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Tennessee Law and the Sales Article of the Uniform Commercial Code

W. Harold Bigham*

On July 1, 1964, the Uniform Commercial Code became effective in Tennessee. The author here explains the provisions of the Code dealing with sales and compares these provisions with the former Tennessee law of sales.

Although much of the interest engendered by the Uniform Commercial Code has centered around Article 9—Secured Transactions, and although Article 9 has been described as the heart of the Code, Article 2—Sales—is half again as long, is in many ways more iconoclastic,¹ and has precipitated perhaps more criticism than any of the other articles of the Code.² Article 2 contains some innovations which are, at least upon initial impression, startling departures from traditional concepts of sales law, and it is therefore not surprising that there has been a spate of legal literature published on various aspects of this article.³ Since limitations of space prohibit a section by section discussion of Article 2, and the effect thereof upon prior Tennessee law, we must necessarily limit our discussion to those areas where Article 2 departs most drastically from commonly accepted

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1. "Some of these provisions [of the Code] are not only iconoclastic but open to criticisms that I regard so fundamental as to preclude the desirability of enacting this part at least of the proposed Code." Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950).

2. The more vociferous critics have been Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952); Hall, *Article 2—Sales—"From Status to Contract?"*, 1952 WIS. L. REV. 209; Murphy, *Some Problems Concerning Sellers' Remedies Under the Amended Uniform Commercial Code in Pennsylvania*, 33 TEMP. L.Q. 273 (1960); Williston, *supra* note 1.

3. There is in GOODRICH & WOLKIN, *A STORY OF THE AMERICAN LAW INSTITUTE* 55-57 (1961) (selected bibliography), a list of articles and comments on Article 2 of the Uniform Commercial Code published through 1961. Professor Corman of Rutgers University has brought this bibliography up to the latter part of 1962, Corman, *The Law of Sales Under the Uniform Commercial Code*, 17 RUTGERS L. REV. 14 (1962). The following are those articles published since Corman's compilation which the writer finds of interest: Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127 (1963); Mahon, *Remedies in Sales Disputes Under the Uniform Commercial Code—Notes for the Litigator*, 31 FORDHAM L. REV. 727 (1963); Peters, *Remedies for Breach of Contracts Relating to the Sales of Goods Under the Uniform Commercial Code: a Road Map for Article 2*, 73 YALE L.J. 199 (1963); Tisdale, *Impact of the Uniform Commercial Code on the Law of Contracts*, 39 N.D.L. REV. 7 (1963); Note, 43 B.U.L. REV. 396 (1963); Note, 30 U. CHI. L. REV. 540 (1963).

rules of sales and contract law now existing under the statutory and decisional law of Tennessee.

Article 2 of the Uniform Commercial Code, which supersedes the Uniform Sales Act⁴ in Tennessee, is divided into seven parts, one-hundred-four sections, and comprises approximately one-fourth of the entire Code. Although it is impossible to conclude with any mathematical precision, it seems safe to say that the overwhelming majority of the problems with which the practitioner and the jurist are faced in the area of sales revolve around the questions of when title to the goods passes and secondly whether there is an enforceable contract for the sale of goods. The former issue, which is perhaps the more formidable of the two, has traditionally been resolved by a formula utilizing variously the ascertainment of intention of the parties and the circumstances and usage of the trade involved.⁵ The Uniform Sales Act furnishes some guidelines which are helpful in determining whether title had passed, but the act is, on the whole, silent as to when an enforceable contract to sell comes into existence, and that issue is left to be resolved by the application of traditional rules of contract. After midnight, June 30, 1964, the jocular query among lawyers, "title, title, who has the title?" is no longer appropriate or useful, for Article 2 all but abandons the concept of title as a tool for solving sales law problems. Furthermore, on the assumption that ordinary principles of contract law have not worked well in their application to the practices of the commercial world, the draftsmen of the Uniform Commercial Code have substituted therefor principles more nearly approximating the actual practices and understanding of the businessman and merchant.

Although Article 2 introduces into the law of sales a great many terms and concepts which are alien to the lawyer's discipline, it is submitted that the efforts of lawyers and judges to fit actual business practices into a Procrustean bed of traditional legal concepts, in the form of the Uniform Sales Act and traditional principles of contract law, have not been altogether successful or happy. Any attempt,

4. The Uniform Sales Act, TENN. CODE ANN. §§ 47-1201 to 47-1277 (1956) [hereinafter cited U.S.A.] was enacted in Tennessee in 1919 and has been adopted in 37 states of the United States.

The Uniform Commercial Code was enacted as chapter 81 of the Public Acts of 1963 and Article 2—Sales is codified as TENN. CODE ANN. §§ 47-2-101 to -2-725 (repl. vol. 1964).

5. See, e.g., *State ex rel. Day Pulverizer Co. v. Fitts*, 166 Tenn. 156, 60 S.W.2d 167 (1933); *Knoxville Tinware & Mfg. Co. v. Rogers*, 158 Tenn. 126, 11 S.W.2d 874 (1928); *Young v. Harris-Cortner Co.*, 152 Tenn. 15, 268 S.W. 125 (1924); *Sanford v. Keef*, 140 Tenn. 368, 204 S.W. 1154 (1918); *Sindle v. American Ry. Express Co.*, 8 Tenn. App. 594 (M.S. 1928); *Mayer v. Catron*, 48 S.W. 255 (E.S. Tenn. Ch. App. 1898).

therefore, more nearly to pattern the law in conformity with accepted business practice and understanding is laudable.⁶

I. DEFINITIONS

Many of the definitions in Article 2 are new, in that they have no exact counterpart in existing law, while others modify or restate recognized terms. Competent statutory interpretation in any context requires close scrutiny of the "definitions" section of the statute under consideration, if any. A fortiori, this is true of the "definitions" provisions of Article 2,⁷ where familiar words are given meanings utterly unfamiliar to the average practitioner.

Undoubtedly, the most significant and radical departure from traditional law, as far as the new definitions of Article 2 are concerned, is the introduction by the Code of the term "merchant." Section 2-104 (1) defines this new creature thusly:

"Merchant" means a person who deals in goods of a kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

It is this term "merchant" which has caused the greatest controversy among legal writers and others.⁸

Under the Uniform Sales Act, with a few exceptions,⁹ controversies are resolved by the application of legal rules which are not "respecters of persons." Thus liability in any given case did not depend upon whether or not the buyer or seller was a professional in his particular field. Article 2 of the code, however, includes a number of sections containing two standards for such circumstances: one for the non-

6. Although it is early to be making predictions, the Uniform Commercial Code has been in effect in Pennsylvania and Massachusetts for some years, and the experience with Article 2 has been a very satisfactory one, with a considerable decrease in the amount of litigation. See Del Duca, *Commercial Code Litigation: Conflicts of Law; Sales*, 65 DICK. L. REV. 287 (1961); Malcolm and Funk, *Pennsylvania and Massachusetts Experience under the Uniform Commercial Code*, 16 BUS. LAW. 525 (1961).

7. TENN. CODE ANN. §§ 47-2-104 to -2-107 (repl. vol. 1964).

8. Hall, *Article 2—Sales—"From Status to Contract?"*, 1952 WIS. L. REV. 209; Williston, *Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950); *Hearings on the Uniform Commercial Code Before the New York Law Revision Commission*, NEW YORK LAW REVISION COMMISSION REPORT 1305, 1456 (1954) [hereinafter cited N.Y.L.R. COMM'N REP.].

9. Uniform Sales Act § 15 imposes an implied warranty of quality on the dealer or merchant which was not imposed on other sellers. U.S.A. § 16(c), TENN. CODE ANN. § 47-1216(c) (1956), imposed an implied warranty where there was a sale by sample by a seller who was "a dealer in goods of that kind." See also UNIFORM BILL OF LADING ACT §§ 35, 37.

merchant and a second higher and more demanding standard for the merchant or for transactions between merchants.¹⁰

Upon first examination it would appear that Article 2 makes a bipartite categorization of the individuals to whom specialized rules will be applied; closer scrutiny reveals, however, that there are three groups of individuals to whom varied rules apply. Some of the specialized rules, which appear only in Article 2, are premised on normal and ordinary practices in any type of business and are rules with which a person of even a modicum of common sense or business sense should be acquainted. On the other hand, referring again to the definition of "merchant," it is seen that Section 2-104(1) includes within its definition of the term "merchant" not only the professional who deals in goods of a kind, but also those persons who, by their occupation, hold themselves out as having knowledge or skill peculiar to the practices or goods involved in the transaction. Thus, there is a second group of rules prescribing special legal consequences where a party is a merchant with respect to the particular type goods involved; while still a third type of rule has references to "reasonable commercial standards of fair dealing in the trade" applicable to persons who are merchants under either the "goods" or the "practices" aspect of the definition of merchant.¹¹

Article 2's introduction into Tennessee law of the idea that parties to a sales contract should be treated differently according to their experience and knowledge is a radical departure from existing law. It is also true that juries will be faced with some difficult questions as to whether parties to litigation are "merchants" *vel non*.¹² To the

10. There are some 14 sections of Article 2 which contain special provisions of this nature: TENN. CODE ANN. § 47-2-103(1)(b) (repl. vol. 1964) ("good faith"); TENN. CODE ANN. §§ 47-2-104(1), 47-2-104(3) (repl. vol. 1964) ("merchant", "between merchants"); TENN. CODE ANN. § 47-2-201(2) (repl. vol. 1964) (formal requirements, Statute of Frauds); TENN. CODE ANN. § 47-2-205 (repl. vol. 1964) (firm offers); TENN. CODE ANN. § 47-2-207(2) (repl. vol. 1964) (additional terms in contract acceptance); TENN. CODE ANN. § 47-2-209(2) (repl. vol. 1964) (agreement to modification or rescission); TENN. CODE ANN. § 47-2-314(1) (repl. vol. 1964) (implied warranty merchantability); TENN. CODE ANN. § 47-2-327(1)(c) (repl. vol. 1964) (merchant's obligations upon election to return goods received under a sale on approval); TENN. CODE ANN. § 47-2-402(2) (repl. vol. 1964) (retention of possession of goods by seller after sale or identification); TENN. CODE ANN. § 47-2-403(2) (repl. vol. 1964) (merchant's power to transfer entrusted goods); TENN. CODE ANN. § 47-2-509(3) (repl. vol. 1964) (passage of risk of loss when the seller is a merchant); TENN. CODE ANN. § 47-2-603(1) (repl. vol. 1964) (merchant buyer's duties as to rightfully rejected goods); TENN. CODE ANN. § 47-2-605(1)(b) (repl. vol. 1964) (waiver of buyer's objections by failure to particularize); TENN. CODE ANN. § 47-2-609(2) (repl. vol. 1964) (right of adequate assurance of performance between merchants).

11. See discussion in Whiteside, *Uniform Commercial Code—Major Changes in Sales Law*, 49 Ky. L.J. 163, 170 (1960).

12. It has been suggested that "it is highly likely that there will be litigation over who is a 'merchant'; it may often be a jury question," Holahan, *Contract Formalities and the Uniform Commercial Code*, 3 VILL. L. REV. 1, 23 (1957).

author these do not appear to be valid objections, if they be considered as such. In the first place, it is certainly not true that all persons to all contracts are "equal before the law" in any real sense of the term in areas outside of sales transactions, for in many contexts the law, and particularly equity, treats persons differently according to their experience and knowledge.¹³ Secondly, even if experience bears out expressed fears that the question of who is and who is not a "merchant" may be a troublesome issue in almost every case, it is hard to conceive that it will be a more difficult issue than, for example, questions of contributory negligence in tort cases.

II. FORM, FORMATION AND READJUSTMENT OF THE CONTRACT

A. *Statute of Frauds*

Both the Statute of Frauds as contained in the Uniform Sales Act in Tennessee¹⁴ and the Statute of Frauds provision of Article 2, section 2-201,¹⁵ prohibit the enforcement of contracts for the sale of goods equalling or exceeding five-hundred dollars in value unless in writing.¹⁶ Beyond this similarity, these two provisions have little in common, and the new Statute of Frauds will make a significant—if not drastic—alteration in existing Tennessee law. Whether one agrees with Williston that section 2-201 is, with the exception of section 2-401 (which diminishes the importance of title), the most iconoclastic provision within the Code,¹⁷ or with Rabel that the Statute of Frauds is "a thoroughly antiquated legislative trick, which has so often misfired that the old law has been called the Statute *for* frauds and 'the refuge of the welcher,'"¹⁸ one must conclude that the draftsmen of the Code have made an attempt to hew a line somewhere between these opposing points of view. Whether this new hybrid will work well in practice remains to be seen. Indeed one is almost compelled to conclude that the draftsmen of the code would have preferred to omit the Statute of Frauds altogether, but as Corman has pointed out, "changes in the

13. For example an insurance contract is construed most favorably to the insured and strictly against the insurer. See, *e.g.*, *Woods v. City of La Follette*, 185 Tenn. 655, 207 S.W.2d 572 (1948).

14. TENN. CODE ANN. § 47-1204 (1956).

15. TENN. CODE ANN. § 47-2-201 (repl. vol. 1964).

16. The \$500 monetary amount necessary to make applicable the Statute of Frauds, as set out in the Uniform Sales Act, is stated as a "value" limit. It has been suggested that subsection 2-201(1) of the Uniform Commercial Code which sets a "price" limit may represent a change. This is so, because "value" may very well represent a broader concept than "price." See HAWKLAND, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE, 32, 22 (1958).

17. Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 573 (1950).

18. Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 433 (1950). (Emphasis added.)

method of satisfying the requirements of the Statute of Frauds . . . [reflecting] a liberalization of written formality requirements and a de-emphasis of permissive use of the alternate method of part performance of oral agreements made between merchants . . ." were chosen as an alternative to the almost insuperable task of obtaining legislative agreement to the omission of the Statute of Frauds.¹⁹

Section 2-201(1) lessens the rigid requirements of section 4 of the Uniform Sales Act²⁰ that the memorandum must contain itself every essential term of the contract to be enforced.²¹ This subsection merely requires that the writing be sufficient to indicate that a contract of sale has been made between the parties, that it be signed by the party against whom enforcement is sought or his authorized agent, and that a quantity be stated. An error as to the quantity in the memorandum prevents enforcement of the agreement beyond that quantity, thereby making the quantity term "the heart" of the sales contract; comment 1 to section 2-201(1) points out that:

[The required writing] . . . need not indicate which party is the buyer and which the seller. The only term which must appear is a quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Subsection 2-201(2) makes an innovation in the Statute of Frauds and at the same time corrects a situation fraught with inequity. This is the situation where X and Y enter into an oral contract for the sale of goods, perhaps by telephone, and one of the parties immediately sends a letter of confirmation to the other. The sender of the letter of confirmation, of course, has signed a memorandum which would satisfy the Statute of Frauds under the Uniform Sales Act, but the recipient thereof has signed no memorandum and may sit blithely by and "watch the market." Under the Code this artful dodger will no longer be able to ply his trade, for he too will be bound, unless he objects to the contents of the letter of confirmation within ten days of its receipt.²²

19. Corman, *supra* note 3, at 23.

20. TENN. CODE ANN. § 47-1204 (1956).

21. See, e.g., *Cashin v. Markwalter*, 208 Ga. 444, 67 S.E.2d 226 (1951); *Bauer v. Victory Catering Co.*, 101 N.J.L. 364, 128 Atl. 262 (Ct. Err. & App. 1925); *Wool Prod. v. Buff*, 109 N.Y.S.2d 324 (Sup. Ct. 1952).

22. "Of course, the effect of the subsection, at least, is to take away the protection of the Statute of Frauds from one who has unreasonably failed to reply to a letter of confirmation. The burden of proving that a contract was in fact made is not affected by it, and it will not be easy to use the provision in the perpetration of fraud. For example, a fraudulent party who sends out a letter of confirmation when no oral agreement has been made might succeed in using subsection 2-201(2) to deprive a foolish victim of the protection of the Statute of Frauds, but he would not be able to recover unless he could prove the existence of a contract, and, in this respect, subsection

Under the Uniform Sales Act, the Statute of Frauds can also be satisfied when the buyer accepts and receives part of the goods or gives something in earnest to bind the contract or in part payment.²³ Under that section a partial payment or partial acceptance validated the entire transaction against the Statute of Frauds, and not merely the executed portion. The vice inherent in this exception to the Statute of Frauds under the Uniform Sales Act was that it made it possible for the unscrupulous seller or buyer to watch fluctuations in the market and by a small shipment or a small payment expand an oral contract for the sale of a small amount of goods into a very large contract.²⁴ Of course, partial performance tends to prove the existence of the contract, but it does not provide any reasonably certain basis for ascertaining the quantity agreed upon, thereby making perjury attractive. Subsection 2-201(3)(c)²⁵ corrects this rule by providing that partial performance of an oral contract satisfies the Statute of Frauds only to the extent that goods have been accepted and actually received or that payment has been made and accepted. Were it not for the provision of the Code, discussed earlier, permitting the validation of oral sales contracts by letters of confirmation, this new part performance provision would be subject to serious abuse.

Tennessee and most other jurisdictions have generally denied application of the Statute of Frauds to contracts for sales of goods manufactured especially for the buyer and not suitable for sale to others in the ordinary course of the seller's business.²⁶ Such a contract is usually

2-201(2) would help him not at all. There is some danger, of course, that the fraudulent party might persuade the trier of fact that a contract was made prior to the written confirmation, but, on balance it would seem that this is a small price to pay for the many positive benefits effected by the subsection." HAWKLAND, *supra* note 16, at 29.

23. The Tennessee courts have been accused of applying the doctrine of part performance to contracts for the sale of goods and choses in action, without specifically requiring that performance be tantamount either to delivery of part of the goods, or acceptance of something in earnest or part payment, and in so doing they have set up a "judicially constructed avenue for escaping the Statute of Frauds . . . [which] is without foundation in the statute." Hartman, *Contracts—1960 Tennessee Survey*, 13 VAND. L. REV. 1035, 1046 (1960). The cases most severely criticized by Professor Hartman are *Foust v. Carney*, 205 Tenn. 604, 329 S.W.2d 825 (1959); *Buice v. Scruggs Equip. Co.*, 194 Tenn. 129, 250 S.W.2d 44 (1952); and *Ashley v. Preston*, 162 Tenn. 540, 39 S.W.2d 279 (1931).

It is to be noted that TENN. CODE ANN. § 47-2-201(1) (repl. vol. 1964), eliminates the term "choses in action," used in § 4 of the Uniform Sales Act, and such cases as *Buice v. Scruggs Equip. Co.*, 194 Tenn. 129, 250 S.W.2d 44 (1952) involving the sale of corporate shares of stock will now be governed by the Statute of Frauds contained in TENN. CODE ANN. § 47-8-319 (repl. vol. 1964).

24. See HAWKLAND, *supra* note 16, at 30.

25. TENN. CODE ANN. § 47-2-201(3)(c) (repl. vol. 1964).

26. *Anderson-Gregory Co. v. Lea*, 370 S.W.2d 934 (Tenn. 1963); 1 WILLISTON, SALES § 55 (rev. ed. 1948).

treated as one for work and labor.²⁷ The Code qualifies these decisions by adding a further requirement to withdraw contracts of this kind from the Statute, namely, that the seller, before notice of repudiation, have made a "substantial" beginning of manufacture, or have "made commitments" for procuring goods. Williston is critical of this new provision because he thinks it "undesirable to extend the Statute of Frauds to cases not heretofore within it, and also to introduce questions of what is a 'substantial' beginning and what is 'commitment.'"²⁸

Neither criticism appears valid to the writer; in the first place, inherent in the manufacturer exception to the Statute of Frauds is a policy decision that the seller has changed position to his detriment in manufacturing goods saleable only to the purchaser, and if he has not thus relied upon the oral commitment to purchase by making a "substantial" beginning, it is difficult to justify taking the case out of the Statute, as has been the wont of the courts heretofore. In the second place, resolution of the issue as to whether the manufacturer has made a "substantial" beginning presents the same type of problem before a court where an offeree in a unilateral contract situation alleges that he has begun performance.²⁹ After all, courts are created to resolve difficult issues.

One other provision of the Statute of Frauds in the Code deserves comment at this point. Under section 2-201(3)(b) "if a party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract sale was made," this will satisfy the Statute of Frauds, but only to the extent of the *quantity* which he admits. The similarities of this new rule to the doctrine of estoppel are obvious. The immediate problem which comes to mind is whether a demurrer to a declaration or an original bill will amount to an in-court admission by the defendant that a contract for sale is made in Tennessee. In view of the fact that a demurrer in this state admits all facts well pleaded in the plaintiff's pleading,³⁰ it would seem highly advisable, as has been suggested,³¹ that the legislature amend the

27. *Anderson-Gregory v. Lea*, *supra* note 26; see also *C. W. Rantoul Co. v. Claremont Paper Co.*, 196 Fed. 305 (1st Cir. 1912); *Mixer v. Howarth*, 38 Mass. (21 Pick.) 205 (1839).

28. Williston, *supra* note 1, at 575.

29. *Cf. Hutchison v. Dobson-Bainbridge Realty Co.*, 31 Tenn. App. 490, 217 S.W.2d 6 (M.S. 1946); RESTATEMENT, CONTRACTS § 45 (1932).

30. See, *e.g.*, *Deaton v. Vise*, 186 Tenn. 364, 210 S.W.2d 655 (1948); *Farris v. Yellow Cab Co.*, 189 Tenn. 46, 222 S.W.2d 187 (1949); *Jones v. Allied Am. Mut. Fire Ins. Co.*, 38 Tenn. App. 362, 274 S.W.2d 525 (E.S. 1954).

31. The Statute of Frauds may be raised in Tennessee by a demurrer. *Buice v. Scruggs Equip. Co.*, 194 Tenn. 129, 267 S.W.2d 119 (1954). See *Corman*, *supra* note 3, at 22.

It is to be hoped that, in the absence of such amendment, the Tennessee courts would follow the case of *Beter v. Helman*, 41 West. 7 (Westmoreland Co. Ct., Pa. 1958), in which it was held that a demurrer to a petition to enjoin the defendants from

Code to incorporate a procedural rule permitting the statute to be raised as a defense in a preliminary pleading which is not responsive to the declaration or original bill, as is true of a demurrer.

B. Parol Evidence Rule

The parol evidence rule, which is a rule of substantive law,³² forbids the admission of evidence to contradict or vary the terms or to enlarge or diminish the obligation of a written instrument or deed, except upon grounds of fraud, accident or mistake.³³ Section 2-202 of the Uniform Commercial Code³⁴ "loosens up" the parol evidence rule by abolishing the presumption that a writing (apparently complete) is a total integration, "a complete and exclusive statement of the terms agreed," and by requiring the court to make finding that the parties intended a total integration, before "consistent additional terms" (parol) are to be excluded.³⁵ The principal effect of this section will be to shift the presumption of finality under existing Tennessee law with respect to sales contracts to one of partial integration—a substantial change. Additionally, the Code permits the admission of parol evidence to show a course of prior dealings between the parties, customs and usages of the trade, and even consistent additional terms, without requiring a condition precedent of ambiguity of the terms.

One immediately obvious benefit of the new parol evidence rule as

selling or transferring a business which they had allegedly agreed, by parol, to sell the plaintiff was not an absolute admission of fact in the pleading and the alleged oral agreement was therefore unenforceable. In so holding the court observed that "a demurrer is not an absolute admission of any fact, but simply it admits those facts for the sole purpose of handling their legal sufficiency as determined by the courts." 41 West. at 12.

32. *Deaver v. J. C. Mahan Motor Co.*, 163 Tenn. 429; 43 S.W.2d 199 (1931).

33. *Hines v. Wilcox*, 96 Tenn. 148, 33 S.W. 914 (1896); *Littlejohn v. Fowler*, 45 Tenn. 284 (1868); *McQuiddy Printing Co. v. Hirsig*, 23 Tenn. App. 434, 134 S.W.2d 197 (M.S. 1939).

34. TENN. CODE ANN. § 47-2-202 (repl. vol. 1964).

35. There is a peculiar anomaly in Tennessee with respect to the procedural aspect of the parol evidence rule. According to McCormick, *Cobb v. Wallace*, 45 Tenn. 539 (1868), is the first case in the United States to suggest that it is for the jury to decide whether the writing introduced embraced all the terms of the previous parol contract. McCormick, EVIDENCE § 214 (1954). The rule of *Cobb v. Wallace* has been followed subsequently. See *Hines v. Wilcox*, 96 Tenn. 148, 159, 33 S.W. 914, 916 (1896): "The question as to whether the entire contract was reduced to writing, or an independent, collateral agreement was made, was a question of fact; and, when there was any evidence to sustain the contention, it was a matter for the jury to determine, and not for the court."

These cases are reversed by TENN. CODE ANN. § 47-2-202(b) (repl. vol. 1964), which provides that a writing intended by the parties as a final expression of their agreement with respect to the terms of the contract may be contradicted by evidence of prior agreement or contemporaneous oral agreement, but may be explained or supplemented "by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." (Emphasis added.)

set forth in the Code is the abrogation of the infamous Lord Bacon's maxim which forbids the use of oral evidence to explain or resolve a patent ambiguity, but admits oral evidence to explain a latent ambiguity. This is so because ambiguity of no kind will now be needed. In all candor it must be admitted few will mourn its demise. As Professor Morgan has forcefully pointed out,³⁶ the Tennessee courts have been forced into some ridiculous mental gymnastics in an attempt to do justice where the ambiguity was really patent, rather than latent, but the circumstances cried out for the admission of the proffered oral evidence.

C. *Formation of the Contract*

Every sale is a contract, and of necessity the draftsmen of the Uniform Commercial Code in their efforts to modify and modernize the law of sales to conform with common and accepted business practices, were driven to altering or repudiating some hornbook principles of contract law. To be sure, some sacred cows which many of us have worshiped since our first semester in law school have been rather rudely slaughtered by Article 2. Among the more traditional minded, these modifications of pure contract law, as applied to sales, may be somewhat harder to digest than even more radical innovations contained in Article 2, which are purely matters of sales law. For example, under the Code, the offeror no longer has complete control of his offer; acceptances to be effective need not comply in every respect with the offer; recovery may now be had on an executory contract even though the price is not fixed in the contract. An agreement modifying a sales contract needs no consideration to be binding; and, as discussed earlier, whether an ambiguity in a sales contract is latent or patent will no longer be a factor in determining whether or not parol evidence varying the terms of the contract may be introduced. These modifications represent significant changes in the statutory and decisional law of Tennessee.

It has been said by a much-quoted encyclopedia of law that the formation of a contract requires that there be a meeting of minds of the parties "at the same time."³⁷ It is questionable whether there is real support for such a statement, in the law of Tennessee or elsewhere, but it is true that assent to an offer to purchase is a prerequisite to the formation of a contract or an agreement, and there are many circumstances in which the specified time at which the contract came into existence may be important.

Section 2-204 of the Code modifies substantially the requirement of

36. Morgan, *Procedure and Evidence—1954 Tennessee Survey*, 7 VAND. L. REV. 895, 906 (1954).

37. 17 C.J.S., *Contracts* § 31 (1963).

mutual assent and adds or substitutes new rules as to formation of contracts for sale which are inconsistent with, and in some significant respects contrary to, Tennessee case law. The court is permitted to find the existence of a contract even though no specific time can be pointed to as the "birthday of the contract," and "even though one or more terms are left open." The contract for sale "does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." It has been stated that "in these respects its purpose is apparently to empower or require courts to give legal consequences to the rough-hewn deals of businessmen, even though they lack the precision which the judicial mind would find indispensable in an award of damages or specific performance."³⁸

If there is anything well settled in the law of contracts, it is that an offer for which no consideration has been given, may be withdrawn by the offeror at any time prior to acceptance by the offeree, regardless of promises by the former that such revocation will not take place.³⁹ The Code abolishes the need for consideration in order to make a written "firm" offer irrevocable for a reasonable time or during a specified time in the offer, thus making it possible for an offeror deliberately to make his offer irrevocable without requiring the offeree to pay a consideration for an "option." The new Code provision does fix an absolute limitation of three months upon irrevocability, subject to renewals and requires a separate signature by the offeror in the event that the term of irrevocability is contained within a form supplied by the offeree.

It is to be noted that the new section specifically recognizes that offers are "ordinarily" revocable, and one possible difficulty is the determination by a court or an attorney in advising his client as to what will constitute a "firm" offer, within the meaning of section 2-205. It has been suggested that the following language would almost certainly be held to constitute a "firm" offer:⁴⁰ "This offer shall be irrevocable for ten days," or "this offer shall be irrevocable," or "we offer you irrevocably," or "the foregoing offer is not to be withdrawn before November 1."

Although section 2-205 contains provisions which are contrary to the familiar rule that offers unsupported by consideration may be withdrawn at any time prior to their acceptance, there is no valid reason why a person should not be held to such a promise, consideration or no

38. 1 N.Y.L.R. COMM'N REP. 602 (1955).

39. Hoover Motor Express Co. v. Clements Paper Co., 193 Tenn. 6, 241 S.W.2d 851 (1951); Akers v. J. B. Sedberry, Inc., 39 Tenn. App. 633, 286 S.W.2d 617 (M.S. 1955).

40. 1 N.Y.L.R. COMM'N REP. 614 (1955).

consideration.⁴¹ Section 2-205 represents another section of the Code seriously curtailing the activities of the unscrupulous market-watcher, and is a significant improvement over the former Tennessee rule.

The Code abolishes the technical requirement that an acceptance be transmitted to the offeror by the same medium of communication used by the offeror in order to make a binding contract, the only requirement being that the medium be reasonable under the circumstances; however, the Code would not circumvent a stipulation by the offeror that the offeree use a particular medium for acceptance. There is no doubt that men who make offers in the buying and selling of goods are ordinarily not as exacting about the kind of acceptance (promise or performance) wanted as the courts have made them seem. More often than not there is no reason why the offeror, unless he has clearly stipulated the manner of acceptance, should be able to raise the technical defense that the offeree accepted in the wrong way. Generally speaking, when this defense is raised, it is utilized to avoid a deal which no longer appears as attractive as it did when the offer was made, usually because of a change in market conditions.

To some extent, section 2-206⁴² in permitting acceptance of an offer to make a contract "in any manner and by a medium reasonable in the circumstances" blurs the distinction between the unilateral contract where performance is sought in return for a promise, and a bilateral contract where promises are exchanged by the contracting parties. In addition, the section is a substantial alteration of the Tennessee rule, reflected by many cases⁴³ that the acceptance must exactly match the offer, *i.e.*, that the acceptance of an offer must be unqualified and must not vary from the terms of the offer.

Section 2-207 is a related provision and is likewise a radical departure from the general rule, which was the rule in Tennessee, that acceptance of an offer must exactly and precisely accord with the terms of an offer. Contrary to these rules, in transactions between merchants, the Code recognizes, with certain exceptions, acceptances or confirmations containing variations from the offer as forming a contract, even though they may be additional to or different from the offer. Section 2-207 has already produced problems in judicial interpretation, provoking the United States Court of Appeals for the First Circuit to comment that "this statute is not too happily drafted."⁴⁴

41. It is to be noted that TENN. CODE ANN. § 47-2-205 (repl. vol. 1964), applies only to offers made by a "merchant."

42. TENN. CODE ANN. § 47-2-206 (repl. vol. 1964).

43. *Ray v. Thomas*, 191 Tenn. 195, 232 S.W.2d 32 (1950); *Canton Cotton Mills v. Bowman Overall Co.*, 149 Tenn. 18, 257 S.W. 398 (1923); *Armistead v. Tenn. Consol. Coal Co.*, 14 Tenn. App. 434 (M.S. 1932).

44. *Roto-Lith, Ltd. v. F. T. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962). This case involved the sales transaction in which form contracts were exchanged. The

A considerable number of Tennessee decisions support the rule that a course of performance, as manifested in the conduct of both parties to a contract, may be used to show the meaning of a provision *which is ambiguous*.⁴⁵ Section 2-208⁴⁶ of the Code provides:

Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted without objection shall be relevant to determine the meaning of the agreement or to show a waiver or modification of any term inconsistent with such course of performance.

It is immediately obvious that this provision setting out that a course of performance is always relevant to a determination of the meaning of the contract is contrary to the judicial decisions cited earlier, which have stated or held that the course of performance under a contract or the practical interpretation of the parties themselves only applies in cases where the contract is ambiguous and the intention doubtful. Official comment 1 states that this section completes the "set of factors" which determine the meaning of the agreement. The other two, as mentioned in section 2-208(a), are course of prior dealing (between these parties) and usage of trade (section 1-205). The statement in official comment 1 that what the parties do under their agreement is the best indication of what it means has been criticized as a "brocard" giving "considerable advantage to the nervy and persistent contract-breaker, who, as against a less aggressive opponent, tries to bull his way through a course of conduct which does not satisfy the explicit terms of the contract."⁴⁷

Most of us, if not all, learned in our first semester in law school that the famous (or is it infamous?) pre-existing duty rule makes impossible the enforcement of a contract modification where the person agreeing to the modification has changed his mind. Section 2-209, the general purpose of which, according to official comment 1, is "to protect and make effective all necessary desirable modifications of sales contracts without regard to technicalities which at present hamper such adjustments," states that "an agreement modifying a contract within

defendant's acknowledgment and invoice included the printed warranty disclaimer clause. The goods were received and used by the plaintiff. He subsequently instituted an action for breach of sales warranty and the defendant maintained that such liability was excluded by the disclaimer clause. For a critical discussion of the court's decision in *Roto-Lith*, see Note, 3 B.C. IND. & COM. L. REV. 573 (1962).

45. See, e.g., *Canton Cotton Mills v. Bowman Overall Co.*, 149 Tenn. 18, 257 S.W. 398 (1923); *Frierson v. International Agricultural Co.*, 24 Tenn. App. 616, 148 S.W.2d 27 (M.S. 1940).

46. TENN. CODE ANN. § 47-2-208(1) (repl. vol. 1964).

47. 1 N.Y.L.R. COMM'N REP. 637 (1955).

this Article needs no consideration to be binding." This reverses a rule which has obtained in Tennessee at least since 1857.⁴⁸

It is to be noted that, although section 2-209 permits oral modification without consideration, if the original contract was within the Statute of Frauds, then section 2-201 (Statute of Frauds) must be satisfied as to the waiver or modification as well. To allay any fear that the abrogation of the pre-existing duty rule might lead to the extortion of modifications by one seeking to escape duties of performance under the contract, the second paragraph of official comment 2 points out that the forcing of a modification on one party by the other "without legitimate commercial reason is ineffective as a violation of the duty of good faith."

III. GENERAL OBLIGATIONS AND CONSTRUCTIONS OF CONTRACT

Part 3 of Article 2 contains provisions relating to unconscionable contracts, allocation of risks, payment of the purchase price, delivery output and requirements contracts, mercantile terms and sales warranties. Of these, the sections relating to unconscionability, output and requirements contracts, and sales warranties are the most important, and the discussion here shall be limited to these sections, with emphasis on the first and last.

A. "Unconscionability"

Section 2-302 offers protection against "unconscionable" contracts or clauses therein.⁴⁹ When it is found, as a matter of law, that the contract or any clause therein was unconscionable at the time it was made, the court has the option: (1) to limit the application of such clause; (2) to strike the clause and enforce the balance of the contract; or (3) to refuse to enforce the contract. The comment to this section points out that the purpose is merely to allow courts to do directly what they already do by indirection. This section will make substantial changes in Tennessee law by opening the door to claims of "unconscionable clauses" much more broadly than before. About as far as Tennessee courts have gone is to state that where one construction would make a contract unusual, extraordinary, and harsh, and another

48. See *Bryan v. Hunt*, 36 Tenn. 543 (1857).

49. TENN. CODE ANN. § 47-2-302 (repl. vol. 1964). "Unconscionable contract or clause—(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction will prevail.⁵⁰ A much more typical statement is that "it is the court's function to interpret and enforce contracts as written, though they may contain terms which may be thought harsh and unjust."⁵¹

This section has been criticized on the ground that the fairness or unfairness of a transaction may not be as apparent to a court when there is litigation about the contract as when it was viewed by the parties earlier under different circumstances.⁵² Furthermore, it has been suggested that the section may give birth to a great deal of litigation, since "what is unconscionable under any given set of facts is obviously a very difficult thing for anyone to determine." Corman has effectively answered these criticisms by pointing out that it is for the court to determine whether or not a clause in a contract is unconscionable, and that the court will be aided in making its determination by evidence presented as to the commercial setting of the contract or clause and its purpose and effect.⁵³

In the author's view no valid objection has been presented to section 2-302. There is a well established analogy in Tennessee law, it is believed, in the general rule that a provision in a contract which purports to prescribe the damages for one or more breaches of its provisions will not be enforced if the amount stipulated is to operate *in terrorem*, *i.e.*, as a penalty.⁵⁴ Additionally, section 2-302 makes unnecessary the courts' sometimes painful attempts at interpreting a harsh or inequitable provision in a contract so as to attain a result not unconscionable.⁵⁵ There is no reason why the court should not be able to refuse the enforcement of an unconscionable clause in a contract in the same

50. *Nashville Terminal Co. v. Tennessee Cent. Ry.*, 2 Tenn. App. 646 (M.S. 1926).

51. *Petty v. Sloan*, 197 Tenn. 630, 631, 277 S.W.2d 355, 356 (1955); see also *Smithart v. John Hancock Mut. Ins. Co.*, 167 Tenn. 513, 71 S.W.2d 1059 (1934); *E. D. Bailey & Co. v. Union Planters Title Guaranty Co.*, 33 Tenn. App. 439, 232 S.W.2d 309 (W.S. 1949); *Matthews v. Matthews*, 24 Tenn. App. 580, 148 S.W.2d 3 (M.S. 1940). The cases which best illustrate this view are those in which the argument of unconscionability is based on the claim that one party receives or is to receive a performance grossly unequal to the value of his own performance; generally, courts reject such an argument on the ground that the court will not inquire into inadequacy of consideration in a bargain between persons *sui juris* and not coerced. See Note, 63 *YALE L.J.* 560 (1954). It is to be noted, however, that *specific performance* of a contract will not be decreed when it is hard or unreasonable in itself, or when, from material change of circumstances since the contract, the performance would be attended with any particular hardship. *McCarthy v. Kyle*, 44 Tenn. 348 (1867); *Sanders v. Sanders*, 40 Tenn. App. 20, 288 S.W.2d 473 (E.S. 1955); *Fultz v. Melcher*, 1 Tenn. Civ. App. (1 Higgins) 72 (M.S. 1910).

52. Corman, *supra* note 3, at 27.

53. *Ibid.*

54. *Railroad v. Cabinet Co.*, 104 Tenn. 568, 58 S.W. 303 (1900); *Schrimpf v. Tennessee Mfg. Co.*, 86 Tenn. 219, 6 S.W. 131 (1887); see also *RESTATEMENT, CONTRACTS* § 339 (1932).

55. See cases cited in *UNIFORM COMMERCIAL CODE* § 2-302, official comment 1.

manner as specific enforcement is now refused where the contract presented is "harsh, inequitable or oppressive." It is true, however, that the Tennessee courts, in the interpretation of this provision, should avoid any temptation to remake contracts for persons who are sui juris, where the contract was not coerced. This section should not be a refuge for the scoundrel who is merely wishing to avoid a contract which has, subsequent to the making thereof, become unprofitable or disadvantageous to him.

B. *Output and Requirements Contracts*

Contracts which require that the promisor provide all of a certain item which the promisee shall require during a given period, and contracts in which the promisor agrees to buy all the output of the promisee during a specific period have been the source of considerable difficulty over the years. Although such contracts have been held valid in Tennessee, in some states they have been struck down as being too indefinite to be enforceable, or on the ground that such a contract lacks mutuality of obligation.⁵⁶ Output and requirement contracts serve significant business needs by tailoring the quantity prescribed in the contract to the future operations of seller or buyer. Contracts for the sale of total output assure the seller of a market at capacity production and avoid the burdens of marketing and the risks of overproduction; a buyer normally would be induced to assume these burdens and risks by a price concession. On the other hand, contracts to supply requirements are normally designed to assure the buyer of needed supplies, and may be attractive to the seller in assuring him of buyer's patronage for a prescribed period. Section 2-306⁵⁷ of the Code validates such contracts, further requiring the reading of commercial background and intent into the language of any agreement and demanding good faith in the performance of the agreement. In neither respect does it alter prior Tennessee law.⁵⁸

C. *Warranties*

The Code substantially continues the policy of the Uniform Sales Act with regard to warranties of title by seller as to the rightfulness of the transfer of goods and their freedom from encumbrances of liens not known by the buyer at the time of the contract. The sections on sales warranties—2-213 through 2-318—make, however, a number of

56. See Havighurst & Berman, *Requirement and Output Contracts*, 27 ILL. L. REV. 1 (1932); Note, 102 U. PA. L. REV. 654 (1954).

57. TENN. CODE ANN. § 47-2-306 (repl. vol. 1964).

58. The leading case in Tennessee is *Hardwick v. American Can Co.*, 113 Tenn. 657, 88 S.W. 797 (1904); see also *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298 (6th Cir. 1903).

significant changes which should be noted. The warranty of quiet possession is abolished by the Code, on the theory that disturbance of quiet possession is but one way of establishing a breach of warranty of title.⁵⁹

The express warranty has continued to gain in prominence and the Code reflects this trend by broadening its coverage to transactions which formerly were only within the bounds of implied warranties. This extended coverage affords the buyer additional protection against a disclaiming seller who seeks without the purchaser's consent to limit his obligation under the sale or contract sale, and is consistent with the Code changes with respect to warranties reflecting a trend toward greater consumer protection.

The express warranty was narrowly defined under the Sales Act as:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement of the seller's opinion only shall be construed as a warranty.⁶⁰

Where the Sales Act limited the express warranty only to affirmations of fact or promises of the seller which have a natural tendency to induce the buyer to purchase the goods in reliance thereon, the Code has extended the application of the express warranty to sales by descriptions and to sales by sample or model.⁶¹ The Code also substitutes the phrase "part of the basis of the bargain,"⁶² in place of the words "natural tendency" and "purchasers . . . relying thereon" in the Sales Act provision set out above.

Warranties arising from sales by description and by sample are classified as implied warranties under the Sales Act, obligating the

59. See UNIFORM COMMERCIAL CODE § 2-312, official comment 1. Section 2-725 of the Code provides for a four year statute of limitations and this four year period could conceivably expire before the buyer's right of possession is disturbed. Corman has pointed out, "however, the advantages of clear questions as to title within a relatively short time, coupled with the infrequency of quiet possession actions involving the sale of personal property was felt sufficient justification for the elimination of the separate warranty." Corman, *supra* note 3, at 28. See also 1 N.Y.L.R. COMM'N. REP. 122 (1954); Lattin, *Article 2: Sales*, 23 OHIO ST. L.J. 185 (1962). *But cf.* Hall, *Article 2: Sales—“From Status to Contract?”*, 1952 WIS. L. REV. 209, 215-16.

60. TENN. CODE ANN. § 47-1212 (1956).

61. TENN. CODE ANN. § 47-2-313(1) (repl. vol. 1964) provides: "Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes a *part of the basis of the bargain* creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made *part of the basis of the bargain* creates an express warranty that the goods shall conform to the description. (c) Any sample or model which is made *part of the basis of the bargain* creates an express warranty that the whole of the goods shall conform to the sample or model." (Emphasis added.)

62. *Ibid.*

seller only to the extent of supplying goods which reasonably conform to the description,⁶³ or in the case of sale by sample supplying bulk in reasonable conformity with the sample.⁶⁴ Professor Williston and others have criticized the failure of the Sales Act to allow for an express warranty in sales by description, and the draftsmen of the Code, being cognizant of the problem, left no room for ambiguity by creating an express warranty under section 2-313 in all sales involving a description or descriptive language.

The warranty of merchantability represents perhaps one of the most significant changes made by the Code. If the seller is a merchant with respect to goods of the kind sold, a warranty of merchantability is implied, unless excluded or modified. The Uniform Sales Act⁶⁵ and the common law decisions preceding it limited applications of the implied warranty of merchantability to sellers who dealt in goods of that description, and this position is continued by the Code. Though there have been some criticism of this provision, as has been pointed out, "there seems no reason why any person who sells goods should not make an implied warranty that they are merchantable."⁶⁶

The long disputed issue of whether the sale of food to be consumed on the premises constituted a sale under which the seller could be liable for breach of warranty is conclusively settled by the Code.⁶⁷ Whether the food be consumed on the premises or taken elsewhere, it will be, for the purposes of a warranty of merchantability, a sale of goods and not a furnishing of services with the sale of food being only incidental.⁶⁸ Although no Tennessee decision has been found dealing with the problem, courts in other jurisdictions have at times resorted to the legal fiction that the buyer had made known his purpose and that he purchased in reliance upon the skill and judgment of the seller, thus qualifying under the warranty of fitness for a particular purpose. Such fiction need no longer be resorted to under the Code since the warranty of merchantability is applicable in all sales of food.⁶⁹

63. See TENN. CODE ANN. § 47-1214 (1956).

64. See TENN. CODE ANN. § 47-1216(a) (1956).

65. TENN. CODE ANN. § 47-1215(2) (1956).

66. 1 N.Y.L.R. COMM'N REP. 99 (1954).

67. TENN. CODE ANN. § 47-2-314(1) (repl. vol. 1964). This section reverses the decision in *Walton v. Gurthrie*, 50 Tenn. App. 383, 362 S.W.2d 41 (W.S. 1962), which denied the existence of any warranty as to a barbecued ham hock purchased by the plaintiff, who suffered dire consequences from the eating thereof.

68. UNIFORM COMMERCIAL CODE § 2-314, official comment 5. Some jurisdictions have held that there are no sales warranties where food is purchased and consumed on the premises on the ground that the transaction was not a sale. See, e.g., *Valeri v. Pullman Co.*, 218 Fed. 519 (S.D.N.Y. 1914); *Childs Dining Hall v. Swingler*, 173 Md. App. 490, 197 Atl. 105 (1938).

69. The non-food cases where both goods and services are furnished have plagued the courts. In *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954), the New York Court of Appeals ruled that the furnishing of diseased blood for which

Disclaimer of the implied warranty of merchantability is permitted under section 2-316(2)⁷⁰ with the safeguard that such disclaimer must mention merchantability and, in the case of a writing, must be conspicuous. Unlike the implied warranty of merchantability, the implied warranty of fitness for a particular purpose may be excluded by the use of general language; however, the disclaimer must be both in writing and conspicuous. It is assumed that the word "all" in section 2-316(3) (a) does not include the implied warranty of title. If language such as "as is" or "with all faults" excludes the implied warranty of title, this section changes the law of Tennessee.⁷¹ It has been suggested that the warranty of title may be protected by judicial application of the introductory phrase to section 2-316(3) (a)—"unless the circumstances indicate otherwise."

Except in a minority of jurisdictions which have deviated from the norm, the general proposition is that warranty extends only to parties to the contract, to those persons said to be in privity. The privity doctrine, a contractual theory, developed in an era when the buyer was held to deal at arms length in commercial dealings and social policy reflected the need for protection of sellers and manufacturers. To some extent at least the requirement of privity of warranty is eliminated by Article 2 of the Code. Section 2-318 provides that the sellers express or implied warranties extend "to any natural person who is in the family or household of his buyer or is a guest in his home if it is 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." The seller may neither exclude nor limit the operation of section 2-318.

It is submitted that the considerable furor which section 2-318 has provoked is completely uncalled for. Indeed the courts of Tennessee have already gone farther than section 2-318.⁷² The section applies only to warranties given by the seller and, therefore, does not specifically include any other party involved in manufacturing or distributing the goods. The manufacturer does not sell his product directly to the ultimate retail purchaser and is not included within the language of the section. Efforts are already being made to expand the scope for the sales warranty beyond the language within section 2-318,

the plaintiff patient was charged did not constitute a sale, but was only incidental to the main function of the hospital. See VOLD, SALES § 94 (2d ed. 1959).

70. TENN. CODE ANN. § 47-2-316(2) (repl. vol. 1964).

71. See *Rundle v. Capitol Chevrolet, Inc.*, 23 Tenn. App. 151, 129 S.W.2d 217 (M.S. 1939); 1 N.Y.L.R. COMM'N REP. 410 (1955). It has been suggested that "warranty of title may be protected by judicial application of the introductory phrase to § 2-316(3)(a)—'unless the circumstances indicate otherwise.'" Corman, *supra* note 3, at 31 n.98.

72. *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655 (M.S. 1960).

and it will take on great significance only if these efforts are successful.⁷³

D. "Sale or Return" and "Sale on Approval"

The Code makes several needed improvements in the area of "consignment sales," "sale or return," and "sale on approval." There has never been any difficulty in drafting a contract which will provide clearly either for a "consignment sale" or for a "sale or return." The difficulty is the drafting of a contract which will enable the seller to treat it as one or the other as expediency dictates in the light of subsequent events. If creditors of the consignee levy on the goods, the seller wishes it to be a consignment sale, or, more properly speaking, a consignment for sale; in that case he has the title and the creditors take nothing. If it is a question of personal property taxes, or a case of loss, the seller would rather it be a sale or return, in which case title is in the consignee until the return is made.

Both the Code and the Uniform Sales Act recognize "sales on approval" and "sale or return" contracts. Former Tennessee law distinguished between the two contracts by reference to intent as to the location of title. Section 19, rule 3 of the Uniform Sales Act defines a "sale or return" as a contract which uses "terms indicating an intention to make a *present sale*, but to give the buyer an option to return the goods instead of paying the price . . ." (Emphasis added.) The Uniform Sales Act does not define a "sale on approval," but refers to contracts under which "goods are delivered to the buyer on approval or on trial or satisfaction, or, other similar terms . . ."⁷⁴

The vice of the consignment sale, unless duly curbed, is that it gives the consignee misleading appearances of wealth. Of course, the purchaser from the consignee in ordinary course of business is protected because the very purpose of the arrangement is a sale to him. The creditors of the consignee, even though they rely upon appearances, are defeated by the retained title of the consignor. Section 2-326⁷⁵ covers this matter by providing that if the consignee is carrying on business under any name except that of the consignor, the transaction shall be treated as a sale or return as far as creditors of the consignee

73. Such efforts in Pennsylvania to expand the scope of the sales warranty beyond the language within § 2-318 have been unsuccessful; *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961); *Facciolo Paving & Const. Co. v. Road Machinery, Inc.*, 8 Ches. Co. Rep. 375 (Pa. Co. Ct. 1958); *Kaczmarkiewicz v. Williams Co.*, 13 Pa. D. & C.2d 14 (Co. Ct. 1957).

For a list of recent decisions imposing warranty liability upon a manufacturer who is not in privity with the injured plaintiff. See *Corman*, *supra* note 3, at 33.

74. TENN. CODE ANN. § 47-1219 (1956). See *Newkirk v. Tennessee Metal Culvert Co.*, 15 Tenn. App. 417 (M.S. 1932); *Sindle v. American Ry. Express Co.*, 8 Tenn. App. 594 (M.S. 1928).

75. TENN. CODE ANN. § 47-2-326 (repl. vol. 1964).

are concerned. There are three exceptions: (a) If the consignee is generally known to be engaged in selling the goods of others; (b) if the consignee complies with any applicable law with respect to a sign giving notice; or (c) if the consignor complies with the filing provisions of Article 9 on Secured Transactions.

Section 2-326 also distinguishes between "sale or return" and "sale on approval" along functional lines, providing a needed clarification. The intent of the draftsman is suggested by the statement in official comment 1 that "every presumption runs against a delivery to a consumer being a 'sale or return' and against a delivery to a merchant for resale being a 'sale on approval.'" Unless otherwise agreed if delivered goods may be returned by the buyer even though they conform to the contract, then the transaction is a sale on approval if the goods are delivered *primarily for use*; and a sale or return if delivered *primarily for resale*. As we have seen, section 19(3) of the Uniform Sales Act speaks in conceptual terms and provides no objective guide for distinguishing between the two.

Section 2-327⁷⁶ of the Code settles two matters not covered by the Uniform Sales Act and not altogether clear under the cases. In the case of a sale on approval, section 2-327(1)(c) provides that, after due notification of an election to return, the return is at seller's risk and expense. However, a merchant buyer is required to follow any reasonable instructions. Under section 2-327(2) in case of a sale or return, the option to return (unless otherwise agreed) extends to the whole of any commercial unit of the goods while in substantially their original condition, but must be exercised reasonably; and the return is at the buyer's risk and expense.

IV. TITLE, CREDITORS AND GOOD FAITH PURCHASERS

A. *Abandonment of Title Concept*

Professor Williston has stated that by minimizing the consequences of title passing in almost all situations and abandoning the search for presumed intention about title passing in the remaining cases, the Code has departed "from the long-established tests for determining title and the consequences of title or the lack of it."⁷⁷ This he finds the most objectionable and irreparable feature of the sales part of the Code. Certainly there can be no doubt that the question of the passing of the title has been resorted to "as a solvent of the work-a-day problems of the market, and to nearly everything in sales outside of warranty." No other provision of the Code so materially alters pre-existing law.

76. TENN. CODE ANN. § 47-2-327 (repl. vol. 1964).

77. Williston, *supra* note 1, at 570.

Of the title analysis approach, Professor Latty has commented as follows:

The rules of the Uniform Sales Act and their common law counterparts (with their varying degrees of conflict of authority that we have come to expect as natural) seem on the surface easy to grasp. True, we sometimes have misgivings about the reality of ascertaining the presumed intent of the parties about something that they didn't think about, but we are accustomed to similar "finding" of the intent of the legislature and statutes and of parties and contracts. Moreover, the judicial opinions on title-passing, in isolated cases, seem on the whole to "read well" and to come to a "good" result. It is when you begin to dig below the surface that you strike trouble and confusion; and the further you dig the greater the confusion; and while I cannot claim where you end when you "exhaust" the explorations, I venture that the more you explore the more you become willing to take either side on an alleged title-passing question in most cases.⁷⁸

The conception of title and the almost hopeless task of ascertaining the precise moment of the passage of title are abandoned in the Code in favor of a more pragmatic approach which does not resort to finding nonexistent title-intention. There is, however, of course, no way in which the Code could avoid the problems which have been heretofore attempted to be solved by the use of the title concept. It is furthermore true that the ultimate result in many cases will not vary materially from that reached by the indirect process of first locating title to the goods.

In lieu of resort to the finding of "an intention about something that laymen in business deals don't think about and hence don't express themselves about,"⁷⁹ the approach of the Code is to come to grips directly with the issue to be resolved. Although the final result may be the same as that which would have obtained under the Uniform Sales Act, the question of the passage of title will have no real significance. Thus, for example, if the question presented is whether the buyer has obtained an insurable interest in the goods, section 2-501⁸⁰ dealing specifically with "insurable interest in goods" must be resorted to; a question of the location of risk of loss in the absence of breach, section 2-509;⁸¹ the location of risk of loss in the event of breach, section 2-510;⁸² and the seller's right to obtain the purchase price of the goods, section 2-709.⁸³

Although a lawyer handling a sales problem under the Code should first explore sections within Article 2 that may relate to the issue in-

78. Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROB. 3, 9 (1951).

79. *Id.* at 10.

80. TENN. CODE ANN. § 47-2-501 (repl. vol. 1964).

81. TENN. CODE ANN. § 47-2-509 (repl. vol. 1964).

82. TENN. CODE ANN. § 47-2-510 (repl. vol. 1964).

83. TENN. CODE ANN. § 47-2-709 (repl. vol. 1964).

volved, when he is satisfied that there is no specific section on point, he may turn to section 2-401.⁸⁴ This section recognizes that determining many of the issues between buyers and sellers and in fixing the rights of third parties, reference must be made to the concept of "title" or "property." Section 2-401 of the Code prescribes general rules on the passage of title, and is designed as a stopgap for problems not covered by a specific rule. The preamble to section 2-401 emphasizes its limited scope:

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply

The official comments to section 2-401 would suggest that the section is of little importance, but it may very well be that experience will show the concept of "title" to be a very difficult bird to kill indeed.⁸⁵

B. The "Voidable Title" Problem

Prior Tennessee law, the law in general, and the Code are in harmony on the proposition that one can pass no better title to goods than he himself possesses, unless the actual owner is estopped by his own conduct from denying the seller's authority to sell.⁸⁶ Subsection (1) of section 2-403⁸⁷ of the Code, which provides that a person with voidable title has power to transfer good title to a good faith purchaser for value, is merely a restatement of existing law. However, the section also provides that when the goods have been delivered under a transaction of purchase, the purchaser has such power even though the delivery was in exchange for a check later dishonored,⁸⁸ or where it was agreed that the transaction was to be a cash sale.

A more difficult question than that presented by the bad check situation can hardly be conceived in the law of sales. The difficulty is well illustrated by the case of *Young v. Harris-Cortner Co.*⁸⁹ In that

84. TENN. CODE ANN. § 47-2-401 (repl. vol. 1964).

85. See the numerous cases cited in the annotation to this section in UNIFORM LAWS ANN., UNIFORM COMMERCIAL CODE.

86. For an example of the application of such estoppel, see *Mayer v. Catron*, 48 S.W. 255 (Tenn. Ch. App. 1898).

87. TENN. CODE ANN. § 47-2-403(1) (repl. vol. 1964).

88. This is a reversal of the existing rule in Tennessee. *Ohio Motors, Inc. v. Russell Willis, Inc.*, 193 Tenn. 524, 246 S.W.2d 962 (1952); *Young v. Harris-Cortner Co.*, 152 Tenn. 15, 268 S.W. 125 (1924); *Dillard & Coffin Co. v. Beley Cotton Co.*, 150 Tenn. 195, 263 S.W. 87 (1923); *Edwards v. Central Motor Co.*, 38 Tenn. App. 577, 277 S.W.2d 413 (M.S. 1954), *aff'd*, 198 Tenn. 50 (1955). It has been stated that the market overt does not obtain in this state. *Parham v. Riley*, 44 Tenn. 5 (1867)

89. 152 Tenn. 15, 268 S.W. 125 (1924).

case Young, a farmer, delivered ten bales of cotton to McNamee, and received in return therefor a check for over seven-hundred dollars. The check was deposited the next day in the bank of Bolivar, and upon presentment to the payee bank, was dishonored because of insufficient funds. On the day of the sale McNamee delivered the cotton to a warehouse and delivered warehouse receipts to Harris-Cortner. Upon the dishonor of the check, Young sought to replevy the cotton from the warehouse company and Harris-Cortner, the innocent subpurchaser. The supreme court, after considerable mental gymnastics, concluded that Young intended to sell the cotton to McNamee for cash only, and that title to the cotton did not pass until the check was honored. It was further held Young had done nothing which would estop him to recover the goods from the innocent subpurchaser.

The "cash sale" rule is a harsh one indeed, and has frequently worked real injustices in those cases involving the retail sale of an automobile where an intermediate buyer gives the initial seller a worthless check and then resells the automobile to a bona fide purchaser for value before the check is returned. Unless the ultimate purchaser can establish some basis for estoppel, the initial seller prevails. It is highly questionable whether or not a rule which seems to have been engendered by a solicitous attitude toward the farmer in an agrarian society has any place in present day commercial law.⁹⁰ Section 2-403, of course, represents a substantial alteration of former Tennessee law.

V. PERFORMANCE

Part 5 of Article 2 involves the various aspects of contract performance, including insurable interest in the goods, manner and effect of seller's tender of delivery, shipment, risk of loss, payment of purchase price and right of inspection. Many of the provisions within Part 5 are clarifications of comparable sections within the Uniform Sales Act.⁹¹ Sections 2-501 through 2-507 are primarily codifications of existing commercial practice, with a few changes of interest to the practicing attorney.

A. "Identification"

Section 2-501 is primarily devoted to defining the concept of "identi-

90. The inequity of this situation is well illustrated by those cases in Tennessee where automobiles have been reclaimed from good faith purchasers by original vendors. See, e.g., *Ohio Motors, Inc. v. Russell Willis, Inc.*, 193 Tenn. 524, 246 S.W.2d 962 (1952); *Edwards v. Central Motor Co.*, *supra* note 88. Cf. *Hunter v. Moore*, 38 Tenn. App. 533, 276 S.W.2d 754 (E.S. 1954).

91. It has been stated that "much of Part 5 of the Code dealing with problems of performance by parties to the sales contract would simply tidy up areas already covered by the Uniform Sales Act." Steinheimer, *Effects of Uniform Commercial Code on Michigan Sales Law*, 40 MICH. ST. B.J. 12, 17 (1961).

fication" of goods to a sales contract. In addition, the section lays down rules governing the insurability of goods by a buyer and seller.

The Uniform Sales Act does not employ "identification" as a separate concept. Instead, that act speaks in terms of goods which are "specific or ascertained."⁹² There is a close relationship between these latter terms and "identification" under the Code. Thus, section 76(1)⁹³ of the Uniform Sales Act defines "specific goods" as "goods *identified* and agreed upon at the time a contract of sale or a sale is made." (Emphasis added.) The Uniform Sales Act does not define "ascertain." However, the Uniform Sales Act section 20(1)⁹⁴ refers to "a contract to sell *specific* goods, or where goods are subsequently appropriated to the contract." (Emphasis added.) The inference is that "ascertained" goods under the present Act are those not specific (identified) at the making of the contract, but which are thereafter "appropriated" to the contract under the Uniform Sales Act section 19,⁹⁵ rules 4(1) and 4(2).

"Identification" under section 2-501⁹⁶ of the Code is more readily accomplished than "appropriation" under the present Uniform Sales Act. Under section 19,⁹⁷ rule 4(1) of the Uniform Sales Act, appropriation requires some degree of concurrence by both parties, for the Act speaks of appropriation "by the seller with the assent of the buyer, or the buyer with the assent of the seller . . ." However, the same section adds that "assent may be expressed or *implied*, and may be given either before or after the appropriation is made." (Emphasis added.) This rule that assent to appropriation may be based on implication leaves considerable room for doubt in particular cases.

Participation by both parties is allowed but not required for "identification" under the Code. Under subsection (1)(b) of section 2-501, identification may occur "when goods are shipped, marked, or otherwise designated by the *seller* as goods to which the contract refers." (Emphasis added.)

The buyer's insurable interest arises as soon as existing goods are "identified" to the contract and the seller's insurable interest continues so long as the seller retains any security interest in the goods. Thus for a considerable period during a sales transaction both parties may have an insurable interest.

B. Cure

Section 2-601 of the Code contains a sweeping rule favoring rejection which presents considerable opportunity for abuse.⁹⁸ Buyers in a

92. TENN. CODE ANN. § 47-1218 (1956).

93. TENN. CODE ANN. § 47-1276(1) (1956).

94. TENN. CODE ANN. § 47-1220(1) (1956).

95. TENN. CODE ANN. § 47-1219 (1956).

96. TENN. CODE ANN. § 47-2-501 (repl. vol. 1964).

97. TENN. CODE ANN. § 47-1219 (1956).

98. 1 N.Y.L.R. COMM'N REP. 482-83 (1955).

declining market are tempted to search for some way to avoid responsibility under contracts made when the market was higher, and may attempt to shift the loss to the seller by rejecting the goods on the ground of some slight incidental defect in the seller's performance. The Code in section 2-508⁹⁹ introduces the new concept of "cure" and grants to the seller varying rights to "cure," depending upon whether he attempts to cure the non-conforming delivery *prior to* or *after* the date for performance. In effect, and within limited circumstances, the section gives the seller a second chance to comply with the contract.

Subsection (1) of section 2-508 reads: "Where any tender or delivery by the seller is rejected because of non-conforming and the time for performance has not yet expired, the seller may reasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery."¹⁰⁰ As can be seen, the opportunity for a second tender is sharply limited. In the first place, the seller's conforming delivery must be made "within the contract time." Furthermore, as Professor Williston has pointed out, a second tender may not be effective if the original defective tender was made under circumstances which warranted the buyer in believing that the tender was the only one which would be made. Under such circumstances, the buyer may change his position, and if he does so a subsequent conforming tender by seller, even though within the contract time, in all probability need not be accepted.¹⁰¹

Subsection (2) of section 2-508¹⁰² covers the seller's right to cure *after* the date for performance. Here the seller's rights are even more limited. The seller must have had reasonable grounds to believe that the tender of non-conforming goods would be acceptable, either with or without a money allowance. Under such circumstances if he seasonably notifies the buyer, he is afforded a further reasonable time in which to substitute a conforming tender. This subsection prevents the buyer from forcing the seller to breach by making a surprise rejection of the goods because of some minor non-conformity, the rejection coming at such late date that the seller cannot cure the deficiency within the time for performance prescribed by the contract.¹⁰³

C. Risk of Loss

In the resolution of no other problem under the Uniform Sales Act,

99. TENN. CODE ANN. § 47-2-508 (repl. vol. 1964).

100. This is a codification of an existing Tennessee rule. See *MacBeth v. Jones Cotton Co.*, 149 Fed. 383 (6th Cir. 1906).

101. Cf. 2 WILLISTON, SALES § 459 (rev. ed. 1948).

102. TENN. CODE ANN. § 47-2-508(2) (repl. vol. 1964).

103. See HAWKLAND, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE 120-22 (1958). Some have argued that the language, "the seller had reasonable grounds to believe" is vague and will produce difficult questions in litigation. Corman, *supra* note 3, at 40.

and under common law of which the Sales Act is generally a reflection, was the concept of title so frequently resorted to as in the placing of risk of loss of goods sold. Indeed, "title" was the shibboleth on which risk of loss questions were invariably resolved. The stated approach of the draftsman of the Uniform Commercial Code "is the adoption of the contractual approach rather than an arbitrary shifting of the risk with the 'property' in the goods."¹⁰⁴ Under the Code, risk of loss is no longer tied up with any passage of title but it is delivery which is the controlling factor. As is readily obvious, the greatest change here is in the approach, not in the result which will normally be attained.

Section 2-509 provides two distinct sets of rules on risk of loss, the applicability of which depends on whether the contract requires the seller to ship the goods. Section 2-509(1)¹⁰⁵ makes risk of loss turn on whether the contract requires the seller "to deliver at destination." If not, risk passes to buyer when the goods are "delivered to the carrier." If seller does have such an obligation to deliver at destination, risk remains on seller until at destination the goods are "duly tendered."

This statutory structure closely resembles that of the Uniform Sales Act. Under section 19, rule 4(2), when seller delivers goods to a carrier "he is presumed to have unconditionally appropriated goods to the contract." This contemplates that title passes to the buyer and that he, therefore, bears the risk of loss while the goods are in transit.¹⁰⁶ This rule is, however, subject to an exception under section 19, rule 5, which provides:

If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

104. UNIFORM COMMERCIAL CODE § 2-509, official comment 1.

105. "(1) Where the contract requires or authorizes the seller to ship the goods by carrier (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery."

Although this language of Section 2-509(1) appears to be a complete statement of the rules governing risk of loss in contracts which call for shipment, several other sections of the Code set forth more specific rules on this problem. Thus, under section 2-319, if the contract employs the term "F.O.B. place of shipment" seller bears the "risk of putting [the goods] into the possession of the carrier," but buyer thereafter bears the risk; if the term is "F.O.B. the place of destination" the seller must "at his own expense and risk transport the goods to that place . . ." The same section deals with risk in F.A.S. shipments; section 2-320 deals with risk in C.I.F. and C. & F. contracts; section 2-322 deals with risk when the contract calls for delivery "exship." See Hawkland, *Curing an Improper Tender of Title to Chattels, Past, Present and Commercial Code*, 46 MINN. L. REV. 697 (1962).

106. TENN. CODE ANN. § 47-1222 (1956).

The Uniform Sales Act thus equates an obligation "to deliver" with an obligation "to pay the freight or cost of transportation to the buyer;" in both instances there is a presumption that risk of loss in transit remains on the seller.¹⁰⁷

If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer on his receipt of a negotiable document of title covering the goods, or on acknowledgment by the bailee of the buyer's right to possession of the goods, or after his receipt of a non-negotiable document of title or other written directions to deliver, as provided in subsection (2)(b) of section 2-509.¹⁰⁸ If neither of these situations exist and there is no breach, the risk of loss is based on whether the seller is a "merchant."¹⁰⁹ With non-merchants, the risk of loss passes to the buyer on tender of delivery. This provision tends more strongly to hold risk of loss on seller than does the Uniform Sales Act, and has provoked considerable controversy.¹¹⁰

Section 2-510¹¹¹ is designed to qualify the general provisions on risk of loss in section 2-509 so as to throw risk on a party who is in breach of contract.¹¹² These rules pinning risk of loss on the party who has broken his sales contract are, however, modified by provisions in subsections (2) and (3) which hold the risk on the innocent party to the extent that he has insurance. The net effect is that if one party is in breach, insured loss falls on the insurance company; the uninsured loss falls on the party in breach.

Section 2-510(3) states that if one of the parties is in breach of contract, the aggrieved party "may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on" the defaulting party. It will be noted that this section has no impact on the rules of section 2-509 which control risk in the absence of breach. The insurance deficiency assigned to the breaching party must exist without subrogation, and the section merely distributes the risk of loss as

107. See Note, 12 TENN. L. REV. 61 (1933).

108. TENN. CODE ANN. § 47-2-503(4)(b) (repl. vol. 1964).

109. Uniform Commercial Code § 2-509(3) provides that "in any case not within subsection (1) nor (2), 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."

110. See Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427 (1950). See also 1 N.Y.L.R. COMM'N REP. 137 (1954). Section 2-509(2) probably changes the result in the famous case of *Tarling v. Baxter*, 6 B. & C. 360, 108 Eng. Rep. 484 (K.B. 1827), which was codified by section 19 of the Uniform Sales Act. In that case the seller agreed to sell the buyer a certain stack of hay then standing in a field owned by seller's brother-in-law; buyer was not to take the hay until he paid the price. Before the date for payment and delivery the stack burned. The court held that since the contract referred to a specific stack of hay and seller had nothing further to do, "title" passed to the buyer when the contract was made; he, therefore, bore the risk of loss.

111. TENN. CODE ANN. § 47-2-510 (repl. vol. 1964).

112. Subsections (1) and (2) deal with breach by seller; and subsection (3) deals with breach by buyer.

stated, without intent that this distribution be disturbed by any subrogation of an insurer.¹¹³ This is pretty clearly a "soak the insurance company" device, and, as Latty has pointed out, it may very well be that "sharp drafters of insurance policies will try to work out clauses to make the insurance non-effective under these Code provisions."¹¹⁴

VI. BREACH, REPUDIATION AND EXCUSE

Part 6 of Article 2 contains little which is startling or changes prior statutory and decisional law. The buyer, prior to his acceptance of the goods, is afforded three alternative courses in the event that either the goods or tender thereof fail, in any respect, to conform to the contract. He may accept the whole, reject the whole, or accept any commercial unit or units and reject the rest.¹¹⁵ It is immediately apparent that the Code, by permitting the buyer to reject if the goods or tender *fail in any respect* to conform to the contract, places in the hands of the buyer a powerful weapon which he may very well not hesitate to utilize. For this reason section 2-601 of the Code which grants to the buyer the alternatives mentioned has been severely criticized.¹¹⁶

A. Rejection of Goods by Buyer

Should the buyer elect to reject, the Code provides guide lines both as to the manner and effect of rightful rejection and as to the duties and privileges of the buyer in connection with the disposition of the rightfully rejected goods.

Section 2-602¹¹⁷ of the Code outlines the steps which the buyer must follow if he rejects goods because of the seller's breach of contract. Should the buyer fail to follow these rules, he may be deemed to have "accepted" the goods, and will consequently become responsible to the seller for the contract price. For the most part, the Code's rules on rejection follow former law. Rejection of goods must be within a reasonable time after their delivery or tender and the buyer must seasonably notify the seller.¹¹⁸ Should a buyer exercise any badges of owner-

113. UNIFORM COMMERCIAL CODE § 2-510, official comment 3. See also 1 N.Y.L.R. COMM'N REP. 499 (1955).

114. Latty, *supra* note 78, at 16.

115. TENN. CODE ANN. § 47-2-601 (repl. vol. 1964).

116. Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457 (1949); Rabel, *supra* note 110, at 438. This section's strict rules allowing rejection are qualified at several points in the Code. Section 2-612 allows rejection in an installment contract only if there is "substantial impairment" of the value of the installment; section 2-504 allows rejection only if material delay or loss ensues when seller has failed to make reasonable provisions for shipment or his failure to notify buyer of shipment.

117. TENN. CODE ANN. § 47-2-602 (repl. vol. 1964).

118. This provision is similar to section 48 of the Uniform Sales Act, TENN. CODE ANN. § 47-1248 (1956), which provides: "The buyer is deemed to have accepted the goods . . . when, after the lapse of a reasonable time, he retains the goods without intimating to seller that he has rejected them."

ship after he has rightfully rejected non-conforming goods, such conduct will be deemed to be wrongful as against the seller.¹¹⁹ Where the buyer has, prior to his rejection, taken possession of goods and has no security interest in them, he is under duty to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to move them.¹²⁰

These provisions of the Code are slightly more favorable to the buyers than our present rules governing rescission. Under section 69(1)(d) and (3) of the Uniform Sales Act,¹²¹ a buyer who rescinds a sale must, if the goods have been received, "return them or offer to return them to the seller." The Code imposes no such obligation to return the goods; it is enough if the buyer "seasonably notifies the seller" and holds the goods with reasonable care "at the seller's disposition for a time sufficient to permit the seller to remove them."

Section 2-603 enlarges the buyer's duties with respect to goods which he has rejected, even though the rejection was rightful because of non-conformity of the goods. These duties arise, however, only when all of the three following factors are present: (1) seller "has no agent or place of business at the market of rejection," and (2) buyer is a "merchant" and (3) the goods are in buyer's possession or control. In such a situation, the buyer is under a duty "to follow any reasonable instructions received from the seller with respect to the goods and the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily."¹²² It should be noted that this and the preceding sections involve a merchant buyer; nevertheless there have been criticisms of adding additional duties to the "merchant buyer."¹²³ If a merchant buyer decides to reject non-conforming goods in the manner specified in section 2-602, and such goods are either perishable or threaten to speedily decline in value, he is charged with the duty to sell them for the seller's account. In addition if the seller has no agent or place of business at the point of rejection, the merchant buyer is under a duty, after he has rejected the goods in his possession or control, to follow any reasonable instructions received from the seller with respect to the goods. However, if the merchant buyer's demand for

119. TENN. CODE ANN. § 47-2-602(2)(a) (repl. vol. 1964).

120. TENN. CODE ANN. § 47-2-602(2)(b) (repl. vol. 1964). It has been suggested that the exception in subsection (2)(b) for instances in which buyer has a security interest may be expressed in a manner which could cause confusion.

121. TENN. CODE ANN. § 47-1269(1)(d) (1956).

122. TENN. CODE ANN. § 47-2-603(1) (repl. vol. 1964).

123. It has been pointed out that *any* buyer who rejects goods in his possession should be under an obligation to follow reasonable instructions from the seller with respect to the goods. 1 N.Y.L.R. COMM'N REP. 102 (1954). *But see* reply by Llewellyn, 1 N.Y.L.R. COMM'N REP. 166 (1954).

indemnity for his expenses is not forthcoming the seller's instructions are not reasonable.

While section 2-603 imposes certain duties on the rejecting merchant buyer, section 2-604 grants the buyer certain privileges in connection with the disposing of goods rightfully rejected. The purpose of the section is to remove the hazards which otherwise might follow when one deals with another's goods.¹²⁴

B. *Reasons for Rejection of Performance*

Section 2-605¹²⁵ of the Code deals with a problem which has proved troublesome not only in sales law but also in connection with the performance of other types of contracts. One party tenders performance; the other party refuses to accept performance, and in later litigation seeks to justify his rejection by objections to the tendered performance which he did not specify at the time of rejection. In this setting it has on occasion been possible to invoke doctrines of "waiver" or "estoppel" to bar the new objection. Under section 2-605, if the sales transaction is between merchants and the buyer rejects the goods for non-conformity, the seller may request in writing a full and final written statement of all defects upon which the buyer proposes to rely. Once such a written request has been made, the buyer who fails to state a particular defect which is ascertainable by reasonable inspection is precluded from relying upon such defect either to justify his rejection or to establish breach. This section has no counterpart in existing Tennessee case law; it has been criticized on at least two grounds. Some have criticized it because it is limited to transactions between merchants;¹²⁶ others have criticized the section on the ground that it may be a trap, since it requires the setting forth of *all* defects, as opposed to all material defects.¹²⁷

C. *"Revocation of Acceptance"*

The concept of rescission is not used in the Code. Consistent with the abandonment of the title approach in its place has been substituted the concept of "revocation of acceptance."¹²⁸ Unlike the Uniform Sales Act which contains no provision on the degree of materiality of breach by seller such as will entitle the buyer to reject or rescind, other than the general provision of section 69(I)¹²⁹ that, "where there is a breach

124. See, e.g., TENN. CODE ANN. § 47-2-602(2) (repl. vol. 1964); TENN. CODE ANN. § 47-2-606(1)(c) (repl. vol. 1964).

125. TENN. CODE ANN. § 47-2-605 (repl. vol. 1964).

126. "[A]ny buyer should answer the seller's written request." Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 584 (1950). See also 1 N.Y.L.R. COMM'N REP. 523 (1955).

127. See N.Y.L.R. COMM'N REP. 390-91 (1956).

128. TENN. CODE ANN. § 47-2-608 (repl. vol. 1964).

129. TENN. CODE ANN. § 47-1269(1) (1956).

of warranty by the seller, the buyer may, at his election . . . reject . . . or rescind . . ." and also unlike section 2-601 of the Code which gives the buyer the right to "reject" if the goods deviate from the contract "in any respect," section 2-608 of the Code permits the buyer to "revoke his acceptance" only where the non-conformity of the goods "substantially impairs its value to him."

Under section 2-608(1)(a), a buyer's knowledge of a defect at the time of acceptance does not bar later revocation of acceptance if the buyer accepted "on the reasonable assumption" that the non-conformity would be cured and the seller fails to cure the defect. This preservation of the buyer's right to revoke acceptance while he is reasonably waiting for seller to cure a defect is doubtless occasioned in part by the ease with which "acceptance" may be based on "any act inconsistent with seller's ownership" in section 2-606(1)(c).¹³⁰ Under the provisions of the Code, both revocation of acceptance and recovery of damages for breach are available to the buyer. Furthermore, revocation of acceptance, as well as rejection, may be exercised partially.¹³¹

D. Assurance of Due Performance

What is a seller to do when he learns, after entering into a contract of sale, that the purchaser is insolvent or very nearly so. Must he ship the goods, regardless of the information which has come to him? If a seller is manufacturing goods to the specifications of a buyer whose ability to accept and pay for the goods becomes questionable, must the seller continue manufacturing or may he suspend production until the buyer's position has been clarified? Conversely, if a buyer has reason to believe that a seller will not be able to supply goods which the buyer urgently needs, must the buyer remain in doubt about his source of supply, or may he make a contract with another supplier and refuse a later tender by the original party?

The question of "insecurity" is, of course, closely related to anticipatory repudiation, but section 2-609¹³² deals with a situation where the impairment of expectation of performance falls short of explicit repudiation. There are Tennessee cases from which it could be reasonably argued that the rights given under section 2-609 are akin to sales contract rights under former Tennessee law,¹³³ but there is at least one case which suggests a contrary conclusion.¹³⁴ In any case, under section 2-609 the section may be invoked when "reasonable" grounds for in-

130. Cf. *White v. Mid-City Motor Co.*, 39 Tenn. App. 429, 284 S.W.2d 689 (E.S. 1955).

131. TENN. CODE ANN. § 47-2-608(1) (repl. vol. 1964).

132. TENN. CODE ANN. § 47-2-609 (repl. vol. 1964).

133. See, e.g., *Dorman v. Weakley*, 39 S.W. 890 (Tenn. Ch. App. 1896).

134. *Ault v. Dustin*, 100 Tenn. 366, 45 S.W. 981 (1898).

security arise; the aggrieved party may then demand "adequate" assurance of due performance. This language, of course, gives the courts broad discretion to determine its application in the light of the needs of specific cases. It should be pointed out that the official comments suggest the proper use of this section in several situations.

E. *Anticipatory Repudiation*

The Uniform Sales Act does not incorporate the principle of the famous case of *Hochster v. De La Tour*,¹³⁵ that the repudiation of an obligation under a contract, even though the time for performance has not arrived, constitutes a breach of contract for which an immediate action lies. The rule of the case is nevertheless the law in Tennessee.¹³⁶ Section 2-610¹³⁷ of the Code both accepts the principle and resolves some vexing problems which have arisen concerning it. Section 2-610(b) provides that the fact that the aggrieved party has urged retraction of the repudiation does not eliminate the effect nor deprive him of his remedies for such repudiation until the retraction is actually made.

VII. REMEDIES OF THE SELLER AND BUYER

There are few drastic changes made by the Uniform Commercial Code in the remedies available to the seller and buyer from those provided for in the Uniform Sales Act. The Code provisions regarding remedies are, however, a considerable improvement over the provisions of the Uniform Sales Act. First, from a purely formal standpoint, the Code collects the sections relative to remedies together in one place rather than scattering them as is the case with the Uniform Sales Act. Secondly, the Code broadens the remedies presently available to both the buyer and seller and more nearly conforms the law to existing commercial understanding of what is fair and equitable.

In view of space limitations, no attempt will be made to discuss all the remedy provisions set out in Part 7 of Article 2. Most of the remedies are familiar to the reader, since they are substantially the same as those contained in the Uniform Sales Act. We shall rather limit ourselves here to a brief discussion of those areas in the law of sales remedies where major innovations are made by the Code.

A. *The Reclaiming Seller*

One of the most significant changes made by the Uniform Commercial Code is the broadened power of reclamation given the seller

135. 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853).

136. See, e.g., *Brady v. Oliver*, 125 Tenn. 595, 147 S.W. 1135 (1911); *Ault v. Dustin*, *supra* note 134.

137. TENN. CODE ANN. § 47-2-610 (repl. vol. 1964).

by section 2-702.¹³⁸ This section has already caused trouble, and bids fair to cause further difficulty. Section 2-702(2) provides that:

Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

The reclamation right thus given to the seller is limited, however, by section 2-702(3) which provides that: "Seller's right to reclaim under Subsection (2) is subject to the rights of a buyer in ordinary course or good faith purchaser or *lien creditor*. . . ." (Emphasis added.)

It has been the law for at least a hundred years that sellers who can prove that the buyer misrepresented his financial condition may rescind the sale and revert the property interest in the goods in himself.¹³⁹ This has been the law in Tennessee at least since 1881.¹⁴⁰ Apparently all that the draftsmen of the Uniform Commercial Code intended by the new reclamation provision was to broaden this existing right by creating a conclusive presumption that the purchase was fraudulent where the buyer receives goods while insolvent.¹⁴¹

The "well-laid schemes of mice and men" went badly astray in 1960, however, with the decision of the United States Court of Appeals for the Third Circuit in the celebrated case of *In re Kravitz*.¹⁴² It was there held that the rights of a reclaiming seller were inferior to those of the trustee in bankruptcy under Section 70(c) of the Bankruptcy Act. Since the court in *Kravitz* relied upon section 9-301 of the Uniform Commercial Code which defines "lien creditor" to include the trustee in bankruptcy, and upon the fact that the seller's right of reclamation is subject to the rights of "lien creditors," there has been considerable fear that section 2-702 has had the totally unintended result of permitting the trustee in bankruptcy always to prevail over the defrauded seller.¹⁴³ Indeed, some states have

138. TENN. CODE ANN. § 47-2-702 (repl. vol. 1964).

139. See 3 WILLISTON, SALES § 638 (rev. ed. 1948).

140. See *Belding Bros. & Co. v. Frankland*, 76 Tenn. 67 (1881).

141. Professor Karl Llewellyn has explained its purpose to be "to slightly enlarge the existing law of reclamation by seller when a buyer goes insolvent." 1 N.Y.L.R. COMM'N REP. 106 (1954).

142. 278 F.2d 820 (3d Cir. 1960).

143. See Hawkland, "The Relative Rights of Lien Creditors and Defrauded Sellers—Amending the Uniform Commercial Code to Conform to the *Kravitz* Case," 67 COM. L.J., 86, 88 (1962).

amended section 2-702 so as to omit "lien creditors" from those persons whose rights may not be cut off by a reclaiming seller.¹⁴⁴

In re Kravitz relied heavily upon the fact that under ante-Code law in Pennsylvania a lien creditor does have a higher claim than a defrauded seller, and as has been pointed out, in all probability the *Kravitz* case is an anomaly peculiar to Pennsylvania.¹⁴⁵ It is not believed that the *Kravitz* case reasoning will cause any difficulty in Tennessee. A Tennessee case, *Richardson v. Vick*,¹⁴⁶ specifically holds that where a purchaser falsely represented that he was solvent and the seller acted on such representation, the seller could recover the property, notwithstanding the fact that a valid assignment had been made to secure creditors or the fact that the debtor had been declared bankrupt.¹⁴⁷

B. Cancellation

Under the Uniform Sales Act, the seller was given two separate and distinct rights of rescission.¹⁴⁸ Where he had reserved the right to do so or the buyer had been in default an unreasonable length of time, the seller could rescind the *transfer of title*. If the seller rescinded only the transfer of title, he was permitted to recover damages for the breach of the contract. If he elected to rescind the entire contract, however, the seller could not, of course, recover damages for the breach, since the rescission in and of itself was a declaration that the contract had ceased to exist.

Under Section 2-703¹⁴⁹ of the Code, the seller in four enumerated situations is permitted to "cancel" the contract, without in any way prejudicing his right to recover damages accruing prior to the "cancellation."¹⁵⁰ Unlike the Uniform Sales Act, the seller may cancel

144. The legislatures of New York and Illinois have deleted the words "lien creditors" from their enactment of Uniform Commercial Code § 2-702.

145. The best discussion of the *Kravitz* case is contained in Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518, 552 (1960).

146. 125 Tenn. 532, 145 S.W. 174 (1911).

147. In all likelihood, Uniform Commercial Code § 2-702, does not represent any change in existing Tennessee law. As we have seen, *Richardson v. Vick*, *supra* note 146, recognizes the right of the seller to reclaim. In addition, the Code appears to enact an existing Tennessee rule which permits the seller to reclaim even in those cases where there has been no actual misrepresentation. See *Katzenberger v. Leedom & Co.*, 103 Tenn. 144 (1899). The ante-Code rule in Tennessee apparently permitted the seller to reclaim even in those situations where he had simply "guessed wrong" as to the solvency of his buyer.

148. TENN. CODE ANN. § 47-1261(1) (1956).

149. TENN. CODE ANN. § 47-2-703 (repl. vol. 1964).

150. "Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part of the whole, then with respect to any goods directly affected, and if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may . . . cancel."

even when the goods are in the possession of the buyer. The Sales Act specifically provided that the goods must not have been delivered to the buyer if the seller were to rescind the contract.¹⁵¹

C. "Cover"

One of the new terms introduced by Part 7 of the Code is "cover," which represents an essentially new remedy for the buyer.¹⁵² Under the Sales Act the buyer was limited to the actions of conversion, replevin, or for wrongful detention, and if title had not passed he could maintain an action for failure to deliver, but in no instance was the buyer especially authorized or permitted to procure substitute goods, regardless of the urgency of his need. Unfortunately, where the buyer did protect himself by going into the market and purchasing substitute goods and was required to pay an amount in addition to the contract price for the items, it was under the Uniform Sales Act incumbent upon him to prove that the acquisition of the substitute goods was in the contemplation of the parties at the time the contract was made, since the additional costs would constitute special damages.¹⁵³

Under the Code, upon the seller's breach the buyer is permitted to procure substitute goods to meet his essential need; and the defaulting seller is held liable for the damages which the buyer sustains as a result of the breach, including reasonable expenses incurred in effecting the cover. Official comment 2 to section 2-712 states that "the test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective." After fulfilling these requirements, the buyer can recover from the seller the difference in the costs of the substitute goods and the contract price, as well as incidental and consequential damages, less the expenses saved as a consequence of the seller's breach. Cover is not mandatory remedy, but if the buyer chooses not to cover when cover is available, damages which he

151. Uniform Commercial Code § 2-703, provides only that the seller may cancel when there has been a wrongful rejection, revocation of acceptance, failure to make payment due or repudiation. That the goods have not been delivered to the buyer is not made a condition upon which the right to cancel depends.

152. TENN. CODE ANN. § 47-2-712 (repl. vol. 1964): "'Cover'; Buyers Procurement of Substitute Goods. (1) After a breach within the preceding section the buyer may 'cover' by making in good faith and without reasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Sec. 2-715), but less expenses saved in consequence of the seller's breach. (3) Failure of the buyer to effect cover within this section does not bar him from any other remedy."

153. See 3 WILLISTON, SALES, § 599-99b (rev. ed. 1948).

sustained as a result of his particular need will not be recoverable, since consequential damages are limited to those which could not have been obviated by cover.

D. *Specific Performance*

Under the Uniform Sales Act, the buyer can obtain specific performance of the contract for "specific or ascertained goods," and the courts are given very broad discretion in rendering such decrees. While the Code does not require that the goods be specific or ascertained, it does require that specific performance be decreed only when the goods are "unique" or in other proper circumstances.¹⁵⁴ Although the change was accomplished for the purpose of liberalizing the remedy of specific performance, it has been suggested that the opposite may have resulted. This is because of uncertainty as to what are "other proper circumstances" and because the requirement that goods be specific or ascertained may have been removed and the more stringent requirement of uniqueness substituted therefor.¹⁵⁵ Such certainly was not the intention of the draftsmen of the Code.

VII. CONCLUSION

Article 2 of the Uniform Commercial Code, Sales, represents an attempt to move away from legal niceties and technicalities in the law of sales which the modern commercial world neither appreciates nor wishes to be guided by. At the same time, it is an attempt to approximate as closely as possible existing commercial understanding of the sales transaction within the context of existing legal concepts. After studying it extensively over a period of several months, the author is firmly persuaded that it is a major improvement over the Uniform Sales Act, and that once it is better understood, it will be warmly received by both the business community and the legal profession in Tennessee.

154. TENN. CODE ANN. § 47-2-716(1) (repl. vol. 1964).

155. See HAWKLAND, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE 144 (1958).

