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## Effects of Uniform Commercial Code on Michigan Sales Law

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# Effects of Uniform Commercial Code on Michigan Sales Law

By ROY L. STEINHEIMER, JR.

**A**RTICLE 2 of the code treats the law of sales under the following headings: (1) form, formation and readjustment of contract; (2) general obligation and construction of contract; (3) title, creditors and good faith purchasers; (4) performance; (5) breach, repudiation and excuse; (6) remedies.

## FORMATION OF CONTRACT

This part of the code deals with the statute of frauds, parol evidence rule and problems of formation of the contract of sale.

Section 2-201 of the code would work several changes in the statute of frauds as to sales contracts. The dollar amount necessary to bring the statute of frauds into operation would be raised from \$100 to \$500. In a transaction "between merchants,"<sup>1</sup> the seller or buyer could become legally bound by a contract of sale without having signed a written contract. This would occur, for example, where merchant seller sends a written confirmation of an oral contract of sale to merchant buyer who, knowing the contents of the confirmation, fails to give written notice of his objection to the contents of the confirmation within ten days. In these circumstances merchant buyer would be bound by the terms stated in the confirmation despite the fact that he has not signed any written agreement. The statute of frauds would not protect a party against whom en-

1. In a number of situations the code places a higher degree of responsibility and obligation on "merchant" sellers and buyers than non-merchants. "Merchant" is defined in §2-104(1).



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forcement of a contract of sale was sought if he admits "in his pleading, testimony or otherwise in court that a contract of sale was made."<sup>2</sup> The code would also change the technique by which part performance or payment would take an oral contract of sale out of the statute of frauds. Section 4 of the Uniform Sales Act<sup>3</sup> provides that

2. Cf. *Starkweather v. Bentley*, 247 Mich. 503, 226 N.W. 251 (1929).

3. Hereinafter referred to as "USA" Mich. Comp. Laws (1948) §440.4, Mich. Stat. Ann. (1959) §19.244.

part performance or payment makes the entire oral contract enforceable. The code renders enforceable only that portion of the oral contract to which the partial performance or payment can be apportioned.

In Michigan, parol evidence is admitted to explain the terms of a written contract of sale intended by the parties as a final expression of their agreement<sup>4</sup> only when such terms are ambiguous.<sup>5</sup> Under section 2-202 of the code a finding of ambiguity in the writing would not be necessary to the admission of parol evidence. Unambiguous terms of a written contract of sale could be "explained or supplemented" by parol evidence of a "course of dealing," "usage of trade" or "course of performance." Thus the code would relax, to some extent, the operation of the parol evidence rule.

The code contains a number of important provisions relating to the formation of effective contracts of sale. The Michigan court refuses to enforce contracts of sale which are rendered indefinite for lack of an essential term, e.g., quantity and quality,<sup>6</sup> price,<sup>7</sup> payment,<sup>8</sup> manner and place of delivery.<sup>9</sup>

4. *Aldine Press v. Estes*, 75 Mich. 100, 42 N.W. 67 (1889).

5. See, for example, *Sheldon-Seatz, Inc. v. Coles*, 319 Mich. 401, 29 N.W. 2d 832 (1947); *Montana Flour Mills Co. v. Lawrence*, 224 Mich. 21, 194 N.W. 489 (1923); *Menominee Lumber & Cedar Co. v. Thomson*, 309 Mich. 263, 15 N.W. 2d 155 (1944); *National Cash Register v. Verbrugge*, 263 Mich. 243, 248 N.W. 608 (1933); *Saginaw Milling Co. v. Schram*, 186 Mich. 52, 152 N.W. 945 (1915); *Fort Pitt Malleable Iron Co. v. Detroit Steel Products Co.*, 260 Mich. 683, 245 N.W. 546 (1932).

6. *Jordan v. Walker*, 154 Mich. 394, 117 N.W. 492 (1908); *Wheaton v. Cadillac Automobile*, 143 Mich. 21, 106 N.W. 399 (1906).

7. *Dayton v. Stone*, 111 Mich. 196, 69 N.W. 515 (1896).

8. *Whiteford v. Hitchcock*, 74 Mich. 208, 41 N.W. 898 (1889); *Foster v. Lumbermen's Mining Company*, 68 Mich. 188, 36 N.W. 171 (1888).

9. *Topliff v. McKendree*, 88 Mich. 148, 50 N.W. 109 (1891).

Under the code, fewer contracts of sale should fail for indefiniteness for "if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy," the contract of sale would not fail for indefiniteness even though one or more terms are left open.<sup>10</sup> The code supplies the terms left open so that the contract can be enforced.<sup>11</sup>

Under Michigan law shipment of non-conforming goods does not operate as an acceptance of an offer to buy goods.<sup>12</sup> Instead it operates as a counter-offer. Under the code shipment of non-conforming goods would constitute acceptance of the offer unless seller notifies buyer that the shipment is offered only as an accommodation to the buyer.<sup>13</sup> If such notice is given, the shipment would constitute a counter-offer. If not, shipment of the goods would create a contract between buyer and seller and buyer would be entitled to appropriate remedies for seller's failure to ship goods in conformity with the contract.

Section 2-207 of the code lays down some ground rules for the "battle of the forms" so often involved in sales situations. Buyer submits his order on one form. Seller confirms the order using another form containing additional or different terms. What is the contract, if any?<sup>14</sup> Under the code, seller's confirmation would normally constitute an acceptance of buyer's order despite the

10. §2-204(3).

11. §2-305 (price); §2-306 (quantity measured by output or requirements); 2-307 (mode of delivery); §2-308 (place of delivery); §2-309 (time for performance); §2-310 (credit terms); §2-311 (options in performance).

12. *Carrollton Acceptance Co. v. Ruggles Motor Truck Co.*, 253 Mich. 1, 234 N.W. 134 (1931).

13. §2-206(1)(6).

14. In Michigan the terms of the acceptance must correspond exactly with the terms of the offer if a contract of sale is to result. *Guyan Coal & Coke Co. v. Wholesale Coal Co.*, 229 Mich. 257, 201 N.W. 194 (1924); *Marshall Manufacturing Co. v. Berrien County Package Co.*, 269 Mich. 337, 257 N.W. 714 (1934).

additional or different terms in seller's confirmation. The additional terms would simply be construed as "proposals for addition to the contract."<sup>15</sup> Between merchants, however, the additional terms<sup>16</sup> could become a part of the contract rather than mere proposals for addition to the contract.

Section 2-209 of the code deals with modification or waiver of contract terms. Its provisions would effect one substantial change in Michigan law. Presently, oral modification of a written contract will be given effect even though the written contract contains a requirement that any modification of the contract must be in writing. Under the code oral modification of such a contract would not be possible unless the prohibition against oral modification appeared in a form supplied by a merchant and was not separately signed by buyer.

#### OBLIGATION AND CONSTRUCTION

Section 2-302 of the code provides that if a court finds as a matter of law that a contract or any clause thereof was unconscionable at the time it was made, the court may refuse to enforce the contract or the unconscionable clause. If it appears that the contract or any clause thereof may be unconscionable, the parties shall have the opportunity "to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." This provision provides a safety valve for the release of pressure on a court to reach a commercially sensible result through strained construction of contractual language or by stretching rules of law.<sup>17</sup>

15. The code is not explicit on what the status of different terms would be. Possibly they would operate as proposals to modify the contract which has been established by the confirmation.

16. Also, presumably, the different terms.

17. *Eames v. Eames*, 16 Mich. 348 (1868); *Briggs v. Withey*, 24 Mich. 136 (1871); *Dorrill v. Eaton*, 35 Mich. 301 (1877); *Ferguson v. Perry Coal Co.*, 213 Mich. 197, 181 N.W. 980 (1921).

Sections 2-304 through 2-311 provide rules for construction of contracts which leave certain performance terms open. Section 2-304 refines the provisions of sections 9 and 10 of the USA<sup>18</sup> regarding open price terms. Under the code, if the price is to be set by a third person or agency and such person or agency fails to set the price, the contract would be enforceable by either party at a reasonable price. In such circumstances, the contract would be unenforceable under present Michigan law.<sup>19</sup>

Section 2-305 would, for the first time, provide statutory rules for the construction of output, requirements and exclusive dealing contracts in Michigan.<sup>20</sup> Under output and requirements contracts, the code provides that quantity shall be determined by actual good faith output or requirements with two important limitations. First, if an estimate of output or requirements is stated in the contract, quantity shall not be unreasonably disproportionate to the estimate. Second, if no estimate is stated, the quantity may not be unreasonably disproportionate to "normal or otherwise comparable" prior output or requirements.<sup>21</sup> As to exclusive dealing con-

18. Mich. Comp. Laws (1948) §§440.9 and 440.10, Mich. Stat. Ann. (1959) §§19.249 and 19.250.

19. USA §10(1); *Louisville Soap Co. v. Taylor*, 279 F. 470 (CA 6, 1922); *Canadian National Railway Co. v. George M. Jones Co.*, 27 F. 2d 240 (CA 6, 1928).

20. Such contracts are presently enforceable in Michigan. **Output contracts**—*Bastian v. J. H. DuPrey Co.*, 261 Mich. 94, 245 N.W. 581 (1932); *Shepherd Hardwood Products Co. v. Gorham Brothers Co.*, 225 Mich. 457, 196 N.W. 362 (1923). **Requirements contracts**—*Menominee Lumber & Cedar Co. v. Thomson*, 309 Mich. 263, 15 N.W. 2d 155 (1944); *Boehme & Rauch Co. v. Lorimer*, 221 Mich. 372, 191 N.W. 8 (1922). **Exclusive dealing contracts**—*Hart Potato Growers Association v. Greiner*, 236 Mich. 638, 211 N.W. 45 (1926); *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich. 158, 136 N.W. 1113 (1912).

21. Cf., *F. B. Holmes & Co. v. City of Detroit*, 158 Mich. 137, 122 N.W. 506 (1909); *E. G. Dailey Co. v. Clark Can Co.*, 128 Mich. 591, 87 N.W. 761 (1901); *Helper v. MacKinnon Manufacturing Co.*, 138 Mich. 593, 101 N.W. 804 (1904).

tracts, the code would impose "an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."

Sections 2-307 and 2-308, which deal with open delivery terms, would work no significant change in Michigan law.

Section 2-309 of the code covers the accepted rule that if a contract specifies no time for performance, the law will imply an agreement to perform within a reasonable time.<sup>22</sup>

Section 2-310 of the code, like the USA,<sup>23</sup> supplies the time of payment for goods where the contract is silent on this item. Section 42 of the USA declares that "delivery" and payment shall be concurrent conditions. There is difficulty, however, in situations where delivery by seller to the carrier constitutes delivery to buyer. Michigan law is not clear as to whether payment is due upon delivery to the carrier or whether buyer's right of inspection should defer time for payment until the buyer receives the goods from the carrier and has had a reasonable opportunity to inspect.<sup>24</sup> The code relates time of payment to buyer's "receipt"<sup>25</sup> of the goods, rather than delivery, which should clear up this uncertainty.

Sections 2-312 through 2-318 of the code deal with the subject of warranties. Section 2-312 would replace section 13

of the USA<sup>26</sup> which deals with warranties of title. The code would eliminate the warranty of quiet possession. It would add a warranty against rightful claims by third persons for infringement of patent or trademark rights. This warranty against infringement would arise only in sales of goods by a "merchant regularly dealing in goods of the kind." The warranty would not arise where buyer furnished specifications for the goods. Indeed, in such a situation buyer would be required to "hold seller harmless" from any claims of infringement arising out of following such specifications.

Section 2-313 deals with express warranties.<sup>27</sup> Under the code the warranties arising out of sales by description<sup>28</sup> and sample<sup>29</sup> would become express rather than implied warranties. This change would be of significance in connection with the problem of disclaimer of such warranties. The warranty in sales by sample under the code would require that "the whole of the goods shall conform to sample" rather than just the "bulk" of the goods.

Section 2-314 replaces section 15(2) of the USA<sup>30</sup> which deals with the implied warranty of merchantability. Under the code, the warranty of merchantability would arise out of any sale by a merchant—not just in sales "by description."<sup>31</sup> The code specifically provides that sale of food or drink for consumption on the premises gives rise to the warranty of merchantability.<sup>32</sup> Unlike

22. *Sterling Wheelbarrow Co. v. Great Lakes Foundry Co.*, 225 Mich. 395, 196 N.W. 381 (1923); *Brenner v. Feinburg*, 218 Mich. 92, 187 N.W. 274 (1922).

23. USA §42 [Mich. Comp. Laws (1948) §440.42, Mich. Stat. Ann. (1959) §19.282].

24. See *Struthers-Ziegler Co. v. Farmers Mfg. Co.*, 233 Mich. 298, 206 N.W. 331 (1925); *Tri-State Milling Co. v. Breisch*, 145 Mich. 232, 108 N.W. 657 (1906); *Dow Chemical Co. v. Detroit Chemical Works*, 208 Mich. 157, 175 N.W. 269 (1919); *Thick v. Detroit, Utica & Rome Ry.*, 137 Mich. 708, 101 N.W. 64 (1904).

25. "Receipt" of goods means taking physical possession of them." §2-103(1)(c).

26. Mich. Comp. Laws (1948) §440.13, Mich. Stat. Ann. (1959) §19.253.

27. Cf., USA §12 [Mich. Comp. Laws (1948) §440.12, Mich. Stat. Ann. (1959) §19.252].

28. Cf., USA §14 [Mich. Comp. Laws (1948) §440.14, Mich. Stat. Ann. (1959) §19.254].

29. Cf., USA §16 [Mich. Comp. Laws (1948) §440.16, Mich. Stat. Ann. (1959) §19.256].

30. Mich. Comp. Laws (1948) §440.15, Mich. Stat. Ann. (1959) §19.255.

31. Cf., *Salzman v. Maldaver*, 315 Mich. 403, 24 N.W. 2d 161 (1946).

32. Accord: *Kenower v. Hotels Statler Co., Inc.*, 124 F. 2d 658 (CA 6, 1942).

the USA, the code states in detail the qualities which goods must possess in order to be merchantable.<sup>33</sup>

Section 2-315 makes one important change in the law relating to the implied warranty of fitness for purpose intended.<sup>34</sup> The patent or trade-name exception would be eliminated as such.<sup>35</sup> Under the code, purchase by patent or trade-name would simply be a fact to be considered in determining whether the buyer actually relied on the seller's skill and judgment.

Section 2-316 reworks the law relating to disclaimer of warranties in an effort to protect buyers from unexpected and unbargained for disclaimers.<sup>36</sup> For example, this section provides that a disclaimer of the warranty of merchantability must expressly refer to merchantability. Any writing disclaiming the warranties of merchantability and fitness for purpose intended must be "conspicuous."

Section 2-317 deals with cumulation and conflict of warranties. No substantial change in Michigan law would be involved.

The code, like the USA, does not deal specifically with the problem of privity except in one limited area. Under section 2-318 of the code, a seller's warranty would inure to the benefit of members of buyer's family or household

and guests in the buyer's home.<sup>37</sup> Such liability could not be limited or disclaimed by seller.

Sections 2-319 through 2-324 of the code describe in detail the legal consequences flowing from delivery terms such as F.O.B., F.A.S., C.I.F., C. & F., etc. This statutory blueprint should be helpful in an area where there is presently little law to guide us.<sup>38</sup>

Sections 2-326 and 2-327 of the code deal with "sale or return" and "sale on approval" transactions. The functional distinction between the two types of transactions contemplated by the code<sup>39</sup> is more satisfactory than the present title test under the USA.<sup>40</sup>

#### TITLE AND GOOD FAITH PURCHASERS

Section 2-401 of the code would de-emphasize the significance of the troublesome title concept in the law of sales. Under the USA, risk of loss, insurable interest, liability for price, rights of creditors and other important aspects of sale transactions are tied directly to the location of title to the goods. Section 2-401 of the code provides that "the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties" are normally to be determined "irrespective of title to the goods." For example, title would play no part in deciding questions of risk of loss,<sup>41</sup> insurable interest,<sup>42</sup> liability for price,<sup>43</sup>

33. The following cases discuss the meaning to be given to the concept of merchantability: *Cool v. Fighter*, 239 Mich. 224, 214 N.W. 310 (1927); *Outhwaite v. A. B. Knowlson Co.*, 259 Mich. 224, 242 N.W. 895 (1932); *Egbert v. Barrett*, 223 Mich. 218, 193 N.W. 837 (1923).

34. USA §15(1) [Mich. Comp. Laws (1948) §440.15, Mich. Stat. Ann. (1959) §19.255].

35. As to operation of this exception, see *Outhwaite v. A. B. Knowlson Co.*, 259 Mich. 224, 242 N.W. 895 (1932); *Wade v. Chariot Trailer Co.*, 331 Mich. 576, 50 N.W. 2d 162 (1951).

36. Cf., USA §71 [Mich. Comp. Laws (1948) §440.71, Mich. Stat. Ann. (1959) §19.311].

37. Cf., *Paull v. McBride*, 273 Mich. 661, 263 N.W. 877 (1935); *Camden Fire Insurance Co. v. Peterman*, 278 Mich. 615, 270 N.W. 807 (1937); *Curby v. Mastenbrook*, 288 Mich. 676, 286 N.W. 123 (1939).

38. USA §19(4) and (5) [Mich. Comp. Laws (1948) §440.19, Mich. Stat. Ann. (1959) §19.259]. *Germain v. Loud*, 189 Mich. 38, 155 N.W. 373 (1915).

39. Under the code, where buyer has a right to return the goods, the transaction is a sale on approval if the goods were delivered primarily for use and a sale or return if the goods were delivered primarily for resale.

40. USA §19(3)(1) [Mich. Comp. Laws (1948) §440.19, Mich. Stat. Ann. (1959) §19.259].

41. See §§2-509 and 2-510.

42. See §2-501.

43. See §2-709.

recovery against third persons for injury to the goods,<sup>44</sup> creditors rights in certain situations<sup>45</sup> and recovery of the goods.<sup>46</sup> On the other hand, the title provisions of section 2-401, which follow a pattern similar to that of section 19 of the USA,<sup>47</sup> would be operative on questions concerning the rights of purchasers, donees, specific lienors and creditors,<sup>48</sup> determination of when a "sale" occurs,<sup>49</sup> applicability of homestead exemptions,<sup>50</sup> application of tax statutes and statutes regulating sale of certain types of goods,<sup>51</sup> etc.

The code would have little effect on rights of unsecured creditors of buyer and seller as to goods which are the subject of a sale. Section 2-402 does, however, have a built-in conflict of laws rule which makes the fraudulent conveyancing law of the state where the goods are situated controlling.

Section 2-403 of the code, like section 24 of the USA,<sup>52</sup> empowers a person with voidable title to transfer title to a good faith purchaser for value. The code explicitly provides that the title obtained by an imposter, through larceny by trick, through giving of a bad check or in a frustrated "cash sale" transaction is a voidable title to which this doctrine shall apply. The code also provides that a merchant can transfer to a buyer in ordinary course of trade title to any goods entrusted to his possession despite the fact that the goods were entrusted to him by the owner for the limited purpose of repair, safe-keeping, etc.

44. See §2-722.

45. See §§2-402 and 2-326.

46. See §§2-502, 2-702 and 2-716.

47. Mich. Comp. Laws (1948) §440.19, Mich. Stat. Ann. (1959) §19.259.

48. See §2-403.

49. See §2-106(1).

50. See *Roach-Montgomery v. Smith*, 263 Mich. 153 (1933).

51. See, for example, *Goebel Brewing Co. v. State Board of Tax Administration*, 306 Mich. 222, 10 N.W. 2d 835 (1943).

52. Mich. Comp. Laws (1948) §440.24, Mich. Stat. Ann. (1959) §19.264.

## PERFORMANCE

Much of part 5 of the code dealing with problems of performance by parties to the sales contract would simply tidy up areas already covered by the USA. Such is the case with respect to buyer's right to goods on seller's insolvency,<sup>53</sup> manner of seller's tender of delivery,<sup>54</sup> effect of seller's tender of delivery,<sup>55</sup> seller's obligations respecting shipment<sup>56</sup> and his right to reserve a security interest in the goods during shipment,<sup>57</sup> buyer's right of inspection<sup>58</sup> and tender of payment by buyer.<sup>59</sup>

In some respects, however, part 5 would bring changes and innovations to Michigan law. Section 2-501 substitutes the concept of "identification" of goods to the contract of sale for that of "appropriation."<sup>60</sup> It also covers in detail the situations in which buyer and seller shall be deemed to have in "insurable interest" in the goods.

Sections 2-509 and 2-510 establish the rules for allocation of risk of loss as between buyer and seller. The allocation of risk would no longer be dependent on title<sup>61</sup> to the goods. Instead, risk of loss is allocated functionally according to considerations revolving around whether either party was in breach of the contract when the loss occurred.

Section 2-506 spells out in detail the rights of a financing agency handling documentary drafts relating to goods shipped under a contract of sale.

Section 2-508 introduces the concept of the right of a seller to "cure" an improper tender or delivery of goods. This is a departure from traditional the-

53. §2-502.

54. §2-503.

55. §2-507.

56. §2-504.

57. §2-505.

58. §§2-512 and 2-513.

59. §2-511.

60. See USA §19(4) [Mich. Comp. Laws (1948) §440.19, Mich. Stat. Ann. (1959) §19.259].

61. USA §22 [Mich. Comp. Laws (1948) §440.22, Mich. Stat. Ann. (1959) §19.262].



ories of strict performance of commercial contracts. Under this concept seller could cure any defective tender or delivery if (1) the tender was rejected for non-conformity of the goods to the contract, (2) time for delivery under the contract has not expired, (3) seller reasonably notifies buyer of his intention to cure the defective tender and (4) cure is actually effected within the time for delivery under the contract. Seller would also have a right to cure a non-conforming tender if (1) he had reasonable grounds to believe that the non-conforming tender would be acceptable to buyer, with or without a money allowance, (2) seasonable notice of intention to cure is given to buyer and (3) a conforming tender is made within a reasonable time.<sup>62</sup>

Section 2-515 would provide techniques for obtaining and preserving evidence of conformity and condition of goods when a dispute arises under the contract of sale. Discovery techniques under this section would be considerably broader and simpler than any now available in Michigan.<sup>63</sup>

#### BREACH, REPUDIATION, EXCUSE

Section 2-601 of the code would give buyer greater flexibility with respect to rejection of non-conforming tenders. Under section 44 of the USA<sup>64</sup> partial acceptance or rejection is permitted only where (1) more than the quantity of goods contracted for is delivered<sup>65</sup> or (2) non-conforming goods are mixed with goods of the description contracted for.<sup>66</sup> In the first situation, buyer must reject all of the goods or accept the

quantity contracted for, rejecting the excess. In the second situation, buyer must reject all of the goods or accept all of the conforming goods, and reject the rest. The code would allow buyer to accept "any commercial unit or units"<sup>67</sup> and reject the rest. Thus in the case of over-shipment, buyer could accept less or more commercial units than the quantity contracted for or in the case of non-conforming goods, could accept fewer conforming commercial units than were contracted for.

The code explicitly covers the question of buyer's rights with respect to goods which he has rightfully rejected. The USA is silent on this problem and any action taken by buyer with respect to the goods after rejection is fraught with danger. Section 2-604 of the code provides that in the absence of instructions from seller, buyer may, after rejection, store the goods, reship them to seller or resell them for seller's account without the danger of such action being regarded as acceptance or conversion.<sup>68</sup>

Under Michigan decisions there is no obligation on buyer to specify the particular basis for his rejection of goods.<sup>69</sup> Under section 2-605 of the code, buyer would be required to specify defects discernible on inspection when rejecting goods if seller could have cured<sup>70</sup> the defect.

67. §2-105(6) defines "commercial unit" as a unit of goods which "by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole."

68. A merchant buyer would be required under §2-603 to resell for seller's account if the goods were perishable or threatened "to decline in value speedily."

69. *Providence Jewelry Co. v. Bailey*, 159 Mich. 285, 123 N.W. 1117 (1909); *Ginn v. W. C. Clark Co.*, 143 Mich. 84, 106 N.W. 867 (1906).

70. The "cure" concept is covered in §2-508.

62. Sympathy for the "cure" concept is indicated in *Black v. Herbert*, 111 Mich. 638 (1897).

63. See Michigan Court Rules 35, 40 and 41.

64. Mich. Comp. Laws (1948) §440.44, Mich. Stat. Ann. (1959) §19.284.

65. *E. E. Huber & Co. v. Lalley Light Corp.*, 242 Mich. 171, 218 N.W. 793 (1928).

66. *Adam Kroehle's Soup Co. v. Rockford Oak Leather Co.*, 240 Mich. 524, 215 N.W. 324 (1927); *Shapiro v. Goodman*, 236 Mich. 412, 210 N.W. 211 (1926).

Section 2-607 of the code would give form and structure to the vague common law concept of "vouching in" a seller who is answerable over to a buyer who is being sued for breach of warranty.<sup>71</sup>

Section 2-608 of the code would replace the remedy of rescission for breach of warranty under section 69 of the USA<sup>72</sup> with a concept of "revocation of acceptance." A number of changes in Michigan law would result. Under the code, buyer would be allowed to revoke his acceptance of any part of the goods delivered under a contract of sale. This amounts to partial rescission which is not presently possible.<sup>73</sup> Under section 69(2) of the USA, election of the remedy of rescission forecloses buyer from the remedy of damages for breach of warranty.<sup>74</sup> Revocation of acceptance would not constitute such an election of remedies under the code.

The code deals in detail with the troublesome problem of anticipatory repudiation of contracts of sale. A party is given the right to demand adequate assurance of performance of the other party's obligations under the contract of sale if there is reasonable question that he will perform his obligations. If adequate assurance of performance is not forthcoming, the contract will be deemed to be repudiated.<sup>75</sup> In the event of anticipatory repudiation, the aggrieved party may (1) await performance by the repudiating party, (2) resort to any remedy for breach and (3) in either of the foregoing instances, may suspend his own performance.<sup>76</sup> In some circumstances,

the repudiating party is given the right to retract his repudiation.<sup>77</sup> The code should bring more certainty into this difficult area.

Sections 2-613 through 2-616 treat the problems arising out of frustration of performance of the contract of sale. The solutions suggested are generally in line with present doctrine but by charting this area in some detail the code makes an important contribution.

#### SELLER'S REMEDIES

Seller's remedies on buyer's insolvency are described in section 2-702. Like section 54(1)(c) of the USA,<sup>78</sup> the code provides that seller may refuse delivery or stop in transit upon discovery of buyer's insolvency. However, the seller's remedy is broadened under the code to allow withholding of delivery until payment is made "for all goods theretofore delivered under the contract" instead of just payment for the particular shipment withheld. Where goods have been delivered to buyer on credit before seller discovers the buyer's insolvency, the code expands the common law rule allowing reclamation of the goods where buyer procured the goods by fraudulent representations as to his solvency.<sup>79</sup> Under the code there is a conclusive presumption of fraud entitling seller to reclamation of the goods if seller, after discovery of the insolvency, demands the goods within ten days after receipt by buyer or if buyer made a written misrepresentation of solvency within three months before delivery of the goods.

71. *DeWitt v. Prescott*, 51 Mich. 298, 16 N.W. 656 (1883); *Alford v. Graham*, 57 Mich. 422, 24 N.W. 158 (1885).

72. Mich. Comp. Laws (1948) §440.69, Mich. Stat. Ann. (1959) §19.309.

73. *Blumrosen v. Silver Flame Industries, Inc.*, 334 Mich. 441, 54 N.W. 2d 712 (1952).

74. *Kelly-Springfield Tire Co. v. Harrity*, 242 Mich. 515, 219 N.W. 752 (1928); *Watkins v. Phelps*, 165 Mich. 180, 130 N.W. 618 (1912).

75. See §2-609.

76. See §2-610.

77. See §2-611.

78. Mich. Comp. Laws (1948) §440.54, Mich. Stat. Ann. (1959) §19.294.

79. The Michigan court has held that the seller cannot reclaim the goods for fraud unless it is shown that buyer made some express misrepresentation concerning his financial condition [*Clark v. William Munroe Co.*, 127 Mich. 300, 86 N.W. 816 (1901); *Kirshbaum v. Jasspon*, 123 Mich. 314, 82 N.W. 69 (1900)] or that buyer did not intend to pay for the goods [*Carson v. Milcrow Motor Sales*, 303 Mich. 86, 5 N.W. 2d 665 (1942); *Weidman v. Phillips*, 159 Mich. 380, 124 N.W. 40 (1909)].

In the event of breach of the contract of sale by buyer, the code provides that seller shall have the following remedies:

(1) Seller may withhold delivery of the goods.<sup>80</sup>

(2) Seller may stop the goods in transit.<sup>81</sup> Under section 57 of the USA<sup>82</sup> seller may exercise the right of stoppage in transit only in event of buyer's insolvency. The code extends the availability of this remedy to any situation of breach by buyer. Also, the right of stoppage under the code would be available as to warehousemen as well as carriers.

(3) Seller may identify conforming goods to the contract of sale even after breach by buyer, including reasonable completion and identification to the contract of goods which were incomplete at the time of buyer's breach.<sup>84</sup> The code would thus render the seller's remedies of damages and price more effective upon buyer's breach.

(4) Seller may recover damages for breach of the contract of sale measured by the difference between contract and market price.<sup>85</sup> Market price could be established by seller's resale of the goods so long as the resale was made in a commercially reasonable manner.<sup>86</sup> Resale would be appropriate regardless of whether title had passed to buyer.<sup>87</sup> Buyer would be entitled to notice of the

resale.<sup>88</sup> A good faith purchaser at the resale would take the goods free of any claims of the original buyer even though the resale was not conducted in accordance with the requirements of the code.<sup>89</sup> The code would also expand the area in which seller could use loss of profits as the measure of damages in lieu of difference between contract and market.<sup>90</sup>

(5) Seller may recover the purchase price of the goods.<sup>91</sup> Most commonly, recovery of price under the USA requires that seller demonstrate that title has passed to buyer. Under the code, seller can recover price regardless of title if he can show that the goods are not reasonably capable of resale.

#### BUYER'S REMEDIES

Section 2-711 describes the remedies available to buyer if seller "fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance."<sup>92</sup> In such circumstances, buyer has the following remedies:

(1) Under section 2-712, buyer may "cover" by purchase of substitute goods and recover the difference between the cost of "cover" and the contract price. The code thus gives buyer greater assurance of adequate relief in situations where "cover" is commercially desirable.<sup>93</sup>

(2) If buyer does not "cover," he can recover damages measured by "the dif-

80. §2-703(a). Accord: *Lamb v. Utley*, 146 Mich. 654, 110 N.W. 50 (1906).

81. §2-705.

82. Mich. Comp. Laws (1948) §440.57, Mich. Stat. Ann. (1959) §19.297.

83. §2-704.

84. §2-704. Cf. USA §64(4) [Mich. Comp. Laws (1948) §440.64, Mich. Stat. Ann. (1959) §19.304].

85. UCC §2-708 and USA §64 [Mich. Comp. Laws (1948) §440.64, Mich. Stat. Ann. (1959) §19.304].

86. UCC §2-706.

87. Michigan decisions require title in buyer if seller is to exercise the right of resale. *Kellogg v. Frolich*, 139 Mich. 612, 102 N.W. 1057 (1905); *Piowaty v. Sheldon*, 167 Mich. 218, 132 N.W. 517 (1911).

88. The USA contains no such requirement. USA §60 [Mich. Comp. Laws (1948) §440.60, Mich. Stat. Ann. (1959) §19.300].

89. Not so under USA §60.

90. UCC §2-708(2).

91. UCC §2-709 and USA §63 [Mich. Comp. Laws (1948) §440.63, Mich. Stat. Ann. (1959) §19.303].

92. The concept of revocation of acceptance (§2-608) replaces rescission. By allowing the buyer to revoke his acceptance and assert remedies normally associated with affirmation of the contract, the code eliminates election of remedies problems under the USA. See, for example, §69(1) and (2) [Mich. Comp. Laws (1948) §440.69, Mich. Stat. Ann. (1959) §19.309].

93. Cf. USA §67(3) [Mich. Comp. Laws (1948) §440.67, Mich. Stat. Ann. (1959) §19.307].

ference between the market price at the time when the buyer learned of the breach and the contract price."<sup>94</sup> This changes the rule of the USA which measures the difference between contract and market at the time when the goods ought to have been delivered.<sup>95</sup>

(3) If seller fails to deliver or repudiates, buyer can recover goods identified to the contract in the event of insolvency of the seller within ten days after payment of the first installment on the price.<sup>96</sup>

(4) Buyer can obtain specific performance "where the goods are unique or in other proper circumstances."<sup>97</sup>

94. §2-713.

95. USA §67(3) [Mich. Comp. Laws (1948) §440.67, Mich. Stat. Ann. (1959) §19.307].

96. §2-502.

97. §2-716. Compare USA §68 [Mich. Comp. Laws (1948) §440.68, Mich. Stat. Ann. (1959) §19.308] and *White Marble Lime Co. v. Consolidated Lumber Co.*, 205 Mich. 634, 172 N.W. 603 (1919); *Oreland Equipment Co. v. Copco Steel & Engineering Corp.*, 310 Mich. 6, 16 N.W. 2d 646 (1944); *Turner v. Williams*, 311 Mich. 563, 19 N.W. 2d 100 (1945).

If buyer has accepted the goods (and does not or cannot revoke acceptance), he may recover the "loss resulting in the ordinary course of events from the seller's breach."<sup>98</sup>

Unlike the USA, the code establishes a statute of limitation for actions arising out of sales transactions. The period of limitations would be four years rather than the six-year period of limitations presently applicable.<sup>99</sup>

#### CONCLUSION

While article 2 of the code does little that is revolutionary in the sales area, it would be a distinct improvement over the USA which, after all, is a statute that is more than fifty years old. Of particular importance is the relegation of the title concept to a position of relative unimportance under the code and the coverage in the code of many areas which are left to the uncertainties of common law decision under the present state of our law. The code should introduce greater certainty and predictability in transactions involving sale of goods.

98. §2-714.

99. Mich. Comp. Laws (1948) §609.13, Mich. Stat. Ann. (1937) §27.605.

## THE AMERICAN BAR ASSOCIATION

American Bar Association membership has topped the 100,000 mark, an increase of 94.5 per cent since the American Bar Center was established in 1954 as the national headquarters for the ABA and affiliated legal organizations.

Achievement of the new membership mark (100,184 on April 1) coincides with the completion of a new \$850,000 addition to the Bar Center, made necessary by the expansion of services and activities. The original three-story and ground floor buildings of the Bar Center, adjoining the University of Chicago campus, now house seven major organizations of the legal profession in addition to the ABA.

Designed to conform to the exterior and interior of the original buildings, the annex has 14,300 square feet of office

space which will increase the work area by about 30 per cent.

The first affiliated organization to move into the new quarters will be the American Bar Association Endowment, which administers the group life insurance programs available to ABA members. The National Conference of Bar Examiners is scheduled to move in later this year from its present headquarters in Denver.

The Bar Center now houses the administrative offices of the American Bar Foundation, National Association of Women Lawyers, National Conference of Commissioners on Uniform State Laws, the American Judicature Society, the National Legal Aid and Defender Association, and the American Law Student Association.