

1. Cobb, an acquaintance of Sparr, went to Sparr's jewelry store and asked to see some diamond earrings and a diamond ring which he desired to purchase for his wife. Sparr exhibited the merchandise and told Cobb that the price of the earrings was \$300 and the price of the ring, \$250. Cobb then asked him if he could take them and show them to his wife and if she liked them, he could contact a diamond dealer to see if it was a bargain, assuring Sparr that he would report back to him within two hours. Sparr let Cobb take the earrings and the ring. Shortly after leaving the jewelry store, Cobb pawned the earrings for \$300 and the ring for \$175 to Colter. Upon learning these facts, Sparr made a demand upon Colter for the earrings and ring, and, upon refusal to deliver, brought an action against Colter for conversion.

Is Sparr entitled to recover? Discuss.

July 1951

1. Sparr did not give Cobb the jewelry with the intention of passing title to him, and therefore voidable title concepts under which Cobb would have power to transfer an interest in the rings to Colter do not come into play. Cobb is a mere bailee in possession, and possession alone is not sufficient indicia of title to enable Cobb to transfer to third persons rights as against Sparr. Therefore, Colter, in refusing to return the jewelry to Sparr, has committed an act of conversion.

2. Johnson, the owner and operator of a gasoline service station, parked his own automobile in front of the station with the words "For Sale" painted on the side windows. A few days after he did this, two men approached him while he was repairing a tire and asked to examine the car, which they did. After some negotiations about the price, Johnson agreed to sell for \$285. An hour later, the men reappeared with a certified check and Johnson delivered the car to them. When Johnson presented the check to the bank which had supposedly certified it, he was told that it was a forgery. Some months later, Webster drove the same car into the service station for gasoline whereupon Johnson called the police and demanded its return. Webster exhibited a bill of sale executed from a used car dealer, who, in turn, it developed upon investigation, had purchased it from the men who had dealt with Johnson. Webster knew nothing about the circumstances of Johnson's transaction with the forgers. Johnson brought a replevin suit against Webster for the return of the car.

What result and why?

July 1951

2. Johnson loses.

Johnson was defrauded by the men who gave him the forged check in payment for the automobile, but he did intend to pass title to them. Even though Johnson could have rescinded the sale as against the buyers because of their fraud, they had voidable title, and had power to transfer good title to a subsequent bona fide purchaser. Under the UCC, this result is reached in the case of a sale induced by the giving of a forged check.

It is clear that Webster is a bona fide purchaser and therefore he takes free of Johnson's interest.

3. Rich delivered to Smith, a dealer in used farm machinery, a cream separator under an agreement which stated, "Consigned by Rich to Smith one Royal Cream Separator, to be sold for not less than \$50; 10% to be retained by Smith."

At the same time, Rich picked out a milking machine, paid for it in full, and Smith agreed to ship the milking machine by rail and pay the freight from Smith's place of business to a distant town where Rich lived.

The following day, Rich informed Smith that he intended to go into the business of baling hay for other farmers and that he wanted to buy a used tractor which would not only operate standard plows but also a hay baler requiring a thirty horsepower unit to run it. Smith said, "I have several tractors but from my experience the one you should have to operate both hay baler and plows is this Hercules Deluxe Model 88 that I have here." Rich replied, "If you say this Hercules Deluxe Model 88 will do both jobs, I will take it." Smith said it would. Rich then paid Smith \$1,000 for the tractor.

The cream separator was stolen from Smith's place of business. The milking machine was promptly shipped by Smith who paid the railroad freight charges, but it was lost in the process of shipment. Although sufficient to operate plows, the tractor was completely inadequate to use with a hay baler. Equally good tractors for plowing purposes only were selling for \$600, the amount which Rich received when he resold the tractor.

Rich consults you concerning his transactions with Smith. Explain to him his rights in each instance.

September 1954

3. (a) *The Cream Separator.* Rich bears the loss unless Smith was in some way negligent in allowing the theft. Goods on consignment are the risk of the consignor, who remains the owner of the goods. No sale is involved.

(b) *The Milking Machine.* Under the Code, the risk of loss in transit in this case is on the buyer, Rich. The Code rule is that where the goods will move by common carrier, the risk of loss passes to the buyer upon delivery of the goods to the carrier, unless a contract term provides for a different result. Under the Code, if the phrase "f.o.b." is used, the risk passes at the f.o.b. point, and if, in this case, the contract has been f.o.b. buyer's city, the risk would have remained on the seller in transit. However, the Code does not treat an agreement to pay freight as equivalent to an f.o.b. term and such an agreement does not change the basic rule that risk passes when the seller delivers the goods to the carrier.

(c) *The Tractor.* Rich is entitled to recover for breach of warranty. Smith's assertion that the Hercules Deluxe Model 88 would handle both of Rich's jobs and Rich's reliance thereon is a clear warranty of fitness for a particular purpose under the Code. As damages, Rich is entitled to the difference between the value of the tractor as it was and the value it would have had if it had been as warranted. The \$600 sale price does not necessarily establish the actual value, but will be evidence of that value. Rich is at least entitled to the difference between actual value and \$1,000 and can recover more if he can prove that the tractor would have been worth more than \$1,000 if it had been as warranted.

4. S, a salesman employed by B Company, a manufacturer of television sets in Rochester, N.Y., called upon A, a retailer of furniture in New York City, to sell him an "apartment size" model recently designed by B Company. S told A in good faith that the sets would "positively bring in all channels within seventy miles of New York." A then entered into a written contract with B Company for the purchase of 100 apartment-size sets. The contract provided:

"The sets shall be shipped by railroad freight f.o.b. Rochester as soon as completed. The seller gives no warranty, express or implied, as to description, quality or any other matter and will be in no way responsible for the performance of the set."

At the time of the execution of the contract, A was informed that the 100 sets were fully assembled in B Company's factory in Rochester and were available for immediate delivery.

To assist A in selling the television sets, B Company then sent A a supply of advertising circulars which stated, in part:

"Available now, apartment-size models - - will bring in all channels within 70 miles of New York City. B Company."

Because of a railroad strike at the time, B Company delivered the 100 sets to C, a trucker. When A received the first shipment, he discovered that 70 of the 100 sets were smashed beyond repair by vandals, who broke into the truck en route. When the unbroken sets were delivered to A's store, P read one of the advertising circulars and inquired of A as to the correctness of the claim. A told P that the statements were correct and, in reliance thereon, P purchased a set for his apartment but, after installation, discovered that the set could not receive any signal from a station more than 20 miles distant.

A then tested the other sets and found them similarly limited in reception. He immediately wrote B Company that he would not pay for any of the sets already received and rescinded his contract with B Company. He also returned to B Company the sets previously delivered.

What are P's rights, if any, against A and B Company?

What are A's rights, if any, against B Company?

September 1956

4. (1) P may recover against either A or B Company for breach of warranty.

(a) *Against A:* A's statement to P that the TV sets would pick up all stations within 80 miles of New York was an express warranty for the breach of which A is liable. P can keep the set and sue for damages, or alternatively, can probably revoke his acceptance and rescind the contract or sue for damages. A party can revoke his acceptance of the goods (a) where he received them without discovery of the defect because of the difficulty of discovery before acceptance, (b) the defect substantially impairs their value to him, and (c) he acts to revoke acceptance within a reasonable time after he discovers or should have discovered the defect and before a change in their condition not caused by the defect.

(b) *Against B:* There are many cases, including New York cases, holding that a remote seller who prepares advertising circulars to be given to buyers, is liable to them for breach of express warranty as to assertions made in the circulars, without regard to privity of contract. Under such cases, B is liable.

(2) A probably cannot recover against B Company.

Proof of the express warranty made by the salesman prior to the signing of the written contract would be excluded by the parol evidence rule. Terms which are set forth in the written contract intended by the parties as the final expression of their agreement may not be contradicted by evidence of a prior agreement. And proof of the prior warranty would contradict the written agreement.

If the failures of the TV sets are such as to make them unmerchantable, then B may be liable for breach of implied warranties, since the disclaimer of implied warranties is not conspicuous and does not mention the word "merchantability" and would, therefore, be inadequate as a disclaimer under the UCC. However, I assume that the sets were merchantable even though they only pulled stations within a 20 mile radius of New York City.

Risk of loss depends on whether there was a breach of warranty. If there was no breach of warranty (as has been assumed), risk passed to the buyer at the f.o.b. point (Rochester) and A must pay for the sets even though they were damaged in transit.

Under the Code, where a specified method of shipment is unavailable, any commercially reasonable substitute must be tendered and accepted. Therefore, under the facts, shipment by truck was proper and does not affect the risk of loss.

If the goods were unmerchantable and could have been rejected by A, the risk stays upon B Company until they are accepted by A, and therefore, the risk of loss in transit would have been on B Company.

5. A was given a watch by his father, who had just completed a European tour and purchased the watch in Switzerland. B, an associate of A, saw the watch and inquired of A if he would sell the watch. A told B that it was a practically new watch, 21 jewels, anti-magnetic and shock resistant. B purchased the watch, paying A \$250. Later, when the watch stopped, B discovered that the works in the watch were quite old, consisting of an old 7 jewel movement, neither shock resistant or anti-magnetic. A did not know of the defects in the watch. B complained to A that he had been defrauded and that A had misrepresented the watch to him.

What action or actions are available to B, if any?

September 1959

5. B has an action for breach of warranty and may also have an action in tort for fraud.

(1) *Breach of Warranty.* Since A is apparently not a merchant, there are no implied warranties of merchantability in connection with the sale. However, A's statements to B that the watch had 21 jewels, was anti-magnetic, shock resistant and practically new created express warranties which were breached.

Because of the difficulty of discovering these defects, B could probably revoke his acceptance upon discovery if he acted within a reasonable time. Certainly the defects materially impaired the value of the watch to B and he could, therefore, bring into operation the revocation of acceptance provisions of the UCC. B could, of course, choose to keep the watch and sue for damages.

(2) *Fraud.* If A made his statements to B concerning the watch without any reason to believe they were true, he would appear to have acted with culpable disregard for the truthfulness of his statements, and, if so, is guilty of fraudulent conduct for which B could rescind the sale or recover damages.

6. (a) A route salesman for Ideal Milk Company delivered a one-half gallon glass jug of milk to Allen's home. The next day when Allen grasped the milk container by its neck to take it out of his refrigerator, it shattered in his hand and caused serious injury. Allen paid Ideal on a monthly basis for the regular delivery of milk. Ideal's milk bottles each contained the legend "Property of Ideal - - To Be Returned" and the route salesman would pick up the empty bottles when he delivered milk.

(b) Barnes, while receiving medical care in a private hospital, was given a blood transfusion which resulted in his contracting jaundice and hepatitis. The hospital rendered a statement upon Barnes' discharge which itemized room and board and \$60 for the blood transfusion.

Allen brought an action against Ideal Milk Company and Barnes brought an action against the hospital, each charging breach of warranty.

What result in each case and why?

September 1962

6. (a) Judgment for Allen.

Generally, the sale of liquids or foods in containers carries with it an implied warranty of fitness for purpose intended, with regard to both the food and the container. This is true even though the sale does not contemplate the passage of title of the container. By placing the food or liquid in a container manufactured by the seller, the seller, or bailor, impliedly warrants to the person with whom he deals that the container will serve the purpose mutually intended. The milk jug failing to serve its intended purpose, an action for breach of warranty lies in favor of Allen. The fact that Allen pays for the milk on a monthly basis, and not at the time of the sale of milk, does not impair privity of contract.

(b) Judgment for the hospital.

A hospital, in giving a blood transfusion, does not warrant either expressly or impliedly, that the blood as transferred will not cause any ill effects. There is no implied warranty of fitness, since the hospital cannot be held to be an insurer of its quality. There was, in fact, no sale here to which a warranty could attach. Rather, the hospital was merely performing a personal service contract. Personal service contracts do not carry with them implied warranties of fitness, and the only possible action against the hospital would be a negligence action.

4.

7. On August 1, 1961, seller sold and delivered to the buyer 25 cases of Italian Romanello cheese for \$3,360. Within a reasonable time, the buyer examined the cheese only to find that 16 cases of it were covered with "a brown slime." He made complaint to the seller immediately and seller described this as "merely a condensation of moisture." The buyer was still dissatisfied and on August 15 returned the 16 cases to the seller with a request for a rebate.

Weeks passed and the buyer heard nothing in response to his return of the cheese from the seller. Meanwhile, the seller had tried to sell the 16 returned cases at a discount. During October, the buyer was able to sell the 9 cases he had retained.

On October 15, the buyer, having heard nothing from the seller concerning the cases returned, again requested a rebate for the 16 cases. On October 17, seller answered the request with the statement that he expected the buyer to retake the 16 cases in accordance with the original order which had been filled by him. The buyer refused to do so and the seller sued the buyer for the purchase price.

What decision? Give reasons.

March 1963

7. Decision for buyer.

The resolution of the question turns upon whether the "brown slime" substantially impaired the value of the cheese. If it did, seller's return, if within a reasonable time, was justified and he is not liable for the price or damages. If the slime did not substantially impair the value of the cheese, the return was wrongful and seller is entitled to damages or possibly, on the facts of the case, to the price.

*Discussion.* A buyer will be held to have accepted goods if he keeps them beyond a reasonable time without notifying the seller of rejection. It would seem that 15 days is beyond a reasonable time and that the immediate "complaint" did not constitute a rejection. However, a buyer may revoke his acceptance of goods if the defect substantially impairs the value of the goods and the failure to discover the defect was induced by seller's assurances. Here, even though the buyer knew of the slime, he did not know the seriousness of the defect and seller's statement that it was merely a condensation of moisture would seem to have been an assurance which kept the buyer from realizing that the slime was actually a defect. Therefore, buyer is still entitled to revoke his acceptance upon coming to disbelieve the seller's assurances if he acts within a reasonable time. While the reasonable time is a question of fact, I conclude that revocation on the 15th was within a reasonable time.

If the defects did not substantially impair the value of the cheese, the revocation of acceptance was wrongful. In the case of a wrongful rejection or revocation of acceptance the seller may recover the price of the goods from the buyer if the buyer after reasonable effort is unable to resell the goods at a reasonable price. However, in a case like this, inability to resell is probably evidence of a substantial defect which will operate in favor of buyer's position.

8. After the death of Moses Miller, all of the stock, produce and equipment on his farm was sold at auction. Albert was awarded all of the unbaled hay in the large barn in the valley for \$400 cash and \$100 each time he hauled a load of hay from the barn. It was estimated that the barn would be emptied after eight loads were removed. Bivins made the highest bid for all of the baled hay in the small barn on the hill, the bid being on the basis of a price per ton. The arrangement with Bivins was that the hay could be left in the barn and would be weighed as taken away. It was estimated that there were fifty tons of hay in the barn.

Before either Albert or Bivins had an opportunity to remove any hay, a flood destroyed the large barn and the hay in it. In the farm custodian's haste to remove a tractor from the path of the flood, he drove it into the small barn on the hill where a spark ignited the hay and destroyed all of it.

Miller's administrator sued both Albert and Bivins for the full price of the estimated amounts of hay in each barn.

What result and why?

March 1963

8. *Administrator v. Bivins.* Decision for Administrator.

Since Miller's administrator was not a merchant, risk passed on tender of delivery. Since delivery was to be made at the barn at any time, it had been tendered. Therefore, the risk of loss had passed to Albert. UCC 2-509(3) If the custodian's negligence caused the loss, the estate could, of course, be liable on tort and agency principles.

*Administrator v. Albert.* Decision for Administrator. Same rationale.

9. A printer and a promoter of automobile races entered into an agreement that the printer would print and the promoter would buy 2,000 copies of the program for the races to be run on Saturday and Sunday of the following week. The promoter explained that he needed half of the programs on each day and that he would pick up half the programs on Saturday morning and half the programs on Sunday morning.

The contract provided "half shipment Saturday morning, half shipment Sunday morning," and that the programs would be paid for on delivery. The promoter paid \$500 at the time of placing the order and there was a balance due of \$500 for the job.

On Saturday morning, the promoter appeared at the proper time and asked for delivery of half the programs and he was refused. The printer argued that his contract called for the payment upon delivery and that he would deliver no part of the programs until he had the balance due him. The promoter became incensed, returned to the track, advised the drivers of the situation and cancelled the racing meet.

The promoter brought an action against the printer for a breach of contract and for loss of profits.

What decision? Give reasons.

March 1963

9. Decision for promoter for breach of contract.

The printer could not demand full payment for partial delivery. The contract said the time of payment was the time of delivery, but UCC 2-307 makes it clear that where delivery in lots is appropriate, apportionment of the price is also appropriate. It seems reasonable to conclude that the second \$500 was not due until delivery of the second batch of programs on Sunday.

But the promoter cannot recover his loss of profits. His damages are limited to "any loss resulting from . . . particular requirements . . . of which the seller at the time of contracting had reason to know and which could not reasonably be prevented." UCC 2-715(2)(a) The promoter probably did not have to cancel the whole race simply because he had no programs. Therefore his loss of all profits could have been avoided, and they certainly would not reasonably be anticipated by the printer, so he cannot recover them from the printer. *BUT - HE COULD HAVE RECOVERED LOSS OF PROFITS FROM LOST SALES OF PROGRAMS.*

10. M and K executed an instrument reading: "M agrees to sell and K to buy within the next 60 days 20,000 gallons of diesel oil at a price of six cents per gallon payable in cash on delivery, the oil to be delivered at M's plant when and in such quantities as K shall request. This agreement can be terminated by M if the price of crude oil on the Tulsa market rises above \$2.50 per barrel."

In each of the following two weeks, K requested and M delivered 1,000 gallons of diesel oil for which K paid by a check drawn by him on his checking account in Q Bank.

At 10 a.m. on Tuesday of the third week the market price of diesel oil advanced to eight cents per gallon. At 10:30 a.m. on the same day K arrived at M's plant with tank trucks and made delivery of 18,000 gallons of diesel oil. M asked K how he expected to pay for the oil. K said he had adequate funds in his checking account in the Q Bank, had his checkbook with him, and would pay M by check on that account. K then proffered M his check for \$1,080 against a sufficient account. M replied: "I won't take your check; I must have cash." K immediately telephoned his attorney, related the foregoing facts and told the attorney that the price of crude oil on the Tulsa market was then \$2.50 per barrel and expected to go higher any minute, that it would take K an hour to go to Q Bank and back to M's plant, and inquired concerning his legal position under M-K agreement.

What is the correct advice for K? Give reasons.

March 1967

10. K should be advised to tell M that K will get the cash as soon as possible and pay in cash, and then go to the bank immediately and get the cash and tender it to M. If M refuses to give K time to secure cash or refuses to accept it when it is tendered, M will be in breach.

Under UCC 2-511, tender of payment in any manner current in the ordinary course of business is sufficient unless legal tender is demanded and any extension of time reasonably necessary to secure cash is given. Here it is clear that a check was payment in a manner current in the ordinary course of business. The extension of time would commit seller to deliver even if the price went higher in the meantime.

The reference in the contract to "cash on delivery" should undoubtedly be read as referring to "cash" rather than "credit," as distinguished from "cash" rather than "checks." In the ordinary sales contract, when the term "cash on delivery" is used, the parties intend to say that credit is not being extended rather than that buyer's check is not acceptable.

11. On January 18, 1966, C explained to a salesman of A Car Company that he wanted a 1916 Stutz automobile for his normal transportation purposes, as well as for its antique value, and that it must be in perfect working condition. The salesman assured him that the Stutz had been overhauled and worn out parts replaced with new parts. After driving the car, C remarked to the salesman that the engine was firing erratically, causing a jerking motion. The salesman replied that the new parts were not yet "seated" but that within several days of driving the trouble would disappear. C, relying

on this assurance, purchased the car. For several days the engine's irregular firing continued, and, on January 22, C returned the Stutz to A Car Company for an explanation. Its reply was that the parts had not yet "seated." When the trouble persisted, C returned the car again on February 9, and again on March 13. A Car Company gave as an explanation that the parts were taking an unusually long time to "seat" themselves. On May 1, C was told by an expert mechanic that the replacement parts in the car were old parts taken from another 1916 engine and were too worn to give perfect performance. In June, C sought to return the car to A Car Company and recover his purchase price.

Is C entitled to rescind? Explain.

August 1967

11. No.

The statements by A Car Company's salesman that the automobile had been overhauled and new parts installed for all worn parts and that in several days of driving they would "seat" and the driving difficulties disappear were clearly express warranties on which C relied.

C, by keeping the automobile from January 22 until June, has accepted it and cannot now reject it because of the breach of warranty. C could, nevertheless, revoke his acceptance and rescind the contract, if he accepted the automobile on the basis of an assurance by the seller that it had no defects or that apparent defects would disappear and the defects substantially impaired the value of the automobile to C.

However, a revocation of acceptance must be made within a reasonable time after the buyer discovers or should have discovered the grounds for revocation. Here C learned of the breach of warranty on May 1, and did not attempt to return the automobile until sometime in June, more than a month later. Without the appearance of any facts justifying this delay, the finders of fact are quite likely to conclude that the return was not made within a reasonable time. If the return was made within a reasonable time, C should be able to revoke his acceptance and rescind as the defects would appear to materially impair the value of the automobile to him.

12. Ajax Manufacturing Company had been negotiating with the Diamond Company to sell furnaces manufactured by Ajax. After many conferences, Ajax prepared a contract and mailed it to Diamond offering to sell six gas furnaces of the exact size for Six Hundred Dollars (\$600) each, delivered. Accompanying the contract Ajax wrote, "if this is acceptable sign one copy and return it to us."

This was never done but, upon receipt of the contract, Diamond called Ajax and advised they would accept and to ship the furnaces. Ajax shipped one furnace and Diamond immediately remitted \$600. The remaining five furnaces were delivered to Diamond, and Diamond refused to accept and refused to pay. Ajax brings an appropriate action on the contract.

What decision and why?

March 1968

12. Decision for Diamond.

Under the UCC Statute of Frauds, acceptance of a part of the goods makes the contract enforceable only as to that part. It is true that the Code contains a provision making the contract enforceable against a party who receives a written confirmation effective against the sender if the person receiving has reason to know its contents and does not reply within ten days after receipt. However, that provision does not apply here since the Ajax draft contract was not sent in confirmation of any prior contract.

The Code also provides for enforcement of a contract without a writing where the goods are to be specially manufactured for the buyer, are not readily saleable by the seller in the ordinary course of his business, and substantial beginning is made in the manufacture or procurement before the seller learns of a repudiation by the buyer. Here, this section might apply to make the contract enforceable against Diamond if the furnaces of the "exact size" were not saleable elsewhere. However, there is nothing in the facts which would suggest that these furnaces would not be saleable in the ordinary course of seller's business.

13. Egyptian Livestock, Inc., of Saline County, Illinois, conformably to a written order, dated November 15, 1967, shipped by rail a carload of steers to Southern Cattle Company. The shipment was f.o.b. at the point of delivery to the carrier. The purchase money was due and payable two days after receipt of the shipment by the buyer. The carrier issued a straight bill of lading for the shipment. While the shipment was en route, the seller learned that the buyer was insolvent and had filed a voluntary petition in bankruptcy. Before the shipment reached its destination the carrier, upon directions of the seller, delivered the carload of steers back to the seller. In an appropriate action the Trustee in Bankruptcy claimed that he was entitled to take possession of the steers and to sell them and apply the proceeds of the sale ratably among the general creditors of Southern Cattle Company.

Decision? Give reasons.

August 1968

## 13. Decision for Egyptian Livestock, Inc.

When goods are shipped under a straight bill of lading, the seller, upon learning of buyer's insolvency, may stop delivery prior to receipt of the goods by the buyer or acknowledgement to the buyer by the carrier as warehouseman that the carrier holds for the buyer, or reshipment by the carrier on behalf of the buyer. Since neither of these limiting events occurred here, the seller had a right to stop the goods and have them returned to him. The fact that the f.o.b. point was seller's place of business and that seller had already completed his delivery obligations under the contract do not change the result.

Once a shipment has been properly stopped, the result is the same as if no delivery had ever been made. Therefore, since under the Code the insolvency of the buyer relieves the seller of obligation to deliver, except for cash, the Trustee in Bankruptcy is not entitled to the cattle unless he tenders the purchase price in cash.

14. S, a chemical manufacturer, entered into a contract with B, an ammunition manufacturer, for two carloads of a new chemical to be used in tracer ammunition. The terms were \$8,000 per carload, net 30 days. Later, S wrote B that his costs of manufacturing had doubled and he could only deliver at \$14,000 per carload, net 60 days. B wired: "Believe a deal is a deal but since must deliver tracers to government in next two weeks under penalty contract, I agree to \$14,000 per carload, net 60 days, f.o.b. my plant. (signed) B."

S loaded the two cars immediately and XYZ Railroad Company put the cars on B's siding two days later at 2:00 a.m. XYZ's brakeman failed to set the brakes on the last delivered car and at 4:00 a.m. it rolled down Dead Man's Hill, jumped the rails and fell into Bottomless Lake. B unloaded the remaining car later that morning and notified S he had only received one car. The new chemical had been shipped in special type shipping bags.

The following evening, the chemical in the bags had reacted for a sufficiently long time with a coating on the shipping bags to ignite the bags. There was no marking on the bags to indicate any such danger. The ensuing fire completely destroyed B's factory.

Advise B as to his rights, remedies and liabilities.

August 1968

14. Under the Code, a contract modification may be effective - - even without consideration - - if sought in good faith. Here there are facts, doubling of costs, which would support a good faith request for a modification. However, the action of the seller in stating that he would not deliver except on the increased price, coupled with the buyer's statement that he was agreeing to pay the increased price because he had to have the chemical, indicate coercion of B which would probably result in a holding that the requested modification was sought in bad faith and is unenforceable.

Seller breached by failing to package the chemical properly. One of the specific requirements of the Code as to the warranty of merchantability is that the goods be adequately packaged. Putting goods in containers which will chemically react to the contents so as to cause a fire breaches this warranty.

The breach of warranty has three effects:

(1) It delays the passage of the risk of loss. Risk of loss would ordinarily shift to the buyer in an f.o.b. buyer's plant case when the car was spotted at his plant (tender of delivery there made to him).

However, if the goods were so defective that seller had a right to reject, risk of loss does not pass to buyer until he actually accepts the goods. Here, a carload of goods fell into a lake at 4:00 a.m. after the car had been spotted at 2:00 a.m.; on those facts, clearly loss occurred before B had accepted. The case does appear to be one in which B could reject. The contract is probably for a single delivery, in which case B could reject for any defect. Even if the contract is one under which S could have delivered in installments, it is therefore, one in which B can reject only if the defect substantially impairs the value of the goods. The defective packaging probably did substantially impair their value. Therefore, since in either case buyer could reject and had not yet accepted, risk hadn't passed. B would not have to pay for the lost carload. Even in the absence of breach of warranty as to the goods, risk of loss may not have passed to B because of the failure of the railroad brakeman to set the brake properly. Under the Code, in an f.o.b. buyer's plant case, risk passes when goods are duly tendered. Here it can be argued that tender was not made when the car was spotted at 2:00 a.m. and, alternatively, that the goods were not "duly" tendered since the brakes were left unset.

(2) The breach relieves B of the obligation to pay the price of the goods unloaded. Under the Code, a buyer must pay at the contract price for goods accepted. B had probably accepted the goods by unloading and failing to notify S of rejection within the time before the goods were destroyed.

However, the buyer would appear to be able to revoke his acceptance. The tests for revocation of acceptance are: defect which substantially impairs their value, not discovered before acceptance because of difficulty of discovery. Both elements appear to be present. The Code does require that revocation of acceptance occur before any change in condition of the goods not caused by their own defects, but this limitation should not apply where the goods are destroyed as a result of breach of warranty as to packaging.

Even if B could not revoke his acceptance, he would have a complete set off against the price if the goods, had they been as warranted, would have been worth as much as or more than the price to be paid. If, however, the goods without defects were actually worth less than the price, S could argue, based on the Code statement that damages for breach of warranty are the difference between the actual value of the goods (worthless) and the value they would have had if they had been as warranted, that B is only entitled to a set off based on their actual value.

(3) Breach of warranty entitles B to recover consequential damages for injury to his plant if the finder of facts finds that the damage was a proximate result of the breach of warranty. There would probably be liability under that test here.

15. Select the alternative which best completes each statement and write the corresponding letter in your examination book.

- (1) Generally, identification of goods takes place
  - (a) when the parties so agree
  - (b) at any time and in any manner agreed to by the parties
  - (c) when the goods are ascertained only
  - (d) on delivery to the carrier
- (2) Under the UCC, the risk of loss
  - (a) remains with the seller until he transfers title to the buyer
  - (b) does not always fall upon the owner of the goods
  - (c) always remains with the seller
  - (d) always remains with the buyer
- (3) A special interest in the goods gives rise to the right of the buyer
  - (a) to insure the goods
  - (b) to inspect the goods
  - (c) to replevy the goods
  - (d) to do all of the foregoing
- (4) A seller has an insurable interest in goods as long as
  - (a) they remain in his possession
  - (b) the buyer executes a security agreement
  - (c) he has title to them or any security interest in them
  - (d) all of the foregoing
- (5) If delivery of the goods has been made to the buyer and the seller retains property in the goods to secure performance by the buyer then
  - (a) the risk of loss is on the buyer
  - (b) the risk of loss is on the seller
  - (c) the risk of loss is shared by both parties
  - (d) none of the foregoing
- (6) A buyer on discovery of a breach of contract
  - (a) must immediately notify the seller
  - (b) must return the goods
  - (c) must immediately notify the seller or is barred from asserting this defect
  - (d) none of these
- (7) If the court finds a contract unconscionable it may
  - (a) refuse to enforce the contract
  - (b) delete the unconscionable clause
  - (c) limit the application of the unconscionable clause
  - (d) all of the foregoing
- (8) Upon delivery of nonconforming goods a buyer may
  - (a) reject all of the goods
  - (b) accept all of the goods
  - (c) accept any commercial unit or units and reject the rest
  - (d) all of the foregoing
- (9) A buyer who has effected "cover" may recover
  - (a) all his losses
  - (b) the difference between the cost of "cover" and the contract price plus incidental or consequential damages
  - (c) "(b)" minus expenses saved as a result of the seller's breach
  - (d) none of the foregoing

- (10) Which of the following do not have implied warranties
- (a) blood transfusion
  - (b) water served in a restaurant with a meal
  - (c) a sale "as is"
  - (d) (a) and (c)

August 1968

- |     |       |        |
|-----|-------|--------|
| 15. | (1) B | (6) D  |
|     | (2) B | (7) D  |
|     | (3) A | (8) D  |
|     | (4) C | (9) C  |
|     | (5) A | (10) D |

16. A written memorandum was signed by two residents of Illinois, stating:  
 "Sold to L. F. Barker by O. T. Stone one carload, 28 tons, 40% soy bean meal, bagged at \$90 per ton wholesale. Delivered Baytown, Illinois. For November shipment. Dated November 4, 1968."

Stone obtained the meal from a processor and had it shipped by rail on November 27, with the bill of lading showing 28 tons. Barker had not received the meal by December 3, and called Stone repeatedly advising that he had to have the meal for his customers. On December 4, the retail price of meal dropped from \$100 to \$80 per ton. On December 5, the car arrived at the siding, but the seal on the door was broken, and the car only contained 20 tons of meal. The usual shipping time of such a shipment was 5 to 12 days.

Barker refused to accept the shipment and refused to pay for the meal. Stone advised Barker he would charge for 20 tons only or would divert another shipment of meal. Stone found another shipment and diverted it, the second containing 8 tons of meal arriving at Baytown on December 10. Barker continued to refuse acceptance of any of the meal or make payment. Stone managed to sell the meal at \$70 a ton wholesale and brought an action against Barker for the difference of \$20 per ton for 28 tons of meal.

Decision? Give reasons.

March 1969

16. Verdict for Barker.

The contract was apparently one for delivery at buyer's place of business, Baytown. Under such a contract, the risk of loss during transit by carrier is on the seller. Therefore, when the car arrived with only 20 rather than 28 tons, seller breached.

Since this was a single delivery contract, buyer could reject for any defect. Therefore, he could refuse to accept whether or not the eight-ton shortage amounted to a material breach.

Stone, in recognition that the shortage in delivery was a breach on his part, offered to either send another car with eight tons of meal, or charge only for 20 tons. This was an offer to cure under the Code. There is, under the Code an absolute right to cure so long as the original time for performance under the contract has not expired. However, in this case, the contract called for November shipment, and since the cure shipment was not offered until after December 5, it comes too late. This is true even though the car actually arrived within the time that a November shipment might have arrived in ordinary course.

There is also, under the Code, a right to cure after the originally fixed time for performance, if the seller was reasonable in believing that the buyer would accept the defective tender with or without money allowance. In this case, we do not know whether Stone can bring himself within that provision. That would finally be a question of fact to be decided on the basis of the total circumstances and the trade usages and custom, but I have assumed that there is no such right to cure here.

17. Select the alternative which best completes each statement and write the corresponding letter in your examination book.

- (1) A contract to furnish goods not yet in existence by the process of special manufacture is
- (a) always void
  - (b) always valid
  - (c) always valid where the manufacturing has begun
  - (d) none of the above
- (2) A sale of goods not yet in existence is
- (a) impossible
  - (b) valid
  - (c) a conditional sale
  - (d) none of the above
- (3) Identification of goods to the contract
- (a) creates a special property of the buyer in the goods
  - (b) does not shift the risk of loss per se
  - (c) may be made by either the buyer or seller
  - (d) all of the above

- (4) If the buyer recovers against a third person for destruction of the seller's goods, the
- buyer holds the recovery in trust for the seller
  - buyer can keep his recovery
  - buyer cannot accept the recovery payment from the third person
  - none of the above
- (5) Acceptance occurs
- when the buyer fails to make an effective rejection
  - on acceptance of a single unit
  - when the buyer waits an unreasonable time
  - all of these
- (6) When the buyer has breached, the seller may do which of the following with unfinished goods?
- cease manufacture and resell them for scrap
  - finish their manufacture
  - give them to a charity
  - (a) and (b) above
- (7) When liquidated damages are provided for they must be
- reasonable
  - commensurate with the anticipated or actual losses
  - no more than \$500
  - (a) and (b) above
- (8) The contract between buyer and seller may
- not limit a remedy provided in the Code because it is statutory law
  - provide for remedies in addition to those provided in the Code
  - provide for remedies in lieu of those provided in the Code
  - (b) and (c) above
- (9) Express warranties under the Code are made to depend upon whether the statement in question
- was a part of the basis for contracting
  - was a repudiation of the contract
  - was the basis for damages
  - none of these
- (10) If a buyer inspects goods,
- there is an implied warranty
  - an express warranty does not apply to obvious defects
  - a warranty by description arises
  - none of the above.

March 1969

17. (1) D

(2) A or B. Under 2-106(1), a "sale consists in the passing of title from seller to the buyer." Under 2-401, title cannot pass until goods are identified. Under 2-501, only existing goods can be identified. Therefore, in the technical sense, a "sale" of future (non-existences) goods is impossible. On the other hand, in the non-technical sense, a "sale" of goods to be made is perfectly all right. The Code calls such a contract a "contract . . . to sell goods at a future time."

- D
- D
- A
- D
- D
- D
- D
- D
- D

(10) Unanswerable. Each of A, B and C might arguably be correct.

18. Huckster, a salesman for Duplicator, Inc., called on Tide, an office equipment retailer, on June 1, 1968. Huckster told Tide that Duplicator, Inc. was going to become the exclusive manufacturer and wholesaler of a simplified new office copier, the "Super-Copy" and that the copiers were to be sold to him for \$125 each and were to be resold to the general public at \$200 each. In response to Tide's question, Huckster told him the machine would make ten sharp copies in 60 seconds and would reproduce color. Tide expressed doubt that his customers would be interested in the copier but Huckster assured him there was "no doubt" that it would be a "big seller."

Tide told Huckster he would take twelve "Super-Copy" machines, to be delivered f.o.b. at Tide's place of business. The machines were delivered by Duplicator, Inc. to the V. C. Railroad Company, a common carrier, on July 5. Duplicator, Inc. received a bill of lading to its order and sent it with sight draft attached to XYZ Bank. The bank notified Tide of the arrival of the draft. The machines arrived at the spur track of Tide's place of business on July 7, and Tide asked to inspect them before paying the draft. When told this was impossible, Tide paid the draft under protest. When he received the machines from V. C. Railroad Company, Tide discovered three were badly damaged. A test of the

undamaged machines two days later disclosed they would only produce five legible copies in 60 seconds. Tide had, before receiving the machines, contracted to sell four machines to Dale on the representation that they would make ten legible copies in 60 seconds.

Discuss fully the rights of Duplicator, Inc., Tide and Dale.

August 1969

18. Duplicator, Inc. has no rights, except perhaps against the railroad for damage to the copying machines.

Tide may reject the machines and sue for damages which may include lost profits on resales and any damages which Tide must pay to Dale.

Dale may refuse to accept the machines and sue for breach of contract or may accept the machines and sue for breach of warranty.

While the assertion of Huckster that the machines would be a "big seller" was mere puffing which created no express warranty, his assertion that the machines would produce ten copies per minute was an express warranty.

Since this is a cash sale transaction, seller had a right to ship under reservation by sight draft order bill of lading. However, it was obligated to allow inspection prior to payment. Tide, by payment before inspection, did not lose his right to inspect nor his right to reject defective goods. However, a buyer must reject within a reasonable time after he receives the goods. What is a reasonable time is a question of fact, but we will assume that two days is within a reasonable time and if Tide acts promptly after discovery of the breach of warranty as to ability to copy, he may reject. Since this was a single delivery contract, buyer can reject for any defect.

In addition to rejecting, Tide can recover damages including lost profits if he can prove the profits sufficiently. Since he already had a contract to re-sell four machines to Dale, he can probably recover lost profit on those four machines if Dale now refuses to accept. In addition, if he pays damages to Dale, he could, in turn, recover those damages plus the cost of defending any Dale suit, from Duplicator.

Since the contract was f.o.b. Tide's place of business, the risk of loss in transit falls on Duplicator. Therefore, even if Duplicator had not breached as to ability to copy, Tide would not have been obligated to pay for the damaged machines, and might have been able to reject the total shipment based merely on the fact that three were delivered in damaged condition.

Dale may refuse to accept the machines because they are not as warranted or he may accept and sue for breach of warranty. In either case, Dale could recover damages from Tide.

19. G was a wholesale dealer in luggage. In May 1969, G had been in financial difficulties for several months, when he was visited in his Chicago plant by K, a distributor of handbags, whose business was located in Seattle, Washington. G exhibited to K advertising material illustrating various styles of luggage manufactured by S in Chicago, and K entered into a written contract to buy from G \$5,000 worth of these luggage items to be shipped in June by R. Railroad Co.

In the first week of June, G entered into a contract with S whereby S agreed to sell to G for \$4,000, on 30 days' credit, the luggage items required to fill G's contract with K, S also agreeing to ship the goods directly to K for G's account. On June 10, S delivered the luggage shipment to R. Railroad Co., consigning the bill of lading to G. On the same day, G forwarded the bill of lading to K, with a request for payment. On June 13, K sent G his check for \$5,000 which was paid on June 15.

On June 20, S discovered that G was insolvent and immediately notified R. Railroad Co. to stop the goods and hold them subject to further order. On June 21, the luggage arrived in Seattle, and R. Railroad Co. notified K that S had stopped the shipment. K demanded delivery of the luggage. G has fled with the proceeds of the transaction.

What are the rights of K and S in the luggage transaction? Do not discuss the liabilities of G.

August 1969

19. K is entitled to the handbags. S had no right, as against K, to stop delivery.

It is true that under the Code, as between S and G, S would have had the right to stop the shipment upon learning of G's insolvency. The Code has no provision specifically dealing with the question of whether there is a right to stop where goods are shipped by the seller directly to a sub-purchaser. However, it would seem that a seller who ships directly to a sub-purchaser should be aware that the sub-purchaser may pay the intermediate buyer-seller on the strength of the shipment and should, therefore, lose to the sub-purchaser where the sub-purchaser has made payment to the intermediate buyer-seller in reliance on the shipment.

(Note to bar review students: Comment 2 to 2-705 suggests the above result. The second sentence of that comment reads: "It is entirely proper under this Article that the seller, by making . . . direct shipment to the sub-purchaser, be regarded as acquiescing in the latter's purchase and as thus barred from stoppage of the goods as against him.")

20. X and Y entered into the following written agreement with respect to a specially built computing machine:

"In consideration of \$2,000 to be paid upon receipt of machine, X hereby agrees to sell and deliver to Y at his office in Springfield, Illinois, one 125 ZZ computer No. 567 now in process of construction by X, on or before June 1, 1969."

The machine was completed according to specifications but the night before it was to be delivered a fire of undetermined origin destroyed X's plant and its contents including the ZZ computer. X claims that Y owes him \$2,000 and Y claims \$1,000 damages from X for failure to deliver the computer.

What are the rights of X and Y?

March 1970

20. Neither X nor Y has a right of recovery against the other.

Under the UCC, in the absence of special agreement, risk of loss under this contract would not have passed to the buyer until the computer was delivered to buyer's office. Since the computer to be delivered was destroyed prior to the time risk passed, X had failed to perform under the contract and is not entitled to recover any part of the contract price.

Also, under the Code, where the contract requires for its performance a particular chattel identified to the contract at the time of contracting, and the chattel is destroyed without the fault of either party, the contract is voided. While the facts here are not entirely clear, it appears that X was required to deliver a particular computer (No. 567 - not just a computer like that one) and, if so, X is discharged from his duty to perform and Y has no claim against him.

21. On June 10, 1969, Byer Toy Stores, Inc. began ordering its Christmas stock. One of Byer's officers telephoned Sellers Mfg. Co., located 500 miles from Byer, and ordered 5,000 "formal" dolls at \$6 each, with delivery scheduled for October 30. The "formal" doll, manufactured solely by Sellers, sold extremely well throughout the U.S. during the last three Christmas seasons. Sellers orally accepted the order and that afternoon mailed to Byer a written confirmation of the order, properly signed and listing the quantity and price of "formal" dolls ordered. The confirmation arrived at Byer's office on June 12, and was filed by Byer.

By mid-October, a new lifelike doll was the current craze. Sales of "formal" dolls were extremely low. Byer called Sellers and cancelled its June order but Sellers refused to accept the cancellation, saying the dolls had already been packaged for shipment. On October 24, Sellers consulted its attorney and told him the cost of manufacturing each "formal" doll was \$4, not including \$1 for overhead. The demand for lifelike dolls has lowered the market price of "formal" dolls to \$5.25.

What legal advice should the attorney give Sellers? Explain.

March 1970

21. Sellers is probably entitled to recover \$10,000 in damages from Byer.

The contract, being for the sale of goods at a price of \$500 or more, is not enforceable without a writing. However, under the UCC, where within a reasonable time a writing in confirmation of a contract which is sufficient as against the sender is sent to the other party to the contract, it is also sufficient as against the recipient if he had reason to know its contents and fails, within ten days after its receipt, to give notice of objection to its contents.

Here an oral contract was concluded over the telephone. Sellers' confirmation, sent the same afternoon, surely was sent within a reasonable time after the oral contract was concluded, and appears to be sufficient to indicate that a contract has been made and need not contain all the contract terms. The only essential term is the quantity term. Here the confirmation contained kind of item, quantity, price and parties - - which is sufficient.

When Byer refused to accept, Sellers became entitled to damages based on the difference between contract and market or, if that is insufficient to put him in the position he would have been had the contract been performed, lost profits. Since Sellers could presumably have filled all other orders he would receive, whether or not Byer purchased, the only way to put him in the position he would have been in had the contract been performed is to allow lost profits.

In determining lost profits, a seller need not include in his cost of manufacturing fixed overhead expenses which he would have incurred whether or not he manufactured the 5,000 dolls. Assuming the \$1.00 is such fixed overhead, Sellers need only figure his costs as \$4.00 per doll - - and therefore is entitled to recover lost profits of \$2.00 per doll or \$10,000.

