

## Dual Nature Contracts And The Uniform Commercial Code - Foster v. Colorado Radio Corporation

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# Comments and Casenotes

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## Dual Nature Contracts And The Uniform Commercial Code

*Foster v. Colorado Radio Corporation*<sup>1</sup>

Defendant contracted to purchase the assets of plaintiff's radio station, which included license, good will, real estate, studios and furnishings. Upon defendant's default, plaintiff sold to a third party for a lower price and brought an action against defendant for the difference. The defendant contended, *inter alia*, that she was not liable because of the plaintiff's failure to give her notice of this sale in accordance with Section 2-706(3)<sup>2</sup> of the Uniform Commercial Code. The district court held that the Code was not applicable since only the furnishings, the value of which constituted between five and ten per cent of the contract price were "goods" within the meaning of the Code.<sup>3</sup> These "goods" were incidental to the contract's main purpose, the conveyance of assets not covered by the Code. Consequently, the court found for the plaintiff and awarded as damages the difference between the contract price and resale price. On appeal, the court of appeals held that the plaintiff could not recover the value of the furnishings and reduced damages accordingly. Observing that the furnishings were easily identifiable and that their value was both considerable and readily ascertainable,<sup>4</sup> the court held that Article 2 of the Code should be applied to them even though they were only a small part of a sale involving assets not covered by the Code. The court interpreted the language of Section 2-102 of the Code to include the sale of all goods falling within the definition of "goods" contained in Section 2-105, regardless of whether the goods were sold under a contract with property to which the definition did not apply.<sup>5</sup>

To reach this result, the appellate court was forced to divide the original contract, placing only part of it within the ambit of the Code. It should be noted at the outset that the *Foster* case involved a unified contract for existing goods. Where the contract is divisible,<sup>6</sup> it can

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1. 381 F.2d 222 (10th Cir. 1967).

2. UNIFORM COMMERCIAL CODE § 2-706(3) provides that "[w]here the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell."

3. UNIFORM COMMERCIAL CODE § 2-105(1): "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract other than the money in which the price is to be paid, investment securities (Article 8) and things in action."

4. The amount involved was between \$12,500 and \$25,000.

5. UNIFORM COMMERCIAL CODE § 2-102 states: "Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers."

6. See notes 43-45 *infra* and accompanying text. Although the appellate court divided the contract for the purpose of reducing damages, neither the parties nor the

be treated without logical difficulty as two separate agreements with different law applicable to each. There are few cases which deal with the problem of whether to apply two bodies of law to a unified agreement for existing goods, but the available decisions suggest varying approaches, each of which may be appropriate in certain contexts.

The problem presented by the dual nature of unified sales contracts predates the Code; the courts had previously encountered the problem in an analogous context, that of the mixed sales-service contract. A typical situation would be one in which *X* contracts with *Y* to perform certain services involving a transfer of goods from *X* to *Y* as a part of the transaction. The goods are defective, and *Y* brings an action for breach of implied warranty. Traditionally, the court would then decide the vexatious question of whether the contract should be considered as a sale of goods, in which case a warranty would be implied, or as a service contract, in which case no implied warranty would arise. The majority of the courts would follow the holding of the district court in *Foster* and look to the "essence" or main object of the contract and then characterize the entire contract accordingly.<sup>7</sup>

A recurrent situation in the sales-service area is the "bad blood" case<sup>8</sup> in which the plaintiff is injured by faulty blood administered to him in the course of hospital treatments and sues on a warranty theory. In the first and most influential bad blood case, *Perlmutter v. Beth David Hospital*,<sup>9</sup> a strong three-judge dissent favored the severance of the contract, but the majority ruled that: "[W]hen service predominates, and transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act."<sup>10</sup> The passage of the Uniform Commercial Code has had only a limited effect on the resolution of the "bad blood" cases. The majority of the courts have stood fast to *Perlmutter*, maintaining that the provision of a service was the main purpose of the contract.<sup>11</sup>

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court contended that the contract involved here was a severable contract as opposed to an entire or unitary contract.

7. Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957). There are three basic theories used in the service-sale area which were originally formulated for the purpose of determining whether the Statute of Frauds applied to the contract. The Massachusetts rule characterizes contracts for goods to be made on order which are not part of the seller's stock in trade as contracts for services. *Goddard v. Binney*, 115 Mass. 450 (1874). Under the old New York rule, if the contract is for goods manufactured in the future, it is viewed as a contract for services. *Crookshand v. Burrell*, 18 Johns. 58 (N.Y. 1820). The old English rule looked to whether the services or materials supplied were the "essence" of the contract. *Clay v. Yates*, 1 H.&N. 73, 156 Eng. Rep. 1123 (1856).

The New York and Massachusetts rules are not suitable for cases not involving sales-service contracts where the goods are in existence. See generally Farnsworth, *supra* note 7; Comment, *Sales, Distinguished from other Distribution Transactions*, 1960 WIS. L. REV. 294; Note, "Sale of Goods" or "Work, Labor and Materials" — *What is the Distinction?*, 43 IOWA L. REV. 95 (1957); 1 S. WILLISTON, SALES §§ 54-55 (1948).

8. *E.g.*, *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956); *Sloneker v. St. Joseph's Hospital*, 233 F. Supp. 105 (D. Colo. 1964); Note, *Sales and Service Warranties in Blood Transfusions*, 26 MD. L. REV. 182 (1966); Annot., 59 A.L.R.2d 761, 777 (1958).

9. 308 N.Y. 100, 123 N.E.2d 792 (1954).

10. *Id.* at 104, 123 N.E.2d at 794.

11. *Dorfman v. Austenal*, 3 U.C.C. Rep. 856 (N.Y. Sup. Ct. 1966); *Cutler v. General Electric Co.*, 4 U.C.C. Rep. 300 (N.Y. Sup. Ct. 1967) (holding that the

However, in 1967, a New Jersey intermediate court decision, *Jackson v. Muhlenberg Hospital*,<sup>12</sup> held that when the hospital provided a transfusion in the course of treatment, a sale within the scope of Article 2 had occurred. The court, in denying defendant's motion for summary judgment, decided further that although all implied warranties had been "reasonably" disclaimed, the plaintiff might contend that an express warranty printed on the bottle, that the "utmost care" had been used in the selection of donors, had been breached. However, had the disclaimer not been present, it is apparent that the court would not have subjected the hospital to strict liability based on an implied warranty of merchantability. The court felt that neither public policy nor the facts of the case would justify that result.<sup>13</sup> In another recent decision, a Florida district appellate court held, in a suit against a blood bank, that a sale had occurred and, thus, that an implied warranty attached.<sup>14</sup> The court narrowed its holding by stating that the plaintiff could recover only if he showed that his injuries were caused by a failure to detect or remove a deleterious substance in the blood which was capable of detection or removal.<sup>15</sup> In reaching its conclusion, the court specifically rejected the "essence" theory and came to grips with the basic policy question which controls the bad blood cases:

[A]lthough many of the decisions denying recovery for breach of implied warranty are based on the technical distinction between a service and a sale, the factor underlying the decisions is the inability, in the present state of medical knowledge, to detect or remove the virus which causes serum hepatitis. It is often stated that it would be against public policy to impose strict warranty liability, for an undetectable unremovable defect, against a non-commercial organization which was supplying a commodity essential for medical treatment.<sup>16</sup>

Other courts have stressed the fact that blood suppliers are not commercial competitors advertising the superiority of their product and that the patient's only real reliance is on the judgment of the attending physician.<sup>17</sup>

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securing of a "Pacemaker" machine was "a secondary adjunct to the service performed"); *Lovett v. Emory University, Inc.*, 116 Ga. App. 277, 156 S.E.2d 923 (1967).

12. 96 N.J. Super. 314, 232 A.2d 879 (L. Div. 1967).

13. The court's discussion of the policy grounds centered mostly around strict tort liability. The court indicated that the same reasoning would preclude recovery on implied warranty theory. The policy grounds were fundamentally the same as those discussed in *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749 (Fla. App. 1966), *aff'd*, 196 So. 2d 115 (Fla. 1967).

14. *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749 (Fla. App. 1966), *aff'd*, 196 So. 2d 115 (Fla. 1967). Courts have previously rejected a distinction between a blood bank and a hospital. *E.g.*, *Whitehurst v. American National Red Cross*, 402 P.2d 584 (Ariz. 1965); *Balkswitsch v. Minnesota War Memorial Blood Bank, Inc.*, 270 Minn. 151, 132 N.W.2d 805 (1965).

15. See RESTATEMENT OF TORTS § 402A, comment *k* (1938). The court indicated that it viewed blood as an "unavoidably unsafe product" under the Restatement definition, but no medical evidence on this question had been presented in the record.

16. 185 So. 2d at 752. See also Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367-68 (1965).

17. *Jackson v. Muhlenberg Hospital*, 96 N.J. Super. 314, 232 A.2d 879 (1967). See generally Note, *Sales and Service Warranties in Blood Transfusions*, 26 Md. L. Rev. 182 (1966).

Because of the special factors which support a policy favoring blood suppliers, the bad blood cases should not be regarded as persuasive authority in analogous situations. However, the "essence" rationale relied on in the bad blood cases has been used to bar warranty recovery in widely differing areas.<sup>18</sup> A Connecticut case, *Epstein v. Giannattasio*,<sup>19</sup> is one of the few reported sales-service cases to apply the "essence" theory under the Code. In *Epstein*, the plaintiff was injured when products used during a beauty treatment caused injury. In denying recovery on a warranty theory, the court stressed the incidental nature of any sale of products attending the treatment and viewed the situation as closely analogous to Connecticut precedents dealing with the sale of food in restaurants.<sup>20</sup> The case may be distinguishable in most jurisdictions since the Connecticut restaurant cases represent a minority position.<sup>21</sup> However, dictum in a Pennsylvania lower court decision indicates that the court might use the "essence" or main object theory in determining whether to imply a warranty in a sales-service contract.<sup>22</sup>

The "essence" test has also been used to determine whether or not the Statute of Frauds in Article 2<sup>23</sup> should apply to a sales-service contract. In *National Historic Shrines Foundation, Inc. v. Dali*,<sup>24</sup> decided under the Code, the court held that an oral contract to paint a picture and donate it to the public was in essence a service contract and, therefore, not required to be evidenced by a writing to be enforceable. The court, however, in disallowing a motion for summary judgment, gave the plaintiff an opportunity to demonstrate the existence of the entire contract, not merely the service element.

*Foster*, which illustrates a second approach to the dual nature contract, is the first case to deal with a contract covering both Code and non-Code property, although dictum in a recent Georgia case<sup>25</sup> indicates that the Georgia court would not apply the Code to a sale of both movables and non-movables unless the sale of the non-movables was incidental to the sale of the movable goods covered by the Code. The court in *Foster* did not choose to limit the application of the Code in this manner. Accordingly, it distinguished *Epstein* on its facts, since the strict holding of that case dealt with a sales-service contract. However, contrary to the position taken by the *Epstein* court, the *Foster* court gave a broad reading to Section 2-102, viewing it as extending the scope of Article 2 to the sale of all goods within the

18. *E.g.*, *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P.2d 897 (1961) (contract to furnish necessary material and labor for installation of a heating system was a contract for services); *Lynch v. Hotel Bond Co.*, 117 Conn. 128, 167 A. 99 (1933) (purchase of food in a restaurant held a service); *Stammer v. Mulvaney*, 264 Wis. 244, 58 N.W.2d 671 (1953) (purchase and installation of a septic tank is a contract for services).

19. 25 Conn. Sup. 109, 197 A.2d 342 (C.P. 1963).

20. *E.g.*, *Lynch v. Hotel Bond Co.*, 117 Conn. 128, 167 A. 99 (1933).

21. *See generally* Annot., 7 A.L.R.2d 1028 (1949).

22. *Victor v. Barzaleski*, 19 Pa. D. & C.2d 698 (C.P. Luzerne County 1959).

23. UNIFORM COMMERCIAL CODE § 2-207.

24. 4 U.C.C. Rep. 71 (N.Y. Sup. Ct. 1967).

25. *Lunsford v. Wilson*, 113 Ga. App. 602, 149 S.E.2d 515 (1966). *But cf.* *Ahern v. Nudelman*, 374 Ill. 237, 29 N.E.2d 268 (1940) (pre-Code case partitioning a funeral service so as to apply the state sales tax to the "goods" involved, the coffin and the graveclothes).

section's definition, regardless of whether the sale of those goods was an incidental or predominant part of the entire transaction.

The existence of a third approach has been indicated by the commentators and by several recent cases. The commentators have argued that the Code should have the broadest possible application and that the policies embodied in the Code should be applicable to subject matter not expressly included within its purview if the problem is sufficiently analogous to one contemplated by the Code.<sup>26</sup> This argument, based on the theory that the Code represents today's most progressive thought in commercial law, asserts that where a case falls in an area where there is a "gap" in the Code's coverage, outside law should not be applied if it is inconsistent with Code policies. This line of reasoning has been adopted in several recent cases. In *Stern & Company v. State Loan and Finance Corporation*,<sup>27</sup> the Delaware district court applied the parol evidence rule of Article 2<sup>28</sup> to a contract involving investment securities. Although investment securities are excluded from Article 2 by Section 2-105, the court relied on the comments to that section which state that such exclusion is not intended to prevent the application by analogy of a section of the Article to securities when the application is sensible and the situation is not covered by Article 8.<sup>29</sup> In *Vitex Manufacturing Corporation v. Caribtex Corporation*,<sup>30</sup> the Court of Appeals for the Third Circuit, when faced with conflicting lines of authority, found the Code persuasive in including overhead as damages for breach of a service contract:

Significantly, the Uniform Commercial Code . . . provides for the recovery of overhead in circumstances similar to those presented here [citing 2-708]. . . . While this contract is not controlled by the Code, the Code is persuasive here because it embodies the foremost modern legal thought concerning commercial transactions.<sup>31</sup>

Similar use of the Code was made in *Transatlantic Financing Corporation v. United States*.<sup>32</sup> Although the subject matter of that case in-

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26. Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 330 (1951); Hawkland, *Uniform Commercial "Code" Mythology*, 1962 ILL. L.F. 291; Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965); see also UNIFORM COMMERCIAL CODE § 1-102, Comment I, which states:

Courts have been careful to keep broad acts from being hampered in their effects by later acts of limited scope [citation omitted]. They have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act [citation omitted]. They have done the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general. . . . Nothing in this Act stands in the way of continuance of such action by the courts.

27. 238 F. Supp. 901 (D. Del. 1965). See also *Hunt Foods & Indus. v. Dolner*, 49 Misc. 2d 246, 267 N.Y.S.2d 364 (1966), *rev'd on other grounds*, 26 A.D.2d 41, 270 N.Y.S.2d 937 (1966).

28. UNIFORM COMMERCIAL CODE § 2-202.

29. 238 F. Supp. at 911 n.2.

30. 377 F.2d 795 (3rd Cir. 1967).

31. *Id.* at 799.

32. 363 F.2d 312 (D.C. Cir. 1966). See also *Berk v. Gordon-Johnson Co.*, 232 F. Supp. 682 (E.D. Mich. 1964), where the defendant sold processing machinery which proved unfit for the Kosher slaughtering of poultry. Plaintiff-buyer contended

volved the duty of a carrier, rather than the sale of goods, and in spite of the fact that the transaction occurred well before the Code was generally accepted, the court looked to Sections 2-614(1) and 2-615(a) of the Code to determine a standard for impossibility of performance.

Three methods have been suggested for dealing with a contract the subject matter of which is covered only partially by the Code: the "essence" theory applied by *Epstein*, the contract splitting device utilized by *Foster*, and the analogy theory suggested by *Vitex*. Which method will be applied in any given case would seem to depend on two factors: the nature of the contract and the issues involved.

The "essence" test will probably be applied by most courts, as it has been in the past,<sup>33</sup> to sales-service contracts where the issue is whether to imply a warranty to the sales portion of the contract. Despite the modern trend toward strict liability,<sup>34</sup> it has been the almost universal rule in American jurisdictions that no implied warranties attach to a service contract.<sup>35</sup> The argument has been made that the policies behind the imposition of implied warranties should require them to be imposed wherever there is an element of sale;<sup>36</sup> the *Jackson*<sup>37</sup> case endorses this theory. However, in cases such as *Epstein*, the courts will no doubt continue to resist this theory because of the danger that a warranty on the "sales" portion will operate, in effect, as a service warranty, since it is often unclear whether the injury results from the services or from the goods used in connection with the services.<sup>38</sup> Moreover, it is conceptually difficult to view an agreement, such as that in *Epstein*, as a contract for the sale of goods where such is not the intent of the parties and where the seller does not specifically realize a profit on the "transfer" of goods but profits only from the services rendered. Such goods appear more similar in nature to tools of a particular trade than to goods which pass from a seller to a buyer for a consideration. To avoid this latter difficulty, it has

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that a sketch of the machine labelled "Kosher operation" constituted an express warranty despite the presence of a disclaimer clause within the sales contract. The court, in rejecting defendant's motion for summary judgment, held that the language of the disclaimer need not be construed as nullifying an express warranty. The court used the 1952 version of the Code, not then applicable in Michigan, as "a further aid to the interpretation of contracts in which there is conflict in the language as to the existence of an express warranty." 232 F. Supp. at 688. *But cf. In re Advance Printing & Litho Co.*, 4 U.C.C. Rep. 838, 842 (3rd Cir. 1967) ("Unconscionability" clause, Section 2-302, does not apply to secured transactions even though, quoting from the opinion below, "the result here appears inequitable and unconscionable . . .").

33. Comment, *Contracts For Services Distinguished from Those to Sell Goods*, 15 *FORDHAM L. REV.* 92 (1946).

34. *E.g.*, *Cirrtrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965).

35. Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 *COLUM. L. REV.* 653 (1957).

36. *Id.*; Note, *Contract Formation and the Law of Warranty: A Broader Use of the Code*, 8 *B.C. IND. & COM. L. REV.* 81 (1967).

37. Note 11 *supra* and accompanying text.

38. *Cf. Voight v. Ott*, 86 *Ariz.* 128, 341 P.2d 923 (1959). Defendant faultily converted a heating and cooling system over to refrigeration, causing permanent damage to the unit. The court's discussion was directed to the issue of whether the defendant's sale of the unit was a sale of goods to which the Uniform Sales Act applied, or whether the unit was a fixture to which no warranty attached. However, it appears from the opinion that defendant's faulty servicing of the unit may have been the real proximate cause of the damage to the unit.

been contended that the English approach of warranting any goods furnished, whether or not there has been a "sale," is the better view;<sup>39</sup> some courts may be disposed to adopt this position even in the *Epstein* situation.<sup>40</sup> This argument is reinforced by the fact that in admiralty law an implied warranty has been attached without apparent difficulty both to the services rendered and to the equipment used by a stevedoring contractor.<sup>41</sup> These considerations may have some merit in the *Epstein* situation, but they would not be persuasive in cases where the goods are likely to have substantial value and are relatively complete in themselves, even though services are needed to make them fully effective for the buyer's purpose. In the installation contract situation, for example, it is more likely, because of the importance of the goods, that the parties view the transaction, at least in part, as a sale, that the servicer is profiting on the price for which he buys and for which he sells the goods, and that the alleged injury will be more easily traceable to a defect in the goods themselves. In such a situation the courts have applied the "essence" theory.<sup>42</sup>

The "essence" test seems most appropriate to the sales-service contract when the issue is the applicability of the Statute of Frauds to the "sales" portion of the contract. Traditionally, the Statute of Frauds has differentiated between entire and divisible contracts.<sup>43</sup> For the purpose of the statute, an entire contract is a contract in which the elements of one party's performance obligation, taken together, form a unit, or are all directed to the accomplishment of a single purpose. Typically, the consideration for such a contract is in the form of a fixed sum which is not allocated to the individual goods covered by the contract. *Foster* is an example of such a contract. A divisible contract is one in which one party's various performance obligations are not intrinsically related and separate consideration is received for each distinct performance. A divisible contract thus consists of two or more individual, independent contracts. Generally, where any part of an entire contract fails to satisfy the requirements of the Statute of Frauds, the whole contract is unenforceable<sup>44</sup> on the theory that if

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39. Farnsworth, *supra* note 35, at 664-65.

40. *Cf. Cirrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965) (implying a warranty to a lease on the ground that it was "analogous" to a sale).

41. *Italia Societa per Azioni Di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Thompson v. Trent Maritime Co.*, 353 F.2d 632 (3d Cir. 1965).

42. Comment, *Contracts for Services Distinguished from Those to Sell Goods*, 15 *FORDHAM L. REV.* 92, 105 (1946).

43. 3 S. WILLISTON, *CONTRACTS* § 532 (3d ed. 1960); Annot., 71 *A.L.R.* 479 (1931).

44. *E.g.*, *Traiman v. Rappaport*, 41 F.2d 336 (3d Cir. 1930). Theoretically at least, in deciding whether or not to apply the statute, the court need only consider whether the performance is unitary and whether the consideration is in a lump sum. In fact, however, application of these principles has been less than mechanical. First, it is unclear exactly where the line between severable and unitary contracts should be drawn. 3 S. WILLISTON, *supra* note 43, at 764, states that the question of whether or not a contract is divisible "is one of law, but no formula has been devised which furnishes an infallible abstract rule for determining what given contracts are severable and what are entire. . . ." Second, the courts' characterization of whether a contract is divisible or not often depends on whether the court wants to apply the Statute of Frauds. This is especially true with regard to the enforceability of an oral contract to devise land and personality for services rendered. Even a highly suspect claim may be hard to disprove. The courts often conclude that (1) the performance alleged

the court eliminated part of the contract it would, by enforcing the remainder, be writing a new contract between the parties, one which they probably never intended.<sup>45</sup> However, these principles should not preclude the enforcement of an oral sales-service contract if the essence of the contract is service. First, compliance with the "essence" test does not require a partial enforcement of the contract. According to the *Dali* case, if the contract is essentially one for service it may be enforced in its entirety, not merely as to its service elements. Such total enforcement appears justified; if a contract is essentially for "services," it is not a "sales" contract within the intended scope of the Statute of Frauds, and the statute should in no way affect it. Secondly, the consumer often contracts orally for the repair and, if necessary, the replacement of a major unit such as a furnace or air conditioning system. The emergency nature of the consumer's needs may leave no time for the formalities usual in a sales contract. Furthermore, there may be no writing because the parties intended to form, and thought they had formed, a service contract. It would be inequitable to allow either party to repudiate in such a situation by claiming the protection of the statute.

The theory utilized in *Foster*, that of applying two bodies of law to a unified contract, would not adequately resolve the problems presented by a sales contract which only partially satisfied the Statute of Frauds. As stated previously, if a court were to partially enforce the provisions of a contract, it would in effect be creating a new contract, one to which the parties never agreed. Moreover, the court would have to determine what proportion of the total consideration was represented by the enforceable segment of the contract. The fair market value of that segment would be an unreliable indicator because it might well be greater than the portion of the purchase price which was allocated to that segment in the contemplation of the parties. Indeed, standing by itself, the enforceable segment might have little, if any, value to the buyer.

The arguments against enforcing only a part of a contract would require the use of the "essence" test in applying the Statute of Frauds to a unified contract for the sale of real and personal property. However, underlying policy considerations relating to memorandum requirements in the conveyance of real estate might demand the application of the stricter real property statute in all such cases. Where the issue is one of warranty, however, severability is the more reasonable

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is insufficient as to the real estate, (2) the alleged contract is indivisible, and (3) the Statute of Frauds makes the entire contract indivisible. *E.g.*, *Hamilton v. Thirston*, 93 Md. 213, 48 A. 709 (1901); Annot., 71 A.L.R. 479 (1931). The courts may also feel that *quantum meruit* provides sufficient remedy for the deserving plaintiff. *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S.W. 767 (1906).

45. 3 S. WILLISTON, *supra* note 43, at 764. This rule applies only to executory contracts. If one party is to render two performances, one within and one outside the statute, for an executed consideration, there is no reason why the other party may not waive the performance obligation invalidated by the statute and enforce the contract as to the other obligation. However, in some states the statute may have the effect of making a contract in violation of the statute not merely "unenforceable" but "void." *E.g.*, *Hearn v. May*, 207 Or. 514, 298 P.2d 177 (1956). Such a statute might completely invalidate the contract, even when the prohibited act had been fully performed. *Pier v. Clarke*, 71 Minn. 114, 73 N.W. 522 (1898).

solution. Consider a contract for the sale of a farm upon which stands a silo of wheat. Assume that the value of the wheat was included in the price of the farm and that both parties realized that an attempt would be made to market the wheat. Generally no implied warranty attaches to the sale of real estate,<sup>46</sup> but if the contract were severed, an implied warranty of merchantability could be applied to the wheat. It could be argued that the same result would be reached by a holding that the contract was not unitary at all but was really two divisible contracts, one for the sale of land and one for the sale of goods. There is, however, no certainty that a court would hold that such a contract is not unified,<sup>47</sup> especially if the consideration was in the form of a lump sum. According to Corbin:

In cases of this sort the courts often call the contract a divisible contract; but all the facts justify a statement that the defendant has promised two performances that can easily be distinguished by the court by reference to the agreement itself. The contract is not divisible in the sense that the plaintiff has given or promised to give a separate and distinct equivalent for each of the two performances promised by the defendant.<sup>48</sup>

The analogy theory may have the widest general applicability. As the Code's solutions to specific problems become more accepted, it seems likely that the analogy doctrine will also receive a broader acceptance. The use of the analogy doctrine would both obviate the difficulty of severing the contract and extend the progressive Code formulations into appropriate areas which otherwise would be beyond the scope of the Code. *Foster* may present a situation where the notice of resale required by the Code should be applied to the whole contract. If it was commercially reasonable to expect the plaintiff to satisfy the notice requirement as to the furnishings, why should he be allowed to forego giving notice with regard to the studios and real estate? The Code<sup>49</sup> and the common law<sup>50</sup> require the seller to conduct the resale in good faith and in a commercially reasonable manner. The scheme of the Code suggests that, as to movables, notice of resale is an integral requirement of a reasonable resale. The notice requirement is appar-

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46. Note, *Implied Warranties in the Sale of New Houses*, 27 Md. L. Rev. 299 (1967).

47. The courts have found no clear line of division between the entire and divisible contract. See note 44 *supra*. Cf. *Porter v. Fisher*, 4 Cal. Unrep. 324, 34 P. 700 (1893) (Oral contract to collect brokerage fees for sale of land and chattels is divisible) and *Pettigrove v. Corvallis Lumber Mfg. Co.*, 143 Or. 33, 21 P.2d 198 (1933) (Oral contract to collect brokerage fees for sale of land and chattels is entire).

48. 2 A. CORBIN, CONTRACTS § 313 (1950). However, the courts have sometimes construed what appeared formalistically to be a divisible contract as a unitary contract, if, in their belief, justice so required. *Bethea v. Investors Loan Co.*, 197 A.2d 448 (D.C. Ct. App. 1964) (Contract for the purchase of freezer and for the purchase of foods at a discount held entire even though separate consideration paid for each. Divisibility of subject matter and apportionment of purchase price was not conclusive where (1) parties assented to the contract as a whole, (2) the buyer already owned a freezer, and (3) the buyer's intent was to purchase the food at a discount).

49. UNIFORM COMMERCIAL CODE § 2-706(1).

50. 5 S. WILLISTON, CONTRACTS § 1379B (rev. ed. 1937). At common law, seller's notice of resale has been held to be optional. *Id.* at § 1379C. Some states, however have required such notice. *Bell v. Lamborn*, 2 F.2d 205 (4th Cir. 1924) (interpreting Georgia law); *Penn v. Smith*, 98 Ala. 560, 12 So. 818 (1893).

ently based on the common law theory that the resale treats the property as owned by the buyer and that the sale is on the buyer's account.<sup>51</sup> As a consequence, the buyer is entitled to an opportunity to protect his interest and prevent a sacrifice of the property.<sup>52</sup> In the *Foster* situation, it would appear that a reasonable resale would require the sale of all the assets of the radio station as a unit. It is submitted that the court should have made such a finding and then addressed itself to the question of whether, on the basis of policy considerations stemming from background law, business practices, and the reasonable expectations of the parties, the requirement of notice should be imposed as to any portion of the contract. If the latter question were answered in the affirmative, the court should then have determined whether there was any sound reason to distinguish between movables and non-movables.<sup>53</sup>

In conclusion, there appears to be no one general rule that can be applied to the dual nature contract. There may be good policy reasons to apply one particular rule to a certain type of contract, but as soon as the issue or the subject matter of the contract changes, the policy reasons may change or entirely disappear. It is not the purpose of this Note to suggest that the result in *Foster* is incorrect, although it may well be, but it is submitted that the court's mechanical approach should be avoided by courts confronted with problems concerning the application of the Code to the dual nature contract.

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51. See *Green v. Ansley*, 92 Ga. 647, 19 S.E. 53 (1893) (notice of resale required for sale of real estate). In those states requiring notice, and where it was in fact given, the measure of damages at common law was the difference between the contract price and the price obtained at the resale. Where the required notice was not given, the damages were the difference between the market value at the time of breach and the contract price. With minor changes, these damage rules have also been adopted by the Code. Compare UNIFORM COMMERCIAL CODE § 2-706(1) and UNIFORM COMMERCIAL CODE § 2-708(1).

52. *Green v. Ansley*, 92 Ga. 647, 19 S.E. 53 (1893).

53. The court in *Foster* was apparently not faced with any binding precedent on the question.