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I. Introduction

Article 2 of the Uniform Commercial Code, entitled Sales, contains an entire chapter (Part 7) devoted to remedies. This chapter reveals two basic philosophies. First, the draftsmen were concerned with developing a pattern of recovery following default by one of the parties, even though default is but one reason for the nonperformance of promises. Second, the remedies which are codified emphasize the expectation interest of the nondefaulting party and almost ignore any development of the restitution interest. This emphasis upon the expectation interest singles out only one judicial approach by which the economic interests of the parties can be readjusted following a breakdown in contractual relationships. On many occasions restitution recoveries represent a more equitable method of treating these interests. The purpose of this article is to collect and to examine those sections of article 2 of the Code which provide lawyers and judges an opportunity to protect a party's restitution interest following a default in a contract for the sale of goods.

II. Court Protected Contract Interests

On breach of a contract for the sale of goods three interests of the parties contend for judicial protection. These are the expectation, reliance, and restitution interests,[1] discussed below:

1. *The expectation interest.*— When the parties enter into an agreement, certain hopes—or expectations—are created by the respective promises. When the agreement concerns the purchase and sale of goods, the buyer expects to receive those goods and the seller expects to receive the price. If the agreement is also a contract, the Anglo-American legal system has traditionally protected this expectation in-

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1. Other articles have developed these three interests in detail; thus only a brief description is given as a background for tracing the protection of the restitution interest under article 2 of the Code. The most complete analysis appears in Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52 (1936), concluded in 46 Yale L.J. 373 (1937).

terest upon the default of one of the parties.[2] Protection may come through remedies which award the nondefaulting promisee the property which was promised—remedies such as specific performance and replevin.[3] Protection may also come through an award of the full contract price[4] or through damages measured by the difference between the contract price and the market value of the promised performance.[5] Other "formulas" have been worked out by courts for varying fact patterns, but each has this common theme: each seeks to award the nondefaulting party the gain which he expected to make had the defaulting party performed.[6]

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2. Miller v. Robertson, 266 U.S. 243 (1924); United Protective Workers v. Ford Motor Co., 223 F.2d 49 (7th Cir. 1955); Bachman v. Fortuna, 145 Conn. 191, 141 A.2d 477 (1958); Ficara v. Belleau, 331 Mass. 80, 117 N.E.2d 287 (1954); Mt. Ida School for Girls, Inc. v. Rood, 253 Mich. 482, 235 N.W. 227 (1931); Spitz v. Lesser, 302 N.Y. 490, 99 N.E.2d 540 (1951); Norwood v. Carter, 242 N.C. 152, 87 S.E.2d 2 (1955); International Correspondence School, Inc. v. Crabtree, 162 Tenn. 70, 34 S.W.2d 447 (1931); Donald W. Lyle, Inc. v. Heidner & Co., 45 Wash. 2d 806, 278 P.2d 650 (1954).

3. As to specific performance: "When land is the subject matter of the agreement, the inadequacy of the legal remedy is well settled and specific performance will be decreed unless there are circumstances which make it inequitable or impossible to do so." Gulf Oil Corp. v. Rybicki, 102 N.H. 51, 52, 149 A.2d 877, 879 (1959). See, *e.g.*, Rathbun v. Herche, 323 Mich. 160, 35 N.W.2d 230 (1948); Kjeldgaard v. Carlberg, 168 Neb. 662, 97 N.W.2d 233 (1959); Gartrell v. Stafford, 12 Neb. 545, 11 N.W. 732 (1882); Springs v. Sanders, 62 N.C. 67 (1866). When goods are the subject matter of the agreement, specific performance is allowed under the Uniform Commercial Code whenever "the goods are unique or in other proper circumstances." UNIFORM COMMERCIAL CODE § 2-716(1) [hereinafter cited as UCC]. The comment states that article 2 (Sales) "seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale." UCC § 2-716, comment (1). As to a specific performance of a contract to sell stock, see Waddle v. Cabana, 220 N.Y. 18, 114 N.E. 1054 (1917); Comment, 51 MICH. L. REV. 408 (1953).

As to replevin: Under the Uniform Sales Act the buyer's right to replevy goods turned on whether title had passed to the buyer. 3 WILLISTON, SALES § 594 (rev. ed. 1948). The circumstances under which a buyer may obtain replevin in a Code state are detailed in UCC § 2-716(3).

4. John I. Haas, Inc. v. Wellman, 186 F.2d 862 (9th Cir. 1951). Cases involving suit for full price following breach of a contract for the sale of goods are collected and discussed in 3 WILLISTON, SALES §§ 560-73 (rev. ed. 1948). See UCC § 2-709. More difficulty arises when the seller of land seeks to pursue a full price remedy at law, but any difficulty disappears when he proceeds in equity. Prichard v. Mulhall, 127 Iowa 545, 103 N.W. 774 (1905), *retrial on amended complaint aff'd*, 140 Iowa 1, 118 N.W. 43 (1908).

5. Shurtleff v. Marcus Land & Inv. Co., 59 Cal. App. 520, 211 Pac. 244 (Dist. Ct. App. 1922); Sauer v. McClintic-Marshall Constr. Co., 179 Mich. 618, 146 N.W. 422 (1914). A discussion of the meaning of "value" appears in 5 CORBIN, CONTRACTS §§ 1004-05 (1964). See generally BONBRIGHT, VALUATION OF PROPERTY (1937).

6. One area in which there has been considerable litigation involves the circumstances under which lost profits may be recovered. See MCCORMICK, DAMAGES §§ 25-32 (1935) and 5 CORBIN, CONTRACTS §§ 1006-28 (1964). A partial listing of the various measures of recovery for different types of contracts is contained and discussed in 5 CORBIN, CONTRACTS §§ 1089-1101 (1964).

2. *The reliance interest.* — In reliance on contract promises, some promisees may have lost more than a hoped-for performance; they may have incurred obligations, spent money, or transferred or consumed property. The reliance losses may have been valuable only in relation to the performance, and when the performance was not forthcoming, may be valueless to the promisee. The promisee is now in a worse position than he would have been had only his expectations been thwarted. Not only has he lost his hoped-for gains but also he has suffered a decrease of assets. Thus, reliance losses present a more compelling case for legal intervention than the failure to obtain an expected gain.[7] Nevertheless, courts have had difficulty defining the limits of separate protection of the reliance interest.[8] The trend, however, suggests that a nondefaulting promisee will be awarded compensation for his reliance losses upon the promisor's default, such compensation being decreased by any provable loss which the promisee would have suffered had there been no breach.[9]

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7. Fuller & Perdue, *supra* note 1, at 56.

8. A part of the difficulty may be caused by a failure to distinguish various kinds of reliance losses. Expenses may be incurred:

(1) prior to the time the agreement was entered into. These expenses are not recoverable; they were not made in reliance on any contract promise and are not attributable to breach. The party was willing to make these expenses to obtain the agreement of the other party. Protection of these expenses comes in obtaining the contracted-for performance or its equivalent. Manning v. Pounds, 2 Conn. Cir. 344, 199 A.2d 188 (1963); Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932); Norton & Lamphere Constr. Co. v. Blow & Cote, Inc., 123 Vt. 130, 183 A.2d 230 (1962). See 5 CORBIN, CONTRACTS § 1034 (1964); Annot., 17 A.L.R.2d 1300, 1314 § 7 (1951).

(2) after the agreement and prior to its breach. These expenses are generally the basis of a recovery to the extent that they are reasonable, foreseeable, and are of no value to the promisee. Columbia Motors Co. v. Williams, 209 Ala. 640, 96 So. 900 (1923); Abrams v. Reynolds Metals Co., 340 Mass. 704, 166 N.E.2d 204 (1960); Security Store & Mfg. Co. v. American Rys. Express Co., 227 Mo. App. 175, 51 S.W.2d 572 (1932); Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N.Y. 209, 31 N.E. 1018 (1892); Glasgow v. Peatross, 201 Va. 43, 109 S.E.2d 135 (1959). Annot., 17 A.L.R.2d 1300 (1951). Recovery for these expenditures cannot exceed the contract price. RESTATEMENT, CONTRACTS § 333 (1932).

(3) after the breach, often in an attempt to lessen damages. There is authority that such expenses cannot be recovered when they are the costs of litigation against the defaulting party. Chicago Coliseum Club v. Dempsey, *supra.* However, if the expenses are incurred by the nondefaulting party in a reasonable effort to decrease his damages, many cases allow a recovery of those expenses. Casey v. Nampa & Meridian Irr. Dist., 85 Idaho 299, 379 P.2d 409 (1963); Reneh v. Hayes Equip. Mfg. Co., 134 Kan. 865, 8 P.2d 346 (1932); Atholwood Co. v. Houston, 179 Md. 441, 19 A.2d 706 (1941); Eastern Advertising Co. v. Shapiro, 263 Mass. 228, 161 N.E. 240 (1928); RESTATEMENT, CONTRACTS § 336 (1932). Annot., 84 A.L.R. 171 (1933).

9. In addition to the cases cited note 8 *supra,* see L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182 (2d Cir. 1949); Lynch v. Culhane, 237 Mass. 172, 129 N.E. 717 (1921); DePaolo v. DeRomo, 346 Pa. 654, 31 A.2d 158 (1943); Allen v. Elliott Reynolds Motor Co., 33 Tenu. App. 179, 230 S.W.2d 418 (1950). Some courts have stated that the defaulter is estopped to claim that the nondefaulting party would have suffered a loss on the agreement if performed. United States v. Behan, 110 U.S. 338 (1884);

3. *The restitution interest.* — In reliance on contract promises, some promisees may have conferred a benefit upon the promisor. For example, in a contract for the sale of goods the buyer may have made a down-payment or the seller may have made a partial delivery. The position of the promisee is similar to his position when reliance losses are involved: the promisee has suffered a loss by the transfer of assets. There is, however, an apparent and important distinction between the reliance and the restitution interests. When what is described as the restitution interest is involved, the promisee's loss has been coupled with a benefit to the promisor.[10] Therefore, there is a double reason for protecting the restitution interest.[11] Despite this, the restitution remedies have grown haphazardly and it was not until this century—and probably not until the *Restatement of Restitution* had its impact upon lawyers and judges—that anything resembling an organized approach was taken toward protection of the restitution interest.[12]

One of the difficulties in developing restitution remedies has centered on the concept of "contract." Underlying the decision in many restitution cases is the notion that the parties' *contract* looks to performance and, unless that *contract* can be rescinded, the performance obligations must be enforced. Rescission becomes viewed almost as a physical destruction of the *contract,* but—once accomplished—removes the *contract* as an impediment to restoration of benefits. This concept results in protection of the expectation interest as the norm and of the restitution interest only on the cancellation of the expecta-

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American Can Co. v. Garnett, 279 Fed. 722 (9th Cir. 1922); Lloyd v. American Can Co., 128 Wash. 298, 222 Pac. 876 (1924). Other courts place the burden of proof on the defaulting party to show that the nondefaulter would have suffered a loss. L. Albert & Son v. Armstrong Rubber Co., *supra;* Holt v. United Security Life Ins. & Trust Co., 76 N.J.L. 585, 72 Atl. 301 (Ct. Err. & App. 1909). Under either approach, however, when profits are not recoverable because they cannot be proved with "certainty," reliance expenses provide an alternative measure of recovery. RESTATEMENT, CONTRACTS § 333, comment *c* (1932).

10. This is the "plus-minus" analysis in KEENER, QUASI-CONTRACTS 163 (1893) and WOODWARD, QUASI-CONTRACTS § 274 (1913). As is pointed out later in this article, not always is an economic loss to the promisee necessary to have a benefit to the promisor. In Acme Mills & Elevator Co. v. Johnson, 141 Ky. 718, 133 S.W. 784 (1911), the defaulting party gained by the breach but the promisee suffered no economic loss. The court refused to transfer the gain to the promisee.

11. "It is obvious that the three 'interests' we have distinguished do not present equal claims to judicial intervention . . . . The 'restitution interest,' involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two." Fuller & Perdue, *supra* note 1, at 56.

12. Dawson, *Restitution or Damages?,* 20 OHIO ST. L.J. 175 (1959).

tion interest.[13]

Such a concept should be repudiated for many reasons including the fact that it confuses the meaning of the word "contract." Notice how the italicized *contract* varies in content each time it is used in the prior paragraph. Sometimes *contract* means the agreement of the parties;[14] other times *contract* is used as a synonym for the piece of paper which was signed by the parties and which contains one or more of their promises;[15] and still other times its use moves between these meanings. Confusion in analysis is bound to be the product of such an ambiguous use of language.

If, however, "contract" is employed with more precision, much of the confusion disappears. The word "contract" is a term of art; it describes a legal conclusion which has been reached through a process of legal rationalization—a result which ascribes a legal obligation to a promise or a set of promises.[16] Such a description is not definitive in that it makes no effort to state the circumstances under which certain promises are sorted out as creating no obligation. To attempt to add these circumstances to the description would require the writing of a treatise, and the resulting definition (if one emerged) would be so long as to be completely unworkable. Nor does the description concern itself with the meaning of "obligation." In large part this is a study of remedies and the subject of another treatise. Such a description does, however, approximate the approach of many cases,[17] treatises,[18] and the *Restatement*.[19] It is also in accord with the definition contained in the Uniform Commercial Code:

> (Contract) means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law.[20]

13. See discussion in Alder v. Drudis, 30 Cal. 2d 372, 182 P.2d 195 (1947); Boomer v. Muir, 24 P.2d 570 (Cal. Dist. Ct. App. 1933); Savage v. Horne, 159 Fla. 301, 31 So. 2d 477 (1947) (land); Krebs Hop Co. v. Livesley, 59 Ore. 574, 114 Pac. 944 (1911).

14. 1 CORBIN, CONTRACTS § 3 (1963); 1 WILLISTON, CONTRACTS § 1 (3d ed. 1957).

15. This usage occurs frequently in cases involving a discussion of the parol evidence rule. In these cases the courts tend to refer to the writing as "the contract" or as "the written contract." See Brown v. Oliver, 123 Kan. 711, 256 Pac. 1008 (1927); First Nat'l Bank v. Houtzer, 96 Ohio St. 404, 117 N.E. 383 (1917).

16. "[W]hat we mean by contract is whatever the officials do about promises in these various fields. . . ." Llewellyn, *What Price Contract?*, 40 YALE L.J. 704, 717 (1931).

17. Port Huron Mach. Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1928); Greiner v. Greiner, 131 Kan. 760, 293 Pac. 759 (1930); Ulledalen v. United States Fire Ins. Co., 74 N.D. 589, 23 N.W.2d 856 (1946); Schenley v. Kauth, 96 Ohio App. 345, 122 N.E.2d 189 (1953).

18. 1 CORBIN, CONTRACTS § 3 (1963); 1 WILLISTON, CONTRACTS § 1 (3d ed. 1957).

19. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT, CONTRACTS § 1 (1932). This definition is not changed in RESTATEMENT (SECOND), CONTRACTS (Tent. Draft No. 1, 1964).

20. UCC § 1-201(11). All references to the UNIFORM COMMERCIAL CODE are—unless otherwise noted—to the 1962 Official Text.

"Agreement" is defined as the "bargain of the parties in fact . . . , whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts."[21]

Distinguishing the agreement of the parties from the obligation imposed by the legal system should have at least this desirable result: it should make clear that the legal system is free to shape the extent of the obligation which ought to be imposed upon the parties to the agreement.[22] Courts and legislatures need not conclude that, simply because performance was agreed upon, the only (or even the necessarily preferred) remedy is to be the one which awards the equivalent of performance. Instead, in shaping remedies which at least indirectly define the scope of the legal obligation attaching to contract promises, the legal system should consider and balance the three contract interests discussed above.

Balancing these three interests (expectation, reliance, and restitution) in a specific case will also indicate that they are not as separate as they first appeared. A definition of benefit is central to a determination of what is the restitution interest. As long as benefit is limited to an increase in the tangible assets of the promisor, the walls between the reliance and restitution interests remain firm. However, such a limitation cannot long be defended. In noncontract cases, a saving of an expense by the promisor has also been held to be a benefit.[23] Fur-

21. UCC § 1-201(3).

22. There are other ways to make the same point—for example, by ignoring labels of "agreement" and "contract" but expanding the distinction between what the parties did (be it acts, words, or even silence) and what the legal system does in relation to what the parties have done (by imposing or withholding obligation). The text was chosen because it coincides with language used by courts and with the definitions of the Code. The text does not suggest that there should be only one correct definition or description of "contract." Too many human relationships are embraced within that word to permit one definition or description to embrace all of these relationships. See Llewellyn, *supra* note 16.

23. Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (1946), citing RESTATEMENT, RESTITUTION § 1(b) (1938). In that case personal property was used by defendant without plaintiff's permission. Plaintiff sued on a restitution theory (waiver of tort and action in quasi-contract). Plaintiff had no need for the property during the time of defendant's use and defendant argued that plaintiff suffered no loss. See note 10 *supra*. The court said: "The very essence of the nature of property is the right to its exclusive use. Without it, no beneficial right remains. However plausible, the appellant cannot be heard to say that its wrongful invasion of the respondent's property right to exclusive use is not a loss compensable in law. To hold otherwise would be subversive of all property rights, since its use was admittedly wrongful and without claim of right. The theory of unjust enrichment is applicable in such a case." *Id.* at 286, 173 P.2d at 654. Applying such an idea to contract cases could result in finding the nondefaulter's loss in the breach of the contract. If the defaulter received a gain by his breach, that gain would be a "benefit" and open restitution remedies. *Cf.* Acme Mills & Elevator Co. v. Johnson, *supra* note 10. Such an analysis may explain Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235 (1939).

ther, benefit may be viewed as any action taken by the promisee in part performance of or pursuant to the contract;[24] if so, much of the distinction between restitution and reliance disappears. A final step could be taken and benefit defined to include the return promise given by the promisee; in a bilateral contract this return promise is the reason for the promisor's promise and, arguably, of "benefit" to the promisor. If this expanded definition is accepted, much of the distinction between the expectation and restitution interests disappears.

Overlap also occurs in traditional contract damage formulas. These formulas begin with the idea of determining the value of the defaulter's promise and subtracting therefrom the value of the promise made by the nondefaulting party. Applied to a pre-Code case involving a contract for the sale of goods with the seller in default, one damage formula would be presented in this form: market price (or value) of the goods less the contract price.[25] However, if the buyer has paid a portion of the purchase price prior to the seller's breach, the formula is rewritten by insertion of the word "unpaid" immediately preceding the words "contract price"[26]—thus, adding restitution protection to the recovery. The reliance interest is also considered—usually through the doctrine of mitigation. To the extent that expenses were made in reliance on the defaulter's promise, no deduction is made from the damages,[27] but if the breach came at a time when the expenses could have been saved, the total recovery is limited by reducing the award by the amount of the expenses which need not have been incurred.[28]

An analysis of the extent to which article 2 of the Uniform Commercial Code protects the restitution interest of the parties to a con-

24. Planche v. Colburn, 8 Bing. 14, 131 Eng. Rep. 305 (C.P. 1831), is often cited for this proposition. "An expenditure in part performance, however, is generally regarded in modern cases as a benefit for purposes of the restitutionary remedies." Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264, 282 (1959).

25. This method of expressing a damage formula assumes that the seller has made no deliveries pursuant to the agreement but that other markets are available in which the buyer can purchase the same goods. See UNIFORM SALES ACT § 67(3); VOLD, SALES 222-23 (1959).

26. 3 WILLISTON, SALES § 599 (rev. ed. 1948). See UCC § 2-708 for the formula when the buyer is in default.

27. The buyer is not entitled to the reliance costs in addition to his gross profits since such an allowance would amount to a double recovery. Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903). See generally Annot., 17 A.L.R.2d 1300, 1316 § 8 (1951).

28. Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929). The text discussion was designed to indicate how the three contract interests overlap in a typical situation; it was not meant to state an inflexible rule of damages. For example, merely because a buyer can purchase the contracted-for goods from another seller would not mitigate his lost profits if the buyer could have made both purchases and both profits. Fruehauf Trailer Co. v. Lydick, 325 Ill. App. 28, 59 N.E.2d 551 (1944); Harrison v. Martin, 272 Ky. 307, 114 S.W.2d 112 (1938).

tract for the sale of goods is subject to criticism because it attempts to separate ideas which may well be inseparable. Nevertheless, this article will emphasize the protection (and the lack of protection) given by article 2 to the restitution interest of buyers and sellers of goods, in the hope that lawyers and judges will be able to use some of the language found in the Code to promote restitution remedies in those cases where such remedies are appropriate.

III. CODE PROTECTED CONTRACT INTERESTS

> 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 . . . .[29]

This section expresses the basic article 2 (Sales) Code philosophy toward remedies. Performance becomes the standard against which the judicial administration of Code remedies is to be measured. The remedial sections of the Code promote the philosophy of performance by providing for such alternative remedies as cover,[30] full price,[31] specific performance and replevin,[32] and damages measured by the difference between contract and market prices.[33] Under limited circumstances consequential damages may also be recovered.[34] Reliance is protected through the further allowance of incidental expenses.[35]

Legislative and judicial attempts to compel performance of commercial transactions are understandable. Business survives on performance—not on breach or on damages awarded for breach. Thus, the value of the Uniform Commercial Code lies in its recognition of the importance of performance and in its attempts to detail reasonable criteria to aid in measuring performance obligations. However, once the promised performance is not forthcoming and one of the parties has defaulted on his legal obligations, the determination of the remedy which *ought* to be given is a separate problem. In some instances protection of the restitution interest is preferable to repeated emphasis upon expected gains. Even though the Code defines "contract" in a manner which could promote a balancing of the three contract interests, the draftsmen's pre-occupation with performance carried over to the remedies and resulted in almost a total absence of any development of restitution recoveries. Only one remedy section

29. UCC § 1-106(1). An "aggrieved party" is defined in the Code as "a party entitled to resort to a remedy." UCC § 1-201(2).
30. UCC §§ 2-706, 2-712.
31. UCC § 2-709.
32. UCC § 2-716.
33. UCC §§ 2-708, 2-713.
34. UCC § 2-715(2).
35. UCC §§ 2-710, 2-715(1).

mentions the word "restitution";[36] another creates a presumption that renunciation or discharge of the sales contract is not intended when the parties use such words as "cancellation" and "rescission."[37] This latter section will influence the right, or obligation, to use restitution remedies,[38] but it does not attempt to define the scope of such remedies once they become applicable.

A general reading of article 2 reveals that, while the expectation and reliance interests are developed in detail, there is a noticeable absence of any thorough treatment of either the buyer's or seller's restitution interest. Whether such a treatment can be found on a closer study of the Code requires an analysis of the Code's approach to remedies in two types of cases: (1) those in which the buyer is in default, and (2) those in which the seller is in default.

A. *Buyer in Default*

1. *Protection of Seller's Restitution Interest.*—(a.) *Buyer's breach following seller's full performance.*

FACT PATTERN 1. Seller owns a hardware store which sells, among other items, power lawn mowers. Buyer discovered that his old lawn mower was beyond repair and selected a new 179 dollar mower from Seller's store. Seller charged the price to Buyer's account and Buyer left the store with "his" new mower. The mower worked well. The trouble arose when Buyer did not pay the bill which Seller sent.

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36. UCC § 2-718. This section is quoted in the text, p. 1171 *infra*.

37. UCC § 2-720. See also UCC § 2-721.

38. UCC § 2-720 was included to combat those decisions which had held that words importing a rescission of a contract prevented a recovery of damages. These cases rested on an idea that restitution protection required a rescission of the contract, almost a physical destruction of the document but certainly a cancellation of the legal relationship created by the agreement. Once there had been a rescission there no longer was any basis for awarding damages for breach. A "contract rescinded is no longer in existence for any purpose. . . ." Boomer v. Muir, *supra* note 13, at 578. A slip of the tongue during discussions following an agreement could easily result in rescission. See Lassen v. Miller, 41 Ill. 101 (1866), as an old example of this kind of "logic." Estate Counseling Serv., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F.2d 527 (10th Cir. 1962), indicates that this "logic" is far from dead. See also Authorized Supply Co. v. Swift & Co., 271 F.2d 242 (9th Cir. 1959), *rehearing denied*, 277 F.2d 710 (1960). Some cases had already approached the position adopted by UCC § 2-720. See, *e.g.*, Karapetian v. Carolan, 83 Cal. App. 2d 344, 188 P.2d 809 (1948); RESTATEMENT, RESTITUTION § 68(2) (1937). Cases are collected in Annot., 1 A.L.R.2d 1084 (1948). UCC § 2-720 acquires added meaning when considered in connection with UCC § 1-107 which provides: "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." Other sections of the Code combine with UCC § 2-720 to mitigate the prior constrictions of the doctrine of election of remedies. These include UCC §§ 2-608(3), 2-709(3), 2-711(1).

This is a rather typical example of the manner in which millions of dollars worth of goods are sold annually. The seller has completely performed his contractual obligations by giving up title to and possession of the goods on the strength of the buyer's credit. All that remains is the performance of the buyer's obligation to pay the price. Fortunately, Fact Pattern 1 is not typical as far as Buyer's default is concerned. Most buyers do pay the price when the bill is received—or within a reasonable time thereafter.

Pre-Code cases were clear. The expectation interest of a seller who had fully performed was protected but the seller was not allowed to rescind the sales agreement and recover from the buyer the value of the mower.[39] Strangely, this conclusion was based upon a choice of remedies. "The remedy of restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance that has not been rendered by the defendant is a sum of money constituting a liquidated debt . . . ."[40] Reasons for denying protection of the restitution interest are difficult to discover—beyond a "feeling" that a failure to pay money when due should not become the basis of a cause of action for a larger sum of money.[41] Nevertheless, the denial of a restitution remedy to a seller effectively eliminated any protection of his restitution interest.

39. 3 WILLISTON, SALES § 593 (rev. ed. 1948), pointing out that although indebitatus assumpsit could be used by plaintiff the recovery was limited to the agreed-upon price. See 5 CORBIN, CONTRACTS § 1110 (1964); Palmer, *supra* note 24, at 266. Southern Lumber Co. v. Colvin, 104 Ark. 130, 148 S.W. 496 (1912) is typical: "There is no evidence of fraud or misrepresentation on the part of the purchaser, Donnelly, in obtaining credit for part of the purchase price, and, in the absence of such proof, the failure to pay the deferred installment according to promise afforded no ground for rescinding the sale." *Id.* at 132, 148 S.W. at 497.

40. RESTATEMENT, CONTRACTS § 350 (1932). See also RESTATEMENT, RESTITUTION §§ 107-08 (1937). Full performance also affects legal principles related to recovery of the expectation interest. For example, the doctrine of anticipatory repudiation has been held inapplicable when the nonrepudiating party has fully performed. Huffman v. Martin, 226 Ky. 137, 10 S.W.2d 636 (1928); RESTATEMENT, CONTRACTS § 318 (1932). See also New York Life Ins. Co. v. Viglas, 297 U.S. 672 (1936).

41. Denial of protection of the restitution interest when the plaintiff has fully performed by delivering goods or performing services and the defendant owes a liquidated sum of money is criticized in 5 CORBIN, CONTRACTS § 1110 (1964). This criticism is not new but it has not affected court decisions. KEENER, QUASI-CONTRACTS 301 (1893); WOODWARD, QUASI-CONTRACTS § 292 (1913). Other reasons why courts may have refused to heed the criticism (including attorney apathy) are suggested in Comment, 57 MICH. L. REV. 268 (1958). The Restatement states that "full performance does not make restitution unavailable if any part of the consideration due from the defendant in return is something other than a liquidated debt." RESTATEMENT, CONTRACTS § 350 (1932). Cases are generally contrary to this position. See Comment, 57 MICH. L. REV. 268 (1958); 5 WILLISTON, CONTRACTS § 1471 (rev. ed. 1937). Williston, in the section cited, states that the cases are "unfortunate" and should "be swept away by future decisions." Woodward calls the conclusion of the courts "illogical." WOODWARD, QUASI-CONTRACTS § 262 (1913). See 5 CORBIN, CONTRACTS § 1110 (1964).

The Uniform Commercial Code has not changed the result of these pre-Code cases. Seller, in Fact Pattern 1, could recover the 179 dollars promised, not because the lawn mower was "worth" 179 dollars but because this was the amount which Buyer promised to pay for the mower.

The Code inventories a seller's remedies in section 2-703.[42] Seven courses of action are included in this inventory, ranging from cancellation (conceivably a preliminary step to restitution remedies) to recovery of the price. However, before section 2-703 inventory is available, the buyer must have:

(1) wrongfully rejected the goods;
(2) wrongfully revoked acceptance of the goods;[43]
(3) failed to make a payment due on or before delivery; or
(4) repudiated either a part or whole of his contract promise.

These four triggering events—even without considering the courses of action open to an aggrieved seller under the remainder of section 2-703—indicate the minor role which restitution plays in measuring a seller's recovery under the Code.[44] The first three events deal with situations in which there is little or no possibility (under a single delivery contract) for the buyer to receive a benefit; they look toward cases in which such a buyer, at the time of breach, either has not yet received a benefit or is most willing that any benefit which has

42. UCC § 2-703. Seller's Remedies in General.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may

(a) withhold delivery of such goods;
(b) stop delivery by any bailee as hereafter provided (Section 2-705).
(c) proceed under the next section respecting goods still unidentified to the contract;
(d) resell and recover damages as hereafter provided (Section 2-706);
(e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);
(f) cancel.

43. The manner of rightful rejection is covered in UCC § 2-602. Revocation of acceptance is detailed in UCC § 2-608. The Code does not define when either of these events is "wrongful." See UCC § 2-602(3).

44. The courses of action open to an aggrieved seller also show that the draftsmen of the Code were primarily concerned with protection of the expectation interest. The principal course of action for a seller is resale with the recovery of damages. UCC § 2-706. Damages under UCC § 2-708 and recovery of the full price under UCC § 2-709 also attempt to put the seller in the same financial position in which he would have been had the contract been performed. The privilege of withholding or stopping delivery under UCC § 2-703(a) and (b) amount to a negative protection of the restitution interest by allowing the seller to prevent the buyer from obtaining a benefit. Only the last alternative (cancel) appears to consider the restitution interest. There is, however, no separate treatment of the effect of cancellation—beyond the definition in UCC § 2-106—as there is with many of the other remedies inventoried in UCC § 2-703.

been received be returned to the seller. Only the fourth triggering event potentially affects the seller's restitution interest. Here, the buyer may have received some benefit and then "repudiated" the contract.

Whether there has been a repudiation in those cases in which the seller has fully performed will depend upon how the word "repudiated" is construed. There is no Code definition of that word. Conceivably "repudiation" could be interpreted as synonymous with breach.[45] If so, the failure of Buyer in Fact Pattern 1 to pay the price would be a repudiation of the contract and Seller could cancel. Such cancellation "puts an end to the contract" and Seller retains "any remedy" for the breach.[46] Arguably, some of those remedies protect the restitution interest of Seller. Such an argument would change pre-Code law and allow Seller in Fact Pattern 1 to recover from Buyer the value of the mower in those instances in which that value was in excess of the agreed-upon price.

This argument rests on the assumption that "repudiation" is the equivalent of breach. A reading of other sections of the Code makes this assumption of doubtful validity. In these other sections repudiation is used in the sense of some action (or failure to act) taken by one of the parties to a contract before that party has received full performance.[47] The triggering events of section 2-703 are four

45. Comment 1 to UCC § 2-703 states that that section gathers all remedies open to a seller for *any* breach by the buyer. Unless repudiation is given a broad meaning, there are *some* breaches which are not covered by UCC § 2-703—for example, the failure to pay the price following delivery of goods. See Fact Pattern 1.

46. UCC § 2-106(4) provides: " 'Cancellation' occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of 'termination' except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance." This section does not inform a seller *how* he cancels a contract of sale; it merely labels a result—the putting an "end" to a contract for breach. The extent to which older ideas about rescission (such as the requirement of restitution) will be read into the word "cancel" must await court decisions. See UCC § 1-103.

47. See especially UCC §§ 2-609—11, 2-708. UCC § 2-610 could also be cited to support the proposition that repudiation can occur after full performance because that section speaks of a repudiation "with respect to a performance not yet due." Compare UCC § 2-713 where the buyer's damage remedy is conditioned on "non-delivery or repudiation by the seller." Does this mean that a failure to deliver is different from a repudiation? The interpretation suggested in the text is generally supported by the manner in which "repudiation" has been used by courts. "A repudiation of a contract is something said or done by a contracting party to indicate that he will not perform, or further perform, his contracts. It is an essential element of a repudiation that there be something still to be performed by the repudiating party in the future." Holden & Martin v. Gilfeather, 78 Vt. 405, 409, 63 Atl. 144, 146 (1906). See also Cold Mining & Water Co. v. Swinerton, 23 Cal. 2d 19, 142 P.2d 22 (1943); Rehart v. Klossner, 48 Cal. App. 2d 46, 119 P.2d 148 (1941); Daley v. People's Bldg., Loan & Sav. Ass'n, 178 Mass. 13, 59 N.E. 452 (1901); Scott v. Miller, 114 App. Div. 6, 99 N.Y. Supp. 609 (1906); Brooks v. Scoville, 81 Utah 163, 17 P.2d 218 (1932); Rottman v. Endejan, 6 Wis. 2d 221, 94 N.W.2d 596 (1959). *But see* Crowley v. McCullough, 254

types of breaches; no one of the events is intended to be construed generally as including all other types of breach.[48] Thus, in Fact Pattern 1, Buyer has not wrongfully rejected or revoked acceptance of the goods, failed to make a payment due on or before delivery, or repudiated. Section 2-703 would have no application to Fact Pattern 1 and Seller could not cancel under the provisions of that section. This conclusion is strengthened by section 2-709 which allows suit for full price when, among other situations, the goods have been accepted. The condition of that section is broader than the third of the four triggering events of section 2-703. Price can be recovered for accepted goods when the buyer fails to pay the price "as it becomes due," with no reference to the time of delivery.[49] The draftsmen of the Code looked toward a recovery of the price in a case like Fact Pattern 1 and not toward a restitutionary money award.[50] Pre-Code law has been continued.

If—instead of seeking a money recovery based upon protection of the restitution interest—Seller attempts to reclaim the mower, the Code will undoubtedly be construed to reach the same result; restitution in the form of specific relief will be denied the seller who has fully performed.[51] The reasoning is the same. Failure to pay after delivery is not a repudiation (or any of the other three events listed in section 2-703); therefore, Seller cannot cancel under section 2-703 and recapture the mower.[52] Policy arguments are even harder to

Mich. 362, 237 N.W. 50 (1931). See also UNIFORM SALES ACT § 65.

48. See UCC § 2-711(2).

49. The full text of the condition in UCC § 2-709 is: "When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price (a) of goods accepted. . . ."

50. Compare UNIFORM SALES ACT § 63. Recovery of the price will often be equivalent to the amount which could be recovered in restitution because most goods have an established market value and are sold at that value. That these two amounts happen to be equal in a particular case does not, however, convert the action for price into a restitution remedy.

51. Pre-Code cases include Brand v. State, 26 Ala. App. 286, 158 So. 769 (1935); Pyrene Mfg. Co. v. Burnell, 127 Me. 503, 144 Atl. 649 (1929); Chapman v. Lathrop, 6 Cow. 110 (N.Y. Sup. Ct. 1824) (rule assumed); Hayden v. Collins, 90 Utah 238, 63 P.2d 223 (1936). But General Util. Corp. v. Goldman, 108 Pa. Super. 212, 164 Atl. 72 (1933) suggests that recapture is permissible if buyer is in default. After stating that a seller cannot rescind and "ordinarily obtain specific restitution of what he has parted with," Williston suggests in a footuote that if "the goods are of a unique character and other remedies are inadequate, specific restitution should be allowed." 3 WILLISTON, SALES § 593 n.20 (rev. ed. 1948). See also 5 WILLISTON, CONTRACTS § 1458 (rev. ed. 1937); RESTATEMENT, CONTRACTS § 354 (1932). In view of UCC § 2-703, it will be difficult to reach this position under the Code. Compare UCC § 2-716 where the buyer is given "a right of replevin" under specified conditions. Perhaps the general language of UCC § 1-103 will be relied upon in an appealing case to grant a seller specific restitution.

52. UCC §§ 2-507 and 2-702 provide specific instances in which the seller may reclaim the goods which have been delivered to the buyer. Both are discused, pp. 1157-64 *infra*, under Fact Patterns 2-5.

discover for this conclusion when the controversy is solely between the seller and the buyer. The buyer has failed to pay the price; the buyer still has the goods; the seller would like to reclaim the goods and call the deal off; and there are no creditors of, or purchasers from, the buyer involved in the transaction. Are there sound reasons for denying specific relief to the seller in such a case? Historically, the failure to be able to show a wrongful taking of the goods barred the remedy of replevin[53]—but most states changed this rule long ago.[54] Under the Uniform Sales Act there was a concern over the passage of title (or "property"), but title is a legal concept which can be manipulated to reach a desired result.[55] Also, the seller could be told that the way to reserve the right to recapture is to put that right in some type of agreement reserving a security interest in the goods;[56] however, this is only restating the conclusion in another form. Perhaps the justification for the Code's position, denying the seller the privilege of recapturing the goods on buyer's failure to pay the price when due, rests upon two beliefs: (1) that recovery of full price is a "sufficient" remedy for the seller, and (2) that in any specific litigation it is extremely difficult to be certain that the controversy is really between the seller and the buyer.

These beliefs are reasonable.[57] When the seller and the buyer are the only parties to the controversy a recovery of full price will usually be as satisfactory for the seller as reclaiming the goods. If the seller wants the specific goods, local procedural rules will generally allow him to reach them either by attachment or by levy of execution.

53. Goldstein v. Miami Wrecking & Salvage Co., 103 Fla. 149, 137 So. 283 (1931); Woodward v. Grand Trunk Ry., 46 N.H. 524 (1866). COBBEY, REPLEVIN § 51 (1900).

54. A & A Credit Co. v. Berquist, 230 Minn. 303, 41 N.W.2d 582 (1950); Ray v. Hill, 194 Wash. 321, 77 P.2d 1009 (1938).

55. UNIFORM SALES ACT §§ 17-19. See Lee v. Wagner, 185 Ark. 374, 47 S.W.2d 33 (1932), for a case relying upon title and decided before the Uniform Sales Act was adopted in Arkansas. An early attack on the title concept appears in 3 LAW: A CENTURY OF PROGRESS 80 (1937), in a chapter written by Karl Llewellyn. In referring to the idea expressed in the text of this article as the power to manipulate, Llewellyn says: "A judge experienced and skillful enough, a judge with flair, can make out reasonably well with any tools, however clumsy, and with any guideposts, however many-fingered. But ordinary judges and ordinary lawyers and young lawyers and law students will do better work if they are given better wherewithal than buttered mittens to sort and pick out those elusive peas known as wise decisions in cases involving Sales." *Id.* at 105-06. Title plays a small role under the UCC. See UCC § 2-401.

56. UCC §§ 9-503—06. See also Caraway v. Jean, 97 N.H. 506, 92 A.2d 660 (1952).

57. The action for full price accomplishes the result which was often reached under the Uniform Sales Act through the title concept. See UNIFORM SALES ACT § 61; 3 WILLISTON, SALES § 561 (rev. ed. 1948). Such a recovery gives the seller that which was promised—the price—thus protecting his expectation interest. Since recoveries for breaches of contract promises have long been grounded on the notion that these recoveries should put the plaintiff in the same financial position in which he would have been had the promise been performed, the position of the Code can be termed "reasonable" as seeking to accomplish that purpose.

However, the typical case in which full price is not satisfactory to the seller is the one in which some third party is competing with the seller for the buyer's assets. The third party may be a creditor of the buyer, a representative of the buyer's creditors, or a subsequent purchaser of the goods. In these cases the controversy is not between the seller and the buyer but between the seller and this third party. If the seller can cancel the contract with the buyer and reclaim the goods (thus protecting seller's restitution interest), the seller will receive—to the extent of the value of the reclaimed goods—a preference over the third party. It is for this kind of case that the Code (both in article 2 and article 9) attempts to provide specific answers as to when a seller may have his restitution interest protected. The Code's scheme in article 2 is illustrated in the following variations in Fact Pattern 1.

> FACT PATTERN 2. Within ten days after the sale and delivery of the mower in Fact Pattern 1, Seller discovered that Buyer was insolvent. Buyer has not paid Seller the 179 dollars.

Pre-Code sales which could not be avoided because of a breach of contract could be rescinded if the buyer was guilty of fraud. Thus, if the buyer misrepresented his ability to pay the price, a sale based upon that misrepresentation could be rescinded and the seller's restitution interest protected either by granting specific recovery of the goods[58] or a money award.[59] Prior to the Code, there was disagreement as to whether a buyer's promise to pay, coupled with his inability to pay, amounted to a misrepresentation within the above principle.[60] The Code resolved this disagreement with two specific rules in section 2-702(2):

> Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

Looking only at this section of the Code, Seller in Fact Pattern 2 could reclaim the goods (1) if he demanded the mower within ten days

58. Henderson v. Gibbs, 39 Kan. 679, 18 Pac. 926 (1888); Roesler v. Shastri, 168 Wis. 153, 169 N.W. 282 (1918). See RESTATEMENT, RESTITUTION § 166 (1937).

59. Crown Cycle Co. v. Brown, 39 Ore. 285, 64 Pac. 451 (1901). Cases are collected in 3 WILLISTON, SALES § 636 (rev. ed. 1948); 5 WILLISTON, CONTRACTS § 1521 (rev. ed. 1937).

60. See cases cited in 59 A.L.R. 426 (1929); 23 L. Ed. 993 (1885); 40 L. Ed. 543, 545 (1896); and discussion in 34 MICH. L. REV. 850 (1936).

after Buyer received the mower,[61] or (2) if Buyer had in writing misrepresented his solvency to Seller within three months before delivery.[62] As to (2) the comment states: "To fall within the exception [to the ten-day limitation] the statement of solvency must be in writing, addressed to the particular seller and dated within three months of the delivery."[63] Difficulty is caused by this further Code language in section 2-702(3):

> The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

Since Fact Pattern 2, as written, does not involve a claim by a buyer in ordinary course, a good faith purchaser,[64] or a lien creditor, Seller can reclaim the goods if he can meet either of the rules stated in section 2-702(3). Further variations in Fact Patterns 1 and 2 can be used to suggest the Code results when either a lien creditor (Fact Patterns 3 and 4) or a subsequent purchaser (Fact Pattern 5) is added.

> FACT PATTERN 3. Seller, in Fact Pattern 1, sold the mower to Buyer on credit, Buyer taking delivery on May 17. An involuntary petition in bankruptcy was filed against Buyer on May 20. On May 21, Seller demanded a return of the mower.

These are the basic facts of *In re Kravitz*.[65] That case held that a

61. *In re* Units, Inc., 3 UCC REP. SERV. 46 (D. Conn. 1965).

62. The words "misrepresentation of solvency' will require construction. Does an innocent misrepresentation suffice or must knowledge be involved? The last sentence of UCC § 2-702(2) is not conclusive because it may be interpreted as (a) an indication that "misrepresentation" in the first sentence includes both innocent and fraudulent misrepresentations or (b) an indication that innocent misrepresentations of solvency are no longer a basis of restitution. Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17 (Ky. 1965), construes the insolvency provision in the ten-day rule as including *innocent* receipt of the goods while insolvent. If a solvent buyer overstates his assets or understates his liabilities, has that buyer misrepresented his *solvency*? See 1 N.Y. LAW REV. COMM'N REP. 549 (1954) raising these and other questions about the 1952 Official Text of the Code.

63. UCC § 2-702, comment (2). If this comment is accepted as the proper construction of UCG § 2-702, further problems will be raised in those cases in which the representation of solvency is made through a credit rating agency. Manly v. Ohio Shoe Co., 25 F.2d 384 (4th Cir. 1928). Cases are colleeted in Annot., 91 A.L.R. 1363, 1372 (1934). Non-subscribers may not be able to obtain restitution (even if they relied upon a written credit agency report) on the theory that the report was not "addressed to the particular seller." Davis v. Louisville Trust Co., 181 Fed. 10 (6th Cir. 1910), should be helpful on this problem.

64. Restitution from a subsequent purchaser from a buyer is considered under Fact Pattern 5, pp. 1162-64 *infra*.

65. *In re* Kravitz, 278 F.2d 820 (3d Cir. 1960). Note, 79 HARV. L. REV. 598, 609 (1966).

"lien creditor" under the Code included a trustee in bankruptcy, that the Bankruptcy Act made the trustee an "ideal lien creditor," and that the rights of an ideal lien creditor are to be determined under state law. Those rights were then measured by *pre-Code* state law. Since the pre-Code law of the particular state (Pennsylvania) "gives certain lien creditors a higher claim than that of a defrauded seller," the seller was not allowed to reclaim the goods. Thus, under *Kravitz*, protection of Seller's restitution interest (through reclamation of the mower) as against the claims of a lien creditor depends upon the pre-Code law of each jurisdiction.[66] *Kravitz*, properly read, does not permit a lien creditor (or trustee in bankruptcy) to cut off the defrauded seller's right of reclamation in all jurisdictions simply because the sale had been made on credit.[67] To the extent that *Kravitz* is followed, each state's law (other than the Code) will have to be examined to determine whether the defrauded seller or the lien creditor is entitled to a preference to the goods.[68]

> FACT PATTERN 4. Assume one principle change in the facts of Fact Pattern 1: Seller sold the mower to Buyer but—instead of selling on credit—took from Buyer a check for 179 dollars. The mower worked well. The trouble arose when the check was dishonored on due presentment.

Fact Pattern 4 presents a different kind of a seller from those

66. There is another way to read UCC § 2-702(3): unless a lien creditor is given a superior right under article 2, Seller may reclaim the goods under the conditions of UCC § 2-702(2). UCC § 2-403(4) refers the rights of lien creditors to article 9. While article 9 does define "lien creditor" to include a trustee in bankruptcy (see UCC § 9-301(3)), article 9 does not deal with the problem of a lien creditor competing with a defrauding buyer. Note, 79 HARV. L. REV. 598, 610 (1966); Note, 68 YALE L.J. 751, 758 (1958). Therefore, this method of reading UCC § 2-702(3) would always grant a preference to a seller in reclaiming goods from the trustee in backruptcy providing the seller acts within the scope of UCC § 2-702(2). There are policy bases on which to ground such a conclusion. UCC § 2-702(2) provides for reclamation in the quick discovery of insolvency cases and in situations where there is an outright misrepresentation. In both instances, the seller can be viewed as being in a preferable position to other creditors who were not defrauded and who did not discover insolvency within the short period provided by the Code. Law review writers have disagreed as to the wisdom of *Kravitz*. See Hawkland, *The Relative Rights of Lien Creditors and Defrauded Sellers—Amending the Uniform Commercial Code to Conform to the Kravitz Case*, 67 COM. L.J. 86 (1962); Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 W. RES. L. REV. 93 (1963). *Kravitz* was distinguished in In the Matter of Mort, 208 F. Supp. 309 (E.D. Pa. 1962). California, Illinois, Maine, New Mexico, and New York have amended UCC § 2-702(3) by removing the words "or lien creditor."

67. Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518, 552 (1960).

68. *Cf. In re* Woederhoff Shoe Co., 184 F. Supp. 479 (N.D. Iowa 1960); Oswego Starch Factory v. Lendrum, 57 Iowa 573, 10 N.W. 900 (1881). If the facts of *In re* Kravitz, *supra* note 65, arose in Iowa—or in most states—the defrauded seller should prevail. Jones v. H. M. Hobbie Grocery Co., 246 Fed. 431 (5th Cir. 1917).

considered up to this point. This seller was not willing to part with title to, and possession, the mower on the strength of Buyer's promise to pay the price at some future date. This seller demanded and received what he believed was immediate payment for the mower. Only in a limited sense did this seller trust the credit of Buyer, trusting that there would be sufficient funds in the bank to cover the check upon presentment.

Code analysis of Fact Pattern 4 begins with the doctrine of concurrent conditions, the seller having the obligation to transfer and deliver the goods and the buyer to accept and pay "in accordance with the contract."[69] If the contract requires payment on delivery and if such payment is demanded by the seller, the buyer's "right as against the seller to retain or dispose of them [the goods] is conditional upon his making the payment due."[70] Tender of payment through a check will, in most cases, be held sufficient tender.[71] However:

> Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3-802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.[72]

Fact Pattern 4 Seller would, therefore, be allowed to reclaim the goods upon dishonor of Buyer's check, at least so long as no third party has intervened to claim an interest in the goods. The restitution interest of a seller who has received a bad check is protected by the Code through the statutory device of conditioning the buyer's right to retain the goods upon making the payment due.

Once third parties intervene the answer may be different. If, in Fact Pattern 4, a petition in bankruptcy had been filed against Buyer before Seller reclaimed the mower, the Code is not clear regarding the extent to which Seller's restitution interest would be protected.[73]

69. UCC § 2-301. The phrase "in accordance with the contract" modifies only the obligation to pay. UCC § 2-507(1).

70. UCC § 2-507(2) states: "Where payment is due and demanded on delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due." Questions will arise as to whether payment was demanded "on delivery" when the bill is not tendered until sometime after the transfer of physical possession. Some pre-Code cases may aid in construing these words. Harbert v. Fort Smith Canning Co., 134 Kan. 240, 5 P.2d 849 (1931); McAllister v. Michigamme Oil Co., 230 Mich. 531, 203 N.W. 78 (1925); Owcharoffsky v. Lambert, 135 N.Y. Supp. 599 (App. T. 1912); Burns Bros. v. Bigelow, 122 N.Y. Supp. 253 (Sup. Ct. 1910); Frech v. Lewis, 218 Pa. 141, 67 Atl. 45 (1907).

71. UCC § 2-511(2).

72. UCC § 2-511(3).

73. Pre-Code cases became involved in attempting to determine who had the title to (or property in) the goods. 2 WILLISTON, SALES § 346a (rev. ed. 1948). The problem is that of determining which of two parties is entitled to a preference as to the goods. Confusing that problem with a search for title (a concept added only by lawyers)

The comments indicate that the ten-day limitation discussed above would be applicable to Seller.[74] This result can be justified by the Code references which limit Seller's reclamation rights to the parties to the sales contract.[75] However, *Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc.*,[76] apparently ignored the general insolvency time-period limitation in a case in which the sellers had been paid with checks which were later dishonored. The ten-day demand Code provision was specifically mentioned by the court but the stated facts did not indicate that any demand had been made within that period. The case may be of greater importance, however, in that the court allowed the sellers to recover from a party other than the buyer. The defendant in *Ogle Buick* was an auction company which had advanced checks to buyer to cover the cost of the purchase and then had (1) stopped payment on the checks and (2) withheld the proceeds of the auction sale of the goods (cars) which had been purchased by the buyer from the sellers—all as a part of a "conscious design" to recover as much as possible of a debt which the buyer owed the defendant. The result was that an unpaid seller who had received bad checks from an insolvent buyer (who honestly believed the checks to be good) was allowed protection of his restitution interest against an unsecured creditor who had sold the goods and retained the proceeds of the sale.[77]

> Though technically the Indiana sellers' right of reclamation ended when the cars were sold at auction to the ultimate buyers in ordinary course, we think that eqnity cannot allow Auction to retain the proceeds under circumstances in which it would not have been permitted to defeat the prior and superior rights of the Indiana sellers by taking the cars themselves.
>
> Our conclusion to the effect that the rights of the Indiana sellers survived the resale of the cars and attached to the proceeds is based on equitable principles. . . .[78]

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was bound to cause more illogical distinctions than it ever could shed light on a solution.

74. UCC § 2-507, comment (3). However, the section on insolvency refers to goods received *on credit*. UCC § 2-702.. UCC § 2-507, comment (3) also states that UCC § 2-507 should be construed to conform with the policy on bona fide purchases. This is covered under Fact Pattern 5, pp. 1162-64 *infra*.

75. UCC §§ 2-507(2), 2-511(3). Applications of the ten-day limitation to those cases in which the bad check is given by an *insolvent* buyer may make UCC § 2-507(2) of little practical value to a seller who has not received a written misrepresentation of the buyer's solvency. If the buyer has written the check on an out of town bank, nearly ten days will expire before the seller learns that the check has been dishonored.

76. 387 S.W.2d 17 (Ky. 1965). The briefs in the Court of Appeals did not argue that the ten-day provision applied.

77. The court did not mention either UCC § 2-507 or § 2-511. Instead, the court found that because of the buyer's ignorance of the defendant's "conscious design" to withhold the proceeds of the auction sale, "for all practical purposes Auction had already converted the automobiles to its own account before the sale." 387 S.W.2d at 21.

78. 387 S.W.2d at 20. The court went on to state: "All that we have said still might

This case may indicate that such restitutionary remedies as constructive trust and equitable lien have survived the Uniform Commercial Code although not mentioned specifically in the Code.[79]

> FACT PATTERN 5. Seller in Fact Pattern 1 sold a mower to Buyer for 179 dollars. Assume that Seller took from Buyer a check for 179 dollars and that the check was dishonored on due presentment. Seller demanded a return of the mower, relying upon sections 2-507 and 2-511. Buyer, however, informed Seller that the mower had already been sold to B. F. Peters.

Two kinds of cases must be distinguished in considering Seller's Code right to restitution of the mower. The first is where the Buyer is a merchant dealing in goods of that kind. When possession of goods has been entrusted to a merchant who deals in goods of a kind entrusted, the merchant has the power to transfer all the rights of the entruster to a "buyer in the ordinary course of business."[80] This last phrase is defined by the Code;[81] the facts of the sale to B. F. Peters would have to be examined to determine whether Peters met that definition.

The second is where the buyer is not a merchant dealing in goods of that kind. Initially, Peters acquires all of the title which Buyer had since Peters did not purchase a "limited interest" in the mower.[82]

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not justify impressing the interest of the Indiana sellers upon the proceeds of sale except that Auction knew enough of the circumstances to put it on notice of the likelihood that its actions in stopping payment of its checks would result in the dishonor of checks Caylor [buyer] had issued in payment for the vehicles sold. The chancellor so found, and in our opinion that factual conclusion is supported by the evidence. . . ." *Id.* at 21.

79. These remedies are discussed in Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175 (1959). A more complete discussion is included in DAWSON, UNJUST ENRICHMENT 10-40 (1951). UCC § 1-103 is broad enough to make these restitutionary remedies applicable in Code cases.

80. UCC § 2-403(2) and (3). Notice the limitation that the merchane must *deal* in goods of that *kind*. It is not sufficient to show that the buyer is a merchant. "Merchant" is defined in UCC § 2-104(1).

81. UCC § 1-201 states in part: "(9) 'Buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. 'Buying' may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt."

82. UCC § 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting."

"(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 purchase has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

Buyer's title was, however, subject to reclamation under section 2-511. Is Peters' title also subject to Seller's right to reclaim? Section 2-403(1) provides in part: "A person with voidable title has power to transfer a good title to a good faith purchaser for value." Pre-Code cases were in conflict as to when a buyer had a "voidable title."[83] Most of this conflict has been resolved by the four types of cases listed in section 2-403(1).[84] These cases make it clear that a good faith purchaser will always prevail over cash sellers even if delivery was in exchange for a check which was later dishonored. Thus, Seller in Fact Pattern 5 will undoubtedly lose to B. F. Peters unless Peters had knowledge (at the time of his purchase) of Seller's interest in the mower.

Had Seller in Fact Pattern 5 sold to Buyer on credit—rather than for a check—the same results would be reached. If Buyer were not a merchant, Buyer would have title to the goods and could pass that title to Peters under section 2-403(1).[85] If Buyer were a merchant, the entrusting provisions of section 2-403(2) and (3) would apply and pass any possible interest of Seller to Peters, if Peters were a buyer in the ordinary course of business. Thus, the Code expresses a policy of protecting an innocent subsequent purchaser of goods from the restitution claims of sellers who have parted with possession of the goods.[86]

A remedy not specifically covered by the Code (but one which should be considered under Fact Pattern 5) is the possibility of impressing a trust on the proceeds which Buyer received from the sale to Peters. It may well be that those proceeds are either still

(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 . . . .

83. Sullivan Co. v. Larson, 149 Neb. 97, 30 N.W.2d 460 (1948) (sale in which buyer gave bad check; subsequent purchaser prevailed); Phelps v. McQuade, 220 N.Y. 232, 115 N.E. 441 (1917) (sale on credit following personal misrepresentation of identity; subsequent purchaser prevailed); Cundy v. Lindsay, [1878] 3 A.C. 459 (sale on credit following what court found to be misrepresentation of identity by mail; seller prevailed over subsequent purchaser); UNIFORM SALES ACT § 24. See cases collected in 3 WILLISTON, SALES §§ 623-52 (rev. ed. 1948); Corman, *Cash Sales, Worthless Checks and the Bona Fide Purchaser*, 10 VAND. L. REV. 55 (1956).

84. UCC § 2-403(1), quoted in note 82 *supra*.

85. UCC § 2-401.

86. For a possible argument in favor of the defrauded seller, 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, 221-22 (1963). However, that author concludes: "No matter how aggravated the buyer's breach, relinquishment of custody and control over the goods by the seller waives any effective right to replevin where third party rights have intervened and reduces the seller to the status of the buyer's unsecured creditor." *Id.* at 223. As to the privilege of an infant to disaffirm a contract of sale and to recapture personalty transferred to a good faith purchaser for value, see Annot., 16 A.L.R.2d 1420 (1951).

intact or are traceable into some asset within the control of Buyer. The pre-Code theory of such an action would begin with a "rescission"[87] of the Seller-Buyer contract for fraud; the Code approach could conceivably be through "cancellation"[88] of that contract or more probably by the use of sections 2-507 and 2-511.[89] Seller would have a right to reclamation of the power mower as long as Buyer had title and to the traceable proceeds of the sale (as a substitute for the mower) after title has passed.[90] If this restitution remedy is sought when Buyer is insolvent, section 2-702 may place a limit on Seller's right to use the remedy.[91]

(b.) *Buyer's breach following seller's part performance.*

> FACT PATTERN 6. Seller is a seller of coal. Buyer is a manufacturer using large quanties of coal. In September Seller and Buyer entered into an agreement by which Seller agreed to sell and Buyer to buy 1,000 tons of a certain grade of coal each month for one year at fifteen dollars a ton. Buyer purchased coal from Seller for the first six months of the year during which time coal was selling for more than fifteen dollars a ton. Buyer refused to buy further coal from Seller during the last six-month period when coal was selling for less than fifteen dollars a ton.

The Code allows Seller to recover fifteen dollars for each ton of coal delivered plus damages for non-acceptance of the coal during the last six months of the contract period—less any payments already made by Buyer.[92] This measure of damages places Seller in the same financial position in which he would have been had Buyer not breached the contract. Thus, the Code protects Seller's expectation interest. However, if the market value of coal had averaged (say)

87. See note 38 *supra*.

88. UCC § 2-703.

89. "Rescission" or "cancellation" of the sales contract is not necessary under UCC §§ 2-507, 2-511. These sections give seller the right to reclaim without going through an unnecessary step of rescinding anything. In a specific case UCC § 2-721 may aid the text argument.

90. Brooks v. Conston, 364 Pa. 256, 72 A.2d 75 (1950); BOGERT, TRUSTS AND TRUSTEES § 473 (2d ed. 1960); RESTATEMENT, RESTITUTION §§ 160(h), 166 (1937). See also Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., *supra* note 62.

91. The good faith purchaser from the buyer is protected through the denial of restitution remedies against him; thus, he has no interest in the outcome of the action to impress a trust on the proceeds of the sale. However, if the buyer is insolvent, buyer's other creditors will have an interest in preserving this asset. See discussion following Fact Pattern 4, pp. 1159-62 *supra*.

92. This result is reached by combining UCC §§ 2-703, 2-709 (which allows suit for full price of goods accepted), 2-708 (which allows damages for goods not accepted), 2-610 (anticipatory breach), 2-703 comment (1) (rejecting a doctrine of election of remedies), and 1-106.

twenty dollars a ton during the time Buyer accepted shipments and fourteen dollars during the last six months when Buyer refused shipments, Seller's recovery would be larger if the legal system protected Seller's restitution interest by awarding him the value of the coal delivered to Buyer.

Fact Pattern 6 presents the basic facts of *Wellston Coal Co. v. Franklin Paper Co.*[93] That case held that the seller could disregard the contract and recover the value of the coal delivered, thus protecting the restitution interest. The theory of the decision turned, first, on rescinding the contract[94] and, second, on recovering the value of the goods which the buyer had obtained.

> [T]he general rule is that, when full performance of a contract has been prevented by the wrongful act of the defendant, the plaintiff has the right either to sue for damages, or he may disregard the contract, and sue as upon a quantum meruit for what he has performed. The plaintiff has pursued the latter course; and it seems well settled, both in reason and authority, that he had the right to do so.[95]

Pre-Code cases generally agreed with *Wellston Coal*,[96] although in non-sales cases there was some disposition to limit the plaintiff to the contract price.[97]

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93. 57 Ohio St. 182, 48 N.E. 888 (1897).

94. The requirement that the contract be "rescinded" is found in countless restitution opinions, but is logically an unnecessary prerequisite to protection of the restitution interest. Evidently rescission is equated with a physical destruction of "the contract" allowing recovery to exceed the contract prices. Boomer v. Muir 24 P.2d 570 (Cal. Dist. Ct. App. 1933). "The contract" is not destroyed by rescission; the promises of the parties carry legal obligation. See notes 14-22 *supra* and accompanying text. Restitution is a remedy for breach and the problem to which attention should be directed is whether, in a particular case, the restitution interest *ought* to be protected. 5 CORBIN, CONTRACTS § 1105 (1964); cases cited note 38 *supra*.

95. 57 Ohio St. at 185, 48 N.E. at 889. The *Wellston Coal* case attempts to distinguish an earlier Ohio case which had refused to allow plaintiff to recover free of the contract price. Doolittle & Chamberlain v. McCullough, 12 Ohio St. 360 (1861). The distinction suggested (that restitution would not be allowed in excess of the expectation interest when the unperformed portion of the contract could have been performed only at a loss appears to have been repudiated in Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co., 151 Ohio St. 522, 86 N.E.2d 782 (1949), suggesting an overruling of *Doolittle*. See Kirkland v. Archbold, 113 N.E.2d 496 (Ohio Ct. App. 1953).

96. 3 WILLISTON, SALES § 593 (rev. ed. 1948).

97. 5 CORBIN, CONTRACTS § 1113 (1964); Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264 (1959). If the sales contract is divisible, each division is viewed as a separate contract for the purpose of granting or denying restitutionary remedies. RESTATEMENT, CONTRACTS § 351 (1932). Thus, divisible contracts in which the seller has performed one or more divisions are similar to the cases discussed under Fact Patterns 1-5, pp. 1151-64 *supra*, and are not in point here as indicating that the seller is limited to contract price when he has partially performed. Also to be distinguished are those cases in which the court finds substantial performance. Oliver v. Campbell, 43 Cal. 2d 298, 273 P.2d 15 (1954). However, substantial performance of a contract for the sale of goods is generally not a sufficient tender to put the buyer in default. *In re* A. W. Cowen & Bros., 11 F.2d 692 (2d Cir.

Regrettably, the Uniform Commercial Code does not provide expressly for protection of the restitution interest in a case like Fact Pattern 6 (partial performance by a seller prior to buyer's repudiation of the contract) even though the Code does give careful attention to the seller's expectation interest. However, it can be argued that Buyer's breach would be a repudiation[98] of the Seller-Buyer contract, thus opening the inventory of remedies available under section 2-703. One of these remedies is the privilege of Seller to cancel; that is, the privilege to put an "end" to the contract because of Buyer's breach.[99] Upon cancellation Seller retains—under section 2-106(4)—"any remedy for breach of the whole contract"; and although the Code does not require Seller, under the doctrine of election, to pursue restitutionary remedies following cancellation, pre-Code cases should give added content to the words "cancel" and "remedy" and allow protection of Seller's restitution interest free of the contract price.[100] Whether courts will accept this interpretation of the Code remains for future determination, but the language is broad enough to permit courts to balance the restitution and expectation interests of a seller who has partially performed an entire contract, and to award restitution damages when that interest merits protection.

2. *Protection of the Buyer's Restitution Interests.*—(a.) *Seller as plaintiff.*

> FACT PATTERN 7. Seller and Buyer entered into a written agreement by which Seller agreed to sell and Buyer to buy for 1,000 dollars a machine owned by Seller. Buyer paid 300 dollars down. Buyer repudiated and, at the time and place set for tender, the market price of the machine was 600 dollars. Seller did not deliver the machine to Buyer.

Seller has several courses of action open to him under section 2-703.[101] First, Seller may, pursuant to section 2-708, seek damages measured by the traditional formula, unpaid contract price minus

1926) (tender of defective goods); Perry v. Mount Hope Iron Co., 16 R.I. 318, 15 Atl. 87 (1888) (tender of more goods than called for in the contract); Prescott & Co. v. J. B. Powles & Co., 113 Wash. 177, 193 Pac. 680 (1920) (tender of less goods than called for in the contract). The "perfect tender rule" was carried into the Code by UCC § 2-601, but many of its harsh effects were ameliorated by UCC §§ 2-504, 2-508, 2-602, 2-605, 2-614 and possibly 1-203. The perfect tender rule was rejected for installment contracts. UCC § 2-612.

98. See UCC § 2-610. Query as to whether the repudiation in Fact Pattern 6 will substantially impair the *value* of the contract to the seller.

99. UCC § 2-106(4).

100. When the buyer has given a bad check or is insolvent, cancellation should also allow the seller to replevy the goods under UCC §§ 2-507, 2-511, and 2-702.

101. See UCC § 2-703.

market price.[102] Translated to the facts of Fact Pattern 7, this formula would award Seller 100 dollars—plus incidental damages but less expenses saved because of Buyer's breach. This Code formula protects the restitution interest of Buyer by offsetting against Seller's recovery the amount which Buyer had paid on the contract price. Buyer's part payment was of a "benefit" to Seller and is accounted for by the insertion of the word "unpaid" in the measure of damages.

Second, Seller may resell the goods (or any undelivered balance) under section 2-706.[103] If the resale meets certain Code conditions, Seller "may recover the difference between the resale price and the contract price. . . ."[104] This section omits the word "unpaid" as a modifier of "contract price." Thus, if Seller complied with the conditions of section 2-706 and resold the machine for 600 dollars, a literal application of that section to Fact Pattern 7 would allow Seller to recover 400 dollars from Buyer (computed by subtracting the 600 dollar resale price from the 1,000 dollar contract price). Such a result fails to recognize the restitution interest of a buyer who has paid a part of the purchase price. The philosophy of the Code is to place the nondefaulting party in the same financial position in which he would have been had the defaulter performed his contractual promise,[105] but generally not to place him in a better position.[106]

102. UCC § 2-708. Seller's Damages for Non-acceptance or Repudiation.

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

103. UCC § 2-706(1) provides: "Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach."

104. *Ibid.* Recovering damages following a resale "made in good faith and in a commercially reasonable manner" under the conditions of subsections (3) and (4) of UCC § 2-706 combats the notion that the sale must be at market value (see comment 3) and at least partially takes the place of the Sales Act's enforcement of a seller's lien. UNIFORM SALES ACT §§ 60, 64. Such a sale assures the seller that he will be in as good a financial position as he would have been had buyer performed. See UCC § 1-106; 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 273 (1964).

105. UCC § 1-106 provides:

"(1) 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

Therefore, the word "unpaid" should be read into section 2-706(1) when a seller seeks to use that section against a partially performing buyer. If so, the section 2-706 result would be the same as that discussed under section 2-708: Seller would recover only 100 dollars in damages and Buyer's 300 dollar restitution interest would be protected.

Third, Seller may be able to proceed under section 2-709 and recover the price of the machine.[107] The conditions on this remedy restrict use of full-price actions, the Code promoting resale rather than forcing the goods on a defaulting buyer. Nevertheless, section 2-709 remains a possibility for sellers to consider. If Seller in Fact Pattern 7 is able to recover the full contract price, the amount which buyer paid prior to the breach should be credited against the judgment in the same manner as are the net proceeds of any resale made by Seller after suit is brought.[108] Again, Buyer's restitution interest is protected.

In summary, when a nondefaulting seller is seeking to recover a money judgment from a defaulting buyer, the Code (with one inadvertant deviation) protects payments made by the buyer. This is accomplished by emphasizing the seller's expectation interest and offsetting the benefits which the seller has received, thus protecting the defaulting buyer's restitution interest.

(b.) *Buyer as plaintiff.*

FACT PATTERN 8. Seller and Buyer entered into a written agreement by which Seller agreed to sell and Buyer to buy for 1,000

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.

"(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect."

106. UCC §§ 2-706(6), 2-718 may put some sellers in a better financial position than they would have been in had the buyer performed his contract.

107. UCC § 2-709. Action for the Price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding seetion.

108. UCC § 2-709(2).

> dollars a used automobile owned by Seller. Buyer paid 300 dollars down. Buyer repudiated on the date set for delivery. Seller, without added expense, sold the automobile to B. F. Peters for 1,050 dollars. Buyer has demanded a return of "his" 300 dollars.

Prior to the adoption of the Code, courts disagreed as to whether a buyer who was in substantial default on an entire contract for the purchase of goods could recover the value of any benefit which the buyer had conferred upon the nondefaulting party.[109] Some courts allowed a recovery for those benefits, carefully defining benefit as the excess of the value of the buyer's performance over the injury caused the seller by the buyer's breach.[110]

> While it would seem that respondent [buyer] in the instant case cannot maintain an action for breach of contract, due to his own failure to perform, he is not prevented from recovering the amounts advanced, less any damages sustained by appellant [seller].[111]

These decisions rested upon the following policy argument. Had Buyer in Fact Pattern 8 not paid the 300 dollars down and had Seller brought suit against Buyer for damages for breach of Buyer's contract promise, the court would award Seller his damages but would not add 300 dollars—or any other amount—as a lesson to Buyer for "violating his contract." Seller is entitled to damages as compensation for his loss. He is not entitled to more than compensation simply because the transaction resulted in the payment of a part of the purchase price prior to the time when the facts were presented to a court.[112]

Nevertheless, a substantial number of courts—probably the majority[113]—denied the buyer in default any recovery for benefits conferred

109. Corman, *Restitution for Benefits Conferred by Party in Default Under Sales Contract*, 34 TEXAS L. REV. 582 (1956); Talbott, *Restitution for the Defaulting Buyer*, 9 W. RES. L. REV. 445 (1958).

110. Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co., 206 F.2d 103 (2d Cir. 1953); Michigan Yacht & Power Co. v. Busch, 143 Fed. 929 (6th Cir. 1906) ("In justice the defendants have no right to more of this money than will compensate them against loss by reason of plaintiff's conduct"); Cherry Valley Iron Works v. Florence Iron River Co., 64 Fed. 569 (6th Cir. 1894); McCrea v. Ford, 24 Colo. App. 506, 135 Pac. 465 (1913); Sabas v. Gregory, 91 Conn. 26, 98 Atl. 293 (1916); Hickock v. Hoyt, 33 Conn. 553 (1866); Wonder Prods., Inc. v. Blake, 330 Mich. 159, 47 N.W.2d 61 (1951), *cert. denied*, 342 U.S. 850 (1951); Humphrey v. Sagouspe, 50 Nev. 157, 254 Pac. 1074 (1927); Bryant v. Pennington, 346 S.W.2d 367 (Tex. Civ. App. 1961); Breding v. Champlain Marine & Realty Co., 106 Vt. 288, 172 Atl. 625 (1934); Stewart v. Moss, 30 Wash. 2d 535, 192 P.2d 362 (1948).

111. Foster v. Warner, 42 Idaho 729, 736, 249 Pac. 771, 773 (1926).

112. See the text following Fact Pattern 7, pp. 1166-68 *supra* and the discussion in 5A CORBIN, CONTRACTS § 1122 (1964).

113. 3 WILLISTON, SALES § 599m (rev. ed. 1948); WOODWARD, QUASI-CONTRACTS § 177 (1913). Cases are collected in 11 A.L.R.2d 701 (1950).

prior to breach.[114] Allowing recovery for these benefits was viewed as a "dangerous precedent"[115] which "would tend to demoralize the whole country."[116]

> [T]he establishment of such a principle would have a tendency to encourage the violation of contracts—to diminish, in the minds of contracting parties, a sense of the obligation which rests upon them to perform their agreements. Any principle which would have such an effect, ought not to be recognized as sound law. It is the duty of courts to enforce the performance of contracts, not to encourage their violation.[117]

In these jurisdictions the ultimate financial position of the parties depended upon the extent of the buyer's performance prior to his breach and Seller in Fact Pattern 8 could have kept the 300 dollars—netting 1,350 dollars on the sale of the automobile which he had originally agreed to sell for 1,000 dollars.[118]

The Uniform Sales Act contained sections dealing with the remedies of a buyer but made no mention of any recovery (or denial of recovery) by the buyer who defaulted after having paid a part of the

114. See, *e.g.*, Atalah v. Wilson Lewith Mach. Corp., 200 F.2d 297 (4th Cir. 1952); Tomboy Gold & Copper Co. v. Marks, 185 Cal. 336, 197 Pac. 94 (1921) ("no rule is more firmly settled . . . ."); Noel v. Dumont Builders, Inc., 178 Cal. App. 2d 691, 3 Cal. Rptr. 220 (Dist. Ct. App. 1960); Moore v. Mosher, 88 Cal. App. 2d 324, 198 P.2d 714 (Dist. Ct. App. 1948); (*but cf.* Freedman v. Rector, Wardens & Vestrymen, 37 Cal. 2d 16, 230 P.2d 629 (1951); Crofoot v. Weger, 109 Cal. App. 2d 839, 241 P.2d 1017 (Dist. Ct. App. 1952); Thach v. Durham, 120 Colo. 253, 208 P.2d 1159 (1949); (*but cf.* Perino v. Jarvis, 135 Colo. 393, 312 P.2d 108 (1957); Foss-Hughes Co. v. Norman, 32 Del. 108, 119 Atl. 854 (Super. Ct. 1923); Reitano v. Fote, 50 So. 2d 873 (Fla. 1951); Coob v. Library Bureau, 268 Mass. 311, 167 N.E. 765 (1929); Babbitt v. Wides Motor Sales Corp., 17 Misc. 2d 889, 192 N.Y.S.2d 21 (App. T. 1959); Notti v. Clark, 133 Mont. 263, 322 P.2d 112 (1958); Ellinghouse v. Hansen Packing Co., 66 Mont. 444, 213 Pac. 1087 (1923); Dluge v. Whiteson, 292 Pa. 334, 141 Atl. 230 (1928); Neis v. O'Brien, 12 Wash. 358, 41 Pac. 59 (1895).

115. Neis v. O'Brien, *supra* note 114.

116. Dluge v. Whiteson, *supra* note 114.

117. Witherow v. Witherow, 16 Ohio 238, 241 (1847). Although the case involved a seller in default attempting to recover for partial deliveries, the opinion has been frequently cited to support a denial of restitution to a buyer in default. See, *e.g.*, Neis v. O'Brien, *supra* note 114.

118. The text overgeneralizes in suggesting that all of the pre-Code cases could be grouped around two principles of law. Distinctions and exceptions were recognized to the broad quoted statements. See, *e.g.*, Thach v. Durham, *supra* note 114, which denied restitution to the buyer in default, but added that if injustice is involved, "equity will intervene." The quality of the breach (see RESTATEMENT, CONTRACTS § 357 (1932) and KEENER, QUASI-CONTRACTS 215-31 (1893)), the type of contract, the supposed existence of a mutual assent rescission, Young v. New Pedrara Onyx Co., 48 Cal. App. 1, 192 Pac. 55 (Dist. Ct. App. 1920), and the presence or absence of a forfeiture clause were among distinctions suggested. These ideas appear in many of the cases cited in notes 110 & 114 *supra*. See Talbott, *supra* note 109. Also, ideas of substantial performance and divisibility were available to allow a defaulting plaintiff some recovery. Nordstrom & Woodland, *Recovery by Building Contractor in Default*, 20 OHIO ST. L.J. 193 (1959).

purchase price. States were left to develop common law rules without uniformity. New York, one of the states in which a defaulting buyer was regularly denied recovery for benefits conferred,[119] enacted a statute which provided some relief to such a buyer.[120] Following New York's lead, the draftsmen of the Uniform Commercial Code turned their attention to this restitution problem. The Code now provides:

> Section 2-718. LIQUIDATION OR LIMITATION OF DAMAGES; DEPOSITS.
>
> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.
>
> (2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds
>
> (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or
>
> (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.
>
> (3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes
>
> (a) a right to recover damages under the provisions of this Article other than subsection (1), and
>
> (b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.
>
> (4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (section 2-706).

Those cases which denied the defaulting buyer any possibility of restitution recovery are now repudiated by the Code. Further, under the Code, a contract clause providing for forfeiture of payments made by a buyer prior to his breach will not be enforced unless the clause meets the tests of section 2-718(1). The draftsmen of the Code refused, however, to go as far as those pre-Code cases which freely

119. In addition to the cases cited in N.Y. LAW REV. COMM'N REP. 234 n.171 (1942), see Babbitt v. Wides Motor Sales Corp., *supra* note 114; Zubach v. Moskowitz Flour Corp., 13 Misc. 2d 445, 176 N.Y.S.2d 404 (Sup. Ct. 1958); Harris v. Emerson Sales Corp., 160 N.Y.S.2d 659 (Sup. Ct. 1957). New York case law drew a distinction between payments on the price and deposits given as security. The latter could be recovered. Cases are collected in Annot., 11 A.L.R.2d § 7, at 713 (1950). UCC § 2-718, comment (2), repudiates such a distinction.

120. NEW YORK PERS. PROP. LAW § 145(a).

awarded protection of the restitution interest of the defaulting buyer. The Code seller is allowed to retain from any payments made (either in money or goods) 500 dollars or 20 per cent of the value of buyer's total performance, whichever amount is the smaller.[121] This may be a recognition that a seller has been injured in an amount which cannot accurately be measured under any of the existing damage formulas, and that an award of up to 20 per cent on small sales or 500 dollars on larger ones is a rough estimate of that injury. "Rough" justice may be done by such a formula, but it would be preferable to define more carefully the elements of a seller's damage and to allow restitution of *all* amounts over that damage than to continue any part of the prior practice of letting the extent of performance determine the ultimate financial position of the parties.

Fact Pattern 8 Seller in a Code state would be allowed to retain 200 dollars of the down payment and would be required to make restitution of 100 dollars.[122]

> FACT PATTERN 9. Assume that Seller in Fact Pattern 8 was able to sell the automobile (after Buyer's breach) for only 900 dollars. Buyer has demanded a return of "his" 300 dollars.

The discussion following Fact Pattern 8 quickly disposes of a part of Buyer's demand if made in a Code state. Seller may retain 20 per cent of the contract price—here 200 dollars—without a showing of damages; thus, the most that Fact Pattern 9 Buyer can recover in restitution is 100 dollars. However, when the goods are resold at below the original contract price, to what extent is Buyer's restitution interest further limited?

The answer to this question requires a careful reading of at least three Code sections. Under section 2-718(3), discussed earlier, the buyer's *right to restitution* is offset to the extent that the seller can establish a right to damages under other sections of article 2. It is not the down payment (the 300 dollars) which is subject to offset; it is the right to restitution (the 100 dollars) on which section 2-718(3) operates. Therefore, as soon as Seller can establish 100 dollars in article 2 damages, Buyer will recover nothing under section 2-718(2).

There are two Code sections through which a seller who has not delivered the contracted-for goods would most likely claim damages

121. The Code language leaves open an argument that buyer is eutitled to restitution of any amount by which the sum of his payments exceeds 20% of (1) the value of buyer's total performance or (2) $500—whichever is smaller. Proctor & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., 16 N.Y.2d 344, 213 N.E.2d 873, 266 N.Y.S.2d 785 (1965), by implication, properly rejects this argument.

122. The $50 "profit" made by Seller on resale to B. F. Peters is not recoverable by Buyer. UCC § 2-706(6).

against a defaulting buyer.[123] These sections were discussed as a part of Fact Pattern 7. To the extent that the Code recognizes the *unpaid* contract price as the base from which a seller's damages are to be computed, Fact Pattern 9 Seller would have a right only to nominal damages since he sold the automobile for 200 dollars more than the amount owed by Buyer.[124] Until a seller can establish a right to recover substantial Code damages from a defaulting buyer, the buyer's right to restitution recovery (above the section 2-718(2) amounts) should be fully protected, and Buyer in Fact Pattern 9 would be entitled to a return of 100 dollars of his own down payment.[125] However, the policy of section 2-718 (of allowing a seller to retain 20 per cent—up to 500 dollars—of any down payment) may be applied by courts to deny Buyer in Fact Pattern 9 any recovery.[126]

B. *Seller in Default*

1. *Protection of Buyer's Restitution Interest.*

FACT PATTERN 10. Seller and Buyer entered into a written agreement by which Seller agreed to sell and Buyer to buy for 2,500 dollars a new automobile. Buyer paid 300 dollars down. Seller failed to deliver the automobile and Buyer has demanded a return of "his" 300 dollars.

123. These are UCC §§ 2-706, 2-708. See notes 102 & 103 *supra.*

124. Two variations of Fact Patterns 8 and 9 can cause Code difficulties:

(1) Assume Seller retained the automobile following breach by Buyer and that the automobile was worth $750. A literal application of UCC § 2-708 would result in holding that Seller suffered no "damages" on Buyer's non-acceptance; therefore, Buyer would still be entitled to $100 in restitution under UCC § 2-718. Seller would then have $750 from Peters but only $200 from Buyer, or $50 less than the contract price. UCC §§2-708 and 2-718 do not mesh properly at this point. Difficulty can be avoided by recognizing that, to the extent Buyer is allowed to recover his restitution interest, the *unpaid* contract price is increased.

(2) Assume that Seller in Fact Patterns 8 and 9 was a dealer in automobiles and that the sale could have been made to Peters even if a sale had been made to Buyer. In such a case the sale to Peters does not mitigate Seller's loss of profit on the breached Buyer contract. Damages under UCC § 2-708(2) should be subtracted from Buyer's right to restitution, although the cases are in conflict. Jessup & Moore Paper Co. v. Bryant Paper Co., 297 Pa. 483, 147 Atl. 519 (1929); Comment, 65 YALE L.J. 992 (1956); cases collected in 24 A.L.R.2d 1008 (1952).

125. Such a result was assumed in Proctor & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., *supra* note 121. Cases of the type discussed in the text under Fact Pattern 9 will not be plentiful because they involve (1) small sums of money—the $500 top limit was completely lost in the discussion in *Proctor & Gamble* case; and (2) buyers who owe less than the goods are worth or can be sold for. UCC § 207(6) is of no aid to a seller who sells for less than the unpaid contract price and seeks to retain buyer's down payment (above the UCC § 2-718 amounts) as a "profit." The profit contemplated by that subsection is that made *on resale,* not from bnyer's down payment.

126. This problem is analyzed more fully in Nordstrom, *Seller's Damages Following Resale Under Article 2 of the Uniform Commercial Code,* to be printed in the May 1967 issue of the Michigan Law Review.

The buyer's remedies for a seller's default are inventoried in section 2-711. One of the four triggering events of that section is the seller's failure to deliver—the event which occurred in Fact Pattern 10.[127] The Code makes clear that a buyer in the position of Fact Pattern 10 Buyer "may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid" either cover or recover damages for the non-delivery.[128] Thus, Buyer would be granted a recovery measured by his down payment which would protect his restitution interest.

The principal Code change over prior law lies in the elimination of a need for the buyer to elect restitution as opposed to other measures of recovery. Price may be recovered *in addition to* expectation and reliance damages. Fact Pattern 11 involves an expanded discussion of this principle.

> FACT PATTERN 11. Seller and Buyer entered into a written agreement by which Seller agreed to sell and Buyer to buy for 2,500 dollars a new automobile. Buyer paid the 2500 dollars and Seller delivered the automobile. Buyer discovered that the automobile did not conform to warranties that were made at the time of the sale and justifiably revoked acceptance.[129] Buyer demanded a return of the purchase price.

Considered only within the narrow terms of Fact Pattern 11, the rights of Buyer are clear: the Code contemplates a return to Buyer of "so much of the price as has been paid."[130] Since the entire purchase price was paid to Seller in Fact Pattern 11, Buyer may recover that amount from Seller under section 2-711. In this narrow sense such an award is a continuation of one of the buyer's remedies under the Uniform Sales Act. That Act gave the buyer, upon breach of a warranty, four alternative courses of action. One of these was to

127. The conditions to UCC § 2-711 remedies are: "Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance. . . ."

128. UCC § 2-711. See the pre-Code case of James v. Hogan, 154 Neb. 306, 47 N.W.2d 847 (1951), *opinion modified as to costs,* 154 Neb. 640, 48 N.W.2d 756 (1951).

129. When a seller tenders non-conforming goods a buyer may reject the whole, accept the whole, or accept any commercial unit or units and reject the rest. UCC § 2-601. What constitutes an acceptance is detailed in UCC § 2-606. Goods accepted must be paid for at the contract rate. UCC § 2-607(1). If the goods accepted are non-conforming, the buyer may revoke acceptance under the conditions stated in UCC § 2-608; however, notice of the breach must be given seller within a reasonable time after buyer discovers (or should have discovered) the breach "or be barred from any remedy." UCC § 2-607(3)(a). Further, if the buyer decides to revoke acceptance, notification must be given to the seller. UCC § 2-608(2).

130. UCC § 2-711. The buyer could also recover "so much of the price as has been paid" if the buyer has rejected the goods. UCG § 2-711(1).

> Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.[131]

Title concepts strongly influenced Sales Act cases, requiring the buyer to rescind the contract of sale before the buyer's restitution interest could be protected. Since rescission was viewed as the antithesis of enforcement, the rescinding buyer gave up any claim to damages for breach of warranty.[132] In this sense, the Code protection of a buyer's restitution interest is much broader. No longer must an election be made. The Code does not use the term "rescission"—a word encrusted with misconceptions—but speaks instead of "revocation of acceptance."[133] The comment cautions that

> Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him.[134]

Therefore, Buyer in Fact Pattern 11 may recover the price paid for the goods as well as damages measured by his expectation and reliance interests.[135] Further, the Code gives additional protection to the restitution and reliance interests by providing that, on rightful rejection or justifiable revocation of acceptance, a buyer has a "security interest in goods in his possession or control" for payments made and certain expenses incurred, and may resell the goods "as an aggrieved seller."[136]

When the contract of sale involved more than one item of goods and some (but not all) of the items delivered did not conform to

131. UNIFORM SALES ACT § 69(1)(d).

132. UNIFORM SALES ACT § 69 provided that, on breach of warranty, a buyer may at his *election* pursue four courses of action—one of which was rescission. Cases are collected in 3 WILLISTON, SALES §§ 611-612b (rev. ed. 1948). Cases have, however, allowed recovery for both the restitution and reliance interests. Maurice v. Chaffin, 219 Ark. 273, 241 S.W.2d 257 (1951); Garbark v. Newman, 155 Neb. 188, 51 N.W.2d 315 (1952); Brandtjen & Kluge, Inc. v. Shonka, 2 Utah 2d 223, 272 P.2d 155 (1954). Others refused such relief. Balch v. Newberry, 208 Okla. 46, 253 P.2d 153 (1953). See Rogge, *Damages upon Rescission for Breach of Warranty*, 28 MICH. L. REV. 26 (1929); 45 YALE L.J. 1313 (1936).

133. UCC § 2-608.

134. UCC § 2-608, comment (1).

135. The Code does not consider the possibilities of defueting from any recovery the value of the buyer's use prior to revocation of acceptance. 101 U. PA. L. REV. 1232 (1953). The closest the Code comes to the problem is in UCC § 2-608(2) which prevents revocation of acceptance if a substantial change occurred in the condition of the goods which change was not caused by their own defects.

136. UCC § 2-711(3). The necessity of the buyer returning the seller to the status quo in those cases in which the buyer does not have a security interest is treated in UCC §§ 2-608(3), 2-602(2), 2-603.

the warranties made for the goods, partial rescission and a partial affirmance of the contract was extremely troublesome before the Code. A buyer could rescind, but if he did, he was required to rescind entirely and to return all of the goods; alternatively, he could pursue a damage remedy.[137] This rule was relaxed in installment sales and when the contract was divisible, but these limitations provided crude tools with which to fashion appropriate solutions.

The Code extends the possibility of restitutionary relief for the buyer of more than one item when some (but not all) of those items do not meet the warranted quality. Section 2-608 allows a buyer to revoke his acceptance of a "lot" or of a "commercial unit" when the non-conformity substantially impairs its value and under the circumstances stated in that section.[138] "Lot" is defined as "a parcel or a single article which is the subject matter of a separate sale or delivery. . . ."[139] "Commercial unit" carries much the same connotation: "a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value in the market or use."[140] Thus, a buyer in a multiple-item Code contract may revoke his acceptance of any single article if that article is the subject matter of a separate sale or delivery or of a commercial unit, provided that the non-conformity *substantially impairs its value.* Having revoked acceptance, that buyer can recover the price which he paid for the "goods involved." There are problems of interpretation facing a buyer selecting this statutory approach, among them the selection of a rational basis for apportioning the price when the items were sold for a single price rather than on a unit basis. Despite these problems, the Uniform Commercial Code accords expanded protection of the buyer's restitution interest following a default by the seller.

137. Reno Sales Co. v. Pritchard Indus., 178 F.2d 279 (7th Cir. 1949); cases cited in 3 WILLISTON, SALES § 608b (rev. ed. 1948).

138. UCC § 2-608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

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

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

139. UCC § 2-105(5).

140. UCC § 2-105(6).

FACT PATTERN 12. Seller and Buyer entered into a written agreement by which Seller agreed to sell and Buyer to buy for 1,000 dollars new living room furniture. Buyer paid Seller 300 dollars down, promising to pay the balance within thirty days—at which time the furniture would be delivered to Buyer. After Buyer paid the 300 dollars Buyer discovered that Seller was insolvent. Buyer has demanded a return of "his" 300 dollars.

If Seller failed to deliver the furniture on tender of the balance of the purchase price, Seller would be in default and Buyer could (among other Code remedies available to him) recover a judgment for the 300 dollars which had been paid toward the purchase price.[141] However, other creditors of Seller may intervene to diminish Buyer's chances of realizing on his restitutionary money judgment. Under such circumstances Buyer would be interested in a preferred claim to the 300 dollars which he paid.

The answer of the Uniform Commercial Code to Fact Pattern 12 is contained in section 2-502:

> (1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.
>
> (2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract of sale.

A buyer's restitution interest is protected—following insolvency of his seller—not by a return of the money paid toward the price but by allowing the buyer to tender the remaining portion of the price and to recover the goods which were the subject matter of the contract.[142] To the extent that the buyer made a profitable contract, the Code allows the buyer to retain that profit even though creditors of the seller may be involved. The value of this section may, however, be more illusory than real.

One limitation on the buyer's rights under section 2-502 is found in the requirement that the buyer have a *special property* in the goods. Reminiscent of the title (or property) concept of the Uniform Sales Act,[143] the Code states that a buyer has a "special property interest"

141. See the discussion following Fact Pattern 10, pp. 1173-74 *supra*.

142. UCC § 2-711(2)(a). Compare the seller's right to restitution following insolvency of the buyer. Fact Patterns 2 and 3, pp. 1157-59 *supra*.

143. UNIFORM SALES ACT §§ 18 & 19.

in goods at the time and in the manner that the parties have explicitly agreed that the goods are to be identified to the contract. In the absence of explicit agreement, the identification occurs (a) when the contract is made if it is for the sale of goods already identified, or (b) if the contract is for the sale of future goods (other than crops or the unborn young of animals),[144] when the goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers.[145]

The second limitation is more restrictive. Although the buyer need not make his tender and demand within any stated period of time,[146] section 2-502 is applicable only if the seller *becomes* insolvent within ten days after receipt of the first installment on the price of the goods. Seller's insolvency at, or prior to, the time of the first payment will defeat a preferred protection of the buyer's restitution interest.[147] Thus, a buyer faces the difficult task of proving that the seller *became* insolvent sometime between the moment the seller received the *first* payment on the price and ten days thereafter.[148] The precise instant at which a person becomes insolvent may be extremely difficult to determine; yet such determination must be made favorably to the buyer if section 2-502 is to have any application.

2. *Protection of the Seller's Restitution Interest.*

With but few exceptions, the seller who is in substantial default but who has partially performed a contract of sale has long been allowed restitutionary recovery without concern over the quality of his breach.[149] The Uniform Sales Act codified the prior common law (and changed the rule in those few states which had denied recovery to the defaulting seller) with two basic rules. First, if the buyer accepted or

144. UCC § 2-501(1): "In the absence of explicit agreement identification occurs . . . . (c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer."

145. UCC § 2-501.

146. *Cf.* UCC § 2-702(2) which provides for buyer's insolvency.

147. "The question of whether the buyer also acquires a security interest in identified goods and has rights to the goods when insolvency takes place after the ten-day period provided in this section depends upon compliance with the provisions of the Article on Secured Transactions (Article 9)." UCC § 2-502, comment 2.

148. When the seller is seeking protection of his restitution interest on insolvency of the buyer, the Code grants such protection if the buyer "has received goods on credit while insolvent." UCC § 2-702(2). The selection of a different time for the seller's insolvency may reflect a policy of limiting the number of preferred claims when dividing a seller's insolvent estate—particularly when that seller is a merchant. Insolvency is defined in UCC § 1-201(23).

149. Corman, *supra* note 109, at 583-89 (1956). Those difficulties that are mentioned when the partially performing buyer is in substantial default do not appear in the majority of seller-in-default cases. See Fact Pattern 8, p. 1168-72 *supra*.

retained the partial delivery knowing that the seller was not going to perform completely, the buyer was liable to pay at the contract rate. Second, if the buyer used or disposed of the partial delivery before he knew that the seller was not going to perform completely, the buyer was not liable for more than the fair value to the buyer of the goods received—a clear restitutionary recovery.[150] If the goods were of the right quantity but did not measure up to the warranted quality, the buyer could (under the Uniform Sales Act) retain the goods and offset his damages against the price.[151]

The Uniform Commercial Code continues the policy of allowing the defaulting seller to recover for goods accepted and retained by the buyer, but does so without reference to restitution. The basic policy of the Code is that of granting the defaulting seller the price of the goods retained by the buyer, and deducting from that price the damages suffered by the buyer. The sections which detail this policy are discussed in the following paragraphs. Notice, however, that the emphasis on price is another indication that the draftsmen of the Code were intent on protecting the expectation interest of the parties to a sales contract, giving little direction to the growth of restitution recoveries. Emphasizing price may, in some cases, protect (or partially protect) the profit which the defaulting seller would have made had he fully performed. Such an approach represents a marked change from usual restitution recoveries for the defaulting plaintiffs;[152] it is also considerably more liberal than the treatment given by the Code to defaulting buyers.[153]

Once the buyer has "accepted" the goods, he must pay for them at the contract rate.[154] "Acceptance" is defined in section 2-606. A detailed study of that section lies outside the scope of this article, but notice that an acceptance may occur even though the buyer did not intend to keep the goods.[155] Therefore, non-conforming goods may be thrust upon an unwary buyer who then becomes liable for their price. Such a buyer may be able to revoke his acceptance[156] and

150. UNIFORM SALES ACT § 44(1). The pre-Code law is discussed in 2 WILLISTON, SALES §§ 458-60 (rev. ed. 1948).

151. UNIFORM SALES ACT § 69(1)(a). *Cf.* UCC § 2-717.

152. 5A CORBIN, CONTRACTS § 1124 (1964).

153. See discussion following Fact Pattern 8, PP. 1168-72 *supra.* Notice that defaulting sellers do not forfeit 20% of the goods delivered. *Cf.* UCC § 2-718(2)(b).

154. UCC § 2-607(1). "In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned, using the type of apportionment familiar to the courts in quantum valebat cases, to be determined in terms of 'the contract rate' . . . ." UCC § 2-607, comment 1.

155. "Acceptance" occurs when a buyer fails to make an *effective* rejection after reasonable opportunity to inspect and when a buyer does *any* act inconsistent with seller's ownership as well as when that buyer intends to accept. See UCC § 2-606(1).

156. UCC § 2-608. See note 138 *supra.*

terminate price liability; if not, his only hope is to reduce the price by the damages which he suffered.[157]

To offset damages against the purchase price, the buyer must notify the seller of the breach *or be barred from any remedy*.[158] The requirements of an effective notice are detailed in the Code.[159] If the buyer has accepted goods (intentionally or unwittingly) which are non-conforming—either because of their quality or tender—and has given the proper notification of breach, he may recover damages under one of two rules. First, if the non-conformity is one of tender, he may recover damages for "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."[160] Second, if the non-conformity arises out of a breach of warranty, the buyer may recover damages measured by "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."[161] In addition, "incidental" and "consequential" damages may be recovered in "a proper case."[162]

These two rules give the court latitude in adopting a measure of recovery suited to the facts of the transaction before the court. For this, the draftsmen of the Code are to be commended. It is regretted, however, that the emphasis placed upon the expectation interest overshadowed a measure of recovery similar to the "fair value" treatment given the defaulting seller under the Uniform Sales Act.[163] Perhaps courts will be wise enough in working with these two Code damage rules to consider Code cases with an emphasis upon the seller's restitution interest, rather than to allow the seller to recover a part of his profit even though he is in substantial default.

IV. CONCLUSION

Code remedies center primarily around default. Only infrequently is there a reference to a possible recovery in a fact pattern in which neither party has defaulted on his promised performance;[164] but for

157. Damages may also be recovered following a justified revocation of acceptance. UCC § 2-711.

158. UCC § 2-607(3)(A). See also UCC § 2-714, comment 1.

159. Boeing Airplane Co. v. O'Malley, 329 F.2d 585 (8th Cir. 1964); Babcock Poultry Farm, Inc. v. Shook, 204 Pa. Super. 141, 203 A.2d 399 (1964).

160. UCC § 2-714(1).

161. UCC § 2-714(2).

162. UCC § 2-714(3).

163. UNIFORM SALES ACT § 44. *Cf.* UCC § 2-305(4).

164. The sections of the Code dealing with insolvency of the buyer or seller (discussed under Fact Patterns 2-4, pp. 1157-62 *supra* and 12, p. 1177 *supra*) may cover more than default cases. See UCC §§ 2-502, 2-702, UCC § 2-305(4) grants restitution recovery when money or goods have been received prior to the formation of legal obligation when "the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed . . . ."

some reason (such as fraud, mistake, illegality, impossibility,[165] or even ineffective tender) those obligations are not enforceable. Recoveries for these cases are left to case law analysis.[166]

Code remedies emphasize the expectation interest of the non-defaulting party with only broad reference to the reliance interest. Practically no attention is given to a development of restitution remedies. This is unfortunate since an intelligent analysis of the right to recover benefits conferred could have advanced the law of restitution and given it a direction which has been needed since *Moses v. Macferlan.*[167] Such an analysis could also have provided courts with a statutory series of remedies available when protection of the expectation interest—following a default—is not an equitable readjustment of the contractual relations between the parties.[168] Perhaps, however, restitution defies statutory codification, and a case by case development which considers the impact of each case is the only path which holds promise of an adequate development of restitutionary ideas.[169] It is hoped that lawyers will be able to work through the Uniform Commercial Code to insure the continuing judicial disapproval of those enrichments which have resulted from another's loss.

165. See UCC §§ 2-613, 2-615.
166. UCC § 1-103.
167. 2 Burr. 1005 (K.B. 1760).
168. Anderson, *Quasi Contractual Recovery in the Law of Sales,* 21 MINN. L. REV. 529 (1937).
169. DAWSON, UNJUST ENRICHMENT ch. III (1951).