them that the donor make them in his last illness, or in contemplation and expectation of death. If the donor recovers, they are void; if he die, they are good notwithstanding a previous will. The apprehension of death may arise from infirmity or old age, or from external and anticipated danger.

5. *What is the rule as to the revocation of gifts?*—444.

That gifts *inter vivos* are irrevocable, but that gifts *causâ mortis* are conditional and revocable.

---

# LECTURE XXXIX.

## OF CONTRACTS.

1. *What is an executory contract?*—449.

It is an agreement of two or more persons, upon a sufficient consideration, to do or not to do a particular thing.

2. *Into what classes are contracts divided?*—450.

Into contracts under seal and not under seal. If under seal, the contract is denominated a specialty, and if not under seal, an agreement by parol; and the latter includes equally verbal and written contracts not under seal.

3. *What is the distinction between a contract* executed *and a contract* executory?—450.

It is this; if one person sells and delivers goods to another for a price paid, the agreement is *executed*, and becomes complete and absolute; but if the vendor agrees to sell and deliver at a future time, and for a stipulated price, and the other party agrees to accept and pay, the contract is *executory*, and rests in action merely. There are also *express* and *implied* contracts. The former exist when the parties contract in express words, or by writing; and the latter are those contracts which the law raises.



4. *What qualifications of the parties are essential to render a contract valid?*—450.

That they have sufficient understanding, and age, and freedom of will, and of the exercise of it, for the given case.

5. *What is the rule as regards contracts made by lunatics?*—450-452.

The contracts of lunatics are generally void, from the period at which the inquisition finds the lunacy to have commenced. But the inquisition is not conclusive evidence of the fact; and the party affected by the allegation of lunacy may gainsay it by proof, without first traversing the inquisition. The general rule is, that sanity is to be presumed until the contrary be proved; and when an act is sought to be avoided on the ground of mental imbecility, the proof of the fact lies upon the person who alleges it. On the other hand, if a mental derangement be once established or conceded, the presumption is shifted to the other side, and sanity is then to be shown.

6. *What as to contracts made by an intoxicated person?*—451.

A contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is void. And it has been decided that an obligation, executed by a man when deprived of the exercise of his understanding by intoxication, was voidable by himself, though the intoxication was voluntary, and not procured through the circumvention of the other party.

7. *What is the rule where a general imbecility of mind exists?*—452.

That imbecility of mind is not sufficient to set aside a contract, when there is not an essential privation of the reasoning faculties, or an incapacity of understanding and acting with discretion in the ordinary affairs of life. This incapacity is now the test of that unsoundness of mind which will avoid a deed at law. The law can not undertake to measure the validity of contracts by the greater or less strength of the understanding; and if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him. Weakness of understanding may, however, be a material circumstance in establishing an in-

ference of unfair practice or imposition; and it would naturally awaken the attention of a court of justice to every unfavorable appearance in the case. Nor is a person born deaf and dumb deemed absolutely *non compos mentis*, though by some of the ancient authorities he was deemed incompetent to contract.

**8.** *How as to contracts procured by violence, or misrepresentation?* —453.

If a contract be entered into by means of violence offered to the will, or under the influence of undue constraint, the party may avoid it by the plea of duress; it is requisite to the validity of every agreement that it be the result of a free and *bona fide* exercise of the will. Nor will a contract be valid if obtained by misrepresentation or concealment, or if it be founded in mistake as to the subject-matter of the contract.

**9.** *How are contracts made abroad to be construed in the courts of justice in this country?*—454–458.

The general rule is, that a contract, valid by the law of the place where it was made, is valid everywhere *jure gentium*, and by tacit consent. The *lex loci contractus* controls the nature, construction and validity of the contract; and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been originally established. There is no doubt of the truth of the general proposition that the laws of a country have no binding force beyond its territorial limits; and their authority is admitted in other States, not *ex proprio vigore*, but *ex comitate*. There are, however, certain general rules, in respect to the admission of the *lex loci contractus*, to which we may confidently appeal, as being of commanding influence in the consideration of the subject. Thus, it may be laid down, as the settled doctrine of public law, that personal contracts are to have the same validity, interpretation, and obligatory force, in every other country, which they have in the country where they were made; and also, that parties are presumed to contract in reference to the laws of the country in which the contract is made, and where it is to be paid, unless otherwise expressed.



**10.** *What is the rule laid down by Huber relative to contracts made in one country and put in suit in the courts of another; and is his rule the true one?*—458.

The rule stated by him in his tract De Conflictu Legum, is, that the interpretation of the contract is to be governed by the law of the country where the contract was made, but the mode and time of suing must be governed by the law of the country where the action is brought. This is the true rule, and the one which courts follow.

**11.** *Are there any exceptions to this rule?*—458, 459.

Yes; it is a necessary exception to the rule, that no people are bound to enforce or hold valid, in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law. And it is a consequence of the admission of the *lex loci*, that contracts void by the law of the land where they are made, are void in every other country. Another exception is, where a contract is made in one country to be executed in another, and the parties had in view the laws of such other country in reference to the execution of the contract; in such case the contract, in respect to its construction and force, is to be governed by the law of the country in which it is to be executed.

**12.** *According to which law are remedies on contracts regulated?* —462.

According to the law of the place where the action is instituted, and the *lex loci* has no application. *Actio sequitur forum rei.* The *lex loci* acts upon the right, the *lex fori* on the remedy. This is the rule in all civilized countries, and it has become part of the *jus gentium.*

**13.** *How many places of jurisdiction are there in respect to remedies?*—463.

Three, properly speaking: 1. The place of domicile of the defendant, commonly called the *forum domicilii;* 2. The place where the thing in controversy is situate, commonly called the *forum rei sitæ;* 3. The place where the contract is made, or the

act done, commonly called the *forum rei gestæ*, or *forum contractus.*

**14.** *Is it necessary to a contract that there be a consideration?*—463.

Yes; it is essential to the validity of a contract that it be founded on a sufficient consideration.

**15.** *What is a* nudum pactum?—463, 464.

It is a contract without a consideration, and not binding in law, though it may be in point of conscience; and this maxim of the common law was taken from the civil law, in which the doctrine of consideration is treated with an air of scholastic subtlety. Whether the agreement be verbal or in writing, it is still a nude pact, and will not support an action if a consideration be wanting. The rule that a consideration is necessary to the validity of a contract, applies to all contracts not under seal, with the exception of bills of exchange and negotiable notes, after they have been negotiated and passed into the hands of an innocent endorsee.

**16.** *What is a valuable consideration?*—465, 466.

It is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of right, will be sufficient to sustain the promise. A mutual promise amounts to a sufficient consideration, provided the mutual promises be concurrent in point of time; and in that case the one promise is a good consideration for the other. But if two concurrent acts are stipulated, as delivery by one party and payment by the other, no action can be maintained by either without showing a performance, or what is equivalent to a performance, of his part of the agreement. If the consideration be wholly past and executed before the promise be made, it is not sufficient, unless the consideration arose at the instance or request of the party promising; and that request must have been expressly, or be necessarily implied from the moral obligation under which the party was placed; and the consideration must have been beneficial to one, or onerous to the other party. The consideration must not



only be valuable, but it must be lawful, and not repugnant to law, or sound policy, or good morals.

**17.** *What is a sale?*—468.

It is a contract for the transfer of property from one person to another, for a valuable consideration, and three things are requisite to its validity, viz., the thing sold, which is the object of the contract, the price, and the consent of the contracting parties.

**18.** *What about the thing sold?*—468.

It must have an actual or potential existence, and be specific or identified, and capable of delivery, otherwise it is not strictly a contract of sale, but a special or executory agreement. If the subject-matter of the sale be in existence, and only constructively in the possession of the seller, as by being in the possession of his agent or carrier abroad, it is nevertheless a sale, though a conditional or imperfect one, depending on the future or actual delivery.

**19.** *Is the purchaser of an article entitled to be repaid his money, if the title or essential qualities of part of the subject fail without any fraud on the part of the vendor?*—471–476.

The cases on this point are conflicting; but it would seem to be sound doctrine, that a substantial error between the parties concerning the subject-matter of the contract, either as to the nature of the article, or as to the consideration, or as to the security intended, would destroy the consent requisite to its validity. The good sense and equity of the law on the subject is, that if the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement of the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether.

**20.** *What about the price of the thing sold?*—477.

It must be real and not merely nominal, and fixed, or be susceptible of being ascertained in the mode prescribed by the contract, without further negotiation between the parties.

**21.** *Is the mutual consent of the contracting parties requisite?*—477.

It is requisite to the creation of the contract. A contract becomes binding when a proposition is made on one side and accepted on the other; and, on the other hand, if there be an error or mistake of a fact, or in circumstances going to the essence of it, it is not binding.

**22.** *What is the rule, in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title?*—478.

The rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sells it as his own, and not as the agent for another, and for a fair price, he is understood to warrant the title.

**23.** *Is the seller bound to answer for the quality or goodness of the thing sold?*—478.

He is not, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he hath made a fraudulent representation, or used some fraudulent concealment concerning them, and which amounts to a warranty in law.

**24.** *What is the general rule on this subject?*—479.

The general rule is, that if there was no express warranty by the seller, or fraud on his part, the buyer, who examines the article himself, must abide by all losses arising from latent defects equally unknown to both parties.

**25.** *What is the duty of mutual disclosure in making contracts?*—482.

As a general rule, each party is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation.

**26.** *Is a mere false assertion of value, where no warranty is intended, ground of belief to a purchaser?*—485-489.

It is not; because the assertion is a matter of opinion, which does not imply knowledge, and in which men may differ: Mere expression of judgment or opinion does not amount to a warranty. Every person reposes, at his peril, on the opinion of others, and when he has an equal opportunity to form and exercise his own judgment, *simplex commendatio non obligat.*



But an action will lie against a person, not interested in the property, for making a false and fraudulent representation to the seller, whereby he sustained damage, by trusting the purchaser on the credit of such misrepresentations.

**27.** *When does the contract of sale become absolute?*—492, 493.

When the terms of the sale are agreed on, and the bargain is struck, and every thing that the seller has to do with the goods is complete, the contract of sale becomes absolute, as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or of payment. The payment or tender of the price is, in such cases, a condition precedent implied in the contract of sale, and the buyer can not take the goods, or sue for them, without payment or tender of payment. But, if the goods are sold on credit, and nothing said as to delivery, the right of possession and right of property vest immediately in the vendee.

**28.** *What if the purchaser becomes insolvent before the goods are delivered?*—493.

The seller may retain them, even if they were sold upon credit; or if he dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu.*

**29.** *What is necessary, in the first instance, to make the contract of sale valid according to statute law?*—493.

That there must be a delivery or tender of it, or payment, or tender of payment, or *earnest* given, or a *memorandum* in writing signed by the party to be charged; and if nothing of this kind takes place, it is no contract, and the owner may dispose of the goods as he pleases.

**30.** *What is the rule as to what amounts to a delivery of the goods, so as to vest the entire property in the vendee without payment?* —494.

If every thing to be done on the part of the vendor be completed, a delivery of part of a cargo or lot of goods has, under certain circumstances, been considered a delivery of the whole, so as to vest the property. To constitute a part acceptance, so as to take the case out of the statute, there must have been such a dealing on the part of the purchaser, as to deprive him of the right to object to the quantity of the goods, or to deprive the seller of his lien.

**31.** *Can the vendee take the goods without payment, even if an earnest has been given?*—495.

He can not.

**32.** *What is the rule where no time is agreed on for payment?* —496.

It is understood to be a cash sale.

**33.** *When are the goods at the risk of the purchaser?*—498, 499.

The common law fixes the risk where the title resides; and when the bargain is made and rendered binding by giving earnest, or by part payment, or part delivery, or by a compliance with the requisitions of the statute of frauds, the property, and with it the risk, attach to the purchaser.

**34.** *What amounts to a delivery?*—499.

Delivery of goods to a servant or agent of the purchaser, or to a carrier or master of a vessel, when they are to be sent by a carrier or by water, is equivalent to delivery to the purchaser, and the property, with the correspondent risk, vests in him, subject to the vendor's right of stoppage *in transitu.*

**35.** *In what cases is a symbolical delivery sufficient to pass the property?*—500–502.

The delivery of the key of the warehouse in which goods sold are deposited, or transferring them on the warehouse-man or wharfinger's books to the name of the buyer, is a delivery



sufficient to transfer the property. So the delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, has been held to be constructive delivery of the goods. There may be a symbolical delivery when the thing does not admit of an actual delivery. The delivery must always be according to the subject-matter of the delivery, and the property must be placed under the control and power of the vendee.

**36.** *At what place is the delivery to be made?*—505–509.

If no place be designated by the contract, the general rule is, that the articles sold are to be delivered at the place where they are at the time of the sale. But this rule is subject to many modifications dependent on the nature of the thing to be delivered.

**37.** *What has the statute of frauds provided in relation to certain contracts therein mentioned?*—510, 511.

That no action should be brought to charge any executor or administrator, upon any special promise, to answer in damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that was not to be performed in one year, unless there was some memorandum, or note in writing of the agreement, signed by the party to be charged or his agent. The statute, in respect to the memorandum, applied also to contracts for the sale of goods, wares, and merchandise, in cases where there was no delivery and acceptance of part, or payment in part, or something earnest given. The signing of the agreement by one party is sufficient, provided he is the party sought to be charged. It is sufficient, likewise, if the note or memorandum be made by a broker employed to effect the purchase; and the instrument is liberally construed, without a scrupulous regard to forms.

**38.** *If there be a judgment against the vendor, and the purchaser have notice of it, will that fact, of itself, affect the validity of the sale of personal property?*—512, 513.

No; but if the purchaser, knowing of the judgment, pur-

chases with the view and purpose to defeat the creditor's execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor. The question of fraud depends upon the motive. The purchase must be *bona fide*, as well as upon a valuable consideration.

**39.** *What is the legal effect of an agreement between the parties, at the time of sale, that possession was not to accompany and follow the bill of sale of the goods?*—515-532.

There is no doubt of its being evidence of fraud; but whether the fraud is an inference of law, to be drawn by the court from the fact, or whether the fact is only evidence of fraud, to be judged of by the jury and capable of explanation, is a question on which the decisions are various and conflicting.

**40.** *Are voluntary assignments of their property, by insolvent traders and others, valid?*—532.

A conveyance in trust to pay debts is valid, and founded on a valuable consideration. A debtor, pending a suit, may assign to trustees all his effects for the benefit of all his creditors, and deliver possession, and it will be valid. And a debtor in failing circumstances may, by assignment of all his estate in trust, and made in good faith, prefer one creditor to another, when no bankrupt or other law prohibits such preference, and no legal lien binds the property assigned.

**41.** *What are the principal rights and obligations of auctioneers?*—536.

An auctioneer has not only the possession of the goods which he is employed to sell, but he has an interest coupled with that possession. He has a special property in the goods, and a lien upon them for the charges of the sale, and his commission, and the auction duty. He may sue the buyer for the purchase money, and if he gives credit to the vendee, and makes delivery without payment, it is at his own risk. If the auctioneer has notice that the property he is about to sell does not belong to his principal, and he sells notwithstanding the notice, he will be held responsible to the owner for the amount of the



sale. So, if the auctioneer does not disclose the name of his principal, at the time of the sale, the purchaser is entitled to look to him personally for the completion of the contract, and for damages for its non-performance.

**42.** *How far are auction sales within the statute of frauds?*—539, 540.

The auctioneer is regarded as the agent of both parties, and lawfully authorized by the purchaser, either of lands or goods, to sign the contract of sale for him as the highest bidder. The writing his name as the highest bidder in the *memorandum* book of the sale by the auctioneer, immediately on receiving his bid, and knocking down the hammer, is a sufficient signing of the contract, within the statute, so as to bind the purchaser.

**43.** *What is meant by the right of stoppage* in transitu?—540, 541.

It is the right which the vendor, when he sells goods to another on credit, has of resuming the possession of the goods, while they are in the hands of a carrier or middle man, in their transit to the consignee or vendee, and before they arrive into his actual possession, or to the destination which he has appointed for them, on his becoming bankrupt or insolvent. The right exists only as between the vendor and vendee. If the price be paid or tendered, the vendor can not stop or detain goods for money due on other accounts. The right of stoppage does not proceed upon the ground of rescinding the contract, but as a case of equitable lien. It assumes its existence and continuance, and, as a consequence of that principle, the vendee, or his assignees, may recover the goods on payment of the price; and the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment. If he has been paid in part, he may stop the goods for the balance due him, and the part payment only diminishes the lien *pro tanto* on the goods detained.

**44.** *What persons are entitled to exercise this right?*—542.

The right exists in every case in which the consignor is sub-

stantially the vendor; and it does not extend to a mere surety for the price, nor to any person who does not stand in the character of vendor or consignor, and rest his claim on a proprietor's right.

**45.** *What will defeat the right?*—543–546.

Actual delivery to the vendee, or circumstances which are equivalent to actual delivery.

There are cases in which constructive delivery will, and others in which it will not, destroy the right. The delivery to a carrier or packer, to and for the use of the vendee, or to a wharfinger, is a constructive delivery to the vendee; but it is not sufficient to defeat this right, even though the carrier be appointed by the vendee. It will continue until the place of delivery be, in fact, the end of the journey of the goods, and they have arrived to the possession, or under the direction of the vendee himself. The delivery to the master of a general ship, or of one chartered by the consignee, is a delivery to the vendee or consignee, but still subject to this right of stoppage. And yet, if the consignee had hired the ship for a term of years, and the goods were put on board to be sent by him on a mercantile adventure, the delivery would be absolute. The cases generally upon constructive delivery may be reconciled by the distinction, that if the delivery to a carrier or agent of the vendee be *for the purpose of conveyance to the vendee*, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to the carrier or agent for *safe custody*, or for *disposal on the part of the vendee*, and the middle man is by agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage. So, a complete delivery of part of an entire parcel, or cargo, terminates the *transitus*, and the vendor can not stop the remainder.

**46.** *Will a re-sale of the goods by the vendee destroy the vendor's right of stoppage* in transitu?—547, 548.

Not of itself and without other circumstances. But if the vendor has given to the vendee documents sufficient to transfer the property, and the vendee, upon the strength of them, sells the goods to a *bona fide* purchaser without notice, the vendor would be divested of his right.



**47.** *What are the principal legal rules for the interpretation of contracts?*—554–557.

The mutual intention of the parties to the instrument is the great, and sometimes the difficult, object of inquiry, when the terms of it are not free from ambiguity. To reach and carry that intention into effect, the law, when it becomes necessary, will control even the literal terms of the contract, if they manifestly contravene the purpose. Plain and unambiguous words need no interpretation. Words are to be taken in their natural and most obvious meaning, unless some good reason be assigned to show that they should be understood in a different sense. If the intention be doubtful, it is to be sought after by reference to the context, and to the nature of the contract. It must be a reasonable construction, and according to the subject-matter and motive. The whole instrument is to be reviewed and compared in all its parts, so that every part may be made consistent and effectual. If it be a mercantile case, and the instrument be not clear and unequivocal, the usage of trade will enable us frequently to determine the precise import of the particular terms, and the certain intention declared by the use of them. Parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a written contract. Parol evidence is received, when it goes, not to contradict the terms of the writing, but to defeat the whole contract, as being fraudulent or illegal. Contracts are to receive the sense in which the person making the promise believed the other party to have accepted it, if he, in fact, did so understand and accept it.