THE AMERICAN UNIFORM COMMERCIAL CODE, THE TASMANIAN SALE OF GOODS ACT 1896, A COMPARATIVE STUDY*

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PART II‡

V

TITLE UNDER THE UNIFORM COMMERCIAL CODE

A. *General*

Section 2-401 is as follows:

> 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:
>
> (1) Title of goods cannot pass under a contract for sale prior to their identification to the contract (section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.
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> (2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading,
>
> (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
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> (b) if the contract requires delivery at destination, title passes on tender there.
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> (3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

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‡ Continued from Volume 2, No. 1, page 27.

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a 'sale'.

So as to render fruitful and precise a comparison of the Code rules on passing of title with the Act rules, it is essential to consider again the four categories of goods in the light of section 2-401 and the previous discussion. The initial two sentences of this section make clear the general approach of the Code to questions of title and risk of loss. In effect they provide that unless specifically mentioned, title to goods is irrelevant in an inquiry as to sellers', buyers' or third parties' rights, obligations and remedies.[1]

If, however, title is not specifically mentioned and other provisions of Article 2 do not apply to a situation in which title becomes material the ensuing four fragments apply.

B. The Categories of Goods Re-examined

It should be noted that in applying section 2-401 to these categories the examination proceeds on the assumption that neither section 2-509 nor section 2-510 are applicable. The interrelation of the three articles will be considered in the discussion of the latter sections. Section 2-401 will now be examined.

(1) *Specific Existing Goods*

By virtue of section 2-401(1) title cannot pass until goods have been identified to the contract. This sets a limit from a negative point of view which, by reference to section 2-501(1)(a) dealing with manner of identification in the absence of specific agreement means that title can only pass at the time when the contract is made if it is for 'specific existing goods'. This view is taken because section 2-501 (1)(a) refers to 'goods already existing and identified' and section 3(1) of the Act defines specific goods as 'goods identified and agreed upon at the time a contract of sale is made'. Thus while the position is taken that specific goods may be future goods under the Act, for example under section 10 (2), the Code expressly excludes the element of futurity with the words 'already existing'. Despite the fact of this

[1] Under the Uniform Commercial Code of Pennsylvania which is identical in this respect, *Girard Trust Corn Exchange Bank* v. *Warner Lelpley Ford, Inc. (No. 1)*, 12 D & C 2d 351, was decided. It was held that although the seller of automobiles had reserved title in goods delivered, which thus operated to create a security interest, this interest was subject to the rule made clear in section 2-903 that the filing of a financing statement as regulated by section 9-402 is a prerequisite to perfecting a security interest, leaving the seller in the status of the holder of an imperfected security interest subordinate to the interest of a lien creditor without notice of such unperfected security interest.

similarity the legal result is not the same. Under the Act title does pass, in the absence of agreement to the contrary, whereas under section 2-401(1) title merely *may* pass so soon as the goods fall within the category under discussion. As to when title actually will pass under the Code for this type of goods section 2-401(2) and (3) allow for two broad divisions depending upon whether or not delivery by the seller under the contract involves physical movement of the goods. Subsection (2) deals with the case where a seller completes his performance with reference to the physical delivery of the goods and provides that in the absence of explicit agreement otherwise and notwithstanding any reservation of a security interest or requirement of delivery of a document of title at a different time or place, title passes at the time and place of completion of physical delivery.

Two particular instances of this rule are specifically mentioned in paragraphs (a) and (b) of subsection (2) and these deal with whether title passes on shipment of the goods to a buyer or on tender at destination after delivery basing the result on the terms of the agreement. It is obvious that this is a radical departure from the result obtained in the application of the Act provisions to specific existing goods. There title passes on formation of a valid contract. Here title, as it were, stays with the goods and passes physically with them. Stated broadly this means that the owner of the goods is the person who has them or at whose disposal they are. This appears to be an eminently practical and workable approach.

Turning to the second alternative, under section 2-401(3), again in the absence of agreement to the contrary, where delivery is to be made without movement of goods then if the seller is to deliver a document of title, title passes at the time and place of delivery of such document, but if no document of title is to be delivered title passes at the time and place of contracting if the goods are at the time of contracting already identified. The general approach of the Code and the Act may now be noticed. The method of the Code under this Article is quite clear. Title is to pass with the appearance or indicia of ownership. It is only as a last resort that the Act solution is adopted, for under section 2-401 three cases in descending order of certainty of physical transfer are treated, viz., (1) actual physical delivery—title passes with the goods, (2) notional physical delivery by delivery of a document of title—title passes with the document, and (3) failure to provide for physical delivery either actually or notionally—title passes at the time of contracting. There is no need to dwell on the difference from the Act under which title passes 'when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed'. The difference is patent and clear.

Another point of variance under the Code is the result flowing from section 2-401(1) and (2) whereby any retention or reservation by the seller of the title in goods shipped or delivered is limited in effect to a

reservation of a security interest and whereby a reservation of a security interest does not affect passing of title under section 2-401(2). It has been noticed that a contrary result obtained under prior law.

Further, the practical approach of the Code is manifest in section 2-401(4) under which a refusal by a buyer to receive goods whether justified or not revests title to the goods in the seller. This linking of title with the presence and attitude of the parties to the goods is to be distinguished from the more doctrinaire method of (i) section 44(1) III of the Act which gives a seller a statutory title to sell goods, notwithstanding that property in the goods may have passed to the buyer where the seller is an 'unpaid seller' within section 63 and (ii) of section 52 (4) which has the effect of revesting title in the vendor when (a) the buyer makes default and (b) a right of resale has been reserved, by virtue of the statutory result that on resale by the seller the original contract of sale is 'thereby rescinded'. The Act thus distinguishes between proper and improper default by the buyer for in the case of a justified rejection of goods although title to the goods, the subject matter of the contract, may have been passed to the buyer, no title to goods which the buyer was entitled to reject and which *ipso facto* were not the goods agreed upon would pass to the buyer. The Code by section 2-401(4) avoids the subtleties and complexities of these provisions and in section 2-501 permits the identification of existing goods to the contract even though such goods are nonconforming and the buyer has an option to return or reject them, giving the buyer a special property and an insurable interest in such goods. This is directly linked with section 2-510(2) which is discussed later.

In the light of the foregoing discussion the remaining three categories of goods may now be considered.

(2) *Unascertained Existing Goods*

By virtue of section 2-105(2) goods which are not both existing and identified are 'future' goods. Accordingly unascertained existing goods fall to be considered with future goods. Further, no distinction in result will obtain between the case of specific future goods or unascertained future goods. The two will therefore be considered together.

(3) *Future Goods*

It was noted above that one result of the distinction between specific future goods and unascertained future goods was that section 21 of the Act prevents title passing until the goods are ascertained, whereas with specific future goods this restriction does not apply. Is there any comparable result under the Code? It appears that there is not for although section 2-401(1) states that title to goods cannot pass under a contract for sale prior to their identification to the contract, section 2-501(1) provides that such identification can be made at any time and in any manner explicitly agreed to by the parties.

To summarize the position, under the Act in the absence of specific agreement in the case of specific or unascertained future goods title will pass pursuant to rule 5 when the goods are appropriated to the contract. Section 21 provides that property in unascertained goods shall not pass before they become ascertained. It is open to parties to agree that property in specific future goods shall pass at the time of contracting. Under the Code these distinctions are all subject to agreement of the parties as to when identification takes place. Consequently goods which under the Act would be unascertained because not identified and agreed upon may by agreement of parties be identified to the contract 'in any manner' so as to effectively give identification of the goods to the contract and passing of title when the same would not occur under the Sale of Goods Act[2].

Leaving aside the question of the operation of special agreements once future goods are identified to the contract pursuant to section 2-501(1)(b) and (c) then the rules as to passing of title as discussed in the case of specific existing goods will apply. One feature of the rules requires attention. It would appear that an unprovided for case could arise in the case of goods not involving physical delivery under section 2-401(2), not involving delivery of a document of title under section 2-401(3)(a) and not involving goods which at the time of contracting are already identified under section 2-401(3)(b). Such goods are of course the very goods under discussion, for under the rules for identification in section 2-501 future goods are not identified at the time of contracting and only become so when they are shipped, marked or otherwise designated as goods to which the contract refers. Thus none of the provisions of section 2-401 will be applicable to goods which are merely 'marked or otherwise designated' unless as with goods which are shipped this involves a delivery of the goods.

Bearing in mind section 1-102 a tentative solution to the case may be suggested. In the case of future goods falling within section 2-401 the result will be the passing of title upon shipment of the goods or other designation, which may be by delivery of goods or delivery of title deeds, and in view of this and the general approach of these sections to pass title when the seller has finally committed himself as to the goods in question, in the case of non-physical delivery, and non-title document delivery, title to goods which are not identified at the time of contracting should pass when they are marked or otherwise designated and not as the alternative solution at the time of contracting. In addition, in the Official Comment to section 2-401 it is stated that 'future' goods cannot be the subject of a present sale and in section 2-105(2) it is stated that a purported present sale of future goods . . . operates as a contract to sell.

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[2] The implication in the second paragraph of the official comment to section 2-041 that in the case of existing goods parties can arrange for passing of title before identification of goods pursuant to section 2-501 is plainly inconsistent with section 2-401(1) which prevents title to 'goods' passing before their identification.

C. Comparison with the Sale of Goods Act

The basic approach of the two statutory instruments to the passing of title is now apparent. The Act provides for the passing of title when a complete and certain contract is made in respect of goods which are in a state in which under the terms of the contract the buyer is bound to take delivery of them. The Code provides for the passing of title not when the agreement is formally confected but when it is performed in relation to delivery. Consequently title and risk of loss under the Act will generally pass sooner than title under the Code articles.

It might be thought that once the question of risk of loss is divorced from the passing of title the point of time at which title passes becomes of little practical importance, but actually the practical importance arises often in relation to the rights of third parties who either have a right against a seller's or buyer's goods generally or specifically have purported to purchase goods and receive title from a seller or buyer when an original party claims that he already has title under a prior contract of sale. In these cases the rules of the Code which have just been examined are controlling and as to the third party's claim to title the question of risk of loss is irrelevant. Section 2-403(1) lays down the basal rule that 'a purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased'.

The section then goes on to outline cases in which a seller has power to transfer title even though his own title is voidable, and in which a non-owner can transfer title, the case here being when a merchant is entrusted with possession of goods which are the kind in which he deals. This is similar to the powers of a mercantile agent under the Tasmanian Factors Act 1891.[3] A comparison of the several cases under both the Code and the Act in which a non-owner can give a purchaser a valid title is not material to the present discussion as they present no departure from the conventional prior law approach to this matter.[4]

VI

Risk of Loss under the Uniform Commercial Code

A. General

The two risk of loss sections deal generally with the question of risk of loss without reference to the question of title to goods. The specific purpose of the ensuing discussion will be twofold, namely, to

[3] Section 5(1) reads 'Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same: Provided that the person taking under the disposition takes in good faith and has not at the time of the disposition notice that the person making the disposition has no authority to make the same.'

[4] See Franklin, La Possession Vaut Titre, 6 Tulane L. Rev. 589.

make clear the meaning and scope of the rules as enunciated and to isolate any differences in result from the application of the Act provisions. Since the differences between the title provisions of the Code and the title provisions of the Act have already been presented, to the extent risk of loss passes simultaneously albeit coincidentally with title under the Code, no further discussion will be necessary. To the extent it does not, the threefold position of the Act, Code title and Code risk of loss will be considered. It should also be pointed out that in addition to the general rules governing risk of loss contained in section 2-509 and section 2-510 certain rules as to specific types of agreements are contained in the Code and these will be considered later.

B. Section 2-509

> (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
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> (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the 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.
>
> (2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer
>
> (a) on his receipt of a negotiable document of title covering the goods; or
>
> (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
>
> (c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of section 2-503.
>
> (3) In any case not within subsection (1) or (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.
>
> (4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on Sale on Approval (section 2-327) and on effect of breach on risk of loss (section 2-510).

Section 2-509(4) renders the provisions of this section subject to contrary agreement of the parties and to the provisions on sale and approval[5] and to the provisions on the effect of breach on risk of loss.[6] The official comment to section 2-509 makes it clear that the word 'contrary' in no way limits the area of freedom within which the parties may provide their own terms as to passing of loss. Subject to these exceptions the rule applies as follows.

Just as in the case of section 2-401, the method of section 2-509 is to treat of passing of risk of loss in two main subdivisions. Firstly those cases in which the contract requires or authorizes the seller to ship the goods by carrier and secondly those cases where goods are held by a bailee to be delivered without being moved.

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[5] Section 2-327.
[6] Section 2-510.

(1) *Cases Involving Shipment of Goods*

(a) In the first case, if the contract does not require the seller to deliver goods at a particular destination but merely to ship them, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation as provided in section 2-509(1)(a). Although in this section the reference is to shipping the goods by carrier and in section 2-401(2)(a) dealing with title in similar circumstances, the reference is to sending the goods to the buyer, it would appear merely from reading each section that in each case the meaning is the same, that is, delivery of the goods to the carrier bound for a port or city as distinct from a specific buyer's address founds passing of title and risk simultaneously, on the one hand under section 2-401(2)(a) 'at the time and place of shipment' and on the other under section 2-509(1)(a) 'when the goods are duly delivered to the carrier'. Support for this interpretation is to be found in the Official Comment to section 2-509 which refers to the language of subsection (1) as being intended to be construed parallel to comparable language in the section on shipment by a seller.

(b) Again in the first case mentioned above, where the contract requires or authorizes the seller to ship the goods by carrier and it does require him to deliver them at a particular destination then according to section 2-509(1)(b) if the goods are duly tendered while in the possession of the carrier, the risk of loss passes to the buyer on such tender there as to enable the buyer to take delivery. Again simultaneity of passing of risk of loss and title under the Code flows from the similarity of this section with section 2-401(2)(b). However, it should be noted that the section on risk of loss amplifies the concept of tender a little more fully than section 2-401(2)(b) which merely refers to 'tender there'.[7]

At this point so far as a contract involving shipment of goods is concerned it is clear that risk and title pass together just as they do under the Act.

(2) *Delivery Not Involving Movement*

In the second broad class of goods where goods are held by a bailee to be delivered without being moved the passing of risk of loss occurs on the happening of any of three events (a) first, on the receipt by a buyer of a negotiable document of title to the goods. This is a parallel provision to section 2-401(3)(a) although the reference to a 'negotiable' document of title narrows the instant provision compared with the other. However, to the extent of congruence, title and risk will again pass concurrently. (b) Secondly, on acknowledgment by the bailee of the buyer's right to possession of the goods risk of loss passes. This appears to be the first instance in which the passing of risk and title is not simultaneous. Once the bailee acknowledges the buyer's right the Official Comment to section 2-509 makes

[7] In view of the detailed provisions of section 2-503 as to tender nothing seems to turn on this distinction.

it clear that this completes the 'delivery' and passes the risk. However, no twin provision is to be found in section 2-401, the only applicable section being section 2-401(3)(b), which provides that title passes at the time and place of contracting. Accordingly the result of this is to delay the passing of risk of loss for the period between the making of the contract and the acknowledgment by the bailee that the goods are at the buyer's disposal.

The comparison of passing of risk of loss in this case under the Code and under the Act reveals that this is the one case in which under the Act title, and therefore risk, passes at the same time as title does in similar circumstances under the Code. Accordingly the gap between the passing of title and risk under the Act and title under the Code on the one hand and passing of risk under the Code on the other is precisely the same. Discussion of the policy and utility of separating the passing of risk from title will be postponed until all specific instances have been isolated.

(c) Thirdly, in this second broad class of goods, risk of loss will pass after receipt by a buyer of a non-negotiable document of title or other written direction to deliver as provided in section 2-503(4)(b).[8] The reference to risk of loss passing 'after' receipt of a non-negotiable document of title or other written direction to deliver in section 2-509(2)(c) as distinct from the reference to risk of loss passing 'on' receipt of a negotiable document of title in section 2-509(2)(a) is explained on referring to section 2-503(4)(b) which makes it clear in the second sentence that notwithstanding receipt of a non-negotiable document of title or other written direction to deliver, risk of loss of the goods and risk of any failure by the bailee to perform his duties *vis-a-vis* the buyer, remains on the seller until the buyer has had a reasonable time to present the document or direction. Any failure by the bailee to admit the buyer's rights defeats the tender. What then is the combined effect of these provisions and how does it compare with the relevant rule as to title? It appears that the result under the Code will again be a separation of the two incidents of a contractual transaction.

Section 2-401(3)(a) specifies quite clearly that in the circumstances contemplated by section 2-509(2)(c) when the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents. A threefold series of points of departure immediately is posited. In the circumstances under consideration in order of logical priority, first, speaking generally and in the light of earlier discussion, under the Act, so soon as the parties conclude a contract for the sale of specific goods or in the case of future or unascertained goods so soon as they are unconditionally appropriated to the contract, title and its companion risk of loss pass to the buyer. Secondly, under the Code, title passes at the time when and the place

[8] Section 2-509(2)(c).

where the documents are delivered. Thirdly, risk of loss and bailee's failure under the Code pass only after the buyer has had a 'reasonable' time to assert and exercise his proprietory rights over his newly acquired goods.

The results in a contract on approval will be considered in the section dealing with special cases not covered by section 2-509 or section 2-510.

(3) *Residual Cases*

Section 2-509(3) deals with any case not within subsection (1) or (2) and provides that the risk of loss shall pass to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery. For a case not to be within subsection (1) or (2) it must not involve shipment of goods nor non-physical delivery of goods held by a bailee. An obvious example of such a case would be a sale by a seller at whose place of business where the goods are situated, delivery is to take place, or the alternative case of a sale involving physical delivery by a bailee holding goods, although it may well be a court would hold that this would be delivery by a seller through his agent.[9]

Before the result in these cases is elucidated the distinction between merchant and non-merchant is to be observed. Section 2-104 (1) defines a merchant very broadly as follows:

> 'Merchant' means 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.

This is paraphrased as a 'professional in business' [10] in the Official Comment to the definition. The differing results flowing from this distinction are clearly stated in subsection (3). The Code in section 2-103(1)(c) defines 'receipt of goods' as 'taking physical possession of them'. And section 2-503 deals with tender of delivery, stating generally in the initial sentence of subsection (1) 'Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery'. It follows then that if the seller is a merchant, risk of loss will pass later than in the case of a non-merchant vendor. The explanation of this perhaps unexpected distinction may be gleaned from the Official Comment to section 2-509 where it is made clear that it is likely a 'merchant' seller will carry insurance on his goods so long as they are in his possession and it is unlikely a buyer will insure goods not in his possession. Accordingly, in a completely commercially practical manner the probable insurance protection of the seller is relied upon to absorb any risk of loss. Contrariwise where a non-merchant seller is involved, it is apparently assumed no insurance is likely to be involved, and risk of loss passes not when possession does, but when it (possession) ought to pass, i.e., on tender of properly conforming goods.

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9 See section 2-509 Official Comment paragraph 2.

10 Section 2-104 Official Comment paragraph 2.

In the circumstances envisaged by subsection (3) no distinction is made either in the Act or in the section on title in the Code between a merchant and non-merchant vendor. However, dealing generally with the case of goods to be delivered at the seller's place of business or at the *situs* of the goods the third section of section 2-401 is parallel to section 2-509(3) providing either for passing of title with the document of title or to the absence thereof at the time of contracting. In the first alternative when passing of title depends on delivery of a document of title it is plain that title may pass prior to, contemporaneously with, or subsequently to receipt or tender depending solely upon the method of doing business employed by the parties. Presumably a document of title, if any, would usually be delivered subsequently to tender of delivery or receipt, pending payment.

In the second alternative, title would pass prior to risk of loss unless a contract were made and tender of delivery or receipt effected at the same time, which would of course be the case in simple 'over the counter' cash sales.

Finally, in the case of a contract for the sale of future or unascertained goods not falling within section 2-509(3), if the suggestion made above[11] were adopted and title passes when the goods are marked or otherwise designated, then usually title would again pass prior to risk of loss since marking or other designation would in all probability precede tender of delivery or receipt.

C. *Section* 2-510

The provisions of this section are as follows:

> (1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.
>
> (2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.
>
> (3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

This section deals with breach by the seller in two situations and breach by the buyer generally and the section will be considered under these headings.

(i) *Seller's Breach*

Subsections (1) and (2) deal with the cases where goods so fail to conform to the contract as to give the purchaser a right of rejection[12] or where a buyer rightfully revokes acceptance.

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11 At page 42.

12 See section 2-602.

(a) *Non-conforming Tender*

As to when goods conform to a contract one finds the rather enigmatic definition in section 2-106(2) that goods 'conform to the contract when they are in accordance with the obligations under the contract'. This of course would be a nice question for a court in any given case, but once the finding is made that goods do not conform the result is clearly stated, namely, risk of loss remains on the seller until cure or acceptance. This is the only practical result commercially feasible and this view is supported by the fact that it is arguable that this subsection is not absolutely necessary for it deals with a tender or delivery which fails to conform to the contract.

By definition a tender is of 'conforming goods'[13] and so in the circumstances postulated by section 2-510(1) it could be argued that there has been no 'tender' at all. Nonetheless the word delivery appears and, although not defined in relation to goods, this may justify the logical necessity for subsection (1) by covering the case of a *'de facto'* delivery of goods failing to comply with the contract.

The word 'cure' is not defined in the Code but its meaning is plain: non-conforming goods must be converted into conforming goods.[14] Again 'acceptance' is not defined but its significance may be gathered from section 2-606 which deals generally with the effect of acceptance. The meaning appears to indicate that when a tender is treated and acted upon as 'conforming' there has been an 'acceptance'.

How then does this rule as to risk of loss compare with the Act, the Code title provisions, and the prior Code risk of loss provisions?

Subsection (1) provides that when non-conforming goods are tendered the risk 'remains' on the seller. Two tentative conclusions may be drawn from this. First, the section appears to have its main function in operating as a barrier. That is to say, in all cases in which risk of loss passes with tender or delivery of goods, in the case of non-conforming goods this subsection will rise up to halt the passage of risk of loss. Secondly, and as a corollary of the first comment, it appears that this subsection will have no operation in those cases under the Code in which risk of loss passes before tender or delivery of goods. This limitation is unlikely to have great practical effect for section 2-503 dealing with the manner of the seller's tender of delivery completes a trilogy of the Code provisions on title, on risk of loss, and on tender, in which in each case the approach is to deal with a contract involving physical shipment by a seller, 'delivery' of goods by delivery of documents of title and residual situations. Accordingly in many cases 'tender' will coincide with passing of risk of loss so as to permit section 2-510 to operate if appropriate, but an example of a case where it would appear to be inapplicable is when risk of loss, pursuant to section 2-509(4) under a specific agreement is agreed to pass on the making of the contract. This contingency presents a real

[13] Section 2-503.
[14] Section 2-510 Official Comment paragraph 2.

problem which falls between the provisions of section 2-510(1) and section 2-510(2) inasmuch as risk cannot 'remain' on the seller since it has already passed to the buyer and inasmuch as section 2-510(2) deals with a revocation of acceptance, but in the instant case *ex hypothesi* the buyer rejects on tender before any question of acceptance of goods arises. Subject to the operation of section 2-508 regulating cure by the seller of an improper tender on general principles of contract, it would seem in the circumstances contemplated that although the buyer would be entitled to reject the goods for non-conformance, pursuant to the specific agreement risk of loss would remain his but at the same time he would have an action for damages for breach of contract against the seller just as he would have had if the vendor had failed altogether to deliver goods as required. However, in these circumstances it is likely that a court would treat the agreement as discharged by breach and avoid the circuitous and perhaps questionable result that the buyer as bearer of risk of loss should pay for goods if lost, and also be entitled to sue for damages to neutralise his liability. Support for this more straightforward and practical approach may be found in section 2-507 which makes tender of delivery a condition of the buyer's duty to accept and pay for goods and under section 2-503 and section 2-504 such tender would have to be proper before the buyer's duty arises.

Apart from this exceptional case it is unlikely that risk of loss will ever precede tender of delivery and thus the simple result of section 2-510(1) is to leave unaffected the rules on passing of risk of loss except in the obvious case where the goods in question are not the goods contemplated by the contract. In view of this conclusion no further comparison with Code title law is necessary inasmuch as the passing of title operates independently of passing of risk of loss, bearing in mind always the initial sentence of section 2-401 which subordinates the question of title to all other codal provisions. Further in comparison with the result in similar circumstances under the Act, the result is substantially the same. Section 35 deals with a buyer's right to reject goods if an incorrect quantity is delivered or if goods not within the contract are mixed with goods agreed to be sold and pursuant to section 5(2) which saves all consistent rules of common law and in particular the rules relating to invalidating clauses, the *a fortiori* case of complete failure to deliver or delivery of goods completely inappropriate to the contract would found a similar right to reject. Although the theoretical basis is not stated and the question of redistribution of risk of loss is not discussed, the common law approach is to treat the buyer as discharged from his duties and liabilities under the contract by the seller's breach.

Thus although generally title and risk of loss will already have passed under the Act before tender or delivery the same result is reached as under the Code where risk of loss is prevented from passing.

(b) *Rightful Revocation of Acceptance*

The situation contemplated by section 2-510(2) appears to involve a revocation of acceptance of goods which are subsequently lost, and for which the buyer may recover some insurance. The section provides for the recovery by the buyer from the seller of any deficiency between any such insurance and the value of the goods by permitting the buyer to treat the risk of loss as having rested on the seller from the beginning. Section 2-608 permits a buyer revocation of his acceptance of goods if their non-conformity substantially impairs their value to him and if either he accepted them on the reasonable assumption that their non-conformity would be reasonably cured and this has not been done or he accepted them without discovery of the non-conformity and his acceptance was reasonably induced either by the difficulty of discovery or by the seller's assurances. Revocation must occur within a reasonable time and the seller must be notified.

The combined result of these sections is that in the events stated, notwithstanding the fact that first title and secondly the risk of loss, except in the cases above mentioned,[15] will have passed at or before acceptance of the goods, the buyer after exhausting his personal insurance (if any) in the orthodox manner, may if his loss is not remedied turn to the seller for recompense. This possible limitation on the seller's liability is however without prejudice to the insurer's right of subrogation.[16] In comparison with prior Code title and risk of loss sections the approach of this section is basically to deal with a situation where the other provisions are *functus*. That is to say, after they have had their operation and are spent this provision deals with subsequently arising commercial problems. Accordingly there is no engagement between these sets of provisions in any sense of concurrent competing application. Nonetheless the question arises naturally what happens to title and risk of loss in the goods insofar as or in the case where the buyer's insurance leaves no deficiency? Section 2-608(3) states that on rightful revocation a buyer has the same rights and duties with regard to the goods involved as if he had rejected them. Section 2-601 dealing with buyer's rights of rejection has the official comment[17] that buyer's remedies for breach of warranty and the like when the buyer has returned the goods after transfer of title are no longer barred. It appears to follow, therefore, that revocation of acceptance will operate to rescind the contract restoring the *status quo ante*, the buyer having returned the goods and having an action for breach of the formerly existing contract subject to the extent of the sufficiency of his own insurance. At all times such a result is subject to any relevant application of section 2-603 dealing with a merchant buyer's duties as to rightfully rejected goods, section 2-604

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15 At page 50.

16 Section 2-510 Official Comment paragraph 3.

17 Section 2-601 Official Comment on changes.

dealing with buyer's options as to salvage of rightfully rejected goods, section 2-605 dealing with waiver of buyer's objections, section 2-612 dealing with instalment contracts and sections 718 and 719 dealing with liquidation or limitation of damages and modification or limitation of remedy. Turning to the Act it is found that in the particular situation under review an entirely different method is used for no provision is made for revocation of acceptance of goods. Section 35 deems a buyer to have accepted goods when he indicates to the seller such an intention, when he treats goods delivered to him inconsistently with the seller's ownership or when he returns the goods beyond a reasonable time without giving notice of rejection to the seller. Accordingly once goods are 'accepted' the buyer loses his right to reject goods and his remedy for any breach of contract, be it condition or warranty, is an action in damages. The apparent harshness of this section is tempered by section 34 which delays the demption of acceptance in the case of goods not previously examined unless and until the buyer has had a reasonable opportunity of examining them for conformity with the contract. Dealing with this section the following comment is made in *Halsbury's Laws of England*:[18]

> The time and place of delivery is *prima facie* the time and place for the examination of the goods by the buyer; but the circumstances of the case may indicate some other place and time especially where the goods contain a latent defect not discoverable by ordinary diligence at the place of delivery. In the latter case an examination of the goods at the place of delivery is not binding upon the buyer, and he may, on a subsequent inspection, reject the goods if they are not in conformity with the contract.

This interpretation largely equiparates the Act and Code provisions at least so far as practical result is concerned although there is no Act provision dealing with acceptance on the assumption of a reasonable cure. The position appears to be that while an acceptance is more readily to be found under the Code than the Act the purchaser in a Code jurisdiction has an outlet not open to a purchaser in Tasmania, who will be bound so far as title and risk of loss are concerned once an acceptance is established, subject always to any contrary agreement between the parties and without prejudice to any contractual action the buyer may have.

(ii) *Buyer's Breach*

Subsection (3) of section 2-510 again reflects the view acknowledged in the official comment[19] that in a case of breach of contract in which the innnocent party has control of the goods the guilty party is directly liable for any loss for which the purchaser is not indemnified by his insurance. Both in this connection and in connection with the previously considered subsection it hardly seems necessary to point out that these insurance deficiency provisions are an innovation which do no more than recognise one of the facts of commercial life and

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18 34 Halsbury's Laws of England (3rd Edn.) 110.

19 Section 2-510 Official Comment paragraph 3.

thereby help further to narrow the gap between legal rules and commercial practice. Subsection (3) is directed to the case where a buyer is in breach of contract in relation to conforming goods already identified to the contract, the risk of loss of which has not passed to him.

An example of conforming goods identified to the contract in which the risk of loss has not passed is as follows.

Under section 2-501(1)(a) in the absence of explicit agreement identification occurs when the contract is made, in the case of specific existing goods. Under section 2-509(1)(a) risk of loss passes to the buyer when goods are duly delivered to a carrier if the contract required or authorized the shipment and did not require delivery to a particular destination. Section 2-510(3) operates to permit the seller to treat the buyer as bearing the risk of loss for a commercially reasonable time after the breach by the buyer. At the expiration of this reasonable time the seller will have had an opportunity to arrange further or fresh insurance. It is a little difficult to elucidate any specific theoretical basis for this rule for in the generality of cases any loss of goods in the seller's possession before he has tendered delivery or otherwise complied with the contract so as pass the risk of loss will not be due to any action of the buyer nor specifically due to his breach.

However, on a general view the explanation appears to be simply that in breaching his obligations the buyer is at fault and should be fixed with liability. If this view were not taken the seller would in many cases himself become the breaching party if he were unable to substitute different conforming goods before the time for performance of the contract, and apparently it was thought that such a contingency ought to be avoided in the face of an initial breach by the buyer.

In the absence of agreement to the contrary and because of the different terminology used in the two statutory instruments under consideration it is difficult to find parallel cases for consideration. It may be remarked that no express provision deals with breach by a buyer after goods have become specific but before title and its concomitant risk passes. The closest comparable situation would appear to be a case under rules 2 or 3 of section 23 which speak of specific goods property in which does not pass until a further act and notice thereof is complete. What happens if after the goods are specific but before the act is done the buyer repudiates and the goods are lost? Certainly no question of a seller's inadequate insurance arises, but further, apart from a question of the seller's right to sue the buyer for damages for his breach or sue for specific performance in neither case would the buyer bear any responsibility for the damage to the goods. In a suit for specific performance the seller would have to allege his readiness and willingness to perform his side of the bargain

which would involve the production and delivery of the object of the contract, and in a suit for damages his damages would be those proved to flow from the seller's breach which would normally be his loss of expected profit. By the rules of section 23 the risk and title would have been his and no claim in respect of such loss could be enforced against the buyer.

[To be continued in next issue]