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## THE SALES LAW IN THE PROPOSED COMMERCIAL CODE

ERNST RABEL\*

THE PROPOSED Commercial Code<sup>1</sup> is an outstanding work, a most remarkable phenomenon in the realm of the common law. It is founded on intimate knowledge of American law and business practice, high scholarly industry and abundant legislative thought. There is no doubt that this Code contains the substance of progressive and beneficent law making. The basic question is whether the Draft presents the type of legislative art needed in this country at this time. This question I do not dare to answer. I want only to urge the necessity of examining it by a repeated appraisal of the choice of problems, the solution of the particular questions, and, above all, the technique of the Draft. Any critical observations can only be advanced with respect and diffidence, because the thoroughness of the draftsmen raises grave doubts in the reader of his own impression. But hesitation is also caused by the unusual difficulty in approaching these proposals, even though finally a comment has become available.

In the short preface, Judge Goodrich, the chairman of the Editorial Board, states that the form of the Code is still "very tentative." It may, thus, be the view of Professor Llewellyn, the eminent Editor-in-Chief, and the other draftsmen, that even a radical revision is not out of the question before Congress and state legislatures are addressed.

In any case, we might do well to notice the historic place of this Draft not only in the common-law sphere but in the rest of the world. It has

\* Research Associate, University of Michigan; former Professor of Law at the University of Berlin and Director of the Kaiser Wilhelm Institute of Foreign and International Private Law; one-time member of the Permanent Court of International Justice at the Hague.

<sup>1</sup> Uniform Commercial Code, May 1949 Draft, The American Law Institute and the National Conference of Commissioners on Uniform State Laws.

been noted incessantly that the common-law system is adverse to statute law,<sup>2</sup> since its juridical method is concerned with the case and the judge possesses a monopoly in that field,<sup>3</sup> and that even codification is of an entirely different character from Continental codes. The proposed Commercial Code seems definitely in disagreement with this old theory. Pound,<sup>4</sup> prophetically emphasizing the growing might of legislation, once defined various degrees of authority which an enactment may have in comparison with a judicial decision; of these, neither subordination nor equal status is reconcilable with the many declarations in the comment that the Code will end this or that line of decisions. Judicial interpretation of the Act is thought of as being "limited to its reason," the Act providing "its own machinery for expansion and gradual alteration" (Comment 1 to Section 1-102). This natural effect of a true reformatory statute is transcended by two highly questionable pretensions. Section 1-108 proclaims that: "The rules enunciated in this Act are mandatory and may not be waived or modified by agreement unless the rule is qualified by the words 'unless otherwise agreed' or their equivalent." The generality of this statement, deservedly pushed aside in the excellent recent draft on bank collections (Section 3-601), is entirely unusual in application to obligations. Worse, however, Section 1-105 extends the application of the Code to almost every case brought before a court where the Code is *lex fori*, with disregard of any known system of conflict of laws.<sup>5</sup> These are aberrations, but they certainly do away with the idea that the Code regards itself inferior in force to the most arrogant civil law codification. Moreover, the initial declaration that "this Act is remedial and shall be liberally construed and applied to promote its underlying reasons and policies" seems to displace the traditional rules of statutory interpretation.

In reality, the statutes merged into the Code, such as the uniform acts on sales or negotiable instruments, have exercised as much binding force as Continental enactments, which themselves vary from strictest legalism to such loose guiding principles as are contained in some parts of the Swiss Civil-Code. The peculiarities of British statutory construction and

<sup>2</sup> Amos, *The Interpretation of Statutes*, 5 *Camb. L. J.* 163, 174 (1943).

<sup>3</sup> Franklin, *The Historical Function of the American Law Institute*, 47 *Harv. L. Rev.* 1367, 1370 (1934).

<sup>4</sup> Pound, *Common Law and Legislation*, 21 *Harv. L. Rev.* 383, 385 (1908).

<sup>5</sup> This section has been sharply criticized by the scholars of conflicts law assembled in *Ann Arbor*, on August 20, 1949. See Note, 10 *La. L. Rev.* (March, 1950).

other historic differences from civil law have "disintegrated" on the American soil, or gone through changes.<sup>6</sup>

Under these circumstances, this country faces the same great problem of legislative technique which is well known abroad, arising from the contradictory demands of generalization and concrete perception, legal conciseness and popular language, comprehensive coverage and judicial discretion. And the highly interesting question ensues, whether out of the venerable tradition of the common law a new style can be formulated, leading to a happier reconciliation of the opposing postulates than the European types of codification have reached.

Is this the ambition that animates those parts of the Draft which are not manifestly revisions amending the older statutes? Notably, the "revised Sales law" is totally "rearranged and re-written." It seems to observe the inductive method of common law, piling case upon case and ascending to the cautious generalizations of tentative rules, continuously interrupted by cross references, exceptions and counterbalances. By such method, however, legislation is well prepared but not yet achieved. Since this Code is intended to innovate the law, its conservative language and its evident anxiety to clothe modern rules in the old familiar style are not introduced by a feeling of necessity but are presumably opportune concessions to the habits of the American lawyers. This is a puzzling compromise.

A new American Code may choose one of two clear-cut paths. It may be content with amending, complementing, and recomposing the uniform laws. This is what Article Three on negotiable instruments does. Whether the same method should cover the results of Article Two on sales law, depends on the legislative intent. If we think of the basic juridical aspect of sales contracts, they appear the same as under the Roman emperors. Yet the economic organization and habits mirrored in Chalmers' Sale of Goods Act were long antiquated even in 1893. An act limited to amendments in this case would have largely to preserve the accustomed arrangement and language. A code may, instead, resolutely create a fresh body of rules. Such an undertaking frightens our conservative profession. However, reluctantly abandoning our routine, we still fare better with a streamlined new order, brought to us in a simple and persuasive form, than with a confusing conglomeration of old and new substance resulting in years of litigation for ascertaining what is new and how it fits into the old frame.

<sup>6</sup> See Horack, *The Disintegration of Statutory Construction*, 24 *Ind. L. J.* 335 (1950) and authors cited.

There are good reasons to contend that the time has come for a thorough legal consolidation of American business life. The rules and points of view advanced in the Draft suffice for this purpose, if improved in many places, and, above all, if presented with co-ordination, discipline and self-restriction. Such pre-eminent draftsmen can certainly bring about any perfection when they set their minds to it. Professor Llewellyn has not only elucidated the merits of past judges but also led the movement towards reform of the American sales law.

Submitting a plea for a freer and clearer development of the Draft's vigorous impulses, I have to illustrate, by some striking examples from the Revised Sales Act, what I regretfully regard as the remaining obstacles to the most efficient legislation. But serious critical concentration on a few shortcomings should by no means be taken as opposition to the Draft, which I admire. To the contrary, I am convinced that by a change of certain methods the great qualities of the Code would gain fuller recognition and a better prospect of success.

I once reported in this periodical on the close relationship between the Uniform Sales Act and the (first) Rome draft of a uniform world law on the sale of goods.<sup>7</sup> This reference may help to shorten my remarks. In its last version, the Code has reached a high degree of similarity with the international draft, in major rules though not in all particulars and not at all in the external form.<sup>8</sup>

### 1) *Non-Merchants*

The Code had to face the problem, familiar to civil law countries, whether commercial law should be distinguished from non-mercantile law and what the differences should be. When the merchants were organized in guilds, the law merchant was a semipolitical category; in the commercial codes, added to the civil codes since Napoleon's *Code de Commerce*, it was professional. To this personal criterion, an objective one was added by considering certain transactions as mercantile per se because of their speculative nature. In modern development, commercial enterprise has become the center of the more typical subject matters of commercial law. Due to all these influences, the separate commercial codes of Europe, Latin America and Japan vary in scope, the principal question in the law

<sup>7</sup> Rabel, A Draft of an International Law of Sales, 5 Univ. Chi. L. Rev. 543 (1938). A second edition of the *Projet d'une loi uniforme pour la vente d'objets corporels meubles* was published in 1939, and also in *Unification of Private Law, Institute for the Unification of Private Law, Rome, 1948*.

<sup>8</sup> A preliminary comparison of the two drafts is outlined in a paper by the present writer, read at the 1949 Ann Arbor Institute for World Trade Problems, to be published in the *Michigan Legal Studies*.

of contract being to what degree the duties of precise contracting, accurate performance, alert correspondence and quick decision, natural to modern mercantile speed and exactitude, have to be relaxed for non-merchants. The English courts and the sales acts avoided distinction, and, in principle, imposed the commercial standards on everybody. And some prominent laws on the European Continent followed by largely "commercializing" the general law of obligations.

As the draftsmen evidently perceived, Anglo-American law naturally belongs to the same class of legislation as the Swiss Code of Obligations and the recent Italian Civil Code. These codes include, or leave to special legislation, the institutions exclusively or primarily serving commercial enterprises and therefore forming the main body of commercial law; they establish a unified law of obligations with exceptions for transactions between merchants or for merchants. The Swiss Code, by numerous exceptions of this kind, results in a partial dualism practically similar to the German law which started from the opposite end with a separate law of merchants. The Italian Code arrived at its analogous system after a hard fight between the advocates of the merger, the "Fusionists," and the commercial "Autonomists" who continue to revolt.<sup>9</sup>

It should be noted, first, that in the European codes the exceptions in the law of obligations are intended for relationships involving merchants who are, as a rule (though not always), immediately identifiable by their registration in the appropriate register; and, second, that the exceptions for merchants are stated in unequivocal special rules.

Our Draft follows, as it should, this pattern of general rules and commercial exceptions (although the excepted subject matters are different and scarce), with more regard for the non-merchants than the common law has shown in the last century. This purpose forced the Draft into a new field. What it does is ingenious but should not be the last word.

As the now necessary definition of a merchant, Section 2-104 provides that a merchant is a person who by his "occupation"—meaning professional business (Comment 1)—"holds himself out as having knowledge or skill peculiar to the practice or goods involved in the transaction or in any particular phase of it." If I understand well the elasticity of this phraseology, the idea is that a farmer selling a crop is liable as a merchant for the quality of the goods, but may not have to account for solicitude in answering letters. But so many questions are left to the imagination that,

<sup>9</sup> For a list of the comprehensive literature, see Greco, *Il diritto commerciale fra l'autonomia e la fusione*, 45 *Rivista del Diritto Commerciale* I, 1 (1947); 41 *id.* I, 21 (1943). For the view of the "Autonomists" after the contrary decision by the fascist government, see especially Valeri, *Autonomia e limiti del nuovo diritto commerciale*, I, 21 (1943).

as it is now, this is scarcely a workable formula. The danger of litigation, however, especially lurks behind Section 1-102 (3), which states: "A provision of this Act which is stated to be applicable 'between merchants' or otherwise to be of limited application need not be so limited when the circumstances and underlying reasons justify extending its application."

Hence, although Section 2-405 requires that the goods must have been "delivered in current course of trade" to a purchaser in good faith who is a merchant if he is to acquire better title than his transferor, the comment notes that "even a non-merchant may be affected" by this criterion. "Between merchants," when the buyer has rejected the goods and given timely notice of a defect, the seller may make "a request in writing for a full and final written statement of all defects on which the buyer proposes to rely" (Section 2-605 [1] [b]). However, according to the comment, "The 'between merchants' language . . . is not intended to exclude the non-merchant buyer," except that the seller should hand him a fuller explanation of what he "is really after."

Shall nonprofessional parties, then, really be assimilated to the professionals? Suppose that the administrator of an estate sells three carloads of timber to be delivered at his station, that the wood is duly piled and the buyer receives notice for taking delivery. If the timber perishes in an accidental fire, has risk of loss passed? Section 2-509 (2) answers that "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." Is this seller a "merchant"? If so, he bears the risk despite his entirely correct tender. The comment explains that the merchant's "occupation warrants the assumption that he has insured his wares." Is this true for any lumber camp? For our administrator? The comment suggests that even though a seller bears the risk, he may recover his damage on the ground of the buyer's breach of contract by not taking timely delivery. In practice, this method may sometimes be cumbersome. Of course, in this case, the entire distinction is questionable. After all, the universal rule that risk passes when the buyer fails to take delivery (not on tender!) should be good enough for every party. This rule, in fact, ought to be distinctly expressed in a code designed for courts and for merchants.

With respect to notice of breach, under the present Uniform Sales Act any buyer must give notice of any breach within a reasonable time (Section 49). Most foreign laws require notice only from merchants and only for defects of quality. The American courts could have differentiated by allowing non-merchants a longer period of time and less precise substanti-

ation of notices than merchants<sup>10</sup>; we find, instead, most cases between merchants concerned with long periods. The proposed Code provision mentioned above retains all the severity and adds a duty of indistinct personal scope.

Although businessmen's behavior has always attracted the attention of the courts, only in the doctrine of warranty for merchantability does the text of the present Uniform Sales Act contain special provisions for a "seller who deals in goods of that description" (Section 15 [2]). In this limitation, the Draft imposes liability on the seller for fitness of the goods for their ordinary purpose only if he is a merchant (Sections 2-314 [1] and [2] [c]). No genuinely new act would do this. The Draft maintains the merely historically explicable English list of warranted defects, including implied warranty in its fictitious sense (Section 2-315), in a singular contrast with the modern method by which the Draft integrates the remedies for breach of warranty into those for breach of contract.

## 2) *Statute of Frauds*

The most striking example of ultra-conservatism in the Draft is the insertion and reinvigoration of the Statute of Frauds (Section 2-201). Compulsory writing for the enforceability of transactions 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 a welcher." There is almost no jurisdiction left in the civil law orbit where commercial contracts are subjected to this patriarchal protection of ignorant parties. Not even the small farmers of Poland and Italy have been considered to need this guard. In conservative England, criticism by a long chain of pre-eminent jurists has led to the repeal proposal of the Law Reform Committee.<sup>11</sup> Do we rate American businessmen as less intelligent, more naive? Considering all the well-known arguments, historical<sup>12</sup> and practical,<sup>13</sup> the draftsmen owe us some justification for their stand.

<sup>10</sup> Thus the unitary rule is applied in Sweden, Almén, 1 *Skandinavisches Kaufrecht* 124; and in Switzerland, Federal Tribunal 18 *Off. Coll. II* 353; v. Tuhr, *Allgemeiner Teil des Schweizer Obligationenrechts* 3 (1924); 1 *Oser-Schoenenberger, C. Obl.* p. xxx.

<sup>11</sup> Chief Justice Campbell (1851); Sir J. F. Stephen and Sir Frederick Pollock (1884); Judge Willis (1901); Francis M. Burdick (1916); Holdsworth (1924); James Williams (1932); the Sixth Interim Report of the British Law Revision Committee, Section A (1937); and Cheshire and Fifoot (1945).

<sup>12</sup> See Rabel, *The Statute of Frauds and Comparative Legal History*, 63 *L. Q. Rev.* 174 (1947).

<sup>13</sup> Compare Rabel, *A Draft of an International Law of Sales*, 5 *Univ. Chi. L. Rev.* 543, 558 (1938).

How little sense it makes, moreover, that where one party to an oral agreement confirms it, the other should enjoy ten days for giving notice of objection (Section 2-201 [2])—ten days for speculation in the era of radio and planes! And every formality is satisfied when a transaction is “written in lead pencil on a scratch pad,” without indicating “which party is the buyer and which the seller,” or “the price, time and place of payment or delivery, the general quality of the goods or any particular warranties.” “The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated” (Comment 1). A surprising law!

### 3) *Basic Concepts*

In a previous article, I explained how the Rome draft of a sales law is technically based on certain fundamental, exactly-shaped concepts such as delivery, rescission, general and special damages, etc.<sup>14</sup> The Code neglects this technique, and I believe that the effort to maintain an amount of the old language coupled with the reluctance to formulate definite rules contributes much to the regrettable obscurity of the text. For example:

*Acceptance.* Like “delivery,” “acceptance” is used in Anglo-American business forms and law “in many different senses.”<sup>15</sup> For the purpose of the Statute of Frauds, the word has been defined in England as the taking of the goods by the buyer with the intention of becoming owner.<sup>16</sup> As a condition for an action for the price, another leading English case held that by dealing with the goods as owner the buyer “has so waived any objection on that score.”<sup>17</sup> This close connection of “acceptance” with the passing of the title at the same time determined the passing of the risk.<sup>18</sup>

The Code, without defining the word, states the constitution, effect, and “revocation” of acceptance:

SECTION 2-606. What Constitutes Acceptance of Goods.

- (1) Acceptance of goods occurs when the buyer
  - (a) signifies his acceptance to the seller; or
  - (b) fails to make an effective rejection (Subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
  - (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.
- (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

<sup>14</sup> Ibid.

<sup>15</sup> Isaacs, *The Industrial Purchaser and the Sales Act*, 34 Col. L. Rev. 262, 270 (1934).

<sup>16</sup> Benjamin, *Sales* 781 (1920); 1 Williston, *Sales* § 75 (1948).

<sup>17</sup> *Parker v. Palmer*, 4 B. & Ald. 387 (1821); *Chapman v. Morton*, 11 M. & W. 534 (1843);

<sup>4</sup> Williston, *Sales* § 483 (1948).

<sup>18</sup> Compare 2 Williston, *Sales* § 301 (1948).

## SECTION 2-607. Effect of Acceptance; Notice of Breach.

- (1) The buyer must pay at the contract rate for any goods accepted.
- (2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.
- (3) When a non-conforming tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered the breach give the seller notice of breach or be barred from any remedy. The burden is on the buyer to establish any breach with respect to the goods accepted.

## SECTION 2-608. Revocation of Acceptance in Whole or in Part.

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
  - (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
  - (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
- (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer gives the seller notice of it.
- (3) The buyer has the same rights and duties with regard to the goods involved as if he had rejected them.

These provisions have bewildered me. Intentionally or not, the Code maintains somehow the old connection of acceptance and title. According to Section 2-606 (1) (c), repeating Section 48 of the Uniform Sales Act, acceptance occurs if the buyer "does any act inconsistent with the seller's ownership." And Comment 2, although not the text, asserts that "acceptance always includes acceptance of the title and there is no acceptance of title apart from acceptance in general." But Professor Llewellyn in his brilliant articles has postulated that the contractual duties of the parties should no longer be tied up with the passing of the title,<sup>99</sup> and the same idea, recognized everywhere in the leading literature, is at the basis of the Code. "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." (Comment to Section 2-101). Section 2-721, in fact, connects passing of the risk with tender of delivery or "receipt" rather than with the transfer of title. But may a buyer not become an owner upon contracting long before he is in a position to "accept" the goods (whatever this may

<sup>99</sup> Llewellyn, *Cases and Materials in the Law of Sales XIV* (1930); Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. Rev. 159, 169 (1938).

mean)? Or, does not the buyer in a conditional sale "accept" the goods without acquiring the title?

What, then, is the meaning of acceptance? It seems to me that three situations should be distinguished (all regarding acceptance of the goods, not of the title or the documents).

(a) The buyer "*takes delivery*" in the physical sense. Sections 2-103-(1) (c) and 2-705 correctly call this act "*receipt*." This is a duty of the buyer if the goods conform to the contract. This act cannot deprive him of any remedy if the goods are nonconforming. Whether they are, examination will or should tell. Hence this case cannot be an exception to the rule that the buyer loses the right to rejection by "acceptance" as Section 2-606 (1) (b) assumes. Here, the text intends to say the right thing but confuses the reader by using ambiguous wording.

(b) The buyer approves the goods provisionally with the sole effect of shifting the burden of proof for nonconformity of the goods with the contract. This concept has been adopted by the German Civil Code, Section 363, under the name of *acceptance as delivery*. The buyer acknowledges that prima facie the tender fulfills the seller's duty, an act correlative to what the draft calls appropriation by the seller. Section 2-326 (1) presumably uses the word in this sense.

In practice, doubts may arise whether the buyer's attitude does not include a waiver of remedies, so as to make express protestations advisable. But because the Draft ignores such prima facie approval, Section 2-606 (1) (c) fails to make the exception provided in (b) for subsequent examination of the goods.

The same situation arises when a defect cannot be discovered by an examination at the time of receipt, but only subsequently, as for instance in the course of manufacturing. The buyer, of course, may avail himself of the defect despite a previous receipt or prima facie approval which is not more prejudicial with regard to these defects than with regard to defects discoverable by prompt examination. Section 2-607 (3) seems to view this case in some unexplained variance with Section 2-606 (1) (b).

(c) Finally, the accepting buyer may waive his remedies, totally or in part, or lose them on the ground of a legal provision. In this regard, the Draft is unsatisfactory in two respects. On the one hand, the text is unduly involved. Section 2-607 (2) takes the right to rejection away from the buyer in *all* cases of "acceptance," apparently even though the goods have merely been "received" into physical possession, with the only exception of a future examination. This severity, it is true, continues an Anglo-American rule based upon the passing of title, but in Section 49

of the Uniform Sales Act (as in many foreign laws) the loss of the right to reject is based on the failure to give notice rather than on the so-called acceptance. These principles are quite distinct.

On the other hand, Sections 2-607 (2) and (3), in a sound effort to preserve the right to damages in cases of hardship,<sup>20</sup> maintain all of the buyer's other remedies for nonconformity if he gives notice in time. It seems however that he even preserves his remedies when he knows of the defect at the time of "signifying acceptance" or disposing of the goods, but subsequently gives notice of defects. Other codes rightly deny all remedies in these cases, unless protestation is made.<sup>21</sup>

Section 2-608 (compare Section 2-703), further complicates things by admitting a "revocation of acceptance," and Section 2-606 (1) (c) adds a revocation of rejection in the form of a "wrongful acceptance" needing a "ratification" by the seller. The former is simply a rejection after a receipt which does not imply waiver, and the latter is a new agreement by the parties which may occur in all situations and should not be stereotyped as a specific sort of acceptance.

*Special Damages.* Section 2-715 has the excellent purpose of combining the buyer's right to "rejection"—it would be better to say here "cancellation"—with his right to receive damages. In this it follows the French and New York pattern and the Rome proposals. The often alleged incompatibility of rescission and damages is one of those "logical impossibilities" lawyers love to invent. But how this section exactly fits in with provisions such as Sections 2-601, 2-711, 2-713 and the doctrine of warranty, must be thoroughly clarified before application is practicable. In any case, the section itself accumulates remedies really incompatible. Among the "incidental damages," Section 2-715 (1) mentions "expense reasonably incurred in inspection, receipt and transportation" of goods rightfully rejected. Such expenses are incurred whether the goods are good or bad, accepted or rejected. Their recovery can be asked on the theory that the buyer would have been spared them if he had *not made* the harmful contract—so-called reliance interest, negative damages. On the other hand, "charges, expenses or commissions in connection with effecting cover and any damages from delay or otherwise resulting from the breach" are typical damages for nonperformance, that is, substitutes for the performance of a contract on which the buyer stands—"positive damages." Notwithstanding Williston's express text in the Uniform Sales Act, Section 69 (2), damages for the reliance interest have frequently been

<sup>20</sup> See Report to the Second Draft 12 (1941).

<sup>21</sup> German Civil Code § 464; Swiss C. Obl., art. 201; Italian C.C., art. 1175.

granted by American courts which found it insufficient, in case of "rescission," to limit the buyer to mere restitution of the price paid. Where, however, the contract is kept alive as far as the claim for damages is concerned, as under the new Code, the accumulation of restitution of the price and a claim for damages for the expectation interest with an additional claim for damages for the reliance interest is unjustified. The buyer must not be allowed simultaneously to claim to be restored to the status in which he would be if he had never made the contract, and that in which he would be if the contract had been properly performed.

#### 4) *Essential and Inessential Breaches*

Adapting the British Sale of Goods Act, Williston perceived the inadequateness of the traditional treatment of "conditions" and "warranties" and almost eliminated the distinction, although he hesitated to adjust all the language.<sup>22</sup> However, the Uniform Sales Act thereby lost its balance in that it failed to make clear the highly important difference between the situations on which the distorted distinction rested, originally and practically. Not every stipulation of a time for *delivery* is "of the essence of the contract" so as to justify immediate rejection of the goods; the English Act, in Section 10 (1), states that this depends on the terms of the contract, and the courts merely presume its essential nature, and then only in transactions between merchants.<sup>23</sup> The British section also expressly says that "stipulations as to time of *payment* are not deemed to be of the essence of a contract of sale." Whatever the American practice may be, Section 2-601 would allow rejection of the whole "if the goods or the tender of delivery fail *in any respect* to conform to the contract." Section 2-703 offers the seller the entire arsenal of his remedies "where the buyer wrongfully fails to make a payment due on or before delivery." All this severity goes far beyond the English model which itself exaggerated the scope of usages developed in such speculative operations as the trade in grains and other bulk merchandise. For industrial and agricultural sellers and for any ordinary buyers this rigidity is so excessive that the courts would seek to escape and thereby fall back into uncertainty, or the contract forms of powerful parties will indulge in even more contracting out than they have done.

Essential and inessential duties must also be distinguished in principle.<sup>24</sup>

<sup>22</sup> See Bogert, *The Proposed Federal Sales Act*, 26 Va. L. Rev. 638, 640 (1940).

<sup>23</sup> Reuter, *Hufeland & Co. v. Sala & Co.*, 4 C.P.D. 239, 246, 249 (1879); *Hartley v. Hymans*, [1920] 3 K.B. 475; 2 Williston, *Sales* § 452 ff. (1948).

<sup>24</sup> Compare 1 Williston, *Sales* § 225a (1948).

However, the Draft recognizes their difference only in some special cases: Section 2-311 (3) mentions the case "where the exercise of an option will materially affect the other party's performance"; Section 2-504 (c) allows rejection because of failure to give notice of shipment "only if material delay, loss or damage ensues"; Section 2-608 permits revocation of acceptance when "non-conformity substantially impairs its value" to the buyer; and, of course, there is the case of nonconforming installments (Section 2-612).

It should be added, however, that the Code wisely refrains from making the right to rejection for breach of the main obligations—of delivery, warranty and payment—dependent on the major or minor importance of the defects. Some legislation has denied rescission for minor defects of quality. It is well known that the great distances often involved in modern commercial transactions make it advisable to avoid returns of goods or sales at auction in faraway places. It is also true that rescission is less necessary or equitable when the aggrieved party can dispose of the goods, when goods are manufactured on order, or when the buyer does not have the risk of paying cash in accepting a shipment.<sup>25</sup> Yet a general sales law must avoid trying to cover all situations and provoking litigation by fine distinctions.

Every general sales law is confronted with the variety of contract types, developed for different kinds of merchandise, of transportation, of financing, or of local habits. For this reason the "c.i.f." rules have been endlessly attacked as unrealistic generalization, and the international sales draft encountered similar opposition. Nevertheless, time and again, codifications and unifications have rightly sought a basic, fair regulation of the average seller-buyer relation, leaving the special types to the formulations of the trade. There can be no end if we try to do justice to every factual situation.

Has the Draft itself observed this truth quite consistently? Has it not too willingly responded to the multitude of economic organizations and standards, and of risks inherent in business transactions? It will need a highly qualified generation of judges and counsel to live up to its imposing flow of thought-provoking ideas and suggestions.

#### CONCLUSION

In perusing this enormously rich and thoughtful work, infinitely more comes to mind. We owe it general grateful acknowledgment despite some strong objections to the substance, and a general wish for clarification, simplification and modification, respecting the technique as well as minor

<sup>25</sup> Honnold, *Buyer's Right to Rejection*, 97 U. of Pa. L. Rev. 457, 466 (1949).

points.<sup>26</sup> The Draft has overcome huge difficulties. Other handicaps remain to be surmounted.

I cannot suppress the mention of the most efficient remedy. The Code, in each of its subsequent versions, has come nearer to the results of comparative research. Its ultimate shape would still be original and suitable to internal American business life, so thoroughly studied by the authors, if a resolute attempt were made to agree with the rest of the Western countries on common solutions to the common problems and to give them, in the several countries and languages, a varying but commonly understandable expression. Many particulars may remain at variance. Sales law, negotiable instruments and commodity papers are over-ripe for a measure of world law, a uniformity not obtainable by the dictate in Section 1-105. Other parts of the Code are running ahead of the Continental achievements and will gladly be taken as a model elsewhere. At the very least, a common comparative legislative research, on the basis of this impressive draft, would provide fruitful lessons for each nation involved, an effort so far never sufficiently supported from the American side.

The Draft is such an accomplishment as to deserve perfection by every conceivable effort. In the mutual inspiration of some international collaboration, American legislation would achieve its own growth and exercise a mighty influence on the world.

<sup>26</sup> A simple, though tiny, example for many: Uniform Sales Act § 63(3) grants action for the price if the goods "cannot readily be resold for a reasonable price." The Draft, Section 2-709(1) and Comment 3, "substitutes an objective test": the action "can be sustained only after a reasonable effort to resell the goods at 'a reasonable price' actually has been made or where the circumstances 'reasonably indicate' that such an effort will be unavailing." The test of the Rome Project is considerably more objective: it requires always and only that the goods have no current price. The rational merits of these two versions ought to be examined.