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Sales: The Uniform Commercial Code v. Existing Law as to the Buyer's Rights on Improper Delivery of Goods

Harold M. Frauendorfer

THE UNIFORM COMMERCIAL CODE V. EXISTING LAW AS TO THE BUYER'S RIGHTS ON IMPROPER DELIVERY OF GOODS

I. Introduction

The proposed Uniform Commercial Code is the subject of some discussion among lawyers and businessmen in many walks of life. The Uniform Commercial Code is certainly one of the most ambitious attempts at a uniform law ever made, in that it is an attempt to codify an entire field of law into one uniform act, in this instance premised on the concept that all commercial transactions relate to a single field of law.[1] Because of the scope of the proposed code, it appears that a comparison of some of the provisions of the proposed code with existing law is in order, and an evaluation attempted where a comparison is made. The Uniform Commercial Code is an attempt at simplification and clarification of the law relating to commercial transactions generally.[2]

Therefore, it seems appropriate to examine various phases of the commercial law in the light of what our law now is and what the Uniform Commercial Code proposes. One of the phases of the law of sales, involving some changes in present law, has to do with the rights of the buyer when goods shipped to him by the seller do not comply with the contract.[3]

II. The Uniform Commercial Code-Its Terminology

Section 2-601 of the Uniform Commercial Code provides as follows:

> ". . . if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
> (a) reject the whole; or
> (b) accept the whole; or
> (c) accept any commercial unit or units and reject the rest."

This section effects a change in the present law in that it allows a partial acceptance of a non-conforming tender in good faith without the loss of any of the buyer's remedies.[4] It would also permit the acceptance of all or part of the goods even though they did not con-

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[1] Bunn, Charles, *"Uniform Commercial Code—Some General Observations,"* 1952 Wis. L. Rev. 197.

[2] The drafters of the Uniform Commercial Code are the members of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, with their respective advisers. See also, *supra,* note 1.

[3] Uniform Commercial Code, Official Draft, Text and Comments Edition, 1952, p.186.

[4] *Ibid.*

form with the contract at all, requiring only that there be good faith on the part of the buyer and that any acceptance be commercially reasonable.[5] Just who is to determine what is commercially reasonable in such a situation is not indicated, but it appears that the only solution would be a judicial determination of the commercial reasonableness of the buyer's acts where the parties could not agree between themselves. True enough, the commercial custom could be used as a basic determining factor, but commercial custom varies from locale to locale. Another problem here involved has to do with the value to be given to non-conforming goods when the buyer decides to accept them. Is the contract price to apply? How can it when the goods are not in conformity with the contract? Who is to determine what price to apply to the situation?

It should also be noted here that there is a new term—new to the law—used in section 2-601 of the Code. That term is "commercial unit." It is also well to note, at this point, that whole sections of the Code are devoted solely to defining terms. Experience has shown that this is both practical and useful. The Uniform Commercial Code, Sec. 2-105 defines a "commercial unit" as:

> ". . . such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (such as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole."

The introduction of this term appears merely to be the introduction into law of a term used by those whom the law directly affects, and gives the term the definition and meaning it has among those to whom the law is meant to apply and who most use the term. This situation should surely simplify any problems that arise in relation to the term and should, in fact, prevent a number of definition problems from arising.

Another point, concerning the introduction of this concept of the commercial unit, has to do with the effect on other non-conforming goods shipped to a buyer, where the buyer accepts one or a few of the non-conforming units and rejects the remainder of the goods. The comment of the drafters indicates that a buyer will not be permitted to accept a commercial unit or units out of a shipment where such acceptance would materially impair the value of the remaining goods.[6] Just what would constitute a "material impairment" of the value of the remaining goods in such a situation? Should not a buyer be given con-

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[5] *Supra*, note 4.
[6] *Supra*, note 4.

siderable leeway where the seller has sent non-conforming goods? Certainly, in times of shortages of certain goods, when a buyer is expected to take a certain amount of some other goods in order to get a quota of an item in short supply, the acceptance of the item in short supply, and rejection of the rest of the goods where none of the goods shipped comply to the contract, could lead to numerous problems. This is true even though the buyer has complied strictly with the letter of the wording of the Code.[7]

In order to attempt a solution of some of the problems involved herein, it appears proper to examine part of the existing law on this subject generally, and to make a comparison of the existing law with the above sections of the proposed Code.

III. Existing Law and Uniform Enactments as Compared with the Uniform Commercial Code

The only previous uniform law on the subject consists of several portions of the Uniform Sales Act.[8] However, before the enactment of the Uniform Sales Act by any of the states, there appears to have been consideable confusion as to the effect of the acceptance of non-conforming goods.[9] Strictly speaking, many of the decisions on this subject involve situations where there was a defect in the goods when delivered.[10] In such a situation, the New York rule, before the passage of the Uniform Sales Act, was that in the case of a present sale of goods, acceptance of non-conforming goods did not bar the buyer's right to an action for breach of warranty where there were express warranties.[11] That there was an extension of this rule to include express warranties in contracts to sell should be noted.[12] However, where there were no express warranties, acceptance of non-conforming goods by the buyer barred his rights to sue for breach of implied warranties.[13]

Since the passage of the Uniform Sales Act, which is now in effect in most of the forty-eight states,[14] the buyer's remedies for breach

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[7] It is also well to note at this point that much of the meaning to be given the various sections of the proposed code are derived from the comments of the drafters. The sections of the code, in and of themselves, sometimes do not clearly indicate what the drafters' comments show was intended to be included in the code itself. The 1952 Text and Comments Edition of the Uniform Commercial Code includes the entire code plus the comments of the drafters, edited by Charles Bunn of the University of Wisconsin.

[8] Wis. Stats., Ch. 121 (1951).

[9] Williston on Sales, §§488 and 489 (2 ed., 1924), and cases there cited. See also, Vold on Sales, §138 (1931).

[10] Vold on Sales, pp.432-433.

[11] Reed v. Randall, 29 N.Y. 358 (1864); McCormick v. Sarson, 45 N.Y. 265 (1871); Foot v. Bently, 44 N.Y. 166 (1870); Staiger v. Soht, 116 App.Div. 874, 102 N.Y.S. 342 (1907).

[12] Day v. Pool, 52 N.Y. 416, 11 Am.Rep. 719 (1873).

[13] Gaylord Mfg. Co. v. Allen, 53 N.Y. 515 (1873).

[14] 1 U.L.A. '52 pp., page 6.

of warranty, either express or implied, survive acceptance of the goods so long as notice of any defect or lack of conformity with the contract is given to the seller within a reasonable time.[15] Therefore, it appears that under the Uniform Sales Act a buyer could accept a non-conforming tender and still sue for breach of warranty in most cases.[16] Acceptance of a non-conforming tender, with knowledge on the part of the buyer, waives the right of the buyer to rescind under the Act,[17] but the buyer may sue for breach of warranty without requesting the seller to make good on his breach.[18] It should also be noted that, under the Uniform Sales Act, a buyer may waive his right to rescind the contract by acceptance of an incomplete delivery and a continued use of the goods so accepted.[19] It appears that where the buyer does waive his right to rescind in the manner last stated, he may still have an abatement of the purchase price.[20] All that the Act requires is that the buyer give notice of the defects in the goods within a reasonable time in order to be able to maintain an action for breach of warranty or to have the court abate the purchase price when the seller sues for his sales price.[21]

Now, it is apparent from the authorities that, under the Uniform Sales Act, a buyer may accept non-conforming goods either by expressly so doing or by performing an act inconsistent with the idea of recission, such as using the goods knowing that they do not conform to the contract.[22] However, from the language of Section 44 of the Uniform Sales Act, it seems highly improbable that a buyer could so accept part of a shipment which is entirely non-conforming without accepting the whole shipment. This is possible under the Uniform Commercial Code.

The next problem then is, what did the buyer have to do to effect a recission before and under the Uniform Sales Act? Authority indicates that, both before and since the Act, it is necessary for the buyer to unconditionally offer to return the goods before there can be an effective recission.[23] It also appears that under the Uniform Sales Act.

[15] UNIFORM SALES ACT, §§48 and 69 (1); See also, VOLD ON SALES, p.432 (1931).
[16] Henderson Tire & Rubber Co. v. P. K. Wilson & Co., 235 N.Y. 489, 139 N.E. 583 (1923); Bass v. Bellofatto, 96 N.J.Law 320, 115 A. 302 (1921); UNIFORM SALES ACT, §49; See also, VOLD ON SALES, p.433 (1931).
[17] Banninger v. Landfield, 209 Wis. 327, 245 N.W. 113 (1932).
[18] Dunck Tank Works, Inc. v. Sutherland, 236 Wis. 83, 294 N.W. 510 (1940). That this concept was accepted prior to the Uniform Sales Act is evident. Butler v. Titus, 13 Wis. 479 (1861).
[19] *Supra*, note 17.
[20] *Supra*, note 17.
[21] For what may or may not be a reasonable time for giving notice of defects, see: Knobel v. J. Bartel Co., 176 Wis. 393, 187 N.W. 188 (1922); Svoboda v. Barta, 169 Wis. 338, 172 N.W. 719 (1919); Aaron Bodek & Son v. Avrach, 297 Pa. 225, 146 A. 546 (1929).
[22] *Supra*, note 17.
[23] Dunck Tank Works, Inc. v. Sutherland, 236 Wis. 83, 294 N.W. 510 (1940); Mallow v. Hall, 209 Wis. 429, 245 N.W. 90 (1932); J. L. Owens Co. v.

Section 44, if any part of the contract was not fulfilled by the delivery of goods proper to all parts of the contract by the seller, the buyer could reject the entire shipment.[24] The Wisconsin Supreme Court has indicated that this rule would be applicable even without the Uniform Sales Act.[25] Of course Section 44 of the Uniform Sales Act specifically allows the buyer, in the case last indicated, to accept that portion of the goods that conforms to the contract by paying contract price for the conforming goods accepted and to reject the non-conforming goods. Under Section 2-601 of the Uniform Commercial Code, this requirement for partial acceptance is done away with.

In addition, Section 2-601 of the Uniform Commercial Code seems to indicate, from its terminology and from the comment of the drafters, that the buyer has all of the rights assured him both before the Uniform Sales Act and under Sections 44 and 69 of said Act. Also, there seems to be the notable addition to the buyer's rights under the new code, in that it allows the acceptance of the previously mentioned "commercial unit" whether or not it conforms in any way to the contract, and whether or not the seller intended the delivery to be complete or partial. This appears to put the buyer in a position of being able to accept some portion of a shipment of goods which he sorely needs, even if they do not conform strictly to the contract, without his act being construed in law to have been an acceptance of the entire shipment. This last mentioned result is a carry-over of the old common law rule which was described even before the advent of the Uniform Sales Act.[26] In most other instances of rejection or acceptance of non-conforming goods, the buyer's rights appear not to be changed much by these sections of the proposed code.

IV. Conclusions

The only real changes that appear to have been effectuated in the law as to the buyer's rights on improper delivery by the Uniform Commercial Code are: (1) the introduction of the new term "commercial unit" to the law; and (2) the right given to the buyer to accept a commercial unit or units, apparently whether or not the goods contained therein conform to the contract in any way, and to reject the rest of the goods if they do not conform to the contract. The introduction of the new term into the law could well be in accord with the avowed purpose of the drafters of the code to aid in making the law of the world of commerce clear.[27] It seems that there could be no

Whitcomb, 165 Wis. 92, 160 N.W. 161 (1917); Restatement, Contracts, §400 (1932).

[24] Washburn-Crosby Co. v. Kubiak, 175 Wis. 291, 185 N.W. 162 (1921); 46 Am. Jur., Sales, §211, 212 and cases there cited.

[25] Washburn-Crosby Co. v. Kubiak, 175 Wis. 291, 185 N.W. 162 (1921).

[26] Morse v. Moore, 83 Me. 473, 22 A. 362 (1891); See also, Williston on Sales, Sec. 488 and 489.

[27] *Supra,* note 1.

better way of clarifying the law of the commercial world than by using terminology in the law that is common to commerce and the business world. In the event of adoption of the code, however, the understanding of it would be well served by including the comments of the drafters because, as above noted, the code itself is much clarified and explained by these comments.

HAROLD M. FRAUENDORFER
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OWNERSHIP AND CONTROL OF AIRSPACE

The development of wide-spread air navigation has presented an interesting problem to the legal world. Just who owns and controls the airspace over this nation? Is it the subjacent landowner? If not, is it then the property of the public? If the property of the public, which government, federal, state or local is supreme as to regulating the use of this airspace?

Prior to the advent of aeronautics, the courts had relied on the ancient maxim, *"cujus est solum ejus est usque ad coelum et ad infernas,"* in determining the landowner's rights to the airspace above his property.[1] Freely translated the maxim reads: "He who possesses the land possesses also all that which is above and below." Now that air travel is on a nationwide scale, four theories of airspace ownership have been advanced: (1) The ancient *"ad coelum"* maxim mentioned above which gives the landowner unrestricted ownership; (2) There is no ownership at all of unenclosed airspace. This theory is the extreme opposite of the first theory; (3) Landowner has unrestricted ownership, but the airspace is subject to a "privilege" of aerial transit at reasonable altitudes. This theory offers a compromise between the extremes of the first two theories; (4) There is unrestricted ownership up to a certain altitude, at which ownership ceases. This is the so-called "zone theory." The extent of the zone is designated by such phrases as "lower stratum," "effective possession," or "actual or prospective user."[2]

It is obvious that to apply the *ad coelum* maxim to the operation of airplanes would be a serious barrier to the development of aviation. Each flight would be a trespass against the rights of the land-

[1] Bury v. Pope, 1 Cro. Elizabeth 118, 78 Eng. Rep. 375 (1586) was the first reported case in which the maxim was quoted. Case held that where a landowner erects a house so close to a window on the adjoining property that the light is cut off therefrom, the injured landowner has no complaint even though his building and his window were built forty years before the second building was erected. Penruddock's case, 5 Coke's Rep. 100 (1597); Baten's case, 9 Coke's Rep. 53, 77 Eng. Rep. 810 (1611).

[2] Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. AIR L. 329 (1932).