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ON THE DIFFICULTIES OF CODIFYING COMMERCIAL LAW

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The principal objects of draftsmen of general commercial legislation—by which I mean legislation which is designed to clarify the law about business transactions rather than to change the habits of the business community—are to be accurate and not to be original. Their intention is to assure that if a given transaction involving commercial paper is initiated, it shall have a specified result; they attempt to state as matter of law the conclusion which the business community apart from statute and as matter of fact gives to the transaction in any case. But achievement of those modest goals is a task of considerable difficulty. The draftsman is called upon to build a coherent pattern out of the infinite variety of business customs and practices in an unstable and rapidly changing economy. The more detail and color he loads into his statute, the sooner it will begin to wither on the vine; if, on the other hand, he proceeds from generalization to abstraction, his statute will never be of much use or interest to anyone. The process demands a nice eye, a steady hand, and a sure judgment.

In this country, there has been extensive codification of commercial law over the past fifty years in the guise of Acts to Make Uniform the Laws of Several States—we have gone off the common law standard for good. It is now suggested that the old Uniform Acts are out-of-date and should be scrapped in favor of a streamlined Commercial Code.¹

There is apparently wide agreement that the law of sales, in particular, is hopelessly behind the times. Horse law and haystack law are uneasily tolerated in the complex business of mass production and national distribution. And yet that law was codified long after horses and haystacks ceased to be vital objects of commerce. If the 1900 codification failed to bring the law much closer to us than 1850, is there any reason to believe that the 1950 codification will get us much be-

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1. In detail, the Code prospectus provides for new acts on Negotiable Instruments, Sales, Investment Instruments, Letters of Credit, Foreign Remittances, Bank Collections, Documents of Title, and Secured Commercial Transactions.

yond 1900? It might even be argued, paradoxically, that in 1950 a Sales Act, vintage 1850, would be much less objectionable than a Sales Act, vintage 1900. At least a statute a hundred years out of date will have much less bite left in it and consequently will give freer rein to judicial interpretation than will a statute merely fifty years behind the times.

In order to appreciate why the Uniform Sales Act—that scholarly reconstruction of nineteenth century law—has proved inadequate, it is necessary to have some understanding of the type of business organization which the common law reflected, and of the ways in which technological change made many of the old assumptions obsolete. After a review of nineteenth century developments, we shall be in a position to consider how far the Revised Sales Act, which is the first publicly available specimen of the new codifiers' handiwork, takes into account the changes in business organization which its predecessor neglected. Finally, we will consider the likelihood of still further changes in the economic pattern coming to supersede the present facts of business life.

I

English commercial law did not begin its modern development until late in the eighteenth century. For a century before that, there had been something like an organized flight from the common law courts by the merchants. Deprived first of their own courts during the seventeenth century and then of recourse to the commercially trained judges of the Admiralty, merchants were unwilling to submit their disputes to the stiff-necked judges of King's Bench who had been known to hold that there was no such thing as a negotiable promissory note.

Not until the period of Lord Mansfield did commercial cases begin to come in any numbers to the courts and the slow meandering line of case by case decision did not lead to a comprehensive body of commercial law until well into the nineteenth century. The business organization revealed by this body of law is even today not completely irrelevant to our problems. The picture was one of a society in the period which followed its organization for capitalist enterprise but preceded most of the technological advances of the industrial revolution. The economy was organized for production, trading and distribution, but the manufacture was small-scale; distribution was mostly local with buyer and seller dealing face to face without the interposition of agents, and goods produced by craftsmen to individual order.

The interlocking set of legal rules which developed to clarify sales of chattel property was as much property law as it was sales law. This confusion of unlike concepts had results which were to become increasingly restrictive as techniques of production and distribution grew in complexity.

The most resistant of the concepts proved to be the theory of ownership and the right of the true owner to be protected against those who deal with his property without authority. If A owned a chattel and B took it away from him, A still owned it and could get it back—not only from B but from any one else who might have taken it from B, even if taken in good faith and relying on B's possession as evidence of ownership. Similarly, if A entrusted his chattel to a faithless servant who disposed of it to B contrary to instructions, A could get it back even though B wore on his candid brow the halo of good faith purchase for value. Or, if A preferred, he might treat the transaction as a sale and by his action in conversion receive back the value of the misappropriated chattel in lieu of the chattel itself.

Insofar as our early sales law was sales law at all—that is, law relating to the contractual transfer of property rather than a law of ownership—it focussed on a manual delivery of a simple object from seller to buyer against a simultaneous payment from buyer to seller. That pattern being set, the thrust of the law was to conform increasingly intricate transactions to the simple basic formula—to construe, interpret, and project in the light of this ideal bargain and sale. But the rights of the contracting parties were still described in property terms: the location of title was the key to unlock the most abstruse problems.

The common law of sales was reasonably adequate for the period during which it was developed. But unfortunately for the prestige of the law, the tempo of industrial change did not suddenly become static. Technological changes in the methods of production and distribution of goods have over the last hundred and fifty years rendered the sturdy framework of the common law of sales quaint and archaic.

Illustrative of this development is the process by which the basic assumptions of the law of warranty of quality were undermined. Those assumptions were that as between one object offered for sale and another of the same kind there are individual variations of quality; and that any buyer is as well placed as any seller to determine by casual inspection the worth of an object and consequently the price he should offer. Today, as manufactured goods have become increasingly complex and standardized, those assumptions remain valid only for a limited area of the economy and are hopelessly false as to others. Certainly the individual consumer is no longer capable of determining the quality of most of the things he buys, as necessities or luxuries, even where inspection before purchase is permitted. The retail dealer and the local or regional distributor are hardly better off: goods sold in sealed containers necessarily pass down the distribution chain to the consumer on faith; the man whose business is selling, not making, is no more competent than the ultimate consumer to determine the quality of a complex modern machine. Furthermore, as factory inspection methods improve, one object becomes, with increasing unlikelihood of

individual variance, like any other, and the sale is made on the manufacturer's, or the dealer's, general reputation.

The old assumptions still have a limited validity when applied to sales to manufacturers of their raw materials, semi-finished goods or finished components. We may assume that many transactions of this type are carried out between informed professionals, able to protect their own interests. Even at this level, however, the precision of the laboratory has to a notable degree supplanted the rough and ready bargain and sale contemplated by warranty law. It may be that, paradoxically, that body of law, manifestly inadequate to protect the consumer in a world he never made, has become unduly severe in its operation against sellers who dispose of their product to professionals more than able to take care of themselves without the haphazard aid of the warranty law.

The techniques of mass production had other curious effects on the body of sales law. The common law of sales, in its relation to the manufacture of goods, contemplated Buyer coming to Seller's shop and requesting an object to be made for him. Seller accepted the order, made the object and in due course delivered it to Buyer against cash payment. This situation differed from the sale of finished goods in that the process of manufacture continued over a period of time; it was therefore necessary to declare the rights of the parties in the event of untoward incident during that period. The principal problems were of accidental destruction of the goods and repudiation of the contract. Naturally enough recourse was had to property law: at some point of time the goods became the Buyer's. That point of time was fixed at the stage where the goods, having been completed, were set aside for Buyer with his consent—the magic word was appropriation. If Seller repudiated before appropriation, Buyer had a contract action in damages; after appropriation, he had, on tender of the price, a possessory action based on his ownership of the goods; when Seller had resold the goods, the value of Buyer's action was lessened by the inroads of the doctrine of good faith purchase for value. If Buyer repudiated before appropriation, Seller's remedy was in damages; if the goods were in course of manufacture, the idea of minimization of damages led to the conclusion that Seller had no right to complete the manufacture; if he did, his maximum damages were calculated nevertheless as of the point reached at repudiation. If Buyer repudiated after appropriation, Seller's action was not for damages but for price. As to destruction of the goods: the risk, before appropriation, was the Seller's, but the doctrine of impossibility operated to void the contract; Seller lost his profit but escaped liability in damages. After appropriation, Buyer bore the risk and remained liable for the full price.

Mass production cuts the factual base from beneath the foregoing analysis. Now, goods are produced according to a prearranged schedule;

except for output contracts, no allocation of particular goods to particular orders will be made until after the finished goods reach the shipping room. Furthermore, the arrangements under which a manufacturer disposes of his goods will be continuing ones: forward contracts covering the buyer's estimated requirements for the next year with provision for instalment deliveries. Production proceeds under an elaborate contractual mechanism: the simple put and take ideas of property law no longer, in the event of something going wrong, work out to an equitable or even a reasonable solution. The idea that a manufacturer, on receiving a cancellation, should be under a fancied duty to scrap work in process to the amount of the cancellation is farcical. The further idea that a business enterprise, engaged in marketing goods, should under a particular metaphysical constellation—viz: the goods have been appropriated, title has passed—have the option to remove goods from commerce and force them on a buyer who has no use for them by suing for the price instead of for damages is almost as bad.² Where the seller repudiates, the results of the application of the old rules are not quite so absurd: if the buyer follows reasonable commercial practice and covers, his damage action will compensate him for his loss. The buyer's theoretically available possessory remedies, after appropriation, have atrophied: if the seller has the goods but chooses not to deliver them, there will be, in the normal course, no appropriation because that is within the seller's control. There are, however, fugitive, perhaps misleading, indications that the courts are beginning to look at this situation through specific performance glasses. If the seller does not have the goods, a possessory action is a whited sepulchre anyway. If the seller's failure to deliver is occasioned by insolvency and the appointment of a creditor's representative, the buyer will find it hard at best to establish a claim as of right to undelivered goods; if he has paid in advance, he will be joyfully welcomed into the brotherhood of unsecured creditors.

Changes in the methods of distribution of goods had effects that were, if anything, even more far-reaching than the changes in the kind of goods sold and in the manner of their manufacture. The old law contemplated local distribution and direct sale from producer to consumer without benefit of agent; therefore, a buyer who bought from an agent bought at peril subject to the rights of the true owner. Increasing productive capacity demanded an ever-widening area of distribution and rail transportation made the wider distribution possible. As the system of local distribution disappeared, the role of the agent, the intermediate handler, became more important. It became a commercial necessity to

2. Reasonable men differ on this point as on others. For a different evaluation of the effect of the traditional rules to measure damages, see the comprehensive Comment, *Remedies for Total Breach of Contract under the Uniform Revised Sales Act*, *infra* p. 1360.

allow purchase from the agent free of underlying claims of ownership—to give to goods in commerce some of the classical attributes of negotiable paper.

The 19th century Factor's Acts were the first attempts to meet the needs of the expanding distribution system. These Acts protected purchasers from certain types of agents in situations where the true owner of goods had "entrusted" them to the agent "for sale." No protection was given where the agent was not a "factor," or when the owner had not "entrusted," or where there had been an entrusting but not for sale. More was needed.

What followed was a fascinating exercise in legal ingenuity. The attempt to warp the old property law in such a way that goods could be distributed nationally was abandoned, and an independent parallel body of law based on contract was invented. Goods in transit or in storage were represented by pieces of paper negotiable in form—bills of lading or warehouse receipts. Whoever had possession of the piece of paper, however his possession was acquired, could sell the goods free and clear. Contrariwise, no one not in possession of the document could deal in the goods so long as the document remained outstanding.³ The development of the negotiable document of title made it possible to by-pass entirely the restrictions of the old law. Note however that the admirable whimsy of dealing with goods as if they were negotiable was law of, by and for merchants exclusively: goods moved from plant to distributor on order documents; from distributor to retailer the order document was available if needed. What the consumer bought from the retailer, however, was an ordinary non-negotiable chattel to which he got good title if indeed the retailer had title to give.

Rapid economic progress gradually left us with a body of law which was in fact applicable only to what had become commercially the least important segment, although that law in theory was to be applied generally. Parts of the old law merely became irrelevant in changed circumstances; for example, the once hotly debated issues of risk of loss and passage of title, despite the conventional importance with which they are still treated in law school course and textbook, are of small moment. The risk question may still be vital to the farmer whose crop may be destroyed by a hail storm; but crop insurance provides better protection than the rule of *Tarling v. Baxter*.⁴ So far as manufacturers with goods in storage or in shipment are concerned, they may choose between insuring the goods or including the occasional loss as an element of price.

3. The text states the end result of a fairly long process of evolution. At first the document could be "duly" negotiated only by one either lawfully in possession or to whom possession had been "entrusted" by the owner. Contrast the provisions of original Sections 32 and 38 of the Uniform Sales Act with the later amendments to those Sections.

4. See discussion *infra*, p. 1352.

As the national market replaced the local market, so did mass production replace the handiwork of the individual artisan. In disposing of the factory's product, the forward contract largely replaced dickering for the present sale of identified goods. With increasing frequency the forward contract itself became a long-term arrangement, an annual contract to take the factory's output or supply the buyer's requirements. The stepchild of the common law, the credit sale, came into its own, and the simple sale for cash no longer had much place except at the far end of the distribution chain when the consumer bought his loaf of bread.

We have sketched in the foregoing pages some of the discrepancies which have grown up, since the early nineteenth century formulation of our law of sales, between business practice and legal theory about business practice. Thus far we have talked of common law and not of statute. Except incidentally, as for example in the Factors' Acts, sales law remained judge-made law throughout the century; but after the first great period of creation, there was little development apart from the fields of negotiable documents of title and, to some extent, warranty law.

II

It is entirely possible that, had the judicial process been allowed to continue, sales law would have been readjusted to the facts of economic life in a fresh burst of legal creativeness. The success of our courts in the last generation in scrapping tort law which proved unsuited to an industrialized society suggests what the same courts might have done on the commercial side. Judicial discretion was, however, replaced by a codifying statute. The Uniform Sales Act, promulgated in 1906, was shortly adopted in the principal commercial states and in time in all but a few of the states.

From our retrospective vantage point, the changes which rendered the common law of sales obsolete are easy to see. Half a century ago, their form and nature were considerably more obscure. As a result, the Uniform Sales Act largely reproduced the outdated patterns and the simple generalizations of a hundred years earlier.

The Uniform Sales Act starts with the idea of a single transaction, a sale, a metaphysical act which, just as a point is assumed to have no extension in space, has no duration in time. There is a brooding emphasis on the passage of title, of "the property in the goods"—the two expressions are used interchangeably—which underlies the failure to take any distinction between professionals and non-professionals, informed merchant and uninformed customer. Seller and Buyer remain bloodless abstractions. Given that fundamental bias, problems of a continuing contractual performance over a period of time are necessarily slighted; that is not to say that such problems are ignored but

rather than the basic conception in the draftsman's mind made it nearly impossible that such problems should receive the schematic, coherent treatment which their commercial importance merited.

The Act's concentration on the transfer of ownership of a single identified chattel as the typical transaction caused many of its legal presumptions to be diametrically opposed to commercial practice. For example, the Act lays down the rule that "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. . . ." That is to say, in the absence of express stipulation for credit, all sales are to be deemed for cash. This no doubt corresponds to the understanding of consumers buying goods at retail. With respect to the great majority of commercial contracts, however, the presumption in fact seems to run the other way: apart from documentary contracts—cash against documents—delivery is understood to be on the credit terms customary in the trade, and every trade has its customary terms. Another example is the Act's provision that apart from agreement or trade usage to the contrary, "the place of delivery is the seller's place of business if he have one, and if not his residence." Once again this is an accurate statement of the typical bargain only in the cash and carry retail trade; elsewhere the underlying presumption is no doubt that the goods will be delivered to the buyer or at his order. A third example is the Act's predilection in favor of the single, indivisible non-severable contract of sale. Despite the inclusion of a liberal definition of "divisible contract," the Act proceeds on the theory that most contracts are indivisible wholes. This is reasonable if you think of most contracts as concerning unique chattels, unreasonable if you think principally of contracts calling for a large number of like units, typically in more than one delivery. Under the Act's rather wooden provisions it took a good deal of judicial ingenuity to work out, on the one hand, the buyer's right of partial rescission when some of the goods delivered were up to standard and some were not, and, on the other hand, the seller's right to proceed with the balance of a contract despite a trivial defect in an early instalment. Finally, the Act codified, with certain exceptions, the rule of protection of the true owner rather than of the good faith purchaser for value. Although the rule had considerably relaxed it remained entirely possible under the Uniform Act for goods to be exposed for sale with the consent of the owner, and, even though sold in ordinary course to a good faith purchaser, pass subject to equities of ownership. The bias, once again, was fundamentally non-or anti-commercial.

It is not to be gainsaid, however, that the Act was drafted with industry and skill and that some of its provisions achieved a needed adjustment of theory to practice. The warranty provisions represented a notable advance and broke cleanly with the more rigid common law restrictions: the abrogation of the old rule that acceptance of non-con-

forming goods bars an action for breach of warranty was in particular a boon to commerce. We are apt to forget just how good the warranty sections of the Act were since that branch of sales law has continued its development with almost no regard for the restrictive provisions of the Act. The handling of documents of title (which had been ignored in the English Sale of Goods Act of a few years earlier) was also markedly successful. It will be noted that the best parts of the act dealt with the branches of the law which had not been frozen in the pattern of the early period: warranty, which had continued its case-law development, and documents of title, which were a later invention.

Despite its good features, the effect of the Act as a whole was to perpetuate the split between the law of sales and business practice, with the inevitable result that the law came to be less and less a living thing. The surprising growth of commercial arbitration over the past generation and the corresponding decrease in sales litigation (which now comes in largely through the bankruptcy courts) may be attributed in great part to the need of business to find tribunals which would not apply obsolete rules of law to present-day disputes. The flight from the law can also be noted in the development of elaborate form contracts; since the presumptions of the statute so frequently run counter to business understanding, it has become necessary to nail down, in every possible contingency, the fact that there has been "agreement otherwise" between the parties.

An obsolete general statute which remains on the books acts as a brake or a drag but can never entirely block forward movement. General language is not self-executing; fortunately, it is subject to construction. The better courts have done a surprisingly ingenious job of bending and warping the Act to fit the long-term arrangements in respect to which the provisions of the Act are sadly deficient. In a sense, the task of the courts in writing sound commercial law has been simplified by the Act's rather conventional coverage: the draftsman treated only what was understood to be within the traditional body of sales law. As a result, such matters as documentary contracts and letters of credit (which were just beginning to come into extensive use in this country when the Act was drafted) were left uncodified and have since enjoyed a case-law development which has been on the whole exceedingly satisfactory.

Although it is quite easy to point out where the Sales Act went wrong, it does not follow that we can do better today, at least from the view point of fifty years in the future. To underline the difficulties of accurately blueprinting what is going on around us, let alone what is about to happen, we cannot do better than pause to consider the unhappy fate of a younger member of the Uniform family, the Conditional Sales Act (1918).

The conditional sale originated as a useful device which allowed

sellers to deliver goods in advance of payment without relinquishing control. In the latter part of the nineteenth century, its history was undistinguished. Toward the end of the century, it did have a short flurry in the financing of railroad rolling stock but was quickly dropped in favor of the equipment trust. Generally it was used in disposing of certain types of goods—first furniture, later sewing machines—to consumers, but never in any significant volume either in dollar amount or in number of transactions. There could have been no reason to believe, when the Conditional Sales Act was drafted, that the conditional sale was not a stable, well-understood legal form, ripe for codification.

Between 1900 and 1910 several enterprisers, with available capital and an inquiring turn of mind, hit on the idea that money could be made by financing the instalment sale of durable goods to consumers on a scale that had never been attempted. The banks were entirely uninterested in backing the venture—thus the finance companies were born. Even the ingenious gentlemen who first began operating in this twilight zone between banking and usury could hardly have anticipated that the automobile would so quickly become a fixture in the American way of life and that the miraculously magnified market for consumer finance would find their companies with going organizations, established operating techniques and increasing capital, just at the moment when there was a killing to be made.

The finance companies, so far as legal form went, used title retention devices: conditional sale or its twin the bailment lease. In jurisdictions where neither was recognized, the chattel mortgage was put to work. There was nothing revolutionary about the forms which the finance company lawyers designed; the fine print expanded to settle every known contingency not unfavorably to the finance company, but the framework was standard. The only novel feature was that the contract was invariably assigned by the dealer to the finance company. As a result, the conditional sale as developed for use in consumer instalment selling was a device which, like the bank letter of credit, straddled over three distinct sets of contractual relationships: the buyer-dealer contract, the dealer-finance company contract and the finance company-buyer contract. The old fashioned seller-buyer contract, which might be occasionally assigned or pledged to secure a bank loan, was revolutionized by the introduction of the inevitable assignee.

The draftsman of a commercial act is supposed to be the recorder of established usage; he cannot be at his best when the subject matter he is working on persists in taking on new shapes and forms. The Conditional Sales Act entirely ignored the use of the assigned contract in financing retail instalment sales. Aside from defining "seller" to include "any legal successor in interest" and suggesting, in the commentary to the Act, that the seller's assignee stood in the shoes of the

seller,⁵ the Act was blank on the problems raised by the interposition of a third-party financing agent into what apparently was regarded as essentially a two-party arrangement.

The problems raised and not solved by the Act were both legal and economic or social. On the legal side: Can a buyer, having a breach of warranty claim against the dealer set off the amount of the claim against the unpaid balance due the finance company? Can the buyer effectively waive against the finance company some or all of the defenses or claims he may have against the dealer? Can the buyer after assignment make any adjustments with the dealer which will bind the finance company? Other unanswered problems had a wider social importance. Should there be a requirement of full disclosure to the buyer of the terms of the contract or should the proliferating fine print be allowed to continue its cancerous growth unchecked? Should there be any limitation placed, under the usury laws or otherwise, on the various items that went into the "time price," finance, service or carrying charge? Should the finance company be allowed to make a profit on the insurance that went with the car or other chattel? Should kick-backs from finance company to dealer or tie-in arrangements between manufacturer and finance company which squeeze the dealer be regulated or prohibited?

Such were a few of the questions to which the Uniform Conditional Sales Act provided no answer. Nor indeed could it have been expected to give the answers, since the questions themselves, while the Act was being drafted, had not yet been asked.

III

There has grown up over the years an extensive literature calling for the amendment or revision of the earlier Uniform Acts, particularly the Negotiable Instruments Law and the Sales Act. In 1940, the American Law Institute and the National Conference of Commissioners on Uniform State Law jointly undertook the considerable project of preparing a comprehensive Commercial Code which would supplant the various commercial acts already in the field and cover as well much matter which had previously escaped codification. Although the Code is now nearing completion, the only Article which has been made publicly available, albeit in tentative form, is the Revised Sales Act. It is not unreasonable to consider the Revised Act as indicative of the approach of the draftsmen of the Code as a whole.

In the Revised Sales Act, a notable effort has been made to conform the law to current business practice. We may indicate how thoroughly sales law has been cut loose from its common law moorings by running one of the classical cases through the applicable hoops of the new act.

5. See 2A UNIFORM LAWS ANNOTATED § 40.

Every law student is familiar with the unhappy events catalogued in the great case of *Tarling v. Baxter*.⁶ On the 4th of January, 1825, one Tarling entered into an agreement to buy a stack of hay from Baxter; the hay was already cut and standing in a field belonging to Baxter's brother. The bought and sold notes signed by the parties provided for payment on the 4th of February. Baxter had requested Tarling to "give him a bill" for the purchase price, but Tarling, in the language of the opinion, "rather objected." Nevertheless a few days later Tarling did accept such a bill, presented to him by still another of the Baxter brothers. The bill, dated January 4 and payable at one month from date, came into the hands of a third party, to whom Tarling paid it when due. Before then, however, the hay had been accidentally destroyed by fire. Both parties were in agreement that Tarling would not have been allowed to remove the hay before February 4, due day of the note. The action was by Tarling against Baxter to recover back the amount of the note as money paid to the defendant's use, the defendant claiming a set-off for the purchase price of the hay.

It was clear to the court, and equally clear to the draftsmen of the Uniform Act nearly a century later, that the proper rule of law was as follows: Where there is an unconditional contract to sell specific goods in a deliverable state, the property (and consequently the risk) in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed. Judgment absolute, therefore, for Baxter, the defendant seller. The bland and certain pronouncements of the judges, unsupported by any ghost of authority, have stood for a hundred years as the very fountainhead of the law of sales.

The Revised Sales Act treats of the matter in Section 79: *Risk of Loss in the Absence of Breach*. Since subsection 1 is directed only to cases where "the contract requires or authorizes the seller to ship the goods," our case must fall within subsection 2 which provides:

"In a case not within subsection 1 if the seller is a merchant the risk of loss passes to the buyer on his receipt of the goods; otherwise the risk passes to him on tender of delivery."

We note first that where the common law and the Uniform Act had one rule, the Revised Act sets up two: one for a merchant seller, one for a non-merchant seller—the merchant seller to bear the risk until physical delivery of the goods, the non-merchant until the goods have been tendered, tender being elsewhere (§ 73(1)) defined as putting the goods "at the buyer's disposition." In view of the agreement between the parties that the haystack was not to be at Tarling's disposition

6. 6 B. & C. 360 (K.B. 1827).

until February 4, it seems clear that the decision on the facts of *Tarling v. Baxter* must be reversed, whether the seller was a "merchant" or not. It is instructive to note, however, that "merchant" receives a surprisingly expansive definition in the Revised Act (§ 7(1)): "a person who by his occupation holds himself out as having the knowledge or skill peculiar to the practices or goods involved in the transaction or in any particular phase of it." Baxter, therefore, whether he was a farmer or a commission man dealing in hay, would qualify as a "merchant" and thus, apart from specific agreement otherwise, bear the risk as long as the goods remained in his possession.

The foregoing discussion suggests that the Revised Act has broken with its predecessor not only by selecting entirely different presumptions of law but also by differentiating the commercial from the non-commercial sale.

We may consider in some detail one other type of case, the forward contract of sale in which the buyer, by payment in advance, finances the seller's operation. A good recent example is *Ely & Walker Dry Goods Co. v. Adams Mfg. Co., Inc.*⁷ Here the buyer ordered several thousand pieces of gnat net of specified width, length and color. Payment in full was made in January, 1937 and various shipments were made thereafter at the buyer's order until May when, something more than a third of the order remaining undelivered, the seller was placed in reorganization and no further deliveries were made. Netting of the proper color to fill the undelivered balance of the order had been manufactured and was in the seller's plant on the date the reorganization proceeding was begun. None of this netting, however, had been segregated for the buyer and much of it had not been cut into the required length and width. Reorganization of the seller was unsuccessful and liquidation was ordered. The buyer, appearing in the liquidation proceedings, sought either to reclaim, or to establish a lien for the value of, netting sufficient to make up the undelivered balance of its order for which it had already paid. The buyer's petition was dismissed on the ground that there had been no "unconditional appropriation" of goods "in a deliverable state" to the contract and that therefore the buyer could have no preferred claim in the liquidation. Under the statute and in the light of existing doctrine the court's ruling was perfectly sound; even if "appropriation" had been found, the buyer would still have faced the hurdle of proving that the retention of goods sold by the seller was not fraudulent as to creditors. The holding indicates the very slight degree of protection which a financing buyer can claim under present law on seller's insolvency under a contract for future delivery.

One of the most interesting provisions of the Revised Act (§ 54) purports to reverse this long established doctrine. A mercantile buyer who

7. 105 F. 2d 906 (2d Cir. 1939).

has made enabling advances to aid the seller in carrying out a particular production operation "acquires"—apparently without having specifically contracted therefor—a lien on "any goods, which have become identified as intended for the contract even though they have not been appropriated or reached a state obligating the buyer to take delivery." Furthermore, Section 55(1) of the Act provides that retention for a reasonable time of goods sold by a merchant-seller is not fraudulent as to creditors. The buyer's lien is, however, subordinated to purchasers including mortgagees and pledgees, in current course.

Enough has been said to make clear that problems incident to the performance of mercantile or commercial contracts are spotlighted in the Revised Act. In this respect, Sections 99 through 102, *Insecurity, Instalments and Repudiation*, are particularly interesting. The Uniform Act had included sketchy provisions on instalment delivery contracts so arbitrary and non-commercial that the better courts had to sweat through to reasonable decisions. In contrast, the Revised Act sets up well thought out and flexible standards of performance. The key thought is that, in non-documentary, long-term contracts, minor non-conformity should not be ground for rejection or repudiation provided that the substantial value of the entire instalment or contract is not impaired and that there is adequate assurance in fact that defects will be cured and that future performance will be proper.

The Sales Article of the Commercial Code has also gone considerably beyond the Uniform Act in the protection accorded buyers from merchants: the good faith purchaser for value from a merchant-seller takes clear title to any goods which the true owner has delivered to the seller, on whatever condition (§ 57(2)(c)). Thus the commercial sale is protected, even in circumstances where the casual, non-commercial transaction may be stricken down. Twin sets of remedies, possessory and non-possessory, which have long been a distinguishing feature of sales law, have been abandoned in favor of a single set, phrased in terms of contract rather than property law. In the warranty sections, the Revised Act has followed the trend of the case law under the Uniform Act in broadening the scope of seller's liability: the new provisions seem particularly successful in the treatment of the vital problem, untouched by the Uniform Act, of how far disclaimers of warranty should be allowed to operate. Finally, as might be expected, the Revised Act goes into considerably more detail than did the Uniform Act in its treatment of the document of title and the documentary contract.

IV

It is apparent that from the point of view adopted in this paper the Revised Sales Act is an impressive piece of work, both in substance and form. Nevertheless, there are several *caveats* which, with great

respect and deference to the chief artisans of the Code, I shall set down.

First, it is a matter of vital importance that the Code as a whole be kept in terms of such generality as to allow an easy and unstrained application of its provisions to new patterns of business behavior. Commercial codification cannot successfully overparticularize: the penalty for being too precise is that the statute will have to keep coming in for repairs (and amendment is a costly, cumbersome and unsatisfactory process) or else become a dead-letter.

The Revised Sales Act, as printed in the second edition of Bogert's *Cases on Sales*, runs to 135 sections and 47 pages. The Uniform Sales Act has 79 sections and, in the same edition, 27 pages. The count on the English Sale of Goods Act is 64 sections and 17 pages. By way of extreme contrast, the provisions of the French Code of 1804 relating to the law of sales run to a scant 40 sections and printed in the same format would hardly take up 10 pages. Indeed, the French provisions are so fragmentary and of such extreme generality that it is safe to say that, in substance although not in form, sales law has been on an uncodified, case-law footing in France for at least the past fifty years.

Not only does the Revised Act have just short of twice the bulk of the Uniform Act; the new act (§ 1(2)) invites the courts to consult the Official Comments "to determine the underlying reasons, purposes and policies" of the Act and as a guide to its construction and application. This provision apparently gives the Comments an odd sort of quasi-statutory status. Although they are not yet available in final form, a number of Comments on particular sections have been printed to accompany tentative drafts of the Act. Those that have appeared are sometimes learned, sometimes brilliant, and not infrequently run to the length of law review articles. They are extremely specific in explaining what the draftsman had in mind, and in stating that the holdings in cases *A*, *B*, *C*, and *D* have been codified, while the holdings in other named cases have been rejected.

The decision to give an official quasi-statutory status to the Comments is unfortunate. The statutory draftsman, like the common law dog, is entitled to only one bite. Statutes should not come equipped with an elaborate law-review apparatus for reiterating in footnotes what has (or should have) been already set out in the text. On the basis of the Comments that have appeared, it would not be difficult to cite examples where the draftsman has wisely left a breathing space, so to say, in the text to allow a free case-law development and then come back in the Comment to nail the coffin lid down tightly.

Quite apart from the doubtful use of Official Comments, the principal reproach that may be brought against the Revised Sales Act itself is its proneness to indulge in excessive detail. In a sense this is the defect of the Act's greatest single virtue: a keen awareness of the importance of reflecting actual business practice. The same flair that has

enabled the draftsman to produce what must be one of the finest drafts in the history of commercial legislation may also be responsible for his Flemish tendency to draw in every leaf on every tree. In a sense, the fondness for the hypothetical case which is bred in the bone of lawyers brought up in a case-method teaching system may be partly responsible. A drafting conference typically proceeds by testing proposed language against the widest variety of hypothetical situations which those present can imagine. When a hole is discovered, the instinctive reaction is to plug it with new language. In the process an initially simple statement may take on Byzantine convolutions.

Furthermore, the Sales Act is but one Article of the proposed Code. Multiply its fifty pages by five, six or seven and we end up with several hundred pages—a thousand or more separate sections—of tightly written text whose various parts are interrelated in a by no means simple manner. With all the good will and industry in the world, it will be years before the bench and bar have mastered the intricacies and explored the implications of so massive a statute. If the structure does grow to such grotesque proportions, a very probable result would be an increase in litigation and legal uncertainty for a considerable period of time.

Good draftsmen's early drafts will customarily be more complicated than the final product. Simplicity takes time and sweat. Although the main lines of policy are presumably fixed, the published version of the Sales Act is still marked tentative. When the process of drafting has been completed on the balance of the Code, the time will be appropriate for going to work on the entire corpus with a blue pencil.

Second, the times may well be out of joint for the production of a Commercial Code.

We have noted earlier how technological change cracked and twisted the traditional structure of sales law and how, in the case of the conditional sale, a sudden and unexpected mutation in what had been thought to be a stable legal form left a codifying statute obsolete before enactment.

In the present post-war period, following ten years of unprecedented expansion of the national productive capacity, industrial and commercial practices are fluid and subject to sudden change. It is not hard to demonstrate that change is taking place and that the rate of change is accelerating, but when, at what point and in what form the economy will achieve relative stability, if there is indeed such a prospect at all, is unpredictable. It is, however, possible to lay hold of a few straws in the wind.

The promising development of air transportation has notable implications in the field of documentary contracts. Use of negotiable documents of title in long distance shipments has been predicated on the fact that the documents will in normal course reach destination con-

siderably ahead of the goods. Thus there has developed that well settled body of documentary law according to which payment or rejection is made on the documents alone without reference to the goods. Tender of defective documents is a default even though conforming goods underlie the documents, while tender of proper documents entitles the seller to payment even though he has shipped non-conforming goods. The time-gap between receipt of documents and arrival of the goods has also made possible the practice of selling and reselling the goods in transit by transfers of the documents, without the added expense of warehousing. None of this body of law fits into the pattern of rapid transportation of goods by air; indeed, the very use of the order bill of lading in air (as in truck) transportation is rendered nearly impossible by the carriers' present lack of terminal warehouse facilities. It is easy to predict that as air freight gropes its way out of its experimental stage, new legal patterns for controlling and financing goods in transit will develop; it is less easy to say what the new patterns will be. One interesting suggestion, designed to reintroduce the time gap, is to allow the transmission, before shipment, of copies of the documents by radio or television.

Industrial finance, particularly in the acquisition of short term working capital, has greatly changed during the past ten years; it is difficult to say whether the change was a temporary war-production phenomenon or the beginning of a permanent shift in our financing habits. Nevertheless, the borrowing of capital against the security of accounts receivable, chattel paper and tangible inventory, both by manufacturers and distributors, has increased in scale and may even be supplanting to some extent the standard methods of acquiring long term capital by bond and stock issue. Accounts receivable financing in particular, which for many years was carried on in the business equivalent of the red light district, has turned respectable. Here, as in the related field of consumer finance, the banks are actively competing with the finance companies for business which not so long ago they disdained. Meanwhile, the finance companies continue to break new ground by profitably lending money on the security of supposedly non-bankable assets.

It is entirely possible that our distribution system is also undergoing significant change. Cooperative associations of producers, retailers, and to a lesser extent of consumers, are increasingly cutting the middleman's profit from the cost of marketing. National and regional mail order houses and chain stores have the same effect. The integrated operation, with centralized control which may extend from the extraction of raw materials to the retail distribution of finished products, may become typical of the next stage of industrial organization. If the independent agent, whose appearance led to the shattering and eventual abandonment of property law concepts of ownership, in his turn dis-

appears, how much of our present "mercantile" law will still be relevant in a fundamentally altered context?

Our list of straws in the wind could be almost indefinitely multiplied. The startling increase in the range and complexity of goods and services put on the market will undoubtedly lead to far-reaching changes in our thinking about seller's obligations just as did the equally dramatic but less rapid advances of the 19th century. What, for one example, will be the long-term effect of prefabricated housing on the law of construction contracts? The possible uses of atomic energy are unknown but will presumably be more than routine. Increasing segments of industry are coming under direct government subsidy—aircraft and artificial rubber, for example—and since 1929 and particularly during the war, government guarantees and direct government lending have played an important role in supplementing or supplanting private sources of capital.

The draftsmen of the Commercial Code do not have a reliable crystal ball. It does little good to counsel them to be alert to detect change, since the direction of change is unknowable except from a vantage point safely in the future. The only lesson that can be drawn from the fact that society is in flux is the one already made: keep the Code, in its final form, as general, as unspecific as possible. Let the strategic strong points be as widely spaced as they can be and still defend the essential territory.

Thirdly and lastly, we should consider the present and the probable future limits of government intervention in and regulation of business agreement.

American lawyers have traditionally thought of private commercial law as being in one watertight compartment and public control of business in another. The separation of two halves of an indivisible whole has never been logically sound; it is rapidly becoming manifestly untenable. Consider for example the effects of the recent basing-point decision on pricing policies, the distribution of goods and, no doubt, on the location of new industry. Consider the increasing role of the Federal Government in business activity—as purchaser, producer, part owner, guarantor or bank, and regulator. Consider, in the particular field of our discussion, the increasing number of states which have recently established agencies to supervise the activities of companies engaged in financing consumer instalment sales. Although the political weather is doubtful, nothing is less likely than that the future will see a protracted period of unregulated private agreement.

Here again there is little the draftsman can do except exercise caution and walk warily. What is certain is that a 19th century *laissez-faire* code, or a code drafted with such an underlying bias, will be far from adequate in an economy which has scrapped *laissez-faire* principles.

We must not delude ourselves as to the benefits which can be derived from a general codification, however admirably executed. Experience with code law has demonstrated that it is impossible accurately to assess or project the effects of contemporary change. And the accelerating rate of change in our own day makes the enterprise incomparably more hazardous than it was fifty years ago. In the field of commercial activity, in the area in which private agreement still operates, that code is best, in a sense, which codifies least.

Even in a civil-law jurisdiction like France, whose commercial law is nominally codified, the code provisions have been allowed to moulder unamended for a hundred and fifty years while a flourishing case law, *jurisprudence*, has gradually taken over. There has as yet been no move in England to replace its commercial acts, ten or twenty years older than ours, with streamlined models. As statutes pass quietly out of date without disappearing from the books, the effect is to reintroduce a common law case system, which is perhaps peculiarly fitted to deal with the fluctuations and mutations of commercial life.

The theory of the proposed Commercial Code is that we must keep our statutes up to date. If the project is successfully carried through, we should understand that we have probably committed ourselves to basic revisions at fairly short time intervals. However excellent the new Code may be it will no doubt be necessary, in another twenty-five years or so, to revise the revisions.