

THE AMERICAN UNIFORM COMMERCIAL CODE, THE TASMANIAN SALE OF GOODS ACT 1896, A COMPARATIVE STUDY*

By A. G. OGILVIE†

PART III‡

VI

RISK OF LOSS UNDER THE UNIFORM COMMERCIAL CODE

D. Transactions Specifically Provided for in the Code

Of general application throughout the article, though more likely to be invoked under this heading, is section 2-303 which provides:

Where this Article allocates a risk or a burden as between the parties 'unless otherwise agreed', the agreement may not only shift the allocation but may also divide the risk or burden.

This section gives a freedom to the parties to escape the rules as to shifting of risk of loss by either dividing the risk or shifting it to a party not contemplated by the rules. By virtue of section 1-201(3) the 'agreement' which may shift or divide the risk, is broad in its scope and includes reference to course of dealing, trade usage and course of performance. The freedom under this section is subject to section 2-302 which prohibits unconscionability. Section 1-102(3) and (4) should also be noticed. These provide generally for variations of Code provisions by agreement and specifically that the absence in any section of the words 'unless otherwise agreed' or words of similar import does not imply that an agreement to vary is prohibited. It is against this background of flexibility and commercial freedom that the specific cases will be considered. In passing, section 59 of the Act should be noticed, providing:

When any right, duty, or liability would arise under a contract of sale by implication of law it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage if the usage be such as to bind both parties to the contract.

* The material contained in this article forms part of a thesis presented in partial fulfilment of the requirements for the degree of Master of Laws at Tulane University.

† LL.B. (Tas.), LL.M. (Tulane).

‡ Continued from Volume 2, No. 2, p. 192.

In addition, sections 22(1), 23 and 25 combine to subject the operation of the Act to the freely decided intention of the parties. Nonetheless the courts are chary to find an exclusion of such statutory rights as would otherwise exist in the absence of an excluding agreement, and apply a restrictive interpretation to them.¹

Examples of the specific transactions and risk of loss therein dealt with by the Code are an F.O.B. contract (section 2-319(1)), and F.A.S. contract (section 2-319(2)), a C.I.F. contract (section 2-320(1) and section 2-321(2)), a C. and F. contract (section 2-320(3)), a delivery 'ex-ship' contract (section 2-322) a 'no arrival, no sale contract' (section 2-324), a sale on approval contract (section 2-327(1)), a sale with privilege of return contract (section 2-327(1) and (2)), and the general application of the section dealing with casualty to identified goods (section 2-613).

Before plunging *in medias res*, in a discussion of these contracts and their variations from their Anglo-Australian counterparts, it will be worthwhile to restate the purpose and aim of this thesis in order to determine their exact relevance and significance to the thesis.

The aim of this section of the thesis has been to set out the compound concept of title and risk of loss under the Act and compare with it the divided and differently treated Code concepts of title and risk of loss. In so doing the aim has been to isolate and elucidate the variations and thereby to provide a proper basis for evaluation and consideration of the different treatment by these two statutory documents, of this aspect of sale of goods.

In all of the specific examples mentioned above the result to be obtained will be found either by the application of the Act sections as already discussed or by finding a contrary agreement as to title or risk of loss or both. On the other hand in Code jurisdictions the result is to be sought in the specific Codal provisions referred to above.

Insofar as the Act provides a specific direction for any of the above examples a comparison with the Code provision is strictly germane to the endeavour of this discussion. Two examples are involved, namely a contract of sale on approval and a contract of sale with privilege of return. The rest of the examples are all common forms of commercial contracts which in Anglo-Australian law have the effect of negating or varying the statutory rights, duties and liabilities. To these common commercial contracts the courts have attached uniform particular incidents as to title and risk of loss. Accordingly any complete comparison in this field requires a discussion of at least the commonest and most important of these exceptions to the Act, which are now statutorily

¹ *Karsales (Harrow), Ltd. v. Wallis* [1956] 1 All E.R. 867. Here there was such fundamental breach of the contract as to disentitle the plaintiff from relying on the exception clause. *Andrews Brothers (Bournemouth), Ltd. v. Singer and Company, Ltd.* [1934] 1 K.B. 17. Exclusion of all conditions, warranties and liabilities implied by statute, common law or otherwise held not to extend to express warranties.

dealt with in the Code. These are considered to be the C.I.F. and the F.O.B. contracts, with incidental variations.

(i) *Contract of Sale on Approval*

The Act provision in this connection has been referred to and outlined above.² It will have been noted that the section makes no distinction between sale on approval and sale or return, prescribing the same rules and results for each. The Code distinguishes these sharply. Section 2-326(1) states this distinction as follows:

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

- (a) a 'sale on approval' if the goods are delivered primarily for use, and
- (b) a 'sale or return' if the goods are delivered primarily for resale.

Further, by delimiting the rights of buyers' creditors and dealing with the creation of apparent authority in a buyer and the means of avoiding this, this section also apportions 'title' rights so as to override any contrary result following from section 2-401, under which usually with delivery of goods title would have passed. Under section 2-326 goods held on approval are not subject to the claims of the buyer's creditors until acceptance. That is, title is treated as not having passed. This is similar to the result under the Act.

On examination of section 2-327 this view is found to be confirmed by subsection (1) which explicitly states that risk of loss and the title do not pass to the buyer until acceptance. Retention of the goods beyond a reasonable time is such an acceptance.³ And after due notice of election to return, the return is expressly at the seller's risk and expense except that a 'merchant' buyer must follow any reasonable instructions.⁴ The basic method of approach in this type of contract is seen to be very similar to that of the Act. In both cases a buyer has been put in possession of goods which he is not bound to retain primarily because a seller was prepared to permit this in order to enhance the possibility of a sale. Hence in the absence of negligence or wilful damage by the buyer it seems correct that the seller must take the risks of his speculation.

(ii) *Contract of Sale with Privilege of Return*

In this type of contract a significant difference in treatment reveals itself. Section 2-327(2) after dealing with the right to return the goods in whole or in part specifies that unless otherwise agreed the return is at the buyer's risk. The risk of loss under the general provisions would be the buyer's from the time the goods are in his possession at the latest and the *Official Comment* verifies this opinion in point 3:

In the case of a sale on approval the risk rests on the seller until acceptance of the goods by the buyer, while in a sale or return the risk remains throughout on the buyer.

² Vol. 2, No. 1 *Univ. of Tas. L. Rev.*, p. 24.

³ Section 2-327(1)(b).

⁴ Section 2-327(1)(c).

So in contradistinction to the Code provisions for a sale on approval and the Act provisions on each type of transaction here where goods are delivered, so far as the speculative or profit making aspect is concerned, the delivery is equally for the benefit of the buyer as the seller, and the profiteer holding the goods is prescribed to be the proper party to bear the risk of loss and this continues until actual re-delivery to the seller, and not merely until notification of intention to return in the case of sale on approval. To the writer this distinction is completely indefensible and reveals an inadequacy in the Act. In effect the Code distinguishes between a speculative purchaser in which case both seller and buyer are profiteers and risk goes with possession, and a *bona fide* purchaser in which case there is only one profiteer and until he secures a definite commitment as to purchase of his goods his speculative venture involves him in the risk of loss attendant thereon.

(iii) *A Contract of Sale Involving a 'Cost, Insurance, Freight' Clause*

The treatment of this matter will proceed with an exposition of the essential nature and elements of a C.I.F. contract at common law,⁵ in particular relation to passing of property and incidence of risk, followed by an examination of the comparative Codal provision in the light of the common law.

At common law a C.I.F. contract involves the seller in a duty to arrange delivery of the goods to the carrier, to contract for their delivery with the carrier, and to arrange insurance on the goods on behalf of the buyer at the seller's expense. It is then the seller's duty to forward the bill of lading or other delivery order, the policy of insurance and an invoice which identifies the goods to the buyer, as soon as reasonably possible after shipment.⁶ Against tender of these documents, which give the buyer the right to delivery or collection of insurance in lieu thereof, arises the buyer's duty to pay the price which is comprised of costs, insurance and freight. The essence of this type of contract for the sale of goods is delivery of documents and the property in the goods usually passes with delivery of the documents.⁷ If the price is to be paid by means of acceptance by the buyer of a bill of exchange drawn by the seller upon the buyer, section 24(3) provides that if the buyer does not honour the bill the property in the goods does not pass. In addition to the permissibility of a delivery order being substituted for a bill of lading, a certificate of insurance may also be substituted for a policy without negating the C.I.F. nature of the contract.⁸ Ordinarily, applying the rules of section 23 a C.I.F. contract for the sale of specific goods would pass the property

⁵ See *Smyth (Ross T.) & Co., Ltd. v. Bailey (T.D.), Son & Co.* [1949] 3 All E.R. 60 (H.L.) for general discussion.

⁶ *Johnson v. Taylor Brothers & Co., Ltd.* [1920] A.C. 144 (H.L.).

⁷ For discussion see *Arnhold Karnberg & Co. v. Blythe, Green, Jourdain & Co.* [1916] 1 K.B. 495 (C.A.); *Comptoir D'Achat et de Vente du Boerenbond Belge S.A. v. Luis de Ridder, Limitada (The Julia)*, [1949] A.C. 293 (H.L.).

⁸ *The Julia*, *supra*, n. 7.

not when the contract was made within rule 1, because the duty of the seller to deliver the goods to the carrier renders the contract a conditional one taking it out of rule 1, but when the condition was fulfilled and the goods placed on the carrier. Generally however, a term in the contract would further postpone the passing of title, *i.e.*, whenever a seller reserved the right of disposal of the goods until certain specified conditions are fulfilled.⁹ Section 24(1) expressly provides for this, stating that property does not pass until those conditions are fulfilled.

But for this contingency, which is in practice more the rule than the exception, risk of loss and title would pass together, for in a C.I.F. contract the incidence of risk of loss passes when the goods are shipped aboard the carrier.¹⁰ Thus generally risk of loss precedes passing of title and this occurrence is noted to be most unusual for no provision for risk of loss preceding passing of title appears in the Act; under section 2-509 dealing generally with risk of loss it was found that in all cases of separation of title and risk of loss the title preceded risk of loss so far as the direct application of statutory provisions governed the matter. The result in the case of the normal C.I.F. contract in which the seller has reserved a right of disposal is that if the goods are lost after shipment by the seller the buyer still remains liable to pay the price on tender of the requisite documents, for in effect under the C.I.F. contract he has bargained either for the goods or indemnity in lieu thereof. Accordingly if the goods are lost he can claim either against the carriers of the lost goods or on his insurance, whichever is appropriate. These results obtain even if at the time of tender of the document the seller knows that the goods have been lost.¹¹

Section 2-320(1) declares that the term 'C.I.F.' means that the price includes in a lump sum the cost of the goods, the insurance and the freight to a named destination. Subsection (2) then spells out explicitly the duties of the seller paralleling those enumerated above, stating that fulfilment of these duties is at the seller's 'own expense and risk'. This provision is not directly concerned with the risk of loss of the goods but merely with making explicit the precise delimitation of the seller's duties, and its provisions are not directly material to the discussion in hand. In fact no explicit provision is to be found in this section as to passing of either title or risk of loss, but in the lengthy *Official Comment*, point 1 states that the purposes of section 2-320 include making it clear that 'The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods.

⁹ *Smith v. Bailey*, *supra* n. 5, holding that a notice of appropriation under an ordinary C.I.F. contract is not unconditional.

¹⁰ *Biddell Brothers v. E. Clemens Horst Company* [1911] 1 K.B. 934, 956.

¹¹ See *Re Weis & Co. Ltd. v. Credit Colonial et Commercial, Antwerp* [1916] 1 K.B. 346; *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K.B. 198. Cf. section 2-320 *Official Comment*, para. 17.

Delivery to the carrier is delivery to the buyer for purposes of risk and "title". In paragraph 6 the comment further clarifies that any deficiency between the value of the usual marine insurance and the loss actually suffered is to be borne by the buyer. This restates the position at common law.¹² Again, as seen at common law, the Code provides that the buyer's duty to pay arises on tender of the required documents.¹³ Accordingly, in the absence of any alternative agreement by the parties, which according to point 14 of the *Official Comment* is not lightly to be found, an almost exact statutory correspondence exists in relation to C.I.F. contracts. On shipment title and risk pass and the buyer must bear the expense of loss of the goods, however, until tender by the seller of proper documents which will entitle the buyer to the insurable value of the lost goods, his risk is an empty one for he is under no duty to make payment until tender. Hence if such goods were lost and the seller failed to tender the documents, the effect would be that the loss would be the seller's for he would have no claim against the buyer for the price.

Where at common law, when a right of disposal is reserved, title does not pass until the happening of the specified event, usually delivery of the documents, it is clearly open to the parties in a Code jurisdiction to make a similar agreement with similar results. The result of this discussion of C.I.F. contracts is to find a statutory coincidence in treatment of title and risk of loss. Section 2-320(3) establishes that the term 'C. & F.' creates the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(iv) *A Contract of Sale Involving an F.O.B. Clause*

A seller of goods F.O.B., which means free on board, is bound at common law to deliver the goods on board ship at his own expense for carriage to the buyer. The ship or ships upon which the goods are to be loaded may be referred to by the contract or left to be designated by the buyer. The time at which shipment is to take place may be stated in the contract, left to the buyer or left to the seller.¹⁴ The actual contract of carriage is either made by the buyer himself or by the seller on his behalf. In the absence of provision as to this the seller is bound to deliver the goods on board the ship under a usual and reasonable contract of carriage,¹⁵ *prima facie*, regardless of any postponement of the passing of property and of whether the goods at the time are specific or unascertained the risk passes to the buyer on shipment.¹⁶ Similarly to the case of a C.I.F. contract the property in the goods will be presumed to pass simultaneously but this result

¹² See discussion in *Halsbury's Laws of England* (3rd Edn.), p. 169.

¹³ Section 2-320(4).

¹⁴ *Ian Stack, Ltd. v. Baker Borly, Ltd.* [1958] 2 Q.B. 130, 141, 142, in which a classic F.O.B. contract is distinguished from other F.O.B. contracts.

¹⁵ *Wimble Sons & Co. v. Rosenberg & Sons* [1913] 3 K.B. 743, 757 *per* Hamilton L.J.

¹⁶ *Inglis v. Stock* (1885) 10 App. Cas. 263 H.L.

will be negated by the seller evidencing an intention of not appropriating goods to the contract or of reserving a right of disposal until payment, as by having the goods deliverable not directly to the buyer but to the order of the seller. The parity between this and the usual C.I.F. contract is thus apparent.

For purposes of completeness a 'free alongside' contract (F.A.S.) which binds a seller to deliver the goods free alongside ship at his own expense and a 'free on rail' contract (F.O.R.) which binds the seller similarly to deliver the goods to the railway are noticed here only insofar as in each of these types of contract a specific place of delivery is appointed and this *prima facie* fixes the point and the time at which risk of loss and title pass from seller to buyer. The rationale of these types of contract, as also of an ex-ship contract in which risk and property pass only when the goods are delivered over the rail of the ship at the point of disembarkation, is that when a specific point is fixed for delivery this is sufficient to take the contract outside the ordinary rules for ascertaining intention as provided by the Act.

The Code deals with F.O.B. and F.A.S. terms in section 2-319 in conjunction with each other and provides for certain common situations.

In the case of F.O.B. contracts three essential situations are dealt with.

(a) *F.O.B. place of shipment.* In this case the seller must ship the goods in compliance with section 2-504. This section requires delivery of the goods into the possession of the carrier, the making of such contract of carriage as is reasonable in all the circumstances and procurement and tender to the buyer of such documents as are necessary or required to permit the buyer to obtain possession of the goods. Section 2-319(1)(a) provides that the expense and risk of putting the goods into the possession of the carrier must be borne by the seller. As noted above in relation to C.I.F. contracts,¹⁷ this provision does not explicitly deal with the question of the location or passing of risk of loss, but unlike section 2-320 there is no official comment to section 2-319 to clarify this point. The question is whether the risk is the buyer's or the seller's if the goods are lost through a cause totally unconnected with the delivery into the possession of the carrier. Section 2-509, which has already been fully discussed, deals with a contract which requires or authorises the seller to ship goods by carrier and, in the case of a contract which does not require delivery to a particular destination, provides that risk of loss passes to the buyer when the goods are duly delivered to the carrier. Although the situation under consideration does not fall literally within this description, the duty of delivery to the possession of the carrier flowing from section 2-504 appears to make section 2-509 applicable so as to pass the complete risk of loss of the goods at this time. Similarly section 2-401(2)(a) as discussed above in conjunction with section

¹⁷ *Supra*, p. 292.

2-509 will operate to pass title at the same time. The result then is that risk of loss and title, insofar as the operation of statutory provisions is not ousted by the special agreement, will both pass simultaneously when the goods are delivered to the carrier and not merely at the time of actual shipment on board as under the Act. As has been noted already in relation to section 2-401 and in relation to C.I.F. contracts, while a reservation of title in goods shipped operates to create only a security interest under the Code, reservation of title or a right of disposal equivalent thereto will effectively separate risk and title and postpone the passing of title under the Act.

(b) *F.O.B. place of destination.* In this case the seller must at his own expense and risk transport the goods to the destination and there tender delivery of them in the manner provided in section 2-503. On the basis of similar reasoning to that used in relation to a contract 'F.O.B. place of shipment' it would appear that the parallel general title and risk of loss provisions contained in section 2-401(2)(b) and section 2-509(1)(b) will operate to pass the incidents of ownership when the goods are duly tendered so as to enable the buyer to take delivery. The type of contract contemplated under the instant description does not fall within the common law description of an F.O.B. contract but is expressly provided for in the Act in section 34 which, dealing with a contract where a seller is authorised or required to send the goods to the buyer, states that delivery to the carrier is *prima facie* delivery to the buyer. Thus, as expressed in *Wait v. Baker*,¹⁸ the carrier becomes the agent of the vendee. Accordingly, the conditional element which would take the contract outside the normal operation of rule 1 of section 23 is fulfilled and the risk and title pass on delivery to the carrier. Thus the Code provision in deferring this passing until actual delivery or tender thereof tends to favour the buyer as to risk of loss and, reflect again the basic divergence between the two approaches, *i.e.*, regard to actual performance of the events contemplated by the contract rather than a metaphysical event at an arbitrary moment.

(c) *F.O.B. carrier.* That seller must at his own risk and expense load the goods on board conveyance is merely a factual refinement of the situation covered by an F.O.B. place of shipment contract. On the performance of this delivery, although no specific provision covers the question of passing of loss, again the fact that the loading is expressed to be at the seller's risk and that section 2-504(a) requires delivery into the possession of the carrier, makes it likely that a court would hold both title and loss to pass when the goods are loaded, and not merely when they pass into the possession of the carrier; although on one interpretation of section 2-509 and section 2-401 the latter could be held. Unless this were so the distinction between 'F.O.B. place of shipment' and 'F.O.B. carrier' would be lost. The

¹⁸ [1848] 2 Exch. 1, 7.

result then is that this type of contract is treated so as to give the same result as occurs at common law in the case of the classic F.O.B. contract as noted above.

Section 2-319(2) in its treatment of F.A.S. contracts reveals a similar method and result as noted above under the common law jurisdiction.

In summary it may be noted that although more express particularisation is to be found in the Code in relation to these contracts the results in each case are those which a common lawyer would have expected. It is thought that in contracts of such commercial frequency as these the statutory exposition of rights and duties provided in the Code is necessary and adequate.

(v) *No Arrival, No Sale and Casualty to Goods*

Under this final heading the comparison of title and risk provisions becomes complete.

At common law parties are free to contract as they please¹⁹ and may contract for the sale of goods 'on arrival' under which the contract is contingent for both parties on the arrival of the goods. Under the Code, section 2-324 regularises this type of contract, and as pointed out in paragraph 1 of the *Official Comment* leaves risk of loss on the seller but gives him an exemption from liability for non-delivery. At common law both title and risk would be unaffected until the arrival. What is the position in relation to title under the Code?

Section 2-324 makes no provision and therefore section 2-401 must be regarded, subsection 2 of which provides that title passes 'to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods'. The results are identical for both title and risk at common law and under the Code.

Section 2-324 further provides that in the event of failure of the goods to properly arrive the buyer may proceed as if there had been casualty to identified goods as provided in section 2-613.

This section is the Code equivalent of sections 11 and 12 of the Sale of Goods Act which were noticed above under the heading of 'Frustration'. Those two sections in the case of goods destroyed before contract, or after contract before risk passed, provided that the contract was avoided. Section 2-613 combines these two sections by merely dealing with the case where goods suffer casualty before the risk of loss passes, which of course is broad enough to embrace the case of goods destroyed before the contract is made, and the *Official Comment* in point 2 expressly confirms this view. If the loss is total, as under the Act, the contract is avoided. However, in the case of partial

¹⁹ *Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863) 32 L.J.Q.B. 322, 328.

loss or substantial deterioration, a case with which the Act does not deal, the Code permits the buyer to accept the goods at a duly reduced price or avoid the contract. If he accepts the goods he has no 'further rights' against the vendor.

This addition to the law is a worthwhile statement of a course of action which is always open to parties at common law in such circumstances by novation.²⁰ It has, however, turned the liberty of the buyer to enter into such an arrangement, if the seller consents, into a right irrespective of the seller's attitude. This is fully consistent with an attitude basic to all commerce that the greatest efficacy possible should be given to agreements even in events somewhat different from those originally envisaged by the parties. Apart from this provision there is no difference in these areas of the law of sales in the two jurisdictions.

VII

CONCLUSIONS

What general observations and principles may be distilled from this analysis of these two documents? Two outstanding divergencies are the separate Codal treatment of title and then risk of loss, and secondly the shifting of the time of vital importance from the moment of contractual agreement to the time of effective delivery of possession. As was seen, this shift has been applied not only to risk of loss but also, to the extent shown, to title itself. Furthermore, the commercial importance of insurance now receives statutory recognition and actually becomes determinative in relation to the distribution of risk of loss, not as a matter of insurance law but within the framework of the law of sale of goods itself. This 'commerciality' was also reflected in the attention paid to the character of the contracting parties as either merchants or non-merchants.

While the delictual quality of the risk of loss rules has on the whole been preserved by the treatment of risk involving breach, this has been tempered by the insurance provisions which leave risk on the 'innocent' party to the extent of his insurance cover for such risk.

In another area of this subject, a remedial rather than substantive difference is to be found. Under section 53 of the Act the seller's action for the price of goods cannot be maintained unless the property in the goods has passed to the seller. The basis for this provision may be seen in the type of reasoning found in *Laird v. Pim*²¹ where Baron Parke laid stress on the importance of the goods having been absolutely parted with and the seller's inability to sell them again. However, the section does except the case when the price is payable on a day certain irrespective of delivery, in which case an action for the

²⁰ In the absence of novation section 11 applies where only part of the goods perish. *Barrow, Lane & Ballard, Ltd. v. Phillip Phillips & Co.* [1929] 1 K.B. 574.

²¹ (1841) 7 M. & W. 474, 478.

price may be maintained although property in the goods has not passed. The Code alters this in section 2-709 by giving a seller the right to recover the price without regard to the passing of title or the fact of a fixed date for payment, of accepted or conforming goods or goods which the seller is unable after reasonable effort to resell or which the circumstances reasonably indicate will not be resellable. So here again the pragmatic approach of the Code is to be seen by a methodic test of duty to pay price. The overall result of the changes which have been noticed is a diminishment in importance of title, and the consequences, which were formerly title-dependent, are now separately and much more exhaustively treated. This change is succinctly phrased in the comment to section 2-101.

The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was passed as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

Furthermore, the actual method of treating title is different in each instrument for the Act refers all to intention of the parties and then provides rules for ascertaining intention by presumption, whereas the Code states rules of law. But apart from these subsidiary types of alteration the fundamental question to be asked in a comparative study of this nature is whether the Code approach to title will be effective in the present legal environment of America.

As might be expected, views differ on this question. One writer,²² referring to the 1950 draft, thought that Article 2 would be rather productive of litigation than beneficial to the reform of the law, while another²³ feels that many changes are so far reaching as to make questionable the enactment of Article 2 at all.

To the writer a certain basis for opposition to the 'devaluation' of title can be found in the fact that in such areas of the law as criminal law, bankruptcy and taxation, title is often all-important. But any such criticism is apparently met by the argument that the very purpose of section 2-401 was to meet these kinds of problems. In fact, Professor Hawkland has said:

The U.C.C. abandons 'lump concept thinking' in favour of 'narrow-issue thinking' . . . Consequently, the 'title' concept is relatively unimportant under the U.C.C. Under the U.C.C. the lawyer's search does not start with location of title. Rather his search should start with an analysis of the problem in terms of narrow issues, and an ascertainment of whether or not the U.C.C. contains specific provisions dealing with those issues. If it does contain specific provisions dealing with those issues the search ends at that point; if it does not contain specific provisions dealing with those issues, the 'title' concept must be employed. And, to this extent, the 'title' concept is still important.²⁴

²² Waite, 'The Proposed New Uniform Sales Act', 17 *Univ. of Chicago L. Rev.* 427 (1950).

²³ Williston, 'The Law of Sales in the Proposed Uniform Commercial Code', 63 *Harv. L. Rev.* 561 (1950).

²⁴ Hawkland, *Sales and Bulk Sales*, 91 (1963).

However, on the utility of the general concept of 'title' method of resolving sales problems the same writer says this:

The artificiality of presuming an intention for the parties, as to passage of title, when their actual, manifested intention is inconclusive or non-existent would not, of itself, justify a wholesale scrapping of the 'property approach' if it worked well in practice. But it has worked poorly, and, as a result of it, we have on our books a mass of conflicting cases which haunt the counsellor and offset almost every advantage the advocate can find in his client's favour.²⁵

When one considers the extensive drafting history behind the Code it seems almost improper to question the handiwork of such industry. In fact, under an Editorial Board with Professor Llewellyn as Chief Reporter, the actual drafting was in the hands of practising lawyers and teachers in law schools.

Three groups examined such drafts. The first group was the 'advisers' who were judges, lawyers and law teachers. The next group was the Council of the American Law Institute. The third group was either the Commercial Acts Section or the Property Acts Section of the Conference of Commissioners. In addition, in the final stages of the Code's history it was submitted to special subcommittees of review for each article.

The only conclusion which it seems proper to make against such a scholarly background is that the Code, representing the co-operative legal skill and knowledge of the world's most highly commercialised nation, is a bold legislative endeavour. Subject only to minor objections and qualifications, it appears to be a great legal achievement, but, as with all legal instruments its true worth and efficacy will only be seen from its actual implementation and use over the ensuing years of American development.

Whether it also will ultimately be seen to be the main *causa causans* of the conversion from common law to civilian techniques in America remains similarly shrouded in the uncertainties of the future. One thing is certain: its role in this field will not be inconsiderable.

²⁵ *Ibid.* 91.