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Sales: Result of Buyer's Receipt of Defective Goods in Installment Contracts with Knowledge of the Defect

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SALES: RESULT OF BUYER'S RECEIPT OF DEFECTIVE GOODS IN INSTALLMENT CONTRACTS WITH KNOWLEDGE OF THE DEFECT

A buyer who knowingly accepts defective goods cannot rescind the sale.[1] However, under the Uniform Sales Act, he can accept or keep the goods and maintain an action against the seller for damages for breach of warranty, unless the parties have made an express agreement or an accord to the contrary.[2] Cases involving these agreements and accords are rare, and, generally, the buyer will recover his damages.

The courts usually have little difficulty in interpreting the two sections of the Uniform Sales Act[4] which define the rights of a buyer against a defaulting seller in ordinary contract cases. The difficulty arises when the cases concern installment contracts. It has been said:

> "There are few questions arising out of contracts of sale on which the authorities have been in more hopeless discord than the question of the right of one party to a contract providing for the delivery of the commodity sold in installments and the payment therefor as delivered to rescind or treat the contract at an end for a default of the other party with respect to one instalment."[5]

Pertinent parts of the section of the Uniform Sales Act which relates to installment contracts provide:

> "Where there is a contract to sell goods to be delivered by stated installments and the seller makes defective deliveries in respect to one or more installments it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing

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[1] UNIFORM SALES ACT, sec. 69 (3), Scriven v Hecht, 287 Fed. 853 (C.C.A. 2d 1923), Bannınger v. Landfield, 209 Wis. 327, 245 N.W 113 (1932), RESTATEMENT, CONTRACTS, sec. 353.

[2] UNIFORM SALES ACT, sec. 49, 69; Lewis v. Conrad & Co., 305 Mass. 437, 42 N.E. 2d 732 (1942).

[3] Rubin v. Crowley, Milner & Co., 214 Mich. 365, 183 N.W 51 (1921), Joseph F Rothe Foundry Co. v. Harding, 180 Wis. 14, 191 N.W 551 (1923). There was such an agreement in Bishop v. Descalsi, 45 Cal. App. 228, 189 Pac. 122 (1920). A crop of oranges was sold while still on the trees. Later, after they had been damaged by frost, the buyer inspected them and elected to take them in their damaged condition. In an action by the seller for the purchase price, the buyer was not allowed to recoup damages.

[4] UNIFORM SALES ACT, secs. 49, 69.

[5] 46 AM. JUR. (1943) *Sales*, sec. 267.

> for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."[6]

It is to be noted that the quoted section is mainly concerned with the problem of when the injured party can rescind instead of merely having damages. There are many cases interpreting this question. However, in installment contracts, as with single performance contracts, a buyer who knowingly accepts defective performance, waives his right to rescind and is limited to an action for damages.[5] Therefore, this section is of little help in the determination of the present problem.

In the absence of an express agreement which is controlling, three situations may arise: (1) the prior installment may be proper and the subsequent installment defective, (2) the prior installment may be defective and the subsequent installment proper, (3) the prior installment may be defective and the subsequent installment also defective.

First. The acceptance of installments which comply with the contract does not affect the buyer's right to refuse to accept subsequent installments which are defective in quality.[9]

Second. The buyer who knowingly accepts a defective installment thereby waives his right to rely upon such defect as a ground for refusing to receive subsequent installments which conform to the contract.[10] In *George Cahen* v. *John R. Platt*[11] the buyer received and kept installments of defective glass. The court held that although the buyer could demand glass of the stipulated quality and

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[6] UNIFORM SALES ACT, sec. 45 (2)

See 46 AM. JUR. (1943) Sales, sec. 272, n. 4 and cases therein cited; Note (1919) 2 A.L.R. at 659.

[8] J. W Ellison, Son & Co., v. Flat Top Grocery Co., 69 W Va. 380, 71 S.W 391 (1911) *Compare* Wolfert v Caledonia Springs Ice Co., 195 N. Y. 118, 88 N.E. 24 (1909) which was decided two years before New York adopted the Uniform Sales Act. The court allowed the buyer to rescind upon presentment of one defective performance although he had previously accepted installments conforming to the contract.

[9] O'Bryan v Mengel Co., 224 Ky 284, 6 S.W 2d 249 (1928), Jackson v. Rotax Motor & Cycle Co., 2 K.B. (Eng.) 937, 20 Ann. Cas. 523 (1910) (a case decided under the English Sale of Goods Act which is very similar to our Uniform Sales Act)

[10] Harding, Whitman & Co. v York Knitting Mills, 142 Fed. 228 (C.C.M.D. Pa. 1905) Sachs Shoe Co. v. Maysville Suit & Dry Goods Co., 201 Ky 239, 256 S.W 401 (1923), Shotwell-Johnson Co. v. C.O.D. Tractor Co., 154 Minn. 417, 191 N.W 813 (1923). However, if the prior defective performance had not been knowingly received, and if the breach is material, the buyer may terminate the contract. *See* 1 UNIFORM LAWS ANNOTATED (1931) 246; *3* WILLISTON, CONTRACTS (rev. ed., 1936) sec. 868.

[11] 69 N. Y. 348 (1877).

refuse to accept further defective performance, he would be liable for breach of contract if he refused to receive future installments conforming to the contract.

The results reached in both the first and second situations seem to be established by most of our courts. This is not so with the third situation.

Third. In cases where the buyer has received prior defective performance and the seller tenders him subsequent defective performance of the same kind, the courts have reached wide and varying results. Consider the following instances. Courts have held that the buyer is required to accept similar defective performance.[12] Other cases hold that the buyer may insist upon his right to receive subsequent goods conforming to the contract,[13] providing he gives proper notice.[14] Still other courts hold that the buyer may when he has complained of the prior installments and the performance continues to be defective, cancel the contract.[15] Often equity is done in individual cases, but the numerous conflicting decisions concerning the rights of the parties under a contract will only impede commerce. It is submitted that a buyer should have a right to refuse further defective performance without giving notice, unless such notice is reasonably necessary to prevent the seller's incurring further expense by unknowingly continuing defective performance. To state this another way, the buyer is justified in refusing further defective performance unless he is estopped because his failure to give notice caused the seller to change his position to his detriment. Such an estoppel is found in *McDonald* v. *Kansas City Bolt & Nut Co.*[16] Under an installment contract the seller manufactured and furnished the buyer special steel pipe bands having a latent defect which the buyer discovered when he tried to use some of the bands from the first shipment. The court said that before he received subsequent installments, the buyer had an option to perform, or to refuse to perform, the remainder of the contract. But silence, delay, or failure to give notice of his choice to refuse was a choice to perform and destroyed the option.

One thing which should always be kept in mind in cases where the buyer knowingly accepts defective goods with knowledge of the defect is that, although the buyer by acceptance waives his

[12] Weil v. Unique Electric Device Co., 80 N. Y. Supp. 484 (1902).

[13] McFadden v. George C. Wetherbee & Co., 63 Mich. 390, 29 N.W 881 (1886).

[14] Remington Arms Union Metallic Cartridge Co. Inc., v. Gaynor Mfg. Co., 98 Conn. 721, 120 Atl. 572 (1923), Troy Carriage Sun Shade Co. v F A. Ames Co., 201 Ky. 193, 256 S.W 27 (1923).

[15] Dexter Yarn Co., v. American Fabrics Co., 102 Conn. 529, 129 Atl. 527 (1925), Red Star Milling Co., v. Moses, 176 Miss. 634, 169 So. 785 (1936) Valley Refining Co. v. Rock Island Refining Co., 167 Okla. 266, 29 P 2d 117 (1934).

[16] 149 Fed. 360 (C.C.A., 8th, 1906).

right to terminate the contract, he does not waive his right to recover damages for the breach thereof.[17] Of course, the buyer cannot continue to receive defective performance throughout the contract with no word of protest and then seek to recoup damages from an unsuspecting seller;[18] but the law would indeed be harsh if the buyer were forced to elect whether he should reject the entire shipment or pay full price for defective merchandise.

The results of the buyer's acceptance of defective performance are nearly always predictable in non-installment contract cases. However, there is a surprising lack of uniformity in decisions where a buyer knowingly receives defective performance of an installment contract. It is suggested that the following results could and should be reached in installment contract cases where the contract contains no express controlling provisions:

1. When the buyer is tendered defective performance after he has accepted prior installments conforming to the contract, he can refuse to receive the defective performance.

2. When the buyer is tendered an installment conforming to the contract after accepting prior defective performance with knowledge of the defect, he must accept the installment or be liable for breach of contract.

3. When the buyer is tendered a defective installment after he has received other similarly defective installments without complaint, he need not receive the installment unless his failure to give notice to the seller caused the seller to change his position to his detriment.

4. Although by knowingly receiving defective performance the buyer waives his right to rescind the contract, he is still entitled to damages.

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[17] John Service, Inc. v. Goodnow-Pearson Co., 242 Mass. 594, 136 N.E. 623 (1922).

[18] Pfaudler Co. v. Westphal, 190 Wis. 486, 209 N.W 700 (1926).