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A Child's First Book of Sellers' and Buyers' Remedies—Then and Now

HARRY L. SNEAD, JR.

If you are one of those uncomfortable lawyers who as yet has not made his first penetration into Article 2 of the Uniform Commercial Code perhaps this brief comparative note can start you on the road to learning the sellers' and buyers' remedies under the Code. The emphasis will be on fundamental differences in approach between the Code and prior law; detailed treatment may be found in texts, treatises, and numerous law review articles.

I.

GENERAL SUMMARY OF PRIOR LAW

Under prior law, generally, both buyer and seller were held to strict performance of the sales contract; there was little room for the doctrine of substantial performance. The law of anticipatory repudiation frequently was developed sketchily within a given jurisdiction, often less well analyzed and articulated.

If the goods were defective upon tender the buyer could reject. If title had passed the buyer became liable for the price; conversely, if title had passed the buyer could obtain the goods by a possessory action brought against a repudiating seller. If the goods were later discovered to be defective the buyer could sometimes *rescind*, but if he did so he often was held to have given up all further rights against his seller.

If *title* had not passed the wronged party could recover only damages (which were usually measured by the difference between the contract price and market value at the time and place of tender). Specially made

goods, if not readily resaleable, were an exception in some jurisdictions; the seller could recover the price even though title had not passed.

Where *title* had not passed, specific performance was awarded the buyer only if the goods were *unique* in the traditional, orthodox sense, although a few jurisdictions grudgingly went beyond this.

And, whether *title* has passed depended upon the "intent" of the parties. If the parties did not express any intent (and they usually did not), *title* passed according to certain familiar presumptions and concepts, the most familiar being: (1) If the goods were *specific* and in a *deliverable state* at the time the contract was made, and nothing further remained to be done by the seller, *title* passed at the time the contract was made; and, (2) If the goods were not *specific* (unascertained) at the time the contract was made, *title* passed when there was an *act of appropriation* (which had to be assented to, expressly or impliedly, by the other party to the contract).

Clearly, then, under prior law some of the key words and concepts were "title," "specific," "deliverable state," "act of appropriation," "unique," and "re-scind."

Only the word "unique" is at all relevant in a discussion of sellers' and buyers' remedies under the UCC. Read that last sentence again!

II.

THE CODE ABANDONS THE TITLE CONCEPT; WHAT THE CODE SUBSTITUTES FOR THE OLD, FAMILIAR WORDS AND CONCEPTS; SOME ESSENTIAL DEFINITIONS

Although it may be painful to do so, the first thing you must surrender to the UCC is your time-worn, comfortable (yet misplaced) reliance on the title concept.

The UCC abandons the title concept as a means of adjusting the remedies of sellers and buyers. Va. Code Ann. 1950 §8.2-401 (Added Vol. 1965) and comments.

What next follows is so incomplete as to be misleading (perhaps dangerously so), but is employed as a "gimmick" which may speed the initial learning process by assisting the pre-Code lawyer in relating the old law to the UCC:

What are the words and ideas of the UCC which are most analagous to the words and ideas of prior law?

(1) In place of "specific goods" the UCC substitutes a similar concept of "identified goods." Va. Code Ann. 1950 §8 2-501 (Added Vol. 1965).

(2) "Deliverable state" gives way to "conforming goods" under the UCC. Va. Code Ann. 1950 §8.2-106 (Added Vol. 1965).

(3) "Act of appropriation" has no single counterpart in the UCC; the whole concept of an "act of appropriation" has been by-passed in the UCC.

This requires a short explanation which hinges on the UCC method of "identifying" (specifying) goods: Under prior law both parties had to assent, at least impliedly, to the "act of appropriation." Under the UCC "identification" (specification) may occur when "goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers." Va. Code Ann. 1950 §8.2-501 (1) (6) (Added Vol. 1965). Thus, under the UCC, a seller can single-handedly "identify" goods, no assent of the buyer to the identification need be found. This ability of a UCC seller to identify goods without the buyer's assent to the "act" of identification, when coupled with several specific sections of the UCC which cause rights and obligations to turn upon whether the goods were "identified," has made it possible to eliminate in the UCC any single word or concept which

is closely analagous to the "act of appropriation" employed in prior law.

No one who is even one step removed from a crippling neurosis enjoys memorizing definitions. Regretfully, there are at least three additional definitions and ideas you must have in mind before any further discussion is practicable; you will need to know many more as a knowledgeable practicing attorney. Here are those additional three:

(1) "Rejection"—"If the goods or the [seller's] tender of delivery fail in any respect to conform to the contract" the buyer may reject all of the goods, or he may accept all of the goods, or he may elect to accept any "commercial unit" and reject the rest. The rejection must be within a reasonable time after tender or delivery, and the buyer must seasonably notify the seller that he is rejecting the goods. Va. Code Ann. 1950 §§8.2-601 and 8.2-602 (Added Vol. 1965). This is similar to "rejection" under prior law. Notice, however, that the UCC has made it clear that when a buyer is faced with non-conforming goods he has a right to reject all, accept all, or elect to accept part of the goods and reject the rest.

(2) "Acceptance"—Under the UCC "acceptance" of the goods is the operative event which comes closest to having one of the effects that "title passing" had under prior law, *i. e.*, when the buyer irrevocably "accepts" goods he becomes liable for the purchase price. Va. Code Ann. 1950 §8.2-709 (1) (a) (Added Vol. 1965).

Under what circumstances has the buyer "accepted" the goods? The three principles which govern "acceptance" are found in Va. Code Ann. 1950 §8.2-606 (1) (Added Vol. 1965):

(a) when the buyer after a reasonable opportunity to make an inspection of the goods signifies to the seller that the goods are conforming or that he will accept them despite their non-conformity; or,

(b) the buyer after a reasonable opportunity to inspect the goods fails to make an effective rejection, that is, waits an unreasonable time before rejecting and notifying the seller of his rejection; or,

(c) does any act inconsistent with the seller's ownership, *e. g.*, sells or intentionally destroys the goods.

(3) "Revocation of acceptance"—Va. Code Ann. 1950 §8.2-608 (Added Vol. 1965).

Under prior law a buyer who had failed to reject defective goods usually was entitled to rescind if the defect was substantial and "latent," that is, not apparent on reasonable inspection. Many cases, however, held that when the buyer rescinded he rescinded the entire contract and had no further rights against the seller.

The UCC avoids the probability of being construed in this fashion by abandoning the use of the word "rescision" in this context and substituting in its place the right of a buyer to "revoke his acceptance." This approach assures the buyer of a right to "rescind" and, in addition, to recover damages for breach. See Comment 1, Va. Code Ann. 1950 §8.2-608 (Added Vol. 1965).

Under what circumstances may a buyer "revoke his acceptance"?

The buyer may revoke his acceptance only as to goods which are so non-conforming (defective) as to "substantially impair" their value to him, *and*, if the buyer had accepted the goods.

(a) on the reasonable assumption that the seller would cure the non-conformity and it has not been seasonably cured, or,

(b) the buyer had not discovered the non-conformity and the failure of the buyer to discover the non-conformity was reasonably induced either by the difficulty of discovery of the non-conformity before acceptance or by the seller's assurances. Va. Code Ann. 1950 §8.2-608 (Added Vol. 1965).

In any event, the buyer who seeks to revoke his acceptance must do so within a reasonable time after he discovers or should have discovered the non-conformity, and his revocation of acceptance is not effective until he notifies the seller. Va. Code Ann. 1950 §8.2-608 (Added Vol. 1965).

III.

A SURVEY OF ARTICLE 2 REMEDIES— HORNBOOK STYLE

Having now mastered a minimum "UCC vocabulary" it is possible to undertake a survey of the more important UCC provisions respecting sellers' and buyers' remedies. This survey will be directed to three areas: (1) performance, breach, excuse, and anticipatory repudiation; (2) sellers' remedies; (3) buyers' remedies.

A brief, skeleton outline of specific UCC rules, with citations, will be presented in the next section of this article.

A. A survey of the UCC rules relating to performance, breach, excuse and anticipatory repudiation.

The UCC, like prior law, takes the initial position that buyers and sellers are obliged to adhere to the doctrine of strict performance. Va. Code Ann. 1950 §8.2-301 (Added Vol. 1965). [Installment contracts are an exception. Va. Code Ann. 1950 §8.2-612 (Added Vol. 1965).]

Having taken this initial position, the UCC then softens the impact of the doctrine of strict performance with several mitigating provisions which, in effect, tend to relieve or excuse a party having to strictly perform his contract. Although the policy reasons for these "mitigation doctrines" vary, the policy reason for several such provisions is that under prior law, with its insistence on strict performance, buyers and sellers in changing

market conditions (in which it was advantageous to avoid the contract) were perverting the doctrine and using it to force the opposite party to breach his contract, *e. g.*, a seller suddenly and without warning insisting on legal tender when the prior commercial practice had been to accept a check. See Va. Code Ann. 1950 §8.2-511 (Added Vol. 1965).

The UCC has several provisions which discourage this perversion of the doctrine of strict performance, some of which provisions permit a party who is "technically" in breach to "cure" his breach by taking timely action.

The UCC provisions giving a party a right to "cure" his breach often would leave the opposite party to the contract in an insecure position, uncertain as to whether the "cure" would be effected (or effective). Thus, giving one party a right to "cure" his breach gave rise to a need in the other party to a "right to an adequate assurance of performance." The UCC gives such a right. Va. Code Ann. 1950 §8.2-609 (Added Vol. 1965).

In regard to the doctrine of anticipatory repudiation, the UCC (unlike many common law decisions) clearly recognizes that there are at least three varieties of "anticipatory repudiation": (1) a material decline in the promisor's ability or willingness to perform the contract occurring after the contract is formed, (2) inadequacies in installment contracts, and (3) cases in which there is an express repudiation or a clear manifestation of intention not to perform. The UCC sets forth a remedy or remedies which are thought to be appropriate to each of these distinct types of "anticipatory repudiation." Some of these remedies and rights upon anticipatory repudiation could rightfully be said to mitigate the doctrine of strict performance.

Other UCC provisions which mitigate or temper the doctrine of strict performance are those on casualty to identified goods, substituted performance, and failure

of presupposed conditions. Va. Code Ann. 1950 §§8.2-613 through 8.2-616 (Added Vol. 1965).

B. A survey of the UCC provisions on seller's remedies.

Prior law often enabled a seller to force goods on a buyer who no longer had any use or market for the goods. This was caused, in effect, by the seller being able to obtain "specific performance," that is, sue for the purchase price, whenever "title had passed." The result often was that arbitrary and needless economic waste resulted, in that the goods were neither used nor marketed by the buyer. When a buyer clearly cannot use or market the goods, economic waste is less likely to occur if the seller, with his presumably superior ability to remarket the goods, is deprived of a right to force the goods on such a buyer. It was for this reason that the UCC greatly curtailed the right of the seller to sue for the purchase price, thus curtailing, in effect, the seller's opportunities to obtain specific performance.

The UCC rules allow a seller to recover the purchase price in only three instances: (1) when the buyer (irrevocably) has "accepted" the goods [Va. Code Ann. 1950 §8.2-606 (Added Vol. 1965)], or (2) when conforming goods have been lost or damaged within a commercially reasonable time after their risk of loss has passed to the buyer, or (3) when the goods have been identified to the contract and the seller is unable after a reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing. Va. Code Ann. 1950 §8.2-709 (Added Vol. 1965). (See, primarily Va. Code Ann. 1950 §§8.2-509 and 8.2-510 (Added Vol. 1965) for rules as to when the risk of loss has passed to the buyer. Do *not* use §8.2-401 for this purpose!)

Although the UCC has diminished sellers' opportunities to recover the purchase price, the Code rules consid-

erably improve upon the traditional measure of damages for breach of a sale contract. Prior law did not always encourage parties to abide by their contracts, because in a stable market the damages were usually nominal. The Code, however, makes it clear that the seller, in computing his damages, may: (1) resell the goods in the manner prescribed in Article 2 and recover the difference between the contract price and the resale price, or (2) sue for the difference between the market price at the time and place of tender and the contract price, or (3) if market price, as a measure of damages, is "inadequate to put the seller in as good a position as performance would have done" then the seller may sue and as his measure of damages recover "the profit . . . which the seller would have made from full performance by the buyer." Va. Code Ann. 1950 §§8.2-706 and 8.2-709 (Added Vol. 1965). In addition, the seller can recover incidental damages, which include expenses incurred in transportation, custody, return, *etc.* of the goods. Va. Code Ann. 1950 §8.2-710 (Added Vol. 1965).

The sellers' right of stoppage in transit has been preserved and broadened. Va. Code Ann. 1950 §8.2-710 (Added Vol. 1965).

An innovation in the Code is a seller's remedy of "reclamation." This is an attempt to give the seller a right to reclaim the goods from an insolvent buyer within a limited period of time. Va. Code Ann. 1950 §8.2-702 (Added Vol. 1965). Before employing this remedy an attorney would be well advised to be prepared to explain away *In re Kravitz*, 278 F. 2d 820 (3d Cir. 1960). See HAWKLAND, *A Transactional Guide to the Uniform Commercial Code* §1,6002 (1964).

C. *A survey of the UCC provisions relating to buyers' remedies.*

If law is to serve as an aid to commerce then its rules

should be such as to attempt to assure buyers of a continuing supply of raw materials and goods for re-sale. In other words, from the buyers' viewpoint, the predominant policy consideration should be to assure the buyer of a right to obtain in timely fashion the goods he has contracted for, or, at least, substitute goods. The UCC makes a more determined attempt to satisfy this policy consideration than did prior law, which, as you recall, gave clear authority to the buyer to obtain the goods only when "title had passed" or the goods were "unique."

Several sections of Article 2, used serially or in combination, tend to assure the buyer of a continuing flow of goods:

First, the buyer has the right to maintain a possessory action at law for the goods if the goods have been "identified" and the buyer is unable after reasonable effort to procure substitute goods at a reasonable price, that is, "cover." Va. Code Ann. 1950 §8.2-717 (3) (Added Vol. 1965).

Second, the buyer may maintain a suit for specific performance when the goods are "unique" or "in other proper circumstances." The Comments to the UCC suggest that an inability of the buyer to procure substitute goods at a reasonable price ("cover") would presumptively be "other proper circumstances" justifying an award of specific performance; and, it should be noted that the goods need not be "identified" for the court to award specific performance. This remedy will be very useful in enforcing requirements and output contracts. See the Comments to Va. Code Ann. 1950 §8.2-717 (Added Vol. 1965).

Third, a buyer whose seller has breached may go into the market "without unreasonable delay" and purchase or contract to purchase goods in substitution for those due by the seller. This remedy is called "cover." After

“covering” the buyer may also sue for damages measured by the difference between the contract price and the cost of “cover.” Va. Code Ann. 1950 §8.2-712 (Added Vol. 1965).

Fourth, where a seller has repudiated his contract prior to the date of performance, the UCC provisions on anticipatory repudiation [Va. Code Ann. 1950 §8.2-610 (a) (Added Vol. 1965)] expressly permit the buyer to go then and there into the market and purchase or contract to purchase substitute goods, that is, “cover.” Thus, the combination of an anticipatory repudiation remedy with the remedy of “cover” tends to assure a steady flow of raw materials and goods to buyers.

In those instances in which the buyer is not entitled to the goods, Article 2 gives the buyer several methods of measuring damages. [Incidentally, the buyer, if he wishes to do so, may elect not to recover the goods or “cover” even though entitled to do so; he may elect to sue for damages instead. Va. Code Ann. 1950 §8.2-711 (Added Vol. 1965).]

The buyers' damage remedies may be summarized as follows:

(1) Having procured or contracted to procure substitute goods (“cover”) the buyer may sue for the difference between the cost of “cover” and the contract price Va. Code Ann. 1950 §8.2-712 (Added Vol. 1965); or

(2) Where the seller has (a) not delivered conforming goods, or (b) has repudiated, or (c) the buyer has rightfully rejected or justifiably revoked his acceptance, the buyer may elect not to “cover” but sue for the difference between the market price (at the time the buyer learned of the breach) and the contract price. Market price is to be determined as of the place of tender, or, in cases of rejection after arrival of the goods or revocation of acceptance, as of the place of arrival. Va. Code Ann. 1950 §8.2-713 (Added Vol. 1965).

(3) Where the goods that the seller tenders are non-conforming, but the buyer (irrevocably) has accepted the goods and given the seller notification of the breach [Va. Code Ann. 1950 §8.2-607 (3) (a) (Added Vol. 1965)], the buyer is liable for the purchase price but he may recover as damages "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." Va. Code Ann. 1950 §8.2-714 (Added Vol. 1965). This section will have primary application to situations in which there are after-discovered defects in the goods.

In all of the above-mentioned "damage" situations, the buyer may be entitled to recover "incidental" and "consequential" damages as provided and limited in Va. Code Ann. 1950 §8.2-715 (Added Vol. 1965).

In addition to the remedies previously mentioned, two additional rights given a buyer should be mentioned:

First, a buyer who has paid all or part of the price has a security interest in goods which he has rightfully rejected or as to which he has justifiably revoked his acceptance and, in appropriate circumstances, may make an "Article 2" resale of the goods to recover his payment(s). Va. Code Ann. 1950 §8.2-711 (3) (Added Vol. 1965).

Second, where a buyer has made payments in advance of delivery, and the seller becomes insolvent within ten days after the first installment paid by the buyer, the buyer, by keeping good a tender of any unpaid portion of the purchase price, may recover possession of goods "identified" by the *seller*, whether the goods are conforming or non-conforming; however, if the *buyer* made the "identification" of the goods, the buyer may recover possession of the goods only if the goods conform to the contract. Va. Code Ann. 1950 §8.2-502 (Added Vol. 1965).

IV.

AN OUTLINE OF SELLERS' AND BUYERS'
REMEDIES UNDER THE UCCA. *Performances, breach, excuse, and anticipatory repudiation*

1. Parties are obliged to strictly perform sales contract. §8.2-301.

(a) Exception as to installment contracts. §8.2-612.

(b) Provisions which bear upon mitigating the doctrine of strict performance.

(1) Tender of payment by buyer; payment by check. §8.2-511.

(2) Cure by seller of improper tender or delivery. §8.2-508.

(3) Right to adequate assurance of performance. §8.2-609.

(4) Substituted performance. §8.2-614.

(5) Casualty to identified goods. §8.2-613.

(6) Excuse by failure of pre-supposed conditions. §8.2-615.

2. Three branches of anticipatory repudiation.

(a) Impaired expectation of performance. Adequate assurance of performance. §8.2-609.

(b) Installment contracts. §8.2-612.

(c) Unequivocal repudiation. §8.2-610.

(1) Retraction of anticipatory repudiation. §8.2-611.

B. *Sellers' remedies*

1. Action for the price. §8.2-709.

(a) When buyer has "accepted."

(b) When loss or damage to goods after risk of loss has passed to buyer.

- (c) Seller is unable to re-sell identified goods after reasonable effort.
- 2. Reclaiming goods on buyer's insolvency. §8.2-702.
- 3. Stoppage in transit. §8.2-705.
- 4. Damages.
 - (a) Measured by re-sale. §8.2-706.
 - (b) Measured by market. §8.2-708 (1).
 - (c) Measured by loss of profit. §8.2-708 (2).
 - (d) Incidental damages. §8.2-710.
- 5. Seller's right to salvage unfinished goods. §8.2-704.

C. *Buyers' remedies*

- 1. Right to recover contract goods. §8.2-716.
 - (a) Possessory action at law if goods "identified" and buyer unable to effect "cover."
 - (b) Specific performance if goods "unique" or in "other proper circumstances."
- 2. Right to substitute goods (and damages). The remedy of "cover." §8.2-712.
- 3. Right to damages when goods not irrevocably accepted.
 - (a) Measured by "cover." §8.2-712.
 - (b) Measured by market price. §8.2-713.
 - (c) Incidental and consequential damages. §8.2-715.
- 4. Right to damages when buyer has irrevocably accepted goods.
 - (a) Loss resulting in ordinary course of events from breach. §8.2-714 (1).
 - (b) Rule for breach of warranty. §8.2-714 (2).
 - (c) Incidental and consequential damage. §8.2-715.
- 5. Buyer's security interest when goods rightfully re-

jected or acceptance justifiably revoked. §8.2-711 (3).

6. Right of buyer who has made advances to recover identified goods in event of seller's insolvency. §8.2-502.

D. *Miscellaneous provisions*

1. Liquidated damages.
 - (a) By agreement. §8.2-718 (1).
 - (b) By operation of law. §8.2-718 (2) (3).
2. Contractual limitation or modification of remedy. §8.2-719.