EXAMPLES & EXPLANATIONS

买卖与租赁案例与解析

影印系列

Sales and Leases

第三版

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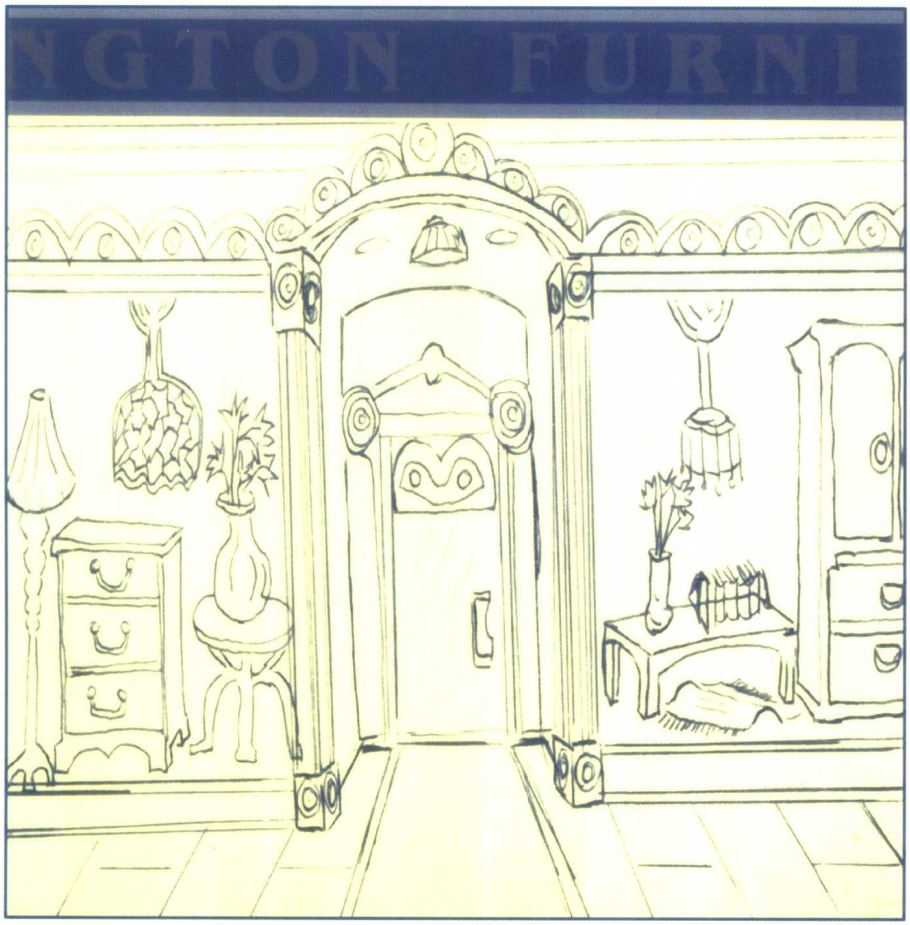
(James Brook)



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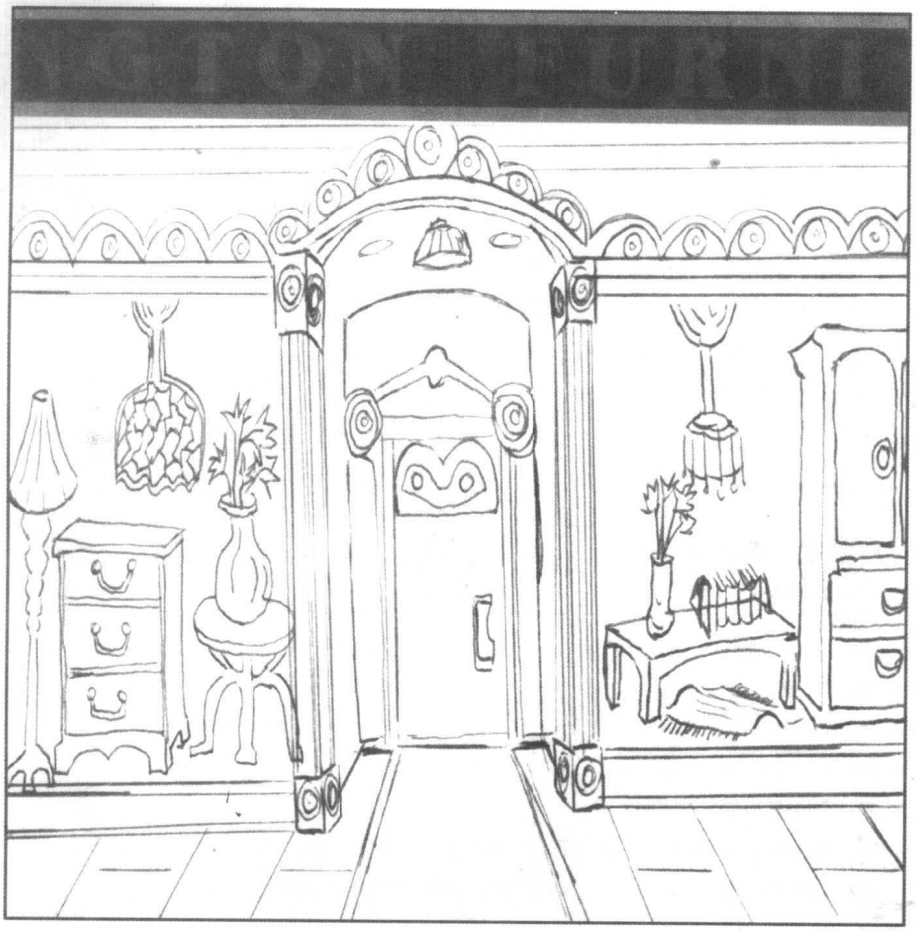

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买卖与租赁：案例与解析

MAIMAI YU ZULIN ANLI YU JIEXI

著　　者：［美］詹姆斯·布鲁克
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总　序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出："为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。"

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要（Emanuel Law Outlines）美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析（Examples and Explanations）由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列（Casebook Series）覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要（Casenote Legal Briefs）美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

SALES AND LEASES

Examples and Explanations

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For Isabelle

Preface

I start with a simple assumption. You come to this book because for one reason or another you want to learn the basic law relating to sales and leases of goods as such transactions are governed by Articles 2 and 2A of the Uniform Commercial Code. You may be trying to pick this up on your own, but more likely you are in a course—either a course devoted distinctly to these topics or a more expansive survey course in Commercial Law that will necessarily devote a great deal of time to them. The book may have been assigned or recommended as additional reading by the professor teaching the course, or you may have come upon it on your own as means of review. Whatever the circumstances, I hope this book is of help. If it is, it will not be simply because you bought it or even because of the considerable energy I put into writing it, but because of the time, energy, and the thought you put into using it. Here are a few basic points you should understand from the outset if you are to make the best use of what I have written and what you have bought.

- This is not a review text. You may find it helpful to think of it as a kind of workbook, giving you an organized way of ***working through*** the various sections, definitions, concepts and controversies that make up the modern law of sale and lease of goods as rendered in Articles 2 and 2A of the Uniform Commercial Code.
- This volume is not a substitute for your own copy of the Uniform Commercial Code (including Official Comments). I will be quoting snippets of the Code from time to time. At other points I may simply suggest that you "recall the rule of §2-607(1)" or "look to §1-201(10)." What you have here should not distract you, however, from the fundamental proposition that the law you are learning is found in, not merely suggested by or illustrated through, the exact language of the Code as it has been enacted into law in the several states. I assume throughout that as you work through the material you will always have at your side and at the ready the primary text for the study of sale and lease of goods, the Code itself.
- The general organization and sequence of chapters follows what is a fairly standard order in which the various topics are taken up in courses on Sales. You should certainly start with Chapter 1 and move on from there. If this book has been assigned or recommended by your professor you will of course follow his or her instructions as to which chapters to look to when and even as to which Examples to do and which to leave for another day. If you are working through the book on your own and trying to coordinate it with your course, you should be able to determine fairly easily which chapters to take up just by the chapter headings, but if you are having any trouble finding where to turn there is help available by Topic in the Index and a Table showing which U.C.C. sections are dealt with, both at the back of the book.

- Each chapter is structured in the same way: an introductory text, a set of Examples for you to ponder, followed finally by my own Explanations of the questions asked and issues raised by the Examples. It is very important that you appreciate that the introductory text does not purport to outline or give a full account of the chapter's topic. This is not the type of book where you are given all the law up front and then asked to apply the rules and principles to the questions that follow. The law you are going to have to apply is to be found in the Uniform Commercial Code which you have right there with you. In some chapters the introductory text can be very brief. In others it goes on for a while. But in any event the introductory text is meant only to set the stage; its purpose is to put you on the best possible course for learning *through the Examples.* In other words if you aren't prepared to go through the Examples thoroughly on your own—if not writing down a carefully constructed answer to each one then at least jotting down an idea or two on how you see the situation and how you expect the Code would deal with it—then there's really not much point in your starting the chapter to begin with.

One final note on the Examples: It will not surprise you if when you get to my analysis in the Explanations you find I cannot always offer a simple yes or no in many cases. I am, after all, a law professor and this subject, like any other you have already studied, has its unresolvable questions, places where the statute seems to be of little or no help, and "subtle" difficulties. On the other hand, don't think just because this is the study of law that the answer to even the most simple question must necessarily be open to argument or subject to competing analyses. Sometimes, perhaps most of the time, a question can and should be answered in a word or two, directly and without any hedging. If the answer is "Yes," you should say "Yes." If "No," say "No." Beyond that, of course, you should go on to say *why*—citing the Code, chapter and verse—you respond as you do. I always give my students in Commercial Transactions courses some rules of thumb to follow, which are in general good advice when dealing with this material, in writing their examination answers:

- Where an answer is given or suggested by a specific section of the Code, make reference to that section.
- Where a particular subsection is relevant, cite the subsection.
- Where a particular word or phrase in the section or subsection is of importance to your answer, identify exactly what that word or phrase is.
- Where an Official Comment answers—or seems to answer—the question, refer to it, reporting as you do whether you have any qualms or questions about the position taken in the Comment.
- Where the answer appears to be dictated by a single fact or a set of facts, make clear what facts those are.

If, as will sometimes be the case, the answer has to be "that depends," say *on what* you see the outcome depending. If you need to know other facts to better analyze the situation, say *whom* you would ask and *what* you would want to know. If the answer seems to depend on how a court would interpret a particular provision or how it would settle a seeming conflict between two provisions, what are the various possible interpretations or resolutions? What argues for one resolution over the other?

As I have said, I hope and expect this book will be helpful. If at the same time you find it stimulating and even mildly entertaining, then so much the better.

James Brook

January 2003

Acknowledgments

I would like to thank Dean Rick Matasar and Associate Deans Steve Ellmann and Jethro Lieberman, who have shown their support for this project in a variety of ways. I would also like to acknowledge the continuing contribution of my staff assistant, Silvy Singh, without whom my workdays would be far more difficult and a lot less pleasant. Thanks as well to my colleagues on the faculty at New York Law School and to the vast numbers of students at that school who have given me the opportunity to practice my teaching methods (and madness) on them over the years. The feedback that I've been given on my classroom work as well as on various parts of these materials, in ways subtle and not so subtle, has been of enormous help even if I have not always recognized it at the time.

There is no question that this book would never have been brought to any kind of conclusion without the enthusiastic support and encouragement of a number of good people at Aspen Publishers. I would particularly like to thank Carol McGeehan, Jim Cohen, and Mei Y. Wang. I also have to single out for special mention Joe Glannon, who was a friend long before either of us even dreamt of going to law school much less making a career out of teaching law. His initial work on the Examples and Explanations series was the genesis for all that followed, including this effort.

Introduction

People have been buying and selling stuff for a long time, and so it should come as no surprise that the law governing such activity has a long and varied history. In this book we will be concerned with the rules governing buying, selling, and leasing of goods as they now stand with each of the states' adoption of Articles 2 and 2A of the *Uniform Commercial Code* (with the notable exception of Louisiana, whose legal system, derived from the French civil Law and not the British common law tradition, has not enacted Article 2). A bit of history, however, will help to put our studies into perspective.

For our purposes, we pick up the story of the sale of goods in medieval England. By the 1300s and 1400s, the system of common law courts acting in the name of the King had already taken shape and their far-reaching powers had been recognized. Disputes involving sales of goods, however, would for the most part not have found their way into this national court system. Such disputes were the province of a separate set, or really a set of sets, of more narrowly focused courts operating at the local level. Such courts were usually to be found in one of the principal market towns or occurring in conjunction with the regional trading fairs that were held on a regular basis at various places in England. Such courts became the specialists in dealing with disagreements between merchants, applying a set of rules that came to be thought of as to some degree a coherent body of rules and principles comprising the *law merchant* or *mercantile law*.

It was only later, during the seventeenth century, that the national system of common law courts began to expand its competence and jurisdiction to include commercial disputes. Eventually the *common law of sales,* which often but not always adopted the reasoning and results of the mercantile law, replaced the older system. Eventually, the distinct set of mercantile courts died out.

So what we characterize as the modern common law of sales is a relatively recent phenomenon. It was only in the middle of the 1800s that there appeared the first general treatises attempting to set out a systematic view of the common law as it related to the purchase and sale of goods. At the very same time, however, one of the grandest features of the common law—its very commonality, the supposed uniformity and predictability that it offered to the country as a whole—was being sorely tested in the United States of America, which is after all one big patchwork quilt of common law jurisdictions. No doubt each of the states (again, with the exception of Louisiana) applied what it saw as the principles of the common law of sales to purchase-and-sale transactions. Similarly, each state applied common law principles to other areas of commercial life. The problem, however, was that as each state's common law jurisprudence in a given field of commercial endeavor was advanced, refined, and further explicated by a steady stream of decisions, it was perhaps inevitable that there would develop a growing disparity among the

common law renderings of the several states. So, in the United States, lawyers (and, not incidentally, ordinary folks going about their daily business) had to become acquainted with, or at least acknowledge that they were subject to different variants of the same common law principles in each of the states.

In many fields of law the steadily increasing divergence, both stylistic and substantive, in the common law renderings of the states was troubling, and not just in a theoretical sense; it made life more difficult. It was perhaps in the arena of commercial endeavor that this lack of uniformity and predictability was felt most keenly. As more and more individuals and firms reached out to enter into contracts and do business in places farther and farther from their home base, it became increasingly apparent that the lack of uniformity of basic commercial law was more than a minor nuisance.

Throughout the nineteenth century pressure was building for a change and some way out of this predicament. One response was the advancement of what is referred to as the "uniform law movement," which also tapped into the growing sentiment in favor of a codification or statutory treatment of difficult areas of the law. At the end of the last century a group was formed by the name of the National Conference of Commissioners on Uniform State Laws (or more succinctly, the "Uniform Law Commission," or NCCUSL). The Uniform Law Commission, a kind of quasi-government group, is made up of representatives of each of the states. These representatives are chosen by different methods in different states, usually by the governor acting alone or in conjunction with the state legislature. *The Commission itself can make no law.* Its role is to investigate, argue over, and eventually formulate and adopt recommended legislation—the "Official Versions" of its recommended Uniform Acts are then forwarded to each of the states for consideration. The fate of any of the recommended Uniform Acts is up to the legislative processes in each of the states. The idea—and it's a wonderful one when it works—is that if each and every one of the states adopts the suggested legislation, and adopts it in exactly the Official Version form, then blessed uniformity and predictability has been achieved. You, I, and everyone else for that matter will have no trouble knowing the applicable rules in each of the many jurisdictions, since we will have the benefit of knowing we are working with the identical statutory law no matter where the problem arises or which state's law is to be applied.

Among the earliest of the Uniform, Acts was the Uniform Sales Act, drafted for the Uniform Law Commissioners by the eminent Professor Samuel Williston of Harvard. Promulgated in 1906 and later amended in 1922, the Uniform Sales Act was eventually adopted in more than 30 states. By the late 1930s and into the 1940s the feeling began to grow, however, that this Uniform Sales Act, along with several other Uniform Acts covering other aspects of commercial law, were in need of revision and updating. Teamed up by this time with the American Law Institute (whose work you are no doubt familiar with in connection with the various Restatements of common

law topics), the Uniform Law Commissioners determined that the various pieces of recommended uniform commercial legislation would be reconfigured into a single *Uniform Commercial Code*. The *Uniform Commercial Code* (UCC) would bring together, in substantially revised form, a number of previous uniform acts as well as some topics not previously subjected to the uniform law approach.. The noted Professor Karl Llewellyn of Columbia University was appointed Chief Reporter (a kind of editor-in-chief) of the project.

The history of the drafting and redrafting, politicking, name-calling, and eventual set of compromises that led up to the adoption of the Uniform Commercial Code in its 1962 Official Version is a story unto itself. Suffice it to say that by 1968, this Official Version of the Code had been adopted essentially intact by 49 states, the District of Columbia, and the Virgin Islands. Guam came aboard in 1977. Article 2 of this *Uniform Commercial Code* was the successor of the Uniform Sales Act, dealing with the purchase and sale of goods.

Article 2 of the UCC has stood the test of time fairly well. Unlike most of the other articles, which have by this time been amended or completely revised at least once, the version of Article 2 with which we work today is basically that drafted in the 1950s and enacted by the states in the 1960s. The one significant change in the Code that we will have to deal with (beginning in Chapter 2) is the creation of a new and distinct Article 2A, dealing with the lease of goods, which made its way into the Official Version of the UCC in 1990 and was quickly adopted by the states. It is only fair to warn the student of sales and leases, however, that a wholesale revision of Article 2 is probably forthcoming.

In 1988 the bodies responsible for the upkeep of the Code, NCCUSL, and the ALI, appointed a study commission, the primary recommendation of which was that Article 2 was in need of revision. A drafting committee was appointed in 1991 to undertake the project and has been hard at work ever since.

The process has not been the smoothest. While the successive tentative drafts produced by this committee cleared up many problems with the present version of Article 2, other problems and controversies emerged. The original drafting committee, finding its ambitious proposal rejected (or perhaps merely misunderstood) to a large degree by the powers-that-be, felt honor-bound to resign. A new drafting committee was appointed to its place and given a much more modest change. Some changes now contemplated in the language and substance of Article 2 seem fairly certain to make their way into any eventual revision if, that is, one can be agreed to. Other changes, small and not so small (at least to those arguing over them) are yet to be fully resolved. I have tried to deal with this situation with what I have termed "Revision Previews." Set off in boxes, generally at the end of each chapter, they give at least some indication of what the anticipated Revised Version of Article 2 will look like and how it will deal with some distinct issues of

consequence. You may find these of interest and will certainly want to look at them if you are studying with a professor who makes reference to "the revision" of Article 2.

The Revision Previews in this edition are based on the draft of a Revised Article 2 produced for, and actually given final approval by, the Annual Meeting of NCCUSL held in the late summer of 2002. It is the most recent draft we have at hand. Be advised, however, that even though this draft has gained the approval of one of the sponsors of the Uniform Commercial Code, it has not, as of this writing, been considered (and certainly not approved) by the other. The ALI has yet to render a decision on this most recent draft. If—a big if, at least at this point, and not just some technicality—the ALI does approve this draft with no modifications, then it would indeed become a part of the Official Version of the UCC and become the Revised Article 2 which we have all been waiting for, now for almost 15 years.

It is important to remember, however, that even if a Revised Article 2 has been adopted by both NCCUSL and the ALI at some point, say as of the time you are reading this, it will still not be the law of any jurisdiction just because it has been approved for inclusion in the Official Version of the Uniform Commercial Code promulgated and endorsed by these two august bodies. The real test of any revision of this or any article of the UCC is whether it is adopted by the states, and ideally all of the states, after some reasonable period of time. There exists doubts in the minds of many as to whether any, much less all or even a significant majority of the state legislatures will rush to adopt any new version of Article 2 even under the greatest prodding to action by the revision's sponsors. In short, any "Revised Article 2" is now a work-in-progress, and seems likely to remain so for some time into the future. How the revision enterprise will eventually play itself out when all is said and done only the boldest mind would try to predict. I am not of such a mind.

A Note on Article 1

The National Conference of Commissioners on Uniform State Laws and the American Law Institute formally adopted a revised version of Article 1 of the Uniform Commercial Code in 2001. This Revised Article 1 is now therefore, by the sponsors' decree, part of the Official Version of the UCC. As of this date, however, it has not been adopted to replace what we will forevermore call the Original Article 1 in any state. (To be fair, the revision has been adopted in the Virgin Islands.) I have for that reason chosen to continue citing to the Original Article 1 in this edition. This version of the article should be available to you in any copy of the Code you might be studying from—either at the very front just before Article 2 or elsewhere if the editors of the particular statutory supplement have chosen to put Revised Article 1 in the front and move the original to an appendix.

A simple rule: To figure out which version of Article 1 you have before you at any given moment, just look at §1-102. If it is titled Scope of Article you are looking at the Revised Article 1. If that section purports to be about the Purposes of the article, then what you've got is the Original Article 1, the version that has been part of the Code since its introduction in the 1960s and the version that is still on the books in all states, at least for the moment.

If you are studying with a professor who is "using" the Revised Article 1, this should not cause you any real difficulty. For all practical purposes, the parts of Article 1 we make use of in this volume are in substance the same in both versions; only the numbering has been slightly changed to confuse the innocent. While I will be citing to the Original Article 1 (as will all the cases and earlier authorities you may be reading), you should be able to find the parallel cite in the Revised Article 1 with little difficulty just by browsing through the table of contents to that new version.