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George Gleason Bogert

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THE PROPOSED FEDERAL SALES ACT

IT seems to me that all lawyers who have a special interest in the topic of Sales should give to the draftsmen of the proposed Federal Sales Act all ideas which they may have with regard to the improvement of that act as introduced by Representative Pearson. If there is to be a revised Sales Act, the revision should be thorough. All doubts, difficulties and defects which have appeared in connection with the Uniform States Sales Act should be remedied in the new bill.

SEC. 5. STATUTE OF FRAUDS. — I do not favor reducing the price in contracts subject to the Statute of Frauds from \$500 to \$50.

In my opinion the influence of the Statute of Frauds should be diminished instead of being increased. Litigation shows that the Statute is generally the refuge of a welcher who is endeavoring to get out of performing a contract which he admits he made. There is very little evidence that the Statute often helps an innocent party to avoid having a contract of sale thrust upon him by the use of perjured testimony, or as a result of misunderstanding or mistake.

Many cases in construction of the various sections of the Statute of Frauds tend to whittle away its effect and to avoid it by dubious reasoning. The courts are hostile to the statute. This is some evidence that the statute is unwise and not supported by public opinion. It is probably too late to repeal the statute, but its influence should not be extended by bringing small contracts within its control.

In twenty-four of the jurisdictions having a sale of goods section of the Statute of Frauds the price is fixed at \$500 or more, while in only twelve jurisdictions is it set at \$50. In three states the sum is \$100, in two \$200, in one \$2500, in two all sale contracts are subject to the statute, in seven there is no statute. The decided weight of opinion is, thus, in favor of requiring formality only in the case of contracts of substantial importance.

Insofar as the statute is applicable it should be satisfied only by acts which genuinely confirm the making of a contract. The proposed Federal Act, sec. 5 (4), would permit receipt of the goods to be shown by proof of retention by the buyer of goods which were in his possession before the date when it is alleged the contract was made. Thus, a bailee could fraudulently force a sale of the goods on his bailor. While some cases go this far,¹ I think they are unfortunate and unsound.² I believe in expressly limiting the application of the seventeenth section as far as possible, but I do not believe in judicial or legislative evasions of the spirit of the act.

SEC. 12. EFFECT OF CONDITIONS.—The proposed Federal Act leaves the language of subdivisions (1) and (2) as it is, but adds two new subdivisions, (3) and (4), regarding sales to arrive and sales to arrive by a particular vessel.

I approve the new proposed subdivisions (3) and (4), but would change subdivisions (1) and (2). Subdivision (1)¹ states the effect of a breach of a condition. Subdivision (2) tells of the effect of a breach of warranty where property has not passed.

All of us who have taught sales are familiar with the use of the word "condition" in English law as meaning an obligation by the seller regarding the kind or quality of the goods which was expressed in the description of the goods and was regarded as a part of the contract of sale and not as a collateral obligation. Condition and warranty are still used as describing promissory obligations of the seller in sales contracts in English law. We also know that Professor Williston intended to abandon the use of the word condition in any sense indicating a promise, and to limit the use of the word in the Sales Act to suspensory conditions, that is, to events the happening of which were conditions precedent to the obligations of seller or buyer, but as to the happening of which no promise had been made by either party. Doubtless most of us approve this abandonment of a very arti-

1. *Wilson v. Hotchkiss*, 171 Cal. 617, 154 Pac. 1 (1915); *James Mack Co. v. Milling Co.*, 63 Utah 565, 227 Pac. 1033 (1924).

2. See *Silkman Lumber Co. v. Hunholz*, 132 Wis. 610, 112 N. W. 1081 (1907).

ficial use of "condition" and the consequent scrapping of many very confusing common law decisions distinguishing between warranties and conditions and their effects. But did Mr. Williston indicate clearly in the act what he intended to do? He did not define "condition" in the Sales Act, and in section 11 which deals with conditions he speaks twice of the "performance" of a condition, as if it were an event, the happening of which showed fulfillment of a contractual obligation. I suggest that condition be defined in section 67 of the Federal Act in such a way as to show the difference between its meaning in the Sales Act and in the Sale of Goods Act, and that the word "occur" or "happen" be substituted for "performance" in section 12 of the Federal Act, when reference is had to the condition.

As to subdivision (2) of sec. 12 the objection is not to the substance of the subdivision, but to its location at this point and to the need for it, in view of the later section 60 which defines the remedies for breaches of warranty. The substance of sec. 12 (2) is that where a seller has warranted the goods, and title has not passed at the time when the buyer discovers the breach of warranty, the buyer may reject the goods and rescind the contract. Should not this remedial provision be placed in section 60 later on, and is it not already covered by sec. 60 (d) which provides the remedies of rejection and rescission?

SEC. 13. DEFINITION OF EXPRESS WARRANTY.—Although it impliedly negatives the idea that the seller must intend to warrant in order that he may be held to have made an express warranty, still some courts have persisted in the heresy that such intent must be shown, and some of these courts are in jurisdictions having adopted the Sales Act.³ Why not kill this snake in the grass by inserting a sentence in sec. 13 at the end of the first sentence, as follows: "whether the seller intended it to be a warranty or not"?

With reference to this section also I recommend including in the last sentence which excludes statements of opinion and expressions as to value from the warranty field, a clause excluding also puffs. In my notion a puff is not a statement of value

3. *Van Horn v. Stautz*, 297 Ill. 530, 131 N. E. 153 (1921); *Michelin Tire Co. v. Schulz*, 295 Pa. 140, 145 Atl. 67 (1929).

or of opinion, but rather a vague, extravagant assertion to which no reasonable buyer pays attention. A puff is of course excluded impliedly by the definition of an express warranty as a statement which naturally induces the buyer to act, but so are statements of opinion and of value thus excluded. If you are going to have any statement as to what are not warranties, why not include puffs or salesmen's talk?

In this connection also there should be in the act a provision as to the meaning of the phrase "I guarantee these goods". Is this a puff or does it have some clear meaning? It is undoubtedly a very common statement from the mouth of the seller. I have not seen a case construing it. It seems to me it should be taken as a warranty that the goods are of average quality and reasonably fit for the use for which the buyer expressly or impliedly stated he wanted to use the goods.

I recommend also that in section 13 there be a provision that where an advertisement is published and the names of the manufacturer and dealer are attached, with the consent of both, and the advertisement contains statements as to the quality or capacity of the goods, and goods of this kind are later sold by the dealer to one who has read the advertisement, the statements therein shall amount to express warranties by the dealer, although he did not pay for the advertisement or prepare it.

SEC. 15. IMPLIED WARRANTY IN SALE BY DESCRIPTION.—New matter is included regarding a sale partly by sample and partly by description. There should be definitions of a sale by description and also of a sale partly by sample and partly by description.

A sale by description should be defined as one where the goods are identified by the use of written or spoken words which state the kind, type, brand, grade, trade name, patent name, or origin of the goods, or words which describe the goods by reference to two or more of these features.

The phrase "partly by description and partly by sample" I take it means that the kind and character of the goods are described as to some features by the use of written or spoken words and as to other features by the showing of a small unit of the goods. This should be made clear. The phrase is capable of the con-

struction that it means that part of the goods are identified by written or oral description and the remainder are described by showing a sample. It should be clear that "partly" refers to part of the attributes of the goods and not part of the quantity of the goods. This phrase is not one in common use. It should be made of easy use by the courts, without danger of misconstruction.

SEC. 16. IMPLIED WARRANTIES OF QUALITY.—I suggest adding two new subsections and changing one existing subsection.

It seems to me that there should be a new subsection to the effect that where goods are sold in containers or packages and hence are not easily examined in their entirety, there should be an implied warranty that the goods are honestly packed and are uniform in quality throughout. Under sec. 16, subd. (3) the buyer is deprived of an implied warranty as to any goods which he has examined and as to any defects which such examination ought to have revealed. The cases hold that if he examines only the exterior, or examines the entire contents of only a few units, he is deemed to have examined the whole.⁴ He has had a chance to examine the entire contents of all units, and hence is in the same legal position as if he had made such examination. The result is that the buyer must go to the great labor and expense of examining all units or must take a chance. He cannot sample here and there and rely on each package being the same throughout.

Recent cases hold that on the sale of a second hand article as such, there is no implied warranty of quality.⁵ This seems a reasonable interpretation and might well be inserted in section 16.

In connection with section 16 I think the revisers of the Sales Act are passing up an important opportunity to improve the act when they fail to define the word "merchantable". Two of the leading writers in the Sales field have differed on the meaning of

4. *Cudahy Packing Co. v. Narzisenfeld*, 3 F. (2d) 567 (C. C. A. 2d, 1924).

5. See *Farris v. Alfred*, 158 Ill. App. 158 (1910); *Jones v. Armstrong*, 50 Mont. 168, 145 Pac. 949 (1915); *Durbin v. Denham*, 106 Ore. 34, 210 Pac. 165 (1922).

this word. Williston states ⁶ that it means salable as goods of the kind in question, without regard to grade. Mechem wrote ⁷ that it meant of fair average quality. Under the definition of Professor Williston goods may be merchantable if they are of the lowest quality, so long as they are salable. The cases are not at all clear on which idea they accept. Etymologically the word means "capable of being sold". I think warranty law would be considerably clarified if the definition section of the act defined "merchantable" and I would favor stating that it means "at least of fair or average quality".

I do not like sec. 16, subd. (5), the patent or trade name subdivision. It has been the basis of much litigation and the decisions are many of them unfair to the buyer. The fault is partly that of the Sales Act, in that it does not make clear what is a sale under a patent or trade name. The object of the draftsman was probably to exclude warranties in trade name sales because they are necessarily cases where the buyer relies on his own knowledge of what the article is like and not on the skill and judgment of the seller. The act should have defined a sale "under a patent or trade name" as one in which "the goods possess such a name and it is used in the negotiations leading to the contract or sale or in the contract or bill of sale in such a way as to show that the buyer is judging for himself as to the fitness of the goods for his purposes." It should exclude cases where the trade name is used only by the seller in the negotiations, and where the buyer uses it without having any knowledge from experience as to what it means.

SEC. 17. IMPLIED WARRANTY IN SALE BY SAMPLE. — There should be inserted a statement that it is not necessary that the seller should indicate his intent to warrant that the goods will be equal to the sample, otherwise than by exhibiting the sample during negotiations for the making of the contract. Some cases at common law and under the act require a finding that the seller intended by the use of the sample to warrant the

6. 1 WILLISTON, SALES (2d ed. 1924) § 243.

7. MECHEM, SALES (1901) §§ 1340-1341.

goods.⁸ The section should define a sale by sample as one where the seller during the negotiations leading to the sale exhibits goods which he impliedly or expressly states are samples of, or identical with, those which will be furnished under the contract.

SEC. 20. RULES FOR ASCERTAINING INTENTION.—It seems to me that this section should be reworded so that the rules are stated as creating presumptions about the intention of the parties, and not as hard and fast rules of law. It is true that the first paragraph contains the clause "Unless a different intention appears", showing that the rules listed below can be avoided by a contrary intention on the part of seller and buyer. But I believe the true nature of these rules would be clearer if they were stated as presumptions of fact about the intent.

There are three types of controls to be used in deciding when property in goods passes. The first is the rule of law which is inexorable and cannot be avoided by the parties. For example, present property cannot pass in a non-existent or unidentified thing. Secondly, there are certain common fact situations where human experience leads us to believe that normally there is an intent to pass property at a given time. These we are justified in turning into rebuttable presumptions of fact. These are rules 1 to 5. Thirdly, there are various minor bits of fact which have a slight effect one way or the other as to the intent about title passing. An example is found in the fact that the goods have not been weighed or measured where such process is needed in order to find out the price. Here there is some probability that the parties did not want title to pass until the weighing or measuring was done, because if the goods were destroyed while unweighed and unmeasured the price would have to be estimated and might become the subject of conflicting testimony. But the American Sales Act does not regard this as a fact of sufficient importance to dignify it with the authority of a presumption. It is merely an incidental item which when thrown into the scales of justice may turn the balance against passage of property. If the Sales Act as it is amended could be so framed as to bring out

8. See *L. A. Lockwood, Jr., Inc. v. E. Gross & Co.*, 99 Conn. 296, 122 Atl. 59 (1923).

the distinctions between rules of law, presumptions, and minor evidentiary facts, I think a service would have been accomplished.

I propose that section 20 make clear what is the effect of a cash sale relating to specific goods, where the seller is not to ship them or deliver them to a particular place. Rules 4 and 5 make it plain that if the seller contracts to ship or deliver, the C. O. D. clause does not presumptively suspend passage of property. But there is nothing in rule 1 which covers the cash sale of specific goods. Rule 1 says that if the contract is "unconditional" title is presumed to pass on the making of the contract regardless of terms as to payment. But is a cash sale "unconditional"? At common law it was conditional, in the sense that the payment of the price was deemed a condition precedent to the passage of property, and the sales act does not tell us whether a cash sale is conditional or unconditional. I think rule 1 should be amended so that it clearly provides that it controls even though the terms are cash or cash down, and that those terms merely relate to a right to retain possession until payment.

In rule 3 I suggest that the section be amplified to provide at what point the buyer must deliver or tender delivery of the goods, when he is taking advantage of his privilege to return. Does he revest title in the seller by returning them to the place where he (the buyer) got possession, or must he return them to the seller, or must he place the goods in the position in which they were located before the making of the contract, as is customary in rescission? There is not much law on this subject. I do not think the act is entirely clear, and suggest it be clarified.

I suggest that section 20 cover the case where a buyer has ordered goods shipped to him, and has agreed not to cancel the order, and yet before time for shipment he does attempt to cancel the order. Does the seller have power thereafter to ship the goods and vest title in the buyer, or has he lost that power? Is the agency to ship and appropriate a revocable or irrevocable one? I think it might be stated in the act to be an irrevocable agency since it is an agency coupled with an interest.⁹

9. For conflicting decisions, see *Lewis v. Scoville*, 94 Conn. 79, 108 Atl.

In section 23, subd. (b) we have the provision that if delivery is delayed by fault of either party the risk is on the delaying party as to "any loss which might not have occurred but for such fault." I would like to see the quoted words stricken out. I think they are a source of speculation and doubt. I think they impose an impossible burden on courts and juries. Let us say that *B* has agreed to take possession of an automobile and pay for it at his home at 6 p. m. on December 31st. *S* brings the machine there and is ready to deliver it, but neither *B* nor any member of his family is present. *S* returns the car to his garage and stores it for the night. During the night the garage is struck by lightning and the car burned. Under subd. (b) as it now stands the buyer whose fault delayed the delivery must pay the price and bear the loss if the court and jury find that the loss of the car might not have occurred if the car had been taken by *B* at the appointed time and place. Of course, *B* might have stored it in a place where it would have been burned or stolen, but he might also have stored it in a safe place. The jury is required to speculate on what might have occurred if *B* had taken delivery as he agreed to. Any sensible set of men would agree that there was a possibility at least that *B* might have stored the automobile in a safe place for that particular night. Why make them consider this rather mysterious set of words at all?

With regard to the omission from the proposed Federal Sales Act of the sections on documents of title, it is true that interstate and foreign bills of lading are covered by the federal Bills of Lading Act, and that warehouse receipts are issued within a single state; but it seems to me that warehouse receipts after issuance frequently get into interstate or foreign commerce, and that it would be desirable to add the document of title sections in order to have the same rules govern warehouse receipts in interstate commerce as govern them in intrastate commerce. Georgia, Hawaii, New Hampshire, and South Carolina have not adopted the Uniform Warehouse Receipts Act, and the act has been amended by the Commissioners on Uniform State Laws

501 (1919); *Knight & Bostwick v. Moore*, 203 Wis. 540, 234 N. W. 902 (1931).

since its original promulgation. The amendments have been adopted in only 14 jurisdictions, so that 35 jurisdictions have the unamended Warehouse Receipts Act, 14 have the amended act, and Georgia, Hawaii, New Hampshire and South Carolina have no uniform act. The passage of document of title sections in the Federal Sales Act would have the effect of increasing the amount of uniformity in warehouse receipts law. Probably the states would be forced to take action to bring their acts into harmony with the Federal Act, and in a few years we might have identical state and federal law.

Furthermore, are there not some documents of title, aside from warehouse receipts and bills of lading? One reads of dock warrants and express receipts. If there are such documents, then the document of title sections of the state Sales Act should be incorporated into the Federal Act.

SEC. 29. DELIVERY AND PAYMENT ARE CONCURRENT CONDITIONS.—Here I think there should be further language to show the meaning of a cash, or cash down, or c. o. d. sale, as far as delivery and payment are concerned. I take it that if no terms of payment are specifically agreed upon the seller is entitled to the price at the same time he tenders the goods. With the right hand he reaches out the diamond ring which he is selling and with his left he receives the \$100 bill which is the agreed payment. But in cash, or cash down, or c. o. d. sales I take it there is a slight difference. The buyer is supposed to pay the price first, and then immediately thereafter the seller is expected to hand over the goods. The abbreviation really should be c. b. d., meaning cash before delivery. If there is this slight variation in meaning should it not be made clear by a section immediately following 29 or by a new sentence in 29?

There is a disagreement among the courts as to the law where a seller has a set period for making delivery and makes an imperfect delivery before the end of that period. Some cases hold that he may try again and tender performance later within the permitted period.¹⁰ Other courts hold that he has only one trial

10. *Mann v. Eastern Sugar & Products Co.*, 244 Mass. 100, 138 N. E. 244 (1923); *Gumbinsky Bros. Co. v. Smalley*, 203 N. Y. App. Div. 661, 197 N.

in his effort to make good performance.¹¹ I believe that this matter should be settled by providing that the seller may tender performance at any time within the permitted period.

SEC. 35. WHAT CONSTITUTES ACCEPTANCE.—I think some difficulties would be avoided by defining acceptance. In the talk of business men and lawyers it has three possible meanings, namely, a consent to take title to the goods immediately, and an expression of satisfaction with the quality of the goods, and thirdly, an expression of satisfaction with the entire performance of the seller. Now a study of sections 35 and 36 will show the careful reader that acceptance is used in those two sections as meaning consent to take title, but this would be clearer if the definition section at the end contained a definition of acceptance.

Under section 54, *Action for the Price*, in subd. 4 which concerns an action for the price where the goods are not readily resalable for a reasonable price, it is suggested that the following words be inserted after the words "price"; "by the buyer in the usual course of his business and within a reasonable time". A small number of cases have indicated that this is the proper construction of the original language of the Sales Act.¹² If these words are read into the Act by judicial implication, would it not be desirable that they be expressly inserted in the Act, so that merchants and lawyers can see them easily and not be obliged to read the cases in order to learn the exact meaning of this particular subdivision of the Act.

In Section 60, Remedies for Breach of Warranty, I suggest two slight changes for the purpose of clarification. Subdivision (a) provides the remedy or recoupment, and (b) provides an action for damages. There is some doubt whether "recoupment" is used in its technical sense as indicating the right to reduce the recovery of the plaintiff to the value of what he gave the defendant, or whether it is used as including counterclaim. I have supposed that it is used in its technical sense, and therefore that counterclaim is not covered by subd. (a). If this

Y. Supp. 530 (1st Dep't 1922), *aff'd without opinion*, 235 N. Y. 619, 139 N. E. 758 (1923).

11. *Hageman v. Ule*, 188 Wis. 617, 206 N. W. 842 (1926).

12. *Illustrated Postal Card Co. v. Holt*, 85 Conn. 140, 81 Atl. 1061 (1912).

is so, should not subd. (b) be reworded so as to make it plain that the buyer may maintain his cause of action for damages either as a plaintiff, or as a defendant by way of counterclaim? Surely it is intended to permit the use of a cause of action for breach of warranty by way of counterclaim. The Act does not specifically say so. I think subd. (b) should be amended by inserting after the word "action" in subd. (b) the words "or counterclaim".

Would it not be worth while at this point to insert a new subdivision to the effect that a buyer under a conditional sale, when sued in replevin for a return of the goods, may set up a breach of warranty for the purpose of showing that there is no balance due the seller and therefore that the seller does not have the right to retake?¹³

In subdivision (d) which has to do with the remedy of rescission I suggest inserting after the word "seller", in line three, the words "at the place where the buyer received possession of them". There is a possible ambiguity here as to the extent of the buyer's duty, just as there was with regard to a sale or return, and it should be settled. In connection with this same rescission section I would favor allowing the buyer to rescind in part if he does not discover the breach of warranty until after he has consumed or parted with a portion of the goods. There is some case authority for this position.¹⁴ It appeals to me as fair and reasonable.

The section states in general how damages for breach of warranty are to be measured. This is in subd. (6). Then in subd. (7) it elaborates the measuring of damages for breach of a warranty of quality. There is no corresponding elaboration of the method of measuring damages for breach of a warranty of title. Since the division of warranties of title in three elements in sec. 14, I believe it will be found that good will result from detailing

13. This result is reached in *Peuser v. Marsh*, 218 N. Y. 505, 113 N. E. 494 (1916).

14. *Clifford v. Stewart*, 153 Minn. 382, 190 N. W. 613 (1922); *Baxter v. Savoy Shirt Co.*, 238 N. Y. 106, 143 N. E. 808 (1924). But see, *contra*, *Allis-Chalmers Mfg. Co. v. Frank*, 57 N. D. 295, 221 N. W. 75 (1928); *McClarran v. Longdin*, 24 Ohio App. 434, 157 N. E. 828 (1926).

the standards for measuring liability where the warranties of right to sell, quiet enjoyment, and freedom from encumbrances are broken.

The Merchants' Association of New York and its advisers have done excellent work in preparing this proposed Federal Sales Act. They are to be highly commended. But the Act should not be adopted in its present condition. It needs much more study, discussion, and revision. In an important matter affecting all the states the burden and responsibility of this work should not be left to the New York businessmen and lawyers. Experts from the field of business and law should be called in from various parts of the country. So far as I know this has not been done. Since the form of the Federal Act will inevitably determine the changes to be made in the Uniform State Act, the Commissioners on Uniform Laws, who will have to draft the amendments to the State Act, should be given an opportunity to present their views to the Merchants' Association of New York and to the Committee of Congress which is considering this Act. The Act is of national importance. It should not be rushed through Congress at the instigation of a local interest, no matter how large and well-informed that interest.

George G. Bogert.

UNIVERSITY OF CHICAGO LAW SCHOOL.