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Joseph P. McKeehan

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EFFECT OF THE UNIFORM SALES ACT ON THE PRE-EXISTING LAW IN PENNSYLVANIA*

By

JOSEPH P. MCKEEHAN

The Uniform Sales Act is, of course, in large part a mere statement of rules long settled by judicial decision. In some cases, however, where it was thought that improvement could be made by changing the established rule, the law was changed, and where the rule was not uniform among the states, what was supposed to be the better rule was written into the Act. It may be useful to call attention to the changes in the law of Pennsylvania resulting from the enactment of the Act in 1915, (P. L. 543) and the changes made in the Uniform Act before its enactment in Pennsylvania.

Section 2 requires infants and other incompetents to pay a reasonable price for necessities sold and delivered to them. The necessity of the incompetent is to be determined by the facts at the time of delivery, though title may have passed when the goods were purchased. The liability of an incompetent for necessities is not contractual.¹ Any promise implied in fact is as voidable as is his express promise. His liability should be limited by the benefit actually enjoyed. The Uniform Act was accordingly amended before enactment in Pennsylvania by permitting the incompetent to return the necessities, if he acts within a reasonable time and returns the goods in substantially the same condition as when received. The right of an incompetent to avoid a sale of his goods, though the one to whom he sold had resold the goods to a bona fide purchaser for value, who bought in ignorance of the infancy or insanity of the original owner was settled law until Section 24 of the Act made the rule universal that a bona fide purchaser for value from one who has a voidable title acquires a good title. Contrast the right of an infant to avoid his obligation even on a negotiable instrument in the hands of a holder in due course.

The fourth section of the Sales Act renders unenforceable a contract to sell or a sale of goods or choses in action of the value of \$500.00 or upwards, unless there be part delivery and acceptance or part payment or a memorandum signed by the party to be charged. The seventeenth section of the English Statute of Frauds was never enacted in Pennsylvania and this provision of the Sales Act is the first legislation requiring any formalities to render enforceable a sale of goods.

*Re-printed from 26 Dick. L. Rev. 151 (1922).

¹ Woodward on Quasi Contracts, Section 202.

Section 5, (3) provides: "Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods." Prior to this enactment a sale of goods in potential possession operated to transfer title as soon as they came into actual possession, (*Henderson vs. Jennings*, 228 Pa. 193) and the buyer was liable for the price. Now the action for damages for non-acceptance is the seller's only remedy. (Compare Secs. 63 and 64.)

Section 6 (2) provides: "In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined." Prior to this enactment we could not say certainly that the doctrine of *Kimberly vs. Patchin*, 19 N. Y. 330, would be followed in Pennsylvania, though this case was cited with approval in *Bretz vs. Diehl*, 117 Pa. 589.

Section 12 defines an express warranty as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." The doctrine of *Chandelor vs. Lopus*, 1 Smith's Leading Cases (9th Am. Ed.) 329, that the seller must expressly warrant or use other words containing a direct and positive promise to be responsible for the truth of the fact asserted, was followed in Pennsylvania with less change than in any other American state. (Williston on Sales. Sec. 199.) *McFarland vs. Newman*, 9 Watts 55; *Jackson vs. Wetherill*, 7 S. & R. 480; *McAlister vs. Morgan*, 29 Super. 476. Chief Justice Gibson laid down the rule in the early cases that, "the naked averment of a fact is neither a warranty of itself or evidence of it." He esteemed highly the good old doctrine of caveat emptor. But, says Prof. Williston, "the law of Pennsylvania is peculiar." So now the maxim is reversed, and the seller must beware, for any statement about the goods, however honestly believed, may expose him to a damage suit, if it proves to be false and it influenced the buyer in deciding to buy. So now even descriptive statements are warranties, though it had been settled law in Pennsylvania that where the title had passed such words did not import a promise. *Fogel vs. Brubaker*, 122 Pa. 7; *Ryan vs. Ulmer*, 108 Pa. 332; 137 Pa. 310; *Shisler vs. Baxter*, 109 Pa. 443. Since this provision was adopted, the House of Lords of England has declared that, "It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it. It would entirely negative the firmly established rule that an innocent representation gives no right to damages." *Heilbut vs. Buckleton*, (1913) App. Cas. 30. That this decision was a surprise, if not a shock, to the learned draftsman of the Act, see 27 *Harvard L. Rev.* 1.

Section 13. This section divides the common law implied warranty of title into (a) a warranty of the right to sell, (b) a warranty of quiet possession and (c) a warranty against undisclosed incumbrances. Prior to the Sales Act a buyer had no right of action in Pennsylvania until his possession was interfered with. *Krumbhaar vs. Birch*, 83 Pa. 426; *Morrison vs. Whitfield*, 46 Super. Ct. 107. Williston concedes that to regard the warranty as broken before eviction may lead to the buyer's right of action being barred before he is aware of a breach, and that it is difficult to estimate the damages prior to the assertion of the superior title. But the rule in Pennsylvania prior to the Act compelled the buyer to await the assertion of the adverse title or surrender the goods and assume the burden of proving that the seller had no title. He may now sue twice and recover in the second suit whatever damages he did not get in the first one.

Section 14 deals with the warranty implied when the goods sold are identified only by a general description and the seller undertakes to supply goods to meet this description. This section merely requires the goods to "correspond" with the description, and adds that the use of a sample shall not reduce this requirement though the goods correspond with the sample.

Section 15 limits the implied warranties of quality to two situations, first, when the buyer informs the seller of a particular purpose for which the goods are required and relies on the seller's skill or judgment, second, when goods are bought by description. In the first case the Act imposes on every seller, whether a manufacturer or dealer or neither, a warranty that the goods are fit for the particular purpose. In the second case the warranty of merchantable quality is imposed only on dealers.

In *Griffin vs. Metal P. Co.*, 264 Pa. 254, it is said that the first provision imposes on every seller a liability previously only resting on manufacturers or growers. This is to confuse the general purpose for which a thing is made, e. g. a mower, to mow, and a reaper, to reap, and the particular purpose to which the buyer intends to put goods which may be used for a variety of purposes. It is true that *Sellers vs. Stevenson*, 163 Pa. 262, held that, while a manufacturer of wind-mills might impliedly warrant that they would work, a dealer selling them ready made did not. But this is hardly a case of such particular purpose as requires disclosure by the buyer that the seller may be informed of it. *Port Carbon Iron Works vs. Groves*, 68 Pa. 149, declares that when an article is ordered for a special purpose, (e. g. pig iron) that is, if the goods are described in the order as goods fit for the named purpose, the seller must select goods fit for that special purpose. But this is only a special application of the rule that goods sold by description must correspond with the description. The important change effected by the Sales Act is in imposing an implied warranty of quality on sellers of specific chattels, though sold upon inspection. The law had become fixed in Pennsylvania that in such cases there was no warranty but that of title.

Fogel vs. Brubaker, 122 Pa. 7; Wilson vs. Belles, 22 Super. 477; Pyott vs. Baltz, 38 Super. 608. Now the seller must beware of selling goods unfit for a particular contemplated use, if this is disclosed and the buyer relies on the seller. The seller's occupation does not figure. "On the whole subject, the Pennsylvania law has been open to criticism, but the enactment of the Uniform Sales Act has presumably corrected its archaisms." Williston on Contracts, Sec. 1002, note 69.

In "executory sales," that is, contracts to sell goods by description, the cases cited above all recognized that the sellers warranted that the goods would be of the kind ordered and merchantable in quality. (But contrast Ryan vs. Ulmer, 108 Pa. at page 338.) "Subsection (2) relates only to goods bought by description and expresses, therefore, a well settled rule. Though the terms of this subsection are confined to dealers, it is not to be supposed that one who is not a dealer and who contracts to sell goods by description to be furnished in the future, can perform his contract by tendering unmerchantable goods. It is only where the goods are actually bought that subsection (2) is applicable." Williston on Sales, Sec. 248 at page 335.

Now, remember, this section first of all declares that it will enumerate all the warranties of quality. Merchantableness is then treated as a matter of quality. It is a universal requirement in all sales by description but the only sellers to which it is expressly made to apply by the only relevant section of the Act are dealers. By goods "bought," we suppose is meant, goods which the buyer accepts. Does he mean that in such cases the warranty of merchantableness survives acceptance in case of dealers but not as against other sellers? He cannot. Section 49 expressly provides that liability for breach of all warranties, whether "in damages or other legal remedy," e. g. rescission, shall survive acceptance of the goods, if notice of the breach be given within a reasonable time. What this special warranty is which is imposed upon dealers only is not clear. And where we are to find in the Act the degree to which goods sold by description must "correspond" with the description is not clear. We are glad to know that the Act must not be regarded as a step backward even in such an archaic state as Pennsylvania, and that in all contracts to sell by description the seller still warrants kind and merchantableness.

Subsection (3) provides: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." Shisler vs. Baxter, 109 Pa. 443, and Lord vs. Grow, 39 Pa. 88, held a purchaser who bought on inspection a particular kind of seed to be without remedy, though he got a different kind of seed, which it was impossible to distinguish by its appearance. It would seem that since the buyer must rely on the seller's selection and statements in these cases, the Act would give him a remedy.

Though the Sales Act repeals inconsistent acts, as it specifically repeals the Act of 1887 and does not repeal the Act of May 4, 1889, P. L. 87, we may

assume that food sold must still correspond in quality, as well as kind, with the description given, and unless otherwise agreed, it must be fit for household consumption. This Act operates against all sellers, whether dealers or not, and in favor of all buyers, whether they buy for consumption or not. See 10 Dickinson Law Review 135, and *Weiss vs. Swift & Co.*, 36 Super. 381. But for our Act of '89, any implied warranty in sales of food would extend only to sales by dealers to buyers for immediate consumption, 2 Williston on Contracts, Sec. 996, page 1874.

Section 16 deals with sales by sample. The Act of April 13, 1887, P. L. 21, Sec. 1, repealed by Sec. 77 of Sales Act, required the bulk to correspond with the sample in quality. This is repeated in Section 16 of the Sales Act. The Sales Act expressly assures the buyer "a reasonable opportunity of comparing the bulk with the sample," unless the buyer agrees that the goods be shipped "C. O. D." It also provides the same warranty of merchantable quality, "if the seller is a dealer in goods of that kind," as in sales by description, unless the defect was apparent on reasonable examination of the sample. The decisions in Pennsylvania prior to the Act of '87 made the sample a standard only of the "kind," but required that the article be merchantable for "an unmarketable article is substantially different in kind from one that is salable in the market." *Boyd vs. Wilson*, 83 Pa. 319, and the exhaustive article of Dean Trickett in Vol. 13 Dickinson Law Review 1. "The whole law of warranties, express and implied, as it existed in Pennsylvania prior to the Act is open to criticism," says Williston on Sales, page 342, note 38. "A statute is the more necessary." Sec. 199 at page 254. Again we need to be assured that the Sales Act is not a step backwards in Pennsylvania in limiting the warranty of merchantableness in sales by sample to dealers only. That such limitation was intentional, see Williston on Contracts, Sec. 1006.

Section 18 provides that the time when the title to specific goods passes depends on the intention of the parties, to be ascertained from the usages of trade and the circumstances of the case, as well as from their words and conduct, and when there is doubt from the rules of presumption recited in the following section.

Sec. 19, Rule 1, provides that in a sale of specific goods, in a deliverable state, the parties are presumed to intend that the title shall pass when the contract is made, though no money be paid nor goods delivered. In the seventeenth century the seller's lien was hardly recognized and Blackstone regarded a cash payment or delivery as essential to the transfer of title. There are only a few cases in Pennsylvania discussing the seller's lien. *Welsh vs. Bell*, 32 Pa. 121, and various later cases follow Blackstone. Accordingly the risk of loss was on the seller and he could not sue for the price of a specific chattel, prior to the Act, unless there had been payment or delivery. See *Brown vs. Reber*,

30 Super, 114; *Mervine vs. Arndt*, cigar bands, 33 Super. 333; *Robb vs. Zern*, 42 Super. 182. But contrast *Reynolds vs. Callender*, 19 Super. 610, *Henderson vs. Jennings*, 228 Pa. 188; and *Steiner vs. Turner*, 45 Super. 225, (article specially made for buyer) and 12 D. L. Rev. 274. "If the parties when they make their bargain contemplate an exchange of the goods for the price immediately on making the bargain, the sale is to be regarded as a cash sale, (i. e. payment is an implied condition of the transfer of title.) On the other hand, if the parties do not contemplate an immediate exchange of the money for the goods, even though they do contemplate that possession of the goods shall not be delivered until the price is paid, it is presumptively an absolute sale as soon as the parties are agreed on the terms of the bargain and the goods are in a deliverable state." Williston, page 549.

Since the Sales Act the right of an unpaid seller who has refused to extend credit is a right of possession merely and the title having passed, the seller's right to collect the price is clear. Sec. 63, (1).

Prior to the Sales Act it was the presumed intention of the parties, where the goods were to be weighed or measured to ascertain the price, that title should not pass until after weighing or measuring, unless the goods have been delivered. Compare *Nicholson vs. Taylor*, 31 Pa. 128 and *Miller vs. Seaman*, 176 Pa. 291 with *Scott vs. Wells*, 6 W. & S. 357. The English Sale of Goods Act limits the rule to cases in which the seller is to take part in the weighing or measuring. Williston says this rule is "founded on a mistake, has no principle behind it" (Sales Sec. 266,) and it has been abandoned in the Sales Act. This change must not be confused with the rule that where something is to be done by the seller to put the goods into a deliverable state, the presumed intention of the parties is that the property even in specific goods shall not pass until such thing is done. This doctrine, recognized in *Nesbit vs. Burry*, 25 Pa. 208, is enacted in Sec. 19, Rule 2, of the Sales Act. The remaining rules of Sec. 19 express the previously settled law of Pennsylvania.

Sec. 20 (3) provides that a seller reserves his right of possession by consigning the goods to the order of the buyer or his agent and retaining possession of the bill of lading. This provision harmonizes with the plan of the Uniform Bills of Lading Act, which requires the surrender of order bills before delivery of goods by the carrier but permits delivery to the buyer named as consignee in a straight bill. See Secs. 12 and 14 of Bills of Lading Act of June 9, 1911, P. L. 838.

Prior to the enactment of the Uniform Bills of Lading Act the Act of Sept. 24, 1866, P. L. 1363, was controlling and by its terms all bills of lading were made negotiable, if not marked non-negotiable, and those negotiable were required to be surrendered before the delivery of the goods.

The other subsections of section 20 express existing law.

Sec. 21, (1) provides that "where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale." This reverses the rule of *Coffman vs. Hampton*, 2 W. & S. 377, *Kerr vs. Shroder*, 1 W. N. 33 and *Tompkins vs. Haas*, 2 Pa. 74, which held that all the purchases of the same buyer constitute but one contract.

Sec. 21, (2) provides that until the fall of the hammer or the auctioneer declares the goods sold, any bidder may retract his bid, but if the sale has been announced to be without reserve, the auctioneer may not withdraw the goods from sale. "If the contract is incomplete so far as the bidder is concerned, it must also be incomplete so far as the auctioneer is concerned." See *Williston*, p. 447. The Act does not provide that a bidder may not at any time withdraw his bid, if the sale is announced to be without reserve. But if the auctioneer is bound beyond withdrawal in such cases, the bidder must be also, unless released by a higher bid. *Fisher vs. Seltzer*, 23 Pa. 308 had established the general rule that both bidder and auctioneer were free to withdraw until the hammer fell. "Sales without reserve" are a novelty in Pennsylvania and we must wait for the courts to say what the position of a bidder is at such a sale. The Act appears to adopt for special use in such cases the view advocated by *Langdell* that the auctioneer makes an offer, namely to sell a specific chattel to the person and at the price fixed by the bidding and that a bidder accepts and is then bound, unless released by a higher bidder taking his place. Subsections (3) and (4) express the settled law.

Sec. 22 provides that the risk of loss is on the buyer only from the time he becomes the owner, except when he has possession under a conditional sale contract, or where delivery has been delayed through his fault. But destruction after the bargain ends the seller's obligation. Sec. 8 (1). Of course an express agreement as to risk of loss at any stage would be enforceable. The Act has performed a service in fixing the rule in cases where the buyer's non-payment of the price or failure to take delivery on request has prevented the transfer of title. For a discussion of the law in conditional sales before the Act, see 18 *Dickinson Law Review* 202; and for a discussion of the change involved in the second exception, see Vol. 1 *Wis. Law Rev.* page 311.

Sec. 23 provides that a buyer generally gets no better title than his seller had, unless the real owner has estopped himself to assert his interest or the case falls within some statute e. g. a factors' act or a recording act. Of the latter type is the conditional sales act of 1915, P. L. 866. What will create an estoppel is a question not always easy to answer but the Act leaves this question for the courts to settle. In Pennsylvania one who makes delivery under a contract of conditional sale is estopped, though in most jurisdictions the contrary is the law. A uniform rule would have been useful, but the subject was evidently thought to be big enough to require a special statute to cover it. A uniform Conditional Sale statute has been completed by the Commissioners on Uniform

State Laws but awaits enactment in Pennsylvania. See Vol. XLVI Reports of A. B. A. Page 714. The further question so much litigated in Pennsylvania, namely, the distinction between a conditional sale and a bailment, is not aided in its solution by any of the provisions of the Sales Act.

As noted above, Sec. 24 provides that where the seller has a voidable title, a purchaser in good faith, for value, and without notice of the seller's defect of title, takes a perfect title. In the case of sales made by lunatics and infants and a resale to an innocent purchaser, this cutting off of the incapable's right to avoid his sale is a startling change in the law. "The advantage to trade and the stability of titles justifies the diminution in the privilege of infants and lunatics," says Williston (Sales, p. 563.) It may be asked whether, if this is a dominating consideration, why not protect an innocent purchaser from a bailee or even perhaps from a finder of goods?

Secs. 25 and 26 cover the rights of purchasers from or creditors of a seller who continues in possession of the goods after he has sold them. The former section gives absolute protection to purchasers in good faith, for value and without notice of the prior sale. But Sec. 26 merely tells us that creditors of the seller may treat the sale as void, "if such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law." In short, instead of a uniform rule in such cases, the old law of each state continues to control. For a good discussion of the rule that a sale without delivery is fraud in law in Pennsylvania, see *Riggs vs. Bair*, 213 Pa. 402.

Secs. 27 to 40 deal with documents of title, that is, bills of lading and warehouse receipts. The prior enactment in Pennsylvania of the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act and the provision of Sec. 78, of the Sales Act that nothing in it should be taken to repeal anything in these earlier acts, render any discussion of these sections as superfluous as are the sections themselves in Pennsylvania. Their presence in the Sales Act is a snare and a delusion and can serve no useful purpose. The writer has delivered himself in extenso on this topic in the November and December issues of Volume XX, (1915) of this publication and will not repeat here what was then said. Suffice it to say that all that is said in these sections must be discounted and reference must be made in any case to the act dealing with the particular document involved in the case, for the acts are not in accord with each other on many points and the attempt to state propositions in the Sales Act purporting to be the law as to both kinds of documents, with a disconnected warning tacked on at the end of the Act that it does not have the usual effect of repealing prior legislation on these matters, can only operate to mislead the unwary practitioner or student.

Section 43, (3) provides that "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 has notice of the sale." As noted above, the Pennsylvania rule was, and still is, that retention of possession by a seller is fraudulent as to his creditors and later purchasers from him without notice. But it has been the law in Pennsylvania, that, when at the time of the sale, possession of the property is in a bailee of the seller, and the seller does not take possession after the sale, the rule requiring a change does not apply. *Linton vs. Butz*, 7 Pa. 89. It is hardly to be supposed that this section will be construed as operating to change this rule by requiring notice to the bailee to render the goods immune against creditors of the seller or innocent purchasers from him. But if it has not this effect, it has no use in the Act and it can only serve to mislead the student. It is true, however, that in *Linton vs. Butz*, *supra*, the bailee had kept the article to repair it for the buyer.

Sec. 44 (2) provides that, "where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole." Subsection 4 qualifies this harsh rule by providing: "The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties." It was decided in *Brownfield vs. Johnson*, 128 Pa. 245, following *Lockhart vs. Bonsall*, 77 Pa. 53, that "where the article is uniform in bulk and the act of separation throws no additional burden on the buyer, a tender of too much, from which the buyer is to take the proper quantity, is a good delivery." Williston says this requires the buyer to assume the chance of a dispute with the seller as to the correctness of the buyer's separation. *Sales*, Sec. 461. Whether this be a sufficient reason or not, the Act establishes a general rule and opens the door to an arbitrary rejection of the whole, unless the excessive tender can be justified by a usage of trade or course of dealing. Doubtless the custom to keep in bulk goods of the character involved in the cases cited above, to wit, nuts and oil, had its influence in the decision of the cases and for this reason, perhaps, like decisions would be reached today, notwithstanding the provision of Sec. 44, (2).

Section 49 provides: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty, within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor."

Section 69 provides: "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 breach of warranty."

In *Luella Coal and Coke Co. vs. Gans*, 61 Super. 37, Judge Kephart said: "When a vendee of a certain kind or class of goods has an opportunity to inspect them before acceptance, and after such inspection, knowing their inferior quality, takes the goods and disposes of them, he will be liable for the contract price."

In *Noble vs. Edwin*, 50 Super. 72, the following charge was held proper: "As there is no implied warranty as to quality, when goods are received, if they are of the kind that were ordered and they are of inferior quality, the purchaser has a right to a reasonable time for inspection and if he is not satisfied, that is, if they are not of the grade that was ordered, he may elect to return them, refuse to receive them, or he may keep them; and if he keeps them, if they were the kind that were ordered, although of an inferior quality, he affirms the contract to such an extent that he is bound to pay the contract price, notwithstanding they are of inferior quality, because by his keeping them and not returning them, thus using them, he affirms the contract."

This doctrine was reiterated by Justice Kephart in *Samuel vs. Del. River Steel Co.*, 69 Super. 605, but it was emphasized that: "The acceptance of goods not ordered without protest or complaint will not estop the vendee from setting up the breach of the implied warranty when sued for the contract price of the chattel ordered." The question thus became whether the goods were so inferior as to differ in kind or merely in quality. On the appeal in this case from the Superior to the Supreme Court, 264 Pa. 190, it was held that all warranties, whether express or implied, survived acceptance. Mr. Justice Schaffer was of counsel for the buyer and relied on the Sales Act, quoted above, but the Supreme Court, as the Superior Court, refrained from any reference to the fact that the matter was covered by express statutory provision, an attitude too frequently displayed by the courts toward acts which attempt to codify the common law.

It would therefore appear that there may be such a disparity between the quality of the goods ordered and those tendered as to justify rejection but that the disparity may not be so great as to constitute a difference in kind, and so amount to an implied warranty which will survive acceptance.

The right to accept goods and later set up the breach of warranty is recognized also in *Diamond City Beef Co. vs. Murdock*, 270 Pa. 455, *Wright vs. General Carbonic Co.*, 114 Atl. 517 and *Hoffman vs. Hockfield Bros.*, 75 Super. 595.

In *Wright vs. General Carbonic Co.*, *Supra.*, Justice Sadler points out that the requirement of Sec. 49 of the Sales Act that the buyer give notice of breach

of warranty within a reasonable time after he knows or ought to have known of it, on pain of losing his right of action for breach of warranty, is a change in the existing rule. Such omission always barred rescission but not the remedy in damages.

Prior to the Act it was the law of Pennsylvania that a buyer could not accept a late delivery and set up the delay as a partial defense when sued for the price, if on date of delivery he could have secured the goods in the market. *Blakeslee Mfg. Co. vs. Hilton*, 5 Super. 189, but an exception was recognized where the goods were being specially made of peculiar pattern or when for other reason it was impossible for the buyer to obtain sufficient goods of the kind and quality contracted for. *Rockwell Mfg. Co. vs. Cambridge Springs Co.*, 141 Pa. 386. Section 49 of the Sales Act permits acceptance in all cases and preserves the buyer's claim for damages in all cases.

Sec. 58 (c) provides that goods are no longer in transit within the meaning of Sec. 57, (the section providing for the right of stoppage in transitu), "if the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf." No American cases are cited by the draftsman for this proposition and the case of *Allen vs. Mercier*, 1 Ashmead 103, is to the contrary.

Subsection (3) of Sec. 63, permits a seller to specifically enforce an executory contract to buy, whenever the goods cannot readily be resold for a reasonable price. If the buyer refuses to receive the tendered goods, the seller may notify him that he will hold the goods for him and he may proceed to collect the price. *Ballentine vs. Robinson*, 46 Pa. 177, and *Larkin vs. Schwitzer*, 54 Super. 238, were cases of goods made specially for the buyer, and adopted this rule, but that a seller could not do this in other cases in Pennsylvania, see *Unexcelled Fire Works Co. vs. Policies*, 130 Pa. 536; *Jones vs. Jennings*, 168 Pa. 493; and *Puritan Coke Co. vs. Clark*, 204 Pa. 556. "Courts of equity have confined the right of specific performance of affirmative obligations in regard to personal property so narrowly that either injustice must be done or the necessary remedy must be sought in another way. Where a seller has prepared goods of a special and peculiar kind under a contract and the buyer wrongfully refuses to take them, * * * damages are not an adequate remedy." *Williston*, Sec. 573. "But except in the limited class of cases where equity gives specific performance of a contract to sell chattels, an action for damages is the buyer's only remedy for the seller's refusal to transfer the property in the goods as agreed." *Id.* Section 598.

Section 69 defines a buyer's remedies for breach of warranty. Subsection (1), (d) gives the right "to 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." Prior to this enactment the buyer had no right to rescission for the breach of an express collateral warranty in the absence of fraud. *Kase vs. John*, 10 Watts 107; *Freyman vs. Knecht*, 78 Pa. 141, *Eshleman vs. Lightner*, 169 Pa. 46. "The desirability of such a remedy depends purely upon the business customs of a community and on whether it appeals to the natural sense of justice. * * * The morality of taking advantage afterwards of false statements innocently made, by insisting upon retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring about the sale." *Williston on Sales*, Section 608. Of course rescission was always allowed for a fraudulent warranty. *Nelson vs. Martin*, 105 Pa. 229. Professor Burdick ably championed the Pennsylvania doctrine but the draft followed the Massachusetts rule. See the spirited debate in 16 *Harvard Law Rev.* 465 and 4 *Columbia Law Rev.* 1, 195 and 265.

Section 74 provides: "This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the law of those States which enact it." It may cause surprise that a legislature should so enjoin the courts and then make various changes in the Uniform Act before enacting it. This they did.

Section 2 was amended as stated at the outset of this article.

Section 20 was amended by adding the words: "but delivery to the endorsee of the bill of lading shall discharge the carrier from all responsibility for the goods."

Section 31 was amended by adding: "(b) Nothing in this section, nor in any other provision of this act, shall be construed to impose upon any common carrier any obligation to require the surrender of the bill of lading or shipping receipt before making delivery of the goods, where, by the terms of said bill of lading or shipping receipt, the goods are deliverable to the consignee without surrender of such bill of lading or shipping receipt."

Section 47, Third, requires payment of the price before a buyer may examine goods shipped C. O. D. This section is amended by requiring "proper written authority to the carrier" permitting such examination, when the seller has agreed to permit examination before payment of the price.

Section 59, as amended, requires that the notice of a seller to the carrier to stop goods in transit "state that the buyer is insolvent and has not paid the seller of the goods."

Section 64, Fourth, requires that loss of profits resulting from interrupted performance be "considered" in estimating damages. As amended, the words "allowed for" are substituted for "considered."

Section 68 gives a buyer of specific goods a right to get specific performance in a court of equity, "if it (the Court) sees fit." As amended, "if the remedy at law be inadequate," is substituted for "if it sees fit."

Section 71 is amended by adding: "All implications from surrounding circumstances, or from the nature of a contract or agreement, shall be regarded as forming part of the contract or agreement."