

1978

Russ Bullock, June Mundy Bullock v. Joe Bailey  
Auction Company, Et Al, Joe Bailey Auction Co. v.  
Western Surety Company : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RUSS BULLOCK, JUNE MUNDY :  
BULLOCK, :

Plaintiffs and :  
Appellants, :

-vs- :

JOE BAILEY AUCTION COMPANY, :  
et al., :

Defendants and :  
Respondents, :

Case No. 14845

JOE BAILEY AUCTION CO., :

Third Party Plaintiff :  
and Respondent, :

-vs- :

WESTERN SURETY COMPANY, :

Third Party Defendant :  
and Appellant. :

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REPLY BRIEF

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APPEAL FROM JUDGMENT IN THE FIFTH JUDICIAL  
DISTRICT COURT, IN AND FOR WASHINGTON COUNTY,  
STATE OF UTAH, THE HONORABLE J. HARLAN BURNS,  
JUDGE, PRESIDING

---

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RUSS BULLOCK, JUNE MUNDY	:	
BULLOCK,	:	
	:	
Plaintiffs and	:	
Appellants,	:	
	:	
-vs-	:	
	:	
JOE BAILEY AUCTION COMPANY,	:	
et al.,	:	
	:	
Defendants and	:	
Respondents,	:	Case No. 14845
	:	
JOE BAILEY AUCTION CO.,	:	
	:	
Third Party Plaintiff	:	
and Respondent,	:	
	:	
-vs-	:	
	:	
WESTERN SURETY COMPANY,	:	
	:	
Third Party Defendant	:	
and Appellant.	:	

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REPLY BRIEF

---

PRELIMINARY NOTE

Appellants would refer the Court to the Statement of Facts in the Brief of Appellants for a complete statement of the facts Appellants believe to be pertinent in this matter. Appellants' brief (hereinafter AB) at 3. Appellants make the following observations pertaining to the Statement of Facts as cited in Respondents' Brief (hereinafter RB).

Apparently, Respondent recognizes the fallacy of reliance on Joe Bailey's personal testimony as indicative of Joe Bailey Auction Co. policy. Other agents, such as Parkes Shewmake obviously can and did speak for the company.

Appellants note that Respondent concedes the auction was not strictly on a cash basis. RB.2. Furthermore, the terms of the auction were broader than that set forth in the first paragraph of the Statement of Facts in the Respondent's Brief. Respondent has significantly ignored the fact that Joe Bailey announced at the auction that payment could also be made by means of approved credit. See Finding of Fact No. 5, R.218, as prepared by Respondent's counsel.

Without citing the record, Respondent asserts that Appellants' credit had not been established prior to the auction. A review of the transcript clearly shows that the Respondent never testified to this fact. To the contrary, Appellants testified that Respondent required the approval of Appellants' credit before allowing Appellants to bid at the auction in question. Transcript (hereinafter T) 37:14-38:9; T 50:9-20.

Respondent refers to a "meeting" which occurred after the auction to settle accounts. RB.3. Respondent does not cite any testimony to substantiate holding such a meeting, nor do the Findings of Fact as cited by Respondent

(R.215) make reference to this "meeting". In the same manner, Respondent states "that no sale had been or would be consummated to them until such payment had been made (R.218)." RB.3. To support this assertion, the Respondent cites the Court again to the Findings of Fact. While Appellants do not believe that this fact if shown would be relevant to the Court's decision, there is no evidence that Joe Bailey or any other witness testifying in this matter ever made such a statement. The phrase "consummation" was never used by the Respondent in his testimony. This phrase was contrived by the Respondent in three of its separate Findings of Fact to support the result Respondent desired to obtain.

Respondent places major emphasis on the fact that Appellants did not pay for the equipment in question. RB.3. However, Respondent has not stated to the Court that Respondent testified that Appellants had complied with all of the terms of the auction except payment. T 175:15. Mr. Bailey further testified that despite non-payment by the Appellants he did not attempt to revoke acceptance of their offer. T 166:22; 167:22.

Further, Respondent concludes that the removal of equipment from Ventura, California was without its knowledge or permission. RB.3. Parkes Shewmake, an officer



of Joe Bailey Auction Company, was aware of the repairs and moving (T 47:19; 53:27; 54; 93:13; 94:8), though Mr. Bailey individually was unaware of these facts and unaware of what Shewmake knew. T 116:18; 26; 122:16. Also, those at the lot who had custody of the equipment acquiesced in and aided its removal. T 105:28; 11-103:22.

In clarifying Respondent's Statement of Facts it should be pointed out to the Court that Appellants had hired a watchman to guard the equipment in question after transporting it to Washington County, Utah. Subsequently, Appellants became aware that Respondent had hired Appellants' own agent to dispossess Appellants of the goods. T:77. Appellants objected to the attempted repossession and the same day obtained a temporary restraining order. AB.5-6.

POINT I. THE CONFLICTS OF LAW ARGUMENT IS WITHOUT SIGNIFICANCE.

Respondent's Brief raises the issue of conflict of laws for the first time. RB.7. The issue of whether Utah or California law should be applied in the instant case was not raised by the Respondent in the District Court. By their silence, the Findings of Fact and Conclusions of Law prepared by Respondent give evidence that this argument was never raised. R.216.

This Supreme Court has already stated that it will not consider an issue which was not considered by the court below and which was raised for the first time

on appeal. Thompson Ditch Co. v. Jackson, 29 Utah 2d 259, 508 P.2d 528 (1973); State By and Through Road Commission v. Larkin, 27 Utah 2d 295, 495 P.2d 817 (1972); Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702 (1971); In re Ekker's Estate, 19 Utah 2d 414, 432 P.2d 45 (1967); Riter v. Cayias, 19 Utah 2d 358, 431 P.2d 788 (1967). Since at no time in the proceedings before the lower court did Respondent raise the issue of conflict of laws, based upon the above cited authorities, this Court should not now consider an issue which was neither raised, argued nor considered by the lower court.

Furthermore, if a conflict exists, Appellants believe that Respondent has the burden of showing the applicable law to support its claim for damages. Respondent's argument that Appellants have failed to divine the legal basis for its claim does not dispose of Appellants' objection that the judgment below is without legal support or foundation.

Furthermore, Respondent asserts that "California has also adopted the Uniform Commercial Code and it is substantially similar to ours...." RB.8. Even if California law was applicable Respondent has failed to show that a different result would occur if California law were adopted. The rule of this Court has been that unless the contrary is shown, sister state law would be

assumed to be the same as that of this state. Lamberth v. Lamberth, 550 P.2d 200, 201 (Utah 1976). If this Court desires, however, to take judicial notice of California law, Appellants would be prepared to advise the Court that the same result should be reached. U.R.E. 9(2); 12(3) and U.R.C.P. 44(f). Relevant California statutes are reproduced in the Appendix. U.R.E. 68(5); 72.

POINT II. THE AWARD OF DAMAGES FOR BREACH OF  
THE SALE CONTRACT IS BARRED.

Respondents' arguments about the title to the equipment (RB.8.) are totally immaterial and serve only to confuse the issues before the Court. The Uniform Commercial Code has drastically reformed the common law in the "pervasive de-emphasis of the title concept." White and Summers Uniform Commercial Code, at 15 (1972). A correct understanding of the concept of title under the Uniform Commercial Code is imperative to an accurate analysis of the issues raised herein by Respondent. Thus while Appellants concur with Respondent that any agreement of the parties would govern passage of title, we deny its materiality. See RB.8; cf. Utah Code Ann. 2-401(2).

The dispute in this case centers around the rights of the parties to possession. As Appellants point out in their prior brief, the only rights of the Respondent to reclaim the goods in question are found in §70A-2-507 and §70A-2-702. AB.9-11. In reviewing both of these

code sections the Court will find that neither mention title as being relevant to possession. A case dealing with the seller's right to reclamation, Ranchers & Farmers Livestock Auction Company v. Honey, 552 P.2d 313, 316 (Colo. 1976) specifically holds that the application of the substantive provisions of the Uniform Commercial Code do not depend upon the location of title as set forth in §2-401. This case illustrates the irrelevancy of title to the issue of possession. While the seller was attempting to undo a transaction by reclamation because of dishonor of the buyer's check the court held that until reclamation is completed title remained in the buyer, however, title was irrelevant to the disposition of the case.

Respondent asserts "that the evidence is uncontroverted, that delivery of the goods to the Appellants was not to be made until they paid for them." RB.8. Respondent does not cite the record or transcript for this assertion. In fact, it is the testimony of Mr. Bailey which is somewhat supportive of this assertion. However, apparently Mr. Bailey was not personally present in Ventura, California after the day of the auction. Appellants took possession of the equipment with no resistance from the agents of Mr. Bailey and with the blessing of those agents exercised dominion and control over the equipment; moving the same, repairing the same and finally transport-

ing the equipment to Utah. In light of the references to the transcript found on page 4 of Appellants' Brief in support of these facts as stated the evidence of Respondent certainly was controverted.

Respondent completely ignores Appellants' argument that auctions are clearly within the scope of Article II of the Uniform Commercial Code. AB.8. Respondent is content to note that the lower court made a specific finding that payment for the goods was a condition precedent to any sale of them to Appellants. This fact and the ramifications of this fact are clearly set forth in Appellants' Brief at page 8. Respondent also argues that since "the provision that either payment wuld (sic) be made for the goods or satisfactory credit be arranged," were neither met by Appellants there was no "consummation of sale and passage of title", RB.10. Again, not only is the passage of title irrelevant but it has nothing to do with payment.

Furthermore, on the day of the auction in Ventura California Appellants certainly believed their credit was satisfactory to the Respondent. Although the auction was underway when the Bullocks arrived, they were not allowed to bid until telephone verification of their credit had been made by the auction company. Furthermore, it was an employee of Joe Bailey Auction Company, Mr. Shewmake who actually did the bidding for the Bullocks. AB.3. A review of the testi-

mony of Mr. Bailey will show that he did not refute the testimony of the Appellant Mrs. Mundy on this point. Finally, Respondent states and Appellants agree that "as a result it cannot be reasonable (sic) contended that title to the goods involved in the auction conducted in California passed when the hammer fell at the auction." R3.9.

Respondent makes no response to Appellants' argument that the reclamation of goods bars Respondent's claims for damages for breach of sale contract. He merely asserts that "(t)he law allows incidental damages for the failure of Appellants to perform their agreement." RB.11. Appellants submit that in light of the admitted reclamation of the goods, and Respondent's failure to meet the argument based on 70A-2-702(3), the successful reclamation of goods should bar all damage remedies. See AB at 9-11.

Respondent claims as incidental damages that it is entitled to \$750 damages for loss of commission in sale of property and \$500 damages, incurred cost of resale, under §70A-2-710 which states as follows:

"Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions 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." Id.

This section defines incidental damages. It does not state when they are allowable or recoverable.

"Successful reclamation of goods excludes all other remedies with respect to them." 70A-2-702 Utah Code Ann. The word "them" as found in this section specifically refers to the goods. Since in every instance the charges and expenses mentioned in §70A-2-710 also refer to actions taken in respect to the goods, successful reclamation as achieved by the Respondent excludes the remedy of incidental damages as well as any other remedy with respect to the goods. Furthermore, the \$750 damage which the court awarded the Respondent for loss of commission (Conclusion of Law no. 13, R.220) is clearly outside the scope of incidental damages as defined in §70A-2-710 as not pertaining to the resale of the goods.

Respondent testified at trial that it gave no public notice of the resale of the goods in question nor any type of notice to the Appellants. T 189:11-12 and 13-15. Respondent also testified that he gave no notice to the Appellants before or after the sale, that he intended to sell the chattels nor the time, manner or place of sale. T 200:4-8. Respondent "understands" that the requirements of §70A-2-706, for notice of sale and in compliance with other commercial standards apply only where damages are computed as a difference between the contract price and the resale price. RB.9. Respondent cites no law for this proposition. Since Bailey Auction Co. stands in the position

of a seller (Utah Code Ann. §70A-2-707), Appellants submit the provisions of §70A-2-706 apply by analogy where the seller's agent seeks a commission loss based on the contract price - sale price differential.

It should be noted that even under the common law, the requirements of commercial reasonableness and notice of resale were exacted of auctioneers reselling goods. If the sale was not circumspect the court measured damages by a fair market valuation instead of the sale price valuation. In the case of Green v. Ansley, 92 Ga.647, 19 S.E. 53 (1893) a purchaser at an auction failed to complete the sale. The court pointed out the auctioneer's options for measuring damages. He could elect to leave the property with the purchaser and sue for the price. But if the auctioneer elected to keep the property without selling, or conducted a resale improperly, the measure of damages was the difference between the contract price and the fair market value.

Only if the resale was circumspect could the resale price be compared with the contract price to measure damages.

"(T)he sole question to be considered is whether the plaintiff, in reselling, proceeded in such manner as to render the result of the resale legally binding upon the defendant. In order to conclude the defendant in this manner, not only must it appear that the resale was made without unreasonable delay, with the same publicity, and, as far as possible, under the same conditions,



as the first, and with an honest effort to get the best price obtainable, but it must appear also that the defendant had notice that the sale was to be at his risk." 19 S.E. at 54.

The court noted the rationale behind the requirements of notice, fairness and publicity.

"The property resold at his risk is regarded as in some sense [the first purchaser's] his own, and the result of the resale is in the nature of an adjudication against him; and, before he should be charged with the deficiency, he should be afforded an opportunity to protect his interest and prevent a sacrifice of the property. Unless notice is given him that the property is held and will be sold at his risk, he has the right to assume, if it is sold again, that the vendor elected to retain and deal with it as his own, and at his own risk." (Citations omitted) Id.

Since the time that Appellants wrote their arguments concerning the analogy between the similar language found in §70A-2-706 pertaining to deficiency judgments and §70A-2-504 Appellants have found the recent Utah Supreme Court case of Chrysler Credit Corp. v. Burns, 562 P.2d 233 (1977), wherein it was held that failure to give notice under Article 9 demonstrates that the sale was not commercially reasonable and that as a result the secured party is not entitled to a deficiency judgment. Since the policy applicable to the Burns case is equally applicable to an Article 2 case, Appellants would urge the application of the Burns rationale to the case before the Court.

The question this Court faces is whether the Appellants should be bound by a price determined in a private, non-auction resale made without notice, apparently before the Respondent had arranged repossession, without notice to other potential buyers. And beyond that question, the clear language of Section 2-702 of the UCC bars the damages remedy awarded below.

POINT III. APPELLANTS ARE NOT LIABLE FOR  
WRONGFUL RESTRAINT.

Respondent bases his claim for recovery of damages for wrongful restraint on the proposition that failure to continue proceeding after a temporary restraining order to obtain a preliminary injunction conclusively establishes the wrongfulness of the restraint. RB.6. The authorities cited in support of this argument do not support it. Rather, they state that the voluntary termination of the entire case by dismissal by the party moving for the restraint may have that effect. 42 Am.Jur. 2d Injunction §364 (1969); Annot., 91 ALR 2d 1313 (1963); Janssen v. Shown, 53 F.2d 608 (9th Cir. 1931).

The rule stating the effect of dissolution of a temporary injunction on the determination of "wrongfulness" is stated in the next section of this text. 42 Am.Jur. 2d, Injunction §365 (1969). Dissolution of a temporary restraining order is at best only a prima facie establishment of wrongfulness, subject to refutation, "and perhaps

it is better to say that such a termination is not an adjudication of wrongfulness but merely leaves the question open for proof in the ordinary way." Id.

The rationale for the former rule is that the filing of a restraining order gives the moving party an advantage, although be it temporary. Having obtained the advantage it would be decidedly unfair to allow the moving party to unilaterally determine when to terminate the restraint without a hearing on the merits of the matter. In the instant case Appellants did not voluntarily terminate the restraint. Furthermore, there was a hearing on the merits of Appellants' case. Therefore, this matter falls within the scope of the latter rule as stated above and it should be applied by this Court.

Respondent's Brief is absent any argument of wrongful conduct on the part of the Appellants, other than their failure to appear at the hearing on the temporary restraining order held March 8, 1973. RB.6-7. However, the same record shows that Appellants' reason for not appearing at the hearing that they were still attempting to arrange financing for the equipment in question. Finally, the Findings of Fact do not state the evidence which establishes a finding of wrongfulness, but rather speak again in terms of a conclusion, "there being no proper sale of equipment consummated to the Plaintiffs...." R.219.

Against the proposition that the restraint was improper, Appellants have shown that their possession was consensual. AB.14. Further, non-payment did not justify the repossession. AB.15. The remedies for non-payment are specified in the Uniform Commercial Code, and as applied by Stumbo v. Paul B. Hult Lumber Co., 444 P.2d 564 (Or. 1968) self-help repossession is unjustified.

Section 702 of Article 2 allows a reclamation of goods in a credit sale situation where the purchaser was insolvent when he received the goods. Respondent denies this is a credit sale and is precluded from that section's remedy. Further, Appellants were not insolvent when the goods were received, under §70A-1-201 (23) of the Code. Also, the seller must make a demand for return, either within 10 days of the buyer's receipt of the goods, or at any time if there has been written, signed, and dated misrepresentation of solvency. 2-702: 2-702 Official Comment 2. Joe Bailey Auction Co. made no demand, and did not proceed within the 10 day time limit. Obviously, there has been no misrepresentation of solvency.

If the sale in question was a cash sale as the Respondent claims, the only right of reclamation would be under 2-507. But Section 2-507 is subject to the ten day limitation of 2-702. Section 2-507 Official Comment 3; Anderson Uniform Commercial Code §2-507:8; Re Samuels & Co., 510 F.2d 139 (5th Cir.); Re Helms Veneer Corp., 287 F.Supp 840 (D.C.Va.)

Respondent, an unsecured seller, falls within the purview of Article 2 of the Code. Clearly, the Code provides no right to reclamation which will cover the Respondent's attempted repossession of the goods in question. Therefore, the Respondent's attempted repossession was outside the scope of Utah law. Under these circumstances the Appellants' temporary restraint was certainly proper. Indeed, Appellants have been denied substantial rights by the lower court's failure to require Respondent to pursue remedies provided under Utah law. For the Supreme Court to permit unsecured creditors to reclaim goods without following the Commercial Code severely undermines this body of law. Appellants would urge the Court to find that under the facts of this case Appellants have no liability for obtaining the temporary restraining order and as a result are not liable for the \$6507.46 in damages awarded as caused by the issuance of the restraining order.

POINT IV. RESPONDENT'S COMPUTATION OF THE DAMAGES WAS NOT UNCONTROVERTED.

Respondent states that its calculation of damages is uncontroverted. RB.10-11. This is unresponsive to Point III of Appellants' Brief that the damages awarded are not substantiated by the evidence. Respondent has not replied to Appellants' argument that the damages testified to by Mr. Bailey do not total the \$2,800 awarded by the court. AB.15

19.


In preparing the Findings of Fact and Conclusions of Law and Judgment Respondent sets forth its entitlement to an award of damages against the Appellants Russ Bullock, June Mundy and the Western Surety Company in the amount of \$6,507.46 for the issuance of the restraining order in this case. R.220-221 and 223. However, the itemized damages in Findings of Fact No. 12 (a)-(d) total only \$6,107.46. R.219. In Respondent's Brief, Respondent alleges that as a result of the temporary restraining order it suffered damages in the amount of \$6,107.46 (the total of \$3,307.46 and \$2,800). RB.10-11. In the event the Court finds in favor of the Respondent, the Court must reduce this award of damages to the lower figure as this is the figure to which Respondent actually claims entitlement.

#### CONCLUSION

The legal issues in this case, discussed in Points II and III, supra, are of critical importance. The decision on these points will affect the operation of the Uniform Commercial Code in Utah and other states. If this Court approves Respondent's course of action, the power of the Code will be vitiated and sellers will continue to rely on extra-legal remedies. Therefore, Appellants request that this Court reverse the awards of damages made by the lower court herein.

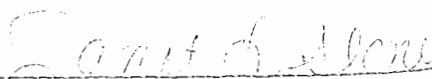
Respectfully submitted this 9th day of March,  
1978.

  
FRANK A. ALLEN  
Attorney for Appellants

  
MICHAEL D. HUGHES  
Attorney for Appellants

CERTIFICATE OF MAILING

I do hereby certify that on this 10th day of March, 1978, I did mail a correct and true copy of the above and foregoing REPLY BRIEF to Mr. Phillip L. Foremaster, Attorney for Defendant and Respondent, 494 E. Tabernacle, St. George, Utah 84770, postage prepaid.

  
Secretary

## FOREWORD

The Uniform Commercial Code, adopted in California at the 1963 Regular Session of the Legislature, is a comprehensive modernization of the law governing commercial transactions. It is designed to simplify and clarify the law, and to secure uniformity in the adopting states.

The section numbers in the official text of the Uniform Code are a composite number, such as section 3-101, in which the digit preceding the dash designates the article (Division in California) in which the section appears. In the California Code the dash has been removed from the section numbers so that section 3-101 of the Uniform Code becomes section 3101 of the California Code, section 1-212 becomes section 1212, and so on.

The Code was adopted in California without section headings. Acting on the advice of the Legislative Counsel, the Code is published herein with the section headings used in the official text, except in instances where changes, additions or modifications were supplied by the Legislative Counsel to reflect variations in the California Code.

The California Code Comments which appear in these volumes are based on exhaustive pre-adoption Studies and Reports by Legislative and Bar Committees. They were prepared specially for this edition by John A. Bohn and his associate Charles J. Williams, both of Benicia. Mr. Bohn was Counsel to the Senate Fact Finding Committee on Judiciary which made a comprehensive Progress Report on the Uniform Commercial Code prior to its adoption in California. A study of these Comments is indispensable to a thorough understanding of the Code. They contain an exhaustive review of legislative history as an aid to interpretation, explanations of the impact on and changes effected in California law, and a review of variations from the 1962 official text. Grateful acknowledgment is made of the service rendered the California Bench and Bar by the authors.

Numerous other features are included to enhance the value of these volumes. Among them are—

The Official Code Comments prepared by The American Law Institute and National Conference of Commissioners on Uniform State Laws.

Library References to pertinent Digest Key Numbers and to Corpus Juris Secundum.



## FOREWORD

Cross References to related or qualifying provisions of other sections of the Commercial Code, to sections of other Codes, and to sections of the Constitution.

Law Review References which facilitate research by directing attention to pertinent articles and commentaries.

Notes of Decisions preserving under appropriate sections the judicial constructions of former laws now covered by the Commercial Code, and, additionally, judicial constructions of the Code itself by the courts of other adopting states.

An Appendix setting out for convenient reference the text and source of prior laws which are repealed by the Code but which continue to be applicable to transactions validly entered into before the effective date of the Code.

Tables correlating sections of the California Commercial Code with prior provisions of other California Codes governing commercial transactions.

A detailed Index at the end of the Code providing a means of quick access to the text.

The Publisher gratefully acknowledges the cordial cooperation of the State Officials, and of the members of the Bench and Bar whose advice and suggestions have aided in the preparation of these volumes.

Special acknowledgment is made to the Publishers of the various Law Reviews and Bar Journals which are cited throughout these volumes and which, in limited number, are quoted in the California Code Comments under particular sections.

The time and energies of many people have combined to produce West's Annotated California Commercial Code. It incorporates a far more comprehensive and exhaustive development of annotative materials than any other edition of the Commercial Code yet produced in California or any other state. The Publisher is proud to present this definitive version as a permanent unit of West's Annotated California Codes.

THE PUBLISHER

June, 1964

Ch. 2

GENERAL PROVISIONS

§ 1201

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, compress receipt, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person entitled under the document (Section 7403(1)) has the right to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

## Cross References

Priority of secured transactions, see § 4101 et seq.  
 Creation of documents and drafts, see § 4501 et seq.  
 Transfer of documents, see § 4501 et seq.  
 Priority of claims, see § 471 et seq.  
 Liability of seller, buyer's right to goods, see § 2502.  
 Possible interest in goods, see § 2501.  
 Transfer of credit, see § 5001 et seq.  
 Stoppage in transit, see § 2505.

## Law Review Commentaries

§ 2501, *Liability for Title*, in *Secured Financing under the Uniform Commercial Code*, (1969), 68 *Yale L.J.* 751.

## Notes of Decisions

## Library references

§ 2502, *Goods*  
 C.F.R. § 1.101, 1.840.

## 1. Decisions in other states

For judicial constructions of the Uniform Commercial Code by the courts of other reporting states, see *Notes of Decisions in the States 2-596 Uniform Laws Annotated—Uniform Commercial Code*.

§ 2507. **Effect of Seller's Tender; Delivery on Condition.** (1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due. (Stats.1963, c. 819, § 2507.)

## California Code Comment

*By John A. Bohn and Charles J. Williams*

## Prior California Law

1. Subdivision (1) is in accord with the general principles of former Civil Code § 1731(2) (seller's obligation a condition of the buyer's obligation to perform his promises to accept and pay for the goods); former Civil Code § 1762 (seller must be ready and willing to give possession of the goods to the buyer in exchange for the price) and former Civil Code § 1761 (seller must deliver and buyer accept goods).

2. Subdivision (2) is in accord with the principle expressed in former Civil Code § 1762 that the buyer must be ready and willing to pay the price in exchange for possession of the goods and with former Civil Code § 1761 providing that seller must deliver and buyer accept goods.

## Changes from U.C.C. (1962 Official Text)

3. This is section 2507 of the Official Text without change.

## Uniform Commercial Code Comment

## Prior Uniform Statutory Provision:

None.

## Purpose:

Whether a claim for breach of an "entire" contract should be treated as a claim requiring separate trial to the exclusion of issues beyond the scope of this Article has long constituted a problem, one with which as a

business matter enter vitally into the contract should be considered a part thereof in so far as cross-claims or defenses are concerned.

## Definitional Cross References:

"Contract for sale". Section 2-101.

"Remedy". Section 1-201.

## Law Review Commentaries

See, e.g., *Commentaries on the Law of Sales*, 2d ed., § 10, 100 (1960); *Uniform Commercial Code*, 1st ed., § 2-101, 100 (1951); *U.C.C. Ann.*, 1951, 270.

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## Notes of Decisions

## Citing references

See, e.g., *Commentaries on the Law of Sales*, 2d ed., § 10, 100 (1960); *Uniform Commercial Code*, 1st ed., § 2-101, 100 (1951); *U.C.C. Ann.*, 1951, 270.

## 1. Decisions in other states

For judicial constructions of the Uniform Commercial Code by the courts of other adopting states, see Notes of Decisions under section 2-701 Uniform Laws Annotated—Uniform Commercial Code.

## § 2702. Seller's Remedies on Discovery of Buyer's Insolvency.

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this division (Section 2705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within 10 days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the 10-day limitation does not apply. Except as provided in this subdivision the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subdivision (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this division (Section 2403). Successful reclamation of goods excludes all other remedies with respect to them. (Stats.1963, c. 819, § 2702.)

### California Code Comment

*By John A. Bohn and Charles J. Williams*

#### Prior California Law

1. Subdivision (1) is the counterpart of former Civil Code § 1771(c) which authorized the seller to retain possession of the goods "until payment in full of the price" in cases where the buyer became insolvent. Former Civil Code § 1777 provided that the seller could stop goods which were in transit if the buyer became insolvent.

2. Subdivisions (2) and (3) relate to the situation where the buyer has received the goods and the seller discovers his insolvency. The USA only covered the situation where the buyer became insolvent while the goods were still in the seller's possession. Former Civil Code § 1771 (c) or in transit (former Civil Code § 1777).

3. A California State Bar Committee made the following comments with regard to this section and its effect upon prior California law:

"At present, a seller who has delivered goods on credit to a buyer who thereafter becomes insolvent is a general creditor of the insolvent buyer. [*Fn.*: 4 Collier, op. cit. 1117-1129.] Sellers in this position often try to recover the goods by rescinding the sale contract. [*Fn.*: California Conserving Co. v. D'Avanzo, 62 F.2d 528 (2d Cir.1933); 4 Collier, op. cit. 70,11.] The usual basis for

such action is the allegation that the buyer has misrepresented his solvency and his intention to pay. The courts have greatly assisted the seller by presuming that one who buys goods on credit when he manifestly cannot pay for them does not intend to do so. This presumption, along with the rule that a mere purchase of goods on credit is an 'implied representation' of the buyer's intention to pay, has often permitted a seller to reclaim goods from a bankrupt buyer. [*Fn.*: 4 Collier, op. cit. 1322-1323. "Knowledge of inability to pay when the purchase is made is equivalent to a purchase with intent not to pay and such purchase is constructively fraudulent. Good faith which rests only on ignorance due to wilful, reckless, or despairing failure to face the facts is, in proceedings of this nature, the legal equivalent of actual fraud and entitles the seller to reclaim his goods." Matter of Penn Table Co., 26 F.Supp. 887, 889 (S.D.W.Va.1939).] However, a seller's success now depends upon a particular court's assessment of intangible factual issues.

"Section 12702 [2702] would substitute an arbitrary rule of thumb. A seller could recover goods from an insolvent buyer only if the goods are demanded within

the rights of the parties shall be determined by the federal court unless both parties previously agreed in writing that the state tribunal, Metropolitan Distribution Co., Eastern Supply Co., 174 Pa. 13, 34 A. 2d 128, 167 P.2d 151.

#### 14. — Nonpayment of check

A set of rules of post-dated check amounts to delivery on credit, and remedies for nonpayment of such check are set forth in subdivision (2) of this section. Conn. v. K. 100 (1962) 181 A.2d 371, 199 Pa. 81, 196 A.2d 371.

**§ 2703. Seller's Remedies in General.** Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2312), then also with respect to the whole undelivered balance, the aggrieved seller may

- (a) Withhold delivery of such goods;
- (b) Stop delivery by any bailee as hereinafter provided (Section 2705);
- (c) Proceed under the next section respecting goods still unidentified to the contract;
- (d) Resell and recover damages as hereafter provided (Section 2706);
- (e) Recover damages for nonacceptance (Section 2708) or in a proper case the price (Section 2709);
- (f) Cancel. (Stats.1933, c. 819, § 2703.)

#### California Code Comment

*By John A. Bohn and Charles J. Williams*

##### Prior California Law

1. This section has no statutory counterpart in prior California law. While there were similar remedies under the USA the basic remedies available to the seller were an action for the contract price (former Civil Code § 1783) an action for damages (former Civil Code § 1781) or rescission (former Civil Code § 1785).

2. The Legislative Counsel in the California Annotations to the Proposed Uniform Commercial Code made the following observation on the difference between the Commercial Code and the Uniform Sales Act (former Civil Code §§ 1721-1800) in

regard to the availability of remedies:

"The comments to U.C.C. suggest the section means that an election of remedies is not required (see Official Comment 1). In California, the usual remedies of an aggrieved seller are an action for the price, an action for damages, or rescission, but the seller under the theory of the Civil Code is forced to an election. These remedies under U.C.C. are given irrespective of the situs of title. Under the Civil Code the remedies differ depending on the situs of title. Compare Civil Code section 1783." Sixth Progress Re-

had already been delivered, when non-payment was proved to defendant, but that the plaintiff had not forwarded to C. & C. the bill that plaintiff held the shipping receipts for the goods in transit.

The court held in favor of C. & C. It was held that defendant was not a mere forwarding agent, and that there was no effective stoppage in transit. *Carney v. Pierce and Union & Mining Co.* (1860) 86 D. 565, 3 C.C. 549.

Where a bill of lading is obtained after the goods have been in possession of the carrier, the shipping receipts for the goods in the seller's possession being furnished to the carrier, the goods being delivered to the carrier by the seller, such delivery did not constitute a sale of the goods with the title, which had already become vested in the carrier of the goods by the seller.

#### 4. Indorsement and transfer of bill

Where a bill of lading is drawn payable to "bearer or assign," and the drawer is a carrier of goods at New York, who intended to transport the goods, and he shipped the goods to San Francisco, and transferred the bill of lading to the purchaser without indorsement, and the purchaser indorsed the bill, and delivered it to a consignee for release, and before the arrival of the goods the purchaser became insolvent, and the shipper gave notice of stoppage in transitu, the shipper's right to take possession of the goods was not affected by the purchaser's indorsement and transfer of the bill of lading, as "B. H." having failed to indorse it, to take to the consignee. *Shipper v. Newell* (1893) 51 C. 165, 4 C.C. 372.

If the carrier of goods sold the same on credit and shipped them on a bill of lading to the vendee, as consignee, with bills of lading in the usual form, and while the goods

were in transit the vendee became insolvent, and the vendor notified the railroad company that he stopped the goods, and if after such notification the vendee insisted on delivery of the goods, the carrier of the goods is not liable. *Whelan v. 2nd Nat. Bank*, and without knowledge of the vendee, or of such notification, shipped to him, to be repaid out of the proceeds of the goods to be sold by him at auction, the vendee, on tender of freight and charges, was entitled to receive the goods from the carrier as against the vendee. *Newell v. Central Pac. R. R. Co.* (1879) 71 C. 145, 21 Am.R. 713.

#### 5. Levy or execution

The right of stoppage in transit is not affected, though the goods are held on execution or attachment at the suit of a creditor of the vendee, provided it is effected before the transit is at its end. *Brown v. Pierce* (1853) 21 C. 508.

Vendor demanding goods prior to sale on execution by sheriff could thereafter have the goods sold to a vendee in person. *Carey v. Lusk* (1878) 2 Lab. 149.

#### 6. Time for demand

The time for process while in sheriff's hands and before paid over to creditor is too late as assertion of right of stoppage in transitu on part of vendor. *Carey v. Lusk* (1878) 2 Lab. 149.

Right of stoppage in transitu is lost to vendor if he allows sheriff to sell goods to be executed without claim or demand for them prior to sale. *Id.*

#### 7. Decisions in other states

For future judicial constructions of the Uniform Commercial Code by the courts of other adopting states, see Notes of Decisions under section 2-705 Uniform Laws, Annotated - Uniform Commercial Code.

**§ 2706. Seller's Resale Including Contract for Resale.** (1) Under the conditions stated in Section 2703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this division (Section 2710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subdivision (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an exist-

ing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as relating to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) Only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) It must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value specify the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) If the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective buyers; and

(d) The seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subdivision (3) of Section 2711). (Stats. 1966, c. 819, § 2706.)

#### California Code Comment

*By John A. Baker and Charles J. Williams*

##### Prior California Law

1. Subdivision (1) broadens the right of the seller to resell the goods by allowing the exercise of this right upon the conditions stated in section 2706: buyer's wrongful rejection, revocation of acceptance, failure to pay when due, or repudiation.

##### Under former Civil Code § 1780

(1) the seller could resell the goods only if either (1) the goods were perishable or (2) the seller expressly reserved the right of resale or (3) the buyer was in default an unreasonable length of time.