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FACILITATION AND REGULATION IN THE UNIFORM COMMERCIAL CODE

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"It is a big job, and why should anybody get it all under his belt the first time out?"[1] Thus did Chief Draftsman Karl Llewellyn address some New York critics of the Uniform Commercial Code. The pertinence (and perhaps the impertinence) of Professor Llewellyn's cautionary remark will be evident to anyone who has worked with the Code. The statute has no rival in our country in terms of sheer displacement and modification of existing commercial law. It is much more than a mere restatement or an effort "to make uniform the law among the various jurisdictions."[2] The effect of strict application alone will be enormous; possible analogical application adds to the potential impact.[3]

That the draftsmen dealt with many basic questions and did not always follow the path of least resistance is attested by the abundance of literature generated by the Code. Heretofore, much of this writing has been concerned with selling the product or with seeking to block a sale. But since more than forty states have now adopted the statute, with a clean sweep virtually assured, additional efforts will be made to examine the provisions in various contexts

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1 [1954] 1 N.Y. LAW REVISION COMM'N ANN. REP. 159.

2 UNIFORM COMMERCIAL CODE § 1—102(2)(c). Code language throughout is that of the 1962 official text. Although the desire for uniformity may have been the principal motive for initiation of the project, the Code being designed to replace seven of the uniform acts prepared by one of the sponsoring organizations, and although the practical value of uniformity may well be the major factor in widespread legislative acceptance, it is clear that normative elements of law improvement are so dominant as to result in a considerable reorientation of legal doctrine. See, *e.g.*, King, *The New Conceptualism of the Uniform Commercial Code*, 10 ST. LOUIS U.L.J. 30 (1965); Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MODERN L. REV. 167 (1964); Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213 (1966).

3 Collins, *Contracts*, in 1961 ANN. SURVEY AM. L. 243; Murphy, Book Review, 37 NOTRE DAME LAWYER 465 (1962); Note, 65 COLUM. L. REV. 880 (1965). The extent to which the Code is likely to be influential as a prestigious model for structuring general doctrine can be perceived, for example, in the initial draft of the committee currently revising the *Restatement of Contracts*. See RESTATEMENT (SECOND), CONTRACTS (Tent. Draft No. 1, 1964).

and from different perspectives. I propose to examine the extent to which Code rules and principles facilitate private autonomy, distinguishing such facilitation from a regulatory approach which assigns rights and duties irrespective of private agreement.

Obviously, if one is intent upon prospecting for commercial law cast in a regulatory mode, calculated to subordinate private choice to collective goals or policies of legislative origin, there are more promising fields than the Uniform Commercial Code. The Code does not appear to be a regulatory measure at all, certainly not in the sense of the typical insurance code or labor relations statute.[4] No one gainsays that the multitudinous legislative measures of the latter type limit private autonomy; that is precisely what they are designed to do. No comparable intention has been imputed to bodies in adopting the Code, the Code dealing, in the main, with matters still left within the domain of private agreement. If such a purpose is discernible in some Code provisions, it would be all the more significant in the light of avowed purpose.

Analyzing the varying types of economic promises which are made and kept, economist Harry Scherman made this observation: "I do not think there is any single fact more important for men to recognize, with all its implications, than this simple one — *that their individual well-being, as well as that of the whole society, is determined by the volume of exchanges going on in the whole society.*" (All italicized in original.)[5] Whatever the merits of this as a statement of universal principle, there can be no doubting that it is a presupposition upon which the bulk of our traditional commercial law is predicated. Whether derived from common law or statutory sources, this area of law is designed primarily to protect and promote commercial exchange. The Uniform Commercial Code is not an exception. Section 1—102(2) states its "underlying purposes and policies":

> Underlying purposes and policies of this Act are
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions.

4 There is extensive legislative activity in the area of consumer protection, for instance, most of it providing for regulation through administrative agencies. On the federal level there is; notably, the Federal Trade Commission Act of 1914, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1964), and the Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301-92 (1964). Far-reaching "truth in packaging" and "truth in lending" bills are now pending in Congress. See, *e.g.*, S. 985, 89th Cong., 1st Sess. (1965) (packaging); S. 2275, 89th Cong., 1st Sess. (1965); (lending; for text see 111 CONG. REC. 15848 (daily ed. July 12, 1965)). Many states, as well, have legislation of comparable import, including, in particular, consumer credit and disclosure statutes. See Note, *Economic Institutions and Value Survey: The Consumer in the Marketplace—A Survey of the Law of Informed Buying*, 38 NOTRE DAME LAWYER 555 (1963).

5 SCHERMAN, THE PROMISES MEN LIVE BY 393 (1938).

It is noteworthy that the desired "expansion of commercial practices" is to be accomplished through "agreement of the parties." This suggests another bedrock concept traditionally present in the Anglo-American law governing commercial transactions — freedom of contract. Under a regime of contract, parties are recognized as possessing a high degree of autonomy as regards the existence and content of legal relationships voluntarily assumed. There is, in effect, private lawmaking.

Policy considerations which support this kind of legal order often are unspecified in particular statutory enactments; they are usually presumed or simply taken for granted. One reason for a lack of specification is that a significant and perhaps major portion of the law that implements the system is to be found in court decisions rather than in laws or regulations emanating from legislative or quasi-legislative bodies. Even in judicial opinion there is little articulation of basic premises. Indeed, only when legislation was constitutionally challenged did the judges attempt to articulate the economic or philosophical foundations for freedom of contract, as in the past decades when regulatory measures of varying types were making their way through the courts. For elaboration one did not ordinarily turn to the law book, but to the economic, philosophical or political treatise. It has been asserted that freedom of choice tends to bring about a greater diffusion of power, creating a condition of pluralism in economic and political decision making. This, in turn, begets and encourages private initiative and action, resulting in an increasing number of transactions benefiting society as a whole. Many commentators emphasize the diffusion of power aspect as a means of protecting individuals against coercive, collective authority.[6]

The Code continues in the common law tradition of private autonomy, stating in section 1—102(3):

> The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

The point is underscored in the following subsection:

> The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

6 For typicality, the following will suffice:

> It is the function of the free economy to allow human judgments and values to be registered in the market place, and in an age of rapid technological innovation we shall need its services more, not less. If war is too important to be left to the generals, choice as to what shall be produced, saved, invested and consumed is too important to be left to the scientists, or to any group of reputed "experts."

DAVENPORT, THE U.S. ECONOMY 175 (paperback ed. 1965).

Removing all doubt as to general intendment, the drafters state in the comment to this section, "[F]reedom of contract is a principle of the Code."[7] Moreover, the three concluding sections of the first part of article 1 indicate that this affirmation is not merely a ceremonial gesture. For example, section 1—105(1) deals with the parties' power to choose applicable law:

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

This section has been rightly characterized as "a clear victory for parties' choice . . . a clear and important victory for freedom of contract, in an area of great importance."[8] Its importance, of course, diminishes as the Code becomes common patrimony, but the decisive opting for freedom of choice in this field is probative of general intendment.

Section 1—107 illustrates that some of the Code provisions implementing the idea of private autonomy serve to displace common law doctrine which tended to inhibit freedom of action:

> Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

It is evident that a recognition of freedom of contract would be hollow indeed if the remedies available to the aggrieved party were inadequate. Section 1—106(1) sets the tone for later sections:

> The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

In short, the thrust of the Code, at least as manifested by the general provisions of article 1, is facilitation, not regulation. It remains to be seen to what extent this theme is followed in other sections. Particular attention will be given to article 2, the important sales article which treats many basic commercial law questions.

I. Agreement

Our traditional commitment to freedom encompasses a presumed permis-

7 UNIFORM COMMERCIAL CODE § 1—102, comment 2.
8 Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. IND. & COM. L. REV. 59, 60 (1960).

sion to do whatever is not lawfully forbidden. We do not insist that the private party justify his right to act; the public authority which seeks to restrain bears the burden of justification. The recognition of private autonomy in contracting is an authentic manifestation of this attitude. "Just as there must be 'freedom for the thought that we hate,' " Professor Havighurst has reminded us, "so there must also be, in a measure, freedom for the contract that we hate."[9]

The degree to which there was official protection and encouragement of contractual freedom in nineteenth-century United States is without historical parallel.[10] But since then the trend has, indisputably, been to restrict the area of private agreement, as vast segments of economic behavior have been brought within the purview of statutory and administrative regulations.[11] Commercial activity to which the Code is most intimately related is largely of the unregulated type where the residue of respect for private agreement is the strongest.

Enforcement of Promises: Consideration

"In a developed economic order," Roscoe Pound observed, "the claim to promised advantages is one of the most important of the individual interests that press for recognition."[12] He elaborated as follows: "Credit is a principal form of wealth. It is a presupposition of the whole economic order that promises will be kept. Indeed, the matter goes deeper. The social order rests upon stability and predictability of conduct, of which keeping promises is a large item."[13] Although there is no record of a legal system which has undertaken to enforce all promises, there is yet to appear an organized society which has repudiated altogether the concept of binding promise or contract. To be sure, criteria of enforcement have varied. The sanction imposed has at times been merely social or religious, rather than that prevailing today, a court command to perform the promise or a judgment awarding money damages.[14] Still, the

9 HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 124-25 (1961).

10 See, *e.g.*, HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (paperback ed. 1964).

11 For a brilliant description of this "spin-off" from contract, set against a Wisconsin background, see FRIEDMAN, CONTRACT LAW IN AMERICA (1965). For a critical evaluation of this development, see DIETZE, IN DEFENSE OF PROPERTY (1963).

12 3 POUND, JURISPRUDENCE § 88, at 162 (1959).

13 *Ibid.*

> . . . [P]romises are everywhere, and it is rarely that one is ever broken. Big deals in cotton futures are made in a gabble which no broker would ever dare say he misunderstood. When an investment banker guarantees the underwriting of a new issue of stock, he normally takes his licking without protest if something happens to go wrong with the prospective market. It is the promise that sheet steel will be paid for once the automobiles are sold, or that the installment on the car will go to the finance company or the bank when it is due, or that the rent will be paid out of the proceeds of the crop, that enables men to gain untold benefits from the "long circuit of energy" which credit creates.

CHAMBERLAIN, THE ROOTS OF CAPITALISM 64 (rev. ed. 1965).

14

> If one could not contract to dispose of one's labor and property in a complex world, one could hardly be called a free man. In the modern context contracts are, of course, enforceable by the State: it is the assurance of this, as well as simple trust in the common honesty and common pride of man, that permits thousands of half-completed transactions to take place in business every hour of the day. In ancient law, however, there was nothing to compel the performance of a promise—and "incomplete conveyances" required a religious sanction, ritualized by a solemn ceremonial, to guarantee the fulfillment of an obligation.

CHAMBERLAIN, *op. cit. supra* note 13, at 62. In addition to the noted compulsions for keeping promises, the prospect of legal sanction and common honesty, there is also obvious compulsion

modern who insists "you gave me your word" or even "a bargain's a bargain," is hardly advancing novel doctrine. *Pacta sunt servanda* (agreements shall be kept), or its equivalent, seems to be a characteristic human attitude.

. . Every legal system must provide guides for differentiating enforceable and nonenforceable promises. The common law fundamental was that a promise must be supported by consideration, something bargained for and given in exchange for the promise.[15] Efforts to expand the area of enforcement have been, by and large, unavailing.[16]

. . It might be thought that the insistence upon consideration would severely restrict private autonomy. But for the most part, at least, this has not been the case. First, the area of real significance is that pertaining to commercial exchange where the *quid pro quo* is, of course, a prime ingredient. Instances of nonenforcement have involved, with few exceptions, marginal transactions of a noncommercial character. Second, the criteria of bargained-for exchange vest the parties with broad discretion. There has been no attempt at judicial review of the price or the terms so as to assure a "fair exchange." Rather, the courts have often reiterated what is regarded as a staple of common law opinion in this field: no inquiry will be made into the "adequacy" of the consideration.[17]

One exception must be noted, however. There has been one situation involving a bargain in fact but viewed as nonenforceable because of inadequacy. This occurs where the so-called pre-existing duty rule is applied, a rule which traces its pedigree to the famous case of *Foakes v. Beer*.[18] The promise or the performance of that which one is already legally obligated to perform, whether the duty be owed to the other party or to a third person, will not suffice as consideration. If *A* owes *B* one hundred dollars, *A* cannot obtain a discharge by paying fifty dollars and obtaining *B*'s promise to forgive the balance. Legally speaking, it would seem, a bird in the hand is never worth two in the bush. Whatever else may be said of this doctrine, its inhibiting effect must be acknowledged; it does not facilitate transactions. The Uniform Commercial Code meets this problem head on in section 2—209(1):

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derived from the fact that a failure to keep promises is, on the whole, economically disadvantageous. One's economic self-interest dictates keeping promises, for as one writer observed, "Old promises must be infallibly carried out before new ones will be believed." SCHERMAN, *op. cit. supra* note 5, at 29. "To say 'it pays to be honest' is wrong emphasis. The clearer view is that it is highly dangerous, economically, to be *dis*honest." (Italicized in original.) *Id.* at 71.

15 "Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise." RESTATEMENT, CONTRACTS § 75 (1932). See generally Shatwell, *The Doctrine of Consideration in the Modern Law*, 1 SYDNEY L. REV. 289 (1954).

16 The courts have resisted enforcement predicated upon antecedent moral obligation. Apart from promises to pay a debt barred by the statute of limitations or discharged in bankruptcy, so-called moral consideration will seldom suffice. See, *e.g.*, Manwill v. Oyler, 11 Utah 2d 433, 361 P.2d 177 (1961). There has been considerable implementation, however, of the doctrine of promissory estoppel, the recognition of obligation arising from unbargained-for reliance upon a promise. For a discussion of tendencies to extend the sphere of legally enforceable promises beyond the boundaries of a bargain theory of consideration, see 3 POUND, *op. cit. supra* note 12, § 88, at 201-21.

17 ". . . [T]he relative values of a promise and the consideration for it, do not affect the sufficiency of consideration." RESTATEMENT, CONTRACTS § 81 (1932).

18 9 App. Cas. 605 (1884).

> An agreement modifying a contract within this Article needs no consideration to be binding.

Here as elsewhere in the Code parties are enabled to do what they previously could not have done, providing they exercise good faith.[19]

Another manifestation of this approach is the treatment, in section 2—306 (1), of output and requirements contracts. At common law it was not unusual for attempts to construct commercial agreements of this type to fail for indefiniteness or lack of consideration. The Code insures enforceability by ascribing to the parties an intention to give the terms used a definite meaning. Section 2—306(1) provides:

> A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Simply because there is a promise not to revoke an offer does not preclude revocation under common law. This promise, the same as any other promise, must have something additional, typically consideration, before it becomes a binding commitment. The common law provided no "firm offer" apart from a standard option arrangement; the Code does. Section 2—205 reads:

> An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Private autonomy is enhanced to the extent that these legal barriers to promissory obligation are removed or neutralized. The lack of consideration defense of one who promises to hold an offer open, or accept a lesser price, or supply requirements, or give up a claim or right arising out of an alleged breach, buttresses the private lawmaking power of the parties and expedites commercial transactions, one of the principal reasons advanced for recognition of that power.[20]

19 Section 1—107 is complementary: "Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party."

20 Of comparable import is § 2—306(2), which governs exclusive dealing arrangements:

> A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed 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.

One other Code provision dispensing with the consideration requirement is contained in the article on letters of credit. Section 5—105 reads: "No consideration is necessary to establish a credit or to enlarge or otherwise modify its terms."

Offer and Acceptance: Indefiniteness

Closely related to the removal of barriers to carrying out the manifested intention of the parties is the enactment of rules designed to save a transaction despite some degree of uncertainty of expressed terms. Section 2—306, discussed above, is illustrative. This gap-filling or implied term technique is utilized throughout the Code.[21]

"It is fundamental that courts will not enforce a contract which is vague, indefinite, or uncertain, nor will they make a new contract for the parties."[22] This statement or a paraphrase has appeared in countless decisions and epitomizes the judicial attitude regarding indefiniteness. There has been, in general, a marked disinclination to fill any gaps or resolve uncertainties by the enforcement of some judicially approved standard, such as reasonable price, and save the purported agreement. Similarly, despite evident intention to be bound, "agreements to agree" have usually been held to be unenforceable. It has been argued that this attitude is anachronistic, being at variance with commercial expectations and inadequate to satisfy legitimate commercial needs.[23] Adverse business effects have, in part, been mitigated through utilization of types of escalator clauses. Thus, rent is geared to gross receipts, wage scales to a cost of living index, price to specified market quotations.[24] There is reason to believe that a change in prevailing attitude will not be long in coming. Most significantly, the Code breaks decisively with the traditional approach. Section 2—204(3), which states the principle as to "open term" agreements underlying other sections, provides:

> Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

This is a sweeping provision, amplified by the following official comment:

> The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like.[25]

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21 Foremost is § 1—203, which reads: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." This general provision is buttressed by more specific provisions, the effect of which is to read into expressions of the parties certain terms or obligations. One notable example is § 1—208:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

22 Hughes Realty Co. v. Breitbach, 98 N.W.2d 374, 376 (N. Dak. 1959).

23 Prosser, *Open Price in Contracts for the Sale of Goods*, 16 MINN. L. REV. 733 (1932). See VOLD, SALES § 10 (2d ed. 1959).

24 FULLER, BASIC CONTRACT LAW 87-89 (1947); Annot., 63 A.L.R.2d 1337 (1959).

25 UNIFORM COMMERCIAL CODE § 2—204, comment.

The important "open price" section is 2—305, which provides in part:

> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
>
> (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

Related sections pertain to place of delivery (section 2—308), time for performance (section 2—309), credit terms (section 2—310) and options in performance (section 2—311). Section 2—311(1) provides:

> An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2—204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

Offer and Acceptance: Mechanics of Assent

As "master of his offer," the offeror may not only stipulate the terms of the contract but also specify the manner of acceptance. In the standard bilateral contract, where the offeror seeks a commitment (promise) from the offeree, he may indicate how the return promise may be manifested. He may demand a signed writing; he may require that the return promise be actually communicated to him before obligation arises; he may even prescribe a "promissory act" as the permissible mode of acceptance.[26] If a unilateral contract is contemplated (where, typically, the offeror promises to do something in exchange for an act or forbearance by the offeree), the proferred consideration of the offeree and his acceptance are the same. His act or forbearance is both a manifestation of assent and the consideration for the offeror's promise.

Over the years a great deal of litigation has arisen dealing with various aspects of the acceptance problem, and for the most part it has been resolved by deduction from broad principles. Many have argued that although the conclusions reached may possess logical validity, they do not comport with reason-

26 *E.g.*, Ever-Tite Roofing Corp. v. Green, 83 So. 2d 449 (La. App. 1955) ("commencing performance of the work" held to constitute acceptance of offer for bilateral contract).

able commercial expectation and desire. For example, suppose a seller receives an order from the buyer, calling for prompt shipment of certain goods. Would a return promise of the seller to ship bind the parties to a contract? Or would only actual shipment suffice? And in either case, what effect, if any, would the shipment of nonconforming goods have? Section 2—206(1) affords clarification:

> Unless otherwise unambiguously indicated by the language or circumstances
>
> (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
>
> (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.[27]

Since it removes uncertainties present in prior law, subsection (1)(b) has the general effect of expediting transactions. Moreover, it deals decisively with the problem which Professor Hawkland has styled the "unilateral contract trick."[28] He gives the example of *B*'s wire reading: "Send me 1000 widgets Tuesday." If this is treated as an offer to enter into a unilateral contract, and *S* ships 1000 defective widgets, has he breached his contract? The buyer would so insist, but seller would contend otherwise. His position would be (and here the "trickiness" seems evident) that the offer specified "1000 widgets," and only by the shipment of goods conforming to this would a contract come into being. The shipment of 1000 defective widgets did not conform to the offer and was inoperative as an acceptance. Presumably under the Code this escape valve is closed.

There is another difficulty arising in the unilateral contract area (a prolific source of conceptual versus practical conflicts) for which the Code treatment does not afford such clarification. Consider the traditional classroom hypothetical: "If you will climb the flagpole outside and hang this flag at the top, I will give you five dollars. As you are midway in your ascent, I yell up at you: 'Offer revoked.' What legal recourse, if any, do you have?" None, according

27 The general character of the Code sections in this area can be seen in §§ 2—204 (1), (2):

> (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
>
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

28 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 33 (1964).

to older opinion, the reason being that no contract arises until the act requested as acceptance was completed. This view has been modified significantly. While rationales may differ, the effect is the same: after part performance by the offeree, the offer becomes irrevocable. But it has been urged that the modification has itself spawned a condition which needs amelioration. Originally the offeree undertaking to perform the act requested was at the mercy of the offeror, for the offeror could revoke any time prior to full completion. The modification of this was highly advantageous to the offeree, who was, after part performance, not susceptible to the offeror's power of revocation. While the offeror is not able to revoke, there is no obligation on the part of the offeree to continue, a situation disadvantageous to the offeror. It may be that section 2—206(2) was aimed at this problem as presented in the sale of goods area:

> Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

Professor Hawkland is of the opinion that such may have been the intention of the drafters but that the attempt falls short of accomplishing the objective. As he sees it:

> The lack of equality in a state of affairs in which the offeror can be bound, while the offeree is free, would seem to require a new rule providing that the beginning of performance does not bar the power of revocation, unless the offeree notifies the offeror that a start has been made and surrenders his right to cease performing. There is some reason to think that subsection 2-206(2) purports to formulate such a rule, but the plain meaning of that section seems to indicate that the offeree need notify the offeror that a start has been made, only "where the beginning of the requested performance is a reasonable mode of acceptance." If the offer is clearly one to enter into a unilateral contract, with completion unambiguously indicated as the accepting event, the beginning of a requested performance is not a reasonable mode of acceptance, and subsection 2-206(2) would not give the offeror additional protection in such a case.[29]

It is often said that an acceptance must be "unequivocal."[30] "An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent."[31] Moreover, the offeree cannot pick and choose among the terms, agreeing here and disagreeing there, and then assert the existence of an operative acceptance. If he varies or changes the terms, he makes, at best, a counteroffer. There can then be no contract until agreement is reached as to those changes, *i.e.*, until the counteroffer itself has been accepted.[32] In section 2—207 the Code breaks some-

29 *Id.* at 35.
30 *E.g.*, Venters v. Stewart, 261 S.W.2d 444, 446 (Ky. App. 1953).
31 RESTATEMENT, CONTRACTS § 58, comment a (1932).
32 There is a considerable body of law devoted to differentiating a "conditional acceptance," which is really no acceptance at all, from a genuine acceptance accompanied by mere inquiries, requests or suggestions of the offeree. Although a reply which purports to be an

what with tradition, presumably in an attempt to reflect what is believed to be the prevailing business consensus:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Under this section "a definite and seasonable expression of acceptance or a written confirmation" may operate as an acceptance even though "it states terms additional to or different from those offered." "The additional terms are to be construed as proposals for addition to the contract," which the offeror can either accept or reject. However, and this is a striking innovation, between merchants such additional terms *may become part of the contract* without further manifestation of assent by the original offeror.[33] This may be the result of subsection (2); the early returns indicate some judicial hesitation. For example, in *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*, a 1962 decision of the First Circuit,[34] the buyer submitted an order for a drum emulsion, which contained the state-

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acceptance but adds qualifications or requires performance of conditions is not an acceptance but a counteroffer, RESTATEMENT, CONTRACTS § 60 (1932), "an acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms." *Id.* § 62.

33 The drafters of the Code have expressed the hope that § 2—207 will help alleviate some of the difficulties surrounding what has aptly been called the "battle of the forms." To illustrate: the purchaser submits terms favorable to himself on his "purchaser order," with a request that the seller assent to those terms. But the seller, using his "sales order" or "invoice," ignores the purchaser's form and seeks to secure the latter's approval of different terms. And so it may go, back and forth. For an account of this business phenomenon, see FULLER, *op. cit. supra* note 24, at 178-80.

34 297 F.2d 497 (1st Cir. 1962).

ment: "End use; wet pack spinach bags." Upon receipt of the order the seller prepared an "acknowledgment" and an "invoice" simultaneously. The acknowledgment was mailed the same day and was received no later than the goods. The invoice was presumably received a day or two after the goods. Each document bore the following in conspicuous type on its face: "All goods sold without warranties, express or implied, and subject to the terms on reverse side." The buyer did not protest the seller's attempt to disclaim warranty liability, and in due course paid for the emulsion and used it. The case turned upon whether all warranties were excluded by the seller's acknowledgment. The plaintiff (buyer) based his case on section 2—207, claiming that the acknowledgment was "a definite and seasonable expression of acceptance or a written confirmation" which operated as an acceptance despite the inclusion of the warranty disclaimer. He contended that the disclaimer became merely a proposal "for addition to the contract." Moreover, since the additional term would "materially alter" the contract, it did not become a part thereof automatically. Finally, since the buyer did not expressly assent to the disclaimer, it did not become a part of the contract.

On the face of it, the buyer's argument appears to be ironclad. The court disagreed. It refused to regard the "acknowledgment" as an acceptance; hence, the acknowledgment, containing the disclaimer provision, was the offer which the buyer accepted by accepting the goods. The court seemed troubled by the section, which it said "is not too happily drafted."[35] It stated:

> If plaintiff's contention is correct that a reply to an offer stating additional conditions unilaterally burdensome upon the offeror is a binding acceptance of the original offer plus simply a proposal for the additional conditions, the statute would lead to an absurdity. Obviously no offeror will subsequently assent to such conditions.[36]

The court does not make clear whether it believed the plaintiff's contention was without statutory warrant or whether the statutory provision was absurd and should not be implemented judicially. If *Roto-Lith* is typical of the judicial response to this section, the overall effect will not be to facilitate agreement. The judicial gloss may well neutralize the apparent legislative intent.

The foregoing reflects a general Code policy of deemphasizing traditional offer and acceptance rules which can be used to defeat binding obligation despite overall manifestation of intent to the contrary. The treatment is far from comprehensive, nor are the provisions drafted in such a way as to preclude judicial obfuscation. Still, a stance is taken, and this is a foundation for further development.

Interpretation; "Gap Filling"; Construction: "Making a Contract for the Parties"

The time has long since passed when common law judges purported to ascertain the actual intentions of contracting parties. Rather, parties are presumed to mean what they say; the objective theory of contracts is dominant.

35 *Id.* at 500.
36 *Ibid.*

The emphasis is upon the outward expressions of the parties, considered in the full context of the transaction. There is a similar emphasis in the interpretation of contracts. The initial attempt is to find the plain meaning of the words used, ascribing to the words their ordinary, dictionary meaning. But there is, of course, a "breaking point . . . beyond which no language can be forced,"[37] resulting in some modification of the plain meaning rule. A word or phrase may not have a "plain meaning"; a choice must, therefore, be made from among alternative meanings.[38] The choice may be dictated by the context or by some type of special usage. There may be several dictionary meanings, including as well that given in advance by the parties, their own private code as it were. Hence, it often happens that courts will rely on various extrinsic aids in the process of interpretation. One such aid is the practical construction of the parties themselves, evidenced by their course of performance. In this regard, section 2—208(1) of the Code provides:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

The Code provides other extrinsic aids of a general character. Section 1—205, Course of Dealing and Usage of Trade, is the most significant:

> (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
>
> (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
>
> (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
>
> (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as con-

37 Learned Hand, J., in Eustis Mining Co. v. Beer, 239 Fed. 976, 982 (S.D.N.Y. 1917).
38 See generally Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964).

sistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

The above provision relating to "course of dealing" does not seem to go beyond the well-recognized view that the totality is to be examined—not words alone, but the context as well. This is not inconsistent with respect for the "agreement of the parties," as indicated by outward manifestation. The "usage of trade" provision is somewhat different. Arguably, it is more than a difference of degree. For example, for a binding contract it is not essential that there be proof that the particular parties were aware of the usage. The requirement is that it have such "regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." This affords the court some leeway, and suggests the possibility of holding parties to standards of which they not only did not intend to impose but of which they were completely unaware.

In a broad sense the usage of trade mandate may simply be a reflection of "Lombard Street dictating to Westminster Hall," a recognition of both the legitimacy and desirability of adapting commercial law to the needs, desires and practices of the business community. The drafters seem to underscore this: in the following comment:

> Under the requirement of subsection (2) full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes.[39]

Whether for good or for ill it must be recognized that while this may facilitate transactions it also encourages some judicial regulation. The transaction "agreed upon" will be held to be of a certain type, as found by the court in its consideration of trade usage.

This is not a new problem. Indeed, it may be but one aspect of the most basic problem which frequently confronts a court in its avowed attempt to implement the agreement of the parties. No matter how much care goes into the drafting of a document, there will almost inevitably be gaps, terms which are imperfectly articulated or matters not touched upon at all. What is the court to do? It may let the agreement fail for want of sufficient definiteness, or try

39 UNIFORM COMMERCIAL CODE § 1—205, comment 5.

to facilitate the transaction by the imposition of judicially prescribed terms. The former approach is rejected in the Code. For instance, section 2—204(3) states that "even though one or more terms are left open a contract for sale does not fail for indefinitness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." But "gap filling" by the courts lays it open to charge of "making the contract for the parties."

The Code has opted for one position over the other; so, it would seem, have the courts. There has been a tendency for courts not only to "interpret" contracts in the ordinary sense, but to "construct" terms as well.[40] It is not accidental that a leading opinion dealing with so-called "constructive conditions," *Kingston v. Preston,*[41] was authored by Lord Mansfield, a jurist noted for his assimilation of mercantile law and custom into the mainstream of the common law.

Judicial activism of this type need not, and usually does not, involve a determined disregard for the "intentions of the parties." A masterful treatment by Judge Cardozo is illustrative. In *Jacob & Youngs, Inc. v. Kent*[42] plaintiff, after building a country residence for the defendant at a cost of upwards of $77,000, sued to recover the contract balance of $3,483.46. The defendant argued that the plaintiff breached the contract in that the specifications called for iron pipe for the plumbing work to be "of Reading manufacture" and pipe of another manufacturer was installed. The improper substitution of "Cohoes pipe" for "Reading pipe," shown by the evidence to be of equal quality, resulted from the oversight of plaintiff's subcontractor. The defendant did not learn of the substitution until after most of it had been encased within the walls. To replace pipe at that point would have meant the expensive demolition of substantial parts of the completed structure.

Did the failure to install the Reading pipe constitute the breach of a condition to be followed by a forfeiture? Judge Cardozo, speaking for the Court of Appeals of New York, said it did not. He readily acknowledged that the plaintiff did not fill the measure of his contractual duty, but he declined to hold that the plaintiff was thereby disqualified from collecting the balance. The allowance of damages, in this instance measured by difference in value rather than cost of replacement, was all that defendant could rightfully demand.

Did the court thereby disregard the intentions of the parties and improperly "make a contract for the parties"? The simple fact is that the parties did not express themselves on the precise point. There was no "agreement of the parties" in that sense. Cardozo referred to similar problems which arise in differentiating promised performances which are dependent and those which are independent, or between promises and conditions. In resolving these problems, he said, courts rely upon "considerations *partly of justice and partly of presumable intention.*" (Emphasis added.)[43] He elaborated:

> From the conclusion that promises may not be treated as dependent to the

40 For a definitive treatment of this subject, see Patterson, *Constructive Conditions in Contracts,* 42 COLUM. L. REV. 903 (1942).
41 2 Doug. 684, 689, 99 Eng. Rep. 433, 437 (1773).
42 230 N.Y. 239, 129 N.E. 889 (1921).
43 *Id.* at 242, 129 N.E. at 890.

> extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. *Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable.* (Emphasis added.)[44]

Thus it is that in the process of "interpretation," or "construction" to be more precise, the courts will often find matters to be within the "agreement of the parties" which the parties themselves evidently did not consider at all. In doing so courts must rely upon "considerations partly of justice and partly of presumable intention," to use Cardozo's descriptive language. Inevitably there is a normative element in the decision, *i.e.*, the court must prescribe what is "fair," "just," "reasonable," etc. "Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable."

The Uniform Commercial Code not only continues this tradition; it significantly extends it. Apart from more general provisions, such as 1—203 (obligation of good faith), 1—205 (course of dealing and usage of trade), 1—208 (option to accelerate at will) and 2—208 (course of performance or practical construction), there are a multitude of specific provisions which, in effect, fill gaps left because of the absence of a term or an incomplete description thereof. Some of these have already been noted, *e.g.*, the "open price term" in section 2—305 and related provisions touching the general problem of definiteness in contracting. There are others which are clustered around various important segments of the sales contract, *e.g.*, the delivery obligation of the seller, the payment obligation of the buyer and the risk of loss.

Section 2—301 states the general obligations of parties to a sales contract as follows:

> The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

But what are the particulars of each obligation? Where is delivery to be made? When? Must all goods be tendered in a single delivery? When is payment due? Who bears risk of loss? These are matters which can and should be expressly provided for in the agreement, but often they are not. If such an omission occurs, how is the gap to be filled?

Concerning the "delivery obligation," the following are pertinent: 2—307 (delivery in single lot or several lots); 2—308 (absence of specified place for delivery); 2—503 (manner of seller's tender of delivery); 2—504 (shipment by seller); and 2—309 (absence of specific time provisions).[45] Similarly, there are particularizations of the buyer's "payment obligation"; 2—310 (open time for payment or running of credit; authority to ship under reservation); 2—511 (tender of payment by buyer; payment by check); 2—512 (payment by buyer before inspection); and 2—513 (buyer's right to inspection of goods).

Who suffers the loss if the goods contracted for are lost, destroyed or

44 *Id.* at 242, 129 N.E. at 891.

45 For the effect of standard mercantile terms, see UNIFORM COMMERCIAL CODE §§ 2—319 to —324.

damaged? Here, too, the parties may by agreement expressly allocate this risk in advance. But often, of course, they do not do so, and it devolves upon the court to make the risk assignment. The approach of the common law and the Uniform Sales Act is well known—risk followed "title." Whoever "owned" the goods at the time of the loss had to bear the burden. This, in turn, depended upon the intention of the parties. But the obvious difficulty was that the parties often gave little, if any, hint of their intention in this regard. Accordingly, the Uniform Sales Act established rules for ascertaining intention, which were applicable "unless a different intention appear[ed]."[46]

One can discern in the Uniform Sales Act, and in the common law opinions which it followed, a strong emphais upon the primacy of intention. Indeed, even when there is a clear realization that the parties had no intention in the subjective sense, the rules were formulated so as to purport to implement such intention. Even when the courts actually added to what the parties expressed, they did so with apparent reluctance and under the guise of effectuating intention. This fictional approach has been abandoned in other areas, and it was to be expected that it would be abandoned here as well. The Code provides for gap filling as did the Uniform Sales Act, but it does not seek to create the illusion that it is thereby implementing actual intention. The comment to section 2—101, sets the tone of the Code treatment of this and related questions:

> The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor.

The Code treatment lessens the importance of the concept of title in favor of a narrow issue approach detailing specific legal consequences for different factual situations. Important examples of these provisions are those relating to risk of loss (sections 2—509 and 2—510), the seller's right to an action for the price (section 2—709), and the buyer's right to obtain the goods (section 2—716). In handling matters of this type, the attorney must look first for a Code provision determinative of the particular issue at hand. Only when there is no such specific provision applicable will resort be had to the general provision, section 2—401, which establishes guidelines for the location of title.[47]

In the ordinary bilateral contract, where there are "promises for an agreed exchange,"[48] the parties exchange promises, but only as a means of facilitating an exchange of performances. Thus, *A* promises to sell *x* goods; *B* promises to pay *y* dollars. To facilitate the overall purpose, the exchange of goods for dollars, the

46 UNIFORM SALES ACT § 19. For example, rule 1 of that section reads:

> Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

47 The Code makes a major contribution in this area by recognizing that a buyer obtains an insurable interest in goods upon their "identification." See UNIFORM COMMERCIAL CODE § 2—501.

48 See RESTATEMENT, CONTRACTS § 266 (1932).

law "implies" or "constructs" conditions.[49] Tender by *A* is a condition to his right to the money; tender by *B* is a condition to his right to the goods. The Code is in accord. Section 2—507(1) reads:

> Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

In the same way, section 2—511(1) stipulates:

> Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

The foregoing would, of course, not apply in the common situation where credit is extended to the buyer—since the parties have "agreed" that payment should not condition the right to recieve the goods. But even here, events may occur which will have the effect of excusing performance by one party until further action is taken by the other. What, for example, of the case where one party's expectation of receiving due performance has been impaired? Section 2—609, an extremely important Code section, deals with this matter:

> (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
>
> (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

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49 The principles underlying the constructive condition of exchange have been more or less influential in English and American law for several centuries. Their articulate recognition has been obscured by a faulty terminology ("implied") which confused them with genuine inferences of intention inadequately expressed. The construction of conditions on this principle is limited, on the one side, by the principle that courts cannot make contracts for the parties (freedom of contract implies the possibility of contracting foolishly) and, on the other side, by the principle that unjust enrichment and "forfeiture" are to be avoided. The underlying conception is that bargain is a means of assuring and effectuating exchange, and that exchange (by some means) is a necessary mechanism in the economic organization of society by division of labor and specialization of function. Exchange by bargain (always limited to some extent by the environmental framework of law and usage) brings the bargainers into competing and even antagonistic relations with each other, since each seeks the satisfaction of his wants by a minimum of outlay, harm and risk. The effectuation of exchange is, however, not merely a means of satisfying the wants of the contracting parties; it also functions in the total economy to satisfy the wants of others in society. Thus a social interest in having the job done, and done well, is a part of the policy of the law of contracts.
Patterson, *Constructive Conditions in Contracts,* 42 COLUM. L. REV. 903, 928 (1942).

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

The thinking behind this section is detailed in the official commentary:

> The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, the other party is threatened with the loss of a substantial part of what he has bargained for. A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to believe that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance. Similarly, a buyer who believes that the seller's deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise.[50]

Failure to provide the required assurance constitutes "a repudiation of the contract" the effect of which is to afford the aggrieved party alternatives stipulated in section 2—610, dealing with anticipatory repudiation:

> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
>
> (a) for a commercially reasonable time await performance by the repudiating party; or
>
> (b) resort to any remedy for breach (Section 2—703 or Section 2—711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
>
> (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2—704).

50 UNIFORM COMMERCIAL CODE § 2—609, comment 1.

The landmark decision which developed the idea of anticipatory breach is *Hochster v. De La Tour*,[51] decided in 1853. On May 11 the employer repudiated a contract entered into the previous April, which called for the employee to begin work on June 1. The action was brought on May 22, *i.e.*, prior to the time when performance under the contract was to begin. The English court held this not to have been premature. The renunciation could be treated as a breach of contract, dispensing with the necessity of waiting until the time set for the performance by the employer.

Lord Campbell advanced two rationales in his opinion. One was that unless the employee was permitted an immediate right of action he would be obliged, in order to preserve his cause of action, to remain idle until the date set for the work to commence. The court was of the opinion that "If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June 1852, it follows that, till then, he must enter into no employment which will interfere with his promise . . . ."[52] It did not follow that refusal to recognize an immediate cause of action required continued maintenance of readiness to perform. The court might have recognized the repudiation as discharging the employee from his duty, *i.e.*, as providing him with a defense, without at the same time according him a present right to sue. But the court apparently did not consider the available alternative, and this inhibited future development. In general, courts have refused to apply the doctrine of anticipatory breach where the enforced idleness feature was not present, as for example, where the aggrieved party has already rendered his performance. One would think the case for one who has already performed his part of the bargain all the more appealing, but such persons have fared poorly in the cases. It is ironic that *Hochster* itself provided a most persuasive theory of recovery for them. In his opinion Lord Campbell observed:

> . . . [W]here there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and . . . they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation.[53]

This relation argument would, of course, be appropriate whether an aggrieved party has completed his performance or not. The finding of "implied promise" not to "do anything to the prejudice of the other inconsistent with their relation," actually makes the default "present" rather than "anticipatory." This is as it should be, since it is demonstrable that a repudiation can inflict present injury.

The Code abandons the principal judicial limitation of anticipatory breach, in that a remedy is available "when either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract." The Code does not state its rationale, but its attitude is certainly consistent wih recognition of a general obligation to exercise good faith and a policy of encouraging contract performance.[54]

51 2 Ell. & Bl. 678, 118 Eng. Rep. 922 (1853).
52 *Id.* at 689, 118 Eng. Rep. at 926.
53 *Ibid.*
54 Section 2—611(1), which gives the repudiating party an opportunity to retract "unless

Turning from the "anticipatory" to the "present," will *any* breach justify nonperformance by the innocent party? *Jacob & Youngs, Inc., v. Kent,* discussed previously, gave a negative answer, based upon "considerations partly of justice and partly of presumable intention." The elaboration of a doctrine of substantial performance is one of the most striking examples of "courts making contracts for parties." The vast majority of substantial performance cases involve construction or building contracts, where the circumstances are particularly appropriate for application of the doctrine. The structure is attached to the realty, and a return is not feasible. In such a contract the general judicial disfavor of forefeiture and unjust enrichment strongly impels mitigation. Since this is ordinarily not the case in contracts for the sale of goods, it no doubt helps to account for the sparing use of the substantial performance doctrine in mercantile transactions.[55] Certainly an effort to foist nonconforming goods upon the buyer —which are allegedly "just as good" as those contracted for—is doomed to failure. On the other hand, the principle of *de minimis non curat lex* may absolve a seller from a trivial failure, and occasional help has been forthcoming for a seller who has manufactured goods to buyer's special order and would suffer heavy losses if substantially conforming goods were not accepted. The basic pattern, however, is to demand strict, literal compliance. Variations from this pattern have usually involved some minor variance from stipulations governing time of shipment.[56]

The Code's treatment is rather nebulous. Section 2—601 seemingly adopts the "rule of perfect tender," in that if goods fail in any respect to conform to the contract the buyer may reject the whole:

> Subject to the provisions of this Article on breach in installment contracts (Section 2—612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2—718 and 2—719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
>
> (a) reject the whole; or
>
> (b) accept the whole; or
>
> (c) accept any commercial unit or units and reject the rest.

The decisive rejection of the doctrine of substantial performance must be read, however, against the background of other provisions which tend to limit a buyer's right of rejection.[57] For example, section 2—601 does not purport

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the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final," is consistent with this policy. Understandably, retraction must include any assurance justifiably demanded by § 2—609.

55 See 1 WILLISTON, SALES § 225a (rev. ed. 1948); Note, *Application of the Doctrine of Substantial Performance in the Law of Sales,* 33 COLUM. L. REV. 1021 (1933).

56 *E.g.,* LeRoy Dyal Co. v. Allen, 161 F.2d 152 (4th Cir. 1947).

57 For a detailed discussion of Code intricacies relative to the buyer's right to reject nonconforming tenders, as well as the seller's right to cancel, see Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two,* 73 YALE L.J. 199, 206-27 (1963). See Honnold, *Buyer's Right of Rejection,* 97 U. PA. L. REV. 457 (1949).

to deal with the effect of breach in an installment contract. That is covered by section 2—612, which provides:

> (1) An "installment contract" is 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.
>
> (2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
>
> (3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

This section minimizes the effect of the breach in terms of the relationship of the parties, and thereby limits, in practice, the buyer's right to reject. The buyer cannot claim a right to rescind or cancel respecting future performance. The measure of the limitation is indicated by the official comment:

> Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract.[58]

Consider also the mitigating effect of section 2—508, pertaining to opportunity given the seller to "cure" the improper tender or delivery:

> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
>
> (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

58 UNIFORM COMMERCIAL CODE § 2—612, comment 6.

The foregoing is consonant with the general policy of the Code which looks "to preserving the deal wherever possible."[59] Implementation of this policy can be seen also in a related section, 2—605, which covers the waiver of buyer's objections by failure to particularize:

> (1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach
>
> (a) where the seller could have cured it if stated seasonably; or
>
> (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.
>
> (2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

What if, after formation of the contract, it becomes "impossible" for one party to perform? Or if not "impossible," would a change of circumstances frustrating the objective or purpose sought to be attained excuse one's performance? If the device of contract is to have real utility there must be a general judicial attitude compelling performance of contractual undertakings or providing compensatory damages for breach. *Pacta sunt servanda*! It should not, therefore, be surprising that courts manifest an unwillingness to excuse a contracting party simply because performance is difficult, unprofitable or even impossible in some sense. As indicated in a celebrated dictum from an early common law decision,

> . . . when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.[60]

A considerable part of the judicial effort in the implication and construction of conditions has involved problems relating to so-called "impossibility of performance" and "frustration of purpose."[61] In this area as well a common pattern can be detected. Initial strictness gives way to implied terms, eventuating in obligations imposed by law or constructive conditions. The Code encourages this development and formulates specific rules. For instance, section 2—614 relates to substituted performance:

> (1) Where without fault of either party the agreed berthing, loading,

59 UNIFORM COMMERCIAL CODE § 2—605, comment 2.
60 Paradine v. Jane, Aleyn 26, 27, 82 Eng. Rep. 897 (1647).
61 See generally Page, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH. L. REV. 589 (1920). For an extensive annotation, see Annot., 84 A.L.R.2d 12 (1962).

or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

This provision is buttressed by two other sections which pertain to circumstances providing an excuse for performance. Section 2—613, dealing with "casualty to identified goods," is largely congruent with prior law. In contrast, section 2—615, Excuse by Failure of Presupposed Conditions, seems destined to have a reach considerably beyond that of common law cases:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic government regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

The Code does not distinguish between impossibility of performance ("frustration of performance") and frustration of purpose ("frustration of venture"). In this respect, the Code commentators observe:

> The first test for excuse under this Article in terms of basic assumption is a familiar one. The additional test of commercial impracticability (as contrasted with "impossibility," "frustration of performance" or "frustration of the venture") has been adopted in order to call attention to the commercial character of the criterion chosen by this Article.[62]

The "commercial character of the criterion" employed is also manifested in section 2—615(b), treating allocation in the event of partial limitation or capacity to perform.

In sum, these three sections purport to vest the court with considerable authority to apportion risk between the parties in cases involving impossibility of performance and frustration of purpose. Reflecting an avowed effort to encourage and prescribe commercial reasonableness, the guidelines are, perforce, vague, *e.g.*, "impracticable," "basic assumption." This is a mandate for closer judicial supervision or regulation. As elsewhere in the Code, the purpose of this regulation is to create a legal structure which is more consistent with business practice and legitimate expectation. Here, however, the dominant theme does not seem to be simply expediting business, but fairly adjusting obligations to take account of altered circumstances.

Contract Formalities: Seal; Statute of Frauds; Parol Evidence Rule

Formalities of an almost limitless variety have been used in the making of contracts. Both Homer and Herodotus describe a ceremonial libation which accompanied solemn agreements. Contracting parties will today, as they have presumably from time immemorial, "shake on it" as if the added form imported special obligation. Professor Corbin has observed that "the small boys of today no doubt feel the weight of an awful sanction when they say 'I cross my heart [and hope] to die.' " As he puts it, "the keeping of promises is in the folkways and mores of mankind" and "in the vast majority of cases they are kept and performed without the thought of breach or necessity of enforcement." Not all promises are enforceable, however, nor is there any historical precedent to the contrary. One of the traditional criteria for determining enforceability has been the form in which a promise is made or expressed.[63]

At common law the form *par excellence* was the seal, at first a wax substance attached to the document. Later, writing the word "seal" or "L.S." (*locus sigilii,* place of the seal) was more common. A sealed promise was enforceable centuries before the evolution of the doctrine of consideration. Enforceability did not derive from bargain or exchange, but precisely because of the formal mode in which the promise was cast.

There is an impressive body of learning concerning the common law seal, but most of this has become obsolete. By decision and statute, the seal has lost virtually all of its former efficacy.[64] The general abolition of the seal did not prove an unmixed blessing, however. Many regarded the seal as a useful legal device, if for no other reason than providing a convenient method for making

62 UNIFORM COMMERCIAL CODE § 2—615, comment 3.
63 1A CORBIN, CONTRACTS § 240, at 386 (1963).
64 For a table showing the status of the seal in each jurisdiction of the United States, see 1 WILLISTON, CONTRACTS § 219A (3d ed. 1957).

binding gratuitous promises. It was inevitable that attention would be given to filling the vacuum, and it was most natural to turn to that most common of contemporary "forms," the signed writing. In 1925, largely at the instigation of Professor Williston, the National Conference of Commissioners on Uniform State Laws approved the draft of the Uniform Written Obligations Act. This recommended statute reads:

> A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.[65]

The proposal met with a singular, and somewhat surprising, lack of success. Only Pennsylvania has adopted and retained the act,[66] and in 1943 it was redesignated, quite appropriately, the Model Written Obligations Act.[67]

The Uniform Commercial Code, by prescribing outright abolition of the seal in section 2—203, generally adheres to the historical pattern. Some resurgence of "contract form," however, has been ushered in by the Code. In two instances it uses a signed writing as a substitute for consideration.[68] In addition, section 2—209(1), relating to modification, rescission and waiver, states:

> An agreement modifying a contract within this Article needs no consideration to be binding.

In effect, this is added emphasis upon form, since the requirements of the Statute of Frauds section of article 2, section 2—201, must be satisfied if the contract as modified is within its provisions.[69]

The original Statute of Frauds sections pertaining to oral contracts appear to have been Parliamentary expressions of no confidence in the ability of courts to prevent enforcement of promises which, in fact, had never been made. To be sure, the judiciary was handicapped at that time. Neither the parties to the transaction nor interested third persons were competent to testify; the power to set aside a jury verdict was virtually nonexistent; contract law itself was largely undeveloped.[70] The requirement of a signed writing seemed appropriate as an additional safeguard. This limitation on the freedom of parties to bind themselves by means of their own choosing was, evidently, not too high a price to pay. It is somewhat surprising, however, that after the judicial handicaps which ostensibly brought the statute into being had been remedied, the writing requirement persisted. This may be suggestive of a value that transcends the original reasons calling for enactment of the statute. Many have thought so, including,

65 MODEL WRITTEN OBLIGATIONS ACT § 1.
66 PA. STAT. ANN. tit. 33, §§ 6-8 (1949).
67 For a discussion of the act, see Note, *The Uniform Written Obligations Act*, 76 U. PA. L. REV. 580 (1928).
68 UNIFORM COMMERCIAL CODE § 1—107 (waiver or renunciation of claim or right after breach); UNIFORM COMMERCIAL CODE § 2—205 (firm offer).
69 For a penetrating treatment of this topic, see Holahan, *Contract Formalities and the Uniform Commercial Code*, 3 VILL. L. REV. 1 (1957).
70 Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 429-31 (1928).

Professor Karl Llewellyn. He has written: "That statute is an amazing product. In it de Leon might have found his secret of perpetual youth. After two centuries and a half the statute stands, in essence, better adapted to our needs than when it first was passed."[71] Hence, it is not to be wondered that the Code contains Statute of Frauds provisions, the most important of which, section 2—201, reads as follows:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.
>
> (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
>
> (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
>
> (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
>
> (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2—606).[72]

71 Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931).

72 There is also a general residuary section, § 1—206, for "kinds of personal property not otherwise covered," which sets a $5000 limit to the enforceable oral contract. See UNIFORM COMMERCIAL CODE § 8—319 (pertaining to securities); UNIFORM COMMERCIAL CODE § 9—203 (covering security agreements).

Professor Williston called this provision one of "the most iconoclastic in the Code."[73] He surely overstated the case here. Although there are changes, the one overriding fact is that a writing requirement is retained for contracts for the sale of goods in excess of five hundred dollars.

On the one hand, the memorandum requirement is liberalized considerably. The writing need only "indicate that a contract for sale has been made," and it is not insufficient because it "omits or incorrectly states a term agreed upon." The Uniform Sales Act requirement of a sufficient memorandum was more demanding, and the omission or incorrect statement of term could be a fatal flaw. Moreover, in subsection (2) the Code relaxes the signature requirement in transactions between merchants. The special manufacture provision of subsection (3) had a counterpart in the Uniform Sales Act, but it has been liberalized somewhat.[74] The Code also has a rather vague, but potentially important provision, respecting admissions by a party that a contract for sale was made.[75]

On the other hand, the "acceptance and receipt" and "part payment" exceptions of the Uniform Sales Act were more liberal. Any part payment, no matter how small, or the acceptance and receipt of any part would enable a party to enforce an oral contract in its completeness. The Code limits enforcement to only those goods for which payment has been made or which have been received and accepted.

It would be interesting to learn the extent to which the Statute of Frauds section effectively precludes enforcement of oral contracts.[76] No doubt there are many who agree with the statement attributed to Samuel Goldwyn: "An oral contract is not worth the paper it's written on." But there certainly is much contracting that occurs through oral communication. Since informal compulsions may dictate performance of a contract unenforceable under the Statute, it may be that any inhibiting effect is illusory. At the same time, however, the Statute creates confusion, if not outright injustice on occasion.

It has been observed that while the Statute of Frauds denies enforcement to agreements actually made, the parol evidence rule compels enforcement of agreements not made. The commercial utility of the parol evidence rule seems more evident, however. In any event, regardless of the actual impact of the rule, it certainly was not designed to frustrate the intentions of the contracting parties. To the contrary, according to orthodox statement of the rule, it is not

73 Williston, *The Law of Sales in the Proposed Uniform Commercial Code,* 63 HARV. L. REV. 561, 573 (1950).

74 The Code omits the Uniform Sales Act requirement that the item be manufactured by the seller especially for the buyer. For the exception to be operative, however, the seller must have "made either a substantial beginning of their manufacture or commitments for their procurement." UNIFORM COMMERCIAL CODE § 2—201(3)(a).

75 The critical question, as yet unanswered, is whether the defendant can be obliged to deny the oral agreement before he can take advantage of the statutory defense. 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 29-30 (1964). See Stevens, *Ethics and the Statute of Frauds,* 37 CORNELL L.Q. 355 (1952).

76 There have been, unfortunately, too few efforts to appraise the impact of law upon commercial practice and vice versa. Perhaps the gap will be closed as investigating techniques are perfected and the fruitfulness of such endeavors comes to be appreciated. Certainly a comprehensive law that purports to reflect existent business practices in great measure would be illuminated by such investigation. The value is evident in studies of this type that have been undertaken. See, *e.g.,* Macaulay, *Non-Contractual Relations in Business: A Preliminary Study,* 28 AMERICAN SOCIOLOGICAL REV. 55 (1963).

applicable unless the court finds the parties intended the writing as a complete integration or final expression of their agreement. Section 2—202 of the Code does not deviate from this basic approach:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade (Section 1—205) or by course of performance (Section 2—208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Professor Corbin expressed the view that both the Statute of Frauds and the parol evidence rule "may have done more harm than good," maintaining that "both are attempts to determine justice and the truth by a mechanistic device and thus evidence a distrust of the capacity of courts and juries to weigh human credibility."[77] In its treatment of parol or extrinsic evidence, however, the Code permits the writing ("intended by the parties as the final expression of their agreement") to be explained or supplemented by course of dealing, usage of trade and course of performance. It also allows evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. Thus, the Code escapes much of the criticism lodged against the strictness of a large segment of prior judicial opinion.[78]

Warranty Obligation of Seller: Approaching Strict Product Liability

Professor Williston observed that "there is no more troublesome word in the law than the word 'warranty.' "[79] It may have a different meaning in one area of law than in another; even within a single area sharply divergent meanings have emerged in the cases. Originally an action on a warranty against a seller of goods was regarded as an action of deceit, a tort; not until 1778 does there appear to have been a reported case of a warranty action brought in assumpsit.[80] Thereafter, courts came to assimilate warranty to contract. In recent years, however, the tort origins have been increasingly emphasized, particularly as the "assault upon the citadel of privity" has been vigorously carried forward.[81] It

77 Corbin, *The Parol Evidence Rule,* 53 YALE L.J. 603, 609 (1944).
78 See King, *The New Conceptualism of the Uniform Commercial Code,* 10 ST. LOUIS U.L.J. 30, 58-62 (1965).
79 1 WILLISTON, SALES § 181, at 463 (rev. ed. 1948).
80 1 *id.* § 195, at 502.
81 The dramatic developments in this area have been told often and well, *e.g.,* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE U.L. REV. 1 (1963).

has also been urged that the evolving "product liability" law demands a view of warranty as *sui generis,* unfettered by either contract or tort antecedents.[82]

The Uniform Commercial Code's delineation of the warranty obligation of a seller of goods is a continuation of the development under the common law and the Uniform Sales Act. A number of significant changes have been made, however. The general effect of Code innovation will be to assist somewhat the on-going transformation from *caveat emptor* to *caveat venditor.*

Section 2—313 applies to the express warranty of quality:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely that seller's opinion or commendation of the goods does not create a warranty.

Under the Uniform Sales Act, reliance by the buyer was a necessary requisite of express warranty.[83] The Code makes no explicit reference to reliance, and it is questionable to what extent, if any, the "basis of the bargain" element implicitly incorporates such requirement.[84] It does seem clear that the Code does not require a showing that the purchase was induced by the affirmation or promise. Indeed, the official comments suggest that an express warranty may be predicated upon statements made after the deal is closed.[85] In sum, the probable impact will be to broaden the area of obligation.

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82 Jaeger, *Product Liability: The Constructive Warranty,* 39 NOTRE DAME LAWYER 501, 503 (1964).

83 UNIFORM SALES ACT § 12:

> Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. . . .

84 It is Professor Hawkland's opinion that the "basis of the bargain" requirement is "apparently the same as the 'reliance' requirement of section 12 of the U.S.A." 1 HAWKLAND, *op. cit. supra* note 75, at 58 (1964). Others insist that the Code has severely downgraded, if not eliminated, the reliance element. See, *e.g.,* Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties,* 8 U.C.L.A.L. REV. 281, 284-85 (1961).

85 UNIFORM COMMERCIAL CODE § 2—313, comment 7.

The Code preserves the designation "implied warranty" for those obligations which do not ostensibly rest upon manifestations of the parties but are more obviously implied by law. Historically, the pattern here is familiar — initially, there is a disregard of intentions not expressed in words, but this evolves to an approach which recognizes implied meanings. In short, obligations are constructed. The important implied warranty of merchantability is described in section 2—314:

> (1) Unless excluded or modified (Section 2—316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (Section 2—316) other implied warranties may arise from course of dealing or usage of trade.

As it did under the Uniform Sales Act, this obligation contains a class limitation. Under section 15(2) of that act it applied to "a seller who deals in goods of that description," and under the Code it applies to a "seller who is a merchant with respect to the goods of that kind." The Code, however, dispenses with the Sales Act requirement that the goods be "bought by description." It elaborates upon minimum standards of merchantability, and in subsection (3) suggests the possibility of other implied warranties arising from "course of conduct or usage of trade."

Section 2—315 of the Code provides for the implied warranty of fitness for a particular purpose:

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

The most notable innovation here is the elimination of the trade name exception. The existence of a patent or other trade name "is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but is not of itself decisive of the issue."[86]

The warranty obligations of the Uniform Sales Act were couched in terms of a seller being obligated to his buyer. Despite this apparent adherence to a regime of warranty limiting recovery to those in privity, the courts were able, through various methods, to expand the coverage, justifying Cardozo's classic remark: "The assault upon the citadel of privity is proceeding in these days apace."[87] It was of course, to be expected that a new codification of sales warranties would have to address this matter. The result is an obvious compromise. The Code extends horizontal privity, affording protection to some who are not actually purchasers, but does nothing about the problem of vertical privity. Section 2—318 reads:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Taking cognizance of the judicial assaults upon privity, however, the drafters appended the following comment:

> This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.[88]

Section 2—318 is a forceful reminder of the formidable difficulties involved in securing general approval of a comprehensive commercial code. The Code avoids the problem instead of attempting a definitive resolution. The treatment is sketchy, piecemeal and, in all likelihood, provisional. The classification of

86 UNIFORM COMMERCIAL CODE § 2—315, comment 5.
87 Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).
88 UNIFORM COMMERCIAL CODE § 2—318, comment 3.

"third party beneficiaries" is quite arbitrary. Why guest in the home, for example, but not in the family automobile? Why a house guest, but not an employee? Moreover, the Code fails to grapple at all with the issue of vertical privity, let alone related problems, such as indemnification among those in the distributive chain.

One writer, observing the restriction of the class of potential plaintiffs, as well as the failure to enlarge the class of potential defendants, maintains that "section 2—318 has given rebirth to the privity of contract doctrine."[89] This is highly unlikely. Indeed, the section is not likely to have much solid impact at all, apart from extending recovery to the limited class in those jurisdictions more or less adhering to the strictness of the privity bar. In the past few years the courts have begun to pre-empt the field, with far-reaching opinions calculated to reorient the entire subject of a seller's liability for defects in goods sold to those not in privity. The most dramatic breakthrough was *Henningsen v. Bloomfield Motors, Inc.*,[90] decided by the New Jersey Supreme Court in 1960. Subsequent decisions by the highest courts in New York,[91] California,[92] Illinois[93] and Michigan[94] are indicative of the vast change that is occurring. There may well be an emerging consensus which will delineate a strict liability in tort for sellers of goods,[95] rendering such statutory provisions as section 2—318 virtually obsolete.[96]

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89 Freedman, *Products Liability Under the Uniform Commercial Code*, 10 PRAC. LAW. 49, 55 (1964).

90 32 N.J. 358, 161 A.2d 69 (1960).

91 Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

92 Greenman v. Yuba Power Prods., Inc., 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

93 Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

94 Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965).

95 Reflecting the change of attitude which has taken place, both in the decided cases and the legal literature generally, the second edition of the *Restatement of Torts* articulates a rule of strict tort liability. Section 402A, entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," reads:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND), TORTS § 402A (1965).

96 A divergence may occur in the few jurisdictions (Colorado, Virginia and Wyoming) which have, in adopting the Code, altered § 2—318 so as to enlarge the warranty obligation significantly. COLO. REV. STAT. ANN. § 155–2–318 (1963); VA. CODE ANN. § 8–654.3 (Supp. 1964); WYO. STAT. ANN. § 34–2–318 (Supp. 1965). California did not enact § 2—318 on the grounds that it might restrict the already developed case law in that state. CAL. COMM. CODE § 2318 & comment. The Virginia statute is a good example of the enlargement of the obligation:

> Lack of privity between plaintiff and defendant shall be no defense in any action

In a decision allowing recovery to a nonpurchaser against the manufacturer, Judge Traynor decisively stated that the action did not derive from statute, *i.e.*, from a sale of goods warranty:

> . . . [T]he liability is not one governed by the law of contract warranties but by the law of strict liability in tort. . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.[97]

To the extent that this attitude becomes dominant, the range of Code influence will be constricted and, in all likelihood, confined to commercial transactions where the contending parties deal directly with each other. The judicial shift to strict liability in tort will also have repercussions in other areas which are at least partially covered by the Code, *e.g.*, limitation or disclaimer of liability.

If the warranty obligation is assimilated to contract law, there is little difficulty in supporting a power to limit or disclaim that obligation. So viewed, the power of disclaimer is simply an attribute of freedom of contract generally. To the extent the liability is seen as being created more formally "by operation of law" disclaimer or limitation by agreement will be discouraged.

In the 1952 edition of the Code, section 2—316(1) rendered inoperative any attempt to disclaim an express warranty. The provision read simply: "If the agreement creates an express warranty, words disclaiming it are inoperative." However, in the 1958 edition, carried forward in the 1962 official text, this terse language was replaced with the following:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2—202) negation or limitation is inoperative to the extent that such construction is unreasonable.

It is probable, but not certain, that the revised language will be interpreted so as to accomplish the evident legislative purpose clearly manifest in the original text. Even if this is true, it will still be possible to limit the effect of the express warranty. Section 2—316(4) reads:

> brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; however, this section shall not be construed to affect any litigation pending at its effective date.

VA. CODE ANN. § 8-654.3 (Supp. 1964). For a perceptive analysis of this statute, in which the author compares the Virginia approach (the same as the Code, but with abolition of the privity defense) with that of the second edition of the *Restatement of Torts* (strict liability), see Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965).

97 Greenman v. Yuba Power Prods., Inc., 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1962).

> Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Section 2—718 and 2—719).

Subsection (3) of section 2—719 is of special pertinence:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The foregoing is applicable as well to the disclaimer of an implied warranty of quality, which is treated in section 2—316(2) and (3):

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
>
> (3) Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and and makes plain that there is no implied warranty; and
>
> (b) when the buyer before entering the contract has examined the goods or the sample model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
>
> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

These subsections purport to permit disclaimer or modification but prescribe certain methods which must be observed in so doing. For the most part the statutory effort here is to protect the buyer from surprise by requiring conspicuous language. The area of paramount concern today, however, involves the power, if any, to limit liability as to those not in privity. Section 2—318, entitled Third Party Beneficiaries of Warranties Express or Implied, extends protection to "any natural person who is in the family or household of his buyer or who is a guest in his home . . ." and concludes: "A seller may not exclude

or limit the operation of this section." Does this sentence mean that a disclaimer effective as to the immediate purchaser would not, for example, bar recovery by one "who is a guest in his home"? If the theory of section 2—318 is that of third party beneficiary, as the title would indicate, it would seem that the rights of the beneficiary, if any, would be no greater than those of the immediate purchaser. Evidently this was the intention of the drafters, as attested by official commentary to the section:

> The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by Section 2—316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in Sections 2—718 and 2—719. To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section.[98]

A number of difficulties arise because the rationale for modification and disclaimer breaks down with regard to those persons who do not assent (actually or apparently) to the limitation. Although it may be thought desirable to permit the parties broad freedom to adjust rights and duties between themselves respecting the quality of goods sold, the supporting reasons are inappropriate as to those who have exercised no choice in the matter. Inevitably, the rights of this latter group must be defined, and in so doing the courts or legislatures must make normative judgments. It will not do to say simply that it is a matter which can be determined by agreement of the parties themselves. Just as in the matter of privity, the Code does not really address the problem in its full dimensions. Predictably, the relevant Code provisions are not likely to be very influential.

Vandermark v. Ford Motor Co.,[99] a California case, may be a precursor of things to come. An automobile retailer claimed to be insulated from liability to a purchaser and a passenger (purchaser's sister) in the automobile because of a limitation of warranty provision in the contract of sale. Speaking for the court, Judge Traynor decisively rejected the argument, declaring

> Since Maywood Bell [retailer] is strictly liable in tort, the fact that it restricted its contractual liability to Vandermark [purchaser] is immaterial. Regardless of the obligations it assumed by contract, it is subject to strict liability in tort because it is in the business of selling automobiles, one of which proved to be defective and caused injury to human beings.[100]

98 UNIFORM COMMERCIAL CODE § 2—318, comment 1.

99 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

100 *Id.* at 900, 391 P.2d at 172. Arguably, the same result could have been reached under the Code. Section 2—719 states that "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. . . ." But, as in *Vandermark*, the strict liability in tort theory is viewed as incompatible with a power to disclaim as to the immediate purchaser — a thesis which is questionable and which will doubtless be chal-

It is not surprising that the Code, given its avowed purposes, should fail to provide definitive treatment of the rights of those parties who are not parties to the sales transaction. Given the overall purpose of facilitating private agreements, such intervention would have been rather extraordinary. In the absence of such treatment, the delineation of the warranty obligation will be left to the judiciary, with such legislative requirements or guidelines as may be established from time to time.[101]

Unconscionability: Policing Contracts

It is evident that the "agreement" which the law recognizes and purports to implement is not solely the creation of the parties to the transaction. The law itself will supply components, reflecting normative judgments of courts. Gaps are filled, conditions constructed, and so on. Through it all the courts seldom, if ever, make an outright disavowal of an intent to carry out what, on the basis of outward manifestation, the parties intended or as reasonable men would likely have intended had they given attention to the matter. Autonomy is not challenged in theory, however much the court, in fact, "makes the contract for the parties." But there are exceptions, such as the regulatory aspect of the warranty sections. The most notable exception in the Code is section 2—302, pertaining to the unconscionable contract or clause:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The statutory purpose is regulatory according to official commentary:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. . . . The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the

lenged repeatedly — there is no comparable difficulty in proscribing attempts to limit liability to nonassenting third persons. For elaboration of the problems in reconciling strict tort doctrine with Code warranty provisions, see Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5 (1965); Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?* 114 U. PA. L. REV. 539 (1966).

101 For elaboration upon the regulatory aspect of warranty, see Note, *Economic Institutions and Value Survey: The Consumer in the Marketplace—A Survey of the Law of Informed Buying*, 38 NOTRE DAME LAWYER 555, 602 (1963).

> clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.[102]

What, precisely, is this statutory mandate? Is it simply a restatement of antecedent case law concerning instances of "over-reaching," "suprise," "deceptive fine print clauses" and the like, where the reality of voluntary assent is lacking? Or are courts encouraged to evaluate the agreed-upon terms with a view of helping to assure a "fair exchange"?

It is clear that this section raises questions of fundamental import. One such issue is whether courts should undertake to protect parties from "bad bargains." This is a classic policy question which must be confronted in every legal system. The standard response of the common law is that apart from instances where there is some impropriety involved, *e.g.*, where a promise is procured through fraud or duress, the courts take a "hands off" attitude. They insist that there be an actual bargain struck by the parties, but beyond this they will not, in traditional language, "inquire into the adequacy of the consideration." This has been regarded as a corollary of freedom of contract, buttressed by laissez-faire economics. Reflecting this approach, the *Restatement of Contracts* states flatly that "the relative values of a promise and the consideration for it, do not affect the sufficiency of consideration."[103]

At the other pole was the general medieval attitude, influenced in part by Roman law antecedents, which sought to insure equivalency of value in all exchanges. Such concepts as "just price" were formulated to inhibit unfair advantage in bargaining, even where the disadvantage arose from inadvertence, inexperience or carelessness.[104] Under the doctrine of *laesio enormis* a vendor could rescind a transaction where the price was less than one-half the value of the goods. This was limited to real estate transactions under Roman law, but extended to other areas by the canonists. There are some vestiges of the lesion doctrine in civil law countries, but the trend has been away from it.[105] In contrast, American courts are departing from the strict common law doctrine. Inadequacy, as such, is rarely an express reason for relief from a bargain, but it may be grounds for denying specific performance. It may serve as a wedge

102 UNIFORM COMMERCIAL CODE § 2—302, comment 1.

103 RESTATEMENT, CONTRACTS § 81 (1932). The following typifies the judicial attitude:

> Appellant's argument that the contract should not be enforced because the real estate was worth much more than the purchase price named in the agreement is, likewise, without merit. . . . It is the general rule that inadequacy of consideration, exorbitance of price or improvidence in a contract will not, in the absence of fraud, constitute a defense . . . . The evidence does not show any fraud or bad faith on the part of the appellees. While the appellant indicates that she was tired and ill at the time of transaction, the nature of her illness was not disclosed, it does not appear that her mental faculties were impaired, and it is nowhere contended that she was not competent to contract. Under such circumstances, it is not inequitable or unjust to require appellant to do what she agreed to do.

Hotze v. Schlanser, 410 Ill. 265, 270, 102 N.E.2d 131, 133-34 (1951).

104 It has been suggested that "just price" in practice more closely approximated current market price than doctrinal formulation would indicate. See de Roover, *The Concept of the Just Price: Theory and Economic Policy*, 18 J. ECONOMIC HISTORY 418 (1958).

105 See, *e.g.*, AMOS & WALTON, INTRODUCTION TO FRENCH LAW 163-65 (2d ed. 1963).

whereby a court will carefully scrutinize the bargaining process. Thus, it may be that a low price is seen as evidence of impropriety, as a "badge of fraud." Similarly, the court may be more easily persuaded to relieve because of mutual mistake or duress. The concept of duress has, in recent times, been employed in an ever-increasing variety of situations.[106] In addition, courts have demonstrated great concern over contracts of adhesion, illustrated by *Henningsen v. Bloomfield Motors, Inc.* The New Jersey Supreme Court cited section 2—302 of the Code in its comprehensive opinion invalidating the disclaimer of warranty features of the then standard warranty of the Automobile Manufactuers Assocation.[107]

The sparsity of reported litigation helped convince one authority that this section would not effect radical change. Professor Hawkland, observing that "not one single case involving unconscionability has been decided yet in any of the states which have adopted the U.C.C.,"[108] insists that "in the heat generated by this dispute, some of the opponents and proponents of section 2-302 have failed to comprehend that the provision is designed only to permit the courts to do openly what they have been doing for many years in a semi-covert way."[109] Noting that the case illustrations in the comments accompanying section 2—302 involve, for the most part, warranty disclaimers and limitations of remedies, he concludes:

> *They* [most of the case illustrations] *indicate, therefore, two flaccid areas upon which the contract draftsman must focus.* The remainder of the cases are concerned with adhesive contracts. These contracts must be carefully prepared and reviewed for fairness. If they are not oppressive and do not surprise, they should be sustained. (All italicized in original.)[110]

Section 2—302 was used as "persuasive authority" in *Williams v. Walker-Thomas Furniture Co.*,[111] a recent case arising in the District of Columbia which probably represents the high water mark for the unconscionability doctrine to date. A furniture retailer "sold" items pursuant to terms stipulated in printed form contracts purporting to lease the items for a stipulated monthly rental. Title to an item was to remain with the retailer until the total of all monthly payments made equalled the stated price, at which time purchaser would take title. The retailer could repossess in the event of a default in the payment of any monthly installment.

The contract specified further that

> the amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; *and all payments now and hereafter made by* [*purchaser*] *shall be credited pro rata on all out-*

106 Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).
107 32 N.J. 358, 404, 161 A.2d 69, 95 (1960).
108 1 HAWKLAND, *op. cit. supra* note 75, at 45.
109 *Id.* at 46.
110 *Id.* at 47-48.
111 350 F.2d 445 (1965).

> *standing leases, bill and accounts* due the Company by [purchaser] at the time each such payment is made. (Emphasis added by court.)[112]

The court said:

> The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.[113]

This appeal was a consolidation of two cases involving the same retailer and the same essential fact pattern. In one of the cases, the customer, Ora Lee Williams (known to the seller as a relief recipient with seven dependents to support on a $218 monthly government stipend) purchased a stereo set on April 17, 1962, for a stated price of $514.95. She defaulted shortly thereafter and the seller sought to replevy all items purchased since December, 1957. At the time of the April, 1962, purchase a balance of $164 was still owing from prior purchases. The total of all the purchases made over the years in question came to $1800. The total payments amounted to $1400.

Judge Wright, speaking for the majority, observed that congressional enactment of the Code occurred subsequent to the contracts in question. Nonetheless, in view of the absence of prior authority in the District of Columbia on the precise point, the court held "the congressional adoption of § 2—302 persuasive authority for following the rationale of the cases from which the section is explicitly derived."[114] "Accordingly," it was concluded, "we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced."[115]

The concept of unconscionability was elaborated upon as follows:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. [Citation made to Henningsen v. Bloomfield Motors, Inc.] The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power and hence little real choice, signs a commercially

112 *Id.* at 447.
113 *Ibid.*
114 *Id.* at 449.
115 *Ibid.*

> unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.
>
> In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case." Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." . . . We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract. (Footnotes omitted.)[116]

Since the trial court did not feel that enforcement could be refused, no findings were made on the possible unconscionability in the instant cases. Hence, the court did not believe the record sufficient for decision as a matter of law. The case was remanded to the trial court for further proceedings.

Judge Danaher, dissenting, supported the lower court's call for congressional consideration of "corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar."[117] But he urged "a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts."[118] He concluded, "I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect the decision in these cases will have."[119]

Unconscionability doctrine is obviously heady stuff, suggesting the need for judicial restraint in the exercise of its "police power." Each case, however, need not be resolved on a strictly *ad hoc* basis. There are guidelines. There is the older judicial delineation, particularly reflected in equity cases, and the overriding emphasis in the Code upon commercial practice as evidentiary of commercial reasonableness. The early returns and absence thereof indicate that the potentially broad mandate of section 2—302 will receive a rather narrow judicial construction. Even *Williams* can be viewed as consistent with a more narrow interpretation, which would confine the effect of the section to the invalidation of—in the characterization of the dissenting judge—manifestly "oppressive" or "exploitive" provisions not shown to have been consciously assented to and appearing in a context strongly suggestive of impropriety in the bargaining process.[120]

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116 *Id.* at 449-50.
117 *Id.* at 450.
118 *Ibid.*
119 *Ibid.*
120 It is predictable that consumer protection legislation will in many instances obviate the need for reliance upon § 2—302 in order to reach certain flagrant abuses. American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964), is illustrative. A written home improvement contract violated the applicable New Hampshire statute in that finance

II. Policy

Despite some regulatory aspects wherein private choice is subordinated to public policy, the dominant theme of the Code is respect for private choice as to both the existence and the content of legal relationships. It does indeed afford "an impressive view of a large sphere of commercial dealing that remains free."[121] In this part of the article additional provisions will be examined in the light of this apparent overall purpose. These provisions reflect Code policies seemingly inconsistent with a commitment to private autonomy. Attention will be given to the emergence in the Code of a kind of professional merchant status, to the prescription of forms enabling parties to attain desired ends but restricting the means available, and to the promotion of assignment and negotiation in the interest of promoting the free flow of commerce.

(Freedom of) Contract and (Professional) Status

Section 1—203 of the Code imposes upon contracting parties an obligation of good faith: "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." "Good faith," as defined in section 1—201(19), "means honesty in fact in the conduct or transaction concerned." Additionally, under the sales article, " 'Good faith' in the case of a merchant means honesty in fact *and the observance of reasonable commercial standards of fair dealing in the trade.*" (Emphasis added.)[122]

The general imposition of a requirement of good faith, in the sense of an obligation to be honest, is actually no more than what many courts have been willing to read into an agreement without explicit direction of the parties.[123] The very notion of a legal relationship existing between parties implies that each must act in a way consistent with that relationship. It is, of course, a legally imposed requirement but it does no more than demand an observance of conduct presumably contemplated. For the merchant, however, the additional requirement of article 2 goes beyond this minimum. The concept of good faith for the merchant is said to encompass the "observance of reasonable commercial standards of fair dealing in the trade." Nowhere in the Code is "fair dealing in the trade" defined, nor are "reasonable commercial standards" articulated. It devolves upon the judiciary to make these determinations, and this power could be very far reaching. Coupled with the mandate in section 2—302 "to police explicitly against the contracts or clauses which they find to be unconscionable,"[124] the result is an invitation to the courts to scrutinize transactions more closely than

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charges were not specified. This was held to bar the plaintiff from recovery on the contract, although the court also mentioned § 2—302 as "another and independent reason" for the result reached. *Id.* at 439, 201 A.2d at 888.

121 HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 97 (1961).

122 UNIFORM COMMERCIAL CODE § 2—103(1)(b).

123 For example:

> In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.

Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 771, 128 P.2d 665, 677 (1942).

124 UNIFORM COMMERCIAL CODE § 2—302, comment 1.

they might otherwise be inclined. Predictably, there will be constant pressure upon the courts to implement this power.

Courts need not and should not approach these questions as if they had a *tabula rasa.* Under section 2—302, when a claim of unconscionability is asserted as to a contract or any clause thereof, "the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect." The statement of obligation in terms of "reasonable commercial standards of fair dealing in the trade," suggests that norms are to be derived from the business community, such as practice, custom and usage. Although the obligations of good faith, diligence, reasonableness and care prescribed by the Code may not be disclaimed by agreement, the parties may by agreement determine the standards by which the performance of such obligation is to be measured if such standards are not manifestly unreasonable.[125]

It said that the law should be no respecter of persons,[126] but there are numerous instances where select persons or groups are singled out for either a grant of special privilege or the imposition of special obligation.[127] The higher standard of good faith for a merchant is illustrative and constitutes an important feature of the Code. It has no general counterpart in either the common law or prior codifications, but it is not unprecedented.[128] The general effect is to

125 It may come about that the imposition of a good faith term will be the very thing that will save some agreements from a condemnation of unconscionability. It is doubtful, for instance, whether Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948), an acknowledged antecedent of § 2—302, would have been decided as it was if the court had not been able to construct, by ignoring any element of presumed good faith in performance, a horrendous hypothetical of what "might be done" pursuant to the agreement. See UNIFORM COMMERCIAL CODE § 2—302, comment 1.

126 "The rules of law should depend upon the facts and the nature of the transaction, and not upon the particular persons involved." Hall, *Article 2—Sales—"From Status to Contract"?* 1952 WIS. L. REV. 209, 212.

127 If we look narrowly at our legal tradition we shall see that it has two characteristics. On the one hand, it is characterized by an extreme individualism. A foreign observer has said that its distinguishing marks are "unlimited valuation of individual liberty and respect for individual property." It is concerned not with social righteousness but with individual rights. . . . On the other hand, it is characterized by another element tending in quite another direction; a tendency to affix duties and liabilities independently of the will of those bound, to look to relations rather than to legal transactions as the basis of legal consequences, and to impose both liabilities and disabilities upon those standing in certain relations as members of a class rather than upon individuals.

POUND, THE SPIRIT OF THE COMMON LAW 13-14 (1921).

128 In answering criticism of those who objected that different rules were set up for persons regarded as "merchants," Professor Llewellyn pointed to the older Law Merchant tradition and its partial assimilation into the common law under the aegis, particularly, of Lord Mansfield. Professor Llewellyn put it this way:

These are rules which lay upon a person professionally involved in the field those obligations which should properly be laid upon persons. The practice along this line is ancient, not new. Before Lord Mansfield there were merchants' courts which made merchants, and only merchants, answer to the proper obligations of merchants. Lord Mansfield incorporated into the common law, if one cares to really examine the cases, not "The Law Merchant," but "The Law of Merchants' Peculiar Obligations." . . . The whole law, developed now over more than a hundred years, on foreign trade terms and letters of credit — and the whole current effort to establish by bankers' and merchants' negotiation "uniform" interpretations and clauses and "customs" — and the whole current successful movement to build, association-wise, "standard terms" — all of these rest on a vital need for distinguishing merchants from housewives and from farmers and from mere lawyers.

[1954] 1 N.Y. LAW REVISION COMM'N ANN. REP. 107-08. *Cf.* Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law,* 1 INTER-AMERICAN L. REV. 11 (1959).

demand a higher standard of performance from a "merchant," defined broadly as:

> . . . a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.[129]

One who fits this category of "a professional in business" assumes a status, the attributes of which are particularized in various Code sections. A few of these have already been noted, *e.g.*, section 2—205 ("firm offer"), section 2—207 (additional terms of "acceptance" becoming part of contract), section 2—201 (confirmatory memorandum binding on recipient under Statute of Frauds),[130] section 2—314(1) (implied warranty of merchantability)[131] and section 2—609(2) (reasonableness of grounds for insecurity and adequacy of any assurance offered to be determined according to commercial standards). Section 2—603 specifies the duties of a merchant with respect to *rightfully* rejected goods. When the seller has no agent or place of business at the market of rejection a merchant buyer is "under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and 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."[132]

A related provision applies to a buyer's waiver of objections by failure to particularize defects. Between merchants, a buyer who has rejected goods may not rely on an unstated defect that is ascertainable by reasonable inspection to justify rejection or to establish breach when the seller "has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely."[133]

Section 2—509, pertaining to risk of loss in the absence of breach, differ-

129 UNIFORM COMMERCIAL CODE § 2—104(1).

130 *Cf.* UNIFORM COMMERCIAL CODE § 2—209(2), which applies to signed agreements excluding modification or rescission except by a signed writing.

131 Of comparable import is UNIFORM COMMERCIAL CODE § 2—312(3), which pertains to warranty against infringement:

> Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

132 UNIFORM COMMERCIAL CODE § 2—603(1). However, "instructions are not reasonable if on demand indemnity for expenses is not forthcoming." *Ibid.* In addition,

> When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

UNIFORM COMMERCIAL CODE § 2—603(2). Finally, in complying with this section, "the buyer is held only to good faith." UNIFORM COMMERCIAL CODE § 2—603(3). See UNIFORM COMMERCIAL CODE § 2—327(1)(c), relative to a merchant buyer's duty to follow reasonable instructions in returning goods delivered on approval.

133 UNIFORM COMMERCIAL CODE § 2—605(1)(b).

entiates the merchant in an important respect. Unless the contract requires or auhorizes the seller to ship the goods by carrier or the goods are held by a bailee to be delivered without being moved, "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery."[134] The rationale is convincing:

> The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.[135]

These special instances do not add up to a general pattern of mercantile regulation. Each is carefully tailored to meet a specific problem, and taken singly or in combination, they fall far short of reorienting commercial obligation toward some emerging professional status. If they are illustrative of how the broader judicial mandates respecting unconscionable contracts and reasonable commercial standards of fair dealing in the trade are to be implemented, the traditional respect for private autonomy will not be undermined.[136]

Prescribed Forms and Prescribed Terms

X, desiring to give his ring to *Z*, says, in the presence of witnesses: "I hereby give you, *Z*, this ring; you are now the owner of it." Does *Z* own the ring? No. Similarly, *X* says: "I hereby promise to give you this ring, hereby waiving any necessity for consideration." Is his promise binding? No. Or *X* says to *Z*, again in the presence of witnesses: "I hereby will this ring to you; you are to be the owner of it at my death." Upon the death of *X*, does *Z* thereby become owner of ring? No.

In none of these cases was there an overriding policy precluding *X* from accomplishing his objective, but each expression of intention was not, of itself, sufficient to have the desired juristic effect. There are certain prescribed formalities which must be observed if the desired end is to be attained. In the first case, typically, there must be delivery, in the second, consideration, in the last case, compliance with the applicable Statute of Wills.

Superficially, the insistence upon forms might seem a limitation of private autonomy. So long as the formalities are easy to observe and are made known to potential users, however, their prescription enhances a party's ability to create legal relations. Use of a form guarantees the accomplishment of the intended objective; informal expression is more susceptible to the vagaries of judicial

134 UNIFORM COMMERCIAL CODE § 2—509(3).

135 UNIFORM COMMERCIAL CODE § 2—509, comment 3. There are three other sections of article 2 which contain special rules for merchants, but they do not stipulate any increase in obligations. Two of these, §§ 2—326 & —402(2), were drafted with the rights of creditors in mind. The other, § 2—403(2), is a notable innovation covering the entrustment of goods to a merchant and his power to transfer title to third persons. For discussion of this section in another context, see text accompanying note 159 *infra*.

136 For a discussion of other Code provisions which, to a degree, impose higher standards ("reasonable commercial standards") upon "professional" parties, *e.g.*, warehousemen, carriers and banks, see Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MODERN L. REV. 167, 168-70 (1964).

interpretation.[137] Moreover, the form can have a salutary effect in that the possibility of fraud or other impropriety may be diminished to the extent that an external corroborative event is demanded.

One of the most formal instruments known to the law is the negotiable instrument. The extraordinary legal effect given to a negotiable instrument, whereby good faith purchasers are insulated against prior claims and defenses, demands careful delineation by law of the types of instruments which qualify. Not surprisingly, the law has evolved certain formal requisites, such as the requirements of payment to order or bearer, of a sum certain and at a definite time. Section 3—104(1) of the Code continues this tradition:

> Any writing to be a negotiable instrument within this Article must
>
> (a) be signed by the maker or drawer; and
>
> (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and
>
> (c) be payable on demand or at a definite time; and
>
> (d) be payable to order or to bearer.

These formal requisites are not absolute prerequisites of negotiability, however. The provision covers only those negotiable instruments "within this Article." Other sections in the Code treat the negotiability of investment paper (article 8) and commodity paper (article 7, documents of title). Beyond this there is the possibility of judicial recognition of new types of paper which commercial practice may develop. The phrase "within this Article," according to Code commentary, "leaves open the possibility that some writings may be made negotiable by other statutes or by judicial decision."[138]

Chief Justice Gibson of the Pennsylvania Supreme Court insisted in 1846 that a negotiable instrument must be a "courier without luggage,"[139] and countless judges have repeated this as an ideal. But just as the emergence of the

137 See Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 Nw. U.L. Rev. 751 (1965).

138 Uniform Commercial Code § 3—104, comment 1. A leading authority, Professor William Britton, urged that the language "within this Article" be stricken. As he saw it:

> The prospective course of decision over twenty-five or fifty years under the proposed policy of having nonconforming instruments negotiable, in whole or in part, if they obtain judicial recognition, is of course conjectural. It is possible that the change might raise only a ripple; yet it might stir up winds strong enough to wreck the docks and shift the channel in this stream of the law. The proposal to cut the dyke and let the waters of negotiability flow out in any and all directions could well create legal swamps for miles around the banks.

Britton, *Formal Requisites of Negotiability—The Negotiable Instruments Law Compared With the Proposed Commercial Code*, 26 Rocky Mt. L. Rev. 1, 4 (1953). See Uniform Commercial Code § 9—206, relative to the possibility of "negotiability by contract."

139 Overton v. Tyler, 3 Pa. 346, 347 (1846).

negotiable instrument in the common law was brought about by the pressure of "Lombard Street dictating to Westminster Hall," so statute and judicial opinion has responded to apparent business demands by permitting a considerable amount of luggage.[140] If anything, the Code permits more than the prior codification. Most significant is the allowance of all types of acceleration clauses. Section 3—105(1) states in part: "An instrument is payable at a definite time if by its terms it is payable . . . (c) at a definite time subject to any acceleration . . . ." Moreover, under section 3—105, "a promise or order otherwise unconditional is not made conditional by the fact that the instrument . . . (c) refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to prepayment or acceleration . . . ."[141]

The effect of the Code provisions touching the formal requisites for negotiable commercial paper is to provide a comparatively easy form for those desiring the use of such commercial paper. A similar appraisal may be made of the Code treatment of investment securities,[142] documents of title[143] and letters of credit.[144] Finally, the same intelligent prescription of usable forms to facilitate the accomplishment of desired objectives can be seen in article 9 (on secured transactions), credited by many as being the most important article in the Code.[145]

The unprecedented growth of commercial credit has demanded and de-

140 For a discussion of the situation under the Negotiable Instruments Law, see Gilmore, *The Commercial Doctrine of Good Faith Purchase,* 63 YALE L.J. 1057, 1070-71 (1954).

141 Recall, however, that under § 1—208

> a term providing that one party . . . may accelerate payment . . . "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. . . .

142 UNIFORM COMMERCIAL CODE art. 8. The express purpose of this article is to create "a negotiable instruments law dealing with securities," encompassing

> . . . bearer bonds, formerly covered by the Uniform Negotiable Instruments Law . . . registered bonds, not previously covered by any Uniform Law . . . certificates of stock, formerly provided for by the Uniform Stock Transfer Act, and additional types of investment paper not now covered by any Uniform Act.

UNIFORM COMMERCIAL CODE § 8—101, comment.

> The basic purpose of Article 8 of the Uniform Commercial Code is to facilitate the transferability in our free capital markets of instruments which fairly fall within the definition of "security" in section 8-102. That definition is functional and is directly related to criterion of marketability by the requirement that the instrument be "of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment."

Israels, *Stop-Transfer Procedures and the Securities Act of 1933—Addendum to Uniform Commercial Code—Article 8,* 17 RUTGERS L. REV. 158 (1962) (reprinted in ABA SECTION OF CORPORATION, BANKING & BUSINESS LAW, UNIFORM COMMERCIAL CODE HANDBOOK 247 (1964) [Hereinafter cited as UNIFORM COMMERCIAL CODE HANDBOOK]). See Guttman, *Article 8—Investment Securities,* 17 RUTGERS L. REV. 136 (1962).

143 UNIFORM COMMERCIAL CODE art. 7. The negotiable document of title, of obvious business utility, enables the owner to retain control of the goods while they are in possession of a carrier or a warehouseman.

> When Article 7 is compared with the prior law . . . it is apparent that the continuity with prior law is more significant than the changes are. Terminology is recast; disputed questions are resolved; and some innovations are introduced. But the overall picture is one of tidying up traditional concepts rather than of radical reform.

Braucher, *The Uniform Commercial Code—Documents of Title* (Davenport rev.), in UNIFORM COMMERCIAL HANDBOOK 173, 209 (1964) (original in 102 U. PA. L. REV. 831 (1954)).

144 The sole formal requisite is a signed writing. UNIFORM COMMERCIAL CODE § 5—104.

145 See, *e.g.,* Henson, *Secured Financing Under the Uniform Commercial Code,* 18 BUS. LAW. 337 (1963) (reprinted in UNIFORM COMMERCIAL CODE HANDBOOK 257).

pended upon legal devices calculated to insure repayment of credit extensions. Typically, this is accomplished by making available to a creditor an opportunity to obtain a security interest in his debtor's property. The applicable law has evolved to heights of enormous difficulty and complexity. Article 9 undertakes a massive task of simplification and modernization.[146] It supersedes existing legislation dealing with such security devices as chattel mortgages, conditional sales, trust receipts, factor's liens and assignments of accounts receivable. And while the official comments insist that the article "sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures,"[147] there is no attempt to displace regulatory legislation such as small loan and retail installment acts, measures designed to subordinate private agreement to a policy of consumer protection.[148] In the main, the Code prescribes forms for the facilitation of these security transactions; the other legislation undertakes, to a much greater degree, to control and regulate the existence and content of the transactions. The latter, for example, have detailed provisions relative to the form of contract and prohibited practices. There are, in most instances, limitations imposed as to finance or service charges. In contrast the Code greatly simplifies the formal requirements for the creation and perfection of such security interests.

Freedom of Assignability; Negotiability of Goods: Promoting the Free Flow of Commerce

Since assignments are commonplace today — indeed one cannot imagine our complex credit structure existing without them — it is difficult to understand why common law courts refused for so long to recognize the assignability of a contract right. Legal historians have ascribed the refusal to various factors. For example, the severe proscription of maintenance and champerty, the unlawful interference in or purchase of an interest in another's lawsuit, helped create a climate of judicial disfavor to the notion of one suing to enforce a right arising out of a transaction to which he was not privy. In this respect Lord Coke commented:

> And first was observed the great wisdom and policy of the sages and founders of our law, who have provided, that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice.[149]

The emphasis upon the personal relationship of the contracting parties,

146 "The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty." UNIFORM COMMERCIAL CODE § 9—101, comment. For an excellent discussion of article 9, see SPIVACK, SECURED TRANSACTIONS (3d ed. 1963) (published by the Joint Committee on Continuing Legal Education of the American Law Institute and the ABA).

147 UNIFORM COMMERCIAL CODE § 9—101, comment.

148 "Consumer instalment sales and consumer loans present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification." UNIFORM COMMERCIAL CODE § 9—101, comment.

149 Lampet's Case, 10 Coke 46b, 48a, 77 Eng. Rep. 994, 997 (1612).

discernible also in the development of third party beneficiary contracts, tended to make the lack of privity an insurmountable obstacle to a third party's right of action. The law merchant, however, developed a considerable body of assignment doctrine, presumably in response to commercial demand. This indicates that the common law position might be explainable in practical rather than theoretical terms. The state of the economy did not require the credit stimulation afforded by the transferability of choses in action. Even where such stimulation was necessary it was given by the law merchant.

As the economy expanded, the common law courts, spurred on by courts of Equity, began to fashion legal doctrine which, in effect, permitted the assignment of a contract right. This was accomplished ostensibly within the framework of settled law, but actually amounted to a sharp departure from precedent. The owner of the right could appoint another his agent for collection and agree that the latter would keep the proceeds. As time went on, even if the transaction was formally denominated an assignment, courts would say the effect was to create a power of attorney, enabling the "assignee" to sue in the name of the "assignor." There were serious drawbacks to this agency evasion, however. The "assignor" could revoke the agency himself, and revocation was effected automatically by his death or bankruptcy. To overcome this defect in the process, litigants appealed to Equity, and characteristically, the Chancellor responded. If the "assignee" gave value, he was treated as owner of the claim, which ownership could not be divested by the "assignor's" attempted revocation or by his death or bankruptcy. At this point the future of assignment doctrine was assured. Although there persisted a language which described choses in action as assignable in Equity but not at law, the subsequent merger of law and Equity caused even this terminology to all but disappear. The result is that the power of assignment is firmly established, and judicial attention has been given to the implications of this power.[150]

As would be expected, the Uniform Commercial Code opts decisively in favor of assignability. In addition, it recognizes delegation of a duty of performance as a normal and permissible incident of a contract for the sale of goods.[151] The basic section is 2—210, which provides:

> (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
>
> (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on

150 FULLER, BASIC CONTRACT LAW 585-92 (1947); CORBIN, CONTRACTS § 856 (1951).
151 UNIFORM COMMERCIAL CODE § 2—210, comment 1. For a general discussion of assignment and delegation under the Code, see Note, *The Uniform Commercial Code and Contract Law: Some Selected Problems,* 105 U. PA. L. REV. 836, 906-20 (1957).

him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2—609).

The Code preference for freedom of assignability can be seen most clearly in its treatment of nonassignment clauses. Traditionally, the law has recognized the power of the contracting parties to limit the assignability of rights by agreement.[152] A leading decision in accord with this view is *Allhusen v. Caristo Constr. Corp.*, a 1952 New York case.[153] A subcontractor sought to assign the right to payments due or to become due under a construction contract with the general contractor. A clause in the contract provided: "The assignment by the second party . . . [subcontractor] of this contract or any interest therein, or of any money due or to become due by reason of the terms hereof without the written consent of the first party . . . [general contractor] shall be void."[154] The New York Court of Appeals rejected the position of the assignee in his suit against the general contractor. It said that "while the courts have striven to uphold freedom of assignability, they have not failed to recognize the concept of freedom to contract."[155]

In this instance where implementation of one freedom has a limiting effect upon another (broadly, "contract" versus "property"), the common law favored freedom of contract. The Code, as will be seen, subordinates freedom of contract in this instance, recognizing, in effect, that "this is not too high a

152 This view was embodied in the *Restatement of Contracts* as follows: "A right may be the subject of effective assignment unless . . . (c) the assignment is prohibited by the contract creating the right." RESTATEMENT, CONTRACTS § 151 (1932).
153 303 N.Y. 446, 103 N.E.2d 891 (1952). See Note, 1952 WIS. L. REV. 740.
154 *Id.* at 449, 103 N.E.2d at 891.
155 *Id.* at 452, 103 N.E.2d at 893.

price to pay for the pragmatic necessity of furthering the utilization of financial resources."[156]

Subsection (2) of 2—210, which undertakes to state what rights are assignable, begins with the words "unless otherwise agreed," inferentially recognizing that it would be possible for the parties to control the matter by agreement. However, in the very subsection, this contractual freedom is limited: "A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise." And the virtual *coup de grace* is administered in article 9. Section 9—318(4) stipulates: "A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective." An "account" is defined in section 9—106 as a "right to payment for goods sold or leased or for services rendered. . . ." In the same section a "contract right" is defined as a "right to payment . . . not yet earned by performance. . . ." The breadth of these definitions shows the extent to which the Code limits the rights of parties to prohibit assignability. To underscore this impression, the draftsmen added this forthright commentary:

> Subsection (4) [of 9—318] breaks sharply with the older contract doctrines by denying effectiveness to contractual terms prohibiting assignment of accounts and contract rights . . . .
>
> There can be no doubt that a term prohibiting assignment of proceeds was effective against an assignee with notice through the nineteenth century and well into the twentieth. Section 151 of the Restatement of Contracts (1932) so states the law without qualifications.
>
> That rule of law has been progressively undermined by a process of erosion which began much earlier than the cited section of the Restatement of Contracts would suggest. The cases are legion in which courts have construed the heart out of prohibitory or restrictive terms and held the assignment good. The cases are not lacking where courts have flatly held assignments valid without bothering to construe away the prohibition. . . . Such cases as Allhusen v. Caristo Const. Corp. . . . would be rejected by this subsection.
>
> This gradual and largely unacknowledged shift in legal doctrine has taken place in response to economic need: as accounts and contract rights have become the collateral which secures an ever increasing number of financing transactions, it has been necessary to reshape the law so that these intangibles, like negotiable instruments and negotiable documents of title, can be freely assigned.
>
> Subsection (4) thus states a rule of law which is widely recognized in the cases and which corresponds to current business practices. It can be regarded as a revolutionary departure only by those who still cherish the hope that

156 GRISMORE, CONTRACTS § 258, at 422 (rev. ed. 1965).

> Probably the outstanding example of the commercial use of assignment is accounts receivable financing. This means of stimulating a supply of credit has become exceedingly popular because it enables the businessman to convert what otherwise would be dormant accounts receivable into available working capital. In this respect the ability to assign assumes great social significance for, if our economy is fully to realize its potential, it is essential that all sources of capital be available.

Note, *The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. PA. L. REV. 836, 909-10 (1957).

> we may yet return to the views entertained some two hundred years ago by the Court of King's Bench.[157]

It is understandable that a major codification of commercial law would attach a high priority to transferability of assets. It is not to be wondered that negotiability in particular would be promoted with determination. Negotiability expedites commercial exchange, since the purchaser is insulated from defenses and claims of prior parties.[158]

The Code seeks to implement a kind of "negotiability of goods"[159] to a much greater degree than the common law or the superseded uniform acts. The key provision is section 2—403:

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> (a) the transferor was deceived as to the identity of the purchaser, or
>
> (b) the delivery was in exchange for a check which is later dishonored, or
>
> (c) it was agreed that the transaction was to be a "cash sale," or
>
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
>
> (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
>
> (3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

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157 UNIFORM COMMERCIAL CODE § 9—318, comment 4.

158 The triumph of the good faith purchaser has been one of the most dramatic episodes in our legal history. In his several guises, he serves a commercial function: he is protected not because of his praiseworthy character, but to the end that commercial transactions may be engaged in without elaborate investigation of property rights and in reliance on the possession of property by one who offers it for sale or to secure a loan.
Gilmore, *supra* note 140, at 1057.

159 See generally Warren, *Cutting Off Claims of Ownership Under the Uniform Commercial Code,* 30 U. CHI. L. REV. 469 (1963).

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk-Transfers (Article 6) and Documents of Title (Article 7).

Subsection (1) supersedes, in a decisive fashion, the older approach which sought to effectuate the "intention" of the original owner. More often than not, the title of the original owner was upheld as against a competing claim of a third-party good faith purchaser. An enormous body of learning was developed, with all sorts of subtleties, fine distinctions and refinements. The Code makes all this obsolete. A purchaser has power to transfer title even though his transferor was deceived as to his identity, the delivery was in exchange for a check which was later dishonored, it was agreed the transaction was to be a "cash sale" or the delivery was procured through fraud punishable as larcenous under the criminal law.

This subsection (1) was widely acclaimed. Apart from the commercial advantage, a degree of certainty was implanted. This was not so with respect to subsection (2). Its sharp break with precedent has been and continues to be a source of controversy. Many have asserted its scope to be indefensible. The criticism often takes the form of hypothetical questions, *e.g.*, What if *X* takes a prized piece of jewelry to a store for repairs—to a "merchant who deals in goods of that kind"—and the latter purports to sell the item to a good faith purchaser in ordinary course of business? Who "owns" the jewelry? To say that the purchaser now owns the jewelry is certainly to implement a "negotiability of goods" concept — perhaps with a vengeance. Professor Llewellyn, when pressed on this matter, seemed to concede that perhaps the Code goes too far here. In testifying before the New York Law Revision Commission he stated: "The choice is hard, and it gives little satisfaction, either way; but the Code's choice fits more comfortably into the whole body of our commercial law."[160] But the provision remains. There has been no significant reported litigation concerning it; certainly the "lost family heirloom" case has not yet surfaced. Perhaps it never will, or perhaps if it does judicial ingenuity will find a way to preserve, in this rather special situation, the security of possession clearly guaranteed by prior law.

III. Conclusion

When Mackenzie D. Chalmers was directed by Parliament to codify English sales law, his mandate was to "reproduce as exactly as possible the existing law."[161] The resultant English Sale of Goods Act, enacted in 1893, reflects a determined effort to preserve continuity with the common law. When, at the turn of the century, Professor Williston commenced work on what was to become the Uniform Sales Act, it was understood that his statutory codification should likewise comport with legal antecedents. In general, Professor Williston's draft followed the English statute; in several instances Lord Chalmers's language was copied verbatim.

160 [1954] 1 N.Y. Law Revision Comm'n Ann. Rep. 123.
161 Chalmers, Sale of Goods Act x (13th ed. 1957).

Work on the Uniform Commercial Code began in the early 1940's, under joint sponsorship of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The Chief Reporter was the late Karl Llewellyn, assisted by many others from the ranks of the judiciary, the practicing bar, the law schools and business. Unlike Chalmers and Williston, Llewellyn and his colleagues did not feel a special need or obligation to follow previously chartered courses. Accordingly, there are many innovations and departures from precedent. But in a larger sense, there is remarkable continuity.[162]

Evidence of this continuity can be found in both the formulation of basic policy and the specification of means of implementation. The dominant policy remains the facilitation of commercial exchange of a type desired by the participants. The interest is in creating a framework within which private choice can be exercised. There is no discernible overall effort to reorder commercial activity to some preconceived pattern of social justice. Contractual freedom remains the rule, subordination to overriding policy, the exception. When such policy is articulated, *e.g.*, when the concept of unconscionability or of reasonable commercial standards of fair dealing in the trade is introduced, directions to the judiciary militate against arbitrary disregard of actual or presumed intention of the contracting parties. The judge is not to rely simply upon his own unsupported conscience, or upon his own observation of business practice or usage. He must consider data in the record, since the Code provides explicitly for introduction of evidence of commercial context. Nor is the judge encouraged to take cognizance of whatever policies are, at the moment, appealing to him, *e.g.*, price stability, conservation of natural resources, balance of payments or need for temporary credit relaxation or tightening. Rather, he is to derive his norms from statutory language and purpose, as illuminated by commercial background and practice.

The choice of judicial implementation is itself highly significant, especially in an age of increasing administrative execution of detailed legislative policy. That a legislature which is determined "to simplify, clarify and modernize the law governing commercial transactions"[163] should cede so much responsibility to the courts is both a sign of confidence and an encouragement of judicial creativity.[164] As sketched in the official comments, the following is envisioned:

> It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. . . .
>
> The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the

162 It has been said that "we are all conservatives—just different ancestors." As noted, even the most striking of Code innovations are not unprecedented, *e.g.*, special merchant obligations or standards. In particular, analogues can be found in the Law Merchant, which strongly influenced the development of commercial law by the common law courts. For a general survey, see MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT (1904).

163 UNIFORM COMMERCIAL CODE § 1—102(2)(a).

164 ". . . [T]his Code has been planned to endure and to afford both the courts and the people affected by it room to move *in the best American common law tradition.*" (Emphasis added.) Mentschikoff, *supra* note 136, at 167-68. See LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

> Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.[165]

The prospects are that commercial law will enter upon a formative period. Issues long dormant will again be debated, not only in the legislative assembly but in the courtroom. A judicial awareness of the broad statutory mandate to adapt and modernize will produce changes exceeding in significance even those of the Mansfield era. Hopefully, the quality of this creativity will match that of that great jurist, whom Holdsworth called "the greatest lawyer of the eighteenth century."[166] If a comparable encouragement of commercial exchange again stimulates years of economic expansion, the contribution will surely be accounted as exceedingly great.

165 UNIFORM COMMERCIAL CODE § 1—102, comment 1.

166 HOLDSWORTH, SOME MAKERS OF ENGLISH LAW 161 (1938). Edmund Burke, a contemporary, said of Mansfield:

> His ideas go to the growing melioration of the law, by making its liberality keep pace with the demands of justice, and the actual concerns of the world; not restricting the infinitely diversified occasions of men, and the rules of natural justice, within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and of our empire.

Id. at 169.