

## The Status of the Concept of Title in Article II of the Uniform Commercial Code

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## LEGISLATION

### THE STATUS OF THE CONCEPT OF TITLE IN ARTICLE II OF THE UNIFORM COMMERCIAL CODE

The arrangement of [Article II] is in the terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.<sup>1</sup>

This quotation deftly summarizes the most significant departure which the Uniform Commercial Code purports to make from the traditional law of sales: the abandonment of the concept of title as a cornerstone upon which much of the remainder of the law depends. The framers of the Code have attempted to supply specific rules for resolving many of the difficulties which the law has traditionally solved by determining whether the buyer or the seller held the title or general property in the goods when the problem arose. This note will consider what takes place when a sale is made and how a sale under the Code differs from one made under the Uniform Sales Act. It will also analyze the step by step transfer of rights and liabilities from the seller to the buyer when a sale is made under the Code, discuss the reasons behind the abandonment of title as a problem-solving device by the Code, consider objections to the Code's approach to sales, and touch on the position which the concept of "title" will hold under the Code.

#### *Definitions*

Before proceeding further, certain terms used in this note or in the Code should be defined.

A *sale*, according to the Code, "consists in the passage of title from the seller to the buyer for a price."<sup>2</sup> This definition is essentially the same as that found in the Sales Act, except

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<sup>1</sup> UNIFORM COMMERCIAL CODE § 2-101, comment.

<sup>2</sup> UNIFORM COMMERCIAL CODE § 2-106.

that the latter speaks in terms of a "transfer of property" rather than "passage of title."<sup>3</sup>

For the purpose of this note, the terms "title" and "property in the goods" will be used as synonyms. This "title" or "property" may be conceived of as all the rights which a person may possess with respect to a chattel, and the duties which the law places upon him as a result of his possessing these rights.<sup>4</sup>

### *What is a Sale*

*S* owns a chattel. He has certain rights with respect to it, *e.g.*, he can use it and prohibit others from using it. As an adjunct to these rights he bears certain risks, such as the risk that the chattel will be injured or destroyed and as a result the value of his rights with respect to it will be diminished or destroyed. Furthermore, the law imposes certain duties upon him as an owner, such as the duty to pay personal property taxes.

A sale is a transaction whereby *S* transfers his rights with respect to the chattel, along with the attendant risks and duties, to a buyer, *B*.<sup>5</sup> In the exchange *S* receives a consideration called the price. When the sale is consummated, *B* possesses all the rights, risks and duties, and *S* no longer has any interest in the chattel.

One purpose of the law of sales is to prescribe conditions, upon the happening of which the seller's rights, risks and duties with respect to a chattel are transferred to the buyer. For this purpose the law of sales is applicable to a transaction from the time a contract of sale is made until the seller's interests in the goods being sold and the contract of sale are terminated. Of course, in case of a breach or a rescission of the contract by the parties, the law of sales may cease to be applicable upon the termination of the buyer's, rather than the seller's, interest in the goods or the contract.<sup>6</sup>

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<sup>3</sup> UNIFORM SALES ACT § 1, N.Y. PERS. PROP. LAW § 82. Hereafter all references to the Sales Act will refer to the appropriate section of the New York Personal Property Law, rather than to the section in the edition promulgated by the Commissioners on Uniform Laws.

<sup>4</sup> For an analysis of the concept of property as a collection of rights see Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, in HALL, READINGS IN JURISPRUDENCE 484 (1938).

<sup>5</sup> *Id.* at 497. Cook is of the opinion that rights are not transferred, but rather are extinguished in the seller and simultaneously spring into being in the buyer.

<sup>6</sup> An example of a party having an interest in the contract, but not in the goods being sold occurs under the Sales Act when a seller breaches the contract before the property in the goods has passed to the buyer. The buyer may sue on the contract for damages, but has no claim at all on the goods. N.Y. PERS. PROP. LAW § 148. Under the Code this situation would arise if

Both the making of the contract of sale and the passage of all the seller's interest in the goods to the buyer may occur at the same instant—the typical cash sale is a common example. On the other hand a considerable period of time may intervene between the making of the contract and the extinguishment of the seller's interest in the goods—as is the case in conditional sales contracts.

*Comparison of a Sale Under the Sales Act With One  
Under the Code*

Under the Uniform Sales Act, the seller's interest in the goods being sold is considered as a unit which passes to the buyer in its entirety at one moment in time. The designation of this moment is left to the parties concerned.<sup>7</sup> If their intention does not clearly appear in their contract, the Sales Act contains presumptions which supplant the intent of the parties as the criteria for determining when title passes.<sup>8</sup>

The primary innovation in sales law produced by Article II of the Uniform Commercial Code is that it does not conceive of the seller's interest in the goods as an entity passing to the buyer at one moment, but as a conglomeration of rights, risks and duties which can be and are transferred from the seller to the buyer at different times. The Code then lays down rules for determining when several of the important rights, risks and duties of the seller are terminated, and when the buyer receives them.<sup>9</sup> Some of these rules may be altered by the express wish of the parties; some may not. Before analyzing a sale under the Code in detail, it will be worthwhile to point out three facts with respect to a sale under the Code. First, under the Code, some rights may exist in both parties at the same time. The most notable examples are the right to insure<sup>10</sup> and the right to sue third parties for damage to the goods.<sup>11</sup> Each of these may be enjoyed by both the buyer and the seller during a considerable period of time. Second, the Code does not attempt to indicate specifically at what

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the seller were to breach the contract and the buyer were not entitled to recover the goods under § 2-502 (which allows the buyer to recover the goods on the seller's insolvency if he has paid part of the purchase price) or § 2-716 (which grants the buyer the right to specific performance of the contract if the goods are unique, and the right to replevy the goods if he cannot obtain cover).

<sup>7</sup> N.Y. PERS. PROP. LAW § 99.

<sup>8</sup> N.Y. PERS. PROP. LAW § 100.

<sup>9</sup> A detailed analysis of these rules is contained in the chart beginning on page 183 of this note.

<sup>10</sup> UNIFORM COMMERCIAL CODE § 2-501.

<sup>11</sup> UNIFORM COMMERCIAL CODE § 2-722.

point each of the many rights, risks and duties which comprise an owner's interest in goods passes from the seller to the buyer. It deals individually only with those of significant commercial importance. Provision is also made in the Code for the passage of "title" which embraces all those aspects of ownership not specifically provided for by other sections of the Code.<sup>12</sup> Finally, the Code does not purport to lay down rules for determining who owns the goods for the purpose of public regulations. The question of who owns a chattel on a particular date, for the purpose of assessing a personal property tax, is not within the cognizance of the Code. It leaves lawmakers entirely free to prescribe whatever criteria they choose for deciding such questions.<sup>13</sup> Clearly they are free to use the passage of title or of some particular right, risk or duty under the Code as determinative of title for the purposes of any public regulation.

#### *Analysis of a Sale Under the Code*

The following chart indicates how, upon the happening of certain events and under certain conditions, particular rights, risks and duties are deemed to pass from the seller to the buyer (and sometimes back to the seller again) under the Code. In analyzing a sale under the Code one deals with six types of goods:

1. *Existing* goods—goods which are in being when the contract of sale is made.
2. *Future* goods—goods which are to come into being at some time subsequent to the making of the contract.
3. *Identified* goods—goods which have been designated by the buyer, the seller or both acting together, as the goods to which the contract refers.<sup>14</sup>
4. *Unidentified* goods—goods which have not been so designated.
5. *Conforming* goods—goods which meet the specifications contained in the contract of sale.
6. *Nonconforming* goods—goods which do not meet such specifications.

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<sup>12</sup> UNIFORM COMMERCIAL CODE § 2-401.

<sup>13</sup> UNIFORM COMMERCIAL CODE § 2-401, comment.

<sup>14</sup> UNIFORM COMMERCIAL CODE § 2-501. This is the only definition of the six listed which is contained in the Code. The remaining five terms are used but not defined.

It is also necessary to define two new concepts which the Code adds to the law of sales. The term "merchant" is defined as a

person who deals in goods of the 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.<sup>15</sup>

The term "cover" means the right of the buyer, in the event of a breach by the seller, to make "in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller."<sup>16</sup>

An attempt has been made to organize this chart chronologically, from the making of the contract of sale to the final cessation of the seller's interest in the goods. Because so many variables (contract terms, type and status of goods, breach by either party, etc.) may affect the time of transfer of a particular right or risk, it has been possible to arrive at only an approximation of a chronological sequence. Nevertheless, it is hoped that the chart will serve to indicate what happens when a sale is made under the Uniform Commercial Code. If any situation involving title is not covered by the chart, this indicates that the Code does not provide for any transfer of rights in the goods in that situation. As a result the rights of the parties will be determined by ordinary contract or property law, rather than sales law per se.

In order to use the chart one reads down any of the vertical columns until the event (col. 1), contract provision (col. 2), etc., in which one is interested is reached. By then reading across the horizontal column in which this item is located, one can see at a glance how this item, in concert with the other factors in the first five columns, will affect the rights of the parties. This result appears in the sixth, seventh and eighth columns. The applicable section of the Code is indicated in the ninth column.

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<sup>15</sup> UNIFORM COMMERCIAL CODE § 2-104.

<sup>16</sup> UNIFORM COMMERCIAL CODE § 2-712.

**Allocation Under the Code of  
RIGHTS AND LIABILITIES BETWEEN PARTIES  
to a Sales Transaction**

Sequence of Events	C O N D I T I O N S					R E S U L T S				Code §
	Type of Goods Contracted For	Status of Goods at Time of Event	Conditions Imposed by Code	Conditions Imposed by Contract	General Result	Seller's Rights and Liabilities	Buyer's Rights and Liabilities			
Before contract						All	None			2-501
Contract made	Existing and identified	Conforming or non-conforming		No agreement to the contrary	Goods identified to contract	All	Special property—insurable interest			2-501
Contract made	Existing and identified			Delivery to be made without moving goods — no document of title to be delivered	Goods identified to contract	All	Special property—insurable interest			2-501
Crops planted	Unplanted crops to be harvested within 12 months or at next harvest, whichever is longer	Conforming or non-conforming			Goods identified to contract	All	Special property—insurable interest			2-501

Sequence of Events	CONDITIONS				RESULTS				Code §
	Type of Goods Contracted For	Status of Goods at Time of Event	Conditions Imposed by Code	Conditions Imposed by Contract	General Result	Seller's Rights and Liabilities	Buyer's Rights and Liabilities		
	Young conceived	Unborn young to be conceived within 12 months	Conforming or non-conforming			Goods identified to contract	All	Special property—insurable interest	
Contract made and goods shipped or identified as those to which the contract applies	Future goods	Conforming or non-conforming			Goods identified to contract	All	Special property—insurable interest	2-501	
Buyer pays price or part thereof and keeps good a tender of the rest	Existing or future goods which are identified	Conforming or non-conforming	Buyer has a special property in the goods under § 2-501 as a result of seller's identification of the goods			None (except duty to deliver to buyer)	Right to possession	2-502	
Buyer pays price or part thereof and keeps good a tender of the rest	Existing or future goods which are identified	Conforming goods only	Buyer himself made identification of goods creating his special property			None (except duty to deliver to buyer)	Right to possession	2-502	



Sequence of Events	CONDITIONS					RESULTS			Code §
	Type of Goods Contracted For	Status of Goods at Time of Event	Conditions Imposed by Code	Conditions Imposed by Contract	General Result	Seller's Rights and Liabilities	Buyer's Rights and Liabilities		
Goods delivered to carrier	Existing and identified			Seller required or authorized to ship by carrier — need not deliver to particular destination		No longer bears risk of loss	Assumes risk of loss	2-509	
Goods tendered to buyer while in carrier's possession	Existing and identified			Seller required to deliver to a destination		No longer bears risk of loss	Assumes risk of loss	2-509	
Buyer receives negotiable document of title	Existing and identified		Goods held by bailee to be delivered without movement			No longer bears risk of loss	Assumes risk of loss	2-509	
Bailee acknowledges buyer's right to the goods	Existing and identified		Goods held by bailee to be delivered without movement			No longer bears risk of loss	Assumes risk of loss	2-509	
Buyer receives non-negotiable document of title or a direction to the bailee to deliver	Existing and identified		Goods held by bailee to be delivered without movement	Passage of reasonable time for presentation		No longer bears risk of loss	Assumes risk of loss	2-509	

Sequence of Events	CONDITIONS					RESULTS			Code §
	Type of Goods Contracted For	Status of Goods at Time of Event	Conditions Imposed by Code	Conditions Imposed by Contract	General Result	Seller's Rights and Liabilities	Buyer's Rights and Liabilities		
Buyer receives goods	Existing and identified		Seller is merchant			No longer bears risk of loss	Assumes risk of loss	2-509	
Seller tenders delivery	Existing and identified		Seller is not merchant			No longer bears risk of loss	Assumes risk of loss	2-509	
Seller tenders or delivers	Existing and identified	Non-conforming, so that buyer may reject				Bears risk of loss	Does not assume risk of loss	2-510	
Buyer rightfully revokes acceptance	Existing and identified	Non-conforming, so that buyer may reject				Bears loss not covered by buyer's insurance	Does not bear loss not covered by buyer's insurance	2-510	
Buyer repudiates or breaches contract before risk of loss passes to him	Existing and identified	Conforming				Does not bear risk of loss for commercially reasonable time	Bears loss not covered by seller's insurance for commercially reasonable time	2-510	

Sequence of Events	CONDITIONS					RESULTS				Code §
	Type of Goods Contracted For	Status of Goods at Time of Event	Conditions Imposed by Code	Conditions Imposed by Contract	General Result	Seller's Rights and Liabilities	Buyer's Rights and Liabilities			
Goods accepted by buyer	Existing and identified	Conforming or non-conforming				Entitled to price and incidental damages	Liable for price and incidental damages		2-709	
Goods lost or damaged within commercially reasonable time after risk of loss passed to buyer		Conforming but not accepted				Entitled to price and incidental damages	Liable for price and incidental damages		2-709	
Buyer fails to pay price and seller is unable to resell at a reasonable price after reasonable effort	Existing and identified		Seller must hold goods for buyer but may resell if possible			Entitled to price and incidental damages	Liable for price and incidental damages		2-709	
Buyer cannot obtain cover for goods or goods shipped under reservation and the security interest has been satisfied	Existing and identified						Entitled to replevy goods		2-716	

Sequence of Events	CONDITIONS					RESULTS			Code §
	Type of Goods Contracted For	Status of Goods at Time of Event	Conditions Imposed by Code	Conditions Imposed by Contract	General Result	Seller's Rights and Liabilities	Buyer's Rights and Liabilities		
	Existing and identified	Existing and identified	Seller to ship goods	Seller to ship goods to buyer — need not deliver at any destination	Title to goods passes from buyer to seller	All seller's rights in goods end, except a security interest or any rights specifically reserved by Code	Buyer has all rights in property, subject to seller's security interest and other rights reserved to seller by the Code	2-401	
Existing and identified	Existing and identified	Seller to ship goods	Seller to ship goods to buyer — must deliver goods at destination	Title to goods passes from buyer to seller	All seller's rights in goods end, except a security interest or any rights specifically reserved by Code	Buyer has all rights in property, subject to seller's security interest and other rights reserved to seller by the Code	2-401		

Sequence of Events	CONDITIONS				RESULTS			Code §
	Type of Goods Contracted For	Status of Goods at Time of Event	Conditions Imposed by Code	Conditions Imposed by Contract	General Result	Seller's Rights and Liabilities	Buyer's Rights and Liabilities	
Seller delivers document of title	Existing and identified		Delivery to be made without moving goods and seller to deliver a document of title		Title to goods passes from buyer to seller	All seller's rights in goods end, except a security interest or any rights specifically reserved by Code	Buyer has all rights in property, subject to seller's security interest and other rights reserved to seller by the Code	2-401
Buyer rejects goods or refuses to receive or retain them				Buyer's refusal justified or unjustified	Title to goods reverts in seller by operation of law	Seller regains all rights in goods which he lost because of passage of title to buyer	Buyer loses all rights in goods which he gained because of passage of title to him	2-401

Sequence of Events	CONDITIONS				RESULTS			Code §
	Type of Goods Contracted For	Status of Goods at Time of Event	Conditions Imposed by Code	Conditions Imposed by Contract	General Result	Seller's Rights and Liabilities	Buyer's Rights and Liabilities	
Buyer revokes acceptance				Buyer's revocation is justified	Title to goods reverts in seller by operation of law	Seller regains all rights in goods which he lost because of passage of title to buyer	Buyer loses all rights in goods which he gained because of passage of title to him	2-401

Section 2-722 provides that both buyer and seller possess a right to sue third parties for injury to the goods occurring from the time the goods are identified until the buyer's last interest in the goods is terminated. Specifically, a right of action is in either party who has: title, a security interest, a special property or an insurable interest in the goods. If the goods are destroyed or converted, the party who bore or has since assumed the risk of loss may also sue. If the party bringing the action did not bear this risk at the time of the injury, his suit "is as a fiduciary for the other party to the contract."

*Reasons for Changes Made by the Code*

As the chart indicates, the Code constitutes a significant departure from the traditional law of sales. There seem to be two primary reasons for making this departure, one practical and the other theoretical.

The practical reason is that businessmen, when engaged in a sales transaction, do not think in terms of title, which is an abstract legal concept, but in terms of particular problems.<sup>17</sup> The Code approach is to deal with each of these problems individually. The drafters believe that this approach is more in conformity with business reality than the method used by the Sales Act, which would allocate rights and duties on the basis of title. While businessmen probably do not think in terms of title, it is undoubtedly true that they should consider such questions as who will bear the risk of loss if goods are lost or damaged, or whether the buyer will be able to replevy the goods if the seller becomes insolvent. But it is an unfortunate fact that many buyers and sellers, particularly those not regularly engaged in the business of buying and selling, simply do not advert to many of these problems at the time the contract of sale is made.<sup>18</sup> This is the reason why the drafters of both the Uniform Sales Act and the Code felt compelled to enunciate arbitrary rules for solving problems. In such cases the Code's "specific problem" approach is as arbitrary as the Sales Act's "title" approach. Neither conforms to the actual intent of the parties involved, since the parties had not formulated any intent. In such a situation the only course open to the law is to make arbitrary rules to compensate for the parties' lack of foresight. Of course this does not mean that the arbitrary rules formulated by the Code are not more in accord with the actual practice of those businessmen who do attempt to anticipate problems than the approach taken by the Sales Act. A businessman seeking to protect himself against the risk of loss would probably do so by incorporating in a sales contract a provision specifically dealing with risk of loss, rather than by a general provision dealing with the passage of title.

The theoretical justification given for the Code's abandonment of the "title" theory is that its use as a premise for solving problems is not valid. For example, a court determining whether the buyer who breaches his contract is liable for the price of goods under the Sales Act might reason as follows: He who has title, being the party who bears the risk of loss, will be the party for whose benefit goods will be insured. Conversely, if in a particular

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<sup>17</sup> ALI, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 91 (1955).

<sup>18</sup> *Id.* at 80.

transaction the goods are insured for the benefit of the buyer during shipment, the court will conclude that once the goods are shipped the buyer has title and therefore owns them. Having so concluded the court can then find that as owner the buyer is liable for the price. The objection to this line of reasoning is that it does not necessarily follow that because the parties intend that the buyer will receive the insurance proceeds if the goods are damaged, they also intend that the buyer be liable for the purchase price if he breaches his contract.<sup>19</sup> Nor is there any apparent reason why the law should use one set of rules to solve such diverse problems. The Code purports to create "custom made" law by treating each of these problems individually, without necessarily making any reference to the others.

*A Comparison of the Sales Act and the Code with Respect to Intent and Passage of Title*

It should be remembered that although the basic philosophy of the Code is completely different from that of the Sales Act, there are certain similarities regarding intent of the parties and the passage of title. For example, the Sales Act, which solves problems by discovering which party has title to the goods, has three criteria for determining when title passes:

- 1) The explicit intent of the parties.<sup>20</sup>
- 2) The intent of the parties which, although not explicitly stated, is indicated by the terms of the contract, the conduct of the parties, the usages of the trade and the circumstances of the case.<sup>21</sup>
- 3) The rules arbitrarily promulgated by the Sales Act for determining the intent of the parties when no intent is manifest.<sup>22</sup> The Code also makes provision for the passage of title,<sup>23</sup> or risk of loss in absence of a breach,<sup>24</sup> according to the explicit intent of the parties. Wherever parties manifest their intent clearly, both the Code and the Sales Act will produce the same result.

However, the Code does not make provision for determining the intent of the parties when it does not clearly appear, as does the Sales Act. As a result, where the intent of the parties is doubtful a court operating under the Sales Act would make an attempt to discover it, while a court operating under the Code

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<sup>19</sup> *Id.* at 91.

<sup>20</sup> N.Y. PERS. PROP. LAW § 99(1).

<sup>21</sup> N.Y. PERS. PROP. LAW § 99(2).

<sup>22</sup> N.Y. PERS. PROP. LAW § 100.

<sup>23</sup> UNIFORM COMMERCIAL CODE § 2-401.

<sup>24</sup> UNIFORM COMMERCIAL CODE § 2-509(4).



would not, but would decide the question in issue according to the rules contained in the Code.

To the extent that a court applying the Sales Act is successful in discovering the intent of the parties in cases where it is not explicit, its decision will be more in conformity with business reality than that of a court applying the Code. On the other hand, in situations in which courts applying the Sales Act guess incorrectly at the intent of the parties, the position taken by the Code, although arbitrary, may very well be more in accord with what the parties would have intended. As businessmen, parties probably intend to conform their transaction to usual business practice, which the Code purports to represent.

In those cases in which the intent of the parties cannot be discerned at all, courts operating under either law must fall back upon the use of arbitrary rules to solve problems. This situation gives rise to two important questions: to what extent do the rules contained in the Code differ from those in the Sales Act; and to what extent will differences in the wording of the two statutes dictate different results when the rules are applied to problems? The answers to these questions require a section by section comparison of the Code and the Sales Act. This has already been expertly done by the Commission on Uniform State Laws, whose work may be referred to for a thorough and detailed treatment.<sup>25</sup>

#### *Some Problems Arising Under the Code*

As previously indicated, the approach of the Code is geared to solving specific problems which arise between two parties, a buyer and a seller. Frequently, however, a sale will affect the rights and liabilities of the buyer and the seller with respect to third parties as well. Specifically, the rights of creditors of both parties, their liability to the state for property taxes on the goods sold and even their liability for criminal prosecution for illegal possession of certain types of property may depend upon the place and time at which a sale took place.

With respect to the rights of creditors, the Code provides that, absent a sale which would be considered fraudulent under state law, the rights of the seller's creditors with respect to the goods are subject to the buyer's right to recover the goods under sections 2-502 and 2-716 of the Code.<sup>26</sup> But difficulties may arise if the seller goes into bankruptcy. The bankruptcy law provides

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<sup>25</sup> COMMISSION ON UNIFORM STATE LAWS, NEW YORK ANNOTATIONS TO UNIFORM COMMERCIAL CODE AND REPORT TO LEGISLATURE OF NEW YORK STATE (1961).

<sup>26</sup> UNIFORM COMMERCIAL CODE § 2-402.

that, with respect to the property of the bankrupt, "the trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the *title* of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title."<sup>27</sup> Professor Williston believes that this act gives the trustee all those rights which the possessor of "title" holds under the Sales Act.<sup>28</sup> If this is in fact the way in which the bankruptcy law is to be construed, then the rights of the parties in a bankruptcy proceeding will have to be determined as they would be under the Sales Act, even though this Act had been supplanted by the Code. For example: A seller becomes insolvent, possessing goods which are existing and identified. A buyer would have a special property in these goods under the Code<sup>29</sup> and if he had paid part of the price within ten days before the seller's insolvency,<sup>30</sup> or were not able to effect cover for the goods,<sup>31</sup> he would be entitled to replevy them.<sup>32</sup> But, if the seller is adjudged a bankrupt under the Federal Bankruptcy Act, these Code rules will no longer apply, according to Professor Williston's view, and the buyer's right to the goods will depend on whether or not title to them passed to him according to the rules contained in the Sales Act. However, the courts may hold that in a state which has adopted the Code, the *title* which the trustee in bankruptcy receives consists of only those rights which the bankrupt possessed under the Code. If this occurs, the problem suggested by Professor Williston will be obviated.

A further problem exists with regard to the influence which the location of title exerts upon the application of public regulations. The person who has title to goods is liable for personal property taxes thereon. Furthermore, certain states, counties and municipalities prohibit the sale of particular commodities, notably liquors and drugs, or impose sales taxes on all sales made within the jurisdiction. The applicability of these prohibitions and taxes to a transaction depends upon whether or not title passed from the seller to the buyer within that jurisdiction.<sup>33</sup> Also, in questions of conflict of laws, the location of title may control the determin-

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<sup>27</sup> Bankruptcy Act § 23(a), 66 Stat. 429 (1952), 11 U.S.C. § 110 (1958). (Emphasis added.)

<sup>28</sup> Williston, *The Proposed Commercial Code*, 63 HARV. L. REV. 561, 568-69 (1950).

<sup>29</sup> UNIFORM COMMERCIAL CODE § 2-501.

<sup>30</sup> UNIFORM COMMERCIAL CODE § 2-502.

<sup>31</sup> UNIFORM COMMERCIAL CODE § 2-716.

<sup>32</sup> UNIFORM COMMERCIAL CODE § 2-502. The suggestion has also been made that the buyer's right to replevy goods under § 2-502, which is "predicated on the seller's insolvency" is a voidable preference under the Bankruptcy Law. Note, *The Uniform Commercial Code and an Insolvent Seller's Possession of Goods Sold*, 104 U. PA. L. REV. 91 (1955).

<sup>33</sup> Williston, *op. cit. supra* note 28, at 569.

ation of which state's law is to be applied.<sup>34</sup> The Code, however, does not purport to decide whether the buyer or the seller has title to goods for the purpose of applying these laws.

The comment to section 2-401, which deals with the passage of title, declares that "this section . . . in no way intends to indicate which line of interpretation should be followed in cases where the applicability of 'public' regulation depends upon a 'sale' or upon location of 'title' without further definition." Yet even the drafters of the Code realized that, whether they intended it or not, courts might naturally look to the law of sales to determine time and place of sale and ownership. Thus it was found "necessary to state what a 'sale' is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the 'private' law."<sup>35</sup>

The point to be emphasized is that the applicability of these taxes and public regulations is a matter of grave concern to both the buyer and the seller.<sup>36</sup> Under the Sales Act, courts applying these laws had the sometimes difficult task of determining whether the buyer or the seller possessed the title to the goods. In some cases it was also necessary to decide the time and the place at which title passed to the buyer. Under the Code the problems of the courts are multiplied. They must first decide which of the many possible criteria they will use in applying public regulations. For example, in assessing a sales tax, the court might decide that the sale took place when the buyer received "title" under section 2-401, or when he obtained a "special property" in the goods under section 2-501, or when he obtained the right to possession under section 2-502, or assumed the risk of loss under section 2-509. In determining whether a sale has taken place, the courts might resort to any one or a combination of these criteria. On the other hand, they might follow the suggestion contained in the comment to section 2-401 and use some criterion not contained in the Code at all. The adoption of the Code presents all these varied possibilities to the courts and there may well be considerable confusion before the courts arrive at the criteria to be used in these cases of public regulation which depend on the law of sales for their application. And when this is done there remains

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<sup>34</sup> *Ibid.*

<sup>35</sup> UNIFORM COMMERCIAL CODE § 2-401, comment.

<sup>36</sup> Dealers in over the counter securities, when transacting business by telephone with customers outside New York State, "will try to make sure that the customer, not the dealer, utters the fatal words 'I'll take it' or 'Sold' because New York State alone has a state transfer tax. If the 'situs' of the sale can be established in [any other state] no state transfer tax need be paid; if the situs is New York, on comes the tax." MAYER, WALL STREET: MEN AND MONEY 136 (1962).

the task of applying the criteria to each problem which demands resolution.

Finally, reference should be made to one more aspect of the Code, that is, the concept of "identification" of goods to the contract. According to the American Law Institute, since the concept of identification under section 2-501 is only important in determining when a buyer obtains an insurable interest in the goods, identification can occur at an early stage in the transaction, even before the goods are in a deliverable state.<sup>37</sup> On the other hand, the Institute points out, the concept of "appropriation" under the Sales Act affects the passage of title, and comes into play somewhat later in the transaction, generally when the goods are ready for shipment. But the Commissioners on Uniform State Laws, in a report to the New York State Legislature, referred to the concept of "identification" in section 2-401 as "comparable to that of Personal Property Law § 98, that no property passes until the goods are ascertained."<sup>38</sup> Since under the Sales Act title to unascertained goods passes when they are "appropriated" to the contract, the Commissioners apparently believe that "identification" equals "appropriation." If the courts arrive at divergent opinions as to the meaning of identification, as the above cited authorities apparently have, there will be considerable difficulty in the application of the concept.

In summary, a few points will bear reiteration. The Code abandons a "property" approach to the law of sales, in favor of a "contract" approach. Instead of solving all problems on the basis of one criterion, namely, who has title, it attempts to treat each problem individually, through the application of specific rules designed to deal with specific situations. On the whole this alteration is probably an improvement in the law.

But while the Code has replaced the concept of title as a problem-solving instrument in many situations, the concept has not completely disappeared.<sup>39</sup> The ultimate purpose of a sale is still to

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<sup>37</sup> ALI, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 96-97 (1955). Section 2-501 provides for identification of the goods according to the explicit intent of the parties. If such intent is absent "identification occurs—(a) when the contract is made if it is for the sale of goods already existing and *identified*. . . ." (Emphasis added.) It is unfortunate that the drafters of the Code chose to use the word "identify" in the definition of identification. Apparently what is meant is that identification occurs when goods are designated by one or both of the parties as those to which the contract refers.

<sup>38</sup> COMMISSION ON UNIFORM STATE LAWS, NEW YORK ANNOTATIONS TO UNIFORM COMMERCIAL CODE AND REPORT TO LEGISLATURE OF NEW YORK STATE 56 (1961).

<sup>39</sup> One way of looking at the Code approach to a sales transaction is to say that it does not so much ignore title, as grant to the party not possessing title certain rights in derogation of the title of the other party.

pass all the rights which the seller has with respect to a chattel to a buyer, *i.e.*, to pass title. Even during the period of the sales transaction the party who has title possesses all these rights and liabilities which the Code does not specifically allocate to the other. This will include the liability resulting from public regulations, such as taxes with which the Code does not purport to deal. Of course, as indicated above, the courts may use one or more sections of the Code to determine which party has title. In any event, it may be said that while the Code has reduced the significance of the concept of title, it will remain an important aspect of the law of sales, with which attorneys will continue to be seriously concerned.