BUYER'S RIGHT OF REJECTION
A STUDY IN THE IMPACT OF CODIFICATION UPON A COMMERCIAL PROBLEM

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Preparation of a Revised Sales Act calls for examination of a problem which has vexed courts and legislative draftsmen since the beginning of sales law. This problem, which merchants face daily, arises whenever the seller's tender of performance deviates in some respect from his contract obligation. Does the buyer in every such case have the right to reject the goods, or are there instances in which he may be under a duty to accept subject to compensation for the defect in the seller's performance?¹

The question is made acute by wide swings in commodity prices between the making of the contract and the time for performance. When the market drops, the buyer views the contract with regret and tends to look with a sharp eye to every detail of the seller's performance. In this setting, a right of rejection is of crucial importance to both parties, since it throws upon the seller the burden of the mar-

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1. Scrutton, L. J. in Meyer, Ltd. v. Kivisto, 142 L. T. 480, 481 (C. A. 1930) summed up a lifetime of experience; "... As far as I remember, in every commercial litigation this question of whether you can reject or have a claim for damages has constantly been raised in various kinds of trade, and under various kinds of contracts, and, I daresay, will continue to be raised for centuries yet to come." See Burdick, Conditions and Warranties in the Sale of Goods, 1 Col. L. Rev. 71 (1901); Note, 33 Col. L. Rev. 1021 (1933); Note, 5 Minn. L. Rev. 216 (1921); 48 Col. L. Rev. 161 (1948); 1 Williston, Sales §§ 178 et seq. (3d ed. 1948) (herein cited Williston, Sales). On the Revised Sales Act see note 66 infra.
ket decline which, in normal course, the making of the contract placed upon the buyer.\footnote{2}

The scope of the right of rejection has significance beyond the solution of current sales controversies. Counselors, warned of pitfalls in the present law, may be well advised to review their clients' sales contracts. In addition, examination of this problem will provide a basis for evaluating proposed changes in the rules now in force under the Uniform Sales Act.

**Origins of the Present Rules**

The roots of the right to reject for breach of contract run deep, and follow a tortuous path. The development of early contract law need not now be traced in detail.\footnote{3} But it is relevant to recall that early decisions did not relieve one of the duty of performing his promise in spite of a breach by the other party unless the two parts of the contract were linked by some verbal formula;\footnote{4} that this literal approach was discarded by Lord Mansfield in *Kingston v. Preston*;\footnote{5} and that further attempts to solve the problem by rigid rules have been widely rejected in favor of a more flexible approach depending in each case upon the seriousness of the breach and the harshness of relieving a party of his contract obligation.\footnote{6}

This line of development, however, has not been followed in the law of sales. Arrested development, however, has not been followed in the law of sales. Arrested development may be traced in part to early

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\footnote{4} E. g., Anon., Y. B. Trin. 15 Hen. VII, pl. 17 (1500), in which Fineux, C. J. stated that covenants would be treated as independent unless linked by a phrase such as "for said cause."


\footnote{6} Sergeant Williams’ set of five rules in the note to Pordage v. Cole, 1 Saund. 319, 320, 85 Eng. Rep. 449, 451-3 (1681) is the classic attempt to prescribe rules to govern the problem of conditions. Sergeant Williams’ first rule found its way into the Sale of Goods Act, 1893, 56 & 57 Vict., c. 71, §49(2) (hereafter cited as Sale of Goods Act) and from there into the Uniform Sales Act, Section 63(2). Descendants of the fifth rule may be found in Section 28 of the Sale of Goods Act and in Section 42 of the Uniform Sales Act.

For the breakdown of these rules see 3 Williston, *Contracts* §821 et seq., esp. at p. 2360; Restatement, *Contracts* §§275, 276 (1942).
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codification in Britain in the Sale of Goods Act, and to the conscientious effort of its draftsman to reproduce "as exactly as possible the existing law." 7 As a result, there was frozen into permanent form a curious blend of early property and contract principles. On the one hand, the British Act followed early case-law in curtailing the right of the buyer to reject "specific goods, the property in which has passed to the buyer," 8 but balanced this with an equally technical rule authorizing rejection of goods sold "by description" whenever the goods failed to correspond with the description. 9 But the Act also set forth a third rule, of uncertain scope, that the right of rejection "depends in each case on the construction of the contract." 10

The treatment of this single problem in the Sale of Goods Act suffered at the same time from the contrasting evils of technicality and indefiniteness. Little relationship was apparent between the question whether goods were "specific" and the appropriateness of the remedy of rejection. 11 On the other hand, the rule that the right of rejection turns on the "construction of the contract" invited search for an intent which usually was not expressed, and proved difficult of application. 12

The lack of precision was particularly disturbing to Professor Williston, the draftsman of the Uniform Sales Act. In commenting on the British statute, Williston concluded that although it enabled courts to "deal freely with each case as it arises, and to find that words were 'intended' as a condition whenever circumstances make it desirable," the loss of predictability from such an approach could not

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8. SALE OF GOODS ACT § 11(1) (c). This provision codified the rule of Heyworth v. Hutchinson, L. R. 2 Q. B. 446 (1867).

9. SALE OF GOODS ACT § 13. For an extreme application of the right of rejection under this section see Arcos, Ltd. v. Ronnassen and Son, [1933] A. C. 470 (H. L.). Under the statute, the right of rejection arises from labelling the seller's obligation a "condition," in contrast to a mere "warranty," which under Section 11(1) (b) gives rise to a "claim for damages, but not to a right to reject the goods." The implied obligations under Section 14 of fitness for purpose and merchantable quality are labelled "conditions," thereby affording the buyer a right of rejection for their breach. But cf. id. §§ 12(2), 12(3) (obligations as to "right to sell" and "quiet possession" termed "warranties").

The foregoing provisions were applied only to England and Ireland; Section 11(2) preserved for Scotland the simpler rule that the buyer may reject goods if the seller fails to perform "any material part" of his contract.

10. SALE OF GOODS ACT § 11(1) (b).

11. The distinction between "specific" goods and those purchased "by description" broke down in Varley v. Whipp, [1900] 1 Q. B. 513 (purchase of specific binder which buyer had not seen; held a purchase "by description").

12. See Bailhache, J. in Harrison v. Knowles, [1917] 2 K. B. 606, 609-10; BENJAMIN, SALES 580 (7th ed. 1931). It seems, however, that part of the confusion arose from the attempt to borrow the distinction between "condition" and "warranty" in order to solve the elusive problems arising under the parol evidence rule. E. g., see Harrison v. Knowles, supra.
be tolerated. Consequently, it was decided at this point to abandon the British pattern; in the words of the draftsman:

"... it is believed that no greater simplification can be made in the law of sales than to make it of no importance whether an obligation which forms part of a bargain is collateral or not; and this simplification is obtained without danger of injustice." 

The desired simplicity and predictability were sought through sweeping rules written into the Uniform Sales Act which gave the buyer the right to refuse to accept goods, or to rescind the contract, for any "breach of warranty"; at the same time the definition of "warranty" was expanded to cover the entire scope of the seller's obligations relating to the goods. One could hardly ask a more clearcut rule. If ease in the application of a rule is a correlative of simplicity in its statement, the task of counselor and judge was indeed made light. But there remains the question of the extent to which case-law and business needs have been able to adjust themselves to this simply stated rule.

CASE-LAW AND BUSINESS PRACTICE

There has now been more than a generation of experience under the Uniform Sales Act to provide a measure of its impact upon the problem of rejection. Certainly the Act has served well to end the attempt to relate this problem to the subtle question of whether the subject-matter of the contract was "specific," or called for a sale "by description." In addition, the provisions of the Act have afforded a basis for strong judicial language rejecting the contention that a


14. 1 Williston, Sales § 181.

15. Section 69(1) of the Uniform Sales Act provides: "Where there is a breach of warranty by the seller, the buyer may, at his election: (a) accept or keep the goods [and recoup or recover damages, or]; (b) refuse to accept the goods . . . ; (c) rescind the contract to sell or the sale." In this article, "rejection" refers to buyer's refusal to accept or to keep tendered goods under either Section 69(1) (c) or 69(1) (d).

16. "Warranty" was defined to include not only the basic implied warranties of title, merchantability and fitness, but also "any affirmation" and "any promise" relating to the goods on which the buyer relied. Uniform Sales Act §§ 12-15. Cf. id. § 44 (rejection for deviation in quantity). Contrast the narrow scope of this term in the British statute, supra note 9.

17. But cf. Forsyth Furniture Lines v. Druckman, 8 F. 2d 212 (4th Cir. 1925); Mathis v. Holland Furnace Co., 109 Utah 449, 166 P. 2d 518 (1946). Unaccountably, the "by description" qualification is preserved in the Uniform Sales Act, Section 15(2) (warranty of merchantable quality) where it continues to be a source of difficulty. See also Sections 11(2), 14.
buyer should have accepted goods deviating from the contract;\textsuperscript{18} taken at face value these decisions suggest that the problem of rejection in sales law has been solved.

The results of the cases, however, hardly support this conclusion. Commencing with the litigation which followed the price collapse after the first World War, it is possible to detect a slow retreat from an inflexible rule of rejection.\textsuperscript{19} Recently this trend was made explicit in a decision which barred rejection on the ground that “amelioration of the strict rule” had occurred which “brings the law of sales in closer harmony with the law of contracts.”\textsuperscript{20}

**The Statute.** The language of the Uniform Sales Act has not proved an impassable barrier to this development. In a number of cases rejection has been readily found improper on the ground that the buyer relied on a literal reading of the contract, out of harmony with the leeway permitted under commercial understanding of its provisions.\textsuperscript{21} Cases of this variety place little strain upon the language of the Uniform Sales Act; far from tolerating a breach of the contract, the court rejects a dictionary-bound reading of its words in favor of the meaning of the contract to the business men who executed it.\textsuperscript{22}

Greater difficulty is presented in instances in which the seller’s performance clearly departs from some specification of the contract,

\textsuperscript{18} In re A. W. Cowen & Bros., 11 F. 2d 692 (2d Cir. 1926); True v. Deeds & Son, 151 Tenn. 630, 271 S. W. 41 (1925); Frankel v. Foreman, 33 F. 2d 83 (2d Cir. 1929); see Note, 33 Col. L. Rev. 1021 (1933).


\textsuperscript{20} LeRoy Dyal Co. v. Allen, 161 F. 2d 152 (4th Cir. 1947), 48 Col. L. Rev. 161 (1948) (deviation from contract as to time of shipment and date of inspection certificates).


\textsuperscript{22} On applicability of the parol evidence rule to bar commercial understanding see the opinion of Coleridge, J. in Brown v. Byrne, 3 E. & B. 703, 118 Eng. Rep. 1304 (Q. B. 1854). See also the opinion of Rossman, J. in Hurst v. Lake & Co., 141 Ore. 306, 16 P. 2d 627 (1932); 9 Wigmore, Evidence § 2464 (3d ed. 1940).
but in a trivial or immaterial respect which does not affect the value of the seller's performance. Is this a "breach of warranty," with the result that under the Uniform Sales Act the buyer automatically has the right of rejection?

Two cases carried to the Supreme Court pose the problem. In the early case of Filley v. Pope a contract for the purchase of Scotch iron called for shipment from Glasgow as soon as possible. Because ships were unavailable at Glasgow, the seller speeded delivery by shipping from Leith. After collapse of the iron market, the buyer rejected on the ground that the goods had not been sent from the agreed point of shipment. The trial court instructed the jury that this reference to the point of shipment was not a material provision of the contract. The Supreme Court reversed, declaring that "the court has neither the means, nor the right" to determine why the parties inserted this provision in the contract.

The Court's later decision in Lamborn v. National Bank of Commerce presents an interesting contrast. In 1920, after the post-war price collapse, the buyer's bank refused to honor a letter of credit on tender of documents covering a shipment of sugar, on the ground that the seller tendered delivery on a different ship than the one originally declared. The lower court, on the authority of the Filley case, refused to consider the materiality of this deviation and sustained the rejection, but the Supreme Court, by a vote of five to four, reversed on the ground that the seller had complied with the contract.

Even on the assumption that the seller's action was inconsistent with some term of the contract, there is basis in the Uniform Sales Act for barring rejection. The statute provides that an affirmation or promise gives rise to an express warranty only if its natural tendency "is to induce the buyer to purchase the goods, and the buyer purchases the goods relying thereon." At this point the Act appears

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23. 115 U. S. 213 (1885). This case, decided shortly before the drafting of the Uniform Sales Act, provides a point of reference for the trend of later decisions.

24. Id. at 220. The court added that the deviation might have affected policies of insurance, but did not suggest that the possibility was material to the buyer in this case. The result may have been affected by the difficulty of distinguishing the facts in the Filley decision from the facts in Norrington v. Wright, 115 U. S. 188 (1885), another case of iron rejection decided on the same day. But in the Norrington case the seller was slow in delivering in a falling market; this breach was highly significant to the buyer, since the buyer in turn would need to dispose of the iron before the price collapse. Cf. Pope v. Allis, 115 U. S. 363 (1885).

25. 276 U. S. 469 (1928).

26. UNIFORM SALES ACT § 12. (Here, and elsewhere unless noted otherwise, italics are added.) Section 14 provides that in a sale of goods "by description" there is an implied warranty that the goods shall correspond with the description. The reliance requirement of Section 12, while not expressly incorporated into Section 14, must be implied to avoid incongruity between these two overlapping provisions. The emphasis on reliance permeates the warranty provision of the Uniform Sales Act. See id. §§ 12, 15(1), 15(3), 15(4).
to prescribe a test—reminiscent of the "uncertain" case law which preceded its adoption—which permits inquiry into the materiality to the parties of a contract provision. Although it has not often been expressly invoked, the reliance test provides strong statutory support for a growing number of decisions which have barred rejection based on an immaterial deviation from the contract. Full use of this provision appears to be consistent with contract principles. A party's reliance upon or expectation of performance provides the strongest support for the enforcement of promises; where there has been no real impairment of these interests there is little reason to confer upon the buyer the remedy of rejection.

It is apparent, however, that under the present statute the scope of the reliance test is limited in one important respect. Although useful in dealing with a deviation in seller's performance which is immaterial to the buyer, it can not apply if the default is of sufficient import to require an adjustment of the price. Under the statute such a deviation must be termed a "breach of warranty" for which the remedies of rejection or damages may be chosen at the election of the buyer.

As significant as flexible handling of statutory language has been the development of legal obstacles to rejection not based on express provisions of the Act. Examples may be found in cases holding that the buyer may not revest in the seller title to only a part of the goods covered by the contract. Further barriers lie in numerous holdings that the buyer has "waived" those objections to the seller's performance which he failed to specify on rejection; on the basis of an exhaus-

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27. E. g., Kraig v. Benjamin, 111 Conn. 266, 149 Atl. 687 (1930); Hellman v. Kirschner, 191 N. Y. Supp. 202 (Sup. Ct. 1921). The reliance test has been most commonly employed where the buyer inspected the goods at the time of making the contract; the language of the statute, however, is not limited to this state of facts. Cf. Uniform Sales Act § 15(3).


The decisions have not faced a subtle question of construction under Section 12: does the reliance test bar rejection based on a clause of the contract on which the buyer plainly placed some reliance, but only for substantial performance? For example, a buyer certainly would place some reliance upon a specification as to time or quantity, but possibly only for substantial compliance. But to exclude the reliance test from such cases would deny Section 12 its full force in basing warranty protection upon the actual expectation of the parties. See notes 26, 29.


30. See Note, 35 Col. L. Rev. 726 (1935). The significance of these cases for our purposes is not weakened by the fact that in other situations the strong need of the buyer to avoid the burden of disposing of goods has led to a retreat. E. g., Portfolio v. Rubin, 233 N. Y. 439, 135 N. E. 843 (1922), 38 Harv. L. Rev. 988 (1924).
tive review of the cases one writer found that the motive force behind these decisions was impatience with rejection in a falling market.\textsuperscript{31} On occasion, rejection has been denied on the ground, also unsupported by statutory language, that goods had been “made to order.”\textsuperscript{32}

Mercantile practice. Pressure to preserve the obligation of acceptance has found its most significant outlet in the rules and customs of merchants.\textsuperscript{33} Although often inarticulate, “merchants’ law” governing the obligation of acceptance occasionally comes to light. Arbitration awards in commercial cases show a strong tendency to supplant rejection with adjustment of the price.\textsuperscript{34} More concrete evidence appears in the detailed regulations which govern trade in the highly developed commercial markets; these rules reveal a marked tendency, particularly in the basic raw commodity markets, expressly to limit the remedy of rejection, and to substitute price adjustment.\textsuperscript{35}

Rules of the market which have been expressly incorporated into the sales contract are, of course, effective to curtail the right of rejec-

\textsuperscript{31} Eno, \textit{Price Movements and Unstated Objections to the Defective Performance of Sales Contracts}, 44 \textit{Yale L. J.} 782 (1935). This explanation of the cases was preliminary to an attack on the doctrine of “waiver.” Removal of this safety-valve, however, would render more urgent the problem of substantial performance.

\textsuperscript{32} See cases cited note 55 infra.


\textsuperscript{34} See the significant work in Note, \textit{Predictability of Result in Commercial Arbitration}, 61 \textit{Harv. L. Rev.} 1022, 1025-6 (1948).

\textsuperscript{35} E. g., \textit{WORTH STREET RULES} (April 17, 1941). Detailed provisions applicable to trade in cotton textiles set forth careful tolerances of quality. For example, Specifications F. F. (Effective January 2, 1936) (p. 10) at numerous points prescribe tolerances within which “the buyer may claim an allowance in value but may not reject or cancel because of such deficiency.” A default of ten days in delivering samples beyond the specified date is termed a “substantial breach.” Cf. \textit{id.} Standard Cotton Textile Salesnote (p. 4): For deviation outside the specified tolerances, buyer may reject; if payment by buyer has been in default “over five days,” seller may cancel “upon eight days registered mail notice of such intention.” See also: \textit{Basic Sales Provisions}, \textit{National Retail Dry Goods Association and Apparel Industries Inter-Association Committee} (January 1948) Clause 3 (return only for non-conformity with “material provision”; seller may replace returned merchandise within 5 days after last permissible delivery date); \textit{Rules and Regulations of the Board of Trade of the City of Chicago} (Dec. 1, 1947); Rules 83, 282, 341, 517, 913. (Unless otherwise specified, sellers may deliver certain grades of grain other than those specified in the contract, subject to price adjustment.) See also: \textit{By-Laws of the Commodity Exchange, Inc., of New York}, Chap. X, \S 1009: Rule 10; \textit{Rules of the New York Produce Exchange} (as amended Jan. 3, 1924) Rule 8, \S 14 (leeway as to time for presentation of documents); Rule 9, \S\S 2, 3, 6, 8, 13, 15, 17, 23, 25, \textit{et seq.} (allowances for deficiency in quality); \textit{Rules of the New York Produce Exchange} (Vegetable Oils; March 7, 1935) General Rules 7 & 11 (quantity); Rejection Rules 4 (further tender permitted within five days after rejection); Quality Rules 7, 9, 12 \textit{et seq.} (allowances for a quality deficiency); \textit{Clearing House Rules, New York Mercantile Exchange} (April 10, 1933) Rules 64, 66C, 81A-para. 5, 86-para. 5, 6, 8, 9; \textit{Rule Relating to Contracts and Deliveries, New Orleans Cotton Exchange} (Amended June 4, 1941) Rule 1, \S 2; Rule 12, \S\S 2, 4, 5; \textit{New York Produce Exchange, Rules Regulating Transactions in Cottonseed Oil Futures Contracts} Rules 75, 90 (Dec. 4, 1947); \textit{Rules of the Chicago Mercantile Exchange} \S S 815, 1205, 1307, 1605, 1705, 1805, 1905 (September 3, 1946).
tion. But the Act provides that its rules yield not only to agreement but also to “custom”; by this route the inarticulate habits of the market may be given legal effect. Under the promptings of lawyers sensitive to commercial practice, courts on occasion have barred rejection which was found to be inconsistent with the manner in which buyers and sellers in the market customarily adjust deviation from the contract. These cases make a substantial inroad on the rule of rejection for they provide a basis for requiring a buyer to accept even though there has occurred a “breach of warranty” which would occasion adjustment of the price.

Decisions which supplant the remedies of the Act with new standards derived from the market place stand on one of the frontiers of sales law. One of the questions yet to be answered is the degree of firmness with which the custom must be rooted in commercial practice. It is often said that for judicial recognition a custom must be “ancient” and “universal.” But the sales cases have not always been bound by these narrow formulas, and there has recently arisen some slight support for the suggestion that rejection may be barred if inconsistent with a habit of acceptance in normal times, in spite of evidence of contrary action on market collapse. The lack of fuller development in


37. Section 71 of the Uniform Sales Act provides that “any right, duty, or liability” may be varied by “express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.” Cf. SALE OF GOODS ACT § 55.


40. Dixon, Irmaos & Cia v. Chase National Bank, 144 F. 2d 759 (2d Cir. 1944), cert. denied, 324 U. S. 850 (1945). A witness for defendant naively testified that acceptance was the practice until the occupation of Belgium in 1940 rendered such action unprofitable. See also conflicting evidence of custom in cases cited note 38 supra.
the cases suggests that attorneys have not fully exhausted the possibilities of custom as a source of sales law. From the inception of commercial law, reference to the customs of business men has been employed to bring the law of the courts into closer relationship with business needs. Continued access to this source of law is made possible by express provision in the Uniform Sales Act.

A sound solution to the problem of the duty of acceptance apparently does not lie on the surface of any simple statutory formula. The questions of construction still open under the present statute and the necessity to consider a reformulation of sales rules in the proposed Revised Sales Act require an analysis of the conflicting interests which are at stake.

**CONFLICTING INTERESTS**

At the threshold of any inquiry into the interests of buyer and seller in the choice of remedy for breach of warranty, it is necessary to deal with the suggestion that the right of rejection may summarily be deduced from the nature of the buyer's promise. It has been suggested by eminent authority that if tendered goods fail to correspond with the contract description it necessarily follows that the buyer may refuse to take them, "for the goods are not within the terms of his promise to buy." 41

This deduction from the nature of the "promise to buy" is not conclusive since it fails to draw a necessary distinction between the buyer's promise to pay the full contract price and his promise to accept the goods. There is little difficulty in concluding that the buyer's promise to pay the full price should not be enforced if the seller has failed to tender the agreed exchange. 42 But to go further requires an assumption that the parties to sales contracts in each case agree that an appropriate remedy for any contract deviation shall be rejection, rather than adjustment of the price. Such an intent is actually expressed in some instances, and in many others is a reasonable construction of the expectation of the parties. It plainly is a fiction, however, to assume that in all sales contracts the parties have actually considered and agreed upon rejection for every breach. Certainly, this assumption is belied by mercantile practice in many areas. 43 In addition, it runs afool of the decisions; if valid, it would apply with equal

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41. 1 WILLISTON, SALES § 225. Compare the "by description" rule of the British Act. SALE OF GOODS Act § 13, supra note 11.

42. It is not necessary for present purposes to decide whether relieving the buyer of his promise to pay the full price is based upon agreement or upon considerations of fairness. In either event, the buyer has the right to recover or recoup from the seller damages for breach of warranty. UNIFORM SALES ACT §§ 69(1)(a), (b).

43. See note 35 supra.
force throughout the law of contracts, and is contradicted by all the
cases which in that field refuse to hold that perfect performance by one
party is a condition of the other's duty of counter-performance.\textsuperscript{44}

The appeal of this fiction in the law of sales probably arises from
the fact that many sales transactions call for a simultaneous exchange
of goods for the price. As the development of the doctrine of con-
ditions in contracts illustrates, one of the powerful influences towards
holding full performance by one party to be a condition of the other
party's duty of counter-performance has been a policy against forcing
an extension of credit to the defaulting party.\textsuperscript{46} In sales transactions
which call for full cash payment in exchange for the delivery of goods
or documents, there are compelling reasons for the remedy of rejection
whenever the value of seller's tendered performance falls short of the
contract price. The buyer's right at a later date to recover damages
is a lame answer to his need for protection from the seller's breach,
since it forces on him the risk of impairment of the seller's credit, as
well as the burden of instituting and prosecuting legal action.

The typical commercial situation calling for simultaneous ex-
change of the goods for full cash payment is the familiar transaction
in which the buyer or his bank have agreed to honor a draft for the
price in exchange for the surrender of a bill of lading covering the
goods. Observers have already noted the broad scope which courts
have given to rejection in "overseas" shipments, and it has been sup-
posed that this derives from mercantile custom calling for strict per-
formance in "documentary" transactions.\textsuperscript{48} This explanation coin-
cides with the results of a substantial number of the cases, but it is

\textsuperscript{44} Cf. 3 WILLISTON, CONTRACTS §§ 825-857. There is surprising contrast between
Professor Williston's handling of the problem of conditions in the treatise on contracts
and in the treatise on sales. See note 41 \textit{supra}.

The classic statement by Holmes bears repetition here: "You can always imply
a condition in a contract. But why do you imply it? It is because of some belief as
to the practice of a community or of a class, or because of some opinion as to policy,
or, in short, because of some attitude of yours upon a matter not capable of exact
quantitative measurement, and therefore not capable of founding exact logical con-

\textsuperscript{46} See Patterson, \textit{Constructive Conditions in Contracts}, 42 COL. L. REV. 902, 909
(1942), for an illuminating analysis of this problem in the light of the facts of
\textit{UNIFORM SALES ACT} § 42 (delivery and payment concurrent unless otherwise agreed).

\textsuperscript{48} Llewellyn, \textit{On Warranty of Quality, and Society}, 36 COL. L. REV. 699, 730, 731 (1936);
\textit{cf.} \textit{REVISED SALES ACT} § 101(2), discussed \textit{infra} text at note 79.

An otherwise trivial defect in documents may have significance to the buyer if
he has contracted to resell the documents in the terms of the original contract, and
the deviation raises doubts as to their acceptability to the second buyer. \textit{See}
Hanson v. Hamel and Horley, Ltd., [1922] 2 A. C. 36, 46; Finlay and Co. v. Kwik Hoo Tong
Handel Maatschappij, [1928] 2 K. B. 604. The possibility of a bank's liability to its
principal for improper acceptance provides a comparable reason for strictness in
transactions involving letters of credit. \textit{Cf.} International Banking Corp. v. Irving
Bank, 239 N. Y. 234, 146 N. E. 347 (1924).
submitted that the significant reason probably lies deeper, in the hazards involved in securing redress after full cash payment.

It is important to get at the root of the reason for this rule. If the dominant policy justifying rejection is avoidance of extension of credit for a refund, the same strict rule should apply to domestic cash transactions which do not employ documents. On the other hand, the strict rule should not apply to the "documentary" transaction where credit extension is negligible, as in instances where the deviation does not impair the full value of seller's performance or is overcome by an adjustment of the demanded price or by adequate indemnity. The point is neatly illustrated by the facts in Dixon, Irmaos & Cia v. Chase National Bank. The contract called for the buyer's bank to honor a draft on presentation of a "full set" of documents. The seller tendered only one set of bills of lading, but coupled the tender with a bond of indemnity against loss from the missing documents. Rejection was held inconsistent with mercantile custom and therefore improper; it is also evident that the bond of indemnity avoided the hazard of advance cash payment which otherwise would provide strong grounds for rejection.

The buyer's interest in avoiding an extension of credit to a defaulting seller does not, of course, apply to the frequent transaction allowing the buyer to pay the seller after delivery, since the buyer may deduct from the price any deficiency in the value of the seller's performance. Does the buyer in a credit transaction have a significant interest in rejection, as opposed to recoupment? In many instances it is possible to isolate a second strong interest in rejection. This second consideration stems from the fact that rejection has one of the virtues of a "specific" remedy, such as replevin and specific relief in equity, since it avoids the necessity of submitting the extent of damage to negotiation with the adverse party and, in event of dispute, to measurement by a trier of fact. The interest in avoiding an

47. 144 F. 2d 759 (2d Cir. 1944), cert. denied, 324 U. S. 850 (1945).
48. See also LeRoy Dyal Co. v. Allen, 161 F. 2d 152 (4th Cir. 1947) (defect in documents of no pecuniary significance to buyer); Mutual Chemical Co. v. Marden, Orth & Hastings, 235 N. Y. 143, 139 N. E. 221 (1923) (seller offered adjustment for excessive quantity; reliance on custom). The willingness of some equity courts to grant specific performance although the plaintiff may have been in default may, in part, be explained by the lack of credit strain; the court there supervises a simultaneous exchange after adjustment of the price to cover the deficiency.
49. Uniform Sales Act §§ 49, 69(1) (a). For data showing the overwhelming proportion of sales made on credit see Clark & Clark, Principles of Marketing 491 (3d ed. 1947). Transactions calling for the acceptance of a negotiable time draft must be classed for present purposes with cash payment, because of the possibility of negotiation to a holder in due course who would not be subject to recoupment based on seller's breach of warranty.
50. Rejection, of course, is not always a complete remedy, as where the market price has risen or the buyer is otherwise damaged by seller's failure to supply goods needed by the buyer. But in each case rejection avoids the problem of measuring the extent of the deficiency in seller's performance.
uncertain measurement of damages is a traditional basis for the remedy of specific performance; in many sales transactions it also provides a strong reason for affording the buyer the specific remedy of rejection.

The buyer's need for rejection rather than adjustment of the price is likely to be strongest when goods have been purchased for use rather than resale. In such a case, the extent to which a defect in quality impairs the value of the goods to the buyer may be difficult and expensive to establish. Resale by the buyer cannot always be relied upon to provide a certain measurement of his damage because of the possibility of dispute over the question whether the second sale established the full value of the commodity, and the difficulty of showing the extent of the burden which the resale placed upon the buyer.61 On the other hand, rejection is least needed if the buyer is a merchant who has purchased for resale, standards of quality are well understood and reflected in a current market price, and there is a live market for the goods to which the buyer has ready access. These factors are present in a pronounced degree in trading in the basic raw and semi-fabricated commodities. It is here that we have seen a strong trend in commercial practice towards price adjustment rather than rejection.62 There is likewise some response by the cases to the lighter need for rejection when the extent of the buyer's damage may readily be ascertained.63 Neither the problem of credit extension nor an uncertain measure of damages arises where the deviation in seller's performance does not detract from its full expected value; in this context rejection is least needed, and encounters the greatest hazards in the cases.64

The foregoing discussion has centered on the interests of the buyer. Does the seller have any interest in acceptance worthy of judicial concern? Examples appear when the seller has made a heavy

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51. Uniform Sales Act § 69(7) (buyer's damage the difference between "... the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty"). Under this provision the resale provides strong evidence of "value," but does not fix the measure of damages. 3 Williston, Sales §§ 550a, 582. Contrast Uniform Sales Act §§ 53(1), 60, 69(5) (resale executing lien); Revised Sales Act §§ 107(1), 112(3) (damages may be fixed by resale).

52. See note 35 supra.

53. In Forsyth Furniture Lines v. Druckman, 8 F. 2d 212, 214 (4th Cir. 1925), the court, in holding the buyer must accept goods subject to an allowance, included as a reason "more important... [the extent of seller's default] is one which in dollars and cents is capable of exact determination." Difficulty in determining expense to the buyer also may explain the otherwise difficult case of Jackson v. Rotax Motor and Cycle Co., [1910] 2 K. B. 937 (C. A.). The availability of skilled arbitration may make more precise the measurement of a price adjustment. On the greater tendency towards acceptance in this setting, see note 34 supra.

54. See notes 28, 48 supra.
investment in performance, by special manufacture to buyer's specifications or by a long and expensive shipment to the buyer which does not carry the goods in the direction of a normal market. In either instance if the goods are substantially usable by the buyer, rejection may effect a loss of resources to the community, and impose a penalty upon the seller disproportionate to the burden of acceptance. In this context, courts have not been wholly callous to the seller's interest.55

The more common instance in which the seller has a strong interest in acceptance arises when there has been a break in the market between the making of the contract and the date of delivery. Particularly in contracts for later delivery of raw commodities which are subject to wide price fluctuations, one of the central objects of the transaction is the avoidance by the buyer of the risk of a subsequent price increase, in exchange for which he assumes the risk of a price decline.55 The function of such contracts in providing for the voluntary redistribution of business risks is defeated to the extent that the transaction may be upset on trivial grounds not related to the substantial interests of the parties.

But the fact that rejection may prove to be harsh does not necessarily lead to the conclusion that it is inappropriate. Occasionally stern remedies are placed in the hands of private litigants as a means of penalizing and deterring undesirable conduct.57 Therefore it is appropriate to ask whether a rule authorizing rejection for any deviation from the contract may be desirable on the ground that the threat


The analogy to substantial performance in building contracts on which reliance is sometimes placed is not fully apposite; in sales contracts the buyer may not retain the goods without liability for the price, less damages. UNIFORM SALES ACT §§ 44, 63(1), 69(1)(a) & (b).

56. See note 2 supra. The buyer often may transfer the risk by immediately contracting to resell. In such a case, after a drop in the market the buyer by rejection may gain a windfall, since he may be able to meet his obligations by fresh purchases at the new low price. The buyer who has agreed to resell a particular shipment from the seller stands in a more precarious position. See note 46 supra.

of severe loss from rejection may have a healthy effect on the tone of
sellers' performance throughout the market.

The possible prophylactic affect of a stern rule of rejection can
not, of course, be measured. Certainly, this possibility provides a
basis for caution in limiting the right of rejection. But the suggestion
that the interest in insuring high standards of performance requires
the adoption of an inflexible rule of rejection is belied by merchants' rules which have tended to substitute acceptance and price adjustment
for rejection. Moreover, in the handling of actual cases, experience
indicates that courts and triers of fact can recognize performance which
is slovenly or designed to take advantage of the difficulty of price
adjustment, where rejection by the buyer should be supported.

Even if it were conceded that the interests just examined are
relevant from a standpoint of abstract "justice" to the propriety of the
remedy of rejection, the more difficult question remains: is it feasible
to use such delicate tools in deciding actual controversies? It will
be remembered that the drafting of the Uniform Sales Act was in-
fluenced by a distaste for the uncertainty possible under the British
statute with respect to right of rejection. Does the interest in a sharp
and workable rule make it advisable for legislators and courts to hew
to the line, and support the right of rejection for any deviation from
the contract?

The question may not be dismissed lightly. A buyer faced with
a shipment needs to know his legal position, for serious loss may fol-
low an improper attempt to reject. The pressure to give him an
easy answer to his problem is strong; one shrinks from the suggestion
that he be forced to ask himself whether a court or jury will decide
that seller's breach was sufficiently material to justify his rejection.

58. See note 35 supra.

59. Compare the rule that no recovery on the ground of substantial performance
will be allowed for a "wilful" breach, which seems to reach towards the policy of
terference. See Corbin, op. cit. supra note 3, at 891; RESTATEMENT, CONTRACTS
§§ 275(e), 357(1) (a) (1932). However, this rule does not provide a solvent for all
cases: in some instances a conscious deviation from some immaterial term of a con-
tract may be consistent with the highest standards of mercantile conduct in order to

60. See Pound, INTRODUCTION TO THE PHILOSOPHY OF LAW 137-143 (1922),
emphasizing the importance of certainty in rules governing property and "commer-
cial" transactions, as distinguished from rules governing "conduct." Contrast Frank,

61. A cautious seller, aware of the vagaries of litigation, on rejection by the
buyer will reduce his stake in future legal action by resale. But under the present
statute, he may be under no duty to do so on the ground that "title" passed to the
buyer who thereupon became liable for the full price. UNIFORM SALES ACT
§§ 19(4) (2), 46(1), 63(1). And the books are full of cases where the parties, over-
confident of their legal position, litigated the rightfulness of rejection while the goods
were consumed by demurrage or storage. Contrast REVISED SALES ACT §§ 110(1) (a)
("acceptance" rather than "title" the basic test of price liability), 92(1) (limited duty
on buyer to dispose of goods although rejection rightful).
It is necessary, however, to face the question whether in actual practice a much greater degree of certainty actually follows from a rule which is more severe. Experience, it is believed, shows that this is one of the areas in the law where it is impossible to escape questions of degree, and that, as Justice Holmes was fond of saying, any appearance of exactness is an illusion. Lack of precision, as we have seen, arises from the flexibility inherent in the language used in sales contracts. Nor would it have been tolerable to draft or administer the Uniform Sales Act without the qualification that the buyer must have "relied" upon the promise or representation in question, in spite of the elusive factors on which this test necessarily turns. Moreover, if the buyer's position is based on a technicality and would cast serious loss upon the seller, a practicing lawyer would tell him that his rejection, when scrutinized in court, must run the gauntlet, not only of the rules of law but also of an unfriendly trier of fact or arbitrator, who in a close case may conclude that seller's performance complied with the contract.

Finally, it should be noted that the buyer who honestly is in doubt as to his right to reject has in many instances a non-hazardous answer: he may accept the goods and recoup from the seller the value of any deficiency. Only where the demand for full cash outlay creates a credit risk or where disposition would be burdensome does acceptance involve substantial hazards; in these instances experience shows that a court or arbitrator will be sensitive to his need. On balance, therefore, it appears that any interest in deciding the problem easily is outweighed by the interest in deciding it well, and that there is sound policy behind the case-law which has tended to strengthen the obligation of acceptance. Proposed revision of the statutory law of sales raises the question whether it is possible to formulate rules to this end without sacrificing the legitimate interests of the buyer in full protection against breach of contract.

The Revised Sales Act

The subtle nature of the problem of rejection is reflected in delicate distinctions and compromises which appear in the Revised Sales


63. See note 21 supra.

64. See notes 30-31 supra, referring to ad hoc principles which have arisen to curtail rejection.

65. See Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 13-14 (1910); Fuller, American Legal Realism, 82 U. of Pa. L. Rev. 429, 431 (1934).
Little intimation of delicacy appears on an initial reading of the Revised Act, for with more than Willistonian severity it lays down a rule that "... if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may ... reject the whole." But this language far from expresses the spirit of the proposed legislation, for at many points other provisions have been designed to soften its impact.

"Cure". Of the greatest commercial significance is the creation of legal machinery to enable the seller to "cure" an infirmity in his performance. The Revised Act provides that in spite of a defective tender if the seller had "reason to believe" that his performance "would be acceptable with or without money allowance" he may have the privilege of a second tender within a "further reasonable time", which apparently may reach beyond the date specified in the contract.

By this device, the Revised Act opens a way for the seller to make effective delivery without sacrificing those interests which we have found most strongly support rejection by the buyer. Presumably, a late tender would not be within a "reasonable" time if the delay substantially impaired the value of the seller's performance. If this is true, no credit strain with respect to a refund is placed upon the buyer; and since on the final tender the goods must fully comply with the contract, the buyer is not subjected to the burden involved in measuring the value of a defect in the goods. A degree of uncertainty, however, arises with respect to the buyer's choices. In deciding whether he may reject he must weigh such intangible factors as whether the seller had "reason to believe" the first tender would be acceptable, and the length of a further "reasonable" time during which he must await a second tender. Nevertheless, at this point the draftsmen of the Revised Act have cast their lot on the side of strengthening the obliga-
tion to accept, rather than adherence to a simply stated and sweeping rule of rejection. 70

Permission to "cure" a defective delivery is not a complete answer to the problem. Although this device will be highly useful where seller and buyer are near each other or where substitute goods may readily be purchased in buyer's market, if a long shipment is involved the seller will find it difficult to effect a prompt and perfect "cure" after rejection by the buyer at the point of destination. The circumstances which will measure "reasonable time" for a second tender are not defined, but presumably the Revised Act does not overturn present rulings that a fluctuating market price forecloses any substantial delay. 71 It thus appears that the section would seldom be of help to a distant seller during a falling market—the very time when rejection by the buyer on insubstantial grounds is most likely. 72

Acceptance. The Revised Act again qualifies its rule of rejection in the case of a defect in performance which appears after "acceptance" of the goods. In this event, the goods (and consequent losses from market declines) may be forced back upon the seller only if the defect "substantially impairs" their value. 73 This, it will be remembered, is a departure from the present statute which allows "rescission", as well as rejection, for any breach of warranty.

This change from the present rule also appears to be sound. Certainly there are strong reasons for relaxing the strict rule of rejection where goods have reached a late point in the process of distribution. Under most mercantile contracts, the goods will not have been "accepted" until after they have reached the buyer's place of

70. The buyer's hazard is further reduced by a further bold stroke in Section 110 of the Revised Sales Act, which substantially curtails the seller's right to recover the full price, as distinguished from damages. Under the Revised Act, the primary test for liability to pay the price is "acceptance," and thus breaks from the rule of Sections 19(4)(2), 46(1) and 63(1) of the Uniform Sales Act, under which the buyer may become liable for the full price when goods are delivered to a carrier. With seller's claim reduced to actual damage, rather than the full price, the consequences of a wrong decision by the buyer are substantially minimized. But cf. REVISED SALES ACT §110(1)(b), UNIFORM SALES ACT §63(3) (action for price for goods not reasonably subject to resale).

71. See 3 WILLISTON, CONTRACTS §854.

72. Some of the problems arising from technical mishap in shipment are met by provisions that if the "agreed manner of delivery" becomes "commercially impracticable," the seller must tender, and the buyer must accept a "commercially reasonable substitute." REVISED SALES ACT §86(1). This provision expressly includes failure of agreed berthing, loading or unloading facilities and unavailability of an agreed type of carrier. Cf. id. §86(2) (failure of agreed means of payment).

73. REVISED SALES ACT §97. The proposed act is here dealing with the remedy which it terms "revocation of acceptance," which is the analogue of "rescission" under the present statute. UNIFORM SALES ACT §69(1)(d).
business. To upset the transfer of goods for trivial defects at this late stage results in unnecessary expense and waste in distribution. In addition, late action enhances the possibility that unfavorable market changes have intervened, and places the seller in an awkward evidentiary position in coping with the possibility that defects in the goods arose (or were created) after their receipt by the buyer.

But the very fact that "acceptance" usually occurs at a late stage in the sales transaction curtails the usefulness of this provision. The rule does not fully follow the reasons which have been suggested in its support, since goods may reach a late stage of distribution through extended manufacture or long shipment, and may come into the buyer's possession without "acceptance." This provision thus leaves ample room for an alert buyer to find a technical defect in performance before he accepts; although unquestionably sound, it does not carry the seller far beyond the protection which the present statute gives him against late objections.

"Good faith" and commercial practice. Counsel facing litigation will be intrigued to find in the Revised Act the admonition that every sales contract "imposes an obligation of good faith in its performance." The precise scope intended for this provision is not apparent. But its language is sufficiently vague to invite the argument that a rejection in a falling market was engendered by an ulterior motive to avoid the price decline and therefore was not made in "good faith."

This new legal tool may be used to good effect to bar untoward rejection. But it gives little aid in determining whether in any specific case rejection is an appropriate remedy. In its customary setting in problems of bona fide purchase, a concept such as "good faith" is necessary, and reasonably workable. In dealing with the propriety of rejection, however, a legal test framed in terms of the buyer's state

74. The definition of "acceptance," in Section 95 of the Revised Sales Act is not wholly clear; the difficulty is enhanced by the elliptical rule that "(1) Acceptance of goods occurs when the buyer (a) signifies his acceptance to the seller." The Revised Act strongly suggests, but does not plainly state, that acts which under the present Act would constitute "assent" to "appropriation" (such as authorization to ship) are not "acceptance" unless they indicate judgment that the specified goods are satisfactory. Compare Revised Sales Act §97(1)(b) with Uniform Sales Act §47(1) (no acceptance until a reasonable opportunity for examination). This is one of the points at which the Revised Act could well be clarified by modification or by explanation in the Official Joint Comments.

75. Uniform Sales Act §69(3) (no rescission if buyer "knew of the breach of warranty when he accepted" or fails to give notice within a reasonable time). Cf. id. §§15(3), 49.

76. Revised Sales Act §26(2).

77. Uniform Sales Act §§24, 25; Revised Sales Act §§57, 59. In problems of bona fide purchase, the question of "good faith" will usually turn on the reasonably tangible issue as to the buyer's access to information concerning a defect in his transferor's title.
of mind is much more elusive. Presumably a rejection of goods which were seriously defective would not be held improper on evidence that the buyer was aware of a market decline and was delighted to have an avenue of escape from the purchase. In this field, less subjective tests are needed. These may be found in the interests of the parties which have already been isolated. Tangible tests are also available in normal commercial practice. Here the Revised Act moves in a more sure-footed manner in encouraging courts to refer to "usages of the trade" and "commercial standards." 78

The "installment" rule. Still another refinement appears in a special rule which curtails rejection in "installment contracts"; in these transactions the buyer is subject to the duty to accept deliveries in spite of a breach of warranty, unless the non-conformity "substantially impairs the value of the installment." 79

Through this provision, the Revised Act retreats on a broad front from its own strict rule of rejection. The result may be welcomed by one who favors a general rule of substantial performance. However, the reasons for this distinction, which makes the right of rejection turn on whether a contract of sale is to be performed singly or in installments, are less than self-evident. If separate shipments under a single contract are dependent on each other for full value or use (such as separate parts of a single machine) there would be good reason to limit the buyer's right to reject only one of the shipments. But this is a problem of limited scope, and quite appropriately has been given separate handling in the Revised Act. 80 Also peculiar to installment contracts is the question whether a defect on one delivery is so serious that the buyer may repudiate the contract and reject future deliveries.

78. Revised Sales Act §§ 21, 26(1). Under Section 21(2) a "usage of trade" is binding if "currently recognized as established in a particular place," a test which may be employed to enlarge current restrictive rulings as to "custom." See note 39 supra. Cf. Revised Sales Act § 15(a) (parol evidence rule does not bar proof, unless "contradicted" by contract).

79. Revised Sales Act § 101. This section provides:

1) An installment contract is one which requires or authorizes the delivery of goods in separate lots to be separately accepted and paid for, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within paragraph (a) and the seller gives adequate assurance of its cure the buyer must accept that installment . . . . (The reference to "paragraph (a)" is a drafting error, presumably to be corrected, which resulted from merging paragraphs labeled "(a)" and "(b)" in an earlier draft with paragraph (2). The apparent meaning is: "if the non-conformity does not fall within this paragraph.")

80. Acceptance of part of any "commercial unit" is acceptance of the "entire unit"; and "revocation of acceptance" is limited to "lots" and "commercial units" and then only if non-conformity "substantially impairs" value. Revised Sales Act §§ 95(2), 97. Nor would reasons based on the difficulty of separating shipments apply to the first installment.
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in spite of their conformity to the contract. This latter problem also demands a flexible rule, which is embodied in both the present and proposed statutes. 81

One might suppose that some clue to the reason for this special rule could be found in its scope, as expressed in the statutory definition of an "installment contract." But this is the very point at which the Revised Act proves most troublesome. The installment contract is defined as "one which requires or authorizes the delivery of goods in separate lots to be separately accepted and paid for . . ." 82 A literal reading can not be given to this language, for it seems to say that separate payment for each delivery is a necessary criterion of the "installment" contract. It would be startling to conclude that the special rules which apply because separate deliveries are embraced by a single contract may not also apply when the deliveries are even more closely linked by common payment. 83 The concept of "separate payment" for each installment calls for clarification, but the transaction which most plainly falls within this language is the contract requiring cash on delivery. This, however, is the very transaction where departures by the seller from the contract is least to be tolerated, for any deficiency in the value of the delivery would force the buyer to trust the seller's credit for a refund. At the very least, this definition of the "installment contract" should be redrafted. If that step is not taken courts will be forced to cut through its language to avoid the absurdity of holding that the principles applicable to installment contracts depend on "separate payment" for each delivery. 84

The search for some explanation of the separate rule for "installment" contracts leads us finally to the suggestion in the writings of one of the draftsmen that "standing relations" warrant separate

81. UNIFORM SALES ACT § 45 (right to repudiate "depends in each case on the terms of the contract and the circumstances of the case"); REVISED SALES ACT § 101(3) (test is whether breach "substantially impairs the value of the whole contract"). Cf. SALE OF GOODS ACT § 31(2) (more rigid rule employing "repudiation" as the test).

82. REVISED SALES ACT § 101(1), note 79 supra.

83. For example, it could hardly have been intended to exclude a contract calling for a series of deliveries but a single payment from the benefit of Section 101(3), which provides that a breach which "substantially impairs the value of the whole contract" will justify repudiation of future shipments.

84. Incongruity is avoided by reading Section 101(1) to define an "installment contract" as one which calls for the delivery of goods in separate lots to be separately accepted "although the lots are to be separately paid for or although there is a clause in the contract that each delivery is a separate contract or its equivalent." If Section 101(1) is redrafted, the error in Section 101(2) should be removed at the same time. See note 79 supra.

The confusing emphasis upon separate payment apparently arises from attention to the distinct problem whether the buyer is required to make piecemeal payment in advance of complete delivery. Cf. REVISED SALES ACT § 31; UNIFORM SALES ACT § 45(1).
handling from "single-occasion deals." For many purposes, this distinction is inescapable: for example, a defective shipment may justify rejection of that shipment, but not repudiation of a long-term contract; past transactions may supply a "course of dealing" which will shed light upon the parties' expectations; and the fact that further shipments are expected may make it reasonable for the buyer to wait for "cure" of shortages in the shipment. But these are all problems which call for and have appropriately been given separate handling in the Revised Act.

Moreover, it does not appear that the existence of a "continuing relationship" bears on the interests which support the right of rejection; the need to avoid credit strain or an uncertain measure of damages may be present regardless of other transactions between seller and buyer. Nor does the "installment" rule necessarily fit the well-established business relationship. The Act would apparently apply a more strict test to deliveries to an old customer who repeatedly places an order for single delivery than to a new contract between distant and unacquainted parties which divides delivery into two or more installments. Finally, this portion of the Revised Act violates the sound canon of draftsmanship that the rule should "bear its reason on its face." The lack of an apparent reason for this rule is likely to result in difficult and formal disputes over the question whether, for present purposes, a contract should fall within the "installment" category.

The "documentary" exception. In a further respect this same provision of the Revised Act speaks in an uncertain voice, for even in "installment" sales the right of rejection automatically follows if there is a "defect in the required documents." This qualification, when read in context, means that if there is such a "defect," the buyer may reject even though there is no "substantial impairment" of the value of the installment.

The effect of this return to the strict rule is minimized by the fact it will often be possible promptly to "cure" a "defect" in documents. Moreover, such a defect is often a serious matter which readily justifies rejection. It has already been noted that in any cash transaction, typified by the exchange of shipping documents for a draft, the buyer should not be required to undertake the credit hazard involved in paying the full price subject to a later claim for refund.

86. REVISED SALES ACT §§ 101(3), 21, 22, 77.
87. REVISED SALES ACT §101(2), note 79 supra.
88. REVISED SALES ACT §77. See text at note 68 supra.
There are other strong reasons why documents should be fair on their face, so that they may be readily marketable for pledge or resale before arrival of the goods. But even under the less rigid rule of "substantial impairment" which the Revised Act provides for other "installment" deliveries, courts may be expected to continue to recognize these interests. The difficulty with the Act's special emphasis upon strict compliance in the "documentary" field is that it may jeopardize the results of recent cases which have barred rejection based on trivial defects which did not impair the full value or salability of the shipment. And, as the cases illustrate, sellers in a "documentary" transaction often have a particularly strong interest in acceptance, since heavy freight charges may have accrued in shipping to the buyer, and the time consumed in shipping increases the possibility of price fluctuation.

**Summary and Conclusions**

It is evident that the Revised Sales Act will mark a further significant step in the evolution of the law of conditions in sales contracts. Viewed as a whole, this development forms an instructive pattern of action, reaction, and adjustment. From early cases holding parties to their promises regardless of failure of the expected return, the law made its way through an intermediate position in the formal and technical rules of the British statute to the opposite extreme in the strict rule of rejection of the Uniform Sales Act. Case-law and mercantile practice then became restive under this regime and pressures developed which are now finding outlet in the delicate adjustments which the Revised Act proposes.

This partial return towards strengthening the obligation of acceptance is to be welcomed. The Revised Act has found a number of means to this end without seriously impairing the buyer's protection against breach of the sales contract. It appears unfortunate, however, that the draftsmen of the Revised Act have not found the way

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89. See note 46 supra.

90. Cases cited in notes 47, 48 supra. Sellers may counter with the contention that an immaterial deviation is not a "defect," and invoke the provisions already discussed, on "good faith," "commercial standards," and "usage." REVISED SALES ACT §§ 10, 21; cf. id. § 37(1) (affirmation and promises are warranties only if "part of the bargain").

91. A number of the difficult "documentary" cases have involved long shipments of raw staples, where price fluctuations are particularly severe. E. g., Dixon, Irmaos & Cia v. Chase National Bank, 144 F. 2d 759 (2d Cir. 1944), cert. denied, 324 U. S. 850 (1945) (sugar for Belgium—war intervened); Lamborn v. National Bank of Commerce, 276 U. S. 469 (1928) (sugar from Java—post-war price panic); Filley v. Pope, 115 U. S. 213 (1885), and Norrington v. Wright, 115 U. S. 188 (1885) (iron from Scotland—price drop).
open to seize a somewhat bolder and less complex course, by con-
ferring the right to reject only for a “material” breach by the seller, subject to guides to the materiality of the breach in terms of the inter-
est of seller and buyer which we have isolated. Although the Revised Act provides a wide assortment of tools for reaching the result either of rejection or acceptance there is some danger that the significant interests of the parties may be lost among these over-
lapping rules.

One may hazard the suggestion that the draftsmen, acutely aware of the part which neat factual distinctions have played in the growth of case-law, have at this point strained a bit too hard to place these distinctions into permanent statutory form. These sections of the Revised Sales Act, therefore, present a larger problem, which can only be suggested here, concerning the degree of detail for which legislative draftsmen should strive.

As Justice Cardozo has told us, we may “worry overmuch about the enduring consequences of our errors,” for there is a process which “silently and steadily effaces our mistakes and eccentricities.” But this reassurance was concerned with the judicial rather than the legislative process, where errors have a more stubborn existence. Of course, where the draftsman clearly sees a vision of the law as it should be, he can and should construct with sharp and detailed lines. However, in dealing with a problem such as substantial performance in sales contracts, where the presence of a number of variable factors tends to blur formal distinctions, it seems wise to give wider scope to further development in case-law.

The Revised Act, as it now stands, provides a partial answer to the problems raised by its highly-refined provisions. One of its most novel and, it is believed, one of its most wholesome provisions is a self-denying rule of statutory construction. The Revised Act invites courts to look through its language to “underlying reasons, purposes and policies” and, in addition, authorizes the expansion of any


It must be added that examination of the problem of rejection gives far from a fair picture of the skill employed in building most of the other provisions of this proposed statute. Although improvement seems possible in the handling of rejection, particularly with respect to the “installment” distinction, it may be appropriate to note that I should have little hesitation in moving the adoption of the Revised Act as a whole.
"limited" rule when "circumstances and underlying reasons justify extending its application." 96

Such a self-limiting rule of construction must, it seems, be born of a proper feeling of humility on the part of any draftsman as to his ability to put into words the rules which will do justice in the infinite combinations of facts which may arise under the statute. Given this mandate, courts which may find no clear answer to the problem of rejection from the interplay of the rules of the Act may be invited to give effect to the thrust of legislative policy towards enhancing the obligation of acceptance, subject to alert concern for the interests of the buyer which are served by the remedy of rejection.

96. Revised Sales Act §§ 1(1), 1(3).