

PAPUA.



No. 3 of 1927.

AN ORDINANCE

For Codifying the Law Relating to the Sale of Goods.

J. H. P. MURRAY.

[L.S.]

9th June, 1927.

BE it enacted by the Lieutenant-Governor of the Territory of Papua with the advice and consent of the Legislative Council thereof as follows:—

PART I.—PRELIMINARY.

1. This Ordinance may be cited as the *Sale of Goods* Short title.
Ordinance, 1927.

2. This Ordinance shall commence on a date to be Commence-
fixed by the Lieutenant-Governor by Proclamation pub-ment.
lished in the *Gazette*.

Division.

3. This Ordinance is divided into Parts as follows:—

PART I.—PRELIMINARY ;

PART II.—FORMATION OF THE CONTRACT ;

PART III.—EFFECTS OF THE CONTRACT ;

PART IV.—PERFORMANCE OF THE CONTRACT ;

PART V.—RIGHTS OF UNPAID SELLER AGAINST THE
GOODS ;

PART VI.—ACTIONS FOR BREACH OF THE CONTRACT ;

PART VII.—SUPPLEMENTARY.

Repeal.

4. The enactments mentioned in the Schedule to this Ordinance are repealed as from the commencement of this Ordinance to the extent in that Schedule mentioned.

Schedule.

Savings.

But such repeal does not affect anything done or suffered or any right title or interest acquired or accrued before the commencement of this Ordinance or any legal proceeding or remedy in respect of any such thing right title or interest.

When in any Ordinance reference is made to any of the said repealed provisions such reference is to be taken to be made to the corresponding provisions of this Ordinance.

Interpretation
of terms.
Q. 60 Vic. No. 6,
s. 3.

5. In this Ordinance unless the context or subject matter otherwise requires:—

“Action” includes counter-claim and set-off;

“Buyer” means a person who buys or agrees to buy goods;

“Contract of Sale” includes an agreement to sell as well as a sale;

“Delivery” means voluntary transfer of possession from one person to another;

“Document of Title to Goods” has the same meaning as it has in the *Factors Ordinance, 1927*;

“Factors Ordinance” means the *Factors Ordinance, 1927*, and any enactment amending or substituted for the same;

“Fault” means wrongful act or default;

The term “Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale;

The term "Goods" includes all chattels personal other than things in action and moneys: The term also includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

"Plaintiff" includes a defendant counterclaiming;

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

"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;

The term "Specific goods" means goods identified and agreed upon at the time a contract of sale is made;

"Warranty" means an agreement with reference to goods which are the subject of a contract of sale but collateral to the main purpose of such contract the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

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

(3) A person is deemed to be insolvent within the meaning of this Ordinance 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 insolvency or not.

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

PART II.—FORMATION OF THE CONTRACT.

Contract of Sale.

6. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in

Sale and
agreement to
sell.
Q. 60 Vic. No. 6,
s. 4.

goods to the buyer for a money consideration called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) When under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but when the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time has elapsed or the conditions have been fulfilled subject to which the property in the goods is to be transferred.

Capacity to
buy and sell.
Q. 60 Vic. No. 6,
s. 5.

7. Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property:

Provided that when necessities are sold and delivered to an infant or to a person who by reason of mental incapacity or drunkenness is incompetent to contract he must pay a reasonable price therefor.

The term "Necessaries" in this section means goods suitable to the condition in life of such infant or other person and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

Contract of
sale, how
made.
Ib. s. 6.

8. Subject to the provisions of this Ordinance and of any Ordinance in that behalf a contract of sale may be made in writing (either with or without seal) or by word of mouth or partly in writing and partly by word of mouth or may be implied from the conduct of the parties:

This section does not affect the law relating to corporations.

Contract of
sale for Ten
pounds and
upwards.
Ib. s. 7.

9. (1) A contract for the sale of any goods of the value of Ten pounds or upwards is not enforceable by action unless the buyer accepts part of the goods so sold and actually receives the same or gives something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made procured or provided or fit or ready for delivery or that some act may be requisite for the making or completing thereof or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there is an acceptance in performance of the contract or not.

Subject Matter of Contract.

10. (1) The goods which form the subject of a contract of sale may be either existing goods owned or possessed by the seller or future goods. Existing or future goods. Q. 60 Vic. No. 6, s. 8.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) When by a contract of sale the seller purports to effect a present sale of future goods the contract operates as an agreement to sell the goods.

11. When there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made the contract is void. Goods which have perished. Ib. s. 9.

12. When there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer the agreement is avoided. Goods perishing before sale but after agreement to sell. Ib. s. 10.

The Price.

13. (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties. Ascertainment of price. Ib. s. 11.

(2) When the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Agreement
to sell at
valuation.
Q. 60 Vic. No. 6,
s. 12.

14. (1) When there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation the agreement is avoided: Provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price for them.

(2) When such third party is prevented from making the valuation by the fault of the seller or buyer the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

Stipulations as
to time.
Ib. s. 13.

15. (1) Unless a different intention appears from the terms of the contract stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *prima facie* calendar month.

When
condition to
be treated as
warranty.
Ib. s. 14.

16. (1) When a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract: A stipulation may be a condition though called a warranty in the contract.

(3) When a contract of sale is not severable and the buyer has accepted the goods or part thereof or when the contract is for specific goods the property in which has passed to the buyer the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated unless there is a term of the contract express or implied to that effect.

(4) This section does not affect the case of any condition or warranty the fulfilment of which is excused by law by reason of impossibility or otherwise.

17. In a contract of sale unless the circumstances of the contract are such as to show a different intention there is—

Implied undertaking as to title, etc. Q. 60 Vic. No. 6, s. 15.

- (1) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;
- (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
- (3) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

18. When there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and if the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Sale by description. Ib. s. 16.

19. Subject to the provisions of this Ordinance and of any law of the Territory in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:—

Implied conditions as to quality or fitness. Ib. s. 17.

- (1) When the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or

other trade name there is no implied condition as to its fitness for any particular purpose.

- (2) When goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods there is no implied condition as regards defects which such examination ought to have revealed.
- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade if the usage is such as to bind both parties to the contract.
- (4) An express warranty or condition does not negative a warranty or condition implied by this Ordinance unless inconsistent therewith.

Sale by Sample.

Sale by
sample.
Q. 60 Vic. No. 6,
s. 18.

20. (1) A contract of sale is a contract for sale by sample when there is a term in the contract express or implied to that effect.

- (2) In the case of a contract for sale by sample—
 - (a) there is an implied condition that the bulk shall correspond with the sample in quality;
 - (b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
 - (c) there is an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

PART III.—EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

Goods must
be ascertained
Ib. s. 19.

21. When there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.



22. (1) When there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Property passes when intended to pass.
Q. 60 Vic. No. 6, s. 20.

(2) For the purpose of ascertaining the intention of the parties regard is to be had to the terms of the contract the conduct of the parties and the circumstances of the case.

23. Unless a different intention appears the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer :—

Rules for ascertaining intention.
Ib. s. 21.

Rule 1.—When there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is or are postponed.

Rule 2.—When there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state the property does not pass until such thing is done and the buyer has notice thereof.

Rule 3.—When there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh measure test or do some other act or thing with reference to the goods for the purpose of ascertaining the price the property does not pass until such act or thing is done and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms the property therein passes to the buyer—

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction ;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection

then if a time has been fixed for the return of the goods on the expiration of such time and if no time has been fixed on the expiration of a reasonable time: What is a reasonable time is a question of fact.

Rule 5. (1) When there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller the property in the goods thereupon passes to the buyer. Such assent may be express or implied and may be given either before or after the appropriation is made;

(2) When in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal he is deemed to have unconditionally appropriated the goods to the contract.

Reservation
of right of
disposal.
Q. 60 Vic. No. 6,
s. 22.

24. (1) When there is a contract for the sale of specific goods or when goods are subsequently appropriated to the contract the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. In such case notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) When goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent the seller is *prima facie* deemed to reserve the right of disposal.

(3) When the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange the buyer is bound to return the bill of lading if he does not honour the bill of exchange

and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

25. Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not :

Risk prima facie passes with property. Q. 60 Vic. No. 6. s. 23.

Provided that when delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault :

This section does not affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Transfer of Title.

26. (1) Subject to the provisions of this Ordinance when goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Sale by person not the owner. Ib. s. 24.

(2) This Ordinance does not affect—

- (a) the provisions of the *Factors Ordinance, 1927*, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof ;
- (b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

27. When the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale the buyer acquires a good title to the goods if he buys them in good faith and without notice of the seller's defect of title.

Sale under voidable title. Ib. s. 25.

28. (1) When goods have been stolen and the offender is prosecuted to conviction the property in the goods so stolen revests in the person who was the owner of the goods

Revesting of property in stolen goods on conviction of offender. Ib. s. 26.

or his personal representative notwithstanding any intermediate dealing with them.

(2) Notwithstanding any enactment to the contrary when goods have been obtained by fraud or other wrongful means not amounting to larceny the property in such goods does not revert in the person who was the owner of the goods or his personal representative by reason only of the conviction of the offender.

Seller or
buyer in
possession
after sale.
Q. 60 Vic. No. 6,
s. 27.

29. (1) When a person having sold goods continues or is in possession of the goods or of the documents of title to the goods the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2) When a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the documents of title to the goods the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the *Factors Ordinance, 1927*.

Effect of writs
of execution.
Ib. s. 28.

30. (1) A writ of *fieri-facias* or other writ of execution against goods binds the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and for the better manifestation of such time it is the duty of the sheriff upon the receipt of any such writ to endorse upon the back thereof the hour day month and year when he received it.

But the delivery of such a writ to the sheriff does not prejudice the title to such goods acquired by any person in good faith and for valuable consideration unless such person had at the time when he acquired his title notice

that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

PART IV.—PERFORMANCE OF THE CONTRACT.

31. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Duties of seller and buyer.
Q. 60 Vic. No. 6, s. 29.

32. Unless otherwise agreed delivery of the goods and payment of the price are concurrent conditions that is to say the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Payment and delivery are concurrent conditions.
Ib. s. 30.

33. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract express or implied between the parties. Apart from any such contract express or implied the place of delivery is the seller's place of business if he has one and if not his residence: Provided that if the contract is for the sale of specific goods which to the knowledge of the parties when the contract is made are in some other place then that place is the place of delivery.

Rules as to delivery.
Ib. s. 31.

(2) When under the contract of sale the seller is bound to send the goods to the buyer but no time for sending them is fixed the seller is bound to send them within a reasonable time.

(3) When the goods at the time of sale are in the possession of a third person there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

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

(6) This section does not affect the operation of the issue or transfer of any document of title to goods.

Delivery of
wrong
quantity.
Q. 60 Vic. No. 6,
s. 32.

34. (1) When the seller delivers to the buyer a quantity of goods less than he contracted to sell the buyer may reject them but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) When 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. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

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

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

Instalment
deliveries.
Ib. s. 33.

35. (1) Unless otherwise agreed the buyer of goods is not bound to accept delivery of them by instalments.

(2) When there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for and the seller makes defective deliveries in respect of one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

Delivery to
carrier.
Ib. s. 34.

36. (1) When in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer delivery of the goods to a carrier whether named by

the buyer or not for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do and the goods are lost or damaged in course of transit the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.

(3) Unless otherwise agreed when goods are sent by the seller to the buyer by a route involving sea transit under circumstances in which it is usual to insure the seller must give such notice to the buyer as may enable him to insure them during their sea transit and if the seller fails to do so the goods are deemed to be at his risk during such sea transit.

37. When the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold the buyer must nevertheless unless otherwise agreed take any risk of deterioration in the goods necessarily incident to the course of transit.

Risk where goods are delivered at distant place.
Q. 60 Vic. No. 6, s. 35.

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

Buyer's right of examining the goods.
Ib. s. 36.

(2) Unless otherwise agreed when the seller tenders delivery of goods to the buyer he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

39. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

Acceptance.
Ib. s. 37.

Buyer not bound to return rejected goods.
Q. 60 Vic. No. 6, s. 38.

40. Unless otherwise agreed when goods are delivered to the buyer and he refuses to accept them having the right so to do he is not bound to return them to the seller but it is sufficient if he intimates to the seller that he refuses to accept them.

Liability of buyer for neglecting or refusing delivery of goods.
Ib. s. 39.

41. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery and the buyer does not within a reasonable time after such request take delivery of the goods he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods :

This section does not affect the rights of the seller if the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART V.—RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Unpaid seller defined.
Ib. s. 40.

42. (1) The seller of goods is deemed to be an “unpaid seller” within the meaning of this Ordinance—

- (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 not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this part of this Ordinance the term “seller” includes any person who is in the position of a seller as for instance an agent of the seller to whom the bill of lading has been endorsed or a consignor or agent who has himself paid or is directly responsible for the price.

Unpaid seller's right.
Ib. s. 41.

43. (1) Subject to the provisions of this Ordinance and of any Ordinance in that behalf notwithstanding that the property in the goods may have passed to the buyer the unpaid seller of goods as such has by implication of law—

- (a) a right to retain the goods 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 re-sale as limited by this Ordinance.

(2) When 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 co-extensive with his rights of retention and stoppage *in transitu* when the property has passed to the buyer.

Unpaid Seller's Right of Retention.

44. (1) Subject to the provisions of this Ordinance 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 :—

Seller's right of retention.
Q. 60 Vic. No. 6,
s. 42.

(a) When the goods have been sold without any stipulation as to credit ;

(b) When the goods have been sold on credit but the term of credit has expired ;

(c) When the buyer becomes insolvent.

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

45. When an unpaid seller has made part delivery of the goods he may exercise his right of retention on the remainder unless such part delivery has been made under such circumstances as to show an agreement to waive that right.

Part delivery.
Ib. s. 43.

46. (1) The unpaid seller of goods loses his right of retention—

Termination of right of retention.
Ib. s. 44.

(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;

(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 right of retention thereof does not lose that right by reason only that he has obtained judgment for the price of the goods.

Stoppage in Transitu.

Right of
stoppage in
transitu.
Q. 60 Vic. No. 6,
s. 45.

47. Subject to the provisions of this Ordinance when the buyer of goods 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 he may resume possession of the goods as long as they are in course of transit and may retain them until payment or tender of the price.

Duration of
transit.
Ib. s. 46.

48. (1) Goods are deemed to be in course of transit 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.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination the transit is at an end.

(3) 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 the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them the transit is not deemed to be at an end even if the seller has refused to receive them back.

(5) When 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 to the buyer.

(6) When the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf the transit is deemed to be at an end.

(7) When 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 to give up possession of the whole of the goods.

49. (1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking 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 communicate it to his servant or agent in time to prevent a delivery to the buyer.

How stoppage
in transitu is
effected.
Q. 60 Vic. No. 6,
s. 47.

(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 re-deliver the goods to or according to the directions of the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller.

50. Subject to the provisions of this Ordinance the unpaid seller's right of retention 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:

Effect of
sub-sale or
pledge by
buyer.
Ib. s. 48.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods and that person transfers the document to a person who takes the document in good faith and for valuable consideration then if such last-mentioned transfer was by way of sale the unpaid seller's right of retention or stoppage *in transitu* is defeated and if such last-mentioned transfer was by way of pledge or other disposition for value the unpaid seller's right of retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

51. (1) Subject to the provisions of this section a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of retention or stoppage *in transitu*.

Sale not
generally
rescinded by
lien or
stoppage *in
transitu*.
Ib. s. 49.

(2) When an unpaid seller who has exercised his right of retention or stoppage *in transitu* re-sells the goods the

buyer acquires a good title to them as against the original buyer.

(3) When the goods are of a perishable nature or when the unpaid seller gives notice to the buyer of his intention to re-sell and the buyer does not within a reasonable time pay or tender the price the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) When the seller expressly reserves a right of re-sale in case the buyer should make default and on the buyer making default re-sells the goods the original contract of sale is thereby rescinded but without prejudice to any claim that the seller may have for damages.

PART VI.—ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

Action for
price.
Q. 60 Vic. No. 6,
s. 50.

52. (1) When under a contract of 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 the seller may maintain an action against him for the price of the goods.

(2) When under a contract of sale the price is payable on a day certain irrespective of delivery 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.

Damages for
non-
acceptance.
Ib. s. 51.

53. (1) When 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) When there is an available market for the goods in question the measure of damages is prima facie to be ascertained by 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.

Remedies of the Buyer.

54. (1) When the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may maintain an action against the seller for damages for non-delivery.

Damages for non-delivery. Q. 60 Vic. No. 6. s. 52.

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

(3) When there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by 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.

55. In an action for breach of contract to deliver specific or ascertained goods the Court may if it thinks fit on the application of the plaintiff by its judgment direct that the contract shall be performed specifically without giving the defendant the option of retaining the goods on payment of damages. The judgment 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 and the application by the plaintiff may be made at any time before judgment.

Specific performance. *Ib.* s. 53.

56. (1) When there is a breach of warranty by the seller or when the buyer elects or is compelled to treat a breach of a condition on the part of the seller as a breach of warranty the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

Remedy for breach of warranty. *Ib.* s. 54.

- (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
- (b) maintain an action against the seller for damages for the breach of warranty.

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

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value which they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

Interest and special damages. Q. 60 Vic. No. 6, s. 55.

57. This Ordinance does not affect the right of a buyer or a seller to recover interest or special damages in any case in which by law interest or special damages are recoverable or to recover money paid when the consideration for the payment of it has failed.

PART VII.—SUPPLEMENTARY.

Exclusion of implied terms and conditions. *Ib.* s. 56.

58. When any right duty or liability would arise under a contract of 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 usage if the usage is such as to bind both parties to the contract.

Reasonable time a question of fact. *Ib.* s. 57.

59. Whenever in this Ordinance reference is made to a reasonable time the question what is a reasonable time is a question of fact.

Rights, etc., enforceable by action. *Ib.* s. 58.

60. When any right duty or liability is declared by this Ordinance it may unless by this Ordinance otherwise provided be enforced by action.

Auction sales. *Ib.* s. 59.

61. In the case of a sale by auction—

- (1) when goods are put up for sale by auction in lots each lot is *prima facie* deemed to be the subject of a separate contract for sale;
- (2) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner: Until such announcement is made any bidder may retract his bid;
- (3) when a sale by auction is not notified to be subject to a right to bid on behalf of the seller it is not lawful for the seller to bid himself or to employ any person to bid at such sale or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer;

- (4) a sale by auction may be notified to be subject to a reserved price and a right to bid may also be reserved expressly by or on behalf of the seller.

When a right to bid is expressly reserved but not otherwise the seller or any one person on his behalf may bid at the auction.

62. (1) The Rules in Insolvency relating to contracts of sale continue to apply thereto notwithstanding anything in this Ordinance contained.

Savings of
rules in
insolvency
and common
law.
Q. 60 Vic. No. 6,
s. 61.

(2) The rules of the common law including the law merchant save in so far as they are inconsistent with the express provisions of this Ordinance and in particular the rules relating to the law of principal and agent and the effect of fraud misrepresentation duress or coercion mistake or other invalidating cause continue to apply to contracts for the sale of goods.

(3) Nothing in this Ordinance or in any repeal effected by it affects the enactments relating to bills of sale or any enactment relating to the sale of goods which is not expressly repealed by this Ordinance.

(4) The provisions of this Ordinance relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage pledge charge or other security.

Passed in Council this ninth day of June, in the year of Our Lord One thousand nine hundred and twenty-seven.

SCHEDULE.

Number and Year of Act or Ordinance.	Title of Act or Ordinance and Extent of Repeal.
31 Vic. No. 22 (Queensland adopted) ...	<i>Statute of Frauds and Limitations of 1867—</i> In part, that is to say, Section 8.
No. 38 of 1912...	<i>Mercantile Ordinance, 1912-1924—</i> In part, that is to say, Section 3A.