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THE PROPOSED NEW UNIFORM SALES ACT

John Barker Waite*

A complete Uniform Commercial Code has been formulated by committees acting under joint auspices of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. While the Code is apparently not yet ready for presentation to state legislatures for enactment, it has been offered to the public for discussion of its merits. Its scope is comprehensive. As now tentatively proposed, it comprises presumably complete statutes covering Sales, Commercial Paper, Letters of Credit, Foreign Banking, Documents of Title, Secured Transactions, Investment Securities. If adopted it would displace the present Uniform Sales Act, the Uniform Negotiable Instruments Act, and the various existing statutes in other fields which it covers. Its impact on the whole field of commercial law from beginning to end would be tremendous. What revolutions it would accomplish depends on its content. I have been asked by the editors of the Law Review to give my opinion concerning that part of it which deals particularly with the law of Sales.

The comment by the draftsmen of this particular part states:

"This Article is a complete revision and modernization of the Uniform Sales Act which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1906 and has been adopted in 34 states and Alaska, the District of Columbia and Hawaii.

"The coverage of the present Article is much more extensive than that of the old Sales Act and extends to the various bodies of case law which have been developed both outside of and under the latter.

"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."

* Professor of Law, University of Michigan.—Ed.
The article covering Sales was drafted by Professor Karl N. Llewellyn and Professor Sonia Mentschikoff, whose "advisers" were Howard L. Barkdull, Arthur L. Corbin, Willard B. Luther, Judge Thomas W. Swan, Hiram Thomas and Sterry R. Waterman.¹

One does not lightly criticize anything proposed by such men as these, nor willingly question their judgment of the wisdom of what they propose. Nevertheless, anything which is offered for legislative enactment, and especially something which will have so widespread and pervasive an effect, imperatively calls for thoughtful consideration and careful evaluation by everyone. The very fact that it is offered for enactment indicates that the proponents consider it desirable, and any depreciative comment must necessarily be only a matter of the commentator's opinion, so what I shall have to say is offered as just that, without any purpose of dogmatic assertion. But even the enviably elegant verbosity with which the merits of the proposal have on occasion been expounded cannot immunize it from the basic English of interrogation to which all proposed legislation must respond. How much good, if any, will be attained by its enactment? How much evil, if any, will result? How do the good and evil balance? And because I respect the great amount of thought and effort which went into the production of this proposal it is with regret that I find the composite answer to those questions emphatically unfavorable.

If this proposal undertook to make a fundamental alteration in the basic law relating to Sales, if it embodied some intrinsically different concept of the rights and obligations growing out of a contract to sell, or even if it purported to express as law only certain broad basic principles the application of which to detailed circumstance should be left to the courts—if its objective were of some such radical nature, then an evaluation of it would have to consider primarily the wisdom of its content, or objective. The language and detail of method by which it undertook to express its content or to attain the objective would be important, of course, but a secondary consideration. The proposal as made, however, appears to be in effect the same sexagenarian baby as the English Sale of Goods Act and our own Uniform Sales Act. The English act undertook primarily to put into statutory form the then existing rules of judicial decision, while at the same

time clarifying their uncertainties and making some changes and amendments. The American act, a decade later, did essentially the same thing for our own law. Its primary purpose was not to make new law but to declare accurately and clearly what its draftsman believed to be the wisest existing rules and to make them uniform throughout the country. Again, of course, he added what new rules he thought proper and made some changes in the old. Now, if I read it aright, the effect of the proposed new act would be to repeat this process—to bring existing law up to date, to clarify its uncertainties, to change an occasional old rule and to add an occasional new one. I assume that its proponents think of it as going much farther, else they would not have so completely altered its form. Yet I cannot myself find in it either novel fundamental policy or basic alteration of existing notions concerning the proper legal consequences following a contract to sell. What amendments or alterations it would actually produce in those legal consequences could all be made specifically in their various particular applications without necessity for rewriting the whole body of the law. The baby's dress is allegedly modernized, but the body within the dress is essentially the same.

If the proposed changes were primarily of substance, with novelty in basic idea, then, as I have suggested, a study of its merits would look primarily to evaluation of those substantial changes and only incidentally to its formalities of expressing them. The form would be far from unimportant, yet only incidental to the value of the objective. But where, as in this case, the changes in substance are relatively minor and do not affect the basic notions of established law, and the form of the proposal goes far beyond what would have been necessary to effectuate those changes, then the worth of the form becomes quite as important as the worth of the substance. The desirability of one may be lost in unwisdom of the other.

The proposal as it stands, though not a fundamental change in the existing law, is a complete restatement of it; a rearrangement in part of the now familiar Uniform Sales Act, a rephrasing of most of its provisions. The purpose of these changes in form is thus expressed in the introduction to an earlier tentative draft:

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2 Whether or not some radically, basically different type of codification of sales law should be made, or might be desirable, is not involved in this discussion. I am considering not what proposal should be made but only the merit of that which has been made.

3 Second Draft (1941).
"The truth is that Sales law has for at least three quarters of a century, in this country, been a lawyers' law in a quite peculiar sense—almost as severely and exclusively a lawyers' law as is the law of future interests. The layman, whether merchant or non professional common man, has been faced, in Sales law, with a body of doctrine which governs his every day transactions, but of which he has understood, and could understand, neither hide nor hair.

"The Draft proceeds upon the proposition that if the reason in life of a situation be clearly grasped and stated, and the reason of its solution be made clear to the courts, there results both immediately and over the long haul a more reckonable course of decision and a more reckonable body of interpretation than can be had by any other statutory device which is not to be overhauled and rebuilt every two years, or five.

"To this end, the search for accuracy and precision of language has been directed. First, in order that its lines of guidance and purpose may be clear to courts.

"And the test of adequacy on this should be sought by consultation with judges.

"Secondly, the goal sought has been that previously discussed: to wit; that the language shall give clear guidance to the men whose law it is to be, about their conduct. Repeatedly, in an effort both to make the provisions accessible to laymen and to fit the provisions to the situation, lay terms are used. This is deliberate. Most of our commercial 'law' terms were 'lay' terms once. We need new ones, and the place to quarry them from is the life we are attempting to regulate. The attempt has been to exclude lay terms of chameleon, character, and to introduce, deliberately, lay terms which aid clarity and brevity."

Certainly no one would dispute the desirability of this objective.\(^4\)

\(^4\) In fact I so fully appreciate the need for clarification of the law for laymen, and lawyers as well, that I should more willingly approve the proposed act were it more effective in this respect. But as it stands, it clings so faithfully to the hand of the old act and steps forward so hesitantly as to suggest only adolescence of approach to the end allegedly sought. Had the text, instead of the "comment" stated forthrightly that the rights and liabilities of parties to a contract of sale depend, as in any contract, upon its terms and their performance, that the passing of title is important primarily to the extent that it is the consideration for the contract or a condition therein, and had it then expounded the place of title in these connections, I feel sure that intelligent laymen would have comprehended it. But I find myself quite as distressed under the proposed act as under the old one by the subtleties of plain "title" in the abstract, "title" for security purposes only, "title" free from risk of loss, and "title" subject to attachment by creditors of someone other than the titleholder.

The new draft likewise still adheres to the verbal distinction in the Sales Act between
Beside restating the present law, the proposal also makes some definite changes. It would, for example, create certain differences in legal consequence between those contracts to which both parties are non-merchants, those to which one party is a merchant, and those to which both parties are merchants. As the introduction to the earlier draft puts it, "The transactions of men whose business is Sales are separately treated, where such men have peculiar facilities, or needs, or face peculiar problems." Thus—section 2-509: "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery." Section 2-405: a purchaser in good faith acquires "the title of both the transferor and of any person who has made delivery to the transferor on conditional sale or on any other condition of sale if his transferor is a merchant who deals in goods of the kind . . . a good faith purchaser for value who is not a pawnbroker and to whom goods have been delivered and, if he is a merchant, delivered in current course of trade," acquires certain kinds of title. Section 2-327: goods held on approval may be returned, and "after due notice of election is given the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions." Section 2-314: "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to such goods . . . ." Section 2-603: "merchant buyer's duties as to rightfully rejected goods." Section 2-615: "merchant's excuse by failure of presupposed conditions." Section 2-326: "between merchants there is a contract for sale or return" under stated circumstances. Changes of other types, not relating especially to merchants, have also been made, some of which will be adverted to in the course of discussion.

Of the merits of some of the changes I am highly sceptical. As to others, such as the differentiation in rules where "merchants" are involved I am not well enough equipped with knowledge to have a sound opinion. Hence I am willing to assume, though only for the sake of argument, that the changes of rule are wise and desirable. All of them, a "contract for sale" as meaning both an agreement under which title has passed and one under which it has not passed, and a "sale" which "consists in the passing of title from the seller to the buyer." Yet I suspect that laymen and even lawyers use "sell," "sold" and "sale" indiscriminately without thought that one connotes a title passed and the other does not.

6 "Differently" treated would be more accurate than "separately," since the problems of both merchants and non-merchants are covered in the same sections.
it is true, could be accomplished by specific amendment of existing law without need for rearrangement or rephrasing of the whole. Such simplicity of procedure was protested, however, in the introduction to the tentative second draft with the statement that "the Uniform Sales Act should thus not be amended, in any ordinary sense of amendment. Nor should an Act which has so entered into case-law have its purposes or intent recast in a material way. What is required is a 'Uniform Sales Act, 194-' which works the premises of the older Act further through, which supplements the older Act's provisions with such others as are needed to guide merchants' practice, and which makes more clearly explicit to the merchant the rules on which he can rely in his dealings from day to day."

Here, then, we have assumedly desirable alterations in the substance of the law and a method of formulating them whose asserted objective is wholly commendable. Why should enactment not be approved?

My objection springs from the comparative weighing of possible good with potential evil. On one side of the scale, the good is not extreme. The changes in substance, even if all are desirable, which I doubt, but assume, could be attained without restatement of the whole body of the law, without complete rearrangement and rephrasing. And though the objective of the restating be concededly admirable, the proposal as actually drafted would not if enacted go far toward effectuating its assumed objective either, as one may choose, because the present Sales Act is not quite so obfuscating to normal intelligence as is assumed by proponents of the proposed act, or because the proposed act is itself not quite so much clearer and more understandable as it might be. I am no adherent of Panglossian philosophy, but neither do I assume that the old is ipso facto wrong and the new is good by virtue of its novelty. Novelty of expression and arrangement is plentiful in the proposed act, but the solid weight of practical social benefit is not commensurate therewith. Hence, on the "benefit" side of the balance is something of assumed good but lacking great weight.

On the other side of the balance are the confusion and mistake which always result from rearrangement of the accustomed and familiar. When the coat which for years has hung on a certain hook is moved to another, it becomes surprisingly difficult to find. Added to the confusion which always follows rearrangement is the uncertainty and need for interpretative litigation which ineluctably follows rephrasing. When new words are used to garb an old idea there arises a presumption,
real or speciously plausible, that some new idea is intended. The ultimate judicial decision may be that nothing new was in fact expressed, but the damage of protracted litigation to find out will have been done. Where such potential dangers must be risked to attain a desirable end, the end may be worth the risk. But in respect of this proposed act, neither restatement nor rephrasing are requisite to the end of its changes in substance. The risks are run solely for the sake of the rearrangement and rephrasing themselves. And there, as the restating is done in this particular proposal, I am of the opinion that the good which would be attained by its enactment is in no way equivalent in balance with the evil of the litigation it would inevitably provoke.

The danger that mere rearrangement without change of substance may precipitate litigation is not an improbability conjured from imagined possibilities. It has happened in fact within the framework of the present Sales Act. In *Automobile Equipment Co. v. Motor Bankers Corp.* it appears that Community Motors, retailers of new automobiles, had mortgaged a car to defendant who left it in Community possession. Community then sold it to plaintiff for “surrender and cancellation of an existing indebtedness,” and plaintiff took possession without knowledge of the mortgage to defendant. Defendant somehow got actual possession thereafter and sold or mortgaged the car to a taker in good faith. Plaintiff sued to have that latter transaction set aside. The defense was that because plaintiff had taken for a pre-existing debt his right was subordinate to the interest of the later good faith taker. The Uniform Sales Act, then long in effect in Michigan, was not mentioned in the court’s brief opinion. The existence of the statute was known to the court and the attorneys, however, because defendant’s brief cited section 25 and contended that plaintiff was not a purchaser “for value” with its meaning. The argument on that point went off on the common law definitions of value, and plaintiff lost his case. Section 76 of the Sales Act, which defines “value” as used in section 25 favorably to the plaintiff, seems not to have occurred to either the attorneys or the court. A similar ignorance of section 76 by everyone concerned appears in the later Indiana decision of *Smith v. Autocar Sales.* If practicing lawyers and supreme court judges can get into so unnecessary litigation and so completely overlook the explicit provisions of a statute which has been so long on the books, the danger

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7 107 Ind. App. 244, 20 N.E. (2d) 188 (1939).
from a completely new and far less conventional rearrangement of the statute needs no elaboration.

Moreover, the rearrangement of this proposed act seems in places unnecessarily difficult to follow. For example, assume \( B \) to have suffered damage from a chattel bought from retailer \( S \) and impliedly warranted sound by \( S \). Under the existing law \( B \) will have an action against \( S \). But if \( S \) be execution proof, or otherwise an unsatisfactory defendant, can \( B \) sue \( M \), the manufacturer who sold the article to \( S \)? The early common law rule denied the right, usually for "lack of privity" between \( B \) and \( M \).\(^8\)

Courts easily broke away from this specious logic where the sale was of food, or drugs, or dangerous instrumentalities, and, on one expressed theory or another, it is fairly clear that under present rules \( B \) can have an action against \( M \) where the sale is of such commodities.\(^9\) But at least some doubt still surrounds \( M \)'s liability directly to \( B \) where

\(^8\) Chanin v. Chevrolet Motor Co., (C.C.A. 7th, 1937) 89 F. (2d) 889 at 890-891: "If we are to construe the word 'warranty' in its usual legal sense, as a part of a contract between two parties, an action thereon is ex contractu and will, therefore, not lie against persons not party to the contract. But the apparent disagreement in the decisions, we believe, springs not so much from a divergence of opinion upon the propriety of relief in some manner as from disagreement as to the proper form of action. Courts and legal writers quite generally recognize that under a proper statement of facts, a cause of action ex delicto, in the nature of fraud and deceit will lie, and those courts which have sustained rights of recovery in actions ex contractu, in their reasoning, often indicate that the recovery was allowed rather upon a conception of a legal injury done by the manufacturer for which redress should be furnished by the courts under the doctrine of the common law in one of the two forms of action, ex contractu or ex delicto.

"We conclude that no cause of action ex contractu is stated where there is no privity of contract and the complaint is based upon such a statement of an alleged misrepresentation by the manufacturer as is made here. . . ."

"An action of deceit to recover damages for fraud inducing the making of the contract is not based upon the contract but upon the tort. 27 C. J. 16. In such actions intentional misrepresentation is an essential element. Independent Harvester Co. v. Tinsman, 253 F. 935 (C.C.A. 7). The plaintiff must aver and prove, not only that the representation was false, but also that the person making it knew it to be false. Hindman v. First Nat. Bank, 112 F. 931, 57 L.R.A. 108 (C.C.A. 6), certiorari denied 186 U.S. 483, 22 S.Ct. 943, 46 L. Ed. 1261. No allegation of such knowledge of falsity appears in the complaint. Hence it was defective as a statement of cause of action ex delicto."


\(^9\) Jacob Decker & Sons, Inc. v. Capps, 139 Tex. 609 at 611-612, 164 S.W. (2d) 828 (1942): "Under the foregoing facts, the question to be determined is whether a non-negligent manufacturer, who processes and sells contaminated food to a retailer for resale for human consumption, is liable to the consumer for the injuries sustained by him as a result of the eating of such food. So far as we have been able to ascertain, this exact question has not heretofore been before this Court. While there is quite a contrariety of opinion on the subject in other jurisdictions, there is no dearth of authorities. The question has been the subject of many annotations in the American Law Reports, as well as numerous articles in law reviews. 17 A.L.R. 709; 39 A.L.R. 1000; 63 A.L.R. 349; 88 A.L.R. 534; 105 A.L.R. 1511; 111 A.L.R. 1251; Jeanblanc, 'Manufacturer's Liability to Persons Other Than Their Immediate Vendees,' 24 Va. L. Rev. 134-158; Lessler, 'Implied Warranty
M is not guilty of negligence and the goods sold to B by S are not of the food, or inherently dangerous type—enough doubt so that the specific provisions of the proposed act are important.

When I turn to the proposal I find that it is not indexed—as presumably a statute would not be indexed—so I look at the table of contents. Because the problem is essentially one of "warranty" I look for that heading and I find: "Sec. 2-318. Third Party Beneficiaries of Warranties Express or Implied." In a vague sense B is a third party to the contract between M and S, and the section is obviously worth looking into. It reads:

"A warranty whether express or implied extends to any natural person who is in the family or household of the buyer or one who is his guest or one whose relationship to him is such as to make it reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

This provision is not limited by its terms to warranties by a retailer; neither is it restricted to persons who are technically "third party beneficiaries"; in every respect it could apply to warranties between a manufacturer and a retailer by which third persons might be affected as well as to those between a retailer and a customer. But it does expressly limit the type of third person who can take advantage of a warranty—one "in the family," "a guest," or one whose "relationship to the buyer" is so and so. On the "ejusdem generis" theory of statutory interpretation the "relationship" generalization would be limited to relationships of the type specifically stated. By hypothesis of the case, M is not liable to B on the ground of negligence in manufacture. This section of the statute, which gives some third persons a right of action against a remote warrantor, does not extend the rights in this case to

B. Unless the common law gives such a right, which I assume it does not, as attorney for $M$ I should be apt flatly to deny liability to $B$ in the hypothetical case and carry the matter into court if necessary.\textsuperscript{10}

But because in fact I have time to study the statute through its other sections I do find eventually a clear answer to the problem. Under the heading of "Remedies" I find "Direct Action Against Prior Seller." Here section 2-719 reads:\textsuperscript{11}

"Damages for breach of a warranty sustained by the buyer or by any beneficiary to whom the warranty extends [section 2-318] may be recovered in a direct action against the seller or any person subject to impleader under the preceding section."

Though the warranty does not "extend" under section 2-318 to $B$, still the preceding section, 2-718, allows a seller who is sued for breach of warranty to implead his own seller. This seems clearly to settle the problem. $S$ could implead $M$ in a suit by $B$, hence $B$ can sue $M$ directly. But would I, as a hurried, and possibly harried, practitioner, have discovered section 2-719 after I had found section 2-318 and decided that by negative inference it left $M$ not liable to $B$? Perhaps a more competent attorney than I would surely have found it, just as more competent attorneys and judges than those in the Michigan and Indiana cases would have discovered how section 25 of the old act was clarified by section 76. But not all practicing attorneys are more competent, and the situation illustrates the evil which makes even rearrangement dangerous.\textsuperscript{12}

\textsuperscript{10} The draftsmen themselves apparently think of this section as covering the whole extent of third party rights against a remote warrantor. The "comment" to the section says, "This article is intended to take the burden of defending cases from an intermediate seller by permitting him to implead his own seller [query: does it do that?] and by providing, as the choice of the consumer, a direct action against the party ultimately responsible for the injury." But unless a draftsman's comments are enacted as part of a statute, which is not exactly commonplace, I know of no rule of statutory construction which would make them determinative of the legislative intent, and I doubt if any court would be likely to find such an intent from the wording of this section—one in the family, or household, or guest or other (similar) relationship.

In any event, here are potential law suits resulting from unprecise rephrasing.

\textsuperscript{11} Lest the apparent jump from §2-318 to §2-719 be misleading as to the size of the proposed act it should be said that each of its seven "parts" begins with a new hundreds digit; there are in fact only 111 sections.

\textsuperscript{12} In this particular instance the potential harm could have been forestalled either by combining in one section the rights of actions of all third party beneficiaries (to use that phrase as §2-318 uses it), or by a simple cross reference in §2-318 to the extension of rights in §2-719. As to this latter method, however, the introduction to the tentative second draft says, without explanation, "Internal cross references have been avoided in the text wherever that seemed feasible."
A somewhat similar possibility of unnecessary litigation growing from complication in arrangement relates to sales where possession is delivered but title is retained by the seller until payment. Unless otherwise provided by state statute, the buyer from one in possession under such a condition is not protected against the title-retaining seller. This is the rule whether the retention of title, the "condition," is evidenced by formal writing or is judicially inferred from the fact that the transaction was what courts sometimes loosely call a "cash sale." A not uncharacteristic case is Keegan v. Lenzie. Here was a sale of lambs not yet in existence, $500 down payment, $500 the following August, remainder "to be paid on delivery of the lambs." The lambs were delivered to the buyer who gave a draft for the remainder of the price, then resold and delivered the lambs to a purchaser in good faith. The buyer's draft proved worthless. The court with some apparent mental struggle held the original transaction to be one in which the seller intended to retain the title until payment of the actual cash, and because the title had not passed out of him at the time of the second sale the first seller was allowed recovery despite the sub-purchaser's good faith. Courts have had great difficulty in determining whether or not to infer an intent that payment is a condition precedent to passing of title. But once that is decided they have had no hesitation in protecting the original seller. The rule is straightforwardly set out in section 24 of the Sales Act, to the effect that where goods are sold by a person who is not the owner and who has not estopped himself the buyer acquires no better title than his seller had. And mere delivery of possession on condition that title shall not pass until payment has not been held to create an estoppel.

I have not yet found so explicit a statement in the proposed act, though I may have overlooked it, but the same idea seems there by implication. Section 2-405 provides:

14 So also Barksdale v. Banks, 206 Ala. 569, 90 S. 913 (1921); "Where the seller parted with possession of the goods with the intention that the sale was to be for cash and that title was not to pass until the check for the purchase money was honored, he can, after the dishonor of the check, recover the goods even from an innocent purchaser." (Syll.) Ocean Steamship Co. v. Southern Naval Stores Co., 145 Ga. 798, 89 S.E. 838 (1916); Johnson v. Iankovetz, 57 Ore. 24, 102 P. 799 (1910).
15 The conflict of authority where a check has been accepted in possible "payment" is discussed in 13 Mo. L. Rev. 211 (1948).
"A purchaser of goods acquires all title which his transferor has or has power to transfer; and in particular a good faith purchaser for value who is not a pawnbroker and to whom goods have been delivered and, if he is a merchant, delivered in current course of trade, acquires. . . . (c) the title of both the transferor and of any person who has made delivery to the transferor on conditional sale or on any other condition of sale if his transferor is a merchant who deals in goods of the kind." 16

By the clearest kind of implication, if the transferor is not a merchant the purchaser does not get the title of the person who has put them into the transferor's possession on condition. I cannot possibly avoid the conclusion that the proposed act protects the owner who, though he has given possession to a non-merchant, retains title in himself until the price is paid, quite as fully as do the Sales Act and the decisions. That is, I cannot avoid that conclusion if I stop with this section. I have no reason for looking further, but if I can carefully read the whole act through and go back to section 2-401 (1) b, I find another provision: "No agreement that a contract for sale is a 'cash sale' alters the effects of appropriation or impairs the rights of good faith purchasers from the buyers." This, I admit, is explicit enough, and I know now where my cash sale seller stands. But do I know after all? Section 2-405 gives the seller protection if he has transferred possession "on conditional sale or on any other condition of sale." Just what is the distinction between a "cash sale," and a sale on condition that title shall not pass until the price is paid? I have an idea of the difference myself, but will my opponent and the court agree with me? Any misunderstanding resulting from the arrangement of the proposed act I may have evaded by patient search and discovery of section 2-401 as well as section 2-405, but have I not still an inescapable series of suits for interpretation? 17

Even more than by change merely in arrangement, misunderstanding and litigation are likely to be precipitated by indefiniteness of phrasing. Were a change in phrasing imperative to desirable changes in substance the resultant interpretative litigation might be tolerable, depending on the value of the substantive change. But it can never be tolerable if it is the product of unnecessary or ineptly done rephrasing. And with that in mind, consider some of the changes which this pro-

16 Italics added.
17 Again the fault seems to be that the proposed act clings so closely to the verbiage of the old law as to detract from its alleged purpose of stating the law in lay parlance.
posed act apparently intends to make and the manner in which it expresses them.

Take first the stock situation of a contract for the sale of a definite specific chattel to which the seller obligates himself to do something before it is physically transferred to the buyer. The seller gets the work properly done, but before the buyer learns that it has been done, the chattel is destroyed without fault of either party. Is the seller entitled to the agreed price? Recovery cannot now be denied on the ground that the seller has not completed his contract by doing the work. Hence, under present rules the answer depends on the place of "title"; if it has passed, the buyer is liable, if it has not, he is not.

As to this passing of title the English act says simply and clearly: "Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof." The American act changes the rule by omitting the requirement of notice and says simply that the property does not pass "until such thing be done" period. If it is desirable to revert to the English rule and protect the buyer against possible loss during the period when from lack of notice he is not aware that he has title, the change could be accomplished by simply amending the present statute and reinstating the phrase "and the buyer has notice."

I believe the proposed act intends just such a reversion to the English rule that the buyer is not liable until he has had notice. But I reach that conclusion in this way. Section 2-401 (3) reads, "Where delivery is to be made without moving the goods (as is the case assumed) ... (b) if the goods are at the time of contracting already identified (as here) and no documents are to be delivered, then title passes at the time and place of contracting." If I rest content with this explicit statement I assume that the new act goes even farther than the Sales Act in putting risk on the buyer. Under the Sales Act, title to even specified goods does not pass until at least the thing is done; under the English act it passes only when the thing is done and the buyer has been notified; under this proposed section it would pass and risk would be on the buyer from the time the contract is made.

But if I do not stop there with the passing of title, and jump over to section 2-509 I find a heading "Risk of loss in absence of breach." By this section risk of loss is separated from title and I find: "The risk
of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.” For the moment I assume the seller not to be a merchant. The buyer, then, has title under section 2-401. But under section 2-509 he does not yet have the risk of loss—unless there has been a tender of delivery. By going back to section 2-503 I find: “Tender of delivery requires that the seller put and hold conforming goods at the buyer’s disposition and give the buyer any notice reasonably necessary to enable him to take delivery.” I presume that the seller cannot be said to “put and hold” even the specific goods “at the buyer’s disposition” until he has done the contracted-for work upon them. Therefore, he could not give the notice; therefore, though the buyer has the title, he does not yet have the risk. When the seller does get the work done, he can put and hold at the buyer’s disposition, but until he has also given the buyer notice he has not yet tendered delivery and the risk would not yet be on the buyer. Section 401, in relation to section 509 as explained by section 503, has the same ultimate effect on the particular case as reinserting “and the buyer has notice” into section 19, rule 2, of the Sales Act. I believe I know the answer to my problem; I object only to the relative circuitry by which I had to come to it.

But this leads to a similar problem whose solution under the proposed act I am not so sure of. Assume the stock situation of Tarling v. Baxter. S contracts to sell, and B to buy, a specific stack of hay for a stated sum; the price is to be paid thirty days later; the hay is to be allowed to stand on the premises for four months without charge; B is not to have possession until payment. Two weeks later the hay is destroyed by fire without fault of either party. On whom does the loss legally fall? The basic case in an infinite variety of circumstances is more commonplace today than it was when Tarling v. Baxter came before the courts over a century ago. That court put the loss “upon him in whom the property was vested at the time when it was destroyed,” and laid down “the rule of law, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee. . . .” This idea went into the now familiar rule in section 19 of the Sales Act:

“Rules for Ascertaining Intention . . . Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property 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.”

In the hypothetical case, then, under existing law, title would be in B and risk of loss as well would be on him. Under section 2-401 of the proposed act also title is clearly in B. But under section 2-509 the risk of loss is not on B unless S has made tender of delivery. S will not have made tender of delivery unless he has put and held the hay “at B’s disposition.” Is it held “at B’s disposition” before B pays or offers to pay? I would say not—in which case the proposed act is a complete change from the rule of *Tarling v. Baxter* and the Sales Act, and now S must bear the loss. But will S agree with me without a lawsuit? 19 Had such a change, if intended, been more explicitly stated, as might easily have been done, the now inevitable litigation would have been forestalled.

To carry the problem into still greater semantic difficulty, suppose that S has not retained the right of possession until payment. In such case the hay would without dispute be at B’s disposition, title and risk both would be in B under the proposed act, and he would have to pay despite the loss. But this would not be true, and the risk would not be on B if S is a “merchant.” Section 2-509 says, “the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant.” If

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19 The “comment” to §2-503 leaves me somewhat further in doubt:

“The major general rules governing the manner of proper or due tender of delivery are gathered in this section. The term ‘tender’ is used in this Article in two different senses. In one sense it refers to ‘due tender’ which contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed. Unless the context unmistakably indicates otherwise this is the meaning of ‘tender’ in this Article and the occasional addition of the word ‘due’ is only for clarity and emphasis. At other times it is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation. Used in either sense, however, ‘tender’ connotes such performance by the tendering party as puts the other party in default if he fails to proceed in some manner.

“(2) Subsection (1) sets forth two primary requirements of tender: first, that the seller ‘put and hold conforming goods at the buyer’s disposition’ and, second, that he ‘give the buyer any notice reasonably necessary to enable him to take delivery.’

“In cases in which payment is due and demanded upon delivery the ‘buyer’s disposition’ is qualified by the seller’s right to retain control of the goods until payment by the provision of this Article on delivery on condition. However, where the seller is demanding payment on delivery he must first allow the buyer to inspect the goods in order to avoid impairing his tender.” (Italics added).
S is a merchant the loss is still on him, even though he has duly “tendered delivery” to B. Assume that as seller of a stack of hay he is a farmer. Is every farmer who sells his product a “merchant”? Certainly not in the usual sense. But I find the word defined in the act itself, section 2-104: “‘merchant’ means a person who by his occupation holds himself out as having knowledge or skill peculiar to the practices of goods involved in the transaction.” Surely few men are by their occupation more skilled in the practices of hay than farmers. If that be so, the loss, contrary to the accepted law of the Sales Act, is still on S despite a tender of delivery which would have transferred it to B if farmer S were not a “merchant.” But I cannot believe that the attorney for a farmer who makes an occasional sale of his hay would admit as much without a lawsuit—a lawsuit in every state.20

The point I am trying to make is not merely that certain provisions of the proposal are obscure, or that it could wisely be corrected in this, that, or another respect, but that in undertaking a rearrangement and rephrasing far beyond what would be necessary for the substantive changes it makes, the proposal if adopted in its present form would precipitate litigation more harmful than the substantive good it creates. That odd definition of “merchant,” for instance, in terms of knowledge rather than of business, would provoke—indeed would necessitate—litigation in many types of circumstances. Section 2-314, for example, concerning implied warranty of merchantability says:

“A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to those goods or though not a merchant states generally that they are guaranteed.”

20 Does the professional small boat operator, or the amateur sailor who has no real “occupation,” so hold himself out as having special knowledge or skill that when he sells his old boat to buy a new one, he “warrants” it as to matters about which he in fact has no more knowledge than the buyer? Does a taxi driver “warrant” his old car in ways which the ordinary seller of a used car does not warrant it? Or the community “wash-woman” her old washing machine in a way that the banker’s wife in selling her old one does not? Although the farmer and the boat operator clearly come within the precise terms of the definition in §2-104 it seems fairly clear that the term is used in the text of other sections in its accepted dictionary significance rather than in the definition given it in this section. A “merchant” to whom “goods have been delivered in current course of trade” (§2-405) surely must mean a “dealer,” rather than merely a man who professes special skill. Indeed the “comment” to §2-314 says: “A person making an isolated sale of such goods would not be a ‘merchant’ within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply.”
Who is a "merchant" as the term is here used? I should normally assume it to mean what the lexicons say it means, "one who buys and sells marketable commodities for profit"; "a retailer of goods." From that definition I should assume that the proprietor of a country general store, who sells eggs bought from his neighbors, canned pate de foie gras, bought by summer residents but never tasted by himself or his own associates, hardware, toilet paper, wool socks, cotton goods, alcoholic liquor, and a host of other things is a merchant. And I should assume that under this section such a merchant, impliedly warrants the merchantability of all the various commodities he sells. I might think this an unreasonable and economically unbearable burden for the law to impose on such merchants, but I have no doubt that the statute does impose it. No doubt, that is, until I look at section 2-104 just referred to and find that the word does not mean in the statute what it means in the dictionary. Under the statutory definition he is "a person who by his occupation holds himself out as having knowledge or skill peculiar to the practices of goods involved in the transaction or in any particular phase of it, or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary having such knowledge or skill." And now I have real and serious doubt as to what section 2-314 means.

Is my general storekeeper peculiarly skilled "in the practices of" eggs—whatever that means? Or in the practices of pate? Or of toilet paper and cotton goods and all the rest? I personally might think him skilled in the practices of eggs—they do make a practice of becoming mephitic with age and messing floors when dropped—but he is hardly skilled in the practices of pate. As to his peculiar skill in the practices of all the other commodities he sells I would certainly be disputatious if some customer sued him for breach of implied warranty. Or does he, merely because he sells such things, "hold himself out as having knowledge or skill" peculiar to them? I would myself say emphatically "no." But I see an unending series of lawsuits to determine the applicability of section 2-314 as modified by section 2-104.21

21 This problem of the merchant seller's liability calls for study of more than the phraseology in which the liability is stated. Whenever a merchant sells to a customer a canned product which he has himself procured from a reputable manufacturer it is obvious to the buyer that he, the buyer, knows quite as much about what is in the can as the seller could possibly know. By no stretch of reasonable pretense can it be fairly inferred that the seller says, by implication, anything more than just that the can was obtained from a reputable
A problem which bothers practitioners today is whether or not a buyer who receives what he contracted for but finds it not to be as it was collaterally represented can both have restitution of money paid and also recover damages resulting from untruth of the collateral representation. Assume for illustration the standard hypothetical case: S contracts to sell to B a specific high-priced bull for breeding purposes, with an express representation that the animal is free from disease. S delivers and B pays. Title is now in B. Though S's representation was in good faith it was in fact untrue; the bull is found to have been infected with a contagious disease which has been communicated to other of B's cattle. B does not want the bull; to keep it would be of no gain but a continuing expense. He does want to return the bull and have restitution of his payment, and he wants also to recover for damage to his other cattle. Logically, if one assumes a certain dubious premise, B cannot have both remedies. Title to the bull has passed; to return the bull and regain his payment B must "rescind" the contract (the dubious premise). The contract being rescinded there is now no contract on which B can predicate action for breach of warranty. Impaled on the other horn—not of the bull—if he preserves the contract as a basis for recovery of damages for breach of warranty he must keep the bull.

The Sales Act in simple, straight-forward expression, appears to adopt this logic and make it the law. It says:

"Section 69. Remedies for breach of warranty. (1) Where there is a breach of warranty by the seller, the buyer may at his manufacturer. The courts which have come in growing numbers to impose on the seller an arbitrary liability for anything deleterious in the can have used the words of "implied warranty" as one of those hypocritical epithets whereby courts sometimes strive to hide the fact that they are making new rules of law, and succeed in concealing it from no one. It is a phase of the "judicial mind" at its sourest. Hence it is unfortunate that merely as a matter of verbiage the proposed act should retain the phrase "implied warranty" for the little man who isn't there, as well as for the one who is. Properly speaking, "warranty" means an actual representation of something, and "implied warranty" an actual representation fairly implied. Yet the "implied warranty" of this section covers both those representations which a buyer can reasonably infer to have been made and those fictitious ones which the statute would create out of whole cloth and supposed policy.

But quite regardless of its phrasing, §2-314 does impose on every merchant a liability if the content of what he sells is not "fit for the ordinary purposes for which such goods are sold"—an arbitrary liability, regardless of any lack of superior knowledge, or opportunity for knowledge, on the part of the seller. This definitely involves a problem of policy, of economic wisdom, which should be carefully studied before the section is enacted into law. The problem is discussed in detail in Waite, "Retail Responsibility and Judicial Law Making," 34 Mich. L. Rev. 494 (1936); 23 Minn. L. Rev. 941 (1939).
election—(b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty; . . . (d) rescind the contract to sell or the sale and . . . if the goods have already been received, return them or offer to return them to the seller and recover the price. . . . (2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

Under this statute, as well as by the possibly specious logic, B must elect his remedy and either forego restitution of the price as such, or forego his damages for breach of warranty.\(^{22}\)

Courts, however, have found various ways of dodging the dilemma. Cannot B return the bull and have restitution without necessarily rescinding the contract? That may be conceptually possible; in which case, of course, the contract would still stand on which to recover the damage to other cattle. Or if B does "rescind" in order to get his payment back, can he not still sue S for the damage? A true action for deceit will not lie because there is not even negligence on S's part in failing to know the truth. Nevertheless on one theory or another recovery of damages after return of the goods has been sustained.\(^{23}\) Other courts have found themselves unable to side-step both horns; they limit B to restitution or damages; they will not give him both.\(^{24}\) Thus even under the Sales Act the available remedies are uncertain and the "law" is confused. There is both opportunity and need for clarification through the proposed act.\(^{25}\)

But I do not find the needed clarification in the proposed act; I find instead only a necessity for renewed litigation even in states where the law is now settled. As I trace the problem through the proposed sections I find:

\(^{22}\) Section 70 of the Sales Act is ignored here, although it has been suspected of be-clouding the clarity of §69.

\(^{23}\) Amer. Pure Food Co. v. Elliott, 151 N.C. 393, 66 S.E. 451 (1909); Faris v. Lewis, 41 Ky. 375 (1842); Farris v. Ware, 60 Me. 482 (1872); Hostetter v. Bartholomew, 95 Kan. 217, 147 P. 1134 (1915); Granette Products Co. v. Neumann & Co., 200 Iowa 572, 205 N.W. 205 (1925).


Section 2-606. "(1) Acceptance occurs when the buyer (a) signifies his acceptance to the seller. . . ."

Under this I assume that the bull has been accepted and title is in $B$, as it would be at common law or under the Sales Act. Section 2-607 provides:

"... (2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked. . . . but acceptance does not of itself impair any other remedy provided by this Article for non-conformity."

$B$ did "accept," but not with knowledge. From the statement that he cannot revoke acceptance if it is made with knowledge of the defect I infer that he can revoke if he has accepted without knowledge. This is confirmed by section 2-608:

"... (1) the buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it."\(^{26}\)

Moreover, by section 2-401 (4), "a justified revocation of acceptance revests title to the goods in the seller."

When $B$ has thus "revoked his acceptance" and revested title to the bull in $S$ what are his rights of action against $S$? Recovery only of the price he paid $S$ for the bull? Or such recovery plus recovery of damages resulting from breach of the warranty? Section 2-714 gives him a right to damages for breach of warranty if he has not revoked his acceptance. By thus affirmatively expressing a right of suit if he has not revoked, does the section impliedly leave in effect the existing law which probably denies a right of action if he has revoked? At any rate there is nothing here which affirmatively alters the presently prevailing law. Up to this point $B$'s right to both remedies is still left in its present confused uncertainty. But jumping from section 2-608,

\(^{26}\) I assume that non-conformity as used in this section is not limited to non-conformity with the contract of sale—to which the bull did conform; but that it includes non-conformity with collateral representations as well. If I am wrong in this, then I find nothing in the proposed act which specifically authorizes revocation of acceptance and return of the bull, and I am left to the confusion of common law decisions. In §2-502 which allows revocation of acceptance of goods not specified at the making of the contract but later "appropriated," the terms of "non-conformity" obviously relate only to conformity with the identifying description, not with collateral warranties. I wonder if the proposed act does authorize return of the bull at all. Indeed I am sure that litigation will be needed to find out.
which gives him the privilege of revocation, to section 2-711, I find, under "Buyers Remedies in General," that when the buyer has justifiably revoked acceptance, then,

"with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid (a) 'cover' and have damages under the next section as to all the goods affected whether or not they have been appropriated; or (b) recover damages for non delivery as provided in this article (Section 2-711)."

I have difficulty in thinking of the damage to B's other cattle as in any possible sense "damage for non delivery." I am tempted to stop, with the assumption that it is not. Nevertheless, I look at section 2-713, entitled "Damages for Non-Delivery" and I find:

"The measure of damages for non-delivery is the difference between the price current at the time the buyer learned of the breach and the contract price together with the incidental and consequential damages as provided in this Article (Section 2-713)."

I still don't think of damage to other cattle from delivery of the diseased bull as consequential damages resulting from non-delivery. But I look at section 2-715. Here I find:

"(2) Consequential damages which could not reasonably be prevented by cover or otherwise include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know; and (b) injury to person or property resulting from breach of warranty."

On its face, this answers the question: B can return the bull and he can also recover for damages to his other cattle from the "breach of warranty." On its superficial face, yes. But as it is used in this context does the phrase "breach of warranty" refer to the representation of the bull's freedom from disease? Or is "warranty" in this section used in a different signification?

As properly and most commonly used, "warranty" does connote a representation concerning the thing sold, which representation is collateral to the contractual identification of the thing sold. In this usual significance the term would cover the representation as to the health

27 Italics added.
of the specific bull sold to B. And in this sense the provision of section 2-715 would clearly give B his right to recover damages resulting from the untrue statement, even though he has returned the bull. In this sense also the section is a change from the Sales Act. But “warranty” does have also a quite different connotation. In certain contextual situations it is well recognized as meaning, not a collateral characterization of the thing contracted for, but a part of the identifying description. The difference in the two significances is the difference between a contract for “this particular bull which I represent to be healthy” and a contract for “a healthy bull” not otherwise specified.28 In the one case the specific thing contracted for is delivered and damage results subsequent to that delivery and from it. In the other case the damage results from the non-delivery of the thing contracted for. In the hypothetical case the bull contracted for was in fact delivered; there has been no damage at all from non-delivery. In which of its two recognized connotations, then, is the term used in this section? If in the usual significance of a collateral representation, B can recover for injury to his other cattle, but the statute becomes internally contradictory and absurd in its verbiage, by allowing recovery for damages resulting from delivery under the heading of damages resulting from non-delivery. On the other hand, if the section intends the phrase in its other significance of breach of condition, the section becomes internally consistent—but B cannot recover for the damage to his other cattle. Which is the proper interpretation of the provision? I shall not know until some supreme court has rendered decision; and I venture the guess that some of the result-

28 It is used indiscriminately in each of these significances in the Sales Act. Sec. 12: “Definition of Express Warranty. Any affirmation of fact or any promise by the seller relating to the goods....” Sec. 14: “Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description....” Sec. 16: “In the case of a contract to sell or a sale by sample there is an implied warranty that the bulk shall correspond with the sample.”

So also in Murchie v. Cornell, 155 Mass. 60, 29 N.E. 207 (1891), a contract for the sale of unspecified ice was held to contain an implied “warranty” that the ice should be of a certain quality. Norrington v. Wright, 115 U.S. 188, 6 S.Ct. 12 (1885); Fairbanks Canning Co. v. Metzger, 118 N.Y. 260, 23 N.E. 372 (1890); Condit v. Onward Const. Co., 210 N.Y. 88, 103 N.E. 886 (1913).

Charter v. Hopkins, 4 M. & W. 399 at 404, 150 Eng. Rep. 1484 (1838): “A good deal of confusion has arisen in many of the cases on this subject, from the unfortunate use made of the term ‘warranty’.... But in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description, has been called a warranty; and the breach of such a contract, a breach of warranty....”
ant judicial decisions in different states will be flatly contradictory. 29

One more example of litigious uncertainty in the proposed act is section 2-327, relating to sales on approval. It provides that "after due notice of election (to return the goods) is given the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions." Does this mean that a non-merchant buyer need not follow reasonable instructions in making the return? What else can it possibly mean? But I am certain that no seller who has suffered loss through his buyer's neglect to follow reasonable instructions will accept that loss without resort to the courts.

Other instances of unclear or indefinite statement likely to lead to litigation could be adduced; just how many I have not attempted to find out. My purpose in this comment is not to point out how the proposed act could be made suitable for adoption, but only to indicate that as proposed it is not suitable.

Captious criticism of a great work? Picayune objection to minor flaws? No. The work is great, perhaps. Admittedly the specified faults are minor and correctable. But compelled resort to the courts when litigation should not be required is never picayune, always socially evil. The more superficial the flaw and more easily correctable the fault, the less justification there is for precipitating upon the public a burden of unneeded litigation. I do not now raise question of the wisdom of the substantive changes proposed, nor of whether, if the defects in form were corrected, the value of the statute would be worth the concerted effort to have it enacted or the trouble which seems always to follow material change in complicated and long familiar statutes. 30

29 Contrast with this involution the recent straightforward amendment of New York's sales act. The section [69 (1) (d) of the Uniform Act] read: "Where there is a breach of warranty by the seller, the buyer may, at his election....(d) rescind the contract to sell or the sale and refuse to receive the goods or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid." The amendment merely extends this to read: "...recover the price or any part thereof which has been paid, and damages recoverable in an action for breach of warranty to the extent that such damages are not compensated by recovery of the purchase price or discharge of the buyer's obligation to pay the same." N.Y. Personal Property Law (McKinney, 1949) art. 5, §150.

"... 'And the moral of that [said the Duchess] is "Be what you would seem to be"--or if you'd like it put more simply--"Never imagine yourself not to be otherwise than what it might appear to others that what you were or might have been was not otherwise than what you had been would have appeared to them to be otherwise."'"

30 "... '...and they drew all manner of things—everything that begins with an M'—'
" 'Why with an M?' said Alice.
" 'Why not?' said the March Hare.
" 'Alice was silent."
This comment goes only to the advisability of adopting the act in the form proposed. As to that, it is my opinion that the only net profit to the public in so doing would be an increase of business for the legal profession.