

REJECTION OR REVOCATION UNDER THE UNIFORM COMMERCIAL CODE

In a normal single delivery sales contract under the Uniform Commercial Code¹ the buyer's obligation to accept and pay for goods (unless otherwise agreed) is dependent upon a conforming tender of delivery,² which requires placing conforming goods at the disposition of the buyer and giving him notice.³ Goods are conforming when they are in accord with the terms of the contract.⁴ Most contracts for the sale of goods are entered into and routinely performed without controversy; but what happens when the tender or the goods are not "conforming"? Under the Code the buyer, faced with a tender of non-conforming goods, has three options: (1) he can accept and retain the goods,⁵ (2) he can reject the goods and thus not be liable for the price,⁶ or (3) he can accept the goods and then later revoke his acceptance and defend an action for price.⁷ It is with these last two courses of action that this note will be concerned.

While both options seem to be much the same, at least as to result, there are important differences between them.⁸ The result of these differences could mean defeat to a buyer who is defending a seller's action for the price of the goods on a breach of warranty theory as occurred in the case of *Miron v. Yonkers Raceway, Inc.*⁹ There the plaintiff Miron had sold a horse at an auction held by the defendant Raceway to the defendant Finkelstein¹⁰ who purchased the horse with an express warranty that it was sound. There was also a term in the contract of sale which limited any warranty made to a 24-hour period.¹¹ Finkelstein removed the horse and early the next morning his trainer discovered the horse was favoring its left hind leg. Upon examination it was discovered the horse had a broken splint bone.¹² Finkelstein immediately notified the Raceway that the horse was not sound but return of the horse was refused. The seller, Miron,

¹ UNIFORM COMMERCIAL CODE (1962 official text) [hereinafter cited as the UCC].

² UCC § 2-507.

³ UCC § 2-503.

⁴ UCC § 2-106(2).

⁵ UCC § 2-601.

⁶ UCC § 2-602.

⁷ UCC § 2-608.

⁸ Barnes, *The Sales Contract — Buyer's Remedies*, 49 MARQ. L. REV. 122 (1965).

⁹ 400 F.2d 112 (2nd Cir. 1968).

¹⁰ Henceforth all references to the defendant will mean the defendant Finkelstein.

¹¹ 400 F.2d 112, 114.

¹² A splint bone is a small bone in a horse's leg. It is actually the vestige of earlier toes on the horse. It is below the hock bone on the horse's hind legs and runs along the main leg bone to the ankle. It is tied to the leg bone by ligaments. It varies in diameter from approximately 1 inch at the top to about 1/8 inch at the bottom. It is relatively easy to fracture in comparison with the main leg bone, and could be fractured by being struck by a hoof while the horse is running or trotting.

then filed suit against Finkelstein for the price of the horse. The trial court found for the plaintiff, holding that the horse was sound when sold and thus the defendant was liable for the price.¹³ The Court of Appeals affirmed on the basis that the buyer had not carried the burden of proof necessary to win a favorable judgment.¹⁴ The defendant lost because *he failed to prove* that the horse was not as warranted at the time of the sale. The shifting of the burden of proof from the seller to the buyer is one of the results of the differences between revocation of acceptance and rejection under the Code. Besides shifting the burden of proof, the distinction between rejection and revocation has other effects. This note will attempt to focus on the distinction between the two courses of action and the results of that distinction.

To understand rejection and revocation one must first comprehend what constitutes acceptance of the goods under the Code, since rejection precludes acceptance and revocation can occur only after the goods have been accepted. Acceptance is governed by section 2-606 which specifies that acceptance occurs:

- (1) When the buyer, after a reasonable opportunity to inspect signifies to the seller that the goods are conforming or, if not conforming, that he will still retain them.¹⁵
- (2) When the buyer fails to make an effective rejection after a reasonable opportunity to inspect.¹⁶
- (3) Where the buyer does any act inconsistent with the seller's ownership of the goods.¹⁷

Thus when goods are shipped that do not conform to the contract, the buyer may accept or reject them; his decision will be affected by many things, the extent of the non-conformity, the market, his relationship with the seller, trade practices and other factors¹⁸ if he chooses to accept, he must do so in one of the ways provided for in section 2-606. The first method (signifying acceptance to the seller) is not too complex, the buyer can signify acceptance by several courses of action. The comments to the Code suggest that one way is payment of the price;¹⁹ another way would be a letter to the effect that the buyer was accepting the goods. It is clear that the notice required to signify acceptance need be less formal than the notice required for a rejection.²⁰ The second method will be discussed

¹³ 400 F.2d 112, 113-14.

¹⁴ 400 F.2d 112.

¹⁵ UCC § 2-606(1)(a).

¹⁶ *Id.* (1)(b).

¹⁷ *Id.* (1)(c).

¹⁸ Symposium, *The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. PA. L. REV. 836, 864-80 (1957).

¹⁹ UCC § 2-606, Comment 3.

²⁰ *Manfredi v. Fettes Inc.*, 352 Mass. 775, 226 N.E.2d 365 (1967); *Babcock Poultry Farm, Inc. v. Shook*, 204 Pa. Super. 141, 203 A.2d 399 (1964).

later in the discussion of how an effective rejection is made. The last method, (the doing of an act inconsistent with the seller's ownership) is more involved. The courts usually talk of exercising dominion over the goods in some manner.²¹ It has been held for instance that putting a new bed on a truck was acceptance in one case;²² keeping the goods for an unreasonable length of time, or continuing to accept future deliveries may also constitute acceptance.²³ Custody of the goods does not constitute acceptance in all cases however, since the buyer has a "reasonable"²⁴ opportunity to inspect the goods.²⁵

It is clear that for the buyer to avoid accepting the non-conforming goods, he must make an effective rejection,²⁶ otherwise he will be deemed to have accepted.²⁷ Thus an important difference between rejection and revocation is the time in the sequence of events at which they occur. Rejection forecloses any possibility of acceptance of the goods, while revocation can occur only after the goods have been accepted.

The elements of an effective rejection are outlined by section 2-602(1). There are two requirements for an effective rejection: 1) it must occur within a reasonable²⁸ time and 2) the seller must be seasonably²⁹ notified. Once a buyer has effectively and rightfully rejected the tender, he cannot be held to have accepted nor to have obtained possession.³⁰ Rejection is an easier remedy for the buyer to use than is revocation. To give buyer the right to reject the whole delivery (in a single delivery contract) any defect is enough; in the words of the Code, "if the goods or the tender of delivery fail in *any respect* to conform to the contract, the buyer may (a) reject the whole. . ."³¹ Not only will a defect in the goods allow rejection, but a defect in the tender of the goods will also allow the buyer to reject. In addition the defect need not be major, the Code says "in any respect."

²¹ *Mazur Bros. v. Jaffe Fish Co.*, 3 UCC Rep. 419 (Veterans Admin. Contract Appeals Board 1965); *Marbelite Co. v. Philadelphia*, 208 Pa. Super. 256, 222 A.2d 443 (1966); *F. W. Lang Co. v. Fleet*, 193 Pa. Super. 365, 165 A.2d 258 (1960).

²² *Park County Implement Co. v. Craig*, 397 P.2d 800 (Wyo. 1964).

²³ *General Foods Corp. v. Bittinger Co.*, 31 Pa. D. & C.2d 282 (C. P. 1963); *BoMyte Co. v. L-Co. Cabinet Corp.*, 40 Northumberland Legal J. 172 (Pa. C. P. 1968); *Sal Metal Products, Co. v. Rennert*, 5 UCC Rep. 826 (N. Y. Sup. Ct. 1968).

²⁴ Definitions of "Reasonable Time" cover over 50 pages and 160 categories in Vol. 36 Words and Phrases.

²⁵ UCC § 2-606(1)(a).

²⁶ UCC § 2-606(1)(b).

²⁷ *Hudspeth Motors v. Wilkinson*, 238 Ark. 410, 382 S. W.2d. 191 (1964).

²⁸ UCC § 1-204(2).

²⁹ UCC § 1-204(3).

³⁰ Phalan, *Uniform Commercial Code—Sales—Summary of Buyer's Remedies*, 16 U. PITT. L. REV. 209 (1955).

³¹ UCC § 2-601; "The general rule is that if there is *any* defect in the seller's tender or delivery (2-503), . . . the buyer is entitled to reject (2-601). Therefore until cure (2-508) or acceptance (2-606), the risk remains on the seller." Mahon, *Remedies in Sales Disputes Under the Uniform Commercial Code—Notes for the Litigator*, 31 *FORDHAM L. REV.* 727, 737-38 (1963).

Thus in a contract for delivery of 20 wickets at 2:00 p.m. on the fifth; a tender at 2:01 p.m. gives the buyer the right to reject the same as if only 15 wickets were tendered or 20 broken ones were offered.³²

In order to be proper, a rejection must be made within a reasonable time. In a case where the buyer had kept a truck for 5 months before the engine blew up, the court held he had not rejected within a reasonable time.³³ In another case where the buyer's new car traveled only a few blocks and then ceased to run, the court held there was no acceptance and that buyer had made an effective rejection.³⁴ It becomes clear that reasonable time will depend on the facts of each particular case, or it could conceivably be fixed by the parties' agreement.³⁵ Reasonable time will vary depending on how hard the defect is to discover and will usually be a question for the jury.³⁶ The reasonable time requirement in the Code can present problems; however, had the Code set a certain number of days in the place of a reasonable time, the problems would have been greater. Since what is a reasonable time is a jury question,³⁷ this provision of the Code allows the trier of fact to review the particular circumstances and reach a fair result in the case before it. Concomitant with this idea is the one that a latent defect, or one not readily discoverable, will not require as prompt a notice as will a patent or obvious defect.³⁸ The *Miron* case makes this last point when it states that "Finkelstein failed to make an effective rejection of the horse under U.C.C. § 2-602(1) thereby accepting it under subsection (b) (of 2-606);"³⁹ impliedly at least the court is saying this defect should have been noticed immediately after the sale and the delay, even though less than 24 hours, was unreasonable.

The second element required for an effective rejection is a seasonable notice to the seller. Failure to give such a notice will bar the buyer from any remedy⁴⁰ and he will be held to have accepted the goods regardless of

³² This may be an overstatement or extreme example since UCC § 1-203 imposes a requirement of good faith. There are also provisions allowing the seller to cure certain defects; UCC § 2-508, see Barnes, *supra* note 8.

³³ *Hudspeth Motors v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964).

³⁴ *Zabriskie Chevrolet, Inc. v. Smith*, 99 N. J. Super. 441, 240 A.2d 195 (L. Div. 1968).

³⁵ See Barnes, *supra* note 8.

³⁶ *Trailmobile Div. of Pullman, Inc. v. Jones*, 118 Ga. App. 472, 164 S. E.2d 346 (1968); *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349 (1889); *Rawsilk Trading Co. v. Kaltenbach & Stephens, Inc.*, 199 App. Div. 799, 192 N. Y. S. 375 (1922); *Vandenberg v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964); *Schneider v. Person*, 34 Pa. D. & C.2d 10, 30 Lehigh L. J. 416 (C. P. 1964); *Annot.*, 52 A. L. R.2d 900, 907-920 (1957).

³⁷ See, cases cited in note 36 *supra*.

³⁸ *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S. W.2d 286 (1968); *Zabriskie Chevrolet, Inc. v. Smith*, 99 N. J. Super. 441, 240 A.2d 195 (L. Div. 1968); *Berlin & Co. v. T. Whiting Mfg.*, 5 UCC REP. 357 (N. Y. Sup. Ct. 1968); *Vandenberg v. Siter*, 204, Pa. Super. 392, 204 A.2d 494 (1964). See also *Miron v. Yonkers Raceway*, 400 F.2d 112 (2nd Cir. 1968), UCC § 2-602 Comment 1.

³⁹ 400 F.2d at 118.

⁴⁰ UCC § 2-602; *Shreve v. Casto Trailer Sales, Inc.*, 150 W. Va. 669, 149 S. E.2d 238

their non-conformity.⁴¹ The notice requirement is in two parts: 1) the adequacy of the notice, and 2) the delivery of the notice within a reasonable time. The purpose of the notice in the case of rejection is to give the seller some indication that a problem exists with respect to the goods delivered. This is to allow the seller to cure or make some arrangement to protect his interest in the goods. The Code does not indicate the exact words needed to constitute adequate notice, but it is clear that the notice need only alert the seller that there is something wrong.⁴² Thus almost anything will serve as an adequate notice; and in fact courts seem almost to ignore the wording of the notice.⁴³ In one case a notice consisting of a letter, drafted by plaintiff's attorney, stating plaintiff's name, the date of his injuries, the product causing those injuries and that they were purchased at defendant's store and were unfit for human consumption without any further explanation was held to be sufficient.⁴⁴

While the necessary wording of a notice is somewhat flexible; the element of timeliness of delivery is not. The Code demands that notice be given seasonably to the seller if it is to be effective.⁴⁵ Seasonableness, like reasonableness, is a jury question.⁴⁶ In the cases decided, the factual pattern is of utmost importance in determining whether the notice given was seasonable. For example, in one case the plaintiff ate a pork dinner and became ill, he sent notice of the injury to the restaurant 32 days later. A request by the defendant that the court rule 32 days not a reasonable time was denied, and the denial was upheld by the Appellate Court.⁴⁷ In doing so the court said, "Whether notice . . . has been given within a reasonable time depends not only on the time that has elapsed . . . but on circumstances embracing the plaintiff's ability to give such notice . . ."⁴⁸ In another case where the plaintiff was injured by an exploding pop bottle, she gave notice to the supplier within 4 months, but took 12 months to notify the seller. The court held the notice to the seller was not within a reasonable time, and that the reasonableness of the 4-month delay in giving notice to the supplier was a question for the jury.⁴⁹ As the difficulty in discovering the non-conformity increases so also does the time in which notice will remain seasonable. For this reason a set time limitation in the contract

(1966); *Dippel v. Sciano*, 37 Wis.2d 443, 155 N. W.2d 55 (1967); Bailey, *Sales Warranties, Products Liability and the UCC: A Lab Analysis of the Cases*, 4 WILLAMETTE L. J. 291 (1967).

⁴¹ *J. C. Cohen Salvage Corp. v. Eastern Elec. Sales Co.*, 205 Pa. Super. 26, 206 A.2d 331 (1965).

⁴² UCC § 2-607, Comment 4.

⁴³ *Manfredi v. Fettes, Inc.*, 352 Mass. 775, 226 N. E.2d 365 (1967).

⁴⁴ *Nugent v. Popular Markets, Inc.*, 353 Mass. 45, 228 N. E.2d 91 (1967).

⁴⁵ UCC § 2-602(1).

⁴⁶ See text accompanying note 37, *supra*.

⁴⁷ *Downey v. Mahoney*, 25 Mass. App. Dec. 196 (1962).

⁴⁸ *Id.* at 198-99.

⁴⁹ *San Antonio v. Warwick Club Ginger Ale Co.*, — R. I. —, 248 A.2d 778 (1968).

may be set aside if it is not a reasonable time in which to discover certain defects.⁵⁰ The Code's use of reasonable makes the question one for the jury and allows it to reach a just and fair result.⁵¹

If the buyer has accepted the goods, he is not without remedy under the Code any more than he would be under the general law of contracts. Under the common law the buyer could rescind the contract under certain conditions,⁵² the Code term for this action is revocation of acceptance which avoids the use of the word rescission which has several different meanings.⁵³

The Code has introduced a new concept of revocation of acceptance in place of the former theory of rescission (with its varying meanings) and has added the rule that a buyer may revoke and also claim damages.⁵⁴

The Code contemplates the return of the purchase price to the buyer when he has justifiably revoked acceptance.⁵⁵ The buyer had a similar course of action available under the Uniform Sales Act; where one of the remedies provided was for the buyer to rescind the contract and return or offer to return the goods.⁵⁶ The Uniform Sales Act however did not clearly decide the effect of accepting non-conforming goods and there existed a good deal of confusion. It seemed as though the buyer's suit for breach of warranty would survive his acceptance if he gave reasonable notice of the breach to the seller.⁵⁷

One important distinction between rejection and revocation is the extent of the defect required. To reject, any breach in either the tender or the goods themselves is sufficient; this is not true with revocation. For the buyer to revoke his acceptance the defect involved must "*substantially im-*

⁵⁰ *Neville Chem. Co. v. Union Carbide Corp.*, 294 F. Supp. 649 (W. D. Pa. 1968); *Wilson Trading Co. v. David Ferguson Ltd.*, 23 N. Y.2d 398, 244 N. E.2d 685, 297 N. Y. S.2d 108 (1968); *Vandenberg v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964).

⁵¹ See cases cited in note 50 *supra*; see also, *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. 1964); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3rd Cir. 1961); *Schneider v. Person*, 34 Pa. D. & C.2d 10, 30 Lehigh L. J. 416 (C. P. 1964).

⁵² See 5A CORBIN, CONTRACTS, § 1236 (1964); *Lawner v. Engelbach*, 433 Pa. 311, 249 A.2d 295 (1969).

⁵³ See Murray, *The Consumer and the Code: A Cross-Sectional View*, 23 U. MIAMI L. REV. 11 (1968).

⁵⁴ Murray, *supra*, note 53 at 40; see also Spies, *Article 2: Breach Repudiation and Excuse*, 30 MO. L. REV. 225 (1965).

⁵⁵ UCC § 2-711(1).

⁵⁶ Uniform Sales Act § 69(1)(d) (1950); for a discussion of this point, see Nordstrom, *Restitution on Default and Article Two of the Uniform Commercial Code*, 19 VAND. L. REV. 1143, 1173-78 (1966).

⁵⁷ Uniform Sales Act § 69(1)(a)(b) and § 69(3) (1950); *Knobel v. J. Bartel Co.*, 176 Wis. 393, 187 N. W. 188 (1922); *Aaron Bodek & Son v. Avrach*, 297 Pa. 225, 146 A. 546 (1929). See also, Comment, *The Uniform Commercial Code v. Existing Law as to the Buyer's Rights On Improper Delivery of Goods*, 37 MARQ. L. REV. 171 (1953); Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281 (1961); Schaffer, *Sales Warranties in Illinois: Commercial Code and Pre-Code Law*, 39 CHI.-KENT L. REV. 93 (1962); Sutton, *Sales Warranties Under the Sale of Goods Act and the Uniform Commercial Code*, 6 M.U.L.R. 150 (1967).

pair its (the goods') value to him [emphasis added.]"⁵⁸ This is not the only requirement for an effective revocation, but it is the first one the buyer must satisfy. By substantial, the Code means a defect which is not readily repairable or so very basic to the contract, that its lack or malfunctioning causes the buyer to lose a substantial portion of the value of the bargain.⁵⁹ Thus a loose drive shaft that causes an automobile to be noisy, but which can be fixed in a few minutes is not a substantial enough defect to allow the buyer to revoke.⁶⁰ However, the seller is not allowed to continue making numerous minor repairs for an unlimited time. Thus defects in a car which caused it to be shopped for repairs 30 times in one year constituted a breach substantial enough to allow revocation.⁶¹ In *Campbell v. Pollack*,⁶² the contract was for a sale of a car washing business. When the buyer did not receive the heating equipment he attempted to get his money returned. In answer to the defendants assertion, that lack of heating equipment was not a substantial defect, the court replied:

. . . [T]he car-wash business is a year round activity. Heat and adequate lighting play an important part in the efficient operation of any such enterprise. A car-wash establishment in the middle of winter in Rhode Island without heat and light would be a strange place indeed.⁶³

Since any minor defect or non-conforming tender will allow the buyer to reject, it is much easier for him to reject than it is for him to accept and then later attempt to revoke that acceptance under section 2-608.⁶⁴

It is not enough that the defect is substantial, as more is required by the Code. The next requirement under 2-608 is that the buyer when he accepted, either did not know of the defect, or if knowing, accepted on the reasonable assumption that the non-conformity would be cured.⁶⁵ Unless the buyer comes under one of these two subsections, the substantiality of the breach is immaterial. If the buyer knows of the defect, but accepts anyway, reasonably assuming that the defect will be cured, he can revoke if the cure is not made.⁶⁶ The buyer may also revoke if at the time of acceptance he did not know of the non-conformity. The buyer's lack of knowledge may be the result of either the difficulty of discovering the de-

⁵⁸ UCC § 2-608(1).

⁵⁹ See UCC § 2-608, Comment 2.

⁶⁰ *Rozmus v. Thompson's Lincoln-Mercury Co.*, 209 Pa. Super. 120, 224 A.2d 782 (1966).

⁶¹ *Tiger Motor Co. v. McMurtry*, — Ala. —, 224 So.2d 638 (1969).

⁶² 101 R. I. 223, 221 A.2d 615 (1966).

⁶³ *Id.* at 231, 221 A.2d at 619.

⁶⁴ Mahon, *supra* note 31; Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L. J. 199 (1963); Comment, *Buyers' Remedies in Sales Cases Under the Uniform Commercial Code*, 11 LAND & WATER L. REV. 419 (1967).

⁶⁵ UCC § 2-608 1(a) & (b).

⁶⁶ UCC § 2-608(1) (a).

fect, or by his relying on the seller's assurances.⁶⁷ This assurance can come from the circumstances of the transaction as well as from express language of assurance.⁶⁸ The assurances usually take the form of promises that the goods conform to the agreement and that any defect will be remedied. The courts, that have addressed themselves to the problem of whether the seller had given an assurance to the buyer, have seemed to confuse assurance with warranty. Thus in a case where the seller warranted that he would remedy any defects in a new car for a period of 24 months, the court held that warranty to be a sufficient assurance under 2-608(1)(b) to induce the buyer to accept the automobile.⁶⁹ However a salesman's statement that a car is in "good shape mechanically," and a mechanic's statement that "there is nothing wrong with this car" were held not to be the type assurance demanded by the Code.⁷⁰ In a third case, a statement by a seller that a vending machine business will improve if only given time, was held to be 2-608(1)(b) assurance.⁷¹ It appears as if the courts that have litigated this question are using a test for assurance similar to the test for determining the difference between a warranty and mere sales talk. This is probably not the result intended by the drafters⁷² although it is difficult to conceive of an assurance which would not become a warranty under section 2-313. Any assurance must be reasonable and must be heard and believed or relied upon by the buyer if he is later to attempt to revoke acceptance because of obvious defects.

Cases where acceptance is induced by the seller's assurances appear to be rare, more common are cases where the goods appear to be conforming, but in reality, because of a hidden defect, are not. If the buyer's acceptance was reasonably induced by the difficulty of discovering the defect, he will be allowed to revoke his acceptance if the defect substantially impairs the value of the goods. A non-apparent defect is some non-conformity in a good that exists but is not readily discoverable. Perhaps the most common types are: 1) a defect that can be discovered only by testing or analysis, 2) a defect not discoverable by testing, which manifests itself only after a long passage of time, or 3) an animal that appears healthy but in reality is not.

An example of the first type is illustrated by the case of *Lawner v. Engelback*.⁷³ In this case a woman bought a diamond ring purportedly valued at \$30,000; upon appraisal, after the purchase, it was discovered

⁶⁷ UCC § 2-608(1)(b).

⁶⁸ UCC § 2-608, Comment 3.

⁶⁹ *Tiger Motor Co. v. McMurtry*, — Ala. —, 224 So.2d 638 (1969).

⁷⁰ *Hudspeth Motors v. Wilkinson*, 238 Ark. 410, 382 S. W.2d 191 (1964).

⁷¹ *Parker v. Johnston*, 244 Ark. 355, 426 S. W.2d 155 (1968); *See also*, *Babcock Poultry Farm, Inc. v. Shook*, 204 Pa. Super. 141, 203 A.2d 399 (1964).

⁷² UCC § 2-608, Comment 3.

⁷³ 433 Pa. 311, 249 A.2d 295 (1969).

that the ring had a value of only \$15,000. In a suit for conversion the buyer recovered, the court stating:

. . . the sale . . . was made subject to the right of Lawner to have the ring appraised, and that if the ring did not live up to expectations, she had the right to revoke her acceptance. . . .⁷⁴

A similar situation is presented when the only way to ascertain conformity is by an extensive laboratory check. Acceptance might be made prior to the check on the "assurance" that if any defect was found acceptance could later be revoked.

The second type of situation is presented by a defect which does not manifest itself until after the passage of time. A contaminated oil used to manufacture resin for use in shoes, floor tiles, paint and other products, presented such a problem to the court in *Neville Chemical Co. v. Union Carbide Corp.*⁷⁵ The oil appeared proper and the resin produced from it also appeared to be satisfactory. After a passage of time, however, the contaminant caused a reverse chemical reaction which created an acid whose foul odor "taxed the powers of the witnesses to explain."⁷⁶ The court held that the passage of time was not a bar to a suit for breach of warranty. A similar case involving tulip bulbs whose defects were unknown until they failed to bloom, reached a similar result on similar reasoning, that the excess time was required for the breach to manifest itself.⁷⁷

The *Miron* case is an example of the third type of hidden defect. It is often hard to discover a defect in an animal merely by a visual observation; and the only way to determine the animal's fitness is to use him for the purpose for which he was purchased. In another interesting horse case *Grandi v. LeSage*,⁷⁸ the buyers sought a stallion for their breeding farm. A horse named Cur-Non was purchased in reliance on the fact that he was listed in a brochure as a stallion.⁷⁹ After 3 months it was determined the horse was a gelding⁸⁰ and not capable of reproducing. Upon discovering this the buyer notified the seller and brought suit for rescission. The court allowed recovery against the seller saying the buyer had properly revoked acceptance.⁸¹

⁷⁴ *Id.* at —, 249 A.2d at 298.

⁷⁵ 294 F. Supp. 649 (W. D. Pa. 1968).

⁷⁶ *Id.* at 652.

⁷⁷ *Vandenberg v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964).

⁷⁸ 74 N. Mex. 799, 399 P.2d 285 (1965).

⁷⁹ The horse was bought under a local procedure where the buyers had only a glimpse of the horses as they were led to the track. They then made a claim on a horse on the basis of the information in the brochure. Thus there was no opportunity to inspect the horse before the race.

⁸⁰ A gelding is a horse which has been castrated, he appears normal, but cannot function as a stallion.

⁸¹ 74 N. Mex. 799, 808-9, 399 P.2d 285, 292 (1965); *See also* *Schneider v. Person*, 34 Pa. D. & C.2d 10, 30 Lehigh L. J. 416 (C. P. 1964); *Barnes*, *supra* note 8; *Murray*, *supra* note 53; *Nordstrom*, *supra* note 56; *Comment*, *supra* note 64.

The buyer has two more conditions to meet effectively to revoke his acceptance: 1) the revocation must occur within a reasonable time, and 2) he must notify the seller. The reasonable time requirement is similar to the requirement for rejection,⁸² each case depends on its particular facts, and reasonableness is usually a question for the jury.⁸³ One difference, however, is that the reasonable time begins to run from when the buyer discovers *or should have* discovered the defect in the goods not caused by their own defects.⁸⁴ While not very certain language, it does allow the trier of fact to weigh each case and decide reasonableness on the facts.⁸⁵ If the buyer fails to act within this period he will not be permitted to revoke his acceptance.⁸⁶

Finally, the buyer must notify his seller of the revocation. The Code words are "(I)t is not effective until the buyer notifies the seller of it."⁸⁷ The "it" refers to the revocation, thus it is no longer sufficient for the notice to merely advise the seller of a defect; it must now inform him that the buyer is revoking his acceptance because of the defect and that the goods are being returned.⁸⁸ Here again what is sufficient notice will depend on the facts in each case and will be a question for the trier of fact.⁸⁹ After revocation occurs, the buyer must be careful not to cancel out his revocation by use of the goods. While there is no Code provision stating that use after revocation constitutes renewal of acceptance (as in the case of rejection) courts that have considered this problem have reached that result.⁹⁰ Once all of the above requirements are met, the buyer has effectively revoked his acceptance and may maintain an action to recover his purchase price and damages.⁹¹

Having looked at the elements of rejection and revocation, and the differences between them, attention must be turned to the significance of those differences. One of these differences has been touched on; that is,

⁸² See text accompanying notes 35-38, *supra*.

⁸³ *Lanners v. Whitney*, 247 Ore. 223, 428 P.2d 398 (1967); *Schneider v. Person*, 34 Pa. D. & C.2d 10, 30 Lehigh L. J. 416 (C. P. 1964).

⁸⁴ UCC § 2-608(2).

⁸⁵ See *Bailey*, *supra* note 40; *Barnes*, *supra* note 8; *Murray*, *supra* note 53; *Nordstrom*, *supra* note 56; Comment, *supra* note 64.

⁸⁶ *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S. W.2d 142 (1966); *Hudspeth Motors v. Wilkinson*, 238 Ark. 410, 382 S. W.2d 191 (1964); *Shreve v. Casto Trailer Sales, Inc.*, 150 W. Va. 669, 149 S. E.2d 238 (1966).

⁸⁷ UCC § 2-608(2).

⁸⁸ *Lanners v. Whitney*, 247 Ore. 223, 428 P.2d 398 (1967); *Grandi v. LeSage*, 74 N. Mex. 799, 399 P.2d 285 (1965); *Campbell v. Pollack*, 101 R. I. 223, 221 A.2d 615 (1966). See also *Nordstrom*, *supra* note 56; *Bailey*, *supra* note 40.

⁸⁹ See cases cited note 88 *supra*.

⁹⁰ *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S. W.2d 286 (1968); *F. W. Lang Co. v. Fleet*, 193 Pa. Super, 365, 165 A.2d 258 (1960); *Bassman v. Manhattan Dodge Sales*, 5 UCC REP. 128 (N. Y. Sup. Ct. 1968); *But cf.*, *Trailmobile Div. of Pullman, Inc. v. Jones*, 118 Ga. App. 472, 164 S. E.2d 346 (1968).

⁹¹ See *Bailey*, *supra* note 40; *Barnes*, *supra* note 8; *Nordstrom*, *supra* note 56.

the substantiality of the defect required to allow the buyer to avail himself of revocation rather than rejection. While important, this is not the most important difference. The most significant difference to the parties between the two courses of action is that the course chosen by the buyer will determine *who has the burden of proof*. Simply stated, when the buyer rejects the seller must prove the goods and tender were conforming; but when the buyer revokes acceptance it is the buyer who must prove the breach or defect existed at the time of delivery.

When a rejection occurs, the buyer is claiming a defect in tender or in the goods. The question involved is, was that claim rightful, was there a defect in the goods? Since rejection usually comes soon after delivery the seller is in the best position to prove the conformity of the delivery. He has the production records, shipping records, and so forth and since he is contending the delivery was conforming, the burden of proof rests with him. Revocation, on the other hand often comes later and after a period when the buyer has had exclusive control over the goods. The seller usually cannot know what the buyer has done with the goods and in fact the defect may have arisen from some action of the buyer. For the seller to have to prove conformity would be an onerous task; so the Code logically puts the burden on the buyer to prove that the goods were non-conforming at the time of delivery.⁹² Since the buyer is now claiming the seller breached the contract, the burden of proof is upon him.⁹³ The buyer must prove that the defect was present when the goods were sold, and that the defect substantially impaired the value of the goods.⁹⁴

In place of the usual summary, perhaps it would be helpful to take the facts of the *Miron*⁹⁵ case and proceed through the Code sections on rejection and revocation in an attempt better to understand the workings of these two sections. Basically the contract involved the sale of goods—namely, a race horse—warranted to be sound. The horse was delivered at the auction⁹⁶ and if buyer was to reject it had to be done within a reasonable time after the delivery. It is clear from the case that the buyer had no opportunity to inspect the horse before the sale.⁹⁷ This opportunity did present itself after the sale but the buyer rather than inspecting the

⁹² UCC § 2-607(4).

⁹³ *Tennessee-Virginia Constr. Co. v. Willingham*, 117 Ga. App. 290, 160 S. E.2d 444 (1968); *Burge Ice Mach. Co. v. Dickerson*, 60 Ill. App.2d 266, 210 N.E.2d 243, (Abstract Only 1965); *State ex rel Hawkins-Hawkins Co. v. Travelers Indemnity Co.*, 250 Ore. 356, 442 P.2d 612 (1968).

⁹⁴ See generally, Close, *Problems of Proof in Warranty Cases*, 31 INS. COUN. J. 282 (1964); see also, UCC § 1-201(31); Bigham, *Presumptions, Burden of Proof and the Uniform Commercial Code*, 21 VAND. L. REV. 177 (1968).

⁹⁵ 400 F.2d 112, 115.

⁹⁶ In most instances the risk of loss passes to the buyer when the goods are "knocked down," *Diefenback v. Gorney*, 93 Ill. App.2d 51, 234 N. E.2d 813 (1968); See also, UCC § 2-328.

⁹⁷ 400 F.2d 112, 115.

horse, put it into a trailer and removed it to his farm. Keep in mind the idea that a rejection must occur within a reasonable time and that determination of a reasonable time is a question for the trier of fact. The court (as trier of fact) made the determination that a reasonable time to discover a broken leg (a patent defect) was immediately upon delivery and since the buyer did not reject within a reasonable time, as determined by the facts of the case, the court properly held that he had accepted the horse⁹⁸ under section 2-606(1)(b).⁹⁹ Once the court had made the determination that the buyer had accepted the goods, section 2-607(4)¹⁰⁰ comes into effect placing the burden of proof on the buyer. It was this burden that the buyer failed to carry. He could not amass enough evidence to show that the defect existed when the horse was sold and also that the defect was not caused by anything that had happened to the horse while in his possession. The failure of proof on these issues is what caused the buyer to lose. Had the court determined that his attempted rejection the next day had occurred within a reasonable time, he would not have had this heavy burden of proof. While it would appear as if the plaintiff would have won regardless of who had the burden of proof;¹⁰¹ the seller may have had a difficult time proving the horse was sound at the time of sale; or in the alternative, proving that the defect was caused by the buyers treatment of the horse. This would have been much harder on the seller and may have been a burden he could not have carried thus causing him to lose the case. The court however, following the pattern of other "reasonable time" cases, reached the proper result by putting the onus on the buyer to prove the defect; when he failed to do so, he lost the case.

Thus it is obvious that the Uniform Commercial Code has changed the general law of contracts to a considerable extent.¹⁰² Part of this change has come about in the area of remedies of both the buyer and the seller.¹⁰³ The *Miron* case is an example of how two of these basically

⁹⁸ *Id.* at 117-19.

⁹⁹ "Acceptance of goods occurs when the buyer (b) fails to make an effective rejection (subsection (1) of section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect."

¹⁰⁰ "The burden is on the buyer to establish any breach with respect to the goods accepted."

¹⁰¹ 400 F.2d 112, 117.

¹⁰² See, Bracucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); Cudahy, *Limitations of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127 (1963); Hawkland, *Major Changes Under the Uniform Commercial Code in the Formation and Terms of Sales Contracts*, 10 PRAC. LAW. 73 (May, 1964); Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291; Latin, *Article 2*, 23 OHIO ST. L. J. 185 (1962); Sutton, *supra* note 57; Whitney, *Contracts*, 26 ST. JOHN'S L. REV. 3 (1952); Fiegel, *The Seller's Liability for Defective Goods at Common Law*, 12 MCGILL L. J. 183 (1966).

¹⁰³ Barnes, *The Sales Contract—Seller's Remedies*, 49 MARQ. L. REV. 131 (1965); Cudahy, *supra* note 102; Hawkland *supra* note 102; Murphy, *Some Problems Concerning Seller's Remedies Under the Amended Uniform Commercial Code*, 33 TEMPLE L. Q. 273 (1960); Phalan, *supra* note 30; Whitney, *supra* note 102.

new sections¹⁰⁴ are being read and interpreted by the courts. Perhaps the main point this case makes is that a buyer cannot force goods back upon the seller by revocation of acceptance once a "reasonable time" has elapsed and that what is a reasonable time is to be determined by all the facts of the case. This approach allows the court to reach a just result in the immediate case before it and also to preserve the fundamental idea of the uniformity of the Uniform Commercial Code.¹⁰⁵

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¹⁰⁴ While some of the principles underlying sections 2-602 and 2-608, existed in the prior law, the Code has refined and added new ideas to the old.

¹⁰⁵ See, Clifford, *Article Two: Sales*, 44 N. C. L. REV. 539 (1966); Liberman, *Opportunity & Challenge to Bring Commercial Laws in Step with Present Day Needs*, 62 COM. L. J. 221 (1957); Schnader, *Why the Commercial Code should be "Uniform"*, 20 WASH. & LEE L. REV. 237 (1963). See also, Lattin, *Uniform Commercial Code, Article 2 on Sales: Some Observations on Four Fundamentals*, 16 HASTINGS L. J. 551 (1965).