THE DOCTRINE OF ACCEPTANCE IN SALES

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'Acceptance' has not one but several meanings in the law of sale. In its first and most familiar sense, we say that an offer has to be accepted before a contract can be formed.[1] Then we speak of 'acceptance' in relation to the passing of title or property, where it is said that the buyer must assent to—and thus accept—the seller's appropriation of the contract goods.[2] In the third place, 'acceptance' appears in a well-known section of the Statute of Frauds which dispenses with the requirement of writing if there is an acceptance or receipt of the goods.[3] What concerns us now, however, is 'acceptance' in a fourth sense, one of great significance, yet also one little explored. To illustrate its meaning, take the case of a buyer receiving the delivery of goods which on subsequent inspection prove unsatisfactory; suppose also the absence of other complications relating to warranties, conditions and so on.[4] Can in this situation the buyer return the goods? The broad answer is that he can, but only so long as he has not 'accepted' the goods. Obviously, the notion of 'acceptance' now constitutes an important limitation upon the buyer's right of return; but how does this limitation work? Some indication is given by the Sale of Goods Act which provides that:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.[5]

The statute thus distinguishes three kinds of acceptance: (i) an intimation of acceptance, (ii) acts inconsistent with the seller's ownership, and (iii) an acceptance because of unreasonable delay. While (i) is an *express* acceptance, (ii) and (iii) represent 'acceptances' which are not intentional, but which can be construed or implied from certain acts. It is clear that the express and the constructive accep-

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[1] Even in this familiar sense, the nature of 'acceptance' is by no means always clear: see the difficulties discussed, Stoljar, *Offer, Promise and Acceptance,* (1955) 50 *Northwestern University Law Review* 445.

[2] *Blackburn on Sale* (3rd ed. 1910) 129; *Benjamin on Sale* (8th ed. 1950) 329.

[3] Section 17 of the Statute of Frauds. Blackburn, *op. cit.,* 17; Benjamin, *op. cit.,* 194; Chalmers, *Sale of Goods,* (12th ed. 1945) 25, 114.

[4] For these complications, see Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods* (1952) 15 *Modern Law Review* 445, (1953) 16 *Modern Law Review* 174.

[5] Section 35; for the corresponding Australian provisions, see Joske, *Sale of Goods in Australia* (1949) 101. See generally Benjamin, *op. cit.,* 753; 3 *Williston on Sale* (Rev. ed. 1948) §§ 481ff.

tance are of a very different type. In the former, the buyer voluntarily accepts what in the usual case will be goods inferior in quality. In the constructive kind, the buyer, far from accepting, actually wishes to reject the goods; and his true intentions are thus much less generous than the word 'acceptance' seems to imply. Why, then, do we talk of 'acceptance' or 'deeming to accept'? And how did this talk come about? To find some explanation we need to look at the original clues. . . . . .

Consider as a start the early case of *Grimaldi v. White,*[6] an action for work and labour which was also very much like sale. The plaintiff, a painter of miniatures, claimed the price of several pictures which the defendant had bought. The latter alleged inferior execution, but he never returned the miniatures. The court had no doubt that the buyer could refuse to take the pictures, and return them, if they did not conform to the original specimens shown. Yet the buyer having taken delivery, he 'must either abide by it, or rescind it *in toto,* by returning the thing sold; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at less price than that charged by the contract'.[7] The buyer had argued that the plaintiff could only recover the actual value of the pictures, not their full contract price; and indeed he had planned to call expert witnesses to show how inferior and overpriced the pictures were. Why, then, was this argument rejected by the court?[8] More precisely, why did the court insist upon the buyer either returning the goods or paying the fixed price? The reason is closely connected with a problem of evidence or provability. If the pictures were really inferior, the buyer should have been happy to return them; his desire to keep the pictures was at least some evidence that they were perhaps not entirely inadequate. Rather, therefore, than let the buyer keep the pictures at a new and lower price, return to the seller here seemed a more realistic remedy. This remedy, however, could cause other difficulties. For example, how long could an article be kept before return, or how could it be tested or tried? The cases were soon confronted with these difficulties.

In *Fisher v. Samuda*[9] the buyer knew in July that the beer was

[6] (1802) 4 Esp. 95.

[7] *Ibid.*, 96. Observe how already at this date the law clearly recognized the seller's duty to supply articles which are both 'conformable' and 'fit'. It seems clear, moreover, that what later became the implied warranty of 'fitness' was an import into sale from contracts of work and labour.

[8] This also represented the modern solution. The buyer's present defence could be regarded as a counter-claim to be deducted from the full price. Cross-actions and counter-claims only became enforceable at common law a few years hence. But it may be interesting to note that a counter-claim could be *indirectly* enforced through the *quantum valebat, i.e.* making the buyer liable not on the express contract, but for the actual value of the goods: see *Lomi v. Tucker* (1829) 4 C. & P. 15.

[9] (1808) 1 Camp. 190.

unfit for the purpose intended but did nothing before December. Having already paid the price, he sued in damages for this loss. His action failed. It was his duty, said Lord Ellenborough, to return the article to the vendor or to give him notice to take it back as soon as he discovered that the beer was not according to order or was unfit for the purpose intended; not having done this, 'the plaintiff must be presumed to have *assented* to its being of good quality and to have *acquiesced* in the due performance of the contract on the part of the defendants'.[10] Subsequent decisions re-emphasized this requirement for immediate notice. In *Okell v. Smith,*[11] the seller sued for the price of sixteen copper pans, which were to be of the best materials, but which after five or six trials proved unsound. The court held it a question for the jury whether the things had been used more than necessary for testing. At any rate, the buyer should have given notice to the seller to take the pans away; he should, moreover, have given notice before eventually being sued for the price.[12] Similarly, in *Groning v. Mendham,*[13] in an action for the price of seeds, the purchaser complained that the goods were inferior as well as different from sample. Lord Ellenborough specially asked whether the buyer gave notice of the alleged inferiority, before he would admit evidence that the seed was in fact inferior. As no notice was given, the buyer became liable for the price. In *Hopkins v. Appleby*[14] it was soap-makers who refused to pay for materials supplied, alleging a breach of warranty that the goods were of the 'best quality'. They had used the materials without complaint until the whole was consumed. Said Lord Ellenborough: 'When an objection is made to an article of sale, common justice and honesty require that it should be returned at the earliest period, and before the commodity has been so changed as to render it impossible to ascertain, by proper tests, whether it is of the quality contracted for.'[15]

What can we say of the four cases just seen? Their main feature is that they are all about usable or consumable goods, articles which had first to be tasted, or tested, or tried, before their deficiency could be known. This tasting or testing would not only take time, it also increased the possibility of the goods deteriorating in the buyer's possession and through his own fault. Again, this lapse of time could make it more difficult to ascertain the condition of the goods at the time of delivery. Hence Lord Ellenborough's constant insistence upon the buyer making an immediate complaint, when it was still possible to ascertain the true value of the delivered goods. It is perhaps in this narrow, and somewhat artificial, sense that one could

[10] *Ibid.*, 193-194. My italics.
[11] (1815) 1 Stark. 107.
[12] *Ibid.*, 109, *per* Bayley J.
[13] (1816) 1 Stark. 256.
[14] (1816) 1 Stark. 477.
[15] *Ibid.*, 479.

speak of the buyer having 'accepted' the goods. This 'acceptance', to be sure, was no deliberate act of assent; the 'acceptance' had rather a purely evidentiary significance: the buyer's failure to give early notice destroyed the provability of his complaint, so that 'the party who extinguishes the light, and precludes the other party from the means of ascertaining the truth, ought to bear the loss'.[16]

The next group of cases gave to the word 'acceptance' another sense. In *Parker v. Palmer*[17] the facts (as presently relevant) were that the defendant, though informed that the goods (rice) were inferior to the original sample, still put them up at an auction for possible resale. The goods remained unsold and the defendant then tried to return them. This the court disallowed, for by 'taking his chance of that sale, the *defendant did in fact consent and agree*, that, as far as he was concerned, the goods should be considered as corresponding with the sample. . . . In justice and conscience, therefore, he ought to be estopped from objecting that the goods did not correspond with the sample.'[18] In *Milner v. Tucker*[19] a chandelier sold to the proprietor of some assembly rooms did not give sufficient light. When the buyer wanted to return it after six months, this was held to be too late, because 'if a man take an article, and keep it, and use it as his own, though it was not according to contract, he is bound to keep it, and pay for it'.[20] In *Percival v. Blake*[21] an iron vat warranted sound was found unfit when examined by the buyer two months after its delivery. The buyer, it was said, was bound to make his objections more promptly, not two months after the sale.[22] So also in *Cash v. Giles*[23] where it was a threshing-machine that proved unfit for use. The buyer had kept it for some years, but had used it only twice. The decision was that by keeping it so long, the buyer had 'waived all objections to its goodness and [was] bound to pay for it'.[24]

The last four decisions differ greatly from the earlier group. First, the buyer could now have returned the things immediately or, at least, very shortly after delivery. Secondly, his failure to return them

[16] *Ibid.*, 480.
[17] (1821) 4 B. & Ald. 387.
[18] *Ibid.*, 392, *per* Abbott C.J. My italics. *Cf. Horncastle v. Farran* (1820) 3 B. & Ald. 497, where an owner's acceptance of a bill in payment of goods was held to relinquish his lien on the goods. See also *Hardman v. Bellhouse* (1842) 9 M. & W. 596.
[19] (1823) 1 C. & P. 15.
[20] *Ibid.*
[21] (1826) 2 C. & P. 514.
[22] *Ibid.*, Abbott C.J., 576. The jury had actually found for the buyer on the ground that he had been deceived, but not wilfully, by the seller. This was indeed an interesting example of innocent misrepresentation doing the work of (what later became) the implied warranty of quality or fitness; though once this implied warranty was established, there was little further need for a law of misrepresentation in sale of goods. See also *Jones v. Bright* (1829) 5 Bing. 533.
[23] (1828) 3 C. & P. 407.
[24] *Ibid.*

did not affect the provability of his complaint; indeed, the seller never really denied that the goods were unsatisfactory; the seller, for example, had admitted the inferiority of the rice, and he had not seriously disputed the fact that the lamp or the iron vat were unfit for the purposes intended for them. Of course, it could be said that the buyer 'accepted' the goods or 'waived' his objections, when he chose to keep them, even though fully aware that the goods were defective or unfit. But imagine that the buyer had actually disclaimed any such generous intention to waive or accept; suppose he said that, rather than accept, he had always intended to reject the goods, and that even supposing that he kept them longer than he should, this delay should not destroy his right to return, once it was admitted that the articles were unfit when delivered and that the delay did not detrimentally affect the goods. And if the buyer said this, what was to become of the acceptance argument? Clearly, that argument depended on some intention to accept (or to waive) an intention now convincingly disclaimed. It follows that we must defend the above results on grounds that are independent of 'acceptance' or 'waiver'. Thus we might say that the buyer lost his right of return because of the delay, or because he attempted to resell. These grounds would need a broader formula indicating and rationalizing the policy behind them. What would this policy be? Obviously one protecting the seller's interests: in particular, his interest in having a bargain concluded at some definitive point, since otherwise he would never know where he stood or what liabilities he might still incur. Such an interest, furthermore, would be important enough and worthy of protection quite apart from what the buyer's personal intentions might be. In other words, the buyer would be deprived of his right to return because of an interest protecting the seller and not because he somehow 'accepted' the goods.

For the time being, however, it was still uncertain whether this policy would win through. Indeed, a very different policy was to appear, one that tended to protect the buyer at all costs. In illustration, consider two decisions, and first *Poulton v. Lattimore*.[25] The buyer bought eight quarters of seed warranted to be 'new growing seed'. Soon after the sale, this was examined by a person of skill, and the buyer was told that the seed was not good growing seed. But the buyer neither communicated this to the seller nor returned the seed. Instead, he afterwards sowed part and sold the residue. Was he liable for the price? Although the sub-purchaser stated, as a witness, that the seed was wholly unproductive, was not worth anything and that he would pay nothing, the original seller could argue, on the other hand, that the buyer had not given notice of the alleged

[25] (1829) 9 B. & C. 259.

defect, so that he had adopted the contract and could not set up the defect as a defence. At trial the court agreed with this argument, but the Court of King's Bench upheld the buyer's refusal to pay the price for the seed. It was true, they said, that he had given no notice; but a notice was only important to prove the breach of warranty: 'if that be clearly established, the seller will be liable in an action brought for breach of his contract, notwithstanding any lapse of time which may have elapsed since the sale'.[26] This did not answer the seller's point, that is, that the buyer had 'adopted' the contract by reselling part of the seed, on the analogy of *Parker v. Palmer*[27] which had held the buyer to be 'accepting' if and when he resold. Consider next *Pateshall v. Tranter*[28] where a horse warranted sound was discovered unsound and unfit for work. After being tried and treated for nine months, the buyer then notified the seller that the horse was unsound. The seller refused to take the horse back because of (what he claimed was) unreasonable delay. Though this objection succeeded at trial, the Court of King's Bench held the buyer entitled to return the horse on the ground that a buyer could return a horse or sue on the express warranty, provided it was established that the horse was unfit and unsound *at the time of the sale*.[29] Yet the same had been true in previous cases in which the buyer's delay was nevertheless regarded as an 'acceptance' or 'waiver' by him.[30] Thus the cases reveal a significant disaccord. On the one hand, they tended to develop an important limitation upon the buyer's right to reject, a limitation called 'acceptance' but an acceptance mainly consisting of the buyer's delay or resale. The latter cases, on the other hand, concentrated on the buyer's right to have sound or fit goods, since without 'good' quality he could not be made liable for the price, and this implied that the buyer was entitled to return the things or sue on the warranty without any limitation being attached. Nor could this disaccord be resolved except by abandoning one or the other trend.[31]

This soon occurred. Subsequent cases began to settle along a line marked out by *Parker v. Palmer* rather than by *Pateshall v. Tranter.*

[26] *Ibid.*, 265, *per* Littledale J., relying directly on *Fielder v. Starkin* (1788) 1 H. Bl. 17 where the buyer succeeded in his action for breach of an express warranty, though unable to return the unsound horse which in the meantime had died through no fault of his. [27] *Supra,* n. 17. [28] (1835) 3 Ad. & E. 103.

[29] All the arguments against the right of return were fully before the court. In particular, the arguments derived from *Hunt v. Silk* (1804) 5 East 449 and *Street v. Blay* (1831) 2 B. & Ad. 456, as well as Baron Bayley's explanations of them in *Gompertz v. Denton* (1832) 1 C. & M. 207 and *Allen v. Cameron* (1833) 1 C. & M. 832. However, the court was content to say that *Fielder v. Starkin* (1788) 1 H. Bl. 17 was not overruled.

[30] *Milner v. Tucker, Percival v. Blake* and *Cash v. Giles, supra,* nn. 19-24.

[31] This argument does not effect the earliest cases of Lord Ellenborough's group, in which 'acceptance' was used in an evidentiary sense. There was, obviously, no disaccord in relation to them. Our present problem assumes that the buyer has a legitimate and provable complaint, not that he has none having himself destroyed the evidence for it.

The cases, in short, resumed the trend limiting the buyer's right to reject. But this development could also go too far; a curious instance is *Chapman v. Morton*.[32] The seller shipped a cargo of oilcake from Dieppe to Wisbech in Cambridgeshire where the buyer was. On arrival, the latter at once complained that the goods did not correspond to sample. He however landed part of the cargo for further examination, and while still protesting that the goods were unsatisfactory, he landed the whole, lodged them in the public granary, and then wrote to the seller that they lay there at his risk and that he should take them back. This the seller refused to do, even after further negotiations which remained without result. The seller was sitting pretty: he had already been paid for the goods, and probably could not care less what was now to happen to them. In May 1842, about six months after the cargo had arrived, the buyer then told the seller that, in the absence of further directions, he (the buyer) would sell the goods to recoup himself for the price he had already paid. The seller still made no positive response, and the buyer thereupon sold the goods in his own name. The court held this act to be an acceptance of the cargo, for this act was 'explicable only on the supposition that the defendant means to take the goods, and to get the proceeds of the sale, in reduction of his damages for the alleged breach of warranty'.[33] And since 'we must judge of men's intentions by their acts', his acts after May 'of his offering to sell and selling the cargo in his own name, are very strong evidence of his taking to the goods, which will not deprive him of his cross-remedy for a breach of warranty, but whereby the property in the goods passed to him'.[34] The actual decision, it will be noticed, is far less severe than looks at first sight. For it mattered nothing whether or not the described events constituted an 'acceptance' or whether or not the 'property' passed; having resold, the buyer could anyhow no longer return the goods, since he had no goods to return; hence all he could

[32] (1843) 11 M. & W. 534.

[33] *Ibid.*, 541. There was much discussion whether the defendant could have sold as an agent of necessity. Now it is true that the goods were not 'perishable' in the sense that they were in immediate danger, one usual criterion of a 'necessary' agency. On the other hand, what was the defendant to do? The seller was a merchant abroad whom the buyer had already paid, so that returning the goods to the seller would give him both goods and price. Moreover, if there was nothing else to do but sell them, he could only sell them in his own name. The court seemed to recognize this, but understandably insisted that the defendant should have sold them in the seller's name. It is therefore important to see that the decision does not veto the buyer's right of resale, at least not on account of the seller. These hesitations do not seem to exist in America: there the decisions do recognize that a right to resell exists where the necessity exists: 3 Williston, *op. cit.*, § 498.

[34] *Ibid.*, 541. *Chapman v. Morton* was later discussed in *Loder v. Kekulé* (1857) 3 C.B.N.S. 128, where the facts were similar, but where the main question concerned the measure of damages the seller became liable for in breach of warranty: was it the difference between the contract price and its actual value, or the difference between the price and current market-price at the time of resale.

ask for was damages, the availability of which the court far from denying indeed affirmed. Yet if the buyer did obtain the one and only remedy he could have, what was the point of discussing at such length whether, and how or when, the buyer had 'accepted' the goods?

But such, unfortunately, was to be the manner in which the problem was to be dealt with as from now. The problem was seen in terms of the buyer's *animus accipiendi*,[35] that is, whether his 'intention' to accept could be inferred from certain acts. Further, these inferences were soon invested with an arbitrary and technical quality. Thus in *Harnor v. Groves*[36] the buyer resold three and a half sacks out of twenty-five sacks of flour delivered to him. Complaining that the flour was of much worse quality than agreed, he now sued both on the warranty and for money had and received. It was held that the buyer could not repudiate the sale, for 'when he found that the flour was not of the quality described in the contract, he might have repudiated it at once. Instead of doing so, he uses two sacks of it, and sells one.'[37] Similarly in *Parker v. Wallis*,[38] the buyer, after intimating his wish to reject twenty sacks of seed (alleging it to be hot and mouldy), later spread the seed out thin, an act which was construed as an acceptance. 'Of the law there is no doubt', said Campbell C.J., 'to make an acceptance, it is not necessary that the vendee should have acted so as to preclude himself from afterwards making objection to the quality of the article delivered; but *he must have done something indicating that he has accepted part of the goods and taken to them as owner*. This may be indicated by his conduct, as when he does any act which would be justified if he was the owner of the goods and not otherwise.'[39] Both decisions are perhaps justifiable inasmuch as in the former apparently no evidence existed that the flour was inferior at the time of delivery and that in the latter decision the buyer certainly destroyed by his own acts the evidence for his complaint. On the other hand, Lord Campbell's statement was both too vague and too wide. For while in some situations it certainly was possible to distinguish between (i) acts expressing objection to quality and (ii) acts expressing assumption of ownership,

[35] For this phrase, see Wightman J. in *Parker v. Wallis* (1855) 5 E. & B. 21, 26.

[36] (1855) 15 C.B. 667.

[37] *Ibid.*, 673, *per* Jervis C.J. Similarly Maule J. said that 'if the plaintiff ever had a right—which I by no means admit that he had—to repudiate the contract, he precluded himself from so doing by the mode in which he dealt with the flour after it had been delivered to him.' *Ibid.*, 674. Another doubt was whether there was a warranty on the part of the seller, since the contract did not contain a written warranty and since parol evidence was not admissible to introduce the new term or to vary the old terms of the contract. This doubt was remarkable for its omission of a possible implied warranty. This was also one of the earlier cases establishing the 'parol evidence rule', though Lord Ellenborough had, almost half a century earlier, first mentioned it.

[38] (1855) 5 E. & B. 21.

[39] *Ibid.*, 26. My italics.

there were many cases in which this distinction could not be practically applied, because acts (i) and (ii) could be the same kind of conduct. The trying or testing of goods, instead of forming an independent inspection, could occur in the course of the *jus utendi.* Indeed, in many cases even an act of reselling could be like an act of user, especially where the buyer was himself a dealer or middleman.

There are two excellent examples of this. In *Lucy v. Mouflet,*[40] the buyer bought a hogshead of cider, but three weeks later wrote to complain that the cider was flat and bad and that it was 'complained of in every case'. After further correspondence, the buyer said that he was rejecting the cider, that the seller should take it away, though he was willing to pay for what he had 'wasted in trying to sell it', a quantity of about twenty gallons and more than required to test the quality of the cider. Still, it was held that the buyer had *not* accepted the cider and was therefore not liable for the price. The court arrived at this result by construing the seller's failure to answer the buyer's first letter as evidence that the seller had acquiesced in the buyer's further trials of the cider. Clearly, this was not only an artificial inference, it also was one that shifted ground. For, according to previous decisions, the buyer's *animus accipiendi* was derived from his own conduct in relation to the goods and not from the acts or intentions of the seller.[41] The matter of the buyer's resale also came up in the well-known case of *Heilbutt v. Hickson.*[42] The plaintiffs, merchants in London, bought 30,000 pairs of shoes (intended for the French army) for which they paid in cash on each (weekly) delivery. An expert inspected sample shoes on their behalf, rejecting several hundred pairs but approving a larger number. As the soles were not opened on inspection, their true quality was not known, in particular whether they contained paper or not, which (as was later discovered) many pairs in fact did. The whole quantity was rejected by the French army and remained in a bonded warehouse at Lille. The plaintiffs claimed the money they had paid for the shoes as well as expenses and loss of profit. The cumulative damages amounted to (in round figures) £4,200 of which only £2,900 represented the price paid, the further £1,300 being transport expenses and profits lost.[43] The buyers fully recovered the damages, but an interesting argument developed in the Court of Common Pleas. The

[40] (1860) 6 H. & N. 229.

[41] *Cf. Chapman v. Morton, supra,* n. 32. So long as the seller had not agreed to something very like a 'sale or return' or a 'sale on approval', it would actually have been as real to say that the seller was against further trials as that he had acquiesced in them. The reason for attributing acquiescence to the seller was to spell out something like a rescission or modification by mutual consent. This not only avoided the doctrine of 'acceptance', but rendered it otiose. For another example, see n. 44 *infra.*

[42] (1872) L.R. 7 C.P. 438.

[43] For these figures, see *ibid.,* 448.

manufacturers had objected that the buyers could not recover the price of the shoes as they could no longer return them, property having passed and the buyers having accepted the goods. Though the majority agreed with this, the better opinion of Brett J. was that the buyers retained their right to reject the shoes and recover the price, since the defects were latent and could never have been discovered before acceptance or use.[44] The sellers, of course, were entitled to resume possession of the shoes, though probably even they could have had no further use for them. Be this as it may, the decision (on the explanation of Brett J.) clearly means that even a resale does not constitute an 'acceptance' of the goods, even though by reselling the buyer does seem to assume ownership and thereby to contradict the seller's rights.

A similar difficulty about 'acceptance' arose in connection with the place of inspection. Thus in *Grimoldby v. Wells,*[45] tares were sold and delivered, delivery to be made halfway between the houses of the contracting parties, whence the buyer took the goods to his barn. After inspecting them, he rejected them as being different from sample, but without offering to take them back to the seller. The Court of Common Pleas held that no such return could be asked for from the buyer: as this was a sale by sample, and (as Brett J. pointed out) the time and place for inspection were different from those of delivery, and the goods were unequal to sample, the buyer could reject them then and there, so that it became the seller's duty to fetch them.[46] *Perkins v. Bell*[47] fell on the other side of the line. The seller had sold barley which was deliverable at a railway station near to his farm. The buyer resold the barley on the day of delivery to brewers. Shortly afterwards the seller discovered that the quantity delivered had by mistake been mixed with some inferior barley, and he notified the buyer that he was willing to rectify the deficiency. Despite this, the buyer directed the barley to be sent on to the brewers. The latter rejected it as quite unfit for the brewing of ale, and then the buyer rejected in turn. However, in an action for goods sold and delivered, the buyer was held liable for the price, one reason being that in sending the barley to the brewers the buyer must be taken to have accepted the goods. Another reason given was that there was nothing in the contract to rebut the presumption that the

[44] The other members of the court, Bovill C.J. and Byles J., thought that the property would pass to the buyer, so that they would lose their right to reject. But they also thought the buyers were entitled to reject on account of some correspondence from the sellers now interpreted as their acquiescence or as their assent to a modification of the contract. However, there can be little doubt that on the main point the view of Brett J. is the better one, as it also seems the view accepted by Chalmers himself: see n. 54 *infra*.

[45] (1875) L.R. 10 C.P. 391.

[46] *Ibid.*, 396. *Cf. Bushel v. Wheeler* (1844) 15 Q.B. 442 n. *Norman v. Phillips* (1845) 14 M. & W. 277, for a similar problem, but involving 'acceptance' under the Statute of Frauds.

[47] [1893] 1 Q.B. 193.

place of delivery (the railway station) was also the place of inspection. While, in other words, the buyer could have rejected the goods as from the railway station, he could not do so after he had sent it on to a new destination. This was fully explained by A. L. Smith L.J.:

> Of all that should take place afterwards as regards the barley, the vendor knew nothing. It was entirely at the disposal of the vendee, who might send it where and to whom he pleased, and when he pleased, and over which disposition the seller could exercise no control. We find no evidence in this case to dislodge the presumption which prima facie arises, that the place of delivery is the place for inspection. To hold otherwise would be to expose the vendor to unknown risks, impossible of calculation, when the contract was entered into. The vendee might consign the barley not only to one, but to different sub-vendees, living in different places and at different distances from [the place of delivery], and until arrival the vendor would have at his own risk and cost to take the barley back from whatever places it might happen to be in, no matter how far they might be . . ., or to arrange for its sale at the places where it then was. As to these risks the contract is wholly silent, and in our judgment it is impossible to read into it that the vendor undertook these risks, as we were invited . . . to do.[48]

This passage is important because of the first attempt to give a deeper explanation why 'acceptance' should qualify or limit a buyer's right to reject. Still, the advanced explanation was not really satisfactory. Suppose that in this case the barley had not merely been unfit for the purpose of brewing, but had been unsound altogether; suppose also that this defect had not been known and only later discovered. Surely the buyer could have rejected the goods when and where they proved worthless. This precisely is what the buyer was allowed to do in some previous decisions and, in particular, in *Heilbutt v. Hickson,* where the seller himself would have had to fetch the French army boots from Lille. Hence it cannot be entirely true (as A. L. Smith L.J. said) that a seller cannot be exposed to the 'unknown risks' of having to get the goods back from 'whatever places . . . no matter how far'. But *Perkins v. Bell* can also be given another interpretation. The deficiency of the barley was easily curable, so that it remained an appreciable and marketable asset. Moreover, the seller had expressly told the buyer of his willingness to correct any deficiency; that is, he was prepared to replace the bad by good or more satisfactory barley. Thus the buyer not only knew of the defect, but he was perhaps hoping that the brewers might take the barley without too careful enquiry. In other words, the buyer though having an opportunity to reject the goods, did not seize it; by taking his risks with the brewers, he rather chose to accept what the vendor had supplied.

But *Perkins v. Bell* also looked, superficially, like just another example of the purely technical and artificial manner in which the

[48] *Ibid.*, 197.

doctrine of 'acceptance' was being handled. Indeed, this method was to culminate in the modern case of *Hardy & Co. v. Hillerns and Fowler*.[49] Wheat was sold under a c.i.f. contract to be shipped from a foreign port to England. The ship arrived on 18 March and the buyers took up the shipping documents on 20 March. On 21 March she commenced to discharge the wheat and the buyers took delivery. On the same day they resold and despatched to sub-purchasers a portion of the wheat so delivered. On the same day, 21 March, the buyers took samples of the wheat discharged from the ship when they began to suspect that the wheat was not of the contract description. On 22 March, the ship continued to discharge; the buyers took further samples which confirmed their suspicions, and they at once rejected the whole cargo as inferior. They then stopped all parcels of wheat in transit to sub-purchasers, ordered their return to Hull and had them stored there. Referred to arbitration, both the arbitrators and their committee of appeal found that the buyers had acted reasonably and with all promptitude in every step. However, Greer J. held that merely reselling a portion of the wheat and sending it to the sub-purchasers was an act 'inconsistent with the ownership of the sellers', so that the act fell squarely within section 35.[50] The buyers appealed on a simple and subtle ground: property must have passed to them on 20 March, when the shipping documents were taken up; and since, furthermore, the sub-sales did not take place until 21 March, the sellers had no ownership with which the buyers' act could be inconsistent. Further, the buyers had authority on their side: *Heilbutt v. Hickson*[51] (as previously explained) completely favoured their argument; and *Perkins v. Bell*[52] was obviously distinguishable, since there the buyer sent the goods on *after* their deficiency was revealed to him. But the Court of Appeal agreed with Greer J. They thought sections 34 and 35 quite independent of each other; indeed, so independent that it was quite immaterial for the purpose of section 35 that the reasonable time for examining the goods had not expired when the act was done.[53] What mattered was that the seller was unable to resume possession forthwith, that is, immediately the rejection was notified to him; and it was this change which made the buyer's acts inconsistent with the seller's ownership. Even so great a judge as Atkin L.J. could not see the wood for the trees. He too rejected the view that sections 34 and 35 were connected, so that the buyer could not be deemed to have accepted the goods under section 35 until and unless he had an opportunity for examin-

[49] [1923] 2 K.B. 490. *Cf. Benaim & Co. v. Debono* [1924] A.C. 514.
[50] [1923] 1 K.B. 658.
[51] *Supra*, n. 42.
[52] *Supra*, n. 47.
[53] [1923] 2 K.B. 490, 494-497.

ing them.[54] The judge advanced two reasons for this view. The first, that under section 35 the buyer could expressly intimate acceptance, so that he could be bound even without reasonable inspection of the goods. Second, that 'all the words of the section must have effect given to them'; the section says that 'when the goods have been delivered to [the buyer] and he does any act' of the kind specified, and here one such specified act took place, as the buyers' reselling transferred possession to third persons, and though the sub-purchasers afterwards returned the goods, 'such return cannot avail to restore a right of rejection which has been lost'.[55]

No lengthy discussion is necessary to show that this makes the doctrine of 'acceptance' far too wide. Not only does the decision clash with the main current of the previous cases,[56] but there was also no discernible reason, apart from a statute now over-technically construed, why the whole risk of bad quality should be shifted from the seller to the buyer. Moreover, in some cases no proper inspection can take place before the goods are unloaded or before they reach the sub-purchasers by whom (since the buyer is only a dealer or middleman) the goods are intended to be used. Thus *Hardy v. Hillern,* if rigidly followed, could produce quite absurd results. A recent case shows this.[57] The buyer bought a quantity of rubber material of specified length and width. He had bought this by sample and for resale to footwear manufacturers, asking the seller to deliver the rubber direct to the sub-purchasers. When the latter rejected the rubber as not according to sample, the buyer immediately notified his own rejection. The seller disputed the buyer's right to do this and sued for the price of the rubber. Supporting the seller's claim, the court said: 'The buyers took delivery at the sellers' premises. . . . Thereafter the handling of the goods by passing them on to the carrier was an act done for the buyers with their goods by the sellers; an act done by the sellers for the buyers with the buyers' goods.'[58]

[54] This view (as Atkin L.J. recognized) had been expressed in earlier editions of Benjamin. This must also have been the view of Chalmers. The evidence for this is that he accepted the statement of the law by Brett J. in *Heilbutt v. Hickson* (n. 44 *supra*) and gave effect to it by making 'acceptance' depend on a prior opportunity for examination and inspection. This Chalmers did simply by putting the opportunity-provision (s. 34) before the acceptance-rule (s. 35). Far from being independent the two sections (34 and 35) were thus mutually explanatory and complementary.

[55] [1923] 2 K.B. 490, 498-499. This manner of construing the section, *i.e.* independently of previous case-law, was of course part of Lord Atkin's general view as to how to interpret codifying commercial statutes.

[56] Though the court now chose to distinguish *Heilbutt v. Hickson* (n. 44 *supra*) on the ground that it only concerned the proper place for inspection, it must be obvious that where and how a buyer inspects closely affects his 'acts' under s. 35. Of all cases previously considered, there is only one—*Harnor v. Groves* (n. 36, *supra*)—which can be said to be in the seller's favour. Yet even that case can be explained, as we have seen, on the basis that the buyer knew of the inferiority of the goods or that the goods deteriorated in his possession.

[57] *Ruben Ltd v. Faire Bros.,* [1949] 1 K.B. 254.

[58] *Ibid.,* 259.

Does this mean that the seller can 'deliver' the goods at his own place of business and thereupon disclaim all further responsibility for bad quality? Or was the buyer obliged to examine every piece supplied to confirm its required width and length? Surely, it should have been held that there was no 'delivery' until proper inspection of the goods, an inspection which as a practical matter had to be postponed until the manufacturers as users could see and try the goods, and that the seller must have been aware that this inspection would be deferred in this way.[59] Instead, the buyer became forced to retain goods for which perhaps he had no further use, and this only because of the seller's own failure to supply the correct things.

. . . . . .

The last decision raises our final point. Though the buyer was held not to be entitled to return the goods, the court did hold him entitled to recover damages for the seller's breach of warranty.[60] But what are such damages and how are they to be assessed? If the buyer has to resell at a loss, then he can recover the difference between the price he paid and the price at which he resells.[61] Does this mean that the buyer can resell at any price, since his loss would anyhow be met? Or suppose that the goods being perhaps very special, cannot be resold. Now the damages (as it is usually put) would be the difference between the price paid and the actual value of the goods. But what is the actual value of goods not wanted by the buyer himself, which he bought for resale yet goods which cannot be resold? Are not such goods more or less worthless to him, even though they may represent some value as 'materials' or 'product'? And even if not entirely worthless, what is their realistic worth? Further, can the buyer claim compensatory items such as, for example, warehousing or similar costs while he is waiting for a sub-buyer to turn up? And will not the attempt at assessing the buyer's loss often tend to give him more generous compensation than perhaps he should have, having regard to the price of the goods? The dilemma, it seems, will always be this: that the buyer ought not to recover more than the amount of the price he paid (for he would then have his own money as well as keep the goods), yet if the buyer recovers less than his price, he remains a loser despite his remedy in damages (for he would still get less for his price than the exchange he bargained for). We can see that, to avoid these difficulties, we should make it possible

[59] For such and more sensible results, see *Molling v. Dean* (1902) 18 T.L.R. 217; *Saunt v. Belcher* (1920) 26 Com. Cas. 115; *Bragg v. Villanova* (1923) 40 T.L.R. 154. See generally Benjamin, *op. cit.*, 759.

[60] [1949] 1 K.B. 254, 259-260. The court however, left the quantum of damages to be determined by a Master or by the parties themselves. The buyer, though having claimed damages as an alternative, had understandably given no precise particulars.

[61] This seems well settled: *Loder v. Kekulé* (1857) 3 C.B.N.S. 128 (and see n. 34 *supra*); *Van den Hurk v. Martens* [1920] 1 K.B. 850.

for the buyer to return unsatisfactory goods and to recover his price, without his being driven to an action in damages while still compelled to keep the goods.[62] In short, the doctrine of 'acceptance' should be applied sparingly, since the more limited its operation, the better the remedy.

[62] Professor Williston cannot have seen this point. He criticized American jurisdictions in which 'acceptance' was held not only to preclude the right to return but also the claim to damages; he preferred the English rule that the buyer could sue for breach of warranty: see 3 *Williston on Sales*, §§ 485ff. It is true that English law has (since *Poulton v. Lattimore* (1829) 9 B. & C. 259) permitted a remedy in damages. Nor is there any objection to this where the buyer sues in damages where he can no longer physically return the goods either because he has resold or because the goods perished while being tried or because of internal defects not patent at the time of sale. In these cases, the doctrine of 'acceptance' has anyhow little to do, except insofar as we still wish to 'accept' (or keep) or reject (or return) worthless articles. However, where articles are not worthless in this sense, but remain perfectly returnable, the American rule, denying an action in damages, seems preferrable to (present) English law, provided that the doctrine of 'acceptance' is kept within bounds, thus leading to a mutual return of price and commodity.