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THE UNIFORM SALES ACT IN THE STATE OF WASHINGTON

The Uniform Sales Act was enacted by the State of Washington at the extraordinary session of its legislature convened November 9, 1925, and adjourned January 7, 1926. Under constitutional provision, this law went into effect ninety days after the adjournment of the session at which it was enacted. Prior to this time the Uniform Sales Act had been enacted in Arizona, Connecticut and New Jersey in 1907, Massachusetts, Ohio and Rhode Island in 1908, Maryland in 1910; New York and Wisconsin in 1911, Alaska and Michigan in 1913, Illinois, Nevada and Pennsylvania in 1915, Minnesota, North Dakota, Utah and Wyoming in 1917, Idaho, Iowa, Oregon, and Tennessee in 1919; Nebraska, South Dakota and Vermont in 1921, and, Maine and New Hampshire in 1923, a total of twenty-seven jurisdictions. Prior to these enactments, the Sale of Goods Act, which forms the basis of the Uniform Sales Act, had been adopted in England in 1894. That act has since been adopted in most of the Canadian jurisdictions and in the British dominions. It was adopted in British Columbia in 1897 and in the Northwest Territories of Canada (then including Alberta and Saskatchewan) in 1898.

The advantages of uniformity of legislation in matters pertaining to commercial subjects seems so obvious as to require but slight comment. In laws relating to commercial subjects, conditions and problems are rarely of a local nature, and in view of the great amount of trading which exists between the several states, it cannot help but add to the convenience and advantage of those engaged in commercial

\[^1\text{Laws 1925, Ext. Sess., ch. 142.}\]
\[^2\text{Const. Art. 2, § 31.}\]
ventures that the laws so far as possible be the same. While there may be some slight inconvenience occasioned by the adjustment which accompanies any change of the law, the changes occasioned by reason of the adoption of the Uniform Acts are usually minor, and in the case of the Sales Act have to some extent been anticipated by the prior adoption of the Uniform Negotiable Instruments Act, the Uniform Warehouse Receipts Act, and the Uniform Bills of Lading Act.

None of the Uniform Commercial Acts have been drafted with greater care than the Sales Act. It is based upon the Sale of Goods Act, which was largely a codification of the then existing law of sales. This act has been in force in England since 1894, and the draftsman of the American Act accordingly could look not only to the English Act but also to the experience of England for about ten years in operation under the English Act. The first tentative draft of the Sales Act, prepared in 1902-03, by Professor Samuel Williston, was submitted with revision and amendments to the Commissioners of Uniform Laws in national conference each year until its final adoption by that body in 1906, and was, in 1907, given the approval of the American Bar Association.

The Sales Act is largely a codification of the existing law of sales and will, therefore, not usually affect the prior law of the jurisdictions in which adopted. Where there is a division of authority the sections of the Act usually state the prevailing or majority rule. It is to be noted, however, that in such instances as the commissioners deemed another rule to be better, either from the standpoint of legal principle or business convenience the same was adopted. As the Act can at most be but an outline or statement of the general principles of the law of sales, it will doubtless receive different constructions in the several jurisdictions, and unquestionably in time will need a revision. However, as section 74 of the Act provides that "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it," it is likely that such deviation as develops will be limited to rather immaterial matters. In any event, so far as a revision will be necessary, it will be a great advantage to have the courts in the many jurisdictions passing upon the same provisions, as it will tend more quickly to thoroughly establish the law.

In the following treatment the sections of the Act as adopted in Washington will each be considered in turn. No attempt has been

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made to exhaust the authorities in the State of Washington or elsewhere.  

Occasional comment is made where the sections merely codify or correspond with the existing law. A more detailed consideration is given with occasional analysis of the cases where there is a conflict in authority or where the law differs from that expressed in the Act. The Act itself is analyzed in the few instances where there might be a difference of opinion as to its interpretation and application. In this way it is hoped that these articles will be of assistance in accomplishing the adjustment to the Act necessitated in the few instances in which it changes the law of sales heretofore existing in the State of Washington.

UNIFORM SALES ACT

FORMATION OF THE CONTRACT

Sec. 1. Contracts to Sell and Sales.

1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

3. A contract to sell or a sale may be absolute or conditional.

4. There may be a contract to sell or a sale between one part owner and another.

The definitions given in this section are necessary to an understanding of the Act. The distinction between “contract to sell” and “sale” is fundamental and vital, for in the case of a contract to sell, there being no transfer of title, property, or ownership, the rights of the parties are necessarily discussed from the standpoint of contract; while in the case of a sale the transfer of property having taken place, the rights of the parties are discussed from the standpoint of property. There has been some confusion in the use of the terms “executory” and “executed” as applied to sales. The suggested usage is not too technical and it should be remembered that accuracy in the use and meaning of terms is most conducive to clear thinking. The use of these terms is not inconsistent with the present state of the law except

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4 For a scholarly treatise on the law of sales at common law and under the Uniform Sales Act, with elaborate citations, see WILLISTON ON SALES, (2 ed., 1924), and for authorities since its adoption see UNIFORM LAWS, ANNEXED—UNIFORM SALES ACT WITH ANNUAL SUPPLEMENT, published by the Edward Thompson Company.
that it must be borne in mind that these terms have heretofore been used indiscriminately, their meaning being left to determination largely from context and the circumstances under which used.

Subsections (3) and (4) simply restate the existing law

Sec. 2. Capacity Liabilities for Necessaries.

Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

The capacity to contract or buy and sell is determined by the law of the place of the contract in accordance with the general rule that the validity of a contract and its construction are determined by that law.

The first paragraph merely states that the law of a state prevails as to capacity both as to contract and the transfer and acquisition of property. While not necessary to discuss the subject of capacity in detail here, it may be noted that by the Session Laws of 1923, Chapter 72, both males and females become of legal age at twenty-one years, Washington thus returning to the age which has been fixed by law for centuries. It has been suggested that in Washington the marriage of either a man or woman under the age of twenty-one years has the effect not only of emancipation, but of giving full contractual capacity (See Williston, Sales (2d ed. 1924) §10b, and note to same which cites In re Hollopeter 52 Wash. 41, 100 Pac. 159 (1909) That case, however, held merely that the husband although under legal age was entitled to maintain an action in his own name to secure the custody and society of his wife and the later case of Morgan v. Cunningham, holds that while a minor son is emancipated by marriage it does not remove civil disability The capacity of married women is, of course, subject to the law of community property so far as applicable.

The second paragraph fixing the liability for necessaries at a reasonable price states the prevailing law. While Rem. Comp. Stat. §5829 provides that "A minor is bound, not only by his contract for necessaries,—", this must have been intended to refer to quasi-contractual relations rather than the contract actually made. This was not so.

5 109 Wash. 105, 186 Pac. 309 (1919).
held in *Plummer v. Northern Pacific R. Co.*, wherein Justice Chadwick says, at page 70: "Even if we regard the legal services of appellants as necessaries, it does not follow that the contract made with them is binding. The correct rule is stated in 14 Ruling Case Law, page 255, 'It is, however, inaccurate, strictly speaking, to say that the infant's contract, if for necessaries, is valid and binding upon him. The more accurate statement is that he is liable to pay the reasonable value of such necessaries as he has purchased or received, or, as it is sometimes expressed, he is liable on an implied contract, but not on the express contract which he has made.'"

As to what constitutes necessaries, the rule stated is that which generally prevails.

**Formalities of the Contract**

Sec. 3. Form of Contract or Sale.

Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties. This section states an obvious rule of the common law. Aside from the Statutes of Fraud the only importance of a writing in a contract to sell or of sale is that it furnishes evidence which cannot be varied by parol.

Sec. 4. Statute of Fraud.

(1) A contract to sell or a sale of any goods or choses in action exceeding the value of $50 shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

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6 98 Wash. 67, 167 Pac. 73 (1917).
The Uniform Sales Act as adopted in Washington provides7 that "Section 5826 of Remington's Compiled Statutes is hereby repealed." This section reads as follows:

Section 5826. Contract for Sale of Goods Void When. No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars, or more, shall be good and valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

While the form and wording of section 5826 and the section of the Uniform Act are at great variance, the substance of the two sections is substantially the same, the main effect of the Uniform Act being to give a more accurate and explicit statement of the law as expressed by the weight of authority and as it exists in the State of Washington. The changes and reasons for the same will appear in the following analysis:

"A contract to sell or a sale" definitely shows that the sale applies to executory contracts to sell goods as well as to sales. "Contracts for the sale" is ambiguous but was always construed to mean either a contract to sell or a sale.

The term "goods" as defined in the Uniform Sales Act is as wide in its meaning as the several words "goods, wares, or merchandise." The most troublesome question in any attempt to define the meaning of the word "goods" relates to the dividing line between real and personal property. As to the sale of standing trees the courts of most of the American states that have considered the question have held that a sale of growing or standing timber is a contract concerning an interest in land. The Sales Act copies the definition of "goods" so far as concerns this question8 from the English statute, and adopts the English rule that any growing object attached to the soil is to be treated as goods, if by the terms of the contract it is to be immediately severed.9

The term " choses in action" has been added. This is not included within the term "goods, wares, and merchandise," but in the United

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7 Laws 1925, Ext. Sess., ch. 142, § 77.
8 Laws 1925, Ext. Sess., ch. 142, § 76.
9 See remarks pertaining to this point in Sommers Company v. Piz, 75 Wash. 233, 134 Pac. 932 (1913) the case of the sale of a small house; In re Bloor's Estate, 115 Wash. 507, 197 Pac. 614 (1921) may be similarly analyzed.
States choses in action evidenced by tangible documents such as certificates of stock have generally been recognized as being included within the statute.\textsuperscript{10} The statute has, however, rarely been extended beyond securities which have a visible and tangible form. As there is just as much reason for supporting the transfer of intangible property by written evidence as the transfer of visible property, the Sales Act expressly includes choses in action.

The use of the word “value” instead of the word “price” is more precise, as it covers contracts of barter which have always been interpreted to be within the terms of the statute. The Act as adopted by the Commissioners fixes the amount at $500 and the majority of the states have adopted this amount. Washington follows a number of states in adopting the amount as $50.\textsuperscript{11} Others vary from sales irrespective of value, to the amount fixed in Ohio at $2500.

The words “shall not be enforceable by action” more accurately express the effect of non-compliance with the statute. In Rem. Comp. Stat. §5826 the title includes the term “void” and the section itself reads “No contract shall be good and valid.” As it is generally held that the statute affects only the enforceability and not the validity of a bargain, the use of such terms as “void” and “not valid” are obviously confusing as well as inaccurate.

The methods of satisfying the statute, although slightly different in wording, are the same. While occasionally the word “delivery,” and even the word “acceptance,” is used as the equivalent of acceptance and actual receipt, it is clear that acceptance and actual receipt are imposed by the statute as a double requirement. Further, it may be noted that receipt may precede acceptance or that acceptance may precede receipt.\textsuperscript{12} At the present day earnest money as distinguished from part payment is seldom or never given. It would, perhaps, still be binding, but as distinguished from part payment is now of little practical importance. Part payment does not require payment in money. Even the discharge of a prior debt will be sufficient provided there is evidence of the discharge. A detriment incurred in reliance on the oral contract, but not part of the price, is obviously insufficient either as part payment or as earnest. Interesting cases to this effect are found in Hewson v. Peterman Mfg. Co.,\textsuperscript{13} where

\textsuperscript{11} Laws 1925, Ext. Sess., ch. 142, p. 356.
\textsuperscript{12} Hoerner v. McDonnell, 114 Wash. 489, 195 Pac. 231 (1921).
\textsuperscript{13} Note 10, supra.
the plaintiff's having given up his position to go to work for the defendant was held not earnest or part payment— and Coleman v. St. Paul & Tacoma Lumber Co.,\(^\text{14}\) where it was held that the payment of expenses in exploring property was not the giving of something in earnest. As to the note or memorandum, and the signature of the party to be charged or his agent, the decisions in Washington generally express the views prevailing in other jurisdictions.

Subsection (2) definitely states the line of demarcation between contracts for work and labor and contracts for the sale of goods. The original statute left room for three different interpretations, which gave rise to three different views designated as the English, the Massachusetts, and the New York rules. The English rule was perhaps the more logical in basing the test upon whether the parties intended ultimately to pass the title to a chattel. The New York rule drew the distinction between goods to be manufactured which were treated as not within the statute and goods already in existence, which were held within the statute. The Massachusetts rule made no distinction as to whether or not the chattel was then existing but particularly considered whether the article was made in the usual course of business or made specially for the buyer; in the former case it was deemed a contract for a sale, and in the latter case a contract for work and labor. The Sales Act is an adoption of the Massachusetts rule, which was the one most commonly adopted prior to the Uniform Sales Act. The State of Washington early recognized the Massachusetts rule.\(^\text{15}\)

Subsection (3) makes the test of acceptance a willingness to take the particular goods. Some jurisdictions had held that mere words were not sufficient to constitute an acceptance. This section makes it clear that either words or conduct are sufficient and also makes it clear that the acceptance may be either before or after the delivery of the goods.

**SUBJECT MATTER OF CONTRACT**

Sec. 5. *Existing and Future Goods.*

(1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2) There may be a contract to sell goods, the acquisition of which

\(^{14}\) Note 10, supra.

by the seller depends upon a contingency which may or may not happen.

(3) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

Undoubtedly, the seller could at common law contract to sell goods which he did not own. Contracts by a manufacturer for the sale of his future product and contracts by dealers who expect later to acquire the subject-matter of their contracts, are common illustrations. The only question raised in the law has been the one of public policy relating to contracts of speculation. These have been determined as against public policy only when they are in effect pure wagers as to price. There is nothing in the wording of this section to permit or make legal wagering contracts. The same may be said for subsection (2).

The seller and buyer may make a contract which purports to be a present sale of goods which in fact the seller does not own. Obviously, there can be no transfer of title, but the question at once presents itself—what is the effect of such an agreement? It might be suggested that it being impossible to pass title, no effect should be given to such a contract; but the more reasonable interpretation would be that the parties intended some effect, and the Sales Act has accordingly declared this agreement to operate as a contract to sell the goods. An exception should be noted, however, in the case where only the seller knows that he has no present title to transfer. In such a case the seller would be estopped from asserting his title upon later acquisition of the goods purported to be sold. In effect, at least as between the parties, the title would pass with no further act of appropriation as would be required in the event it were treated as a mere contract to sell.

The anomalous doctrine of potential possession or potential existence existed under the common law to the effect that in some instances the equivalent of a present sale could be effected although the seller did not then possess the goods or the goods were not in existence. These cases were restricted to future increase from the root, stem, or stock then owned by the seller and the doctrine found its application for the most part in the cases of crops and the offspring or natural products of animals. This doctrine although seldom applied has been recognized in many American jurisdictions. For instance, in North Idaho Grain Company v. Callison, Justice Chadwick states: "This being so, all authorities concur in laying down the rule that there can

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be no valid executed sale unless the thing sold has either an actual or potential existence at the time of the sale. That is to say, it must actually exist and be in the possession or under the control of the vendor, or it must come out of something that is in his possession or under his control, as for instance, growing crops, goods in the process of manufacture, the increase of cattle and the like.” While this is rather unusual in including “goods in the process of manufacture,” it in general recognizes the existence of the doctrine. The doctrine is more commonly recognized in cases of chattel mortgages, which cases are, however, capable of being explained on an equitable doctrine and are often provided for by statute. (In Washington, Rem. Comp. Stat. §3779 provides that mortgages may be made upon growing crops provided such crops are sowed or planted within one year from the execution of the mortgage.) In so far as the doctrine is recognized in the cases of chattel mortgages it will not be affected, since the Sales Act expressly provides in section 75 that its provisions are not applicable to mortgages.

As subsection (3) provides that the effect of a present sale of future goods is to operate as a contract to sell and no exception is made in favor of goods of which the seller has the potential possession it may be assumed that the adoption of the Uniform Sales Act does away with this doctrine. In view of the many objections to the doctrine in rendering titles uncertain so far as third parties are concerned, this seems most desirable. As stated by the draughtsman of the English Sale of Goods Act, “there is no rational distinction between one class of future goods and another.”17

Sec. 6. Undivided Shares.

(1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass, and the seller is

bound to make good the deficiency from similar goods unless a contrary intent appears.

Subsection (1) states a well recognized rule in all jurisdictions.

Subsection (2) follows the doctrine of *Kimberly v. Patchin*. This does not represent the law of England and is contrary to a large minority group of the American jurisdictions.

The difference between the two views lies in the interpretation or construction of the transaction. It is a well recognized rule of law, as well as of logic, that no title can pass to unidentified or unascertained goods. When the seller purports to sell a definite number of goods in a definite mass as provided by subsection (2), the English courts construe this to be an attempt to sell specific goods before they are ascertained, and, therefore, that it is impossible to do so. As it is impossible to determine these goods specifically until an appropriation is made, no title can pass to any specific goods and, therefore, no title does pass. The construction given by the courts of the United States, however, is in accord more with the parties' intent than with a literal construction of the words used. If in these cases it is clear that the parties have attempted to pass title as, for instance, where the seller has been paid and acknowledges that he holds the goods for the buyer, it seems quite plausible that the parties contemplate that the buyer instead of becoming the owner of any specific goods shall rather become the owner of a portion of the goods; in other words, he becomes a tenant in common owning a share of the mass measured by the amount sold compared to the entire mass.

It should be observed that this rule applies only to cases of fungible goods, that is, goods comprised of units each of which is deemed by the parties in the particular transaction to be of equal value to the other. Moreover, the fundamental rule that title to personal property passes according to intention controls; accordingly, the rule is not called into play until the intention to pass title is manifest. In the case of *Anderson v. Crisp*, the doctrine of *Kimberly v. Patchin*, supra was urged, but not applied, as Justice Dunbar felt that the subject-matter was not strictly fungible and something further remained to be done. In the later case of *Mayer v. Gibson*, the goods being fungible and the intention clear, the doctrine of *Kimberly v. Patchin*, supra, was expressly approved.

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18 19 N. Y. 330 (1859).
19 5 Wash. 178, 31 Pac. 638 (1899).
20 114 Wash. 394, 195 Pac. 1 (1921).
Cases which involve a selection of a portion of the mass must be carefully distinguished. That there is to be a selection, necessarily implies that the contents of the mass are regarded by the parties as differing in value and it would be a direct violation of the terms of such a bargain to say that it was in effect an agreement to create a tenancy in common in the mass. If specific goods are to be selected, it might be urged that there is a sale of specific goods, even so, the property would not pass until the separation is made. This would be overcome ordinarily by delivery to the buyer, but if the terms of the bargain were not sufficient to enable any competent person to determine to what parts of the mass the bargain related, it would seem impossible for the property to pass until the separation was made.\footnote{\textit{See Lauber v. Johnson,} 54 Wash. 59, 102 Pac. 873 (1909).}

Sec. 7 \textit{Destruction of Goods Sold.}

(1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character the buyer may at his option treat the sale:

(a) As avoided; or

(b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.

This section expresses the existing law Subsection (1) is sometimes put upon the ground of impossibility, sometimes upon the ground of mistake, and sometimes upon the ground of lack of mutual assent. Subsection (2) provides for the case of deterioration or partial destruction of the goods when unknown to the parties at the time they enter into the sale.

Sec. 8. \textit{Destruction of Goods Contracted to Be Sold.}

(1) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a ma-
material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract:

(a) As avoided; or

(b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

This section is also believed to express the existing law. Subsection (1) is a well recognized principle of the law of contracts. Subsection (2) (a) is also a well recognized principle in the law of contracts, and subsection (2) (b) is merely an application to the law of sales of the general doctrine of election.

The Price

Sec. 9. Definition and Ascertainment of Price.

(1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealings between the parties.

(2) The price may be made payable in any personal property.

(3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Subsection (1) states a principle obvious under the law of contracts and is based on section 8 of the English Act.

Subsection (2) provides that barter shall be covered by the Act. It would seem unfortunate in codifying the law of sales to exclude contracts of exchange which turn on precisely the same principle. Exchanges have always been held within the section of the Statute of Frauds relating to the sale of goods and in the construction of other statutes the word "sale" usually includes transactions other than for a money price. On the other hand, different principles are often applicable where a bargain concerns real estate, and these cases are, therefore, expressly excluded by subsection (3).

Subsection (4) is in accord with well recognized principles.
Sec. 10. Sale at a Valuation.

(1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by parts IV and V of this act.

This section states the general law. It is for the parties to make their own bargain, and if they never have arrived at an agreement as to an essential term, there should be no obligation on either side. If the buyer has actually appropriated the goods without the value being fixed, the law will construct the contract. The interesting question will arise as to how far the valuation is conclusive upon the parties. The prevailing rule is that in the absence of mistake or fraud, the price fixed by agreed valuers is conclusive upon the parties. The question presented is analogous to the cases of the engineer's or architect's certificate. In Washington, the Court apparently exercises a somewhat liberal right to revise the conclusion of the architect or engineer. See Taft v. Whitney Co., wherein Justice Main says:

"The rule of these decisions is, that where construction work is to be done to the satisfaction of a third party, such as an architect, the judgment of such third party either in approving or condemning the work, must be exercised in an honest and independent manner and not in an arbitrary or fraudulent manner. If the approval or condemnation of the work is arbitrary, it amounts to a constructive fraud."

This probably reflects the view that the Court will take in the case in question should the same arise.

Conditions and Warranties

Sec. 11. Effect of Conditions.

(1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the nonperformance of the condition as a breach of warranty.

22 85 Wash. 389, 392, 148 Pac. 43 (1915).
(2) Where the property in the goods has not passed, the buyer may
treat the fulfillment by the seller of his obligation to furnish goods as
described and as warranted expressly or by implication in the contract
to sell as a condition of the obligation of the buyer to perform his
promise to accept and pay for the goods.

This section preserves the distinction between conditions and war-
ranties or other promises, and aims to avoid the confusion in this
difficult subject which is largely traceable to terminology. The Eng-
lish Act authorizes not only the waiver of a condition, but the election
to treat the breach of any condition to be fulfilled by the seller as a
breach of warranty. This use of condition as including promise or
warranty is confusing and unfortunate. In the Sales Act the word
condition is never used in the sense of a promise.

The English Act treats a warranty as collateral to the main purpose
of the contract, the breach of which gives rise to a claim for damages
but not to a right to reject the goods and treat the contract as repudi-
ated. That is, the warranty is a promise, but the performance of the
promise is not a condition. Under the Sales Act the word is limited
to what is probably its essential meaning—a material promise. It is,
therefore, not necessary to determine under the Sales Act whether the
promise is or is not collateral, in either event the innocent party has
the right to rescind or repudiate the transaction. The opinion of Ellis,
J., in Hurley-Mason Co. v. Stebbins,\textsuperscript{23} well illustrates the diffi-
culties involved. In that case the parties had entered into a
contract to sell cement subject to certain tests. It was found
that the provision for tests was a condition of the contract and
not a collateral warranty; that a collateral warranty placed the con-
sequences of a failure of the article to perform to the given standard
(survive the test) upon the seller, so that the purchaser's remedy
would survive his acceptance. On the other hand, it was found that
a condition would merely be precedent to acceptance, placing the con-
sequences of the failure to inspect or to make the test upon the pur-
chaser. It is suggested that the real question was whether or not
the seller had promised that the condition should happen or be per-
formed, if he had, it would make no difference under the Sales Act
whether collateral, direct, condition or warranty, for in the latter part
of subsection (1) it is expressly provided that non-performance of the
condition under circumstances may be treated as a breach of warranty,
and it is further provided in a later portion of the Sales Act, that in

\textsuperscript{23} 79 Wash. 366, 374, 375, 140 Pac. 381 (1914).
cases of breach of warranty, the buyer may accept the goods without waiving the breach and recover damages for the non-performance. See also the opinion of Morris, J., in Springfield Shingle Co. v. Edgecomb Mill Co. The often difficult question of determining whether a promise is or is not collateral is thus obviated.

Obviously, the buyer's promise is impliedly conditioned on the performance by the seller of his promise and this is so provided in subsection (2)

Sec. 12. Definition of Express Warranty.

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

On theory the fundamental basis for liability on warranty is the justifiable reliance by the buyer on the seller's assertions. At common law and under the English Act the meaning of warranty has not always been clear and the line of division between express and implied warranties has not been exact. The definition of an express warranty under the Sales Act is one that is derived from the use of express language. As to form, it may be either a promise or a representation. The real test is—does the promise or affirmation or representation (language used) of fact tend to induce the buyer to purchase the goods and, further, does the buyer purchase the goods relying thereon. Under such a test it is not the intent of the seller, but what the seller says and the reliance of the buyer that are alone important. An early case in Washington, Huntington v. Lombard, was the precedent for later cases in holding that it was immaterial whether the representations by the seller were intended to be a warranty if the buyer did in fact rely upon them.

The Act merely restates the law as to affirmation of value of opinion not being construed as a warranty. It is apparent that to justify reliance the representation should be one of fact. The Washington cases are in line with this part of the definition, varying occasionally

24 Sec. 69, Sales Act; Laws 1925, Ext. Sess., ch. 24, p. 385.
25 52 Wash. 620, 626, 101 Pac. 233 (1909).
26 22 Wash. 202, 60 Pac. 414 (1900).
on the difficult question of whether a particular representation is one of fact or one of opinion.\textsuperscript{27}

As no distinction is made in the form of words used it is apparent that words of description, as well as collateral representation, will constitute an express warranty. Most of the Washington decisions seem to have been cases of description, but usually the descriptions were used for the purpose of identification. When so used, while included in the foregoing definition of an express warranty, the warranty is rather an implied one in the sense that the promise is implied that the goods will correspond with the description. Such warranties are discussed under section 14, infra. In the case of specific goods, as it is apparent the description is not used for the purpose of identification, the warranty, if any, arising from the description, must be one of character or quality and is, therefore, designated an express warranty. Whether covered by section 12 or section 14, infra, the descriptive statement upon which the buyer justifiably relies constitutes the warranty.\textsuperscript{28}

It may be noted that the tendency of the courts has been distinctly in the direction of greater strictness against sellers' statements, and this seems commendable in view of the modern trend of business towards higher and more exact standards.

Sec. 13. \textit{Implied Warranties of Title.}

In a contract to sell or a sale, unless a contrary intention appears, there is: (1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract of sale is made.

(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee or other person professing to sell by


virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

As distinguished from express warranty an implied warranty is one which arises from the transaction, usually irrespective of words and not dependent on words. It should be noted that under the foregoing provisions of the Sales Act that there is (1) a warranty not only of a present right to sell, but of quiet enjoyment; and (2) the omission of any requirement as to possession. Where the seller is in possession of goods it has been uniformly held in the United States that a warranty of title is implied. There are a few decisions and more dicta that there is no warranty of title where the vendor is out of possession. The weight of authority is against such a distinction. The Sales Act by the omission of the requirement does away with this distinction. This will at least relieve a doubt that may have arisen from several decisions in Washington by implication. In *Baker v. McAllister* the Court says: “It also clearly appears that at the time the lumber was sold, it was in the possession of the defendant.” In *North American Commercial Co. v. North American, etc.*, the Court says: “Moreover, the coal was in the constructive possession of appellant at the time of the sale, and the law, therefore, raises an implication of warranty of title.” And, in *Baker v. Shaw* the Court says: “If A, being in possession of the property...” These cases apparently recognize possession as an important element.

As to subsection (2), there has been a controversy as to whether the implied warranty of title should also include a warranty against the disturbance of possession. The Sales Act settles this. The effect of this provision would seem to be to give the buyer the right to proceed immediately though his possession was not disturbed, and if later his possession was interfered with he could bring another action on the implied covenant of quiet enjoyment and recover the damages which he failed to recover in the first action.

The rule expressed in subsection (3) was recognized in *Baker v. Shaw*.

Subsection (4) restates well settled rules. These agents are, however, liable for their actual representations. It may further be noted

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29 2 Wash. Terr. 48, 3 Pac. 581 (1880).  
30 52 Wash. 502, 100 Pac. 985 (1909).  
31 68 Wash. 99, 192 Pac. 611 (1919).  
32 1 WILLISTON, SALES (2 ed. 1924) § 221.  
33 68 Wash. 99, 104, 192 Pac. 611 (1919).
that an agent in fact warrants his authority and may bind the principal to a warranty so far as he acts within his authority.

Sec. 14. **Implied Warranty in Sale by Description.**

Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.

This section expresses the well recognized law of Washington. See *Springfield, etc., v. Edgecomb, etc.*, supra, and the other cases cited under section 12, supra.

Words may be used (1) to describe the quality or condition of goods sold or (2) to describe the goods bought for the purpose of identification. The former are included in the definition of express warranty. The latter are in a sense conditional to the buyer’s obligation, as the buyer’s obligation is impliedly conditional on performance by the seller and the seller does not perform unless he tenders goods of the description bought. If the seller has promised expressly that he will deliver the described goods clearly there is an express warranty or its equivalent. This section provides that even though not promised expressly there is an implied promise to deliver goods according to the description and in this sense there is an implied warranty. It is thus definitely settled that the description entails obligation on the seller and is more than a mere condition. This is clearly stated and recognized in the case of *Springfield Shingle Co. v. Edgecomb Mill Co.*, supra. Used in this sense this section plainly applies to goods which are not specific. It does not provide for the warranty of quality. Whether there may be an implied warranty of quality outside of description, such as fitness or merchantability, will depend upon the provisions in sections 15 and 16. The obligation imposed upon the seller who contracts to sell or make a sale by sample will be considered later. Obviously, such a sale should not exclude the usual obligation imposed by a description when a description is used, as the sample with the description by words makes the total description, the sample as here used is merely an identification by a physical specimen rather than by words.

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34 Note 28, supra.
Sec. 15. *Implied Warranties of Quality.*

Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name there is no implied warranty as to its fitness for any particular purpose.

(5) An implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under the act unless inconsistent therewith.

The provisions of the Sales Act are copies from the English statute and the English statute was intended to express the common law of England as it existed at the time the Act was passed. It may, therefore, be supposed that the liability of a seller under the Sales Act will be somewhat greater than that imposed by the common law of many jurisdictions of the United States. According to the English law (and also under the American Sales Act) the seller impliedly warrants the merchantable character of the goods which he sells as fully when he is merely a dealer in goods of that description as when he is a manufacturer. Accordingly, the distinction made in *Hoyt v. Hansworth Motor Co.* between a manufacturer and a dealer is no longer the law.

Subsection (1) is the only subsection under which a warranty of a specific chattel can be implied. It applies to all sellers. It is based on the fundamental principle of justifiable reliance. Whether the warranty shall be implied in a given case is essentially a question of

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35 1 WILLISTON, SALES (3 ed. 1924) § 248.
36 1 WILLISTON, SALES (2 ed. 1924) § 233.
37 119 Wash. 440, 192 Pac. 918 (1920).
fact. The words used are "particular purpose," and this raises the question as to whether there may be the implication of a warranty of merchantability and, if this may be inferred, the further question whether the customary or usual use may not always be inferred as the particular use in the absence of evidence otherwise. Liability would, of course, depend on the further qualification in the section that the buyer actually does rely on the seller's skill or judgment. Williston says:

"In regard to subsection (1) some difficulty of construction has been felt. This is the only subsection under which a warranty of a specific chattel can be implied and the question has been raised—do the words of this subsection justify the implication of a warranty of merchantability, or must the words 'particular purpose' be held to indicate that the section is not aimed at general merchantability but only at more specific purposes? It would be unfortunate if the section should be narrowly construed, and had it not already received a liberal construction in England, a construction which it may be assumed American courts would follow, it would be undesirable to copy the English legislation in this matter."38

Benjamin says:

"A 'particular purpose' is not some purpose necessarily distinct from a general purpose, for example, the general purpose for which all food is bought is to be eaten, and this would also be the particular purpose in any specific instance. A particular purpose is, in fact, the purpose, expressly or impliedly communicated to the seller, for which the buyer buys the goods; and it may appear from the very description of the article, as, for example, 'coatings' or a 'hot-water bottle.' But where an article is capable of being applied to a variety of purposes the buyer must particularize the specific purpose he has in view. The purpose for which the goods are required need not necessarily appear in the contract itself, but may be proved by evidence of matters ab extra the contract, even when it is in writing, if such evidence does not contradict the contract. The purpose intended 'may be gathered from the course pursued by the parties, and from their conduct and acts and writings antecedent but leading up to the contract itself.'"39

Cases bearing out this contention as to merchantability are Sampson v. Pals Co.,40 and Parker v. Shaghalian,41 each case holding this though the goods were sold under a trade name.

38 1 Williston, Sales (2 ed. 1924) § 248.
39 2 Benjamin on Sales (6 ed. English) 715-716.
40 192 N. Y. Supp. 538 (1922).
41 244 Mass. 19, 138 N. E. 236 (1923).
There are many cases in Washington recognizing that there may be an implied warranty for a particular purpose and they do not limit it to the manufacturer.\textsuperscript{42}

Subsection (2) provides for an implied warranty that the goods shall be of merchantability in the sale of goods by description. Section 12 covers description as an express warranty when the description goes to merchantability and section 14 covers the implied warranty of description for purposes of identification that the goods shall correspond to the description. It is obvious that this might be possible and still the goods might not be merchantable. The subsection, accordingly, provides for the additional implied warranty that when goods are sold by description they shall be of merchantable quality. This is limited, however, to dealers. Williston says:

"Though the terms of this subsection are confined to dealers, it is not to be supposed that one who is not a dealer and who contracts to sell goods by description to be furnished in the future, can perform his contract by tendering unmerchantable goods. It is only where the goods are actually bought that subsection (2) is applicable.\textsuperscript{43}"

The section relates only to unspecified goods. This section changes the rule as to the distinction suggested between manufacturers and dealers in \textit{Hoyt v. Hansworth Motor Co.}, supra, also recognized in \textit{Hurley-Mason Co. v. Stebbins}.\textsuperscript{44}

Subsection (3) expresses the better view in regard to inspection. Where inspection is had or may be had at the time the bargain is made, the courts usually hold that the inspection precludes the existence of any implied warranty, regardless of whether the defect is latent.\textsuperscript{45} This subsection limits the qualification to defects which the examination ought to have revealed.\textsuperscript{46} It might be thought that the subsection changes the law in that it refers only to examination and says nothing of opportunity to examine, and, therefore, that the opportunity to examine is unimportant. It has been held, however, that the buyer when given full opportunity to inspect has examined the goods within the meaning of the Act.\textsuperscript{47} This makes the rule definite so far

\textsuperscript{43} 1 Williston, Sales (2 ed., 1924) § 348.
\textsuperscript{44} 79 Wash. 361, 140 Pac. 394 (1914).
\textsuperscript{45} Springfield Shingle Co. v. Edgcomb Mill Co., 52 Wash. 620, 101 Pac. 233 (1909).
\textsuperscript{46} Hurley-Mason Co. v. Stebbins, note 44, supra, Ketchum v. Stetson Mill Co., 33 Wash. 92, 73 Pac. 1127 (1903).
\textsuperscript{47} Thornett v. Beers, (1919) 1 K. B. 486.
as an implied warranty is concerned. Inspection will not preclude a specific express warranty, although it might well preclude implications in a general express warranty so far as the defects are obvious.

Subsection (4) is a restatement of the rule in regard to a known, described, and defined article. It states the general rule. When goods are to be identified by description and the buyer makes known the particular purpose for which the goods are required, evidence that the buyer asked for something by its patent or trade name would be almost conclusive evidence that the buyer relied upon his own judgment. This, however, should not prevent the buyer's reliance on the fact that there may be merchantable articles under the trade name in the sense that they are in fact what they purport to be and are not worthless because of latent or hidden defects.

Subsection (5) lays down a rule contrary to that generally adopted in the United States. It is, however, in accord with the English law and the Sale of Goods Act. Evidence was admitted to deprive a buyer of a warranty which would otherwise have been implied in Seattle Seed Co. v. Fijimori. The admissibility of usage or custom for such a purpose involves no different question than the rule adopted in the subsection.

Subsection (6) pronounces what seems to be the logical rule, although it has been broadly stated that an express warranty in a contract to sell or the sale necessarily excludes any implied warranty. Obviously, if express warranties are in their nature inconsistent with implied warranties it would be violating the parties' intentions to imply such warranties. It is apparent, however, that if the seller makes some express warranty it certainly ought not to exclude an implied warranty that an article sold shall answer the description and be fit for the purpose intended if these warranties, not being inconsistent, would otherwise be implied. This subsection brings the authorities into accord. Of course, the parties may provide expressly that there shall be no warranties, and when there is a complete written contract of sale it is usually held that the parol evidence rule excludes warranties not in the contract. It may be suggested that this latter rule seems doubtful as to such warranties that arise regardless of intention or assent and are not, therefore, dependent on the written contract.

48 Peninsula Motor Co. v. Daggett, 196 Wash. 275, 218 Pac. 263 (1923).
49 See Parker v. Shaghalin, 244 Mass. 19, 138 N. E. 236 (1923).
50 79 Wash. 123, 139 Pac. 866 (1914).
Sec. 16. *Implied Warranties in Sale by Sample.*

In the case of a contract to sell or a sale by sample:

(a) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

The sample amounts to a representation and is in effect a shorthand description. Subsection (a) recognizes this and the warranty is implied that the bulk shall correspond with the description. This is a warranty for the purpose of identity similar to the warranty in sale by description discussed in section 14, supra.

Subsection (c) adds a warranty of quality in certain cases, that is, where the sale is by a dealer, but not otherwise. This is the warranty of merchantability, added just as the warranty of merchantability in sales by description by dealers was added by subsection (2) in section 15 not having been imposed by section 14.

The effect of section 16 is merely to provide specifically for the implied warranties arising where samples are used for the purpose of description.

Subsection (b) states a general rule discussed subsequently. It merely shows that the duty of the seller to afford the buyer an opportunity for inspection is not dispensed with in sales by sample.

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(To be continued.)

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