Washington Law Review

Volume 36 | Number 1

3-1-1961

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

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

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[Continued from 35 WASH. L. REV. 617 (1960)]

Section 2—501. Insurable Interest in Goods; Manner of Identification of Goods.

(1) The buyer obtains 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 and he has an option to return or reject them. Such identification can be made at any time and in any monner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when 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 twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

In view of the fact that most sales transactions, excepting retail store sales, start at a time when no particular goods are being dealt with, it is necessary to determine a point at which time the deal can be said to change from one about described goods into one about specific goods. There is a world of difference legally between an

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agreement to sell "a ton of coal" and an agreement to sell "*this* ton of coal." The point at which the parties are dealing with particular goods is the point at which those goods are "identified," and the present section articulates rules for determining this critical event.

Though these rules are subject to modification by agreement, they can only be supplanted by an *explicit* agreement.[1] This invites comparison to the present statute respecting the rules for determining intention of the parties as to when property passes.[2] The rules set forth in that statute are also subject to agreement, but the agreement to override the present statute need not be *explicit*,[3] it may be found in the total conduct of the parties. But a more fundamental difference between the Code's provisions and the present statute is that the Code's provisions are directed to the simple acts which serve to identify goods to the contract, while the present statute aims at solving the abstruse question of when "property" passes. Identification is a *sine qua non* of passage of property,[4] but the goods may be identified at a time prior to the time title passes.

The contribution of this section of the Code is, thus, to recognize that once specific goods have been identified to the contract, the buyer reasonably expects to get those goods and this expectancy is insurable, whether or not the buyer has "title" or "risk of loss" of the goods.[5] This departs from the traditional approach[6] followed by the Washington court by which insurable interest coincides with title[7] or risk of loss.[8]

With respect to the potential possession concept embodied in this

[1] See official comment 3.

[2] RCW 63.04.200 [UNIFORM SALES ACT § 19].

[3] In Gillingham v. Phelps, 5 Wn.2d 410, 105 P.2d 825 (1940), 11 Wn.2d 492, 119 P.2d 914 (1941), the court was faced with the problem of determining what evidence overrides the presumptions created by the present statute. The subject matter of the transaction, a card club, had been destroyed by fire, and the suit involved the proceeds of fire insurance. On the first appeal, no evidence was in the record, so the presumption controlled; however, on remand a trial to a jury brought out evidence which was sufficient to overcome the stated presumptions. The case presented the familiar problem of whether a contract arose from an oral agreement which anticipated a written embodiment thereof which never came into existence. On this problem, the present section of the statute is of no help.

If it be determined that a contract for sale does exist, however, the present statute would seem to create a stronger inference that the goods were identified, but it does not answer the question of whether the risk of loss was on the buyer. See § 2-509, UNIFORM COMMERCIAL CODE (hereinafter cited only to appropriate Code sections).

[4] Section 2-401.

[5] VOLD, SALES 186 (2d ed. 1959).

[6] HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 96 (1958).

[7] Puget Sound Bulb Exch. v. St. Paul Ins. Co., 174 Wash. 691, 26 P.2d 84 (1933).

[8] In at least one situation, though, risk of loss and insurability do not go hand in hand, for the buyer under a conditional sales contract has an insurable interest. Quinn

section of the Code,[9] the main point of interest in Washington seems to lie in the official comments which exclude from the concept of "growing" goods the product of a lumbering, mining or fishing operation.[10] Such products must be identified to the contract by some act selecting the particular subject matter of the contract of sale.

The seller's security interest is a sufficient one to constitute it as insurable, and this accords with Washington decisions dealing with conditional sales.[11]

Section 2—502. Buyer's Right to Goods on Seller's Insolvency.

(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

The Washington court has recognized the need for increased protection of a buyer presented by the seller's insolvency;[12] but this section of the Code is without precedent and goes farther than existing law.[13] Though the statute is worded in terms of allowing the financing buyer to recover goods from the seller, the obvious impact is on the seller's creditors, rather than on the seller, since the section is premised on insolvency. This places the section in a touchy area,

v. Parke & Lacy Mach. Co., 5 Wash. 276, 31 Pac. 866 (1892). But not the risk of loss. Holt Mfg. Co. v. Jaussaud, 132 Wash. 667, 233 Pac. 35 (1925). As a practical matter, most conditional sales contracts are so drawn as to shift this risk to the buyer. Shattuck, *Secured Transactions (Other Than Real Estate Mortgages)—A Comparison of the Law in Washington and the Uniform Commercial Code Article 9*, 29 WASH. L. REV. 1, 39 (1954).

[9] Subsection (1)(c). See Johnson, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code*, 34 WASH. L. REV. 78, 85 (1959). North Idaho Grain Co. v. Callison, 83 Wash. 212, 145 Pac. 232, *rehearing denied*, 87 Wash. 278, 151 Pac. 775 (1915).

[10] Official comment 6. Goods in these categories can be identified by customary methods of marking or other selection. See McFarland v. Wendorf, 1 F.2d 850 (9th Cir. 1924).

[11] Brown v. Northwestern Mut. Fire Ass'n, 176 Wash. 693, 30 P.2d 640 (1934); Hassett v. Pennsylvania Fire Ins. Co., 150 Wash. 502, 273 Pac. 745 (1929); Osborne v. Phoenix Ins. Co., 90 Wash. 387, 156 Pac. 5 (1916).

[12] Gardiner v. Gyorog, 109 Wash. 660, 187 Pac. 318 (1920).

[13] HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 141 (1958).

and it immediately suggests the need for interrelating it with three other statutes: (1) the Federal Bankruptcy Act,[14] (2) the Washington statute on filing bills of sale,[15] and (3) the Washington statute forbidding preferences by insolvent corporations.[16]

Insofar as the bankruptcy act is concerned, the prediction generally made is that the federal statute's foundations lie in state law in this area, and thus the specific provisions of the Code will govern and be effective.[17]

Unless the Washington statute providing for recordation of bills of sale is repealed, it would seem that noncompliance with that statute will make the buyer's rights under this section of the Code subject to the superior rights created by that statute in favor of existing creditors. This result is produced by section 2-402 of the Code, previously discussed, by which an identification of goods under a sale may be voided by a creditor if fraudulent by any rule of law.

The typical case of preference is that of the seller's obtaining payment of the price within the specified period of four months prior to bankruptcy or state proceedings.[18] It would seem that when the buyer gets title to the goods, if subsequent to his payment of the price, he, too, obtains a preference if the seller was at that time insolvent. In view of the fact that the buyer's rights under the presently discussed section do not turn on his being the owner of the goods, one can scarcely argue that the buyer is merely taking that which is his and not collecting a debt. One would predict, however, that the buyer's compliance with the present section of the Code would not result in a preference, based on these three observations:

First, the short interval in which the seller's insolvency must occur to set the statute in motion suggests an analogy to the cash sale rulings under present law, by which cash sales constitute a present exchange of values and not preferences.[19]

Second, the section itself assumes that in some cases the seller's creditors will have a substituted asset to which to look, that is the installments of the price paid and the balance tendered.

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[14] 11 U.S.C. § 1.
[15] RCW 65.08.040.
[16] RCW 23.72.010.
[17] Comment, *The Commercial Code and the Bankruptcy Act: Potential Conflicts*, 53 NW. U.L. REV. 411, 424 (1958); Hogan, *The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety*, 38 B.U.L. REV. 571 (1958).
[18] *E.g.*, Seattle Ass'n Credit Men v. Luster, 37 Wn.2d 192, 222 P.2d 843 (1950); Stern v. Lone, 32 Wn.2d 785, 203 P.2d 1074 (1949).
[19] Engstrom v. Benzel, 191 F.2d 689 (9th Cir. 1951); Engstrom v. Wiley, 191 F.2d 684 (9th Cir. 1951).

Third, the Code itself has recognized the possibility of a preference in section 2-402, subsection (3) (b). That section applies only where the identification has been made in satisfaction or security for an antecedent debt. Under the facts pertinent to our present inquiry, the identification occurred prior to insolvency, else section 2-502 does not apply. Further, the identification contemplated by section 2-502 is not one related to an antecedent debt. The buyer's rights under this section can best be said to vest in him at the time of identification, and his obtaining the goods by tender of the unpaid price under the section ought to be held to relate back to the earlier time, thus defeating any creditor's claim of preference.

This is not to say, however, that the rights of a creditor of the seller who has obtained a lien by attachment or execution could also be cut off by the buyer's compliance with this section, for the statute says that the buyer may recover from the *seller*, suggesting that some third persons will be protected. Surely, for example, a bona fide purchaser can prevail over the buyer if his rights are superior by the operation of any rule of law.[20]

Section 2—503. Manner of Seller's Tender of Delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

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[20] Section 2-403.

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowlment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and 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 non-negotiable 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.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2—323); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

The general obligations of the seller, to transfer and deliver the goods, are stated in an earlier section of the Code.[21] The section here discussed spells out the detailed nature of those requirements, recognizing that inasmuch as delivery to the buyer may require his cooperation, the usual burden on the seller will be to *tender* delivery. As under the present statute,[22] the presumption is that this is to occur at the seller's place of business or residence.[23]

The contract may require the seller to deliver to the buyer's place, in which event the tender must be made in conformity therewith. Differing from the present statute, the seller's substantial performance may not entitle him to recovery of the price.[24] Departing further from

[21] Section 2-301.

[22] RCW 63.04.440 [UNIFORM SALES ACT § 43].

[23] Section 2-308.

[24] In United Iron Works v. Wagner, 89 Wash. 293, 154 Pac. 460 (1916), it was held a question for the jury whether the seller had substantially complied with a contract requiring delivery of very heavy equipment "on your ground," where the equipment was landed on a gravel bar near the buyer's ranch, but at a point separated by 300 feet of rough, steep terrain from the place where the equipment was to be installed. The Code's treatment of materiality of the breach is discussed in connection with section 2-601.

the present statute,[25] the Code does not treat a contract requiring the seller to pay the costs of transportation as one requiring delivery by the seller to the buyer's place. The buyer bears the risk of loss in such transactions under the Code, but not under the presently operative statute.[26]

Not to be overlooked is that often provisions respecting the delivery obligation of the contract will be in the commercial short-hand terms of "F. O. B.," "F. A. S.," and the like, matters particularly and exhaustively covered by other sections of the Code.[27] The presently discussed section of the Code applies only where the parties have not used these accepted commercial terms to spell out their agreement.

Section 2—504. Shipment by Seller.

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

The changes made by this section are spelled out in the official comments. As has been stated elsewhere in this discussion of the Code, no change in the delivery obligation peculiar to Washington is made.[28]

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[25] RCW 63.04.200. Rule 5 [UNIFORM SALES ACT § 19].

[26] Official comment 5.

[27] Section 2-319. Thus, cases such as Rawleigh Co. v. Harper, 173 Wash. 233, 22 P.2d 665 (1933), and Phoenix Packing Co. v. Humphrey-Ball Co., 58 Wash. 396, 108 Pac. 952 (1910), will be decided under those sections of the Code rather than the presently discussed section.

[28] 35 WASH. L. REV. 617, 637 n. 82 (1960).

That the seller must exercise due care in arranging for the transportation of the goods, see Gillarde v. Northern Pac. Ry., 28 Wn.2d 233, 179 P.2d 235 (1947).

Section 2—505. Seller's Shipment Under Reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) a non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Section 2—507) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

Because of the emphasis of the Code on the particular rights and duties of the parties to the sales transaction, rather than the general concept of "title" or "property," it scarcely needs mention that this section, being limited to the seller's reservation of security, does not govern any other incident of the sales transaction, such as the risk of loss. This is the same approach as the one taken by the Washington court under the present statute[29] and as a common law matter.[30] The seller, in short, may reserve a security interest without subjecting himself to the risks incident to the beneficial interest in the property.

The nature of the interest retained by the seller depends on the nature of the bill of lading used. That is to say, whether a straight or order bill of lading is used, and whether or not the seller is named as consignee. As under present law, the seller who desires to retain a security interest which will be effective against third persons should avoid the use of a straight bill of lading naming the buyer as con-

[29] RCW 63.04.210 [UNIFORM SALES ACT § 20].

[30] Norbom Eng'r Co. v. A. H. Cox & Co., 120 Wash. 675, 208 Pac. 87 (1922) (taking a bill of lading in the seller's name merely security device); Northern Grain Warehouse Co. v. Northwest Trading Co., 117 Wash. 422, 201 Pac. 903, 204 Pac. 202 (1921).

signee.[31] The straight bill of lading designating the seller as consignee will, however, reserve the right to possession of the seller.[32]

A dictum in *Hancock Mut. Life Ins. Co. v. Lewis Corp.*,[33] suggests that at present RCW 63.04.210[34] is limited to contracts involving specific goods. Quite plainly, the Code's provision is not thus limited, for it applies in any case where goods are identified to the contract whether before the shipment or merely by the very act of shipment.

Professor Hawkland articulates an incidental benefit to the seller to result under the Code, in that by artful use of this section of the Code, a seller may control the situs of litigation which may be necessary due to a subsequent rejection of the goods by the buyer.[35] Seller's counsel will find his remarks helpful.

Section 2—506. Rights of Financing Agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

No relevant Washington authority has been found.

Section 2—507. Effect of Seller's Tender; Delivery on Condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for

[31] While as between seller and buyer, a seller still may insist upon cash payment where he has used a straight bill running to the buyer, such a bill will enable the buyer to convey an interest to a third person superior to the retained interest of the buyer. Official comment 4. *Accord,* Orilla Lumber Co. v. Chicago, M. & P. S. Ry., 84 Wash. 362, 148 Pac. 850 (1915), *reversing* 81 Wash. 611, 143 Pac. 152 (1914).

[32] Thus the carrier is not authorized to deliver merchandise so shipped to the buyer. Rountree v. Lydick-Barmann Co., 150 S.W.2d 173 (Tex. Civ. App. 1941). The Washington court's decision on the point is a little obscure, for it "assumes" that the carrier would be a converter by delivering to the buyer in such a case. Prentice v. Union Pac. Ry., 28 Wn.2d 212, 182 P.2d 41 (1947).

[33] 173 Wash. 444, 23 P.2d 572 (1933).

[34] UNIFORM SALES ACT § 20.

[35] HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 132-34 (1958).

them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

Coupled with section 2-511, this Code section adopts the long settled assumption that, absent agreement or waiver, delivery of the goods and payment of the price are concurrent conditions. The Washington court has recognized this rule.[36] The presently discussed section thus makes tender by the seller of complying goods a condition precedent to the buyer's acceptance and, unless the buyer has agreed to pay the price independently of any tender, to the buyer's duty to pay. Sufficiency of the seller's tender is, of course, a question of fact. Obviously the circumstances may permit the seller to recover the price even though the goods tendered are not precisely in compliance with the agreement, as in cases where the seller, admitting defects in the goods, agrees to correct those defects.[37]

As under present decisions, it will be possible for the buyer to waive the implied condition of tender by the seller,[38] or for the seller to waive his right to payment of the price in cash on tender.[39] This latter point is often of significance in determining the rights of a third person who has purchased from the buyer. This section of the Code does not govern such a situation, for the wording of the section limits the application thereof to the seller's rights against the buyer and the buyer's rights against the seller. Rights of third persons are determined by a previously discussed section.[40]

Section 2—508. Cure by Seller of Improper Tender or Delivery; Replacement.

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet ex-

[36] Crandall Eng'r Co. v. Winslow Marine Co., 188 Wash. 1, 61 P.2d 136 (1936); Balcom v. Kohno, 124 Wash. 628, 215 Pac. 17, *aff'd on rehearing*, 127 Wash. 697, 221 Pac. 340 (1923); W. E. Dooley & Co. v. Seattle Elec. Supply Co., 122 Wash. 354, 210 Pac. 668 (1922); Wagner Co. v. Craib & Co., 114 Wash. 139, 194 Pac. 584 (1921); Hunter v. Radford, 111 Wash. 668, 191 Pac. 794 (1920).

[37] Hallidie Mach. Co. v. Whidbey Island Sand & Gravel Co., 62 Wash. 604, 114 Pac. 457 (1911).

[38] Alaska Junk Co. v. McPherson, Fenstamaker, Whitehouse Co., 123 Wash. 254, 212 Pac. 185 (1923).

[39] Veblen v. Foss, 32 Wn.2d 385, 201 P.2d 719 (1949).

[40] Section 2-403.

pired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

The equitable principle underlying subsection (1) has been accepted and enforced by the Washington court in a somewhat unusual case.[41] Essentially, the facts were that the seller and buyer became involved in a dispute as to certain parts of the equipment sold, the seller maintaining that it had complied with the contract, and the buyer contending that the equipment furnished was not adequate. After abortive efforts to resolve the conflict, the seller sued for the price, and in that action, the buyer sought rescission of the contract by reason of the seller's breach. The court decided in the first instance that the seller had not complied with the contract, so its action for the price could not be maintained. However, because the seller had acted in good faith, the court decided that the seller should be given a reasonable time in which to make the equipment comply with the contract. Thus it denied the buyer's request for rescission. Implicit in the holding is the eventual result that if the seller makes good under his contract within that reasonable time, the buyer will be obligated to pay the price.

That decision, it will be observed, goes farther than the Code's provision, but adoption of the Code will not necessitate a backing down from the holding. The case recognizes that the seller may make good his tender, even after he has instituted an unsuccessful action for the price. It is this feature of the decision which is not necessarily required by the Code's provision.

Subsection (2) of the Code seems to be without previous statutory or decisional precedent; however, it seems to embody the principle underlying the entire article by which a party who acts in accordance with the standards of commercial good faith will be protected from surprise resulting from the technical demands of the other contracting party.[42]

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[41] Robinson v. Puget Elec. Welding Co., 162 Wash. 626, 299 Pac. 405 (1931).
[42] See HAWKLAND, *op. cit. supra* note 35, at 121-22.

Section 2—509. Risk of Loss in the Absence of Breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2—505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgement by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2—503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2—327) and on effect of breach on risk of loss (Section 2—510).

With one major exception, to be noted in a moment, this section places the risk of loss on the party who bears it under the present statute,[43] and like the present statute, is subject to modification by agreement of the parties.[44] Under the Code, evidence of trade usage

[43] RCW 63.04.230 [UNIFORM SALES ACT §22].
[44] Gillingham v. Phelps, 11 Wn.2d 492, 119 P.2d 914 (1941), 5 Wn.2d 410, 105 P.2d 825 (1940); Marks v. Kucich, 181 Wash. 73, 42 P.2d 16 (1935).

is relevant to a determination of the location of risk of loss, even though the contract is not ambiguous on the point,[45] a position contrary to that taken by the Washington court.[46]

Where transportation of the goods is involved, the Code will have the effect of passing the risk of loss to the buyer on delivery to the carrier, unless the seller is specifically required to deliver. The fact that the seller is required to arrange and pay the shipping costs does not mean that he is required to deliver within the meaning of this rule, thus departing from the present statute.[47] Thus in most instances, the risk of loss during shipment will rest on the buyer.

Where transportation of the goods is not involved, the Code states rules for two situations: one, where the goods are in the possession of a bailee,[48] and the other, where the goods are in the possession of the seller.[49] In this latter situation, the Code departs drastically from present law. Under the present statute, of course, the courts traditionally locate the risk of loss by first locating the title.[50] This, of course, is modified by the Code. But further, where under the present statute the parties are dealing with specific goods and nothing remains to be done by the seller, the rule of thumb is that "property" and thus risk of loss pass to the buyer when the bargain is made.[51] Under the Code, the risk of loss rests on the party who has possession, where the seller is a merchant. In other words, so long as the merchant seller remains in possession, he bears the risk of destruction of the goods, absent a contract shifting that risk. In deals involving sellers who are

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[45] Official comment 5.

[46] Williams v. Ninemire, 23 Wash. 393, 63 Pac. 534 (1900).

[47] RCW 63.04.200, Rule 5 [UNIFORM SALES ACT § 19]. Washington case authority for the proposition that risk of harm during transit may be on the seller is practically nonexistent. In Chicago Lumber & Coal Co. v. McCann, 48 Wash. 174, 93 Pac. 216 (1908), there is a suggestion that the seller may bear this risk where he is bound to pay delivery costs, but the holding is that no such obligation was imposed on the facts. Other cases have put the risk of loss during transit on the buyer for one reason or another. Inland Seed Co. v. Washington-Idaho Seed Co., 160 Wash. 244, 294 Pac. 991 (1931); Discount Corp. of Wash. v. Philippine Mfg. Co., 150 Wash. 274, 272 Pac. 970 (1928); National Fin. Co. v. Emerson, 117 Wash. 297, 201 Pac. 4 (1921); Ankeny v. Young Bros., 52 Wash. 235, 100 Pac. 736 (1909); Jones v. Emerson, 41 Wash. 33, 82 Pac. 1017 (1905); Roy & Roy v. Griffin, 26 Wash. 106, 66 Pac. 120 (1901); Izett v. Stetson & Post Mill Co., 22 Wash. 300, 60 Pac. 1128 (1900). The Code will produce a similar location of the risk by its position that presumably most transactions are shipment transactions, not delivery transactions. Section 2-503, official comment 5.

The contract may cover this matter by use of commercial terms such as F.O.B., F.A.S. and the like. See § 2-319.

[48] Section 2-509 (2).

[49] Section 2-509 (3).

[50] *E.g.*, Inland Seed Co. v. Washington-Idaho Seed Co., 160 Wash. 244, 294 Pac. 991 (1931).

[51] MacLeod v. Aberdeen Brewing Co., 82 Wash. 74, 143 Pac. 440 (1914); Lauber v. Johnston, 54 Wash. 59, 102 Pac. 873 (1909).

not merchants,[52] the risk of loss may be passed to the buyer merely by a tender of delivery.

The rule is so simple that one is tempted to look behind it for a catch or trick. There seems to be none. The theory is that the person in possession is the one most likely to insure, and thus the one most competent to bear the risk of loss.[53] A breach of contract by either party has the effect of shifting the risk of loss to that party, however, under the next section of the Code.

Section 2—510. Effect of Breach on Risk of Loss.

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

In substance, this section places the risk of loss on either party to the contract who may have breached it. In the event the seller tenders or delivers nonconforming goods, the risk of loss of those goods is on him. This is a terse statement of what, under the present statute, requires some rather complex explaining.[54] The modification in existing law is contained in subsection (2), by which the seller is given the benefit of the buyer's insurance, on the assumption that the buyer, having possession, is more likely to carry insurance on the goods.

In view of the fact that the risk of loss normally does not pass to the buyer until delivery or tender thereof under the preceding section of the Code, subsection (3) states a necessary rule that risk of loss of identified goods, over and above the seller's insurance, is placed on

[52] For definitions, see § 2-104.

[53] Official comment 3.

[54] The seller's shipment by carrier of nonconforming goods under circumstances where risk of loss of conforming goods would be on the buyer has caused some difficulty. The risk of loss is on the seller in such a circumstance (as under the Code), but the reason given is that there was no sufficient appropriation of goods to the contract. VOLD, SALES 195 (2d ed. 1959). See Jones v. Emerson, 41 Wash. 33, 82 Pac. 1017 (1905).

the buyer if he repudiates or breaches. This protects the seller's interest in his expectancy in selling the goods, and the protection lasts only a commercially reasonable time within which the seller may make other disposition of those goods.[55]

Under the present statute[56] and court decisions,[57] delay in performance attributable to either party places the risk of loss resulting from such delay on that party. Though the matter is not spelled out in the Code, it would seem that a delay in performance is a breach within the meaning of the Code's rule.

Section 2—511. Tender of Payment by Buyer; Payment by Check.

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3—802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

The Code adopts the usually accepted premise that, absent agreement, payment and delivery are concurrent conditions.[58] The circumstances may show, of course, that this is not the case, as in the situation where the seller's performance requires an extended period, so that he must begin his performance prior to any tender by the buyer.[59] This requirement may be waived,[60] and in no event will be imposed where the tender, if made, would be a useless act.[61]

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[55] Professor Williston criticized an earlier version of the Code which appeared to have placed the risk of loss on the buyer in such circumstances without limitation as to time. See Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 583 (1950).

[56] RCW 63.04.230(b) [UNIFORM SALES ACT § 22(b)].

[57] Taggares v. Wagener, 55 Wn.2d 672, 349 P.2d 601 (1960); Stephenson v. Kenworthy Grain & Milling Co., 186 Wash. 114, 56 P.2d 1301 (1936).

[58] Houser v. Atherton, 98 Wash. 386, 167 Pac. 1109 (1917); Robinson v. Thoma, 30 Wash. 129, 70 Pac. 240 (1902).

[59] Sussman v. Gustav, 109 Wash. 459, 186 Pac. 882 (1920).

[60] Wallace v. Babcock, 93 Wash. 392, 160 Pac. 1041 (1916).

[61] Jones-Scott Co. v. Ellensburg Milling Co., 116 Wash. 266, 199 Pac. 238 (1921); Hunter v. Radford, 111 Wash. 668, 191 Pac. 794 (1920); Houser v. Atherton, 98 Wash. 386, 167 Pac. 1109 (1917).

Subsection (2) makes it clear that checks, personal and otherwise, normally used in paying debts may be used as tender, absent objection by the seller.[62] Said objection by the seller must specify that it is based on or directed to the medium of payment used.[63] A tender will not be sufficient, however, unless it is unconditional.[64]

As between the parties, the tender accomplished by use of a check is conditional on eventual payment of that check by the drawee.[65] One should recall, however, that a buyer who obtains possession of the goods by use of such a check is empowered by the Code to convey a title to an innocent purchaser superior to that of the seller.[66] The presently discussed section of the Code does not apply to such a case, for this section governs the rights of seller and buyer *inter se*.

Section 2—512. Payment by Buyer Before Inspection.

(1) Where the contract requires payment before inspection nonconformity of the goods does not excuse the buyer from so making payment unless

(a) the non-conformity appears without inspection; or

(b) despite tender of the required documents the circumstances would justify injunction against honor under the provisions of this Act (Section 5—114).

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

The official comments point out the minor changes made by this section. No Washington decisions dealing with this particular point have been found. This Code section must be read in connection with the one immediately following.

Section 2—513. Buyer's Right to Inspection of Goods.

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract

[62] Phalan, *The Obligations of Parties to Sales of Goods Under the Uniform Commercial Code*, 62 DICK. L. REV. 235, 236 (1958).

[63] RESTATEMENT, CONTRACTS § 305 (1932). See Oriental Trading Co. v. Houser, 87 Wash. 184, 151 Pac. 242 (1915).

[64] Grant v. Auvil, 39 Wn.2d 722, 238 P.2d 393 (1951), noted 27 WASH. L. REV. 231 (1952). If an unconditional tender is made by the buyer, it would seem that under the Code § 2-716, there may be a replevin action, though an early Washington decision seems contrary on this. Hays v. Bashor, 108 Wash. 491, 185 Pac. 814 (1919).

[65] *Cf.* Berliner v. Greenberg, 37 Wn.2d 308, 223 P.2d 598 (1950), holding that there was no accord and satisfaction where the drawer of the check tendered in the accord stopped payment thereon prior to the time it was cashed.

[66] Section 2-403.

for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this Article on C.I.F. contracts (subsection (3) of Section 2—321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides
   (a) for delivery "C.O.D." or on other like terms; or
   (b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

Subsection (1) corresponds fundamentally to the present statute.[67] An opportunity to inspect is basically a condition precedent to the buyer's payment or acceptance. At the same time, there is authority that a seller who denies the opportunity to inspect thereby breaches his contract,[68] precluding the buyer's liability for the price and subjecting the seller to a suit for damages.

The present statute which, like the Code, gives the *buyer* the right of inspection, has been construed as limiting this inspection to one made by a buyer and not by a third person.[69] The Code does not seem to require a contrary interpretation; however, a reconsideration of the point may be in order. The critical issue seems to be whether

[67] RCW 63.04.480 [UNIFORM SALES ACT § 47].
[68] WILLISTON, SALES § 471 (rev. ed. 1948); § 2-310.
[69] Pearce v. Dulien Steel Prods., Inc., 14 Wn.2d 132, 127 P.2d 271 (1942). The precise issue this case poses has been discussed at another point. See 35 WASH. L. REV. 420 (1960).

such an inspection is reasonable under all the circumstances. One can scarcely say that such inspection is necessarily unreasonable, yet the facts may show that the particular inspector selected by the buyer is hostile to the seller, and thus inspection by him might not be appropriate.

The place of inspection, too, must be reasonable, both under the Code and under the present statute. Where extended transportation of goods not previously inspected by the buyer is involved, the buyer's place will typically be the place of inspection.[70] The circumstances or the express agreement of the parties may, however, demonstrate that inspection is to be made elsewhere.[71]

Subsection (2) spells out the accepted premise that in the first instance the buyer must bear inspection costs, but if the inspection shows that the goods do not conform, those inspection costs are part of his damages, recoverable from the seller.[72]

Subsection (3) spells out the typical commercial patterns where inspection prior to payment is not contemplated, as under "C.O.D." shipments. Payment under these contracts in no way impairs the rights of the buyer if the goods do not conform.[73] The section clarifies a point of some uncertainty, by spelling out that under certain circumstances the buyer will have a right to inspect the *goods* even though his obligation is to pay against *documents*. The rule adopted is the one followed by the Washington court, by which (a) inspection is allowed if the title documents are to be held until arrival of the goods,[74] or (b) if the contract otherwise calls for such inspection.[75]

Subsection (4) clarifies some uncertain points, and in so doing, solves problems which have caused difficulty under the present statute. The points can best be illustrated hypothetically.

First, suppose the agreement calls for inspection by a designated inspector who dies or is disabled before he can inspect. If, and only if, inspection by this person was an indispensable condition, the con-

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[70] Inland Seed Co. v. Washington-Idaho Seed Co., 160 Wash. 244, 294 Pac. 991 (1931); Dement Bros. Co. v. Coon, 104 Wash. 603, 177 Pac. 354 (1919), (place of delivery); Skinner v. Griffiths & Sons, 80 Wash. 291, 141 Pac. 693 (1914).

[71] Van Dusen Harrington Co. v. W. F. Jahn & Co., 127 Wash. 426, 221 Pac. 301 (1923); Mill & Mine Supply Co. v. Seattle Frog & Switch Co., 109 Wash. 351, 186 Pac. 1067 (1920), (place of shipment); Tacoma & Eastern Lumber Co. v. Field & Co., 100 Wash. 79, 170 Pac. 360 (1918); Klock Produce Co. v. Robertson, 90 Wash. 260, 155 Pac. 1044 (1916).

[72] See 3 WILLISTON, SALES § 477 (rev. ed. 1948).

[73] Section 2-512.

[74] Seattle Nat'l Bank v. Powles, 33 Wash. 21, 73 Pac. 887 (1903).

[75] Inland Seed Co. v. Washington-Idaho Seed Co., 160 Wash. 244, 294 Pac. 991 (1931).

tract fails, by the express provisions of this subsection. In most instances, inability of the inspector designated by the contract will not frustrate its performance.

Secondly, suppose the agreement calls for shipment over some distance under circumstances where the buyer has the right to inspect at destination before payment, but the goods are lost or damaged in shipment without the seller's fault. The statute makes it quite plain that the buyer is nonetheless liable for the price, if the risk of loss was on him by the terms of the contract. The stipulation for inspection does not affect the risk of loss! This is the Washington rule under the present statute,[76] but the Code crystalizes it and is thus desirable.

A reminder is in order that this section of the Code, and all others, subjects the parties to the general obligation of good faith, so the buyer's inspection must be a good faith inspection.[77]

Section 2—514. When Documents Deliverable on Acceptance; When on Payment.

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

This section extends the rule of the present Bills of Lading Act[78] to all forms of title documents. Except for this extension, the Washington rule on the point will not be changed.[79]

Section 2—515. Preserving Evidence of Goods in Dispute.

In furtherance of the adjustment of any claim or dispute

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and

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[76] Skinner v. Griffiths & Sons, 80 Wash. 291, 141 Pac. 693 (1914).

[77] Section 1-203. The Washington court has imposed this requirement of good faith upon the buyer's inspection in Gonter v. Klaber & Co., 67 Wash. 84, 120 Pac. 533 (1912).

[78] RCW 81.32.500 [UNIFORM BILLS OF LADING ACT § 41].

[79] Citizens Bank & Trust Co. v. Everbest Shingle Co., 135 Wash. 575, 238 Pac. 644 (1925), *reversing* 131 Wash. 241, 229 Pac. 743 (1924). The departmental decision seems to have overlooked the controlling statute.

may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

Though there are no specific decisions on the rule of law set forth in this section, one may readily visualize the impact of scientific testing on the vigor with which a claim of defect is pressed or defended.[80] This section of the Code seems unique in commercial statutes, in that its effect is to foster settlement of claims. Its importance, in short, is not in the substantive provision but in the probable effect it will induce in disputants in commercial matters. It tends to prevent surprise, thus implementing policies permitting ready discovery.

Section 2—601. Buyer's Rights on Improper Delivery.

Subject to the provisions of this Article on breach in installment contracts (Section 2—612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2—718 and 2—719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

Perhaps the most startling and noteworthy provision in this section is the recognition that a buyer may reject goods which *in any respect* fail to conform to the contract. This means what it says, and the buyer need not limit his rejection to cases of material breach.[81] The Washington court has tended to recognize this rule,[82] though there is

[80] In Williams v. S. H. Kress Co., 48 Wn.2d 88, 291 P.2d 662 (1955), the reliability of such a test was shaded by a claimed inability on the seller's part to trace the particular goods from the buyer to the testing laboratory. This was sufficient to cause the trial court to discredit the test, but one is impressed by the impact of the results of such tests on the trier of facts.

[81] "Limitation of UCC Section 2-601 to cases of material breach was urged in Honnold, *The Buyer's Right of Rejection*, 97 U. of Pa. L. Rev. 457 (1949), and in the 1956 Report of the New York Law Revision Commission, Leg. Doc. (1956) No. 65(A), pp. 26-27. That recommendation was rejected by the editorial board on two grounds: First, that the buyer should not be required to guess at his peril whether a breach is material; second, that proof of materiality would sometimes require disclosure of the buyer's private affairs such as secret formulas or processes." BRAUCHER & SUTHERLAND, COMMERCIAL TRANSACTIONS: CASES AND PROBLEMS 56 (2d ed. 1958).

[82] C. A. Mauk Lumber Co. v. Miller Bros. Lumber Co., 126 Wash. 593, 219 Pac. 28 (1923). Where the seller has built goods for a special use of the buyer, so that a rejection by the buyer on a technicality would mean that the seller suffers substantially where he cannot sell those goods on the ordinary market, the analogy to the building contracts seems rather plain. In such cases, substantial performance by the seller may be adequate. A decision to that effect is Harrild v. Spokane School Dist., 112 Wash. 266, 192 Pac. 1 (1920).

no clear cut adoption of it.[83] Under the Code, there will be exceptions to this policy of allowing a buyer to stand on a trivial breach, as follows:

First, in installment contracts, the buyer may reject only if the non-conformity of goods "substantially impairs" the value of an installment.[84]

Second, a seller will be protected against surprise when a buyer rejects on some trivial ground, because he will have a reasonable time in which to correct the matter.[85]

Third, a buyer may lose his ground for rejecting if he fails to particularize it.[86]

Fourth, the materiality of a breach is necessarily involved in an action for damages based on that breach.[87]

Fifth, once goods are accepted, the acceptance can be revoked only for substantial non-conformity.[88]

Apart from these, it is believed that the buyer may reject with impunity goods which in the slightest degree depart from the bargained-for standards.

The Code will clarify Washington law on the extent to which the buyer is authorized in rejecting a part of delivered or tendered goods and accepting the balance. The Code permits him to do this, limiting him only to breaking the contract into commercial units[89] where the price can reasonably be determined and where accepting a part does not impair the value of the remaining portion of the goods.[90] The Washington court appears to allow partial rejection only in divisible contracts,[91] and seems to require that a unit price be specified for each

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[83] In Ketchum v. Albertson Bulb Gardens, Inc., 142 Wash. 134, 252 Pac. 523 (1927), a seller who had agreed to deliver "Flamingo" bulbs had substituted "Clara Butt" bulbs was sued for damages by the buyer. The seller was permitted to show that the delivered bulbs were of equal value to those for which he contracted. The rule here adopted would presumably not be changed by the Code, for the issue was one of provable damages after the buyer had accepted; it was not an issue of whether the buyer could have refused the tender of the substituted bulbs.

There is, in short, a distinction to be drawn between cases where the buyer rejects goods (where substantial performance does not apply), and those where the issue is merely one of damages, where performance by the seller, though different from that bargained for, may have been "just as good" as that contracted for. See Barry v. Danielson, 78 Wash. 453, 139 Pac. 223 (1914).

[84] Section 2-612.

[85] Section 2-508.

[86] Section 2-605.

[87] See case cited note 83 *supra.*

[88] Section 2-608.

[89] As defined in Section 2-105.

[90] Official comment 1.

[91] Bariel v. Tuinstra, 45 Wn.2d 513, 276 P.2d 569 (1954); Lucas v. Andros, 185 Wash. 383, 55 P.2d 330 (1936); Creel v. Nettleton, 151 Wash. 440, 276 Pac. 91 (1929); J. I. Case Threshing Mach. Co. v. Scott, 131 Wash. 328, 230 Pac. 151 (1924); da Ponte

unit as a test for whether or not the contract is divisible.[92] This last mentioned requirement has been held not to be necessary to show that a contract is entire, where separate prices have been set for units but the units are part of a larger functioning whole.[93] In such transactions, the buyer cannot accept and reject part of the goods under the Code, for he is bound by commercial good faith and thus may not unduly impair the value of the remaining goods.[94] Aside from this, however, it is suggested that the Code does not limit the buyer's partial rejection to contracts deemed divisible under ordinary contract principle, so long as the value of the portions retained can reasonably be determined.[95]

Section 2—602. Manner and Effect of Rightful Rejection.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (Sections 2—603 and 2-604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Sec-

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v. Simonian, 127 Wash. 214, 220 Pac. 799 (1923); Weatherred v. Hirai, 115 Wash. 142, 196 Pac. 572 (1921).

[92] Bariel v. Tuinstra, 45 Wn.2d 513, 276 P.2d 569 (1954); Darst v. Meduna, 15 Wn.2d 293, 130 P.2d 361 (1942); Creel v. Nettleton, 151 Wash. 440, 276 Pac. 91 (1929); Buckeye Buggy Co. v. Montana Stables, Inc., 43 Wash. 49, 85 Pac. 1077 (1906).

[93] Greenwood v. International Harvester Co., 122 Wash. 603, 211 Pac. 727 (1922).

[94] In Kramer v. Zappone, 53 Wn.2d 115, 330 P.2d 1072 (1958), a buyer was denied the right to retain bolts and other miscellaneous parts of awnings where he had purchased unassembled awnings. Under the Code, the awnings, not the parts, would seem to be the commercial units and thus a similar outcome would follow.

In a somewhat nostalgic case, a Tucker dealer, being sued for the down payment he had received on a Tucker auto, contended that the buyer was liable for the price of a tool kit delivered to him which was supposed to have been used on his new Tucker. While the kit could have been used on other cars, the court held that the buyer was not obligated to take the kit without the car, and it would seem that commercial standards of fair play would, under the Code, produce a similar result. Kraft v. Spencer Tucker Sales, Inc., 39 Wn.2d 943, 239 P.2d 563 (1952).

[95] Buyers who have received part of the goods prior to learning of a subsequent breach have been held not bound on the entire contract merely because they had accepted and used the first conforming goods. Stack v. Baird, 171 Wash. 651, 19 P.2d 105 (1933); American Nat'l Bank v. National Bank of Commerce, 132 Wash. 490, 232 Pac. 295 (1925); United Iron Works v. Hosea, 81 Wash. 234, 142 Pac. 673 (1914).

tion 2—711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller's remedies in general (Section 2—703).

Under the Uniform Sales Act, a distinction is to be drawn between rejection and rescission, the former being the buyer's remedy if he acts before he has become the owner, the latter being his remedy after the property has passed.[96] The Code retains the concept of rejection, but shuns the concept, or at least the word, "rescission." In the language of the Code, once the buyer has accepted, his course of conduct, circumstances permitting, is to "revoke his acceptance."[97]

Rejection, then, must occur prior to acceptance, or to put the matter differently, one test of whether or not the buyer has accepted is whether he has successfully rejected.[98] Both under the presently discussed section of the Code, and under the existing statute,[99] rejection, if effective, must be made within a reasonable time after delivery or tender, that time being the time within which the buyer may reasonably inspect the goods.[100]

Under the Uniform Sales Act, rejection by the buyer involves no particular conduct or obligation on his part, and herein the Code adopts a different point of view. Under the Code, the buyer must notify the seller that he has rejected the goods, and further the buyer must hold those goods, even though they do not conform to the con-

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[96] 3 WILLISTON, SALES § 497 (rev. ed. 1948). The specific sections are RCW 63.04.510 [UNIFORM SALES ACT § 50] and RCW 63.04.700 [UNIFORM SALES ACT § 69]. See First Church of Christ, Scientist v. Southern Seating & Cabinet Co., 76 Wash. 367, 136 Pac. 127 (1913).

[97] Section 2-608.

[98] Section 2-606. Under the present statute, too, the buyer's failure to act promptly in rejecting may amount to an acceptance. Mutual Sales Agency, Inc. v. Hori, 145 Wash. 236, 259 Pac. 712 (1927).

[99] Nielsen v. Woodruff, 133 Wash. 174, 233 Pac. 1 (1925); Carman Dist. Co. v. Cascade Laundry Co., 111 Wash. 487, 191 Pac. 392 (1920).

[100] This time may legitimately be limited by a contractual stipulation. Gruendler Patent Crusher & Pulverizer Co. v. Preston Grain & Milling Co., 124 Wash. 479, 215 Pac. 60 (1923); Fred W. Wolf Co. v. Northwestern Dairy Co., 55 Wash. 665, 104 Pac. 1123 (1909). But unreasonable stipulations will not be enforced in accordance with the literal meaning of the words used. National Grocery Co. v. Pratt-Low Preserving Co., 170 Wash. 575, 17 P.2d 51 (1932); Los Angeles Olive Growers Ass'n v. Pacific Grocery Co., 119 Wash. 293, 205 Pac. 375 (1922); Hurley-Mason Co. v. Stebbins, 79 Wash. 366, 140 Pac. 381 (1914).

tract, for the seller's disposition. The next section of the Code imposes additional burdens on the buyer.[101]

Section 2—603. Merchant Buyer's Duties as to Rightfully Rejected Goods.

(1) Subject to any security interest in the buyer (subsection (3) of Section 2—711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

So much of this section as imposes a duty on a merchant buyer to follow the seller's instructions and, in the case of perishables, to resell them, is new. Since the depression, the unenviable position of the seller of perishables who has shipped them to a distant market has been aided by a federal statute.[102] Under certain circumstances, the buyer of such commodities is positively precluded from rejecting goods, whether they conform or not.[103] This is done to prevent the buyer's taking unfair advantage of the seller's inability to deal with such goods at a remote place. The same policy underlies the present section of the Code, in that it requires the buyer to sell perishable

[101] Professor Williston regrets this "soft" treatment of contract breaking sellers. 3 WILLISTON, SALES § 496 (supp. 1960).

[102] Perishable Agricultural Commodities Act, 46 Stat. 531 (1930), as amended, 7 U.S.C. 499a (1959).

[103] L. Gillarde Co. v. Joseph Martinelli & Co., 168 F.2d 276, 169 F.2d 60 (1st Cir. 1948), *cert. denied*, 335 U. S. 885 (1948).

commodities rather than to take a hands-off attitude and allow them to deteriorate, thus increasing the seller's loss.

Under the presently operative statute, a buyer may occasionally make reasonable disposition of the goods in order to protect the seller from this loss. This is somewhat dangerous, for it may be construed as "acceptance" of the goods. Properly understood, of course, it is not such acceptance of noncomplying merchandise,[104] and reasonable conduct on the part of the buyer in handling of the goods should be compensated as part of his damages. Such compensation has been allowed in Washington,[105] and is provided for in subsection (2) of this Code section.

Section 2—604. Buyer's Options as to Salvage of Rightfully Rejected Goods.

Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

No relevant Washington decision has been found, other than the decision cited in the discussion of the next preceding section.

Section 2—605. Waiver of Buyer's Objections by Failure to Particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

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[104] Subsection (3) so provides.

[105] R. P. Arkley Lumber Co. v. Vincent, 121 Wash. 512, 209 Pac. 690 (1922).

A buyer who, in rejecting goods, fails to mention a defect which he subsequently seeks to raise runs two risks: (1) His late mention of the defect suggests that it was not the real reason for his rejection, that he is grabbing for straws to evade a just obligation for the price, and thus tends to discredit the validity of his complaint. (2) His failure to particularize a defect may estop him from later claiming it, where the seller is prejudiced in some way by the failure.

Subsection (1) (a) of this Code section adopts the second of these effects of failure to specify defects, by precluding the buyer from using it where the seller could have corrected the defect had it been timely raised. This accords with Washington decisions.[106] Subsection (1) (b) adds to this provision that as between merchants a seller may force the buyer to list his objections, thus effectually limiting the buyer to those objections in any later discussions or suit. Absent this and absent estoppel, the buyer may raise any objection he has at any time.[107] Though the statute does not cover the matter, there remains the substantial risk that the trier of fact will disbelieve the buyer's late efforts to raise objections.[108]

Subsection (2) merely applies the same principle to objections to documents tendered for payment.

Section 2—606. What Constitutes Acceptance of Goods.

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2—602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act 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.

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[106] Angeles Gravel & Supply Co. v. Clallam County Hosp. Dist., 42 Wn.2d 827, 259 P.2d 366 (1953); Armour & Co. v. Jesmer, 76 Wash. 475, 136 Pac. 689 (1913); Sedro Veneer Co. v. Kwapil, 62 Wash. 385, 113 Pac. 1100 (1911).

[107] Prescott & Co. v. Powles Co., 113 Wash. 177, 193 Pac. 680 (1920); Nelson v. Imperial Trading Co., 69 Wash. 442, 125 Pac. 777 (1912).

[108] Wares v. Washington Grocery Co., 136 Wash. 53, 238 Pac. 911 (1925); Fink v. Marr, 81 Wash. 92, 142 Pac. 482 (1914); Sedro Veneer Co. v. Kwapil, 62 Wash. 385, 113 Pac. 1100 (1911).

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

This section states concisely the circumstances which have been sufficient to show the buyer's acceptance under the present Uniform Sales Act[109] and by judicial decision.[110] The rules announced in subsection (1) cover the typical fact patterns posing the issue of whether acceptance has occurred. The section does not purport to settle the effect of the acceptance, a matter settled elsewhere.[111] In point of fact, however, the effect can scarcely be divorced from the fact of accept-

[109] RCW 63.04.490 [UNIFORM SALES ACT § 48].

[110] This note is intended merely to summarize the decisions respecting acts constituting acceptance. The effect of the acceptance is covered by § 2-607. It must, however, be observed that a buyer's words or conduct may signify either that he accepts the goods as fully complying with the contract, or that he accepts them, reserving the matter of noncompliance to be taken up in a claim for damages for nonconformity. The mere act of acceptance does not preclude a claim of damage for nonconformity under § 2-607.

Statements by the buyer expressing satisfaction of the goods as delivered would constitute acceptance, but in the litigated cases these statements have rarely been sufficient to prevent the buyer from raising objections to the goods at a later time. See, *e.g.*, Buob v. Feenaughty Mach. Co., 191 Wash. 477, 71 P.2d 559 (1937); J. I. Case Threshing Mach. Co. v. Scott, 96 Wash. 566, 165 Pac. 485 (1917).

Payment of the price by the buyer after a substantial time to test the goods constitutes evidence of acceptance which under the Code is not conclusive. Official comment 3. Though there are statements in some Washington decisions suggesting that payment by the buyer is at least very persuasive evidence of acceptance, most of the cases are consistent with the rule announced by the Code. Fines v. West Side Imp. Co., 156 Wash. Dec. 317, 352 P.2d 1018 (1960); Frisken v. Art Strand Floor Coverings, Inc., 47 Wn.2d 587, 288 P.2d 1087 (1955); Smelt Fishermen's Ass'n v. Soleim, 39 Wn.2d 524, 236 P.2d 1057 (1951); Leschen & Sons Rope Co. v. Case Shingle & Lumber Co., 152 Wash. 37, 276 Pac. 892 (1929); Greenwood v. International Harvester Co., 122 Wash. 603, 211 Pac. 727 (1922); Maltbie v. Gadd, 101 Wash. 483, 172 Pac. 557 (1918).

The buyer's entering into some new obligation after he has used the goods is generally construed as acceptance. Fines v. West Side Imp. Co., *supra;* Primm v. Wockner, 156 Wash. Dec. 214, 351 P.2d 933 (1960); Carr v. Bonthius, 79 Wash. 282, 140 Pac. 339 (1914).

Use of the goods by the buyer produces hard cases and thus tends toward making bad law. Only such use as may truly be said to be inconsistent with the seller's ownership amounts to an acceptance. Thus, after a seller has installed a furnace in midwinter, the buyer's use of it till warm weather hardly leads to the conclusion that he has accepted the goods and thus cannot "rescind." Eliason v. Walker, 42 Wn.2d 473, 256 P.2d 298 (1953). Coovert v. Ingwersen, 37 Wn.2d 797, 226 P.2d 187 (1951) to the contrary has been criticized. Note 27 WASH. L. REV. 165 (1952). Other cases are merely illustrative of the types of fact patterns where use by the buyer has been held an acceptance *vel non* under particular circumstances. Fines v. West Side Imp. Co., *supra;* Frisken v. Art Strand Floor Coverings, Inc., *supra;* Campbell v. Bucyrus-Erie Co., 172 Wash. 428, 20 P.2d 594 (1933); Sloane v. State, 161 Wash. 414, 297 Pac. 194 (1931); Kahl v. Ablan, 160 Wash. 201, 294 Pac. 1010 (1931); Toledo Scale Co. v. Grusczynksi, 155 Wash. 253, 283 Pac. 1086 (1930); John S. Hudson, Inc. v. Power Plant Eng'r Co., 154 Wash. 172, 281 Pac. 324 (1929); Carstens Packing Co. v. Swift & Co., 154 Wash. 15, 280 Pac. 351 (1929); Creel v. Nettleton, 151 Wash. 440, 276 Pac. 91 (1929); Lowenthal Co. v. McCormack Bros. Co., 144 Wash. 229, 257 Pac. 632 (1927); Los Angeles Olive Growers Ass'n v. Pacific Grocery Co., 119 Wash. 293, 205 Pac. 375 (1922); Noel v. Garford Motor Truck Co., 111 Wash. 650, 191 Pac. 828 (1920); Cuschner v. Pittsburgh-Hickson Co., 91 Wash. 371, 157 Pac. 879 (1916); Perine Mach. Co. v. Buck, 90 Wash. 344, 156 Pac. 20 (1916).

[111] Section 2-607.

ance, because the buyer's conduct may demonstrate, (a) that he refuses the goods, (b) that he accepts the goods as fully complying with the contract in every detail, or (c) a somewhat intermediate position that he is willing to accept the goods, but he does not thereby relinquish any right he may have to compensation for defects in the goods which he will overlook in receiving the goods, but not in discharging the seller's liability. In substance, this third alternative expresses the effect of acceptance under the Code.

In some of the leading cases,[112] acceptance of the goods has become interwoven with other questions, such as risk of loss and the passage of the property interest in the goods. Under the Code, these matters are separately treated without reference to acceptance.[113]

Section 2—607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2—312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

[112] Inland Seed Co. v. Washington-Idaho Seed Co., 160 Wash. 244, 294 Pac. 991 (1931), is such a case, and it relies on Henry Glass & Co. v. Misroch, 239 N.Y. 475, 147 N.E. 71 (1925), the main case on the point.

[113] Official comment 2.

(5) Where the buyer is sued for breach of warranty or other obligation for which his seller is answerable over
   (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.
   (b) if the claim is one for infringement or the like (subsection (3) of Section 2—312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2—312).

Subsection (1) restates the principle of the present statute.[114]

Subsection (2) makes it quite clear that a buyer who has accepted goods is not in the same care-free position of a buyer who rejects them on tender. The acceptance precludes rejection and, indeed, is final as an acceptance, except for specific provisions of the presently discussed section and Section 2-608, by which an acceptance can be revoked. The Washington decisions, though couched in different language, have generally recognized this principle. Retention and use of goods sold after discovery of defects have often prevented "rescission" by the buyer.[115]

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[114] RCW 63.04.420 [UNIFORM SALES ACT § 41].

[115] Wilson v. Pearce, 156 Wash. Dec. 685, 355 P.2d 154 (1960); Fines v. West Side Imp. Co., 156 Wash. Dec. 317, 352 P.2d 1018 (1960); Sloane v. State, 161 Wash. 414, 297 Pac. 194 (1931); Kahl v. Ablan, 160 Wash. 201, 294 Pac. 1010 (1931); John S. Hudson, Inc. v. Power Plant Eng'r Co., 154 Wash. 172, 281 Pac. 324 (1929); Creel v. Nettleton, 151 Wash. 440, 276 Pac. 91 (1929); Noel v. Garford Motor Truck Co., 111 Wash. 650, 191 Pac. 828 (1920); Kleeb v. Long-Bell Lumber Co., 27 Wash. 648, 68 Pac. 202 (1902); Eldridge v. Young America & Cliff Consol. Mining Co., 27 Wash. 297, 67 Pac. 703 (1902).

The circumstances surrounding the delay must be considered; consequently, a buyer has been permitted to rescind after considerable delay where he has made his intention to rescind quite clear. Primm v. Wockner, 156 Wash. Dec. 214, 351 P.2d 933 (1960); Bariel v. Tuinstra, 45 Wn.2d 513, 276 P.2d 569 (1954); Bleyhl v. Tea Garden Prods.

The conduct of the buyer may, of course, demonstrate that the goods fully comply with the contract, in which case no damage claim exists against the seller.[116] The Code makes it clear that the mere acceptance does not have that effect, for it preserves any remedy other than rejection. While there are occasional statements in some Washington decisions that acceptance per se precludes a subsequent damage action,[117] the proper view is in accord with the Code provision that such an action can be brought successfully even after acceptance by the buyer.[118]

One element of the buyer's conduct is accorded special treatment both under the Uniform Sales Act[119] and under the Code,[120] namely the buyer's failure to notify the seller within a reasonable time of the breach. This may be accounted for either on the assumption that the buyer's failure to give notice of defects is a silent admission that the goods conform, or on the theory that the failure to notify so prejudices the seller's ability to defend against a subsequent suit, that the buyer should be deprived of his cause because of his delay. The provisions of the Uniform Sales Act and of the Code are categorical on the point. Though the Washington court has bowed to the rule,[121] the seller's attempt to avoid liability by the assertion of the failure to receive notice of defect is uniformly unsuccessful, either because the facts show that reasonable notice was given, or because the court adopts "judge made" exceptions to the rule, namely (1) notice is not required where the warranty is one of title,[122] or (2) notice is not required where liability is imposed for breach of warranty absent privity.[123] While

Co., 30 Wn.2d 447, 191 P.2d 851 (1948); Lambach v. Lundberg, 177 Wash. 568, 33 P.2d 105 (1934); Wisconsin Lumber Co. v. Pacific Tank & Silo Co., 76 Wash. 452, 136 Pac. 691 (1913).

Of particular significance in evaluating the buyer's delay in disavowing acceptance of the goods is the circumstance that the seller has urged the buyer to retain them under assurances that they would be made good. Lambach v. Lundberg, 177 Wash. 568, 33 P.2d 105 (1934); J. I. Case Threshing Mach. Co. v. Scott, 96 Wash. 566, 165 Pac. 485 (1917).

[116] Freeman v. Stemm Bros. Co., 44 Wn.2d 189, 265 P.2d 1055 (1954).

[117] Carstens Packing Co. v. Swift & Co., 154 Wash. 15, 280 Pac. 351 (1929); White v. Little Co., 118 Wash. 582, 204 Pac. 186 (1922) (this case requires express qualification of the acceptance).

[118] Dally v. Isaacson, 40 Wn.2d 574, 245 P.2d 200 (1952); Ketchum v. Albertson Bulb Gardens, 142 Wash. 134, 252 Pac. 523 (1927); W. P. Fuller & Co. v. Harris, 48 Wash. 519, 93 Pac. 1080 (1908).

[119] RCW 63.04.500 [UNIFORM SALES ACT § 49].

[120] Section 2-607, (3) (a).

[121] Ringstad v. I. Magnin & Co., 39 Wn.2d 923, 239 P.2d 848 (1952); Bleyhl v. Tea Garden Prods. Co., 30 Wn.2d 447, 191 P.2d 851 (1948); Baum v. Murray, 23 Wn.2d 890, 162 P.2d 801 (1945); Suryan v. Lake Washington Shipyards, 163 Wash. 164, 300 Pac. 941 (1931).

[122] O'Connor v. Teasdale, 34 Wn.2d 259, 209 P.2d 274 (1949). See 35 WASH. L. REV. 619, n. 16 (1960).

[123] La Hue v. Coca Cola Bottling Co., 50 Wn.2d 645, 314 P.2d 421 (1957).

one is reluctant to bar the relief of an injured consumer by technical traps, it is believed that the notice requirement is a fair one, and thus these exceptions should not be made to the clear wording of the Code.

Subsection (3)(b) is new.

Subsection (4) is a clear-cut allocation of the burden of proof on the question of damages, but it follows the normal rule that once the buyer has accepted, his liability for the price is prima facie established and any claim for damages he makes, either as an offset against the price or as an independent claim, must amount to an affirmative claim by him.

Subsection (5), authorizing a buyer who resells to vouch in his supplier is new. This buyer is protected by the vouching-in process under some circumstances where he could not use impleader to drag his supplier into the suit. There is Washington authority in the indemnitor-indemitee situation that a notice to the indemnitor of pending suit against the indemnitee may be sufficient to bind the indemnitor to factual determinations made in that suit.[124] There is also a suggestion that a notice to the seller in a breach of warranty of title situation may require the seller to make good losses established in a suit to sustain that title,[125] but though one case has been found where notice of a pending suit for breach of warranty of quality or description was involved, nothing seems to have turned on the principle of "vouching in."[126] It is believed, therefore, that subsection (5) will offer new relief to the "middle man," freeing him of the difficulties incident to his trying to defend a suit brought by his customer for breach of warranty of quality, and at the same time trying to preserve his rights against his supplier in the event his defense is unsuccessful.[127]

Section 2—608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

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[124] Nelson v. Sponberg, 51 Wn.2d 371, 318 P.2d 951 (1957).

[125] Bevan v. Muir, 53 Wash. 54, 101 Pac. 485 (1909).

[126] Ingalls v. Angell, 76 Wash. 692, 137 Pac. 309 (1913).

[127] If he sues the supplier before the suit against him is decided, he may be embarrassed by having taken inconsistent positions. See Frank R. Jelleff, Inc. v. Braden, 233 F.2d 671 (D. C. Cir. 1956). Yet if he waits for the suit against him to be decided, the statute of limitations may bar his claim. *Cf.* Ingalls v. Angell, *supra* note 126, and subsequent discussion of UNIFORM COMMERCIAL CODE § 2-725.

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

By changing the word "rescind," as it appears under the present Uniform Sales Act,[128] to "revoke his acceptance," the Code brings about some major changes in the law. Paramount among those changes is the abolition of any requirement of an election between "rescission" and a claim for damages.[129] Under the Code, both revocation of his acceptance and the claim of damages are available to the buyer.[130]

The Code recognizes that revocation of acceptance is not lightly to be come by, so it limits its availability to cases where the acceptance resulting from urgings and assurances by the seller that he would make the goods comply,[131] or to situations where the buyer did not discover

[128] RCW 63.04.700 [UNIFORM SALES ACT § 69].

[129] The landmark case in Washington is Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 Pac. 894 (1909). In that case a buyer of a harvester lost his grain crop because of defects in the machine. He sought to recover (a) the price he had paid, and (b) the loss of the crop. The majority opinion required him to elect between these two. Under the Code, no such election is required, nor should it be. If we are to assume that rescission contemplates restoration of the status quo, it would seem that both items are properly allowable to the buyer. The dissenting opinion sums it up nicely: "If *A* purchases a horse of *B* for $300, and under a warranty that the horse is a safe driving horse, and instead he proves to be vicious and wild and when he is hitched up, runs away, demolishes *A's* carriage, which is worth $300, it is evident that *A* is injured in the whole transaction $600, $300 for the purchase price of the horse, which is useless to him, and $300 for the loss of the carriage. And yet this court, in effect, decides that he must keep the horse, which he cannot use and which is a source of constant expense to him; in order to recover for damages to his carriage; or, if he desire to recover the purchase price of the horse, he must lose his claim for damages to his carriage...."

Though this case has been followed, *e.g.*, Holt Mfg. Co. v. Strachan, 77 Wash. 380, 137 Pac. 1006 (1914); Blake-Rutherford Farms Co. v. Holt Mfg. Co., 70 Wash. 192, 126 Pac. 418 (1912); the court has often had occasion to refuse to enforce the harsh election rule. See Letres v. Wash-Co-op Chick Ass'n, 8 Wn.2d 64, 111 P.2d 594 (1941); Warren v. W. W. Sheane Auto Co., 118 Wash. 213, 203 Pac. 372 (1922); First Church of Christ Scientist v. Southern Seating & Cabinet Co., 76 Wash. 367, 136 Pac. 127 (1913).

[130] Official comment 1. There are some suggestions in early Washington decisions that a buyer may not rescind for breach of warranty absent fraud. Sevier v. Hopkins, 101 Wash. 404, 172 Pac. 550 (1918); Klock v. Newbury, 63 Wash. 153, 114 Pac. 1032 (1911). Clearly, the Code permits him to revoke his acceptance for breach of warranty, even though no fraud is shown.

[131] The Washington decisions accord under the present statute. Lacay Plywood Co. v. Wienker, 42 Wn.2d 719, 258 P.2d 477 (1953); Eliason v. Walker, 42 Wn.2d 473,

the defects either because of those assurances made by the seller or because the defects were latent.[132]

Further, by subsection (2) the buyer must act reasonably promptly after he discovers the defect in the goods. This is, of course, a factual question not dissimilar to the one posed under the present statute where the buyer seeks to rescind after some delay.[133] In no case will the buyer be permitted to revoke his acceptance where he cannot restore to the seller his goods, except where the goods were destroyed or substantially changed because of their own defects.[134] The Code does not seem to require that the buyer actually return the goods to the seller;[135] he is obligated only to give notice.[136]

Section 2—609. Right to Adequate Assurance of Performance. (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise

256 P.2d 298 (1953); Lambach v. Lundberg, 177 Wash. 568, 33 P.2d 105 (1934); Noel v. Garford Motor Truck Co., 111 Wash. 650, 191 Pac. 828 (1920); United Iron Works v. Rathskeller Co., 94 Wash. 67, 161 Pac. 1197 (1916); Schroeder v. Hotel Commercial Co., 84 Wash. 685, 147 Pac. 417 (1915); Thompson v. Rhodehamel, 71 Wash. 24, 127 Pac. 572 (1912); Berlin Mach. Works v. Fuller, 59 Wash. 572, 110 Pac. 422 (1910).

[132] *Accord,* Frisken v. Art Strand, Etc., 47 Wn.2d 587, 288 P.2d 1087 (1955); Cooney v. Mossbach, 128 Wash. 427, 222 Pac. 893 (1924). The last cited case must involve this principle, though it is somewhat curious in that some months elapsed before the buyer discovered that he had received a 1917 or 1918 model car instead of the promised 1919 model.

[133] Wilson v. Pearce, 156 Wash. Dec. 685, 355 P.2d 154 (1960); Fines v. West Side Imp. Co., 156 Wash. Dec. 317, 352 P.2d 1018 (1960); Bariel v. Tuinstra, 45 Wn.2d 513, 276 P.2d 569 (1954); Holland Furnace Co. v. Korth, 43 Wn.2d 618, 262 P.2d 772 (1953); Brown v. Vantuyl, 40 Wn.2d 364, 242 P.2d 1021 (1952); Coover v. Ingwerson, 37 Wn.2d 797, 226 P.2d 187 (1951), criticized in 27 WASH. L. REV. 165 (1952); W. W. Sheane Auto Co. v. Williams, 143 Wash. 352, 255 Pac. 147 (1927); Singmaster v. Hall, 98 Wash. 134, 167 Pac. 136 (1917); Sowles v. Fleetwood, 97 Wash. 166, 165 Pac. 1056 (1917); Peterson v. Denny-Renton Clay & Coal Co., 89 Wash. 141, 154 Pac. 123 (1916); Higson v. Hughes, 72 Wash. 362, 130 Pac. 478 (1913); Aurora Land Co. v. Keevan, 67 Wash. 305, 121 Pac. 469 (1912); Noble v. Olympia Brewing Co., 64 Wash. 461, 117 Pac. 241 (1911); Dickinson Fire & Pressed Brick Co. v. Crowe & Co., 63 Wash. 550, 115 Pac. 1087 (1911).

[134] *Accord,* American Exch. Bank v. Smith, 173 Wash. 441, 23 P.2d 414 (1933); Noel v. Garford Motor Truck Co., 111 Wash. 650, 191 Pac. 828 (1920); Pierce County Auto Co. v. Menard, 92 Wash. 149, 158 Pac. 729 (1916); Burnley v. Shinn, 80 Wash. 240, 141 Pac. 326 (1914); Konnerup v. Allen, 56 Wash. 292, 105 Pac. 639 (1909).

Worthless goods need not be returned, of course. Official comment 6; Pierce County Auto Co. v. Menard, *supra.*

If the seller can protect against the change in the goods, it would seem that he cannot block revocation of acceptance for such changes therein. Kracke v. Cohen, 121 Wash. 253, 208 Pac. 1100 (1922). This is probably the proper explanation of Payne v. Lindsey Co., 71 Wash. 293, 128 Pac. 678 (1912), though the broad statement of the rule therein that the buyer is precluded from rescission only where harm to the goods was his fault seems inaccurate.

[135] Loveland v. Jenkins-Boys Co., 49 Wash. 369, 95 Pac. 490 (1908), is in accord.

[136] For a review of the cases under the present statute, see Holland Furnace Co. v. Korth, 43 Wn.2d 618, 262 P.2d 772 (1953).

with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

Except for certain particular provisions setting forth the privileges of a seller on insolvency of the buyer,[137] nothing in the present statute specifically covers the point here stated. Basically involved, however, is the concept of prospective failure of consideration.[138] When it appears to a party to a sales transaction that his chances of obtaining the promised counter-performance are impaired, he may suspend performance. Under a leading Washington decision, this right is recognized, but seems to be limited to circumstances which clearly threaten a material failure to perform the contract.[139] Under the Code, the excuse is not limited to such circumstances, for the facts creating a reasonable belief that performance will not be forthcoming need not relate directly to performance of that contract at all.

Faced with reasonable grounds for doubt about the continued ability of the other contracting party to perform, the seller or buyer may demand adequate assurance of due performance. This is new, and the controlling principles are outlined in the official comments which are of much value.

Finally, a failure to provide such assurance as is reasonably called for is equal to a breach of contract by anticipation or repudiation under subsection (4). This, too, is new, and completes the arsenal

[137] RCW 63.04.540 [UNIFORM SALES ACT § 53]; RCW 63.04.550 [UNIFORM SALES ACT § 54]; RCW 63.04.560 [UNIFORM SALES ACT § 55]; RCW 63.04.640(2) [UNIFORM SALES ACT § 63(2)].

[138] See Shattuck, *Contracts in Washington, 1937-1957*, 34 WASH. L. REV. 467, 474 (1959).

[139] Jacks v. Blazer, 39 Wn.2d 277, 235 P.2d 187 (1951).

provided either party to the sale transaction to protect himself when his expectancies under the contract are endangered. This effort to protect reasonable expectancies reflects once more the adoption by the Code writers of the concepts prevalent among business men rather than the technical, limited precepts of the present statute.

Section 2—610. Anticipatory Repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2—703 or Section 2—711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2—704).

The preceding section of the Code suggests fact patterns in which one party may be excused from further performance of his obligations. The presently discussed section states another such circumstance, the repudiation of the contract by either party. Upon such repudiation, both under the Code and by judicial decision, the innocent (non-repudiating) party may take one of two courses of action:

First, he may suspend performance, on the theory that the repudiation excuses his further carrying out the contract.[140]

Second, he may institute any appropriate remedy for breach,[141] even though he may have urged the repudiator to perform the contract.[142] The normal appropriate remedy will be an action for damages. It is doubtful whether the seller who, after repudiation by the buyer, fails to tender the contracted-for goods can recover the purchase price,[143]

[140] Walker v. Herke, 20 Wn.2d 239, 147 P.2d 255 (1944); Kilgas v. Mother's Grandma Cookie Co., 156 Wash. 8, 285 Pac. 1118 (1930); Jones-Scott Co. v. Ellensburg Milling Co., 116 Wash. 266, 199 Pac. 238 (1921); Citizens Bank v. Willing, 109 Wash. 464, 186 Pac. 1072 (1920); Curtis v. Parks, 57 Wash. 223, 106 Pac. 740 (1910).

[141] Walker v. Herke, *supra* note 140; Cron & Dehn Inc. v. Chedan Packing Co., 158 Wash. 167, 290 Pac. 999 (1930).

[142] Phoenix Packing Co. v. Humphrey-Ball Co., 58 Wash. 396, 108 Pac. 952 (1910), has some inconsistent sounding language to the contrary on this point.

[143] Paulsen v. Gilmore, 160 Wash. 232, 295 Pac. 135 (1931).

for obviously he can recover that price only if he is in a position to hold goods for the buyer.[144]

The damages recoverable have traditionally been measured not as of the time of the breach, but as of the time of the performance set in the contract.[145] On this point, however, the Code adopts a different rule, at least where it is the seller who repudiates. This rule, to be discussed later, sets the measure of damages for the seller's repudiation as of the time "when the buyer learned of the breach."[146] This is consistent with the view that the buyer is normally entitled to "cover" upon breach by the seller.[147] This theory has been recognized in Washington in a case dealing with a futures contract for apples, where the measure of damages was *not* the difference between contract and market price on the date of delivery, but was the value of a futures contract for such goods as of the day of the breach.[148]

Section 2—611. Retraction of Anticipatory Repudiation.

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2—609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

Though there is no statutory authority for the rule of this Code section, the Washington court has adopted this approach[149] following traditional common law rules.[150]

Section 2—612. "Installment Contract"; Breach.

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted,

144 See § 2-709 (3), and official comment 7 thereto.
145 3 WILLISTON, SALES § 587 (rev. ed. 1948).
146 Section 2-713.
147 Section 2-712.
148 Cron & Dehn Inc. v. Chelan Packing Co., 158 Wash. 167, 290 Pac. 999 (1930).
149 Walker v. Herke, 20 Wn.2d 239, 147 P.2d 255 (1944).
150 RESTATEMENT, CONTRACTS § 319 (1932).

even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

In discussing section 2-307, the point was made that where lot deliveries were contemplated, the buyer must specifically spell out an agreement to pay on conclusion of all deliveries, else he will be required to pay for each installment as delivered.[151] The presently discussed section implements this by spelling out that an installment contract may be found to exist whether or not installment payments are specifically called for by the contract, and whether or not the contract is divisible in the technical sense of the word. In short, installment performance by the seller is justified whenever all the circumstances "tacitly authorize" it.[152] This does not constitute a departure from current law,[153] which also permits an agreement for installment performance to be implied from the circumstances.

In the installment contract transaction, the buyer is warranted in rejecting an installment only when nonconformance *substantially impairs* the value of that installment and cannot be cured. This differs from the approach taken in non-installment contracts wherein the buyer may reject "for any reason."[154] The apparent reason for the divergent treatment is a recognition that a contractual arrangement looking forward to an extended series of performances ought not be

[151] 35 WASH. L. REV. 432 (1960).
[152] Official comment 2.
[153] Pillsbury Flour Mills, Inc. v. Independent Bakery, Inc., 165 Wash. 360, 5 P.2d 517 (1931), *aff'd*, 8 P.2d 430, *aff'd*, 10 P.2d 975 (1932); Kalispell Flour Mill Co. v. Marshall, 125 Wash. 80, 215 Pac. 70 (1923).
[154] Section 2-601.

thwarted in mid-stream by anything less than a material breach which cannot be corrected.[155]

While the buyer is entitled to be compensated for any defect in an installment, he is justified in treating the whole contract as breached (and thus refuse further installments) only where the breach substantially impairs the value of the whole contract. This, too, is aimed at effectively keeping alive contractual arrangements until there has been a repudiation or a material breach of the entire contract. This accords with Washington decisions,[156] though it spells out with greater clarity the standard by which a breach will be a breach of the whole contract, and not of an installment only. It further clarifies the point that the test used is not whether the breach is equal to a repudiation, but merely whether there has been a substantial impairment of the buyer's expectancy.

Finally, even though a breach has occurred which constitutes a substantial impairment of the entire contract, the buyer may not use it as a breach of the entire contract if the buyer fails to notify the seller of his desire to cancel, or if the buyer sues for damages only as to past installments, or if he demands future performance. These enumerated acts constitute, in the language of the decisions, a manifestation of the buyer's election to keep the contract in existence, thus binding himself to accept further complying performance.[157] It would seem that such conduct on the part of the buyer does not constitute a waiver of his claim for damages suffered as the result of the breach;[158] it merely precludes his treating the entire contract as breached. The damages thus recoverable will be based as of the time the buyer learns of the breach under the Code,[159] and not as of the date of the breach as under present law.[160]

To be remembered is that this section is one part of a sequence, and that in one section of that sequence, section 2-609, either party is given the right to demand assurance of due performance on the appearance of reasonable grounds for insecurity. An insignificant breach of an

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[155] Comment, *Article 2-Sales-Performance, Breach and Remedies,* 53 Nw. U.L. Rev. 332, 340 (1958).

[156] Jacks v. Blazer, 39 Wn.2d 277, 235 P.2d 187 (1951); Sunset Oil Co. v. Vertner, 34 Wn.2d 268, 208 P.2d 906 (1949); Nott-Atwater Co. v. Berry, 145 Wash. 640, 261 Pac. 390 (1927).

[157] Fry v. Grangers Warehouse Co., 131 Wash. 497, 230 Pac. 423 (1924). *Cf.* Balcom v. Kohno, 124 Wash. 628, 215 Pac. 17 (1923), *aff'd,* 127 Wash. 697, 221 Pac. 340 (1923), where essentially the same approach is taken, but the court also finds no breach of the contract.

[158] American Fuel Co. v. Interstate Fuel Agency, 261 Fed. 120 (9th Cir. 1919).

[159] Section 2-713.

[160] Clements v. Cook, 112 Wash. 217, 191 Pac. 874 (1920).

installment could justify, under appropriate circumstances, a demand for such assurance under that section.[161]

Section 2—613. Casualty to Identified Goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2—324) then

(a) if the loss is total the contract is avoided; and

(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

Though the cases prior to the adoption in Washington of the Uniform Sales Act are not consistent,[162] the Uniform Sales Act's provisions[163] are basically in accord with the Code. The principal difference concerns the treatment of partial deterioration and partial destruction of goods. Under the Uniform Sales Act, acceptance by the buyer of part of the goods after destruction of the balance made him liable for the full contract price if the contract was not divisible. This is not true under the Code, by which the buyer's liability is limited to a portion of the price.[164]

Section 2—614. Substituted Performance.

(1) Where without fault of either party the agreed berthing, loading or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

[161] HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 118 (1958).

[162] W. W. Robinson Co. v. McClaine, 98 Wash. 322, 167 Pac. 912 (1917), excuses the parties after destruction of the subject matter of the sale without fault of either party; however, MacLeod v. Aberdeen Brewing Co., 82 Wash. 74, 143 Pac. 440 (1914), seems to place responsibility on the seller in such circumstances, until "title" passes to the buyer.

[163] RCW 63.04.080 and 63.94.090 [UNIFORM SALES ACT §§ 7 and 8].

[164] Official comment 1.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

Sections 2-613 through 2-615 of the Code are all directed toward the same basic problem: frustration of the contract by change of circumstances. The most absolute change of circumstance is the physical destruction of the goods, covered in the preceding section. Destruction or impairment of other things contemplated in the performance of the contract may tend toward such frustration, depending upon how fundamental they are to the performance of the contract.

The present section of the Code deals with two matters not directly related to the quantity or quality of the goods, or to their existence, or to their means of production. This section relates only to contemplated means of delivery and payment. The effect of the section is to prevent frustration of commercial contracts because of inability to provide the specifically contracted for means. In the case of delivery, if the contemplated means becomes unavailable, a reasonably satisfactory substitute may be provided.

Somewhat the same approach has been taken in Washington decisions from an early date. In *Hatch* v. *Hall*,[165] a seller had agreed that the buyer might pay a portion of the purchase price of a threshing machine by threshing the seller's wheat. In fact, however, after making the agreement, the seller threshed some 15,000 bushels of wheat himslf, and when the buyer objected that this was a breach of the contract, the seller made an arrangement with a neighbor by which the buyer could thresh 15,000 bushels of the neighbor's wheat in substitution for his own. It was held that thereby the seller had substantially performed, and this seems proper in view of the fact that the particular point involved was largely collateral to the deal between the parties.

In *Farmers Grain & Supply Co.* v. *Lemley*,[166] a more direct analogy to the present section was presented, for there the seller had agreed to deliver wheat at a particular warehouse which, on the date of delivery, was full and thus unable to take delivery. The buyer offered to provide

[165] 48 Wash. 109, 92 Pac. 936 (1907).
[166] 105 Wash. 508, 178 Pac. 640, *aff'd*, 181 Pac. 858 (1919).

sacks, but in the opinion of the court, this would have involved additional expense to the seller, so the tendered substitute was not one which the seller was bound to accept, and he could thus rely on the defense of impossibility. This, it seems, would be the result under the Code, for clearly the unavailability of the proposed means of delivery will not shift the burden of providing those means, or a reasonable substitute.[167] The defense of impossibility of performance will not be available, of course, where a means of delivery becomes unavailable, unless that means was agreed to and recognized as fundamental to the contract. For example, a seller who agrees to deliver wheat, intending to ship it from a foreign port, is not excused from delivering wheat when transportation from that port becomes unavailable, unless the assumption of both contracting parties that this port was the necessary source of the wheat.[168]

No Washington decisions have been found respecting the medium of payment, covered in subsection (2).

Section 2—615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required

[167] Sussman v. Gustav, 109 Wash. 459, 186 Pac. 882 (1920).

[168] Thompson & Stacy Co. v. Evans, Coleman & Evans, 100 Wash. 277, 170 Pac. 578 (1918).

under paragraph (b), of the estimated quota thus made available for the buyer.

At the outset, it seems evident that any attempt to correlate Washington law under present statutes with the broad sweep of the Code will miss the true significance of this section of the Code. The reason is that to talk in conventional terms of "impossibility," "frustration of purpose," and the like is not consonant with the essence of this section, that commercial *impracticality* will constitute an excuse. Clearly illustrative cases under present law, suggesting the type of thing which will excuse, are those dealing with the destruction of an agreed source of goods, an excuse under present law and, of course, under the Code,[169] so long as the seller has exercised due care to assure that the source will not fail.[170] Some of the older decisions, such as *Isaacson v. Starret*,[171] in which a seller was held liable for damages for failure to deliver in spite of the fact that the supplier's plant was destroyed in the San Francisco earthquake and also struck by its employees, will no longer be accepted statements of the law.

The important point is, though, that the broad concept of *impracticality* as an excuse staggers the imagination of anyone accustomed to the limited excuses now recognized. A disservice to the Code results from seeking an equivalence to things past. It will remain for the courts to give specificity to this word, but they must strive not to be limited by the older decisions. Full recognition of the full implications of the Code ought not be prevented by the influence of past decisions.[172]

Subsection (c) imposes a duty upon the seller to notify where full performance is not to be forthcoming, a circumstance which sets the basis for the next following section.

Section 2—616. Procedure on Notice Claiming Excuse.

(1)Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery con-

[169] Reinemann v. Anderson, 34 Wn.2d 809, 210 P.2d 394 (1949) (small crop); Snipes Mountain Co. v. Benz Bros. & Co., 162 Wash. 334, 298 Pac. 714 (1931); Leavenworth State Bank v. Cashmere Apple Co., 118 Wash. 356, 204 Pac. 5 (1922) (destruction of mill); Pearce v. Puyallup & Sumner Fruit Growers' Canning Co., 117 Wash. 612, 201 Pac. 905, 208 Pac. 1117 (1921); Patrick v. Watson, 55 Wash. 76, 104 Pac. 144 (1909) (sale of all horses on the land); West Coast Shingle Co. v. Markham Shingle Co., 50 Wash. 681, 97 Pac. 801 (1908).

[170] Washington Mfg. Co. v. Midland Lumber Co., 113 Wash. 593, 194 Pac. 777 (1921). This case is cited in official comment 5.

[171] 56 Wash. 18, 104 Pac. 1115 (1909).

[172] The official comments provide the only authoritative interpretation of the rule until such time as court decisions have given it additional content.

cerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2—612), then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

The preceding section provides an excuse for the seller's non-performance in case of impracticality. The present section demonstrates that the risk of such nonperformance is not shifted over to the buyer, for he is not obligated to accept partial performance where the performance is partially impractical. Similarly, he is not obligated to accept late performance. If he wishes, he may accept the proffered substitute performance by modifying the contract. If he does not affirmatively elect this course of conduct, the contract is terminated.

While the mechanics established by this section are new, the principle behind the section is old. For example, in *Prescott & Co.* v. *Powles & Co.*[178] the seller of 300 crates of onions was able to ship only 240 crates because of a governmental preemption of shipping space. By way of dictum, the court suggests that the seller would in these circumstances be excused from full performance. By way of holding, the conclusion is that the seller, not having fully performed, cannot recover damages for the buyer's refusal to accept the insufficient tender. Such a decision is entirely consistent with Uniform Commercial Code sections 2-615 and 2-616, for though the seller may have a defense of impracticality or impossibility, the buyer is not obligated to accept anything less than full performance, unless he agrees to do so, except in the case of installment contracts. In contracts of that type, materiality of the deviation from full compliance is the determining factor.

[This discussion will be concluded in a subsequent issue.]

[178] 113 Wash. 177, 193 Pac. 680 (1920).