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

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Section 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

This section evidences two changes from existing statutory law. First, it creates a warranty on the part of dealers in goods of the kind sold that no right of a third person, such as a patent right, is infringed. Reasonable minds may well differ whether under the existing statute such a warranty exists, the difference in interpretation involving the words of the statute imposing a warranty that the seller "has a right to sell the goods," which seem to encompass warranties against infringement. Indicating that such a warranty is not included, however, is the title of the section, "Implied Warranties of Title," for clearly infringe-
ments do not involve questions of title.\textsuperscript{2} Clarification of this matter is obviously desirable.

The second change worked by this section is a simplification in the statement of the substance of the warranty of title, for under the present Uniform Sales Act, three warranties are separately identified: (1) the warranty of a right to sell; (2) the warranty that the buyer will have quiet enjoyment of the property; and (3) the warranty that the goods are free from encumbrance at the time of the sale.\textsuperscript{3} This detailed elaboration reflects a policy of ensuring that the buyer’s cause of action for breach of the warranty will not be barred by the running of the statute of limitations during a time when the buyer is unaware of the breach.\textsuperscript{4} The theory is that the warranty of quiet enjoyment cannot be breached until there is an actual interference with the buyer’s interests, however long after the date of the sale. The statute of limitations period for breach of that warranty thus runs from the date of the interference, not from the date of the sale.

The Code has adopted a contrary policy, by providing a four year limitation period starting from the date of the sale, which as applied to the breach of the warranty of title means that the cause of action is barred after this period even though the buyer did not know of the defect in title and even though the interference with his possession may come after the limitations period has run.\textsuperscript{5} An exception to this will, presumably, be made in the case of conditional sales of chattels. The current statute has been interpreted by the Washington court to mean that the conditional seller is not required to have title at the time he enters the contract, but only at the time such “title” is to pass to the buyer.\textsuperscript{6}

Adoption of the Code would seem to present an opportunity for the court to reconsider this holding, because it may have been overly in-

\textsuperscript{2} Cassidy & Possin, Implied Warranties Against Infringement in the Sale of Goods, 27 GEO. WASH. L. REV. 673 (1959); Robertson, Implied Warranties of Non-Infringe-


\textsuperscript{4} 1 WILLISTON, SALES § 221 (rev. ed., 1948).

\textsuperscript{5} If the buyer actually knows of the defect of title, there is no warranty against this defect, by the express wording of subsection (1) (b) of the presently discussed section of the Code. This does not change existing law. Spokane Sec. Fin. Co. v. Titus, 170 Wash. 508, 16 P.2d 1053 (1932).

fluenced by the Washington concept of conditional sales, by which the seller is virtually seen as withholding the "title" to the goods almost as if the transaction were an executory contract to sell. One would believe that a conditional buyer should be permitted, on discovery of a defect in title during the period of his instalment payments, to demand some assurance that the title will be clear at the time the last instalment is due. The buyer should not be forced to continue his payments in the face of a substantial risk that all he is purchasing is a lawsuit.

The Code repudiates those decisions imposing a warranty of title only in situations where the seller is in possession of the goods, thus obviating the need to resort to the fiction of "constructive possession" once used in an early Washington decision.

Subsection (2) of the section restates the present Washington case law.

There are two problems relating to the warranty of title which are not expressly treated in this section of the Code, but are handled in other sections. The first involves the requirement of "privity," which in Washington has been held to mean that, in the case of the warranty of title, each purchaser must look for recompense to his immediate vendor, for the warranty does not "run with the goods." Adoption of the Code will not, as will be seen in the discussion of section 2-318, require a modification of this rule.

But a second holding of the Washington court will be reversed by the Code. This is the case of O'Connor v. Tesdale, holding that the notice requirements of the present statute do not apply to the breach of warranty of title. Under the Code, reasonably timely notice to the seller of the defect in title is required, where the seller's breach is innocent, but not where he knew of the defect in title.

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7 This is evidenced by the Washington (clearly minority) rule that the risk of loss is on the vendor, because he has title. Holt Mfg. Co. v. Jaussaud, 132 Wash. 667, 233 Pac. 35 (1925). See Shattuck, Secured Transactions Under the UCC, 29 Wash. L. Rev. 1, 39 (1954).
8 The buyer is, indeed, expressly given a general right to demand and receive this assurance by a specific provision of the Code, § 2-609, to be discussed hereafter.
9 Official comment 1.
12 Peregrine v. West Seattle State Bank, 120 Wash. 653, 208 Pac. 35 (1922).
13 34 Wn.2d 239, 209 P.2d 274 (1949).
14 RCW 63.04.500 [Uniform Sales Act § 49].
15 Uniform Commercial Code, § 2-607.
16 Official comment 2 to the present section.
Section 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

It is quite obvious that many, indeed most, of the litigated cases involving express warranties turn on factual issues. These questions of fact exist under the present statute, and will continue to exist under the Code. The Washington cases are illustrative of the types of factual issues to be expected: (1) What, in fact, did the seller really say?\textsuperscript{17} (2) Did the person making the alleged statement have authority to bind the seller therefor?\textsuperscript{18} (3) Under what circumstances will a retailer or wholesaler adopt warranties stated in the manufacturer's advertising or on the containers for the goods?\textsuperscript{19} (4) Under the particular situation, were the words used a warranty or merely a statement of "value," or "opinion," and the like?\textsuperscript{20} (5) Was the sale,\textsuperscript{20}

\textsuperscript{17} Bosscher v. Leenders, 49 Wn.2d 397, 301 P.2d 1080 (1956); Glaspey v. Wool Growers Serv. Co., 151 Wash. 683, 277 Pac. 70 (1929).


\textsuperscript{20} Smith v. Frontier, Inc., 53 Wn.2d 805, 337 P.2d 299 (1959) (recapped tires warranted as good as new tires); McDonald Credit Serv., Inc. v. Church, 49 Wn.2d 400, 301 P.2d 1082 (1956); Miller Lumber Co. v. Holdin, 45 Wn.2d 237, 273 P.2d 786 (1954); Jeffery v. Hanson, 39 Wn.2d 855, 239 P.2d 346 (1952); Beers v. Martin, 30 Wn.2d 1, 190 P.2d 573 (1948); Getty v. Jett Ross Mines, 23 Wn.2d 45, 159 P.2d 379 (1945); Letres v. Wash. Co-op Chick Ass'n, 8 Wn.2d 64, 111 P.2d 594 (1941); Randa-
in fact, a sale by description?\(^6\) Was the particular use of a sample such as to constitute a technical sale by sample?\(^2\)

One feature of warranty liability under the present statute that has raised fact inquiries has been the question of whether or not the buyer really relied upon the statements of the seller.\(^2\) The Code does not require such reliance.\(^2\) Instead, the issue is whether or not, under the circumstances; the seller’s statements, his use of a sample, or his description become part of the basis of the bargain, and the presumption is that any such conduct by the seller becomes part of the contract, “unless good reason is shown to the contrary.”\(^2\) As under existing law,\(^2\) this will be determined objectively without regard to the intent or state of mind of the seller.

Perhaps the principal contribution of this section is the clarification of a point doubtful under the existing statute, i.e., whether the warranties arising from description are express or implied.\(^7\) They are classified by the Code as express, as is the warranty arising in sales by sample, a matter of great significance where an effort is made to disclaim warranties. The point is illustrated by the famous old case of Shepherd v. Kain,\(^8\) where the seller advertised a “copper fastened...
vessel" to be taken "with all faults." After the sale, the buyer discovered that the vessel was not, in fact, "copper fastened" and the issue was whether his purchase of the boat "with all faults" precluded his remedies for failure of the boat to meet the description. In holding that the buyer might rely on a warranty, the court emphasized that the general disclaimer, when used in connection with the description, was not sufficient to cut off the seller's liability. The same result would follow under the Code, as will be seen.

The basis under the Code would be that the description and the qualifying phrase "with all faults" must be consistently construed, and so construed manifest that the faults referred to are those other than the noncompliance of the boat with the express warranty given in the description.

Two points of relevance to the Washington law are emphasized in the official comments to this section but not clearly spelled out in the section itself. The first is that warranties made after the sale has been made will be binding, because if they become the basis of the bargain as a modification of that bargain, no consideration for the change is necessary.

The second point made is that the Code does not imply that warranties arise only in a sales transaction. Thus the Code will leave open for consideration such cases as Gile v. Kennewick Public Hospital, in which the "non sale" nature of the furnishing of blood by a hospital was emphasized as a basis of denial of warranty liability, and Boyle v. King County, where the court refused to find a warranty on the ground that the transaction involved in disposal of garbage to a pig farmer was a "public service contract" and not a sale.

Section 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this Section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
(2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Subsection (2) is the first effort to state in detail in statutory form precisely what is meant by merchantable, but even this list is not intended to be exhaustive. The only specific requirement of merchantability stated in the Code which is not generally recognized under the Sales Act seems to be the sixth and final one, requiring that goods to be merchantable must conform to the affirmations of fact or promises on the label. Since under the present law, the issue here is whether or not the dealer by selling affirms or makes as his own statements on the label or container, the Code substitutes an implied warranty for an express warranty which inevitably involved factual disputes. In Washington, similar treatment has been given warranties appearing on the packaging and disclaimers thereof, to the effect that since the retailer or wholesaler does not necessarily affirm the warranties so stated, he likewise does not necessarily have the advantage of a disclaimer so stated. The Code does not address itself to this question. It would seem that to the extent that liability is imposed on a seller other than the one who expressly made the representations, that liability should be coincident to and not greater than the liability on the express warranty as stated, thus giving the retailer the benefit of any disclaimer clause.

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33 Vold, Sales 437 (2d ed., 1959) illustrates the generality of the concept of merchantability under the Uniform Sales Act.
34 Official comment 6.
While the Washington court has followed the traditional path in defining "merchantable" as being reasonably fit for the ordinary purposes for which intended, the court has far more frequently handled cases on the basis of the warranty of fitness for a particular purpose. That is to say, in many consumer items the particular purpose of the buyer (which the Washington court has stressed) is merely the intention to use the product in the ordinary way, such as to drink a Coke, wear a sweater, put tires on a car, without any indication of a unique need on the buyer's part. This usage should not be continued under the Code.

Under the present statute, the warranty of merchantability is imposed only against a dealer in sales by description. This requirement does not apply to actions based on the warranty of fitness for

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57 Baum v. Murray, 23 Wn.2d 890, 162 P.2d 801 (1945) (recognizes the concept of merchantability as applied to food, but does not spell out what this means); Dalton v. Pioneer Sand & Gravel Co., 37 Wn.2d 946, 227 P.2d 173 (1951); Lockit Cap Co. v. Globe Mfg. Co., 158 Wash. 183, 290 Pac. 813 (1930) (goods need be only of ordinary quality); Hoyt v. Hainsworth Motor Co., 112 Wash. 440, 192 Pac. 918 (1920) (refers to the warranty as being that the goods will be "of fair average quality of goodness according to its kind"); Kelly v. Lum, 73 Wash. 135, 134 Pac. 819 (1913).

Obviously, the seller is not held to be a guarantor that there will be no defects of any sort in what is sold, only that the goods sold are acceptable as the goods contracted for. In the case of the sale of second-hand equipment, implied warranties will either be nonexistent or at least minimal. Warren v. W. W. Sheane Auto Co., 118 Wash. 213, 203 Pac. 372 (1922); Perine Mach. Co. v. Buck, 90 Wash. 344, 156 Pac. 20 (1916).

The amount of permissible defect or impurity will, obviously, vary from case to case. While a latent piece of iron in logs sold, which damages the buyer's expensive saw, will not be a basis for imposing liability on the seller of those logs. Ketchum v. Stetson & Post Mill Co., 33 Wash. 92, 73 Pac. 1127 (1903). A relatively small impurity in food will impose liability on the seller. La Hue v. Coca Cola Bottling Co., 50 Wn.2d 645, 314 P.2d 421 (1957); Lundquist v. Coca Cola Bottling Co., 42 Wn.2d 170, 254 P.2d 488 (1953); Baum v. Murray, 23 Wn.2d 890, 162 P.2d 801 (1945); Geisness v. Scow Bay Packing Co., 16 Wn.2d 1, 132 P.2d 740 (1942); Flessher v. Carstens Packing Co., 93 Wash. 48, 160 Pac. 14 (1916); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). The entire transaction must be considered to determine what quality of goods was actually being sold; for example, the price paid is relevant on this issue. Libke v. Craig, 35 Wn.2d 870, 216 P.2d 189 (1950). There is an occasional effort to generalize a rule for warranty liability, suggesting that a seller, other than the grower or manufacturer, does not warrant against "latent" defects. Puratich v. Pacific Marine Supply Co., 184 Wash. 531, 51 P.2d 1080 (1935). The later cases reject this.

58 E.g., Smith v. Frontier, 53 Wn.2d 805, 337 P.2d 299 (1959) (seller of auto tires held to know that purchaser would put them on a car); Martin v. J. C. Penney Co., 50 Wn.2d 560, 313 P.2d 689 (1957) (sweater to be worn); Williams v. S. H. Kress Co., 48 Wn.2d 88, 291 P.2d 662 (1955) (purchaser of mouth wash at ten cent store didn't tell the clerk how she intended to use it); Ringstad v. I. Magnin Co., 39 Wn.2d 923, 239 P.2d 848 (1952) (cocktail robe to be worn even in the kitchen). Libke v. Craig, 35 Wn.2d 870, 216 P.2d 189 (1950), demonstrates the close relationship between general purpose (merchantability) and specific purpose, because the hay sold by the grower was held not to be merchantable; at the same time, the court concludes that the seller must have known because of the amount purchased that the buyer was reselling to stable, thus imposing a warranty of fitness for a particular purpose. Puratich v. Pacific Marine Supply Co., 184 Wash. 531, 51 P.2d 1080 (1935) (fishnet sold was treated under the fitness for a particular purpose warranty, even though it was used for fishing).

59 RCW 63.04.160(2) [Uniform Sales Act, § 15].
use, and it is probably for this reason that the Washington court has handled cases as fitness for purpose rather than general merchantability. It is quite difficult, for example, to determine how a retailer of dresses can be held responsible under the present statutory warranty of merchantability to a purchaser who selects the particular dress from the racks, tries it on without assistance, takes it to a clerk who wraps it and bills her; but it is not difficult to see that there should be liability to her in the event the dress is made of an unusually flammable material. Under the Code, such liability can be based on the warranty of merchantability [and not the warranty of fitness for a particular purpose], because the Code does not limit the warranty of merchantability to sales by description, thus removing the premise underlying one portion of the decision in Williams v. S. H. Kress & Co. which held that absent a sale by description, no warranty of merchantability is imposed. Under the Code, it would seem that the retailer of products such as the mouth wash involved, is held to a warranty of merchantability.

However, it is quite clear that the mere existence of that warranty does not establish liability on the seller for any and all consequences, for under the Code, as under present law, the burden is on the consumer to prove that the warranty was breached and that his injuries proximately resulted therefrom.

40 This is difficult to demonstrate except in a negative way. In those cases where warranty liability was imposed on the seller for latent defects, it was based on the warranty for a specific use. For example, Ringstad v. I. Magnin & Co., 39 Wn.2d 923, 239 P.2d 848 (1952). But in cases where warranty obligations were not found, the court has stressed the statute's requirement of a sale by description. McCormick v. Hoyt, 53 Wn.2d 338, 333 P.2d 639 (1959); Williams v. S. H. Kress Co., 48 Wn.2d 88, 291 P.2d 662 (1955). For a short, but helpful, discussion of this in the law of other states, see Note, Sale of Specific Goods—Is There an Implied Warranty of Merchantable Quality? 20 Albany L. Rev. 205 (1956).

4148 Wn.2d 88, 291 P.2d 662 (1955). Though the warranty of quiet possession is inherent in the general warranty of good title (White, Sale Warranties Under Wyoming Law and the Uniform Commercial Code, 14 Wyo. L. J. 246 (1960)), the omission of specific reference to this warranty has been subject to criticism, such as: "It [the Code] omits any warranty of quiet possession which is specifically provided for in section 12(2) of the Uniform Sales Act. In view of the provision in section 2-725(2) that 'A breach of warranty occurs when tender of delivery is made,' this is a serious deficiency in the Code. Quiet possession may not be disturbed for some time after delivery, and section 2-725(1) sets a short statute of limitations of four years and, by agreement, a still shorter one of 'not less than a year.'" Hall, Article 2—Sales—From Status to Contract? 1952 Wis. L. Rev. 209. See also Williston, Law of Sales in the Proposed Uniform Commercial Code, 63 Harv. L. Rev. 561, 478 (1950).

An interference with quiet possession will, under the Code, evidence a defect in title (Volm, Sales 433 (2d ed., 1959)), and thus will be the basis for recovery under this warranty, if it occurs within the statutory period of limitations.

42 This has been many times demonstrated in Washington decisions: In Williams v. S. H. Kress Co., 48 Wn.2d 88, 291 P.2d 662 (1955), the court was impressed by the fact that the manufacturer had produced over 60,000 bottles of the mouth wash in the year 1954 without a single complaint, and by the fact that plaintiff's bottle came from
Traditionally, the Washington court has treated \textit{food} cases as involving considerations different from sales of other merchandise,\textsuperscript{43} usually to two practical ends: (1) To impose liability even though the defendant and plaintiff were not in privity,\textsuperscript{44} and (2) to overcome some technical obstacle to the plaintiff's recovery, such as his failure to give reasonable notice.\textsuperscript{45} The Code, unlike the Uniform Sales Act, specifically includes the serving of food or drink as within the section here discussed, but this does not \textit{require} the court to terminate its particular treatment of the food cases. That provision is designed to change the rule in those states where the serving of food is viewed as not a sale and thus not within any of the warranty liabilities of the Sales Act. It is designed to increase the coverage of the Code; it is not designed to have a restrictive effect.

Observe that the warranty obligation is imposed by this section of the Code only on merchants dealing in goods of the kind sold. Thus, excluded from warranty liability is the owner of goods who makes an occasional isolated sale. It is of more consequence that the warranty of merchantability is implied in the case of merchants even though they did not manufacture or grow the item sold.\textsuperscript{46}

\begin{itemize}
\item a wholesome batch, insofar as the evidence showed, because her particular bottle was not shown to have been analyzed, but was traced to a batch of 5600 bottles for which no other complaint had been made. In Ringstad v. I. Magnin & Co., 39 Wn.2d 923, 239 P.2d 848 (1952), the court emphasized that the injured plaintiff had not used her cocktail robe in any unorthodox way. Geisness v. Scow Bay Packing Co., 16 Wn.2d 1, 132 P.2d 740 (1942), spells out in detail the problems of proof of breach of warranty and of proximate cause. In Nelson v. West Coast Dairy Co., 5 Wn.2d 284, 105 P.2d 76, (1940), the plaintiff was able to show causation by evidence beyond mere speculation. Larson v. Farmers Warehouse Co., 161 Wash. 640, 297 Pac. 753 (1931); Carstens Packing Co. v. Swift & Co., 154 Wash. 15, 280 Pac. 351 (1929) (buyer was unable to prove that the tallow he had purchased deteriorated because of a defect therein); United States Cast Iron Co. v. Ellis, 117 Wash. 601, 201 Pac. 900 (1921); Mians Motor Works v. Vollans, 94 Wash. 209, 162 Pac. 49 (1917); Makins Produce Co. v. Callison, 67 Wash. 434, 121 Pac. 837 (1912). Official comment 13 is helpful on this point.

\item The cases are listed in note 38 \textit{supra}.

\item This has been so since Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

\item La Hue v. Coca Cola Bottling Co., 50 Wn.2d 645, 314 P.2d 421 (1957). This matter will be discussed under Uniform Commercial Code § 2-607.

\item This does not differ from Uniform Sales Act § 15, nor from the present wording of that section in RCW 63.04.160, but it seems that at some time in the past, the critical words ("whether he be the grower or manufacturer or not") were inadvertently omitted from the Washington statute. See the quotation of the statute in Williamson v. Irwin, 44 Wn.2d 373, 381, 267 P.2d 702 (1954). There is a certain reluctance to impose liability on middle men, viz. wholesalers, who neither manufacture the goods nor deal directly with the ultimate consumer. Cochran v. McDonald, 23 Wn.2d 348, 161 P.2d 305 (1945). Nothing in the Code suggests that such wholesalers are not merchants within the meaning of the presently discussed section. If they are not to be held liable, the probable basis is lack of privity between them and the ultimate consumer. See discussion under Uniform Commercial Code § 2-318.

\item A receiver's sale is generally treated as one where caveat emptor obtains, so the
Section 2-315. Implied Warranty: Fitness for Particular Purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

There does not seem to be any distinctive effect of this section so far as Washington law is concerned, but the generally accepted principles are modified in two respects: First, under the present Uniform Sales Act, the buyer can rely on the warranty of fitness for a particular purpose only by expressly or impliedly making known his purpose, while under the Code that warranty exists whenever the seller has reason to know of that purpose. Secondly those cases holding

receiver makes no implied warranties, though he may be held answerable for positive misstatements. Fryar v. Hazelwood Holstein Farms, 97 Wash. 78, 165 Pac. 1084 (1917).

As a practical matter, this will not alter the existing Washington law, for more often than not the buyer's disclosure of his purpose was implied rather than expressed. Smith v. Frontier, Inc., 53 Wn.2d 805, 337 P.2d 299 (1959); Martin v. J. C. Penney Co., 50 Wn.2d 560, 313 P.2d 689 (1957) (here the buyer by happenchance stated the purpose to be served by a boy's sport shirt; little imagination would be required for a finding of an implication of that purpose); Williams v. S. H. Kress & Co., 48 Wn.2d 88, 291 P.2d 662 (1955) (unfortunately for the plaintiff, she did not disclose how she intended to use the mouth wash); Friskien v. Art Strand Floor Coverings, Inc., 47 Wn.2d 587, 288 P.2d 1087 (1955); Eliason v. Walker, 42 Wn.2d 473, 256 P.2d 209 (1953) (this is a legitimate use of the fitness for a particular purpose doctrine, since the furnace was to be designed to heat the buyer's home. A "merchantable" furnace would not meet the requirements; Lundquist v. Coca Cola Bottling, Inc., 42 Wn.2d 170, 254 P.2d 488 (1953) (correctly concludes that negligence need not be shown in order to establish a breach of warranty); Ringstad v. I. Maginn & Co., 39 Wn.2d 93, 239 P.2d 848 (1952); Columbia Concrete Pipe Co. v. Knowles, 36 Wn.2d 602, 219 P.2d 557 (1955) (the particular purpose doctrine was essential to this recovery); Libkle v. Craig, 35 Wn.2d 870, 216 P.2d 189 (1959) (this decision seems a forerunner of the Code's provision). In Baum v. Murray, 23 Wn.2d 890, 162 P.2d 801 (1945), the court observes at 897, "generally when an article of food for human consumption is purchased either directly from the manufacturer or a retail dealer thereof, the buyer does by implication make known to the seller that the particular purpose for which the food is required is for consumption. In arriving at this conclusion, the courts take into consideration the nature of the article itself, the quantity purchased, and the evident purpose for which it is manufactured, sold, and purchased." Under the Code, this language would not be necessary to permit a customer's recovery, for the use here described is the obvious general use of food, properly treated under the warranty of merchantability. Jones v. Mallon, 3 Wn.2d 382, 101 P.2d 332 (1940); Poss v. Golden Rule Bakery, 184 Wash. 265, 51 P.2d 405 (1935). Webster v. L. Romano Eng'r Co., 178 Wash. 118, 34 P.2d (1934), held no warranty by dealer where the purchaser purchases a stock grade of known and described kind. One should observe that the fact that the seller is a dealer and not the manufacturer does not mean that there is no warranty of fitness for use. Official comment 4. Mono Serv. Co. v. Kurtz, 170 Wash. 539, 17 P.2d 29 (1932); McKaskey Register Co. v. Davis, 159 Wash. 483, 293 Pac. 461 (1930); Zapon Co. v. Bryant, 156 Wash. 161, 126 Pac. 282 (1930); Long v. Five Hundred Co., 123 Wash. 347, 212 Pac. 559 (1923); Greenwood v. International Harvester Co., 122 Wash. 603, 211 Pac. 727 (1922); T. W. Little Co. v. Fynboh, 120 Wash. 595, 207 Pac. 1064, 211 Pac. 766 (1922) (applies the warranty of fitness for a particular purpose to the sale of second hand machinery); United States Cast Iron Pipe & Foundry Co. v.
that the buyer's designation of goods by trade name ipso facto negates reliance on the seller are rejected. Instead, the use of the trade name is only one factor to be considered in resolving the factual issue of whether or not the buyer relied on the seller's skill in furnishing goods to serve the buyer's particular purpose.

Because of the inclusion within the warranty of merchantability of the generalized purpose of a particular item, that section of the Code dealing with merchantability rather than the present one should be used where the buyer purchases for the normal use for which the article is obviously designed. As discussed earlier, this will alter the Washington approach to the problem.

Section 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be consistent with the rest of the writing.

Ellis, 117 Wash. 601, 606, 201 Pac. 900, 902 (1921) ("when the article ordered is to be manufactured according to certain prescribed specifications, or is an article well known and defined in current trade, the contract is complied with when an article is furnished which is manufactured in accordance with the designated specifications, or is an article of the standard kind known to the trade, even though the seller may know the purposes for which it is intended to be used and if afterwards proves to be unfit or unsuitable for the intended purpose"); Hausken v. Hodson-Fenaughty Co., 109 Wash. 606, 187 Pac. 319 (1920); Perine Mach. Co. v. Buck, 90 Wash. 344, 156 Pac. 20 (1916) (the suggestion that an implied warranty of fitness for particular purpose will not be found in the sale of secondhand equipment seems incorrect, and seems to have been rejected in the T. W. Little Co. case supra); Turlock Fruit-Juice Co. v. Pacific & Puget Sound Bottling Co., 71 Wash. 128, 127 Pac. 842 (1912); Blake-Rutherford Farms Co. v. Holt Manufacturing Co., 70 Wash. 192, 126 Pac. 418 (1912) (the generalization that there is always a warranty of fitness for the purpose for which machinery is sold seems unwarranted, for there is always a warranty of fitness for the purpose for which machinery is sold seems unwarranted, for this warranty may be negatived); Ketchum v. Stetson & Post Mill Co., 33 Wash. 92, 73 Pac. 1127 (1903); Puget Sound Iron & Steel Works v. Clemmons, 32 Wash. 36, 72 Pac. 465 (1903).


50 Section 2-314.

51 See Note 38 supra and the accompanying text.
spicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

(3) Notwithstanding subsection (2) 

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” “with all faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and 

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and 

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

It is recognized under the Code, and under the Washington decisions, that any warranty liability may be disclaimed. The Code sets

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62 Dimoff v. Ernie Majer, Inc., 155 Wash. Dec. 389, 347 P.2d 1056 (1960); McDonald Credit Serv., Inc., v. Church, 49 Wn.2d 400, 301 P.2d 1082 (1956). Ketel v. Hovick, 47 Wn.2d 368, 287 P.2d 739 (1955) held, however, that the limitation of the seller’s liability was waived by his refusal to permit the buyer to return the goods, which return was made a condition precedent to the seller’s making good on the limited liability undertaking. For a brief discussion, see Shattuck, Contracts in Washington, 1937-1957: Part III, 34 WASH. L. REV. 467, 500 (1959). Williamson v. Irwin, 44 Wn.2d 373, 267 P.2d 702 (1954); Gibson v. California Spray Chem. Corp., 29 Wn.2d 611, 188 P.2d 316 (1948) (disclaimer valid whether or not the buyer reads it); Columbia River Ice Co. v. Farris, 27 Wn.2d 636, 179 P.2d 520 (1947) (the particular holding that a disclaimer of warranty made after the sale is not effective would not obtain under UNIFORM COMMERCIAL CODE § 2-209, discussed supra); Jones v. Mallon, 3 Wn.2d 382, 101 P.2d 332 (1940); Crandall Eng’r Co. v. Winslow Marine Ry. & Shipbuilding Co., 188 Wash. 1, 61 P.2d 136 (1936); Puratich v. Pacific Marine Supply Co., 184 Wash. 531, 51 P.2d 1080 (1935) (disclaimer on a tag effective); Marks v. Kucich, 181 Wash. 73, 42 P.2d 16 (1935); National Grocery Co. v. Pratt-Low Preserving Co., 170 Wash. 575, 17 P.2d 51 (1932) (provision requiring claim within ten days not applicable to latent defects); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, noted 7 WASH. L. REV. 351 (1932); Van Vliet v. Washington Nursery Co., 167 Wash. 115, 8 P.2d 961 (1933) (See comments on the Columbia River Ice Co. case, supra.); Ingraham v. Associated Oil Co., 166 Wash. 305, 6 P.2d 645 (1932); Weller v. Advance-Rumley Thresher Co., 160 Wash. 510, 295 Pac. 482 (1931).
out the mechanics of the disclaimer, if it is to be successful, with the aim of protecting the buyer from overreaching. In general, there are three types of warranties, and the effect of disclaimer differs somewhat among these types:

First, the express warranty can be disclaimed, but this result can be surely obtained only by the use of an integrated written contract setting out the terms of the sale, which contains an express disclaimer or which is inconsistent with a particular warranty claimed by the buyer. Even this may not, in Washington, insure against a claim based on a showing of fraudulent statements dehors the contract.

Second, the implied warranties of quality (merchantability and fitness for a particular purpose) may be generally disclaimed, by a sale "as is," or under similar terms, but if a particular disclaimer is to be

Larson v. Inland Seed Co., 143 Wash. 557, 255 Pac. 919 (1927); Peninsula Motor Co. v. Dagget, 126 Wash. 275, 218 Pac. 253 (1923); Los Angeles Olive Growers Ass'n v. Pacific Grocery Co., 119 Wash. 293, 205 Pac. 375 (1922) (ten day limitation on notice of defects not applicable to latent defects); Gwinn v. Heydon, 112 Wash. 664, 192 Pac. 914 (1920) (similar to the Ketel case supra); Seattle Seed Co. v. Fujimori, 79 Wash. 123, 139 Pac. 866 (1914) (buyer need not read the disclaimer; it nonetheless is effective); Buffalo Pitts Co. v. Shriner, 41 Wash. 146, 82 Pac. 1016 (1905).

An earlier version of subsection (1), however, stated categorically that if the agreement created an express warranty, words disclaiming it are inoperative.

Warranties, Disclaimers and the Parol Evidence Rule, 53 Colum. L. Rev. 858, 868 (1953).


Prior to Haagen v. Landeis, 156 Wash. Dec. 301, 352 P.2d 636 (1960), it seemed never to have been doubted that a claim of fraud could be pressed in spite of a disclaimer in a written contract of any representations not contained in the writing. Nyquist v. Foster, 44 Wn.2d 465, 268 P.2d 442 (1954); Gronlund v. Andersson, 38 Wn.2d 60, 227 P.2d 741 (1951); Lent v. McIntosh, 29 Wn.2d 216, 186 P.2d 626 (1947) (rule recognized, but no fraud found); Peoples Bank & Trust Co. v. Romano Eng'r. Corp., 188 Wash. 290, 62 P.2d 445 (1936) (here the written disclaimer covered only warranties, and thus might easily be interpreted as not being applicable to representations, but for the fact that a seller's statements are now express warranties).

The disturbing effect of the Haagen case is that a provision in the written contract, "this Agreement contains the entire understanding...and no representation...has been made that is not set forth herein," is held by the majority to negative any possible reliance on any parol representation. Prior to this, the concept has been that if fraud is shown, and this presumably required reliance, the effect of the fraud is to vitiate the entire contract, including the disclaimer clause. See Note, 59 Colum. L. Rev. 525 (1959).
made, in the case of merchantability, that warranty must be expressly identified as disclaimed.65

Third, the warranties of title which under existing law57 and probably under the Code58 must be specifically disclaimed and are not excluded by a sale "as is," which term normally refers only to quality of the goods.

Subsection (3) (b) of this section is essentially the same provision as that stated in the present statute,59 negativing warranties against defects which can be or ought to be discovered on inspection. The present statute permits warranties to be negatived by custom or usage,60 and it is to be expected that in view of the Code's definition of "usage of the trade,"61 there will be no departure from the Washington decisions requiring a showing that the claimed custom is general or of one which the parties should know.62

The case of Jolly v. C. E. Blackwell & Co.63 merits particular notice. In that case, a retailer was sued for his failure to supply spring rye, where he delivered fall rye in bags which had come from his supplier and on which appeared: "The greatest care is exercised to have all goods true and reliable, but they are not warranted nor will any responsibility be assumed for any loss or damage for failure of crop. If not accepted on these terms goods must be returned at once." This disclaimer was held to have been made by, and thus to effect the liability of, the supplier, but did not amount to a disclaimer by the re-

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If a seller were to offer for sale "potatoes, as is," it is quite obvious that he will not comply by delivering sacks of rocks. The phrase "as is" does not negative the express warranty of description created by the use of the word "potatoes." See discussion at notes 28 and 29 supra. Obviously, then, problem cases are to be expected testing out how putrid a potato can be without ceasing to be a potato. See Gagnon v. Speback, 389 Pa. 17, 131 A.2d 619 (1957), noted 34 TEXAS L. REV. 952 (1956), 1 VILL. L. REV. 360 (1956); Williamson v. Irwin, 44 Wn.2d 373, 267 P.2d 702 (1954).


68 UNIFORM COMMERCIAL CODE, § 2-312 (2).

69 RCW 63.04.160 [UNIFORM SALES ACT § 15].

60 RCW 63.04.720 [UNIFORM SALES ACT § 71].

61 UNIFORM COMMERCIAL CODE, § 1-205.


63 122 Wash. 620, 211 Pac. 748 (1922).
tailer who was thus liable. The basis for the seller's liability was a warranty that the goods sold must be true to name, presumably included in the Code under merchantability. The Code does not seem to address itself to this point, for it merely requires a disclaimer to be in conspicuous writing but does not specify who must provide that writing. Since the liability was based on implied warranty, it would seem that the Code does not require any change in the rule announced by this case, but of course had the liability been based on an express warranty as contained in the label, then clearly the disclaimer is relevant to determining the meaning of the whole contract.

Section 2-317. Cumulation and Conflict of Warranties Express or Implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
(b) A sample from an existing bulk displaces inconsistent general language of description.
(c) Express warranties displace inconsistent implied warranties other than implied warranty of fitness for a particular purpose.

In general, this section of the Code expresses the approach taken by the Washington court. The use of specifications, for example, has

64 In Eliason v. Walker, 42 Wn.2d 473, 256 P.2d 298 (1953), an express warranty was held not to negative the implied warranty of fitness for a particular purpose. In Foss v. Golden Rule Bakery, 184 Wash. 265, 266-267, 51 P.2d 405 (1935), a printed warranty stated, "It is expressly understood that the only warranty relating to the sale of said property is the standard warranty from the manufacturer to the purchaser, a copy of which is available to the purchaser and of which he has full knowledge. There is no dealer's warranty, expressed or implied, attending this sale." Typewritten on the contract were these words: "This machine is guaranteed in workmanship and any expense or repair will be taken care of by the Northwest Dairy Supply Co. for one year." The court held that there is no inconsistency in these warranties, one is a warranty of fitness for purpose; the other, a warranty of workmanship. In Greenwood v. International Harvester Co., 122 Wash. 603, 606, 211 Pac. 727, 728 (1922), the written contract provided that no warranty of fitness for a particular purpose was given, that the only warranty was that the machine would perform general farm purposes under average conditions. The buyer introduced testimony that the seller's agents had represented that the machine was specially fitted for harvesting the particular crop the buyer showed those agents. The court upheld the admission of this testimony on the ground that "it was permissible to show the purposes for which the machines were designed, the written contract not being explicit upon that subject, and to show by oral evidence what ordinary and average conditions were and what is was contemplated that the machinery should be capable of doing under such circumstances." In Spirit Valley Lumber Co. v.
been effective to prevent implication of warranties which, absent specifications, might have been found. For example, one seller and buyer exchanged correspondence describing the article sold as a “400-ton coal bunker and washer,” which words used by the seller would amount to an express warranty that the bunker delivered would meet that description. The contract, however, was found to contain rather complete specifications known to both buyer and seller and the item delivered and installed, though not of 400-ton capacity, was in compliance with the specifications. The holding, that there was no breach of warranty, is precisely that to be anticipated under the Code.

Frequently, however, the problem is not one of interpreting various conflicting warranties; instead, the issue is whether the failure of a writing to state a warranty necessarily excludes evidence of previous oral agreements. Or slightly modified, does the inclusion of a particular express warranty in a written agreement necessarily preclude reliance on previously stated parol warranties? This will turn on whether the writing is designed as the integrated agreement of the parties. If the writing is construed to be the embodiment of the entire contract between the parties, evidence of additional express undertakings prior to or contemporaneous therewith would be inadmissible; contrarywise if the writing is not construed as a complete integration. The writing will not preclude enforcement of implied warranties, except insofar as the warranty claimed is inconsistent with or disclaimed by the writing.

Section 2-318. Third Party Beneficiaries of Warranties Express or Implied.

A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who

A. H. Averill Mach. Co., 49 Wash. 46, 94 Pac. 650 (1908), the court found that certain express provisions were inconsistent with a claimed implied warranty.


In Pacific Aviation Co. v. Philbrick, 67 Wash. 414, 419, 121 Pac. 864, 865 (1912), the buyer sought to rely on parol representations about the airplane sold, contending they were false. The court said: “Touching the question of a parol warranty, it suffices to say that the bill of sale to Waldron warrants title only. The instrument is complete in itself, and evidence of a prior or contemporaneous parol warranty was inadmissible.”


One may question whether the bill of sale relied on by the court in the Philbrick case supra note 65 is necessarily an integration of the contract. In general, see Shattuck, Contracts in Washington, 1937-1957: Part II, 34 Wash. L. Rev. 345, 380 (1959).

See discussion of Uniform Commercial Code § 2-318.
is injured in person by breach of warranty. A seller may not exclude or limit the operation of this section.

The liability of the seller of goods to members of the purchaser's household has been tacitly recognized in this state, so the statute will not enlarge the seller's responsibility in that respect. Somewhat more serious, however, is the possibility that the silence of the statute on other aspects of the privity problem may tend to have a retrogressive effect on some of the Washington views on the privity rule. It must be made as plain as possible that the writers of the Code did not mean to suggest that this limited inroad into the requirement of privity tacitly approves the other aspects of the privity rule. For example, the Code takes no position respecting the warranty obligations of the manufacturer or wholesaler to the ultimate consumer. Those issues are to be resolved on the basis of the common law.

One cannot fail to discern that in the Washington decisions which have pioneered the extension of the liability of manufacturers to persons not in privity with them, there has been a reluctance to adopt a forthright rule that warranty liability, being a mixture of tort and contract does not require privity. To the contrary, the concept has been

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70 For example, in LaHue v. Coca Cola Bottling, Inc., 50 Wn.2d 645, 314 P.2d 421 (1957), a case involving a foreign substance in a soft drink, the discussion centers on the liability of the manufacturer to the consumer, without particular attention to the fact that the person injured was the wife of the purchaser. In Martin v. J. C. Penney Co., 50 Wn.2d 569, 313 P.2d 689 (1957), the person injured by a burning shirt was the son of the purchaser. In Ringstad v. I. Magnin & Co., 39 Wn.2d 923, 239 P.2d 848 (1952), the injured user of a flammable robe was the wife of the purchaser, a factor not discussed.

In Bock v. Truck & Tractor, Inc., 18 Wn.2d 458, 139 P.2d 706 (1943) a passenger in a car was held to have stated a cause of action against the seller of that car, who had reconditioned it and sold it as a used car. The recovery seems to lie in the field of negligence, however, though the court does mention representations and warranties made by the seller. One may speculate whether the Code's provision extending the seller's warranty liability to guests in the home may not reasonably extend to guests in a car. In Hanson v. Blackwell Motor Co., 143 Wash. 547, 255 Pac. 939 (1927) the operator of a garage, not a seller of the car, was held not to be liable to passengers in a car on which he had done repair work in a manner claimed to have been improper.

In Fuhrman v. Interior Warehouse Co., 64 Wash. 159, 116 Pac. 666 (1911) one who sold to a tenant under a cropping contract was held answerable to the landlord when he delivered wheat different from that described, on the theory that the landlord and tenant were tenants in common. One may speculate whether a landlord-tenant relationship will be treated similarly to the host-guest relationship specifically covered by the Code.


72 In Fines v. West Side Implement Co., 156 Wash. Dec. 317, 324, 352 P.2d 1018, 1022 (1960), the court said: "We have indicated that the time is coming, and now is (at least under certain circumstances), when manufacturers are to be held responsible to those damaged by reliance on their false and misleading advertising, even though there be no privity of contract."

Perhaps the nearest the Washington Supreme Court has come to this approach in the case of express warranties is the now classic decision in Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) noted in 7 WASH. L. REV. 351 (1932), and in the
that privity is required for warranty liability under the Uniform Sales Act, but in a given case there may be a basis for the manufacturer's liability above and beyond statutory warranty. This is especially true of the food cases. Attention has been directed before to the fact that the Code encompasses within its rules the liability of one who serves food or drink, a matter on which the Sales Act decisions have varied. The impact of this section will not be great insofar as what the Code actually says, but the fact that the Code treats this liability as warranty of merchantability liability may indicate that the liability of food manufacturers, wholesalers and retailers is likewise warranty liability. This would take away the shelter which permits the Washington court to impose liability on remote suppliers of food and "dangerous instrumentalities" without abolishing the privity requirement of warranty. Three possibilities thus exist: (1) The least desirable and least likely is that the court will treat this liability of remote food suppliers as statutory warranty and only that, and depart from the long established recognition of their liability in this state. (2) The court may decide that even if the food dealer's liability is warranty liability, still privity is not required. (3) The liability based on the public policy of imposing responsibility to provide pure food on anyone who engages in the food business is recognized, quite apart and in addition to any warranty of merchantability. If the second approach is taken, the court will be hard put to find ways of distinguishing some kinds of warranty liability (food and dangerous instrumentality) from others, so it is

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74 Privity is said not to be required where the goods sold are "noxious or dangerous," or where fraud and deceit can be shown. Edwards, Privity: Property Damage; and Personal Injuries—A Re-appraisal, 32 Wash. L. Rev. 153 (1957). In addition to these cases, liability for breach of warranty has occasionally been imposed on a remote party by use of fictions, particularly by a finding that the purchaser from the manufacturer was the agent of the plaintiff in making the purchase. Freeman v. Navarre, 47 Wn.2d 760, 289 P.2d 1015 (1955); Jeffery v. Hanson, 39 Wn.2d 855, 239 P.2d 346 (1952). See Gillam, Judicial Legislation, Legal Fictions and Products Liability: the Agency Theory, 37 Ore. L. Rev. 217 (1958).

75 Somewhat the same problem is posed by the restrictive language of the present Uniform Sales Act, in that inferentially at least, warranty liability is imposed on sellers in favor of buyers. This has not precluded a finding of liability of a supplier of unwholesome food other than the person who dealt with the consumer. See Edwards, supra note 73; Fisher, Implied Warranties of Quality—A Tort Peg in a Contract Hole, 11 Food Drug Cosm. L.J. 262 (1956).

76 As for example, trying to decide whether dog food is "food" within the meaning of the rule, as in McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D., Cal., 1954); Note, 34 Texas L. Rev. 954 (1956), or trying to distinguish food cases from cases involving cos-
most likely that the Code will not affect the liability of any remote supplier who, for reasons of assumed policy, ought to bear the risks of defective food or of any commodity dangerous to life or health.\textsuperscript{77}


(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

(2) Unless otherwise agreed the term F.A.S. (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of co-

\textsuperscript{77} For a learned discussion of the privity rule, see Prosser, \textit{The Assault Upon the Citadel (Strict Liability to the Consumer)}, 69 \textit{Yale L.J.} 1099 (1960).
operation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

There will, of course, be cases where the use of F.O.B. and F.A.S. will be significant as a price term, for example in determining prices permissible under price fixing statutes. But most important the use of these terms is of significance on two basic issues: (a) what must the seller do to perform the contract, and (b) where is the risk of loss. The present Code section section governs these issues, irrespective of whether the term "F.O.B." or "F.A.S." appears only in the price terms of the contract. This will clarify existing Washington case law.

Insofar as risk of loss is concerned, the statute does not alter present statements of the law, except that the issue is no longer couched in terms of who has title as is the case under some of the Washington decisions. The seller's obligations vis-à-vis delivery will not be changed.

The critical words in these subsections are "unless otherwise agreed." One can illustrate the significance of these words by reference to the written contract used in Phoenix Packing Co. v. Humphrey-Ball Co., wherein a Seattle buyer wrote to a San Francisco seller: "We have this day bought from [seller] of San Francisco . . . to be shipped first half of November or as soon thereafter as goods can be packed, the following . . . . These prices are f.o.b. California, Fresno, less 1 ½ per cent cash discount. Terms—Cash with documents attached. When buyer requests the privilege of examination before payment of draft, routing

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79 In Valley Fruit Co. v. United States Fid. & Guar. Co., 161 Wash. 166, 296 Pac. 557 (1931) the price term "f.o.b. Walla Walla" was held to determine the place of delivery, but in Mutual Sales Agency, Inc. v. Hori, 145 Wash. 236, 259 Pac. 712 (1927) the court disregarded an f.o.b. phrase as determinative only of the price. The Code, of course, takes the view of the later decision.
80 See UNIFORM COMMERCIAL CODE § 2-401.
81 Gillarde v. Northern Pacific Ry. Co., 28 Wn.2d 233, 179 P.2d 235 (1947) (If the contract calls for delivery f.o.b. seller's place, the seller must exercise due care in loading else he will bear the risk of loss.); Rawleigh Co. v. Harper, 173 Wash. 233, 22 P.2d 665 (1933) (The seller was not doing business within the state of Washington by selling f.o.b. a place in California); Valley Fruit Co. v. United States Fid. & Guar. Co., supra note 78; Skinner v. Griffiths & Sons, 80 Wash. 291, 141 Pac. 693 (1914); R. J. Menz Lumber Co. v. E. J. McNeely & Co., 58 Wash. 223, 108 Pac. 621 (1910).
82 58 Wash. 396, 108 Pac. 952 (1910).
to rest with seller. Such examination to be made within three days of
the arrival of the goods, otherwise buyer waives all rights of rejection
or claim as to quality.”

The issue involved, in the court’s analysis, was whether the seller
can maintain an action for an admitted breach by buyer and recover
damages, without evidence as to those damages in Washington. The
critical provision of the contract was that giving the buyer a right to
inspect, in Seattle, which in effect overrode the effect of the provision
for prices “f.o.b. California,” and for payment against documents.
Thus “title had not passed” until inspection, and evidence as to the
market value in Fresno is not relevant.

Under the Code, however, by which “f.o.b. California” even in the
price term is treated as a delivery term, a contrary result would be
anticipated, turning on the effect of the provision for inspection. It
is quite clear that the Code’s provisions giving the buyer the right to
inspect\(^8\) affect only his obligation to pay, and do not condition the
passage of “title”.\(^5\)

(1) The term C.I.F. means that the price includes in a lump sum
the cost of the goods and the insurance and freight to the
named destination. The term C. & F. or C.F. means that the
price so includes cost and freight to the named destination.
(2) Unless otherwise agreed and even though used only in connec-
tion with the stated price and destination, the term C.I.F. des-
tination or its equivalent requires the seller at his own expense
and risk to
   (a) put the goods into the possession of a carrier at the port
   for shipment and obtain a negotiable bill or bills of lading
   covering the entire transportation to the named destina-
   tion; and
   (b) load the goods and obtain a receipt from the carrier (which
   may be contained in the bill of lading) showing that the
   freight has been paid or provided for; and
   (c) obtain a policy or certificate of insurance, including any
   war risk insurance, of a kind and on terms then current at
   the port of shipment in the usual amount, in the currency
   of the contract, shown to cover the same goods covered by
   the bill of lading and providing for payment of loss to the

\(^8\) Uniform Commercial Code § 2-613.
\(^5\) Official comment to § 2-613.
order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

This section is without statutory precedent and is an effort to state the understanding of commercial men as to the meaning of certain standardized terms. Except for an early decision,66 later discredited,67 the Code reflects the Washington case law.68 Particularly noteworthy is the decision in Anderson, Meyer & Co. v. Northwest Trading Co.,69 where the court dealt with a transaction involving both rail and ship transportation, raising the issue of whether timely shipment by rail under a C.I.F. contract was performance, in spite of the fact that delivery to the buyer was actually substantially delayed because of the war's effect on ship transportation out of San Francisco. The decision, that shipment by rail and tender of bill of lading for trans-Pacific export met the seller's requirement, is accepted by the Code. A counseling point is that the present section of the Code, and the next preceding and five following sections spell out in detail the consequences to follow from use of these terms. By choosing with care the precise term and its modifiers, (i.e. if F.O.B. is used, indicate also

86 Collignon & Co. v. Hammond Milling Co., 68 Wash. 626, 123 Pac. 1083 (1912). "C.I.F." does not "determine as between buyer and seller when or where the title to the goods passes, . . . That depends upon the intention of the parties to be determined as in other cases."


88 Cases cited in preceding note. No case has been found dealing with the "C. & F." term.

89 115 Wash. 37, 196 Pac. 630 (1921).
whether (a) the seller's place of business, (b) the buyer's place of business, (c) a vessel, or (d) a railroad car is intended) the obligations of the seller can be stated with simplicity yet precision.


Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to "net landed weights," "delivered weights," "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

While use of the term "C.I.F." passes the risk of loss during transit to the buyer, this section makes it quite plain that reference is had to the risk of loss incident to shipment. The seller and buyer may agree, even under a contract of this sort, that other risks, such as deterioration, are to be borne by the seller. In *Klock Produce Co. v. Robertson*, the contract called for "first grade New Zealand creamery butter," to be shipped "C.I.F.E." with "Government certificate attached to bill of lading. Butter to be paid for in full as soon as cleared by U. S. Government inspection against preservatives." The suit was one by the buyer who claimed that the contract visualized that the butter would be first class in Seattle, which it was not. As would be true under the Code, the court reasoned that the contract plainly

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90 See *Hawkland, Sales and Bulk Sales (Under the Uniform Commercial Code)* 63 (1958).
91 90 Wash. 260, 155 Pac. 1044 (1916).
92 "Cost, Insurance, Freight, Exchange."
placed the risks of deterioration on the buyer, by providing for a Government certificate to be attached to the bill of lading, which must require a certificate from the New Zealand government, thus placing deterioration risks on the buyer. The actual holding was, however, that the seller's subsequent acquiescence in the buyer's claim and agreeing on new terms shifted this loss back to him.\(^9\)

The provision of the contract requiring payment in full “as soon as cleared by the U. S. Government inspection against preservatives,” was not adverted to. Under subsection (3), this clause would defer the buyer's obligation to pay until such inspection, but would not shift to the seller the risk of loss in transit, for if the goods did not arrive, the Code would have required the buyer to pay “when the goods should have arrived.”

Section 2-322. Delivery “Ex-Ship.”
(1) Unless otherwise agreed a term for delivery of goods “ex-ship” (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed
(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and
(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

No Washington authority has been found dealing with the use of this term.

Section 2-323. Form of Bill of Lading Required in Overseas Shipment; “Overseas.”
(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating

\(^9\) The allocation of risks is within the power of the contracting parties, thus posing the need for skillful draftsmanship. In any case, problems of construction of the contract may arise. For example, in Pacific Commercial Co. v Northwestern Fisheries Co., 115 Wash. 608, 197 Pac. 930 (1921), canned salmon was contracted for to be shipped by steamer at the buyer's risk, except for "swells, blows and puffs," not directly traceable to exceptional conditions in transit. The goods were shipped aboard a sailing vessel, which delayed arrival as much as six months. The jury found that the harm to the cans was not the result of the buyer's directing shipment aboard a sailing vessel rather than a steamer, thus the risks were the seller's.
that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

(a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of Section 2-508); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is “overseas” insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

No Washington case has been found dealing with this aspect of the law of sales, and this section is without statutory precedent.

Section 2-324. “No Arrival, No Sale” Term.

Under a term “no arrival, no sale” or terms of like meaning, unless otherwise agreed,

(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 2-613).

To further the policy of permitting the parties to allocate the risks incident to the sales transaction, this section permits the seller and buyer to agree that, though the risk during transit is on the seller, he will be discharged from his obligation to perform the contract should the goods be destroyed or should they become deteriorated. This is one application of the rule that where specific goods are destroyed,
without the fault of either party, prior to the time the risk of loss has passed to the buyer, both parties are discharged under ordinary contract principles of impossibility of performance.\textsuperscript{94}

Since the section is aimed at risks of loss of identified goods, that is to say of goods indicated in some way to be the goods sold, it is quite clear that the section will not apply to the situation in which no particular goods are being dealt with. For example, in \textit{United Fig & Date Co. v. Falkenberg},\textsuperscript{95} a buyer brought action against the seller for damages for breach of the contract, in that the seller tendered unmerchantable goods. The contract stated: "All sales of imported merchandise are subject to its safe arrival at port of entry." In holding the seller liable for damages for breach of contract, the court stated that there was nothing to suggest that the particular goods tendered by the seller to the buyer had been "sold" to the buyer or appropriated to the buyer prior to the time they reached Seattle, the "port of entry." Had the intention of the parties been that the particular goods sold were the specific goods covered by the clause, presumably the seller would have been relieved of responsibility for deterioration en route, but under the circumstances of the case, the seller's obligation to perform the contract was not affected by the destruction of some goods not specifically the subject matter of the sale. A similar result would follow under the Code.\textsuperscript{96}

\textbf{Section 2-325. "Letter of Credit" Term; "Confirmed Credit."}

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

One of the main contributions of the Uniform Commercial Code is

\textsuperscript{94} See \textit{Uniform Commercial Code} § 2-613; RCW 63.04.080, 63.04.090.

\textsuperscript{95} 176 Wash. 122, 28 P.2d 287 (1934).

\textsuperscript{96} Official comment 2.
the article therein dealing with letters of credit, the first effort at state legislation in this field. The present section spells out the obligation of the buyer under a contract calling for his furnishing a letter of credit, using terms generally recognized in commerce. The detailed statements of the nature of the letter of credit are without statutory precedent and without judicial precedent in Washington; however, it has been recognized that the buyer's failure to provide the letter of credit called for by the contract is, unless waived, a breach of the contract. This accords with the first subsection of this section.

Section 2-326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors.

1. Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is
   (a) a "sale on approval" if the goods are delivered primarily for use, and
   (b) a "sale or return" if the goods are delivered primarily for resale.

2. Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

3. Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this sub-

97 Article 5.
98 In Bharat Overseas Ltd. v. Dulien Steel Prods., Inc., 51 Wn.2d 685, 321 P.2d 266 (1958), the seller, as defendant, contended that the buyer's posting a letter of credit was a condition precedent to the seller's duty to perform. The buyer had posted a letter of credit, but the seller pointed to variances between the letter provided and the one called for by the contract. In rejecting the seller's contention, the court held that (a) the variance shown was immaterial, thus the buyer had substantially performed, (b) further, the seller had waived the contract's specifications by accepting the letter of credit sent without objection. In Anderson, Meyer & Co. v. Northwest Trading Co., 115 Wash. 37, 196 Pac. 630 (1921), the contract called for payment of "cash against shipping documents through confirmed bank credit," and the holding seems to be that the buyer cannot recover, having failed to make the banking arrangements, though the court seems to say that this failure was waived.
section is not applicable if the person making delivery
(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or
(c) complies with the filing provisions of the Article on Secured Transactions (Article 9).

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (Section 2-201) and as contradicting the sale aspect of the contract with in the provisions of this Article on parol or extrinsic evidence (Section 2-202).

The present statute recognizes the distinction between sales on approval and sales on a "sale or return" basis, but it does not undertake to spell out the factual differences between the two. Thus, subsection (1) of this section is without statutory precedent. Unless the parties agree otherwise, the difference between the two transactions turns on the identity of the purchaser. If he is purchasing for use or consumption and is given, in whatever terms, the power to return conforming goods, the transaction is one on approval. On the other hand, if the buyer is purchasing for resale, and thus not particularly interested in the way the article performs, the deal is a "sale or return."

The most frequent source of litigation in Washington in this area has not involved the distinction between a sale or return and a sale on approval, but has been the interpretation of contracts as either sales or consignments. The Code is not helpful in resolving these factual

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99 RCW 63.04.200 [UNIFORM SALES ACT § 19].
100 Though the Code is clear enough on this, the details can be seen in HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 89 and 101 (1958).
101 In Washington Fish & Oyster Co. v. G. P. Halterty Co., 44 Wn.2d 646, 269 P.2d 806 (1954), the court in holding this transaction to be one of sale, stated that the contract as written is not ambiguous, thus parol evidence is not admissible to show that it was a consignment. Rathke v. Yakima Valley Grape Growers Assn., 30 Wn.2d 486, 192 P.2d 349 (1948) (illegality under the Robinson Patman Act turned on whether a transaction was a sale or brokerage agreement); Irwin v. Pacific Fruit & Produce Co., 188 Wash. 572, 63 P.2d 382 (1936) (defendant not liable for the "price" where he took on consignment and guaranteed a minimum return); Innocenti v. Padavich, 167 Wash. 515, 9 P.2d 1044 (1932) (risk of loss problem, loss not being caused by either party, determined on the distinction between a sale and a consignment); Three Rivers Growers' Assn v. Pacific Fruit & Produce Co., 159 Wash. 572, 294 Pac. 233 (1930) (Defendant's liability for the "price" turns on whether it purchased or took on consignment.) In Hansen Serv. Co. v. Lunn, 155 Wash. 182, 283 Pac. 695 (1930), the distinction between a sale and a consignment arose collaterally. An uncompensated surety had guaranteed that his son would pay the price of goods sold. It was held that
disputes, except insofar as the parol evidence rule applies. As between the seller and buyer, thus, no significant effect will be produced by the Code.

However, the Code's treatment of the interests of creditors is different, for goods sold on sale or return are, under subsection (2) subject to claims of the buyer's creditors while the buyer is in possession. Further, the entruster to a dealer of goods "on consignment" or "on memorandum" is treated by subsection (3) as having delivered the goods on sale or return, and thus the dealer's creditors have an interest in those goods, unless the entruster complies with the filing provisions in article 9, or shows that the dealer is generally known to be operating as a factor in selling goods for others, or complies (in some states) with a statute requiring posting of a sign. The rights of purchasers from one who has taken on approval or on sale or return will be treated under section 2-403, by which the entruster in a variety of situations loses his interests in the property when it reaches a bona fide purchaser.

Section 2-327. Special Incidents of Sale on Approval and Sale or Return.

he was not liable to the creditor who had delivered goods only on consignment. In Hubenthal v. Creighton, 81 Wash. 688, 143 Pac. 98 (1914), there was a fatal variance between the plaintiff's allegation of a sale and his proof of a contract of consignment. In Kempe v. Johnson, 57 Wash. 154, 106 Pac. 619 (1910), a sale, not a consignment, was found on these facts: (i) the agreement set a price which the defendant (buyer) was to pay, without regard to what he was able to get on resale; (ii) the defendant commingled the goods with the goods of several other persons with whom he had similar arrangements; (iii) no books of account were kept as is required by what is now RCW 20.01.370.

In McIntyre v. Johnston, 63 Wash. 323, 115 Pac. 509 (1911), are spelled out the effects of a sale on approval and those of a sale or return. No principle different from that stated in the Code is announced.

102 Uniform Commercial Code § 2-202. See subsection (4) of the present section. 103 In Johnson-Stephens & Shinkle Shoe Co. v. Marlatt & Miller, 181 Wash. 621, 44 P.2d 818 (1935) the dispute was between a receiver and one who had entrusted to the debtor either on consignment or on an unrecorded conditional sales contract. The majority held that this was a conditional sale, not a consignment, but nonetheless protected the entruster because it was effective, even though not recorded, as against the receiver who did not represent subsequent creditors. The assumption is, of course, that had this been a consignment, the entruster would be protected. The present section of the Code, when read in connection with § 1-201 (12), would permit the receiver to prevail over the consignor.

In Meyer v. Hodge, 91 Wash. 35, 157 Pac. 42 (1916), the buyer under a sale or return arrangement had called a taxi late on a Saturday night, instructing the taxi company to return the goods to the seller in Chicago. Before the goods could be turned over to the railroad for return to Chicago, the buyer's creditors attached them. The court treated this as a "resale" to the original seller, not complete before the creditors had attached, and thus the seller was denied recovery against the sheriff who had attached. One may ponder whether these goods were "within the buyer's possession," within the words of this section of the Code.

104 It has been held in Washington that one who entrusts to a dealer on consignment may recover the goods from a purchaser to whom the dealer sold in an unordinary way, such as a sale in payment of an antecedent debt, absent some estoppel against the entruster. Eilers Music House v. Fairbanks, 80 Wash. 379, 141 Pac. 885 (1914), and
(1) Under a sale on approval unless otherwise agreed
   (a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and
   (b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and
   (c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.
(2) Under a sale or return unless otherwise agreed
   (a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and
   (b) the return is at the buyer's risk and expense.

The allocation of title and risk of loss in the sale on approval transaction, where the risk of loss is in the seller until the buyer has accepted, and in the sale or return transaction, where the risk of loss and title are in the buyer, is identical to that under the present statute and decisions. Similarly, the policy expressed in subsection (1)(b) by which the buyer's use and failure to notify the seller of dissatisfaction amounts to acceptance echoes the decisions in this state.

While in a sale on approval, if the buyer accepts any part he has, under the Code, accepted all, there will be an occasional, rare instance where the buyer may accept in part and reject the balance. In *Berlin Mach. Works v. Fuller*, the buyer purchased for one lump sum price two saws, one of which was guaranteed by the seller to perform according to certain specifications. The buyer used the other saw but when the price was demanded, he contended that the guaranteed saw did not meet the specifications. The contract was held to be severa-

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105 RCW 63.04.200, Rule 3 [Uniform Sales Act § 19, Rule 3], Tatum v. Geist, 46 Wash. 947, 547 (1907).
107 59 Wash. 572, 110 Pac. 422 (1910).
ble, in spite of the lump price, with the result that the seller recovered the price of the saw used, but he could not recover for the other saw. It would appear that the provision of the Code referring to acceptance of any part as acceptance of all is predicated on a situation where all are sold on approval. The basis for this rule is the assumed understanding of persons in a transaction of this sort, as distinguished from a sale with option to return where the assumption is that the transferee will sell the items one-by-one without, by any individual sale, accepting the whole lot of the goods entrusted. These rules are subject to contrary agreement, so the housewife who takes home two dresses, intending to select one, does not accept both by agreeing to purchase the one she selects.

The statute makes no provision with respect to whether the buyer, in a sale on approval, must be personally satisfied or only reasonably satisfied, since it requires only that he act in good faith.

Section 2-328. Sale by Auction.

(1) In a sale by auction if the goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at

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109 Official comment 1.
110 HAWKLAND, op. cit. supra note 108; see Tatum v. Geist, supra note 105.
the price of the last good faith bid prior to the completion of
the sale. This subsection shall not apply to any bid at a forced
sale.

No Washington decisions have been found dealing with the Uniform
Sales Act counterpart of this section, or with the common law rules
pertaining to auctions. The recent decision in Continental Can Co.
v. Commercial Waterway Dist. merits a comparison with the Code
provision. In that case, certain real estate owned by the district was
put up for sale at auction, on the announced terms that: “The com-
missioners reserve the right to reject any and all bids received...”
The plaintiff in the action was the highest bidder to whom the auc-
tioneer had “knocked down” the property, but the district commission-
ers rejected its bid. The action was one to compel the commissioners
to issue a deed, and the determinative issue was the effect of this reser-
vation of the right in the commissioners to reject bids, which the court
interpreted as authorizing such rejection even after the hammer had
fallen. Conceptually, the issue would seem to be whether an accepted
bid is still a bid within the meaning of the rule.

Under the Code (though obviously it would not affect the sale in-
volved in the discussed case for a variety of reasons) a similar result
would not be expected, for the Code suggests that the sale is complete
when the auctioneer announces his acceptance of the high bid in any
usual manner. The bid, now an accepted offer, would seem no longer
to be subject to retraction or rejection.

Section 2-401. Passing of Title; Reservation for Security; Limited
Application of This Section.

Each provision of this Article with regard to the rights, obliga-
tions 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. Insofar as situations are
not covered by the other provisions of this Article and matters
concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to
their identification to the contract (Section 2-501), and unless
otherwise explicitly agreed the buyer acquires by their identi-
fication a special property as limited by this Act. Any reten-

111 RCW 63.04.220 [Uniform Sales Act §21].
112 See Restatement, Contracts §27 (1933).
114 Collins v. Heitman, 225 Ark. 666, 284 S.W.2d 628 (1955).
tion or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a “sale.”

The opening paragraph of this section is perhaps the most significant contribution of article II of the Code, for it marks a departure from the current approach of solving a wide variety of disputes in sales transactions by first resolving the question, “who has title?” Each of the following questions is typically solved today by determination of which of the parties has the title to the goods:

(1) Who has the risk of loss?115

115 For example, in Innocenti v. Padavich, 167 Wash. 515, 9 P.2d 1094 (1932), the
(2) Why may insure the goods?\textsuperscript{216}
(3) When may the seller sue for the price?\textsuperscript{217}
(4) Who may sue a third person who damages the goods?\textsuperscript{218}
(5) What is the relative position of each party to the sale with respect to the other party’s creditors?\textsuperscript{219}
(6) What is the effect of use of terms such as F.O.B., C.I.F., and C. & F.?\textsuperscript{219}

Each of these is specifically covered by the Code.

Before one can decide an issue in a particular case on the basis of the present section, dealing with title, one must be absolutely certain that that particular issue is not specifically covered elsewhere. This is the last place to look; not, as under the present statute, the first.\textsuperscript{221} This leaves the attorney with a somewhat uncertain feeling until he finds the specific answer to his client’s question somewhere in the Code, a not unusual response. As the Code becomes more familiar and better indexed, this approach will be less awesome.

There will, of course, be cases which must be resolved on the basis of the location of the title,\textsuperscript{222} and the presently discussed section is the court says: “The question is whether the loss by reason of the collision should fall upon the appellant or upon the respondents, and this in turn depends upon where the title was.” In Lauber v. Johnston, 54 Wash. 59, 102 Pac. 873 (1909) risk of the loss of hay destroyed by fire was determined by the allocation of the title. Under the Code, the technique is to ask, “who bears the risk of loss?” and the answer is to be found in §§ 2-509 and 2-510.

\textsuperscript{216}This is spelled out in § 2-501.
\textsuperscript{217}Under the present statute, RCW 63.04.640 [Uniform Sales Act § 63] this is determined by whether “property” or the title to the goods has passed to the buyer. Under the Code, § 2-709, the circumstances in which the price is recoverable are spelled out without reference to title.

\textsuperscript{218}This will turn on who is the real party in interest, typically decided on the basis of who is the owner or who has title, as in Sweeney v. Waterhouse & Co., 39 Wash. 507, 81 Pac. 1005 (1905). Under the Code, this matter is specifically dealt with by § 2-722.

\textsuperscript{219}In Lloyd L. Hughes, Inc. v. Widders, 187 Wash. 452, 60 P.2d 243 (1936) the location of title in a sales transaction determined whether the goods were subject to attachment by a creditor of the seller. Under the Code, there are specific sections dealing with (a) the rights of creditors of the seller vis a vis the buyer (§§ 2-402, 2-501); (b) the buyer’s rights to goods on the seller’s insolvency (§ 2-502), and (c) the seller’s rights to reclaim on discovery of the buyer’s insolvency (§ 2-702).

\textsuperscript{220}Under the present statute (RCW 63.04.200) these terms are usually construed with respect to the effect they have on the passage of title, usually involving the extent to which they require the seller to deliver to the buyer or the extent to which they show an avowal by the buyer of some interest in the goods, as by his contract requiring insurance thereon. Under the Code, as has been seen, each of the various well-known commercial terms is specifically treated. (§§ 2-319 through 2-324).

\textsuperscript{221}Latty, Sales and Title and the Proposed Code, 16 Law & Contemp. Prob. 3, 26 (1951)

\textsuperscript{222}In State v. Hartwig, 45 Wn.2d 76, 273 P.2d 482 (1954), the issue was the meaning of the word “sell” in a criminal statute making the sale of mortgaged goods without revealing the existence of the mortgage a false representation under the larceny statute. (RCW 9.54.070) The buyer had paid $100 “earnest money” under the agreement that “title” would remain in the seller until the balance of the price was paid. The court pointed out that “sell” means completed sales where title has passed, so the
“catch all” to provide the solution. By making quite clear that the seller’s reservation of “title” is a reservation of a security interest only, it clarifies the existing Washington law.\(^2\)

With respect to the criteria for determining whether the title has passed, the Code (although allowing free range to the parties to contract with respect thereto)\(^3\) makes the matter turn on objectively manifested circumstances — delivery. This does not mean that in all cases a physical handing over to the buyer will be required, for this section articulates the types of situations where (a) the seller may be required to deliver at destination of a shipment, (b) the seller may be required to send the goods, but does not have to deliver them, or (c) the seller may not have to move the goods at all. In all of these situations, the seller must commit himself to specific goods as covered by the sale, and this is the critical factor. That manifestation of commitment is found on his completion of the steps necessary for his delivery of specific goods. In the case of the present sale of identified goods not to be moved, the very making of the contract of sale is sufficient to manifest the seller’s commitment.\(^4\)

Section 2-402. Rights of Seller’s Creditors Against Sold Goods. (1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer’s rights to recover the goods under this Article (Sections 2-502 and 2-716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that re-

statute is not relevant to this case. Under the Code, if the court elects to find its definition of sell or sale under this Article, one would find this definition in § 2-106: “A ‘sale’ consists in the passing of title from the seller to the buyer for a price (§ 2-401).” Thus the crux remains the title to the goods, but the Code makes it quite plain that the reservation of “title” by a seller until he is paid means only that he has retained a security interest in the goods. One may doubt, however, whether a criminal conviction would follow from use of this statute, particularly where it appears that the seller-defendant was able to and showed clearly his intention to make the title good on completion of the instalment payments.

In Mayer v. Gibson, 114 Wash. 394, 195 Pac. 1 (1921) the obviously to be anticipated problem of the incidence of a property tax on goods turned on the location of the title, a solution still available by use of this section of the Code.\(^5\) In Holt Mfg. Co. v. Jaussaud, 132 Wash. 667, 233 Pac. 35 (1925) the risk of loss in a conditional sale contract was held to be on the seller because he had reserved “title.” See Shattuck, Secured Transactions Under the UCC, 29 WASH. L. REV. 1, 39 (1954).

\(^{124}\) Except that title cannot pass to goods not in existence.

\(^{125}\) Official comment 4.
tention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this Article shall be deemed to impair the rights of creditors of the seller.

(a) under the provisions of the Article on Secured Transactions (Article 9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this Article constitute the transaction a fraudulent transfer or voidable preference.

Subsection (1) is designed to clarify the point that the rights of unsecured creditors of the seller will be subject to the buyer's rights not on the basis of finding that "title" has passed, but on the circumstance that the particular goods have been identified to the contract, a matter best discussed in connection with sections 2-502 and 2-716, referred to in this subsection.126

Subsection (2) is the counterpart of the present provision in the Uniform Sales Act.127 To be remembered is that there is an additional statute as follows:

No bill of sale for the transfer of personal property shall be valid, as against existing creditors, or innocent purchasers where the property is left in the possession of the vendor, unless the said bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made.128

That statute will supplement the Code's provisions as to those persons who were creditors at the time of the sale.129

126 This provision of the Code will not change existing Washington law. In Huseby v. Kilgore, 32 Wn.2d 179, 201 P.2d 148 (1948) a dispute between a buyer and creditors of the seller was resolved in the buyer's favor where the buyer had paid and the goods had been identified to the contract.

127 RCW 63.04.270 [UNIFORM SALES ACT §26].

128 RCW 65.08.040.

Subsection (3) makes it quite clear that those statutes dealing with preferences\textsuperscript{130} and fraudulent conveyances\textsuperscript{131} are not affected. 

Section 2-403. Power to Transfer; Good Faith Purchases of Goods; "Entrusting."

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale," or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

Subsection (1) continues the prevailing rule that a purchaser in good faith and for value from one having a voidable title takes free of the claim of the person having the power to avoid that title.\textsuperscript{132} It also continues the general principles of agency and estoppel, in that

\textsuperscript{130} RCW ch. 23.72.

\textsuperscript{131} RCW ch. 19.40.

\textsuperscript{132} RCW 63.04.250 [\textit{UNIFORM SALES ACT} §24]; Fisher v. Thumlert, 194 Wash. 76, 76 P.2d 1018 (1938); Goodyear Rubber Co. v. Schreiber, 29 Wash. 94, 69 Pac. 648 (1902).
the purchaser of goods acquires the title which the transferor "had power" to transfer, and this power can be given by express agency, by apparent authority, or by estoppel. It then deals in detail with four types of sales transactions where the purchaser is held to have the power to transfer title to a bona fide purchaser for value, even though the purchaser's title vis-a-vis the initial seller is defective. Subsections (b) and (c), dealing with sales induced by the use of bogus checks and the related "cash sale" transaction will change the Washington law.

Subdivision 1(a) and 1(d) are diametrically contrary to another section of the Revised Code of Washington, as it is presently construed. That section provides:

All property obtained by larceny, robbery or burglary, shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property; and it shall be the duty of the officer who shall arrest any person charged as principal or accessory in any robbery or larceny, to secure the property alleged to have been stolen, and he shall be answerable for the same, and shall annex a schedule thereof to his return of the warrant.

Insofar as larceny includes obtaining property by false pretenses the Code will protect bona fide purchasers, but the above section has been construed as protecting the original owner. If the Uniform Commercial Code is adopted, RCW 10.79.050 should be repealed in its present form. If it is not repealed, the primacy of the Code should be protected by finding a constructive repeal of the older inconsistent statute, or by construing the statute as merely one directing the arresting officer as to the proper immediate disposition of stolen goods.


134 Quality Shingle Co. v. Old Oregon Lumber & Shingle Co., 110 Wash. 60, 187 Pac. 705 (1920); Orilla Lumber Co. v. Milwaukee & P. S. Ry. Co., 81 Wash. 611, 143 Pac. 152 (1914), rev'd 84 Wash. 362, 148 Pac. 850 (1915) (on principles of estoppel). Because of the hardship imposed by the presently prevailing legal principle, the courts tend to find exceptions, as in the Orilla Lumber Co. case, supra, on rehearing, and as in Esmond v. Richards, 112 Wash. 641, 192 Pac. 917 (1920), where a sale on credit rather than for cash was found. See also Goodwin v. Bear, 122 Wash. 49, 209 Pac. 1080 (1922). The issue does not arise where the original owner does not voluntarily part with possession. Turner v. Benz Bros. & Co., 153 Wash. 123, 279 Pac. 398 (1929); Merinella v. Swartz, 123 Wash. 521, 212 Pac. 1052 (1923).

135 RCW 10.79.050.

or by construing the statute to mean larceny as it existed at the time RCW 10.79.050's counterpart in earlier codes was adopted, that is, as not including false pretense.  

Subsection (2) is in effect an adoption of the rule of market overt, for any entrusting of goods for whatever purpose to a dealer gives the dealer power to transfer the property so entrusted to a buyer in ordinary course of business. Though this comports with a dictum in a Washington decision, it is a substantial change from the generally accepted rule.  

Subsection (3) runs counter to the statute dealing with stolen goods, previously discussed, and so far as it relates to the retention of possession by the seller must be read in connection with the bill of sale recording statute. Though the former of these statutes may be repealed by implication by adoption of this section of the Code, it is not likely that the bills of sale recording provision will be so dealt with.  

This section of the Code protects only buyers in the ordinary course of business, leaving to article 9 the rights of others.  

[This discussion will be continued in subsequent issues.]

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137 See Linn v. Reid, supra note 136.
140 RCW 65.08.040.
141 Professor Williston was of the opinion that the adoption of the Uniform Sales Act's § 25 would repeal this statute. Ayer, The Uniform Sales Act in the State of Washington, 2 Wash. L. Rev. 65, 166 (1927). This has not proved to be the case.
142 The entrusting of goods to a dealer by a seller who takes from that dealer a conditional sales contract will enable that dealer to sell to a purchaser under doctrines of actual authority to sell. Not infrequently, however, the rights of conditional sellers will be determined by the applicable recording statutes. See Commercial Credit Co. v. Cutler, 176 Wash. 423, 29 P.2d 686 (1934); Bauer v. Commercial Credit Co. supra note 138; Northwestern Fin. Co. v. Russell, 161 Wash. 389, 297 Pac. 186 (1931); Bonneviere v. Cole, 90 Wash. 526, 156 Pac. 527 (1916).