THE SCOPE OF ARTICLE 2 OF THE U.C.C.: CLASSIFICATION OF CONTRACTS RELATING TO THE SALE OF GOODS

Article 2 of the Uniform Commercial Code "applies to transactions in goods." The apparent simplicity of this statement vanishes when one asks what is meant by transactions, a word with broader meaning than "contracts relating to the sale of goods." Certain sections of the Article do make special mention of a contract for the sale of goods, and thus it would seem that those sections are restricted to such contracts. However, numerous other provisions make no such reference and it has been suggested that they may apply to any type of contract. Exactly what contracts are within the scope of Article 2 is a question which has arisen particularly in the area of "hybrid" contracts—those contracts which involve both

1. U.C.C. § 2-102 (All citations to the U.C.C. in this article will be to the 1972 official text unless otherwise indicated).
2. "Presumably the use of 'transactions' rather than 'contracts relating to the sale of goods' was intentional, designed perhaps to encompass leases, bailments or similar types of contracts." Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 YALE L. J. 199, 200 n.4 (1963). A firmer stance is taken by another commentator: "It is now clearly established that the reach of Article 2 goes considerably beyond the confines of that type transaction which the Code itself defines to be a 'sale' . . . ." 3 BENDER'S U.C.C. SERVICE, DUSENBERG & KING, SALES AND BULK TRANSFERS § 1.03 (4).
3. See, e.g., sections 2-201 (statute of frauds); 2-204 (formation in general); 2-305 (open price term); 2-313, 2-314, 2-315 (warranty provisions). But see, 3 BENDER'S U.C.C. SERVICE, DUSENBERG & KING, SALES AND BULK TRANSFERS § 1.03 (4): "[I]t is the warranty sections of the Article which are most often at issue [in cases deciding the scope of Article Two], and yet, in each and every one of those sections a specific reference is made to either 'sale,' 'seller,' or 'buyer.'"
4. See, e.g., sections 2-202 (parol evidence); 2-206 and 2-207 (offer and acceptance); 2-209 (modifications); 2-210 (assignments of rights and delegations of performance); 2-304 and 2-309 (price and delivery terms); 2-302 (unconscionability); 2-303 (contractual allocations of risk); 2-610 and 2-611 (anticipatory repudiation); 2-720 (interpretation of language of rescission); 2-718 and 2-719 (contractual variation of remedy). See Peters, supra note 3, at 200 n.4. Cf. 1 N.Y. LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 355-56 (1955) wherein Professor John Honnold points out that the "scope" section did not appear in the 1952 Official Draft and the Commission expressed concern that those sections not specifically referring to "contracts for sale," "buyer" and "seller" might be construed as applying to all contracts. Subsequently, section 2-102 was added to Article 2 and Honnold felt it would meet the Commission's objections.
goods and distinct non-goods elements. The problem with such contracts may be illustrated by the following situations.

A seller has contracted with a buyer for the sale of a food store. The seller learns that his buyer may not be able to purchase the store because of financial difficulties. If the seller can establish that the transaction falls within the scope of Article 2, he can rely on the Code's right to adequate assurance of performance, a right that did not exist at common law. The difficult issue is whether the sale of a going concern can be characterized as a contract for "goods," thereby invoking Article 2.

As another example, suppose a contractor agreed to blacktop a homeowner's driveway with payment to be made in full upon completion of the work. Before completion, the parties agreed to payment in several installments, but the contractor, nevertheless, demanded the full amount upon completion.

The contractor now argues that the agreement changing the payment terms is invalid for lack of consideration. However, if the homeowner can establish the contract is one for goods and thereby governed by Article 2, he may rely on the Code provision that no consideration is necessary to make binding a modification of a contract. Again, the problem is whether the contract may be classified as one for "goods."

The classification problems which arise in factual patterns similar to those in the above examples have met with varying judicial responses. This comment examines these responses and attempts to assess them in light of the apparent intention and purpose of the Code.

THE SALE OF A BUSINESS OR GOING CONCERN

Frequently, in the sale of a business, more is being transferred

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5. U.C.C. § 2-609(1) provides, in pertinent part:
   When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

6. U.C.C. § 2-209(1) states:
   An agreement modifying a contract within this Article needs no consideration to be binding.

At common law, consideration for modification of a contract was required. However, the requirement varies from jurisdiction to jurisdiction. See, e.g., Heggen v. Clover Leaf Coal & Mining Co., 217 Iowa 820, 253 N.W. 140, 142 (1934) (modification of contract must be supported by valid consideration) and Selig v. Wunderlich Contracting Co., 160 Neb. 215, 69 N.W.2d 861, 867 (1955) (consideration not required to modify contract prior to breach).
than physical, movable assets such as inventory. The subject of the contract may include real estate, fixtures, and goodwill. The problem of whether the sale of all these elements which constitute an entity is covered by Article 2 has been treated by a small but interesting group of cases. The leading case is Foster v. Colorado Radio Corp., a breach of contract action in which the main issue was the proper measure of damages.

The buyer, Foster, who allegedly breached a contract to purchase a radio station, had argued that Colorado Radio was not entitled to the measure of damages stipulated by the trial court since it had failed to notify her, as required by section 2-706 (1) and (3) of the Uniform Commercial Code, of its resale of the station. The trial court rejected the contention, apparently on the ground that the sale was not one for goods. The Tenth Circuit agreed that the license, goodwill, real estate, studios, and transmission equipment were not “goods” because they were not “movables,” but it held that the office equipment and furnishings were “goods.”

The result of this apportionment was that Colorado Radio was entitled to the Code’s measure of damages for that portion of the contract not covering “goods,” but denied recovery for the office equipment and furnishings.

In several cases which relied on Foster, such splitting of the contract was not necessary. For example, the Oregon Supreme Court in Melms v. Mitchell held that in a contract for the sale of a going concern, the U.C.C. applied to “items of tangible property which are within the statutory definitions of goods,” i.e., movables. The contract, entitled “Sale of Wood Business,” had itemized equipment and inventory of cut wood. Based on this itemization, the court concluded that the entire contract was for the sale of “goods.” The Code being applicable, the buyer was able to revoke acceptance under section 2-608.

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7. 381 F.2d 222, 224 (10th Cir. 1967).
8. Id. at 225.
9. Id.
10. Id.
11. Id. at 225-26.
12. Id. at 226.
15. Id. at —, 512 P.2d at 1340.
Unlike Melms, certain factual patterns may lead to a classification of a contract as something more than a sale of “goods.” Where the subject matter of the contract contains “non-goods” elements, the issue sometimes does not lend itself to application of Code provisions to the “goods” element and of common law principles to the non-goods element. Hence, the Foster approach of apportionment may not be feasible.

Such apportionment was found inappropriate in Field v. Golden Triangle Broadcasting. There, the seller allegedly breached an agreement to sell two radio stations to plaintiff Field. One of seller’s arguments was that he was entitled to adequate assurance of performance under U.C.C. § 2-609 when he found buyer’s financing arrangements to be questionable. In view of the claim being asserted, it would have been awkward for the court to follow the lead of Foster and grant seller a right to adequate assurance as to one portion of the contract and not the other. Rather than dealing head-on with this dilemma, the court simply held that the contract as a whole was not meant to be a sale of goods, though it included “movables.” It distinguished Foster by pointing out that only 4.6% of the total contract price in Field represented “goods” and that those physical assets “are of little significance to either party when separated from the contract.”

Clearly, the “goods” were not the center of the dispute but that fact hardly distinguishes Field from Foster, where the value of the “goods” constituted only some 5-10% of the sale price. The distinction between the two cases lay in the Code provisions invoked. Thus, Field raises the question of whether the courts ought to split the subject matter of contracts into goods and non-goods elements in determining whether Code principles should apply to commercial transactions.

(1974) (U.C.C. § 2-607 held applicable to the sale of a retail sporting good business since inventory of sporting goods “must certainly be included within the broad definition of goods.”); Parker v. Johnston, 244 Ark. 355, 426 S.W.2d 155, 157-58 (1968) (Court held in favor of a buyer’s right to rescind a contract based on prior case law but found the Code’s right of revocation applicable where the “business consisted essentially of 33 juke boxes, 22 pinball machines and 38 cigarette machines.”)

18. Id. at —, 305 A.2d at 695.
19. Id. at —, 305 A.2d at 696.
20. 381 F.2d at 226.
21. One commentator has suggested that the Code should govern the entire contract: “While the direct applicability of the Uniform Commercial Code to remedial problems arising out of the sale of a business is quite limited, the Code—especially Article 2—must nevertheless be regarded as
Although no court has completely disregarded this classification process, the Third Circuit has suggested a more satisfactory approach than that of Foster or Field. Rather than considering whether specific portions of the contract qualify as goods, the court in DeFilippo v. Ford Motor Co.,22 looked to the "totality of circumstances"23 to determine the nature of the contract. The issue in DeFilippo was whether an alleged contract, not signed by defendant Ford, was subject to the Code's Statute of Frauds.24 According to the disputed instrument, plaintiffs were to purchase the assets, less realty, of an automobile dealership from Ford. The court had little difficulty in holding that the contract was essentially one for the sale of inventory items and that plaintiff's reliance on Field was inapposite.25

Implicitly criticizing Field, the court rejected a "view of mechanical technicality or of mathematical nicety" and suggested that

the reasonable totality of the circumstances should control the characterization of the contract for sale. If viewed as a whole, it can be concluded that the essential bulk of the assets to be transferred qualify as "goods," then it is appropriate to consider the transaction a "contract for the sale of goods."26

It also found the Foster approach of apportionment unsatisfactory because segregating "goods" assets from "non-goods" assets "would be to make the contract divisible and impossible of performance within the intention of the parties."27 In finding the contract for the sale of goods, the court outlined these salient factors: the assets consisted mostly of inventory; no title to real estate was to pass; and no value was assigned to goodwill or the value of the business as a going concern.28

While the Foster-DeFilippo line of cases demonstrates no agreement on characterization of "sale of business" contracts, the cases do deal directly with the issue of classification of "hybrid" contracts. Such a direct approach is not to be found in cases not in-

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22. 16 U.C.C. REP. SERV. 1199 (3rd Cir. 1975).
23. Id. at 1206.
24. Id. at 1202.
25. Id. at 1204. In DeFilippo, the assets to be sold were listed and consisted mainly of inventory and equipment items. In Field, the assets being transferred were mainly realty, licenses, and good will.
26. Id. at 1206.
27. Id.
28. Id.
volving a sale of a business. These involve the traditional dichotomy between performance of service and sale of goods. The importance of the distinction has especially been apparent in cases involving the Statute of Frauds. In such cases, characterization of the contract as being for services avoids the statute, but if the contract is for the sale of goods, the statute applies. Although some commentators have suggested that the distinction should be restricted to cases involving the Statute of Frauds, courts nonetheless continue to grapple with the problem in other situations.

FORMATION AND MODIFICATION OF CONTRACTS

The distinction between contracts for goods and those for services in the area of contract formation and modification can be significant. This consequence is the result of changes to the common law adopted by the U.C.C. For example, section 2-205 modifies the common-law rule that an offeror can withdraw an offer for which he has received no consideration; section 2-207 alleviates the hazards of the "mirror image" rule whereby terms in an "acceptance" which varied from those in the offer made the purported acceptance a counteroffer; and section 2-209 eliminates the

29. See Note, "Sale of Goods" or "Work, Labor and Materials"—What is the Distinction?, 43 IOWA L. REV. 95 (1957); see also 3 WILLISTON, CONTRACTS §§ 508, 509 (3d ed. 1960). 30. "It would be indeed unfortunate if the strained construction which has been adopted in order to evade the Statute of Frauds should be applied in other classes of cases." 3 WILLISTON, SALES § 563 (rev. ed. 1948). 31. U.C.C. §§ 2-201 through 2-210. 32. An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror. U.C.C. § 2-205.

Although the "service or sale" question does not appear to have arisen in the context of section 2-205, pre-Code cases frequently involved construction contracts where a general contractor would use a subcontractor's offer in determining his bid. For a discussion of the problem of firm offers in the context of the construction business and of the drafters' intention to meet this problem with section 2-205, see Schultz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry, 19 U. CHI. L. REV. 237 (1952).

33. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. U.C.C. § 2-207 (1).
requirement of consideration to make binding a modification of a contract.\textsuperscript{34}

Courts frequently determine the applicability of Code provisions based on a categorization of the contract as one for services or for goods without explanation of its rationale for such categorization. For example, one court found section 2-207 applicable to a contract to design, furnish, and provide necessary engineering services for an earth-moving conveyor system,\textsuperscript{35} but another found Article Two's provisions on assignment not to be controlling in a contract to install a heating and air-conditioning system.\textsuperscript{36} On the contrary, another court held a contract to install an air-conditioning system subject to the "no consideration" provision of section 2-209.\textsuperscript{37} In none of these cases did the particular court discuss its reason for finding the Code applicable or not.

The Illinois Appellate Court, in \textit{J. \& R Electric of J.O. Mory Stores, Inc. v. Skoog Construction Co.},\textsuperscript{38} did directly address the issue of whether a subcontract to provide labor and materials was within the scope of Article Two. There, the main contract for construction of a building called for the general contractor to purchase a switchgear. The general contractor subcontracted electrical work to the plaintiff who was to receive monthly payments on the basis of cost information supplied by the subcontractor. After the plaintiff purchased and installed a switchgear, but failed to include its cost in his monthly report, he sued the prime contractor for its price. He claimed that a letter from the contractor constituted a modification of the payment terms in the original contract.\textsuperscript{39} The contractor rebutted that the alleged modification must fail for lack of consideration.\textsuperscript{40} The Appellate Court agreed with the contract-
tor that section 2-209, which does not require consideration for contract modification, did not apply because the contract was not one for goods.\textsuperscript{41}

In finding the contract to be one for services rather than goods, the court focused on the word "contract" in section 2-209. The definition of "contract" in section 2-106 states that contracts are limited to the sale of goods.\textsuperscript{42} It referred to the definitions of "contract to sell goods" and "sale of goods" in the Uniform Sales Act since the Code was considered "basically a reenactment, modification and expansion of the Uniform Sales Act."\textsuperscript{43} It then found dispositive a pre-Code case which had held a contract for manufacture and installation of a marquee on a building was not a contract for the sale of goods.\textsuperscript{44}

The reasoning could have been more convincing. The very case which the court cited in support of its view that the Code did not vitiate the Uniform Sales Act also stated that the Code was to be liberally construed. That case held that the Code's policies should be applicable to "subject matter which was not expressly included in the language of the Act."\textsuperscript{45} Therefore, while a construction contract is not literally a contract for the sale of goods as defined by section 2-106, it conceivably is a "transaction in goods" within the scope of Article Two. At least by concluding the controversy centered in a "transaction in goods," the court could have addressed the real issue—whether the disputed letter amounted to a modification of the original contract.

**BREACH AND REPUDIATION**

The goods-services distinction carries over to the issue of breach and repudiation. Courts have concentrated on this distinction several times in determining whether the Code's right to adequate assurance of performance should apply in a given situation, even though some commentators argue that this Code-created right

\textsuperscript{41} Id.

\textsuperscript{42} Id. "In this Article unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods." U.C.C. § 2-106(1).


\textsuperscript{44} Id. at —, 348 N.E.2d at 477, referring to Continental Ill. Nat'l Bank v. National Casket Co., 27 Ill. App. 2d 447, 169 N.E.2d 853 (1960)).

should be extended to contracts which are not strictly for the sale of goods. 46

The right has been allowed where the dispute involved a subcontractor’s failure to install kitchen cabinets as agreed, 47 and its applicability was acknowledged in an action by a designer and fabricator of a water tank against the buyer who allegedly repudiated the contract to construct the tank. 48 In discussing the applicability of the Code in the latter case, the court commented:

[T]he scope of coverage of “goods” is not to be given a narrow construction but instead should be viewed as being broad in scope so as to carry out the underlying purpose of the Code of achieving uniformity in commercial transactions. The Code, which by its own terms, section 1-102, is to be liberally construed, should be uniformly applied to achieve its purposes. 49

Particularly illustrative of possible judicial paths which may be taken in addressing the goods-services problem is Schenectady Steel Co. v. Bruno Trimpoli General Construction Co. 50 The seller had contracted with the buyer to furnish and erect steel beams for a bridge which the buyer was building. After the seller encountered difficulties in production, the buyer demanded, to no avail, the seller's completion schedule and then cancelled the contract. 51 In holding such cancellation justified after the seller’s failure to give adequate assurance of performance, the trial court treated the transaction as a contract for the sale of goods subject to the U.C.C. 52 On review, the Appellate Division concluded that the Code did not apply to the contract 53 because the predominant feature of the contract was the rendition of services. After a cursory reference to the terms of the contract, which required the seller to “furnish and erect structural steel,” the court in conclusory fashion found the “objective of the parties was . . . clearly to secure the erection of struc-


48. Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 580 (7th Cir. 1976) (however, buyer found not within protection of § 2-609 because no “reasonable grounds for insecurity” existed. Id. at 581).

49. Id. at 580.


51. Id. at —. 350 N.Y.S.2d at 921-22.

52. Id. at —. 350 N.Y.S.2d at 922. See note 5 supra.

53. 43 App. Div. 2d at —. 350 N.Y.S.2d at 922-23 (1974). However, the Appellate Division affirmed the trial court judgment on the basis of common law principle of “timeliness.” The court held that the buyer had notified the seller that time was an essential element of the contract and
tural steel for the bridge." It said the "transfer of the title to the steel [was] a mere incident of the overall transaction." Another Justice strongly disagreed with the majority's view on the applicability of the Code. He found the sale of the steel to be an "integral aspect" of the contract because it was material upon which subsequent work was to be performed, not material upon which a service already had been performed. Through this reasoning, he found the predominant purpose of the contract to be the sale of the goods.

_Schenectady Steel_ points out the difficulty in avoiding the venerable distinction between contracts for services and contracts for the sale of goods. Secondly, it shows that the "predominant feature" test, which seems to have been devised fairly recently, may not be that much more satisfactory than traditional tests applied to the service-or-sale problem. These tests were the so-called "English Rule," or Chattel Rule, which looked to whether the transaction ultimately resulted in a transfer of goods, and the

then when the seller failed to perform within a reasonable time the buyer was justified in cancelling.

54. Id. at —, 350 N.Y.S.2d at 923.
55. Id. at —, 350 N.Y.S.2d at 923. The cases upon which the court relied for its holding do not provide particularly strong support. One was Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 796 (1954), which denied the applicability of warranty to a blood transfusion. Clearly, such a case involves social policy considerations and should not be determinative in nonwarranty cases. The other case, Ben Constr. Corp. v. Ventre, 23 App. Div. 2d 44, 257 N.Y.S.2d 988 (1965), included a dissent from the Presiding Justice who viewed the contract, which was to install a swimming pool, as "primarily a sale of a swimming pool with an incidental agreement to install." Id. at —, 257 N.Y.S.2d at 990.
56. 43 App. Div. 2d at —, 350 N.Y.S.2d at 924 (concurring opinion). See also Mercanti v. Persson, 160 Conn. 468, 280 A.2d 137 (1971), which held that the Code's risk of loss provisions applied to a contract to construct a mast for buyer's yacht.
57. Id. at —, 350 N.Y.S.2d at 924, 925.
58. See text at note 29 supra.
60. See Lee v. Griffin, 121 Eng. Rep. 716 (K.B. 1861) in which Blackburn J. held that a contract to manufacture a set of false teeth and to fit the patient with them was a contract for the sale of goods. See also 2 A. CORBIN, CONTRACTS § 476 (1950); 3 WILLISTON, CONTRACTS § 508 (3rd ed. 1960).
Massachusetts or Labor Rule, generally followed in the United
States, which considered whether a workman was “to put materials
together and construct an article for the employer.” 61

The shortcomings of the “predominant feature” test were more
directly related in Bonebrake v. Cox. 62 The court had to decide
whether a contract for the sale and installation of bowling equip-
ment was subject to the Code provisions on acceptance of non-
conforming goods. 63 One party asserted the warranty cases, out of
which the “predominant feature” test developed, as authority for
categorization of sales or service contracts. The court, however,
found warranty cases involve “widely variant factual and policy
consideration[s].” 64 It rephrased its test as follows:
The test for inclusion or exclusion is not whether they are
mixed, but, granting that they are mixed, whether their
predominant factor, their thrust, their purpose, reasonably
stated, is the rendition of service, with goods incidentally
involved . . . or is a transaction of sale, with labor in-
cidentally involved . . . . 65

The Bonebrake test has been cited favorably in subsequent
cases 66 and does have the value of being a formulation enunciated
outside the context of the Statute of Frauds and warranty cases.
But, as Schenectady Steel 67 demonstrated, such a test can easily
be used as a conclusion rather than as an aid to analysis.

Neither Bonebrake, nor apparently any other case, has held
the distinction between services and sales to be of diminished rele-
vance outside the area of Statute of Frauds and warranty cases and
looked instead to other factors to determine whether the Code
should be applicable. However, one court seemed to question the
classifications when it remarked: “As long as the distinction, how-
ever arbitrary, exists, between classes of contracts the Court must
sort out the relevant factors in order to characterize the contract
in issue.” 68

62. 499 F.2d 951 (8th Cir. 1974).
63. Id. at 955-56.
64. Id. at 960.
65. Id. As examples of a contract for the rendition of services and
one which is a transaction of sale, the court cited a Statute of Frauds case
and a warranty case.
66. See, e.g., Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor
Water Co., 532 F.2d 572, 580 n.6 (7th Cir. 1976); Cleveland Lumber Co. v.
1971). The court went on to find a contract to print and bind a book to be
a contract for work and labor and not a sale. Cf. Lake Wales Publishing
"Hybrid" contracts—both those for the sale of a going concern and those for service and sale—have presented the courts with two inquiries. The first is whether the Code is applicable at all to the contract. The second is in what manner should the Code be applied. The first of these inquiries has involved the courts in a classification process which in general can be characterized as conclusory and inconsistent. The second has brought the suggestion that the Code may be applied only partially to a contract, a suggestion which has led to anomalous results.

The problems and confusion surrounding the above inquiries prompt the question of whether either inquiry is necessary or appropriate in most cases. For example, there appears to be no good reason for maintaining the distinction between service and sale outside the area of Statute of Frauds and warranty problems. Force of history rather than logic seems to keep the distinction alive. The more pertinent inquiry would seem to be whether the transaction is one to which Code principles should apply. If so, the Code governs the entire contract.

There is recent authority for the view that Code principles should be applied uniformly to commercial transactions even when a particular transaction does not fall literally within Code definitions. This is certainly the preferable view if one considers that the drafters of the Code intended that the decisionmaking process be based "directly on the merits of a problem," not on "selection among pigeon-hole categories constituting predetermined answers to the question at issue." Likewise, if a code represents a "preemptive, systematic, and comprehensive enactment of a whole field of law," then courts should consider it "sufficiently inclusive and comprehensive to be governing but felt the Code provisions should be applied anyway.

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70. See text at note 17.


independent to enable it to be administered in accordance with its own basic policies. As one of the principal drafters of the Code remarked:

A "code"... is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law; the pre-Code common law is no longer available as an authoritative source.74

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