

# MINNESOTA STATUTES 1953 ANNOTATIONS

## 511.273 CHATTEL MORTGAGES, ETC.

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### 511.273 INSPECTION OF RECORDS

HISTORY. 1953 c 721 s 9.

### 511.274 ABANDONED AIRCRAFT

HISTORY. 1953 c 721 s 10.

### 511.275 LIMITATION OF APPLICATION

HISTORY. 1953 c 721 s 12.

## SEED GRAIN LOANS

### 511.29 SEED GRAIN LOANS; AGREEMENT, CONTRACT

HISTORY. 1875 c 93 s 1; GS 1878 c 39 s 21; GS 1894 s 4155; 1897 c 292 s 21; RL 1905 s 3479; GS 1913 s 6994; 1923 c 48 s 1.

### 511.31 LIENOR MAY TAKE POSSESSION

HISTORY. 1875 c 93 s 3; GS 1878 c 39 s 23; 1883 c 38 s 3; GS 1878 Vol 2 (1888 Supp) c 39 s 23; GS 1894 s 4157; 1897 c 292 s 23; RL 1905 s 3481; GS 1913 s 6996.

### 511.32 CHATTEL MORTGAGE PROVISIONS, HOW APPLICABLE

HISTORY. 1875 c 93 s 4; GS 1878 c 39 s 24; 1883 c 38 s 4; GS 1878 Vol 2 (1888 Supp) c 39 s 24; GS 1894 s 4158; 1897 c 292 s 24; RL 1905 s 3482; GS 1913 s 6997.

## CHAPTER 512

### SALES OF GOODS

#### FORMATION OF THE CONTRACT

##### 512.01 CONTRACTS TO SELL AND SALES

A contract for the sale of gypsum contained a provision that if the seller's cost of production for any 12-month period should increase five percent above its average cost of production for the preceding 12-month period, the seller could increase the price in an amount not to exceed the actual advance in the cost of manufacture as shown by the seller's books of account. This provision was not invalid for uncertainty. *Pacific Portland Cement Co. v Westvaco Corp.*, 77 F(Supp) 406.

Defendant's orders, given to a traveling salesman of plaintiff's agent, for purchase of plaintiff's soybean oil meal to be shipped on specified dates was an offer to buy, and plaintiff's counter proposition reciting different dates was a rejection of such offer but constituted a counter offer to sell which put an end to the negotiations. Plaintiff could not thereafter create a binding contract by accepting defendant's original offer. *Staley v Northern Cooperatives*, 168 F(2d) 892.

Under patent license agreement providing that the licenses therein granted should be nontransferable except to a corporation organized and controlled by the licensee, or except to the licensee's heirs or legal representatives, the licensee could have organized a corporation and could have assigned the license rights to it; but the heirs did not possess the same rights as the licensee and, although they might personally enjoy the license, their use was subject to the limitations imposed by the agreement. *Rock-Ola Corp. v Filben*, 168 F(2d) 919.

## FORMALITIES OF THE CONTRACT

### 512.03 FORM OF CONTRACT OR SALE

Mailed acceptance of an offer for a bilateral contract as effective when received. 34 MLR 140.

### 512.04 STATUTE OF FRAUDS

HISTORY. RS 1851 c 63 s 3; PS 1858 c 50 s 3; GS 1866 c 44 s 7; GS 1878 c 41 s 7; GS 1894 s 4210; RL 1905 s 3484; GS 1913 s 6999; 1917 c 465 s 4.

Effect of buyer's renunciation of an oral contract prior to receipt and acceptance of part of the goods. 36 MLR 293.

Statute of frauds; acceptance and receipt. 37 MLR 459.

An unqualified order for 340 oil heaters accepted by the seller without qualification would sustain the jury's finding of a valid contract between the parties. A requirement that OPA ration certificates be furnished before delivery would not prevent consumation of valid contract for future delivery, but would effect only the right to complete the performance of the contract by making delivery. Where requirement for OPA ration certificates had been abolished before delivery date there would be no obstacle to performance of the contract. Defendant's inability to procure sufficient steel to manufacture enough heaters to fill all its orders on time would not excuse failure to perform contract within a reasonable time where buyer was willing to accept delivery at a later date. Loss of profits on resale was the proper measure of damages for breach of contract where goods of a similar nature could not be obtained. Proof of loss of profits must be based upon reasonable certainty, but the rule does not call for absolute certainty. *Appliances v Queen Store Works*, 228 M 55, 36 NW(2d) 121.

## CONDITIONS AND WARRANTIES

### 512.11 EFFECT OF CONDITIONS

Warranty, re-sale, assignment. Who may sue for breach of warranty? 34 MLR 269.

A document contained in the record of the Missouri action by a subpurchaser against a purchaser for breach of the purchaser's warranties, which was designated as a judgment, and which included, in addition to the verdict, a statement that it was adjudged by the court that the subpurchaser should recover the amount of the verdict, was equivalent to a final judgment, and, therefore, was res judicata upon the issue of breach of warranty in a subsequent action by the subrogee of the original purchaser against the original seller for the amount of the verdict and expenses incurred in defending the subpurchaser's action. The court did not err in receiving a certified copy of a "judgment" and other documents of the circuit court of the city of St. Louis, submitted by plaintiff, although not authenticated as required by section 599.11, where the defendant's counsel specifically waived objection thereto because of such lack of authentication. *Liberty Mutual Ins. Co. v Clark*, ..... M ....., 59 NW(2d) 899.

Where all parties in a breach of warranty action arising out of sale and use of hair dye agreed at the trial that proper interpretation of the book of instructions which accompanied the dye involved a question of law, and no request was made for submission of the question to the jury, after an adverse determination, defendant could not raise the question of propriety of the manner in which the issue was determined. *Schilling v Roux*, ..... M ....., 59 NW(2d) 907.

In an action by the United States for breaches of implied warranties of materials sold by defendants to a subcontractor, defendants made a motion to dismiss the complaint as stating no claim. The motion was based on alleged failure to alleged timely notice to defendants of defects in materials and breaches of the warranty.

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The court held that the complaint was insufficient because the notice was not given until over seven months to a year had elapsed after the defects must have been known to the plaintiff and assignor. Such delay was unreasonable as a matter of law. *United States v American Radiator & Standard Sanitary Co.*, 115 F(Supp) 422.

### 512.12 EXPRESS WARRANTIES DEFINED

Liability of restaurants for defective food. 34 MLR 156.

Express warranty of goods sold as passing with the goods on resale entitling the subsequent buyer to sue the original seller for breach of warranty. 34 MLR 269, 367.

Where there was neither allegation nor proof by the buyer of damages for breach of contract or sale, and the allegations and proof related only to consequential damages which were not recoverable under the terms of the contract, the breach if there was one, and the failure to grant any relief therefor presented no ground for reversal of judgment for the seller. An appellate court will not reverse where the appellant is entitled to nominal damages and nothing more unless the right asserted is such that it can be vindicated only by recovery of such damages or some sort of relief ancillary thereto. *Despatch Oven Co. v Rauenhorst*, 229 M 188, 40 NW(2d) 73.

A "contract" is an agreement between parties whereby one acquires the right to an act by the other and the other assumes an obligation to perform that act; and the contract should be construed to give effect to the intention of the parties expressed in the language used; and the words used are not only to be construed with reference to the subject matter and the circumstances of their use but words also derive meaning from such factors. *Despatch Oven Co. v Rauenhorst*, 229 M 188, 40 NW(2d) 73.

In an action involving claims of both express and implied warranties, a requested instruction regarding opinions should be limited to the claim of expressed warranty and should also include some definition of "opinion" as distinguished from warranty. Under the evidence in this case if the alleged representation was in fact made, it was a warranty and not a mere opinion. *Rappaport v Boyer & Gilfillan Co.*, ..... M ....., 59 NW(2d) 302.

### 512.13 IMPLIED WARRANTIES OF TITLE

Manufacturer of a food or drug product is charged with notice of the quality of the article he has made. He cannot excuse himself for harmful results resulting from its use upon the ground that he did not know its dangerous qualities. Evidence that the product was manufactured and sold for use as a hair shampoo, contained an excessive amount of alkali so that its application to female plaintiff's scalp resulted in complete baldness, was sufficient to sustain a claim for damages. *Pietrus v Watkins*, 229 M 179, 38 NW(2d) 799.

In an action based on a fraudulent representation, the trial court properly dismissed the case on motion of the defendant where the evidence failed to establish such fraudulent representation or that the plaintiff relied thereon. *Linneman v Swartz*, 235 M 107, 50 NW(2d) 47.

### 512.14 IMPLIED WARRANTY IN SALE BY DESCRIPTION

Implied warranty in sale by description, effect of government certification. 31 MLR 502.

In this action for breach of warranty the evidence is sufficient to sustain a finding that defendant's agents warranted the interchangeability of certain truck motors on behalf of the defendant dealer and did not merely transmit the manufacturer's warranty to the plaintiff. A buyer has the opportunity and skill to pass judgment upon the goods he is buying, but may be induced not to do so by positive statements of the seller in which case such statements may amount to a warranty. If the terms of the bargain include a description, as well as a sample, the fact that it is a sale by sample does not relieve the seller from the obligation of one who sells by description. *Rappaport v Boyer & Gilfillan Co.*, ..... M....., 59 NW(2d) 302.

**512.15 IMPLIED WARRANTIES OF QUALITY AND FITNESS**

Liability of restaurants for defective food. 34 MLR 156.

Duty of an innocent party to mitigate damages upon anticipatory breach. 37 MLR 215.

Manufacturer of a food or drug product is charged with notice of the quality of the article he has made. He cannot excuse himself for harmful results resulting from its use upon the ground that he did not know its dangerous qualities. Evidence that the product was manufactured and sold for use as a hair shampoo, contained an excessive amount of alkali so that its application to female plaintiff's scalp resulted in complete baldness, was sufficient to sustain a claim for damages. *Pietrus v Watkins*, 229 M 179, 38 NW(2d) 799.

Where there was neither allegation nor proof by the buyer of damages for breach of contract or sale and the allegations and proof related only to consequential damages which were not recoverable under the terms of the contract, the breach if there was one, and the failure to grant any relief therefor presented no ground for reversal of judgment for the seller. An appellate court will not reverse where the appellant is entitled to nominal damages and nothing more unless the right asserted is such that it can be vindicated only by recovery of such damages or some sort of relief ancillary thereto. *Despatch Oven Co. v Rauenhorst*, 229 M 188, 40 NW(2d) 73.

A "contract" is an agreement between parties whereby one acquires the right to an act by the other and the other assumes an obligation to perform that act; and the contract should be construed to give effect to the intention of the parties expressed in the language used; and the words used are not only to be construed with reference to the subject matter and the circumstances of their use but words also derive meaning from such factors. *Despatch Oven Co. v Rauenhorst*, 229 M 188, 40 NW(2d) 73.

Where defendant's liability for breach of implied warranty of fitness of bedroom furniture for the purpose for which it was sold, was conclusively established, the evidence sustains the verdict for plaintiff for an amount within the limits fixed by the evidence. *Altman v Furniture Exposition Mart*, 235 M 459, 51 NW(2d) 96.

An implied warranty is imposed by law for the protection of the buyer, and does not depend upon the affirmative intention of the parties. *McPeak v Boker*, 236 M 420, 53 NW(2d) 130.

In an action for damages based on breach of implied warranty of fitness of hair shampoo for the purpose for which it was intended, and where a neighbor purchased a bottle of shampoo from a salesman of the manufacturer and delivered it to plaintiff, applicable law attached to the sale and consequence of manufacturer's conduct, notwithstanding lack of privity of contract between the plaintiff and manufacturer. *Raymond v Watkins*, 88 F(Supp) 932.

**512.18 PROPERTY IN SPECIFIC GOODS PASSES WHEN PARTIES SO INTEND****TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER**

Plaintiff, a wholesaler of fish, sold to defendant, also a wholesaler of fish, a specific quantity of frozen fish in a deliverable state at an agreed price. The fish was owned by plaintiff and was in storage with a third person. As defendant was short of storage space, it requested plaintiff to arrange for continued storage of the fish with the third person. The third person, pursuant to the arrangement between plaintiff and defendant and at the request of plaintiff, transferred the account on its books from plaintiff to the defendant and sent invoices for storage to defendant. Under facts of case, the defendant was liable for the purchase price. *Griffin Co. v Northwestern Fish Co.*, 226 M 497, 33 NW(2d) 838.

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### 512.20 RESERVATION OF RIGHT OF POSSESSION OR PROPERTY WHEN GOODS ARE SHIPPED

Risk of loss of delivery order substituted for bill of lading in C.I.F. contract. 34 MLR 483.

## TRANSFER OF TITLE

### 512.23 SALE BY A PERSON NOT THE OWNER

Real owner of personal property is not estopped from asserting title against a person dealing with one in possession, unless possession is accompanied by indices of title. *Moberg v Commercial Credit Corp.*, 230 M 469, 42 NW(2d) 54.

### 512.28 NEGOTIATION OF NEGOTIABLE DOCUMENTS BY DELIVERY

Whether defendant represented to plaintiff that the house which, as agent for the owner, he sold to plaintiff was modern and had city water, sewer, and gas connections, and whether the representations were relied upon by plaintiff were questions of fact for the jury. Although plaintiff might, by examining the premises or by going to the proper public office, have ascertained the fact that there were no water, sewer, or gas connections to the house which he purchased, defendant cannot impute to him negligence as a defense in this action, if, relying on defendant's representations, plaintiff did not deem it necessary to make such examination, following *Porter v Fletcher*, 25 M 493, and *Bonness v Felsing*, 97 M 227, 106 NW 909, 114 Am.St.Rep. 707. *Erickson v Midgarden*, 225 M 153, 31 NW(2d) 919.

### 512.37 ENDORSER NOT A GUARANTOR

Defendant's counterclaim alleging that plaintiff was indebted to a named person in a stated amount, which indebtedness defendant had guaranteed to pay upon plaintiff's default, and the defendant had been obliged to mortgage her home to secure payment of such indebtedness as a result of plaintiff's default, did not state a cause of action against plaintiff in the absence of an allegation that guarantor had paid such indebtedness. *Bennett v Bennett*, 230 M 415, 42 NW(2d) 39.

## PERFORMANCE OF THE CONTRACT

### 512.41 SELLER MUST DELIVER AND BUYER MUST ACCEPT GOODS

Right to damages of a buyer who rejects for a breach of contract; effect of Perishable Agricultural Commodities Act. 33 MLR 789.

Sales, remedies of buyer, right to reject for fraud, effect of Perishable Agricultural Commodities Act. 34 MLR 369.

An unqualified order for 340 oil heaters accepted by the seller without qualification would sustain the jury's finding of a valid contract between the parties. A requirement that OPA ration certificates be furnished before delivery would not prevent consummation of valid contract for future delivery, but would affect only the right to complete the performance of the contract by making delivery; and where requirement for OPA ration certificates had been abolished before delivery date there would be no obstacle to performance of the contract. Defendant's inability to procure sufficient steel to manufacture enough heaters to fill all its orders on time would not excuse failure to perform contract within reasonable time where buyer was willing to accept delivery at a later date. Loss of profits on resale was the proper measure of damages for breach of contract where goods of a similar nature could not be obtained on the market or elsewhere. Proof of loss of profits must be based upon reasonable certainty, but the rule does not call for absolute certainty. *Appliances v Queen Store Works*, 228 M 55, 36 NW(2d) 121.

Where plaintiff's money was paid to the defendant because of a mistake of fact induced by the material misrepresentation of defendant, and plaintiff received nothing in exchange for the money so paid, in an action for money had and received, based on unjust enrichment, the good or bad faith of the defendant is not material. *Dwinnell v Oftedahl*, 235 M 383, 51 NW(2d) 93.

**512.43 PLACE, TIME, AND MANNER OF DELIVERY**

Risk of loss; delivery order substituted for bill of lading in C. I. F. contract. 34 MLR 483.

Plaintiff, a wholesaler of fish, sold to defendant, also a wholesaler of fish, a specific quantity of frozen fish in a deliverable state at an agreed price. The fish was owned by plaintiff and was in storage with a third person. As defendant was short of storage space, it requested plaintiff to arrange for continued storage of the fish with the third person. The third person, pursuant to the arrangement between plaintiff and defendant and at the request of plaintiff, transferred the account on its books from plaintiff to the defendant and sent invoices for storage to defendant. Under facts of case, the defendant was liable for the purchase price. *Griffin Co. v Northwestern Fish Co.*, 226 M 397, 33 NW(2d) 838.

**512.46 DELIVERY TO A CARRIER ON BEHALF OF THE BUYER**

Bailment for mutual benefit; under valuation of goods by bailee-consignee when shipping. 32 MLR 293.

**512.47 RIGHT TO EXAMINE THE GOODS**

Perishable Agricultural Commodities Act as it affects the remedy of the buyer and his right to reject for fraud. 34 MLR 369.

**512.50 BUYER IS NOT BOUND TO RETURN GOODS WRONGFULLY DELIVERED**

Remedies of buyer; right to reject for fraud; effect of Perishable Agricultural Commodities Act of 1930 as amended. 34 MLR 369.

**RE-SALE BY THE SELLER****512.60 WHEN AND HOW RE-SALE MAY BE MADE**

Where a valuable consideration is paid for an option to purchase property, the option is binding and enforceable during the period stipulated in the option contract notwithstanding that the contract provides that in the event of the exercise of the option the sum paid for the option is to be applied as a part of the purchase price. *Country Club Oil Co. v Lee*, ..... M ....., 58 NW(2d) 247.

**RESCISSION BY THE SELLER****512.62 EFFECT OF SALE OF GOODS SUBJECT TO LIEN ON STOPPAGE IN TRANSITU.**

Where appellant in argument and brief did not discuss the refusal of the trial court to grant him a permanent injunction, his assignment of error on such point would be deemed to have been waived. Where a contract between the owner of a farm and a logger for the sale of standing timber was ambiguous, a letter from the attorney of the owner of the farm to the logger with respect to the contract was competent as evidence, not of existing agreement between parties but to explain what the owner of the farm meant by certain clauses in the contract. An oral contract for the sale of standing timber to be severed from the land by the buyer is a mere license to enter and cut timber which may be revoked at any time but such

trees as are cut down before the revocation of the license become personalty and belong to the buyer and when the timber is severed, the contract becomes an executed one with all incidents of any other contract of sale of chattels. *Steller v Thomas*, 232 M 275, 45 NW(2d) 537.

### **ACTIONS FOR BREACH OF THE CONTRACT**

#### **REMEDIES OF THE SELLER**

##### **512.64 ACTION FOR DAMAGES FOR NON-ACCEPTANCE OF THE GOODS**

Although the element of a disparity in business experience is not of itself a sufficient ground for rescission of a contract for purchase of a business, the law does not ignore such disparity especially where the inexperience of youth is coupled with an added factor of special trust and confidence growing out of a reasonable assumption by purchasers that a genuine and close friendship existed between them and the vendors. *Spieß v Brandt*, 230 M 246, 41 NW(2d) 562.

##### **512.65 WHEN SELLER MAY RESCIND CONTRACT OR SALE**

Evidence considered and held sufficient to sustain trial court's finding that plaintiff and defendant entered into an oral agreement on or about November 21, 1941, whereby plaintiff purchased certain oak flooring from defendant which defendant agreed to store until plaintiff should demand delivery thereof; and that, before a reasonable time for such delivery had elapsed, executive orders promulgated by the federal government under its war powers had made such delivery illegal. Where by virtue of war, or conditions created thereby, performance of a contract becomes illegal, obligations of the parties thereunder are terminated rather than suspended, unless the parties enter into a further agreement governing ultimate performance thereof. Whether parties entered into agreement for future performance of contract rendered presently illegal of performance by virtue of war, or conditions created thereby, is a fact question to be determined from the evidence submitted.

Evidence disclosing that parties held numerous conversations after date of illegality of performance, and after termination of illegality, wherein defendant repeatedly reiterated promise that delivery would be made as soon as market conditions permitted; that defendant at all times retained purchase price previously paid by plaintiff; and that defendant in writing repeatedly assured plaintiff that delivery would be made as soon as merchandise became available held to sustain trial court's finding that defendant's ultimate refusal to perform agreement when the material was available constituted a breach thereof rendering defendant liable in damages. *Monite Waterproof Glue Co. v Sawyer-Cleator Lumber Co.*, 234 M 89, 48 NW(2d) 333.

#### **REMEDIES OF THE BUYER**

##### **512.66 ACTION FOR CONVERTING OR DETAINING GOODS**

Damages recoverable by buyer who rescinds for breach of warranty. 33 MLR 406.

Although the element of a disparity in business experience is not of itself a sufficient ground for rescission of a contract for purchase of a business, the law does not ignore such disparity especially where the inexperience of youth is coupled with an added factor of special trust and confidence growing out of a reasonable assumption by purchasers that a genuine and close friendship existed between them and the vendors. *Spieß v Brandt*, 230 M 246, 41 NW(2d) 562.

##### **512.67 ACTION FOR FAILURE TO DELIVER GOODS**

An unqualified order for 340 oil heaters accepted by the seller without qualification would sustain the jury's finding of a valid contract between the parties.

A requirement that OPA ration certificates be furnished before delivery would not prevent consummation of valid contract for future delivery, but would affect only the right to complete the performance of the contract by making delivery; and where requirement for OPA ration certificates had been abolished before delivery date there would be no obstacle to performance of the contract. Defendant's inability to procure sufficient steel to manufacture enough heaters to fill all its orders on time would not excuse failure to perform contract within reasonable time where buyer was willing to accept delivery at a later date. Loss of profits on resale was the proper measure of damages for breach of contract where goods of a similar nature could not be obtained on the market or elsewhere. Proof of loss of profits must be based upon reasonable certainty, but the rule does not call for absolute certainty. *Appliances v Queen Store Works*, 228 M 55, 36 NW(2d) 121.

#### 512.68 SPECIFIC PERFORMANCE

Specific performance of contracts for the sale of goods. 35 MLR 330.

Jurisdiction to grant specific performance as to real estate carries with it the right to give specific performance of a contract relating to both real estate and personalty. *Goette v Howe*, 223 M 168, 44 NW(2d) 734.

Parties to a contract may provide for its annulment or cancellation either by subsequent valid agreement or by incorporating conditional provisions in the contract itself to accomplish the same purpose, and by so doing they may limit and determine the rights and liability of each to the other in the event of a failure of performance as stipulated. *Hensche v Young*, 226 M 339, 28 NW(2d) 766.

In a suit by the vendee for specific performance, the vendor may not set up as a defense his own failure or neglect to make the title marketable where he has not sustained the burden of proof of showing that he cannot make the title marketable as agreed. *Hensche v Young*, 226 M 339, 28 NW(2d) 767.

Where a stockholder's offer to sell stock to the corporation was not within the mutual agreement between all stockholders of the corporation giving the corporation the right of first refusal and the corporation impliedly rejected the offer by making a counteroffer, the corporation would not be entitled to specific performance of that portion of the agreement wherein the stockholder making the offer within the terms of the agreement could not be required to sell at book value of shares in absence of an agreement between the parties on price. *Simmons Lumber Co. v Simmons*, 232 M 160, 44 NW(2d) 726.

In passing upon questions of offer and acceptance the action must be in terms of the offer and the courts may require greater exactitude than when they are trying to salvage an existing contract, since there is no compulsion on the court to guess at what the parties intended. *Simmons Lumber Co. v Simmons*, 232 M 160, 44 NW(2d) 726.

Where an earnest money contract covering the sale and purchase of an apartment building provided that the vendors could remain in the building for a period of one year from December 31, 1948, at an increase of 15 percent over the figure set by OPA and that legal process of the described property was to be given the vendee not later than December 31, 1948, vendors became tenants of the vendee and therefor the vendee was unable to evict the vendors except by complying with the provisions of the Federal Housing and Rent Act. *Graf v Root*, 232 M 168, 44 NW(2d) 732.

In a suit for specific performance of an oral contract to make a will disposing of property or to adopt a child, the contract must be proved by clear, positive, and convincing evidence and it must be definite and certain in its terms. The burden is upon the plaintiff to show by full and satisfactory proof the fact of the contract and its terms before specific performance may be granted. In the instant case the evidence was insufficient to sustain the finding of the trial court that such an agreement was made. *McCarty v Nelson*, 233 M 362, 47 NW(2d) 595.

Specific performance of an oral contract to devise land will be granted where promisee pursuant to such contract has assumed peculiarly personal and domestic relation as a member of family of the promisor and has given to the promisor



society and services incident to such relation and of a kind and character the value of which is not measureable in money, provided the terms of the contract are clearly established and the consideration therefor is not grossly inadequate or its terms otherwise unfair. *O'Brien v DeMeules*, 234 M 133, 47 NW(2d) 772.

An option is an agreement by which one binds himself to perform a certain act, usually to convey property, for a stipulated price within a designated time, leaving it to the discretion of the person to whom the option is given to accept upon the terms specified. An offer not supported by a consideration may be revoked before acceptance, even though it expressly gives and offeree a definite time in which to accept. *Johnson v Fitzke*, 234 M 216, 48 NW(2d) 37.

An acceptance of an offer to sell real estate must be in terms of the offer in order to create a contract. The part performance which will make an oral contract to convey real property specifically enforceable must be done in reliance upon and in pursuance of an existing contract, and acts ancillary or preparatory to performance are not sufficient. *Ruble v Ruble*, 234 M 15, 47 NW(2d) 420.

The hardship of performance of a contract arising from a subsequent increase or decrease in the value of property, in the absence of fraud or bad faith in the inception of the contract, is no reason for refusing specific performance. *Shell Oil Co. v Kapler*, 235 M 292, 50 NW(2d) 707.

In passing upon questions of offer and acceptance, as determinative of whether a contract has thereby been created, a greater exactitude is required than where the object is to salvage an existing contract. To be valid, an acceptance must be in unequivocal and positive terms which comply exactly with the requirements of the offer. The acceptance must be such that it unequivocally, without the aid of anything else, creates a contract. *Minor v Skoog*, 235 M 292, 50 NW(2d) 300.

In a suit for specific performance of an option to purchase realty, where defendant owner alleged express rejection, cancellation and termination of the option agreement, proof of the principal's knowledge of the unauthorized act of the agent in arranging construction contract and direction to the owner to construct an addition with knowledge that the owner's offer required surrender of the option to purchase and the conclusion of the trial court that the principal had surrendered the option, was properly within the issues raised by the allegation of the express termination of the option. *Knaus v Donaldson*, 235 M 453, 51 NW(2d) 99.

The doctrine of part performance sufficient to take an oral contract out of the statute of frauds may rest either on the fraud theory or the unequivocal reference theory; where the plaintiff has failed to bring his cash within the confines of either of these theories, specific performance of the oral contract is denied. *Burke v Fine*, 236 M 52, 51 NW(2d) 818.

To justify specific performance of an oral contract to leave property to a specified person, the contract must be proved by clear, positive, and convincing evidence, and where the court denies a motion for amended findings of fact, such action is equivalent to making findings negating the facts asked to be found. *Alsdorf v Svoboda*, ..... M ....., 57 NW(2d) 824.

In a suit by a stockholder against a corporation for specific performance of a contract entered into by the corporation and the stockholder for repurchase by the corporation, on opposition by the stockholder, of the stock for a sum of money per share equal to twelve months "net earnings" per share of stock for preceding twelve months, the evidence sustained the finding of the mistake that "net earnings" meant "net profits." *Sanitary Farm Dairies v Gammel*, 195 F(2d) 106.

## **512.69 REMEDIES FOR BREACH OF WARRANTY**

Rescinding buyer's right to damages for breach of warranty. 33 MLR 406.

Measure of damages for breach of warranty of title. 34 MLR 367.

The law of the place of contracting determines the validity and effect of a promise with respect to fraud, illegality, or any other circumstances which may make it void or voidable; the law of the place of performance of a contract ap-

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plies only to questions relating to the manner, time, location and sufficiency of the performance. This rule applies to the seller of a secret process or of an employee to whom it has been disclosed, not to disclose such secret or make use thereof. *Larx v Nicol*, 225 M 1, 28 NW(2d) 705.

A clause providing that the seller "assumes no liability for consequential damages," following in the same paragraph of a sales contract containing express warranties of the goods sold another clause providing that the seller "shall not be liable" in certain other cases, means that the seller shall not be liable for consequential damages. A buyer is not entitled to recover for such damages for breach of contract of sale as arise directly in the usual course of things where there was neither allegation nor proof thereof and the only allegations and proofs related to consequential damages, which were not recoverable under the terms of the contract. A party is not negligent where the act complained of involved no danger of harm and he had no knowledge or notice that through the intervention of others it might be made so. *Despatch Oven Co. v Rauenhorst*, 229 M 188, 40 NW(2d) 73.

In an action for breach of warranty in the sale of cattle, evidence that some of the defendant's herd on a farm several miles distant had Bangs Disease when tested several years before the sale was inadmissible as being too remote, in the absence of evidence that some of the tested herd were incorporated into the herd from which the sale was made in contradiction of testimony of the defendant and son that tested herd had never mingled with the herd from which the sale was made. *Frame v Hohrman*, 229 M 468, 39 NW(2d) 881.

The rule requiring clear and convincing evidence to justify a rescission of a contract for fraud is merely a rule of caution against setting aside written instruments upon weak and inconclusive evidence. A fair preponderance of the evidence is sufficient. *Spieß v Brandt*, 230 M 246, 41 NW(2d) 561.

In case of the sale of drugs or foods, an express warranty may extend to an ultimate consumer, if the warranty in the first instance induces the purchase and the usage is inconsistent with the purchase for which the goods were purchased in reliance on the warranty. *Randall v Goodrich-Gamble*, 237 M 233, 54 NW(2d) 769.

## INTERPRETATION

### 512.73 RULE FOR CASES NOT PROVIDED FOR BY THIS CHAPTER

New automobile dealer's option to repurchase if the buyer decides to sell, rescission of a contract of sale for fraud, function of the injunction as against the buyer and used car dealer. 33 MLR 184.

Where a purchaser is induced to purchase through fraud the measure of damages is the difference in value between what was given and what was received. *Rosenquist v Baker*, 227 M 217, 35 NW(2d) 346.

### 512.76 DEFINITIONS

Property right in an idea. 37 MLR 493.

### 512.79 Unnecessary.