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Article Two: Sales

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ARTICLE TWO: SALES

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A brief explanation of the Sales Article of the Uniform Commercial Code is practically a contradiction in terms. The Article itself consists of some one hundred and four sections covering, with the comments of the draftsmen, almost one-fourth of the 732 pages contained in the official text of the Code. In the face of this wealth of official Code material, one is tempted to let it speak for itself—and, indeed, the practitioner would be well advised so to approach the subject. But, there are some things that can be said as an aid to consideration of the text, and, hopefully, some of them will be said here. No attempt is made here to explain all of the sales law set forth in the Code.¹ This commentary will be limited to one man's opinion of the spirit of the Code, its new concepts and approaches, and to a meager discussion of some of the more important and controversial provisions of the new law. Finally, the amendments made by the North Carolina legislature to the official text of Article 2 will be discussed.

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¹ One useful volume covering most of the provisions of the Sales and Bulk Sales Articles of the Code with some discussion of pre-Code law by way of contrast in HAWKLAND, SALES AND BULK SALES (1958). This paperback book consists of 176 pages and is published by the American Law Institute as a project of the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. Amplification of Professor Hawkland's work on sales law can be found in volume 1 of his TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (1964) [hereinafter cited as HAWKLAND] also published by the American Law Institute. For the convenience of the practitioner, most citations in this article to outside reading will be to these two works.

Perhaps the most dramatic change effectuated by the adoption of Article 2 in this state is the simple fact that North Carolina now has, for the first time, a statutory body of law pertaining to sales transactions. Although the North Carolina Supreme Court has, from time to time, virtually adopted certain sections of the Uniform Sales Act by judicial decision,² the state has never enjoyed the benefit that has accrued to the thirty-seven jurisdictions in this country that adopted the Uniform Sales Act in its entirety. As a result of legislative inaction, the pre-Code sales law of this state has been aptly characterized as "a very uneven piecemeal pattern made up of relatively narrow points of law."³ In this light, the adoption of Article 2 should not require a radical reorientation on the part of the North Carolina practitioner to the new approaches of the Code, since the profession has had very little to start with in the area of Sales until this time. It is thus apparent that some real advantages will accrue to the state by virtue of the very existence of a coherent, comprehensive body of statutory law dealing with sales. Indeed, it seems appropriate that this legislation comes at a time when such gigantic strides are being taken from an essentially rural to a commercially oriented state.⁴

I. THE INHERENT PRACTICALITY OF THE CODE

One of the most reassuring things that can be said to a novice of the Code is that it is an exceedingly practical document keyed to modern commercial practices. Looking at its history, one might say that it had its origin in the market place. Indeed, it not only attempts to incorporate the actual business practices of modern businessmen; it is presumably drawn in such a way as to encompass their changing business practices.⁵ One of the more exuberant expressions of this underlying notion, as specifically applied to Article

² See, e.g., *Potter v. National Supply Co.*, 230 N.C. 1, 51 S.E.2d 908 (1949), in which the court, commenting on section 12 of the Uniform Sales Act, said the following: "Our Legislature has not incorporated the Uniform Sales Act in our statutory law, but the accuracy of the lucid and succinct definition of an express warranty embodied in the Act is fully supported by repeated decisions of this Court."

³ LEGISLATIVE COUNCIL, NORTH CAROLINA ANNOTATIONS: THE UNIFORM COMMERCIAL CODE ix (1965).

⁴ In this regard, it is interesting to note that a strong appeal for the adoption of statutory sales law was made more than thirty years ago. See *Proposals for Legislation in North Carolina*, 11 N.C.L. REV. 51, 68 (1932).

⁵ See G.S. § 25-1-102(2).

2, puts it in this way: "This article of the Code perhaps more than any other, represents a triumph of the business community over the legal profession."⁶ Whether or not one wishes thus to characterize the sales provisions of the Code, one may at least say that they embody an essentially pragmatic approach that should make the dialogue between businessmen and their counsel easier and considerably more meaningful.

Three examples of the pragmatic approach underscoring the spirit of Code sales law should suffice. First of all, the lawyer is probably accustomed to thinking solely in terms of the use and abuse of contracts in the market place. Seldom, if ever, does he give any thought to what has been called the "non-use of contracts" or "non-contractual relations in business."⁷ Such practices, however, are apparently widespread, and the law must deal with them, a job that it has not always done well. For example, under pre-Code sales law, when one had the horrendous task of straightening out the legal problems arising out of the use of conflicting printed forms—one of the most common results of the above-mentioned practices—it was quite possible to conclude that there never had been a binding contract, or, if there were a contract it was impossible to ascertain its terms.⁸ The Code takes cognizance of such practices and comes directly to grips with them, making it possible

⁶ Ryan, *Article 2: Sales*, 15 OKLA. L. REV. 249 (1962).

⁷ See Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, 9 PRAC. LAW 13 (1963); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMER. SOC. REV. 55 (1963).

These excellent articles contain a very vivid exposition of the practices of businessmen who frequently deliberately bypass the legal contractual elements of their business relationships. As a brief preview of Professor Macaulay's incisive observations, consider this paragraph from his second article at 28 AMER. SOC. REV. 60:

A large manufacturer of packaging materials audited its records to determine how often it had failed to agree on terms and conditions with its customers or had failed to create legally binding contracts. Such failures cause a risk of loss to this firm since the packaging is printed with the customer's design and cannot be salvaged once this is done. The orders for five days in four different years were reviewed. The percentages of orders where no agreement on terms and conditions was reached or no contract was formed were as follows:

1953	75.0%
1954	69.4%
1955	71.5%
1956	59.5%

⁸ See HAWKLAND, SALES AND BULK SALES 9; 1 HAWKLAND §§ 1.05-.090304; Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, 9 PRAC. LAW 13, 19-25 (1963).

to resolve these relatively complex problems in a fairly simple fashion.⁹ The Code's advantage over pre-Code law in this area is not solely that it has facilitated the resolution of what formerly was an almost insoluble kind of problem, but that it has recognized a very real problem of the market place and dealt with it in such a way that makes sense for continuing business relationships.

A second example of the Code's pragmatic approach is its wholesale de-emphasis of the concept of "title" or "property" as a key to the solution of most sales disputes. Under pre-Code law, the first step to the resolution of most sales disputes has been to find who had title at the crucial moment, a matter that was supposed to be determined by ascertaining the intention of the parties. To the businessman that approach must have appeared to be nothing short of sheer nonsense. When seller is dickering with buyer for a deal, he is unlikely (unless coached in advance by experienced counsel) to bargain as to who is to have title at any particular stage in the transaction. He may—though even this may be unlikely—be inclined to bargain about who is to bear the risk of loss before the goods are delivered, but he is not likely to equate that with who has title. Under the Code, the resolution to sales disputes starts not with the search for some fictional intention pertaining to who has title, but with the specific question posed by the facts at hand: who bore the risk of loss, can seller sue buyer for the price, etc.

A final example of the Code's pragmatic approach is its assumption that it is fair to treat some sales problems differently when a professional seller and/or buyer is involved in the transaction. Businessmen, after all, deal with each other on a different basis than they do with consumers; why, then, should not the law acknowledge those differences? The Code takes this step, declaring outright that under certain circumstances specialized rules should be applied to the professional—or "merchant," as he is called under the Code.

II. THE MERCHANT UNDER THE CODE

The merchant concept has important consequences under a number of sections of the Sales Article. This professional status is attributed to anyone who has specialized knowledge pertaining either to the goods that are the subject of the transaction at hand or of

⁹ *Ibid.*

business practices as such. It also applies to one who utilizes an agent with such specialized knowledge.¹⁰ Some sections of the Code have specific provisions applying to merchants irrespective of the reason for so classifying him—*i.e.*, it makes no difference that he is a merchant because of his knowledge of the goods or because of his knowledge of business practices; the mere fact that he is a merchant triggers the provisions of these sections. However, provisions of some other sections will be applicable only to merchants who have professional status because of their knowledge of the goods that are the subject of the transaction, while still others are applicable only to merchants whose professional status has its roots in their specialized business knowledge.

A. The Merchant Generally

The person who qualifies as a merchant either by virtue of a “goods” or “business practices” test is held to a slightly different standard of good faith than the nonmerchant under the Code. As to the nonmerchant, “good faith” is defined as “honesty in fact in the conduct or transaction concerned.”¹¹ This definition is applicable throughout the Code. The good faith of a merchant under the Sales Article involves a little more. “‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”¹² Consequently, whenever a merchant is involved in a sales transaction, inquiry may be made as to his observance of reasonable commercial standards of fair dealing as well as his honesty.

Generally, the merchant-buyer is also obligated to follow instructions from the merchant-seller under certain circumstances. When a merchant-buyer rejects goods, he must, upon a written request from the seller, provide the seller with a full and final written statement of all the defects upon which he proposes to rely or face the prospect of waiving those objections.¹³ If the merchant-

¹⁰ “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

G.S. § 25-2-104(1).

¹¹ G.S. § 25-1-201(19).

¹² G.S. § 25-2-103(1)(b).

¹³ G.S. § 25-2-605.

buyer's rightful rejection takes place at a point at which the seller has no agent or place of business, he is also obligated to follow any reasonable instructions from the seller with respect to the disposition of the goods. (It should be noted that instructions are unreasonable as a matter of law if indemnity for the buyer's expenses is not furnished on demand.) Moreover, if the rejected goods are perishable or "threaten to decline in value speedily," the merchant-buyer is further obligated to "make reasonable efforts to sell them for the seller's account." He is entitled to indemnity for his expenses in so acting and may also have a normal seller's commission if he manages to sell the goods.¹⁴ The merchant-buyer is also obliged to follow the reasonable instructions of a seller as to goods held by the buyer that he has elected to return under a sale on approval.¹⁵

One of the two sections dealing with risk of loss treats the merchant-seller a little differently from the nonmerchant. If goods under contract are not to be shipped by carrier or are not held by a bailee for delivery without being moved, the risk of loss passes to the buyer only upon his receipt of the goods if the seller is a merchant. If the seller is not a merchant, the risk of loss would pass upon tender of delivery.^{15a} These provisions are, however, explicitly subject to the contrary agreement of the parties.¹⁶ The general rationale underlying the distinction seems to be that the merchant-seller is much more likely to have insurance on the goods than the buyer and because of his expertise is in a good position to care for them properly.

Finally, a distinction exists as to dealings between merchants generally and between others under the section dealing with the parties' right to adequate assurance of performance when one of the parties has reasonable grounds for believing the other may no longer be in a position to perform his part of the contract. As between merchants, commercial standards form the basis both for determination of whether reasonable grounds for insecurity (the other party's ability to perform) exist and whether the assurance for performance given is adequate.¹⁷

¹⁴ G.S. § 25-2-603.

¹⁵ G.S. § 25-2-327.

^{15a} G.S. § 25-2-509(3).

¹⁶ G.S. § 25-2-509(4).

¹⁷ G.S. § 25-2-609.

B. The Merchant "in goods of that kind"

The person who qualifies as a merchant because he is a specialist in goods of the kind involved in the transaction is held to a higher standard in several situations. For example, unless duly excluded or modified,¹⁸ a sales transaction raises an implied warranty that the goods shall be merchantable if the seller is a merchant with respect to goods of that kind.¹⁹ The section contains rather extensive criteria for that warranty, which criteria may also be used as a guide to an express warranty of merchantability that may arise in a transaction involving a nonmerchant seller.²⁰

The ordinary business practices of the merchant-sellers are given special consideration in the general section dealing with the doctrine of retention of possession of goods by a seller after they have been sold as constituting a fraud upon his creditors. It is there provided that retention of possession by a merchant-seller for a commercially reasonable time after sale does not constitute a fraud as against his creditors.²¹ This is, of course, merely a recognition of ordinary business practices.

The last of the sections specifically applicable to the merchant who "deals in goods of that kind" contains one of the most controversial provisions of the Code—the subsection dealing with the power of such a merchant to transfer title of goods "entrusted" to him to a buyer in the ordinary course of business.²² This subsection is part of an over-all package designed to "state a unified and simplified policy on good faith purchase of goods"²³ and seems an obvious extension of the pre-Code law that protected a bona fide purchaser from the "real" owner of goods in certain situations.

The controversy surrounding the provision arises because of its possible application to certain fact situations. Thus, in an often-used example,²⁴ if a man leaves his watch for repair with a jeweler and the jeweler, who also sells watches, sells it to an ordinary customer, the "real owner" may not, under the Code, replevy the watch from the customer. Such an example may evoke a "gut re-

¹⁸ See G.S. § 25-2-316(2).

¹⁹ G.S. § 25-2-314.

²⁰ See G.S. § 25-2-314, comment 4.

²¹ G.S. § 25-2-402.

²² G.S. § 25-2-403.

²³ G.S. § 25-2-403, comment.

²⁴ See, *e.g.*, HAWKLAND, SALES AND BULK SALES, 105.

action" against the doctrine. Thus, a student of mine—missing the point—when asked for an off-the-top-of-the-head preference as between the Code approach and the Uniform Sales Act approach to title, thought of this example and blurted out something like the following: "I'll take the Sales Act. I'll be darned if I like the idea that a jeweler can get away with selling my watch." The reaction, though straight-forward, is too simple. If, for example, the jeweler had fixed the watch and put it in the window, and the "real owner" saw it there, he would not even under pre-Code law²⁵ be able to replevy it from a customer of the jeweler who bought it without knowledge of the jeweler's lack of authority to sell. Moreover, under pre-Code law, the "real owner" would probably only recover the watch or its equivalent if (1) he could not find the jeweler (or the jeweler is judgment-proof) and (2) he could find the customer. But the discussion here avoids the central point: the protection of the good-faith purchaser. Should not an ordinary consumer in our consumer-oriented society be able to purchase goods without the latent possibility that he has not bought anything at all—so long as he is buying from a professional seller (not the cartoon character beckoning to him from the alley) who sells goods of that kind? Or putting the same matter in a different way, the provision helps attribute to the goods themselves a kind of negotiability because they are goods in the *ordinary* stream of commerce.²⁶

Indeed, the provision does not go as far as it might. For example, it falls short of the so-called market overt, the continental doctrine under which a purchaser acquires absolute rights even to merchandise stolen by the person who passes it on to the merchant. The Code provisions make it clear that the only rights the merchant can pass on are the rights of the "entruster," and if the "entruster" is a thief, he has no rights to the goods. Thus, in this situation, the "real owner" (the person who was robbed) can replevy the goods even from a bona fide purchaser. A second kind of safeguard is that which focuses upon the purchaser: he must be a "buyer in the ordinary course of business," a phrase that is elsewhere specifically defined in the Code.²⁷ Note, for example, that

²⁵ See *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 (1953).

²⁶ See VOLD, SALES, 181-84 (2d ed. 1959).

²⁷ "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods

a pawnbroker cannot be a "buyer in ordinary course of business" of a merchant.²⁸ And remember, of course, that the seller must be a person who "deals in goods of that kind."

C. The Merchant With "knowledge or skill peculiar to the practices involved in the transaction"

The Code draftsmen's suggestion that there is a third category of provisions applicable to persons who qualify as merchants under the business practices test—as distinguished from merchants generally (persons who qualify under either the goods or business practices test) seems a little puzzling. Does it mean that there are really *two* kinds of merchants under the business practices test? It is not clear in the commentary,²⁹ but there is some intimation that there are.

The comment explains that "the special provisions as to merchants . . . are of three kinds."³⁰ Two have already been discussed—the kind that has been described as applicable to the "merchant generally" and the kind that has been described as applicable to "the merchant in goods of that kind." On their face, it would seem the two categories are exclusive, since one would expect that a person who would qualify as a merchant under the goods test would also qualify as a merchant under the practices test—hence the general provisions would apply. But the draftsmen seem to suggest there is a third category of provisions applicable to the person who qualifies as a merchant under the practices test:

buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

G.S. § 25-1-201(9).

²⁸ This interpretation is contrary to that of some commentators who construe 1-201(9) as excluding the pawnbroker from the merchant class for purposes of this section, not from the consumer class. See, *e.g.*, BUNN, SNEAD & SPEIDEL, AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE § 2.33, at 133. *Contra*, 1 STATE OF NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 233 (1955). A careful study of the language of the definition and the policy underlying it leads to a rejection of that view. Properly interpreted, the provision should not restrict a pawnbroker's legitimate activities, and, of course, it applies to the pawnbroker only in his capacity as a pawnbroker, not as an ordinary red-blooded American consumer.

²⁹ G.S. § 25-2-104, comment 2.

³⁰ *Ibid.*

Sections 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . ." since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants."⁸¹

This distinction seems thus to suggest that there may really be two types of categories of merchants under the business practices test and that one must look to the nature of the specific section involved to see whether the status is applicable. Thus, it would seem that one might hold a university purchasing officer—or a lawyer—to merchant standards under the section dealing with the statute of frauds, but to nonmerchant standards as to the responsibilities of a merchant-buyer to follow the seller's instructions. Presumably, then, the applicability of these provisions is dependent both upon the kind of specialized person involved and the nature of the provision pertaining to the problem immediately at hand.

The distinction seems, in perspective, a fair one. The problem is that it is not explicit either in the section that defines "merchants" or in the sections that establish higher standards for merchants. Consequently, the distinction may very well be overlooked. However, it does seem to fit well into the general purpose of the definition—namely that it is fair and proper to distinguish between transactions involving a casual or inexperienced buyer and seller and transactions involving persons with some expertise—be it great or small. Perhaps one can borrow the words of the Mikado in Gilbert and Sullivan's immortal work:

My object all sublime
I will achieve in time
To let the punishment fit the crime
The punishment fit the crime

The substance of the provisions that apply to merchants in this category provides no real difficulty, although it shows a few innova-

⁸¹ *Ibid.*

tions as compared to prior law. Under the Statute of Frauds section it is provided that a writing that would otherwise qualify as a memorandum satisfying the Statute of Frauds may be sufficient as against both the sender (a merchant) *and* the recipient (also a merchant) if the recipient does not object to the contents of the memorandum within ten days after it is received.³² This is a change from the traditional Statute of Frauds rule, which provides that the memorandum may be used only as against the party who signed it.³³

However, the only effect of the provision "is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected."³⁴ Presumably, the reason for the change is to make letters of confirmation a normal method of satisfying the Statute of Frauds,³⁵ a practice that should appeal to the business community.

The "firm offer" rule encompassed in G.S. § 25-2-205 is still another example of incorporating into the Code a practice of the business community that has not previously been enforced by the law. With some restrictions, an offer made by a merchant in writing stating that it will be held open is made irrevocable—even without consideration.³⁶ Finally,³⁷ special rules are set out for resolving the complex difficulties that beset transactions when both parties—merchants—use printed forms to accomplish their contractual relationships.³⁸

III. THE CONCEPT AND UTILIZATION OF TITLE UNDER THE CODE

For the practitioner, the most radical reorientation towards the new sales law will be required in the Code's approach to the concept of title as a tool for resolving sales problems. Under prior law,

³² G.S. § 25-2-201(2).

³³ The older rule is still applicable to the nonmerchant by virtue of the express language of G.S. § 25-2-201(1).

³⁴ G.S. § 25-2-201(2), comment 3.

³⁵ HAWKLAND, SALES AND BULK SALES 28.

³⁶ This provision is further discussed in text accompanying notes 73-74 *infra*.

³⁷ There is one other situation in which this specific status of merchant has some significance. See G.S. § 25-2-209(2).

³⁸ G.S. § 25-2-207(2). These rules are discussed at length at text accompanying notes 82-97 *infra*.

title became a sort of universal solvent in which most sales problems could be dissolved. For example, if the facts of a dispute presented a risk-of-loss problem, one looked first to see who had title in order to determine who should bear the risk of loss; if one wanted to sue for the price, as contrasted with an action for damages, one looked first to see who had title etc., etc. On the surface, this "title analysis approach looks good,"³⁹ but "an endless procession of cases . . . furnishes strong proof that the title approach creates a magnificent illusion of certainty. . . ."⁴⁰ In fact, it has usually taken litigation to establish the fictitious title-passing intention of the parties.⁴¹

The Code has abandoned this "lump-concept" title approach in favor of "narrow-issue thinking."⁴² The Code draftsmen have made this abundantly clear in the preamble to the Code provision dealing with title: "Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to title."⁴³

Their intent is amplified in the comments to the section: "This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed."⁴⁴

³⁹ Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROB. 3, 9 (1951).

⁴⁰ *Id.* at 12-13. Professor Vold, in the latest edition of his HORNBOOK ON SALES, put it in this way:

[A]t the outset parties often expect no trouble. They may not think of technical title matters at all. For shedding light on their intent on title matters their express terms may include little but chance fragments or ambiguities. The attempt to establish in such cases who had the title at the controlling moment, therefore, often can involve intricate, obscure and frustratingly puzzling title questions.

VOLD, SALES 7 (2d ed. 1959).

Such criticism has by no means been confined to the academic world. Witness the following observation of Judge Learned Hand made in 1935: "Title is a formal word for a purely conceptual notion; I do not know what it means and I question whether anybody does, except perhaps legal historians." *In re Lake's Laundry, Inc.*, 79 F.2d 326, 328-29 (2d Cir. 1935).

⁴¹ Latty, *supra* note 39, at 8.

⁴² HAWKLAND, SALES AND BULK SALES 91. The characterization of the title approach as lump-concept thinking apparently stems from Professor Llewellyn, the principal draftsman of the Code.

⁴³ G.S. § 25-2-401, preamble.

⁴⁴ G.S. § 25-2-401, comment 1.

This change in approach toward problem-solving should not necessarily be equated with change in result. Few results of the old law will likely be changed.⁴⁵ However, these results can be achieved more directly and simply under the Code by a consideration of the real issues in dispute, not by a juggling of generalized concepts as was necessary under prior law.⁴⁶ And, predictability of result—hence less litigation—is better served.

Despite the minimization of the role of title under the Code, it does contain a section dealing with title. The section's preamble, however, underscores its limited applicability: Code title rules are to be applied only "insofar as situations are not covered by the other provisions of this Article. . . ." And even the rules that determine title in those few situations reflect a change in approach, for one of the section's basic rules⁴⁷ resorts not to the classical presumed intention of the parties about title, but to "an objectively manifested physical act as the title passing point."⁴⁸

It is not possible to overemphasize the limited role of title under the Code. The presence of a title section in the Code will almost certainly tempt the practitioner to compare the new title-passing rules with the old and to assume that, though the rules have changed, their importance in resolving sales problems has not. Nothing could be more misleading. Dean Latty has summarized the new approach in this concise fashion:

[I]t should be re-emphasized that the lawyer's analysis of his sales problems under the Code should not begin with a study of the title section, 2-401. One should stay away from that section as long as possible, first exploring all other sections that seem to bear any kinship to the specific issue involved; only when satisfied that nothing else in the Code is in point and that for some reason a title issue has to be faced, should one turn to 2-401 For many of us that is going to mean a considerable change in attitude.⁴⁹

⁴⁵ See, *e.g.*, the brief comparison of results obtained by employing the Code approach in contrast to the pre-Code approach to risk of loss in HAWKLAND § 1.230201, at 137-38.

⁴⁶ For a good example of the difference in approaches, see Dean Latty's discussion of a complex fact situation in Latty, *supra* note 39, at 4-7.

⁴⁷ "Unless otherwise expressly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." G.S. § 25-2-401(2).

⁴⁸ Latty, *supra* note 39, at 7.

⁴⁹ Latty, *supra* note 39, at 26.

IV. SPECIAL CONTRACT RULES FOR SALES TRANSACTIONS

Another of the attributes of Article 2's approach is its much greater specificity as compared to prior sales legislation.⁵⁰ There are several reasons for it. At least one commercial law authority has estimated that "over forty percent of sales law employed by courts in their actual decisions cannot be found in the Uniform Sales Act."⁵¹ Article 2 fills a good many of these statutory gaps.⁵² Secondly, the Code rests on a tacit assumption that "simple contract rules cannot efficaciously solve complex sales problems."⁵³ Finally, many businessmen tend to ignore contractual formalities in their actual business dealings.⁵⁴ It is only sensible to provide "that commercial laws should enforce agreements which, by commercial understanding, have been closed and consummated. . . ."⁵⁵

A. *The Statute of Frauds*

The most obvious thing that can be said about North Carolina's adoption of section 2-201, the Statute of Frauds section of the Code, is that it is the first Statute of Frauds applicable to the sale of goods in this state since 1792.⁵⁶ The practitioner will find that his knowledge of Statutes of Frauds pertaining to other kinds of transactions will be helpful, but not conclusive.⁵⁷ Indeed, the Code's Statute of Frauds for the sale of goods⁵⁸ brings some changes to

⁵⁰ Compare the 104 (sometimes rather lengthy sections of Article 2 with the seventy-nine (sometimes rather brief) sections of the Uniform Sales Act.

⁵¹ HAWKLAND, SALES AND BULK SALES v.

⁵² Note that it does not purport to fill them all. Indeed, the Code specifically incorporates applicable supplementary general principles of law in G.S. § 25-1-103:

Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

⁵³ AMERICAN LAW INSTITUTE, STUDY OUTLINE, UNIFORM COMMERCIAL CODE 9.

⁵⁴ See notes 7-9 *supra* and accompanying text.

⁵⁵ HAWKLAND, SALES AND BULK SALES 9.

⁵⁶ See Odom v. Clark, 146 N.C. 544, 60 S.E. 513 (1908).

⁵⁷ See Professor Webster's comparison of G.S. § 25-2-201 with the North Carolina law pertaining to the Statute of Frauds as it relates to real property transactions. G.S. § 25-2-201, N.C. comment.

⁵⁸ Note that the Code contains three other Statutes of Frauds: G.S. § 25-8-319 covering "securities," G.S. § 25-9-203 covering "secured transactions," and G.S. § 25-1-206 covering undocumented choses in action.

traditional concepts of Statutes of Frauds. As a matter of fact, it seems unlikely that a Statute of Frauds for the sale of goods would have been adopted at all if such changes had not been made. It was only after considerable debate—and change of prior law—that the decision to retain it was made.

The Statute of Frauds applies to all sales of goods for a price⁵⁹ of 500 dollars or more. The underlying philosophy of the section is that there be in existence some kind of writing that will “afford a basis for believing that the offered oral evidence rests on a real transaction.”⁶⁰ The most essential requirement, therefore, is that the writing relied on shows that the parties entered into a contract. Except as between merchants,⁶¹ it must be signed⁶² by the party against whom enforcement is sought. The writing need not be comprehensive. Indeed, the draftsmen suggest that “the price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may be omitted.”⁶³ Thus, next to an indication that the parties have entered into a contract, the most important term is the quantity term, and even that need not be correctly stated. However, the quantity stated will limit the extent of the enforcement of the oral contract.⁶⁴ In short,

Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be “signed,” a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.⁶⁵

The significance of a quantity term as “assurance that there is a reasonably certain basis for providing appropriate relief”⁶⁶ is also

⁵⁹ See HAWKLAND § 1.1102, at 23-24, for a discussion of whether the use of the word “price” was intended to change the law construing the word “value” that appeared in the Uniform Sales Act.

⁶⁰ G.S. § 25-2-201, comment 1.

⁶¹ See text accompanying note 32 *supra* for a brief discussion of a special provision applicable only to merchants.

⁶² See G.S. § 25-1-201(39) and comment 39 for what qualifies as “signed” under the Code.

⁶³ G.S. § 25-2-201, comment 1. The statutory basis for this comment is found in § 2-201(1) which provides in relevant part: “A writing is not insufficient because it omits or incorrectly states a term agreed upon” Note, in this connection, the Code’s general approach toward problems of uncertainty. See discussion in text accompanying notes 97-105 *infra*.

⁶⁴ “[T]he contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.” G.S. § 25-2-201(1).

⁶⁵ G.S. § 25-2-201, comment 1.

⁶⁶ HAWKLAND § 1.120101, at 25.

recognized in what might be called the "partial performance" substitute for the required writing. Under prior law, partial performance of the contract has been considered as an indication that a real contract existed. Hence, if a buyer accepted part of the goods sold or made a part payment of the price, it was apparently thought that there was no reason for requiring a writing because there was no danger of a fraudulent claim that a contract existed—the part performance showed that one existed. This reasoning overlooks one significant possibility of fraud, namely that one of the parties will claim that a greater quantity was involved in the contract than the part performance showed. The Code attempts to foreclose this kind of fraud by providing that part performance removes the Statute of Frauds only to the extent of actual performance—a carry-over of the quantity limitation found in the subsection dealing with the sufficiency of a writing.

The "special manufacturing" exception to the Statute of Frauds has been carried over into the Code with minor modifications in both philosophy and substance. Under prior law, the justification for the special manufacturing exception was that it involved "work and labor," a rationale that prevented a person who "farmed out" the work to another manufacturer from coming within its protection on the grounds that he was a "seller," not a "worker." The Code's provision rests on the theory that the special manufacturer is in a particularly vulnerable position when a buyer backs out because he will be stuck with goods—or commitments to subcontractors—that will meet only the buyer's requirements.⁶⁷ Under the Code's provisions, therefore, the seller himself need not be the special manufacturer; it is enough if the deal involves special manufacturing. The provisions do require, however, that the seller shall have changed his position in reliance "under circumstances which reasonably indicate that the goods are for the buyer."⁶⁸ After all, as has been observed, "the fact that *S* manufactures some special goods for *B* does not prove that *B* requests him to do it, and even if it did, there is no proof of the quantity term of the resultant contract."⁶⁹

The final exception made by the Code to the requirement of a writing is in a new statutory provision that the Statute may not be

⁶⁷ *Id.* § 1.1204.

⁶⁸ G.S. § 25-2-201(3)(a).

⁶⁹ HAWKLAND, SALES AND BULK SALES 34.

asserted as a defense by a party who "admits in his pleading, testimony or otherwise in court that a contract for sale was made. . . ." ⁷⁰ Again, the familiar quantity limitation is imposed on the extent of enforcement of the oral deal. One question that comes to mind in considering this provision is whether the plaintiff could require the defendant to take the stand to answer a direct question whether an oral contract was made. The draftsmen of the provision have given no answer to the question, and it appears to be in doubt. At least one authority suggests that "a plaintiff would be well advised to try to compel the admission." ⁷¹

It should again be emphasized that the Code contemplates making letters of confirmation a normal method of satisfying the Statute of Frauds as between businessmen. ⁷² If this in fact happens, some of the difficulties that beset the special exceptions under prior law should not reoccur in new form under the Code provisions.

B. Offer and Acceptance

The pre-Code rule that "firm offers" made by professionals must be sustained by consideration in order to be irrevocable is one of the ordinary contract rules that has been discarded in actual commercial practice. The Code takes cognizance of this by providing in section 2-205 that an offer by a *merchant* in a *signed writing* which states that it will be held open is not revocable. Three safeguards are employed in addition to the requirement that the offer be made by a merchant: (1) The offer must be in a signed ⁷³ writing; (2) it will be kept open only for the time stated, or, if no time is stated, for a reasonable time—but in no event will the period of irrevocability be kept open without consideration beyond three months; (3) it is operable as against an offeror on a form supplied by the offeree only if separately signed by the offeror. ⁷⁴

Section 2-206 puts the onus of ambiguously worded offers on the offeror rather than on the offeree by employing a criterion of reasonableness in place of such technical rules as requiring that telegraphic offers be accepted by telegraphic acceptances, etc. ⁷⁵ It

⁷⁰ G.S. § 25-2-201(3)(b).

⁷¹ HAWKLAND, SALES AND BULK SALES 31.

⁷² See text accompanying note 35 *supra*.

⁷³ See G.S. § 25-1-201(39) for the Code's definition of a "signed" writing.

⁷⁴ Obviously, this safeguard is to prevent surprise.

⁷⁵ G.S. § 25-2-206(1)(a) and comment 1. The rejection of such technical rules is not a radical innovation. It may, in fact, already have been the

should be emphasized that this reasonable criterion applies only when the offer does not otherwise "unambiguously" indicate the form of acceptance. An offeror can still remain the master of the mode of acceptance by being specific. The rule applies only when he is ambiguous.

Poorly drafted offers looking to current shipment of goods⁷⁶ are specially provided for.⁷⁷ They may be accepted either by current shipment or a prompt promise to ship. This same provision undertakes to resolve what Professor Hawkland has labeled "the unilateral contract trick,"⁷⁸ *i.e.*, the offeree of an offer that calls for acceptance by shipment ships defective goods, and, when he is sued, he claims his non-conforming shipment was not an acceptance but a counter-offer and thus that there was no breach of contract. This subsection provides that a shipment of non-conforming goods is automatically an acceptance unless the offeree "seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer."⁷⁹ The provision simply gives the offeror some recourse in a situation in which buyers in the past have been able to get away with something.

Finally, the section gives some protection to the offeror where it is not clear whether or not acceptance can take the form of the beginning of performance by the offeree. Under pre-Code law, a beginning of performance in such a context might not amount to an acceptance, but it would destroy the offeror's power of revocation—with the consequence of tying up the offeror while the offeree retains the power to complete his performance and thus bind the offeror or to stop performance and claim that there had never been any acceptance. The applicable provision does not have the effect of wholly changing this prior law,⁸⁰ but it does put a premium on notice given by the offeree that he has begun performance. If the offeree does not give such notice within a reasonable time, the offeror "may treat the offer as having lapsed before acceptance."⁸¹

law in North Carolina prior to the Code. See the brief discussion in G.S. § 25-2-206, N.C. comment.

⁷⁶ *E.g.*, "I offer to buy 100 units of your 'X brand,' ship at once."

⁷⁷ G.S. § 25-2-206(1)(b).

⁷⁸ HAWKLAND, SALES AND BULK SALES 6-7.

⁷⁹ G.S. § 2-206(1)(b). Obviously, the fact that the non-conforming shipment constitutes an acceptance does not mean that the offeror (here the buyer) is without remedy for the non-conformity. See text accompanying notes 247-53 *infra*.

⁸⁰ See G.S. § 25-2-206, comment 3.

⁸¹ G.S. § 25-2-206(2).

The "Battle of Conflicting Forms."—If one strictly applies the classic rules of offer and acceptance, it is not difficult to conclude that an exchange of conflicting order and acknowledgment forms does not result in a binding contract. However, such a result would make most commercial transactions that utilize printed forms rest on very uncertain legal grounds. As one commentator has put it, businessmen "would be shocked to find that no binding 'contract' had been formed."⁸² But, absent special statutory provision, what other result can be reached?

The legal problem, of course, has its genesis in what may, unfortunately, be typical of modern commercial practices. Each party to the transaction, with the aid of its counsel, has mass-produced its own forms replete with detailed boilerplate. Neither party, in all likelihood, has any intention of relying on the boilerplate, but has been advised by its counsel that it should be there in the event trouble of some kind develops in a transaction. When trouble does develop, counsel for each party starts interpreting its own boilerplate, and the result might well mystify a Solomon.

As has been noted previously,⁸³ the Code comes directly to grips with the problem. What is important within the purview of the Code is whether there has been an intention to contract. As has been stated with respect to the Code's Statute of Frauds provisions, "all that is necessary is some showing that the parties have entered into a generalized agreement."⁸⁴ Once this is shown, the Code provides for some very simple rules to determine what the terms of the contract are on the basis of the conflicting forms.

The first question when conflicting forms have been exchanged is whether the offeree's form constitutes an acceptance. The Code provides that the mere presence of different or additional terms in the offeree's form does not preclude the legal conclusion that his form constitutes an acceptance. Indeed, the way in which the relevant subsection is written, it might be said that there is a presumption of acceptance—*i.e.*, that a binding contract has been entered into—because the alternative, that the form does not constitute acceptance, is stated almost in terms of an exception—"unless acceptance is expressly made conditional on assent to the additional or

⁸² HAWKLAND, SALES AND BULK SALES 9.

⁸³ See text accompanying notes 7-9 *supra*.

⁸⁴ King, *The New Conceptualism of the UCC*, 10 St. Louis U.L.J. 30, 54 (1965).

different terms."⁸⁵ The burden is thus put on the party who wishes to contract *only* on his own terms so to provide. If he does not, he is party to a binding contract terms of which will be ascertained by the Code's rules as explained below.

Additional⁸⁶ terms in the offeree's form "are to be construed as proposals for addition to the contract."⁸⁷ If either offeror or offeree is not a merchant, the additional terms must be accepted by the offeror before they become part of the contract.

In other words, if the offeror does nothing after receiving a conflicting acceptance form, a binding contract is made on the offeror's terms. However, if both offeror and offeree are merchants (the most likely situation where printed forms are used), the additional⁸⁸ terms automatically become part of the contract *unless* (1) "the offer expressly limits acceptance to the terms of the offer" (a provision obviously giving offeror the right to insist on a contract only on his terms),⁸⁹ or (2) the additional terms materially alter the terms of the original offer (as when the offeree's form negates standard warranties in a situation in which they would normally arise),⁹⁰ or (3) the offeror objects to the additional terms within a reasonable time after he receives notice of them. In shorthand, this means that, absent a clause by virtue of which the offeror insists only on his own terms, nonmaterial additional terms automatically become a part of the contract unless seasonably objected to by the offeror, but any material additional terms do not become a part of the contract unless the offeror accepts them. Thus, if

⁸⁵ G.S. § 25-2-207(1).

⁸⁶ Note that the North Carolina legislature amended UCC § 2-207 by adding the words "or different" after the word "additional" in the original official text. Presumably, the amendment was intended to clarify the meaning of the subsection and to make the phraseology conform to that of subsection (1). At first blush, it seems to be an improvement over the original, but it would seem to effectuate a slight change in the result from the official version when applied to merchants. See text accompanying note 282 *infra*.

⁸⁷ G.S. § 25-2-207(2).

⁸⁸ As indicated at note 86 *supra*, the North Carolina legislature added the word "or different" to the original text of this subsection. The effect of this change is discussed in the text accompanying note 282 *infra*.

⁸⁹ Note the obvious impasse that would arise if the offeror insisted on this right while the offeree made his acceptance expressly conditional on assent to his additional or different terms—and then both parties proceeded to ignore each other's terms and go ahead with the transaction. The consequences of this nightmare are discussed in the text accompanying note 92 *infra*.

⁹⁰ See G.S. § 25-2-207, comment 4.

the offeror does nothing when he receives a form that conflicts with his own, nonmaterial changes become a part of the contract, but material changes do not.

Up to this point, this Code provision has been discussed as applicable to the exchange of conflicting forms. In actuality, it is not confined to that. It is applicable, for example, to at least two other typical situations: (1) where the agreement has been reached orally or by informal correspondence and is confirmed by one or both of the parties by formal acknowledgments or memoranda covering the terms agreed upon and adding terms not discussed; and (2) where a wire or a letter that is intended as a closing or confirmation adds further minor suggestions or proposals not previously discussed or negotiated.⁹¹ Indeed, it would seem that the provision might be most workable in the context of these two kinds of situations. This is because it is easy to foresee the possibility that astute counsel for an offeror will insert into his mass-produced boilerplate the provisions of section 2-207(2)(b) that permit the offeror to insist on a contract only on his own terms,⁹² while astute counsel for the offeree will insert into his mass-produced boilerplate the provisions of section 2-207(1) that permit the offeree to insist that the contract be only on his terms—and then *both* parties proceed to ignore each other's forms, and the goods are shipped and accepted. What result now? Does the Code really resolve the dilemma of the battle of the forms, or does it just permit the battle to be fought on a different battleground?

The answer to this question is found within subsection (3) of section 2-207:

Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

⁹¹ See G.S. § 25-2-207, comment 1.

⁹² Thus, one form-book author states the following: "The battle of the forms can be won by providing *conspicuously* that 'Only the terms herein set forth shall constitute an agreement between the parties' or 'Acceptance upon the enclosed copy of this order form shall constitute the sole means of effecting an agreement between the parties.'" DENONN & WOLFE, 5 WEST'S MCKINNEY'S FORMS, UNIFORM COMMERCIAL CODE 36 (Italics in original.)

If both parties are so greedy as to insist upon contracting (or at least such insistence is written into their boilerplate forms) only on their own terms and both blithely proceed to carry out the transaction by sending and accepting goods without regard to each other's forms, they end up, under the above provision, with a contract that consists of (1) the terms that their conflicting forms happen to agree upon—typically, price, description of the goods, and, perhaps, the delivery date, and (2) any supplementary terms incorporated under any other provisions of the Code Sales Article.

This result, of course, might well substantially rewrite the boilerplate of both parties. For example, if the buyer in such a form has insisted upon broad warranties and the seller has disclaimed all warranties, the result is the incorporation of those warranties provided for by the Code in the absence of explicit agreement,⁹³ a result that would seem more favorable to buyer than to seller. But, whether one party will have the ultimate advantage over the other when the Code's general provisions are "substituted" for the parties' boilerplate depends on the particular term in question. For example, if the buyer has insisted upon an arbitration clause and the seller has purposely left such a clause out of his form, the seller would seem to have the advantage because the Code does not impose an arbitration term when the parties have not contracted on the matter. Optimistically viewed, the provision would seem to "put the parties on equal grounds";⁹⁴ even pessimistically looked at, it would seem to be one "you can live with."⁹⁵ It does seem preferable to the one-sided result possible under pre-Code law under which all of the offeree's and none of the offeror's terms became binding by virtue of calling the offeree's form a counter-offer and the offeror's performance an acceptance of that counter-offer. Indeed, it seems the only fair way out of an enigmatic impasse. Conceivably it might even have some impact on heavy-handed boilerplate, although that might be asking too much of mere man-made legislation.

C. *Uncertainty and Lack of Mutuality*

Mention has already been made of the Code's inherent practicality⁹⁶ and its attempt to make legally binding what businessmen

⁹³ See G.S. §§ 25-2-314, -315.

⁹⁴ HAWKLAND 19.

⁹⁵ Macaulay, *supra* note 8, at 13, 27.

⁹⁶ See Part I. *supra*.

consider to be binding agreements. These notions are again illustrated in the Code's approach toward uncertainty and lack of mutuality, two rules of pre-Code law that have caused particular difficulty for open price agreements;⁹⁷ agreements relating to output, requirements, and exclusive dealings; and agreements relating to options and cooperation respecting performance. The Code's treatment of these specific problems chip away at old notions of uncertainty and lack of mutuality.

Broadly speaking, open price agreements are validated under section 2-305 of the Code. If the parties so intend, they "can conclude a contract for sale even though the price is not settled."⁹⁸ If nothing has been said about price, or the parties agreed to fix a price later⁹⁹ and they later fail to agree, the contract price is "a reasonable price at the time for delivery." If the price is to be fixed by either the seller or the buyer alone, it must be fixed in "good faith," a phrase elsewhere defined in the Code.¹⁰⁰ And, if the price left to be fixed other than by agreement of the parties is not so fixed because of the fault of one party, the other is given the option of treating the contract as "cancelled" or may himself fix a reasonable price.¹⁰¹ The above provisions do not apply if "the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed." In that situation, there is, of course, no binding contract.¹⁰²

⁹⁷ Professor Webster's selection of two excerpts from North Carolina cases provides an apt illustration:

There cannot be an executed sale as to pass the property where the price is to be fixed by agreement between the parties afterwards, and the parties do not afterwards agree.

Wittkowsky v. Wassom, 71 N.C. 451 (1874).

One of the essential elements of every contract is mutuality of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.

Kirby v. Board of Education, 230 N.C. 619, 55 S.E.2d 322 (1949).

These excerpts are quoted at G.S. § 25-2-305, N.C. comment.

⁹⁸ G.S. § 25-2-305(1).

⁹⁹ Or they agree to fix the price in terms of some agreed market or other standard. G.S. § 25-2-305(c).

¹⁰⁰ "Good faith" means honesty in fact in the conduct or transaction concerned." G.S. § 25-1-201(19). As to a merchant, "Good faith" . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." G.S. § 25-2-605. See text accompanying notes 11-12 *supra*.

¹⁰¹ G.S. § 25-2-305(3).

¹⁰² G.S. § 25-2-305(4).

Problems arising out of output and requirements contracts are somewhat similar to those arising under open-price provisions except that in these situations it is the quantity term that is left open. Section 2-306 of the Code deals with them in an analogous fashion. Again, the good-faith limitation is imposed,¹⁰³ with an additional proviso that no quantity unreasonably disproportionate to a stated estimate may be tendered or demanded, and that if no estimate has been stated there may not be tendered or demanded a quantity unreasonably disproportionate to any normal or otherwise comparable prior output or requirements. The exclusive-dealings provisions rest on similar good-faith commercial requirements. Unless otherwise agreed, both parties are obligated to use their best efforts to supply the goods and promote their sale.

The situation in which details of performance are left to be specified by one of the parties is also treated under section 2-311 similarly to the "open price" and "open quantity" agreements. Such an agreement (if otherwise sufficiently definite to be a contract) is valid, provided the specification is made in good faith and with commercial reasonableness. Unless otherwise agreed, specifications concerning the assortment of goods are at buyer's option, while those relating to shipment are at seller's option. Special sanctions are provided if the party who is to specify fails to do so, or if a party whose cooperation is necessary to the other party's performance fails to cooperate: the party not at fault (1) is excused for any delay in his own performance, and (2) may either proceed to perform in any reasonable manner himself or treat the other party's failure as a breach.¹⁰⁴ These sanctions are not applicable in case of true commercial impracticability.¹⁰⁵

D. Unconscionability

The most controversial section of the Code has been that dealing with what is called an "Unconscionable Contract or Clause,"¹⁰⁶ and it has been, as Dean Hawkland has put it, "a favorite target

¹⁰³ See note 100 *supra*.

¹⁰⁴ G.S. §§ 25-2-311(3)(a), (b). Note that there is a time limitation put on the latter option—"after the time for a material part of his own performance."

¹⁰⁵ See G.S. § 25-2-311, comment 4; G.S. § 25-2-614.

¹⁰⁶ One of the best brief expositions of the subject may be found in BOGERT, BRITTON & HAWKLAND, *CASES ON SALES AND SECURITY* § 9-15.

of critics."¹⁰⁷ Apparently, the critics hit the bull's-eye in this state because section 2-302 was the only section of the official Code Sales Article that was rejected by the North Carolina legislature. It will, nonetheless, be discussed briefly here because North Carolina practitioners should be familiar with it, considering that only one other jurisdiction of the forty-two that have adopted the Code up to the writing of this paper has taken a similar step.¹⁰⁸

In view of the controversy surrounding this section, it seems the better part of prudence to set out in full rather than to attempt a paraphrase:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or it appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The underlying philosophy of this section is, of course, not a radical innovation. It has been known in equity for centuries. What is new is its explicit statutory incorporation into the law. But why bring it into the law at all? It is in the answer to that question that the real justification of the section can be found.

In the view of the Code draftsmen, the section was needed to permit *explicit* policing against surprising and oppressive contracts. As is made clear in the comments accompanying the section, law courts have in fact accomplished that purpose for years "by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract."¹⁰⁹ The draftsmen felt that the law—not to mention justice—would be best served by bringing the doctrine out into the open. If the courts will persist in such policing without explicit doctrine, why not give them doc-

¹⁰⁷ *Id.* at 12.

¹⁰⁸ See the discussion dealing with North Carolina amendments in text accompanying notes 283-96 *infra*.

¹⁰⁹ UCC § 2-302, comment 1.

trine with some built-in limitations and require them to face the question squarely and honestly?

It has been said that "this particular section (2-302) is safeguarded to a curious degree."¹¹⁰ First of all, the question of unconscionability is to be decided by the judge, not the jury. Presumably, this should remove the qualms of those who fear that a jury will always decide in favor of the poor widow who is the adversary of General Motors in spite of the merits of General Motor's claim. Secondly, subsection (2) specifically provides that when claim of unconscionability is made, "the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect . . ." It is not, then, a matter left to the judge's intuition or what he ate for breakfast. Thirdly, the court is specifically directed to make its determination as to unconscionability on the basis of the facts existing as of the time the contract was made. Finally, the flexibility given the court by way of remedy—(1) refusal to enforce the contract as a whole, (2) enforcement without the unconscionable clause, (3) modification of the unconscionable clause—will give the court the opportunity to limit the impact of a finding of unconscionability to the specific needs of the case. For example, the entire contract will not be voided because of the unconscionability of a clause not related to the actual dispute.

Fears that the clause would lead to a great deal of litigation have been unfounded. Not one single case has so far been decided on the grounds of unconscionability in any jurisdiction that has adopted the Code. Ironically, two cases that have turned on unconscionable grounds contain statements to the effect that they were reaching the same result as the Code provision on *purely common-law grounds*.¹¹¹ In the face of these facts, the North Carolina legislature's objection to the section is mystifying.¹¹²

¹¹⁰ Professor Karl Llewellyn (chief draftsman of the UCC), Statement, 1 STATE OF NEW YORK LAW REV. COMM. REPORT OF UCC 178 (1954).

¹¹¹ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964).

¹¹² Perhaps the reason can be found in the commentary relating to this section contained in the report of the Legislative Council to the legislature. See discussion in text accompanying note 283 *infra*.

V. TERMS OF THE CONTRACT

A. Introduction

Many of the Code provisions dealing with the terms that will be part of an agreement expressly contain the qualification "unless otherwise agreed."¹¹³ The presence of this phrase in various sections makes it clear beyond doubt that, subject to unconscionability, the parties are free to contract as they wish on subjects dealt with in these sections. This is not to say, however, that parties do not have freedom of contract with respect to subjects covered by other sections.¹¹⁴ Such a negative implication is expressly disclaimed by the draftsmen in one of the Code sections applicable to all the Articles of the Code: "The presence in certain provisions of this Act of the words 'unless otherwise agreed' or words of similar import does not imply that the effect of other provisions may not be varied by agreement . . ."¹¹⁵ The immediately preceding subsection of the same section underscores this freedom-of-contract approach by affirmatively providing that "the effect of provisions of this Act may be varied by agreement." Exceptions to this principle are limited to provisions "as otherwise provided in this Act," and "the obligations of good faith, diligence, reasonableness and care prescribed by this Chapter . . . but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."¹¹⁶

While recognizing that the parties should be free to contract on their own terms, the Code draftsmen also acknowledged the obvious by a series of specific provisions that apply when the parties have not written their own terms. In addition, the Code has defined for the first time in statutory language, the meaning of certain standard mercantile terms. All of these provisions are for the most part self-explanatory and will only be briefly discussed.

B. Delivery

1. *Delivery Terms in the Absence of Agreement.*—The Code rules pertaining to delivery—in the absence of agreement of the

¹¹³ See, e.g., G.S. §§ 25-2-307, -308, -309(2), -310, -311(2), -312(3), -319(1)-(4), -320(2)-(4), -321(3), -322(1), (2), -324, -325(3), -326 and -327(1), (2).

¹¹⁴ Indeed, this approach, once contemplated in early Code drafts, was expressly rejected. See the brief discussion in 1 HAWKLAND § 1.15.

¹¹⁵ G.S. § 25-1-102(4).

¹¹⁶ G.S. § 25-1-102(3).

parties—are by and large consistent with the common law and should be familiar to most practitioners. Ordinarily, goods must be delivered in a single lot. However, if special circumstances exist, delivery may be in lots, in which case the price, if it can be apportioned, may be demanded for each lot.¹¹⁷ If not contractually stipulated, the place of delivery is the seller's place of business, or wherever the goods are located if not at his business. If the parties do not contemplate delivery of the goods themselves but have chosen to deal with documents of title, the documents may be delivered through customary banking channels.¹¹⁸ Duties arising from agreements for delivery by carrier are not, of course, covered by these rules. They are treated below.

2. *Delivery Terms When Delivery by Carrier Is Contemplated.*

—When delivery by carrier is contemplated by the parties, the contract is presumptively a “shipment” contract,¹¹⁹ which means that the seller's responsibility for the goods terminates after he has put the goods in possession of the carrier, made a reasonable contract for their shipment, obtained and tendered appropriate documents, and promptly notified the buyer.¹²⁰ A requirement that the seller pay the cost of transportation does not change these rules, as it did under prior law.¹²¹ Under a “destination” contract the seller is obliged to get the goods to the destination point at his own risk¹²² and, where appropriate, tender the proper documents.¹²³ If it is not clear whether delivery by carrier is authorized, the presumption is that it is not, and the rules set out for delivery in the absence of agreement apply.¹²⁴

3. *Contracts Employing Mercantile Symbols.*—Commonly used mercantile symbols are carefully defined in considerable detail under the Code. This statutory definition is, of itself, a giant step toward certainty, since prior legislation contained no such definitions. The

¹¹⁷ G.S. § 25-2-307.

¹¹⁸ G.S. § 25-2-308.

¹¹⁹ “Under this Article the ‘shipment’ contract is regarded as the normal one and the ‘destination’ contract is regarded as the variant type.” G.S. § 25-2-503, comment 5.

¹²⁰ G.S. § 25-2-504. See also G.S. § 25-2-509(1)(a), which specifically provided that risk of loss passes to the buyer when the seller duly delivers the goods to the carrier.

¹²¹ G.S. § 25-2-503, comment 5.

¹²² G.S. § 25-2-509(1)(b).

¹²³ G.S. § 25-2-503(3).

¹²⁴ See text accompanying notes 117-18 *supra*. See also 1 HAWKLAND § 1.2104.

definitions not only specify whether the terms utilized result in a "shipment" or "destination" contract (thus leading one to the sections dealing with those kinds of contracts); they also spell out other rights and duties—including risk of loss, which, in the case of contracts not employing mercantile symbols, is treated as a separate subject.¹²⁵ Coverage of the symbols is comprehensive, including F.O.B. and F.A.S.,¹²⁶ C.I.F. and C. & F.¹²⁷ and variants thereof,¹²⁸ Ex-Ship¹²⁹ and No Arrival, No Sale.¹³⁰

C. Payment and Credit

The parties may, of course, agree as to the manner and time for payment. The following rules thus apply only in the absence of agreement, although such agreement is subject to the usual requirements of good faith and conscionability.

The price may be payable in money "or otherwise," as the parties agree. If payment is in goods, in whole or in part, each party is treated as a seller of the goods he transfers.¹³¹ Absent other agreement, payment may be by check unless the seller insists on cash. If seller does so insist, he must give the buyer reasonable time to get the cash—the premise being that the check is the standard payment device in modern commercial practices.

The time and place of payment are at the point where the buyer is to receive¹³² the goods. This rule applies even though the contract is one of "shipment" and seems consistent both with commercial understanding and the right of the buyer to inspect before paying.¹³³

If the seller is authorized to send the goods, he is entitled to ship them under reservation and to tender documents of title, in

¹²⁵ G.S. §§ 25-2-509, -2-510.

¹²⁶ G.S. § 25-2-319.

¹²⁷ G.S. § 25-2-320.

¹²⁸ G.S. § 25-2-321.

¹²⁹ G.S. § 25-2-322.

¹³⁰ G.S. § 25-2-324.

¹³¹ G.S. § 25-2-304(1). Note that under subsection (2) the price may also be payable in an interest in realty. In such a case, "the provisions of this Article apply only to those aspects of the transaction which concern the transfer of title to goods but do not affect the transfer of the realty since the detailed regulation of various particular contracts which fall outside the scope of this Article is left to the courts and other legislation." G.S. § 25-2-304, comment 3.

¹³² Under G.S. § 25-2-103(1)(c), "'Receipt' of goods means taking physical possession of them."

¹³³ As to buyer's rights of inspection, see G.S. § 25-2-513(1).

which case the buyer may inspect the goods before payment unless the contract contains C.O.D., C.I.F., or cash-against-documents terms.¹³⁴ But, in all documentary sales except shipment under reservation, payment is due when and where the buyer is to receive the documents.¹³⁵ If the shipment is required or authorized to be on credit, the credit period starts to run from the time of shipment, "but post-dating the invoice or . . . delaying its dispatch will correspondingly delay the starting of the credit period."¹³⁶

D. Risk of Loss

As has been previously noted, the Code has abandoned the use of "title" as a tool for resolving sales problems in favor of rules dealing directly with the real issues involved in the dispute at hand.¹³⁷ An excellent example of the Code approach may be found in sections 2-509 and 2-510, which deal with risk of loss. If the parties have not specifically provided for the allocation of risk between them—a matter on which they are certainly competent to agree—¹³⁸ reference to simple rules will guide the result wholly without reference to who may have title at any particular time. It should again be emphasized that the difference is one chiefly of method, not of result.

The first factor of importance in allocating risk is whether there has been a breach by one of the parties. The importance of breach in determining risk of loss is illustrated by the fact that one Code section deals with risk in the absence of breach,¹³⁹ while another deals with risk when there has been a breach.¹⁴⁰ Once the initial breach question has been answered, the appropriate section may be consulted and reference to such objective facts as delivery to the carrier or tender and receipt of the goods will answer the ultimate question of risk of loss.

¹³⁴ G.S. § 25-2-310. Note that a shipment under reservation, if expressly authorized by contract, could be construed as a pure documentary sale in which payment would be due *after* tender of documents and *prior* to inspections. G.S. 25-2-513(3). Subsection 2-310(b) under discussion in the text governs only contracts in which there is no agreement on shipping under reservation. See 2 HAWKLAND § 1.2203 for a fuller discussion of this subject.

¹³⁵ G.S. § 25-2-310(c).

¹³⁶ G.S. § 25-2-310(d).

¹³⁷ See text accompanying notes 39-49 *supra*.

¹³⁸ See G.S. §§ 25-2-509(3), -303.

¹³⁹ G.S. § 25-2-509.

¹⁴⁰ G.S. § 25-2-510.

The rules applicable in the absence of breach are first considered. Under a "shipment" contract,¹⁴¹ risk of loss passes to the buyer when the seller has duly delivered the goods to the carrier. Shipment under reservation does not vary this result. The only determining factors are whether the contract is one of shipment and whether the seller has performed his duties under such a contract.¹⁴² If the contract is a "destination" contract,¹⁴³ the risk does not pass to the buyer until the goods are tendered at destination while in the possession of the carrier so as to enable the buyer to take delivery.¹⁴⁴ If the goods are in the hands of a bailee and are not to be moved under the contract, the risk of loss passes to the buyer on his receipt of a negotiable document of title, or upon the bailee's acknowledgment of the buyer's right to possession, or within a reasonable time after the buyer's receipt of a non-negotiable document of title or written delivery order.¹⁴⁵

In cases other than those described above, the risk passes to the buyer upon his receipt of the goods if the *seller* is a merchant; if the seller is not a merchant, the risk passes to the buyer upon seller's tender of delivery. The theory underlying this distinction is that the merchant-seller is more likely than the buyer to have insurance covering the goods while they are still in his possession,¹⁴⁶ and is in a better position—and has the requisite knowledge—to care for them to avoid loss. It should be noted that this shift of the risk to the insurance-bearing party is carried over into the next section dealing with risk of loss when the contract has been breached. Where the seller so breaches the contract as to give the buyer the right to reject the goods, the risk of loss does not pass to the buyer until the seller has cured the breach or the buyer has accepted the goods. If the buyer rightfully revokes acceptance of the goods,¹⁴⁷ "he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the

¹⁴¹ See text accompanying notes 119-21 *supra* for discussion of shipment contracts. Note also that C.I.F. and C. & F. and F.O.B. place-of-shipment contracts fall into this category.

¹⁴² See G.S. § 25-2-504 for a delineation of seller's duties in this regard.

¹⁴³ See text accompanying notes 122-24 *supra* for discussion of destination contracts.

¹⁴⁴ G.S. § 25-2-509(1)(b). See G.S. § 25-2-503 for a delineation of seller's duties under a destination contract.

¹⁴⁵ G.S. § 25-2-503(4)(b).

¹⁴⁶ G.S. § 25-2-509, comment 3.

¹⁴⁷ See G.S. § 25-2-608.

seller from the beginning."¹⁴⁸ Finally, the seller is given a reciprocal right of treating the risk of loss on the buyer to the extent of any deficiency in the seller's effective insurance coverage in the situation where conforming goods have been identified to the contract by the seller and the buyer has repudiated or otherwise breached.¹⁴⁹

E. Insurable Interests

An example of the Code's very practical approach has just been discussed: the frank utilization of available insurance to cover risk of loss. It should be no surprise that the Code makes explicit provisions for the determination of who has insurable interest at any particular phase of a sales transaction and that these rules rest on a pragmatic basis.

Section 2-501 is framed in such a way as to give the buyer an insurable interest at the earliest possible stage of the sales transaction. This is accomplished by virtue of the concept of identification of the goods, a concept analogous to, but sharply distinguishable from, the pre-Code concept of appropriation. As distinguished from appropriation, identification has principal significance in determining when the buyer has an insurable interest; it has no significance, for example, with respect to risk of loss.¹⁵⁰

The buyer is given a special property and an insurable interest in goods "by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming." This identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of such agreement, it occurs at the time the contract of sale is made if it is for goods existing and identified as of that time. If the contract is for future goods, the identification occurs "when the goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers." It should be emphasized that this can be accomplished by the seller alone—another sharp difference from

¹⁴⁸ G.S. § 25-2-510(2). Note that even when the seller has identified non-conforming goods to the contract, the buyer obtains an insurable interest and a special property in the goods. The seller also retains an insurable interest in this situation. See G.S. § 25-2-501.

¹⁴⁹ G.S. § 25-2-510(3).

¹⁵⁰ It is also a necessary part of the determination of who has title under G.S. § 25-2-401(1), (although title, of course, has nothing of the same significance it enjoyed under pre-Code law), whether a buyer may recover goods from an insolvent seller under G.S. § 25-2-502, and it affords a basis for the buyer's right of replevin under G.S. § 25-2-716.

the pre-Code concept of appropriation. Future goods in the form of crops and the "unborn young" of animals are specially provided for; identification occurs at the time the crops are planted or otherwise become growing crops or the young are conceived, if the contract is for the sale of unborn young to be born within one year after the making of the contract, or for the sale of crops to be harvested within one year or the next normal harvest season after contracting, whichever is longer.¹⁵¹

The seller retains an insurable interest even after the act of identification that gives the buyer an insurable interest—he retains that interest so long as title or any security interest remains in him. The limited function of identification is again illustrated by the provision that authorizes the seller (until default or insolvency or notification to the buyer that the identification is final) to substitute other goods for those originally identified, if the original identification was accomplished by the seller alone.¹⁵²

It is specifically provided that the above rules should not be construed to impair "any insurable interest recognized under any other statute or rule of law."¹⁵³ The rules thus can be viewed as an attempt to expand the concept of insurable interest that existed under prior law. Or, as stated in a different way, "the rules of this section . . . are . . . effective only if existing law would negate insurability."¹⁵⁴

F. Assignment and Delegation

The provisions for delegation of performance and the assignment of rights of section 2-210 apparently will not materially change North Carolina case law.¹⁵⁵ However, the specificity of the new Code provisions and the guidelines therein provided for construction of contractual provisions should considerably clarify the rights of the parties in these areas. At least one author considers this to be "one of the most significant sections of the Article of Sales."¹⁵⁶

¹⁵¹ For further discussion of the concept and importance of identification under the Code, see Lattin, *Uniform Commercial Code, Article 2 on Sales: Some Observations on Four Fundamentals*, 16 HASTINGS L.J. 551, 561-67 (1965).

¹⁵² G.S. § 25-2-501(2).

¹⁵³ G.S. § 25-2-501(3).

¹⁵⁴ N.Y. UNIFORM COMMERCIAL CODE § 2-501, comment at 467.

¹⁵⁵ See G.S. § 25-2-210, N.C. comment.

¹⁵⁶ Ryan, *Article 2: Sales*, 15 OKLA. L. REV. 249, 254 (1962).

A clear distinction is made between delegation of performance and assignment of rights. Thus, although both are made "normal and permissible incidents of a contract for the sale of goods,"¹⁵⁷ it is recognized that delegation of performance is more objectionable than assignment of rights (usually the right to receive money). Consequently, a contractual prohibition of assignment of "the contract" is construed as barring only the delegation to the assignee of the assignor's performance,¹⁵⁸ and "a right to damages for breach of the whole contract, or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise."¹⁵⁹ Aside from these limitations, the parties can agree against assignment.¹⁶⁰ If a valid assignment delegating performance is made, the other party may treat the assignment as reasonable grounds for insecurity and may proceed under section 2-609 to demand assurances of due performance by the assignee.¹⁶¹ This should be particularly helpful in the case of output requirements and exclusive dealing contracts.¹⁶²

G. Warranties, Disclaimers, and Limitations on Warranty Actions

One of the most litigated areas of sales law has been that dealing with warranties. Indeed, one authority has estimated that as much as one-third of all sales litigation has revolved around it.¹⁶³ While the provisions of the Code in this area cannot be considered a magic balm, they should bring greater certainty to this complex field by virtue of their clarity and specificity. A few changes in terminology and categorization have been employed to overcome some of the ambiguities of prior law, and specific provision has been made for disclaimers, a subject of considerable difficulty.

1. *Express Warranties.*—Under the Code, an express warranty of quality may be created in any of three ways: (1) by affirmations of fact or promises made by the seller relating to the goods and becoming "a part of the basis of the bargain,"¹⁶⁴ (2) by a descrip-

¹⁵⁷ G.S. § 25-2-210, comment 1.

¹⁵⁸ G.S. § 25-2-210(3).

¹⁵⁹ G.S. § 25-2-210(2).

¹⁶⁰ G.S. §§ 25-2-210(1), (2).

¹⁶¹ G.S. § 25-2-210(5). See G.S. § 25-2-609.

¹⁶² G.S. § 25-2-210, comment 4.

¹⁶³ HAWKLAND, SALES AND BULK SALES 36.

¹⁶⁴ The "basis of the bargain" requirement of subsection 2-313(1)(a)

tion of the goods that is made a part of the basis of the bargain, or (3) by any sample or model that is so used.¹⁶⁵ It is specifically provided that neither formal words (such as "warranty" or "guarantee") nor specific intent are necessary to create a warranty.¹⁶⁶ Moreover, the draftsmen have indicated, in line with the Code provision on the validity of contractual modification without consideration,¹⁶⁷ that an express warranty may arise even after the deal is closed.¹⁶⁸

2. *Implied Warranties of Merchantability and Fitness.*—If not specifically excluded or modified, a warranty of merchantability is implied in every sale by a merchant who deals in "goods of that kind."¹⁶⁹ The warranty is, for the first time in a statutory context, elaborately defined. The goods must, among other things, be fit for the ordinary purposes for which such goods are used; they must be adequately "contained, packaged and labeled as the agreement may require"; and they must "conform to the promises or affirmations of fact made on the container or label if any." The serving of food and drink is specifically made a sale for purposes of this implied warranty, thus clarifying some conflicting case law on this point.¹⁷⁰ Finally, the pre-Code requirement that the sale be by "description" in order for the implied warranty of merchantability to arise has been eliminated,¹⁷¹ a step that may change present North Carolina law.¹⁷²

of the U.C.C. is apparently the same as the "reliance" qualification of section 12 of the U.S.A. It also seems to include the Sales Act provision "if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods."

1 HAWKLAND § 1.190101.

¹⁶⁵ Note that the warranties of sample and description, which were categorized as implied warranties under the Uniform Sales Act, are treated as express warranties under the Code to overcome some ambiguities that arose in the pre-Code cases. See HAWKLAND, SALES AND BULK SALES 36-39; 1 HAWKLAND § 1.190102.

¹⁶⁶ G.S. § 25-2-313(2).

¹⁶⁷ G.S. § 25-2-209.

¹⁶⁸ The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (section 2-209).

G.S. § 25-2-313, comment 7.

¹⁶⁹ The warranty may also arise under proper circumstances in sales by nonmerchants. See G.S. § 25-2-314, comment 4.

¹⁷⁰ See G.S. § 25-2-314, N.C. comment; 1 HAWKLAND § 1.1906.

¹⁷¹ See 1 HAWKLAND §§ 1.190204, 1.190206.

¹⁷² Consider, *e.g.*, the following description of the implied warranty of

The implied warranty of fitness for a particular purpose is spelled out in terms of a seller who has reason to know at the time of the transaction that the buyer has a particular purpose for his purchase and is relying on the seller's skill and judgment to select or furnish goods suitable for that purpose. Normally, the warranty of fitness will arise only where the seller is a merchant, but the commentary suggests that "it can arise as to non-merchants where this is justified by the particular circumstances."¹⁷³ The warranty has been extended beyond its pre-Code scope by the elimination of the "patent or other trade name" exception that formerly applied.¹⁷⁴ Use of a trade name, however, may still be relevant to show that the buyer was not relying on seller's skill and judgment.

3. *Implied Warranty of Title.*—Unless disclaimed by specific language or circumstances that reasonably indicate that the seller does not claim title in himself or purports to sell only such interest as he has, a warranty arises in every sale that the title conveyed shall be good, its transfer rightful and that the goods will be delivered free of any interest not known to the buyer.¹⁷⁵ One significant addition is made to the prior law on the subject: a duty is imposed on a merchant-seller who regularly deals in goods of the kind to make certain that no claim of patent infringement will cloud or mar the buyer's title, unless the circumstances surrounding the contract show that the risk of such a claim was placed on the buyer.¹⁷⁶ The old warranty of quiet possession as such has been abolished, but disturbance of quiet possession remains one way in which the breach of the warranty of title may be established.¹⁷⁷ It should be noted that this will also result in a change in statute-of-limitations application to this area: no longer will the statute begin running only when quiet possession is disturbed. The general four-

merchantability contained in *Swift & Co. v. Aydlett*, 192 N.C. 330, 135 S.E. 141 (1926):

A vendor of an article of personal property, by *name and description*, cannot relieve himself of the obligation arising from the warranty implied by law to deliver an article which is at least merchantable, or saleable or fit for the use of which article of that name and description are ordinarily sold and bought.

Id. at 335, 135 S.E. at 144. (Emphasis added.)

¹⁷³ G.S. § 25-2-315, comment 4.

¹⁷⁴ See G.S. § 25-2-315, comment 5.

¹⁷⁵ G.S. § 25-2-312(1)(2).

¹⁷⁶ G.S. § 25-2-312(3).

¹⁷⁷ G.S. § 25-2-312, comment 1.

year sales statute begins running when the goods are delivered.¹⁷⁸ It is not believed that the result is unduly harsh.¹⁷⁹

4. *Disclaimers.*—The subject of warranty disclaimers is specifically treated under the Code in recognition of the difficulty of accommodating the parties' freedom to contract away warranties with the social policy of preventing deception in this crucial area. So considered, the Code provisions dealing with exclusion or modification of warranties¹⁸⁰ can perhaps be described as specific applications of the general Code section dealing with unconscionability.¹⁸¹ The purpose of the draftsmen in framing the section is made quite clear in their commentary:

It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.¹⁸²

If language of express warranty and of disclaimer is used simultaneously and cannot be construed as consistent, the language of disclaimer is inoperative. This seems quite reasonable. The difficulty arises when words or conduct that would ordinarily create an express warranty are used prior to the signing of a written contract that disclaims all warranties. Affirmations of fact made while the bargain is entered into usually become a part of the ultimate contract; hence, a subsequent disclaimer would seem to be ineffective. However, the seller can protect himself against false assertions of prior warranty agreements by inserting his disclaimer in an integrated contract, since the Code parol evidence rule provides that terms set forth in a writing intended by the parties as a final expression of their agreement "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. . . ."¹⁸³ It has been suggested that "even where the seller intends to assume the obligations of express warranties, he should include them in

¹⁷⁸ G.S. § 25-2-725.

¹⁷⁹ See 1 HAWKLAND § 1.2002.

¹⁸⁰ G.S. § 25-2-316.

¹⁸¹ UCC § 2-302. Note that this Code section was rejected by the North Carolina legislature. See discussion in text accompanying notes 283-96 *infra*.

¹⁸² G.S. § 25-2-316, comment 1.

¹⁸³ G.S. § 25-2-202. Note also that this section is specifically referred to in G.S. § 25-2-316(1).

a written integrated contract to prevent misunderstanding or false allegations as to their nature and scope."¹⁸⁴

Disclaimer of implied warranties is also permitted, but it must be accomplished in specific ways designed to apprise the buyer of the risks he assumes when the protection he would otherwise enjoy¹⁸⁵ is disclaimed. An effective disclaimer of the implied warranty of merchantability must mention the word "merchantability" and, if in writing, the language must be "conspicuous"—meaning that, in a printed form, the language must ordinarily be in larger or other contrasting type or color.¹⁸⁶ Exceptions are made to this requirement when such words as "with all faults," "as is" or the like are used,¹⁸⁷ or the buyer has examined (or has refused to examine) the goods,¹⁸⁸ or course of dealing or course of performance or usage of trade¹⁸⁹ dictate otherwise.¹⁹⁰ A disclaimer of implied warranties of fitness is effective if it states, for example, that "there are no warranties which extend beyond the description on the face hereof."¹⁹¹ The exceptions noted above to the requirement of specific language of disclaimer in the case of implied warranties of merchantability apply also to those of fitness.

It should be noted that the above discussion of disclaimer does not mention remedies or disclaimer of the warranty of title. Obviously, if a warranty has been effectively disclaimed, no remedy exists for its "breach." The disclaimer section thus specifically indicates that remedies for breach of warranties are elsewhere treated.¹⁹² If one is concerned with the limitation or avoidance of consequential damages, he must look to the sections that deal with that subject.¹⁹³

¹⁸⁴ HAWKLAND, SALES AND BULK SALES 48.

¹⁸⁵ Note that G.S. § 25-2-316, comment 5, indicates that "subsection (2) presupposes that the implied warranty in question exists unless excluded or modified."

¹⁸⁶ G.S. § 25-1-201 defines "conspicuous" as follows:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

¹⁸⁷ G.S. § 25-2-316(3)(a).

¹⁸⁸ G.S. § 25-2-316(3)(b).

¹⁸⁹ See G.S. § 25-1-205.

¹⁹⁰ G.S. § 25-2-316(3)(c).

¹⁹¹ G.S. § 25-2-316(2).

¹⁹² G.S. § 25-2-316(4).

¹⁹³ See G.S. §§ 25-2-718, -719.

Disclaimer of the warranty of title is also separately treated. This is on the assumption that the average buyer thinks of warranties as pertaining to the quality of the goods, not whether their transfer to him has been "rightful." Thus, even though a buyer may agree to assume the risk of the quality of goods, he would ordinarily be surprised to find that his agreement to a disclaimer has left him without remedy if it later turns out that his seller had no right to sell them. Accordingly, disclaimer of title is dealt with in the section dealing with title, and it "will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have."¹⁹⁴

5. *Contractual Limitations on Warranty Actions and the Code's Relationship to Strict Liability in Tort.*—The Code has taken a few rather conservative steps toward the mitigation of some of the contractual barriers often associated with warranty actions. But, although it may be conceded that these small steps parallel to a very modest extent some of the expanding case law in this field predicated on tort theory, it must be emphasized that these Code provisions do not purport either to go as far as or to interfere with the development of tort case law in this area. This observation seems particularly relevant in North Carolina because of the rather stringent limitations on contract warranty actions now on the books.¹⁹⁵

The first step is that involving privity. This traditional barrier to warranty actions is removed by the Code only in a very limited context: where a warranty exists,¹⁹⁶ it "extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty."¹⁹⁷ The defense of lack of privity is thus made unavailable as against that class of persons. But, beyond that point, the section is "neutral": it "is not intended to enlarge or restrict the developing case law on whether the seller's

¹⁹⁴ G.S. § 25-2-312(2).

¹⁹⁵ See G.S. § 25-2-318, N.C. comment; Byrd & Dobbs, *Torts, North Carolina Case Law*, 43 N.C.L. REV. 906, 936-38 (1965); 43 N.C.L. REV. 1019 (1965).

¹⁹⁶ Privity rules are obviously irrelevant if the warranty has been effectively disclaimed.

¹⁹⁷ G.S. § 25-2-318.

warranties, given to his buyer who resells, extend to other persons in the distributive chain."¹⁹⁸ In other words, if state case law now requires that a consumer have direct privity with a manufacturer of goods before he may bring suit for breach of warranty, the consumer will still have no action—as against the manufacturer—under the Code.

The Code's neutrality to rapidly developing case law is also apparent with respect to the so-called "sale" requirement in warranty actions. Normally, of course, warranty litigation is founded on a sale. However, a few troublesome areas have developed as a result of the assumption of some courts that warranty obligations arise only out of sales transactions. There is conflicting case law, for example, as to whether the serving of food or drink should be classified as "uttering" or "serving" as opposed to a "sale." Those courts that have not labeled it a "sale" have refused to extend warranty protection to it.¹⁹⁹ The Code specifically reverses those courts by providing that "the serving for value of food and drink to be consumed either on the premises or elsewhere is a sale" for purposes of the application of the implied warranty of merchantability.²⁰⁰ Beyond this, the Code does not go: it is silent as to other situations that might be characterized as "sales" and not as "services" for purposes of warranty coverage (*e.g.*, improper blood transfusions and supermarket injuries sustained before a contemplated sale has been consummated).²⁰¹ The Code draftsmen put it in these words:

[T]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law.²⁰²

¹⁹⁸ G.S. § 25-2-318, comment 3.

¹⁹⁹ See G.S. § 25-2-314, N.C. comment; 43 N.C.L. REV. 1019 (1965).

²⁰⁰ G.S. § 25-2-314(1).

²⁰¹ See 1 HAWKLAND § 1.1906. Another very good example is thoroughly discussed in 43 N.C.L. REV. 1019 (1965).

²⁰² G.S. § 25-2-313, comment 2.

Finally, mention must be made of the relationship of the Code warranty provisions to case-law developments founded on strict liability in tort, an area of both great expansion and controversy. It must be emphasized that the Code provisions relating to warranties, disclaimers and unconscionability were not designed either to pre-empt or encroach upon that area of the law. Consequently, there is absolutely no reason why case law founded on strict liability in tort cannot continue to develop wholly independently of the Code. Indeed, it was observed only last year (without regard to the change in privity law that will result from the Code provisions described above) that the rigid North Carolina view toward privity in a contract action for breach of warranty need not be changed in order to allow recovery for personal injuries if the court is willing to adopt a claim of strict liability in tort when personal injury is involved: "It is perfectly consistent to insist upon privity of contract in contract cases and at the same time impose strict liability in tort" ²⁰³ Thus, in proper cases—and wholly apart from the Code—the court would have "a perfectly legitimate basis for eliminating the privity requirement—by viewing the action realistically as one in tort" ²⁰⁴

Where, then, is the line to be drawn? Too many decisions in this area speak the language of strict liability and contract-warranty liability in the same breath to make the distinction clear. And, it must be admitted that to the extent the Code has encroached upon the old privity and sales requirements of contract-warranty actions and declared the limitation of consequential damages for injury to the person from consumer goods to be unconscionable, ²⁰⁵ there will remain a small area in which either a Code warranty action or a tort strict-liability action would lie. Still, the Code speaks in the language and terms of contract, not tort, actions, and so long as it is recognized that the two kinds of action serve distinctly different needs, the line can be drawn. Chief Justice Traynor of California has aptly expressed the distinction in these words: "The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the Sales Act or of the

²⁰³ Byrd & Dobbs *supra* note 195, at 937.

²⁰⁴ *Ibid.*

²⁰⁵ G.S. § 25-2-719(3). One must remember that the subject of limitation of remedies is divorced from that of disclaimers of warranties under the Code. See text accompanying notes 192-93 *supra*.

Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries."²⁰⁶

Thus, while the Code may make some actions for personal injuries within very limited areas available in states where the tort strict-liability doctrine is not well developed, it would seem best to confine its application primarily to losses of an economic or commercial variety. Indeed, one may speculate that the Code provisions permitting recovery for personal injuries under limited circumstances were inserted in view of the fact that the tort strict-liability doctrine was not well enough developed—and distinguished from sales warranty doctrine—to permit recovery for personal injuries when such recovery would seem justified under the circumstances. However, with the advent of the modern view now expressed by the *Restatement of Torts (Second)*,²⁰⁷ that need is diminishing. Consequently, the doctrines both of tort and sales might best be served by drawing the line between economic loss—caused by the failure of the product to match economic expectations—caused by failure of the goods “to match a standard of safety defined in terms of conditions that create unreasonable risks of harm.”²⁰⁸

VI. PERFORMANCE OF THE CONTRACT

A. *By the Seller*

The seller's basic duty to tender delivery of conforming goods is well-defined in section 2-503. Merely fulfilling his delivery obligations²⁰⁹ is not sufficient; he must make a proper tender as well, *i.e.*, make conforming²¹⁰ goods (or documents) reasonably available to the buyer. The seller thus must notify the buyer of his delivery, proffer the goods at a reasonable hour and keep them available for the period reasonably necessary to enable the buyer to take possession—including such time, where the buyer has a right of inspection before he is obligated to pay,²¹¹ as is necessary for the buyer to make a reasonable inspection. If the goods are in the possession of a bailee and are to be delivered without being moved, the seller

²⁰⁶ *Seely v. White Motor Co.*, 45 Cal. Rptr. 17, 21, 403 P.2d 145, 149 (1965).

²⁰⁷ RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 10, 1964).

²⁰⁸ *Seely v. White Motor Co.*, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

²⁰⁹ Discussed in text accompanying notes 117-30 *supra*.

²¹⁰ “Goods or conduct including any part of a performance are ‘conforming’ or conform to the contract when they are in accordance with the obligations under the contract.” G.S. § 25-2-106(2).

²¹¹ See G.S. § 25-2-513.

fulfills his tender obligation by tendering a negotiable document of title or procuring the bailee's acknowledgment of the buyer's right to possession. He may also, unless the buyer "seasonably" objects, tender a non-negotiable document of title or written delivery order.²¹² Where the seller by contract is to tender documents, they must, of course be in correct form, and tender through customary banking channels is sufficient.

B. By the Buyer

The buyer performs his part of the contract by accepting the goods and paying for them upon the seller's proper tender, which is a condition to buyer's duty to accept and pay. The buyer is always given the right to inspect before he is obliged to accept the goods,²¹³ and normally he may inspect before he pays.²¹⁴ The buyer thus always has a right of inspection before he must completely perform. The expenses of such inspection are to be borne by the buyer unless the goods do not conform and are rejected.²¹⁵

C. Curing the Breach and Excuse

1. *Cure and Adequate Assurance of Performance.*—Two new Code concepts dealing with the seller's right to "cure" his own breach under limited circumstances and either party's right to receive adequate assurance of performance from the other party under limited circumstances again illustrate the Code's overriding pragmatic response to business needs. The seller who has made a tender is permitted to cure the defects if the time for his own performance has not expired and he "seasonably" notifies the buyer of his intention to cure. The defects may be cured in any manner including, for example, substituting goods or repairing damaged ones. Moreover, the seller may be given time to cure even beyond the contract

²¹² If the seller takes this course of fulfilling his tender obligation, receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

G.S. § 25-2-503(4)(b).

²¹³ G.S. § 25-2-606(1)(b).

²¹⁴ See G.S. § 25-2-513. *But see* G.S. § 25-2-512.

²¹⁵ G.S. § 25-2-513(2).

date for his own performance if he had reason to believe that his tender would be acceptable by virtue of the parties' prior course of dealing, course of performance, usage of the trade, or the like. This provision is obviously designed to eliminate the so-called "forced breach" that occurs when one party to a bargain wants out (*e.g.*, when the market changes) and decides the best way out is to stand on some minor defect, which would ordinarily make no difference, as grounds for rejection—thus forcing the willing party to breach.²¹⁶

The right to cure is not merely a one-way street. The buyer is also given a right to cure under circumstances that sellers have occasionally utilized to force buyers to breach: when the seller unexpectedly demands payment in cash, the buyer is given a reasonable extension of time to procure it.²¹⁷ More importantly, however, when the seller is given the opportunity to cure, the buyer is given the right to demand "adequate assurance of performance," a concept that makes the cure doctrine fair and workable. Any demonstrable breach by a seller is likely to make his buyer a little nervous about the seller's ultimate ability to perform pursuant to contract. Consequently, when the seller has breached—even before the contract date for his own performance has expired—the buyer is given the right to demand assurance that the seller will duly perform. Until he receives this assurance, the buyer may suspend his own performance, and, if he has not received "adequate" assurance within a reasonable time after he has demanded one in writing, he may treat the contract as repudiated.²¹⁸

This concept of adequate assurance of performance is by no means limited to situations in which the seller is given a right to cure. As set out in the Code, it is applicable to *either* party to the sales contract whenever he has good commercial reasons—such as a buyer falling behind in "his account" with his seller or a seller making deliveries of defective goods under identical contracts to third parties²¹⁹—to think the other party's performance will not be forthcoming. It is notable that when both parties are merchants, the standards for determining whether good commercial reasons²²⁰

²¹⁶ See HAWKLAND, SALES AND BULK SALES 120-22.

²¹⁷ G.S. § 25-2-511(2).

²¹⁸ G.S. § 25-2-609.

²¹⁹ See G.S. § 25-2-609, comment 3.

²²⁰ The actual term used is "reasonable grounds for insecurity." G.S. § 25-2-609(1).

exist and the adequacy of the assurance to be given are commercial rather than legal standards.²²¹

2. *Impossibility, Frustration, and Impracticability.*—The rules providing for excuse on grounds of impossibility or commercial impracticability, along with a procedure²²² for claiming such excuse, are set forth in separate Code sections. The first deals with casualty to identified²²³ goods and provides that when the contract involves goods identified at the time of contract and those goods are (or have been) destroyed without fault before the risk of loss has passed to the buyer, the seller is excused from performance; if the loss is only partial, the buyer may either take what is left with money allowance or treat the contract as avoided. The second section²²⁴ in this area provides for substituted performance when agreed berthing or loading facilities or an agreed type of carrier becomes unavailable, or when the agreed means or manner of payment fails because of some domestic or foreign governmental regulation. The third²²⁵ covers rights, duties and liabilities that arise when the agreed-upon performance becomes impracticable due to failure of presupposed conditions.

VII. REMEDIES

A. Introduction

It has been suggested that the remedies provided by the Code rest on the distinction that turns on whether the buyer has accepted the goods.²²⁶ Consequently, any discussion of remedies must start with a consideration of the Code concepts of "acceptance," "revocation of acceptance," and "rejection."

Goods may be accepted in any of several ways. The usual way is for the buyer to signify by language or conduct that he will take them, and such signification does not necessarily indicate that the buyer considers the goods as conforming to the contract.²²⁷ It may also be accomplished by any act on the part of the buyer that is

²²¹ See G.S. § 25-2-609(2); G.S. § 25-2-609, comment 3.

²²² G.S. § 25-2-616.

²²³ See discussion in text accompanying notes 150-51 *supra*.

²²⁴ G.S. § 25-2-614.

²²⁵ G.S. § 25-2-615.

²²⁶ 1 HAWKLAND § 1.39.

²²⁷ G.S. § 2-606. Note, as explained more fully below, that acceptance "does not of itself" preclude an action for damages or other remedies provided by the Code. G.S. § 25-2-607(2).

inconsistent with the seller's ownership, "but if such act is wrongful as against the seller it is an acceptance only if ratified by him."²²⁸ However, retention of a small portion of defective goods for use as evidence in case of trial would probably not constitute such an act.²²⁹ The final way in which acceptance can be accomplished is by the failure of the buyer "to make an effective rejection,"²³⁰ a rule that obviously necessitates a discussion of "rejection."

The buyer may reject, subject to the rules already discussed with respect to "cure"²³¹ and special rules relating to installment contracts,²³² "if the goods or the tender of delivery fail in any respect to conform to the contract."²³³ However, the buyer must make his rejection in a certain manner in order to avoid acceptance; he must, in other words, make an *effective* rejection. In order for his rejection to be effective, the buyer must reject within a reasonable time and seasonably notify the seller. Rejection may be of the whole contract or any commercial unit or units constituting a part of the contract. The buyer may revoke his acceptance within a reasonable time under limited circumstances if the non-conformity "substantially impairs" the value of the goods. Such a revocation of acceptance places the buyer in the same position he would have occupied had he initially rejected the goods. There is, for example, no question, as there might have been under pre-Code law, whether he would retain the right to claim damages²³⁴—under the Code he clearly has such a right. Grounds for such revocation are that the acceptance was made originally on the assumption that the non-conformity would be cured, that the non-conformity could not be discovered earlier because of its latent nature, or that the original acceptance was

²²⁸ G.S. § 25-2-606(1)(c). See 1 HAWKLAND § 1.4002.

²²⁹ See G.S. § 25-2-515. Dean Hawklund argues that though this section does not specifically authorize the buyer to preserve evidence without suffering the consequences of acceptance, "forward-looking courts probably will give section 2-515 a broad construction and will be reluctant to find acceptance in these situations on technical grounds." 1 HAWKLAND § 1.4002.

²³⁰ G.S. § 25-2-606(1)(b).

²³¹ See discussion in text accompanying note 216 *supra*.

²³² Under an installment contract, the buyer may reject a single installment only if the non-conformity *substantially* impairs the value of that installment. And, the buyer may not treat the entire contract as breached unless the non-conforming installment *also* substantially impairs the value of the whole contract. Of course, any non-conformity would trigger the provisions giving the buyer the right to adequate assurances of performance. See discussion in text accompanying notes 218-21 *supra*. G.S. § 25-2-612.

²³³ G.S. § 25-2-601.

²³⁴ G.S. § 25-2-608, comment 1.

induced by the seller's assurances that there were no defects. Revocation is not effective "until the buyer notifies the seller of it."

B. The Buyer's Remedies Prior to Acceptance

If the buyer has made an effective rejection or revocation of acceptance or the seller has failed to deliver or has repudiated, the buyer may "cancel" the contract and, in addition to recovering whatever he has already paid on the contract, recover damages.²³⁶ This right of "cancellation" in no way affects any of the other remedies the buyer is given by the Code.²³⁶ If the buyer needs conforming goods, he may "cover," *i.e.*, purchase substitute goods on the market, and have as damages the difference between the cost of cover and the contract price.²³⁷ If the buyer does not wish to cover, he may have damages measured by the difference between the market price at the place for tender at the time when the buyer learned of the seller's breach.²³⁸ The buyer is also given a security interest in goods in his possession—which he may foreclose by sale if necessary²³⁹—to insure the sufficiency of his remedies.²⁴⁰

Because the buyer's right to "cover" or recover damages for non-delivery will not protect him in every situation, he is given rights of specific performance and replevin under very limited circumstances. If the goods are "unique or in other proper circumstances," the buyer may have specific performance.²⁴¹ If the buyer is unable to effect cover, he may replevy identified goods,²⁴² if the replevin is not in derogation of the rights of third persons.²⁴³ Finally, the buyer may reach the goods if the seller has become in-

²³⁵ See G.S. § 25-2-711 which is an index to the remedies available to the buyer prior to acceptance.

²³⁶ See G.S. § 25-2-711(1). Note that G.S. § 25-2-720 provides that "Unless the contrary intention clearly appears, expressions of 'cancellation' or 'rescission' of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach." See also G.S. § 25-2-106(4), which defines "cancellation" and its effect.

²³⁷ G.S. § 25-2-712.

²³⁸ G.S. § 25-2-713. Note that the Code contains special provisions for establishing market price. See G.S. §§ 25-2-723, -724.

²³⁹ See G.S. §§ 25-2-711(3), -706.

²⁴⁰ G.S. § 25-711(3).

²⁴¹ UCC § 2-716. Note that the North Carolina legislature omitted the phrase "or in other proper circumstances." The amendment seems a clear violation of the spirit of the section. See discussion in text accompanying notes 299-300 *infra*.

²⁴² G.S. § 25-2-716(3).

²⁴³ See 1 HAWKLAND § 1.460102.

solvent within ten days after receipt of the first installment on their price.²⁴⁴

C. *The Buyer's Remedies after Acceptance*

Certain incidents follow upon the buyer's acceptance. He must pay at the contract rate for any goods he has accepted,²⁴⁵ and he may not return them unless he qualifies and chooses to revoke his acceptance.²⁴⁶ However, he is not barred from damages,²⁴⁷ which he may usually collect by deducting them from the price,²⁴⁸ if he gives the seller notice of the breach.²⁴⁹ Special provisions are made for situations in which the buyer himself is sued for patent infringement or breach of warranty for which his seller is answerable.²⁵⁰ The buyer's damages for breaches other than those of warranty may be determined "in any manner which is reasonable." "Damages for breach of warranty are the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless circumstances show proximate damages of a different amount."²⁵¹ Incidental and consequential damages may also be recovered under "proper circumstances."²⁵² One entire section is devoted to an illustrative delineation of circumstances considered to be "proper" for such damages.²⁵³

D. *Seller's Remedies Prior to Acceptance*

As is true with respect to the remedies given to the buyer, the seller is afforded a variety of remedies designed to put him "in as good a position as if the other party had fully performed."²⁵⁴ A seller's remedies—as is also true with the buyer—are essentially

²⁴⁴ G.S. § 25-2-502. There is some question whether this provision might be conflict with the bankruptcy laws. See discussion in HAWKLAND, SALES AND BULK SALES 141-43 and 1 HAWKLAND § 1.460104.

²⁴⁵ G.S. § 25-2-607.

²⁴⁶ G.S. §§ 25-2-607(2), -608. See text accompanying note 234 *supra* for a brief discussion.

²⁴⁷ See generally G.S. §§ 25-2-714, -715.

²⁴⁸ G.S. § 25-2-717.

²⁴⁹ G.S. § 25-2-607(3).

²⁵⁰ G.S. § 25-2-606(1)(b), (5), (6). See 1 HAWKLAND §§ 1.4803, 1.4804.

²⁵¹ G.S. § 25-2-714.

²⁵² G.S. § 25-2-714(2). Note also that such damages are specifically mentioned in the sections dealing with cover (§ 25-2-712) and non-delivery (§ 25-2-713).

²⁵³ G.S. § 25-2-715.

²⁵⁴ G.S. § 25-2-106. This section also indicates broadly that Code remedies are to be "liberally administered."

cumulative in nature. Thus, any notion of election of remedies is rejected; "whether the pursuit of one remedy bars another depends entirely on the facts of the individual case."²⁵⁵ An index of the remedies available to the seller prior to acceptance is found in section 2-703.

Usually, a seller will desire to sell rejected goods if he can. The Code's damages provisions encourage this result by making his resale price, rather than the "market" price, the conclusive test of the value of the rejected goods if the resale has been "made in good faith and in a commercially reasonable manner."²⁵⁶ However, the seller is under no obligation to resell, and if he chooses not to do so, he may have as damages the difference between the market²⁵⁷ and the contract price plus incidental damages.²⁵⁸ Moreover, if the difference between the market and contract prices will not put the seller "in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer" plus incidental damages.²⁵⁹ It is arguable whether a seller may have consequential damages under any of these provisions.²⁶⁰

Special provision is made for the situation in which the seller is stuck with unidentified goods as a result of the buyer's breach. Although he may resell even unidentified goods,²⁶¹ he may "in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization" complete their manufacture and resell under section 2-706 or merely sue for the difference between their market price and the contract price under section 2-708. This option should be particularly helpful in the situation

²⁵⁵ G.S. § 25-2-703, comment 1.

²⁵⁶ G.S. § 25-2-706. The manner in which such a resale may be made is set out in detail in this section. For a brief discussion of the subject see HAWKLAND, SALES AND BULK SALES 149-52.

²⁵⁷ See note 238 *supra*.

²⁵⁸ G.S. § 25-2-708(1).

²⁵⁹ G.S. § 25-2-708(2).

²⁶⁰ No Code provision specifically gives such a right to the seller, and G.S. § 25-1-106 provides, *inter alia*, that "neither consequential or special nor penal damages may be had except as specifically provided in this Chapter or by other rule of law." See the brief discussion in 1 HAWKLAND § 1.5506.

²⁶¹ G.S. § 25-2-704(1). Note, however, that only identified goods may be resold at *public* sale "except where there is a recognized market for a public sale of futures in goods of that kind." G.S. § 25-2-706(4)(a).

in which the buyer has become insolvent, making a recovery of money damages from him very unlikely.

The seller's right to the price for the goods is very limited under the Code; he may have it only if he is unable to resell them or they have been accepted or conforming goods have been lost or damaged after risk of their loss has passed to the buyer.²⁶² If a seller does sue for the price, he must, of course, hold the goods for the buyer (if they have not been destroyed), but he may still resell them at any time before judgment is collected if resale becomes possible, in which case he must credit the proceeds of the resale to the buyer.²⁶³

If the buyer has breached or repudiated, the seller may, at the outset, withhold delivery of the goods.²⁶⁴ Moreover, if the buyer has become insolvent, the seller "may refuse delivery except for cash including payment for all goods theretofore delivered under the contract" even though the terms of the sale originally contemplated credit.²⁶⁵ The seller is also specifically given the right to "cancel" the contract,²⁶⁶ an action—as is also true with withholding delivery—which does not bar other remedies.

The seller's right of stoppage in transit is broadened beyond its pre-Code scope. If the seller discovers the buyer to be insolvent, he may stop delivery of goods in the possession of a carrier *or other bailee*. Moreover, the seller may stop delivery in cases of fraud and breach, as well as insolvency, but only in "carload, truckload, plane-load or larger shipments."²⁶⁷ The bailee's rights and duties in these situations are carefully set out.²⁶⁸ If the ground for stoppage is the buyer's insolvency, the seller is not automatically entitled to resell the goods because insolvency of itself is not a breach. However, it does constitute a reasonable ground for insecurity under section 2-609, and if adequate assurance of performance is not forthcoming on request, the seller may pursue remedies for breach.²⁶⁹ If the ground for stoppage is either breach or fraud, the seller may immediately proceed to pursue the other remedies to which the Code entitles him, including the right to resell.

²⁶² G.S. § 25-2-709(1)(a)(b).

²⁶³ G.S. § 25-2-709(2).

²⁶⁴ G.S. § 25-2-703(a).

²⁶⁵ G.S. § 25-2-702(1).

²⁶⁶ G.S. § 25-2-703(f). See note 236 *supra*.

²⁶⁷ G.S. § 25-2-705. See 1 HAWKLAND §§ 1.5702-.570204 for a discussion of these expanded rights.

²⁶⁸ G.S. § 25-2-705(3).

²⁶⁹ See discussion in text accompanying note 218 *supra*.

E. Seller's Remedies After Acceptance

If the buyer has accepted the goods, the seller's basic right, of course, is an action for the price.²⁷⁰ However, he may under limited circumstances reach the goods themselves. If the seller discovers that the buyer received goods on credit while insolvent, he may, subject to the intervening rights of third parties, reclaim the goods from the buyer even after acceptance—if he makes a demand *within ten days* after the buyer has received the goods. This ten-day limitation does not apply if the buyer has made a misrepresentation of solvency to the seller in writing within three months before delivery.²⁷¹

*F. Fraud, Actions Against Third Party Tort-feasors
and Statute of Limitations*

A specific section²⁷² summarily extends remedies for fraud to coincide with those for nonfraudulent breach by rejecting the doctrine of election of remedies. However, the common-law remedy for fraud is not otherwise changed and is in fact incorporated into the Code.²⁷³ Another section²⁷⁴ virtually gives both seller and buyer a right of action against third party tort-feasors—another example of the disregard of title as a matter of significance under the Code. The Code establishes a sales statute of limitations²⁷⁵ of four years, which starts to run as of the time of breach even though the aggrieved party has no knowledge of the breach. This period is considered to be “within the normal commercial record keeping period.”²⁷⁶ The parties “may reduce the period of limitation to not less than one year but may not extend it.”²⁷⁷ The statute adopts local tolling rules and is not retroactive.²⁷⁸

²⁷⁰ G.S. § 25-2-709(1)(a).

²⁷¹ G.S. § 25-2-703. This section has engendered some controversy. See 1 HAWKLAND §§ 1.6001-.61 for a useful discussion of the topic and one of the important cases construing this section.

²⁷² G.S. § 25-2-721.

²⁷³ See G.S. § 25-1-103.

²⁷⁴ G.S. § 25-2-722.

²⁷⁵ G.S. § 25-2-725.

²⁷⁶ G.S. § 25-2-725, comment.

²⁷⁷ UCC 2-725(1). Note that the North Carolina legislature eliminated this provision. See discussion in text accompanying notes 301-03 *infra*.

²⁷⁸ G.S. § 25-2-725(4).

VIII. NORTH CAROLINA AMENDMENTS TO THE
OFFICIAL TEXT

The North Carolina legislature made a total of eight amendments to six sections of the Sales Article of the Code. Although most of these amendments have been referred to in the preceding text, they are all discussed here for the sake of convenience. With three exceptions, the amendments appear to be unique to North Carolina. In this author's opinion, the rationale for most of the amendments is not compelling enough to justify departure from the official text.²⁷⁹ Indeed, it is the opinion of this author that the official text should be restored in every instance.

A. Section 25-2-207(2)

Subsection (2) of section 2-207 was amended by the addition of the words "or different" after the word "additional" in the official text, making the first sentence of that subsection read: "The additional *or different* terms are to be construed as proposals for addition to the contract." This amendment, which is identical to one made in Wisconsin,²⁸⁰ was presumably intended to clarify the meaning of the subsection and to conform its language with that of subsection (1). However—probably unintentionally—the amendment will result in slightly different consequences than would obtain under the official text when the subsection is applied to merchants.

Under the official text, as between merchants, additional non-material terms in an acceptance automatically become part of the contract unless they are seasonably objected to by the offeror.²⁸¹ But, "different" terms in the acceptance would not automatically become part of the contract because they have already been objected to within the meaning of subsection (2)(c).²⁸² The change would

²⁷⁹ Note that G.S. § 25-1-102 provides, *inter alia*, that "(2) Underlying purposes and policies of this Act are . . . (c) to make uniform the law among the various jurisdictions."

²⁸⁰ PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT No. 2, 33-34 (1965).

²⁸¹ See discussion in text accompanying and immediately following notes 88-90 *supra*.

²⁸² "[B]ut 'different terms,' as distinguished from 'additional terms,' do not become part of the contract under the second sentence of subsection (2), since they have already been objected to. See subsections (2)(c) and (3) and Comment 6." PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT No. 2, 34. See also CORMAN, THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE IN UNIFORM COMMERCIAL CODE HANDBOOK 21, 31 (1964).

seem to be minor, since only immaterial different terms in the acceptance would prevail over those of the offeror, a difference which by definition seems of little significance. It is, nonetheless, a change, not mere clarification, and there seems to be no policy reason supporting it.

B. Section 25-2-302

This section dealing with "unconscionability" was omitted in its entirety by the legislature, a step that only one other state, California, has taken. Because of the lack of explicit legislative history in this state, the legislative intent in rejecting this section is not absolutely clear. However, it seems reasonable to suppose that the legislature was influenced by what must be described as the "unfriendly" commentary to this section contained in the report to the General Assembly on the Code.²⁸³ That commentary contains the following four objections: (1) "This section states an entirely new theory in sales law. It will change N.C. law as it changes law everywhere"; (2) The New York Law Revision Commission criticized this section in its final report to the New York legislature; (3) "This section will allow the court *AS A MATTER OF LAW* to determine whether a particular contract is unconscionable. If . . . the contract is unconscionable, it is not enforceable in the court, either by damages or by specific performance"; (4) California excluded this section entirely.

The first objection, that the section states a new theory in sales law, is perhaps true in a very limited sense; namely, that sales law has not heretofore explicitly had a *specific* doctrine of unconscionability. However, the Code draftsmen have made it quite clear in their commentary to this section that pre-Code courts have in fact applied that doctrine by various devious means and cite a number of illustrative cases²⁸⁴ in support of that thesis. Moreover, it is manifestly clear that "equity courts long have refused to enforce agreements which are so extreme in nature as to appear unconscionable in the light of business practices and mores."²⁸⁵ Finally, the Circuit Court of Appeals of the District of Columbia recently was faced with the question whether the doctrine of unconscion-

²⁸³ LEGISLATIVE COUNCIL, NORTH CAROLINA ANNOTATIONS: THE UNIFORM COMMERCIAL CODE 34-35 (1965).

²⁸⁴ See G.S. § 25-2-302, comment 1.

²⁸⁵ HAWKLAND, SALES AND BULK SALES 22.

ability could be applied to a transaction that occurred before the Code became effective in that jurisdiction. In holding that the doctrine could be applied as a matter of *common law*, the court made the following observations:

While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel. . . . The enactment of this section [2-302], which occurred subsequent to the contracts here in suit, does not mean that the common law was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its power to develop the common law for the District of Columbia.²⁸⁶

The doctrine, then, is not new to the law; the only thing new is its explicit statutory incorporation into sales law. Any discussion should start on that basis.²⁸⁷

The second objection (which is supported by a quotation from the report of that Commission), that the New York Law Revision Commission made to this section, loses its force when considered in context. As stated in the New Jersey commentary to this section, "The New York Law Revision Commission, contrary to common understanding, did not strongly criticize section 2-302."²⁸⁸ Portions of the remainder of the New York Commission's report were quoted in support of this contention, some of which are here extracted:

Some of the discussion . . . indicate[d] that the primary purpose of the section was . . . to provide a basis on which contracts might be preserved from destruction on grounds of unconscionability. Thus, the section is said to be aimed at tendencies, observable in some decisions, to determine unconscionability without adequate information as to business factors in the light of which the assertions of unconscionability might be refuted, or to reject an entire contract because of unconscionability in a clause not actually involved in the controversy, or to resort to construction of the contract, distorting its expressed intent to avoid results thought to be disfavored by the law, but without clearly meeting the issue of unconscionability.²⁸⁹

²⁸⁶ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448-49 (D.C. Cir. 1965). See also *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964).

²⁸⁷ See discussion in text accompanying notes 106-12 *supra*.

²⁸⁸ STATE OF NEW JERSEY UNIFORM COMMERCIAL CODE STUDY COMMISSION, STUDY AND REPORT ON THE UNIFORM COMMERCIAL CODE 52-53 (1960).

²⁸⁹ REPORT OF THE LAW REVISION COMMISSION TO THE LEGISLATURE RELATING TO THE UNIFORM COMMERCIAL CODE, STATE OF NEW YORK LEG.

The official text was amended in response to criticisms made in New York to make it clear that unconscionability was to be decided by the court as of the date of formation of the contract and that the parties were to have a right to present evidence going to the question of unconscionability.²⁸⁰ As officially amended, the section was adopted in toto by New York.

Part of the third objection, that the court may *as a matter of law* determine that a contract or clause is unconscionable, has been considered a strong point in favor of the section, not as an objection to it as implied in the North Carolina commentary. As stated above in a discussion of this section, "Presumably, this should remove the qualms of those who fear that a jury will always decide in favor of the poor widow who is the adversary of General Motors in spite of the merits of General Motor's claim."²⁸¹ The second part of this objection, that if the contract is unconscionable it will not be enforceable, overstates the results contemplated by the section. The remedies provided by the section may range from ignoring an unconscionable clause if it is not related to the dispute before the court, enforcing the contract without the unconscionable clause, or modifying the effect of the clause, or to refusing to enforce the contract as a whole.²⁸²

The observation that California rejected this section is, of course, true. However, it should be noted that only California of the states that have adopted the Code to date has taken this step.²⁸³

This author is of the firm conviction that section 2-302 should

Doc. (1956) No. 65A. 27, cited in STATE OF NEW JERSEY UNIFORM COMMERCIAL CODE STUDY COMMISSION, STUDY AND REPORT ON THE UNIFORM COMMERCIAL CODE 53 (1960).

²⁸⁰ N.Y. UNIFORM COMMERCIAL CODE § 2-302, comment at 448.

²⁸¹ Text *supra* at 564.

²⁸² *Ibid.*

²⁸³ For those interested in California's reason for rejection and the UCC Permanent Editorial Board's reaction to it, the Board's comment was as follows:

The deletion of the section was based upon the belief that a power to strike down "unconscionable" terms could result in judicial revision of contracts in every case of disagreement with the fairness of provisions the parties had accepted. At the same time it was conceded that California courts had reached the same kind of result by forced construction. This is an issue of policy which has been fully debated many times, and no new consideration has been advanced in the California discussion.

PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT No. 2, at 35 (1965).

be reconsidered in the light of its essential purposes²⁰⁴ and in the context of what one commentator has called the Code's "emphasis on commercial decency"²⁰⁵ of which this section is an integral part. As shown by results reached purely on the basis of the common law in other jurisdictions,²⁰⁶ the legislature's failure to adopt the doctrine of unconscionability in statutory form would not preclude the courts from deciding cases, at least indirectly, on those grounds. It is felt that the law would be best served by bringing the doctrine out into the open.

C. Section 25-2-310(d)

The amendment by the addition of the word "intentionally" to subsection (d) of section 2-310 seems to be of only minor consequence. No other state has made a similar change. With the added word italicized, the subsection now reads:

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or *intentionally* delaying its dispatch will correspondingly delay the starting of the credit period.

At the outset, it should be noted that this subsection is an "unless otherwise agreed" provision, meaning that the parties are free to provide specifically otherwise if they wish. The draftsmen explain in their commentary that the subsection as written states "the common commercial understanding" of the subject.²⁰⁷ Apparently, the North Carolina legislature felt solicitude for the seller in drafting the amendment. The Code commentary favors the buyer: "The provision concerning any delay in sending forth the invoice is included because such conduct results in depriving the buyer of his full notice and warning as to when he must be prepared to pay."²⁰⁸ On balance, this author favors the official Code approach—especially in view of the desirability of uniformity.

D. Section 25-2-716(1)

The amendment to the section dealing with the buyer's right to specific performance is one of deletion, the deletion shown here in

²⁰⁴ See text accompanying notes 106-12 *supra*.

²⁰⁵ King, *The New Conceptualism of the U.C.C.*, 10 ST. LOUIS U.L.J. 30, 33 (1965).

²⁰⁶ See note 286 *supra* and accompanying text.

²⁰⁷ UCC § 2-310, comment 5.

²⁰⁸ *Ibid.*

brackets: "(1) Specific performance may be decreed where the goods are unique [or in other proper circumstances]." This amendment is also unique to North Carolina, and again, there seems no compelling purpose for its adoption.

One commentator has suggested that "the words 'in other proper circumstances' probably mean the same as the U.S.A. [Uniform Sales Act § 68] words 'if it thinks fit.'"²⁹⁹ Indeed, North Carolina case law does not presently restrict specific performance to unique goods, as G.S. § 25-2-716(1) as presently written would. One quotation should suffice:

The true principle upon which specific performance is decreed . . . is founded upon the inadequacy of the legal remedy by way of pecuniary damages. This principle is acted upon (1) where there is peculiar value attached to the subject of the contract which is not compensable in damages. . . . The principle is also applied (2) where the damages at law are so uncertain and unascertainable, owing to the nature of the property or circumstances of the case, that a specific performance is indispensable to justice.³⁰⁰

Moreover, it is eminently clear from the official comment to the section that the North Carolina amendment violates the section's purpose. The official language should be restored.

E. Section 25-2-723(2)

The amendment to section 2-723(2) is also an amendment by deletion, the deleted words shown below in brackets:

(2) If evidence of a price prevailing at the times or places described in this article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which [in commercial judgment or] under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

This author is at a loss to explain why experts should not be called in to testify about the fair price of goods when the normal price mechanisms contemplated by the Code are "not readily available." In the absence of compelling reasons—which are not now apparent—the deleted language should be restored.

²⁹⁹ 1 HAWKLAND § 1.460101.

³⁰⁰ Paddock v. Davenport, 107 N.C. 710, 716-17, 12 S.E. 464, 464-65 (1890).

F. Section 25-2-725

The legislature made three amendments to the section dealing with the sales statute of limitations. The first is one of deletion as indicated by the words in brackets in the following quotation:

- (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. [By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.]

Obviously, one of the purposes of adopting a uniform statute of limitations is to eliminate jurisdictional variations and provide needed relief for concerns doing business on a nationwide scale.³⁰¹ It is highly doubtful whether this amendment serves that purpose. Under the subsection as now constituted, for example, what would happen to a provision in a sales contract drafted by a nationwide concern, which restricted the period in which a cause of action could be brought to two years or even six years? It might well require litigation to determine whether the Code freedom of contract policy³⁰² would prevail as against the stark language presently found in the subsection. If it was the intent of the legislature to preclude any modification of the four-year period, it would have been well to adopt the kind of amendment that was made in Wisconsin: "This period of limitation may not be varied by agreement of the parties."³⁰³ Although such an amendment would be subject to objection on uniformity grounds,³⁰⁴ it at least makes clear the effect of a provision that attempts to vary the statutory norm.

In the opinion of this author, the subsection as now constituted requires amendment of some kind, and restoration of the official language would seem the best course of action.

The last two amendments of this section were made to subsection (3) so that it now reads:

- (3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within [six] *twelve* months after the termination of the first action [un-

³⁰¹ See UCC § 2-725, comment.

³⁰² See text accompanying note 116 *supra*.

³⁰³ PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT No. 2, at 51.

³⁰⁴ *Ibid*.

less the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute].

The change from six to twelve months is the same as one of the changes made in Oklahoma. The reaction of the UCC Editorial Board to the Oklahoma changes was very terse: "These changes reflect disagreement with considered Code policy and conflict with the purpose of the uniform statutes of limitations."³⁰⁵ The amendment by deletion, which is unique to North Carolina, deserves harsher treatment. It accomplishes two results: (1) it opens the way for harassment by a party who is willing to start a lawsuit, voluntarily drop it, start it again *ad infinitum*; and (2) it provides a safe harbor for the indolent or negligent attorney. Neither result deserves support. The official language should be restored.

³⁰⁵ *Id.* at 52.