts is to take horses out of the rule as to market overt.

[4] *Wilkinson* v. *King* (1809), 2 Camp. 335.

[5] *Crane* v. *London Dock Co.* (1864), 33 L. J. Q. B. 224.

[6] *Hargreave* v. *Spink* (1891), 1 Q. B. 25.

[7] *Cf. Moyce* v. *Newington* (1878), 4 Q. B. D., at p. 34, per Cockburn, C.J.; and see *Lee* v. *Bayes* (1856), 18 C. B. 599; 25 L. J. C. P. 249 (sale by auction at horse repository).

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Sect. 24 is not in the nature of an exception or proviso to this section. When stolen goods are sold in market overt, the property passes to the buyer, though on the conviction of the thief the property revests in the original owner by force of the statute (24 & 25 Vict. c. 96, s. 100). Hence an intermediate purchaser incurs no liability;[1] so, again, the buyer who is dispossessed cannot charge for the keep of the goods, for they were his own till the statute revested them in the original owner.[2]

Sale under voidable title.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.[3]

See "good faith" defined by sect. 62, *post*, p. 115. Many of the cases covered by this section would also fall within sect. 25, *post*, p. 54.

Where goods have been obtained by means amounting to larceny, the thief has no title, and can give none, except by selling in market overt; but where goods have been obtained by fraud the person who has so obtained them may either have no title at all, or a voidable title, according to the nature of the transaction. If the nature of the fraud be such that there never was a contract between the parties, as, for instance, if A. obtains goods from B. by falsely pretending to be X., then the person who so obtains the goods has no title at all and can give none.[4]

But if the person defrauded really intended to part with the property in, and possession of the goods, although induced to do so by fraud, there is a contract which he may affirm or disaffirm at his election.[5] Hence, the person who obtains the goods has a voidable

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[1] *Horwood* v. *Smith* (1788), 2 T. R. 750; *cf. Vilmont* v. *Bentley* (1886), 18 Q. B. D. 322, at p. 331.

[2] *Walker* v. *Matthews* (1881), 8 Q. B. D. 109.

[3] *White* v. *Garden* (1851), 10 C. B. 919; 20 L. J. C. P. 166; *Kingsford* v. *Merry* (1856), 25 L. J. Ex. 166, reversed on another ground, 26 L. J. Ex. 83; *Pease* v. *Gloahec* (1866), L. R. 1 P. C. 219, at pp. 229, 230; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, at p. 464, per Lord Cairns; *Pollock on Possession*, pp. 203, 204.

[4] *Higgons* v. *Burton* (1857), 26 L. J. Ex. 342; *Hardman* v. *Booth* (1863), 32 L. J. Ex. 105; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; *Pollock on Possession*, p. 111; *Ex p. Barnett* (1876), 3 Ch. D. 123.

[5] *Clough* v. *Lond. and N. W. Railway* (1871), L. R. 7 Ex. 26.

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title, and can give a good title to an innocent purchaser while the matter is in suspense. "If," says Lord Cairns, "the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, then the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it, and set it aside."[1]

Revesting of property in stolen, &c., goods on conviction of offender. [Cf. 24 & 25 Vict. c. 96. s. 100, *post*, p. 152.]

24.—(1.) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt, or otherwise.[2]

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

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

The rule, that on the conviction of the thief the property in stolen goods revested in the original owner, is as old as the 21 Hen. VIII. c. 11, which was perhaps declaratory. The effect of sect. 100 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), was to extend the rule to all offences under that Act. The operation of the extended rule to cases where goods had been obtained by false pretences, but under a *de facto* contract, was anomalous, and was regretted by the Lords in *Bentley* v. *Vilmont*.[3] Sub-sect. (2) was accordingly introduced as

[1] *Cundy* v. *Lindsay* (1878), 3 App. Cas., at p. 464.

[2] *Benjamin on Sale*, 4th ed., pp. 11, 12; Stone's *Justices' Manual*, 24th ed., p. 782; *Horwood* v. *Smith* (1788), 2 T. R. 750; *Scattergood* v. *Sylvester* (1850), 15 Q. B. 506; 19 L. J. Q. B. 447.

[3] *Vilmont* v. *Bentley* (1886), 18 Q. B. D. 322, C. A.; affirmed *Bentley* v.

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an amendment in Committee. Its effect is to restore the old state of the law and to override sect. 100 of the Larceny Act, 1861, so far as it relates to offences other than offences amounting to larceny.

Sect. 100 of the Larceny Act, 1861 (*post*, p. 152), enables the convicting Court to make an order for restitution; but, as the effect of the statute is to revest the property, the original owner has his ordinary legal remedies without resorting to this special one.

It is to be noted that the rule laid down in this section is not strictly an exception to the rule laid down in sect. 22 (*ante*, p. 51). By a sale in market overt, the property in the goods really vests in the buyer, though on conviction of the offender it revests in the original owner by force of the statute. Hence, if the goods pass through several hands, intermediate parties are not guilty of a conversion.

By art. 2279 of the French Civil Code, lost or stolen goods may be recovered by the true owner at any time within three years, but by art. 2280, if the actual possessor obtained them at a public auction or by a sale in the ordinary course of business, the original owner can only get them back on paying the possessor the sum he gave for them.

Seller in possession after sale. [52 & 53 Vict. c. 45. s. 8.]

25.—(1.) Where a person, having sold goods, continues, or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Buyer in possession. [52 & 53 Vict. c. 45. s. 9.]

(2.) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title,

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Vilmont (1887), 12 App. Cas. 471, overruling *Moyce* v. *Newington* (1878), 4 Q. B. D. 32.

under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. Sect. 25.

(3.) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

By sect. 62, *post*, p. 111, "Factors Acts" mean the Factors Act, 1889, and the Factors (Scotland) Act, 1890, which are set out, *post*, p. 118, and "document of title" has the same meaning as in those Acts. For definitions of "document of title" and "mercantile agent" by the Factors Acts, see *post*, pp. 119, 121.

This section reproduces, with a slight modification, sects. 8 and 9 of the Factors Act, 1889, which came into operation on the 1st of January, 1890. See *post*, p. 128, where the effect of these provisions is considered.

As regards questions arising before the 1st of January, 1890, see sects. 3 and 4 of the Factors Act, 1877 (40 & 41 Vict. c. 39), which were more limited in their scope, inasmuch as they referred only to dealings with the documents of title to goods, and not to dealings with the goods themselves.

It was originally intended to repeal the sections which are here reproduced, but they were omitted from the repeals at a late stage for consultation with the draftsman of the Factors Act. If not wanted they can be repealed by a Statute Law Revision Act.

Effect of writs of execution. [29 Car. 2, c. 3. s. 15.]

26.—(1.) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to

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[19 & 20 Vict. c. 97. s. 1.]

such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2.) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

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

The first paragraph of this section reproduces sect. 15 of the Statute of Frauds with the addition that the sheriff is required to indorse the *hour* on the writ, but this accords with the practice. The second paragraph reproduces sect. 1 of the Mercantile Law Amendment Act, 1856. Both these enactments are now repealed.

Sect. 1 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), was in the nature of a proviso to sect. 15 of the Statute of Frauds.[1] It was enacted to carry out a recommendation of the Mercantile Law Commission, 1855, and to assimilate English to Scotch law in this respect. See Second Report, p. 8.

It has been held that the words, "shall bind the property in the goods," do not prevent the property from passing by the sale, but constitute the execution a charge upon the goods.[2]

Compare the definition of sheriff given by sect. 168 of the Bankruptcy Act, 1883, and see the saving for the bankruptcy laws, *post*, p. 108.

[1] Sect. 15 of the Revised Edition is commonly cited as sect. 16.

[2] *Woodland* v. *Fuller* (1840), 11 A. & E. 849; see at p. 867.

PART III.

Performance of the Contract.

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Duties of seller and buyer.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.[1]

See "delivery" defined, *post*, p. 109. "In every contract of sale," says Watson, B., "there is involved a contract on the one side to accept, and on the other to deliver." "If," says Martin, B., in the same case, "one buys goods of another in the possession of a third party, the vendor undertakes that they shall be delivered in a reasonable time. . . . If I buy a horse of you in another man's field, it is part of the contract that if I go for the horse I shall have it."[2] The general obligation to deliver may, however, be modified by the terms of the contract. As Lord Blackburn says, there is no rule of law to prevent the parties from making whatever bargain they please.[3] Thus, where the seller gives the buyer a delivery order for the goods it may be a condition that the order should be given up to the warehouseman before the buyer can get the goods.[4] Again, a man with his eyes open may buy the chance of obtaining goods and not the goods themselves: see sect. 5 (2), *ante*, p. 15 (sale of expectancy), and sect. 12, *ante*, p. 25 (warranty of title). French

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[1] *Buddle* v. *Green* (1857), 27 L. J. Ex. 33; *Woolfe* v. *Horne* (1877), 2 Q. B. D. 355 (sale by auction); French Civil Code, arts. 1603, 1650.

[2] *Buddle* v. *Green*, supra; *cf.* *Wood* v. *Baxter* (1883), 49 L. T. N.S. 45.

[3] *Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B., at p. 328. See the passage cited at length, *post*, p. 180; and see per Lord Esher in *Honck* v. *Muller* (1881), 7 Q. B. D., at p. 103, C. A.

[4] *Bartlett* v. *Holmes* (1853), 22 L. J. C. P. 182; see, too, *Salter* v. *Woollams* (1841), 2 M. & Gr. 650, as explained in *Benjamin on Sale*, 4th ed., p. 683; *Bagueley* v. *Hawley* (1867), L. R. 2 C. P. 625, which is of doubtful authority.

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law, like Civil Law, puts a stricter interpretation on the general obligation of the seller to deliver than English law does.[1] Whether the seller be the owner of the goods or not, he is bound to deliver. *Hactenus tenetur ut rem emptori habere liceat, non etiam ut ejus faciat.*

Payment and delivery are concurrent conditions.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.[2]

"Where goods are sold," says Bayley, J., "and nothing is said as to the time of delivery or the time of payment . . . the seller is liable to deliver them whenever they are demanded upon payment of the price, but the buyer has no right to have possession of the goods till he pays the price. . . . If goods are sold *on credit*, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property at once vest in him. But the right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession."[3] The language of Bayley, J., might be taken to imply that in cash sales payment was a condition precedent to delivery, but a reference to the cases cited in the foot-note to the section shews that payment and delivery have always been considered concurrent conditions.

Evidence.

In an action for non-delivery, it seems the buyer need not give evidence that he was ready and willing to pay, till the seller shews he was ready to deliver.[4] Conversely, in an action for non-acceptance,

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[1] Pothier, *Contrat de Vente*, Nos. 42-48; French Civil Code, arts. 1603, *et seq.*

[2] *Morton* v. *Lamb* (1797), 7 T. R. 125; *Rawson* v. *Johnson* (1801), 1 East, 201; *Wilks* v. *Atkinson* (1815), 1 Marshall, 412; *Pickford* v. *Grand Junction Railway* (1841), 8 M. & W., at p. 378; *cf. Bussey* v. *Barnett* (1842), 9 M. & W. 312; *Bankart* v. *Bowers* (1866), L. R. 1 C. P. 484; *Paynter* v. *James* (1867), L. R. 2 C. P.

[3] *Bloxam* v. *Sanders* (1825), 4 B. & C. 941, at p. 948; *cf. Chinery* v. *Viall* (1860), 29 L. J. Ex., at p. 183, as to credit sales.

[4] *Wilks* v. *Atkinson* (1815), 1 Marshall, 412. "The averment of the plaintiff's readiness and willingness to perform his part of the contract will be proved by shewing that he called on the defendant to accomplish his part." Notes to *Cutter* v. *Powell*, 2 Smith, L. C., 9th ed., p. 18.

the seller need not prove any tender of delivery. It is enough to shew that he was ready and willing to deliver.[1] Sect. 28.

Where shares were sold, under a written contract, to be paid for at a future day, it was held that evidence might be received of a trade usage not to deliver till payment.[2] On the other hand, where there was a contract in writing for the sale of hops at so much per cwt., evidence of a course of dealing between the parties to allow six months' credit was rejected.[3] It is easier to draw imaginary distinctions between these cases than to harmonise the principles on which they rest.

Rules as to delivery.

29.—(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2.) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.[4]

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on

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[1] *Jackson* v. *Allaway* (1844), 6 M. & Gr. 942; *Baker* v. *Firminger* (1859), 28 L. J. Ex. 130.

[2] *Field* v. *Lelean* (1861), 30 L. J. Ex. 168, Ex. Ch.; overruling as to usage, *Spartali* v. *Benecke* (1850), 10 C. B. 212; 19 L. J. C. P. 293.

[3] *Ford* v. *Yates* (1841), 2 M. & Gr. 549, as explained, *Lockett* v. *Nicklin* (1848), 2 Exch. 93; 19 L. J. Ex. 403.

[4] *Ellis* v. *Thompson* (1838), 3 M. & W. 445, see at p. 456, per Alderson, B.

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his behalf;[1] provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.[2]

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour.[3] What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

See "delivery" defined by sect. 62, *post*, p. 109, and "specific goods," *post*, p. 114, and "deliverable state," *post*, p. 116. As to negativing implied terms, see sect. 55, *post*, p. 103.

The delivery of the key of the place where the goods are may, by agreement, operate as a delivery of the goods.[4]

Place of delivery.

Sub-sect. (1.) This sub-section was much considered and several times altered in Committee. The first part deals incidentally with the mode of delivery, and the second part with the place of delivery. As regards mode of delivery there was very little authority, but the assumed rule was, that it was for the buyer to take delivery, and that in the absence of any different agreement, the duty of the seller to deliver was satisfied by his affording to the buyer reasonable facilities for taking possession of the goods at the agreed place of delivery.[5] It seems a pity that a more definite *primâ facie* rule has not been laid down by the Act.

As regards place of delivery, there was no authority in point, and

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[1] *Farina* v. *Home* (1846), 16 M. & W. 119 (see at p. 123); *Godts* v. *Rose* (1855), 17 C. B. 229; 25 L. J. C. P. 61; *Buddle* v. *Green* (1857), 27 L. J. Ex. 33; *Pollock on Possession*, p. 73.

[2] See the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), *post*, p. 149; and the Factors Act, 1889, *post*, p. 118; and sects. 25 and 47.

[3] *Startup* v. *Macdonald* (1843), 6 M. & Gr. 593 Ex. Ch.

[4] *Ellis* v. *Hunt* (1789), 3 T. R. 464; *Chaplin* v. *Rogers* (1800), 1 East, 192; *Elmore* v. *Stone* (1809), 1 Taunt. 458; *cf. Ancona* v. *Rogers* (1876), 1 Ex. D. 285, at p. 290, C. A. See *Milgate* v. *Kebble* (1841), 3 M. & Gr. 100 (delivery of key not delivery of goods); and see the whole question of so-called symbolic delivery discussed in *Pollock on Possession*, pp. 61–70; *cf.* French Civil Code, art. 1606; and see *post*, p. 110.

[5] *Cf. Wood* v. *Tassell* (1844), 6 Q. B. 234; *Smith* v. *Chance* (1822), 2 B. & Ald., at p. 755; *Salter* v. *Woollams* (1841), 2 M. & Gr. 650, as explained, *Benjamin on Sale*, 4th ed., p. 683.

text writers seem to have followed Pothier, who says, "S'il n'y a point de lieu exprimé, la livraison doit se faire au lieu où est la chose; c'est à l'acheteur de l'envoyer chercher."[1] The Act adopts a rule which is more in accordance with ordinary practice, and which in substance is the rule laid down by Art. 342 of the German Commercial Code. Sect. 29.

Sub-sect. (2.) In a contract for goods to be delivered "as required," the buyer must require delivery within a reasonable time, but the seller cannot rescind the contract on the ground of delay without giving the buyer notice. "No doubt," says Pollock, C.B., "where a contract is silent as to time, the law implies that it is to be performed within a reasonable time; but there is another maxim of law, viz., that *every reasonable condition is also implied*, and it seems to me reasonable that the party who seeks to put an end to a contract, because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them."[2] Delivery as required.

Sub-sect. (3.) As regards documents of title, the common law drew a hard and fast distinction between bills of lading and other documents. The lawful transfer of a bill of lading was always held to operate as a delivery of the goods themselves, because, while goods were at sea they could not be otherwise dealt with.[3] But the transfer of a delivery order or dock warrant operated only as a token of authority to take possession, and not as a transfer of possession;[4] and, as between immediate parties, there is nothing to modify the common law rule. If, however, a buyer or mercantile agent, who is lawfully in possession of any document of title to goods, transfers it for value to a third person, the original seller's rights of lien and stoppage *in transitu* are thereby defeated (see Factors Act, 1889, *post*, p. 118, and sects. 25 and 47 of this Act). Goods in possession of third person.

Sub-sect. (4.) This sub-section alters the law in so far as it makes the question what is a reasonable hour a question of fact. It was formerly a question of law, and some highly technical rules for determining it were laid down by Lord Wensleydale.[5] Hours for delivery.

Sub-sect. (5.) This is declaratory. "There is no implied contract," says Story, "that the vendee shall pay the vendor for any services in Expenses of delivery.

[1] *Contrat de Vente*, No. 52; and see French Civil Code, art. 1609.

[2] *Jones* v. *Gibbons* (1853), 8 Exch. 920, at p. 922.

[3] *Sanders* v. *Maclean* (1883), 11 Q. B. D., at p. 341, per Bowen, L.J., and notes to *Lickbarrow* v. *Mason*, 1 Smith Lead. Cas., 9th ed., p. 737.

[4] *Blackburn on Sale*, p. 302; *M'Ewan* v. *Smith* (1849), 2 H. L. Cas. 309.

[5] *Startup* v. *Macdonald* (1843), 6 M. & Gr. 593 Ex. Ch.

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relation to the property rendered previous to the completion of the sale by delivery."[1] The rule seems a general one. By art. 1608 of the French Civil Code, "Les frais de la délivrance sont à la charge du vendeur, et ceux de l'enlèvement à la charge de l'acheteur, s'il n'y a eu stipulation contraire."

Delivery of wrong quantity.

30.—(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.[2]

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.[3]

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.[4]

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

As the seller does not fulfil his contract by delivering a less quantity than he contracted to sell, so, conversely, "if a man contracts

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[1] *Story on Sale*, § 297*a*.

[2] *Shipton* v. *Casson* (1826), 5 B. & C. 378, at p. 382 (bark); *Oxendale* v. *Wetherell* (1829), 4 Man & Ry. 429 (250 bushels of wheat), approved, *Colonial Ins. Co.* v. *Adelaide Ins. Co.* (1886), 12 App. Cas., at p. 138; *Morgan* v. *Gath* (1865), 34 L. J. Ex. 165 (500 piculs China cotton).

[3] *Hart* v. *Mills* (1846), 15 M. & W. 85 (two dozen of port); *Cunliffe* v. *Harrison* (1851), 6 Exch. 903; 20 L. J. Ex. 325; *cf. Dixon* v. *Fletcher* (1837), 3 M. & W. 146 (cotton), and cases in next note.

[4] *Cf. Levy* v. *Green* (1859), 28 L. J. Q. B. 319, Ex. Ch.; *cf. Nicholson* v. *Bradfield Union* (1866), L. R. 1 Q. B., at pp. 624, 625, per Ld. Blackburn

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to buy 150 quarters of wheat, he is not at liberty to call for a small portion without being prepared to receive the whole quantity,"[1] unless, of course, he has stipulated for so doing.

When the seller delivers a larger quantity of goods than was ordered, such delivery operates as a proposal for a new contract.[2] This, presumably, is the effect of any tender of goods which are not in conformity with the contract.

When the seller is uncertain as to the exact amount he can deliver, he may protect himself by using such terms as "about" so many tons, or so many tons "more or less," and he is then allowed a reasonable margin.[3] Sub-sect. (3) was amended in Committee.

Instalment deliveries.

31.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.[4]

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.[5]

Sub-sect. (1.) "Suppose," says Lord Bramwell, "a man orders a suit of clothes, the price being £7; £4 for the coat, £2 for the trousers,

[1] *Kingdom* v. *Cox* (1848), 5 C. B. 522, at p. 526, per Wilde, C.J. (iron girders).

[2] *Cunliffe* v. *Harrison* (1851), 6 Exch., at p. 906, per Parke, B. (10 hogsheads of claret).

[3] *Cockerell* v. *Aucompte* (1857), 26 L. J. C. P. 194; *McConnell* v. *Murphy* (1873), L. R. 5 P. C. 203. As to importing such a term by usage, see *Moore* v. *Campbell* (1854), 10 Exch. 323; 23 L. J. Ex. 310 (100 tons of hemp); and see p. 178.

[4] *Reuter* v. *Sala* (1879), 4 C. P. D. 239, C. A. (25 tons of pepper). Nor can he demand it; see note to last section.

[5] *Mersey Steel & Iron Co.* v. *Naylor & Co.* (1884), 9 App. Cas. 434.

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and £1 for the waistcoat, can he be made to take the coat only, whether they were all to be delivered together, or the trousers and waistcoat first?" and he then proceeds to shew that this cannot be.[1] On the other hand, the circumstances of a contract may be such that an agreement for delivery by instalments will be implied. "In many cases of contracts to supply a quantity of goods to be delivered within a fixed period the whole quantity cannot, from the very nature of the case, be delivered at one time," as, for instance, in the case of contracts for the supply of provisions for the army and navy.[2]

Sub-sect. (2.) It is very difficult to reconcile the decisions in which it has been held that the refusal to deliver, accept, or pay for a particular instalment, is a breach going to the root of the contract[3] with those in which the contrary has been held.[4] But the true principle is that each case must be judged on its own merits. "The rule of law," says Lord Blackburn, "is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'"[5]

Delivery to carrier.

32.—(1.) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is primâ facie deemed to be a delivery of the goods to the buyer.[6]

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[1] *Honck* v. *Muller* (1881), 7 Q. B. D. 92, at p. 99, C. A.

[2] *Colonial Ins. Co. of New Zealand* v. *Adelaide Ins. Co.* (1886), 12 App. Cas., at pp. 138, 139, P. C.

[3] See *Withers* v. *Reynolds* (1831), 2 B. & Ad. 882; *Hoare* v. *Rennie* (1859), 29 L. J. Ex. 73; *Honck* v. *Muller* (1881), 7 Q. B. D. 92, C. A.

[4] See *Jonassohn* v. *Young* (1863), 32 L. J. Q. B. 385; *Simpson* v. *Crippin* (1872), L. R. 8 Q. B. 14; *Freeth* v. *Burr* (1874), L. R. 9 C. P. 208.

[5] *Mersey Steel Co.* v. *Naylor & Co.* (1884), 9 App. Cas., at p. 443; and see per Jessel, M.R., in court below, 9 Q. B. D., at p. 657.

[6] For statement of principle, see *Wait* v. *Baker* (1848), 2 Exch. 1, at p. 7, per Parke, B.; *Dunlop* v. *Lambert* (1839), 6 Cl. & F. 600, at p. 620, per Ld. Cottenham; *Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B., at p. 328, per Blackburn, J. For illustrations, see *Dutton* v. *Solomonson* (1803), 3 B. & P. 582 (carrier by land); *Bryans* v. *Nix* (1839), 4 M. & W. 775 (canal boat); *Alexander* v. *Gardner* (1835), 1 Bing N. C. 671 (ship);

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(2.) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself,[1] or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

Effect of delivery to carrier.

Sub-sect. (1.) The rule that delivery of goods to a carrier is *primâ facie* delivery to the buyer, passing to him the property and the risk, if they have not passed before, is the natural complement of the rule that *primâ facie* the proper place for delivery is the seller's abode, or the place where the goods are at the time of sale, *ante*, p. 59.

It is to be noted that, though the carrier is ordinarily the agent of the buyer to receive the goods, he is not his agent to accept them; and this is reasonable, for he cannot judge whether the goods are in conformity with the contract or not; so, too, while the goods are in the hands of a carrier, as such they are liable to be stopped *in transitu*, *post*, p. 81; and of course they may be delivered to the carrier on such terms as to make him the seller's agent, *ante*, p. 44. When goods are sent "carriage forward" it is strong evidence that the delivery to the carrier was intended as a delivery to the buyer.

Seller's duty.

Sub-sect. (2.) "Delivery of goods to a carrier or wharfinger," says Lord Ellenborough, "with due care and diligence is sufficient to

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Ex p. Pearson (1868), L. R. 3 Ch. App. 443 (railway); *Bell on Sale* (Scotland), p. 86.

[1] *Clarke* v. *Hutchins* (1811), 14 East, 475; *Buckman* v. *Levi* (1813), 3 Camp. 414; Indian Contract Act, 1872, § 91; *Story on Sale*, § 305.

[2] *Hanson* v. *Armitage* (1822), 5 B. & Ald. 557; *Norman* v. *Phillips* (1845), 14 M. & W. 277; *Meredith* v. *Meigh* (1853), 2 E. & B. 364.

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charge the purchaser, but he has a right to require that in making this delivery due care and diligence shall be exercised by the seller."[1]

Sea transit.

Sub-sect. (3.) As regards goods sent by sea, Mr. Bell, summing up the Scotch cases, says: "In delivering goods on ship board, the seller is bound not only to charge the ship-master or shipping company with them effectually, but, though not bound to insure, he must give such notice as to enable the buyer to insure."[2] There appears to be no English decision in point, but the Scotch rule is good sense and has been adopted by the Act. Where goods are forwarded by sea by an agent to his principal, it seems to be the duty of the agent to insure, in the absence of any different agreement or course of dealing.[3]

Risk where goods are delivered at distant place.

33. Where the seller of goods agrees to deliver them, at his own risk, at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.[4]

"A manufacturer," says Alderson, B., "who contracts to deliver a manufactured article at a distant place, must indeed stand the risk of any extraordinary or unusual deterioration; but the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other."[5] There appeared to be no reason for confining the rule to the case of a manufacturer, nor is it inconsistent with the case of *Beer* v. *Walker*,[6] where the buyer was held entitled to reject rabbits which arrived in Brighton in an unsaleable condition, though they were saleable when sent off from London. In the case of goods such as rabbits, they are not really merchantable when sent off by the seller unless they are in such condition as to continue saleable for a reasonable time. As to negativing implied terms, see sect. 55.

Buyer's right of examining the goods.

34.—(1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a

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[1] *Buckman* v. *Levi* (1813), 3 Camp. 414. [2] *Law of Sale*, p. 89.

[3] *Smith* v. *Lascelles* (1788), 1 R. R. 457.

[4] *Bull* v. *Robison* (1854), 10 Exch. 342; 24 L. J. Ex. 165; *Benjamin on Sale*, 4th ed., p. 656.

[5] *Bull* v. *Robison* (1854), 10 Exch., at p. 346.

[6] *Beer* v. *Walker* (1877), 46 L. J. C. P. 677.

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reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.[1]

(2.) Unless otherwise agreed,[2] when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.[3]

"Suppose," says Lord Bramwell, "I order a certain quantity of lime to be taken to a farm, and I am not there to object, and nobody else is there to object to it, I shall not be at liberty afterwards to say: 'Those goods have not been accepted and received by me;' they have been as much as it was possible, unless I had chosen to be there to make objection. So, on the other hand, if I go to a shop for an article I have previously ordered, and it is delivered to me, wrapped up, though I cannot see what it is, there cannot be the slightest question that I have received and accepted the goods, if they turn out to be in conformity with the order; yet nobody can say that I shall not have a right to object to them afterwards, if they are not in conformity with the contract."[4] As to negativing implied terms, see sect. 55, *post*, p. 103.

Where goods are bought by sample, the place of delivery is *primâ facie* the place of examination.[5]

Acceptance.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them,[6] or when the goods have been delivered to him,

[1] *Lorymer* v. *Smith* (1822), 1 B. & C. 1; *Toulmin* v. *Hedley* (1845), 2 C. & K. 157, see p. 160; *cf. Hunt* v. *Hecht* (1853), 8 Exch. 814, at p. 817; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438, at p. 456, per Brett, J. As to waiver of inspection, see *Castle* v. *Sworder* (1861), 30 L. J. Ex., at p. 312.

[2] *Pettitt* v. *Mitchell* (1842), 4 M. & Gr. 819.

[3] *Isherwood* v. *Whitmore* (1843), 11 M. & W. 347, see at p. 350, and S.C. on demurrer, 10 M. & W. 757 (goods in closed casks). *Cf. Startup* v. *Macdonald* (1845), 6 M. & Gr., at p. 610, per Rolfe, B.

[4] *Castle* v. *Sworder* (1860), 29 L. J. Ex. 235, at p. 238. See S.C. 30 L. J. Ex., at p. 312, Ex. Ch.

[5] *Perkins* v. *Bell* (1893), 1 Q. B. 193, C. A. (barley bought by sample).

[6] *Saunders* v. *Topp* (1849), 4 Exch. 390, 18 L. J. Ex. 374.

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and he does any act in relation to them which is inconsistent with the ownership of the seller,[1] or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.[2]

The question of acceptance is only material where there is a right to reject. Most of the numerous decisions relating to acceptance have arisen on the construction of the Statute of Frauds.[3] They must be looked at critically, because it is now well settled that there may be an acceptance within the meaning of that statute, which is not an acceptance in performance of the contract. For the purposes of the statute (now reproduced in sect. 4 of the Act, *ante*, p. 13), any dealing with the goods which recognises a pre-existing contract of sale is an acceptance; but such an acceptance may not be finally binding on the buyer, precluding him from rejecting the goods.[4] For example, "the purchaser has [may have] a right to object that the bulk does not correspond with the sample after acceptance within the Statute of Frauds."[5]

The right of rejecting goods as not being in conformity with the contract appears to be larger in Scotland than in England. It seems that in Scotland a buyer may reject goods which he has accepted if he do so "timeously," whereas in England he could only do so if the contract contained what the continental lawyers call a "resolutive condition."[6]

Conditional acceptance.

Goods may, of course, by arrangement, be accepted conditionally and the acceptance may in such case be withdrawn on failure of the condition.[7] A re-sale by the buyer is strong evidence of acceptance, but may not be conclusive.

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[1] *Parker* v. *Palmer* (1821), 4 B. & Ald. 387; *Chapman* v. *Morton* (1843), 11 M. & W. 534; *Harnor* v. *Groves* (1855), 15 C. B. 667.

[2] *Sanders* v. *Jameson* (1848), 2 C. & K. 557; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P., at pp. 451, 452, reviewing the cases. See, too, the cases on "sale or return," *ante*, p. 39.

[3] See *Benjamin on Sale*, 4th ed., pp. 134–169.

[4] *Page* v. *Morgan* (1885), 15 Q. B. D. 228, C. A.; *Benjamin on Sale*, 4th ed., pp. 140–150.

[5] *Morton* v. *Tibbett* (1850), 15 Q. B., at p. 431.

[6] *Couston* v. *Chapman* (1872), L. R. 2 Sc. App., at p. 254. For resolutive conditions, see *Lamond* v. *Davall* (1847), 9 Q. B. 1030; *Head* v. *Tattersall* (1871), L. R. 7 Ex. 7.

[7] *Lucy* v. *Mouflet* (1860), 29 L. J. Ex. 110; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438.

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Buyer not bound to return rejected goods.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.[1]

The buyer, says Lord Esher, may return the goods, or offer to return them, if not according to contract; but it is sufficient to signify his rejection of them by stating that they are not according to contract, and that they are at the vendor's risk. No particular form is essential. It is sufficient if he does any unequivocal act shewing that he rejects them.[2]

Liability of buyer for neglecting or refusing delivery of goods.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods.[3] Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.[4]

Conversely, if the seller is in default in making delivery, and the buyer, notwithstanding the delay, accepts the goods, he may recover damages for any loss occasioned by the delay, *post*, p. 96.

When the seller holds the goods in the exercise of his right of lien, he cannot charge for expenses of keeping them, *post*, p. 75.

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[1] *Grimoldby* v. *Wells* (1875), L. R. 10 C. P. 391; *Benjamin on Sale*, 4th ed., p. 649; as to the place of rejection, see *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438, at p. 456, per Brett, J.

[2] *Grimoldby* v. *Wells* (1875), L. R. 10 C. P., at p. 395, per Brett, J.

[3] *Greaves* v. *Ashlin* (1813), 3 Camp. 425; *cf. Bloxam* v. *Sanders* (1825) 4 B. & C. 941, at p. 950; *Mayne on Damages*, 4th ed., p. 165. As to the converse case, where the buyer properly rejects goods and the seller refuses to take them back, see *Caswell* v. *Coare* (1809), 1 Taunt. 566; *Chesterman* v. *Lamb* (1834), 2 A. & E. 129.

[4] *Cf. Mersey Steel Co.* v. *Naylor & Co.* (1884), 9 App. Cas., at p. 443.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Sect. 38.

Unpaid seller defined.

38.—(1.) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(*a.*) When the whole of the price has not been paid or tendered;[1]

(*b.*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.[2]

(2.) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed,[3] or a consignor or agent who has himself paid, or is directly responsible for, the price.[4]

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[1] *Hodgson* v. *Loy* (1797), 7 T. R. 440; *Feise* v. *Wray* (1802), 3 East, 93, at p. 102; *Van Casteel* v. *Booker* (1848), 2 Exch. 691, at pp. 702, 709; *Ex p. Chalmers* (1873), L. R. 8 Ch. App. 289 (severable contract). As to tender after the appointed day, see *Martindale* v. *Smith* (1841), 1 Q. B. 389.

[2] *Feise* v. *Wray* (1802), 3 East, 93; *Griffiths* v. *Perry* (1859), 28 L. J. Q. B. 204; *Ex p. Lambton* (1875), L. R. 10 Ch. App., at p. 415; *Gunn* v. *Bolckow, Vaughan & Co.* (1875), L. R. 10 Ch. App. 491, at p. 501; *cf. Ex p. Stapleton* (1879), 10 Ch. D. 586, C. A. Whether a bill is given in absolute or conditional payment is a question of fact, *Goldshede* v. *Cottrell* (1836), 2 M. & W. 20.

[3] *Morison* v. *Gray* (1824), 2 Bing. 260. See, too, the Bills of Lading Act, 1855.

[4] *Feise* v. *Wray* (1802), 3 East, 93; *Tucker* v. *Humphrey* (1828), 4 Bing. 516; *cf. Ireland* v. *Livingston* (1872), L. R. 5 H. L., at pp. 408, 409, per Blackburn, J.

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Sub-sect. (1.) In a case where the seller had discounted the buyer's acceptances, but the latter failed before the bills matured, it was held that the seller was unpaid, and Mellish, L.J., says, "If the bill is dishonoured before delivery of the goods has been made, then the vendor's lien revives, *or*, if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser." [1]

Sub-sect. (2.) The Courts shew a strong inclination to give the rights of an unpaid seller against the goods to any one whose position can be shewn to be substantially analogous to that of an ordinary seller.[2]

Unpaid seller's rights.

39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf,[3] notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(*a.*) A lien on the goods [or right to retain them] for the price while he is in possession of them;

(*b.*) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(*c.*) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

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[1] *Gunn* v. *Bolckow, Vaughan & Co.* (1875), L. R. 10 Ch. App., at p. 501, overruling on this point, it seems, *Bunney* v. *Poyntz* (1833), 4 B. & Ad. 568.

[2] *Cf. Cassaboglou* v. *Gibb* (1883), 11 Q. B. D., at p. 804, per Lord Esher; and, for examples, see *Jenkyns* v. *Usborne* (1844), 7 M. & Gr. 678, at p. 698 (re-sale by party who had contracted to buy goods); *Imperial Bank* v. *Lond. & St. Katharine Dock Co.* (1877), 5 Ch. D. 195 (surety who has paid the price); *Benjamin on Sale* 4th ed., p. 847.

[3] See sect. 47, *post*, p. 85, and the Factors Act, *post*, p. 130.

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By sect. 62, *post*, p. 112, "lien" in Scotland includes right of retention. The words "or right to retain them" were inserted when the Bill was extended to Scotland. As to negativing implied terms, see sect. 55.

Sub-sect. (1.) The origin of the seller's lien in English law is doubtful. It is probably founded on the custom of merchants.[1] The term "lien" is unfortunate, because the seller's rights, arising out of his original ownership, in all cases exceed a mere lien. They "perhaps come nearer to the rights of a pawnee with a power of sale than to any other common law rights."[2]

Many of the cases fail to distinguish the seller's right of lien from his right of stoppage *in transitu*. But it is important to keep them distinct, because, though the rights are analogous, they are in certain respects governed by different considerations.[3] The seller's lien attaches when the buyer is in default, whether he be solvent or insolvent. The right of stoppage *in transitu* only arises when the buyer is insolvent. Moreover, it does not arise until the seller's lien is gone, for it presupposes that the seller has parted with the possession as well as with the property in the goods. "The right of stoppage *in transitu*," says Bowen, L.J., "is founded upon mercantile rules, and is borrowed from the custom of merchants; from their custom it has been engrafted upon the law of England. The doctrine was at variance with the Civil Law, which laid down that, although the goods had been sold upon credit, and although the goods were in the possession of the vendee, there might be recaption by the vendor if the vendee became insolvent. But, according to the rules as to stoppage *in transitu*, the goods can be stopped only whilst they are passing through channels of communication for the purpose of reaching the hands of the vendee. This doctrine was adopted by the Court of Chancery, and afterwards by the Courts of Common Law."[4]

The Courts look with great favour on the right of stoppage *in transitu* on account of its intrinsic justice.[5] The decisions on the

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[1] *Blackburn on Sale*, p. 318.

[2] *Blackburn on Sale*, p. 325; *cf. Bloxam* v. *Sanders* (1825), 4 B. & C. 941, at p. 948; *Schotsmans* v. *Lancashire Railway* (1867), L. R. 2 Ch. App., at p. 340.

[3] *Blackburn on Sale*, p. 308; *cf. Bolton* v. *Lanc. & Yorks. Railway* (1866), L. R. 1 C. P., at p. 439, per Willes, J.

[4] *Kendall* v. *Marshall, Stevens & Co.* (1883), 11 Q. B. D., at p. 368, C. A.; see *Gibson* v. *Carruthers* (1841), 8 M. & W. 321, at p. 326, per Lord Abinger; *Blackburn on Sale*, pp. 204–209. See Lord Bowen's statement as to the Civil Law criticised in Moyle's *Sale in the Civil Law*, p. 155.

[5] *Cf. Cassaboglou* v. *Gibb* (1883), 11 Q. B. D., at p. 804; *Kemp* v. *Falk*

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subject are very numerous, but as Jessel, M.R., observes, "As to several of them there is great difficulty in reconciling them with principle; as to others there is great difficulty in reconciling them with one another; and, as to the whole, the law on this subject is in a very unsatisfactory state."[1] The decisions now must be read subject to the Act.

The seller's "right of retention" in Scotland was more extensive than the seller's lien in England. Apart from statute the seller had the right to retain the goods not only for the price, but also for any other debt due from the buyer even if there had been a sub-sale.[2] But the Mercantile Law Amendment (Scotland) Act, 1856, sect. 2, altered the law in the case of sub-sales, and now the Act appears to apply a uniform rule to both countries.

The Scotch law as to stoppage *in transitu* appears to be similar to English law. The doctrine "was first applied to Scottish bargains of moveables by a decision of the House of Lords in 1790, in place of a rule of presumed fraud *intra triduum*, which had formerly been held to entitle a seller to restitution of his goods even after delivery."[3]

As to France, see art. 1654 of the Civil Code, which is modified in commercial matters by arts. 574–576 of the Code de Commerce, and Bravard Demangeat, *Droit Commercial*, 7th ed., p. 621. As to India, see sects. 95–106 of the Indian Contract Act, 1872.

Sub-sect. (2) was necessary because it would be a contradiction in terms to speak of a man having a lien upon his own goods. The enactment is declaratory.[4]

Attachment by seller in Scotland.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

(1882), 7 App. Cas., at p. 590; *Tucker* v. *Humphrey* (1828), 4 Bing., at p. 519.

[1] *Merchant Banking Co.* v. *Phœnix Co.* (1877), 5 Ch. D., at p. 220 (case of seller's lien).

[2] Mercantile Law Commission, 1855, 2nd Rep., pp. 8, 9, 44; *Melrose* v. *Hastie* (1851), 13 Sess. Cas. 880.

[3] Bell's *Principles*, 9th ed., § 1307; *Allan* v. *Stein* (1790), M. 4949.

[4] *Griffiths* v. *Perry* (1859), 28 L. J. Q. B. 204, at p. 208; *Ex p. Chalmers* (1873), L. R. 8 Ch. App., at p. 292.

Sect. 40. This section is taken from sect. 3 of the Mercantile Law Amendment (Scotland) Act, 1856. It is probably restrained by the provisions of sect. 47, *post*, p. 85.

Unpaid Seller's Lien.

Seller's lien.

41.—(1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(*a.*) Where the goods have been sold without any stipulation as to credit;[1]

(*b.*) Where the goods have been sold on credit, but the term of credit has expired;[2]

(*c.*) Where the buyer becomes insolvent.[3]

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee [or custodier] for the buyer.[4]

As to the term "unpaid seller," see sect. 38, *ante*, p. 70; and as to the term "insolvent," see *post*, p. 116. By sect. 62, *post*, "bailee" in Scotland includes custodier, and "lien" includes right of retention.

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[1] *Benjamin on Sale*, 4th ed., p. 767; *Bloxam* v. *Sanders* (1825), 4 B. & C. 941, at p. 948; *Miles* v. *Gorton* (1834), 2 Cr. & M. 504, at p. 511.

[2] *Benjamin on Sale*, 4th ed., p. 839. The point has been twice decided at Nisi Prius, *New* v. *Swain* (1828), 1 Dan. & Lloyd, 193, per Bayley, J.; *Bunney* v. *Poyntz* (1833), 4 B. & Ad. 568, at p. 569, per Littledale, J.; see, too, dicta in *Martindale* v. *Smith* (1841), 1 Q. B., at p. 395; *Valpy* v. *Oakeley* (1851), 16 Q. B., at p. 951, and sects. 95, 96 of the Indian Contract Act, 1872.

[3] *Bloxam* v. *Sanders* (1825), 4 B. & C. 941; *Bloxam* v. *Morley* (1825), 4 B. & C. 951; *Griffiths* v. *Perry* (1859), 28 L. J. Q. B. 204; *Ex p. Lambton* (1875), L. R. 10 Ch. App., at p. 415; *Gunn* v. *Bolckow, Vaughan & Co.* (1875), L. R. 10 Ch. App. 491, at p. 501.

[4] *Benjamin on Sale*, 4th ed., p. 771; *Townley* v. *Crump* (1835), 4 A. & E. 58; *Grice* v. *Richardson* (1877), 3 App. Cas. 319 P. C. *Aliter* before the Act if the buyer was solvent, *Cusack* v. *Robinson* (1861), 30 L. J. Q. B., at p. 264, per Blackburn, J.; and *Blackburn on Sale*, p. 224. Subsect. (2) was originally confined to the case where the buyer was insolvent. It was altered to its present form in Committee.

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The lien is a lien for the price only, and not for charges for keeping the goods, for they are kept against the buyer's will.[1]

A sale on credit excludes the lien during the currency of the credit,[2] unless there be a trade usage to the contrary.[3]

As regards instalment contracts, Mellish, L.J., says, "the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered. . . . It would be strange if the right of a vendor who had agreed to deliver goods by instalments were less than that of a vendor who had sold specific goods."[4]

Even if the seller has broken his contract to deliver while the buyer is solvent, his lien revives on the buyer becoming insolvent, and the buyer's trustee is only entitled at most to nominal damages for the breach, unless the value of the goods at the time of breach was above the contract price.[5]

Where the seller exercises his right of lien, the buyer's trustee may affirm the contract and obtain the goods by tendering the price within a reasonable time,[6] for it is clear law that the mere insolvency or bankruptcy of a party to a contract does not rescind it. But it seems that, in the case of insolvency, an agreement to rescind will be presumed on slight grounds.[7]

A sub-purchaser also is probably entitled to obtain the goods by tendering the price to the original seller within a reasonable time.[8]

42. Where an unpaid seller has made part delivery

Part delivery.

[1] *Somes* v. *British Empire Shipping Co.* (1859), 28 L. J. Q. B. 220, Ex. Ch. affirmed by H. L., 30 L. J. Q. B. 229 (case of shipwright's lien, but the rule was stated to apply to the seller's lien).

[2] *Spartali* v. *Benecke* (1850), 10 C. B. 212, at p. 223.

[3] *Field* v. *Lelean* (1861), 30 L. J. Ex. 168 Ex. Ch.

[4] *Ex p. Chalmers* (1873), L. R. 8 Ch. App. 289, at p. 293; *cf. Ex p. Stapleton* (1879), 10 Ch. D. 586, C. A.

[5] *Valpy* v. *Oakeley* (1851), 16 Q. B. 941; 20 L. J. Q. B. 380; *Griffiths* v. *Perry* (1859), 28 L. J. Q. B. 204.

[6] *Ex p. Stapleton* (1879), 10 Ch. D. 586, C. A.

[7] *Morgan* v. *Bain* (1874), L. R. 10 C. P. 15. As to trustee's right to disclaim onerous contracts, see s. 55 of the Bankruptcy Act, 1883.

[8] *Ex p. Stapleton*, supra; and *cf. Kemp* v. *Falk* (1882), 7 App. Cas., at p. 578, per Lord Selborne.

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of the goods, he may exercise his right of lien [or retention] on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien[1] [or right of retention].

By sect. 62, "lien" in Scotland includes right of retention.

In a case where it was unsuccessfully contended that the delivery of part of a cargo to a sub-purchaser was a constructive delivery of the whole, Lord Blackburn says: "It is said that delivery of a part is delivery of the whole. It may be a delivery of the whole. In agreeing for the delivery of goods with a person, you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that a delivery of part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole."[2]

Severable contract.

As regards severable contracts, if, for instance, delivery is to be made by three instalments, and the first instalment has been delivered and paid for, and the second has been delivered but not paid for, the seller may withhold delivery of the third instalment till he has been paid for both the second and third instalments.[3] But any instalment which has been paid for must be delivered, even though the buyer be bankrupt.[4]

Termination of lien.

43.—(1.) The unpaid seller of goods loses his lien [or right of retention] thereon—

(*a.*) When he delivers the goods to a carrier or other bailee [or custodier] for the purpose of transmission

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[1] *Dixon* v. *Yates* (1833), 5 B. & Ad. 313, see at p. 341; *Miles* v. *Gorton* (1834), 2 Cr. & M. 504; *cf. Ex p. Cooper* (1879), 11 Ch. D. 68, C. A. (stoppage *in transitu*).

[2] *Kemp* v. *Falk* (1882), 7 App. Cas. 573, at p. 586, citing for the position, *Dixon* v. *Yates*, supra, which was a case of seller's lien.

[3] *Ex p. Chalmers* (1873), L. R. 8 Ch. App. 289 (buyer insolvent. *Qu.* if buyer was not insolvent?).

[4] *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.* (1877), 5 Ch. D. 205.

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to the buyer[1] without reserving the right of disposal of the goods;[2]

(*b.*) When the buyer or his agent lawfully obtains possession of the goods;[3]

(*c.*) By waiver thereof.[4]

(2.) The unpaid seller of goods, having a lien [or right of retention] thereon, does not lose his lien [or right of retention] by reason only that he has obtained judgment [or decree] for the price of the goods.[5]

As to the term "unpaid seller," see sect. 38, *ante*, p. 70; and as to reservation of the right of disposal, see sect. 19, *ante*, p. 44. The words in brackets are Scotch terms.

When goods are delivered to a carrier for transmission to the buyer, the right of lien becomes changed into a right of stoppage *in transitu* should the buyer become insolvent. As in the case of the buyer's insolvency the two rights are similar in their effects, they are sometimes confused in the cases.

For the most part, the cases on what constitutes an actual receipt within the meaning of the Statute of Frauds appear to furnish the test for determining whether the seller's lien is gone or not. "The principle," says Blackburn, J., "is that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller so as to preserve his lien. But though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept, not

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[1] *Benjamin on Sale*, 4th ed., p. 813; *Bolton* v. *Lanc. & Yorks. Railway Co.* (1866), L. R. 1 C. P., at p. 439, per Willes, J.; *Pollock on Possession*, pp. 71, 72; *cf. Griffiths* v. *Perry* (1859), 28 L. J. Q. B., at pp. 207, 208; and see the cases cited for sect. 32, *ante*, p. 64.

[2] As to reserving right of disposal, see sect. 19, *ante*, p. 44.

[3] *Hawes* v. *Watson* (1824), 2 B. & C. 543; *Cooper* v. *Bill* (1865), 34 L. J. Ex. 161; *Benjamin on Sale*, 4th ed., p. 811; *Dodsley* v. *Varley* (1840), 12 A. & E. 632; *cf. Schotsmans* v. *Lanc. & Yorks. Railway* (1867), L. R. 2 Ch. App., at p. 335, as to stoppage *in transitu*. Amended in Committee.

[4] *Benjamin on Sale*, 4th ed., pp. 808, 812, and see note, *post*, p. 78.

[5] *Houlditch* v. *Desanges* (1818), 2 Stark. 337; *Scrivener* v. *Great Northern Railway* (1871), 19 W. R. 388. (*Qu.* if lien extends only to price or also to costs on the judgment?)

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as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is sufficient receipt to satisfy the statute."[1] But this proposition must now be taken subject to the provisions of sect. 41 (2), *ante*, p. 74. The sub-section was altered in Committee into its present form. As the Bill was drafted it was confined to cases where the buyer was insolvent.

Subject to sect. 47, when goods, at the time of sale, are in the possession of a third person there is no delivery to the buyer, and the seller's lien therefore is not divested till such third person attorns to the buyer.[2]

Again, the seller may deliver the goods to the buyer on such terms as that the buyer holds them as bailee for the seller;[3] but in that case the seller has rather a special property in the goods arising out of the special agreement, than a lien properly so called.[4]

Waiver of lien.

The right of lien is given to the seller by implication of law, see sect. 39. It follows that it may be waived expressly. But it may also be waived by implication. The seller may reserve an express lien which excludes the implied one,[5] or he may take a bill for the price which ordinarily would exclude his lien during its currency, though the lien would revive on its dishonour;[6] or the seller may assent to a sub-sale;[7] or part with the documents of title so as to exclude his lien under the provisions of the Factors Acts, if the documents get into the hands of a holder for value. See, too, sect. 55 as to negativing implied terms.

Stoppage in transitu.

Right of stoppage in transitu.

44. Subject to the provisions of this Act,[8] when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right

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[1] *Cusack* v. *Robinson* (1861), 30 L. J. Q. B., at p. 264; *cf. Baldey* v. *Parker* (1823), 2 B. & C., at p. 44, per Holroyd, J.

[2] *McEwan* v. *Smith* (1849), 2 H. of L. Cas. 309, and *ante*, p. 61.

[3] *Benjamin on Sale*, 4th ed., p. 812.

[4] *Cf. Dodsley* v. *Varley* (1840), 12 A. & E. 632, at p. 634, per Lord Denman.

[5] *Re Leith's Estate* (1866), L. R. 1 C. P., at p. 305. As to effect of taking subsequent security, see *Angus* v. *McLachlan* (1883), 23 Ch. D. 330.

[6] *Valpy* v. *Oakeley* (1851), 16 Q. B. 941, at p. 951; *Griffiths* v. *Perry* (1859), 28 L. J. Q. B., at p. 207.

[7] *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660; see, too, sect. 47, *post*, p. 85.

[8] See sects. 45 to 47.

of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.[1] Sect. 44.

Nature of stoppage in transitu.

"The vendors being unpaid," says Lord Esher, "and the purchasers having become insolvent, according to the law merchant the vendors had a right to stop the goods *in transitu*, although the property in such goods might have passed to the purchasers. The doctrine of stoppage *in transitu* has always been construed favourably to the vendor."[2]

The right of stoppage *in transitu* is a right against the goods themselves. "If they arrive injured and damaged in bulk or quality the right to stop *in transitu* is so far impaired, there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive, and to claim moneys which have been paid by the underwriters to the purchasers of the goods in respect of their loss by the non-arrival of their property."[3]

The term stoppage *in transitu* only applies in strictness to cases where the property in the goods has passed to the buyer.[4] If the property has not passed, the seller's rights depend upon his so-called right of lien or upon a reservation of the *jus disponendi*.[5] But it is now clear that the seller's right of withholding delivery extends to executory, as well as executed, contracts when the buyer is insolvent.[6]

In order to form a clear notion of the meaning of the term "transitus," two points should be noted:— (1) The goods may be *in transitu* although they have left the hands of the person to whom the seller intrusted them for transmission. It is immaterial how many agents' hands they may have passed through if they have not reached their

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[1] *Lickbarrow* v. *Mason* (1793), 6 East, 21 H. L.; 1 Smith, L. C., 9th ed., p. 737, and notes; *Gibson* v. *Carruthers* (1841), 8 M. & W. 321; *Bolton* v. *Lanc. & Yorks. Railway* (1866), L. R. 1 C. P. 431, at p. 439; *Bethell* v. *Clark* (1887), 19 Q. B. D. 553, at p. 561, affirmed 20 Q. B. D. 615, C. A.; *Pollock on Possession*, pp. 72, 74, 214.

[2] *Bethell* v. *Clark* (1888), 20 Q. B. D., at p. 617, C. A.

[3] *Berndtson* v. *Strang* (1868), L. R. 3 Ch. App. 588, at p. 591, per Lord Cairns; *cf. Phelps* v. *Comber* (1885), 29 Ch. D. 813, C. A.

[4] *Gibson* v. *Carruthers* (1841), 8 M. & W. 321.

[5] *Bolton* v. *Lanc. & Yorks. Railway* (1866), L. R. 1 C. P., at p. 439, per Willes, J.

[6] See sect. 39 (2), and *Griffiths* v. *Perry* (1859), 28 L. J. Q. B., at p. 208; *Ex p. Chalmers* (1873), L. R. 8 Ch. App., at p. 292.

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destination.[1] (2) The term does not necessarily imply that the goods are in motion, for, "if the goods are deposited with one who holds them merely as an agent to forward and has the custody as such, they are as much *in transitu* as if they were actually moving."[2]

"The essence of stoppage *in transitu*," says Lord Cairns, "is that the goods should be in the possession of a middleman."[3]

Lord Esher, to a great extent adopting Lord Tenterden's definition of the term *transitus*, suggests the following proposition:—"Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee; but also when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purposes of transmission and delivery until they arrive at the actual possession of the consignee or at the possession of his agent, who is to hold them at his disposal and deal with them accordingly."[4] Mr. Justice R. S. Wright defines the term *transitus*, by stating that goods are *in transitu* "at any time before the goods have reached the possession of the vendee or of the vendee's servant, *and* whilst they were still in the possession of a carrier or other person, as an intermediary, who has not yet by attornment, usage, or otherwise, agreed to hold them exclusively for the vendee."[5]

When goods, which have been sold, are in the actual possession of a carrier or other bailee, three states of fact may exist with regard to them:—First, the carrier or other bailee may hold them as agent for the seller; in that case the seller preserves his lien, and the right of stoppage *in transitu* does not arise. Secondly, the goods may be *in medio*. The carrier or other bailee may hold them in his character as such, and not exclusively as the agent of either the seller or buyer. In that case the right of stoppage *in transitu* exists. Thirdly, the carrier or other bailee may hold the goods either originally or by subsequent attornment, solely as agent for the buyer. In that case

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[1] *Bethell* v. *Clark* (1888), 20 Q. B. D., at p. 619, per Fry, L. J., approved; *Lyons* v. *Hoffnung* (1890), 15 App. Cas. 391 P. C.

[2] *Blackburn on Sale*, p. 244.

[3] *Schotsman* v. *Lanc. & Yorks. Railway* (1867), L. R. 2 Ch. App., at p. 338.

[4] *Kendal* v. *Marshall, Stevens & Co.* (1883), 11 Q. B. D. 356, at p. 364. C. A.; *cf. Abbot on Shipping*, 12th ed., p. 409.

[5] *Pollock and Wright on Possession*, p. 214.

there either has been no right of stoppage or it is determined. The difficulties that arise are rather difficulties of fact than of law. Sect. 44.

45.—(1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee [or custodier], for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee [or custodier].[1] Duration of transit.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.[2]

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee [or custodier]

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[1] For principle, see *Bolton* v. *Lanc. & Yorks. Railway* (1866), L. R. 1 C.P., at p. 439, per Willes, J. For illustrations see *Whitehead* v. *Anderson* (1842), 9 M. & W. 518 (promise by captain to deliver when satisfied as to freight, transit not ended); *Dodson* v. *Wentworth* (1842), 4 M. & Gr. 1080 (goods delivered by carrier to warehouse to await orders, transit ended); *Valpy* v. *Gibson* (1847), 4 C. B. 837 (goods delivered to shipping agent of buyer, transit ended); *Schotsmans* v. *Lanc. & Yorks. Railway* (1867), L. R. 2 Ch. App. 332 (goods delivered to general ship owned by buyer, transit ended); *Coventry* v. *Gladstone* (1868), L. R. 6 Eq. 44 (overside orders given by mate to holder of bill of lading, transit not ended); *Ex p. Gibbes* (1875), 1 Ch. D. 101 (goods shipped to Liverpool and then put on railway for buyer, transit ended); *Ex p. Watson* (1877), 5 Ch. D. 35 (ineffectual interruption of transit); *Ex p. Barrow* (1877), 6 Ch. D. 783 (goods warehoused by carrier as forwarding agent, transit not ended) (?); *Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560 (goods shipped on ship hired by buyer, destination not stated, transit not ended); *Kemp* v. *Falk* (1882), 7 App. Cas. 573, see at p. 584 (goods on ship, cash receipts instead of delivery orders given to buyer, transit not ended); *Ex p. Francis* (1887), 4 Morrell, 146 (goods shipped in vessel of buyer's agent, transit ended); *Bethell* v. *Clark* (1888), 20 Q. B. D. 615 C. A. (goods ordered to be delivered to the "Darling Downs" to Melbourne, transit not ended by shipment); followed *Lyons* v. *Hoffnung* (1890), 15 App. Cas. 391 P. C.

[2] *Whitehead* v. *Anderson* (1842), 9 M. & W. 518, at p. 534; *Blackburn on Sale*, p. 249; *cf. Lond. & N. W. Railway* v. *Bartlett* (1861), 31 L. J. Ex. 92 (alteration of journey by agreement between carrier and consignee); see, too, dictum of Bowen, L. J., in *Kendal* v. *Marshall, Stevens & Co.* (1883), 11 Q. B. D., at p. 369.

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acknowledges to the buyer, or his agent, that he holds the goods on his behalf, and continues in possession of them as bailee [or custodier] for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.[1]

(4.) If the goods are rejected by the buyer, and the carrier or other bailee [or custodier] continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.[2]

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.[3]

(6.) Where the carrier or other bailee [or custodier] wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.[4]

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to

[1] For principle, see *Kendal* v. *Marshall, Stevens & Co.* (1883), 11 Q. B. D. 356 C. A., where the carrier attorned to buyer's agent. In illustration, see *Dixon* v. *Baldwen* (1804), 5 East. 175; *Valpy* v. *Gibson* (1847), 4 C. B. 865, where a re-delivery to seller for special purpose did not revive right of stoppage; *Ex p. Miles* (1885), 15 Q. B. D. 39 C. A.

[2] *Bolton* v. *Lanc. & Yorks. Railway* (1866), L. R. 1 C. P. 431; *cf. James* v. *Griffin* (1837), 2 M. & W. 623.

[3] *Berndtson* v. *Strang* (1867), L. R. 4 Eq. 481, at p. 489; on appeal L. R. 3 Ch. App., at p. 590, per Lord Cairns (the test is whether the master is the servant of the owner or the charterer); *Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560, C. A. (ship hired verbally); *cf. Schotsmans* v. *Lanc. & Yorks. Railway* (1867), 2 Ch. App. 332 (geueral ship owned by buyer, transit ended).

[4] *Bird* v. *Brown* (1850), 4 Exch. 786, at p. 790 (where carrier refused to deliver in consequence of an invalid notice to stop).

show an agreement to give up possession of the whole of the goods.[1] Sect. 45.

The term "custodier" is the Scotch equivalent of bailee. As the right of stoppage *in transitu* arises by implication of law (sect. 39), it follows that it may be waived by the seller under the provisions of sect. 55, *post*, p. 103.

Destination.

As regards the term "destination," Lord Esher says that "it means sending the goods to a particular place to a particular person who is to receive them, and not sending them to a particular place without saying to whom;"[2] and Lord Fitzgerald says, "Transit embraces not only the carriage of the goods to the place where delivery is to be made, but also delivery of the goods there according to the terms of the contract of conveyance."[3]

Termination of transit.

Where the attornment of the carrier is relied on, that attornment must be founded on mutual assent. If the carrier do not assent to hold the goods for the buyer, or if the buyer do not assent to his so holding them, there is no attornment.[4]

The fact that the freight is unpaid is strong, though not conclusive evidence that the carrier is in possession of the goods, as such, and not as the buyer's agent.[5]

A neat summary of the law as to the termination of the transit is given by Cave, J., who says, "When the goods have arrived at their destination, and have been delivered to the purchaser or his agent, or where the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the *transitus* is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the vendor. But, however fixed, the goods have arrived at their destination, and the transit is at an end when they have got into the hands of some one who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser

[1] *Bolton* v. *Lanc. and Yorks. Railway* (1866), L. R. 1 C. P., at p. 440, per Willes, J.; *Ex p. Cooper* (1879), 11 Ch. D. 68 C. A.; *Kemp* v. *Falk* (1882), 7 App. Cas., at p. 586, per Lord Blackburn; *cf.* sect. 42, *ante*, p. 75, as to seller's lien.

[2] *Ex p. Miles* (1885), 15 Q. B. D. 39, at p. 43 C. A.

[3] *Kemp* v. *Falk* (1882), 7 App. Cas., at p. 588.

[4] See *James* v. *Griffin* (1837), 2 M. & W. 623 (offer to attorn not accepted by buyer); *Kemp* v. *Falk* (1882), 7 App. Cas., at pp. 584, 586 (carrier not agreeing to change his character). See also *Blackburn on Sale*, p. 248.

[5] *Kemp* v. *Falk* (1882), 7 App. Cas., at p. 584.

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to the vendor. The difficulty in each case lies in applying these principles."[1]

How stoppage in transitu is effected.

46.—(1.) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods,[2] or by giving notice of his claim to the carrier or other bailee [or custodier] in whose possession the goods are.[3] Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.[4]

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee [or custodier] in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller.[5] The expenses of such re-delivery must be borne by the seller.

"The law is clearly settled," says Parke, B., "that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come into the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carriers into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end, though, in the case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of action."[6]

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[1] *Bethell* v. *Clark* (1887), 19 Q. B. D. 553, at p. 561; affirmed by C. A., 20 Q. B. D. 615.

[2] *Snee* v. *Prescot* (1743), 1 Atk. 245, at p. 250, per Ld. Hardwicke; *Whitehead* v. *Anderson* (1842), 9 M. & W., at p. 534, per Parke, B.

[3] *Litt* v. *Cowley* (1816), 7 Taunt. 169, at p. 170, per Gibbs, C.J.

[4] *Whitehead* v. *Anderson* (1842), 9 M. & W. 518; *Ex p. Watson* (1877), 5 Ch. D. 35 C. A.; *Kemp* v. *Falk* (1882), 7 App. Cas., at p. 585; *cf. Phelps* v. *Comber* (1885), 29 Ch. D. 813 C. A. (notice to consignee to hold proceeds ineffectual).

[5] *The Tigress* (1863), 32 L. J. Adm. 97, at p. 102.

[6] *Whitehead* v. *Anderson* (1842), 9 M. & W., at p. 534.

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The seller, says Dr. Lushington, "exercises his right of stoppage *in transitu* at his own peril, and it is incumbent upon the master to give effect to a claim, as soon as he is satisfied it is made by the vendor, unless he is aware of a legal defeasance of the claim."[1] If after notice, lawfully given, the carrier delivers to the consignee or refuses to deliver to the seller, he is guilty of a conversion of the goods. In case of real doubt he should resort to an interpleader.[2] The seller has also a remedy by injunction,[3] or, if the goods be in the hands of the master of a ship, by arrest of the ship.[4]

In a case in the Court of Appeal, Lord Bramwell doubted whether there was any obligation on the part of the principal to send on a notice of stoppage to his agent;[5] but, when the case went to the House of Lords, Lord Blackburn expressly repudiated this doubt.[6] Though, as between seller and carrier, the expenses of stoppage and re-delivery fall on the seller, it may be that the seller would be able to prove for them against the buyer's estate.

Re-sale by Buyer or Seller.

Effect of sub-sale or pledge by buyer.

47. Subject to the provisions of this Act,[7] the unpaid seller's right of lien [or retention] or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made,[8] unless the seller has assented thereto.[9]

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[1] *The Tigress* (1863), 32 L. J. Adm. 97, at p. 101.

[2] *The Tigress* (1863), 32 L. J. Adm., at p. 102; *cf. Litt* v. *Cowley* (1816), 7 Taunt., at p. 170.

[3] *Schotsmans* v. *Lancashire Railway* (1867), L. R. 2 Ch. App., at p. 340.

[4] *The Tigress* (1863), 32 L. J. Adm. 97.

[5] *Ex p. Falk* (1880), 14 Ch. D. 446 C. A.

[6] *Kemp* v. *Falk* (1882), 7 App. Cas., at p. 585.

[7] See sect. 25 (2), *ante*, p. 54, buyer in possession of document of title, and see notes to sects. 9 and 10 of the Factors Act, 1889, *post*, p. 129.

[8] As to seller's lien, see *Dixon* v. *Yates* (1833), 5 B. & Ad. 313, at p. 339; *Farmeloe* v. *Bain* (1876), 1 C. P. D. 445. As to stoppage *in transitu*, *Craven* v. *Ryder* (1816), 6 Taunt. 433; *Ex p. Golding Davis & Co.* (1880), 13 Ch. D. 628; *Kemp* v. *Falk* (1882), 7 App. Cas. 573. As to delivery orders *before* the Factors Act, 1877, see *McEwan* v. *Smith* (1849), 2 H. of L. Cas. 309; *Blackburn on Sale*, p. 302, which shows the common law effect of these documents.

[9] *Blackburn on Sale*, p. 224; *Stovell* v. *Hughes* (1811), 14 East. 308; *Pearson* v. *Dawson* (1858), 27 L. J. Q. B. 248; *Woodley* v. *Coventry* (1863),

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[Cf. 52 & 53 Vict. c. 45. s. 10.]

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien [or retention] or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien [or retention] or stoppage in transitu can only be exercised subject to the rights of the transferee.

The proviso reproduces and develops sect. 10 of the Factors Act, 1889, *post*, p. 130, which puts all documents of title on the same footing as a bill of lading. See "document of title" and "lien," defined by sect. 62, *post*, p. 110.

The effect of this enactment appears to be (*a*) to affirm the common law effect of the transfer of a bill of lading, and (*b*) to put all the documents of title mentioned in sect. 1 of the Factors Act, 1889, on the same footing as bills of lading. As regards bills of lading the law appears to be as follows:—

Transfer of bill of lading.

(1.) That as between buyer and seller, that is to say, the immediate parties to the contract, the indorsement of the bill of lading does not affect the right of stoppage, nor does a further indorsement by the buyer affect the right unless the indorsement be for value,[1] but an antecedent debt may constitute such value.[2]

(2.) That if the holder of the bill of lading re-sells the goods or otherwise disposes of them for value to a third person, who pays the money, such third person acquires his interest in the goods, subject to the original seller's right of stoppage *in transitu*, unless he gets a transfer of the bill of lading.[3]

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32 L. J. Ex. 185; *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660; *Merchant Banking Co.* v. *Phœnix Bessemer Co.* (1877), 5 Ch. D. 205.

[1] *Lickbarrow* v. *Mason* (1793), 1 Smith, L. C., 9th ed., p. 737.

[2] *Leask* v. *Scott* (1877), 2 Q. B. D. 376 C. A., dissenting from *Rodger* v. *Comptoir d'Escompte* (1869), L. R. 2 P. C. 393.

[3] *Kemp* v. *Falk* (1882), 7 App. Cas. 573, see at p. 582, per Lord Blackburn.

(3.) That since the Bills of Lading Act, 1855, as well as before, a bill of lading may be indorsed by way of mortgage, pledge, or other security, and not by way of absolute sale.[1] Where a bill of lading is so transferred, the original seller retains his right of stoppage subject to rights of the incumbrancer, and, further, he may compel the incumbrancer to resort to other goods pledged with him by his debtor, if such there be, before resorting to the goods covered by the bill of lading.[2]

(4.) That the right of stoppage *in transitu* is wholly defeated when the bill of lading is assigned absolutely for a consideration which is wholly paid.[3]

(5.) That when the bill of lading is transferred to a sub-purchaser absolutely and for value, but that value is wholly or in part unpaid, there is probably no longer any right to stop to the extent of the money which is unpaid. In *Ex p. Golding Davis & Co.*, the buyer re-sold the goods and became insolvent; the bill of lading was made out in the name of the sub-purchaser but not delivered to him, and when the goods were stopped he had not paid the price. It was held, that the original seller was entitled to stop the goods for the original purchase-money. Cotton, L.J., said that the case must be decided "as if the bill of lading had been made out in the name of the original purchasers and had then been assigned by them to their sub-purchasers."[4] The decision was followed a few months afterwards in *Ex p. Falk*, and Lord Bramwell, referring to the cases where bills of lading had been pledged, said, "What difference is there in principle between the case of a man selling goods on credit for £500 and their being re-sold for £600, and the case of the purchaser pledging the goods for £600 with a right of sale by the pledgee?"[5] But when *Ex p. Falk* was taken to the House of Lords it was found to turn on wholly different considerations. Lord Selborne seemed to doubt the rule laid down in *Ex p. Golding Davis & Co.*, saying he assented to "the proposition that where the sub-purchasers get a good title as against the right of stoppage *in transitu*, there can be no stoppage

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[1] *Sewell* v. *Burdick* (1884), 10 App. Cas. 74.

[2] *Re Westzinthus* (1833), 5 B. & Ad. 817; *Spalding* v. *Ruding* (1843), 12 L. J. Ch. 503; 6 Beav. 376; approved *Kemp* v. *Falk*, supra; *cf. Coventry* v. *Gladstone* (1868), L. R. 6 Eq. 44.

[3] *Lickbarrow* v. *Mason* (1793), 1 Smith, Lead. Cas., 9th ed., p. 737; *Leask* v. *Scott* (1877), 2 Q. B. D. 376, C. A.

[4] *Ex p. Golding Davis & Co.* (1880), 13 Ch. D. 628, at p. 637, C. A.

[5] *Ex p. Falk* (1880), 14 Ch. D. 446, at p. 457, C. A.; *Phelps* v. *Comber* (1885) 29 Ch. D. at p. 821.

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in transitu as against the purchase-money payable by them to their vendor." The other lords declined to give any opinion on the point.[1]

As to bills of lading, see further the Bills of Lading Act, 1855, and notes thereto, *post*, p. 149.

Sale not generally rescinded by lien or stoppage in transitu.

48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien [or retention] or stoppage in transitu.[2]

(2.) Where an unpaid seller who has exercised his right of lien [or retention] or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.[3]

(3.) Where the goods are of a perishable nature,[4] or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.[5]

(4.) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original

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[1] *Kemp* v. *Falk* (1882), 7 App. Cas. 573, at p. 577.

[2] *Greaves* v. *Ashlin* (1813), 3 Camp. 425; *Martindale* v. *Smith* (1841), 1 Q. B. 389; *Wentworth* v. *Outhwaite* (1842), 10 M. & W. 436 (Lord Abinger dissenting); *Page* v. *Cowasjee* (1866), L. R. 1 P. C., at p. 145; *Schotsmans* v. *Lanc. & Yorks. Railway* (1867), L. R. 2 Ch. App., at p. 340, per Lord Cairns; *Kemp* v. *Falk* (1882), 7 App. Cas., at p. 581, per Lord Blackburn.

[3] *Milgate* v. *Kebble* (1841), 3 M. & Gr. 100; *cf. Lord* v. *Price* (1874), L. R. 9 Ex. 54; and see sect. 8 of the Factors Act, 1889.

[4] Notes to *Lickbarrow* v. *Mason*, 1 Smith, Lead. Cas., 9th ed., p. 798; *cf. Maclean* v. *Dunn* (1828), 4 Bing. 722, at p. 728, where there had been a refusal to accept.

[5] *Page* v. *Cowasjee* (1866), L. R. 1 P. C., at p. 145; *Lord* v. *Price* (1874), L. R. 9 Ex., at p. 55; *Ex p. Stapleton* (1879), 10 Ch. D. 586, C. A.; Indian Contract Act, 1872, § 107.

contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.[1] Sect. 48.

By sect. 62, *post*, p. 112, "lien" in Scotland includes right of retention. By sect 56, *post*, p. 104, reasonable time is a question of fact.

As long as the buyer is in default he is not entitled to the immediate possession of the goods, and therefore cannot maintain an action for conversion even against a wrong-doer in possession.[2]

In *Ex p. Stapleton*, it was said that when the buyer was insolvent the seller might re-sell unless the trustee or a sub-purchaser tendered the price within a reasonable time, and nothing was said about notice. But as a fact the seller in that case gave fair notice of his intention to re-sell.[3] Re-sale by seller.

Before the Factors Act, 1877, if the seller wrongfully re-sold goods left in his possession, the original buyer could follow them into the hands of an innocent purchaser,[4] but that Act protected the purchaser where the seller was left in possession of the documents of title, and sect. 8 of the Factors Act, 1889, now reproduced in sect. 25 (1) of this Act, protects the second purchaser if either the goods themselves or the documents of title to them are left in the seller's hands.

See "unpaid seller," defined by sect. 38, *ante*, p. 70. Sub-sect. (3) is governed by sub-sect. (1). It only applies to an unpaid seller who has exercised his right of lien or stoppage.

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[1] *Lamond* v. *Davall* (1847), 9 Q. B. 1030, 16 L. J. Q. B. 136.

[2] *Lord* v. *Price* (1874), L. R. 9 Ex. 54.

[3] *Ex p. Stapleton* (1879), 10 Ch. D. 586, C. A.

[4] *Langton* v. *Higgins* (1859), 28 L. J. Ex. 252; *Johnson* v. *Crédit Lyonnais* (1877), 3 C. P. D. 32.

PART V.

Actions for Breach of the Contract.

Remedies of the Seller.

Sect. 49. Action for price.

49.—(1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.[1]

(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.[2]

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

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[1] *Scott* v. *England* (1844), 2 D. & L. 520; *cf. Kymer* v. *Suwercropp* (1807), 1 Camp. 109 (goods stopped *in transitu*); *Alexander* v. *Gardner* (1835), 1 Bing. N. C. 671 (goods lost at sea).

[2] *Dunlop* v. *Grote* (1845), 2 C. & K. 153; *Mayne on Damages*, 4th ed., p. 167.

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The general rule of English law is that, in the absence of any different agreement, when a debt becomes due, it is the duty of the debtor to go and tender the amount to his creditor without waiting for any demand.[1]

Before the Judicature Acts the price of goods sold could be recovered under the common *indebitatus* counts. The count for goods sold and delivered was applicable where the property had passed and the goods had been delivered to the buyer, and the price was payable at the time of action brought. The count for goods bargained and sold was applicable when the property had passed to the buyer and the contract had been completed in all respects except delivery, and the delivery was not a condition precedent to the payment of the price.[2] Now it is sufficient to shew facts disclosing either cause of action.

The term "sale" includes both a bargain and sale and a sale and delivery. See sect. 62, *post*, p. 114.

The neglect or refusal to pay must be wrongful. It does not necessarily follow that because the property has passed the price is forthwith payable. The sale may have been on credit, or payment may be made to depend on some specified contingency.[3]

Payment by bill.

Where there is an agreement for payment of the price by a bill payable at a future day, and the bill is not given, the seller cannot sue for the price till the bill would have matured. His remedy before that time is by action for damages for breach of the agreement.[4] Where a bill is given for the price, the general rule is that it operates as conditional payment. If the bill be dishonoured, the debt revives, and the buyer may be sued either on the bill or on the consideration.[5]

Interest.

The general rule of English law is that damages for the detention of a debt are merely nominal, and that in an action for the price of goods sold interest is not recoverable.[6] Interest is only recoverable when there was an agreement for payment of interest, or where the debt was to be paid by a negotiable instrument, or under the special circumstances which give the jury or other tribunal a discretion under the 3 & 4 Will. 4, c. 42, s. 28.[7]

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[1] *Cf. Walton* v. *Mascall* (1844), 13 M. & W., at p. 458; *Fessard* v. *Mugnier* (1865), 34 L. J. C. P. 126.

[2] Bullen & Leake's *Prec. of Pleading*, 3rd ed., pp. 38, 39.

[3] *Cf. Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B., at p. 328.

[4] *Paul* v. *Dod* (1846), 2 C. B. 800; but see *Bartholomew* v. *Markwick* (1863), 33 L. J. C. P. 145, where there was a repudiation of the contract.

[5] *Chalmers on Bills of Exchange*, 4th ed., p. 305.

[6] *Gordon* v. *Swan* (1810), 2 Camp. 429; *Beaumont* v. *Greathed* (1846), 2 C. B. 494.

[7] *Mayne on Damages*, 4th ed., p. 146; *Duncombe* v. *Brighton Club* (1875), L. R. 10 Q. B. 371.

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In Scotland it seems "the seller may sue the purchaser for the price *and interest*, whether the goods sold are specific or not, provided goods according to the contract have been tendered to the purchaser."[1] The Act preserves this rule.

Damages for non-acceptance.

50.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.[2]

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.[3]

(3.) Where there is an available market for the goods in question[4] the measure of damage is primâ facie to be ascertained by the difference between the contract price and the market or current price at the time or times[5] when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.[6]

See note to sect. 53 as to non-delivery, and sect. 54 as to special damage. This section deals only with general damages.

Subject to the special case mentioned in sect. 49 (2), where the property in the goods has not passed to the buyer, the seller's only remedy is an action for non-acceptance.[7] Where the property has

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[1] Mercantile Law Commission, 1855, Second Report, p. 47.

[2] See Bullen & Leake's *Prec. of Pleading*, 3rd ed., p. 239; *Graves* v. *Legg* (1854), 9 Exch. 709.

[3] *Cort* v. *Ambergate Railway* (1851), 17 Q. B. 127; *Mayne on Damages*, 4th ed., p. 10.

[4] As to what is a market, see per James, L.J., *Dunkirk Colliery* v. *Lever* (1878), 9 Ch. D., at p. 25, C. A.

[5] *Cf. Brown* v. *Muller* (1872), L. R. 7 Ex. 319; *Roper* v. *Johnson* (1873), L. R. 8 C. P. 167, as to non-delivery; *Mayne on Damages*, 4th ed., p. 162.

[6] *Phillpotts* v. *Evans* (1839), 5 M. & W. 475; *Barrow* v. *Arnaud* (1846), 8 Q. B. 595, at p. 609, Ex. Ch.; *cf. Ex p. Stapleton* (1879), 10 Ch. D., at p. 590, C. A.

[7] *Cf. Laird* v. *Pim* (1841), 7 M. & W. 478.

passed he may sue, either for the price[1] or for damages for non-acceptance. Sect. 50.

As to damages for buyer's delay in taking delivery, see sect. 37, *ante*, p. 69.

In some cases where the seller has re-sold, the re-sale price has been assumed to furnish the correct measure of damages.[2]

Remedies of the Buyer.

51.—(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.[3] Damages for non-delivery.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.[4]

(3.) Where there is an available market for the goods in question[5] the measure of damages is primâ facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time[6] or times when they ought to have been delivered,[7]

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[1] Unless he has re-sold, in which case he must sue for damages, *Lamond* v. *Davall* (1847), 9 Q. B. 1030.

[2] *Maclean* v. *Dunn* (1828), 4 Bing. 722; *Ex p. Stapleton* (1879), 10 Ch. D. 586, C. A.

[3] Bullen & Leake's *Prec. of Pleading*, 3rd ed., p. 241; *Ramsden* v. *Gray* (1849), 7 C. B. 961; *cf. Jones* v. *Gibbons* (1853), 8 Exch. 920 (not delivering goods agreed to be delivered "as required"); *Lewis* v. *Clifton* (1854), 14 C. B. 245 (refusal to permit growing timber, which had been sold by auction, to be carried away).

[4] *Smeed* v. *Foord* (1859), 28 L. J. Q. B. 178 (non-delivery of machine); *Grébert-Borgnis* v. *Nugent* (1885), 15 Q. B. D. 85, C. A. (specially manufactured goods); *cf. Hammond* v. *Bussey* (1887), 20 Q. B. D., at p. 93, C. A.

[5] As to what constitutes an available market, see *Dunkirk Colliery* v. *Lever* (1878), 9 Ch. D., at p. 25, C. A.

[6] *Mayne on Damages*, 4th ed., p. 167; *Leigh* v. *Paterson* (1818), 8 Taunt. 540; *Hinde* v. *Liddell* (1875), L. R. 10 Q. B. 265.

[7] As to instalment deliveries, see *Brown* v. *Muller* (1872), L. R. 7 Ex. 319; *Roper* v. *Johnson* (1873), L. R. 8 C. P. 167; *cf. Bergheim* v. *Blaenavon Co.* (1875), L. R. 10 Q. B. 319.

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or, if no time was fixed, then at the time of the refusal to deliver.[1]

This section, in terms, deals only with general damages. Rules as to special damages are saved by sect. 54. The section is declaratory and is founded on *Hadley* v. *Baxendale.*

The rules laid down in *Hadley* v. *Baxendale*[2] are rules of general application. The measure of general or ordinary damages is the estimated loss directly and naturally resulting from the breach of contract, for those are the damages which a reasonable man would contemplate as the likely result of the breach if he directed his mind to it. The rule as to special damage depends on a similar principle. A party cannot be charged with special damages, unless, when he entered into the contract, he had notice of the special circumstances which made the special loss the likely result of the breach in the ordinary course of things. It has been objected to this rule that, when parties enter into a contract, they contemplate its performance and not its breach; but the answer is that the standard of the law is always an objective one. The question is not what the particular parties had actually in contemplation, but what a reasonable man with their knowledge would have contemplated as the likely result if he had directed his attention to it.[3] As to special damages, see further note to sect. 54, *post*, p. 100.

The rule as to market price is clearly a deduction from the more general rule in *Hadley* v. *Baxendale.* "When a contract to deliver goods is broken," says Tindal, C.J., "the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser having the money in his hands may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them."[4] Hence, if in an action for non-delivery no difference between the contract price

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[1] *Mayne on Damages*, 4th ed., p. 169; *Shaw* v. *Holland* (1846), 15 M. & W. 136, 146.

[2] *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 354; 2 Smith, Lead. Cas., 9th ed., p. 594.

[3] *Cf. Cory* v. *Thames Iron Works Co.* (1868), L. R. 3 Q. B. 181, and *Hammond* v. *Bussey* (1887), 20 Q. B. D., at p. 100, C. A.

[4] *Barrow* v. *Arnaud* (1846), 8 Q. B., at p. 609, Ex. Ch.

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and market price is shown, the plaintiff in general is only entitled to nominal damages.[1]

Damages for non-delivery.

The rule is so convenient and obvious that the English Courts apply it whenever possible, even where it produces hardship in individual cases.[2] In Scotland the rule is not nearly so strictly applied.[3]

But there are many cases in which the rule of market price is inapplicable. If it is partially applicable it will be applied with the necessary modifications, thus—

(1.) The buyer may have prepaid the price. In that case he is probably entitled to recover the full market price of the goods on the day when they ought to have been delivered, together with interest on the money he has been kept out of.[4]

(2.) The exact sort of goods the buyer has contracted for may not be obtainable, but if it is reasonable for him to buy in similar goods he may charge the seller with the difference in price.[5]

(3.) The seller may have repudiated his contract before the time for delivery arrives. In such case the buyer may either hold him to his contract and wait till the appointed time, or he may treat the contract as rescinded and sue at once. In the latter case regard is still to be had to the market price at the agreed time, but it seems that the seller may give evidence in mitigation of damage if the buyer's conduct has been unreasonable.[6]

(4.) The time for delivery may have been extended at the seller's request. In that case the extended time will be taken as the contract time.[7]

Again the market price test may be wholly inapplicable, and then recourse must be had to the wider general principle of *Hadley* v. *Baxendale*. This is the case where there is no market for the goods

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[1] *Valpy* v. *Oakeley* (1851), 16 Q. B. 941.

[2] *Brady* v. *Oastler* (1864), 33 L. J. Ex. 300 (special price for early delivery); *Williams* v. *Reynolds* (1865), 34 L. J. Q. B. 221 (profit on re-sale excluded); *Thol* v. *Henderson* (1881), 8 Q. B. D. 457 (sub-contract by buyer).

[3] *Dunlop* v. *Higgins* (1848), 1 H. of L. Cas. 381; see at p. 403.

[4] *Startup* v. *Cortazzi* (1835), 2 C. M. & R. 165; *cf. Barrow* v. *Arnaud* (1846), 8 Q. B., at p. 610; and see *Mayne on Damages*, 4th ed., p. 175.

[5] *Hinde* v. *Liddell* (1875), L. R. 10 Q. B. 265.

[6] *Roper* v. *Johnson* (1873), L. R. 8 C. P. 167, see at p. 181; *Mayne on Damages*, 4th ed., p. 164.

[7] *Ogle* v. *Earl Vane* (1868), L. R. 3 Q. B. 272 (non-delivery), Ex. Ch.; *Hickman* v. *Haynes* (1875), L. R. 10 C. P. 598 (non-acceptance); *cf. Tyers* v. *Rosedale Co.* (1875), L. R. 10 Ex. 195, Ex. Ch.

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in question at the time and place appointed for delivery,[1] as where the buyer has ordered some special article or articles to be expressly manufactured for him. Each case then turns on its particular circumstances, and is usually complicated by questions of special damage.[2]

Delay in delivery.

A similar rule applies to damages for delay, when goods of a particular description are ordered, and are ultimately accepted after the delay,[3] there being perhaps a *primâ facie* rule that the damage is the difference between "the value of the article contracted for at the time when it ought to have been and the time when it actually was delivered."[4]

Trover or detinue.

Subject to the provisions of sects. 8 to 10 of the Factors Act, 1889[5] (now reproduced in sects. 25 and 47 of this Act), where, under a contract of sale, the property in the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action for damages for detention of the goods against the seller or any other person in possession of the goods, or an action for the conversion of the goods against the seller or any other person who has dealt with the goods under such circumstances as to amount to a conversion thereof.[6]

As between seller and buyer the buyer cannot recover larger damages by suing in tort instead of in contract. Thus if he has not paid the price he can only recover the difference between the contract price and the value of the goods.[7]

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[1] *Elbinger Actien Gesellschafft* v. *Armstrong* (1874), L. R. 9 Q. B., at p. 476.

[2] *Hydraulic Co.* v. *McHaffie* (1878), 4 Q. B. D. 670, C. A. (machine ordered "as soon as possible"); *Grébert Borgnis* v. *Nugent* (1885), 15 Q. B. D. 85, C. A. (goods made to order).

[3] *Smeed* v. *Foord* (1859), 28 L. J. Q. B. 178 (steam thrashing-machine); *Cory* v. *Thames Iron Works Co.* (1868), L. R. 3 Q. B. 181 (steam derrick). As to damages against a carrier for delay in delivering ordinary goods of commerce, see *The Parana* (1877), 2 P. D. 118, at p. 122, C. A.

[4] *Elbinger Actien Gesellschafft* v. *Armstrong* (1874), L. R. 9 Q. B., at p. 477, per Blackburn, J.

[5] See Part IV., *ante*, pp. 70 to 89, as to seller's lien and stoppage *in transitu*, and note on p. 86 as to re-sale, and the Factors Act, *post*, p. 128.

[6] As to detinue, see Bullen & Leake's *Prec. of Pleading*, 3rd ed., p. 311; *Langton* v. *Higgins* (1859), 28 L. J. Ex. 252. As to conversion or trover, *ibid.*, p. 290; also *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757.

[7] *Chinery* v. *Viall* (1860), 29 L. J. Ex. 180; *cf. Johnson* v. *Stear* (1863), 33 L. J. C. P. 130; *Hiort* v. *L. & N. W. Railway* (1879), 4 Ex. D. 188, C. A. *Aliter* if perhaps the seller wrongfully retake the goods after

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As regards third parties the ordinary measure of damages for conversion is the value of the goods at the time of the wrongful act.[1]

When a man has sold goods to one person, a mere contract to sell them to another is not a conversion,[2] but a delivery of them in pursuance of that contract is a conversion,[3] unless at the time of re-sale the original buyer was in default as regards paying the price.[4] Ordinarily a person who buys and receives goods which the seller had no right to sell is guilty of a conversion, however innocently he may have acted,[5] but from the 1st January, 1890, his liability has been much restricted by sects. 8 and 9 of the Factors Act, 1889, *post*, p. 128 (reproduced in sect. 25 of this Act).

Specific performance. [19 & 20 Vict. c. 97. s. 2, and Jud. Act, 1873.]

52. In any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment [or decree] direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment [or decree] may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment [or decree].

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

See "specific goods" and "plaintiff" and "defendant" and "action" defined by sect. 62, *post*, pp. 112, 114. "Decree" is the Scotch term for judgment.

This section reproduces sect. 2 of the Mercantile Law Amendment

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delivery, *Gillard* v. *Brittan* (1841), 8 M. & W. 575; but see *Johnson* v. *Lancashire Railway* (1878), 3 C. P. D., at p. 507.

[1] *Ibid.*, and *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199.

[2] *Lancashire Wagon Co.* v. *Fitzhugh* (1861), 30 L. J. Ex. 231.

[3] *Ibid.*; *cf. Cooper* v. *Willomatt* (1845), 1 C. B. 672.

[4] *Milgate* v. *Kebble* (1841), 3 M. & Gr. 100.

[5] *Cooper* v. *Willomatt* (1845), 1 C. B. 672; *Hilbery* v. *Hatton* (1864), 33 L. J. Ex. 190.

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Act, 1856, as modified by the Judicature Acts and Rules which enable a Judge to try a case without a jury and give a defendant the right to claim any relief by counterclaim which he could have sought if he had brought an independent action, and enable all courts to administer all remedies.

Sect. 2 of the Mercantile Law Amendment Act extended the provisions of sect. 78 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) which enabled the Court in an action of detinue, to order that execution should issue for the return of the chattel detained without giving the defendant the option of retaining the chattel upon paying the value assessed. The enactment seems to have been passed to carry out the recommendation of the Mercantile Law Commission, 1855, and to assimilate English to Scotch law in this respect.[1]

In Scotland specific performance, or, as it is called, specific implement, is an ordinary and not an extraordinary remedy, and it can be demanded as of right wherever it is practicable.[2]

Remedy for breach of warranty.

53.—(1.) Where there is a breach of warranty by the seller,[3] or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty,[4] the buyer is not by reason only[5] of such breach of warranty entitled to reject the goods; but he may

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price;[6] or

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[1] Mercantile Law Commission (1855), Second Report, p. 10.

[2] *Stewart* v. *Kennedy* (1890), 15 App. Cas., at pp. 102, 105, H. L.

[3] *Benjamin on Sale*, 4th ed., p. 936; *Syers* v. *Jonas* (1848), 2 Exch., at p. 117; *Dawson* v. *Collis* (1851), 10 C. B. 523, at p. 533; *Behn* v. *Burness* (1863), 32 L. J. Q. B., at p. 206, Ex. Ch.; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438, at p. 451.

[4] *Ibid.*, and *Street* v. *Blay* (1831), 2 B. & Ad. 456, at p. 463; *Gompertz* v. *Denton* (1832), 1 Cr. & M. 207; *Parsons* v. *Sexton* (1847), 4 C. B. 899; *Couston* v. *Chapman* (1872), L. R. 2 Sc. App., at p. 254. *Aliter*, of course if the warranty be fraudulent, *Murray* v. *Mann* (1848), 2 Exch. 538.

[5] See *Bannerman* v. *White* (1861), 31 L. J. C. P. 28; *cf. Behn* v. *Burness* (1863), 32 L. J. Q. B., at p. 206, Ex. Ch.; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438, as to condition for rejection.

[6] *Mayne on Damages*, 4th. ed., p. 105. As to reduction, see *Street* v. *Blay* (1831), 2 B. & Ad. 456; *Allen* v. *Cameron* (1833), 1 Cr. & M., at

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(*b*) maintain an action against the seller for damages for the breach of warranty.[1]

(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.[2]

(3.) In the case of breach of warranty of quality such loss is primâ facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.[3]

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.[4]

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

See "quality" and "warranty" defined, *post*, p. 113. This section is the complement to sect. 11, *ante*, p. 23. Sect. 11 shews when

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p. 840; *Mondel* v. *Steel* (1841), 8 M. & W. 858, at p. 870. As to extinction, eee *Poulton* v. *Lattimore* (1829), 9 B. & C. 259.

[1] Bullen & Leake's *Prec. of Pleading*, 3rd ed., p. 264. The buyer, if sued for the price, is not bound to set up the breach of warranty. He may pay in full, and then sue, *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687.

[2] *Randall* v. *Roper* (1858), 27 L. J. Q. B. 266 (seed barley of inferior quality); *Smith* v. *Green* (1875), 1 C. P. D. 92 (cow with foot and mouth disease); *Randall* v. *Newson* (1877), 2 Q. B. D. 102, C. A., at p. 111 (defective carriage-pole specially made for carriage); *Hammond* v. *Bussey* (1887), 20 Q. B. D. 79, C. A. (ship coal of particular quality—special damage).

[3] *Mayne on Damages*, 4th ed., p. 180; *Loder* v. *Kekulé* (1857), 27 L. J. C. P. 27; *Jones* v. *Just* (1868), L. R. 3 Q. B. 197; *cf. Heilbutt* v. *Hickson* (1872), L. R. 7 C. P., at p. 453.

[4] *Mayne on Damages*, 4th ed., p. 182; *Mondel* v. *Steel* (1841), 8 M. & W. 858; *cf. Rigge* v. *Burbidge* (1846), 15 M. & W. 598.

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goods may be rejected or when the buyer must resort to his remedy for breach of warranty under this section. Although the buyer may not be able to reject the goods for simple breach of warranty, he may be entitled to reject them for fraud or some other invalidating cause. This conclusion is pointed to by the words "by reason *only* of such breach of warranty" in sub-sect. (1), and see sect. 61 (2).

When the buyer is entitled to reject the goods, and does so, he can recover the price if he has paid it for the consideration for its payment has wholly failed.[1] Then arises the question what further compensation, if any, is he entitled to? When he rejects the goods the position seems to be this. He has contracted for the supply of certain goods, and those goods have never been supplied to him. The seller, therefore, has failed in his obligation to deliver, and whatever damages would be recoverable in an action for non-delivery should on principle be recoverable in this case.[2]

In a recent case, where a horse, sold with a warranty, was killed, by no fault of the buyer, before the time for return had elapsed, it was held that the buyer could sue for breach of warranty, though he could not return the horse.[3]

Where an affirmation, which might be treated as a warranty, is made fraudulently, the buyer's powers are larger. In the first place, he may retain the goods and sue for damages; and secondly, if he can restore the goods unaltered, he may rescind the contract.[4]

In Scotland hitherto no distinction has been drawn between warranties and conditions. Every material term is a condition, and the rule has been that where the buyer can reject the goods but has not done so, he cannot sue for damages. The *actio quanti minoris* only applied to cases where the goods could not be returned; but now the buyer has a double remedy, guarded however by sect. 59.

Interest and special damages.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may

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[1] *Mayne on Damages*, 4th ed., p. 180.

[2] See *Bridge* v. *Wain* (1816), 1 Stark. 504, as commented on in *Elbinger Actien Gesellschafft* v. *Armstrong* (1874), L. R. 9 Q. B., at p. 476, where this position seems to be assumed.

[3] *Chapman* v. *Withers* (1888), 20 Q. B. D. 824.

[4] *Holdsworth* v. *Glasgow Bank* (1880), 5 App. Cas. 317, at pp. 323, 338 (distinguishing goods from shares).

be recoverable, or to recover money paid where the consideration for the payment of it has failed. Sect. 54.

As to interest, see note to sect. 49, *ante*, p. 90.

As regards special damages, there are no rules peculiar to the contract of sale. Each case must be determined on its own merits, according to the general rule that, when a contract is entered into by the parties with knowledge that there are special circumstances attaching to it, which, in the ordinary course of things, would produce special loss if the contract were broken, the law implies a liability to pay damages for such special loss. "We must follow out the rule," says Cotton, L.J., in an action for non-delivery of a gun, "that the plaintiffs are only to have the damages which are the ordinary and natural consequences of the breach; but this rule is subject to the limitation, that where the breach has occasioned a special loss which was actually in contemplation of the parties at the time of entering into the contract, that special loss, happening subsequently to the breach, must be taken into account."[1] In a later case, where the action was brought for breach of warranty, Fry, L.J., suggests four tests for determining whether the damages claimed are recoverable. (1.) What are the damages which actually resulted from the breach of contract? (2.) Was the contract made under any special circumstances, and, if so, what were those circumstances? (3.) What, at the time of making the contract, was the common knowledge of both parties? (4.) What may the Court reasonably suppose to have been in the contemplation of the parties as a probable result of the breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?[2] Special damage.

The liability to pay damages for breach of contract is an obligation annexed by law independently of the volition of the parties, and the criterion is necessarily an objective one. What the parties themselves may have contemplated is immaterial. The question is what a reasonable man with their common knowledge would contemplate as a probable consequence of the breach if he applied his mind to it. The same result will be arrived at if the supposed contemplation of the

[1] *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D., at p. 677, C. A. (gun ordered to fulfil sub-contract); *cf.* *Grebert* v. *Nugent* (1885), 15 Q. B. D. 85, C. A. (goods ordered for French sub-contract).

[2] *Hammond* v. *Bussey* (1887), 20 Q. B. D., at p. 100, C. A. (breach of warranty and sub-sale with similar warranty, costs of action reasonably defended).

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parties be wholly eliminated. Given a contract made without any special circumstances, then the measure of ordinary damages is the loss which naturally arises from the breach of such a contract. Given a contract made under special circumstances to the knowledge of both parties, then the special damages are those which naturally arise from a breach of such a contract under the particular circumstances.

Failnre of consideration.

As to failure of consideration also, there is nothing peculiar to the contract of sale. Money paid on a consideration which has failed can usually be recovered as money had and received.[1] Where the plaintiff bought and paid for 175 tons of terra japonica, and only 155 tons were delivered, he was held entitled to recover a proportionate amount of the price under the common money counts.[2]

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[1] See Bullen & Leake's *Prec. of Pleading*, 3rd ed., pp. 48, 49, and cases there collected.

[2] *Devaux* v. *Conolly* (1849), 8 C. B. 640; but cf. *Covas* v. *Bingham* (1853) 2 E. B. 836, where by the contract the bill of lading was made conclusive.

PART VI.

SUPPLEMENTARY.

Sect. 55.

Exclusion of implied terms and conditions.

55. Where any right, duty, or liability would arise under a contract of sale, by implication of law, it may be negatived or varied by express agreement[1] or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

This section is merely an application of the general maxims, *Expressum facit cessare tacitum*, and *Modus et conventio vincunt legem*. As Pothier has pointed out, sale is a consensual contract, and the parties may alter at will the obligations which the law implies from the general nature of the contract.[2] Lord Blackburn, discussing the correlative obligations of payment and delivery, says, "There is no rule of law to prevent the parties from making any bargain they please,"[3] and Lord Esher says, "Merchants are not bound to make their contracts according to any rule of law."[4] Bédarride accurately expresses the similar rule in France. "C'est surtout de la vente commerciale qu'on peut dire qu'elle peut se plier à toutes les modalités, sans autres exceptions que celles qui résulteraient d'une disposition de la loi prohibitive, ou des exigeances de l'ordre de la morale ou des bonnes mœurs."[5]

In estimating the effect of an express stipulation, it must be borne

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[1] See, *e.g.*, *Ward* v. *Hobbs* (1887), 4 App. Cas. 13 (diseased pigs sold "with all faults").

[2] *Contrat de Vente*, Nos. 1, 181, 306.

[3] *Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B., at p. 329; see the passage cited at length, *post*, pp. 180–182.

[4] *Honck* v. *Muller* (1881), 7 Q. B. D., at p. 103, C. A.

[5] *Des Achats et Ventes*, § 226.

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in mind, as Willes, J., remarks, that "the doctrine that an express provision excludes implication does not affect cases in which the express provision appears on the true construction of the contract to have been superadded for the benefit of the buyer."[1] French law goes further, and art. 1602 of the Civil Code provides that, where a stipulation in a contract of sale is ambiguous, it is to be construed in favour of the buyer. And this was the Roman rule. In *contrahendâ venditione ambiguum pactum contra venditorem interpretandum est.*[2]

Referring to a consignee's lien for advances, Lord Westbury says: "Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract they have made."[3]

Usage.

As regards trade usage, it is to be noted that when one party relies on and gives evidence of usage, the opposite party is at liberty to prove—"either, first, the non-existence of the usage; or, secondly, its illegality or unreasonableness; or, thirdly, that, in fact, it formed no part of the agreement between the parties."[4]

For a list of terms and expressions which have been the subject of judicial construction, see note B, *post*, p. 174.

Reasonable time a question of fact.

56. Where, by this Act, any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

It is often difficult to say whether reasonable time is a question of law or a question of fact, or a mixed question of law and fact.[5] The

[1] *Mody* v. *Gregson* (1868), L. R. 4 Ex., at p. 53, Ex. Ch.; approved, *Drummond* v. *Van Ingen* (1887), 12 App. Cas., at p. 294, per Lord Herschell. *Cf. Bigge* v. *Parkinson* (1862), 31 L. J. Ex. 301, Ex. Ch. (sale of provisions for troopship with warranty that they should pass inspection).

[2] In English law occasional effect is given to the maxim *Verba fortius accipiunter contra proferentem;* see notes to *Roe* v. *Tranmar*, 2 Smith, Lead. Cas., 7th ed., p. 525.

[3] *Re Leith's Estate* (1866), L. R. 1 P. C. 296, at p. 305.

[4] *Taylor on Evidence*, § 1077. See all the authorities on usage collected and reviewed in notes to *Wigglesworth* v. *Dallison*, 2 Smith, Lead Cas., 9th ed., p. 569; and as to usage to bind both parties, *i.e.* that it must be known or taken to be known to both, see *Robinson* v. *Mollet* (1875), L. R. 7 H. L. 802.

[5] *Taylor on Evidence*, § 30.

Act resolves the doubt as regards sale, by making it in all cases a question of fact. Compare sect. 29 (4), *ante*, p. 60, as to reasonable hours. Sect. 56.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action. Rights enforceable by action.

This section is required in order to negative the rule of the common law, that when a statute provides no express penalty for disobedience to its provisions, any contravention of its provisions is punishable as a misdemeanour.[1] See "action" defined by sect. 62, *post*, p. 109.

58. In the case of a sale by auction— Auction sales.

(1.) Where goods are put up for sale by auction in lots, each lot is primâ facie deemed to be the subject of a separate contract of sale:[2]

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:[3]

(3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly[4] to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:[5] [Cf. 30 & 31 Vict. c. 48. s. 5, *post*, p. 153.]

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[1] Stephen's *Digest of Criminal Law*, 3rd ed., p. 87.

[2] *Emmerson* v. *Heelis* (1809), 2 Taunt. 38; *Roots* v. *Lord Dormer* (1832), 4 B. & Ad. 77; *cf. Couston* v. *Chapman* (1872), L. R. 2 Sc. App. 250 (a Scotch case).

[3] *Payne* v. *Cave* (1789), 3 T. R. 148; *Warlow* v. *Harrison* (1858), 28 L. J. Q. B., at p. 21, per Lord Campbell.

[4] *Mainprice* v. *Westley* (1865), 34 L. J. Q. B. 229; *cf.* 30 & 31 Vict. c. 48, s. 5.

[5] *Bexwell* v. *Christie* (1776), Cowp. 395, per Lord Mansfield; *Thornett* v. *Haines* (1846), 15 M. & W. 367; *Green* v. *Baverstock* (1863), 32 L. J. C. P.,

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[Cf. 30 & 31 Vict. c. 48. s. 6, *post*, p. 154.]

(4.) A sale by auction may be notified to be subject to a reserved [or upset] price, and a right to bid may also be reserved expressly by or on behalf of the seller.[1]

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.[2]

Nature of auction sale.

Sub-sect. (2.) The nature of the contract involved in a sale by auction was much discussed by the Roman lawyers.[3] In England if the contract be resolved into offer and acceptance, it seems clear that the bid constitutes the offer. As the offer may be retracted before acceptance, so, conversely, it has been held that if a sale be advertised, but the lots are afterwards withdrawn, an intending bidder has no right of action.[4] An auctioneer who sells goods which he has no right to sell may or may not be guilty of conversion, according to the circumstances.[5]

Bids at auction.

Sub-sect. (3.) Formerly it seems to have been the rule in equity that, when a sale by auction was not expressly stated to be without reserve, the seller might employ one person to bid, so as to prevent the property going at an undervalue. The Sales of Land by Auction Act, 1867 (30 & 31 Vict. c. 48) was passed to abolish this rule. It first declares that any sale which would be invalid at common law by reason of the employment of a puffer, shall be invalid in equity, and then proceeds to regulate sales at which a price is reserved or a right to bid is reserved, and in this it appears to go slightly further than the common law rule.[6] The Act does not apply to the sale of goods by auction, but this section is in substantial accordance with the Act. For the sake of comparison the Sale of Land by Auction Act, or, as

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181; *cf. Mortimer* v. *Bell* (1865), L. R. 1 Ch. App., at p. 13. As to fictitious bids by person interested in the sale, but not the seller, see *Union Bank* v. *Munster* (1887), 37 Ch. D. 51, and the Rule of Roman law, *Alterius circumventio alio non præbst actionem.*

[1] *Ibid.*; and see *Howard* v. *Castle* (1796), 6 T. R., at p. 645, per Grose, J.

[2] *Thornett* v. *Haines* (1846), 15 M. & W., at p. 372; *Mortimer* v. *Bell* (1865), L. R. 1 Ch. App. 10 (where auctioneer and puffer both bid and sale was held void).

[3] See Moyle's *Sale in the Civil Law.*

[4] *Harris* v. *Nickerson* (1873), L. R. 8 Q. B. 286.

[5] *Barker* v. *Furlong* (1891), 2 Ch. 172; see, too, *Sol. Journal*, vol. 36, p. 480.

[6] *Parfitt* v. *Jepson* (1877), 46 L. J. C. P. 529, at p. 533.

it is commonly called, the Puffers Act, is set out in the Appendix, *post*, p. 153. The common law rule is an ancient one, *Tollendum est igitur ex rebus contrahendis omne mendacium non licitatorem venditor, nec qui contra se liceatur emptor opponat.*[1] Sect. 58.

An agreement for a "knock-out" seems to be a conspiracy at common law.

As to auctioneer's duty to put up his name, etc., during sale, see 8 & 9 Vict. c. 15, s. 7.

Payment into Court in Scotland when breach of warranty alleged.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

In Scotland the *actio quanti minoris* has hitherto been extremely limited in its scope. It was only competent when the buyer could not return the goods. Now that the English rule is extended to Scotland, by sects. 11 and 53, it was thought well to safeguard it by this provision. It is to be regretted that the section was not extended to England, where it is a common fraud to keep the goods and then set up against the price an alleged breach of warranty.

Repeals.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

See list of repeals, *post*, p. 117.

[1] Cicero, *De Officiis*, lib. 3, s. 15, cited in *Warlow* v. *Harrison* (1858), 28 L. J. Q. B. 19.

Sect. 61.
Savings.

61.—(1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

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

(5.) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

Sub-sect. (1.) The Act now in force is the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See in particular sect. 44 (2) (III.), reputed ownership; sect. 48, fraudulent preferences; sect. 49, protected *bonâ fide* transactions; sect. 51, power of trustee to sell; and sect. 55, power of trustee to disclaim onerous contracts.

Sub-sect. (3.) The Bills of Sale Acts at present in force are the Acts of 1878, 1882, 1890, and 1891. The Act of 1878 alone affects sales as defined and dealt with by this Act. As to the Act of 1878, see App. II., *post*, p. 155.

For examples of other Acts relating to sales, see the Conveyancing and Law of Property Act, 1881, so far as it relates to conveyances of personalty; the Acts regulating the Sale of Food and Drugs; the Acts regulating the sale of Poisons; and the Weights and Measures Acts; also the Acts relating to the sale of horses, *post*, p. 136.

Sect. 62.

Interpretation of terms.

62.—(1.) In this Act, unless the context or subject-matter otherwise requires—

"Action" includes counterclaim and set-off, and in Scotland condescendence and claim and compensation. Action.

"Bailee" in Scotland includes custodier. Bailee.

"Buyer" means a person who buys or agrees to buy goods. Buyer.

"Contract of sale" includes an agreement to sell as well as a sale. Contract of sale.

The term "contract of sale" is used to include both executory and executed contracts of sale; see for instance, as justifying this, the 17th sect. of the Statute of Frauds. Probably a similar object is aimed at by the obscure art. 1589 of the French Civil Code: "La promesse de vente vaut vente."

"Defendant" includes in Scotland defender, respondent, and claimant in a multiple-poinding. Defendant.

"Delivery" means voluntary transfer of possession from one person to another. Delivery. [Cf. 45 & 46 Vict. c. 61, s. 3.]

For rules as to delivery in contracts of sale, see sects. 27 to 32, *ante*, p. 57. Mr. Benjamin observes that the term "delivery" is used in different senses in the cases.[1] It would perhaps be more correct to say that a delivery which is effectual for one purpose is ineffectual for other purposes. For instance, delivery to a carrier generally passes the property to the buyer, but does not defeat the right of stoppage *in transitu*, while delivery by the carrier to the consignee does defeat that right.

Sir F. Pollock defines delivery as "voluntary dispossession in favour of another," and proceeds to say that, "in all cases the essence of delivery is that the deliveror by some apt and manifest act puts the deliveree in the same position of control over the thing, either directly or through a custodian, which he himself held immediately before that act."[2]

Delivery may be actual or constructive. Delivery is constructive

[1] *Benjamin on Sale*, 4th ed., p. 677.
Pollock on Possession, pp. 43, 46.

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when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery. Delivery by attornment may take place in three classes of cases. First, the seller may be in possession of the goods, but after sale he may attorn to the buyer, and continue to hold the goods as his bailee. Secondly, the goods may be in the possession of the buyer before sale, but after sale he may hold them on his own account.[1] Thirdly, the goods may be in the possession of a third person, as bailee for the seller. After sale such third person may attorn to the buyer and continue to hold them as his bailee.[2]

Sir F. Pollock has carefully discussed the so-called "symbolic delivery" by giving the buyer the key of the place where the goods are stored. He shews that the key is not the symbol of the goods, but that the transaction "consists of such a transfer of control in fact as the nature of the case admits, and as will practically suffice for causing the new possessor to be recognised as such."[3]

But the transfer of a bill of lading appears to afford a genuine instance of symbolic delivery.[4] While goods are at sea, they can only be dealt with on land through the instrumentality of the bill of lading which represents them. The transfer of the bill of lading has the same effect as a delivery of the goods themselves.

Where goods are taken possession of by the buyer under a license to seize, the transaction is equivalent to a delivery by the seller,[5] and should perhaps be regarded as a case of actual delivery.

A delivery by mistake may be inoperative.[6]

It is to be noted that the Act makes no attempt to define "possession." But a definition of possession for the purposes of the Factors Acts is given by sect. 1 (2) of the Factors Act, 1889, *post*, p. 120. The subject is exhaustively treated in Pollock and Wright, *Possession in the Common Law*.[7]

Document of title.

"Document of title to goods" has the same meaning as it has in the Factors Acts.

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[1] *Story on Sale*, § 312*a*.

[2] *Pollock on Possession*, p. 72.

[3] *Ibid.*, p. 61.

[4] *Sanders* v. *Maclean* (1883), 11 Q. B. D. 327, at p. 341.

[5] *Congreve* v. *Evetts* (1854), 10 Exch. 298, at p. 308, per Parke, B.

[6] *Godts* v. *Rose* (1855), 17 C. B. 229; *Pollock on Possession*, pp. 100–114.

[7] Professor Maitland, in an interesting article on the *Seisin of Chattels*, establishes that in early times the term "seisin" was applied to chattels

Sect. 62.

By sect. 1 (4) of the Factors Act, 1889, *post*, p. 121, "The expression 'document of title' shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by endorsement or delivery, the possessor of the document to transfer or receive goods thereby represented."

Factors Acts.

"Factors Acts" mean the Factors Act, 1889; the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same.

See these Acts set out and noted, *post*, pp. 118, 135.

Fault.

"Fault" means wrongful act or default.

This definition was inserted at the instance of Lord Watson. See sects. 7, 9, and 20, which require it.

Future goods.

"Future goods" mean goods to be manufactured or acquired by the seller after the making of the contract of sale.

See sect. 5, *ante*, p. 14, and note thereto, and p. 43, and *post*, p. 114.

Goods.

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term also includes emblements [industrial growing crops], and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Compare the definition of "goods" given by sect. 168 of the Bankruptcy Act, 1883, and contrast the definition of "personal chattels" given by sect. 4 of the Bills of Sale Act, 1878, *post*, p. 155. The words in brackets are a Scotch term.

The term "goods, wares, and merchandise" is used in the 17th sect. of the Statute of Frauds, and in the Stamp Act, 1890, but other statutes use simply the term "goods."

The term applies to all "tangible moveable property."[1] Scrip and

as freely as the term "possession" and as its equivalent (*Law Quarterly Review*, vol. i.).

[1] *Cf. Blackburn on Sale*, pp. 6 and 9.

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shares are things in action, and so of course are bills, notes, and cheques.[1]

Most of the decisions have arisen on the construction of the Statute of Frauds, and the definition of goods has been somewhat artificially extended in order to bring contracts of sale within the 17th rather than the 4th sect. of the Act, which does not recognise part performance. See *post*, p. 142.

Tenants' fixtures, unsevered, seem to fall neither within the 4th nor the 17th sects.,[2] though the price of fixtures could be recovered on a count for fixtures sold and delivered.

Emblements, or *fructus industriales*, are treated as goods, even though they are to derive benefit from the land after sale.[3]

As regards *fructus naturales*, the question seems to turn on how they are treated by the contract. If they are to be delivered by the seller who is to sever them himself and deliver them, they are goods within the meaning of the 17th sect. If the buyer is to take them away, "the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining." If so, they come within the 4th sect. If not, and they are to be delivered immediately, even though the buyer is to enter and take them, they come within the 17th sect.[4] The 17th sect. is now repealed and reproduced in sect. 4 of this Act, *ante*, p. 12.

Lien.

"Lien" in Scotland includes right of retention.

Cf. Factors (Scotland) Act, *post*, p. 135. The common law extent of the right of retention is cut down by the provisions of the Act.

Plaintiff.

"Plaintiff" includes [pursuer, complainer, claimant in a multiple-poinding], and defendant [or defender] counter claiming.

The terms in brackets are Scotch terms.

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[1] *Humble* v. *Mitchell* (1839), 11 A. & E. 205; *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426 (shares); *Lang* v. *Smith* (1831), 7 Bing. 284 (foreign bonds); *Freeman* v. *Appleyard* (1862), 32 L. J. Ex. 175 (certificate of Railway Stock).

[2] *Lee* v. *Gaskell* (1876), 1 Q. B. D. 700.

[3] *Marshall* v. *Green* (1875), 1 C. P. D. 35, at p. 42; *Benjamin on Sale*, 4th ed., p. 117.

[4] *Marshall* v. *Green* (1875), 1 C. P. D., at p. 42, per Brett, J. (growing timber). But see *Lavery* v. *Pursell* (1888), 39 Ch. D. 508, per Chitty, J., where there was a sale of the building materials of a house which were to be cleared away in two months. This was held to be an agreement within the 4th section.

"Property" means the general property in goods, and not merely a special property. Sect. 62. Property.

The essence of sale is the transfer of the ownership or general property in goods from seller to buyer for a price. See "*the*" property, that is, the general property, distinguished from "*a*" property, that is, merely a special property, by Lord Bowen.[1]

The general property in certain goods may be in one person, while a special property in them is in another person, as in the case of a pledge where the pledgee has only a special property, the general property remaining in the pledgor.[2] The general property in goods may be transferred to one person subject to a special property in another.[3]

Again, the right of property in goods must be distinguished from the right to their present possession. The entire right of property may be in one person, while the right to possession may be in another, as in the case of a lien.[4]

Thus, where there is a sale of specific goods for cash, the property passes by the contract, but the seller may retain the goods till the price is paid. Again, goods may be sold which are in the possession of a third person, such as a warehouseman, who has no property in the goods, but has a right to retain them till his charges are paid.

"Quality of goods" includes their state or condition. Quality.

See sects. 14 and 15, which require this definition. Corn or wine may be of excellent kind, but if it is sea-damaged it may not be merchantable.

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[1] *Burdick* v. *Sewell* (1884), 13 Q. B. D., at p. 175, C. A., and 10 App. Cas., at p. 93.

[2] *Halliday* v. *Holgate* (1868), L. R. 3 Ex. 299, Ex. Ch.

[3] *Franklin* v. *Neate* (1844), 13 M. & W. 481; *Jenkyns* v. *Brown* (1849), 14 Q. B. 496. See a lien distinguished from a pledge, *Donald* v. *Suckling* (1866), L. R. 1 Q. B., at p. 612; *cf. Howes* v. *Ball* (1827), 7 B. & C. 481 (hypothecation); a pledge distinguished from a mortgage, *Ex p. Hubbard* (1886), 17 Q. B. D., at p. 698; *Re Morritt* (1886), 18 Q. B. D., at p. 232; a pledge distinguished from a sale, *Sewell* v. *Burdick* (1884), 10 App. Cas. 74.

[4] *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A.; *Blackburn on Sale*, pp. 198, 316; *Milgate* v. *Kebble* (1841), 3 M. & Gr. 100; *Pollock on Possession*, p. 120.

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Sale.

"Sale" includes a bargain and sale as well as a sale and delivery.

This definition follows from the definition of sale given by sect. 1. See notes to that section and to sect. 49, *ante*, p. 91.

Seller.

"Seller" means a person who sells or agrees to sell goods.

Specific goods.

"Specific goods" mean goods identified and agreed upon at the time a contract of sale is made.

Specific or individualised goods must be distinguished from general or unascertained goods. Where there is a contract for specific goods, the seller would not fulfil his contract by delivering any other goods than those agreed upon. When there is a contract for general goods the seller fulfils his contract by delivering at the appointed time any goods which answer to the description in the contract. It is clear that future goods, even though particularly described, do not come within the definition of specific goods, but for most purposes would be subject to the same considerations as general goods, *ante*, pp. 41, 43.

The definition is only a *primâ facie* one, because there may be a mixed case, namely, when there is a contract for the sale of an unascertained portion of a larger ascertained quantity of goods. Suppose a man having a hundred dozen of a particular brand of champagne in his cellar, agrees to sell twenty dozen of the champagne of that brand "now in my cellar." For some purposes this would be regarded as a contract for specific goods, while for other purposes it would be regarded as a contract for the sale of unascertained goods. The property in the wine would not pass till the twenty dozen had been appropriated to the contract (*ante*, p. 36), but if the whole of the wine were destroyed the seller would be discharged from his obligation (*ante*, p. 17).

Warranty.

"Warranty," as regards England and Ireland, means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland, a breach of warranty shall be

deemed to be a failure to perform a material part of the contract. Sect. 62.

Sir W. Anson, in his work on contracts, has collected six different senses in which the word warranty is used in the cases,[1] but it is submitted that the definition given above is the most correct. See Note A, *post*, p. 168, where the subject is discussed at length. Lord Abinger, protesting against a warranty being confused with a condition, says, "a warranty is an express or implied statement of some things which the party undertakes shall be part of the contract, and though part of the contract yet collateral to the express object of it."[2]

The Act, in accordance with this view, draws throughout a distinction between the terms "condition precedent" and "warranty." See sect. 11, *ante*, p. 23, and sects. 12 to 14, and 53, *ante*, p. 98.

(2.) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.[3] Good faith.

The House of Lords in *Derry* v. *Peek*[4] has exploded the notion of "legal fraud," and has established the principle that there is no *tertium quid* between good faith on the one hand, and bad faith or fraud on the other.

"First," says Lord Herschell, "in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances, can have no real belief in the truth of what he states. To prevent a false statement being fraudu- What constitutes fraud.

[1] *Anson on Contracts*, 5th ed., p. 309.

[2] *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, at p. 404. See, too, *Behn* v. *Burness* (1863), 33 L. J. Q. B. 204, at p. 207; *Heyworth* v. *Hutchinson* (1867), L. R. 2 Q. B. 447; *cf. Kennedy* v. *Panama Mail Co.* (1867), L. R. 2 Q. B., at p. 587, and notes to *Cutter* v. *Powell*, 2 Smith, Lead. Cas., 9th ed., p. 31.

[3] Taken from the 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882, s. 90); *cf. Jones* v. *Gordon* (1877), 2 App. Cas. 616.

[4] *Derry* v. *Peek* (1889), 14 App. Cas. 337.

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lent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground; for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."[1]

Insolvent.

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not [and whether he has become a notour bankrupt or not.][2]

The words in brackets refer to Scotland. By sect. 96 of the Indian Contract Act, 1872, "a person is insolvent who has ceased to pay his debts in the ordinary course of business, or who is incapable of paying them."

Deliverable state.

(4.) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.[3]

Commencement.

63. This Act shall come into operation on the First day of January, One Thousand Eight Hundred and Ninety-four.

Short title.

64. This Act may be cited as the Sale of Goods Act, 1893.

Canon of construction.

The canon for construing a codifying Act was discussed by the House of Lords in a case on the Bills of Exchange Act, 1882. "I think," says Lord Herschell, "the proper course is in the first instance to examine the language of the statute, and to see what is its natural meaning, uninfluenced by any considerations derived from the previous

[1] *Derry* v *Peek* (1889), 14 App. Cas., at p 374, H. L.

[2] *Benjamin on Sale*, 4th ed., 851; *Biddleoombe* v. *Bond* (1835), 4 A. & E. 332 (a general inability to pay debts); *Ex p. Carnforth Co.* (1876), 3 Ch. D. 108, C. A.; see at p. 122 (an inability to pay avowed either in act or word, and a consequent intention on the part of the indebted company not to pay their debts).

[3] See *Blackburn on Sale*, p. 152, and sect. 18 (1), (2).

state of the law; and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if it will bear an interpretation in conformity with this view." But of course if any provision be of doubtful import resort to the previous state of the law would be perfectly legitimate.[1] Sect. 64.

The provisions of this Act must be read with and subject to the provisions of the Interpretation Act, 1889, which apply to all Acts of Parliament, unless expressly excluded.

SCHEDULE.

This schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act and Extent of Repeal.
1 Jac. 1. c. 21	An Act against brokers. The whole Act.
29 Cha. 2. c. 3	An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen and sixteen.[2]
9 Geo. 4. c. 14	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part; that is to say, section seven.
19 & 20 Vict. c. 60 ..	The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four, and five.
19 & 20 Vict. c. 97 ..	The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one and two.

[1] *Vagliano* v. *Bank of England* (1891), A. C., at p. 145.

[2] Commonly cited as sections sixteen and seventeen.

THE FACTORS ACT, 1889.

(52 & 53 VICT. c. 45.)

An Act to amend and consolidate the Factors Acts.

[26th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

[The Factors Act, 1889, which repeals the previous enactments dealing with similar subject-matter, is a partial application to English law of the French maxim, "En fait de meubles possession vaut titre." The present Act is the result of a long struggle between the mercantile community on the one hand and the principles of common law on the other. The general rule of the common law was, *Nemo dat quod non habet*,[1] and it was held that the mere fact that a person was in possession of goods or documents of title to goods did not enable him to dispose of those goods in contravention of his instructions with respect to them. The merchants and bankers contended that, in the interests of commerce, if a person was put or left in the possession of goods or documents of title, he ought, as regards innocent third parties, to be treated as the owner of the goods. As Bowen, L.J., has pointed out, the object of the Courts is to prevent fraud, "the object of mercantile usages is to prevent the risk of insolvency, not of fraud, and any one who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case—credit, not

[1] See sect. 21, *ante*, p. 48, and *Fuentes* v. *Montis* (1868), L. R. 3 C. P. 268, at p. 277, per Willes, J.

distrust, is the basis of commercial dealings; and mercantile genius consists principally in knowing whom to trust."[1]

The first Factors Act was passed in 1823, the second in 1825, and the third in 1842. These enactments were a model of the art of saying few things in many words. They dealt with the powers of factors or other mercantile agents intrusted with the possession of goods or documents of title to goods, and their conjoint effect is carefully summed up by Blackburn, J., in *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, Ex. Ch. After reviewing the history and policy of the Acts, he proceeds to say (p. 372): "We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt. . . . The general rule of law is, that where a person is deceived by another into believing he may safely deal with property he bears the loss, unless he can shew that he was misled by the act of the true owner. The legislature seems to us to have wished to make it the law that, where a third person has intrusted goods or the documents of title to goods to an agent who, in the course of such agency, sells or pledges the goods, he should be deemed by that act to have misled any one who *bonâ fide* deals with the agent, and makes a purchase from or advance to him without notice that he was not authorised to sell or to procure the advance."

The Factors Act, 1877, dealt with a new subject-matter. After providing that a secret revocation of agency should be inoperative, it proceeded to deal with the case, not of agents, but of buyers or sellers left in possession of the documents of title to goods. The present Act reproduces and somewhat extends the effect of the four above-mentioned Acts.]

Preliminary.

Definitions. Mercantile agent.

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

This definition is new, but is mainly declaratory. It extends the construction put on the repealed Acts in so far as it applies to agents

[1] *Sanders* v. *Maclean* (1883), 11 Q. B. D., at p. 343, C. A.

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"to buy goods," and perhaps also in so far as it applies to forwarding agents.[1] Under the repealed Acts, the terms used were simply "person" or "agent" intrusted with the possession of goods, but it was held that the Acts only applied to mercantile transactions, and that the term "person" or "agent" did not include a mere servant or caretaker, or one who had possession of goods for carriage, safe custody, or otherwise as an independent contracting party; but only persons whose employment corresponded to that of some known kind of commercial agent like that class (factors) from which the Acts took their name.[2] Thus, a person entrusted with furniture to keep in her own house for the plaintiff was held not to be an "agent" within the meaning of the Acts;[3] and a wine merchant's clerk who, as such, was possessed of delivery orders, was held not to be an agent within the meaning of the Acts, so as to be able to make a valid pledge in fraud of his master. In the latter case, Blackburn, J., remarks that the clerk "was not a mercantile agent."[4] It was further held, that if a mercantile agent received goods in some other capacity, the Act did not apply; for instance, where goods were warehoused with a warehouseman who was also a broker, it was decided that he could not pledge them in his capacity of broker.[5] Under the present Act it has been held that a person employed to sell jewelry for a firm of jewellers at a small commission is not a mercantile agent.[6] See the chief classes of mercantile agents enumerated, and their functions defined in *Story on Sale*, §§ 78–118.

On the other hand, it was held that the Acts applied to an isolated instance of employment, if the employment was such that persons who ordinarily carried on that kind of business would come within the Acts.[7]

Possession.

(2.) A person shall be deemed to be in possession of

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[1] *Qu.* how far *Hellings* v. *Russell* (1875), 33 L. T. N.S. 380, and *City Bank* v. *Barrow* (1880), 5 App. Cas. 664, are affected?

[2] *Cole* v. *North Western Bank* (1875), L. R. 10 C. P., at pp. 372, 373, per Blackburn, J.; *cf. City Bank* v. *Barrow* (1880), 5 App. Cas., at p. 678.

[3] *Wood* v. *Rowcliffe* (1846), 6 Hare, 183.

[4] *Lamb* v. *Attenborough* (1862), 31 L. J. Q. B. 41.

[5] *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, Ex. Ch.; *cf. City Bank* v. *Barrow* (1880), 5 App. Cas., at p. 678.

[6] *Hastings* v. *Pearson* (1893), 1 Q. B. 62; see also *Tremoille* v. *Christie*, *Sol. Journ.*, 1893, vol. xxxvii. p. 650.

[7] *Hayman* v. *Flewker* (1863), 32 L. J. C. P. 132 (pictures entrusted to insurance agent to sell on commission).

goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf: Sect. 1.

This definition is taken from words used in sect. 4 of the Act of 1842 (5 & 6 Vict. c. 39), but it is generalised by the substitution of the word "person" for the word "agent." The probable object of this change is to make it apply to sects. 8 to 10, *post*, as well as to the agency sections.

(3.) The expression "goods" shall include wares and merchandise: Goods.

The term used in the 17th sect. of the Statute of Frauds is "goods, wares, and merchandise." This definition, therefore, probably incorporates the numerous decisions on the meaning of those words in that Act, which are reproduced in the definition of "goods" given by sect. 62 of the Sale of Goods Act.

(4.) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods,[1] and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented: Document of title.

This definition is taken from sect. 4 of the Factors Act, 1842 (5 & 6 Vict. c. 39), with the addition of the "warehouse-keeper's certificate." The Act of 1825 (6 Geo. 4, c. 94, s. 2) included warehouse-keepers' certificates, but the Act of 1842 omitted them, and in a case in 1878 the Lord Justices held that these documents were not documents of title.[2]

[1] As to delivery orders, see *Ex p. Close* (1885), 54 L. J. Q. B. 43; *Re Cunningham & Co.* (1885), 54 L. J. Ch. 44.

[2] *Gunn* v. *Bolckow, Vaughan & Co.* (1878), L. R. 10 Ch. App. 491.

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Cash receipts given in place of delivery orders are not documents of title.[1]

Ordinarily, when the title to goods depends upon a written instrument, the document requires to be registered as a bill of sale, for the purposes of the Bills of Sale Acts; but by sect. 4 of the Bills of Sale Act, 1878, *post*, p. 155, it is provided that the term bill of sale shall not include "transfers of good, in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of such document to transfer or receive goods thereby represented." And by the Bills of Sale Act, 1890 (53 & 54 Vict. c. 53), as amended by the Bills of Sale Act, 1891 (54 & 55 Vict. c. 35), mercantile letters of hypothecation are exempted from the provisions of the Bills of Sale Acts.

As to the mode of transferring documents of title, see sect. 11, *post*, p. 131.

Pledge.

(5.) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:

This definition is new. Its terms seem wide enough to include a mortgage, that is, a contract transferring conditionally the general property in goods in consideration of a loan, and also perhaps a letter of hypothecation without possession.

The words "any pecuniary liability" are very wide, and are probably intended to meet cases such as the granting of a letter of credit to be operated on by bills of exchange in consideration of the pledge of goods or documents.

The language of this definition should be compared with the language used in sect. 4 of the Act of 1842 (5 & 6 Vict. c. 39).

Person.

(6.) The expression "person" shall include any body of persons corporate or unincorporate.

[1] *Kemp* v. *Falk* (1882), 7 App. Cas. 573, at p. 585, per Lord Blackburn. As to mate's receipts, see *Cowasjee* v. *Thompson* (1845), 11 Moore, P. C. 165; *Hathering* v. *Laing* (1873), L. R. 17 Eq. 92.

Dispositions by Mercantile Agents.

Sect. 2.

Powers of mercantile agent with respect to disposition of goods.

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

See the terms "mercantile agent," "document of title," and "pledge" defined by sect. 1, *ante*, p. 119.

This sub-section supersedes and reproduces, in altered language, sects. 2 and 4 of the Act of 1825 (6 Geo. 4, c. 94), and sect. 4 of the Act of 1842 (5 & 6 Vict. c. 39). It no longer requires the goods or documents to be "intrusted" to the agent, but it suffices that they are in his possession with the owner's consent. How far this alteration of language extends the operation of the new Act is not very clear; but if it was intended to alter the rule that where a mercantile agent was intrusted with goods in some other capacity, he could not sell or pledge them contrary to instructions, it is a pity that so important a change in the law has not been more clearly enunciated.[1] Suppose a house were let furnished to a man who happened to be an auctioneer. Could he sell the furniture by auction and give a good title to the buyers? Surely not.

It was held under the repealed Acts that the mercantile agent's powers were not exhausted by a single transaction. Thus, where the consignee of cotton pledged the bill of lading with a broker, authorising him to sell the cotton, and then with the broker's consent pledged the net proceeds to D., it was held that the latter transaction was valid as

[1] As to former rule, see *Monk* v. *Whittenbury* (1831), 2 B. & Ad. 484 (flour factor and wharfinger); *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354 (warehouse-keeper and broker).

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well as the former one.[1] It was also held that the Acts extended to cases where the agent had by fraud induced his principal to intrust him with the goods or the documents of title to them.[2] These cases, no doubt, are still good law.

As to the consideration necessary to support a sale, pledge, or other disposition, see sect. 5, *post*, p. 126; and as to pledges for antecedent debts or liabilities, see sect. 4, *post*, p. 125.

Notice.

The term "notice" in this section, probably means actual, though not formal, notice; that is to say, either knowledge of the facts, or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge. The same construction would probably be put on it as upon the term "notice" in sect. 29 of the Bills of Exchange Act, 1882, or in sects. 37 and 49 of the Bankruptcy Act, 1883.[3]

Revocation of consent.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

See last note. This sub-section reproduces in altered language the provisions of sect. 2 of the Factors Act, 1877 (40 & 41 Vict. c. 39), which was passed to override the decision in *Fuentes* v. *Montis*, where it was held that a mercantile agent was not intrusted with goods or documents within the meaning of the earlier Acts if his authority had been revoked.[4]

Derivative documents.

(3.) Where a mercantile agent has obtained possession

[1] *Portalis* v. *Tetley* (1867), L. R. 5 Eq. 140.

[2] *Cole* v. *North Western Bank* (1875), L. R. 10 C. P., at p. 373, citing *Baines* v. *Swainson* (1863), 32 L. J. Q. B. 281, and *Vickers* v. *Hertz* (1871), L. R. 2 Sc. App. Cas. 113.

[3] See the term discussed, *Navulshaw* v. *Brownrigg* (1852), 21 L. J. Ch. 908 (Factors Act); *Raphael* v. *Bank of England* (1855), 17 C. B., at p. 174, per Willes, J. (bill of exchange); *Ex p. Snowball* (1872), L. R. 7 Ch. App., at p. 549 (act of bankruptcy).

[4] *Fuentes* v. *Montis* (1868), L. R. 3 C. P. 268 (revocation of agency unknown to pledgee), affirmed, L. R. 4 C. P. 93 Ex. Ch.

of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

This sub-section reproduces in somewhat different language a provision in sect. 4 of the Factors Act, 1842 (5 & 6 Vict. c. 39), which was intended to alter the law as laid down in *Phillips* v. *Huth*, and *Hatfield* v. *Phillips*.[1] In the latter case it was held that a person intrusted with a bill of lading for the purpose of selling the goods mentioned in it, was not, in consequence of being so intrusted, to be considered as intrusted with the dock warrant, notwithstanding that his possession of the bill of lading enabled him to obtain the dock warrant.

Presumption.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

This sub-section reproduces in somewhat different language the concluding paragraph of sect. 4 of the Factors Act, 1842.

Effect of pledges of documents of title.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

This section is taken from a paragraph in sect. 4 of the Factors Act, 1842 (5 & 6 Vict. c. 39). See "pledge," defined by sect. 1, *ante*, p. 122.

Pledge for antecedent debt.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

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[1] See *Cole* v. *North Western Bank* (1875), L. R. 10 C. P., at p. 370, commenting on *Phillips* v. *Huth* (1840), 6 M. & W. 572; *Hatfield* v. *Phillips* (1842), 9 M. & W. 647; (1845) 14 M. & W. 665.

Sects. 4, 5.

This section reproduces in altered language the clumsily worded sect. 3 of the Factors Act, 1825 (6 Geo. 4, c. 94) as read with the proviso contained in sect. 3 of the Factors Act, 1842 (5 & 6 Vict. c. 39). The substitution of the words "debt *or liability*" for "antecedent debt" is material.[1] The nse of the word "due," though appropriate to the term "debt," seems inappropriate to the term "liability." The section should perhaps be read as if it ran "debt due from or liability incurred by," &c.

The object of this section seems to be to draw a marked distinction between past and present or future considerations. In terms it applies only to pledges of goods, but, having regard to the language of sect. 3, it may be intended to apply also to pledges of documents.

Rights acquired by exchange of goods or documents.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

By sect. 4 of the Factors Act, 1842 (5 & 6 Vict. c. 39) it was provided, *inter alia*, that "any payment made, whether by money or bills of exchange, or other negotiable security, shall be deemed and taken to be *an advance* within the meaning of this Act." The first paragraph of the present section considerably extends the scope of the old enactment, by substituting "valuable consideration" for an "advance" as above defined. See the definition of "pledge" in sect. 1, *ante*, p. 122.

The second paragraph of the section reproduces in somewhat

[1] For cases on the repealed sections, see *Jewan* v. *Whitworth* (1866), L. R. 2 Eq. 692; *Macnee* v. *Gorst* (1867), L. R. 4 Eq. 315; *Kaltenbach* v. *Lewis* (1885), 10 App. Cas. 617.

different language the provisions of sect. 2 of the Factors Act, 1842, which was intended to protect exchange of goods and securities made in good faith, and to alter the law as laid down in *Taylor* v. *Kymer* and *Bonzi* v. *Stewart*.[1]

Agreements through clerks, &c

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

This section is taken from, and generalises, a paragraph in sect. 4 of the Factors Act, 1842 (5 & 6 Vict. c. 39).

Provisions as to consignors and consignees.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

The first sub-section reproduces in different language the provisions of sect. 1 of the Factors Act, 1825.[2] It is to be noted that the section applies only to goods and not to documents of title, and to cases

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[1] See *Cole* v. *North Western Bank* (1875), L. R. 10 C. P., at p. 370, commenting on *Taylor* v. *Kymer* (1832), 3 B. & Ad. 320; *Bonzi* v. *Stewart* (1842), 4 M. & Gr. 295.

[2] See that enactment discussed in *Cole* v. *North Western Bank* (1875), L. R. 10 C. P., pp. 361–367; and *Johnson* v. *Crédit Lyonnais* (1877), 3 C. P. D., at pp. 44, 45.

Sects. 7, 8.

where the consignee has not notice that the consignor is not the owner. Lord Blackburn raised a doubt on the repealed enactment whether "notice" was co-extensive with knowledge.[1] The term "advance" must probably be interpreted by the light of sect. 5, *ante*, p. 126.

The second sub-section shews that the present section is to be construed as amplifying, and not as derogating from, the powers of mercantile agents under sect. 2, *ante*, p. 123.

Sect. 13, *post*, p. 132, further saves the common law powers of factors and agents of that class.

As to a factor's or consignee's lien, see *Story on Sale*, § 97.

Dispositions by Sellers and Buyers of Goods.

Disposition by seller remaining in possession.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

This section, which is now reproduced by sect. 25 (1) of the Sale of Goods Act, was substituted for sect. 3 of the Factors Act, 1877 (40 & 41 Vict. c. 39), which altered the law as laid down in *Johnson* v. *Crédit Lyonnais*.[2] It was there held that if the buyer, for his own convenience, left the goods and documents of title in the hands of the seller, who fraudulently resold or pledged them, he could nevertheless recover the goods from the innocent purchaser or pledgee. The Act of 1877 only applied to documents of title. The present section extends the principle of that enactment by applying to goods as well as to documents of title.

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[1] *Mildred* v. *Maspons* (1883), 8 App. Cas., at p. 885.

[2] *Johnson* v. *Crédit Lyonnais* (1877), 3 C. P. D. 32, 40, C. A.

Sects. 8, 9.

The provisions of sect. 5, *ante*, p. 126, as to consideration, clearly apply to this section; but the provisions of sect. 4 (pledge for antecedent debt) appear only to apply when the pledge is effected through a mercantile agent.

Non-repeal.

The Sale of Goods Bill originally proposed to repeal this and the two following sections; but the repeal was afterwards omitted, in order that the draftsman of the Factors Acts might be consulted; and the matter was left over to be dealt with by a Statute Law Revision Act.

Disposition by buyer obtaining possession.

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

This section, which is now reproduced by sect. 25 (2) of the Sale of Goods Act, was substituted for sect. 4 of the Factors Act, 1877 (40 & 41 Vict. c. 39). The latter enactment applied only to documents of title. The present section applies to the goods themselves as well as to documents of title. As to the reason for its non-repeal by the Sale of Goods Act, see note to last section.

The common law rules which preceded these enactments are thus stated by Blackburn, J.: "It has been repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee does not defeat the unpaid vendor's rights, because the vendee is not intrusted as an agent.[1] And it may be

[1] *Cf. Jenkyns* v. *Usborne* (1844), 7 M. & Gr. 678; *McEwan* v. *Smith* (1849), 2 H. L. C. 309.

Sects. 9, 10.

observed that in many of such cases in which money has been advanced to the buyer on the faith of the documents of title, the buyer must have been a person who carried on business as a commission merchant; yet it never seems to have occurred to any one that that fact made any difference. So it has been repeatedly held that when either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on the ground of fraud, but by some trick), a purchaser or pledgee acquires no title, for the trickster is not an 'agent intrusted' with the possession."[1]

It is submitted that the last proposition is not affected by the section; for the foundation of the rule is that there is no real consent. The section, however, would clearly apply to cases where there is a *de facto* contract, though defeasible on the ground of fraud: see *ante*, p. 52. So, too, it applies where there is a *de facto* contract of sale between the original seller and buyer, though that contract might be ineffectual for non-compliance with sect. 17 of the Statute of Frauds,[2] now reproduced in sect. 4 of the Sale of Goods Act.

The section extends to a person in possession of goods under a hire-purchase agreement.

Effect of transfer of documents on seller's lien or right of stoppage in transitu.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

This section, which is now reproduced and developed by sect. 47 of the Sale of Goods Act, was substituted for sect. 5 of the Factors Act, 1877 (40 & 41 Vict. c. 39). It applies to all the documents of title mentioned in sect. 1, *ante*, p. 121, the common law rules relating to the effect of the transfer of a bill of lading on the seller's right of lien or stoppage *in transitu*, as to which, see *ante*, p. 86.

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[1] *Cole* v. *North Western Bank* (1875), L. R. 10 C. P., at p. 373, citing for last proposition, *Kingsford* v. *Merry*, 1 H. & N. 503, and *Hardman* v. *Booth*, 1 H. & C. 803. See those cases discussed, *ante*, pp. 52, 53.

[2] *Hugill* v. *Masker* (1889), 22 Q. B. D. 364, C. A.

[3] *Lee* v. *Butler* (1893), 2 Q. B. 318; *Helby* v. *Matthews*, W. N. 1894, p. 88, C. A.

Sects. 10–12.

To some extent this section covers the same ground as the preceding section. But sect. 9 requires that the transferee shall have no notice of the seller's lien or other rights, because it applies to cases where the buyer has obtained the goods or documents under a contract voidable on the ground of fraud. The present section omits the requirement as to absence of notice. The mere fact that the price is unpaid does not make it a fraud to transfer the goods or documents so as to defeat the seller's lien or right of stoppage *in transitu*.

As to the reason for not repealing this section by the Sale of Goods Act, see note to section 8, *ante*, p. 129.

Supplemental.

Mode of transferring documents.

11. For the purpose of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

See "document of title" defined, *ante*, p. 121. This section is taken from words used in sect. 5 of the Factors Act, 1877 (40 & 41 Vict. c. 39), which are now generalised by being put into a separate section.

Saving for rights of true owner.

12.—(1.) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

As to the criminal liability of factors or agents misappropriating goods or documents of title, see the 24 & 25 Vict. c. 96, ss. 77, 78, 79, and Stephen's *Digest of the Criminal Law*, arts. 347, 348.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in

Sects. 12, 13.

respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

As a general rule, goods or documents of title, held by an agent for his principal, are considered as trust property, and do not pass to the agent's trustee in bankruptcy, though in some cases the reputed ownership clauses might apply: see Bankruptcy Act, 1883, s. 44.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

As to the buyer's right of set-off against an agent with whom he dealt, under the belief that he was a principal, see *Kaltenbach* v. *Lewis* (1885), 10 App. Cas. 617; *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271.

Saving for common law powers of agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exerciseable by an agent independently of this Act.

This section is new. It recognises, what the judges have frequently pointed out, that the Factors Acts are partly declaratory and partly enacting.[1] In dealing with the exceptions to the general rule, *Nemo dat quod non habet* (*ante*, p. 49), Willes, J., observes: "A third case where a man may convey a better title to goods than he himself had is where an agent, who carries on a public business, deals with the goods in the ordinary course of it, though he has received secret instructions from his principal to deal with them contrary to the ordinary course of that trade. In that case he has an ostensible authority to deal in such a way with the goods as agents ordinarily

[1] See *Cole* v. *North Western Bank* (1875), L. R. 10 C. P., at p. 360, *et seq.*

deal with them, and if he deals with them in the ordinary way of the trade he binds his principal."[1] Sects. 13–17.

14. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed. Repeal.

15. This Act shall commence and come into operation on the First day of January, One Thousand Eight Hundred and Ninety. Commencement.

16. This Act shall not extend to Scotland. Extent of Act.

The result of the exclusion of Scotland from this Act is, that the Factors Acts, 1823, 1825, 1842, and 1877, though repealed as to England and Ireland, as from the 1st of January, 1890, still continued to apply to Scotland. Perhaps, however, the Factors (Scotland) Act, 1890, repeals them by implication as from the commencement of that act, namely 14th of August, 1890. It may be noted that their provisions are more nearly declaratory of Scotch common law than they were of English common law.[2] See the subject discussed, Bell's *Principles*, 9th ed., p. 824, *et seq.*

17. This Act may be cited as the Factors Act, 1889. Short title.

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[1] *Fuentes* v. *Montis* (1868), L. R. 3 C. P. 268, at p. 277; *cf. Johnson* v. *Crédit Lyonnais* (1877), 3 C. P. D., at pp. 37–40.

[2] *Vickers* v. *Hertz* (1871), L. R. 2 Sc. App. 113, at p. 119.

SCHEDULE.[1]

Section 14.

ENACTMENTS REPEALED.

Session and Chapter.	Title.	Extent of Repeal.
4 Geo. IV. c. 83 .	An Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
6 Geo. IV. c. 94 .	An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
5 & 6 Vict. c. 39 .	An Act to amend the law relating to advances bonâ fide made to agents entrusted with goods.	The whole Act.
40 & 41 Vict. c. 39.	An Act to amend the Factors Acts.	The whole Act.

[1] This Schedule repeals as to England and Ireland, but not as to Scotland, the Factors Acts of 1823, 1825, 1842, and 1877.

THE FACTORS (SCOTLAND) ACT, 1890.

(53 & 54 Vict. c. 40).

[14th August 1890.]

53 & 54 Vict. c. 40.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Application of 52 & 53 Vict. c. 45 to Scotland.

1. Subject to the following provisions, the Factors Act, 1889, shall apply to Scotland.

(1.) The expression "lien" shall mean and include right of retention; the expression "vendor's lien" shall mean and include any right of retention competent to the original owner or vendor; and the expression "set-off" shall mean and include compensation.

(2.) In the application of section five of the recited Act, a sale, pledge, or other disposition of goods shall not be valid unless made for valuable consideration.

Short title.

2. This Act may be cited as the Factors (Scotland) Act, 1890.

APPENDIX I.—STATUTES.

AN ACT AGAINST THE BUYING OF STOLEN HORSES (1555).[1]

(2 & 3 PHIL. & MAR. c. 7.)

The former misuse in sale of stolen horses.

Forasmuch as stolen horses, mares, and geldings, by thieves and their confederates, be for the most part sold, exchanged, given, or put away in houses, stables, back-sides, and other secret and privy places of markets and fairs, and the toll also privily paid for the same, whereby the true owner thereof, being not able to try the falsehood and covin betwixt the buyer and seller of such horse, mare, or gelding, is by the common law of this realm without remedy:[2]

In what manner horses shall be sold in fairs or markets.

Sect. 2.—Be it therefore enacted by the authority of this present parliament,—That the owner, governor, ruler, fermor, steward, bailiff, or chief keeper of every fair and market overt within this realm, and other the Queen's dominions, shall before the feast of Easter next, and so yearly, appoint and limit out a certain and special open place within the town, place, field, or circuit, where horses, mares, geldings, and colts have been and shall be used to be sold in any fair or market

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[1] Taken from Pickering's edition of the Statutes. See *Moran* v. *Pitt* (1873), 42 L. J. Q. B. 47, and *ante*, p. 51.

[2] This Act and the amending Act, 31 Eliz. c. 12, are saved by sect. 22 (2), *ante*, p. 51. When the Bill left the House of Lords it was proposed to repeal them, and to reproduce their effect in shorter and simpler language in a schedule. In the Select Committee in the Commons it was decided to abolish the anomalous rules of sale in market overt. The schedule therefore was cut out as unnecessary, for the only practical effect of the Acts is to take horses out of the category of things which can be sold in market overt. In Committee of the whole House, however, the rules as to market overt were reinstated, but the schedule was not reinstated. Consequently it became necessary to remove these Acts from the list of repeals.

2 & 3 Phil. & Mar. c. 7.

overt; (2) in which said certain and open place, as is aforesaid, there shall be, by the said ruler or keeper of the said fair or market, put in and appointed one sufficient person or more, to take toll and keep the same place from ten of the clock before noon until sunset of every day of the aforesaid fair and market, upon pain to lose and forfeit for every default forty shillings; (3) and that every toll-gatherer, his deputy or deputies, shall, during the time of every the said fairs and markets, take their due and lawful tolls for every such horse, mare, gelding, or colt, at the said open place to be appointed as is aforesaid, and betwixt the hours of ten of the clock in the morning and sunset of the same day, if it be tendred, and not at any other time or place; (4) and shall have presently before him or them, at the taking of the same toll, the parties to the bargain, exchange, gift, contract, or putting away of every such horse, mare, gelding, or colt; and also the same horse, mare, gelding, and colt so sold, exchanged, or put away; (5) and shall then write, or cause to be written in a book to be kept for that purpose, the names, surnames, and dwelling places of all the said parties, and the colour, with one special mark at the least, of every such horse, mare, gelding, and colt; (6) in pain to forfeit at and for every default contrary to the tenor thereof, forty shillings.

A place shall be appointed for a horse-fair, and also a toll-taker.

When, where, and of whom toll for horses shall be taken.

Sect. 3.—And the said toll-gatherer or keeper of the said book, shall, within one day next after every such fair or market, bring and deliver his said book to the owner, governor, steward, bailiff, or chief keeper of the said fair or market, who shall then cause a note to be made of the true number of all horses, mares, geldings, and colts sold at the said market or fair, and shall there subscribe his name, or set his mark thereunto; (2) upon pain to him that shall make default therein, to lose and forfeit for every default forty shillings, and also answer the party grieved by reason of the same his negligence in every behalf.

A note of all horses sold in a fair or market.

Sect. 4.—And be it further enacted by the authority aforesaid, That the sale, gift, exchange, or putting away after the last day of February now next coming, in any fair or market overt, of any horse, mare, gelding, or colt, that is or shall be thievishly stolen, or feloniously taken away from any person or persons, shall not alter, take away, nor exchange the property of any person or persons to or from any such horse, mare, gelding, or colt, unless the same horse, mare, gelding, or colt shall be in the time of the said fair or market whereon the same shall be so sold, given, exchanged, or put away, openly ridden, led, walked, driven, or kept standing by the space of

The using of a stolen horse in a fair, or, &c. before the owner's property shall be taken away.

2 & 3 Phil. & Mar. c. 7.

one hour together at the least, betwixt ten of the clock in the morning and the sun-setting, in the open place of the fair or market wherein horses are commonly used to be sold, and not within any house, yard, back-side, or other privy or secret place, and unless all the parties to the bargain, sale, contract, gift, or exchange, present in the said fair or market, shall also come together, and bring the horse, mare, gelding, or colt so sold, exchanged, given or put away to the open place appointed for the toll-taker, or for the book-keeper where no toll is due, and there enter or cause to be entered their names and dwelling-places, in manner as is aforesaid, with the colour or colours, and one special mark at the least of every the same horses, mares, geldings, or colts, in the toll-taker's book, or in the keeper's book for that purpose where no toll is due, as is aforesaid, and also pay him their toll, if they ought to pay any; and if not, then the buyer to give one penny for the entry of their names, and executing the other circumstances afore rehearsed to him that shall write the same in the said book.

Recovery of stolen horses.

Sect. 5.—And if any horse, mare, gelding, or colt, that is or shall be thievishly stolen or taken away, shall after the said last day of February next coming be sold, given, exchanged, or put away, in any fair or market, and not used in all points according to the tenor and intent of this statute, that then the owner of every such horse, mare, gelding, or colt shall and may by force of this statute seise or take again the said horse, mare, gelding, or colt, or have an action of detinue or replevin for the same; any sale, gift, exchange, or putting away of any such horse, mare, gelding, or colt, other than according to this statute, in anywise notwithstanding.

Application of penalties.

Sect. 6.—The one half of all which forfeitures to be to the King and Queen's majesties, her heirs and successors, and the other to him or them that will sue for the same before the justices of peace, or in any of the King's and Queen's majesties ordinary courts of record, by bill, plaint, action of debt or information, in which suits no protection, essoin or wager of law shall be allowed.

The justices of peace shall hear and determine the offences aforesaid.

Sect. 7.—And be it enacted by the authority aforesaid, That the justices of peace of every place and county, as well within liberties as without, shall have authority in their sessions, within the limits of their authority and commission, to enquire, hear, and determine all offences against this statute, as they may do any other matter triable before them.

Sect. 8.—Provided always, That in every such fair or market where any toll is nor shall be due nor leviable, by reason of the freedom, liberty, or privilege of the said fair or market, the keeper or keepers of the book touching the execution of this present Act, shall take nor exact but one penny upon and for every contract, for his labour in writing the entry concerning the premises, in manner and form as is before declared. 2 & 3 Phil. & Mar. c. 7.

The allowance of the keeper of the book where no toll is due.

AN ACT TO AVOID HORSE-STEALING (1589).[1]
(31 Eliz. c. 12.)

Whereas, through most counties of this relm, horse stealing is grown so common, as neither in pastures, or closes, nor hardly in stables, the same are to be in safety from stealing, which ensueth by the ready buying of the same by horse-coursers and others, in some open fairs or markets far distant from the owner, and with such speed as the owner cannot by pursuit possibly help the same; (2) and sundry good ordinances have heretofore been made, touching the manner of selling and tolling of horses, mares, geldings, and colts in fairs and markets, which have not wrought so good effect for the repressing or avoiding of horse stealing, as was expected:

Sellers of horses in fairs or markets must be known to the toll-taker or some other who will avouch the sale which shall be entered in the toll-book, &c.

Sect. 2.—Now, for a further remedy in that behalf, be it enacted, &c., That no person after twenty days next after the end of this session of parliament, shall in any fair or market sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, unless the toll-taker there, or (where no toll is paid) the book-keeper, bailiff, or the chief officer of the same fair or market, shall and will take upon him perfect knowledge of the person that so shall sell or offer to sell, give, or exchange any horse, mare, gelding, colt, or filly, and of his true christian name, surname, and place of dwelling or resiancy, and shall enter all the same, his knowledge, into a book there kept for sale of horses; (2) or else, that he so selling or offering to sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, shall bring unto the toll-taker, or other officer aforesaid, of the same fair or market, one sufficient and credible person that can, shall, or will testify and declare unto and before such toll-taker, book-keeper, or other officer, That he knoweth the party that so selleth, giveth, exchangeth, or putteth away such

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[1] Taken from Pickering's edition of the Statutes. See note to the 2 & 3 Phil. & Mar., *ante*, p. 136.

31 Eliz. c. 12.

A sufficient and credible person shall avouch the horse seller.

The price of the horse shall be entered into the toller's book.

horse, mare, gelding, colt, or filly, and his true name, surname, mystery, and dwelling-place, and there enter or cause to be entered in the book of the said toll-taker or officer, as well the true christian name, surname, mystery, and place of dwelling or resiancy of him that so selleth, giveth, exchangeth, or putteth away such horse, mare, gelding, colt, or filly, as of him that so shall testify or avouch his knowledge of the same person; (3) and shall also cause to be entred the very true price or value that he shall have for the same horse, mare, gelding, colt, or filly so sold; (4) and That no person shall take upon him to avouch, testify, or declare That he knoweth the party that so shall offer to sell, give, exchange, or put away any such horse, mare, gelding, colt, or filly, unless he do indeed truly know the same party, and shall truly declare to the toll-keeper or other officer aforesaid, as well the christian name, surname, mystery, and place of dwelling and resiancy of himself, as of him and for whom he maketh such testimony and avouchment; (5) and that no toll-taker or other person keeping any book of entry of sales of horses in fairs or markets, shall take or receive any toll, or make entry of any sale, gift, exchange, or putting away of any horse, mare, gelding, colt, or filly, unless he knoweth the party that so selleth, giveth, exchangeth, or putteth away any such horse, mare, gelding, colt, or filly, and his true christian name, surname, mystery, and place of his dwelling or resiancy, or the party that shall and will testify and avouch his knowledge of the same person so selling, giving, exchanging, or putting away such horse, mare, gelding, colt, or filly, and his true christian name, surname, mystery, and place of dwelling or resiancy, and shall make a perfect entry into the said book, of such, his knowledge of the person, and of the name, surname, mystery, and place of the dwelling or resiancy of the same person, and also the true price or value that shall be *bonâ fide* taken or had for any such horse, mare, gelding, colt, or filly so sold, given, exchanged, or put away, so far as he can understand the same, (6) and then give to the party so buying or taking by gift, exchange or otherwise, such horse, mare, gelding, colt, or filly, requiring and paying two pence for the same, a true and perfect note in writing of all the full contents of the same, subscribed with his hand; (7) on pain that every person that so shall sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, without being known to the toll-taker or other officer aforesaid, or without bringing such avoucher or witness, causing the same to be entred as aforesaid, and every person making any untrue testimony or avouchment in the behalf aforesaid, and every toll-taker, book-keeper, or other officer of fair or market aforesaid, offending in the premises contrary to the true meaning aforesaid, shall forfeit for every such

A note in writing shall be given to the buyer.

The penalty of the person offending in any of the cases aforesaid.

31 Eliz. c. 12.

default the sum of £5; (8) but also that every sale, gift, exchange, or other putting away of any horse, mare, gelding, colt, or filly, in fair or market, not used in all points according to the true meaning aforesaid, shall be void; (9) the one half of all which forfeitures to be to the Queen's Majesty, her heirs and successors, and the other half to him or them that will sue for the same before the justices of peace or in any of Her Majesty's ordinary Courts of record, by bill, plaint, action of debt, or information, in which no essoin or protection shall be allowed.

Every sale otherwise made shall be void.

Sect. 3.—And the justices of peace of every place and county, as well within liberties as without, shall have authority in their sessions, within the limits of their authority and commission, to enquire, hear, and determine all offences against this statute, as they may do any other matter triable before them.

The justices of peace may hear and determine the offences aforesaid.

Sect. 4.—And if any horse, mare, gelding, colt, or filly, after twenty days next ensuing the end of this session of parliament, shall be stolen and after shall be sold in open fair or market, and the same sale shall be used in all points and circumstances as aforesaid, yet, nevertheless, the sale of any such horse, mare, gelding, colt, or filly, within six months next after the felony done, shall not take away the property of the owner from whom the same was stolen, so as claim be made within six months by the party from whom the same was stolen, or by his executors or administrators, or by any other by any of their appointment, at or in the town or parish where the same horse, mare, gelding, colt, or filly shall be found, before the mayor or other head officer of the same town or parish, if the same horse, mare, gelding, colt, or filly shall happen to be found in any town, corporate, or market town, or else before any justice of peace of that county near to the place where such horse, mare, gelding, colt, or filly shall be found, if it be out of a town corporate or market town; (2) and so as proof be made within forty days, then next ensuing by two sufficient witnesses, to be produced and deposed before such head officer or justice (who, by virtue of this Act, shall have authority to minister an oath in that behalf), that the property of the same horse, mare, gelding, colt, or filly so claimed, was in the party, by or from whom such claim is made, and was stolen from him within six months next before such claim of any such horse, mare, gelding, colt, or filly; (3) but the party from whom the said horse, mare, gelding, colt, or filly was stolen, his executors or administrators shall and may at all times after, notwithstanding any such sale or sales in any fair or open market thereof

The owner may redeem a horse stolen from him within six months after, paying the price.

31 Eliz. c. 12.

made, have property and power to have, take again and enjoy the said horse, mare, gelding, colt, or filly, upon payment or readiness, or offer to pay to the party that shall have the possession and interest of the same horse, mare, gelding, colt, or filly, if he will receive and accept it, so much money as the same party shall depose and swear before such head officer or justice of peace (who, by virtue of this Act, shall have authority to minister and give an oath in that behalf), that he paid for the same *bonâ fide*, without fraud or collusion; any law, statute, or other thing to the contrary thereof in any wise notwithstanding.

An accessary to a horse stealer shall not have his clergy.

Sect. 5.—And that after twenty days after the end of this session of parliament, not only all accessaries before such felony done, but also all accessaries after such felony, shall be deprived and put from all benefit of their clergy, as the principal by statute heretofore made is or ought to be.

THE STATUTE OF FRAUDS.[1]

(29 Car. 2, c. 3.)

An Act for Prevention of Frauds and Perjuries.

Promises and agreements by parol.

Sect. 4.—And from and after the said four and twentieth day of June [1677] no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement which is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Note.—The cases on this section are discussed in the notes to *Birkmyr* v. *Darnell*, 1 Smith, L. C., 9th ed., p. 334. It is inserted for

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[1] Taken from Pickering's edition of the Statutes.

the sake of comparison with sect. 17, which is repealed and reproduced by the Sale of Goods Act, *ante*, p. 12. 29 Car. 2, c. 3.

Sect. 17.—And from and after the said four and twentieth day of June [1677] 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 payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised. Contracts for sale of goods for ten pounds or more. [Repealed.]

Note.—This section appears as sect. 16 in the Statutes Revised. It is repealed by the Sale of Goods Act, *ante*, p. 117, and reproduced with verbal alterations by sect. 4 of that Act, *ante*, p. 12.

The very numerous decisions on this section are fully discussed in *Benjamin on Sales*, 4th ed., pp. 93 to 241. They are also digested and the policy of the enactment is questioned in an article in the *Law Quarterly Review* (1885), vol. i. p. 1, by Mr. Justice Stephen and Sir F. Pollock. See, too, Roscoe's *Nisi Prius*, 15th ed., pp. 469–479. The following salient points may be noted.

The enactment has been amended by the 9 Geo. 4, c. 14, s. 7, *post*, p. 148, commonly known as Lord Tenterden's Act, and the two enactments must be construed together.[1]

The effect of construing the two enactments together is that the term "contract of sale" clearly includes both executory and executed contracts; and no argument can any longer be founded on the use of the term "bargain" as meaning "bargain and sale" in the latter part of the section.[2] Contract of sale.

The term "goods, wares, and merchandise" (and its equivalent "goods" in the amending Act), include all moveable tangible property. It also includes certain things attached to the land which by and for the purposes of the contract are treated as goods, such as emblements, and in some cases growing timber.[3] Goods, wares, and merchandise.

The effect of the construction of the 9 Geo. 4, c. 14, s. 7, with the 17th sect. of the Statute of Frauds, is to substitute the word "value" Price or value.

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[1] *Harman* v. *Reeve* (1856), 18 C. B. 587; 25 L. J. C. P. 257, at p. 259.

[2] *Blackburn on Sale*, pp. 7–9; Roscoe's *Nisi Prius*, 15th ed., p. 469.

[3] See sect. 62, *ante*, p. 111; *Benjamin on Sale*, 4th ed., pp. 115–129; *Law Quarterly Review*, vol. i. p. 11.

29 Car. 2, c. 3.

for the word "price" in the last-mentioned enactment.[1] The enactment applies to a single contract for several articles, each of which is priced under £10, if the total value of the articles is £10 or more.[2]

Allowed to be good.

The provision that no contract outside the section "shall be allowed to be good" does not make such contracts void. It merely renders them unenforceable as between the parties. The provision therefore is pretty nearly equivalent to the provision in the 4th sect., which is, that "no action shall be brought" on agreements outside it.[3] It seems to follow that the section must be regarded as forming part of the *lex fori*.[4]

Acceptance.

An artificial construction has been put on the provision that the buyer must "accept" the goods or part of them. It is now well settled that an acceptance to satisfy the statute need not be an acceptance in performance of the contract. Any dealing with the goods which recognises a pre-existing contract of sale constitutes an acceptance for this purpose.[5] The acceptance need not be contemporaneous with the actual receipt. It may precede or follow it.[6]

The statute requires that the goods or part of them shall be both accepted and actually received. The two questions, though distinct, are frequently confused in the cases.

Actual receipt.

Where acceptance is shewn a very liberal construction has been put upon the term "actual receipt." If the seller attorns to the buyer and holds the goods as his bailee,[7] or if the goods are in the possession

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[1] *Harman* v. *Reeve* (1856), 18 C. B. 586, 595; 25 L. J. C. P. 257 (agreements for sale and agistment in one contract).

[2] *Baldey* v. *Parker* (1823), 2 B. & C. 37.

[3] *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, at p. 488, per Ld. Blackburn; *Lucas* v. *Dixon* (1889), 22 Q. B. D., at p. 360; *Hugill* v. *Masker* (1889), 22 Q. B. D. 364, at p. 371, C. A.

[4] *Leroux* v. *Brown* (1852), 12 C. B. 801; 22 L. J. C. P. 1; but see *Williams* v. *Wheeler* (1860), 8 C. B. N.S. 299, 316, per Willes, J.

[5] *Page* v. *Morgan* (1885), 15 Q. B. D. 228 C. A.; *Benjamin on Sale*, 4th ed., p. 149. The previous decisions must be tested by reference to the case cited; but see *Taylor* v. *Smith* (1893), 2 Q. B. 62, C. A., and *ante*, p. 14.

[6] As to acceptance before receipt, see *Cusack* v. *Robinson* (1861), 30 L. J. Q. B. 261; as to acceptance inferred from conduct after receipt, see *Chaplin* v. *Rogers* (1800), 1 East, 192; *Edan* v. *Dudfield* (1841), 1 Q. B. 302; *Beaumont* v. *Brengeri* (1847), 5 C. B. 301; *Parker* v. *Wallis* (1855), 5 E. & B. 21; *cf. Meredith* v. *Meigh* (1853), 22 L. J. Q. B. 401; *Smith* v. *Hudson* (1865), 34 L. J. Q. B. 145. See, too, *Law Quarterly Review*, vol. i. pp. 15, 16.

[7] *Elmore v. Stone* (1809), 1 Taunt. 458; *Marvin* v. *Wallace* (1856), 25 L. J. Q. B. 369; *Castle* v. *Sworder* (1861), 30 L. J. Ex. 310, Ex. Ch.

of a third person who attorns to the buyer, the statute is satisfied.[1] A carrier is usually the buyer's agent to actually receive the goods though he is not his agent to accept them.[2] 29 Car. 2, c. 3.

The acceptance and receipt of a bulk sample may satisfy the statute,[3] and so may the acceptance and receipt of a portion of the goods while the rest are still unmade.[4] Part of the goods.

Earnest consists of any coin or thing of value given in token of the bargain, but which is not, as a rule, part of the price.[5] Earnest.

An agreement to set off a claim of the buyer against part of the price may amount to part payment.[6] Part payment.

The note or memorandum must designate the parties by name or description,[7] the goods sold,[8] the price if agreed on,[9] and must shew directly or by implication the nature of the promise of the party to be charged.[10] Oral evidence is not admissible to connect documents together to make up a memorandum.[11] Note or memorandum.

The note or memorandum need not be contemporaneous with the contract; but it must be in existence before action brought.[12] It may be addressed to a third party,[13] or may be contained in the minutes of a meeting.[14] It may consist of a written proposal which is verbally

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[1] *Law Quarterly Review*, vol. i. p. 12; *cf. Godts* v. *Rose* (1855), 17 C. B. 229, at p. 235.

[2] *Hanson* v. *Armitage* (1822), 5 B. & Ald. 557; *Norman* v. *Phillips* (1845), 14 M. & W. 277; *cf. Smith* v. *Hudson* (1865), 34 L. J. Q. B. 145; *Benjamin on Sale*, 4th ed., pp. 153, 164.

[3] *Hinde* v. *Whitehouse* (1806), 7 East. 558; *Gardner* v. *Grout* (1857), 2 C. B. N.S. 340; but *cf. Nicholson* v. *Bower* (1858), 28 L. J. Q. B. 97.

[4] *Scott* v. *Eastern Counties Railway* (1843), 12 M. & W. 33.

[5] As to earnest and its history, see *Howe* v. *Smith* (1884), 27 Ch. D., at pp. 101, 102, per Fry, L.J.

[6] *Walker* v. *Nussey* (1847), 16 M. & W. 302, at p. 305; *Benjamin on Sale*, 4th ed., p. 173.

[7] *Blackburn on Sale*, p. 55; *Vandenbergh* v. *Spooner* (1866), L. R. 1 Ex. 316; *Newell* v. *Radford* (1867), L. R. 3 C. P. 52; *Benjamin on Sale*, 4th ed., p. 204.

[8] *Thornton* v. *Kempster* (1814), 5 Taunt. 786; *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90, at p. 97, per Lush, L.J.

[9] *Elmore* v. *Kingscote* (1826), 5 B. & C. 583; *aliter*, if the contract be for an implied reasonable price, *Hoadly* v. *M'Laine* (1834), 10 Bing. 482.

[10] *Egerton* v. *Mathews* (1805), 6 East. 307; *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210; *Law Quarterly Review*, vol. i. p. 20; *Benjamin on Sale*, 4th ed., p. 222.

[11] *Taylor* v. *Smith* (1893), 2 Q. B. 62, C. A.

[12] *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357, C. A.

[13] *Gibson* v. *Holland* (1865), L. R. 1 C. P. 1.

[14] *Jones* v. *Victoria Dock Co.* (1877), 2 Q. B. D. 314 (on sect. 4).

29 Car. 2, c. 3.

accepted,[1] or of a letter recognizing the contract, but repudiating liability under.[2]

Signature.

Signature is the writing of a person's name on a document for the purpose of authenticating it. If the name appears in an unusual place it is a question of fact whether it was intended as a signature.[3] Signature by mark, initials, or stamp is sufficient.[4] The signature to a telegram form suffices;[5] so too does the signature of an agent in his own name, for then evidence is admissible to charge the principal though not to discharge the agent.[6]

Parties to be charged.

The 4th sect. requires the agreements within it to be signed by "the *party* to be charged." The 17th sect. requires the note or memorandum of the contracts within it to be signed by "the *parties* to be charged." Nevertheless it has been held that it suffices if the note or memorandum is signed by the party to be charged, though the other party has not signed.[7] It follows that one party may be bound though the other is not.

Agents to sign.

As the signature of the party to be charged suffices, it follows that the words "their agents" must be read as if they ran "his agent." The authority of the agent is to be determined according to the ordinary rules of agency; but it seems that one party cannot be the agent of the other to sign for him.[8]

It is obvious that a person may be an agent to sign, though he may not have authority to settle the terms of the contract between the parties. The two questions are distinct.

Auctioneer.

An auctioneer though employed by the seller is an agent to sign for the buyer at an auction;[9] but his clerk, unless specially autho-

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[1] *Reuss* v. *Picksley* (1866), L. R. 1 Ex. 342, Ex. Ch.

[2] *Bailey* v. *Sweeting* (1861), 30 L. J. C. P. 150; *Wilkinson* v. *Evans* (1866), L. R. 1 C. P., at p. 411.

[3] *Johnson* v. *Dodgson* (1837), 2 M. & W. 653, at p. 659; *Caton* v. *Caton* (1867), L. R. 2 H. L. 127.

[4] *Benjamin on Sale*, 4th ed., p. 232.

[5] *Goodwin* v. *Francis* (1870), L. R. 5 C. P. 295.

[6] *White* v. *Proctor* (1811), 4 Taunt. 209; *cf. Newell* v. *Radford* (1867), L. R. 3 C. P. 52.

[7] *Reuss* v. *Picksley* (1866), L. R. 1 Ex. 342, Ex. Ch.; *Benjamin on Sale*, 4th ed., p. 231.

[8] *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720, Ex. Ch.; *cf. Farebrother* v. *Simmons* (1822), 5 B. & Ald. 333.

[9] *White* v. *Proctor* (1811), 4 Taunt. 209; *Benjamin on Sale*, 4th ed., p. 246.

29 Car. 2, c. 3.

rised, is not.[1] When an auctioneer sells by private contract he is only agent for the seller.[2]

Broker.

A broker is an agent to sign for both seller and buyer. If he duly enters the contract in his book and signs it, the statute is satisfied.[3] So again, if bought and sold, notes, which correspond, are signed by the broker and delivered to the parties, that is sufficient,[4] and it seems that either the bought or sold note is sufficient to charge either party, for buying implies a sale, and selling implies a purchase, but if only one note is produced evidence would be admissible to prove a variance.[5]

Rescission or variation.

A contract of sale in writing, or of which there is a memorandum in writing, may be orally abandoned,[6] but any subsequent variation of the contract, so as to create in contemplation of law a new contract, must be in writing;[7] for example, a parol agreement to extend the time for performing a contract in writing does not affect the contract, and cannot be substituted for it.[8] The acceptance of a substituted mode of performance[9] or a mere forbearance to make or require delivery at the request of the other party does not constitute a variation of the contract.[10]

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[1] *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210.

[2] *Mews* v. *Carr* (1856), 26 L. J. Ex. 39.

[3] *Benjamin on Sale*, 4th ed., p. 268; *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777.

[4] *Sievewright* v. *Archibald* (1851), 17 Q. B. 103; 20 L. J. Q. B. 529, where the notes varied, and the variance was held fatal, there being no signed contract.

[5] *Parton* v. *Crofts* (1864), 33 L. J. C. P. 189; *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777.

[6] *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58, at pp. 65, 66; *cf. Morgan* v. *Bain* (1874), L. R. 10 C. P. 15.

[7] *Plevins* v. *Downing* (1876), 1 C. P. D. 220.

[8] *Noble* v. *Ward* (1867), L. R. 2 Ex. 135, Ex. Ch.

[9] *Leather Cloth Co.* v. *Hieronimus* (1875), L. R. 10 Q. B. 140 (change of route).

[10] *Ogle* v. *Earl Vane* (1868), L. R. 3 Q. B. 272, Ex. Ch.; *Hickman* v. *Haynes* (1875), L. R. 10 C. P. 598, reviewing the previous cases; *cf. Tyers* v. *Rosedale Co.* (1875), L. R. 10 Ex. 195, Ex. Ch.

LORD TENTERDEN'S ACT.

(9 Geo. 4, c. 14.)

An Act for rendering a written memorandum necessary to the validity of certain promises and engagements.

[29 Car. 2, c. 3.]

[Repealed.]

[Irish Act, 7 W. 3, c. 12.]

Sect. 7.—And whereas by an Act passed in England in the twenty-ninth year of the reign of King Charles the Second, intituled an Act for the prevention of frauds and perjuries, it is, among other things, enacted that from and after the 24th day of June, 1677, no contract, for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised. And whereas a similar enactment is contained in an Act passed in Ireland in the seventh year of the reign of King William the Third: And whereas it has been held, that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied: and it is expedient to extend the said enactments to such executory contracts:

Recited Acts extended to contracts for goods of £10 or upwards, although the delivery be not made.

Be it enacted, That the said enactments 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.

Note.—See note to Statute of Frauds, s. 17, *ante*, p. 143, and *Scott* v. *Eastern Counties Railway* (1843), 12 M. & W. 33. This section is repealed by the Sale of Goods Act and reproduced in sect. 4 (2), *ante*, p. 12.

THE BILLS OF LADING ACT, 1855.

(18 & 19 VICT. c. 111.)

An Act to amend the Law relating to Bills of Lading.

[14th August, 1855.]

Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value, should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Rights under bills of lading to vest in consignee or endorsee.

Sect. 1.—Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Not to affect right of stoppage *in transitu* or claims for freight.

Sect. 2.—Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Note.—As to non-liability of pledgee of bill of lading for freight, see *Sewell* v. *Burdick* (1884), 10 App. Cas. 74. As to pledge of bill of lading and conversion before plaintiff's title accrued, see *Bristol Bank* v. *Midland Railway* (1891), 2 Q. B. 653, C. A.

Bill of lading in

Sect. 3.—Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been

18 & 19 Vict. c. 111.

hands of consignee, &c., conclusive evidence of the shipment as against master, &c.

shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

Note.—A bill of lading, says Lord Blackburn, "is a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned in the bill of lading."[1]

A "through bill of lading" is a bill of lading "made for the carriage of goods from one place to another by several shipowners or railway companies."[2] It seems doubtful how far the Act applies to these documents which are of modern origin.[3]

At common law the property in the goods could be transferred by the indorsement of the bill of lading, but the contract created by the bill of lading could not, therefore the endorsee could not sue on the contract in his own name.[4] The Act of 1855 confers this right while confirming the common law rights. "A cargo at sea," says Bowen, L.J., "while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the endorsement and delivery of the bill of lading operates a symbolical delivery of the cargo. Property in the goods passes by such endorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods."[5] He then goes on to say that by the inveterate practice of merchants, bills of lading are made out in three or more parts, one part being usually retained by the captain, the

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[1] *Blackburn on Sale*, p. 275; see *Anson on Contracts*, 5th ed., p. 239.

[2] *Scrutton on Charter Parties*, 2nd ed., p. 52.

[3] See *Scrutton*, supra, and *Law Quarterly Review*, vol. v. p. 424, and vol. vi. p. 289, where the effect of these instruments is fully discussed.

[4] *Thompson* v. *Dominy* (1845), 14 M. & W. 403.

[5] *Sanders* v. *Maclean* (1883), 11 Q. B. D. 327, at p. 341.

others being handed to the shipper. This practice has often given rise to frauds. The decisions on bills of lading which are very numerous are collected in the notes to *Lickbarrow* v. *Mason*, 1 Smith, Lead. Cas., p. 737; and the subject is fully dealt with in *Scrutton on Charterparties and Bills of Lading*; but the following salient points may be noted.

(1.) The voyage is deemed to continue, and the bill of lading to be alive as long as the goods are held on behalf of the master under a lien for freight, even though they have been landed.[1]

(2.) When two or more parts of a bill of lading are transferred to two or more different *bonâ fide* transferees for value, the property in the goods passes to the transferee who is first in point of time.[2]

(3.) But, nevertheless, the person who has the custody of the goods may safely deliver them to the person who first presents the bill of lading (or a part thereof) to him, provided he acts in good faith and without notice of any prior claim.[3]

(4.) A contract to deliver a bill of lading is complied with by delivering one part, though the others are not accounted for.[4]

(5.) Except for the purposes of the Factors Act and of defeating the right of stoppage *in transitu*, the transferee of a bill of lading acquires no better title to the goods represented thereby than the transferor had. In this respect a bill of lading differs from a bill of exchange, or rather it resembles an overdue bill of exchange, which can only be negociated subject to all equities attaching to it.[5] As to the effect of the transfer of a bill of lading on the right of stoppage *in transitu*, see *ante*, p. 86. As to the Factors Act, see *ante*, p. 130.

Where laws conflict, stipulations in a bill of lading must be construed according to the *lex loci contractus*, which *primâ facie* only is the law of the place where the contract was entered into.[6]

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[1] *Barber* v. *Meyerstein* (1870), L. R. 4 H. L. 317.

[2] *Barber* v. *Meyerstein*, supra.

[3] *Glyn, Mills & Co.* v. *East & West India Docks* (1882), 7 App. Cas. 591.

[4] *Sanders* v. *Maclean* (1883), 11 Q. B. D. 327, C. A.

[5] *Anson on Contracts*, 5th ed., p. 239; *Gurney* v. *Behrend* (1854), 3 E. & B. 622. As to fraud, however, see *The Argentina* (1867), L. R. 1 Adm. 370, and *Scrutton on Charter Parties*, 2nd ed., p. 149.

[6] *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, at p. 328, C. A.

THE LARCENY ACT, 1861.

(24 & 25 VICT. c. 96.)

An Act to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar offences.

* * * * * *

As to restitution and recovery of stolen property.

Revesting of property on conviction of offender.

[Modified by sect. 24 (2) of Sale of Goods Act, *ante*, p. 53.]

Proviso as to negotiable securities.

Sect. 100.—If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property or to order the restitution thereof in a summary manner: Provided, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate, liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order the restitution of such security: Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanour against this Act.

Note.—See *R.* v. *Justices of Central Crim. Court* (1886), 18 Q. B. D. 314, C. A., as to proceeds of stolen goods, and sect. 24, *ante*, p. 53, and notes thereto.

THE SALE OF LAND BY AUCTION ACT, 1867.[1]

(30 & 31 VICT. c. 48.)

An Act for amending the Law of Auctions of Estates.

[15th July, 1867.]

Be it enacted and declared by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

Sect. 1.—This Act may be cited for all purposes as the "Sale of Land by Auction Act, 1867."

Commencement of Act.

Sect. 2.—This Act shall commence and take effect on the first day of August, 1867.

Interpretation of terms.

Sect. 3.—"Auctioneer" shall mean any person selling by public auction any land, whether in lots or otherwise:

"Land" shall mean any interest in any messuages, lands, tenements, or hereditaments of whatever tenure:

"Agent" shall mean the solicitor, steward, or land agent of the seller:

"Puffer" shall mean a person appointed to bid on the part of the owner.

Where sales are invalid in law to be also invalid in equity.

Sect. 4.—And whereas there is at present a conflict between Her Majesty's Courts of law and equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the Courts of law holding that all such sales are absolutely illegal, and the Courts of equity under some circumstances giving effect to them, but even in Courts of equity the rule is unsettled: And whereas it is expedient that an end should be put to such conflicting and unsettled opinions: be it therefore enacted, that from and after the passing of this Act, whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law.

Rule respecting sale without reserve, &c.

Sect. 5.—And whereas as sales of land by auction are now conducted many of such sales are illegal, and could not be enforced

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[1] This Act is carefully discussed in Dart's *Vendors and Purchasers*, and in the 3rd ed. of *Fry on Specific Performance*. It is printed for the sake of comparison with sect. 58 of the Sale of Goods Act, *ante*, p. 105.

30 & 31 Vict. c. 48.

against an unwilling purchaser, and it is expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both parties: Be it therefore enacted by the authority aforesaid as follows: That the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person.

Rule respecting sale subject to right of seller to bid.

Sect. 6.—And where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper.

Practice of opening biddings, by Order of Chancery, except on ground of fraud, to be discontinued.

Sect. 7.—And whereas it is the long-settled practice of Courts of equity in sales by auction of land under their authority to open biddings even more than once, and much inconvenience has arisen from such practice, and it is expedient that the Courts of equity should no longer have the power to open biddings after sales by auction of land under their authority: Be it further enacted by the authority aforesaid, that the practice of opening the biddings on any sale by auction of land under or by virtue of any order of the High Court of Chancery shall, from and after the time appointed for the commencement of this Act, be discontinued, and the highest *bonâ fide* bidder at such sale, provided he shall have bid a sum equal to or higher than the reserved price (if any), shall be declared and allowed the purchaser, unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the Court or Judge before the Chief Clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs or otherwise as the Court or Judge shall think fit.

Court of Chancery, &c., in other respects

Sect. 8.—Except as aforesaid, nothing in this Act contained shall affect any sale of land made under or by virtue of any order of the High Court of Chancery in England, of the High Court of Chancery in Ireland, or of the Landed Estates Court there, or of the Court of

Chancery in the County Palatine of Lancaster, or of any county or other Court having jurisdiction in equity. 30 & 31 Vict. c. 48.

Sect. 9.—This Act shall not extend to Scotland. excepted from operation of Act. Not to extend to Scotland.

BILLS OF SALE ACT, 1878.

(41 & 42 Vict. c. 31.)

An Act to consolidate and amend the Law for preventing Frauds upon Creditors by Secret Bills of Sale of Personal Chattels.

Sect. 4.—In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction (that is to say): Interpretation of terms.

The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keeper's certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented: Bill of Sale defined. Excepted documents.

The expression "personal chattels" shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate nor fixtures (except trade machinery, as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are Personal chattels.

41 & 42 Vict. c. 31.

affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interest in the stock, funds, or securities of any Government, or in the capital or property of incorporate or joint-stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale:

Apparent Possession.

Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used or enjoyed by him in any place whatever, notwithstanding that formal possession thereof may have been taken by or given to any other person:[1]

"Prescribed" means prescribed by rules made under the provisions of this Act.

Note.—The Act of 1878 has been amended by the Bills of Sale Act, 1882, but the Act of 1882 only relates to bills of sale by way of security, and does not affect sales within the meaning of the Sale of Goods Act. The Bills of Sale Acts, 1890 and 1891, merely exempt certain mercantile letters of hypothecation from the definition of bill of sale.

The Bills of Sale Acts strike at documents, and not at the transactions themselves.[2] When the seller of goods remains in possession of them, and the buyer has to base his title or right to possession on some document which comes within the definition of a bill of sale, the document must be registered in accordance with the Act of 1878. If it be not so registered, the contract, though valid as between the parties, is void as against the seller's execution creditors, trustee in bankruptcy, or assignee for the benefit of creditors. See *Reed on Bills of Sale*, where all the authorities are exhaustively reviewed. It may be noted that where the seller remains in possession, an entry of the sale by the auctioneer, or a note of the contract drawn up by the sheriff who has sold privately, constitutes a bill of sale.[3] A delivery

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[1] As to distinction between apparent possession and "possession, order, and disposition" in the reputed ownership clause in bankruptcy, see *Ancona* v. *Rogers* (1876), 1 Ex. D., at p. 291, C. A.

[2] *North Central Waggon Co.* v. *Manchester Ry.* (1887), 35 Ch. D., at p. 207.

[3] *Re Roberts* (1887), 36 Ch. D. 196 (auctioneer); *Ex p. Blandford* (1893), 10 Morrell, 231 (sheriff).

order for furniture is not a bill of sale,[1] nor is an unregistered transfer of a ship or vessel.[2] 41 & 42 Vict. c. 31.

THE MERCHANDISE MARKS ACT, 1887.

(50 & 51 Vict. c. 28.)

An Act to consolidate and amend the Law relating to Fraudulent Marks on Merchandise. [23rd August, 1887.]

Implied warranty on sale of marked goods.

Sect. 17.—On the sale or in the contract for the sale of any goods to which a trademark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trademark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor, and delivered at the time of the sale or contract to and accepted by the vendee.

Note.—See sect. 14 (1), *ante*, p. 28, which saves this section.

THE STAMP ACT, 1891.

(54 & 55 Vict. c. 39.)

An Act to consolidate the Enactments granting and relating to the Stamp Duties upon Instruments, and certain other Enactments relating to Stamp Duties. [21st July, 1891.]

Agreements.

Duty may be denoted by adhesive stamp. [See *post*, p. 160.]

Sect. 22.—The duty of sixpence upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.

Bills of Lading.

Bills of lading. [See *post*, p. 160.]

Sect. 40.—(1.) A bill of lading is not to be stamped after the execution thereof.

(2.) Every person who makes or executes any bill of lading not duly stamped shall incur a fine of fifty pounds.

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[1] *Grigg* v. *National Guardian Assur. Co.* (1891), W. N., p. 123.

[2] *Gapp* v. *Bond* (1887), 19 Q. B. D. 200 (dumb-barge).

54 & 55 Vict. c. 39.

Delivery Orders.

Provisions as to duty on delivery order. [See *post*, p. 160.]

Sect. 69.—(1.) For the purposes of this Act "delivery order" means any document or writing entitling, or intended to entitle, any person therein named, or his assigns, or the holder thereof, to the delivery of any goods, wares, or merchandise of the value of forty shillings or upwards lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such document or writing being signed by or on behalf of the owner of such goods, wares, or merchandise, upon the sale or transfer of the property therein.

(2.) A delivery order is to be deemed to have been given upon a sale of, or transfer of the property in, goods, wares, or merchandise of the value of forty shillings or upwards, unless the contrary is expressly stated therein.

(3.) The duty upon a delivery order may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

Penalty for use of unstamped or untrue order.

Sect. 70.—(1.) If any person—

(*a.*) Untruly states, or knowingly allows it to be untruly stated, in a delivery order, either that the transaction to which it relates is not a sale or transfer of property, or that the goods, wares, or merchandise to which it relates are not of the value of forty shillings; or

(*b.*) Makes, signs, or issues any delivery order chargeable with duty, but not being duly stamped; or

(*c.*) Knowingly, either himself, or by his servant or any other person, delivers or procures or authorises the delivery of any goods, wares, or merchandise mentioned in any delivery order which is not duly stamped, or which contains to his knowledge any false statement with reference either to the nature of the transaction, or the value of the goods, wares, or merchandise,

he shall incur a fine of twenty pounds.

(2.) But a delivery order is not, by reason of the same being unstamped, to be deemed invalid in the hands of the person having the custody of, or delivering out, the goods, wares, or merchandise therein mentioned, unless such person is proved to have been party or privy to some fraud on the revenue in relation thereto.

By whom duty on delivery order to be paid.

Sect. 71.—The duty upon a delivery order is, in the absence of any special stipulation, to be paid by the person to whom the order is given, and any person from whom a delivery order chargeable with duty is

required may refuse to give it, unless or until the amount of the duty is paid to him. 54 & 55 Vict. c. 39.

Receipts.

Provisions as to duty upon receipts.

Sect. 101.—(1.) For the purposes of this Act the expression "receipt" includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

(2.) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

Terms upon which receipts may be stamped after execution.

Sect. 102.—A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,

(1.) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds;

(2.) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

Penalty for offences in reference to receipts.

Sect. 103.—If any person—

(1.) Gives a receipt liable to duty and not duly stamped; or

(2.) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or

(3.) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds, or separates or divides the amount paid with intent to evade the duty;

he shall incur a fine of ten pounds.

Warrant for Goods.

Provisions as to warrant for goods.

Sect. 111.—(1.) For the purposes of this Act the expression "warrant for goods" means any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise.

54 & 55 Vict. c. 39.

(2.) The duty upon a warrant for goods may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

(3.) Every person who makes, executes, or issues, or receives or takes by way of security or indemnity, any warrant for goods not being duly stamped, shall incur a fine of twenty pounds.

SCHEDULE.

* * * * *

	£	s.	d.
AGREEMENT, or any MEMORANDUM of an AGREEMENT, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument .	0	0	6

Exemptions.

(1.) Agreement or memorandum the matter whereof is not of the value of £5.

(2.) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.

(3.) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.[1]

BILL OF LADING of or for any goods, merchandise, or effects to be exported or carried coastwise . . . And *see* sect. 40.	0	0	6
DELIVERY ORDER	0	0	1
DOCK WARRANT. *See* WARRANT FOR GOODS.			
RECEIPT given for, or upon the payment of, money amounting to £2 or upwards	0	0	1

[1] The exception includes a guarantee for the price of goods sold (*Warrington* v. *Furbor* (1807), 8 East. 242; *Chanter* v. *Dickinson* (1843), 5 M. & Gr. 253, discussing previous cases; *cf. Rein* v. *Lane* (1867), L. R. 2 Q. B. 144, at p. 150, Blackburn, J.). The exception does not extend to a contract under seal (*Clayton* v. *Burtenshaw* (1826), 5 B. & C. 41, at p. 46, per Bayley B.).

Exemptions.

* * * * *

	£	s.	d.
(8.) Receipt written upon a bill of exchange or promissory note duly stamped.			
(9.) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland.			
(11.) Receipt endorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.			
WARRANT FOR GOODS	0	0	3

Exemptions.

(1.) Any document or writing given by an inland carrier acknowledging the receipt of goods conveyed by such carrier.

(2.) A weight note issued together with a duly stamped warrant, and relating solely to the same goods, wares, or merchandise.

And *see* sect. 111.

APPENDIX II.—NOTES.

Note A.—On the Use of the Terms Contract, Condition, and Warranty.

I.—Contract.

Contract.

The disposition of the best modern writers appears to be to define "contract" as an agreement enforceable by law. There is no question that contract is a species of which agreement is the genus. But having regard to the ordinary language of English cases, the definition seems rather too narrow, for it excludes the case of agreements of imperfect obligation—as, for instance, a verbal agreement to sell goods above the value of £10, which is unenforceable till part performance, or an agreement which does not bear the proper stamp, or an agreement against which the Statute of Limitations may be pleaded. In ordinary legal language all these agreements would be described as contracts (see *e.g.* the language of the 17th sect. of the Statute of Frauds). They all have certain legal consequences. They are cognizable, though not enforceable, by law. But to define a contract as an agreement intended to be enforceable, and, in fact, cognizable by law, though correct according to ordinary language, appears to be too vague for a scientific definition. Having regard to the existing use of the term, any precise definition must be more or less arbitrary.

The so-called "contracts of record" are not contracts within any legitimate meaning of the term.

Citations.

1.—"A *contract* is a speech betwixt parties that a thing which is not done be done."—*The Mirror*, ch. ii., s. 27.

2.—"An agreement upon sufficient consideration to do or not to do a particular thing."—*Blackstone's Com.*, bk. ii., ch. 30, § 9, adopted by Kindersley, V.C., in *Haynes v. Haynes* (1861), 1 Dr. and Sm., p. 433. See *Fry on Specific Performance*, 3rd ed., p. 1.

3.—"A *contract* or agreement is when a promise is made on one side, and assented to on the other, or when two or more persons enter into engagement with each other by a promise on either side."—*Stephen's Com.*, bk. ii. ch. 5. Contract.

4.—"'*Contract*' is a term of uncertain extension. Used loosely, it is equivalent to 'convention' or 'agreement.' Taken in the largest signification which can be given to it correctly, it denotes a convention or agreement which the courts of justice will enforce. That is to say, it bears the meaning which was attached to it originally by the Roman jurisconsults."—*Austin's Jurisprudence*, vol. ii. p. 1015.

5.—"Un *contrat* est une espèce de convention . . . une convention par laquelle les deux parties, reciproquement, ou seulement l'une des deux, promettent et s'engagent envers l'autre à lui donner quelque chose, ou à faire ou ne pas à faire quelque chose."—*Pothier, Traité des Obligations*, § 3, adopted in *Addison on Contracts.*

6.—"A '*contract*' is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others."—*Anson on Contracts*, 6th ed., p. 9.

7.—"Every agreement and promise enforceable by law is a *contract.*"—*Pollock on Contracts*, 4th ed., p. 1.

8.—"An agreement enforceable by law is a *contract.*"—Indian Contract Act, s. 2.

9.—"A *contract* is an agreement to do or not to do a certain thing. It is essential to the existence of a contract that there should be (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration."—New York Draft Civil Code, §§ 744–745.

10.—"Le *contrat* est une convention par laquelle une ou plusieurs personnes s'obligent, envers une autre à donner, à faire, ou ne pas à faire quelque chose."—French Civil Code, art. 1101; see *Rogron's Code Civil Expliqué.*

11.—"Le *contrat* est l'accord de deux ou plusieurs personnes pour former regler ou délier entre elles un lien juridique."—Italian Civil Code, art. 1098, translated by *Huc.*

12.—"When both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then, and not till then, an agreement or *contract* between the

two is constituted."—Per Kindersley, V.C., in *Haynes* v. *Haynes* (1861), 1 Dr. and Sm. 426, p. 433.

13.—"I understand by a *contract* an agreement which the law will enforce, and I apprehend that, speaking generally, the law will enforce all agreements made upon good consideration or with certain solemnities which dispense with consideration. Agreement and consideration are thus the elements which constitute a contract not under seal."—Per Stephen, J., in *Alderson v. Maddison* (1880), 5 Ex. Div. 293, at p. 297.

II.—Condition.

Conditions.

The term "condition" as applied to contracts appears to mean indifferently (*a*) an uncertain event on the happening of which the obligation of the contract is to depend, and (*b*) the stipulation in the contract making its obligation depend on the happening of such event. Though the Act uses the term condition, it does not define it. The definition belongs to the general law of contract.

The term seems to have been imported into the law of contract from the law of conveyancing. In conveyancing a distinction was drawn between "conditions" and "covenants" (*Bacon's Abr.*, 7th ed., vol. ii. p. 116), which, in contracts, has now become obliterated.

The classification of conditions in English law is imperfect and unsatisfactory.

The division of conditions, into positive and negative (*e.g.* if my horse wins the Derby—if my horse does not win the Derby), is obvious, and requires no comment.

Lord Justice James divides conditions into conditions precedent, subsequent, and inherent, a classification which seems to involve a cross-division. Ordinarily they are divided into conditions precedent and conditions subsequent, that is to say, conditions which must be fulfilled before the obligation of the contract arises, and conditions on the happening of which an existent obligation is dissolved. This division corresponds generally, in sale at any rate, with the distinction drawn by Scotch law and the Continental codes, between suspensive and resolutive conditions.

Conditions precedent are again divided into conditions precedent strictly so-called and concurrent conditions. A condition is concurrent where the parties to a contract have reciprocally to perform certain acts at the same time. In the case of the failure of one party to perform his part of the contract it is sufficient if the other party shews that he was ready and willing to perform his part, although he did not actually perform it.

Pothier's further division of conditions precedent into potestative, casual, and mixed conditions, though followed in Scotland and by the Continental codes, is not recognised in England. But for accuracy some such subdivision is required. There is an important distinction between what may be called promissory conditions, and contingent or casual conditions. In the latter case the obligations of both parties are suspended till the event takes place. In the former case the non-performance of the condition by the promisor (unless excused by law) gives a right to the promisee to treat the contract as repudiated, that is to say, he is discharged from his part of the contract, and, further, he has a claim for damages. In the one case the obligation of the contract does not attach. In the other case the contract is broken. If A. says to B., "I will hire your horse and trap to-morrow if the day be fine," and B. assents to this, the obligations of both parties depend on the agreed condition being fulfilled; but if A. agrees with B. to sell him a ton of hay and deliver it "on Monday for certain," there is a breach of contract by A. if the hay be not so delivered. In the older cases promissory conditions were referred to as "dependent covenants or promises" and were contrasted with independent covenants or promises, namely, stipulations the breach of which gives rise to a claim for damages, but not to a right to treat the contract as repudiated. Now the term "dependent promise" appears to be merged in the wider term "condition precedent." Conditions.

The Indian Contract Act discards the term "condition," but seeks to preserve the distinction referred to above by dealing separately with "contingent contracts" and "reciprocal promises."

Citations.

1.—"A condition is a kind of law, or bridle, annexed to one's acts, staying or suspending the same, and making it uncertain whether it shall take effect or no; or, as others define it, it is a *modus*, a quality annexed by him that hath estate, interest, or right to the land, etc., whereby an estate, etc., may either be created, defeated, or enlarged upon an uncertain event. And this doth differ from a limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue."—*Sheppard's Touchstone*, 117.

2.—"By the word *condition* is usually understood some quality annexed to a real estate, by virtue of which it may be defeated, enlarged, or created upon an uncertain event.

"Also, qualities annexed to personal contracts and agreements are frequently called conditions, and these must be interpreted according to the real intention of the parties, and are usually taken most

Conditions. strongly against the party to whom they are meant to extend, lest by the obscure wording of his own contract he should find means to evade and elude it.

"*Conditions precedent* are such as must be punctually performed before the estate can vest; but on a *condition subsequent*, the estate is immediately executed; yet the continuance of such estate dependeth on the breach or performance of the condition."—*Bacon's Abr.*, vol. ii. pp. 108, 121.

"By *covenants* are meant those classes of agreement contained in a deed whereby either party stipulates for the truth of certain facts or binds himself to perform or forbear doing something to the other. For the breach of these covenants the party injured is entitled to relief by an action or writ of covenant against the covenantor founded on the deed."—*Bacon's Abr.*, vol. ii. p. 337.

3.—§ 676.—"An obligation is conditional when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.

§ 677.—"Conditions may be precedent, concurrent, or subsequent.

§ 678.—"A condition precedent is one which is to be fulfilled before some right dependent thereon accrues, or some act dependent thereon is performed.

§ 679.—"Conditions concurrent are those which are mutually dependent, and are to be fulfilled at the same time.

§ 680.—"A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition."—New York Draft Civil Code, secs. 676–680.

4.—"A *condition* is the case of a future uncertain event, which may or may not happen, and upon which the obligation is made to depend. Conditions upon which an obligation may be suspended are divided into positive and negative. A positive condition consists in the case where a thing that may or may not happen shall happen: as, if I marry. A negative condition is that which consists in the case where something that may or may not happen shall not happen: as, if I do not marry. Conditions are also distinguished into potestative, casual, and mixed. A potestative condition is that which is in the power of the person in whose favour the obligation is contracted: as, if I engage to give my neighbour a sum of money in case he cuts down a tree which obstructs my prospect. A casual condition is that which depends upon accident and is nowise in the power of the creditor: as, if such a ship should arrive safe. A mixed condition is that which

depends upon the concurrence of the will of the creditor and of a third person: as, if you marry my cousin. Conditions.

"Resolutory conditions are those which are added not to suspend the obligation until their accomplishment, but to make it cease when they are accomplished."—*Pothier's Obligations, by Evans*, pp. 112–129, adopted; French Civil Code, arts. 1168–1171; Italian Civil Code, arts. 1157–1159; and *Bell's Princ. Law of Scotland*, 9th ed., pp. 47–50.

5.—"A conditional promise is one of which the performance is not due immediately, but becomes so only after a lapse of time or upon the happening of some event, certain or uncertain. The lapse of time and the happening of the event are then conditions precedent, in reference to the liability for performance of the promise.

"A promise may also be conditional, as being subject to cease or be discharged upon some event or contingency, which is then a condition subsequent."—*Leake's Digest of Law of Contract*, ed. 3, p. 550.

6.—"*Conditions* are either statements or promises which form the basis of the contract. . . . When a term in the contract is ascertained to be a *condition*, then, whether it be a statement or a promise, the untruth or the breach of it will entitle the party to whom it is made to be discharged from his liabilities under the contract.

"A *condition precedent* may be defined as a statement or promise the untruth or failure of which discharges the contract."—*Anson on Contracts*, 6th ed., pp. 146, 201.

7.—"It is open to the parties, if so minded, to contract when selling specific goods, that a particular stipulation, such, for instance, as one relating to the nature or quality of the goods, shall be conditional to the validity of the sale; and if this is the contract really intended, the buyer may repudiate the contract and return the goods, even after their delivery, on its appearing that the affirmation was not correct. In this class of cases the sale is not absolute with a warranty or condition superadded, but conditioned and to be null if the affirmation is incorrect."—Notes to *Cutter* v. *Powell*, 2 Smith, Lead. Cas., 7th ed., pp. 30, 31.

8.—"The distinction is very clear; where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent."—Per Lord Mansfield, in *Boone* v. *Eyre* (1788), cited in *Duke of St. Albans* v. *Shore* (1789), 1 H. Bl. 271, at p. 273; cf. *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238, at p. 245.

Conditions.

9.—"There are three kinds of covenants:—1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenant in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready and offered to perform his part and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."—Per Lord Mansfield, in *Kingston* v. *Preston* (1773), 2 Dougl. 648, at p. 690.

10.—"Conditions may be either precedent, subsequent, or inherent. A condition is precedent when, unless it is complied with, the estate does not arise; it is subsequent when, if it is broken, the estate is defeated; it is inherent when the estate is qualified, restrained, or charged by it. In every case it denotes something which prejudicially affects the interests of the donee."—Per James, L.J., in *Ex p. Collins*, Re *Lees* (1875), L. R. 10 Ch. App. 367, at p. 372 (bill of sale case).

"A condition is something which defeats or qualifies an estate."—Per Jessel, M.R., in *Ex p. Popplewell* (1882), 21 Ch. D. 73, at p. 81 (bill of sale case).

III.—Warranty.

Warranty.

The term "warranty" seems to have been imported into the law of contract from the old law of conveyancing, where it signified an express or implied covenant by the grantor of real estate, to indemnify the grantee if he should be evicted.

Its meaning has been considerably widened in the law of contract, and it is now a term of very uncertain signification.

In the law of insurance it is used as strictly equivalent to condition precedent, and, to some extent, it has the same meaning in other contracts, though it is sometimes sought to contrast it with condition precedent, or rather with a certain kind of condition precedent, namely, a promissory condition precedent. When used in the latter sense the distinction between "condition" and "warranty" corresponds with the distinction drawn by the older cases between what were known as "dependent" and "independent" covenants or promises.

Warranty.

The chief controversy over the proper meaning of the term "warranty" has arisen in the law of sale, and the ambiguity of its use appears to result from the want of clear distinction in English law between sale—*i.e.* the transfer of property in a thing—and the contract by which that transfer is effected. The term is used in two different senses, and judges and text writers continually oscillate between them.

First, the term "warranty" is opposed to the term "condition precedent," and denotes a stipulation in a contract of sale, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated. This is the meaning which, after much consideration, has been adopted by the Act. The objection to this use of the term appears to be that it does not cover the whole field of independent stipulations. For instance, where there is a contract for instalment deliveries the obligation to pay for a particular instalment may be an independent promise, but it would not ordinarily be called a warranty.

Secondly, the term "warranty" is used to denote any auxiliary stipulation in a contract of sale, and in particular a stipulation relating to the title to, or the quality, condition, or fitness of, goods contracted to be sold. In this sense of the term a breach of warranty may give rise either to a mere claim for damages, or to a right to reject the goods, and treat the contract as repudiated according as the goods may have been accepted or not.

The weight of judicial authority is in favour of the first meaning, though etymologically and historically the second meaning appears more correct. [Warranty = Guarantee.] The objection to this use of the term is that it does not mark the distinction between a condition precedent and a collateral promise or undertaking. Using the term in the first sense, it is to be noted that many stipulations which in their inception are conditions (*i.e.* the implied undertakings as to merchantableness and fitness for a particular purpose) may become contracted into warranties by virtue of subsequent events, and this fact doubtless explains much of the confusion of language which the term has given rise to.

Citations.

1.—"A warranty (concerning freeholds and inheritances) is a covenant real annexed to lands or tenements whereby a man and his heirs are bound to warrant the same, and either by voucher or by judgment in a writ of *warrantia chartæ* to yield other lands and tenements to the value of those that shall be evicted by a former title, else it may be used by way of rebutter."—*Bacon's Abridgment*, 7th ed., pp. 356, 359, 361; and see *Williams's Real Property*, 16 ed., p. 513.

Warranty.

2.—"A *warranty* is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future."—New York Draft Code, § 877.

3.—A *warranty*, properly so called, can only exist where the subject-matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract, and is a collateral engagement that the specific thing so sold possesses certain qualities, but the property passing by the contract of sale a breach of the warranty cannot entitle the vendor to rescind the contract, and re-vest the property in the vendor without his consent. . . . But when the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere *warranty* but a *condition*, the performance of which is precedent to any obligation on the vendee under the contract, because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be compelled to receive and pay for a thing different from that for which he contracted."—Notes to *Cutter* v. *Powell*, 2 Smith, Lead. Cas., 7th ed., p. 30.

4.—"A *warranty* is a more or less unqualified promise of indemnity against a failure in the performance of a term in the contract. . . .

"*Warranties* are independent subsidiary promises, the breach of which does not discharge the contract, but gives to the injured party a right of action for such damage as he has sustained by the failure of the other to fulfil his promise.

"A *condition* may be broken, and the injured party may not avail himself of the right to be discharged, but continue to take benefit under the contract, or, at any rate, to act as though it were still in operation. In such a case this condition sinks to the level of a warranty, and the breach of it being waived as a discharge, can only give a right of action for the damage sustained."—*Anson on Contracts*, 6th ed., pp. 146, 147, 301.

5.—"An express *warranty* is a stipulation inserted in writing on the face of the policy, upon the literal truth or fulfilment of which the validity of the entire contract is dependent. These written stipulations either allege the existence of some fact or state of things at the time, or previous to the time, of making the policy, or they undertake for the happening of future events, or the performance of future acts. In the former case Mr. Marshall terms the stipulation an affirmative, and in the latter a promissory warranty."—*Arnould's Marine Insurance*, 6th ed., p. 599; *Cranston* v. *Marshall* (1850), 5 Exch. 395,

at p. 402; and see *Barnard* v. *Faber* (1893), 1 Q. B., at p. 343, per Ld. Bowen, as to fire insurance. Warranty.

6.—"When it appears that the consideration has been executed in part, that which before was a warranty or condition precedent, loses the character of a condition, or, to speak more properly, ceases to be available as a condition and becomes a warranty in a narrower sense of the word, viz. a stipulation by way of agreement for the breach of which a compensation must be sought in damages."—Notes to *Williams' Saunders*, vol. i., p. 554, cited and approved; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438, at p. 450.

7.—"From both these cases (*i.e.* representations and conditions) must be distinguished that of a distinct collateral agreement that a representation shall be true, so that its untruth, if so it prove, shall in no case avoid the contract, but shall be matter for compensation. Such an agreement is called a *warranty*. . . . Where there has been a sale with a warranty of goods not in existence or not ascertained, and the warranty is broken, the buyer may refuse to accept the goods. This, at first sight, appears to put a warranty on the same footing as a condition when the sale is not of specific goods, but the true explanation is that the tender of an article not corresponding to the warranty is not a performance of the contract. The warranty retains its peculiar effect in this, that if the buyer chooses to accept the goods, he has a distinct collateral right of action on the warranty; whereas if there is a condition, but not a warranty, the party may indeed insist on the condition, but if he accepts performance of the contract without it he may have no claim to compensation."—*Pollock on Contracts*, 4th ed., pp. 486—488.

8.—"If upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value and his own goods, and the seller should warrant them, and then the buyer should demand the price, and the seller should set the price, and then the buyer should take time for two or three days to consider, and then should come and give the seller his price, though the warranty here was before the sale yet this will be well, because the *warranty* is the ground of the treaty, and this is *warrantizando vendidit*."—*Lysney* v. *Selby* (1703), 2 Ld. Raym. 1118.

9.—"It was rightly held by Holt, C.J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a *warranty*, provided it appear on evidence to have been so intended."—Per Buller, J., in *Pasley* v. *Freeman* (1789), 3 T. R., c. 1, p. 57.

Warranty.

10.—"Here, when F., a mutual acquaintance of the parties, introduced them to each other, he said, 'Mr. J. is in want of copper sheathing for a vessel,' and one of the defendants answered, 'We will supply him well.' As there was no subsequent communication, that constituted a contract and amounted to a *warranty*. I wish to put the case upon a broad principle. If a man sells an article he thereby *warrants* that it is merchantable—that is, fit for some purpose. If he sells it for a particular purpose he thereby *warrants* it fit for that purpose. . . . In every contract to furnish manufactured goods, however low the price, it is an implied *term* that the goods shall be merchantable."—Per Best, C.J., *Jones* v. *Bright* (1829), 5 Bing. 533, at p. 543.

11.—"Although the vendee of a specific chattel, delivered with a *warranty*, may not have a right to return it, the same reason does not apply to cases of executory contracts, when an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent is such as is never completely accepted by the party ordering it."—Per Lord Tenterden, *Street* v. *Blay* (1831), 2 B. & Ad. 456, at p. 463 (horse case).

12.—"A good deal of confusion has arisen in many of the cases on this subject from the unfortunate use made of the word '*warranty*.' Two things have been confounded together. A *warranty* is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it. But in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description, has been called a *warranty*, and the breach of such contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil, as if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."—Per Lord Abinger, in *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, at p. 404.

13.—"We avoid the term '*warranty*,' because it is used in two senses, and the term 'condition' because the question is whether that term is applicable. Then the effect is that the defendants required and the plaintiff gave his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation; and if it had not

been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted, and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used. The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded, or the sale may be conditional to be null if the warranty is broken; and upon this statement of facts we think the intention appears to have been that the contract should be null if sulphur had been used."—Per Erle, C.J., *Bannerman* v. *White* (1861), 31 L. J. C. P. 28, at p. 32. Warranty.

14.—"I agree with what Maule, J., and Crowder, J., say in *Hopkins* v. *Tanqueray*. Crowder, J., says, in the plainest terms, in that case, that conversation 'was a mere representation, and was evidently not made with an intention to warrant the horse. A representation to constitute a warranty, must be shewn to have been intended to form part of the contract.' It seems to me that that is perfectly correct."—Per Martin, B., in *Stucley* v. *Baily* (1862), 31 L. J., Ex. 483, at p. 489.

15.—"But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle, as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a *warranty*, that is to say, a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and be so relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole, or any substantial part, of the consideration for the promise on his part, the *warranty* loses the character of a *condition*, or, to speak more properly, perhaps, ceases to be available as a condition, and becomes a *warranty* in the narrow sense of the word, namely, a stipulation by way of agreement for the breach of which a compensation must be sought in damages."—Per Williams, J., in *Behn* v. *Burness* (1863), 32 L. J. Q. B. 204, at p. 206.

16.—"The wools are guaranteed 'about similar to samples.' Now such a clause may be a simple guarantee or *warranty*, or it may be a condition—generally speaking when the contract is as to any goods, such a clause is a condition going to the essence of the contract; but when the contract is as to specific goods the clause is only collateral to the contract, and is the subject of a cross action or matter in reduction

of damages. Here there is, I think, merely a *warranty* as distinguished from a *condition*."—Per Blackburn, J., *Heyworth* v. *Hutchinson* (1867), L. R. 2 Q. B. 447, at p. 451.

Note B.—Construction of Terms and Conditions.

Construction of contracts of sale.

There is no canon of construction peculiar to contracts of sale. In a case arising on a contract of sale where the material words were "delivering on April 17th; complete 8th May," Kelly, C.B., says: "The rule of construction applicable in general to all written contracts is, that they are to be construed according to the real intention of the parties, to be collected from the language they have used; that effect is to be given, if possible, to every word used, and that every word is to be interpreted according to its natural and ordinary meaning, unless such construction would be contrary to the manifest intention of the parties, or would necessarily lead to some contradiction or absurdity. But this rule, though applicable to contracts in general, must be received with some qualification, when the contract or a portion of the contract in question consists of an incomplete sentence, ambiguous in its terms, and upon which a literal construction of every word would either be impracticable or would leave the contract indeterminate and uncertain. And such is the case with the contract in question, which I think is to be construed according to what we can collect to have been the substantial intention of the parties, applying our common sense, and such knowledge as we may possess, to the language in which they have expressed themselves."[1]

The rule for construing conditions as to delivery and payment is thus given by Williams, J.: "Where there is an agreement to deliver to a vendee on a certain condition and the condition (without any fault on the part of the vendor) never comes to pass, it is plain that he will not be liable for a non-delivery. But where the agreement is absolute or conditional on an event which happens, the vendor will be liable for a breach, although he could not help the non-performance; for it is his own heedlessness if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract."[2] And see note C., *post*, pp. 180, 181.

Some useful rules are given by Stephen, J., for the construction of

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[1] *Coddington* v. *Paleologo* (1867), L. R. 2 Ex. 193, at p. 200; *cf. Honch* v. *Muller* (1881), 7 Q. B. D. 92, at p. 103, per Lord Esher.

[2] *Hale* v. *Rawson* (1858), 27 L. J. C. P. 189, at p. 191 (sale of cargo to arrive by ship).

conditions incorporated by reference into contracts of sale in *Watkins* v. *Rymill* (1878), 10 Q. B. D. 178, at p. 188.

Usage. As regards explaining contracts by usage, Lord Wensleydale says: "In commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent . . . and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.[1]

The following terms and stipulations, among others, have been judicially construed, namely—

Terms as to shipment, i.e.

Stipulations judicially construed. "The names of the vessels to be declared as soon as the wools are shipped."[2]

"Shipped per *Diletta* as per bill of lading dated September or October."[3]

"For shipment in June and [or] July."[4]

"Shipment by steamer or steamers during February."[5]

"To be shipped during the months of March $\frac{\text{or}}{\text{and}}$ April."[6]

As to arrival of ship or cargo, i.e.

"On arrival."[7]

"Payment, bill at two months from the date of landing."[8]

"150 tons of soda to arrive ex *Daniel Grant*."[9]

"100 hogsheads of oil expected to arrive by the ship *Resolute* from Madras."[10]

"100 bales cotton now on passage from Singapore and expected to arrive at London per the *Ravenscraig*."[11]

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[1] *Hutton* v. *Warren* (1836), 1 M. & W., at p. 475.
[2] *Graves* v. *Legg* (1854), 9 Exch. 709.
[3] *Gattorno* v. *Adams* (1862), 12 C. B. N.S. 560.
[4] *Alexander* v. *Vanderzee* (1872), L. R. 7 C. P. 530, Ex. Ch.
[5] *Brandt* v. *Lawrence* (1876), 1 Q. B. D. 344, C. A.; but see *Reuter* v. *Sala* (1879), 4 C. P. D. 239, C. A.
[6] *Bowes* v. *Shand* (1877), 2 App. Cas. 455.
[7] *Alewyn* v. *Pryor* (1826), R. & M. 406.
[8] *Alexander* v. *Gardner* (1835), 1 Bing. N. C. 671.
[9] *Johnson* v. *Macdonald* (1842), 9 M. & W. 600.
[10] *Fischel* v. *Scott* (1854), 15 C. B. 69.
[11] *Gorrissen* v. *Perrin* (1857), 27 L. J. C. P. 29.

Stipulations judicially construed.

"50 cases of tallow to be delivered on the safe arrival of the ship *Elgin*." [1]

"The cotton to be taken from the quay." [2]

"600 tons of nitrate of soda expected to arrive at port of call per *Precursor*." [3]

As to priority of delivery and payment.

"Payment, bill at two months from the date of landing." [4]

"To be paid for by cash in one month." [5]

"Delivery forthwith; payment, cash in 14 days from the making of the contract." [6]

Delivery order running, "we engage to deliver on presentation of this document." [7]

"To be free delivered and paid for in 14 days in cash." [8]

"The balance in cash on right delivery at Rangoon." [9]

"Freight to be payable on right delivery of the cargo." [10]

"Payment to be made in net cash in London in exchange for bills of lading of each cargo or shipment." [11]

As to time of delivery, i.e.

"Delivery at buyer's option in all April or sooner." [12]

"10 tons of oil to be delivered within the last 14 days of March." [13]

"5 tons oilcake to be put on board directly." [14]

"Delivery forthwith." [15]

Goods to be delivered "as required." [16]

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[1] *Hale* v. *Rawson* (1858), 27 L. J. C. P. 189.

[2] *Neill* v. *Whitworth* (1865), 34 L. J. C. P. 155, affirmed by Ex. Ch. (1866), L. R. 1 C. P. 684.

[3] *Smith* v. *Myers* (1871), L. R. 7 Q. B. 139, Ex. Ch.

[4] *Alexander* v. *Gardner* (1835), 1 Bing. N. C. 671.

[5] *Spartali* v. *Benecke* (1850), 10 C. B. 212; but see *Field* v. *Lelean* (1861), 30 L. J. Ex. 168, Ex. Ch., as to usage.

[6] *Staunton* v. *Wood* (1851), 16 Q. B. 638.

[7] *Bartlett* v. *Holmes* (1853), 22 L. J. C. P. 182.

[8] *Godts* v. *Rose* (1855), 17 C. B. 229.

[9] *Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B. 322.

[10] *Paynter* v. *James* (1867), L. R. 2 C. P. 348.

[11] *Sanders* v. *Maclean* (1883), 11 Q. B. D. 327, C. A.

[12] *Cox* v. *Todd* (1825), 7 D. & R. 131.

[13] *Startup* v. *Macdonald* (1843), 6 M. & G. 593, Ex. Ch. (tender at 8.30 on Saturday night).

[14] *Duncan* v. *Topham* (1849), 8 C. B. 225.

[15] *Staunton* v. *Wood* (1851), 16 Q. B. 638.

[16] *Jones* v. *Gibbons* (1853), 8 Exch. 920.

Stipulations judicially construed.

"Delivering on April 17th, complete 8th May." [1]

"The lots to be cleared away within 3 days after the sale at the purchaser's expense." [2]

"To be finished as soon as possible." [3]

As to cost of delivery.

"Free on board a foreign ship." [4]

"Free on board," or, "F. O. B." [5]

"The cotton to be taken from the quay." [6]

Goods to be taken "from the deck." [7]

C. F. I. = at a price to cover "cost, freight, and insurance." [8]

Delivery on payment of freight "and other conditions as per charter-party." [9]

As to price.

"2½ per cent. discount for cash, the duty to be deducted." [10]

"Market value." [11]

"Terms—net cash, to be paid within six to eight weeks from date hereof." [12]

"Without reserve." [13]

"The highest bidder to be the purchaser." [14]

"Cash, or approved banker's bills." [15]

As to quantity.

"18 *pockets* Kent hops." [16]

"1000 *bales* of gambier." [17]

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[1] *Coddington* v. *Paleologo* (1867), L. R. 2 Ex. 193.

[2] *Woolfe v. Horne* (1877), 2 Q. B. D. 355, C. A.

[3] *Hydraulic Co.* v. *McHaffie* (1878), 4 Q. B. D. 670, C. A.

[4] *Wackerbarth* v. *Masson* (1812), 3 Camp. 270.

[5] *Cowasjee* v. *Thompson* (1845), 5 Moore, P. C. C. 165, see at p. 173; *Brown* v. *Hare* (1858), 27 L. J. Ex., at p. 377; *Stock* v. *Inglis* (1884), 12 Q. B. D. 564, at p. 573; affirmed (1885), 10 App. Cas. 263.

[6] *Neill* v. *Whitworth* (1865), 34 L. J. C. P. 155; affirmed (1886), L. R. 1 C. P. 684, Ex. Ch.

[7] *Playford* v. *Mercer* (1870), 22 L. T. N.S. 41.

[8] *Ireland* v. *Livingston* (1872), L. R. 5 H. L., at p. 406.

[9] *Steamship 'County of Lancaster'* v. *Sharp* (1889), 24 Q. B. D. 158.

[10] *Smith* v. *Blandy* (1825), R. & M., at p. 260.

[11] *Orchard* v. *Simpson* (1857), 2 C. B. N.S. 299.

[12] *Ashforth* v. *Redford* (1873), L. R. 9 C. P. 20.

[13] *Thornett* v. *Haines* (1846), 15 M. & W. 367.

[14] *Green* v. *Baverstock* (1863), 32 L. J. C. P. 181.

[15] *Smith* v. *Mercer* (1867), L. R. 3 Ex. 51.

[16] *Spicer* v. *Cooper* (1841), 1 Q. B. 424.

[17] *Gorrissen* v. *Perrin* (1857), 27 L. J. C. P. 29.

Stipulations judicially construed.

"Cargo." [1]

"A full and complete cargo of sugar and molasses." [2]

"A small cargo of lath-wood (specifying lengths), in all about 60 cubic fathoms." [3]

"A cargo of from 2500 to 3000 barrels (seller's option) American petroleum." [4]

"About 300 quarters more or less of foreign rye shipped at Hamburg." [5]

"Say from 1000 to 1200 gallons per month." [6]

"Say not less than 100 packs." [7]

"The quantity to be taken from the bill of lading." [8]

"We hold to your order about 30 tons Saint Petersburg hemp."

"100 tons of Wallsend coals, more or less." [10]

"Say about 600 red pine spars averaging 16 inches." [11]

"25 tons, more or less, Penang pepper; name of vessel or vessels to be declared within 60 days from date of bill of lading." [12]

"About 150 tons of scrap iron." [13]

"The whole of the steel required for the Forth Bridge. The estimated quantity we understand to be 30,000 tons, more or less." [14]

As to quality, &c., i.e.

"With all faults." [15]

Carriage to be built "to meet my convenience and taste." [16]

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[1] *Anderson* v. *Morrice* (1876), 1 App. Cas. 713; *Colonial Ins. Co.* v. *Adelaide Ins. Co.* (1886), 12 App. Cas., at pp. 129, 130.

[2] *Cuthbert* v. *Cumming* (1855), 11 Exch. 405, Ex. Ch.

[3] *Kreuger* v. *Blanck* (1870), L. R. 5 Ex. 179; but see *Ireland* v. *Livingston* (1872), L. R. 5 H. L., at pp. 405, 410.

[4] *Borrowman* v. *Drayton* (1876), 2 Ex. D. 15, C. A.

[5] *Cross* v. *Eglin* (1831), 2 B. & Ad. 106.

[6] *Gwillim* v. *Daniell* (1835), 2 C. M. & R. 61; *cf. Morris* v. *Levison* (1876), 1 C. P. D., at p. 159.

[7] *Leeming* v. *Snaith* (1851), 16 Q. B. 275.

[8] *Covas* v. *Bingham* (1853), 2 E. & B. 836.

[9] *Moore* v. *Campbell* (1854), 10 Exch. 323.

[10] *Cockerell* v. *Aucompte* (1857), 26 L. J. C. P. 194; *cf. Bourne* v. *Seymour* (1855), 24 L. J. C. P. 207.

[11] *McConnell* v. *Murphy* (1873), L. R. 5 P. C. 203.

[12] *Reuter* v. *Sala* (1879), 4 C. P. D. 239, C. A.

[13] *McLay* v. *Perry* (1881), 44 L. T. 152.

[14] *Tancred* v. *Steel Co. of Scotland* (1890), 15 App. Cas. 125, H. L.

[15] *Shepherd* v. *Kain* (1821), 5 B. & Ald. 240 (ship); *Taylor* v. *Bullen* (1850), 5 Exch. 779 (ship); *Ward* v. *Hobbs* (1878), 4 App. Cas. 13 (diseased pigs).

[16] *Andrews v. Belfield* (1857), 2 C. B. N.S. 779.

Stipulations judicially construed.

"Scott and Co.'s mess pork." [1]

"Your wool at 16s. a stone." [2]

"Prime singed bacon." [3]

"Ware potatoes." [4]

"50 tons best palm oil; wet and inferior oil, if any, at a fair allowance." [5]

"Seed barley." [6]

"413 bales of wool guaranteed about similar to samples in selling broker's possession." [7]

"The cotton guaranteed equal to sample; should the quality prove inferior to guarantee, a fair allowance to be made." [8]

"Horses not answering the description must be returned before 5 o'clock on Wednesday." [9]

"Horses warranted good workers, not answering such warranty, to be returned before 5 o'clock of the day after the sale, and shall then be tried by a person to be appointed by the auctioneer." [10]

"Warranted sound." [11]

"I believe the mare to be sound, but I will not warrant her." [12]

"Received £10 for a grey 4-year-old colt, warranted sound." [13]

"Four pictures, views in Venice. Canaletti." [14]

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[1] *Powell* v. *Horton* (1836), 2 Bing. N. C. 668; *cf. Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, C. A.

[2] *Macdonald* v. *Longbottom* (1860), 29 L. J. Q. B. 256, Ex. Ch.; *cf. McCollin* v. *Gilpin* (1881), 6 Q. B. D. 516, C. A.

[3] *Yates* v. *Pym* (1816), 6 Taunt. 446.

[4] *Smith* v. *Jeffryes* (1846), 15 M. & W. 561.

[5] *Lucas* v. *Bristow* (1858), 27 L. J. Q. B. 364.

[6] *Carter* v. *Crick* (1859), 28 L. J. Ex. 238.

[7] *Heyworth* v. *Hutchinson* (1867), L. R. 2 Q. B. 447.

[8] *Azémar* v. *Casella* (1867), L. R. 2 C. P. 677, Ex. Ch.

[9] *Head* v. *Tattersall* (1871), L. R. 7 Ex. 7; *cf. Chapman* v. *Withers* (1888), 20 Q. B. D. 824.

[10] *Hinchcliffe* v. *Barwick* (1880), 5 Ex. D. 177, C. A.

[11] *Kiddell* v. *Burnard* (1842), 9 M. & W. 668; *Holyday* v. *Morgan* (1858), 28 L. J. Q. B. 9. For list of defects constituting unsoundness, see *Benjamin on Sale*, 4th ed., p. 616.

[12] *Wood* v. *Smith* (1829), 5 M. & R. 124.

[13] *Budd* v. *Fairmaner* (1831), 8 Bing. 48; *Anthony* v. *Halstead* (1877), 37 L. T. N.S. 433.

[14] *Power* v. *Barham* (1836), 4 A. & E. 473.

Note C.—Delivery to Carrier.

Delivery to carrier.

Frequent reference has been made to the rule that delivery of goods to a carrier is *primâ facie* a delivery to the buyer, a performance of the seller's contract which passes both the property and the risk to the buyer. It follows that as a rule if the goods are lost or destroyed, the buyer or consignee is the proper person to sue the carrier. The most authoritative statement of the principle is in the judgment of the House of Lords in *Dunlop* v. *Lambert*, where it was held that if there was a special contract the consignor might sue the carrier though the goods might be the property of the consignee. Lord Cottenham there says: "It is no doubt true as a general rule that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is after such delivery the risk of the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance: the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent.

"But, though the authorities all establish the general inference I have stated, yet that general inference is capable of being varied by the circumstances of any special arrangement between the parties, or of any particular mode of dealing between them. If a particular contract be proved between the consignor and the consignee, and the circumstance of the payment of the freight and insurance is not alone a conclusive evidence of ownership—as where the party undertaking to consign undertakes to deliver at a particular place—the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignor. And again, though in general the following the directions of the consignee, and delivering the goods to a particular carrier, will relieve the consignor from the risk, he may make such a special contract that, though delivering the goods to the carrier specially intimated by the consignee, the risk may remain with him; and the consignor may, by a contract with the carrier, make the carrier liable to himself. In an infinite variety of circumstances, the ordinary rule may turn out not to be that which regulates the liabilities of the parties."[1]

This passage is discussed by Blackburn, J., in an instructive judgment in *The Calcutta Co.* v. *De Mattos*, which has often been referred to in the text but which was too long for insertion there. He says:

[1] *Dunlop* v. *Lambert* (1839), 6 Cl. & Fin. 600, at pp. 620, 621.

"What was the effect of the contract as regards the property in the goods and the right to the price, from the time of the handing over the shipping documents and paying half of the invoice value? There is no rule of law to prevent the parties, in cases like the present, from making whatever bargain they please. If they use words in the contract shewing that they intend that the goods shall be shipped by the person who is to supply them, on the terms that when shipped they shall be the consignee's property, and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is, in such cases, at an end when he has delivered the goods to the carrier, and, if the goods perish in the carrier's hands, the vendor is discharged and the purchaser is bound to pay him the price. If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual; in such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination. But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that, when he has done so, he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination; and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser, as owner, as soon as the goods are shipped, that they shall then be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might, if they pleased, contract that the price should not be payable unless a particular tree fall; but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall. Where the contract is of this kind, the position of the vendor and purchaser, in case the goods do not arrive, is analogous to that of freighter and shipowner, in the ordinary contract of carriage on board a ship, in case the goods are prevented from arriving by one of the excepted perils. The shipowner is not bound to carry and deliver at all events; but, though he is excused if prevented by the excepted perils, yet no freight is earned or payable unless the goods are deli-

Delivery to carrier to pass property.

Delivery to carrier to pass property.

vered. In the case of freight, also, the question often arises, whether a payment made at the port of shipment is an advance of part of the freight, returnable if the goods are not delivered and freight earned, or is an absolute payment, leaving only the balance contingent on the safe delivery of the goods—a question very analogous to the one that arises on the present contract."[1]

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[1] *Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B. 322, at p. 328. See the cases as to pre-payment of freight collected in *M'Lachlan on Shipping*, p. 443.

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