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SAMUEL WILLISTON: THE UNIFORM COMMERCIAL CODE AND THE PRIOR LAW OF SALES—SEAMLESS OR TANGLED WEB

RICHARD D. CUDAHY*

On February 17, 1963, Samuel Williston, whose name and works run through almost the entire course of modern legal education and practice of American commercial law, died at Cambridge, Massachusetts, where he was born in 1861. He was the oldest alumnus of both Harvard College (1882) and its Law School (1888). Between college and law school Williston worked for some time in Newport on a survey of the Northern Pacific Railroad, where, among other things, he acquired a considerable skill in billiards (though not, as he noted in later years, so considerable as to put him in danger of making it a career).¹

After graduating at the top of his class from Harvard Law School, he served as secretary to Mr. Justice Gray of the United States Supreme Court, was a practicing lawyer in Boston, and taught law for nearly fifty years at Harvard, taking a major part in the growth and development of that institution. He played a leading role in systematizing and to a degree, modifying the common law as draftsman of some of the most important of the Uniform State Laws, particularly including the Uniform Sales Act, which was first recommended for enactment in 1906. In the same connection, he served for many years as the Commissioner from Massachusetts on the National Conference of Commissioners on Uniform State Laws, was the Reporter for the Restatement of Contracts (1932) and an Advisor on the Restatement of Restitution.² He is perhaps best known to practically all of us who have ever opened a law book as the author of *Williston on Contracts* and *Williston on Sales*, two works having almost scriptural status in their fields. His influence, on American commercial law, though exercised with modesty and restraint and the utmost sense of responsibility, has been pervasive almost beyond belief.

In 1940 Williston published a charming autobiographical work, *Life and Law*,³ which was reviewed in the Harvard Law Review by Austin Whiteman Scott (of Trusts eminence), who was Dane Professor of Law as Samuel Williston had been before him.

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¹ WILLISTON, *LIFE AND LAW*, 36, 56, 71 (1940).

² *Ibid.*

³ *Ibid.*

Of Williston, Scott wrote:

No one could sit in the classroom under Professor Williston, as I did thirty-four years ago, without realizing at once that here was a great teacher. The students were not merely interested; they were roused. There was an intellectual excitement in the atmosphere. This was not due to anything as artificial as oratory or histrionics on the part of the teacher. No one could have been more calm and more restrained than he. There was a feeling, however, of eagerness in the pursuit of ideas, a pursuit as exciting as a fox hunt. Many of us realized for the first time the real joy of an intellectual combat.

How did he create this atmosphere? I think that it was by being himself. His acute mind, his accurate mastery of his material, his own keen interest in the matter at hand, his treatment of the students as equals cooperating in the search for truth, his great sense of humor, all these played a part in the tri-weekly drama of the course on Contracts.⁴

It is, perhaps, ironic that Williston's last published work, published at his then age of 89 in 1950, was an adverse criticism of Article 2 (The Sales Article) of the Uniform Commercial Code (1949 Draft, since modified), which Williston saw as a disruptive development in the conceptual coherence and evolutionary growth of the Law of Sales, which he had labored so long and fruitfully to further.⁵ But the erosive winds of legal realism, coupled with changes in the commercial realities themselves, had long since begun to weaken the foundations of the work which the common-law system-builders of 1890-1920 had striven to construct.⁶

Williston in the 1950 article said:

Some of these provisions [of Article 2 of the U.C.C.] are not only iconoclastic but open to criticisms that I regard so fundamental as to preclude the desirability of enacting this part at least of the proposed Code. I feel compelled, contrary to my original expectation, to publish the reasons for my opposition.⁷

⁴ Scott, *Book Review*, 54 HARV. L. REV. 352 (1940).

⁵ WILLISTON, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950).

Several revised drafts of the Code have been prepared subsequent to the 1949 Draft (the tentative document reviewed by Williston) and to the critiques of the New York Revision Commission and many other reviewers and commentators. Thus, a leading student of the Code writes: "The present writer, in an article concerning the 1952 'Official Draft,' concluded that 'the things which are good in this draft are so fine and so many as compared with the things that are mediocre or downright bad that the Uniform Sales Act can well be replaced by the Uniform Commercial Code provisions on Sales.' This latest [1958], and final draft has cured a number of sections from ambiguities and uncertainties due to awkward draftsmanship and, in some cases, policy matters were rectified due to intervening criticism." Lattin, *The Uniform Commercial Code, Article 2: Sales*, 23 OHIO ST. L. J. 185 (1962).

⁶ Gilmore, *For Wesley Sturges: On the Teaching and Study of Law*, 72 YALE L. J. 646-650 (1963).

⁷ Williston, *supra*, note 5, at 561.

In an unnecessary, but poignant, footnote to his critique of the Code (and by references to the "Code" we refer throughout this article only to Article 2 thereof), he expressly disavowed any financial motivation for attacking it. Thus, he stated: "I have no pecuniary interest in the *status quo*. My treatises on *Sales* and on *Contracts* belong wholly to the publishers. My share in a casebook on *Sales* belongs now wholly to the co-editor."⁸

It is certain that financial considerations could not influence Samuel Williston's judgment of the new work; but his emotional and intellectual investment in the existing fabric of the codified common law, to which he had contributed so much, with so much distinction, for so many years, might be another matter.

Williston's fundamental objection to the new Code was that it represented a seemingly abrupt departure in language and formulation, and to a lesser degree, in concept and doctrine, from existing statutory and common law. To him it was not a mark of merit that the Code spoke unabashedly in a new language. That the Commercial Code more frequently than not is intended to produce a *result* identical to that reached under existing law (or if not, a "better" result), or that the new language of the Code attempts to embody rules more meaningful *in business practice* than the language and concepts abandoned, were apparently not considerations of sufficient validity or weight to Williston to justify the deliberate and wholesale departure from the purportedly integrating and rationalizing formulations of the prior law.

Williston himself favored amendment of the existing uniform statutes as a device preferable to the promulgation of virgin law. His objections to a new statute, speaking in significant measure in a *language* foreign to the existing law, were stated in part as follows:

Lawyers are well aware that the words of a long statute, comprehending a large branch of the law, never clearly give the answers to all possible problems. Years of judicial decisions are necessary to resolve the problems. Under a statute as long as the proposed Code, in which many of the rules and most of the language differ from those in existing statutes, the determination of countless cases will be necessary to give reasonable certainty to the law. Precedents cease to have certain application when words are wholly changed from those in existing statutes. The question whether principles were also changed is always present, even though no change in them was intended.

It was such considerations that led me, when the project was first proposed, to express the belief that amendments and additions to the existing uniform statute were the proper remedy to correct any defects in them and to provide for omitted situations; I did not then imagine a project to restate or to reform the law so radically as the proposed Code seeks to do. My

⁸ *Id.* at 561.

original objection to a new Code seems to me still sound, but the novelty of the phraseology and the iconoclastic provisions of the present [1949] draft add force to this objection.⁹

The most glaring (but not the only) vice which Williston detected in the Commercial Code was the radical downgrading of the concept of title from its prior eminence as a pivotal consideration in sales transactions.

He said:

Certainly many of the most important questions in the law of property, both real and personal, have always turned on the requisites for the transfer of title, the moment when the transfer occurs, and the consequences of transfer. The English Sale of Goods Act and the American Sales Act, following established common law rules, make elaborate provisions for answering these questions.

He warned that the attempt to make title unimportant was unsatisfactory and could result only in confusion when taken in connection with other laws (*e.g.* The Bankruptcy Act laws, regulating the sale of liquor and like goods, conflict of law matters, and problems of devolution of property and taxation). He feared that the rights of a good faith purchaser would become confused if divorced from the concept of title.¹⁰

He also said:

If it were intended under the novel terminology of the Code that the rights and duties of seller and buyer should be the same as under the hitherto accepted terminology which bases rights and duties on ownership, and makes intention the vital basis for transfer of title, the wording is so different that much litigation would be necessary to establish the fact. But the Code expressly repudiates title as determining the rights and duties of the parties and *seeks to substitute particular rules instead of the inclusive principle based on intention*. The provisions of the Code apply "irrespective of title." The Code gives no indication of what is to be done where rights of buyer and seller, under such laws as I have referred to, vary the rights provided for in the Code.¹¹ [Emphasis supplied.]

Williston basically disapproved abandonment of the generalization and inclusiveness seemingly achieved by the codifiers of the common law in favor of a Code employing a far greater particularization of rules. He felt that by amputating or emasculating a major central concept such as "title" (no matter how abstruse might be the means of applying such a concept to particular situations) the new codifiers might violently disturb the purported balance and integrity provided by the old formulae. Williston wrote:

⁹ *Id.* at 565.

¹⁰ *Id.* at 566-569

¹¹ *Id.* at 569.

As Maitland wrote, the law is a "seamless web." The most fundamental feature of the law of property (the concept of title) cannot be made immaterial in a statute on the sale of goods without tearing the seamless web. This misfit with other legislation and with the common law seems to me fatal.¹²

Williston also pointed out that the advantages of having a close statutory mesh with the English Sale of Goods Act (which controls a substantial part of the world's commerce) and of having a helpful degree of parallelism with the common law would be lost under the new Code.¹³

Thus, Williston's objections to Article 2 of the Uniform Commercial Code (though incorporating many specific and detailed criticisms of form and substance) were generally rooted in a deep respect for the tested terminological and conceptual scheme. He apparently preferred the effort of the great treatise-writers and draftsmen of the Uniform Acts to rationalize, codify and selectively improve the concepts of the common law to the contrasting method of massively infusing into the body of the law new language, and to a lesser degree new concepts, unprocessed by the judicial mill. The Code, on the other hand, takes the view that if the old language is a dead language, or at best an archaic one, it is better to substitute the "vernacular" reflecting commercial practice and formulate it into as many rules as seem necessary to cover the complex realities of current business. The authors of the Commercial Code, as Williston so indignantly points out, have shown little reverence for language honored by legal usage and have set up a new and judicially "rootless" (though commercially more pertinent) scheme within which to frame the rules of trade. What Williston saw as a "seamless web," the Code draftsmen saw as a "tangled web" better boldly jettisoned where necessary than tinkered with.¹⁴

The debate continues as to whether adoption of the Uniform Commercial Code is in the interest of all those concerned with the commercial law. Clearly, the majority view at this date seems to be that the Code, in its current form retains all or practically all, that was substantially important and desirable in the Sales Act and the common law and that the new Code formulations have been helpful. The Code has now been adopted (with some modifications) in twenty-three jurisdictions and has been effective in Pennsylvania for almost nine

¹² *Id.* at 569.

¹³ *Id.* at 563-564.

¹⁴ See also Corman, *The Law of Sales Under the Uniform Commercial Code*, 17 RUTGERS L. REV. 14 (1962); Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted*, 59 YALE L. J. 821 (1950); Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427 (1950).

years.¹⁵ In a recent article a practitioner in Pennsylvania indicated a considerable degree of satisfaction with the operation of the Code and particularly with its philosophy toward the concept of title which was so irksome to Samuel Williston.

Thus the Pennsylvanian writes :

The code minimizes, practically to the vanishing point, the importance of title as a factor in the solution of sales problems. * * * Although at first glance the presumptions [as to title] set forth in the Sales Act seemed to solve everything, when [the author of the article] endeavored to find out in a particular transaction between two business men just where the title of the goods rested at a particular moment, something with which the business men themselves had been in no way concerned, he had the greatest difficulty in fixing its location even with the help of these presumptions. * * * Although he has had little occasion to face similar actual problems since the Code was adopted, he has nevertheless made some study of Article 2 [of the U.C.C.], with the result that he feels far more confident about his ability to answer them if they should arise than he was ten years ago. The Code appears to provide specific answers to a large number of factual situations which commonly arise in sales transactions and to afford the bar a far greater degree of certainty than was ever available under the Sales Act.¹⁶

So far, at least, no deluge of litigation to confirm the fears of its critics, has appeared in the jurisdiction where the Code is in effect.

Possibly, it is too early to tell whether the radical approach frequently taken by the Commercial Code in matters of language, formulation, conceptual scheme and other areas will prove to be merely a clearing away of the disabling undergrowth of the past or whether

¹⁵ Alaska (effective Jan. 1, 1963)
 Arkansas (effective Jan. 1, 1962)
 Connecticut (effective Oct. 1, 1961)
 Georgia (effective April 1, 1963)
 Illinois (effective July 2, 1962)
 Indiana (no effective date yet set)
 Kentucky (effective July 1, 1960)
 Maryland (effective Feb. 1, 1964)
 Massachusetts (effective Oct. 1, 1958)
 Michigan (effective Jan. 1, 1964)
 Montana (effective Jan. 1, 1965)
 New Hampshire (effective July 1, 1961)
 New Jersey (effective Jan. 1, 1963)
 New Mexico (effective Jan. 1, 1962)
 New York (effective Sept. 27, 1964)
 Ohio (effective July 1, 1962)
 Oklahoma (effective Jan. 1, 1963)
 Oregon (effective Sept. 1, 1963)
 Pennsylvania (effective July 1, 1954)
 Rhode Island (effective Jan. 2, 1962)
 Tennessee (effective June 30, 1964)
 West Virginia (no effective date yet set)
 Wyoming (effective Jan. 1, 1962)

¹⁶ Malcolm and Funk, *Pennsylvania and Massachusetts Experience Under the Uniform Commercial Code*, 16 Bus. Law. 525, 533 (1961).

new concepts will produce the disorder in the body of the law anticipated thirteen years ago by Williston. So far the Code, changed in many respects since he reviewed it, seems to have performed remarkably well.

In any event, and whatever the outcome, Samuel Williston's almost unique eminence as a scholar and reformer-systematizer in the fields of sales and contract law, and as the veritable court of last resort for a great body of American commercial transactions, can never be compromised. For it was he who was pre-eminent in the endeavor to codify, improve and rationalize the common law, so necessary in the years when he worked and taught. Even if the statute, which he so vigorously opposed in its then form in 1950, were to be universally adopted, Williston's methodical and searching legal thought will continue to speak through the new law as it did through the old.