A

PRACTICAL TREATISE

ON THE

LAW OF HORSES

EMBRACING THE

LAW OF BARGAIN, SALE, AND WARRANTY OF HORSES AND OTHER LIVE STOCK; THE RULE AS TO UNSOUNDNESS AND VICE

AND

THE RESPONSIBILITY OF THE PROPRIETORS OF LIVERY, AUCTION AND SALE STABLES, INNKEEPERS, VETERINARY SURGEONS, AND FARRIERS

By M. D. HANOVER

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PREFACE.

In this work the author has chiefly sought to investigate the principles which constitute the Law of Warranty in the sale of horses and to present them in a clear and concise form.

Contracts, Frauds, and other branches of the law, have also been treated of, so far as they relate to the bargain and sale of horses, and other live stock.

The rule as to unsoundness and vice in horses, the and responsibility of Innkeepers, Livery-stable Keepers, and others having the care of horses, have also been carefully presented.

The aim of the author has been to afford assistance to the lawyer, and at the same time to enable the unprofessional reader to gain a general acquaintance with the law upon the subject.

In the preparation of the work, valuable aid has been derived from the works of Howden, Oliphant, and Story.

The Indexes are comprehensive and conveniently arranged, both alphabetically and by sections.

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The Law of Horses.

CHAPTER I.

THE TRANSFER OF CHATTEL PROPERTY, AND THE CONTRACT UNDER WHICH SUCH TRANSFERS ARE MADE.

1. A sale is a contract by which one of the contracting parties, called the seller, transfers the absolute title to property, for a certain agreed price in current money, to the other party, who is called the buyer or purchaser, and who on his part agrees to pay such price.

2. The contract of exchange or barter differs from a sale in this, that barter is always of chattels for chattels, whereas a sale is an exchange of chattels for money.

In the former, there never is a price fixed; in the latter, a price is indispensable. When the contract is an exchange of goods on one side, and on the other side it is partly goods and partly money, the contract is not a barter but a sale.[1] So where the plaintiff agreed to give a horse, warranted sound, in exchange for a horse of defendant, and a sum of money; the horses were exchanged, but the defendant, pretending the plaintiff's horse was unsound, refused to pay the money. Held, it might be recovered on a count for horses sold and delivered.[2]

3. Property may be transferred by gift, either in writing or verbally, and as far as personal property is concerned, they are equally binding.

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[1] 1 Bouvier's Dict. 159.

[2] Sheldon *v.* Cox, 3 B. & C. 420.

To make a gift valid there must be a transfer made, with an intention of passing the title, and delivering the possession of the thing given, and it must be accepted by the donee.

There are two kinds of gifts; they are gifts *inter vivos* and gifts *causa mortis*.

Gift *inter vivos* is a gift made from one or more persons to others, without any prospect of immediate death; these kinds of gifts, when completed by delivery, pass the title to the thing so that it can not be recovered back by the giver. The gift *causa mortis* is always given upon the implied condition that the giver may, at any time during his life, revoke it. A gift *inter vivos* may be made by the giver at any time; the *donatio causa mortis* must be made by the donor while in peril of death.

4. The title to personal property may pass by act of law, or by recovery of damages in trover, trespass, etc.[1] But where one is sued in trover, or it would seem in any other form of action, a mere default has not the effect of transferring the title of the goods to him. There must be a judgment, because in the former case judgment might be arrested.[2]

As the transfer of title to horses or other chattel property can only be done by contract, we will first briefly consider the different kinds of contract under which such transfers are made.

5. Contracts of sale may be divided into express and implied contracts, executory and executed contracts, entire and severable contracts, and absolute and conditional contracts.

6. An express contract is what its name indicates; its terms are plainly defined, either in words or writing, and both of the parties are bound by its precise stipulations, unless by mutual consent the terms are altered.

7. An implied contract is one not precisely defined in spoken or written words, but which the acts or words of the parties, or the acts of one and the silence of the other, clearly manifest an agreement to purchase and sell.[3] No contract, however, will

[1] Canvan *v.* Greenwoods, 1 Conn. 7

[2] Carlisle *v.* Burley, 3 Maine, 250.

[3] Abbott *v.* Herman, 7 Maine, 118; Brackett *v.* Norton, 4 Conn. 524; Richards *v.* Sears, 6 Adol. & Ell. 475; Weston *v.* Davis, 24 Maine.

ever be implied in contravention of an express contract, nor indeed in any case, unless such an hypothesis would alone explain the circumstances. If, therefore, the conduct of both parties be susceptible of a different or better explanation, a contract of sale would not be implied. Indeed, an implied contract only differs from an express contract in the mode of proof; both equally proceed upon the mutual agreement of the parties, and can not exist without it. If the agreement be formally and verbally stated, the contract is express; if it be inferred from the acts of the parties, or the circumstances of the case, it is implied.

8. An executed contract of sale is one in which the whole matter of sale is concluded at once by an immediate transfer of the subject by the one party, and of the price by the other. In such a case neither party has any remedy unless there have been either fraud, mistake, or a breach of warranty.[1] An executed sale is also understood to mean a sale when nothing remains to be done by either party to effect a complete transfer of the subject-matter of the sale, although it might originally have been executory, and although the purchase money still remains due.[2]

9. An executory contract of sale is one where something remains to be done; it is rather an agreement to sell. As in this class of contracts the property is not at once transferred, they are usually within the statute of frauds (which will be discussed more at length hereafter), and require more formality in their execution. The question sometimes arises in this class of contracts, whether it is necessary to the validity of a sale that the thing sold should be in existence at the time of sale, or whether if sold in expectation of its future existence, a title will rest in the vendee whenever the article is brought into being. It is now pretty well settled that "a man may grant that which he hath potentially though not actually."[3]

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[1] Fletcher *v.* Peck, 6 Cranch, 136.

[2] Bellen *v.* Block, 19 Ark. 566.

[3] Bigelow *v.* Wilson, 1 Pick. 493; Grantham *v.* Hawley, Hob. 132; 2 Rolle, 47, 48. See Butterfield *v.* Baker, 5 Pick. 522; Glover *v.* Aus-

So, it has been held in North Carolina, that an agreement to deliver the plaintiff the first colt which should be foaled by defendant's mare vested a title to the colt in the plaintiff. Fonville *v.* Kasey, 1 Murph. 389. So, in Tennessee, it is held that the owner of a mare during gestation may sell her future offspring, the property to vest in possession whenever such offspring shall be born. It is remarked by the court, that in general no right can be communicated to property of which the bargainer has no title in possession, actually or potentially. But that the case above mentioned does not fall within this principle. It is like that of a growing fleece, a crop of fruit or grain. Hence, when A. agrees with B. that the foal of A.'s mare shall belong to C., and after the colt is born conveys it to D., C. may maintain trover against D. McCarty *v.* Blevins, 5 Yerg. 195.

10. The next class of contracts of sale, as mentioned in section 5, is Entire and Severable Contracts.

A contract is entire when the consideration is entire on both sides. Thus, whenever a sale is made of one certain thing for one certain price, as where a horse is sold for one hundred dollars; or where several articles are sold together, as where a horse, buggy, and harness were sold together for two hundred dollars, the contract is entire, because there is no means for determining the price of each.[1] The rule is, that the complete fulfillment of his part of the contract by one party is a condition precedent to the fulfillment of any part of his contract by the other. This rule has been well illustrated in the sale of a yoke of oxen, sold for a certain price, and one of them dies before

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tin, 6 Pick. 209; 1 Cov. & Hughes, 345 (4); Walker *v.* Russell, 17 Pick. 280; 11 Mass. 157, n; Couturier *v.* Haste, 16 E. L. & E. 562; Wood and Foster's case, 1 Leon. 42; Strickland *v.* Turner, 14 El. & E. 471; Scrans *v.* Roach, 22 Ala. 675; Smith *v.* Atkins, 18 Vt. 461; Pettis *v.* Kellogg, 7 Cush. 456.

[1] Miner *v.* Bradley, 22 Pick. 459; Johnson *v.* Johnson, 3 Bos. & Pul. 162; Mayfield *v.* Wadsley, 3 Barn. & Cres. 361; S. C. 5 Dowl. & Ryl. 288; Wood *v.* Benson, 2 Cromp. & Jerv. 94; Kingdom *v.* Cox, 12 Jar. 336; Paige *v.* Ott, 5 Denio, 406; Davis *v.* Maxwell, 12 Met. 286; Irving *v.* Thomas, 6 Shepley, 418; Clark *v.* Baker, 5 Met. 452.

delivery. How could it be determined the valuation placed upon either the living or dead ox, or whether there would have been any sale of one without the other?

11. A contract is severable, when, by the terms of the consideration upon which it is founded, it is susceptible of apportionment so as to conform to the unascertained consideration on the other side. As where a horse and buggy were sold, the purchaser agreeing to pay one hundred dollars for the horse and seventy-five dollars for the buggy, the contract would be severable, and if the vendor's title to the horse should fail, the vendee would be obliged to keep and pay for the buggy at the stipulated price.[1] In such a case, however, if the agreement should be that the vendee should have both or neither, the contract would be entire; because the entirety of the consideration would be of the essence of the contract.

12. An absolute contract is one without any conditions, and a conditional contract is an executory contract, the performance of which depends upon a condition. It is an executory contract which depends upon a contingency; thus, if A. sell a horse to B. for so much as C. shall name, the contract is not complete unless C. names the price.

13. A condition may be precedent or subsequent. A precedent condition is a condition that must happen before either party becomes bound by the contract. As if A. promise B. that if he will cure an unsound horse he will purchase him at a stipulated price, the precedent condition is the curing of the horse, and the contract will be incomplete until he is sound. The sale of horses on trial are examples of this species of conditional sale.[2]

14. A subsequent condition is one which will annul the contract by its failure.[3] As if a horse be sold on condition that the purchaser shall, if he prove satisfactory, return him within an

[1] See cases cited in previous note.

[2] Ellis *v.* Mortimer, 1 B. & P., N. R. 257; Hayward *v.* Scougall, 2 Camp. 56; Hawes *v.* Humble, 2 Camp. 327, n; Boyd *v.* Siffkin, 2 Camp. 326.

[3] Hayden *v.* Stoughton, 5 Pick. 528.

agreed time, and also a sale of a horse on an express warranty, are examples of this species of contract.[1]

15. In sales of chattels on trial, if a time certain be named within which they are to be returned if not approved of, they must be returned within such time, or the contract will become binding at the expiration of the time. But it is not necessary

[1] Door *v.* Fisher, 1 Cush. 271.

Thus where A. proposed to exchange horses with B. and give him a specific sum as difference, and B. reserved to himself the privilege of determining upon it by a certain day, and before that day arrived, A. gave notice to B. that he would not confirm the proposed contract, it was held that no action would lie to recover the difference agreed to be paid by A. Eskridge *v.* Glover, 5 Stew. & Port. 264.

By a written agreement between A. and B., the former was to give the latter three horses, and the gear belonging to them, for two hundred dollars, in consideration of which B. agreed to work out the amount by carting, at seventy cents per thousand, till the property was paid for, A. to pay one-half the amount earned by B. for carting during the season till the property should be paid for—the horses, etc., to remain the property of A. till worked out, or paid, any agreement to the contrary notwithstanding—B. to attend to the carting and furnishing carts necessary for delivering brick to buildings, and wood to kiln, at the above price, to the brick-yard. At the end of the season, January 1, 1836, whichever party is in debt upon settlement is to be paid in cash. If B. refuses to cart when called on, the horses, etc., to be returned, and the agreement void, and B. to forfeit the balance of cash remaining with A. as collateral. Held, only the right of possession passed to B. till payment of two hundred dollars by carting; and this right revested in A. whenever B. refused the price agreed on; that B., after paying by his labor for the horses, etc., could in no event forfeit them; but if before such payment he refused to cart for A., he was to lose the possession, and forfeit what he had paid. Huhn *v.* Long, 2 Whart. 200. See Hunter *v.* Warner, 1 Wis. 141.

Where A. purchased a mare of B., and it was agreed in writing upon the note which A. gave for the purchase money, that B. should keep possession of the mare till the note was paid, and A. sold the mare before he had paid the note: Held, no title passed to the vendee, as none had vested in A., and the vendee was liable after demand in trover to B. Ballew *v.* Sudderth, 10 Ired. 176.

that the seller should give notice to the buyer that the chattels are not approved, for the fact of the expiration of the time establishes the contract.[1]

16. Where, however, a person is allowed to take the chattel for a certain time on trial, he is at liberty to change his mind during the whole term, and this right is not affected by his telling the vendor in the interval that the price does not suit him, if he still retains possession of the thing.[2] Thus, in the case of Ellis *v.* Mortimer,[3] Ellis, having a horse to sell, offered him to Mortimer, and it was agreed that Mortimer should give thirty guineas for the horse, "if he liked him, and should take him a month upon trial;" and Mortimer took the horse, and Ellis having asked him within the fortnight how he liked the horse, he answered that he liked the horse, but not the price; upon which Ellis desired that if he did not like the price he would return the horse. But Mortimer kept the horse ten days longer, and then returned him within the month. It was held, that he was not bound to

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A. purchased from B. a cow, on condition that if A. should pay for her, she should become his property; otherwise, to remain the property of B. A. took possession of the cow, used her three or four years, and paid a part of the price, which B. accepted; but he neglected to pay the residue, though requested. The son of B., by his order, took possession of the cow, and A. brings trespass against him. Held, the property had not vested in A., and the action did not lie. West *v.* Botton, 4 Vt. 558.

A. sold a wagon to B. for a certain sum. Possession was delivered, but at the same time it was agreed, in writing, that the title should remain in A. until payment within a certain time. B. did not thus pay, and sent word to A. to come and take his wagon; subsequently it was attached as the property of B. and taken into possession by the officer. Held, a conditional sale, and that A. might maintain trover against the officer. Buson *v.* Dougherty, 11 Humph. 50. See Herring *v.* Hoppock, 10 N. Y. 409; 3 Duer, 20; Patton *v.* McClure, 15 B. Mon. 555. On the other hand, before payment, the property may be seized by a creditor of the seller. Tomlinson *v.* Collins, 20 Conn. 364.

[1] Humphrey *v.* Carvalha, 16 East, 45.

[2] Reed *v.* Upton, 10 Pick. 522.

[3] Ellis *v.* Mortimer, 1 B. & P., N. R. 257.

take the horse, inasmuch as the facts did not show a complete determination of the contract by either party before the return of the horse, and as he was entitled, whatever might be the fluctuations of his opinion, to try the horse for a month.

17. In sales of goods on trial, when no particular time is fixed within which they are to be returned, if not approved of, the vendee will only be allowed a reasonable time in which to decide.[1]

18. Besides the different kinds of contracts heretofore mentioned, they are sometimes improperly divided into verbal and written contracts. Mr. Parsons, in his work on Contracts, says: "It is not accurate in point of language to distinguish between verbal and written contracts; for whether the words are written or spoken, the contracts are equally verbal or expressed in words. Nor is it accurate, in point of law, to distinguish between written and parol contracts, for whether they be written or only spoken, they are in law, if not sealed, equally and only parol contracts." For some purposes, and especially by the requirements of the Statute of Frauds, the evidence of the contract must be in writing, and when it is in writing, some peculiar rules apply to it.

19. In the first section of this chapter we gave a brief definition of a contract of sale without describing its essential qualities. To make a valid sale there must be: 1. The parties competent to contract; 2. Mutual assent; 3. The thing or property to be transferred from the buyer to the seller; and 4. A price in money paid or promised.

I. PARTIES.

20. The rule is that all persons are competent to buy or sell unless laboring under some special disability, such as marriage or infancy; it is not the purpose of this work to discuss these various cases, and for special information upon this subject the reader must be referred to works which treat of the subject of contracts in general.

21. It is a rule that none but the owner can sell. A person, therefore, who buys chattels from one not the owner, has no

[1] See Washington *v.* Jones, 7 Humph. 468; Moss *v.* Sweet, 16 Q. B. 593; Humphrey *v.* Dale, 7 El. & Bl. 266.

property in them, and even if in ignorance of the fact that the chattels were lost, or stolen, or loaned, he resell them to a third person in good faith, he remains liable in trover to the original owner, who may maintain his action without prosecuting the felon.

So, where plaintiff had loaned a horse to A. who had sold him to defendant, a recovery was had in replevin for the horse.[1]

22. To this rule, that none but the owner can sell, there are certain exceptions. The sheriff, as an officer on whom the law confers a power, may sell the goods of the defendant in execution, and confer a valid title on the purchaser.

23. The agent of the owner, with proper authority, can sell; and also the pawnee under some circumstances. These will be discussed hereafter.

24. There are certain classes of persons who are incompetent to make contracts in general, yet who, under special circumstances, may make valid purchases. Insane persons and married women, and under some circumstances drunkards, can make valid purchases for necessaries.

25. *Infants.*]—Infants or persons under twenty-one years of age are not liable on purchases except necessaries; but their general purchases are not absolutely void, only avoidable in their favor.

They can purchase for cash or on credit a supply of necessaries; there are numerous cases illustrating what may be considered necessaries, of course varied by the different circumstances of the infants.

Thus, in Hart *v.* Prater, 1 Jur. 623, it was held that a pur-

[1] Rowland *v.* Grundy, 5 Ohio, 202.

That the owner of a chattel wrongfully sold by the bailee can recover the specific chattel, or its value, of whomsoever he may find in possession of it, is well settled. Ingersoll *v.* Emerson, 1 Smith (Ind.), 77; Story on Bailments, sec. 102; Salters *v.* Everett, 20 Wend, 267; Hoffman *v.* Carow, 22 Wend. 285; Smith's Mercantile Law (Am. ed.), 474; Kitchell *v.* Vanadar, 1 Blackf. 356, Unless the holder has held the bailee out to the world as the owner. Dyer *v.* Pearson, 3 Barn. & Cress. 42; Swan's Stat. 422, sec. 3; Pickard *v.* Sears, 6 Ad. & El. 469; Nicholson *v.* Hooper, 4 Myl. & Craig, 179; 1 Story Eq. Jur., sec. 385.

chase of a horse by an infant may be valid if it be shown to be suitable to his rank and fortune to keep horses, or if it were rendered necessary by circumstances that he should keep one, as if he were directed by his physician to ride for exercise.

II. MUTUAL ASSENT.

26. In all valid contracts, there must be the assent of both parties. This may be either expressed in words to that effect, or implied by nod or gesture, or even inferred from silence in certain cases, but it must be mutual and intended to bind both parties; and it must be in respect of a certain and definite proposition.[1] A proposal or offer binds no one until it is accepted, and that unconditionally.

If the party to whom the offer is made affixes any condition to his acceptance, it becomes a new proposal on his part, and does not bind until assented to by the first proposer. Until a proposition is accepted unconditionally, the proposer may withdraw it or not at his option.[2]

Thus, in the case of Jordan *v.* Norton,[3] defendant offered to buy a mare "if warranted sound and quiet in harness." Plaintiff sent the mare, with warranty that she was "sound and quiet in double harness." Held, no complete contract. The above rule is modified, under certain circumstances, where parties are compelled to treat by correspondence through the post or by telegraph.[4] In such cases the party making the offer can not retract after the acceptance by his correspondent has been duly

[1] Bruce *v.* Pearson, 3 Johns. 534; Allcott *v.* Boston Steam Flour Co., 9 Cush. 17; Sanford, J., in Crocker *v.* New London, Willimantic and Palmer R. R. Co., 24 Conn. 362, 363.

[2] Tucker *v.* Woods, 12 Johns. 190; Jackson *v.* Galloway, 5 Bing. (N. C.), 75, 76; Rowell *v.* Montville, 4 Maine, 270; McKinley *v.* Watkins, 13 Ill. 140; Eskridge *v.* Glover, 5 Stew. & Port. 264; Faulkner *v.* Heberd, 26 Vt., 452; Chitty on Cont. (ed. 1860), 8, 9, and note; Summers *v.* Mills, 21 Texas, 77.

[3] 3 T. R. 653.

[4] Contracts may be made by telegraphic dispatches, and by them proved in court. Taylor *v.* Steamboat Robert Campbell, 20 Mo. (5 Bennett), 254; Durkee *v.* Vermont Central R. R., 29 Vt. 127.

posted, although it may not have reached him.[1] Nor can the party accepting retract his acceptance, after posting his letter, although prior to his correspondent's receipt of it, nor, indeed, if it never be received.[2]

27. Assent must be mutual and given freely. If given under duress, it is not binding; so, also, if given through some mistake of fact, there is no valid agreement.[3]

28. *Mistake.*—The rule is that no contract of sale is reciprocally binding upon the parties thereto if it be founded upon an injurious mistake of a material fact forming the basis of the contract, although such mistake be occasioned by no fraud or imposition.[4] As where an article is bought as being one thing, when it is, in fact, a different thing, the sale is voidable. So, also, where a mistake arises as to the existence of the article sold, it is voidable; as if a person should sell a horse, believing him to be alive when he was dead, no binding contract would arise.

29. A mistake may also arise in respect to the nature of the contract, one party considering it as a sale, and the other as a bailment; or one considering it as an absolute sale, and the other as a conditional sale. In all such cases, there is no perfect consent, and, therefore, no sale.

30. There are other cases to which the above rule is applicable, as when there is a mutual mistake of both parties as to the quantity of the subject matter intended to be sold by one and bought by the other. As where a mare and colt are supposed

[1] Adams *v.* Lindsall, 1 B. & Ald. 681; Dunlap *v.* Higgins, 1 H. L. Cas. 381; Potter *v.* Sanders, 6 Hare, 1; Clark *v.* Doles, 20 Barb. 42; Myers *v.* Smith, 48 Barb. 614; Moor *v.* Wood, 36 U. S. 307; Hutcheson *v.* Blakeman, 3 Met. (Ky.) 80.

[2] Duncan *v.* Topham, 8 C. B. 225; Potter *v.* Sanders, 6 Hare, 1; Taylor *v.* Merchants Fire Ins. Co., Baltimore, 9 Howard, 390; Wheat *v.* Cross, 31 Md. 99.

[3] Ketchum *v.* Catlin, 21 Vt. 191; Miles *v.* Stevens, 3 Barr, 21; Bank of Commerce *v.* Union Bank, 3 Comst. 230.

[4] Article 1109 of the French Civil Code is in these words: "There is no valid assent where assent has been given by mistake, extorted by violence, or surprised by fraud."

to be included in a sale by the purchaser, and the vendor intended only to sell the mare. A mistake of this kind will afford a sufficient ground for annulling the contract.

31. The rule also applies where several articles are mistakenly sold together by the vendor as his own, and he can not make a good title to all of them. As where several horses are sold together, and it afterward turns out that one of them, previous to the possession of the vendor, had been stolen, the mistake will furnish a good ground to the purchaser to annul the contract, provided he offer to return the remaining horses within reasonable time; but if the contract be severable, as where the purchase was made as so much for each horse, the purchaser will be bound thereby as to the horses to which good titles can be given.

32. If mistakes occur as to the quality or value of the property sold, the validity of the sale depends upon the existence of an express or implied warranty, which will be discussed at length under the head of warranty.

33. There are cases where a mistake arises as to the extent of the vendor's interest in the thing sold; where the vendor supposes his property to be free from all liens or incumbrances, when, in fact, it is not. In such cases, the general rule is that the purchaser may claim damages at law, or when damages will not compensate him, he may insist in equity that the vendor shall specifically perform his contract as far as he is able, a proper abatement of the price being made for any deficiency in respect to the original agreement,[1] or he may altogether reject the contract and reclaim his purchase money, provided that the deficiency in title or interest is of a material extent.[2] This rule is, however, subject to qualification under equitable circumstances, and, of course, is not applicable to cases of fraudulent sales.[3]

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[1] 2 Story Eq. Jur., sec. 718; Adderly *v.* Dixyn, 1 Sim. & Stu. 607, 610; Buxton *v.* Lister, 3 Atk. 384.

[2] Todd *v.* Gee, 17 Ves. 278; Waters *v.* Travis, 9 Johns. 465; Graham *v.* Oliver, 3 Beav. 124; Paton *v.* Rogers, 1 Ves. & Bea. 351; 2 Story Eq. Jur., secs. 718, 779.

[3] Graham *v.* Oliver, 3 Beav. 124.

34. *Fraud.*—When a contract is infected by fraud it is void. Fraud has been defined to be "every kind of artifice employed by one person for the purpose of deceiving another." A person who is guilty of fraud can not take any advantage of it; and, in general, in cases of sale, the party defrauding is bound by his agreement if the party defrauded choose to hold him to it;[1] and hence the defrauded party has the option of acquiescing in the the agreement or of avoiding it. If he chooses to avoid it, he must manifest his determination within a reasonable time after the discovery of the fraud. If, after he discovers the fraud, he remains silent under circumstances in which silence would indicate acquiescence, or if by any of his acts he indicates a willingness to stand by his bargain, he is considered as ratifying it, and he can not afterward avoid it.[2]

If both parties be guilty of fraud, the law will not interfere, leaving them as it finds them; it will enforce no claim by the one against the other.[3]

Misrepresentations of material facts, whether the party making them knows them to be false or ignorantly and carelessly makes them, will be treated as fraudulent, and vitiate the contract.[4] The question of fraud often does not depend so much upon the intention as upon the practical result of the misrepresentation; and if the misrepresentations operated as a material inducement to the contract, it is not necessary upon trial to give proof of a fraudulent intent by the party making such representations.[5]

36. The manner of making the misrepresentations, or practicing the deceit, is immaterial; whether by acts, by words, by

[1] Story on Contracts, sec. 167; Hanney *v.* Eve, 3 Cranch, 242; Armstrong *v.* Toler, 11 Wheat. 258.

[2] Campbell *v.* Fleming, 1 Adol. & Ell. 40.

[3] Taylor *v.* Weld, 5 Mass. 116; Deady *v.* Harrison, 1 Stack. 60.

[4] Laidlaw *v.* Organ, 2 Wheat. 178; Evans *v.* Bicknell, 6 Ves. 173, 182; Smith *v.* Richards, 13 Peters (U. S.), 26; Ainsle *v.* Medlycott, 9 Ves. 21; Stone *v.* Denny, 4 Met. 151; Flight *v.* Booth, 1 Bing. (N. C.) 377.

[5] Collins *v.* Dennison, 12 Met. 549; Taylor *v.* Fleet, 1 Barb. (S. C.) 471; Hammat *v.* Emerson, 27 Maine, 308; Lewis *v.* McLemore, 10 Yerg. 206.

signs, or silence, provided that it produce a false and injurious impression.[1] Or if a party take advantage of a misrepresentation in his favor by a third person, and act upon it as if it were true, he is liable for it.[2] Nor is it necessary that the party guilty of fraud should appear to have been benefited by it, in order to found a right for the defrauded party to avoid his contract. If one injures another by false statements, which he knows to be false, he will be held answerable, although there is no evidence of gain to himself, or of any interest in the question, or of malice, or of intended mischief.[3]

37. And where the representations are apparently true, if in reality they operate to deceive, or if words of a double meaning be used, and the other party be misled by them, there is no contract.[4] The mere fact that the representation is true, affords no excuse to a party making it, if made with the intention to deceive another, and he is deceived and thereby injured.[5] So also where an artifice is used by which a party is circumvented and deceived into making a contract different from what he intended, it can not be enforced against him. Thus, where A. agreed to buy a horse, and to give a barley-corn for the first nail, and double it for every nail in the horse's shoes, it was held that a contract in such terms was void, and the jury was ordered to give the plaintiff the mere value of the horse as damages.[6]

38. If the misrepresentations be made as a matter of opinion or belief, and the relationship of the parties give rise to no personal confidence or special trust, although made for the purpose of deception, they will not void the contract; but in all cases of this kind, the party making the representations must state them as his opinion, and not as facts, or he will be held liable.

[1] Martin *v.* Penrock, 2 Barb. 376; Willink *v.* Vandervear, 1 Barb. (S. C.) 599.

[2] Fitzsimmons *v.* Joslin, 21 Vt. 129; Ladd *v.* Lord, 36 Vt. 194.

[3] Pasley *v.* Freeman, 3 T. R. 51; Foster *v.* Charles, 6 Bing. 396; Corbett *v.* Brown, 8 Bing. 83; White *v.* Wheston, 3 Seld. (N. Y.) 352.

[4] Laidlaw *v.* Organ, 2 Wheat, 195; Chesterfield *v.* Janssen, 2 Ves. 155; Corbett *v.* Brown, 8 Bing. 35.

[5] Denney *v.* Gelinan, 26 Maine, 149.

[6] James *v.* Morgan, 1 Lev. 111.

III. THE THING TO BE SOLD.

39. There can be no sale unless the thing to be sold has an actual or possible existence; but if the sale be the natural product or expected increase of something to which the seller has a present vested right, the sale will be good. Thus a valid sale may be made of a mare and her future offspring with which she is in foal,[1] or the future young that shall be born of the sheep owned by the vendor at the time of the sale, or the wool that shall grow upon them, or the milk that a cow may yield during the coming summer.[2]

40. There have been many decisions, both in Europe and America, as to whether a man may sell what he does not possess, and what he expects to go into market and buy. The general rule is that the subject of sale must belong to the vendor, and that he can sell no more than the interest which he legally possesses.[3] If, therefore, he sell an article not belonging to him, whether it were obtained by theft or finding, or by other means, without the consent of the owner, the person whose property it is may claim restitution thereof from the hands of the vendee, although it be sold and purchased *bona fide* and for a valuable consideration, for unless the title to the property was obtained from the original owner, by a legal and valid sale or transfer, it would still be his property, into whatever innocent hands it might subsequently come; and in America, recent decisions are to the effect that if a vendee sell a thing not

[1] Fonville *v.* Kasey, 1 Murph. 381; McCarty *v.* Blevins, 5 Yerg. 195; Andrew *v.* Newcomb, 32 N. Y. 417.

[2] Grantham *v.* Hawley, Hob. 132; 2 Story Eq. Jur., sec. 1040, 1040*b*, 1055; Langdon *v.* Horton, 1 Hare, 556; Trull *v.* Eastman, 3 Met. 121; Clapman *v.* Moyle, 1 Lev. 155; Wood and Foster's case, 1 Leon. 42; Carter *v.* James, 9 Johns. 143; Smith *v.* Atkins, 18 Vt. 461; Pothier Contrat de Vente, part 1, sec. 2, No. 5.

[3] Hibblewhite *v.* McMorine, 5 M. & W. 462; Mortimer *v.* McCallan, 6 M. & W. 68; Crocker *v.* Crocker, 31 N. Y. 507; Wooster *v.* Sherwood, 25 N. Y. 278; Brodley *v.* Hale, 8 Allen, 59; Cox *v.* Jackson, 6 Allen, 108; Wilson *v.* Crockett, 43 Mo. 218.

belonging to him, and subsequently acquires a title to it before repudiation of the contract by the purchaser, the property in the thing sold vests at once in the purchaser.[1] So, in a contract of "sale and return," where the vendor had no title at the time of sale, but acquired one afterward before the time limited for the return: Held, that the buyer who had allowed the time to elapse without returning the thing sold, could not set up the failure of consideration in the original contract as a defense in an action for the price.[2]

41. The subject of sale must be one which is not prohibited from sale, either by law or public policy and morals. So articles which are expressly prohibited from sale by statute can not be sold so as to bind the purchaser; as where the selling of game was prohibited by statute, a contract for the sale of pheasants was held to pass no property.[3] So also the sale of unwholesome or tainted provisions is void, if the sale be in the particular case conducive to the injury of public health.[4]

42. But a valid sale may be made of living creatures *feræ nature* (of a wild nature) if the vendor have a qualified property in them, produced by reclaiming, taming, or confining them; as if he confine deer in his park, or doves in his dove-cot, or fishes in his private pond, etc. This property depends, however, on the possession and retention of the creatures; but a mere temporary escape or departure from his confines would not, however, divest him of his property if he should pursue them with the design of reclaiming them. But if he abandon all pursuit of them, the law presumes that he also intends to abandon his claim to them, and his right to them is lost. Where a creature has been sufficiently tamed, so that it goes and comes at pleasure, a temporary absence from its owner's confines will not divest him of its title; but if it should stray away, and be gone an unusual length of time, without any knowledge on the part of the owner of its whereabouts,

[1] Frazier *v.* Hilliard, 2 Strob. 309; Blackmore *v.* Shelby, 8 Humph. (Tenn.) 439.

[2] Hotchkiss *v.* Oliver, 5 Denio, 314.

[3] Heeps *v.* Glenister, 8 Barn. & Cress. 553.

[4] Pothier Contrat de Vente, No. 11.

so that he abandons all reasonable hope of recovery, it becomes common and the property of whoever takes it.

IV. PRICE.

43. The price must be certain, or capable of being made certain. If left to be fixed by the buyer or seller, the sale is void.[1] It can, however, be left to be settled by arbitration. If nothing is said about the price of an article when it is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth.[2] And it has been held that this reasonable price is such a one as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable.[3] The price must be in money or its representative, for if one article be exchanged for another, as we have seen, it is a barter, and not a sale.[4] And it has been held on trial that proof of an exchange will not support an averment of a sale of an article.[5]

44. But if, after the execution of the sale, the vendor agree with the purchaser to receive something else than money in payment, as a substitute for the price first agreed upon, it will still be a sale, for it is not the actual payment of a price, but the agreement to pay a price, that is requisite to constitute a sale.

45. A vendor is not bound to receive anything in payment for his property but cash. A bank-check need not be taken, as it is nothing but mere personal security, as the purchaser may have no funds in hand or the bank may have reasons for dishonoring the check.[6] So if a purchaser offer such a check in pay-

[1] Yr. Bk., 14 H. 8, 17*b*. "If I sell my horse to you for so much as S. shall say, this is good, if he does say, and if not, void." Per Pollard, J.

[2] Hoadly *v.* Maclaine, 10 Bing. 482.

[3] Acebal *v.* Levy, 10 Bing. 376.

[4] Loomis *v.* Wainwright, 21 Vt. 520; Mitchell *v.* Gile, 12 N. Hamp. 390.

[5] Vail *v.* Strong, 10 Vt. 457.

[6] Per contra, see Ward *v.* Bourne, 56 Maine, 161; Paine *v.* Drunel, 53 Maine, 52; Curtis *v.* Hubbard, 9 Met. 328. Also, 6 Mass. 358 9 Pick. 54; 12 Maine, 381; 31 Vt. 516.

ment, and the vendor refuse to accept it, and the goods are re-sold at a loss, the party offering the check is liable for the deficiency.[1]

46. If the vendor take in payment for his property a bill of exchange or promissory note, these do not operate as an absolute payment of the debt, but only as a conditional payment; and in the absence of an agreement, either express or implied, to receive them as absolute payment, they are held simply as securities, and if not paid at maturity the vendor can bring suit for the price, and maintain an action as for goods sold and delivered. And it has been recently decided that this can be done before restoring the securities.[2] And where the vendee agrees to pay for property on delivery, and gives a check which he has no reason to expect will be paid, and which is accordingly dishonored, no property passes and the seller may rescind the sale and reclaim the property.[3]

47. So where the vendee of goods, by agreement, was to pay for them in cash, but he obtained possession from the servant of vendor by means of a check, which he represented as the equivalent of money but which was dishonored, he having overdrawn many months. On the day of sale the vendee gave to a prior creditor a warrant of attorney for a judgment against himself, upon which the goods were seized in execution. Held, it seems that the vendor might regain his goods even by stratagem, no property having passed but that it was a question for the jury as determining this right whether the vendee at the time of sale intended not to pay for them.[4]

48. The sale and immediate transfer of property and the price closes the transaction so that neither party can avoid it or enforce any claim growing out of the sale against the other, nor reclaim the consideration, unless the sale be fraudulent or unless there be a breach of warranty. But since there are many sales in which the subject-matter is to be delivered, or the price is to

[1] Webber *v.* Tibels, 2 Sann. 121, n. 2; Clarke *v.* Carter, 3 Cow. 84

[2] Hadwen *v.* Mendisebel, 2 C. & P. 20; 10 Mos. 477.

[3] Hawse *v.* Crowe, Ry & M. 414.

[4] Bristol *v.* Wilsmore, 1 B & C. 514; 2 D. & R. 755.

be paid, at some future time, or which requires the performance of some acts by the seller before delivery can be actually or legally made, and as these last-mentioned sales are conditioned by the Statute of Frauds, before proceeding further it will be necessary for us briefly to examine some of the provisions of this celebrated statute.

CHAPTER II.

STATUTE OF FRAUDS.

50. *The Statute of Frauds* has been a law of England for nearly two centuries, and, with some slight variations, it is upon the statute-books of every State of the American Union. Sections 4 and 17 of this statute are alone applicable to the subject now under consideration. Section 4 enacts "that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

51. The words of section 17 of the Statute of Frauds are as follows: "And be it enacted, that no contract for the sale of any goods, wares, or merchandise, for the price of 10*l.* or upward, 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 party to be charged by such contract, or their agents thereunto lawfully authorized."

52. This statute was further extended by 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act, by section 7 of which it is enacted, that "the provisions of the Statute of Frauds shall extend to all contracts for the sale of goods to the value of 10*l.* or upward, 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 for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

53. The only distinction between sections 4 and 17 of the

statute, in reference to the writing of the agreement, is this: That under section 4 the whole contract must be in writing, including the consideration which induced the party to make the stipulations; whereas, under section 17, it is sufficient if all the terms by which the defendant is to be bound are stated in writing so as to bind him. But, as the contract for the buying and selling of horses, or similar chattel property, which is not to be performed within one year, are seldom made, we will confine ourselves to a discussion of the requirements of section 17, which is the foundation of the law governing the transfer of chattels worth 10*l.* and upward.

54. Under section 17, a valid sale of a horse, or any chattel property of the value of 10*l.* or upward (or the value designated in the statute as in force where the sale is made),[1] can not be made unless: 1. The buyer either actually accept and receive it; or 2. He give something in earnest to bind the bargain or make part payment for it; or 3. The parties to be charged by themselves or their agents make and sign some note or memoranda in writing of the bargain.

ACCEPTANCE.

55. To accept and actually receive the thing purchased, as contemplated in the Statute of Frauds, means a final and absolute appropriation by the buyer with the intention of taking possession as the owner, and this of course implies

[1] The amounts necessary to bring a contract within the provisions of section 17 of the Statute of Frauds differ in the different States of the United States, as follows: In Alabama, it is fixed at $200; in Arkansas, at $30; in California, at $200; in Colorado, at $50; in Connecticut, at $35; in Delaware, at $25; in Florida, no amount named, all sales come within it; in Georgia, same as English statute, 10*l.*; in Indiana, at $50; in Iowa, all amounts are within; in Maryland, same as the English statute, 10*l.*; in Maine, at $30; in Massachusetts, at $50; in Michigan, at $50; in Missouri, at $30; in Minnesota, at $50; in New Hampshire, at $33; in New Jersey, at $30; in Oregon, at $50; in South Carolina, same as the English statute, 10*l.*; in Wisconsin, at $50. In the following States this clause of section 17 has never been adopted, although statutes similar to the Statute of Frauds are in force: Illinois, Kansas, Kentucky, Mississippi, North Carolina, Nevada, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, and Virginia.

either actual or constructive delivery by the seller, but there can be no acceptance or actual receipt unless there is a change of possession from the seller to the buyer, either actual or constructive.[1]

56. An actual change of possession, where the buyer being satisfied with his bargain and removes the goods from the seller, is a plain case of acceptance and will bind the bargain; but there are constantly cases arising where the change of possession has been constructive, and in these cases it is frequently very difficult to determine whether or not there has been an acceptance and receipt. There are frequently cases arising where the buyer has declared his satisfaction with the bargain, but, for reasons of convenience, has left the property with the seller; in such case, the agreement between the parties is, that the seller shall hold the property as bailee and not as vendor.

57. In all of these cases it is a question for the jury to determine whether there has been an acceptance or not, and not unfrequently there arises in these cases very fine distinctions.

58. There are certain acts on the part of the buyer that are taken as almost conclusive evidence of acceptance, in these cases of constructive change of possession. If a purchaser select an article among many and declare his satisfaction with it, it has been held as evidence of acceptance and receipt. Thus, in a leading case where the defendant verbally agreed to buy some sheep which he had selected from the plaintiff's stock, and directed them to be sent to his field, which was done; two days afterward he sent his agent to remove them from the field to his farm, and upon their arrival he counted them over and said, "It is all right." It was held that this was evidence for the jury of the acceptance of the sheep, notwithstanding he afterward repudiated the bargain and sent the sheep back to the plaintiff.[2] And the judge deciding the case used the following words: "The previous selection of the sheep is very material, to show the nature of the acceptance when the sheep were received." The defendant says, "It is all right." If he had never seen the sheep, and there had been

[1] Carter *v.* Toussart, 5 B. & Ald. 859.

[2] Saunders *v.* Topp, 4 Ex. 390.

no previous acceptance, his saying, "It is all right," would have had no effect; but when he had previously examined and selected the sheep, it was for the jury to say whether he did not mean, "These are the sheep which I selected." Suppose, in the case of a remarkable animal, for instance, a horse with peculiar spots, the vendee had said, "All right," there could be no doubt he would mean, "This is the horse I bought."

So, in another case, Cusack *v.* Robinson,[1] where the buyer was shown a lot of 156 firkins of butter in the vendor's cellar, and had the opportunity of inspecting as many of them as he pleased, and did in fact open and inspect six of the firkins, and then agreed to buy them, and the goods were then forwarded to the purchaser by a carrier, according to his directions. It was held, that there was sufficient evidence to justify the jury in finding an acceptance, and that the acceptance before the bargain was concluded was a compliance with the statute.

59. Constructive acceptance may properly be inferred when the purchaser exercises acts of ownership over the property, and deals with it as his own, as stated by Justice Erle,[2] "If the vendee does any act to the goods of wrong, if he is not owner of the goods, and of right if he is owner, the doing of that act is evidence that he has accepted them."

The case of Blenkinsop *v.* Clayton[3] is illustrative of this principle. The purchaser of a horse took a third person to the vendor's stable and offered to resell the horse to the third person at a profit, the buyer was held to have accepted.

So, where A. bargained and sold to B. in a farmyard, a stack of hay there standing, and B. afterward sold part of it to C., who took it away without the knowledge and against the direction of B., it was held an acceptance and receipt.[4]

60. In Beaumont *v.* Brengeri,[5] where the defendant bought a

[1] 30 L. J., Q. B. 261.

[2] In Parker *v.* Wallas, 5 E. & B. 21. See also Vincent *v.* Germond, 11 Johns. 283.

[3] 7 Yaunt. 557.

[4] Chaplin *v.* Rogers, 1 E. 192; Lillywhite *v.* Devereaux, 15 M. & W. 285.

[5] 5 C. B. 301.

carriage from plaintiff, and ordered certain alterations made, and then sent for the carriage and took a drive in it, after telling plaintiff that he intended to take it out a few times so as to make it pass for a second-hand carriage on exportation, it was held that the defendant had thereby assumed to deal with it as his own, had accepted it, and could not refuse to take it, although it had been sent back and left in the plaintiff's shop.

61. In Parker *v.* Wallis,[1] the defendants received some turnip-seed under a verbal contract of sale, but sent word to plaintiff that it was "out of condition;" this was denied by plaintiff, who refused to receive it back. The defendants then took the seed out of the bags and laid it out thin, alleging that it was hot and moldy, and that plaintiff had given them authority to do so; both these facts were denied by plaintiff. Plaintiff was nonsuited by Wightman, J., and leave reserved to enter a verdict for 140*l.*, the price of the seed, if the evidence sufficed to show acceptance and actual receipt of any part of the goods.

The court made the rule absolute for a new trial, but refused to enter verdict for plaintiff, and held that the act of taking the seed out of the bag was susceptible of various constructions; it might have been because the seed was hot, or because the plaintiff had authorized it, but as the evidence stood, when the nonsuit was ordered, these were not the facts. There remained a third construction, namely, that spreading out the seed was an act of ownership; a wrongful act if the defendants had not accepted as owners. This was a question for the jury.

62. But acts of ownership exercised over an article before it is capable of delivery, or where there is a cash sale and the vendor claims the money before the delivery of the property; acts of ownership on the part of the vendee will not necessarily infer acceptance, as illustrated in the following cases:

63. In Maberley *v.* Sheppard,[2] the action was for goods sold and delivered, and it was proven that the defendant ordered a wagon to be made for him by plaintiff, and during the progress of the work furnished the iron work and sent it to plaintiff, and

[1] 5 E. & B. 21.

[2] 10 Bing. 99.

sent a man to help plaintiff in fitting the iron to the wagon, and afterward bought a tilt, and sent it to the plaintiff to be put on the wagon. It was insisted by plaintiff that the defendant had thereby exercised such dominion over the goods sold as amounted to acceptance.

The court took time to consider, and Tindal, C. J., delivered the decision that plaintiff had been rightly nonsuited, because the acts of the defendant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress, so that it still remained in plaintiff's yard for further work until it was finished. If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance.

64. In the case of Carter *v.* Toussant,[1] which was a sale upon credit, the purchaser had exercised various acts of ownership over the horse, which were held to be no acceptance within the statute.

It appeared that the horse was sold by a parol contract for 30*l.*, but no time was fixed for the payment of the price. The price was fixed in the purchaser's presence, and with his approbation, and it was agreed that the horse should be kept by the vendor for twenty days without any charge being made for it. At the expiration of that time, the horse was sent to grass by the direction of the purchaser, and by his desire entered as the horse of the vendor. Chief Justice Abbot, and Justice Bayley and Holroyd, distinguished this case from Elmore *v.* Stone,[2] on the ground that there the plaintiff was both a livery stable keeper and a horse dealer, but that here he is not, and held that there was no acceptance of the horse by the purchaser within section 17 of the Statute of Frauds.

The case of Tempest *v.* Fitzgerald[3] was a ready-money transaction, and the agreement was that the horse should be taken

[1] Carter *v.* Toussant, 2 B. & Ald. 855; S. C. 1 D. & R. 515.

[2] Elmore *v.* Stone, 1 Taunt. 458.

[3] Tempest *v.* Fitzgerald, 3 B. & Ald. 680.

away and the money paid on a certain day. On that ground there was held to have been no acceptance within the statute, although the purchaser had exercised various acts of ownership over him. It seems A. entered into a parol agreement to purchase a horse of B. for ready money, and to take him away at a time agreed upon. Shortly before the expiration of that time, A. returned, and ordered the horse to be taken out of the stable, when he and his servant mounted, galloped, and leaped him; and after they had so done, his servant cleaned him, and A. himself gave directions that a roller should be taken off and a fresh one put on, and that a strap should be put upon his neck, which was consequently done. A. then requested that he might remain in B.'s possession a week longer, at the expiration of which time he promised to fetch him away and pay for him. To this B. assented. The horse died the day before A.'s return, and he refused to pay the price. It was held by the court of the King's Bench that this was a ready-money bargain, and as the purchaser could have no right to take away the horse till he had paid the price, there was no acceptance of the horse within the meaning of the Statute of Frauds.[1] Constructive acceptance may properly be inferred by the jury when the vendee directs expense to be incurred in reference to the property.

66. In Elmore *v.* Stone,[2] an action was brought for the price of two horses, and a question arose whether there had been a delivery of them under the Statute of Frauds. The plaintiff was a livery-stable keeper and horse dealer. He asked 180 guineas for two horses, which the defendant at first refused to give, but afterward sent word that "the horses were his, but that, as he had neither servant nor stable, the plaintiff must keep them at livery for him." The plaintiff assented, and removed them out of the stable into another. The defendant afterward refused to take them, and set up for his defense section 17 of the Statute of Frauds. It was there held that if a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the

[1] Tempest *v.* Fitzgerald, 3 B. & Ald. 680.

[2] Elmore *v.* Stone, 1 Taunt. 458.

vendee, and the vendor accepts the order, it is a sufficient delivery of the goods within the Statute of Frauds, and that it is no objection to a constructive delivery of goods that it is made by words parcel of the parol contract of sale; and Chief Justice Mansfield said: "A common case is that of a sale of goods at a wharf or a warehouse, where the usual practice is to deliver the key of a warehouse, or a note to the wharfinger, who in consequence makes a new entry of the goods in the name of the vendee, although no transfer of the local situation or actual possession takes place."

After the defendant in the case had said that the horses must stand at livery, and the plaintiff had accepted the order, it made no difference whether they stood at livery in the vendor's stable, or whether they had been taken away and put in some other stable. The plaintiff possessed them from that time, not as owner of the horses, but as any other livery-stable keeper might have them to keep. Under many events, it might appear hard if the plaintiff should not continue to have a lien upon the horses, which were in his own possession, so long as the price remained unpaid, but it was for him to consider that before he made his agreement. After he had assented to keep the horses at livery, they would, on the decease of the defendant, have become general assets; and so, if he had become bankrupt, they would have gone to his assignees. The plaintiff could not have retained them, though he had not received the price.

67. In all of these cases, where an acceptance has been held, although no change of possession of the property, the decisions are based upon the principle that the character of the possessor has changed from vendor to bailee. In the case of Marvin *v.* Wallis,[1] decided in 1856, the facts, as found by the jury, were that, after the completion of the bargain, the vendor borrowed the horse for a short time, and, with the purchaser's assent, retained him as a borrowed horse: Held, that there had been an actual receipt by vendee; that there had been a change of character in the vendor, from owner to bailee and agent of the purchaser.

[1] 6 E. & B. 726.

68. Where property is in the possession of a third person at the time of the bargain, and said third person, holding them as agent of the vendor, agrees to hold them after the sale as agent of vendee, if the three join in the agreement, it will be held as an acceptance by the buyer. So, also, goods in the possession of the vendee at the time of the contract may be sold, and acceptance by the vendee inferred by his acts toward the goods after contract. The case of Edar *v.* Dudfield is a leading case to this point.[1]

In that case, the defendant, agent of plaintiff, had in his possession goods which he had entered at the custom-house in his own name, but which belonged to plaintiff. He agreed to buy them at a discount on the invoice cost, and afterward sold them. On action for the price, it was strenuously maintained by Sir Fitzroy Kelley that where the goods, exceeding 10*l.* in value, were already in possession of the alleged buyer, there could be no valid sale, under the Statute of Frauds, without a writing, because, although there might be a virtual, there could not possibly be an actual receipt. But the court, after time to consider, held that there was evidence to justify the jury in finding an actual receipt, saying: "We have no doubt that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts without any writing between the parties, which amounts to acceptance."

And the effect of such acts necessarily to be proven by parol evidence, must be submitted to a jury.

69. An acceptance within the statute may be by agent,[2] but an act of this kind, by an agent to bind his principal, must be clearly within the scope of his agency.

70. In the case of Smith *v.* Mason,[3] it was held that an ac-

[1] 1 Q. B. 306.

[2] Snow *v.* Warner, 10 Met. (Mass.) 133; Outwater *v.* Dodge, 6 Wend. (N. Y.) 400; Barney *v.* Brown, 2 Vt. 574; Howe *v.* Palmer, 3 Barn. & Ald. 321; Astley *v.* Emery, 4 Maule & S. 262; Spencer v. Hale, 30 Vt. 314; Dows *v.* Montgomery, 5 Rob. 445.

[3] Anth. (N. Y.) 164.

ceptance of a shop boy out of the scope of his duty was not sufficient.

71. There has been much discussion as to whether a carrier's or wharfinger's acceptance will bind the buyer, but it is now well settled that the ordinary authority of these agents is only to receive the goods, not to accept them.[1] But if the buyer designate especially a carrier or wharfinger to receive the goods, he becomes bailee of the buyer, and the vendor, in employing the carrier or wharfinger, is considered the agent of the buyer for that purpose.[2]

72. It is not well settled whether silence and delay in notifying the seller, of refusal of goods forwarded to purchaser, will infer an acceptance, but the later decisions seem to regard this as a question of degree; a long and unreasonable delay being considered proof of acceptance, while shorter time would constitute some evidence, to be taken into consideration by the jury with the other circumstances of the case.

73. In all the cases of acceptance the general rule is, that acceptance takes place when the vendor parts with his lien upon the goods and not until then. And in many of the cases this is the test for determining whether there has been an actual acceptance or not. This rule was stated by Justice Holroyd, in his decision of Baldey v. Parker:[3] "Upon a sale of specific goods for a specific price, by parting with the possession, the seller parts with his lien."

The statute contemplates such a parting with the possession, and, therefore, as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute.

[1] Astey *v.* Emery, 4 M. & S. 262; Hanson *v.* Armitage, 5 B. & Ald. 557; Johnson *v.* Dodgson, 2 M. & W. 656; Norman *v.* Phillips, 14 M. & W. 276; Hunt *v.* Hecht, 8 Ex. 814.

[2] Dawes *v.* Peck, 8 T. R. 330; Waite *v.* Baker, 2 Ex. 1; Fragaro *v.* Long, 4 B. & C. 219; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 14 M. & W. 277.

[3] 2 B. & C. 44

So that it is safe to infer that no actual acceptance and receipt has taken place where no act has been proven showing an abandonment by the vendor of his lien.[1]

And so a jury can reasonably infer this in all cases where the purchaser is entitled to rescind the contract or to object to the quality or quantity of the goods sent, or so long as the seller retains any right of lien or of stoppage in transitu.

74. It is not necessary for a valid acceptance that it should take place at the time of the bargain; it is now well established that it may take place at any time subsequent to the contract.[2] But it must be before action.[3]

And an acceptance once intelligently made can not be afterward revoked and its effect avioded.[4]

EARNEST.

75. The statute also requires "the giving of something in earnest to bind the bargain," or "the giving of something in part payment" to bind the bargain. The custom of giving earnest is now seldom resorted to, but it was known and used both in the civil and common law, and there it was recognized as of two kinds, symbolical and pecuniary; the first being a transfer of something by way of a pledge, and the other being a payment of a part of the purchase money; but, under the statute, the giving of earnest and the part payment of the price are two facts, independent of the bargain, capable of proof by parol, and the framers of the statute have said, in effect, that

[1] Dodsley *v.* Varley, 12 Ad. & E. 632; Hawes *v.* Ball, 7 B. & C. 484; Parks *v.* Hall, 2 Pick. 212, 213; Lupin *v.* Marie, 6 Wend. 77; Welsh *v.* Bell, 32 Penn. St. 13; Howe *v.* Palmer, 3 B. & A. 321; Smith *v.* Surman, 9 B. & C. 561; Bill *v.* Bament, 9 M. & W. 37; Holmes *v.* Hoskins, 9 Exch. 753.

[2] Bush *v.* Holmes, 53 Maine, 417 (1866); Richardson *v.* Squires, 37 Vt. 640; Danforth *v.* Walker, Ib.; 40 Vt. 257; Thompson *v.* Alger, 12 Met. 435.

[3] Browne on Stat. Frauds, secs. 338, 348*a*; Bill *v.* Bament. 9 M. & W. 36.

[4] Jackson *v.* Watts, 1 McCord (S. C.), 288.

either of them, if proven, in addition to parol proof of the contract itself, is sufficient safe-guard against fraud and perjury to render the contract good without a writing.

76. However, earnest, if given in money, must be regarded as part payment, and it must be applied upon the price of the article. And it seems to be settled that the earnest must be something of value, either money or money's worth, though the amount is immaterial.[1]

77. And it must be actually paid. In the case of Blenkersop *v.* Clayton,[2] where the buyer drew a shilling across the seller's hand, and which the witness called "striking off the bargain," according to the custom of the country; but, as the buyer then returned the coin to his own pocket instead of giving it to the vendor, the court necessarily held that the statute had not been satisfied.

78. Part payment is usually made in money, although it need not necessarily be made in money, but in anything of value or representing value, which, by mutual consent, is given by the buyer and accepted by the seller "on account," or in part satisfaction of the price of the article sold.

In the case of Dow *v.* Worthen,[3] it was held that if the vendee at the time of purchase agreed that the vendor should take in part payment certain personal property which had already been delivered to him, and this is agreed to by the vendor, it would be a part payment within the statute.

79. So, in a Wisconsin case,[4] it was held that a promise by the buyer to pay the amount to a creditor of the vendor, which

[1] Artcher *v.* Leh, 5 Hill (N. Y.), 200; Langfoot *v.* Tyler, 1 Salk. 113.

[2] 7 Taunt. 597.

[3] 37 Vt. 108.

[4] Cotterill *v.* Stevens, 10 Wis. 422.

Upon the subject of part payment, see Mattice *v.* Allen, 3 Keyes, 492; Brabin *v.* Hyde, 32 N. Y. 519; Teed *v.* Teed, 44 Barb. 96; Walker *v.* Nussey, 16 Mees. & W. 302; Hart *v.* Nash, 2 Cromp., Mees. & Rosc. 337; Hooper *v.* Stevens. 4 Adol. & El. 71; 5 Hill (N.Y.) 200; Combs *v.* Bateman, 10 Barb. (N. Y.) 573; Ely *v.* Ormsby, 12 Barb. 570; Clark *v.* Tucker, 2 Sandf. 157; Gilman *v.* Hill, 36 N. Hamp. 319.

is accepted by the creditor who discharges the original debtor, is a payment within the statute.

80. As in the case of acceptance, part payment may take place any time subsequent to the contract and before action. But it must always be accepted as part payment by the seller; a tender to him is not sufficient. In a recent case where the vendee sent it by mail, and the vendor returned it, it was held to be no part payment within the statute.[1]

THE NOTE OR MEMORANDA.

81. The law of evidence as to written contracts is not changed by the Statute of Frauds, and if the bargain be in writing, in whole or in part, this writing must be looked to as containing the terms of the contract. It is not necessary, however, that all the terms of the contract be inserted in one document; it is sufficient if they can be collected from several writings referring to one agreement, but the connection between the different writings must clearly appear on their face, for parol evidence can only be used to show that the writing is the agreement between the parties.

82. As we have seen there is no particular form necessary for this memorandum, but there are certain requisites which it must contain to satisfy the statute.

83. The names of both buyer and seller must distinctly appear in the memoranda, but the signature of both parties is not necessary; if it be signed by the party to be charged it will be sufficient, although the other party may not have signed it.[2] Thus, where the defendant's agent made an entry in the books of N. as follows: "Mr. N., 32 sacks culasses at 39*s*., 280 lbs., to await orders," and signed it with his own initials, this entry

[1] Edgerton *v.* Hodges, 41 Vt. 676 (1869).

[2] Williams *v.* Byrens, 1 Moore, P. C. (N. S.) 154; Williams *v.* Lake, 29 Law J., Q. B. 1; Justice *v.* Lang, 42 N. Y. 494 (1870); Champion *v.* Plumber, 1 N. R. 154; Clason *v.* Bailey, 14 Johns. 487; McCrea *v.* Purmont, 16 Wend. 460; Shirley *v.* Shirley, 7 Blackf. 452; Barstow *v.* Gray, 3 Maine, 341; Nichols *v.* Johnson, 10 Conn. 192; Old Col R. R. Corp. *v.* Evans, 6 Gray, 25.

was held sufficient, coupled with oral evidence that N. was a baker, and the defendant a flour merchant, and the defendant had subsequently corresponded with N. in regard to the delivery of the flour, in which the relative position of buyer and seller distinctly appeared.[1]

84. A letter properly signed, and containing the necessary particulars of the agreement, is a sufficient memoranda within the statute.[2]

85. A person who transmits a proposal by letter must be considered as renewing his offer every moment, until the time at which the answer is to be sent, and then the contract is completed by the acceptance of the offer. For if the law were otherwise, no contract could ever be completed by post.[3] And if a letter be given in evidence with the direction torn off, the jury will do well to presume, *prima facie*, that it was addressed to the person who produces it.[4] In the case of Felthouse *v.* Bindley,[5] where an intending purchaser wrote to the seller, saying: "If I hear no more about the horse, I consider the horse is mine at 30*l.* 15*s.*," and the seller did not answer the letter, the purchaser would have been bound to his offer, if the seller had chosen to accept it; but the fact of the seller not having answered the letter will not bind him, as the purchaser had no right to put upon him the burden of the choice of writing a letter of refusal or being bound by the agreement proposed."

86. If letters taken together contain a sufficient contract, namely, one that would express all its terms, they would constitute a memorandum in writing within the statute. And of course, therefore, the court may look at all the letters which

[1] Newell *v.* Radford, Law Rep., 3 C. P. 52 (1867); McDonald *v.* Longbottom, 1 E. & E. 977; Spicer *v.* Cooper, 12 B. 424.

[2] Fruster *v.* Hale, 3 Ves. 696; Allen *v.* Bennett, 3 Taunt. 169.

[3] See Chitty's Contracts (7 ed.), 12; Dunlop *v.* Higgins, 12 Jur. 295.

[4] Curtis *v.* Rickards, 1 M. & G. 47, per Tindal, C. J.

[5] 31 L. J., C. P. 204.

have passed, for the purpose of seeing whether or not they contain a sufficient contract to take the case out of the statute.[1]

87. But they must express all the terms of the contract.[2] Thus, where it was clear from letters and invoices that the defendant had bought goods from the plaintiff upon some contract or other; but whether he bought it on a contract to take particular goods seen by him at the warehouse, or whether he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with the sample, or whether the agreement was that they should be delivered within a particular time, did not appear; it was held that there was no agreement coming within the Statute of Frauds, because what was in truth the dispute between the parties was not settled by the contract in writing.[3]

88. But as mutual assent is necessary to constitute a binding contract, it is held that where it is sought to establish an agreement by means of letters, such letters will not amount to an agreement, unless the answer be *ex simplice* without the introduction of any new term.[4] Thus, in the case of Cooper *v.* Hood, where an action of assumpsit was brought for the price of a mare sold and delivered, to which the defendant pleaded non assumpsit, it appeared that the defendant, having seen and ridden a mare, wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted; therefore, as she lays out, turn her out my mare." The plaintiff agreed to sell her for the

[1] Archer *v.* Baynes, 5 Ex. 629; Richards *v.* Porter, 6 C. D. 438; Warner *v.* Willington, 25 L. J., Ch. 662; Smith *v.* Neale, 26 L. J., C. P. 143; Watts *v.* Ainsworth, 1 H. & C. 83.

[2] Bailey *v.* Sweeting, 9 W. R. 273; Bailey *v.* Ogden, 3 Johns. 399; Penniman *v.* Hartshorn, 13 Mass. 87; Roberts *v.* Tacker, 3 Exch. 632; Waterman *v.* Meigs, 4 Cush. 497; Morton *v.* Dean, 13 Met. 385; Burke *v.* Haley, 2 Gil. 614; Barickman *v.* Kuykendall, 6 Blackf. 21; Sarl *v.* Bourdillon, 1 Com. B. (N. S.) 188; Gibson *v.* Holland, Law Rep., 1 C. P. 1.

[3] Archer *v.* Baynes, 5 Ex. 625; Richards *v.* Porter, 6 B. & C. 438; Goodman *v.* Griffiths, 26 L. J., Ex. 145; McLean *v.* Nicholl, 7 Jur., N. S. 999; Honeyman *v.* Marryat, 21 Beav. 14.

[4] Cooper *v.* Hood, 28 L. J., Ch. 212.

twenty guineas. The defendant afterward wrote again to him, "My son will be at the 'World's End' (a public house) on Monday, when he will take the mare and pay you; send anybody with a receipt, and the money shall be paid; only say in the receipt sound, and quiet in harness." The plaintiff wrote in reply, "She is warranted sound, and quiet in double harness; I never put her in single harness." The mare was brought to the "World's End" on the Monday, and the defendant's son took her away without paying the price and without any receipt or warranty. The defendant kept her two days, and then returned her as being unsound. The learned judge stated to the jury that the question was, whether the defendant had accepted the mare, and directed them to find for the defendant if they thought he had returned her within a reasonable time, and desired them also to say whether the son had authority to take her without the warranty. The jury found that the defendant did not accept the mare, and that the son had not authority to take her away. It was held by the Court of Exchequer, on motion to enter a verdict for the plaintiff, that there was no complete contract in writing between the parties; that, therefore, the direction of the learned judge was right; also, that the defendant was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent, and consequently that the plaintiff was not entitled to recover.[1]

89. A contract is complete upon the posting by one party of a letter addressed to the other, accepting the terms offered by the latter, notwithstanding such letter never reaches its destination.[2]

90. All that the statute requires is that the memorandum shall contain a distinct and clear statement of the terms of the agreement, and of the names of the parties. It matters not whether the name of the party to be charged appear as a superscription or as a signature, or be contained in the body of the memorandum, provided it be so distinctly set forth as to avoid all uncertainty. It is immaterial in what part of the memorandum the

[1] Jordan *v.* Norton, 4 M. & W. 155; Heyward *v.* Barnes, 23 L. T. 68

[2] Duncan *v.* Topham, 8 C. B. 225.

name of the party be found, if it be inserted in such a manner as to have the effect of authenticating the instrument.[1]

91. And where a party drew up an agreement, commencing, "I, A. B., agree," but neglected to sign his name at its conclusion, it was held sufficient.

92. A signature with pencil, or where a party makes his mark or only signs his initials, is sufficient.[2] Nor is it material whether the signature is written or printed, or whether it was written by the person to be charged or by somebody else, if he assent to its terms and knew of the signature.[3] So when a bill of parcels, in which the name of the vendor was printed and that of the vendee was written by the vendor, it was held a sufficient memorandum to charge the vendor;[4] and the party signing is the only one bound, as stated by Justice Mason, in Fenly *v.* Stewart:[5] "If a mutual contract is made, and one of the parties gives the other a memorandum, in pursuance of the statute, but neglects to take from that other a corresponding memorandum, he has but himself to blame if he is unable to compel its performance, while he is bound to the other party. The difficulty is not that the contract, as originally entered into, is not mutual, but that one of the parties has not the evidence which the statute has made indispensable to its enforcement."

It may be enforced against the party who has subscribed a note or memorandum of it, though the other party, by not having signed, is, by the express words of the statute, freed from its obligation.[6]

93. The statute requires some note or memorandum, in writ-

[1] Penniman *v.* Hartshorn, 13 Mass. 87.

[2] Propert *v.* Parker, 1 Russ. & Myl. 53; Baker *v.* Denung, 8 Ad. & E. 94; Hubert *v.* Moreau, 2 C. & P. 528; Selby *v.* Selby, 3 Mer. 2; Sweet *v.* Lee, 3 M. & G. 452.

[3] Sanderson *v.* Jackson, 2 B. & P. 138; Canton *v.* Canton, L. R., 2 H. L. 127, 143.

[4] Schneider *v.* Norris, 2 Maule & Sel. 286; Salmon Falls Man. Co. *v.* Goddard, 14 How. (U. S.) 456.

[5] 5 Sandf. (S. C.) 101.

[6] Thornton *v.* Tempster, 5 Taunt. 788; Old Colony R. R. Corp. *v.* Evans, 6 Gray, 25.

ing, to be signed by the party to be charged or his agent thereunto lawfully authorized.[1] Authority given to an agent, either in writing or parol, is lawful and sufficient; a general agent would have lawful authority;[2] all that is required is that the agent should be recognized by the party as his agent for that purpose; and it matters not whether, at the time of signing, the agent had authority or not, if subsequently his act be recognized and adopted by the parties or the party to be charged.

94. An auctioneer is considered as the agent of both parties for the purpose of making the memorandum, and an entry made by him in his book at the time of sale, will bind both parties.[3]

95. The memorandum must state the terms upon which the bargain was made, or it will be held insufficient, because the very object of the requirement of the statute was to prohibit verbal testimony of the terms of the bargain.

96. When no definite price has been agreed upon by the parties, the law will fix the price, by implication, to be the worth of the articles or their market price on the day of sale.

97. The price, when agreed upon, is a material part of the bargain, and must be stated in the memorandum. Thus, in the case of Elmore *v.* Kingscote,[4] where, on the 13th June, a verbal contract was made for the sale of a horse, warranted five years old, for 200 guineas, and in order to take the case out of the Statute of Frauds, the plaintiff gave in evidence the following letter, written by the defendant on the 18th of June: "Mr. Kingscote begs to inform Mr. Elmore, that if the horse can be proved to be five years old, on the 13th of this month, in a perfectly satisfactory manner, of course he shall be most happy to take him; and if not most clearly proved, Mr. K. will most decidedly not have him;" Lord Chief Justice Ab-

[1] Snyder *v.* Neefas, 53 Barb. 63 (1868;) McWhorter *v.* McMohan, 10 Paige, 393.

[2] Hawkins *v.* Chase, 19 Pick. 505; Pringle *v.* Spaulding, 53 Barb. 17 (1868); Graham *v.* Musson, 5 Bing. 603; Durrel *v.* Evans, 6 H. & N. 660.

[3] Horton *v.* McCarty, 53 Maine, 394; Mews *v.* Carr, 48 Eng. L. & Eq. 358; Smith *v.* Arnold, 5 Mason, 414.

[4] 5 B. & C. 945.

bott was of opinion that this was not a sufficient note or memorandum, in writing, within the Statute of Frauds, and nonsuited the plaintiff. The Court of King's Bench confirmed the nonsuit, on the ground that the price agreed to be paid constitutes a material part of the bargain; because, if it were competent to a party to prove by parol evidence the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent. But it has been held that a written order for goods, "on moderate terms," is sufficient.[1]

98. And if a memorandum or letter contains all the necessary elements of the contract, it is sufficient to charge the signer, although it be accompanied with an express repudiation of the contract by him. This principle is plainly illustrated in the next case of Bailey *v.* Sweeting.[2] The letter produced as the memorandum was as follows: "In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was the chimney glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known to you at the time," etc. Erle, C. J., in his opinion, said: "The letter, in effect, says this to the plaintiff: 'I made a bargain with you for the purchase of chimney glasses, at the sum of 38*l.* 10*s.* 6*d.*, but I declined to have them because the carrier broke them.' Now the first part of the letter is unquestionably a note or memorandum of the bargain. It contains the price and all the substance of the contract, and there could be no dispute that if it had stopped there, it would have been a good memorandum of the contract within the meaning of the statute." The learned chief justice then referred to the passage from Blackburn on Sales, where a contrary principle was laid down, and declared his inability to assent to it, and in this the other judges, Williams, Willes, and Keating, concurred.

99. There seems to be considerable misunderstanding in cases

[1] Ashcroft *v.* Morrin, 4 M. & G. 450; Thornton *v.* Kempster, 5 Taunt. 786; Archer *v.* Baynes, 5 Ex. 625; Cooper *v.* Smith, 15 East, 103; Valpy *v.* Gibson, 4 C. B. 835.

[2] 9 C. B. (N. S.) 843; Wilkinson *v.* Evans, 35 L. J., C. P. 224.

where a written memorandum is produced as to what parol evidence may be offered in reference to the memorandum.

The intent of this statute, which was made to prevent frauds and perjuries, seems to be to prevent the enforcement of parol contracts above a certain value unless the defendant had executed the contract by partial performance, or unless his signature to some written note or memorandum of the bargain be shown, and a note or memorandum of a bargain presupposes a bargain previously made by parol; hence it follows that parol evidence may be admitted for the purpose of showing that the writing is not the memorandum of the parol contract, but only a note of a part of it.

100. So, if the writing offered in evidence contain no reference to the price or place of delivery or terms of sale, parol evidence can be admitted to prove these facts and that the writing does not contain all the terms of the bargain. So parol evidence can be admitted for the purpose of identifying the subject-matter of the memorandum; as in the case of McDonald *v.* Longbottom,[1] where the written letter contained an agreement to purchase "your wool," parol evidence was admitted to show what was meant by "your wool."

101. Parol evidence may be admitted to show the circumstances and situation of the parties at the time the writing was made,[2] or to show that a writing purporting to be an agreement and properly signed was executed, not with the intention of making a present contract, but, like an escrow or writing, to take effect only on condition of the happening of some future event.[3]

So, also, it may be admitted to explain a latent ambiguity in a contract, as in the case of Raffles v. Wichelhaus,[4] where a bargain was made for the sale of cotton to arrive ex Peerless from Bombay, parol evidence was admitted to show that there were two ships "Peerless" from Bombay.

[1] 28 L. J., Q. B. 293.

[2] Sweet *v.* Lee, 3 M. & G. 466; Bold *v.* Rayner, 1 M. & W. 342; Edmonds *v.* Downs, 2 C. & M. 459; Hartley *v.* Wharton, 11 Ad. & E. 934; Spicer *v.* Cooper, 1 Q. B. 424.

[3] Pym *v.* Campbell, 6 E. & B. 370; Furness *v.* Meek, 27 L. J., Exch. 34.

[4] 2 H. & C. 906.

CHAPTER III.

AUCTION AND SALE STABLES.

102. A large amount of the business of buying and selling horses in the cities, is done through the "auction and sale stables," and no work upon the subject of the sale of horses would be complete without some mention of them.

We have seen, in a previous paragraph, that the auctioneer is considered the agent of both the buyer and seller at the time of the sale, but he is not the agent for the purchaser until that time, nor after that time, unless by special appointment; and he is agent for the purchaser only for the purpose of signing the note of sale and thereby binding the bargain.

103. The auctioneer is, however, agent for the vendor until the property is disposed of. Where a horse is sent to an auction stable, an authority to sell is implied, although no authority was ever given in fact, and the owner will be bound by a bona fide purchase although made without his express content.[1]

104. In an auction sale the vendor may withdraw his property from sale or the bidder may retract his bid at any time before the hammer falls,[2] but this retraction by either party must be in such a manner as to bring it to the notice of the other party.[3]

105. But there must be no fraud or deceitful misrepresentations by either party, or if either party act under a mistake as to a material particular the contract will be avoidable, and it makes no difference that the sale was made under a stipulation that error

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[1] Pickering *v.* Busk, 15 East, 38.

[2] Mauser *v.* Busk, 6 Hare, 443; Payne *v.* Cave, 3 T. R. 148; Routledge *v.* Grant, 4 Bing. 653; Cook *v.* Oxley, 3 T. R. 654.

[3] Jones *v.* Nanney, McCle. 25; S. C., 13 Price, 103.

or misstatement should not vitiate the sale, if the misdescription be willfully or fraudulently made with a design to mislead.[1]

106. It is very common in auction sales to sell by printed terms of sale and catalogues, and it is a general rule that when they are used, the auctioneer can not, by parol explanation at the time of sale, vary from them; the printed terms or catalogue will form a part of the contract, and will be binding upon the parties.[2]

107. So, in the case of Bywater *v.* Richardson,[3] where, at the time of sale there was a board fixed on the wall of the stable having certain rules printed upon it, one of which was that a warranty of soundness then given should remain in full force until noon of the day following, when the sale should become complete and the seller's responsibility terminate, unless a notice and veterinary surgeon's certificate of unsoundness were given in the meantime. The rules were not particularly referred to at the time of this sale and warranty. The horse proved unsound, but no complaint was made till after twelve on the following day. The unsoundness was of a nature not likely to be immediately discovered. Some evidence was given to show that the defendant knew of it, and the horse was shown at the sale under circumstances favorable to concealing it. After verdict for the plaintiff, it was held that there was sufficient proof of the plaintiff having had notice of the rules at the time of sale to render them binding on him; also, that the rule in question was such as a seller might reasonably impose, and that the facts did not show such fraud or artifice in him as would render the condition imperative; and Mr. Justice Littledale observed: "The warranty here was as if the vendor had said, after twenty-four hours, I do not warrant; such a stipulation is not unreasonable."

108. If a horse sold at a public auction be warranted sound and six years old, and it be one of the conditions of sale that it

[1] Fuller *v.* Abrahams, 6 Moore, 316; Sheldon *v.* Capron, 3 R. I. 171; Norfolk *v.* Worthy, 1 Camp. 340.

[2] Meshard *v.* Aldridge, 3 Esp. 271.

[3] 1 Adol. & El. 508.

shall be deemed sound unless returned in two days, this condition applies only to the warranty of soundness.

Thus, in the case of Buchanan *v.* Parrshaw,[1] where a horse sold with such warranty was discovered to be twelve years old ten days after sale, and was then offered to the seller, who refused to take him, it was held by the Court of King's Bench that an action might be maintained by the buyer against the seller, and Lord Kenyon said: "The question turns on the meaning of this condition of sale, and I am of opinion that it must be confined solely to the circumstance of unsoundness." There is good sense in making such a condition at public sales, because, notwithstanding all the care that can be taken, many accidents may happen to the horse between the time of sale and the time when the horse may be returned, if no time were limited. But the circumstance of the age of the horse is not open to the same difficulty.

109. Where the auctioneer declares that the conditions of a sale by auction are as usual, there is a sufficient notice of them to purchasers,[2] where they are printed and posted up in a conspicuous part of the auction-room.

110. Thus, in the case of Mesnard *v.* Aldridge,[3] where an action on the case was brought on the warranty of a horse, it appeared that the horse was sold by auction at the defendant's repository and warranted sound. The sale took place on the Wednesday. At the time of the sale, the auctioneer announced that the conditions of the sale were as usual. These conditions of sale were proved to be contained in a printed paper posted up under the auctioneer's box, and by one of them all horses purchased there, in case of any unsoundness being discovered, were required to be returned before the evening of the second day after the sale. The horse in question was not returned till the Saturday. When returned by the plaintiff, he was informed that it was too late, as he ought, pursuant to the conditions of sale, to have returned him on the evening of Friday. It was contended that there was no evidence of notice of the condi-

[1] 2 T. R. 746.

[2] Laing *v.* Hain, 2 S. M. & P. 395.

[3] 3 Esp. 271.

tions of sale, sufficient to bind the plaintiff. But Lord Kenyon (in summing up) said: "In this case, it is proved that particulars of the sale are posted up in the public sale-room under the auctioneer's box. In the case of carriers, who advertise that they will not be liable for goods lost, above the value of 5*l.*, unless entered as such, the posting up of a bill in the coach-office to that effect has been held to be sufficient. I therefore think the same mode being adopted here, gives the same degree of notice to all persons who come to this sale, and that it is a sufficient notice of the conditions under which the horses are sold." With respect to the main point, when parties enter into a special agreement, they must adhere to the terms of it. Here there is a condition that the party purchasing must return the horse within two days, which he has not done. I therefore think the plaintiff must be nonsuited.

111. The relation of the Statute of Frauds to sales has been discussed in the previous chapter, and the general principles there laid down apply to auction sales. The memorandum required is usually, in auction sales, a catalogue or auction book containing a list of the articles to be sold and the vendor's name; and as the articles are knocked off, the auctioneer inserts the price and the purchaser's name, and the memorandum is complete, but if there are any conditions to the sale they should be attached to the book, as the memorandum must contain all the terms of sale.

112. In ordinary sales, the memorandum can be made at any time subsequent to the sale, and before action. In auction sales, they must be made by the auctioneer at the time of the sale, because it is the theory of the law that at that time he has the mutual assent of both parties.

113. After a sale is effected, the auctioneer may, in general, be considered as the agent and witness of both the parties to a contract. But a difficulty arises in the case where the auctioneer sues as one of the contracting parties,[1] because the agent, whose signature is to bind the defendant, must not be the other con-

[1] Wright *v.* Dannah, 2 Camp. 203.

tracting party upon the record.[1] However, an entry made in the sale-book by the auctioneer's clerk, who attends the sale, and, as each lot is knocked down, names the purchaser aloud, and, on a sign of assent from him, makes a note accordingly in the book, is a memorandum in writing by an agent within the Statute of Frauds, for the clerk is not identified with the auctioneer (who sues), and in the business which he performs of entering the names, etc., he is impliedly authorized by the persons attending the sale to be their agent.[2]

114. An auctioneer is liable for negligence or unskillful management of an auction sale, as in the case of Parker *v.* Farebrother,[3] where the seller was compelled to make compensation to the purchaser in consequence of the property having been improperly described by the auctioneer, who had been employed to prepare particulars and sell the property, it was held that an action on the case would lie against the auctioneer by the vendor.

115. So, also, an auctioneer is liable for negligence in the care of goods intrusted to him for sale, but not for unavoidable accidents.[4]

116. An auctioneer has no right to rescind a sale without instructions from the seller. Thus, in the case of Neson *v.* Aldridge,[5] where an auctioneer having sold a horse, and the purchaser complaining that he did not correspond with the advertisement and would not work, the auctioneer rescinded the sale. An action was brought by the vendor against the auctioneer, and it was held that the plaintiff was not bound to show any express agreement by the defendant not to rescind, but that the burden of proof was on the defendant to show some excuse for rescinding.

117. If an auctioneer sell an article without saying on whose

[1] Farebrother *v.* Simmons, 5 B. & A. 333.

[2] 29 Car. 2, c. 3, Bird *v.* Bolton, 4 B. & Adol. 443; see Sugd. Vend. and Purch., 14 ed. 147.

[3] 2 Weekly Rep., C. B. 370.

[4] Waltby *v.* Christie, 1 Esp. 340.

[5] 2 Stark. 435.

behalf he is acting, the purchaser can look to him for the completion of the contract.[1] And this rule applies also to the purchaser.[2]

118. It is customary in auction sales for the auctioneer to require a deposit from the purchaser at the time the property is knocked off; in such cases it is the duty of the auctioneer to retain the deposit until the sale is completed, and he ascertain to whom the deposit belongs. He is, under these circumstances, the stakeholder of both parties, and is liable as such.[3]

119. If a purchaser declines to take goods knocked off to him at auction they may be resold, and the first purchaser will be liable to the loss, if any, upon the sale.[4] So, in the case of Laving *v.* Haine,[5] where some horses were sold at auction, without stipulation as to credit, and the purchaser allowed two days to elapse without tendering the price, it was held that the seller, who had never parted with the possession, was entitled to the third day to resell them without any communication with the original purchaser, and to sue the original purchaser for the difference in the prices, and for the keep of the horses between the periods of sale and resale, and the expenses of the resale.

120. If an auctioneer be guilty of fraud or deceit, or assume the responsibility of selling property in dispute, he will render himself personally liable to the person defrauded.[6] And in cases where he connives with the vendor to defraud the buyer, he has no remedy against his confederate where he has been compelled to respond in damages to the party defrauded.[7]

121. If the vendor or auctioneer state that the property being

[1] Gaby *v.* Driver, 2 You. & Jer. 549; Hanson *v.* Robert Dean, 1 Peake, 163.

[2] Thompson *v.* Davenport, 9 B. & C. 86.

[3] Burroughs *v.* Skinner, 5 Burr. 2639; Gray *v.* Gutteridge, 3 C. & P. 40; Edwards *v.* Hodding, 5 Taunt. 815; Hanson *v.* Robert Dean, Peake, 120.

[4] Maclean *v.* Dunn, 4 Bing. 729; Story on Sales, 348.

[5] 2 S. M. & P. 396.

[6] Handacre *v.* Stewart, 5 Esp. 103; Adamson *v.* Jarvis, 4 Bing. 66.

[7] Medina *v.* Stoughton, 1 Salk. 210; Sanders *v.* Powell, 1 Lev. 129; Crosse *v.* Gardner, Carth. 90.

sold belongs to a certain person, when it does not, it will vitiate the sale; so, where an auctioneer stated that all the horses in a sale were the property of the person whose stud he had advertised to sell, and the horse purchased was put into the sale after advertisement, and was not a part of the stud advertised, it was held that the sale was void, because the purchaser might have given a much higher price for a horse belonging to the stud in question than for one without a character.[1]

122. So, also, in the case of Hill *v.* Gray,[2] where the agent employed by plaintiff to sell a picture was pressed by the defendant to tell him whose property it was; the agent refused. The same agent was, at the time, selling also pictures for Sir Felix Agar, and the defendant, "misled by circumstances, erroneously supposed" that the picture in question also belonged to Sir Felix Agar, and under this misapprehension bought it. The agent "knew that the defendant labored under this delusion, but did not remove it." The price was 1,000*l.*, the picture being said to be a Claude, and proof was offered that it was genuine; and that after the defendant knew that it was not one of Sir Felix Agar's pictures, he had objected to paying, on the ground that it was not genuine, but not on the ground of any deception. Lord Ellenborough said, "Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser, which he knew enhanced the price, and under these circumstances the plaintiff could not recover the sum for which the picture was sold, the price being probably enhanced by the error."

123. The sale at auction seems to be peculiarly suited to the purposes of fraud, and there are many ingenious devices used to defraud the purchaser at these sales. One of the most common of these devices is technically known as employing "puffers,"

[1] Brexwell *v.* Christie, 3 Cowp. 397; and see Bradshaw's case there cited.

[2] 1 Stark. 434.

or by-bidders; that is, persons who, without having any intention to purchase, are employed to raise the price by fictitious bids, so as to create competition among the bidders, with a secret understanding that they are not to be held responsible for their bids. The general rule in these cases is, that if their bidding operate to mislead and deceive the purchaser, the sale will be void. There are many adjudicated cases upon this subject, and we will mention two or three of them to illustrate this principle.[1]

124. One of the earliest cases upon this subject reported (1776) by Lord Mansfield, is the case of Brexwell *v.* Christie,[2] already cited in this chapter. This was an action against an auctioneer for selling a gelding belonging to the plaintiff, at public auction, for 6*l.* 16*s.* 6*d.*, when he had been directed by plaintiff not to sell it for less than 15*l.* On behalf of the plaintiff, it was contended that the auctioneer should not have let the gelding go for less than the directed price; and on behalf of defendant, it was claimed that the auctioneer could not legally control the price, because it would have been fraudulent to have employed by-bidders.

Lord Mansfield held the practice to be a fraud upon the buyer and on the public. "The question then is," said he, "whether the owner can privately employ another person to bid for him? The basis of all dealings ought to be good faith; so more especially in these transactions, where the public are brought together upon a confidence that the articles set up for sale will be disposed of to the highest real bidder; that could never be the case, if the owner might secretly and privately enhance the price by a person employed for that purpose; yet tricks and practices of this kind daily increase, and grow so frequent that good men give in to the ways of the bad and dishonest in their own defense. But such a practice was never openly avowed. An owner of goods set up for sale at an auction never yet bid in the room for himself. If such a practice were allowed, no

[1] Green *v.* Baverstock, 32 L. J., C. P. 181; Wheeler *v.* Collier, 1 M. & W. 123; Crowder *v.* Austin, 3 Bing. 368; Rex *v.* Marsh, 3 Y. & J. 331.

[2] Cowp. 395.

one would bid. It is fraud upon the sale and upon the public. The disallowing it is no hardship upon the owner. For if he is unwilling his goods should go at an under price, he may order them to be set up at his own price, and not lower; such a direction would be fair."

Afterward, in deciding the case of Howard *v.* Castle,[1] Lord Kenyon reviewed the foregoing case, approving its wisdom, and saying that Lord Mansfield had in its decision made a precedent which he (Lord Kenyon) was happy to follow.

125. The law upon this point was also fully considered by the Court of Common Pleas in the case of Pilmore *v.* Hood,[2] where an action was brought by the plaintiff to recover the value of a horse sold by him to the defendant at a public auction at Aldridge's repository. It appeared that it was one of the conditions of sale "that each horse should be sold to the highest bidder;" that the plaintiff's groom attended at the sale on the part of his master for the purpose of raising the price; that the last *bona fide* bidder had bid 12*l.*; after which, until the horse was knocked down to the defendant for 29*l.*, he and the groom were the only bidders; and that when the defendant discovered against whom he had been bidding, he refused to take the horse. Upon these facts, Chief Justice Best said, "I am clearly of opinion that the action can not be maintained. I have long been surprised that the objection has never been taken. A man goes to a sale, and is told that if he is the highest bidder he shall have the article. He bids a certain sum, and a person, employed by the seller, whom he does not know, attends and puffs against him, and in consequence of that, he is compelled to pay a much larger price than he would otherwise have paid. Is not this a gross fraud? I am prepared to nonsuit the plaintiff."

It was then proved for the plaintiff, by the evidence of the auctioneer, that the defendant was in the habit of attending sales of horses, and that he knew the plaintiff's groom was present; and it was stated that there was a case deciding that a seller has a right to have one person to bid for him at the sale, if he does not do it in order to impose. Chief Justice Best then said, "I

[1] Adol & El. 508.

[2] 5 N. C. 97.

agree that he has such a right, but then he must declare it by the conditions of sale. I am of opinion that a person acts in opposition to the conditions of sale, where the highest bidder is to be the buyer, if he employs a person to bid for the purpose of enhancing the price. In this case the other person at the sale did not go near the ultimate sum. It is impossible, under these circumstances, to say that 29*l.* was the highest price contemplated by the conditions; for the defendant, under them, was entitled to have the horse at the next highest bidding to that of the only fair bidder."[1]

The Court of Common Pleas confirmed Chief Justice Best's ruling at *nisi prius;* and Mr. Justice Parke said, "I entirely concur in the opinion expressed by Lord Mansfield;" as to which Lord Kenyon, in Howard *v.* Castle, said, "The whole of the reasoning of Lord Mansfield, in Brexwell *v.* Christie, is founded on the noblest principles of morality and justice—principles that are calculated to preserve honesty between man and man. The circumstance of puffers bidding at auctions has been always complained of. If the first case of this kind had been tried before me, perhaps I should have hesitated a little before I determined it; but Lord Mansfield's comprehensive mind saw it in its true colors, and made a precedent which I am happy to follow." And in the later case of Thornett *v.* Haines,[2] this decision has been confirmed, and it was held that a sale by auction without reserve, if a by-bidder be employed without notice of his being there to protect the interest of the seller, the sale is void.

126. Since these decisions, this question has been frequently before the courts, and while contrary doctrines have been declared in some cases, it is believed that they yet stand as good law.

127. The law as to the responsibility of the auctioneer, in cases where by-bidders are employed, was examined in the case of Warlow *v.* Harrison.[3] The defendant was an auctioneer,

[1] Crowder *v.* Austin, 2 C. & P. 208.

[2] 15 L. & J., Ex., 230.

[3] 28 L. J., Q. B. 18.

having a horse repository, and they advertised for sale a mare, the property of a gentleman, without reserve. The plaintiff attended the sale, and bid 60 guineas, and another person bid 61 guineas. The plaintiff being informed that this last person was the owner, declined to bid further, and the horse was knocked down to the owner as purchaser at 61 guineas. The plaintiff at once informed the defendant and the owner that he claimed the mare as the highest *bona fide* bidder, the sale having been advertised "without reserve." The owner refused to let him have the mare, and he thereupon tendered to the defendant, the auctioneer, 60 guineas in gold, and demanded the mare. The plaintiff had notice of the conditions of the sale, among which were the following: "*First.* The highest bidder to be the buyer, and if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer may declare the purchaser. *Third.* The purchaser being declared, must immediately give in his name and address, and, if required, a deposit of 5*s.* in the pound on account of his purchase, and pay the remainder before such lot is delivered. *Eighth.* Any lot ordered for this sale and sold by private contract by the owner, or advertised 'without reserve,' and bought by the owner, to be liable to the usual commission of two per cent."

The learned baron then proceeded as follows: "In a sale by auction there are three parties, namely, the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed; he was a concealed principal. The names of the auctioneers, of whom the defendant was one alone, were published, and the sale was announced by them 'without reserve.' This, according to all cases, both at law and in equity, means that neither the vendor, nor any one on his behalf, may bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. For this position, see the case of Thornett *v.* Haines, 15 M. & W. 367. We can not distinguish the case of an auctioneer putting up property for sale upon such a condition, from the case of the

loser of property offering a reward; or that of a railway company publishing a time-table, stating the times when and the places at which the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. Denton *v.* The Great Northern Railway Company, 5 E. & B. 860; 25 L. J., Q. B. 129. Upon the same principle, it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think that the auctioneer who puts property up for sale upon such a condition, pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so, and that this contract is made with the highest *bona fide* bidder, and in case of a breach of it, he has a right of action against the auctioneer.

"We entertain no doubt that the owner may at any time before the contract is legally complete, interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment, and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

In reference to the conditions of the sale, the learned baron further said, as to the first condition, that the owner could not be the buyer, and the auctioneer ought to have refused his bid, giving for a reason that the sale was without reserve.

CHAPTER IV.

THE RULE AS TO UNSOUNDNESS AND VICE IN HORSES.

128. There has been much discussion upon this subject and many rules laid down as to what constitutes unsoundness in horses. Mr. Youatt, in his work on "The Horse,"[1] gives the following rule: "The horse is unsound that labors under disease or has some alteration of structure which does interfere or is likely to interfere with his natural usefulness. The term "natural usefulness" must be borne in mind One horse may possess great speed, but is soon knocked up; another will work all day, but can not be got beyond a snail's pace; a third, with a heavy forehead, is liable to stumble, and is continually putting to hazard the neck of his rider; another, with an irritable constitution, and a loose, washy form, looses his appetite and begins to scour if a little extra work is exacted from him. The term unsoundness must not be applied to either of these; it would be opening far too widely a door to disputation and endless wrangling. The buyer can discern, or ought to know, whether the form of the horse is that which will render him likely to suit his purpose, and he should try him sufficiently to ascertain his natural strength, endurance, and manner of going."

129. The above definition of Mr. Youatt is not broad enough. It will be observed that any alteration of structure from accident is not comprehended in it as it should be. In the leading English case[2] upon this subject, it was distinctly held that the disqualification for work which renders a horse unsound, may arise *either* from disease or *accident*.

The late Professor Coleman says that "any deviation from nature is an unsoundness in a horse."

Mr. Chitty,[3] in his work on contracts, lays down the follow-

[1] The Horse, by William Youatt, 391.

[2] Kiddell *v.* Barnard, 9 M. & W. 671.

[3] Chitty on Contracts, 7 Am. ed. 464.

ing rule: "The rule as to an unsoundness of a horse is, that if at the time of sale the horse has any disease which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from *disease* or *accident*, undergone any alteration of structure that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such a horse is unsound."

131. We will now give a few leading cases upon this subject in England and America, and from them endeavor to state the rule as to unsoundness in horses. The leading English case seems to be Kiddell *v.* Barnard.[1] This was an action of assumpsit, on the warranty of three bullocks, and under the direction of Mr. Justice Erskine, at the trial, a verdict was found for the plaintiff. In refusing a rule for a new trial, Mr. Baron Parke said: "The rule I laid in Coates *v.* Stephens[2] is correctly reported; that is the rule I have always adopted and acted on in cases of unsoundness, although in so doing I differ from the contrary doctrine laid down by my brother Coleridge, in Bolden *v.* Brogden:[3]

"I think the word sound means what it expresses, namely, that the animal is sound and free from disease at the time he is warranted sound. If, indeed, the disease were not of a nature to impede the natural usefulness of the animal for the purpose for which he is used, as for instance, if a horse had a slight pimple on his skin, it would not amount to an unsoundness; but even if such a thing as a pimple were on some part of the body where it might have that effect, as for instance, on a part which would prevent the putting of a saddle or bridle on the animal, it would be different.

"An argument has, however, been adduced from the slightness of the disease and the facility of cure; but if we once let in considerations of that kind, where are we to draw the line? A

[1] 9 M. & W. 671.

[2] Coates *v.* Stephens, 2 M. & R. 137; and see rule as to unsoundness.

[3] Bolden *v.* Brogden, 2 M. & R. 113.

horse may have a cold which may be cured in a day, or a fever which may be cured in a week or a month, and it would be difficult to say where to stop. Of course, if the disease be slight, the unsoundness is proportionably so, and so also ought to be the damages, and if they were very inconsiderable, the judge might still certify under the statute of Elizabeth,[1] to deprive the plaintiffs of costs. But, on the question of law, I think the direction of the judge, in this case, was perfectly correct, and that this verdict ought not to be disturbed. Were this matter presented to us for the first time we might deem it proper to grant a rule, but the matter has been, we think, settled by previous cases, and the opinion which we now express is the result of deliberate consideration."

And Mr. Baron Alderson said: "I am of the same opinion. The word sound means sound, and the only qualification of which it is susceptible arises from the purpose for which the warranty is given. If, for instance, a horse is purchased to be used in a given way, the word 'sound' means that the animal is useful for that purpose, and 'unsound' means that he, at the time, is affected with something which will have the effect of impeding that use. If the disease be one easily cured, that will only go in mitigation of damages. It is, however, right to make to the definition of unsoundness the addition my brother Parke has made, namely, that the disqualification for work may arise either from disease or accident, and the doctrine laid down by him on this subject, both to-day and in the case of Coates *v.* Stephens,[2] is not new law; it is to be found recognized by Lord Ellenborough and other judges in a series of cases."[3]

132. In a more recent English case, Holiday *v.* Morgan,[4] where a horse with a warranty of soundness had an unusual convexity in the cornea of the eye, which caused short-sightedness, and a habit of shying. The direction to the jury was that, "if they thought the habit of shying arose from defectiveness of

[1] 43 Eliz. c. 6, s. n.
[2] Coates *v.* Stephens, 1 M. & R. 137.
[3] Kiddell *v.* Barnard, 9 M. & W. 670.
[4] 1 E. & E. 1; 28 L. J., Q. B. 9.

vision, caused by natural malformation of the eye, this was unsoundness." All the judges held this direction correct, and concurred in the doctrine of Kiddell *v.* Barnard, that the true test of unsoundness is, as expressed by Hill, J., "whether the defect complained of *renders the horse less* than reasonably fit for present use."

133. The case of Roberts *v.* Jenkins,[1] decided by the Supreme Court of New Hampshire, is a leading American case upon this subject. This was an action on a note for the payment of a horse. It appeared on the trial that the horse had been injured three or four years before sale, in the left hind-leg, and evidence was introduced tending to show that the injury had never been fully removed and was permanent. Evidence was also introduced tending to show that the horse had a defect in the hock, either temporary or permanent. In deciding the case, Wood, J., after quoting the words of Lord Ellenborough in the case of Elton *v.* Brogden,[2] "I have always held, and now hold, that a warranty of soundness is broken, if the animal, at the time of sale, had any infirmity upon him which rendered him less fit for present service," said: "If a horse be afflicted with an infirmity which renders him less fit for immediate use than he otherwise would be, and less able to perform the proper and ordinary labor of a horse, it would seem but reasonable that it should be regarded as an unsoundness, for which a party selling the horse and warranting its soundness should be held responsible. Such infirmity may well be supposed to be the occasion of damages to the purchaser. The intention and understanding of the parties to the warranty are in such, as well as in all other contracts, to govern their construction. It is in the size of a horse that his value principally consists. It may well be presumed, then, that when a horse is purchased he is purchased for service, and that it is with reference to his ability and fitness for service that a guaranty of soundness would ordinarily be required or given; and we can see no reason for supposing that the future fitness or usefulness of the horse would be likely to be more an object of

[1] 21 New Hamp. 116.

[2] 4 Camp. 281.

solicitude on the part of the purchaser than his present fitness; and when we consider the subject-matter of such a guaranty, we can see no reason to suppose that in such cases the parties do not, at least, intend, by a general warranty of soundness, that at the time of sale the animal is laboring under no disease or injury which, at the time or afterward, does or will diminish his natural and ordinary usefulness and fitness for service."

134. After an examination of the cases upon this subject, both English and American, we will say that a horse is *sound* "*when he is free from hereditary disease, is in the possession of his natural and constitutional health, and has as much bodily perfection*[1] *as is consistent with his natural formation.*"

And a horse *is free from vice when he has no bad habits that make him dangerous, or that are injurious to his health, or that in any way diminishes his natural usefulness.*[2]

135. The soundness or unsoundness of a horse is a question peculiarly fit for the consideration of a jury, and the court will not set aside a verdict on account of there being a preponderance of evidence the other way;[3] and they should consider whether the effect said to proceed from the alleged unsoundness, is such an effect as in the eye of the law renders a horse unsound. It is also a question for them, whether a horse warranted sound was at the time of delivery rendered unfit for immediate use to an ordinary person, on account of some disease.[4]

[1] Kiddell *v.* Barnard, 9 M. & W. 668; Coates *v.* Stephens, 2 M. & Rob. 157; Elton *v.* Brogden, 4 Camp. 281; Elton *v.* Jordan, 1 Stark. 127; Bolden *v.* Brogden, 2 M. & Rob. 113; Garment *v.* Barrs, 2 Esp. 673; Kornegay *v.* White, 10 Ala. 255; Roberts *v.* Jenkins, 1 Foster (N. H.), 116; Burton *v.* Young, 5 Harrington, 233; Holiday *v.* Morgan, 28 L. J., Q. B. 9; Thompson *v.* Bertrand, 23 Ark. 730; Tatum *v.* Mohr, 21 Ark. 349; Merrick *v.* Bradley, 19 Md. 50; Watson *v.* Denton, 7 Car. & P. 85; Joliff *v.* Bendell, R. & M. 136; Hook *v.* Stovall, 21 Ga. 69.

[2] Schofield *v.* Robb, 2 M. & Rob. 210.

[3] Lewis *v.* Peake, 7 Taunt. 153; S. C., 2 Marsh. 43, per Patterson, J.; Baylis *v.* Lawrence, 11 Ad. & E. 926.

[4] Ainsley *v.* Brown, before Mr. Justice Wrightman, Newcastle Spring Assizes, 1845.

And in case of vice, they should consider whether the effect alleged to proceed from a certain habit, is such an effect as the law holds to be a vice in a horse.

DISEASES AND BAD HABITS.

136. We will now mention, in alphabetical order, the different diseases and bad habits to which the horse is subject, and, with the aid of the rules laid down, and various decisions of the courts, endeavor to determine, in each case, what amounts to an unsoundness or a vice. It is very difficult, however, in many cases, to ascertain where soundness ends and unsoundness begins. And in such doubtful cases we must be guided by the circumstances.

137. *Asthma* produces a short, soft cough in horses, and is easily recognized. In some cases the inconvenience caused by this complaint is slight, the horse giving merely a scarcely perceptible cough on coming out of, or going into the stable, and that more in winter than in summer; the extent of such cough depends upon the atmosphere and cleanliness of his box. Frequently horses affected with asthma, do not cough when working, and apparently suffer but little and last many years. Yet, as there is chronic disease present, besides an assumed predisposition to injury of the lungs they are regarded as *unsound.*

138. *Abrasions.*—Very slight abrasions, though hardly perceptible, and requiring but little care, are an unsoundness until perfectly healed.

139. *Blood and Bog-spavin.*—This disease is caused by violent exertion to the tendons of the legs of the horse, and causes the enlargement of the little bags at their ends, which contain a mucous substance to lubricate the tendons. Wind-galls and thoroughpins are examples of such enlargements. Bog-spavin is caused by the increase in size of one of these little bags situated inside the bending of the hock. When the vein which passes over this bag is distended with accumulated blood, it is called blood-spavin, and is therefore the consequence of bog-spavin, with which it is often confounded. The different forms of this disease usually produce lameness and constitutes *unsoundness.*

140. *Bone-spavin.*—This is a disease of the bones of the hock

joint. When an undue weight and concussion are thrown on the inner splint-bone, they cause an inflammation of the cartilaginous substance which unites it to the shank-bone; the consequence of which is that the cartilage is absorbed and bone deposited so that the union between the splint-bone and shank becomes bony instead of cartilaginous, and the degree of elastic action between them is destroyed. A splint in the form of a tumor appears in the inside of the hind-leg in front of the union of the head of the splint-bone with the shank, and is called bone-spavin. It almost always produces lameness, and whether apparent at the time of sale or not, it is an *unsoundness*.

In the case of Watson *v.* Denton, 7 C. & P. 86, the following evidence, as regards bone-spavin, given by veterinary surgeons of reputation, will be of value.

Mr. Nice, a veterinary surgeon, stated for the plaintiff, that eleven days after sale he had seen the horse, which then had a confirmed bone-spavin, and that in his opinion it was not a curable disease.

Mr. Sewell, of the Veterinary College, had examined him about a month after sale, and he said that at that time he had a confirmed bone-spavin, which could not have occurred subsequent to the time of sale.

For the defendant, Mr. Child, a veterinary surgeon, was called, who said that there was a bony deposit in the interior of the hock, but that it did not interfere with its flexion. It was what is called a bone-spavin, though the term was very indefinite; that the deposit generally but not invariably increases, and in the incipient stages it requires skill, and is often difficult to determine; that there might be a deposit to a considerable extent without producing lameness; that he had known horses rejected for bone-spavin as unsound which had not become lame, and had one himself that was rejected three years ago, and had not become so. Another witness, a farrier, says: "I do not think bone-spavin is an unsoundness myself without lameness; but bone-spavin is, in our profession, a known unsoundness, whether it produce lameness or not."

The plaintiff obtained a verdict.

141. *Broken-backed.*—When a horse has been put to hard serv-

ice before they have gained their full strength, it is not uncommon that some of the bones of their back or loins become anchylosed, being united together by bony matter instead of ligaments. When this exists to any considerable extent, the horse is not pleasant to ride; he turns with difficulty in the stall; he is unwilling to lie down, or when down to rise again; such horses are said to be broken-backed, or chinked in the chine. Where this impairs the natural usefulness of the horse, it is such an alteration of structure as constitutes *unsoundness*.

142. *Back: Saddle-back, Cradle-back, Hollow-back, Low-back.*—These terms are used to denote the form of horse who has his back lower than in ordinary cases.

Such a horse, when not so low in the bend of the back as to be disqualified for carrying a fair amount of weight, is generally easy and pleasant to ride, and *sound*.

But, when the back is so low as to disenable the horse to carry proper weight, though he may be a good harness horse, he is, as a saddle horse, *unsound*.

For harness, such a horse may be considered sound, and he is by some preferred for his showing an elevated forehead.

143. *Roach, or High-back*, is the reverse of low-back, and is frequently produced in a horse by his being set to draw heavy weights while he is young. When it occurs to a moderate extent only, it does not impede him in his work, and he is, therefore, *sound*.

Even though it does not interfere with his title to a warranty of soundness, yet, when it is a positive disfigurement to the horse, it is held to be a *blemish*.

When the back is weakened, or the horse is thereby impeded in his work, he is *unsound*.

144. *Blemishes.*—All scars left from wounds or sores, as well as all unsightly enlargements, whether such be the effects of blows, work, or sprains, are blemishes.

Some blemishes do and some do not impair the horse's value; thus, while collar marks are considered a disgrace to a saddle horse, and lessen his value, in a very superior harness horse they would be altogether overlooked.

Broken knees lessen the market price of all horses; so, also, does the loss of one or both eyes. (See *Blindness*.)

Marks on the fetlock show that the horse has at some time or other cut, and therefore require to be noticed, with a view to seeing what probability there is that he will do so again.

But, if such marks are not the result of any peculiarity in his make, they may be perchance of no consequence, as it is possible they may have been produced in him when, as a colt, he was being broken, or when, subsequently, he was laboring under severe illness, fatigue, or want of condition.

145. *Balkiness, or Backing and Jibbing*, are closely allied, and are generally the result of bad breaking at the time when the horse is first put to the collar and refuses to start. When the habit becomes confirmed, the horse swerves, gibs, and backs, as soon as he thinks he has had enough work, or has been improperly checked or corrected, or when he begins to feel the pressure of the collar painful. It is impossible permanently to cure a horse of this bad habit when it has become fixed; and, as it is both dangerous and diminishes a horse's natural usefulness, it is a breach of a warranty of freedom from *vice*. In the case of Finley *v.* Quirk[1] (a Minnesota case), the Supreme Court held, that the fact of a horse on trial three or four days after purchase proved to be balky, is evidence that he was balky at the time of purchase.

Biting, when dangerous, is a vice.

146. *Blindness*.—The *crystalline lens* is generally the seat of disease in the eye of a horse; it is so called from its resemblance to a piece of crystal or transparent glass, and on it all the important uses of the eye mainly depend. It is of a thick, jelly-like consistence, *convex* on each side, but there is more convexity on the inner than on the outer side.

It is inclosed in a delicate transparent bag or capsule, and is placed between the aqueous and the vetreous humors, and received within a hollow in the *latter*, with which it exactly corresponds. It has, from its density and its double convexity, the chief concern in conveying the rays of light, which pass into

[1] 9 Minn. 194.

pupil. The *lens* is very apt to be affected from long or violent inflammation of the conjunctiva and either its capsule becomes *cloudy*, and imperfectly transmits the light, or the substance of the *lens* becomes opaque.

The confirmed *cataract*, or the *opaque lens*, of long standing, will exhibit a pearly appearance which can not be mistaken, and will frequently be attended with a change of form, a portion of the *lens* being forced forward into the pupil. Although the disease may not have proceeded so far as this, yet if there be the slightest cloudiness of the *lens*, either generally, or in the form of a minute spot in the center, and with or without lines radiating from that spot, the horse is to be condemned; for in ninety-nine cases out of a hundred, the disease will proceed, and *cataract*, or complete *opacity of the lens*, and absolute *blindness* will be the result. *Cataract* is an *unsoundness*.[1]

That *inflammation* of the eye of the horse, which usually terminates in *blindness*, of one or both eyes, has the peculiar character of *remitting* or *disappearing* for a time, once or twice, or thrice, before it fully runs its course. The eye, after an attack of inflammation, regains so near its former natural brilliancy that a man well acquinted with horses will not always recognize the traces of former disease. After a time, however, the inflammation returns, and the result is unavoidable.

Blindness is undoubtedly an *unsoundness;* but to constitute a breach of warranty in case of *cloudiness of the eye, or opacity of the lens*, after the sale, there must either be proof of an attack of inflammation before sale, or veterinary surgeons must be produced who will distinctly state that, from the appearance of the eye, there *must have been* inflammation before the time of sale. The following case is in point:

A horse was bought by the plaintiff in April, warranted sound and quiet. He was sent, on the 18th of June, to be examined by an eminent veterinary surgeon, who detected an "*opacity of the crystalline lens*" in the near eye, and pronounced it his decided opinion that the *defect* must have been of long standing, and

[1] Higgs *v.* Thrale, before Chief Baron Pollock, Guildhall, February 18, 1850.

that in fact it was chronic; to produce which state, it must have required a great many successive attacks of inflammation. It might have been produced in six months, and it was a sort of thing which few dealers would have been likely to find out. Another veterinary surgeon had examined the horse, and did not see the defect, but could not swear that it did not then exist. On this evidence, a verdict was found for the plaintiff.[1]

147. *Broken Wind.*—The disease, broken wind, is easily recognized by the horse's peculiar suppressed cough when at exercise, after a hearty meal, or upon being changed from one kind of atmosphere to another, as, for instance, from the stable air to a cold and foggy atmosphere, or *vice versa.*

If you observe a horse thus afflicted, when he is quiet, you may notice that the flank appears to distend and contract *twice* while the ribs rise once.

Immediately after brisk exercise this labored breathing is still more apparent, the nostrils being more or less distended, and a peculiar seam or wrinkle between them being perceptible; whereas, in horses of "good wind" no such mark can be found.

Broken-wind horses are *unsound.*

148. *Bronchitis.*—The division of the wind-pipe just before it enters the lungs, and the numerous vessels into which it immediately afterward branches out, are called the *bronchial tubes*, and the inflammation of the membrane that lines them is called *bronchitis.*

It is *catarrh* extending to the entrance of the lungs, and is characterized by quicker and harder breathing than catarrh usually presents, and by a peculiar wheezing, which is relieved by the coughing up of *mucus.* It is decidedly an *unsoundness.*

149. *Bleeding*, simple as the operation seems, and in spite of the careless and slovenly manner in which many horse proprietors allow it to be performed, is not unattended with danger.

As mischievous and unexpected results follow from even the most carefully executed operation, until the orifice made by the lancet or fleam is completely healed the horse is *unsound.*

[1] Briggs *v.* Baker, before Chief Justice Tindal, November 29, 1845. See also Holliday *v.* Morgan, 1 El. & El. 1.

When he is healed, and no evil effects or symptoms remain, he is *sound.*

Any large, unsightly knot or lump about the neck-vein will generally be found to be the effect of bleeding, and must be considered to be a *blemish.*

150. *Bald Places.*—Bare or bald places, which occur on many parts of horses bodies, are not deserving of much notice, not being indications of any fault nor of any liability to accidents. However, when they are accounted unsightly, they are considered to be *blemishes.*

With a saddle horse, such a blemish occurring on the shoulders is decidedly unsightly ; while in a harness horse otherwise suitable for the purpose, it would be ridiculous to object to that which is covered by the collar. The same reasoning applies to the marks beneath the roller or saddle, as well as to all such as are covered by the horse's trapping when at work.

151. *Bandages.*—Where the constant use of bandages is required to enable a horse to perform the ordinary work of horses of his class, he is *unsound.*

Bandages are good things properly applied, and there is a great deal of humanity in their seasonable appropriation and right use. You should remember, however, that there may also be "too much of a good thing" and that by overdoing the thing, or bandaging improperly, you defeat your own purpose.

152. *Bar Shoes.*—Whenever bar or round shoes are required, even though for a temporary purpose, the horse is *unsound;* for no disease is cured, whether sand-cracks, corns, thrushes, or whatever else it may be, so long as these shoes are *necessary.*

153. *Bastard Strangles, or Vives.*—When a horse has not had the strangles at the usual time—that is, generally between the second and fourth years—he is frequently attacked by this disease, being in fact the strangles delayed till a later period of life than usual. Vives really means a revival of the attack, which is frequently called by old farriers bastard strangles, or vives, and which is a more obstinate complaint than true strangles.

Vives is not often in itself fatal, nor difficult to cure if attended to without delay, but if neglected it is often followed by very serious results, such as broken wind, or even glanders. It

is originated by a severe cold, too long neglected. The accompanying cough is more violent than that in strangles.

A horse laboring under vives or bastard strangles is *unsound.*

Should you have bought the horse with an expressed understanding that the disease under which he was laboring was the strangles only, and that he was in other respects sound, you may return him if the complaint is found to be the vives, on the score of his not fulfilling the conditions of the warranty.

154. *Bearing Rein.*—Among the many advantages of dispensing with the bearing-rein, not the least is that of doing away with the nut which fastens the hook in the saddle, as this not uncommonly hurts the horse's back, producing, if not broken knees and fistula, at least a troublesome sore on the withers.

Whether such a result be the smallest pimple or the largest wen, the merest abrasion or the foulest ulcer, the horse is in any case *unsound.*

When the sore is healed, and the horse restored to perfect usefulness, he is again *sound.*

When the saddle hurts the horse so much as to cause him to go lame, or to fall upon his knees, and no sore is visible on the removal of the saddle, the horse is *sound.*

But should there be any wound caused by the saddle, the animal is, until cured, *unsound.*

155. *Bent Before.*—When the forelegs of the horse are bent forward at the knee, he is said to be bent before. This may proceed from overwork, or from pain in the feet, resulting from contraction, inflammation, etc., but it more frequently proceeds from flat feet. In these cases the animal is *unsound.*

When the cause does not consist in pain, and when the deviation from the natural line is but slight, and the horse can do his proper work without inconvenience, even then, as in the case of total blindness, the defect may be visible, but he is *sound.*

When the profile of the forelegs has a deviation of anything more than the very slightest, it is a *blemish.*

156. *Contraction.*—In *contraction*, the foot loses its healthy circular form; it increases in length, and narrows in the quarters, particularly at the heel; the frog is diminished in width;

the sole becomes more concave, the heels higher, and lameness, or at least a shortened and feeling action, ensues. It seems there is nothing in the appearance of the feet which would enable a person to decide when *contraction* is or is not destructive to the natural usefulness of the animal, but it is indicated by his manner of going and his capability for work.

Lameness usually accompanies the beginning of *contraction*. It is the invariable attendant on rapid contraction, but it does not always exist when the *wiring* in is slow or of long standing. *Contraction* may be caused by neglect of paring, by suffering the shoes to remain on too long, by the want of natural moisture on account of the feet being kept too dry, or by the removal of the bars, or by thrushes, which, however, are much oftener the consequence than the cause of it. The contraction, however, which is connected with permanent lameness, though increased by the circumstances just mentioned, usually derives its origin from a cause which acts violently and suddenly, namely, an inflammation of the little plates covering the coffin-bone, and not sufficiently intense to be characterized as acute founder. The contracted heel rarely or never permanently expands, as neither the lengthened and narrowed coffin-bone can resume its natural shape, nor can the portion of the frog which has been absorbed be restored.

Contraction of the hoof, when produced by inflammation, or accompanied by disease in the foot, or any alteration in its natural structure, though it may not cause lameness at the time of sale, yet, if lameness be afterward produced by it, is an *unsoundness*. This was held in the following case, which was tried before Chief Baron Pollock:

It appeared that the plaintiff, who was a horse dealer, bought a mare at Lincoln Fair, warranted sound, for 37*l*. On her way up to town, she gradually became dead lame on her off foreleg. She was brought by easy stages to London, and examined by various veterinary surgeons, who at once asserted that her lameness proceeded from a contraction of the hoof of the off forefoot, which might have existed, and probably did exist, before sale, though the disease had not developed itself in lameness, and that, at all events, there *must* have been a strong predisposi-

tion to unsoundness. The defendant wrote a letter, offering to take her back. However, it was miscarried, and the mare was sold by auction for 25*l.* An action was brought for the balance, and on this evidence the jury gave a verdict for the plaintiff.

157. *Capped hocks* are the result of blows, not unfrequently from kicking or rubbing against sharp corners of the stall-post. Stone or fluted iron pillars at the back end of the stalls are the most frequent cause. They are unsightly, but they in no way inconvenience the animal, unless suppuration takes place, when they heal soon, and the swelling disappears. While this suppuration is going on, and the wound is unhealed, as there is a disease in progress, the horse is *unsound.*

Although in itself simple, there is no telling with certainty what will be the result, but when the horse is cured he is *sound.*

Where there is no appearance of suppuration taking place, he is sound.

Where capped hocks, from their size, become a disfigurement to the horse, a suspicious sign on harness horses, they must be recorded as a *blemish.*

158. *Canker.*—Thrushes neglected will turn to canker. This disease in the hoof is easily detected, and is very troublesome to cure. A cankered horse is *unsound.*

159. *Cough.*—A cough from catarrh or common cold is a complaint of frequent occurrence, generally subdued without much difficulty, but often becoming of serious consequence when neglected. It is accompanied by a little increase of pulse, a slight discharge from the nose and eyes, a rough coat, and a diminished appetite. If the inflammation increases, the complaint degenerates into *bronchitis*, catarrhal fever, thick wind, and broken wind.

Although it was laid down differently by Mr. Justice Coleridge, in Bolden *v.* Brogden,[1] it may now be considered as settled law that a *cough* at the time of sale, whether *permanent* or *temporary*, is a *breach* of a warranty of *soundness*, and the subsequent recovery of the horse is no defense to an action on the warranty,[2]

[1] 2 M. & Rob. 113.

[2] Coates *v.* Stephens, 2 M. & Rob. 157.

but may be proved in *reduction of damages*.[1] The law on the subject of temporary diseases was laid down by Lord Ellenborough nearly forty years ago; and with regard to a *cough*, his lordship said:

"I have always held, and now hold, that a warranty of soundness is broken if the animal, at the time of sale, had any infirmity upon him which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a *cough*, I say he is unsound, although that may be either temporary, or the *cough* may prove mortal.[2] Any infirmity which renders a horse less fit for present use and convenience is unsoundness."[3]

In a late case an action was brought on the warranty of a horse which, immediately on being taken home after sale, was found to have a *cough*. The cough became worse, and on the horse being examined by a veterinary surgeon eighteen days afterward, he was pronounced unsound from *diseased bronchial tube* and chronic inflammation, *cough* being an incident of that disease. However, it appeared that at the time of the trial, the *cough* had been cured. Mr. Baron Parke, in summing up, said to the jury:

"I have always considered that a man who buys a horse warranted sound, must be taken as buying for immediate use, and has a right to expect one capable of that use and of being immediately put to any fair work the owner choses.

"The rule as to *unsoundness* is, that if at the time of sale the horse has any disease which either actually does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has, either from disease or accident, undergone any alteration of structure that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is *unsound*.

"If the *cough* actually existed at the time of sale as a disease so

[1] Kiddell *v.* Barnard, 9 M. & W. 670.

[2] Elton *v.* Brogden, 4 Camp. 281.

[3] Elton *v.* Jordan, 1 Stark., N. P. C. 127.

as actually to diminish the natural usefulness of the horse at that time and to make him then less capable of immediate work, he was then *unsound;* or if you think the *cough*, which in fact did afterward diminish the usefulness of the horse, existed at all at the time of sale, you will find for the plaintiff.

"I am not now delivering an opinion formed on the moment on a new subject, but it is the result of a full previous consideration, as I find I differ from the law as laid down by a learned judge."[1] The jury found a verdict for the plaintiff.[2]

160. *Chest-founder.*—The muscles of the breast are occasionally the seat of a singular and somewhat mysterious disease. The old farriers called it *anticor* and *chest-founder.* The horse has considerable stiffness in moving, evidently not referable to the feet.

There is a tenderness about the muscles of the breast and occasional swelling, and after a while the muscles of the chest waste considerably. It is evidently an *unsoundness*, and was formerly supposed to proceed from rheumatism ; but now, according to the later opinions, *chest-founder* is pronounced to be the result of navicular disease, which, preventing the forelegs from being exercised to the same extent as before, produces an absorption of the muscles of the chest. *Anticor* is distinguished from *chest-founder*, and declared to be an abscess of the breast of the brisket.

But where an action was brought on the warranty of a horse, and the plaintiff obtained a verdict on the ground that the horse was *chest-foundered*, the Court of Common Pleas refused to grant a new trial, on the ground that there was no known disease to constitute such *unsoundness*, or that the defendant was taken by surprise, the plaintiff having before trial refused to inform him of the cause or nature of the *unsoundness*.[3]

161. *Corns.*—In the angle between the bars and the quarters, the horn of the sole has sometimes a red appearance, and is more spongy and soft than at any other part. The horse flinches when this portion of the horn is pressed upon, and there is an

[1] Mr. Justice Coleridge, in Bolden *v.* Brogden, 2 M. & Rob. 113.

[2] Coates *v.* Stephens, 2 M. & Rob. 157.

[3] Atterbury *v.* Fairmanner, 8 Moore, 32.

occasional or permanent lameness. This disease of the foot is termed *corns*, bearing this resemblance to the corn of the human being: that it is produced by pressure and is a cause of lameness, but differing from it in that the horn answering to the skin of the human foot is thin and weak, instead of being thickened and hardened. When it is neglected, so much inflammation is produced in that part of the sensible sole, that suppuration follows, which is succeeded by quittor, and the matter either undermines the horny sole, or is discharged at the coronet. The cause is pressure on the sole at that part by the irritation of which a small quantity of blood is extravasated. The horn is secreted in a less quantity, and is of a more spongy nature, and the extravasated blood becomes inclosed in it. The portion of the foot in which they are situated will not bear the ordinary pressure of the shoe, and any accidental additional pressure from the growing down of the horn or the introduction of dirt or gravel will cause serious lameness. They render it necessary to wear a thick and heavy shoe or a bar-shoe to protect the weakened and diseased part.

Corns are hardly ever found on the hind feet; in any situation, they are very seldom radically cured, and manifestly constitute *unsoundness*.

162. *Cutting*, like speedy cut, arises from badness of structure, and, being neither a disease or a bad habit, can not be pronounced a *breach* of a warranty of soundness and *freedom from vice*, and, although it may be a greater detriment to the horse than some kinds of unsoundness or vice, yet, if the wounds occasioned by it did not actually exist at the time of sale, the purchaser has no legal remedy against the buyer. This is a case to which the legal maxim *caveat emptor* particularly applies. The purchaser should examine the horse, and if there appear any probability of *cutting*, a special warranty should be taken against it. It is always a great annoyance, and the effects produced by it are sometimes most serious. Many horses go lame for a considerable period after *cutting* themselves severely, and others have dropped from sudden agony, and endangered themselves and their riders. *Cutting* renders a horse liable to serious injury of the legs, and

indicates that he is either weak or has an awkwardness of gait inconsistent with safety.

In the only decided case on the subject it was held that mere *badness of shape*, though rendering the horse incapable of work, 1859; that the excresence on the fore-leg was of a bony or is not *unsoundness*. It appeared that at the time of sale there existed neither lameness nor wound. And Mr. Justice Alderson said: "The horse could not be considered unsound in law merely from *badness of shape*. As long as he was uninjured, he must be considered sound. When the *injury* is produced by the badness of his action, that injury constitutes the *unsoundness*.[1]"

163. *Curb.*—From sudden or overexertion, the ligaments which tie down the tendons in the neighborhood of joints may be extended, and inflammation, swelling, and lameness may ensue, or the sheaths of the tendons in the neighborhood of joints, from their extent of motion in these situations, may be susceptible of injury.

A *curb* is an affection of this kind. It is an enlargement at the back of the hock, about three or four inches blow the point of the hock. Any sudden action of the limb, of more than usual violence, may produce it, and therefore horses are found to "throw out curbs" after a hardly contested race, an extraordinary leap, a severe gallop over heavy ground, or a sudden check in the gallop. Young horses are particularly liable to it, and horses that are *cowhocked*, or whose hocks and legs resemble those of a cow, the hocks being turned inward and the legs forming a considerable angle outward; for in hocks so formed, the annular ligament must be continually on the stretch to confine the tendon.

A horse with a *curb* is manifestly *unsound*. But as curbs do not necessarily produce lameness, it is considered that horses with curbs may be passed as sound on a special warranty being given, that should the curb cause lameness within a reasonable time (which time should be fixed) the seller should be responsible.

But if a horse throw out a curb immediately after sale, it is

[1] Dickenson *v.* Follett, 1 M. & Rob. 299.

no breach of a warranty of soundness, even if he had *curby hocks* at the time of sale. Thus, where an action was brought on a breach of warranty of soundness, it appeared that the plaintiff before sale had objected to the horse because he had CURBY *hocks*. However, he bought him on a general warranty of soundness being given, and about a fortnight after sale the horse sprung a *curb*. At the trial, veterinary surgeons were called by the plaintiff, who stated that the term *curby hocks* indicated a peculiar form of the hock, which was considered to render a horse more liable to throw out a curb, but did not of itself occasion lameness. Lord Abinger, C. B., told the jury "that a defect in the form of the horse, which had not occasioned lameness at the time of the sale, although it might render the animal more liable to become lame at some future time, was no breach of the warranty." And, on a motion for a new trial, the Court of Exchequer refused a rule, Mr. Baron Alderson saying, "Dickinson *v.* Follett[1] is expressly in point for the defendant, and the law, as laid down by me on that occasion, has not been questioned in any subsequent case."[2]

164. *Crib-biting*, being an unnatural sucking in of the air, must be to a certain degree injurious to digestion, must dispose to colic, and so interfere with the strength and usefulness and health of the horse. Some *crib-biters* are good goers, but they probably would have possessed more endurance had they not acquired this habit; and it is a fact well established, that as soon as a horse begins to become a *crib-biter*, he, in more than nine cases out of ten, begins to lose condition. He is not, to the experienced eye, the horse he was before. The wear of the front teeth, and even the frequent breaking of them, makes a horse old before his time, and sometimes renders it difficult, or almost impossible, for him to graze.

Crib-biting which has not yet produced disease or alteration of structure, is *not* an *unsoundness*, but is a *vice* under a warranty that a horse is "sound and free from vice." Thus, when an action was brought on the warranty of a horse which had been

[1] 1 M. & Rob. 299.

[2] Brown *v.* Elkington, 8 M. & W. 132.

sold for ninety guineas, the question was, whether *crib-biting*, which was the *vice* in question, was such a species of *unsoundness* as to sustain the action. The horse had been warranted sound generally. Some eminent veterinary surgeons were called as witnesses, who stated that the habit of *crib-biting* originated in indigestion; that a horse by this habit wasted the saliva which was necessary to digest his food, and that the consequence was a gradual emaciation. They said they did *not* consider *crib-biting* to be an *unsoundness*, but that it may lead to *unsoundness;* that it was sometimes an indication of incipient disease, and sometimes produced *unsoundness* where it existed in any degree. Upon this Mr. Justice Burrough, said: "This horse was only proved to be an incipient *crib-biter*. I am quite clear that it is not included in a general warranty," and the plaintiff was accordingly non-suited.[1]

Thus, in the case of Scholefield *v.* Robb,[2] where a horse was bought warranted "sound and free from vice," and an action was brought against the vendor on the ground of its being a *crib-biter* and *wind-sucker*, veterinary surgeons were examined who said that the habit of *crib-biting* was injurious to horses; that the air sucked into the stomach of the animal distended it, and impaired its powers of digestion, occasionally, to such an extent as greatly to diminish the value of the horse and render it incapable of work. Some of the witnesses gave it as their opinion that *crib-biting* was an *unsoundness;* it was not, however, shown that in the present instance the habit of *crib-biting* had brought on any disease, or had, as yet, interfered with the power or usefulness of the horse.

Mr. Baron Parke told the jury that to constitute *unsoundness* there must either be shown alteration in the structure of the animal, whereby it is rendered less able to perform its work, or else there must be some disease. Here neither of those facts had been shown. If, however, the jury thought that at the time of the warranty the horse had contracted the habit of *crib-biting*, he thought that was a *vice*, and that the plaintiff would be enti-

[1] Broennenburgh *v.* Haycock, Holt, 630.

[2] 2 M. & Rob. 210.

tled to a verdict on that head. The habit complained of might not, indeed, like some others (for instance, that of kicking) show *vice* in the temper of the animal, but it was proved to be a habit decidedly injurious to its health, and tending to impair its usefulness, and came, therefore, in his lordship's opinion, within the meaning of the term *vice* as used on such occasions as the present.

And in the case of Paul *v.* Hardwick,[1] some of the most eminent veterinary surgeons gave evidence that *crib-biting* was, in their opinion, at all events, a vice within the meaning of a warranty that a horse was free from vice, and the plaintiff had a verdict on that ground.

In a late Massachusetts case, Washburn *v.* Cuddihy,[2] which was an action of contract on a warranty of soundness of a horse exchanged by the defendant with the plaintiff for another horse—trial in the court of common pleas at October term, 1856—Justice Briggs, in giving the decision, used the following words: "The unsoundness alleged was that the horse was a *cribber*, and that he was so affected by that complaint, or disease, that he was rendered much less valuable." The court rightly refused to rule as matter of law that *cribbing* was not *unsoundness* in a horse.

As indications of approaching disease fall under that term, it would be difficult to say *cribbing* was not *unsoundness*. A crib-biter will not retain his condition or be fit for constant work.

165. *Dishing* is a term used to express the movements of those horses which turn out their forefeet when in action; they usually lift their legs high and are safe to ride, but unpleasant, partly on account of the peculiar roll of the shoulders, and also because their action bespatters riders with mud.

This action is rarely seen in English horses, though sometimes it is induced by bad breaking; with work it generally leaves them, or as they get stronger with age they lose the habit; but in American horses it may often be noticed.

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[1] Sittings at Westminster H. T. 1831, MS.; Chitty on Contracts (ed. of 1860), 480.

[2] 8 Gray, 430.

A horse that thus turns his feet is unable to perform long journeys, or to do extraordinary work, on account of the amount of exertion consumed in accomplishing the useless labor.

Horses that have this habit may still be considered *sound.*

166. *Dropsy of the Skin.*—There are two kinds of dropsy, which must both be considered, namely, *dropsy of the skin* and *dropsy of the heart.* Dropsical swellings often appear between the forelegs and on the chest; they are effusions of fluid underneath the skin. They accompany various diseases, particularly when the animal is weakened by them, and sometimes appear when there is no other disease than the debility, which, in the spring and fall of the year, accompanies the changing of the coat.

167. *Dropsy of the Heart.*—When the *pericardium* of the heart itself becomes inflamed, the secretion of the *pericardium* is much increased, and so much fluid accumulates as to obstruct the beating of the heart. This is called *dropsy of the heart*, and each of these diseases is an *unsoundness.*[1]

168. *Enlargements.*—During the formation of soft enlargements, and until their result is ascertained, the horse is *unsound.*

If, upon their being fully developed, they do not impede the horse in the execution of his work, he is *sound.*

But when they are so large as to be unsightly they are *blemishes.*

169. *False Quarter.*—Where the coronary ligaments by which the horn of the coronet is secreted, is either divided by a cut or bruise, or eaten through by caustic, there will be a division of the horn as it grows down, either in the form of a permanent sand-crack, or of one portion of the horn overlapping the other. This is not only a very serious defect, and a frequent cause of lameness, but it is exceedingly difficult to remedy, and must be considered *unsoundness.* Sometimes the horn grows down whole, but the ligament is unable to secrete that which is perfectly healthy, and, therefore, there is a narrow strip of horn of a different and lighter color.

170. *Fever in the Feet, or Acute Founder.*—Fever in the feet will produce in a horse "low action," or "going near the ground," and the horse thus afflicted is *unsound.*

[1] Eaves *v.* Dixon, 2 Taunt. 343.

If fever in the feet be of so recent a character as not to have caused alteration in the structure of the feet, it is curable; but this disease is so rapid in its progress, and so quickly assumes a chronic form and produces permanent lameness, that it is rarely worth while buying a horse thus affected, unless you are thoroughly conversant with the treatment proper for such cases.

171. *Farcy* is intimately connected with glanders. They will run into each other, or their symptoms will mingle together, and before either arrives at its fatal termination its associate will almost invariably appear. An animal inoculated with the matter of farcy will often be afflicted with glanders, while the matter of glanders will often produce farcy. They are different types or stages of the same disease. There is, however, a very material difference in their symptoms and progress, and this most important one of all, that while glanders are generally incurable, farcy, in its early stage and mild form, may be successfully treated. It is, however, in either case an *unsoundness.*

172. *Farcy Water*, compounded by name with the common farcy, is a dropsical affection of the skin, either of the chest or of the limbs generally, and is also an *unsoundness.*

173. *Grease.*—Swelled legs, although distinct from *grease*, are apt to degenerate into it. It is an inflammation of the skin of the heel, sometimes of the fore, but oftener of the hind-foot. The skin of the heel of the horse somewhat differs from that of any other part. There is a great deal of motion in the fetlock, and to prevent the skin from excoriation or chapping, it is necessary that it should be kept soft and pliable; therefore, in the healthy state of the part, the skin of the heel has a peculiar greasy feel. Under inflammation the secretion of this greasy matter is stopped, the heels become red, dry, and scurvy, and being almost constantly in motion, cracks soon succeed; these sometimes extend, and the whole surface of the heel becomes a mass of soreness, ulceration, and fungus. When this disease renders a horse unfit for immediate work, it must be considered an *unsoundness.*

174. *Grogginess.*—Horses that are usually termed groggy do not nod, or, rather, bow their heads, on account of being equally lame with both forefeet. Their ears are placed backward when in action, and there is peculiarity about their stepping,

as if from anxiety to retain their feet upon the ground each time they touched it. There is also a peculiarity in the working of their shoulder-blades, and, in spite of their mostly going well upon their haunches to relieve their forefeet, they are very shaky and unpleasant, more especially when put into the canter. Some consider them easy in the trot. They ought, however, to be used only in harness, or where there is no weight on the back. They are *unsound.*

175. *Glaucoma* is a dimness or obscurity of sight from an opacity of the vitreous humor. It is difficult to ascertain, and is only to be discovered by a very attentive examination of the eye. It prevents a horse from appreciating objects, and is therefore an *unsoundness.*[1]

176. *Glanders.*—The most formidable of all the diseases to which the horse is subject is *glanders.* It is described by writers fifteen hundred years ago; and it was then, and is now, not only a loathsome but an incurable disease. The most early and unquestionable symptom of glanders is an increased discharge from one or both nostrils; different from the discharge of catarrh, because it is usually lighter and clearer in its color, and more glutinous or sticky. It is not discharged occasionally and in large quantities, like the *mucus* of catarrh, but it is constantly running from the nostril. This has always been held an *unsoundness*, and in the case of Woodbury *v.* Robbins[2] (a Massachusetts case), the judge used the following words: "The moment that symptoms of glanders appear in a horse, it is indications of the incipiency of the disease—that is, if he really have the seeds of it in him, he is *unsound*, although it may be some time before the disease becomes fully developed in its most offensive conditions. And it is the future history of the case which is to show whether it was the *glanders* or not. Symptoms are not always decisive, but the result shows whether or not a true prognostification was deduced from the symptoms. If, in the words of the testimony here, the seeds ripen into the unmistakable glanders, then the seeds are the *glanders*—it is only the difference between

[1] Settle *v.* Garner, Cor. Martin, B., Westminster, Feb. 10, 1857.
[2] 10 Cush. (Mass.) 520.

the inchoate and consummate glanders. In this view of the subject, we sustain the exceptions, and direct a new trial in the court of common pleas."

177. *Goggles* has been held an *unsoundness* in sheep, in the case of Joliff *v.* Bendell,[1] where the plaintiff bought a hundred sheep warranted sound; about two months after sale fifty of them died of the *goggles*, which was stated by farmers and others conversant with sheep to arise from "breeding in and in from relations;" and that sheep so disordered will thrive and seem to be in sound health until they be about two or three years old; that there were no means of discovering, by the appearance or otherwise, when sheep are affected; that it is generally fatal, and no cure or prevention known for it, and that it was reputed among farmers as *unsoundness*. Chief Justice Abbott left it to the jury to say "whether at the time of the sale the sheep had existing in their blood or constitution the disease of which they afterward died, or whether it had arisen from any subsequent cause." And, on this direction, a verdict was found for the plaintiff.

178. *Harness, Quiet in.*—"Warranted quiet in harness" does not imply the long usage of a horse to that particular kind of work, or that he has become particularly handy. All that it engages is that the horse has been used sufficiently to prove that any coachman of tolerable ability may drive him without accident. Therefore, after buying a horse thus warranted, before you put yourself to any expense in returning him on account of an accident, be sure the accident was not caused through your own negligence.

A little negligence or mismanagement may do a great deal of mischief. Too rough a hand upon a sensitive mouth, or a little nervousness or improper treatment in the driving or inattention to the harness, may be all the fault, and, after being put to great inconvenience, you may still be obliged to retain the horse, as all those things that seemed the effect of *vice* have been occasioned by want of skill.

A chance kick or rear, if merely in play, as is generally the case when the animal is too fresh or in the habit of looking or

[1] R. & M. 136.

playing on seeing certain objects (which some would term shying), is not a vice, and does not render the horse returnable where it can be proved that he was in a good humor or wanted work. Any mischief that might result would be at the risk of the buyer.

But where the seller allows any one to try a horse in harness while thus too fresh, without giving a caution, all mischief that ensues falls upon the vendor's shoulders. Where this caution is given, he must be either a very good or a very fool-hardy coachman to be his own driver until the seller has driven a little of this play out of him. In a recent case in Wisconsin (Smith *v.* Justie),[1] the Supreme Court held that in the sale of a horse, where he is bought for use in harness, and the vendor knowing that fact represents that the horse is all right to induce the vendee to purchase it, and the latter purchases relying on such statement, the representations amount to a warranty not only of soundness, but that the horse is reasonably fit for the use intended.

Paine, J., in deciding the case, said: "Thus, if the horse was purchased to be used in harness, if the vendor said it was all right, and it was actually ungovernable in harness, though a good saddle-horse, that would be a breach of warranty."

So, in the case of Woodruff *v.* Weeks (Connecticut case),[2] it was held, that a warranty that cattle will work evenly in the yoke, is broken if they will not so work when driven by one of ordinary skill in the management of oxen.

179. *Heel, Fleshy.*—*Fleshy heel* is an abnormal structure of the frog, wherein the sensitive part of the foot becomes too much exposed, the horse thereby being more or less tender according to the progress of the disease, and therefore *unsound.*

180. *Heels, Cracked.*—When of recent occurrence, cracked heels are of less consequence than grease. Till cured, the animal is *unsound.*

Afterward *sound.*

181. *Humors* is a term applied to swelling of the legs and

[1] 13 Wis. 600.

[2] 28 Conn. 328

other parts of the horse, and to small spots on the body, which denote a want of medicine or bleeding. When humor arises from weakness or overwork, tonics should be applied occasionally, but as they are not properly understood by the term medicine, it is right they should be mentioned to prevent the substitution of depletents.

A horse while thus troubled is *unsound.*

When the effect of the medical treatment is over, and the indications of its necessity removed, he is again *sound.*

182. *Kicking*, either in the stable or harness, is a bad and dangerous habit, and therefore a *vice.* Some horses, particularly mares, from fidgetiness and irritability, get a habit of kicking at the stall, and this generally taking place at night disturbs the other horses, and produces swelled hocks or some other serious injury. It shows *vice* in the temper of the animal, and it is very seldom that a confirmed *kicker* can be cured.[1]

183. *Kidney Dropping.*—A *kidney-dropper* will appear quite well at starting, but, after traveling a short distance, he will come to a dead stand-still, and if not supported, will drop down on the spot. A kidney-dropper is worthless and *unsound.*[2]

184. *Lameness*, whether temporary or permanent, is an *unsoundness;* because however temporary it may be, or however obscure, it lessens the utility of the horse and renders him *unsound* for the time. How far his soundness may be afterward affected, must depend on the circumstances of the case. The law, as laid down in Coates *v.* Stephens,[3] and Kiddell *v.* Barnard,[4] with regard to temporary diseases, is the same as was formerly held by Lord Ellenborough, and will be seen in the following cases: A horse sold, warranted sound, was proved to have been lame at the time of sale; this the defendant admitted, but undertook to prove that the lameness was of a temporary nature, and that the horse had afterward recovered, since which he had been perfectly sound; however, Lord Ellenborough said, "I have always

[1] Schofield *v.* Robb, 2 M. & Rob. 210.

[2] See Eastman's case, Lambeth Police Court, November 11, 1853.

[3] 2 M. & Rob. 137, overruling Bolden *v.* Brogden, 2 M. & Rob. 113.

[4] 8 M. & W. 670.

held, and now hold, that a warranty of soundness is broken if the animal, at the time of sale, had any infirmity upon him which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a cough, I say he is *unsound*, although that may either be temporary or may prove mortal. The horse in question, having been lame at the time of sale, when he was warranted to be sound, his condition subsequently is no defense to the action."[1]

And in another case, on the trial of an action on the warranty of a horse, where the evidence was very contradictory, but a witness of the defendant's admitted that he had bandaged one of the forelegs of the horse, but not the other, because the one was weaker than the other, Lord Ellenborough said, "To constitute *unsoundness*, it is not essential that the infirmity should be of a permanent nature; it is sufficient if it render the animal for the time unfit for service; as, for instance, a cough, which for the present renders it less useful, and may ultimately prove fatal. Any infirmity which renders a horse less fit for present use and convenience is *unsoundness*."[2] In a previous case, it was said to have been held, that a warranty that a horse is sound, is not false because the horse labors under a temporary injury from an accident at the time the defendant warranted it sound. But the warranty there appears to have been a qualified one, because when bargaining the plaintiff observed that the mare went rather lame on one leg. The defendant replied that it had been occasioned by her taking up a nail at the farrier's, and, except as to that lameness, she was perfectly sound.[3] In the case of Brown *v.* Bigelow[4] (Massachusetts case), it was held that a bill of sale of "one horse sound and kind," is a warranty of soundness upon which the vendor is liable if the horse proves to be permanently lame, although the purchaser knew that he was lame a week

[1] Elton *v.* Brogden, 4 Camp. 281.

[2] Elton *v.* Jordan, 1 Stark. N. P. C. 127.

[3] Garment *v.* Bars, 2 Esp. 673.

[4] 10 Allen, 242.

before the sale, and his lameness was talked of before the sale, and the vendor then refused to give a warranty.

185. *Laminitis*, *Chronic.*—This is a species of founder, insidious in its attack, and destructive to the horse. It is a milder form of *acute founder*. There is lameness, but it is not so severe as in acute founder. The horse stands as usual. The crust is warm, and the warmth is constant, but it is not often probably greater than in a state of health. The surest symptom is the action of the animal. It is diametrically opposite to that in the navicular disease. The horse throws as much of his weight as he can on the posterior parts of his feet. In any case, it is an *unsoundness*.[1]

186. *Lampas* is a fullness in the mouth of young horses, and is so generally confined to them as to be almost an incontrovertible proof of youth.

If *lampas* interferes with their eating, a little blood should be taken away by scarifying the roof of the mouth, or a dose of physic should be administered. Until one of these two courses is adopted, the horse is *unsound*.

187. *Liver.*—A diseased *liver* is an *unsoundness*.

In the case of Buckingham *v.* Rogers,[2] where the plaintiff, a horse dealer, on the 2d of June, 1864, purchased at Rugby Fair a gray mare, fit for cart work, from the defendant, who was farm bailiff under Mr. Nask, the manager of Lord Shrewsbury, to whom the horse belonged, a written warranty was given with the mare, which was sold for 29*l*. The plaintiff brought her up to London, and according to his case, she shortly after appeared ill, whereupon he called in a farrier to doctor her. She seemed at first to recover, but eventually, on the 26th of July, she died, when it was discovered that her lungs, liver, and spleen were almost extensively diseased. The plaintiff's witness swore that the animal must have been greatly diseased at the period she was purchased by the plaintiff.

The defense was that the animal had been in perfect health up to the time the warranty was given, and that the disease was

[1] See Hall *v.* Rogerson, Oliph. 444; Smart *v.* Allison, Id. 450.

[2] Oliphant on Horses, 455.

the effect of her being put into a hot stable and fed upon stimulating food. The jury found a verdict for the defendant.

188. *Lungs.*—All diseases of the *lungs* are an *unsoundness.*

In the case of Hyde *v.* Davis,[1] the plaintiff and defendant were both horse dealers, the plaintiff carrying on business in Liverpool, and the defendant at Stratton-on-Harrow, in Herefordshire.

On the 23d day of August, 1848, the plaintiff purchased a young chestnut gelding of the defendant for 62*l.*, with the following warranty: "This is to certify that I have this day sold to Mr. James Hyde, horse dealer, a chestnut gelding; the said gelding I warrant sound, free from vice, steady in harness, no crib-biter, and no wind-sucker." Next day the horse was sent to Liverpool, and appeared to have a little cough. On being put into the plaintiff's stables, the horse looked depressed, and the cough continued. It was then found that he had a sore throat, and it being supposed that he had taken cold he was treated accordingly, and had some stimulating application given to him for his throat, after which he seemed better. The horse was afterward, on the 22d of September, sold at Howden Fair, to Mr. Widows, veterinary surgeon, who took him to Bristol, where he died on the 12th of October.

After death there was a *post-mortem* examination of the horse, and his lungs were found to be extensively diseased, to be full of tubercles, and of the substance of liver. The liver was also double its proper size. The veterinary surgeons called in were of opinion, and gave evidence to the effect, that the horse died from disease of the lungs, and that the disease was of long standing, and that a horse having such a disease was not sound.

For the defendant, it was contended that the horse was sound when sold; that he had been bred by a farmer, who sold him to the defendant; that the horse had never done any work, and was five years old. That the greatest care had been taken of him, as he had been bred to sell; that the cause of his death was sudden inflammation from a cold caught after he had been sold, when traveling to and from fairs. To prove this several veterinary surgeons of eminence were called, and among them Pro-

[1] Oliphant on Horses, 453.

fessor Dick, of the Veterinary College, Edinburgh, founded by him in 1817, who gave evidence to the following effect: That disease of the lungs had frequently come under his notice, as it frequently happens in horses; the ordinary causes being changes in temperature, particularly a transition from cool air to a close confined stable, and more especially during the prevalence of particular winds. The disease is usually ascertained by a cough, there being commonly a slight shivering. It always affects the skin more or less, the coat stares, the animal seems unthrifty, and is never in sleek condition. The breathing and pulse are always more or less affected. The lungs become liver-like and have tubercles and abscesses, which run into one another, and are two different stages. When the lungs are much diseased, or hepatized, there is an interruption of blood and consequent enlargement of the liver. Hepatization takes place very rapidly in the lungs, in consequence of their extreme vascularity. It seldom happens that both lungs are equally affected. When inflammation has taken place sufficiently to produce hepatization, there is an invariable tendency to produce tubercles and abscesses. Then the disease commonly runs its course from ten days to a fortnight, depending in some measure upon the treatment. If he had found the lungs hepatized with tubercles and abscesses, and the liver double in weight, containing cheesy matter, he should have said it had lasted for a week. He had, however, met with many cases of tubercles, abscesses, and hepatization which must have lasted longer. He had known a liver enlarged twice its natural dimensions in less than a week. This arises from distention with blood. He should expect the liver to be congested. If it was very pale the complaint must have been chronic. Purging carried to excess increases inflammation of the lungs. The function of the liver is to separate the bile from the blood. He should expect to find irritation of the bowels when the liver is enlarged. The liver in this case weighed thirty-two pounds instead of fifteen pounds. The disease is like a galloping consumption in a human being. In answer to a question put by the learned judge, the witness said, "I consider the disease in the lungs began within a fortnight of his death,

but there had been a catarrh from the time the man led him home."

Mr. Justice Coleridge told the jury that the question they had to consider was, had the horse the seeds of the disease on the 23d of August? The plaintiff must make out this proposition. The defendant maintained that the horse was sound at the time of delivery. The horse had been sold a short time before his death, and both the plaintiff and defendant had been taken in.

The jury found a verdict for the plaintiff. Damages 62*l.*

189. *Legs, Swollen.*—Where *swollen legs* proceed from dropsy, or farcy, or of long standing, and therefore a sign of general debility, they are difficult of cure, and the horse is mostly useless, except for slow work, and therefore *unsound.*

In the milder forms, where the swelling arises either from too much fatigue, or from want of medicine, whether tonics, depletents, or exercise, until cured, the horse is *unsound.*

When the swelling is permanently removed, *sound.*

190. *Mallenders and Sallenders.*—At the bend of the knee, as well as in the inside of the hock, or a little below it, there is sometimes a scurfy eruption, called *mallenders* in the foreleg, and *sallenders* in the hind leg. They seldom produce lameness, but if no means are taken to get rid of them, a discharge proceeds from them which it is afterward difficult to stop. They must be considered *unsoundness.*

191. *Mange.*—The *mange* is a pimpled or lumpy eruption of the skin, followed by blotches covered with scurf; these change into scabs, and occasionally extend over the whole carcass; it is one of the most contagious diseases to which the horse is exposed. A *mangy* horse is *unsound.*

192. *Navicular Joint Disease* is *unsoundness*, as it produces lameness, which is rarely cured. It proceeds from sudden concussion, or from rapid and overstrained motion. Horses which have irregular and undue exercise are most liable to it, and particularly those whose feet are contracted. An action was brought for the breach of an alleged warranty; the *unsoundness* in question was what is termed "navicular disease," which was stated to be an inflammation in a joint on the inside of the hoof, and to be of such a nature that it might be alleviated by proper

treatment, so far as to render a horse fit for gentle work, and to make him appear sound for a short time and on soft ground; but could seldom, if ever, be permanently cured, so as to qualify him for hard work.[1] In the case of Matthews *v.* Parker,[2] the plaintiff, in May, 1846, bought at Stow Fair, of the defendant, a bay horse warranted sound. On the day after its arrival at Cirencester, where the plaintiff resided, it exhibited symptoms of lameness, which increased till the 23d of June, when it was examined by an experienced veterinary surgeon, who pronounced it to have *navicular disease* in both the forefeet, of whi h fact the defendant had notice. The horse was sold at auction as a lame horse, and bought by the defendant, who was in the habit of attending Cirencester market.

For the defendant, witnesses were called to prove that the horse was sound, and could therefore never have had the *navicular disease*, as it is incurable. It transpired during the trial that the defendant was a member of a horse-dealers' club in London, the funds of which were devoted to pay the expenses of trials.

The jury found a verdict for the plaintiff.

193. *Nerved Horse.*—A horse on whom the operation of *nerving* has been performed, may be improved, may cease to be lame, may go well for many years; but there is no certainty of his continuing to do so, and he is *unsound.*

In the case of Best *v.* Osborne,[3] an action was brought on the warranty of a horse which had been *nerved.* Several eminent farriers were called, who stated that the operation of *nerving* consisted in the division of a nerve leading from the foot up the leg; that it was usually performed in order to relieve the horse from the pain arising from a disease in the foot, the nerve cut being the vehicle of sensation from the foot; that the disease in the foot would not be affected by the operation, and would go on increasing or not, according to its character; that horses previously lame from the pain of such a disease would, when *nerved*, frequently go free from lameness, and continue so

[1] Bywater *v.* Richardson, 1 A. & C. 508.

[2] Oliphant on Horses, 447.

[3] M. & Rob. 290.

for years; that the operation had been found successful in cavalry regiments, and horses so operated on had been for years employed in actual service; but that, in their opinion, a horse that had been *nerved*, whether by accident or design, was *unsound*, and could not be safely trusted for any severe work, and that it was an organic defect.

It appeared that the horse in question had not exhibited any lameness. But Chief Justice Best told the jury "that it was difficult to say that a horse in which there was an organic defect could be considered sound; that *sound* meant *perfect*, and a horse deprived of a useful nerve was imperfect, and had not that capacity of service which is stipulated for in a warranty." And the jury returned a verdict for the plaintiff.

194. *Nasal Gleet, or Discharge from the Nose.*—There is a constant secretion of fluid to lubricate and moisten the membrane that lines the cavity of the nose, and which, under catarrh or cold, is increased in quantity and altered in appearance and consistence. This will properly belong to the account of catarrh or cold; but that which is immediately under consideration is a continued and oftentimes profuse discharge of thickened mucus, when every symptom of catarrh and fever has passed away. If the horse is at grass, the discharge is almost as green as the food upon which he lives; or if he is stabled, it is white or straw-colored, or brown, or even bloody, and sometimes purulent. It is either constantly running or snorted out in masses, many times a day, teazing the horse, and becoming a perfect nuisance in the stable and to the rider. This has been known to continue several months and eventually to destroy the horse. In any stage it is an *unsoundness*.

195. *Ossification of the Cartilages or Side-bones.*—The *slide cartilages* occupy a considerable portion of the external side and back part of the foot, the expansion of the upper part of which they are designed to preserve.

These cartilages are subject to inflammation, and the result of that inflammation is, that the cartilages are absorbed, and bone is substituted in their stead. This *ossification of the cartilages* frequently accompanies ringbone; but it may exist without any affection of the pastern joint. It is oftenest found in horses

of heavy draught. It arises not so much from concussion as from a species of sprain; for the pace of such heavy horses is slow. The cause, indeed, is not well understood, but of the effect the instances are very numerous, few heavy draught horses arriving at old age without this change of structure. It is an *unsoundness*.

In the case of Simpson *v.* Potts,[1] an action for *money had ana received*, to recover back the price of a mare which had been sold to the plaintiff by the defendant, warranted sound. The warranty was a verbal one, and the plaintiff's case was, that there was a condition in it authorizing a return of the mare if she should prove unsound, on which ground she had been sent back to the defendant; or, that at any rate, there had been an actual rescission by consent. Mr. Brockbank, a veterinary surgeon, proved that the mare was brought to him by both parties to be examined, as she was lame at that time, and they wished him to say whether it was an unsoundness. He said that the lameness was produced by *side-bones*, which is in fact *ossification of the cartilages*, and is an *unsoundness*, whether it produce lameness or not. If the mare had absolute rest for any length of time, the lameness would leave her, but quick work and a hard road would bring it on again; if she were ploughed, it would not so soon be shown.

It was contended for the defendant that there was no condition in the warranty authorizing a return, and that the defendant had taken her back to sell her on behalf of the plaintiff.

Rolfe, J., told the jury, "that they must be satisfied either that the contract was rescinded, or that there was a condition in the warranty authorizing a return of the horse if it turned out unsound, and that in either of these cases an action for *money had and received* would lie."

The jury returned a verdict for the plaintiff.

196. *Overreaching.*—Clicking, or striking the hind shoe against the fore one, while the horse is in action, often proceeds from his having been improperly ridden.

As a warranty of soundness has nothing to do with what a horse has or has not been taught, so long as he is capable, with

[1] Oliphant on Horses, 443.

proper education, of doing the work due from one of his class, and, therefore, is not physically disqualified, he is *sound.*

But when overreaching or clicking is caused by his body being too short for his legs, or, as some express it, by his legs being too long for his body, the danger is much greater than in the former case; for, in this latter, he is much more liable to tread on the heel of the forefoot, and thus throw himself down, or to tear off the forefoot shoe, in this instance, also running a great risk of falling. Such clicking stamps a horse as *unsound.*

He is sound so long as there is no abrasion or injury; but he requires careful shoeing and adapting to right work.

As long as any abrasion of the skin, or soreness of heel, arising from overreaching exists, the horse is *unsound.*[1]

197. *Parotid Gland Ulcerated.*—The *parotid gland* is placed in the hollow which extends from the root of the ear to the angle of the lower jaw. In bad strangles, and sometimes in violent cold, it will swell to a great size and ulcerate; or an obstruction will arise in some part of the duct, and the accumulating fluid will burst the vessel, and a fistulous ulcer will be formed, very difficult to heal. Such a disease is an *unsoundness.*

198. *Poll-evil.*—The point of juncture between the head and the bone nearest the skull is called the *atlas* and is the seat of a very serious and troublesome ulcer termed *poll-evil*, caused by the horse rubbing and sometimes striking his *poll* against the lower edge of the manger, or hanging back in the stall and bruising the part with the halter; or from a violent blow on the *poll*, carelessly or wantonly inflicted, or perhaps by unnecessary tight reining; the consequence is inflammation, and a swelling appears, hot, tender, and painful. The swelling increases, and matter is formed, which spreads around and eats into the neighboring parts. This disease is an *unsoundness.*

199. *Pumice Sole.*—If the sole of the foot is in the slightest degree convex, or lower at the middle than at the sides, it may be inferred that the horse has had inflammation of the foot, which has divided some of the laminæ that attach the inner foot

[1] Brown *v.* Elkington, 8 M. & W. 132; Dickenson *v.* Follett, 1 M. & Rob. 299.

to the horny covering. These laminæ, which are one thousand in number in the healthy foot, support the entire weight of the horse, as it were, on springs, instead of allowing it to rest on the sole alone. In the early stage of inflammation but few of these laminæ are injured. The presence of pumice sole stamps the horse as *unsound.*

200. *Paralysis.*—The loss of the use of any limb or function, through injury to the brain, the nerves, or the muscles, is paralysis.

Horses laboring under a liability to this disease are on many occasions deprived instantaneously of the use of the part so affected; as, for example, a horse will become paralyzed in his leg while he is in action. Sometimes horses, while trotting or galloping rapidly, are deprived momentarily of the use of a leg, to the great risk of the rider, and after a few moments they recover the use as suddenly, and proceed as well as ever, until again attacked. A horse liable to paralysis is *unsound.*

201. *Pigeon-toed.*—Horses that stand with the fronts of the hoofs turned toward each other are called *pigeon-toed.*

They are commonly considered to be unsafe, but this depends upon the width of chest, and upon whether they can or can not perform all their paces without the toes of one foot touching the other leg, so as to interfere with the usefulness of their action.

If this peculiarity, then, does not make them defective in the execution of their proper work, they are *sound.*

But, should the peculiarity impede them in their labor, they are *unsound.*

202.—*Quidding.*—If the mastification of the food gives pain to the animal, in consequence of soreness of the mouth or throat, he will drop it before it is perfectly chewed. This is an indication of disease and constitutes unsoundness. *Quidding* sometimes arises from irregularity in the teeth, which wound the cheek with their sharp edges, or a protruding tooth renders it impossible for the horse to close his jaws so as to chew his food thoroughly. Quidding is *unsoundness* for the time; but the unsoundness will cease when the teeth are properly filed, or the soreness or other cause of this imperfect chewing removed.

203. *Rat-tail* is indiscriminately employed to describe the tail of the horse when it is either quite free from hair or partially so. It does not prevent the horse from being *sound.*

Although unsightly, it is *not* a blemish that will enable the purchaser to return the horse, as it is impossible not to notice so glaring a disfigurement. When it is covered by false hair, or any other fraud is practiced in order to hide it, the offense is punishable.

204. *Ring-bones* are situate above the hoof, being an ossification of the cartilages at the top of the coronet. If seen only in front of the pastern, whence the disease generally extends itself round the front of the hoof, in form of a ring, it is frequently of little consequence; but where it approaches the heels, the horse is fit for slow work only, the flexibility of the cartilages, by its altered structure, being lost. The cartilage is likely to be fractured by the ascent of the internal structure of the hoof on any extreme pressure being given to the frogs, either from accelerated speed or from treading on a stone. At slow work, horses with these hoofs often last for years without accident, but when they do fracture the ossified part they should be at once destroyed, or turned out till the fracture is united, in which case, though not sound, they often go apparently soundly, though they are ever afterward liable to accidents. When this cure occurs, they do not move in pain, but are still *unsound.*

Where the disorganization is only in front of the pastern bone, and not in the way of any joint, or approaching the heels, all inflammation or disease has disappeared. The animal will suffer no inconvenience from quick work, and is therefore *sound*, but shows a *blemish.*

205. *Rumbling*, which is frequently but erroneousby confounded with washy, upon the supposition that the noise proceeds from air or water being lodged in the intestines, is, in fact, a sound that proceeds from the sheath. Horses liable to rumbling are not thereby inconvenienced, and are, for the most part, good round-barreled horses, and *sound.*

The fact that mares never make this noise, is a sufficient explanation of its origin.

206. *Running Away or Bolting.*—Horses addicted to running away are decidedly dangerous, both for the user and for all that they encounter. This habit is the result of mismanagement, because no horse with a good mouth, when well handled, can run away.

The cure is not difficult to effect, but until that is effected, and the mouth restored to its proper condition, the horse is decidedly *vicious.*

When bolting or running away is caused by defective vision, the vice is, properly so called, shying; although this is often, by misnomer, called bolting, on account of the difficulty experienced in pulling up, owing to the bad mouth.

A tendency of blood to the head, or any defect in the organs of vision, renders a horse *unsound.*

207. *Rheumatism* can be discovered only when the horse is lame, and consequently unsound; but should you be able to prove that the horse was afflicted with rheumatism within a reasonable time of purchase, and that he was subject to that disease before you purchased him—even though he was going sound at the time of purchase—if he was warranted, he is returnable.

This is a disease generally brought on horses by carelessness and the supposition that they are never afflicted by it. Horses should not be exposed to draughts, particularly in the stable, the flooring of which, more especially the straw, should be dry for them to lie upon. As horses are exposed to damp and cold out of doors, people imagine it matters not what condition the stable may be in, thinking only that if foul it may spoil their coats. Out of doors and at liberty, horses are not exposed to draughts; whenever they can, they will get out of them, and when unpleasantly cold, will move about and warm themselves. This they have not room to do in the stable. Do they ever lie down in the wet out of doors? They choose the driest spot they can find, and when cold they will either roll and get an extra layer of dirt as a covering, or otherwise exercise themselves.

For this disease it is usual to treat in the vicinity of the round bone. Therefore, when you see marks of blistering, setons, or firing on this part, even though the horse at the time of examination goes free from lameness, you have reason to apprehend

occasional inconvenience from the temporary lameness occasioned by this complaint; and, while subject to the return at intervals, or when it is a determined complaint of the horse, the animal is *unsound.*

Where the cure has been effected some time, and no relapse has occurred, as it is clear that the malady has not become a constitutional complaint of the horse, then it may be considered that a permanent cure has been effected, and the animal be warranted as *sound.*

In the case of Couch *v.* Culbreth,[1] it was held by the Supreme Court of South Carolina that in questions of unsoundness, where the disease is chronic, like rheumatism, it is not necessary to show that the symptoms existed at the time of the sale, for subsequent incidents and appearances may show that the disease existed before the sale, although the symptoms had not then been observed.

208. *Roaring.*—Horses afflicted with the disease named *roaring*, make, when galloping or trotting, a peculiar noise, the nature of which is sufficiently indicated by its name. Such horses, upon being suddenly agitated, checked, or pulled up short, make more or less of this noise, according to what progress the disease has made. *Roaring* is a chronic disease of the wind-pipe, or, perhaps, more correctly, the remains of such a disease; but when it is not acute or serious, the horse does not appear to suffer much inconvenience from it in its earlier stages, although the noise caused by it is very unpleasant. If the horse is put to fast work, the noise will increase, till at last it becomes most distressing to both horse and user.

The roarer's coat usually indicates a departure from *robust* health, however fat the horse may be.

Such a horse is adapted to slow work only, and is *unsound.*[2]

209. *Sand-crack.*—This is a crack or fissure, mostly situate in the inside quarter of the forefoot, beginning just below the cor-

[1] 11 Rich. Law (S. C.), 9. See this case for definition of the term "organic disease."

[2] Onslow *v.* Eames, 2 Stark. N. P. C. 81; Bassett *v.* Collis, 2 Camp. 522; Quintard *v.* Newton, 5 Rob. (N. Y. 1867) 84.

onet between hair and hoof, and passing down toward the bottom of the foot. Attention should be paid to this the moment it is discovered, when the requisite treatment and two or three days' rest will enable the horse to go sound in his work. In a few days the bandages may be taken off. The horse will most probably remain free from sand-crack till about the same time in the following year, when, unless strict attention is paid to it, he may throw another. While the *sand-crack* is in existence, the animal is *unsound.*

When cured, he may be warranted as *sound;* but so long as the hoof is unsightly from the cure, it is a temporary *blemish.*

Where any marks of the sand-crack still remain at the time of the warranty being taken, in order to render the seller more secure, it would be advisable to make this disease an exception.

210. *Splint*, like a *bone-spavin*, is an excrescence or bony deposit on the leg of a horse, and the danger in both cases is the probability of their interfering with his action; the *bone-spavin* by preventing the proper flexion of the joint, and the *splint* by pressing on the sinews of the leg. Lameness is thus produced by each—by *bone-spavin* nearly always, by *splint* sometimes.

It entirely depends on the situation of the bony tumor on the inside of the shank-bone whether a *splint* is to be considered an *unsoundness.* If it is not in the neighborhood of any joint, so as to interfere with its action, and if it does not press upon any ligament or tendon, it can be no cause of *unsoundness.* And, although it is often very unsightly, it does not lessen the capabilities and value of the animal.

In an action on the warranty of a horse "to be sound, wind and limb, *at this time*," the breach of which was lameness, produced by a *splint*, it was given in evidence that a *splint* might or might not be the efficient cause of lameness, according to its position, its size, and extent; that the splint in this instance was in a very bad situation, as it pressed upon one of the sinews of the leg, and was calculated to produce, when the horse was worked, inflammation of the sinew, and consequent lameness. Lord Chief Justice Tindal said: "It now appears that some *splints* cause lameness, and others do not, and that the consequences of a *splint* can not be apparent at the time, like those

of the loss of an eye, or any other blemish or defect visible to a common observer. We therefore think that, by the terms of this written warranty, the parties meant that this was not, at that time, a *splint* which would be the cause of future lameness, and that the jury have found that it was. We therefore think that the *warranty* was broken."[1]

211. *Staring Coat.*—When the horse's coat is harsh, dry, and staring, you may at once make up your mind that he is *unsound.* If he has not an active disease, he has a chronic one. Roarers, whistlers, those with old coughs and broken wind, and subject to meagrims, old crib-biters, wind-suckers, etc., all have their coats more or less affected.

212. *String-halt.*—This disease may be at once detected by the awkward catch of the leg affected, the action of this leg being much higher than the others, and drawn up by a jerk. It is seldom seen in both hind legs. The collapse of the muscles, which is by some persons supposed to be the cause of this peculiar action, is occasioned by the interior of the muscle having been formed into a kind of cyst or bag by an abscess, which, having discharged the pus, leaves the interior of the muscle open. It is frequently supposed to arise from inflammation of the nerve, while others say it is an excess of energy, without disease. It is an *unsoundness.*

There has been a difference of opinion whether *string-halt* constitutes *unsoundness*, but in Thompson *v.* Patteson[2] it was held to be so. It was tried before Mr. Justice Cresswell, at the Liverpool Summer Assizes, 1846, and was an action of *assumpsit* on the warranty of a horse, the breach of which was *wilrem-haunch*, or *string-halt*, and spavin.

The plaintiff and defendant were both horse dealers, and it appeared that the plaintiff met the horse in question coming to Chester Fair, and at that time there was a kick apparent on one hock. The plaintiff mounted and tried him, but said he had got a *string-halt.* This the defendant denied, saying there was

[1] Margetson *v.* Wright, 1 M. & Sc. 622; also, Smith *v.* O'Brien, 11 L. T. (N. S.) 346.

[2] Oliphant on Horses, 102.

nothing but the previous kick. The horse was eventually bought for 52*l.*, the defendant warranting him "sound, except a kick on the hock." The horse was *stringhalted* on both legs. Veterinary surgeons and other witnesses were called on both sides, who all agreed that there was *string-halt*, but differed in their opinion as to the existence of a spavin.

To prove *string-halt* unsoundness, Mr. Howarth, of Manchester, a veterinary surgeon, described it to be a spasmodic affection of the *abductor* muscle of the hind leg, a nerve coming through the trunk being affected. He said that a horse affected by it loses his condition, and is not able to do so much work.

Mr. Ellis, of Liverpool, a veterinary surgeon, stated that *string-halt* is a disease of the sciatic nerve, rendering a horse less fit for work, and impeding him in backing, and that he had practical experience showing it to be a disease.

Mr. Bretherton, of Liverpool, a veterinary surgeon of twenty-four years' practice, said that *string-halt* is caused by pressure on the sciatic nerve; that it increases by work, and is *unsoundness*. He had seen horses become quite useless from it, but that more aggravated cases were seen in the country than any submitted to the Veterinary College. He had seen horses in his father's stables quite useless from it, but that at first it is only observable when the horse is turning around.

The defendant called Mr. Gregson, a veterinary surgeon, who had attended the horse, and did not consider *string-halt unsoundness*. But on being questioned by the judge, he admitted that it frequently gets worse, and that when very bad it impedes the action of the horse, making him less competent for work.

Mr. Taylor, another veterinary surgeon, said that *string-halt* does not impair a horse's condition. He had examined the horse in question, and considered him *sound*.

Upon this, his lordship said: "It is a question for the jury whether *string-halt* produces those effects which, in the eye of the law, renders him *unsound*." And in summing up, shortly afterward, his lordship said to the jury: "You have heard the evidence as to string-halt. If you are satisfied that it is a disease calculated to impair the natural usefulness of the horse, you

must find for the plaintiff, it being admitted that the horse had it."

The jury found a verdict for the plaintiff.

213. *Shying* is often the result of cowardice, playfulness, or want of work. *Shying* on coming out of the stable is a habit which proceeds from the remembrance of some ill-usage or hurt which the animal has received in coming out of the stable, and can rarely or never be cured. When confirmed, it is a bad and dangerous habit, and therefore a *vice*.

Shying sometimes, however, results from defective sight. An unusual convexity in the formation of the cornea of the eye will produce shortsightedness; and if, as is often the case, there is thereby induced a habit of shying, such shying is an *unsoundness*, although there is no disease, and although it is the natural result of a congenital malformation of the eye.[1]

Side-bones is an *unsoundness*. See *Ossification of Cartilages*, *ante*.

Spavin is an *unsoundness*. See *Blood and Bog Spavin*, *ante*.

214. *Thick-wind* consists of short, frequent, and laborious breathings, especially when the horse is in exercise, the inspirations and expirations often succeeding each other so rapidly as evidently to express distress, and occasionlly almost to threaten suffocation. Some degree of it frequently exists in round-chested and fat horses, and heavy draught horses are almost invariably *thickwinded*, and so are almost all horses unused to exercise, or violently exercised on a full stomach. The principal cause, however, of *thick-wind* is previous inflammation, and particularly inflammation of the bronchial passages. *Thick-wind* is often the forerunner of *broken wind*, and when it proceeds from inflammation it is an *unsoundness*.

In the case of Atkinson *v.* Horridge,[2] it appeared that the plaintiff was a gentleman living at Leeds, and the defendant a gentleman well known in the Cheshire Hunt. At Chester October races, the defendant's horse, Paragon, was standing at the Albion Hotel, at the price of 150 guineas, and another horse

[1] Holiday *v.* Morgan, 28 L. J., Q. B. 9.

[2] Oliphant on Horses, 448.

at 60 guineas. The plaintiff bought them for 210*l.* Paragon was warranted, but the other was not. The plaintiff's groom fetched the horses to Leeds, where they arrived on the 5th of October. At the end of a canter next morning, the groom detected that the horse breathed thick. The plaintiff immediately submitted the horse to Mr. Yates, a veterinary surgeon, who pronounced the horse to be suffering from a *chronic* affection arising from a *thickening of the mucous membrane*, which was incurable, and an unsoundness, although it would not prevent the horse being hunted. The plaintiff then wrote to the defendant, inclosing Mr. Yates' certificate, and stating that he would send the horse to Manchester to meet his groom on any day he might appoint. No reply was received, and the plaintiff wrote a second letter, again requesting that the groom might be sent to Manchester. The defendant wrote that he had submitted the certificate to a competent surgeon and a good sportsman, who said that no specific unsoundness had been alleged. He offered to refer the matter to a sportsman and a gentleman. The plaintiff submitted the horse to other veterinary surgeons, who confirmed the opinion of Mr. Yates, and certified that he had a *chronic disease* in the air passages, constituting *thick breathing*. This certificate was also forwarded to the defendant. Some additional correspondence then took place, and at last the horse was sold for 56*l.*, which sum was reduced by expenses to 48*l.*, and it was for the difference between this sum and the purchase-money that the action was brought.

The defendant called several veterinary surgeons, but the jury found for the plaintiff 101*l.* 5*s.* damages.

215. *Thinness of Sole* is not necessarily an *unsoundness*. See cases, Brown *v.* Elkington, 8 M. & W. 132; also, Bailey *v.* Forrest, 2 C. & K. 131.

216. *Thorough-pin*, except it is of great size, is rarely productive of lameness, and therefore can not be termed unsoundness; but as it is the consequence of hard work, and now and then does produce lameness, the hock should be most carefully examined and there should be a special warranty against it. When it produces lameness, or is so large as to render it likely that lameness will soon ensue, it is an *unsoundness*.

217. *Trush* is the inflammation of the lower surface of the inner or sensible frog, and the secretion or throwing out of pus, almost invariably accompanied by a slight degree of tenderness of the frog itself, or of the heel a little above it, and if neglected leading to diminution of the substance of the frog, and separation of the horn from the parts beneath, and the production of fungus and canker, and ultimately a diseased state of the foot, destructive of the present and dangerous to the future usefulness of the horse. A *thrush* is an *unsoundness.*

218. *Wheezing.*—The *wheezer* utters a sound not unlike that of an asthmatic person when a little hurried. This is a kind of *thick-wind*, caused by the lodgment of some mucous fluid in the small passages of the lungs, and it frequently accompanies bronchitis. *Wheezing* can be heard at all times, even when the horse is at rest in the stable, and thus differs from *roaring*, which is confined to the increased breathing during considerable exertion. It is an *unsoundness.*[1]

219. *Whistling.*—The *whistler* utters a shriller sound than the *wheezer*, but only when in exercise, and that of some duration, as a sudden motion will not always produce it. It seems to be referable to some contraction in the wind-pipe or larynx.

The sound is a great nuisance to the rider, and the *whistler* very speedily becomes distressed. This is an *unsoundness.*[2]

220. *Washy* is a term applied to a horse when the least exercise produces in him purging, the cause being irritation of the intestines; such a horse is small in the barrel.

A horse laboring under this malady is incapable of performing his work like others of his class, a very little exertion causing him great inconvenience, and he is therefore *unsound.*

221. *Wind-galls.*—There are few horses perfectly free from *wind-galls*, but they do not interfere with the action of the fetlock or cause lameness, except when they are numerous or large. Like thorough-pin, they do not constitute *unsoundness* unless they cause lameness, or perhaps when they are so large and numerous as to make it likely they will soon cause it.

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[1] Onslow *v.* Eames, 2 Stark. N. P. C. 81

[2] Onslow *v.* Eames, 2 Stark. N. P. C. 81

In an action which was brought on the warranty of a horse, the breach of which was "*wind-galls*," a verdict was found for the plaintiff.[1] The *wind-galls* had probably produced lameness, as there appeared not to have been any dispute about the *unsoundness*, but only about the form of action.

222.—*Wolf's-tooth.*—In some few instances, the second teeth do not rise immediately under the temporary or middle teeth, but somewhat by their side. The tooth is pushed out of its place to the fore part of the first grinder, and remains for a considerable time under the name of a *wolf's-tooth*, causing swelling and soreness of the gums, and frequently wounding the cheeks. This is easily remedied by drawing the tooth, and though an *unsoundness* while it lasts, no dispute would be likely to arise in practice respecting it.

223. *Yellows*, otherwise the *jaundice*, is the introduction of bile into the general circulation, and which is usually caused by some obstruction in the ducts or tubes which carry the bile from the liver to the intestines. It exhibits itself by a yellowness of the eyes and mouth, and any part of the skin not covered with hair. It is, while it lasts, an *unsoundness*.

[1] Stuart *v.* Wilkins, Doug. 18.

CHAPTER V.

EXPRESS WARRANTY.

224. A contract of warranty is distinct from a contract of sale, and, unless there be either an express or implied agreement of the parties that it should be a part of the contract of sale; there is no warranty founded upon the sale. And while it is necessary for the contract of warranty to be agreed upon before the contract of sale is closed for it to form a part of the sale, yet the representations upon which the warranty is founded can be made at any time during the negotiations, if at the time of the closing of the bargain it is evident these representations entered into the bargain and were an inducement to it.[1]

As in the case of Pinney *v.* Andros,[2] which was an action for false warranty in the sale of some sheep, the parties to the sale on the first day settled the terms of a valid executory agreement in respect to the sheep, and as a part of the agreement, the vendor warranted them sound and free from foot-rot. And on the second day, when the vendee went to pay for them as agreed upon, he discovered they were unsound and believed they had the foot-rot. And then the vendor repeated his statement made on the first day that the sheep were sound and free from foot-root, and that he would warrant them so. It was *held* that the two interviews constituted but one trade and one warranty.

Since warranty is a distinct contract, and all contracts must have a valid consideration to support them, it follows that a warranty made after the closing of the bargain must have a new and distinct consideration.[3]

Thus, where A. exchanged a horse with B. for a mare and

[1] Weimer *v.* Clement, 37 Penn. St. 147; Vincent *v.* Leland, 100 Mass. 432.

[2] 41 Vt. 631 (1869).

[3] Conger *v.* Chamberlain, 14 Wis. 258; Burton *v.* Young. 5 Harring. (Del.) 233.

10*l.*, and B. on the following day sent his servant with the 10*l.* to A., and A., at the request of the servant, gave the following receipt: "Received of the defendant 10*l.* for a colt warranted sound in every respect;" it was held that this receipt being given after the sale, and not in compliance with any previous promise, A. was not liable thereon.[1]

225. In buying a horse the rule of law is, that the purchaser buys at his own risk, which is usually expressed by the maxim *caveat emptor*, as was declared in the case of Jones *v.* Bright.[2] "In the general sale of a horse the seller only warrants it to be an animal of the description it appears to be, and nothing more, and if the purchaser makes no inquiries as to its soundness or qualities, and it turns out unsound or restive, or unfit for use, he can not recover as against the seller, as it must be assumed that he purchased the animal at a cheaper rate." This maxim of *caveat emptor* applies to every sale of chattels, unless there has been: 1. An *express warranty*; or, 2. An implied warranty; or, 3. There has been *fraud* or *false representations* made by the seller as an inducement to the sale.

226. *An Express Warranty* is what its name indicates; a contract of warranty expressed in words or signs, either written or spoken; and this contract of warranty, like every other contract, is within the power of the parties making it, and they may mold it into any shape that best meets their views; they may make it cover all unsoundness and vice, or they can except anything from the contract. It may be limited as to time; as in a case where a warranty was to last to noon of the following day, when the sale was to become complete, Mr. Justice Littledale said: "The warranty here was, if the vendor had said, 'after twenty-four hours I do not warrant;' such a stipulation is not unreasonable."[3] No particular form or words are necessary to constitute a war-

[1] Budd *v.* Fairmaner, 8 Bing. 48; S. C., see also 1 Mood. & Scott, 74; Leddard *v.* Kain, 2 Bing. 183; S. C., 9 Moore, 356; Tuttle *v.* Brown, 4 Gray, 457; Bloss. *v.* Kittredge, 5 Vt. 28; Reed *v.* Wood, 9 Vt. 285; Hogins *v.* Plympton, 11 Pick. 97; Burton *v.* Young, 5 Harrington, 233.

[2] 5 Bingham's Rep. 553.

[3] Bywater *v.* Richardson, 1 A. & E. 508; Best *v.* Osborne, 2 C. & P. 74.

ranty, and the old rule laid down in Pasley *v.* Freeman,[1] "that any affirmation made by the vendor at the time of the sale, is a warranty provided it appear in evidence to have been so intended," is still the rule upon this subject.

227. It is not necessary for the seller to say, "I warrant." It is sufficient if he says that the article is of a particular quality, or is fit for a particular purpose. So when the seller said, "this horse is sound,"[2] it was held a warranty of soundness; and when the seller said, "you may depend upon it, the horse is perfectly quiet and free from vice," it was held a warranty of *freedom from vice*.[3]

So where a person at the time of selling a horse said, "I never warrant, but he is sound so far as I know," it was held to be a qualified warranty, upon which the purchaser could maintain an action only upon showing that the seller knew at the time of sale that the horse was unsound.[4]

So also where a warranty was given in the following words: "Received of A. B. (the purchaser) 10*l.* for a gray four-year old colt, warranted sound in every respect;" it was held, that it was restricted to the soundness of the animal, the age being mere matter of description.[5]

228. But in the case of Watson *v.* Rowe,[6] a bill of sale of a horse in these words: "Thomas Nason bought of Elijah Rowe one bay horse, five years old last July, considered sound," signed by the vendor and acknowledging payment of the price, it was *held* not to import a warranty of soundness of the horse. When a contract is reduced to writing, that alone must be the evidence of the terms of the contract, and the writing must receive its construction from the court and not the jury.

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[1] 3 T. R. 57.
[2] Jones *v.* Bright, 5 Bingham, 553.
[3] Cave *v.* Coleman, 3 M. & R. 2.
[4] Wood *v.* Smith, 5 Mood. & Ry. 124.
[5] Budd *v.* Fairmaner, 1 Mood. & Scott, 74.
[6] 16 Vt. 525.

229. And in a recent case in New York,[1] where an assertion by the vendor of cows was, that "they are all coming in, in good season in the spring;" it was held to constitute a warranty.

And where plaintiff offered a certain price for a mare upon condition that she was sound, and the defendant thereupon declared that she was sound, and received the price offered; it was held that these facts were sufficient to the jury as evidence of warranty.[2] And a bill of sale of "one horse, sound and kind," was held to be a warranty of soundness.[3] And where the purchaser of a cow said to the seller, after the sale: "You said the cow was all right," to which the seller replied: "Well, she is all right;" this was held to be competent evidence of a warranty at the time of sale.[4] And in a late Minnesota case,[5] it was held that representations made by the vendor of sheep, that "they are all sound and right and free from any disease," to induce a purchase, if it acts as an inducement, amounts to a warranty.

230. Care should be taken not to confound representations or expressions of matters of opinion into a warranty. It is frequently a nice point to determine what is a warranty, and what is mere matters of opinion or representations. The rule upon this subject, laid down in the recent case of Randall *v.* Thornton,[6] is as concise and expressive as any we have been able to find. "An affirmation by the vendor at the time of a sale of chattels of a fact as to the quality or title of the subject-matter of sale, made in distinct terms as an inducement to the sale and on the faith of which the vendee bought, will be held an express warranty of quality or title."

231. The intention of the warrantor is always a question of fact for the jury, to be inferred from the nature of the sale and the circumstances of the particular case. The rules for interpretation of an express warranty do not differ from those applied to other contracts. The object is always to carry into effect the

[1] Richardson *v.* Mason, 53 Barb. 601.

[2] Quintor *v.* Newton, 5 Rob. (N. Y.) 84 (1869).

[3] Brown *v.* Bigelow, 10 Allen, 242.

[4] Tuttle *v.* Brown, 4 Gray, 457.

[5] Marsh *v.* Weber, 13 Minn. 109 (1869).

[6] 43 Maine, 226.

intention of the parties. And in some cases, even where the alleged warranty was expressed in writing, it has been left to the jury to say whether the intention of the parties was that the representation or affirmation should constitute a warranty[1] or

[1] Upon the subject of express warranty, see the following cases: Hopkins *v.* Tangueray, 15 C. B. 130; Cross *v.* Gardner, Carth. 90; Medina *v.* Stoughton, 1 Ld. Raym. 593; Power *v.* Parham, 4 A. & E. 473; Shepherd *v.* Kain, 5 B. & A. 240; Hopkins *v.* Hitchcock, 14 C. B., N. S. 65; Oneida Manufact. Co. *v.* Lawrence, 4 Cow. 440; Jendwine *v.* Slade, 2 Esp. 572; Lomi *v.* Tucker, 4 Car. & P. 15; De Sewhanburg *v.* Buchanan, 5 Car. & P. 343; Powell *v.* Horten, 2 Bing. (N. C.) 668; Bywater *v.* Richardson, 1 Ad. & E. 508; Chapman *v.* Gwyther, L. R., 1 Q. B. 464; Leddard *v.* Kain, 2 Bing. 183; Margetson *v.* Wright, 8 Bing. 454; Alexander *v.* Gibson, 2 Camp. 555; Brady *v.* Todd, 9 C. B., N. S. 592; Chapman *v.* March, 19 Johns. 290; Whitney *v.* Sutton, 10 Wend. 411; Foster *v.* Smith, 37 Eng. L. & Eq. 218; Ender *v.* Scott, 11 Ill. 35; Humphreys *v.* Comline, 8 Blackf. 508; Osgood *v.* Lewis, 2 Harr. & Gill. 495; Morrell *v.* Wallace, 9 N. Hamp. 111; Roberts *v.* Morgan, 2 Cow. 438; Hawkins *v.* Berry, 5 Gil. 36; Hillman *v.* Wilcox, 30 Maine, 170, Ricks *v.* Dillahanty, 8 Porter, 133; Otts *v.* Alderson, 11 Smedes & M. 476; Carley *v.* Wilkins, 6 Barb. (S. C.) 557; Beeman *v.* Buck, 3 Vt. 53; Beals *v.* Olmstead, 24 Vt. 114; Kinley *v.* Fitzpatrick, 4 How. (Miss.) 59; Bryant *v.* Crosby, 40 Maine, 18; Erwin *v.* Maxwell, 3 Murphy, 246; Henshaw *v.* Robbins, 9 Met. 88; Sweet *v.* Colgate, 20 Johns. 196; Foster *v.* Caldwell, 18 Vt. 176; Bradford *v.* Bush, 10 Ala. 386; House *v.* Fort, 4 Blackf. 296; Watson *v.* Rowe, 16 Vt. 525; Tuttle *v.* Brown, 4 Gray, 457; McFarland *v.* Newton, 9 Watts, 56; McGregor *v.* Penn, 9 Yerger, 74; Cook *v.* Moseley, 13 Wend. 277; Foggart *v.* Blackweller, 4 Iredell, 238; House *v.* Fort, 4 Blackf. 296; March *v.* Phelps, Phil. L. (N. C.) 560; Harris *v.* Mullens, 32 Ga. 704; Terhune *v.* Dever, 36 Ga. 448; Overbay *v.* Lighty, 27 Ind. 27; Jones *v.* Quick, 28 Ind. 125; Cook *v.* Gray, 2 Bush (Ky.), 121; Woodruff *v.* Weeks, 28 Conn. 328; Wheeler *v.* Reed, 36 Ill. 81; Smith *v.* Justice, 13 Wis. 600; Johnson *v.* Wallower et al., 15 Minn. 472 (1870); Bond *v.* Clark, 35 Vt. (6 Shaw) 577; Manny *v.* Glendinney, 15 Wis. 50; O'Neal *v.* Bacon, 1 Houston (Del.) 215; Perrine *v.* Sennell, 1 Vroom (N. J.), 454; Percival *v.* Oldacre, 18 C. B., N. S. 398; Morrell *v.* Bemis, 37 Vt. 155; Houghton *v.* Carpenter, 40 Vt. 588; Moore *v.* McKinley, 5 Cal. 471; Marshall *v.* Drawhorn, 27 Ga. 275.

not. But the construction of the written warranty is for the court.

So, in the case of Wheeler *v.* Reed,[1] it was held that "whether or not certain words or declarations amount to a warranty, is a question of intention, to be left to the jury. The word 'warrant' need not be used; but to make any representation or affirmation of quality amount to a warranty on the part of the seller, it must appear to have been made at the time of the sale, with the intention of thereby warranting the quality of the article, and not merely as an expression of the seller's opinion."

232. But whatever a party warrants, he must make good to the spirit and letter of the warranty; and if the buyer can show that the horse does not correspond to the exact terms of the contract, the seller will be liable. So it has been held that proof that a horse was a good drawer did not satisfy a warranty that he was a good drawer, and pulls quietly in harness.[2] So a warranty that cattle will work evenly in yoke, is broken if they will not so work if driven by one of ordinary skill in the management of oxen.[3] We will give at some length a valuable case upon this subject.

233. Lamme *v.* Gregg,[4] Chief Justice Simpson. "The plaintiff alleged in his petition that the defendant sold him a jackass, at the price of $400, and at the time of the sale warranted said jackass to be a *good* and sure *foal-getter*, and a superior breeding jack. He averred that he was not a sure *foal-getter* at the time of the sale, nor since that time, and that he was of no value whatever for breeding. The defendant admitted the sale, denied the alleged warranty, but stated that he represented the jack to be a good and *sure foal-getter* at the time of the sale.

"It was proved on the trial in the circuit court that the defendant stated, at the time he sold the jack to the plaintiff, that

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[1] 36 Ill. 81. See also, on this subject, Terhune *v.* Dever, 36 Ga. 648; Jones *v.* Quick, 28 Ind. 125; Bigler *v.* Flickenger, 55 Penn. St. 279; Bond *v.* Clark, 35 Vt. 577; Lindsey *v.* Davis, 30 Mo. 406.

[2] Colthard *v.* Puncheon, 2 Dowl. & Ry. 10.

[3] Woodruff *v.* Weeks, 28 Conn. 328.

[4] 1 Met. (Ky.) 444.

he was a sure foal-getter, and that he had made a season the year before, and got sixty or seventy-five colts. The plaintiff also introduced evidence conducing to prove that the jack was not a sure foal-getter, but, on the contrary, was entirely impotent and deficient as a breeder. On this evidence, the court instructed the jury to find a verdict for the defendant, and a judgment having been rendered against the plaintiff, he prosecutes this appeal for its reversal.

"The question presented in this case is, whether the representation made by the vendor at the time of the sale, that the jack was a good and sure foal-getter, amounted to a warranty. As the action was brought for a breach of warranty only, the plaintiff could not recover unless he proved the warranty relied on.

"In some of the early cases in this court, it was decided that a mere affirmation or representation of the *soundness* of the thing sold did not constitute a warranty; that although no particular form of words was necessary to create a warranty, yet that words must be used which imported an agreement, and that a mere affirmation of soundness did not amount to an undertaking that the thing sold was sound. Smith *v.* Miller, 2 Bibb, 617; Bacon *v.* Brown, 3 Bibb, 35.

"But in the case of Dickens *v.* Williams, etc., 2 B. Mon. 374, it was held that an affirmation in a bill of sale, that the jack sold was a good and sure *foal-getter*, imports a covenant of warranty that it was so; and it was said by the court that "such expressions in a written contract, when unqualified, as in that case, by anything else therein, should be deemed a part of the contract, and therefore stipulatory; thereby the vendor, of course, agreed that the jack was as described, and consequently that agreement was a covenant to that effect."

"Several other cases, the opinions in which were not published, have since been decided by this court, in which it was held, on the authority of that case, that an affirmation of soundness in a written contract of sale amounted to a warranty. It may, therefore, be now considered as the settled doctrine of this court that an affirmation of the soundness or quality of the thing sold, if contained in a bill of sale, constitutes a warranty.

"We can not perceive any substantial reason for a distinction between a written and a verbal contract, where, as in this case, the sale is as effectual when made by a verbal as by a written contract. The language means the same thing, whether it be written or verbal; and uniformity of decision, as well as the rights of the parties, requires that the same construction and effect should be given to both kinds of contracts.

"The tendency of the modern adjudications upon this question is to regard an assertion of a fact relating to the kind, quality, or condition of the article sold, made by the vendor at the time of sale, as being part of the contract, and amounting to a warranty. 8 Cow. 25; 12 East, 637; 9 New Hamp. 111.

"Some of the cases seem to make the question of warranty depend upon the intention of the vendor. 19 Johns. 290; 13 Wend. 278.

"We think whenever the vendor, at the time of sale, makes an assertion or representation respecting the kind, quality, or condition of the thing sold, upon which he intends that the vendee shall rely, and upon which he does rely in making the purchase, that it amounts to a warranty. If, however, the vendor, by what he says, merely intends to express an opinion or belief about the matter, and not to make an affirmation of the fact, then the statement will not amount to a warranty.

"Where doubts exist upon the evidence, whether the vendor intended to assert a fact, or merely express an opinion or belief, that question must be left to the jury to decide.

"Here the vendor admits in his answer that he represented the jack to be a *good* and *sure foal-getter*. This was such a representation of a fact as constituted it a part of the contract of sale, and makes it amount to a warranty.

"Wherefore, the judgment is reversed and cause remanded for a new trial and further proceedings consistent with this opinion."

PATENT DEFECTS.

234. A general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer.[1] As if a horse, warranted perfect, be *minus* an eye or a tail, or a house, warranted to be in perfect repair, be without roof or windows;[2] or, "as if one sells purple to another, and saith to him that it is scarlet," this warrant is to no purpose, for that the other may *perceive* this, and this gives no cause of action to him. "To warrant a thing that may be perceived by sight is not good."[3] The reason for this rule is that the warranty can not operate as a false inducement in respect to defects which are perfectly manifest, nor can the seller be presumed to have intended to warrant against them, nor the buyer to have understood him so to do.[4] This is a very important branch of the subject of warranty, as applied to the sale and exchange of horses. In order to fairly illustrate it, we will give a few of the leading English and American cases upon this subject.

235. In Liddard *v.* Kain,[5] the sale was of horses known to the buyer to be affected, one with a cough, and the other with a swelled leg; but the vendor agreed to deliver the horses at the end of a fortnight, sound and free from blemish, and this war-

[1]Upon the subject of "Patent Defects," see the following cases: Williams *v.* Ingraham, 21 Texas, 300; Dyer *v.* Hargrave, 10 Ves. 507; Schuyler *v.* Ross, 2 Caines, 202; Dana *v.* Boyd, 2 J. J. Marsh. 587; Southern *v.* How, 2 Roll. 5; Long *v.* Hicks, 2 Humph. 305; Fisher *v.* Pollard, 2 Head (Tenn.), 314; Mulvany *v.* Rosenberger, 18 Penn. St. 203; Dillard *v.* Moore, 2 Eng. (Ark.) 166; Richardson *v.* Johnson, 1 Louis. Ann. 389; Livingston *v.* Arrington, 28 Ala. 424; Chadsey *v.* Greene, 24 Conn. 562; Morrell *v.* Bemis, 37 Vt. 155; Scarborough *v.* Reynolds, 13 Rich. (S. C.) L. 98.

[2]Dyer *v.* Hargrave, 10 Ves. 507.

[3]Bailey *v.* Merrell, 3 Bulst. 95.

[4]See Brown *v.* Bigelow, 10 Allen (Mass.), 342; also Chadsey *v.* Green, 24 Conn. 562.

[5]2 Bing. 183.

ranty was held to include the defects above mentioned, although known to the purchaser.

236. Margetson *v.* Wright,[1] which was twice tried, is instructive on this point. The sale was of a race horse, which had broken down in training, was a crib-biter, and had a splint on the off foreleg. The horse, sound in other respects, would have been worth 500*l.* if free from the defects named. He was sold by the defendant to the plaintiff, after disclosure of these defects, for 90*l.*

The defendant refused to give a warranty that the horse would stand training, and refused to sign a warranty that the horse was "sound, wind and limb," without adding the words "at this time." Six months afterward the horse broke down in training, and Parke, J., told the jury that the express warranty rendered the defendant responsible for the consequences of the splint, though it was known to the purchaser; but that the addition of the words "at this time," was intended to exclude a warranty that the horse would stand training. On motion for new trial, the first branch of this ruling was held erroneous, Tindal, J., saying: "The older books lay it down that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud, and originally the mode of proceeding on a warranty was by an action of deceit, grounded on a supposed fraud. There can, however, be no deceit when a defect is so manifest that both parties discuss it at the time. A party, therefore, who should buy a horse, knowing it to be blind in both eyes, could not sue on a general warranty of soundness. In the present case the splint was known to both parties, and the learned judge left it to the jury to say whether the horse was fit for ordinary purposes. His direction would have been less subject to misapprehension if he had left them to consider whether the horse was at the time of the bargain sound, wind and limb, *saving those manifest defects contemplated by the parties.*"

On the new trial then ordered, the plaintiff proved to the satisfaction of the jury that there were two kinds of splints,

[1] 8 Bing. 454.

some of which cause lameness, and others do not, and that the splint in question did cause subsequent lameness, and they found that the horse, at the time of the sale, had upon him the seeds of unsoundness, arising from the splint." Held, that this result not being apparent at the time, and the buyer not being able to tell whether the splint was one that would cause lameness, was protected by the warranty that the horse was then sound.[1]

237. In a Tennessee case, Fisher *v.* Pollard,[2] it was held that a general warranty of soundness, whether in writing or by parol, does not extend to an unsoundness, or defect which is plain and obvious to the purchaser, or of which he had cognizance. But to exclude a defect or disease from the operation of the warranty, it must be of such a character or description as to disclose to the vendee not only the existence but the *extent* of the defect or disease, and if this is not so, it is covered by the warranty. And parol evidence to show that the defect was obvious, or that the seller disclosed the unsoundness at the time of the sale, is admissible, notwithstanding the warranty may be in writing.

238. Brown *v.* Bigelow[3] was an action on contract to recover damages for breach of warranty of a horse, as set forth in a bill of sale containing these words: "One chestnut horse, nine years old, sound and kind." Bigelow, C. J., said: "The construction of the written contract of warranty was exclusively for the court, and it was rightly interpreted to be a general warranty of the soundness of the animal. The doctrine that such a warranty does not include or cover patent and obvious defects which are plainly visible to a purchaser, has no application to a case such as was proved at the trial, but only to one where it appears that a horse had been sold having a palpable defect, constituting unsoundness, such as the loss of an eye, which could not have escaped the observation of the purchaser. The doctrine rests upon the reasonable presumption that the parties could not have intended the warranty to apply to a defect rendering

[1] See also Butterfield *v.* Burroughs, 1 Salk. 211; Southern *v.* Howe, 2 Rolle, 5.

[2] 2 Head (Tenn.), 3'4.

[3] Brown *v.* Bigelow, 10 Allen (Mass.) 342.

the horse unsound, which was seen and known to both parties at the time of sale."

239. Birdseye *v.* Frost.[1] This was an action for a breach of warranty upon the sale of a span of horses. The complaint alleged that the defendant warranted that the horses were *sound* and *right* every way, except that one had a blemish on his nose and the other was a stallion; but that they were not sound and were ring-boned and had the heaves. The answer was a general denial.

Mullin, J., said, "The only question before us is, whether upon the evidence there was a breach of the warranty for which the plaintiff was entitled to recover; in other words, whether the warranty applied to the defects, which it was proved the horses sold to the plaintiff had, at the time of such sale. It is not pretended by the defendant but that the horses had ring-bones on their legs, but he insisted that they were so plain to be seen that the plaintiff must have seen them, and hence that his warranty of soundness did not apply to them. If the defects were thus visible, the law is, that a general warranty of soundness does not reach them." . . . . .

"But it is not enough that the defects exist and are visible. They must be such as could be discovered by an ordinary observer examining the animal with the view of trading for it, and such as not to require skill to detect them."

240. Pinney *v.* Andrus,[2] decided by the Supreme Court of Vermont in 1869; an action for false warranty of sheep. The sheep in question had the foot-rot at the time of sale, and this unsoundness was discovered by the plaintiff before the bargain for them was closed, but at the time the plaintiff discovered the unsoundness, the defendant declared that they were sound and that he would warrant them so.

Wilson, J., in deciding the case said, "It seems to be now well settled that the rule of law which exempts a vendor from liability upon a general warranty of soundness where the defect is perfectly visible and obvious to the unaided senses, does not extend to an apparent defect, to understand the true nature and

[1] 34 Barb. (N. Y.) 367.
[2] 41 Vt. 631.

extent of which requires the aid of skill, experience, or judgment. Nor is the rule applicable to a case where the vendor has resorted to any acts or representations, in respect to the property, intended, or naturally calculated, to throw the purchaser off his guard, and induce him to omit such thorough examination of the conditions of the property as he might, and very likely would, have made if he relied solely upon his own judgment in making the purchase. Nor has the rule any application to the case of a special warranty against a specified defect. 1 Parson on Con. 576; Chitty on Con. 396; Chadsey *v.* Green, 24 Conn. 562; Hill *v.* North, 34 Vt. 604; 1 Smith's Leading Cases, 221. . .

"In this form of action as well as in assumpsit in the warranty, proof of the contract and breach renders the defendant liable, and when the plaintiff claims to recover on this ground it is not necessary to allege *scienter*, and if alleged, it need not be proved. Beeman *v.* Buck, 3 Vt. 53; Vail *v.* Strang, 10 Vt. 457; 27 Vt. 720."

241. A leading American case upon the subject is Hill *v.* North.[1] This was an action on the case for the breach of a written warranty in the sale of a horse.

On the trial the plaintiff gave in evidence a written instrument signed by the defendant, of which the following is a copy:

"BIRDPORT, VT., *May* 21, 1857.

"Noble H. Hill, Boston, Massachusetts, bought of E. A. North, Champlain, New York, a Black Hawk stallion, called Rip Van Winkle, which will be five years old July 18, 1857, and which I warrant sound and kind in every respect, for $2,750.

"Received twenty-seven hundred and fifty dollars, May 21, 1857. E. A. NORTH."

Plaintiff further proved that the father of plaintiff, David Hill, as agent of plaintiff, went to the residence of defendant for the purpose of purchasing the horse in question; that the day after his arrival, he saw the horse and made some slight examinations of him, and noticed a quarter-crack and a small bunch

[1] 34 Vt. 604.

on the knee-joint of the right foreleg; also, that he saw the horse rode and driven near evening, when it was too dark for a close examination; that after considerable debate the defendant offered to sell the horse for $2,750; that said agent thereupon gave the defendant fifty dollars and agreed with him to bring the horse to Birdport on a subsequent day, where the plaintiff would meet him, and then, if the plaintiff should conclude to buy the horse, he would pay the defendant money enough to make, with the fifty dollars advanced, the sum of $1,000, and would give such notes for the balance as the plaintiff and defendant might agree upon; . . . . that, upon May 1, 1857, the defendant brought the horse to Birdport, where he met the plaintiff for the first time, who then closed the bargain at the price of $2,750, and gave satisfactory notes for the balance, and that thereupon the defendant executed the bill of sale and warranty above set forth; that on that occasion the plaintiff remained at Birdport but a short time, not more than an hour, returning the same day to Boston, where he resided.

The horse was left with plaintiff's agent, and within a day or two after sale, the agent discovered on the two hind feet of the horse what are termed clug-fasts or ring-bones, and also an enlargement of one of the gambrel joints; evidence was also given to prove the existence of these ring-bones and this enlargement of the gambrel joint at the time of sale, and that each of these constituted an unsoundness.

The plaintiff's evidence also tended to prove that the quarter-cracks, before mentioned, constituted unsoundness in the horse; but, in respect to these quarter-cracks, it was proved that at the time of the negotiation and trade they were spoken of by David Hill and the defendant, and David Hill testified that he said to the defendant he did not care much about them as they could be cured, and it appeared that they *were* cured within a year after the sale.

The plaintiff's evidence also tended to show that the bunch on the right foreleg was an unnatural deposit of bone, which some of the witnesses called a splint, and that it constituted an unsoundness at the time of the sale, and that both of these defects last named materially lessened the value of the horse.

As to the bunch on the foreleg, the plaintiff introduced as a witness Dr. Dadd, a veterinary surgeon, who testified that he saw the horse first in September, 1859, and again in December, 1859; that the excrescence on the foreleg was of a bony or cartilaginous character, and as such would constitute an unsoundness; that it was about as large as the half of a walnut, and he thought had increased in size some from 1858 to 1859; that it might have been the result of an accident and might interfere with the free action of the knee-joint. David Hill testified that there was a bone projecting from the knee of the horse; that it was on the right foreleg, and stuck out half an inch on the outside of the leg; that he saw and spoke of it to the defendant at the time of the negotiation at Champlain, and that the defendant said that it had always been there and did not injure him. David Hill also testified that this bone affects the walking of the horse, and shows a weakness of the joint; that he thought this bone did not increase in size after he was purchased, but that it might have done so a little. It was not claimed on either side that this leg was affected by any cause other than this bunch and the quarter-cracks.

The evidence further showed, and on this point was uncontradicted, that in September, 1858, the horse had large deposits of bone of an unnatural character on his hinder feet, known as ringbones, and a large spavin on the gambrel joint at the points indicated in the testimony of David Hill, as stated above, but it was claimed by the defendant that these did not exist at the time of the sale.

The evidence given by the defendant in question, and other witnesses in his behalf, tended to prove that the horse was examined by David Hill, at Champlain, in a much more thorough manner than stated by him; that he saw the horse rode and driven, and that the horse was also examined by one More, who was well acquainted with horses, and was taken by David Hill to Champlain for the purpose of making such examination; that David Hill had great experience and skill in regard to horses; that all the negotiation were conducted by David Hill at Champlain in his own name, and without reference to the plaintiff; that the price was there agreed upon; that the defendant agreed to de-

liver the horse at Birdport, where David Hill agreed to receive him, pay nine hundred and fifty dollars in money in addition to fifty dollars he then paid, and give notes, either signed by the plaintiff, or Mr. Fletcher, of Birdport, having not more than a year to run, for the balance; that the defendant understood that he was contracting with David Hill as principal and not as agent for the plaintiff, and that during the interview at Champlain nothing was said about any warranty of the horse as to soundness or otherwise; that the defendant met the plaintiff for the first time at Birdport, when he took the horse there; that the plaintiff was at Birdport when the defendant arrived there, where the plaintiff remained over night, and until some time in the following day, and examined the horse and noticed the quarter-cracks. There was no evidence, however, tending to show that the plaintiff ever saw or noticed the bunch upon the foreleg or any other defect or unsoundness in the horse, except the quarter-cracks, previous to the sale. . . . . .

Poland, Ch. J., said: "We have not been furnished with a copy of the plaintiff's declaration, but it is agreed that it is in the usual form in case for a false warranty, under which the plaintiff might recover by proving either a deceit or an express warranty, and a breach of it. It is apparent, from the exceptions, that the plaintiff at the trial sought to establish his case wholly upon the latter ground, and in that respect his case was to be made out in the same manner precisely as if his action had been assumpsit on the contract of warranty. The plaintiff proved a general warranty of soundness of the horse by written agreement of the defendant. . . . . .

"The more important question in the case arises upon the other points of this branch of the charge, in the condition of the evidence on the subject, that as David Hill saw the quarter-cracks and the bunch on the foreleg of the horse during the negotiation, and before the sale and warranty, they should wholly be laid out of the case.

"The express contract of general warranty of soundness in terms covers every existing unsoundness, whether known by the parties at the time of the horse trade or not. It seems somewhat anomalous to make the liability of a party upon an express

contract, for a breach of it, to depend upon the fact whether the party taking such contract knew at the time that the party was contracting what he could not perform. But it seems to have been established from the earliest history of this class of actions, that a general warranty does not cover defects that are perfectly visible and obvious to the senses, and known to the party taking the warranty. The illustration generally given in the old books is the sale of a horse with a general warranty of soundness which has lost one eye, or an ear, or a tail. The reason given why the general warranty does not cover such defects is because it is presumed that they are not intended to be included in the warranty, being fully known to the parties at the time. . . . .

"The rule excluding from a warranty such defects as are known to the purchaser only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them. All other defects, though apparent to some extent, but still equivocal and doubtful in their character, whether they are permanent or temporary, or whether they are mere harmless blemishes or but partially developed unsoundness, must be understood to be included and covered by a general warranty, and warranties are usually asked and given to protect purchasers against the risk presented by such cases." . . . . .

242. But a warranty may be so expressed or given under such circumstances as to protect the buyer from consequences growing out of patent defects. In a recent case,[1] in which the defendant sold a horse to the plaintiff with a general written warranty of soundness, but at the same time pointed out a splint which it had, and the horse subsequently became lame from the splint, it was held that the lameness was a breach of the warranty. Pollock, C. B., in his judgment said, "The rule is asked for, on the ground that when you point out a splint to the purchaser you except it out of the warranty; it may be so, if the horse be blind, or have any other patent defect, which is to be seen and is clear; but here it may well be that the defendant warranted that the splint should not grow into a lameness. A person buy-

[1] Smith *v.* O'Brien, 11 L. T., N. S. 346.

ing a horse is often no judge of horses, and may say, 'I don't want to see the defects or blemishes of a horse, as I really know nothing about them; I want and must have a written warranty.' I do not see why this warranty should not be taken thus: 'I show you this splint, and I warrant the horse perfectly sound notwithstanding.' It may have been excepted in the warranty, but there is no exception at all. I think the defendant is liable on his warranty." This entirely agrees with the decision in Margetson *v.* Wright.[1] Some splints cause lameness, and others do not. A splint, therefore, is not one of those patent "defects against which warranty is inoperative." Bramwell, B., in the same case, in giving judgment for the plaintiff, based his decision upon the broader ground, that where the warranty is a written one, it can not be modified by parol evidence to the effect that the defect existed at the time, and was therefore excluded from the warranty.

243. From what has been said upon this subject, it will be seen that there may be several exceptions to the rule that a general warranty does not cover patent defects, for the presumption of the rule is, that the defects being patent, they were brought by some means to the knowledge of the buyer; so if the buyer neglect to examine, or if from physical causes, such as blindness, he be unable to perceive them, or if it require peculiar skill or knowledge to discover or understand the defects which the purchaser does not possess, the seller will be bound to the full extent of his warranty; so, also, if the buyer be distant from the horse which he is purchasing and has no means of examining him, and upon seeing the horse it is found to have some patent defect, such as the absence of an eye or tail, the seller would be bound on his general warranty, as stated in the old year book hundreds of years ago, by Thirning, J.

244. If I buy a horse of you in a different place from where the horse is, through the confidence I have in you, and you warrant him sound in all his parts when he is blind, I shall have an action of deceit against you.[2] So in the case of Overbay *v.* Lighty,[3]

[1] 5 M. & P. 610.

[2] Year Book, 13 Hen., 4 p. 1.

[3] 27 Ind. 27; see also Warren *v.* Van Pelt, 4 E. D. Smith (N. Y.), 202.

it was held that where personal property sold at public auction is, at the time, remote from the place of sale, the purchaser, to whom this fact is unknown up to the moment of bidding, being ignorant of its condition, and having no opportunity to examine it, has a right to rely upon the statement of the seller. The rule of *caveat emptor* does not apply in such a case.

245. There is nothing peculiar to the contract of warranty; the same general rule governs it that governs any other contract. It may, as we have seen, be made at the time of sale, making a part of the sale, and the consideration for it founded upon the sale, or it may be made at any other time and founded upon a separate consideration; in which latter case it is in the nature of an insurance. It may be made by parol, or it may be in writing, and in each case the same rules of evidence govern it that govern any other contract so made. When the whole matter passes in parol, all that has passed should be taken together as forming the contract, except in cases where things talked of at the commencement of a bargain be canceled or excluded by the language used at its termination.[1] But if the contract of warranty be reduced to writing, nothing which is not found in the writing can be considered as a part of the contract, and the parties, in the absence of fraud or false representations, are bound by the written warranty, and no parol evidence can be admitted to modify the contract thus written.[2]

246. The usual warranty of title to soundness or of age in horses is founded upon the sale, and when in writing, forms a part of the bill of sale of the horse, or the receipt given for the price of the horse. The following form of receipt and warranty is frequently used:

"CINCINNATI, OHIO, *Jan.* 2, 1872.

"Received of A. B. two hundred dollars for a bay mare, warranted six years old, sound, free from vice, and quiet to ride or drive either in single or double harness.

"$200. C. D."

1 Deming *v.* Foster, 42 N. H. 165.

2 Kain *v.* Old, 2 B. & C. 627; Dickson *v.* Zizaina, 10 C. B. 602; Begg *v.* Parkinson, 7 H. & N. 955; Bywater *v.* Richardson, 1 Ad. & E. 508.

It may combine a bill of sale, a warranty of soundness, and receipt, as follows:[1]

"BIRDPORT, VT., *May* 21, 1857.

"Noble H. Hill, Boston, Massachusetts, bought of E. A. North, Champlain, New York, a Black Hawk stallion, called Rip Van Winkle, which will be five years old July 18, 1857, and which I warrant sound and kind in every respect, for $2,750.

"Received twenty-seven hundred and fifty dollars, May 21, 1857. E. A. NORTH."

247. These receipts and bills of sale may contain two elements, a description of the horse sold and a warranty; and there have been many decisions upon the subject and much learning displayed in their interpretation, in order to determine what is description and what warranty. And where an express warranty is contained in one of these instruments coupled with a description of the horse sold, if the buyer afterward discover a latent defect preventing the horse answering the description, but not violating the warranty, he must, in order to recover, show that the description was false within the knowledge of the seller. As in the case of Budd *v.* Fairmaner,[2] where a receipt was given in the following terms, "Received of J. B. ten pounds for a gray four year old colt, *warranted* sound in every respect," it was held that as far as regarded the descriptive portion of the receipt, the buyer was bound to prove a willful misrepresentation or he could not recover, and that it was not covered by the warranty. In giving judgment in the case, Tindal, C. J., said: "A written instrument was produced by the plaintiff to show the nature of the contract between him and the defendant, and we are to interpret that instrument like all others, according to the inten-

[1] Hill *v.* North, 34 Vt. 604.

[2] 8 Bing. 51; see also, upon this subject, Richardson *v.* Brown, 1 Bing. 344; Sewhanburg *v.* Buchanan, 5 Car. & P. 343; Lomi *v.* Tucker, 4 Car. & P. 15; Dickinson *v.* Gupp, quoted at p. 50 in Budd *v.* Fairmaner, 8 Bing. 48; Bywater *v.* Richardson, 1 Ad. & E. 508; Chapman *v.* Gwyther, L. R., 1 Q. B. 464; Willard *v.* Stevens, 4 Foster (N. H.), 271.

tion of the parties. The instrument appears to be a receipt for 10*l.*, for a gray four year old colt, warranted sound. I should say that upon the face of this instrument the intention of the parties was to confine the warranty to soundness, and that the preceding statement was matter of description only. And the difference is most essential. Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not; it is only necessary for the buyer to show that the article is not according to the warranty; whereas, if an article be sold by description merely, and the buyer afterward discovers a latent defect, he must go further, allege the *scienter*, and show that the description was false within the knowledge of the seller. And where there is an express warranty as to any single point, the law does not, beyond that, raise an implied warranty that the commodity sold shall be also merchantable." So in the case of March *v.* Phelps,[1] where a receipt was given in the following words: "Received of M. & H. $2,000 for a negro boy, named Allen, 26 years old; said negro is warranted sound in mind and body, and the title good," was held to contain no warranty as to the negro's age.

248. And in the case of Willard *v.* Stevens,[2] where the contract upon which the suit was brought was in these words:

"NEWTON, *June* 27, 1849.

"Mr. Jeremiah Willard bought one red horse, six years old, for $125, which I warrant sound and kind. Signed by the defendant, CHARLES STEVENS."

It was held that the age was matter of description, and that the warranty applied only to the soundness and kindness. In deciding the case. Eastman, J., said, "The defendant sells a red horse, six years old, for one hundred and twenty-five dollars, and warrants him sound and kind. Now if it had been the intention to warrant the age as well as the soundness and kindness, it could very easily have been so said, and we think it would have been. The

[1] Phill. L. (N. C.) 50.

[2] 4 Foster (N. H.), 271.

defendant does not say, I warrant the horse six years old, but I warrant him sound and kind; and in order to make the warranty apply to the age, the contract must be divided. It must be held that the intention was, first, to warrant the age by implication, and then to make an express warranty of the soundness and kindness. We think there can be but little doubt as to the true construction to be put upon this contract; that the age is matter of mere description, and that the warranty applies only to the soundness and kindness."

It will be seen from what has been said upon this subject that these instruments can be in any form to meet the views of the parties to the sale, and that the warranty contained in them will be always conditioned by their form; but where they contain any words of warranty, the seller will be held strictly to such warranty, and no warranty will be implied beyond their terms, as was decided in Deming *v.* Foster,[1] a New Hampshire case, which was an action of assumpsit for the breach of a warranty in the sale of a yoke of oxen. In deciding the case, Bell, C. J., said, "Where there is an express warranty of the quality of an article sold, in any respect no further warranty will be implied by law. Thus if a man sell a horse and warrant it sound, and the seller knows that it is intended to carry a lady, and the horse is sound but is not fit to carry a lady, there is no breach of warranty."

249. As in other contracts, this contract of warranty may be gathered from letters which have passed between the parties.[2] The case of Perrin *v.* Sewell is a fine illustration of this point, and as there were several other points ably discussed in the case, we will venture to give the opinion of Judge Ogden at some length.

The action below was for the recovery of damages for a breach of warranty contained in a contract for the sale of a horse.

A verdict was rendered in favor of the plaintiff below, and judgment entered thereon.

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[1] 42 N. H. 165; see, also, Budd *v.* Fairmaner, 8 Bing. 51.

[2] Stucley *v.* Bailey, 31 L. J., Ex. 483; Perrin *v.* Sewell, 1 Vroom (N. J.), 454.

The first error assigned is, that the court refused to nonsuit the plaintiff below, because, as alleged by the plaintiff in error, the sale was not absolute touching the warranty, but that Perrin had a right to furnish another horse in place of the one which was the subject of the sale. The whole contract was made in writing, by letters passing between them, the seller living in Freehold, the buyer living in New York. The plaintiff after looking at the animal, called "the Bashaw colt," in Freehold, returned to the city, and on the 21st day of January, 1861, wrote to Perrin as follows:

"The end of this week, or the beginning of next, if you will please write me what day you will send the Bashaw colt (price as spoken, $200, and warrant it sound in all respects), up by the boat, I will be there with my horse, which can return by the boat on the same day. I will also send you one hundred dollars on account, and you to allow me what is just for my horse; and if on trial the horse suits I will pay the balance, or if not, you are to get me such horse as will suit."

On the 23d of January, the defendant replied by letter as follows:

"I received yours of the 21st inst., stating you would like me to send you the Bashaw colt. I will do so, and warrant him sound and kind. If he does not suit you, I will take him back and send you one that will. I will send him up on Saturday morning. Please have your horse to send back by my man. The price of this colt is $200. Send your check for $100; your horse I will allow you all he is worth. When I see you, all things I think will be satisfactory. I make it my business to make it so.

"P. S. The horse will come up with the 'Keyport,' from Keyport, N. J."

On the 26th of January, Perrin sent the horse in charge of one Shepherd, his employe, together with the following letter:

"We send to-day the black colt as agreed to. You will please inclose the money or check in an envelope, and remit it by the bearer, Edward Shepherd, and much oblige,

"Yours respectfully, JOHN D. PERRIN,
"*By D. M. Reed.*"

The horse was received by the plaintiff in New York, and he sent his own horse to the defendant by Shepherd, with the following letter:

"*January* 26, 1851.

"Herewith I send you a certified check for $100, payable to your order, which can be drawn in any of your banks, on account of Bashaw colt, as agreed by letters which have passed between us." Then adding some characteristics of his own horse.

Perrin received the horse and check through his agent, Shepherd. It did not appear that any valuation was fixed by either party, then or at any other time, upon the plaintiff's horse, nor was there any testimony of his value offered at the trial. On the afternoon of the day on which the colt was sent to the city, he coughed considerably. He was well taken care of and nursed. He grew worse from day to day, and in a month afterward died from inflammation of the trachea and lungs.

Judge Ogden, in deciding the case, said, "It was contended by Perrin, in support of the first error assigned, that by the terms of the contract, the right to provide another horse extended to unsoundness; that it was a part of the warranty, and that the plaintiff could not recover any damages unless he proved that he had called upon Perrin to furnish another horse and that Perrin had refused to do so. This is not the true construction of the contract. The warranty as to soundness was complete and independent of the undertaking, that if the horse did not suit he might be returned, and another which would suit might be furnished in his place. The defendant below could not have warranted that the horse would suit. That was not a subject matter of warranty, because it might depend upon the taste of the plaintiff as to gait, style, speed, etc. It did not refer to unexisting quality or condition of the animal. The plaintiff below could not have fulfilled the terms upon which he was entitled to call for another horse, because the colt died upon his hands from a disease, which the jury found existed when the contract of sale and purchase was made. If the horse had been sound, from aught that appears in the case, he might have suited the plaintiff in all respects contemplated in the condition.

"Again, the plaintiff might immediately on delivery have resold

the horse in good faith before the malady, of which he died, had developed itself, with his warranty of soundness, and have thus deprived himself of the ability to make return; but in such case, if he become liable for damages on his warranty, could it have been said that he could not have fallen back upon the defendant because he did not first offer to return the horse? There is nothing in the terms of the contract which prevented the plaintiff from treating the warranty as extending only to soundness and kindness.

"Another error assigned is, that the court erred in instructing the jury that the risk of the horse was upon Perrin until he was delivered in New York.

"I think that the letters sustain the court in that position. The plaintiff was not to pay until the colt was received in the city. If a creditor of the plaintiff had attached the animal within the jurisdiction of this State, could the process have held him against the defendant as the owner? Or if the defendant had gone with the horse to New York, and sold him to a third party there, could the plaintiff have maintained trover for him against the purchaser?

"The trial by Sewell, which was to precede the purchase, was to be made in New York, and within a reasonable time; hence the title and ownership must have continued in the defendant until a fair opportunity was offered for making the trial. It appears in this case, that the plaintiff after receiving the horse drove him several times without complaining of his qualities; and from the evidence, it is fair to assume that he would have been satisfied if a serious unsoundness had not have been discovered.

"It is not the case of an absolute sale made at Keyport, with possession remaining in the seller merely as a lien, or to secure the payment of the purchase money.

"Another error assigned is, that the judge instructed the jury that their verdict could in no way depend upon the value of the plaintiff's horse.

"How could the value of that horse enter into the question of damages? Sewell was to give $200 for the colt. He paid $100 cash in New York, and at the same time passed his own horse

over to Perrin, at what he might be worth, on account of the balance. The defendant never informed the plaintiff of his estimate of the value of the horse sent to him. If he would not at the time fetch enough to make up the full price of $200, Perrin had his action against Sewell for the balance. There was no error in this instruction of the court.

"The defendant also excepted to the following part of the charge: 'The measure of damages of the plaintiff is the difference between the horse, if sound, and as he was; and you shall also allow the plaintiff the expenses of doctoring the horse.' The rule as to the measure of damages was correctly stated, and has been well established. What other sensible rule could be adopted for the guidance of a jury?

"Although the price was $200, yet if it satisfactorily appeared by the proofs, that had he have been sound he would have been worth $300, upon what principle should the plaintiff be deprived of the benefit of the increased value?

"The last error relates to the charge respecting the expenses incurred by the plaintiff in doctoring the horse in New York. The judge told the jury that such expenses should be allowed. The proof is, that Sewell paid twenty dollars to a veterinarian. It was not contended that the charge was unreasonable; why should it not have been allowed?

"It was a liability incurred by Sewell on account of the false warranty, and done for the benefit of the defendant. Sewell was bound to have the animal properly cared for, at the cost of the warrantor, until he should come and take him under his own charge." . . . .

250. A warranty, like any other contract, can be made by an agent, and when so made the general rules of law, as to principal and agent, apply.

And it is not necessary that the warranty should be made directly to the vendee; as where representations have been made by the vendor to a person in respect to the property sold, and that representation be known to the vendor, to constitute the basis of a sale subsequently made by him to a third person to whom the representations have been communicated, it would

have the same effect as if it were made directly to the vendee.[1] And in a recent Minnesota case,[2] it was held, "That a part owner in a horse, who stands by and hears the other part owner represent it to one to whom they are trying to sell it to be sound and remains silent, is as much a party to such representation as if he had made them himself.

251. We come now to a question which has caused great discussion and which does not seem to be well settled. Where there is no express warranty in terms in the memorandum, does the description of the article therein constitute a warranty that the chattel corresponds thereto? Upon a superficial reading of the cases previously quoted, it would appear that the description was regarded as immaterial, and the conclusions there arrived at would seem to negative the above question; but if we bear in mind the well-settled rule, that "*where there is an express warranty in the memorandum as to a particular quality, it constitutes an implied exclusion of warranty as to every other quality*," we will be able better to interpret the above decisions.

252. Mr. Benjamin, in his work on Sales, with considerable show of reason, repudiates the doctrine of warranty in a description, and declares that in such cases the vendor fails to comply, not with a warranty or collateral agreement, but with the contract itself by breach of a condition precedent.[3]

253. In Budd *v.* Fairmaner,[4] already alluded to, Mr. Justice Bosanquet says: "In every case where the contract appears on a written instrument, the instrument must be construed according to the intent of the parties; as where the dealing is by a contract note, the article delivered must agree with the terms of the note."

254. In the case of Allan *v.* Lake,[5] where the agent of A. sold a parcel of turnip-seed to B. and gave the following sold note: "Sold to B. for A. fourteen quarters of *Shirving's Sweedes* at 17*s.* per bushel;" it was held that this amounted to a warranty that the seeds were *Shirving's Sweedes*.

[1] Chadsey *v.* Green, 24 Conn. 562.

[2] Johnson *v.* Wallomer et al., 15 Minn. 472 (1870).

[3] Benjamin on Sales, 479.

[4] 8 Bing. 51.

[5] 18 Q. B. 560.

255. In the case of Nichol *v.* Godts,[1] where an agreement for the sale of oil described it as "foreign rape oil, warranted sound, equal to samples," it was held that this description was not complied with, by a tender of oil which was not "foreign rape oil," although it was equal in quality to the samples.

256. In New York, and several of the other States, it has been held,[2] that a vendor is liable only for a false affirmation or express warranty.

257. In Fraley *v.* Bisham,[3] a Pennsylvania case, this class of warranty was limited to the kind of article described. Thus, where the article was described in the bill of sale as "*superior sweet-scented* Kentucky tobacco," the seller was held *not* liable on a warranty, if the tobacco was Kentucky leaf, though of a very low quality, ill-flavored, unfit for the market, and not *sweet-scented.*

258. In the case of Gunther *v.* Atwell,[4] a Maryland case, it was held, "A bill of parcels designating merchandise, sold of a particular kind, imposes no obligations as to quality, but only as to kind."

259. But in many of the United States, the doctrine is now well established that a description in a bill of sale constitutes a warranty.

Thus, in California, in the case of Flynt *v.* Lyon,[5] it was held that the use of the word "Haxall," in a sale note for flour, is a warranty that the flour was "Haxall."

260. In the case of Windsor *v.* Lombard,[6] Mr. Chief Justice Shaw said, "The old rule upon this subject was well settled, that upon a sale of goods, if there be no express warranty of the quality of the goods sold, and no actual fraud, by a willful misrepresentation, the maxim *caveat emptor* applies. Without going at large into the doctrine upon this subject, or attempting to reconcile

[1] 10 Ex. 191.
[2] Carley *v.* Wilkins, 9 Barb. (N. Y.) 557.
[3] 10 Penn. 320.
[4] 19 Md. 157.
[5] 4 Cal. 17.
[6] 18 Pick. 60.

all the cases, which would certainly be very difficult, it may be sufficient to say, that in this commonwealth the law has undergone some modification, and it is now held, that without express warranty, or actual fraud, every person who sells goods of a certain denomination or description, undertakes, as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind, and quality thus expressed in the contract of sale."

261. This doctrine of warranty in description, where there is no warranty otherwise expressed, seems reasonable. If a bill of parcels contains a warranty of general soundness, and a description of the horse, by age, color, or size, the law will imply the description of age, color, or size to have been immaterial in the sale; but if the bill of parcels states that the sale is only of a black horse or a five-year old horse, or of a horse sixteen hands high, it may fairly be presumed that the intention of the parties was, the one to sell and the other to buy a horse as described in the bill of parcels. And it may be fairly stated, that in all cases, where the description in a bill of parcels enters into and forms a part of the contract, there is a warranty expressed in such description.[1]

262. There is another class of cases arising upon a bill of parcels which we will mention in this connection. We have stated previously that where a warranty is given in writing, no parol evidence can be admitted to vary or condition it. But if the contract is first concluded by parol, and a paper is afterward given, not as containing the terms of the contract, but merely as a memorandum of the transaction or a receipt for the money, or a

[1] Upon the subject of warranty in description, see the following cases: Hastings *v.* Lovering, 2 Pick. 214; Hogins *v.* Plympton, 11 Pick. 99; Winsor *v.* Lombard, 18 Pick. 60; Henshaw *v.* Robbins, 9 Met. 88; Morrell *v.* Wallace, 9 N. Hamp. 111; Goss *v.* Turner, 21 Vt. 437; Richmond Trading Co. *v.* Farquar, 8 Blackf. 89; Osgood *v.* Lewis, 2 Har. & Gil. 495; Barrikens *v.* Bevan, 3 Rawle, 23; Flint *v.* Lyon, 4 Cal. 17; Shepherd *v.* Kain, 5 B. & Ald. 240; Carson *v.* Baillie, 19 Penn. St. 375; Ender *v.* Scott, 11 Ill. 35; Emerson *v.* Brigham, 10 Mass. 197; Bradford *v.* Manly, 13 Mass. 139; Hargous *v.* Stone, 1 Seldon, 73.

mere bill of parcels be given, parol evidence can be given to show what the terms of the sale really were, and that there was a warranty, although it does not appear in writing. This doctrine seems to be now well settled both in this country and in England. We will give two of the leading American cases upon this subject, as applied to the sale of a horse.

263. Hersom *v.* Henderson.[1] This was an action of assumpsit on a warranty of a horse. Upon the trial of the cause at *nisi prius*, upon notice of the defendant the plaintiff produced the following bill of sale:

"ROCHESTER, *March* 12, 1849.

"Mr. Isaac Hersom bought of Charles Henderson one brown horse, eight years old this spring; one bay mare, eight years old this spring.

"Received payment, $250.

"CHARLES HENDERSON."

Upon the production of this bill of sale, the defendant moved for a nonsuit, on the ground that this writing must be presumed to contain the contract between the parties, and parol evidence was not admissible to prove a contract of warranty not contained in the writing.

The court so held and further, that in the absence of any evidence tending to show that the writing was intended or agreed to contain but a part of the contract, it could not be left to the jury to say whether or not the writing contained or was designed to contain the whole contract. To these rulings exceptions were taken, and the cause went up to the Supreme Court of New Hampshire.

Gilchrist, C. J., in deciding the case, said, "The writing produced in evidence is a bill of sale of the horses, containing a receipt for the payment of their price. Nothing is said in it about a warranty of their soundness.

"The plaintiffs have proved by parol evidence independent of the writing, and having no connection with it, that the defendant, at the time of the sale, warranted the horses to be sound.

[1] 1 Foster (N. H.), 224.

"The court ruled that the writing must be presumed to contain the contract between the parties, and that parol evidence was not admissible to prove a contract of warranty not contained in the writing.

"Parol evidence is not admissible to vary or control the writing, and if the evidence offered has that effect, it was properly excluded. But we think that the evidence was competent. The plaintiffs did not rely on the writing to make out their case, nor was it necessary that they should do so. The evidence of the warranty does not contradict or vary the effect of the writing in any degree. It does not even explain it, and it needs no explanation by evidence *aliunde*. The defendant proved a warranty by evidence as independent of the writing as one thing of the kind can be of another. There is no reason to presume that because the parties made a written contract relating to the price and age of the horses, therefore they made no other contract relating to them, touching a matter perfectly consistent with the writing. There is no necessary or usual connection between the two matters, and we can not reason from one to the other. The opinion of the court is that the ruling was erroneous; and there is an English case which justifies this conclusion. In the case of Allen *v.* Pink, 4 M. & W. 140, the defendant gave a verbal warranty of a horse, which the plaintiff thereupon bought and paid for, and the defendant then gave him the following memorandum: 'Bought of G. A. (the plaintiff) a horse for the sum of seven pounds two shillings and sixpence. [Signed,] G. P.' It was held that parol evidence might, notwithstanding, be given of the warranty. Lord Abinger said, in the course of his opinion, 'The general principle stated by Mr. Byles is quite true, that if there had been a parol agreement which is afterward reduced by the parties into writing, that writing alone must be looked to, to ascertain the terms of the contract.' But that principle does not apply here. There was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant. The contract is first concluded by parol, and afterward the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction, or an

informal receipt for the money, not as containing the terms of the contract itself."

The verdict was set aside.

264. Filkins *v.* Whyland.[1] This action was appealed from the Supreme Court to the Court of Appeals of New York, and was for the breach of warranty of the soundness of a horse. Upon the trial the plaintiff gave evidence of the negotiation for the sale and purchase of the horse, tending to prove that the plaintiff warranted him to be sound, and that he proved unsound shortly after the delivery of him to the defendant. At the conclusion of the plaintiff's evidence, he produced, upon the call of the defendant's counsel, an instrument in writing, in these words:

"TROY, *Nov.* 19, 1852.

"C. B. Filkins bought of C. Whyland one horse, $150.

"Received payment. C. WHYLAND."

The plaintiff admitted that the defendant, upon the purchase of and payment for the horse, executed and delivered this writing to the defendant. After the writing had been put in evidence, the defendant moved for a nonsuit, on the ground that the contract of sale being in writing, parol testimony to add to or vary it by proving a warranty of soundness was inadmissible. The plaintiff was nonsuited, and took an exception. The judgment for the defendant having been reversed by the Supreme Court at general term in the third district, and a new trial granted, the defendant appealed to this court, stipulating for judgment absolute against him if the order for a new trial should be affirmed.

Judge Wright, in deciding the case, said, "When a contract is consummated by writing, the presumption of law is that the written instrument contains the whole of it; and it will not be allowed to show oral representations or stipulations, preceding or accompanying the execution of the instrument, differing from or not inserted in it. The agreement to which the contractors bound themselves is to be ascertained exclusively by the writing.

"These familiar principles were applied to and controlled the

[1] 24 N. Y. 338.

decision of this case by the referee. Whether, in view of conceded facts, they were correctly applied, is now the single point in judgment.

"The action was for a breach of warranty on the sale of a horse. The sale and delivery of the horse, the warranty and breach thereof, were proved by parol; and, after the plaintiff rested, it was admitted that, upon purchasing and paying for the horse, the defendant executed and delivered to the plaintiff the writing set out in the case. A controlling inquiry, therefore, is as to the import and legal effect of that writing. If it is to be regarded and treated as the contract of the parties for the purchase and sale of the horse, reduced to writing after verbal representations and stipulations, then, as it contains no warranty, it was inadmissible to add to or vary such contract by parol testimony tending to prove a warranty. On the contrary, if it be a mere receipt acknowledging payment of the purchase money, and not intended by the parties as an embodiment of the contract of sale, then the rule that we can only look at the written instrument to ascertain the agreement, and that such writing can not be varied or altered by parol proof, has no application. The defense can only prevail, if at all, on the assumption that the writing embodies the contract of bargain and sale, and that it was executed in consummation of such contract. If it be simply a receipt, and obviously not the written transfer of title to the horse, it would not be such a writing as to preclude proof by parol of the actual contract between the parties.

"I think the paper is to be construed as a simple receipt, delivered and accepted as evidence of payment, and not the contract by which title to the horse was transferred. This construction will best accord with its terms, and the obvious intent of the parties in executing and accepting it. The paper can not be read as a present agreement of sale. It contains no stipulations to sell or to buy, nor declares any present undertaking by either party. The vendor acknowledges payment, but he does not profess by the writing to sell.

"The vendee does not execute, but accepts it. It recites a fact of a past sale. The only words of purchase or sale it contains are, "*C. B. Filkins bought of C. Whyland*," and they are

but the admission of a fact, and not an undertaking. Looking at the instrument alone, and without the aid of extrinsic evidence, they could not be connected at all with the purchase in question. The paper does not, by its own force, at the time of its execution, vend the horse or assume to do so. It admits that a sale has been had, but does not effect one. No presumption necessarily arises from the language used in the writing that the parties intended it for the contract of sale. . . . . .

"No one doubts that, when the contract of sale is reduced to writing, recourse can only be had to the written instrument to ascertain its extent. But the fact is always an open one, whether the parties have assumed to consummate the agreement by writing. In this case, had a formal contract of bargain and sale been shown to have been executed in writing, upon the purchase and transfer of the horse, there could have been no question that the parties intended that for the agreement of sale. But no such inference can be predicated of a paper, defective as a contract, but complete as an acknowledgment of payment.

"In Allen *v.* Pink, 4 Mees. & Welsb. 140, a paper, which was delivered to the plaintiff when he paid the sum agreed upon for the price of a horse, viz: 'Bought of G. Pink a horse, for the sum of 7*l.* 2*s.* 6*d.*—G. Pink,' was held not to be the contract of the parties for the sale of the horse. Lord Abinger said, 'The paper appears to have been meant as a memorandum of the transaction, or an informal receipt of the money, and not as containing the terms of the contract itself.' And the plaintiff was allowed to give parol evidence of a verbal warranty. So, also, in Hersom *v.* Henderson, 1 Foster, 224, when the defendant had proved a bill of sale in which the horses were described, their ages stated, and the receipt of the price acknowledged, it was held that parol evidence was competent to prove a warranty of the soundness of the horses. The latter is a more marked case than the present. In the case under consideration, the written instrument was not a present operative contract of sale, nor did it purport to be, but a formal, and not informal, receipt of the purchase money.

"The Supreme Court placed its decision of the case on the ground that the paper was, in terms and legal effect, nothing

more than an acknowledgment that the plaintiff had paid the purchase money upon the sale of a horse, and that it contained no agreement, stipulation, or condition which characterizes a contract whose written terms can not be varied by parol. Coinciding in this view, I am of the opinion that the order of the Supreme Court granting a new trial should be affirmed, and that judgment absolute should be rendered against the defendant."

Allen, J., also delivered an opinion for affirmance, and all the judges concurred.

CHAPTER VI.

IMPLIED WARRANTY.

265. *Implied Warranty* is the second exception we made to the rule of *caveat emptor*. This warranty is made by implication of law. Every warranty is a promise made that the article is so and so. This promise may be written or spoken, and it is then called *express warranty;* but the promise may also be implied by the conduct of the vendor, or it may result from the nature and circumstances of the sale, and it is then called *implied warranty.*

266. There are several cases of sales in which, in the absence of warranty expressed, the law *implies* a warranty. They are not all of them applicable to the scope of this work, but we will notice the following:

1. The law implies that the vendor has a valid title.

2. That the article sold is reasonably fit for the use for which it is sold.

3. That in sales of chattels by description, which are not inspected by buyer, a warranty is implied that they are salable.

4. That a warranty may be implied from the usage of a particular trade.

267. *Warranty of Title Implied.*—There has been much discussion, especially in England, upon this subject. The earlier English decisions recognized no such implication of law, and held that in sales of chattels without an express warranty of title, *caveat emptor* applied, and the title was at the risk of the purchaser. The later English cases seem to have modified this rule. Mr. Benjamin, in his recent work on Sales, after reviewing the English cases upon this subject, commencing with Morley *v.* Attenborough,[1] and ending with Eichholz *v.* Banister,[2] gives the following rule as in accordance with these cases:

"*A sale of personal chattels implies an affirmation by the vendor*

[1] 3 Ex. 500.

[2] 17 C. B., N. S. 708.

that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."

268. In America, as in England, it is now well settled that in an executory agreement the vendor warrants by implication his title in the article which he promises to sell; and in the discussion of this subject, it has been said that "nothing could be more untenable than the pretension that if A. promises to sell 100 quarters of wheat to B., the contract would be fulfilled by the transfer, not of the *property* in the wheat but of the possession of another man's wheat."[1] So, also, is it well settled that as to goods *in possession* of the vendor, there is an implied warranty of title.

269. Judge Dewey, in the case of Whitney *v.* Heywood,[2] has fairly stated the American doctrine on this subject. He says, "The vendee of goods in possession and selling them as his own, is liable to his vendee upon the implied warranty of title. The principle is usually stated under this limitation of a vendee in possession, and I take it properly so. But possession here must be taken in its broadest sense, and as including possession by a bailee of the vendor. . . . . The excepted cases in which no warranty of title is implied, must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive."

270. We will give a few of the leading American cases in illustration.

Rew *v.* Barber,[3] is an early case upon this subject. In this case, the horse in question was levied upon by a sheriff; the execution creditor allowed it to remain in the possession of the debtor. Afterward the debtor sold the horse to A. and A. sold it to B., both acting in good faith, and without notice of the levy. Afterward the sheriff took the horse from B. and sold it. *Held*, B. might maintain an action against A. on an implied warranty.

[1] Benjamin on Sales, 466.

[2] 6 Cush. 82.

[3] 3 Cow. (N. Y.) 272.

It will be seen that in these cases the implication of warranty of title is confined to chattels in possession, and this distinction between chattels not in possession and those in possession seems to be pretty well settled in this country;[1] and, as said by Judge Prentiss, in his edition of Story on Sales: "This distinction has now become so deeply rooted in the decisions of courts, in the *dicta* of judges, and in the conclusions of learned authors and commentaries, that even if it were shown to be misconceived in its origin, it could not at this day be easily eradicated."

272. Miller *v.* Van Tassel.[2] The action in this case was founded upon the following bill of sale:

"This is to certify that I have sold to William Miller my brown Maltese jack, for $1,000.

"N. Van Tassel."

"This action was brought by the vendee of an American jack to recover back from the vendor the purchase money, on the ground that the vendor had no title at the time of the sale. The first count of the complaint amounts merely to the common count for money had and received by the defendant to the use of the plaintiff. The second count states, in substance, that the defendant represented to plaintiff that he, the defendant, was the owner of and entitled to sell the property; that thereupon the defendant executed to the plaintiff a bill of sale of the property, a copy of which is inserted; that the plaintiff paid the defendant the price and received possession of the property; that the United States is the owner, and reclaimed and took possession of the jack; that the sale was void, and that the plaintiff rescinded the sale and demanded from the defendant the price, with interest, and that defendant refused to pay the same.

"The defendant, in his answer, denies that the property was the property of the United States, that the sale was void, or that

[1] Huntington *v.* Hall, 36 Maine, 501; McCoy *v.* Archer, 3 Barb. 223; Dresser *v.* Ainsworth, 9 Barb. 619; Edick *v.* Crim, 10 Barb. 445; Long *v.* Hickingbottom, 28 Miss. 772.

[2] 24 Cal. 458.

the plaintiff had the right to rescind the contract; and he sets up that the plaintiff bought the property at his own risk; in other words, he denies what is not alleged in the complaint—that is to say, that he warranted the title.

"The case was treated by the parties in the court below as an action upon the warranty of title, and the counsel of both sides have submitted the case to this court on that theory. But evidently no recovery can be had for a breach of the warranty under the first count, because it contains no allegation of a warranty. Eldick *v.* Crim, 10 Barb. 445.

"It is a rule well established inthe American courts, that the vendor of chattels in his possession warrants the title by implication. 1 Parsons on Contracts, 456. This implied warranty applies to nothing more than a presumption of law of the existence of a fact, arising from the proof of certain other facts, to wit: the possession of the vendor and his sale of the chattel; but this is not a conclusive presumption. If the whole evidence of the sale had rested in parol, there would be no question that in an action brought to recover damages for a breach of the warranty of title, evidence of the character of that offered by the defendant would have been competent and material in support of the answer denying the warranty.

"The plaintiff urges that there being a bill of sale of the property, the warranty of title arising by implication attaches itself to the writing, and thereby becomes a part of the written instrument, and thus is subject to the rule of law forbidding an instrument in writing to be contradicted by parol testimony.

"There is much force in the point, but in our opinion it is untenable. No case is cited by the respondent directly to the point, and it is doubtful if any well-adjudged case can be found sustaining that doctrine. The language of the court, in Munford *v.* McPherson, 1 Johns. 414, is broad enough to exclude parol proof of a warranty of any description, when there was a contract in writing which was silent in regard to a warranty, because, if allowed, it would add a new term to the written instrument of sale, but in that case the question of adding to the written contract a *further* warranty of quality was under consideration. Van Ostreand *v.* Reed, 1 Wend. 424; Powell *v.* Edmunds, 12

East, 6, and a large number of English and American cases, decide that a warranty of quality or quantity can not be added by parol to the written contract of sale; but they do hold, as counsel argues, that an implied warranty of title arising out of a sale of chattels, can not be varied or contradicted by verbal evidence.

"The fallacy of the learned counsel's argument consists in considering the warranty as arising out of the terms of the contract, in holding that a contract of sale means a sale and a warranty, by the same process and in the same manner that the words 'grant, bargain, and sale,' in a conveyance of land, import a warranty as against the grantor; or as the term *demise*, in a lease of real estate, implies a covenant for quiet enjoyment; or as a clear bill of lading (as was held in Creery *v.* Holly, 14 Wend. 30) means, according to commercial usage, that the goods were stowed *under* the deck. A warranty of title of a chattel, not directly expressed, either verbally or in writing, is an implied agreement of the vendor, presumed by law from the concurring facts of the sale of the chattel by the vendor, and his possession at the time of the sale, without regard to the terms of the sale, or the fact that the sale is or is not evidenced by writing. Chancellor Kent adds the further fact that the sale was for a fair price (2 Kent, 478); but the current of the late American cases does not regard that as an essential fact. Familiar illustrations of such contracts arising by implication may be found in the cases of sale of chattels, either verbal or in writing, where no price or terms of payment are expressed. In such cases the law presumes, from the fact of sale, that the purchaser promised to pay the reasonable value of the chattels; also, to pay on demand and to pay in money. A tenant holding over, after the expiration of a lease in writing, is presumed to hold as a tenant from year to year, and upon the terms expressed in the lease. But, in all these cases, the implied contracts may be varied or contradicted by parol evidence, showing an agreement differing from that presumed by law. This doctrine is further enforced by the fact that if the warranty is presumed from the contract, as distinguished from the facts of the

sale and possession by the vendor, none could be presumed when the contract was in writing, unless the writing also stated that the vendor was in possession at the time of sale, for it would be certainly not allowable to presume the existence of a fact which might as well not be true as be true, and thereupon to presume an agreement that could not arise by implication unless that fact was true. The implied agreement of warranty does not form a portion of the contract in writing, and may be varied or contradicted by parol. 'It is a general rule that oral and extrinsic evidence is admissible to rebut a presumption of law or equity.' 2 Starkie on Ev. 568.

"An instrument simply expressing that the vendor has sold to the vendee a certain chattel at a specified price, the receipt of which is acknowledged, and which is usually denominated a bill of sale, does not amount in legal contemplation to a contract, defined by Parsons (vol. 1, p. 6) as 'an agreement between two or more parties for the doing or not doing of some specified thing,' but amounts rather to a bill of parcels, according to commercial usage. But even if it is said to be a contract in any sense, yet the rules of law might not preclude the defendant in this case from introducing the evidence offered by him, for in a case where a writing is not required by law, 'oral proof of a distinct parol contract, relative to terms not noticed in the written memorandum, and showing that the memorandum was confined to one part only of the transaction, may be received.' Chitty on Contracts, 109. The bill of sale is silent in respect to the warranty." . . . . .

273. Thurston *v.* Spratt.[1] This was an action to recover the value of a horse, and damages, and costs incurred by plaintiff in an action defending his title. Thurston, the plaintiff, exchanged horses with Spratt, the defendant; afterward Thurston sold the horse, which he had received from Spratt, to one Ham, and Ham sold to Gould—Thurston, Ham, and Gould all believing that the title to the horse was in them respectively as per said sales. The horse was afterward replevied from Gould, and thereupon Gould notified Ham, and Ham notified Thurston, and Thurston noti-

[1] 52 Maine, 202.

fied Spratt, who made no defense to the action of replevin and judgment went against Gould for the horse, with five dollars damages and $29.50 taxable costs, making Gould's loss in answering to the suit, including attorney's fees and value of the horse, $117.51, which sum of money was refunded to him by Ham and to Ham by Thurston, who brought this action to recover said sum of Spratt, who sold and delivered to him said horse. Kent, J., in giving judgment, said: "The vendor, in possession of personal property, impliedly warrants the title to the thing sold. He is, therefore, bound to make good to the purchaser all his losses resulting from the want of a good title. If the purchaser, or any subsequent vendee, is sued in replevin or trover, or in any other action involving the question of title, if he gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor. If no notice is given, it is not conclusive on him, but he may show that the plaintiff, in a suit against him on his warranty, ought not to recover the amount he has paid because the case was not properly defended and judgment was suffered unnecessarily. French *v.* Parish, 14 N. H. 496; Duffield *v.* Scott, 3 D. & E. 210; 1 Johns. 517; Weed *v.* Nichols, 17 Pick. 538; Kipp *v.* Bingham, 6 Johns. 157.

"It makes no difference that there are intermediate purchasers, and that the suit is against the last one, *if the question of title is the sole matter in controversy*.

"All the individuals who have sold the property are alike warrantors, and can as well defend the title in the suit against the last purchaser as in a suit against themselves, if they have notice. The law will not tolerate a succession of long lawsuits to determine, as in this case, the title to a single horse, in all of which precisely the same issue is to be tried, when all the parties have had due notice and an opportunity to defend. It requires that every warrantor who is notified shall act at once in defending himself or in aiding the party sued to defend the action. This is the rule in real actions. Perkins *v.* Pitts, 11 Mass. 125; 4 Mass. 353. Where there is a succession of transfers and judgment against the last holder and notices to all the vendors, it may be competent for the first, or any seller, to show that the

defect in the title arose after he sold the property, and that, therefore, he had no interest in the determination of the question tried. However this may be, the defect, in the case before us, was in the title of the defendant. That was the only question in issue. He was notified and did nothing to aid in the defense. This case illustrates the wisdom of the rule. After being notified, he stands by, and keeps to himself the facts which he now says would show a right in him to sell the property. If he had disclosed them or testified to them at the trial, the result might have been different. He allows a final judgment to pass by while the other innocent purchasers lose the property and damages and costs, and now asks to be allowed to prove them when it is too late for his vendee to use them in his defense."

274. In Richardson *v.* Tipton,[1] it was held that a party who sold a horse branded U. S., which was afterward seized by a United States horse inspector merely because he was so branded, is no more liable, in his implied warranty of title, than if any other trespasser had seized the horse under any other pretended claim. In deciding the case, Judge Williams said: "In Plummer *v.* Newdgate,[2] this court held that the obscure brand of U. S. does not prove title in the United States as a deduction of law, because stolen horses have often been sold to the government, and such sale could not pass the title without the agency or consent of the owner."

275. Williamson *v.* Sammons.[3] This was an action of trover for the conversion of a horse. Walker, C. J., said: "A vendor who stands as a warrantor of the title, may take upon himself the suit of his vendee, which involves that title, and may act in its prosecution as if it were his own suit, when his vendee interposes no objection. Upon principle, we can see no reason why he may not as well be permitted to take back the title, and prosecute the suit in his own name. . . . . The law, in the absence of proof to the contrary, implies a warranty of title in the sale of chattels. Ricks *v.* Dillahanty, 8 Porter 133.

[1] 2 Bush (Ky.), 202.

[2] 2 Duvall, 3.

[3] 34 Ala. 691.

Upon the reasoning above adduced, we decide that if the plaintiff sold the horse which is the subject of litigation, either with an express or implied warranty of title, and that after such sale the defendant took the horse into his possession, and held him under a *bona fide* claim of title, a transfer back to plaintiff by the purchaser, upon a rescission of the contract of purchase made pending the adverse possession, would be void."

276. As to the quality of an article, the buyer, when there is no fraud, purchases at his own risk, and the common law rule of *caveat emptor* applies, unless there is an express warranty, or unless, from the nature and circumstances of the sale, there is an implied warranty; and as to specific articles which the buyer has inspected and buys upon his own judgment, there is no implied warranty of quality.

277. But as to chattels which are to be supplied for a certain purpose, upon order of the buyer, and that purpose be known to the seller at the time the order is given; or if a person buy an article for a particular purpose, made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose. Upon this subject see Fisk *v.* Tank, 12 Wis. 276; Devine *v.* McCormick, 50 Barb. (N. Y.) 116; Pease *v.* Sabin, 38 Vt. 432; Ketchum *v.* Wells, 19 Wis. 25; Lord *v.* Grow, 39 Penn. St. 88; Bird *v.* Meyer, 8 Wis. 362.

278. Chief Justice Best, in Jones *v.* Bright,[1] stated this principle in the following words: "If a man sells an article, he thereby warrants that it is merchantable; that is, that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose, and no case has decided otherwise, although there are doubtless some *dicta* to the contra. If a man sells a horse, generally, he warrants no more than that it is a horse; the buyer puts no question, and perhaps gets the animal cheaper. But if he asks for a horse to carry a lady or a child, or to drive in a particular carriage, he who knows the qualities of the animal, and sells, undertakes, on every principle of honesty,

[1] 5 Bing. 544.

that it is fit for the purpose indicated; but if it should turn out that the horse was vicious, or had never been in harness, the buyer would be entitled to recover, on proving that the horse was unfit for the purpose for which it was sold, although it might be fit for several other purposes. The selling, upon demand for a horse with particular qualities, is an affirmation that he possesses those qualities."

279. And in the case of Charter *v.* Hopkins,[1] Mr. Baron Parke said: "Suppose a party offered to sell me a horse of such a description as would suit my carriage, he could not fix on me a liability to pay for it unless it were a horse fit for the purpose it was wanted for; but if I describe it as a particular bay horse, in that case the contract is performed by his sending that horse."

280. Chief Justice Tindal, in Brown *v.* Eldington,[2] said: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he can not afterward hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed. . . . . When a party undertakes to supply an article for any particular purpose, he warrants that it shall be fit and proper for such purpose."

281. Beals *v.* Olmstead,[3] a Vermont case. This was an action for the breach of a warranty in the sale of some hay, which was in such a situation that it could not be inspected by the plaintiff. During the negotiation Beals said to Olmstead: "You know what use I wish to make of the hay; I want it to feed my oxen on during the spring and summer, while they are at work on the railroad." After the delivery of the hay to the plaintiff, he found it was in bad condition; had been poorly cured, and was

[1] 4 M. & W. 406.
[2] 2 M. & G. 279.
[3] 24 Vt. 114.

full of weeds, and not fit to feed his oxen. In deciding the case, the judge said: "The hay was bought for a particular use, and the defendant knew plaintiff would not buy an inferior article. The sale of the hay, then, for this particular use, ordinarily implies a certainty that it is fit for the use."

282. Smith *v.* Justice.[1] This suit was commenced before a justice of the peace. The complainant alleged that the plaintiff bought a horse of the defendant for $150, the defendant representing at the time that the horse was sound and gentle in harness, whereas the horse was then unsound, and ungovernable in harness, as the defendant well knew, to the plaintiff's damage, etc. Verdict and judgment for the plaintiff. . . . .

Paine, J. "This action was for a breach of warranty in the sale of a horse. The complaint was criticised somewhat by the counsel for the appellant, upon the ground that it did not sufficiently appear whether the action was for a breach of warranty, or for fraud and deceit. No question was made as to the sufficiency of the complaint in the court below, and we think it sufficiently sets forth a cause of action for a breach of warranty to sustain the judgment, if there is no other objection to it.

"The principal question arises upon the instruction given at the request of the plaintiff's counsel. It was that if the jury found that the defendant told the plaintiff that the horse was 'all right,' to induce the plaintiff to purchase, and that the plaintiff relied on the assertion of the defendant, 'then it was an express warranty, and the plaintiff need not show that the defendant had any knowledge of the bad qualities of the mare.' We suppose the law to be settled that a positive representation with respect to the quality of the thing sold, made by the vendor and relied on by the vendee, at the time of the sale, amounts to a warranty. The only question that it would seem could be made upon this instruction, is as to the meaning and effect of such a representation. And we have come to the conclusion that effect ought to be given to it, according to what the parties would fairly have understood it to mean.

"Undoubtedly such a representation would cover soundness.

[1] 13 Wis. 600.

And in addition to that, where the vendee buys the horse for a particular use, which is known to the vendor, and the latter tells him "the horse is all right," such representation amounts to warranty that the horse was reasonably fit for the use for which it was desired by the vendee.

"This is what the vendee would naturally understand, and the vendor must be presumed to have intended. Thus, if a horse was purchased to use in harness, if the vendor said it was all right, and it was actually ungovernable in harness, though a good saddle horse, that would be a breach of the warranty.

"The evidence here was that the plaintiff bought the horse to use in harness, and that this was known to the defendant. The instruction was applicable to the evidence and was correct.

"The court submitted the questions of fact fairly to the jury, and gave all the instructions asked by the defendant's counsel, except one.

"That one was, 'that if the jury find from the evidence that the defendant did not intend to warrant the mare, then the plaintiff can not recover,' etc. The court modified this, by striking out the words 'intend to,' so that it would read, 'if the defendant did not warrant the mare,' etc. We think this also was correct. The question for the jury was, whether there was a warranty, and this was left to them under proper instructions as to what would amount to a warranty. If they should find that the defendant made such representations as would amount to a warranty, if relied on, of course this effect could not be defeated by any secret intentions he may have had not to warrant.

"It is true the question to be arrived at, in construing every agreement, is the intention of the parties. But each party is bound by such intention as his language in making the agreement indicates. And he can not use language there showing one intention, and then avoid its effect by leaving to the jury the question whether he really intended it or not. Such would have been the effect of the instruction asked for by the defendant's counsel, if given without modification, taken in connection with the previous instructions.

"We see no error, and the judgment is affirmed, with costs."

283. It is upon the principle that a warranty is implied, that the article is fit for the uses for which it is purchased, that an implied warranty is raised in the sale of provisions.

284. So, in the case of Divine *v.* McCormick,[1] the principle that on a sale of provisions for immediate consumption, there is an implied warranty of soundness, was *held* applicable to a diseased heifer which the vendor sold knowing that it was to be killed for beef the next day.

285. And in Pease *v.* Sabin,[2] where cheese was bought for a certain purpose, for a full price, without examination, and the purpose was disclosed to the defendant; but, by the unskillfulness in the manufacture, latent maggots were in the cheese which rendered it unfit for the purpose in view, it was *held*, that a warranty would be implied that the article was fit for the purpose specified and free from latent defects.

286. A recent case in Michigan, Hoover et al. *v.* Peters,[3] gives the law upon this subject. This was a suit for the balance remaining unpaid on the price of the carcasses of three hogs sold by Peters to defendant below to be used as food in their lumber camp. They set up by way of recoupment that one of the carcasses was unsound and unfit for use. The purchase was made from the son of Peters, who was informed at the time of the purpose for which they were bought. Upon trial below the jury found for defendant.

The court refused to charge that if such facts existed, Peters could not recover for the unsound article, and was liable on an implied warranty of soundness.

In deciding the case, Campbell, J., said: "It seems to be settled, by many authorities, that no implied warranty of soundness arises where such articles are purchased by a dealer to sell again.

"Whether this rule arises from the fact that any injury from the use of the articles is likely to be remote and not readily traced out, or because where his purpose in buying is merely specu-

[1] 50 Barb. (N. Y.) 116.
[2] 38 Vt. 432.
[3] 18 Mich. 51.

lative, one commodity is not to be distinguished from another in its incidents as merchandise, or what special reasons have led to it, can not easily be determined. It stands as a recognized doctrine, whatever may have been its reasons.

"But where property is brought for a particular purpose, and only because of its supposed fitness for that, there are many cases in which a warranty is implied, unless the purchaser has seen fit to act upon his own responsibility and judgment. And where articles of food are bought for consumption, and the vendor sells them for that express purpose, the consequences of unsoundness are so dangerous to health and life, and the failure of consideration is so complete, that we think the rule has often been recognized that such sales are warranted is not only reasonable, but essential to public safety. There may be sellers who are not much skilled, and there may be purchasers able to judge for themselves; but in sales of provisions the seller is generally so much better able than the buyer to judge of quality and condition, that if a general rule is to be adopted, it is safer to hold the vendor to a strict accountability than to throw the risk on the purchaser. The reason given by the New York authorities in favor of health and personal safety, is much more satisfactory than the purely commercial considerations which take no account of these important interests. While the question has not perhaps been very often decided, the principle has been generally accepted among the legal writers, and we feel no disposition to recede from it. We have been pointed to no distinction between sales in one market or another, and can conceive of no special reason for regarding one sale for this purpose as differing in its incidents from any other. The doctrine seems to be that any purchase for domestic consumption is protected.

"We think, therefore, that for this reason the judgment should be reversed, and a new trial granted."

287. It seems to be well settled that where a party purchases an article without inspection, but upon a description either made verbally or in a bill of parcels, there is an implied warranty that the article shall be salable.

288. The rule was long ago stated by Lord Ellenborough, in the

case of Gardiner *v.* Gray,[1] where he said: "*When there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply.* He can not, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be that it shall be *salable in the market*, under the denomination mentioned in the contract between them. The purchaser can not be supposed to buy goods to lay them on a dunghill."

289. An implied warranty may also result from the usage of a particular trade. Thus, in Jones *v.* Bowden,[2] it was shown that in auction sales of certain drugs, as pimento, it was usual to state in the catalogue whether they were sea-damaged or not, and in the absence of a statement that they were sea-damaged, they would be assumed to be free from that defect. The court held, on this evidence, that freedom from sea-damage was an implied warranty in the sale. And Heath, J., in that case, mentioned a *nisi prius* decision by himself, that where sheep were sold as stock, there was an implied warranty that they were sound, proof having been given that such was the custom of the trade; and said that this ruling was not questioned when the case was argued before the King's Bench. The case referred to by the learned judge was probably Weal *v.* King,[3] decided on a different point.

290. Some text writers, upon the subject of warranty, treat of latent defects under the head of implied warranty, and declare that the law implies a contract of warranty in all cases of latent defects known to the buyer, unless the seller expressly negative the warranty; but if latent defects exist unknown to both of the parties, and there be no express warranty, and there are no circumstances of the sale, outside of the latent defect, that would imply a warranty, *caveat emptor* is the rule.

291. And in the case of latent defects, existing in such a condition that they could not be detected by the buyer, and are known to the vendor, and he fail to disclose them to the buyer, this would be a constructive fraud, unless the article be sold with all faults,

[1] 4 Camp. 144.
[2] 4 Taunt. 847.
[3] 12 East, 452.

and would be more properly treated of under the head of fraud and concealment.

292. It will be seen that the old common law maxim of *caveat emptor* has been greatly modified by the modern doctrine of implied warranty, and the exceptions to the maxim are so numerous as, in the words of Lord Campbell, to have "well nigh eaten up the rule." The tendency of all the modern decisions seem to be to enlarge the responsibility of the seller, until we have nearly reached the maxim of the civil law *caveat venditio.*

293. But it will always be a difficult point to decide, in a certain class of cases, just what constitute words of warranty and what mere expressions of opinion or representations. The opinion of the value or quality of an article, when made in good faith, will not constitute a warranty, for the reason that the opinion does not indicate any certain knowledge on the part of the seller, and the buyer is generally as capable of forming an opinion as the seller, and where he can inspect the article he can exercise his judgment or demand a warranty.

294. And where, as is very common in the sale or exchange of horses, vague general representations are made, and the great value and advantages of the horse are boastfully set forth, such statements are considered as not creating a warranty, on the ground that they are not intended to be wholly relied upon.

295. The distinction between a *warranty* and *representation* is pointed out in a note to the case of Gorham *v.* Sweeting,[1] and was also laid down by Chief Justice Best, in the following case: An action of *assumpsit* was brought on the warranty of a horse; no direct evidence was given of what took place when the contract was made, but letters passed between the plaintiff and defendant, in which the plaintiff writes: "You well remember that you represented the horse to me as five years old;" to which the defendant answers: "The horse is as I represented it." Chief Justice Best said: "The question is whether I and the jury can collect that a warranty took place; I quite agree that there is a difference between a *warranty* and a *representation*, because a *representation* must be *known* to be wrong. The plaint-

[1] 2 Wms. Saund. 200 c.

iff in his letter says: "You remember you represented the horse to me as five years old." To which the defendant's answer is: "The horse is as I represented it." Now, if the jury find that this occurred at the time of sale and without any qualification, then I am of opinion that it is a *warranty*." If it occurred before, or if it was qualified, then it must be taken to be a *representation* and not a *warranty*." His lordship then left the question to the jury, telling them "that if they found that the defendant at the sale gave an undertaking to the effect mentioned in the letters, then such undertaking was a warranty." The jury returned a verdict for the plaintiff.[1]

296. In the case of Behn *v.* Burness,[2] Mr. Justice Williams, in delivering the judgment of the Exchequer Chamber, gave the following lucid exposition of the legal characteristics of representation as distinguished from warranty. He said: "Properly speaking, a representation is a statement or assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Although it is something contained in a written instrument, it is not an integral part of the contract, and consequently the contract is not broken, although the representation proves to be untrue, nor (with the exception of the case of policies of insurance, or, at all events, marine policies, which stand upon a peculiar and anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, or with a reckless ignorance whether it was true or untrue.[3] If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree sanctioned by judicial authority,[4] that a representation, if it differs from the

[1] Salmon *v.* Ward, 2 C. & P. 211; and see Cave *v.* Coleman, 3 M & Ry. 3.

[2] 32 L. J., Q. B. 204.

[3] Elliot *v.* Van Glehen, 18 L. J., Q. B. 221; Wheelton *v.* Hardisty 27 L. J., Q. B. 241.

[4] Barker *v.* Windle, 6 El. & Bl. 675.

truth, to an unreasonable extent, may affect the validity of the contract. Where, indeed, a representation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract on that ground is voidable. Although representations are not usually contained in the written instrument of contract, yet they sometimes are; but it is plain that their insertion therein can not alter their nature. A question, however, may arise, whether a descriptive statement in a written statement is a mere representation, or whether it is a substantive part of the contract. This is a question of construction, which the court and not the jury must determine.

297. 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 by authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract,[1] it is to be regarded as a warranty—that is to say, a condition—on the failure or non-performance of which, the other may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it,[2] provided it has not been partially executed in his favor.

298. 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. Accordingly, if a specific thing has been sold with a warranty of its quality, under such circumstances the property passes by the sale; the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, can not treat the failure of the warranty as a condition broken, unless there is a special stipulation to that effect in the contract,[3] but must have

[1] Foster *v.* Smith, 18 C. B. 156.

[2] Wheelton *v.* Hardisty, 27 L. J., Q. B. 241.

[3] Bannerman *v.* White, 10 C. B., N. S. 884.

recourse to an action for damages in respect of the breach of warranty.

299. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed. Still, if he receives the thing sold, and has the enjoyment of it, he can not afterward treat the descriptive statement as a condition, but only as an agreement, for the breach of which he may bring an action to recover damages.

300. But a written instrument may consist *partly* of a *warranty* and *partly* of a *representation*. Thus where the following receipt was given on the purchase of a horse: "Received of Robert Dickinson 100*l.* for a bay gelding, got by *Cheshire Cheese*, and warranted *sound*," and an action was brought on an alleged breach of warranty, on the ground that he was not bred in the manner above described. Chief Justice Dallas held that the warranty was confined to the soundness, and the statement that he was got by Cheshire Cheese was a mere representation.[1]

301. Also, where a receipt on the sale of a colt contained the following words after the date, name, and sum, "for a gray four year old colt, warranted sound in every respect," and the colt turned out to be only three years old, Chief Justice Tindal nonsuited the plaintiff, who had brought an action on that ground, and said, "I am of opinion that the first part of the receipt contains a *representation*, and the latter part a *warranty*. In the case of a representation, to render liable the party making it, the facts stated must be untrue to his knowledge; but in the case of a warranty, he is liable whether they are within his knowledge or not. The Court of Common Pleas discharged a rule *nisi* for setting aside the nonsuit, and Mr. Justice Alderson said, "A warranty must be complied with, whether it is material or not, but it is otherwise as to *representation*. If the word *warranted* had been the *last word*, I should have held that it extended to

[1] Dickenson *v.* Gapp, H. T. 1821, cited in Budd *v.* Fairmaner, 1 M. & Sc. 78.

the whole."[1] However, in a previous case, where the plaintiff brought an action to recover the price of a horse, sold under the following warranty: "A black gelding about five years old, has been constantly driven in the plow—warranted," it was held that the terms of such warranty applied to the *soundness* of the horse rather than to the nature of his employment.[2]

302. The proper question for the jury in a case in which the effect of a statement made during the sale is the point at issue, is whether it is or is not intended to form part of the contract. In the case of Foster *v.* Smith,[3] an agent sold a mare to C., and having no express authority from the owner to warrant her, refused to do so, but at the time of the sale told C. that "if the mare was not all right she was not his." C. thereupon paid the price, which was received by the owner. The mare proving unsound, C. returned her to the agent, and sued the owner in the county court for a return of the money. Jervis, C. J., in delivering the judgment of the Court of Common Pleas, said that the proper question to leave to the jury in this case was, whether it was part of the contract that the mare should be returned if she proved unsound; if so, and she were returned, there would be a failure of consideration, and the plaintiff would be entitled to recover back the price.

303. It is also a question for the jury whether the description of an article in a catalogue, a receipt, or a bill of parcels amounts to a *warranty*, or is merely a matter of *description* or intimation of an opinion, and it should be submitted to the jury with all the attendant circumstances. Thus where a picture had been sold as a Rembrandt, an action was brought on a bill of exchange of which the picture was the consideration, and it appeared doubtful on the evidence whether there had been a *warranty* or only a *representation*, Chief Justice Tindal, in summing up, said, "The question is, whether you think that a *warranty* was in fact given, and if given, was it broken? For, if you do, you must find your verdict for such sum as you think to be the real value of the picture; but if there was no *express warranty*, but

[1] Budd *v.* Fairmaner, 5 C. & P. 78.

[2] Richardson *v.* Brown, 8 Moore, 338.

[3] 18 C. B. 156.

only a *representation*, then, as there is no evidence that the plaintiff did not *believe* that the picture was not a Rembrandt, he will be entitled to recover the full amount of the bill," which the jury found.[1]

304. But in a case where pictures were sold with a bill of parcels, containing the words, "Four pictures, views in Venice, Canaletti," the jury thought this a *warranty*, and refusing a rule for a new trial, Lord Denman, C. J., said, "It is for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a *warranty* of genuineness or conveyed only a *description*, or an expression of opinion. I think that their finding was right; Canaletti[2] is not a very old painter."[3]

305. So, too, in the case of Percival *v.* Oldacre,[4] the plaintiff saw a horse at Banks', in Gray's Inn Lane, belonging to the defendant, which was for sale. He afterward saw the defendant, told him that he had seen the horse, and asked him, "What about the horse?" The defendant said that he was a good harness horse, and that he had been bought to match for Baron Rothschild for 85*l.* and that he was only selling him because he would not match. The plaintiff on this went to Banks', and bought the horse eventually for 65*l.* The horse, on being put in harness, turned out to be a kicker, and kicked the plaintiff's trap to pieces. He was afterward sent to a stable, and sold for 40*l.*, and the action was brought for the difference. The jury found a verdict for the plaintiff for the 25*l.* claimed. In moving for a new trial, it was contended that there was no evidence of warranty, but Erle, C. J., said that Mr. Justice Byles, who tried the cause, was of opinion that there was evidence to go to the jury of a warranty, and that the verdict therefore ought not to be disturbed.

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[1] De Schwanberg *v.* Buchanan, 5 C. & P. 343.

[2] Canaletti died in 1768, and Claude Loraine and Teniers (the younger), mentioned in Jendwine *v.* Slade, died, the former in 1682, the latter in 1694.

[3] Power *v.* Barham, 4 A. & E. 473.

[4] N. P., C. P., Jan. 18, 1865.

CHAPTER VII.

FRAUD.

306. The third exception which we made to the rule of *caveat emptor* was fraud and false representations as an inducement to the contract. An old maxim of the law is that *fraud vitiates all contracts*.[1] This subject was discussed in Chapter I., and the old definition of fraud was there given, "every kind of artifice employed by one person for the purpose of deceiving another." While this will answer for a general definition of fraud, human ingenuity has clothed it with so many guises that it is found very difficult to give a definition which fraud will not find some means of evading; but while it is so difficult to define what fraud is in all cases, there are certain elements readily pointed out which is essential to constitute legal fraud.

307. It is essential to constitute a fraud that the means used should be successful in deceiving; for it matters not how false the representation, or how ingenious the artifice used, if the party to whom they are used knows the truth, and sees through the devices. And where a contract is made under these circumstances, it is plain that the inducement is something else than the fraudulent representations.

308. Another element in fraud is damages.[2] The party deceived must be damaged. Lord Coke, in 3 Bulst. 95, has laid down this rule: "Fraud without damage, or damage without fraud, gives no cause of action."

309. It is also necessary to constitute fraud that there should be a dishonest intention and knowledge of the fraud upon the part

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[1] Jones *v.* Emery, 40 N. H. 348; Wintz *v.* Morrison, 17 Texas, 372; Crayton *v.* Mungor, 9 Texas, 285.

[2] Whitson *v.* Gray, 3 Head (Tenn.), 441; Nye *v.* Merriam, 35 Vt. 438; Castleman *v.* Griffin, 13 Wis. 535.

of the person upon whom it is charged.[1] It is true there are numerous dicta contrary to this proposition, but an examination of the cases will generally show that the remedies allowed in them were upon other grounds than fraud.

310. The deceit necessary to constitute a fraud may be *active*, as by the statement of falsehood; or the necessary deceit may be *passive*, by silence when it is a duty to speak.[2] The former is usually discussed under the head of *misrepresentations*, the latter under *concealment*.

311. *Misrepresentations* of a material fact made by one party, with a design to deceive the other party to his injury, is a fraud, and generally will avoid any contract based thereon. It is not necessary to prove that the misrepresentations be made by the party to the contract; for if he employ any other person to make them, or if he take advantage of misrepresentations in his favor made by any other person and acts upon them, he thereby adopts them as his own, and is liable therefor.

312. As in the case of Ladd *v.* Lord,[3] where a tenant received a yoke of oxen from his landlord, under an agreement that if they sold under a certain sum, he should share the gain; and if under that sum, he should share the loss. The tenant sold the oxen, fraudulently misrepresenting that they were sound, and the landlord approved the sale and received his share of the avails of the sale: *Held*, that the landlord, as well as the tenant, was liable for the fraud, although he was not in any way privy to it.

313. So in Linton *v.* Housch,[4] it was held that a vendor who, in negotiating a sale, refers to a third party as a proper person to give the purchaser information upon the subject-matter, is bound by representations made thereon to the purchaser by such third party subsequently but not prior to such reference.

[1] Bondurant *v.* Crawford, 22 Iowa, 40; Zehner *v.* Kepler, 16 Ind. 290; Peers *v.* Davis, 29 Mo. 184; Bennett *v.* Judson, 21 N. Y. 238; Weed *v.* Case, 55 Barb. 534; Taylor *v.* Scoville, 54 Barb. 34.

[2] Wintz *v.* Morrison, 17 Tex. 372; Be'dens *v.* Hennigues, 8 Cal. 87.

[3] 36 Vt. 194.

[4] 4 Kan. 535.

314. *Concealment* of a fact is fraudulent whenever there is, on the part of the person concealing it, some legal or equitable obligation to divulge it. But this obligation must be something more than moral or honorary. Thus when one buys goods, knowing that a recent declaration of peace has put up the market price, he is not compelled to divulge his knowledge to the seller; but a vendor who stands by, and allows the purchaser to be deceived in the subject-matter of the purchase, will, under some circumstances, commit a fraud by his silence.

315. As in the case of Graham *v.* Stiles,[1] where the defendant sold the plaintiff a horse, telling him the horse had been lame by spells, but that they did not know the cause. The defendant intentionally conveyed the idea that the horse was suffering from no permanent unsoundness by several remarks in conversation, such as the horse had slipped and wrenched his shoulder; that the person of whom they bought him said that he was sound. The first remark was untrue, but the second was true. On the strength of these statements, the plaintiff bought the horse, thinking him sound, and giving the price with that idea. The horse was foundered, and had been from the time the defendants bought him. The referee found that the defendants had been satisfied that the lameness was permanent, although he did not find that they were fully satisfied of the cause, and it was held that the defendants were liable on the ground of fraudulent concealment.

316. It is now well settled[2] that if goods are sold expressly "with all faults," the seller is not bound to disclose latent defects, and is therefore not liable to an action in respect of them, although he was aware of them at the time of sale, unless there be an express warranty against some particular defect, or unless some artifice or fraud was practiced to prevent the vendee from discerning such defects; therefore, in effecting such a sale of a horse, it is best for the seller to say nothing, and let the purchaser inspect the horse, and so judge for himself.

317. So far as the description goes, there is an express warranty

[1] 38 Vt. 578.

[2] Chit. Cont., 7 ed. 413.

against any particular defect, which is excluded by that description. Accordingly, where an advertisement for the sale of a ship described her as a "copper-fastened vessel," adding that the vessel was to be taken "with all faults, without any allowance for any defects whatsoever," and it appeared that she was only partly copper-fastened, it was held that the vendor was liable on the ground that she was warranted to be copper-fastened, and that "with all faults" applies to such only as a copper-fastened vessel may have.[1]

318. But where a vessel which was described as "teak-built" was sold, "to be taken with all faults, without any allowance for any defect or *error* whatsoever," and it turned out that she was not "teak-built," it was held that this was a misdescription of the vessel, which came within the term "error," and that the vendor was not liable as for a breach of warranty.[2]

319. At one time, Lord Kenyon held that a seller was bound to disclose to the buyer all latent defects known to him, and that "*buying with all faults*," without a warranty, must be understood to relate only to those faults which the buyer could have discovered, or with which the seller was unacquainted.[3]

However, Lord Ellenborough overruled this decision, and said, "I can not subscribe to the doctrine of that case, although I feel the greatest respect to the judge by whom it was decided. Where an article is sold *with all faults*, I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them and to prevent their being discovered by the purchaser. The very object of introducing such stipulations is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him '*with all faults*.' Having thus laboriously freed myself from

[1] Shepherd *v.* Kain, 5 B. & Ald. 240.

[2] Taylor *v.* Bullen, 5 Ex. 779.

[3] Mellish *v.* Matteaux, Peak Cas. 115.

responsibility, am I to be liable if it be afterward discovered that the horse was unsound? Why did not the purchaser examine him in the market, when exposed to sale? By acceding to buy the horse, *with all faults*, he takes upon himself the risk of *latent* or *secret* faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust, if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, I think there is no fraud, unless the seller by *positive means* renders it impossible for the purchaser to detect latent faults."[1]

Therefore, the meaning of a horse sold "*with all faults*" is, that the purchaser shall make use of his eyes and understand what *faults* there are; and the seller is not answerable for them if he does not make use of any *fraud* or *practice* to conceal them.[2]

320. But, where on the sale of a house in South Audley street, the seller being conscious of a *defect* in the main wall, plastered it up and papered it over, it was held that as the seller had *expressly concealed* it, the purchaser might recover.[3]

321. It would appear from this case that where a horse has been sold "*with all his faults*," and artificial means have been used to conceal some defect, the vendor would be liable to the purchaser for such conduct.

For instance, the practice of *Plugging*, *etc.*, or perhaps the artificially filling up a sand-crack, or thrush (such devices being, without doubt, used to deceive the purchaser), would each be a sufficient ground for an action *on the case*, because a man may act *a lie or fraudulent representation* without speaking a word, and the injury under such circumstances would be damage as the result of a *fraudulent representation*, coupled with dealing. Thus where a ship was sold "*with all her faults*," but means had been taken *fraudulently* to conceal some defects in her bottom, the vendor was held liable.[4]

[1] Baglehole *v.* Walters, 3 Camp. 156.

[2] Pickering *v.* Dawson, 4 Taunt. 784.

[3] Case cited by Gibbs, J., in Pickering *v.* Dawson, 4 Taunt. 785.

[4] Schneider *v.* Heath, 3 Camp. 508; Jones *v.* Bright, 5 Bing. 535.

322. Fraud does not make a contract void, but only voidable at the election of the party defrauded, who has the option of acquiescing in it, or of avoiding it.[1]

323. If a party be induced to purchase an article by fraudulent representations of the seller respecting it, he may treat it as a good contract, or the moment he chooses to declare it void, he may recover the price from the seller.[2]

324. If, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration.[3]

325. Thus where the plaintiff was induced by the fraud of the defendants to become a shareholder in a company, it was held, as he had in the interval between the making of the contract and the discovery of the fraud, received dividends, and otherwise dealt with the property, he could not treat the contract as void, and sue for money had and received; but though he could not rescind the contract, inasmuch as such rescission would work injustice, yet he might bring an action on the deceit and recover his real damages.[4]

326. But if after discovering the fraud, he continue to deal with the article as his own, he can not recover back the money from the seller.[5]

And the right to repudiate the contract is not afterward revived by the discovery of another incident in the fraud.[6]

327. A sale of goods effected by the fraud of the buyer is not absolutely void, but the seller may elect to treat it as a valid

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[1] Murray *v.* Mann, 2 Ex. 541; Story on Sales, 126.

[2] Murray *v.* Mann, 2 Ex. 541.

[3] See Broom's Maxims, 4 ed. 293; and per Blackburn, J., R. *v.* Saddlers' Co., 32 L. J., Q. B. 343.

[4] Clarke *v.* Dickson, 27 L. J., Q. B. 223.

[5] Campbell *v.* Fleming, 1 A. & E. 40.

[6] Campbell *v.* Fleming, 1 A. & E. 40.

transaction,[1] or has a right to treat the contract as a nullity, and recover the value of the goods in an action of *trover*.[2]

328. If he does not treat the sale as void before the buyer has resold the goods to an innocent vendee,[3] or pledged them for a *bona fide* advance,[4] the property will pass to the vendee.

329. But the property will not pass to an innocent vendee, unless the relation of vendor and vendee existed between the original owner of the goods and the person who has fraudulently obtained them; for if there be not a sale between these parties there is no contract, which the owner can either affirm or disaffirm. Thus where A., who had formerly been B.'s agent, and had been known to the plaintiff as such, after his agency ceased, obtained goods from the plaintiff in the name of B., which he handed over to the defendant, an auctioneer, by whom they were sold, it was held, that the plaintiff might maintain *trover* against the defendants, for there was never any sale to A. or any contract between *him* and the plaintiffs.[6]

330. All contracts of purchase made with the fraudulent intent to cheat the seller, and dispose of the goods at a swindling price, to raise money, are held void.[7]

331. It would appear that where the buyer purchases goods with the preconceived design of not paying for them, such sale does not pass the property therein.[8] Thus where some sheep had been bought under such circumstances, Chief Justice Abbott held that if the buyer contracted for, and obtained possession of the sheep in question, with a *preconceived* design of not paying

[1] White *v.* Garden, 20 L. J., C. P. 166.

[2] Ferguson *v.* Carrington, 9 B. & C. 59; Load *v.* Green, 15 M. & W. 216.

[3] White *v.* Garden, 20 L. J., C. P. 166.

[4] Kingsford *v.* Merry, 11 Ex. 577.

[5] Kingsford *v.* Merry, 26 L. J. Ex. 83.

[6] Higgins *v.* Barton, 26 L. J. Ex. 342.

[7] Gibson *v.* Carruthers, 8 M. & W. 346.

[8] See Irving *v.* Motley, 7 Bing. 551; Load *v.* Green, 15 M. & W. 221; Ferguson *v.* Carrington, 9 B. & C. 59; see Chitty's Cont., 4 ed. 356.

for them, that would be such a fraud as would vitiate the sale and prevent the property from passing to him.[1]

332. The resale of the goods at reduced prices immediately after the buyer has obtained possession of them, is evidence that such prior transaction is fraudulent.[2]

333. If a buyer, under terms to pay for goods on delivery, obtains possession of them by giving a check, which is afterward dishonored, he gains no property in the goods, if, at the time of giving the check, he had *no reasonable ground* to expect that it would be paid. As in the case of Bristol *v.* Wilsmore,[3] where the buyer had given to the vendor's servant, in payment for some sheep sold for cash, a check, which the buyer represented to be as good as money. He then immediately executed a warrant of attorney, by virtue of which judgment was entered and execution issued in favor of his sister-in-law, and the sheep were taken under the execution on the very day of the purchase. There were no funds in bank to the credit of the buyer, who had overdrawn his account some months before, and who absconded after this transaction was completed, and was not afterward heard of.

The court held that it was a question of fact for the jury whether the buyer had obtained possession of the sheep with a *preconceived design of not paying for them*, and, if that were the case, it would be such a fraud as would vitiate the sale and *prevent the property from passing to them.*

334. In the case of Fuller *v.* Abrahams,[4] where the purchaser and his friend were the only bidders at an auction, the rest of the company being deterred from bidding by the purchaser's stating to them that he had a claim against, and had been used ill by, the late owner of the article, it was held that such purchaser did not acquire any property against the vendor under such sale.

335. Fraudulent concealment is of considerable practical importance in connection with the sale and exchange of horses,

[1] Earl of Bristol *v.* Wilsmore, 1 B. & C. 521.

[2] Ferguson *v.* Carrington, 9 B. & C. 59.

[3] Hawse *v.* Crowe, R. & M. 414; Earl of Bristol *v.* Wilsmore, 1 B. & C. 521.

[4] 3 B. & Bing. 116.

and in closing this chapter we will give at some length two leading American cases upon this subject.

336. Wheeler *v.* Wheelock.[1] Judge Barrett, in deciding the case, said: "This is an action on the case for the false warranty of a horse, in the common form of declaring in such cases. The evidence showed that the defendant, in reply to an inquiry made by the plaintiff in making the purchase, whether the horse was sound, said that he was, as far as he knew. It was proved that the horse was unsound, in fact, at that time. The evidence showed that the defendant, before he sold the horse, and on the occasion of purchasing him of Currier, had discovered unsound appearances indicating some trouble, or, at any rate, some unusual condition of the horse; and that, when he made the purchase of Currier, he was told that he must take him at his own risk—that he must not expect him, Currier, to take him back if he was mad or crazy; and that, while the plaintiff was driving the horse on trial, pending the negotiation of the trade between the plaintiff and the defendant, the defendant was told by the two Benedicts how the horse acted a few days before on two occasions of being shod, and on account thereof, that they did not think the horse was sound; and, specifically, that he acted as if he had fits; and that they told him truly. In a few minutes after this, on the return of the plaintiff in trying the horse, he made the said inquiry, and received the said answer from the defendant as to the soundness of the horse, and thereupon the trade was closed.

"The court, upon all the evidence, failed to find that the defendant *really believed* that the horse was unsound; but they found 'that he had reasonable and good ground to suppose that he was, and that he knew that if he communicated what he had discovered, and what had been told him in relation to the horse, it would likely prevent the plaintiff or any purchaser from buying the horse, or materially lessen the price he could obtain for him, and lessen his value in the estimation of the plaintiff or any purchaser.' What the defendant had observed, and what was

[1] 34 Vt. 553.

told him, constituted the reasonable and good ground for supposing the horse to be unsound. What he thus observed and was thus told him, would lessen the value of the horse in the estimation of any purchaser. These facts, then, were material, as bearing upon the subject-matter of the trade. And though, in point of fact, they may not have operated to produce full belief in Wheelock's mind that the horse was unsound, still, being material facts looking in the direction of the unsoundness of the horse, and constituting *reasonable and good ground for supposing him unsound*, and the defendant knowing, as the court have found, that these facts would lessen his value in the estimation of plaintiff or any buyer, the conclusion is irresistible that the defendant did know facts which tended to show the horse unsound, and which rendered untrue what he told the plaintiff, that the horse was sound, *so far as he knew*.

"If the defendant would have placed himself on safe ground, instead of making such a reply to the plaintiff's inquiry, he should have stated those facts, thus constituting a good ground for supposing him unsound, to the plaintiff, and might, if he had seen fit, have accompanied it with any amount of positive asseveration of his belief that the horse was sound.

"The manner of stating the case leaves it somewhat equivocal whether the court mean to leave it with no finding as to whether the defendant believed the horse to be sound, or to find that the defendant did not believe him to be unsound. But we do not regard it important how the exceptions should be construed in this respect. The question is not whether the defendant made a fraudulent expression of *his belief;* but whether he made a fraudulent expression in saying 'the horse was sound, *so far as he knew*.' If he knew anything contrary to the truth of that statement, then the statement was not true. The court, upon warrantable evidence, have found that he did.

"The court have also found that he knew that those facts would lessen the value of the horse in the estimation of the plaintiff or any purchaser. Here, then, arose the duty to tell the truth in reply to the plaintiff's inquiry, and his failure to do so operated the fraud complained of, and found by the county court."

337. Paddock *v.* Strobridge[1] was an action on the case for deceit in exchange of horses.

The plaintiff's evidence tended to show that in September, 1853, he employed one Dow to go to market for him with horses; that Dow, on his return, put up or stopped at the defendant's tavern, in Peacham, and put his horse in the barn, there being no one present to take him, and went into the house; that the defendant soon came in and proposed to Dow to exchange horses and said he had a young horse, too young for his business (which was staging), which had been used pretty hard and wanted to be turned out; that Dow and the defendant went to the barn and looked at the defendant's horse, whose ankles were swollen; that the defendant remarked he had been used hard and stood on the floor, and in answer to inquiry by Dow said that he had fed well and had no cough; that he was young, not old enough for his business, and had been worked hard and was out of fix and wanted to be turned out and run in full feed, and run in the yard through the winter; that Dow offered to swap for sixty dollars to boot, and the defendant offered twenty-five dollars, and that finally the trade was concluded, the defendant paying fifty dollars as boot; that Dow put the horse he obtained, a gray horse, in his wagon, started for Craftsburg; that he had proceeded but a few rods when the horse discharged blood with his manure, and before he had gone a mile he had again discharged his manure with streams of blood, throwing it over the dasher into the wagon; that he then went back and told the defendant the trouble, and asked him to swap back; that the defendant said he did not think it would injure him, and declined to re-exchange; that Dow went home with the horse and doctored him till the next April, when he died of the same disorder, which was bloody flux; that said horse was worth apparently seventy-five dollars when the trade was made, and would have been worth that but for this disease.

The defendant admitted, on cross-examination, that he knew the horse discharged blood occasionally, and that he did not inform Dow of it, and testified that he did not know why he did

[1] 29 Vt. 470.

not; that he meant by term "out of fix," that the horse was not fit for use; that he did not mean anything in particular; that he meant he was "all out of fix." The defendant testified, among other things, as follows: "I am not sure whether Dow asked me whether the horse was sound; he asked me about the swollen legs, and whether he fed well; he asked if he could get him home; I told him he could, and we traded."

Redfield, C. J. "The question in this case is whether, in the sale of a horse having an internal and secret malady of a fatal character, and no external indications calculated to excite suspicion of its existence, but known to the seller and not to the purchaser, and which the seller knows or believes the purchaser would not buy if he did know of its existence, and still sells at such a price as the article seems to be worth without disclosing the defect, he is guilty of such fraud and deceit as will be actionable.

"There is no doubt that there is a class of positive misrepresentations affecting more or less the marketable price of commodities sold, for which the vendor is not legally liable. Such are those we every day encounter in the way of traffic, and which it is understood are nothing more than a species of bandinage or allowable chaffer. So, too, representations in regard to the state of the market, and other extraneous incidents not affecting the state and quality of the article sold, and the suppression of facts of this character by the party profited thereby, although morally wrong, do not constitute an actionable fraud. The somewhat celebrated case of Laidlow *v.* Organ, 2 Wheaton, 178, where the purchaser of a quantity of tobacco obtained it much under its present value by not disclosing the news of peace, which was known to him but not to the seller, is a very fair illustration of the rule of law upon this subject. In this case the seller inquired if there was any news calculated to enhance the price or value of the article, and the buyer made no assertion or suggestion calculated to impose upon the seller in regard to the news. The circuit court charged the jury that this did not amount to such fraud as will avoid the sale. Marshall, C. J., in giving judgment says, 'The court is of opinion the buyer is not bound to communicate intelligence of external

circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee. But at the same time each party must take care not to say or do anything tending to impose upon the other. The court thinks the absolute instructions of the judge were erroneous, and that the question whether any imposition was practiced by the vendee upon the vendor ought to have been submitted to the jury.'

"The disposition of this case made in the Supreme Court would seem to indicate that it was there considered that the testimony in this case did tend to show such imposition as would avoid the sale or expose the party to an action at law. But I should not be prepared to believe that the rule of law, as at present recognized in the courts of law or equity, will fully justify that view. It is more generally considered, perhaps, that the party is fully justified in taking advantage of any superior knowledge he may have of any extraneous circumstances not affecting the essential quality of the article sold, and there is no positive misrepresentation.

"But in regard to those incidents which do materially affect the quality and value of the article sold, the rule is different. It is certain no positive misrepresentation will be allowed here, and there is a degree of negative deceit which the more recent cases certainly do not justify. But negative deceit, like any other, must be practiced in such a manner, and upon such a subject, as to be calculated to mislead and impose upon a person of ordinary sagacity. And the vendor must know, at the time, that the vendee is misled, and must intend he shall be, and must do this for the purpose of gaining an unjust advantage which he could not otherwise expect to do.

"This negative deceit has more commonly been reached in the English courts by engrafting successive exceptions to the general rule of warranty by way of implied warranties. As in regard to provisions bought for consumption, that they are wholesome. So, too, in regard to manufactured articles purchased for a particular use, known at the time of sale to the vendor, it is said there is an implied warranty, although nothing is said that the articles are reasonably fit for the use for which they are

purchased. So, too, of articles contracted to be delivered in future for any specified use, and some others, perhaps, where the law implies a warranty that the articles are of a merchantable quality in the absence of all stipulation upon the subject.

"These cases, it is obvious, are nothing more than exceptions founded upon certain flagrant indications of fraud and deceit, which do not exist in ordinary cases.

"And following out this, as the leading idea, it seems now to be the settled rule of law, in Westminster Hall, that there is an implied warranty on the part of the seller, that the article sold is what it appears to be, so far as the vendor knows. In other words, that a defect in the article, which changes its essential character and renders it wholly unfit for the purpose for which it is purchased, will justify the vendee in rescinding the sale or bringing suit for damages at his election. It seems to be there considered that secret defects in the article sold, which materially affect its value, and which the vendor supposes the vendee would regard as an impassable barrier to the contract, must be disclosed or the contract is not binding. To have this effect, the defect must be known to the vendor and wholly unknown to the vendee, and there must be no external or sensible indication calculated to excite suspicion in ordinary observers. It must be of such a character as clearly to have formed an impassable barrier to the contract, and so understood by the vendor at the time. In such case, the defect known to one party and unknown to the other, is not strictly what the law understands by latent defects. And it is impossible to make any sensible distinction between such a case and one where the party uses some device to mislead the other party in regard to a defect which he might otherwise have discovered, or where he makes positive representations of soundness, knowing them to be false, which is done ordinarily to put the other party off his guard. It is putting the parties upon unequal footing, and without advertising the vendee that such is the vendor's purpose.

"For if the vendee is made fully to understand that he must take the article, with all faults, or that he must not rely upon the vendor, this is equivalent to putting him upon his guard, and it is upon this ground that the case of Mellish *v.* Matteaux,

Peake's Cases, 115, and in Pickering *v.* Dawson, 4 Taunt. 779. But the principle of that decision in other respects, in the language of Chancellor Kent, 2 Com. 482, and note, 'remains unmoved.'

"This case was the sale of a ship which had a latent defect, known to the seller, and which could not have been discovered by the buyer. Says Chancellor Kent: 'The seller was held to be bound to disclose it, and the concealment was justly considered to be a breach of honesty and good faith on general principles.'

" To this extent this same decision has been several times since recognized in the English courts. The principle of these decisions was thus stated by me, upon a former occasion, and which a pretty thorough re-examination of the cases, on the present occasion, has served to confirm.

" So, too, it is not always necessary that there should be an express representation; one will often be inferred from circumstances which are in fact equivalent to such positive representation, as in Bruce *v.* Reeder, 17 Eng. C. L. 290, where the defendant induced the plaintiff to accept an insolvent tenant in his stead without making known such insolvency. The defendant made known no positive representation whatever as to the person he offered as tenant. The court held, the mere fact of his offering him as such to take his own place, was equivalent to a representation of his solvency, and as he knew the contrary he was guilty of a fraud. Bayley, J., says: 'I thought at the trial the keeping back that fact was, legally speaking, a fraud which renders the defendant liable.' Lord Tenderden says: 'I think so now.' Bayley, J., says: 'It is very desirable, if possible, to *make* people honest." Holroyd, J.: 'I think it was *clearly* a fraud.' So, too, in Hill *v.* Gray, 2 Eng. C. L. 459, it was held that suffering one to buy goods under a wrong impression as to their quality in an essential particular, is a fraud, although the seller did nothing to induce the misapprehension, and that the purchaser is not bound by the contract. The only misapprehension in this case was in regard to the picture, which was the subject of the contract, having belonged to the cabinet of Sir Felix Agar. It was sold and bought as one of Claude's,

and was confessedly genuine; but the sale was held void, because the purchaser was allowed to buy it supposing it had belonged to that particular cabinet, which, in his estimation greatly enhanced the value, and which the seller knew to be false. Lord Ellenborough said: 'Although it was the finest picture Claude ever painted, it must not be sold under a deception.'

"This last case came under consideration in the C. P. so late as 1851, and Jervis, Ch. J., said, quoting from the opinion, that the purchaser had fallen into the delusion of believing the picture to have belonged to Sir Felix Agar's cabinet. 'Not removing that delusion might be taken as equivalent to an express misrepresentation.'

"These two last cases have never been questioned.

"They seem to rest upon the principle that under some circumstances a *suppressio veri* is equivalent to a *suggestio falsi*. And of this we think there can be no manner of doubt. The difficulty will arise in the application of the principle in practice. Many plain and flagrant cases may be supposed where no manner of doubt whatever will arise in the mind of any one. The case supposed in argument of selling a vicious horse for horseback, or carriage use, which will be sure to kill the purchaser or his family, if put to use, and not guarded, or possibly in spite of all circumspection, the seller would no doubt be liable beyond the price of the purchase, by way of special damage, if he did not declare the fact.

"And we may suppose cases of the sale of spurious articles, as of nutmegs made of wood, or white lead of whiting or ground stone, which is really of no value, or none for the purpose of the purchase. There can be no doubt, if the seller is aware of the deception, and the buyer is ignorant, such deceit will form the basis of an action at law, although no representation is made. But if both parties are equally innocent, the contract is probably binding, certainly unless there is such a misapprehension in regard to the subject-matter of the contract, that the minds of the parties can not be said to have met, which requires a strong case to excuse the purchaser at law. Certainly, courts of equitv sometimes interfere, in such cases, upon grounds which would not always excuse the party at law.

"And in cases of this character, when the price or other circumstances indicate that both parties are aware of the spurious quality of the article, and they are bought to sell, no action lies, for there is no deception. But where fraud and damage occur, an action ordinarily lies. And a representation sufficient to constitute fraud often exists without the use of articulate language. And in a case like the present, where the hidden malady is known or believed to be of a fatal character, and to render the commodity valueless, and it appears to be valuable and is sold as such, and this malady is known to the vendor and unknown to the vendee, and is known to form an impassable barrier to the sale, if disclosed, and the malady proves speedily fatal, we are not prepared to say that the action for deceit or false warranty will not lie. We think it will as much as if the party had sold a horse which was not present, knowing it to be dead at the time, and without making any false representation in terms; or as if he had sold the mere image of a horse at such a distance as to impose itself upon the senses for a living animal or a horse, after having given it a slow but fatal poison, or where it had, to the knowledge of the vendor, received a fatal wound in a part not visible.

"The opinion in Hanson *v.* Edgerly, 9 Foster, 343, 359, by Wood, Ch. J., contains a thorough and critical revision of the leading cases upon the subject, and the conclusion of the learned judge is certainly very sound: 'It is going far enough to hold that an omission to disclose them (secret defects known to the vendor and unknown to the vendee), with a design of deceiving the party or an intentional concealment by which he is deceived and injured, will render the party responsible. It would be going quite too far to say that a simple unintentional concealment or omission to disclose them would render the party liable for the damages sustained.'

"This seems to be placing the subject on a sound basis. That there is no positive duty on the vendor to disclose secret defects in the article, but if he conceal them, even by silence, when he knows the other party has fallen into a delusion in regard to them, and is making a purchase which he otherwise would not make, or at a price materially beyond what he otherwise would in con-

sequence of such delusion, this is equivalent to a false representation or the use of art to disguise the defects of the article.

"We think this case contained testimony tending to show both that the sale was knowingly and intentionally made under such a delusion on the part of the vendee, which did materially increase the value of the article in his mind, and without this he would not have entered into the contract; and this well known to the vendor and acted upon by him with the purpose of defrauding the vendee; and also that the vendor used artifice more or less to keep up this delusion, both of which will render him liable for the damage thereby sustained."

CHAPTER VIII.

BREACH OF CONTRACT AND ITS REMEDIES.

338. Whenever a bargain for the sale of a horse has been completely closed so as to pass the title to the buyer, and the seller is ready to deliver possession of the horse according to the agreement, and the buyer neglects to take possession at the agreed time and place, or within a reasonable time and at some reasonable place, the seller may recover the price of the buyer, or if no price has been fixed he may recover the value of the horse at the time and place agreed upon; and he may under such circumstances resell it, and recover the difference between the contract price and the net proceeds of the second sale, provided said second sale is made in good faith and in a manner best calculated to produce its value.

339. If there be a failure on the part of the seller to perform his part of the contract, the vendee may rescind it and bring an action for money had and received, if the horse be paid for, and if not paid for, a special action on the contract for damages.

340. When the vendor of a horse has been guilty of fraudulent misrepresentations or concealment, as to an essential inducement to the contract, the buyer will, on the discovery thereof, have a right to rescind the contract of sale and return the horse, although there was no special agreement authorizing him to return it, and in such cases his action will be for money had and received. So it has been held that in a material misdescription going to the essence of the contract, the buyer was entitled to rescind the contract, although the misstatements were neither willful nor designed.

341. In the case of Flight *v.* Booth,[1] Tindal, Ch. J., said, upon this subject: "It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine

[1] 1 Bing. N. C. 377.

what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only.

342. "All cases concur in this, that where the misstatement is willful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether.

343. "But, with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; . . . . whilst other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. . . . .

344. "In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt that when the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all; in such case, the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

345. It is now pretty well established in this country, that in all cases of false representations of material facts where the vendee relied upon such representation, and was thereby induced to make the bargain, he is, upon the discovery of the false representation, entitled to a rescission of the contract, whether such false representations were known to be false by the party making them or not; he must, in these cases, return the property within a reasonable time, or offer to return it, and he will then be entitled to an action for the price paid for the property.

346. But if the party who has been misled or defrauded desire to rescind, he must do so within a reasonable time; for if he do anything to affirm the sale after he knows all the circumstances

of the case, or if through neglect he induce others to act in affirming the sale, his right to rescission is gone.

347. And if he should keep the property, and bring an action of deceit for false or fraudulent representations made in the sale, he can only do so by alleging and proving the knowledge of the false representations by the party making them. This is believed to be well established,[1] although there are numerous *contra dicta.*

348. This action of deceit can only be maintained when the property purchased is retained, for if the contract is rescinded the parties are just where they were before the contract, and of course there is no damages.

349. Where a horse has been sold, warranted sound, which was clearly unsound at the time of sale, the vendor is liable to an action on the warranty, without the buyer either returning the horse or giving notice of the unsoundness.[2] And the seller can not be compelled to take the horse back, but the buyer can set up the warranty in evidence upon a suit for the price of the horse in reduction of damages.

350. The case of Love *v.* Oldham[3] will be found interesting in this connection.

The parties to this case each owned a jackass. The parties exchanged animals with each other. Oldham was to give Love $400 for the supposed difference in their value. Accordingly, Oldham executed to Love four notes, each for $100, and upon one of these notes suit was brought. Oldham answered, in substance, as follows: 1. A warranty and false representations on

[1] Moore *v.* Noble, 53 Barb. (N. Y.) 425; Barber *v.* Morgan, 51 Barb. (N. Y.) 116; Morehouse *v.* Northrop, 33 Conn. 380; Allen *v.* Wanmaker, 2 Vroom (N. J.), 370; Taylor *v.* Frost, 39 Miss. 328; Merton *v.* Scull, 23 Ark. 289; Mizell *v.* Sims, 39 Miss. 331; Plant *v.* Condit, 22 Ark. 454; King *v.* Eagle Mills, 10 Allen (Mass.), 548; Zehner *v.* Kepler, 16 Ind. 290; Pettigrew *v.* Chellis, 41 N. H. 95; Wooten *v.* Callahan, 26 Ga. 366; Emerson *v.* Brigham, 10 Mass. 197; Dyer *v.* Lewis, 7 Mass. 284; Ross *v.* Marther, 47 Barb. (N. Y.) 582; Mahurin *v.* Harding, 8 Foster, 128.

[2] Douglas Manufacturing Co. *v.* Gardner, 10 Cush. 88; Getty *v.* Rountre, 2 Chand. (Wis.) 28.

[3] 22 Ind. 51.

the part of Love as to the quality and capacity of the jack traded by him to the defendant, and a breach of the warranty and falsity of the representations. 2. By way of counter-claim, a warranty and false representations claiming damages in the sum of $500. 3. Fraud in making false representations. To this answer a demurrer was interposed. In this condition it went to the Supreme Court, and Judge Worden, in deciding the case, said: "We think it clear enough that where there has been fraud practiced upon a purchaser of property, if he would rescind the contract on that ground, he must show a return of the property or an offer to return it, or that it was of no value whatever, in order that the other party may be placed in *statu quo*. But when there has been such fraud practiced, or when there has been a breach of warranty, a rescission is not the only remedy of the purchaser. 'A party defrauded in a contract has his choice of remedies. He may stand to the bargain and recover damages for the fraud, or he may rescind the contract and return the thing bought, and receive back what he paid or sold.' 2 Kent Com., 10 ed. 664 note *a*; notes to Chandler *v.* Lopus, 1 Smith's Leading Cases, 3 ed. 189, 190. . . . .

"It seems equally well settled by the authorities that where there is a fraud in the sale of goods, or a breach of warranty, the purchaser may set up as a defense in an action against him for the purchase money. If the injury sustained by the purchaser, in consequence of the fraud or breach of warranty, be equal or greater than the purchase money unpaid, he may defeat the action entirely. If the injury be less, it will go in reduction of the plaintiff's damages, and, under the code, a defendant may undoubtedly set up, by way of counter-claim, such fraud or breach of warranty, and not only defeat the action, but recover against the plaintiff any damages greater than the plaintiff's claim, as was done in this case. The objection made to the pleading in question we think not well taken."

351. The remedy for a breach of warranty is entirely different from the remedy in cases of fraud. A contract of warranty, as has been previously said, is entirely different, and may be entirely independent of the contract of sale, and the compensation

for its breach must be in damages. In simple fraud, the property can be returned and a rescission demanded. In a breach of warranty; the vendee has no right to return the property, and he can not compel the vendor to take it back; his compensation must be measured in damages.

352. In an action of deceit, for false representations, the *scienter* must be alleged and proven: in an action on a warranty the *scienter* is immaterial. There seems to be great conflict in America upon this point, but an examination of the cases will show that this conflict generally arises from a misconception of the nature of the contract of warranty. There are many cases of warranty involved in fraud; in such cases, of course, it is optional on the part of the party defrauded whether he will bring his action on the warranty or on the fraud; in the one case he must allege and prove *scienter*, and in the other he need not, as was held in the following case:

353. Bartholomew *v.* Bushnell.[1] "Where there is a warranty of soundness, and the action is brought for a breach thereof, proof of the warranty is indispensable, and it is immaterial whether the defendant *knew* of the unsoundness or not. But if the action be brought, not for a breach of warranty, but for fraud in the sale, by representations which the defendant knew to be false, such knowledge is an essential ingredient in the fraud, and must be proved.

"Therefore, where on the trial of an action on the case, alleging that the defendant sold two horses to the plaintiff by fraudulently and falsely warranting them to be sound, when, in fact, they were blind in both their eyes, which was unknown to the plaintiff, but well known to the defendant, after the plaintiff had introduced evidence to prove that the defendant, at the time of the sale, made certain representations respecting the soundness of the horse, which he knew to be false. The defendant claimed to have proved that the representations made by him were accompanied by a distinct refusal to warrant the horses, but the court instructed the jury that if the horses were unsound, and the defendant made representation calculated and in-

[1] 20 Conn. 271.

tended to deceive the plaintiff, and he was thereby deceived, the defendant was precluded from saying there was no warranty; it was held, that this was a misdirection, as proof of fraud without a warranty would not support the declaration."

354. There has been so much conflict of opinion as to the proper remedies upon a breach of warranty, and also upon fraudulent representations, that we desire in this connection to give at considerable length two leading American cases that seem to pretty well cover the whole ground.

355. Ross *v.* Mather.[1] An action not for deceit in the sale of a horse, but for what was formerly called a false warranty, it is unnecessary to prove the *scienter* on the part of the seller. Proof of the warranty is sufficient.

Such an action sounding in contract, and not in tort, whether the defendant knew that the warranty was false, at the time of making it, is of no importance.

The complaint, in this action, alleged fraud and deceit in the sale of a horse by the defendant to the plaintiff; that the plaintiff made representations which he knew to be false, and that the defendant, by means of the premises, falsely and fraudulently deceived him (the plaintiff) on the sale of the said horse as aforesaid, to the damage of the plaintiff of five hundred dollars, for which judgment was demanded. The answer admits the sale, but denies the allegation of fraud and deceit. The action was tried February 14, 1866, at the Circuit Court held in Rochester, E. Darwin Smith presiding.

By the court, Johnson, J.: "The action was tried as one sounding in contract and not in tort, the plaintiff giving no evidence whatever of any knowledge on the part of the defendant of the cause of the defects complained of in the animal purchased. The defendant's counsel raised the question by motion for a nonsuit, and in various other ways, whether the plaintiff could maintain the action under the pleadings without giving some evidence to show the defendant's knowledge of the defect or of the cause of it. The court held that it was unnecessary for the plaintiff to make proof of the *scienter*, but that proof of the

[1] 47 Barb. (N. Y.) 582.

warranty was sufficient. In this the court was clearly right. The action was not for the deceit in the sale, as appears by the complaint, but was for what is called, in the old books of forms, a complaint for a *false warranty* of a horse. (See form, 2 Chit. Pl. 679, 6 Am. from 5 London ed.) It is sometimes called a special warranty. It was a form of pleading quite familiar to lawyers before the adoption of the code. The rule was well settled that in such a case it was wholly unnecessary to prove the *scienter* on the part of the seller. Williamson *v.* Allison, 2 East, 446.

"All the allegations of fraud might be stricken out without affecting the cause of action alleged in the complaint. The contract is clearly counted upon, and whether the defendant knew that the warranty was false at the time of making it, was of no importance.

"The form in which the jury rendered their verdict was no error which can be made available on this motion. It was, in substance, a general verdict for the plaintiff, and was properly received and entered as such by the court. A new trial must therefore be denied."

356. Mahurin *v.* Harding.[1] The declaration was as follows: In a plea of trespass on the case, for that the said J. & J. (defendants), on, etc., at, etc., being possessed of one mare, of a dark-brown color, which mare was unsound, and infected with a bad and inveterate disease, commonly called glanders, which rendered the said mare good for nothing; and the plaintiff being then and there also possessed of another mare, of a bay color, of his own proper mare, of the value of $100; the defendants, to induce the plaintiff to exchange with them, did then and there fraudulently affirm to the plaintiff that theirs, the said defendants' mare, was then well, good, and sound, with the exception of "a slight touch of the heaves;" whereupon the plaintiff, giving full credit to said defendants' said affirmation, was instantly induced to, and did then and there deliver his said bay mare to the defendants in exchange for said defendants' brown mare as aforesaid; and the said defendants did then and there deliver their said brown mare to the plaintiff in exchange for the plaintiff's

[1] 8 Foster (N. H.), 128.

said bay mare; and also did then and there give to the plaintiff one sucking colt of the value of twenty dollars, and also gave to the plaintiff one joint and several note for thirty dollars, and one other joint and several note for the sum of five dollars, as boot between said mares. Now the plaintiff in fact says, that the defendants' mare aforesaid was not, at the time of the delivery, exchange, and affirmation aforesaid, well, sound, or good, but that said mare was then and there infected with and labored under a bad and inveterate disease called glanders, as aforesaid, which made said mare utterly unfit for any service and good for nothing, and she soon after died of the said glanders, as aforesaid; of all which the said defendants were then and there well knowing. And so the said defendants, by means of their said false affirmation, have greatly injured and defrauded the plaintiff, to his damage, etc.

Upon the trial on the general issue, the court instructed the jury that the plaintiff must prove that the affirmation was both false and fraudulent; that in this State the defendant is liable to arrest for a fraudulent affirmation, by which the plaintiff has suffered damage, but not for a mere breach of contract, and that in other respects the distinction between tort and contract is material and should be regarded; and, therefore, if they found that the defendants stated as a fact for the plaintiff to rely upon, that the mare was sound (with the exception named in the writ), and found that she was not sound; yet if the defendants made this statement in entire good faith, fully believing it to be true, they are not liable on this form of action; but if the affirmation was known or believed, or suspected by them to be false, and the event proved that it was so, it should be deemed fraudulent.

The jury found a verdict for the defendants, which the plaintiff moved to set aside, because of said instructions.

Bell, J., in deciding the case said, "The declaration in this case is in trespass on the case for deceit in a sale.

"It is said in some of the books that assumpsit and case for deceit are in certain cases concurrent remedies for the same injuries in the sale of horses; and to some extent this is true. Where a seller is chargeable upon an implied warranty of title, or where he makes an express warranty, or makes such state-

ments as to the quality of the article he sells, as he intends the purchaser shall rely upon, and which in law constitute a warranty (Morrill *v.* Wallace, 9 N. H. 111; Whitney *v.* Sutton, 10 Wend. 413; Cook *v.* Moseley, 13 Wend. 277), while at the same time he knows them to be false, and intends by them to deceive and impose upon the purchaser, the buyer may seek his redress either by action of assumpsit upon his warranty, or by action of deceit for the fraud. Stuart *v.* Wilkins, Doug. 81; Williamson *v.* Allison, 2 East, 446; Wallace *v.* Jarman, 2 Stark. 162; Wardell *v.* Davis, 13 Johns. 325; Cravens *v.* Grant, 4 Mon. 126; 2 Stephens' N. P. 1285.

"The warranty is none the less a contract, because it is the means by which a fraud is accomplished, and the fraud is in no way diminished, because the seller has at the same time bound himself by a warranty.

"But these remedies though concurrent, and though they entitle the sufferer to the same measure of redress in damages, are by no means identical. The distinction between the two classes of actions, as being founded respectively on tort and on contract, is nowhere neglected or disregarded. There are substantial differences at common law, and as remarked by the learned judge who tried this case, in his charge to the jury, the distinction is not merely formal, but in the present state of our law there is a substantial difference, which must not be overlooked. In tort, here, there is a remedy against the person, which ordinarily does not consist in actions on contracts.

"The forms of declaring in these cases are substantially different. The declaration in assumpsit always states a consideration, and a promise or warranty, and complains of a breach of the warranty. 1 Ch. Pl. 99; Saund. Pl. and Ev. 111; Carley *v.* Wilkins, 6 Barb. S. C. 557; Edick *v.* Crim, Id. 445. The contract to warrant, of the breach of which the plaintiff complains, and the entire consideration for it, is indispensable to be stated. Miles *v.* Sheward, 8 East, 7; Webster *v.* Hodgkins, 5 Foster, 128.

"In this action, the allegations very often introduced, that the defendant intended to defraud, that he knew his warranty to be false, and that he thereby deceived and defrauded the plaintiff,

are immaterial and need not be proved. The defendant is bound to answer for his false warranty, whether he knew it to be false or not; whether he intended a fraud, or acted with entire good faith and fully believed it to be true. Denison *v.* Ralphson, 1 Vt. 366; Northcote *v.* Maynard, 3 Keb. 807; *Anon.*, Lofft, 146; Gresham *v.* Postan, 2 C. & P. 540; Bayard *v.* Malcolm, 1 Johns. 453; 2 Johns. 550; Case *v.* Boughton, 11 Wend. 107; Carley *v.* Wilkins, 6 Barb. S. C. 557.

"The declaration for deceit alleges that the defendant induced the plaintiff to purchase an article by a warranty, or by statements *which he knew to be false*, and thereby deceived and defrauded him. Evertson *v.* Miles, 6 Johns. 138; Case *v.* Boughton, 11 Wend. 107; Carley *v.* Wilkins, 6 Barb. S. C. 557; Edick *v.* Crim, 10 Id. 445. And this is all that is essential to be alleged. Barney *v.* Dewey, 13 Johns. 224; Weeks *v.* Burton, 7 Vt. 67. It is not necessary to make any allegation in relation to the consideration or the terms of the contract of sale, unless they happen to be connected with the fraud alleged in that case, though if a party incautiously recites the particulars of such a contract, he may be compelled to prove them as he states them, and may fail if any material variance occurs in his proof. Weall *v.* King, 12 East, 452; Jones *v.* Cowley, 4 B. & C. 446; Hands *v.* Burton, 9 East, 349; Morris *v.* Littlegoe, 2 Smith, 394; Blyth *v.* Bampton, 3 Bing. 472; Webster *v.* Hodgkins, *ub sup.*; Hart *v.* Dixon, 1 Selw. N. P. 104; 2 N. H. 291; Barney *v.* Dewey, 13 Johns. 224; Corwin *v.* Davidson, 9 Cow. 22; Porter *v.* Talcott, 1 Cow. 359.

"But the intention to defraud, the knowledge that his warranty or his statements were false, and the fact that the plaintiff was thereby defrauded, constitute, in cases of this kind, the very gist and foundation of the action for deceit, and they must be proved or the action must fail. Springwell *v.* Allen, Aleyn, 91; Parkinson *v.* Lee, 2 East, 313; Dowding *v.* Mortimer, 2 East, 449 *n*; 2 Stark. Ev. 266; 2 St. N. P. 1286; Dale's case, Cro. Eliz. 44; Turner *v.* Brent, 12 Mod. 245; 1 Com. Dig., Action for Deceit, A. 8, A. 11, E. 4; Eversten *v.* Miller, 6 Johns. 138; Young *v.* Covell, 8 Johns. 23; Addington *v.* Allen, 11 Wend. 375.

"A seller may in good faith make statements as to the qualities of the articles he sells, believing them to be true, and intending that the purchaser should rely upon them, either in the form of explicit warranties, or of such representations as in law constitute warranties, and the purchase may be made in reliance upon their truth; but the seller is guilty of no fraud or deceit, for bad faith and a design to deceive are essential elements of every fraud or deception; and though he may be liable upon his warranty, yet no action founded on fraud or deceit will lie in such case. Stone *v.* Denney, 4 Met. 151; Rubber Co. *v.* Adams, 23 Pick. 256; Emerson *v.* Brigham, 10 Mass. 197; Kingsbury *v.* Taylor, 29 Maine, 508; Hazard *v.* Irvin, 18 Pick. 95; Shrewsbury *v.* Blunt, 2 M. & G. 475; Freeman *v.* Baker, 5 B. & Ad. 797; Page *v.* Bent, 2 Met. 371.

"It is on this principle that it has, in many cases, been made a serious question what form of allegation was sufficient distinctly to express this charge. Chandler *v.* Lopus, Cro. Jac. 4; Medina *v.* Stoughton, 1 Salk. 210; S. C., 1 Ld. Ray. 593; Leakins *v.* Chissell, Sid. 146; Northcote *v.* Maynard, 3 Keb. 897; Cross *v.* Garnett, 3 Mod. 261; Warner *v.* Tallard, Rolle's Ab. 91; Elkins *v.* Tresham, 1 Lev. 102; 1 Bac. Ab. 80; Bayard *v.* Malcolm, 1 Johns. 453; 2 Johns. 550; Lyndsey *v.* Selby, 2 Ld. Ray. 118; Harding *v.* Freeman, Sty. 310; S. C., 1 Rolle's Ab. 91; 1 Com. Dig., Action for Deceit, F. 3, E. 4.

"If, by the exercise of some ingenuity, a declaration could be drawn in such a form that it may seem doubtful whether it is designed to be founded on tort or on contract, and not entirely defective if regarded as either the one or the other; yet it must be held to be founded either in tort or on contract.

"It can not be considered as having a double aspect or character, or being either the one or the other, as the exigencies of the case may, from time to time, happen to require. To allow it such a double character, would be contrary to the whole theory of the common law, and would make it a perfect anomaly in legal proceedings.

"In former times the more usual form of declaring in actions upon a false warranty was in case for deceit, in which it was more commonly alleged that the defendant *warrantizando ven-*

ditit an article as sound, well knowing that it was not so, though declarations in assumpsit were not uncommon (2 Inst. Cler. 227; Butterfield *v.* Burroughs, 1 Salk. 211); nor declarations in case without *warrantizando venditit.* Firnis *v.* Leicester, Cro. Jac. 474; Roswell *v.* Vaughan, Cro. Jac. 196; Cross *v.* Garnett, 3 Mod. 261; Kendrick *v.* Burgess, Mo. 126.

"In Williamson *v.* Allison, 2 East, 445, in 1802, in a declaration upon a *warrantizando venditit*, it was expressly held, that the declaration was in case for deceit, but that by striking out the averment of the *scienter*, the action might still be maintained in tort, and therefore the *scienter* was not necessary to be proved. It seems to have been decided upon the authority of a *nisi prius* ruling in a case, where it did not appear whether the action was on contract (where the ruling would have been right, but no authority for the case in hand) or in tort; and it was conjectured it must have been in tort, because such was then the more common form of declaring.

"This decision seems to have been since followed in some cases in England (Gresham *v.* Posthan, 2 C. & P. 540); and is cited in most of the elementary English books on the subject.

"It has been followed in Vermont, and some of the other States, and has been made the basis of a theory that in actions for deceit, in the sale of personal property, if an express warranty is proved, it is not necessary to prove the *scienter* or any allegation that the false warranty or affirmation was made with any design to deceive. But this idea is not supported by the decision in Williamson *v.* Allison, which is expressly limited to a declaration upon a *warrantizando venditit.* See 3 Vt. 53; 10 Id. 457; 17 Id. 583.

"The English case is without authority here, and seems to us entirely unsupported by any authority at common law. And it seems to us entirely inconsistent with the doctrine of the common law to hold that an action for deceit can be sustained without evidence of the intention to deceive. It would be unjustifiable to hold that a man may be imprisoned on execution in an action for a tort, where a court should hold no proof need be produced but of an expressed contract. In the case of Crooker *v.* Willard (Sullivan, July term, 1851), it was held, that a court

alleging a deceit in a sale in the same form as in Williamson *v.* Allison, could not be joined with one on contract, so far agreeing with that case. But that decision is entirely irreconcilable with the case of Vail *v.* Strong, 10 Vt. 457, that such a declaration has a double aspect, which makes it join well with assumpsit or trover. And the same view of such a declaration was taken in Webster *v.* Hodgkins, 5 Foster, 128. With those decisions we remain entirely satisfied.

"The present case has a declaration framed upon a different principle. It could not be supported as a declaration on a warranty, on any idea of rejecting the allegations importing a charge of fraud, if the cases referred to were not questioned.

"It sets forth that the defendants being possessed of a horse, which was unsound, and the plaintiff of another, of value, the defendants, to induce the plaintiff to exchange with them, did falsely and fraudulently *affirm* to him that their horse was sound, and the plaintiff giving credit to their affirmation, was induced to exchange, and did so, whereas, the defendants' horse was not sound, etc., which they well knew, and so the defendants, by their false affirmation, have greatly injured and defrauded the plaintiff.

"This is a common form of declaring in case for deceit. It has no feature of declaration in assumpsit. It contains no promise nor undertaking, nor consideration for any. It complains of no breach of any contract or warranty. It does not even speak of any warranty. Its gist and substance is that the defendants, by their false and fraudulent affirmation, have defrauded the plaintiff, and not by any breach of contract. Assuredly, no court could hold that such a declaration was proved by any evidence which did not establish the fact of fraud, of an intention to deceive, carried into effect by statements known to be false.

"As, then, the allegation that the defendants well knew their horse to be unsound, was essential to be inserted in the declaration, either in direct terms or in expressions of equivalent import, and necessary to be proved, the charge of the court below was entirely correct, and there must be *judgment on the verdict.*"

357. *Damages* are of two kinds—*general* and *special.* The

former is what necessarily and by implication of law arises from the non-performance of the contract, and need not be specially pleaded.

358. But *special damages*, or damages which really exist without implication of law, should be pleaded so that the defendant may be prepared to dispute the facts. Damages must be the legal and natural consequences of the breach of contract, or of the injury which has been inflicted.

359. The leading English case upon this subject, is Hadley *v.* Baxendale.[1] It was there held that where a contract is made under special circumstances, which are communicated by one of the contracting parties to the other, the damages resulting from a breach of the contract, which the parties would reasonably be supposed to have contemplated, are the amount of injury which would ordinarily follow from such a breach of contract under *the* special circumstances.

360. But if the special circumstances are unknown to the party breaking the contract, he, at the most, *can only be held to have* contemplated the amount of injuries which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract.

361. In the case of Sharon *v.* Mosher,[2] it was held, that "the measure of damages in an action upon a warranty, is in general the difference in value between the property as represented and its actual value. But when the warranty complained of is characterized by fraud, malice, or gross carelessness, the rule of damages will be extended so as to embrace all damages which naturally flow therefrom."

As in this action, which was to recover damages for deceit in the sale of a horse, the plaintiff having proved that the defendant at the time of the sale represented the horse to be perfectly gentle and kind, and that the defendant knew such representations to be false; and having proved also that within a day or two after the trade, and for the first time, he attempted to use the horse before a buggy, and without any apparent cause, he

[1] 23 L. J. Ex. 179.
[2] 17 Barb. (N. Y.) 518.

ran and kicked until the buggy was badly broken, and, to save his life, the plaintiff leaped upon the ground and thereby broke one of his legs, it was competent for the plaintiff to introduce evidence to show the full nature and extent of the injuries to his person and his vehicle, and the expenses necessarily incurred in effecting his cure, and that it was for the jury to say, as a question of fact, whether they resulted from the viciousness of the horse, and were the probable and natural consequences of the fraud practiced upon the plaintiff by the defendant.

362. And in the case of Bradley *v.* Lea,[1] where certain animals in a drove were sold under a warranty that all the animals in the drove were free from contagious or infectious disease, the purchaser was allowed to recoup in damages in an action for the price of the whole loss occasioned to him by the presence of the disease in the drove at that time, although some of the animals purchased by him did not take the infection until afterward.

363. In the case of Fisk *v.* Hicks,[2] it was held that in an action of deceit in an exchange of horses, the value of the horse given by the plaintiff in exchange may be shown, as tending to fix the value of the horse taken in exchange, if the false warranty or representation had been true. The rule of damages in actions for deceit in the sale of a horse, by means of a false warranty, when the unsound horse remains in the hands of the buyer, is the difference between the value of the horse as he was and as he was represented to be. The consideration paid, is evidence of the value if the warranty had been true.

364. In the recent case of French *v.* Vining,[3] where the defendant had a lot of hay on which he knew white-lead had been spilt, and tried to separate the damaged hay from the rest, and thought he had succeeded. From what was left he sold to the plaintiff a quantity knowing that it was bought as food for a cow, which, on eating it, sickened and died from the effects of lead that

[1] 14 Allen, 20. See also Mullet *v.* Mason, Law Rep., 1 C. P. 559, and Marsh *v.* Webber, 13 Minn. 109.

[2] 11 Foster (N. H.), 535.

[3] 102 Mass. 132.

still remained on it. It was held that the plaintiff could recover the value of the cow.

365. In the case of Knowes *v.* Minns,[1] which was an action on a warranty of soundness of two oxen, sold by defendant to the plaintiff, which had the rinderpest at the time, and after the purchase died of it, and nine other cattle belonging to the plaintiff also died in consequence of being placed with them, and it appeared that the plaintiff had told the defendant he wanted to put them with his other stock, and would not have them if there was the least fear of disease, on which the defendant gave the verbal warranty on which the action was brought, the defendant was held liable, not only for the value of the two oxen sold, but for that of the other nine.

366. In Passenger *v.* Thorburn,[2] the defendant sold cabbage-seed, warranting that it would produce Bristol cabbages, and the plaintiff having sowed it in the expectation of producing that crop, the warranty proved untrue. The damages were held to be the value of a crop such as should have been produced by the seed that year had it conformed to the warranty, deducting the expenses of raising the crop and the value or product of the one in fact raised.

367. Where a breach of warranty has taken place, it is prudent for the buyer, in an ordinary case, to tender the horse back to the seller immediately on discovering such breach,[3] and so entitle himself to be repaid the expenses he has been put to in keeping him; and if the seller receive him back, there will be a mutual rescission of the original contract.[4] But where the seller refuses to take back the horse, he should be sold as soon as possible for the best price that can be procured.[5] And perhaps the best course to be pursued under such circumstances is to sell him by public auction, for in that way the true market value, which is the proper measure of damages, can best be discovered.

[1] 14 Law Times

[2] 34 N. Y. 634.

[3] Selwyn's N. P., 8 ed., Val. 657, tit. Deceit, cited in Chesterman *v.* Lamb, 2 A. & E. 129.

[4] Chesterman *v.* Lamb, 2 A. & E. 129.

[5] Weston *v.* Downes, Doug. 24.

[6] Caswell *v.* Coare, 1 Taunt. 566.

368. If the buyer does not wish to tender the horse, he should at any rate give notice of the breach of warranty, because the not giving notice will be strong presumption against the buyer that the horse, at the time of sale, had not the defect complained of, and will make the proof on his side much more difficult;[1] and unless the breach in such case is clearly established, the jury will naturally suppose that the horse corresponded with the warranty.[2]

369. The longer the time before notice or bringing an action, after discovering the breach of warranty, the greater will be the difficulty in making out a good case to a jury.[3]

370. But where the breach of warranty can be clearly proved, the length of time before notice does not appear material; for the Court of King's Bench, in the case where an unsound horse was sold with a warranty of soundness, decided that the buyer might maintain an action on the warranty, although shortly after the sale he had discovered the unsoundness, and, without giving notice to the seller, had kept and used him for nine months as his own, during which period he had given him physic, and used other means to cure him. He had also cut the horse's tail. The case had been tried at the Hereford assizes before Mr. Justice Parke, who directed a nonsuit. However, in the ensuing term a rule was obtained to set that nonsuit aside, and for new trial. The cases of Fielder *v.* Starkie,[4] and Caswell *v.* Coare,[5] being referred to in showing cause, it was contended that Fielder *v.* Starkie was overruled, or at least qualified, by subsequent cases; but Lord Denman, with the assent of Justices Littledale, Patteson, and Coleridge, said: "We think that Fielder *v.* Starkie is not overruled. The rule must be absolute."[6]

371. The seller, on receiving notice on a breach of warranty,

[1] Dingle *v.* Hare, 7 C. B., N. S. 148.

[2] Poulton *v.* Lattimore, 9 B. & C. 265.

[3] Fielder *v.* Starkie, 1 H. Bla. 17.

[4] 1 H. Bla. 17.

[5] 1 Taunt. 566.

[6] Pateshall *v.* Tranter, 3 A. & E. 103; S. C., 4 Nev. & M. 649.

should have the horse examined by some skillful person, and so ascertain the exact state of the case. If he find that the warranty is broken, or that there is doubt, he had either better take back the horse, or come to what terms he can with the buyer, as horse causes are decided, in a great measure, by the strength of veterinary testimony. But if he find there is really no breach of warranty, the evidence of the party who has examined the horse will place him in a favorable position in case an action should be brought.

372. Where the horse has not been returned, the measure of damages is the difference between his real value and the price given; because, immediately the warranty has been broken, the buyer may sell the horse for what he can get, and recover the residue in damages.[1]

373. But, after a breach of warranty, the buyer is entitled to recover a reasonable sum of money for the expense of keep, where, before resale, he has tendered the horse to the seller; and the buyer is entitled to keep the horse for such reasonable time as is required to sell him to the best advantage.[2] What length of time, and what sum of money is reasonable for the keep, is a question for the jury.

374. The whole subject of keep was fully considered in the case of Chesterman *v.* Lamb,[3] where an action of assumpsit was brought on the warranty of a horse, and also for the expense for his keep. It appeared at the trial that the defendant sold and delivered the horse to the plaintiff on the 28th of June. Early in July the horse was found to be lame, and on the 10th, upon being examined by the veterinary surgeon, the complaint was found to be spavin. On the 11th of July, the plaintiff gave the defendant notice that the horse was unsound, and that he should return him and demand back the purchase money; and on the 21st the plaintiff sent the horse to livery, and informed the defendant that he had done so. On the 27th the action was commenced, and on the 16th of September, the plaintiff, having

[1] Caswell *v.* Coare, 1 Taunt. 566.

[2] McKenzie *v.* Hancock, B. M. 436.

[3] 2 A. & E. 129.

informed the defendant of his intention to do so, sold the horse by auction for 23 guineas. The action was brought to recover the difference between that sum and 40*l.*, the price given by the plaintiff, and likewise 9*l.* 17*s.* for the horse's keep at livery till the second sale. For the defendant, it was insisted that the horse was not unsound, and, consequently, that nothing was due on account either of the price or the keep. Mr. Justice Taunton, in leaving the case to the jury, said that in his opinion there had been sufficient tender of the horse back to the defendant; that if the horse was unsound, it was the defendant's duty to provide for the charges of standing at livery; and therefore the plaintiff in that case would be entitled to 9*l.* 17*s.*, claimed for keep. The jury found a verdict for the plaintiff for the whole sum demanded. A rule was obtained to show cause why there should not be a new trial, or why the verdict should not be reduced in respect of the keep. The rule, however, was discharged, and Lord Denman, C. J., said: "I can conceive no case where a purchaser returns a horse, in which the seller may not be liable for some keep." The law upon the subject is thus laid down in Mr. Selwyn's Law of Nisi Prius: "As soon as the unsoundness is discovered, the buyer should immediately tender the horse to the seller, and if he refuses to take him back, sell the horse as soon as possible for the best price that can be procured; for the purchaser is entitled to recover for the keep of the horse for such time only as would be required to resell the horse to the best advantage."

375. Whether the time of keeping be reasonable or not, is a question for the jury; but here the defendant altogether denied his liability. It is true that counsel would have been under a disadvantage in resting the case on two different grounds, but that consideration can not vary the course which must be pursued in trying a cause. If the defendant's counsel meant to rely upon the unreasonableness of the time, he should have shown grounds for insisting on that point, and taken the opinion of the jury upon it. In the following case, where an action of assumpsit was brought on the warranty of a horse, it appeared that the plaintiff had tendered back the horse to the defendant, and on his refusal

to receive it had kept it nearly eight weeks at livery, at Reading, till Reading Fair, when it was sold. The plaintiff sought to recover the difference between the price he had given for the horse and the price for which he had sold it, and also the expense of his standing at livery. Mr. Justice Coleridge, in summing up, said to the jury: "With respect to the keep of the horse, I am of opinion that if a person has bought a horse with a warranty, which has been broken, and he tenders the horse to the seller, and the seller refuse to receive it back, the buyer is entitled to keep it a reasonable time till he can sell it, and for that time he may, against the seller, recover the expense of keeping it, but he must not keep it as long as he chooses. All that he is allowed to do is to keep it for a reasonable time, till he can fairly sell it, and for that time he ought to be allowed for keeping it. If it was a good thing for the sale of the horse to keep it till Reading Fair, you will find your verdict for the amount claimed; but if you think the horse ought to have been sold within a week or a fortnight, or some other short time, you will deduct so much of the claim as goes beyond the time." The jury gave the plaintiff the verdict for the whole amount.

376. In the case of Cox *v.* Walker,[1] where an action was brought for a breach of warranty of a horse sold as sound, the special damage alleged in the declaration was the plaintiff's expense incurred by reason of the warranty, and his loss of gains and profits in reselling the horse, and the only plea was a denial of the unsoundness. It appeared that the plaintiff had bought the horse of the defendants for 100*l.* and had been offered 140*l.* for him; but the horse proving unsound, the plaintiff had been obliged to give up the bargain and sell him for 41*9l.* 7*s.* Lord Denman, C. J., directed the jury that the plaintiff was entitled to recover the difference between the price at which he was finally sold and the actual value of the horse if he had been sound at the time of such sale, and he left it to the consideration of the jury, as a measure of the value, the price offered for the horse while in the plaintiff's hands. The jury found for the plaintiff 90*l.* 13*s.* damages.

[1] 7 Car. & P. 744; S. C., 6 Adol. & E. 523.

A rule *nisi* was obtained for a new trial, on the ground of misdirection, or for reduction of damages. Cause was shown in Easter Term, 1836, before Lord Denman, C. J., and Littledale, Patteson, and Coleridge, J. S. The court took time to consider, and the case stood over for several terms, but was at length settled; and in another case, where the horse had been tendered to the defendant and refused, Chief Justice Tindal, in charging the jury,said: "You will give as damages the difference between the price paid and the real value of the horse, and damages for the expense which the plaintiff was put to by the defendant's selling him, that which was no use to him for a certain time, at least to the time when he offered the horse to the defendant. The increase in value consequent on the care and expense bestowed on a horse, after purchase, and evidenced by an advance of price on a resale, might probably be recovered if the cause of such increase were properly laid as special damage. Because, although the court of Queen's Bench thought it unnecessary to give their opinion in Clare *v.* Maynard,[1] as that point there did not properly arise; yet Lord Denman, C. J., appeared to hold that if it had arisen he should have directed the jury as he did in the case of Cox *v.* Walker,[2] and there the measure of damages would be the difference between the price ultimately obtained for him and his actual value, if he had been sound at the time of such last resale. And where a horse had been bought in the country and brought up to London, and after it was discovered to be unsound was tendered to the seller, and then sold by auction, Lord Denman, C. J., told the jury that the measure of damages was the difference between the value of the horse, if sound (of which the price was only strong evidence), and the sum it brought as unsound.[3] That the buyer could not recover the expenses of obtaining a certificate of unsoundness from the veterinary college, or of counsel's opinion, as they were no part of the necessary expenses, but were merely for the plaintiff's own comfort, and to convince him he could bring an

[1] 6 A. & E. 523.

[2] Cited in the case of Clare *v.* Maynard.

[3] Clare *v.* Maynard, 7 C. & P. 741.

action in safety. But that he was entitled to be paid the expenses of the horse up to London, and of its keep. A person who has bought a horse warranted sound, and has had it returned to him, after a resale at a profit, can not, in an action on the warranty, recover damages for the loss of a good bargain, and on this ground the Court of Queen's Bench gave their decision in Clare *v.* Maynard,[1] because the declaration there merely alleged that the plaintiff bought the horse at so much and resold him at so much, without alleging the cause of the advance or averring that he had laid out any money on the horse in the meantime; and it was held in that case, that although the contract of sale at a profit had actually been completed before the unsoundness was discovered, yet the plaintiff could not recover as special damage the advance in value, which, as stated in the declaration, was the mere loss of a good bargain. If the buyer of a horse, with a warranty relying thereon, resells him with a warranty, and being sued thereon by his vendee, offers the defense to the vendor, who gives no direction as to the action, the plaintiff defending that action is entitled to recover the costs of it from his vendor as part of the damage occasioned by his breach of warranty. He may also recover not only the sum fairly and reasonably paid to the second vendee as compensation, but also a sum in respect to damages, which he has agreed to make good, although no amount has been fixed nor any sum actually paid, the mere liability to pay such costs being sufficient to sustain the claim for special damage, but he can not recover any such costs, if by a reasonable examination he could have discovered the breach of warranty before sale."

377. In concluding this chapter, we will give the decision in Burton *v.* Young,[2] a leading American case.

This was an action on the case for breach of warranty of soundness in the exchange of horses.

The *Court* charged that to entitle the plaintiff to recover he must prove to the satisfaction of the jury: 1. The contract of warranty; that is, the consideration and promise. 2. The breach

[1] Close *v.* Maynard, 7 C. & P. 741.

[2] 5 Har. (Del.) 233.

of the contract of warranty. 3. The damage the plaintiff has sustained.

1. The plaintiff must prove an express warranty, viz: that he stated expressly that the horse was sound, or represented him as a sound animal. Whatever representations are made by the seller at the time of the sale, as to the quality of the article, is an express warranty. But it must appear to the jury that the warranty was given to the plaintiff by the defendant, or by some person acting under the authority of the defendant, either before or at the time of the sale. If the warranty is made after the sale or completion of the contract, it is void for want of consideration, and the plaintiff in such case can not recover.

2. If plaintiff has proved the contract, he must next show the breach of it. He must prove that the unsoundness existed at the time of the sale. Any disease, infirmity, or defect, which renders the horse less fit for present use and convenience, and not openly and palpably visible, and which is discoverable only by persons of skill and judgment in regard to the qualities of horses, constitutes unsoundness. Therefore, if a horse is deprived of sight in one eye, or the eye is defective, and this is only discoverable by persons skilled in horses, it constitutes unsoundness, and is a breach of the warranty.

3. The measure of damages is the difference between the actual or real value of a horse in his defective, unsound state, and his value in that sound state he was represented to be by the defendant. The damage to the defendant, arising from the unsoundness of the horse exchanged for, can not be deducted from or set off against the plaintiff's claim in this action.

CHAPTER IX.

RESPONSIBILITY OF INNKEEPERS, LIVERY-STABLE KEEPERS, AND OTHERS HAVING THE CARE OF HORSES.

378. When a horse is taken to an inn, the innkeeper has a particular responsibility imposed upon him, in return for which he has certain peculiar privileges. An innkeeper is a person who makes it his business to entertain travelers and passengers, and to provide lodging and necessaries for them and their horses and attendants, and it is no way material whether he have any sign before his door.[1]

379. The true definition of an inn is a house where the traveler is furnished with everything which he has occasion for whilst on his way.[2]

380. An innkeeper or hotel keeper undertakes to receive and entertain all travelers until his house is filled, and an innkeeper by opening a common inn undertakes also to receive and keep the horses of those who come to his inn.[3]

381. A traveler may be defined to be a person who is *bona fide* on a journey. A person who has taken a ticket at a railway station, and is about to start by a train from that station, is a traveler.[4]

382. A man can not be said to be a traveler who goes to a place merely for the purpose of taking refreshment; but if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment, and the innkeeper is justified in supplying it.[5]

383. Therefore, the distance traveled over becomes a material

[1] Palm. 374; 2 Roll. 345; Williard *v.* Reinhard, 2 E. D. Smith, 148.

[2] Per Bayley, J., Thompson *v.* Lacy, 3 B. & Ald. 286.

[3] Jones *v.* Osborn, 2 Chitty, 484.

[4] Fisher *v.* Howard, 34 L. J., M. C. 42.

[5] Atkinson *v.* Sellers, 28 L. J., M. C. 12; Taylor *v.* Humphreys, 30 L. J., M. C. 242. See Carter *v.* Hobbs, 12 Mich. 52.

element in the definition of this word in each particular instance. A man is a traveler within the meaning of the law if the distance which he has traveled is sufficient to justify the supposition that he was naturally, by reason of his journey, in need of refreshment, but no rule can be laid down for a defined instance, as that which may be short for the vigorous may be long for the weakly.

384. The circumstances under which the guest is admitted and supplied are matters for consideration in deciding whether the innkeeper has reason to believe and did believe that he was a traveler within the description, either when he admitted him or when he supplied him such, as whether he was a stranger or a neighbor, or whether he delayed longer or took more than was consistent with the need of refreshment.[1]

385. For as the exception is contained within the section of the act which creates the offense, the onus of showing that the persons supplied with refreshment are not within it is on the informer. It is said that an innkeeper may be compelled by the constable of the town to receive and entertain a traveler as his guest.

386. If an innkeeper who has room in his house refuse to receive a traveler, after a tender or an attempted tender of a reasonable sum for his accommodation, he may be indicted for it, and the indictment must state that the person refused was a traveler.[2]

387. And it is no defense for the innkeeper that the guest was traveling on Sunday and at an hour of the night after the innkeeper's family had gone to bed, or that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing these particulars.[3]

388. But although an innkeeper can not refuse a person who is sick, he is not bound to receive a person who comes to the inn drunk or behaves in an indecent or improper manner.[5] An

[1] Berkshier Woolen Co. *v.* Procter, 7 Cush. 417; Pinkerton *v.* Woodard, 33 Cal. 557; Norcross *v.* Norcross, 53 Maine, 163; Hall *v.* Pike, 100 Mass. 495; Chamberlin *v.* Masterson, 26 Ala. 371.

[2] Fell *v.* Knight, 8 M. & W. 276; Rex *v.* Ivens, 7 C. & P. 219; Rex *v.* Luellin, 12 Mod. 445; Grinnell *v.* Cook, 3 Hill, N. Y. 485.

[3] Rex *v.* Ivens, 7 C. & P. 213.

[4] Rex *v.* Luellin, 12 Mod. 445.

action on the case lies to recover compensation for any injury in consequence of such refusal, but as it appears not for the mere refusal to receive the traveler or his horse.[1]

389. An innkeeper, though licensed to let post-horses, is not liable to an action for refusing to supply a chaise and horse to enable his guest to pursue his journey, although they may be disengaged and a reasonable sum be tendered for them.[2]

390. But although a traveler is entitled to reasonable accommodation in an inn, he is not entitled to select a particular apartment, or insist upon occupying a bed-room for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose;[3] nor is he entitled to compel an innkeeper to furnish rooms in which to exhibit the wares of his guest, for an innkeeper is not bound by law to find show-rooms for his guest, but only convenient lodging-rooms and lodging.[4]

391. If the guest's horse is stolen, the innkeeper is answerable in an action,[5] even if the owner has gone away for several days, and it is lost or stolen in his absence, or if it has been brought by a servant.[6]

392. But if a person takes another's horse and rides him to the inn, where he is lost or stolen, the owner has no action against the host, but has his remedy against the taker.[7] The liability of an innkeeper for loss continues only so long as he derives benefit from his visitor, or his property; for if the innkeeper could not gain a profit, he is not liable to suffer loss with-

[1] Hawthorn *v.* Hammond, 1 C. & K. 407; Lane *v.* Colton, 1 Salk. 18; Collins' case, Godf. 346; Palm. 374; 5 Roll. 345; Newton *v.* Trigg, 1 Shaw, 270; Markham *v.* Brown, 8 New Hamp. 523.

[2] Dicas *v.* Hides, 1 Starkie, 247.

[3] Fell *v.* Knight, 8 M. & W. 269.

[4] Burgess *v.* Clements, 4 M. & S. 306.

[5] Fitzherbert's Nat. Brev. 943; Jelly *v.* Clark, Cro. Jac. 189; York *v.* Greenough, 2 Ld. Raym. 867; S. C., 1 Salk. 338. n

[6] 1 Salk. 338; 1 Rol. Abr. 3; see also Hallenbake *v.* Fish, 8 Wend. 547, and Albin *v.* Presby, 8 N. H. 408; Moore, 877; Cro. Jac. 224; Yelv. 162; Bac. Abr. tit. Inns and Innkeepers.

[7] 1 Rol. Abr. 3.

out a special undertaking.[1] For so long only is a visitor a guest upon this principle. A person leaving a horse at an inn becomes a guest, while a person leaving dead goods at an inn does not become a guest, for the horse must be fed by which the innkeeper has gain.[2]

393. And, therefore, the innkeeper is liable for the loss of the horse, although the owner is not staying at the inn. Thus, too, when a person came to an inn and desired to leave some goods there till the next week, which was refused, and then stayed to drink something, during which time his goods were stolen, the innkeeper was held to be liable.[3]

394. But if a man who has been a guest, gives up his room and quits the inn for a few days, intending to return, and asks permission to leave his goods at the inn, and the innkeeper takes charge of them, the inn-keeper is clothed only with the ordinary duties and responsibilities of a bailee.[4]

395. An innkeeper is only bound to answer for those things that are *infra hospitium* and not for anything out of his inn; for where a horse is lost or stolen when out at grass by the guest's desire, the host is not chargeable, unless it was the consequence of his willful negligence;[5] for instance, an action on the case lies against an inn-keeper who voluntarily leaves open the gates of his close whereby the horse strays out and so is lost or stolen.[6] But he is answerable if he has put the horse out to grass without the owner requiring him to do so, and where an innkeeper took in a horse and gig, on a fair day, and the hostler without the guest's permission, placed the gig outside the inn-yard, in the part of the street in which the carriages at the inn were usually placed on fair days, and the gig was stolen

[1] Gelley *v.* Clerk, Cro. Jac. 188.

[2] York *v.* Grindstone, 1 Salk. 388.

[3] Bennet *v.* Mellov, 5 T. R. 273.

[4] Smith *v.* Dearlove, 6 C. B. 132.

[5] Saunders *v.* Plummer, Orl. Bridg. 227.

[6] Bac. Abr., tit. Inns and Innkeepers; Colye's case, 8 Coke, 32; B. Moore, 1229; Pop. 127; Mosley *v.* Fosset, 1 Rol. Abr. 3; 4 Com. 96; 2 Brownl. 255; Richmond *v.* Smith, S. B. & C. 11.

thence, the Court of King's Bench held the innkeeper responsible, and Mr. Justice Taunton said it does not appear that the gig was put in this place at all at the request or instance of the plaintiff; the place is, therefore, a part of the inn, for the defendant by his conduct treats it as such. If he would wish to protect himself, he should have told the plaintiff that he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it; not having done so, he is bound by his common law liability.[1] It is said in Calye's case,[2] that an innkeeper's liability is confined to *bona et catalla*, and that he is not answerable if the guest himself is beaten, as that is not a damage to *bona et catalla*, but where the guest's horse has been beaten, the innkeeper was held liable; and it appeared that it had been injured by having been taken out of the inn and immoderately ridden and whipped, though it did not appear by whom.[3]

397. Where a guest's horse is injured, there is always a presumption of negligence against the innkeeper; it is questionable, indeed, if in any case this presumption can be rebutted without proof of actual negligence on the part of the guest. The case of Dawson *v.* Chamney,[4] has been relied upon to show that this presumption may be rebutted by giving proof of such skillful management, on the part of the innkeeper, as to convince the jury that the damage could not have been occasioned by the negligence imputed, but this view of the law was held to be untenable by Pollock, C. B., in the case of Morgan *v.* Ravey,[5] who, in delivering the judgment of the Court of Exchequer, said, "We think the cases show there is default in the innkeeper wherever there is a loss not arising from the plaintiff's negligence, the act of God, or the Queen's enemies.

[1] Jones *v.* Tyler, 1 A. & E. 522, S. C., 3 U. & M. 576.

[2] 8 Rep. 32, A. S. C., 8 Co. 32.

[3] Stannion *v.* Davis, 1 Salk. 404; S. C., 6 Mod. 323.

[4] 13 L. J., Q. B. 33; S. C., 5 Q. B. 165; S. C. 7 Jur. 1037. See also Cashill *v.* Wright, 2 Jur. N. S. 1072; and Hill *v.* Owen, 5 Blackf. 323.

[5] Morgan *v.* Ravey, 6 H. & N. 265; S. C., 30 L. J. Ex. 131.

398. In Dawson *v.* Chamney,[1] as reported in 13 L. J. & Q. B. 33, the horse of the guest was left at the defendant's inn, on a market day, and given in charge to the ostler, who placed it in a stall where there was another horse, which kicked it, and so inflicted an injury. On these facts, it was held by the Court of Queen's Bench, that in such case there was a presumption of negligence on the part of the innkeeper, or his servants; but that this presumption might be rebutted by giving proof of such skillful management, on his or their part, as to convince the jury that the damage could not have been occasioned by the negligence imputed. But a material difference will be found in the report of the facts of this case in 7 Jur. 1057, for it is there stated that there was no evidence of the manner in which the horse received the injury for which the action was brought.

It appears that the only report of this case, which was seen by the court when giving judgment in the case of Morgan *v.* Ravey, was that of the Jurist, and that Pollock, C. B., founded the only possible reconcilement of Dawson *v.* Chamney, with the law upon this point, which is the very point of discrepancy between the Jurist and the other reports. He said: "The only case which points the other way is that of Dawson *v.* Chamney, and according to the report of that case in 7 Jur. 1057, there was no evidence of the manner in which the horse received the injury for which the action was brought, and this may be the explanation of that case, for though the damage happening to the horse from what occurred in the stable, might be evidence of default or neglect, still it was not shown how the damage arose, and it was not even shown that it arose from what occurred in the stable. It might have arisen from something which occurred long prior to the horse being put into the custody of the innkeeper. That would distinguish this case, and reconcile all the cases with the general current of authority."

It matters not, indeed, so far as the law is concerned, which report of the case of Dawson *v.* Chamney is authentic, for if that contained in the L. J. & Q. B. reports is the correct one, it has been overruled by Morgan *v.* Ravey, and if that of the

[1] 17 L. J., Q. B. 33.

Jurist is to be taken, it does not establish the point that in case of loss to the guest, the presumption of negligence on the part of the innkeeper can be rebutted otherwise than by proof of actual negligence on the part of the guest.

399. An innkeeper has no lien on goods sent to his guest for a particular purpose, and known by him to be the property of another person,[1] but it extends to goods brought to the inn by a guest, though they belong to a third party, provided they be such as persons ordinarily travel with,[2] as these he is compelled to receive, the principle upon which an innkeeper's lien depends being that it is co-extensive with the goods which he is bound to receive.

400. As an innkeeper by law is bound to receive the horse of a traveler in case his stable is not full, he has therefore a lien for its keep upon a horse left with him and received by him in his character as innkeeper,[3] whether it be kept in the stable or put out to grass. For the pasture of such persons set up by law for entertainment, has the same privilege as the stables, and an action of trover can not be maintained against him for detaining the horse of his guest, unless the money due for its keep has been paid or tendered.[4]

401. An innkeeper can not detain a guest, or take off his clothes in order to secure payment of his bill.[5] But he may detain a horse for its meat (but not for that of the guest), or he may bring an action for lodging, etc., without any special contract.[6] An innkeeper's right of lien depends upon the fact of the goods coming into his possession, in his character of innkeeper, as belonging to a guest.[7]

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[1] Broadwood *v.* Granara, 10 Ex. 417.

[2] Snead *v.* Watkins, 26 L. J., C. P. 57.

[3] Smith *v.* Dearlove, 6 C. B. 135; S. C., 12 Jur. 377.

[4] 39 Hen. c. 18; 5 Hen. 7, p. 15; 2 Vol. Abr. 85; Allen *v.* Sweet, 12 C. B. 638.

[5] Bac. Abr., tit. Inns and Inkeepers, 451; Sunbolf *v.* Alford, 3 M. & W. 248.

[6] Saunder *v.* Plummer, Orl. Bridg. 227; Smith *v.* Dearlove, 6 C. B. 135.

[7] Smith *v.* Dearlove, 6 C. B. 135; S. C., 12 Jur. 377.m

402. So in a case in which a trainer of race-horses went to an inn, stayed there for a length of time and put the horses into training, nothing being said of any special contract between him and the innkeeper. It was held by the Exchequer Chamber that he came there on the ordinary terms of an inn, and that the innkeeper had a lien on the horses for their keep, although they were frequently taken off the premises for days together to attend races.[1]

403. But if a man send his horses and carriages to livery at an inn, and they are so received, the fact of his becoming a guest, at a subsequent period, does not give the innkeeper any lien.[2] Where several horses were brought to an inn by the same person, each by the custom of London may be sold for its own keep only and not for the keep of others; so that if the innkeeper permits the guest to take away all but one, he can not sell this to pay the expenses of keeping the whole, but must deliver it up on tender of the amount of its own keep.[3]

404. Where a person wrongfully seizes a horse and takes it to an inn to be kept, the owner can not have it until he has satisfied the innkeeper for its meat; for the innkeeper is not bound to inquire who is the owner of the property brought to his inn.[4] If the innkeeper in such case was to have no lien, Doderidge, J., said, "It were a pretty trick for one who wants keeping for his horse.[5]

405. "But if he knew at the time the horse was left, that the person who brought it was a wrongdoer, and not the owner of it, he has made himself a party to the wrongful act, and has no lien upon the horse for its keep; and the question as to the *scienter* must be left to the jury.[6]

406. The horse must be placed at the inn by the guest to entitle the innkeeper to detain it for its keep; for where a person

[1] Allen *v.* Smith, 9 Jur., N. S. 230, 1284.

[2] Smith *v.* Dearlove, 6. C. B. 135; S. C., 12 Jur. 377.

[3] Moss *v.* Townsend, 1 Bulst. 207.

[4] Turley *v.* Crawley, 18 L. J., Q. B. 155.

[5] Robinson *v.* Walter, Pop. 127.

[6] Johnson *v.* Hill, 3 Stark. N. P. C. 172.

was stopped with a horse under suspicious circumstances, and it was left at the inn by the police, it was held that the innkeeper had no lien, and that an auctioneer, by the direction of the innkeeper, selling the horse for its keep, was liable to the owner of the horse in an action of trover.[1]

407. If the innkeeper previously agree to give the guest credit for his entertainment, he can not detain his horse or goods, or if where there has been no such agreement, he suffer his guest's horse to depart without payment, or by any other means give credit to the owner, he can not afterward detain it for the debt upon its coming again in his possession.[2]

408. If a third party promise the innkeeper to satisfy him for the meat of the horse, in consideration that he will deliver it to the guest, it is a good promise, for there is a good consideration, inasmuch as the innkeeper loses the detainer, which is a damage, and the guest regains the horse, which is the advantage.[3]

409. But where the owner of a horse has fraudulently got possession of it to defeat the lien, the innkeeper may retake it without force, for the lien is not put an end to by his thus parting with the possession of it.[4] But it is held that the innkeeper must make fresh pursuit after it, and retake it, otherwise the custody is lost, for he can not take it at any other time, as it is in the nature of a distress. But where there is a lien by agreement, it is in the nature of a pledge, and the innkeeper may retake the horse, not only on fresh pursuit, but also wherever he finds it.[5]

LIVERY-STABLE KEEPERS.

410. A livery-stable keeper, who is not an innkeeper, has no privilege himself, and none can be claimed under him; he must, therefore, rest on his own agreement.[6] But he is not

[1] Binns *v.* Pigot, 9 C. & P. 208; Peet *v.* McGraw, 25 Wend. 654; Mason *v.* Thompson, 9 Pick. 280.

[2] Jones *v.* Thurloe, 8 Mod. 172; S. C., Jones *v.* Pearle, 7 Str. 557.

[3] Hutton, 101.

[4] Wallace *v.* Woodgate, Ry. & M. 193; S. C., 1 C. & P. 575.

[5] Ross *v.* Bramstead, 2 Rol. 438.

[6] Yelv. 66; Chapman *v.* Allen, Cro. Car. 271; York *v.* Greenaugh, 2 Ld. Raym. 687; S. C., Salk. 388; Gelly *v.* Clerk, Cro. Jac. 188.

liable to the inconveniences to which innkeepers are subject. But if a horse in his keeping be lost or stolen, he is answerable for it.[1]

The case of a horse sent to a livery stable merely to be cleaned and fed, is very different from one where he is sent to remain during the owner's pleasure, the feeding and grooming being incident to the principal object.[2]

411. In the case of Parson *v.* Gingell,[3] the following was taken by Wilde, Ch. J.: "If the goods are sent to the premises for the purpose of being dealt with in the way of the parties' trade, and are to remain upon the premises until that purpose is answered and no longer, the case falls within one class; but if they are sent for the purpose of remaining there merely at the will of the owner, there being no work to be done upon them, it falls within a totally different consideration."

412. A livery-stable keeper can not detain a horse for his keep, as an innkeeper may, because he is not bound to take it, much less can he detain or be bound to take a carriage, without horses.[4] But he may have a lien by special agreement, as where a mare was placed with a livery-stable keeper, who advanced money to her owner, and it was agreed that she should remain as a security for the repayment of the sum advanced, and for the expenses of her keep, the livery-stable keeper was held to have a lien on her for the amount due.[5]

413. And if he have such lien by agreement, and the owner of the horse fraudulently take it out of his possession, to defeat the lien, the livery stable keeper may retake it without force,

[1] Yorke *v.* Greenaugh, 2 Ld. Raym. 866; Francis *v.* Wyatt, 3 Burr. 1498; S. C., 1 Bl. 485; Parson *v.* Gingell, 4 C. B. 558; S. C., 16 L. J., C. P. 227.

[2] See per Wilde, Ch. J., Parson *v.* Gingell, 4 C. B. 558.

[3] 4 C. B. 558.

[4] Barnard *v.* How, 1 C. & P. 366; Yorke *v.* Greenaugh, 2 Ld. Raym. 867; Francis *v.* Wyatt, 3 Bur. 1498; S. C., 1 Bl. 485; Parsons *v.* Gingell, 4 C. B. 558; S. C., 16 L. J., C. P. 227. See also Hickman *v.* Thomas, 16 Ala. 666, and Thickstun *v.* Howard, 8 Blackf. 535.

[5] Donatty *v.* Crouder, 11 Moore, 479.

for the lien is not put an end to by his having parted with the possession under such circumstances.[1]

414. A livery-stable keeper has no lien on a horse for money expended by him on the horse at the request of the owner. Thus in a case in which a livery-stable keeper had employed a veterinary surgeon, at the request of the owner, to blister a horse standing at livery with him, for splints, and has actually paid the bill, it was held that he had no right to detain the horse for the amount of this bill, inasmuch as the veterinary surgeon had no lien for his bill, nor the livery-stable keeper for his keep; and inasmuch as there is no rule of law which gives a livery stable keeper a lien for money expended upon a horse standing at livery at the request of the owner.[2]

415. Where a livery-stable keeper brings an action for a horse's keep, money received by him as the price of the horse, but afterward returned on the rescission of a contract of sale, can not be set off against him by the defendant. Thus, the plaintiff, a livery-stable keeper, sold for the defendant a horse and received the price. The purchaser afterward rescinded the contract, on the ground of fraud, and was repaid the purchase money. In an action by the plaintiff, for the keep of the horse, it was held that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud.[3]

GRAZIERS.

416. A grazier has such a possession that he may maintain trespass against a person who has taken away any horse or cattle left with him to be pastured.[4] He may also maintain an action of trover for horses or other cattle during their pasturage.[5]

Wallace *v.* Woodgate, R. & M. 193; S. C., 1 C. & P. 575.

[2] Orchard *v.* Rackstraw, 9 C. B. 698.

[3] Murray *v.* Mann, 2 Ex. 538.

[4] See 4 Inst. 293; 2 Rol. Abr. 551; Woodward's case, 2 East, P. C. 653.

[5] Clark *v.* Roe, 4 Ir. C. L. 7.

If a horse so left be sold by him it is no larceny;[1] and if it be stolen, and the thief prosecuted, the property may be laid as his.[2]

417. A person who takes in horses to pasture does not, like an innkeeper, insure their safety. He is obliged to use reasonable care, but is not answerable for the wantonness or mischief of others. For, if a horse has been taken from his premises, or has been lost by accident, against which he could not guard, he is not responsible.[3]

418. A person who takes horses to pasture is answerable even if a particular negligence be proved, through which the horse was lost, or if, in ignorance of the special circumstances of the case, there be gross general negligence, to which the loss may reasonably be ascribed.[4] For instance, if cattle be pastured and the pasturer leaves the gates of the field open, he uses less than ordinary negligence; and if the cattle stray out, and are stolen, he must make good the loss.

419. So, too, if the fences were in an improper state when the horse was taken in to pasture, or if the party taking it in did not apply that care and diligence to its custody, even though it be taken in gratuitously,[5] which the owner had a right to expect,[5] or as where from not properly fencing a pond the horse stuck in the mud and died, the pasturer is answerable for such negligence.

420. But where a horse fell through some rotten boards into a cesspool, and was injured, it was doubted by Wiles, J., whether the defendant was liable.[7] In the case of Gaunt *v.* Smith,[8]

[1] Rex *v.* Smith, 1 Mood. C. C. 473; Goodrich *v.* Willard, 7 Gray, 183; Miller *v.* Marston, 35 Maine, 155; Grinnell *v.* Cook, 3 Hill, N. Y. 485.

[2] Woodward's case, East, P. C. 653.

[3] Broadwater *v.* Blot, Holt, 547. See Corbett *v.* Packington, 6 B. & C. 268; Lib. Plac. 14.

[4] Broadwater *v.* Blot, Holt, 547; also per Byles, J., Marfell *v.* South Wales R. R. Co., 8 C. B., N. S. 525; McCarthy *v.* Wolfe, 40 Mo. 520; Rey *v.* Toney, 24 Mo. 600; Hickman *v.* Thomas, 16 Ala. 666.

[5] Rooth *v.* Wilson, 1 B. & Ald. 59.

[6] Povey *v.* Purnel, before Jervis, Ch. J., C. P., N. P., Dec. 6, 1853.

[7] Stacy *v.* Livestay, C. P., N. P., Nov. 14, 1856.

[8] N. P. Ex., Dec. 11, 1856.

tried before Pollock, C. B., which was an action brought against a pasturer for negligence in the care of the plaintiff's pony, which was kicked and damaged during its pasturage by a horse whose shoes had not been taken off, there being no evidence that the defendant knew the horse to be vicious, the plaintiff was non-suited.[1]

421. It is only just that if A. send his horse to B. to be kept for him at grass for a certain time, B. should be answerable to him if the horse, when returned, appear in a worse condition than horses usually are under such circumstances, unless B. show that the horse has been in a good pasture, and therefore that the falling off must have arisen from some fault in his constitution. But were B. to agree to take in A.'s horse as one of ten to graze on a certain field, in that case B. would not be answerable if A.'s horse fell off in condition in consequence of the field being eaten bare.

422. It will be seen by a modern case that on a demise of land or the vesture of land (as the eatage of a field), for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken. Therefore, where A. had agreed in writing to take the eatage of twenty-four acres of land from B. for seven months, at a rent of 40*l.*, and then stocked the land with beasts, several of which died a few days afterward from the effect of a poisonous substance which had accidentally spread over the field without B.'s knowledge, among some manure, the Court of Exchequer held that A. was not entitled on that account to throw up the land, but continued liable for the whole rent; Mr. Baron Parke saying, in the course of the argument, "It comes simply to the question whether there is an implied undertaking that the grass shall be fit for the eatage of cattle; if there is *cadit quæstio;* if not, the plaintiff has performed his engagement, and the defendant has had all he bargained for, namely, a *demise* of the eatage for six months, and must pay for all."[2]

[1] See Groucott *v.* Williams, 32 L. J., Q. B. 237, in which it was held that injury done to a horse, when grazing in a field, by falling down a shaft, which was improperly fenced by the defendants, who were in occupation of the minerals under the field, was actionable.

[2] Sutton *v.* Temple, 12 M. & W. 60.

423. If a man take in horses, kine, or other cattle to pasture, on a contract at so much a head per week, he can not detain them for the value of the pasturement unless there is a special agreement to that effect.[1] And the law on this subject was laid down and explained in the case of Jackson *v.* Cummins,[2] in which Mr. Baron Parke said, "I think that by the common law no lien exists in the case of pasturement. The general rule, as laid down by Best, C. J., in Bevan *v.* Waters,[3] and by this court in Scarfe *v.* Morgan,[4] is by the general law, in the absence of any special agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him he has no lien upon it. Now, the case of pasturement does not fall within that principle, inasmuch as the pasture does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, as was the case with the stallion in Scarfe *v.* Morgan; he simply takes in the animal to feed it. In addition to which we have the express authority of Chapman *v.* Allen,[5] that a pasturer has no lien.

"And, although possibly that case may have been decided on the special ground that there had been an agreement between the parties, or a conversion of the animal had taken place, still it is also quite possible that it might have proceeded on the more general principle that no lien can exist in the case of pasturement, and it was so understood in this court in Judson *v.* Ethridge.[6]

424. "The analogy, also, of the case of the livery-stable keeper who has no lien by law, furnishes an additional reason why none can exist here, for this is a case of pasturement of milch cows, and from the very nature of the subject-matter the owner is to have possession of them during the time of milking.

[1] Chapman *v.* Allen, Cro. Car. 273; Richards *v.* Symons, 8 Q. B. 93.

[2] 5 M. & W. 342.

[3] 3 C. & P. 520; S. C., M. & M. 236.

[4] 4 M. & W. 283; S. C., 1 Hoen. & Hurl. 292.

[5] Cro. Car. 278.

[6] 1 Car. & M. 743.

"Which establishes that it was not intended that the pasturer was to have the entire possession of the thing bailed, and there is nothing to show that the owner might not, for that purpose, have taken the animals out of the field wherein they were grazing if he had thought proper so to do. This claim of lien is, therefore, inconsistent with the necessary enjoyment of the property by the owner."

425. But where there is a special agreement, there may of course be a lien.[1] Thus, the plaintiff having a cow at grass in defendant's field, and being indebted for the pasturement, agreed with him that the cow should be security; that he would not remove her until the defendant was paid, and that if he did, the defendant might take her where she might be, and keep her till he was paid. The plaintiff removed the cow without having paid the debt, and the defendant seized her on the high road. In an action of trespass for the taking, it was held that the agreement might be set up as a defense under a plea that the cow was not the plaintiff's.

HORSE-BREAKERS AND TRAINERS.

426. A horse-breaker is liable for any damage which, through his negligence, may happen to the horse he is breaking.

Thus, an action on the case was brought, and damages recovered against the defendant, to whose charge a mare has been committed, to be taught to pace.[2]

427. The horse-breaker, by whose skill the horse is rendered manageable, has a lien on him in respect to his charges, and such lien being consistent with the principles of natural equity is favored by the law, which, in such case, is construed liberally.[3] It was for a long time doubtful whether, in any case, a trainer had a lien for the keep and exercise of a race-horse sent to him to be trained, unless perhaps it was delivered to be trained for the

[1] Richards *v.* Symons, 8 Q. B. 90.

[2] Lib. Plac. 25.

[3] Scarfe *v.* Morgan, 4 M. &. W. 276.

purpose of running a specified race.[1] In Bevan *v.* Walters[2] he was held to have a lien, and the question also arose in Jacobs *v.* Latour,[3] but the case was decided on another point. The doubt seemed to be, whether in the contract for training there was a stipulation for the redelivery of the horse trained for the purpose of racing. And in a later case, Mr. Baron Alderson said, "It may be very doubtful whether a trainer would not be considered to be in the situation of a livery-stable keeper, if by the contract he is to allow the owner to run the horse."[4] Mr. Baron Parke shortly afterwards, in another case, said, "As to the case of the training groom it is not necessary to say anything, as it has not been formerly decided, for in Jacobs *v.* Latour[5] the point was left undetermined. It is true there is a *nisi prius* decision of Best, C. J., in Bevan *v.* Walters, that the trainer would have a lien, on the ground of his having expended labor and skill in bringing the animal into condition to run at races.

"But it does not appear to have been present to the mind of the judge, nor was the usage of training to that effect explained to him, that when horses are delivered for that purpose, the owner always has a right, during the continuance of the process, to take the animal away for the purpose of running races for plates elsewhere. The right of lien, therefore, must be subservient to this general right, which overrules it; so that I doubt if that doctrine would apply where the animal delivered was a race-horse, as that case differs much from the ordinary case of training, I do not say that the case of Bevan *v.* Walters,[6] was wrongly decided.

"I only doubt if it extends to the case of a race-horse, unless, perhaps, he was delivered to the groom to be trained for the

[1] See Jackson *v.* Cummins, post.

[2] 3 C. & P. 520; see also Sanderson *v.* Bell, 2 C. &. M. 304.

[3] 2 M. & P. 205.

[4] Scarfe *v.* Morgan, 4 M. & W. 276.

[5] 2 M. & P. 205.

[6] 3 C. & P. 520.

purpose of running a specified race, when, of course, these observations would not apply."

428. It has, however, been decided in a late case, that the labor and skill employed on a race-horse, by a trainer, are a good foundation for a lien.[1] But if, by usage or contract, the owner may send the horse to run at any race he chooses, and may select the jockey, the trainer has no continuing right of possession, and consequently no lien. The owner of a stallion is entitled to a specific lien on the mare, in respect of his charge for covering her. Thus, in the following case, S. sent a mare to M., a farmer, to be covered by a stallion belonging to him, and the mare was taken to M.'s stable and covered accordingly upon a Sunday. However, the charge for covering her not being paid, M. detained the mare, and on a demand of her being afterward made, M. refused to deliver her, claiming a lien not only for the charge on that occasion, but for a general balance due to him on another account. It was held that M. was entitled to a specific lien on the mare for the charge for covering her, and that the claim made by M. to retain the mare for the general balance, was not a waiver of his lien for the charge on the particular occasion, and did not dispense with the necessity of a tender of that sum.[2] It was also decided that such a contract was not void within 29 Car. 2, c. 7, s. 1, on the ground of its having been made and executed on a Sunday, but that even if it were void, the contract having been executed, the lien attached.

And Mr. Baron Parke said: "We are of opinion that this is not a case within the statute 29 Car. 2, c. 7, which only had in its contemplation the case of persons exercising trades, etc., on that day, and not one like the present, where the defendant, in the ordinary calling of a farmer, happens to be in possession of a stallion occasionally covering mares. That does not appear to me to be exercising any trade, or to be the case of a person practicing his ordinary calling.[3]

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[1] Forth *v.* Simpson, 13 Q. B. 680; S. C., 18 L. J., Q. B. 266; Lee *v.* Irvin, 4 Ir. Jur. 372.

[2] Scarfe *v.* Morgan, 4 M. & W. 270.

[3] Scarfe *v.* Morgan, 4 M. & W. 270.

VETERINARY SURGEONS AND FARRIERS.

429. The Royal College of Veterinary Surgeons was founded in the year 1791, and received a charter of incorporation in the year 1845. By its charter, veterinary surgery is constituted a profession, and the registered members of its body are alone to be recognized as the members of the veterinary profession. Its diploma is granted only to persons who have qualified themselves by a certain educationable course tested by examination.

430. There is no law which applies to a veterinary surgeon in particular; and where there is no contract, he must go upon a *quantum meruit* and an usage to charge for attendance, where there is not much medicine required, is too uncertain.[1] Where a man takes upon himself a public employment, he is bound to serve the public as far as his employment goes, or an action lies against him for refusing. Thus, if a farrier refuse to shoe a horse,[2] an innkeeper to receive a guest, a carrier to carry, when he may do it, an action lies.

431. But the horse must be brought to be shod at a reasonable time for such purpose, because, if brought at an irregular hour, the farrier may say: "I will not do it." A farrier is liable for laming a horse, in shoeing it, and the action is founded on the implied contract, that any workman undertaking any work will perform it properly,[3] because it is the duty of every artificer to exercise his art rightly and truly as he ought.[4]

432. And an action may be maintained for a breach of duty, arising out of a contract with a third person. Thus, Coke, Ch. J., puts this case: If the master send his servant to pay money for him upon the penalty of a bond, and on his way a smith in shoeing doth prick his horse, and so by reason of this the money is not paid, this being the servant's horse, he shall have an action upon the case for pricking of his horse, and the master also shall have his action upon the case for the special

[1] Lane *v.* Cotton, 1 Salk. 18.

[2] 14 Hen. 6, 18.

[3] 2 Chit. Plead., 6 ed. 262.

[4] 2 Rex *v.* Kilderby, 1 Saund. 312, n. 2.

wrong which he has sustained by the non-payment of his money, occasioned by this.[1] And where a horse had been injured in shoeing, from the negligence of a farrier's servant, the master is liable.[2] But not if the wrong be willful, as if the servant maliciously drive a nail into the horse's foot in order to lame him.[3]

433. An action lies against a farrier for pricking a horse when shoeing him,[4] and where one smith lends a horse to another, and the second pricks him in shoeing, the action lies against the first or the second, at the option of the owner.[5]

434. The rule of law, as to the extent of a farrier's liability in shoeing a horse, is fully and clearly laid down by Pollock, Ch. B., in the case of Collins *v.* Rodway.[6] We will here give it at considerable length. The following is compressed from an exact copy of the short-hand notes which were taken at the trial and afterward published in the Veterinarian: It was an action brought against the defendant, a farrier, for unskillfulness in the shoeing of two horses, sent by the plaintiff to be shod at the defendant's forge, which he carried on for the purpose of shoeing horses with a shoe for which he had a patent. The one, a gray mare pony, was sent on the 16th of July, in the evening, after working hours, and was shod at the particular request of the plaintiff's father. On the 17th, she was driven by two men in a gig to Barnet, and it was admitted that for three miles she had gone sound. On the 20th, the shoes were taken off by the apprentice of Beck, another farrier. On the 21st, the defendant received notice of her lameness. And, on the 26th, after her feet had been cut about and poulticed, she was reshod by

[1] Everard *v.* Hopkins, 2 Bolster, 332, and see Longmead *v.* Holliday, 6 Ex. 764.

[2] 1 Bl. Com. 431; Randleson *v.* Murray, 8 A. & E. 109.

[3] Jones *v.* Hart, 2 Salk. 440.

[4] Nat. Brev. 94d; 17 Edw. 4, 43, 11; Edw. 4, 6, 56; Edw. 3, 19; 3 Hen. 6, 36; 14 Hen. 6, 88; Orig. 106 a; 48 Edw.; 3 E. Pl. 11.

[5] 12 Edw. 4, 13.

[6] Collins *v.* Rodway, before Pollock, C. B., Guild Hall, Dec. 15, 1845; 14 Veterinarian, 102.

Beck, and afterward worked. It appeared that subsequently she had been turned out for nine weeks.

The other, a black entire pony, was sent to be shod on the 18th of July. On the 21st, the shoes were taken off by Beck, and blood was said to have followed the withdrawal of two of the nails; it was admitted that this pony's feet were very thin and bad, and his action very high. What was done to this pony did not appear; but he had been under the care of Mr. Field, the veterinary surgeon, and was afterward sold for a small sum, at Aldridge's Repository, some time in October. At the trial no veterinary surgeons were called to give any information as to the nature of the injury, or of the parts injured. And the allegation that the patent shoe was one likely to produce lameness by its application, was withdrawn by the plaintiff's counsel. The defendant's case rested on two grounds: *First.* That even supposing the ponies to have been lamed in shoeing, he was not liable, because he had brought to the performance of that duty competent skill and reasonable care, and that the plaintiff knowingly brought them to have the patent shoe applied. *Secondly.* That one pony was lame before it was shod, and the other had not been lamed by the shoeing, but the lameness had arisen from other causes. In summing up Pollock, Ch. B., said to the jury: "The only rule of law that I feel it necessary to lay down upon the subject in this case is, that if this operation has been performed unskillfully and improperly, no doubt the defendant is liable to the plaintiff for any mischief that may have resulted from such unskillfulness, but he is liable only to the extent to which mischief has been produced.

"The rule I take to be this, that a person employed for any purpose must bring to the subject-matter a reasonable skill and fitness, and he must exercise that reasonable skill and fitness with due and proper care. If he be deficient in the requisite skillfulness, and in consequence of that the operation is performed in a bad and bungling manner, or if having the requisite skillfulness he fails to bring it to act, he is liable for any mischief which results from that. I need hardly tell you that an operation of this sort can not be considered in the light of an insurance. If you apply to a surgeon or a medical man to cure you

of any disorder, he is liable if there is any want of skill or proper care, and I observed that one of you asked whether pricking a horse was a frequent accident. I think the answer to that immediate question, was that it was not at all events very unfrequent; still, it may happen without any great degree of unskillfulness attaching to it.

"The operation most resembles that of shaving. If a man undertakes to shave another, he would not be responsible for every abrasion of the skin that the barber might make; it requires a degree of skillfulness and care, and it might be hardly possible to operate upon a certain person without something of that sort taking place; and although an accident may happen, such as in this case, it may be that the foot of the horse was in such a state that it would be difficult to perform the operation of shoeing. Wherever that is the case, you would naturally expect some information given that there were those defects and difficulties, so that the farrier might be made acquainted with the risk he was exposing himself to. You will therefore have to judge whether you think there was any want of skill in the operation of shoeing these horses. I own it appears to me that I think it is impossible to doubt as to the fact that there was an actual pricking.

"With respect to the man's skill, he may have done it on this occasion badly, they coming to him at night to insist upon the job being done at an irregular hour; that was partly suggested at one time. I must say it appears to me, as a question of law, that it is no excuse. If you go to any place and call in a surgeon or a farrier, or any person to perform an operation, if the time is inconvenient, and if the light be not sufficient, and if the occasion be not suitable, he is bound to say, I will not do it. If he does it he is answerable, unless, indeed, he distinctly and explicitly says, I do it at your urgent request, but I will not be responsible for consequences. Nothing of that sort appears to have come from him. On the contrary, though there may have been a remonstrance that the man came too late, yet it was done. It appears to me, in point of law, that if a person, called upon at an unreasonable time, undertakes to do it without declar-

ing that he will not be responsible, he does it with the same responsibility as if he did it at any proper time."

435. Under a general count for work, labor, and materials, a farrier may recover, in an action brought by him, for attendance, and for medicines administered in the cure of a horse.[1] As a party has a right to go to a farrier's shop by the tacit permission of the law,[2] an action of trover does not lie against a farrier for refusing to deliver a horse which he has shod, unless the money due for the shoeing has been paid or tendered.[3] Because the artificer to whom goods are delivered for the purpose of being worked into form, the farrier by whose skill an animal is cured of a disease, the horse-breaker by whose skill a horse is rendered manageable, and the man who covers a mare with a stallion, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favored by the law, which is construed liberally in such cases.[4]

436. But the horse can only be kept for work done at that particular time, for the lien does not extend to any previous account; and when this point was decided by the Court of Queen's Bench, Lord Ellenborough said, "Growing liens are always to be looked at with jealousy, as they are encroachments on the common law. If they are encouraged in practice, the farrier will be claiming a lien upon a horse sent to him to be shod. It is not for the convenience of the public that these liens should be extended further than they are already established by law."[5]

HIRING HORSES.

437. Letting for hire is a bailment of a thing to be used by the hirer, for a compensation in money.[6] If a horse or carriage

[1] Clarke *v.* Munford, 3 Camp. 37.

[2] Lane *v.* Cotton, 1 Salk. 18.

[3] Bac. Abr., Trover (E), 816.

[4] Scarfe *v.* Morgan, 4 M. & W. 280; Chase *v.* Westmore, 5 M. & S. 189.

[5] Rushforth *v.* Hadfield, 7 East, 229.

[6] Jones on Bailments, 118.

be let out for hire for the purpose of performing a particular journey, the party letting warrants that the horse or carriage, as it may be, is fit and proper and competent for such journey.[1] And even if a particular horse has been selected out of the owner's stables, it makes no difference, as it must be supposed that all are fit for the work.[2]

438. But if a horse is hired for one purpose and is used for another, and the horse when thus used is injured, the hirer is liable for the damage thus occasioned. Accordingly, where a horse was hired as a lady's riding horse, the hirer was held to be liable for damage occasioned when trying him in harness.[3]

439. In contracts reciprocally beneficial to both parties, such as hiring, etc., such care is exacted, as every prudent man commonly takes of his own goods; and by consequence the hirer is answerable for ordinary neglect.[4] If, therefore, a man so treat and manage his hired horse as any prudent man would act toward his own horse, he is not answerable for any damage the horse may receive.[5]

440. Where the plaintiff declared that, at the defendant's request, he delivered a mare to the defendant to be prudently ridden, and the defendant injured her, it was held that he might plead his infancy in bar, as the action was founded on a contract.[6]

441. A hirer is answerable at all events, if he keep the thing hired after the stipulated time, or use it differently from his agreement.[7]

442. A veterinary surgeon in his evidence said that he considered it a want of proper care and attention to compel a horse

[1] Per Pollock, C. B., Chew *v.* Jones, 10 L. T. 231.

[2] Chew *v.* Jones, 10 L. T. 231, 308.

[3] Gapp *v.* Giandowati, C. P., N. P., Nov. 14, 1857, coram Creswell, J.

[4] Jones on Bailments, 25; Maynard *v.* Buck, 100 Mass. 40; Sullivan *v.* Scripture, 3 Allen, 564.

[5] Cooper *v.* Burton, 3 Camp. 5 n.

[6] Jennings *v.* Rundall, 8 D. & R. 335.

[7] Jones on Bailments, 121; See Trotter *v.* McCall, 26 Miss. 413; Lucus *v.* Trumbull, 15 Gray, 306.

to pursue his journey after it had been driven twenty miles, and had then refused its feed, and Chief Justice Dallas directed the jury accordingly.[1]

His lordship also held that the defendant was not entitled to return the horse on payment of 10*l.*, because as the horse, on being returned, was in a worse state than when originally delivered, the condition on which it was delivered had not been fulfilled.

443. If a hired horse is taken sick on the journey agreed upon, without the fault of the hirer, its cure is at the expense of the owner.[2]

But if the hirer prescribes medicine for it, he is answerable for any improper treatment, but not if he call in a farrier. Thus where a horse has been hired of the plaintiff by the defendant, who, on the horse having been taken ill, prescribed improper medicine for it, and the horse died, Lord Ellenborough said, "Had the defendant called in a farrier, he would not have been answerable for the medicines the latter might have administered, but when he prescribes himself he assumes a new degree of responsibility; and prescribing so improperly, I think he did not exercise that degree of care which might be expected from a prudent man toward his horse, and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse from the plaintiff."[3]

444. Pothier says that where a horse is let to one on hire, to be kept by him for a certain period, the hirer is to pay for his shoeing during that time; but that it is otherwise if a person lets his coach and horses to another for a journey to be driven by his own servants.[4]

445. A bailee of goods for hire, by selling them, determines the bailment, and the bailer may maintain trover against the purchaser, though the purchase was *bona fide*.[5] Thus, where a person hired a horse and sold it to a third party, it was held by

[1] Bray *v.* Mayne, 1 Gow, 1.

[2] Pothier's Loanage, 129; Story on Bailments, 259; Eastman *v.* Sanborn, 3 Allen, 595; Edwards *v.* Carr, 13 Gray, 234.

[3] Dean *v.* Keate, 3 Camp. 4.

[4] See Pothier's, Loanage 107, 129; Story on Bailments, 258.

[5] Cooper *v.* Willomatt, 1 C. B. 672.

Mr. Justice Bosanquet that the owner might recover its value from the purchaser, although he had acted *bona fide*, and had given the hirer the full value for it, as the hirer could give him no better title than he got himself.[1]

446. If through the hirer's negligence, as by leaving his stable door open all night, the horse be stolen, he must answer for it, but not if he be robbed of it by highwaymen, unless by imprudence he gave occasion to the robbery, as by traveling at unusual hours, or by taking an unusual road. The hirer is liable in the same way for the negligence of his servant, when acting under his directions, either express or implied.[2]

447. If a person gets a horse out of the possession of the owner under the pretense of hiring it, and then go and offer it for sale, there will be no felony at common law until the sale is actually effected. In the following case the prisoner was indicted for stealing a horse and gig which he had hired of a livery-stable keeper in Stratford Mews, near Manchester Square, London. It appeared that he drove it off to some distance, and offered it for sale at a small price to an innkeeper, who, under pretense of getting him the money, procured a constable and gave him into custody.[3] On the trial Pear's case,[4] Charlewood's case[5] and Semple's case[6] were referred to, and the following passage from the latter quoted: "But on the other hand, if the hiring was only a pretense made use of to get the chaise out of the possession of the owner, without any intention to restore it or to pay for it, in that case the law supposes the possession still to reside with the owner, though the property itself has gone out of his hands, *and then the subsequent conversion will be the felony.*" And C. J. Tindal said: "This case comes near to many of those

[1] Shelly, Adm'rx, *v.* F., 5 C. & P. 313.

[2] Jones on Bailments, 88; See Brown *v.* Waterman, 10 Cush. 117; McDaniels *v.* Robinson, 26 Vt. 316; Brown *v.* Johnson, 29 Texas, 40; Cross *v.* Brown, 41, N. H. 283, Am. Law Review, Jan. 1871.

[3] Reg. *v.* Brooks, 8 C. & P. 295.

[4] 1 Leach, 212.

[5] 1 Leach, 409.

[6] 1 Leach, 420.

which have decided that the appropriation of property, under circumstances in some degree similar to the present, amount to larceny. However, there has been no actual conversion of the property, but only an offer to sell, therefore the prisoner must be acquitted.[1]"

448. If the owner parts with the possession of a horse for a special purpose, and the bailee, when that purpose is executed, neglects to return it, and afterward disposes of it, if he had not a felonious intention when he originally took it, his subsequent holding and disposing of it will not, at common law, constitute a new felonious taking, or make him guilty of felony.[2]

449. In general, the owner of a horse is liable for any accident which may befall it when fairly used by the hirer.[3] Thus where a carriage is let for hire and it breaks down on the journey, the person who lets it is liable, and not the hirer,[4] unless it breaks down through some act of the hirer which is not within the contract.[5] And we shall see, in a variety of cases, what are the circumstances under which owners have been held liable for damage, inflicted through the negligent use of carriages and horses they have let for hire.

450. If a man hire a carriage and any number of horses, and the owner send with him his postilion or coachman, the hirer is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glasses and inside of the carriage while he sits in it, and he is not answerable for any damage done by the negligence of the owner's servants.[6]

451. Where horses are hired to draw a private carriage to a certain place, and they are driven by the owner's servants, the owner is liable for any damage done through the negligence of

[1] Rex *v.* Brooks, 8 C. & P. 295.

[2] Rex *v.* Banks, R. & R. 441.

[3] See Arbon *v.* Fussell, 3 F. & F. 152; and Holmes *v.* Onion, 2 C. B., N. S. 790.

[4] Sutton *v.* Temple, 12 M. & W. 60.

[5] Lygo *v.* Newbolt, 23 L. J. Ex. 108.

[6] Jones on Bailments, 88; Samuel *v.* Wright, 5 Esp. 263; Smith *v.* Lawrence, 2 M. & R. 1.

his servants; for where a person hired horses to take his own carriage to Epsom, and he was driven by the owner's post-boys, Lord Ellenborough held, that a person who hires horses under such circumstances has not the entire power and management over them, but that they continue under the control and power of the servants who are intrusted with the driving, and that the owner of them would be answerable for any accident occasioned by the post-boys' misconduct on the road, and his lordship mentioned a case of the kind in which damages were recovered against the owner of a chaise for an injury done by it, when Mr. Burton, a Welsh judge, was in it, and who was called as a witness;[1] and where horses were hired to draw a private carriage to Windsor, the owner of the horses was held liable for damage done, because they were under the care and direction of his servant.[2] And in the case of Sir Henry Houghton,[3] horses were hired by him to draw his carriage, traveling post, and he was held not to be answerable for damages which had been done.

452. But where horses have been hired to be driven about by the owner's servant wherever the hirer pleases, and for which he gives him some gratuity, there seems at one time to have been a difference of opinion among the judges as to the party liable for injury done.

In Laugher *v.* Pointer,[4] where the able judgments on both sides, as is observed by Mr. Justice Story in his book on agency, exhausted the whole learning of the subject, the judges of the Court of King's Bench were equally divided, Chief Justice Abbott and Mr. Justice Littledale holding that the hirer of the horses was not liable for any injury done, and Mr. Justice Bayley and Mr. Justice Holroyd being of the contrary opinion.

453. In the case of Quarman *v.* Burnett,[5] the owners of the carriage had always been driven by the same driver, he being

[1] Dean *v.* Branthwaite, 5 Esp. 35, and quoted by Mr. Justice Littledale in Laugher *v.* Pointer, 5 B. & C. 558.

[2] Samuel *v.* Wright, 5 Esp. 263.

[3] Sir H. Houghton's case, cited 5 B. & C. 556.

[4] 5 B. & C. 558.

[5] 6 M. & W. 499.

the only regular coachman in the employ of the owners of the horses, who paid him regular weekly wages. The owners of the carriage paid him 2s. a drive, and provided him with livery, which he left at their house at the end of each drive. Mr. Baron Parke said: "It appears to us that there is no special circumstances which distinguish the present case, and we must decide the difference between the judges in Laugher *v.* Pointer.[1] There is no satisfactory evidence of any selection by which this man was made the defendant's servant; the question is therefore the same as in that case.

"If the driver be the servant of a jobmaster, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack postboy ceases to be the servant of an innkeeper where a traveler has a particular preference to one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the jobmaster, appointed by themselves, it would have made all the difference."

The fact of the coachman wearing the defendant's livery with their consent, and so being the means of inducing third persons to believe that he was their servant, was mentioned in the course of argument as a ground of liability, but can not effect our decision. If the defendants had told the plaintiff that he might sell goods to their livery servant, and had induced him to contract with the coachman, on the footing of his really being such servant, they would have been liable on such contract; but this representation can only conclude the defendant with respect to those who have altered their condition on the faith of its being true. In the present case, it is a matter of evidence only of the man being their servant, which the fact at once answers. We have fully considered the judgments on both sides in Laugher *v.* Pointer,[2] and think that the weight of authority and legal princi-

[1] 5 B. & C. 547.
[2] 5 B. & C. 547.

ple is in favor of the view taken by Lord Tenterden[1] and Mr. Justice Littledale.

454. A person jobbing a carriage by the year, under a written agreement, by which the owner binds himself to keep the same in perfect repair without any further charges whatever, is not liable for repairs made necessary by accident. And in a case where the owner had so bound himself, Lord Denman said, "Looking at the terms of the agreement, it seems to me that the only case in which the defendant could be subjected to the expense of repairs is the case of damage happening through the willful default of the defendant. With regard to the evidence of the usage of the trade, the language of the agreement between the parties being clear and unequivocal, evidence as to general usage of the trade can not be of any avail."[2]

455. The hirer of a horse or carriage is liable for damage occasioned by the negligence of himself or his servant; and where two persons hire a carriage they are both answerable for any damage occasioned by the negligent driving of one of them; but if it be hired by one only, the other, who is a mere passenger, is not liable.[3]

456. It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. Thus, he may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of.[4]

457. When a master and servant are together in a carriage, and an injury ensues, the master, from his mere presence, is a co-trespasser, if the act of the servant amounts to a trespass.[5]

458. And on this principle, where a carriage and horses are hired, and the postboys are servants of the owner, if the hirer be sitting outside, and have a view of their proceedings, and do

[1] Then Chief Justice Abbott.

[2] Reading *v.* Menham, 1 M. & Rob. 234.

[3] Davy *v.* Chamberlayne, 4 Esp. 229.

[4] Per Parke, B., Quarman *v.* Burnett, 6 M. & W. 499.

[5] Chandler *v.* Boughton, 1 Cr. & M. 229.

not interfere to prevent their misconduct, and an injury ensues, he is a co-trespasser with them, because, as he did not endeavor to stop their improper proceedings, he has adopted their conduct as his own.

459. The law upon this subject was fully discussed and determined in the case of McLaughlin *v.* Prior,[1] in which a trespass had been committed by a carriage and horses hired by the defendant driving against the plaintiff's gig. It appeared that the defendant and seven others were driving in a carriage and four, with two postilions, to Epsom races, on the 3d of June, 1840; the defendant, with another party, sat upon the box. The carriage was not in the line of the vehicles which were going through the turnpike at Sutton, and as it approached the toll-bar the postilions endeavored to get into that line in order that they might pass through the gate. The plaintiff and a friend of his, Mr. Mason, were driving in a small gig at that particular place where the postilions attempted to fall into the line. The man on the wheel-horse said to the other postilion, "Break in, you are all right there," and upon doing this the trace of the leaders of the carriage caught the wheel of the plaintiff's gig; the gig was upset, and the plaintiff was injured and rendered lame for life.

Immediately before the accident the defendants called out to his postilions to let the plaintiff's gig pass first, but the order then came too late. As soon as the accident occurred the carriage was stopped and the owner's name demanded, whereupon the defendant, in order to prevent his party being detained, offered money to the parties, and eventually gave his card.

On the part of the defendant, it was objected that even assuming that the fault lay with the drivers of the carriage, the defendant was not responsible, neither the horses nor the carriage being his, or at all events that he was not liable in trespass. Chief Justice Tindal left it to the jury to say whether the accident was the result of want of skill or caution on the part of the drivers of the carriage, or on the part of the owner of the gig, reserving it for the court of common pleas to say whether upon the

[1] 1 C. & Marsh. 354; 4 M. & G. 48.

facts proved the defendant was liable in this form of action. The jury returned a verdict for the plaintiff.

The court of common pleas discharged the defendants' rule *nisi* for a nonsuit, and Chief Justice Tindal said: "Undoubtedly the cases in which the hirer of a glass coach or a post-chaise has been held not to be responsible for the act of the driver, depend upon grounds wholly different from those on which the liability of the defendant on this occasion is to be sustained. It has always been held that the hirer of the carriage, having no power of selection, no foreknowledge of the character of the driver, is not responsible for any negligence or want of skill or experience on his part, for that it is the duty of the party who lets to exercise care and caution in the selection of those to whom he intrusts the government and protection of his horses and his carriage. But here the question is whether the evidence did not show that this defendant so conducted himself as to be liable as a co-trespasser with the postilions whose conduct has given rise to this inquiry. The general rule is, that all who are present and who, from the circumstances, may be presumed to be assenting to the wrongful act are trespassers. In trespass, all are principals. I think there was abundant evidence to justify the jury in coming to the conclusion they did. In the first place the defendant was present, sitting on the box of the carriage, and when he saw that the carriage was out of the line he must have known that the postboys intended to get into it again whenever they found an opportunity, so as to be enabled to pass through the toll-gate. Had the defendant at that time expostulated, I hesitate not to say that he would have been a trespasser whatever might have ensued, for no servant can, against his master's will, make him a trespasser by any wrongful act of his. Had he expressed any, the slightest disapprobation of the course the postboys were evidently pursuing, he would have escaped all liability; or if the defendant and his friends had all been inside the carriage, so that they could not be supposed to be well aware of what was going on, the plaintiff must have sought his remedy elsewhere. But being, or some of them being, on the outside, and seeing the improper manner in which the postboys were endeavoring to get on, and though not actually encourag-

ing them in their unlawful course, yet abstaining from all interposition to restrain them, this, though not very strong, certainly was some evidence whence the jury might properly infer that the defendant assented to that course. But the evidence does not stop there, for the defendant, some time after the accident, in a conversation with one of the witnesses said, that he intended to have stopped when the carriage had established itself in the line, and allowed the gig to regain its place. Now, that remark showed pretty strongly that the defendant was exercising control over the motions of the postboys, and was an assenting party to their act. I therefore think the defendant, the '*dominus pro tempore*,' being present and seeing what was going on, and not interfering to prevent the mischief, must be taken to have been an assenting party, and that this case falls within the principle laid down in Gregory *v.* Piper,[1] and Chandler *v.* Broughton,[2] in which latter case it was held that where master and servant are together in a vehicle and an accident occurs, from which an immediate injury ensues, the master is liable in trespass and not in case, although the servant was driving, and not only no evidence was given on the part of the plaintiff of any interference on the master's part, but the evidence on the part of the defendant distinctly negatives any interference, so that the mere presence of the master with the servant will constitute him a trespasser if the act of the servants amount to trespass. Upon the whole, therefore, in this case, I think the jury may have come justly to the conclusion that the defendant was a co-trespasser with the postboys." And in this decision, Coltman, Erskine, and Cresswell, Justices, concurred.[3]

It is always a question for the jury whether the driver is acting as servant for the owner or hirer, and Lord Abinger, in leaving that point to the jury, observed that no satisfactory line could be drawn, at which, as a matter of law, the general owner of a carriage, or rather the general employer of a driver ceased

[1] 9 B. & C. 591; 4 M. & R. 500.

[2] 1 C. & M. 29.

[3] McLaughlin *v.* Pryor, 1 C. & Marsh. 354; S. C., 4 Scott N. R. 655; 4 M. & G. 48.

to be responsible, and the temporary hirer to become so; each case of this class must depend upon its own circumstances.[1]

A hirer may, of course, by agreement, make himself answerable for accidents. Thus, in the following case, it appeared that a man who let out horses to hire told a person who applied to him for one, that he had no horse at home but a black one that shied, and that if he took it on hire he must be answerable for all accidents. The horse was engaged for six weeks at a certain price, and it appeared that whilst it was in the hirer's possession it came down upon the road in consequence of shying, and suffered a material injury in having its fetlocks cut severely by a glass bottle. The owner of the horse brought an action against the hirer on his agreement, and the latter was held answerable for the damage done.[2]

BORROWING HORSES.

460. Lending for use is a bailment of a thing for a certain time when used by the borrower without paying for it.

461. The duties of the borrower and lender are thus well laid down by Mr. Justice Coleridge, in Blackmore *v.* Bristol and Exeter Railway Company:[3] "The duties of the lender and borrower are, in some degree, correlative. The lender must be taken to lend for the purpose of beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be defined as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware and owing to which directly the borrower is injured. Would it not be monstrous to hold, that if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one ignorant of its bad qualities, and

[1] Brady *v.* Giles, 1 M. & Rob. 496.

[2] Jeffery *v.* Walton, 1 Stark. N. P. C. 267.

[3] 27 L. J., Q. B. 167. See also McCarthy *v.* Young, 3 L. T., N. S. 785.

conceal them from him, and the rider using ordinary care and skill, is thrown from it and injured, he should not be responsible." By the necessarily implied purpose of the loan, a duty is contracted toward the *borrower* not to conceal from him those defects known to the *lender*, which may make the loan perilous or unprofitable to him.

462. In contracts from which a benefit accrues only to him who has the goods in his custody, as in that of lending for use, an extraordinary degree of care is demanded, and the borrower is therefore responsible for slight negligence.

463. But if the lender was not deceived, but perfectly knew the quality as well as age of the borrower, he must be supposed to have demanded no higher care than that of which such a person was capable; as if a person lend a fine horse to a raw youth, he can not exact the same degree of management and circumspection as he would expect from a riding-master or an officer of dragoons.

464. Where a person rides a horse gratuitously, at the owner's request, for the purpose of showing him for sale, he is bound in so doing to use such skill as he actually possesses, or such as may be implied from his profession or situation, and he is equally liable with a borrower for injury done to the horse while ridden by him.

465. In a case tried before Mr. Baron Rolfe, it appeared that the plaintiff had intrusted a horse to the defendant, requesting him to ride it to Peckham for the purpose of showing it for sale to a Mr. Margetson. The defendant accordingly rode the horse to Peckham, and for the purpose of showing it took it into the East Surrey race-ground, where Mr. Margetson was engaged, with others, playing at cricket; and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses.

The learned judge, in summing up, left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and told them that, under the circumstances, the defend-

ant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it, and that if they thought the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly there, they ought to find for the plaintiff, which they did.

The Court of Exchequer refused a rule for a new trial, applied for on the ground of misdirection. Lord Abinger, C. B., saying: "We must take the summing-up altogether; and all it amounts to is, that the defendant was bound to use such skill and management as he really possessed. Whether he did so or not was, as it appears to me, the proper question for the jury. And Mr. Baron Parke said: "The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use; if he did not, he was guilty of negligence."

And Mr. Baron Rolfe said: "The distinction I intended to make between this case and that of a borrower, is, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets or from whom he borrows that he is a person of competent skill. If a person more skilled knows that to be dangerous, which another, not so skilled as he, does not, surely that makes a difference in the liability. I said I could see no difference between negligence and gross negligence—that it was the same thing with the addition of a vituperative epithet.[1]

466. Whether there is a distinction, and what that distinction is, if there be one, between negligence and gross negligence, is a matter of little importance, but one thing is settled, that the negligence of a gratuitous bailee, to be actionable, differs from the negligence which would be actionable in a bailee who is not gratuitous, and the distinction appears to be that a gratuitous bailee is not liable for simple negligence, for which a borrower would be liable, but only for such negligence as he is guilty of

[1] Wilson *v.* Brett, 11 M. & W. 113.

in spite of the better skill or knowledge which he either actually had or undertook to have.[1]

467. And the principle upon which he is liable is thus well laid down in Coggs *v.* Bernard,[2] if a man will enter upon a thing, and take the trust upon himself, and miscarries in the performance of the trust, an action will lie against him for that, though no one could have compelled him to do the thing.

468. In cases of mere gratuitous loan, the use is to be deemed strictly a personal favor and confined to the borrower, unless a more extensive use can be implied from other circumstances, such as, for instance, lending a horse on trial. In general, it may be said, in the absence of all controlling circumstances, that the use intended by the parties is the natural and ordinary use for which the thing is adapted.[3]

469. A borrowed horse cannot be used by a servant. Thus where an action of trespass was brought for immoderately riding the plaintiff's horse, it appeared that the defendant had borrowed the animal, and that he and his servant had ridden it by turns. It was held that the license was annexed to the person of the defendant, and could not be communicated to another.[4]

470. If a horse or cart, or such other thing as may be used and delivered again, be used according to the purpose for which they are lent, and they perish, he who owns them must bear the loss, if they perish not through default of him who borrowed them, or he made a promise at the time of delivering to redeliver them safe again.

471. But if they be used in any other manner than according to the lending, in whatever manner they may perish, if it be not

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[1] Beal *v.* S. D. Railway Co., 5 H. & N. 881; Austin *v.* Manchester Railway Co., 10 C. B. 454.

[2] 1 Smith's L. C., 5 ed. 161.

[3] Story on Bailments, 201; Lord Carnoys *v.* Scurr, 9 C. & P. 386; Vaughn *v.* Menlove, 3 Bing. N. C. 468; Howard *v.* Babcock, 21 Ill. 259; Bennett *v.* O'Brien, 37 Ill. 250; Phillips *v.* Coudon, 14 Ill. 84; Scranton *v.* Baxter, 4 Sandf. 8; Wood *v.* McClure, 7 Ind. 155; Eastman *v.* Sanborn, 3 Allen, 594; Carpenter *v.* Branch, 13 Vt. 161.

[4] Bingloe *v.* Morrice, 1 Mod. 210; S. C., 3 Salk. 271; Scranton *v.* Baxter, 4 Sandf. 8.

by default of the owner, the borrower is chargeable both in law and conscience. Thus if the borrower, instead of going to Boston, for which purpose the horse was lent, go toward Albany, or having borrowed him for a week, keep him for a month, he becomes responsible for any accident that may befall the horse in his journey to Albany, or after the expiration of the week.[1]

472. In regard to time, if no particular time is fixed, a reasonable time must be intended, keeping in view the objects of the bailment. If a horse is lent for a journey, it is presumed to be a loan for the ordinary time consumed in such a journey, making proper allowance for the ordinary delays and the ordinary objects of such a journey.

473. But where a borrower of a horse promises to redeliver it on request, and the horse died without his default before request, he was held not liable.[2]

474. A party who borrows a horse is bound to feed it during the time of the loan,[3] and if it is returned out of condition, the borrower would probably be called upon to prove that he fed it properly, and that the falling off in condition did not arise from any neglect on his part.[4]

475. Where the horse is exhausted and refuses his feed, he must not be ridden or driven any further.

476. If a man, through his own imprudence, has his borrowed horse killed, by robbers, for instance, or by a ruinous house or stable, in manifest danger of falling, coming on to his head, the owner is entitled to the price of the horse, but not if the house and stable were in good condition, and fell by the violence of a sudden hurricane.

477. Where a borrowed horse dies from disease, the borrower is not answerable. Thus in Williams *v.* Heide,[5] the plaintiff declared that in consideration he had lent to defendant's wife,

[1] Story on Bailments, 200; Wheelstock *v.* Wheelright, 5 Mass. 104; Booth *v.* Terrell, 16 Geo. 25.

[2] Williams *v.* Lloyd; Jones on Bailments, 179; Williams *v.* Hill, Palm. 548.

[3] Handford *v.* Palmer, 2 B. & Bing. 359.

[4] Bray *v.* Mayne, 1 Gow, 1.

[5] Palm. 548, cited in Powell *v.* Salisbury, 2 Y. & J. 394.

dum sola, a horse, to be returned upon request; she promised to return it upon request, but had not done so. The defendants pleaded that, before the request the horse *per diversos morbos in corpore suo crescentes moritur*, and so they could not redeliver it. Upon the demurrer the defendants had judgment, for where the agreement is possible when made, but afterward becomes impossible by the act of God, the party is forever discharged.

478. A person borrowing a horse or carriage is answerable for any damage occasioned by negligent management, whether done by himself or another person in driving.[1]

479. The rule is that when there has been a misuser of the thing lent, as by its destruction or otherwise, there is an end of the bailment, and an action of trover is maintainable for the conversion.[2]

[1] Wheatly *v.* Patrick, 2 M. & W. 650.

[2] Bryant *v.* Wardell, 2 Ex. 482.

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