Chapter 72

Sales

Chapter 72

CASE CITATIONS: Evans Prods. Co. v. Jorgensen, (1966) 245 Or 362, 421 P2d 978; Lanners v. Whitney, (1967) 247 Or 223, 428 P2d 398.

72.1010 to 72.1070

LAW REVIEW CITATIONS: 30 OLR 139-149.

72.1020

NOTES OF DECISIONS

A former similar statute was not applicable to mortgages. Lockwood v. Gugin, (1933) 142 Or 138, 18 P2d 246.

72.1030

LAW REVIEW CITATIONS: 43 OLR 51.

72.1040

LAW REVIEW CITATIONS: 7 OLR 358.

72.1050

NOTES OF DECISIONS

Things in action were not goods within the meaning of a former similar statute. Braden v. Hall, (1933) 143 Or 367, 21 P2d 1094.

Under former similar statute the word "goods" did not include standing timber where the sales contract did not require its removal at any stated time or at all. Reid v. Kier, (1944) 175 Or 192, 152 P2d 417.

The former similar statute was applicable only to the sale of "goods" as defined and was not applicable where a contract included in nonsegregated form both real and personal property. Huebener v. Chinn, (1949) 186 Or 508, 207 P2d 1136.

FURTHER CITATIONS: Shull v. State Tax Comm., (1963) 1 OTR 445.

LAW REVIEW CITATIONS: 5 OLR 165, 249; 18 OLR 171; 42 OLR 159; 47 OLR 267, 285.

72.1060

NOTES OF DECISIONS

Under former similar statute where goods were delivered to processor by owner-grower, and no sale price was agreed upon, but it was agreed that processor should process and hold the goods for market rise, and processor knew owner had pledged goods, the transaction was a bailment rather than a sale. Montgomery v. United States Nat. Bank, (1960) 220 Or 553, 349 P2d 464.

FURTHER CITATIONS: Oregon Research Institute, Inc. v. Dept. of Rev., (1971) 4 OTR 433.

72.1070

NOTES OF DECISIONS

Under former similar statute contract for the sale of timber requiring severance by the purchaser brought the transaction within the definition of "goods". Paullus v. Yarbrough, (1959) 219 Or 611, 347 P2d 620, 79 ALR2d 1222.

LAW REVIEW CITATIONS: 36 OLR 282; 47 OLR 267.

72.2010 to 72.2100

LAW REVIEW CITATIONS: 30 OLR 149-163.

72.2010

NOTES OF DECISIONS

1. In general
2. Under former similar statutes
   (1) Cases decided under ORS 75.040
      (a) In general
      (b) Acts validating contract
      (c) Necessity of expressing the consideration
      (d) Contract taken out of statute
      (e) Pleading and proof
   (2) Cases decided under ORS 41.590
      (a) In general
      (b) Contract to manufacture
      (c) Part performance
      (d) Goods delivered and accepted
      (e) Part payment

1. In general

The parties are presumed to know that this section requires the terms of a transaction discussed by telephone to be reduced to writing. Oregon-Pacific Prod. Co. v. Welsh Panel Co., (1965) 248 F Supp 903.

Both contracts were a part of the agreement and had to be read together. Id.

2. Under former similar statutes

(1) Cases decided under ORS 75.040

(a) In general. The enactment of ORS 75.040 operated to repeal by implication ORS 41.590 to the extent it was inconsistent with ORS 75.040. Fredenburg v. Horn, (1923) 108 Or 672, 218 P 939.

Where section required a contract to be in writing or evidenced by a written memorandum, terms of contract could not be varied by subsequent oral agreements. Willman v. Alver, (1958) 252 F2d 895.

(b) Acts validating contract. While partial performance of oral contract relative to conveyance of land could take a contract out of the statute of frauds, partial performance did not apply to a contract for the sale of goods. Michelin Tire Co. v. Williams, (1928) 125 Or 689, 268 P 56.

An oral contract for the sale of hay was taken out of the statute by the act of the buyer in harvesting the crop and causing it to be hauled to and ricketed in his own stackyard. Klingback v. Mendiola, (1931) 138 Or 234, 6 P2d 237.

Acceptance and actual receipt or payment had to be exclusively referable to the contract. Howland v. Iron Fireman Mfg. Co., (1950) 188 Or 230, 213 P2d 177, 215 P2d 380.

(c) Necessity of expressing the consideration. The note or memorandum did not need to express the consideration. Fredenburg v. Horn, (1923) 108 Or 672, 218 P 939.

(d) Contract taken out of statute. An oral dealership contract of purchase and sale was not taken out of the statute by reason of terms also establishing an agency relationship, where the contract was indivisible. Howland v. Iron Fireman Mfg. Co., (1950) 188 Or 230, 213 P2d 177, 215 P2d 380.

A counterclaim not based on the alleged oral contract did not waive the statute. Id.

(e) Pleading and proof. Whether machinery was delivered by seller under contract of sale and accepted by buyer was a jury question. Imperial Laundry Co. v. Allen, (1933) 143 Or 71, 20 P2d 217.

A party who sought to enforce an oral contract for the sale of goods had to show by a preponderance of the evidence that there was delivery, acceptance and actual receipt of some part of the goods, or that something was given in earnest to bind the bargain or in part payment. Howland v. Iron Fireman Mfg. Co., (1950) 188 Or 230, 213 P2d 177, 215 P2d 380.

The issue of whether acceptance and actual receipt or payment was exclusively referable to an oral contract should have been submitted to the jury. Id.

(2) Cases decided under ORS 41.590

(a) In general. An oral agreement to deliver goods exceeding $50 in value in payment of an antecedent debt was within the statute of frauds. Milos v. Covacevich, (1901) 40 Or 239, 66 P 914.

A contract for the sale of goods, being in excess of $50, was void in the absence of part payment, written evidence or partial performance. Bagot v. Inter-Mountain Milling Co., (1921) 100 Or 127, 196 P 824.

The section was applicable to a barter. Aya v. Morson, (1919) 90 Or 647, 178 P 207.

Verbal options were void for want of written memorandum, absence of part performance, and nonpayment of any part of the purchase price. Leadbetter v. Price, (1922) 103 Or 222, 202 P 104.

Verbal options to repurchase stock given at the time of the purchase of stock were based on consideration and part performance and not within the statute of frauds. Id.

(b) Contract to manufacture. An oral contract to manufacture iron works for a certain building according to special designs for use only in that particular building was not an agreement for sale of personal property. Heintz v. Burkhard, (1896) 29 Or 55, 43 P 866, 31 LRA 608.

A contract for the sale of articles then existing or such as the vendor procures for the general market whether on hand at the time or not was a contract for the sale of goods. Courtney v. Bridal Veil Box Factory, (1909) 55 Or 210, 105 P 896.

A contract to manufacture goods upon special order and not for the general market was not a contract for the sale of goods. Id.

A contract to purchase all the railroad ties cut at seller's mill during a six month period was not within the statute of frauds. Stuart v. Univ. Lbr. Co., (1913) 66 Or 546, 132 P 1, 1164, 135 P 165.

(c) Part performance. The acts relied upon to constitute part performance had to have reference to the contract and clearly appear to have been done solely with a view to its performance. Reynolds v. Scriber, (1902) 41 Or 407, 69 P 48.

Where a parol agreement had been so far executed by one party with the assent and acquiescence of the other that it would amount to fraud to allow the latter to repudiate it a court of equity would interfere and compel specific performance. Id.

(d) Goods delivered and accepted. An agreement was taken out of the statute of frauds where part or all of the goods were delivered and accepted. Meyer, Wilson & Co. v. Thompson De Hart & Co., (1888) 16 Or 194, 18 P 16; Duzan v. Meserve, (1893) 24 Or 523, 34 P 548; Richey v. Robertson, (1917) 86 Or 525, 169 P 99; Newman v. Multnomah Fuel Co., (1919) 93 Or 247, 183 P 1; Naftzger v. Henneman, (1919) 94 Or 109, 185 P 233.

The clause "unless the buyer. . . .accept. . . .and receive" some part of the personal property was intended to require such proof of the existence of the contract as would be an impediment to fraud, perjury and mistake. Galvin v. MacKenzie, (1891) 21 Or 184, 27 P 1039.

To constitute an acceptance the purchaser had to so deal with the property as to prove he acknowledged the contract, and the vendor had to intend to vest the right of possession in the vendee. Id.

The delivery of a bill of lading of a car of wheat by indorsement in blank to the purchaser was sufficient to take the transaction out of the statute of frauds. Wadhams v. Balfour, (1898) 32 Or 313, 51 P 642.

Evidence was insufficient to show acceptance and receipt of cattle, or some part thereof, so as to satisfy the statute. Brown v. Sheedy, (1918) 90 Or 74, 175 P 613.

(e) Part payment. The statute required the payment to be made at the time of the agreement, and it was doubtful whether a subsequent payment would suffice, unless it was made for the express purpose of complying with the statute, or at a time when the parties substantially restated or reaffirmed the terms of the contract. Milos v. Covacevich, (1901) 40 Or 239, 241, 66 P 914.

FURTHER CITATIONS: Yarnberg v. Watson, (1884) 13 Or 11, 4 P 296; Brigham v. Hibbard, (1896) 28 Or 386, 43 P 383; Champion v. Hammer, (1946) 178 Or 595, 169 P2d 119; Wadhams v. Inman, (1900) 38 Or 143, 63 P 11; Meier & Frank Co. v. Sabin, (1914) 214 Fed 231; Universal Ins. Co. v. Steinbach, (1948) 170 F2d 303.

LAW REVIEW CITATIONS: 1 OLR 9; 1 OLR 124; 42 OLR 133-175.

72.2040

NOTES OF DECISIONS

Under former similar statute where the language of a written contract was vague and ambiguous and fraud was alleged it was competent to show by oral testimony what quality of goods defendant agreed to sell. Klinge v. Farris, (1929) 128 Or 142, 268 P 748, 273 P 954.

72.2080

LAW REVIEW CITATIONS: 7 OLR 358.

72.3010 to 72.3280

LAW REVIEW CITATIONS: 30 OLR 212-347; 4 WLJ 291-310, 315-323.

72.3010

CASE CITATIONS: Jeffries v. Pankow, (1924) 112 Or 439, 223 P 745, 229 P 903.

72.3020

LAW REVIEW CITATIONS: 4 WLJ 364-377.

72.3040

LAW REVIEW CITATIONS: 42 OLR 133-175.

72.3050

NOTES OF DECISIONS

Under former similar statute a letter offering to buy a business, but not stating the price to be paid for the stock, could not be construed as more than an offer to pay a reasonable price for it. Ellingsworth v. Shannon, (1939) 161 Or 106, 88 P2d 293.

FURTHER CITATIONS: Anchor Petroleum Co. v. Buller, (1960) 225 Or 10, 357 P2d 408; Oregon-Wash. Vegetable & Fruit Growers Assn. v. Sunset Packing Co., (1969) 254 Or 33, 456 P2d 1002.

72.3070

LAW REVIEW CITATIONS: 7 WLJ 109.

72.3090

NOTES OF DECISIONS

Termination of a contract is required to be in good faith. Tele-Controls, Inc. v. Ford Industries, Inc., (1967) 388 F2d 48.

72.3100

NOTES OF DECISIONS

1. Under former similar statute

An acceptance specifying payment on 60 days' time amounted to a rejection of an offer to sell goods which stated no time for payment. Shaw Wholesale Co. v. Hackbarth, (1921) 102 Or 80, 198 P 908, 201 P 1066.

Delivery and payment were concurrent conditions unless otherwise agreed. Weyerhaeuser Timber Co. v. First Nat. Bank of Portland, (1935) 150 Or 172, 38 P2d 48, 43 P2d 1078.

The fact that time was required in which to procure the money for payment does not alter the character of a cash sale. Id.

Where a cash sale was intended title did not pass upon seller's receipt of worthless check. Nugent v. Union Automobile Ins. Co., (1932) 140 Or 61, 13 P2d 343; Weyerhaeuser Tbr. Co. v. First Nat. Bank, (1935) 150 Or 172, 38 P2d 48, 43 P2d 1078; Keegan v. Lenzie, (1943) 171 Or 194, 135 P2d 717; Tyler v. Kelley Tbr. Prod. Co., (1951) 192 Or 368, 233 P2d 774.

FURTHER CITATIONS: Allen v. Baker, (1923) 109 Or 443, 220 P 574; Smith v. Abel, (1957) 211 Or 571, 316 P2d 793.

72.3120

NOTES OF DECISIONS

1. Under former similar statute

Implied warranties were not subject to the parol evidence rule. Campbell Co. v. Corley, (1932) 140 Or 462, 3 P2d 776, 13 P2d 610, 14 P2d 455.

An intent on the part of the seller of an automobile not to give a warranty of title was not established by the fact that the title papers were transferred directly from the previous owner to the purchaser. Maxwell Co. v. So. Ore. Gas Corp., (1938) 158 Or 168, 74 P2d 594, 75 P2d 9, 114 ALR 697.

Where the terms and conditions of the sale were not alleged, the existence of implied warranty of title was not assumed. Walin v. Young, (1947) 181 Or 185, 180 P2d 535.

The implied warranty applied only to encumberances not declared or known to buyer before or at time the contract or sale was made. Id.

FURTHER CITATIONS: Wentworth & Irwin, Inc. v. Sears, (1936) 153 Or 201, 56 P2d 324.

72.3130

NOTES OF DECISIONS

1. In general

Where the purchaser of an unmerchantable product suffers only loss of profits, his remedy for the breach of warranty is against his immediate seller unless he can predicate liability upon some fault on the part of a remote seller. State ex rel. Western Seed Prod. Corp. v. Campbell, (1968) 250 Or 262, 442 P2d 215, cert. denied, 393 US 1093.

2. Under former similar statute

A person filling an order for specifically described goods warranted that they were of the kind ordered. Parrish v. Kotthoff, (1929) 128 Or 529, 274 P 1108; Kotthoff v. Portland Seed Co., (1931) 137 Or 152, 300 P 1029.

Where cigars were referred to as "El Wadora" the sale was made by description. Mayer & Co. v. Smith, (1924) 112 Or 559, 230 P 355.

The term "contract to sell or sale by description" was confined to cases where the identification of goods depended upon the description. American Soda Fountain Co. v. Medford Grocery Co., (1928) 128 Or 83, 262 P 939.

Implied warranties were not subject to the parol evidence rule. Campbell Co. v. Corley, (1932) 140 Or 462, 3 P2d 776, 13 P2d 610, 14 P2d 455.

The goods had to be identified by a description by the buyer in his order or by the seller in his offer to state a cause of action for breach of implied warranty. Sol-o-lite Laminating Corp. v. Allen, (1960) 223 Or 80, 353 P2d 843.

An allegation in defendant's cross-complaint that he bought by description was a conclusion of law and a nullity. Id.

FURTHER CITATIONS: Western Feed Co. v. Heidloff, (1962) 230 Or 324, 370 P2d 612; American Hdw. Mut. Ins. Co. v. Griffith Rubber Mills, (1968) 252 Or 182, 448 P2d 515.

ATTY. GEN. OPINIONS: Ski breakage warranty as insurance, 1958-60, p 94.

LAW REVIEW CITATIONS: 9 OLR 513; 37 OLR 124.

72.3140 to 72.3152

LAW REVIEW CITATIONS: 49 OLR 424.

72.3140

NOTES OF DECISIONS

1. In general

Seller cannot recover on an implied warranty under this section against the manufacturer. Hupp Corp. v. Metered Washer Serv., (1970) 256 Or 245, 472 P2d 816.

2. Under former similar statute

An article sold under a trade name was impliedly warranted to be merchantable. Campbell Co. v. Corley, (1932) 140 Or 462, 3 P2d 776, 13 P2d 610, 14 P2d 455; Sperry Flour Co. v. DeMoss, (1933) 141 Or 440, 18 P2d 242, 90 ALR 406.

A contract for sale of specifically described lumber at stated minimum prices "on bright lumber only" could be regarded as a warranty that the lumber would comply with description and specifications and be of merchantable qual-

ity. Kitterman v. Eagle Pine Co., (1927) 122 Or 137, 257 P 815.

A buyer of silver foxes was entitled to receive good merchantable animals under a contract whereby the seller was to select registered ancestors for their fur qualities, ". . . .and so mate them that there will be no inbreeding." Klinge v. Farris, (1929) 128 Or 142, 268 P 748, 273 P 954.

Implied warranties were not subject to the parol evidence rule. Campbell Co. v. Corley, (1932) 140 Or 462, 3 P2d 776, 13 P2d 610, 14 P2d 455.

If there was no warranty of fitness the buyer could not claim more than that the goods with their defects known be merchantable. Rockwood & Co. v. Parrott & Co., (1933) 142 Or 261, 19 P2d 423.

When merchantable and unmerchantable goods were commingled the buyer was obliged to accept the merchantable goods unless the percentage of unmerchantable goods was so great it would be unreasonable to require such acceptance. Webster v. Harris, (1950) 189 Or 671, 222 P2d 644.

FURTHER CITATIONS: State ex rel. Western Seed Prod. Corp. v. Campbell, (1968) 250 Or 262, 442 P2d 215; Cornelius v. Bay Motors Inc., (1971) 258 Or 564, 484 P2d 299.

LAW REVIEW CITATIONS: 4 WLJ 402.

72.3150

NOTES OF DECISIONS

1. In general

Seller cannot recover on an implied warranty under this section against the manufacturer. Hupp Corp. v. Metered Washer Serv., (1970) 256 Or 245, 472 P2d 816.

2. Under former similar statute

(1) In general. Implied warranties were not subject to the parol evidence rule. Campbell Co. v. Corley, (1932) 140 Or 462, 3 P2d 776, 13 P2d 610, 14 P2d 455.

(2) Warranty of fitness. Where the seller was advised of the purpose and the buyer relied on the seller's skill and judgment a warranty of fitness arose. Pendergrass v. Fairchild, (1923) 106 Or 537, 212 P 963; Rhodes v. Libby, McNeill & Libby, (1930) 133 Or 128, 288 P 207; Stonebrink v. Highland Motors Inc., (1943) 171 Or 415, 137 P2d 986.

Where a supplier of flour assured a baker that the flour would make "good" bread, it was not a mere expression of opinion or seller's loose talk, but was an implied warranty of fitness. Campbell Co. v. Corley, (1932) 140 Or 462, 3 P2d 776, 13 P2d 610, 14 P2d 455.

Express stipulation in written contract against guaranty of any kind excluded implied warranty of fitness. Rockwood & Co. v. Parrott & Co., (1933) 142 Or 261, 19 P2d 423.

An implied warranty of fitness had to be construed in the light of common knowledge with reference to the nature of the article sold. Landers v. Safeway Stores, Inc., (1943) 172 Or 116, 139 P2d 788.

Buyer could not recover for breach of implied warranty of fitness if he suffered harm by reason of improper use of the article warranted. Id.

When the contract stipulated that the seller was to deliver logs to the buyer's sawmill, the seller impliedly warranted that the logs he delivered would be suitable for sawing into lumber. Webster v. Harris, (1950) 189 Or 671, 222 P2d 644.

An implied warranty of fitness and merchantability ran between the sellers and the ultimate user even in the absence of privity of contract, when the user stood within the reasonable contemplation of the parties to the warranty, and might be reasonably expected to suffer a harm from its use. Spada v. Stauffer Chem. Co., (1961) 195 F Supp 819.

(3) Trade name. Where it was shown that the buyer made known to the vendor the purposes for which he desired the article, relied upon the seller's skill and judgment, and the trade name was used merely for convenience of description, an implied warranty of fitness arose. Campbell Co. v. Corley, (1932) 140 Or 462, 3 P2d 776, 13 P2d 610, 14 P2d 455; Sperry Flour Co. v. DeMoss, (1933) 141 Or 440, 18 P2d 242, 90 ALR 406; Start v. Shell Co., (1954) 202 Or 99, 260 P2d 468, 273 P2d 225.

FURTHER CITATIONS: Hunt v. Ferguson-Paulus Enterprises, (1966) 243 Or 546, 415 P2d 13; Cornelius v. Bay Motors Inc., (1971) 258 Or 564, 484 P2d 299.

72.3160

CASE CITATIONS: State ex rel. Western Seed Prod. Corp. v. Campbell, (1968) 250 Or 262, 442 P2d 215; Arrow Trans. Co. v. Fruehauf Corp., (1968) 289 F Supp 170; Hupp Corp. v. Metered Washer Serv., (1970) 256 Or 245, 472 P2d 816.

LAW REVIEW CITATIONS: 4 WLJ 364-377.

72.3170

NOTES OF DECISIONS

Under former similar statute, the provisions of the contract in reference to the quality of the goods had to be read in connection with the warranties mentioned in the statute. Klinge v. Farris, (1929) 128 Or 142, 268 P 748, 273 P 954.

Under former similar statute, the sale of an automobile bumper jack involved both an implied warranty of fitness and merchantability. Stonebrink v. Highland Motors, Inc., (1943) 171 Or 415, 137 P2d 986.

FURTHER CITATIONS: Durbin v. Denham, (1922) 106 Or 34, 210 P 165, 29 ALR 1227; McCarger v. Wiley, (1924) 112 Or 215, 229 P 665; American Oil Pump & Tank Co. v. Foust, (1929) 128 Or 263, 274 P 322; Parrish v. Kotthoff, (1929) 128 Or 529, 274 P 1108; Maxwell Co. v. So. Ore. Gas Corp., (1938) 158 Or 168, 74 P2d 594, 75 P2d 9, 114 ALR 697; The Gray Line Co. v. The Goodyear Tire & Rubber Co., (1960) 28 F2d 294; Wagner Tractor, Inc. v. Shields, (1967) 370 F2d 73, 371 F2d 441.

LAW REVIEW CITATIONS: 34 OLR 59; 37 OLR 125; 40 OLR 199, 364; 4 WLJ 364-377.

72.3180

LAW REVIEW CITATIONS: 40 OLR 366.

72.3280

NOTES OF DECISIONS

The right to reject bids is the type of reservation referred to by subsection (3). Eugene Stud & Veneer, Inc. v. State Bd. of Forestry, (1970) 3 Or App 20, 469 P2d 635.

LAW REVIEW CITATIONS: 9 OLR 102, 444.

72.4010 to 72.4030

LAW REVIEW CITATIONS: 30 OLR 347-358.

72.4010

NOTES OF DECISIONS

1. Under former similar statute
   (1) In general
   (2) Deliverable state
   (3) Delivery at a particular place
   (4) Delivery "on trial"

(5) Cash sale
(6) Payment

1. Under former similar statute

(1) In general. The time at which title passed was generally a matter of intent as between the parties. Wade v. Johnson, (1924) 111 Or 468, 227 P 466; Keegan v. Lenzie, (1943) 171 Or 194, 135 P2d 717; Hopkins v. Bronaugh, (1922) 281 Fed 799.

It was competent for buyer and seller to agree that title not pass to buyer until certain conditions had been met. Jeffries v. Pankow, (1924) 112 Or 439, 223 P 745, 229 P 903.

At common law a mere contract for the sale of goods, where the goods were identified and nothing remained to be done by the seller before delivery, the right of property was transferred although the price had not been paid nor the goods delivered to the purchaser. Pulkrabek v. Bankers' Mortgage Corp., (1925) 115 Or 379, 238 P 347.

It could not be said that delivery of a shipment of automobiles was made at the shipping point in Michigan, if the seller retained possession of the bill of lading. Northwest Auto Co. v. Reo Motor Car Co., (1927) 121 Or 658, 257 P 10.

Appropriation of goods to the contract did not by itself effect a transfer of title but passing of title depended upon the parties' intent. Keegan v. Lenzie, (1943) 171 Or 194, 135 P2d 717.

Reservation by seller of power of designation did not postpone passage of title where selection of timber to be harvested could be made in accordance with objective standards. Paullus v. Yarbrough, (1959) 219 Or 611, 347 P2d 620, 79 ALR2d 1222.

Seller's contention that buyer's instruction to ship lumber showing buyer as the shipper showed a "different intention," was overcome by the portion of the agreement requiring seller to ship to a certain location "F.O.B. Delivered." Raylo Lbr. Co. v. Ore. Pac. Lbr. Co., (1960) 222 Or 257, 352 P2d 749.

Under an agreement for the sale of property on condition, title did not pass until the condition was fulfilled by making payment. In re Stewart, (1964) 233 F Supp 89.

(2) Deliverable state. When some act remained to be done by the seller for the purpose of putting the subject of the sale into a deliverable condition, the property did not pass until such act was performed. Wade v. Johnson, (1924) 111 Or 468, 227 P 466.

Title did not pass upon execution of contract where seller had not yet put goods in a deliverable state, and seller was to pay the freight charges. Pulkrabek v. Bankers' Mortgage Corp., (1925) 115 Or 379, 238 P 347.

Where lumber was cut and piled at seller's mill at buyer's directions and seller had been paid purchase price title to lumber passed. Wheeler Lbr., Bridge & Supply Co. v. Shelton, (1934) 146 Or 550, 29 P2d 1013, 31 P2d 163.

(3) Delivery at a particular place. Where the contract of sale required seller to deliver goods to buyer at a particular place, title did not pass until the goods reached that place. Wade v. Johnson, (1924) 111 Or 468, 227 P 466; Raylo Lbr. Co. v. Oregon Pac. Lbr. Co., (1960) 222 Or 257, 352 P2d 749.

(4) Delivery "on trial." Title did not pass upon delivery and use of machinery to be put "on trial" and the seller had guaranteed certain performance. Latture Equip. Co. v. Gruendler Patent Crusher & Pulverizer Co., (1930) 133 Or 421, 289 P 1067.

(5) Cash sale. Where a cash sale was intended title did not pass upon seller's receipt of worthless check. Nugent v. Union Automobile Ins. Co., (1932) 140 Or 61, 13 P2d 343; Weyerhaeuser Tbr. Co. v. First Nat. Bank, (1935) 150 Or 172, 38 P2d 48, 43 P2d 1078; Keegan v. Lenzie, (1943) 171 Or 194, 135 P2d 717.

Where there was a cash sale title didn't pass until seller received the purchase price. Weyerhaeuser Tbr. Co. v. First Nat. Bank, (1935) 150 Or 172, 38 P2d 48, 43 P2d 1078.

(6) Payment. To constitute a waiver of the condition of payment there had to be an intent not to insist on immediate payment as a condition to the passing of the title. Id.

FURTHER CITATIONS: Pulkrabek v. Bankers' Mortgage Corp., (1925) 115 Or 379, 238 P 347; South Seattle Auto Auction, Inc. v. Ladd, (1962) 230 Or 350, 370 P2d 630; Evans Prods. Co. v. Jorgensen, (1966) 245 Or 362, 421 P2d 978.

LAW REVIEW CITATIONS: 1 OLR 116; 5 OLR 165; 7 OLR 358; 13 OLR 177; 38 OLR 180.

72.4020

LAW REVIEW CITATIONS: 1 OLR 220; 10 OLR 275; 31 OLR 162.

72.4030

NOTES OF DECISIONS

1. Under former similar statute

(1) In general. A purchaser who had not acquired the title could not sell or pledge the goods in such manner as to divest the seller of his rights. Weyerhaeuser Tbr. Co. v. First Nat. Bank, (1935) 150 Or 172, 38 P2d 48, 43 P2d 1078.

Where the vendor was not in possession of the property at the time of the second sale, title did not pass to the second vendee. Kelley v. Ness, (1948) 182 Or 661, 189 P2d 570.

If the seller manifested an intent to retain title until the buyer's check was honored, he did in fact keep title until that event occurred even though he had previously given indicia of title to the buyer. Plummer v. Kingsley, (1951) 190 Or 378, 226 P2d 297. **Distinguished in** Valley Motor Co. v. Ralls, (1960) 224 Or 290, 355 P2d 1100.

A purchaser of a vehicle who received a properly indorsed certificate of title in circumstances which would not put an ordinary person on inquiry was protected when the owner was estopped to assert title because of misplaced trust in a wrongdoer. Valley Motor Co. v. Ralls, (1960) 224 Or 290, 355 P2d 1100.

In the sale of an automobile by a dealer who did not own it and had no authority to sell it, a purchaser, who did not obtain the title papers, or relied on a promise to furnish them later, and made no effort to ascertain true ownership, acquired no title as against the owner. South Seattle Auto Auction, Inc. v. Ladd, (1962) 230 Or 350, 370 P2d 630.

Merely entrusting another with possession or control of property was not sufficient to estop the true owner from asserting title. Id.

(2) Bona fide purchaser. Where a lender furnished money to a dealer to pay for automobiles and permitted dealer to register same in his own name, the lender was not permitted to recover one of the automobiles from a bona fide purchaser. Neppach v. Mitchell, (1930) 132 Or 395, 285 P 1109.

A subsequent bona fide purchaser who acquired possession of goods was entitled to same, the first buyer not being permitted a reasonable time to take possession. Pacific Wool Growers v. Draper & Co., Inc., (1937) 158 Or 1, 73 P2d 1391.

Sale to a bona fide purchaser cut off a defrauded seller's right to regain title and possession of the goods. Plummer v. Kingsley, (1951) 190 Or 378, 226 P2d 297. **Distinguished in** Valley Motor Co. v. Ralls, (1960) 224 Or 290, 355 P2d 1100.

An estoppel was raised in favor of a bona fide purchaser

when he bought from a person who had acquired indicia of title and possession of the goods by fraud. Id.

FURTHER CITATIONS: Wheeler Lbr. Bridge & Supply Co. v. Shelton, (1934) 146 Or 550, 29 P2d 1013, 31 P2d 163.

LAW REVIEW CITATIONS: 1 OLR 220; 10 OLR 275; 18 OLR 171; 31 OLR 162; 38 OLR 179.

72.5010 to 72.5110

LAW REVIEW CITATIONS: 33 OLR 188-215.

72.5030

NOTES OF DECISIONS

Under former similar statute where goods were in the hands of third parties, the seller was required to secure third parties' acknowledgment of holding for the buyer in order to make delivery. Allen v. Baker, (1923) 109 Or 443, 220 P 574.

Under former similar statute delivery of animals purchased on a f.o.b. sale was complete when they were loaded upon the cars. Wade v. Johnson, (1924) 111 Or 468, 227 P 466.

Where seller shipped goods but retained order bill of lading in his possession the section was not applicable. Northwest Auto Co. v. Reo Motor Car Co., (1927) 121 Or 658, 257 P 10.

72.5050

NOTES OF DECISIONS

Common carriers, particularly express companies, are held strictly to performance of their duty to make delivery of goods at the place of destination to the person designated to receive them if he presents himself or can be found with reasonable diligence. Richardson v. Ry. Express Agency, (1971) 258 Or 170, 482 P2d 176.

72.5070

NOTES OF DECISIONS

The seller's right to have the buyer's right to the goods conditional upon payment, even after delivery, is applicable only between the buyer and seller not as to third persons who acquire an intervening interest. Evans Prods. Co. v. Jorgensen, (1966) 245 Or 362, 421 P2d 978.

FURTHER CITATIONS: Stumbo v. Paul B. Hult Lbr. Co., (1968) 251 Or 20, 444 P2d 564.

LAW REVIEW CITATIONS: 7 WLJ 112.

72.5090

NOTES OF DECISIONS

A merchant seller cannot transfer risk of loss to the buyer until the buyer has actually received the merchandise even though the buyer has paid full price and has been notified that the goods are at his disposal. Ellis v. Bell Aerospace Corp., (1970) 315 F Supp 221.

FURTHER CITATIONS: Klingback v. Mendiola, (1931) 138 Or 234, 6 P2d 237; Raylo Lbr. Co. v. Ore. Pac. Lbr. Co., (1960) 222 Or 257, 352 P2d 749; Tweedle Bros., Inc. v. Berliner, (1961) 226 Or 509, 360 P2d 557.

LAW REVIEW CITATIONS: 1 OLR 173; 2 OLR 1, 189; 5 OLR 225.

72.5100

CASE CITATIONS: Ellis v. Bell Aerospace Corp., (1970) 315 F Supp 221.

72.5130

NOTES OF DECISIONS

Under former similar statute a buyer of sheep was not required to accept delivery without first having had reasonable opportunity for inspection. Crosland v. Sloan, (1927) 123 Or 243, 261 P 701.

Under former similar statute the buyers of a stock of merchandise under a contract to sell were entitled to inspect the goods before taking delivery. Champion v. Hammer, (1946) 178 Or 595, 169 P2d 119.

LAW REVIEW CITATIONS: 7 OLR 358.

72.6010 to 72.6160

LAW REVIEW CITATIONS: 4 WLJ 311-315.

72.6010

NOTES OF DECISIONS

1. Under former similar statute

The option accorded the buyer contemplated an independent action against the seller. McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

An action for damages for breach of warranty left the contract in full force and effect. Latture Equipment Co. v. Gruendler Patent Crusher Co., (1930) 133 Or 421, 289 P 1067.

The fact that the buyer resold the property in no way affected his right to maintain an action for breach of warranty. Id.

Payment of the purchase price did not as a matter of law bar an action for breach of warranty. Id.

FURTHER CITATIONS: Allen v. Baker, (1923) 109 Or 443, 220 P 574; Lanners v. Whitney, (1967) 247 Or 223, 428 P2d 398.

LAW REVIEW CITATIONS: 7 WLJ 110.

72.6020

CASE CITATIONS: Lanners v. Whitney, (1967) 247 Or 223, 428 P2d 398.

72.6060

NOTES OF DECISIONS

1. Under former similar statute

A purchaser was not precluded from rescinding a contract due to the fact that part of the goods he had received had been sold. Mayer & Co. v. Smith, (1924) 112 Or 559, 230 P 355.

Delivery of an unindorsed warehouse receipt to a buyer of hops was substantial evidence of acceptance of the hops and transfer of title. Pokorny v. Williams, (1953) 199 Or 17, 260 P2d 490.

Rerouting and subsequent resale of goods by the buyer was acceptance, although the buyer protested receiving the goods. Israel v. Miller, (1958) 214 Or 368, 328 P2d 749.

FURTHER CITATIONS: Lanners v. Whitney, (1967) 247 Or 223, 428 P2d 398.

72.6070

NOTES OF DECISIONS

1. Under former similar statute

(1) In general. The section enabled the buyer to seek redress for a breach of warranty observed after the goods had been accepted, provided he gave the requisite notice in due course. Kitterman v. Eagle Pine Co., (1927) 122 Or 137, 257 P 815.

The fact that goods were destroyed by fire after acceptance did not prevent buyer from recovering for breach of warranty. Boone v. Lockhart, (1933) 143 Or 299, 22 P2d 317.

The section was applicable where the breach by the seller consisted in delay of time of performance. Israel v. Miller, (1958) 214 Or 368, 328 P2d 749.

(2) Notice. The buyer had to notify the seller not only of the breach of warranty but also that he intended to claim damages for such breach. Western Feed. Co. v. Heidloff, (1962) 230 Or 324, 341, 370 P2d 612; Clarizo v. Spada Distrib. Co., (1962) 231 Or 516, 373 P2d 689; Ambrose v. Standard Oil Co. of Calif., (1963) 214 F Supp 872.

Notice to seller that a machine was out of repair and would not operate, together with efforts on seller's part to secure adjustments therefor from the factory, did not constitute notice of breach of warranty. Howard-Cooper Corp. v. Umpqua Dredging & Constr. Co., (1934) 148 Or 582, 36 P2d 590.

The requirement relative to giving notice as a condition precedent to recovery had no application to a case where the buyer was suing for breach of warranty of title. Maxwell Co. v. So. Ore. Gas Corp., (1938) 158 Or 168, 74 P2d 594, 75 P2d 9; 114 ALR 697.

Where the buyer failed to give the seller any notice of breach of warranty after accepting the goods, the buyer was not entitled to recoupment of damages in the seller's action for the purchase price. Tripp v. Renhard, (1948) 184 Or 622, 200 P2d 644.

Buyer did not by merely commencing an action about two years after the alleged breach of the implied warranty give the seller sufficient notice. Owen v. Sears Roebuck & Co., (1959) 273 F2d 140.

The requirement of notice was a condition precedent to recovery. Nichols v. Bellavista Farms, Inc., (1960) 186 F Supp 270, 594.

The intent to claim damages could be found in any language sufficient to apprise the seller of the buyer's purpose to seek damages arising out of the breach. Clarizo v. Spada Distrib. Co., (1962) 231 Or 516, 373 P2d 689.

(3) Pleading and proof. The giving of notice had to be pleaded and proved by the party seeking to recover for the breach of warranty. Maxwell Co. v. So. Ore. Gas Corp., (1938) 158 Or 168, 74 P2d 594, 75 P2d 9, 114 ALR 697. Overruling Boone v. Lockhart, (1933) 143 Or 299, 22 P2d 317.

No pleading or proof of defense of lack of notice was required of seller where buyer did not make the essential allegation of notice within a reasonable time. Owen v. Sears Roebuck & Co., (1959) 273 F2d 140.

Since seasonable notice was a condition precedent to the right of recovery, notice had to be pleaded and proved. Western Feed Co. v. Heidloff, (1962) 230 Or 324, 370 P2d 612.

FURTHER CITATIONS: Spada v. Stauffer Chem. Co., (1961) 195 F Supp 819; Siebrand v. Eyerly Aircraft Co., (1961) 196 F Supp 936; Staff Jennings, Inc. v. Fireman's Fund Ins. Co., (1962) 218 F Supp 112; Wights v. Staff Jennings, Inc., (1965) 241 Or 301, 405 P2d 624; Lanners v. Whitney, (1967) 247 Or 223, 428 P2d 398; State ex rel. W. Seed Prod. Corp. v. Campbell, (1968) 250 Or 262, 442 P2d 215; State ex rel. Hawkins-Hawkins Co. v. Travelers Indem. Co., (1968) 250 Or 356, 442 P2d 612.

72.6080

NOTES OF DECISIONS

1. In general

The unairworthy condition of the airplane materially impaired its value to plaintiff. Lanners v. Whitney, (1967) 247 Or 223, 428 P2d 398.

Plaintiff reasonably relied on defendant's assurances the airplane was airworthy. Id.

Revocation of acceptance occurred within a reasonable time. Id.

2. Under former similar statute

(1) Notice. The requirement of notice to be given by the vendee charging breach of warranty was a condition precedent to the right to recover and it had to be pleaded and proved by the vendee. Maxwell Co. v. So. Ore. Gas. Corp., (1938) 158 Or 168, 74 P2d 594, 75 P2d 9. Overruling Boone v. Lockhart, (1933) 143 Or 299, 22 P2d 317.

Where the buyer failed to give timely notice of breach of warranty after the goods were delivered he was not entitled to recoupment of damages in seller's action for purchase price. Tripp v. Renhard, (1948) 184 Or 622, 200 P2d 644.

(2) Rescission. Before a buyer could rescind the contract and recover back the money he had paid he had to return the goods he had received. McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

A buyer was not precluded from rescinding the contract by acceptance of the goods and sale of part of them if he gave notice as soon as he discovered the defect. Mayer & Co. v. Smith, (1924) 112 Or 559, 230 P 355.

Rescission was an appropriate remedy when the goods tendered did not comply with the requirements of the contract. Klinge v. Farris, (1929) 128 Or 142, 268 P 748, 273 P 954.

LAW REVIEW CITATIONS: 49 OLR 424.

72.6090

CASE CITATIONS: Weyerhaeuser Tbr. Co. v. First Nat. Bank, (1935) 150 Or 172, 38 P2d 48, 43 P2d 1078; Continental Forest Prods., Inc., v. White Lumber Sales, Inc., (1970) 256 Or 466, 474 P2d 1.

LAW REVIEW CITATIONS: 7 WLJ 107-118.

72.6120

NOTES OF DECISIONS

1. In general

If there is a minor breach which is curable by the seller, the instalment must be accepted and the buyer cannot cancel the contract. Continental Forest Prods., Inc. v. White Lumber Sales, Inc., (1970) 256 Or 466, 474 P2d 1.

2. Under former similar statute

Whether or not one purchasing goods on instalment was entitled to rescind the contract was a question for the jury. Mayer & Co. v. Smith, (1924) 112 Or 559, 230 P 355.

Materiality was generally a question of fact but the circumstances could be such that the question became one for the court to determine. Benedict v. Harris, (1938) 158 Or 613, 77 P2d 442.

LAW REVIEW CITATIONS: 23 OLR 213; 7 WLJ 107-118.

72.6150

CASE CITATIONS: Sachs v. Precision Prod. Co., (1970) 257 Or 273, 476 P2d 199.

72.7020

CASE CITATIONS: Evans Prods. Co. v. Jorgensen, (1966) 245 Or 362, 421 P2d 978; Stumbo v. Paul B. Hult Lbr. Co., (1968) 251 Or 20, 444 P2d 564.

72.7030

CASE CITATIONS: Finchum v. Lyons, (1970) 255 Or 216, 465 P2d 708.

72.7050

NOTES OF DECISIONS

Under former similar statute, an unpaid seller who had parted with possession of goods to carrier for transportation to buyer could, if buyer was or became insolvent, stop goods in transit so long as they were in course of transit. Weyerhaeuser Tbr. Co. v. First Nat. Bank, (1935) 150 Or 172, 38 P2d 48, 43 P2d 1078.

Under former similar statute, there was no particular method required for exercising the right of stoppage in transitu. Id.

72.7060

NOTES OF DECISIONS

Under former similar statute, the seller making a resale was required to use reasonable efforts to obtain the best price possible. Imperial Laundry Co. v. Allen, (1933) 143 Or 71, 20 P2d 217.

Under former similar statute, where the buyer unequivocally repudiated the contract notice was not required. Id.

FURTHER CITATIONS: Dose v. Lilly Co., (1930) 132 Or 533, 286 P 560.

LAW REVIEW CITATIONS: 5 OLR 225.

72.7080

NOTES OF DECISIONS

1. Under former similar statute

Commission paid or agreed to be paid by the seller to a broker for the procurement of a purchaser was not an element of recoverable damage in a case based upon a breach of contract to buy. Ellingsworth v. Shannon, (1939) 161 Or 106, 88 P2d 293.

When the goods were not readily salable the agent for the seller could recover as damages the profits that he would have realized if the contract had been performed. Nelson Equip. Co. v. Harner, (1951) 191 Or 359, 230 P2d 188, 24 ALR2d 999.

Where contract permitted recovery of "any and all losses," seller could offer evidence of "special circumstances showing proximate damages" in greater amount than the difference between the contract and market price. Schnitzer Steel Prod. Co. v. Dulien Steel Prod., Inc., (1961) 227 Or 348, 362 P2d 362.

FURTHER CITATIONS: Dose v. Lilly Co., (1930) 132 Or 533, 286 P 560.

72.7090

NOTES OF DECISIONS

1. Under former similar statute

Where there was a conditional sale and vendee defaulted, the vendor could treat the sale as absolute and sue for consideration or recover the property. McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

Where an escrow agreement was not divisible and included "things in action," which were not covered by the term "goods," the statute was inapplicable to the entire contract. Braden v. Hall, (1933) 143 Or 367, 21 P2d 1094.

The statute was not applicable where escrow agreement was not a binding contract. Id.

The statute was not applicable to a contract for sale of standing timber where there was no covenant or agreement to sever the timber at any particular time or at all. Reid v. Kier, (1944) 175 Or 192, 152 P2d 417.

Liability to pay the purchase price was imposed on a buyer who accepted the goods although he might have refused to accept them because of a defect therein or delay in delivery. Israel v. Miller, (1958) 214 Or 368, 328 P2d 749.

72.7100

NOTES OF DECISIONS

Under former similar statute anticipated profits on a collateral agreement were recoverable only as special damages. Wentworth & Irwin Inc. v. Sears, (1936) 153 Or 201, 56 P2d 324.

Under former similar statute special damages could not be recovered unless it could fairly be said that both parties had such consequences in their contemplation at the time of sale. Id.

72.7110

NOTES OF DECISIONS

Both cancellation and damages are available, and the availability or adequacy of a remedy at law is not the criterion for denial of cancellation. Lanners v. Whitney, (1967) 247 Or 223, 428 P2d 398.

FURTHER CITATIONS: Dodge City, Inc. v. Ralston, (1964) 237 Or 436, 391 P2d 745.

72.7130

NOTES OF DECISIONS

Under former similar statute, allegations of special damages did not bar a party from proof of general damages. Philippi v. Pac. Grains, Inc., (1960) 225 Or 57, 356 P2d 438.

The true measure of damages for breach of a contract to sell a fixed quantity of grain was provided by the former similar statute. Id.

FURTHER CITATIONS: Schnitzer Steel Prod. Co. v. Dulien Steel Prod., Inc., (1961) 227 Or 348, 362 P2d 362.

72.7140

NOTES OF DECISIONS

1. Under former similar statute

(1) In general. Motion for directed verdict properly denied where plaintiff introduced, without requesting any limitation, certificates of a licensed government grader certifying the goods to be of the quality warranted by the seller. American Prod. Co. v. Marion Creamery and Poultry Co., (1958) 214 Or 103, 327 P2d 1104.

(2) Rescission. Plaintiff, who had secreted an automobile to prevent defendant from repossessing it, had asserted ownership over the car and could not still seek rescission. Davidson v. Francis Motor Car Co., (1959) 216 Or 480, 338 P2d 658.

(3) Amount of recovery. In an action for breach of warranty of quiet possession the buyer of a truck was not entitled to recover for loss of anticipated profits on a collateral agreement entered into subsequent to the time of sale. Wentworth & Irwin, Inc. v. Sears, (1936) 153 Or 201, 56 P2d 324.

Damages for personal injuries directly and naturally re-

sulting from breach of warranty were recoverable. Stonebrink v. Highland Motors, Inc., (1943) 171 Or 415, 137 P2d 986.

It was not within the discretion of the court to admit evidence about experiments, unless conditions are substantially alike. Western Feed Co. v. Heidloff, (1962) 230 Or 324, 370 P2d 612.

The measure of general damages for breach of warranty where the buyer retained the goods was the difference between the value of the goods as warranted and the value of the goods actually supplied. Id.

Price paid for goods was not necessarily their value, but was prima facie evidence of value. Id.

Lost profits could be recovered if they could be established with sufficient certainty. Id.

The certainty required to recover lost profits was the certainty that a loss of profit resulted from the breach. Id.

FURTHER CITATIONS: Maynard v. Ore. Willamette Lbr. Corp., (1963) 235 Or 124, 383 P2d 1001; State ex rel. Hawkins-Hawkins Co. v. Travelers Indem. Co., (1968) 250 Or 356, 442 P2d 612.

72.7150

NOTES OF DECISIONS

Under former similar statute the buyer may recover lost profits if such loss was within the contemplation of the parties at the time of the sale and no other measure of damages would afford due compensation. American Oil Pump & Tank Co. v. Foust, (1929) 128 Or 263, 274 P 322.

Under former similar statute in an action for breach of warranty the buyer was entitled to be reimbursed for the payment made on the purchase price, and for freight and express charges. Latture Equip. Co. v. Gruendler Patent Crusher Co., (1930) 133 Or 421, 289 P 1067.

FURTHER CITATIONS: Lanners v. Whitney, (1967) 247 Or 223, 428 P2d 398; State ex rel. W. Seed Prod. Corp. v. Campbell, (1968) 250 Or 262, 442 P2d 215.

LAW REVIEW CITATIONS: 48 OLR 204.

72.7160

NOTES OF DECISIONS

The purpose of a former similar statute was to enlarge the power of courts to grant specific performance of contracts of sale of personal property not unique or unavailable. Pittenger Equip. Co. v. Tbr. Structures, Inc., (1950) 189 Or 1, 217 P2d 770.

Under former similar statute, specific performance was a proper remedy to require seller to perform contract for sale of timber requiring severance. Paullus v. Yarbrough, (1959) 219 Or 611, 347 P2d 620, 79 ALR2d 1222.

FURTHER CITATIONS: Nelson v. Hampton, (1956) 206 Or 573, 294 P2d 329.

LAW REVIEW CITATIONS: 28 OLR 285.

72.7170

NOTES OF DECISIONS

Under former similar statute a buyer who sets up a breach of warranty when sued for the purchase price could not recover an independent judgment if the damages exceeded the balance due, as the damages were in diminution or extinction of the price only. McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

72.7180

LAW REVIEW CITATIONS: 4 WLJ 308, 364-377.

72.7190

CASE CITATIONS: State ex rel. W. Seed Prod. Corp. v. Campbell, (1968) 250 Or 262, 442 P2d 215.

LAW REVIEW CITATIONS: 4 WLJ 308, 364-377.

72.7210

CASE CITATIONS: Lanners v. Whitney, (1967) 247 Or 223, 428 P2d 398.

LAW REVIEW CITATIONS: 45 OLR 138; 49 OLR 424.

72.7250

CASE CITATIONS: State ex rel. W. Seed Prod. Corp. v. Campbell, (1968) 250 Or 262, 442 P2d 215; Arrow Trans. Co. v. Fruehauf Corp., (1968) 289 F Supp 170.

LAW REVIEW CITATIONS: 4 WLJ 327.