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## TITLE: RISK OF LOSS AND THIRD PARTIES

RICHARD W. DUESENBERG\*

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 to pass 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.<sup>1</sup>

These words of the Official Comments to the *Uniform Commercial Code* tend to create the notion that sales law under Article 2 of the Code radically cuts loose from principles of the past to solve sales problems of contemporary commerce. Again, however, lawyers on their first excursion into Article 2 should be cautioned that here, as was even more true of Article 9, the Official Comments bear witness to a self-appraisal which is occasionally more exaggerated than necessary. At the outset, it might as well be stated that no great purge of the past and no shocking changes in results achieved under pre-Code law will take place as of the Code's effective date in Missouri. To the extent that the need for changes was indicated, they have been made, and also the Code has taken the essential and exceedingly useful step of making more orderly and more specific the rules of the game. But the Code still stands on the shoulders of the past.

Since Missouri is not among the thirty-seven states which at one time or another had adopted the *Uniform Sales Act* (USA), it will be the first time for this state that the law of sales will be codified. But this

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1. Comment to § 2-101, UNIFORM COMMERCIAL CODE, 1962 OFFICIAL TEXT WITH COMMENTS, published by the American Law Institute and the National Conference of Commissioners on Uniform State Laws [hereinafter cited UCC (1962)] with a section number, e.g., UCC § 2-101 (1962). For a comparative study of the subject, see Lawson, *The Passing of Property and Risk in Sale of Goods*, 65 L.Q. REV. 352 (1949).

does not necessitate any great adjustment by the practitioner, for working with the provisions of the USA has been a practical necessity for each of us in the past several generations of lawyers. In this brief outline of the Code treatment of a traditional sales principle, namely, the importance of title, the USA, which to a large extent reflected common law principles, will therefore be used to contrast cognate provisions in the new statute.

### I. TITLE PRE-CODE

Obviously, disputes arising out of sales contracts will either be between the parties to the contract, or with third parties. In the first instance, most of the litigation surrounds the issues of warranties or risk of loss, while in the latter, the questions are quite frequently ones of good faith and ordinary course purchase or of creditor's rights. Though the situations in which the conflicts arise vary from case to case, in all but the warranty category the decision-maker is likely to have posited the question: Who has title? This is so because ascertaining the location of title was the common law and USA solvent to many legal issues.

Which legal issues? First and foremost was that of risk-bearing, which traditionally has been made to depend upon the transfer of the property interest in the goods.<sup>2</sup> The buyer's right to the goods,<sup>3</sup> other than by an action for specific performance based on the equitable concept of uniqueness,<sup>4</sup> as well as the seller's right to the purchase price<sup>5</sup> have

2. Cf. UNIFORM SALES ACT § 22 (hereafter cited as USA). "Property interest" in this context is for all practical purposes synonymous with "title." Application of the title concept for locating risk of loss is demonstrated in innumerable cases, among which is *Fairbanks v. Richardson Drug Co.*, 42 Mo. App. 262 (St. L. Ct. App. 1890) (contract for sale and installation of engine held not contract for work and labor, but loss from fire fell on seller because all conditions of installation in buyer's building had not been completed).

3. USA § 66. *Lumsden v. Howard*, 210 Mo. App. 645, 236 S.W.2d 420 (Spr. Ct. App. 1922) (fact that buyer had made down payment held operative to pass title, even though seller had obligation to deliver goods at buyer's location, and buyer was therefore allowed to bring replevin to recover the undelivered portion of the goods, but as to the portion the buyer was unprepared to take delivery of on due tender, the court said the seller had a right to dispose of to a third party). Cf. § 400.2-711, RSMo 1963 Supp.

4. *Koelling v. Bank of Sullivan*, 220 S.W.2d 794 (St. L. Mo. App. 1949) (sale of stock of merchandise located at premises buyer was to lease, court holding seller had no action for price, even though buyer had taken possession of store and stock, the court viewing the down payment as liquidated damages; the court unnecessarily emphasized only the "uniqueness" element of an equitable action for specific performance and overlooked that an action at law for purchase price on the basis of title passage was distinguishable in theory, though not in result). Cf. § 400.2-703, RSMo 1963 Supp.

5. USA § 63(1). *Koenig v. Truscott Boat Mfg. Co.*, 155 Mo. App. 685, 135

had the same dependency, and certain obligations and liabilities under tax,<sup>6</sup> liquor,<sup>7</sup> and other laws have also been based on the passage of title. Similarly, the claims of bona fide purchasers, trustees in bankruptcy and creditors, being based essentially on title, have made it important for these claimants to know what was the effect of the agreement of their predecessors in interest in regard to property transfer.

When property in goods passed at common law or under the USA was a matter of intention.<sup>8</sup> Since a contract of sale is consensual, it followed logically that the significant consequences of the parties' acts should be made to depend upon what they intended. On this premise, certain rules were constructed. Where the parties gave expression to their intentions, the problems were few, and the first principle used was to apply the parties' expressed intentions. Application of the right rule for determining the transfer of property was conditioned first, therefore, on the existence or non-existence of an express provision in the contract. Usually, the expressed intention would be effective, though not necessarily, for to pass a property interest in goods, the subject matter of the contract had to be "ascertained," in the language of the USA,<sup>9</sup> and if the goods were not specific and ascertained a present intention to pass the property interest could not be effective. In such a case, rather than totally frustrate the objectives of the party, the agreement would be construed prospectively,<sup>10</sup> and, save as to the vagaries of the common law rule of potential possession,<sup>11</sup> the property would not pass as of the time of

S.W. 514 (St. L. Ct. App. 1911) (contract for sale of boat to be manufactured by seller, who, the court said, had right to elect between damages or purchase price in action against buyer on completion of boat).

6. *Pacific Grape Prod. Co. v. Commissioner*, 219 F.2d 862 (9th Cir. 1955), cited in 34 TEXAS L. REV. 133 (1955); *United States v. Amalgamated Sugar Co.*, 72 F.2d 755 (10th Cir. 1934) (seller using accrual method properly taxed for proceeds of sales of sugar, though sales were of fungible goods, stored in different locations and delivery was postponed, court holding that title could pass to less than all of fungible mass); *Custom Built Homes Co. v. State Comm'n of Revenue and Taxation*, 184 Kan. 31, 334 P.2d 808 (1959) (f.o.b. destination contract construed for determining use tax liability). Cf. § 400.2-401 RSMo 1963 Supp.

7. Cf. *Clark v. Crown Drug Co.*, 236 Mo. App. 206, 146 S.W.2d 98 (Spr. Ct. App. 1940), *rev'd.*, 348 Mo. 91, 152 S.W.2d 145 (1941).

8. See, e.g., *Keen v. Rush*, 19 S.W.2d 25 (Spr. Mo. App. 1929) (suit for purchase price; only delivery and final payment postponed, held that passage of risk of loss rebutted).

9. USA § 17: "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. . . ."

10. USA § 5(3).

11. See *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718 (1877). See "*Potential Goods*" in *Kentucky before and after the Uniform Sales Act*, 31 Ky.

contracting, but rather as of the time the goods were ascertained and appropriated to the contract.

Oftentimes intention is unclear or unstated in the express terms of an agreement. Pre-Code decisions then resorted to certain rules,<sup>12</sup> which presumed what the intentions of the parties were. While the over-simplification may be dangerous, the basic structural outline of the rules was to divide cases into two groups, separated generally by whether the goods were specific and ascertained at the time of contracting. If the goods were specific, the time of passage of property hinged on the conditional or unconditional character of the contract, passage being postponed until performance of any obligations the seller may have assumed, including that of shipment.<sup>13</sup> Instances of unascertained goods required that they be "appropriated" to the contract before property could pass.<sup>14</sup> Still another rule was designed to cover specific situations of sales on approval and sale or return contracts.<sup>15</sup>

On the surface, the common law and USA rules would appear to cover well all possible examples. In practice, however, difficulties arose in fitting the cases to the rules, and as the years passed the volume of conflicting decisions under the USA began to mount. Whether the "title" theory of sales law is as outmoded a conceptualism as the drafters and many writers have said it is seems debatable; in by far the larger number of cases eminently sensible applications of the principle have been made to the end that results reached are in most cases hard to criticize. Nevertheless, the USA has served its day, and the amount of confusing decisions on the books does give sound reason for a rewrite of the rules.

L.J. 185 (1943). Cf. USA § 5, which treated all future goods alike, making no distinction based on potential possession.

12. Codified in USA § 19.

13. See, e.g., *Eisenberg v. Nelson*, 247 S.W. 244 (St. L. Mo. App. 1923) (load of corn not yet loaded, title did not pass); *Hubbard v. Home Ins. Co.*, 205 Mo. App. 316, 222 S.W. 886 (Spr. Ct. App. 1920) (contract for sale of portion of fungible goods to be loaded at place of storage; buyer to furnish the cars and part of price paid; held title did not pass and therefore coverage under seller's policy of insurance continued).

14. *Longsdorff v. Meyers*, 171 Mo. App. 255, 157 S.W. 85 (K.C. Ct. App. 1913) (all apples of first and second grade when ripe, buyer to pick and do grading; buyer had taken the fall, but not the winter, apples, which were allowed to stay until frozen; goods held unascertained and no title passed); USA 19(4).

15. Cf. *Jacob Strauss Sadlery Co. v. Kingman*, 42 Mo. App. 208 (St. L. Ct. App. 1890) (sale or return; risk on buyer); USA § 19(3); § 400.2-327, RSMo 1963 Supp.

## II. RISK OF LOSS

The departure from the property concept of title is best illustrated in the Code provisions regarding transfer of risk of loss. As an issue between seller and buyer, it is dealt with not by inquiring into the intentions of the parties as to passage of title, but by analyzing the terms of the contract and the "step by step performance" thereunder. In those instances where the parties have not expressed their intentions,<sup>16</sup> lawyers will, under the Code, have the advantage of not having to pursue the illusive inquiry of presumed intent.

Not in results, but in the reasoning used to arrive at results, is where the Code differs most from prior law. To demonstrate, suppose the case of a seller in Kansas City contracting to sell to a buyer in St. Louis four carloads of grain, "f.o.b. St. Louis." If nothing more than the price, the quality, and the specific four carloads is known at the time of contracting, and if nothing specific was said concerning risk of loss during shipment, the orthodox common law approach would be to place the risk of loss on the seller by presuming that no transfer of property was intended until arrival at destination, because the term "f.o.b. St. Louis" would be construed to mean that the seller had the duty of paying the cost of transportation.<sup>17</sup> Thus, though the buyer might have paid the full price and taken delivery of two carloads that had arrived safely ahead of the others which were destroyed by some event not brought about by act of the buyer, it might be expected that he could recover for nondelivery. Typically, we might expect the opinion of the court to read: "The intention of the parties necessarily governs in determining when the title passed. . . . If, under the contract, the seller is to deliver the things sold at a designated place, . . . the general rule is that the title will not pass until delivery is there made."<sup>18</sup>

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16. Much of the literature on the Code has often remarked that parties to sales contracts do not think in terms of title or property interest passage. It is quite natural to get this impression from a reading of the cases, for the litigated instances are not likely to be ones where provision was made regarding risk of loss. The experience of the writer, which is largely with contracts of substantial value, is to the contrary, it being the rare example where risk of loss is not expressly a matter of bargaining. Furthermore, many printed forms of sales and purchase orders contain blanks for risk of loss. To the extent that this argument has been used in support of breaking away from past concepts, it is probably not as consistent with actual practice as much of the literature has suggested.

17. USA § 19(5).

18. *Hunter Bros. Milling Co. v. Kramer Bros.*, 71 Kan. 468, 80 Pac. 963 (1905).

Under the Code, analysis is different. Risk of loss is determined first by looking at section 400.2-509, which speaks not in terms of the parties' title intent, but rather of their requirements of performance under the contract. The first subdivision distinguishes between shipment and destination contracts, providing that the seller retains the risk of loss until his delivery obligation has been accomplished or duly tendered. What this shipment obligation amounts to is answered not in section 400.2-509, but in other sections of Article 2. At this point, the Code has an advantage not enjoyed under the USA, for very detailed definitions of common mercantile terms are written into Article 2. F.O.B., F.A.S., C.I.F.,<sup>19</sup> C&F, "net landed weights," "payment on arrival," "ex ship," "no arrival, no sale," none of which appeared in the USA, are carefully given meaning in the Code.<sup>20</sup> With reference to our hypothetical, section 400.2-319(1) states that, subject to a contrary agreement, "the term 'F.O.B.' (which means 'free on board') at a named place, even though used only in connection with a stated price, is a delivery term," and when the stated place is that of destination, "the seller must at his own expense and risk transport the goods to that place and there tender delivery of them." No element of intent and no reference to title. The case would be disposed of by a relatively simple application of statutory sections to the performance by the parties of the obligations they had assumed.

The years of effort spent in drafting the Code would be short-changed if the need for change were no better demonstrated than the above comparison would indicate. The in-depth study preceding the Code rather convincingly proved that in more instances than desirable courts were having to manipulate the common law—USA title theory to arrive at proper results. Think of the problem in the following manner. "Risk of loss" as an element of the sales contract does not refer to the actual placing of ultimate loss, once it has occurred. It refers instead to the liability assumed by the parties at the time of contracting, whenever that loss may in fact take place. Who has this initial risk of loss is, as noted earlier, determined under the common law—USA analysis on the basis of the parties' intention. If their intention is expressed, it speaks as of the time of contracting; if their agreement is silent on the point,

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19. See, *e.g.*, *Rand v. Morse*, 289 Fed. 339 (8th Cir. 1923) (*c.i.f.*, market value of goods decreased).

20. Essentially, these definitions adopted in the Code are the same as provided in the American Foreign Trade Definitions, adopted July 30, 1941 by the Joint Committee representing the Chamber of Commerce of the U.S.A., the National Council of American Importers and the National Trade Council.

then the factors operative in the presumptive rules for ascertaining their intent are factors existing at the time of contracting—the status of the goods, conditions of making them ready for tender, shipment and other obligations. Logic would have it, therefore, that whatever the cause giving rise to a loss, and thus to litigation, the location of the property (risk of loss) should in all situations be the same, unless at the time of contracting the parties contemplated different results on the happening of different contingencies. It is here where the common law—USA property emphasis had its greatest failure.

Going back to our Kansas City seller and St. Louis buyer, suppose that instead of the goods having been destroyed en route, all four carloads had arrived in good order, but they were worth less than the contract price because of a precipitous drop in market value. The buyer, knowing he could get the same goods elsewhere at lower cost, might refuse to accept delivery. Assume further that though the buyer had already sent a check for a substantial amount, he was able to stop payment; the goods are then destroyed, and the seller seeks recovery of the purchase price. As with locating risk of loss, the action for purchase price is dependent upon passage of property, without which the seller's remedy would be only in damages. If the presumptive rules of pre-Code law were followed, the seller's action should fail, and doubtless cases with such a result can be found. But there are factors in the case which those familiar with sales law can anticipate might be used to convince the court (or jury) that the parties intended a contrary result. For example, it might be reasoned that the payment of part of the price indicated an intent to pass title,<sup>21</sup> or that the f.o.b. term was merely a price term, and not a delivery term bringing the case within rule 5 of USA section 19. Behind such forcing of the presumptive rules is an attempt to give a performing seller the best remedy against a renegeing buyer; but it is a manipulation which pulls in a direction opposite from giving certainty to the application of the presumptive rules.<sup>22</sup>

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21. Cf. *Johnson v. Besoyan*, 85 Cal. App.2d 389, 193 P.2d 63 (1948).

22. *Glass v. Blazer Bros.*, 91 Mo. App. 564 (K.C. Ct. App. 1902), is another excellent example of manipulating the title concept to arrive at a preferred result. The contract recited that the seller "had this day sold" his entire crop of growing flax, delivery to be at buyer's elevator. When the price went up, the seller attempted to renege, hoping to get a higher price on sales elsewhere. The buyer sought replevin, an action based on title. The court, in holding that title passed, seized on the present intent language of the contract. Had the litigation occurred because of the destruction of the crop, there is little doubt that the seller would not have been able to recover the price, for not only might the goods have been



A more objective test with more predictable consequences would be applied under the Code, in the case of the defaulting buyer. Special consideration was given by the drafters to the situation of locating risk of loss where one of the parties is in breach. Section 400.2-319 would prevent passage of risk of loss until tender of delivery, but section 400.2-510 would permit the seller to treat the risk of loss as on the buyer to the extent of the seller's deficiency in effective insurance coverage.<sup>23</sup> Here, then, are two other characteristics of the Code which give greater certainty to this area of sales law. First, the Code relates risk of loss to defective performance,<sup>24</sup> and second, if the one in control of the goods is the aggrieved party, whatever loss or damage may prove to be uncovered by insurance falls upon the contract breaker rather than upon him. The former meets head-on the case of a defaulting party;<sup>25</sup> the latter is a policy decision based upon the reality of likely insurance coverage on the part of one in possession.<sup>26</sup> If the seller under the circumstances of our hypothetical had no insurance, suit for the price of the goods would lie because under section 400.2-709 recovery of the purchase price is permitted as to conforming goods after risk of their loss has passed to the buyer.

One point of the preceding contrast of our hypothetical in court for different reasons is to underscore the fact that the pure abstraction of theoretical common law concepts has often compelled courts to choose the rule to be applied not on the basis of the facts at the time of

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held not to be ascertained, but since the crop was still growing almost all courts would hold that title had not passed because the goods were not yet ascertained and/or in a deliverable state. Cf. *Longsdorff v. Meyers*, 171 Mo. App. 255, 157 S.W. 85 (K.C. Ct. App. 1913); *Post v. Jacobsen*, 180 Cal. App.2d 297, 4 Cal. Rptr. 817 (1960). Cf. also *Kuhler v. Tobin*, 61 Mo. App. 576 (K.C. Ct. App. 1895) (where seller had to deliver to buyer's location where weighing would be done to determine price, court held title passed, thus enabling buyer to recover possession when seller attempted a second sale to take advantage of rising prices).

23. § 400.2-510(3), RSMo 1963 Supp.

24. Cf. USA § 22(b), which made such a connection where the loss would not have occurred but for the default of one party.

25. Cf. *Rylance v. James Walker Co.*, 129 Md. 475, 99 Atl. 597 (1916). See also USA § 22(b).

26. Even this provision is not without a somewhat analogous pre-Code line of cases, where insurance proceeds were recoverable by the other party, generally under some sort of bailment coverage. *Exton & Co. v. Home Fire & Marine Ins. Co.*, 249 N.Y. 258, 164 N.E. 43 (1928). The theory is very different, however, for in place of transferring the proceeds to the party who has risk of loss, it transfers risk to the party with insurance, even though that party is without fault. The theory in this approach prevents the insurer from claiming any right to subrogation against the other party on the basis of the sales contract.

contracting, but rather on the event giving rise to litigation.<sup>27</sup> This has led to uncertainty. Cases not very different from one another often come to opposite results on the question of passage of property, primarily because of the reason for bringing them to court. This is not to say that the results in particular cases have been bad, but to suggest that the unpredictability of when a court might strictly and narrowly apply the facts to the presumptive prescriptions is itself an unhealthy state for any major body of decisional law.

The common law rules as embodied in the USA themselves have allowed for easy maneuvering. The first two rules of USA section 19 are illustrative. In language they are not contradictory. Both deal with specific goods, but the first refers to goods in a deliverable condition at the time of contracting, while the second involves the case where the seller must do something to put them in a deliverable state. If the facts fit rule one, that payment and delivery are postponed is specifically said to be immaterial, whereas the performance of some other condition by the seller is under rule two an event which holds up title transfer. One of the most notorious of title passage cases was decided on consideration of these rules, a court holding that risk of loss was on the buyer of a flock of turkeys, killed in a blizzard, before delivery and before weighing and measuring was performed to determine the purchase price.<sup>28</sup> Had the catastrophe been fire, instead of freezing, it would not have been so easy to determine the price, and placing the facts under rule two rather than rule one of section 19 would likely have been the solution to the dilemma.<sup>29</sup> But, as others have pointed out, if the task is one of locating risk of loss by associating it with title passage intent, the casualty causing loss should not be determinative.<sup>30</sup> Similarly, the existence of other extraneous

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27. See cases cited note 22 *supra*. Compare *Lumsden v. Howard*, 210 Mo. App. 645, 236 S.W. 420 (Spr. Ct. App. 1922) (f.o.b. destination, title passed before arrival) with *Hubbard v. Home Ins. Co.*, 205 Mo. App. 316, 222 S.W. 886 (Spr. Ct. App. 1920) (f.o.b. shipment, part delivered, title did not pass, thus allowing recovery on seller's insurance).

28. *Radloff v. Bragmus*, 214 Minn. 130, 7 N.W.2d 491 (1943).

29. *Cf. Curtis v. Truitt*, 7 S.W.2d 383 (Spr. Mo. App. 1928) (fire destroyed goods delivered to buyer's docks for weighing and inspection, title held not to have passed); *Crumley v. Western Tie & Timber Co.*, 144 Mo. App. 528, 129 S.W. 46 (Spr. Ct. App. 1910) (timber cut and made into ties by seller broke loose from raft and was totally lost before buyer could inspect and measure to determine price); *Lingham v. Eggleston*, 27 Mich. 324 (1873) (reliance on delivery provision); *Wheatley v. H & H Poultry Co.*, 45 Del. 502, 75 A.2d 702 (1955) (rebutting the application of USA § 19(1) by accepting evidence of trade usage that only merchantable goods were required to be taken).

30. See *HAWKLAND, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE* 81 (1958). In *Mitchell v. Weiner*, 94 Conn. 446, 109 Atl. 164 (1904), fire

factors, such as insurance coverage, should have little or no operative effect if in reality of application the rules are to mean what they say in theory.<sup>31</sup>

Not a little of the uncertainty of the title passage theory is also derived from the concept of appropriation, which is applicable to the common law—USA principles of title passage concerning contracts for the sale of unascertained goods. Appropriation is defined as the act which the parties mutually agree operates to transfer the property interest. When they have failed to express their intent, the law has presumed that delivery to the buyer, or to a bailee for holding for the buyer, or to a carrier for transporting to (including arrival at destination, if the seller were required to pay the freight) the buyer, was the act of appropriation. F.o.b. contracts have offered some of the best examples of the courts twisting the intent-to-pass-title approach of the common law and USA, it not being uncommon for courts to postpone delivery beyond the f.o.b. point by making the f.o.b. term a price rather than a delivery term in order to avoid a hardship which might result from passing title at the f.o.b. point.<sup>32</sup> But the f.o.b. cases are only one example area; the very technique that has required identifying the act by which the parties did or would have passed title has lent itself to the certainty of uncertain responses by decision-makers to assessing what were the significant, operative facts of any given case.

Only a few of the highspots of uncertainty under the title passage conceptualism are touched upon in the preceding paragraphs. There are many other examples which space does not permit noting. To make sure

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destroyed lumber which was to be sorted according to size to determine which was the subject of sale. The court said that until the act of sorting had been accomplished, neither party knew precisely what lumber was the subject of the contract. In common law and USA parlance, this meant that the goods were not yet ascertained, and until ascertained, title could not be presumed to pass. Yet, the mass from which the goods were to be chosen was specific, so that in fact the act of sorting had little more function than to determine a price based on the conforming quantity. That title should be held not to pass in this instance, where the whole mass is specific and ascertained, though not the specific units contracted to be sold, seems to make a rather inconsequential distinction lead to a substantial difference in result.

31. See cases cited note 27 *supra*.

32. Cf. *Rock Glen Salt Co. v. Segal*, 229 Mass. 115, 118 N.E. 239 (1918); *Lee v. Northway Sales*, 121 Atl. 425 (R.I. 1923). See also *Levine v. Hochman*, 217 Mo. App. 76, 273 S.W. 204 (St. L. Ct. App. 1925), where the common law emphasis on title caused the court to ignore risk shifting at an f.o.b. point because the seller had reserved a security title by use of an order bill of lading, a result which would not be reached under USA § 22(a). See also § 400.2-505, RSMo 1963 Supp.

that the reader understands the paramount change of the Code to be not in results, but in the methods of arriving at results, a comparative resume of the Code sections on passage of risk of loss is offered.

Section 400.2-509, applicable where there is no breach, is not unlike the conclusions generally obtained under the presumptive rules of the common law<sup>33</sup> or USA section 19, but it does not presume what the intent of the parties was, but sets forth specific rules applicable as of any step in the performance of the contract at which the loss occurred. If delivery is not required at destination, risk of loss passes on delivery to the carrier, even where a security interest is retained; but risk is retained until a proper tender or actual delivery is made at destination where the terms require the seller to deliver to a given point.<sup>34</sup> These results are in line with those under the pre-Code law.<sup>35</sup> The clear and detailed definitions of mercantile terms, particularly in sections 400.2-319 and 400.2-320, make fairly certain and fairly easy the application of the risk of loss sections, especially in view of the more stringent requirement of a "contrary agreement"<sup>36</sup> for a contrary result, substituted for the more ambivalent USA language requiring only that a "different intention appears."<sup>37</sup> This is buttressed by a presumption in favor of shipment rather than destination type contracts, thus adding certainty by way of a constructive guide in those instances where defined mercantile terms are not used and the agreement is otherwise silent or unclear on the seller's delivery obligations.<sup>38</sup> Nor will any major changes come about under section 400.2-509(2), dealing with goods sold, held by a bailee, and not intended to be moved in conjunction with the sale.<sup>39</sup> It is there provided that risk of loss does not pass until negotiable documents of title, if any, are tendered, or in other cases until the bailee has acknowledged the buyer's right to possession.

33. *Hoffman v. Wisconsin Lumber Co.*, 262 S.W. 414 (Spr. Mo. App. 1924) (deterioration during transit at buyer's risk where seller's only duty is to deliver to carrier, unless improper condition at time of delivery).

34. *Sabin Robbins Paper Co. v. Cal Hirsch & Sons Mercantile Co.*, 263 S.W. 479 (St. L. Mo. App. 1924) (seller had risk of loss in destination contract).

35. USA §§ 19(4) and (5), 22(a).

36. § 400.2-509(4), RSMo 1963 Supp., or "otherwise agreed" in §§ 400.2-319, 2-320, RSMo 1963 Supp.

37. USA § 19.

38. See Comments to UCC § 2-503 (1962). For statement of common law presumptive rules of shipment obligations where contract is silent or unclear, see *Mountain Grove Grocer Co. v. Ellison*, 212 Mo. App. 395, 245 S.W. 1078 (Spr. Ct. App. 1922).

39. *Cf. Allgear v. Walsh*, 24 Mo. App. 134 (K.C. Ct. App. 1887).

A significant area of change will take place under section 400.2-509(3), which covers cases where goods are neither held by a bailee nor intended to be shipped. Here the Code adopts a policy position, by keeping the risk of loss on the seller until actual receipt by the buyer, where the seller is a merchant.<sup>40</sup> In the words of the drafters:

The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.<sup>41</sup>

How this departs from prior law is vividly shown by comparing the section with rule one of USA section 19, which would pass the risk as soon as the contract was executed, even where delivery and payment were postponed, if the goods were specific and ascertained and the contract was otherwise unconditional. Even here, however, while the old and new rules seem much at odds, there are not too many cases where courts have imposed risk of loss on retail buyers, though the goods were specific and ascertained at the time of sale. Concepts of "cash sale," or rebuttals of the presumptive rule because of custom or usage, have variously been used to arrive at results not unlike those prescribed under section 400.2-509(3). Where the agreement is between merchants, it is probably more an issue of whose insurance should bear the risk, so the change is not that consequential, except as it may in a given case relate to the risk experience of the insured.

Similar comments can be made of consistent results under section 400.2-510, applicable where there has been a breach. Previous discussion has indicated that courts have attempted to place the loss on a welching party, and in some instances this is also expressly provided for under the USA, which contains several sections affecting title passage in instances of defective performance. Title did not pass under the USA<sup>42</sup> where nonconforming goods were delivered to a carrier, and under section 400.2-510(1) risk of loss is retained under the same situation, or any other situation, so long as the seller has not cured<sup>43</sup> his breach or the buyer has not accepted. Similarly, a seller in possession of con-

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40. "Merchant" is defined in § 400.2-104(1), RSMo 1963 Supp.

41. Comment 3 to UCC § 2-509 (1962).

42. USA §§ 19(4), 22(a).

43. For the meaning of "cured" see § 400.2-508, RSMo 1963 Supp.

forming goods which the buyer should have accepted may treat the risk of loss as on the buyer, as would usually have been the case as to goods appropriated to the contract under the USA.<sup>44</sup> Conversely, a buyer in possession of nonconforming goods could rescind under the USA and shift the risk of loss back to the seller, and by revoking his acceptance can do the same under the Code.<sup>45</sup> The important change under the Code is, as said earlier, with respect to insurance, as it operates as a limitation on either party's ability to treat the risk of loss as on the one in default.

### III. THIRD PARTIES

The property oriented approach of the common law and USA has shown its worst side, perhaps, in the area of conflict between third parties and the original owner. Because of the property oriented emphasis on the rights of ownership, the common law and USA treated these problems in much the same way as those involving risk of loss—by looking at what the parties intended or were presumed to intend in the way of title passage. Any extended reading of these cases reveals the many accommodations which the security of property emphasis has had to make in favor of the security of transactions principle, and abundantly demonstrates one of the more significant underminings of the effectiveness of the "intent to pass title" analysis of the common law.

So far as third party purchasers are concerned, they get into the picture generally through a purchase from either the original seller or the buyer, or from one purporting to represent the owner of the goods. At least as to number, instances of good faith purchase from thieves or finders are not significant.<sup>46</sup> If a second sale by the original owner was involved, common law decisions usually entertained a debate as to whether the retention of possession by the seller was fraudulent in fact, or fraud might be conclusively presumed as a matter of law.<sup>47</sup> Section 25 of

44. See, e.g., *Turner Looker Liquor Co. v. Hindman*, 232 S.W. 1076 (Spr. Mo. App. 1921), *aff'd sub nom. Turner Looker Co. v. Hindman*, 298 Mo. 61, 250 S.W. 388 (1921) (goods destroyed after tender and wrongful rejection); § 400.2-510, RSMo 1963 Supp.

45. § 400.2-510(2), RSMo 1963 Supp.

46. Nor does the Code change the law everywhere that the owner may recover stolen goods from a good faith purchaser. *Wilson v. Crocket*, 43 Mo. 216 (1869) (stolen horse); *Superior Iron Works & Supply Co. v. McMillan*, 235 Ark. 207, 357 S.W.2d 524 (1962).

47. See *Trimble v. Keet & Roundtree Mercantile Co.*, 65 Mo. App. 174 (St. L. Ct. App. 1896) (imposing some duty of notice on first buyer); *Thomas v. Ramsey*, 47 Mo. App. 84 (K.C. Ct. App. 1891) (first to take possession prevails).

the USA finally resolved many of these issues by providing that a sale by a seller in possession passed better title to the second buyer, who received the goods and paid value in good faith and without notice of the previous sale. The same result will be achieved under the Code if the seller is a merchant dealing in the goods of the kind retained. This follows from the definition of "entrusting," which includes "any acquiescence in retention."<sup>48</sup> What the result will be where the seller is not a merchant is unclear; in fact, the situation seems uncovered in the Code, unless a seller retaining possession can be said to have "voidable title" under section 400.2-403(1), a position difficult to support in view of the traditional understanding that "voidable" usually refers to the defective title acquired by the purchaser which is subject to rescission. Presumably, the Missouri decisions as to non-merchant sales would continue relevant.<sup>49</sup>

When it came to instances of good faith purchase from one not the owner, or from one who bought (usually under some cloud) from the original owner, the counterpart of the fraudulent retention principle was generally expressed in terms of voidable title, apparent authority, estoppel, bad check-cash sale or some other doctrine.

None of these doctrines has worked without major defect. In the case of wrongful sales by agents (using that word loosely), some states attempted a solution through the so-called factors' acts which basically protected a purchaser from one whom the owner of goods had clothed with apparent ownership.<sup>50</sup> Not many states passed such acts, and even when they did, the issues remained very much the same as in those states, including Missouri, without such legislation, because under the acts the time-honored elements of entrustment for purpose of sale or as security for an advance were incorporated.<sup>51</sup> Nor did the USA improve the situation, for section 23 excluded affect of the act on these statutes,

48. § 400.2-403(3), RSMo 1963 Supp.

49. In this connection, Comment 1 to UCC § 2-403 (1962) states: ". . . the provisions of the section are applicable to a person taking by any form of 'purchase' as defined by this Act. Moreover, the policy of this Act expressly providing for the application of supplementary general principles of law to sales transactions wherever appropriate joins with the present section to continue unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles. The section also leaves unimpaired the powers given to selling factors under the earlier Factors Acts."

50. N.Y. PERS. PROP. LAW § 43 (repealed by N.Y. U.C.C. § 10-102) was a typical 19th century factors' act.

51. See, e.g., *Freudenheim v. Gutter*, 201 N.Y. 94, 94 N.E. 640 (1911).

in addition to stating that sale by one not the owner passed no better title to the goods than the seller had.

Even greater confusion has abounded in the efforts to resolve the competing claims of original owner versus good faith purchaser from a purchaser who was either fraudulent or under the onus of some other impairment in his right to the goods. Here exist the familiar cases of impersonation (direct or indirect), purchase by insolvents (with or without intent to pay), and the instances of giving a bad check in payment. From the point of view of the good faith purchaser, which of these is involved should be immaterial, for a condition of his good faith status is that he is without knowledge of the defect in relations between his seller and the original owner. Yet, before and since the USA, courts have attempted to resolve the opposite pulls of security of ownership and security of transactions by making these cases turn on such matters as whether an impersonation was direct or through some means of communication, or whether an insolvent buyer at the time of purchase had or could have had an intent to pay for the goods. If an impersonation was direct, the reasoning went, then the seller intended to pass title to the party with whom he was dealing, and therefore a "voidable" title passed.<sup>52</sup> Similarly, if an insolvent buyer in fact intended to pay, he got a voidable title.<sup>53</sup> In either case, the voidable title could be made indefeasible by sale to a good faith purchaser for value.

While the distinctions of the preceding paragraph have some support as a resolution of competing policies, another concept, the bad check-cash sale doctrine, has produced not only bad results but has had little to support it in policy.<sup>54</sup> Basically, a "cash-sale" has been defined as one where payment of the price is a condition of the passing of title.<sup>55</sup> When a principle of negotiable instruments law, namely, that a check is conditional payment, was grafted on the concept of cash sale, the result was that if the check bounced, payment was never made, and the "buyer" had no title which he could pass on to a third party.<sup>56</sup> *In vacuo*, the

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52. Compare the leading case of *Phelps v. McQuade*, 220 N.Y. 232, 115 N.E. 441 (1917), with *Wyckoff v. Vicary*, 75 Hun 409, 27 N.Y. Supp. 103 (Sup. Ct. 1894). See also *Windle v. Citizens Nat'l Bank*, 216 S.W. 1023 (Spr. Mo. App. 1919).

53. See, e.g., *Strauss, Pritz & Co. v. Hirsch*, 63 Mo. App. 95 (K.C. Ct. App. 1895).

54. For an excellent comment see, Note, *The "Cash Sale" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly*, 62 YALE L.J. 101 (1952).

55. *Martin v. Ficklin*, 240 Mo. App. 1225, 227 S.W.2d 69 (K.C. Ct. App. 1950).

56. *Pettus v. Powers*, 185 S.W.2d 872 (Spr. Mo. App. 1945); *Crocker State*



principles worked logically, but they were not consistent with experience. The loss was too often visited on the innocent third party purchaser who bought from one whose honesty in issuing the check the original owner was willing to rely on and who inevitably ended up absent while the third party was left holding the bag. Furthermore, the doctrine clashed in theory whenever counsel for the third party purchaser attempted to synthesize the doctrine with presumptive rules of the common law or USA.<sup>57</sup> For example, application of the cash sale doctrine in the context of an insufficient funds check inevitably conflicted with the provision of rule 1 of USA section 19 that postponement of payment was immaterial as to passage of title in the sale of specific goods under an otherwise unconditional contract.<sup>58</sup> Not only has the bad check-cash sale doctrine been inherently at odds with the minimization of the importance of payment as related to the question of passage of title under rule 1 of USA section 19, but it has also collided head-on with innumerable other decisions where courts have said that the transfer of possession showed an intent to pass title, when without the transfer title might not otherwise have been held to pass.<sup>59</sup>

All of the problems connected with fraudulent purchases, the use of bad checks, cash sale, larceny by trick, theft and loss were solved at common law by reference to the original owner's intent as to passage of title. This remains the primary line of inquiry under the Code, which in section 400.2-403(1) provides that a purchaser acquires all title which his transferor had or had power to transfer. But the drafters of the Code in framing section 400.2-403—one of the most important of

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Bank v. White, 226 S.W. 972 (K.C. Mo. App. 1920); Hall v. Missouri Pac. Ry., 50 Mo. App. 179 (K.C. Ct. App. 1892). Cf. Sellner v. Meyer, 240 S.W. 247 (St. L. Mo. App., 1922) (part payment and forged check; seller could not recover from bona fide purchaser without returning payment received and rescinding).

57. See, e.g., Strother v. McMullen Lumber Co., 200 Mo. 647, 98 S.W. 34 (1906) (even though 15 days open terms were given, until check was cleared there was no payment and title held not to pass); Goddard Grocer Co. v. Freedman, 127 S.W.2d 759 (St. L. Mo. App. 1939).

58. That this is so is tested when instead of the original owner seeking repossession from the third party purchaser he seeks recovery of the price from the original buyer. In such cases, that the buyer gave an insufficient funds check is not likely to hold up passage of property. See Williams v. Gray, 39 Mo. 201 (1866) (cash sale term did not hold up passage of risk of loss), and cf. Lewis v. James McMahon & Co., 307 Mo. 552, 271 S.W. 779 (1925) (repossession from third party).

59. Cunningham v. Ashbrook, 20 Mo. 553 (1855) (exchange of possession rebutted presumption that title does not pass until goods are weighed and measured).

the sales article—have sacrificed some of the owner's claims to his goods to the commercial requirement that goods be more freely transferable. The burden of the section is carried in its definitions of certain terms used in it, and in its statement of the circumstances under which a party has the power to transfer better title than he himself had.

If common law decisions are studied analytically, it will be discovered that what the Code does is not too different from what was being accomplished under pre-Code decisions. Cases of entrustment to an agent often protected the third party if the entrusting was for purposes of procuring a sale or offer to purchase,<sup>60</sup> but protected the owner's claims where goods were delivered to merchants for some other purpose, such as display or inspection.<sup>61</sup> What in fact these cases did was to accommodate the claims of ownership with the risks which those claims were burdened with when the owner voluntarily delivered the goods to another person for the purpose of acquiring certain benefits. If the benefit sought was a sale—an exchange of the goods for cash—then the policy in protecting the purchaser usually prevailed through imposing on the owner the risk that his trustee might not comply in every way with his instructions and might act outside the scope of his authority. This balancing of competing interests is the very soul of the entrustment for purpose of sale doctrine of the common law and of the factors' acts.

Many old conflicts over whether goods were "entrusted" will fall by the wayside under section 400.2-403(2) and (3), which abandons the old doctrine. These subsections create a special protection for a class of purchasers termed "buyers in the ordinary course," when the acquisition is from a merchant who has been entrusted with the goods.<sup>62</sup> By defining "entrusting" to include *any delivery* and *any acquiescence*<sup>63</sup>

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60. Many cases also distinguished between entrusting for sale and for soliciting order to purchase, but the later decisions seemed to move away from refinement. See, e.g., *Commercial Credit Co. v. Parker*, 101 Fla. 928, 132 So. 640 (1931); *Boice v. Finance & Guar. Corp.*, 127 Va. 563, 102 S.E. 591 (1920).

61. *But see* *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 (1953). See also 2 WILLISTON, SALES § 315 (1948).

62. "The many particular situations in which a buyer in ordinary course . . . has been protected against reservation of property or other hidden interest are gathered . . . into a single principle protecting persons who buy in ordinary course out of inventory. Consignors have no reason to complain, or have lenders who hold a security interest . . . , since the purpose of goods in inventory is to be turned into cash by sale." Comment 2 to UCC § 2-403 (1962).

63. The requirement that the owner "deliver" or "acquiesce" operates to eliminate the possibility of a merchant-thief passing good title. See cases cited note 46 *supra*.

in retention of possession, regardless of any condition in the agreement between the rightful owner and the merchant, and irrespective of whether the original procurement of the entrusting was larcenous, the section implements the policy decision by giving to this class of purchaser a protection much stronger than the bona fide purchaser had in this context under pre-Code law. Again, the major shift from the past is in emphasis, with the point of focus being on protecting the transferability of goods voluntarily introduced into the stream of commerce.<sup>64</sup>

It should be noted that while the term "entrusting" is very broadly defined,<sup>65</sup> two other limitations constrict the application of the subsections: the goods must have been entrusted to a merchant<sup>66</sup> dealing in goods of that kind, and the purchase must be in the ordinary course. By definition elsewhere in the Code, ordinary course purchase excludes purchases from pawnbrokers or at bulk sales,<sup>67</sup> and probably also excludes purchases at grossly inadequate prices or under other strained circumstances which show less than good faith. The basic objective of the section is to protect the buyer at the normal inventory sale, without quarrel as to hidden limitations on authority of the seller.<sup>68</sup>

The abandonment of the bad check-cash sale and larcenous by trick doctrines can be similarly ascribed to an interest in liberalizing the transferability of goods at the sacrifice of claims of ownership. The cash sale, bad check and impersonation problems are resolved by section 400.2-403(1) in favor of the purchaser in good faith for value, without regard to the giving of a check, the terms of a cash sale, or the nature of the impersonation. In doing this, the Code maintains the historic concept of "voidable title," but broadens and makes more definite the instances in which the buyer gets a voidable title which is made indefeasible on transfer.

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64. By way of contrast, the law has long protected the negotiability of goods represented by valid negotiable documents of title, even to the point of protecting purchasers from thieves or finders of the documents, provided the document was negotiated to the holder who bought in good faith and for value. See, e.g., *John S. Hale & Co., v. Beley Cotton Co.*, 154 Tenn. 689, 290 S.W. 994 (1927), a case involving a bad check given for negotiable documents. See Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

65. § 400.2-403(3), RSMo 1963 Supp.

66. Defined in § 400.2-104, RSMo 1963 Supp.

67. § 400.1-201(9), RSMo 1963 Supp.

68. Since the common law protected the good faith purchaser in some situations where the seller might not qualify as a merchant under the Code, it is conceivable that there may be some narrowing of the protection of good faith purchasers having to rely on common law concepts of estoppel, because not coming within the protection of § 400.2-403(2) and (3), RSMo 1963 Supp.

Basically, it states that one has the power to transfer good title to a bona fide purchaser even though he:

- (i) deceived the original owner as to his identity;
- (ii) gave a bad check;
- (iii) agreed that the sale was a "cash sale"; or
- (iv) fraudulently procured the goods, even if the procurement was punishable as larceny.

Consequently, the inherent conflict of the bad check-cash sale doctrine with other of the common law presumptive rules, and the dominant intent test of impersonation cases will no longer continue. While the section protects the good faith purchaser, the owner's interests are not disregarded, for he is deprived of his goods only where in the initial instance he delivered them under a transaction of purchase.

In short, section 400.2-403 cuts back considerably on the protection of a seller who introduces goods into the channels of commerce. It is interesting to contrast this section, which bestows its advantages on the subsequent purchaser, with the relatively obscure provision of section 400.2-702 that subjects the seller's right of reclamation against an insolvent purchaser to the protection of a "buyer in ordinary course or other good faith purchaser or lien creditor" under section 400.2-403. The avowed purpose of section 400.2-702 is to expand the seller's rights against an insolvent purchaser, and clear up a conflict which has existed among American states as to a seller's right of rescission against a buyer who misrepresented his solvency. Some states subordinated the seller's right to claims of intervening attaching creditors, with the result that if bankruptcy ensued after delivery but before an attempted rescission, the trustee would prevail by virtue of his hypothetical lien creditor standing under section 70c of the Bankruptcy Act.

Now, the problem which arises under the language of the Code is this. Because section 400.2-403 took a position in favor of protecting purchasers, it became necessary to consider this in the context of section 400.2-702, which improves the seller's remedies in case of the buyer's sudden insolvency. Subject to the conditions stated, section 400.2-702 allows the seller to rescind, and the theory of rescission is that it reverts the title to the goods in the seller. Obviously, the seller cannot be allowed to do this where the goods have been resold, if the protection accorded purchasers under section 400.2-403 is not to be impaired. Thus, the drafters limited the remedy by denying reclamation from purchasers falling within

section 400.2-403, and gratuitously tacked on lien creditors.<sup>69</sup> This was an unfortunate addition, not necessary for the purpose of leaving undisturbed the design of section 400.2-403, and disastrous if section 400.2-702 is to be very meaningful. This is because many of the instances where the remedy of section 400.2-702 will be important will be cases where the buyer plunges into bankruptcy, in which case the seller's remedy will be subject to the "lien creditor" exception, because of the hypothetical judicial lien creditor standing enjoyed by the trustee.<sup>70</sup>

The remedy of reclamation provided in section 400.2-702 is not the remedy of a secured party; the seller in no way intended a security agreement. Therefore, he is not in violation of any of the provisions of Article 9, and should not suffer the penalty of losing in bankruptcy for any of the reasons pertinent to that article. By the same token, the policy of section 400.2-403 is directed at purchasers, not creditors, and the trustee in bankruptcy does not have the standing of a purchaser, good faith or otherwise. In order that the sound objective of section 400.2-702 not be aborted by the claims of a trustee in bankruptcy, whose success has the sole effect of increasing the bankrupt buyer's estate in favor of his general creditors and at the expense of a defrauded seller,<sup>71</sup> it would be well if the three words "or lien creditor" were deleted from the Missouri version of the Code.

#### IV. CONCLUSION

By no means is the preceding a complete examination of all the problems of risk bearing and third party claims. Notwithstanding its de-emphasis of title, the Code contains an elaborate and lengthy section on title passing, section 400.2-401. Why? The answer is found in the title premise of legislation outside the Code affecting personal property. Included are the Bankruptcy Act, tax laws, various regulatory laws such as liquor laws, criminal laws and others. Were section 400.2-401 not included, the lawyer would find himself in a difficult spot trying to solve the problems

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69. § 400.2-702(3), RSMo 1963 Supp.

70. Bankruptcy Act § 70c, 30 Stat. 566 (1898), as amended, 11 U.S.C. § 110(c) (1958).

71. *E.g.*, *In re Kravitz*, 278 F.2d 820 (3rd Cir. 1960). The buyer's right of possession in case of the seller's insolvency is set forth in § 400.2-502, and essentially permits recovery if the seller becomes insolvent within ten days of receipt of the first installment of the price. For a common law decision on the seller's remedy see *California Conserving Co. v. D'Avanzo*, 62 F.2d 528 (2d Cir. 1933). The subject of remedies is more fully explored in another article of this symposium.

arising under these laws within the principles of the Code. However, for most of the issues arising pursuant to a sale transaction, section 400.2-401 will not be applicable, and to save the embarrassment of having found the right—or wrong—answer in the wrong place, look elsewhere in the Code for the solution of a conflict before resorting to the title passage provisions.

Space does not permit outlining the title passage rules of section 400.2-401. Conceptually, they are consistent with the principles of the common law and of the *USA*, but they are less illusive than the pre-Code “intent” analysis. While it cannot here be reviewed, it should be read. Its basic similarity to pre-Code law should be apparent.