

Malawi

## Sale of Goods Act

### Chapter 48:01

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# Malawi

## Sale of Goods Act

### Chapter 48:01

Assented to on 24 July 1967

Commenced on 28 July 1967

*[This is the version of this document at 31 December 2014.]*

*[Note: This version of the Act was revised and consolidated in the Fifth Revised Edition of the Laws of Malawi (L.R.O. 1/2018), by the Solicitor General and Secretary for Justice under the authority of the Revision of the Laws Act.]*

#### An Act to regulate the Sale of Goods

### Part I – Preliminary

#### 1. Short title

This Act may be cited as the Sale of Goods Act.

#### 2. Interpretation

(1) In this Act, except where the context otherwise requires—

"**action**" includes counterclaim 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**" includes any bill of lading, dock warrant, warehouse-keeper's certificate or warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;

"**fault**" means wrongful act or default;

"**future goods**" means goods to be manufactured or acquired by the seller after the making of the contract of sale;

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

"**minor**" means an unmarried person under the age of twenty-one years;

"**plaintiff**" includes 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;

"**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 Act when it is in fact done honestly, whether it be done negligently or not.
- (3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not.
- (4) Goods are in a deliverable state within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

## **Part II – Formation of the contract**

### **Contract of sale**

#### **3. Sale and agreement to sell**

- (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.
- (2) There may be a contract of sale between one part owner and another.
- (3) A contract of sale may be absolute or conditional.
- (4) Where 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, where 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.
- (5) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

#### **4. Capacity to buy and sell**

- (1) Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property:  
  
Provided that, where necessities are sold and delivered to a minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.
- (2) Necessaries in this section means goods suitable to the condition in life of such minor or other person, and to his actual requirements at the time of the sale and delivery.

### **Formalities of the contract**

#### **5. Contract of sale, how made**

Subject to this Act and any written law 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:

Provided that nothing in this section shall affect the law relating to corporations.

## 6. Contract of sale for ten pounds or more to be in writing

- (1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be 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) This section shall 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 some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.
- (3) There shall be 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 be an acceptance in performance of the contract or not.

### Subject matter of contract

## 7. Existing or future goods

- (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale.
- (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) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract shall operate as an agreement to sell the goods.

## 8. Sale of perished goods

Where 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 shall be void.

## 9. Goods perished after agreement to sell

Where 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 shall be thereby avoided.

### The price

## 10. Ascertainment of price

- (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner thereby agreed, or may be determined by the course of dealing between the parties.
- (2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price, and what is a reasonable price shall be a question of fact dependent on the circumstances of each particular case.

## 11. Agreement to sell at valuation

- (1) Where 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 shall be 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 therefor.

- (2) Where 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

### 12. Stipulations as to time

- (1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment shall not be deemed to be of the essence of a contract of sale.
- (2) Whether any other stipulation as to time is of the essence of the contract or not shall depend on the terms of the contract.
- (3) In a contract of sale, "month" means *prima facie* calendar month.

### 13. When condition to be treated as warranty

- (1) Where 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 goods and treat the contract as repudiated, shall depend in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.
- (3) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any conditions 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 contract as repudiated, unless there be a term of the contract express or implied, to that effect.
- (4) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

### 14. Condition and warranties implied in contracts of sale

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there shall be—

- (a) 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;
- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
- (c) 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.



## 15. Conditions implied by description

Where 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.

## 16. No implied warranty as to fitness, except in certain cases

Subject to this Act and any written law in that behalf, there shall be 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—

- (a) where 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 be the manufacturer or not), there shall be 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 shall be no implied condition as to its fitness for any particular purpose;

- (b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there shall be an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

- (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
- (d) an express warranty or condition shall not negative a warranty or condition implied by this Act unless inconsistent therewith.

## Sale by sample

## 17. Sale by sample

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

## Part III – Effects of the contract

### Transfer of property as between seller and buyer

#### 18. Property in unascertained goods

Where there is a contract for the sale of unascertained goods, no property in the goods shall be transferred to the buyer unless and until the goods are ascertained.

#### 19. Property in specific or ascertained goods passes when intended to pass

- (1) Where there is a contract for the sale of specific or ascertained goods, the property in them shall be transferred to the buyer at such time as the parties to the contract intend it to be transferred.
- (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

#### 20. Rules for ascertaining intention as to time when property passes

Unless a different intention appears, the following rules shall apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—

- (a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods shall pass to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;
- (b) where 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 shall not pass until such thing be done, and the buyer has notice thereof;
- (c) where 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 shall not pass until such act or thing be done, and the buyer has notice thereof;
- (d) when goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein shall pass to the buyer—
  - (i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
  - (ii) 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, or, if no time has been fixed, on the expiration of a reasonable time;
- (e)
  - (i) where 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 shall pass to the buyer; such assent may be express or implied, and may be given either before or after the appropriation is made;
  - (ii) where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he shall be deemed to have unconditionally appropriated the goods to the contract.

## 21. Reservation by seller of right of disposal

- (1) Where there is a contract for the sale of specific goods, or where 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; and in such case notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods shall not pass to the buyer until the conditions imposed by the seller are fulfilled.
- (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller shall be *prima facie* deemed to reserve the right of disposal.
- (3) Where 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 shall be 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 shall not pass to him.

## 22. Risk *prima facie* passes with property

Unless otherwise agreed, the goods shall 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 shall be at the buyer's risk whether delivery has been made or not:

Provided that—

- (a) where delivery has been delayed through the fault of either buyer or seller the goods shall be at the risk of the party in fault as regards any loss which might not have occurred but for such fault;
- (b) nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

## Transfer of title

## 23. Sale by person not the owner

- (1) Subject to this Act, where 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 shall acquire 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.
- (2) Nothing in this Act shall affect—
  - (a) any written law 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.

## 24. Sale under voidable title

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 shall acquire a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

## 25. Revesting of property in stolen goods on conviction of offender

- (1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen shall revert in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale or otherwise.
- (2) Notwithstanding any written law to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to theft, the property in such goods shall 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.

## 26. Resale of goods in certain cases

- (1) Where 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 shall have 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) Where 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 to 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 shall have 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, "mercantile agent" means a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

## 27. Effect of writs of execution

- (1) A writ of *fieri facias* or other writ of execution against goods shall bind 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 shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month and year when he received the same:

Provided that no such writ shall 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, "sheriff" includes any officer charged with the enforcement of a writ of execution.

## Part IV – Performance of the contract

### 28. Duties of seller and buyer

It shall be 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.

## 29. Payment and delivery concurrent conditions

Unless otherwise agreed, delivery of the goods and payment of the price shall be 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.

## 30. Rules as to delivery

- (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer shall be a question depending in each case on the contract, express or implied, between the parties; and apart from any such contract, express or implied, the place of delivery shall be the seller's place of business, if he have 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 shall be the place of delivery.

- (2) Where 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 shall be bound to send them within a reasonable time.
- (3) Where the goods at the time of sale are in the possession of a third person, there shall be no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

- (4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour shall be 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.

## 31. Delivery of wrong quantity or description

Where 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) 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; and if the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.
- (3) Where the seller delivers to the buyer the goods 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) This section shall be subject to any usage of trade, special agreement or course of dealing between the parties.

## 32. Delivery by instalments

- (1) Unless otherwise agreed, the buyer of goods shall not be bound to accept delivery thereof by instalments.
- (2) Where there is a contract for the sale of goods to be delivered by stated instalments and 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 shall be 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.

### 33. Delivery to carrier as buyer's agent

- (1) Where, 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 the carrier, whether named by the buyer or not, for the purpose of transmission to the buyer shall *prima facie* be 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; and 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, where 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 shall be deemed to be at his risk during such sea transit.

### 34. Risk where goods delivered elsewhere than at place of sale

Where 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.

### 35. Buyer's right of examining the goods

- (1) Where goods are delivered to the buyer which he has not previously examined, he shall not be 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.
- (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he shall be 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.

### 36. Acceptance

The buyer shall be 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.

### 37. Buyer is not bound to return rejected goods

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

### 38. Liability of buyer for neglecting or refusing delivery of goods

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 shall be 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:

Provided that nothing in this section shall affect the rights of the seller where 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

### 39. Unpaid seller defined

- (1) The seller of goods shall be deemed to be an unpaid seller within the meaning of this Act—
  - (a) when the whole of the price has not been paid or tendered;
  - (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.
- (2) In this Part, "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.

### 40. Rights of unpaid seller

- (1) Subject to this Act and any written law in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, shall have by implication of law—
  - (a) a lien on the goods or right to retain them for the price while he is in possession of them;
  - (b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;
  - (c) a right of resale as limited by this Act.
- (2) Where the property in goods has not passed to the buyer, the unpaid seller shall have, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

## Unpaid seller's lien

### 41. Seller's lien

- (1) Subject to this Act, the unpaid seller of goods who is in possession of them shall be entitled to retain possession of them until payment or tender of the price in the following cases, namely—
  - (a) where the goods have been sold without any stipulation as to credit;
  - (b) where the goods have been sold on credit, but the term of credit has expired;
  - (c) where the buyer becomes insolvent.
- (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

### 42. Lien after part delivery

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

**43. Termination of lien**

- (1) The unpaid seller of goods shall lose his lien or right of retention thereon—
  - (a) when he delivers the goods to a carrier or other bailee or custodian 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 lien or right of retention thereon, shall not lose his lien or right of retention by reason only that he has obtained judgment or a decree for the price of the goods.

**Stoppage in transitu****44. Right of stoppage in transitu**

Subject to this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods shall have 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.

**45. Duration of transit**

- (1) Goods shall be deemed to be in course of transit from the time when they are delivered to a carrier by land, air or water, or other bailee or custodian for the purposes of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee or custodian.
- (2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit shall be at an end.
- (3) If, after the arrival, of the goods at the, appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit shall be at an end, and it shall be 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 or custodian continues in possession of them, the transit shall not be deemed to be at an end, even if the seller has refused to receive them back.
- (5) When the goods are delivered to a ship chartered by the buyer, it shall be 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) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit shall be deemed to be at an end.
- (7) Where 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.

**46. Mode of stoppage in transitu**

- (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 or custodian in whose possession the goods are; and such notice may be given either to the person in actual possession of



the goods or to his principal; and 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.

- (2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller; and the expenses of such redelivery must be borne by the seller.

### **Resale by buyer or seller**

#### **47. Effect of subsale or pledge by buyer**

Subject to this Act, the unpaid seller's right of lien or retention or stoppage in transitu shall not be affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto:

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 lien or retention or stoppage in transitu shall be defeated, and, if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu shall only be exercised subject to the rights of the transferee.

#### **48. Effect on sale of exercise of lien or stoppage in transitu**

- (1) Subject to this section, a contract of sale shall not be rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.
- (2) Where an unpaid seller who, has exercised his right of lien or retention or stoppage in transitu resells the goods, the buyer shall acquire a good title thereto as against the original buyer.
- (3) Where goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.
- (4) Where the seller expressly reserves a right of resale in case the buyer should make default, and, on the buyer making default, resells the goods, the original contract of sale shall thereby be rescinded, but without prejudice to any claim the seller may have for damages.

## **Part VI – Actions for breach of contract**

### **Remedies of the seller**

#### **49. Action for price**

- (1) Where, 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) Where, 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.

**50. Action for non-acceptance**

- (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
- (2) The measure of damages shall be the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
- (3) Where there is an available market for the goods in question, the measure of damages shall *prima facie* 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****51. Action for non-delivery**

- (1) Where 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.
- (2) The measure of damages shall be the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
- (3) Where there is an available market for the goods in question the measure of damages shall *prima facie* 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.

**52. Right to specific performance**

- (1) In any action for breach of contract to deliver specific or ascertained goods the courts may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.
- (2) The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

**53. Remedy for breach of warranty**

- (1) Where there is a breach of warranty by seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer shall not by reason only of such breach of warranty be entitled to reject the goods; but he may—
  - (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 shall be 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 shall *prima facie* be the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
- (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price shall not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

#### 54. Interest and special damages

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

### Part VII – Supplementary

#### 55. Variation, etc., of implied rights

Where 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 be such as to bind both parties to the contract.

#### 56. Reasonable time

Where, by this Act, any reference is made to a reasonable time, the question what is reasonable time shall be a question of fact.

#### 57. Rights, etc., enforceable by action

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

#### 58. Auction sales

- (1) In the case of sale by auction—
  - (a) where goods are put up for sale by auction in lots, each lot shall *prima facie* be deemed to be the subject of a separate contract of sale;
  - (b) a sale by auction shall be complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner; and until such announcement is made any bidder may retract his bid;
  - (c) where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be 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; and any sale contravening this rule may be treated as fraudulent by the buyer;
  - (d) a sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.
- (2) Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

#### 59. Savings

- (1) The rules in bankruptcy-relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.
- (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 Act, 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, shall continue to apply to contracts for the sale of goods.
- (3) Nothing in this Act shall affect any written law relating to bills of sale or any other written law relating to the sale of goods.

- (4) The provisions of this Act relating to contracts of sale shall 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.