Some Comments on Contracts and the California Commercial Code

By Raymond G. Coyne*

CALIFORNIA'S VERSION of the Commercial Code was enacted in June of 1963 and became effective on January 1, 1965. This article is an attempt to answer in a general way the natural question posed by so many since its enactment—what does the Commercial Code do to the law of contracts? The question is reasonable and the answer is short—not much. But the Commercial Code does bring about some changes in contract law and cases governed by the Commercial Code are in the California courts. It might be prudent therefore to examine the changes in contract law brought about by this Code.

The first thing to be noted is that the Commercial Code, insofar as general contract law is concerned, is largely limited in its application to contracts for the sale of goods. It does not make any changes in the law relating to other types of contracts, e.g. contracts for services, contracts for the sale of real property or construction contracts. Since, as to those contracts not specifically covered by the Commercial Code the law has not been changed, this means that we probably will see two bodies of contract law develop, one with respect to the sale of goods and the other with respect to the rest. This raises another question. Will the Uniform Commercial Code extend its influence beyond the commercial area and gradually bring about a change in the law applicable to those contracts now beyond its ken? This question will perforce be answered in time by the bench and the bar and others who contribute to shaping the law.

The Commercial Code does not seem to have changed the basic concept of what a contract is. True, the Commercial Code defines the terms "agreement" and "contract" and differentiates between them. "Agreement" for example means "... the bargain of the parties..." "Contract" means "... the total legal obligation which results from the parties' agreement. ..." But when these definitions are read together they incor-

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1 California's Commercial Code contains some 125 variations from the Official Text of the Uniform Commercial Code.

2 Adopted in at least 41 states and the District of Columbia as of this writing.


porate the provisions of current California law defining the term "contract." In addition the Commercial Code makes express reference to the existing body of California law concerning contracts, equity, capacity, agency, estoppel, fraud, misrepresentation, duress, coercion, mistake and the like, as supplementing the Commercial Code unless specifically displaced by the provisions of that code. Thus, it is clear that the Commercial Code was not intended to make obsolete the entire common law of contracts even with respect to those contracts subject to the Commercial Code. It is also clear that insofar as the basic concept of contract is concerned, those contracts subject to the Commercial Code and those which are not, are alike.

Aside from contracts for the sale of goods, which used to be covered in the Sales Act provision of the Civil Code, California law concerning offer and acceptance and mutual assent, though codified, is in line with the common law. An offer, for example, must be definite and certain before it can be accepted and thus form a contract. The Commercial Code, on the other hand, would allow the formation of a contract even though the offer was not definite and certain since by its terms a contract does not fail for indefiniteness if the parties intend to make a contract and if there is a reasonably certain basis for giving an appropriate remedy. Here contracts for the sale of goods and contracts not covered by the Commercial Code part company, and whether they will come together again is conjectural. The Commercial Code provision is based upon the intent of the parties to make a contract and the requirement that there be a reasonably certain basis for granting an appropriate remedy. These qualifications have their origins in commercial practices which would not seem applicable in the non-commercial setting and it may well be that this twain shall not meet again.

With regard to acceptance, there are some differences between contracts subject to the Commercial Code and those which are not. But first, a point of similarity should be noted. The Commercial Code provides that unless otherwise unambiguously indicated by language or circumstances, an offer is to be construed as inviting acceptance in any matter

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5 Cal. Civ. Code §§1549 (contract defined), 1619, 1620, 1621 (express and implied contracts); Cf. Restatement, Contracts §§1, 3 (1932).
and by any medium reasonable in the circumstances. The provision was deliberately drafted in this manner to avoid the application of any rule to the effect that the mode of communicating the acceptance must be the same as that used for the offer and is intended to be flexible enough to apply to acceptances by present and future means of communication. It has its counterpart in the Civil Code provision which requires the acceptance to conform to any prescribed conditions concerning communication which are contained in the offer. In the absence of any such conditions, "any reasonable and usual mode may be adopted." Actually both of these provisions are in accord with the common law rule.

However, the Commercial Code in the same section provides that an order or other offer to buy goods for prompt or current shipment can be accepted by a prompt promise to ship or by prompt shipment of conforming or nonconforming goods. To the extent that this section permits acceptance by either prompt promise to ship or prompt shipment of conforming goods it appears that there has been no change in California law. But insofar as this section provides that an offer to buy goods can be accepted by shipping nonconforming goods we have new contract law in California.

In another section of the Commercial Code there is a change as to acceptance in contract law applicable to the sale of goods. This section states that a definite and seasonable expression of acceptance or a written confirmation operates as an acceptance even though it contains terms in addition to or different from those contained in the offer, unless the acceptance itself is expressly made conditional on the further acceptance of the additional terms by the original offeror. Absent any such condition the additional terms become proposals for addition to the contract and presumably these proposals must be assented to before they become a part of the contract. As may be seen from the foregoing an acceptance or written confirmation containing additional terms can have a twofold effect. It is an acceptance so that a contract is formed according to the terms of the original offer and it is also in the nature of a counteroffer to the extent that it contains proposals for addition to the contract already formed. It should be noted here that what has been said above concerning proposals for additions to the contract applies only in cases where at least one of the parties to the contract is not a merchant.

11 See e.g., Henthorn v. Fraser, 2 Ch. App. 27 (1892); Restatement, Contracts §66 (1932).
There is another standard applied as between merchants. In this case any additional terms contained in the acceptance, not expressly made conditional on the acceptance of the additions by the original offeror, become a part of the contract automatically, unless: (1) the offeror had taken the precaution to limit expressly the acceptance to the terms of the offer; or, (2) the additions would materially alter the offer; or, (3) the offeror objects to the additions and gives notice before, or within a reasonable time after, receiving notice of the additions. In any event, whether we are dealing with merchants or not, it is possible for an offer to be accepted by an acceptance which varies the terms of the offer.

On the other hand when we are concerned with contracts not within the scope of the Commercial Code, California law has been and is to the effect that an acceptance, in order to operate as such and create a binding contract, must not vary from or qualify the terms of the offer. If there is such a variance the purported acceptance amounts in law only to a counteroffer which rejects and terminates the original offer and there is no possibility of contract unless and until the counteroffer is itself accepted. Again we have the situation where contracts subject to the Commercial Code and those which are not are governed by different rules of law. Since the modes of acceptance set out in the Commercial Code are based on and designed to accomodate commercial practices, and sometimes only commercial practices "between merchants" which developed apart from the general law of contracts, it seems that the dichotomy will continue and that in this area we will have to contend with two bodies of contract law.

Consideration is another area of change. Under the Commercial Code with respect to the sale of goods we now have the concept of "firm offer." This is an offer by a merchant to buy or sell goods contained in a signed writing which gives assurance that the offer will be held open. The Commercial Code provides that such an offer is not revocable for lack of consideration for the time stated, and if no time is stated then for a reasonable time, but in no event will it be irrevocable for more than three

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15 For definitions of "merchant" and "between merchants" see Cal. Comm. Code §2104.
17 Parenthetically, we note that within the Commercial Code itself we have a Commercial Code (between merchants) and a non-Commercial Code (between others).
20 We assume that if §§2207 and 10103 (general repealer) of the Commercial Code modify §1585 of the Civil Code, the modification is only with respect to contracts for the sale of goods.
22 "Merchant" is defined in Cal. Comm. Code §2104(1).

months. As a precaution and in order to avoid a battle of forms the section goes on to state that if the assurance is contained on a form supplied by the offeree it must be separately signed by the offeror. This is new California law. Until the adoption of the Commercial Code offers had to be supported by consideration in order to make them irrevocable and this was true of offers to buy and sell goods as well as offers relating to other contracts. The Commercial Code does not affect those sections of the Civil Code which allow revocation of an offer any time before acceptance unless consideration had been paid to keep the offer open or unless the doctrine of estoppel is applicable. Consequently, in cases where the Commercial Code is not applicable, absent any grounds for applying estoppel, an offer will still need to be supported by consideration in order to be irrevocable. Here, it should be noted that the Commercial Code provisions relative to firm offers apply only to offers of relatively short duration which are contained in signed writings. Apparently, there is nothing to prevent an offeror from making his offer irrevocable beyond three months if consideration is paid for it. Also, since the provision had to do with signed writings, oral offers, to be irrevocable will still require consideration.

The Commercial Code attempts to solve the familiar and vexing problem of the pre-existing duty rule. Among other things it states that an agreement modifying a contract for the sale of goods needs no consideration to be binding. It also provides that a written agreement for the sale of goods may only be modified by a written agreement or by an oral agreement "fully" executed by both parties. This last provision is similar to past and current California law except that in order to overrule a famous case specifically provides that the oral agreement to be an effective modification must be fully executed by both parties. However, insofar as a written modification of a written contract needs no consideration the law is new. One of the chief objections of doing away with the necessity of consideration when a one-sided modification of an agreement

27 Cal. Comm. Code §2209. California's Commercial Code varied from the Official Text in §2209(2) and omitted §2209(3) of the Official Text. The latter required any contract as modified which was within the statute of frauds of the Commercial Code to satisfy the requirements of the statute of frauds.
29 D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952), holding that an oral agreement executed by only one of the parties was effective.
is made is the hold-up aspect. Conceivably situations could arise wherein one of the parties to a contract for the sale of goods could in bad faith demand higher than the contract price. To obviate this and other bad faith situations the Commercial Code provides that "Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement." The requirement of good faith is not new in contract law in California, of course, but it seems certain that there will be difficulty in determining what is or is not good faith when a contract subject to the Commercial Code is modified without consideration in a situation that would otherwise invoke the pre-existing duty rule.

Those contracts not subject to the Commercial Code, if oral, can be modified in writing without new consideration as before; if written, they can be modified either by an executed oral agreement or by a contract in writing, but in the latter case consideration is necessary. Once again we have different rules depending upon whether the contract is subject to the Commercial Code or not.

There are also some changes in the Commercial Code regarding the statute of frauds. The statutory amount in contracts for the sale of goods remains the same, i.e., the statute does not apply unless the price is $500 or more. The statutory amount for choses in action under the Commercial Code, however, is $5000. Previously it was $500.

The Commercial Code makes other changes, too. Formerly the memorandum, in order to suffice, had to be "a note or memorandum in writing of the contract of sale." Now it is enough if there is a writing "sufficient to indicate that a contract for sale has been made between the parties." Also the memorandum need not be complete and can omit or incorrectly state material terms although a contract is not enforceable beyond the quantity of goods stated in the writing. Thus, to be a sufficient memorandum under the Commercial Code the memorandum need only indicate that a contract has been made; the writing must be signed; and the writing must specify the quantity of goods involved. The word "signed,"

35 Cal. Comm. Code §1206. (For statute of frauds relating to securities see §§8319 and for security agreements §9203.)
incidentally, is defined by the Commercial Code\textsuperscript{39} as including "any symbol executed or adopted by a party with present intention to authenticate a writing." This seems to be in accord with current California law.\textsuperscript{40}

Those contracts not subject to the Commercial Code continue to be governed by the Civil Code with respect to the statute of frauds.\textsuperscript{41} Moreover, under the Civil Code a memorandum, in order to be sufficient, must state with reasonable certainty each party to the contract, the subject matter to which the contract relates, the terms and conditions of all the promises and by when and to whom the promises are made.\textsuperscript{42} In short, under the Civil Code the memorandum must be self sufficient in the sense that it must contain all the terms of the contract and name the parties. Under the Commercial Code if the memorandum indicates that a contract has been made and specifies the quantity of goods, then the door is open for oral evidence as to what the contract is. Thus it would seem that a memorandum sufficient to meet the requirements of the Commercial Code might fall far short of meeting the requirements of the Civil Code. This might raise an interesting question if a contract is subject to the Commercial Code statute of frauds because it is a contract for the sale of goods for a price of more than $500, and also subject to the Civil Code statute of frauds because it is a contract not to be performed within a year from the making of the memorandum. Would or should the relaxed requirements of the Commercial Code with respect to the sufficiency of the memorandum be applicable in such a case?

As indicated above\textsuperscript{43} in discussing the preexisting duty rule, California's version of the Commercial Code varies from the Official Text with respect to agreements modifying an existing contract. The California version states initially that "An agreement modifying a contract within this division needs no consideration in order to be binding." This language is broad enough to include oral modifications of oral contracts.\textsuperscript{44} The official version of the Commercial Code contained a subsection\textsuperscript{45} which stated: "The requirements of the statute of frauds section of the article (Section 2-201) must be satisfied if the contract as modified is within its provisions." This last quoted subsection was omitted from the California

\textsuperscript{40} See Murphy v. Munson, 95 Cal.App.2d 306, 212 P.2d 603 (1949).
\textsuperscript{41} Cal. Civ. Code §1624.
\textsuperscript{44} See definitions of "agreement" and "contract," Cal. Comm. Code §§1201(3) and 1201(11) respectively.
\textsuperscript{45} Uniform Comm. Code §2-209(3), not enacted in California.
Commercial Code. Does this mean that we could have a situation where the original oral contract was unenforceable because of lack of a writing but that the contract as orally modified without consideration is enforceable even though it is for the sale of goods for a price in excess of the statutory amount? The section purports to deal with agreements to modify contracts. It specifically requires either a writing or an oral agreement fully executed by both parties to modify a written contract. Further, it is silent as to the necessity of a writing in the case of modification of an oral contract. In view of these factors, perhaps a plausible case could be made to the effect that no writing is necessary. A court faced with such a question might reason that insofar as the modified agreement is a contract for the sale of goods for a price in excess of the statutory amount the basic statute of frauds provision\(^46\) is applicable. It seems, however, that to obviate such a problem it might have been wise to make specific reference to compliance with the Commercial Code's statute of frauds in the case of agreements modifying contracts as did the Official Text.

There are two other situations in which the California Commercial Code differs from the Official Text in dealing with the statute of frauds. These are not changes in contract law but rather a change in the definition of "goods" in one case and a change in the legal effect of pleading or testimony in court with respect to the statute of frauds in the other.

In the first instance, the California Commercial Code,\(^47\) unlike the Official Text, classifies timber as "goods" rather than real property no matter which party to the contract of sale is to sever the timber. This was deliberately done in order to avoid a limitation on the amount that could be loaned by national banks to finance timber cutting contracts. According to the Comptroller of the Currency, the limitation (40 per cent) applies only where a timber cutting contract under local law is a contract for the sale of real property and not a contract for the sale of goods. By classifying timber as goods the application of the limitation is avoided with respect to California timber.

The other situation of change is found in the deliberate failure to include in the statute of frauds section of the California Commercial Code\(^48\) a provision contained in the Official Text to the effect that if a party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made, then the contract is enforceable against him. The basis for this provision is the theory that once such an


admission is made the reason for the rule against enforcement disappears since the purpose of the rule is to prevent enforcement of contracts not in fact made. Because of some practical difficulties and also because such a provision might tend to put a premium on perjured testimony to the effect that no contract had been made the rule was not adopted in California.

With respect to the statute of frauds the Commercial Code has also adopted a special rule applicable "between merchants." In effect it states that if there is a written confirmation of a contract sent, which would be a sufficient memorandum as against the sender, a failure to answer the confirmation within ten days of receipt has the effect of making the writing a sufficient memorandum as against both parties. Insofar as this provision would allow one party to sign the memorandum and thus bind the other party it is new contract law. It differs from the rule obtaining in other contracts subject to the Commercial Code but not between merchants. In that case the memorandum must be signed "by the party against whom enforcement is sought or by his authorized agent or broker." Also it differs from the rule which applies to contracts not subject to the Commercial Code where the memorandum must be "subscribed by the party to be charged or by his agent."

The doctrine of anticipatory repudiation has always caused problems for students of the law and despite the respectable authority to the effect that there never was any real necessity for its adoption it appears to be here to stay. Not surprisingly it is provided for in the Commercial Code. Basically the Commercial Code does not change California law except in one particular. Under the Commercial Code when there has been an anticipatory repudiation the aggrieved party may await performance by the repudiating party for a "commercially reasonable time." At the end of a commercially reasonable time he has a duty to avoid resulting damages from that time on and if he does not he will not recover those damages. On the other hand and with respect to contracts not subject to the Commercial Code California law allows the non-repudiating party to await performance until preformance is due under the terms of the con-

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49 e.g. Does a demurrer constitute an admission?
tract.\textsuperscript{56} Thus, in some circumstances, a person whose repudiated contract is subject to the Commercial Code may not, without penalty anyway, await performance until the contract performance date, whereas in those contracts not subject to the Commercial Code he may. Perhaps this is an area where the Civil Code ought to be changed. Certainly it seems unrealistic and economically unsound to allow a non-repudiating party to await performance even for a term of years if it happens to be a contract wherein the date of performance will not arrive until then. A reasonable time ought to be long enough for him to urge retraction and performance if he desires to do so. But when he has had a reasonable time for this and is unsuccessful, it seems just to require him to look elsewhere or in any event to avoid resulting damages after this time.

Of course, the Commercial Code\textsuperscript{57} allows the non-repudiating party to pursue immediately any remedies available for breach if there has been no timely retraction of the repudiation\textsuperscript{58} and in this respect Commercial Code contract law and non-Commercial Code contract law are the same.\textsuperscript{59}

The Commercial Code also makes it clear that prospective inability to perform can in some circumstances be treated as a repudiation.\textsuperscript{60} It provides that when reasonable grounds for insecurity arise with respect to the other party's performance, the apprehensive party may demand adequate assurance in writing that the other party will perform and can suspend his own performance until such assurance is forthcoming. If such assurance is not received within thirty days the failure to provide the assurance constitutes a repudiation. The idea underlying this provision is really the same as that underlying the former provisions of the Civil Code with respect to stoppage in transit because of insolvency.\textsuperscript{61} However, the Commercial Code remedy is new and can be used in a variety of circumstances other than insolvency.\textsuperscript{62} Further, it eliminates the necessity of acting at one's peril in differentiating between mere intervening impairment of credit and insolvency. This is a realistic remedy. It is based on the proposition that when people enter into a contractual relationship they are actually and ultimately bargaining for whatever performance is promised and each has an obligation to see that the other's expectancy

\textsuperscript{56} Cal. Civ. Code §1440.
\textsuperscript{57} Cal. Comm. Code §2610(b).
\textsuperscript{58} Cal. Comm. Code §2611.
\textsuperscript{59} Winegar v. Gray, 204 Cal.App.2d 303, 22 Cal.Rptr. 301 (1962).
\textsuperscript{60} Cal. Comm. Code §2609.
\textsuperscript{61} Cal. Civ. Code §§1777, 3076, 3077, all repealed by the Commercial Code.
\textsuperscript{62} See 37 J. State Bar Cal. 148, 149 (1962).
is not impaired. Once that obligation is accepted\(^63\) then there is no hardship in requiring an assurance of performance from one whose own actions have given rise to the doubts. It seems that it would be wise to extend this doctrine to contracts other than those covered by the Commercial Code.\(^64\)

The principal change in the Commercial Code with respect to damages is in the cover provisions applicable to both buyer and seller.\(^65\) For example, if there has been a repudiation the buyer can cover by purchasing substitute goods from other sources. If he does so then the measure of damages is the difference between the cost of the substitute goods purchased and the contract price. Formerly the measure of damages was the difference between the contract price and the market price at the time set for performance. The buyer is not required to cover, but if he does not, he cannot recover any consequential damages which cover would have prevented.\(^66\) The seller has a similar remedy, the right of resale, and if he resells in good faith in a commercially reasonable manner then the measure of damages is the difference between the resale price and the contract price. Further the Commercial Code specifically provides that the seller is not accountable to the buyer for any profit he might make on the resale. Once again the seller does not have to resell and if he does not then the measure of damages is the difference between the contract price and the market price at the time of performance under the contract.\(^67\)

What has been said so far sketches the more drastic changes in contract law brought about by the California Commercial Code. No attempt has been made to make the coverage all inclusive (and obviously anyone who is involved with a case or a study affected by the Commercial Code must do his own work). There are, of course, many concepts encompassed by the Commercial Code which are about the same under the Code as they were under statute and decision previously in California. Assignment of rights and delegation of duties\(^68\) and the doctrine of impossibility of performance and commercial frustration\(^69\) come immediately to mind. As a matter of fact, it seems that the changes in contract law have not been great, a matter which should be of some comfort to those who have labored to master contract law in the pre-Commercial Code era.

\(^63\) As it has been in California, see Univsral Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 128 P.2d 665 (1942).

\(^64\) Compare Restatement, Contracts §§318, 324 (1932); Cal. Civ. Code §1440.

\(^65\) Cal. Comm. Code §§2706 (cover by seller), 2712 (cover by buyer).


