

# Montana Law Review

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Volume 21  
Issue 1 *Fall 1959*

Article 2

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July 1959

## Article 2: Sales

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### Recommended Citation

David R. Mason, *Article 2: Sales*, 21 Mont. L. Rev. 4 (1959).

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## Article 2: Sales

By DAVID R. MASON\*

Article 2 of the Uniform Commercial Code, dealing with sales, is stated to be a complete revision and modernization of the Uniform Sales Act.<sup>1</sup> Montana never has adopted this act, although it has been adopted in thirty-six states and the District of Columbia. This resistance over a period of half a century to the trend in other jurisdictions<sup>2</sup> should not be used as a precedent to justify failure to carefully consider for enactment the sales article of the Code, since in rebuilding upon the decisions and mercantile customs of the past fifty years the Code makes many changes not only in terminology but also in substance from the existing law.

### *Transactions Covered*

The sales article applies only to transactions in "goods,"<sup>3</sup> the definition of which is based upon the concept of movability, and the term "chattels personal" is not used.<sup>4</sup> Investment securities and things in action are not covered.<sup>5</sup> This article does not apply to "any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction,"<sup>6</sup> thus leaving substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage.<sup>7</sup>

The word "fixture" has been avoided,<sup>8</sup> and the concept of "industrial" growing crops has been abandoned.<sup>9</sup> The article does, however, cover "things attached" which can be served "without material harm" to the realty.<sup>10</sup> Timber, minerals or structures are covered only if they are to be "severed by the seller." If the buyer is to sever such things, the transaction is considered a contract affecting land and all problems of the Statute of Frauds and of the recording of land rights apply to them.<sup>11</sup>

### *Distinctions Between Merchants and Others*

The Code goes beyond present law in treating "merchants" as a special class, in their dealings with each other and with the public. Of

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<sup>1</sup>UNIFORM COMMERCIAL CODE § 2-101, comment. (Hereinafter UNIFORM COMMERCIAL CODE is cited UCC.)

<sup>2</sup>The *Uniform Sales Act* was recommended by the Commissioners on Uniform Laws in 1906 for enactment in the several states. The first states to enact it were Arizona, Connecticut, and New Jersey in 1907; the last states to adopt it were Arkansas and Colorado in 1941.

<sup>3</sup>UCC § 2-102. It is provided that statutes regulating sales to consumers, farmers or other specified classes of buyers are not impaired or repealed. Probably this is of no significance in this state, since there seems to be no special treatment accorded such classes of buyers.

<sup>4</sup>UCC § 2-105, comment 1. Unborn young animals are included, since they are frequently intended for sale and may be contracted for before birth. The reason of the definition also leads to the inclusion of a wool crop or the like. *Ibid.*

<sup>5</sup>UCC § 2-105(1).

<sup>6</sup>UCC § 2-102.

<sup>7</sup>UCC § 2-102, comment.

<sup>8</sup>UCC § 2-107, comment 2.

<sup>9</sup>UCC § 2-105, comment 1.

<sup>10</sup>UCC § 2-107(2).

<sup>11</sup>UCC § 2-107(1) and comment 1.

course, the law of merchants, later incorporated into the common law, developed as a result of the application of special rules to merchants, and occasionally statutes are found prescribing different duties for merchants than for non-merchants. For instance, *Revised Codes of Montana*, 1947, section 74-321, provides that "one who makes a business of selling provisions for domestic use warrants, by sale thereof, to one who buys for actual consumption, that they are sound and wholesome."<sup>12</sup> Nevertheless, the Code is unusual in its provisions for special rules which apply to the professional trader, and difficult and novel questions of fact will arise in determining who is to be so regarded.

"Merchant" is defined as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."<sup>13</sup> Thus, the position of a person as a merchant may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both. Which kind of specialized knowledge is sufficient to establish the merchant status is indicated by the nature of the provision.<sup>14</sup>

One class of special provisions appears in sections dealing with the Statute of Frauds,<sup>15</sup> "firm offers,"<sup>16</sup> confirmatory memoranda,<sup>17</sup> and modification.<sup>18</sup> These provisions are considered to "rest on normal business practices . . . typical of and familiar to any person in business,"<sup>19</sup> and, therefore, are applicable to anyone "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction." A comment states: "In this type of provision, banks or even universities . . . may be 'merchants.' But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant."<sup>20</sup>

The class of special provisions applicable only to those who have a professional status as to the particular kind of goods, is restricted to a much smaller group than that to which the first class of provisions applies. The section dealing with implied warranty of merchantability provides that the warranty is implied only "if the seller is a merchant with respect to goods of that kind."<sup>21</sup> In the same class are provisions with respect to retention of possession by sellers,<sup>22</sup> and entrusting possession of goods to another.<sup>23</sup>

<sup>12</sup>Under REVISED CODES OF MONTANA, 1947, § 27-101, this implied warranty of the article sold extends to the public generally. *Bolth v. Safeway Stores, Inc.*, 109 Mont. 213, 95 P.2d 433 (1939). (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.)

<sup>13</sup>UCC § 2-104 (1).

<sup>14</sup>UCC § 2-104, comment 2.

<sup>15</sup>UCC § 2-201 (2).

<sup>16</sup>UCC § 2-205.

<sup>17</sup>UCC § 2-207 (2).

<sup>18</sup>UCC § 2-209 (2).

<sup>19</sup>UCC § 2-104, comment 2.

<sup>20</sup>*Ibid.*

<sup>21</sup>UCC § 2-314.

<sup>22</sup>UCC § 2-402 (2).

<sup>23</sup>UCC § 2-403 (2).

The third class of provisions, which applies to persons who are merchants under either the "practices" or the "goods" aspect of the definition of merchant,<sup>24</sup> includes sections with respect to "good faith,"<sup>25</sup> the responsibility of merchant buyers to follow seller's instructions,<sup>26</sup> risk of loss,<sup>27</sup> and adequate assurance of performance.<sup>28</sup>

### *Rejection of Title as Basis for Legal Consequences*

Perhaps the most striking departure by the Code from present law is its abandonment of the concept of title as a basis for determining the rights of parties. American courts generally have held that the location of title governs the rights of parties in the law of sales, in the absence of special circumstances justifying a different rule. The Supreme Court of Montana has recognized the significance of title in determining who has the risk of loss of the goods and whether the seller may maintain an action for their price.<sup>29</sup> A statute provides that the right to rescind for breach of warranty not intended by the parties to operate as a condition depends upon whether the sale is executed.<sup>30</sup>

The purpose of the Code to make the location of title immaterial, so far as possible, is stated in the comment to the first section of the sales article, as follows:

The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

The Code proceeds to state the legal consequences of specific fact situations, and provides that "each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title."<sup>31</sup>

The rules relative to risk of loss in the absence of breach are specified in section 2-509. Subsection (1) reads as follows:

(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

<sup>24</sup>UCC § 2-104, comment 2.

<sup>25</sup>UCC § 2-103 (1) (b).

<sup>26</sup>UCC §§ 2-327 (1) (c), -603, -605.

<sup>27</sup>UCC § 2-509 (3).

<sup>28</sup>UCC § 2-609.

<sup>29</sup>DeMers v. O'Leary, 126 Mont. 528, 535, 254 P.2d 1080, 1084 (1953); Old Kentucky Distillery v. Stromberg-Mullins Co., 54 Mont. 285, 169 Pac. 737 (1917); Mette & Kanne Distilling Co. v. Lowrey, 39 Mont. 124, 101 Pac. 966 (1909).

<sup>30</sup>R.C.M. 1947, § 74-403; Rickards v. Aultman and Taylor Machinery Co., 64 Mont. 394, 399, 210 Pac. 82, 83 (1922).

<sup>31</sup>UCC § 2-401.

duly delivered to the carrier even though the shipment is under reservation (Section 2-505);<sup>22</sup> 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.

A Montana case serves to demonstrate the change effected in the existing commercial law. In *William Merchantile Co. v. Fussy*,<sup>23</sup> the question was with respect to the right of a seller to recover the price of a carload of apples shipped by a seller at St. Joseph, Missouri, to a buyer at Missoula, Montana. In accordance with the order, the seller shipped f. o. b. St. Joseph, taking a bill of lading in his own name, which, with a sight draft attached, was sent through a bank and presented to the buyer. The buyer refused to honor the draft or to receive the apples because they had frozen en route. In sustaining a judgment for the defendant, the court said: "When the bill of lading was taken in the shipper's name the presumption arose that he intended to retain the title in himself. This presumption must stand as conclusive until it is rebutted by affirmative proof on the plaintiff's part."<sup>24</sup>

As against this position, the Code analysis would run somewhat as follows: Since the goods were to be shipped f. o. b. St. Joseph, the contract was not one which required delivery at destination, and under section 2-509 the risk of loss would pass to the buyer when the goods were delivered to the carrier. Such being the case, under section 2-709 (1) (a) the seller could recover the price if the goods were "lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer."<sup>25</sup> Even if the loss in transit were not regarded as within such time, the seller could nevertheless under section 2-709 (3) recover damages for non-acceptance.

Subsection (2) of section 2-509 contains provisions for risk of loss where the goods are held by a bailee to be delivered without being moved. Due delivery of a negotiable document of title covering the goods or acknowledgment by the bailee that he holds for the buyer passes the risk.

If the case is not one where the contract authorizes the seller to ship the goods by carrier nor one where the goods are held by a bailee to be delivered without being moved, the Code contains provisions differentiat-

<sup>22</sup>This section is concerned with the reservation of a security interest in the goods.

<sup>23</sup>15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698 (1895).

<sup>24</sup>*Cf.* *Old Kentucky Distillery v. Stromberg-Mullins Co.*, *supra*, note 29, at 292, Pac. at 736. "[T]he delivery of goods by a seller to a carrier for shipment to the purchaser, in the absence of circumstances indicating a contrary intention, is sufficient. . . to vest title in the purchaser. . . . The rule is elementary." But it was held that this rule did not apply where the buyer directed that the goods be assigned to himself and the seller consigned them to another person with the request that they be reassigned to the buyer. *Cf.* UCC § 2-510 (1).

The better view is that taking a bill of lading to the seller or his order merely to enable the seller to exercise control as security for the price does not prevent the passing of beneficial ownership with the usual benefits and burdens thereof. VOLD, SALES § 105 (1931); Annot. 60 A.L.R. 677, 691 (1929); UNIFORM SALES ACT § 22.

<sup>25</sup>The phrase "commercially reasonable time" is new with the 1957 revision and does not appear to be defined or explained.

ing between a merchant seller and a non-merchant seller.<sup>36</sup> If a seller is to make physical delivery at the situs of the goods the risk of loss passes to the buyer on tender of delivery. But if the seller is a merchant and delivery is to be made at his place of business or the situs of the goods, the risk of loss remains on the seller until actual receipt of the goods by the buyer, even though full payment has been made and the goods are at the disposal of the buyer. The comment explains that the merchant seller is in control of the goods and can be expected to insure them.

The rules with respect to risk of loss where there has been a breach of the sales contract are separately stated in section 2-510. Subsection (1) provides: "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." This seems to state the present rule in Montana that the risk of loss remains on the seller when he has "deviated from the contract in a substantial particular."<sup>37</sup> But the Code again correlates the reality of insurance coverage with the legal rules and contains provisions to put the real or out of pocket loss on the wrongdoer. Thus if, after accepting nonconforming goods, the buyer asserts the right to revoke, the seller is responsible for any loss in excess of the buyer's insurance coverage.<sup>38</sup>

Conversely, if the buyer breaches before the risk of loss passes to him, he will be held responsible for the deficiency between the actual loss and the insurance coverage.<sup>39</sup>

#### *Form of Contract: Statute of Frauds*

Montana has adopted a statute patterned after the original Statute of Frauds passed in England in 1677.<sup>40</sup> R.C.M. 1947, section 74-201, provides:<sup>41</sup>

No sale of personal property, or agreement to buy or sell it for a price of \$200 or more, is valid unless:

1. The agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent; or
2. The buyer accepts and receives a part of the thing sold, or when it consists of a thing in action, part of the evidences thereof, or some of them; or
3. The buyer at the time of sale, pays a part of the price.

<sup>36</sup>UCC § 2-509 (3) provides: "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."

<sup>37</sup>Old Kentucky Distillery v. Stromberg-Mullins Co., *supra* note 29. In *Mette & Kanne Distilling Co. v. Lowrey*, *supra* note 29, the court held that one who seeks to recover the contract price of goods shipped on order is bound to show by a preponderance of the evidence that they are of the kind and quality ordered.

<sup>38</sup>UCC § 2-510 (2) reads: "Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his insurance coverage treat the risk of loss as having rested on the seller. . . ."

<sup>39</sup>UCC § 2-510 (3) reads: "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 or loss as resting on the buyer for a commercially reasonable time."

<sup>40</sup>*Gravelin v. Porter*, 77 Mont. 260, 250 Pac. 823 (1926).

<sup>41</sup>Similar provisions are contained in R.C.M. 1947, § 13-606 (4), 93-1401-7.

The Uniform Commercial Code completely rephrases the statute. It provides:<sup>42</sup>

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable.

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted.

The most obvious differences between the Montana statute and the Code are in the coverages. The Code establishes a \$500 minimum; the Montana statute sets \$200 as the minimum.<sup>43</sup> This provision of the Code is restricted to the sale of "goods" and does not include things in action, as does the Montana statute,<sup>44</sup> although a separate article of the Code contains provisions applicable to investment securities which conform to the policy of the provisions with respect to the sale of goods.<sup>45</sup>

Both the Code and the Montana statute contain exceptions with respect to goods to be manufactured. The Montana statute excludes from the Statute of Frauds "an agreement to manufacture a thing, from materials furnished by the manufacturer, or by another person."<sup>46</sup> The Code provides that an oral contract will be enforceable, "if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement."<sup>47</sup>

The extent to which this provision of the Code qualifies the Montana rule is somewhat doubtful. On its face, the Montana statute appears to adopt former holdings of the New York courts which distinguished between a contract for goods to be manufactured and a contract for goods already in existence even though something remains to be done before the

<sup>42</sup>UCC § 2-201.

<sup>43</sup>The \$500 minimum conforms to that in the UNIFORM SALES ACT § 4.

<sup>44</sup>The Montana statute follows the pattern of the UNIFORM SALES ACT § 4 in covering choses in action.

<sup>45</sup>UCC § 8-319, and comments.

<sup>46</sup>R.C.M. 1947, § 74-202.

<sup>47</sup>UCC § 2-201 (3) (a).

goods are in deliverable condition. However, the Uniform Sales Act adopted a rule derived from Massachusetts, and distinguishes between goods manufactured for the general market and those manufactured especially for the buyer.<sup>48</sup> It is this rule which the Code adopts, and the Montana statute may be construed to conform to it.<sup>49</sup>

Very clearly the Code requirement that the seller, before notice of repudiation, shall have made a "substantial" beginning of manufacture, or shall have "made commitments" for procuring the goods, extends the Statute of Frauds to cases not theretofore within it and introduces difficult questions as to what is "substantial" and what is a "commitment."

The Code materially relaxes the requirements as regards the essential elements of the memorandum. In *Dineen v. Sullivan*,<sup>50</sup> the Supreme Court of Montana stated the rule that "the note or memorandum must contain the essentials of the contract so that they may be ascertained from the writing without a resort to oral evidence." A memorandum omitting terms of the agreement, such as the amount, number and date of installment payments, the rate of interest on unpaid balances, when possession was to be delivered, that the buyer would execute a mortgage as security for the purchase price balance, and that the buyer would keep the property insured, was held to be insufficient.<sup>51</sup>

Under the Code it is not required that the writing contain all the material terms of the contract. As is stated in a comment, only three definite requirements are made: "First, it must evidence a contract for the sale of goods; second, it must be 'signed', a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity."<sup>52</sup>

The comment also states that it is not necessary that the memorandum indicate which party is the buyer and which is the seller, the price, time and place of payment or delivery, the general quality of the goods, or any particular warranty. Even the quantity term need not be accurately stated, but recovery is limited to the amount stated.

Another major change brought about by the Code is in respect to partial performance as a substitute for the required memorandum. Under the Montana statute acceptance and receipt by the buyer of any part of the thing sold or payment by the buyer of any part of the price is sufficient to take the entire transaction out of the statute.<sup>53</sup> But under the

<sup>48</sup>See 2 CORBIN, CONTRACTS § 477 (1950) ; 1 WILLISTON, SALES § 55 (rev. ed. 1948).

<sup>49</sup>See *Golden Eagle Milling Co. v. Old Homestead Bakery*, 56 Cal. App. 541, 211 Pac. 56 (1922).

<sup>50</sup>123 Mont. 195, 213 P.2d 241 (1949).

<sup>51</sup>Under this rule, as the court pointed out, little need be stated in a simple pay and take agreement; much more in an involved transaction or agreement. Also, it is sufficient if all the material elements of the agreement are stated in general terms in the memorandum; all the details or particulars need not be stated. Further, it was held in *Lewis v. Aronow*, 77 Mont. 348, 251 Pac. 146 (1926), that no greater strictness is required in respect to the competency of the parol evidence to be applied to contracts within the statute of frauds than is applied to written contracts in general. "Parol evidence may be admitted to show the situation and relation of the parties and the surrounding circumstances at the time the instrument was made."

<sup>52</sup>UCC § 2-201, comment 1.

<sup>53</sup>See *Springer v. Imperial Elevator Co.*, 99 Mont. 432, 43 P.2d 891 (1935) ; 2 CORBIN, CONTRACTS § 428 (1950) ; 1 WILLISTON, SALES § § 94, 98 (rev. ed. 1948).



Code such partial performance "can validate the contract only for the goods which have been accepted or for which payment has been made and accepted."<sup>54</sup> A comments explains that, "if the court can make a just apportionment . . . the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods."<sup>55</sup>

The provision of the Code relating to merchants has no counterpart in the law of Montana. It is provided, in effect, that if a writing is sent confirming the contract of sale, which writing is adequate to charge the sender, it will also bind the person receiving it as though he had signed it, unless written notice of objection to its contents is given within ten days after it is received.<sup>56</sup> In other words, between merchants, failure to answer a written confirmation of contract within ten days dispenses with the requirement of a memorandum. The effect "is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected."<sup>57</sup>

#### *Contract Rules*

At several points the Code modifies general contract law as applied in the sales area. Sales and agreements to sell are contracts,<sup>58</sup> and the Supreme Court of Montana in a sales case has stated the established concept of a contract in this language: "The rule is well settled that, in order to form a contract, there must be an offer by one party and an unconditional acceptance of it by the other in accordance with its terms. . . , and that, if the acceptance falls within or goes beyond the terms of the offer or makes a condition at variance with the proposal, there is no contract and the transaction amounts to one of proposals and counter proposals. . . ."<sup>59</sup>

Contrary to this rule, under the Code between merchants additional terms in an acceptance become a part of the contract, unless (1) the offer expressly limits acceptance to the terms of the offer, (2) they materially alter it, or (3) notification of objection is given within a reasonable time.<sup>60</sup>

Again as to merchants, the Code is contrary to the established rule that offers unsupported by consideration may be withdrawn at any time prior to their acceptance.<sup>61</sup> A signed written offer by a merchant to buy or sell is not revocable for lack of consideration during the time for which it is stated that it will be held open, or if no time is stated for a reasonable time, provided that the period of irrevocability may not exceed three months.<sup>62</sup>

The Code expands the present rule that shipment of goods in response to an order is an acceptance.<sup>63</sup> An order for prompt shipment may

<sup>54</sup>UCC § 2-201, comment 2.

<sup>55</sup>*Ibid.*

<sup>56</sup>UCC § 2-201 (2).

<sup>57</sup>UCC § 2-201, comment 3.

<sup>58</sup>R.C.M. 1947, §§ 74-101 to -106.

<sup>59</sup>*J. Neils Lumber Co. v. Farmers' Lumber Co.*, 88 Mont. 392, 397, 293 Pac. 288, 290. (1930).

<sup>60</sup>UCC § 2-207(2) (a), (b), (c).

<sup>61</sup>See I WILLISTON, *CONTRACTS* § 61B (3rd ed. 1957).

<sup>62</sup>UCC § 2-205.

be accepted by a prompt promise to ship,<sup>64</sup> apparently regardless of the actual intent of the offeror to require the act of shipment.<sup>65</sup> Also, shipment of non-conforming goods constitutes an acceptance, unless the seller notifies the buyer that the shipment is offered only as accommodation to the buyer.<sup>66</sup> Thus an act which constitutes a breach may at the same time be an acceptance,<sup>67</sup> and there is nothing in the Code provision which undertakes to limit the extent of the non-conformance in the shipment which may have this effect.<sup>68</sup>

However, in situations where the beginning of a requested performance may be considered as an acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed.<sup>69</sup>

Provisions for open price terms in the contract depart from existing law. Of course, if the property in the goods is transferred reasonable price may be substituted for agreed price as a quasi contractual obligation. But the law applicable to executory contracts has been stated by the Supreme Court of Montana as follows: "Where a contract of sale is executory, the price to be paid must be definitely stated or made capable of definite determination."<sup>70</sup>

Under the Code, executory contracts which fail to fix a price or the means of ascertaining the price are valid, if the parties intend a binding agreement. The price is the reasonable price at the time of delivery.<sup>71</sup>

Again, the established rule that the modification of a contract must be supported by consideration is departed from. The Code permits modification, provided it is made in good faith, without the necessity of consideration.<sup>72</sup>

There are special provisions making it possible for courts to police contracts or clauses of contracts which are "unconscionable," without resort to adverse construction of language, manipulation of rules of offer and acceptance, or determination that contracts or clauses are contrary to public policy. The Code permits courts in their discretion to refuse to enforce any such contract or clause, or limit it so as to avoid unconscionable results. Parties must be afforded reasonable opportunity to present evidence as to the commercial setting, purpose and effect of the contract or clause claimed to be unconscionable. This evidence is for the court's consideration, not for the jury's.<sup>73</sup>

### Warranties

The Code changes the law of warranties at several points. It was an early requirement of the law that the buyer should have relied upon the

<sup>64</sup>UCC § 2-206 (1) (b).

<sup>65</sup>UCC § 2-206, comment 2, states that the Code provision is in accord with ordinary commercial understanding of the meaning of such an order. Cf. CORBIN, CONTRACTS § 70 (1950).

<sup>66</sup>UCC § 2-206 (1) (b).

<sup>67</sup>UCC § 2-206, comment 4.

<sup>68</sup>See criticism by Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 577-78 (1950).

<sup>69</sup>UCC § 2-206 (2).

<sup>70</sup>*Lewis v. Aronow*, 77 Mont. 348, 359, 251 Pac. 146 (1926).

<sup>71</sup>UCC § 2-305.

<sup>72</sup>UCC § 2-209, comment 2.

<sup>73</sup>UCC § 2-302.

seller's representation in order that there be an express warranty," and the Supreme Court of Montana has stated this to be the rule in this state.<sup>74</sup> Under the Code, however, according to a comment, no particular reliance on the seller's statements need be shown in order to make them a part of the agreement. The theory is that affirmations of fact by a seller about goods during a bargain should be regarded as part of the description of goods.<sup>75</sup>

The Code continues recognition of implied warranties of fitness for a particular purpose and of merchantability, but at some points it broadens such warranties while at others it narrows them. In Montana a seller makes no implied warranty of fitness for intended use unless he manufactures the goods under order for the particular purpose.<sup>76</sup> The only qualification to this appears to be in the case of one who makes a business of selling provisions for domestic use, who warrants by the sale thereof that they are sound and wholesome.<sup>77</sup> But under the Code, regardless of the character of the goods, it is not necessary that the seller be a manufacturer or even a dealer. The Code provides for such a warranty if the seller has reason to know any particular purpose for which the goods are required and that the buyer is relying on his skill and judgment.<sup>78</sup> On the other hand, there is an implied warranty of merchantability under the Code only if the seller is a merchant with respect to goods of the kind sold,<sup>79</sup> and a person making an isolated sale is not a merchant.<sup>80</sup> Under the Montana statute anyone who sells merchandise inaccessible to the examination of the buyer thereby warrants that it is sound and merchantable.<sup>81</sup> Apparently the Supreme Court of Montana has construed this statute to exclude an implied warranty of merchantability if the merchandise is subject to the examination of the buyer and if he has an equal opportunity with the seller to discover its defects.<sup>82</sup> Under the Code implied warranties are not excluded unless the buyer has in fact examined

<sup>74</sup>1 WILLISTON, SALES § 206 (rev. ed. 1948).

<sup>75</sup>Jones v. Armstrong, 50 Mont. 168, 175, 145 Pac. 949, 951 (1915); Lundquist v. Jennison, 66 Mont. 516, 522, 214 Pac. 67, 69 (1923).

<sup>76</sup>UCC § 2-313, comment 3.

<sup>77</sup>R.C.M. 1947, §§ 74-310, -316.

<sup>78</sup>R.C.M. 1947, § 74-321. This statute has reference to something to be consumed as food. Harrington v. Montgomery Drug Co., 111 Mont. 564, 567, 111 P.2d 808, 810 (1941). It is not confined to food consumed by human beings but includes provisions consumed by animals. Seaton Ranch Co. v. Montana Vegetable Oil Co., 123 Mont. 396, 217 P.2d 549 (1950).

<sup>79</sup>UCC § 2-315, comment 4. The Code modifies the law under the Uniform Sales Act by extending the implied warranty of fitness for a particular purpose to purchase by particular patent or trade name, provided the purchase is made in reliance on the seller's skill and judgment. UCC § 2-315, comment 5. Cf. UNIFORM SALES ACT § 15 (4). In Montana there is no exclusion from any implied warranty of articles sold under patent or trade name. On the contrary, one who sells an article to which there is attached a trade mark thereby warrants that trade mark to be genuine and lawfully used. R.C.M. 1947, § 74-318. Under the Code, it is only when goods are a part of the seller's normal stock and are sold in his normal course of business that it is the duty of the seller to see that no claim of infringement of trademark (or patent) by a third party will mar the buyer's title. UCC § 3-312 (3).

<sup>80</sup>UCC § 2-314. The definition of merchantable goods under the Code is detailed and exact. The Montana statutes contain no definition.

<sup>81</sup>UCC § 2-314, comment (3).

<sup>82</sup>R.C.M. 1947, § 74-317.

<sup>83</sup>Harrington v. Montgomery Drug Co., 111 Mont. 564, 567, 111 Pac. 808, 809 (1941).

the goods or has refused on demand by the seller to examine them, and in such situations implied warranties, both of fitness for a particular purpose and of merchantability, are excluded with regard to defects which an examination ought in the circumstances to have revealed to the buyer.<sup>84</sup>

Under existing law warranties may be excluded by express stipulation in the contract of sale, the Supreme Court of Montana having said that it "must assume that the parties entered into the contract with their eyes open, having known and understood all its provisions and stipulations."<sup>85</sup> The Code also recognizes the validity of disclaimer clauses, but seeks to protect the buyer from unexpected language. Implied warranties may be excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion and makes it plain that there is no implied warranty.<sup>86</sup> But subject to this provision, disclaimers of warranties of merchantability must mention "merchantability" and in case of a writing must be conspicuous; and disclaimers of warranties of fitness must be by writing and conspicuous.<sup>87</sup>

The Supreme Court of Montana has held that the statutory provision for warranty of food offered for sale extends only to the immediate purchaser, on the theory that the warranty arises out of the contractual relations of the parties. However, reliance has been placed on the provisions of the Pure Food and Drug Act for the extension of the warranty to the public generally, it being reasoned that the act of selling impure food is unlawful and the seller is responsible for the natural consequences of his wrongful act.<sup>88</sup> Under the Code the buyer's family, household and guests, are given the benefit of the same warranty, whether express or implied, which the buyer receives in the contract of sale. It is only as to the buyer's family or household, however, that the Code abolishes the rule of privity. The developing case law is neither enlarged nor restricted as to liability to others in the distributive chain.<sup>89</sup>

#### *Assurance of Performance and Anticipatory Repudiation*

The Code contains novel provisions imposing on buyers and sellers an obligation that the other party's expectation of receiving due performance will not be impaired. If "reasonable grounds for insecurity" arise, the party affected 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 received the agreed return. Failure to provide such assurance within a reasonable time not exceeding thirty days is repudiation of the contract.<sup>90</sup> According to a comment, the provisions permitting suspension of performance embody the same principles which govern the ancient law of stoppage in transitu and

<sup>84</sup>UCC § 2-316 (3) (b).

<sup>85</sup>Friesen v. Hart-Parr Co., 64 Mont. 373, 374, 209 Pac. 986 (1922).

<sup>86</sup>UCC § 2-316 (3) (a).

<sup>87</sup>UCC § 2-316 (2). Warranties may also be excluded or modified by course of dealing, performance or usages of trade. UCC § 2-316 (3) (b).

<sup>88</sup>Kelley v. John R. Daily Co., 56 Mont. 63, 181 Pac. 326 (1919); Bolitho v. Safeway Stores, Inc., 109 Mont. 213, 95 P.2d 443 (1939).

<sup>89</sup>UCC § 2-318, comment 3.

seller's lien, and also of excuse of a buyer from prepayment if the seller's actions manifest that he cannot or will not perform. The provision requiring adequate assurance is a reflection of clauses in contracts permitting the seller to curtail delivery if the buyer's credit becomes impaired. The provision permitting the aggrieved party to treat the contract as at an end embodies the principle underlying the law of anticipatory breach.<sup>81</sup>

There are provisions for immediate right of action for anticipatory breach. The aggrieved party after the repudiation may await performance by the repudiating party for a reasonable time, or resort to any remedy for breach even though he has notified the repudiating party that he would await the latter's performance.<sup>82</sup>

### *Remedies of the Seller*

The remedies given a seller in the event of the buyer's insolvency have been expanded under the Code. Although the goods have been delivered to the buyer and regardless of the transfer of title, the seller may reclaim the goods within ten days, subject to the rights of a good faith purchaser or lien creditor, when he discovers that the buyer received the goods while insolvent. Further, if there is a misrepresentation of solvency in writing within three months of delivery, the ten day limitation does not apply.<sup>83</sup> The basic proposition appears to be that any receipt of goods on credit by an insolvent buyer amounts to a tacit misrepresentation of solvency and therefore is deemed to be fraudulent as against the seller.<sup>84</sup>

The remedies of the seller have been further enlarged by giving him, when he learns of the buyer's breach, the right to identify conforming goods to the contract, if they are in his possession or control.<sup>85</sup>

As has been indicated, the Code materially changes the law with respect to a suit for the purchase price, and under the Code the passing of title is not material to an action for the price.<sup>86</sup> Generally under the Code, such action is "limited to those cases where resale of the goods is impracticable except where the buyer has accepted the goods or where they have been destroyed after risk of loss has passed to the buyer."<sup>87</sup>

The seller's rights of resale are expanded. Under the Montana statutes, a seller who remains in possession "after payment is due" or "when the price becomes payable" may rescind the sale, or he may enforce his lien for the price in the manner provided for the foreclosure of a pledge.<sup>88</sup> Although these statutory provisions apply to executory as well as executed sales,<sup>89</sup> yet they do not seem to contemplate resale in the case of an anticipatory breach. The Code, on the other hand, enlarges the rights of resale to the point where the seller may resell the goods after any breach, even an anticipatory breach, and this is supplemented by express authorization of

<sup>81</sup>UCC § 2-609, comment 2.

<sup>82</sup>UCC § 2-610.

<sup>83</sup>UCC § 2-702.

<sup>84</sup>UCC § 2-702, comment 2.

<sup>85</sup>UCC § 2-704. Williston has criticised this and some other provisions on the ground that they permit increased damages. Williston, *supra* note 68, at 586.

<sup>86</sup>Text at notes 29-39.

<sup>87</sup>UCC § 2-709, comment 2.

<sup>88</sup>R.C.M. 1947, §§ 74-302, 45-1104.

<sup>89</sup>Welch v. Nichols, 41 Mont. 435, 441, 110 Pac. 89, 91 (1910); Evankovich v. Howard Pierce, Inc., 91 Mont. 344, 8 P.2d 653 (1932).

resale of goods which are not in existence or identified to the contract before breach.<sup>100</sup>

The meticulous restrictions in Montana on the manner of resale in enforcing a seller's lien have been described by the Supreme Court of Montana as follows:<sup>101</sup>

Under the law of pledges, the pledgee may collect what is due him on the pledge by the sale of the property . . . , but before the sale is made the pledgee must demand performance by the pledgor, if he can be found . . . , and must give actual notice to the pledgor of the time and place of sale far enough in advance of the sale to permit the attendance of the pledgor at the sale . . . ; the sale must be at public auction, after notice to the public, and the property must be sold for the highest obtainable bid.

The Code does not so limit the seller, but merely requires him to act "in good faith and in a commercially reasonable manner" in making the resale, and requires notice of intention to resell if the sale is a private sale and reasonable notice of the time and place of sale if public except if the goods are perishable and threaten to decline swiftly in value.<sup>102</sup> No distinction is drawn, as it has been in Montana,<sup>103</sup> between cases where the title has not passed to the buyer and the seller resells as owner and cases where title has passed and the seller resells by virtue of his lien.<sup>104</sup>

Resale as provided by the Code permits the seller to retain any profit from the resale.<sup>105</sup> Failure to conform with the provisions of the Code does not prevent a bona fide purchaser from taking good title, although, of course, it does affect the damages recoverable by the seller.<sup>106</sup>

### *Remedies of the Buyer*

There are several significant changes in the existing law in regard to the remedies of a buyer where a seller breaches his contract to sell. In Montana the buyer may recover damages measured by the difference between the contract price and the market value at the time and place of delivery.<sup>107</sup> Under the Code the measure of damages for non-delivery or repudiation by the seller is the difference between the contract price and the market price at the time the buyer learns of the breach.<sup>108</sup>

With respect to damages for breach of warranty, the rule in Montana is that the measure is the difference between the actual or market value of

<sup>100</sup>UCC § 2-706.

<sup>101</sup>*Evankovich v. Howard Pierce, Inc.*, 91 Mont. 344, 352, 8 P.2d 653, 656 (1932).

<sup>102</sup>UCC § 2-705.

<sup>103</sup>*Welch v. Nichols*, *supra* note 99.

<sup>104</sup>UCC § 2-706, comment 3.

<sup>105</sup>UCC § 2-706 (6), and comment 11.

<sup>106</sup>UCC § 2-706 (1), (5), and comments 2, 10.

<sup>107</sup>*Montana Livestock and Loan Co. v. Stewart*, 58 Mont. 221, 190 Pac. 985 (1920). R.C.M. 1947, § 17-308 provides: "The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled." "Value of the property to the buyer" is measured by market value. *Evankovich v. Howard Pierce, Inc.*, *supra*

note 101.

UCC § 2-705.

the property at the time to which the warranty referred, and the actual or market value which the property would have had at the time to which the warranty referred if the warranty had been complied with.<sup>109</sup> The Code is explicit in providing that the time and place of acceptance shall control the measure of damages.<sup>110</sup>

In determining market value, if the goods are regularly bought and sold in any established commodity market, reports in official publications or trade journals or in newspapers of general circulation published as reports of such market are admissible in evidence. The circumstances of preparation of such a report may be shown to effect its weight but not its admissibility.<sup>111</sup>

The Code introduces a concept of "cover" as additional protection for a buyer in cases where the seller does not deliver or repudiates or the buyer rightfully rejects or justifiably revokes. The buyer may obtain goods in substitution for those due from the seller, and recover from the seller as damages the difference between the cost of cover and the contract price together with incidental or consequential damages, but less expenses saved as a result of the seller's breach.<sup>112</sup>

The Code ends the harsh rule requiring the buyer to elect between rescission and damages for breach.<sup>113</sup> In stating the buyer's rights where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, the Code provides that the buyer may "cancel" and recover so much of the price as has been paid in addition to damages.<sup>114</sup> Further, in extending the remedies for fraud to coincide in scope with those for non-fraudulent breach, the Code provides that rescission does not bar a claim for damages.<sup>115</sup>

The above directs attention to some of the more significant provisions of article 2 of the Code. While in a considerable measure this article continues the law as now embraced in the Uniform Sales Act, yet it is new in its approach and it makes significant changes and additions to the law of sales. The conceptualistic approach found in the Uniform Sales Act is abandoned as inadequate to meet present needs, and the law is adjusted and expanded to cover realistically commercial relationships and practices as they now exist. Some difficulty of adjustment to the provisions of article 2 may be encountered by those schooled in the present sales law, but it is believed that the Code provisions are an improvement over other statutes in a field where need for certainty and uniformity peculiarly calls for legislation.

<sup>109</sup>R.C.M. 1947, § 17-313; Rickards v. Aultman and Taylor Machinery Co., 64 Mont. 394, 210 Pac. 82 (1922); Fryburg v. Brinck, 92 Mont. 294, 12 P.2d 757 (1932). See also, Butte Floral Co. v. Reed, 65 Mont. 138, 211 Pac. 325 (1922).

<sup>110</sup>UCC § 2-714 (2).

<sup>111</sup>UCC § 2-724. Cf. Evankovich v. Howard Pierce, Inc., *supra* note 101.

<sup>112</sup>UCC § 2-712.

<sup>113</sup>Several Montana cases have laid down the rule that if there is a breach of warranty by the seller, the buyer may either rescind and recover the purchase price or retain the goods and recover damages for breach, but that he cannot do both. Fryburg v. Brinck, *supra* note 109; Rickards v. Aultman and Taylor Machinery Co., 64 Mont. 394, 210 Pac. 82 (1922); Advance-Rumley Thresher Co. v. Terpening, 58 Mont. 507, 193 Pac. 752 (1920).

<sup>114</sup>UCC § 2-711. See also UCC §§ 2-106(4), 720.

<sup>115</sup>UCC § 2-721.