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Risk of Loss in Sales: A Missing Chapter in the History of the U.C.C.: Through Llewellyn to Williston and a Bit Beyond

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Robert L. Flores*

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I. INTRODUCTION AND OVERVIEW

A. Introduction

In the law of sales of goods and land, no topic has proven more troubling in modern times than the allocation of risk of loss. There are efforts now underway to rewrite the risk of loss provisions of the Uniform Commercial Code governing sales of goods, demonstrating that the topic of risk of loss remains both important and deeply troubled. The revision efforts come some half of a century after the Code’s provisions were first drafted by Karl Llewellyn. Those efforts coincide with the 100th anniversary of one of the most significant scholarly works ever to address the topic of risk of loss, a set of articles by Samuel

1. The writings of Karl Llewellyn leading up to his drafting of the current Uniform Commercial Code make clear that risk of loss was one of the most troubling aspects of sales law and that reform of those rules was a primary motivation for developing the Code to replace the Uniform Sales Act. See infra notes 225-63 and accompanying text.


Problematic rules as to risk of loss raise far greater concerns than one might assume based on the cases litigated, because so many other issues in a sale transaction are affected by the transfer of risk of loss. See JOHN HONNOLD ET AL., LAW OF SALES AND SECURED FINANCING 383 (6th ed. 1993) [hereinafter HONNOLD, LAW OF SALES] (“The point at which risk of loss passes is thus of greater practical significance than would be indicated.”).


3. Risk of loss rules apply when land or goods that are under contract for sale suffer accidental loss, and the loss must be allocated as between the seller and buyer. For example, goods that are subject to a contract for sale might be partly damaged or completely destroyed by fire, weather, or vandalism. Risk of loss rules determine which party—seller or buyer—bears the burden of loss to the value of the goods arising from such an occurrence. See HONNOLD, LAW OF SALES, supra note 1.


5. See infra note 279 and accompanying text.
Williston. With the watershed revision of the Code now underway, and in light of the historical significance of this centennial anniversary, it is especially appropriate now to thoroughly examine the modern history of risk of loss doctrine.

The premise of this article is that the conventional view of the modern history of risk of loss in sales of goods is seriously in error. There is a significant chapter missing from that conventional view. The missing chapter ties together the law of risk of loss in sales of land and in sales of goods. It shows that much of the credit for development of the modern doctrine belongs to Williston, and not to Llewellyn alone. Among other effects, the longstanding conventional failure to recognize the missing chapter means that the current rewriting of the Code is being undertaken with a deficient understanding of the origins of the provisions targeted for revision.

The objective of this article is to reconstruct this missing chapter of history. In doing so, this article lays a foundation for an accurate understanding of the historical origins and underlying principles of the modern rules of risk of loss in sales of goods, and a greater understanding of the benefits available from exploration of the historical relationship between land law and goods law.

The remaining portions of Part I of this article provide an overview of the missing historical chapter and a brief description of the Code revision efforts now being undertaken without benefit of that missing chapter. The balance of the article lays out in detail the missing chapter of history. Part II describes the parallels in the development of risk of loss doctrine in land sales and goods sales through the 19th century. Part III describes a revolution led by Williston as to risk of loss doctrine in sales of land. Part IV examines Llewellyn’s revolution in the risk of loss doctrine in sales of goods. In both Parts III and IV, the article demonstrates that Llewellyn modelled his work on the Code’s risk of loss provisions after the doctrine developed by Williston in sales of land.

B. Overview of the Missing Chapter in the History of the Code

The contents of this missing chapter are likely to be surprising to those familiar with the accepted version of the Code’s history. The overlooked information directly contradicts major tenets of the conventional story.

The conventional view is that risk of loss doctrine in sales of land and the doctrine in sales of goods, though stemming from one common source, have been almost entirely separate and different for centuries. In particular the view is that

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7. See, e.g., HONNOLD, LAW OF SALES, supra note 1, at 384 n.2.
goods law has not benefited from developments in risk of loss doctrine in the field of land sales, a view stated by Karl Llewellyn himself. Consequently, the conventional view holds that little of value for understanding goods sales law can be gained by examining the development of risk of loss doctrine in sales of land. In fact, the missing chapter shows that at the very time he was stating that view, Llewellyn was aware of the innovations taking place in land sales law, and would soon borrow from them to reform goods sales law.

A revolution in thinking about risk of loss in sales of land, begun decades before Llewellyn’s time, culminated in the Uniform Vendor and Purchaser Risk Act in the 1930s, reflecting major innovations in risk of loss theory. Llewellyn, though otherwise not versed in the field of sales of land, actively involved himself in the promulgation of the Risk Act, and thus was exposed to the innovations it represented.

Shortly after that experience, Llewellyn began presenting proposals for the radical reformation of the law of risk of loss in sales of goods. Eventually he incorporated those reforms into the Code. The innovations in sales of goods attributed to Llewellyn are strikingly similar to those which had already been achieved in sales of land. Most importantly, the innovations achieved in land law involved a de-emphasis of the use of status of ownership as a basis for allocating risk of loss, and an integration of other principles for loss allocation. Essentially, the Code’s drafters carried the same change into the Code for goods law, and in the conventional view, that shift of underlying principles is recognized as the single most significant change in risk of loss doctrine wrought by promulgation of the Code.

The prior development of innovative theory in the law of land sales, Llewellyn’s relationship with the Risk Act, and the evident influence of that experience on his drafting of the Code, are facts overlooked in the conventional view of the Code’s history.

The conventional view is that Llewellyn led the revolution in goods law, and that Samuel Williston was at best not a contributor and at worst the leading opponent of needed reform. This conventional painting of Williston as the

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8. See Karl N. Llewellyn, The First Struggle to Unhorse Sales, 52 HARV. J. L. & ECON. 873, 873 (1939) (asserting that goods sales law had been marked off and cut loose from land sales law long before modern risk of loss doctrine had been developed).
9. See infra notes 193-228 and accompanying text.
10. See infra note 195 and accompanying text.
11. See infra notes 235-63 and accompanying text.
12. See id.
13. See id.
14. See, e.g., HONNOLD, LAw OFSALES, supra note 1, at 386.
enemy of needed modernization, specifically in risk of loss doctrine, coincides with the more general conventional view of his approach to goods sales law and contracts law generally. Critics have generally branded Williston as a rigid formalistic thinker, unable to appreciate the benefits of Llewellyn’s revolutionary ideas.\textsuperscript{16} The conventional view is not entirely without historical support. Williston did in fact oppose the enactment of the Code, and in part based his opposition on the new Code’s treatment of risk of loss.\textsuperscript{17}

However, there are significant aspects of Williston’s role that are missing from the conventional view. His famed opposition to the Code came in 1950, when he was nearly 90 years old.\textsuperscript{18} Beginning half a century earlier, it was the young scholar Williston who led the revolution in thinking about risk of loss in sales of land, the same revolution which Llewellyn then carried into sales of goods. Williston led that revolution in land sales law from his seminal articles in 1895, through his important Contracts treatise, his drafting of the Restatement (First) of Contracts, and finally, into his drafting of the Uniform Vendor and Purchaser Risk Act.\textsuperscript{19} During the later stages in Williston’s campaign, Llewellyn was extensively exposed to the innovative ideas that he would later bring to the Code.

The story twists even further. In the drafting of the Risk Act for land sales, Llewellyn briefly played the role of opponent to the important theoretical innovations Williston sought.\textsuperscript{20} Yet soon afterward, Llewellyn took the same innovations and made them a central feature of his own campaign for reform of the law in sales of goods.

The full story of Williston’s role in developing an innovative approach to risk of loss in sales of land is not well-known even to scholars in the land sales field.\textsuperscript{21} The conventional view of the Code’s history has entirely overlooked the role that Williston’s realty sales groundwork served in the development of the modern law


\textsuperscript{17} Williston drafted the Uniform Sales Act, which the Code was designed to replace, and when Llewellyn presented the Code for adoption, Williston objected. See infra notes 297-310 and accompanying text.

\textsuperscript{18} See id.

\textsuperscript{19} See infra notes 83-228 and accompanying text.

\textsuperscript{20} See infra notes 210-16 and accompanying text.

\textsuperscript{21} While many land sales writers have referred to Williston’s early article and treatise, and some have noted his role in promulgation of the Risk Act, they have generally not taken account of the importance the Contracts Restatement played in Williston’s overall reform campaign. See, e.g., Simpson, II, supra note 2, at 757-59, 769; 3 AMERICAN LAW OF PROPERTY, supra note 2; ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 10.13, at 743-44 (2d ed. 1993); 1 MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 4.11, at 507-14 (5th ed. 1991); HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 113 (2d ed. 1948); 12 THOMPSON ON REAL PROPERTY § 99.09 (David A. Thomas ed., 1994); Milton M. Hermann, The Doctrine of Equitable Conversion: I, Conversion by Contract, 12 DEPAUL L. REV. 1, 13-14 (1962).
of risk of loss in sales of goods. 22 Llewellyn may well have fostered this oversight by his silence on the point. 23

The conventional view of the history of the Code's risk of loss provisions also fails to adequately recognize the role of Arthur Corbin. Corbin is not conventionally viewed as having had any significant role in Llewellyn's drafting of the risk of loss provisions. 24 In fact, Corbin appears to have had an important role as sort of an intermediary between Williston's work in land sales and Llewellyn's work in goods sales. 25

Thus the conventional view of the Code's history gives Llewellyn credit for too much, and Williston and Corbin credit for too little. More importantly, the conventional view fails to recognize that the developments that occurred in the law of land sales—particularly Williston's work in that field—can be valuable resources to use in understanding the current risk of loss provisions in the Code. That understanding is needed now more than ever, given the present efforts to rewrite the Code.

C. Relevance of the Missing History to Current Plans for Revision of the Code

The criticisms that have led to the current rewriting efforts began at least as early as the 1960s, a period in which the states first widely enacted the Code. 26
Fueled by the increasing attention to the tools of economic analysis of law, and by developments in international law governing international sales, critics increasingly targeted the Code’s risk of loss provisions in the 1980s and early 1990s. In 1990, a study group appointed by the Permanent Editorial Board of the Code submitted a report urging that the Code’s risk of loss provisions be substantially revised. In 1994, the Board’s drafting committee submitted a first discussion draft implementing the recommended revisions of Article 2 of the Code.

From the beginning of that criticism the debate regarding the Code’s risk of loss provisions has focussed on the mix of principles that drive those provisions. One effect of the revolution from pre-Code to Code rules was a shift from principles of ownership, that is, property law, to principles of contract law. Other effects were the incorporation of principles of loss prevention and the maximization of insurance coverage. As with pre-Code law, the rules of the Code also retained a role for principles of fault, allocating risk based on one party’s wrongful act. Criticism of the Code has come in the form of a debate about how all of those principles should be balanced.

of the risk of loss rules in 1968. See King, supra note 15, at 53.


30. See Preliminary Report, supra note 4, at 1150-55 (Article 2, Part 5, Recommendations 6, 7).


32. See U.C.C. §§ 2-509, 2-510 (1990). For further explanation of the mix of principles in the current Code’s risk of loss provisions, see infra notes 279-96 and accompanying text.
For example, the most powerful voices have argued that the current rules place too little weight on the policy of imposing risk on the party most likely to have insurance coverage, and too much weight on other principles. Those critics have so far succeeded in persuading the drafting committee to eliminate a key provision of the current rules, section 2-510, because it is perceived to poorly balance the underlying principles of the rule. On the other hand, some argue that those conventional critics fail to understand the true intended balance of the principles in the Code.

That debate will not be resolved here, nor even fully described. That current debate is important, however, in that it shows how vital it is to have a full understanding of the principles intended by the Code’s original drafters to guide the risk of loss provisions. This author contends that such a full understanding cannot be had without reference to the missing historical chapter detailed here. The blend of principles that underlie the current rules of the Code came about largely through Williston’s work in the field of sales of land. Any comprehensive study of the history and underlying theories of the Code’s rules should include that long-overlooked chapter.

Parts II, III, and IV of this article will bring to light the missing chapter in the history of the Code.

II. RISK OF LOSS IN SALES OF LAND AND SALES OF GOODS TO THE END OF THE 19TH CENTURY: EARLY PARALLELS—RES PERIT DOMINO

The Anglo-American law on risk of loss can be traced at least to 13th century doctrine, described by both Bracton and Glanville. Their descriptions show that land and goods were treated alike, that risk doctrine was based on a principle of ownership, and that possession determined ownership. Risk of loss fell to the party defined as the owner at the time of loss. Ownership passed from seller to buyer only upon delivery of possession. Bracton cited two examples of this view: a loss resulting from the burning of a house under contract for sale and one resulting from the death of an ox under contract for sale. The rule in both cases was that a loss occurring before delivery of possession to the buyer fell on the

33. See supra note 29.
34. See Preliminary Report, supra note 4, at 1154 (Article 2, Part 5, Recommendation 7); 1994 Draft, supra note 31, § 2-509, Reporter’s Notes.

The drafting committee has not entirely accepted the views taken by the majority of critics. In its 1994 draft, the committee refused to go to the extent of entirely eliminating the much-criticized provisions of section 2-510 of the Code. See 1994 Draft, supra note 31, § 2-509 Reporter’s Note.
seller "because in truth, he who has not delivered a thing to the purchaser, is still himself the lord of it."

The underlying principle, that risk followed ownership, came to be commonly expressed in Anglo-American statements of law using the Latin phrases, res perit domino (the risk of the thing lies with its owner), typically used in reference to goods, and damnum ex casu sentit dominus (injury falls on the owner), typically used in reference to land.

The early law operated on a simple equation: possession = ownership = risk of loss. Between the 13th and early 19th centuries, the simple equation was changed. In the middle ages, the common method of transferring ownership was livery of seisin, that is, delivery of possession. It is well-known that conveyances of land required livery of seisin. Though it is not well-known now, the seisin concept also applied for transfers of ownership of goods.

Long before the 19th century, however, it had become possible to transfer ownership of both land and goods through means other than delivery of possession. The changes developed through different avenues for land and goods, although the end results were quite similar.

For sales of land, it first became possible to carry out a land transfer through delivery of a document of title, without the handing over of a clod of dirt. Though that innovation originated within equity, the common law courts eventually accepted it. By the late 18th century, equity had developed another innovation, which came to be known as the doctrine of equitable conversion by contract. In simplified form, this doctrine provided that upon the formation of a contract for the sale of land, the buyer became, in the eyes of equity, the owner of the land, though the delivery of the document of legal title and possession was not to occur until later.

The equitable conversion doctrine appears to have been developed for two reasons. First, equity used conversion when either buyer or seller died between the time of contracting and the time of conveyance of legal title. For example, because the English law of descent treated land and goods differently, it made a great deal of difference whether a buyer of land died before or after gaining ownership of the land. If the buyer died owning only personal property (the

36. BR ACTON, DE LEGIBUS, Ch. XXVII, at 493 (Twiss ed., 1878); see also GLANVILLE, LAWS & CUSTOMS (Cir. 1187-89) Book X, Ch. XIV, at 216 (Beames ed., 1900) ("The risk in respect of the thing purchased and sold is generally on the party in possession, unless there is an agreement to the contrary.").

37. See Williston, Common Law, supra note 6, at 106.


39. As to land, see THOMPSON, supra note 21, § 4.06(i)(2). As to goods, see James B. Ames, The Disseisin of Chattels, 3 HARV. L. REV. 23, 313, 337 (1889-90); SAMUEL WILLISTON, [A TREATISE ON] THE LAW OF CONTRACTS § 450, at 807 n.35 (1st ed. 1920) [hereinafter WILLISTON, CONTRACTS TREATISE].

40. See CUNNINGHAM ET AL., supra note 21, § 11.1; THOMPSON, supra note 21, § 4.07(f)(3).
purchase price and a contractual right to purchase the land), one set of survivors (the next of kin) would benefit. If the buyer died after gaining ownership of the land, another set (the heirs) would benefit. Equity employed the equitable conversion doctrine to treat the buyer as having gained ownership of the land, even though the conveyance had not been completed, on the theory that this result was most likely to reflect the intent of the decedent.41

Second, treating the buyer as owner gave the buyer various protections not otherwise available. With a recognized property interest in the land, rather than a mere contractual right, the buyer had greater remedies against the seller and any third parties who might threaten the land. The buyer could get the remedy of specific performance. The buyer could even sell the property interest, in an era when mere contract rights (chooses in action) were not easily transferable.42

With the law courts slow to respond to these perceived needs, equity intervened and developed the equitable conversion doctrine. By the beginning of the 19th century, it could be said that, upon formation of a sale contract, without awaiting conveyance recognized at law, or delivery of possession, the buyer of land

by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his, they may be assets, and they would descend to his heir.43

The Chancellor was then asked how to allocate risk of loss in a case in which there was a contract for sale, but the buyer had not yet received possession or a conveyance of legal title. In 1801, in Paine v. Meller,44 the Chancellor combined the ancient principle that risk goes with ownership with the new equitable definition of ownership. The parties had agreed on the sale of a house, which then burned before possession and the legal title were transferred. Paine came to stand for the proposition that upon formation of a specifically enforceable contract for sale of land, "any subsequent deterioration . . . of the property prima facie accrues to the purchaser as owner; as a loss by fire, according to the maxim 'damnnum ex casu sentit dominus.'"45

41. Conversion would also be used in case of a seller's death. See Flores, Comparison, supra note 2; see generally, Sidney P. Simpson, Legislative Changes in the Law of Equitable Conversion by Contract: I, 44 YALE L.J. 559, 561 (1935).
42. See generally Simpson, supra note 41, at 580 (describing protections against third parties); McClintock, supra note 21, § 106; Hermann, supra note 21, at 7-9; AMERICAN LAW OF PROPERTY, supra note 2, § 11.22.
44. Id.
The Chancellor, though adhering to the underlying theory for risk of loss doctrine described by Bracton for the 13th century, had created a rule of nearly opposite effect, shifting ownership and risk to the buyer despite the seller’s retention of possession.46

The common law courts did not entirely accept the innovation of equitable conversion. They continued to require more formal means of transfer of ownership, and so it came to be that at the time of contracting, a buyer was considered to have the equitable title, while the seller retained the legal title until the conveyance was completed by delivery of a document of title.47 That differentiation of equitable and legal title has continued until the present time.

Despite refusing to recognize a buyer under contract as owner at law, the law courts did accept the risk of loss rule of Paine, and it became the rule of England. The conversion doctrine, the splitting of legal and equitable title, and the Paine rule were adopted by American courts by the end of the 19th century.48

Meanwhile the risk of loss doctrine in sales of goods was undergoing change that would lead to a result much like the Paine rule. The change seems to have been motivated by a desire to provide greater protection for a buyer under contract, as against the seller and third parties.49 The remedies available to one with a mere contractual right as to goods were unsatisfactory. A buyer could best be protected, given more satisfactory remedies, if the buyer were viewed as having a property interest, rather than a mere right in contract.50

Although equity was not nearly so willing to intercede in matters of personal property as in matters of real property,51 it did take some cases involving sales of goods.52

Perhaps spurred on by the possibility of Chancery duplicating in goods sales what it had done in land sales, or perhaps merely responding to the need to protect buyers without such spurring, the courts of law developed a rule roughly equivalent to the conversion doctrine. They held that at the time of formation of

46. Prior to Paine, equity had followed the rule of Stent v. Balis, 2 P. Wms. 217, 220, 24 Eng. Rep. 705, 706 (Ch. 1724) (“If I should buy an house, and before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house. . . .”).
47. See Seton v. Slade, 7 Ves. Jun. 265, 274, 32 Eng. Rep. 108, 111 (Ch. 1802) (“The effect of a contract for purchase is very different at Law and in Equity. At Law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee.”).
48. See, e.g., Brewer v. Herbert, 30 Md. 301 (1869) (adopting Paine rule); see generally AMERICAN LAW OF PROPERTY, supra note 2, § 11.30; Williston, Common Law, supra note 6, at 112-30.
49. See HONNOLD, LAW OF SALES, supra note 1, at 384.
51. See Llewellyn, The First Struggle to Unhorse Sales, supra note 8, at 873, 890-93.
52. In the few cases there were indications of equitable development of something like the doctrine of equitable conversion for personal property, and something like the Paine rule to govern risk of loss. See Williston, Common Law, supra note 6, at 107 n.3.
a contract for sale, the buyer became, at law, the owner of the goods. In other words, the "property" in or "title" to the goods was transferred to the buyer at the time of contracting, even if the seller still had possession. As owner, the buyer acquired all of the benefits of ownership, including desirable remedies, as was true for land sales under the conversion doctrine.

A quarter century after Chancery had developed the Paine rule, imposing the risk of loss on the buyer of land as equitable owner at the time of contracting, the law courts faced a parallel issue in sales of goods. In Tarling v. Baxter, the parties had agreed on a sale of a haystack. The hay burned before the buyer obtained possession. The court called on the ancient principle of ownership, that "the loss must fall upon him in whom the property was vested at the time..." It held that at the time of formation of the contract, though lacking actual possession or the right to possession, the buyer had acquired the "property."

By the end of the 19th century American courts followed the underlying theory and the specific rule of Tarling, with risk determined by ownership and ownership passing upon formation of a contract, without transfer of possession. Thus, at the close of the century American doctrines for risk of loss in sales of land, and in sales of goods, though using somewhat different concepts of ownership, were in both theory and specific results quite similar. For both, the doctrine described by Bracton for the Middle Ages had been changed. The theory remained that risk attended ownership, yet the rules for determining ownership had changed.

53. See Honnold, Law of Sales, supra note 1, at 384.
54. In land sales, the existence of separate regimes of equity and law had led to the development of separate concepts of equitable ownership and legal title. In goods sales, lacking the equitable terminology, another kind of distinction was developed. The term "property" was used to refer to the status of ownership as between the buyer and seller. The term "title" was used to refer to the status of ownership with regard to third parties. For reasons unimportant here, title and property were treated as distinct in some circumstances. See Samuel Williston, The Law of Sales in the Proposed Uniform Commercial Code, 63 Harv. L. Rev. 561, 566 n.7 (1950) [hereinafter Williston, The Proposed Code].
55. See Honnold, Law of Sales, supra note 1, at 384. The change from the former requirement of delivery of possession had occurred in steps. One intermediate step was to allow the desirable remedy of detinue to a buyer who had paid the price but not yet taken delivery. Later, it was no longer necessary that the buyer have paid the price to trigger the transfer of property. See generally Williston, Sales Treatise, supra note 50, § 260, at 354.
57. Id.
58. Id.
59. See, e.g., Osborn v. Nicholson, 80 U.S. 654, 660 (1871) ("[t]he question... who shall bear the loss occasioned by a vis major... depends much upon the question, who was the proprietor when that loss was occasioned... the maxim applies, Res perit suo domino"). Osborn, though a case involving personal property, relied on the realty case of Paine, for the general proposition that risk was tied to ownership. Id.
60. Civil law had also changed by the 19th century. Whereas early Roman law had held that both ownership and risk, for land or goods, passed only with delivery of possession, by the 19th century the Civil law had developed a rule similar to the Paine rule for land and Tarling rule for goods, such that risk passed at the time of formation of an enforceable contract for sale. The Civil law was more similar to the Paine rule
Also at the close of the 19th century, American risk of loss law, for both land and goods, was purely judge-made law. That was about to change for sales of goods, and with that change, the paths of risk doctrine for land and goods were to part for a time. In the 1890s, in both England and the United States, the bar saw a need for codification of commercial law, including the law of sales of goods. England moved first, codifying the common law of sales of goods in the English Sale of Goods Act, effective in 1896. In America, it was first necessary to establish an organization to develop uniform codes for the states and lobby for their enactment. Energies were focussed on establishing such an institution, the National Conference of Commissioners on Uniform State Laws, during the 1890s. Immediately after the Conference was formed, the Commissioners went to work on developing a statute for sales of goods. They brought the author of the English Act to meet with the Conference to describe the English experience with codification. They elected to base an American statute on the English model and enlisted Williston to modify it slightly to meet American circumstances, but otherwise to follow the English Act as closely as possible, which he did.

In particular, the American statute, like the English Act, incorporated both the ancient principle of basing risk of loss on ownership, and the early 19th century rule, designating the buyer as the owner and risk-bearer immediately upon formation of the sale agreement, regardless of possession of the goods.

In 1906, the Commissioners approved that statute and recommended it to the states as the Uniform Sales Act. The earliest products of the Conference did not include the sort of extensive official commentary familiar in later uniform laws. Instead, the Commissioners asked Williston to develop a treatise to accompany the Sales Act, which he completed in 1909.

than the rule, in that the Civil law did not hold that the Civil law equivalent of title passed at the time of contracting, though the burden of risk, as an attribute of ownership, did pass at that time. See , supra note 6, at 72-73.

61. As to the history of the English Act, see Francis M. Burdick, Conditions and Warranties in the Sale of Goods, 1 Colum. L. Rev. 71 (1901); William E. McCurdy, Uniformity and a Proposed Federal Sales Act, 26 Va. L. Rev. 572, 575 (1940).

62. The Conference was formally constituted in 1905. However, it had already been operating for a few years on an informal basis, and in that period had promulgated one uniform act regarding negotiable instruments. See McCurdy, supra note 61, at 574.

63. Id. at 575.

64. , Life and Law 219 (1941) [hereinafter Williston, Autobiography]; McCurdy, supra note 61, at 575; Honnold, Law of Sales, supra note 1, at 385. Williston did make one significant change from the English Act's treatment of risk of loss. He incorporated into the Sales Act a special rule for so-called conditional sales transactions in which the buyer took possession although the seller explicitly retained title for security purposes. See Unif. Sales Act § 22(a); Williston, Sales Treatise, supra note 50, §§ 300-305, 334.


66. Id. at preface.

67. See Williston, Autobiography, supra note 64, at 263; Williston, Sales Treatise, supra note 50, at iii.
As Karl Llewellyn was later to write, the Sales Act was seen as an "outstanding" achievement in modernizing the muddled and backward law that preceded it. 68 The Commissioners through their votes to recommend the Act apparently agreed with that sentiment, and in particular with the Act's preservation of the ownership theory and Tarling rule for risk allocation. The majority of states seemingly agreed as well. Six jurisdictions adopted the Act before Williston could even complete the accompanying treatise 69 and eventually 34 jurisdictions did so. 70 The organized bar was so pleased with the Sales Act that in 1917 the bar prevailed upon Williston to develop a slightly modified version to govern interstate sales, and submitted the modified version to Congress for enactment as federal law. 71 The English Act was also widely copied in other common law countries, including Canada. 72

Aside from its perceived benefits, codification of the risk of loss doctrine in the Sales Act effectively froze the doctrine in place. It remained essentially unchanged until the Sales Act was finally replaced by Article Two of the Code beginning in the 1950s. For a half century the risk of loss doctrine in force as to sales of goods was unaffected by numerous changes affecting commerce in goods, and immune to the jurisprudential evolution already underway in the doctrine of risk of loss in sales of land.

III. WILLISTON'S CAMPAIGN FOR REVOLUTION IN RISK OF LOSS IN SALES OF LAND: FROM PROPERTY TO CONTRACT AND A BIT BEYOND

A. Developments to the End of the 19th Century

At the time the ownership theory and Tarling rule for sales of goods had been codified in England in the early 1890s, the ownership theory and Paine rule had become well established in the United States. However, there had already been one significant challenge to Paine in the United States, and developments were underway in the law of contracts which opened an avenue for Williston to attack Paine at the turn of the century.

The courts of Massachusetts rejected Paine, and initiated a minority rule, in the 1838 case of Thompson v. Gould. 73 and the 1871 case of Wells v. Calnan. 74 In Thompson, the parties had agreed on the sale of a lot and house, but the deed

69. See WILLISTON, SALES TREATISE, supra note 50, at iii.
70. See UNIF. SALES ACT, 1 U.L.A. 15, Table of Jurisdictions (1950).
71. The American Bar Association led the project. The bill was introduced in Congress in 1922, but died without further action. See McCurdy, supra note 61, at 585-86.
72. See HONNOLD, LAW OF SALES, supra note 1, at 385.
73. 37 Mass. (20 Pick.) 134 (1838).
74. 107 Mass. 514 (1871).
had not been delivered when the house burned.\textsuperscript{75} Under \textit{Paine}, the seller would have been able to compel the buyer to go through with the sale, exchanging the full price for the destroyed premises. The court rejected the \textit{Paine} rule, and treated the sale arrangement as canceled, effectively leaving the loss on the seller. The court used two interrelated rationales. First, simply applying the ownership principle, it treated legal title, not equitable title, as the appropriate test of ownership for purposes of risk of loss. The court referred to the English cases prior to \textit{Paine}, and to the then-current law as to sales of goods, as support for using legal title. Second, the court made use of a doctrine of contract law, failure of consideration. The theory, though not very clearly stated in the early case, was that the seller’s inability to provide the promised realty eliminated the basis for enforcement of the buyer’s promise to pay.

In \textit{Wells}, a house under contract for sale burned before the deed was delivered. Again the court effectively imposed the risk on the seller by refusing to enforce the buyer’s obligation to pay. The court repeated the first rationale from \textit{Thompson}, that the seller, as holder of legal title, was the owner for purposes of risk of loss. In that sense, the decision was based on the law of property. This time the court elaborated on the second rationale from \textit{Thompson}, failure of consideration. The court found support in two English cases. In the first, \textit{Bacon v. Simpson},\textsuperscript{76} the holder of a leasehold on a furnished residence had agreed to assign the remaining term. Before the assignee could take possession, the residence burned. The assignor sought payment. The Court of Exchequer held that the assignor “could not have completed the contract . . . for it was impossible for her to do so,” and therefore could not maintain the action for payment by the assignee-tenant.\textsuperscript{77}

The second English case was the now famous 1863 decision of \textit{Taylor v. Caldwell}.\textsuperscript{78} In \textit{Taylor}, the parties had agreed on the hire of a music hall for a few days time. The hall burned after the agreement was made, but before the agreed date for the hall to be put to use. As all contract law students now know, the \textit{Taylor} court’s main holding was that the destruction of the hall excused the owner from the obligation to provide the use of the hall. The \textit{Taylor} court reasoned that the parties had contracted on the basis of a mutual assumption that the hall would be in existence, and so their agreement had an implied condition that the owner would be excused if the hall no longer existed. The \textit{Taylor} court also stated that the same implied condition applied to the obligation to pay for the use of the hall, holding that “the music hall having ceased to exist, without fault of

\begin{itemize}
  \item \textsuperscript{75} The buyer had already paid the price, and after the destruction the case was presented in the form of a suit by the buyer seeking return of the money paid. \textit{Thompson}, 37 Mass. at 136.
  \item \textsuperscript{76} 3 M. & W. 78, 150 Eng. Rep. 1064 (Ex. 1837).
  \item \textsuperscript{77}  Id. at 89-90, 150 Eng. Rep. at 1069.
  \item \textsuperscript{78} 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863).
\end{itemize}
either party, both parties are excused, the plaintiffs from . . . paying the money, 
the defendants from performing their promise to give the use of the hall. . . . 79

The Massachusetts court used Taylor and the Bacon case for the rationale that 
the occurrence of the fire prevented the seller from performing, and so in turn 
excused the buyer from the obligation to buy, 80 and used the Taylor way of 
framing that rationale; that the parties had implicitly agreed that destruction of the 
premises before the sale would cancel the arrangement. 81

The Massachusetts doctrine, as it came to be known, could be viewed as 
having two aspects. First, it could be seen as carrying on, without question, the 
ancient principle of basing risk of loss on ownership. In that sense the 
Massachusetts cases differed from Paine only in that Paine used the definition of 
ownership recognized in equity, whereas the Massachusetts cases used the 
definition recognized in courts of law, i.e., legal title. The rule then, was that risk 
did not pass until there was a completed conveyance of legal title, usually by 
delivery of a deed.

However, by bringing the Taylor doctrine into its analysis, the Massachusetts 
court opened another avenue for risk of loss issues. Whereas risk of loss had pre-
viously been approached purely as a matter of the law of property, with 
ownership the critical issue, the Massachusetts cases moved in the direction of 
taking contract doctrine into account. The body of law now known as contract 
had not existed in the medieval era when Bracton wrote, and was only coming to 
be recognized as a distinct body of law as of the early 19th century, when Paine 
was decided. With the Wells decision in 1873, the Massachusetts court, using the 
excuse doctrine recently clarified in Taylor, opened the way for more important 
roles in risk of loss law for the emerging law of contract. Although the 
Massachusetts doctrine attracted only a small minority following in comparison 
with the majority Paine rule as of the turn of the century, 82 it did open a line of 
development of which Williston would make much use.

Williston entered the field of risk of loss in sales of land with a set of articles 
in 1895. With those articles he began a campaign to change the law. He continued 
that campaign with a 1920 treatise, the 1932 Restatement (First) of Contracts, and 
the 1935 Uniform Vendor and Purchaser Risk Act. He began the campaign with 
a clear sense that the Paine rule led to bad results, and a vague sense that the 
underlying theory of ownership was troubled. He remained committed to the goal

79. Id. Had Taylor involved the sale of a fee interest the Taylor holding would of course have been seen 
as directly stating a rule of risk of loss. In effect it did impose on the owner the risk of loss of the rental value 
of the hall for the agreed period. Taylor has not generally been recognized as a risk of loss case, and is not cited 
in treatments of risk of loss in sales of land. That presumably is so because rather than a fee interest (i.e., a 
property interest), Taylor involved a mere temporary hiring, which would probably be classified as a mere 
license (i.e., a mere contract right).
80. Wells, 107 Mass. at 518.
81. Id.; see also Libman v. Levenson, 128 N.E. 13 (Mass. 1920).
82. See, e.g., Wilson v. Clark, 60 N.H. 352 (1880); Gould v. Murch, 70 Me. 288 (1879).
of replacing *Paine*, but at each stage in the forty year campaign his thinking about
the underlying theory evolved away from ownership (property law), and toward
alternatives, most prominently theories based on doctrines of contract law.

**B. Williston’s 1895 Articles on Risk of Loss: The First Stage of the
Campaign**

The opening stage in Williston’s campaign was a pair of articles he published
in 1895, addressing risk of loss in both common law and civil law traditions, for
both land and goods sales: *The Risk of Loss After an Executory Contract of Sale
in the Civil Law* and *The Risk of Loss After an Executory Contract of Sale in the
Common Law.* Williston made clear that his motivation for publishing the
articles, and indeed for continuing the campaign in later years, was his conclusion
that it was unjust to impose risk on a land buyer who had not yet obtained
possession, as the *Paine* rule did. He felt that risk should remain with the seller
so long as the seller retained possession. In other words, it was the result of
*Paine*, not the underlying theory of basing risk on ownership that initially
troubled him.

In the 1895 articles he mounted a number of attacks on *Paine*. One line of
attack was to pit the conversion doctrine, using equitable title as the test of
ownership, against rules treating legal title as ownership for purposes of risk of
loss. Thus, he showed that *Paine* was inconsistent with the accepted common law
doctrine for sales of goods, relying on legal title. And he devoted one of the two
articles to a comprehensive study of the Civil Law, to show that *Paine* was
inconsistent with the then-modern Civil Law, which imposed risk on the seller
until conveyance of the Civil Law equivalent of legal title, in both land and goods
sales.

He also argued that *Paine* was inconsistent with what he saw as the trend rule
in leasehold cases. The *Bacon* case used by the *Wells* court declined to enforce
a lease agreement against a tenant in circumstances in which the premises burned
before the tenant took possession. In cases in which premises were destroyed
after a tenant took possession, the English rule had been to enforce the tenant’s
obligation to pay rent despite the destruction, on the theory that the tenant put in

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84. WILLISTON, *AUTOBIOGRAPHY*, supra note 64, at 259. Williston has not been alone in that sense of
what is just. The authors of the Cunningham Property treatise have reported that students in their courses
typically find the *Paine* rule counter-intuitive. See CUNNINGHAM ET AL., supra note 21, at 741 n.27. This author
has found similar sentiments among lay persons, law students, and lawyers.
85. See Williston, *Common Law*, supra note 6, at 106, 111.
86. Williston, *Civil Law*, supra note 6, at 76-77. Williston did observe that before the 19th century,
Civil law had used a rule effectively equivalent to *Paine*. He examined and undercut each of the arguments that
had been forwarded to support that rule before it was overturned. *Id.*
87. Wells, 107 Mass. at 516; see also supra notes 76-77 and accompanying text.
possession had obtained the legal estate for which the tenant had bargained.\textsuperscript{58} However, by the late 19th century, some American courts had come to favor relieving a tenant in such circumstances.\textsuperscript{59} Williston saw this as the trend in leasehold law, and argued that it seemed particularly unjust to impose risk on a land buyer who had never taken possession, while relieving a tenant who had at least been put in possession before the casualty.\textsuperscript{90}

Williston’s most direct attack on \textit{Paine} was a challenge to the underlying assumption of the conversion doctrine, the notion that a buyer under contract, with equitable ownership, should be treated as owner for purposes of risk of loss. He conceded that the buyer had been given significant attributes of ownership, including protection against the seller and against third parties.\textsuperscript{91} Williston argued, however, that one of two most important attributes of ownership was the right of present enjoyment.\textsuperscript{92} He showed that it was undisputed that a buyer under contract of sale, not having taken legal title by deed, had no right to possession of the land, nor to take rents and profits of the land, unless the parties had explicitly agreed otherwise.\textsuperscript{93} The \textit{Paine} decision had ignored that fundamental aspect of ownership. Williston argued this as a fatal blow to the foundation of \textit{Paine}, as the seller, not the buyer had the right of present enjoyment while the contract was executory. With the right of possession as well as legal title, the seller was more nearly the owner.

Williston also looked at land sale contract arrangements in which the parties did explicitly agree that the buyer could take possession and/or rents and profits, while the seller retained legal title. In such arrangements, he argued that the seller’s legal title was nothing more than a security interest, comparable to a mortgagee’s interest and lacking in other significant attributes of ownership. In such cases he argued that the buyer, with equitable title and the right of present enjoyment, was more nearly the owner and should be treated as such for purposes of risk.

Williston thus took on both the majority \textit{Paine} rule which used equitable title alone as the measure of ownership for risk of loss, and the minority rule of the

\begin{itemize}
  \item \textsuperscript{88} Williston, \textit{Common Law}, supra note 6, at 125-27.
  \item \textsuperscript{89} See id. at 127-29.
  \item \textsuperscript{90} Id. at 129.
  \item \textsuperscript{91} Since the time of Bracton, the buyer had, through the intercession of equity, gotten protection as against the seller, particularly with the right of specific performance. \textit{See} Williston, \textit{Common Law}, supra note 6, at 113. Through laws allowing recording of land sale contracts, the buyer had gotten protection against third parties. \textit{See} \textit{id.} The buyer’s rights under a land sale contract had come to be assignable. \textit{See} \textit{id.} at 119 (describing the right to dispose of the property).
  \item \textsuperscript{92} \textit{id.} at 119.
  \item \textsuperscript{93} \textit{id.} at 123-24.
\end{itemize}
Massachusetts cases, which used legal title alone as the measure. He proposed a third rule, based on possession. In his view, the buyer with both equitable title and possession, or the seller with both legal title and possession, should be treated as the “substantial” owner and made to bear the risk of loss.

In the process of arguing against Paine and for its replacement in the 1895 articles, Williston began to challenge the underlying theory of risk of loss doctrine. He demonstrated that ownership was no longer a reliable basis for assigning risk, because in then-current sale arrangements, the attributes of ownership tended to be split up. He argued that risk allocation should be approached not as a question of identifying one party as owner (property law), but through principles of contract. He added that a rule which satisfied the primary concern of being in accord with contract principles could also, secondarily, be judged by its “practical advantage” as to insurance and loss prevention.

1. **From property**

In the medieval era of which Bracton wrote, a rule of risk based on ownership made sense because all of the attributes of ownership passed in one neat transaction with the transfer of possession (and ceremonial handing over of a clod of dirt). Until the transfer of possession (and livery of seisin), the would-be buyer had no recognized property interest, and afterward the seller had lost all property interests. With the recognition of transfers of ownership by deed, the English had allowed at least temporary splitting of possession and other attributes of ownership as represented in the concept of legal title. In response to the perceived need to treat a buyer as owner for purposes other than risk of loss, equity had developed the conversion doctrine. By the time of Paine, the English had allowed ownership to be split into legal title, equitable title, and possession.

In the process of arguing against both the Paine rule (equitable title alone) and the Massachusetts rule (legal title alone) Williston effectively demonstrated that in sale arrangements of his era, the various attributes of ownership were often split between the parties, and shifted over time. That analysis demonstrated the difficulties of defining either buyer or seller as owner in the midst of a sale transaction. Add to that the fact that equity and the law courts were operating under opposing definitions of ownership, and it became apparent that basing risk of loss on ownership had become a highly questionable policy by the late 19th century.

Williston did not explicitly conclude that the difficulties of identifying one party as the owner made it untenable to allocate risk of loss on status of ownership in the midst of a sale. However, he did argue, significantly, that determining ownership, i.e. applying the law of property, should no longer serve as the primary way to approach risk of loss issues. Instead, the primary role should be given principles of contract law.
In determining the propriety of throwing the risk on the purchaser from the date of the contract, the primary question is not, it should be observed, whether the vendor or the vendee may be called owner with the greater propriety pending performance of the contract, still less whether the vendee may be called owner in equity and the vendor a trustee... [Rather, the focus should be on principles of] the law of contracts... 94

2. To contract

Williston devoted extensive attention to the prospect of using principles of contract law to guide risk of loss decisions. The full import of his turn away from property and to contract is somewhat difficult to grasp, just as the full import of the role of contract principles in the Uniform Commercial Code has proven difficult for modern-day scholars to grasp. The difficulty stems in part from the fact that there are multiple principles in the body of contract law that Williston found relevant to risk in land sales and that are relevant today in sales of goods.

Contract law had already come to affect land-sale risk of loss decisions as of the time Williston wrote. The clearest example was the willingness of courts to enforce a specific clause in the contract for sale by which risk of loss would be allocated to one party even if that party would not otherwise be considered to be the owner. Williston posited that “[i]t would be universally admitted that, if the contract expressly provided that the risk should be with one party or the other, this provision would be of controlling force.” 95 While he had no examples of clauses explicitly referring to the risk of loss as such, he did cite the example of a clause by which the seller expressly promised to deliver the premises in good condition. In one case the court held that such a clause effectively shifted the risk to the seller, as the seller’s failure to perform on that “good condition” obligation prevented enforcement of the buyer’s promise to pay. 96

Williston next noted precedent to the effect that one party’s delay in performance would affect the allocation of risk. While the then controlling rule of Paine would otherwise put risk on the buyer as equitable owner, that rule would not apply if at the time of the loss the seller had been in “default.” 97 From

94. Id. at 118-19.
95. Id. at 120; see generally Flores, Comparison, supra note 2, at 338-41.
96. Williston, Common Law, supra note 6, at 115.
97. See id. Williston used Paine itself as an example. In Paine the seller had been obligated to have the title to the realty clear and marketable by a certain date. The seller had apparently failed to perform on that obligation, but there was also some indication that the buyer may have waived the default. After pronouncing the rule for which Paine came to be known (risk on the buyer from the time of contracting), the Chancellor remanded the case for further fact finding on the issues of default and waiver. Paine v. Meller, 6 Ves. Jun. 350, 353, 31 Eng. Rep., 1088, 1090 (Ch. 1801); see also Williston, Common Law, supra note 6, at 115.

Williston observed a similar default-based rule in his study of Civil law. In that setting, he observed that
that established base, Williston moved to build upon the role of contract doctrine in risk allocation, approving of and elaborating upon the avenue of contract-oriented thinking opened by the Massachusetts court, and then moving to entirely new ground.

The contract-oriented approach begun by the Massachusetts courts rose in part from the doctrine of mutual dependency of promises. The buyer's obligation to pay was dependent on performance of the seller's obligation to convey and deliver. That doctrine Williston saw as not having been well established in contract law until nearly the 19th century, which led him to suggest that there was little value in examining earlier risk of loss cases. With the 1863 *Taylor v. Caldwell* decision, Williston urged that it had come to be a "fundamental principle of the law of contracts—a principle founded on natural justice" that the buyer could not be compelled to perform the promise to pay unless the seller at least substantially performed the counter promise. He expressed that principle in the way that it was then viewed in the still maturing body of contract law, describing it as based on a theory of "implied conditions" and "failure of consideration."

In his view, *Paine*, older than *Taylor* by some sixty years, violated that recently recognized fundamental principle. The seller's counter promise was to convey and deliver all of the benefits of ownership. The benefits conferred on the buyer through application of the doctrines of equity at the time of contracting, lacking the critically important right of present enjoyment, did not amount to substantial performance of the seller's promise. Only when possession also had been transferred could it be said that the seller had substantially performed, and only then could the buyer's counter promise to pay the price be enforced. If the doctrine of excuse by impossibility, for which *Taylor* was coming to be known, worked to excuse the seller, it should necessarily excuse the buyer, as well.

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98. See Williston, *Common Law*, supra note 6, at 115. See generally Flores, *Comparison*, supra note 2, at 325-31 (discussing the role that both default and causal fault may play in allocation of loss).

99. Williston, *Common Law*, supra note 6, at 106 n.2 ("[O]nly modern decisions have much value because "the dependency of mutual promises in any executory bilateral contract was little understood before the present century."). Although he expressed that sentiment in the context of examining the law as to sales of goods, it is apparent he thought it applied to sales of land as well, because he looked no further into the past than *Paine*. He later made clear in his 1920 Contracts Treatise that he intended the sentiment to apply to land as well as goods. See infra notes 149-61 and accompanying text.

100. Id. at 115.

101. Id. at 119.

102. Id.
Williston then combined his *Taylor* analysis with the existing precedent holding that the buyer’s promise could not be enforced if the seller had explicitly agreed to deliver the premises in good condition. In his view the express promise was unnecessary because, implicitly, a seller’s “promise to convey must always mean a promise to convey in substantially the same condition as at the time of the contract.” The doctrine applicable in cases of express promises should logically be extended to all cases, and would inevitably lead to destruction of the *Paine* rule.

Williston then moved into new territory, addressing the core of classical contract law: finding and carrying out the intention of the parties. He argued that “the chief factor in any proper decision” as to risk of loss should be the “intention of the parties” on the precise question of whether “the risk should be with one party or the other.” Enforcing an explicit agreement as to risk allocation was, of course, “universally” accepted. In the many cases lacking such explicit provisions, there had to be a way to come as close as possible to finding and carrying out the parties’ intent on that precise question. Williston came up with such a way, by using the ancient notion that risk belonged with ownership. However, he used it far differently than it had been used before, turning it into a factor to consider in applying contract doctrine, rather than a maxim of property law dictating an inevitable outcome of risk allocation.

He argued that the parties’ intent as to risk allocation could be determined through finding their intent as to the transfer of ownership. Their agreement as to the point of transfer of ownership would serve as a proxy. It would work because ordinarily the parties could be assumed to view risk as an incident of ownership, and to expect that risk would pass with ownership. However, it would work only if the focus were on substantial ownership, encompassing the crucial “beneficial incidents” of ownership, as most clearly represented by possession. Neither equitable title without possession, nor legal title without possession, could accurately serve that proxy role.

Williston tested the *Paine* rule by this new standard of carrying out the intent of the parties, and found it failed. In a typical transaction in which the parties agreed to have legal title and possession transferred at some date well after the formation of the contract, one could assume they intended to have the substantial ownership and thus risk pass at that later date. The *Paine* rule violated that intent.
by proceeding as if they had intended ownership and risk to pass earlier. Paine converted an agreement for a future transfer into a present transfer.

Williston also tested the legal-title rule used in the Massachusetts cases and found it failed his intent test. In cases in which the parties agreed on an immediate transfer of possession, with the seller to retain legal title pending payment, the retained legal title was intended to serve merely as a security interest, like that of a mortgagee. Leaving risk on the seller merely because the seller had yet to transfer legal title would violate the parties’ presumed intent to have risk pass along with the “beneficial incidents” of possession. That rule converted an agreement for a present transfer into a future transfer.

Williston concluded that portion of his analysis by clearly restating risk issues as issues to be decided first and foremost through contract doctrine. A land sale arrangement was a contract, and should be treated as such. “[I]n dealing with contracts no general rule can be more just than to aim to follow the intention of the parties, and therefore to throw the loss on the vendee if the parties intend a present transfer, on the vendor if they intend a future transfer.”

From at least the time of Bracton through the time of Paine, the courts had approached risk of loss issues predominantly, perhaps even exclusively, through principles of property. In the mid-19th century Massachusetts cases, property thinking remained important, perhaps dominant, but a place was being made for

108. Id. at 120-21.
109. From that perspective, he argued that Paine would be wrong even if equitable intercession did give the buyer substantial ownership as of the time of contracting. The parties did not agree to a present transfer. Imposing on them a present transfer, in place of the future transfer they contemplated, would run contrary to the core principle of contract law. See id. at 118-20.
110. Id. at 109-10.
111. Williston further emphasized this point in his use of the analogy of leasehold law. As previously noted, the American trend rule favored relieving a tenant from the obligation to pay rent after destruction of the leased premises. The former rule had denied relief to the tenant who took possession before the destruction, reasoning that the conveyance had been completed with the transfer of possession, and the tenant was the owner of the premises during the term of the lease. See id. at 127-29. Williston observed that the trend rule relieving the tenant was based in part on the growing understanding that parties to a modern lease transaction were “apt to regard it rather as a contract than as a conveyance.” Id. at 129. From that base he argued that an executory contract for the sale of land, prior to transfer of possession, was also more contract than conveyance, and so the buyer should be given the same protection given a tenant under the trend rule. He cited one example involving a lease of such long term that it was practically an absolute conveyance. The court would have applied the Paine rule had it been a contract for a fee, but relieved the tenant because it was technically a lease. See id. at 128 n.2, 129.

As followers of modern landlord-tenant law are aware, the trend Williston observed has strengthened over the century since he wrote. Courts, and many states through legislation, have adopted rules canceling leaseholds in the event of accidental destruction of the premises. In some cases the trend rule has been fashioned as an application of the principle of Taylor v. Caldwell, excuse by impossibility. See, e.g., Albert M. Greenfield & Co. v. Kolea, 380 A.2d 758 (Pa. 1977). The trend rule has been recognized as “one outgrowth of the move from property to contract currently underway in landlord-tenant law.” Jesse Duke Minor & James E. Krier, Property 424 (2d ed. 1988). See generally RESTATEMENT (SECOND) OF PROPERTY, §§ 5.3, 5.4 (1977 & Supp. 1995).

112. Williston, Common Law, supra note 6, at 121.
contract thinking. Williston put forward an analytical scheme with contract thinking as its primary feature, relegating property thinking to a subsidiary role. The concept of ownership was to serve only as a means of finding the fact (intention) needed for a proper contract-oriented analysis.

3. And a bit beyond

Having shifted the focus from property principles to contract principles, Williston then added a third set of principles. He argued that any rule for risk allocation, in addition to meeting the primary test of compliance with contract principles, should also pass the test of “practical advantage.” He identified three such practical considerations, and asserted that his proposed rule of transferring risk with possession best served each consideration.

Perhaps most important of the three was “the consideration that it is wiser to have the party in possession of property care for it at his peril, rather than at the peril of another.” Giving the party in possession a “great personal stake” would induce that party to take care of the premises, even more effectively than the existing doctrine that imposed a loss on the party proven to have negligently caused the loss.

Less important was the consideration that “it is better in a doubtful case to let a loss lie where it falls. It saves litigation.” Putting risk on the party in possession, using Williston’s proposed rule, would effectively leave any loss where it fell.

Finally, as a “further consideration” Williston referred to the “arrangement of the insurance.” He argued that by putting risk on the buyer immediately upon formation of the contract, the Paine rule “practically removes it from an insurer. . . .” Under then current insurance law and practices, the buyer could

113. Id.
114. Id. at 122.
115. Id.
116. Id.
117. Although Williston did not say so, his rule using possession as the test would also save litigation, and otherwise serve the goal today known as efficiency, by providing certainty. Just as livery of seisin had once served to make abundantly clear to all concerned that a transfer of ownership had occurred, so would Williston’s rule allow the parties to have an unmistakably concrete event to signal the transfer of risk.

In his study of Civil law, Williston went further in explaining how a rule effectively equivalent to the Paine rule would generate, rather than save litigation, and create other practical disadvantages. A seller holding possession and legal title might (intentionally or inadvertently) purport to contract with two or more prospective buyers for sale of the same property. In Civil law countries which once followed the rule equivalent to Paine, allocating the risk in such cases had been addressed through a wide variety of rules, such that a contract might be enforced against and risk imposed on the first buyer only, the second buyer only, neither buyer, or the buyer arbitrarily elected by the seller. Williston observed that allocating risk in such successive agreement cases had become a “favorite matter of dispute . . . .” Williston, Civil Law, supra note 6, at 77.
118. Williston, Common Law, supra note 6, at 122.
119. Id.
not obtain insurance coverage until after the contract was formed, because the buyer would have no insurable interest until then. Any insurance coverage previously obtained by the seller might in effect be canceled by application of the Paine rule, because the effect of Paine was to declare the buyer the owner, and thus change the seller's interest in the property. In his view, it was desirable to maximize the likelihood of having the property insured, and that could best be accomplished by leaving risk on the seller, in light of the fact that the seller "ordinarily has insurance at the time of the contract." Williston cited no cases or works of other scholars for the proposition that such practical considerations ought to have a role in formulation of risk of loss doctrine. There is no evidence of such thinking in the cases prior to 1895, certainly not in Paine itself, nor even in the Massachusetts cases. Until Williston entered the field, the sort of practical considerations he raised had not been given significant attention in risk of loss law.

With the 1895 articles, Williston had set the course that he would follow in his 40 year campaign for reform. He set out to advocate replacing the majority Paine equitable title rule, and the minority Massachusetts legal title rule with a rule using possession as the test. He did that. And in the process he began to advocate for changes in the underlying theory. He forcefully argued that principles of contract law be given the dominant role in formulating risk of loss doctrine, with a subservient role for the formerly all-important principles of property and an additional supporting role for the newly identified practical considerations, including loss prevention and insurance maximization.

4. The early responses

The reception given Williston's work by courts and scholars in the years following 1895 made clear that it would be a long and difficult campaign for reform. Two prime examples of that reception came in 1901. Williston's former contracts teacher and then colleague, William Keener, published a defense of Paine and severe criticism of many of Williston's arguments for the possession rule. Keener focussed on the principle of ownership as the only basis on which
risk should be allocated. He defended the *Paine* equitable title rule as a proper application of the ownership principle by mustering the various equitable doctrines that *Paine* had relied on in holding that a buyer under contract, even without possession, had the important attributes of ownership.  

He called upon the analogy of the common law mortgage, as treated by equity at the turn of the century. In a mortgage transaction, the mortgagee held legal title, but through the intervention of equity over the years, the mortgagor had come to have equitable protection, including the equity of redemption, and so had come to be seen as having equitable ownership. In mortgage law the risk of loss lay on the mortgagor. Keener equated a buyer under contract as having ownership rights similar to a mortgagor, and so argued it was appropriate to also impose the risk of loss on the buyer.  

Keener even defended the *Wells* legal title rule. Because *Wells* issued from a common law court, and at common law the holder of legal title was viewed as owner, Keener asserted that under the controlling principle of ownership, the common law courts not only could but must leave risk on the seller until conveyance of legal title.  

As to Williston's attempt to overcome *Paine* by refocussing the inquiry away from ownership and into contract principles, Keener dismissed the contract principles as matters of common law. Equity, he wrote, had developed the *Paine* rule using the law of trusts, and should continue to follow that road undeterred by the common law of contracts.  

Keener grudgingly recognized some value to Williston's creation of a role for practical considerations, such as loss prevention and insurance coverage, but declared them insufficiently important to overcome the weight of the ownership principle. He concluded that the established doctrine had to stand because it

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125. Id. at 4.
126. Id. at 1. Keener seemed not at all bothered by the prospect of having directly opposing risk of loss results reached at law and in equity.
127. Id. at 3, 6. Where Williston approached risk allocation with the notion that the "intention of the parties is the chief factor in any proper decision," *Williston, Common Law*, supra note 6, at 120, Keener approached the issue from the perspective that the buyer, even without the right of possession "has been given in equity... substantially the benefits of equitable ownership. As a necessary consequence... he must bear, as one of the burdens of ownership, the loss involved in the destruction of property..." Keener, supra note 123, at 10.
was not "possible to reach any other result."  Keener carried great weight and his response foretold a difficult road ahead for Williston's reforms.

In the same year that Keener wrote, the courts' response to Williston was signalled by a Maryland decision, *Skinner & Sons' Co. v. Houghton.* The court ignored Williston's reform efforts and reaffirmed the *Paine* rule. In the ensuing two decades, with few exceptions, the courts continued to follow *Paine* and reject Williston's proposal. In Massachusetts, the court continued to follow the line it had set out in *Thompson* and *Wells.*

C. Williston's 1920 Contracts Treatise: The Second Stage of the Campaign

Williston returned to the campaign in 1920, with his landmark treatise on contract law published that year. He included in the massive treatise a separate chapter on sales of land, and devoted much of the chapter to risk of loss. He

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129. *Id.* at 1.

130. Keener was the Dean of the Columbia Law School, and a prominent scholar in equity. See WILLISTON, AUTOBIOGRAPHY, supra note 64, at 74; Keener, supra note 123, at 1 (referring to his equity casebook). He was equally prominent in contract law, having taught in the field and even having taught Williston. See WILLISTON, AUTOBIOGRAPHY, supra, at 75. He presented his article prominently as the lead article in the first issue of the Columbia Law Review.

131. Harvard's Dean Pound joined the rejection of Williston's efforts. He argued that "[p]ossession is not material with respect to the passing or existence of either legal or equitable title to land. Why then should it be material as to the incidents of equitable title" such as risk? He also faulted the possession test for having no basis in case law. *Paine,* on the other hand was both theoretically sound on the principle of ownership and had the weight of authority. Roscoe Pound, *The Progress of the Law, 1918-19: Equity (Continued),* 33 HARV. L. REV. 813, 826 n.68 (1920). Pound's influential views were carried further through one of the period's most important treatises on property law. See 1 TIFFANY, REAL PROPERTY 460 (2d ed. 1940).

132. 48 A. 85 (Md. 1900).

133. *Skinner* was treated in student notes at *Notes,* 1 COLUM. L. REV. 311 (1901); 1 COLUM. L. REV. 313 (1901).


137. Williston had actually made another contribution to the field before 1920. In his 1904 Contracts casebook he included a small treatment of risk of loss. The section consisted solely of the *Wells* case, presenting the Massachusetts contract-influenced approach to risk. He made no mention of *Paine.* Perhaps that choice of cases was a simple statement about the lack of evidence of contract law influence in *Paine.* See SAMUEL WILLISTON, A SELECTION OF CASES ON THE LAW OF CONTRACTS 73-77 (1904).

138. See WILLISTON, CONTRACTS TREATISE, supra note 39.

139. *Id.* §§ 927-954.
repeated, and enlarged and sharpened the points made in the 1895 articles, with many of the changes obviously being in response to Keener's article.\(^{140}\)

The focus, again, was to have his possession rule replace the majority \textit{Paine} rule, and less importantly the minority Massachusetts rule.\(^{141}\) Again he demonstrated that the rule of \textit{Paine} imposing risk on the buyer was inconsistent with the trend in modern civil law, and the trend in American landlord-tenant law, both of which had grown stronger since 1895.\(^{142}\)

With renewed vigor he challenged the assumption of \textit{Paine} that a buyer, lacking possession, could be considered to have substantial ownership.\(^{143}\) In that vein he added a response to Keener's attempt to justify \textit{Paine} through analogy to mortgage law. Keener had argued that a buyer under contract was in a position equivalent to a mortgagor, and so should similarly bear the risk of loss. Williston found the analogy untenable because the mortgagor had the right of possession, and the contract buyer did not except by special agreement.\(^{144}\)

Williston offered a more apt analogy. A buyer under contract was in many ways in a position similar to the holder of an option to buy. Each had rights against the giver of the option, rights against interference by third parties, and the right to assign the option, but no right to possession. The option holder under no circumstances was held to bear the risk of loss, as even Keener had to admit.\(^{145}\)

Summing up, he added to his attack on the equitable title rule of \textit{Paine} a nicely turned phrase that would later catch on with scholars and courts. Of the maxim that the buyer under contract, though lacking possession, was the owner and the seller was merely a trustee of the legal title, Williston wrote, "[o]nly the hoary age and frequent repetition of the maxim prevents a general recognition of its absurdity."\(^{146}\)

Even so, Williston had not concluded that ownership was an unworkable basis for allocating risk of loss. On the one hand, his analyses in challenging both \textit{Paine} and the legal title rule demonstrated a growing understanding that in the

\(^{140}\) See \textit{id.} § 930 (citing Keener).

\(^{141}\) See \textit{id.} § 940.

\(^{142}\) See \textit{id.} §§ 947-954 (discussing the civil law); see \textit{id.} §§ 944-946 (elaborating upon landlord-tenant law).

\(^{143}\) See \textit{id.} §§ 927-931, 936-938.

\(^{144}\) See \textit{id.} § 937. Williston observed two other flaws in Keener's analogy. First, in mortgage law, a mortgagee was not liable for payment of taxes. A seller under contract who retained possession was expected to pay taxes. Second, there was the matter of equity of redemption. In mortgage law, equity had long since intervened to prevent forfeitures of a mortgagor's interest, by prohibiting strict enforcement of forfeiture clauses. Thus the concept known today as equity of redemption had been developed. Equity offered no such protection for a buyer under contract, and would not intervene to prevent strict enforcement of forfeiture provisions in contracts for the sale of land. See \textit{id}. Of course there is today a move to provide protections against forfeiture similar to the equity of redemption for buyers under long term installment land contracts. See, \textit{e.g.}, \textit{RESTATEMENT (THIRD) OF PROPERTY} § 3.4 (Tentative Draft No. 2, 1992).

\(^{145}\) \textit{See WILLISTON, CONTRACTS TREATISE, supra} note 39, § 936; Keener, \textit{supra} note 123, at 2.

\(^{146}\) \textit{WILLISTON, CONTRACTS TREATISE, supra} note 39, § 929.
midst of a sale transaction the attributes of ownership were ordinarily split and shifting between seller and buyer. He recognized that at any given time, each party had substantial rights, both equitable and legal in nature. On the other hand, in the treatise he added a statement not made in 1895:

The principle that risk attends ownership might conceivably be contested, but it is not, and though if that principle is understood as necessarily throwing the risk where the technical legal title lies, it is open to criticism; it is not open to criticism when understood as requiring that the risk shall rest on that party...who...has...the substantial rights...148

Although he left somewhat unsettled his position on the plausibility of basing risk on ownership, Williston left no doubt as to his view that risk issues should be addressed through application of contract principles, and that those principles should predominate.

He stated more strongly than before the idea that the Paine rule was anachronistic because it had been formed before contract law had come into its own. In particular, before Paine there had not been developed the doctrine of mutual dependency, making the buyer’s promise to pay and the seller’s promise to convey dependent on one another. Had that doctrine been developed earlier, Williston speculated that the concept of equitable ownership relied on in Paine might never have arisen. Once the dependency doctrine had come about, the concept of equitable ownership used in Paine should have been discarded. He observed that civil law countries had undertaken such a transformation, first using a rule equivalent to Paine, then developing the doctrine of mutual dependency, and finally rejecting the rule equivalent to Paine. Williston characterized the continued reliance on Paine in Anglo-American law as “an illustration of an unfortunate but common habit of the law to follow precedents when the reason for them no longer exists.” 150 He concluded with the hope that “[t]he law of the United States if not of England may yet, as the law of the continent of Europe ultimately has done, discard a doctrine of risk fundamentally inconsistent with that of the mutual dependency of bilateral promises.” 151

147. See, e.g., id. §§ 936, 937, 939.
148. Id. § 939.
149. See id. § 933.
150. Id.
151. Id. In 1895 Williston had argued, as had the Massachusetts court, that the dependency doctrine was significant because it made the buyer’s obligation to pay dependent on substantial performance of the seller’s obligation to convey and deliver the premises. In 1920 he added another reason for seeing the rise of the dependency doctrine as significant to risk allocation. Before the doctrine arose, the seller’s promise to convey, being independent of the buyer’s promise to pay, was effectively an unconditional obligation. In that light, as of the moment the seller’s promise was made it was virtually certain that the seller would indeed convey and
Williston reiterated and expanded on the earlier argument based on the doctrine of *Taylor v. Caldwell* (mutual excuse by impossibility, frustration of purpose, failure of consideration). In conjunction with that analysis he enlarged upon the earlier argument using the analogy of leaseholds. The effect being given the *Taylor* doctrine in the trend of landlord-tenant cases, excusing the tenant upon destruction of the leased premises, should be followed so as to lead away from the *Paine* rule in land sales cases.

Finally, he reiterated that the ultimate objective of a rule of risk allocation should be to carry out the intent of the parties on the question of risk, and the best way to do that, lacking a specifically stated intent, was to use as a proxy the parties’ intent as to the point of transfer of substantial ownership. The best evidence of intent as to the point of transfer of substantial ownership was the actual transfer of possession. Using an equitable title rule to conclude that ownership passed earlier than the parties intended, or a legal title rule to conclude that ownership passed later than they intended, would not serve that objective.

In this second stage in his campaign, he stated it even more strongly than before, as the core principle of contract law: “In the law of contracts unless the agreement of the parties is in violation of public policy, it is the duty of the court to enforce that agreement; not to substitute different rights and liabilities of its own creation.”

As to the so-called practical considerations, Williston reiterated and more fully elaborated the points made in 1895, that in addition to fulfilling the primary concern of compliance with contract principles, his possession rule would serve better than *Paine* to facilitate loss prevention, reduction of litigation, and coverage by insurance.

The 1920 treatise was important, not only because it elaborated upon the points made in the 1895 articles, but also because it came to be a far more effective vehicle for carrying Williston’s message. Over the years Williston’s

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1. See id. §§ 943-946. For a full treatment of the *Taylor* doctrine in another chapter of the treatise, separate from the chapter on land sales, see id. § 1946.

2. See id. §§ 944-946.

3. See id. §§ 939-940.

4. See id. §§ 939-944.

5. *Id.* § 939.

6. *Id.* § 942. Williston also noted that since his 1895 study, there had arisen what he saw as a disturbing trend as to insurance. Courts had begun to manipulate long established insurance law principles in order to work around the undesirable effects of the *Paine* rule. See id. at n.98. The trend Williston observed, an interaction of insurance law and practices with risk of loss law, would be worthy of further study in its own right.
contracts treatise came to be widely cited, \(^{158}\) regarded as Williston’s most famous work and was generally influential throughout the English-speaking world. \(^{159}\) It also helped earn Williston the reputation of the “foremost legal expert” on contract law, which in turn led to his being selected to lead the drafting of the first Restatement of Contracts, \(^{160}\) a project which he began shortly after completing the treatise, using the treatise as the primary source of much of the law incorporated into the Restatement. \(^{161}\)

D. The Restatement (First) of Contracts: Williston and Corbin in the Third Stage of the Campaign

From 1923 to 1932 Williston as Reporter and Arthur Corbin as Assistant Reporter carried out the drafting \(^{162}\) of the Restatement (First) of Contracts. \(^{163}\)

One can imagine the dilemma Williston was in when he began drafting the portions of the Restatement addressing risk of loss issues. Advocating for radical change of an established doctrine through law review articles and a treatise was one thing; the Restatement was quite another. Unlike later Restatement projects, the charge of the first Restatement drafters was to present, in clarified form, the prevailing law, not to use the Restatements as vehicles for advocating on behalf of minority or new rules. \(^{164}\) To adhere strictly to that restriction would have led to a Restatement capturing the established doctrine represented by \(Paine\), with an underlying theory basing risk allocation solely on property ownership, and a

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158. See SAMUEL WILLISTON, MORE THAN 11,000 CASES CITING OR QUOTING WILLISTON ON CONTRACTS (1959).

159. See Austin W. Scott, [Tribute to] Samuel Williston, 76 HARV. L. REV. 1330 (1963). The treatise was quickly hailed as an essential reference work in contracts law generally. See, e.g., Arthur L. Corbin, \(Williston’s\) Law of Contracts, 29 YALE L.J. 942, 945 (1920) (book review) (“[N]o difficult question... should be answered without first consulting Professor Williston’s work.”); Herbert W. Oliphant, \(Williston’s\) Law of Contracts, 19 Mich. L. Rev. 358 (1921) (book review) (accord). It was viewed as of equal importance in the specialized field of sales of goods. See, e.g., Current Legislation: Proposed Warsaw Rules—1928 Relating to Contracts C.I.F., Parts I & II, 20 Colum. L. Rev. 652, 813 (1929). This 1929 examination of international law on sales of goods frequently cites Williston’s contracts treatise. The article’s author is not identified. There are strong substantive similarities to Llewellyn’s later writings in the sales field, including his 1938 Through Title article. See supra notes 23, and infra notes 235-64, and accompanying text. Such an important treatise could not have escaped the attention of Llewellyn, who in the early 1920s was just beginning his career teaching commercial law at Yale. See The Law School, 29 YALE L.J. 85, 86 (1919); The Law School, 30 YALE L.J. 56, 57 (1920). The treatise has continued in use to the present through a series of updating. Williston prepared a second edition in 1936 which would certainly have come to the attention of Llewellyn and Corbin before and during the drafting of the risk of loss provisions in the Uniform Commercial Code.

160. RESTATEMENT (FIRST) OF CONTRACTS at ix (1932).

161. See Klaug, supra note 122, at n.93.

162. See id. (providing descriptions of the drafting process); GRANT GILMORE, THE DEATH OF CONTRACT (1974).

163. RESTATEMENT (FIRST), supra note 160.

164. As Williston said of the Contracts Restatement, “the endeavor in this Restatement is to restate the law as it is, not a new law. . . .” 3 A.L.I. ANN. PROC. 159 (1925).
specific rule imposing risk on a buyer before the transfer of possession. Yet Williston had already devoted much of his career to challenging that established doctrine. He had found the Massachusetts doctrine preferable to Paine on several points, and had forwarded his own proposal for a possession rule superior to both the majority and minority rules.

On the question of stating a specific rule of risk allocation (equitable title, legal title, or possession), Williston appears to have dealt with his dilemma by a combination of compromise and deliberate vagueness. The Restatement did not directly challenge the equitable title majority rule of Paine, neither did it unquestioningly accept that rule. On the question of the underlying theory, Williston moved far more boldly in the direction he had been advocating. He restructured risk of loss issues almost entirely through the perspective of contract doctrines, relegating the formerly dominant property thinking to a minor role, and leaving the practical considerations to, at best, a minor role.

The Restatement’s treatment of the specific rule pointing to buyer or seller can best be understood after a study of the way in which the underlying theory was addressed. Both inquiries proceed with some difficulty, as the first Restatement was far from being a model of clarity.

A major shift in treatment of the underlying theory occurred between Williston’s earlier writings and the Restatement. In a sense, in the earlier writings Williston had merely been talking about refocussing to emphasize contract over property. In the Restatement he moved from mere talk to action. The Restatement was drafted in such a way as to actually implement a contract-oriented approach. The first clue to that shift comes from an examination of the terminology used.

Through all of the portions of the Restatement even remotely relevant to treatment of risk of loss issues, there was only one instance in which the words “ownership” or “title” or “property” were used. The terminology associated with property thinking seems to have been deliberately avoided. Instead, the provisions addressing risk issues used terminology associated with contract thinking, words such as promise, duty, performance, condition, and discharge of obligation. Even the words “risk of loss” were never used. That phrase had long been associated with risk issues, and with the established property oriented approach to those issues. Williston himself had used it extensively in his earlier writings. Leaving it out of the Restatement could hardly have been an accident. The most plausible reason for that choice is that the phrase was seen as too closely associated with the property-oriented thinking from which it had sprung. By leaving it out, along with all other words and concepts associated with

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165. See Restatement (First), supra note 160, § 281 cmt. c (referring to “substantial incidents of ownership”).

166. See id. §§ 274, 281.

167. The phrase “risk of loss” did appear in the index. See id. at index. However, it was not used in the table of contents, headings, or text of any portion of the Restatement.
property thinking, the drafters reframed risk of loss issues into contract terminology, and in a sense forced readers to think about risk issues from a contract perspective.

The reframing went beyond a change of terminology to a change in the way risk issues would be approached. In property thinking, a court presented with a risk issue began by asking two questions: Who bore the risk of loss, and who was the owner at the time of the loss? The Restatement took a very different approach. Upon the destruction of property being sold, the Restatement approach asked: What effect did this destruction have on the rights and duties of the parties under the contract for sale? That question was in turn answered through a set of distinct but integrated provisions. The effect of the destruction on the seller’s duty to convey and deliver the land was answered through the doctrine of “Supervening Impossibility” which typically would lead to the discharge of that duty, i.e., excuse of the seller. That of course was the primary proposition of Taylor v. Caldwell.

The effect on the buyer’s duty to pay was answered through the doctrine generally described as “Failure of [Seller’s] Consideration as a Discharge of [Buyer’s] Duty.” The gist of that doctrine, as applied in a contract for the sale of land, was that the seller’s failure to perform could discharge the buyer’s duty to pay. Combining the two doctrines led to this outcome: The destruction would render the seller not liable for damages resulting from the failure to deliver the property in its original form. Whether it would free the buyer from the obligation to pay depended on whether the seller had performed, at least substantially, before the loss occurred. In other words, the question became: Had the seller done what the seller promised to do in exchange for the buyer’s promise to pay? If so, the buyer’s obligation to pay was not affected by the destruction. If the seller had not performed, and could not perform because of the destruction, the effect of the destruction was to discharge the buyer’s duty to pay.

Williston had begun to urge such a contract-oriented, property-de-emphasizing approach in his 1895 articles, and again more strongly in his 1920 treatise. Now with the Restatement he demonstrated the way risk issues would be implemented in a contract-oriented regime of law. It could be viewed as an overly bold step, in light of the established nature of the Paine and Bracton approach, and the instructions to the Restatement drafters to clarify, not change, the law. Perhaps Williston and the others involved rationalized their draft as being not so bold, as viewed from the perspective that the old way of thinking about risk of

168. Id. §§ 457, 460.
169. Id. § 274.
170. Id. § 281. Section 281 was a specific application of the general doctrine stated in section 274. Id.
171. See id. § 460 cmt. e (cross-referencing the two doctrines).
172. Id. §§ 457, 460.
173. Id. § 281.

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loss had simply failed to reflect development of general contract doctrine that had been underway for many years and was by then quite mature.  

Perhaps because the drafters were so concerned with the relative roles of contract thinking and property thinking, they included nothing in the Restatement explicitly referring to the practical considerations Williston had earlier forwarded as subsidiary factors for adopting a risk of loss rule.

With that background of the Restatement's theoretical approach to risk issues, the specific rule pointing to buyer or seller can be considered. It is quite difficult to get a clear picture as to whether the Restatement approach would lead to the same result in a particular case as the *Paine* equitable title rule, the Massachusetts legal title rule, or the Williston possession rule. The vagueness might be a result of the perceived role of the Restatement to state only general principles of law, not necessarily provide concrete rules for specific situations. However, it might also be that Williston thought it better to be vague rather than further the existing rules he thought to be bad law, or use his own rule, which as yet had no significant support in case law. The result is a provision in the Restatement which seems to be a compromise. It provides that after destruction, the buyer is discharged from the obligation to pay if the seller has not previously rendered "substantial performance." That provision, which seems to favor the Williston rule, is balanced by another.

After a contract to sell land and a building, in some states under some circumstances the buyer is held bound to pay the price in spite of the destruction of the building. These are not exceptions to the rule . . . since the result is based on a premise that substantial incidents of ownership had already passed to buyer before destruction.

Although it left unclear the outcome of the contest between the equitable title, legal title, and possession rules, the Restatement of Contracts represented a major

174. The Restatement reflected another aspect of the maturation of contract doctrine. It concerned the rationale underlying the doctrine by which the buyer's duty might be discharged as a result of the seller's failure to perform. Previously, the Massachusetts cases and Williston had used the fiction of an implied agreement of the parties, a rationale consistent with classical contract theory. Now the Restatement dropped the fiction and admitted that the doctrine was based on the policy that "justice [so] requires." *Id.* § 274 cmt. d. That may have been one of the modernizing moves Williston referred to when he wrote that although the drafters were trying to restate the law as it existed, nevertheless "it has been thought vital to discard outworn fictions." 3 A.L.I., ANN. PROC. 159 (1925).

175. *RESTATEMENT (FIRST)*, supra note 160, § 281.  
[A] promisor is discharged from the duty of performing his promise if substantial performance of the return promise is impossible because of the non-existence, destruction or impairment of the requisite subject-matter . . . provided that the promisor has not himself wrongfully caused the impossibility or has not assumed the duty the subject-matter or means of performance shall exist unimpaired.

*Id.*  
176. *Id.* § 281 cmt. c.
step in the process of reorienting the theory of risk of loss law to give principles of contract the dominant position. The Restatement was of course a far more powerful vehicle for that process than Williston’s prior writings, as it represented the voice of the entire American Law Institute. It was a voice shared in by Corbin as Assistant Reporter, and clearly heard by Llewellyn as an observer of the project.  

The Institute presented another opportunity for Williston to address the issue of risk of loss in sales of land. As the Contracts Restatement was in its last stages, the Institute planned a Restatement of Sales of Land (Vendor and Purchaser), and assigned Williston as the Reporter. However, the project was shelved due to a shortage of funds before Williston could present a draft of the risk of loss provisions. One point of value can be taken from the reports of the drafting work. The drafters reported having great difficulty coming up with workable definitions of concepts of ownership used in the midst of a sale transaction, particularly the concept of “title.”

Williston converted his work on the Land Sales Restatement into the drafting and proposing of the Uniform Vendor and Purchaser Risk Act. By the time the Risk Act was completed, Williston’s earlier efforts had begun to make some headway, attracting the attention and sometimes the support of other scholars, and of the judges.

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177. Llewellyn was clearly attentive to the Restatement drafting from the very outset of the project in 1923. See Karl Llewellyn, Relation of Current Economic and Social Problems to the Restatement of the Law: From the Point of View of the Economist and Business Man, 10 Proc. Acad. Pol. Sci. 331, 338 (1924).


180. 12 A.L.I. Ann. Proc. 150-58 (1935) (May 1935 Discussion of Sales of Land, Tentative Draft No. 1); see id. at 154 (“I never knew what title meant and I am not sure I have yet found out. We have had an awful time with it.”). The difficulties of defining the concept of title were also reflected in the work of the drafters of the Restatement (First) of Property. Although the Property Restatement included a definition of “title,” the drafters actually avoided using that concept in pronouncing the principles and rules of property law. See Restatement (First) of Property, Ch. I (1936) (providing definitions). Corbin later made reference to the difficulties the Property Restatement drafters had experienced with the concept of title. He used their experience to support the reformulation of risk of loss rules in the Uniform Commercial Code. See Corbin, supra note 25, at 825-27.

E. The Response of Courts and Scholars Through the Third Stage of the Campaign

Many of the writers in this period were at least persuaded that the Paine equitable title rule was bad law and should be replaced.\(^{182}\) A few specifically supported Williston’s possession rule as the best alternative.\(^{183}\) Others favored the general thrust of Williston’s proposal to use possession as the test, but offered rather vague and complex variations using factors other than possession alone.\(^{184}\) With those variations forwarded, the writers observed that there were now at least five distinguishable rules for land risk with either scholarly support or case law support.\(^{185}\)

The majority of courts continued to follow the Paine rule, some even explicitly considering and rejecting the use of possession as the test for transfer of risk.\(^{186}\) However, support for Williston’s rule began to build, particularly after the 1920 publication of his Contracts treatise. It began with a strong dissenting

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183. See Morris Karon, supra note 135; Comment, Vendor and Purchaser—Risk of Loss After Contract to Convey But Before Actual Conveyance—Possession as Determining Factor, 79 U. PA. L. REV. 239, 240-41 (1930). The supporters typically focussed on the possession rule as a superior means of implementing the ownership principle, or as superior according to the practical considerations, but did not focus much on Williston’s effort to reorient the law toward contract thinking. See, e.g., Simpson, II, supra note 2, at 756-57, 759 (approving the point that the party in possession more nearly had substantial ownership, and finding persuasive Williston’s arguments about loss prevention and insurance).
184. See Harry L. Vanneman, Risk of Loss, in Equity, Between the Date of Contract to Sell Real Estate and Transfer of Title, 8 MINN. L. REV. 127 (1924) (presenting one of the more solid analyses). Vanneman was persuaded of the need to replace Paine, the appropriateness of shifting away from property concepts and toward contract oriented treatment of risk of loss issues, and the merits of Williston’s possession proposal. However, Vanneman argued for a modification, by which possession would be only one of several circumstances to be examined to determine whether the parties had intended to transfer substantial ownership, and thus risk. He would also take into account evidence of agreements on such matters as a duty of one party to care for the land, a duty to pay taxes, a duty to obtain insurance coverage, and the specific right to returns (rents and profits) from use of the land during the executory period. See id. Vanneman’s article and his proposed modification of Williston’s suggested rule were later widely cited in the treatises. See, e.g., MCCLINTOCK, supra note 21, § 113.
185. See R.T. Miller, Notes: Equitable Conversion by Contract, 26 KY. L.J. 56 (1937) (providing a particularly thorough listing and comparison of the five rules); see also Simpson, II, supra note 2, at 755-57; Everett J. Brown, Jr., Comment, Risk of Loss Occurring Between Date of Contract to Sell Real Estate and Transfer of Legal Title, 22 CAL. L. REV. 427 (1934); Pirnie, supra note 182.
opinion in a 1921 Nebraska opinion which drew significant attention. Then in a 1930 Wisconsin case, a court for the first time explicitly adopted Williston's proposed rule, and that case also drew extensive attention.

Two additional supporting decisions came after the Contracts Restatement was completed in 1932. A 1933 California decision adopted the possession rule, and adopted extensive portions of Williston's arguments to support the rule. A 1935 Connecticut decision cited the Restatement in rejecting the Paine rule, and drew much attention.

The volume and intensity of the debate in this period prompted one commentator to describe risk of loss in sales of land as "the most debated question in the law of vendor and purchaser. . . ." It was also a question that from the medieval era of Bracton until 1935 had been addressed "without legislative aid or hindrance." Williston was about to change that.

187. McGinley v. Forrest, 186 N.W. 74 (Neb. 1921) (Dean, J., dissenting). Although the majority held to the Paine rule imposing risk on the buyer, the dissent strongly argued for a possession-based rule by which the risk would have fallen on the seller. The attention given the opinion boosted the attention given Williston's campaign. The case was presented at 22 A.L.R. 567 and cited in several notes, articles, and eventually treatises. See, e.g., Recent Cases, Vendor and Purchaser—Sale of Land—Destruction of Buildings by Fire, 70 U. Pa. L. Rev. 248 (1922).

188. Appleton Elec. Co. v. Rogers, 228 N.W. 505 (Wis. 1930). The court imposed the loss on the seller who had retained possession. For examples of the attention drawn by the case, see Bernard Soref, Note, Vendor and Vendee: Real Property: Risk of Loss: Insurance, 14 Marq. L. Rev. 183 (1930); Vernon Swanson, Note, Insurance—Risk of Loss on Vendor When in Possession—Vendee Cannot Recover Insurance Money, 5 Wis. L. Rev. 503 (1930).

189. Kelly v. Smith, 218 Cal. 543, 24 P.2d 471 (Cal. 1933). The decision, along with other California cases, was examined in Brown, supra note 185.

190. Anderson v. Yaworski, 181 A. 205 (Conn. 1935). Under the circumstances it was not necessary to choose between the Massachusetts legal title rule and Williston's possession rule, and the court did not make clear which it favored. The case was presented in 101 A.L.R. 1232 (1936). See also Recent Decision, Specific Performance—Vendor and Purchaser Relation—Burden of Loss on Destruction of Premises by Fire, 13 N.Y.U. L. Q. Rev. 492 (1936); Recent Case, Vendor and Purchaser—Risk of Loss—Accidental Damage to Property Between Contract and Conveyance, 49 Harv. L. Rev. 497 (1936).


192. Simpson, II, supra note 2, at 769.
In 1934 Williston went to the National Conference of Commissioners on Uniform State Laws with a proposal for a uniform statute to govern risk of loss in sales of land.193 In 1935 the Commissioners approved the statute and recommended it to the states as the Uniform Vendor and Purchaser Risk Act.194 Llewellyn was to play a very active role in the Commissioners’ handling of Williston’s proposal. The proposal, and the draft statute Williston included with the proposal, were assigned initially to be considered by the Conference’s Commercial Law Committee, including Commissioner and Committee member Karl Llewellyn.195

The promulgation of the Risk Act was clearly a victory in Williston’s campaign to replace the specific Paine equitable title rule with a possession rule.196 The Act provides that risk of loss remains with the seller until transfer of possession, or completion of the conveyance by transfer of legal title.197

193. See id.
194. See UNIF. VENDOR AND PURCHASER RISK ACT, 14 U.L.A. 471 (1935) (Master ed. 1990) [hereinafter RISK ACT] (providing in principal part:
§ 1 Risk of Loss.

Any contract hereafter made in this State for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

(a) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid;

(b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid).


Williston too was a long time participant in the Conference, serving as Commissioner from Massachusetts from 1910 to 1929 as well as drafting several uniform laws beginning with the Sales Act in 1902 and ending with the Risk Act in 1935. See WILLISTON, AUTOBIOGRAPHY, supra note 64, at 219-27.

196. The Act resulted “in the most general and thoroughgoing single change in the law of equitable conversion by contract which has yet been made by legislative action.” Simpson, II, supra note 2, at 773.

197. The Act provides that risk of loss remains on the seller “when neither the legal title nor the possession of the subject matter of the contract has been transferred” and passes to the buyer “when either the legal title or the possession of the subject matter of the contract has been transferred. . . .” RISK ACT, supra note 194, § 1(a), (b). Clearly the Act is contrary to the Paine rule, which would have risk pass immediately upon formation of the contract, without awaiting transfer of possession. The Act also differs from the Massachusetts legal title rule, which would have risk remain on the seller until legal title had been transferred, even if the buyer previously took possession. The Act has been widely recognized as a codification of “the Williston
The Act also represents the culmination of Williston's forty year journey from property thinking to contract thinking. First, it accommodates the core classical contract notion that an express agreement of the parties on the precise question of risk allocation should be enforced.  

Second, and more importantly, in the absence of express agreement, the Act decidedly places principles of contract law over all others. Like the Contracts Restatement, the shift from property to contract thinking is reflected in the terminology of the Act, and in the approach used to address risk issues. Words such as "ownership" associated with property thinking are not used in the Act. The Act does not use the phrase "risk of loss" that had come to be associated with property-based thinking. Most significantly, the opening line of the Act is stated in contract terminology: "Any contract . . . for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties . . . ."  

The Act, like the Restatement, approaches risk issues not by asking, Who bears the burden of risk and who is the owner? Rather, it addresses the effect the destruction of the property has on the rights and duties of the parties, including the seller's right to enforce the contract, the buyer's duty to pay the price, and the buyer's right to recover any portion of the price paid prior to the destruction.

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In the drafting process, the Commissioners briefly considered a provision which would have taken into account not only possession but also the additional factor of a specific agreement giving one party the right to receive rents and profits. See Note, Legislation, Adoption of the Uniform Vendor and Purchaser Risk Act in New York, 6 BROOK. L. REV. 372, 374-75 (1937) [hereinafter Adoption of the UVPRA]. The rejected provision would have followed the model urged by Vanneman. See Vanneman, supra note 184.

198. The Act does not govern when "the contract expressly provides otherwise." RISK ACT, supra note 194, § 1. The Act does not explicitly indicate what result is to follow when the parties had made an express agreement as to allocation of risk. The implication is that loss allocation in such circumstances is to be governed by state law outside the Act. Presumably, that would lead to enforcing the specific agreement and imposing the loss on the party who had agreed to accept the risk, in accord with the accepted doctrine that preceded the Act. There was minor debate about the wording of that part of the Act, but not about the basic notion of respecting an express agreement. See Simpson, II, supra note 2, at 771 n.273.

199. The only such word used is the term "legal title" and it is used more in the way of describing the occurrence of a key event, like transfer of possession, than to refer to an abstract ownership concept. See RISK ACT, supra note 194, § 1(a), (b).

200. Even the word "risk" appears only once—in the title, "The Uniform Vendor and Purchaser Risk Act." Williston apparently wished to avoid even that use of the term. He submitted the draft under the name "Uniform Vendor and Purchaser Act" and the word "Risk" was added to the title by the Conference Committee. See Simpson, II, supra note 2, at 769 n.268.

201. RISK ACT, supra note 194, § 1.

202. Id. § 1(a), (b). The Act does not directly address the question of whether the seller is to be excused under the doctrine of impossibility or held liable for breach should the destruction occur prior to the transfer of possession or legal title (i.e., while risk is still on the seller). Presumably, that and various other questions about the rights and duties of the parties were to be left to general contract law outside the Act. Williston and the Commissioners must have viewed that general contract law as being best represented in the Contracts Restatement.
Reports of the drafting discussions among the Commissioners clearly show that the final form of the Act was meant to emphasize principles of contract over those of property, and that this emphasis was carefully considered and understood to be a dramatic break from longstanding precedent. The reports also make it clear that Karl Llewellyn not only observed the discussions, but was deeply involved in them, and in the early discussions actually argued for retaining a property-based approach. The reports come both through unpublished transcripts of two meetings of the Commissioners in 1934 and 1935, and a published commentary from observer Sidney Simpson.

The final decision to frame the risk allocation rule of the Act in terms of contract rather than property came in the context of determining the jurisdictional reach of the Act in cases connected to more than one state. Some background in theories of jurisdiction, as represented in the field of conflicts of law, will make the context more easily understood. The Restatement (First) of Conflict of Laws was drafted in roughly the same period of time as the Risk Act, and so reflects the then current thinking on those jurisdictional theories. In the thinking of the time, the two important jurisdictional facts in a land sale transaction were the place at which the contract was formed and the situs of the land. The Conflicts Restatement incorporated a set of rules that basically divided land sale transactions into aspects of contract law and aspects of property law. It provided that any questions regarding the contract side of a transaction, such as the validity of the contract, were to be decided according to the law of the place at which the contract was formed. Questions regarding the effect a valid contract might have on ownership of the land were to be decided according to the law of the place in which the land was located. In particular, the question of whether the formation of the contract caused a transfer of ownership to the buyer through the doctrine of equitable conversion was to be decided by the law of the situs of the land.

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204. Professor Simpson's reporting and commentary on the drafting of the Act appeared in his extensive article on equitable conversion. See Simpson, supra note 2, at 769-73. Simpson also served as Assistant Reporter while Williston served as Reporter for the never-completed Restatement of Sales of Land (Vendor and Purchaser). See 11 A.L.I. ANN. PROC. 16 (1934); 12 A.L.I. ANN. PROC. 8, 150 (1935) (May 1935 Discussion of Sales of Land, Tentative Draft No. 1).

205. See RESTATMENT (FIRST) OF CONFLICT OF LAWS (1934).

206. Id. § 340.

207. Id. §§ 209, 239.

208. Id. The Restatement featured an illustration showing that if the contract was formed in a jurisdiction which recognized conversion, but the land was in a jurisdiction which did not, then the buyer would not have gained an equitable property interest in the land. Id. § 209, illus. 2. This principle was further clarified in
Presumably Williston and the Commissioners had that regime in mind when they considered the jurisdictional scope to give the Risk Act in cases involving contacts with more than one state. After Williston presented his proposed Act, Llewellyn proposed an amendment to the Act’s jurisdictional clause that would have made the Act applicable to all transactions affecting land inside the adopting state, including transactions conducted through contracts made outside the state for the sale of land located in the state. In the context of the conflict of laws rules, Simpson explained that adopting the Llewellyn proposal would necessarily put the Act in the form of a “rule of property.” The other alternative considered was to make the Act applicable to all contracts formed in the adopting state, affecting land situated in or out of the state. As Simpson wrote, that was viewed as a “rule of interpretation [of] contracts.”

It would be “highly anomalous” to draft the Act to incorporate both “divergent theories” and so the relative merits of each were considered and one was selected. Simpson observed that the chief merit of Llewellyn’s property-oriented proposal was that the ownership principle was the theory of risk allocation accepted by the courts in most jurisdictions and by most lawyers of the time. Simpson advised that, if the Conference wished to follow the long accepted theory, it should adopt Llewellyn’s proposal and frame the Act as changing the rule of property by using a new definition of ownership (substituting possession for the Paine rule), rather than adopting a rule of contract.

In the end the Commissioners rejected Llewellyn’s proposal and stayed with the original language with the result that, as Simpson observed, the Act “proceeds on the theory that the allocation of the burden of loss . . . is a matter of contract between the parties . . . .” The other section stating that a court of one jurisdiction could not by equitable decree create an equitable interest in land in another jurisdiction. Id. § 240.

209. Simpson, II, supra note 2, at 770.
210. Id.
211. Id.
212. See id. (“[Risk of loss law generally is thought of as] a rule of property law which may be abrogated by express contract, rather than as a rule as to the interpretation of land contracts”).
213. Id.
214. Id.; see also 1934 Proceedings, supra note 203, at 12 (providing Williston’s statement).
215. RISK ACT, supra note 194, § 1. One reason for the rejection of Llewellyn’s proposal was that it was thought likely to create significant conflict of laws problems. Simpson, II, supra note 2, at 770. A few years later students at Llewellyn’s school (Columbia) prepared a Note examining the conflicts problems, probably following an interest triggered by Llewellyn’s experience with the Risk Act, although the Note made no reference to the Risk Act. See Note, Choice of Law for Land Transactions, 38 COLUM. L. REV. 1049 (1938).
In addition to choosing to base the new Act on contract rather than property theory, the Commissioners also gave some consideration to one of the practical considerations Williston had introduced with his 1895 articles, the matter of insurance. In fact, the initial proposed draft included language dealing with insurance, and Llewellyn then proposed an amendment dealing even more expansively with insurance. The Commissioners rejected those provisions, leaving the final version of the Act silent as to matters of insurance. It does not appear that other practical considerations, in particular, incentives for loss prevention, were given much attention within the Conference. It seems that the Commissioners devoted their attention to the more momentous matter of dethroning property thinking and elevating contract thinking to the dominant position.

The final version of the Risk Act, like other early Uniform Laws and unlike later Uniform Laws, has no explanatory comments or illustrations. Given Williston's extensive role in campaigning for the reforms that the Act represents and his role in drafting and lobbying for acceptance of the Act by the Commissioners, it can be said that his earlier writings are the best sources for understanding the full implications of the Act. In a sense they are substitutes for the official commentary. It is also a virtual certainty that those writings played prominently in the deliberations of the Commissioners, especially in light of the great stature that Williston's Contracts treatise had attained. It seems highly probable then that Commissioner Llewellyn, in addition to being exposed to Williston's thinking in the debating of the Act, both at the Committee level and before the Conference as a whole, must have carefully studied Williston's writings on the topic of risk of loss in sales of land.

As a Commissioner, and one closely involved in the promulgation of the Risk Act, Llewellyn must also have followed the reception given the Act by scholars and lawmakers in the years between its promulgation in 1935 and Llewellyn's work on the Uniform Commercial Code. New York adopted the Risk Act

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The Note was published in 1938, the same year as Llewellyn began his campaign for reform in sales of goods. See infra note 235 and accompanying text.

216. See Simpson, II, supra note 2, at 769-70. Compare the draft there described by Simpson to the final version of the Act. See also 1934 Proceedings, supra note 203, at 9.


218. See the substantive provisions of the Act, supra note 194. Simpson offered several insights as to the reasons for excluding matters of insurance from the Act. There was some concern that the proposed insurance provisions would create conflict of laws problems, that political opposition from the insurance community would doom the Act, and that since the issues were primarily matters of insurance law, they should be dealt with through a vehicle other than the Risk Act. See Simpson, II, supra note 2, at 772-73; see also 1934 Proceedings, supra note 203, at 28-29; 1935 Proceedings, supra note 203, at 4.

219. See Simpson, II, supra note 2, at 771 (observing that there was actually very little discussion of the substantive provisions of the Act).
immediately after its approval by the Conference and, by the time Llewellyn was involved in drafting the Code, seven jurisdictions had adopted the Act. There was a great deal of writing on the topic of risk of loss in land sales in those years as well, with many of the publications lauding the Risk Act. A few of those scholars alluded to and some strongly urged greater attention to the parallels of risk of loss law in land sales and goods sales.

Beginning soon after promulgation of the Act, Williston issued a second edition of his landmark contracts treatise, with its extensive treatment of risk of loss, publishing the final volume in 1938. Williston also retired in 1938, and in his autobiography he wrote of his campaign to reform the law of risk of loss in sales of land. The Risk Act “has not yet been widely adopted, but I hope that it may have success in the future.”

Most American courts are still opposed to me; it is hard to get a court that has once taken a position to reverse its opinion. Precedents are not lightly overruled, but in a few instances such a change has come about . . . and in states where it had not been decided before I wrote, the trend of decisions supports my contention. I do not regard my battle as lost.

In the battle to replace the Paine rule with his possession rule, Williston had won the support not only of a few courts, but of the Conference and several state legislatures. In his long journey of rethinking risk of loss law away from property

220. The New York version was modified in minor ways. See Adoption of the UVPRA, supra note 197, at 376-77 (describing the modification and prior case law); see also Note, Legislation—Vendor and Purchaser—Uniform Risk of Loss Act, 14 N.Y.U. L. Rev. 240 (1937). Llewellyn would likely have been especially interested in New York’s adoption of the Act, given that he was at the time on the faculty at Columbia. See 34 Colum. L. Rev. 1, 40 (1934); 37 Colum. L. Rev. 429 (1937) (listing Llewellyn’s faculty position).


222. See, e.g., Miller, supra note 185; Adoption of the UVPRA, supra note 197; Note, Legislation, The Uniform Vendor and Purchaser Risk Act, 51 Harv. L. Rev. 1276 (1938) (providing a thorough analysis of the Act).

223. See, e.g., Recent Case, Vendor and Purchaser—Risk of Loss—Accidental Damage to Property Between Contract and Conveyance, 49 Harv. L. Rev. 497 (1936); Legislation—Vendor and Purchaser—Uniform Risk of Loss Act, supra note 221. But see Diller, supra note 186 (opposing the Act, urging that risk of loss law be left to the courts to develop).

224. See, e.g., Diller, supra note 186 (arguing that goods law and land law should have essentially the same approach to allocation of risk of loss); Simpson, II, supra note 2, at 770 n.271 (comparing the Risk Act and the Uniform Sales Act).


226. See Williston, Autobiography, supra note 64, at 333.

227. Id. at 228.

228. Id. at 260.
thinking and toward a regime placing principles of contract above all else, he had
been joined by a few courts, the ALI (including Corbin), the Conference
(including Llewellyn), and several legislatures.

IV. LLEWELLYN'S CAMPAIGN FOR REVOLUTION IN SALES OF GOODS: FROM
LAND TO GOODS AND A BIT LEFT UNTOLD

In 1938, the year Williston concluded his campaign with a second edition of
his treatise and retired, Llewellyn wrote the article that came to symbolize
Llewellyn's campaign to reform the law of risk of loss in sales of goods.

The law as to goods had been frozen in place since the turn of the century,
and would remain so until Llewellyn's campaign began to find legislative success
in the 1950s. As captured in the Uniform Sales Act, the law held over since the
19th century was based on the ancient principle of *res perit domino*. The way to
allocate a loss as between the seller and buyer was to determine which was owner
of the goods at the time of loss—the same in 1938 as it had been in the middle
ages. As applied through the rule derived from *Tarling v. Baxter*, the law
provided that upon formation of a contract for sale, without awaiting transfer of
possession, the buyer of goods became the owner and therefore the risk bearer.
In broad theory and specific application, the law as to goods paralleled the law as
to land reflected in *Paine v. Meller*.

The promulgation and wide adoption of the Sales Act beginning at the turn
of the century signalled uniform nationwide approval of its risk of loss provisions. That approval continued to be shown through additional adoptions of
the Act up through 1941, and through efforts from 1917 to 1940 to enact a
federal version of the Sales Act, employing the same risk of loss doctrine to
govern interstate and international trade.

When Llewellyn initiated his campaign to change goods law in 1938, he
faced a challenge much like that Williston had faced in 1895 in beginning the
campaign to reform land law. However, Llewellyn had the benefit of Williston's
ground breaking. In particular, he had the Restatement of Contracts. In the 1932

230. 6 Ves. Jun. 350, 31 Eng. Rep. 1088 (Ch. 1801); see supra notes 44-48, 55-60, and accompanying
text.
231. See Unif. Sales Act, 1 U.L.A. at xv (1950) (providing a table of jurisdictions wherein the Act was
adopted). Also, certain jurisdictions such as New York, which had adopted the Sales Act soon after its
promulgation, repeatedly reiterated their approval of the risk of loss provisions by leaving those provisions
intact despite amending other provisions of their versions of the Act on several occasions. See Study of the
Uniform Commercial Code, 1 N.Y. L. REVISION COMM’N REP. 347 (1955) (describing various amendments
made to New York’s version of the Sales Act).
232. See McCurdy, supra note 61, at 586.
233. Had the ALI had additional resources, Llewellyn might also have had the benefit of a restatement
of sales of goods. The ALI at one time contemplated such a restatement topic, but concluded that the resources
should be directed to areas more greatly in need of attention. See 4 A.L.I. ANN. PROC. 103-04, 218-22 (1926)
Restatement, Williston and Corbin had dealt with risk of loss in sales of goods in essentially the same manner they used for sales of land, demonstrating a contractual approach and de-emphasizing the property-oriented approach. As with land sales, the Restatement approached risk issues for goods not so much by asking, “Who was the owner?” Rather, it asked “What effect did the destruction have on the rights and duties of the parties?”

A. Llewellyn’s 1938 Article: From Property to Contract and a Bit Beyond in the First Stage

With the example of the Restatement at hand, and with all that he had been exposed to in the Conference’s handling of Williston’s Risk Act for land sales, Llewellyn opened his campaign as to risk of loss in sales of goods with his 1938 article, Through Title to Contract and a Bit Beyond. Williston’s initial motivation for his campaign as to land sales had been his sense that the results dictated by the Paine rule were unjust. At the outset, the underlying theories of property and contract were not his primary concern, and his concern with the theories grew over the years. In contrast, for sales of goods Llewellyn focussed on the underlying theories immediately, and actually paid almost no heed at first to the specific rule of Tarling.

1. From property

Recognizing that goods sales law in general was “in one phase part of the law of contract, in another phase part of the law of property,” Llewellyn first turned to examining the role of property law, which for risk of loss and other issues appeared mainly in the form of the concept of “title” (the term Llewellyn used to refer to ownership). He observed three failings in the use of the title concept in sales law. Goods sales law (i) treated title to goods as if it were concrete and objectively identifiable when it was not, (ii) proceeded as if title were singular and located in one party when the incidents of ownership were actually split and in transition during a sale, and (iii) used the single concept of title to govern not only risk of loss but also a diverse multitude of other issues, each of which ought to be governed by different policy concerns.

(Report of Bigelow).

234. See Restatement (First), supra note 160, §§ 277, 281, 301, 457, 460, 468.

235. Llewellyn, Through Title, supra note 23. The 1938 article was one of a series in which Llewellyn broadly examined the history of the general law of sales of goods and certain major reform trends in that general law. See also Karl N. Llewellyn, On Warranty of Quality, and Society, 36 Colum. L. Rev. 699 (1936); Llewellyn, On Warranty of Quality, and Society: II, 37 Colum. L. Rev. 341 (1937); Llewellyn, Across Sales on Horseback, supra note 23; Llewellyn, The First Struggle to Unhorse Sales, supra note 8.

236. Llewellyn, Through Title, supra note 23, at 159.

237. Id. at 165-66.
The 19th century law captured in the Sales Act was based on an assumption that the location of title to goods being sold could be determined objectively and with certainty. That premise had been valid when transactions were simple and delivery of possession was required to transfer ownership. With modern complex sale transactions, Llewellyn wrote that title to chattels had become a “mythical” or “mystical” abstraction that the parties could not see or otherwise “objectively and definitely” locate.\(^2\)

In the law of property the concept of title had developed as a static and indivisible concept. Title was expected to remain steadily in one person, and when it did move, to move as a whole. This concept worked satisfactorily in early sales law where transactions were made in “one stroke, shifting possession along with title, no strings being left behind.”\(^3\) In contrast, modern commercial sales were carried out through a “complicated series of actions” with matters in “temporary suspension” or “active flux between the parties,” and “no such Title in either party.”\(^4\) Llewellyn wrote that except in such increasingly rare “single-stroke” transactions, the relationship of seller and buyer had become one of “dynamic movement to which the Whole-Title concept applies on neither side.”\(^5\)

He held that in a body of law concerned with modern dynamic transactions the old concept had became an “alien lump.”\(^6\) Llewellyn argued that sales law relied on title for too many issues, using it to govern not only risk of loss but “every point which it can be made to govern” both “between the parties” and “against outsiders.”\(^7\) In consequence, he wrote, “the Title-concept lumps so many policy decisions together that the same decision about Title, in two cases having similar facts, would repeatedly lead to unfortunate results in one or the other. . . .”\(^8\) That lumping together of diverse issues under the single concept of title made it necessary for a judge to either accept a “regrettable consequence” or use sleight-of-hand to manipulate the location of title, which would eventually lead to uncertainty for the parties.\(^9\)

\(^{238}\) Id. at 165.
\(^{239}\) Id. at 167.
\(^{240}\) Id.
\(^{241}\) Id. at 168.
\(^{242}\) Id. at 169. Llewellyn observed that the lump title concept had been clung to in the law of sales of goods even though there were at hand models within the law of real property, demonstrating recognition of ownership being divisible, and providing conceptual tools to describe such division. Those models and tools included the splitting of legal and equitable ownership, and mortgagee and mortgagor interests. Id. at 166 n.9.
\(^{243}\) Id. at 169. In prevailing sales doctrine “the location of Title will . . . govern, between the parties, risk, action for the price, the applicable law in an interstate transaction, the place and time for measuring damages, the power to defeat the other party’s interest, or to replevy, or to reject; it will govern, as against outsiders, leviability, rights against tort-feasors, infraction of criminal statutes about sales, incidence of taxation, and power to insure.” Id.
\(^{244}\) Id. at 171.
\(^{245}\) Id. at 172.
Llewellyn studied the possibilities of continuing to use title-based thinking with substantial modifications to counter the failings of then current doctrine. He observed that goods sales law had already made some adaptations to deal with the reality of ownership being split and in transition during complex sales transactions. He found those efforts were insufficient, and tended to leave obscured the issues to which the title concept was being applied.

Llewellyn concluded that sales law could not be salvaged as long as the concept of title remained in its central position. He did not argue for the complete abandonment of title in resolving issues, but did argue that it be used only where no other means could be found with better results for a particular issue.

Years earlier Williston, after studying the failings of the equitable ownership concept in the doctrine of risk of loss in sales of land, had commented on the law's unfortunate habit of clinging to such an outmoded concept. "Only the hoary age and frequent repetition of the maxim prevents a general recognition of its absurdity." Llewellyn concluded his study of the role of title in goods sales with a similar sentiment, writing that it was "disgusting" that the lump title concept had been allowed to continue to govern risk of loss and other issues simply because "it was so laid down in the time of... the third George."

Although Williston in his early writings did not conclude that the principle of ownership was utterly inappropriate for risk of loss law in sales of land, he did make clear from the beginning that a far better approach was through principles of contract law. By the end of his campaign, he implemented that assessment by reformulating land sales law with contract principles given the primary role in risk of loss. Llewellyn, for risk of loss in sales of goods, was quicker to conclude that the ownership principle was unworkable, and equally quick to conclude that risk of loss should be primarily determined through principles of contract.

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246. For example, there had been efforts to recognize differences between true title and title held merely for purposes of security. Id. at 168-69, 195 n.69.

247. Id. at 169.

248. "I do not suggest the elimination of the Title-concept. It has its uses. But it should be made to serve merely as the general residuary clause... as a better-than-nothing, when inquiry has failed to reveal any other line of solution adapted to the problem in hand." Id. at 170.

249. WILLISTON, CONTRACTS TREATISE, supra note 39, § 929.

250. Llewellyn, Through Title, supra note 23, at 175.

251. Llewellyn also concluded that principles of contract should be used to govern other issues, aside from risk of loss, which in then current law had been governed by the title concept. For example, the lump title concept had been used to determine whether or not a party could get remedies in the nature of specific performance. Llewellyn argued that, rather than using the title concept, the better approach would be to make that determination by applying the contract doctrine of benefit of the bargain. Id. at 175-77.
2. To contract

When goods being sold are destroyed, Llewellyn wrote, the real question is, “Must the buyer pay [the price]; or if it has been paid, can he get it back?” The first step in answering that question would be to ask if there had been an express agreement on the specific issue of risk of loss. If not, the second step would be to ask “whether or not the active party [ordinarily the seller] had done enough of what he agreed to do to earn his agreed award.” Llewellyn also explained that dropping the focus on title, and moving to a focus on whether the seller had sufficiently performed, would place risk of loss problems in their proper place in an overall context of contract issues raised by the destruction of the goods being sold. Using contract principles to determine the consequences of destruction of goods would appropriately resolve not only the allocation of risk of loss, but also the question of whether to excuse the seller from liability for damages for failing to perform.

Llewellyn demonstrated the contractual approach to risk allocation by reference to the duties taken on by a seller in a variety of typical transactions, asking in each case whether the seller had earned the price by carrying out the agreed upon obligation prior to the occurrence of the destruction:

(i) “He agreed to ship goods of a certain description. Well, has he shipped? Or has anything supervened which makes it fair to throw risk on the buyer without the shipment?”

(ii) “He agreed to hold specified goods until call. Well did he?”

(iii) “He was under duty to let the buyer inspect on demand. Is it reasonable to disregard that duty, in view of the supervening destruction?”

(iv) “If he agreed to deliver at destination, and has not delivered, how has he earned his price?”

Llewellyn thus proposed an approach for goods sales that was strikingly similar to the approach Williston had come to in sales of land. It eschewed

252. Id. at 182.
253. Id. at 184. The risk allocation analysis would, of course, be undertaken only if the goods destroyed had previously been specified as connected with the sale contract. Id. at 183-84.
254. Id. at 184.
255. Id. at 185 n.45.
256. Id. at 184.
257. Id.
258. Id.
259. Id. at 184-85.
260. See the treatment of Williston’s approach in his 1895 articles, his 1920 Contracts treatise, the first Restatement of Contracts, and the Uniform Vendor and Purchaser Risk Act. Williston, Civil Law, supra note 6; Williston, Common Law, supra note 6; WILLISTON, CONTRACTS TREATISE, supra note 39; RISK ACT, supra
property thinking in favor of contract thinking. It framed risk issues as part of a set of questions about the effect the destruction would have on the rights and duties of the parties. Those questions were whether the buyer was obligated to pay (or able to get back what was already paid), and whether the seller was liable for failure to perform or was excused. The buyer’s obligation to pay was primarily dependent on whether the seller had performed as obligated at the time of the destruction.

3. **And a bit beyond**

In the early stages of his campaign in land sales law Williston had urged attention to certain practical considerations as additional factors supporting a risk of loss rule already meeting the primary test of compliance with principles of contract. Those practical considerations included facilitating loss prevention, minimizing the likelihood of litigation, and maximizing the likelihood of insurance coverage.

In Llewellyn’s first stage, he began to take one of those practical considerations into account, the matter of insurance. After identifying contract thinking as superior to property thinking for risk allocation, he considered several ways in which insurance might be taken into account. The thrust of his treatment of insurance was essentially the same as Williston’s; that sales law in general and risk of loss doctrine in particular should not be formulated in such a way as to make it difficult for the parties to insure and unlikely that there would be adequate insurance coverage. Williston had argued that a risk allocation rule which increased the ease and likelihood of having insurance coverage should be favored over a rule which decreased the likelihood of coverage, assuming the favored rule also met the prime test of carrying out general contract principles. Llewellyn took a similar position.

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262. See Llewellyn, Through Title, supra note 23, at 169. Llewellyn argued that the insurable interest concept should be given a broad interpretation, to make it easier for either party to obtain or maintain insurance coverage during a sale transaction in which property interests were being split and shifted. Id. at 188-91; cf. id. at 192 n.63 (arguing similarly for an expansive view of parties’ rights to bring claims against a third party at fault in causing a loss, such as a carrier).

264. Llewellyn made the point as to transactions in which the seller was to hold the goods temporarily awaiting the buyer’s call. Under the Tarling rule, the risk would be on the buyer, because the contract had been formed. With the goods in the seller’s possession, it would be unlikely for the buyer to have insurance. Llewellyn observed that “[i]t would certainly be much to be said for a rule that, in mercantile cases, risk should not pass . . . unless seller insured to cover buyer during any period in which, under the contract, seller
At this stage in his campaign, Llewellyn included no significant treatment of 
the other practical considerations Williston had proffered, prevention of loss and 
avoidance of litigation. He also differed from Williston in that Williston had from 
the outset sought to replace a specific rule pointing to one party as the risk bearer 
(Paine, putting risk on the buyer). Llewellyn had not yet reached the point of 
pronouncing the equivalent Tarling rule as bad law needing replacement.263

Aside from those differences, the themes Llewellyn laid out for his campaign 
in goods law are remarkably similar to those Williston had announced and carried 
through for land law. The ancient principle of ownership was failing in modern 
complex transactions, particularly because possession and title had become 
separated. With the development of contract law, the old property thinking should 
be set aside and risk of loss in sales should be governed primarily by principles 
of modern contract law. Practical considerations, including insurance coverage 
should also be taken into account.

4. And a bit left untold

Llewellyn’s 1938 article made no mention of the work that had already 
occurred for reform of risk of loss law in the field of sales of land, including the 
Risk Act in which Llewellyn had participated, the Contracts Restatement, or 
Williston’s contracts treatise or 1895 articles. In the opening footnote of the 1938 
article, Llewellyn did include a statement that may shed some light on his 
treatment of the relationship between his work and Williston’s earlier work. The 
works of others, he wrote, “are noted where I am conscious of the debt; 
sometimes one absorbs, forgetting the source; and memory has a statute of 
limitations of its own.”264

Although Llewellyn’s campaign would not be entirely successful until the 
states began adopting the Uniform Commercial Code in the 1950s, the major 
themes would all be solidly in place by 1944.

B. The Federal Sales Bill and the Uniform Revised Sales Act: The Second 
Stage

After Llewellyn’s 1938 article, the next major developments came in the 
context of efforts to enact a federal sales law. The efforts had begun in 1917, with 
a plan to enact a federal version of the Uniform Sales Act, to govern interstate and 
international trade. The initial efforts had been unsuccessful, and interest waned

263. Llewellyn actually did vaguely refer to the Tarling rule in the context of mentioning how insurance 
might be taken into account in reformulating the risk of loss law. See id.
264. Id. at 159 n.*.
during the 1920s and early 1930s as attention was being focussed on the Restatements. Interest was revived in 1937, and in 1940 a Federal Sales Bill was introduced in Congress.\footnote{265. See generally McCurdy, supra note 61, at 585, 589 (describing the history).} In that period, there were no serious efforts underway to revise the state law codified in the Uniform Sales Act, despite Llewellyn's campaign. However, the introduction of the Federal Bill indirectly led to reopening of the Sales Act.

Enactment of federal law would have a major influence on the near term future of state sales law. From 1917 on, the plan had been to have the federal law modelled after the Sales Act. In particular, this meant using the risk of loss provisions of the Sales Act, which were based on ownership and codified the \textit{Tarling} rule to impose risk on the buyer without possession. If a federal version replicating the provisions of the Sales Act were enacted, it would become extremely difficult to uproot the Sales Act. States would be reluctant to change their laws so as to create conflicts with federal law. On the other hand, if the federal law enacted was more modern, incorporating the reforms Llewellyn was advocating, then the states would feel pressure to replace more quickly the aging Sales Act with modern state law modelled on the federal law, to maintain uniformity.\footnote{266. See id. at 589-90; Thomas, supra note 22, at 557.} Supporters of Llewellyn's reform efforts came to see that the plan to enact a federal law was of great importance because of its likely influence on state law.\footnote{267. “To extend the operation of the Uniform Sales Law to the federal sphere [would] give a new lease of life to the philosophy which it represents….” Nathan Isaacs, \textit{The Sale in Legal Theory and in Practice}, 26 VA. L. REV. 651, 667 (1940). \textit{See also} Llewellyn, \textit{The Needed Federal Sales Act}, supra note 23, at 561-62.}

The federal bill introduced in 1940\footnote{268. The Proposed Federal Sales Act, H.R. 8176, 76th Cong., 3d Sess. (1940), reprinted in 26 VA. L. REV. 668-86 (1940).} included risk of loss provisions essentially identical to those of the Sales Act.\footnote{269. See id. §§ 19, 20 (Rule 1), 23. For commentary, see Thomas, supra note 22, at 547-49; McCurdy supra note 61, at 606-12.} Aware of the stakes, Llewellyn and a collaborator, Nathan Isaacs,\footnote{270. Llewellyn and Isaacs shared views about the risk of loss provisions. Llewellyn’s 1938 article cited approvingly some of Isaacs’ work. \textit{See} Llewellyn, \textit{Through Title}, supra note 23, at 184 n.44.} wrote articles opposing the bill’s enactment. Isaacs’ article substantively attacked the old law of the Sales Act.\footnote{271. See Isaacs, supra note 267.} In the process, Isaacs added the element previously missing from Llewellyn’s campaign, a direct attack on the \textit{Tarling} rule that had long been codified in the Sales Act and was proposed for inclusion in federal law.

Isaacs viewed the \textit{Tarling} rule for goods in much the same way Williston had long viewed the \textit{Paine} rule for land, with a sense of injustice. The rule was "thoroughly logical" within the realm of property theory in which it had been
developed, but "nonsensical" as judged by modern business practices, and so did not comport with expectations of the parties. 272

If I agree to sell you my old automobile for $300, to be delivered to you and paid for on the first of next month, can you imagine your surprise if I should then call you up before the end of this month and say: "I am sorry, but your car has burned. Don't forget however, to have my check ready on the first!" Yet that is precisely what is called for by the nonsensical [Tarling] rule. . . . 273

Llewellyn's reaction to the federal proposal was more strategic. He took the tack of urging Congress to avoid any action until the National Conference of Commissioners on Uniform State Laws could first review the bill and give Congress the benefit of the Conference's expertise in commercial law. 274 Although his request for a delay did not so indicate, Llewellyn had in effect asked that the bill be turned over to his care. Llewellyn was by then already poised to assume responsibility for the Conference's role in reviewing the federal bill. 275 Congress did not take action on the 1940 bill. In 1940 the Conference did take up study of the federal bill, coupled that project with a plan to revise the Sales Act, and appointed Llewellyn as chair of a special committee to take on the dual task. 276 The American Law Institute (ALI) then joined with the Conference in the project, the two institutions jointly appointed Llewellyn as Reporter, and the ALI appointed Arthur Corbin as its special advisor to participate with Llewellyn in the drafting. 277 Corbin took an "active and critical part" in the drafting thereafter. 278

In 1944, Llewellyn, Corbin, and the others presented the first proposed draft Revised Sales Act. 279 The risk of loss provisions of the 1944 draft carried out the theoretical reforms laid out in Llewellyn's 1938 article, as well as Isaacs' reform

272. Id. at 652.
273. Id.
275. Llewellyn had many years of involvement with the Conference. See 21 A.L.I. ANN. PROC. 64-65 (1944) (Report on the Revised Sales Act). He had been a Commissioner since 1926, and had held such influential positions as chair of the Committee on Amendments to Uniform Commercial Acts, and chair of the Section on Uniform Commercial Acts. See id. at 263; McCurdy, supra note 61, at 582; Wladis, supra note 195, at 530.
278. Corbin, supra note 25, at 821.
279. See The Uniform Revised Sales Act (Proposed Final Draft No. 1, 1944), reprinted in 1 A.L.I. & N.C.C.U.S.L., Uniform Commercial Code: Drafts 505-06 (E. Kelly comp. 1984). The Conference and ALI had directed Llewellyn's committee to proceed on the premise that the text they were drafting would be used either as a federal law or a revised state law, or both, and as state law would be suitable for adoption either separately as a Revised Sales Act, or as the sales division of a planned comprehensive commercial code. See 20 A.L.I. ANN. PROC. 38, 40 (1943).
of the Tarling rule. Llewellyn articulated the reform themes in a discussion accompanying the presentation of the draft to the ALI members. The report is particularly useful because the draft did not yet include official commentary for the risk of loss provisions.

In accord with Llewellyn's 1938 article, the 1944 draft was based on the understanding that the lump title concept failed to account for modern transactions in which ownership interests were "divided . . . in the process of performance of a contract." Consequently, the former central role of title was eliminated, particularly for risk of loss.

As Llewellyn had urged in 1938, the draft addressed risk of loss issues through what Llewellyn described as a "contract-approach." Risk of loss, and other aspects of the "rights between buyer and seller" were addressed "primary in terms of the contract." Putting that theory of contract orientation into practice resulted in allocating risk according to the "seller's successive stages of performance," so that the results could be stated "in terms of the particular things that the seller has done."

In the contract approach, the transfer of risk would depend not on the status of title, but on whether or not "the seller is rightly performing his contract" or "is in breach . . . ." Thus, risk would be allocated one way in a case "in which the seller's action exactly conforms to what he is supposed to do, and therefore amounts to performance . . . earning him rights" and allocated another way in a case "in which what the seller has done is not what he is supposed to do under the contract and is earning him liabilities for breach and is not earning him rights by performance of conditions." For example, "in the normal order of events," transfer of risk of loss to the buyer would occur with a proper tender of delivery by the seller, and would not occur if the seller had "not done what he was supposed to do."

280. See Revised Sales Act, supra note 279, §§ 79, 80.
281. For a transcript of Llewellyn's presentation and discussion of the draft with the ALI members at the 1944 Annual Meeting of the ALI, see 21 A.L.I. ANN. PROC. 63-268 (1944) (Report on the Revised Sales Act) [hereinafter 1944 Report].
282. See id. at 183-84.
283. Id. at 172.
284. See Revised Sales Act, supra note 279, §§ 79, 80; 1944 Report, supra note 281, at 74, 175-83.
286. Id. at 170.
287. Id.
288. Id.
289. Id. at 74 ("if the seller is in breach, [risk] does not pass at all").
290. Id. at 170. The matter of the seller's liability for breach, in the sense of possibly being excused under the doctrine of impossibility of performance, was addressed in Sections 86-89 of the Revised Act ("Events Interfering with Performance"). See id. at 188-90.
291. Id. at 171.
The concern Llewellyn had shown for maximizing insurance coverage was also implemented in the 1944 draft. In the 1938 article, Llewellyn had argued for a broad interpretation of the insurance law concept of insurable interest, so as to increase the ease and likelihood of at least one party obtaining or maintaining insurance coverage in the midst of the sale. That objective was addressed in the 1944 draft by freeing the insurable interest concept from the limitations of the concept of title and liberally allowing either party to insure during a sale.292

In addition to implementing the shift from property theory to contract theory, the 1944 draft carried out Isaacs' objective of replacing the Tarling rule. Instead of having risk pass as soon as the contract was formed, despite the seller's retention of possession, the 1944 draft provided for risk to pass when possession passed.293 This was perhaps the clearest instance of a change that would actually lead to different results in risk allocation, rather than a change only in underlying theory. The change was justified not only by Isaacs' earlier expressed sense that Tarling did not comport with the usual expectations of the parties, but also because the new possession rule was thought to better serve the practical consideration of insurance.294

The drafters had not yet formally articulated the practical considerations of loss prevention and litigation avoidance as policies underlying the revised risk of loss provisions. However, Llewellyn and Corbin had developed by 1944 a regime of risk of loss in sales of goods that was in most other significant respects a close match to the regime of risk of loss law Williston had shepherded into existence for sales of land.

C. To the Current Version of the Code, and Williston's Strange Response: The Third Stage

It would take until 1958 for Llewellyn and company to carry the draft Revised Sales Act into the officially-accepted Sales Article of the Uniform Commercial Code as we know it today.295 Along the way, they would draft the official commentary explaining the underlying principles for the risk of loss provisions, but in most important respects would leave those provisions

292. See id. at 172.
293. See id. at 180 (describing section 79 of the draft).
294. See id. at 180-83; see also Llewellyn, Through Title, supra note 23, at 184 n.44 (describing Isaacs' earlier, less sharpened thinking about the need for revision of the Tarling rule to better address the practical consideration of insurance).
295. The long period was in large part a result of New York's less than enthusiastic reaction to the early versions of the Code. New York carried out a massive study that led to significant changes in the Code. See Study of the Uniform Commercial Code, 1 N.Y. LAW REVISION COMM'N REP. (1955). The controversies that caused the adoption of the Code to be delayed for so long mostly had to do with provisions other than risk of loss. See Preliminary Report, supra note 4, at Introduction; Braucher, supra note 24, at 802-04. For a general view of the process of creating the Code, see id.; William A. Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 MIAMI L. REV. 1 (1967).
essentially as drafted in 1944.296 Included among those provisions are the now-controversial provisions of Section 2-510, targeted for elimination by critics and the revising committee.

Also along the way to official acceptance of the Code, the drafters encountered and succeeded despite the opposition of Williston. The Revised Sales Act was put into the framework of a draft of the Code in 1949. Williston then emerged from retirement to author his only detailed published treatment of the revisions in a 1950 article: *The Law of Sales in the Proposed Uniform Commercial Code.* 297 He criticized the Sales portion of the Code in general, and had a few criticisms of the risk of loss provisions in particular.298

As to the Sales article in general, Williston’s major criticism was that promulgating the Code would destroy the interstate and international uniformity it had taken so long to build up. As to uniformity between the states, experience with other uniform laws showed that adoption of the new Code would be accomplished slowly.299 In the meanwhile, there would be conflict between the majority of states that continued to adhere to the old law represented in the Sales Act and the minority of states adopting the new law of the Code.300 He was equally concerned about uniformity on an international level. A great strength of the Sales Act was that it had been modelled after English law, and the English law was widely followed throughout the common law world, including Canada, and where not followed, was at least highly familiar.301 Adopting a radically

296. Section 2-101 sets out a general theme for the Sales Article of the Code:
The arrangement of the present Article is in terms of contract . . . 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 . . . . The purpose is to avoid making . . . issues turn upon the location of an intangible . . . abstraction . . . U.C.C. § 2-101, cmt. (1990).

For risk of loss, as for most issues, the Code implements the core principle of classical contract theory by providing that an express agreement on the specific issue of risk of loss is to be enforced. See id. §§ 1-102(3) cmt. 3, 2-303, 2-509(4). In the absence of such a specific agreement, risk of loss is governed by sections 2-509 and 2-510 of the Code, the counterparts to sections 79 and 80 of the 1944 draft Revised Sales Act.

The official comments to those Code sections declare that the underlying principles are “the adoption of the contractual approach rather than . . . ‘property,’” and expectations about the parties’ relative likelihood of insuring the goods at any given point in time. See id. §§ 2-509 cmt., 2-510 cmt. Another established principle is to impose risk on the party best able to guard against loss by taking care of the goods. See Jason’s Foods, Inc. v. Peter Eckrich & Sons, Inc., 774 F.2d 214, 218 (7th Cir. 1985).


298. The article came to be known as Williston’s “famous attack” on the Code. See Preliminary Report, supra note 4, at 3 n.8. After Llewellyn’s death, a typewritten copy of Williston’s article was found in Llewellyn’s files. See Wladis, supra note 195, at 564 n.231.

The intensity of Williston’s criticism coupled with his great stature in the legal community must have presented a major threat to the drafters’ hopes for acceptance of the draft Code. Corbin, as the other living venerated statesman of contract law, and co-drafter of the Code, responded immediately with a published defense of the Code. See Corbin, supra note 25; Preliminary Report, supra note 4, at 3 n.8.


300. Id. at 562, 565. Williston wrote that 37 of 53 jurisdictions had adopted the Sales Act. Id.

301. Id. at 563-64.

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different domestic law would wipe out the existing international uniformity and thus hamper America's role in the international trade burgeoning in the aftermath of World War II.\textsuperscript{302}

Williston's second general criticism related to another sort of connection. Sales law, he wrote, was only one part of an overall "seamless web" of private and regulatory law. Sales law was in particular tied to other fields of law through the concept of title. Removing the concept of title from sales law generally, as the Code was designed to do, would tear the web, upsetting the way that sales law meshed with other fields, such as tax law and bankruptcy law, in which the title concept was important.\textsuperscript{303}

As to the risk of loss provisions in particular, Williston pointed out that the possession rule being applied to replace the Tarling rule was inconsistent with precedent. The new rule was entirely a product of the scholars drafting the Code, existed "nowhere" else, and thus was bound to create interstate and international conflicts.\textsuperscript{304} He offered a few other minor criticisms of the risk provisions, including finding them undesirably complex and also incomplete.\textsuperscript{305} Finally, he acknowledged, without substantively commenting upon, the reliance on principles of contract\textsuperscript{306} and the practical consideration of insurance\textsuperscript{307} in the Code.

While Williston did not object to refocussing attention to principles of contract and insurance, he did object strenuously to the removal of the lump title concept from goods sales law generally.\textsuperscript{308} Thus, there was at least to some degree a strange discrepancy between the younger Williston's career-long successful campaign to reform land sales law, and the older Williston's response to the innovations Llewellyn and Corbin had carried into goods sales law. In an indirect sense, Williston's 1950 statement opposed in goods law the very innovations he had championed in land law. The high value he placed on keeping interstate and international uniformity in goods sales laws explains away only part of his puzzling inconsistency.\textsuperscript{309} Perhaps a bit more can be attributed to some

\begin{footnotes}
\footnote{302. Id.}
\footnote{303. Id. at 568-69.}
\footnote{304. Id. at 583.}
\footnote{305. Id. at 582-83.}
\footnote{306. Williston referred to section 2-401, in which it is stated that the sales portion of the Code "deals with the issues between seller and buyer in terms of step-by-step performance or nonperformance under the contract." Id. at 568; see id. (quoting U.C.C. § 2-401, cmt. 1). Again, he criticized the Code for tearing the overall web of law by eliminating the concept of title, but he did not specifically object to the proposition of using principles of contract to guide risk of loss doctrine or other aspects of sales law. See id. at 568-69.}
\footnote{307. See id. at 583. Williston acknowledged the role given insurance in section 2-510, which in certain circumstances imposes risk on the seller to the extent of the buyer's deficiency in insurance. He criticized the section on grounds other than its use of insurance as a principle for loss allocation. Id.}
\footnote{308. Williston found the Code's departure from pre-Code law on the topic of title an "objectionable and irreparable feature . . .!" Id. at 570-71.}
\footnote{309. Williston's extremely strong concern for preserving uniformity was also evident in his reaction to the 1940 Federal Sales Bill. The federal bill was modelled after the Sales Act and duplicated its core provisions, including the risk of loss provisions. However, it varied from the Sales Act in several other}
\end{footnotes}
combination of illness, advanced age, and personal bitterness toward Llewellyn.\textsuperscript{310} To some extent, however, there is simply an unexplained inconsistency.

Perhaps Williston's strange response to the Code has contributed to the conventional failure to recognize his role in bringing about the very innovations that are represented in the Code's risk of loss provisions.

\section*{V. CONCLUSION}

Risk of loss has long been recognized as among the most troubled areas in the fields of sales of goods and sales of land. That troubled nature is now again being demonstrated by efforts to rewrite the relevant provisions of the Code governing sales of goods. Those provisions have remained largely untouched since Llewellyn first drafted them a half century ago. The present rare opportunity to reopen the Code makes this an important period for scholars to have a full understanding of the history and underlying theories of the Code's risk of loss provisions. The conjunction of this opportunity with the 100th anniversary of

\textsuperscript{310} At the time of the 1950 article, Williston was 88 years old. See \textit{WILLISTON, AUTOBIOGRAPHY}, supra note 64, at 3 (reporting his birthdate as September 24, 1861). He had been retired since 1938. See \textit{Id.} at 333. He had suffered extended bouts of debilitating illness throughout his career, sometimes unable to work for years at a time, and had continued to suffer such incapacity after his retirement. See \textit{Id.} at 142-66, 327, 331-32. The 1950 article was the first he had published in several years, and was his last significant article.

In his autobiography, written in 1940, Williston devoted a chapter to the changing schools of jurisprudence he had observed and in which he had participated during his career. He made several pointed references to the way that Llewellyn, as a leader of the school of Legal Realism, had treated Williston. He bridled at the labels Llewellyn had publicly applied to Williston. \textit{Id.} at 209, 214. In several passages he barely concealed a degree of bitterness toward Llewellyn. For example, he characterized the Realists, Llewellyn chief among them, as having "a tendency, if not to frenzy, at least to exaggerated statement." \textit{Id.} at 211-12.

In the 1950 article, Williston also commented that the decision to develop a new law of sales, rather than merely amend the existing Sales Act, had been taken "contrary to my expressed judgment." When Williston had, despite that overruling, attempted to assist by offering suggestions for the new Code, most of his suggestions had been rejected by Llewellyn's committee. Williston, \textit{The Proposed Code, supra} note 54, at 561 n.1. With that background, Williston even pleaded with readers not to dismiss his views as "warped" or motivated by "pecuniary interests" rising from his treatises and casebooks built around pre-Code law. \textit{Id.}

Tension between Williston and Llewellyn was evident much earlier, during the drafting of the Uniform Vendor and Purchaser Risk Act. Williston persuaded the Commissioners to reject most of Llewellyn's suggestions for the Act, and conflict between the two was sufficiently intense that one observer characterized Williston as having "annihilated" Llewellyn's arguments. See 1934 Proceedings, \textit{supra} note 203, at 27.
Williston’s seminal work in the field makes it even more appropriate to explore that history now.

This article has brought to light an important chapter missing from the conventional view of the history of the risk of loss rules in the Code. This missing chapter demonstrates that the innovations long credited to Karl Llewellyn actually originated in the work of Samuel Williston. More importantly, this missing chapter ties goods law to earlier developments in the field of sales of land. That connection provides a previously-untapped well of resources to gain greater understanding of goods law.

The recent criticism of the Code and the current plans for its rewriting demonstrate that, even a half century after the Code’s drafting, it remains important to grasp the full import of the blending of underlying principles in the risk of loss provisions. The debate accompanying these reform efforts also demonstrates that there is much still not well understood about how Llewellyn and company formulated the current provisions to serve their underlying principles.

The historical record of Williston’s work in the field of land sales is rich with material that could be of great value in developing greater understanding of the Code’s provisions. This article is meant as a first step in making that material available to scholars of the law of sales of goods. The path is now open. Let us see what we can find along the way.