Crop Failures and Section 2-615 of the Uniform Commercial Code

by

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CROP FAILURES AND SECTION 2-615 OF THE UNIFORM COMMERCIAL CODE

Adverse weather conditions in recent years have put terrific burdens upon farmers in South Dakota. Not only are their livelihoods being threatened, but in many cases the farmers are also faced with the threat of litigation as a result of unfilled contracts for the future delivery of crops. Section 2-615 of the Uniform Commercial Code was designed in part to help the farmer avoid liability on these contracts when performance has been rendered commercially impracticable because of crop failure. This comment will survey what various courts have done when faced with problems of this nature and attempt to ameliorate some of the confusion that presently exists regarding the purposes and intended application of section 2-615 when a contract is not performed because of a crop failure.

INTRODUCTION

One of the major difficulties in producing agricultural products for commercial resale is the danger that uncontrollable climatic conditions or other freaks of nature may render an entire year's work in the fields useless. It is common knowledge that farmers throughout history have had to contend with droughts, floods, fires, insects and other types of disasters. Not only does the farmer bear the risk of losing his whole crop, but in many circumstances he may also have to face a breach of contract action if he tries to hedge against uncertain prices in the future by contracting to sell whatever crop he might raise. This comment will address the problem in light of recent court decisions which speak to the question of who must bear the loss when a crop fails.

The key issues arise in the interpretation of the statutory law presently designed to meet this problem. The Uniform Commercial Code has three major sections which can be applied in the context of crop failures. If the goods are identified to the contract, section 2-613[1] allows the contract to be avoided when the goods are com-

1. S.D.C.L. § 57-7-34 (1967); U.C.C. § 2-613 reads as follows:
Where contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) [§§ 57-4-59 and 57-4-60] then
(a) if the loss is total the contract is avoided; and
(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his own option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or

pletely destroyed or, in cases where the loss is not whole, to be enforced at the buyer's option as to those goods that are not destroyed or are only partially damaged.[2] Section 2-615[3] attempts to give the seller an excuse if presupposed conditions fail. Section 2-616[4] in turn imposes certain notice and procedural requirements on the buyer if he has plans to avoid the contract.

The courts have interpreted and applied these three sections only a few times in the context of crop failures. This comment will show that most of the courts have been too strict in applying sections 2-613, 2-615 and 2-616; that they have tenaciously clung to anachronistic common law principles; and that they have disregarded the Code's mandate of liberal interpretation.[5] First, this comment will set out the common law background of the law of impossibility and then will probe into the origins and purposes of section 2-615. The cases involving crop failures that have been decided under this section will then be surveyed with an analysis of how the Uniform Commercial Code was applied to each fact situation. Next, the comment will focus on an evidentiary problem peculiar to farmers claiming excuse, with a necessary analysis of pre-Code law in this area. Finally, solutions to the problems raised will be considered.

THE BEGINNINGS—EARLY COMMON LAW

After the recognition of bilateral contracts in the sixteenth century,[6] the famous case of *Paradine v. Jane*[7] set down what has

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the deficiency in quantity but without further right against the seller.

2. *See also* S.D.C.L. §§ 57-8-6 to -7 (1967); U.C.C. § 2-704.

3. For the text of S.D.C.L. §§ 57-7-37 to -39 (1967); U.C.C. § 2-615, see text accompanying note 29 *infra*.

4. S.D.C.L. §§ 57-7-40 to -42 (1967); U.C.C. § 2-616 reads as follows:

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section [§§ 57-7-37 to 57-7-39, inclusive] he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article [chapter] relating to breach of installment contracts (Section 2-612) [§§ 57-7-31 to 57-7-33, inclusive], then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section [§§ 57-7-40 and 57-7-41] may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section [§§ 57-7-37 to 57-7-39, inclusive].

5. S.D.C.L. § 57-1-4 (1967); U.C.C. § 1-102 (1). "This Act shall be liberally construed and applied to promote its underlying purposes and policies."

6. 6 A. CORBIN, CONTRACTS § 1320 (1963) [hereinafter cited as CORBIN].

7. 82 Eng. Rep. 897 (Aleyn, 26, 1647).

been recognized for about 300 years as the general rule requiring contractual performance.[8] In *Paradine* the court compelled a lessee to pay rent during a three year period in which alien enemies occupied the leasehold. The court said

> where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. . . . [B]ut when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he ought to repair it.[9]

Various exceptions to this rule have been recognized,[10] including: 1) an exception if the contract were for some purpose which was subsequently declared illegal,[11] 2) an exception if the contract called for personal services and the promisor died;[12] and 3) exceptions for certain types of impossibility,[13] including absolute impossibility.[14] It is the third of these exceptions that has been of the most importance to farmers who suffered crop failures, yet the general rule from *Paradine* was commonly followed in early American history.

The first case in the United States to apply the general rule to the specific question of a farmer's liability on a contract after a crop failure was *M'Gehee v. Hill*.[15] The defendant had contracted to deliver corn to the plaintiff, but was unable to perform due to severe drought. The court suggested that a specific clause would be needed in the contract before the farmer could hope to be excused. Although the contract did contain an "unavoidable accident" clause, the court decided that this was not intended to cover droughts. Therefore, the defendant was held liable for nonperformance.[16] Apparently, the only farmers who could be ex-

8. *See, e.g.*, Serjeant Williams' Notes to Saunders' Reports, 2 Williams' Saunders, 422 n.2. *See generally* 6 WILLISTON, WILLISTON ON CONTRACTS § 1931 (1938) [hereinafter cited as WILLISTON].

9. 82 Eng. Rep. 897 (Aleyn, 26, 1647).

10. 6 WILLISTON, *supra* note 8, at 5408.

11. Westminster v. Clarke, 73 Eng. Rep. 59, 63 (Dyer, 276, 1536).

12. Hyde v. The Dean of Windsor, 78 Eng. Rep. 798 (Cro. Eliz., 522, 1597).

13. In Williams v. Floyd, 82 Eng. Rep. 95 (W. Jones, 179, 1629), it was held that a bailee did not have to return a horse held in bailment, although the bailee made an unqualified promise to return it, where the horse died without any negligence on the part of the bailee.

14. 6 CORBIN, *supra* note 6, at 322.

15. 4 Port. 170, 29 Am. Dec. 277 (Ala. 1836).

16. Another early example of the judicial attitude in the United States toward one claiming excuse is found in *Beebe v. Johnson*, 19 Wend. 500 (N.Y. 1838), where the court said "if the covenant be within the range of possibility, however absurd or improbable the idea of the execution of it

cused were those who protected themselves with specific contract clauses. As the law developed, however, the courts began to retreat from this strict rule.

In 1863 the first important liberalization of judicial attitudes occurred in England in the landmark case of *Taylor v. Caldwell*,[17] where the law of impossibility was stated in the language of implied conditions.[18]

> [I]n contracts in which the performance depends on continued existence of a given . . . thing, a condition is implied that the impossibility of performance arising from the perishing of the . . . thing shall excuse the performance.
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> [T]hat excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular . . . chattel.[19]

The *Taylor* principle was applied to a crop failure eleven years later in *Howell v. Coupland*,[20] where the contract was for delivery of a specified amount of potatoes to be grown on specific land. An unpreventable disease destroyed much of the defendant's crop, yet the court held that he was excused from making full delivery. Lord Coleridge explained it this way:

> [B]y the simple and obvious construction of the agreement both parties understood and agreed, that there should be a condition implied that before the time for the performance of the contract the potatoes should be, or should have been, in existence, and should still be existing when the time came for performance. They had been in existence and had been destroyed by causes over which the defendant, the contractor, had no control, and it became impossible for him to perform his contract; and, according to the condition which the parties had understood should be in the contract, he was excused from the performance. It was not an absolute contract of delivery under all circumstances, but a contract to deliver so many potatoes, of a particular kind, grown on a specific place, if deliverable from that place. On the facts the condition did arise and the performance was excused.[21]

This doctrine gradually gained acceptance in the United States, but the courts often were strict in applying it. Before a contracting party could use the doctrine to excuse performance if his crop failed, it had to appear, usually only from the contract itself, that

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may be, it will be upheld; as where one covenants it shall rain tomorrow, or that the Pope shall be at Westminster on a certain day." *Id.* at 502.

17. 122 Eng. Rep. 309 (1863).

18. Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COMM. L. J. 75 (1974) [hereinafter cited as Hawkland].

19. 122 Eng. Rep. 309, 314 (1863).

20. L.R. 1 Q.B. 258 (1876).

21. *Id.* at 261.

a specific crop was the subject matter of the contract[22] and that both parties intended that the crop be grown on a specific piece of land.[23] Many courts construed contracts for the future delivery of crops very strictly, reflecting a predominant judicial attitude vigorously opposed to excusing the farmer when he fell victim to a crop failure.[24] Although the famous Coronation Cases[25] extended the doctrine of impossibility with the "frustration of contract" principle, the requirements of identification of a specific crop and of specific land were never really altered to excuse parties in the event of crop failure.[26]

THE UNIFORM COMMERCIAL CODE

Today's law on this subject has been codified in Uniform Commercial Code sections 2-613, 2-615, and 2-616.[27] Since section 2-613 was intended to protect the buyer,[28] not the seller, and sec-

22. *See, e.g.*, Al Jones & Co. v. Cochran, 33 Okla. 431, 126 P. 716 (1912) (defendant offered to prove that the contract was to cover specific onion sets, but the court refused the evidence since the contract was not uncertain or ambiguous).

23. In Anderson v. May, 50 Minn. 280, 52 N.W. 530 (1892), the contract showed that the plaintiff was to grow beans to sell to the defendant, but it did not specify where. Although plaintiff's crop failed, the court held that he was not excused from fully performing the contract because the contract was construed to be for beans from anywhere, not just from plaintiff's land. *See also* Clay Grocery Co. v. Kenyon Canning Corp., 198 Minn. 533, 270 N.W. 590 (1936) (defendant precluded from introducing parol evidence to show where the crop was to be grown because the contract was silent and the defendant had not acted in good faith); Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N.W. 487 (1903) (frost destroyed defendant's tomato crop; parol evidence of intent refused).

24. *E.g.*, in Riley-Wilson Grocer Co. v. Seymour Canning Co., 129 Mo. App. 325, 108 S.W. 628 (1907), the defendant included within the contract a *force majeure* clause and, because of that, the trial court excused the defendant from performance due to crop failure. The appellate court reversed and remanded because the *force majeure* clause did not specify what land was intended to be covered by the clause. The trial court was ordered to take extrinsic evidence to see if the land intended was that from which the defendant normally purchased tomatoes.

25. *E.g.*, Krell v. Henry, 2 K.B. 740 (1903).

26. RESTATEMENT OF CONTRACTS § 460 (1938) stated the rule this way:

> § 460 (1) Where the existence of a specific thing or person is, either by the terms of a bargain or in the contemplation of both parties, necessary for performance of a promise in the bargain, a duty to perform the promise
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> (a) never arises if at the time the bargain is made the existence of the thing or person within the time for seasonable performance is impossible, and
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> (b) is discharged if the thing or person subsequently is not in existence in time for seasonable performance, unless a contrary intention is manifested, or the contributing fault of the promisor causes the non-existence.
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> (2) Material deterioration of such a specific thing or physical incapacity of such a specific person as is within the rule stated in Subsection (1) has the same effect as nonexistence in preventing a promisor's duty from arising or in discharging it, except that if the other party remains ready and willing to render in full the agreed exchange for whatever performance remains possible, the promisor is under a duty to render such partial performance. . . .

27. S.D.C.L. §§ 57-7-34, 57-7-37 to -41 (1967).

28. U.C.C. § 2-613 Comment 1, "the buyer is relieved"; Comment 2, "this section applies . . . before the risk of loss passes to buyer"; and Com-

tion 2-616 deals with the procedural requirements imposed on the buyer, the proper analytical point of focus for this comment will be section 2-615. That section provides,

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
> (a) Delay in delivery or non delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.[29]

Comment 9 to section 2-615 deals with the case of a farmer whose crop has failed under certain circumstances, and provides,

> The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.[30]

Thus Comment 9, in effect, reiterates a hypothetical which clearly fits into the pre-Code provisions of the common law doctrine of impossibility as an excuse for nonperformance because of crop failure. It will be shown, however, that it is unreasonable to presume, as some courts have, that the draftsmen of the Code intended that the farmer whose crop has failed is limited to raising this as an excuse only if his crop and the land upon which the crop was to be raised were specifically designated in the contract itself.

The forerunner to section 2-615 was section 87 of the Revised Sales Act[31] drafted by Professor Karl Llewellyn. In his private

ment 3, "gives the buyer the options." *But see* U.C.C. § 2-615 Comment 9.

29. S.D.C.L. §§ 57-7-37 to -39 (1967); U.C.C. § 2-615.

30. U.C.C. § 2-615, Comment 9.

31. Section 87. Merchants' Excuse by Failure of Presupposed Conditions

notes[32] Professor Llewellyn gives some insight into why section 87 was drafted. He explains that although the better decisions excused the seller where performance became unduly burdensome or impossible, such a result was often uncertain. In order to achieve more certainty in the outcome of such problems, the parties would often include express provisions to cover them in their contracts. He points out that

> such protection has come to be a normal assumption underlying sales contracts . . . . [T]he protection must operate without need for any cause at all lest the law discriminate on an important point of normal commercial understanding against small businesses which do not happen to employ skilled council.[33]

The protection offered for those who did not have the foresight (or resources) to include a *force majeure* clause in their contract is indicative, then, of the general purpose of this section, *viz.*, to create relative equality of bargaining power within the context of a commercial setting. Professor William D. Hawkland aptly states that the purpose of section 2-615 is "to bring the doctrine of frustration into our law of sales thereby providing relief in those onerous situations not covered by the contract in which changed circumstances have rendered performance impracticable."[34] The Official Comments to section 2-615 likewise reflect this attitude. Comment 6 explains that the section is not intended to simply draw a hard and fast line separating excuse from non-excuse; instead it mandates that the provisions be read in light of the Code's general policy of furthering the use of commercial standards and good faith by employing equitable principles to resolve these disputes.[35]

Principles of equity demand, at a minimum, a fair reading and construction of the parties' contract in order to determine what

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Between merchants unless otherwise agreed and subject to section 86 on substituted performance

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

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

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

32. Hawkland, *supra* note 18, at 77.
33. *Id.*, citing unpublished notes of Karl Llewellyn, 1-2.
34. *Id.*
35. U.C.C. § 2-615, Comment 6.

their intent and expectation may have been. For example, although the Code Comments speak in terms of foreseeability[36] of the event claimed to excuse the contract, the text of section 2-615 does not specifically depend on such premonitions. Crop failures, as common as they have been in history, would presumably be foreseeable, but neither pre-Code law,[37] nor the official Comments[38] seem to indicate that a crop failure is within the reasonable expectation of the parties. Indeed, equity would retch at such a suggestion. Moreover, assume that a contract calls for the delivery of grain and is certain as to the price, amount, date and place of delivery, and specifically requires No. 2 type XYZ grain, but fails to specify that the grain is to be grown on Blackacre. Does the commercial sense of section 2-615, and equity, demand that the seller, who just happens to be the farmer who owns Blackacre and has planted No. 2 type XYZ grain but unfortunately has lost the crop due to some fortuitous circumstance, be precluded from even mentioning where the crop was to be grown? Does section 2-615, and equity, demand that he perform or pay damages? The intent of section 2-615 would certainly indicate a negative answer. Notwithstanding this, many of the courts deciding these questions purport to implement section 2-615 but rely heavily on the tradition of their strict common law ancestors and answer in the affirmative, holding the farmer liable. The basic problem revolves around the courts' inability to molt the hard shell of the common law and adopt the modern approach that is required if the Code is to work.

THE CASES

There have been only a few decisions under the Uniform Commercial Code concerning the seller's inability to perform because of crop failure or other fortuitous events. Generally, the courts analyze these problems as if section 2-615 exists without words. The existence of the Code section is recognized, but instead of applying the statute itself, the courts apply common law rules and principles.

The first decision to purport to implement section 2-615 in this area was *Low's Ezy-Fry Potato Co. v. J. A. Wood Co.*[39] The defendant had contracted to sell the plaintiff 425 one hundred pound sacks of three inch potatoes by June 1965, but the defendant's harvest failed to yield any three inch potatoes. The plaintiff instituted

36. U.C.C. § 2-615, Comment 1.
37. *See, e.g.*, C.G. Davis & Co. v. Bishop, 139 Ark. 273, 213 S.W. 744, 746 (1919). "The rule appears to be that, if the parties contemplate a sale of the crop . . . of a particular tract of land, and, by reason of a drought, or other fortuitous event, . . . the crop on that land fails . . . , nonperformance . . . is . . . excused. *Contra*, United Sales Co. v. Curtis Peanut Co., 302 S.W.2d 763 (Tex. Civ. App. 1957).
38. U.C.C. § 2-612, Comments 4 and 9.
39. 26 Agric. Dec. 583, 4 U.C.C. Rep. 483 (1967).

a reparation proceeding under the Perishable Agricultural Commodities Act.[40] The factfinder determined that both the plaintiff and defendant had contemplated that the potatoes would be grown upon the defendant's lands. Whether this fact was based on parol evidence was not mentioned. The rule was set out as follows:

> [I]f the parties contemplate a sale of all or a certain part of the crop of a particular tract of land, and by reason of drought or other fortuitious event, without fault of the seller, the crop of that land fails or is destroyed, nonperformance is to that extent excused; the contract, in the absence of an express provision controlling the matter, being considered as subject to an implied condition in this regard.[41]

Several pre-Code cases were cited as authority[42] in conjunction with a "see also . . . Uniform Commercial Code, Sales § 2-615."[43] This rule that the tribunal recites is, of course, simply a restatement of the standard impossibility exception to the common law rule of strict performance of contracts for future delivery of crops. Once the facts were found to fit within this exception the logical outcome was to excuse the defendant. It was unfortunate that the tribunal did not analyze the case under section 2-615 since it was a good opportunity to treat this problem in terms of commercial impracticability rather than in terms of impossibility. Nevertheless, the final outcome would have undoubtedly been the same.

The next decision did not come until 1973 in *Holly Hill Fruit Products Co. Inc. v. Bob Staton Inc.*[44] The defendant had contracted to deliver oranges "from various groves located in Highlands and Hardee Counties,"[45] but was unable to perform because of an early frost. The Supreme Court of Florida affirmed a finding that delivery was excused according to the doctrine of impossibility. Although Florida had adopted the Uniform Commercial Code in 1965, effective in 1967,[46] the court made no mention of section 2-615. The court did, however, point out that the concept of legal impossibility is not limited to the case in which a seller contracts to sell a crop of his own land, but may include a case in which a seller contracts to sell a crop regardless of source. This principle reflects a progressive attitude. Unfortunately, whether or not the Florida court believed it to be a requirement of section 2-615 is still unknown. Over the next two years, however, there was a rash of cases decided explicitly under the Uniform Commer-

40. 7 U.S.C. §§ 499a to s (1970).
41. 26 Agric. Dec. 583, —, 4 U.C.C. Rep. 483, 485 (1967).
42. Haley v. Van Lierop, 64 F. Supp. 114 (W.D. Mich. 1945); Pearce-Young-Angel Co. v. C.R. Allen Inc., 213 S.C. 578, 50 S.E.2d 698 (1948); Snipes Mountain Co. v. Benz Bros. & Co., 162 Wash. 334, 298 P. 714 (1931).
43. 26 Agric. Dec. 583, —, 4 U.C.C. Rep. 483, 485 (1967).
44. 275 So. 2d 583 (Fla. 1973).
45. *Id.* at 584.
46. FLA. STAT. ANN. §§ 672.2-613, 672.2-615, and 672.2-616 (1966).

cial Code. These cases indicate the potential parameters that the courts will apply to the new concept of commercial impracticability excusing the performance of a contract for the future delivery of crops.

In 1974 two cases were decided by the Federal District Court for the Western District of Tennessee. In *Bunge Corp. v. Miller*[47] the defendant had contracted to sell the plaintiff 10,000 bushels of soybeans at $3.30 per bushel with delivery by November 30, 1972. There was a clause in the contract that allowed the plaintiff to extend the time of performance and placed any resulting loss upon the defendant. The defendant had delivered approximately 1,200 bushels by November 30 and made his last delivery of about 550 bushels on January 4, 1973. On January 22 the plaintiff sent defendant a letter purporting to extend the time for delivery of the remaining 8,250 bushels until February 28. On the 20th of February the defendant sent plaintiff a letter explaining that due to heavy rains and flooding in the fall of 1972 defendant could not deliver any more soybeans. The price of soybeans on November 30 was $3.61 per bushel, but by February 28 it had risen to $6.00 per bushel. The plaintiff sued, requesting that the amount of damages be the difference between the contract price and the price on February 28, 1973. The defendant counterclaimed for the price of the January delivery which had not yet been paid. The defendant also raised the defense of commercial impracticability under section 2-615 based on the adverse weather. The plaintiff argued that the defendant could not rely on section 2-615 since his notice of nondelivery under section 2-615(c) was not seasonable. The district court held that although the plaintiff could not unilaterally extend the time for delivery, thereby increasing the damages, the defendant was still liable for nondelivery on November 30. The court reasoned that since there was no evidence to show that plaintiff had any special knowledge of the defendant's soybean operations, it was not the parties' intent to have the crop come from the defendant's land. The court set out this rule:

> [A] contract to sell a future crop from specified land is excused if without the promisor's fault there is no crop due to a blight or flooding of the land. But a contract to sell a specified quantity of produce is not excused by the fact that the seller expected to fulfill the contract with the crop of a particular land, and that such crop without fault on his part is a failure. A case of this sort, however, might come under the heading of "impossibility" if both parties contemplated fulfillment of the contract by a particular crop.[48]

47. 381 F. Supp. 176 (W.D. Tenn. 1974).

48. *Id.* at 180. The court extracted this rule of law from 2 ANDERSON, UNIFORM COMMERCIAL CODE § 2-615:21 (2d ed. 1970). Notably, the court failed to quote the words "for example" used by Mr. Anderson immediately prior to the quoted language. That tends to give one the impression

The court, relying on this rule, said the facts in this case made the defense of "impossibility" unavailable. This analysis was a needless restriction on the application of section 2-615 since the court had very solid grounds to come to the same result with an alternative holding. The defendant clearly failed to comply with the notice requirements of section 2-615(c) and the court could have held that this failure made section 2-615 unavailable to the defendant. The rule given by the court, however, seems to be a fair statement of the common law rule of impossibility, yet does not align at all with the intent of section 2-615. In the next case, *Ralston Purina Co. v. McNabb*,[49] the district court followed its rule as set out in *Bunge Corp. v. Miller*.[50] Due to severe weather, the defendant in *Ralston* delivered about 3,700 bushels less than the contract called for. The district court held that "the defense of impossibility is unavailable to the defendant since there has been no showing that the contract was to sell a crop from specified land, and therefore no such issue was submitted to the jury."[51] The court again for some reason refused to analyze the case under section 2-615 itself, but instead relied on the common law doctrine of impossibility. Comment 3 to section 2-615 specifically rejects this principle, "The additional test of commercial impracticability (*as contrasted with impossibility* . . .) has been adopted in order to call attention to the commercial character of the criterion chosen by this Article."[52] Unfortunately, the Federal District Court for Tennessee has twice rejected this reasoning in applying section 2-615 to crop failures.

In 1975 the Eighth Circuit Court of Appeals was presented with an opportunity to correct this misinterpretation of section 2-615. In *Bunge Corp. v. Recker*,[53] the defendant-farmer contracted to sell the plaintiff-grain dealer 10,000 bushels of soybeans at $3.30 per bushel, with delivery in January 1973. Although the contract did not specifically require the defendant to grow the beans on his own lands, it did provide, "Seller warrants that the commodity delivered under this contract was grown within the boundary [sic] of the Continental United States."[54] In addition to this boilerplate clause, the contract also allowed the plaintiff to extend the delivery time. This was one of a series of contracts between plaintiff and defendant. The defendant had delivered approximately 1,200 bushels under the other contracts, but no beans were delivered

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that the quoted portion is the rule of section 2-615 rather than simply an example of one of many possible applications.

49. 381 F. Supp. 181 (W.D. Tenn. 1974).

50. 381 F. Supp. 176 (W.D. Tenn. 1974).

51. 381 F. Supp. 181, 182 (W.D. Tenn 1974). The court cited *Bunge Corp. v. Miller*, 381 F. Supp. 176 (W.D. Tenn. 1974), U.C.C. § 2-615, Comment 9, and 2 ANDERSON, UNIFORM COMMERCIAL CODE § 2-615:21 (2d ed. 1970).

52. Emphasis added.

53. 519 F.2d 449 (8th Cir. 1975).

54. *Id.* at 451.

under this particular contract because severe winter weather had ruined 865 acres of his beans. The plaintiff had visited the defendant's land in mid-January and saw that the beans were unharvestable, but extended the time for delivery to March 31, 1973. The price of soybeans on January 31 was found to be $4.98 per bushel, but it had risen to $5.50 per bushel by April 2. When the defendant had not delivered by April 2 the plaintiff sued claiming that as the proper date upon which to measure damages. The defendant pleaded that performance was prevented by an act of God. The district court had held that the act of God defense was inapposite since the goods were not "identified to the contract" as required by section 2-613. It also held that the plaintiff's extension of time was not in good faith. On appeal, the court of appeals agreed with the district court that section 2-613 did not apply because the contract did not mention the beans in any way except in kind and amount. The question whether parol evidence was admissible to show where the parties had expected the beans to come from was raised. The court decided that this evidence was not admissible because the contract had, by its boilerplate warranty clause, "clearly" shown that the parties intended that the defendant supply the beans from any source whatsoever. The court rationalized that the defendant "obviously" could have fulfilled his contractual duty by purchasing beans anywhere in the United States, and that to allow parol evidence on the matter would circumvent the provisions of section 2-202.[55] The court did, however, reverse on the damage issue with directions to allow the defendant to amend his pleadings to raise the "lack of good faith" defense, because, although it did not disagree with the district court that the plaintiff had not acted in good faith, such a finding technically must be based on a pleading by one of the parties. Although the court's ruling on the parol evidence offered has some support in pre-Code decisions,[56] two hypertrophic problems sprout from this particular decision. First, the court did not even mention section 2-615 when an analysis under it could have easily solved the problem. Secondly, and more glaringly, if the parties' contractual intent that

55. S.D.C.L. § 57-3-4 (1967); U.C.C. § 2-202. This statute provides,
Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
(a) by course of dealing or usage of trade (Section 1-205) [§§ 57-1-15 to 57-1-20, inclusive] or by course of performance (Section 2-208) [§§ 57-3-16 to 57-3-18, inclusive]; and
(b) by evidence of consistant additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

56. *See* notes 22 and 23 *supra* and note 64 *infra*. *See generally* Cohen v. Morneault, 120 Me. 358, 114 A. 307 (1921); P. Pastene & Co. v. Greco Canning Co., 268 F. 168 (1920); United Sales Co. v. Curtis Peanut Co., 302 S.W.2d 763 (Tex. Civ. App. 1957).

the defendant perform by obtaining soybeans from anywhere in the United States was genuinely clear from the contract, then why was the plaintiff held to have acted in bad faith (or at least not good faith) when it extended the time for delivery, pursuant to the contract, after visiting the defendant's farm and seeing that a large portion of the crop had failed? The most plausable answer to this question seems to be that both the district court and court of appeals actually did recognize that the parties intended the beans to come from the defendant's field. The court, on the other hand, apparently determined that it would be better to disembowel section 2-615 impliedly rather than read section 2-202 liberally. Perhaps the decision can be accounted for because the parol evidence rule embodied in section 2-202 has been around for so much longer than the concept that every sales contract, unless otherwise agreed, includes an implied *force majeure* clause. Nevertheless, the Eighth Circuit Court of Appeals frustrated the draftsmen's intent by allowing a boilerplate contract warranty provision to be read as a clear statement of the parties' intent. As pointed out earlier, the draftsmen's intent was to create relative equality of bargaining power by injecting unwritten clauses into contracts to provide for unplanned circumstances that have made performance of the contract commercially impracticable.[57] It would seem to follow that the draftsmen could not have possibly intended section 2-615 to apply only when the parties' contract specifically indicates the very thing that the parties thought too obvious to worry about, namely, that the crop to be delivered was to come from the farmer's land.

In 1975, the court in *Semo Grain Co. v. Oliver Farms Inc.*,[58] was caught in the wake of *Bunge Corp. v. Recker*.[59] The defendant had contracted to sell plaintiff 75,000 bushels of soybeans at $3.10 per bushel with delivery by January 1973, but there was no provision in the contract that the beans were to be grown on the defendant's land. In reliance on the contract the plaintiff had contracted with third parties to sell the beans which the defendant was to supply. Heavy rains during 1972 destroyed all but 1,500 acres of the defendant's cropland, reducing the yield to about 20,000 bushels. The defendant sold these beans to others for higher prices and did not notify the plaintiff that no delivery would be forthcoming. In the trial court the defendant sought to prove that its crop was destroyed and that it was this crop which was the basis of the parties' contract. The trial court refused to admit the defendant's evidence on the matter. On appeal the defendant argued that the contract fell within the provisions of sections 2-613 and 2-615. The Supreme Court of Missouri ruled that, since the contract did not identify any acreage or obligate the defendant to even grow

57. *See* text accompanying notes 33 and 34 *supra*.
58. 530 S.W.2d 256 (Mo. 1975).
59. 519 F.2d 449 (8th Cir. 1975).

soybeans, and since the contract was unambiguous, no evidence could have been allowed to show any different construction of the contract. Therefore, the defendant was not excused. Relying heavily on *Bunge Corp. v. Recker*,[60] and quoting from it extensively, the court said that the defendant could have fulfilled the contract from any source at all. The result reached in *Semo Grain Co. v. Oliver Farms Inc.*[61] is no doubt correct but the reasoning relied on is most unfortunate and will probably lead to future inequitable decisions. A much sounder rationale could have been used through the application of the section 2-615(b) requirement of pro-rationing that portion of the crop which has not been destroyed, and the section 2-615(c) requirement of notice of the inability to perform. These sections would have made the defense provided for in section 2-615(a) unavailable and could have led the court to the same result.[62]

These cases show, then, that although the draftsmen wrote section 2-615 with careful ambiguity so that its application could fall within the changing notions of commercial sense,[63] the courts have frustrated the intended application of section 2-615 by redeeming this planned ambiguity for a ticket to the past. The courts still cling tenaciously to the common law concepts of impossibility and acts of God rather than the Uniform Commercial Code's mandate of a test of commercial impracticability. Although the draftsmen intended to have all contracts, unless they provide otherwise, interpreted as if they contained a *force majeure* clause, the courts have been unwilling to so interpret section 2-615. Furthermore, the courts have construed contracts for the future delivery of crops with the idea of precluding the possibility of allowing the admission of parol evidence to show where the parties intended to get the crop covered by the contract. If the draftsmen intended that the small businessman be put on equal footing with those he contracts with, one cannot reasonably believe that they would permit the use of a technicality, *viz.*, strict application of section 2-202, to preclude proof of the parties' intent, thereby vitiating any beneficial effect that section 2-615 might have. In fact, although some courts did apply the parol evidence rule strictly in pre-Code cases (on grounds of lack of ambiguity),[64] other courts dealing with crop

60. *Id.*
61. 530 S.W.2d 256 (Mo. 1975).
62. The courts' reluctance to tear themselves away from the common law is further illustrated in *GoldKist Inc. v. Stokes*, 139 Ga. App. 482, 226 S.E.2d 268 (1976). In this case the seller had clearly obligated himself to pay liquidated damages for non-delivery, even in the event of crop failure, and the court recognized that section 2-615 would permit this. In explaining the law on "Act of God," however, the court reverted to a legal encyclopedia rather than the Code itself.
63. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 41.7, at 1105 (1965).
64. *See, e.g.*, Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N.W. 487 (1903). "There is no allusion in the contract to any particular source

failures and the like were quite willing to admit parol evidence if it could shed light on what the parties actually intended.[65] In order to further understand just how the parol evidence rule should be applied in cases where the defendant claims that a crop failure renders him unable to perform, a survey of some important pre-Code decisions dealing with this problem is necessary.

CASES ALLOWING PAROL EVIDENCE

Many of the pre-Code cases that allowed the use of parol evidence to show which land was intended to produce the crop involved contracts with obvious references to certain lands,[66] but many others had contract clauses capable of being construed as absolute promises to deliver from broad areas. Thus, in *Ontario Deciduous Fruit-Growers Association v. Cutting Fruit-Packing Co.*,[67] the contract provided that the plaintiff was to deliver peaches "grown in the year 1898 on the orchard or land described as follows: sundry orchards in Ontario and Cucamonga."[68] Due to unusually hot and dry weather the plaintiff could only deliver about half of what it had promised and the defendant refused to pay for what was delivered. The plaintiff sued for the price and the defendant counterclaimed for breach of contract. The trial court admitted parol evidence to show what was meant by "sundry orchards" and then decided for the plaintiff. The California Supreme Court held that it was not error to admit parol evidence since the contract showed on its face that it was not intended to include all the orchards in Ontario and Cucamonga. And in *Ryley-Wilson Grocer Co. v. Seymour Canning Co.*,[69] the Missouri Court of Appeals admitted extrinsic evidence to show which lands were meant by a clause in the contract which provided that the seller should "not be held liable for fulfillment of the contract in the event of total failure or destruction of the crop."[70] The court explained that the defendant would not be excused unless the trial court found that the land that the clause was to cover was the land from which the defendant normally purchased its tomatoes. In both of these cases the most plausable reading of the contractual provisions lends itself to the inclusion of broad areas, yet the courts

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from which these tomatoes were to be taken . . . it seems a reasonable and natural conclusion that the parties did not intend that [the tomatoes were] to be grown on a particular field; A.L. Jones & Co. v. Cochran, 33 Okla. 431, 126 P. 716 (1912) (no uncertainty or ambiguity in that portion of the contract which described the property sold and to be delivered). *Cf.* Clay Grocery Co. v. Kenyon Canning Corp., 198 Minn. 533, 270 N.W. 590 (1936) (seller acted in bad faith). *See also* notes 22 and 23 *supra.*

65. *See* text accompanying notes 66 - 86 *infra.*

66. *See, e.g.*, Berg v. Erickson, 234 F. 817 (1916); Whipple v. Lyons Beet Sugar Refining Co., 64 Misc. 363, 118 N.Y.S. 338 (1909); C. G. Davis v. Bishop, 139 Ark. 273, 213 S.W. 744 (1919).

67. 134 Cal. 21, 66 P. 28 (1901).

68. *Id.* at 22-23, 66 P. at 29.

69. 129 Mo. App. 325, 108 S.W. 628 (1907).

70. *Id.* at 327, 108 S.W. at 628.

were quite willing to allow parol evidence to show what the parties intended; one to provide an excuse and one to prevent an excuse.[71]

Later cases extended the possibilities of admitting extrinsic evidence to show from which lands the parties had intended the crops to come. The issue before the Kansas City Court of Appeals in *St. Joseph Hay & Feed Co. v. Brewster*[72] was whether the defendant had been improperly precluded from introducing parol evidence to show that the grain covered by the contract was to have come from the defendant's land. The contract contained a clause which read, "if there should be 500 bushels over or under this is to be taken on the same basis."[73] The court used this contract provision to discover the necessary ambiguity.

> Now, the contract on its face carries an implication that the parties had in mind and were contracting with reference to some certain particular wheat the exact amount of which was not known but was estimated. The words "if there should be five hundred bushels over or under" clearly show this . . . . [E]ven if it be said that this clause may or could refer to any wheat in general which the defendant could go out into the market and obtain, still this leaves the written contract showing on its fact [sic] that it is uncertain or ambiguous as to what was in the mind of the parties. And that being the case, the defendant is entitled to show by parol evidence what the agreement was, and what both of the contracting parties intended.[74]

This willingness to allow proof of what cropland was intended by the parties was extended even further in *Matousek v. Galligan*.[75] The contract between the plaintiff and defendant simply read:

> April 5, 1917. This is an acknowledgement of $150 payment on about 60 tons of hay at $9.25 per ton delivered in barn or cars at Atkinson, Neb., good No. 1 merchantable hay to be delivered on or before May 10, said hay sold to Joseph Matousek.
>
> J.F. Galligan
> Joseph Matousek[76]

The defendant was allowed to introduce extrinsic evidence that tended to show that the hay was to come from the defendant's land.

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71. *See also* Pearce-Young-Angel Co., Inc. v. Charles R. Allen, Inc., 213 S.C. 578, 50 S.E.2d 698 (1948), where the contract provided that defendant was to supply 800 bags of "Texas New Crop U.S. 1" blackeye peas. The defendant was allowed to introduce parol evidence to show that the parties intended to get the peas from Dilley, Texas. *Cf.* Squillante v. California Lands, 5 Cal. App. 2d 89, 42 P.2d 81 (1935) (extrinsic evidence allowed to show that the plaintiff had visited the defendant's vineyard and made other arrangements for picking prior to entering into the contract).

72. 195 S.W. 71 (Mo. 1917).

73. *Id.* at 71.

74. *Id.* at 72-73.

75. 104 Neb. 731, 178 N.W. 510 (1920).

76. *Id.* at —, 178 N.W. at 510.

Although this evidence conflicted with evidence the plaintiff had introduced, the Supreme Court of Nebraska simply said that the jury was entitled to believe the defendant,[77] which it had. Finally, in *Snipes Mountain Co. v. Benz Brothers & Co.*,[78] the plaintiff, in order to meet the common law requirements for the defense of impossibility, sought reformation of a contract for the sale of potatoes. The plaintiff asked the court to declare that the potatoes in question were to have come from plaintiff's land. The trial court admitted, apparently without objection, evidence that showed that the defendant had visited the plaintiff's land, prior to the making of the contract, to inspect the plaintiff's potatoes. The evidence also showed that the potatoes appeared to be in excellent condition at that time and a contract was entered into for their sale to the defendant. A disease destroyed about one third of the plaintiff's crop thus rendering plaintiff unable to completely perform. The court accepted the evidence and granted plaintiff's request for reformation.

South Dakota has at least twice faced the problem of whether or not to admit parol evidence to show what crop the parties had in mind at the time of contracting. In *McCaull-Webster Elevator Co. v. Steele Brothers*,[79] the parties had provided in their contract that the defendant would sell, "5000 bu. of good sound, dry and merchantable corn to grade 3Y, . . . said grain being now in my [defendant's] possession."[80] Unfortunately, none of the corn the defendant had grown turned out to be grade 3Y so the plaintiff sued for breach of contract. The defendant set up the defense of mutual mistake, alleging

> the corn that was in the contemplation of the parties as the subject matter of this contract was corn raised by defendants and standing in their fields at the time the written contract was entered into; that, when this contract was entered into, both parties believed that this corn would, at the time it was to be delivered test No. 3 . . . .[81]

The trial court admitted evidence, over the plaintiff's objections, which fully established these allegations. The plaintiff argued, on appeal, that the admission of this evidence was error and that the parties had intended that the defendants deliver the corn from wherever they could procure it. The supreme court simply stated, "The contract itself showed that the parties had in mind certain corn. It was therefore competent to show by parol what corn defendants had in their possession."[82]

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77. *Id.* at —, 178 N.W. at 511.
78. 162 Wash. 334, 298 P. 714 (1931).
79. 43 S.D. 485, 180 N.W. 782 (1921).
80. *Id.* at 487, 180 N.W. at 782.
81. *Id.*
82. *Id.* The court relied exclusively upon Ontario Deciduous Fruit Growers Ass'n v. Cutting Fruit Packing Co., 134 Cal. 21, 66 P. 28 (1901).

The South Dakota Supreme Court extended the rule it had established in *McCaull-Webster Elevator Co. v. Steele Brothers*[83] thirty-two years later in *Unke v. Thorpe*.[84] In this case, Mr. Unke visited Mr. Thorpe and after some discussion they signed a contract whereby Mr. Thorpe was to deliver "600 to 800 bu. S.D. Alfalfa-(like Sample taken) at 53.00 cwt to be recleaned at Christopherson Elev. Buyer to pay cleaning charge."[85] The sample mentioned in the contract did not come from Mr. Thorpe's farm. Upon discovering that delivery was about 300 bushels short Mr. Unke sued for breach of contract. The defendants testified that they had told Unke that they did not know how much seed they would have. Unke testified that nothing of the sort was ever said and that he had told the defendants that he must have a definite figure. The trial court found for the defendants and the supreme court affirmed stating, *inter alia*,

> It is axiomatic that the surrounding circumstances from which a contract stems are to be considered when interpreting its provisions . . . . It is our opinion that the only interpretation which the undisputed surrounding circumstances and the words of the contract warrant is that the parties contracted for the delivery of 600 to 800 bushels of a specific crop of alfalfa, viz., the crop the defendants were threshing.[86]

The supreme court clearly applied a modern, and more importantly, an equitable interpretation of the rules of evidence to permit the parties to show exactly what it was that they had contemplated at the time they had signed the contract.

Although there is a solid body of pre-Code case law that tended to exclude parol evidence in this situation,[87] it has been shown that there was also strong support in the common law for the admission of evidence of the surrounding circumstances to find out exactly what the parties had contemplated before entering into crop futures contracts. Comment 5 to section 2-615 indicates that the draftsmen of the Code intended to adopt the latter rule and probably apply it even more liberally than at common law. Comment 5 provides,

> where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. *The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting.*[88]

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83. 43 S.D. 485, 180 N.W. 782 (1921).
84. 75 S.D. 65, 59 N.W.2d 419 (1953).
85. *Id.* at 68, 59 N.W.2d at 421.
86. *Id.* at 69, 59 N.W.2d at 422.
87. *See* notes 22, 23, 56 and 64 *supra*.
88. Emphasis added.

To help their readers interpret what this phrase means the draftsmen cite[89] to *Davis* (sic) *Co. v. Hoffman-LaRoche Chemical Works*,[90] and *International Paper Co. v. Rockefeller*.[91] In the former case the contract signed by the parties made no reference whatsoever to the source from which the defendant was to procure the goods (crystal carbolic acid) it had promised to supply. A letter from the defendant was admitted into evidence, apparently without objection, that tended to show that the parties had expected the defendant to purchase the acid in Europe, but was unable to, due to embargoes placed on its exportation by various European countries. The plaintiff argued that the defendant should have purchased the acid in the United States and could have performed the contract in that manner. The defendant contended that it was relieved by a *force majeure* clause in the contract. Although the court held that the *force majeure* clause did not cover embargoes and therefore the defendant was liable, no mention was made as to whether the court would require the defendant to get its supply in the United States or whether the admission of parol evidence was error. Apparently it was not. In *International Paper Co. v. Rockefeller*,[92] the contract was more specific as to the source of the defendant's supply of certain wood he had promised to deliver. Facing the question of whether to admit parol evidence, the court decided to let it in. "The defendant was entitled to show his understanding at the time he executed the contract of the amount of green spruce upon the tract. This might have a bearing upon the interpretation of the contract. . . ."[93] Furthermore, all the contract said was that the defendant "has entered into a contract . . . for the purchase of certain timber lands and property in Franklin County, New York."[94] The court explained,

> we need not say that the defendant could not have furnished live wood of equal quality from other lands; but the contract, *read in connection with known facts*, shows the source from which the parties contemplated the wood should be furnished, and when the source is destroyed the defendant is excused from further performance.[95]

These two cases, then, show clearly that the draftsmen of section 2-615 intended to follow the common law view which would permit the parties to introduce evidence which would show exactly what source of supply was contemplated when the contract was made. This principle should certainly apply when the question arises whether the parties to a contract for the future delivery of crops expected the farmer to bind himself absolutely to obtain goods from

89. U.C.C. § 2-615, Comment 5.
90. 178 App. Div. 855, 166 N.Y.S. 179 (1917).
91. 161 App. Div. 180, 146 N.Y.S. 371 (1914).
92. *Id.*
93. *Id.* at —, 146 N.Y.S. at 372-373.
94. *Id.* at —, 146 N.Y.S. at 372.
95. *Id.* at —, 146 N.Y.S. at 374 (emphasis added).

anywhere in the country or whether they believed that he simply intended to sell the crop from his land.

ALTERNATIVE SOLUTIONS

The difficulties encountered by farmers who are threatened with liability after a crop failure must somehow be alleviated. This, of course, is not to say that in every case a farmer may willy nilly breach contracts by claiming excuse; all parties obviously must be held to the standards imposed by section 1-203, *viz.*, "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[96] Likewise, the parties should be allowed to allocate the risks by their contracts,[97] but the strict, anachronistic tests of the common law should be discarded and a fair and equitable reading given to section 2-615. There are at least two possible solutions: 1) The legislature can rewrite, or add to, the present sections of the Code involved to make the solutions intended by the draftsmen more explicit and unambiguous; or, 2) the courts can henceforth begin to interpret the present sections in light of the policy goals of simplification, clarification and modernization of the law governing commercial contracts.[98]

The Mississippi Legislature, apparently recognizing the typical reluctancy of courts to abandon common law principles when a statute with general language abrogates them, has attempted a variation of the legislative solution by adding a new section to Mississippi's Uniform Commercial Code provisions. Mississippi Code 1972 Annoted section 75-2-617, entitled "Force Majeure," reads as follows:

> Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of goods or of a material upon which the manufacture of the goods is dependent. If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner, such deliveries so suspended shall be cancelled without liability, but the contract shall otherwise remain unaaffected.[99]

96. S.D.C.L. § 57-1-13 (1967). S.D.C.L. § 57-2-3(2) (1967); U.C.C. § 2-103 (b) states that good faith "in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

97. Hawkland, *supra*, note 18, at 75. For an example of how commercial trade associations allocate the risks see *Ralston Purina Co. v. McFarland*, No. 75-2022 (4th Cir. Feb. 23, 1977).

98. *See* S.D.C.L. § 57-1-1 (1967); U.C.C. § 1-102.

99. MISS. CODE ANN. § 75-2-617 (1972).

The first time the Supreme Court of Mississippi had to apply this new section in the context of a crop failure it was faced with a relatively easy factual setting. In *Dunavant Enterprises, Inc. v. Ford*,[100] a contract was arranged between the plaintiff and defendant whereby the defendant agreed to sell to the plaintiff "all and only the cotton produced by *Seller* during the crop year 1971 on approximately *1,600* acres situated in *Marks, Miss.*"[101] Due to the nature of the defendant's land, and the weather conditions, the defendant was only able to plant 1,250 acres. The plaintiff sued and the chancellor found as follows: 1) The contract covered specific land; 2) the defendant did all he could to plant the land; 3) the defendant's failure to plant all the land was due to an act of God, *viz.*, the weather conditions; and, 4) the defendant did not breach the contract and hence was not liable. The plaintiff appealed contending that since the contract was executed in Tennessee, and since Tennessee has no *force majeure* statute, the defendant should not be excused. The Supreme Court of Mississippi gave the rule of section 75-2-617 as follows:

> The rule is that if the parties contract for the purchase and sale of all or a part of a particular crop to be grown in the future from a particular tract or tracts of land and by reasons of weather conditions or other forces of nature the seller is unable to plant all or a part of the crop or if all or part of the crop fails or is destroyed by conditions beyond the control of the seller, nonperformance to the extent of the failure is excused in the absence of an express condition in the contract to the contrary. The reason for this rule is that the parties to the contract for the sale of a crop to be grown in the future are well aware of the fact that weather and other conditions of nature control to a large extent the ability of a seller to grow and harvest the crop contemplated. Therefore, the absence of an express condition in the contract to the contrary, the foregoing rule is an implied condition of the contract.[102]

The court explained that even if Tennessee law did apply, it would not help the plaintiff since Comment 9 to section 2-615[103] is consistent with the rule implemented by section 75-2-617. After looking at the facts in light of the above rule, the court affirmed the trial court's decision.

One year later in *Paymaster Oil Mill Co. v. Mitchell*,[104] the Supreme Court of Mississippi was faced with the harder question of applying section 75-2-617 to a contract which did not specify the land which was to grow the crop. The contract specified the amount, price and time of delivery and contained a confirmation

100. 294 So. 2d 788 (Miss. 1974).
101. *Id.* at 789.
102. *Id.* at 792.
103. *See* text accompanying note 30 *supra*.
104. 319 So. 2d 652 (Miss. 1975).

of the plaintiff's "purchase from [defendant], as per our conversation."[105] There was a severe drought and the defendant's crop was damaged. The defendant did not notify the plaintiff of the damage but did deliver all of the crop that had survived. He was about 2,200 bushels short so the plaintiff covered[106] and sued for the loss. The trial court directed a verdict for the defendant based on section 75-2-617 and the plaintiff appealed contending, *inter alia*, that the trial court improperly admitted parol evidence offered by the defendant to show that the parties had intended that the crop was to be grown on the defendant's land. The Supreme Court of Mississippi upheld the trial court's decision, stating simply that the contract was not meant to be a final expression of the terms between the parties and that the rule, as stated in *Dunavant Enterprises Inc. v. Ford*,[107] applied in this case to excuse the defendant. It appears, then, that Mississippi's *force majeure* Code section has at least given the courts something a little more substantial than section 2-615 to hang their hats on. Even so, the Mississippi courts still seem to be hesitant about giving a straightforward analysis based directly upon the statute itself.

It seems highly unlikely that whatever drafting changes may be implemented, courts, at least those which are currently predisposed to follow the rationale of their ancestors, will finally turn their backs on the common law principles preceding the Uniform Commercial Code. The best that can probably be hoped for by changing the statutory language is a clearer expression of legislative intent; but a rewriting of these Code provisions likewise carries with it the danger of the new language narrowing, rather than broadening, the scope of section 2-615, thereby decreasing its potential effect.[108]

On the other hand, it is not totally inconceivable that the courts themselves might step back and take a clear look at what was intended by section 2-615 when faced with the problem of what to do with a crop failure defense to a futures contract. Progressive courts, willing to follow a rule of commercial sense, rather than the outdated chains of pre-Code *stare decisis*, would be required to give a more liberal interpretation to section 2-615 itself with searching inquiries into the statutory language and the Official

105. *Id.* at 654.
106. S.D.C.L. §§ 57-8-31 to -33 (1967); U.C.C. § 2-712.
107. 294 So. 2d 788 (Miss. 1974).
108. *See, e.g.*, Bliss Produce Co. v. A. E. Albert & Sons, Inc., 85 Agric. Dec. 742, 20 U.C.C. Rep. 917 (1976), wherein Comment 9 to § 2-615 was construed not as an example of the section's application, but instead as the only way § 2-615 could be applied in the case of a farmer who has lost his crop!

For an interesting possibilty for improving on the present tests used by § 2-615 see *The Eugenia*, 2 Q.B. 226 (1964), where Lord Denning suggests using the simple test that a situation must arise which renders performance of the contract a thing radically different from that which was undertaken by the contract. Hawkland, *supra* note 18, at 81.

Comments for a guide in the "hard" cases. It would be neither difficult nor inequitable to simply allow the parties to a contract for the future delivery of crops to offer evidence to show what was contemplated by both before they entered the contract. The fact that one of the parties to a crop futures contract is a farmer, without a history of buying or selling other farmers' products on the market for resale, could by itself be enough to establish a rebuttable presumption that the parties expected the crop to come from his or her land. And when one contracts to deliver a crop in the future, but cannot show that the crop was to come from specific lands, the defense of commercial impracticability should still remain open, as suggested by *Holly Hill Fruit Products, Co. Inc. v. Bob Staton Inc.*[109] The other choice, offered by *Bunge Corp. v. Recker*,[110] is that the courts will require one to travel to the far corners of the states, if necessary, to buy the goods in order to fulfill a contract when there has been a crop failure in the immediate area. Unless the parties specifically agree to such an arrangement, it would certainly be unrealistic for the courts to make such demands on them in light of usual commercial practices.

CONCLUSION

After wandering through the quagmire of the common law rules that were applied in order to settle disputes between a buyer and a seller one can see clearly that the trend has been to liberalize and broaden the "impossibility" exception to the common law rule of strict performance. With the advent of farsighted decisions like *Taylor v. Caldwell* and *Howell v. Coupland* that respond to the needs of a changing society, the strict rules of cases like *Paradine v. Jane* became history. Concomitant with the liberalization of the impossibility rules *per se*, there has also been a general liberalization of the strict application of the parol evidence rule when the contract itself does not specifically designate where the crop is to be grown. These attitudes, which recognized, and responded to, the needs of modern commercial practices, were finally codified in section 2-615 of the Uniform Commercial Code. Contemporary courts have seemingly been reluctant, however, to break away from certain strict analytical tendencies of their forefathers. Section 2-615 has been applied to crop failures only a few times. There is still plenty of time for the courts to apply the section as the draftsmen intended and as required in a modern commercial setting. One can only hope that the courts will apply section 2-615 so that it need not be discarded, as so many statutes have been, as unworkable. What is desperately needed is a balancing of the equities and a clear application of section 2-615 itself to crop failure situations. It is, in the final analysis, up to the courts to establish viable and realistic

109. 275 So. 2d 583 (Fla. 1973).
110. 519 F.2d 449 (8th Cir. 1975).

precedent to be used in the application of section 2-615, and it is for them to reject the strict common law rules of the pre-Code courts by a fair and just reading of Uniform Commercial Code section 2-615.

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