threatened to terminate the lease, the bank filed a claim and delivery action to get possession of the diner. At the time, the plaintiffs had made twenty-two of twenty-three monthly payments on their note. The bank ultimately disposed of the diner and the plaintiffs brought the present action for abuse of process. The trial court gave judgment to the debtors, awarding both compensatory and punitive damages.

On appeal, the court reversed and remanded, holding that regardless of whether the bank had waived the defaults in monthly payments, it still had the power under the second part of the acceleration clause to precipitate the maturity date if it deemed itself insecure. Under Section 1-208, the bank could deem itself insecure only if it did so in good faith, and the burden of proving bad faith was on the debtors. "Good faith" was defined by Section 1-201(19) as "honesty in fact." The court found that as a matter of law the bank had accelerated on a good faith belief that it was insecure and that a reversal was in order. The bank had effectively pursued its right to possession by judicial process, given it by Section 9-503.

The court pointed out, however, that the record did not contain an adequate account of the disposition of the diner. Under Section 9-504(3), the bank was required to dispose of it in a "commercially reasonable" manner. If it disposed of it in any other way, it was liable under Section 9-507 for whatever loss the plaintiffs could show resulted from improper disposition.

P.J.N.

ARTICLE 2: SALES

SECTION 2-103. Definitions and Index of Definitions

O'BRIEN v. ISAACS

203 N.E.2d 890 (Ill. 1965)

Annotated under Section 2-106, infra.

SECTION 2-104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency"

ASSOCIATED HARDWARE SUPPLY CO. v. BIG WHEEL DISTRIB. CO.

236 F. Supp. 879 (W.D. Pa. 1965)

Annotated under Section 1-205, supra.

SECTION 2-106. Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation"

O'BRIEN v. ISAACS

203 N.E.2d 890 (Ill. 1965)

This action was brought to test the constitutionality of Section 42 of the Illinois Retail Sales Regulations which taxed payments received by Illinois florists for flowers delivered in Illinois pursuant to telegraphic instructions from out of state florists. Section 42 is an administrative regulation formulated by the Director of Revenue under authority of Chapter 120 of the Illinois Revenue Statute. This statute expressly exempts from the tax goods sold for the purpose of resale. The plaintiff's first argument was that the Illinois florist does not sell the goods at all, that he is not a seller or agent but an independent contractor or bailee of the out of state florist. His second argument was that, even if he does sell the goods, he sells them for resale. That is to say, he sells them to the out of state florist who resells them to the out of state customer. His third contention was that the tax places an unconstitutional burden on interstate commerce.

In affirming a judgment in favor of the Director of Revenue, the Supreme Court of Illinois held that the delivery by the Illinois florist and the consideration tendered him constituted a present sale of the flowers under Sections 2-106(1), 2-401(1) and 2-206(1)(b) of the Uniform Commercial Code, and that the Illinois florist was thus a seller under Section 2-103(1)(d). Title passed in Illinois under Section 2-401(2) when the seller completed his performance with reference to the physical delivery of the goods. The court next rejected the plaintiff's contention that the sale was transacted with the out of state florist for the purpose of resale. The out of state florist performed only a service similar to that performed by an airline booking a customer's passage on another airline. The out of state customer was the sole buyer. Finally, the court held that the tax was not violative of the commerce clause. Two United States Supreme Court cases holding that a tax on a sale to an out of state customer who comes into the state to receive the goods for use out of state, were cited.

M.L.C.

SECTION 2-201. Formal Requirements; Statute of Frauds

JULIAN C. COHEN SALVAGE CORP. v. EASTERN ELEC. SALES CO.

206 A.2d 331 (Pa. Super. 1965)

In the latter part of June, the defendant's employee came to the plaintiff's plant and after examining the cable in question, signed a sales order which contained the name of the plaintiff, the name of the shipper, the quantity, description and weight of the cable, and notations of the defendant's order number and the plaintiff's sales number. The sales order did not contain the price. Over 36,000 pounds of cable was then shipped to the defendant's plant where it was run off onto the defendant's reels, taken by the defendant's employees and placed in the defendant's warehouse, where it still remains. Approximately one month later, after having received a letter demanding payment from plaintiff's counsel, the defendant notified the plaintiff that it was rejecting the cable. The plaintiff sued for the price which was more than $7,000. The defendant argued, first, that there was no contract, and second, that if there were one, it ran afoul of the statute of frauds. At trial, the defendant's president testified that on June 29, his company sent a purchase order to the plaintiff, which contained a statement that the defendant would pay only for the cable it could use. The trial court ruled that a contract existed and that it was enforceable.

On appeal, affirmed. The sales order satisfied Section 2-201(1)(a), the statute of frauds. The omission of the price was not fatal since, by the very terms of the section, "a writing is not insufficient because it omits a term agreed upon." The price could be proved by parol. The purchase order sent by the defendant was found to be improperly addressed; thus there was no presumption that it was received and it was of little probative value. Even if the sales order did not satisfy subsection (1), the cable had been received and accepted by the defendant; therefore, under subsection (3)(c), the contract was enforceable. To the defendant's argument that it had not accepted the goods but rejected them "shortly after the cable was received," the court answered that this was not credible; there was no rejection in writing, the defendant still possessed the goods, and there was never any offer or attempt to return them. Having failed to reject in the manner prescribed by Section 2-602, the defendant accepted under Section 2-606.

COMMENT

The court's statements on the question of rejection are confusing. At one point it states that notice of rejection was given approximately one month after the cable was received; at another, that the defendant's testimony that he gave the plaintiff notice of rejection "shortly after the cable was received" was not credible. Whether the court considered the misaddressed purchase order on the question of rejection is unclear. Assuming that the defendant did give notice approximately one month after delivery—the notice does not, apparently, have to be formal—the question would normally be whether such notice was given within a reasonable time. Section 2-602(1). Under the facts of the present case, notice of rejection a month after delivery probably did not come within a reasonable time.

It would have availed the defendant nothing to argue that it had revoked its acceptance within a reasonable time under Section 2-608. Once having received *and accepted* the cable, it would be precluded from arguing the statute of frauds, under Section 2-201(3)(c).

G.E.F.

ASSOCIATED HARDWARE SUPPLY CO. v. BIG WHEEL DISTRIB. CO.
236 F. Supp. 879 (W.D. Pa. 1965)
Annotated under Section 1-205, supra.

SECTION 2-202. Final Written Expression; Parol or Extrinsic Evidence

ASSOCIATED HARDWARE SUPPLY CO. v. BIG WHEEL DISTRIB. CO.
236 F. Supp. 879 (W.D. Pa. 1965)
Annotated under Section 1-205, supra.

SECTION 2-204. Formation in General

ASSOCIATED HARDWARE SUPPLY CO. v. BIG WHEEL DISTRIB. CO.
236 F. Supp. 879 (W.D. Pa. 1965)
Annotated under Section 1-205, supra.

SECTION 2-206. Offer and Acceptance in Formation of Contract

ASSOCIATED HARDWARE SUPPLY CO. v. BIG WHEEL DISTRIB. CO.
236 F. Supp. 879 (W.D. Pa. 1965)
Annotated under Section 1-205, supra.

O'BRIEN v. ISAACS
203 N.E.2d 890 (Ill. 1965)
Annotated under Section 2-106, supra.

SECTION 2-208. Course of Performance or Practical Construction

ASSOCIATED HARDWARE SUPPLY CO. v. BIG WHEEL DISTRIB. CO.
236 F. Supp. 879 (W.D. Pa. 1965)
Annotated under Section 1-205, supra.

SECTION 2-315. Implied Warranty; Fitness for Particular Purpose

DELTA OXYGEN CO. v. SCOTT
383 S.W.2d 885 (Ark. 1964)
Annotated under Section 2-318, infra.

SECTION 2-318. Third Party Beneficiaries of Warranties Express or Implied

CHAIRALUCE v. STANLEY WARNER MANAGEMENT CORP.
236 F. Supp. 385 (D. Conn. 1964)

The plaintiff fell on a stairway in a theater owned by the defendant Stanley Corp. When the accident occurred, the plaintiff was wearing for the first time a pair of new shoes which had been manufactured by the defendant Wise Corp. and had been purchased by the plaintiff from the defendant Spiegel Corp., a mail-order store. The plaintiff brought an action for negligence against Stanley, Wise, and Spiegel and an action for breach of warranty against Wise and Spiegel. With respect to the action for breach of warranty against Wise, the manufacturer, the plaintiff simply alleged that there was a breach of "the warranties and duties which were owed to the plaintiff under the laws of the State of Connecticut." Wise moved for an order dismissing this action for failure to state a claim upon which relief could be granted. Specifically, Wise contended that absent allegations of representations through advertising by which the plaintiff had been misled, lack of privity between manufacturer and ultimate consumer barred an action for breach of implied warranty.

In denying the motion, the court held that lack of privity between the plaintiff and Wise was no defense to the plaintiff's action for breach of implied warranty against Wise. First, the obvious trend of Connecticut law was toward the complete demise of the defense of lack of privity. The pre-Code case of *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961), had abolished the defense in actions for breach of express warranty. In enacting

Section 2-318 of the Connecticut Uniform Commercial Code, the legislature had abolished the defense as to three classes of persons. The case of *Simpson v. Powered Prods., Inc.*, 24 Conn. Super. 409 (1963), had even extended warranty protection to the *lessee* of the original purchaser. Second, sound public policy required that the defense be abolished in all actions for breach of warranty against the manufacturer where the plaintiff used the manufacturer's product in a way in which it was intended and was injured as a result of a defect of which he was not aware.

COMMENT

See the Comment to *Delta Oxygen Co. v. Scott*, immediately infra.

R.G.K.

DELTA OXYGEN CO. V. SCOTT
383 S.W.2d 885 (Ark. 1964)

The plaintiff, employed as a welder by his brother, was using cylinders of oxygen which his brother had purchased from the defendant, an oxygen manufacturer. In preparing to use the second of these cylinders, the plaintiff momentarily turned on and off the valve of the cylinder, allowing a small amount of the oxygen to escape. He then attached to the valve his own regulator, which was ultimately connected to an acetylene torch. When the plaintiff turned on the oxygen valve again, an explosion occurred in the regulator. The plaintiff was seriously burned and brought action against the defendant for negligence and breach of implied warranty.

In reversing a judgment for the plaintiff and remanding for a new trial, the court held, with respect to the warranty count, first, that there was no substantial evidence of breach of an implied warranty of fitness for a particular purpose under Section 2-315. The oxygen was supposed to increase the heat of the flame, and there was no showing that the oxygen failed in this purpose. Second, the absence of privity between the plaintiff and the defendant was no defense to the action for breach of implied warranty. Though the case of *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S.W. 288 (1905), had upheld the defense of lack of privity in breach of warranty actions, the legislature had since that time abolished the defense as to the family, household, and guests of the original purchaser by enacting Section 2-318 of the Uniform Commercial Code and there was no sound reason why warranty protection should not also be extended to the plaintiff, an employee and servant of the original purchaser, who was using the product in the course of his employment. Furthermore, the *Nelson* case was factually distinguishable, involving a subpurchaser, not the employee of a purchaser.

In its eighth footnote, the court noted that in view of its holding, it was unnecessary to discuss the plaintiff's contention that he was "in the family of" his brother, the original purchaser, and thus immune, under Section 2-318, from the defense of lack of privity.

COMMENT

1. Section 2-318 extends to members of the purchaser's family and household and to guests in his home the same warranty protection which the

purchaser himself receives by virtue of his contract of sale. However, Official Comment 3 to Section 2-318 points out that as to all other third persons, including subpurchasers, the Code is neutral and the developing case law controlling. Thus Section 2-318 did not require in *Delta Oxygen* the extension of warranty protection to an employee of the purchaser, nor did it require in *Chairaluce* the extension of such protection to a subpurchaser. But the courts in both cases felt that Section 2-318 significantly reflected the trend against the rule of privity and presaged further breakdown of the rule by the courts.

2. From a common starting-point, the *Delta Oxygen* and *Chairaluce* cases do not proceed the same distance. The court in *Delta Oxygen* strongly emphasized that its holding was very narrow, breaking down the privity requirement only as to employees of the purchaser. The *Nelson* case, upholding the doctrine of privity in subpurchaser situations, was not overturned but distinguished. In contrast, the court in the *Chairaluce* case completely abolished the privity defense in actions for breach of warranty by a subpurchaser against a manufacturer.

See *Chairaluce v. Stanley Warner Management Corp.*, directly supra.

R.G.K.

SECTION 2-401. Passing of Title; Reservation for Security; Limited Application of This Section

PARK COUNTY IMPLEMENT CO. v. CRAIG
397 P.2d 800 (Wyo. 1964)

The defendant, a resident of Wyoming, placed an order with the plaintiff in Cody, Wyoming, for a certain chassis-cab combination. The plaintiff informed the defendant that it did not have the vehicle on hand, but that one was available at the International Company in Billings, Montana. The defendant took delivery of the vehicle at Billings, but did not receive a statement of origin, a Montana certificate of title, or any evidence of title from the International Company. The defendant then brought the vehicle to Cody, Wyoming. Several days later, while the defendant was installing a hoist and a dump bed on the vehicle, a fire destroyed it. During the period in which the defendant had had possession of the vehicle, he had not received a statement of origin or a Wyoming certificate of title from the plaintiff. The plaintiff brought an action against the defendant for the purchase price of the vehicle. In an effort to escape applicability of the Wyoming Uniform Commercial Code, under which the question of title was irrelevant, the defendant made three contentions: (1) that Montana law was applicable and under the Montana motor vehicle code issuance of a certificate of ownership was necessary to a completed sale; (2) that even if Wyoming law applied, issuance of a certificate of title was necessary to a completed sale under the Wyoming motor vehicle code; and (3) that the Wyoming Uniform Commercial Code did not apply since a motor vehicle could not be classified as "goods."

In reversing a summary judgment for the defendant and ordering summary judgment to be entered for the plaintiff, the court held, first, that the Wyoming Uniform Commercial Code was applicable. A motor vehicle did constitute "goods" to which the Code was applicable, and Section 1-105, the conflict-of-laws provision, required the application of Wyoming, not Montana, law. The delivery at Billings, Montana, constituted a minor part of the transaction; the transaction as a whole bore the necessary "appropriate relation" to Wyoming. Second, since the Wyoming Commercial Code was applicable, the defendant was liable for the contract price of the vehicle under Section 2-607(1), having accepted it under Section 2-606(1). The fact that the plaintiff may not have had legal title to the truck because there was no issuance of a certificate of title was irrelevant under Section 2-401.

COMMENT

1. Where a transaction upon which an action is brought in a Code state bears some relation to the Code state and other jurisdictions and where the parties have failed to agree as to which state law should govern, the relevant question is: does the transaction bear an *appropriate* relation to the Code state? If it does, then the law of the Code state applies, and the answer in each case is left for judicial decision. As Official Comment 3 to Section 1-105 indicates, application of the Code "may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries." However, this list does not purport to be all-inclusive. The court in the instant case appears to have relied on the "totality of the transaction" guide-line, which was suggested by Judge Herbert F. Goodrich, Chairman of the Editorial Board for the Uniform Commercial Code, in *Conflicts Niceties and Commercial Necessities*, 1952 Wis. L. Rev. 199, 206. Compare *Atlas Credit Corp. v. Dolbow*, 193 Pa. Super. 649, 165 A.2d 704 (1960), and especially *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

2. The court correctly held that the issuance of a certificate of title was irrelevant to the question of whether a completed sale had been made under the Code. Under Section 2-401, the rights and obligations of the parties do not depend on title. *Accord, Semple v. State Farm Mut. Auto. Ins. Co.*, 215 F. Supp. 645 (E.D. Pa. 1963). However, the court failed to cite Sections 2-509, 2-510 and 2-709 which specifically deal with risk of loss. Section 2-509(3) provides ". . . the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant. . . ," and Section 2-709(1)(a) provides "When the buyer fails to pay the price as it becomes due the seller may recover . . . the price of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer. . . ."

R.G.K.

O'Brien v. Isaacs
203 N.E.2d 890 (Ill. 1965)
Annotated under Section 2-106, supra.

SECTION 2-509. Risk of Loss in the Absence of Breach

PARK COUNTY IMPLEMENT CO. v. CRAIG
397 P.2d 800 (Wyo. 1964)
Annotated under Section 2-401, supra.

SECTION 2-602. Manner and Effect of Rightful Rejection

JULIAN C. COHEN SALVAGE CORP. v. EASTERN ELEC. SALES CO.
206 A.2d 331 (Pa. Super. 1965)
Annotated under Section 2-201, supra.

SECTION 2-606. What Constitutes Acceptance of Goods

JULIAN C. COHEN SALVAGE CORP. v. EASTERN ELEC. SALES CO.
206 A.2d 331 (Pa. Super. 1965)
Annotated under Section 2-201, supra.

PARK COUNTY IMPLEMENT CO. v. CRAIG
397 P.2d 800 (Wyo. 1964)
Annotated under Section 2-401, supra.

SECTION 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over

G. VANDENBERG & SONS, N.V. v. SITER
204 Pa. Super 392, 204 A.2d 494 (1964)

The defendant purchased flower bulbs from the plaintiff, a Holland grower. The contract stated that the "seller warrants the goods to be sound and healthy at the time of shipment but does not otherwise warrant flowering or other planting, growing or forcing results. . . . All claims hereunder shall be deemed waived unless presented within eight (8) days after receipt of the goods." A month after the bulbs were delivered a defect was discovered in some of the bulbs, which were destroyed. The defect in the rest of the bulbs was not discovered until many months afterwards at a time when the trade customarily inspected its bulbs. At this time notice of breach was given. When the defendant refused to pay further on the contract, the plaintiff brought this action for the balance. The defendant counterclaimed for damages for breach of express and implied warranties. The trial court struck from the record all testimony offered by the defendant to show breach of warranty, so far as it related to the condition of the bulbs more than eight days after delivery.

On appeal, the court found that the plaintiff expressly warranted that the bulbs would be sound and healthy at the time of shipment and that this express warranty was not inconsistent with and did not exclude the implied warranties of merchantability and fitness for a particular purpose. The defendant was required, however, to give notice of breach and notice of revocation within a reasonable time after discovering the breach under Sections 2-607 and 2-608. Section 1-204 permitted the parties to fix in their contract a reasonable time for giving such notice so long as the time agreed upon was reasonable; but where, as here, as to latent defects, the agreed upon time was manifestly unreasonable, it was for the jury to determine whether the plaintiff had given notice within a reasonable time. The lower court erred in striking defendant's offer of proof and much of its evidence. A new trial was required. Consequently, judgments for the plaintiff on the claim and counterclaim were reversed.

G.E.F.

PARK COUNTY IMPLEMENT CO. v. CRAIG
397 P.2d 800 (Wyo. 1964)
Annotated under Section 2-401, supra.

SECTION 2-608. Revocation of Acceptance in Whole or in Part

G. VANDENBERG & SONS, N.V. v. SITER
204 Pa. Super. 392, 204 A.2d 494 (1964)
Annotated under Section 2-607, supra.

SECTION 2-709. Action for the Price

PARK COUNTY IMPLEMENT CO. v. CRAIG
397 P.2d 800 (Wyo. 1964)
Annotated under Section 2-401, supra.

SECTION 2-718. Liquidation or Limitation of Damages; Deposits

BETHLEHEM STEEL CO. v. CITY OF CHICAGO
234 F. Supp. 726 (N.D. Ill. 1964)

Bethlehem Steel Co. contracted to complete structural steel work on a Chicago superhighway within a certain period of time, the contract expressly stating that time was of the essence. "[L]iquidated damages, not a penalty" were set at $1000 for each day of delay, "to partially cover losses and expenses to the City." Recovery was to be made "by deducting the amount thereof out of any moneys due or that may become due the Contractor." Despite Bethlehem's own 52-day tardy performance, the highway was completed on time by the many contractors involved. When the City withheld $52,000 that would otherwise have been due it, Bethlehem sued, claiming that since the highway was completed on time, the City of Chicago had sustained no loss and could not withhold the funds. The court held that the City could retain the $52,000, the consensus being in favor of upholding and enforcing provisions for liquidated damages "*where it was reasonable at the time of making the contract* to so contract." [Emphasis court's.] The fact that no actual damages occurred was irrelevant. In coming to this conclusion the court quoted Section 2-718 which codifies the generally accepted rule.

G.E.F.

SECTION 2-725. Statute of Limitations in Contracts for Sale

NATALE v. UPJOHN CO.
236 F. Supp. 37 (D. Del. 1964)

In April of 1960, upon advice of her physician, the plaintiff was administered drugs in Pennsylvania manufactured by the defendant. Shortly thereafter she suffered a blurring of vision which she continued to suffer when she brought this action in Delaware for breach of warranty, just short of four years later. The parties assumed that the cause of action arose in Pennsylvania. The defendant-manufacturer moved to dismiss on the ground that the Delaware "borrowing statute" was applicable, that that statute prescribed the use of the shorter of the Delaware or out-of-state statute of limitations when an action was brought by a non-resident on an out-of-state cause of action, and that the Delaware statute of limitations had run. The plaintiff contended that the "borrowing statute" applied to out-of-state statutes of limitations which were procedural only and not to those which, like Section 2-725 of the Pennsylvania Uniform Commercial Code, were substantive, *i.e.*, integrated with, or built into, a statute creating a right or liability. The court, however, without ruling on the validity of the plaintiff's supposition, held that Section 2-725 was not substantive but procedural. It reasoned, first, that the few cases in which a period of limitations had been held a part of the right itself involved statutes which created a *new* right or *new* liability and at the same time limited the time within which the new right could be enforced. The Pennsylvania legislature, however, did not create a new right or liability since actions for breach of warranty were allowed in Pennsylvania both under the common law and the Uniform Sales Act; they were not newly created by the Uniform Commercial Code. Second, the fact that the four-year period of limitations was applicable to "breach of *any* contract for sale" seemed to mean that the Pennsylvania legislature did not give special consideration to the impact of the period of limitations upon the particular right involved as distinguished from the other rights to which the article is also applicable. Third, it was doubtful that the Pennsylvania court would deem Section 2-725 a substantive statute of limitations in view of the fact that it had acknowledged that rights under the Pennsylvania Wrongful Death Act were unknown before passage but rejected the argument that the newness of the right caused the statute of limitations to be regarded as anything but procedural.

G.E.F.