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ARTICLE 2: BREACH, REPUDIATION AND EXCUSE

FREDERIC K. SPIES*

I. INTRODUCTION

The *Uniform Commercial Code* is not a "code" in the continental sense, because it does not enact an entire and exclusive body of law. In the same sense, an examination of any part of the Commercial Code is a deceptive study, because it is the part-to-part-to-whole relation which is important and, ultimately, will decide the cases which influence its meaning.

Perhaps Part 6 is a discrete entity within Article 2 more than any other single part. Even the elements of the title—breach, repudiation and excuse—cover many more situational possibilities than the sections on formation of the contract, remedies, and other more or less homogenous parts. It is, in fact, a conglomeration of ideas which have been characterized by Professors Llewellyn and Mentschikoff as the "self-help" rights,¹ and despite their varied origins and emphasis, they share a heritage which was important to the common law. That is to say, they are found, sometimes in an inchoate form, in what Llewellyn describes constantly in his *Notes* as the "sound" or "better" cases, and they are mostly iconoclastic under traditional concepts of sales and contract law.

The writer selected Part 6 because it seemed to be the part of Article 2 which would endure long after the others ceased to have interest. By this I mean that the notions expressed in Part 2, for example, concerning the formation of contracts, are simply the long overdue codification of concepts which have been ascendant or tacitly accepted, in the ineluctable growth of the common law. Will the next generation of lawyers seriously accept the notion that an option is not binding unless it is under

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1. Perhaps reflecting a wrongly placed emphasis, the writer in the past referred to these concepts as the "quasi-remedies," because of their applicability when breach of the sales contract is threatened or incipient. Spies, *Sales: Article II*, 16 *ARK. L. REV.* 6 (1962).

seal, or given for consideration, or within the modest confines of the *Uniform Written Obligations Act*? It seems unlikely. But the next generation of lawyers may well be faced by what now appear to be disruptive spectres to us—excuse by failure of presupposed conditions, the demand for adequate assurance of performance, and other unfamiliar titles in Part 6. The reason for their imminence is not the enacting of a Code; it is rather the changing concepts among businessmen about the means of resolving disputes.

It seems to the writer that anyone who has written *about* a statute inevitably is caught up in a feeling of genuine despair when asked to do it again. A statute must be read and read carefully to be understood, much less appreciated if it contains artistic drafting, unless the interlocutor is willing to take on the responsibility for a disarmingly simple but incomplete exposition of all its terms. Therefore, although some of the following material briefly summarizes statutory material, it is not offered and must not be accepted as a substitute for reading the Code and the relevant comments. The concession herein to difficulty is that this treatment follows the section by section order of the Code, so that a minimum of cross-paging is necessary.

Professor Llewellyn's understanding of the development of Anglo-American common-law was far too profound to admit the possibility that Article 2, and Part 6 in particular, sprang full-blown from the whole cloth of his imagination, despite the growling of some critics. Case references in the official comments are sparse. The announced thrust of the promulgators of the *Uniform Commercial Code* is that it is a fresh start in many areas; one should question the meaning of its terms rather than its antecedents. There is almost the subtle suggestion that one who questions origins is mid-Victorian, since it is the quality of the baby and not his progenitors which matters. But the question persists: what are the origins of the Code, and, more precisely, of Part 6?

When the writer asked this question of the associate reporter of Article 2, Professor Mentschikoff, she suggested that the answers might be found in locked files at the University of Chicago which contained her husband's notes and memoranda. Therefore, the substantive part of this article deals with the Code on two levels. First, what is the meaning of the various sections of Part 6? Second, do the materials used in the preparation of the article perhaps suggest motivations, intentions or methods in its drafting which might be useful in understanding the *Uniform Commercial Code* provisions in general?

In the following, the term "comments" refers to the official text following the statutory section; the term *Notes* refers to the Llewellyn material obtained by the writer from the files. Some of the latter are handwritten. Others obviously are notations to the *Uniform Revised Sales Act*, on which much of Article 2 is based; they are typed and presumably copies were sent to other drafters of that era, but they do not appear to have been published and, as nearly as one can estimate, they come from the middle or late 1940's. Whenever possible, the *Notes* are cited, so that reference can be made if eventually they are published.

II. FAMILIAR CONCEPTS WITH MODIFICATIONS

UCC section 400.2-601, RSMo 1963 Supp. permits the buyer to reject goods if they "or the tender of delivery fail in any respect to conform to the contract." The clause "fail in any respect" is to be given literal application: even though the seller's tender may be referable to the contract, if the goods are defective or there is "an improper manner of shipment, failure of contractual documents, delay or any other reason" why the tender does not match the contract, it will fail.² The Code section thus embraces a variety of non-conformity situations which were scattered through the old *Uniform Sales Act*.³

Commercial buyers rarely order goods which they do not need, and the buyer may be under considerable trade pressure to accept a non-conforming tender. As a practical matter, the inclination to accept may increase in inverse proportion to the seriousness of the breach. Under prior law if the breach was slight the buyer might be in danger of losing his more effective remedies if he accepted the entire lot of goods, although he could make a partial acceptance if the price was "apportionable." The *Uniform Commercial Code* principle is that partial acceptance is permitted

2. *Notes*, Comment on § 7-1 (S 90) at 1. This is the citation form which will be hereinafter used to refer to Professor Karl N. Llewellyn's notes, some of which appear intended for distribution among other drafters. Photocopies of the *Notes* relating to Part 6 are filed at the University of Arkansas School of Law. It is not known what the first number has reference to, but the number following enclosed in parentheses and preceded by a capital S apparently refers to a later edition of the *Uniform Revised Sales Act*, as explained in text. Bracketed references to the *Uniform Commercial Code* are the writer's substitutions for original citations to the *Revised Sales Act*.

3. UNIFORM SALES ACT § 44 (discrepancies in quality); UNIFORM SALES ACT § 69(1) (defects in time or quality); UNIFORM SALES ACT §§ 11, 41, 43 (discrepancies in time, place or manner of delivery).

if the price *can* reasonably be apportioned.⁴ Furthermore, Comment 1 to UCC section 2-601 says, "Partial acceptance is permitted whether the part of the goods accepted conforms or not." This, the *Notes* indicate, is a rejection of holdings typified by *E. Hardy & Co. v. Hillerns & Fowler*,⁵ in which a buyer, prior to inspection, had diverted part of a grain shipment to a subpurchaser. After inspection revealed the entire shipment to be below standard, the buyer was not permitted to reject because the diversion was an acceptance by an act inconsistent with the seller's ownership. By way of dictum, the court alluded to the question of whether the buyer could have rejected the portion of the goods over which he had not vicariously exercised ownership rights and said:

[T]here could not be an acceptance of part and a rejection of the balance; that can be done when a portion of the goods is obviously in accordance with the contract and another part is not, but where the same objection applies to the whole quantity, and a portion has been accepted notwithstanding the objection, there cannot be a rejection of a part.⁶

The Code rule seems a reasonable one in the light of commercial expectations, although it is based on a rejection of dictum in an English case which is not considered by later English authority.

In order to forestall a buyer picking over and arbitrarily selecting what he wants from a shipment of diverse goods, perhaps in a falling market, subsection (c) requires him to "accept any commercial unit or units and reject the rest." According to the definition in section 400.2-105(6), this term, wholly unknown in prior law, "means such a unit of goods as 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." This "impairment test" differs from pre-Code emphasis, which looked to what units the parties had identified in the contract itself, a concept which the Code specifically rejects.⁸

4. Comment 1 to § 2-607, UNIFORM COMMERCIAL CODE, 1962 OFFICIAL TEXT WITH COMMENTS, published by the American Law Institute and the National Conference of Commissioners on Uniform State Laws [hereinafter cited UCC (1962)] with a section number, *e.g.*, UCC § 2-607 (1962).

5. [1923] 1 K.B. 658, *aff'd*, [1923] 2 K.B. 490 (C.A.). Subsequent English cases citing the *Hardy* case are limited to the question of what acts are of a type inconsistent with the seller's ownership of the goods in question. See *e.g.*, *Kwei Tek Chao v. British Traders & Shippers Ltd.*, [1954] 2 Q.B. 459.

6. *E. Hardy & Co. v. Hillerns & Fowler*, [1923] 1 K.B. 658, 666.

7. § 400.2-601(c), RSMo 1963 Supp.

8. Comment 1 to UCC § 2-601 (1962).

The *Notes* suggest that the concept of "commercial unit" results from the amalgamation of two quite distinct ideas in the law of contracts.⁹ In emphasizing that the Code adopts the result but not the reasoning of an early case¹⁰ it is apparent that Llewellyn intended this section to repudiate the "entire-severable" contract theory and to rest the definition of commercial unit on more practical commercial judgment.¹¹ Second, in support of the further test that dividing up a commercial unit would adversely change the market character of the remainder, Llewellyn cites in the *Notes* a single Arkansas decision, *Berger v. Kohler & Romer*.¹² In it the buyer agreed to buy a suit for \$150.00, with two pairs of trousers if the seller could secure enough material. Only one pair was delivered, but buyer wore the suit for a while before he returned it. The seller sued for the "indivisible" price of \$150.00, but the jury awarded only \$100—the contract price less the value of the pair of trousers which was never delivered.

Although the result seems a just one, the *Berger* case has never been cited in Arkansas or elsewhere. How well it suited Llewellyn's purpose is speculative: the buyer was not attempting to invoke the partial acceptance concept but was seeking to avoid liability for the part accepted because of the seller's failure to deliver the entire amount called for in the contract. In actuality, the case presents the opposite side of the coin, since the court's holding is that the buyer's action amounted to an election to treat the contract as divisible, thus barring him from asserting the defective tender defensively.

UCC section 400.2-601 is relatively brief and uncomplicated compared with later sections, and fairness requires pointing out at once that the many other cases cited in the *Notes* stand examination better than the few which appear under this section of the Code.

UCC section 400.2-602, concerning the manner and effect of a right-

9. *Notes*, Comment on § 7-1 (S 90) at 3.

10. *Pacific Timber Co. v. Iowa Windmill & Pump Co.*, 135 Iowa 308, 112 N.W. 771 (1907). For a case which reaches an opposite result on similar facts see *Stearns Salt & Lbr. Co. v. Dennis Lbr. Co.*, 188 Mich. 700, 154 N.W. 91 (1915).

11. The severability-divisibility dichotomy has never been a wholly satisfactory method of analysis and solution of cases. As stated in *Spartan Aircraft Co. v. United States*, 100 F. Supp. 171, 173-74 (Ct. Cl. 1951):

The severability, or divisibility, of a contract is a vexing problem. . . . The authorities hold that the question is essentially one of the intention of the parties; examination of some of the many cases on the point suggests rather that resolution of the question has more commonly been a matter of the intention of the court.

12. 166 Ark. 496, 266 S.W. 454 (1924).

ful rejection of goods by the buyer, amplifies its counterpart, *Uniform Sales Act* section 50, although notice to the seller of the buyer's decision is retained as the principal feature of successfully avoiding an acceptance. Comment 1 refers the reader to UCC section 400.1-201 for a definition of what constitutes a due "notifying." This is, of course, a general provision and does not specifically concern notification in rejection of goods. The *Notes* contain some helpful examples which are specific:

Where the buyer has actually taken the goods into his possession, a properly mailed letter or a duly dispatched telegram will suffice. If the goods are refused on trucks, the actual rejection must still be followed by seasonable notice to the seller. [The Code] does not cover the manner of rejection of defective documents tendered against a demand for payment but it is clear that a refusal by the buyer to take up the documents amounts to a rejection of the goods which they cover. Further, the communication of such a refusal to the financing agency holding and presenting the documents is an adequate giving of notice to the seller.¹³

Perhaps this additional material is surplusage in the light of the meaning and context of the definition in UCC section 400.1-201(26), but it is at least arguable that its inclusion would have been helpful to the reader who lacks a background in commercial practice. Nor would inclusion seem to imply that the process of notification is necessarily limited to the examples given.

An added ingredient in proper rejection of goods under the Code is the requirement in section 400.2-602(1) that rejection must take place "within a reasonable time" after delivery or tender. If nothing else, incorporating a reasonable time provision makes specific what the *Uniform Sales Act* left to conjecture in section 50, but the importance of the term really lies in its influence on the concept of inspection. There is only the passing reference in Comment 1 that the sections on inspection¹⁴ must be read in conjunction with the buyer's reasonable time for action under this section. The *Notes* make it far more clear than the comment by a more thorough cross-referencing. For one thing, the buyer will not be held to have accepted the goods by inaction and silence until he has had a reasonable opportunity to inspect them.¹⁵ Under section 400.2-512,

13. *Notes*, Comment on § 7-2 (S 91) at 3.

14. §§ 400.2-512, 2-513, RSMo 1963 Supp.

15. § 400.2-606(1)(a), RSMo 1963 Supp.

if the contract requires the buyer to pay before inspection, acceptance of and payment against a tender of documents prior to inspection of the goods will not operate as an acceptance of the goods themselves. And in section 400.2-513, the buyer is assured of an opportunity to make an ultimate inspection of the goods at a reasonable time and place, in a reasonable manner. In every sense, these sections are truly ancillary to the gift of reasonable time to reject bestowed by section 400.2-602.

Further provisions of this section are self-explanatory. The buyer cannot perform acts amounting to conversion of the goods after having rejected them,¹⁶ although here his exercise of ownership is wrongful only to the extent of any commercial unit over which he exercises dominion. Therefore, if the goods can be divided into commercial units, he does not run the risk of exercising dominion over the mole-hill and thereby find himself having converted the mountain, as in the past, quite possibly by some inadvertent act of dominion or control.

Uniform Sales Act section 50 provided that after a rightful rejection of goods, the buyer "is not bound to return them to the seller" but had an obligation only to give notice. The Code more carefully spells out the buyer's obligation in this situation, "to hold them with reasonable care . . . for a time sufficient to permit the seller to remove them," and so lessens the danger of misunderstanding at a time when the relations of the parties may be strained.

UCC sections 400.2-603 and 400.2-604 deal more fully with the rights of the parties after rightful rejection. The first of these sections imposes a positive duty on a merchant buyer to follow the seller's reasonable instructions after a rightful rejection when the seller has no agent at the market of rejection, as to goods "in his possession or control." Furthermore, section 400.2-603(1) places an affirmative duty on the buyer "in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily." Llewellyn's *Notes* make it obvious that "possession and control" of the buyer is not tested by personal property concepts. The words are to have a broad effect. For example, if the goods consigned to the buyer are rejected on the tracks they are sufficiently within the control of the buyer, since the carrier will accept his instructions to deliver or reship.¹⁷

16. § 400.2-606(2)(a), RSMo 1963 Supp.

17. *Notes*, Comment on § 7-3 (S 92) at 3.

Section 400.2-603 is rooted in and elaborates on the famous case of *Descalzi Fruit Co. v. William Sweet & Son, Inc.*,¹⁸ in which a buyer was held justified in making a salvage sale of properly rejected peaches for the seller's account. The elaboration exists in the Code's statement that the seller's instructions are not reasonable if the buyer's demand of indemnity for expenses is not met, and the specification of what expenses or commission may be recovered by the buyer in subsection (2).

UCC section 400.2-603 does not mention, however, whether the buyer must give notice of his intention to dispose of the goods. Since notice is essential to a rightful rejection,¹⁹ and the assumption seems to be that notice of rejection of goods which the parties know to be perishable need not be augmented by a further notice, in the absence of seller's instructions, that the buyer now plans to resell the goods. This is perhaps unfortunate, because the more perishable or deteriorated the goods, the more quickly action may have to be taken, and it may be difficult for the buyer to give adequate notice. Moreover, the courts have required notice of intention to resell perishables,²⁰ although at least one court recognized the problem, after adopting the *Descalzi* case:

We think the same rule would apply where notice could not be given to the seller; and if the circumstances were such that immediate action was necessary to preserve the property from damage, the buyer would be in the same position as if the seller had refused to give disposition after notice.²¹

All that is probably required of the buyer in exercising his rights under the Code section is that he act in good faith, and perhaps the concept is broad enough to include the dispensing with notice when swift action is necessary to realize as much as possible in disposing of perishables.

Closely related to the foregoing is section 400.2-604, which provides a number of options which the buyer may exercise if he fails to receive

18. 30 R.I. 320, 75 Atl. 308 (1910). In *White v. Schweitzer*, 221 N.Y. 461, 117 N.E. 941 (1917), the court, in justifying the buyer's salvage sale of turkeys, emphasized the absence of instructions from the seller. In *Baker v. J. C. Watson Co.*, 64 Idaho 573, 134 P.2d 613 (1943), the buyer's sale was upheld in the absence of instructions, notwithstanding contention by the seller that sale before insufficient time for spoilage amounted to an acceptance. The *Baker* case also anticipates the duty to sell perishables adopted by the Code: "Under these circumstances . . . there operated the rule that the buyer should do everything to lessen injury or damage, which, of course, required the immediate sale of these peaches since they were perishable . . ." *Id.* at 584-85, 134 P.2d at 618.

19. § 400.2-602(1), RSMo 1963 Supp.

20. *Grainger Bros. Co. v. G. Amsinck & Co.*, 15 F.2d 329 (8th Cir. 1926).

21. *Barnett v. Perrine*, 250 S.W. 1111, 1114 (Tex. Civ. App. 1923).

instructions from the seller as to rightfully rejected non-perishable goods. As the comment explains, the buyer may store, reship or resell for the seller's account after due notification of rejection, although the alternative courses open to him are not intended to be exclusive. This section differs from section 400.2-603, which positively requires a merchant buyer to dispose of the goods in the situations mentioned. Llewellyn's *Notes* provide a further clue to the motivation behind this section:

At the time of rejection it not infrequently happens that a real doubt is present in the buyer's mind as to the rightfulness of his action and this presents one of the knottiest problems in the law of sales. So many factors enter into the problem that even a buyer who believes in good faith that a tender is non-conforming, is well aware of the risk that a subsequent trier of the fact may disagree with him. [The Code] seeks to reduce the importance of this question, at least in part, by means of [UCC section 400.2-601] permitting partial acceptance, [UCC section 400.2-515] on preserving evidence of goods in dispute and third party inspection . . . and [UCC section 400.2-605] on particularization of objections by the buyer.²²

After a proper rejection, the seller under the Code has a number of options open to him: he may cure,²³ request a written statement of defects from the buyer or insist on inspection—and his failure to avail himself of any of these options coupled with his failure to instruct the buyer surely presents a question of bad faith on the seller's part that the trier of fact may consider.

Both sections 400.2-603 and 400.2-604, then, are designed to avoid the buyer's being "tricked" into a technical acceptance. The *Notes* expressly reject cases which reach this result.²⁴

In the rapid metabolism of modern business, buyer's expressions of rejection often are stated in very general terms ("entire shipment unsuitable"), and the seller is unaware of the precise nature of the complaint. Since the purpose of Part 6 of Article 2 is to negotiate around impending law suits, it is not surprising that section 400.2-605 permits the seller to demand of the buyer a written statement of his objections to the goods. Moreover, because there is a suspicion that the general statement of re-

22. *Notes*, Comment on § 7-4 (S 93) at 1.

23. § 400.2-508, RSMo 1963 Supp.

24. *Notes*, Comment on § 7-4 (S 93). *Scriven v. Hecht*, 287 Fed. 853 (2d Cir. 1923) (non-conformity of horse hides; buyer requested instructions in vain and his testing by tanning several to determine possibility of salvage held an acceptance).

jection may conceal the buyer's bad faith in attempting to welch on the contract, statements of this kind are insufficient if the defect is one which the seller might have cured.²⁵ If the parties are merchants, the seller may demand written particulars. The buyer's failure to respond is a waiver of unstated objections to the goods.

As drafted, the Code section indicates simply that this is new law, the *Uniform Sales Act* not having a comparable section, and the comments cite no decisional authority in opposition to or supporting it.

In fact, the Code provision lays to rest a rather harsh doctrine sometimes called the rule of *Littlejohn v. Shaw*,²⁶ which limited the buyer to those defects which he stated in his initial rejection. Of course, the rule has been useful, as the *Notes* state, "mainly as a means of defeating surprise rejections of what would have been mercantilely acceptable deliveries were it not for a falling market." In view of the seller's right to cure, the rule of *Littlejohn v. Shaw* is no longer necessary.

Subsection (2) of UCC section 400.2-605 precludes recovery by the buyer for defects apparent on the face of documents when payment is made against them. Comment 4 indicates, perhaps more clearly than the statutory language itself, that the waiver applies only to defects in the

25. § 400.2-508, RSMo 1963 Supp.

26. 159 N.Y. 188, 53 N.E. 810 (1899). It is interesting to note that at least one jurist would limit the *Littlejohn* case by holding it inapplicable to a unilateral contract situation. *F. Kieser & Son Co. v. Hallock*, 201 App. Div. 186, 189, 194 N.Y. Supp. 737, 740 (1922) (Kellogg, J., concurring). This opinion utilizes a curious manipulation of contract doctrines to mitigate the effect of the *Littlejohn* case. A case strongly opposed to the rigidity of the *Littlejohn* case was *List & Son Co. v. Chase*, 80 Ohio St. 42, 88 N.E. 120 (1909) where it was held that, in order for a specific objection to preclude any later one on other grounds, the buyer's conduct in making the objection must have been tantamount to a waiver or sufficient to give rise to an estoppel. The *List* case is frequently cited for its definition of a waiver as an intentional relinquishment of a known right. See, e.g., *McMillen v. Willys Sales Corp.*, 118 Ohio App. 20, 193 N.E.2d 160 (1962). The principle of the *List* case has also been applied to situations involving contracts for the sale of realty. *C. O. Frick Co. v. Baetzel*, 169 Mass. 297, 47 N.E.2d 1919 (1942). A case which qualifies the application of the *Littlejohn* rule, although not going as far as *List*, is *Fielding v. Robertson*, 141 Va. 123, 126 S.E. 231 (1925), which held that a defect not objected to must be known at the time objection is made on other grounds before defect not objected to will be deemed waived.

In view of the use of the verbs "precludes" and "relying" in section 400.2-605 of the Code one can speculate that this section is codification of the estoppel aspect of the *List* case rather than a waiver section, although the section uses "Waiver" in the title. In connection with this apparent inconsistency of terminology consider the language of Comment 1 to the section which states one of the policies to be protection of the seller "who is reasonably misled by the buyer's failure"

documents which are apparent on the fact of the documents but does not go beyond this statement in explanation or illustration. The *Notes* on this point, however, continue in this fashion:

Thus, in *Lamborn v. Seggerman*, (1925) 240 N.Y. 118, 147 N.E. 607, the contract was for a car of 1200 cases of apples, payment draft against documents. A delivery order for 1200 cases out of a car of 1770 cases was tendered and the buyer paid. The car had been lost in transit by government seizure and the buyer was rightly held entitled to recover his payment. Acceptance of a delivery order for a non-conforming shipping unit waives only that formal defect . . . It accepts a non-contractual means of reaching the contract goods, but it does not give up the substantial contractual right to the goods themselves. Where the parties assume that the goods are in fact available and conforming in quality, the buyer's action in waiving a defect in the form of their tender, as a matter of business decency and convenience, cannot be read as the taking over of a loss not contemplated at the time.²⁷

The *Lamborn* case is useful exposition of what is meant by waiver of only that which is apparent on the face of the document.

Broadly speaking, the concept of "acceptance" in the Code follows the tripartite arrangement of the *Uniform Sales Act* section 48, *i.e.*, acceptance can be by some overt indication by the buyer, or by failure to make an effective rejection, or by acts amounting to a conversion of the goods. There are several important distinctions in statutory emphasis, however.

The curious use of the verb "intimate" in the *Uniform Sales Act* raises theoretical questions.²⁸ Under it the buyer could intimate his acceptance or his rejection of the goods, and one wonders what was sufficient to satisfy the delicate nuances of the word—a raised eyebrow, perhaps, or a lip curled in scorn, with never a word between the parties? In any event, the Code requires only that the buyer "signifies" to the seller that the goods conform after he has had a reasonable opportunity to inspect them or that he will take them despite non-conformity. Signify has connotations of giving notice of some kind and seems more suited to a commercial statute.

Signification of acceptance conceivably might take a variety of forms. The *Notes* enlarge on two limitations on signification which are briefly

27. *Notes*, Comment on § 7-5 (S 94).

28. This section states: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them . . . or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." UNIFORM SALES ACT § 48.

mentioned in Comment 2 to UCC section 400.2-606. First, payment made after tender is a circumstance tending to show an acceptance but is not conclusive. Second, the Code section as a whole is designed not to jockey the buyer into an acceptance by attaching more significance to his act of approval than the buyer intended. In other words, the buyer may successfully make a conditional communication of acceptance, which will remain subject to the express conditions. As the *Notes* put it:

Thus this Act approves the holding in *Mitsubishi Goshi Kaisha v. J. Aron & Co.* [16 F.2d 185 (2d Cir. 1926)], that the buyer's letter expressing his intention to tender to a sub-buyer a car coming forward under his contract with the seller, was not an acceptance of the carload, when the buyer and seller were engaged at the time in a dispute as to the shipping documents, which was not settled because the seller did not comply with the conditions properly imposed by the buyer. However, under other circumstances a letter from the buyer indicating his intention to sell the goods for his own account, unless clearly conditioned upon the seller's cure of the defective tender, might properly be held to evidence, or even constitute, a disposition of the goods [as an act inconsistent with the seller's ownership, under UCC section 400.2-606(1)(c).]²⁹

Although the *Mitsubishi* case appears in a number of sales casebooks, it has never once been cited. The paragraph quoted also introduces the third manifestation of acceptance—an act inconsistent with the seller's ownership. It is not difficult for a buyer to comply with this part of the acceptance provision: resale or pledge of the goods on his own account, use of the goods for his own purposes, or unjustified refusal to place the rejected goods at the seller's disposition where the buyer has not, by payment of part of the price, acquired a security interest.³⁰ If there is a conflict between the buyer's words of rejection and his acts of dominion, cases cited in the *Notes* indicate that the latter are to prevail.³¹

An exception to the general rule that conversion is acceptance appears in UCC section 400.2-606(1)(c): "but if such act is wrongful as against the seller it is an acceptance only if ratified by him." Only the last sentence

29. *Notes*, Comment on § 7-6 (S 95) at 3.

30. § 400.2-711(3), RSMo 1963 Supp.

31. See *Foley & Co. v. Excelsior Stove & Mfg. Co.*, 265 Ill. App. 78 (1932) (inclusion of goods on insurance claim by buyer held to be act inconsistent with the seller's ownership); *Rice v. Green*, 199 Wis. 518, 227 N.W. 22 (1929) (buyer's displaying and advertising goods held to be an acceptance). *But cf.* *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949) (claiming allowance for depreciation on buyer's tax return not act inconsistent with ownership of seller).

in Comment 4 to the section refers to this provision, and, after noting that it "modifies some of the prior case law," the comment further states "'acceptance' in law based on the wrongful act of the acceptor is acceptance only as against the wrongdoer and then only at the option of the party wronged," which adds little to the language or meaning of the Code section.

The Code rule as stated is easily workable so long as no third parties come into the picture. But what is the result when the buyer is a "merchant who deals in goods of that kind"³² and the act inconsistent with the seller's ownership is reselling the goods "to a buyer in the ordinary course of business"? Then the seller's option not to ratify the wrongful acceptance under section 400.2-606(1)(c) surely would become moot. The policy behind this concept and its intended operation as between the buyer and seller themselves or where a third party less than a bona fide purchaser takes from the buyer is more fully explained in the *Notes*:

A result intended for relief should never operate to prejudice the party for whose relief it is designed. The situation frequently arises where jewels are turned over to a shoe-string "buyer-broker" on terms which amount in law to a sale on approval, the understanding being that title is to remain in the "seller" until the broker finds a purchaser at a profit, after which he is to bring in the originally agreed price in cash. The courts have rightly viewed a wrongful pledge or pawn of the jewels by the "buyer-broker" as "an act inconsistent with the ownership of the seller" within the Original Act, Section 48; but this does not warrant putting the title into the "buyer-broker" except by an estoppel operating against him personally at the option of the seller. [The Code] therefore rejects any argument in favor of the pledge or pawn-broker in such a case unless the seller has ratified the wrongful disposition.³³

A word more is perhaps necessary, about the meaning of the concept of acceptance. Ordinarily, acceptance becomes important only when the goods or the tender are such that they are subject to the buyer's rightful rejection: that is, when they do not conform to the contract or have been delivered on approval. Acceptance, moreover, has the protean ability to become an issue at different junctures of the sales transaction: acceptance in section 400.2-606(1)(a) and (c)—by affirmative words or acts—can

32. § 400.2-403(2), RSMo 1963 Supp.

33. *Notes*, Comment on § 7-6 (S 95) at 4.

also be an acceptance for purposes of the Statute of Frauds.³⁴ It has been mentioned before that acceptance of documents is not acceptance of the goods themselves,³⁵ and the acceptance here discussed must not be confused with the same term in section 400.2-206, dealing with acceptance of an offer to contract.

Section 400.2-607 is the only section in Part 6 which brings together a number of remotely related concepts, rather than dealing with a single principle. Since it concerns the effect of acceptance this is quite natural, because acceptance unquestionably alters the legal relation of the parties on a number of levels.

Subsection (1) provides that "the buyer must pay at the contract rate for any goods accepted," and this rule is reinforced by the subsection (4) provision that the buyer has the burden of establishing any breach with respect to the goods accepted. These two propositions might seem unnecessary or self-explanatory at first blush, but the *Notes*³⁶ reveal the problem which the drafters attempted to solve. "Occasional suggestions in the case-law that the seller has the burden of showing compliance with the contract to prove that he is entitled to the price extend properly only to cases where the goods have not been accepted."³⁷ Thus, subsection (4), placing the burden of proof on the buyer after acceptance, becomes purely procedural when the accepted tender was non-conforming and the buyer has given notice within a reasonable time after he discovers or should have discovered the breach.³⁸ This is because subsection (3) clearly leaves unimpaired the buyer's right to be made whole, including not only his money remedies, but, according to Comment 3, his full rights with respect to future installments despite his acceptance of any earlier non-conforming

34. § 400.2-201, RSMo 1963 Supp. The *Uniform Sales Act* defined "acceptance" separately for Statute of Frauds purposes. UNIFORM SALES ACT § 4(3).

35. See text accompanying notes 15 and 27 *supra*.

36. *Notes*, Comment on § 7-7 (S 96) at 1.

37. *Ibid.* See *Frankel v. Foreman & Clark, Inc.*, 33 F.2d 83 (2d Cir. 1929). Compare *John Fabick Tractor Co. v. Lizza & Sons, Inc.*, 298 F.2d 63 (2d Cir. 1962); *Alper Blouse Co. v. E. E. Connor & Co.*, 309 N.Y. 67, 127 N.E.2d 813 (1955).

38. Notice need not be detailed at this juncture. The comments to the Code state that it must inform the seller that "the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation." Comment 4 to UCC § 2-607 (1962). This overcomes the stringency of some prior cases. See, e.g., *Adler v. United States*, 270 F.2d 715 (8th Cir. 1959); *Truslow & Fulle, Inc. v. Diamond Bottling Corp.*, 112 Conn. 181, 151 Atl. 492 (1930). In *Clarizo v. Spada Distributing Co.*, 231 Ore. 516, 373 P.2d 689 (1962) the court found a buyer's unequivocal rejection of the seller's offer to reduce the price of the goods to be sufficient notice of intent to claim damages. The court was ostensibly applying the more stringent rule generally followed by courts under section 49 of the *Uniform Sales Act* although recognition was given to the more liberal treatment recommended by section 400.2-607 of the Code.

installment. This provision is designed to overcome the effect of cases holding that a buyer who used an early defective shipment to fill immediate needs was not permitted to "rescind" the sale as to future installments.³⁹ Subsection (3)(b) applies a special rule of notice where the buyer is sued for infringement, requiring the buyer to notify the seller within a reasonable time after he receives notice of the litigation, or lose his remedies over against the seller.⁴⁰

The most important innovations in sales law contained in section 400.2-607 are various provisions⁴¹ giving a seller an opportunity to defend or compromise third-party claims or to be relieved of liability, and conferring on the defendant buyer the concomitant right to vouch in a seller who is answerable over. The section helps to resolve an area of genuine uncertainty under prior law.⁴²

The purpose of section 400.2-608, permitting a revocation of acceptance by the buyer, is to overcome the old rule which forced a buyer to elect between return of the goods and damages. It is the counterpart of the Code rule which permits a seller to "rescind" the contract and still sue the buyer for damages for non-acceptance.⁴³ Again the origin of the Code section lies in cases under the *Uniform Sales Act* which sought to avoid the harsh rule of election under a number of subterfuges: extension of the time for acceptance to provide reasonable time for inspection, treating the buyer's acceptance as tentative,⁴⁴ or extending the field of "incidental" damages.

For revocation of acceptance, there must be a nonconformity which "substantially impairs" the value of a lot or commercial unit, and the

39. See, e.g., *John Service, Inc. v. Goodnow-Pearson Co.*, 242 Mass. 594, 136 N.E. 623 (1922). *But see Agoos Kid Co. v. Blumenthal Import Corp.*, 282 Mass. 1, 184 N.E. 279 (1932). It is interesting to note that the *Agoos Kid* case was followed in preference to the *John Service* case in a fairly modern federal decision, *Universal Major Elec. Appliances, Inc. v. Glenwood Range Co.*, 233 F.2d 76 (4th Cir. 1955). For earlier cases which appear to be in accord with the Code treatment see *Interstate Grocer Co. v. Colorado Milling & Elevator Co.*, 199 Ark. 645, 135 S.W.2d 661 (1940); *Enterprise Mfg. Co. v. Oppenhiem Oberndorf & Co.*, 114 Md. 368, 79 Atl. 1007 (1911); *Shotwell Johnson Co. v. C. O. D. Tractor Co.*, 154 Minn. 417, 191 N.W. 813 (1923); *Kansas Flour Mills Corp. v. McDonald*, 32 S.W.2d 890 (Tex. Civ. App. 1930).

40. Infringement was not considered in the *Uniform Sales Act*. The substantive rules are contained in § 400.2-312, RSMo 1963 Supp.

41. § 400.2-607(3)(b), (5) and (6), RSMo 1963 Supp.

42. The best recent treatment of the procedural problems raised by the section is in HONNOLD, *LAW OF SALES AND SALES FINANCING* 52 (2d ed. 1962).

43. § 400.2-703, RSMo 1963 Supp.

44. *Belmont Silk Co. v. Noschkes*, 189 N.Y.S. 112 (App. T. 1921); *Fox v. Boldt*, 172 Wis. 333, 178 N.W. 467 (1920).

buyer must have accepted on the assumption that the defect would have been cured or without having discovered the defect. Non-discovery may be grounded in latency of the defect or by the seller's assurances that the goods would conform.

Revocation of acceptance must take place "within a reasonable time after the buyer discovers or should have discovered the ground for it"⁴⁵ and is not effective until the buyer notifies the seller.

The question again arises: what must be the content of the notice to make it adequate for purposes of this section? Good faith, prevention of surprise and reasonable adjustment are all factors in the answer, according to Comment 5, which vaguely adds, "More will generally be necessary than mere notification of breach required [in the preceding section on acceptance]." There is the suggestion that "notice" under the *Uniform Commercial Code* is even a more subtly protean term than "acceptance," despite general definitions in Article 1.⁴⁶ The *Notes* commenting on section 400.2-607 are more explicit by far than any single Code comment, perhaps because revocation of acceptance is a new concept, and their usefulness can be appraised by the reader:

In the normal case of a tender of delivery by a seller, there are four periods of reasonable time within which various actions by the buyer must be taken: (1) the reasonable time for rejection under [section 400.2-602] after tender; (2) the reasonable time after acceptance during which the discovery of any non-conformity should be made either under [section 400.2-607] requiring notice of breach or under the present [subsection] requiring notice of revocation of acceptance; (3) the reasonable time after discovery of the breach in which to give notice to the seller; and (4) the further reasonable period during which the buyer actually determines to revoke acceptance. In many situations these four phases are cumulative but in others they must be sharply distinguished.

The reasonable time for rejection after tender of the goods coincides with the period during which silence imposes acceptance on the buyer [section 400.2-606] on what constitutes acceptance of the goods. The two dominant factors here are, first, the need of the seller for seasonable notice of any rejection of a current delivery, and, second, the need of the buyer for a fair opportunity to inspect the goods before he acts. A typical case of extended time for buyer's action due to the second factor is where

45. § 400.2-608(2), RSMo 1963 Supp.

46. § 400.1-203, RSMo 1963 Supp.

goods intended for export reshipment are left in the original packages and rejected by the original buyer only after inspection by his sub-purchaser.

The nature of the goods and of dealings in or with them is the controlling consideration in determining the reasonable time for discovering a breach after acceptance has occurred. Thus, a lot of 400 coats may require inspection garment by garment to discover defects, and the practice of the trade may be to inspect a few carefully, tag and hang up the others, inspecting them only as merchandising conditions require or permit. . . . While rarely if ever explicitly stated in the opinions, the course of the decisions in the merchant-to-merchant cases runs clearly and soundly to this effect: the more grave the lurking defect, the more liberal the recognition of the reasonableness of any time taken "in ordinary course" to discover it; per contra, if there is suspicion of captiousness, bad faith or a dropping market, the time for discovery is strictly limited. . . .

The third and fourth phases of reasonable time can best be dealt with together, for [in] neither notice can be given until there has been actual discovery of the breach. Both [section 400.2-607] on notice of breach, and the present [section 400.2-608(2)] on notice of revocation of acceptance, allow a reasonable time after such discovery, if the discovery is itself in time. Whether discovery has come too late is a separate question and a real one. But that must not be confused with either phase of giving of notice of the non-conformity or revocation of acceptance. Discovery of a defect does not necessarily turn the buyer's mind immediately to a claim for breach of warranty. Moreover, when goods are already in use efforts to induce a cure or repair of the defect will be made rather than a claim against the seller. Finally, a non-merchant buyer will have an additional period of doubt and inquiry before he finds legal counsel and is advised what action to take.

When a notice of breach has actually been given there is normally a further period of investigation, possibly cure, possibly negotiation, especially with respect to articles which are already in use by the buyer. Generally, only when such possible adjustments have failed does the question of revocation of acceptance enter. Hence in most cases the reasonable time allowable for notice of revocation of acceptance (which is a choice of remedy) extends materially beyond the time in which notice of breach (which is a warning of trouble) must be given. . . .

The four periods of reasonable time discussed above must always be considered as interlocking. Thus, for instance, when the reasonable time for rejection is extended by such a factor as ex-

port any undue extension of time for discovery of a defect which is not of a peculiarly elusive nature . . . must be avoided. Again when stored goods are resold and suddenly discovered to be materially defective, the reasonable time for giving notice of the breach is then necessarily short. Nevertheless, the distinction among the four phases of time exist in fact and in the text of this [Code]; and each is important and should be applied according to its reasons in any appropriate case.⁴⁷

In the context of the comments, the foregoing would have appeared between the last and next-to-last sentences of Comment 5 to UCC section 400.2-608.

Having revoked his acceptance, the buyer's position with regard to the goods and his remedies is precisely the same as if he had rightfully rejected them.

Looking again to negotiation and the staving off of an ineluctable breach of contract, section 400.2-609 introduces a new concept in the form of a party's "right to adequate assurance of performance." The statutory provision is followed by a long comment, indicating that the concept of assurance is not without prior foundation in case law. The motivation for the section is obvious: commercial men contract with a view to performance by one another, not merely for a promise or "the right to win a law suit."⁴⁸ Three steps for invoking the right are outlined in Sub-section (1) when circumstances reasonably indicate that the expected performance may not be forthcoming from the other party: *i.e.*, suspension by the aggrieved party of his own performance, the right to require adequate assurance of expected performance by the other, and the right of the aggrieved party to treat the contract as broken if assurance is not received within 30 days. Subsection (2) and the additional comments explain the meaning of the terms in the section.

In determining when "reasonable grounds for insecurity" arise, the Code rejects contract law reliance on dependent and independent promises within a single contract as the controlling feature. Instead, the determination is made on the basis of the relatively non-technical but more highly relevant grounds of commercial practice and commercial standards. In other words, as stated in the comments "a ground for insecurity need not arise from, or be directly related to, the contract in question."⁴⁹

47. *Notes*, Comment on 7-8 (S 97) at 5.

48. Comment 1 to UCC § 2-609 (1962).

49. Comment 3 to UCC § 2-609 (1962).

The most direct assault on prior law under the *Uniform Sales Act* is contained in subsection (3) of UCC section 400.2-609, which provides that "acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of performance," with the further implication that if the future assurance is not met, the buyer's remedies are preserved. This provision is made necessary, state the *Notes*,

by the failure of some courts to read the language of Section 49 of the Original Act as saving the buyer's remedies with respect to the undelivered balance of the contract, after he has accepted one or more defective installments. So far as such courts based their rulings on the fact that the defects in the installment accepted were not material enough to make out a breach of the whole contract, these holdings are continued by [UCC section 400.2-612] on breach in installment contracts. However . . . the courts have been loath to apply the doctrine of anticipatory breach with its extreme penalty, and buyers have frequently been forced to continue their own performance in the face of their almost certain knowledge that due counter-performance would not be forthcoming. This section poses the question first as one of insecurity rather than "breach or *virtual*" repudiation. And [the Code] insists that any buyer who because of need or decency accepts a defective installment, shall not be forced to sacrifice any of his remedies as to future installments, including his right to suspend his own performance until he receives adequate assurance of due performance by the other party.⁵⁰

The *Notes* cite *Lander v. Samuel Heller Leather Co.*,⁵¹ as an example distinguishing the difference between "breach" and "insecurity." In that case the seller and buyer contracted for the sale of 120,000 pounds of leather, to be delivered and paid for in installments. After a defective installment, the buyer refused to pay until the leather was "replaced." On the seller's refusal to perform further, the buyer sued for breach of warranty and damages for non-delivery of the balance. The seller's cross-action claimed the unpaid price for the defective lots in which the buyer had sought recoupment for breach of warranty. The lower court found the leather to be defective and allowed the set-off against the seller's claim for damages, but denied the buyer damages for non-performance. This

50. *Notes*, Comment on § 7-10 (S 98) at 6.

51. 314 Mass. 592, 50 N.E.2d 962 (1943). *Accord*, *K & G Constr. Co. v. Harris*, 223 Md. 305, 164 A.2d 451 (1960).

was reversed on appeal, the appellate court holding that the buyer's claim of non-performance should have been sustained because his refusal to pay did not amount to a repudiation of the contract, although payment for each installment normally is a part of such contracts. The court's reasoning was somewhat convoluted: since the buyer might accept goods and set-off damages for breach of warranty—for which litigation and a judgment would be required—he was therefore under no duty to pay until an adjudication of the set-off to which he might be entitled.

What result under UCC section 400.2-609? Probably both parties would have demanded assurances. On receipt of the defective delivery, section 400.2-609(3) would permit the buyer to accept and then demand assurance that future deliveries would be up to par, similar to the *Lander* court's allowance of an acceptance, while keeping the contract in force. But the buyer's failure to give satisfactory assurance of substantial payment on account would have been a repudiation after 30 days under section 400.2-609(4). Or, as the *Notes* put it: "True, a seller who makes a defective delivery must normally expect to wait for his money; but a buyer cannot in good faith turn a contract into one for indefinite credit by repeated acceptances and claims of recoupment, making no payment at all."⁵²

Comment 6 to UCC section 2-609 is, in the writer's opinion, an interesting extension of the drafters' motivation into the Code. It is, in the words of one writer,⁵³ a "time bomb" awaiting the unscrupulously unwary, because it does not relate to any specific portion of the statute but rather qualifies any contract which seeks to "cancel or readjust the contract when grounds for insecurity arise." It means, when read with the section, that an attempt to make ineffective the provisions of section 400.2-609 by contract may be effective if the standards set are not arbitrary. The *Notes* which follow the language of Comment 6 indicate an intent to reject such cases as *Dow Chemical Co. v. Detroit Chem. Works*,⁵⁴ in which the court enforced a clause under which the seller was held justified in cancelling a contract for monthly deliveries. A clause in the contract conferred the right if buyer failed to pay according to the contract, although the buyer had mailed a check several days after expiration of the credit term for the first delivery. Cases following *Dow Chemical* are un-

52. *Notes*, Comment on § 7-10 (S 98) at 8.

53. Speaking of a case cited for a different proposition, Mooney, *The Old and the New: Article IX*, 16 ARK. L. REV. 145, 155 (1962).

54. 208 Mich. 157, 175 N.W.2d 69 (1919).

certain augurs of judicial attitude toward the upholding of such provisions.⁵⁵

Traditionally an area of difficulty, the doctrine of anticipatory repudiation, has been narrowed in scope under the Code. The aggrieved party can, at least, confirm suspicious or vacillating conduct of the other party by demanding an adequate assurance of performance; if assurance is refused, there is a breach. Under section 400.2-610, the aggrieved party may await performance for a commercially reasonable time or proceed with his remedies despite notification that he would await the breaching party's performance, and in either case he can suspend his own performance. If the aggrieved party is the seller, he may suspend his performance, continue to identify certain conforming goods to the contract, resell unfinished goods, or attempt to minimize loss of goods in the process of manufacture according to his reasonable commercial judgment.⁵⁶ This follows the Code principle that the breaching buyer—not the aggrieved seller—has the burden of proving the seller's action after the breach was commercially unreasonable.

Comment 2 to UCC section 2-610 emphasizes that it is not necessary for repudiation that performance be made literally impossible; it is sufficient if the action indicates a rejection of the continuing obligation. In this connection, the comment further spells out that "a demand by one or both parties for more than the contract calls for by way of counter-performance is not in itself a repudiation," unless an overt statement of intention not to perform, except on conditions that exceed the contract, accompanies the demand. As an example of a situation covered by this proposition, the *Notes* again cite *Lander v. Samuel Heller Leather Co.*⁵⁷ There the contract called for 120,000 pounds of leather to be delivered at reasonable intervals. On a defective delivery of 10,000 pounds, the buyer demanded shipment of 80,000 pounds, yet to be delivered, within three days. The buyer's action, say the *Notes*, "need not be regarded as having repudiated the contract (assuming that the defect was not such as to justify his cancellation for breach) unless he refuses to continue with the contract if the deliveries are not forthcoming within that time."⁵⁸

55. See, e.g., *Republic-Odin Appliance Corp. v. Consumers Plumbing & Heating Supply Co.*, 92 Ohio L. Abs. 513, 192 N.E.2d 132 (C. P. 1963). *But see* *Mancourt-Winters Coal Co. v. Ford Motor Co.*, 236 Mich. 323, 210 N.W. 244 (1926). Cf. *Gedanke v. Wisconsin Evaporated Milk Co.*, 215 Wis. 370, 254 N.W. 660 (1934).

56. § 400.2-704, RSMo 1963 Supp.

57. 314 Mass. 592, 50 N.E.2d 962 (1943).

58. *Notes*, Comment on § 7-11 (S 99) at 2.

The test which must be met before a performing party can resort to this Code provision is that the repudiation will substantially impair the value of the contract. A breach which does less should not be "frozen"⁵⁹ before the time for performance. Thus, the aggrieved party could not suspend his own performance or resort to his remedies. This is consonant with the test for demanding an adequate assurance for performance under UCC section 400.2-609: breach which threatens a minor right does not justify suspension of performance until an assurance is given.

Still with an eye on upholding the contract if possible, section 400.2-611 permits the repudiating party to retract his anticipatory repudiation, by giving notice, and, if demanded, assurances under section 400.2-609. The aggrieved party, however, controls the situation at this point: if he has cancelled the contract or materially changed his position after the repudiation, the party in anticipatory breach may not retract. The section naturally follows and complements both the concepts of anticipatory repudiation and adequate assurance of performance.

Installment contracts have presented a variety of perplexing questions under prior law. Frequently the most critical and basic problem is whether the agreement is an installment contract or really a series of separate contracts. In the latter case, of course, the buyer would have no right to cancel and refuse future deliveries no matter how many defective deliveries he has endured in the past.⁶⁰ Even assuming the existence of a true installment contract, what is the result when a party sues for breach of a single installment? Is the entire contract repudiated, as an anticipatory breach within section 400.2-610, or is the repudiation limited to the defective delivery?

Section 400.2-612(1) defines an installment contract as "one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause 'each delivery is a separate contract' or its equivalent."⁶¹ The provision squarely raises the question whether it is possible to separately contract for successive deliveries of goods in the future. Comment 1 points out briefly that this section of the Code covers installment deliveries "tacitly authorized by the

59. *Id.* at 3.

60. *Hetrick Mfg. Co. v. Waxahachie Cotton Mills*, 1 F.2d 913 (6th Cir. 1924) (non-cancellation clause in contract for 40 separate deliveries held to create 40 separate contracts). The ruling of this case is specifically rejected by the *Notes*, Comment on § 7-9 (S 101) at 5.

61. In drafting this clause, the *Notes*, Comment on § 7-9 (S 101) at 4, indicate great reliance was placed on *Robert A. Munro & Co. v. Meyer*, [1930] 2 K.B. 312, 332.

circumstances or by the option of either party," without reference to other Code sections. The section cross reference mentions only section 400.2-307 which concerns delivery in single lot or several lots. Without something more in the way of guidelines the scope of installment contracts could indeed become bewildering.

Professor Llewellyn's *Notes* make both the intended scope of and the inspiration for the section clearer. Section 400.2-307 says that all goods under the contract must be tendered in a single delivery unless the circumstances give either party the right to demand delivery in lots, in which case the price can be demanded for each lot if it can be apportioned.⁶² Despite the lack of cross-references in the Code, his *Notes* also indicate that section 400.2-311, on options as to assortment of goods and shipping arrangements, is intended within the coverage of the installment contract section. Further, the *Notes* contend,⁶³ this section "merely reflects the view of the sound cases," citing three.⁶⁴

In other words, if the surrounding circumstances or the options available to buyer regarding assortment of goods, taken with the contract language, indicate authorization for delivery and acceptance of installments, there is an installment contract under the Code even though the contract stipulates against it. Reading all the sections together, a serious question arises whether it is possible any longer to enter into separate contracts for future deliveries of goods in lots, even where the parties do so by separately executed agreements.

On delivery of a non-conforming installment, section 400.2-612(2) permits the buyer to reject when the non-conformity "substantially impairs the value of the installment" and it cannot be cured, although the buyer must accept if the seller gives adequate assurance of cure.⁶⁵ If the non-conformity or default in one or more installments "substantially impairs the value of the whole contract," subsection (3) declares the contract breached, but it can be reinstated in three circumstances: (1) if the aggrieved party fails to notify of his cancellation, or (2) when he sues for

62. Comment 2 to UCC § 2-612 (1962). This test is more liberal than under prior law, which looked to what was clearly apportioned under the agreement.

63. *Notes*, Comment on § 7-9 (S 101) at 3.

64. *Czarnikow-Rionda Co. v. West Market Grocery Co.*, 21 F.2d 309 (2d Cir. 1927); *Lynn M. Ranger, Inc. v. Gildersleeve*, 106 Conn. 372, 138 Atl. 142 (1927); *Portfolio v. Rubin*, 233 N.Y. 439, 135 N.E. 843 (1922). See generally Annot., 32 A.L.R.2d 1117 (1953).

65. Note the interplay of this section with §§ 400.2-508, 2-609, RSMo 1963 Supp.

breach of past installments or (3) demands performance of future installments.

The *Uniform Sales Act* borrowed a broad and familiar concept from the law of contracts in dealing with breaches of installment contracts: "whether the breach is so material as to justify the injured party in refusing to proceed and suing for damages for breach of the entire contract."⁶⁶ Llewellyn described this test as "confused,"⁶⁷ preferring to rest the Code on the narrower issue of whether the value of the whole unperformed contract is so substantially impaired as to warrant cancellation and damages.

The justification for this change, in regard to a buyer's default in payment or acceptance or a seller's default in delivery, is found in *Helgar Corp. v. Warner's Features, Inc.*⁶⁸ in which the court (Cardozo, J.), speaking of default in payment, said:

We must know the cause of the default, the length of the delay, the needs of the vender, and the expectations of the vendee. If the default is the result of accident or misfortune, if there is a reasonable assurance that it will be promptly repaired, and if immediate payment is not necessary to enable the vendor to proceed with performance, there may be one conclusion. If the breach is wilful, if there is no just ground to look for prompt reparation, if the delay has been substantial, or if the needs of the vendor are urgent so that continued performance is imperiled, in these and in other circumstances, there may be another conclusion.⁶⁹

How does the Code provision relate to the materiality of the breach test in the *Uniform Sales Act*? The *Notes* say,

A much lesser impairment, if it gives insecurity as to the contract-breaker's future adequate performance, will justify "refusing"

66. UNIFORM SALES ACT § 45.

67. *Notes*, Comment on § 7-9 (S 101).

68. 222 N.Y. 449, 119 N.E. 113 (1918).

69. *Id.* at 454, 119 N.E. at 114. For illustrations of the operation of the rule of the *Helgar* case in a variety of fact situations see *Plotnick v. Pennsylvania Smelting & Refining Co.*, 194 F.2d 859 (3d Cir. 1952); *Hall Roach Studios, Inc. v. Film Classics, Inc.*, 156 F.2d 596 (2d Cir. 1946); *A. R. A. Mfg. Co. v. Pierce*, 86 Ariz. 928, 341 P.2d 928 (1959); *Coughlin v. Blair*, 41 Cal.2d 587, 262 P.2d 305 (1953) (rule applied to contract for sale of realty); *Kann v. Wausau Abrasives Co.*, 85 N.H. 41, 153 Atl. 823 (1931) (considers notice of non-consent to future breaches); *Agash Refining Corp. v. Soya Processing Co.*, 69 Ohio App. 175, 43 N.E.2d 311 (1942); *William Feinstein Bros., Inc. v. L. Z. Hatte Granite Co.*, 123 Vt. 167, 184 A.2d 540 (1962). Even though two courts may purport to apply the *Helgar* case, the differences in fact evaluation and emphasis may produce a variation in result. Compare *Cosmopolitan Film Distributors, Inc. v. Feucht-Wanger Corp.*, 226 N.Y.S.2d 584 (Sup. Ct. 1962) with *Hershey Farms, Inc. v. State*, 202 Misc. 105, 110 N.Y.S.2d 324 (Ct. Cl. 1952).

temporarily "to proceed," pending the result of a demand for assurance. This does not mean, however, a reversion "to the rule of the English statute . . . which keeps the contract alive unless the breach is equivalent to repudiation" [citing *Helgar*] . . . if "equivalent to repudiation" describes such breach in installments as indicates an *intention* not to perform. The question under [the Code] goes not to intention as to the future, but to the degree of injury actually suffered by the default. If that injury is sufficient, it happens that the legal *consequences* are almost the same as those entailed by a repudiation.⁷⁰

In computing the degree of default, it should be noted that the defects in prior installments are cumulative.⁷¹

Although the comments to UCC section 2-612 are substantial in length, the *Notes* contain far more case citations and specific illustrations. For example, midway through Comment 4 it is stated that either circumstances or the agreement may explain the need for conformity in a given case, and "in such a case, the effect of the agreement is to define explicitly what amounts to substantial impairment of value impossible to cure." As originally drafted, the comment read: "Thus in a contract for precision parts, chemicals for delicate use, or quality merchandise for a quality house, the circumstances may give notice that even minor non-conformity substantially impairs the value for the purposes of the contract."⁷² Similarly, Comment 5 suggests that on receipt of a discrepant delivery, good faith may require a buyer to cure, as by severing out an acceptable amount in case of an overshipment, but the buyer's duty extends only to "cooperation." The obligation of cooperation may be hard to define in a commercial context, and the comment lets the matter rest there. According to the *Notes*:

The facts of *Burrows & Kenyon, Inc. v. Warren* [9 F.2d 1 (1st Cir. 1925)], although not involving an installment contract, present an instance of the type of cooperation expected from the buyer under [the Code]. In that case a cargo of lumber arrived at the buyer's dock in sizes at great variance with the contract. The market had dropped. The seller offered to sort out the appropriate lumber and to supply any deficiency from local stocks. Nothing appeared to show the materiality of the short delay thus involved. Under [the Code] the minor extra expense incurred by the buyer through having surveyors and labor at the dock to sort the lumber is plainly curable by allowance on the price; the only question

70. *Notes*, Comments on § 7-9 (S 101) at 7.

71. Comment 6 to UCC § 2-612 (1962).

72. *Notes*, Comment on § 7-9 (S 101) at 8.

would be whether the obstruction of the dock would amount to an unreasonable burden. If it would not, the seller's proposed cure would be in order. Similarly, on the facts of *Jackson v. Rotax Motor & Cycle Co.* [1910] 2 K.B. 937 (C.A.), where part of a shipment of motor horns arrived in London in a damaged condition, but the dents were such as could be straightened and the necessary repolishing done by relatively simple and inexpensive processes. Under [the Code] the question would turn not on accurate conformity of the delivery as it did in that case, but on whether an unreasonable burden of trouble and delay would be involved in refinishing, as it might well be, for instance, by disrupting a production schedule. But plainly . . . it is the seller who must take over a cure which involves any material burden; the buyer's obligation reaches only to cooperation, to paying a minor excess of freight, or to separating a certain number of casks from a larger bulk. He is not required to engage in even minor manufacturing operations on goods agreed to be delivered in merchantable condition unless the circumstances indicate that such touching up would be simple for the buyer. . . . (For example, a delivery of parts to a manufacturer for further manufacture where no dislocation of the buyer's production schedule would be involved and the cost of rework would be minor.) . . . Adequate assurance for purposes of this subsection is measured by the same standards as under [UCC section 400.2-609] on right to adequate assurance of performance.⁷³

Disputes involving installment contracts will have to be resolved differently under the Code than in the past, it is certain, but what is relatively uncertain is the extent to which the many new ingredients added by UCC section 400.2-612 will themselves have to be settled by separate law suits.

Except for this section, very little of the common law and the *Uniform Sales Act* preoccupation with the title passages has infiltrated Part 6 of Article 2, primarily because these sections explore devices that may aid avoidance of an irreparable breach. It is, indeed, the Code's preoccupation with contract rather than title which permits the self-help or quasi-remedies, since a party can retreat from a partial breach of contract with relative ease compared with the almost insuperable problem under the common law of revesting a title which has passed.

Thus, section 400.2-613 combines both its former counterparts in the *Uniform Sales Act*⁷⁴ into one relatively easy to administer section. Normally,

73. *Id.* at 10.

74. UNIFORM SALES ACT §§ 7, 8.

risk of loss is determined by UCC sections 400.2-509 and 400.2-510, but in the case of goods *identified when the contract is made*, if risk has not yet passed or if the seller contractually retains it (*e.g.*, “no arrival, no sale”), on total loss of the goods without fault the contract is avoided. If the goods are partially destroyed, however, the buyer may demand inspection and at his option avoid the contract or accept the goods with an allowance from the price for the deterioration or deficiency in quantity.

The *Uniform Sales Act*, following the “sale-contract to sell” dichotomy⁷⁵ with logical consistency, necessarily handled destruction of goods in two sections: section 7 applied when title had passed, and section 8 when there was a contract to sell. In either case, commercial practicality demanded that the contract or sale was avoided if the goods wholly perished or had been destroyed without knowledge or fault of the parties prior to the contract. Here the *Uniform Sales Act* provisions paralleled the Code. But when the goods had been partially destroyed logical consistency rather incongruously demanded that the buyer could elect to treat the title as having passed to so much of the rubble as was left intact. The buyer’s problem did not end, by any means, when he had decided what might be salvaged because the *Uniform Sales Act* further provided that he had to pay the full price if the contract was indivisible. The Code side-steps this technical problem by the “due allowance” provision already mentioned, and the section is a particularly clear illustration of the desirability of deciding contract problems by contract rather than property principles.

UCC section 400.2-614 concerns a limited kind of contract frustration, arising where an agreed type of shipping or goods handling (subsection 1), or manner of payment (subsection 2) becomes commercially impracticable or, of course, literally impossible. Methods of shipment and payment are subsidiary to the primary purpose of the contract, which is the anticipated transfer of goods to the buyer and his payment for them. Rather than calling off the contract this section requires the tender and acceptance of a commercially reasonable substitute.

Comment 1 to UCC section 2-614 is one of the rare ones which cites cases as exemplars. What is not unusual is the absence of cases considered at length in the *Notes*, and the paucity of cross-references in the comments following the section. Again, the reader must judge for himself whether further illustration would have been helpful.

The third paragraph of Comment 1 states that “There must be a true

75. Compare UNIFORM SALES ACT § 1 with § 400.2-106(1), RSMo 1963 Supp.

commercial impracticability to excuse the agreed to performance and justify a substituted performance." The *Notes* cite two cases,⁷⁶ not involving substituted performance, in which the seller could not resist a recovery when his ability to perform or ship failed unexpectedly. In neither had he exercised diligence or good faith in attempting to overcome a failure in his source of supply or to obtain shipping permits under an embargo, respectively, but both are given as examples of the type of commercial impracticability which might properly be the subject of this section.⁷⁷

Nor do the section or its comment answer what is surely to become a question of application: does performance become commercially impracticable when unforeseen circumstances greatly increase the expenses of either party? An English case, *Blackburn Bobbin Co. v. Allen*,⁷⁸ which Llewellyn feels would be in the borderline category under the Code, is discussed at length in the *Notes*.⁷⁹ In this case Finnish timber was to be shipped to an English buyer. In 1914 the war blocked normal sea transport, but the buyer did not insist on delivery, nor did he abandon the contract. Two years later he found that Finnish timber was arriving in England and demanded delivery. In fact, shipments were being made by rail through Sweden, and the more expensive transportation and other factors had more than doubled the market price. On refusal to deliver, the seller had to respond in damages. Of the *Blackburn Bobbin* case, the *Notes* say:

So far as concerns the delay in delivery the result of this case is approved by [UCC section 400.2-615] on . . . failure of presupposed conditions. So far as a possible total excuse from performance is concerned, the availability of rail shipment through Sweden goes to the edge of the idea of a commercially practicable substitute within the present section. The policy of this section materially relaxes the stringency of the "old law" which the court considered basic in this case, namely that a party must make good on his contract despite the occurrence of any contingencies

76. *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194, 179 N.E. 383 (1932); *Washington Mfg. Co. v. Midland Lbr. Co.*, 113 Wash. 593, 194 Pac. 777 (1921).

77. Rejected in the *Notes*, Comment on § 6-2 (S 86) at 3 as a "rigid and uncommercial ruling" is *Commonwealth Title Ins. & Trust Co. v. Gregson*, 303 Ill. 458, 135 N.E. 715 (1922). In this case the contract called for "immediate" shipment on a "through" bill of lading from Philadelphia. When the seller could not obtain a through bill at Philadelphia he shipped by domestic bill to New York City, where a through bill could be acquired. On destruction of the goods in transit to New York, the seller was held to bear risk of loss because the method of shipment was non-conforming.

78. [1918] 2 K.B. 467 (C.A.).

79. *Notes*, Comment on § 6-2 (S 86) at 4.

against which he might have protected himself in the agreement. Under [the Code] the question is not merely one of an increase in expense, for each party contracts with the knowledge that the market may turn against him. However, where unforeseen circumstances operate in such a way as to greatly increase the expense of either party, the agreed performance may be said to have become commercial impracticable.⁸⁰

Except for cross-references to Article 5 in the comment, the reader is left to his own ingenuity or experience in digging through the Code to relate substituted performance to other sections. If supervening casualty prevents the seller from supplying the goods contracted for and he has a commercially reasonable substitute, the *Notes* indicate that section 400.2-613 on casualty to identified goods, section 400.2-615 on allocation among seller's customers and section 400.2-610 on anticipatory repudiation combine to provide a solution.

The buyer, of course, cannot be forced to accept any goods which do not fit the contract. But good faith and observance of decent commercial standards require a seller who is claiming excuse from performance to do what he can to reduce the casualty to the buyer by due notice and offer of substitution where possible with any appropriate reduction in the price.⁸¹

A sophisticate in using the *Uniform Commercial Code* can often be detected by the somewhat automatic and dexterous manner in which he flips from one section to another. One wonders whether, without the cross-referencing provided in the *Notes*, a new hand at the game (or an old one, for that matter) would quickly perceive the relation among these sections.

III. NEW—EXCUSE-FAILURE OF CONDITIONS

Prior sections of Part 6 have introduced concepts whose interplay and difficulties of application are measurable, more or less, by investigation of the judicial interpretation of older commercial statutes. Section 400.2-615, "Excuse by Failure of Presupposed Conditions," has no counter-

80. *Ibid.* It was not shown that the buyer knew that English dealers did not stock Finnish timber or that water shipment was customary, so these were not circumstances within the contemplation of the parties which would render the contract avoidable. Under the *Uniform Commercial Code*, a merchant buyer probably would be responsible for such knowledge.

81. *Notes*, Comment on § 6-2 (S 86) at 6.

part in prior case or statutory law; its meaning and effect are immeasurably more difficult to prognosticate.

In essence, the purpose of this section of the Code is to excuse a seller from timely delivery of goods if supervening circumstances not contemplated by the parties on contracting make his performance commercially impracticable.⁸² The *Notes*, again more complete than the comment, trace the two lines of case development seeking results which will be obtained under section 400.2-615. The first line of cases excused the seller where his performance actually became impossible, as in the case of death of a specific animal contracted to be sold. This rule later extended to future crops grown on agreed land,⁸³ and when a specified means of production of the contract subject matter was damaged or destroyed.⁸⁴ This section of the Code is intended to cover failure of agreed shipping facilities, recognized as a valid excuse by some cases;⁸⁵ in this contingency, it differs from the prior section, section 400.2-614 ("substituted performance"), in degree.

The Code section is meant to overcome the limitation in some earlier cases that the contract or its performance had to be absolutely prohibited by local law.⁸⁶ According to Comment 5, it will be sufficient if the seller in good faith believes himself to be under a restriction, whether it is "law" or a governmental regulation lacking the full force of law, as long as it is truly supervening and beyond the seller's undertaking in the contract. As to the latter, it must be remembered that a "merchant" seller under the Code might be expected to anticipate certain restrictive measures at the time of contracting.⁸⁷

The second line of cases split on the validity and extent of application of "seller's exemption clauses" which have become prevalent in commercial

82. *Whitman v. Anglum*, 92 Conn. 392, 103 Atl. 114 (1918) is given as an example of cases illustrating the need for this section. *Notes*, Comment on § 6-3 (S 87) at 1.

83. *Ontario Deciduous Fruit-Growers Ass'n v. Cutting Fruit-Packing Co.*, 134 Cal. 21, 66 Pac. 28 (1901). See also *C. G. Davis & Co. v. Bishop*, 139 Ark. 273, 213 S.W. 744 (1919); *Otto Seidenberg, Inc. v. Taufest*, 155 Ore. 420, 64 P.2d 534 (1937). *Contra*, *Anderson v. May*, 50 Minn. 280, 52 N.W. 530 (1892). Compare *Powers v. Siats*, 24 Minn. 515, 70 N.W.2d 344 (1955).

84. *Leavenworth State Bank v. Cashmere Apple Co.*, 118 Wash. 356, 204 Pac. 5 (1922).

85. *Reid-Murdock Co. v. Alton Mercantile Co.*, 287 Fed. 460 (8th Cir. 1920).

86. Better cases were more liberal: *Mawhinny v. Millbrook Woolen Mills, Inc.*, 234 N.Y. 244, 137 N.E. 218 (1921) (government "requested" priority treated as compulsory); *Ralli Bros. v. Campania Naviera Sota Aznar*, [1920] 2 K.B. 287 (freight charges under contract executed in England, illegal in Spain, the place of performance, treated as excuse).

87. See text accompanying Note 80 *supra*.

contracts. Clauses of this type contractually recognize the possibility of contingencies developing which may make the seller's performance unduly burdensome and, should they arise, excuse him from performance or permit delay. One line of cases severely limited the operation of such clauses by an *ejusdem generis* interpretation,⁸⁸ making it dangerous for sellers to stipulate one kind of excuse situation without stipulating every possible contingency. The other line looked to the purposes behind the clauses and interpreted them liberally.⁸⁹ It is not surprising that the Code, deeming exemption clauses reasonable in certain commercial circumstances, adopts the latter cases, and expressly refrains from exhaustively supplying illustrative contingencies, in the event exemption clauses under section 400.2-615 come before courts which have interpreted them narrowly.⁹⁰ The comments, however, suggest contingencies that might invoke the excuse provisions of the section: severe shortage of supplies, raw material or labor,⁹¹ or, rarely, unexpected failure to secure adequate financing. The test seems to be how remote the contingency is from the contract, how clearly it falls within the contemplated business risks, and assurance that whatever contingencies develop are outside the seller's control.

It would be fantasy to suggest that section 400.2-615 solves the difficult problems inherent in the seller's failing to perform by failure of presupposed conditions. Assuming that the provision is commercially justifiable and that it is inspired by cases which are the more commercially sound, it is nevertheless difficult to envision its potential range of operation. For one thing, the very definition of "presupposed conditions" may become controversial: what result where technological change debases every expectation of the buyer's need for or the seller's expectation of supplying the subject matter? The examples given in the comment suggest that the conditions intended to be covered must be something more prosaic, although the cases cited in the *Notes* (some of which have been included in these footnotes) suggest that Professor Llewellyn was seeking the widest possible application of this section. Section 400.2-615(b), permitting the seller to allocate production and delivery in any manner which is fair and

88. *Davis Co. v. Hoffman-LaRoche Chem. Works*, 178 App. Div. 855, 166 N.Y. Supp. 179 (1917); *Sunseri v. Garcia & Maggini Co.*, 298 Pa. 249, 148 Atl. 81 (1929).

89. *Davis v. Columbia Coal Mining Co.*, 170 Mass. 391, 49 N.E. 629 (1898) (clause excusing seller from damage because of strike construed to cover carrier strike responsible for interrupting shipment); *Canadian Steel Foundries Co. v. Thomas Furnace Co.*, 188 Wis. 557, 203 N.E. 355 (1925).

90. Comment 2 to UCC § 2-615 (1962).

91. *Cf. Vale v. Suiter & Dunbar*, 58 W.Va. 353, 52 S.E. 313 (1905).

reasonable after excusable interruption, may contain the seeds of litigation, especially if the buyer may then be forced to breach his own contracts. Although excuse applying to the buyer is not mentioned in the statute, Comment 9 suggests that in certain circumstances this section may also exempt the buyer. If buyers, sellers and the courts treat section 400.2-615 as a specific application of the organic requirement of "good faith"⁹² in commercial transactions, simple contemplation of the after effects of the provision may lead the parties to further negotiation and amicable settlement of the problem raised by failure of presupposed conditions.

The effect of the seller's invocation of section 400.2-615 is determined by the last section of Part 6, section 400.2-616, whose succinctness may by and large solve many of the questions raised about the scope of the prior section. When he receives the seller's written notice of a delay or allocation of production or delivery, the buyer may terminate the contract or modify it by agreeing to take the quota.⁹³ If he does nothing within 30 days, the contract is terminated automatically. No reference is made to a seller's attempt to retract his notice within the 30 day period if he discovers he can fully perform, as in the case of anticipatory repudiation.⁹⁴ Presumably seller would have this right if he had received no notice of termination from the buyer. Subsection (3) of section 400.2-616 prohibits contract terms which would require a buyer to take delivery at some unforeseen time in the future from a seller who has been excused from delivery, a reasonable precaution in view of the possible latitude of section 400.2-615.

IV. CONCLUSION

The reader probably has noticed the immoderate length of some of the quoted excerpts from the *Notes*. This is perhaps not *de règle* in current law review writing but in this instance was necessary to accomplish the writer's purposes, which were two: first, to achieve a reasonable exposition of Part 6 of Article 2 without undue repetition of the statutory language, which has to be done on the sometimes risky assumption that the reader has read the act or is reading it along with the present commentary. Secondly, the Llewellyn *Notes* have provided an opportunity to explore the

92. § 400.1-203, RSMo 1963 Supp.

93. No consideration is necessary to support the modification; § 400.2-209(1), RSMo 1963 Supp.

94. § 400.2-611, RSMo 1963 Supp., considered *supra*.

sources and background of this part of Article 2 and to evaluate the drafters' work, as they constructed the Code and the comments.

What do the *Notes* reveal? On the specific level, it is apparent that the comments as finally approved are an extremely terse and cryptic extract of the preparatory material drafted and considered in connection with the proposed *Uniform Revised Sales Act*, which ultimately became Article 2 of the Code. Freedom from the bonds of prior case law and the citations which accompany it is a noble objective if statutory language can be executed with sufficient precision to transcend the niggling reservations for which common lawyers are famous. Certainly many Code provisions raise questions, but by and large the objective has been nobly attained. The writer's impression is that the English language is not sufficiently precise to delineate a Code which anticipates the varieties of problems which can arise in commercial transactions. Evidently this feeling was shared by the drafters—else, why any comments at all? Are the comments satisfactory in their present form?

It is axiomatic among commercial law teachers that the comments never should have been drafted—or printed, anyway. They tend to raise rather than solve legal questions, and it seems to the writer, after having examined the *Notes* on what became Part 6 (admittedly a miniscule portion of Article 2) that the comments do not serve nearly as well as the *Notes* because the latter contain far more exemplary material. Putting it another way, the drafters seem to have operated under two questionable assumptions. One is that the average practitioner caught up in a commercial law case knows a great deal about commercial practices and usages, so that he can envision how an open-ended section may apply in a concrete factual setting. The second is that the inclusion of illustrative situations in the comments would have constricted the interpretation and development of Code principles to the situations actually set out in the comments.

One of the *Notes* goes beyond commentary on the immediate section and describes the purpose of Article 2:

The whole policy of [the Code] as well as its numerous specific sections looks toward furthering negotiations leading to an amicable adjustment of a dispute. The flat option given to the buyer under [section 400.2-601], either to accept or reject when the seller's tender or delivery fails to conform, by no means eliminates the possibility of such negotiation. The purpose of that section is to afford unambiguous protection to the buyer in taking any commercially reasonable action and this purpose is buttressed by

the options given to the buyer under [section 400.2-604] as to salvage of rightfully rejected goods. The state of facts, however, is rarely clear or agreed upon when a possible refusal of acceptance comes in question and [the Code] seeks to avoid forcing either party to commit himself at his peril to what a jury may decide, weeks or months later, as to the conformity of the tender. The provisions of this section, therefore, must be appropriately limited or modified when a negotiation is underway.⁹⁵

The cases upon which some of the propositions of Part 6 are based have stood the test of subsequent litigation, as indicated in the footnotes, and presumably this is true of other sections of Article 2. The writer's impression, after making a detailed study of the *Notes* underlying Part 6, is that the Code itself can stand on its own expert drafting but that the drafters' ambitions for the Code would not be impaired by the publication of whatever notes eventually come to light, suitably edited for the occasion.

95. *Notes*, Comment on 7-2 (S 91) at 3.