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Chapter 185.

Uniform Sales Act.

Formation of Contract.

Sec. 1. Contracts to sell and sales.—

I. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

II. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

III. A contract to sell or a sale may be absolute or conditional.

IV. There may be a contract to sell or a sale between one part owner and another.
(R. S. c. 171, § 1.)

Sec. 2. Capacity; liabilities for necessaries.—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

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

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery. (R. S. c. 171, § 2.)

Sec. 3. Form of contract or sale.—Subject to the provisions of this chapter and of any statute in that behalf, a contract to sell or a sale may be made in writing, either with or without seal, or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties. (R. S. c. 171, § 3.)

Sec. 4. Statute of frauds.—

I. A contract to sell or a sale of any goods or choses in action of the value of $500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

II. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

III. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to become the owner of those specific goods. (R. S. c. 171, § 4.)

Editor's note.—All of the cases carried in the note to this section actually arose under c. 119, § 5, which governs contracts made prior to July 6, 1923 (see note to that section). However, these cases are concerned with provisions of that section which are substantially similar to the provisions of this section, and it is felt that they will be of value in construing the latter.

I. General Consideration.

II. The Nature of the Contract.

III. The "Note or Memorandum."

IV. The Acceptance.

I. GENERAL CONSIDERATION.

The object of the statute is to prevent perjury and fraud. Bird v. Munroe, 66 Me. 337.

This section affects the remedy only and not the validity of the contract. Bird v. Munroe, 66 Me. 337.

It is a defense only for one charged by contract.—This section cannot be set up in defense, except by him who is sought to be charged by the contract, or his legal representatives. Cowan v. Adams, 10 Me. 374.

Parol contracts of sale not made illegal.—Verbal bargains for the sale of personal property are good at common law and they are not made illegal by the statute. Parties can execute them if they mutually please to do so. Bird v. Munroe, 66 Me. 337.

They are merely not enforceable.—This section does not forbid parol contracts, but only precludes the bringing of actions to enforce them. Bird v. Munroe, 66 Me. 337.

Section is in alternative as to written contract, acceptance, or part payment.—The requirement of the statute is in the alternative. The contract need not be evidenced by writing if the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof. Bird v. Munroe, 66 Me. 337.

Applied in Gooch v. Holmes, 41 Me. 523; Chase v. Willard, 57 Me. 157.

Cited in Duffy v. Patten, 74 Me. 396; Delaval Separator Co. v. Jones, 117 Me. 95, 102 A. 968.

II. THE NATURE OF THE CONTRACT.

This section of the statute of frauds embraces executory as well as executed contracts for the sale of goods. Hight v. Ripley, 19 Me. 137; Weeks v. Crie, 94 Me. 458, 48 A. 407.

This section contemplates an absolute sale, where the vendor is to receive payment, and the vendee the goods purchased. Gleason v. Drew, 9 Me. 79.

It applies only to contracts over certain sum.—The statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Bird v. Munroe, 66 Me. 337.

And does not limit time for part payment.—There is nothing in this section which fixes or limits the time within which a purchaser is to give something in part payment. Dean v. W. S. Given Co., 123 Me. 90, 121 A. 644.

Part payment may follow contract of sale before suit.—As acceptance and receipt may be later than the contract of purchase, and as the note or memorandum, which usually is but evidence of the contract, may be made afterward, but preceding action, so by parity of reasoning a part payment may also follow the contract of sale before suit, in substitution of an act for words, on the one continuous transaction. Dean v. W. S. Given Co., 123 Me. 90, 121 A. 644

This section applies to the sale of promissory notes. Pray v. Mitchell, 60 Me. 430.

And to sale of shares in joint stock company.—A contract for the sale of an interest or shares in a joint stock company is within the statute of frauds; and in the absence of the other requisites of the statute, it must be proved by some note or memorandum in writing. Pray v. Mitchell, 60 Me. 430.

But a contract to sell corporate stock is taken out of the statute of frauds by the buyer entering upon the management of the corporate business as an owner. The seller of the stock need not procure issuance of a certificate of the shares to the buyer, nor procure a certificate to himself and transfer or tender it to the buyer. Ford v. Howgate, 106 Me. 517, 76 A. 939.

A mortgage of personal property is not

a contract of sale within the meaning of the statute of frauds. Gleason v. Drew, 9 Me. 79.

Application of statute may depend upon whether sale involves one or more contracts.—The application of the statute of frauds, in case of the purchase of a number of articles in the same transaction, may depend upon whether there is one contract or more. The mere fact that a separate price is agreed upon for each article, or even that each article is laid aside as purchased, makes no difference so long as the different purchases are so connected in time or place, or in the conduct of the parties, that the whole may be fairly considered as one transaction. Weeks v. Crie, 94 Me. 458, 48 A. 107.

Contract of sale and contract to manufacture distinguished.—A contract for the manufacture of an article differs from a contract of sale in this: the person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another and not made for him. It is the peculiar skill and labor of the other party combined with the materials for which he contracted, and to which he is entitled. Hence it has been said that if the article exists at the time in the condition in which it is to be delivered, it should be regarded as a contract for sale. Hight v. Ripley, 19 Me. 137.

Agreement merely for delivery is contract of sale.—If the agreement is for the delivery, and not for the manufacture and delivery of the goods, which may be manufactured at the time, it is a contract of sale, and is within this section of the statute of frauds. Fickett v. Swift, 41 Me. 65.

And it is immaterial that article is thereafter manufactured.—If the contract is one of sale, it cannot be material whether the article is then in the possession of the seller, or whether he afterward procures or makes it. Hight v. Ripley, 19 Me. 137.

To take such contract out of the statute, other facts must be shown.—The fact that the article contracted for does not exist at the time of the contract, but is to be made or manufactured, will not necessarily take the case out of the statute. It must also appear that the particular person who is to manufacture it, or the mode and manner, or materials, enter into and make part of the contract. Edwards v. Grand Trunk Ry., 48 Me. 379.

Illustration.—If a man agrees to purchase one hundred boxes of candles at a fixed price, although both parties understand that the candles are not then manufactured, but are to be thereafter manufactured, yet this is essentially a contract of sale. The fact that they are to be afterwards manufactured makes no part of the contract. But if the bargain had been that the party should manufacture the candles from a particular lot of tallow, or that they should be manufactured by a particular person, it would be an agreement for manufacture, and not for sale. Edwards v. Grand Trunk Ry., 48 Me. 379.

Contract for manufacture and delivery of goods is not within statute.—If the contract is not the contract for the sale of goods, wares and merchandise, but is one for the manufacture and delivery of the goods named, it is not within the statute of frauds. Crockett v. Scribner, 64 Me. 447.

If application is made to a mechanic or manufacturer for articles in his line of business and he undertakes to prepare and furnish them in a given time, such a contract, though not in writing, is not affected by the statute. Cummings v. Dennett, 26 Me. 397.

Contracts to furnish articles to be manufactured or prepared in a prescribed manner are not within the statute. Abbott v. Gilchrist, 38 Me. 260; Edwards v. Grand Trunk Ry., 48 Me. 379.

And such contracts may be verbal.—This section does not prevent persons from contracting verbally for the manufacture and delivery of articles. Hight v. Ripley, 19 Me. 137.

Contract to build vessel frame held not within statute.—A contract to procure and deliver at a certain time and place, one half of a frame for a vessel to be hewn and fashioned according to certain moulds is a contract for manufacture and not within the statute. Abbott v. Gilchrist, 38 Me. 260.

Contract held not to be one for manufacture of goods.—See Edwards v. Grand Trunk Ry., 54 Me. 105.

III. THE "NOTE OR MEMORANDUM."

Written memorandum is condition precedent to suit.—The writing must exist before the action is brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before a memorandum is obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The

writing is a condition precedent to the right to sue. Bird v. Munroe, 66 Me. 337.

The writing is merely necessary evidence of contract.—The writing is not considered as constituting the contract itself, but is regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. Bird v. Munroe, 66 Me. 337.

And it may be made after the contract.—It is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. Bird v. Munroe, 66 Me. 337; Weymouth v. Goodwin, 105 Me. 510, 75 A. 61.

The "note or memorandum" of the contract is not, of course, the contract itself, but the evidence by which it is to be proved, if the defendant requires it in the trial of an action at law brought to recover damages for its breach, or of a bill instituted to enforce specific performance. Williams v. Robinson, 73 Me. 186.

Memorandum must contain, or by reference include, essential terms of contract.—To satisfy this section, the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee and all the essential terms and conditions of the contract expressed with such reasonable certainty that they may be understood from the memorandum and other written evidence referred to, if any, without any aid from parol testimony. Williams v. Robinson, 73 Me. 186.

But parol evidence is competent to identify subject matter.—Parol evidence identifying the subject matter of the contract does not destroy the sufficiency of the memorandum, but when the subject matter is thus ascertained, the memorandum may be construed to apply to it. Williams v. Robinson, 73 Me. 186.

Though writing cannot be varied by parol.—When a memorandum has been deliberately made, executed and delivered in conformity with the statute, and its terms are sensible and free of all ambiguity, it cannot be varied as to its substance by parol; otherwise the great purpose of the legislature would be thwarted. Williams v. Robinson, 73 Me. 186.

And the rights of the parties must be ascertained from the memorandum without resort to parol testimony. L. J. Upton & Co. v. Colbath, 122 Me. 188, 119 A. 384.

Memorandum may be gathered from divers documents.—The "note or memorandum" called for by this section is not required to be found in a single writing. It may be supplied by documents, letters, telegrams, and memoranda written and signed at various times. It may be gathered from a protracted correspondence if the letters are so connected as fairly to constitute one writing. It is sufficient if the letters or other writings, signed by the party to be charged, or his agent, contain by statement, or by reference to others of the writings, all the essential parts of the bargain. Weymouth v. Goodwin, 105 Me. 510, 75 A. 61.

And even letters written to a third party may supply the memorandum. Weymouth v. Goodwin, 105 Me. 510, 75 A. 61.

A sufficient memorandum may be found to exist in a signed communication referring to another unsigned communication so that the two when taken together express the trade. Knobel & Bloom v. Cortell-Markson Co., 122 Me. 511, 120 A. 721.

Or it may be supplied by receipts for payments on account.—This section is not a bar to the enforcement of an oral contract where numerous payments were made on account of the purchase price. The receipts given for these, taken together, are sufficient memoranda to satisfy the statute. Tewksbury v. Noyes, 138 Me. 127, 23 A. (2d) 204.

The fact that a memorandum contains details not embraced in the contract itself does not destroy its force as a memorandum, whether those additional provisions are agreed to or not. It may contain more than the original terms, provided the parties agree to them, but it cannot contain less. Oftentimes the memorandum in writing is gathered from correspondence between the parties, and the fact that the letters contain matters other than the terms of the oral agreement is immaterial. Its purpose is to express the terms of the original trade and is evidence by which that trade can be proved. L. J. Upton & Co. v. Colbath, 122 Me. 188, 119 A. 384.

The memorandum may bind the party to be charged whether it was intended to do so or not. Knobel & Bloom v. Cortell-Markson Co., 122 Me. 511, 120 A. 721.

And the statute is satisfied by a memorandum made after there has been a breach of the contract. Weymouth v. Goodwin, 105 Me. 510, 75 A. 61.

Memoranda held insufficient.—A letter which contains none of the essential elements of the contract except the quantity, omitting the price, time of delivery and terms of payment, and which does not pro-

fess to be more than a confirmation of the execution of an order given by telephone, cannot do duty as a sufficient memorandum. It is too meagre. L. J. Upton & Co. v. Colbath, 122 Me. 188, 119 A. 384.

If the writing refers only to a verbal offer and does not describe the price or the quantity of the goods to be sold, nor contain any of the elements of a sale, but leaves the whole contract, whatever it was, to be established by parol evidence, it is clearly within the statute of frauds. Washington Ice Co. v. Webster, 62 Me. 341.

It is not essential that the consideration for a promise in writing should appear in the writing itself. Cummings v. Dennett, 26 Me. 397; Bird v. Munroe, 66 Me. 337.

For consideration is provable by parol. —The memorandum under this section need not necessarily mention the consideration, that being provable by parol testimony. Williams v. Robinson, 73 Me. 186.

Memorandum need not contain plaintiff's signature. — If a contract in writing is signed by the party sought to be charged, it is sufficient to take the case out of the statute of frauds, though it is not signed by the party seeking the remedy. Barstow v. Gray, 3 Me. 409; Williams v. Robinson, 73 Me. 186.

The note or memorandum is sufficient if signed only by the person sought to be charged. One party may be held thereby and the other may not be. There may be a mutuality of contract but not of evidence or of remedy. Bird v. Munroe, 66 Me. 337; Williams v. Robinson, 73 Me. 186.

Auctioneer is agent of both parties and may make sufficient memorandum. — In sales of goods at auction, the auctioneer is to be considered as the agent of both parties; and his memorandum, stating the price and conditions of sale, with the name of the buyer, is a sufficient signing to charge him, within the statute of frauds. Cleaves v. Foss, 4 Me. 1.

IV. THE ACCEPTANCE.

This section makes acceptance and receipt by the purchaser a test of the removal of the statutory bar. Weeks v. Crie, 94 Me. 458, 48 A. 407.

This section implies delivery by superadding acceptance and receipt; the acceptance touching the title to, and the receipt the possesssion of, the property. Dean v. W. S. Given Co., 123 Me. 90, 121 A. 644.

Acceptance requires delivery with intent to give possession. — To constitute an acceptance within the meaning of this section there must first be a delivery by the seller with intent to give possession of the goods to the purchaser. Washington Ice Co. v. Webster, 62 Me. 341.

But delivery alone is not sufficient.— From the language of this section of the statute it is apparent that, when there is no written contract, a mere delivery will not be sufficient. There must further be an acceptance by the purchaser, else he will not be bound. Maxwell v. Brown, 39 Me. 98.

No act of the vendor alone can be effective to make delivery, without receipt and acceptance, and thus take the case out of the statute. Beedy v. Brayman Wooden Ware Co., 108 Me. 200, 79 A. 721.

And there cannot be acceptance without delivery.—Under this section the confirmatory and binding act proceeds from one party only, the buyer. That there cannot be such an acceptance and receipt as shall conclude the purchase until there has been a delivery by the seller is manifest from the meaning of the former words of the statute of limitations, and has often been judicially affirmed. E. A. Clark & Co. v. D. & C. E. Scribner Co., 122 Me. 418, 120 A. 609.

Wherefore action by both parties is necessary. — The language of this section is unequivocal, and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance. Maxwell v. Brown, 39 Me. 98; Young v. Blaisdell, 60 Me. 272.

And mere words are insufficient to constitute delivery and acceptance. — To constitute a delivery and acceptance, something more than mere words is necessary. There must be some act of the parties amounting to a transfer of the possession, and an acceptance thereof by the buyer. Edwards v. Grand Trunk Ry., 54 Me. 105.

Receipt and acceptance cannot be shown by words alone, where such words are part of the alleged oral bargain and sale. Beedy v. Brayman Wooden Ware Co., 108 Me. 200, 79 A. 721.

Both acceptance and actual receipt, which imply delivery, are essential to take the case out of the statute. E. A. Clark & Co. v. D. & C. E. Scribner Co., 122 Me. 418, 120 A. 609.

They may be concurrent with contract or thereafterwards effected. — There is a distinction between a parting with title as between the parties, and an acceptance and receipt relied upon to free the remedy from the ban of this section. Acceptance and receipt may be concurrent with the contract, or, if in pursuance of it, thereafterwards and before the suing of the ac-

tion. Dean v. W. S. Given Co., 123 Me. 90, 121 A. 644.

Receipt and acceptance need not be contemporaneous with the alleged contract, if made in pursuance of it, nor need they be simultaneous. The former may precede or follow the latter. Beedy v. Brayman Wooden Ware Co., 108 Me. 200, 79 A. 721.

Unequivocal evidence of delivery, acceptance and receipt takes contract out of statute. — When it appears from evidence, in addition to that which establishes the contract itself, that something was done with respect to the subject matter of the contract, either concurrent with or subsequent to it, which unequivocally indicates that there was a delivery by the vendor with an intention of vesting the right of possession of the subject matter of the sale in the vendee as owner, and an acceptance and receipt of the same by the latter with an intent thereby to become the owner thereof, then the contract is so far executed that the statute of frauds does not apply to it. Ford v. Howgate, 106 Me. 517, 76 A. 939; E. A. Clark & Co. v. D. & C. E. Scribner Co., 122 Me. 418, 120 A. 609.

But goods must vest absolutely in vendee. — There must be acceptance as well as delivery. The property of the goods must vest in the vendee as their absolute owner, discharged of all lien. Maxwell v. Brown, 39 Me. 98.

So as to preclude objection to quality or quantity of goods.—Acceptance and delivery under the statute of frauds means such an acceptance as precludes the purchaser from objecting to the quality or quantity of the goods; as for instance, if instead of sending the goods back he keeps or uses them. Maxwell v. Brown, 39 Me. 98; Edwards v. Grand Trunk Ry., 48 Me. 379.

Acceptance is prevented by retention of lien by vendor.—Acceptance cannot legally take place, in the absence of a special agreement, so long as the seller preserves his dominion over the goods so as to retain his lien for the price, for he thereby prevents the purchaser from accepting and receiving them as his own within the meaning of the statute. Consequently, if there is nothing indicating a surrender of the seller's lien, acts of control by the buyer will not be an acceptance, for although there may be cases in which the goods remain in the possession of the vendor, and yet have been received and accepted by the vendee, in such cases the vendor holds possession not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed. E. A. Clark & Co. v. D. & C. E. Scribner Co., 122 Me. 418, 120 A. 609.

As long as the seller's lien on goods for their price remains, and the buyer cannot maintain trover for their detention, there is no acceptance within the meaning of this section. Edwards v. Grand Trunk Ry., 54 Me. 105; E. A. Clark & Co. v. D. & C. E. Scribner Co., 122 Me. 418, 120 A. 609.

Delivery and acceptance of part of goods is sufficient. — Delivery to, and acceptance by, the purchaser of any portion of the goods bargained for will satisfy the statute of frauds. Atwood v. Lucas, 53 Me. 508.

A verbal contract for the sale of goods and a delivery of part of them under the contract is binding, notwithstanding such delivery is subsequent to the time of entering into said agreement. Bush v. Holmes, 53 Me. 417.

An acceptance and receipt of part of the articles purchased, or of all of one class of articles purchased, necessarily takes the whole contract out of the statute. Weeks v. Crie, 94 Me. 458, 48 A. 107; Ford v. Howgate, 106 Me. 517, 76 A. 939.

Though no payment was then made. —The acceptance and receipt by the vendee of a part of a quantity of goods sold by parol contract takes such contract out of the statute of frauds, although no payment was made at the time. Davis v. Moore, 13 Me. 424.

And though remainder of goods in vendors possession were thereafter destroyed.—Where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt occur after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance is treated as the time when the contract was made; and the risk of the loss of the goods is cast upon the buyer. Bird v. Munroe, 66 Me. 337.

But if there are two separate contracts of sale, an acceptance under one contract cannot make another valid. Weeks v. Crie, 94 Me. 458, 48 A. 107.

The question whether there is an acceptance and receipt under the contract is ordinarily for the jury. Weeks v. Crie, 94 Me. 458, 48 A. 107.

And time of passing title may be jury question. — If it is agreed that goods sold shall be hauled by the vendor to a place specified, it does not necessarily follow that the title thereto does not pass until

they reach the place designated. The property may pass, so as to take the case out of the statute of frauds, at the time the agreement is made, if the parties so intend; and whether or not such was their intention in any given case is a question for the jury to be determined from the words, acts, and conduct of the parties, and all the circumstances, Dyer v. Libby, 61 Me. 45.

Both delivery and acceptances may be inferred as conclusions from the attendant circumstances. Ford v. Howgate, 106 Me. 517, 76 A. 939.

As where vendee acts upon the goods.—If the vendee does any act to the goods of wrong, if he is not the owner of the goods, and of right, if he is the owner of the goods, the doing of that act is evidence that he has accepted them. Ford v. Howgate, 106 Me. 517, 76 A. 939; Beedy v. Brayman Wooden Ware Co., 108 Me. 200, 79 A. 721.

Reselling or pledging them.—Constructive acceptance and receipt may arise from dealing with the goods as owner, as by the purchaser reselling or pledging the goods. Beedy v. Brayman Wooden Ware Co., 108 Me. 200, 79 A. 721.

Or taking possession.—Where lumber is delivered on board a vessel, in accordance with a verbal bargain for it, and the vendee afterwards takes possession of it, claiming it as his own, he cannot set up the statute of frauds to defeat an action brought by the vendor to recover the price agreed upon for it. Goddard v. Demerritt, 48 Me. 211.

Delivery and acceptance held sufficient to satisfy statute.—See Edwards v. Brown, 98 Me. 165, 56 A. 654.

Forcible seizure of goods by vendee is not acceptance.—Taking possession of the goods without, or against, the owner's consent is not a receipt or acceptance binding him. The forcible seizure of property sold, when the sale is void by the statute of frauds, cannot be deemed an acceptance or receipt within its provisions. Washington Ice Co. v. Webster, 62 Me. 341.

Nor even seizure by replevin.—The seizure of the goods by a writ of replevin, and a delivery of the same by an officer to the plaintiffs, does not constitute a statutory receipt, and an acceptance by the purchaser. Washington Ice Co. v. Webster, 62 Me. 341.

And requested sale on account is not constructive receipt.—The mere request of the defendant, if proved, that the plaintiff sell certain goods on account is not such a constructive receipt and acceptance as will satisfy the statute of frauds. E. A. Clark & Co. v. D. & C. E. Scribner Co., 122 Me. 418, 120 A. 609.

Sec. 5. Existing and future goods.—

I. The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this chapter called "future goods."

II. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

III. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods. (R. S. c. 171, § 5.)

Sec. 6. Undivided shares.—

I. There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

II. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears. (R. S. c. 171, § 6.)

Sec. 7. Destruction of goods sold.—

I. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

II. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale:

A. As avoided, or

B. As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.
(R. S. c. 171, § 7.)

Sec. 8. Destruction of goods contracted to be sold.—

I. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

II. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract:

A. As avoided, or

B. As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.
(R. S. c. 171, § 8.)

Sec. 9. Definition and ascertainment of price.—

I. The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

II. The price may be made payable in any personal property.

III. Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this chapter shall not apply.

IV. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.
(R. S. c. 171, § 9.)

Sec. 10. Sale at valuation.—

I. Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

II. Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies

against the party in fault as are allowed by sections 52 to 70, inclusive. (R. S. c. 171, § 10.)

Sec. 11. Effect of conditions.—

I. Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non-performance of the condition as a breach of warranty.

II. Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.
(R. S. c. 171, § 11.)

Sec. 12. Definition of express warranty.—Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty. (R. S. c. 171, § 12.)

No expression of opinion merely, however strong, imports a warranty. Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A. (2d) 650.

Sec. 13. Implied warranties of title.—In a contract to sell or a sale, unless a contrary intention appears, there is:

I. An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

II. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;

III. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee or other person professing to sell by virtue of authority in fact or law, goods in which a third person has a legal or equitable interest. (R. S. c. 171, § 13.)

Sec. 14. Implied warranty in sale by description.—Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. (R. S. c. 171, § 14.)

Sale by description imports a warranty.—A sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description. Henderson v. Berce, 142 Me. 242, 50 A. (2d) 45.

Which is a substantive part of the contract.—Where specified goods are sold in compliance with an order describing the goods, and the seller furnishes them, he is held to warrant that the goods are of the kind asked for. In such case, it is a substantive part of the contract that the goods shipped are of the kind ordered. That is one of the terms of the contract, without the fulfillment of which the contract cannot be performed. Henderson v. Berce, 142 Me. 242, 50 A. (2d) 45.

And seller is liable for breach whether he acts willfully or not.—The seller is

responsible for a breach of warranty when he sells a thing as being of a particular kind, if it does not answer the description, the vendee not knowing whether the vendor's representations are true or false, but relying upon them as true, whether the vendor acted willfully or innocently. Henderson v. Berce, 142 Me. 242, 50 A. (2d) 45.

Warranty as to kind of seeds.—Seeds of different kinds cannot always be distinguished by inspection, and it seems to be generally recognized in such cases that the express or implied affirmation of the seller, where seeds of a particular kind are asked for and sold as such, that it is of such kind, constitutes a warranty as to kind. Henderson v. Berce, 142 Me. 242, 50 A. (2d) 45.

Sec. 15. Implied warranties of quality.—Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

I. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

What plaintiff must prove to support recovery.—In order to recover upon an implied warranty under this subsection, the burden is upon the plaintiff to establish (1) that he made known to the seller the particular purpose for which the goods were required, (2) that he relied upon the seller's skill or judgment, (3) that he used the goods purchased for the particular purpose which he made known to the seller, (4) that the goods were not reasonably fit for the purpose disclosed to the seller, and (5) that he suffered damage by breach of the implied warranty. Ross v. Diamond Match Co., 149 Me. 360, 102 A. (2d) 858.

Implied warranty measures buyer's right and seller's liability.—The implied warranty of the statute that goods sold for a known particular purpose "shall be reasonably fit for such purpose" measures the buyer's right of recovery and the seller's liability. Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A. (2d) 650.

And it is conditioned upon use of article for purpose disclosed.—When the buyer makes known to the seller the manner in which the goods are to be used for the particular purpose for which they are required, such manner of use forms a part of the disclosed particular purpose for which the goods are required. In such case the implied warranty that the goods shall be reasonably fit for the disclosed purpose is conditioned upon their use in the manner disclosed by the buyer to the seller. Ross v. Diamond Match Co., 149 Me. 360, 102 A. (2d) 858.

No implied warranty without privity of contract.—There can be no implied warranty without privity of contract, and warranties as to personal property do not attach themselves to and run with the article sold. Pelletier v. Dupont, 124 Me. 269, 128 A. 186.

Thus consumer has no action for breach against manufacturer of food.—An action of an alleged breach of warranty that a certain loaf of bread purchased by the plaintiff of a retail dealer was wholesome and fit for human consumption and free from any foreign substances dangerous and harmful to health, will not lie against the manufacturer or baker of the bread, as there is no privity of contract between a manufacturer and a consumer who purchases the articles of a third party, or retail dealer. A consumer's remedy, if any, in such cases is not founded on a breach of a contract of implied warranty, but on a breach of duty on the part of a manufacturer to use due care in the preparation of articles intended for consumption as food, and is founded on negligence. Pelletier v. Dupont, 124 Me. 269, 128 A. 186.

But dealer does warrant fitness of food.—In respect to the sale of materials intended to be used as food, where the transaction is between a dealer and a consumer, unless the consumer assumes the risk by selecting the article himself, there is an implied warranty that it is wholesome and fit for consumption as food. Pelletier v. Dupont, 124 Me. 269, 128 A. 186.

Injury to buyer of wearing apparel due to supersensitive skin does not constitute breach of warranty.—In the sale of wearing apparel, if the article could be worn by any normal person without harm, and injury is suffered by the purchaser only because of a supersensitive skin, there is no breach of the implied warranty of reasonable fitness of the article for personal wear. Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A. (2d) 650.

II. Where the goods are bought by description from a seller who deals in goods of that description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality.

III. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

IV. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

Implied warranty not necessarily defeated because article has trade name.—The existence of an implied warranty is not negatived where the purchaser of an article, for some definite purpose, relies on the seller to supply him with something adapted to that end; the latter in that case does not escape liability by the recommendation and subsequent sale of an article having a trade name. Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A. (2d) 650.

It does not follow necessarily from the fact that an article purchased has a trade name that it is bought thereunder or that the buyer does not rely on the skill or judgment of the seller. Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A. (2d) 650.

V. An implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade.

VI. An express warranty or condition does not negative a warranty or condition implied under the provisions of this chapter unless inconsistent therewith.
(R. S. c. 171, § 15.)

Sec. 16. Implied warranties in sale by sample.—In the case of a contract to sell or a sale by sample:

I. There is an implied warranty that the bulk shall correspond with the sample in quality.

II. There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in subsection III of section 47.

III. If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.
(R. S. c. 171, § 16.)

Transfer of Property and Title. As Between Seller and Buyer.

Sec. 17. No property passes until goods ascertained.—Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6. (R. S. c. 171, § 17.)

Sec. 18. Property in specific goods passes when parties so intend.—

I. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Whether sale completed and title has passed depends on intention of parties.—The question whether a sale has been completed and title to the property involved has passed depends on the intention of the parties at the time the contract was made. J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co., 135 Me. 267, 194 A. 890.

II. For the purpose of ascertaining the intention of the parties, regard shall

be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.
(R. S. c. 171, § 18.)

Where the intent is not expressed, it must be discovered from the surrounding circumstances and from the conduct and the declarations of the parties. J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co., 135 Me. 267, 194 A. 890.

Sec. 19. Rules for ascertaining intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Quoted in J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co., 135 Me. 267, 194 A. 890.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Quoted in J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co., 135 Me. 267, 194 A. 890.

Rule 3.

I. When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

II. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

A. When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

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

Rule 4.

I. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

II. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price

before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.
(R. S. c. 171, § 19.)

Rules applied only when no different intention appears.—The provisions of this section are controlled by the opening words which indicate that the rules established are to be applied when no "different intention appears." State v. Artus, 141 Me. 347, 43 A. (2d) 924.

Rule 5 applied in J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co., 135 Me. 267, 194 A. 890.

Sec. 20. Reservation of right of possession or property when goods shipped.—

I. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

II. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

III. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

IV. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts, making the transfer wrongful.
(R. S. c. 171, § 20.)

Sec. 21. Sale by auction.—In the case of a sale by auction:

I. Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

II. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

III. A right to bid may be reserved expressly by or on behalf of the seller.

IV. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.
(R. S. c. 171, § 21.)

Sec. 22. Risk of loss.—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that:

I. Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

II. Where delivery has been delayed through the fault of either the buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.
(R. S. c. 171, § 22.)

Sec. 23. Sale by person not owner.—

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

Bailee cannot pass title.—At common law it is well settled that one having possession of personal property as an ordinary bailee can give no title thereof to a purchaser although the latter acts in good faith, parts with value, and is without notice of the want of title in his seller. So long as the possession of the goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title, or affect it, than a mere thief. This section re-affirms this, subject to the condition that the owner of the goods be not precluded by his conduct from denying the seller's authority to sell. Cadwallader v. Clifton R. Shaw, Inc., 127 Me. 172, 142 A. 580.

II. Nothing in this chapter, however, shall affect:

A. The provisions of any factors' acts, recording acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

B. The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.
(R. S. c. 171, § 23.)

Sec. 24. Sale by one having voidable title.—Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title. (R. S. c. 171, § 24.)

Sec. 25. Sale by seller in possession of goods already sold.—Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an

agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same. (R. S. c. 171, § 25.)

Sec. 26. Creditors' rights against sold goods in seller's possession. —Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void. (R. S. c. 171, § 26.)

Sec. 27. Definition of negotiable documents of title.—A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document, is a negotiable document of title. (R. S. c. 171, § 27.)

Sec. 28. Negotiation of negotiable documents by delivery.—A negotiable document of title may be negotiated by delivery:

I. Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

II. Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to the bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee. (R. S. c. 171, § 28.)

Sec. 29. Negotiation of negotiable documents by indorsement.—A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiations may be made in like manner. (R. S. c. 171, § 29.)

Sec. 30. Negotiable documents of title marked "not negotiable." —If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "nonnegotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this chapter. But nothing in this chapter contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman or other bailee issuing a document of title or placing thereon the words "not negotiable," "nonnegotiable" or the like. (R. S. c. 171, § 30.)

Sec. 31. Transfer of nonnegotiable documents.—A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A nonnegotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right. (R. S. c. 171, § 31.)

Sec. 32. Who may negotiate document. — A negotiable document of title may be negotiated:

I. By the owner thereof, or

II. By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the documents undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.
(R. S. c. 171, § 32.)

Sec. 33. Rights of person to whom document negotiated.—A person to whom a negotiable document of title has been duly negotiated acquires thereby:

I. Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

II. The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.
(R. S. c. 171, § 33.)

Sec. 34. Rights of person to whom document transferred.—A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is nonnegotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a nonnegotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. (R. S. c. 171, § 34.)

Sec. 35. Transfer of negotiable document without indorsement.—Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. (R. S. c. 171, § 35.)

Sec. 36. Warranties on sale of document.—A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

I. That the document is genuine;

II. That he has a legal right to negotiate or transfer it;

III. That he has knowledge of no fact which would impair the validity or worth of the document, and

IV. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.
(R. S. c. 171, § 36.)

Sec. 37. Indorser not guarantor. — The indorsement of a document of

title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations. (R. S. c. 171, § 37.)

Sec. 38. When negotiation not impaired by fraud, mistake or duress.—The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress. (R. S. c. 171, § 38.)

Sec. 39. Attachment or levy upon goods for which negotiable document issued. — If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them, they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court. (R. S. c. 171, § 39.)

Sec. 40. Creditors' remedies to reach negotiable documents. — A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (R. S. c. 171, § 40.)

Performance of Contract.

Sec. 41. Seller must deliver and buyer accept goods.—It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale. (R. S. c. 171, § 41.)

Sec. 42. Delivery and payment concurrent conditions. — Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods. (R. S. c. 171, § 42.)

Sec. 43. Place, time and manner of delivery.—

I. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he has one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

II. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

A reasonable time is such time as is necessary conveniently to do what the contract requires should be done. Franklin Paint Co. v. Flaherty, 139 Me. 330, 29 A. (2d) 651.

If there is no time fixed when the goods

shall be sent, the seller has the right to take such time as is necessary conveniently to do what the contract requires to be done. Franklin Paint Co. v. Flaherty, 139 Me. 330, 29 A. (2d) 651.

And it depends upon facts and circumstances of the case.—"Reasonable time," within the meaning of this subsection, depends upon the facts and circumstances of the particular case, such as the parties may be supposed to have contemplated in a general way in making the contract. Franklin Paint Co. v. Flaherty, 139 Me. 330, 29 A. (2d) 651.

And is a question of law.—What constitutes reasonable time, on undisputed facts, is not for the jury, but is a question of law. Franklin Paint Co. v. Flaherty, 139 Me. 330, 29 A. (2d) 651.

III. Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

IV. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

V. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.
(R. S. c. 171, § 43.)

Sec. 44. Delivery of wrong quantity.—

I. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

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

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

The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties. (R. S. c. 171, § 44.)

Sec. 45. Delivery in installments.—

I. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

II. Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.
(R. S. c. 171, § 45.)

Sec. 46. Delivery to carrier on behalf of buyer.—

I. Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, rule 5, or unless a contrary intent appears.

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

III. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.
(R. S. c. 171, § 46.)

Sec. 47. Right to examine goods.—

I. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

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

III. Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.
(R. S. c. 171, § 47.)

Sec. 48. What constitutes acceptance.—The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. (R. S. c. 171, § 48.)

Sec. 49. Acceptance does not bar action for damages. — In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor. (R. S. c. 171, § 49.)

Sec. 50. Buyer not bound to return goods wrongly delivered. — Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the

seller, but it is sufficient if he notifies the seller that he refuses to accept them. (R. S. c. 171, § 50.)

Sec. 51. Buyer's liability for failing to accept delivery. — When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default. (R. S. c. 171, § 51.)

Rights of Unpaid Seller against Goods.

Sec. 52. Definition of unpaid seller.—

I. The seller of goods is deemed to be an unpaid seller within the meaning of this chapter:

A. When the whole of the price has not been paid or tendered;

B. When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer or otherwise.

II. In this part of this chapter the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.
(R. S. c. 171, § 52.)

Sec. 53. Remedies of unpaid seller.—

I. Subject to the provisions of this chapter, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has:

A. A lien on the goods or right to retain them for the price while he is in possession of them;

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

C. A right of resale as limited by this chapter;

D. A right to rescind the sale as limited by this chapter.

II. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.
(R. S. c. 171, § 53.)

Sec. 54. When right of lien exercised.—

I. Subject to the provisions of this chapter, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

A. Where the goods have been sold without any stipulation as to credit;

B. Where the goods have been sold on credit, but the term of credit has expired;

C. Where the buyer becomes insolvent.

II. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.
(R. S. c. 171, § 54.)

Sec. 55. Lien after part delivery.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention. (R. S. c. 171, § 55.)

Sec. 56. When lien lost.—

I. The unpaid seller of goods loses his lien thereon:

A. When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

B. When the buyer or his agent lawfully obtains possession of the goods;

C. By waiver thereof.

II. The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.
(R. S. c. 171, § 56.)

Sec. 57. Seller may stop goods on buyer's insolvency.—Subject to the provisions of this chapter, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession. (R. S. c. 171, § 57.)

Sec. 58. When goods in transit.—

I. Goods are in transit within the meaning of section 57:

A. From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

B. If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

II. Goods are no longer in transit within the meaning of section 57:

A. If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

B. If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

C. If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

III. If the goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

IV. If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.
(R. S. c. 171, § 58.)

Sec. 59. Ways of exercising right to stop.—

I. The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

II. When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.
(R. S. c. 171, § 59.)

Sec. 60. When and how resale made.—

I. Where the goods are of perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

II. Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

III. It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

IV. It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

V. The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.
(R. S. c. 171, § 60.)

Sec. 61. When and how seller may rescind sale.—

I. An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer

upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

II. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.
(R. S. c. 171, § 61.)

Sec. 62. Effect of sale of goods subject to lien or stoppage in transitu.—Subject to the provisions of this chapter, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiations be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu. (R. S. c. 171, § 62.)

Action for Breach of Contract.

Sec. 63. Action for price.—

I. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

II. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

III. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.
(R. S. c. 171, § 63.)

Sec. 64. Action for damages for non-acceptance of goods.—

I. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

Applied in Clark v. Young, 130 Me. 119, 153 A. 884.

II. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

III. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proxi-

mate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Applied in Clark v. Young, 130 Me. 119, 153 A. 884.

IV. If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.
(R. S. c. 171, § 64.)

Sec. 65. When seller may rescind contract or sale.—Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election to do so to the buyer. (R. S. c. 171, § 65.)

Applied in Giguere v. Morrisette, 142 Me. 95, 48 A. (2d) 257.

Sec. 66. Action for converting or detaining goods.—Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld. (R. S. c. 171, § 66.)

Applied in Giguere v. Morrisette, 142 Me. 95, 48 A. (2d) 257.

Sec. 67. Action for failing to deliver goods.—

I. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

II. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

III. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. (R. S. c. 171, § 67.)

Sec. 68. Specific performance.—Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just. (R. S. c. 171, § 68.)

Sec. 69. Remedies for breach of warranty.—

I. Where there is a breach of warranty by the seller, the buyer may, at his election:

A. Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

B. Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

C. Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

D. Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

Remedies are inconsistent. — These remedies between which the buyer is given an election are inconsistent one with the other. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

Buyer may accept goods and maintain action for breach of warranty.—For breach of the implied warranty set forth in § 15, subsection I, the buyer may accept or keep the goods and maintain an action against the seller for damages by the breach of warranty. Ross v. Diamond Match Co., 149 Me. 360, 102 A. (2d) 858.

In which case the contract remains in force. — If there be no rescission the contract of warranty remains in full force and recovery for its breach sounds in damages. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

And the action on the contract. — The action to recover damages for breach of warranty, is an action on the contract of warranty. The contract is affirmed and the buyer seeks to recover the damages occasioned by its breach. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

And action for money had and received does not lie. — The action for money had and received, lies where there is an express promise, if nothing remains to be done but the payment of money, but it is not a proper form of action to recover damages for breach of an actual subsisting or executory contract. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

The plaintiff, in an action for money had and received, cannot recover damages for a breach of warranty of the quality of goods purchased, amounting to less than a total failure of consideration. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

Paragraph D in accord with common law.—The provision of paragraph D is in accord with the common-law decisions of the supreme judicial court which hold that the buyer may rescind a contract of sale for breach of warranty and recover back the purchase price. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

The allegations of warranty, breach thereof and rescission are necessary allegations to a cause of action to recover the purchase price. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

Action to recover purchase price is on implied contract. — The action to recover the purchase price following a rescission is upon an implied contract. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

Of seller to return purchase price. — In the case of rescission the law implies a promise on the part of the seller to return the purchase price received by him to the buyer as so much money had and received to the buyer's use. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

And not on contract of warranty. — The action to recover back the purchase price following a rescission based upon a breach of warranty, is not an action on the contract of warranty. Such action presupposes that the contract of sale has been avoided by the buyer because of the breach of warranty, that title to the goods sold has revested in the seller and that the seller is under an obligation to return the purchase price to the buyer. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

II. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

III. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if

he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

IV. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

Quoted in Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

V. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

Allegations of tender and refusal are necessary.—The allegations of a tender back of the goods and its refusal by the defendant are necessary to the cause of action under this subsection. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

Buyer must act consistently with his tender. — In order to recover the purchase price, based upon an offer to return the goods purchased, the buyer must adhere to his tender and act consistently therewith. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

And he waives rescission by using property as his own.—If, after a tender of return and its refusal, the buyer uses the property as his own, such use will be a waiver of his rescission. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

After an attempted rescission by the buyer of chattels, which the seller has not accepted, the buyer, if he intends to rely upon it, must adhere thereto and act consistently therewith, and if he thereafter continues to use the property as his own, he may be held to have waived or abandoned the rescission, and may be precluded from rescinding or asserting a claim that he has rescinded. In other words, the use of chattels sold, by the purchaser, after the seller has refused the latter's tender of them in a rescission of the contract defeats the attempted rescission, if the property was used for the personal benefit of the purchaser, and not merely in compliance with his duty as bailee of the seller. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

In which case his cause of action cannot be transformed to one under sub-§ I B.— If the evidence discloses a waiver of the plaintiff's right to rely upon the tender and refusal and so defeats the cause of action under this subsection, having failed to establish his cause of action, neither he nor the court can treat allegations which were necessary to the cause of action sought to be enforced as surplusage, and thereby transform the count into one based upon subsection I B for damages for breach of warranty. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

Question of abandonment is one for jury.—The question as to whether or not the plaintiff has abandoned his attempted rescission is one of fact for the jury. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

VI. The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.

Quoted in Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

VII. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the

difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. (R. S. c. 171, § 69.)

Subsection is in accord with common law. — This subsection is in accord with the common-law decisions which hold that the buyer may sue on the warranty and recover as damages the difference between the actual value of the goods at the time of sale and what they would have been worth if they had answered to the warranty; and in special instances additional damages. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

Purchase price is not basis of recovery. —In an action for breach of warranty, the purchase price paid by the buyer does not in any way form the basis of recovery. True the purchase price paid may be evidence on the question of value. Recovery, however, is not of what was paid, but it is the difference between the actual value of the article purchased and what it would have been worth had it answered to the warranty. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

Money counts are inappropriate for the recovery of unliquidated damages caused by a breach of warranty respecting the quality of goods sold. Powers v. Rosenbloom, 143 Me. 361, 62 A. (2d) 531.

Additional damages may be recovered under certain circumstances. — The ordinary rule of damages applying to a warranty of personal property is the difference between the actual value of the articles sold and their value if they had been such as warranted. Additional damages, however, are sometimes recoverable, if specially declared for, and such may reasonably be supposed to have been contemplated by both parties when the contract was made, as a probable result of a breach of it. Henderson v. Berce, 142 Me. 242, 50 A. (2d) 45.

Sec. 70. Interest and special damages.—Nothing in this chapter shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. (R. S. c. 171, § 70.)

Interpretation.

Sec. 71. Variation of implied obligations.—Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale. (R. S. c. 171, § 71.)

Sec. 72. Rights enforced by action. — Where any right, duty or liability is declared by this chapter, it may, unless otherwise by this chapter provided, be enforced by action. (R. S. c. 171, § 72.)

Sec. 73. Rule for cases not provided for by this chapter.—In any case not provided for in this chapter, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods. (R. S. c. 171, § 73.)

Sec. 74. Interpretation shall give effect to purpose of uniformity. —This chapter shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the laws of those states which enact it. (R. S. c. 171, § 74.)

Sec. 75. Provisions not applicable to mortgages. — The provisions of this chapter relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge or other security. (R. S. c. 171, § 75.)

Applied in Harvey v. Anacone, 134 Me. 245, 184 A. 889.

Sec. 76. Definitions.—In this chapter, unless the context or subject matter otherwise requires:

"Action" includes counterclaim, setoff and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of setoff or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this chapter relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of setoff or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction thereof or as security therefor.

A thing is done "in good faith" within the meaning of this chapter when it is in fact done honestly, whether it be done negligently or not.

A person is insolvent within the meaning of this chapter who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

Goods are in a "deliverable state" within the meaning of this chapter when they are in such a state that the buyer would, under the contract, be bound to take delivery of them. (R. S. c. 171, § 76.)

Sec. 77. Uniform warehouse receipts act or uniform bills of lading act not affected.—Nothing in this chapter or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the "Uniform Warehouse Receipts Act" or of the "Uniform Bills of Lading Act." (R. S. c. 171, § 77.)

Sec. 78. Title.—This chapter may be cited as the "Uniform Sales Act." (R. S. c. 171, § 78.)