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SUBSTANTIAL PERFORMANCE UNDER THE UNIFORM COMMERCIAL CODE

INTRODUCTION

The purpose of this note is to trace the development of the doctrine of substantial performance, to examine this doctrine in its modern form, and to consider the impact on this doctrine as applied in the sale of goods of the Uniform Commercial Code. The Uniform Commercial Code (hereinafter referred to as the U.C.C.) is now in effect in Wyoming and is controlling with respect to commercial transactions occurring after January 1, 1962 that fall within its provisions. However, commercial transactions effected prior to January 1, 1962, will still be governed by the laws existing prior to the adoption of the U.C.C.

The act purports to deal with "commercial transactions" which is deemed a single subject of the law, notwithstanding its many facets. The act is so drafted that it covers all phases which ordinarily arise in the handling of a "commercial transaction" from start to finish. There is some possibility that the U.C.C. will be applied in contract areas other than sales by analogy.

DEVELOPMENT OF THE DOCTRINE OF SUBSTANTIAL PERFORMANCE

At early common law to recover on a contract there had to be complete performance of conditions (including promissory conditions) and it was not enough to show that the plaintiff acted in good faith and substantially performed the agreement.¹ If a condition in a contract had not been complied with, regardless if harm or inconvenience resulted, the promisor was excused from performing and the promisee could not recover.² This rule of strict performance was followed in building contracts,³ sales contracts,⁴ surety contracts,⁵ and personal performance contracts⁶ for many years. Some courts were strictly adhering to it as late as 1929.⁷ A Washington court in reference to the rule of strict compliance had this to say:

Later, however, it was realized that this strict rule (of compliance) was liable to, and often did, work a great injustice, and at a somewhat early period the equity courts began to work a relaxation of the common-law rule. Following the lead of equity, the law courts soon began to recognize the justness of the substantial compliance rule, and first applied it to building contracts, and at the present time it is almost universally held that substantial compliance is sufficient in such contracts.⁸

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1. *Glazer v. Schwartz*, 276 Mass. 54, 176 N.E. 613 (1931).
 2. *White v. Price*, 56 Ore. 376, 108 Pac. 776 (1910).
 3. *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29 (1910). *Lombard v. Overland Ditch and Reservoir Co.*, 41 Colo. 253, 92 Pac. 695 (1907). *Cutter v. Arlington Const. Co.*, 268 Mass. 88, 167 N.E. 266 (1929).
 4. *Norrington v. Wright*, 115 U.S. 188 (1885).
 5. *National Surety Co. v. Long*, 125 Fed. 887 (8th Cir. 1903).
 6. *Britton v. Turner*, 6 N.H. 481 (1834).
 7. *Cutter v. Arlington Const. Co.*, 268 Mass. 88, 167 N.E. 266 (1929).
 8. *Harrild v. Spokane School Dist.*, 112 Wash. 226, 192 Pac. 1, 2 (1920).

There are many reasons why the common law requiring strict performance was relaxed and the doctrine of substantial performance was instituted. One of the most important reasons for the relaxation of the common law was to prevent the unjust enrichment that occurred through the application of the rule requiring strict compliance. Thus, the doctrine of substantial performance was primarily intended for the protection of those who had faithfully and honestly endeavored to carry out their contract, so that their right to compensation would not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects.⁹ This attitude is reflected by the case of *St. Charles v. Stookey* in the 1st Circuit Court of Appeals. Judge Sanborn said:

When one has received the benefits of substantial performance by the other without paying the price agreed upon, and he cannot or does not return these benefits, it is manifestly unjust to permit him to retain them without payment, or doing as he promised. In order to avoid such an injustice, the party who has substantially performed may enforce specific performance of the covenants of the other party, or may recover damages for the breach upon an averment of performance, without proof of complete fulfillment, while the other party on the other hand, may by an independent action before he is sued, or by a counterclaim after the commencement of a suit against him, recover from the first party the damages which he has sustained by the latter's failure to completely fulfill his covenants.¹⁰

Another reason for the relaxation of the common law rule was the realization of the difficulty and improbability of attaining complete perfection in the quality of materials and workmanship called for by many contracts.¹¹ But, the principal reason for accepting the doctrine of substantial performance is still based primarily on the idea of trying to prevent the unjust enrichment that resulted from the application of the common law rule of strict performance.

The doctrine of restitution as a remedy at common law was not an adequate or sufficient remedy for a substantially performing party. At common law restitution meant the return or restoration of a specific thing or condition;¹² this would not be practical or reasonable when applied to a building or structure constructed on another's property or to personal services rendered under a contract. It would be impossible or impractical to restore the services rendered or to tear down and return a building. This interpretation of restitution as a remedy was later changed.¹³ Restitution is now the restoration of anything to its rightful owner; act of making good, or of giving an equivalent for any loss, damage, or injury.¹⁴ The measure of recovery generally in restitution is the reasonable value

9. *Williard Sales and Service Inc. v. Stevens*, 167 Pa. Super. 621, 76 A.2d 225 (1950).
10. *St. Charles v. Stookey*, 154 Fed. 772, 776, 85 1st Cir. 494 (1907).
11. *Dodge v. Kimball*, 203 Mass. 364, 89 N.E. 542 (1909).
12. *Holloway v. Peoples Water Co.*, 100 Kan. 414, 167 Pac. 265 (1917).
13. *Holloway v. Peoples Water Co.*, supra note 12.
14. *Holloway v. Peoples Water Co.*, 100 Kan. 414, 167 Pac. 265 (1917).

of the plaintiff's performance and in cases of a plaintiff substantially performing the recovery could not exceed the contract price since the plaintiff would be in default.¹⁵ Restitution would be a poor remedy for the plaintiff in a situation where the prices or value of the services had dropped before or at the time they were rendered since the basis of recovery is their reasonable value at the time of performance. The use of the substantial performance doctrine would prevent this loss as recovery is based on the contract price.

THE DOCTRINE OF SUBSTANTIAL PERFORMANCE

To allow a recovery upon substantial performance, the work must be done in good faith, substantial, and not a deviation from the general plan contemplated for the work. In a California case¹⁶ in 1894, the court said that:

Good faith . . . is not enough . . . (as) the owner has a right to a structure in all essential particulars such as he contracted for; and, to authorize a court or jury to find that there has been a substantial performance, it must be found that he has such a structure.

Substantial performance has been given various definitions by different courts. A Wyoming court¹⁷ said that:

Substantial performance of a condition precedent sometimes means something distinctly short of full performance, in which case recoupment may be had for the part not performed, but in other cases means full performance according to the fair intent of the contract and permits recovery thereon without recoupment.

The definition that is generally followed by courts is very similar to the following definition given in *Connell v. Higgins*:¹⁸

Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms.

There is no set test to see if there has been a substantial performance because this a question which must be answered in each case with reference to the existing facts and circumstances.¹⁹ It is almost universally held that certain general elements must exist in order to constitute a substantial performance. Those generally required are: an endeavor in good faith to perform,²⁰ the omission or defect must be unintentional or through inadvertance,²¹ the essential particulars of the contract must be met so

15. *Hertz v. Sayers et al.*, 32 Del. 207, 121 Atl. 225 (1923).

16. *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740, 742 (1894).

17. *Pacific-Wyoming Oil Co. v. Carter Oil Co.*, 31 Wyo. 314, 226 Pac. 193, 198 (1924).

18. *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769, 775 (1915).

19. *Connell v. Higgins*, supra note 18.

20. *J & L. Steel Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290 (1912).

21. *Lusk Lumber Co. v. Independent Producers Consolidated*, 35 Wyo. 381, 249 Pac. 790 (1926).

the plan or purpose is fulfilled,²² and last, but not least, there must be a benefit to the other party.²³

The burden of proving the existence of these required elements is on the party who is invoking the protection of the doctrine of substantial performance.²⁴ In order to get his case to the jury, he must present one that is without willful omission or departure.²⁵

THE SUBSTANTIAL PERFORMANCE DOCTRINE IN DISGUISE

The same or a similar result to the substantial performance doctrine is sometimes achieved by manipulating other authoritative doctrines. If for example, a court construes promises as being independent, the plaintiff is not required to prove performance of his promise in order to recover on the defendant's promise, and the defendant is not excused from performing because of a breach of plaintiff's promise. If the promises are construed as dependent, that is as conditional promises, plaintiff to recover must prove performance of his promise, but the doctrine of substantial performance may be available to the plaintiff so as to excuse a breach. The doctrine of material and immaterial breach used by some courts appear to be an application of the substantial performance doctrine under another name. In allowing recovery on the contract for an immaterial breach not going to the essence,²⁶ the court is just applying a test that is the converse of the test applied in the substantial performance doctrine and reaches the same results. That is, the court is saying that there has been no material breach (and hence there has been substantial performance) of plaintiff's promise. Thus the tests used to determine if a breach is immaterial and not of the essence could in reality be said to be a part of the test for substantial performance. However, the doctrine of immaterial breach may be helpful in reaching a fair result in those situations in which at the time of breach plaintiff has not performed even in part but has expended considerable effort to prepare for performance.

APPLICATION OF DOCTRINE

The doctrine of substantial performance is not limited to construction or building contracts even though the doctrine reached fruition and is generally applied in this area. In a 1926 Wyoming case,²⁷ the court, quoting Willston on Contracts, Section 805, said:

22. *Richard v. Miller*, 182 Cal. 351, 188 Pac. 50 (1920).

23. *Britton v. Turner*, 6 N.H. 481 (1834). But see where in *Ylijarvi v. Brockphaler*, 213 Minn. 385, 7 N.W.2d 314, 319 (1942), the court said:

. . . The mere fact that a part performance has been beneficial is not enough to render the party benefited liable to pay for the advantage. It must appear that he has taken the benefit under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the nonperformance of the special contract.

24. *De Vito v. Uto*, 253 Mass. 239, 148 N.E. 456 (1925).

25. *Williard Sales and Service Co. v. Stevens*, 167 Pa. Super. 621, 76 A.2d 225 (1950).

26. *Sipley v. Stickney*, 190 Mass. 43, 76 N.E. 226 (1906).

27. *Lusk Lumber Co. v. Independent Producers Consolidated*, 35 Wyo. 381, 249 Pac. 790 (1926).

The doctrine of substantial performance is not confined to building contracts. The reasons underlying the doctrine make it applicable to all cases where it would be unjust to the plaintiff to declare a forfeiture of his work and materials.

Page on Contracts,²⁸ is to the effect that the doctrine of substantial performance is by no means limited to building contracts. If any contract is performed substantially, recovery can be had thereon, subject to recoupment of damages, if any, by the other party.

Besides being used in building and construction contracts, the doctrine of substantial performance has been applied in contracts involving specially manufactured chattels;²⁹ sale of real estate in special circumstances;³⁰ personal performance;³¹ and sale of goods.³²

UNDER THE UNIFORM COMMERCIAL CODE—NON-INSTALLMENT CONTRACTS

If in a non-installment contract for the sale of goods, the goods or tender of delivery fail in any respect to conform to the contract, the buyer under the U.C.C. has his option of rejecting the whole, accepting the whole, or accepting any commercial unit or units and rejecting the rest.³³ Inasmuch as the buyer is able to reject the goods or delivery for failure in any respect to conform to the contract, a substantial performance on the part of the seller will be of no avail to him. However, the buyer's rejection must in compliance with Section 2-602(1) which requires a rejection to be made within a reasonable time after delivery or tender, and the seller must be seasonably notified. Also, if a defect is ascertainable by reasonable inspection and the buyer wants to rely on this defect to justify his rejection, under Section 2-605 the buyer must state and specify this particular defect in connection with his rejection if the defect is one which the seller could have cured if he had been seasonably notified or if he has asked the buyer to list in writing all defects on which he proposes to rely. However, if the buyer should choose either of two options that are left to him, accept the whole or accept any commercial unit or units and reject the rest,³⁴ and then try to revoke his acceptance of a lot or commercial unit,³⁵ the substantiality of the seller's performance would become a prime consideration in determining if the buyer can revoke his acceptance and refuse to keep the goods. If a buyer has accepted non-conforming goods under the assumption the non-conformity would be cured and it has not, or if the buyer's acceptance was made without discovery of the non-conformity because of the difficulty of

28. 3 Page, Contracts, § 2147.

29. *Harrild v. Spokane School Dist.*, 112 Wash. 266, 192 Pac. 1 (1920).

30. *Froedtert v. Haines*, 142 F.2d 338 (1944).

31. *Northwestern Theatrical Ass'n. v. Hannigan*, 218 F. 359 (2nd Cir. 1914). *Britton v. Turner*, 6 N.H. 481 (1934).

32. *J & L Steel Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290 (1912); *Lusk Lumber Co. v. Independent Producers Consolidated*, 35 Wyo. 381, 249 Pac. 190 (1926); *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 115 N.E. 42 (1917).

33. Uniform Commercial Code, 1958, Official Text with Comments, § 2-601.

34. *Ibid.*

35. Uniform Commercial Code, § 2-608.

discovery or because of the seller's assurances, he can revoke his acceptance if the non-conformity substantially impairs the value of the lot or commercial unit to him.³⁶ Taking the converse of Section 2-608 and say if even with the non-conformity the goods or commercial unit still give substantial value to the buyer, he cannot revoke an acceptance made under the assumptions allowed in this section.³⁷ In this type of situation a seller would be able to invoke the doctrine of substantial performance for his protection and a buyer would be unable to revoke his acceptance. This is the only situation or section dealing with non-installment sales contracts that allows for the application of the substantial performance doctrine.

Also, under the loose and liberal language used in Section 2-601, if a time for delivery is contained or set forth in the contract and if the seller should fail to meet this date or time in any respect, the buyer can reject the entire contract if he so chooses. The harsh and unjust result of this type of rejection by the buyer was frequently overcome by the courts under the modern common law by holding that "time is not ordinarily of the essence of the contract, unless the contract expressly so declares, or unless from the subject-matter or nature of the contract, . . . it is apparent that the parties so intended."³⁸ The U.C.C. appears to reject this doctrine and allow rejection for any failure of delivery to meet the time requirement regardless of how slight. However, Section 2-615 does excuse a delay or non-delivery by a seller, where performances was made impractical by the occurrence of a contingency, the non-occurrence of which was a basic assumption of the parties in making the contract or the seller is complying in good faith with a foreign or domestic governmental regulation. The seller must seasonably notify the buyer of the delay or non-delivery and if only part of seller's capacity is effected, he must make fair and reasonable allocations among his customers. Also, under Section 2-601 the parties can agree that some defect, or conduct by the seller, such as delay in delivery will not constitute a non-conformity and thus the seller by appropriate drafting can avoid the severe consequences following from Section 2-601 in the event of a non-conforming delivery that does not substantially impair the value of the performance. Thus, parties can, if they so intend, incorporate the substantial performance doctrine into their contracts.

Section 2-601 of the U.C.C. allows a buyer who is not harmed or injured by a seller's late delivery to place a serious and significant injury or loss upon the seller. This will especially be true under circumstances in which the market price for the goods has taken a large drop and time was not of the essence, or the goods are unique and specially manufactured goods. This is an example of where the burden is placed on the seller by the inflexible rule set down by the code, and if the substantial performance

36. *Ibid.*

37. *Ibid.*

38. *Walker v. American Automobile Ins. Co.*, 229 Mo. App. 1202, 70 S.W.2d 82 (1934).

doctrine were applied, which is very flexible, we could place the burden where justice and equity under the facts of the particular case required that it be placed. The harshness of the code in this situation can also be alleviated by the parties themselves, if they have adequate knowledge of the law and through proper draftsmanship shape their own remedies to their particular requirements as they are allowed to do under Section 2-719. These provisions for shifting the burden by draftsmanship will be of no avail though to the unwary and unexperienced working under the code.

When the buyer has accepted any lot or commercial unit, he must pay the seller at the contract rate for these goods even though they do not conform to the contract.³⁹ If the buyer has accepted and given notice of the non-conformity as required by Section 2-607, he can recover damages for any loss that results naturally out of the non-conformity,⁴⁰ and also his incidental and consequential damages that result from the seller's breach.⁴¹

The seller is offered some relief under Section 2-508 which allows the seller to cure the non-conformity if time for performance has not yet expired and he can do so within the contract time. This provision is beneficial to the seller, but is very limited in application from the viewpoint of the time limitation. Also, under this same section, subsection (2), the seller is protected from a surprise rejection if he had reasonable grounds on which to believe the tender would be acceptable to the buyer and the time for performance has not yet expired. In this situation if the seller notifies the buyer, he will be allowed a reasonable time within which he can make a conforming tender.

UNDER THE UNIFORM COMMERCIAL CODE—INSTALLMENT CONTRACTS

An installment contract under the U.C.C. is one which requires or authorizes the delivery of goods in separate lots to be separately accepted. In an installment contract, the buyer may reject any non-conforming installment which substantially impairs the value of that installment and cannot be cured; or if the non-conformity is a defect in the required documents, the buyer can reject the installment.⁴² If the non-conformity can be cured, though, and the seller gives the buyer adequate assurance that it will be cured, the buyer must accept that installment.⁴³ From this we can see that in an installment contract, if the seller has substantially performed his part of the contract, the buyer must accept that part of the installment so performed. This is different than a non-installment contract, as there, the buyer can reject at his option for any non-conformity at all. The foregoing pertains only to the non-conforming installment,

39. Uniform Commercial Code, § 2-607(1), but also note that subsection (2) states that acceptance will not impair any other remedy by this article, and this acts as a bridge to get us into section cited in the next two footnotes.

40. Uniform Commercial Code, § 2-714.

41. Uniform Commercial Code, § 2-715.

42. Uniform Commercial Code, § 2-612.

43. Uniform Commercial Code, § 2-612. See Comment 5 of this section for an illustration of "adequate assurance" and "cure" in this context.

but whenever the non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract, the buyer can treat the entire contract as breached and cancelled.⁴⁴ This again requires a substantial impairment of the value of the whole contract before the buyer can reject or rescind the whole contract. However, if comment 4 to Section 2-612 is to be believed as read in connection with Section 2-102 (3) the burden of draftsmanship can also become involved. Since the provision of this Act can be varied by agreement between the parties as qualified and restricted by subsection 3 of Section 2-102, the parties can agree what will and what will not be a substantial non-conformity so as to allow a rejection of the goods.

Whether or not the substantial performance doctrine will be applied as it was developed prior to the code depends upon the court's interpretation of the phrase, "substantially impairs the value of that installment," and also the type of contract involved. As was stated previously in this article, one of the principal tests to see if there has been a substantial performance is if the essential particulars of the contract are met so the buyer's plan or purpose is fulfilled. If this is the interpretation to be used by the courts, in this context, the substantial performance doctrine is in effect incorporated into Section 2-612. A problem in this regard is to determine the meaning of the term "value" as used in Section 2-612. "Value" as defined in Section 1-201 is any consideration sufficient to support a simple contract. This definition would be of no use as the word is used in Section 2-612. In Section 2-724 the term "value" is used in reference to market price, and in Section 2-608 "value" is qualified and means the value to the buyer. Although "value" as used in Section 2-612 is not specifically qualified, it apparently refers to "value" to the buyer and may be very similar to the requirement in the substantial performance doctrine that all the essential particulars of the contract must be met so the buyer's plan or purpose is fulfilled. Comment 4 to Section 2-612 substantiates this in saying impairment of value can turn not only on the quality of good, but also on factors like time, quantity, assortment and the like.

Conceivably the term "value" might refer to market value and in a contract where the goods are being purchased by a retailer for resale on the market, the "substantial impairment of the market value" would be an adequate test and would result in giving the buyer substantially what he had bargained for. But, in still another type of contract, this interpretation of the word "value" would be disastrous to the buyer. This would be in the situation where the buyer is a manufacturer or assembler and uses the goods purchased as component parts. Here the buyer may have his tolerance limits set so tight that only exact performance would meet his needs or purposes and yet there may still be other manufacturers or assemblers whose tolerances are not as tight as the present buyer's. Thus,

44. *Ibid.*

there would still be a market for the goods and their market value would not be impaired by the seller failing to meet the buyer's precise requirements, and yet the goods are absolutely useless to the buyer for his specific purposes. If the court said "value" meant market value, the buyer would be obligated to take goods absolutely useless to him. In this situation the buyer can possibly sustain losses from two different causes. If he resells the goods on the market and the market price is lower than his contract price, he will sustain a loss. The more serious loss or detriment to the buyer will be his expenses and time loss in securing replacement good to use in his manufacturing process.

The above situation is just the converse of the seller's situation in a non-installment contract involving specially manufactured goods. This may tend to show why the buyer should be given the right to reject in non-installment contracts, but is there any real justification of why this right should not extend to installment contracts, too? I think the real significance of this conflict is that it tends to point out the inconsistency of the U.C.C. in its treatment of installment and non-installment contracts where there is no real justification for such distinction. In other words, the U.C.C. generalizes too broadly and is not flexible enough to handle the many different situations that will arise under both types of contracts. In determining the consequence of a defect, it is necessary to make refinements as to to:

1. Defect in time of delivery
2. Defect in goods
3. Specially manufactured goods
 - a. Buyer's standpoint in that they may or may not have to meet precise specifications
 - b. Seller's standpoint in that there is no other market for such goods

rather than making a determination upon whether the contract involved is an installment or non-installment contract.

If there has been an installment or installments which substantially impair the whole contract and the buyer has accepted these without notifying the seller he chose to cancel the contract, the contract is reinstated. Or if the buyer brings an action only for the past installments or demands performance from the seller in regard to future installments, the contract is also reinstated.⁴⁵ Thus, even though there has been a substantial breach of the contract, and the contract is cancelled by the buyer's conduct, the contract can be reinstated and remain in effect. But, still, before the breach can be sufficient to cancel the entire contract, it must substantially impair the value of the whole contract.⁴⁶

45. Uniform Commercial Code, § 2-612.

46. Uniform Commercial Code, § 2-612, Comment 6, 3rd sentence and § 2-610, Comment 1, 1st sentence. By reading comments to the two sections in conjunction with each other we get some insight as to the objectives of the draftsman in this area, which appears to substitute "objective test" for "subjective test" in determining buyer's right to cancel entire remaining portions of contract because of one

APPRAISAL OF THE CODE DOCTRINE

Comparing the doctrine of substantial performance as developed outside of the code with the code provisions relating to the comparable problem as it arises in non-installment contracts, the code appears to be a reversion to the common law requiring strict performance if the parties to the agreement have not "otherwise agreed." This will tend to reinstate the exact thing the courts were trying to alleviate by introducing doctrine of substantial performance. Although the buyer is given an option of accepting or rejecting a non-complying performance by the seller, this is still almost identical to the common law requiring strict performance and holding liberal performance (including time of performance) to be of the essence. The buyer can reject if he so chooses for failure in any respect to conform to the contract. If the buyer chooses this option and rejects in the proper manner, it is the same as requiring the seller to make a complete and perfect performance on his part before he is entitled to any compensation on the contract. The seller only has a remedy if the buyer wrongfully rejects or revokes acceptance or fails to make a payment when due,⁴⁷ or if he finds the buyer insolvent.⁴⁸ Thus, for a substantial performance on a non-installment contract, with a defect, however slight, the seller has no remedy if the buyer chooses to reject. This is not too harmful to a seller if there is a wide and open market for the contract goods. He can get them back, as it is wrongful for the buyer to exercise any ownership over goods that have been rejected.⁴⁹ The greatest harm and injustice will result in goods that are specially manufactured with a slight and unsubstantial defect. A rejection by a buyer in this situation would cause the seller a great loss and injustice. This is just the thing the substantial performance doctrine is supposed to prevent in its proper application. Although this is something that will not happen in every case, it can happen if an insistent buyer so chooses. This power of choice should not be given to a buyer, but should remain with the courts so they can allow the seller to invoke the doctrine of substantial performance if the merits of the case so allow.

In the installment contracts, the U.C.C. makes the basis for rejection of the goods or lot the substantiality of the impairment to the value of the installment or the contract. With the use of the word "value" in Section 2-612 and the various interpretations available and with no assurance of which one the court may choose to use, we could conclude that if the drafters were trying to incorporate the substantial performance doctrine, they could have selected more apt words.

Assuming by proper draftsmanship the parties to an installment contract could either invoke or exclude the substantial performance doctrine

defect in seller's performance. Whether draftsmen's method of seeking this objective is sound is a serious question, but at least they did have an objective in mind.

47. Uniform Commercial Code, § 2-703.

48. Uniform Commercial Code, § 2-702.

49. *Ibid.*

by so agreeing, we are faced by another question. Was it sound legislative policy to change the present law in this fashion merely in order to accord the parties the right to choose their own rules?

Inherent in this question are these:

1. Analytically, could not the same result have been reached more directly by preserving the present law insofar as an agreement was silent on this point?

2. As a matter of legislative policy, are the social costs of re-education of the profession and public (which re-education may often involve learning through bitter experience) justified in view of the limited results produced?

3. As a matter of legislative policy, are the "new rules" more apt to produce "justice" for the unwary than the "old rules"?

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