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The Uniform Sales Act in the State of Washington, Part III

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THE UNIFORM SALES ACT IN THE STATE OF WASHINGTON*

PART III.

Sec. 28. *Negotiation of Negotiable Documents by Delivery.*

A negotiable document of title may be negotiated by delivery: (a) Where by the terms of the document the carrier, warehousemen or other bailee issuing the same undertakes to deliver the goods to the bearer; or, (b) 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 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.

This section is identical with section 3623 of Remington's Compiled Statutes (Pierce's Code, §7177). The corresponding section of the Bills of Lading Act, section 3674 of Remington's Compiled Statutes (Pierce's Code, §455), differs from subsection (b) only in omitting the words "or to bearer."

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.

This section duplicates sections 3624 and 3675 of Remington's Compiled Statutes (Pierce's Code, §§ 456, 7178), except that in the latter, the Uniform Bills of Lading Act, the words "to bearer" are not included. The analogy of this and the previous section to bills of exchange and promissory notes is apparent.

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 negot-

*Continued from Vol. II, No. 3, Page 168.

iable," "Non negotiable" 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 act. But nothing in this act 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 therein the words "Not negotiable," "Non-negotiable" or the like.

Statutes were passed in many jurisdictions making documents of title negotiable unless marked "Not negotiable" as merchants were accustomed to treat them as negotiable. Thereupon carriers marked "Not negotiable" even on negotiable bills of lading. This led to confusion and hence the provision of this section. While there are no corresponding sections in the other acts, a part of section 3591 of Remington's Compiled Statutes (Pierce's Code, § 7145) provides: "No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provision, if inserted, shall be void." Similarly, a part of section 3651 of Remington's Compiled Statutes (Pierce's Code, § 432) provides. "Any provision in such a bill that it is non-negotiable shall not affect its negotiability within the meaning of this Act."

Sec. 31. *Transfer of Non-Negotiable 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 non-negotiable document can not be negotiated and the indorsement of such a document gives the transferee no additional right.

It is to be noted that the term "transfer" is used to distinguish from "negotiation." The section is identical with section 3625 and substantially the same as section 3676, of Remington's Compiled Statutes (Pierce's Code, §§ 3180, 457), being the corresponding sections in the acts under comparison.

Sec. 32. *Who May Negotiate a Document?*

A negotiable document of title may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the document, the bailee issuing it undertakes to deliver the goods to the order of such person, or if at the time of negotiation the document is in such form that it may be negotiated by delivery.

This section is identical with section 3677 of Remington's Compiled Statutes (Pierce's Code, § 458) relating to bills of lading. It makes the bill fully negotiable and even a finder or a thief may acquire title if in proper form as in the case of negotiable bills and notes. This represents a change from the section as originally adopted by the Commissioners of Uniform Laws, which was substantially in accord

with the corresponding section of the Warehouse Receipts Act. This section 3626 of Remington's Compiled Statutes (Pierce's Code, § 7180) provides that "A negotiable receipt may be negotiated by any person to whom the possession or custody of the receipt *has been intrusted by the owner, etc.*" This distinction should be noted.

Sec. 33. *Rights of Person to Whom Document Has Been Negotiated.*

A person to whom a negotiable document of title has been duly negotiated acquires thereby: (a) 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 (b) 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.

The foregoing section is substantially the same as sections 3627 and 3678 of Remington's Compiled Statutes (Pierce's Code, §§ 7181, 459).

Sec. 34. *Rights of Person to Whom Document Has Been 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 non-negotiable, 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 non-negotiable 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 tansferor.

This section is almost identical with section 3628 and section 3679 of Remington's Compiled Statutes (Pierce's Code, §§ 7182, 460), except that section 3679 (Pierce's Code, § 460) contains the words "by garnishment" and, further, defines what constitutes notification.

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.

Sections 3629 and 3680 of Remington's Compiled Statutes (Pierce's Code, §§ 7183, 461) are practically the same as the foregoing section, except that section 3680 (Pierce's Code, § 461) provides that the obligation may be specifically enforced. The provision is taken from a similar provision in the Negotiable Instruments Law

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:

(a) The document is genuine;

(b) That he has a legal right to negotiate or transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the document; and

(d) 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.

This section duplicates sections 3630 and 3681 of Remington's Compiled Statutes (Pierce's Code, §§ 7184, 462), except that section 3681 (Pierce's Code, § 462) contains an additional provision that "In the case of an assignment of a claim secured by a bill, the liability of the assignor shall not exceed the amount of the claim."

Sec. 37 *Indorser Not a 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 fill their respective obligations.

Indorsements of documents of title have always been understood to amount merely to conveyances by the indorsers and were not treated as contracts of guaranty The corresponding sections to the same effect are 3631 and 3682 of Remington's Compiled Statutes (Pierce's Code, §§ 7185, 463)

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 deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress or conversion, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, in good faith, without notice of the breach of duty, or loss, theft, fraud, accident, mistake, duress or conversion.

This section has been changed or amended as originally adopted by the Commissioners on Uniform State Laws by adding the words "loss, theft, fraud, accident," to the words "mistake, duress, or conversion." This is in accord with section 32, *supra,* which provides that a negotiable document of title may be negotiated by any person in possession however such possession may have been acquired if, *etc.* The section adds nothing to section 32, *supra,* so far as its effect is concerned and seems to have been included in the Act merely to emphasize the mercantile theory of negotiability.[125] The corresponding section of the Warehouse Receipts Act,[126] does not contain the words "loss, theft, fraud, accident," and the corresponding section of the Bills of Lading Act,[127] does not contain the words "loss" or "theft", otherwise they are substantially the same. As section 76-b, *infra,* provides "Nothing in this Act shall be construed to repeal, limit or modify any provisions of—the uniform warehouse receipts act,[128] nor the uniform bills of lading act,[129] negotiable warehouse receipts will still require possession through an "intrusting" as provided by sections 3626 and 3633 of Remington's Compiled Statutes (Pierce's Code, §§ 7180, 7187)

Sec. 39. *Attachment or Levy Upon Goods for Which a Negotiable Document Has Been 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 can not thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon 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.

This section is duplicated by sections 3611 and 3670 of Remington's Compiled Statutes (Pierce's Code §§ 7165, 451). It might be

[125] 2 WILLISTON, SALES (2 ed. 1924) § 436.
[126] Rem. Comp. Stat. § 3633, P. C. § 7187.
[127] Rem. Comp. Stat. § 3684, P. C. § 465.
[128] Rem. Comp. Stat. §§ 3587-3646, P. C. §§ 7141-7201.
[129] Rem. Comp. Stat. §§ 3647-3701, P. C. §§ 428-482.

urged under the mercantile conception of a document of title that the creditor should be limited in his relief entirely to the negotiable document of title, but the same thing is indirectly accomplished by an attachment or levy on the goods and impounding the negotiable document of title.

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 the 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 can not readily be attached or levied upon by ordinary legal process.

This section is identical with sections 3612 and 3671 of Remington's Compiled Statutes (Pierce's Code, §§ 7166, 452) It relates to and should be considered in connection with the preceding section. It may be noted that an injunction would not preclude a *bona fide* purchaser for value without notice from securing a good title from the one enjoined.

PERFORMANCE OF THE 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.

This merely states an obvious proposition. It finds illustration in the cases cited under the succeeding rules, and is the law everywhere.

Sec. 42. *Delivery and Payment Are 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.

This states the general rule and is the law of the state of Washington. Tender of delivery must be made at the place of delivery when and where specified except when excused by the buyer's prior repudiation, in which event it is sufficient that the seller is ready and willing. Similar rules apply as to tender of payment by the buyer. There are a number of cases recognizing the rule in Washington.[130]

[130] *Loewi v. Long*, 76 Wash. 480, 136 Pac. 673 (1913) *Dement Bros. Co. v. Goon*, 104 Wash. 603, 177 Pac. 354 (1919) *Farmer's Grain & Supply Co. v. Lemley*, 105 Wash. 508, 178 Pac. 640 (1919) *Sussman v. Gustav*, 109 Wash. 459, 186 Pac. 882 (1920).

Sec. 43. *Place, Time and Manner of Delivery.*

(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have 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.

(2) 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.

(3) 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.

(4) 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.

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

Subsection (1) is a declaration of the existing law It is, of course, open to the parties to make such agreement as they may choose as to the place of delivery, and if they make no express agreement, usage or circumstances may take the place of express language.[131] In *Loewi v. Long*,[132] the court found that the fact that letters and telegrams constituting a sale of hops did not fix the time and place of delivery was immaterial where no specific agreement was made therefor and by the custom of the trade delivery was to be at the nearest railway station on or before a certain date. There are a number of other washington cases recognizing the rule as stated in the last half of this subsection.[133]

Subsection (2) is the law everywhere. What is a reasonable time

[131] See, Sales Act, § 41, *supra*, and WILLISTON, SALES (2 ed. 1924) § 450.

[132] Note 130, *supra*.

[133] *Nelson v. Imperial Trading Co.*, 69 Wash. 442, 125 Pac. 777 (1912) *Pacific National Bank v. S. F Bridge Co.*, 23 Wash. 425, 63 Pac. 207 (1900) *Wright v. Seattle Grocery Co.*, 105 Wash. 383, 177 Pac. 818 (1919).

is a question of fact to be determined in each particular case. The rule has been accepted and applied in Washington without comment.[134]

Subsection (3) also represents the general rule. As between the parties obviously the seller has not fulfilled his duty of delivery to the buyer by merely notifying the bailee. The bailee must assent to the request. The rule is recognized in *High v. Emerson,*[135] in which case the court says. "It seems to be recognized that delivery of personal property may be made by an arrangement that some third person in possession of the goods may hold them as bailee for the purchaser or owner."

As to third parties, however, it is sufficient that the bailee has notice, for whether he assents to the transfer or not, he is bailee for the buyer and cannot thereafter disregard the buyer's rights. He may refuse to continue to hold for the buyer, but only by surrendering the goods to him.[136] This provision becomes of importance in consideration of sections 25 and 26 of the Sales Act, discussed *supra,* so far as the rights of the seller's creditors or subsequent purchasers from the seller, are concerned. This part of the rule was recognized in *Churchill v. Miller*[137] although distinguished in that case on the basis that the third party did not actually have possession.

Subsection (4) states the existing law In *Nelson v. Imperial Trading Co.*,[138] the court held that the facts in that case required delivery during business hours.

Subsection (5) states the general rule, the duty of putting the goods in a deliverable state being considered as necessarily incidental to the duty of the seller to deliver the goods.

Sec. 44. *Delivery of Wrong Quantity.*

(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts 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

[134] *Pacific National Bank v. S. F Bridge Co.*, note 133, *supra, Wright v. Seattle Grocery Co.*, note 133, *supra, Menz Lumber Co. v. McNeely & Co.*, 58 Wash. 223, 108 Pac. 621 (1910) *Jones-Scott Co. v. Ellensburg Milling Co.*, 108 Wash. 73, 183 Pac. 113 (1919).

[135] 23 Wash. 103, 108, 62 Pac. 455 (1900).

[136] WILLISTON, SALES (2 ed. 1924) § 454.

[137] 90 Wash. 694, 156 Pac. 851 (1916).

[138] Note 133, *supra.*

contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

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

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

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

Subsection (1) is in accordance with the weight of authority. It is to be noted that it is not a case of acceptance of an offer or order but rather deals with delivery under a contract already formed. The effect of this section is to require an exact compliance so customary in the law of mercantile contracts. It provides that the buyer may reject, not necessarily rescind, as it may still be possible for the seller to make a correct tender. That this is possible is intimated in the opinion of Justice Tolman in *Prescott & Co. v. Powles & Co.*[139] Relating to exact performance, he states: "It is contended, and generally held, that the delivery of goods under an executory contract must be of the exact quantity ordered, otherwise the buyer may refuse to accept them."

Where there is knowledge on the part of the buyer that the seller is not going to perform the contract in full, and a less quantity is delivered, the buyer may be held for the purchase price on the theory of a new offer and acceptance. Where there is a partial delivery received by the buyer still contemplating full performance, the liability of the buyer is to be found in quasi-contract. While it is quite generally held that the party in default on a contract may not recover there is a fairly well recognized exception made in the case of goods in th buyer's possession capable of being returned which he retains with knowledge that the seller cannot or will not perform the contract in its entirety. The Act provides and it seems just that the buyer pay the contract price for the goods retained under each of these contingencies. It might be inferred that the buyer is required to pay this price absolutely It will be noted, however, that under section 49, *infra,* acceptance does not bar an action for damages and undoubtedly the buyer could recoup for the

[139] 113 Wash. 177, 179, 193 Pac. 680 (1920).

damage suffered by the seller's failure to deliver the balance of the goods.[140] Specifying that the buyer is liable when he retains goods after knowledge, with the capability of returning, it seems logical to make the buyer liable, even though not capable of returning the goods, and the Act so provides, making him liable, however, only for the fair value of the goods which he received.

Subsection (2) seems clear on contractual principles and is similar in principle to the first provision in subsection (1)

Subsection (3) is merely another specific application, and is similar to subsection (2).

Subsection (4) seems obvious. It finds illustration in the cases of fungible goods in mass, for example the delivery of warehouse receipts takes the place of an actual delivery of the goods in the case of grain in elevators.

Sec. 45. *Delivery in Installments.*

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

(2) 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.

Subsection (1) states the general rule.

Subsection (2) expresses the rule as adopted by the American authorities and departs from the English rule which required a breach equivalent to a repudiation. The American rule hereby adopted seems more logical in making the test depend upon the materiality of the breach rather than upon any one installment and treats an installment contract in its ultimate analysis as a whole, which in fact it is. There are no Washington cases exactly in point.

Sec. 46. *Delivery to a Carrier on Behalf of the Buyer*

(1) 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

[140] See, *Prescott & Co. v. Powles & Co.*, note 139, *supra*, and *Perkins v. Minford*, 235 N. Y. 301, 139 N. E. 276 (1923).

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.

(2) 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 omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) 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.

Subsection (1) states the well established rule which is generally accepted in the state of Washington without comment.[141] It is similar to section 19, rule 4 (2) of the Sales Act, which relates to title, while here the rule relates to delivery.

Subsections (2) and (3) are as said by the draftsman in his notes to the Act to be "probably in accordance with the business usage, but there is little in the way of positive law on the subject."[142]

Sec. 47 *Right to Examine the Goods.*

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

(2) 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.

(3) 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 the words "Collect on delivery," or otherwise, the buyer is not entitled

[141] *Whitman Agricultural Co. v. Strand*, 8 Wash. 647, 36 Pac. 682 (1894) *Roy v. Griffin*, 26 Wash. 106, 66 Pac. 120 (1901) *Orillia Lumber Co. v. Chicago M. & P S. R. Co.*, 84 Wash. 362, 146 Pac. 850 (1915) *Nelson v. Imperial Trading Co.*, note 133, *supra*.

[142] *Miller v. Harvey*, 221 N. Y. 64, 116 N. E. 781, L. R. A. 1917F 559 (1917).

to examine the goods before payment of the price in the absence of agreement permitting such examination.

Subsection (1) and (2) re-enact the common law and are the law everywhere. Whether the right to examine or right to inspection is a condition precedent qualifying the buyer's obligation either to take or to pay the price, or a condition subsequent authorizing the return of the goods and the recovery of the price if title to the goods has passed, or the price has been paid, will depend in each instance on the facts and circumstances and the contract attendant to the transaction. The right exercised after delivery would seem clearly to be for the purpose of the buyer determining whether he will or has become owner and to act accordingly It would further seem that the right of inspection is primarily if not entirely for the benefit of the buyer, although it is possible that in an extreme case where there was some doubt as to the goods to be tendered being in conformance with the goods called for by the contract, the parties might agree upon an inspection as the final determination. There are a number of Washington cases recognizing the right of inspection and its purposes.[143]

Subsection (3) is a recognition of the prevailing practice of express companies not to permit examination before payment on C. O. D. shipments. While there may be a question as to whether the contract permits such a shipment, if it does, it would necessarily contemplate that there be no inspection prior to payment. Extending the rule to cover cases whether the goods are marked with the words C. O. D. or otherwise, is merely an expression of the parties' intention and a recognition of their right to provide for such inspection as they all fit.

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.

This section represents the American common law The meaning of "acceptance" as here used is an assent to become the owner of the specific goods offered by the seller. This may be defeated where there

[143] *Beach v. Bellingham*, 80 Wash. 287, 141 Pac. 703 (1914) *Fox v. Utter* 6 Wash. 299, 33 Pac. 354 (1893) *Fry v. Grangers Warehouse Co.*, 131 Wash. 497, 230 Pac. 423 (1924) *Gonter v. Klaber & Co.*, 67 Wash. 84, 120 Pac. 533 (1912) *Hurley-Mason Co. v. Stebbins, Walker & S.*, 79 Wash. 366, 140 Pac. 381 (1914)

is a right of inspection in the nature of a condition subsequent which has not been waived. And it should be noted as shown in the section following of the Sales Act that it does not mean that the buyer necessarily surrenders his rights against the seller for breach of any promise or warranty in the transaction. The Washington cases are in accord and are illustrations of the various ways in which acceptance is indicated.[144] But the question is dependent not merely upon a lapse of time but also upon the attendant facts.[145]

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 fail 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.

The general rule in the law of contracts holds that one who has a right to rescind because of the other party's default may nevertheless continue with the contract and accept the defective performance and recover damages because of the defective performance. He merely loses his right to rescind. The question of the right of a buyer who has accepted goods to sue thereafter for damages because of their defective quality or other defects in the seller's performance has been one of difficulty and has created much conflict in the law of sales. This conflict extends not only to the right of the buyer to recover in any case but to the various classes of cases in which he may recover. The first part of section 49, therefore, seems desirable in making certain its application and avoiding hardship otherwise consequent on the buyer upon holding that acceptance necessarily deprives him of the seller's obligation.

As to the right of the buyer to sue for a defective quantity this has already been suggested under section 44, *supra.*

As to the right of the buyer to sue for delay in performance, this was

[144] *Tacoma Coal Co. v. Bradley,* 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890 (1891) *Dickinson Fire Brick Co. v. Crowe & Co.,* 63 Wash. 550, 115 Pac. 1078 (1911) *Kleeb v. Long-Bell Lumber Co.,* 27 Wash. 648, 68 Pac. 202 (1902) *Singmaster v. Hall,* 98 Wash. 134, 167 Pac. 136 (1917) *Carmen Distributing Co. v. Cascade Lighting Co.,* 111 Wash. 487, 191 Pac. 392 (1920).

[145] *Noel v. Garford Motor Co.,* 11 Wash. 650, 191 Pac. 828 (1895) *Tatum v. Giest,* 46 Wash. 226, 89 Pac. 457 (1907) *Berlin Machine Works v. Miller,* 59 Wash. 572, 110 Pac. 422 (1910).

early recognized in the case of *Dignan v. Spurr*,[146] where the court quotes with approval a statement by Lord Blackburn.

> "When the contract was to deliver goods at a certain date, and that date is passed, the vendee may accept the goods and bring his action for any damages he may have actually suffered in consequence of the late delivery He does not, by accepting a late delivery, waive any claim he may have for damages arising from the delay"

This was quoted with approval in *Wisconsin Lumber v. Pacific Tank & Silo Co.*[147] Unfortunately, the later cases of *Anderson, Meyer & Co. v. Northwest Tea Co.*,[148] and, *White v. Little Co.*,[149] suggest a waiver of the right of the buyer to claim damages. In the latter case the court suggests that the vendee's acceptance of the property in fulfillment of an executory contract of sale is a waiver of objection that it was not delivered at the time agreed, unless his acceptance was qualified by a reservation of the right to claim damages caused by the delay This certainly was an innovation based on the citation of an exceptional case and should not in view of this section of the Act be reaffirmed.

As to the right of the buyer to recover damages for defective quality, the Washington Court in the early case of *Tacoma Coal Co. v. Bradley* [150] adopted the rule which has since been consistently adhered to with the exception of one case distinguished possibly on other grounds. The court said

> "It is undoubtedly true that if the brick were defective, and appellant was silent, and did not give notice or offer to return them within a reasonable time after discovering defects, the right to rescind the sale was thereby waived. But the right to recover damages on account of defective quality was in no wise affected. Benjamin on Sales (Bennett's Notes, 1888) § 901. It is also true that in such cases a failure to give notice or to offer to return the goods would have an important bearing upon the question of warranty, and would raise a strong presumption that the goods received were of satisfactory quality. That the vendee may retain the goods without notice, and plead breach of warranty, in an action by the vendor for the

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[146] 3 Wash. 309, 28 Pac. 529 (1891)
[147] 76 Wash. 452, 136 Pac. 691 (1913).
[148] 115 Wash. 37, 196 Pac. 630 (1921).
[149] 118 Wash. 582, 204 Pac. 186 (1922)
[150] Note 144, *supra*.

purchase price, is shown by numerous authorities. (Citing cases).[151]

The case mentioned as an exception is that of *Hurley-Mason Co. v. Stebbins Co.*[152] The court says:

> "It seems to us a sound rule, deducible from the authorities, that, where an executory sale is made subject to inspection, an acceptance by the buyer, with or without inspection and without notice to the seller of any defect or offer to return, is a waiver of any claim for damages on account of defects which might have been discovered upon inspection by any ordinary tests or by the tests prescribed by the contract, in the absence of an express warranty intended to survive acceptance."

The citations in support of this statement are mainly New York citations, a state which prior to the adoption of the Sales Act consistently took the minority view that an action for damages did not survive an acceptance. In any event, the first part of this section provides that the seller will not be discharged from liability for breach of any promise or warranty, by the acceptance of the goods in the absence of an express or implied agreement.

An examination of the cases cited under the discussion of this section while suggesting that the failure to give notice would raise a presumption that the goods were satisfactory, nowhere indicates that the failure to give notice is conclusive. In fact the court in *Nielsen v. Woodruff*,[153] expressly repudiates such a rule where the title to the property rests in the person to whom delivery is made. In this respect the latter part of section 49 imposes a qualification and a change in the law of the State of Washington as it has heretofore existed. This seems justified by business practice and avoids the hardship on the seller of allowing a buyer at any time within the period of the Statute of Limitations to assert that the goods are or were defective though no objection was made when they were received. It should be noted that the section provides not merely that the buyer shall give notice within a reasonable time after he knows but adds the words "ought to know" of such breach.

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[151] This rule was followed in: *Dickinson Fire Brick Co. v. Crowe & Co.*, note 144, *supra*, *Fink & Marr* 81 Wash. 92, 142 Pac. 482 (1914) *Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 154 Pac. 123 (1916) *Valentine v. Nebraska Bridge Co.*, 103 Wash. 122, 173 Pac. 746 (1918) *Nielson v. Woodruff*, 133 Wash. 174, 233 Pac. 1 (1925).

[152] Note 143, *supra*.

[153] Note 151, *supra*.

Sec. 50. *Buyer is 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 so to do, 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.**

Such American authority as there is, is in accord. The rule clearly seems to be one of reason and convenience.

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 right against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

There are no Washington cases directly in point. This section states the general law

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(To be continued)

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