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Virginia Bar Notes

1948–1962: Dudley W. Woodbridge (Acting Dean  
1948-1950)

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1968

## Sales

Dudley Warner Woodbridge  
*William & Mary Law School*

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### Repository Citation

Woodbridge, Dudley Warner, "Sales" (1968). *Virginia Bar Notes*. 51.  
<https://scholarship.law.wm.edu/vabarnotes/51>

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1. A sells B a wagon for \$450 without anything being said concerning the title thereto. A stranger finds the wagon in B's possession, and asserts that it belongs to him. B declines to surrender the wagon, and the stranger brings an action in detinue for it, proves that it belongs to him, and recovers it. What claim has B, if any, upon A for the loss of the wagon?

There is an implied warranty in the sale of personal property that the vender has power to pass a good title, so B may sue A for violation of the implied warranty. U.C.C. 2-312.

*Risk of Loss 2-509(3)*

2. Jones, a hay and grain merchant, has 50,000 pounds of hay stored in a warehouse. Smith agrees to buy 25,000 pounds of same at 5 cents per pound, and to pay for the same as soon as the hay is baled, weighed and marked by Jones. Jones bales and weighs the hay, and puts the bales aside for Smith, but before he has marked them the building is destroyed by fire and the contents are entirely lost. Upon whom does the loss fall? Why?

Under U.C.C. 2-509(3) the risk of loss does not pass to the buyer in this case until the buyer has received the goods from the merchant. The seller is in a better position to protect the goods and to effect insurance.

*Damages for Repudiation*

3. What is the measure of damages for an unqualified annulment without reasonable cause by the vendee in an executory contract for the sale of an article not manufactured at the time of the breach?

Under U.C.C. 2-701(1) and (2) the measure of damages for repudiation in this case would be the difference between the market price at the time and place for tender and the unpaid contract price less expenses saved in consequence of the buyer's breach. But if this measure of damages is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer.

*Right of Stoppage in Transitu*

4. Charles Harris purchased from the Maryland Shoe Company \$500 worth of shoes on thirty days' time. The company delivers the shoes to the carrier at Baltimore and consigns them to Harris at Front Royal, Virginia, the company's contract being completed when the shoes were delivered to the carrier at Baltimore. Harris is utterly insolvent, and before the shoes arrive at Front Royal he sells them to Shuerer & Son for \$400 cash. When the goods arrive in Front Royal, and before they leave the custody of the railway company the shoe company discovers Harris' insolvency and attempts to exercise the right of stoppage in transitu, they having had no notice of the sale from Harris to Shuerer. Whose rights are superior?

The right of stoppage in transitu is not affected by a sale of the goods by the buyer while in transit unless the seller consents to the sale or the buyer has negotiated a negotiable document of title for value, or the carrier has attorned to the sub-vendee. See U.C.C. 2-705.

*Negot. paper as conditional payment*

5. Suppose in the above case at the time of the purchase, Harris executed and delivered to the shoe company his note for the \$500, payable thirty days after date; how would this affect the situation?

Commonly one does not take negotiable paper as payment, but only as conditional payment. If the maker is insolvent or becomes insolvent this is regarded as a violation of an implied condition and justifies the seller in exercising his rights of stoppage in transitu even if (it seems) he has negotiated the instrument for he still remains liable as an indorser.

*Acceptance by posting*

6. On Oct. 8, 1965, A in the city of Richmond writes to B in Halifax county offering him 55 cents a pound for 1,000 pounds of a certain grade of tobacco, f.o.b. in Richmond. On Oct. 9th, at 3 P.M. B mails to A in Richmond his acceptance of the offer. At 4 P.M. of the same day B receives a telegram from A withdrawing his offer. Is A bound and why?

A is bound, for an offer cannot be withdrawn after acceptance. B had accepted an hour before by posting a letter of acceptance.



7. What is the right of stoppage in transitu; who may exercise it and when?

Under U.C.C. 2-705 the seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent, (i.e. ceased to pay his debts in the normal course of business, or cannot pay his debts as they become due, or insolvent within the meaning of the federal bankruptcy law). Furthermore, if the seller has a right to withhold or reclaim the goods for some other reason (as repudiation by the buyer or refusal to make a payment due before delivery) seller may stop delivery of carload, truckload, planeload or larger shipments of express or freight. And by U.C.C. 2-702(2) where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after receipt. If misrepresentation of solvency has been made to the seller in writing within three months before delivery the ten day limitation does not apply. The right to stop delivery under U.C.C. 2-705 exists until (a) receipt of the goods by the buyer; or (b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or (c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or (d) negotiation to the buyer of any negotiable document of title covering the goods.

*Risk of Loss - Merchant Seller Possessing Goods Sold*  
8. In its grain elevator at Richmond the Richmond Produce Co. has stored large quantities of wheat, assorted into separate bins according to grades. It sold to B at \$1.75 per bushel, 1,000 bushels of No. 1 grade for delivery on B's order. While awaiting B's order for delivery and before anything had been done towards preparation for delivery, the elevator was destroyed by fire. Whose was the loss of the 1,000 bushels of wheat and why?

The Richmond Produce Company is a merchant seller and the loss is on it. Comment 3 to U.C.C. 2-509 reads in part, "Whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal."

"The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession."

*Damages - "Covers"*

9. What is the measure of damage for failure to deliver staple articles contracted to be sold at a certain price, at a certain time and place?

If the buyer "covers", i.e. buys substitute articles in good faith without unreasonable delay, the measure of damages is the difference between the cost of cover and the contract price together with any incidental or consequential damages, but less expenses saved by seller's breach--U.C.C. 2-712. If the buyer does not effect cover, the measure of damages by U.C.C. 2-713 is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages, but less expenses saved as consequences of the seller's breach. Market price is to be determined as of the place for tender in the situation presented in this question.

*Passage of Title by Gift*

10. What is necessary to pass title to personalty by gift inter vivos?

V#55-43, "No gifts of any goods or chattels shall be valid unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section." Note The delivery may be actual, constructive, or symbolical, depending upon the nature of the thing given.



## SALES

*Remedies for Breach of Warranty, when there has been acceptance*  
 11. William Robinson purchases of David Strickler a horse, which the latter warrants to be sound. The horse is delivered to Robinson, who pays Strickler the purchase money. Robinson soon discovers that there has been a breach of the warranty and consults you as to his rights. State briefly what two remedies you could pursue, and what would be the measure of your recovery in each.

Under U.C.C. 2-608 the buyer may "revoke his acceptance" if the non-conformity substantially impairs its value and his accepting the article without discovery of the breach of the warranty was reasonable either because of the difficulty of discovery before acceptance or because of the seller's assurances. And under U.C.C. 2-714(2) the buyer may keep the article and recover the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

## *Risk of Loss*

12. In case of destruction by fire of goods which have been sold and delivered, with title retained until purchase price is fully paid, does the loss fall upon the buyer or the seller?

On the buyer. The seller has done all that he agreed to do. The buyer has the entire beneficial interest and is in the best position to protect the property. (This point is not covered by the U.C.C.)

## *Passage of Title*

## *Action for Price*

13. A wine merchant sells fifty cases, thirty-five cases of quarts and fifteen cases of pints of wine of a certain brand lying in his cellar, which contains other cases of the same character and description. When the time arrives for the purchaser to receive and pay for the wine he notifies the merchant that he will not take and pay for the same. What are the different views held as to whom title passes, and what are the remedies of the seller?

If the bottles be treated as fungible goods title passes when the bargain is made unless the intention of the parties was to the contrary. The vendee would become a tenant in common of the mass under U.C.C. 2-105(4). If the bottles be treated as unascertained goods the particular units of which are to be selected by the seller, title would not pass until there had been an unconditional appropriation of the goods to the contract with the assent of buyer. Under U.C.C. 2-709 when the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages the price (a) \*\*\* (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing. Comments (1) and (2) read as follows: (1) Neither the passing of title to the goods nor the appointment of a day certain for payment is now material to a price action. (2) The action for the price is now generally limited to those cases where resale of the goods is impracticable except where the buyer has accepted the goods or where they have been destroyed after risk of loss has passed to the buyer.

## *Risk of Loss*

## *S/F \$500 Limitation*

14. Smith calls up Brown by 'phone and offers him \$500 for his bay mare, named "Pendennis," which sum he is to pay thirty days after date. Smith likewise agrees to send for the mare the next morning. Brown at once accepts Smith's offer, and about two hours later Brown's stables burn and the mare is destroyed. Whose loss, and why?

The loss is on Brown for two reasons. (1) Under U.C.C. 2-509(3) if the seller is a merchant the risk of loss passes to the buyer on his receipt of the goods, and if Brown is not a merchant on tender of delivery. (2) Smith also has the defense of the statute of frauds U.C.C. 2-201(1) which reads--except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.



15. What is the law as to warranty of title to personal property: (1) where the property is not in the possession of the seller? (2) where the property is in the possession of the seller? (3) where the property is in the constructive possession of the seller?

Comment 1 to U.C.C. 2-312 reads in part, "The warranty extends to a buyer whether or not the seller was in possession of the goods at the time the sale or contract to sell was made."

*Passage of Title to Holder in due course - Money; Horse?*

17. A steals money and also a horse from B and transfers both the money and the horse to C, who receives both without any knowledge of the theft, and in due course of business. What are C's rights against B?

The money is negotiable, and title passes by delivery to a holder in due course as is the case with bearer paper. Hence C may keep the money, but not the horse, since A could not pass any better title to the horse than he himself had.

*Sale v. Gift*

18. What is a sale, and what a gift, pointing out the differences between a sale and a gift, and between a gift inter vivos and a gift causa mortis?

The primary differences between a sale and a gift are (1) there is no consideration in the case of a gift (2) the subject matter of the gift must be constructively or actually delivered. A gift inter vivos is irrevocable. A gift causa mortis is made in anticipation of death, and should the donor recover he may regain the goods given away.

*Implied Warranty, Rescission; Damages*

19. A sells to B a race horse for \$1,000 cash. B discovers a few days after the purchase of the horse that in a recent race it had been so injured as to disqualify it for the race-course but not for ordinary purposes, which injury was not patent but was known to A, who concealed it from B when selling the horse to him. What are B's remedies against A, and the measure of recovery according to the remedy he elects to adopt?

Where goods are sold for a specific purpose known to both parties and the seller has reason to know that the buyer is relying on the seller's judgment to furnish suitable goods there is an implied warranty that such goods are free from known latent defects that would render the goods unsuitable for that purpose. Since a breach of this warranty goes to the essence of the contract the vendee may rescind the sale and get his \$1,000 back or he may sue on the contract and recover the difference between the actual value and the value if the horse were free from the defect. See U.C.C. 2-315. Implied Warranty: Fitness for Particular Purpose. Also 2-608 as to rescission, and 2-714(2) as to damages.

*C.O.D*

*F.O.B.*

*B/L*

*— Passage of Title*

Query: What effect, if any, have the following on the time when title passes (1) Sale C.O.D. (2) Sale F.O.B. vendee's station (3) Seller retains control of B/L

As to (1) and (3) in the absence of agreement to the contrary U.C.C. 2-401 provides that title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place. As to F.O.B. sales the same section of the U.C.C. provides that title passes (unless otherwise explicitly agreed) despite any reservation of a security interest by the bill of lading (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment, but (b) if the contract requires delivery at destination, title passes on tender there.



If a conditional vendee of personalty defaults what remedies has the conditional vendor in Virginia?

(1) He may disregard his security and sue in personam for whatever may be due just as if he were an unsecured creditor.

(2) Under U.C.C.9-503 the secured party may take possession of the collateral without judicial process if this can be done without a breach of the peace, or, in lieu of self help, he can bring a possessory action.

(3) Under U.C.C.9-504 the secured party, after default may sell or lease any or all of the collateral in its then condition or after any commercially reasonable preparation or processing.

(4) The proceeds of a sale or lease are applied as follows:

(a) to the reasonable expenses of retaking, holding, preparing for sale, selling, and to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of the indebtedness secured by the security interest;

(c) the satisfaction of indebtedness secured by any subordinate security interest if written demand therefor is received before distribution of the proceeds is completed.

(5) In our case by U.C.C.9-504(2) the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency.

(6) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

If a conditional vendee defaults and the conditional vendor brings an action in detinue for the property, what are the rights of the parties?

Under V#8-593 an action in detinue lies. This section has not been repealed and now (1965) reads as follows: When final judgment is rendered on the trial of such action or warrant, the court or judge shall dispose of the property or proceeds according to the rights of those entitled; and when in any such action or warrant the plaintiff shall prevail under a contract which, regardless of its form or express terms, was in fact made to secure the payment of money to the plaintiff or his assignor, judgment shall be for the recovery of the amount due the plaintiff thereunder, or else the specific property, and costs, and the defendant shall have the election of paying the amount of such judgment or surrendering the specific property. And the court or judge may grant the defendant a reasonable time not exceeding thirty days, within which to discharge such judgment upon such security being given as the court or judge may deem sufficient.

In the event of any inconsistency between this section and any applicable provisions of Article 9 of the Uniform Commercial Code, the provisions of that Article shall control."



SALES

*F.O.B. - intention of parties*

177 Va.331.

Defendant bought goods for plaintiff for his hotel "f.o.b. respective factories." Another clause in the contract provided that plaintiff agreed to deliver and install the furniture and furnishings in the hotel on or about May 25, 1939. Should plaintiff or defendant pay the freight?

Held: Defendant should pay the freight. The term. "f.o.b. respective factories" does not purport to tell when or how the goods will be delivered. Hence the other clause about delivery on or about May 25th fixing date of delivery.

"Where there is a repugnancy (if it be admitted that there is one) a general provision in a contract must give way to a special one covering the same ground." Note: In the instant case defendant had at first paid all freight charges. Hence the court also applied the following rule, "The well recognized rule is that if an instrument may have two interpretations, the courts in endeavoring to determine the intention of the parties will follow the one which they put upon it by their own actions."

SALES Contracts Mutual waiver

177 Va.716

P ordered burlap sacks from D to be delivered before March 1939. After that date D wrote P that he would like shipping instructions on at least part of the sacks, and P gave such instructions on part of the shipment. In Sept. P asked for the rest of the sacks. Because of war conditions burlap doubled in price, and D claimed the contract was no longer in force. Is Contract in force? Held: Yes, when both parties after March treated it as in force there was a mutual waiver of time requirements.

Is evidence that P and D had had other contracts and that in their performance time had never been regarded as of the essence, admissible? Held: Yes, not for the purpose of varying the contract, but as evidence of a waiver of the time terms of the instant contract. If contract was in force, fact that it was more difficult to perform than D had expected will not excuse him.

SALES Improper disposition by conditional vendor

Suggested by 178 Va.104

Conditional vendor, hereinafter called C, sold a portable saw mill to B for \$800. B paid \$600 cash and eventually defaulted on the balance. C repossessed and used the mill as his own without bothering to hold a sale of any kind. It was soon thereafter injured by fire. What are the rights of the parties?

Under the U.C.C. 9-507 a secured party who is not following the law where there has been default, may be restrained on appropriate terms and conditions, and, if the disposition has occurred is liable in damages for any loss caused thereby--in our case for the reasonable value of B's interest in the mill just prior to the fire.

SALES *Cond. Sales K*

A conditional sales contract provides that if the vendee defaults, the vendor may repossess the goods sold and sell same, and hold the vendee for any deficiency. Is this provision of the contract valid?

Under U.C.C. 9-504(3) this provision is valid as long as the conditional vendor acts in good faith and the sale is made in a commercially reasonable manner.

SALES Bulk Sales

Bar Exam. Dec. 1943

Q.2. A merchant in Richmond, Va. conveyed all of his stock of goods in a store to his wife. She thereafter reconveyed the stock of goods to her husband, the merchant. Both conveyances were in consideration of natural love and affection. After these transfers the husband became indebted to X for the purchase of additional merchandise in the ordinary course of business. The husband at all times continued in actual possession of the stock of goods. The husband became insolvent and X instituted action at law against the wife for the amount owing. Can X recover against the wife?

In the absence of statute there would be clearly no personal liability on the part of the wife for the debts of her husband. Since there was no consideration for the conveyances or change in possession, both transactions were void. Hence the situation is the same as if they had not been made, and a Bulk Sales law would not apply, even if there were such a statute.



# Bulk Transfer Laws

902 revised June 1965

Note: Article VI of the U.C.C. deals with Bulk Transfers. The central purpose of all bulk transfer(bulk sales) laws is to deal with two common forms of commercial fraud, namely:(a) The merchant, owing debts, who sells out his stock in trade to a friend for less than it is worth, pays his creditors less than he owes them, and hopes to come back onto the business through the back door some time in the future.

(b) The merchant, owing debts, who sells out his stock in trade to any one for any price, pockets the proceeds, and disappears leaving his creditors unpaid.

U.C.C.6-102 states that the enterprises subject to this Article are all those where principal business is the sale of merchandise from stock, including those who manufacture what they sell. A bulk transfer is defined as any "transfer in bulk and not in the ordinary course" of the transferor's business of a "major part" of the "materials, supplies, merchandise or other inventory" of an enterprise subject to this article.

When the reason for a rule ceases, the rule itself ceases. Hence any bulk transfer that does not tend to defraud creditors is in general excepted. Among the excepted transfers are sales by executors, assignments for the benefit of all creditors, transfers from one form of business organization(say a partnership) to another form(say a corporation) where public notice is given and the new enterprise assumes the debts of the old and is solvent at that time.

Further excerpts from Article 6 are set forth below:

#6-104 Schedule of Property, List of Creditors.(1) A bulk transfer is ineffective against any creditor of the transferor unless:

(a) The transferee requires the transferor to furnish a list of his existing creditors prepared as stated in this section; and

(b) The parties prepare a schedule of the property transferred sufficient to identify it, and

(c) The transferee preserves the list and schedule for six months next following the transfer and permits inspection of either or both and copying therefrom by any creditor of the transferor, or files the list and schedule in(a public office to be here identified).

(2) The list of creditors must be signed and sworn to or affirmed by the transferor or his agent. It must contain the names and business addresses of all creditors of the transferor, with the amounts when known, and also the names of all persons who are known to the transferor to assert claims against him even though such claims are disputed.

(3) Responsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the transferee is shown to have had knowledge.

#6-105. Notice to Creditors. In addition to the requirements of the preceding section, any bulk transfer is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in the manner and to the persons hereafter provided (#6-107).

#6-107 The Notice.(1) The notice to creditors(#6-105) shall state:

(a) that a bulk transfer is about to be made; and

(b) the names and business addresses of the transferor and transferee.

#6-110 Subsequent Transfers. When the title of a transferee to property is subject to a defect by reason of his non-compliance with the requirements of this Article, then: (1) a purchaser of any of such property from such transferee who pays no value or who takes with notice of such noncompliance takes subject to such defect, but

(2) a purchaser for value in good faith and without such notice takes free of such defect.

#6-111. Limitation of Actions and Levies. No action under this Article shall be brought nor levy made more than six months after the date on which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brought or levies made within six months after its discovery.



SALES

Risk of Loss - Goods in Poss. of Bailee Bar Exam, Dec. 1943

Q. 10. On Jan. 20, 1936, A.P. Halsworth and Co. sold to Pure Food Corporation 200 barrels each containing 100 pounds of Dixie Belle, Grade AA, Flour, at \$4 per barrel. At 3 p.m. on that day Halsworth & Co. received Pure Food Corporation's check in the amount of \$800, and at the same time delivered to Pure Food Corporation a receipt in full and an order for the 200 barrels on Carl Apperson, in whose warehouse were stored 395 barrels each containing 100 lbs. of Dixie Belle, Grade AA, Flour owned by Halsworth & Co. At 4 P.M. on Jan. 20, before any further steps had been taken, Apperson's warehouse caught fire, and within a short time the warehouse and its entire contents were destroyed. Halsworth & Co. contend that the loss of the 200 barrels must be borne by Pure Food Corporation, which the latter denies. What is your opinion as to this?

A. Under the U.C.C. the loss would be on Halsworth & Co. U.C.C. 2-503(4)(b) in so far as applicable to our problem provides that where goods (flour in our case) are in the possession of a bailee and are to be delivered (by the seller to the buyer without being removed by the seller) tender to the buyer of a written direction to the bailee to deliver is sufficient tender, but risk of loss of the goods remains on the seller until the buyer has had a reasonable time to present the direction (to the bailee).

SALES Effect of acceptance of non-conforming goods

181 Va. 256.

X contracted to sell Y a large quantity of flower bulbs by sample. Y accepted the bulbs, although he shortly thereafter claimed they were not up to sample. X claimed that by accepting them Y waived any defect of quality. Is this contention sound?

The majority rule is that an acceptance is not per se a waiver of inferior quality, and that Y can accept and sue for breach of the warranty that the goods are like the sample, recovering a judgment for the difference between their actual value and their value if they had been as per the sample.

But where, as in the instant case, the goods were open to inspection and any substantial difference was apparent, and where Y in turn attempted to sell the bulbs to others using the same samples he had himself received, there is enough to indicate a waiver of any defect in quality and the vendor is entitled to judgment for the full purchase price. U.C.C. 2-607 is in accord with all of the above.

SALES, TORTS Effect of lack of privity

Suggested by 181 Va. 390

P ran a boarding house and purchased some ham from D. Everyone who partook of the ham contracted ptomaine poisoning. Assuming no other evidence, can the boarders recover from D?

Since 1962 the defense of lack of privity has been practically abolished. The special Virginia version of the U.C.C. on this point now reads as follows:

#2-318. When Lack of Privity No Defense in Action Against Manufacturer or Seller of Goods. Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.

SALES Cumulative warranties

Suggested by 184 Va. 588.

D sold Y a furnace made of substitute war-time materials expressly warranting in writing that the furnace was free from defective material and workmanship. The furnaces, though properly made, were not suitable for the purpose which the seller knew the buyer intended to use them. D was a dealer and not a manufacturer. Does the express warranty exclude the implied warranty of fitness?

No, unless necessarily inconsistent, and generally not even then in the case of an implied warranty of fitness for a particular purpose. The following excerpts from the U.C.C. are in point: #2-314. Implied Warranty: Merchantability: (1) Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.



## #2-315--Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is \*\*\* an implied warranty that the goods shall be fit for such purpose.

## #2-317. Cumulation and Conflict of Warranties Express or Implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply: (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

SALES (first case) Restaurant *Eating food of another* Suggested by 188 Va.214

X and Y went into P's restaurant and each ordered and paid for their meals. They were friends and sat at the same table. X did not wish his desert and gave it to Y who ate it. Are X and Y guilty of a tort?

Yes. Title to the food is in P. What the customer pays for is a right to satisfy his appetite by the process of destruction. When he has done that he must stop. He may not turn over unconsumed portions to others, or carry away such portions. The customer pays for services and no title to any food passes except as an incident to its destruction by the consumption of the person ordering the item so consumed.

Note: U.C.C. #2-314 which deals with the implied warranty of merchantability states that, "Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale." It is probable that this changes the law as first stated above which statement was a dictum only. Note, though, that the U.C.C. states "under this section"--not "under this Article".

SALES (second case) CREDITORS RIGHTS *Bulk Sale* Suggested by 188 Va.214.

X owned a restaurant. She sold it to Y. No attempt was made to comply with the bulk sales law. X's trustee in bankruptcy claims the sale to Y is void as to X's creditors. Is this contention valid?

No. The Bulk Sales Act (U.C.C. 6-102(3)) reads, "The enterprises subject to this Article are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell." Comment 2 reads in part, "The businesses covered do not include farming nor contracting nor professional services, nor such things as cleaning shops, barber shops, pool halls, hotels, restaurants, and the like whose principal business is the sale not of merchandise but of services." Note: The bulk sale of fixtures is within the bulk sales law only if made in connection with a bulk sale of merchandise that is covered by Article VI of the U.C.C.

SALES *Conflicting Warranties?*

191 Va.525,566.

P sued D for \$666,561 damages due to defective paint. D was a manufacturer of paint which P used for finishing radio cabinets. D expressly warranted that the paint would be uniform as to quality and ingredients. Does this negate the existence of an implied warranty of suitability?

Held: No. "When one contracts to supply an article in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the vendor, there is an implied warranty that it shall be reasonably fit for the purpose--". The express warranty is not inconsistent with the implied one. Rather, "The two warranties were complementary rather than conflicting". Note: Same result under U.C.C. 2-317.

SALES Automobiles Title

193 Va.677.

Seller sold Buyer a used car knowing that Buyer expected to resell. The motor number on the engine did not correspond to that on the certificate of title. Held: Seller impliedly warranted the title, and until this matter is cleared up Buyer does not have a good title under statutes and latter can recover damages proximately resulting from this lack of title. U.C.C. 2-312 reads in part, \*\*\*there is in a con-



tract for sale a warranty by the seller that(a) the title conveyed(1) shall be good, and its transfer rightful.

### SALES Sale on Approval

193 Va.831.

P sold D an air conditioning unit on Sept.4,1948 on approval. No definite trial time was stated. There was no more hot weather that year so P told D he could keep the unit until hot weather set in next year so he could give the unit a fair trial. During the winter D decided not to take the unit, but he did not tell P of this decision "because it was P's property and that was P's worry." Finally on August 1, 1949, P, not having had any word from D, demanded payment. Then P for the first time told D he was not going to take the unit and for P to come and get it. P sued D for the purchase price and the jury found for P. Should judgment be given for D notwithstanding the verdict?

Held: For P for two reasons:(1)After D had agreed to take on approval after a trial he had no right to refuse to allow a trial. By his own testimony D had decided not to take the unit in the winter before an adequate trial had been had. (2) A jury could have found that D had had the unit a reasonable time in which to give it a trial and that he had failed to give notice of disapproval within a reasonable time thereafter thereby leading P to believe that he had approved. In such cases title passes, as any other rule would work an unreasonable hardship on the seller who has been deprived of the use of his property and a possible sale to others.

(Same result under U.C.C.2-327(b)(2) Which reads in part, "\*\*\*but failure seasonably to notify the seller of election to return the goods(sold on approval) is acceptance"

And under U.C.C.2-709 the seller is entitled to the purchase price of goods that have been accepted.

### SALES Implied Warranty *that animals not impotent* Suggested by 194 Va.623.

D bought five pairs of chinchillas from P for breeding purposes. If D told P that he knew nothing about chinchillas and asked P to select five pairs for him would there be an implied warranty that the chinchillas were not impotent?

Yes, if P held himself out expressly or impliedly as having special knowledge on the matter and knew that D wished them for breeding rather than for pelts.

Suppose that in the above case P sued D for the purchase price and D defended on the ground that there had been a breach of an oral express warranty, who should open and close on that point?

D's defense would be in the nature of one by confession and avoidance. He is the one who says the warranty was made and broken. Hence he has the burden of proof on that point and should introduce his evidence first.

### SALES Implied Warranty of Fitness 194 Va.976.

D sold P a product called Re-Nu-It which was advertised to seal, insulate, beautify and protect the surface of any house. "You Never Need Paint Again". Some weeks after its application the house began to turn from an original white to a dark color, dampness and mold appeared on both the inside and the outside, and rotten places developed in some of the woodwork. There was evidence to indicate that the product stopped up the pores of the wood and interfered with its "breathing", thereby causing dampness and rot. Is D liable for the damage done?

Held: Yes. He impliedly warranted that Re-Nu-It was reasonably fit for the purpose intended.

### SALES Implied Warranty 197 Va.255.

R was in the hauling business. He ordered a tractor from G, and also a "fifth wheel" which is used to attach a trailer to the tractor. G selected and installed the fifth wheel after having purchased it from H which in turn had purchased it from D, the manufacturer. G, without negligence, improperly installed the fifth wheel so that the mechanism locked when it was not properly attached thereby causing R reasonably to believe that everything was all right. As a result the trailer became de-



tached and it and its cargo were damaged. R sued G and H.

Held: G is liable. G was acquainted with R's business and knew the purpose for which he wished the fifth wheel. There was an implied warranty that the wheel as installed was suitable as R relied on G. Held also that H was not liable as there was no privity between H and R, no reliance by R on H, and no evidence of negligence on the part of H who sold the wheel independently of the tractor. (McPherson v. Buick distinguished on the facts just stated.)

Note: Under the U.C.C. there is an implied warranty of merchantability for usual purposes (#2-314) and an implied warranty for a particular purpose where such purpose is made known to the seller and the seller holds himself out as having special knowledge. (#2-315) Under U.C.C. #2-318 (Virginia version) lack of privity is no longer a defense, but since H has not broken any warranty nor been negligent he is not liable.

#### SALES Torts Conversion *of Auto subj to lie* 198 Va.67

B, a sailor, stationed in Norfolk but whose home was in Wyoming, purchased a car on the conditional sales plan in Wyoming. The contract provided that B would not sell or encumber the car, and that on default the holder of the indebtedness could repossess. The conditional sale was properly recorded in Wyoming and entered on B's certificate of title. After B was in default he erased the entry on the certificate of title and sold the car to X who resold to Y. P, the finance company, to whom the contract of conditional sale had been assigned, claimed (1) that the lien of the indebtedness was still valid, and (2) that X was a converter. The trial court held that the lien was still valid, and that when X exercised dominion over the car by selling it, he necessarily sold it subject to the lien, and hence was not a converter.

Held: The trial court was right as to the existence of the lien since the car had not gained a new situs in Virginia and the laws of Wyoming had been complied with, but wrong in holding that there was no conversion. X in selling the car exercised an act of dominion over the car inconsistent with P's right to immediate possession. This was a conversion of P's interest in the car regardless of X's good faith.

#### SALES Contracts 198 Va.360

P contracted to sell his drugstore to D who paid \$100 down as a deposit, gave his note for \$7,000, and paid E \$2900 to be held by E as an escrow agent for sixty days at the end of which time E was to pay off P's creditors unless P's landlord, L, had refused to accept D as his tenant in place of P. The lease between L and P expressly provided that P could not assign the lease without L's consent. L refused to accept D as a tenant. The contract of sale between P and D was conditioned on L's willingness to accept D as a tenant. The trial judge ruled that the \$2900 placed in escrow should be used to pay P's creditors, and that D's only remedy was one against P for damages for breach of contract.

Held: Error. If the buyer does not receive that which he has purchased he has alternative remedies at his option. He may bring the present equivalent of an action of assumpsit to recover back what he has paid, or he may sue for damages for breach of contract. So D is entitled to the return of his note, the \$100 down payment, and the \$2900 placed in escrow for P's benefit.

#### SALES Swift v. Wells *Unwholesome Food* 201 Va.213.

H and W were husband and wife. W purchased a "Swift's Premium Picnic Shoulder (smoked pork)" from R's supermarket. It was wrapped in cellophane. She ate some of the pork which appeared to be perfectly good and after she had cooked it properly. As a result she had a very severe attack of food poisoning. The medical evidence indicated that enterotoxin had been produced in the pork by bacteria while it was still in the possession of Swift & Co., and that while proper cooking will destroy the bacteria it will not destroy the enterotoxin already produced. There was no evidence of negligence on the part of Swift & Co. The Court says, "The precise question whether a non-negligent manufacturer of food, who supplies the same to a retailer for resale for human consumption, is liable to the ultimate consumer for injuries sustained by him as a result of eating such food, shown to be unwholesome at the time it left the manufacturer's possession, has not heretofore been presented



to this Court." (Underlining added)

Held: Swift & Co. is liable on grounds of public policy despite the fact that there was no privity. Swift & Co. are in the best position to prevent their products from being contaminated. There is an implied warranty of wholesomeness in favor of the ultimate consumer. Also V#3-303 and 3-308, expressly make it unlawful to sell or expose for sale any \*\*\*unwholesome, or adulterated food for human use.

Note: This case was decided before the passage of V#8-654.3 (statute doing away with defense lack of privity now incorporated in the Virginia version of the U.C.C. as V#8.2-318). This statute gives the plaintiff in Swift v. Wells an even stronger case than that which she won without the help of the statute.

#### SALES Implied Warranty--Damages

202 Va.700

Buyer was the franchise dealer of Seller in a certain part of Virginia for Cool Roof Products. Seller had improperly mixed some of his product, and as a result Buyer had to pay damages to some of his customers. Buyer, in order to pay his bills, was forced to sell his equity in some property for \$5,000 less than it was worth. It appeared that Buyer knew as much about roofing materials as did Seller and that he did not rely on Seller's skill and judgment.

Held: (1) While there was no implied warranty of fitness for a specific purpose because of no reliance on Seller's skill and judgment, still, where one buys a product under its trade name, there is an implied warranty of general merchantability or of fitness for the general purposes of goods so described. In the instant case there was a violation of such a warranty. (2) The price paid for the products was not a proper measure of damages since only a portion ~~thereof~~ was defective. The damages should be the difference in value of the goods sold and their value if they had been as warranted. The damages resulting from a forced sale of Buyer's properties were too remote and not in the contemplation of the parties (in case of breach) at the time the contract was made.

#### SALES Sale on approval

203 Va.152

P, who was under contract to build a highway, needed a stone crusher. He contracted to buy one from D. The contract provided for a five day trial period. D guaranteed, "The overall cost will be less than 25¢ per ton." Both agreed that, "In the event the machine fills the above guarantee the customer is to buy the machine. In the event it does not meet the above guarantee then the customer has the option of returning it to the factory at no cost to him other than one-way freight." P kept and paid for the machine after the trial period despite the fact that it cost 40¢ per ton to crush the rock. Both P and D knew that 100,000 tons of crushed rock would be needed. The actual cost of crushing this rock was \$96,000 instead of \$25,000. P sued D for the excess cost. The trial court held for P.

Held: Reversed. The 25¢ guarantee related to the trial period only. D could have returned the machine when tests in that period showed that the cost was excessive. In fact that was his only remedy. When he decided to keep the machine despite the fact that it would not crush stone at a cost of not over 25¢ per ton he waived any rights he might otherwise have had on that score.

#### SALES Limitation of Consequential Damages

205 Va.579.

P bought a tractor from D who warranted that defective parts would be repaired or replaced without charge within certain time and mileage limitations and it was agreed that P should have no other remedy for such defects. P sued D for breach of warranty alleging and proving damages for loss of business while the tractor was being repaired in accordance with the warranty after defective parts broke.

Held: He is not entitled to recover consequential damages since the parties have agreed otherwise. Note: This decision is in accord with U.C.C.2-719 which reads in part "(a) the agreement \*\*\*may limit or alter the measure of damages recoverable\*\*\* as by limiting the buyer's remedies\*\*\*to repair and replacement of non-conforming goods or parts; and (b) resort to a remedy provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy" and "(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial (as in the case above) is not."



SALES Negligence Implied Warranties in Sale of Used Cars

206 Va.307.

P wished to buy a used car. D told him to try one out. While P was driving the car on a trial run he had a flat and a blow out. The latter caused the car to run off the road and P was injured. The evidence showed that the defects in the tires could only have been ascertained by highly scientific tests. These facts (made after the accident) did disclose the defects. P contended that D impliedly warranted that the cars were fit to drive and also that he was negligent in allowing defective cars to be driven by possible purchasers.

Held: For D. He was under no duty to employ expert scientists with elaborate technical equipment to test the tires on all used cars going through his hands. Nor are there any implied warranties of fitness or merchant ability in the case of the sale of used cars. The customer knows he is getting a used car, has full opportunity to inspect same, and can insist on express warranties before buying. If there are no implied warranties in case of a sale, a fortiori there are none in the case of trial runs.

Note: U.C.C.2-316(3)(c) reads, "An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

SALES Implied Warranty

206 Va.457.

*Lack of Privity No Defense*  
P bought a half of a smoked ham from the D Supermarket. This ham had been sold to D by H, a packer. After D received the ham he cut it in two, and wrapped each portion separately in cellophane. While P was eating a portion of the ham she bit into some buckshot thereby injuring her teeth. She sued D and H who contended they were not negligent and had broken no warranties, and even if they had, she was barred by her own contributory negligence. H also contended that it was not liable because the ham was not sold to P in its original package.

Held: Both defendants impliedly warranted that the ham was fit for human consumption and free from harmful substances. P should have been given an opportunity to prove, if she could, that the harmful substance was imbedded in the ham when H sold it to D and likewise as to D when D sold to P. Such a warranty exists whether or not the ultimate purchaser buys the article in the original package. Lack of privity between P and H is no defense as V#8-654.3 (and its successor Virginia U.C.C.812-318) reads, "Lack of privity between the plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty express or implied, or for negligence although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods.\*\*\*".

The Supreme Court of Appeals also held that an action based on breach of an implied warranty is primarily contractual in nature and hence that P's contributory negligence, if any, would not be a bar unless the defect was known, visible or obvious to her in which case the presumption would be that the plaintiff contracted to buy this food in its obvious or known condition.



P bought a new car from D. The car was in the shop about one half of the time during a six-month period for the correction of defects. Finally P tendered the car to D and requested a refund of the purchase price, contending that the car was not as warranted and was of no use to him. D refused to accept the car and P instituted an action against D for damages for breach of warranty. At the trial P introduced no evidence to show the difference in value of the car with the defects warranted against, and its value without defects, but contended that he should recover the purchase price and the financing costs because the car was no good to him.

Held: For D. P had a choice of remedies. He could have brought an action to rescind or one for money for breach of warranty, and he elected the latter. The two are mutually inconsistent. The rule is well established that the measure of damages for breach of warranty on the sale of personalty is the difference between the value of the article sold with the defect warranted against, and the value without the defect. The burden was on P to prove the damages with reasonable certainty. Damages cannot be based on mere conjecture or speculation. A mere statement by P that the car was of no use to him, when it obviously had some value, does not meet the requirement of proof to a reasonable certainty.

Note: The above case was decided under the old law of sales, since the transaction occurred prior to Jan. 1, 1966.

If it were to be decided under the UCC we should take into consideration the following:

(1) The UCC does not use the term "rescission" for reasons explained in Va. Code 8.2-608 comment 1.

(2) The UCC makes it clear that the buyer may accept goods with defects without, waiving his right to sue for damages for breach of warranty within reasonable time after he discovered or should have discovered the defects. (Va. Code 8.2-607)

If the seller attempts to correct the defects and fails to do so, a reasonable time will be extended. Thus in the above case, one of the buyer's remedies would have been for him to have sued for damages for breach of warranty despite his acceptance.

(3) The UCC also gives another remedy, revocations of acceptance, which is wholly inconsistent with the remedy given above.  
Section 2.-608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.



P bought from D automobile agency, for use as a family car, a demonstrator which had been driven 3600 miles. He received an express warranty against defect in material and workmanship under which D was bound. to repair or replace parts, which warranty also stated that there were no other warranties, express or implied. Over the next few months, D made minor repairs to the car on several occasions. Five months after the sale, after having difficulty with the transmission, P returned the car to D and brought an action to rescind the sale and recover the purchase price on the theory that, despite the language of disclaimer in the express warranty, there was breach of an implied warranty of fitness. P also contended that, in any event, the exclusionary provisions of the express warranty were void for "overriding reasons of public policy".

Held: For D. Parties may, by mutual agreement, determine and fix the only warranties by which they are to be bound in the sale of automobiles. Such an agreement excludes existence of an implied warranty of fitness. P's contention that such an exclusionary warranty is contrary to public policy is deprived of force by the fact that the legislature, in adopting the Uniform Commercial Code(after this case arose) specifically provided in Va.Code #8.2-316 how such an implied warranty of fitness attached to the sale of goods may be excluded.

Note: Under present Virginia law, as set out in Va.Code #8.2-316, P would still be able to bring action under an implied warranty of merchantability. To exclude such a warranty, the language must mention merchantability and in case of writing must be conspicuous.