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Sales—A Comparison of the Law in Washington and the Uniform Commercial Code (Part 2)

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SALES—A COMPARISON OF THE LAW IN WASHINGTON AND THE UNIFORM COMMERCIAL CODE

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This article is a continuation of the analysis made by Professor Ralph Johnson in an earlier issue of this *Review*[1] of the effect on Washington law of article 2 (Sales) of the Uniform Commercial Code. As such, it will continue the format there established of a section by section analysis of the Code.

Section 2-204. Formation in General.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

A sale or a contract to sell partakes of much of the general law of contracts, and subsection (1) states a generally recognized principle that agreements can be reached by words or by conduct.[2] Of course, this basic premise turns ultimately on factual inquiries concerning the substance of such an agreement,[3] the identity of the parties to it,[4] and the definition of the subject matter dealt with,[5] which turn on a determination of whether the parties have manifested an intention to be bound by an agreement sufficiently definite to be enforced.[6]

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[1] Johnson, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code*, 34 WASH. L. REV. 78 (1959).

[2] Campbell v. Webber, 29 Wn.2d 516, 188 P.2d 130 (1947); De Britz v. Sylvia, 21 Wn.2d 317, 150 P.2d 978 (1944); Pennington & Co. v. Hedlund Box & Shingle Co., 116 Wash. 292, 199 Pac. 235 (1921); RCW 63.04.040; Shattuck, *Contracts in Washington, 1937-1957*, 34 WASH. L. REV. 24, 27 (1959).

[3] Inland Nav. Co. v. McGrady, 43 Wn.2d 209, 260 P.2d 893 (1953); Jones v. Mallon, 3 Wn.2d 382, 101 P.2d 332 (1940) (record does not show what parties meant by "money back guarantee"); International Lumber Export Co. v. M. Furuya Co., 121 Wash. 350, 209 Pac. 858 (1922) (uncertain which of two measurement methods was to be used).

[4] There is a surprisingly large number of decisions in which the dispute turns on who sold to whom, usually raised as a defense by one claiming that he was not the purchaser, that he was acting for someone else. Marble v. Feak, 31 Wn.2d 844, 199 P.2d 66 (1948); Sears, Roebuck & Co. v. Nilsen, 175 Wash. 237, 27 P.2d 128 (1933);

Subsection (2) of the section under consideration deals with an all too frequent situation in which the definiteness of the agreement is rendered doubtful by what Professor Shattuck has called "sheer garrulity."[7] The section expresses a policy toward finding agreements even though the precise time of closing is not certain; however, inevitably in such circumstances the likelihood is that if the time of closing is uncertain, the details of the proposed agreement are similarly uncertain. The result may be no contract.[8] Another section of the Code[9] deals more explicitly with this problem.

The major contribution of this section is, of course, subsection (3) which establishes the policy of enforcing agreements which leave one or more terms open. This policy is implemented by specific sections dealing with open price terms,[10] undesignated place[11] or time[12] of delivery, and unspecified quantity, as in output and requirements contracts.[13] As will subsequently be seen, this abolishes, so far as the sale of goods is concerned, certain classic verities of the law of contracts, such as that an agreement to agree is no contract.[14] The broad limitation of the statute, requiring a reasonably certain basis for rem-

Voelker v. Cleveland, 168 Wash. 38, 10 P.2d 561 (1932); Paysee Hardware Co. v. Laurens, 156 Wash. 703, 286 Pac. 56 (1930); Porter v. Baretich, 153 Wash. 679, 280 Pac. 78 (1929); Deweese v. Charles C. Moore & Co., 113 Wash. 233, 193 Pac. 702 (1920); Simon v. Saxony Knitting Co., 103 Wash. 148, 173 Pac. 1022 (1918); Hexter v. Crown Woolen Co., 95 Wash. 348, 163 Pac. 774 (1917); State *ex rel.* Upper v. Hanna, 87 Wash. 29, 151 Pac. 1087 (1915); First Nat'l Bank v. Geske & Co., 85 Wash. 477, 148 Pac. 593 (1915); Lovell v. Haye, 85 Wash. 109, 147 Pac. 632 (1915); Anderson v. White Co., 68 Wash. 568, 123 Pac. 1009 (1912); Sumner Iron Works v. Winkleman Lumber Co., 66 Wash. 14, 118 Pac. 886 (1911).

[5] Treadwell v. Kristoferson, Inc., 32 Wn.2d 145, 200 P.2d 740 (1948); Forman v. Columbia Theater Co., 20 Wn.2d 685, 148 P.2d 951 (1944) (What does "etc." mean?); Puget Mill Co. v. Duecy, 1 Wn.2d 421, 96 P.2d 571 (1939) (Does the word "minerals" include sand and gravel?); International Lumber Export Co. v. M. Furuya Co., *supra* note 3; McVeety v. Hayes, 111 Wash. 457, 191 Pac. 401 (1920); Price v. Hornburg, 101 Wash. 472, 172 Pac. 575 (1918).

[6] Kopp v. Paramount Prods. Corp., 50 Wn.2d 607, 313 P.2d 682 (1957); Excelsior Knitting Mills, Inc. v. Bush, 38 Wn.2d 876, 233 P.2d 847 (1951); Moxee Co. v. Lloyd L. Hughes, Inc., 24 Wn.2d 224, 163 P.2d 603 (1945); Pacific Food Prods. Co. v. Mukai, 196 Wash. 656, 84 P.2d 131 (1938); Parks v. Kirkland Packing Co., 172 Wash. 450, 20 P.2d 588 (1933); Garrison v. Anderson, 149 Wash. 281, 270 Pac. 802 (1928). The basic dispute in many of these cases turns on whether a contract had been entered into prior to the execution of a writing contemplated by the parties. See Shattuck, *supra* note 2, at 34.

[7] Shattuck, *supra* note 2, at 44.

[8] Schulze v. General Elec. Co., 108 Wash. 401, 184 Pac. 342 (1919); Jones-Scott Co. v. Ellensburg Milling Co., 108 Wash. 73, 183 Pac. 113 (1919); W. F. Jahn & Co. v. McClaine, 97 Wash. 95, 165 Pac. 1060 (1917); See the cases cited *supra* note 6, and Shattuck, *supra* note 2, at 45.

[9] UNIFORM COMMERCIAL CODE § 2-207 (hereinafter cited only to the appropriate code sections).

[10] Section 2-305.

[11] Section 2-308.

[12] Section 2-309.

[13] Section 2-306.

[14] Section 2-305, official comment 1.

edy, will be effective to keep the time-honored principle that an illusory promise will not constitute the basis of a contract.[15] On the other hand, it will tend to cause a reexamination of some of the Washington cases where no specific undertaking by one of the parties to a contract was spelled out, but some obligation on his part was implicit in the undertaking.[16] Where such an obligation is implicit in the agreement, viewed from a commercial standpoint, it will be enforced.

Section 2-205. Firm Offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

[15] Winslow v. Mell, 48 Wn.2d 581, 295 P.2d 319 (1956); Carolene Sales Co. v. Canyon Milk Prods. Co., 122 Wash. 220, 210 Pac. 366 (1922) (agreement to sell so much as "purchaser might desire"). Seattle Seed Co. v. Fujimori, 79 Wash. 123, 139 Pac. 866 (1914) indicates the direction in which the Code may well be interpreted. The court was unable to find a contract when negotiations did not specify price, quantity or terms, but was able to enforce one which omitted only a statement of kind or quality. In the words of official comment to section 2-204: "The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions."

[16] In Mowbray Pearson Co. v. E. H. Stanton Co., 109 Wash. 601, 187 Pac. 370 (1920) the defendant sent this letter to the plaintiff: "In consideration of [plaintiff's] soliciting and delivering ice in [a designated area in Spokane, the defendant] agrees to sell pure merchantable ice to [the plaintiff] for $1.50 per ton at their plant for their [the plaintiff's] requirements during 1916, and further agrees not to sell to any other dealer for distribution in that district." The plaintiff wrote "Accepted" thereon. *Held,* since this was a promise only on the part of the defendant, he was free to withdraw at any time. It seems quite clear that a contrary result would be reached under the Code. Viewed commercially, the writing contains the implicit undertaking of the plaintiff to purchase his requirements and to proceed in good faith in selling in the area. See section 2-306.

Barnes v. Patrick, 176 Wash. 142, 28 P.2d 293 (1934) dealt with a document titled "Warehouse Purchase" which contained an offer of the warehouseman to purchase, but no offer of the depositor to sell. This was held to be a bailment, a result which would be reached under the Code because the usages demonstrated that such documents ripen into sales only on demand by the depositor for payment.

In Larkins v. St. Paul & Tacoma Lumber Co., 35 Wn.2d 711, 214 P.2d 700 (1950), a license to the plaintiff to remove scrap did not imply a promise on his part to purchase any particular quantity. This result would follow under the Code, for here, unlike Mowbray Pearson Co. v. E. H. Stanton Co., *supra,* applications of commercial standards of good faith do not reveal a definite undertaking by the plaintiff.

There are three particular decisions which carry out the policy implicit in the Code. In Geyen v. Time Oil Co., 46 Wn.2d 457, 282 P.2d 287 (1955), the court found an implied obligation to deal exclusively in the product of a supplier, and thus a binding contract. In Reeker v. Remour, 40 Wn.2d 519, 244 P.2d 270 (1952) a tenant agreed to pay rent on a gallonage basis, thus creating the implied obligation to operate the station, providing consideration for the lease. In Dement Bros. Co. v. Coon, 104 Wash. 603, 177 Pac. 354 (1919) the court rejected a contention that a writing stating only an obligation to sell with a confirmation by the buyer lacked "mutuality." The court said that a document stating that seller sells must carry a corresponding obligation to buy!

This section represents the Code's substitution of commercial understanding for contractual concepts, in that the definition of "firm offer" stated is the definition understood by business men,[17] though it has also been judicially recognized.[18] Within the detailed limits stated in the section, the Code rejects the general common law rule, and the rule in Washington,[19] that an offer not supported by consideration is revocable prior to acceptance. This will mean that a written offer looking forward to the sale of goods by a merchant will be treated differently from an offer to sell land.[20] For example, a written offer by a car dealer to sell a car, his favorite shot gun, and his farm, containing assurances that it will remain outstanding for 30 days, would presumably not be revocable as to the car, but would be revocable as to the land and the shot gun, for the offeror is not a mechant of shotguns.[21] Though this bifurcation of various kinds of contracts seems cumbersome and unreal, one may safely predict that eventually it will be as habitually accepted as present distinct treatments given sales transactions such as in the Statute of Frauds.[22]

Section 2-206. Offer and Acceptance in Formation of Contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute

[17] Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821 (1950).

[18] Alleghany Corp. v. James Foundation, Inc., 115 F. Supp. 282, 285 (D. C. N. Y., 1953). This term has also been used by the Washington court. St. Paul & Tacoma Lumber Co. v. Fox, 26 Wn.2d 109, 173 P.2d 194 (1946).

[19] Shattuck, *Contracts in Washington, 1937–1957*, 34 WASH. L. REV. 24, 42 (1959); (but of course an option cannot be withdrawn after acceptance). Lasswell v. Anderson, 127 Wash. 591, 221 Pac. 300 (1923); Sussman v. Gustav, 109 Wash. 459, 186 Pac. 882 (1920); Baker v. Shaw, 68 Wash. 99, 122 Pac. 611 (1912). If a binding option is created, it will not be defeated for failure to include a specific undertaking not to revoke. Hopkins v. Barlin, 31 Wn.2d 260, 196 P.2d 347 (1948).

[20] A matter which can be solved by adoption of a Uniform Written Obligations Act. Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 577 (1950).

[21] Section 2-104.

[22] Corbin, *supra* note 17.

an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

The offeror under existing law[23] and under the Code is in control of his offer and may thus stipulate the permissible method of acceptance. Absent such a stipulation, the Code takes the currently accepted approach that, so far as means of communication are involved, any appropriate means reasonable in the circumstances may be used.[24] The offeree need not take pains to use the same communications device selected for transmittal of the offer.[25]

The iconoclastic provision of the section, however, is that permitting an offer to buy goods for prompt shipment to be accepted by a "prompt" *promise* to ship.[26] The converse of this is doctrinal, that an offeree may when offered a bilateral contract accept it by full performance without making a promise.[27] Tender of full performance by the offeree obviously gives the offeror the assurance of performance he sought in soliciting a promise, but what justification can there be for requiring the offeror to accept a promise instead of the act he requested? This is merely another illustration of the policy of the Code not to frustrate commercial arrangements on a technicality, but to accommodate the law to the understanding of business men.[28] Commercial good faith is at the heart of this matter, in that: (a) an offeror cannot word his offer so as to make ambiguous the means of acceptance in the hope of

[23] Wax v. Northwest Seed Co., 189 Wash. 212, 64 P.2d 513 (1937); RESTATEMENT, CONTRACTS § 61 (1932).

[24] See RESTATEMENT, CONTRACTS § 66 (1932). It seems pretty clear that if an acceptable method of communication is selected by the offeree, the contract is made on dispatch thereof. *Contra,* Berman, *Creation of Contracts Under the Uniform Commercial Code,* 13 U. PITT. L. REV. 750 (1952).

[25] Section 205, official comment 1.

[26] This has been read to mean a "prompt promise to ship promptly." Williston, *supra* note 20, at 577. This seems to mean "as promptly as possible" under the circumstances. Meyer Bros. Drug Co. v. Callison, 120 Wash. 378, 207 Pac. 683 (1922).

[27] Simms v. Ervin, 46 Wn.2d 417, 282 P.2d 291 (1955) (*Cf.,* Shattuck, *supra note* 19, at 43). Pillsbury Flour Mills, Inc., v. Independent Bakery, Inc., 165 Wash. 360, 5 P.2d 517, 8 P.2d 430, 10 P.2d 975 (1932); RESTATEMENT, CONTRACTS § 63 (1932); Cook v. Story, 89 Wash. 109, 154 Pac. 147, Ann. Cas. 1917C, 985 (1916) is distinguishable, for there although the seller undertook performance, he made it quite clear he was rejecting the deal proposed.

[28] HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 5 (1958).

outwitting the offeree by insisting on a contract or denying it depending on market change (b) a seller cannot ship non-conforming goods in the hope that the buyer will accept them as complying, thus under the contract, or reject them, in which case the seller attempts to argue that his shipment was an unaccepted counterproposal resulting in no contract.

This policy seems to underlie the decision in *Hill's, Inc.* v. *William B. Kessler, Inc.*[29] where the seller on receipt of an order wrote, "You may be assured of our very best attention to this order." These words were held to indicate something more than that the seller would give careful consideration to the order and the desirability of accepting it; they suggest that the seller will use care in filling it. Participants in commercial deals may not "run with the Hare and holde with the Hounde."

There is a Washington decision,[30] not involving the sale of goods and not thus within article 2 of the Code, which found a contract resulting from an offeree's promising to perform instead of performing the act requested, thus following out the policy set by the Code.

Subsection (2) also embodies the concept of commercial fair dealing by requiring an offeree who starts performance to give reasonable notice of that fact, thus precluding his present power to continue or cease that performance at his whim, though the offer has thus been made irrevocable.[31]

Section 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

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[29] 41 Wn.2d 42, 246 P.2d 1099 (1952).

[30] Cook v. Johnson, 37 Wn.2d 19, 221 P.2d 525 (1950). Professor Shattuck's criticism of this case (*supra* note 19, at 43) does not suggest that the codification of the principle in the law of sales of goods is improper. See his comments on the Code elsewhere in this issue of the *Review*.

[31] Coleman v. Davies, 39 Wn.2d 312, 235 P.2d 199 (1951) (where the seller may have been attempting to do just what the Code precludes). The outcome of Excelsior Knitting Mills, Inc. v. Bush, 38 Wn.2d 876, 233 P.2d 847 (1951) would be changed by the Code, for there although the seller wrote that it had placed the order "in work," it also asked for confirmation of the order, which was not forthcoming. DeBritz v. Sylvia, 21 Wn.2d 317, 150 P.2d 978 (1944); RESTATEMENT, CONTRACTS § 45 (1932); HAWKLAND, *op. cit. supra* note 28, at 7; Whitney, *Some Effects of the Uniform Commercial Code on New York Law—Contracts*, 26 ST. JOHN'S L. REV. 3, 10 (1951).

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) 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.

The current "black letter law" is:

> The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract. . . . An expression of assent that changes the terms of the offer in any material respect may be operative as a counteroffer; but it is not an acceptance and consummates no contract. . . .[32]

This principle will be erased or at least faded into a shade of gray by the above quoted provisions of the Code. The significance and effect of this section can possibly best be illustrated by trying to apply it to the facts of decided cases.[33]

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[32] Owens-Corning Fiberglass Corp. v. Fox Sheet Metal Co., 156 Wash. Dec. 165, 351 P.2d 516 (1960); Blue Mountain Constr. Co. v. Grant County School Dist., 49 Wn.2d 685, 688, 306 P.2d 209 (1957); see Shattuck, *supra* note 19, at 45.

[33] The available cases are quite numerous. St. Paul & Tacoma Lumber Co. v. Fox, 26 Wn.2d 109, 173 P.2d 194 (1946); Pearce v. Dulien Steel Prods., Inc., 14 Wn.2d 132, 127 P.2d 271 (1942); Martinson v. Carter, 190 Wash. 502, 68 P.2d 1027 (1937); Pennington & Co. v. Hedlund Box & Shingle Co., 116 Wash. 292, 199 Pac. 235 (1921); L. Teweles Seed Co. v. Fairbanks, 114 Wash. 321, 195 Pac. 40 (1921); Empson Packing Co. v. Lamb-Davis Lumber Co., 112 Wash. 75, 191 Pac. 833 (1920); Schulze v. General Elec. Co., 108 Wash. 401, 184 Pac. 342 (1919); Jones-Scott Co. v. Ellensburg Milling Co., 108 Wash. 73, 183 Pac. 113 (1919); Chinook Lumber & Shingle Co. v. McLane Lumber & Shingle Co., 107 Wash. 587, 182 Pac. 625 (1919); Richardton Roller Mills v. Miller, 99 Wash. 654, 170 Pac. 357 (1918); Loewi v. Long, 76 Wash. 480, 136 Pac. 673 (1913); Wisconsin Lumber Co. v. Pacific Tank & Silo Co., 76 Wash. 452, 136 Pac. 691 (1913); Nelson v. Imperial Trading Co., 69 Wash. 442, 125 Pac. 777 (1912).

In *L. Teweles Seed Co.* v *Fairbanks*,[34] an exchange of communications ran something like this:

(1) Seller to Buyer: "For immediate telegraphic acceptance offer sell two cars choice stock Canadian yellows five three quarters F.O.B. cars here certified weights immediate shipment."

(2) Buyer to Seller: "Five fifty most can pay."

(3) Seller to Buyer: "We accept five and half F.O.B. cars Seattle Canadian yellow peas providing you accept three cars about forty tons each immediate shipment from Seattle certified weights usual terms. Wire reply quick."

(4) Buyer to Seller: "We booked the three cars. Be sure quality is satisfactory. If any more to offer advise."

(5) Seller to Buyer: "CONTRACT CONFIRMATION, We confirm sale to you today of 3 cars Canadian yellow peas at 5½¢ per pound, F.O.B. Seattle for immediate shipment, weights certified. Payment demand draft against bills of lading. Remarks: Peas to be good stock in good merchantable condition."

(6) Buyer wrote: "Accepted, Buyer" on the above confirmation.

To be observed in the above exchange is the fact that in (1) the seller offers *choice* Canadian yellow peas, but that word "choice" does not subsequently appear. Then, in (5) payment terms are introduced. It would seem that under the Code, as well as under current law, the "contract" between the parties is as stated in (5) as "accepted" in (6). Even if we assume that a contract had been reached before that document was signed, such contract could be modified certainly so long as both parties undertook different obligations[35] which seems to be the case.

But suppose Buyer had not signed the confirmation? Then it would appear that *if* an enforceable agreement can be made out of the exchange of wires prior to the "confirmation," the contract between the parties would be on those terms, new terms stated in the confirmation being treated as proposals for additions, effective between *merchants* unless (a) they materially alter the agreement,[36] or (b) buyer gives reasonable notice of objection thereto. The provision for payment would seem not to "materially alter," but difficulty can be anticipated as to whether the bargain requires seller to provide *choice* peas.

[34] 114 Wash. 321, 195 Pac. 40 (1921).

[35] This point will be discussed in connection with section 2-209.

[36] "The test as to whether additional terms 'materially alter' the bargain is whether they would normally occasion surprise to a merchant in that line of business." Whitney, *supra* note 31, at 6.

In *St. Paul & Tacoma Lumber Co.* v *Fox*,[37] a dispute about a deal to purchase shares of stock reached the court. One should note immediately that article 2 would have no impact on such a transaction, for investment securities are controlled by article 8 of the Code. Basically, the facts showed a lengthy and detailed offer by seller, though requiring some "adjustments" in assets to determine the ultimate price, to sell his stock, responded to by a letter from the buyer which made an interpretation of one aspect of the offer which added something not included in the offer, but which then stated: "This is to advise you that [buyer] . . . accepts your offer." The holding of the case was that no contract resulted because of the addition of the new term. One would predict that, under the Code (assuming applicability of the sales article) a contract could be found to exist, not including the added term, unless assented to by the seller.

Finally, in *Pearce* v. *Dulien Steel Prods., Inc.*,[38] the buyer offered to purchase rail and angle bars at $15.00 per gross ton, and seller countered with an offer at $17.50, to which buyer replied (referring specifically to the counterproposal), "please be advised that we will purchase from you two carloads of No. 1 70-pound relay rail at $17.50 per gross ton. *Hunt will inspect this rail for our customer and will probably designate rail to be rejected or accepted.*" Buyer contended that a contract resulted even under present law, because his addition of the request for inspection was of no import, since he had that right anyway. The holding, though, was that he had no such right to have *Hunt* inspect, and thus he had made a new offer, never accepted.

How under the Code? It seems clear that a contract resulted, without the provision for Hunt's inspection at least. It would seem that this provision would not become a part of the bargain, however, unless the seller assented to it. But observe two succinct points made by Professor William D. Hawkland:

> (1) Where the parties are merchants . . . and the offeree "accepts" the offer but adds terms to it, the offeror should promptly object in writing to all of the added terms he finds unsatisfactory. Non-merchant offerors are held to a lesser standard, and they would not have to make this objection to assure themselves that the contract accorded with the terms of their offer; (2) If the offeree is not willing to be bound to a contract consisting of *all* the terms of the offer, he should *reject* the offer prior to making a counter offer.[39]

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[37] 26 Wn.2d 109, 173 P.2d 194 (1946).
[38] 14 Wn.2d 132, 127 P.2d 271 (1942).
[39] HAWKLAND, *op. cit. supra* note 28, at 10.

Section 2-208. Course of Performance or Practical Construction.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modificaiton of any term inconsistent with such course of performance.

Both with respect to the practical construction of contracts for sale placed thereon by the parties,[40] and with respect to usage of the trade,[41] this section seems to state the present Washington law. Though the Washington court has addressed itself to the point that one instance

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[40] Randall v. Tradewell Stores, Inc., 21 Wn.2d 742, 153 P.2d 286 (1944); Webb-McDonald Tractor & Equip. Co. v. Goodfellow Bros., Inc., 182 Wash. 431, 47 P.2d 30 (1935); McElroy v. Andrews, 178 Wash. 1, 33 P.2d 379 (1934); Chinook Lumber & Shingle Co. v. McLane Lumber & Shingle Co., 107 Wash. 587, 182 Pac. 625 (1919); Hughes v. Eastern Ry. & Lumber Co., 93 Wash. 558, 161 Pac. 343 (1916); Kanaskat Lumber & Shingle Co. v. Cascade Timber Co., 80 Wash. 561, 142 Pac. 15 (1914); Higgins v. Product Distrib. Co., 78 Wash. 551, 139 Pac. 500 (1914); Shattuck, *Contracts in Washington, 1937–1957*, 34 WASH. L. REV. 345, 373 (1959).

[41] Donald W. Lyle, Inc. v. Heidner & Co., 45 Wn.2d 806, 278 P.2d 650 (1954); Washington Fish & Oyster Co. v. G. P. Halferty & Co., Inc., 44 Wn.2d 646, 269 P.2d 806 (1954); Williamson v. Irwin, 44 Wn.2d 373, 267 P.2d 702 (1954); Simons v. Stokely Foods, Inc., 35 Wn.2d 920, 216 P.2d 215 (1950); Pearce v. Dulien Steel Prods., Inc., 14 Wn.2d 132, 127 P.2d 271 (1942); Codd v. Crowley Co., 162 Wash. 650, 299 Pac. 366 (1931); Dalk v. Frank D. Black, Inc., 119 Wash. 368, 206 Pac. 22 (1922) (held that a custom of a particular plant is not necessarily a general custom). Florence Fish Co. v. Everett Packing Co., 111 Wash. 1, 188 Pac. 792 (1920) (seems to require that the language of the contract be ambiguous before permitting use of evidence of trade usage). Gile v. Tsutakawa, 109 Wash. 366, 187 Pac. 323 (1920) (trade meaning may be shown even though the words are not ambiguous); Turlock Fruit-Juice Co. v. Pacific & Puget Sound Bottling Co., 71 Wash. 128, 127 Pac. 842 (1912). On the issue of whether evidence of custom is admissible where the contract is not ambiguous, see Shattuck, *supra* note 40, at 385 (1959); Vold, *Usage of Trade and Course of Dealing in the American Law of Sales*, 1958 J. BUS. LAW 103.

will not constitute a demonstrated usage,[42] it does not seem to have had occasion to recognize the principle stated in subjection (1) that only repeated occasions for performance and not a single instance are relevant. The significance of parties' conduct which does not constitute a series of performances is covered elsewhere in the Code, such as those sections dealing with acceptance.[43]

Section 2-209. Modification, Rescission and Waiver.

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Subsection (1) will be a reversal of the common law of most jurisdictions which find the concept of pre-existing obligation a bar to efforts to modify or rescind agreements absent consideration. The status of the law on this matter in Washington is unclear,[44] with some

[42] Seattle Flower & Bulb Co., Inc. v. E. S. Burgan & Sons, Inc., 44 Wn.2d 872, 271 P.2d 704 (1954); Kelly-Springfield Tire Co. v. True's Oil Co., 29 Wn.2d 8, 184 P.2d 827 (1947) (the document expressly excluded any application of trade customs); Dalk v. Frank D. Black, Inc., *supra* note 41. Where the parties are strangers to the particular trade, they will not be deemed to have contracted with respect to it. George E. Miller Lumber Co. v. Holden, 45 Wn.2d 237, 273 P.2d 786 (1954).

[43] Section 2-208, official comment 4.

[44] Shattuck, *Contracts in Washington, 1937–1957*, 34 WASH. L. REV. 24, 57 (1959).

of the decisions tending to support the policy of this subsection,[45] others abiding by traditional principle.[46] The official comments to this subsection are vitally important, for they reveal that the general requirement of good faith and observance of reasonable commercial standards[47] apply here, thus possibly requiring a demonstrated reason for requiring or requesting the modification.[48]

One effect of subsection (1) will constitute a definite change in the law of Washington, in that this subsection applies to agreements which *in fact* modify prior contracts, whether or not the agreement was undertaken by both parties with a design to accomplish this result. Specifically, the doctrine now is that a warranty made after a sale is completed is not enforceable, for it lacks consideration.[49] This will no longer be true under the Code, for the later added warranty is a modification within this subsection.[50] Presumably other subsequent changes arrived at without extensive dickering will be similarly treated.[51]

Subsection (3), applying the Statute of Frauds to modifications of contracts otherwise within its scope, probably states the prevailing Washington law. The word "probably" is used because the Washington cases permitting parol modification of written contracts have talked in terms of "executed contracts,"[52] and execution of the contract makes the Code's Statute of Frauds provision inapplicable.[53]

The Washington court has recognized the principles stated in sub-

[45] National Ass'n of Creditors, Inc. v. Ultican, 190 Wash. 109, 66 P.2d 824 (1937); Inman v. W. E. Roche Fruit Co., 162 Wash. 235, 298 Pac. 342 (1931); Wallace v. Babcock, 93 Wash. 392, 160 Pac. 1041 (1916); Klock Produce Co. v. Robertson, 90 Wash. 260, 155 Pac. 1044 (1916); Stofferan v. Depew, 79 Wash. 170, 139 Pac. 1084 (1914); Tingley v. Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098 (1894).

[46] Thayer v. Brady, 28 Wn.2d 767, 184 P.2d 50 (1947); Stauffer v. Northwestern Mut. Life Ins. Co., 184 Wash. 431, 51 P.2d 390 (1935); Tacoma & E. Lumber Co. v. Field & Co., 100 Wash. 79, 170 Pac. 360 (1918). In some of the cases raising the problem, consideration for the modification existed. Harrington v. W. E. Roche Fruit Co., 192 Wash. 646, 74 P.2d 194 (1937); W. F. Jahn & Co. v. Puyallup & Sumner Fruit Growers Canning Co., 119 Wash. 422, 205 Pac. 833 (1922); Parker v. Advance Thresher Co., 75 Wash. 505, 135 Pac. 229 (1913).

[47] Sections 1-203 and 2-103.

[48] White v. T. W. Little Co., 118 Wash. 582, 204 Pac. 186 (1922).

[49] Fleenor v. Erickson, 35 Wn.2d 891, 215 P.2d 885 (1950); Savage v. Markey Mach. Co., 128 Wash. 433, 223 Pac. 2 (1924).

[50] Section 2-313, official comment.

[51] Columbia River Ice Co. v. Farris, 27 Wn.2d 636, 179 P.2d 520 (1947). The court makes determinative the time of signing a conditional sales contract, holding that if it were signed after the sale transaction had been completed, the transaction would be a cash and not a conditional sale. Under the Code, the later signed agreement could be effective as a modification.

[52] Sunset Pac. Oil Co. v. Clark, 171 Wash. 165, 17 P.2d 879 (1933); Shell Oil Co. v. Wright, 167 Wash. 197, 9 P.2d 106 (1932); Clements v. Cook, 112 Wash. 217, 191 Pac. 874 (1920).

[53] Section 2-201.

sections (4)[54] and (5).[55] The provision of subsection (2) should be read and reread by persons drafting instruments, and the provision used in the contract involved in *Norbom Eng'r. Co.* v. *A. H. Cox & Co.*[56] will probably be commonplace.[57]

Section 2-210. Delegation of Performance; Assignment of Rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. 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.

(3) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

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[54] O'Connor v. Tesdale, 34 Wn.2d 259, 209 P.2d 274 (1949); Searl v. Shell Oil Co., 172 Wash. 621, 21 P.2d 249 (1933); McCaw v. Advance Rumely Thresher Co., 158 Wash. 533, 291 Pac. 319 (1930).

[55] Crutcher v. Scott Publishing Co., 42 Wn.2d 89, 253 P.2d 925 (1953); Beardslee v. North Pac. Fin. Co., 161 Wash. 86, 296 Pac. 155 (1931); Lockit Cap Co. v. Glone Mfg. Co., 158 Wash. 183, 290 Pac. 813 (1930); Yours Truly Biscuit Co. v. Chas. H. Lilly Co., 142 Wash. 513, 253 Pac. 817 (1927); Sussman v. Gustav, 109 Wash. 459, 186 Pac. 882 (1920).

[56] 120 Wash. 675, 208 Pac. 87 (1922) (under no circumstances, said the contract, will modifications be recognized unless authorized by us). One might well add, unless authorized *in writing* by us.

[57] See HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 14 (1958).

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2-609).

The Washington decisions seem to reflect the same liberality in recognizing assignability as is represented by this section. With respect to subsection (1), the leading case of *King* v.*West Coast Grocery,*[58] specifically recognizes the delegability of the seller's undertaking in a sale transaction, and there are decisions in cases involving contracts other than the sale of goods in accord.[59] Subsection (5) gives to the "other party" (that is, the non-assigning party) a protection not afforded by the present law. This right, of course, is in addition to the right of action he retains against the assignor, since "delegation" of duties does terminate the duties owed by the delegating party.[60]

Under the present Washington law, the assignee does not obligate himself to perform executory portions of a contract merely by accepting the assignment, so subsection (4) will alter the controlling legal principle.[61] In fact, however, the Washington court has not been slow to find an undertaking by the assignee to perform those duties,[62] so the change will not be a substantial one.

Subsection (3) in limiting the effect of contractual inhibitions on assignment will hasten the demonstrable trend in this direction. Early cases stated categorically that the assignee of a contract forbidding assignment took nothing but a claim against his assignor.[63] The more recent cases are less stringent,[64] but they have not announced as clear-cut a rule as the Code will provide.

Section 2-301. General Obligations of Parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

[58] 72 Wash. 132, 129 Pac. 1081 (1913).

[59] Panhandle Lumber Co. v. Mackay, 21 F.2d 916 (9th Cir. 1927); School Dist. No. 15 v. People's Nat'l Bank, 13 Wn.2d 230, 124 P.2d 947 (1942); Fisher v. Berg, 158 Wash. 176, 290 Pac. 984 (1930); Jenkins v. Columbia Land & Improvement Co., 13 Wash. 502, 43 Pac. 328 (1896).

[60] RESTATEMENT, CONTRACTS § 160(4) (1932).

[61] McGill v. Baker, 147 Wash. 394, 266 Pac. 138 (1928); Hallidie v. Washington Brick, Lime & Mfg. Co., 70 Wash. 80, 126 Pac. 96 (1912).

[62] McGill v. Baker, *supra* note 61.

[63] Bonds-Foster Lumber Co. v. Northern Pac. Ry. Co., 53 Wash. 302, 101 Pac. 877 (1909).

[64] Erckenbrack v. Jenkins, 33 Wn.2d 126, 204 P.2d 831 (1949); Burleson v. Blankenship, 193 Wash. 547, 76 P.2d 614 (1938); see Shattuck, *Contracts in Washington, 1937–1957,* 34 WASH. L. REV. 345 (1959). Of course, the parties may specifically contract to allow assignment. Western Lumber Exch. v. Johnson, 110 Wash. 200, 188 Pac. 388 (1920).

This general section is designed to cover the performance required of the parties both as conditions precedent to the duty of the other party's performance and as fulfillment of the duty to perform promised acts.[65] It must be read in connection with section 2-106(2) which states the rule for determining when goods conform to the contract, and in general retains the principle that exact performance by the seller is required. Although the Code does not continue the present statute's separate treatment of "conditions,"[66] and "warranties,"[67] the difference in effect will remain, depending on whether the nonperformance by one party is used to excuse the other's performance (*i.e.*, as a condition)[68] or whether that nonperformance is sought to be made the basis of an action for damages or other relief (*i.e.*, as a promise).[69]

The official comment to this section is of particular significance, for it directs that usage of the trade, course of dealing and performance, and the general background and circumstances of the parties *must* be given consideration in conjunction with the lay meaning of the words used to define the scope of the obligations undertaken. This clearly means that this factual information may be shown whether or not the writing is "ambiguous," thus clarifying existing Washington law.[70]

Section 2-302. Unconscionable Contract or Clause.

(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 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.

This section is obviously not intended to have precise limits; instead, it is to permit the court to refuse to lend its aid to any part or all of a contract which it deems to have been unconscionable at the

[65] Official comment.
[66] RCW 63.04.120 (1925).
[67] RCW 63.04.130 (1925).
[68] Barry v. Danielson, 78 Wash. 453, 139 Pac. 223 (1914).
[69] Crandall Eng'r. Co. v. Winslow Marine Ry. & Shipbuilding Co., 188 Wash. 1, 61 P.2d 136, 106 A.L.R. 1457 (1936).
[70] Shattuck, *Contracts in Washington, 1937–1957*, 34 WASH. L. REV. 345, 369 (1959).

time it was made. A statute in such broad terms will obviously draw criticism;[71] the argument for such an enactment is that it permits the courts to do directly what, in the past, has been done indirectly.[72]

Illustrative Washington decisions, indicating what the court has done in the past and thus may be expected to do under this section are these:

United Fig & Date Co. v. *Falkenburg*,[73] involved an effort by the seller to escape liability for a claimed breach of a contract to sell walnut meat halves by relying on this clause: "Rejection by buyer, if accepted by seller, constitutes delivery. However when a rejection is left uncontested by the seller or is sustained as a result of arbitration, seller shall have the original contract period in which to tender other lots, if he so elects." The seller had admittedly delivered unmerchantable nut meats, and he nonetheless contended that the buyer was obligated either to accept or reject them, and in the latter case the clause operated to make delivery complete, giving the seller (but not the buyer) the option to tender other lots, otherwise the contract was terminated. The court, in the guise of interpreting the clause, made it inoperative, by concluding that it meant that if the buyer rejected *conforming* goods, that rejection constituted a delivery. Under the Code, the clause could be delineated on the grounds of unconscionability.

This is not to say that any clause limiting the obligations of the parties will be held unconscionable. In *Smith* v. *Cadillac Motor Car Co.*,[74] the manufacturer's acknowledgment of a dealer's order stated:

> This order is accepted subject to delays caused by conditions of material, fuel and labor markets, strikes, fires, transportation difficulties and other matters beyond the control of this company, rendering the performance of this contract commercially impracticable; *it being understood that this company shall not be liable for loss or damage for its failure to deliver goods ordered.* [Emphasis added.]

This clause was recognized as a "harsh" one, but was nonetheless effective to preclude liability on the manufacturer's part for the profits lost by the dealer caused by his loss of a sale through nonperformance by the manufacturer. The Code does not demand a different result.[75]

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[71] See Comment, *Definition and Interpretation of Unconscionable Contracts (Under the Uniform Commercial Code)*, 58 DICK. L. REV. 161 (1954); Note, *Section 2-302 of the Uniform Commercial Code: The Consequences of Unconscionability in Sales Contracts*, 63 YALE L.J. 560 (1954).

[72] HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE), 22 (1958).

[73] 176 Wash. 122, 124, 28 P.2d 287 (1934).

[74] 152 Wash. 131, 135, 277 Pac. 453 (1929).

[75] See HAWKLAND, *op. cit. supra* note 72, at 24.

In *Jones* v. *Mallon*,[76] the court upheld the validity of this clause, insofar as it negatived warranty liability:

> Purchaser agrees that he has examined the property herein described and is using his own judgment as to its condition, fitness and value; that the seller makes no representation, statement, warranty, or guaranty as to its condition, or with reference to said property; that the execution of this contract is not procured by any statement, representation or agreement not herein contained, and that each and every condition and agreement relative to the subject matter of this contract is contained herein.

Yet in two cases, *Los Angeles Olive Growers' Ass'n* v. *Pacific Grocery Co.*[77] and *National Grocery Co.* v. *Pratt-Low Preserving Co.*,[78] the court limited the effect of a clause restricting the time for making claims for defects to ten days, by holding that such a clause applies to patent, but not latent, defects.

The Code's provision on unconscionable provisions was intended by its draftsmen to apply to cases like the last two cited;[79] at the same time, however, there is nothing to require a different outcome in the automobile case, for a later section[80] permits (though limits) the use of clauses disclaiming or limiting warranties. The court, thus, has within its power express authority to overcome surprise and unfair dealing, without at the same time depriving the superior bargainer of a "hard bargain." The contribution of the Code is that it specifically recognizes this power, and at the same time it permits the court to hear evidence on the issue.

Section 2-303. Allocation or Division of Risks.

Where this Article allocates a risk or a burden as between the parties "unless otherwise agreed," the agreement may not only shift the allocation but may also divide the risk or burden.

Although there is no specific similar provision in the present statutory law, the Washington court has recognized the inherent power of parties to a contract to deal with risks to the property being dealt with, relying on a more general provision of the present Uniform Sales Act.[81]

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[76] 3 Wn.2d 382, 385, 101 P.2d 332 (1940).
[77] 119 Wash. 293, 205 Pac. 375 (1922).
[78] 170 Wash. 575, 17 P.2d 51 (1932).
[79] The official comment refers to several similar decisions. See official comment 1.
[80] Section 2-316.
[81] Marks v. Kucich, 181 Wash. 73, 42 P.2d 16 (1935) (relying on RCW 63.04.720).

Section 2-304. Price Payable in Money, Goods, Realty or Otherwise.

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this Article, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

The principal change worked by this section is its extension of the coverage of the sales statute to exchanges of personal property for real estate. The present statute[82] purports to exclude all aspects of such transactions from the sales statute. This would mean that *Kleeb* v. *McInturff*,[83] which involved a swap of a stallion for land, would not come within the Uniform Sales Act, adopted in Washington subsequent to the particular decision. The facts of the case would be within the operation of the new Code, however, insofar as the rights and ogligations of the parties growing out of the sale of personalty are involved.[84]

Section 2-305. Open Price Term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time of delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other

[82] RCW 63.04.100(2) and (3).
[83] 62 Wash. 508, 114 Pac. 184 (1911).
[84] Specifically, the case involved the effect of the parol evidence rule on an alleged warranty of the horse, a matter covered by section 2-202 of the Code.

may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must[85] pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

The application of this section is entirely within the control of the parties, for by showing explicitly that they intend to conclude a contract with an open price, or on the contrary, that they do not intend to be bound until that price is set, the parties themselves make the statute applicable or inapplicable.[86]

Insofar as sales agreements have been made without reference to a price to be paid, under the existing statute, one must distinguish transactions where the seller has executed all or a part of the transfer from those where the agreement is entirely executory. In those cases where the seller has delivered merchandise for which no price is stipulated, the court has required the buyer to pay a reasonable price, usually the market price,[87] unless the contract is divisible, in which case the buyer is obligated to pay at the contract rate.[88] This result is achieved on the basis of pure contract law, where the buyer accepts goods knowing the price demanded,[89] or on the basis of quasi-contract to prevent unjust enrichment of the buyer.[90]

The Code will not affect these principles, for they are recognized in subsection (4), but the Code's treatment of executory contracts to sell is a substantial change. The traditional view is that an agreement to sell in the future which designates no price is not enforceable, because it is too indefinite.[91] The Code would make such a contract enforceable on the basis of a reasonable price.

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[85] So written in the 1958 official text. No doubt "must" is intended.

[86] In Standard Oil Co. v. Paragon Oil Co., 82 Wash. 408, 144 Pac. 531 (1914) the court concluded that new price arrangements were to be made effective by entering into a new written contract. Because the new written contract was never executed, said new terms did not become effective.

[87] Reid Co. v. M-B Contracting Co., 46 Wn.2d 784, 285 P.2d 121 (1955); Fisher v. Berg, 158 Wash. 176, 290 Pac. 984 (1930); Leavenworth State Bank v. Wenatchee Valley Fruit Exch., 118 Wash. 366, 204 Pac. 8 (1922).

[88] RCW 63.04.450 (1925).

[89] Koths v. Shagren, 38 Wn.2d 52, 227 P.2d 446 (1951) (buyer bound to pay for goods received at the invoice price, for by receiving them he has assented to seller's offer to sell at that price).

[90] VOLD, SALES § 62 (2d ed. 1959).

[91] Bishop v. Williams, 32 Wn.2d 50, 200 P.2d 497 (1948). Perhaps a more accurate

Another substantial change afforded by the Code is its provision respecting prices to be agreed upon, or to be set by one of the parties. The adage is that an agreement to agree is not enforceable, which means that an executory agreement will fail entirely when it calls for a price to be agreed upon by the parties and the parties cannot agree.[92] Under the Code, this will be enforceable on the basis of a reasonable price where the parties fail to agree.

Finally, under settled contract doctrine, a promise by a seller to sell at a price he would fix, or a promise by a buyer to pay a price he would fix, will fail either because of uncertainty, or more logically because of the "illusory" nature of the promise of the one in whose power the determination of the price rests.[93] The Code will validate such contracts by removing the "illusory" nature of the promise, by reading an obligation to set a price *in good faith.* A failure by the designated party to name such a price authorizes the other to cancel the contract or set a reasonable price. Thus, by cutting down the power of the parties to act in bad faith, the Code expands the principle of those cases which have recognized the validity of a contract to sell at "market price,"[94] or "posted price."[95] Such prices will normally be good faith prices within the meaning of the Code, but the absence of such reference to standards will not invalidate an open price term.

Section 2-306. Output, Requirements and Exclusive Dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in

statement of the general rule would be that an executory agreement to sell is unenforceable unless the price is definitely stated or made capable of definite determination. See Mason, *Article 2: Sales,* 21 MONT. L. REV. 4, 12 (1959); 1 WILLISTON, SALES § 168 (rev. ed. 1948).

[92] The *Bishop* case in the preceding footnote seems to make this assumption. See Shattuck, *supra* note 44, at 35, 54; St. Paul & Tacoma Lumber Co. v. Fox, 26 Wn.2d 109, 173 P.2d 194 (1946).

[93] See Shattuck, *id.* In Washington Chocolate Co. v. Canterbury Candy Makers, Inc., 18 Wn.2d 79, 138 P.2d 195 (1943) the contract was worded in terms of a price set at the "current price list" for a period of five years. The long duration of the contract accounts for the use of an open price term, but the actual facts showed that had a different "current market price" was used for each customer, and thus the contract was unenforceable, insofar as it was executory.

[94] McGarry v. Superior Portland Cement Co., 95 Wash. 412, 163 Pac. 928 (1917) (where the market price was actually pretty much within the seller's control).

[95] Geyen v. Time Oil Co., 46 Wn.2d 457, 282 P.2d 287 (1955); Sunset Oil Co. v. Vertner, 34 Wn.2d 268, 208 P.2d 906 (1949); Searl v. Shell Oil Co., 172 Wash. 621, 21 P.2d 249 (1933). In Bearing Sales & Service, Inc. v. Isaacson Iron Works, 179 Wash. 696, 38 P.2d 398 (1934) the court held that a stipulation calling for "Special Mfg. Prices" did not permit the buyer to set the price and allowed the seller to recover the price he had charged, because that price was a "Special Mfg." price.

the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

The validity of both requirements[96] and output[97] contracts has been recognized in Washington, and good faith fluctuations in the amounts of either requirements or output have been permitted.[98] Subsection (2) of this section would, however, clarify the complex Washington case law. Though some decisions have validated agreements by reading in a requirement of performance meeting a standard of reasonable diligence and good faith,[99] there is always the possibility of a decision that such undertaking will not be implied, and that the attempted contract will be abortive because lacking in "mutuality."[100] The Code will reduce the likelihood of this in the exclusive dealing transaction, but this does not mean that any agreement, however loosely drawn, will be sustained. An elaborate arrangement to run for three years, by which buyer was obligated to take all of a product it "might desire" is illusory,[101] for the buyer's apparent offer to buy is entirely dependent on his whim. Thus it is not enforceable.

Section 2-307. Delivery in Single Lot or Several Lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due

[96] Quist v. Zerr, 12 Wn.2d 21, 120 P.2d 539 (1941); Jones v. Shell Oil Co., 164 Wash. 543, 3 P.2d 141 (1931); Parks v. Elmore, 59 Wash. 584, 110 Pac. 381 (1910).

[97] Holden v. Schafer Bros. Lumber & Shingle Co., 23 Wn.2d 202, 160 P.2d 537 (1945); Harms, Inc. v. Meade, 186 Wash. 287, 57 P.2d 1052 (1936); Northrop-Hage Lumber Co. v. Eureka Cedar Lumber & Shingle Co., 114 Wash. 669, 195 Pac. 1052 (1921) (though in this case, the phrase "your entire output" was restricted to include only dried lath and not to preclude sales to third parties of green lath); Gardiner v. Gyorog, 109 Wash. 660, 187 Pac. 318 (1920) ("all prime, dry, merchantable cascara bark as (seller) shall peel, or have for sale" did not include such bark that was not peeled or offered for sale); Kanasket Lumber & Shingle Co. v. Cascade Timber Co., 80 Wash. 561, 142 Pac. 15 (1914).

[98] Kanaskat Lumber & Shingle Co. v. Cascade Timber Co., *supra* note 97.

[99] Sargent v. Drew-English, Inc., 12 Wn.2d 360, 121 P.2d 373 (1942); Poston v. Western Dairy Prods. Co., 179 Wash. 73, 36 P.2d 65 (1934). An agreement to buy all of a dairy's milk which buyer "could sell" was held to require buyer to purchase all "which, in the exercise of reasonable diligence and ordinary good faith, it could sell." Warner v. Channell Chem. Co., 121 Wash. 237, 208 Pac. 1104 (1922).

[100] Mowbray Pearson Co. v. E. H. Stanton Co., 109 Wash. 601, 187 Pac. 370 (1920).

[101] Carolene Sales Co. v. Canyon Milk Prods. Co., 122 Wash. 220, 210 Pac. 366 (1922).

only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

The first portion of this statute, that is the twenty-seven words prior to the word "but" states in substance the provision of the present statute,[102] by which the implication is made that the contract does not authorize installment performances. There are, of course, many contracts which obviously involve installment performance, even though the contract does not expressly so stipulate. "Requirements" contracts and "output" contracts, previously discussed, are illustrative. A contract by a sanatorium to permit a farmer to remove all edible garbage is, quite obviously, such an arrangement.[103] A contract by one hired to destroy a court house by which he sold the steel and iron therein to be removed "as and when it is exposed" obviously looks forward to piecemeal removal.[104] An agreement to sell existing scrap and scrap to be accumulated involves the same basic issue.[105]

The common element in these illustrations is that the surrounding circumstances reveal that, inherent in the undertaking is an agreement for delivery in lots, and the new provisions of the Code recognize the significance of these surrounding circumstances. One can readily imagine borderline cases where neither the contract nor the circumstances clearly delineate whether one or several lots are visualized. The quantity ordered by the buyer may, viewed with respect to his needs and storage capacity, supply the clue. This area of uncertainty can be obviated by express terms in the contract. For example, one should be wary of drawing up a contract for the entire crop of potatoes, estimated at 200 tons, to provide some detail as to when delivery is to be made. A stipulation, "Delivery: When ready," is hardly adequate.[106] On the other hand, a stipulation in a contract between a mail order house and an apple grower, calling for 2500 gift boxes of apples, to be shipped directly to customers of the mail order house, obviously dictates installment delivery.[107]

The last portion of this section, dealing with the right of a seller to

[102] RCW 63.04.460(1) (1925).
[103] Boyle v. King County, 46 Wn.2d 428, 282 P.2d 261 (1955).
[104] Stack v. Baird, 171 Wn.2d 651, 19 P.2d 105 (1933).
[105] Mason-Walsh-Atkinson-Kier Co. v. Stubblefield, 99 F.2d 735 (9th Cir. 1938).
[106] See Irwin v. Pacific Fruit & Produce Co., 188 Wash. 572, 63 P.2d 382 (1936).
[107] Foster v. Montgomery Ward & Co., 24 Wn.2d 248, 163 P.2d 838 (1945). In Kalispell Flour Mill Co. v. Marshall, 125 Wash. 80, 215 Pac. 70 (1923), a course of dealing was used to support a contention of the buyer that he was to receive piecemeal delivery.

recover for goods actually delivered, also emphasizes the need for skilled draftsmanship. The counseling point is that if the buyer wants to postpone his obligation to pay the price until all units have been delivered, an express provision to that effect is desirable. This point can best be illustrated in connection with section 2-612, to be discussed hereafter.

Section 2-308. Absence of Specified Place for Delivery.

Unless otherwise agreed

(a) the place for delivery of goods is the seller's place of business or if he has none his residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.

With the exception of subparagraph (c), this section states the substance of the present statute.[108] The phrase which has been most significant in the Washington decisions has been, "Unless otherwise agreed," and it is to be noted that the policy of those cases will continue. The policy is broad enough to find an agreement not only in the express words used but in the surrounding circumstances.[109] One must, however, be dubious of the continued validity of a statement appearing on *Mutual Sales Agency* v. *Hori*,[110] eliminating the effect of a delivery provision as not controlling because it was part of the price term. This approach would not be appropriate under the Code, for the policy expressed in section 2-319 would seem to be relevant here. That policy is to treat an F.O.B. term as a delivery term, even though it is used only in connection with the price. Consequently, an expression of a place of delivery in the price term of the contract is relevant to the question of where delivery is to occur.

Section 2-309. Absence of Specific Time Provisions; Notice of Termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.

[108] RCW 63.04.440 (1) (1925).
[109] Miles v. Pound Motor Co., 10 Wn.2d 492, 117 P.2d 179 (1941).
[110] 145 Wash. 236, 240, 259 Pac. 712 (1927).

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed my be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

Subsection (1) reading into contracts without specific time for performance an obligation to perform in a reasonable time restates the position reached in the Washington decisions.[111] The analogous problem of determining when payment is to be made, absent a specification,[112] is covered by a later section of the Code.[113]

Subsection (2) will provide a much needed clarification of the existing law in Washington. A contract calling for a series of performances without specified duration may be treated, under present law, as (a) revocable at will,[114] *or* (b) extant for a reasonable time,[115] or subject to clarification by the use of parol evidence as to what time limit was intended.[116] This latter interpretation is still possible, depending on whether the document absent a time provision is an integrated contract, or one intended to be the final expression of the parties'

[111] Ball v. Stokely Foods, Inc., 37 Wn.2d 79, 221 P.2d 832 (1950). The contract for delivery of peas called for delivery "when the peas are ready for harvest." Parol evidence was admitted to resolve the question of what reasonable construction this should receive. Palmer Supply Co. v. Time Oil Co., 27 Wn.2d 468, 178 P.2d 737 (1947) (court relied on the UNIFORM SALES ACT, RCW 63.04.440(2)); Hansen v. Wahl, 158 Wash. 34, 290 Pac. 695 (1930) (a stipulation, "date of delivery to be optional upon return of second party from Norway," was stated to give both parties, but especially the second party, leeway); Sussman v. Gustav, 109 Wash. 459, 186 Pac. 882 (1920); Jones-Scott Co. v. Ellensburg Milling Co., 108 Wash. 73, 183 Pac. 113 (1919); Wheeler v. Pitwood, 104 Wash. 1, 175 Pac. 289 (1918). This case holds that where no time for delivery is stipulated, a reasonable time controls and it is error to admit discussions prior to the execution of the contract as to a specific time of delivery. Norris-Short Co. v. Everson Mercantile Co., 103 Wash. 399, 174 Pac. 645 (1918); United Iron Works v. Wagner, 98 Wash. 453, 167 Pac. 1107 (1917); Hoffman v. Tribune Publishing Co., 65 Wash. 467, 118 Pac. 306 (1911) (agreement to deliver "as promptly as possible" requires delivery within a reasonable time); Menz Lumber Co. v. McNeeley & Co., 58 Wash. 223, 108 Pac. 621 (1910); Victor Safe & Lock Co. v. O'Neil, 48 Wash. 176, 93 Pac. 214 (1908).

[112] Dement Bros. Co. v. Coon, 104 Wash. 603, 177 Pac. 354 (1919) (holding that absent a specified time for payment, delivery and payment are concurrent).

[113] Section 2-513.

[114] National Grocery Co. v. Santaella & Co., 160 Wash. 262, 295 Pac. 128 (1931); Robbins v. Seattle Peerless Motor Co., 148 Wash. 197, 268 Pac. 594 (1928).

[115] Steinert, J., concurring in Randall v. Tradewell Stores, Inc., 21 Wn.2d 742, 756, 153 P.2d 286 (1944) (relying, however, on cases involving not the duration of a series of performances, but the time for performance of a single act).

[116] Randall v. Tradewell Stores, Inc., 21 Wn.2d 742, 153 P.2d 286 (1944) (noted in 20 WASH. L. REV. 171 (1945), and discussed by Professor Shattuck, *Contracts in Washington, 1937-1957*; (pts. 2-3), 34 WASH. L. REV. 345, 467 at 380, 497).

intention.[117] One would anticipate that the broad policy of the Code's creators to permit construction of contracts in the light of the entire circumstance of the case would support the identical decision under the Code that was reached under present law.[118]

That tangled problem aside, however, the Code articulates a sound merging of the two possible approaches to interpretation by allowing a duration of a reasonable time, subject to cancellation by either party *on reasonable notice.*

Section 2-310. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.

Unless otherwise agreed

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513); and

(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(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 delaying its dispatch will correspondingly delay the starting of the credit period.

Paragraph (a) reflects the premise that, absent a specific provision to the contrary, delivery and payment are concurrent acts. This has been the effect of the Washington decisions,[119] but the statute makes it quite plain that unless payment is to be required against documents or "C.O.D.," the buyer has a right of inspection before he must pay.

[117] Section 2-202.
[118] See Note, 20 WASH. L. REV. 171 (1945).
[119] Engstrom v. Wiley, 191 F.2d 684 (9th Cir. 1951); Turner v. Benz Bros. & Co., 153 Wash. 123, 279 Pac. 398 (1929); Dement Bros. Co. v. Coon, 104 Wash. 603, 177 Pac. 354 (1919); Loewi v. Long, 76 Wash. 480, 136 Pac. 673 (1913).

This right exists under present law,[120] and is covered elsewhere by the Code.[121] Situations in which the buyer does not have a right to inspect before payment are C.O.D. transactions, C.I.F. transactions, C. & F. transactions, and any transaction requiring payment against documents, such as "Sight Draft, Bill of Lading Attached, Cash Against Documents."[122] In these cases, payment is due at the time the buyer receives the documents, under paragraph (c).

Paragraph (d), though entirely without statutory precedent, states the obvious point that credit runs from the point of shipment, but the seller cannot mislead the buyer as to this date by postdating an invoice.

Section 2-311. Options and Cooperation Respecting Performance.

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1) (c) and (3) of Section 2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

(a) is excused from any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable man-

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120 3 WILLISTON, SALES § 473 (rev. ed., 1948).

121 Sections 2-512 and 2-513.

122 Phalan, *The Obligations of Parties to Sales of Goods Under the Uniform Commercial Code*, 62 DICK. L. REV. 235, 236 (1958). Mr. Phalan cautions: "the expression 'sight draft, bill of lading attached,' without more, does not expressly require the buyer to pay in advance of the time when the goods can be expected to arrive. The statement is incomplete; for completeness, there should be added either (1) 'cash against documents' (or its equivalent), requiring the buyer to pay upon presentment of the documents which is usually before the goods arrive, or (2) 'inspection allowed' (or its equivalent), permitting the buyer to wait until the time when the goods arrive (or should have arrived, if the goods are lost in transit while risk of loss is on the buyer)."

ner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

The title of this subsection suggests contracts, apparently much used in the sale of farm equipment, calling upon the buyer to give "friendly cooperation" to the seller, or give "friendly assistance" in the rectification of defects.[123] A reading of the section, though, reveals it is designed to produce results different from that aimed at by such a clause. Although there is no obligation on the offeror to assist the offeree in accepting, once a contract is reached there arises an obligation that the parties will cooperate and not hinder the other's carrying forth of his duties.[124] Illustrative Washington sales cases are set forth in the footnote.[125]

The Washington Supreme Court has a significant decision carrying this principle to a desirable, yet not altogether traditional, degree. Briefly stated, the circumstances were that the seller had agreed to deliver title to a logging truck on a day certain, and the buyer had agreed to pay installments of the price at designated times prior to the day on which seller was to deliver. After the buyer had paid a substantial sum of money under the contract, he discovered for the first time a defect in the title of the truck, in the form of a mortgage toward which the seller had made no payments though he could have done so with some of the price he received. The action was one by the buyer to recover the price he had paid, in which he was met with the defense that it was he who had defaulted by not completing the payments on the specified dates. The seller was, of course, relying on traditional concepts that one in default in a contract is in no position to be awarded recovery thereon or recovery for benefit he has conferred on the non-breacher, that is, in the language of the court, he stood pat on his contract. Note what the court says:

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[123] *E.g.*, Womach v. Case Threshing Mach. Co., 62 Wash. 661, 114 Pac. 509 (1911).

[124] 3 WILLISTON, CONTRACTS § 677 (rev. ed., 1936).

[125] Darst v. Meduna, 15 W.2d 293, 130 P.2d 361 (1942) (seller of business to cooperate by supplying customers); Church Mfg. Co. v. Joseph, 110 Wash. 110, 187 Pac. 1090 (1920) (in the sale of cider, buyer could not complain of seller's failure to deliver where buyer had failed to provide empty barrels). In Otis Elevator Co. v. Johnson, 70 Wash. 339, 126 Pac. 894 (1912) a buyer of an elevator had cooperated sufficiently by allowing seller to attempt to rectify defects, even though on occasions the buyer had excluded seller from the building. These occasions were such as would have been "inconvenient" to the buyer in operating the hotel wherein the elevator was installed.

In Davis v. Associated Fruit Co., 135 Wash. 614, 238 Pac. 629 (1925), the buyer denied liability because the seller had failed to comply with his obligation to label apple boxes. The seller, however, was held to have complied where he actually attached labels but was forced to remove them because they were in contravention of state law. The labels had been supplied by the buyer!

> The mores of this time and place require that a seller who has at all times retained possession of the subject matter of the sale may not, upon the default of the purchaser, retain the payments made by the purchaser, if that default has been occasioned by the conduct of the seller in refusing to co-operate with the purchaser in the usual and customary methods and procedures by which such sales are ordinarily effectuated and by which the interest of both parties could have been adequately protected.
>
> This does not put the burden of doing anything beyond the strict requirements of his contract upon the seller if he is content with the damages which he may sustain by the default of the purchaser, but merely puts upon him the extracontractual obligation of common honesty and fair dealing if he seeks to enrich himself substantially beyond his actual damages by retaining the payments which the purchaser has made.[126]

This reading into the transaction a basic requirement of commercial honesty and good faith lies at the heart of the concept the Code displays in this particular section, and, indeed, throughout.[127] By bringing to bear this requirement, the Code permits enforceable agreements to leave details to the determination of one or the other of the parties. Leaving such matters to the determination of third parties is not unheard of under present law,[128] and within limits, the parties may determine details of performance.[129] The effect of the Code will be to extend those limits by applying the general requirements of commercial understanding and good faith to limit the discretion of the parties absent any other specific limitation.[130]

The statutory allocation of the option to the buyer, where specifications of the goods are involved, has support in an early Washington

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[126] Stewart v. Moss, 30 Wn.2d 535, 543, 192 P.2d 362 (1948).

[127] This concept is particularly emphasized in the sections immediately prior to this one, sections 2-301-302.

[128] W. & J. Sloane v. State, 161 Wash. 414, 297 Pac. 194 (1931) (architect's certificate final as to whether furniture complied with the contract).

[129] John S. Hudson, Inc. v. Power Plant Eng'r. Co., 154 Wash. 172, 281 Pac. 324 (1929) (buyer had the power to reject the goods if not satisfactory); Kent Lumber & Timber Co. v. Montborne Lumber Co., 150 Wash. 377, 272 Pac. 957 (1928). The buyer had the power to cancel the contract "on account of excessive shipping delays." This was held not to be an unconditional right to cancel. Jahn & Co. v. Wright, 109 Wash. 164, 186 Pac. 262 (1919) (buyer to measure using an established method of measurement); Houser v. Atherton, 98 Wash. 386, 167 Pac. 1109 (1917) (buyer to grade the wheat according to the State grain inspection act).

[130] The reading in of a requirement of good faith in these matters is not unfamiliar to the Washington decisional law. In John S. Hudson, Inc. v. Power Plant Eng'r. Co., 154 Wash. 172, 281 Pac. 324 (1929) a contract calling for performance to the buyer's satisfaction was held to a standard of good faith where the subject matter of the sale was desirable only because of commercial value or mechanical fitness. In Gonter v. Klaber & Co., 67 Wash. 84, 120 Pac. 533 (1912) the words "subject to inspection" required the buyer to use his honest judgment. If he does so, his decision is final, for the parties have so agreed. However, he may not act capriciously.

case,[131] and is obviously designed to bring to bear what would be ordinary commercial understanding in such a case. The matter may be covered by the contract specifically, of course,[132] but the draftsmen have done great service, for parties to contracts giving options to one or the other are unusually adept at keeping secret where the option lies.[133]

The provision of the Code permitting the innocent party to use defensively the noncompliance by the other is not new, but that portion which allows him, on failure of the other party to delineate specifications, to perform in any reasonable manner is an addition to existing law.

[This discussion will be continued in subsequent issues.]

[131] Hurley-Mason Co. v. Stebbins, Walker & Spinning, 79 Wash. 366, 140 Pac. 381 (1914). A sale "subject to" inspection visualizes inspection by the buyer. Some of the language of the case emphasizing the difference between conditions and warranties may no longer be useful.

[132] In Hudnall v. Pennington & Co., 136 Wash. 155, 239 Pac. 2 (1925) the contract expressly provided that the buyer "will perform all necessary field work, will provide all inspection, and will do all other things necessary and proper to see that the crops herein described are properly crated and packed and prepared for market...." In an action brought for the price of the goods, the buyer claimed they were inferior, but the court concluded that even if so, he had only himself to blame under this clause.

[133] Chermak v. Taggares, Inc., 166 Wash. 67, 6 P.2d 380 (1931). Here the court was moved to suggest that if the person who wrote the contract had wanted to make ambiguous who had the option, he could not have improved on the masterpiece he produced.