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

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THE UNIFORM SALES ACT IN THE STATE OF WASHINGTON.*

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Sec. 52. *Definition of Unpaid Seller*

(1) The seller of goods is deemed to be an unpaid seller within the meaning of this act; (a) When the whole of the price has not been paid or tendered. (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of dishonor of the instrument, the insolvency of the buyer or otherwise.

(2) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

It should be noted under subsection (1) that the seller is not treated as unpaid if tender has been made. Obviously, if he is in default he should not be entitled to the special remedies provided. (a) is in accord with the common law[154] (b) is also in accord with the law in this state.[155]

In the case of *Thomas v. Coast Carton Co.*,[156] where trade acceptances had been given in payment of cartons and the buyer subsequently became bankrupt, Justice Fullerton states

> "No doubt that such (a recovery by the trustee in bankruptcy) would be the necessary result had the acceptances been paid, and it may be that such would be the necessary result had they been negotiated and were outstanding in the hands of third persons as present obligations of the foods company But such is not the situation, the trade acceptances were not paid, nor are they outstanding as obligations of the foods company In so far as the relation of the parties to the acceptances is concerned, the situation is as it would be had there been a breach of the contract to deliver them."

The Court thereupon held that the trustee being in no better position than the bankrupt was not entitled to possession without payment or tender of the purchase price. It may be suggested that even had the acceptances been negotiated the trustee would

[154] *Thomas v. Coast Carton Co.*, 143 Wash. 660, 255 Pac. 1041 (1927)
[155] Note 154, *supra*.
[156] Note 154, *supra*.

have been in no better position, as the seller should be protected upon his indorsement. Such has been the line of authorities.[157]

Subsection (2) merely includes anyone who is in a position similar to the seller and needs similar protection. This subsection follows the general law.

Section 53. *Remedies of an Unpaid Seller*

(1) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has: (a) A lien on the goods or right to retain them for the price while he is in possession of them. (b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them. (c) A right of resale as limited by this act. (d) A right to rescind the sale as limited by this act.

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

The various subdivisions of subsection (1) are generally recognized rules of the common law existing in the United States. These various subdivisions are set out in full and will be discussed hereinafter under sections 54 to 62 of this act. (a) and (b) should, of course, be read in connection with (c) and (d).

Subsection (2) would seem clearly to follow. The seller's remedies should certainly not be less so far at least as the goods are concerned when he has not proceeded so far in the transaction as to pass title.

UNPAID SELLER'S LIEN

Sec. 54. *When Right of Lien May Be Exercised.*

(1) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: (a) Where the goods have been sold without any stipulation as to credit. (b) Where the goods have been sold on credit, but the term of credit has expired. (c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

This section follows section 41 of the English Sale of Goods Act, and expresses well-established rules of the common law.[158]

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[157] *McClee v. Metropolitan Lbr. Co.*, 69 Fed. 302, 16 C. C. A. 232 (1895) and cases cited in 2 WILLISTON, SALES, 1309, note 7.

[158] *Hosner v. McDonnell*, 114 Wash. 489, 195 Pac. 231 (1921) *Thomas v. Coast Carton Co.*, note 154, *supra*, and the various cases cited hereinafter under the treatment of the subjects of resale and rescission.

As to subsection (2), it may be noted that this is always the situation where the seller's lien is in question. It is, of course, qualified by the other provisions.

Sec. 55. *Lien After Part Delivery.*

Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

This section follows the English Sale of Goods Act and expresses the rule of the common law.[159] Cases of delivery to subpurchasers should be distinguished.[160]

Section 56. *When Lien Is Lost.*

(1) The unpaid seller of goods loses his lien thereon: (a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof. (b) When the buyer or his agent lawfully obtains possession of the goods. (c) By waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

Subsection (1) follows the English Act substantially and undoubtedly represents the common law of the United States. (a) is qualified by section 57, *infra,* which should in turn be read with section 62. (b) There are two Washington cases in accord.[161] Even though the goods are delivered to the buyer an agreement may be made that the seller shall retain a lien.[162] (c) The seller waives his lien not only by expressly doing so but by conduct inconsistent with its retention. This is a question of fact, but should not be waived unless clearly inconsistent.

Subsection (2) is in accord with the authorities and seems desirable in that such action is not necessarily inconsistent with the lien.

STOPPAGE IN TRANSITU.

Subsection 57 *Seller May Stop Goods on Buyer's Insolvency.*

Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu; that is to say,

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[159] *Thomas v. Coast Carton Co.*, note 154, *supra.*

[160] See section 62, *infra.*

[161] *Esmond v. Richards,* 112 Wash. 641, 192 Pac. 917 (1920) *Hosner v. McDonnell,* note 158, *supra.*

[162] *Horr v. Powe,* 18 Wash. 536, 52 Pac. 235 (1898).

he may resume possession of the goods at anytime while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

This section states the generally recognized right of stoppage in transitu. It is definitely recognized in the State of Washington.[163] As to when a person is insolvent, see Section 76 (3), this Act, *infra.*

Sec. 58. *When Goods Are in Transit.*

(1) Goods are in transit within the meaning of Section 57· (a) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee; (b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2) Goods are no longer in transit within the meaning of Section 57· (a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination; (b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer; (c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

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

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

This section was intended to reproduce accurately the common law.[164] It may be noted particularly that subsection 1 (a) provides that the goods are in transit regardless of the nature of the general business of the bailee if they are in the bailee's hands for the purpose of transmission to the buyer; that subsection (2) (a) must obviously follow when it is recognixed that the carriage is for the benefit of the buyer; and that the subsections generally are in accord with the provisions for the vendor's lien, of which,

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[163] *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131 (1900).

[164] 1 WILLISTON, SALES, 523 *et seq.*

in fact, the doctrine of stoppage in transitu is merely an extension under the given circumstances. The termination of the transit by reason of the attornment of the bailee to the buyer is well illustrated in a Washington case.[165]

Sec. 59. *Ways of Exercising the Right to Stop.*

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

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

Subsection (1) is sound from a business standpoint and probably expresses the prior law The last part of subsection (2) does not express the English law The carrier should be liable to a bona fide transferee of its bill of lading, and unquestionably would be at common law if the transferee took for value before the stoppage. It would be seen from section 62, *infra,* that even though the transferee took after the notice of stoppage, he is protected. The carrier, therefore, ought not to be obliged or allowed to surrender the goods unless the document of title is surrendered.

RESALE BY THE SELLER.

Sec. 60. *When and How Resale May Be Made.*

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

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[165] *Knox v. Fuller* note 163, *supra.*

buyer damages for any loss occasioned by the breach of the contract or the sale.

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

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

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

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

Bearing in mind that this section comes under the classification of the "Rights of unpaid seller against the goods" and merely contemplates the right of the seller to enforce his lien, it seems obvious that this right should be recognized, and this is generally the law. It was recognized without question in *Carver-Shadbolt Co. v. Klein.*[166]

It is apparent that upon the substantial default of the buyer where title has passed, that the seller is confronted with a choice of several remedies. The title having passed and he still being in possession, he has his lien and may enforce the same by a resale as provided in this section, he may, however, under section 61, *infra,* revest title in himself and recover damages as though title had never passed, and, he may, as provided in section 63, *infra,* maintain his action on the contract for the contract price. The question may, therefore, well arise as to whether the seller is not bound to make an election within a reasonable time, particularly as his election will usually mitigate the damages of the buyer, for it is apparent that if the buyer will not or can not take the goods they will ordinarily deteriorate in value. To be safe, the seller should make such an election.[167] In the similar situation where the seller has an election, the title not having passed, our court has had no hesitation in holding that after a reasonable time the seller has elected to rescind in the absence of other expression.[168]

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[166] 69 Wash. 586, 125 Pac. 944 (1912).
[167] 1 WILLISTON, SALES, 559.
[168] See cases cited under subsection (3), section 63, *infra.*

These cases may possibly be distinguished on the basis that the election there allowed for resale is for the purpose of ascertaining the market price.

It should be noted under subsection (1) that the seller may retain any profit made by such resale. There should be no objection to this, as he has the election to rescind the entire contract of sale under section 65, *infra,* and it would seem the resale itself might under such circumstances be treated as an act showing his intention to thus rescind.

Subsection (2) necessarily follows, for the very right of resale contemplates the buyer's capacity to pass title.

Subsection (3) determines a point upon which there has been considerable conflict. In the case of *Carver-Shadbolt Co. v. Klein,*[169] notice was in fact given. Assuming that notice is of importance, it would seem that it is so only for the purpose of insuring a fair sale and, therefore, should not be the determining factor as to the validity of such a sale. It is to the seller's advantage and good business practice should require such a notice. The last sentence applies to subsection (4) as well.

Subsection (5) states the general rule.

RECISSION BY THE SELLER.

Sec. 61. *When and How the Seller May Rescind the Sale.*

(1) An unpaid seller having the right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default; or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

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

This section is not contained in the English Sale of Goods Act, and the remedy for which the section provides is not allowed by English law. It is allowed in this country, and seems fully jus-

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[169] Note 166, *supra.*

tified by mercantile custom and convenience. It is to be noted that notice or some overt act is necessary in the case of recission of the sale, for until election is manifested the title is presumably still in the buyer.

Sec. 62. *Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.*

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

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

The first part of this section states the well-established law. The second part of the section gives full effect to the mercantile theory of the full negotiability of the bill of lading. As between the right of stoppage in transitu and the negotiability of a bill of lading it seems better to limit the former, as the seller has entrusted the buyer with a perfect apparent title.

PART V

Action for Breach of the Contract—Remedies of the Seller.

Sec. 63. *Action for the Price.*

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

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

(3) Although the property in the goods has not passed, if they can not readily be resold for a reasonable price, and if the provisions of Section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer

that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Subsection (1) is obvious.

Subsection (2) states a well-recognized principle in the law of contracts. The usual rule is that payment of price and delivery of the goods are concurrent acts, and even though a date be fixed for performance on one side only, the court will indulge in this presumption unless clearly shown that the performances are independent.

Subsection (3) is not the English law The English courts hold logically that the seller still being the holder of the goods he ought not also to be given the price for them. He is therefore limited to a recovery in damages measured by the difference in value between what he has and what he would have secured had the contract been performed. In the United States, on the other hand, the weight of authority permits the recovery of the purchase price, and goes even further than the rule announced in the subsection. To this effect see *McNeff v. Capistran*,[170] where the court says at page 505

> "In the early case of *Dunstan v. McAndrew*, 44 N. Y 72, it was held that a vendor in an executory contract for the sale of personal property where the vendee refuses to take or pay for the property, has a choice of remedies, first, he may store or retain the property for the use of the vendee and recover the entire contract price, second, he may sell the property, acting as agent of the vendee for the purpose, and recover the difference between the contract price and the price obtained upon the resale, or, third, he may keep the property as his own and recover the difference between the market price of the property at the time and place of delivery and the contract price. The case has been cited many times since its announcement, and it is possible that the rule laid down is the rule in the majority of jurisdictions."

This election has been stated in several Washington cases.[171]

It may be interesting to note that the foregoing rule from *Dunstan v. McAndrew*[172] is usually cited and used indiscriminately whether title has or has not passed, and occasionally leads to some

[170] 120 Wash. 498, 208 Pac. 41 (1922).

[171] *Hess v. Seitzick*, 95 Wash. 393, 396, 163 Pac. 941 (1917) *Fosseen & Co. v. Kennewick Sup. & Stor Co.*, 144 Wash. 67, 69, 256 Pac. 799 (1927) *Schott Co. v. Stone, Fisher & Lane*, 35 Wash. 252, 259, 77 Pac. 192 (1904).

[172] 44 N. Y. 72.

confusion.[173] When applied in cases where the title has not passed, it obviously has the effect of giving specific performance, and this is true without regard to the nature of the goods, that is, whether they are ordinary or exceptional—with or without market value. Even this extreme application meets the prime requirement of mercantile convenience, *viz.*, certainty

The Sales Act, as expressed in this subsection, has taken the middle ground betweeen the English and the New York views, and one that is consistent with equitable relief. It permits the recovery of the purchase price where the goods can not readily be resold for a reasonable price, incidentally requiring the seller to notify the buyer that the goods are held by the seller as bailee for the buyer. This will have the effect of cutting down the rule in its broader application, where it was applied apparently regardless of the nature of the goods.[174] The case of *Hatchard v. Raymond Veneer Co.*,[175] denying the vendor a verdict for the contract price does not militate against this remedy, as it was there held the seller had made his election by bringing his suit for the recovery of damages.

The cases in Washington seem primarily to have been concerned with the question of the right of the vendor to make a resale and bring suit against the buyer for the difference between the resale price and the contract price. If the resale was made within a reasonable time the vendor was allowed this remedy, but if not made within a reasonable time the courts construed the vendor's delay to be an election to rescind and thereupon limited the vendor to his action for damages. This is probably because the resale is treated as being for the purpose of ascertaining the market price.[176]

To summarize, the effect of this subsection will be to limit the rule of *Dunstan v. McAndrew, supra,* to those cases where goods cannot readily be resold for a reasonable price, and requires notice to the buyer of such election and that they will be held by the

[173] See Section 60, *supra.*

[174] See *Dooley & Co. v. Seattle Electric Supply Co.*, 122 Wash. 354, 210 Pac. 668 (1922).

[175] 127 Wash. 443, 210 Pac. 668 (1923).

[176] *Hess v. Seitzick*, note 171, *supra, Fosseen & Co. v. Kennewick, etc. Co.*, note 171, *supra, Hartman Pac. Co. v. Estee*, 127 Wash. 151, 219 Pac. 867 (1923) *Metzler v. Balcom*, 135 Wash. 318, 237 Pac. 716 (1925). It would seem that the right of resale will not be affected by this act if used for the purpose of ascertaining the market price. See cases cited under subsection (3), section 64, Uniform Laws Annotated—Sales Act and Supplement.

seller thereafter as bailee for the buyer. And, it should be noted that this is further restricted by the provision of subsection (4) of section 64, *infra*.

Section 64. *Action for Damages for Non-Acceptance of the Goods.*

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

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

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

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

Subsections (1) and (2) clearly state the rules of the common law

Subsection (3) states the rule of the common law, adding, however, specifically the cases in which the general rule laid down by the subsection is not applicable. The cases cited under subsection (3) in section 63, where the vendor was held to have elected to have retained the goods apply this rule. The rule was also applied in *Hughes v. Eastern R. & Lumber Co.*,[177] in which case the court permitted the resale price to be taken into consideration in estimating the market price. The court also suggests that profits may be allowed where there is no market price. In *Jones-Scott Co. v. Ellensburg Milling Co.*,[178] the court in accordance with the rule held that where no time is fixed the measure of damages is the difference between the contract price and the mar ket price at the date of the demand and refusal (citing cases)

Subsection (4) expresses the general doctrine of the common

[177] 93 Wash. 558, 562, 161 Pac. 343 (1916).
[178] 116 Wash. 266, 199 Pac. 238 (1921).

law in the United States. It finds application in the case of *Peterson v. Lone Lake Lumber Co.*,[179]

Sec. 65. *When Seller May Rescind Contract or Sale.*

Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

This section represents the weight of authority in this country and is an application of contract law. For the seller to rescind the contract for repudiation or a material breach the election must be manifested.[180] This rule has been applied without question in Washington.[181] Obviously, this remedy would be chosen in the cases where the seller has suffered no damage.

REMEDIES OF THE BUYER.

Sec. 66. *Action for Converting or Detaining Goods.*

Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

This section expresses the law of England as well as of this country It allows trover, replevin, equitable or other relief, as may be permitted under the local law.

Sec. 67 *Action for Failing to Deliver Goods.*

(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

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

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

The buyer is here allowed rights against the seller on breach

[179] 58 Wash. 72, 107 Pac. 857 (1910).

[180] 2 WILLISTON, CONTRACTS, 1469.

[181] *Meeker v. Johnson*, 5 Wash. 718, 32 Pac. 772 (1893) *Neis v. O'Brien*, 12 Wash. 358, 41 Pac. 59, 50 Am. St. Rep. 894 (1895) (seller allowed to retain an advance payment).

of contract which correspond to those of the seller against the buyer under section 64, *supra*. Section 67 is merely declaratory of the common law

Many cases in Washington are in accord with subsection (3).[182]

Sec. 68. *Specific Performance.*

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

While this section does not enlarge or change the powers of the equity court, it is hoped that it will lead to more freedom in the granting of such relief. As Mr. Williston says:[183]

> "Courts of equity have very closely restricted their jurisdiction in regard to contracts for the sale of personal property It would sometimes promote justice if the court were somewhat more ready to allow specific performance of contracts to sell goods in cases where for any reason damages did not seem adequate. This section of the act will perhaps dispose courts to enlarge somewhat the number of cases where specific performance is allowed."

The cases in Washington have been limited to corporate stock and based on the fundamental rule that the relief would be allowed only when the remedy at law for damages would be in-

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[182] In support of the general rule see, *Loewi v. Long*, 76 Wash. 480, 136 Pac. 673 (1913) and *Lilly v. Lilly, Bogardus & Co.*, 39 Wash. 337, 81 Pac. 852 (1905). Damages based on difference between contract price and market price at time when goods ought to have been delivered, see *Pearce v. Puyallup & Sumner F G. C. Co.*, 117 Wash. 612, 201 Pac. 905 (1921). Between contract price and market price at time of refusal to deliver· *Sussman v. Gustav* 116 Wash. 275, 199 Pac. 232 (1921) *Menz Lbr Co. v. McNeely & Co.*, 58 Wash. 223, 108 Pac. 621 (1910) and *Coast Fir Lbr Co. v. Puget Sound M. & P Co.*, 117 Wash. 515, 201 Pac. 747 (1921) For cases showing proximate damages of a greater amount than the general rule,—allowed, see *Schulze v. Buckeye Lbr Co.*, 94 Wash. 520, 162 Pac. 588 (1917) *Keen v. Seanson*, 129 Wash. 269, 224 Pac. 574 (1924) *Waldron Co. v. Beattie Mfg. Co.*, 113 Wash. 533, 194 Pac. 557 (1920) *Sedro Veneer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100 (1911). Not allowed, see *Carolene Sales Co. v. Canyon Mills Prod. Co.*, 122 Wash. 220, 210 Pac. 366 (1922) *Simmons & Co. v. Northwestern Junk Co.*, 124 Wash. 61, 213 Pac. 485 (1923).

[183] 1 WILLISTON, SALES, 601.

adequate. It was refused in the cases of *Templeton v. Warner,*[184] and *Gleason v. Earles.*[185] It was allowed in *Tri-State Term. Co. v. Wash. Wheat G. Ass'n.,*[186] in which case Justice Main cites with approval a note from 22 A.L.R. 1030, 1041, as follows.

> "Generally speaking, where the corporate stock which is the subject of a contract of sale of which specific performance is sought is of unknown and of not easily ascertainable value, or is unobtainable in the open market, it has been held that a suit for the specific performance thereof may be maintained, the remedy at law in such a case being regarded as inadequate."

Sec. 69. *Remedies for Breach of Warranty.*

(1) Where there is a breach of warranty by the seller the buyer may, at his election: (a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price; (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty; (c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty; (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

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

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

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

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the

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[184] 89 Wash. 584, 154 Pac. 1081 (1916).
[185] 78 Wash. 491, 139 Pac. 213 (1914).
[186] 134 Wash. 519, 236 Pac. 75 (1925).

seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed an unpaid seller by Section 53.

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

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

This section differs materially from the English act, particularly in so far as it relates to and permits rescission. It is in accord with the common law in the majority of the American jurisdictions. It should be observed that section 49, *supra,* qualifies section 69 (1) (a) and (b)

The Washington cases are in accord with the rule of the section and its subdivisions.

Subsection (1) (a) recoupment was permitted in *Tacoma Coal Co. v. Bradley,*[187] and *Huntingdon v. Lombard.*[188] (b) The action may be by counterclaim or by a separate proceeding brought by the buyer. This is the usual relief in all cases except rescission and therefore will include practically all the citations under this section except those cases.[189] (c) The buyer may refuse the title and sue for damages.[190] (d) The right of rescission for breach of warranty after the title has passed has been a matter of conflict of authority in the United States. In the early case of *Baker & Hamilton v. McAllister,*[191] rescission was allowed for breach of warranty as to title. In *Hulet v. Achey,*[192] rescission was denied. In *Baker v. Robbins,*[193] the court distinguished the right of rescisshion in cases of fraud and warranty and, finally, in *Klock v. Newbury,*[194] decided squarely that rescission could be had in cases

[187] 2 Wash. 600, 27 Pac. 454, 26 A.S.R. 890 (1891)

[188] 22 Wash. 202, 73 Pac. 1128 (1900).

[189] *Baker Mfg. Co. v. Hall,* 104 Wash. 15, 175 Pac. 304 (1918) *Dickinson Fire, etc. Brick Co. v. Crowe & Co.,* 63 Wash. 550, 115 Pac. 1087 (1911) *Buerkli v. Carstens Packing Co.,* 122 Wash. 458, 210 Pac. 798 (1922) *Peterson v. Denny-Renton C. & C. Co.,* 89 Wash. 147, 154 Pac. 123 (1916).

[190] *Sussman v. Mitsui & Co.,* 114 Wash. 295, 195 Pac. 3 (1921).

[191] 2 Wash. Terr. 48, 3 Pac. 581 (1880).

[192] 39 Wash. 91, 80 Pac. 1105 (1905).

[193] 51 Wash. 467, 99 Pac. 1 (1909).

[194] 63 Wash. 153, 114 Pac. 1032 (1911)

of warranty The later cases recognize this relief without question.

Subsection (2) These remedies are exclusive.[194½]

Subsection (3). It should be noted that if title has passed to the buyer, that if he elects to rescind, he can not hold the seller liable in damages because the goods furnished do not fulfill the contractual obligation. As an application of general contractual principles this might have originally been open to qnestion, (see dissenting opinion by Justice Dunbar in *Houser & Haines Mfg. Co. v. McKay*[195]) but the law is now well settled in accord with the subsection. Failure to notify has been deemed a waiver.[196] The goods must be returned in *statu quo.*[197] But deterioration does not necessarily prevent the buyer from rescission.[198]

Subsection (4) states the general rule where rescission is allowed.[199]

Subsection (5). This seems perfectly reasonable and without the aid of the act was so held in *Case Threshing Machine Co. v. Scott.*[200]

Subsection (6). This states the general rule.[201]

Subsection (7) While there is some conflict of authority this subsection expresses the weight of authority [202]

Section 70. *Interest and Special Damages.*

Nothing in this act shall affect the right of the buyer or of the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

This is a question of damages and merely declares that the Sales Act is not to affect the local rules.

[194½] *Houser & Haines Mfg. Co. v. McKay,* 53 Wash. 337, 101 Pac. 894 (1909) *Blake-Rutherford Farms Co. v. Holt Mfg. Co.,* 70 Wash. 192, 126 Pac. 418 (1912).

[195] Note 194½, *supra.*

[196] *Noble v. Olympia Brewing Co.,* 64 Wash. 461, 117 Pac. 241 (1911).

[197] *Burnley v. Shinn,* 80 Wash. 240, 141 Pac. 326 (1914).

[198] *Noll v. Garford Motor Truck Co.,* 111 Wash. 650, 191 Pac. 828 (1920) *Klock v. Newbury,* note 193, *supra.*

[199] *Houser & Haines Mfg. Co. v. McKay,* note 195, *supra, Greenwood v. International Harvester Co.,* 122 Wash. 603, 211 Pac. 727 (1922).

[200] 96 Wash. 566, 165 Pac. 485 (1917).

[201] As to the recovery of consequential damages see *Wapato Fruit & Cold Storage Co. v. Denham,* 126 Wash. 676, 219 Pac. 30 (1923) where not allowed; and for cases where allowed, see *Mullerlaile v. Brandt,* 64 Wash. 280, 116 Pac. 868 (1911) and *Hausken v. Hodson-Feenaughty Co.,* 109 Wash. 606, 187 Pac. 319 (1920)

[202] *Walsh v. Meyer,* 40 Wash. 650, 82 Pac. 938 (1905) *Connor & Groger, Inc. v. Forest Mills, Ltd.,* 108 Wash. 468, 184 Pac. 319 (1919).

PART VI.

INTERPRETATION.

Sec. 71. *Variation of Implied Obligations.*

Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

This states an obvious proposition of contract law. The following sections, dealing with the interpretation of the act, require little comment, as they are merely directory or explanatory

Sec. 72. *Rights May Be Enforced by Action.*

Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

Sec. 73. *Rule for Cases Not Provided for by This Act.*

In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Sec. 74. *Interpretation Shall Give Effect to Purpose of Uniformity.*

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

This introduces a new principle of interpretation. Generally when a part of the law is codified, the courts in their interpretation have regard to the law as it existed prior to the passage of the part codified. The reason for the provision in this section is apparent when it is understood the purpose of the act is to secure uniformity of the law in the several states.

Sec. 75. *Provisions Not Applicable to Mortgages.*

The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale, which is intended to operate by way of mortgage, pledge, charge or other security.

Reference should be made to sections 20 (2) and 22 (a) *supra.*

Sec. 76. *Definitions.*

(1) In this act, unless the context or subject matter otherwise requires:

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

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

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

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

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

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

"Fault" means wrongful act or default.

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

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

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

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

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

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

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

"Purchaser" includes mortgagee and pledgee.

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

"Quality of goods" includes their state or condition.

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

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

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

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

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

(3) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot

pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

(4) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

"In general the definitions in the Sales Act are not intended to establish a rule of law but merely to define exactly the meaning of words so that the terms in which rules of law are stated in other sections of the Act may be perfectly definite. This is not true, however, of the definition of 'value' in subsection (1) or of the definitions of 'in good faith,' and 'insolvency,' in the subsections (2) and (3) These definitions in defining a word or phrase virtually enact a rule of law "[203]

It should be noted that the term "goods" should not include shares of stock, in which respect it should be distinguished from section 4 of the Act relating to the Statute of Frauds, as there "choses in action" are expressly included.

The word "value" defined in subsection (1) and used in such a phrase as "purchaser for value," is the same as the definition used in the Uniform Negotiable Instruments Law Our court had formerly held that taking property in payment of a pre-existing debt in the case of chattels did not constitute the buyer a purchaser for value.[204] While there was some wavering in the decisions, the court finally went on record in *Long v. McAvoy*,[205] and after an analysis of the various decisions, held that a transfer of property in payment of pre-existing debt did make the buyer a purchaser for value. This seems advisable, as it is confusing to have value mean one thing in the law of negotiable instruments and another in the transfer of chattel interests. In the last mentioned decision Justice Bridges said

> "In *McLaughlin v. Dopps*, 84 Wash. 442, and *German-American Bank v. Wright*, 85 Wash. 460, we held that where the consideration for the purchase of a negotiable instrument was the payment of a pre-existing debt, there was a purchase in good faith and for value. These two cases are based on our Negotiable Instruments Act and should not be considered as controlling of the question

[203] 1 WILLISTON, SALES 619.

[204] *Woonsocket Rubber Co. v. Loewenberg Bros.*, 17 Wash. 29, 48 Pac. 785 (1897) *Thomas v. Grote-Rankin Co.*, 75 Wash. 280, 134 Pac. 919 (1913).

[205] 133 Wash. 472, 233 Pac. 930, 236 Pac. 806 (1925)

here. To hold here that a transfer of property in payment of a pre-existing debt does not make the purchaser one for value would be to bring great confusion into our cases."

"Following that which seems to us to be the most logical rule and the one which will more nearly lend itself to business interests, and which will more completely harmonize our own decisions on the subject, we hold that one who purchases personal property of any character, paying therefor by discharging a pre-existing debt, is a purchaser for value, and that the appellant here was such a purchaser."

In subsection (2) the definition of "good faith" is also the one which is adopted in the law of negotiable instruments. Prior to the adoption of the Act a purchaser was not one in good faith who had knowledge of facts which would put a reasonable man on inquiry, and such inquiry would have disclosed the truth.[206] The change again seems desirable for the reason that it tends to avoid confusion, particularly since bills of lading and warehouse receipts play such an important part in commercial transactions and are by the Acts given negotiability

The definition in subsection (3) is the accepted meaning in the law of contracts and sales and should be, as in the law of contracts and sales the question is not whether a debtor's property exceeds his debts, but whether he can and does pay his debts as they mature.

Sec. 76-a. *Act Does Not Apply to Existing Sales or Contracts to Sell.*

None of the provisions of this act shall apply to any sale, or to any contract to sell, made prior to the taking effect of this act.

Sec. 76-b. *No Repeal of Certain Acts.*

Nothing in this act shall be construed to repeal, limit or modify any of the provisions of the bulk sales act, being Section 5832 to 5836 inclusive of Remington's Compiled Statutes, nor the uniform warehouse receipts act, being sections 3587 to 3646 inclusive of Remington's Compiled Statutes, nor the uniform bills of lading act, being sections 3647 to 3701 inclusive of Remington's Compiled Statutes.

As the Uniform Warehouse Receipts Act does not give to such instruments the same degree of negotiability as is given to documents of title in this Act, this section is necessary to avoid the

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[206] *Reed v. Loney*, 22 Wash. 433, 61 Pac. 41 (1900).

inference that certain sections of that Act dealing with negotiability would be repealed. For a discussion, see section 32, *supra.*

Sec. 77 *Repealed.*

Section 5826 of Remington's Compiled Statutes is hereby repealed.

Sec. 78. *Time When the Act Takes Effect.*

This act shall take effect as provided by law.

Sec. 79. *Name of Act.*

This act may be cited as the "Uniform Sales Act."

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