A Comparison of the Rights and Remedies of Buyers and Sellers Under the Uniform Commercial Code and the Uniform Sales Act

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The major objective in making this comparison of the rights and remedies of buyers and sellers under the Uniform Sales Act adopted in Kentucky in 1928 and the Uniform Commercial Code adopted by the Legislature in 1958, which repealed the Sales Act and became effective July 1, 1960, is to provide a treatment of the field of rights and remedies which is sufficiently comprehensive for a general working reference yet not so lengthy as to require an excessive amount of time for reading.

Primary emphasis is placed upon the conditions upon which the various rights and remedies arose under the Sales Act and how they have been affected by the Code. The additional rights and remedies provided by the Code will be similarly treated. No attempt is made to exhaustively describe what will constitute the requisite elements (i.e., notice, acceptance, reasonable commercial judgment, etc.) upon which the rights and remedies are predicated. Similarly the manner in which the rights may be given effect cannot be properly treated due to space limitation. The statement of the nature of the right or remedy, a comparison with its counterpart and of the conditions upon which both depend, in addition to the new Code provisions, will adequately fulfill the purposes of this article.

The article is divided into three parts to simplify treatment and enhance organization. The passage of title and its relative importance prefaced: (1) The seller's rights with respect to the goods; (2) The seller's remedies; and (3) The buyer's remedies.

The Relative Importance of Title Passage

"Title" or "property" in the goods was extremely important under the Sales Act and the rights and remedies of the parties in many instances were directly dependent upon the location of title. The principle upon which the Code is drawn is quite the contrary. This is reflected in Section 2-401, official comment 1 in the following terms:

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* The present official citation to the Uniform Commercial Code is: Ky. Acts 1958, Ch. 77, Legis. Research Comm'n Bull. No. 24 (1959). It will be referred to in this article as the "Code" and the footnote abbreviation used is "UCC". The Uniform Sales Act is included in the Kentucky Revised Statutes, Chapter 361, (repealed, Ky. Acts 1958, ch. 77 § 10-102) the section numbers of which correspond to the section numbers of the Sales Act, i.e., KRS 361.010, is section 1, KRS 361.020 is section 2, etc., of the Sales Act. The Act is referred to in the text as the "Sales Act" and the footnote abbreviation used is "USA". Comments on particular sections of the Code are the official comments to the 1957 draft.
This article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not “title” to the goods has passed.

Thus, one major factor upon which rights and remedies under the Sales Act depended is virtually eliminated. This aspect of the Code has been cogently criticized. However, the Code was adopted with this principle firmly embedded and presumably will be so interpreted, resulting in title passage being of minor importance.

I. The Seller's Rights with Respect to the Goods

A. The Right of Lien, the right to Retain, the Right to Withhold

An unpaid seller, within the meaning of the Sales Act, had a lien on the goods or a right to retain them for the price if he were in possession of the goods, even where title had passed to the buyer. Similarly if title had not passed and the seller were in possession he had a right to withhold delivery. The right to retain or withhold under the Sales Act were rights which only an unpaid seller within the meaning of the Act could exercise. The Code is not so limited. Irrespective of title passage there are four situations which will enable a seller to withhold delivery under the Code. If the buyer wrongfully (1) rejects the goods, (2) revokes his acceptance, (3) fails to make payment due on or before delivery, or (4) repudiates the contract in whole or in part the seller will be entitled to withhold delivery. Only in number (3) above, would the seller have been “unpaid” within the Sales Act, yet in three other instances under the Code a seller is given the right to withhold. In the other three instances it may not be necessary to exercise the right, however, it nevertheless exists. An example of how it may be desirable to exercise the right

2 “Title passage” under the Uniform Sales Act is governed by §§ 17-19.
3 For the effect of “title passage” upon the law of Sales under the Uniform Commercial Code, see UCC 2-401.
4 An Unpaid Seller is defined in part in USA § 52 as follows:
   (1) The seller of goods is deemed to be an unpaid seller . . .
   (a) When the whole of the price has not been paid or tendered . . .
5 USA § 53 (1) (a).
6 USA § 53 (2).
7 The repudiation which will enable a seller to withhold delivery of the goods includes an anticipatory repudiation. See UCC § 2-610 (b).
8 If the buyer breaches only with respect to a part of the contract then the seller may withhold only with respect to the goods directly affected. See UCC § 2-703.
9 The four actions on the part of the buyer which give rise to the right to withhold delivery as well as other rights and remedies are all included in UCC § 2-703.
is where there has been a wrongful rejection and a subsequent demand for delivery, in which case the seller could rightfully withhold delivery. (The four situations above give rise to other rights to be discussed infra, and reference will be made thereto in order to avoid unnecessary duplication, by referring to them as the four situations in Section 2-703.)

B. The Right to Stop Goods in Transitu

An unpaid seller under the Sales Act was given the right to stop goods in transit upon the buyer's insolvency. If title to the goods had passed, the right was conferred by section 53 (1) (b) and if title had not passed section 53 (2) provided a similar right. The only circumstance which would give rise to this right was the insolvency of the buyer; consequently, repudiation of the contract by the buyer was insufficient, although repudiation would entitle the seller to rescind the entire contract.

A right of stoppage is also provided by the Code. The provisions are broader and more detailed and in addition to permitting the seller to stop any size shipment on the insolvency of the buyer, enable the seller to stop particular size shipments on other conditions. If the buyer repudiates the contract, fails to make payment due, or fails to give adequate assurances of due performance when reasonable grounds for the seller's insecurity arise, the seller may stop carload, planeload and truckload lots or larger shipments. If the goods are stopped upon the seller's insecurity and the assurances are duly forthcoming, the seller's action is considered as merely a suspension of performance which will not entitle the seller to resell or divert.

For purposes of the exercise of the right to stop, it is the stated purpose of the Code that the goods will be considered in "transit" if they are in the possession of a bailee who has not attorned to the buyer. This provision may not substantially affect the result which would have been reached under the Sales Act, however, the stage of

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10 3 Williston, Sales, § 520 (rev. ed. 1948).
11 Recission upon repudiation is discussed in part II, subtopic D, infra.
12 UCC § 2-705 (1).
13 Ibid.
14 The right to stop on the seller's insecurity is derived from the right to suspend performance under UCC § 2-609 until adequate assurances of the other party's (the buyer's) performance is given. For a discussion of what will constitute "reasonable grounds for insecurity" and "adequate assurances of performance" see UCC § 2-609, official comments 3 and 4.
15 UCC § 2-705 (1).
16 See UCC § 2-705, official comment 1.
17 UCC § 2-703, official comment 1.
18 See 3 Williston, Sales § 523 (rev. ed. 1948) and cases therein cited concerning the attornment which will terminate the right to stop.
the transaction at which the right to stop is terminated is made more explicit. This provision is apparently directed to those situations in which the carrier-bailee has accepted the goods for the buyer only in the sense that he has done so as a necessary incident to the contract of carriage, in which case the right to stop would not be terminated.

The right to stop being extended under the Code to the enumerated situations provides a greater protection for the seller in addition to providing a method through which the buyer's damages may be mitigated. Permitting the seller to stop upon the breach by the buyer rather than upon the insolvency alone, will result in many instances, in a mitigation of the buyer's damages through the reduction of transportation, handling and storage costs which would have been incurred if the seller were permitted to stop only upon the buyer's insolvency.

C. The Right to Resell

Where title to the goods had passed and the unpaid seller had a right of lien or had stopped the goods in transit; or, where title had not passed and the unpaid seller was in possession of the goods or had stopped them in transit, such seller had the right to resell the goods under the Sales Act.19 The right was limited in that it could be exercised only if one of the following circumstances existed; (1) the goods were of a perishable nature, (2) the seller had reserved the right upon the default of the buyer, or (3) the buyer had been in default of payment an unreasonable time.20

The right of resale provided by the Code is not so limited. In any of the four situations in section 2-703, the seller may exercise the right. By permitting the seller to resell upon the wrongful rejection, repudiation of acceptance, failure to make payment due, or repudiation of the contract, the right has been substantially broadened. If the goods were not perishable and no express provision for resale were included in the contract, the only way the seller could resell under the Sales Act was by waiting until the buyer had been in default an unreasonable length of time. The only condition precedent to the sale under the Code is that the buyer breach his contract within section 2-703. Further the seller under the Code is permitted to resell upon the anticipatory repudiation by the buyer.21 This would have been impossible under the Sales Act unless the contract expressly provided, since the seller would not have been unpaid until default by the buyer.

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19 USA § 53 (1) (c) (if title has passed); USA § 53 (2) (if title has not passed.)
20 USA § 60.
21 UCC § 2-706, official comment 1.
on the due date. Further the Code expressly permits a seller, after the buyer's breach, to resell goods demonstrably intended for the particular contract even though the goods are unfinished.\textsuperscript{22}

Under the Sales Act in order for the purchaser at the resale to acquire good title as against the buyer in the original contract it was necessary that the sale conform to the provisions of the Act.\textsuperscript{23} On the other hand, failure to comply with the resale provisions of the Code will not preclude the buyer at the resale who purchases in good faith from acquiring the goods free from any rights of the original buyer.\textsuperscript{24} The seller, however, in order to recover the damages which may have accrued under the Code must make the resale in good faith and in a commercially reasonable manner.\textsuperscript{25}

D. The Right to Rescind or Cancel

A seller under the Sales Act was given two separate and distinct rights of rescission, the first, being the right to rescind the transfer of title, which will be discussed here, and the second, i.e. the right to rescind the entire contract or sale, will be discussed \textit{infra}. The unpaid seller who had a right of lien or who had stopped the goods in transit was permitted to rescind the transfer of title, and resume the property in the goods.\textsuperscript{26} This action could be taken by the seller when he had reserved the right to do so in the contract, or when the buyer had been in default an unreasonable length of time. If the seller rescinded only the transfer of title, he was permitted to recover damages for the breach of the contract. Only through this limited rescission could the seller consistently demand damages for the breach. Certainly it is inconsistent to rescind the entire contract, which in itself is a tacit admission that the contract has ceased to exist, and then sue thereon for damages for its breach.\textsuperscript{27}

The Code permits the seller in the four situations in section 2-703 to cancel the contract. This right of cancellation has the effect of combining both rights of rescission under the Sales Act. A rightful cancellation under the Code ends the contractual relationship with the consequent discharge of all obligations of the seller. Moreover the remedies under the Code being cumulative,\textsuperscript{28} the seller will be

\textsuperscript{22} UCC \$ 2-704 (1) (b).
\textsuperscript{23} USA \$ 60 (2).
\textsuperscript{24} UCC \$ 2-706 (5).
\textsuperscript{25} UCC \$ 2-706 (1).
\textsuperscript{26} USA \$ 61 (1).
\textsuperscript{27} Kentucky-West Virginia Gas Co. v. Jayne, 289 Ky. 150, 154, 158 S.W. 2d 398, 400 (1942).
\textsuperscript{28} UCC \$ 2-703, official comment 1.
able to pursue any right or remedy which may have accrued\textsuperscript{29} and which is not barred by the cancellation.\textsuperscript{30} In safeguarding the rights of a seller who has cancelled the contract, it is intended under the Code that to forego any rights which have accrued the intention to do so must clearly appear.\textsuperscript{31} It appears that such an intention can only be shown by an express declaration that the cancellation is "without reservation of rights" or some equivalent statement.\textsuperscript{32}

The Code has thus extended the right of extinguishing the contract to encompass more situations and at the same time retained the opportunity for a seller to recover the losses he has sustained as a result of the contractual relationship. Of great importance to sellers is the fact that they will be able to cancel immediately upon the breach without being compelled to wait until the buyer had been in default an unreasonable time. Furthermore, it relieves them of insuring that they have properly rescinded only the transfer of title and not the entire contract, thereby preserving their right to recover damages for the breach.

E. The Right to Reclaim

A seller who was unpaid under the Sales Act could retain the goods of which he was in possession,\textsuperscript{33} or stop goods in transit upon the buyer's insolvency whether or not title had passed.\textsuperscript{34} Once, however, both title and possession of the goods had passed to the buyer the seller had no right against the goods,\textsuperscript{35} nor did the Sales Act provide for recovery of the goods upon the buyer's insolvency. Thus, if a seller sold to an insolvent buyer and transferred both title and possession he could not reach the goods and consequently became a mere unsecured creditor of the buyer.

The Code will protect the seller where the insolvent buyer has obtained both title and possession of the goods, by permitting the seller in certain situations to reclaim the goods. Where the seller discovers the buyer to be insolvent he may reclaim the goods within ten days after the buyer's receipt, or, where the buyer has made a written misrepresentation of solvency to the seller within the three months before the delivery, the seller may reclaim without complying with the ten-day requirement since it does not apply in this situation.\textsuperscript{36}

\textsuperscript{29} UCC § 2-720, official comment.
\textsuperscript{30} UCC § 2-703, official comment 1.
\textsuperscript{31} UCC § 2-720.
\textsuperscript{32} UCC § 2-720, official comment.
\textsuperscript{33} USA §§ 53 (1) (a), 53 (2).
\textsuperscript{34} USA §§ 53 (1) (b), 53 (2).
\textsuperscript{35} 3 Williston, Sales § 505 (rev. ed. 1948).
\textsuperscript{36} UCC § 2-702 (2).
The theory of the section is that the receipt of goods on credit by an
insolvent buyer, amounts to a tacit misrepresentation of solvency and
is fraudulent to the seller. Kentucky has long followed the rule
that a seller may reclaim goods obtained by the buyer through
fraudulent misrepresentations, on the ground that title to the goods
is still vested in the seller, who may elect to rescind the contract and
recover the goods. The cases so holding involved misrepresentations
of facts other than solvency, however, the principle stated would
seem to be sufficiently broad to include misrepresentations of solvency.
If there were some doubt as to whether the rule would apply to
misrepresentations of solvency, it seems that it has been removed by
the express provisions of the Code.

The right of reclamation is not absolute and is subject to the rights
of good faith purchasers or lien creditors. Further, the successful
reclamation of the goods will most likely place the seller in a better
position than he would have occupied as a mere creditor. Conse-
quently the reclamation excludes any other remedy. The preferential
treatment of the seller as against the other creditors bars any other
claim, since a successful prosecution of any such claim would further
reduce the pro rata recovery by those creditors.

II. The Seller's Remedies for Breach of the Contract

In addition to the rights of a seller with respect to the goods, the
seller is provided specific remedies for the buyer's breach of the con-
tract. These remedies are also dependent upon the existence of various
express conditions. Other than the alteration and modification of the
conditions upon which the remedies depend, the Code makes two
significant changes in the seller's remedies. An express right to
identify goods to the contract after the buyer's breach is provided.
Further, the right to cancel the contract as opposed to the rescission
thereof and the consequences which follow from the cancellation
are also of real importance.

A. The Action for the Price

If the "property" in or "title" to the goods had passed to the buyer
and the buyer had wrongfully neglected or refused to pay for the
goods as provided in the contract the seller was entitled to maintain

37 Ibid.
38 Nashville Grain & Feed Co. v. American Co-Op Ass'n, 203 Ky. 455, 262
S.W. 624 (1924); Dietz's Assignee v. Sutcliffe, 80 Ky. 650, 4 Ky. L.R. 567 (1883).
39 UCC § 2-702 (3).
40 Ibid.
an action for the price of the goods under the Sales Act. Also, if the price were payable on a day certain and had not been paid the seller could maintain an action for the price, irrespective of title passage. In another instance the seller could maintain the action for the price, even though title to the goods had not passed. If (1) the goods could not "readily be resold for a reasonable price" and if (2) the buyer had not repudiated or notified the seller to cease performance of the contract at a time when labor and expense of a material amount were necessary to complete the performance of the contract, the action could be maintained.

The Code has limited the seller's action for the price to those cases in which the buyer has failed to make payment as it becomes due and (1) the buyer has accepted the goods, or (2) the goods are lost or destroyed after the risk of loss has passed to the buyer, or (3) the goods could not be sold after a "reasonable effort to resell at a reasonable price" or the circumstances indicate that such an effort would be unavailing. It is apparent that neither title passage nor the appointment of a day certain for payment are material to the maintenance of the action under the Code. However, it is indispensable to the action that the buyer be in default of payment. In addition to the default, one of the three conditions enumerated above must also exist. If the seller is entitled to and does institute proceedings to recover the price under the Code, the right to resell the goods is retained and the seller may resell the goods at any time before he collects the judgment. If the buyer does sell before he collects the judgment, then he must credit the proceeds of the sale to the buyer.

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41 USA § 63 (1); see also Louisville Tin & Stove Company v. Lay, 251 Ky. 584, 65 S.W. 2d 1002 (1933), where a seller mistakenly ships goods to another who accepts and retains them and is held liable for the price under the implied contract.

42 USA § 63 (2).

43 USA § 63 (3); the latter condition is the essence of USA § 64 (4), which limited the buyer's liability to the damages sustained by the seller at the time of the repudiation or notification in some instances. The seller under this section was not permitted to materially increase the buyer's damages after repudiation or notification to cease performance.

44 UCC § 2-709 (1) (a).

45 UCC §§ 2-509, 2-510 are the sections of the Code which relate to the time and place at which the risk of loss shifts to the buyer.

46 UCC § 2-709 (1) (a).

47 UCC § 2-709 (1) (b); the substitution of the "reasonable effort to resell at a reasonable price" test for the "not readily resalable" test of the Sales Act was intended to provide a more objective type test in determining the propriety of the maintenance of the action for the price. See UCC § 2-709, official comment 3.

48 UCC § 2-709 (2).

49 Ibid.
B. Action for Non-Acceptance and Repudiation

If, under the Sales Act, a buyer wrongfully neglected or refused to accept and pay for the goods the seller was permitted to maintain an action for damages for non-acceptance.\textsuperscript{50} The amount of damages recoverable by the seller was dependent upon, first, whether there was an available market for the goods, and second, the existence or non-existence of circumstances which resulted in special damages.

Where an available market for the goods existed, the seller’s measure of damages was the difference between the contract price and the market price at the time or times the goods should have been accepted, or if no time was fixed, at the time of the refusal to accept, unless there were circumstances resulting in special damages to the seller.\textsuperscript{51} Hence if there were an available market the seller could recover the price differential as well as special damages. The existing Kentucky Rule, with respect to special damages in general contract actions is the well known “contemplation of the parties rule”;\textsuperscript{52} however, no case has been found where it was applied in an action prosecuted under the Sales Act.

Where no market for the goods existed the seller’s measure of damages for non-acceptance was the estimated loss which directly and naturally resulted, in the ordinary course of events, from the buyer’s breach.\textsuperscript{53} Although the seller was permitted to recover such damages under the Sales Act, he could be required to attempt to dispose of the goods for any price in order to minimize the damages. In Kentucky it was so held in a case in which the buyer had wrongfully refused to accept an extraordinary quantity of ice.\textsuperscript{54} In view of the nature of the goods in this case, the rule might be restricted to cases involving perishable goods.

These two rules tended to protect the seller in most situations. The seller, however, was not permitted to increase the buyer’s damages under the Sales Act when he was made aware that the buyer did not desire completion of the contract. The essence of the provision of the

\textsuperscript{50} USA § 64 (1).
\textsuperscript{51} USA § 64 (3). Although the section only provides for damages to be assessed at the “time” when the goods should have been accepted, the provision has been generally interpreted to mean the “time and place” they should have been accepted. See 3 Williston, Sales, § 582 (rev. ed. 1948) and cases cited in Ftn. 19, including Hawkins v. Midland Flour Milling Co., 236 Ky. 303, 34 S.W. 2d 439 (1930).
\textsuperscript{52} Kentucky Consumer’s Oil Co. v. General Bonded Warehousing Corp., 299 Ky. 161, 184 S.W. 2d 972 (1945); Staves Manufacturing Corp. v. Robertson, 278 Ky. 294, 128 S.W. 2d 745 (1939); Hogg v. Edley, 236 Ky. 142, 32 S.W. 2d 744 (1930).
\textsuperscript{53} USA § 64 (2).
\textsuperscript{54} Fruit Grower’s Express Company v. Citizen’s Ice & Fuel Co., 271 Ky. 330, 112 S.W. 2d 54 (1937).
Sales Act is that the buyer shall be liable to the seller for no greater damages than the seller would have suffered, had he done nothing toward the completion of the contract after receiving notice of the buyer's repudiation or notification to proceed no further. This is dependant upon the condition that at the time of the notice, labor and expenses of a material amount would be necessary to fulfill the obligations. Conversely, if the labor and expense necessary to complete the performance were not of a material amount, the seller could complete the contract and the buyer would be liable for the full performance. In case the buyer did give timely notification the seller was still protected to the extent that in assessing damages for the breach, the profits the seller would have made, could be considered under Section 64 (4).

The Code takes as its base line the proposition that the damages recoverable will be the difference between the contract price and the market price at the time and place of tender. To this amount will be added any incidental damages, but from the total must be subtracted any expenses which the seller saves as a consequence of the breach. If, however, the measure of damages derived in the foregoing manner is inadequate to place the seller in as good position as performance would have then the measure of damages is the profit the seller would have made on a full performance, plus any incidental damages. In making this determination, allowance for reasonable costs incurred by the seller due to the buyer's breach may be given; however, due credit for payments or proceeds of resale must be given to the buyer.

This section of the Code will apply equally whether or not a market exists at the time and place of delivery. If a market does exist then the amount of damages is the difference in the contract price and market price at the time of tender. If, on the other hand, no market exists at the time and place of tender, the Courts are given great leeway in establishing a market price to be utilized in assessing the damages. Resort may be had to prices at comparable times or in

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55 USA § 64 (4).
56 UCC § 2-708 (1).
57 UCC § 2-710 provides:
Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commission incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.
58 UCC § 2-708 (1).
59 UCC § 2-708 (2).
60 UCC § 2-710, supra note 56.
61 UCC § 2-709 (2).
62 See UCC § 2-708, official comment 1.
comparable markets.\textsuperscript{63} If the market price is established in this manner the same procedure in assessing the damages will be followed as if a market had existed.\textsuperscript{64}

Of course for some articles there will be no market any place as in the case of items specially manufactured for a particular use. In such cases the market price would be impossible to establish. The court then must resort to the alternative of permitting a recovery of the profits and incidental damages. (Of course if this is the case the seller's action should be, and no doubt will be, one for the price.)\textsuperscript{65}

When the buyer wrongfully breaches the contract prior to the time the goods are finished, the seller has several alternative actions which he may take under the Code. The only restriction upon his permissible actions are that he exercise “reasonable commercial judgment.” Exercising such judgment he may (1) complete manufacture, identify the goods to the contract and then pursue the remedies discussed in Section C, immediately below, (2) cease manufacture and sell the components for scrap, or (3) proceed in any other reasonable manner.\textsuperscript{66} The emphasis is the unfinished-manufacture cases is shifted from the materiality of the amount of labor and expenses necessary to complete manufacture, to the commercial reasonableness of the seller's action. Further, it should be somewhat less difficult for the seller to complete the manufacture in such cases and still recover for the expense incurred in the completion, because the burden of proving that the seller has acted unreasonably is upon the buyer.\textsuperscript{67}

The provisions of the Code discussed in this section should substantially eliminate two major problem area encountered under the Sales Act:

1. The complications encountered in making a determination of the materiality of labor and expense is not only eliminated, but the test of “reasonable commercial judgment” which is substituted, lends itself to a consideration of the circumstances surrounding the transaction, rather than limiting the buyer's liability on a mere determination of materiality. In some cases reasonable commercial judgment may indicate that manufacture should be completed under the particular circumstances, although a material amount of labor and expense are necessary to such completion. It should be pointed out that

\textsuperscript{63} UCC § 2-723.
\textsuperscript{64} With respect to anticipatory repudiation, the market price is to be established as of the date the aggrieved party learned of the repudiation. See UCC § 2-723 (1).
\textsuperscript{65} See UCC § 2-709 (1) (b) (seller permitted to maintain action for price where circumstances indicate that an effort to resell would be unavailing).
\textsuperscript{66} UCC § 2-704 (2).
\textsuperscript{67} See UCC § 2-704, official comment 2.
whether it is commercially reasonable to continue manufacture will be determined upon the facts as they appeared at the time the seller learns of the breach. 68

2. Of no little importance is the provision which enables a court to establish a market price for the goods by resorting to prices in comparable times and circumstances or in comparable markets when no market exists at the time and place of delivery. Although this may present a problem of proof, it should produce a more reliable and less speculative recovery, and at the same time relieve the parties from attempting to prove and the courts from deciding what damages will or will not be the "natural and ordinary result of the buyer's breach" as would be necessary under the Sales Act when no market exists.

C. The Right to Identify Goods to the Contract

The Sales Act made no express provision for the "identification" of goods to the contract after the buyer's breach. Section 64 (4) will enable a seller to reach the same result in proper circumstances, when the seller justifiably completes manufacture of the goods after the buyer's breach.

Since, as a general rule under the Sales Act, title to the goods did not pass until the goods were appropriated to the contract, 69 a seller was unable to maintain an action for the price of goods which had not been appropriated to the contract. In a proceeding under section 63 (1), title passage was a condition precedent to such action. Neither could the seller identify or appropriate goods to the contract without the consent of the buyer, 70 and certainly a buyer who had breached would not consent to such appropriation, thereby placing title in himself and enabling the seller to maintain an action for the price of such goods.

If the goods were not appropriated to the contract at the time of a breach by the buyer, and there were no available market for the goods, the seller could tender all the goods contracted for, and if the buyer refused to accept, the seller could maintain an action for the price 71 or for non-acceptance, 72 even though the goods had not been appropriated to the contract prior to the breach. Similarly, if there

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68 Ibid.
69 The technical rules passage under the Sales Act are found in §§ 17-19. If, under the Sales Act, the parties intended, title to specific or ascertained goods passed when the contract was made. If, however, the goods were unascertained title did not pass until there was an unconditional appropriation of the goods to the contract with the assent of the other party. See specifically § 19, Rule 4.
70 USA § 19, Rule 4.
71 USA § 63 (3).
72 USA § 64 (1).
were a market, the seller could appropriate after the buyer's breach for the purpose of making tender, and if the tender were refused the seller could maintain an action for non-acceptance under section 64 (3) as alluded to previously. However, he could not maintain an action for the price of goods so appropriated since title to them had not passed. In these cases the seller's action depended upon the buyer's refusal to accept the goods tendered. Thus, it can be seen that any effective right of appropriation under the Sales Act which would enable the seller to maintain an action for the price was limited to those cases in which the buyer consented, or where the goods were not readily resalable.

The Code will permit a seller to identify goods to the contract regardless of resalability without any requirement that they be identified with the consent of the buyer. With the requirements of the Sales Act eliminated, a seller may identify goods to the contract after the buyer's breach and resell them or in a proper case recover the price of goods so identified. Further, if the seller is precluded from maintaining the action for the price because the requirements of section 2-709 cannot be met (e.g. failing to make reasonable effort to resell) he will still be able to maintain an action for non-acceptance or repudiation under section 2-708.

As discussed in the preceding section the seller can also complete the manufacture of "unfinished goods" and identify them to the contract. When such goods are finished and identified the effect is the same as if they had been finished before the breach and merely identified afterwards.

D. The Right to Rescind the Entire Contract or Cancel

The right of a seller to rescind only the transfer of title and resume the property in the goods, then maintain an action for damages for the breach, has been discussed in the section on the seller's rights against the goods. The seller under the Sales Act was provided an additional right of rescission. Under certain conditions he was permitted to rescind the entire contract. If the buyer repudiated the contract, manifested his inability to perform, or committed a material

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73 USA § 63 (3) (refusal to accept gives rise to action for the price, where there is no available market); USA § 64 (1) (refusal to accept gives rise to action for nonacceptance, where there is an available market).
74 UCC § 2-704 (1) (a).
75 UCC § 2-704, official comment 1.
76 Ibid.
77 UCC § 2-709 (1) (a).
breach of the contract, the seller was permitted to rescind the entire contract upon giving the buyer notice of his intention to do so.\textsuperscript{78} This section was applicable only to goods which had not been delivered to the buyer. Delivery to the buyer extinguished the right to rescind.\textsuperscript{79}

If the seller did rescind the entire contract he was precluded from maintaining an action for damages under the contract.\textsuperscript{80} In some instances, however, the rescission of the entire contract would give rise to other rights. As an example, the seller could not stop goods in transit upon the repudiation of the contract by the buyer,\textsuperscript{81} because the right could only be exercised upon the insolvency of the buyer. However, when the buyer repudiated his contract while the goods were in transit the seller, under section 65, could rescind the contract, thereby extinguishing any right of the buyer under the contract or against the goods. In this case, the seller alone had rights with respect to such goods, and of course, he could stop shipment of them.

The Code, in order to avoid the objection of permitting a seller to rescind the entire contract and recover damages in addition thereto, discontinues the use of the word "rescind" and provides instead that the seller in the four situations in section 2-703, may "cancel" the contract. The cancellation of the contract under this section does not preclude an action for damages based upon any right which may have accrued prior to the cancellation.\textsuperscript{82} This provision, therefore, avoids the judicial interpretation to the effect that it is inconsistent to rescind the contract and sue thereon for damages.

Other than the dual rights of cancellation and recovery of damages on the contract, the most significant change in the Code pertaining to the seller's right to extinguish the contract, is the fact that the seller may cancel even when the goods are in the possession of the buyer.\textsuperscript{83} This would not have been possible under the Sales Act which specifically provided that the goods must not have been delivered to the buyer in order for the seller to rescind the contract.\textsuperscript{84}

\textsuperscript{78} USA § 65.
\textsuperscript{79} Ibid.
\textsuperscript{80} The inconsistency is a result of the application of principles of general contract law. See e.g., Kentucky West Virginia Gas Co. v. Jayne, 289 Ky. 150, 154, 158 S.W. 2d 398, 400 (1943).
\textsuperscript{81} 3 Williston, Sales § 520 (rev. ed. 1948).
\textsuperscript{82} See UCC § 2-720, official comment.
\textsuperscript{83} UCC § 2-703 provides only that the seller may cancel when there has been a wrongful rejection, revocation of acceptance, failure to make payment due or repudiation. That the goods have not been delivered to the buyer is not made a condition upon which the right to cancel depends.
\textsuperscript{84} USA § 65.
III. The Buyer's Remedies

The Code broadens appreciably the buyer's remedies. As in the case of the seller's remedies, so too does the Code lessen the importance of the location of title to goods. Two important new remedies are provided. The Code allows the buyer to "cover," or procure substitute goods on the open market, upon the seller's breach. Secondly, upon the seller's insolvency the buyer now may reach goods identified to the contract irrespective of the location of title. Under the Code the principles governing election of remedies do not weigh so heavily upon the buyer's choice in that he is expressly permitted to revoke his acceptance and also cancel the contract without impairing his right to damages for its breach. In addition, most of the other remedies of the buyer, whether predicated upon title to the goods or in contractual relief, including replevin, conversion or detention of goods, specific performance, damages for failure to deliver, damages for breach of warranty, are all retained with clarifying amplification.

A. The Action for Conversion or Detention

Under the Sales Act, if the "property" in the goods had passed to the buyer under the contract of sale and the seller wrongfully refused or neglected to deliver the goods, the buyer could maintain any action which an owner in similar circumstances could maintain, primarily an action for conversion or detention of the goods. Such action on the part of the seller constituted both a breach of contract and a tort, upon either of which an action could be prosecuted.

The Code makes no specific provision for an action for conversion or detention. Neither does the Code exclude these remedies. It would seem then, that if the technical requirements of title passage which would be indispensible to either action, are met, either action would be available to the buyer under the Code.

B. The Rights of Rescission and Cancellation

The only express right of rescission of the contract of sale by the buyer under the Sales Act was for a breach of warranty. In some

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85 USA § 66.
86 See 3 Williston, Sales §§ 595, 596 (rev. ed. 1948) for a discussion of tort contract liability based upon the seller's wrongful refusal to deliver and the measure of damages.
87 UCC § 2-711 outlines the remedies of the buyer and no mention is made of the remedies for conversion or detention. Nothing in the official comments to this section would give the impression, however, that it was intended to exclude these remedies.
88 UCC § 2-401 (2) sets forth the technical rules relating to title passage.
89 USA § 69 (1) (d).
instances a breach of the contract, other than a breach of warranty may justify rescission by the buyer under general contract law.\textsuperscript{90} No such right, however, was conferred by the Sales Act. The right to rescind under the Sales Act was qualified in that the buyer could rescind with respect to goods accepted, only if he did not know of the breach of warranty at the time of the acceptance.\textsuperscript{91} In addition the buyer was required to give notice of his intention to rescind within a reasonable time after his election to do so, and return or offer to return the goods in substantially as good condition as they were when the property in them passed. Any deterioration of the goods would not preclude the buyer's right of rescission, if the deterioration resulted from the breach of warranty.\textsuperscript{92}

The Code permits the buyer to "cancel" the contract if the seller (1) fails to deliver, or (2) repudiates, or when the buyer (1) rightfully rejects the goods, or (2) justifiably revokes his acceptance.\textsuperscript{93} The cancellation by the buyer has the same effect as does a cancellation by the seller, in that such action discharges his obligations of performance, but does not preclude his other remedies.\textsuperscript{94} In addition to the right of cancellation the buyer not only may recover the portion of the purchase price he has paid, but also may procure "cover", recover damages for non-delivery, reach the goods if the seller has become insolvent, or in a proper case obtain specific performance or replevy the goods.\textsuperscript{95}

C. The Right to Cover

The express remedy of "cover" provided by the Code is essentially new. In effect it permits a buyer who has been denied the goods contracted for to procure substitute goods in the open market and protects him in so doing. It should be pointed out that under the Sales Act if title had passed the buyer was limited to the actions of conversion, replevin or for wrongful detention, and if title had not passed he could maintain an action for failure to deliver. In neither instance was the buyer expressly authorized or permitted to procure substitute goods, regardless of the urgency of his need. If the buyer

\textsuperscript{90} Black Motor Co. v. Green, 258 Ky. 72, 79 S.W. 2d 409 (1935) (by implication).
\textsuperscript{91} USA § 69 (3).
\textsuperscript{92} Ibid.
\textsuperscript{93} UCC § 2-711 (1). On the manner and effect of a rightful rejection and duty of the buyer with respect to rejected goods in his possession, see UCC § 2-602. Concerning revocation of acceptance see UCC § 2-608 and part III, subtopic H, infra.
\textsuperscript{94} UCC § 2-720.
\textsuperscript{95} See UCC § 2-711. On recovery of goods on seller's insolvency, see UCC § 2-502.
did obtain substitute goods, this almost certainly would not increase his recovery, even if the price paid exceeded the contract price. The ability to purchase substitute goods would be evidence that an available market existed, in which case the recovery would be the contract price-market price differential plus any special damages. He would be entitled to the additional cost only as special damages, in which case it would be incumbent upon him to prove that the acquisition of the substitute goods in the event of the seller's breach was in the contemplation of the parties at the time the contract was made.

The Code approaches this problem with the paramount concern being the practical effect of the breach upon the buyer who presumably needs the goods. Upon the seller's breach, the buyer is permitted to procure substitute goods to meet his essential need; and the defaulting seller is held liable for the damages which the buyer sustained as a result of the breach, including reasonable expenses incurred in effecting the cover.

Substitute goods may be procured if the purchase is made in good faith, without unreasonable delay, and the purchase price paid is reasonable. If the buyer fulfills these requirements he can recover from the seller the difference in the cost of the substitute goods and the contract price as well as incidental and consequential damages, less the expenses saved as a consequence of the seller's breach. If the buyer chooses not to cover, when cover is available, damages which he sustained as a result of his particular need will not be recoverable since consequential damages are limited to those which could not have been obviated by cover.

D. The Action for Damages for Non-Delivery

The Sales Act provided a buyer with the action for damages for non-delivery when the property in the goods had not passed and the

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96 USA § 67 (3).
98 UCC § 2-715 (1), infra note 100.
99 UCC § 2-712 (1).
100 UCC § 2-715 (1) & (2) provides in part:
(1) Incidental damages . . . include expenses reasonably incurred . . . in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
(2) Consequential damages . . . include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.
101 UCC § 2-712 (2).
102 UCC § 2-712, official comment 8.
103 UCC § 2-715 (2), supra note 100.
seller wrongfully refused to deliver the goods.\textsuperscript{104} The measure of damages for the wrongful refusal to deliver was dependent upon the existence or non-existence of an available market. If there were an available market, the measure was the contract price-market price differential at the time or times when the goods should have been delivered, plus any special damages sustained.\textsuperscript{105} If no market existed, the buyer could recover the loss directly and naturally resulting from the seller's breach.\textsuperscript{106}

To implement the buyer's primary remedy of cover, the Code provides that the buyer is entitled to recover the contract price-market price differential at the time the buyer learns of the breach,\textsuperscript{107} rather than at the time there should have been tender of delivery as provided in the Sales Act. The primary purpose of using the time the buyer learns of the breach in measuring the damages, is to make his recovery commensurate with the amount which it would have cost to cover, had he done so.\textsuperscript{108} The place at which the price is to be determined is the place for tender, except where the buyer has rejected the goods, or revoked his acceptance, in which case the place of arrival will be used.\textsuperscript{109}

As in the case of other recoveries by the buyer or seller, the damages may include incidental and consequential damages, but these damages must be offset by the expenses saved as a consequence of the seller's breach.\textsuperscript{110}

No problem is encountered under the Code in proving or making a determination of the damages which directly and naturally result from the seller's breach, if there is no available market, as would have been the case under the Sales Act. The market price may be proved in this situation by resort to evidence of prices in comparable times and circumstances or in comparable markets.\textsuperscript{111} Further, where there is a scarcity of goods, opinion evidence may be admissible,\textsuperscript{112} but if this be the case, specific performance may be desirable remedy.

The action for non-delivery under the Code is an alternative to the remedy of "cover", and may be prosecuted only to the extent that cover has not been procured.\textsuperscript{113} The remedies are compatible, how-

\textsuperscript{104} USA § 67 (1).
\textsuperscript{105} USA § 67 (3).
\textsuperscript{106} USA § 67 (2).
\textsuperscript{107} UCC § 2-713 (1).
\textsuperscript{108} UCC § 2-713, official comment 1.
\textsuperscript{109} UCC § 2-713 (2).
\textsuperscript{110} UCC § 2-713 (1).
\textsuperscript{111} UCC § 2-723, official comment.
\textsuperscript{112} UCC § 2-713, official comment 3.
\textsuperscript{113} UCC § 2-713, official comment 5.
ever, and may be pursued together so long as complete cover is not procured.

E. The Action for Breach of Warranty

If, under the Sales Act, a buyer accepted goods without knowledge of a breach of warranty, four alternative actions were available to him. The buyer could (1) keep the goods and set up the breach by way of recoupment in diminution of the price, (2) keep the goods and bring an action for damages for the breach, (3) refuse to accept the goods if title had not passed, and maintain an action for the breach, or (4) rescind the contract and recover the purchase price paid.

The right to rescind was not available to a buyer who knew of the breach when he accepted the goods. Further, if the buyer did rescind, he was required to notify the seller of his intention within a reasonable time after his election to do so, and return or offer to return the goods.

Where there had been a breach of warranty by the seller, the buyer was limited to a choice of any one of the remedies. Once he had selected and been granted relief under any one of the four methods outlined above, he was barred from any other remedy.

The measure of damages for a breach of warranty under the Sales Act was the loss directly and naturally resulting from the breach, except in the case of a breach of warranty of quality. In the latter instance the measure was the difference in the value of the goods accepted and the value they would have had if they had answered the warranty plus special damages.

The Code treats a breach of warranty as any other breach of contract with respect to accepted goods. Where the buyer has accepted non-conforming goods two courses of action are open to him.

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114 For an extensive discussion of the field of warranties under the Sales Act and the Code including types of warranties, how warranties arise, extent of warranties, disclaimers parties to whom warranties extend, etc., see Note “The Uniform Commercial Code and Greater Consumer Protection under Warranty Law”, 49 Ky. L.J. (1960).
115 Warranties under the Sales Act, types and how they arise are governed by §§ 11-15.
116 USA § 69.
117 USA § 69 (8).
118 USA § 69 (2).
119 USA § 69 (9).
120 See USA § 15 concerning the conditions upon which a warranty of quality arises.
121 USA § 69 (7).
122 Types of warranties, extent of warranties, disclaimers, etc., under the Code are governed by UCC §§ 2-312-2-318.
123 UCC § 2-714, official comment 2.
First, he may revoke his acceptance and maintain an action for damages\textsuperscript{124} in certain situations (discussed infra, subtopic H), or second, he may maintain an action for the breach without revoking his acceptance. Section 2-714 of the Code is directed specifically to the situation where the time for revocation of acceptance has lapsed,\textsuperscript{125} and the buyer must resort to an action for damages for the breach. Two measures of damages are provided in such cases. For any breach with respect to accepted goods, including a breach of warranty,\textsuperscript{126} the damages may be “determined in any manner which is reasonable.”\textsuperscript{127} The difference in the value of the goods accepted and the value they would have had if they had been as warranted is the measure specifically provided for a breach of warranty.\textsuperscript{128} In addition to the damages determined by either of the two methods, in a proper case the buyer may recover incidental and consequential damages.\textsuperscript{129}

It will be noted that the Code does not differentiate between types of warranties in actions for breach as far as the measure of damages is concerned, as did the Sales Act. The Code also makes explicit the time and place at which the value of the goods is to be determined, \textit{i.e.}, the time and place of acceptance. The Sales Act specified only the time of valuation, and that was only in the case of a breach of warranty of quality.

\textbf{F. The Actions of Specific Performance and Replevin}

Under the Sales Act, the buyer could obtain specific performance of the contract for “specific or ascertained” goods,\textsuperscript{130} and the courts were given very broad discretion in rendering such decrees.\textsuperscript{131}

The Code, on the other hand, does not require that the goods be specific or ascertained, however it does requires that specific performance be decreed only when the goods are “unique,” or in other proper circumstances.\textsuperscript{132} The test was changed for the purpose of furthering a more liberal attitude than some courts had shown toward granting specific performance.\textsuperscript{133} It would seem, however, that unless the courts very liberally interpret the phrase “other proper circum-

\textsuperscript{124}UCC § 2-608 and official comment 1.
\textsuperscript{125}UCC § 2-714, official comment 1.
\textsuperscript{126}UCC § 2-714, official comment 3.
\textsuperscript{127}UCC § 2-714 (1).
\textsuperscript{128}UCC § 2-714 (2).
\textsuperscript{129}UCC § 2-714 (3); In addition see UCC § 2-715, official comments 1-5.
\textsuperscript{130}USA § 68.
\textsuperscript{131}Under USA § 68 a court exercising the powers of a court of equity may “if it thinks fit”, render a decree of specific performance of a contact for the sale of specific or ascertained goods.
\textsuperscript{132}UCC § 2-716 (1).
\textsuperscript{133}UCC § 2-716, official comment 1.
stances" the effect of the Code is merely to remove the requirement that the goods be specific or ascertained, and incorporate a requirement of uniqueness. This is true even with the "other proper circumstances" test apparently, since the only examples noted which fall within the test are cases where goods non-unique in character become unique because of scarcity.\textsuperscript{134}

Under the Sales Act a Buyer was able to replevy goods only if the property in them had passed to him.\textsuperscript{135} The Code, in furtherance of the intent to lessen the importance of the passage of title, has removed this requirement. A buyer under the Code will be able to replevy goods which have been identified to the contract, if after a reasonable effort he is unable to effect cover, or the circumstances indicate that the effort would be unavailing.\textsuperscript{136}

G. The Right to Reach Goods on the Seller's Insolvency

In addition to the rights of a buyer to specific performance or replevin, both of which permit him to reach the goods, the buyer under the Code is given the right to the goods upon the insolvency of the seller under certain circumstances.\textsuperscript{137} This right is a corollary to the seller's right to reach the goods on the buyer's insolvency, rather than become a mere unsecured creditor.\textsuperscript{138} In order for the buyer to reach goods identified to the contract upon the seller's insolvency, he must have paid part of the purchase price and obtained a special property in the goods.\textsuperscript{139} Further, the buyer must make and keep good a tender of any unpaid portion of the purchase price.\textsuperscript{140} The right to goods upon the seller's insolvency is limited to the extent that the buyer must have become insolvent within ten days after the receipt of the first installment of the price,\textsuperscript{141} and that the goods be conforming goods, if the identification thereof was made by the buyer himself.\textsuperscript{142} This is true not withstanding the fact that the buyer may obtain a special property in non-conforming goods which he himself identifies to the contract.\textsuperscript{143} This provision is intended to prevent a

\begin{footnotes}
\item[134] See UCC § 2-713, official comment 3 and UCC § 2-716, official comment 2.
\item[135] USA § 60.
\item[136] UCC § 2-716 (3).
\item[137] UCC § 2-502.
\item[138] On the seller’s right to goods on the buyer’s insolvency, see subtopic E, under Seller’s Rights Against the Goods, supra.
\item[139] As to the requirement that the buyer has paid part of the purchase price see UCC § 2-501 (1). The buyer obtains a special property in the goods when identified to the contract. UCC § 2-501 (1).
\item[140] UCC § 2-502 (1).
\item[141] Ibid.
\item[142] UCC § 2-502 (2).
\item[143] See UCC § 2-501 (1).
\end{footnotes}
buyer from obtaining goods superior in quality or quantity than what he contracted for, when he makes the identification himself.\textsuperscript{144}

Neither title passage nor the fact that the buyer is entitled to specific performance is necessary for the buyer to reach the goods under this section. The insolvency of the seller within the ten day period is sufficient. Under the Sales Act, however, if title had not passed, the buyer could not have repleived the goods. Neither could he have obtained specific performance on the basis of insolvency alone, to the detriment of the other creditors.\textsuperscript{145} Hence, the buyer under the Code is in a far more favorable position than was the buyer under the Sales Act in this situation.

H. The Right to Revoke Acceptance

Under the Sales Act, a buyer accepting goods without knowledge of a breach of warranty, could keep the goods and recover from the seller the loss sustained as a result of the breach,\textsuperscript{146} or rescind the contract and recover the purchase price paid.\textsuperscript{147} These remedies were alternative and the rescission would bar the action for any damages sustained.\textsuperscript{148} If the buyer accepted goods with knowledge of the breach of warranty, he could only recover damages, or recoup the price, because a rescission was expressly barred in this situation.\textsuperscript{149}

The Code provides a new remedy for a buyer who accepts non-conforming goods. The buyer is permitted to "revoke acceptance" of a lot or commercial unit of non-conforming goods, if the non-conformity substantially impairs its value. The cases in which acceptance may be revoked are: (1) if non-conforming goods were accepted on the reasonable assumption that the non-conformity would be cured, and it has not been seasonably cured; or (2) if he accepted goods without knowledge of the non-conformity and his acceptance was induced by the difficulty of discovery before acceptance, or by the seller's assurances.\textsuperscript{150} The revocation of acceptance under this section does not bar an action for damages, since the right of revocation and an action for damages are cumulative rather than alternative.\textsuperscript{151} The

\textsuperscript{144} UCC § 2-501, official comment 3.
\textsuperscript{145} Although not decided under the Sales Act, the prevailing rule may be found in George E. Warren Company v. Black Coal Company, 85 W. Va. 684, 102 S.E. 672 (1920); Pomroy, Specific Performance, § 26 (3d ed. 1926); cf. 49 Am. Jur., Specific Performance, § 13 at 23 n. 1. (1943).
\textsuperscript{146} USA § 69 (1) (a) & (b); the recovery could be either by way of recoupment, or in an action for damages.
\textsuperscript{147} USA § 69 (1) (d).
\textsuperscript{148} USA § 69 (2).
\textsuperscript{149} USA § 69 (3).
\textsuperscript{150} UCC § 2-608.
\textsuperscript{151} UCC § 2-608, official comment 1.
net effect of this section is not only to permit the buyer to accept goods which he knows are non-conforming, then revoke his acceptance, but also enables him to recover damages sustained as a result of the breach. This is a most abrupt departure from the underlying theories of title and recission which dominated the drafting of the Sales Act. It is, however, in harmony with the remedy of cancellation of the contract, with the additional right of a subsequent action for damages for the breach. It is in furtherance of the policy of the Code to shift the emphasis from the technical and theoretical conceptions of title and recission to the practical effect of a breach of contract upon the party adversely affected.

The most important limitation upon the exercise of the right of revocation, is that the buyer must notify the seller of the revocation within a reasonable time after discovery or the time at which the non-conformity should have been discovered.\textsuperscript{152}

\textit{William A. Logan}

\textsuperscript{152} UCC § 2-608 (2).