Report To The GENERAL ASSEMBLY of NORTH CAROLINA

NORTH CAROLINA ANNOTATIONS THE UNIFORM COMMERCIAL CODE

LEGISLATIVE COUNCIL
1965

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THE UNIFORM COMMERCIAL CODE

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FOREWORD

The following pages present for the use of the North Carolina General Assembly, in considering the Uniform Commercial Code Bill sponsored by the Legislative Council, the official text of the Uniform Commercial Code, with North Carolina comments and annotations prepared for the Legislative Council study pursuant to the action of the Council taken at its meeting of August 7, 1964.

This study of the Code incorporates the annotations and comments on North Carolina law with the 1962 official text of the Uniform Commercial Code as adopted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. The Code sections are indented, in printers type, with each section followed by North Carolina notes, in typewritten form.

The North Carolina annotations and comments were prepared as follows:

Articles 1, 6, 7 and 10 by Professor Hugh W. Divine of Wake Forest Law School

Article 2, Sales, by Professor James A. Webster of Wake Forest Law School

Articles 3, 4 and 5 on Commercial Paper by Professor E. McGruder Faris, Jr., of Wake Forest Law School

Article 8, Investment Securities by Professor Ernest L. Folk, U. N. C. Law School

Article 9, Secured Transactions, by Professor Richard M. Smith of U. N. C. Law School.

Brief summaries of certain articles, prepared by the Research Reporters, have been placed together at the beginning of the volume.

This North Carolina study was originally prepared in limited edition for use of the Legislative Council, its Uniform Commercial Code Committee and the subcommittees thereof, in preparation for the meeting of the Code Committee on December 3rd and of the Council on December 4, 1964, and is distributed to the members of the General Assembly pursuant to action taken at the meeting of the Council on December 4, 1964.

Senator R. E. Brantley, Chairman
Uniform Commercial Code Committee
N. C. Legislative Council

Hugh S. Johnson, Jr., Chairman
Legislative Council

December 4, 1964

COMMITTEE ACTIVITIES

Following the initial meeting of the Uniform Commercial Code Committee on which all Council members served, a public hearing was held on June 5, 1964. At its meeting on July 17, 1964, Sub-committees reported that the volume of law covered by the Uniform Commercial Code was immense and recommended that in order to accomplish a thorough study, members of legal faculties should be consulted by the Committee. The Chairman of the Utilities Commission agreed to allow Mr. Edward B. Hipp to act as co-ordinator of the study.

Mr. Hipp obtained the excellent services of those professors listed in the forward.

Reports of the consultants were filed on November 1, 1964, and were immediately assigned to Sub-committees for study.

At a meeting of the full Committee on December 3, 1964, Sub-committee reports were received and the Committee agreed to request the Legislative Council to recommend adoption of the Uniform Commercial Code to the 1965 General Assembly.

The Legislative Council meeting on December 4, 1964, adopted the report of the Uniform Commercial Code Committee and ordered that the contents of the study be prepared for distribution to the members of the General Assembly and that the Uniform Commercial Code be prepared for introduction at the 1965 Session of the General Assembly.

The Uniform Commercial Code Committee wishes to extend its gratitude to Mr. Hipp for his very capable and excellent assistance as co-ordinator of this voluminous study and also to Mr. Harry T. Westcott for releasing Mr. Hipp to act in this capacity.

The Committee wishes to thank the consultants for their excellent work in preparing a thorough comparative analysis of the Uniform Commercial Code with current North Carolina commercial law.

GENERAL STATEMENT ON THE UNIFORM COMMERCIAL CODE

The two-fold purpose of the Uniform Commercial Code is to simplify and modernize the rules of law governing commercial transactions and to make the law uniform among the states in order to expedite handling of commercial transactions.

Since about 1900 the basic framework of the commercial law of the United States has been a series of major uniform acts as follows:

1. Uniform Negotiable Instruments Act. North Carolina was the 10th State to adopt it 60 years ago.
2. Uniform Sales Act. North Carolina does not have this Act.
3. Uniform Warehouse Receipts Act. Adopted in North Carolina in 1917.
4. Uniform Bills of Lading Act. Adopted in North Carolina in 1919.
5. Uniform Stock Transfer Act. Adopted in North Carolina in 1941.
6. Uniform Trust Receipts Act. North Carolina does not have this Act.

The basic reason for the Code is the recognition that during the period since 1900, there has been tremendous growth in the commercial activity of the country; that in many areas new patterns of commerce have sprung up and in others material changes have occurred; that the 1900 versions of our commercial acts do not

adequately handle these new patterns of activity and changes, with the result that there is a very real need for an "updating" of the commercial law. Thirty-two states (as listed in Exhibit "A") have adopted the Uniform Commercial Code and several others are currently studying it. Georgia, Tennessee, West Virginia and Virginia * have all adopted the Uniform Commercial Code.

In 1960 the North Carolina General Statutes Commission established a Committee to make a preliminary survey of the Uniform Commercial Code in order to determine whether a more thorough study and investigation might be warranted. Primarily, the Committee was instructed to prepare a preliminary study and advise the Commission regarding the desirability of adoption of the Code in North Carolina.

As a result of this Committee's work, the General Statutes Commission felt that the Uniform Commercial Code was a matter in the public interest in this state and that it should be presented to the Legislature for consideration, but that the General Assembly should determine if further study should be undertaken.

Therefore, a bill was drawn by the Commission for introduction in the 1961 General Assembly. The bill cited the need for further study and called for an appropriation of $10,000 in order to make such a study. After being given a favorable report by the Senate Judiciary I Committee, the bill was placed on the unfavorable calendar by the Senate Appropriations Committee.

Additional detailed information is available in the office of the Legislative Council.

*South Carolina is currently studying the Uniform Commercial Code in anticipation of adoption by that State.

EXHIBIT "A"

State	Date Adopted	Effective Date
Pennsylvania	1953	July 1, 1954
Massachusetts	1957	October 1, 1958
Kentucky	1958	July 1, 1960
Connecticut	1959	October 1, 1961
New Hampshire	1959	July 1, 1961
Rhode Island	1960	January 2, 1962
Wyoming	1961	January 1, 1962
Arkansas	1961	January 1, 1962
New Mexico	1961	January 1, 1962
Ohio	1961	July 1, 1962
Oregon	1961	September 1, 1963
Oklahoma	1961	December 1, 1962
Illinois	1961	July 2, 1962
New Jersey	1961	January 1, 1963
Georgia	1962	January 1, 1964
Alaska	1962	December 31, 1962
New York	1962	September 30, 1964
Michigan	1962	January 1, 1964
Indiana	1963	July 1, 1964
Tennessee	1963	July 1, 1964
West Virginia	1963	July 1, 1964
Montana	1963	January 1, 1965
Maryland	1963	February 1, 1964
California	1963	January 1, 1965
Wisconsin	1963	July 1, 1965
Maine	1963	January 1, 1965
Nebraska	1963	March 1, 1965
Missouri	1963	July 1, 1965
Virginia	1964	January 1, 1966
District of Columbia	1963	

THE UNIFORM COMMERCIAL CODE

INTRODUCTION AND SUMMARIES

ARTICLE I, GENERAL PROVISIONS
(Professor Hugh W. Divine)

This unit is not a separate division of commercial law. It is meant to aid in bringing about unity and avoiding duplication. For example, section 1-102 urges that the 'Act shall be liberally construed' and points out some of the underlying purposes of the act. The Uniform Commercial Code Section 1-103 points out also that the code will undoubtedly not cover everything and that thus the courts should use in its interpretation 'the principles of law and equity, including the law merchant' in settling problems.

Notice Section 1-105 which suggests conflict of laws rules. There may be some change here, though not very much, and there is at least the removal of doubt as to the rule to apply in a number of situations. Notice, also, the modification of the requirement of consideration in the special type of situation provided for in section 1-107.

In Section 2-201, Definitions, notice definitions (9), (23), (32), and (44). Also notice the rule of evidence in Section 2-202.

None of this Article seems really controversial unless it might be Section 1-107 and we have something somewhat similar on a policy basis in our State.

ARTICLE II, SALES
(Professor James A. Webster, Jr.)

If the Uniform Commercial Code is adopted in North Carolina, it would provide for the first time in the history of the state a comprehensive, systematized law of sales. Although thirty-six states and the District of Columbia adopted the Uniform Sales Act between the time of its completion in 1906 and the advent of the Uniform Commercial Code, North Carolina has never adopted the Uniform Sales Act. As a consequence court-made common law is the present source of all sales law in North Carolina and

typical of all court-made law, a very uneven piecemeal pattern made up of relatively narrow points of law has evolved. Precedents have piled up on certain points while numerous other questions float in a void of authority. Attorneys are placed in a dilemma as to what they should advise their clients; they can advise their clients in these areas sometimes with a hope only that the court will follow the general law as evidenced by the Uniform Sales Act which is substantially identical with the British Sale of Goods Act of 1893, which in turn was a codification of the sales concepts of the late seventeenth and the early eighteenth centuries. The provision of a thorough and detailed comprehensive law of sales which will make the law of sales certain and precise is the purpose of the article of the Code on sales. Many gaps and inconclusive generalities in the law of sales not currently predictable under court decisions will be rendered certain and answerable if the Code is adopted.

Some generalizations about the sales article may prove helpful as an introduction before a part by part, section by section, analysis of the Code is undertaken.

The first apparent difference in approach made by the Uniform Commercial Code (different from both the Uniform Sales Act and case law approaches) is that the Code abandons the concept of "title" as the determinant of the rights of parties in a sales contract. See § 2-401. Instead of the title concept, the Code substitutes a "transaction concept" and treats the rights of each party on an issue by issue basis. No preliminary elusive search for "title" is required as is necessary under the Uniform Sales Act and the current law of North Carolina on sales. Questions as to who has the risk of loss, who may bring an action for price or whose creditors may reach the goods are answered directly by specific rules applicable to specific contracts and conduct of the parties. This is perhaps the most significant departure that the Uniform Commercial Code makes from the current sales law of which practitioners should be made aware.

A statute of frauds relating to the sale of goods will also be a significant addition to the sales law of North Carolina. §2-201 provides that contracts for the sale of goods involving more than $500 must be in writing. This will be the first statute of frauds relating to personal property to exist in North Carolina since 1792 when the state legislature repealed the seventeenth section of the English statute of frauds, 29 Charles II. The Uniform Commercial Code, furthermore, introduces two other new ideas to North Carolina law, the doctrine of part performance and the provision that as between merchants a writing in confirmation of a contract, sufficient as against the sender, will be good as against the recipient as a memorandum of the contract if the recipient fails to object in writing to its contents. This latter

innovation also evidences another significant variation in sales law found in the Code; businessmen (called "merchants" in the Code) are held to more business-like standards than non-businessmen in certain instances. "Merchants" are held to a higher standard of sophistication than are non-merchants because they are "professionals.

Another distinctive Uniform Commercial Code approach is that sales contracts for the sale of goods should have their own special rules. Rules for the formation of a sales contract are codified in the Code and after adoption of the Code reliance cannot be placed on general principles of the laws of contracts. The specific rules applicable to sales contracts as set out in the Code will govern. For instance, the Code makes the seal obsolete and inoperative as importing consideration for a contract; the Code tends to liberalize and to enforce contracts which may be indefinite to some degree in terms of time for performance, place for delivery, price, or time for payment, by the application of external, objective reasonable standards relied on in the business community or because of prior dealings and trade usages; "firm offers" are made binding and irrevocable, even if made without consideration "between merchants" (see § 2-205). Modifications of contracts may be made without consideration and this rule too is contrary to the common law (§ 2-209). Perhaps the most revolutionary and controversial of the rules evidencing the non-adherence to general contracts principles is the provision in the Code that a court may, as a matter of law, find a contract or any clause therein to be unconscionable and refuse to enforce it. (See § 2-302). This provision, if adopted, will represent a major departure from the current North Carolina law.

On the subject of "warranties", the Code is generally in accord with North Carolina law. An exception to this is the provision of § 2-317 making warranties, both express and implied, cumulative if consistent. § 2-317 would apparently change the North Carolina rule that if there is an express warranty in a sales contract, there can be no coexisting implied warranty on the same subject. In addition, the Code relaxes the requirement of privity in warranty actions by extending warranty coverage to buyers' families, households, and guests who might be injured by reason of a breach of warranty with reference to goods used or consumed. The requirement of privity which currently disables remote consumers from suing remote sellers or manufacturers for breach of warranty is unchanged. (Unless the state legislature elected to adopt the statutory substitute for § 2-318 of the Code which was adopted by Virginia. See infra.)

Another area in which North Carolina's law will be materially changed is with respect to goods obtained by a purchaser who gives a "bad check". Under present law, a purchaser who gives a worthless check for goods gets "no" title; he cannot pass title to the goods even to a bona fide purchaser. Under the Code (§ 2-403), a purchaser who procures goods by passing a "bad check" obtains at least a "voidable" title and can transfer good title to a bona fide purchaser for value at any time before his title is avoided by the seller.

The statute of limitations will be changed to four years for all actions arising out of breach of contracts for sales of goods. This, of course, will change the limitation of time within which actions on simple contracts and actions on sealed contracts must be brought making the statute of limitations uniform as to all sales contracts, thus materially changing North Carolina law in this respect.

These foregoing introductory remarks offer only some of the highlights of changes that will be effected on the law of sales in North Carolina. They are not meant to be exhaustive; other changes will flow from the adoption of the Code, some too difficult to describe briefly and concisely. It is intended that the material which follows shall attempt to assess in brief form just how each provision of the Sales Article will affect the existing law of North Carolina

ARTICLE III, COMMERCIAL PAPER
(Professor E. McGruder Faris, Jr.)

Article III deals with negotiable instruments, and therefore, it replaces the Negotiable Instruments Law (herein cited as "NIL") which was previously adopted in all states. North Carolina in 1899 was one of the first states to adopt. Presently the 198 NIL sections are found in G. S. 25-1 to 25-199. (Note: G. S. 25-92; 25-194, 25-198, and 25-199 are not in the NIL; and NIL 190, 197, and 198 are omitted from the general statutes.)

The N. C. NIL does not follow the same numbering as the official draft of the National Conference of Commissioners on Uniform Laws, but basically the provisions are the same. For convenience in cross-referencing, this study will cite both the NIL and Chapter 25 of the N. C. General Statutes.

Present Chapter 25 contains a number of slight modifications or amendments to the NIL. Such local statuatory modifications in N. C. and in other states and non-uniform construction of the Act are two of the basic factors which prompted the revision now found in Article III of the Uniform Commercial Code (herein cited UCC). Other factors prompting the revision are:

(1) verbosity, redundancy, and at times inconsistent wording of the NIL;

(2) the use of 19th century English commercial terminology not in accord with present day terminology.

Basically, Article III is designed to modernize the statuatory rules governing commercial paper. This has been done by:

(1) merely rewording some NIL sections;
(2) codifying many of the better decisions under the NIL;
(3) making some changes in substantive law;
(4) adding some new statuatory provisions;
(5) using current day terminology;
(6) eliminating or combining some sections of the NIL.

(Article III contains 79 sections as against 198 sections of the NIL and 199 sections of Chapter 25 of the General Statutes of North Carolina).

Briefly the changes in Article III perform three general functions: (1) Clarification; (2) Change of Policy; and (3) New Coverage. A preliminary summary of some representative sections in each category is given below. A more detailed section-by-section analysis appears later.

Clarifying Sections

3-109 -- states that no acceleration clause renders an instrument non-negotiable, thus changing some decisions from other states holding that a clause permitting acceleration at the capricious option of holder rendered the instrument non-negotiable.

3-110 -- clarifies the rules defining "order" paper and "bearer" paper.

3-302 -- codifies the case-made rule that a payee may be a holder in due course (herein a holder in due course will be designated as "HDC").

3-201 -- clarifies the rights of those who purchase from HDC, especially the rights of a reacquirer.

3-402 -- clarifies the distinction between "value" and "consideration."

Change of Policy Sections

One of the major differences between the NIL and Article III is the scope of the two laws. For example, the NIL has been applied to corporate bonds and other investment securities, as well as to ordinary commercial paper such as drafts, checks, certificates of deposit and promisory notes. By contrast, bonds and other investment type securities are specifically excluded from the operation of Article III. Such investment securities are separately governed by Article VIII.

If a particular instrument meets the requirements to come under Article III (3-104) and if it is also classified as an "investment security" (e. g., a simple corporate bond) then such instrument is governed by Article VIII on Investment Securities and not by Article III on Commercial Paper. See 8-102(1)(b).

Other sections involving substantial or minor changes are:
3-115 -- changes the rule of NIL 15 (G.S. 25-21), which provides that even an HDC is subject to the defense that the defendant signed an incomplete and never delivered instrument.

3-204 -- provides that "face bearer paper" can be made "order paper" by a special indorsement. (Compare 8-310.)

3-206 -- makes changes with respect to restrictive indorsements (G. S. 25-42, G. S. 25-43, G. S. 25-53; NIL 36, 37, 47).

3-407 -- provides that no alteration avoids the instrument unless the alteration is both material and fraudulent; whereas, NIL 124 (G.S. 25-131) makes no exception for a nonfraudulent alteration.

3-501 -- Under this and related sections (3-502(1)(b) and 3-511) any drawer, the acceptor of a draft payable at a bank, and the maker of a note payable at a bank are treated alike for most purposes, while the NIL distinguished these parties for many purposes.

3-503 -- provides that in the absense of special circumstances a drawer of a check is discharged of his secondary liability on the instrument unless the check is presented for payment within 30 days of issue; and any indorser is discharged of his secondary liability unless the check is presented for payment within 7 days of his indorsement.

New Coverage Sections Not in NIL

One of the big areas of new coverage relates to the rights and liabilities between drawers and drawees. 3-419(1)(c), 3-405, and Article IV.

Other specific areas of new statuatory coverage are listed below:

3-405 -- contains some new provisions relating to imposters who obtain instruments by fraud.

3-406 -- expands the duty of all parties not to draw an instrument so carelessly as to contribute to an easy alteration.

3-415(2) -- clarifies and to some extent modifies the liability of an accomodation party.

3-415(5) -- expressly affords an accomodation party recourse on the instrument against the accomodated party.

3-416 -- specifically recognizes the "guarantor" as a technical party on negotiable instruments.

3-417 -- expands the protection of a drawee that has paid an instrument with a forged indorsement. At common law the drawee's remedy was an action against the presenting party for money paid by mistake; but 3-417 now permits the drawee to sue the presenting party and prior indorsers on the instrument for breach of warranty.

3-802 -- a new section, clarifies and codifies the rules relating to the discharge of the underlying obligation when an instrument given on the obligation is not paid.

3-803 -- a new section, permits a defendant in a pending action to partially "vouch in" a third party who may be liable to him.

3-804 -- a new section, permits suits on lost instruments and affords the defendant indemnity where needed.

3-805 -- a new section, permits some technically non-negotiable instruments to be treated as negotiable instruments for all purposes except on matters relating to HDC.

Commentator's Foreword to Section-By Section Commentary

(1) A more meaningful comprehension of the following section-by-section analysis can be obtained if it is read in conjunction with the fully annotated text of Article III, IV, and V. Also, G.S. 25-1, to 25-198 should be available for comparison.

(2) All known relevant N. C. statutes are cited.

(3) Many N. C. cases are cited, but no effort was made to make this preliminary study a fully annotated report.

(4) When a UCC section makes little change in law, the comments will be quite short.

(5) When a major change is made, when the new law is ambiguous or when the matter involved has caused previous difficulty, the comments will be considerably longer.

(6) A few suggestions for clarifying amendments are made, and attention is called to a few "fuzzy" areas that may require further study.

(7) Some comments are somewhat speculative, and these may be used as a basis for further inquiry.

(8) Subsequent statements to the effect that a particular section of the UCC does not make a real change in the N. C. law are intended to state a broad proposition in regard to the general tenor of negotiable instruments law in this state under the NIL. Such statements do not necessarily mean that there may not be some dictum to the contrary in a case previously decided on specific facts.

Part 2, Transfer and Negotiation: The eight sections in this part distinguish a transfer that is not a negotiation (3-201) and a transfer that is a "negotiation" (3-302). They also cover the form and effects of various types of indorsements (3-204, 3-205, 3-206, 3-207); and they state the rights of a reacquirer (3-201(1) and 3-208). See also 3-414 and 3-417(3) for a "without recourse" indorsement that was called a qualified indorsement under the NIL. The term "qualified indorsement" is no longer used in the UCC. Also the NIL "conditional indorsement" is now a subclass of restrictive indorsement under 3-205 and 3-206.

Part 3, Rights of a Holder: The seven sections in this section cover:

(1) Certain rights common to all holders (3-301);
(2) Those rights peculiar to an HDC (3-305);
(3) The more limited rights of a non-HDC (3-306);
(4) The definition of HDC (3-302, 3-303, and 3-304); and
(5) Certain procedural provisions (3-307).

Part 5, Presentment, Notice of Dishonor and Protest: The eleven sections of this part deal with the details of the conditions precendent to the liability of secondary parties (drawers and indorsers). Though there has been considerable streamlining in this sections which would replace dozens of sections of the NIL, there are few fundamental changes.

Generally, Part 5 eliminates some of the technical details of presentment, notice of dishonor and protest; and it simplifies others.

Part 7, Advice of International Sight Draft: There is only one section relating to this instrument of international banking

Part 8, Miscellaneous: This part contains Sections 3-801 to 3-805. All but 3-801 are new provisions not found in the NIL. These new sections restate in statute form the law that has been developed by case decision alone or under some statute other than the NIL.

ARTICLE IV, BANK DEPOSITS AND COLLECTIONS
(Professor E. McGruder Faris, Jr.)

The thirty-seven sections of this article are mainly intended to provide uniform rules to govern the collection processes of banks. The article also contains rules governing the relationship between banks and depositors in connection with the collection and payment of items (Part 4).

At the present time the basic N. C. laws governing bank deposits and collections are found in the NIL (G.S. 25-1 to 25-199) and in scattered sections of Chapter 53 (Banks). These statutes and Article IV may be consulted in conjunction with the following comments in order to obtain a more complete understanding of new coverage.

For a more extensive analysis of this article see Bank Deposits and Collections by Clarke, Bailey and Young (Joint Committee on Continuing Legal Education of the ALI and ABA, 1963).

The present form of Article IV is the product of years of intensive study and controversy, and it appears to offer a reasonable balance (1) between the competing interests of various banks among themselves and (2) in their relations with non-bank customers. To meet criticisms of various banking and non-banking groups there have been many modifications in the past ten years, and some further modifications may be in prospect as experience dictates. Though any reader can find isolated provisions that might not accord with the interests he represents, it seems fair to state that the present form sets forth adequately the balanced and concrete rules for banking processes. At the same time some flexibility in the collection process is permitted.

In summary, it appears that the advantages of having in North Carolina an expanded coverage of statuatory banking law readily available to bankers, lawyers, and the general public will far outweigh any personal objections to specific provisions.

It is not suggested that construction of controlling sections of the UCC is always a simple matter even for a skilled attorney. However, it is likely that legal counselling by attorneys will be based on a somewhat firmer foundation under the UCC than in the past when many areas of banking law were not covered by statute.

Many sections in this Article are in part based on the American Bankers Association Bank Collection Code (Herein cited as BCC) which has been adopted in eighteen states but not in North Carolina.

Draftsman's Note on Scope of Comment: Most comments in this section will be short, and they are primarily designed to call attention to a few of the major items under each section. In most instances the Code text will be reasonably self-explanatory; and to the extent that elaboration is required, the extensive Official Comments should be consulted.

Because of a relative scarcity of statutes and decisions in the area of coverage, comparisons with existing laws is at times not possible. Also, it is believed that an attempt to compare the new rules with existing banking practices not based on N. C. statutes or decisions is beyond the scope of this preliminary study.

Part 2, Collection of Items: Depository and Collecting Banks: Parts 2, 3 and 4 set forth the detailed rights and duties of various banks in the collection process.

Part 2 covers the rights and duties of the (A) original depository bank that starts the item on way through the collection chain; and (B) of other collecting banks that handle the item before it reaches the payor bank.

Part 3 covers the rights and duties of the payor bank in its relations to prior banks and other prior parties (excluding its own customers).

Part 4 covers relations between the payor bank and its own customer.

Part 3, Collection of Items: Payor Banks: This part continues coverage of rules governing the bank collection process, and it emphasizes the rights and duties of payor banks. Part 2 emphasizes the rights and duties of depository banks and collecting banks.

Part 4, Relationship Between Payor Bank and Its Customers: Unlike parts 2 and 3 which deal with relations among payor banks, depository banks, collecting banks, and other parties in the collection process, the seven sections in this part deal with the rights and duties between a payor bank and its customer. It covers such matters as:

(1) When bank can charge its customers account (4-401);
(2) A bank's liability for wrongful dishonor (4-402);
(3) A customer's right to stop payment (4-403);
(4) A bank's right to refuse payment of stale checks (4-404);
(5) The effect of death or incompetence of customer (4-405);

(6) A customer's duty to report unauthorized signatures or alterations (4-406); and

(7) A payor bank's right to subrogation on improper payment (4-407).

ARTICLE V, LETTERS OF CREDIT
(Professor E. McGruder Faris, Jr.)

Though letters of credit have been used in both domestic and international trade for many years, there have been few statuatory provisions. The only known N. C. statutes covering letters of credit are:

(1) G.S. 25-142: "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." This will be repealed along with the rest of the NIL.

(2) G.S. 25-56 (Bank Acceptance Defined): This section in part provides that a bank may "issue letters of credit authorizing the holders thereof to draw upon it or its correspondents, provided that there is a definite bona fide contract for the shipment of goods within a reasonable time, and the existence of such contract is certified in the acceptance agreement."

This statute is not only limited in areas covered, but it appears to be unduly restrictive in an area where growth should be encouraged. Thus, to the extent that G.S. 25-56 is in conflict with the liberal policy of Article V, it should be amended.

A brief outline of Letters of Credit may serve to explain the coverage of Article V. First, it is estimated that today ninety percent of imports are financed by letters of credit. Also the letter of credit is becoming more important in the domestic field.

The device takes two forms:

(A) a "documentary" letter and

(B) a"clean"letter.

The documentary letter helps in financing arrangements when a buyer is unwilling to pay before goods are shipped and when the seller is unwilling to ship without guarantee of payment. In such case an issuer (bank or other financier) at the request of

its customer (buyer) issues a letter which is its promise to the beneficiary (seller) that it will accept or pay drafts drawn on it by the beneficiary under stated conditions if the drafts are accompanied by the appropriate documents (invoice, bill of lading, etc.).

Often an advising bank near the seller will be selected to notify the seller of the letter of credit. If the bank near the seller also engages that it will honor the credit of the issuer, the advising bank becomes a confirming bank.

Because the letter of credit is an evolving financial paper, needing room for experimentation, the rules governing it are purposely drawn quite loosly. Official Comment 2 to 5-102 states the growth aspect as follows:

> "Subsection (3) recognizes that in the present state of the law and variety of practices as to letters of credit, no statute can effectively or wisely codify all possible law of letters of credit without stultifying further development of this useful financing device. The more important areas not covered by this Article revolve around the question of when documents in fact and in law do or do not comply with the terms of the credit. In addition such minor matters as the absence of expiration dates and the effect of extending shipment but not expiration dates are also left untouched for future adjudication. The rules embodied in the Article can be viewed as those expressing the fundamental theories underlying letters of credit. For this reason the second sentence of subsection (3) makes explicit the court's power to apply a particular rule by analogy to cases not within its terms, or to refrain from doing so. Under Section 1-102(1) such application is to follow the canon of liberal interpretation to promote underlying purposes and policies. Since the law of letters of credit is still developing, conscious use of that canon and attention to fundamental theory by the court are peculiarly appropriate."

ARTICLE VI, BULK TRANSFERS
(Professor Hugh W. Divine)

Notice that Section 6-111 changes the statute of limitations. There are a few minor changes in this Article, but for the most part, there are no important changes of policy. Many of the changes clarify the law.

ARTICLE VII, WAREHOUSE RECEIPTS, BILLS OF LADING AND OTHER DOCUMENTS OF TITLE

(Professor Hugh W. Divine)

Section 7-204(2) which seems to allow a contract against full liability except as limited by "warehouseman's tariff." Notice that a State can add to this statute if it desires without affecting uniformity too much.

Section 7-210 some changes but not of a disturbing nature.

Section 7-305 for a change which is similar to many changes in these sections. It does not involve any real change of policy and enables present needs to be supported by law.

Section 7-308 is a change, but probably no problem or objection to the change.

One policy problem might be noted in Section 7-309(2) which was agreed to in 62-203(a) in 1963.

See Section 7-504(3) for a change which will be as acceptable as the old rule.

ARTICLE VIII, INVESTMENT SECURITIES SUMMARY

(Professor Ernest L. Folk)

Article VIII of the Uniform Commercial Code is essentially a negotiable instruments law geared to the special needs and characteristics of investment securities. Thus, the Code departs from statutes such as the Uniform Negotiable Instruments Law which embraces without distinction both short-term commercial paper and bonds and other long-term creditor paper. Article VIII's premise is that all types of investment securities, whether bonds or stocks, are sufficiently similar that they can all be governed by the same uniform statute. Article VIII's basic object is to give investment securities full and complete negotiability, with the major incidents normally associated with that concept: ready transfer by delivery or indorsement, and destruction of issuer defenses to and equities of ownership in investment securities held by bona fide purchasers. Article VIII does not, of course, deal with all aspects of investment securities, e.g., those matters covered by the corporation and "blue sky" laws or by governmental bond statutes, but it states rules governing the transfer of investment paper both on initial issue and on subsequent transfer among owners of the paper.

The coverage of Article VIII rests upon the broad definition of the term "security" which includes all types of investment securities currently marketed today. It includes creditor securities such as bonds and debentures, equity securities such as shares of stock, warrants and rights and special types of stock, and other securities such as voting trust certificates, equipment trust certificates, mutual fund shares, and the like. The definition of "security" carries forward the process, evident in both the Negotiable Instruments Law and the Uniform Stock Transfer Act, of reducing the creditor or equity interest to the instrument itself, so that transfer of the instrument is an effective and complete transfer of the interest.

Article VIII states the rights of the initial purchaser of a security from an issuer such as a corporation or a governmental unit. In general, both the first and subsequent purchasers will cut off defenses if they paid value and took without notice. This includes, for example, a defense based on the act of a faithless employee issuing stock to himself and selling it or using it as collateral for a loan. Defenses of governmental units are subject to special rules designed to protect the public interest as well as the reasonable expectations of the purchaser.

Article VIII gives to bona fide purchasers at least as great a degree of freedom from unknown equities of ownership as the Negotiable Instruments Law gave to holders in due course. Indeed, unlike the older law, the Code permits one who purchases an overdue security within specified time limits to become a bona fide purchaser and cut off issuer defenses and ownership equities, thereby taking accounts of frequent trading in overdue or defaulted securities. The Code states in detail the procedures for transfer or investment securities, the warranties of transferors, and, of special importance, the warranties of persons giving the customary guarantee of the transferor's signature.

Article VIII states the rights, duties, and liabilities of the issuer when the transferee of a security presents it to the issuer (or his transfer agent) and request registration of transfer into his own name on the issuer's books. In this situation the Code gives the issuer broad relief from possible liabilities. In general, the issuer is not liable for registering a wrongful transfer of a security such as a transfer in breach of trust, but remains absolutely liable for registering transfer on an unauthorized or forged indorsement, although in this situation the issuer may fully rely on the warranty of the signature guarantor. In this area, the Code follows the lead given by two existing North Carolina statutes: the Uniform Fiduciaries Act and the Uniform Act for Simplification of Fiduciary Security Transfers. Like the latter statute, the Code indicates what documents the issuer need obtain when he registers transfer of a security, and states the issuer's limited duty of inquiry.

Article VIII provides businessmen, lawyers and judges with the clearest and most comprehensive statement of the important legal rules governing investment securities. It is also a logical outcome of the developments taking place in the law and in the practices of the investment community, both locally and nationally.

ARTICLE IX, SECURED TRANSACTIONS; SALES OF ACCOUNTS, CONTRACT RIGHTS AND CHATTEL PAPER

(Professor Richard M. Smith)

Article IX of the Uniform Commercial Code is a comprehensive statutory scheme which would govern all security interests in personal property and fixtures, excepting a few non-commercial transactions. Oversimplification of the Article would be misleading for it is a complex and highly integrated statute of fifty-three sections which would supplant the existing statutes and case law relating to pledges, chattel mortgages, conditional sales, trust receipts, assignments of accounts receivable, factor's liens, agricultural crop liens and any other transaction intended to create a security interest in personal property.

The Article adopts a functional, rather than formalistic, approach to the consequences of the security interest. Basically, the distinctions as to the rights and duties of the parties in various types of security transactions depend upon the type of collateral rather than on the form of the security agreement. Sections 9-104 through 9-109. Further, the Article would abolish technicalities such as the necessity of acknowledgment, establish a complete "notice filing" system such as is now in effect for factor's liens and trust receipts, Sections 9-401 through 9-403; and provide a single integrated system of priorities. Sections 9-301 and 9-312. It would liberalize the rights of the secured party on default in a manner similar to the Uniform Trust Receipts Act. Sections 9-501 through 9-507.

Another significant substantive modification and clarification would be the general validation of the "floating lien": through express recognition of the validity of after-acquired property clauses and future advances provisions, Section 9-204, and by abolition of control of the debtor over the collateral and proceeds as a test for validity of the security agreement. Section 9-205. Due to the absence of decisions concerning the factor's lien act and accounts receivable act in North Carolina it is perhaps impossible to accurately judge whether the Code would make significant changes in those laws insofar as the floating lien is concerned. Nevertheless, those acts to recognize the concept. Article IX would make express much of that which is now

unclear and extend the availability of the device to all persons financing inventory or the manufacturing of goods.

In general the Article would give increased flexibility to the secured party and the debtor. It provides for perfection of security interests in consumer goods and certain farm equipment without filing. Section 9-302. It gives the consumer complete protection from the security interests in the seller's inventory, thus expanding the protection now available in only three situations in North Carolina. Section 9-307.

There are many more changes which this Article of the Code would make in North Carolina law; there are many places where the Code would merely supplement existing law. But the details are not to be had in one page. Suffice it to say at this point that Article IX does not abandon all knowledge which antedates it. Its adoption would not plunge interested parties into a completely foreign world. The terminology is for the most part new; but once it is mastered, the concepts resulting therefrom are familiar.

Article IX would not give simple answers to what are now complex problems. But this 1962 draft does represent the best efforts of hundreds of persons, made over a period of fourteen years, to achieve a satisfactory balance between the present commercial needs of the secured party, the debtor and third persons. Its adoption in at least twenty-nine states without substantial modification attests to its success.

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I. CODE SECTIONS CONTAINING ALTERNATIVE OR OPTIONAL PROVISIONS, WITH THE SELECTION MADE IN DRAFTING THE NORTH CAROLINA BILL TO ADOPT THE CODE

Section	Caption	Alternative Adopted in Bill
3-121	Instruments Payable at Bank	Alternative B
4-106	Separate Office of a Bank	Words in Brackets included
4-202	Responsibility for Collection; When Action Seasonable	Words in Brackets included
4-212	Right of Charge-Back or Refund	Subsection (2) included
5-112	Time Allowed for Honor or Rejection; Withholding	Words in Brackets in (1) Not included
5-114	Issuer's Duty and Privilege to Honor; Right to Reimbursement	Subsection (4) and (5) Not included
6-104	Schedule of Property, List of Creditors	Subsection (1) (c) specifying Clerk of the Superior Court
6-106	Application of the Proceeds	Optional Subsection (4) included, specifying Clerk of the Superior Court
6-107	The Notice	Optional Subsection (2) (e) included
6-108	Auction Sales; "Auctioneer"	Optional Subsection (3) (c) included
6-109	What Creditors Protected: (Credit for Payment to Particular Creditors)	Optional Section (2) included
7-403	Obligation of Warehouseman or Carrier to Deliver; Excuse	Words in Brackets in (1) (b) included
9-103	Accounts, Contract Rights, General Intangibles and Equipment Relating to Another Jurisdiction; and Incoming Goods Already Subject to a Security Interest	Words in Brackets in (2) and (5) included
9-302	When Filing is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of this Article do not Apply	Alternative A adopted for Subsection (b), new Subsection (5) inserted for mortgages, etc. of public utilities
9-401	Place of Filing; Erroneous Filing; Removal of Collateral	Third alternative, Subsection (1) with words in brackets in (1) (c) included, and original Subsection (3)
9-407	Information From Filing Officer	This optional section included after deleting first two sentences of Subsection (2)

Section	Caption	Alternative Adopted in Bill
10-104	Laws Not Repealed	Optional Subsection (2) included in Section 7 of Bill. New Sections 3, 4, 5, 8 and 9 of Bill inserted

II. CODE SECTIONS CONTAINING BLANK SPACE WITH INSERT USED IN DRAFTING THE NORTH CAROLINA BILL TO ADOPT THE CODE

Section	Caption	Insertion in Bill
7-204	Duty of Care; Contractual Limitation of Warehouseman's Liability	Insert in (4) "any statute which imposes a higher responsibility upon the warehouseman or invalidates contractual limitations which would be permissible under this Article".
9-203	Enforceability of Security Interest; Proceeds, Formal Requisites	G.S. 53-164 to 191 (Consumer Finance Act); 24-1, 24-2 (Usury); 91-1 to 8 (Pawnbrokers)
9-401	Place of Filing; Erroneous Filing; Removal of Collateral	Register of Deeds
9-403	What Constitutes Filing; Duration of Filing; Effect of Lapsed Filing; Duties of Filing Officer	$.50 for the statutory form prescribed in Section 9-402 and for all other statements, $1.00 for the first page and $.75 cents per page for all other pages
9-404	Termination Statement	(1) $.50, (3) $.50
9-405	Assignment of Security Interest; Duties of Filing Officer; Fees	(1) $1.00 for the first page and $.75 for each additional page (2) $1.00 for the first page and $.75 for each additional page
9-406	Release of Collateral; Duties of Filing Officer; Fees	(1) $1.00 for the first page and $.75 for each additional page (2) $1.00 for the first page and $.75 for each additional page
9-407	Information From Filing Officer	(2) Certificate deleted. Copy of Financing Statement $1.00
10-101	Effective Date	July 1, 1967. Section 10 of Bill
10-102 10-103 10-104	Specific Repealer) General Repealer) Laws Not Repealed)	Extensive modification for North Carolina. Sections 2 through 10 of Bill

TABLE OF COMPARATIVE SECTIONS

The numbers preceding the dots refer to sections in the Legislative Council's Recommended Bill for North Carolina; the numbers following the dots give the corresponding sections in the Uniform Commercial Code. The recommended North Carolina Bill does not carry forward the subdivision of the articles into "parts" as in the Uniform Commercial Code since part groupings are not in conformity with the normal numbering system of the General Statutes. The section numbers of the recommended North Carolina Bill which are omitted have been left out intentionally for future use.

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Section 8	313	New
Section 9	314	New
Section 10	314	10-101

*Chapter 25A of the General Statutes will not incorporate a Repealer Article: sections of Code, Article 10 are placed in Sections 2 through 10 of the Bill.

Section 1—101. Short Title.

This Act shall be known and may be cited as Uniform Commercial Code.

Prior Statutes: None

Section 1—102. Purposes; Rules of Construction; Variation by Agreement.

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this Act unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

N. C. Comments

Prior Statutes: GS 55-93
GS 27-3
GS 36-50
GS 36-44
GS 12-3(1)

Subsection (1): Some of the uniform laws previously adopted are in accord: GS 55-93, GS 27-3. As to bulk sales law, the North Carolina follows a strict construction. Swift & Co. v. Tempelos, 178 NC 437(1919).

Subsection (2): This is new except as to paragraph (c). As to paragraph (c) in accord with present law, see GS 27-3, GS 36-50, and GS 55-93, GS 36-44.

Subsection (3): Generally, one can contract except where contrary to public policy. The idea of this subsection is not explicitl set out in previous statutes.

Subsection (4): This subsection is new.

Subsection (5): Similar to GS 12-3(1).

Section 1—103. Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

N. C. Comments

Prior Statutes: GS 27-4
GS 55-9

This section is similar to provisions in a number of prior uniform laws: GS 27-4, GS 55-92.

Section 1—104. Construction Against Implicit Repeal.

This Act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

N. C. Comments

Prior Statutes: None

This is new, but is in accord with language often used by the court indicating it does not favor repeal by implication. State Board of Agriculture v. White Oak Buckle Drainage District, 177 NC 222(1919).

Section 1—105. Territorial Application of the Act; Parties' Power to Choose Applicable Law.

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2—402.

Applicability of the Article on Bank Deposits and Collections. Section 4—102.

Bulk transfers subject to the Article on Bulk Transfers. Section 6—102.

Applicability of the Article on Investment Securities. Section 8—106.

Policy and scope of the Article on Secured Transactions. Sections 9—102 and 9—103.

N. C. Comments

Prior Statutes: None

Subsection (1) is one of the most important preliminary sections of the Official Uniform Commercial Code. It is believed that it would modify our conflict of laws' rules. Our Court has had a tendency to use rigid rules in this area. See Morris v. Hockaday, 94 NC 286(1886); Bundy v. Commercial Credit Co., 200 NC 511(1931). The second sentence provides that where there is no agreement as to the law that will govern, and where there is sufficient relation to North Carolina, North Carolina law will be used. This may be a modification of present law. See Roomy v. Insurance Co., 256 NC 318(1961). Davis v. Coleman, 33 NC 303(1850).

Subsection (2): The specific conflict of laws' rule set out in this section is new. This subsection states a second limitation upon the general right to select the law governing a transaction. The rationale of all five of the exceptions set forth is two-fold: (1) the necessity of certainty as to the applicable law exists in the five instances, and (2) the inalienability by the contracting parties of rights of third parties, generally creditors, under local law.

Section 1—106. Remedies to Be Liberally Administered.

(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

N. C. Comments

Prior Statutes: None

Subsection (1) is new. However, it is similar to a general statement of damages. See Restatement, Contracts, sections 328-345(1932).

Subsection (2) is new.

Section 1—107. Waiver or Renunciation of Claim or Right After Breach.

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

N. C. Comments

Prior Statutes: GS 1-54

This section modifies present law. Mitchell v. Sawyer, 71 NC 70(1874). Except to the extent that GS 1-540, which modifies the consideration requirement to some extent, allows a release without consideration, this is new. The language would not seem to apply to a release "where an agreement is made and accepted for a less amount than that demanded or claimed. . . ."

Section 1—108. Severability.

If any provision or clause of this Act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

N. C. Comments

Prior Statutes: None

This type of provision appears in many statutes.

Section 1—109. Section Captions.

Section captions are parts of this Act.

N. C. Comments

Prior Statutes: None

This section is contra to present law. Sims v. Insurance Co., 257 NC 32(1962).

Section 1—201. General Definitions.

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1—205 and 2—208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1—103). (Compare "Contract".)

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title, or security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law. (Compare "Agreement".)

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

(25) A person has "notice" of a fact when

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this Act.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this Act.

(30) "Person" includes an individual or an organization (See Section 1—102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2—401) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2—401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (Section 2—326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes a forgery.

(44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3—303, 4—208 and 4—209) a person gives "value" for rights if he acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a pre-existing claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

N. C. Comments

Prior Statutes: GS 21-1
GS 27-2, GS 25-1, GS 21-4
GS 45-46, GS 1-10, GS 55-96
GS 25-62, GS 21-11, GS 21-33
GS 25-30, GS 27-8, GS 27-10
GS 12-3

Subsection (1), "Action": Similar definition is GS 21-1, GS 27-2, and GS 25-1. However, broadened to include "recoupment" and "any other proceedings in which rights are determined."

Subsection (2), "Agrieved party": This subsection is new.

Subsection (3), "Agreement": This subsection is new.

Subsection (4), "Bank": Similar to GS 25-1 is "person" means association of persons unincorporated or incorporated.

Subsection (5), "Bearer": Similar to GS 25-1, but with a broader meaning.

Subsection (6), "Bill of Lading": See GS 21-1 and GS 21-4. The definition has been enlarged to include freight forwarders' bills and bills issued by contract carriers as well as those issued by common carriers, and is not restricted to intra-state shipments as is the present law. The defition of airbill is new.

Subsection (7), "Branch": This subsection is new.

Subsection (8), "Burden of establishing": This subsection is new.

Subsection (9), "Buyer in ordinary course of business": Similar to GS 45-46 (supp.). The definition has been expanded. See UCC 2-403 and Article on Secured Transactions (Article 9).

Subsection (10), "Conspicuous": This subsection is new.

Subsection (11), "Contract": This subsection is new.

Subsection (12), "Creditor": This subsection is new.

Subsection (13), "Defendant": Compare with GS 1-10.

Subsection (14), "Delivery": Similar to GS 25-1, GS 27-2.

Subsection (15), "Document of title": This subsection is new.

Subsection (16), "Fault": This subsection is new.

Subsection (17), "Fungible": See similar definition in Edwards v. Power Co., 193 NC 780(1927). See also GS 27-2. The second sentence is new.

Subsection (18), "Genuine": This subsection is new.

Subsection (19), "Good faith": Similar to GS 27-2, GS 55-96(b).

Subsection (20), "Holder": Similar to GS 25-1, GS 21-1, GS 27-2.

Subsection (21), "To honor": This subsection is new.

Subsection (22), "Insolvency proceedings". This is new.

Subsection (23), "Insolvent": This definition is different from that found in Flowers v. American Agricultural Chemical Co., 199 NC 456(1930). The definition in that case suggests that "if the entire assets of a person equal or exceed his entire debts, he is solvent".

Subsection (24), "Money": This subsection is new.

Subsection (25), "Notice": Compare GS 25-62, GS 21-11, GS 21-33.

Subsection (26), "Notifies": This subsection is new.

Subsection (27), "Notice, knowledge or a notice or notification" when effective: Somewhat similar to GS 21-11 and GS 21-33.

Subsection (28), "Organization": "person" is defined in GS 21-1, GS 27-2, GS 25-1, GS 55-96, and GS 45-46. The definition of "organization" given here includes a number of entities or associations not specifically mentioned in prior definitions of "person," namely, government, governmental subdivision or agency, business trust, trust and estate.

Subsection (29), "Party": This is new.

Subsection (30), "Party": See comment to subsection (29).

Subsection (31), "Presumption": This is new.

Subsection (32), "Purchase": See GS 21-1, GS 27-2, GS 55-96, and GS 45-46. UCC definition seems broader than present definitions.

Subsection (33), "Purchaser": See subsection (32), and note.

Subsection (34), "Remedy": This is new.

Subsection (35), "Representative": This is new.

Subsection (36), "Rights": This is new.

Subsection (37), "Security interest": Compare with GS 45-46.

Subsection (38), "Send": This is new.

Subsection (39), "Signed": This is new, but see Lee v. Parker, 171 NC 144, 150(1916).

Subsection (40), "Surety": This seems to vary the meaning set out in Wachovia Bank and Trust Co. v. Clifton, 203 NC 485(1932).

Subsection (41), "Telegram": This is new.

Subsection (42), "Term": This is new.

Subsection (43), "Unauthorized": This is new.

Subsection (44), "Value": Similar to GS 25-1 and GS 25-30, GS 27-2, GS 55-96. See also GS 45-46.

Subsection (45), "Warehouse receipt": This is new, but see GS 27-8 and GS 27-10.

Subsection (46), "Written" or "writing": A broader term that that found in GS 25-1 and GS 12-3(10).

Section 1—202. Prima Facie Evidence by Third Party Documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

N. C. Comments

Prior Statutes: GS 8-45.1
GS 8-44, GS 8-41

This subsection modifies the present law. There are several specific statutes that are intended to make the proof of specified material simple: GS 8-45.1, GS 8-44, and GS 8-41. However, the rule as to business entries is stated as follows: "If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they were made, they are admissible." Stansbury, North Carolina Evidence, Second Edition, P. 390. See Dairy & Ice Cream Supply Co., v. Gastonia Ice Cream Co., 232 NC 684(1950). See Jones v. Atlantic Coast Line R. Co., 148 NC 449(1908) where the Court held it to be error to use a railroad conductor's record without having him there to authenticate it.

Section 1—203. Obligation of Good Faith.

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

N. C. Comments

Prior Statutes: GS 27-2,
GS 55-96(b)

"Good faith" is mentioned in two statutes: GS 27-2 and GS 55-96(b). This section probably makes little substantive change in present law.

Section 1—204. Time; Reasonable Time; "Seasonably".

(1) Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

N. C. Comments

Prior Statutes: GS 25-3.

See somewhat similar idea in GS 25-3. See discussion in Raines v. Granthum, 205 NC 340, 343(1933). The section is probably generally in accord with present law. Subsection (3) is new.

Section 1—205. Course of Dealing and Usage of Trade.

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

N. C. Comments

Prior Statutes: None

The first five subsections are consistent with the common law of contracts in general. Corbin on Contracts, West Publishing Co., 1960, section 556, footnote 86, p. 244. See The T.C. May Company v. The Menzies Shoe Co., 184 NC 150(1922) in which the court took cognizance of the fact that "the custom of the trade at that time required of the defendant acceptance or rejection of the orders within eight or ten days . . . ." In McKinney v. Matthews, 166 NC 576, 580(1914) the Court said "it was competent to prove the custom and the standard ordinarily prevailing under such contracts. . . ."

As to subsections (2) and (3) see Cahoon v. Harrell, 180 NC 39(1920) where the Court says, "It is the accepted principle here and elsewhere that a lawful and existent business custom or usage, clearly established, concerning the subject-matter of a contract, may be received in evidence to explain ambiguities therein, or to add stipulations about which the contract is silent, and, further, where such a custom is known to the parties, or its existence is so universal and all prevailing that knowledge will be imputed, the parties will be presumed to have contracted in reference to it, unless excluded by the express terms of the agreement between them." Thus, our present law is generally in accord with subsections (2) and (3).

Subsection (6). This subsection seems new.

Section 1—206. Statute of Frauds for Kinds of Personal Property Not Otherwise Covered.

(1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

(2) Subsection (1) of this section does not apply to contracts for the sale of goods (Section 2—201) nor of securities (Section 8—319) nor to security agreements (Section 9—203).

N. C. Comments

Prior Statutes: GS 22-1, 22-2, 22-3, 22-4

The present statute of frauds does not apply to personal property. GS 22-1 through GS 22-4. Therefore all changes here will be a change in the law.

Section 1—207. Performance or Acceptance Under Reservation of Rights.

A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.

N. C. Comments

Prior Statutes: None

This seems to be a statement of the present law. In Yates v. W. F. Mickey Body Co., 258 NC 16(1962), the Court says, "The plaintiff knew that defendant required a certain number of catalogs in time for the Miami Convention. A thousand catalogs were printed and delivered for that specific purpose. The defendant, within thirty minutes after they were delivered, informed plaintiff that the page numbers had been omitted and asked him to stop the printing of the others. Under these circumstances, the fact that defendant in an emergency used the 1,000 catalogs would not waive his right to reject the others." p. 22.

Section 1—208. Option to Accelerate at Will.

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

N. C. Comments

Prior Statutes: GS 25-10

The present law is in accord with part of this section. The present law allows note to contain an acceleration provision if collaterals have been deposited provided "the value of the securities so deposited has so decreased or declined as to render the holder insecure. . . ." GS 25-10. An acceleration clause in case of failure to pay interest when due does not make the notes non-negotiable. Walter v. Kilpatrick, 191 NC 458(1926). The part of sentence one concerning an acceleration clause based on a person's ability to accelerate "at will" or "when he deems himself insecure" is new. The last sentence is similar to present law. See Webb v. Trustees, 143 NC 299, 303(1906) in which a person agreed to buy municipal bonds provided his attorney found that they were "legally issued". The attorney did not so find. The Court says, "It is uniformly held by the courts that, in the absence of any allegation and proof of bad faith or arbitrary conduct on the part of the person selected to pass upon the validity of the bond or performance of the contract on the part of the person seeking its enforcement, his approval is a condition precedent and is essential to the right to demand performance."

Section 2—101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Sales.

N.C. Comments — Prior Statutes: None

This Article is entirely new. The Uniform Sales Act, although adopted and in effect in 36 states and the District of Columbia, was never adopted in North Carolina.

Section 2—102. Scope; Certain Security and Other Transactions Excluded From This Article.

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

N.C. Comments — Prior Statutes: None

This section sets out the scope of the Code, limiting it to transactions in goods (as defined in § 2-105) and indicates that the Article on Sales does not apply to transactions intended as security even though in the form of an unconditional contract of sale or to sell. The section also makes clear that the Sales Article does not impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

Section 2—103. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires

(a) "Buyer" means a person who buys or contracts to buy goods.

(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this Article or to specified Parts thereof, and the sections in which they appear are:

"Acceptance". Section 2—606.
"Banker's credit". Section 2—325.
"Between merchants". Section 2—104.
"Cancellation". Section 2—106(4).
"Commercial unit". Section 2—105.
"Confirmed credit". Section 2—325.
"Conforming to contract". Section 2—106.
"Contract for sale". Section 2—106.
"Cover". Section 2—712.
"Entrusting". Section 2—403.
"Financing agency". Section 2—104.
"Future goods". Section 2—105.
"Goods". Section 2—105.

"Identification". Section 2—501.
"Installment contract". Section 2—612.
"Letter of Credit". Section 2—325.
"Lot". Section 2—105.
"Merchant". Section 2—104.
"Overseas". Section 2—323.
"Person in position of seller". Section 2—707.
"Present sale". Section 2—106.
"Sale". Section 2—106.
"Sale on approval". Section 2—326.
"Sale or return". Section 2—326.
"Termination". Section 2—106.

(3) The following definitions in other Articles apply to this Article:

"Check". Section 3—104.
"Consignee". Section 7—102.
"Consignor". Section 7—102.
"Consumer goods". Section 9—109.
"Dishonor". Section 3—507.
"Draft". Section 3—104.

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

N.C. Comments

Prior Statutes: None

There appears to be no specific change in N.C. law attributable to this section. There are, however, no statutes related to this section and the cases do not expressly define the terms treated here. They are expressly and explicitly defined in the Code because of the U.C.C.'s general concern for the precise use of language in cross-references.

Section 2—104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency".

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2—707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

N.C. Comments

Prior Statutes: None

Subsections (1) and (3):

One of the unique features of the Sales Article of the Code finds its genesis in this section. At various points in the Code different standards are applied to "merchants" as opposed to "non-merchant" buyers and sellers. (See, e.g. inter alia § 2-201 which provides a special exception to the statute of frauds applicable only to "merchants" wherein a merchant is held liable in contract of sale or to sell upon his receipt of a memorandum and his failure to object to its terms. Also note that § 2-205 which relates to firm offers made without consideration applies only to "merchants". §2-207 sets out special provisions as to the effect of the inclusion of additional or different terms to a contract in an acceptance "between merchants". § 2-209(2) establishes special rules as to limitations or modifications of contracts between "merchants" and "non-merchants". See also § 2-603 imposing special duties on a "merchant buyer" who has rightfully rejected goods sent by seller and § 2-605(1)(b) where merchant seller may request written specification of defects upon which a rejection is based if the buyer is also a merchant. See also § 2-314, relating to the implied warranty of merchantability which under the U.C.C. applies only when the sale is by a seller who is a "merchant").

Subsection (2) defining "financing agency" is new in N.C. law.

The distinctions between "merchants" and "non-merchants" and as to contracts "between merchants" are new to N.C. law and result in significant differences of treatment resulting in significant changes in N.C. law in distinguishing legal relations created between those who are essentially "professionals" and those who are not.

Section 2—105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2—107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

N.C. Comments

Prior Statutes: None

Subsection (1) defining "goods" accords with N.C. cases. See Vaughn V. Murfreesboro, 96 N.C. 317 (1887); Pippin v. Ellison, 34 N.C. 61 (1851) distinguishing "goods" from choses in action but making the term embrace not only tangible inanimate property such as furniture, farming utensils, corn, etc., but also slaves, horses, cattle, hogs, etc. Growing crops can also be dealt with as personalty. See Odom v. Clark, 146 N.C. 544 (1908). Unborn animals are likewise the subject of sales as "goods". See Fonville v. Casey, 5 N.C. (1810).

Subsection (2) accords with DeVane v. Fennel, 24 N.C. 36 (1841) and Heiser v. Mears, 120 N.C. 443 (1897) that no interest passes in goods until in existence and identified, and pending their existence or identification a contract relating to their sale is only a contract "to sell".

Subsection (3) accords with N.C. law that there may be a sale of a part interest in an identified chattel. See Bullman v. Edney, 232 N.C. 465 (1950) creating a tenancy in common in personalty.

Subsection (4) would change the law in N.C. See the case of Waldo v. Belcher, 33 N.C. 609 (1850) which held that a sale of 2800 of 3100 bushels of stored corn did not pass title because not sufficiently identified to the contract. The U.C.C. provision accords with § 6 (1) of the Uniform Sales Act and follows what is known as the "American Rule" as to the sale of fungible goods.

Subsections (5) and (6) have no statutory or decisional parallel in N.C. law.

Section 2—106. Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation".

(1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the

buyer for a price (Section 2—401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

N.C. Comments — Prior Statutes: None

No significant change in N.C. law is perceived as a result of this section which serves mainly to fill out the general aims of the Code to provide a self-sufficient statement of the law of sales.

Section 2—107. Goods to Be Severed From Realty: Recording.

(1) A contract for the sale of timber, minerals or the like or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

N.C. Comments — Prior Statutes: None

Subsection (1) accords with present N.C. law that if a seller is to sever articles from the realty pursuant to a contract of sale, the contract is for a sale of personalty. See Walston v. Lowery, 212 N.C. 23 (1937), where it is held that a contract whereby the seller contracts to sell timber, to be cut by the seller, is a contrac to sell personalty and not a contract to sell realty requiring a writing. In addition, N.C. goes further than this U.C.C. subsection and holds that even if the contract specifies that the buyer is to

make the severance of articles attached to the realty from the seller's land such is a contract for the sale of personalty and not a contract for the sale of realty and need not be in writing as required under the Statute of Frauds relating to contracts for the sale of realty (GS 22-2). See Bishop v. DuBose, 252 N.C. 158 (1960). If the contract does not contemplate the passage of title until after severance, it is a contract for the sale of personalty irrespective of who is to make the severance. Johnson v. Wallin, 227 N.C. 668 (1947); Ives v. Railroad, 142 N.C. 131 (1906).

Subsection (2) accords in principle with Flynt v. Conrad, 61 N.C. 190 (1867) that a growing crop is a personal chattel and can be transferred or reserved by parol contract because it is personalty. Other items affixed to real property which can be removed without injury to the realty are treated as goods by this subsection of the U.C.C. even though attached at the time the contract is made and without regard to which party (buyer or seller) is to make the severance. This latter aspect of subsection (2) would appear to conflict with current N.C. law that if an item is affixed to the land, it is presumed to be a part of the realty to which attached and in order to create a binding contract to sell such item, there must be a writing as required for contracts for the sale of realty. See Stephens B. Carter, 246 N.C. 318 (1957).

Whether an item is to be deemed "real" or "personal" property ("goods") will be determined under the Code by its potential for severability without injury to the realty to which it is attached and not upon the more difficult determination of whether the item is a "fixture".

It is interesting to note that in North Carolina the net effect of subsections (1) and (2) will be that while certain contracts will be rendered "sales of goods" that are currently considered "sales of realty" (see Stephens v. Carter, 246 N.C. 318 (1957)), with the adoption of the U.C.C., § 2-201, establishing a statute of frauds for the sale of goods for more than $500, more contracts will have to be in writing notwithstanding that many contracts formerly held to be sales of realty shall have become sales of "goods".

Subsection (3) provides for recording a contract contemplating severance of items attached to realty, such recordation to be upon the real property recordation books, whether or not there will be material injury to the realty. This provision will be new to N.C. law and will serve to preserve the rights of a buyer of an item attached to realty (which is to be severed) from the claims of purchasers of the realty and lien creditors of the owner-seller.

Section 2—201. Formal Requirements; Statute of Frauds.

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

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

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

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

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

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2—606).

N.C. Comments

Prior Statutes: None

The statute of frauds relating to the sale of goods, while at one time in effect in North Carolina, has not been in force in this state since 1792. See Odom v. Clark, 146 N.C. 544 (1908). This entire section will be new to the existing law of North Carolina.

N.C., however, does have the statute of frauds as it relates to real property transactions. The statute of frauds provision of the U.C.C., therefore, will be considered in the context of N.C.'s current decisions relating to the statute of frauds:

The second sentence of subsection (1) of § 2-201 provides that a writing is not insufficient to satisfy the statute of frauds because it omits or incorrectly states a term; but that a contract is not enforceable beyond the quantity of goods shown in writing if terms are omitted in the contract. N.C. law provides in the statute of frauds cases that a memorandum of contract to satisfy the statute

must embody the terms of the contract, the names of the vendor and vendee, a description of the proprty to be transferred and that it should be signed by the party to be charged therewith or by someone lawfully authorized by the party to be charged. The essential terms of the contract, the price and a description of the property to be transferred must be in the contract. See Harvey v. Linker, 226 N.C. 711 (1946); Hall v. Misenheimer, 137 N.C. 183 (1904); Shepherd v. Duke Power Co., 140 F. Supp. 27 (1926). But see, even in N.C., the cases of Bateman v. Hopkins, 157 N.C. 470 (1911) and Mizell v. Burnett, 49 N.C. 249 (1857) which hold that if the action is against the vendor on a contract to sell land, it is not required for the validity of the contract that the consideration appear in the writing and parol evidence is admissible to show the purchase price.

This U.C.C. provision, while requiring a memorandum and while requiring application of the statute of frauds to sales of personalty, lessens the rigid requirements of the statute of frauds now in effect in N.C. as now applied to realty which requires that every essential term of a contract must be in the memorandum before it will be enforced. A memorandum that will satisfy the statute of frauds requirement under this section need only (1) contain a writing sufficient to indicate a contract of sale between the parties; (2) be signed by the parties or by authorized agents; and (3) state a quantity. The quantity terms is the "heart" of the contract. The other terms such as price (§ 2-305), place of delivery (§ 2-308) and time of delivery (§ 2-309) will be supplied by this Article if omitted in the memorandum of contract. In addition, these terms can apparently be supplied by parol. Present N.C. law applicable to the statute of frauds will be materially changed.

Subsection (2) is entirely new and has no parrallel in N.C. law. Note that subsection (2) applies "between merchants" only.

Subsection (3)(a) recognizes the doctrine of part performance as taking a contract out of the statute of frauds provision. N.C. does not currently recognize that partial performance will take a contract otherwise required to be in writing outside of the statute of frauds. Hall v. Misenheimer, 137 N.C. 183 (1904); Ebert v. Fisher, 216 N.C. 36 (1939); Grantham v. Grantham, 205 N.C. 363 (1933).

Since N.C. does not currently have a statute of frauds as to contracts for the sale of personal property, the same results as are currently reached will be reached if this U.C.C. provision, § 2-201 (3)(a), is adopted, requiring a writing but obviating the the necessity for a writing where partial performance as set out in subsection (3)(c) is present.

Subsection (3)(b) accords with Sandling v. Kearney, 154 N.C. 596 (1911) that the admissions of the parties in their pleadings may stand for the writing required by the statute of frauds.

Subsection (3)(c) would seem to accord with N.C. law that the statute of frauds applies only to executory contracts and not to executed contracts. See Sprinkle v. Ponder, 233 N.C. 312 (1951); Willis v. Willis, 242 N.C. 597 (1955); Keith Bros. v. Kennedy, 194 N.C. 784 (1927). But note that this U.C.C. section makes the contract enforceable only with respect to goods for which payment has been made and accepted or which have been received and accepted in the absence of a writing.

Section 2—202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1—205) or by course of performance (Section 2—208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

N.C. Comments

Prior Statutes: None

The purpose of subsection (1)(a) is to relax the application of the parol evidence rule to written contracts involving the sale of goods. N.C. has held that where a contract is unambiguous, parol evidence to explain what the contract is, or to add to or vary it, is inadmissible. See Bost v. Bost, 234 N.C. 554 (1951); Pierce v. Cobb, 161 N.C. 300 (1913). If, on the other hand, terms of uncertain meaning are employed, parol evidence may be admitted to show their meaning in a technical or trade sense. See Layton v. Manufacturing Co., 161 N.C. 482 (1913) where the contract term "car load" was amplified and explained by parol according to custom and usage in a particular business and trade. See also Neal v. Ferry Co., 166 N.C. 563 (1914).

This U.C.C. provision will allow admission of "course of dealing or usage of trade" evidence even in the absence of ambiguity, thus apparently changing N.C. law. Compare Williamson v. Miller, 231 N.C. 722 (1950). This section would not limit, apparently, parol evidence to an explanation of a term of the written contract.

Subsection (1)(b) apparently continues N.C. law that when a writing is not complete, consistent additional terms agreed to in parol may be admitted to supply terms on which the writing is silent. See Willis v. Construction Co., 152 N.C. 100 (1910). The U.C.C. provision says, however, that if the court finds the writing to have been intended as a complete and exclusive statement of the terms of the agreement, evidence of consistent additional terms shall not be added.

The U.C.C. provision seems to indicate a presumption that the written memorandum does not necessarily include all the final terms of the contract-that additional terms may be shown unless the memorandum not only evidences a sale but also that it is in fact the "final and exclusive" statement of terms.

N.C. law, on the other hand, apparently presumes that a written contract embraces all previous stipulations between the parties and places the burden of showing any ambiguity or omission, or that the writing does not contain all of the terms of the contract upon the party seeking to add to or explain the writing, however consistent

the addition may be. See Reynolds v. Palmer, 21 F. 433 (1884); Walker v. Horne, 149 F. Supp. 457 (1957); Neal v. Marrone, 239 N.C. 73 (1953).

While the change will not be radical, the parol evidence rule will be liberalized somewhat if this section of the U.C.C. is adopted in the absence of an express stipulation that the contract contains the complete and exclusive terms of the contract.

Section 2—203. Seals Inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

N.C. Comments

Prior Statutes: None

N.C. recognizes the effect of a seal and if a contract is under seal it obviates requirement of showing any consideration. See Angier v. Howard, 94 N.C. 27 (1886); Basketeria v. Public Indemnity Co., 204 N.C. 537 (1933). The seal imports consideration. See Thomason v. Bescher, 176 N.C. 622 (1918); Harrell v. Watson, 63 N.C. 454 (1869); Mordecai's Law Lectures, p. 1053-1054; Coleman v. Whisnant, 226 N.C. 258 (1946); McGowan v. Beach, 242 N.C. 73 (1955).

This U.C.C. provision will make the current law of seals inapplicable to sales contracts in North Carolina and will therefore change N. C. law. All sealed contracts will become simple contracts, requiring other consideration to be shown and resulting in a shorter statute of limitations. See § 2-725. Contracts that would be enforceable under current law in North Carolina will not be enforceable after adoption of this U.C.C. provision.

Section 2—204. Formation in General.

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

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

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

N.C. Comments

Prior Statutes: None

Subsection (1) accords generally with N.C. law. See Crook v. Cowan, 64 N.C. 743 (1870) and May Co. v. Shoe Co., 186 N.C. 144 (1923) that conduct of the parties may indicate the intention of the parties that a contract exists. This provision is inserted primarily to insure a liberal approach to finding the existence of a contract

where the sale of goods is concerned because of a belief that commercial practices often recognize very informal dealings as creating binding obligations.

Subsection (2) has no counterpart in present N.C. statutory or decisional law.

Subsection (3) would seem to change N.C. law to some extent. it is a recognized general principle in N.C. law that parties to a contract must assent to the same thing in the same sense, and their minds must meet as to all terms and if any portion of proposed terms are not settled, or no mode is agreed on by which they may be settled, there is no agreement. Kirby v. Stokes County Board of Education, 230 N.C. 619 (1949); Goeckle v. Stokely, 236 N.C. 604 (1952). But in other instances the N.C. Court has retreated from this principle and enforced "output" and "requirement" contracts. See Herren v. Gaines, 63 N.C. 72 (1868); Coal Co. v. Coal Co., 134 N.C. 574 (1904). The court has supplied a "place of delivery" term when the contract was silent. See Fruit Growers Express Co. v. Plate Ice Co., 59 F.2d 605 (1935). The court has supplied "time for performance" terms where omitted in a contract otherwise sufficient. See Hurlburt v. Simpson, 25 N.C. 233 (1842); J.B. Colt Co. v. Kimbell, 190 N.C. 169 (1925). See annotations under §§ 2-305; 2-306; 2-308; 2-309 which are related to this section.

In appropriate cases where the parties intend to be bound but omit certain terms from their contract, subsection (3) will substitute external, objective commercial standards in lieu of having the contract declared void for indefiniteness because of the lack of a statement of the specific terms to which the parties might have agreed.

Section 2—205. Firm Offers.

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

N.C. Comments

Prior Statutes: None

This provision would reverse existing N.C. law. If an offer to sell is without consideration, it can be withdrawn by the offeror at any time before acceptance. Durham Life Insurance Co. v. Moize, 175 N.C. 344 (1918); Winders v. Kenan, 161 N.C. 628 (1913); Paddock v. Davenport, 107 N.C. 710 (1890). That an option to purchase under a sealed instrument cannot be revoked, see Thomason v. Bescher, 176 N.C. 622 (1918). This section would make firm offers made by merchants even though not supported by consideration or seal.

Note that the section applies only to "merchants."

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

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

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

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

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

N.C. Comments

Prior Statutes: None

Subsection (1)(a) is designed to reject any technical rules of acceptance of contracts and provides that an offer shall be construed as inviting acceptance in any manner or medium reasonable under the circumstances. This is probably already the law of N.C. See Crook v. Cowan, 64 N.C. 743 (1870) which holds that while an assent to the terms of an offer is indispensable, it is not material how or through whom it is given. Of course an offer by mail carries with it an implied invitation, nothing else appearing, that it may be accepted or rejected by mail. See Watauga County Board of Education v. State Board of Education, 217 N.C. 90 (1939). This subsection would appear to accord with reason. Of course, the offeror can specify a particular mode or manner for effective acceptance.

Subsection (1)(b) apparently has no parallel in N.C. law and is therefore new. It is designed to resolve a trick problem not evidenced by any N.C. case. The general principle is that an order for goods authorizes acceptance by seller's shipment of the goods. Crook v. Cowan, 64 N.C. 743 (1870). The trick comes when the seller ships non-conforming goods in response to an order. If these goods are shipped and accepted by the buyer, he has technically accepted a counter-offer. If he rejects the goods, as he has a right to do, he may find himself without any recourse against the seller, as the seller can claim no contract was ever consummated because his acceptance did not conform to the buyer's offer. The Code would shift tactical advantage somewhat. Unless the seller shipping non-conforming goods notifies the buyer that they are being shipped "for accommodation" only, the seller will be held to have accepted the buyer's offer by his shipment - a contract will have been formed.

Subsection (2) is probably already the law in N.C. (compare Crook v. Cowan, 64 N.C. 743 (1870), dissenting opinion of Rodman, J.

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

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

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

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

(b) they materially alter it; or

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

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

N.C. Comments

Prior Statutes: None

This section changes N.C. law. See Morrison v. Parks, 164 N.C. 197 (1913) that for an acceptance of an offer to become a binding contract, it must be absolute and unconditional and identical with the offer's terms in all respects and where the acceptance is for a lower price, or specifies different kinds of goods, the acceptance is conditional and there is no contract. Wilson v. Lumber Co., 180 N.C. 271 (1920). But see Carver v. Britt, 241 N.C. 538 (1955) that where an offer is squarely accepted in positive terms, the addition of a statement relating to ultimate performance of the contract does not make the acceptance conditional and prevent the formation of the contract.

In other words, if the acceptance varies materially with the offer and is conditional, there will be no contract. But if the acceptance adds terms that are not material or which are minor, or which represent in effect a request, or proposal of alteration or modification, made after an unconditional acceptance of an offer, this will not affect the contract. Compare Richardson v. Storage Co. 223 N.C. 344 (1943).

Under subsection (1) of this section the additional or different terms in the acceptance are not treated as "conditions to acceptance", constituting a counter-offer, but result in a completed comtract. The added or different terms set out in the acceptance do not become a part of the contract as between ordinary sellers and purchasers (non-merchants) but become addenda to the contract which merely "propose" or "suggest" such additional or different terms.

Under subsection (2), as to "merchants" contracts, if there are additional or different terms in the acceptance or confirmation, the additional or different terms of the acceptance become a part of the contract unless (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to such terms is given within a reasonable time.

Subsection (3) accords with Sanders Cotton Mill v. Capps, 104 F.Supp. 617 (1952) that an acceptance and a binding contract may result from acts and conduct even though writings of the parties may not by themselves constitute a contract.

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

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

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

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

N.C. Comments

Prior Statutes: None

There does not seem to be any N.C. case directly in point with subsection (1) but it seems to accord with N.C. law that an acceptance of an offer (and thus the terms of the contract) may be established by words or conduct showing that the offeree means to accept. If a party declines to speak when speech is admonished at the peril of an inference from silence, his silence may justify an inference that he has agreed to the terms of a contract even though its terms may be otherwise doubtful and ambiguous. See May v. Menzies, 184 N.C. 150 (1922). That N.C. also follows the rule of "practical interpretation" or "practical construction" of contracts is shown by Cole v. Fibre Co., 200 N.C. 484 (1931) which states:

> "The practical interpretation given to their contracts by the parties to them while they are engaged in their performance and before any controversy has arisen concerning them, is one of the best indications of their intent..."

Subsection (2) accords with Lamborn v. Woodard, 20 F.2d 635 (1927) that custom or usage may explain a doubtful contract but not contradict a plain express one. See also Cooper v. Purvis, 46 N.C. 141 (1853).

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

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

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

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

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

N.C. Comments

Prior Statutes: None

Subsection (1) makes a change in N.C. law. N.C. has held that a consideration is necessary in order to make binding an agreement modifying or discharging a contract. See Lipschitz v. Weatherly, 140 N.C. 365 (1906); Brown v. Lumber Co., 117 N.C. 287 (1895).

Subsection (2) changes N.C. law. See Childress v. Trading Post, 247 N.C. 150 (1957) which holds that a written contract may be modified or waived by a subsequent parol agreement even though the instrument provides that any modification must be in writing. Subsection (2) permits the parties to prescribe their own "statute of frauds" so to speak by requiring modifications of the contract to be in writing. The last part of subsection (2) (after the comma) provides that a merchant-seller's contract form limiting modification by a buyer (who is not a merchant), specifying that it shall be modified only by a writing, will not limit the non-merchant buyer unless he separately signs the instrument containing such limitation.

Subsection (3) makes it clear that if contract as modified would be within the statute of frauds provision, the modification must be in writing.

Subsection (4) attempts to provide an equitable solution to situations where there is conduct or parol agreement which would evince intention to modify the contract but for the requirements of subsections (2) and (3). This subsection would seem to accord with present law in N.C. See Childress v. Trading Post, 247 N.C. 150 (1957) and Whitehurst v. FCX Fruit Service 224 N.C. 628 (1944); Manufacturing Co. v. Lefkowitz, 204 N.C. 449 (1933) which indicate that the doctrine of waiver, in proper cases, is now as firmly established as the doctrine of rigidity and inflexibility of the written word. The latter case defines waiver:

"A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that not only by saying that he dispenses with it, that he excuses the performance, or he may do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it. There can be no waiver unless so intended by one party, and so understood by the other, or one party has so acted as to mislead the other."

Subsection (4), according to the official comment, is directed primarily toward conduct after formation of the contract which will constitute a waiver notwithstanding a provision in the contract that excludes modification or rescission except by a signed writing.

No statutory or decisional parallel has been located concerning the retraction of a waiver as provided for in subsection (5).

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

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

(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

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

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

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

The first sentence of subsection (1) is consistent with decisional law in N.C. that contracts for the sale and purchase of merchandise, not involving a personal element or a relation of personal confidence, are assignable by either party. See Gulf States Creosoting Co. v. Loving, 120 F.2d 195 (1941) and cases there cited. See Restatement of contracts, §§ 151, 152. That executory contracts involving personal confidence or reliance on character, skill, business standing, or capacity cannot be assigned is set forth in Atlantic and N.C. Railroad v. Atlantic and N.C. Co., 147 N.C. 368 (1908).

The second sentence of subsection (1) also accords with N.C. decisional law. That a delegation of performance does not relieve the assignor or delegator, see Atlantic and N.C. Railroad v. Atlantic and N.C. Co., 147 N.C. 368 (1908).

The first sentence of subsection (2) accords with N.C. law. See Atlantic and N.C. Railroad v. Atlantic and N.C. Co., 147 N.C. 368 (1908). The second sentence of subsection (2) makes choses in action arising out of executed contracts assignable, notwithstanding an agreement in the contract not to assign. While Gulf States Creosoting Co. v. Loving, 120 F.2d 195 (1941) holds that a cause of action for breach of contract is assignable, the provision in the U.C.C. that a cause of action is assignable despite a contrary agreement will apparently be new in N.C.

Subsection (3) apparently has no statutory or decisional parallel in N.C.

Subsection (4) accords with Atlantic and N.C. Railroad v. Atlantic and N.C. Co., 147 N.C. 368 (1908) that an assignee assumes both the benefits and burdens upon an assignment of a contract. That an assignor can maintain an action against his assignee for non-performance of duties imposed in an assigned contract is also held in the Atlantic and N. C. Railroad case. Implicit also is the rule that a third party who was an original party to a contract assigned may maintain a suit directly against an assignee for non-performance of the contract assumed. Compare the analogous situation where a transferee of mortgaged property who assumes the obligation which the mortgage secures is directly and personally laible to the holder of the mortgage on the mortgage debt. Rector v. Lyda, 180 N.C. 577 (1920); Parlier v. Miller, 186 N.C. 501 (1923).

Subsection (5) making assignment delegating performance grounds for insecurity entitling the other party to further assurances has no parallel in decisional or statutory law in N.C.

Section 2—301. General Obligations of Parties.

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

N.C.Comments — Prior Statutes: None

This section reflects the current law of N.C. and would seem to require no annotation. See and compare McAden v. Craig, 222 N.C. 497 (1942).

Section 2—302. Unconscionable Contract or Clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

N.C. Comments — Prior Statutes: None

This section states an entirely new theory in sales law. It will change N.C. law as it changes law everywhere. The N.C. court has said:

> "We are not permitted to interpret a contract according to our notion of what may be fair and just, unless perhaps in a case where the terms of the contract are in themselves ambiguous". Coal Co. v. Coal Co., 134 N.C. 574 (1904).

The NEW YORK LAW REVISION COMMISSION stated in its final report to the New York Legislature:

> "Section 2-302, relating to unconscionable contracts and clauses in sales contracts, was criticized at the Commission's hearings as embodying new social concepts and inviting courts to strike down any contract or term it finds to be unconscionable...In view of the misunderstanding that has arisen as to the purpose of this section, further revisions appear to be desirable to avoid error in construing and applying it". Report of Law Revision Commission to the Legislature Relating to the Uniform Commercial Code, State of New York, Leg. Doc. (1956), No. 65 A 27.

CAVEAT: This section will allow the court AS A MATTER OF LAW to determine if a particular contract is unconscionable. If the court AS A MATTER OF LAW determines that the contract is unconscionable, it is not enforceable in the court, either by damages or by specific performance. The Official Code Comment states:

"The commercial evidence referred to in subsection (2) is for the court's consideration and not the jury's."

See an example of the current law as to specific performance as it relates to real property contracts in Knott v. Cutler, 224 N.C. 427 (1944) where it is held that a binding contract to convey land, when there has been no fraud, mistake, undue influence, or oppression, will be specifically enforced, and mere inadequacy of price without more (one half land's fair market value) does not, as a rule, preclude specific performance.

THE STATE OF CALIFORNIA, WHICH HAS ADOPTED THE CODE, EXCLUDES THIS SECTION ENTIRELY.

Section 2—303. Allocation or Division of Risks.

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

N.C. Comments — Prior Statutes: None

This section accords with N.C. law. The risk follows title under current law. Penniman v. Winder, 180 N.C. 73 (1920). Title passes according to the intent of the parties. Teague v. Grocery Store, 175 N.C. 195 (1918). Therefore allocation of risks and burdens can be shifted and allocated by agreement.

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

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

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

N.C. Comments — Prior Statutes: None

This would not materially change the current law of sales but State v. Albarty, 238 N.C. 130 (1953) holds that for purposes of criminal law a barter is not a sale. See, however, State v. Colonial Club, 154 N.C. 177 (1910) that a sale is a transmutation of property

from one man to another in consideration of some price or recompense in value.

The U.C.C. adds, however, the idea that both traders in a barter situation are both sellers. The U.C.C. provides that the rules herein stated will govern only the barterer of personal property if land is bartered for personal property.

Section 2—305. Open Price Term.

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

(a) nothing is said as to price; or

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

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

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

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

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

N.C. Comments

Prior Statutes: None

Subsection (1)(a) and (b) which state that parties can conclude a sales contract even though the price is not settled conflicts with and would change N.C. law as set out in Wittkowsky v. Wassom, 71 N.C. 451 (1874):

> "There cannot be an executed sale as to pass the property where the price is to be fixed by agreement between the parties afterwards, and the parties do not afterwards agree." If, however, the thing sold has been delivered to the vendee and consumed, so that the parties cannot be put in statu quo, the vendee is liable for a reasonable price. Benjamin on Sales, quoted with approval in Wittkowsky v. Wassom, supra.

There are apparently no cases on subsection (1)(c) but it would also conflict with the reasoning of the Wittkowsky case, supra.

There are apparently no cases relating exactly to subsection (2) but it seems to change the contracts rule set forth in Kirby v. Board of Education, 230 N.C. 619 (1949) that:

> "One of the essential elements of every contract is mutuality of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." Compare Richardson v. Storage Co., 223 N.C. 344 (1943).

It would seem that under this U.C.C. section contracts of sale would be enforceable that would not be enforceable under current N.C. law.

There are no parallels in N.C. law to the other subsections of § 2-305.

It should be noted that subsection (4), as well as the first sentence of this section, pays careful attention to the intention of the parties and a contract is not enforceable under the conditions set out unless the contracting parties intend to be bound.

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

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

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

N.C. Comments

Prior Statutes: None

N.C. accords with subsection (1). N.C. has recognized "output" and "requirements" contracts. Herren v. Gaines, 63 N.C. 72 (1868); Coal Co. v. Coal Co., 134 N.C. 74 (1904). The limitation to "good faith output" and "good faith requirements" apparently has no parallel in N.C. although such limitation seems reasonable.

No N.C. authority has been found upon subsection (2).

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

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

N.C. Comments — Prior Statutes: None

There are apparently no N.C. statutes or cases which relate directly to the subject matter of this section. It is therefore new.

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

Unless otherwise agreed

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

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

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

N.C. Comments — Prior Statutes: None

Subsection (a) accords with N.C. law that where no place for delivery is specified and no contrary intention is shown, the place of delivery is the seller's place of business. See Fruit Growers' Express Co. v. Plate Ice Co., 59 F. 2d 605 (1935). There seems to be no N.C. authority as to the other two subsections.

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

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

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

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

N.C. Comments — Prior Statutes: None

Subsection (1) accords with N.C. law. See Ober & Sons Co. v. Katzenstein, 160 N.C. 439 (1912) which holds that when no time for

shipment is specified in contract for sale of goods, there is an implied understanding that shipment will be within a reasonable time. If no particular time is set in contract for delivery, it must be within a reasonable time. Hurlburt v. Simpson, 25 N.C. 233 (1842); J.B. Colt Co. v. Kimbell, 190 N.C. 169 (1925).

Subsections (2) and (3) also accord with N.C. law that a contract calling for successive and continuing performances, wherein no time is fixed during which the contract is to last and none is fixed by usage, may be terminated at the will of either of the parties upon notice being given to the other party. See Pool v. Walker, 156 N.C. 40 (1911). The U.C.C. provision requires "reasonable notification" which is probably implicit in the N.C. decision.

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

Unless otherwise agreed

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

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

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

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

N.C. Comments

Prior Statutes: None

Subsection (a) accords with N.C. law which makes the payment of money and the delivery of property simultaneous or concurrent conditions. McAden v. Craig, 222 N.C. 497 (1942); Hughes v. Knott, 138 N.C. 105 (1905); Wessel v. Seminole Phosphate Co., 13 F.2d 999 (1926).

Subsection (b) accords with Standard Paint and Lead Works v. Spruill, 186 N.C. 68 (1923) that goods shipped from a distant point before he becomes liable for the purchase price in the absence of a contractual provision to the contrary.

Subsection (c) accords with common commercial understanding that shipment under C.O.D. contracts and the like deprives the buyer of the right to inspect goods shipped prior to payment. Delivery is not to be made in C.O.D. shipments until payment has been made.

Subsection (d) has no statutory or decisional parallel.

Section 2—311. Options and Cooperation Respecting Performance.

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

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

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

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

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

N.C. Comments — Prior Statutes: None

The entire section is new and seems to change N.C. law. It states that a contract of sale is not made invalid because particulars of performance are left to be specified by one of the parties. That such particulars of performance may be made by one of the parties and the contract is binding if he acts in good faith and within commercial reasonableness.

This seems to conflict with the statement in Kirby v. Board of Education, 230 N.C. 619 (1949) that: "One of the essential elements of every contract is mutuality of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on which they may be settled, there is no agreement."

Compare Richardson v. Storage Co., 223 N.C. 344 (1943).

It would seem to be a question of materiality under current N.C. law as to whether omitted terms of the contract may be supplied unilaterally by the parties or by the court.

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 in 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.

N.C. Comments

Prior Statutes: None

Subsection (1) accords with N.C. law that upon sale of a chattel the seller impliedly warrants that the seller has good title. Lanier v. Auld's Admr., 5 N.C. 138 (1806); Seymour v. Boyd Sales Co., 257 N.C. 603 (1960). In sales of personal property there is an implied warranty of good title upon the part of the vendor, and this warranty extends to and protects against liens, charges, and encumbrances by which the title is rendered imperfect and the value depreciated thereby.

It is uncertain whether subsection (2) accords with N.C. law. The question of whether a disclaimer of warranty operates to negate the implied warranty of title is expressly not decided in Seymour v. Boyd Sales Co., 257 N.C. 603 (1960). This U.C.C. provision makes it clear that a warranty of title can be disclaimed or modified only by clear specific language or acts indicating a negation of the warranty. This accords with the general law of sales. See Vold, Law of Sales, p.444.

Subsection (3) relating to warranty against infringement is new in N. C.

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 basis 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 whole of 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.

N.C. Comments

Prior Statutes: None

Subsection (1)(a) accords with N.C.'s definition of express warranty. See Wrenn v. Morgan, 148 N.C. 101(1908); Hodges v. Smith, 158 N.C. 256 (1912); Swift & Co. v. Meekins, 179 NC 173(1920); Potter v. National Supply Co., 230 N.C. 1 (1949).

Subsection (1)(b) stating a warranty where a sale is by description accords with Swift & Co. v. Aydlett, 192 N.C.330 (1926) and Grocery Co. v. Vernoy, 167 N.C. 427 (1914).

Subsection (1)(c) accords with Woolridge v. Brown,149 N.C.299 (1908); Robertson v. Halton, 156 N.C. 215 (1911); Kime v. Riddle, 174 N.C. 442 (1917); Wrenn v. Morgan, 148 N.C. 101 (1908).

There will be no change in N.C. law in connection with this section.

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.

N.C. Comments

Prior Statutes: None

The first sentence of subsection (1), implying warranty of merchantability that personal property is merchantable and reasonably fit for the purposes for which sold, accords with N.C. law. See Aldridge Motors v. Alexander, 217 N. C. 750 (1940); Swift Co. v. Aydlett, 192 N. C. 330 (1926); Continental Jewelry Co. v. Stanfield, 183 N.C. 10 (1922); Ashford v. Schrader Co., 167 N.C. 45 (1914); Shoop Co. v. Davenport, 163 N.C. 294 (1913).

The second sentence of subsection (2) negates the possibility of argument that a restaurateur merely "utters a service" and does not make a "sale". This argument has been upheld in a bulk sales case in Swift v. Tempelos, 178 N.C. 487 (1919) but expressly was not decided in Williams v. Elson, 218 N.C. 157 (1940) in a food warranty case. The U.C.C. makes restaurants liable for "sales" whether the food served is to be consumed on or off the premises. It clarifies a point that may be questionable under current law. This can be quite important in N.C. because of the practical non-availability of the doctrine of res ipsa loquitur in negligence actions, often necessitating resort to warranty actions when proof of negligence is not available.

Subsection (2) accords with N.C. law in general but spells out in detail the requirements of "merchantability". N.C.'s definition of merchantability under current law is set out in Swift & Co. v. Aydlett, 192 N.C. 330 (1926):

> "A vendor of an article of personal property, by name and description, cannot relieve himself of the obligation arising from the warranty implied by law to deliver an article which is at least merchantable, or saleable or fit for the use of which articles of that name and description are ordinarily sold and bought."

Note that the section only applies when the seller is a merchant.

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.

N.C. Comments — Prior Statutes: None

This section accords with Stokes v. Edwards, 230 N.C. 306 (1949); Southern Box and Lumber Co. v. Home Chair Co., 250 N.C. 71 (1959).

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 conspicuous, 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).

N.C. Comments — Prior Statutes: None

Subsection (1) seems to accord with Case Threshing Mach. Co. v. McClamrock, 152 N.C. 405 (1910) that personal property may be sold

with or without warranty if there is an express stipulation that the property is not warranted. See also Swift v. Etheridge, 190 N.C. 162 (1925). The intent to warrant is a matter which must appear in the form of the expression, aided in proper cases by the circumstances surrounding the transaction. Walston v. Whitley Co., 226 N.C. 537 (1946). The whole contract should be examined.

Subsection (2) treats a subject that is currently cloaked in uncertainty in N.C. Can implied warranties be disclaimed by the seller? If so, what terms of disclaimer are required?

In Swift v. Etheridge, 190 N.C. 162 (1925) the seller sold goods and the instrument evidencing the sale said "without warranty as to results of its use, or otherwise". It was contended that this disclaimer negated all implied as well as express warranties. The court held the implied warranty "that the goods sold and delivered were merchantable, or salable, and fit for the purpose for which they were bought" was not effectively disclaimed or negated. See Hall Furniture Co. v. Crane Mfg. Co., 169 N.C. 41 (1915).

Yet, in Petroleum Co. v. Allen, 219 N.C. 461 (1941) where a special express warranty limited the liability of the seller to those express warranties stated in the special warranty, the court held that all other warranties ordinarily implied in sales contracts were excluded.

The U.C.C., by this section, attempts to spell out and to render certain a determination of when implied warranties have been effectively disclaimed. After having defined the implied warranty of merchantability, it states that to exclude this warranty, the disclaimer must mention merchantability and must be conspicuous. To disclaim the implied warranty of fitness, the exclusion must be by a writing and consipcuous.

Subsection (3)(a) allows all implied warranties to be excluded by "as is" or "with all faults" provisions that are clear to the buyer. This subsection accords with general commercial understanding.

Subsection (3)(b) accords with Driver v. Snow, 245 N.C. 223 (1956); Southern Box and Lumber Co., 250 N.C. 71 (1959):

> "There is no implied warranty where the buyer has knowledge equal to that of the seller...the presence of the goods at the time of the sale open and available for inspection...prevents the implication of warranties."

Subsection (3)(c) applies to non-merchants and evinces what is left of the doctrine of caveat emptor.

Subsection (3)(c) has no apparent parallel in existing N.C. law.

See comments in connection with §§ 2-718 and 2-719 for a discussion of the principles that govern subsection (3)(d) of this section. See especially Allen v. Tompkins, 136 NC 208 (1904) that warranty provisions to a contract can limit liability to the making

of repairs or the replacement of other goods in lieu of damages. See also Piano Co. v. Kennedy, 152 N.C. 196 (1910).

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 an implied warranty of fitness for a particular purpose.

N.C. Comments

Prior Statutes: None

The first sentence of this section establishes the rule of construction that warranties, both express and implied, shall be construed as consistent unless such construction is unreasonable or contrary to the intention of the parties.

The first sentence also makes all warranties cumulative if consistent. This seems to conflict with Piano Co. v. Kennedy, 152 N.C. 196 (1910); Farquhar Co. v. Hardy Co., 174 N.C. 369 (1917); Case Threshing Mach. Co. v. McClamrock, 152 N.C. 405 (1910); Armour Fertilizer Works v. Aiken, 175 N.C. 398 (1918) that an express warranty excludes an implied warranty as to closely related subjects or qualities in a thing sold. In other words, in N.C. if there is an express warranty in connection with a matter, there is no implied warranty in connecton with that matter which can co-exist. Warranties are not cumulative, at least in all cases in N. C. But see Hyman v. Broughton, 197 N.C. 1 (1929) that they are cumulative if they relate to different matters.

Subsection (a) is consistent with Pickrell & Craig Co. v. Wholesale Co., 169 N.C. 381 (1915) that every sale where a sample is shown is not a sale by sample where there are other exact or technical descriptive specifications. The intention of the parties governs.

There is no exact parallel to subsection (b) but that subsection merely says that a specific description by sample will displace a description by general language.

Subsection (c) would change N.C. law. There is no implied warranty of fitness of purpose if there is an express warranty of quality. Hyman v. Broughton, 197 N.C. 1 (1929).

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 is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

N.C. Comments — Prior Statutes: None

North Carolina, in the absence of a warranty expressly directed to an ultimate consumer, requires privity of contract between the parties to a warranty action before recovery is allowed. Wyatt v. Equipment Co., 253 N.C. 355 (1960); Prince v. Smith, 254 N.C. 768 (1961); Prince v. Smith, 254 N.C. 768 (1961). A warranting seller is liable only to the immediate buyer with whom there is a contractual relation. An employee of the buyer cannot sue on the seller's warranty as the employee is a stranger to the contract. A purchaser from a retailer cannot sue a manufacturer of defective goods with whom he has no contractual relation for breach of warranty. See Thompson v. Ballard, 208 N.C. 1 (1935).

In such cases, the purchaser must sue his immediate seller and in turn his immediate seller may sue his supplier and his supplier may ultimately reach the manufacturer. Prince v. Smith, 254 N.C. 768 (1961). But there can be no direct suit by an ultimate purchaser or consumer against a manufacturer or remote seller unless he has made an express warranty intended to attach to an item sold and intended to run to the ultimate consumer. See Simpson v. Oil Co. 217 N.C. 542 (1940) to the effect that a warranty can be so stated that it will run from a manufacturer to an ultimate consumer.

Therefore, in N.C., if a mother purchased a product for consumption by her children or by a guest, if the product injured or poisoned her child or guest, the mother-purchaser only would have an action for her damages due to breach of the retailer's warranty. No one would have an action for breach of warranty against any wholesaler, jobber or manufacturer of the product as there would not be the requisite privity.

Nor will the theory that a negligence action is permitted be an adequate solution, especially in North Carolina, where the doctrine of res ipsa loquitur is not applicable to any appreciable degree. See Enloe v. Bottling Co., 208 N.C. 305 (1935) and cases there cited. Evidence of negligence other than mere injury from a product must be established.

The damages for the child's own injury or the damages for the guest's own injury will likely not be recover by any method in N.C. Recovery on warranty is not allowed because of lack of privity; recovery on negligence will not likely be available, either from lack of any negligence, or because of difficulty of proof, especially in light of N.C.'s law on res ipsa loquitur.

The U.C.C. provision allows the seller's warranty, express or implied, to run to persons other than the immediate buyer who are in the family or household of the buyer or who is a guest of the

buyer, if it is reasonable that these persons should use or consume or be affected by the goods.

The U.C.C. does away with the doctrine of privity in extending coverage of warranty to a buyer's family, household guests. The U.C.C. does not abolish N.C.'s requirements of privity with reference to strangers to the contract such as employees. See Wyatt v. Equipment Co., 253 N.C. 355 (1960). Nor would it affect the requirement of privity that prevents a cause of action by any ultimate consumer or buyer against a remote seller or manufacturer. See Thompson v. Ballard, 208 N.C. 1 (1935); Service Co. v. Sales Co., 261 N.C. 660 (1964); Murray v. Bensen Aircraft, 259 N.C. 738 (1963); Prince v. Smith, 254 N.C. 768 (1961).

Note: If a statute is desired that will do away with the requirement of privity to a greater extent, see Virginia's substitute for this section of the U.C.C. The Virginia substitute virtually abolishes privity in warranty actions for all purposes:

WHEN LACK OF PRIVITY NO DEFENSE IN ACTION AGAINST MANUFACTURER OR SELLER OF GOODS.

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; however, this section shall not be construed to affect any litigation pending on June twenty-nine, nineteen hundred sixty-two.

Section 2—319. F.O.B. and F.A.S. Terms.

(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. vessel (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 cooperation 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.

N.C. Comments

Prior Statutes: None

Subsections (1)(a) and (b) are in accord with N.C. law as to f.o.b. shipments. See Peed v. Burlesons, Inc. 244 N.C. 437 (1956):

> "Where the contract of sale provides for a sale f.o.b. the point of shipment, the title is generally held to pass, in the absence of a contrary intention between the parties, at the time of the delivery of the goods for shipment at the point designated."

> "If the seller by his contract undertakes to make the delivery himself at the point of destination, thus assuming the risk in the carriage, the delivery to a carrier is not a delivery to the buyer."

See also Box Factory v. Railroad, 148 NC 319 (1908). That this rule can currently be changed according to the intention of the parties, see Refining Co. v. Charlotte Const. Co., 157 N.C. 277 (1911).

The remainder of § 2-319 is new in N.C. and the detailed obligations set out under F.O.B. and F.A.S. contracts will fill gaps not presently treated in decisional law.

Section 2—320. C.I.F. and C. & F. Terms.

(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 connection with the stated price and destination, the term C.I.F. destination 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 destination; 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 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.

N.C. Comments

Prior Statutes: None

No N.C. cases or statutes were found dealing with C.I.F. or C. & F. terms in sales contracts. The provision codifies for the most part case law developed over the country concerning the C.I.F. contract. See Official Comment. See Vold, Law of Sales (2d ed.), pp 199 et. seq.

This is entirely new material.

Section 2—321. C.I.F. or C. & F.: "Net Landed Weights"; "Payment on Arrival"; Warranty of Condition on Arrival.

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.

N.C. Comments — Prior Statutes: None

As previously stated, there are no C.I.F. or C. & F. cases or statutes in N.C.

This is entirely new material.

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.

N.C. Comments — Prior Statutes: None

There are no cases or statutes dealing with "Ex-Ship" provisions found in N.C. This provision is somewhat the overseas shipment parallel to the "F.O.B. Destination" contract on an overland shipment wherein the risk remains with the seller until they reach their destination. Compare Peed v. Burlesons, Inc., 244 N.C. 437 (1956). See § 2-319, supra. The difference, however, is that this provision shifts the risk and expenses to the buyer at the unloading from the vessel, while in the F.O.B. contract the risk normally passes upon tender of the goods at the destination even though they may still be in the possession of the carrier.

This section is entirely new and has no statutory or decisional parallel in N.C. law.

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 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.

N.C. Comments

Prior Statutes: None

There is neither decisional nor case law bearing upon the subject matter of this section. This section is entirely new in N.C. law.

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).

N.C. Comments

Prior Statutes: None

There is no N.C. authority on the subject matter of this section. It allocates risks in regard to shipments where seller bears risk of loss during shipment, but negates any liability to buyer where shipment does not arrive and seller is not responsible for its failure to arrive.

This is entirely new to N.C. law.

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.

N.C. Comments

Prior Statutes: None

North Carolina has no statutory or decisional law on the matters covered by this section. This section, as other sections starting with § 2-319, continues to define and fix the meanings of numerous commercial terms and abbreviations.

This section is new to N.C. law.

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 subsection 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 within the provisions of this Article on parol or extrinsic evidence (Section 2—202).

N.C. Comments

Prior Statutes: None

Subsections (1) (a) and (2) define and state the effect of a "sale on approval". There is no real change in N.C. law. See United States v. One 1955 Model Ford, 157 F. Supp. 798 (1957); Glascock v. Hazell, 109 N.C. 145 (1891) that in a sale on approval where goods are subject to approval by the vendee, title does not vest in the vendee until such approval is manifested. This of course would determine the rights of creditors, risk of loss, etc. in N.C.

There are apparently no "sale or return" case in N.C. which treat the exact subject matter of these subsections but subsections (1)(b) and (2) relating to "sale or return" contracts are in accord with the general understanding of the consequences of this type contract. (Title passes immediately upon delivery to the buyer subject to the buyer's right, a condition subsequent, to return the item to the seller and to revest the title in the seller. The ordinary incidents of ownership are in the buyer until the buyer's option to return is exercised. This would include the risk of loss, rights of creditors, etc.) See Vold on Sales, (2d ed.), pages 382-383. Compare Fountain v. Jones, 181 N.C. 27 (1921). These subsections more clearly define the terms "sale on approval" and "sale or return" and their consequences in N.C. but there is no real change in existing law.

Subsection (3) provides that where a person has a place of business at which he deals in goods of the kind received for sale under a name other than that of the person making delivery, words such as "on consignment" purporting to reserve title until payment will not prevent a transaction from being a sale or return, thus subjecting the goods to levy by the creditors of the person receiving delivery. Thus, possible doubts as to the nature of the transaction are resolved in favor of creditors of the person receiving delivery. The possibility of using a form of bailment to conceal what is essentially a sale is reduced. Provisions are made whereby the seller-consignor can protect himself by following specified procedures.

Subsection (3) is entirely new in N.C. law.

Subsection (4) states, in effect, that any "or return" provision is so definitely at odds with any ordinary contract for the sale of goods that where written agreements are involved the "or return" provision must be contained in a written memorandum. It contradicts the "sale" aspect of the contract within the parol evidence rule. While N.C. does not currently have the statute of frauds as to contracts for the sale of personal property, it does have the parol evidence rule. Subsection (4) accords with the case of Shoop Medicine Co. v. Davenport, 163 N.C. 294 (1913) and Shoop Medicine Co. v. Mizell, 148 N.C. 384 (1908). Where there is a written contract of sale the buyer may not introduce parol agreement allowing return of the article purchased not contained in the written agreement. The U.C.C. provision accords in result with current N.C. law.

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

(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.

N.C. Comments

Prior Statutes: None

Subsection (1) (a) accords with U.S. v. One 1955 Model Ford, 157 F. Supp. 798 (1957) and Glascock v. Hazell, 109 N.C. 145 (1891).

Subsection (1) (b) would seem to accord with N.C. cases that a right of inspection must be exercised within a reasonable time or the buyer will become owner and the right to reject is waived. Fountain v. Jones, 181 N.C. 27 (1921). A use of the item purchased, however, which is consistent with purpose of trial is not acceptance. See Parker v. Fenwick, 138 N.C. 209 (1905).

Subsection (1)(c) has no statutory or decisional parallel in N.C. law but seems reasonable as to what the law would probably be in N.C. as pieced together from previously cited cases wherein title determines such crucial matters as the risk of loss and creditors rights.

Subsection (2)(a) is in substantial accord with N.C. law. See Fountain v. Jones, 181 N.C. 27 (1921). The addition of the provision for return of "any commercial unit of goods" is new to N.C. law.

There is no statutory or decisional parallel to subsection (2)(b) in N.C. law, but since under N.C. law title passes to a buyer on a "sale or return" contract, subject to being revested in the seller upon re-delivery, it would appear that until such re-delivery the expenses of re-delivery and the risk of loss should be on the buyer. See again Fountain v. Jones, 181 N.C. 27 (1921).

Section 2—328. Sale by Auction.

(1) In a sale by auction if 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 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.

N.C. Comments

Prior Statutes: None

Subsection (1) accords with the general understanding of the law of sales by auction. It is practically a verbatim copy of Section (21) (1) of the Uniform Sales Act which is generally thought of as a codification of the common law of sales in most particulars.

The first sentence of subsection (2) follows the Uniform Sales Act, Section 21(2) which is the general law as to when title passes in auction sales. Compare Love v. Harris, 156 N.C. 88 (1911). There are apparently no cases in N.C. relating to re-opening bids when a bid is made while the hammer is falling. This is covered by the second sentence of subsection (2).

While no cases are found in connection with the reserve rights of a seller at an auction which is covered by subsection (3), this provision accords with the Restatement of Contracts, Sec. 27 that a sale by auction is with reserve unless otherwise indicated, entitling the seller to withdraw the goods at any time before the bid is accepted. It also accords with the Uniform Sales Act, Section 21(2). It is believed that this also accords with N.C. law.

Subsection (4) follows N.C. law in permitting a buyer to avoid an auction sale at which the seller or his agent bid. See Morehead v. Hunt, 16 N.C. 35 (1826); Woods v. Hall, 16 N.C. 411 (1830); McDowell v. Simms, 41 N.C. 278 (1849). That by-bidding may be permissible if notice is given to the vendee, see McDowell v. Simms, 41 N.C. 278 (1849). This section of the U.C.C. adds, however, a provision not now in the N.C. law that the buyer has the option of taking at the last bona fide bid made where by-bidding by the seller or his agent is present. Another innovation is that at forced sales unannounced bidding on behalf of the seller is permitted.

For the most part this section of the U.C.C. restates and amplifies generally accepted rules relating to auction sales. There are few innovations.

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

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. 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 identification a special property as limited by this Act. Any retention 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".

N. C. Comments

Prior Statutes: None

The U.C.C. abandons "lump concept thinking", making rights, obligations and remedies of sellers, buyers and third parties dependent on the location of the title of goods at a particular time..

It substitutes therefor "narrow issue thinking" by providing specific provisions with respect to the various rights and duties of the buyer and seller which are not predicated on location of title.

For the most part, the same results will be obtained in N.C. after adoption of the U.C.C. as under current law although the "search for title" theory of deciding many sales cases is abandoned.

The first sentence of subsection (1) accords with Blakely v. Patrick, 67 N.C. 45 (1872); Waldo v. Belcher, 33 N.C. 609 (1850) that title cannot pass until goods are identified or appropriated to the contract.

The second sentence of subsection (1) is contrary to N.C. law. See Early & Daniels Co. v. Aulander Flour Mills, 187 N.C. 344 (1924) that where, by form of bill of lading, seller retains title to goods shipped for security purposes, other incidents such as risk of loss follows the title. See also Penniman v. Winder, 180 N.C. 73 (1920). The buyer and seller, of course, can provide by their contract when title to goods shall pass.

Subsection (2) accords with Richardson v. Insurance Co., 136 N.C. 314 (1904); Teague v. Grocery Co., 175 N.C. 195 (1918); Jenkins v. Jarrett, 70 N.C. 255 (1874) except that if goods are shipped and seller retains shipping documents such as the bill of lading made out to "order of seller", the seller retains title and the risk of loss is on the seller. See Early & Daniels v. Aulander Flour Mills, 187 N.C. 344 (1924). See also Peed v. Burlesons, Inc., 244 N.C. 437 (1956) that title and risk of loss remain in the seller if by the contract the seller agrees to deliver to the buyer at the destination, accords with subsection (2)(b).

Subsection (3) accords with N.C. law. See above paragraph. Title passes upon making contract if goods are in a deliverable state.

Subsection (4) accords with N.C. law that title revests in the seller upon a rescission by the buyer. See Hutchins v. Davis, 230 N.C. 67 (1949). The part of the section which places the title in the seller even if the buyer makes a wrongful repudiation of the contract is new.

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 retention 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.

N.C. Comments

Prior Statutes: None

This section, the intent of which is to preserve local law except where local law would make retention of possession of goods by a merchant-seller fraudulent as against creditors if such retention is in the ordinary course of business, does not affect N.C. law.

Section 2—403. Power to Transfer; Good Faith Purchase 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).

N.C. Comments

Prior Statutes: None

The first sentence of subsection (1) which relates to persons who are not "merchants" accords with N.C. law that the fact that the owner has entrusted the mere possession and control of personal property to another is ordinarily insufficient to estop him from asserting his title against a person who has dealt with the possessor on the faith of his apparent ownership or authority to sell. But if the seller, in addition to mere possession, is given indicia of title by the true owner or the true owner by his conduct clothes the possessor with apparent title or apparent power of disposition, third parties who are induced to deal with the possessor shall be protected. See Motor Co. v. Wood, 237 N.C. 318 (1953); Wilson v. Finance Co., 239 N.C. 349 (1953).

The second provision of this subsection changes N.C. law. While subsection (1) (a) has no case or statutory parallel in N.C., subsection (1)(b) is contrary to N.C. law. In N.C. if a buyer gives a bad check which is dishonored, the buyer takes no title and cannot convey a good title to a bona fide purchaser. See Wilson v. Finance Co., 239 N.C. 349 (1953). If the seller who takes a bad check, however, gives to the buyer an indicium of title upon which a bona fide purchaser subsequently relies, the seller will be estopped to assert his title as against the bona fide purchaser. Wilson v. Finance Co., 239 N.C. 349 (1953); Motor Co. v. Wood, 237 N.C. 318 (1953).

This U.C.C. provision, subsection (1)(b), permits a buyer, who has procured delivery of goods by a check that is later dishonored, to transfer good title to a good faith purchaser for value. The result of the U.C.C. provision is to make the title procured on a bad or worthless check a "voidable" title; before the seller avoids the transaction the holder of such "avoidable" title can convert it into a "good" title by selling it to a bona fide purchaser for value from whom it cannot be recovered. North Carolina law is materially changed.

Subsection (1)(c) also changes N.C. law. In N.C. if a sales contract contemplates a "cash sale", that payment of cash and delivery of goods are to be simultaneous as a condition precedent to the passage of title, mere delivery passes no title but passes only possession if the buyer does not pay. The case of Land Co. v. Bostic, 168 N.C. 99 (1914) holds that a buyer in a "cash sale" gets no title and getting none has only possession of the goods and can pass no title to another purchaser. Compare Millhiser v. Endman, 98 N.C. 292 (1887).

Subsection (1)(d) is likewise probably contrary to N.C. law. Compare Ellison v. Hunsinger, 237 N.C. 619 (1953) which indicates approval of the law of South Carolina that a defrauded owner can recover goods from a bona fide purchaser from one who has obtained them from the true owner by false pretense punishable as a crime. While the case cited applied S.C. law, the N.C. court indicated approval. The U.C.C. protects a bona fide purchaser who has bought from one who obtained delivery through fraud even though such fraud is punishable as larcenous under the criminal law. Compare GS 27-51 of the Uniform Warehouse Receipts Act which is like the U.C.C. in principle on this point.

Subsection (2) which relates to persons who are "merchants" changes N.C. law. N.C. law provides that the fact that an owner has entrusted someone with mere possession and control of personal property will not, without more, estop the owner from asserting his title against one who has bought from such possessor (in the absence of some estoppel factor). The U.C.C., however, protects any purchaser who has bought in the ordinary course of business any item entrusted to a "merchant" who deals in goods of the kind entrusted, whether the merchant had any apparent authority to sell or whether or not there was any indicium of title.

CAVEAT: Subsection (2) changes N.C. law. Will it be safe to leave an item, say a watch or used car, to be repaired if the jeweler or car repairer deals in the sale of used watches or cars in the ordinary course of business?

The U.C.C. specifies different rules for merchants.

Subsection (3) defines entrusting and allows no conditions to defeat the other rules.

Subsection (4) states that creditors' rights are found in other sections, e.g. § 2-403 relating only to purchasers.

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

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

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

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

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

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

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

N.C. Comments

Prior Statutes: None

It is believed that subsection (1) accords with N.C. law although there are neither cases nor decisions exactly in point.

N.C. law states that a person has an insurable interest in subject matter if he has such a relation to, connection with or concern in such subject matter that he will derive pecuniary benefits or advantage from its preservation or will suffer pecuniary loss from its destruction or injury. See King v. Insurance Co., 258 N.C. 432 (1962).

N.C. law also states that where a bargain is made for the purchase of goods and nothing is said about payment or delivery, the property passes immediately, so as to cast on the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price. Richardson v. Insurance Co., 136 N.C. 314 (1904). If the goods are on hand at the time the contract is made, title passes upon the making of the contract. Teague v. Grocery Co., 175 N.C. 195 (1918). Neither delivery nor payment of the price is necessary to pass title. Winborne v. McMahon, 206 N.C. 31 (1934); Jenins v. Jarrett, 70 N.C. 255 (1874).

It follows that a buyer under a contract of sale of ascertained specified goods has an insurable interest in the goods in N.C. under current law.

If something remains to be done to the goods, or they are not specifically identified or ascertained, title remains in the seller. See Blakely v. Patrick, 67 N.C. 40 (1872). In such case the seller, and not the buyer, would have the insurable interest in the goods. Richardson v. Insurance Co., 136 N.C. 314 (1904). A separation or marking of the goods will sufficiently identify them. See Pitts v. Curtis, 152 N.C. 615 (1910).

Subsection (2) giving seller insurable interest also accords with King v. Insurance Co., 258 N.C. 432 (1962). So long as the seller has a pecuniary interest in the goods, such as his seller's lien for the price, possible liability for negligence in their destruction, etc., he should have an insurable interest in the goods.

There will be no real difference in results as to insurable interest as a consequence of adoption of the U.C.C. Under the U.C.C., as under current insurance theory, the question of whether title has or has not passed from the seller to the buyer need not be determined.

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

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

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

N.C. Comments

Prior Statutes: None

There are no N.C. statutes or decisions directly in point.

There is, however, one N. C. case which reaches a result similar to the result that will be reached under subsection (1). Teague v. Grocery Store, 175 N.C. 195 (1918) provides that a purchaser who contracts for specified goods which are not delivered by the seller, but which are in his possession when he makes an assignment for the benefit of creditors, becomes title holder of the specified goods and can take possession of the specific goods against the seller's creditors; that such does not constitute a preference.

The same result is applicable under the Code where all or part payment for identified goods has been made. The buyer is entitled to recover the goods themselves and is not relegated to a position of only a general creditor. Determination of title is not necessary under the Code.

There is no N.C. parallel to subsection (2), either by statute or decision.

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

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

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

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

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

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

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

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

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

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

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

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

N.C. Comments — Prior Statutes: None

The first sentence of subsection (1) apparently accords with N.C. law. See Williams v. Johnston, 26 N.C. 233 (1844) that the seller has the duty to notify the buyer when delivery will take place when the time for delivery is not set out in the contract.

Subsections (1)(a) and (b), defining the time and place for tender have no N.C. parallels although proper tender for purposes of negotiable instruments law is set out in GS 25-78 et.seq.

The remaining subsections setting out the details required for valid tender have no existing counterparts in N.C. law and are therefore new.

Section 2—504. Shipment by Seller.

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

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

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

(c) promptly notify the buyer of the shipment.

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

N.C. Comments — Prior Statutes: None

Subsection (a) accords with N.C. law that if seller is to ship goods but no carrier is designated, it is the duty of the seller to ship in a reasonable course of transit. See Ober and Son v. Smith, 78 N.C. 313 (1878).

Subsection (b), however, does not accord with Ober and Sons v. Smith, supra, which states that bills of lading or other documentary indicia of title need not be sent by the seller to the purchaser.

Subsection (c) also does not accord with N.C. law as set out in Ober and Sons v. Smith, supra. That case held that it was not necessary for the seller to give notice of the shipment in order to shift title and the risk of loss to the buyer.

This section changes N.C. law but not in any significant way that will vary commercial practice.

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

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

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

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

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

N.C. Comments — Prior Statutes: None

Under N.C. law procurement by seller of a bill of lading in his own name or to his own order reserves title in the seller until the draft attached thereto is paid. Early & Daniels Co. v. Aulander Flour Mills, 187 N.C. 344 (1924). Title is not merely for security purposes but includes risk of loss which follows title. See Perriman v. Winder, 180 N.C. 73 (1920).

This section therefore would change N. C. law. If seller ships and has bill of lading made to himself or to his own order, legal title does not pass to the buyer for any purpose (such as risk of loss). Under the U.C.C., however, by making the bill of lading to his own order, or to the order of one other than the buyer, the seller does not retain legal title to goods shipped, but retains only a "security interest." If goods are destroyed, the risk of loss will fall on buyer if the goods conformed. In N.C. the risk of loss would have fallen on the seller if the bill of lading was to his own order.

Subsection (2) accords with Riley v. Carpenter, 143 N.C. 215 (1906) that if shipment with reservation of title in seller violates terms of contract, because bill of lading is made out to the order of the seller and not the buyer, it constitutes a breach.

Section 2—506. Rights of Financing Agency.

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

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

N.C. Comments — Prior Statutes: None

There is no statutory or case law exactly in point. While under existing N.C. law a bank or financing agency can purchase a bill of lading by discounting draft attached and receive seller's title, the U.C.C. by subsection (1) of this section gives the financing agency in such case only a "security interest."

Subsection (2) follows the policy of the Uniform Bills of Lading Act, GS 21-37 in freeing a person who enters transaction merely as a financer from responsibility for defects in the documents of title or the merchandise therein described. See Mason v. Cotton Co. 148 N.C. 492 (1908).

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

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

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

N.C. Comments — Prior Statutes: None

Subsection (1) accords with the general law of contracts that in the absence of contrary agreement, payment and delivery are concurrent conditions. See McAden v. Craig, 222 N.C. 497 (1942); Wessel v. Seminole Phosphate Co., 13 F 2d 999 (1926).

Subsection (2) has no statutory or decisional parallel in the law of sales.

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

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

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

N.C. Comments

Prior Statutes: None

This section has no counterpart in existing N. C. statutory or decisional law.

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

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

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

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

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

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

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

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

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

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

N.C. Comments

Prior Statutes: None

The current law provides that risk of loss follows the title. Penniman v. Winder, 180 N.C. 73 (1920); Early & Daniels v. Aulander Flour Mills, 187 N.C. 344 (1924); Richardson v. Insurance Co., 136 N.C. 314 (1904).

This section of the U.C.C. abolishes the traditional "property passage" or "title" approach as regards the question of who bears the risk of loss. Under the Code it is not necessary to make a broad and circuitous search to locate title to determine risk of loss. This Code section provides a direct mode of determining who has the risk of loss by short and concise statements. In most cases the results are the same under both methods.

Subsection (1)(a) provides that if the contract does not require the seller to deliver to a particular destination, risk of loss passes to the buyer when the goods are delivered to the carrier. This accords with the N. C. Rule. See Hunter v. Randolph, 128 N.C. 91 (1901).

But subsection (1)(a) provides that the risk of loss passes to the buyer even if the shipment is under reservation (by reservation of security via bill of lading made to order of seller). This does not accord with N.C. law which holds that if seller has procured a bill of lading to seller's order, no title passes by shipment of the goods until the draft accompanying the bill of lading is paid. Thus if the bill of lading, upon shipment, is made "to seller's order" risk of loss is on the seller. See Early & Daniels Co. v. Aulander Flour Mills, 187 N.C. 344 (1924). Contra, Uniform Sales Act. Sec. 20 (2) but N.C. has never adopted the Uniform Sales Act.

Subsection (1)(b) provides that if the contract requires seller to deliver to a particular destination, the goods remain at the seller's risk until they reach their destination. Mere delivery to the carrier does not shift the risk of loss to the buyer. This accords with Peed v. Burleson, 244 N.C. 437 (1956). Title remains in the seller until delivery (or tender of delivery) at the rightful place to the buyer. Acme Paper Box Factory v. Railroad, 148 N.C. 421 (1908). Subsection (1)(b) thus accords with the N. C. cases in result.

Subsections (2)(a) and (b) provide that risk of loss shall shift if goods are held by bailee and buyer receives documents of title covering goods or bailee acknowledges buyer's right to possess the goods. Compare Williams v. Hodges 113 N.C. 36 (1893); Waldo v. Belcher, 33 N.C. 609 (1850); on contract for sale of specific goods, property is transferred unless different intention appears, when contract is made. See Winborne v. McMahon, 206 N.C. 30 (1934); Teague v. Grocery Store, 175 N.C. 195 (1918). This would appear to put N. C. substantially in accord with subsections (2)(a) and (b).

Subsection (3) provides that if seller is "merchant", risk of loss does not pass to buyer until receipt of the goods. If seller

is not merchant, risk passes to buyer only upon tender of delivery. This will constitute a basic change in N.C. law, differentiating merchant sellers from others.

Under present N.C. law, risk follows title. On a contract for sale of specific goods title passes when the contract is made. Winborne v. McMahon, 206 N.C. 30 (1934). On making a contract for specific goods, identified without more for the seller to do, the buyer then has the risk of loss after the contract. This Code provision shifts risk of loss to seller until either receipt of the goods by the buyer or until tender of delivery by the seller. It is thought that this accords more with lay understanding and practice. In addition the seller is likely to be better covered with insurance. The search for title is entirely obviated.

Subsection (4) allows the parties to contract to change risk of loss.

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

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

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

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

N.C. Comments

Prior Statutes: None

Subsection (1) placing the risk of loss on the seller if goods do not conform accords in result with N.C. law which allows a right of rescission or rejection for non-compliance of the goods to the contract. See Hendrix v. Motors, Inc., 241 N.C. 644 (1955). This would seem to entitle the buyer to reshift the risk of loss if the goods do not conform to contract as is the effect of this U.C.C. provision.

Subsections (2) and (3) have no statutory or decisional parallels in N.C. except that in N.C. the risk of loss would be on the buyer if the buyer repudiated contract even though the goods conformed to the terms of the contract.

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

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

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

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

N.C. Comments

Prior Statutes: None

Subsection (1) makes tender of payment by the buyer a condition precedent to seller's duty to deliver. The Code requires the buyer to do the first act. Current N.C. law makes the payment of money and the delivery of property simultaneous or concurrent acts. See McAden v. Craig, 222 N.C. 497 (1942). Hughes v. Knott, 138 N.C. 105 (1905) says that payment of the price must be either precedent or concurrent to delivery.

Subsection (2) is in accord with Hughes v. Knott, 138 N.C. 105 (1942) which says that a custom of accepting checks as payment for goods in particular trades can be shown and if the check is refused as payment the buyer shall have a reasonable time to convert his funds into currency and that this will be a valid tender of performance by the buyer.

Subsection (3) which states that payment by check is only conditional accords with N.C. law. See Weddington v. Boshamer, 237 N.C. 556 (1953); Central Nat. Bank of Richmond v. Rich, 256 N.C. 324 (1961); Carrow v. Weston 247 N.C. 735 (1958); Wilson v. Finance Co. 239 N.C. 349 (1953); Motor Co. v. Wood 237 N.C. 318 (1953) which hold that title does not pass by acceptance of check until it is paid by the bank on which it is drawn. The seller may reclaim goods sold to the buyer in case the check is not paid on due presentation.

Section 2—512. Payment by Buyer Before Inspection.

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

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

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

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

N.C. Comments — Prior Statutes: None

There is apparently no statutory or decisional law in N.C. in relation to this section but it seems to accord with "common sense and normal commercial practice" and would probably be the law in N.C.

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

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

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

(3) Unless otherwise agreed and subject to the provisions of this Article on C.I.F. contracts (subsection (3) of Section 2—321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

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

N.C. Comments — Prior Statutes: None

Subsection (1) giving buyer right to inspect goods is in accord with Parker v. Fenwick, 138 N.C. 209 (1905) and Standard Paint and Lead Works v. Spruill, 186 N.C. 68 (1923). The latter case states: "Under an executory contract for the sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality the vendee is not bound to accept them, and unless he does so, he is not liable therefor. This necessarily gives to the vendee the right of inspection, and he must be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides."

"A vendee of merchandise shipped from a distant point, under a

contract specifying the quality of the merchandise and providing for its delivery f.o.b. at the point of shipment, but which contains no provisions as to the time or place of payment, inspection or acceptance, is entitled to a reasonable time after the merchandise arrives at its destination in which to inspect it at that point, and to reject it if it does not comply with the contract."

There are apparently no direct parallels in existing N.C. law, either by statutes or decision, to subsections (2), (3), and (4).

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

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

N.C. Comments

Prior Statute: Compare Chapter 21, General Statutes

North Carolina has no statute on case law corresponding to this section. Although North Carolina adopted the Uniform Bills of Lading Act in 1919, Section 41 of the act was omitted. Its terms are set out below:

"§ 41 Uniform Bills of Lading Act

Demand, presentation on sight draft must be paid, but draft on more than three days time merely accepted before buyer is entitled to the accompanying bill. Where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods whether directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming:

(a) If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended to require payment of the draft before the buyer should be entitled to receive or retain the bill.

(b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such days be termed days of grace or not), that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order."

The effect of this U.C.C. modification of the Uniform Bills of Lading Act is to compel a document of title with draft attached to be delivered to the drawee upon his acceptance of the draft if by its terms it is payable more than three days after presentment; if it is payable within three days of presentment, the documents of title shall be delivered only upon payment being made.

In North Carolina where seller of goods ships them by carrier, with a bill of lading sent with a draft attached for the purchase price, title remains in the seller until the draft is paid. Neither documents of title nor title pass until the draft is paid. See Early and Daniels Co. v. Aulander Flour Mills, 187 N.C. 344 (1924).

There will be a change in N.C. Law by this addition.

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

In furtherance of the adjustment of any claim or dispute

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

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

N.C. Comments

Prior Statutes: None

There is no counterpart to this section in N.C. law, neither statutory nor decisional.

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

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

(a) reject the whole; or

(b) accept the whole; or

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

N. C. Comments

Prior Statutes: None

The law in North Carolina is that if the contract for the purchase of goods is divisible, a buyer's acceptance of a part of a shipment of goods does not obligate the buyer to receive the remainder of non-conforming goods which do not come up to the contract. See Coal Co. v. Coal Co. 134 NC 574 (1904); Freeman v. Skinner, 31 NC 32 (1848). In other words, the present N.C. law recognizes a buyer's right to accept part of a shipment of a divisible contract and reject the balance of shipment if it does not conform to the contract; such partial acceptance of goods does not constitute a waiver of defects as to the quality or quantity of the remainder of the goods.

But see J. W. Sanders Cotton Mill v. Capps, 104 F. Supp. 617 (1952) that where there is a "single order and only one transaction" purchaser may not accept part of a shipment and reject the remainder, but must either affirm or repudiate.

Thus under N.C. law whether a buyer may accept part of the goods contracted for and reject non-conforming goods would appear to be based on whether the contract was divisible. The U.C.C. section here involved would base the buyer's right of acceptance or rejection on commercial units rather than upon the test of divisibility or indivisibility of the contract of sale. (A commercial unit is a unit of goods by commercial usage whose division impairs its character or value on the market or in use.)

The results of the cases under the current law and under the U.C.C. will probably be the same with reference to this section. The results should, however, be more predictable than under current law.

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

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

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

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

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 2—711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

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

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

N. C. Comments

Prior Statutes: None

Subsection (1) accords with the cases of Hajoca Corp. v. Brooks, 249 NC 10 (1958); Hendrix v. Motors, 243 NC 644 (1955); Hutchins v. Davis, 230 NC 67 (1949); May v. Loomis, 140 NC 350 (1905); Manufacturing Co. v. Gray, 124 N.C. 322 (1899); Waldo v. Helsey, 48 NC 107 (1955) and McEntyre v. McEntyre, 34 NC 302 (1851). The latter case states: "If one, not having seen them, orders goods of a certain description, at a certain price, and the goods sent do not answer the description, he may return them, within a reasonable time, and rescind the contract..."

Subsection (2) also accords with present N.C. law. Manufacturing Co. v. Gray, 124 NC 322 (1899) states: "The purchaser is not compelled in all cases to reject the property, at once, upon its receipt; if it is machinery, he has a reasonable time to operate the machinery for the purpose of testing it. But when this is done, and it is found that the machine or the machinery does not fill the specifications of the contract and warranty, he must then abandon the contract and refuse to accept and use the property; and if he does not do this, but continues the possession and use of the property, he will be deemed in law to have accepted the property, and his relief then will be an action for damages upon the breach of the warranty." See Insurance Co. v. Don Allen Chevrolet Co. 253 NC 243 (1960); Bruton v. Bland, 260 N.C. 429 (1963).

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

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

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

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

N. C. Comments — Prior Statutes: None

There are no N. C. Statutes or cases which bear on the subject matter of this section.

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

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

N. C. Comments: — Prior Statutes: None

There are no N.C. statutes or decisions relating to this section.

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

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

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

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

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

N. C. Comments

Prior Statutes: None

There are no N. C. statutes nor decisions relating to this section.

Section 2—606. What Constitutes Acceptance of Goods.

(1) Acceptance of goods occurs when the buyer

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

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

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

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

N. C. Comments

Prior Statutes: None

Subsections (1) (a) and (b) are in accord with Richardson v. Woodruff, 178 NC 46 (1919) which holds that there is no acceptance of goods by the buyer until he has had an opportunity to inspect the goods. Continued use, however, after discovery of non-conformity, or after a reasonable opportunity to discover non-conformity, constitutes an acceptance. Hajoca Corp. v. Brooks, 249 NC 10 (1958).

Subsection (1)(c) accords with Ritchie v. Ritchie, 192 NC 538 (1926) which holds that if a buyer sells part of the goods and keeps the proceeds of the sale and applies them to his own use, there is an acceptance. See Hajoca Corp. v. Brooks, 249 NC 10 (1958) which holds, however, that retention of goods for the purpose of testing it for a reasonable time or at the request of the seller in order that he may endeavor to remedy the defects does not constitute an acceptance or waiver of the buyer's right to rescind.

Subsection (2) has no statutory or decisional parallel in N. C. law.

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

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

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

(3) Where a tender has been accepted

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

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

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

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2—312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

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

N. C. Comments

Prior Statutes: None

Subsection (1) accords with Parker v. Fenwick, 138 N.C. 209 (1905) which requires payment of price upon acceptance. See also Dodson v. Moore, 64 N. C. 512 (1870).

Subsection (2) accords with Spiers v. Halsted, 74 N. C. 620 (1876) that mere acceptance of a purchased article does not itself constitute a waiver of damages for a delay in performance of the contract. Cox v. Long, 69 N. C. 7 (1873); Thomas v. Simpson, 80 N.C. 4 (1899) and Potter v. National Supply Co., 230 N.C. 1 (1949) hold that a purchaser does not waive his right to sue a seller for damages because of the

inferior quality of articles purchased or for breach of warranty by the mere acceptance and retention of goods not fulfilling the terms of the contract.

Subsection 3(a) accords with Main v. Field, 144 N.C. 307 (1907) that a buyer of goods has a reasonable time within which to give the seller notice of a breach of warranty after acceptance of the goods.

Subsection 3(b) has no current N.C. statutory or decisional parallel.

Subsection (4) accords with Furst v. Taylor, 204 N.C. 603 (1933); Parker v. Fenwick, 138 N.C. 209 (1905).

Subsections (5) and (6) have no current N. C. statutory or decisional equivalents.

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

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

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

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

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

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

N. C. Comments — Prior Statutes: None

Subsection (1)(a) accords with Hajoca Corp. v. Brooks, 249 N.C. 10 (1958) that a buyer's retention of goods during a period in which seller makes efforts to remedy defects does not bar buyer from thereafter electing to rescind contract.

Subsection (1)(b) accords with Case Co. v. McKay, 161 N.C. 584 (1913) that retention of a machine at seller's request to try to make it perform the service it was represented as capable of performing does not prevent the purchaser from rescinding the purchase. See also Thomas v. Simpson, 80 N.C. 4 (1879) that acceptance of goods in ignorance of defect therein is not a waiver of implied warranty of quality.

Subsection (2) accords with Manufacturing Co. v. Gray, 124 N.C. 322 (1899) that a purchaser has reasonable time to operate machinery for the purpose of testing it; if machinery does not come up to contract, he may abandon the contract and refuse to receive and use

the property. See also, Hendrix v. Motors, Inc., 241 N. C. 644 (1955).

Subsection (3) accords with Hendrix v. Motors, Inc. 241 N.C. 644 (1955) and Curtis v. White Cadillac-Olds, Inc. 248 N.C. 717 (1958).

Section 2—609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

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

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

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

N. C. Comments

Prior Statutes: None

There is no statutory or case law in N. C. currently as to Security For Performance to be applicable in anticipation of non-performance, repudiation or insecurity on the part of either of the contracting parties. This will be entirely new.

Section 2—610. Anticipatory Repudiation.

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

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

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

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

N. C. Comments

Prior Statutes: None

An anticipatory breach of contracts is apparently actionable in North Carolina before the date fixed by a contract for performance. If one party renounces the contract before the date fixed by contract for performance, the other party may treat the renunciation as a "breach" and sue for his damages at once provided the renunciation covers the entire performance to which the contract binds the promisor. See Pappas v. Crist, 223 N.C. 265 (1943); Tillis v. Cotton Mills, 251 N.C. 359 (1959). In North Carolina, however, for the breach of an executory contract the plaintiff may recover only such substantial damages as can be ascertained and measured with reasonable certainty. While absolute certainty is not required, evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion. A witness will not be permitted to give a mere guess or opinion, unsupported by facts, as to the amount of damages arising upon a breach of contract. See Tillis v. Cotton Mills, 251 N. C. 359 (1959). In addition, the contractor against whom the contract is breached is normally under an obligation to exercise reasonable diligence to minimize the damages caused to him by the breach. Ibid. The result is that in North Carolina, notwithstanding statements of the court that anticipatory breaches of contract are actionable, the court does not favor such actions. In most cases, due to the requirements of certainty and mitigation of damages by the party against whom the contract has been breached, for practical purposes, damages cannot be adequately measured prior to the date when the contract by its terms should have been performed. Compare: McJunkin Corp. v. N.C. Natural Gas Corp., 300F 2d 794 (1961); Tillis v. Cotton Mills, 251 N. C. 360 (1959).

The U.C.C., § 2-610, provides for immediate relief for an aggrieved party upon a repudiation of the contract by the other party by an overt communication of intention or action which renders performance of the contract impossible or demonstrates clearly an intention not to continue with the performance. It gives the aggrieved party

(a) the right to wait a commercially reasonable time for performance by the repudiating party;
(b) the right to resort to any remedy set out in § 2-703 (if the seller) and § 2-711 (if the buyer) for breach; or
(c) the right to suspend his own performance. (Subsection (c) accords with N.C. law on this point. See Wade v. Lutterloh, 196 N.C. 116 (1928) that renunciation by one party to contract excuses other from any further offer to perform.)

While North Carolina recognizes the doctrine of anticipatory breach of contracts, the limits of the doctrine, especially as to damages recoverable, are uncertain. The U.C.C. not only gives either

aggrieved party the right to sue as for breach or to suspend performance in case of repudiation of a contract, but it also establishes the date for the determination of damages. (The date of the anticipatory repudiation of the contract.)

Under the Restatement of Contracts, Section 338, and in most states recognizing the doctrine of anticipatory breach in connection with Sales, the measure of damages recoverable is the difference between the price as specified in the contract and the market price at the date and place when delivery or performance was to have been made. This formula is complicated as it is often well nigh impossible to determine the price of goods at a future date, especially when the duty to mitigate damages is considered which might very well result in no damages at all.

This section of the U.C.C. and Section 2-723 make damages less speculative, providing that if the action comes to trial by reason of anticipatory breach before the date of performance specified in the contract, the damages shall be the difference between the contract price specified and the market price as of "the time the aggrieved party learned of the repudiation". This apparently changes the law of North Carolina. See McJunkin Corp. v. North Carolina Natural Gas Corp., 300 F 2d 794 (1961) which holds that damages for anticipatory breach of contract are to be assessed on the basis of profit factors existent at the time of performance fixed by contract, and not at the time of repudiation.

Section 2—611. Retraction of Anticipatory Repudiation.

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

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

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

N. C. Comments

Prior Statutes: None

There is no case or statutory law in connection with this section.

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

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

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

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

N. C. Comments — Prior Statutes: None

In accord with LaVallette v. Booth, 131 N.C. 36 (1902) that buyer may reject installment which is non-conforming or may reject further performance if non-conformity substantially impairs whole contract. But compare Flour Mills v. Distributing Co., 171 N.C. 708 (1916) that breach of a minor and subsidiary covenant may give rise to an action for damages, but it cannot operate as a discharge.

Section 2—613. Casualty to Identified Goods.

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

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

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

N. C. Comments — Prior Statutes: None

There is neither statutory nor case law in N. C. exactly in point with this section. But compare Stagg v. Spray Water Power and Land Co., 171 N.C. 583 (1916). See note to § 2-615, infra.

Section 2—614. Substituted Performance.

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

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

N. C. Comments — Prior Statutes: None

There is no existing statutory or case law equivalent in N.C.

This section seems to accord, however, with the reasoning behind Ober v. Smith, 78 N.C. 313 ( ) that when a purchaser designates no particular route or carrier by which goods are to be shipped, it is the duty of the seller to ship the goods in a reasonable course of transit.

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

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

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

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

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

N. C. Comments — Prior Statutes: None

Subsection (a) seems to accord with present N. C. contracts principles that if a party by contract charges himself with an obligation possible to be performed, he must make it good, unless its performance be rendered impossible by an act of God, the law, or the other party, and unforeseen difficulties will not excuse him. However, if the parties contract with reference to specific property, the continued existence of which is clearly contemplated by the obligations assumed, the parties are relieved from further obligations concerning property when it is accidentally lost or destroyed by fire or otherwise, rendering performance of the contract impossible. But in order for a party to avail himself of such position, he must show that the destruction of the specific thing, was without his fault. See Stagg v. Spray Water Power and Land Co., 171 N.C. 583 (1916); Sele v. Highway Commission 242 N.C. 612 (1955); Blount-Midyette and Co. v. Aeroglide Corp. 254 N.C. 484 (1961). This is also the rule set out in Taylor v. Caldwell, 3 Best and S. 826 (1863) a widely followed English case.

Subsection (b) is entirely new. There is no statutory or decisional parallel to this subsection in N. C. law which allows seller to make pro rata distribution to customers in the event of partially impossibility of performance. Compare Coal Co. v. Coal Co., 134 N.C. 574 (1904).

Subsection (c) has no N.C. statutory or decisional parrallel. New.

Section 2—616. Procedure on Notice Claiming Excuse.

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2—612), then also as to the whole,

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

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

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

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

N. C. Comments — Prior Statutes: None

The procedures established by this section implement the Rules established under §§ 2-614 and 2-615. There is no comparable statute or case law in N.C.

Section 2—701. Remedies for Breach of Collateral Contracts Not Impaired.

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this Article.

N. C. Comments — Prior Statutes: None

This section appears to limit the scope of the Sales Article to parts of a contract related to the sale of goods and would seem to require no annotation.

Section 2—702. Seller's Remedies on Discovery of Buyer's Insolvency.

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2—705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller, in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2—403). Successful reclamation of goods excludes all other remedies with respect to them.

N. C. Comments — Prior Statutes: None

Subsection (1) accords with principle applicable in right of stoppages in transitu given to seller who learns of buyer's insolvency before goods are delivered to buyer based on "the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts". See Farrell v. Railroad, 102 N.C. 390 (1889).

Subsection (2), which gives a right to the seller to assert a lien or undelivered goods already delivered is new and changes N. C. law. If the goods have been delivered to the buyer or the carrier has agreed to hold the goods for the buyer, the seller's right of stoppage in transitu, under N. C. law, is lost. See Williams v. Hodges, 113 N. C. 36 (1893). It is also the law in N.C. that a vendor of personal property has no lien for the purchase money. See Bafarrah v. Spell, 178 N.C. 231 (1919). An insolvent buyer does not have to disclose his insolvency. If, however, the insolvent buyer misrepresents his solvency and thereafter goes into bankruptcy, even under present N. C. law the seller can recover the property. On a sale of goods, induced by fraud on the part of the rendee, the rendor is authorized to reclaim the property and the title thereto revests in him. See Wilson v. White, 80 N.C. 280 (1878).

Change: While insolvency of buyer alone would not allow a seller to reclaim goods under current law (requiring a misrepresentation that equals fraud), this section allows the buyer to reclaim, even after delivery, from a buyer who received goods while insolvent. It extends the theory behind stoppages in transitu. Subsection (3) protects purchasers in ordinary course of business, purchasers for value and lien creditors of buyer.

Section 2—703. Seller's Remedies in General.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2—612), then also with respect to the whole undelivered balance, the aggrieved seller may

(a) withhold delivery of such goods;

(b) stop delivery by any bailee as hereafter provided (Section 2—705);

(c) proceed under the next section respecting goods still unidentified to the contract;

(d) resell and recover damages as hereafter provided (Section 2—706);

(e) recover damages for non-acceptance (Section 2—708) or in a proper case the price (Section 2—709);

(f) cancel.

N. C. Comments

Prior Statutes: None

This is simply a catalogue section of the seller's remedies given and set out in other sections of this Article and requires no separate annotation. See succeeding sections.

Section 2—704. Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods.

(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

N. C. Comments

Prior Statutes: None

Subsections (1)(a) and (b) allow an aggrieved seller to identify any conforming goods under his control to the contract and to resell the goods intended for particular contract even though unfinished. It is doubtful under existing law whether goods not previously identified or segregated to the contract can, after a repudiation by the buyer, be identified or segregated to lay foundation for a resale for the account of the buyer.

Subsection (2) permits the seller to complete goods in manufacture where the completion is commercially reasonable and to resell them so as to fix the damages payable by the buyer where, in a contract calling for the manufacture of goods, the buyer has breached the contract. This subsection apparently will change N. C. law which in such instances requires the seller-manufacturer to stop manufacture and sue only for the labor expanded and expense incurred in the past performance before repudiation, plus the profit that would have accrued had full performance not been prevented by the buyer. See Novelty Advertising Co. v. Farmer's Mutual Tobacco Warehouse, 186 N.C. 197 (1923); Heiser v. Mears, 120 N.C. 443 (1897).

The principal thrust of this U.C.C. provision is that when a contract is repudiated while goods are in an incomplete state in the process of manufacture, the seller-manufacturer should be permitted to act in good faith in determining by reasonable commercial standards whether to complete manufacture of the goods in process, after buyer's repudiation.

Section 2—705. Seller's Stoppage of Delivery in Transit or Otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2—702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3) (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

N. C. Comments — Prior Statutes: None

N. C. recognizes stoppage in transitu by a seller in the event of a buyer's insolvency. Farrell v. Richmond Railroad, 102 N.C. 390 (1889). If they reach their terminals, however, and are thereafter held by the carrier in storage and the carrier acknowledges to the buyer that it holds the goods for the buyer, the vendor's right to stoppage in transitu is terminated. See Williams v. Hodges, 113 N.C. 36 (1893).

Neither of these principles seems to be affected by this U.C.C. section. However, it should be noted that under this U.C.C. section, the right of stoppage in transitu is to be broadened. Stoppage in transitu will be available not only when the buyer is insolvent but also upon repudiation by buyer, when a payment is missed, or in any other case the seller has a right to withhold or reclaim the goods.

There are no statutes or decisions in N. C. concerning the further details and procedures relating to stoppages in transit set out in this section of the U.C.C.

Section 2—706. Seller's Resale Including Contract for Resale.

(1) Under the conditions stated in Section 2—703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2—710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2—707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2—711).

N. C. Comments

Prior Statutes: None

Subsection (1) accords with N. C. law that where a vendee refuses to receive goods, his vendor may resell the goods and hold the original vendee liable for any difference in prices in the first and second sale. See Hurlburt v. Simpson, 25 N.C. 233 (1842). The seller in such cases is also entitled to recover for incidental costs of storage, interest and an allowance for time spent acting as buyer's agent in reselling the goods. See Vanstory Clothing Co. v. Stadiem, 149 N.C. 6 (1908). See Merrill v. Tew, 183 N.C. 172 (1922) which indicates that in N. C. the vendor need only exercise reasonable care, skill, and prudence in effecting a resale when the buyer has breached his contract to receive the goods contracted for. This section of the U.C.C. accords generally with N. C. law which currently allows the seller to resell upon a buyer's breach, such sale to be in accordance with reasonable commercial practices so as to realize the best price practicable under the circumstances and so as to fix damages.

The remaining subsections allow both private and public sales and set out details of notice and requirements if public sale is held. The section of the U.C.C. is new to this extent.

Subsection (6) may conflict with N. C. law in that it provides that a seller making a resale need not account to the buyer for any profit made on resale. Under current law if the seller resells, it is for the account of the buyer as agent if title has passed with the making of the contract. It would seem that in N. C. under the current law the buyer as titleholder would be entitled to any profits made on resale. He is, of course, under present law liable for any deficiency. See Vanstory Co. v. Stadiem, 149 N.C. 6 (1908). This

subsection illustrates the basic rejection by the U.C.C. of the necessity of determining the location of title at any given time.

Section 2—707. "Person in the Position of a Seller".

(1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this Article withhold or stop delivery (Section 2—705) and resell (Section 2—706) and recover incidental damages (Section 2—710).

N. C. Comments

Prior Statutes: None

This section is designed primarily to allow a financing agency which has acquired documents from the seller to exercise the same rights as the seller in stopping the goods in transit and reselling the goods upon repudiation and recovering incidental damages. There is no N. C. parallel, either statutory or decisional.

Section 2—708. Seller's Damages for Non-acceptance or Repudiation.

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2—723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2—710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2—710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

N. C. Comments

Prior Statutes: None

Subsection (1) accords with N. C. cases in allowing the seller to recover the difference between the contract price and the market price at the time and place of the breach. See Cherry v. Upton Co., 180 N.C. 1 (1920); Bryant v. Southern Box and Lumber Co., 192 N.C. 607 (1926); Heise v. Mears, 120 N.C. 443 (1897).

Subsection (2) also accords with N. C. law where there is a breach of contract and the rule announced in subsection (1) is inadequate. (E.G. if the goods are to be manufactured and the buyer repudiates

before they are manufactured or before they have value.) This subsection, as in N. C. law, allows the seller to recover any profit he would make by full performance after deducting the sum that it would have cost the seller to fully perform. See Bryant v. Southern Box and Lumber Co. 192 N.C. 607 (1926); Springs Co. v. Buggy Co., 148 N.C. 533 (1908).

Incidental damages are recoverable in N. C. by seller upon buyer's breach. See Vanstory v. Stadiem, 149 N.C. 6 (1908) where storage changes before resale was approved. Cole Sons v. Standard Lumber Co., 150 N.C. 183 (1909).

This section does not materially change N. C. law.

(Another example of when subsection (1) would not allow recovery of adequate damages would be a situation where dealer is in business having and selling an unlimited supply of standard priced goods. If a dealer sold a car to buyer, for instance, for $2,000 list price, and buyer repudiated, under subsection (1) if the seller kept the car he could not recover from the buyer because the contract price and the value of the car would be the same. Resale will not prove adequate as by reselling the seller just makes one sale whereas if the buyer had not repudiated seller could have made two sales. Subsection (2) cures this defect by allowing the seller to recover the profit on the repudiated sale that he would have obtained had no repudiation occurred.)

Section 2—709. Action for the Price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2—610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

N. C. Comments — Prior Statutes: None

In N. C. an action for price cannot be maintained unless title has passed to the vendee. Waldo v. Belcher, 33 N.C. 609 (1850); Hendricks v. Mocksville Furniture Co., 156 N.C. 569 (1911). This is the common law rule. See Williston, §§ 560 (a) and 561.

The U.C.C. in this section specifies on an enumerated basis the instances in which an action for price can be maintained. Location of title is no longer determinative under the Code which makes it necessary only to determine if one of the enumerated situations has occurred.

Another important matter is a change of emphasis. An action for "price" seems to be rendered secondary to "efforts to resell". Under current N. C. law, a seller upon a breach has an option (1) to treat goods as property of buyer and sue for price or (2) to treat the goods as property of the buyer and resell for him and sue for the difference between the contract price and what the goods shall have brought upon resale. Vanstory v. Stadiem, 149 N.C. 6 (1908). Under this section of the U.C.C. ((1)(b)), the seller may recover the price only after he is unable to resell them after a reasonable effort. It seems that the Code will make it obligatory to attempt resale whereas heretofore it has been held optional with the seller in N. C.

Section 2—710. Seller's Incidental Damages.

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

N. C. Comments — Prior Statutes: None

N. C. recognizes that seller is entitled to incidental damages and accords with this section of the U.C.C. See Vanstory v. Stadiem, 149 N.C. 6 (1908); Cole and Sons v. Lumber Co., 150 N.C. 183 (1909).

Section 2—711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2—612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2—713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Article (Section 2—502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2—716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2—706).

N. C. Comments

Prior Statutes: None

Subsection (1) accords with N. C. law that upon seller's breach, buyer may cancel contract. See Hajoca Corp. v. Brooks, 249 N.C. 10 (1958). Buyer may also recover so much of the purchase price as he has paid. Robinson v. Huffstetler, 165 N.C. 459 (1914).

Subsection (1)(a) accords with N. C. law which requires the buyer, upon a seller's breach, to make reasonable efforts to protect himself from loss- "to do what reasonable care and business prudence required to minimize the loss". See Mills v. McRae, 187 N. C. 707 (1924) which indicates that a buyer is chargeable with the duty to attempt to purchase goods of similar quantity and quality in the open market to fix buyer's damages in the event of seller's breach. The burden is on the seller to show that the buyer could have minimized his damages by such "cover" purchase.

Subsection (1)(b) accords with N. C. law. See Berbarry v. Tombacher, 162 NC 497 (1913); Morrison and Hill v. Marks, 178 NC 429 (1919); Mills v. McRae, 187 N.C. 707 (1924).

Subsections (2)(a) and (2)(b) allowing buyer to recover the goods themselves upon non-delivery or repudiation accords with Hughes v. Knott, 140 N.C. 550 (1906) which indicates that if a seller breaches a contract to deliver specified goods and the buyer can show that he is ready, willing and able to perform, the buyer can maintain an action to recover the goods themselves. See also Hughes v. Knott, 138 N.C. 105 (1905).

Subsection (3) giving buyer a lien on goods for payments made on the price and expenses incurred when the buyer rightfully rejects goods apparently has no existing statutory or decisional counterpart in N. C. law. There is likewise apparently no law setting out the buyer's right to resell goods rightfully rejected by the buyer and thus would constitute new material.

Section 2—712. "Cover"; Buyer's Procurement of Substitute Goods.

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2—715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

N. C. Comments

Prior Statutes: None

This section accords with N. C. law that buyer, upon learning of seller's breach of contract in failing to deliver may procure goods of similar quantity and quality in the open market, and recover the difference between the contract price and the reasonable market price for which the substituted goods are purchased. See Mills v. McRae, 187 N.C. 707 (1924); Coal Co. v. Coal Co., 134 N.C. 574 (1904); Wilson v. Scarboro, 169 N.C. 654 (1915). This section provides a handy label.

This section makes the price paid by the buyer to effect "cover" pursuant to reasonable good faith efforts determinative rather than "reasonable market value" in the abstract.

Section 2—713. Buyer's Damages for Non-Delivery or Repudiation.

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2—723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2—715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

N. C. Comments

Prior Statutes: None

The cases in N. C. agree with this section that the measure of damages for non-delivery or breach by seller is the difference between the agreed price in the contract and the market value of the goods at the time and place specified for performance. Berbarry v. Tombacher, 162 N.C. 497 (1913); Warehouse Co. v. Chemical Co., 176 N.C. 509 (1918); Coal Co. v. Coal Co., 134 N.C. 574 (1904).

In addition the buyer may recover damages arising by reason of special circumstances, if the seller knew of such special circumstances or if such damages were fairly and reasonably within the contemplation of the parties when the contract was made. This section states the standard contract rule of damages. See Tillinghast v. Cotton Mills, 143 N.C. 268 (1906). As to incidental damages recoverable, see

Manufacturing Co. v. Machine Works, 144 N.C. 689 (1907) where recovery was allowed for expenses incurred to buyer for attempting to make a machine work at the request of the seller.

Section 2—714. Buyer's Damages for Breach in Regard to Accepted Goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2—607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

N. C. Comments

Prior Statutes: None

Subsection (1) accords with Manufacturing Co. v. Machine Works, 144 N.C. 689 (1907) and Fertilizer Works v. McLawhorn, 158 N.C. 274 (1912) that when goods are deficient in quality, the damages sustained is the difference between the value of the goods actually sold and what the value should have been had the terms of the contract been met plus only such damages as were within the contemplation of the parties at the time the contract was made.

Subsection (2) accords with Grossman v. Johnson, 242 N.C. 571 (1955); Harris v. Canady, 236 N.C. 613 (1952); Hendrix v. Motors, Inc., 241 N.C. 644 (1955) that the measure of damages for breach of a warranty in the sale of personal property is the difference between the market value at the time and place of delivery of the goods and the value of the goods as they would have been had they complied with the warranty, with such special damages as were within the contemplation of the parties, including any expenses reasonably incurred in attempting to make the goods conform. See Gulf States Creosoting Co. v. Loving, 120F 2d 195 (1941).

Subsection (3) accords with N. C. law. See Harris v. Canady, 236 N. C. 613 (1952).

Section 2—715. Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

N. C. Comments

Prior Statutes: None

This section generally restates existing N. C. law.

Subsection (1) accords with N. C. law that incidental and consequential damages for breach of contract which are within the contemplation of the parties are recoverable by buyer from the seller. See Neal v. Hardware Co., 122 N.C. 104 (1898); Engine Co. v. Paschall, 151 N.C. 27 (1909). Remote and speculative damages or damages beyond the contemplation of the parties are not recoverable. Fertilizer Works v. McLawhorn, 158 N.C. 274 (1912).

Subsections (2)(a) and (b) accord with N. C. law. See e.g. Harris v. Canady, 236 N.C. 613 (1952); Hanrahan v. Walgreen Co., 243 N.C. 268 (1955) that a buyer has a right to recover incidental, consequential or foreseeable damages which are the proximate result of a breach of warranty. Davis v. Radford, 233 N.C. 283 (1951).

Section 2—716. Buyer's Right to Specific Performance or Replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

N. C. Comments

Prior Statutes: Compare N.C. GS 1-472

Subsections (1) and (2) spell out by statute that specific performance may be decreed as to contracts for the sale of goods. N. C. law provides generally that no specific performance of contracts relating to personal property will be compelled. Virginia Trust Co. v. Webb, 206 N.C. 247 (1934); Tobacco Growers Assn. v. Battle, 187 N.C. 260 (1924). However, even in N. C., the Court will grant specific performance where damages at law for breach will not afford a complete remedy. Virginia Trust Co. v. Webb, 206 N.C. 247 (1934); Misenheimer v. Alexander, 162 N.C. 226 (1913); Williams v. Howard, 7 N.C. 74 (1819).

The Code will give the Court more leeway in granting specific performance of personal property sales contracts "in other proper circumstances".

NOTE: Subsection (3) refers to the old action of replevin which is now "claim and delivery" under N. C. statute (N.C. G.S. 1-472).

It seems that "claim and delivery" can, under current N. C. law, be employed to obtain the subject-matter of a contract for the sale of personal property if legal title to the property has passed. See Holmes v. Godwin, 69 N.C. 467 (1873).

The U.C.C. does not require any determination of "title" as a condition precedent but allows the buyer to replevy specific goods identified to a contract in the event that "cover" cannot be reasonably effected.

Section 2—717. Deduction of Damages From the Price.

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

N. C. Comments — Prior Statutes: None

This section accords with current N. C. law. See Howie v. Rea, 70 N.C. 559 (1874) which holds that a buyer is permitted to deduct damages in an action for price where the contract has been breached in part by the seller.

The notice requirement of this section of the U.C.C., however, is a new innovation.

This section would not affect N.C.'s law of set-off and counter-claim as provided in G.S. 1-137.

Section 2—718. Liquidation or Limitation of Damages; Deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2—706).

N. C. Comments

Prior Statutes: None

Subsection (1) accords with the general law applicable in N. C. as to liquidated damages. See Crawford v. Allen, 189 N.C. 434 (1925) and Horn v. Poindexter, 176 N.C. 620 (1918) which hold that where there is a marked disproportion between the amount fixed upon as liquidated damages in the contract and the damages actually likely to arise from a breach so as to render the amount fixed upon unreasonable or oppresive, it is void as being a penalty and it is not binding. The actual damages can be inquired into notwithstanding such provision. If the amount specified is not unjust, oppressive, or disproportionate to the damages that would likely result from a breach of contract, a provision for liquidated damages would be valid. See Tobacco Growers Co-op Assn. v. Jones, 185 N.C. 265 (1923).

Subsections (2)(3) and (4) have no statutory or decisional parallels in N. C. law and are therefore new to N. C. law.

Section 2—719. Contractual Modification or Limitation of Remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

N. C. Comments — Prior Statutes: None

Subsection (1)(a) accords with N. C. law as expressed in Allen v. Tompkins, 136 N.C. 208 (1904) that the parties to a sales contract can limit their liability and remedies by the terms of their contract (to making repairs, furnishing other goods, etc.).

Subsection (1)(b) has no decisional or statutory counterpart in N. C. Law.

Subsection (2) has no decisional or statutory counterpart in N. C. law.

The first sentence of subsection (3) accords, at least in part, with Hampton Guano Co. v. Live Stock Co., 168 N.C. 442 (1915) and Carter v. McGill, 171 N.C. 775 (1916) where it is held that a seller may limit his liability by inserting in his sales contract a provision that he shall not be liable for certain results.

The second sentence of subsection (3) making limitations as to consequential damages for injuries to persons prima facie unconscionable when goods are consumer goods has no decisional or statutory parallel in N. C. The U.C.C. provision does not create a prima facie presumption of unconscionability of limitations of liability in commercial contracts.

(Note: While it is stated above that there is no statutory nor decisional parallel to subsection (3)'s provisions making limitations of liability prima facie unconscionable with regard to consumer goods, this subsection (3) in principle in this regard is not unlike the contracts principle that a party cannot protect himself by contract from liability for his own negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires performance of a private duty. See Hall v. Sinclair, 242 N.C. 707 (1955). This subsection seems to clothe sales of consumer goods with a protection against limitations of liability on the part of sellers as a matter of public policy with reference to consumer goods where injuries to the person may be involved.)

Section 2—720. Effect of "Cancellation" or "Rescission" on Claims for Antecedent Breach.

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

N. C. Comments — Prior Statutes: None

There are no cases or statutes in N. C. relating to accidental or unintended consequences as the result of the misuse of the words "cancel" or "rescind" for which this section was designed to remedy. Entirely new material.

Section 2—721. Remedies for Fraud.

Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

N. C. Comments

Prior Statutes: None

The second sentence of this section will make a fundamental change in N. C. law.

Under current N. C. law if a person discovers that he has been induced to buy goods by the actionable fraud of another, he may elect to choose between two inconsistent courses with reference to his purchase. He may either affirm the contract or repudiate it. But he cannot do both, either in whole or in part. He may rescind, place the seller in status quo, and recover any portion of the purchase price which he may have paid. Or he may elect to affirm the contract, retain whatever advantage he has received. When he affirms the contract, it becomes validated; the purchaser becomes liable for the purchase price. He may counterclaim or sue in an independent action for damages sustained as a result of the fraud of the seller. See Hutchins v. Davis, 230 N.C. 67 (1949).

Under this U.C.C. section the law of N. C. will be changed. Rescission for fraud will no longer ban other remedies unless the particular circumstances of the case make the remedies incompatible. Under this U.C.C. provision, in proper cases, the buyer may both rescind and recover damages.

Section 2—722. Who Can Sue Third Parties for Injury to Goods.

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

(c) either party may with the consent of the other sue for the benefit of whom it may concern.

N. C. Comments — Prior Statutes: None

This section will apparently change existing N. C. law concerning who can bring an action for tortious injury or conversion against a third person. The present law makes "title" determinative. See Peed v. Burleson's Inc., 244 N.C. 437 (1956). Under this section of the Code a right of action is given to any person who has an insurable interest in the goods.

Section 2—723. Proof of Market Price: Time and Place.

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2—708 or Section 2—713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this Article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

N. C. Comments — Prior Statutes: None

Subsection (1) provides that if an action based on anticipatory breach of contract comes to trial before the time for performance, the measure of damages shall be the difference between the contract price and the price of the goods prevailing at the time the aggrieved party learns of the breach. See § 2-610. This subsection will change the rule in effect currently in N. C. that damages for anticipatory breach of contract are to be assessed on the basis of profit factors existent at the time of performance fixed by contract, not at the time of repudiation. See McJunkin Corp. v. North Carolina Natural Gas Corp. 300 F. 2d 794 (1961).

This subsection is designed to obviate difficulties of determining damages in anticipatory breaches.

Subsections (2) and (3) apparently change N. C. law. The ordinary rule upon breach of contract is that the measure of damages is the difference between the contract price and market value at the time and place where the goods should have been delivered by the terms of the contract. See, e.g., Jeanette v. Hovey, 184 N.C. 140 (1922); Barbarry v. Tombacher, 162 N.C. 497 (1913). The U.C.C. provisions establish the admissibility of evidence of market prices at other times and places than the time and place for performance of the contract if such evidence, by usages of trade and commercial judgment, is reasonably

relevant in determining the damages for non-performance at a particular time or place. The substituted market price evidence is only admissible if other evidence of market price is unavailable or not readily available.

This rule will be new in N. C. although N. C. has previously held that testimony of value of a chattel where there is a market for it, making due allowance for expenses of transportation and sale, may be taken as the basis for ascertaining its value at some other place. See Suttle v. Falls, 98 N.C. 393 (1887). It has also been held that the value of an item within a reasonable time after its conversion or destruction is competent as bearing upon its value at the time it was converted or destroyed. Newsom v. Gothran, 185 N.C. 161 (1923).

Section 2—724. Admissibility of Market Quotations.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

N. C. Comments

Prior Statutes: None

This section accords with N. C. cases permitting evidence as to price or value through commercial circulars, market reports and newspaper price quotations. See Smith v. North Carolina R. Co., 68 N.C. 107 (1873); Fairley v. Smith, 87 N.C. 367 (1882); Suttle v. Falls, 98 N.C. 393 (1887); Moseley v. Johnson, 144 N.C. 257 (1907), on the theory that "it is from such sources and by such means that merchants and business men generally come to have information and knowledge as to the methods, customs and courses of trade and business, and the market value and current prices of classes of goods, articles, and things put upon and sold in the markets of the country".

Section 2—725. Statute of Limitations in Contracts for Sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within

six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

N. C. Comments

Prior Statutes: G.S. 1-52; G.S. 1-47(2); G.S. 1-26

Subsection (1) changes N. C. law. Under G.S. 1-52 an action arising out of a simple, non-sealed contract has a statute of limitations of three years from the accrual of the cause of action. Under G.S. 1-47 (2) the statute of limitations upon action arising out of sealed instruments is ten years. Both of these statutes will be changed by enactment of § 2-725 to four years.

Subsection (2): In addition, a cause of action is made to accrue when a breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. This rule is contrary to that now applicable in N. C.that in an action based on fraud or mistake, the action must be begun within three years of the discovery of the fraud but the statute of limitations does not begin to run until the date of the discovery of the fraud or mistake, or from the time it should have been discovered in the exercise of due diligence. See G.S. 1-52 (9); Wimberly v. Furniture Stores, 216 N.C. 732 (1939).

Subsection (3) is a saving provision which will preserve existing causes of action which might otherwise be barred by the adoption of the U.C.C., specifying a time within which such actions must be brought.

Subsection (4) preserves the existing law as to tolling of limitations.

Section 3—101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Commercial Paper.

N. C. Comments

Prior Statutes: None

Section does not involve substantive law.

Section 3—102. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires

(a) "Issue" means the first delivery of an instrument to a holder or a remitter.

(b) An "order" is a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession.

(c) A "promise" is an undertaking to pay and must be more than an acknowledgment of an obligation.

(d) "Secondary party" means a drawer or endorser.

(e) "Instrument" means a negotiable instrument.

(2) Other definitions applying to this Article and the sections in which they appear are:

"Acceptance". Section 3—410.
"Accommodation party". Section 3—415.
"Alteration". Section 3—407.
"Certificate of deposit". Section 3—104.
"Certification". Section 3—411.
"Check". Section 3—104.
"Definite time". Section 3—109.
"Dishonor". Section 3—507.
"Draft". Section 3—104.
"Holder in due course". Section 3—302.
"Negotiation". Section 3—202.
"Note". Section 3—104.
"Notice of dishonor". Section 3—508.
"On demand". Section 3—108.
"Presentment". Section 3—504.
"Protest". Section 3—509.
"Restrictive Indorsement". Section 3—205.
"Signature". Section 3—401.

(3) The following definitions in other Articles apply to this Article:

"Account". Section 4—104.
"Banking Day". Section 4—104.
"Clearing house". Section 4—104.
"Collecting bank". Section 4—105.
"Customer". Section 4—104.

"Depositary Bank". Section 4—105.
"Documentary Draft". Section 4—104.
"Intermediary Bank". Section 4—105.
"Item". Section 4—104.
"Midnight deadline". Section 4—104.
"Payor bank". Section 4—105.

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

N. C. Comments

Prior Statutes: GS 25-7(5)
GS 25-1 - GS 25-135

The principal change of this section relates to the permissibility of using alternative drawees. NIL 128 (GS 25-135) does not permit an order to be addressed to two or more drawees in the alternative. The new section would permit this, thus recognizing current commercial practice whereby corporations issuing dividend checks (and certain other drawers) name a number of drawee banks often in different parts of the country.

The official comments explain certain other very minor changes.

Section 3—103. Limitations on Scope of Article.

(1) This Article does not apply to money, documents of title or investment securities.

(2) The provisions of this Article are subject to the provisions of the Article on Bank Deposits and Collections (Article 4) and Secured Transactions (Article 9).

N. C. Comments

Prior Statutes: None

This section limits the application of Article 3 to commercial paper (e.g. checks, drafts, promissory notes, and certificates of deposit). Other types of paper are governed by other Articles:

Article 5 - Letters of credit;

Article 7 - Bills of lading, warehouse receipts, and other documents of title;

Article 8 - Investment Securities.

The section also specifies that the provisions of Article 3 are "subject to" the provisions of Article 4 (Bank Deposits and Collections) and to Article 9 (Secured Transactions).

It is important to note here that to the extent that commercial paper comes into the regular stream of bank deposits and collections, the provisions of Article 4 are of great importance; and the special provisions of Article 4 will prevail over the more general provisions of Article 3; thus, these two major articles must often be consulted in order fully to determine the rights and duties of parties on negotiable instruments.

Section 3—104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note".

(1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

(a) a "draft" ("bill of exchange") if it is an order;

(b) a "check" if it is a draft drawn on a bank and payable on demand;

(c) a "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;

(d) a "note" if it is a promise other than a certificate of deposit.

(3) As used in other Articles of this Act, and as the context may require, the terms "draft", "check", "certificate of deposit" and "note" may refer to instruments which are not negotiable within this Article as well as to instruments which are so negotiable.

N. C. Comments

Prior Statutes: GS 25-7; GS 25-11; GS 25-16; GS 25-133 GS 25-191; GS 25-192

This section brings together in one place several related definitional provisions that are widely scattered under the NIL.

The definition of a "negotiable instrument within this article" is set forth in subsection (1)(a). This definition is substantially the same as the definition of a "negotiable instrument" under NIL 1 (GS 25-7). A full comprehension of the general definition can be obtained only by a further examination of the following sections which are herein subsequently discussed in more detail:

3-105 on "unconditional promise or order";

3-106 on "sum Certain";

3-109 on "in money";

3-112 on additional promises, orders, obligations or powers which can be included without killing negotiability under Article 3;

3-108 on "on demand";

3-109 on "at a definite time";

3-110 on "to order";

3-111 on "to bearer".

An examination of the above list together with the definition in subsetion (1)(b) of 3-104 reveals that the full tests for determining whether a particular instrument is a negotiable instrument under Article 3 can be determined only by reading sections 3-104 through 3-112 as a unit. Also 3-113 (Seal, 3-114 (Date, Antedating, Postdating), and 3-119 (Other Writings Affecting Instrument) in part deal with the problem of whether a particular instrument is a "negotiable instrument within this article".

Note: Both subsection (1) of 3-104 and the above discussion use the technical expression "a negotiable instrument within this article". As pointed out in Official Comment 1, this choice of language (i. e., "within this article") leaves open the possibility that some instruments may be made "negotiable" by other statutes or by court decision.

For example, Article 8 (Investment Securities) and Article 7 (Documents of Title) both give negotiable characteristics (e.g., ease of transfer, etc.) to the types of paper governed by them; and yet these instruments are not "negotiable instruments within this article".

Also, for example, court decisions at some future time may ascribe negotiable characteristics to certain paper that does not meet the technical definition of 3-104. In such a situation it would be proper to describe such paper as a "negotiable instrument"; however, it would not be a "negotiable instrument within this article".

For purposes of discussion herein the term "negotiable instrument" used alone will be used to mean "negotiable instrument within this article". Much of the literature on Article 3 uses such abbreviated terminology even though in a technical sense it may not be entirely accurate. Even the UCC itself harmlessly employs the simple term "negotiable instrument" when it apparently means "a negotiable instrument within this article." For example, 3-102(1)(e) states: " 'instrument' means a negotiable instrument."

Additional Promises Clause. Of special importance under subsection (1)(b) is the provision which states that any promise or order in addition to the basic promise or order to pay money will kill negotiability unless the additional promise or order is expressly approved by 3-112or other sections in Article 3. Thus, as will be noted in the comments to 3-112, the UCC takes an "exclusive" approach to the question of what additional matters may be included in an instrument without killing its negotiability. See comments to 3-112.

(1) A promise or order otherwise unconditional is not made conditional by the fact that the instrument

(a) is subject to implied or constructive conditions; or

(b) states its consideration, whether performed or promised, or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or "as per" such transaction; or

(c) refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to prepayment or acceleration; or

(d) states that it is drawn under a letter of credit; or

(e) states that it is secured, whether by mortgage, reservation of title or otherwise; or

(f) indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or

(g) is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or

(h) is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

(2) A promise or order is not unconditional if the instrument

(a) states that it is subject to or governed by any other agreement; or

(b) states that it is to be paid only out of a particular fund or source except as provided in this section.

N. C. Comments Prior Statutes: GS 25-9

The Official Comments reasonably explain that this completely revised section will alter the previous statutory law of GS 25-9 to some extent. The effect of the new section on previous N. C. decisions is as follows:

(1) Commissioners of Cleveland County v. Bank of Gastonia, 157 NC 191(1911). This case was decided under NIL 3 (GS 25-9) which provided that if an instrument was payable only from a particular fund, then the instrument was non-negotiable. The case found that the bonds of a Township in Cleveland County were negotiable even though a particular fund had been set up for their payment. The Court found: "These bonds are the general and unrestricted obligation of that body corporate. They are not payable solely out of a particular fund, although a particular fund is provided for their payment".

Under subsection (1)(g) the instruments of governmental units will be negotiable even if they are to be paid only from a particula fund. Thus, under the new provisions of subsection (1)(b) the

bonds in the Cleveland County case would be negotiable even if they had been limited to payment from a particular fund.

Also, since the instruments were "bonds" they would, under 8-102, be classified as "securities"; and, thus they would be governed by Article 8 (Investment Paper) rather than Article 3 (Commercial Paper). In general, then, the liberalizing provisions of subsection (1)(g)will be limited to governmental instruments that are not investment securities.

(2) Royster v. Hancock, 235 NC 110(1952). This case held that the language "as per our agreement" in a note does not keep the instrument from being negotiable. The decision would be codofied by subsection (1)(a).

(3) Branch Bank and Trust Co. v. Leggett, 185 NC 65 (1923). Held: the fact that an instrument with an unconditional promise in its first sentence also contained a subsequent paragraph relating to a conditional retention of title in the seller of a peanut picker (for which the instrument had been given) did not kill negotiability. The case was decided on two grounds: (1) the basic unconditional promise was not later conditioned by the additional provisions regarding the conditional sale aspects; (2) the additional provisions were approved by GS 25-11(1) (NIL 5(1)) which permits a provision which "authorizes the sale of collateral securities in case the instrument is not paid at maturity". The second ground relating to the propriety of provisions authorizing the sale of security has been brought forward in 3-112(1)(b)

Section 3—106. Sum Certain.

(1) The sum payable is a sum certain even though it is to be paid

(a) with stated interest or by stated installments; or

(b) with stated different rates of interest before and after default or a specified date; or

(c) with a stated discount or addition if paid before or after the date fixed for payment; or

(d) with exchange or less exchange, whether at a fixed rate or at the current rate; or

(e) with costs of collection or an attorney's fee or both upon default.

(2) Nothing in this section shall validate any term which is otherwise illegal.

N. C. Comments

Prior Statutes: GS 25-8; GS25-12(5

Subsection (1)(a) permits a negotiable instrument to contain provisions for interest and for installment payments. This is in accord with GS 25-8(1) and (2).

Subsection (1)(b) permits different rates of interest before and after default. The clarifying purpose of subsections (1)(b) and (c) is stated in Official Comment 1, which states:

"The section rejects decisions which have denied negotiability to a note with a term providing for a discount for early payment on the ground that at the time of issue the amount payable was uncertain."

No N. C. case on the subject was found.

Subsection (1)(e) and subsection (2) require special attention. Subsection (1)(e) adopts the present view of GS 25-8(5) (NIL 2(5)), which states that the inclusion of a provision for the payment of "costs of collection or an attorney's fee in case payment is not made at maturity" does not kill negotiability. However, present 25-8(5) amends NIL 2(5) by stating further:

"But a provision incorporated in the instrument to pay counsel fees for collection is not enforcible, but it does not affect the other terms of the instrument or the negotiability thereof."

By use of the additional language in GS 25-8(5), N. C. has added a procedural provision to NIL 2(5). In other jurisdictions the enforcibility of the harmless attorney's fees clause in the instrument is determined by separate reference to the rules of procedure governing the allowance of attorney's fees pursuant to the contract of the parties.

The present situation in North Carolina on the allowance of attorney's fees appears to be this:

(1) Specific statutes allow attorney's fees as a part of costs in certain enumerated situations. See generally: GS 6-21; 6-21.1; 50-16; 28-170.1 and many other sections under "Fees" in the Index to the N. C. General Statutes. None of these specifically permit attorneys' fees in an action on a negotiable instrument; and the general policy of N. C. is not to allow counsel's fees in the absence of statutory provision.

(2) GS 25-8(5) by its amendment to NIL 2(5) specifically denies the collection of attorneys' fees even when voluntarily contracted for in a negotiable instrument.

(3) Queen City Coach Co. v. Lumberton Coach Co., 229 NC 534, 536 (1948) by dictum ("In the absence of express agreement" for attorneys' fees such will not be allowed implies that an advance contract for the payment of attorneys' fees to a party forced to sue might be enforced. However, no clear-cut N. C. decision was found on the enforcibility of contracts for attorneys' fees other than the several cases condemning the enforcement of such contracts as part of negotiable instruments. The few cases decided under the "no enforcement" provisions of GS 25-8(5) firmly support the policy of the statute on negotiable instruments.

For a short general discussion of attorney's fees as a part of costs, see 38 N.C. Law Rev 156(1960).

Suggested Statutory Change:

(1) Whereas the UCC 3-106(2) takes no position on enforceability of provisions for attorneys' fees;

(2) Whereas the NIL 2(5) similarly takes no such position;

(3) Whereas N. C. did take a position by amendment to NIL 2(5) (GS 25-8(5)) which provides that such provision in a negotiable instrument is not enforceable;

(4) Whereas there is no other known procedural statute permitting the enforcement of agreements for attorneys' fees in contracts not on a negotiable instrument; and

(5) Whereas some case dictum implies that such agreements might be enforced;

Now therefore it is suggested that the problem of enforcing or not enforcing such agreements in Negotiable Instruments be omitted from Article 3 as is done by 3-106(2); and that a separate procedural statute be added to the General Statutes stating the position of the North Carolina Legislature on the matter of the extent to which, if any, such agreements in negotiable instruments or other contracts should be enforced by the courts of North Carolina.

In this connection it is submitted that there may be more reason to enforce such agreements in negotiable instruments than in other contracts.

It is further submitted that it might be desirable to allow certain reasonable attorneys' fees on suits on negotiable instruments even in the absence of agreement. A new statute similar to GS 6-21.1 on minor ($1,000) tort suits might encourage the payment of small amount Instruments that now go uncollected because the holder cannot afford the necessary legal fees to properly institute action on them. To the extent that such instruments are uncollectible, the avoidance of debt payments is encouraged.

Section 3—107. Money.

(1) An instrument is payable in money if the medium of exchange in which it is payable is money at the time the instrument is made. An instrument payable in "currency" or "current funds" is payable in money.

(2) A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the day of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.

N. C. Comments — Prior Statutes: GS 25-12(5)

The Official Comment adequately describes the relatively minor changes which make it clear when an instrument is payable in money. Rules regarding payment in foreign money are also stated in the section.

All N. C. cases on "Medium of Payment" (Bills and Notes, Key #162) are pre-NIL decisions. For example, early cases held that notes payable in tobacco (2 NC 372) or lumber (3 NC 150) or "in bank stock or lawful money" (19 NC 513) are not negotiable. These decisions are affirmed by this section.

Levy v. Meir, 248 NC 328 (1958) happened to involve a note payable in "dinars", but the case did not discuss the foreign money question. The court apparently assumed that an action "to recover the dollar equivalent of 450 dinars" was proper.

Subsection (1) would change the decision of Johnson v. Henderson, 76 NC 227 (1877) which held that a certificate of deposit payable in "current funds" is not negotiable. (1)(b) states: "An instrument payable in 'currency' or 'current funds' is payable in money".

Section 3—108. Payable on Demand.

Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated.

N. C. Comments — Prior Statutes: GS 25-13

The Official Comment adequately explains that this section makes no material change in present law, except to drop the ambiguous last sentence of NIL 7 (GS 25-13). The omitted sentence has caused no problem in N. C.

Section 3—109. Definite Time.

(1) An instrument is payable at a definite time if by its terms it is payable

(a) on or before a stated date or at a fixed period after a stated date; or

(b) at a fixed period after sight; or

(c) at a definite time subject to any acceleration; or

(d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(2) An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred.

N. C. Comments

Prior Statutes: GS 25-10 (3)

Subsection (1) (c): A troublesome problem under NIL 4 was whether a note payable at a time certain, but subject to an acceleration clause was payable at a determinable future time as required by the NIL. Some of the cases involved acceleration clauses permitting a holder to accelerate at his will and the courts occasionally held that such acceleration clauses made the time uncertain, thus the instrument was non-negotiable.

By this poor "non-negotiable" reasoning the courts attempted to protect the maker of the instrument who had contracted for an acceleration clause that was harsh to him. Better reasoned decision, however, took the view that the note was still negotiable, but that the harsh acceleration clause should not be enforced.

By amendment at the end of the NIL 4(GS 25-10) N. C. permits any acceleration clause:

> "but an instrument payable at a determinable future time is negotiable, even though it may mature or be declared due upon a contingency happening before such future time".

A similar provision is found in Subsection (1)(c).

The above N. C. amendment relating to acceleration clauses did not specify the effect of a clause that gave the holder a capricious option to accelerate; and there are no N. C. cases on the matter.

The capricious option problem is solved, however, by UCC 1-208 which provides that clauses permitting a holder to accelerate "at will", etc. will be enforced only when he acts in "good faith". Thus, under the UCC the question of "negotiability" is separated from the independent question of "enforceability". 3-109 (c) and 1-208. See also N. C. Report Comments on 1-208.

Subsection (2): As explained in the Official Comment 1, this section makes an important change by excluding from the operation of Article 3 those instruments that are payable on the heppening of a certain event the time of which is uncertain. For example, an instrument payable at the death of an individual (or at the end of a war, etc.) will not be a "negotiable instrument within this Article". No N. C. cases were found on the subject.

Official Comment 1 strongly states that instruments payable at such uncertain times as death or the end of a war are not fit to be ordinary commercial paper.

Section 3—110. Payable to Order.

(1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names a payee. It may be payable to the order of

(a) the maker or drawer; or

(b) the drawee; or

(c) a payee who is not maker, drawer or drawee; or

(d) two or more payees together or in the alternative; or

(e) an estate, trust or fund, in which case it is payable to the order of the representative of such estate, trust or fund or his successors; or

(f) an office, or an officer by his title as such in which case it is payable to the principal but the incumbent of the office or his successors may act as if he or they were the holder; or

(g) a partnership or unincorporated association, in which case it is payable to the partnership or association and may be indorsed or transferred by any person thereto authorized.

(2) An instrument not payable to order is not made so payable by such words as "payable upon return of this instrument properly indorsed."

(3) An instrument made payable both to order and to bearer is payable to order unless the bearer words are handwritten or typewritten.

N. C. Comments — Prior Statutes: GS 25-14

The Official Comments reasonably explains the purpose of this clarifying section. There are no important N. C. cases on the matter; and no important change in N. C. law will result from this section.

Section 3—111. Payable to Bearer.

An instrument is payable to bearer when by its terms it is payable to

(a) bearer or the order of bearer; or

(b) a specified person or bearer; or

(c) "cash" or the order of "cash", or any other indication which does not purport to designate a specific payee.

N. C. Comments — Prior Statutes: GS 25-15 (1)(2)(4)

As explained in Official Comments, this section rewords NIL 9 (1), (2) and (4) (GS 25-15) to remove some prior uncertainties on the question of what paper is "Bearer Paper".

The only important cases relating to bearer paper in North Carolina concern the "fictitious payee" or "payroll padding" problem. The"fictitious payee" problem was formerly handled under NIL 9 (3) (GS 25-15(3), but under the UCC it is covered by 3-405 (Imposters; Signature is Name of Payee). See Comment to 3-405.

See also 3-204 which now replaces NIL 9(5) (GS 25-15(5)) on blank endorsements as creating "Bearer Paper".

Section 3—112. Terms and Omissions Not Affecting Negotiability.

(1) The negotiability of an instrument is not affected by

(a) the omission of a statement of any consideration or of the place where the instrument is drawn or payable; or

(b) a statement that collateral has been given to secure obligations either on the instrument or otherwise of an obligor on the instrument or that in case of default on those obligations the holder may realize on or dispose of the collateral; or

(c) a promise or power to maintain or protect collateral or to give additional collateral; or

(d) a term authorizing a confession of judgment on the instrument if it is not paid when due; or

(e) a term purporting to waive the benefit of any law intended for the advantage or protection of any obligor; or

(f) a term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer; or

(g) a statement in a draft drawn in a set of parts (Section 3–801) to the effect that the order is effective only if no other part has been honored.

(2) Nothing in this section shall validate any term which is otherwise illegal.

N. C. Comments — Prior Statutes: GS 25-11 and 25-12

As noted in the comment to 3-104, under the provisions of 3-104(1)(b), an instrument to be a negotiable instrument within this article must "contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this article..."

Section 3-112 is the section which authorizes certain additional clauses. It also states what clauses or words normally found in negotiable instruments can be omitted without killing negotiability.

One important change relates to the Rule of NIL 5(4)

(GS 25-11 (4) which permits the holder to be given an election to require that something be done in lieu of payment of money. Under 3-104 and 3-112, such option in the holder would place the instrument beyond the scope of Article 3. Such an instrument, however, might be ascribed the same characteristics as a negotiable instrument by future case decision.

The various subsections of 3-112 are briefly summarized as follows:

Subsection (1)(a): No substantive change in N. C. law.

Subsection (1)(b): It appears that this subection makes no substantive change in N. C. law (especially in light of a N. C. amendment to NIL 4 which adds GS 25-10(4) dealing with clauses relating to collateral).

Subsection (1)(c): A N. C. Amendment to NIL 4 (GS 25-10(4) would today seem to impliedly recognize the new rule of this subsection; thus no substantive change.

Special Note: New York, California, and Virginia have added to subsection (1)(c) the following:

"...to furnish financial information or to do or refrain from doing any other act for the protection of the obligation expressed in the instrument not involving the payment of money on account of the indebtedness evidence by the instrument; or"

This modification was rejected by the Permanent Editorial Board in 1962 for the reason that "It would not only move substantially away from the 'courier without luggage' principle, but, in addition, could produce substantial confusion and litigation". Report No. 1 of the Permanent Editorial Board For the Uniform Commercial Code (1963) p. 73.

Subsection (1)(d): This clause permits the inclusion of a clause permitting confession of a judgment on the instrument if it is not paid when due. Under Subsection 2, the enforceability of such clause would be determined by the ordinary procedural law of the various states.

By modification to NIL 5 (GS 25-11) N. C. specifically states: "But nothing in this section shall authorize the enforcement of an authorization to confess judgment..."

On its face the above modification seems to say that the mere fact that a "confession" clause is not harmful to negotiability does not per se mean that it is enforceable; and one must look to ordinary procedural law to answer the enforceability question. (GS 1-247 to 1-249 cover confession of judgment.) In another sense, however, the amendment in 25-11 could be construed as a positive procedural rule forbidding the enforceability of confession clauses.

To avoid possible confusion in the future, it is suggested that N. C. not modify 3-112 by adding a statement on the non-enforceability of confession of judgment clauses. This is a procedural matter which should be determined by procedural law (GS 1-247 to 1-249). Also subsection (2) recognizes that the enforceability of confession and other clauses must be determined by procedural law or by other statutes or cases. Subsection (2) states:

> "Nothing in this section shall validate any term which is otherwise illegal."

Parenthically, it appears that a confession of a judgment authorization would not be enforceable under GS 1-247 to 1-249. However, if such clauses (whether in negotiable instruments or other contracts) should be made enforceable at some future time, the change could be accomplished by amendment to the procedural statutes only; and no amendment to 3-112 would be necessary.

CASES: Monarch Refrigerating Co. v. Farmers Peanut Co., 74 F. (2d) 790 (1935) held that the N. C. modification to GS 25-11 and GS 1-248 and 1-249 on confession of judgment are merely procedural sections.

Subsection (1)(e): This subsection permits the inclusion of clauses waiving homestead or other benefits of law for the advantage of the obligor. As in the case of confession of judgment, the provision of subsection (2) makes the enforceability of a homestead waiver clause depend on other state law.

The N. C. law regarding contractual waivers of homestead is at present somewhat uncertain. The decided cases (Homestead, Key #154 to 181) do not clearly cover the enforceability of a waiver clause in an ordinary contract. The decisions either involve:

(1) case where all interested parties (husband, wife and children) have not joined in an advance waiver in an ordinary contract.

(2) cases where waiver is made after judgment.

(3) cases where homestead was waived by deed of trust or other security device.

(4) case where the advance waiver agreement was contained in a "negotiable instrument".

Perhaps the strongest language forbidding enforcement of an advance waiver in a negotiable instrument is found in dictum of Howell v. Robertson, 197 N. C. 572 (1929) which stated:

> "It may be noted that the waiver of homestead in the manner set forth in the above note is contrary to the law

of this jurisdiction and also the allowance of attorneys' fees."

No authority is cited for this dictum, and it is uncertain whether:

(1) the court concluded that this is to be the policy of N. C. on any advance waiver; or

(2) whether the no advance waiver rule as based on a strained construction of the last sentence of GS 25-11. That is, the court might have construed the last sentence of GS 25-11 as stating (1) a positive rule of non-enforceability of advance waivers of homestead in negotiable instruments, rather than (2) as redundantly stating that the NIL 5 (GS 25-11) took no positive position on enforceability of advance waivers. Both NIL 5 and 3-112(2) more clearly take the "no positive position view" and leave the question of enforceability to be determined by reference to other procedural or substantive law of the particular state.

SUGGESTED STATUTORY CHANGE:

Whereas: (1) the non-negotiable instrument law of N. C. on the enforceability of advance waivers of homestead is uncertain; (2) whereas the negotiable instrument law of N. C. (GS 25-11 as modified) is also uncertain on this issue; (3) whereas UCC 3-112(2) leaves the question of enforceability of such waivers to other state law; and (4) whereas, the goal of uniformity will be promoted by minimizing modifications to the UCC,

Therefore, it is suggested that N. C. not modify 3-112(2) as was done with NIL 5 (GS 25-11) by adding additional words regarding enforceability of the various clauses that may be included in negotiable instruments under 3-112.

However, since legal planning and counseling would be aided by a clear statement of law on the enforceability or non-enforceability of exemption waivers it is suggested that the exemption laws (GS 1-369 to 1-392) be amended so as to clarify the enforceability of exemption waivers in (1) negotiable instruments, (2) in ordinary contracts, and (3) in security devices. Article 9 on Secured Transactions should be consulted on the latter problem.

Subsection (1)(f): This new section permits inclusion of a clause providing that a payee by indorsing or cashing a draft acknowledges full satisfaction of an obligation of the drawer. The effect of such clause on negotiability was previously uncertain. The new section does not take a position as to the substantive or procedural effect of acknowledgments of full satisfaction of an obligation.

Suggested Modification: As worded, subsection (f) permits satisfaction clauses only in drafts. There seems to be no sound

reason why such clauses should not also be permitted in other negotiable instruments such as notes.

A future problem concerning the effect of such clause in a note could possibly be avoided by using the term "instrument" rather than "draft".

Subsection (1)(g): Official Comment 5 adequately explains this.

Subsection (2): As explained in the prior comments to subsections (1)(d) and (e), this subsection states that the legality or enforceability of the several approved clauses is to be determined by reference to other state law. Thus, 3-112 is left simply as a section dealing with the problem of "negotiability".

Section 3—113. Seal.

An instrument otherwise negotiable is within this Article even though it is under a seal.

N. C. Comments

Prior Statutes: GS 25-12(4)

One problem resolved by this section involves the question whether the donor of a sealed negotiable instrument can plead the defense of "want of consideration" when sued by the donee. There is no N. C. case exactly on this point, but there is much dictum to the effect that a seal imports a consideration.

The purpose of 3-113 is to make all negotiable instruments alike, seal or no seal, as far as defenses are concerned; and "want and failure of consideration" are defenses against a non-HDC under 3-306(c). Thus, under 3-113 a donor would have a defense against his donee in a suit on a sealed negotiable instrument, even though he might not have such defense in a suit on a non-negotiable instrument.

The statute of limitations on a sealed negotiable instrument will continue to be 10 years for suits against the principal obligor just as under existing N. C. law. GS 1-47(2). Note that the 10 year period applies only to an action against the principal to the sealed instrument. The 3 year period applies to the indorser of a sealed instrument even though his indorsement is under a separate seal. Howard v. White, 215 N. C. 130 (1939), Pickett v. Rigsbee, 252 N. C. 200 (1960). These cases appear to make a seal valueless against an indorser or surety as far as an extended period of limitations is concerned.

Suggested Statutory Change: In view of the above decisions this Committee may wish to consider expanding GS 1-47 (2) to apply to sureties as well as to principals.

Section 3—114. Date, Antedating, Postdating.

(1) The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.

(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

(3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.

N. C. Comments

Prior Statutes: GS 25-12(1)
GS 25-17; 25-18
GS 25-23(3)

The Official Comments adequately explain this section, and there appears to be no special problem in N. C.

Section 3—115. Incomplete Instruments.

(1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.

(2) If the completion is unauthorized the rules as to material alteration apply (Section 3—407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.

N. C. Comments

Prior Statutes: GS 25-19, 25-20
25-21

A lengthy Official Comment explains the purposes of this section, which makes some changes in prior law.

One change is a reversal of the rule of NIL 15 (GS 25-21) which provided that an incomplete undelivered instrument could not be enforced even by an HDC. Under 3-115(2) an HDC can enforce an instrument even though there has been no technical delivery by the maker or drawer.

Basically, the problem of unauthorized completions (whether of delivered or undelivered paper) is covered by 3-407 on material alteration.

CASES: Phillips v. Hensley, 175 N. C. 23 (1918) held that an instrument may be enforced as completed when a maker issues a note blank as to amount and trusts another to complete it and the other completes it for an amount in excess of the amount authorized. Under the UCC this unauthorized completion case would be covered by 3-407 on material alteration.

Section 3—116. Instruments Payable to Two or More Persons.

An instrument payable to the order of two or more persons

(a) if in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it;

(b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

N. C. Comments

Prior Statutes: GS 25-47. Also see GS 25-14

The Official Comments adequately describe the purpose of this section. No real change in substance is made.

The rules of Virginia-Carolina Bank v. Bank, 197 N. C. 326 (1929) and Dawson v. Bank, 197 N. C. 499 (1929) are not changed by this section. Both of these cases held that one of two or more payees may not alone properly collect from a drawee bank in the absence of authority of the one to act for the others; and a drawee bank that pays only one payee is liable for the wrongful payment either (1) to the drawer (Virginia-Carolina case) or (2) to the other payees (Dawson Case) if the bank has accepted or certified the check.

GS 25-47 (NIL 41) now contains a special reference to partners as being able to sign on behalf of all partners. However, 3-116 is silent on the matter of who is authorized to sign for another. Thus, whether there was an authorization must be determined by reference to other law (agency, partnership, etc.).

Section 3—117. Instruments Payable With Words of Description.

An instrument made payable to a named person with the addition of words describing him

(a) as agent or officer of a specified person is payable to his principal but the agent or officer may act as if he were the holder;

(b) as any other fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him;

(c) in any other manner is payable to the payee unconditionally and the additional words are without effect on subsequent parties.

N. C. Comments

Prior Statutes: GS 25-48

The Official Comments adequately describe the purpose of this section, and there have been no N. C. decisions under the prior law. GS 25-48.

Subsections (a) and (b) would permit an agent or fiduciary to enforce an instrument in his own name, and this may be in conflict with the N. C. Real Party In Interest Statute. See comment to 3-301 for discussion of which statute should control a suit by non-owners.

Subsections (b) and (c) use the term "payee" in describing the rights of parties named in an instrument together with words of description. The term "payee" is not specifically defined in either the NIL or the UCC; however, it is traditionally used to mean only the person to whom the instrument is originally payable. This technical meaning is obviously continued in the UCC. See 3-302(2). Therefore, in a technical sense the application of subsections (b) and (c) is limited to "payee" even though it is probable that the same rules should apply to any named holder whether he be the "payee" or "indorsee".

SUGGESTED MODIFICATION: Whereas (1) the rules of subsections (b) and (c) appear to be applicable to any named party whose name is accompanied by words of description; (2) whereas subsections (b) and (c) employ the term "payee" when they reasonably mean any named party; (3) whereas clarity could be advanced, without sacrifice of uniformity, by using the more encompassing terminology "named person" (as used in the first sentence of 3-117); and (4) whereas a literal reading of the sections as written could be productive of unnecessary litigation; Now, therefore, it is suggested that the term "payee" be replaced by the words "named person".

Section 3—118. Ambiguous Terms and Rules of Construction.

The following rules apply to every instrument:

(a) Where there is doubt whether the instrument is a draft or a note the holder may treat it as either. A draft drawn on the drawer is effective as a note.

(b) Handwritten terms control typewritten and printed terms, and typewritten control printed.

(c) Words control figures except that if the words are ambiguous figures control.

(d) Unless otherwise specified a provision for interest means interest at the judgment rate at the place of payment from the date of the instrument, or if it is undated from the date of issue.

(e) Unless the instrument otherwise specifies two or more persons who sign as maker, acceptor or drawer or indorser and as a part of the same transaction are jointly and severally liable even though the instrument contains such words as "I promise to pay."

(f) Unless otherwise specified consent to extension authorizes a single extension for not longer than the original period. A consent to extension, expressed in the instrument, is binding on secondary parties and accommodation makers. A holder may not exercise his option to extend an instrument over the objection of a maker or acceptor or other party who in accordance with Section 3—604 tenders full payment when the instrument is due.

N. C. Comments — Prior Statutes: GS 25-23 and 25-74

The Official Comments adequately explain this section, and there are no N. C. cases on subsections (a), (b) and (c).

Subsection (d): This subsection on ambiguous terms regarding interest must be read in conjunction with 3-122(4) on interest. See comment on 3-122(4).

Subsection (e): This clarifying section is not intended to affect the rules governing:

(1) contribution between parties jointly and severally liable.

(2) the order of liability of parties signing in different capacities or at different times. See comment 3-414 (contract of endorser; order of liability).

Subsection (f): The most important part of this subsection deals with the effect on endorsers and accommodation makers of their consent to an extension of time. Under this new provision a holder may not exercise his option to extend an instrument over the objection of a party who in accordance with 3-604 tenders full payment when the instrument is due.

Section 3—119. Other Writings Affecting Instrument.

(1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.

(2) A separate agreement does not affect the negotiability of an instrument.

N. C. Comments — Prior Statutes: None

This section permits collateral written agreements to modify the terms of a negotiable instrument. The section does not purport to cover what parol evidence may be introduced to modify

the instrument. This approach will probably not affect Aden v. Doub, 146 N. C. 10, 59 S. E. 162 (1907) which held that a collateral agreement could be used to show that a note was given on a condition.

Hopefully, the odd rule of Brown v. Osteen, 197 N. C. 305, 148 S. E. 434 (1929) may be changed by this section. The Brown case held that notes containing no acceleration clause could not be recovered on before their stated maturity even though a contemporaneous mortgage securing the notes clearly stated: "A failure to pay any part of the interest, or any note or any part thereof, when due, shall mature all the indebtedness secured by the mortgage."

Compare Meadows Co. v. Bryan, 195 N. C. 398 (1928) on beginning of period of limitations.

As noted in Official Comment 3, if the provision of the collateral agreement relates only to acceleration for time of sale of security and does not state that the basic obligation in the notes is accelerated, then the only acceleration will be of the sale of security. In the Brown Case, however, the contemporaneous agreement in the mortgage also clearly covered acceleration of the notes; and the agreement could be given effect under this new section.

Section 3—120. Instruments "Payable Through" Bank.

An instrument which states that it is "payable through" a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.

N. C. Comments

Prior Statutes: None

The Official Comment adequately describes the purpose of this new section, and there are no known prior N. C. statutes or cases on the matter.

Section 3—121. Instruments Payable at Bank.

Note: *If this Act is introduced in the Congress of the United States this section should be omitted. (States to select either alternative)*

Alternative A—

A note or acceptance which states that it is payable at a bank is the equivalent of a draft drawn on the bank payable when it falls due out of any funds of the maker or acceptor in current account or otherwise available for such payment.

Alternative B—

A note or acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it.

N. C. Comments — Prior Statutes: GS 25-94

G. S. 25-49 states that an instrument "payable at a bank is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon". There are two views in the U. S. as to the meaning of this section:

(1) The "Northeastern" view construes the section as written and treats the bank as under an order to pay even though the instrument is a mere note (payable at the maker's bank).

(2) The "Southern-Western" view construes NIL 87 to mean that the bank's only function is to notify the maker of acceptor that the instrument has been presented and to ask for his instructions.

The N. C. view is not certain. There is, however, some strong dictum to the effect that a note payable at a bank should be treated as an order to pay (as is stated in GS 25-94). See Dry v. Reynolds, 205 N. C. 571 (1934); Peasley-Gaulbert Co. v. Dixon, 172 N.C. 411(1916); Branch Banking and Trust Co. v. Bank of Washington, 255 N.C. 205(1961). However, there appears to be no case that has squarely decided the issue.

It is believed that many bankers in N. C. do not consider a note or draft that is merely payable at a bank as being the equivalent of an order to the bank to pay in the absence of separate agreement (actual or implied). In any event, the way is open for North Carolina to take a firm position on the matter.

This section presents a choice of two alternatives:

(1) Alternative 'A' adopts the "Northeastern view" that the instrument is an order. (Adopted in Alaska, Conn., Ky., Mass., Me., N. H., N. J., N. M., N. Y., Ohio, Penn., R. I., and Wyo.)

(2) Alternative 'B' adopts the "Southern-Western view" that the instrument is not per se an order or an authorization. (Adopted in Ark., Cal., Ind., Ga., Ill., Md., Mich., Mo., Mont., Neb., Okla., Ore., Tenn., W. Va., and Wis.)

Virginia has proposed and probably adopted (the final Virginia Statute is not available at this time) yet a third alternative which reads:

"A note or acceptance which states that it is payable at a bank is not of itself an order to the bank to pay it, but the bank may consider it an authorization to pay."

RECOMMENDATION FOR NORTH CAROLINA: After thorough discussion of the two alternatives with bankers and attorneys, I believe that N. C. should adopt alternative B. The reasons are:

(1) The majority of other states have adopted this view.

(2) Instruments that are merely payable at a bank are better governed by specific instructions to the bank on particular items or on items of a particular class. For example, the average

individual who picks up a blank note form from a bank with the printed statement "Payable at X Bank" probably does not believe that such note payable to another individual is the equivalent of an order to the named bank to pay the instrument when it comes due. However, he can instruct that a specific item be paid.

Also, for example, if the individual or company that uses such blank forms does wish to have the instruments paid by his bank as a matter of course , he can so instruct the bank.

For instruments for which there is no standing instruction, the bank can contact its customer for instructions as to whether a specific item is to be paid from funds of the customer.

In the absence of specific or implied instructions to the bank to pay, the instrument should not be paid from funds of the maker or acceptor merely because the instrument is payable at the bank.

Section 3—122. Accrual of Cause of Action.

(1) A cause of action against a maker or an acceptor accrues

(a) in the case of a time instrument on the day after maturity;

(b) in the case of a demand instrument upon its date or, if no date is stated, on the date of issue.

(2) A cause of action against the obligor of a demand or time certificate of deposit accrues upon demand, but demand on a time certificate may not be made until on or after the date of maturity.

(3) A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand.

(4) Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment

(a) in the case of a maker, acceptor or other primary obligor of a demand instrument, from the date of demand;

(b) in all other cases from the date of accrual of the cause of action.

N. C. Comments — Prior Statutes: None under NIL

Subsections (1), (2) and (3), phrased in terms of "accrual", are intended to state the time at which the period of limitations begins to run in favor of various parties. The rules of subsections (1) (maker and acceptor) and (2) (obligor of a certificate of deposit) are reasonable. But, see subsection (3)below.

Subsection (3): The rule of this subsection may cause some unintended results. It states that:

"A cause of action against a drawer of a draft or an instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand." (Emphasis added.)

A possible unintended result of this language is seen by reference to other sections:

(1) 3-501 states that timely presentment and notice of dishonor are necessary to charge secondary parties unless presentment and notice of dishonor are excused under 3-511.

(2) 3-503 (e) states that in order to charge a secondary party presentment for acceptance or payment must be made "within a reasonable time after such party becomes liable" on the instrument.

(3) 3-502 discharges any indorser when notice of dishonor is delayed without excuse.

By applying the above general rules and by disregarding the "excused" provisions of 3-511, a secondary party, after the maturity of an instrument, would either:

(1) be relieved from liability due to the delay of the holder in making presentment and notice of dishonor; or

(2) if these conditions precedent to secondary liability had been met, the period of limitations would have begun to run in favor of the secondary party under 3-112 (3) from the "demand" on him. A problem arises, however, when 3-511 comes into play.

(4) 3-511 (2) (a). This section excuses timely presentment and notice of dishonor when such have been expressly waived. Typically, printed drafts and notes contain such waiver so as to hold secondary parties liable even though a timely presentment and notice of dishonor are not given. Thus, a holder can legally continue the liability of a secondary party for a long period of time after dishonor of the instrument but before he gives notice of this dishonor.

It is suggested that the continued liability of a secondary party who has waived timely presentment and notice of dishonor should not exceed the period of limitations of three years from the time the instrument is due to be paid or accepted. However, subsection (3) now states that "a cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor". Thus, it appears that a holder has within his power the determination of when the period of limitations will begin in favor of a secondary party who has waived timely presentment and notice of dishonor.

Suggested Modification: In order to clarify the time at which the period of limitations shall begin to run in favor of a secondary party who has waived timely presentment and notice of dishonor,

the first sentence of subsection (3) should be amended by adding at the end:

> "Provided, however, that the Statute of Limitations shall begin to run in favor of such parties not later than the latest time that notice of dishonor should have been given them in accordance with this article, except for the fact that notice is 'excused' or 'entirely excused' (Subsection 3-511)."

Under this modification, the statutes of repose would begin to run in favor of a secondary party from the date of

(1) "demand following dishonor" (3-122 (3); or

(2) the latest time that timely notice should have been given to him except for excused timely notice under 3-511.

Note: It is possible that 3-507 (2) on a holder's "immediate right of recourse against the drawers and indorsers" upon dishonor could be construed to mean that the statute of limitations provisions of 3-122 (3) will begin even before a "demand following dishonor". However, the Official Comments do not mention this possibility; and it is believed that a clarifying addition to 3-122 (3) may avoid future litigation without affecting the principle of uniformity of state laws.

Subsection (4): This new section on interest must be read in conjunction with 3-118 (d) in order to get a full coverage on the rules of interest on a negotiable instrument:

(A) 3-118(4) is a construction section regarding an instrument which provides for interest, but states no rate or time.

(B) 3-112 is a procedural section regarding interest on non-interest bearing obligations. It affirms the rule of Dowd v. Railroad, 70 NC 468 (1874) holding that a "non-interest" note will bear interest after maturity.

SUGGESTED AMENDMENTS: Since this section covers interest as well as "accrual of a cause of action", the heading should be amended to read:

Accrual of Cause of Action; Interest.

Section 3—201. Transfer: Right to Indorsement.

(1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

(2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.

(3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

N.C. Comments

Prior Statutes: GS 25-33; 25-55; 25-64.

A lengthy Official Comment reasonably explains this section which will help to clarify existing N.C. statutes and cases.

While Subsection 1 gives a donee whatever rights his donor had, under Subsection (3) only a transferee can for value compel his transferor to give an unqualified indorsement.

In the past several N.C. cases have inaccurately held that under GS 25-55 (NIL 49) the legal title to a negotiable instrument does not pass when it was order paper transferred without indorsement. See Tyson v. Joyner, 139 N.C. 69, 51 S.E. 803 (1905); Mayers v. McRimmon, 140 N.C. 640, 53 S.E. 447 (1906); and other cases annotated under GS 25-55.

These decisions are correct, however, in stating that even an innocent purchaser for value cannot be an HDC in his own right unless he first becomes a "holder" by negotiation (i.e., obtaining the proper indorsements on order paper); and this rule is continued under 3-302(1) ("a holder in due course is a holder who.....").

The Deritive HDC Problem: As noted in Official Comment 3, an HDC may transfer his rights as such. Thus some transferees, whether they be holders or not, will have the rights of an HDC even though they do not themselves meet the tests for HDC status under 3-302.

Official Comment 3 illustrates the special rules about when "a party to any fraud or illegality affecting the instrument or who was a prior holder had notice of or defense claim against it cannot improve his position by taking from a later holder in due course". As shown by the illustrations, the actual decision of Pierce v. Carlton,

184 N.C. 175, 114 S.E. 13 (1922) would be adopted by this section. However, the dictum of the case (criticised in 1 N.C. Law Rev. 187) would be rejected by this section.

Wellons v. Warren, 203 N.C. 178, 165 S.E. 545 (1932) would be affirmed by the UCC. The case held that a purchaser from HDC gets rights of HDC unless purchaser is himself a party to fraud or illegality affecting the notes, although he knows of the equities at the time he purchases.

Section 3—202. Negotiation.

(1) Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery.

(2) An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.

(3) An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment.

(4) Words of assignment, condition, waiver, guaranty, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement.

N.C. Comments

Prior Statutes: GS 25-35; 25-36; 25-38.

This section states the way in which a "negotiation" is to be made.

Subsection (1). This section requires only a delivery for a negotiation of bearer paper, and it requires a delivery and a proper indorsement for a negotiation of order paper.

Prior N.C. case dealing with when an actual or constructive delivery has been made will not be affected by this section. See cases annotated under GS 25-35.

Subsection (2). This section requires indorsement to be (1) on the instrument or (2) on a paper so firmly affixed as to become a part thereof.

The "on the instrument" requirement continues the rule of GS 25-36 (NIL 31) and cases cited.

The "so firmly affixed" rule is intended to change the decision of Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S.E. 979 (1917) cited under GS 25-36. This case held an indorsement on letter "appended" to a note was an adequate indorsement.

Subsection (3). This continues the rule of GS 25-38 under which

no N.C. cases have been decided.

Subsection (4). This states that certain words added to an indorsement do not affect its character as an indorsement. But, as noted in Official Comment 6, "the liability of the indorser may be affected by the words of guarantee as provided in the section on the contract of a guarantor. (Section 3-416)". See comment to 3-416.

Words of Assignment:

The legal effect of adding words of "assignment" to an indorsement has been a troublesome question in the past, and it is uncertain whether the U.C.C. fully clarifies the problem. The effect of the code on prior N.C. decisions is considered below.

In Evans v. Freeman, 142 N.C. 70, 54 S.E. 847 (1906) an indorser added the words "I assign all my right, title and interest". Held: This is a "qualified indorsement". To the same effect is Medlin v. Miles, 201 N.C. 683, 161 S.E. 207 (1931). Compare Davidson v. Powell, 114 N.C. 575 (1894).

Under Subsection 4 such words do not keep such indorsement from still being an indorsement as such. However, whether such words are the equivalent to "without recourse" so as to create a qualified indorsement under 3-414(1) and 3-417(3) is not clear. Further study may call for an amendment to one or more of the sections in question.

Section 3—203. Wrong or Misspelled Name.

Where an instrument is made payable to a person under a misspelled name or one other than his own he may indorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument.

N.C. Comments — Prior Statutes: GS 25-49

The Official Comment adequately explains this section which makes no real change in GS 25-49, and there are no N.C. cases on the matter.

Section 3—204. Special Indorsement; Blank Indorsement.

(1) A special indorsement specifies the person to whom or to whose order it makes the instrument payable. Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement.

(2) An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed.

(3) The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

N.C. Comments

Prior Statutes: GS 25-15(5); 25-39;25-40;25-41;25-42; 25-46.

This section combines and rewords several separate NIL sections dealing with special and blank indorsements.

It wisely changes the rule of GS 25-46 (NIL 40) which in effect states that "face bearer" paper may not be made "order paper" by a special indorsement. Under the last sentence of 3-204(1) face bearer paper may be made order paper by a special indorsement.

N.C. Cases:

An indorsement to "any bank, banker or trust company" is a special indorsement, and to have a further negotiation there must be an indorsement of one within the class. Edgecombe Bonded Warehouse Co. v. Security Nat. Bk., 216 N.C. 246, 4 S.E. 2d 863 (1939).

Section 3—205. Restrictive Indorsements.

An indorsement is restrictive which either

(a) is conditional; or

(b) purports to prohibit further transfer of the instrument; or

(c) includes the words "for collection", "for deposit", "pay any bank", or like terms signifying a purpose of deposit or collection; or

(d) otherwise states that it is for the benefit or use of the indorser or of another person.

N.C. Comments

Prior Statutes: GS 25-42 and 25-45.

Under NIL 33 (GS 25-39) there are four general categories of indorsements:

(1) Special or blank NIL 34 (GS 25-40).
(2) Qualified or unqualified. NIL 38 (GS 25-44).
(3) Conditional or unconditional. NIL 39 (GS 25-45).
(4) Restrictive or nonrestrictive. NIL 36 (GS 25-42).

Actually, a full description of any single indorsement should include one distinguishing term from each of the four categories.

Under the U.C.C. special and blank (3-204) and qualified and unqualified (3-414) and (3-417(3)) are expressly or impliedly recognized as separate types of indorsement. However, the old conditional indorsement has been merged with restrictive indorsements under this section. See Subsection (a) which states that an indorsement is re-

strictive which is "conditional". This combination approach is not intended to change the law of conditional indorsements as developed under NIL 39 (GS 25-45); however, there are some changes under 3-205 and 3-206 relating to old fashioned restrictive indorsements. See Hawkland, Commercial Paper (ALI/ABA JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, 1959).

Perhaps the biggest change of 3-205 is Subsection (c) which state that restrictive indorsements include those which contain the words "for collection," "for deposit," "pay any bank," or like terms signifying a purpose of deposit or collection. Under the NIL there is a considerable difference of opinion as to the effect of such words.

N.C. Cases:

Murchison Nat. Bk. v. Dunn Oil Mills Co., 150 N.C. 718, 721 (1909 held that "for deposit" and "for collection" are restrictive indorsements.

Edgecombe Bonded Warehouse Co., 216 N.C. 246, 4 S.E. 2d 863 (1939) held that "pay any bank...." was a special indorsement, but it did not decide whether it was also restrictive.

Section 3—206. Effect of Restrictive Indorsement.

(1) No restrictive indorsement prevents further transfer or negotiation of the instrument.

(2) An intermediary bank, or a payor bank which is not the depositary bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment.

(3) Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words "for collection", "for deposit", "pay any bank", or like terms (subparagraphs (a) and (c) of Section 3—205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of Section 3—302 on what constitutes a holder in due course.

(4) The first taker under an indorsement for the benefit of the indorser or another person (subparagraph (d) of Section 3—205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such taker is a holder in due course if he otherwise complies with the requirements of Section 3—302 on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsement unless he has knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty (subsection (2) of Section 3—304).

N.C. Comments

Prior Statutes: GS 25-42; 25-43; 25-45 and 25-53.

This section completely revises the NIL, and the Official Comments should be carefully examined. In general, the section lessens the restrictions of a restrictive indorsement.

Subsection (1). This reverses the NIL rule that "Pay A only" or similar words would prevent a further negotiation. Despite such words of restriction an instrument may still be negotiated under this section.

Subsection (2). Official Comment 2 adequately describes this section which permits certain banks to disregard the restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment. This will aid banks in the collection process; but it does not affect the rights of the restrictive indorser against parties outside the collection process.

Subsection (3). Contrary to NIL 39 (GS 25-45), this subsection permits a transferee under a conditional indorsement to be an HDC free of the indorser's claim if certain conditions are met.

Subsection (4). As noted in Official Comment 6, this section is similar to Subsection 3, but it applies to trust indorsements other than those for deposit or collection. Also, the duty to act consistently with the indorsement is limited to the first taker under it.

Section 3—207. Negotiation Effective Although It May Be Rescinded.

(1) Negotiation is effective to transfer the instrument although the negotiation is

(a) made by an infant, a corporation exceeding its powers, or any other person without capacity; or

(b) obtained by fraud, duress or mistake of any kind; or

(c) part of an illegal transaction; or

(d) made in breach of duty.

(2) Except as against a subsequent holder in due course such negotiation is in an appropriate case subject to rescission, the declaration of a constructive trust or any other remedy permitted by law.

N.C. Comments

Prior Statutes: GS 25-37; 25-64, 25-65.

The Official Comments reasonably explain this section. The section as a whole expands the negotiability of instruments.

Subsection (1). This subsection expands GS 25-37 (NIL 22) to permit a negotiation to be effective even though (a) made by any person without capacity, (b) even though there was fraud or duress, (c) even though the negotiation was part of an illegal transaction, or (d) even though the negotiation was in breach of duty.

Whether or not there may be a recision or other remedy in such unlawful negotiations covered in Subsection 2.

Subsection (2). This recognizes that one who negotiates may have certain remedies (e.g., recision, trust) in some cases, but not against an HDC. See 3-305 (1) on HDC.

Section 3—208. Reacquisition.

Where an instrument is returned to or reacquired by a prior party he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his indorsement has been cancelled is discharged as against subsequent holders in due course as well.

N.C. Comments

Prior Statutes: GS 25-54 25-56; 25-128.

The most important part of this section relates to the discharge of intervening parties after an instrument has been reacquired. Basically, the section affirms the prior law of NIL cited above and also affirms several N.C. decisions annotated under these NIL sections.

The extent to which an HDC loses his rights against an intervening indorser is also partly covered in 3-602 which states:

> "No discharge of any party provided by the Article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument."

There are some latent uncertainties in both 3-208 and in 3-602; however, no modification is suggested at this time.

The rights of a reacquirer as a deritive HDC are covered in 3-201.

Section 3—301. Rights of a Holder.

The holder of an instrument whether or not he is the owner may transfer or negotiate it and, except as otherwise provided in Section 3—603 on payment or satisfaction, discharge it or enforce payment in his own name.

N.C. Comments

Prior Statutes: GS 25-57

For N.C. the most important part of this section pertains to its authorization allowing any holder, "whether or not he is the owner", to enforce payment in his own name.

Under similar wording in GS 25-57 (NIL 51), our court held that a holder collection agent could not sue in his own name because of the "real party in interest" statute, GS 1-57. Bank v. Rochamora, 193 N.C. 1 (1927) and other cases cited under GS 25-43.

Unless, there is some real reason to follow Rochamora, 3-301 should not be amended; and it should be construed as clearly written.

For a criticism of Rochamora see 5 N.C. Law Rev. 369 (1927).

Section 3—302. Holder in Due Course.

(1) A holder in due course is a holder who takes the instrument

(a) for value; and

(b) in good faith; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

(2) A payee may be a holder in due course.

(3) A holder does not become a holder in due course of an instrument:

(a) by purchase of it at judicial sale or by taking it under legal process; or

(b) by acquiring it in taking over an estate; or

(c) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.

(4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased.

N.C. Comments

Prior Statutes: GS 25-58

By clarifying additions this section broadens somewhat the test for HDC status. For example, a payee can be an HDC if he meets the regular tests (Subsection 2). This rule is implied in Mitchell v. Strickland, 207 N.C. 141 (1934).

To get a full picture of the broadened rules of HDC, this section must be read in conjunction with 3-303 (Taking for Value) and 3-304

(Notice to Purchasers). Many of the N.C. cases on the HDC issue involve "value" and "notice", and some of these are cited under comments to 3-303 and 3-304.

One of the major changes is to eliminate the requirement of GS 25-58 (NIL 52) that one must take an instrument "complete and regular on its face" in order to be an HDC. Under the U.C.C. incompleteness or irregularity is considered only as a subdivision of the major test of "notice." See Comment to 3-304.

Section 3—303. Taking for Value.

A holder takes the instrument for value

(a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

(b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

(c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person.

N.C. Comments

Prior Statutes: GS 25-30 25-31, 25-32, 25-60

Generally, this section defines the "value" requirement of HDC status. One change makes it clear that a holder cannot "tack" the value given by another in order to be HDC. An HDC must himself give value.

The time at which bank credit will be treated as value by the bank is not fully covered by this section, but "value" by a bank is covered by 4-209. (When Bank Gives Value For Purposes of Holder in Due Course). The value by a bank problem has been an uncertain matter in N.C., and a more complete discussion is given under 4-208 and 4-209.

The provisions of Subsection (a) stating that a security interest or a lien on an instrument constitute value are in accord with Sugg v. St. Mary's Oil Engine Co., 193 N.C. 815 (1927).

Section 3—304. Notice to Purchaser.

(1) The purchaser has notice of a claim or defense if

(a) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or

(b) the purchaser has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.

(2) The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.

(3) The purchaser has notice that an instrument is overdue if he has reason to know

(a) that any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series; or

(b) that acceleration of the instrument has been made; or

(c) that he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue. A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be thirty days.

(4) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim

(a) that the instrument is antedated or postdated;

(b) that it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defense or claim has arisen from the terms thereof;

(c) that any party has signed for accommodation;

(d) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion;

(e) that any person negotiating the instrument is or was a fiduciary;

(f) that there has been default in payment of interest on the instrument or in payment of any other instrument, except one of the same series.

(5) The filing or recording of a document does not of itself constitute notice within the provisions of this Article to a person who would otherwise be a holder in due course.

(6) To be effective notice must be received at such time and in such manner as to give a reasonable opportunity to act on it.

N.C. Comments

Prior Statutes: GS 25-51, 25-58, 25-59, 25-61, 25-62.

This lengthy section and Official Comment cover the troublesome problem of "notice". The Official Comment gives a reasonable explanation of the rewording function of the section. Basically, the section is merely a recodificiation of the NIL and the better decisions under it.

One major change of this section and 3-302 is to eliminate the "complete and regular on its face "requirement of HDC status. Under Subsection 1(a) and instrument will give notice of a "claim or defense" only if the instrument is "so incomplete," etc., as to call into question its "validity," etc.

A sizable number of N.C. cases on whether a party could be an HDC under varying circumstances are annotated under the above cited sections of the General Statutes. However, a restating of these cases here would add little to a general understanding of the purpose of this section. Any possible conflict between prior decisions made on particularized facts and this section would likely not affect the ordinary dealings in negotiable instruments.

Subsection 2. According to the Official Comment 5, this subsection follows the policy of Section 6 of the Uniform Fiduciaries Act (GS 32-7). Since GS 32-5, 32-6, and 32-7 adopt somewhat different approaches on "notice" to a taker from a fiduciary, the future relationship between these sections and Subsection 2 is somewhat ambiguous.

While no recommendation for amendment is made at this time, a further analysis is suggested.

Section 3—305. Rights of a Holder in Due Course.

To the extent that a holder is a holder in due course he takes the instrument free from

(1) all claims to it on the part of any person; and

(2) all defenses of any party to the instrument with whom the holder has not dealt except

(a) infancy, to the extent that it is a defense to a simple contract; and

(b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

(d) discharge in insolvency proceedings; and

(e) any other discharge of which the holder has notice when he takes the instrument.

N.C. Comments

Prior Statutes: GS 25-21, 25-22, and 25-63

This section states the rights of both (1) a party who is an HDC in his own right and (2) a deritive HDC under 3-201.

The Official Comments adequately explain the changes from the NIL. Perhaps the most important change relates to a change in the rule of NIL 15 (GS 25-21). GS 25-21 does not by its terms permit an HDC to recover against one who signed an incomplete and undelivered paper. Under 3-305, however, an HDC is free of the defense of non-delivery of incomplete paper. Thus, the liability of one who signs such undelivered paper is increased.

Subsection 2 lists the several defenses that are valid even against an HDC. For a collection of N.C. cases on defenses good against HDC see N.C. Dig., Bills and Notes, Key #372-384. The following N.C. cases probably are affirmed by this subsection:

Wachovia Bank & Trust Co. v. Crafton, 181 N. C. 404, 107 S.E. 316 (1921), held (dictum); Maker of note given for gambling debt not liable to HDC.

Planters Bank & Trust Co. v. Felton, 188 N.C. 384, 391, 124 S.E. 849 (1924), held, Maker of note in transaction not complying with Blue Sky Law is liable to HDC. To same effect is Bank v. Hunt, 188 N.C. 377 (1924).

M. & J. Finance Corp. v. Rinehardt, 216 N.C. 380, 5 S.E. 2d 138 (1939), held, fraud in the factum is a defense against HDC (Maker was unable to read). See also Parker v. Thomas 192 N.C. 798, 136 S.E. 118 (1926). Neither of these cases is clear on the usual rule that one who would plead fraud in the factum must show himself free from negligence, but both strongly imply this requirement.

Federal Reserve Bank of Richmond v. Jones, 205 N.C. 648, 172 S.E. 185 (1934), held, usury is good defense against HDC.

Section 3—306. Rights of One Not Holder in Due Course.

Unless he has the rights of a holder in due course any person takes the instrument subject to

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an action on a simple contract; and

(c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (Section 3—408); and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.

N.C. Comments

Prior Statutes: GS 25-22, 25-33, 25-64, 25-65.

This section combines and rewords several sections of the NIL, and it is intended to remove some uncertainties under the NIL. Basically, however, the new rules are about the same as the NIL and decisions in N.C.

Subsection (a) specifically states that a non-HDC takes subject to claims of third persons, thus rejecting Professor Joffee's Thesis that one who is a BFP after maturity takes subject to defenses, but free from claims of others. The rejected theory was based on the premise that the "red flag of maturity" should be an indication of

a possible defense by the maker, but did not per se indicate the same third person might leave a claim.

Subsection (d) specifically states that a defendant may not set up a jus terli defense or claim of some third person unless the third person himself defends the action for the defendant. This section, however, is not intended to prevent another from intervening. See also 3-803 on vouching in other parties alleged to be liable.

Section 3—307. Burden of Establishing Signatures, Defenses and Due Course.

(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue

(a) the burden of establishing it is on the party claiming under the signature; but

(b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

(3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

N.C. Comments

Prior Statutes: GS 25-6 See also 2 17, 25-22, 25-23, 25-25-51, 25-52, 25-130.

This section on burden of proof replaces many of the "presumptions used in the various sections of the NIL cited above.

The three major procedural steps as outlined in this section are:

(A) Subsection (1) on the issue of valid signatures.
(B) Subsection (2) permitting a holder to recover unless the defendant "establishes a defense."
(C) Subsection (3) requiring a person who wishes the rights of an HDC to establish all the elements of HDC after a defense has been shown. See many N.C. cases under GS 25-65.

As explained in Official Comment 2, one who is not a "holder" but who is in possession of an instrument must also prove his right to it and account for the absence of any indorsement in order to recover on the instrument.

Generally, the section will help to clarify the procedural aspect of a suit on a negotiable instrument in North Carolina, but no major change is made.

Section 3—401. Signature.

(1) No person is liable on an instrument unless his signature appears thereon.

(2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

N.C. Comments

Prior Statutes: GS 25-24 (NIL 18).

This simple section makes no real change in N.C. law. See Official Comments.

Section 3—402. Signature in Ambiguous Capacity.

Unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement.

N.C. Comments

Prior Statutes: GS 25-23(6) and 25-69 (NIL 17(6)).

This section continues the rule of the NIL that a signer is presumed to be an indorser when it is not clear that he signed in some other capacity.

The Official Comments state that "Parol evidence is not admissable to show any other capacity, except for reformation of the instrument under the laws of the particular jurisdiction".

It is not possible to exactly predict to what extent parol evidence will be admissable in the future to establish the capacity of various signers; however, see: (A) Wrenn v. Lawrence Cotton Mills, 198 N.C. 89, 150 S.E. 676 (1925). Held: Holder may not show that directors of corporation who signed on back signed as co-makers, guarantors or sureties. (B) Gilliam v. Walker, 189 NC 189, 126 SE 424 (1925). Held: "It is a general rule that the true relation subsisting between the several parties bound for the performance of a written obligation may be shown by parol evidence."

Other parol evidence cases are annotated under GS 25-69.

Section 3—403. Signature by Authorized Representative.

(1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.

(2) An authorized representative who signs his own name to an instrument

(a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the rep-

resentative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

(3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

N. C. Comments

Prior Statutes: GS 25-2 25-26; 25-27 (NIL 19,2 and 21).

This section relates to the liability of an authorized representative. The liability of an unauthorized signer is governed by 3-404 (Unauthorized Signatures). The liability of an unnamed principal is governed by 3-401 which states that an unnamed party is not liable on the instrument.

Subsection (1). This permits a party's name to be signed by another when authorized. The rule is similar to GS 25-25 (NIL 19), 25-27 (NIL 21) and Midgette v. Basnight, 173 N.C. 18, 91 S.E. 353 (1917).

Subsection (2)(a). This makes an authorized representative personally liable when neither his representative capacity nor the name of the person represented appears on the instrument. The rule is implied in GS 25-26 (NIL 20).

Subsection (2)(b). This covers the liability of a representative where the instrument shows only (1) name or principal or (2) representative capacity of signer, but does not show both of these. In a sense such signing creates an ambiguity as to the liability of the signing representative, and the ambiguity has been resolved in favor of personal liability of the representative, "except as otherwise established between immediate parties".

The exception permitting an explanation of capacity between immediate parties is contrary to the wording of NIL 20 (GS 25-26). See Bank of Spruce Pines v. Vance, 205 N.C. 103, 170 S.E. 119 (1933) and 9 N.C. Law Rev. 444.

Subsection 3. This awkwardly worded subsection is not explained in the Official Comments, and no satisfactory explanation of the rule was found elsewhere. Apparently it means that the location of a principal's name on the instrument is not of special importance in determining the liability of the principal and the non-liability of the representative. Also, it appears that the "Except as otherwise established" proviso will permit evidence to prove other than a mere representative signature.

Further study may call for a clarifying amendment to this Subsection.

Section 3—404. Unauthorized Signatures.

(1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.

(2) Any unauthorized signature may be ratified for all purposes of this Article. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

N.C. Comments

Prior Statutes: GS 25-28 (NIL 23).

This section emphasizes:

(1) The non-liability of the person whose name is forged or whose name is added by a representative without authority (actual or apparent) and

(2) The liability of the party who forges or makes the unauthorized signature.

It changes the rule of GS 25-28 which states that such unauthorized signature is "wholly inoperative". It also changes Seymour v. Peoples Bank, 212 N.C. 707 (1938) which stated: "A forged paper is neither a bill nor a check."

Subsection (2) recognizes that an unauthorized signature may be ratified. See implication to this effect in Yarborough v. Trust Co., 142 N.C. 377, 55 S.E. 296 (1906).

Section 3—405. Impostors; Signature in Name of Payee.

(1) An indorsement by any person in the name of a named payee is effective if

(a) an impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or

(b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

(c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

N.C. Comments

Prior Statutes: GS 25-15(3) (NIL 9(3)).

This section codifies the better rules relating to "impostors" and "payroll padders" as previously solved under the NIL by the "fictitious payee" fiction.

This section employs some changes in techniques, but the results are about the same. The new techniques are:

(1) "imposter" and "fictitious payee" papers do not become

"bearer papers."

(2) a purportedly regular indorsement is required.

(3) but any person may effectively indorse in the name of the payee.

No real change is made in N.C. law.

Note: Further study may call for an amendment to broaden the applicability of the principle of this section. At present it is limited to signatures of the name of a "payee".

Section 3—406. Negligence Contributing to Alteration or Unauthorized Signature.

Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

N.C. Comments — Prior Statutes: None

This new section codifies the rule that negligence of a party will at times preclude him from pleading alteration or lack of authority.

Note that this section covers negligence; but in the prior section 3-405 negligence is immaterial.

Note also that under this section a negligent party is not liable in tort. Instead he is estopped from asserting an alteration or an unauthorized signature against an HDC or drawee. Probably no real change in N.C. law is made.

When an alteration is envolved the next section must be read in conjunction with this section.

See Broad St. Bank v. Nat. Bank, 183 N.C. 463, 112 S.E. 11 (1922) held, failure of drawer to use sensitized paper to prevent chemical erasures is not negligence.

Section 3—407. Alteration.

(1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in

(a) the number or relations of the parties; or

(b) an incomplete instrument, by completing it otherwise than as authorized; or

(c) the writing as signed, by adding to it or by removing any part of it.

(2) As against any person other than a subsequent holder in due course

(a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;

(b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

(3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed.

N.C. Comments

Prior Statutes: GS 25-20; 25-21;25-131;25-132 (NIL 14,15,124,125).

This is an important section, and the Official Comments should be studied to get a full appreciation of it. Basically it combines in one section the former rules on incomplete instruments (GS 25-20) and materially altered instruments (GS 25-131).

The rule of GS 25-15 on undelivered and incomplete instruments has been reversed. Also, Subsection 1(b) must be read with 3-115 on incomplete instruments.

N.C. cases: Phillips v. Hensley, 175 N.C. 23 (1917). Held: Maker liable on note for amount filled up when issued in blank. Affirmed by this section.

Broad St. Bank v. Nat. Bank, 183 N.C. 463, 112 S.E. 11 (1922). Held: Drawer of completed check written in ink liable only for original tenor after instrument is fraudulently raised. Affirmed by this section. Failure to use sensitized paper to prevent chemical erasures is not negligence.

Section 3—408. Consideration.

Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3—305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this Act under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount.

N. C. Comments

Prior Statutes: GS 25-29; 25-30;25-33 (NIL 24,25,28).

As was true with the NIL, Article 3 throughout makes a distinction between "consideration" and "value". "Consideration" is concerned with what the obligor has received, and it pertains to whether he has a defense. By contract, "value" pertains to what a purchaser has given in

order to be a taker for value; and, of course, value is an essential element for HDC status (3-302 and 3-303).

The old rebuttable "presumption" of consideration in NIL 24 (GS 25-29) is dropped officially, but it is factually replaced by 3-307 which requires one who pleads a defense (e.g., want or failure of consideration) to "establish a defense," thus putting the burden on the party who pleads the defense.

Some N.C. decisions appear to be inconsistent on the issue of who has the burden of proof on consideration or no consideration.

Piner v. Brittain, 165 N.C. 401 (1914), held, burden of showing failure of consideration is on maker of note. See also Hunt v. Eure,, 188 N.C. 716 (1924) which states the contra rule for a non-negotiable note (burden on plaintiff).

Stein v. Levins, 205 N.C. 302, 171 S.E. 96 (1933), seems to state that the burden of proving no consideration is on the plaintiff. (3-307 is to the contrary).

Briefly, this revised section makes no major change in N.C. law.

Section 3—409. Draft Not an Assignment.

(1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

(2) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance.

N. C. Comments

Prior Statutes: GS 25-134 and 25-197 (NIL 127 and 189).

This section is about the same as the prior law of GS 25-134 and 25-197. See 13 N.C. Law Rev. 131 and 31 N.C. Law Rev. 190 as to what orders constitute an assignment.

A number of N.C. cases annotated under the above sections hold:

(1) that a check passes no title to money on deposit. Perry v. Bank, 131 N.C. 117 (1902).

(2) that payee of unaccepted, uncertified check has no right of action against bank. General American Life Ins. Co. v. Stadiem, 223 N.C. 49(1943); and

(3) that drawer may stop payment before acceptance. In re will of Winborne, 231 N.C. 463 (1950).

Section 3—410. Definition and Operation of Acceptance.

(1) Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification.

(2) A draft may be accepted although it has not been signed by the drawer or is otherwise incomplete or is overdue or has been dishonored.

(3) Where the draft is payable at a fixed period after sight and the acceptor fails to date his acceptance the holder may complete it by supplying a date in good faith.

N.C. Comments

Prior Statutes: GS 25-139 to 25-145; 25-168 to 25-177 & GS 25-1 (NIL 132 to 138, 161 to 170 & 191).

One big quantitative change is the elimination of the special rules governing the obsolete "Acceptance For Honor" in GS 25-168 to 25-177 (NIL 161-170). There have been no N.C. decisions citing these sections in the sixty-five years of the NIL.

An important substantive change requires that all acceptances must be on the draft. Under GS 25-141 and 25-142 (NIL 134 and 135) an acceptance could be on a separate paper. See Nimock v. Woody, 97 N.C. 1, 25 S.E. 249 (1887) holding a separate writing to be an acceptance binding the acceptor; Bank v. Hay, 143 N.C. 326, 55 S.E. 811(1906) holding the particular separate writing did not contain a true acceptance. (Case mainly relates to authority of an agent to draw on his principal).

Though an "acceptance" must be on the draft, the section is not intended to eliminate any liability of a drawee in contract, tort or otherwise arising from the separate writing or any other obligation or representation. (3-409(2) also expressly states this).

Subsection (1) also eliminated the NIL 137 (GS 25-144) provision on constructive acceptance when the drawee destroys the instrument or refuses to return it within 24 hours after receipt. Under 3-419, however, the drawee may be liable for conversion.

Note: N.C. has amended GS 25-144 (NIL 137) to include a provision permitting a bank to disaffirm some conditional payments until midnight the next day. See Article 4 on Bank Deposits and Collections.

See also Branch Banking and Trust Co. v. Bank of Washington, 255 N.C. 205, 120 S.E. 2d 830 (1961) for a long 4-2 decision holding the bank of a drawee of a draft not liable as a constructive acceptor when bank delayed returning the dishonored draft (but bank might be liable in tort).

Subsection 3 permits a holder to supply an acceptance date in "good faith" when a draft is payable at a fixed period after sight. Though this technically changes the wording of the last sentence of NIL 138 (GS 25-145), the new good faith test will probably be applied by reference to the prior law of NIL 138 (GS 25-145) and NIL 136 (GS 25-143).

Section 3—411. Certification of a Check.

(1) Certification of a check is acceptance. Where a holder procures certification the drawer and all prior indorsers are discharged.

(2) Unless otherwise agreed a bank has no obligation to certify a check.

(3) A bank may certify a check before returning it for lack of proper indorsement. If it does so the drawer is discharged.

N.C. Comments

Prior Statutes: GS 25-195 and 25-196 (NIL 187 and 188).

Subsection (1) continues the rule of GS 25-196 (NIL 188) that certification by a drawer leaves him liable as a secondary party, while certification by a holder discharges the drawer and other prior parties. Commercial Investment Trust v. Windsor, 197 N.C. 208 (1929) is to the same effect.

Subsections (2) and (3) are new and are self-explanatory. See also Official Comments 2 and 3.

There is no real change from N.C. law; and only a few N.C. cases are annotated under the above sections.

Section 3—412. Acceptance Varying Draft.

(1) Where the drawee's proffered acceptance in any manner varies the draft as presented the holder may refuse the acceptance and treat the draft as dishonored in which case the drawee is entitled to have his acceptance cancelled.

(2) The terms of the draft are not varied by an acceptance to pay at any particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at such bank or place.

(3) Where the holder assents to an acceptance varying the terms of the draft each drawer and indorser who does not affirmatively assent is discharged.

N.C. Comments

Prior Statutes: GS 25-146 to 25-149 (NIL 139-142)

This section combines and rewords the above sections and makes a change in the effect of the acceptance of a varying acceptance on the liability of a secondary party. The change relates to implied consent by the secondary party to the taking of a varying acceptance.

Under present law (GS 25-149) a secondary party will not be discharged when the holder takes a varying acceptance if the secondary party either expressly or impliedly consents to such acceptance before or after the acceptance. Also, a subsequent assent will be implied when a secondary party does not express his dissent to a varying acceptance within a reasonable time after he receives notice of it.

Thus, the secondary party who wishes to be discharged because of a varying acceptance must take action to show his disapproval of the varying acceptance.

Contrary to the present law of GS 25-149, this U.C.C. section does not recognize an implied assent of a secondary party merely because of his failure to object within a reasonable time. See Official Comment 2. Furthermore, the new section apparently will not recognize any implied advance consent or any implied subsequent assent to a varying acceptance. See Subsection (3) which states: "..... each drawer and indorser who does not affirmatively assent is discharged".

The only N.C. case annotated under GS 25-146 to 25-149 is a pre-NIL case. Wallace Brothers v. Douglas, 116 N.C. 659 (1895).

Section 3—413. Contract of Maker, Drawer and Acceptor.

(1) The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to Section 3—115 on incomplete instruments.

(2) The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse.

(3) By making, drawing or accepting the party admits as against all subsequent parties including the drawee the existence of the payee and his then capacity to indorse.

N.C. Comments

Prior Statutes: GS 25-66, 25-67 and 25-68 (NIL 60, 61 and 62).

The section makes no real change in substance. The section, however, must be read in conjunction with:

3-115 - Incomplete Instruments.

3-406 - Negligence Contributing to Alteration or Unauthorized Signature.

3-407 - Alteration.

3-412 - Acceptance Varying Draft.

3-418 - Finality of Payment or Acceptance.

Section 3—414. Contract of Indorser; Order of Liability.

(1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

(2) Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

N. C. Comments

Prior Statutes: GS 25-44, 25-50, 25-72, 25-73 and 25-74 (NIL 38,44,66,67 and 68).

Subsection (1). As stated, the "contract" of an indorser is to "pay" the instrument if there is a dishonor and if any necessary notice and protest are properly made.

This "contract" applies to any indorser whether or not he is also a transferor. The additional liability of a transferor is covered by 3-417 covering "warranties on presentment and transfer".

A transferor-indorser may eliminate his "contract" to "pay" by indorsing "without recourse" (or by otherwise indicating that he does not make a contract to pay). However, the transferor-indorser will still be liable for any breach of the implied "warranties on presentment or transfer" (3-417).

Generally the restated rules are the same as given in Medlin v. Miles, 201 N.C. 683 (1931) which held:

(1) a qualified indorser is still liable on his warranties as a seller;

(2) the words "without recourse" or similar qualifying words may precede or follow the signature of the transferor;

(3) the words "I hereby sell, transfer and assign all my right title and interest" are to be treated as a "qualified indorsement".

Subsection (2). This continues the rule of GS 25-74 (NIL 68) that indorsers are presumed to be liable in the order in which their signatures appear on the instrument. However, parol evidence is admissable to show the true order of indorsement. Several N.C. cases on the use of parol evidence are annotated under GS 25-74.

Section 3—415. Contract of Accommodation Party.

(1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

(2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

(3) As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

(4) An indorsement which shows that it is not in the chain of title is notice of its accommodation character.

(5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

N.C. Comments

Prior Statuces: GS 25-33; 25-34;25-70 (NIL 28,29 and 64).

Basically, this section adopts the rules of GS 25-34 and 25-70 regarding the liability of an accomodation party. The section is probably about in line with better N.C. decisions. Many N.C. cases are annotated under GS 25-34 and 25-70.

Note: New York has added a sixth paragraph to cover the warranties of an accomodation party; but the Permanent Editorial Board has rejected this amendment. See Report No. 1 of the Permanent Editorial Board For the U.C.C., p. 75 (1962).

Section 3—416. Contract of Guarantor.

(1) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.

(2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

(3) Words of guaranty which do not otherwise specify guarantee payment.

(4) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.

(5) When words of guaranty are used presentment, notice of dishonor and protest are not necessary to charge the user.

(6) Any guaranty written on the instrument is enforcible notwithstanding any statute of frauds.

N.C. Comments

Prior Statutes: None under NIL.

This new section states the commercial effect of words of guaranty

added to a signature. A guarantor is immediately liable upon default, and the holder need not resort to any other party.

This may change Rouse v. Wooten, 140 N.C. 557, 53 S.E. 430 (1906) and Dry v. Reynolds, 205 N.C. 571, 172 S.E. 351 (1934) on the issue of whether presentment for payment is necessary to charge a "surety" or a "guarantor".

Cf. Arcady Farms Milling Co. v. Wallace, 242 N.C. 686 (1955) holding that procedurally a guarantor on a separate letter may be joined as party defendant with principal debtor.

See also 3-502 on discharge when timely presentment not made.

It would seem that this section should not be construed to supersede the provisions of GS 26-7 permitting a guarantor to notify a creditor to take action against the principal with diligence.

Section 3—417. Warranties on Presentment and Transfer.

(1) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that

(a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

(b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

(iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

(c) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee; or

(iii) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or

(iv) to the acceptor of a draft with respect to an alteration made after the acceptance.

(2) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that

(a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

(b) all signatures are genuine or authorized; and

(c) the instrument has not been materially altered; and

(d) no defense of any party is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

(3) By transferring "without recourse" the transferor limits the obligation stated in subsection (2) (d) to a warranty that he has no knowledge of such a defense.

(4) A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority.

N.C. Comments

Prior Statutes: GS 25-71 and 25-75 (NIL 65 and 69).

Subsection (1). This is a new section intended to state the presentor's warranties to the party who accepts or pays.

See Official Comments 2-5 for a long discussion of this subsection.

Closely related to this subsection is 4-207 (Warranties of Customer and Collecting Bank on Transfer or Presentment of Items; Time for Claims).

Subsection (2). This covers the warranties of one who transfers and receives consideration.

Subsection (3). This limits the warranties of one who transfers "without recourse".

Subsection (4). This covers the warranties of a selling agent or broker. Generally, it is not believed that this section will make any great changes in N.C. law, and there are no cases annotated under GS 25-71 or 25-75.

Section 3—418. Finality of Payment or Acceptance.

Except for recovery of bank payments as provided in the Article on Bank Deposits and Collections (Article 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

N. C. Comments

Prior Statutes: GS 25-6[illegible]
(NIL 62)

Though this section completely restates the rules relating to finality of payment or acceptance, it basically follows the rule of the leading case of Price v. Neal; 3 Burr. 1354 (1762).

The section provides that the rules of 3-417 (Warranties on Presentment and Transfer) and Article 4 (especially 4-207 and 4-301) must be read in conjunction with this section. See also 4-213 (Final Payment by Payor Bank, etc.).

It is not believed that this section makes any significant change in N.C. law. See Woodward v. Saving & Trust Co., 178 N.C. 184 (1919), held, bank normally cannot recover a payment from a holder because drawer's name is forged; but if depositor knew of forgery, bank can charge back the forged item against him.

Section 3—419. Conversion of Instrument; Innocent Representative.

(1) An instrument is converted when

(a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or

(b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

(c) it is paid on a forged indorsement.

(2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

(4) An intermediary bank or payor bank which is not a depositary bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (Sections 3—205 and 3—206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.

N. C. Comments

Prior Statutes: GS 25-144 (NIL 137)

As note under 3-410, the NIL 137 rule of constructive acceptance by refusal to return or delay in returning a presented instrument has been changed. This section, however, would make the party who refuses to return an instrument liable as a converter for the face amount of the instrument. Thus, the liability of a wrongdoing drawee will be the same as if there had been a constructive acceptance.

This section will help make the law in N.C. more certain.

Section 3—501. When Presentment, Notice of Dishonor, and Protest Necessary or Permissible.

(1) Unless excused (Section 3–511) presentment is necessary to charge secondary parties as follows:

(a) presentment for acceptance is necessary to charge the drawer and indorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. The holder may at his option present for acceptance any other draft payable at a stated date;

(b) presentment for payment is necessary to charge any indorser;

(c) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor or maker only as stated in Section 3—502(1) (b).

(2) Unless excused (Section 3—511)

(a) notice of any dishonor is necessary to charge any indorser;

(b) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, notice of any dishonor is necessary, but failure to give such notice discharges such drawer, acceptor or maker only as stated in Section 3—502(1) (b).

(3) Unless excused (Section 3—511) protest of any dishonor is necessary to charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states and territories of the United States and the District of Columbia. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.

(4) Notwithstanding any provision of this section, neither presentment nor notice of dishonor nor protest is necessary to charge an indorser who has indorsed an instrument after maturity.

N.C. Comments

Prior Statutes: GS 25-76 25-96, 25-125, 25-136, 25-150, 25-151, 25-157 25-158, 25-159, 25-164 25-165, 25-193.

Subsection 1: Unless presentment is "excused" under 3-511 a proper presentment is necessary to charge secondary parties. See Official Comments 2-4 for long explanation.

Subsection 2: Unless excused by 3-511 notice of dishonor is necessary to charge:

(a) any indorser
(b) any drawer
(c) the acceptor of a draft payable at a bank, or
(d) the maker of a note payable at a bank.

(Note: Normally, acceptors of drafts and makers of notes are considered as primary parties; however, when their instruments are payable at banks, they are entitled to notice of any dishonor. See 3-121.)

Subsection 3. This subsection on protest is perhaps the biggest change from the NIL. Under GS 25-159 (NIL 152) any foreign bill is to be protested; and "foreign" under GS 25-136 (NIL 129) means any instrument not drawn and payable within a single state. The U.C.C. now requires protest only when the instrument on its face is drawn or payable outside the U.S.

The holder has an option to make protest of any dishonor, and in the case of a foreign draft may on insolvency of the acceptor make a protest for better security before maturity. See GS 25-165 (NIL 158).

Subsection 4. This reverses the rule of GS 25-159 (NIL 152), and neither presentment, notice of dishonor nor protest is necessary to charge an indorser who indorses after maturity.

Section 3—502. Unexcused Delay; Discharge.

(1) Where without excuse any necessary presentment or notice of dishonor is delayed beyond the time when it is due

(a) any indorser is discharged; and

(b) any drawer or the acceptor of a draft payable at a bank or the maker of a note payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor or maker is not otherwise discharged.

(2) Where without excuse a necessary protest is delayed beyond the time when it is due any drawer or indorser is discharged.

N.C. Comments

Prior Statutes: GS 25-13, 25-76, 25-96, 25-151, 25-157, 25-159, 25-193.

3-502 complements 3-501.

Subsection 1. This states the effect of an unexcused failure to present and to give notice of dishonor. The extent of discharge differs with the class of secondary party:

(1) indorsers are fully discharged;
(2) the more limited discharge of other parties is covered in Subsection (1)(b), which adopts a sort of pro tanto discharge concept.

Subsection 2. Failure to make necessary protest will discharge a drawer or indorser in full.

N.C. cases on presentment:

Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339 (1924). Held: Demand Instruments, including postdated checks, must be presented for payment within reasonable time after issue; but the only effect of a late presentment against a drawer is to discharge him to the extent that the delay caused him loss.

Rouse v. Wooten, 140 N.C. 557, 53 S.E. 430 (1906) and Dry v. Reynolds, 205 N.C. 571, 172 S.E. 351 (1934) seem to say:

(1) Presentment is not necessary to charge a surety;
(2) Presentment is necessary to charge a guarantor. See also 3-415 (Contract of Accomodation Party) and 3-416 (Contract of Guarantor).

Section 3—503. Time of Presentment.

(1) Unless a different time is expressed in the instrument the time for any presentment is determined as follows:

(a) where an instrument is payable at or a fixed period after a stated date any presentment for acceptance must be made on or before the date it is payable;

(b) where an instrument is payable after sight it must either be presented for acceptance or negotiated within a reasonable time after date or issue whichever is later;

(c) where an instrument shows the date on which it is payable presentment for payment is due on that date;

(d) where an instrument is accelerated presentment for payment is due within a reasonable time after the acceleration;

(e) with respect to the liability of any secondary party presentment for acceptance or payment of any other instrument is due within a reasonable time after such party becomes liable thereon.

(2) A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of the particular case. In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:

(a) with respect to the liability of the drawer, thirty days after date or issue whichever is later; and

(b) with respect to the liability of an indorser, seven days after his indorsement.

(3) Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties.

(4) Presentment to be sufficient must be made at a reasonable hour, and if at a bank during its banking day.

N. C. Comments

Prior Statutes: GS 25-77, 25-78, 25-81, 25-91, 25-93, 25-151, 25-152, 25-153, 25-193, 25-3.

Generally, the section covers the time for presentment for acceptance or payment.

Subsection 1 states the details of time for various situations. Subsection 2 defines "reasonable time". The new provisions of 2(a) and 2(b) state definite number of days for timely presentment of uncertified checks drawn and payable in the U.S. as follows:

(A) Timely presentment of a check as against the drawer is 30 days;

(B) Timely presentment of a check as against an indorser is 7 days. Thus, when this section is read in conjunction with 3-502 (1) (a), it is seen that an indorser of a check is fully discharged unless presentment is made within 7 days of his indorsement (unless delay is excused under 3-511). The theory is that most holders can get to bank at least once a week; and if they fail to do so, they should not be able to continue the secondary liability of an indorser.

Subsection 3 replaces GS 25-91 and 25-153 (NIL 85 and 146), and it recognizes that banks and other businesses close on Saturdays and other days.

Subsection 4 eliminates the provision of GS 25-81 (NIL 75) permitting presentment at a bank "at any time before the bank is closed" in cases where the drawer has no funds in the bank. The theory is that business with a bank should be conducted during banking hours.

Section 3—504. How Presentment Made.

(1) Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder.

(2) Presentment may be made

(a) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or

(b) through a clearing house; or

(c) at the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or pay nor anyone authorized to act for him is present or accessible at such place presentment is excused.

(3) It may be made

(a) to any one of two or more makers, acceptors, drawees or other payors; or

(b) to any person who has authority to make or refuse the acceptance or payment.

(4) A draft accepted or a note made payable at a bank in the United States must be presented at such bank.

(5) In the cases described in Section 4–210 presentment may be made in the manner and with the result stated in that section.

N.C. Comments

Prior Statutes: GS 25-78, 25-79, 25-83, 25-84, 25-15

This section simplifies the rules of how presentment is to be made.

By 1963 amendment to GS 25-79, N.C. adopted the "clearinghouse" provisions of Subsection (2)(b).

This section must be read in conjunction with 4-210 (Presentment by Notice of Item Not Payable By, Through or at a Bank; Liability of Secondary Parties).

Section 3—505. Rights of Party to Whom Presentment Is Made.

(1) The party to whom presentment is made may without dishonor require

(a) exhibition of the instrument; and

(b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and

(c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and

(d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.

(2) Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.

N.C. Comments

Prior Statutes: GS 25-80

This section expands and modifies the limited rules of the NIL on the rights of a party to whom presentment is made.

The section must be read in conjunction with 3-804 (Lost, Destroyed or Stolen Instruments).

Subsection 2. Time for presentment may be extended in some cases. Further study may indicate a need for revision as regards the relation between 3-502, 3-511, 3-503 and this subsection.

Section 3—506. Time Allowed for Acceptance or Payment.

(1) Acceptance may be deferred without dishonor until the close of the next business day following presentment. The holder may also in a good faith effort to obtain acceptance and without either dishonor of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day.

(2) Except as a longer time is allowed in the case of documentary drafts drawn under a letter of credit, and unless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor pending reasonable examination to determine whether it is properly payable, but payment must be made in any event before the close of business on the day of presentment.

N.C. Comments

Prior Statutes: GS 25-143

This section gives a little extra time for a party to whom an instrument is presented for payment or acceptance to decide what action he will take.

Also relevant to the time for action are:

5-112. Time Allowed for Honor Under Letter of Credit.
4-301. On Recovery By Bank of Tentative Settlements.

Several cases annotated under GS 25-143 have cited the section.

Section 3—507. Dishonor; Holder's Right of Recourse; Term Allowing Re-Presentment.

(1) An instrument is dishonored when

(a) a necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is seasonably returned by the midnight deadline (Section 4—301); or

(b) presentment is excused and the instrument is not duly accepted or paid.

(2) Subject to any necessary notice of dishonor and protest, the holder has upon dishonor an immediate right of recourse against the drawers and indorsers.

(3) Return of an instrument for lack of proper indorsement is not dishonor.

(4) A term in a draft or an indorsement thereof allowing a stated time for re-presentment in the event of any dishonor of the draft by nonacceptance if a time draft or by nonpayment if a sight draft gives the holder as against any secondary party bound by the term an option to waive the dishonor without affecting the liability of the secondary party and he may present again up to the end of the stated time.

N.C. Comments

Prior Statutes: GS 25-89, 25-156.

This section rewords the prior statutes, and there are no N.C. cases annotated under the above sections.

It appears that Subsection (2) may have some influence on 3-112 (Accrual of Cause of Action).

Subsection 3 is new. See Official Comment 2.

Section 3—508. Notice of Dishonor.

(1) Notice of dishonor may be given to any person who may be liable on the instrument by or on behalf of the holder or any party who has himself received notice, or any other party who can be compelled to pay the instrument. In addition an agent or bank in whose hands the instrument is dishonored may give notice to his principal or customer or to another agent or bank from which the instrument was received.

(2) Any necessary notice must be given by a bank before its midnight deadline and by any other person before midnight of the third business day after dishonor or receipt of notice of dishonor.

(3) Notice may be given in any reasonable manner. It may be oral or written and in any terms which identify the instrument and state that it has been dishonored. A misdescription which does not mislead the party notified does not vitiate the notice. Sending the instrument bearing a stamp, ticket or writing stating that acceptance or payment has been refused or sending a notice of debit with respect to the instrument is sufficient.

(4) Written notice is given when sent although it is not received.

(5) Notice to one partner is notice to each although the firm has been dissolved.

(6) When any party is in insolvency proceedings instituted after the issue of the instrument notice may be given either to the party or to the representative of his estate.

(7) When any party is dead or incompetent notice may be sent to his last known address or given to his personal representative.

(8) Notice operates for the benefit of all parties who have rights on the instrument against the party notified.

N.C. Comments

Prior Statutes: GS 25-97 through 25-115.

This section brings together in one section some nineteen sections of the NIL dealing with Notice of Dishonor. It eliminates many of the detailed requirements of the NIL.

Only one N.C. case was decided on this matter under the NIL. Piedmont Carolina Ry. v. Shaw, 223 F. 973 (1915) held notice of dishonor to one indorser was binding on other indorsers who discussed the matter among themselves.

Section 3—509. Protest; Noting for Protest.

(1) A protest is a certificate of dishonor made under the hand and seal of a United States consul or vice consul or a notary public or other person authorized to certify dishonor by the law of the place where dishonor occurs. It may be made upon information satisfactory to such person.

(2) The protest must identify the instrument and certify either that due presentment has been made or the reason why it is excused and that the instrument has been dishonored by nonacceptance or nonpayment.

(3) The protest may also certify that notice of dishonor has been given to all parties or to specified parties.

(4) Subject to subsection (5) any necessary protest is due by the time that notice of dishonor is due.

(5) If, before protest is due, an instrument has been noted for protest by the officer to make protest, the protest may be made at any time thereafter as of the date of the noting.

N.C. Comments

Prior Statutes: GS 25-160, 25-163. 25-165, 25-167.

This simplifies the mechanics of protest, and protest is not necessary except on drafts drawn or payable outside the U.S.

There are no N.C. cases citing the above statutes.

Section 3—510. Evidence of Dishonor and Notice of Dishonor.

The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

(a) a document regular in form as provided in the preceding section which purports to be a protest;

(b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

(c) any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

N.C. Comments

Prior Statutes: None under NIL.

Herein are stated some rules of evidence of proper dishonor and notice of dishonor. This new section will help clarify N.C. rules of evidence on this limited subject.

The Official Comments adequately explain the section.

Section 3—511. Waived or Excused Presentment, Protest or Notice of Dishonor or Delay Therein.

(1) Delay in presentment, protest or notice of dishonor is excused when the party is without notice that it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.

(2) Presentment or notice or protest as the case may be is entirely excused when

(a) the party to be charged has waived it expressly or by implication either before or after it is due; or

(b) such party has himself dishonored the instrument or has countermanded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid; or

(c) by reasonable diligence the presentment or protest cannot be made or the notice given.

(3) Presentment is also entirely excused when

(a) the maker, acceptor or drawee of any instrument except a documentary draft is dead or in insolvency proceedings instituted after the issue of the instrument; or

(b) acceptance or payment is refused but not for want of proper presentment.

(4) Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for nonpayment are excused unless in the meantime the instrument has been accepted.

(5) A waiver of protest is also a waiver of presentment and of notice of dishonor even though protest is not required.

(6) Where a waiver of presentment or notice or protest is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

N.C. Comments

Prior Statutes: GS 25-85 to 25-88; 25-116 to 25-123, 25-137, 25-154, 25-155, 25-158, 25-166.

Many sections of the NIL are brought together in one place, and the rules of "excuse" are simplified.

Note that "excused" used alone (Subsection 1) means temporary excuse; while "entirely excused" (Subsection 2 and 3) means that presentment, protest and notice are not required at all in some cases.

In commercial practice this section will be quite important; and the Official Comments should be examined.

Many N.C. cases are annotated under GS 25-85 to 25-88 and 25-116 to 25-122.

Section 3—601. Discharge of Parties.

(1) The extent of the discharge of any party from liability on an instrument is governed by the sections on

(a) payment or satisfaction (Section 3—603); or

(b) tender of payment (Section 3—604); or

(c) cancellation or renunciation (Section 3—605); or

(d) impairment of right of recourse or of collateral (Section 3—606); or

(e) reacquisition of the instrument by a prior party (Section 3—208); or

(f) fraudulent and material alteration (Section 3—407); or

(g) certification of a check (Section 3—411); or

(h) acceptance varying a draft (Section 3—412); or

(i) unexcused delay in presentment or notice of dishonor or protest (Section 3—502).

(2) Any party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money.

(3) The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument

(a) reacquires the instrument in his own right; or

(b) is discharged under any provision of this Article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral (Section 3—606).

N.C. Comments

Prior Statutes: GS 25-126 to 25-128

The various sections dealing with discharge of a party from "liability on an instrument" are widely scattered throughout Article 3. Subsection (1) contains an index to these sections.

Subsection (2) provides for a discharge between parties who deal with each other, but this does not mean that a party will be discharged as against those with whom he is not dealing. See also 3-602.

Subsection (3) provides for the discharge of all parties in some situations. Formerly, this was spoken of as "discharge of the instrument".

Since discharge is an important aspect of negotiable instruments, the Official Comments should be consulted.

Many N.C. cases are annotated under 25-126 to 25-128.

See 29 N.C. Law Rev. 307 for note on effect of discharge of prior party by statute of limitations on guarantor or surety under negotiable instruments law.

Section 3—602. Effect of Discharge Against Holder in Due Course.

No discharge of any party provided by this Article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument.

N.C. Comments

Prior Statutes: None under NIL

This short new section makes it clear that an HDC takes free of any discharge of which he has no notice when he takes the instrument.

One can be an HDC under 3-304 (1) (b) even though he knows of the discharge of some parties; but this section provides he cannot hold them liable on the instrument.

Section 3—603. Payment or Satisfaction.

(1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This subsection does not, however, result in the discharge of the liability

(a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or

(b) of a party (other than an intermediary bank or a payor bank which is not a depositary bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not consistent with the terms of such restrictive indorsement.

(2) Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee (Section 3—201).

N. C. Comments

Prior Statutes: GS 25-61, 25-95, 25-126, 25-128 and 25-178 to 184.

By this section several parts of the NIL are combined and reworded and some changes are made.

GS 25-178 to 25-184 on "payment for honor" have been eliminated as obsolete. There are no N.C. cases under these sections.

Subsection 1 changes the law by eliminating the requirement of GS 25-95 (NIL 88) that in order for a payor to be discharged by payment he must pay at a time when he does not know of adverse claims to the instrument. By this subsection a payor is free to pay despite his knowledge of another's claims unless (1) the claimant supplies adequate indemnity to the payor or (2) the claimant injoins payment. Thus, the burden of taking action to prevent payment is placed on the adverse claimant.

In two situations, however, a payor will not be discharged when he makes payment:

(a) when he in bad faith pays one who has taken through a thief (unless the taker has rights of HDC); or
(b) when certain parties pay contrary to a restrictive indorsement. See also 3-306.

Subsection 2 permits a stranger to pay an instrument with the consent of the holder, and such payor gets the rights of a transferee (3-201).

Section 3—604. Tender of Payment.

(1) Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interest, costs and attorney's fees.

(2) The holder's refusal of such tender wholly discharges any party who has a right of recourse against the party making the tender.

(3) Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender.

N.C. Comments

Prior Statutes: GS 25-76 and 25-127

Subsection 1 is new. It discharges one who makes full tender to the extent of all subsequent liability for interest, costs and attorney's fees.

The provision regarding attorney's fees may be somewhat troublesome in N.C. Despite the probable N.C. general rule that attorney's fees are not to be allowed as a part of costs, this section should be construed as written to save harmless any party who makes a tender of full payment. See also N.C. Comments to 3-106(e).

Official Comments 2 and 3 adequately explain subsections (2) and (3).

See Dry v. Reynolds, 205 N.C. 571, 172 S.E. 351 (1934) which held a deposit in a bank sufficient to pay a note payable at a bank may be sufficient tender (but such tender would discharge only parties secondarily liable on note, and it would not discharge the maker and surety on note).

Section 3—605. Cancellation and Renunciation.

(1) The holder of an instrument may even without consideration discharge any party

(a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or

(b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.

(2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.

N.C. Comments

Prior Statutes: GS 25-54 25-126(3), 25-127(2), 25-129 and 25-130 (48, 119(3), 120(2), 122, 123).

Subsection (1)(a) expands GS 25-54 (NIL 48) by stating additional methods by which a party may be discharged by acts done to or on the instrument. These listed methods are exclusive.

Subsection (1)(b) states that the parties may give and receive a written and signed renunciation. Apparently, an oral renunciation may not be proved. This is the rule of GS 25-129. Page Trust Co. v. Lewis, 200 N.C. 286, 156 S.E. 504 (1931), held verbal renunciation is ineffectual.

See 32 N.C. Law Rev. 210 for note on renunciation by holder conditioned on holder's death.

Section 3—606. Impairment of Recourse or of Collateral.

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of recourse the holder preserves

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others.

N.C. Comments

Prior Statutes: GS 25-127

Subsection (1)(a) provides for the discharge of a party (secondary or surety) when without the party's consent the holder releases certain third persons.

The "except" clause makes it clear that the release provisions apply to the release of a third party by inaction (failure or delay in presentment, etc.) as well as to an active release or covenant not to sue.

Subsection (1)(b) gives a discharge in some cases when collateral is impaired.

Subsection 2 lists the rights that are preserved by an express reservation of rights.

The following N.C. case is affirmed by this section:

Lumber Co. v. Buchanan, 192 771, 136 S.E. 129 (1926). Held: Where holder releases maker of note, he discharges indorsers.

See 29 N.C. Law Rev. for note dealing with effect of discharge of prior party by statute of limitations on guarantor or surety on negotiable instrument.

Section 3—701. Letter of Advice of International Sight Draft.

(1) A "letter of advice" is a drawer's communication to the drawee that a described draft has been drawn.

(2) Unless otherwise agreed when a bank receives from another bank a letter of advice of an international sight draft the drawee bank may immediately debit the drawer's account and stop the running of interest pro tanto. Such a debit and any resulting credit to any account covering outstanding drafts leaves in the drawer full power to stop payment or otherwise dispose of the amount and creates no trust or interest in favor of the holder.

(3) Unless otherwise agreed and except where a draft is drawn under a credit issued by the drawee, the drawee of an international sight draft owes the drawer no duty to pay an unadvised draft but if it does so and the draft is genuine, may appropriately debit the drawer's account.

N.C. Comments

Prior Statutes: None

The Official Comment reasonably explains this rather esoteric instrument. There are no known N.C. cases on the matter.

Section 3--801. Drafts in a Set.

(1) Where a draft is drawn in a set of parts, each of which is numbered and expressed to be an order only if no other part has been honored, the whole of the parts constitutes one draft but a taker of any part may become a holder in due course of the draft.

(2) Any person who negotiates, indorses or accepts a single part of a draft drawn in a set thereby becomes liable to any holder in due course of that part as if it were the whole set, but as between different holders in due course to whom different parts have been negotiated the holder whose title first accrues has all rights to the draft and its proceeds.

(3) As against the drawee the first presented part of a draft drawn in a set is the part entitled to payment, or if a time draft to acceptance and payment. Acceptance of any subsequently presented part renders the drawee liable thereon under subsection (2). With respect both to a holder and to the drawer payment of a subsequently presented part of a draft payable at sight has the same effect as payment of a check notwithstanding an effective stop order (Section 4—407).

(4) Except as otherwise provided in this section, where any part of a draft in a set is discharged by payment or otherwise the whole draft is discharged.

N.C. Comments

Prior Statutes: GS 25-185 to 25-190.

This section simply combines and rewords several sections of NIL. Basically, the section adopts the rules of the NIL, however, there is one bit of new matter. The last sentence of Subsection 3 states a new rule for rights and liabilities of parties when the drawee pays both parts of the Draft. See Official Comment 2.

(The whole area covered is of relatively minor importance because drafts in a set are not widely used in domestic commerce.)

Section 3—802. Effect of Instrument on Obligation for Which It Is Given.

(1) Unless otherwise agreed where an instrument is taken for an underlying obligation

(a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.

(2) The taking in good faith of a check which is not postdated does not of itself so extend the time on the original obligation as to discharge a surety.

N.C. Comments Prior Statutes: None

As explained in the official comment, this new section is designed to express several rules concerning the effect of a negotiable instrument on the underlying obligation for which it is given. This is an important section, and it possibly changes the prior N.C. case law.

Subsections 1(a) and 1(b):

These two subsections distinguish situations where (a) the underlying obligor is completely or pro tanto discharged from any further liability on the underlying obligation and (b) where the obligation is merely suspended pro tanto.

Subsection 1(a):

Under 1(a) two conditions must exist before the obligor is discharged from the underlying obligation: (1) a bank must be liable on the instrument and (2) the obligor must not be liable on the instrument. A typical example is the cashier's check where a bank is liable and the obligor is not liable.

Where an obligee accepts a cashier's check procured by the obligor, the obligor is discharged from the underlying obligation "unless otherwise agreed". If the instrument is not paid by the issuing bank due to insolvency, then the risk of such loss will fall on the obligee who took the check, rather than on the obligor who procured it.

In actual practice such situation probably will never be presented, because of deposit insurance and because of the fact that the courts can probably easily find that it was "otherwise agreed" (even in a case of absolute silence on the matter) that the obligor was to remain liable on the underlying contract until an actual payment of the cashier's check.

Such a finding would for practical purposes permit a continuation of prior N.C. decisions that made a discharge of the underlying debt dependent on the intent of the parties: (1) Andrews-Cooper Lumber Co. v. Hayworth, 205 NC 585 (1934) held there was no agreement that the cashier's check was to be in payment; (2) South v. Sisk, 205 NC 655 (1934) held that there was such agreement, and therefore the obligor was discharged on the underlying obligation even though the issuing bank did not pay the check because of insolvency.

Suggested Modification: Subsection 1(b) should be amended by adding the word"if" before the word "there" in the second line. This will clarify what might otherwise be a confusing ambiguity. By adding the word "if" it will be clear that there are two conditions precedent to the obligor's complete discharge on the underlying obligation: (1) a bank is liable on the instrument and (2) the obligor is not liable on the instrument. Wisconsin has adopted this slight modification.

Subsection 1(b):

This section adopts the view that in cases not covered by Subsection 1(a) the underlying obligation is merely suspended pro tanto

pending a determination of whether the instrument given on the obligation will itself be paid or dishonored. N.C. has adopted the "suspension" approach. Costner v. Fisher, 104 NC 392 (1889); Bank v. Bridges, 98 NC 67 (1887).

Actually the new "suspension" section is somewhat ambiguous as it is not clear what remedies would be available to one holding an instrument that was "due" but which had not been "dishonored". The first sentence says that "the obligation is suspended until the instrument is due, or if it is payable on demand until its presentment". The second sentence says that "If the instrument is dishonored, action may be maintained on either the instrument or the underlying obligation". Thus, it is not entirely clear what rights a holder of a "due" though not "dishonored" instrument will have on the underlying contract. However, official comment 3 strongly implies (1) that the first sentence on "suspended" applies primarily to a suspension of the statute of limitations, and that (2) action on the underlying obligation is suspended until the instrument is "dishonored". Thus, in both theory and practice, the statute of limitations under the first sentence may begin to run again ("due" test) before the time that the holder may institute an action on the instrument or on the underlying contract ("dishonor" test). However, no modification is suggested on this item.

Suggested modification: Another part of subsection 1(b) does need a clarifying modification. 3-802 (1) (b), the last phrase ("discharge of the underlying obligor on the instrument also discharges him on the underlying obligation"), has been the subject of some controversy. See Hawkland, Commercial Paper, Uniform Commercial Code Practice Handbook #2 (ALI/ABA) (1959). No effort is here made to examine this controversy; and if N.C. does adopt the UCC, the principle of uniformity would seem to dictate that we make no substantive modification in this phrase dealing with the effect of discharge of the instrument as giving a discharge on the underlying obligation. However, some ambiguity could be avoided by adding at the end of the last phrase of 1(b) the words: "...to the extent of his discharge on the instrument".

This clarifying addition will make it clear that a full or partial discharge on the instrument will discharge the underlying obligation only to the extent that the obligor is discharged on the instrument.

Example - if a $100 check of a third person has been indorsed by the obligor to the obligee in satisfaction of $100 on a $150 obligation, and if the indorser is discharged on the check as a secondary party due to the failure of the obligee to make a timely presentment to the drawee of the check, it is apparent that the obligor should be discharged of the underlying obligation only to the extent of $100. Yet, a literal reading of the last phrase would imply that the obligee was discharged on the entire underlying obligation of $150. Even the official comment contains this same unwarranted implication by stating: "If, however, the original obigor has been discharged on the instrument (see Section 3-601) he is also discharged on the original obligation".

Section 3—803. Notice to Third Party.

Where a defendant is sued for breach of an obligation for which a third person is answerable over under this Article he may give the third person written notice of the litigation, and

the person notified may then give similar notice to any other person who is answerable over to him under this Article. If the notice states that the person notified may come in and defend and that if the person notified does not do so he will in any action against him by the person giving the notice be bound by any determination of fact common to the two litigations, then unless after seasonable receipt of the notice the person notified does come in and defend he is so bound.

N.C. Comments

Prior Statutes: None under NIL. See GS 1-73.

This section is a procedural one designed to permit parties defendant to give notice of a pending action to any party who is answerable to the party defendant.

It does not actually permit a full scale "vouching in" of parties defendant. However, the limited "vouching in" does permit an application of "res judicata" on matters common to the pending action and a later action in a subsequent action by the first defendant against the person notified.

This procedure is intended to supplement and not replace existing procedures. See GS 1-73 (new parties by order of court) which permits a defendant to request a joinder of other parties.

Section 3—804. Lost, Destroyed or Stolen Instruments.

The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

N.C. Comments

Prior Statutes: None under NIL, but see Comment.

This section apparently makes no change in N.C. law. While N.C. has no statute dealing specifically with suit on a lost, destroyed, or stolen instruments, prior case law has recognized that suit may be brought on such instruments and that the obligor is entitled to indemnity protection. See old cases collected in N.C. Dig., Lost Instruments Secs. 13-18, 24.

One of the most recent N.C. cases on lost instrument is Wooten v. Bell, 196 N.C. 654 (1929) which held (1) that action may be brought on a lost note; (2) that defendant is at times entitled to indemnity; and (3) that recovery cannot be had on a note on which taxes are due.

This new section is similar to GS 98-19. (Replacement of stolen, lost or destroyed State or municipal bonds; indemnity bond) which provides that the issuer of governmental bonds is entitled to an indemnity in double the amount of any bonds to be issued to replace lost, stolen, or destroyed bonds.

The requirement of double indemnity is compulsory under GS 98-19; whereas 3-804 permits the judge to determine whether and in what amount any indemnity should be. Permitting the judge to have discretion on the matter of indemnity seems preferable, because in many cases the obligor will not need any indemnity to be fully protected. New York, however, has amended 3-804 to make a double indemnity compulsory as is done in GS 98-19 for governmental bonds. Such amendment appears to be unwarranted. Prior N.C. cases have made indemnity discretionary except where special statute made it mandatory as in GS 98-19.

Other N.C. statutes relating to lost instruments are:

55-91. Lost or destroyed certificate of stock;
25-167 (NIL 160). Protest where bill is lost;
53-58. Photostatic copies of lost items, presentation of original by innocent holder.
NOTE: Apparently neither the U.C.C. nor any existing N.C. statute or case law govern the rights of an owner or holder to demand a new negotiable instrument in place of a lost, destroyed or stolen one.

Cross-Reference: 3-301 permits any holder, whether or not he also be an owner, to sue in his own name, but 3-804 permits only an owner to enforce a lost, destroyed, or stolen instrument.

Section 3—805. Instruments Not Payable to Order or to Bearer.

This Article applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this Article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.

N.C. Comments

Prior Statutes: None

As stated in the Official Comment this new section is designed to permit money instruments that merely lack the words "order" or "bearer" to be treated as negotiable instruments subject to the provisions of Article 3; except that there can be no holder in due course of such instruments. Some "checks" omitting the word "order" are used in N.C. today.

Section 4—101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Bank Deposits and Collections.

Section 4—102. Applicability.

(1) To the extent that items within this Article are also within the scope of Articles 3 and 8, they are subject to the provisions of those Articles. In the event of conflict the provisions of this Article govern those of Article 3 but the provisions of Article 8 govern those of this Article.

(2) The liability of a bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

N. C. Comments

Prior Statutes: None

Subsection (1):

This recognizes that some items may be controlled in part by Articles 3, 4, and 8. In the event of any conflict Article 4 governs Article 3; but Article 8 governs Article 4.

Because negotiable instruments constitute the bulk of bank collections, there will be much overlap between Articles 3 and 4. However, this Article is not limited to the collection of "negotiable instruments".

Subsection (2):

This states a conflict of laws rule that the liability of a bank will be determined by the law of its situs. Thus, a bank need operate under only one law.

See 4-103 for variation by agreement.

See 4-104 which states:

"'Item' means any instrument for the payment of money even though it is not negotiable but does not include money."

Because Article 4 is not limited to negotiable instruments, it greatly expands the area of banking transactions that will be covered by more easily ascertainable rules. In the past nearly all statutes in N. C. governing the collection process have applied only to negotiable instruments.

Section 4—103. Variation by Agreement; Measure of Damages; Certain Action Constituting Ordinary Care.

(1) The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

(2) Federal Reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled.

(3) Action or non-action approved by this Article or pursuant to Federal Reserve regulations or operating letters constitutes the exercise of ordinary care and, in the absence of special instructions, action or non-action consistent with clearing house rules and the like or with a general banking usage not disapproved by this Article, prima facie constitutes the exercise of ordinary care.

(4) The specification or approval of certain procedures by this Article does not constitute disapproval of other procedures which may be reasonable under the circumstances.

(5) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not have been realized by the use of ordinary care, and where there is bad faith it includes other damages, if any, suffered by the party as a proximate consequence.

N. C. Comments

Prior Statutes: None - Sections 5 and 6 of ABA Bank Collection Code

A bank may not disclaim its responsibility for its own lack of good faith or failure to exercise ordinary care; but generally other express or implied agreements will be recognized.

Flexibility is permitted by Subsection (4) which recognizes that procedures not specifically approved by Article 4 may nevertheless be reasonable.

Subsection (5) states the usual rule on the measure of damages for (1) mere negligence and (2) for bad faith action or inaction.

Five pages of Official Comments elaborate on the section.

Section 4—104. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires

(a) "Account" means any account with a bank and includes a checking, time, interest or savings account;

(b) "Afternoon" means the period of a day between noon and midnight;

(c) "Banking day" means that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions;

(d) "Clearing house" means any association of banks or other payors regularly clearing items;

(e) "Customer" means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank;

(f) "Documentary draft" means any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft;

(g) "Item" means any instrument for the payment of money even though it is not negotiable but does not include money;

(h) "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later;

(i) "Properly payable" includes the availability of funds for payment at the time of decision to pay or dishonor;

(j) "Settle" means to pay in cash, by clearing house settlement, in a charge or credit or by remittance, or otherwise as instructed. A settlement may be either provisional or final;

(k) "Suspends payments" with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over or that it ceases or refuses to make payments in the ordinary course of business.

(2) Other definitions applying to this Article and the sections in which they appear are:

"Collecting bank"	Section 4—105.
"Depositary bank"	Section 4—105.
"Intermediary bank"	Section 4—105.
"Payor bank"	Section 4—105.
"Presenting bank"	Section 4—105.
"Remitting bank"	Section 4—105.

(3) The following definitions in other Articles apply to this Article:

"Acceptance"	Section 3—410.
"Certificate of deposit"	Section 3—104.
"Certification"	Section 3—411.
"Check"	Section 3—104.
"Draft"	Section 3—104.
"Holder in due course"	Section 3—302.
"Notice of dishonor"	Section 3—508.
"Presentment"	Section 3—504.
"Protest"	Section 3—509.
"Secondary party"	Section 3—102.

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article

N. C. Comments — Prior Statutes: None

The definitions given will make no major changes in N. C. law; however, a familiarity with the definitions is necessary to a reasonable comprehension of the U.C.C.

Section 4—105. "Depositary Bank"; "Intermediary Bank"; "Collecting Bank"; "Payor Bank"; "Presenting Bank"; "Remitting Bank".

In this Article unless the context otherwise requires:

(a) "Depositary bank" means the first bank to which an item is transferred for collection even though it is also the payor bank;

(b) "Payor bank" means a bank by which an item is payable as drawn or accepted;

(c) "Intermediary bank" means any bank to which an item is transferred in course of collection except the depositary or payor bank;

(d) "Collecting bank" means any bank handling the item for collection except the payor bank;

(e) "Presenting bank" means any bank presenting an item except a payor bank;

(f) "Remitting bank" means any payor or intermediary bank remitting for an item.

N. C. Comments — Prior Statutes: None

The definitions in general exclude a bank to which an item is issued.

The term "payor bank" includes a drawee bank. Whether "payor bank" includes a bank "at" which an instrument is merely payable will depend on which alternative is adopted under 3-121 (Instruments Payable at Bank). If either Alternative B of 3-121 or the third alternative adopted in Virginia is adopted in N. C., then a bank "at" which an instrument is payable will not be a "payor bank" because the instrument will not be an "order" on it. Such bank will be a "presenting bank" or a "collecting bank". See Official Comment 2.

Suggested Possible Amendment:

Further study and consultation with the Permanent Editorial Board may reveal that 4-105(b), 3-120, 3-121, 4-204(2)(a) and other sections of Articles 3 and 4 should be amended to more clearly describe:

(1) the exact nature of an instrument payable "through" or "at" a bank; and

(2) the technical rights and duties of the bank in question.

Section 4—106. Separate Office of a Bank.

A branch or separate office of a bank [maintaining its own deposit ledgers] is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders shall be given under this Article and under Article 3.

Note: *The words in brackets are optional.*

N. C. Comments

Prior Statutes: No uniform law, but see BCC 1. See also G.S. 53-62

The section covers the problem of what branches or separate offices of a bank should be treated as separate banks for stated purposes.

OPTION: Notice that optional wording is set forth in brackets. No recommendation is made here.

Optional language adopted in:	Optional language omitted in:
Alaska	California
Arkansas	Connecticut
Georgia (originally, now dropped	Georgia (by amentment)
Kentucky	Indiana
Maine	Illinois
Missouri	Massachusetts
Nebraska	Maryland
Oregon	Michigan
Tennessee	Montana
Virginia	New Hampshire
West Virginia	New Mexico
Wisconsin	New Jersey
	New York
	Ohio
	Oklahoma
	Oregon
	Pennsylvania
	Rhode Island

Official Comment 5 states in summary: "In those states where the maintenance by a branch of its own deposit ledgers will serve as a satisfactory standard (of separateness), the bracketed words should be retained. In those states where these words will cause more

problems than benefits, they may be deleted. Insofar as this latter rule allows extra time to banks maintaining branches where such extra time is not needed, it is not ideal. However, it has not been found possible to find a rule that will meet this problem and will work in all cases. Further, it is highly unlikely that large banks maintaining branches will needlessly take advantage of extra time under this rule."

Section 4—107. Time of Receipt of Items.

(1) For the purpose of allowing time to process items, prove balances and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of two P.M. or later as a cut-off hour for the handling of money and items and the making of entries on its books.

(2) Any item or deposit of money received on any day after a cut-off hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.

N. C. Comments

Prior Statutes: No uniform law. But see: 53-54 (Transactions not performed during banking hours); 53-77 (Governor empowered to proclaim banking holidays); 53-77.1 (Saturday closing of banks); 53-77.2 (Additional provision for operation of banks on five-day week basis).

This permits items received after the earlier of (A) the 2:00 p.m. "cut-off" or (B) the close of the banking day to be treated as received at the opening of the next banking day. EXAMPLE: Banks that remain open on Friday until 6:00 p.m. and are closed on Saturday, may treat items received after 2:00 p.m. Friday as being received on the next Monday morning.

This provision is not mandatory on the banks.

Section 4—108. Delays.

(1) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment may, in the case of specific items and with or without the approval of any person involved, waive, modify or extend time limits imposed or permitted by this Act for a period not in excess of an additional banking day without discharge of secondary parties and without liability to its transferor or any prior party.

(2) Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this Act or by instructions is excused if caused by interruption of communication facilities, suspension of payments by another bank, war, emergency conditions or other circumstances beyond the control of the bank provided it exercises such diligence as the circumstances require.

N. C. Comments

Prior Statutes: No prior uniform law.

The section permits two delays to be harmless:

Subsection (1):

This subsection gives an extra day for timely action in securing payment. The extra day is permitted only when bank acts in good faith. Thus, it cannot be exercised when a customer instructs otherwise.

Since time may be extended "without discharge of secondary parties" this section will extend the time for presentment or payment under 3-503 and 3-506, because Article 4 controls Article 3.

Subsection (2):

This subsection permits even further delay to be harmless when certain emergencies cause the delay.

Though this subsection does not include a specific "without discharge of secondary parties provision" as in Subsection (1), such excused delay will not cause a discharge of secondary parties under 3-501 and 3-511.

Section 4—109. Process of Posting.

The "process of posting" means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank:

(a) verification of any signature;

(b) ascertaining that sufficient funds are available;

(c) affixing a "paid" or other stamp;

(d) entering a charge or entry to a customer's account;

(e) correcting or reversing an entry or erroneous action with respect to the item.

N. C. Comments

Prior Statutes: No uniform act.

This section simply defines "process of posting" to mean a bank's "usual procedure" of performing routine bookkeeping functions.

Completion of the "process of posting" is one of the measuring points for determining:

(a) "final payment of item by payor bank" under 4-213(1)(c) and

(b) when knowledge, notice, stop order, legal process and

set-off come too late to affect a payor banks's right or duty to pay an item under 4-303(1)(d).

NOTE:

A "usual procedure" test for determining a fixed time will naturally be productive of future litigation; and yet it seems impossible to legislate a more concrete test for certain cut-off times. Thus, a court must construe this section loosely to achieve substantive justice between the parties when this section and the other sections it affects are in issue.

Section 4—201. Presumption and Duration of Agency Status of Collecting Banks and Provisional Status of Credits; Applicability of Article; Item Indorsed "Pay Any Bank".

(1) Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final (subsection (3) of Section 4—211 and Sections 4—212 and 4—213) the bank is an agent or sub-agent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank such as those resulting from outstanding advances on the item and valid rights of setoff. When an item is handled by banks for purposes of presentment, payment and collection, the relevant provisions of this Article apply even though action of parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(2) After an item has been indorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder

(a) until the item has been returned to the customer initiating collection; or

(b) until the item has been specially indorsed by a bank to a person who is not a bank.

N. C. Comments

Prior Statutes: No uniform law - See BCC 2 and 4.

The major emphasis of this section is in the last sentence of Subsection (1), which states that the rules of Article 4 apply regardless of whether a bank in the collection chain is an agent or an owner.

For residual areas not covered by specific rules, questions of agency or ownership status may still be important. A partial solution to these vital agency-ownership questions is found in sentences 1 and 2 of Subsection (1) which in effect state:

(1) A bank is to be treated as an agent or sub-agent of the owner unless a contrary intent clearly appears.

(2) This agency relationship continues until settlements become final.

(3) Settlements are only provisional unless a contrary intent clearly appears.

(4) The form of indorsement or lack of indorsement does not affect agency or ownership status.

(5) Even though bank is a mere agent, it will have certain rights in the instrument (See 4-208 on security interest

and 4-209 on bank as HDC).

Generally, this section is consistent with prevailing law and practice in the U. S. today; and it will help to clarify some uncertain areas of North Carolina law. See several N. C. cases on agency problem digested in N. C. Digest, Banks and Banking, Secs. 156 and 159.

Subsection (2) states the rule governing the rights of parties to an instrument containing words "pay any bank" or the like.

Three pages of comment elaborate on this fundamental section.

Section 4—202. Responsibility for Collection; When Action Seasonable.

(1) A collecting bank must use ordinary care in

(a) presenting an item or sending it for presentment; and

(b) sending notice of dishonor or non-payment or returning an item other than a documentary draft to the bank's transferor [or directly to the depositary bank under subsection (2) of Section 4—212] (*see note to Section 4—212*) after learning that the item has not been paid or accepted, as the case may be; and

(c) settling for an item when the bank receives final settlement; and

(d) making or providing for any necessary protest; and

(e) notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(2) A collecting bank taking proper action before its midnight deadline following receipt of an item, notice or payment acts seasonably; taking proper action within a reasonably longer time may be seasonable but the bank has the burden of so establishing.

(3) Subject to subsection (1) (a), a bank is not liable for the insolvency, neglect, misconduct, mistake or default of another bank or person or for loss or destruction of an item in transit or in the possession of others.

N. C. Comments

Prior Statutes: No uniform law. See BCC 5 and 6

Subsection (1):

This simply states a bank's general duty to use ordinary care.

Permissive Alternative: Since direct return procedures are used in N. C., the bracketed phrase should be included in 4-202 (1)(b). See note to 4-212 on desirability of permitting direct return procedures.

Subsection (2):

This prescribes the general time for seasonable action. "Midnight deadline" is defined in 4-104 (1)(h).

Drafting Note: A comma can be added after "seasonable" in line 4.

This subsection applies only to "collecting banks". Time limits for "payor banks" appear in 4-301 and 4-302.

Subsection (3):

This adopts the so-called "Massachusetts" rule of agency under which a collecting agent bank is responsible only for its own negligence and not that of sub-agents. This is the present N. C. rule of agency for bank collections.

Section 4—203. Effect of Instructions.

Subject to the provisions of Article 3 concerning conversion of instruments (Section 3—419) and the provisions of both Article 3 and this Article concerning restrictive indorsements only a collecting bank's transferor can give instructions which affect the bank or constitute notice to it and a collecting bank is not liable to prior parties for any action taken pursuant to such instructions or in accordance with any agreement with its transferor.

N. C. Comments

Prior Statutes: No uniform law. See BCC 2.

This section adopts a "chain of command" theory which makes it unnecessary for an intermediary or collecting bank to determine whether its immediate transferor is authorized to give particular instructions.

Basically, the section requires such bank to follow only the instructions of its immediate transferor; and the bank is protected when it does so. There are two exceptions when a bank is not necessarily safe in following only the orders of its immediate transferor:

(a) conversion situations under 3-419; and

(b) restrictive indorsement problems under Articles 3 and 4. (See 3-205, 3-206, 3-419, 3-603, 4-205.)

The section does not apply to "payor banks" which will have greater duties under other provisions of Article 3 and 4.

Section 4—204. Methods of Sending and Presenting; Sending Direct to Payor Bank.

(1) A collecting bank must send items by reasonably prompt method taking into consideration any relevant instructions, the nature of the item, the number of such items on hand, and the cost of collection involved and the method generally used by it or others to present such items.

(2) A collecting bank may send

(a) any item direct to the payor bank;

(b) any item to any non-bank payor if authorized by its transferor; and

(c) any item other than documentary drafts to any non-bank payor, if authorized by Federal Reserve regulation or operating letter, clearing house rule or the like.

(3) Presentment may be made by a presenting bank at a place where the payor bank has requested that presentment be made.

N. C. Comments

Prior Statutes: No uniform law. See BCC 6 and GS 53-58

Subsection (1):

This simply states a general rule demanding reasonably prompt forwarding of items, taking into account all relevant factors.

Subsection (2):

(a) continues the rule of G.S. 53-58 permitting direct presentment to a payor bank.

Suggested amendment: Subsequent study may reveal that this subsection needs to be expanded to expressly approve other direct presentments for instruments payable "at" or "through" a bank.

(b) & (c) permit direct presentment to non-bank payors only when such direct presentment is authorized.

Suggested amendments: 1: The word "Bank" should be omitted from the end of the title, because the direct sending provisions of Subsection (2) apply also to non-banks.
2: The word "direct" should be added before "to" in both Subsections 2(b) and (c), to clarify their exact meaning.

Subsection (2):

This prescribes the general time for seasonable action. "Midnight deadline" is defined in 4-104 (1)(h).

Drafting Note: A comma can be added after "seasonable" in line 4.

This subsection applies only to "collecting banks". Time limits for "payor banks" appear in 4-301 and 4-302.

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N. C. Comments

Prior Statutes: No uniform law. See BCC 2.

This section adopts a "chain of command" theory which makes it unnecessary for an intermediary or collecting bank to determine whether its immediate transferor is authorized to give particular instructions.

Basically, the section requires such bank to follow only the instructions of its immediate transferor; and the bank is protected when it does so. There are two exceptions when a bank is not necessarily safe in following only the orders of its immediate transferor:

(a) conversion situations under 3-419; and

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The section does not apply to "payor banks" which will have greater duties under other provisions of Article 3 and 4.

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(b) any item to any non-bank payor if authorized by its transferor; and

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(3) Presentment may be made by a presenting bank at a place where the payor bank has requested that presentment be made.

N. C. Comments

Prior Statutes: No uniform law. See BCC 6 and GS 53-58

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Suggested amendments: 1: The word "Bank" should be omitted from the end of the title, because the direct sending provisions of Subsection (2) apply also to non-banks.
2: The word "direct" should be added before "to" in both Subsections 2(b) and (c), to clarify their exact meaning.

Section 4—205. Supplying Missing Indorsement; No Notice from Prior Indorsement.

(1) A depositary bank which has taken an item for collection may supply any indorsement of the customer which is necessary to title unless the item contains the words "payee's indorsement required" or the like. In the absence of such a requirement a statement placed on the item by the depositary bank to the effect that the item was deposited by a customer or credited to his account is effective as the customer's indorsement.

(2) An intermediary bank, or payor bank which is not a depositary bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor.

N. C. Comments

Prior Statutes: None

Subsection (1):

This subsection permits a missing indorsement to be supplied by a depositary bank (i.e., "the first bank to which an item is transferred for collection", 4-105(a)).

Presumably, subsequent banks that take "negotiable instruments" containing either of the two authorized types of substitute indorsements will be "holders" and may be HDC's under 4-208 and 4-209. Also see 4-206 on a "transfer" that is not a "negotiation".

Note that a depositary bank may only supply an "indorsement of the customer which is necessary for title". Thus:

(1) On bearer paper, (for which no indorsement is necessary to transfer title) the contract of a customer may not be enlarged to those of an indorser (3-414) by the indorsement of the bank. However, he still makes the warranties of 3-417(2) and 4-207, and

(2) Also the bank is not authorized to supply the indorsement of any part prior to the customer who presents the item for collection.

(3) Furthermore, it appears that this section does not apply to indorsement of one who "cashes" a check.

(Possible Amendment Note: There is some doubt whether a signature is ever really necessary to pass title (3-201); and further study may reveal that Subsection (1)(a) needs to be amended.)

Subsection (2):

This in effect restates the rule of 3-206 on the limited effect of restrictive indorsements. The two sections differ as follows:

(1) 3-206 applies only to negotiable instruments, while 4-205 applies to any "item".

(2) 3-206(2) adds the words "or the person presenting for payment".

Any agreed method which identifies the transferor bank is sufficient for the item's further transfer to another bank.

N. C. Comments Prior Statutes: None

This permits a transfer without the indorsement of the transferor. However, it does not mean that a mere identification of the transferor is the equivalent of an indorsement so as to have a negotiation of a negotiable instrument. Thus, a bank taking under this informal procedure cannot be a holder unless the instrument is bearer paper.

Section 4—207. Warranties of Customer and Collecting Bank on Transfer or Presentment of Items; Time for Claims.

(1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that

(a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

(b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

(iii) to an acceptor of an item if the holder in due course took the item after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

(c) the item has not been materially altered, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee; or

(iii) to the acceptor of an item with respect to an alteration made prior to the acceptance if the holder in due course took the item after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or

(iv) to the acceptor of an item with respect to an alteration made after the acceptance.

(2) Each customer and collecting bank who transfers an item and receives a settlement or other consideration for it warrants to his transferee and to any subsequent collecting bank who takes the item in good faith that

(a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

(b) all signatures are genuine or authorized; and

(c) the item has not been materially altered; and

(d) no defense of any party is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted item.

In addition each customer and collecting bank so transferring an item and receiving a settlement or other consideration engages that upon dishonor and any necessary notice of dishonor and protest he will take up the item.

(3) The warranties and the engagement to honor set forth in the two preceding subsections arise notwithstanding the absence of indorsement or words of guaranty or warranty in the transfer or presentment and a collecting bank remains liable for their breach despite remittance to its transferor. Damages for breach of such warranties or engagement to honor shall not exceed the consideration received by the customer or collecting bank responsible plus finance charges and expenses related to the item, if any.

(4) Unless a claim for breach of warranty under this section is made within a reasonable time after the person claiming learns of the breach, the person liable is discharged to the extent of any loss caused by the delay in making claim.

N. C. Comments

Prior Statutes: No uniform law. See BCC 4.

Subsections (1), (2), and (3):

The warranty provisions of these subsections are extensive; and they apply to both negotiable and non-negotiable instruments. By comparison the substantially similar warranties of 3-417 apply only to negotiable instruments.

Note that the warranties of this section apply regardless of the type of indorsement or whether there was an indorsement. This differs from 3-417 which varies the quantity of warranties according to the type of indorsement.

A detailed analysis of the elaborate warranty provisions of Subsections (1), (2) and (3) is beyond the scope of this preliminary commentary. However, for those who wish to more fully explore this section, and related 3-417, reference is made to the comprehensive N. J. Study pp 308-314, 391-393; and to Clarke, Bailey, and Young, Bank Deposits and Collections - U.C.C. (1963) pp. 130-143.

In addition to providing for various warranties, the last sentence of Subsection (2) creates a contract for each customer and collecting bank that transfers an item and receives consideration. Each such party "engages that upon dishonor and any necessary notice of dishonor and protest he will take up the item".

The "take up" requirement of Subsection (2) should be compared with the limited damages provision of Subsection (3).

Subsection (4):

This subsection grants a limited discharge to a warrantor who is damaged by unreasonable delay of a warrantee in making claim for breach of warranty.

Section 4—208. Security Interest of Collecting Bank in Items, Accompanying Documents and Proceeds.

(1) A bank has a security interest in an item and any accompanying documents or the proceeds of either

(a) in case of an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied;

(b) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of charge-back; or

(c) if it makes an advance on or against the item.

(2) When credit which has been given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(3) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents and proceeds. To the extent and so long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues and is subject to the provisions of Article 9 except that

(a) no security agreement is necessary to make the security interest enforceable (subsection (1) (b) of Section 9—203); and

(b) no filing is required to perfect the security interest; and

(c) the security interest has priority over conflicting perfected security interests in the item, accompanying documents or proceeds.

N. C. Comments

Prior Statutes: No uniform law. See BCC 2

Subsection (1):

This important section gives a bank a security interest in various items; thus enabling a bank to be protected against other claims against items and proceeds; also the security interest will permit a bank to be a holder for value and perhaps an HDC under 4-209.

Because the HDC problem is one of the most important covered by 4-208 and 4-209, the two sections are considered together here. By reading these two sections together, it is clear that even a collecting bank may possibly be an HDC; and often the most important facit of the HDC issue is whether the bank is a holder for value.

Past N. C. decisions have been rather vague in determining whether a collecting bank can be an HDC:

(a) A bank taking for collection is not an HDC. Insurance Co. v. Cotton Mill Co., 187 N.C. 233, 121 S.E. 439 (1924); Bank v. Rochamora, 193 N.C. 1, 136 S.E. 259 (1927).

(b) A bank may be HDC of draft even though custom permits a charge back against depositor. Lumber Co. v. Childerhouse, 167 N.C. 34, 83 S.E. 22 (1914).

(c) Bank may be HDC of check even when it charges back against depositors' account if amounts against which charge back is made are later removed when items representing amounts are returned unpaid. Standard Trust Co. v. Commercial Bank, 240 F303 (1917).

(d) A bank which reserves a right to charge back, by express agreement or one implied from at course of dealing, and not be reason of liability on the indorsement is an agent for collection and not a purchaser. Finance Co. v. Amazon Cotton Mills, 187 N.C. 233 (1924).

(e) Regardless of formal statements on a deposit slip that deposits are accepted for collection only, "if the facts and circumstances surrounding the making of the deposit indicate at the time it was made it was the actual agreement and intention of the parties that the depositor might withdraw completely the deposit, or otherwise completely employ it, and he does so, the title to the item deposited thereupon passes to the bank"; and it may be an HDC (emphasis added). State Planters Bank v. Courtesy Motors, Inc., 250 N.C. 466, 474 (1959).

(f) Where bank permits an uncollected draft received for deposit and collection to be drawn against, the bank has rights superior to an attaching creditor of the depositor. Ledwell v. Shenandoah Milling Co., 215 N.C. 371 (1939).

Despite certain inconsistencies in decisions and many unsettled areas, it seems fair to say that N. C. has in the past usually permitted banks to be HDC's when they could not make themselves harmless by charge back against the depositor's account. Sections 4-208 4-209 will continue and expand this principle.

In short, the new rules are:

(1) a bank in the collecting chain basically occupies a technical position of an agent only (4-201); but

(2) it obtains certain security interests in the item under 4-208; and

(3) under 4-209 it becomes a holder for value and may be an HDC.

See also comment to 4-209.

Subsection (2):

This subsection adopts the first-in, first-out (FIFO) rule for determining when credits have been drawn against. This rule applies to all of 4-208. To the same effect is Bank v. Walser, 162 N.C. 53, 58 (1913).

Subsection (3):

In this subsection (a) and (b) state that no security agreement or filing under Article 9 is necessary to perfect a bank's security interest. (3)(c) gives a bank a priority over other competing security interests.

Section 4—209. When Bank Gives Value for Purposes of Holder in Due Course.

For purposes of determining its status as a holder in due course, the bank has given value to the extent that it has a security interest in an item provided that the bank otherwise complies with the requirements of Section 3—302 on what constitutes a holder in due course.

N. C. Comments

Prior Statutes: GS 25-32

As noted in the comments to 4-208, this awkwardly worded section permits a bank to be a holder for value to the extent that it has a security interest as defined in 4-208.

In order to be an HDC, however, the bank must also meet the other tests of 3-302 for HDC status.

Even though a bank does not qualify as an HDC in its own right, it may be a deritive HDC under the so-called "shelter" provisions of 3-201.

Section 4—210. Presentment by Notice of Item Not Payable by, Through or at a Bank; Liability of Secondary Parties.

(1) Unless otherwise instructed, a collecting bank may present an item not payable by, through or at a bank by sending to the party to accept or pay a written notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under Section 3—505 by the close of the bank's next banking day after it knows of the requirement.

(2) Where presentment is made by notice and neither honor nor request for compliance with a requirement under Section 3—505 is received by the close of business on the day after maturity or in the case of demand items by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any secondary party by sending him notice of the facts.

N. C. Comments

Prior Statutes: None

Subsection (1):

This subsection permits a collecting bank to make a proper presentment to the party who is to pay or accept by merely sending a written notice that the bank holds the item for payment or acceptance. Thus, the bank need not actually present the item itself.

As implied in 4-204(2)(b) and (c), it is often wrong for a bank to send collection items directly to a non-bank payor; and this section will allow a written notice-presentment without the bank's either personally presenting or mailing the items.

However, since (1) notice must be sent in time to be received by the day when presentment is due, and (2) since the bank must permit the presentee to see the instrument, etc., as provided by 3-505 (Rights of Party To Whom Presentment is Made), the presenting bank should be in a position to satisfy the demands of the presentee given under 3-505

by not later than the close of the next day after the bank learns of the presentee's demands ("requirements").

Suggested Amendments to 4-210(1):

(a) Add a semi-colon at end of line 5 after the word "due".

(b) Further study may reveal that this subsection needs to be revised to correlate more closely with 3-505.

(Note: This is but one of several areas where Articles 3 and 4 apply somewhat different rules to a particular situation. While it is not suggested that N. C. amend the U.C.C. without prior consultation with the Permanent Editorial Board, we may wish to take the initiative in proposing some minor changes for action by all adopting states.)

Subsection (2):

This subsection states the rules for treating an instrument as dishonored after "notice presentment". It further says that a bank may charge secondary parties by sending notice of the facts. It does not specifically state the duty of a bank to notify of the facts. This duty is partially covered by 4-202.

Section 4—211. Media of Remittance; Provisional and Final Settlement in Remittance Cases.

(1) A collecting bank may take in settlement of an item

(a) a check of the remitting bank or of another bank on any bank except the remitting bank; or

(b) a cashier's check or similar primary obligation of a remitting bank which is a member of or clears through a member of the same clearing house or group as the collecting bank; or

(c) appropriate authority to charge an account of the remitting bank or of another bank with the collecting bank; or

(d) if the item is drawn upon or payable by a person other than a bank, a cashier's check, certified check or other bank check or obligation.

(2) If before its midnight deadline the collecting bank properly dishonors a remittance check or authorization to charge on

itself or presents or forwards for collection a remittance instrument of or on another bank which is of a kind approved by subsection (1) or has not been authorized by it, the collecting bank is not liable to prior parties in the event of the dishonor of such check, instrument or authorization.

(3) A settlement for an item by means of a remittance instrument or authorization to charge is or becomes a final settlement as to both the person making and the person receiving the settlement

(a) if the remittance instrument or authorization to charge is of a kind approved by subsection (1) or has not been authorized by the person receiving the settlement and in either case the person receiving the settlement acts seasonably before its midnight deadline in presenting, forwarding for collection or paying the instrument or authorization,—at the time the remittance instrument or authorization is finally paid by the payor by which it is payable;

(b) if the person receiving the settlement has authorized remittance by a non-bank check or obligation or by a cashier's check or similar primary obligation of or a check upon the payor or other remitting bank which is not of a kind approved by subsection (1) (b),—at the time of the receipt of such remittance check or obligation; or

(c) if in a case not covered by sub-paragraphs (a) or (b) the person receiving the settlement fails to seasonably present, forward for collection, pay or return a remittance instrument or authorization to it to charge before its midnight deadline,—at such midnight deadline.

N. C. Comments

Prior Statutes: No uniform law; but see BCC 9 and 10 and G.S. 53-71

Subsection (1):

This subsection states the several appropriate settlements that can safely be taken by a collecting bank. The risk that such non-cash settlements may not be realizable in cash is shifted from the collecting bank to the owner of the item.

A somewhat similar rule is now found in G.S. 53-71; however, 4-211(1) gives much broader protection to the collecting bank.

Under G.S. 53-71 the emphasis is on the propriety of non-cash payments by the payor bank; and only indirectly answered are the questions of:

(1) when the drawer is discharged and

(2) whether the collecting bank has accepted a proper payment. (See cases annotated under 53-71).

Under 4-211, the emphasis is on the propriety of the acceptance of a particular medium of payment by the collecting bank. The further question of final payment by the drawer is covered in 4-213. (See comment).

Repeal: It appears that G.S. 53-71 should be repealed if the U.C.C. is adopted.

Subsection (1) does not cover all types of settlement, and the specific listing of certain usual types of remittances does not imply that other types of remittances are improper (4-103(4)). See Official Comment 5.

Subsection (2):

This subsection relieves a collecting bank from liability if an authorized non-cash receipt is later dishonored.

Subsection (3):

This subsection complements Subsections (1) and (2) by stating when a settlement by means of a remittance instrument or an authorization to charge becomes final as to both the person making and the person receiving the settlement. By using the term "person" these rules apply to non-bank payors and non-bank customers for whom items are being collected, as well as to bank payors and collecting banks.

Section 4—212. Right of Charge-Back or Refund.

(1) If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account or obtain refund from its customer whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. These rights to revoke, charge-back and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final. (subsection (3) of Section 4—211 and subsections (2) and (3) of Section 4—213).

[(2) Within the time and manner prescribed by this section and Section 4—301, an intermediary or payor bank, as the case may be, may return an unpaid item directly to the depositary bank and may send for collection a draft on the depositary bank and obtain reimbursement. In such case, if the depositary bank has received provisional settlement for the item, it must reimburse the bank drawing the draft and any provisional credits for the item between banks shall become and remain final.]

Note: *Direct returns is recognized as an innovation that is not yet established bank practice, and therefore, Paragraph 2 has been bracketed. Some lawyers have doubts whether it should be included in legislation or left to development by agreement.*

(3) A depositary bank which is also the payor may charge-back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (Section 4—301).

(4) The right to charge-back is not affected by

(a) prior use of the credit given for the item; or

(b) failure by any bank to exercise ordinary care with respect to the item but any bank so failing remains liable.

(5) A failure to charge-back or claim refund does not affect other rights of the bank against the customer or any other party.

(6) If credit is given in dollars as the equivalent of the value of an item payable in a foreign currency the dollar amount of any charge-back or refund shall be calculated on the basis of the buying sight rate for the foreign currency prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.

N. C. Comments

Prior Statutes: No uniform law. See BCC 2 and 11.

Subsection (1):

This subsection permits a collecting bank under stated circumstances to charge back against its customer's account when the collecting bank is unable to receive a final settlement.

Subsection (2):

This subsection is optional; and it would permit the use of direct return procedures. As direct return procedures are now used by many banks in N. C., it appears that this subsection should be adopted in N. C.

Only the following states have omitted the bracketed material: Calif., Ga., Neb.,,N. J., and Oregon.

Subsection (3):

This subsection covers the right of charge-back by a depositary-payor bank. Basically such right is governed by 4-301 to which incorporating reference is made.

Subsection (4):

This subsection merely preserves other remedies of a bank against its customer or other party.

Subsection (5):

This subsection states a technical rule on foreign currency.

There is little or no statuatory law in N. C. today on the matters in this entire section.

Section 4—213. Final Payment of Item by Payor Bank; When Provisional Debits and Credits Become Final; When Certain Credits Become Available for Withdrawal.

(1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:

(a) paid the item in cash; or

(b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or

(c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or

(d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.

Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

(2) If provisional settlement for an item between the presenting and payor banks is made through a clearing house or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the item by the payor bank.

(3) If a collecting bank receives a settlement for an item which is or becomes final (subsection (3) of Section 4—211, subsection (2) of Section 4—213) the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

(4) Subject to any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in an account with its customer becomes available for withdrawal as of right

(a) in any case where the bank has received a provisional settlement for the item,—when such settlement becomes final and the bank has had a reasonable time to learn that the settlement is final;

(b) in any case where the bank is both a depositary bank and a payor bank and the item is finally paid,—at the opening of the bank's second banking day following receipt of the item.

(5) A deposit of money in a bank is final when made but, subject to any right of the bank to apply the deposit to an obligation of the customer, the deposit becomes available for withdrawal as of right at the opening of the bank's next banking day following receipt of the deposit.

N. C. Comments

Prior Statutes: No uniform law. See BCC 11 and GS25-144

Subsection (1):

This subsection states the several times at which a payment by a payor bank becomes final. This affects the discharge of the drawer and indorsers, as well as the rights of other parties in the collection change.

The time of final payment is important for several reasons:

(1) It is a factor relative priorities between items and notices, stop orders, legal powers and set-offs (4-303).

(2) It is the "end of the line" in the collecting process and the turn around point commencing the return flow of proceeds.

(3) It is the point at which many provisional settlements become final (See 4-213(2)).

(4) Final payment of an item by the payor fixes preferences under 4-214(1) and (2).

Aside from G.S. 25-144 which contains a provision on "midnight deadline", there is little or no statuatory law in N. C. on this matter.

Seven pages of Official Comment explain this section, and a nut-shell summary is not suitable here. However, Official Comment 2 notes that Subsection (1) adopts the policy that final payment occurs at some point in the processing of the item by the payor bank. Thus, it rejects cases holding final payment if influenced by:

(1) whether a remittance draft was accepted by the presenting bank; Dewey v. Margolis & Brooks, 195 N. C. 307, 142 S. E. 22 (1928); or

(2) whether the remittance draft itself was paid; Cleve v. Craven Chemical Co., 18 F. 2d 711 (4th Cir. 1927).

SUGGESTED AMENDMENT: Add semi-colon (;) after the word "item" on line 4 of Subsection (3).

Section 4—214. Insolvency and Preference.

(1) Any item in or coming into the possession of a payor or collecting bank which suspends payment and which item is not finally paid shall be returned by the receiver, trustee or agent in charge of the closed bank to the presenting bank or the closed bank's customer.

(2) If a payor bank finally pays an item and suspends payments without making a settlement for the item with its customer or the presenting bank which settlement is or becomes final, the owner of the item has a preferred claim against the payor bank.

(3) If a payor bank gives or a collecting bank gives or receives a provisional settlement for an item and thereafter suspends payments, the suspension does not prevent or interfere with the settlement becoming final if such finality occurs automatically upon the lapse of certain time or the happening of certain events (subsection (3) of Section 4—211, subsections (1) (d), (2) and (3) of Section 4—213).

(4) If a collecting bank receives from subsequent parties settlement for an item which settlement is or becomes final and suspends payments without making a settlement for the item with its customer which is or becomes final, the owner of the item has a preferred claim against such collecting bank.

N. C. Comments

Prior Statutes: No uniform law. See BCC 13 and GS 53-20(M)(4)

A careful study should be made of this section and G.S. 53-20(M) to determine whether G.S. 53-20 (M) should be modified to conform to this section.

This section will not apply to National banks.

Section 4—301. Deferred Posting; Recovery of Payment by Return of Items; Time of Dishonor.

(1) Where an authorized settlement for a demand item (other than a documentary draft) received by a payor bank otherwise than for immediate payment over the counter has been made before midnight of the banking day of receipt the payor bank may revoke the settlement and recover any payment if before it has made final payment (subsection (1) of Section 4—213) and before its midnight deadline it

(a) returns the item; or

(b) sends written notice of dishonor or nonpayment if the item is held for protest or is otherwise unavailable for return

(2) If a demand item is received by a payor bank for credit on its books it may return such item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in the preceding subsection.

(3) Unless previous notice of dishonor has been sent an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.

(4) An item is returned:

(a) as to an item received through a clearing house, when it is delivered to the presenting or last collecting bank or to the clearing house or is sent or delivered in accordance with its rules; or

(b) in all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to his instructions.

N. C. Comments

Prior Statutes: No uniform law; but see American Bankers Association Model Deferred Posting Statute and GS 25-144

The only known statute in N. C. relating to the several subjects of this section is G.S. 25-144 which has some bearing on deferred posting.

G. S. 25-144 should be repealed along with all of the NIL.

"Midnight deadline" is defined in 4-104.

Subsection (1):

This subsection states the general rule that lets a payor bank which makes a settlement of a demand item on the day the item was received to revoke the settlement by its midnight deadline.

Subsection (2):

This subsection applies the same rule to a payor-depository bank, except it omits the requirement of a settlement on the day of receipt.

This section must be read in conjunction with 4-302 which states the consequences of a late return.

Section 4—302. Payor Bank's Responsibility for Late Return of Item.

In the absence of a valid defense such as breach of a presentment warranty (subsection (1) of Section 4—207), settlement effected or the like, if an item is presented on and received by a payor bank the bank is accountable for the amount of

(a) a demand item other than a documentary draft whether properly payable or not if the bank, in any case where it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(b) any other properly payable item unless within the time allowed for acceptance or payment of that item the bank either accepts or pays the item or returns it and accompanying documents.

N. C. Comments

Prior Statutes: No uniform law; but see ABA Model Deferred Posting Statute and G.S. 25-144

Subsection (1):

This subsection prescribes the time in which a payor bank must act on a demand item other than a documentary draft.

Subsection (2):

This covers all other items.

In either case, if the payor bank does not act promptly it is accountable for the amount of the item. Compare Branch Bank and Trust Co. v. Bank of Washington, 255 N.C. 205 (1961) dealing with duty of a collecting bank that is not a payor bank. Held---The payor's bank is not liable as a constructive acceptor when it delays returning a draft; but court implies on p. 222 that bank might be liable for negligence. The two dissenting justices would adhere to the "time honored maxim among bankers...'Never let the sun set on a Cash Item'".

For demand items other than documentary drafts, a comparison of this section with 4-301 shows that:

(1) 4-301 (1) and (2) emphasize the time for revocation of prompt settlement made by midnight of the day of receipt.

(2) 4-302(2) emphasizes promptness in making an original settlement on the day of receipt even though the prompt settlement may be later revoked by the "midnight deadline".

Thus, it appears that under both 4-301(1) and 4-302(a), a bank is liable for failure to "settle" for an item by midnight of the day it is received. This provision helps to minimize the "float period"

by demanding "day received settlement", but then the deferred posting relief of 4-301 steps in to give until the "midnight deadline" to revoke a previous conditional settlement.

Section 4—303. When Items Subject to Notice, Stop-Order, Legal Process or Setoff; Order in Which Items May Be Charged or Certified.

(1) Any knowledge, notice or stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right or duty to pay an item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the bank has done any of the following:

(a) accepted or certified the item;

(b) paid the item in cash;

(c) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement;

(d) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or

(e) become accountable for the amount of the item under subsection (1) (d) of Section 4—213 and Section 4—302 dealing with the payor bank's responsibility for late return of items.

(2) Subject to the provisions of subsection (1) items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank.

N. C. Comments

Prior Statutes: None

Subsection (1):

This subsection indirectly gives a payor bank a reasonable time to act on any notice it receives. However, the main emphasis is on establishing a cut-off time for determining the bank's right or duty to pay an item or to charge the customer's account for the item.

See also 4-403 (Customer's Right to Stop Payment; Burden of Proof of Loss).

Section 4—401. When Bank May Charge Customer's Account.

(1) As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft.

(2) A bank which in good faith makes payment to a holder may charge the indicated account of its customer according to

(a) the original tenor of his altered item; or

(b) the tenor of his completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

N. C. Comments

Prior Statutes: None

Subsection (1):

This subsection expressly permits overdrafts; but a bank is not required to pay overdraft items.

Subsection (2):

This covers the amounts that may be properly charged against a customer's account. The two provisions follow the same theories found in:

(a) 3-407(3) which permits an HDC to collect the original tenor of an altered negotiable instrument;

(b) 3-115 and 3-407(3) which permit full recovery on incomplete instruments completed in excess of authority.

This section is broader in scope than the Article III sections, because Article III applies only to "negotiable instruments", while this section applies to any "item".

Section 4—402. Bank's Liability to Customer for Wrongful Dishonor.

A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

N. C. Comments

Prior Statutes: No uniform law; but see GS 53-57

This section states the measure of damages for wrongful dishonor of an item. It appears that it will not change the substance of G.S. 53-57 which should be repealed. There have been only two N. C. decisions on 53-57:

Thomas v. American Trust Co., 208 N.C. 653, 182 S.E. 136 (1935), held, when no malice in dishonor, the customer is entitled at least to nominal damages. This dictum (?) seems contrary to the wording of G.S. 53-57 and 4-402, both of which adopt an "actual damages proved" test when no malice is proved.

Woody v. National Bank, 194 N.C. 549, 140 S.E. 150 (1927), held, if malice is proved, the depositor can recover actual or nominal damages, and also punative damages.

Section 4—403. Customer's Right to Stop Payment; Burden of Proof of Loss.

(1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in Section 4—303.

(2) An oral order is binding upon the bank only for fourteen calendar days unless confirmed in writing within that period. A written order is effective for only six months unless renewed in writing.

(3) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer.

N. C. Comments

Prior Statutes: No uniform law; but see GS 25-198

Subsection (1):

This subsection gives a bank a reasonable time to act on a stop-order.

Subsection (2):

This subsection makes an oral stop-prder effective for 14 days and a written stop-order effective for 6 months. This differs from G.S. 25-198 which

(A) implies that an original oral stop-order is effective for six months and

(B) states that a renewal stop-order must be in writing and is effective for six months.

Payment may not be stopped after acceptance of a draft or certification of a check. See 3-411 and 4-303.

Subsection (3):

Payment in violation of a stop-order is improper, but under Subsection (3) the customer must prove his damages.

While a bank may contract to relieve itself of liability for non-negligently overlooking a stop-order, it may not contract away its duty to use reasonable care. Also, to prevent unjust enrichment, a bank is given subrogation rights under 4-407.

(Note: The section applies only to bank-drawees, but it applies to any "item". Article III contains no similar rule for "negotiable instruments" drawn on non-banks, but the same right to stop-payment exists apart from statute.)

Section 4—404. Bank Not Obligated to Pay Check More Than Six Months Old.

A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer's account for a payment made thereafter in good faith.

N. C. Comments

Prior Statutes: No uniform law; but see GS 25-194

This section is similar to G.S. 25-194, a section added by N. C. to the NIL. G.S. 25-194, however, is broader than this U.C.C. section in that G.S. 25-194 applies to "a check or other instrument payable on demand". 4-404 applies only to checks.

Suggested Amendment: Unless study reveals a reason not to amend 4-404, it should be amended to apply to other items as well as checks.

Section 4—405. Death or Incompetence of Customer.

(1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(2) Even with knowledge a bank may for ten days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account.

N. C. Comments

Prior Statutes: No uniform law; but see GS 105-24

Banking custom in N. C. operates on the premise that a check should not be paid after death of the drawer. This custom is sup-

ported by G.S. 105-24, a tax section, which states that a bank should not pay over any money after the death of a customer without retaining an amount to pay inheritance taxes.

Unless 105-24 is amended, 4-405(2) will have little practical meaning.

Graham v. Hoke, 219 N.C. 755 (1941) is contrary to 4-405(2), holding that death of a drawer revoked any authority of a bank to pay "a cheque".

Section 4—406. Customer's Duty to Discover and Report Unauthorized Signature or Alteration.

(1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

(b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

N. C. Comments

Prior Statutes: No uniform law; but see GS 53-52 and GS 53-76

Subsection (1):

This subsection will take the place of G.S. 53-76 which also places a general duty of due care on a depositor to inspect vouchers and promptly report any errors.

Subsection (2):

Subsection (2)(b) changes the rule of G.S. 53-52 on the time within which a depositor must report his own unauthorized signature:

> G.S. 53-52 uses an automatic 60 day test, i.e., (a) for forgeries reported within 60 days of day the customer receives his voucher, he can recover; but (b) for forgeries not reported within the 60 days, he cannot recover.

When there has been a series of unauthorized signatures or alterations by the same person, Subsection (2)(b) has a special rule. It provides, in effect, that a depositor cannot recover payments made by the bank during a period of time commencing with 14 days after the customer has first received one such item and ending with the time that the bank receives notice. These rules apply only if the customer has been negligent under Subsection (1).

Subsection (3):

A depositor has three years to report an unauthorized indorsement. A bank may not show that its customer is "precluded" if the customer establishes lack of ordinary care on the part of the bank.

Subsection (4):

As in Subsection (2)(b), this Subsection (4) changes the rule of G.S. 53-52 on the time within which a depositor must report his own unauthorized signature. (See Subsection (2)(b) above.)

Even within the one year, three year, and 14 day periods, the depositor must still use "reasonable care and promptness".

The decision of Schwabenton v. Security Nat. Bank, 251 N.C. 655, 111 SE2d 856 (1960) will be changed by 4-406.

Subsection (5):

This subsection prevents a bank that can make itself whole against its customer from recovering from collecting banks or other prior parties.

G.S. 53-75 (Statement of account from bank to depositor deemed final adjustment if not objected to within five years) should not be repealed. It will still cover irregularities other than unauthorized signatures and alterations.

SUGGESTED AMENDMENT TO G.S. 53-75: The term "rendered" may well be replaced by phraseology similar to that in 4-406(1).

Section 4—407. Payor Bank's Right to Subrogation on Improper Payment.

If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights

(a) of any holder in due course on the item against the drawer or maker; and

(b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

N. C. Comments — Prior Statutes: None

This section is closely related to 4-403 on stop-orders.

Basically, the section is intended to prevent unjust enrichment, and it accomplishes this by allowing a payor bank that has made a wrongful payment to be subrogated to the rights of various other parties against others.

Perhaps the most important right of a payor is to have the rights of any prior HDC against the drawer-customer in cases where the bank has failed to obey a stop-order.

Section 4—501. Handling of Documentary Drafts; Duty to Send for Presentment and to Notify Customer of Dishonor.

A bank which takes a documentary draft for collection must present or send the draft and accompanying documents for presentment and upon learning that the draft has not been paid or accepted in due course must seasonably notify its customer of such fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

N.C. Comments

Prior Statutes: None known.

Notice that the bank has a duty to notify its cutomer even when the bank has bought the dishonored draft. This is because the cutomer will normally be commercially interested in the fact of dishonor even though the customer is not to be held liable on the instrument.

See Branch Bank v. Bank of Washington, 255 N.C. 205 (1961).

Section 4—502. Presentment of "On Arrival" Drafts.

When a draft or the relevant instructions require presentment "on arrival", "when goods arrive" or the like, the collecting bank need not present until in its judgment a reasonable time for arrival of the goods has expired. Refusal to pay or accept because the goods have not arrived is not dishonor; the bank must notify its transferor of such refusal but need not present the draft again until it is instructed to do so or learns of the arrival of the goods.

N. C. Comments

Prior Statutes: None known.

Notice the duty to notify of a refusal to pay even though the refusal does not amount to a dishonor.

Section 4—503. Responsibility of Presenting Bank for Documents and Goods; Report of Reasons for Dishonor; Referee in Case of Need.

Unless otherwise instructed and except as provided in Article 5 a bank presenting a documentary draft

(a) must deliver the documents to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment; and

(b) upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or if the presenting bank does not choose to utilize his services it must use diligence and good faith to ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor and must request instructions.

But the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received; it has a right to reimbursement for any expense incurred in following instructions and to prepayment of or indemnity for such expenses.

N. C. Comments — Prior Statutes: GS 25-138(3)

Subsection (a):

This subsection varies the duty to deliver the accompanying documents according to whether the draft is payable more or not more than three days after presentment. This subsection should be read in conjunction with 2-514 or when documents are deliverable on acceptance and when only on payment.

Subsection (b):

This gives a bank two choices after dishonor:

(1) ask advice of any designated "referee in case of need"; or

(2) contact the transferor.

Article 5 controls when a draft is drawn under letter of credit. See 5-109 through 5-114.

Section 4—504. Privilege of Presenting Bank to Deal With Goods; Security Interest for Expenses.

(1) A presenting bank which, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

(2) For its reasonable expenses incurred by action under subsection (1) the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien.

N. C. Comments — Prior Statutes: None known.

This section gives protection to a bank that has reasonably dealt with goods. Expenditures may be realized by the bank as if foreclosing an unpaid seller's lien under 2-706.

(Scope of Comments to Article 5: Since for practical purposes there is no law in N. C. on letters of credit, the following commentary will omit references to "PriorStatutes"; and the comments will generally be limited to setting forth one or two highlights of each section together with appropriate cross-references.)

Section 5—101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Letters of Credit.

Section 5—102. Scope.

(1) This Article applies

(a) to a credit issued by a bank if the credit requires a documentary draft or a documentary demand for payment; and

(b) to a credit issued by a person other than a bank if the credit requires that the draft or demand for payment be accompanied by a document of title; and

(c) to a credit issued by a bank or other person if the credit is not within subparagraphs (a) or (b) but conspicuously states that it is a letter of credit or is conspicuously so entitled.

(2) Unless the engagement meets the requirements of subsection (1), this Article does not apply to engagements to make advances or to honor drafts or demands for payment, to authorities to pay or purchase, to guarantees or to general agreements.

(3) This Article deals with some but not all of the rules and concepts of letters of credit as such rules or concepts have developed prior to this act or may hereafter develop. The fact that this Article states a rule does not by itself require, imply or negate application of the same or a converse rule to a situation not provided for or to a person not specified by this Article.

N. C. Comments

Under subsection (1) the applicability of Article 5 depends on the nature of the issuer and the nature of the credit issued.

(A) Paragraph (1)(a) includes "documentary" letters by banks.

(B) Paragraph (1)(b) includes documentary credits by non-banks.

(C) Paragraph includes so-called "clean" letters by both banks and non-banks.

POSSIBLE AMENDMENT: The Permanent Editorial Board has rejected an amendment proposed by and adopted by New York which would exclude from the operation of Article 5 a credit subject to the Uniform Customs and practice for Commercial Documentary Credits fixed by the Thirteenth or by any subsequent Congress of the International Chamber of Commerce. See Report No. 1 of Permanent Editorial Bb., pp81-86.

Section 5—103. Definitions.

(1) In this Article unless the context otherwise requires

(a) "Credit" or "letter of credit" means an engagement by a bank or other person made at the request of a customer and of a kind within the scope of this Article (Section 5—102) that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. A credit may be either revocable or irrevocable. The engagement may be either an agreement to honor or a statement that the bank or other person is authorized to honor.

(b) A "documentary draft" or a "documentary demand for payment" is one honor of which is conditioned upon the presentation of a document or documents. "Document" means any paper including document of title, security, invoice, certificate, notice of default and the like.

(c) An "issuer" is a bank or other person issuing a credit.

(d) A "beneficiary" of a credit is a person who is entitled under its terms to draw or demand payment.

(e) An "advising bank" is a bank which gives notification of the issuance of a credit by another bank.

(f) A "confirming bank" is a bank which engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank.

(g) A "customer" is a buyer or other person who causes an issuer to issue a credit. The term also includes a bank which procures issuance or confirmation on behalf of that bank's customer.

(2) Other definitions applying to this Article and the sections in which they appear are:

"Notation of Credit".	Section 5—108.
"Presenter".	Section 5—112(3).

(3) Definitions in other Articles applying to this Article and the sections in which they appear are:

"Accept" or "Acceptance".	Section 3—410.
"Contract for sale".	Section 2—106.
"Draft".	Section 3—104.
"Holder in due course".	Section 3—302.
"Midnight deadline".	Section 4—104.
"Security".	Section 8—102.

(4) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

N. C. Comments

Paragraph (b) is intended to show that the word "document" is broader than "document of title" for purposes of this Article. This is especially important with respect to 5-102(1)(a); and the broadened definition is different from the definition of "document" in Article 9 on secured transaction which refers only to "documents of title". See 9-105(1)(e).

Section 5—104. Formal Requirements; Signing.

(1) Except as otherwise required in subsection (1) (c) of Section 5—102 on scope, no particular form of phrasing is required for a credit. A credit must be in writing and signed by the issuer and a confirmation must be in writing and signed by the confirming bank. A modification of the terms of a credit or confirmation must be signed by the issuer or confirming bank.

(2) A telegram may be a sufficient signed writing if it identifies its sender by an authorized authentication. The authentication may be in code and the authorized naming of the issuer in an advice of credit is a sufficient signing.

N. C. Comments

This section does not attempt to cover questions of mistake, waiver or estoppel which are left to other principles of law. See 1-103.

Section 5—105. Consideration.

No consideration is necessary to establish a credit or to enlarge or otherwise modify its terms.

Section 5—106. Time and Effect of Establishment of Credit.

(1) Unless otherwise agreed a credit is established

(a) as regards the customer as soon as a letter of credit is sent to him or the letter of credit or an authorized written advice of its issuance is sent to the beneficiary; and

(b) as regards the beneficiary when he receives a letter of credit or an authorized written advice of its issuance.

(2) Unless otherwise agreed once an irrevocable credit is established as regards the customer it can be modified or revoked only with the consent of the customer and once it is established as regards the beneficiary it can be modified or revoked only with his consent.

(3) Unless otherwise agreed after a revocable credit is established it may be modified or revoked by the issuer without notice to or consent from the customer or beneficiary.

(4) Notwithstanding any modification or revocation of a revocable credit any person authorized to honor or negotiate under the terms of the original credit is entitled to reimbursement for or honor of any draft or demand for payment duly honored or negotiated before receipt of notice of the modification or revocation and the issuer in turn is entitled to reimbursement from its customer.

N. C. Comments

The time of establishing an irrevocable credit is the time at which the issuer is no longer free to take unilateral action in cancelling or modifying the credit.

Section 5—107. Advice of Credit; Confirmation; Error in Statement of Terms.

(1) Unless otherwise specified an advising bank by advising a credit issued by another bank does not assume any obligation to honor drafts drawn or demands for payment made under the credit but it does assume obligation for the accuracy of its own statement.

(2) A confirming bank by confirming a credit becomes directly obligated on the credit to the extent of its confirmation as though it were its issuer and acquires the rights of an issuer.

(3) Even though an advising bank incorrectly advises the terms of a credit it has been authorized to advise the credit is established as against the issuer to the extent of its original terms.

(4) Unless otherwise specified the customer bears as against the issuer all risks of transmission and reasonable translation or interpretation of any message relating to a credit.

N. C. Comments

"Advising bank" is defined in 5-103. Subsection (1) states such bank obligations to merely transmit, not honor, drafts.

"Confirming bank" is defined in 5-103; and 5-107(2) states that such bank is liable to the extent of its confirmation. Thus, a beneficiary who has received a confirmed credit has the independent engagements of both the issuing bank and the confirming bank.

Section 5—108. "Notation Credit"; Exhaustion of Credit.

(1) A credit which specifies that any person purchasing or paying drafts drawn or demands for payment made under it must note the amount of the draft or demand on the letter or advice of credit is a "notation credit".

(2) Under a notation credit

(a) a person paying the beneficiary or purchasing a draft or demand for payment from him acquires a right to honor only if the appropriate notation is made and by transferring or forwarding for honor the documents under the credit such a person warrants to the issuer that the notation has been made; and

(b) unless the credit or a signed statement that an appropriate notation has been made accompanies the draft or demand for payment the issuer may delay honor until evidence of notation has been procured which is satisfactory to it but its obligation and that of its customer continue for a reasonable time not exceeding thirty days to obtain such evidence.

(3) If the credit is not a notation credit

(a) the issuer may honor complying drafts or demands for payment presented to it in the order in which they are presented and is discharged pro tanto by honor of any such draft or demand;

(b) as between competing good faith purchasers of complying drafts or demands the person first purchasing has

priority over a subsequent purchaser even though the later purchased draft or demand has been first honored.

N. C. Comments

Subsections (1) and (2) set forth certain rights and duties of parties under a "Notation Credit".

Subsection (3) covers a non-notion letter of credit. Of special importance under the non-notation credit is the rule of paragraph (b) stating a "first in time-first in right" rule among several purchasers.

Because of the dangers to one buying drafts under the non-notation draft their marketability is cut down.

Suggested Amendment: Add semi-colon (;) after "it", line 5, subsection (2)(b).

Section 5—109. Issuer's Obligation to Its Customer.

(1) An issuer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed does not include liability or responsibility

(a) for performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or

(b) for any act or omission of any person other than itself or its own branch or for loss or destruction of a draft, demand or document in transit or in the possession of others; or

(c) based on knowledge or lack of knowledge of any usage of any particular trade.

(2) An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed assumes no liability or responsibility for the genuineness, falsification or effect of any document which appears on such examination to be regular on its face.

(3) A non-bank issuer is not bound by any banking usage of which it has no knowledge.

N. C. Comments

This section provides that in the absence of any agreement to the contrary, the issuer is liable only for its own conduct; and it must exercise only good faith observing general banking usage.

See also 5-114 on Issuer's Duty and Privilege to Honor.

Section 5—110. Availability of Credit in Portions; Presenter's Reservation of Lien or Claim.

(1) Unless otherwise specified a credit may be used in portions in the discretion of the beneficiary.

(2) Unless otherwise specified a person by presenting a documentary draft or demand for payment under a credit relinquishes upon its honor all claims to the documents and a person by transferring such draft or demand or causing such presentment authorizes such relinquishment. An explicit reservation of claim makes the draft or demand non-complying.

N. C. Comments

"Presenter" is defined in 5-112(3). See also 5-108(3) for rule governing situation when the total of drafts drawn exceeds the maximum credit.

Section 5—111. Warranties on Transfer and Presentment.

(1) Unless otherwise agreed the beneficiary by transferring or presenting a documentary draft or demand for payment warrants to all interested parties that the necessary conditions of the credit have been complied with. This is in addition to any warranties arising under Articles 3, 4, 7 and 8.

(2) Unless otherwise agreed a negotiating, advising, confirming, collecting or issuing bank presenting or transferring a draft or demand for payment under a credit warrants only the matters warranted by a collecting bank under Article 4 and any such bank transferring a document warrants only the matters warranted by an intermediary under Articles 7 and 8.

N. C. Comments

Note under subsection (1) that the special warranty of a beneficiary ("that the necessary conditions of the credit have been complied with") is in addition to the several warranties arising under:

3-417; 4-207; 7-507, 7-508, 8-306.

Section 5—112. Time Allowed for Honor or Rejection; Withholding Honor or Rejection by Consent; "Presenter".

(1) A bank to which a documentary draft or demand for payment is presented under a credit may without dishonor of the draft, demand or credit

(a) defer honor until the close of the third banking day following receipt of the documents; and

(b) further defer honor if the presenter has expressly or impliedly consented thereto.

Failure to honor within the time here specified constitutes dishonor of the draft or demand and of the credit [except as otherwise provided in subsection (4) of Section 5—114 on conditional payment].

Note: *The bracketed language in the last sentence of subsection (1) should be included only if the optional provisions of Section 5—114(4) and (5) are included.*

(2) Upon dishonor the bank may unless otherwise instructed fulfill its duty to return the draft or demand and the documents by holding them at the disposal of the presenter and sending him an advice to that effect.

(3) "Presenter" means any person presenting a draft or demand for payment for honor under a credit even though that person is a confirming bank or other correspondent which is acting under an issuer's authorization.

N. C. Comments

The standard three-day time for a bank's determining whether to honor a documentary draft under a credit is longer than the time for ordinary drafts under 3-506, because the accompanying documents must be examined with great care.

Note in the postamble to subsection (1) that both the draft and the credit are dishonored upon failure to act within the specified time.

Option: See comment to 5-114 for discussion of optional language in brackets.

Subsection (2), permitting the bank to retain documents as bailee for the presentee, may be compared with the general duty of presenting banks under 4-202 (1)(b), 4-503 and 4-504.

Section 5—113. Indemnities.

(1) A bank seeking to obtain (whether for itself or another) honor, negotiation or reimbursement under a credit may give an indemnity to induce such honor, negotiation or reimbursement.

(2) An indemnity agreement inducing honor, negotiation or reimbursement

(a) unless otherwise explicitly agreed applies to defects in the documents but not in the goods; and

(b) unless a longer time is explicitly agreed expires at the end of ten business days following receipt of the documents by the ultimate customer unless notice of objection is sent before such expiration date. The ultimate customer may send notice of objection to the person from whom he received the documents and any bank receiving such notice is under a duty to send notice to its transferor before its midnight deadline.

N. C. Comments

A bank will not be acting ultra vires when it gives an indemnity under subsection (1).

Subsection (2)(a) limits the indemnity to defects in the documents and not to defects in the goods.

Under subsection (2)(b) the indemnity period may not be less than ten days after receipt by the ultimate customer (i.e., the customer who is a party to the underlying transaction). If the customer fails to send notice of any objection within the ten days (or longer agreed period), he loses his right to object, and the need for indemnity disappears. Cf. 2-605(2) (Waiver of Buyer's Objection by Failure to Particularize).

Section 5—114. Issuer's Duty and Privilege to Honor; Right to Reimbursement.

(1) An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary. The issuer is not excused from honor of such a draft or demand by reason of an additional general term that all documents must be satisfactory to the issuer, but an issuer may require that specified documents must be satisfactory to it.

(2) Unless otherwise agreed when documents appear on their face to comply with the terms of a credit but a required document does not in fact conform to the warranties made on negotiation or transfer of a document of title (Section 7—507) or of a security (Section 8—306) or is forged or fraudulent or there is fraud in the transaction

(a) the issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances which would make it a holder in due course (Section 3—302) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (Section 7—502) or a bona fide purchaser of a security (Section 8—302); and

(b) in all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents but a court of appropriate jurisdiction may enjoin such honor.

(3) Unless otherwise agreed an issuer which has duly honored a draft or demand for payment is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit.

[(4) When a credit provides for payment by the issuer on receipt of notice that the required documents are in the possession of a correspondent or other agent of the issuer

(a) any payment made on receipt of such notice is conditional; and

(b) the issuer may reject documents which do not comply with the credit if it does so within three banking days following its receipt of the documents; and

(c) in the event of such rejection, the issuer is entitled by charge back or otherwise to return of the payment made.]

[(5) In the case covered by subsection (4) failure to reject documents within the time specified in sub-paragraph (b) constitutes acceptance of the documents and makes the payment final in favor of the beneficiary.]

Note: *Subsections (4) and (5) are bracketed as optional. If they are included the bracketed language in the last sentence of Section 5—112(1) should also be included.*

N. C. Comments

Subsection 1.

Since a credit is essentially a contract between the issuer and the beneficiary (See 5-109), the issuer is legally bound to honor drafts which comply with the terms of the credit, even though the documents do not comply with the underlying independent contract between the customer and the beneficiary.

Subsection 2(a) protects innocent purchasers for value of drafts.

OPTIONAL PROVISIONS: Subsections (4) and (5) are optional. They are intended to cover the situation arising when the currency restrictions of a few nations require payment under the credit before opportunity is given to examine the documents.

New York, Massachusetts, Illinois, California, and sixteen of twenty-nine other states have omitted the optional sections. Virginia did so on the ground that New York, the state having the greatest experience, had omitted them.

No recommendation is made here.

Section 5—115. Remedy for Improper Dishonor or Anticipatory Repudiation.

(1) When an issuer wrongfully dishonors a draft or demand for payment presented under a credit the person entitled to honor has with respect to any documents the rights of a person in the position of a seller (Section 2—707) and may recover from the issuer the face amount of the draft or demand together with incidental damages under Section 2—710 on seller's incidental damages and interest but less any amount realized by resale or other use or disposition of the subject matter of the transaction. In the event no resale or other utilization is made the documents, goods or other subject matter involved in the transaction must be turned over to the issuer on payment of judgment.

(2) When an issuer wrongfully cancels or otherwise repudiates a credit before presentment of a draft or demand for payment drawn under it the beneficiary has the rights of a seller after anticipatory repudiation by the buyer under Section 2—610 if he learns of the repudiation in time reasonably to avoid procurement of the required documents. Otherwise the beneficiary has an immediate right of action for wrongful dishonor.

N. C. Comments

This is an important section, and the following summarization of the Official Comment will describe its purposes.

Subsection (1) states the rights of the person entitled to honor, both with respect to (1) rights to documents and (2) rights to hold the issuer for dishonor. Whether there has been a wrongful dishonor is determined by other sections of Article 5, especially 5-114 on issuer's duty to honor and 5-116 on transfer and assignment.

Subsection (2) states the rights of the beneficiary upon repudiation of the credit both with respect to (1) rights against documents and (2) rights against the issuer.

Both subsections are limited to irrevocable credits. Under 5-106(3) revocable credits may be modified or revoked without notice to the customer or the beneficiary. The rights of innocent third persons under revocable credits is covered by 5-106(4) rather than by this section.

Section 5—116. Transfer and Assignment.

(1) The right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable.

(2) Even though the credit specifically states that it is nontransferable or nonassignable the beneficiary may before performance of the conditions of the credit assign his right to proceeds. Such an assignment is an assignment of a contract right under Article 9 on Secured Transactions and is governed by that Article except that

(a) the assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee which delivery constitutes perfection of the security interest under Article 9; and

(b) the issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignee; and

(c) after what reasonably appears to be such a notification has been received the issuer may without dishonor refuse to accept or pay even to a person otherwise entitled to honor until the letter of credit or advice of credit is exhibited to the issuer.

(3) Except where the beneficiary has effectively assigned his right to draw or his right to proceeds, nothing in this section limits his right to transfer or negotiate drafts or demands drawn under the credit.

N. C. Comments

Subsections (1) and (2) generally do not permit an assignment of the Beneficiary's right to draw, but they do permit a beneficiary to assign his rights to proceeds. A proper assignment of proceeds is governed by the rules of assignment of a contract right under Article IX with the exceptions stated in subsection (2).

The section is made necessary by general confusion as to when there can be a transfer or assignment of a credit.

Subsection (3) makes it clear that the section has no application to the normal case of negotiation of a draft or the transfer of a demand for payment unless there has been an effective assignment of the credit under this section.

Section 5—117. Insolvency of Bank Holding Funds for Documentary Credit.

(1) Where an issuer or an advising or confirming bank or a bank which has for a customer procured issuance of a credit by another bank becomes insolvent before final payment under the credit and the credit is one to which this Article is made applicable by paragraphs (a) or (b) of Section 5—102(1) on scope, the receipt or allocation of funds or collateral to secure or meet obligations under the credit shall have the following results:

(a) to the extent of any funds or collateral turned over after or before the insolvency as indemnity against or specifically for the purpose of payment of drafts or demands for payment drawn under the designated credit, the drafts or demands are entitled to payment in preference over depositors or other general creditors of the issuer or bank; and

(b) on expiration of the credit or surrender of the beneficiary's rights under it unused any person who has given such funds or collateral is similarly entitled to return thereof; and

(c) a change to a general or current account with a bank if specifically consented to for the purpose of indemnity against or payment of drafts or demands for payment drawn under the designated credit falls under the same rules as if the funds had been drawn out in cash and then turned over with specific instructions.

(2) After honor or reimbursement under this section the customer or other person for whose account the insolvent bank has acted is entitled to receive the documents involved.

N. C. Comments

This section regards the outstanding liabilities, the security

held and funds provided to indemnify those liabilities, and the related drafts and documents, as separate from deposit liabilities and from general assets. To do so facilitates the underlying mercantile transaction, and does no wrong to the bank's depositors and other general creditors.

Section 6—101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Bulk Transfers.

Section 6—102. "Bulk Transfers"; Transfers of Equipment; Enterprises Subject to This Article; Bulk Transfers Subject to This Article.

(1) A "bulk transfer" is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (Section 9—109) of an enterprise subject to this Article.

(2) A transfer of a substantial part of the equipment (Section 9—109) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.

(3) The enterprises subject to this Article are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.

(4) Except as limited by the following section all bulk transfers of goods located within this state are subject to this Article.

Prior Statutes: None

N. C. Comments

Subsection (1): This subsection seems to be substantially the same as the present law of North Carolina. The North Carolina statute uses the description "large part or the whole of a stock of merchandise" rather that the UCC description of a "major part of the materials, supplies, merchandise or other inventory". See Armfield Co. v. Saleeby, 176 NC 298(1919) where the Court says that the sale of 10 per cent of the value of a stock of goods is not a large enough part thereof to make the Bulk Sales Law applicable. It seems that "major part" is thought to mean more than half. See 1952 Wisconsin L. Review 312, 313. Thus, the UCC may be slightly narrower than the present North Carolina law. The language "in bulk and not in the ordinary course of the transferor's business" seems to be parallel to the meaning of the present law. The present law applies to "a stock of merchandise, in the sense of a stock of goods which have been bought for resale in a substantially unchanged condition. . ." Swift & Co. v. Tempelos, 178 NC 486, 491(1919). This meaning may be narrower than the UCC above.

Subsection (2): This subsection may make a change in the present law, for it is not clear that "equipment" would be included in the meaning of "stock of merchandise". But see Swift & Co. v. Tempelos, 178 NC 487, 492(1919) where the court in dicta says, "As to the furniture and fixtures used in the business of the keeper of the cafe, they are not kept for sale, and are not within the provisions of the statute. Now, if this stock itself is within it, so as to be, in fact, a "clean-up" sale of the whole business, the appellee's position might, perhaps, be correct, but we do not decide, or intimate any opinion as to such a question." The Court seems to have reserved the very point covered by this subsection.

Subsection (3): This subsection may broaden the coverage of the present law. The cases generally hold that bulk sales laws relating to sales of merchandise have no application to sales by manufacturers, though there is a slight tendency in recent cases to cover some sales of stock by manufacturers. See, 168 ALR 735, 742 and the discussion in Swift & Co. v. Tempelos, 178 NC 487(1919).

Subsection (4): This is new in North Carolina, though the North Carolina law probably applies to all sales in bulk in the state. There is nothing on the problem of whether in determining whether a "major part" of the covered goods has been transferred under subsection (1), must there be taken into account similar goods of the transferor located outside the State.

Section 6—103. Transfers Excepted From This Article.

The following transfers are not subject to this Article:

(1) Those made to give security for the performance of an obligation;

(2) General assignments for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;

(3) Transfers in settlement or realization of a lien or other security interest;

(4) Sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process;

(5) Sales made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation and of which notice is sent to the creditors of the corporation pursuant to order of the court or administrative agency;

(6) Transfers to a person maintaining a known place of business in this State who becomes bound to pay the debts of the transferor in full and gives public notice of that fact, and who is solvent after becoming so bound;

(7) A transfer to a new business enterprise organized to take over and continue the business, if public notice of the transaction is given and the new enterprise assumes the debts of the transferor and he receives nothing from the transaction except an interest in the new enterprise junior to the claims of creditors;

(8) Transfers of property which is exempt from execution.

Public notice under subsection (6) or subsection (7) may be given by publishing once a week for two consecutive weeks in a newspaper of general circulation where the transferor had its principal place of business in this state an advertisement including the names and addresses of the transferor and transferee and the effective date of the transfer.

N. C. Comments

Prior Statutes: GS 39-23

Subsection (1): This subsection seems to be similar to present law. In Rubber Co. v. Crawford, 253 NC 100(1960) lender was assigned conditional sales contracts as security for financing goods in seller's store. Eventually lender took out of seller's store and stored in a warehouse a large part of the stock of the seller. The Court said, "Under our decisions the Trust Receipts given by Crawford cannot be deemed violative of GS 39-23 or void as against creditors, because the debts secured by the Trust Receipts were not pre-existent but contemporaneous with the contract of purchase from intervenor, constituting a part of one continuous transaction." At p. 110. The chattel mortgage had not been filed in this case. Note also: The Court has held that where a person, who is insolvent, makes an assignment of practically all his property to secure a pre-existing debt, there being also other creditors, such instrument will be treated as an assignment for the benefit of creditors and subject to the statutes relating thereto, and neither the omission of a small part of the debtor's property nor a defeasance clause in the instrument will change this result. See National Bank v. Gilmer, 116 NC 684(1895).

Subsection (2): This subsection is in accord with the present law which provides, "Nothing in this section shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law...." GS 39-23.

Subsection (3): This subsection seems to be in accord with the present law. A chattel mortgage on a stock of goods, securing the purchase price, cannot be deemed an assignment for the benefit of creditors where the secured debt is contemporaneous with the contract of purchase, as a part of one continuous transaction. Cowan v. Dale, 189 NC 684(1925). And see recent case, McCreary Tire & Rubber Co. v. Crawford, 253 NC 100(1960).

But notice also that our court has held "that where a person who is insolvent makes an assignment of practically all his property to secure a pre-existing debt, there being also other creditors, such instrument will be treated as an assignment for the benefit of creditors and subject to the statutes relating thereto, and that neither the omission of a small part of the debtor's property nor a defeasance clause in the instrument will change this result." Farmers Banking and Trust Co. v. Tarboro Leaf Tobacco Co., 188 NC 177(1924).

Subsection (4): This is the present law. GS 39-23 provides that nothing in the Bulk Sales Statute shall "apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, of by any public officers under judicial process."

Subsection (5): This section is similar in principle in part to present law, for the present law excludes from the bulk sales

law "sales by any public officers under judicial process." Presumably the reason is the fact that the interest of creditors will be safeguarded by the judicial process, including sales by an administrative officer. There is no specific provision concerning dissolution or reorganization of a corporation in the present bulk sales law.

Subsection (6): This subsection is new. The theory behind this subsection is that if the transferee is willing to assume personal liability for all of the debts of the transferor, and is solvent after such assumption, there is no reason to subject the transaction to the delay and red tape which this Article otherwise imposes. In a jurisdiction such as North Carolina where a third party beneficiary may bring suit, there is no problem.

Subsection (7): This probably modifies the present law. In First National Bank v. Raleigh Savings Bank & Trust Co., 37 F 2d 301(1930), Fourth Circuit, the court held that a transfer of all goods of a business to a new corporation in return for stock of that corporation would violate the bulk sales law.

Subsection (8): This subsection changes the present law. The theory of cases dealing with this problem seems to suggest that where one makes a transfer that comes under the bulk sales law, the transfer is void, and that therefore the title to the goods remains in the transferor. This is held to be true even in the case of a transfer of exempt property. However, the debtor is still allowed his exemptions. See Whitmore v. Hyatt, 175 NC 117(1918). In this case the Court held that a vendor of merchandise in bulk which is void under our statute is not deprived of his right to his personal property exemption under execution of his judgment creditor.

Section 6—104. Schedule of Property, List of Creditors.

(1) Except as provided with respect to auction sales (Section 6-108), a bulk transfer subject to this Article is ineffective against any creditor of the transferor unless:

(a) The transferee requires the transferor to furnish a list of his existing creditors prepared as stated in this section; and

(b) The parties prepare a schedule of the property transferred sufficient to identify it; and

(c) The transferee preserves the list and schedule for six months next following the transfer and permits inspection of either or both and copying therefrom at all reasonable hours by any creditor of the transferor, or files the list and schedule in (a public office to be here identified).

(2) The list of creditors must be signed and sworn to or affirmed by the transferor or his agent. It must contain the names and business addresses of all creditors of the transferor, with the amounts when known, and also the names of all persons who are known to the transferor to assert claims against him even though such claims are disputed. If the transferor is the obligor of an outstanding issue of bonds, debentures or the like as to which there is an indenture trustee, the list of creditors need include only the name and address of the indenture trustee and the aggregate outstanding principal amount of the issue.

(3) Responsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the transferee is shown to have had knowledge.

N. C. Comments

Prior Statutes: None

Subsection (1): There seem to be no other cases involving auction sales in North Carolina. There is conflict on this point in other states. See 65 Harvard L. R. 418, 422(1952). This point is more fully noted in 6-108.

The word "ineffective" used in the act may be interpreted to mean "voidable". It may thus be a little different from the present law. The North Carolina Court has said that a sale in bulk which does not comply with the bulk sale law is "absolutely void as to creditors". Pennel v. Robinson, 164 NC 257 (1913).

(a) The present law requires the seller to "notify the creditors of the proposed sale". GS 39-23. Failure to notify makes the sale void as to creditors.

(b) The present law requires that the seller make "an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale". This compares with the requirement of the UCC that the parties make a schedule of the property "sufficient to identify it".

(c) The present law requires the taking of an inventory and requires that any claim must be presented within twelve months. The statute does not specifically state anything about keeping the inventory or permitting it to be examined, but to comply with the law it would be necessary to keep the inventory available for twelve months. The UCC has the shorter, six months, period of limitations and the specific requirement that a creditor be permitted to inspect the list of creditors and the schedule of property.

Subsection (2): The present law does not require that a list of creditors be signed and sworn to, but permits a creditor, when a creditor has not been notified, to treat the transfer as void. See Gallup v. Rozier, 172 NC 283(1916). There seem to be no cases indicating whether a person with a disputed claim must be notified, but the UCC clears this doubt up.

Subsection (3): There is no provision in the present law exactly like this, but the effect may be to change the law to some degree. This provision protects the purchaser even if the list of

creditors is not accurate. Under the present law, the failure to notify a creditor, even when the failure is inadvertent, would permit the transfer to be voided by the creditor by the creditor omitted. Gallup v. Rozier, 172 NC 283(1916).

Section 6—105. Notice to Creditors.

In addition to the requirements of the preceding section, any bulk transfer subject to this Article except one made by auction sale (Section 6—108) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in the manner and to the persons hereafter provided (Section 6—107).

N. C. Comments

Prior Statutes: GS 39-23

In addition to the requirements of the preceding section, any bulk transfer subject to this Article except one made by auction sale (Section 6-108) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in the manner and to the persons hereafter provided (Section 6-107).

The present law requires that the seller must notify the creditors seven days before the proposed sale instead of the 10 days required by the UCC.

The sanction seems to be the same. The UCC says the sale is "ineffective against any creditor of the transferor" and the present law says the sale is void as to creditors. Raleigh Tire & Rubber Co. v. Morris, 181 NC 184(1921). The consequence of noncompliance under both the UCC and the North Carolina statute is that a creditor may disregard the transfer and levy on the goods as though they still belonged to the transferor.

[Section 6—106. Application of the Proceeds.

In addition to the requirements of the two preceding sections:

(1) Upon every bulk transfer subject to this Article for which new consideration becomes payable except those made by sale at auction it is the duty of the transferee to assure that such consideration is applied so far as necessary to pay those debts of the transferor which are either shown on the list furnished by the transferor (Section 6–104) or filed in writing in the place stated in the notice (Section 6–107) within thirty days after the mailing of such notice. This duty of the transferee runs to all the holders of such debts, and may be enforced by any of them for the benefit of all.

(2) If any of said debts are in dispute the necessary sum may be withheld from distribution until the dispute is settled or adjudicated.

(3) If the consideration payable is not enough to pay all of the said debts in full distribution shall be made pro rata.]

Note: *This section is bracketed to indicate division of opinion as to whether or not it is a wise provision, and to suggest that this is a point on which State enactments may differ without serious damage to the principle of uniformity.*

In any State where this section is omitted, the following parts of sections, also bracketed in the text, should also be omitted, namely:

Section 6–107(2)(e).
6–108(3)(c).
6–109(2).

In any State where this section is enacted, these other provisions should be also.

Optional Subsection (4)

[(4) The transferee may within ten days after he takes possession of the goods pay the consideration into the (specify court) in the county where the transferor had its principal place of business in this state and thereafter may discharge his duty under this section by giving notice by registered or certified mail to all the persons to whom the duty runs that the consideration has been paid into that court and that they should file their claims there. On motion of any interested party, the court may order the distribution of the consideration to the persons entitled to it.]

Note: *Optional subsection (4) is recommended for those states which do not have a general statute providing for payment of money into court.*

N. C. Comments — Prior Statutes: GS 39-23

This section is new. However, the present law is somewhat similar in principle since it provides that a person may see that a bond is provided and take the goods free of the claim of creditors: "If the owner of said stock of goods shall at any time before the sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of the stock of goods, and conditioned that the seller will apply the proceeds of the sale, subject to the right of the owner or owners to retain therefrom the personal property exemption or exemptions as are allowed by law, as far as they will go in payment of debts actually owing by the owner...., then the provisions of this section shall not apply".* The actual payment of the creditors also has the same effect. Otherwise the section is new.

*Quotation from GS 39-23.

Section 6—107. The Notice.

(1) The notice to creditors (Section 6–105) shall state:

(a) that a bulk transfer is about to be made; and

(b) the names and business addresses of the transferor and transferee, and all other business names and addresses used by the transferor within three years last past so far as known to the transferee; and

(c) whether or not all the debts of the transferor are to be paid in full as they fall due as a result of the transaction, and if so, the address to which creditors should send their bills.

(2) If the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point then the notice shall state further:

(a) the location and general description of the property to be transferred and the estimated total of the transferor's debts;

(b) the address where the schedule of property and list of creditors (Section 6–104) may be inspected;

(c) whether the transfer is to pay existing debts and if so the amount of such debts and to whom owing;

(d) whether the transfer is for new consideration and if so the amount of such consideration and the time and place of payment; [and]

[(e) if for new consideration the time and place where creditors of the transferor are to file their claims.]

(3) The notice in any case shall be delivered personally or sent by registered or certified mail to all the persons shown on the list of creditors furnished by the transferor (Section 6–104) and to all other persons who are known to the transferee to hold or assert claims against the transferor.

Note: *The words in brackets are optional.*

N. C. Comments

Prior Statutes: GS 39-23

The UCC provides that where the debts are to be paid, a short form may be used. When debts are not to be paid in full, a longer form is to be used. It is suggested that it may be dangerous for the buyer ever to rely on the short form, for all the debts might not be paid in full. At any rate the present law requires the same notice in any case: "shall notify the creditors of the proposed sale, and the price, terms and conditions thereof". GS 39-23. The details are not set out in the present law, but whether the statute has been complied with on this point is for the determination of the jury. Gallup & Co. v. J. B. Rozier, 172 NC 283(1916).

The present law also requires that "an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale..." be made. GS 39-23.

The other details of this section are new.

This section in part is new. It provides, in subsections (1) and (3) for two alternative forms of notice, depending upon whether or not the transferor's debts are to be paid in full or the transferee is in doubt on that point. No such distinction exists in the present law. The present law requires that "an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale... be made and further requires that the seller shall "notify the creditors of the proposed sale, and the price, terms and conditions thereof."*

The other details are new. The method of giving notice is also new.

* Quotation from GS 39-23.

Section 6—108. **Auction Sales; "Auctioneer".**

(1) A bulk transfer is subject to this Article even though it is by sale at auction, but only in the manner and with the results stated in this section.

(2) The transferor shall furnish a list of his creditors and assist in the preparation of a schedule of the property to be sold, both prepared as before stated (Section 6–104).

(3) The person or persons other than the transferor who direct, control or are responsible for the auction are collectively called the "auctioneer". The auctioneer shall:

(a) receive and retain the list of creditors and prepare and retain the schedule of property for the period stated in this Article (Section 6–104);

(b) give notice of the auction personally or by registered or certified mail at least ten days before it occurs to all persons shown on the list of creditors and to all other persons who are known to him to hold or assert claims against the transferor; [and]

[(c) assure that the net proceeds of the auction are applied as provided in this Article (Section 6–106).]

(4) Failure of the auctioneer to perform any of these duties does not affect the validity of the sale or the title of the purchasers, but if the auctioneer knows that the auction constitutes a bulk transfer such failure renders the auctioneer liable to the creditors of the transferor as a class for the sums owing to them from the transferor up to but not exceeding the net proceeds of the auction. If the auctioneer consists of several persons their liability is joint and several.

Note: *The words in brackets are optional.*

N. C. Comments — Prior Statutes: None

There is no case in North Carolina determining whether an auction sale has to comply with the bulk sales law. There is a conflict in the cases from other jurisdictions that have considered this point. 65 Harvard L. R. 422(1952).

It is probably proper to consider the section as a new section.

The Massachusetts Annotations to this section has the following interesting comment about subsection (3):

"The definition of 'auctioneer' is broad enough to include the transferor's lawyer if he directs, controls or is responsible for the auction." C 106, Sec. 6-108 (1963). Annotated Laws of Massachusetts.

Section 6—109. What Creditors Protected; [Credit for Payment to Particular Creditors].

(1) The creditors of the transferor mentioned in this Article are those holding claims based on transactions or events occurring before the bulk transfer, but creditors who become such after notice to creditors is given (Sections 6—105 and 6—107) are not entitled to notice.

[(2) Against the aggregate obligation imposed by the provisions of this Article concerning the application of the proceeds (Section 6—106 and subsection (3) (c) of 6—108) the transferee or auctioneer is entitled to credit for sums paid to particular creditors of the transferor, not exceeding the sums believed in good faith at the time of the payment to be properly payable to such creditors.]

N. C. Comments — Prior Statutes: GS 39-23

Subsection (1): North Carolina is in accord with this subsection. The present bulk sales law requires notice to creditors at the time of the sale. Farmers Bank and Trust Company v. Murphy, 189 NC 479(1925).

Subsection (2): Subsection (2) is new except for the effect of actual application of the process of a sale to debts actually owed. "If the owner of said stock of goods shall ... execute a ... bond ... conditioned that the seller will apply the proceeds of the sale ... as far as they will go in payment of debts ... or if in fact the proceeds are so applied, then the provisions of this section shall not apply." GS 39-23.

Section 6—110. Subsequent Transfers.

When the title of a transferee to property is subject to a defect by reason of his non-compliance with the requirements of this Article, then:

(1) a purchaser of any of such property from such transferee who pays no value or who takes with notice of such non-compliance takes subject to such defect, but

(2) a purchaser for value in good faith and without such notice takes free of such defect.

N. C. Comments — Prior Statutes: None

Subsection (1): The present law seems to be in accord with this subsection. The court in Raleigh Tire and Rubber Co. v. Morris, 181 NC 184, 186(1921) says, "And when avoided as to creditors of the vendor by reason of failure to comply with the statutory requirements the goods can be made available by direct process of levy and sale in the hands of the original purchaser, and being out of the usual course of business, and so affecting him with notice, such purchaser may be held liable for their value when they have been disposed of by him under the principles recognized and applied in the well considered case of Sprinkle v. Wellborn, 140 NC 163, and either remedy may be pursued by the creditors of the vendor as against subsequent purchasers as long as the goods can be identified or until they pass into the hands of a bona fide purchaser for value and without notice.

Subsection (2): The same principle as subsection (1).

Section 6—111. Limitation of Actions and Levies.

No action under this Article shall be brought nor levy made more than six months after the date on which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brought or levies made within six months after its discovery.

N. C. Comments — Prior Statutes: GS 39-15

The UCC has a six months statute of limitations instead of the present twelve months statute of limitations. The present statute is not clear on this point. The present statute requires that the creditor make demand upon the purchaser in good faith or the trustee named in the bond, if a bond is executed, "within twelve months from the date of maturity of his claim". Literally, this might be taken to mean that if a claim matured more than twelve months before the sale, the statute of limitations would prevent an action. However, the statute also says, "...and any

creditor who does not present his claim or make demand either upon the purchaser in good faith or on the trustee named in a bond within twelve months from the date of its maturity shall be barred...." Here, it seems that where there is a bond, there is a twelve months statute of limitations. Probably the statute of limitations for our present bulk sales law would be twelve months. If so, the UCC clarifies the law and provides a shorter statute of limitations.

Section 7—101. Short Title.

This Article shall be known and may be cited as **Uniform** Commercial Code—Documents of Title.

Section 7—102. Definitions and Index of Definitions.

(1) In this Article, unless the context otherwise requires:

(a) "Bailee" means the person who by a warehouse receipt, bill of lading or other document of title acknowledges possession of goods and contracts to deliver them.

(b) "Consignee" means the person named in a bill to whom or to whose order the bill promises delivery.

(c) "Consignor" means the person named in a bill as the person from whom the goods have been received for shipment.

(d) "Delivery order" means a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary course of business issues warehouse receipts or bills of lading.

(e) "Document" means document of title as defined in the general definitions in Article 1 (Section 1—201).

(f) "Goods" means all things which are treated as movable for the purposes of a contract of storage or transportation.

(g) "Issuer" means a bailee who issues a document except that in relation to an unaccepted delivery order it means the person who orders the possessor of goods to deliver. Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions.

(h) "Warehouseman" is a person engaged in the business of storing goods for hire.

(2) Other definitions applying to this Article or to specified Parts thereof, and the sections in which they appear are:

"Duly negotiate". Section 7—501.

"Person entitled under the document". Section 7—403(4).

(3) Definitions in other Articles applying to this Article and the sections in which they appear are:

"Contract for sale". Section 2—106.

"Overseas". Section 2—323.

"Receipt" of goods. Section 2—103.

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

N. C. Comments

Prior Statutes: G.S. 21-1; G.S. 27-2

Subsection (1):

(a) This paragraph is new. The prior uniform acts did not define "bailee".

(b) "Consignee": Present law similar in meaning, but U.C.C. adds "or to whose order" to definition in G.S. 21-1.

(c) "Consignor": Definition in U.C.C. almost identical to definition in G.S. 21-1.

(d) "Delivery order": This paragraph is new.

(e) "Document": This paragraph is new.

(f) "Goods": Wording different, but meaning apparently very similar. See G.S. 27-2 and G.S. 21-1.

(g) "Issuer": New.

(h) "Warehouseman": As noted in the comment, this is a new definition. Now it is not necessary that one be "lawfully engaged", nor is it necessary for one to be engaged for "profit".

Subsections (2) and (3):

These merely call attention to other sections where there are definitions.

Subsection (4):

See section UCC 1-201 and Article 1.

Section 7—103. Relation of Article to Treaty, Statute, Tariff, Classification or Regulation.

To the extent that any treaty or statute of the United States, regulatory statute of this State or tariff, classification or regulation filed or issued pursuant thereto is applicable, the provisions of this Article are subject thereto.

N. C. Comments

Prior Statutes: None

This section is new, but same as present law.

Section 7—104. Negotiable and Non-Negotiable Warehouse Receipt, Bill of Lading or Other Document of Title.

(1) A warehouse receipt, bill of lading or other document of title is negotiable

(a) if by its terms the goods are to be delivered to bearer or to the order of a named person; or

(b) where recognized in overseas trade, if it runs to a named person or assigns.

(2) Any other document is non-negotiable. A bill of lading in which it is stated that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person.

N. C. Comments

Prior Statutes: G.S. 21-3; G.S. 21-8; G.S. 21-7; G.S. 27-9; G.S. 27-8.

Present law does not provide for "bearer" type bill of lading. See G.S. 21-3 and G.S. 21-8. Present law requires that a non-negotiable, that is, a straight bill of lading, shall be plainly marked "non-negotiable". G.S. 21-7. U.C.C. does not. Present law requires that warehouse receipts be plainly marked "not negotiable". G.S. 27-9. U.C.C. does not. Present law provides that "no provisions shall be inserted in a negotiable receipt that is non-negotiable", and present law also provides that a provision stating an order bill of lading is non-negotiable if void. G.S. 21-3. The U.C.C. has omitted this language. The meaning is probably the same.

Paragraph (b) is new.

Subsection (2):

The U.C.C. defines negotiable documents and provides that all documents that do not meet the definition are non-negotiable. Therefore the U.C.C. omits the definition of non-negotiable, such as G.S. 21-7 and G.S. 27-8.

Section 7—105. Construction Against Negative Implication.

The omission from either Part 2 or Part 3 of this Article of a provision corresponding to a provision made in the other Part does not imply that a corresponding rule of law is not applicable.

N. C. Comments

Prior Statutes: None

This section is new.

Section 7—201. Who May Issue a Warehouse Receipt; Storage Under Government Bond.

(1) A warehouse receipt may be issued by any warehouseman.

(2) Where goods including distilled spirits and agricultural commodities are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods has like effect as a warehouse receipt even though issued by a person who is the owner of the goods and is not a warehouseman.

N. C. Comments

Prior Statutes: G.S. 27-5

Subsection (1):

Same as G.S. 27-5.

Subsection (2):

This is new.

Section 7—202. Form of Warehouse Receipt; Essential Terms; Optional Terms.

(1) A warehouse receipt need not be in any particular form.

(2) Unless a warehouse receipt embodies within its written or printed terms each of the following, the warehouseman is liable for damages caused by the omission to a person injured thereby:

(a) the location of the warehouse where the goods are stored;

(b) the date of issue of the receipt;

(c) the consecutive number of the receipt;

(d) a statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;

(e) the rate of storage and handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a non-negotiable receipt;

(f) a description of the goods or of the packages containing them;

(g) the signature of the warehouseman, which may be made by his authorized agent;

(h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and

(i) a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien or security interest (Section 7—209). If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

(3) A warehouseman may insert in his receipt any other terms which are not contrary to the provisions of this Act and do not impair his obligation of delivery (Section 7—403) or his duty of care (Section 7—204). Any contrary provisions shall be ineffective.

N. C. Comments

Prior Statutes: GS 27-6; GS 27-7

Subsection (1):

This is similar to G.S. 27-6. Present law makes warehouseman liable for injury caused by omission of required information when it it omitted from a negotiable receipt. The U.C.C. creates liability for all injury, both in negotiable and non-negotiable receipts. See G.S. 27-6.

Subsection (2):

This seems identical to present law except for the provision in U.C.C. which excepts from requirement of rate of storage goods that are stored under a field warehousing arrangement. Present law does not contain the exception. See G.S. 27-6 (6).

Subsection (3):

This is similar to G.S. 27-7.

Section 7—203. Liability for Non-Receipt or Misdescription.

A party to or purchaser for value in good faith of a document of title other than a bill of lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the non-receipt or misdescription of the goods, except to the extent that the document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity or condition, or the receipt or description is qualified by "contents, condition and quality unknown", "said to contain" or the like, if such indication be true, or the party or purchaser otherwise has notice.

N. C. Comments — Prior Statutes: GS 27-24

The present law provides a remedy for "nonexistence" rather than "nonreceipt". G.S. 27-24. The meaning is the same, even though the language about issuance by an "agent" has been omitted, for U.C.C. 7-102(g) gives same meaning as omitted part of G.S. 27-24.

Section 7—204. Duty of Care; Contractual Limitation of Warehouseman's Liability.

(1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

(2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any. No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff.

(4) This section does not impair or repeal

Note: *Insert in subsection (4) a reference to any statute which imposes a higher responsibility upon the warehouseman or invalidates contractual limitations which would be permissible under this Article.*

N. C. Comments — Prior Statutes: GS 27-25

The present law is similar in meaning, except that there is nothing in the statute concerning the extent to which a warehouseman may enforce provisions limiting damages and there are cases on this point. See G.S. 27-25. In other words, subsections (2) and (3) are new.

Section 7—205. Title Under Warehouse Receipt Defeated in Certain Cases.

A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated.

N. C. Comments

Prior Statutes: None

There is no similar provision in the present statute. But see Lance v. Butler, 135 NC 419 (1904), which may be in conflict with this section.

Section 7—206. Termination of Storage at Warehouseman's Option.

(1) A warehouseman may on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than thirty days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of the section on enforcement of a warehouseman's lien (Section 7—210).

(2) If a warehouseman in good faith believes that the goods are about to deteriorate or decline in value to less than the amount of his lien within the time prescribed in subsection (1) for notification, advertisement and sale, the warehouseman may specify in the notification any reasonable shorter time for removal of the goods and in case the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting.

(3) If as a result of a quality or condition of the goods of which the warehouseman had no notice at the time of deposit the goods are a hazard to other property or to the warehouse or to persons, the warehouseman may sell the goods at public or private sale without advertisement on reasonable notification to all persons known to claim an interest in the goods. If the warehouseman after a reasonable effort is unable to sell the goods he may dispose of them in any lawful manner and shall incur no liability by reason of such disposition.

(4) The warehouseman must deliver the goods to any person entitled to them under this Article upon due demand made at any time prior to sale or other disposition under this section.

(5) The warehouseman may satisfy his lien from the proceeds of any sale or disposition under this section but must hold the balance for delivery on the demand of any person to whom he would have been bound to deliver the goods.

N. C. Comments

Prior Statutes: GS 27-38; GS 27-37(3).

This is new in part as indicated in the Uniform Laws Comment.

Subsection (1):

This subsection is new. However, the act apparently does not require the warehouseman to continue storage, and even under present law he may have the right to terminate storage at any time.

Subsection (2):

This subsection and subsection (3) make a distinction between goods which the warehouseman knows are perishable or hazardous at the time he receives them for storage and goods whose hazards are concealed at the time of storage. G.S. 27-38 did not make this distinction. Where he does not know of nature of goods, U.C.C. allows sale without advertisement. Otherwise not. G.S. 27-38 allows such sale whether warehouseman knew or not.

Subsection (3):

See above, under subsection (2).

Subsection (4):

Similar to present law. See G.S. 27-37(3).

Subsection (5):

Similar to present law. See G.S. 27-38 and G.S. 27-37(3).

Section 7—207. Goods Must Be Kept Separate; Fungible Goods.

(1) Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be commingled.

(2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehouseman is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated.

N. C. Comments

Prior Statutes: GS 27-26; GS 27-27; GS 27-28

Subsection (1):

Similar to present law, G.S. 27-26, except that present law now permits commingling of fungible only "if authorized by agreement or by custom". U.C.C. permits commingling of fungible goods without permission.

Subsection (2):

This is similar to G.S. 27-27 and G.S. 27-28.

Section 7—208. Altered Warehouse Receipts.

Where a blank in a negotiable warehouse receipt has been filled in without authority, a purchaser for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any receipt enforceable against the issuer according to its original tenor.

N. C. Comments

Prior Statutes: G.S. 27-17.

This is similar to present law, G.S. 27-27, but would expand the liability of the warehouseman to some extent. The U.C.C. would hold the warehouseman to the terms of a negotiable receipt even though a blank had been filled in without authority.

Section 7—209. Lien of Warehouseman.

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the re-

ceipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the Article on Secured Transactions (Article 9).

(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under Section 7—503.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

N. C. Comments

Prior Statutes: GS 27-31; GS 27-32; GS 27-34; GS 27-35; GS 27-33

Subsection (1):

This is substantially the same as G.S. 27-31, G.S. 27-32, and G.S. 27-34. Notice, however, that the last sentence requires that the receipt be "duly negotiated" if the special rule is to apply.

Subsection (2):

This subsection probably covers what is now covered by G.S. 27-31 and G.S. 27-35. Notice Official Comment 2, which indicates that enforcement of the security interest is governed by Article 9.

Subsection (3):

This is similar to G.S. 27-32.

Subsection (4):

This is similar to G.S. 27-33.

Section 7—210. Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially

reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

N. C. Comments

Prior Statutes: GS 27-37; BS 27-36; GS 27-39

Subsection (1):

This subsection is new. The idea explained in the Official Comment to Subsection (1) allows a simpler method of enforcing houseman's lien in the case of goods stored by a merchant. The new provisions specifically permit the sale to be "public or private". This subsection (1) requires that all persons known to claim an interest in the goods be notified, but the provision does not specifically require written notice. The implication of the second sentence is that it will be written.

Subsection (2):

This subsection is similar to the present law found in G. S. 27-37. U.C.C. now allows notice by certified mail.

Subsection (3):

This subsection is similar to G.S. 27-37(3).

Subsection (4):

This is new.

Subsection (5):

This is new. See Official Comment.

Subsection (6):

This is similar to last sentence of G.S. 27-37(2).

Subsection (7):

This is similar to G.S. 27-36 and G.S. 27-39.

Subsection (8):

This is new. Compare comments to subsections (1) and (2) in the Official Comment.

Subsection (9):

This is new. However, under the cases, perhaps North Carolina would hold one who did not comply with the statute to be a converter. See Ellison v. Hunsinger, 237 N.C. 619 (1953). The U.C.C. makes a distinction between "a failure to comply" and "a willful violation".

Section 7—301. Liability for Non-Receipt or Misdescription; "Said to Contain"; "Shipper's Load and Count"; Improper Handling.

(1) A consignee of a non-negotiable bill who has given value in good faith or a holder to whom a negotiable bill has been duly negotiated relying in either case upon the description therein of the goods, or upon the date therein shown, may recover from the issuer damages caused by the misdating of the bill or the non-receipt or misdescription of the goods, except to the extent that the document indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by "contents or condition of contents of packages unknown", "said to contain", "shipper's weight, load and count" or the like, if such indication be true.

(2) When goods are loaded by an issuer who is a common carrier, the issuer must count the packages of goods if package freight and ascertain the kind and quantity if bulk freight. In such cases "shipper's weight, load and count" or other words indicating that the description was made by the shipper are ineffective except as to freight concealed by packages.

(3) When bulk freight is loaded by a shipper who makes available to the issuer adequate facilities for weighing such freight, an issuer who is a common carrier must ascertain the kind and quantity within a reasonable time after receiving the written request of the shipper to do so. In such cases "shipper's weight" or other words of like purport are ineffective.

(4) The issuer may by inserting in the bill the words "shipper's weight, load and count" or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.

(5) The shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition and weight, as furnished by him; and the shipper shall indemnify the issuer against damage caused by inaccuracies in such particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

N. C. Comments

Prior Statutes: GS 21-23; GS 21-22; GS 21-21

Subsection (1):

Our present law protects a "holder of an order bill". The U.C.C. protects in a similar position a holder to whom a negotiable bill has been "duly negotiated". The U.C.C. may be narrower than the present law. Otherwise Subsection (1) is similar to G.S. 21-23 and G.S. 21-22 except as to material about "misdating". See Official Comment.

Subsection (2):

This subsection is similar to G.S. 21-21.

Subsection (3):

Similar to G.S. 21-22.

Subsection (4):

Similar to part of G.S. 21-22.

Subsection (5):

This subsection is new. See Official Comment 4.

Section 7—302. Through Bills of Lading and Similar Documents.

(1) The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by persons acting as its agents or by connecting carriers is liable to anyone entitled to recover on the document for any breach by such other persons or by a connecting carrier of its obligation under the document but to the extent that the bill covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation this liability may be varied by agreement of the parties.

(2) Where goods covered by a through bill of lading or other document embodying an undertaking to be performed in part by persons other than the issuer are received by any such person, he is subject with respect to his own performance while the goods are in his possession to the obligation of the issuer. His obligation is discharged by delivery of the goods to another such person pursuant to the document, and does not include liability for breach by any other such persons or by the issuer.

(3) The issuer of such through bill of lading or other document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document therefor, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action brought by anyone entitled to recover on the document therefor.

N. C. Comments

Prior Statutes: GS 62-203

Subsection (1):

Similar to G.S. 62-203, but present law allows the carrier to limit liability in certain instances.

Subsection (2):

Similar to present law. See G.S. 62-203 and Aydlett v. Norfolk Southern R. Co., 172 N.C. 47 (1916).

Subsection (3):

Similar to G.S. 62-203 after last proviso of paragraph (2).

Section 7—303. Diversion; Reconsignment; Change of Instructions.

(1) Unless the bill of lading otherwise provides, the carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from

(a) the holder of a negotiable bill; or

(b) the consignor on a non-negotiable bill notwithstanding contrary instructions from the consignee; or

(c) the consignee on a non-negotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill; or

(d) the consignee on a non-negotiable bill if he is entitled as against the consignor to dispose of them.

(2) Unless such instructions are noted on a negotiable bill of lading, a person to whom the bill is duly negotiated can hold the bailee according to the original terms.

N. C. Comments

Prior Statutes: GS 21-10; GS 21-11.

Subsection (1):

This subsection is similar in part to G.S. 21-10 and G.S. 21-11. As to negotiable bills, the U.C.C. does not change present law, for it permits change of instructions to be made only by the holder and requires it to be noted on the bill as does G.S. 21-10(3). The present law seems to give consignee more power to give instructions, G.S. 21-10, than does the U.C.C. See U.C.C. 7-303 (1)(c).

Subsection (2):

This subsection is new.

Section 7—304. Bills of Lading in a Set.

(1) Except where customary in overseas transportation, a bill of lading must not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(2) Where a bill of lading is lawfully drawn in a set of parts, each of which is numbered and expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitute one bill.

(3) Where a bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to whom the first due negotiation is made prevails as to both the document and the goods even though any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrender of his part.

(4) Any person who negotiates or transfers a single part of a bill of lading drawn in a set is liable to holders of that part as if it were the whole set.

(5) The bailee is obliged to deliver in accordance with Part 4 of this Article against the first presented part of a bill of lading lawfully drawn in a set. Such delivery discharges the bailee's obligation on the whole bill.

N. C. Comments — Prior Statutes: G.S. 21-5

The present law applies to a negotiable bill of lading only when it involves transportation intrastate. G.S. 21-5. The U.C.C. involves any bill of lading. The part of the U.C.C. setting out the effect of a bill of lading lawfully drawn in a set is new. That is, Subsections (2), (3), (4), and (5) are new.

Section 7—305. Destination Bills.

(1) Instead of issuing a bill of lading to the consignor at the place of shipment a carrier may at the request of the consignor procure the bill to be issued at destination or at any other place designated in the request.

(2) Upon request of anyone entitled as against the carrier to control the goods while in transit and on surrender of any outstanding bill of lading or other receipt covering such goods, the issuer may procure a substitute bill to be issued at any place designated in the request.

N. C. Comments — Prior Statutes: None

This is entirely new. See Official Comment.

Section 7—306. Altered Bills of Lading.

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor.

N. C. Comments

Prior Statutes: G.S. 21-14

This is similar to G.S. 21-14.

Section 7—307. Lien of Carrier.

(1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charge.

(2) A lien for charges and expenses under subsection (1) on goods which the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to such charges and expenses. Any other lien under subsection (1) is effective against the consignor and any person who permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked such authority.

(3) A carrier loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

N. C. Comments

Prior Statutes: G.S. 21-26

Subsection (1):

The present law expressly recognizes the existence of a carrier's lien on goods shipped under a negotiable bill of lading. G.S. 21-26. A carrier's lien as to a non-negotiable bill of lading is not expressly set out. See Hammer Lumber Company v. Seaboard Air Line Ry., 179 N.C. 359 (1920) involving a lien on a non-negotiable bill of lading.

Subsection (2):

This subsection is new.

Subsection (3):

This subsection is new. Compare with U.C.C. 7-209. However, this subsection is in accord with common law rule. See discussion of possessory lien in Barbree-Askew Finance, Inc. v. Maurice Wooten Thompson, 247 N.C. 143 (1957).

Section 7—308. Enforcement of Carrier's Lien.

(1) A carrier's lien may be enforced by public or private sale of the goods, in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the carrier either sells the goods in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the carrier subject to the terms of the bill and this Article.

(3) The carrier may buy at any public sale pursuant to this section.

(4) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the carrier with the requirements of this section.

(5) The carrier may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(6) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(7) A carrier's lien may be enforced in accordance with either subsection (1) or the procedure set forth in subsection (2) of Section 7—210.

(8) The carrier is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

N. C. Comments

Prior Statutes: G.S. 62-2

This section specifically sets out the method of satisfying the lien. This is new for the most part. Compare with U.C.C. 7-210. Compare also with the present law G.S. 62-209 which provides for the sale of unclaimed baggage or freight.

Section 7—309. Duty of Care; Contractual Limitation of Carrier's Liability.

(1) A carrier who issues a bill of lading whether negotiable or non-negotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.

(2) Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the shipment may be included in a bill of lading or tariff.

N. C. Comments

Prior Statutes: GS 62-203(a); GS 60-203(a)

Subsection (1):

Present law may require a higher degree of care. See G.S. 62-203(a).

Subsection (2):

Similar to G.S. 62-203(a); 60-203(a).

Subsection (3):

This subsection is new.

Section 7—401. Irregularities in Issue of Receipt or Bill or Conduct of Issuer.

The obligations imposed by this Article on an issuer apply to a document of title regardless of the fact that

(a) the document may not comply with the requirements of this Article or of any other law or regulation regarding its issue, form or content; or

(b) the issuer may have violated laws regulating the conduct of his business; or

(c) the goods covered by the document were owned by the bailee at the time the document was issued; or

(d) the person issuing the document does not come within the definition of warehouseman if it purports to be a warehouse receipt.

N. C. Comments

Prior Statutes: GS 21-22; GS 21-23; GS 27-24

This whole section is, for the most part, new. The law is similar in respect to misdescription in G.S. 21-22, G.S. 21-23, and G.S. 27-24.

Section 7—402. Duplicate Receipt or Bill; Overissue.

Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents. But the issuer is liable for damages caused by his overissue or failure to identify a duplicate document as such by conspicuous notation on its face.

N. C. Comments

Prior Statutes: G.S. 21-6; G.S. 27-11

This section extends G.S. 21-6 and G.S.27-11, which at present apply only to duplicate negotiable documents, so that issuers of unmarked non-negotiable documents also are covered.

Section 7—403. Obligation of Warehouseman or Carrier to Deliver; Excuse.

(1) The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:

(a) delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) damage to or delay, loss or destruction of the goods for which the bailee is not liable [, but the burden of establishing negligence in such cases is on the person entitled under the document];

Note: *The brackets in (1) (b) indicate that State enactments may differ on this point without serious damage to the principle of uniformity.*

(c) previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

(d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the Article on Sales (Section 2—705);

(e) a diversion, reconsignment or other disposition pursuant to the provisions of this Article (Section 7—303) or tariff regulating such right;

(f) release, satisfaction or any other fact affording a personal defense against the claimant;

(g) any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.

(3) Unless the person claiming is one against whom the document confers no right under Sec. 7—503 (1), he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated.

(4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a non-negotiable document.

N. C. Comments

Prior Statutes: G.S. 21-9; G.S. 27-12; G.S. 27-13; G.S. 21-10; G.S. 21-27; G.S. 21-13; G.S. 27-15; G.S. 27-16; G.S. 27-40; G.S. 21-12

Subsection (1):

Under G.S. 21-9 and G.S. 27-12 the bailee is under a duty to deliver the goods to the person entitled to them under the document of title "in the absence of some lawful excuse". This subsection clarifies what constitutes a "lawful excuse".

(a) Similar to G.S. 27-13 and G.S. 21-10.

(b) The bracketed part of this paragraph, that is, the optional part, seems to be the same as present law. See Stansbury, North Carolina Evidence, the Michie Co., Charlottesville, Va., Second Edition, section 226.

Millers Mutual Ins. Assn. v. Atkinson Motors, 240 N.C. 183 (1954). In this case, the Court says, "under these circumstances, the defendant's possession and control was that of bailee, under a bailment for the mutual benefit of the bailor and bailee; and in such case the duty of the bailee is to exercise due care and his liability depends upon the presence or absence of ordinary negligence". Ibid., p. 184.

(c) Similar in effect to G.S. 21-27 and G.S. 27-40.

(d) Similar to present law in part. G.S. 21-9 permits excuse for failure to deliver when justified, and the cases permit a stoppage in transit. Farrell & Co. v. The Richmond and Danville R.R., 102 N.C. 390 (1889).

(e) See comment to U.C.C. 7-303.

(f) G.S. 21-9 begins by saying that goods must be delivered "in the absence of some lawful excuse," as does G.S. 27-12.

(g) See comment to (f) above.

Subsection (2):

Similar to G.S. 27-12(1) and G.S. 21-9(1).

Subsection (3):

Similar to G.S. 21-12 and G.S. 21-13 and also G.S. 27-15 and G.S. 27-16.

Subsection (4):

Similar to G.S. 27-13, G.S. 21-10.

Section 7—404. No Liability for Good Faith Delivery Pursuant to Receipt or Bill.

A bailee who in good faith including observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document of title or pursuant to this Article is not liable therefor. This rule applies even though the person from whom he received the goods had no authority to procure the document or to dispose of the goods and even though the person to whom he delivered the goods had no authority to receive them.

N. C. Comments

Prior Statutes: G.S. 21-11; G.S. 27-14.

This is rewriting of G.S. 21-11 and G.S. 27-14. See Official Comment. It may give a little more protection for delivery to one

who is not owner than the present law. In an action by the true owner, U.C.C. Section 7-404 gives the bailee a defense if he has delivered "according to the terms of the document," but only if he acts "in good faith including observance of reasonable commercial standards".

Section 7—501. Form of Negotiation and Requirements of "Due Negotiation".

(1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone.

(2) (a) A negotiable document of title is also negotiated by delivery alone when by its original terms it runs to bearer.

(b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.

(3) Negotiation of a negotiable document of title after it has been indorsed to a specified person requires indorsement by the special indorsee as well as delivery.

(4) A negotiable document of title is "duly negotiated" when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.

(5) Indorsement of a non-negotiable document neither makes it negotiable nor adds to the transferee's rights.

(6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods.

N. C. Comments

Prior Statutes: GS 21-28; GS 21-29; GS 27-41; GS 27-42; GS 21-3; GS 27-44; GS 27-51; GS 21-31; GS 21-38; GS 21-30; GS 21-43; GS 21-8

Subsection (1):

This is substantially a restatement of G.S. 21-28 and G.S. 21-29 and G.S. 27-41 and G.S. 27-42.

Subsection (2):

(a) This is a restatement of G.S. 21-28 and G.S. 27-41(1), except to the extent that G.S. 21-3 does not mention "bearer" documents.

(b) According to the Official Comment 3, this paragraph expresses what is implicit in G.S. 21-23 and G.S. 21-29 and G.S. 27-41 and G.S. 27-42.

Subsection (3):

This is substantially a rephrasing of G.S. 21-29 and G.S. 27-42.

Subsection (4):

This is substantially a rewriting of G.S. 27-44, G.S. 27-51, and G.S. 21-31 and G.S. 21-38. The language "unless it is established that the negotiation is not in the regular course of business....." is new unless the requirement of good faith would require negotiation "in the regular course of business". See Locke Cotton Mills v. Pate Cotton Co., 232 N.C. 186 (1950).

Subsection (5):

This subsection is substantially a rephrasing of G.S. 21-30 and G.S. 27-43.

Subsection (6):

This is similar to G.S. 21-8.

Section 7—502. Rights Acquired by Due Negotiation.

(1) Subject to the following section and to the provisions of Section 7—205 on fungible goods, a holder to whom a negotiable document of title has been duly negotiated acquires thereby:

(a) title to the document;

(b) title to the goods;

(c) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(d) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by him except those arising under the terms of the document or under this Article. In the case of a delivery order the bailee's obligation accrues only upon acceptance and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(2) Subject to the following section, title and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of such goods by the bailee, and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person.

N. C. Comments

Prior Statutes: GS 21-32; GS 27-45; GS 21-38; GS 21-39; GS 21-40; GS 27-51; GS 27-52; GS 27-53.

Subsection (1):

(a) This is new. But see Ellison v. Hunsinger, 237 N.C. 619 (1953), which held that where wrongdoer transferred cotton by negotiation of receipts to an innocent purchaser for value without notice, such purchaser obtained absolute title to the cotton.

(b) Similar to meaning of G.S. 21-32(1) and G.S. 27-45(1).

(c) This is new. See Official Comment 2.

(d) The first sentence is similar to G.S. 21-32(2) and G.S. 27-45(2). The second sentence is new.

Subsection (2):

See Official Comment 4. The sections in the present law alluded to in the Official Comment are G.S. 21-38, G.S. 21-39, and G.S. 21-40 and G.S. 27-51, G.S. 27-52, and G.S. 27-53. The present law refers to "stoppage in transitu" and the U.C.C. refers to "any stoppage".

Section 7—503. Document of Title to Goods Defeated in Certain Cases.

(1) A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither

(a) delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery under this Article (Section 7—403) or with power of disposition under this Act (Sections 2—403 and 9—307) or other statute or rule of law; nor

(b) acquiesced in the procurement by the bailor or his nominee of any document of title.

(2) Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such a title may be defeated under the next section to the same extent as the rights of the issuer or a transferee from the issuer.

(3) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier in accordance with Part 4 of this Article pursuant to its own bill of lading discharges the carrier's obligation to deliver.

N. C. Comments

Prior Statutes: GS 21-32; GS 27-45.

Subsection (1):

(a) The subsection enlarges the scope of the present law, according to the Official Comment, Changes. The present law is, however, substantially the same as the U.C.C. See G.S. 21-32 and G.S. 27-45.

(b) No cases have been found in North Carolina on this point. However, there may not be much change in the previous interpretations of our present law. See Commercial National Bank of New Orleans v. Canal-Louisian Bank & Trust Co., 239 U.S. 520,60 L. ed. 417, 36 S. Ct. 194 (1916).

Subsection (2):

This subsection is new.

Subsection (3):

This subsection is new.

Section 7—504. Rights Acquired in the Absence of Due Negotiation; Effect of Diversion; Seller's Stoppage of Delivery.

(1) A transferee of a document, whether negotiable or non-negotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey.

(2) In the case of a non-negotiable document, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated

(a) by those creditors of the transferor who could treat the sale as void under Section 2—402; or

(b) by a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights; or

(c) as against the bailee by good faith dealings of the bailee with the transferor.

(3) A diversion or other change of shipping instructions by the consignor in a non-negotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in ordinary course of business and in any event defeats the consignee's rights against the bailee.

(4) Delivery pursuant to a non-negotiable document may be stopped by a seller under Section 2—705, and subject to the requirement of due notification there provided. A bailee honoring the seller's instructions is entitled to be indemnified by the seller against any resulting loss or expense.

N. C. Comments

Prior Statutes: GS 21-33; GS 27-46

Subsection (1):

This subsection substantially the same as first sentence in G.S. 21-33 and the first sentence in G.S. 27-46.

Subsection (2):

Similar as to meaning to G.S. 21-33 and G.S. 27-46, but prior to notification of bailee in the case of a non-negotiable document, the title of transferee may be defeated by attaching creditors. U.C.C. provides for defeat only if creditor may treat the sale as void under Section 2-402.

Paragraph (a) and Paragraph (c):

Similar to G.S. 21-33 and G.S. 27-46.

Subsection (3):

This subsection seems to be contra to present law. See Hunter v. Randolph, 128 N.C. 91 (1901). See also, Peed v. Burleson's Inc., 244 N.C. 437 (1956), which discusses the rule and an exception to it.

Subsection (4):

First sentence is same as present law. Farrell v. Richmond & D.R. Co., 102 N.C. 390 (1889). The second sentence seems implicit in the decision, but nothing has been found explicitly on the point.

Section 7—505. Indorser Not a Guarantor for Other Parties.

The indorsement of a document of title issued by a bailee does not make the indorser liable for any default by the bailee or by previous indorsers.

N. C. Comments

Prior Statutes: GS 21-36; GS 27-49

Similar to G.S. 21-36 and 27-49.

Section 7—506. Delivery Without Indorsement: Right to Compel Indorsement.

The transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary indorsement but the transfer becomes a negotiation only as of the time the indorsement is supplied.

N. C. Comments

Prior Statutes: GS 21-34; GS 27-47

Similar to G.S. 21-34 and G.S. 27-47.

Section 7—507. Warranties on Negotiation or Transfer of Receipt or Bill.

Where a person negotiates or transfers a document of title for value otherwise than as a mere intermediary under the next following section, then unless otherwise agreed he warrants to his immediate purchaser only in addition to any warranty made in selling the goods

(a) that the document is genuine; and

(b) that he has no knowledge of any fact which would impair its validity or worth; and

(c) that his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

N. C. Comments

Prior Statutes: GS 21-35; GS 27-48

Similar to G.S. 21-35 and G.S. 27-48. For change as to warranties, see Official Comment 1.

Section 7—508. Warranties of Collecting Bank as to Documents.

A collecting bank or other intermediary known to be entrusted with documents on behalf of another or with collection of a draft or other claim against delivery of documents warrants by such delivery of the documents only its own good faith and authority. This rule applies even though the intermediary has purchased or made advances against the claim or draft to be collected.

N. C. Comments

Prior Statutes: GS 21-37; GS 27-50

Similar to G.S. 21-37 and G.S. 27-50 and to Mason v. A. E. Nelson Co., 148 N.C. 492 (1908), which gives a full and careful discussion of the problem. Notice that the U.C.C. applies explicitly to a mere holder for collection; the present statutes apply to a "mortgagee or pledgee or other holder of a bill for security".

Section 7—509. Receipt or Bill: When Adequate Compliance With Commercial Contract.

The question whether a document is adequate to fulfill the obligations of a contract for sale or the conditions of a credit is governed by the Articles on Sales (Article 2) and on Letters of Credit (Article 5).

N. C. Comments

Prior Statutes: None

This is merely a cross-reference section.

Section 7—601. Lost and Missing Documents.

(1) If a document has been lost, stolen or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with such order. If the document was negotiable the claimant must post security approved by the court to indemnify any person who may suffer loss as a result of non-surrender of the document. If the document was not negotiable, such security may be required at the discretion of the court. The court may also in its discretion order payment of the bailee's reasonable costs and counsel fees.

(2) A bailee who without court order delivers goods to a person claiming under a missing negotiable document is liable to any person injured thereby, and if the delivery is not in good faith becomes liable for conversion. Delivery in good faith is not conversion if made in accordance with a filed classification or tariff or, where no classification or tariff is filed, if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery who files a notice of claim within one year after the delivery.

N. C. Comments

Prior Statutes: G.S. 21-15; G.S. 27-18; G.S. 27-15; G.S. 21-12

Subsection (1):

Generally in accord: G.S. 21-15 and G.S. 27-18. Present law applies explicitly to negotiable instruments. Non-negotiable instruments are not mentioned.

Subsection (2):

Generally in accord: G.S. 27-15 and G.S. 21-12, but the last part of the first sentence changes the present law, for delivery to the wrong person, good faith or not, is conversion. See implications of holding in Killingsworth v. Norfolk Southern R.R. Co., 171 N.C. 47 (1916) and Griggs v. York-Shipley, Inc., 229 N.C. 572, 579 (1948).

Section 7—602. Attachment of Goods Covered by a Negotiable Document.

Except where the document was originally issued upon delivery of the goods by a person who had no power to dispose of them, no lien attaches by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court. One who purchases the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

N. C. Comments

Prior Statutes: GS 21-24; GS 27-29

Generally in accord: G.S. 21-24 and G.S. 27-29.

Section 7—603. Conflicting Claims; Interpleader.

If more than one person claims title or possession of the goods, the bailee is excused from delivery until he has had a reasonable time to ascertain the validity of the adverse claims or to bring an action to compel all claimants to interplead and may compel such interpleader, either in defending an action for non-delivery of the goods, or by original action, whichever is appropriate.

N. C. Comments

Prior Statutes: GS 27-21; GS 27-22; GS 21-18; GS 21-19 GS 27-5

This subsection is substantially a rephrasing of G.S. 27-21 and G.S. 27-22 and G.S. 21-18 and G.S. 21-19. However, the present law is confined to common carriers, G.S. 21-4 and warehousemen, G.S. 27-5, whereas the U.C.C. applies to "the bailee".

Section 8—101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Investment Securities.

N.C. Comments

Prior Statutes: GS 25, GS 55-7

This Article is a negotiable instruments law for all forms of investment securities as distinguished from commercial paper (Article 3) and Documents of Title (Article 7). Article 8 replaces the Uniform Negotiable Instruments Law, adopted in North Carolina in 1899, so far as that statute covers bonds and debentures. This Article also replaces the Uniform Stock Transfer Act, adopted in 1941 and re-enacted in 1955 as part of the Business Corporation Act. Article 8 does not replace the Uniform Fiduciaries Act (GS §§ 32-1 through 32-13, adopted in 1923), nor the Uniform Act for Simplification of Fiduciary Security Transfers (GS §§ 32-14 through 32-24 (Supp. 1963), adopted in 1959).

Section 8—102. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires

(a) A "security" is an instrument which

(i) is issued in bearer or registered form; and

(ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

(iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

(b) A writing which is a security is governed by this Article and not by Uniform Commercial Code-Commercial

Paper even though it also meets the requirements of that Article. This Article does not apply to money.

(c) A security is in "registered form" when it specifies a person entitled to the security or to the rights it evidences and when its transfer may be registered upon books maintained for that purpose by or on behalf of an issuer or the security so states.

(d) A security is in "bearer form" when it runs to bearer according to its terms and not by reason of any indorsement.

(2) A "subsequent purchaser" is a person who takes other than by original issue.

(3) A "clearing corporation" is a corporation all of the capital stock of which is held by or for a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934.

(4) A "custodian bank" is any bank or trust company which is supervised and examined by state or federal authority having supervision over banks and which is acting as custodian for a clearing corporation.

(5) Other definitions applying to this Article or to specified Parts thereof and the sections in which they appear are:

"Adverse claim".	Section 8–301.
"Bona fide purchaser".	Section 8–302.
"Broker".	Section 8–303.
"Guarantee of the signature".	Section 8–402.
"Intermediary bank".	Section 4–105.
"Issuer".	Section 8–201.
"Overissue".	Section 8–104.

(6) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

N.C. Comments

Prior Statutes: None

The definition of "security" in Code Section 8-102(1)(a), and the ancillary definitions of "registered form" and "bearer form" securities, determine the coverage of Article 8, which applies to every type of investment security currently traded in the existing securities markets. All such securities are negotiable instruments under Code Section 8-105(1). Securities in registered form have been explicitly recognized as negotiable instruments both under case-law, Thomas v. DeMoss, 202 N.C. 646, 650, 163 S.E. 759, 761 (1932), and under statutes, including the Uniform Act for Simplification of Fiduciary Security Transfers, GS § 32-14(6) (Supp. 1963), and governmental bond statutes, e.g., GS § 136-89.66 (turnpike revenue bonds). Bonds in bearer form are also negotiable instruments under existing law. Bankers Trust Co. v. City of Statesville, 203 N.C. 399, 166 S.E. 169 (1932). The definition likewise covers governmental bonds made payable to bearer but giving the holder a privilege of registering principal or principal and interest, GS §§ 142-1, 142-5, and 142-6 (state bonds); § 153-106 (County Finance Act).

Since the definition of "security" applies only to Article 8 of the Code, it does not limit the broader definition of the term "security" in police statutes such as the North Carolina Securities Law, GS § 78-2(g), or in special statutes such as the Uniform Gifts to Minors Act, GS § 33-68(1)(Supp. 1963).

The other definitions in Code Section 8-102 do not conflict with existing North Carolina law and practice.

Section 8—103. Issuer's Lien.

A lien upon a security in favor of an issuer thereof is valid against a purchaser only if the right of the issuer to such lien is noted conspicuously on the security.

N.C. Comments — Prior Statutes: GS 55-89

This section extends to all investment securities the existing requirement of the Uniform Stock Transfer Act that an issuer's lien must be indicated on the stock certificate. The lien need not be stated in full but need only be "conspicuously noted" on the instrument.

Section 8—104. Effect of Overissue; "Overissue."

(1) The provisions of this Article which validate a security or compel its issue or reissue do not apply to the extent that validation, issue or reissue would result in overissue; but

(a) if an identical security which does not constitute an overissue is reasonably available for purchase, the person entitled to issue or validation may compel the issuer to purchase and deliver such a security to him against surrender of the security, if any, which he holds; or

(b) if a security is not so available for purchase, the person entitled to issue or validation may recover from the issuer the price he or the last purchaser for value paid for it with interest from the date of his demand.

(2) "Overissue" means the issue of securities in excess of the amount which the issuer has corporate power to issue.

N.C. Comments — Prior Statutes: None

Since an overissue of shares is void, Havens v. Bank of Tarboro, 132 N.C. 214, 226, 43 S.E. 639, 643 (1903) recognized that a bona fide pruchaser who would otherwise be entitled to a stock certificate could recover the value of the shares if issue of a certificate would result in an overissue. Since Code Section 8-104 authorizes an action for the value of the shares only if the issuer is unable to purchase and deliver an identical security not constituing an overissue, it gives an additional remedy and also limits the scope of the existing case-law remedy.

Section 8—105. Securities Negotiable; Presumptions.

(1) Securities governed by this Article are negotiable instruments.

(2) In any action on a security

(a) unless specifically denied in the pleadings, each signature on the security or in a necessary indorsement is admitted;

(b) when the effectiveness of a signature is put in issue the burden of establishing it is on the party claiming under the signature but the signature is presumed to be genuine or authorized;

(c) when signatures are admitted or established production of the instrument entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security; and

(d) after it is shown that a defense or defect exists the plaintiff has the burden of establishing that he or some person under whom he claims is a person against whom the defense or defect is ineffective (Section 8—202).

N.C. Comments — Prior Statute: None

Section 8-105(1)'s explicit statement of the negotiability of investment securities accords with North Carolina case holdings. Banker's Trust Co. v. City of Statesville, 203 N.C. 399, 166 S.E. 169 (1932)(coupon bonds); Thomas v. Demoss, 202 N.C. 646, 163, SE. 759 (1932)(registered bonds). North Carolina governmental bond statutes often declare that such bonds are negotiable, e.g., GS 160-485 (bonds of parking authorities), even if they would be non-negotiable under the Negotiable Instruments Law, e.g., GS 136-89.41 (bridge revenue bonds); GS 160-417 (Revenue Bond Act of 1938). Although not technically negotiable instruments, shares of stock have long enjoyed virtually all attributes of negotiability, both before the Uniform Stock Transfer Act, see Castelloe v Jenkins, 186 N.C. 166, 171, 119 S.E. 202 (1923), and since that statute, see especially GS 55-80, 55-95.

Section 8—106. Applicability.

The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer.

N.C. Comments — Prior Statute: None

Although the Code's general choice-of-law rule (Section 1-105) permits the parties, by contract, to agree to be governed by the law of any state which has a "reasonable relation" to the transaction, Section 8-106 states an exception, not subject to contract variation, that the law of the jurisdiction of an issuer's organization governs the validity of its securities and its rights and duties as to registering transfer of those securities. Hence, North Carolina law applies to securities of North Carolina corporations, but North Carolina courts would apply the law of other states with respect to securities of out-of-state issuers. This accords with present law. In Suskin v. Hodges, 216 N.C. 333, 4 S.E.2d 891 (1939) an action involving stock issued by a Maryland corporation, the court applied the Uniform Stock Transfer Act which at the time had been adopted in Maryland but not in North Carolina.

Section 8—107. Securities Deliverable; Action for Price.

(1) Unless otherwise agreed and subject to any applicable law or regulation respecting short sales, a person obligated to deliver securities may deliver any security of the specified issue in bearer form or registered in the name of the transferee or indorsed to him or in blank.

(2) When the buyer fails to pay the price as it comes due under a contract of sale the seller may recover the price

(a) of securities accepted by the buyer; and

(b) of other securities if efforts at their resale would be unduly burdensome or if there is no readily available market for their resale.

N.C. Comments

Prior Statutes: None

Subsection (1), by making securities fungible for purposes of performing contracts to deliver securities, accords with accepted practices of securities brokers, and does not appear to be inconsistent with existing North Carolina law. Subsection (2) allows an action for the price of securities if the buyer has accepted them, or if, despite non-acceptance, re-sale would be difficult (e.g., the securities would have to be registered for sale) or no ready market is available (e.g., in the case of shares of stock in a closely held corporation). Section 8-107 does not cover a seller's remedy if the buyer has not accepted the securities, or a buyer's remedy for breach of a contract to sell stock or other securities. In situations not covered by Section 8-107, the Official Comment to Section 2-105 indicates that remedies analogous to those under Article 2 - sales are available under Article 8 if a rule of sales law is "sensible" in this context and is not preempted by a specific rule under Article 8 such as Section 8-107(2).

Section 8—201. "Issuer."

(1) With respect to obligations on or defenses to a security "issuer" includes a person who

(a) places or authorizes the placing of his name on a security (otherwise than as authenticating trustee, registrar, transfer agent or the like) to evidence that it represents a share, participation or other interest in his property or in an enterprise or to evidence his duty to perform an obligation evidenced by the security; or

(b) directly or indirectly creates fractional interests in his rights or property which fractional interests are evidenced by securities; or

(c) becomes responsible for or in place of any other person described as an issuer in this section.

(2) With respect to obligations on or defenses to a security a guarantor is an issuer to the extent of his guaranty whether or not his obligation is noted on the security.

(3) With respect to registration of transfer (Part 4 of this Article) "issuer" means a person on whose behalf transfer books are maintained.

N.C. Comments

Prior Statutes: GS 25-34
25-66
25-67
25-68

The term "issuer", as defined in this section, conforms to existing law. It closely accords with the definition of the same term in the Uniform Gifts to Minors Act, GS 33-68(h)(Supp. 1963). Since Section 8-201's definition applies only to Article 8 of the Code, it does not affect the somewhat different definition of "issuer" in the Securities Law, GS 78-2(b).

Section 8—202. Issuer's Responsibility and Defenses; Notice of Defect or Defense.

(1) Even against a purchaser for value and without notice, the terms of a security include those stated on the security and those made part of the security by reference to another instrument, indenture or document or to a constitution, statute, ordinance, rule, regulation, order or the like to the extent that the terms so referred to do not conflict with the stated terms. Such a reference does not of itself charge a purchaser for value with notice of a defect going to the validity of the security even though the security expressly states that a person accepting it admits such notice.

(2) (a) A security other than one issued by a government or governmental agency or unit even though issued with a defect going to its validity is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of constitutional provisions in which case the security is valid in the hands of a subsequent purchaser for value and without notice of the defect.

(b) The rule of subparagraph (a) applies to an issuer which is a government or governmental agency or unit only if either there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

(3) Except as otherwise provided in the case of certain unauthorized signatures on issue (Section 8—205), lack of genuineness of a security is a complete defense even against a purchaser for value and without notice.

(4) All other defenses of the issuer including nondelivery and conditional delivery of the security are ineffective against a purchaser for value who has taken without notice of the particular defense.

(5) Nothing in this section shall be construed to affect the right of a party to a "when, as and if issued" or a "when distributed" contract to cancel the contract in the event of a material change in the character of the security which is the subject of the contract or in the plan or arrangement pursuant to which such security is to be issued or distributed.

N.C. Comments

Prior Statutes: GS 25-28 25-33, 25-62, 25-63, 25-67, and 25-68.

1. Subsection (1) validates the common practice of reciting terms not only in the security itself but also in an often lengthy side instrument, such as an indenture or mortgage, which is incorporated by reference into the security. Thus, the indenture may contain terms not recited in the security; the only Code requirement is that the terms of the security and side-instrument be consistent. To the extent that the Negotiable Instruments Law made non-negotiable a bond which was subject to terms in another instrument, cf. Pope v. Righter Parey Lumber Co., 162 N.C. 206, 78 S.E. 65 (1913) (note), the Code changes existing law.

2. Subsection (2) states the circumstances under which an issuer's defenses will be extinguished when the instrument is held by a bona fide purchaser. Bona fide purchasers of non-governmental securities are generally immunized from defenses, but only subsequent bona fide purchasers (see Code Section 8-102(2)) take free of constitutional defects. Code Section 8-202(2)(a). Additional conditions must be met to extinguish defenses of governmental issuers: either the governmental unit must have substantially met all legal requirements, or it must have received substantial consideration for securities which it was empowered to issue. Code Section 8-202(2)(b). The North Carolina case-law substantially accords with these Code rules.

In general, a bona fide purchaser of a security can cut defenses of the issuer. E.g., Bankers Trust Co. v. City of Statesville, 203 N.C. 399, 407, 166 S.E. 169, 174 (1932); Belo v. Commissioners of Forsyth County, 76 N.C. 489, 492-493 (1877). However, "a careful

distinction should be drawn between the want of power to issue bonds, and mere irregularities in the exercise of that power. The latter, under certain circumstances, may be cured by recitals or eliminated by estoppel; but a want of power goes to the very root of the transaction, and destroys its vitality." Commissioners of Wilkes County v. Call, 123 N.C. 308, 31 S.E. 481 (1898). As against a bona fide purchaser, a municipality cannot assert that the bonds were authorized at a special rather than a regular alderman's meeting, Bankers Trust Co. v. City of Statesville, 203 N.C. 399, 408, 166 S.E. 169, 174 (1932), or plead a non-substantial deficiency in the conduct or result of the election, Reiger v. Commissioners of the Town of Beaufort, 70 N.C. 319 (1874); Smith v. Town of Belhaven, 150 N.C. 156, 63 S.E. 610 (1909), or the bonds were issued by de facto town officers, Smith v. Carolina Beach, 206 N.C. 834, 175 S.E. 313 (1934), or were not signed by all the incumbent commissioners, Bank of Statesville v. Town of Statesville, 84 N.C. 169 (1881). Under the Code, as under existing North Carolina law, the clear test is one of substantial compliance with the formalities of the statute. Wilmington, Onslow & East Carolina R.R. v. Commissioners of Onslow County, 116 N.C. 563, 569, 21 S.E. 205, 207 (1895); Hill v. Skinner, 169 N.C. 405, 86 S.E. 351 (1915); Commissioners of Hendersonville v. C.N. Malone & Co., 179 N.C. 604, 103 S.E. 134 (1920). On questions of compliance with statutorily required procedure, recitals in the instrument are conclusive in favor of the bona fide purchaser, although a defective recital may be notice to a purchaser of defenses, Claybrook v. Commissioners of Rockingham County 114 N.C. 453, 19 S.E. 593 (1894).

North Carolina decisions uniformly hold that defenses based on non-compliance with a constitutional requirement are available against any bona fide purchaser, Union Bank of Richmond v. Commissioners of the Town of Oxford, 119 N.C. 214, 35 S.E. 966 (1896); Glenn V. Wray, 126 N.C. 730, 36 S.E. 167 (1900), and the municipality's recognition of the unconstitutional obligation by paying interest does not preclude later assertion of the defense, Commissioners of Stanly County v. Snuggs, 121 N.C. 394, 28 S.E. 539 (1897), for "there can be no bona fide holders of unconstitutional obligations," Debnam v. Chitty, 131 N.C. 657, 681, 43 S.E. 3, 10 (1902). See also Baltzer v. State, 104 N.C. 265, 10 S.E. 153 (1889) (all claims growing out of an unconstitutional obligation are unenforceable). Code Section 8-202(2)(b) slightly modifies this rule since it would sustain, in the hands of subsequent bonafide purchasers (see Section 8-102(2)), a governmental security with a constitutional defect if the issuer has received substantial consideration and if, further, the issuer had power to issue securities for that purpose. This would apparently overrule several old decisions voiding bond issues for non-compliance with a constitutionally required procedure (as distinguished from a lack of power to issue the bonds for a stated purpose). See e.g., Union Bank of Richmond, Glenn v. Wray and Commissioner of Stanly County v. Snuggs, supra (voiding bonds for non-compliance with a constitutional requirement of entering yeas and nays in legislative journals).

Subsection (4) accords with North Carolina decisions. Bankers Trust Co., v. City of Statesville, 203 N.C. 399, 408, 166 S.E. 169, 174 (1932) (defense of non-delivery of bonds rejected); Smith v. Town of Belhaven, 150 N.C. 156, 63 S.E. 610 (1909)(rejecting defense of improper use of bond proceeds); Hightower v. City of Raleigh, 150 N.C. 569, 65 S.E. 279 (1909)(same); Parker v. Flora, 63 N.C. 474 (1869)(lack or failure of consideration held no defense against bona fide purchaser).

Code Section 8-202 does not preclude or limit actions by taxpayers, prior to issue of governmental bonds, questioning the validity of the issue or the procedure by which they are issued. The Code rules apply only to the availability of defenses when the securities have been issued and are held by bona fide purchasers. In recent years contests between governmental issuers and purchasers have markedly declined due to greater care in authorizing the bonds and the common practice of securing firm opinions from counsel as to the validity of the bonds.

Section 8—203. Staleness as Notice of Defects or Defenses.

(1) After an act or event which creates a right to immediate performance of the principal obligation evidenced by the security or which sets a date on or after which the security is to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer

(a) if the act or event is one requiring the payment of money or the delivery of securities or both on presentation or surrender of the security and such funds or securities are available on the date set for payment or exchange and he takes the security more than one year after that date; and

(b) if the act or event is not covered by paragraph (a) and he takes the security more than two years after the date set for surrender or presentation or the date on which such performance became due.

(2) A call which has been revoked is not within subsection (1).

N.C. Comments

Prior Statutes: GS 25-58(2)
25-59

It is not uncommon for bonds to continue in circulation after a default, or for shares to trade after a redemption or conversion date has passed. Because investment securities are thus frequently traded, even though overdue, Code Section 8-203 changes the traditional rule of the Negotiable Instruments Law that a post-maturity purchaser cannot be a holder in due course of the security. See Belo v. Commissioners of Forsyth County, 76 N.C. 489, 494 (1877) applying the old rule to overdue municipal bonds. The effect of the Code rule is to permit purchasers to acquire overdue securities, for specified periods of time, free of issuer defenses. A similar rule applies in the case of equities of ownership. Code Section 8-305.

Section 8—204. Effect of Issuer's Restrictions on Transfer.

Unless noted conspicuously on the security a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective except against a person with actual knowledge of it.

N.C. Comments

Prior Statutes: GS 55-89

Code Section 8-204 extends to all securities the present requirement of the Uniform Stock Transfer Act that transfer restrictions appear upon the certificate, although actual knowledge of the transfer restriction is legally equivalent to a notation of the restriction. Whether or not a restriction is "otherwise lawful" under Section 8-204 depends, not on the Code, but on the substantive law of corporations and property. Thus, buy-and-sell agreements and first option arrangements are normally sustained, and Wright v. Iredell Tel. Co., 182 N.C. 308, 108 S.E. 744 (1921) upheld a requirement that directors consent to a proposed transfer of shares. An absolute restraint on alienating stock or other securities would presumably not be "otherwise lawful" and therefore ineffective even if "conspicuously noted" on the security. Since Code Section 8-204 applied only to restrictions "imposed by the issuer," private agreements among shareholders, not involving the corporation, are not covered by this provision. In this respect, the Code is narrower in scope than the corresponding Stock Transfer Act provision.

Section 8—205. Effect of Unauthorized Signature on Issue.

An unauthorized signature placed on a security prior to or in the course of issue is ineffective except that the signature is effective in favor of a purchaser for value and without notice of the lack of authority if the signing has been done by

(a) an authenticating trustee, registrar, transfer agent or other person entrusted by the issuer with the signing of the security or of similar securities or their immediate preparation for signing; or

(b) an employee of the issuer or of any of the foregoing entrusted with responsible handling of the security.

N.C. Comments

Prior Statutes: GS 25-28

Although an unauthorized signature normally does not bind the issuer under Code Section 8-205, it will be effective in favor of a bona fide purchaser if made by a transfer agent or registrar or its responsible personnel, or by an officer of the issuer. This takes account of the frequent corporate practice of keeping on hand unissued stock and bond certificates which have been signed by appropriate personnel, or which can readily be countersigned or otherwise validated by individuals entrusted with the certificates. Compare GS 55-57(b). The Code rule accords with Havens v. Bank of Tarboro, 132 N.C. 214, 43 S.E. 639 (1903) which sustained, in favor of the innocent purchaser for value, stock certificates which had been signed by the corporation's officers and entrusted to an employee who subsequently issued them to himself to use as collateral for a personal loan. The theory of the case--that the negligent corporation rather than the innocent purchaser should bear the loss--is the basis for the Code rule.

Section 8—206. Completion or Alteration of Instrument.

(1) Where a security contains the signatures necessary to its issue or transfer but is incomplete in any other respect

(a) any person may complete it by filling in the blanks as authorized; and

(b) even though the blanks are incorrectly filled in, the security as completed is enforceable by a purchaser who took it for value and without notice of such incorrectness.

(2) A complete security which has been improperly altered even though fraudulently remains enforceable but only according to its original terms.

N.C. Comments

Prior Statutes: GS 25-20, 25-21, 25-131, 55-90

Since Code Section 8-202(4) abolishes the defense of non-delivery of a security, and Code Section 8-206(1) permits an instrument to be completed, the effect is to change the rule of the Negotiable Instruments Law, GS 25-21, that non-delivery of an incomplete instrument is a defense against a purchaser for value without notice. Thus, under Code Section 8-206, whether or not delivered, the purchaser may enforce the instrument if blanks have been filled in as authorized, or even if the blanks have been incorrectly filled up provided the purchaser was unaware of this fact.

Code Section 8-206(2) reverses the rule of the Negotiable Instruments Law, GS 25-131, that only a holder in due course may enforce a materially altered security, by authorizing any holder to enforce the security according to its original tenor. Although overturning the Negotiable Instruments Law doctrine, Code Section 8-206(2) substantially accords with the rule of Section 16 of the Uniform Stock Transfer Act, GS 55-90, and extends its rule to all securities. The effect, thus, is to eliminate different rules for bonds and shares of stock under existing law.

Section 8—207. Rights of Issuer With Respect to Registered Owners.

(1) Prior to due presentment for registration of transfer of a security in registered form the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, to receive notifications and otherwise to exercise all the rights and powers of an owner.

(2) Nothing in this Article shall be construed to affect the liability of the registered owner of a security for calls, assessments or the like.

N.C. Comments

Prior Statutes: GS 55-77

Code Section 8-207(1) extends to all securities the existing North Carolina rule under Section 3 of the Uniform Stock Transfer Act, GS 55-77. It is thus consistent with provisions in the Business Corporation Law which permit the corporation to look solely to the registered owner of shares, GS 55-59, for the purpose of establishing a record date and closing the stock transfer books, GS 55-60(a), (b), giving notice of meetings, GS 55-62(a), paying dividends and making other distributions, or making any other determination of shareholders, GS 55-60(a), (b). See Bleakley v. Candler 169 N.C. 16, 19, 84 S.E. 1039, 1041 (1915). It does not, however, preclude a court from making a determination that shareholders not of record are entitled to vote, GS 55-71(h)(3), or to enjoy other beneficial interests instead of the holder or record, e.g., where shares have been purchased after a record date or are held in "street name".

Code Section 8-207(2) saves the shareholder liabilities under the Business Corporation Law, GS 55-53.

Section 8—208. Effect of Signature of Authenticating Trustee, Registrar or Transfer Agent.

(1) A person placing his signature upon a security as authenticating trustee, registrar, transfer agent or the like warrants to a purchaser for value without notice of the particular defect that

(a) the security is genuine; and

(b) his own participation in the issue of the security is within his capacity and within the scope of the authorization received by him from the issuer; and

(c) he has reasonable grounds to believe that the security is in the form and within the amount the issuer is authorized to issue.

(2) Unless otherwise agreed, a person by so placing his signature does not assume responsibility for the validity of the security in other respects.

Prior Statutes: None

N.C. Comments

Code Section 8-208(1) specifically states the warranties given by a person signing a security to a purchaser for value without notice of the defect, e.g., signers of stock certificates under the Business Corporation Law, GS 55-57(b). Although no North Carolina decisions deal with these warranties, a line of authoritative New York decisions is in accord with the Code, and it is believed that these rulings would presently be followed in North Carolina. Jarvis v. Manhattan Beach Co., 148 N.Y. 652, 43 N.E. 68 (1896). The Code warranty of the signer's authority, Section 8-208(1)(b), accords with common law agency rules. Code Section 8-208(2) accurately states the accepted view that, unless otherwise agreed by the parties, one signing a security does not warrant the validity of a security, e.g., that it is free of defects going to its validity under a statutory or constitutional provision.

Section 8—301. Rights Acquired by Purchaser; "Adverse Claim"; Title Acquired by Bona Fide Purchaser.

(1) Upon delivery of a security the purchaser acquires the rights in the security which his transferor had or had actual authority to convey except that a purchaser who has himself been a party to any fraud or illegality affecting the security or who as a prior holder had notice of an adverse claim cannot improve his position by taking from a later bona fide purchaser. "Adverse claim" includes a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security.

(2) A bona fide purchaser in addition to acquiring the rights of a purchaser also acquires the security free of any adverse claim.

(3) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.

N.C. Comments

Prior Statutes: GS 25-58, 25-63, 25-64, 25-65, 55-80, 55-81

Under Section 8-301, every pruchaser of a security obtains at least such rights as his transferror was entitled to convey, so that ownership claims against the transferror may be asserted against the transferee. This accords with the Negotiable Instruments Law, GS 25-64, and with a dictum in Belo v. Commissioners of Forsyth County, 76 N.C. 489, 492 (1877) (defenses of issuer). If the transferor was a bona fide purchaser, the transferee of a negotiable bond may be entitled to assert the transferor's rights to extinguish ownership claims. See Wellons v. 203 N.C. 178, 165 S.E. 545 (1932) (negotiable note). Code Section 8-301(2)'s statement that a bona fide purchaser (the equivalent of a holder in due course under the Negotiable Instruments Law) extinguishes adverse claims of ownership accords with existing law, both as to bonds, Stricker v. Buncombe County, 205 N.C. 536, 172 S.E. 188 (1934), and as to stock certificates, both before the enactment of the Uniform Stock Transfer Act, see Castelloe v. Jenkins, 186 N.C. 166, 119 S.E. 202 (1923); Zeiger v. Stephenson, 153 N.C. 528, 530, 69 S.E. 611, 612 (1910); Cox v. Dowd, 133 N.C. 537, 45 S.E. 846 (1903), and since its enactment, GS 55-81; Scottish Bank v. Atkinson, 245 N.C. 563, 96 S.E. 2.d 837 (1957).

The term "adverse interest" as used in Article 8 is not defined, but is intended to include all legal and equitable interests in a security. Compare the definition of "claim of beneficial interest" in the Uniform Act for Simplification of Fiduciary Security Transfers, GS 32-14(2).

Section 8—302. "Bona Fide Purchaser."

A "bona fide purchaser" is a purchaser for value in good faith and without notice of any adverse claim who takes delivery of a security in bearer form or of one in registered form issued to him or indorsed to him or in blank.

N.C. Comments

Prior Statutes: GS 25-58

In general, the bona fide purchaser of an investment security is the equivalent of a holder in due course under the Negotiable Instruments Law, GS 25-58, and to the "purchaser for value in good faith without notice of any facts making the transfer wrongful" under the Uniform Stock Transfer Act, GS 55-81(a). Although it provides uniform usage, the Code definition does not alter existing law in substance except so far as the "bona fide purchaser" of an investment security, unlike the holder in due course, need not take the security before maturity. Compare GS 25-58(2) with Code Section 8-304.

Section 8—303. "Broker."

"Broker" means a person engaged for all or part of his time in the business of buying and selling securities, who in the transaction concerned acts for, or buys a security from or sells a security to a customer. Nothing in this Article determines the capacity in which a person acts for purposes of any other statute or rule to which such person is subject.

N.C. Comments

Prior Statutes: None

This definition substantially accords with the definition of the same term in the Uniform Gifts to Minors Act, GS 33-68(c) (Supp. 1963). Application of the Code definition is limited to Article 8 and does not affect any other statute or law applicable to brokers.

Section 8—304. Notice to Purchaser of Adverse Claims.

(1) A purchaser (including a broker for the seller or buyer but excluding an intermediary bank) of a security is charged with notice of adverse claims if

(a) the security whether in bearer or registered form has been indorsed "for collection" or "for surrender" or for some other purpose not involving transfer; or

(b) the security is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor. The mere writing of a name on a security is not such a statement.

(2) The fact that the purchaser (including a broker for the seller or buyer) has notice that the security is held for a third person or is registered in the name of or indorsed by a fiduciary does not create a duty of inquiry into the rightfulness of the transfer or constitute notice of adverse claims. If, however, the purchaser (excluding an intermediary bank) has knowledge that the proceeds are being used or that the transaction is for the individual benefit of the fiduciary or otherwise in breach of duty, the purchaser is charged with notice of adverse claims.

N.C. Comments

Prior Statutes: GS 25-43, 25-62

Code Section 8-304 declares three special circumstances when purchasers are charged with notice of adverse claims as a matter of law, but it is not exhaustive so that as a matter of fact other

circumstances may also constitute notice. (1) Notice of adverse claims is automatically given if the security is endorsed "for collection" (e.g., a redeemable bond or share of preferred stock which has been redeemed and sent forward to collect the redemption price) or "for surrender" (e.g., a convertible bond which the holder has elected to convert into some other security and sends forward for exchange). Accord, Negotiable Instruments Law, GS 25-43. (2) Notice is imputed if a bearer-form security unambiguously identifies its owner. (3) Notice is given if a purchaser from a fiduciary has "knowledge" (see Code Section 1-201(25)) that the transaction is for the fiduciary's personal benefit or otherwise in breach of trust. This accords with North Carolina case-law. See Exum v. Bowden, 39 N.C. (4 Ired. Eq.) 281, 286 (1846) (dictum). However, the mere fact that a purchaser knows the security is held for a third person or is registered in a fiduciary name does not put the purchaser on notice as to the propriety of the transfer or as to adverse claims. This accords with the rule of the Uniform Act for Simplification of Fiduciary Security Transfers, GS 32-30(a) (Supp. 1963) that "no person who participates in the acquisition, disposition, assignment or transfer of a security by or to a fiduciary" is liable "for participation in any breach of fiduciary duty by reason of failure to inquire" as to the rightfulness of the transfer, absent actual knowledge. To the extent that the Uniform Fiduciaries Act, GS 32-3 and 32-4, had not done so, the Simplification Act provision overruled early North Carolina holdings such as Exum v. Bowden, 39 N.C. (4 Ired. Eq.) 281 (1846) (bond payable to A as guardian of B is of itself notice of B's interest). Although the Simplification Act provision is limited to registered-form securities, Code Section 8-304(2) also covers bearer-form securities.

Section 8—305. Staleness as Notice of Adverse Claims.

An act or event which creates a right to immediate performance of the principal obligation evidenced by the security or which sets a date on or after which the security is to be presented or surrendered for redemption or exchange does not of itself constitute any notice of adverse claims except in the case of a purchase

(a) after one year from any date set for such presentment or surrender for redemption or exchange; or

(b) after six months from any date set for payment of money against presentation or surrender of the security if funds are available for payment on that date.

N.C. Comments

Prior Statutes: GS 25-58(3)
25-59

Code Section 8-305, like Code Section 8-203, overrules the requirement of the Negotiable Instrument Law that one acquiring an overdue security can never be a holder in due course. See Comment to Code Section 8-203, Supra p. 9. Under Code Section 8-305, a bona fide purchaser acquiring an overdue security within specified time limits may nevertheless extinguish adverse claims to the security.

Section 8—306. Warranties on Presentment and Transfer.

(1) A person who presents a security for registration of transfer or for payment or exchange warrants to the issuer that he is entitled to the registration, payment or exchange. But a purchaser for value without notice of adverse claims who receives a new, reissued or re-registered security on registration of transfer warrants only that he has no knowledge of any unauthorized signature (Section 8–311) in a necessary indorsement.

(2) A person by transferring a security to a purchaser for value warrants only that

(a) his transfer is effective and rightful; and

(b) the security is genuine and has not been materially altered; and

(c) he knows no fact which might impair the validity of the security.

(3) Where a security is delivered by an intermediary known to be entrusted with delivery of the security on behalf of another or with collection of a draft or other claim against such delivery, the intermediary by such delivery warrants only his own good faith and authority even though he has purchased or made advances against the claim to be collected against the delivery.

(4) A pledgee or other holder for security who redelivers the security received, or after payment and on order of the debtor delivers that security to a third person makes only the warranties of an intermediary under subsection (3).

(5) A broker gives to his customer and to the issuer and a purchaser the warranties provided in this section and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition to applicable warranties given by and in favor of his customer.

N.C. Comments

Prior Statutes: GS 25-71 25-72, 25-73, 25-75 55-85, 55-86

The warranty under Code Section 8-306(1) of one presenting a security for registration of transfer or for payment or exchange has no counterpart in existing North Carolina statutes. Since North Carolina cases have often held the issuer liable for registering a wrongful transfer, see Comment to Code Section 8-401, infra p. 29, it is probable that North Carolina would follow the established rule that the issuer would then have a right over against the person presenting the security for registration of transfer. The warranties under Code Section 8-306(2) are identical in substance to the warranties of one transferring shares of stock under the Uniform Stock Transfer Act, GS 55-85, or of one negotiating a bond by delivery or qualified indorsement under the Negotiable Instruments Law, GS 25-71. Unlike the unqualified indorser under the Negotiable Instruments Law, GS 25-72, the transferor of an investment security does not warrant that the instrument is "valid or subsisting," but only his ignorance of facts which might impair the validity of the security (Code Section 8-306(2)(c)), nor does he warrant that the security will be paid (see Code Section 8-308(4)). Thus, the effect of Code Section 8-206(2) is to change existing law relating to transfer of negotiable bonds in favor of a single rule for all investment securities derived from the Union Stock Transfer Act, GS 25-85.

The warranties of a pledgee (Code Section 8-306 (4) and of an intermediary (Code Section 8-306(3)) are substantially the same in result as the pledgee's warranty under the Stock Transfer Act, GS 55-86. The brokers' warranty under Code Section 8-306(5) is without counterpart in existing North Carolina law.

Section 8—307. Effect of Delivery Without Indorsement; Right to Compel Indorsement.

Where a security in registered form has been delivered to a purchaser without a necessary indorsement he may become a bona fide purchaser only as of the time the indorsement is supplied, but against the transferor the transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

N.C. Comments

Prior Statutes: GS 25-55, 55-83

Under the Uniform Stock Transfer Act, GS 55-83, delivery of a stock certificate does not effect a complete transfer, even between the parties, until the stock certificate is indorsed. Code Section 8-307 makes delivery of a registered-form security a sufficient transfer between the parties. However, delivery of itself gives the transferee only the rights of the transferor, Code Section 8-301(1), and the transferee can become a bona fide purchaser only as of the date indorsement is given. Although Code Section 8-307 thus alters the rule of the Stock Transfer Act, it adopts for all investment securities the rule of the Negotiable Instruments Law, GS 25-55, which presently applies only to bonds. As under existing law, the transferee of a registered-form investment security has an enforceable right to obtain the needed indorsement.

Section 8—308. Indorsement, How Made; Special Indorsement; Indorser Not a Guarantor; Partial Assignment.

(1) An indorsement of a security in registered form is made when an appropriate person signs on it or on a separate document an assignment or transfer of the security or a power to assign or transfer it or when the signature of such person is written without more upon the back of the security.

(2) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies the person to whom the security is to be transferred, or who has power to transfer it. A holder may convert a blank indorsement into a special indorsement.

(3) "An appropriate person" in subsection (1) means

(a) the person specified by the security or by special indorsement to be entitled to the security; or

(b) where the person so specified is described as a fiduciary but is no longer serving in the described capacity,—either that person or his successor; or

(c) where the security or indorsement so specifies more than one person as fiduciaries and one or more are no longer serving in the described capacity,—the remaining fiduciary or fiduciaries, whether or not a successor has been appointed or qualified; or

(d) where the person so specified is an individual and is without capacity to act by virtue of death, incompetence, infancy or otherwise,—his executor, administrator, guardian or like fiduciary; or

(e) where the security or indorsement so specifies more than one person as tenants by the entirety or with right of survivorship and by reason of death all cannot sign,—the survivor or survivors; or

(f) a person having power to sign under applicable law or controlling instrument; or

(g) to the extent that any of the foregoing persons may act through an agent,—his authorized agent.

(4) Unless otherwise agreed the indorser by his indorsement assumes no obligation that the security will be honored by the issuer.

(5) An indorsement purporting to be only of part of a security representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(6) Whether the person signing is appropriate is determined as of the date of signing and an indorsement by such a person does not become unauthorized for the purposes of this Article by virtue of any subsequent change of circumstances.

(7) Failure of a fiduciary to comply with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer, does not render his indorsement unauthorized for the purposes of this Article.

N.C. Comments

Prior Statutes: GS 25-36 through 25-43, 25-70 through 25-75, 55-94

Code Section 8-308 states uniform rules for indorsement of all securities in registered form; it is inapplicable to bearer-form securities which pass by delivery alone. Excpet as noted in the next two paragraphs, Code Section 8-308 is generally consistent with existing provisions of the North Carolina Negotiable Instruments Law and the Uniform Stock Transfer Act, but it rephrases and expands these provisions.

Code Section 8-308(4) reverses the Negotiable Instruments Law rule that an unqualified indorser engages to pay the instrument on dishonor, GS 25-72, by providing that, unless otherwise agreed, the indorser assumes no such liability. This is a desirable change which reflects the view of the investment community that indorsement of a bond is intended only to transfer the property interest but not to underwrite the issuer's performance of the bond obligation.

Code Section 8-308(1) and 8-308(3) are more specific than existing statutes in defining the "appropriate person" to indorse a registered-form security. The "appropriate person" corresponds to the "person appearing to be the owner of a (stock) certificate" under the Uniform Stock Transfer Act, GS 55-95. In general, the persons specified in Code Section 8-308(3) would be regarded as "appropriate" under existing North Carolina law, except, possibly, that Code Section 8-308(3)(b) changes existing law by permitting a fiduciary no longer in office to indorse a security which refers to him. However, the Simplification Act permits an issuer or transfer agent to assume, without inquiry, that a named fiduciary continues to act as such until contrary written notice is furnished. GS 32-15 and 32-16; see also 32-17. (Supp. 1963).

Section 8—309. Effect of Indorsement Without Delivery.

An indorsement of a security whether special or in blank does not constitute a transfer until delivery of the security on which it appears or if the indorsement is on a separate document until delivery of both the document and the security.

N.C. Comments

Prior Statutes: 25-35, 55-75, and 55-84

This section is consistent with established North Carolina law making delivery an indispensable requisite to transfer of a security. Uniform Stock Transfer Act, GS 55-75. See Scottish Bank v. Atkinson, 245 N.C. 563, 96 S.E. 2d 837 (1957), which indicates that delivery coupled with indorsement vests the transferee with the full title to the shares notwithstanding by-law requirements that the shares must be transferred of record, and a contract provision requiring a third party's prior consent to the transfer. See also Castelloe v. Jenkins, 186 N.C. 166, 173, 119 S.E. 202, 205 (1923). Code Section 8-309 deletes as unnecessary the Stock Transfer Act provision that an attempted transfer without delivery of the security amounts to a promise to transfer, and to that extent it changes existing law, see GS 55-84. Section 8-309 would not preclude the method of stock transfer employed in Jones v. Waldroup, 217 N.C. 178. 7 S.E. 2d 366 (1940) (Transfer of shares on the corporation's books followed by delivery of the stock certificates).

Section 8—310. Indorsement of Security in Bearer Form.

An indorsement of a security in bearer form may give notice of adverse claims (Section 8—304) but does not otherwise affect any right to registration the holder may possess.

N. C. Comments

Prior Statutes: GS 25-46

Since bearer form securities are transferred solely by delivery, an indorsement on such a security neither helps nor hinders its transfer, nor does it preclude further transfer by delivery alone. Code Section 8-310 thus applies to all investment securities the rule of the Negotiable Instruments Law, GS 25-46. Thus, Code Section 8-310, for reasons peculiar to the nature of investment securities, adopts a rule different from that applicable to commercial paper where specially indorsed bearer paper may subsequently be negotiated only by indorsement, and not by delivery. See Code Section 3-204(1). Even though an indorsement has no effect on the transfer of a bearer-form instrument, an indorsement "for collection" or "for surrender" or the like may, under Code Section 8-304, give notice to the purchaser of adverse claims.

Section 8—311. Effect of Unauthorized Indorsement.

Unless the owner has ratified an unauthorized indorsement or is otherwise precluded from asserting its ineffectiveness

(a) he may assert its ineffectiveness against the issuer or any purchaser other than a purchaser for value and without notice of adverse claims who has in good faith received a new, reissued or re-registered security on registration of transfer; and

(b) an issuer who registers the transfer of a security upon the unauthorized indorsement is subject to liability for improper registration (Section 8—404).

N.C. Comments — Prior Statutes: GS 25-28

Under Code Section 1-201(43), an indorsement is "unauthorized" if made without "actual, implied, or apparent authority" or if it is a forgery. Under the Negotiable Instruments Law, GS 25-28, a forged or unauthorized signature is "wholly inoperative" absent estoppel. The general rule under Code Section 8-311 is the same: transfer on an unauthorized indorsement is ineffective to pass title even to a bona fide purchaser. However, Code Section 8-311's recognition of a limited exception changes existing law. A bona fide purchaser for value amy retain the security, as against the true owner, if the purchaser has in good faith presented the security for registration of transfer and has thereafter received a new security from the issuer or transfer agent. If the purchaser has not obtained a new security, the claim of the true owner prevails, unless he is estopped or has ratified the unauthorized signature. See Yarbrough v. Trust Co., 142 N.C. 377, 55 S.E. 296 (1906), indicating that a forgery may be ratified in North Carolina. In all events, the issuer who registered transfer on an unauthorized indorsement remains absolutely liable to the true owner, Code Section 8-311(b) and 8-404, but has a right over against the guarantor of the signature, see Code Section 8-313(1).

Section 8—312. Effect of Guaranteeing Signature or Indorsement.

(1) Any person guaranteeing a signature of an indorser of a security warrants that at the time of signing

(a) the signature was genuine; and

(b) the signer was an appropriate person to indorse (Section 8—308); and

(c) the signer had legal capacity to sign.

But the guarantor does not otherwise warrant the rightfulness of the particular transfer.

(2) Any person may guarantee an indorsement of a security and by so doing warrants not only the signature (subsection 1) but also the rightfulness of the particular transfer in all respects. But no issuer may require a guarantee of indorsement as a condition to registration of transfer.

(3) The foregoing warranties are made to any person taking or dealing with the security in reliance on the guarantee and the guarantor is liable to such person for any loss resulting from breach of the warranties.

N.C. Comments — Prior Statutes: None

Code Section 8-312 gives specific legal sanction to signature and indorsement grarantees, which are in common use in North Carolina and are routinely demanded by issuers before registering transfer of securities. Since Code Section 8-401(1) expressly authorizes issuers and transfer agents to demand a signature guarantee, there will be no change in current North Carolina practice. A signature guarantee warrants the genuineness of the signature and that the signer had legal capacity and was an "appropriate person" to sign under Code Section 8-308. It is thus coterminous with the absolute liability of the issuer registering transfer of a security on an "unauthorized

indorsement" (see Code Section 8-311(b)). A signature guarantor does not warrant that the particular transfer was rightful, e.g., was in accord with the terms of a trust. This accords with existing law embodied in the Simplification Act, GS 32-20(a), (Supp. 1963) which relieves "a person who guarantees the signature of the fiduciary" from liability for paritcipation in a breach of trust, apart from actual knowledge of that fact.

Code Section 8-312(2) recognizes an indorsement guarantee which does warrant the rightfulness of a transfer as well as the validity of the signature. However, an issuer may not demand such a guarantee as a condition to registering transfer, since the issuer is ordinarily not liable with respect to a merely wrongful transfer (see Code Section 8-404). An indorsement guarantee may be voluntarily given to facilitate the issuer in discharging his limited duty of inquiry under Code Section 8-403.

Section 8—313. When Delivery to the Purchaser Occurs; Purchaser's Broker as Holder.

(1) Delivery to a purchaser occurs when

(a) he or a person designated by him acquires possession of a security; or

(b) his broker acquires possession of a security specially indorsed to or issued in the name of the purchaser; or

(c) his broker sends him confirmation of the purchase and also by book entry or otherwise identifies a specific security in the broker's possession as belonging to the purchaser; or

(d) with respect to an identified security to be delivered while still in the possession of a third person when that person acknowledges that he holds for the purchaser; or

(e) appropriate entries on the books of a clearing corporation are made under Section 8–320.

(2) The purchaser is the owner of a security held for him by his broker, but is not the holder except as specified in subparagraphs (b), (c) and (e) of subsection (1). Where a security is part of a fungible bulk the purchaser is the owner of a proportionate property interest in the fungible bulk.

(3) Notice of an adverse claim received by the broker or by the purchaser after the broker takes delivery as a holder for value is not effective either as to the broker or as to the purchaser. However, as between the broker and the purchaser the purchaser may demand delivery of an equivalent security as to which no notice of an adverse claim has been received.

N.C. Comments

Prior Statutes: GS 25-1 (definition of "delivery"), 55-96(a)(2)

Code Section 8-313(1) states five circumstances when delivery occurs. It is consistent with the definition of "delivery" in the

Negotiable Instruments Law, GS 25-1, and the Uniform Stock Transfer Act, GS 55-96(a)(2), but is more specific in defining types of constructive delivery widely recognized in the financial community. It takes account of common practices in the securities industry by defining events constituting delivery when securities are held, as often they are, in a broker's street name (Code Section 8-313(1)(c)), or when securities are traded on margin (Code Section 8-313(1)(d)), or when securities are transferred through clearing corporations (Code Section 8-313(1)(e)). Although no North Carolina decisions deal with these situations, their specific recognition by the Code does not appear to conflict with current law and practice.

Section 313(2) makes the purchaser (including a purchaser on margin the "owner" of securities "held for him by his broker," to that upon the broker's insolvency the customer's securities are not assets subject to claims fo the broker's creditors. Except for the margin purchaser, the purchaser is not only the owner but also has the rights of a "holder" (see Code Section 1-201(20)). Thus, one who has acquired shares held by his broker for him in the purchaser's name or in street name may take the rights of a bona fide purchaser (see Code Sections 8-301 and 8-302).

Under section 8-313(3), notice of an adverse claim (see Code Section 8-301(1)) received after delivery to the broker does not preclude bona fide purchaser status. Since such a certificate may still be virtually unmarketable by the purchaser, Code Section 8-313(3) places the risk of a tainted certificate on the broker and gives the customer a right against the broker to a clean certificate, on the theory that the broker has superior facilities for procuring a clean certificate. See the Relcamation Rules of the New York Stock Exchange, Rules 265 - 275. Code Section 8-313(3) thus reverses the rule of Isham v. Post, 141 N.Y. 100, 35 N.E. 1084 (1894) relieving the broker of any obligation to furnish the customer with an untainted certificated.

Section 8—314. Duty to Deliver, When Completed.

(1) Unless otherwise agreed where a sale of a security is made on an exchange or otherwise through brokers

(a) the selling customer fulfills his duty to deliver when he places such a security in the possession of the selling broker or of a person designated by the broker or if requested causes an acknowledgment to be made to the selling broker that it is held for him; and

(b) the selling broker including a correspondent broker acting for a selling customer fulfills his duty to deliver by placing the security or a like security in the possession of the buying broker or a person designated by him or by effecting clearance of the sale in accordance with the rules of the exchange on which the transaction took place.

(2) Except as otherwise provided in this section and unless otherwise agreed, a transferor's duty to deliver a security under a contract of purchase is not fulfilled until he places the security in form to be negotiated by the purchaser in the possession of the purchaser or of a person designated by him or at the purchaser's request causes an acknowledgment to be made to the purchaser that it is held for him. Unless made on an exchange a sale to a broker purchasing for his own account is within this subsection and not within subsection (1).

N.C. Comments — Prior Statutes: None

Code Section 8-314(2) states when the seller has fulfilled his duty to deliver a security which is being transferred other than through a securities exchange or other facilities of brokers, e.g., from one individual to another, or one bank to another. In general, delivery means physical transfer of possession to the purchaser or his agent; a registered-form security must also be indorsed. Since the risk of loss remains on the seller until the purchaser obtains possession, mailing the security is not of itself a sufficient delivery.

Code Section 8-314(1) states when the seller has fulfilled his duty to deliver a security transferred through a securities exchange or other brokers' facilities. In general, the seller's duty is completed when he delivers possession to the selling broker; and the selling broker's duty is consummated when he transfers possession of the security itself (or a like security) to the purchasing broker or his nominee or clears the security through exchange clearing procedures. The implication of Code Section 8-314(1) is that if the seller has completed his duty of delivery by transfer to the selling broker, the risk of loss thereafter rests on the selling broker.

Since Code Section 8-314 states the common understanding of the investment community, it may be assumed that North Carolina practice is not inconsistent.

Section 8—315. Action Against Purchaser Based Upon Wrongful Transfer.

(1) Any person against whom the transfer of a security is wrongful for any reason, including his incapacity, may against anyone except a bona fide purchaser reclaim possession of the security or obtain possession of any new security evidencing all or part of the same rights or have damages.

(2) If the transfer is wrongful because of an unauthorized indorsement, the owner may also reclaim or obtain possession of the security or new security even from a bona fide purchaser if the ineffectiveness of the purported indorsement can be asserted against him under the provisions of this Article on unauthorized indorsements (Section 8—311).

(3) The right to obtain or reclaim possession of a security may be specifically enforced and its transfer enjoined and the security impounded pending the litigation.

N. C. Comments — Prior Statutes: GS 55-7

Code Section 8-315 states the circumstances under which the true owner of a security has a right of action against the purchaser, either to reclaim the security, obtain a new security, or have damages. It distinguishes a merely wrongful transfer (Code Section 8-315(1)) from a transfer on an unauthorized indorsement (Code Section 8-315(2), referring to Code Section 8-311. Section 8-315(1) substantially accords with the Uniform Stock Transfer Act, GS 55-81, in its protection of a bona fide purchaser where the indorsement is not unauthorized but the transfer is wrongful. Thus under the Code provision the bona fide purchaser would prevail although transfer was obtained through fraud or duress, or under a mistake, or in breach of trust. See also Green v Forsyth Furn. Lines, 198 N.C. 104, 107, 150 S.E. 713, 715

(1929) (stock procured by fraud transferred to bona fide purchaser). Section 8-315(2) supplements (but is not inconsistent with) the Stock Transfer Act by stating the limited circumstances in which a purchaser may prevail over a true owner where the indorsement is unauthorized. See Comment on Code Section 8-311.

Section 8—316. Purchaser's Right to Requisites for Registration of Transfer on Books.

Unless otherwise agreed the transferor must on due demand supply his purchaser with any proof of his authority to transfer or with any other requisite which may be necessary to obtain registration of the transfer of the security but if the transfer is not for value a transferor need not do so unless the purchaser furnishes the necessary expenses. Failure to comply with a demand made within a reasonable time gives the purchaser the right to reject or rescind the transfer.

N.C. Comments

Prior Statutes: None

Section 8-316 specifically requires the transferor to aid the transferee in registering his securities on the issuer's books. Since the issuer's duty to register transfer arises only if certain conditions have been met (see Code Section 8-401(1)), the transferor may be compelled to furnish the necessary indorsements (see Code Section 8-307), to procure a signature guarantee (see Section 8-312), and, where necessary, proof of authority to transfer (see Code Section 8-308(3)), and to furnish the transfer tax stamps. Under existing law the transferor must furnish necessary indorsements. Uniform Stock Transfer Act, GS 55-83. Since North Carolina decisions hold that a bona fide purchaser is entitled to registration of transfer on the issuer's books, Green v. Forsyth Furn. Lines, 198 N.C. 104, 107, 150 S.E. 713, 715 (1929), it seems a fair inference that the purchaser is entitled to other requisites for implementing this right. Under the Code, if the purchaser paid value for the security, the transferor must perform these duties at his own expense; otherwise, the transferee must cover the cost. The transferor's default entitles the purchaser to rescind the transaction or to recover damages.

Section 8—317. Attachment or Levy Upon Security.

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

N.C. Comments

Prior Statutes: GS 55-87, 55-88

Code Section 8-317 reflects the extent to which Article 8 goes in reducing the security interest to the instrument itself and giving full negotiability to the instrument. Like the Uniform Stock Transfer Act, GS 55-87, no attachment or levy is effective absent physical seizure of the instrument, or its surrender to the issuer followed by attachment. Unlike existing North Carolina law embodied in the Stock Transfer Act, an injunction against transfer is not of

itself a sufficient attachment, for, as recognized by Green v. Forsyth Furn. Lines, 198 N.C. 104, 107, 150 S.E. 713, 715, (1929), the holder still has power to defy the injunction and transfer the security to a bona fide purchaser, thereby defeating the attachment. However, under both Code Section 8-317(2) and the Uniform Stock Transfer Act, GS 55-88, injunction and other process may aid one in gaining the indispensable possession of the security itself and thus lay the ground for an attachment effective under Code Section 8-317(1).

Section 8—318. No Conversion by Good Faith Delivery.

An agent or bailee who in good faith (including observance of reasonable commercial standards if he is in the business of buying, selling or otherwise dealing with securities) has received securities and sold, pledged or delivered them according to the instructions of his principal is not liable for conversion or for participation in breach of fiduciary duty although the principal had no right to dispose of them.

N.C. Comments

Prior Statutes: None

Code Section 8-318 exonerates the good faith agent or bailee from liability for conversion or participation in breach of trust if he disposes of securities on his principal's instructions. This provision accords with the Uniform Act for Simplification of Fiduciary Security Transfers, GS 33-20(a) (Supp. 1963) which relieves individuals for liability for participation in breach of trust when they handle securities whose transfer by or to a fiduciary is a breach of trust, and extends the same immunity to transfers other than those of fiduciaries. See also Whiteford v. Lane, 190 N.C. 343, 130 S.E. 36 (1925).

Section 8—319. Statute of Frauds.

A contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

(b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

N.C. Comments

Prior Statutes: None

Section 8-319 provides a statute of frauds for sales of all securities, and defines a sufficient writing. Particularly important is the Code's validation of the normal practice of purchasing securities on an oral order followed by a written confirmation which is not thereafter objected to by the customer. Code Section 8-319(c). Although no general statute of frauds presently applies to sales of securities, the Business Corporation Law, GS 55-43(b), requires all pre-incorporation and post-incorporation stock subscriptions, to be "in writing, signed and delivered by the subscriber" in order to be "valid". An early version of the "Blue Sky Law" apparently required contracts for sales of stock to be in writing. See Seminole Phosphate Co. v. Johnson, 188 N.C. 419, 124 S.E. 859 (1924).

Section 8—320. Transfer or Pledge within a Central Depository System.

(1) If a security

(a) is in the custody of a clearing corporation or of a custodian bank or a nominee of either subject to the instructions of the clearing corporation; and

(b) is in bearer form or indorsed in blank by an appropriate person or registered in the name of the clearing corporation or custodian bank or a nominee of either; and

(c) is shown on the account of a transferor or pledgor on the books of the clearing corporation;

then, in addition to other methods, a transfer or pledge of the security or any interest therein may be effected by the making of appropriate entries on the books of the clearing corporation reducing the account of the transferor or pledgor and increasing the account of the transferee or pledgee by the amount of the obligation or the number of shares or rights transferred or pledged.

(2) Under this section entries may be with respect to like securities or interests therein as a part of a fungible bulk and may refer merely to a quantity of a particular security without reference to the name of the registered owner, certificate or bond number or the like and, in appropriate cases, may be on a net basis taking into account other transfers or pledges of the same security.

(3) A transfer or pledge under this section has the effect of a delivery of a security in bearer form or duly indorsed in blank (Section 8–301) representing the amount of the obligation or the number of shares or rights transferred or pledged. If a pledge or the creation of a security interest is intended, the making of entries has the effect of a taking of delivery by the pledgee or a secured party (Sections 9–304 and 9–305). A transferee or pledgee under this section is a holder.

(4) A transfer or pledge under this section does not constitute a registration of transfer under Part 4 of this Article.

(5) That entries made on the books of the clearing corporation as provided in subsection (1) are not appropriate does not affect the validity or effect of the entries nor the liabilities or obligations of the clearing corporation to any person adversely affected thereby.

N.C. Comments

Prior Statutes: None

Code Section 8-20, without counterpart in existing North Carolina law, gives specific legal recognition to recently evolved procedures, analogous to bank clearing methods, for transferring securities in the organized markets. Securities are held by the "clearing corporation" (see Code Section 8-102(2)) or by a "custodian bank"(Code Section 8-102(4)), either in bearer form or indorsed in blank or registered in the name of the clearing corporation or the custodian bank. Securities may then be transferred or pledged merely upon making book entries reflecting the increase or decrease in the accounts of members of the clearing system. Such entries constitute a delivery of the securities (see Code Section 8-320(3) and 8-313(1)(e)) to the purchaser, who thus takes the rights of any purchaser (Code Section 8-301(1)) or becomes a bona fide purchaser (Code Section 8-302).

Section 8—401. Duty of Issuer to Register Transfer.

(1) Where a security in registered form is presented to the issuer with a request to register transfer, the issuer is under a duty to register the transfer as requested if

(a) the security is indorsed by the appropriate person or persons (Section 8—308); and

(b) reasonable assurance is given that those indorsements are genuine and effective (Section 8—402); and

(c) the issuer has no duty to inquire into adverse claims or has discharged any such duty (Section 8—403); and

(d) any applicable law relating to the collection of taxes has been complied with; and

(e) the transfer is in fact rightful or is to a bona fide purchaser.

(2) Where an issuer is under a duty to register a transfer of a security the issuer is also liable to the person presenting it for registration or his principal for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer.

N.C. Comments

Prior Statutes: None

Section 8-401 states for the first time in any uniform statute the duty of the issuer to register transfer of a registered-form security, and the issuer's liability for non-registration.

1. Background. Prior to specific statutes, North Carolina adhered to the majority American view, see Lowry v. Commercial & Farmer's Bank. 15 Fed. Cases 1040 (No. 8581)(C.C.D.Md. 1848), that the issuer is trustee for all of its shareholders with respect to the transfer of securities, that it owes to shareholders a duty to investigate the rightfulness of each transfer, and that registering transfer without due inquiry makes the issuer absolutely liable to the "true owner." See Baker v. Atlantic C.L.R.R. 173 N.C. 365, 92 S.E. 170 (1917); Cox v. First Nat. Bank of Wilson, 119 N.C. 302, 26 S.E. 22 (1896); Wooten v. Wilmington R.R., 128 N.C. 119 38 S.E. 298 (1901); Richardson v. King, 136 F.2d 849 (4th Cir.), cert. denied, 320 U.S. 777 (1943). Under these decisions, the corporation was specifically obligated, at its peril, to determine the rightfulness of any particular transfer by a fiduciary. See especially Baker v. Atlantic C.L.R.R., supra, stating rules governing particular classes of fiduciaries. This liability of the issuer--to determine rightfulness of a particular transfer--is in addition to the issuer's undoubted liability for registering transfer of shares on a forged or unauthorized indorsement. See e.g., Bank of Virginia v. Craig, 6 Leigh (50 Va.) 399 (1835).

North Carolina has progressivley modified the early case-law rule whose effect was to compel the issuer, for its own protection, to seek excessive documentation of security transfers, with the attendant delay and expense. North Carolina's 1923 adoption of the Uniform Fiduciaries Act relieved issuers and transfer agents of any obligation to "inquire whether the fiduciary is committing a breach of his obligation . . . or to see to the performance of the fiduciary obligation" and imposed liability only upon an issuer registering transfer with

"actual knowledge" of the breach or otherwise in bad faith. GS 32-4, construed in Carolina Tel. & Tel. Co. v. Johnson, 168 F.2d 489 (4th Cir. 1948) to relieve the issuer under the facts of that case for liability for registering transfer of shares by a guardian who neglected to account for the proceeds. But cf. Richardson v. King, 136 F.2d 849 (4th Cir.), cert. denied, 320 U.S. 777 (1943) holding the issuer liable for registering transfer in breach of trust without mention of the Uniform Fiduciaries Act, although the issuer presumably had "actual knowledge" of the nature of the transfer, 136 F.2d at 859.

The Uniform Act for simplification of Fiduciary Security Transfers, adopted in 1959, expressly relieved issuers and transfer agents of a general duty to inquire into the fiduciary relationship, authorized issuers to assume without inquiry the rightfulness of each transfer, negated constructive notice from publicly recorded documents, specified the limited documentation needed for registering a fiduciary security transfer, and expressly exonerated the issuer from any liability for acts conforming to the statutory standards. GS 32-15, -16, -17, and -19 (Supp. 1963).

Code sections 8-401 through 8-404 give issuers the same protection on registering any security transfers as the Simplification Act now accords to fiduciary transfers. In thus making universal these rules, it does not depart from existing North Carolina law embodied in the Uniform Fiduciaries Act and the Simplification Act, except possibly so far as the older case-law might apply outside the ambit of fiduciary security transfers.

2. Code Section 8-401(1) mandates the issuer to register transfer of any security if certain conditions are met. If these conditions are satisfied, but the transfer is in fact wrongful, the issuer has no duty to register transfer, unless it is to a bona fide purchaser. Accord, Green. v. Forsyth Furn. Lines, 198 N.C. 104, 107, 150 S.E. 713, 715 (1929) (corporation must issue new certificate to bona fide purchaser even though corporation knew of fraud practiced on the original owner by an intermediate transferor). Since the issuer has no duty to register a wrongful transfer to one who is not a bona fide purchaser, it is privileged to refuse registration under Section 8-401(1). If the issuer knows that a transfer is not "in fact rightful" or that the purchaser is not a BFP, but all other conditions are satisfied, the issuer is under no duty to register transfer, Code Section 8-401(1)(e), but if it does so, it would appear not to be liable, see Code Section 8-404(1), unless its act was demonstrably not in "good faith". see Code Section 1-201(14). Although not mentioned in Code section 8-401, it is assumed that the presenter surrenders the old certificate, for "a corporation which proceeds to transfer stock 'in the absence of the original certificate' . . . does so ' at its own peril' . . . ." Suskin v. Hodges, 216 N.C. 333, 336, 4 S.E.2d 891, 893 (1939).

3. Code Section 8-402(2) makes the issuer liable to the presenter for failure or refusal to register transfer or for loss from an unreasonable delay in registration. See Sheppard v. Rockingham Power Co., 150 N.C. 776, 781, 64 S.E. 894, 896 (1909) ("a mandamus or mandatory injunction lies to compel a corporation to transfer stock . . . . . ."). Code Section 8-402(2) would not alter existing procedural requirements. See e.g., Griffin & Vose v. Non-Metallic Minerals Corp., 225 N.C. 434, 35 S.E. 2d 247 (1945) alleged transferors are necessary parties to transferee's suit to compel corporation to register stock transfer).

4. Part 4 of Article 8 (Code Sections 8-401 through 8-406) apply not only to issuers but also to transfer agents, registrars, or other persons handling security transfers. See Code Sections 8-201(3) and 8-406.

Section 8—402. Assurance that Indorsements Are Effective.

(1) The issuer may require the following assurance that each necessary indorsement (Section 8—308) is genuine and effective

(a) in all cases, a guarantee of the signature (subsection (1) of Section 8—312) of the person indorsing; and

(b) where the indorsement is by an agent, appropriate assurance of authority to sign;

(c) where the indorsement is by a fiduciary, appropriate evidence of appointment or incumbency;

(d) where there is more than one fiduciary, reasonable assurance that all who are required to sign have done so;

(e) where the indorsement is by a person not covered by any of the foregoing, assurance appropriate to the case corresponding as nearly as may be to the foregoing.

(2) A "guarantee of the signature" in subsection (1) means a guarantee signed by or on behalf of a person reasonably believed by the issuer to be responsible. The issuer may adopt standards with respect to responsibility provided such standards are not manifestly unreasonable.

(3) "Appropriate evidence of appointment or incumbency" in subsection (1) means

(a) in the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within sixty days before the date of presentation for transfer; or

(b) in any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the issuer to be responsible or, in the absence of such a document or certificate, other evidence reasonably deemed by the issuer to be appropriate. The issuer may adopt standards with respect to such evidence provided such standards are not manifestly unreasonable. The issuer is not charged with notice of the contents of any document obtained pursuant to this paragraph (b) except to the extent that the contents relate directly to the appointment or incumbency.

(4) The issuer may elect to require reasonable assurance beyond that specified in this section but if it does so and for a purpose other than that specified in subsection 3(b) both requires and obtains a copy of a will, trust, indenture, articles of co-partnership, by-laws or other controlling instrument it is charged with notice of all matters contained therein affecting the transfer

N.C. Comments

Prior Statutes: None

Under Code Section 8-401(1), an issuer's enforceable duty to register transfer does not arise absent "reasonable assurances" that indorsements are genuine and effective, unless the issuer chooses to waive them. Code Section 8-402(1) specifies what assurances are "reasonable" for particular classes of transfers. This includes in all cases a signature guarantee (see Code Section 8-313(1)) by a person "reasonably believed by the issuer to be responsible" under standards set by the issuer (Code Section 8-402(2)). Fiduciaries may be required to furnish "appropriate evidence of appointment or incumbency" (Code Section 8-402(1)(c)), which Code Section 8-402(3) defines in terms nearly identical with the Simplification Act, GS 32-17. (Supp. 1963). In order to implement the Code policy of discouraging excessive and costly documentation, the issuer may demand only a judicial certificate from a court appointed fiduciary, or a copy of the basic document from all other fiduciaries. Code Section 8-402(3), corresponding to GS 32-17 (Supp. 1963). Possession of such a document, including even a will or trust, does not put the issuer or transfer agent on notice as to any provision of the document bearing on the rightfulness of the transfer. See Code Section 8-402(3)(b), corresponding to GS 32-17(2)(Supp. 1963). Code Section 8-402(4) goes beyond the Simplification Act in affirmatively discouraging the issuer from demanding unnecessary documents by imputing notice of their contents, since the issuer does not need additional documentation to safeguard himself. Although he remains absolutely liable for registering transfer on a forged or unauthorized indorsement, Code Section 8-311(b), the issuer's protection comes, not from documents, comforting legal opinions, and the like, but from the signature guarantee which may always be required, Code Section 8-402(1)(a). If desired, the issuer could obtain insurance or rely only upon insured signature guarantors, see Code Section 8-402(3).

Section 8—403. Limited Duty of Inquiry.

(1) An issuer to whom a security is presented for registration is under a duty to inquire into adverse claims if

(a) a written notification of an adverse claim is received at a time and in a manner which affords the issuer a reasonable opportunity to act on it prior to the issuance of a new, reissued or re-registered security and the notification identifies the claimant, the registered owner and the issue of which the security is a part and provides an address for communications directed to the claimant; or

(b) the issuer is charged with notice of an adverse claim from a controlling instrument which it has elected to require under subsection (4) of Section 8—402.

(2) The issuer may discharge any duty of inquiry by any reasonable means, including notifying an adverse claimant by registered or certified mail at the address furnished by him or if there be no such address at his residence or regular place of business that the security has been presented for registration of transfer by a named person, and that the transfer will be registered unless within thirty days from the date of mailing the notification, either

(a) an appropriate restraining order, injunction or other process issues from a court of competent jurisdiction; or

(b) an indemnity bond sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar or other agent of the issuer involved, from any loss which it or they may suffer by complying with the adverse claim is filed with the issuer.

(3) Unless an issuer is charged with notice of an adverse claim from a controlling instrument which it has elected to require under subsection (4) of Section 8—402 or receives notification of an adverse claim under subsection (1) of this section, where a security presented for registration is indorsed by the appropriate person or persons the issuer is under no duty to inquire into adverse claims. In particular

(a) an issuer registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship and thereafter the issuer may assume without inquiry that the newly registered owner continues to be the fiduciary until the issuer receives written notice that the fiduciary is no longer acting as such with respect to the particular security;

(b) an issuer registering transfer on an indorsement by a fiduciary is not bound to inquire whether the transfer is made in compliance with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer; and

(c) the issuer is not charged with notice of the contents of any court record or file or other recorded or unrecorded document even though the document is in its possession and even though the transfer is made on the indorsement of a fiduciary to the fiduciary himself or to his nominee.

N.C. Comments

Prior Statutes: GS 32-4

Code Section 8-403 extends the issuer's exoneration already recognized in North Carolina for fiduciary security transfers by the Uniform Fiduciaries Act, GS 32-4, and by the Simplification Act, GS 32-14 through 32-23 (Supp. 1963), by substantially contracting the issuer's equitable obligation to inquire into all possible adverse claims. See also the comparable exoneration clause in the Uniform Gifts to Minors Act, GS 33-73 (Supp. 1963). Under Code Section 8-403, no duty of inquiry arises unless the issuer receives a stop-transfer notice whose requirements of form (see Code Section 8-403(1)(a)) enable the issuer or transfer agent to key the notice to its records or business machines. In this way, the normal routine for registering transfer will bring to light any stop-transfer notice duly received. The issuer can discharge its limited duty of inquiry by notice to the claimant identified by the stop-transfer notice, and by waiting thirty days for the claimant to obtain a restraining order or post bond to protect the issuer (see Code Section 8-403(2)). These provisions are consistent with, but more elaboroate than, the counterpart clauses of the Simplification Act, GS 32-18 (Supp. 1963) which lacks the Code procedure authorizing an

indemnity bond in lieu of a court order. Code Section 8-403(3) is identical in substance with the Simplification Act, GS 32-16 (Supp. 1963). As indicated in the Comment to Code Section 8-401, the Code represents the final stage in the gradual modification of the issuer's traditional duty to guarantee at its peril the rightfulness of all transfers of its securities.

Section 8—404. Liability and Non-Liability for Registration.

(1) Except as otherwise provided in any law relating to the collection of taxes, the issuer is not liable to the owner or any other person suffering loss as a result of the registration of a transfer of a security if

(a) there were on or with the security the necessary indorsements (Section 8—308); and

(b) the issuer had no duty to inquire into adverse claims or has discharged any such duty (Section 8—403).

(2) Where an issuer has registered a transfer of a security to a person not entitled to it the issuer on demand must deliver a like security to the true owner unless

(a) the registration was pursuant to subsection (1); or

(b) the owner is precluded from asserting any claim for registering the transfer under subsection (1) of the following section; or

(c) such delivery would result in overissue, in which case the issuer's liability is governed by Section 8—104.

N.C. Comments

Prior Statutes: None

Code Section 8-404(1) saves the issuer from liability if a transfer is merely wrongful, provided the security has been duly indorsed, and the issuer has discharged its duty of inquiry. Hence, the fact that the transfer subsequently turns out to involve a breach of trust entails no issuer liability. This is consistent with the Uniform Fiduciaries Act, GS 32-4; with Carolina Tel. & Tel. v. Johnson, 168 F.2d 489 (4th Cir. 1948) (construing the Uniform Fiduciaries Act); and with the Simplification Act, GS 32-19 (Supp. 1963), and thus works no change in existing law except to extend the now established North Carolina rule to all types of security transfers.

Outside the shelter of Code Section 8-404(1), the issuer remains liable to the true owner. This continues the issuer's absolute liability for registering transfer on an unauthorized indorsement, Code Section 8-311(b), or without performing its limited duty of inquiry under Code Section 8-404(1)(b), or where the true owner of a security has given due notice of its loss, theft, or apparent destruction, Code Section 8-404(2)(b) referring to Code Section 8-405(1).

Section 8—405. Lost, Destroyed and Stolen Securities.

(1) Where a security has been lost, apparently destroyed or wrongfully taken and the owner fails to notify the issuer of that fact within a reasonable time after he has notice of it and the issuer registers a transfer of the security before receiving such a notification, the owner is precluded from asserting against the issuer any claim for registering the transfer under the preceding section or any claim to a new security under this section.

(2) Where the owner of a security claims that the security has been lost, destroyed or wrongfully taken, the issuer must issue a new security in place of the original security if the owner

(a) so requests before the issuer has notice that the security has been acquired by a bona fide purchaser; and

(b) files with the issuer a sufficient indemnity bond; and

(c) satisfies any other reasonable requirements imposed by the issuer.

(3) If, after the issue of the new security, a bona fide purchaser of the original security presents it for registration of transfer, the issuer must register the transfer unless registration would result in overissue, in which event the issuer's liability is governed by Section 8—104. In addition to any rights on the indemnity bond, the issuer may recover the new security from the person to whom it was issued or any person taking under him except a bona fide purchaser.

N.C. Comments

Prior Statutes: GS 55-57(e)
55-91

Code section 8-405 states a uniform rule governing all lost stolen or destroyed securities, and would replace two existing statutes applicable to stock certificates, GS 55-57(e) and 55-91, as well as common law rules applicable to bonds and other securities. Unlike prior statutes, Code Section 8-405 specifically extends its coverage to stolen certificates. Code Section 8-405 abandons the Stock Transfer Act's clumsy and little used requirement of a court order for a new certificate. Instead, like GS 55-57(e), it recognizes the business custom of volumtarily issuing a new certificate on posting adequate bond. Unlike GS 55-57(e), Code Section 8-405(2) makes the issue of a new security an enforceable duty of the issuer even without a court order provided that the conditions of Section 8-405(2)(a)-(c) are met.

Code Section 8-405(3) relieves the issuer of the existing liability in damages, see GS 55-91, to the bona fide transferee of the original certificate, and instead states new rules as follows:

(A) Despite issue of a replacement security, a bona fide purchaser of the original security is entitled to registration of transfer into his name, or to rights under Code Section 8-104 if registration would cause overissue. The issuer may then recover on the "sufficient indemnity bond", Code Section 8-405(2)(b), or reclaim the replacement security, Code Section 8-405(3). In this situation, only the bona fide purchaser of the original security is entitled to registration, and he is preferred because of the Code policy favoring free negotiability and because the original owner was, after all, best placed to avoid the original loss.

(B) If both the original and the replacement security are acquired by bona fide purchasers, both must be registered. The issuer may not reclaim the replacement security, Code Section 8-405(3), but could recover on the indemnity bond, Code Section 8-405(2)(b). Overissue would be dealt with under Code Section 8-104.

Section 8—406. Duty of Authenticating Trustee, Transfer Agent or Registrar.

(1) Where a person acts as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of transfers of its securities or in the issue of new securities or in the cancellation of surrendered securities

(a) he is under a duty to the issuer to exercise good faith and due diligence in performing his functions; and

(b) he has with regard to the particular functions he performs the same obligation to the holder or owner of the security and has the same rights and privileges as the issuer has in regard to those functions.

(2) Notice to an authenticating trustee, transfer agent, registrar or other such agent is notice to the issuer with respect to the functions performed by the agent.

N.C. Comments

Prior Statutes: None

Code Section 8-406(1)(a) imposes upon the transfer agent a duty of good faith and due diligence running to the issuer, and Code Section 8-406(1)(b) exacts of the transfer agent a like duty to every holder or owner of the security with whom he deals. Besides liability for misfeasance, the transfer agent is also liable for negligent inaction, e.g., refusal to register a transfer or undue delay causing damage. This accords with North Carolina common law rules making agents liable to third persons for non-feasance. Palomino Mills, Inc. v. Davidson Mills Corp., 230 N.C. 286, 292, 52 S.E.2d 915, 919 (1949); Wachovia Bank & Trust Co. v. Southern Ry., 209 N.C. 304, 183 S.E. 630 (1936). A transfer agent fulfills his duty of due diligence both to the issuer and the person presenting a security for registration of transfer, if he complies with the relevant Code provisions governing notice and inquiry, Code Section 8-403. Requiring unauthorized documentation, Code Section 8-402(4), or insisting upon an indorsement guarantee, Code Section 8-312(2), may well result in liability for wrongfully refusing to register transfer. See Code Section 8-401(2).

A Note on Repeal of Existing Statutes

Enactment of the Code requires repeal of the following statutes relevant to investment securities:

(1) Uniform Negotiable Instruments Law, GS 25.
(2) Uniform Stock Transfer Act, GS 55-75 through 55-98. In addition, GS 55-57(e) should also be repealed.

The following statutes are not repealed by the Code although there is some overlapping coverage:

(1) Uniform Act for Simplification of Fiduciary Security Transfers, GS 32-14 through 32-24 (Supp. 1963).
(2) Uniform Fiduciaries' Act, GS 32-1 through 32-13.

Thus, Code Section 10-104(2) should be enacted with the Code, and the statutory reference to be inserted in the blank space is as follows:

> Chapter 1246 of the Acts of the 1959 North Carolina General Assembly.

There appears to be no inconsistency between Article 8 and the numerous statutory provisions regarding governmental bonds. Hence, none of these statutes should be repealed, and none appear to require any language modification to accord with the Code language.

Section 9—101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Secured Transactions.

N.C. Comments: None

Prior Statutes: None

Section 9—102. Policy and Scope of Article.

(1) Except as otherwise provided in Section 9—103 on multiple state transactions and in Section 9—104 on excluded transactions, this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts or contract rights; and also

(b) to any sale of accounts, contract rights or chattel paper.

(2) This Article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This Article does not apply to statutory liens except as provided in Section 9—310.

(3) The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply.

Note: *The adoption of this Article should be accompanied by the repeal of existing statutes dealing with conditional sales, trust receipts, factor's liens where the factor is given a non-possessory lien, chattel mortgages, crop mortgages, mortgages on railroad equipment, assignment of accounts and generally statutes regulating security interests in personal property.*

Where the state has a retail installment selling act or small loan act, that legislation should be carefully examined to determine what changes in those acts are needed to conform them to this Article. This Article primarily sets out rules defining rights of a secured party against persons dealing with the debtor; it does not prescribe regulations and controls which may be necessary to curb abuses arising in the small loan business or in the financing of consumer purchases on credit. Accordingly there is no intention to repeal existing regulatory acts in those fields. See Section 9—203(2) and the Note thereto.

N.C. Comments

Prior Statutes: GS 44-52 through 44-63, 44-70 through 44-76, 44-77 through 44-85, 45-1, 45-2, 45-3, 45-3.1, 45-21.1 through 45-21.38, 45-37 through 45-42.1, 47-20 through 47-20.3, 47-21, 45-46 through 45-66, 20-57 through 20-58.10, 44-38.1.

This section states the basic coverage of Article 9. That is, all consensual transactions intended to create a security interest in personal property and fixtures, except those situations covered by Section 9-104, must be created under Article 9 and are subject to the provisions of Article 9.

The initial choice of law determination is governed by the physical location of the collateral at the time of the creation of the security interest, except as to the types of collateral set out in Section 9-103.

The policy of this article is to govern all security interests regardless of the form the transaction might take. And distinctions between various transactions would no longer be made by reference to the form of the transactions, rather distinctions would be made by reference to the type of collateral, and other factors. The abolition of the consequences of form began long ago in North Carolina and the court has consistently held chattel mortgages and conditional sales have essentially the same consequences. See The Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917). Furthermore, until the enactment of the Uniform Trust Receipts Act in this state, the court treated as conditional sales security interests which were denominated "trust receipts." See McCreary Tire & Rubber Co. v. Crawford, 253 N.C. 100, 116 S.E. 2d 491 (1960); General Motors Acceptance Corp. v. Mayberry, 195 N.C. 508, 142 S.E. 767 (1928).

If adopted, the Code would complete the process of abolition of form, and the following types of security interests now recognized in North Carolina would fall with the provisions of Article 9:

1. Chattel mortgages, deeds of trust on personal property and fixtures, and conditional sales contracts.

2. Pledges.

3. Factor's Liens.

4. Liens on Accounts Receivable.

5. Trust Receipts.

6. Agricultural Liens on Crops for Advances.

This is not to say that the words may not be used, nor that the existing forms could not be used (although it would probably be preferable to make new forms to obtain maximum advantage of the Code). But whatever form is used, it can have no effect on the operation of the Code and the security interest would be regulated thereunder.

Section 9—103. Accounts, Contract Rights, General Intangibles and Equipment Relating to Another Jurisdiction; and Incoming Goods Already Subject to a Security Interest.

(1) If the office where the assignor of accounts or contract rights keeps his records concerning them is in this state, the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this Article; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located.

(2) If the chief place of business of a debtor is in this state, this Article governs the validity and perfection of a security interest and the possibility and effect of proper filing with regard to general intangibles or with regard to goods of a type which are normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like) if such goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others. Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern. If the chief place of business is located in a jurisdiction which does not provide for perfection of the security interest by filing or recording in that jurisdiction, then the security interest may be perfected by filing in this state. [For the purpose of determining the validity and perfection of a security interest in an airplane, the chief place of business of a debtor who is a foreign air carrier under the Federal Aviation Act of 1958, as amended, is the designated office of the agent upon whom service of process may be made on behalf of the debtor.]

(3) If personal property other than that governed by subsections (1) and (2) is already subject to a security interest when it is brought into this state, the validity of the security interest in this state is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this state and it was brought into this state within 30 days after the security interest attached for purposes other than transportation through this state, then the validity of the security interest in this state is to be determined by the law of this state. If the security interest was already perfected under the law of the jurisdiction

where the property was when the security interest attached and before being brought into this state, the security interest continues perfected in this state for four months and also thereafter if within the four month period it is perfected in this state. The security interest may also be perfected in this state after the expiration of the four month period; in such case perfection dates from the time of perfection in this state. If the security interest was not perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, it may be perfected in this state; in such case perfection dates from the time of perfection in this state.

(4) Notwithstanding subsections (2) and (3), if personal property is covered by a certificate of title issued under a statute of this state or any other jurisdiction which requires indication on a certificate of title of any security interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate.

[(5) Notwithstanding subsection (1) and Section 9-302, if the office where the assignor of accounts or contract rights keeps his records concerning them is not located in a jurisdiction which is a part of the United States, its territories or possessions, and the accounts or contract rights are within the jurisdiction of this state or the transaction which creates the security interest otherwise bears an appropriate relation to this state, this Article governs the validity and perfection of the security interest and the security interest may only be perfected by notification to the account debtor.]

Note: *The last sentence of subsection (2) and subsection (5) are bracketed to indicate optional enactment. In states engaging in financing of airplanes of foreign carriers and of international open accounts receivable, bracketed language will be of value. In other states not engaging in financing of this type, the bracketed language may not be considered necessary.*

N.C. Comments

Prior Statutes: GS 44-78, 44-38.1 and 20-58.

Subsection (1) would probably change the existing North Carolina conflict of laws rule relating to the initial validity of assignments of accounts or contract rights. No cases involving assignments have been found, but, generally, the law of the place where the last act necessary for the creation of the contract took place will govern. Bundy v. Commercial Credit Corp. 200 N.C. 511, 157 S.E. 860 (1931). The Code adopts the rule that the law of the place where the records concerning the accounts are kept will govern both the validity of the assignment and the perfection of the security interest therein. Present rules regarding the protection of an assignment and the perfection of a security interest in accounts provide that North Carolina law shall govern if the transaction out of which the account arose took place in this state, if payment is to be made in this state, or if the account has situs in this state under the normal conflict of laws rules. GS 44-78.

Subsection (2) would change existing law. Under present law, the question would be resolved by determining whether or not the goods in question had acquired a situs in this state. See GS 44-38.1.

Existing North Carolina rules as set out in GS 44-38.1 are similar in purpose to Subsection (3). However, some changes would be effected, the major one being that the Code would not require that the secured party file or register the security interest in this state within ten days after receiving notice that the chattel has been removed to this state and has acquired situs here. See GS 44-38.1 (b) (2). Rather, under the Code, the secured party would be protected for the maximum four month period without additional action. Also, the Code would not make registration in the former state a prerequisite to temporary perfection of the security interest in this state as does existing law. GS 44-38.1 (d).

The rules of existing law relating to the perfection of security interest in motor vehicles brought in from another jurisdiction are virtually identical to the rules of Subsection (3). See GS 20-58 (c).

Section 9—104. Transactions Excluded From Article.

This Article does not apply

(a) to a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or

(b) to a landlord's lien; or

(c) to a lien given by statute or other rule of law for services or materials except as provided in Section 9—310 on priority of such liens; or

(d) to a transfer of a claim for wages, salary or other compensation of an employee; or

(e) to an equipment trust covering railway rolling stock; or

(f) to a sale of accounts, contract rights or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts, contract rights or chattel paper which is for the purpose of collection only, or a transfer of a contract right to an assignee who is also to do the performance under the contract; or

(g) to a transfer of an interest or claim in or under any policy of insurance; or

(h) to a right represented by a judgment; or

(i) to any right of set-off; or

(j) except to the extent that provision is made for fixtures in Section 9—313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or

(k) to a transfer in whole or in part of any of the following: any claim arising out of tort; any deposit, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization.

N.C. Comments

Prior Statutes: GS 42-15, 44-1 through 44-51, 58-32, 58-98, 95-31.

Subsection (b) preserves the operation and presumably the priority of the landlord's lien, GS 42-15. See In Re Einhorn Bros., Inc., 171 F. Supp. 655 (E.D. Pa. 1959), aff'd 272 F. 2d 434 (3d Cir. 1959).

Subsection (c) excludes from the operation of the Article the common law and statutory liens of persons who furnish services and materials. The validity of the following liens recognized by statute in North Carolina will not be affected by the Code: liens of mechanics, laborers and materialmen, GS 44-1 through 44-5, liens on vessels, GS 44-15 through 44-29, liens of hotel keepers and livery stable keepers, GS 44-30 through 44-33. However, the priority of the non-possessory liens of this class may be changed. See Comment to Section 9-310.

Subsection (d) excludes assignments of wages and status regulating those assignments such as GS 95-31.

Article 9 governs all assignments of accounts or contract rights whether or not made for purposes of acquiring a security interest, except those types of assignments enumerated in Subsection (f) .

Subsection (g) excludes assignments for security or otherwise of any interest or claim under a policy of insurance. Thus, statutes such as GS 58-98 (assignment of policy other than life as collateral security), and 58-32 (insurance as security for loan by the company), would remain operable in the event of passage of the Code.

Subsection (j) makes it clear that whether or not rents from or leases on real property are, by applicable state law, considered as personal property, this Article does not apply to security interests therein. GS 47-20.4 which provides for the place of registration of chattels real would continue in effect, as would all other statutes affecting security interests in real property.

Section 9—105. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires:

(a) "Account debtor" means the person who is obligated on an account, chattel paper, contract right or general intangible;

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

(c) "Collateral" means the property subject to a security interest, and includes accounts, contract rights and chattel paper which have been sold;

(d) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires;

(e) "Document" means document of title as defined in the general definitions of Article 1 (Section 1—201);

(f) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (Section 9—313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, contract rights and other things in action. "Goods" also include the unborn young of animals and growing crops;

(g) "Instrument" means a negotiable instrument (defined in Section 3—104), or a security (defined in Section 8—102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment;

(h) "Security agreement" means an agreement which creates or provides for a security interest;

(i) "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts, contract rights or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party.

(2) Other definitions applying to this Article and the sections in which they appear are:

"Account".	Section 9—106.
"Consumer goods".	Section 9—109(1).
"Contract right".	Section 9—106.
"Equipment".	Section 9—109(2).
"Farm products".	Section 9—109(3).
"General intangibles".	Section 9—106.
"Inventory".	Section 9—109(4).
"Lien creditor".	Section 9—301(3).
"Proceeds".	Section 9—306(1).
"Purchase money security interest".	Section 9—107.

(3) The following definitions in other Articles apply to this Article:

"Check".	Section 3—104.
"Contract for sale".	Section 2—106.
"Holder in due course".	Section 3—302.
"Note".	Section 3—104.
"Sale".	Section 2—106.

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

N.C. Comments — Prior Statutes: None

This section defines the new terminology which the Code applies to the security interest. The terminology is new but the concepts are familiar ones. The definition of "security interest" appears in Section 1-201 (37).

Section 9—106. Definitions: "Account"; "Contract Right"; "General Intangibles".

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. "Contract right" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper. "General intangibles" means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents and instruments.

N.C. Comments — Prior Statutes: GS 44-77 (1

The combined definitions of "account" and "contract right" are substantially the same as the definition of "account receivable" appearing in GS 44-77 (1), except that the Code definitions do not at this point include contract rights to arise in the future. See Section 9-204 and Official Comment No. 4 thereto.

Section 9—107. Definitions: "Purchase Money Security Interest".

A security interest is a "purchase money security interest" to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

N.C. Comments

Prior Statutes: None

This definition of purchase money security interest is substantially in accord with North Carolina law. A "purchase money" security interest exists where the seller reserves a securtiy interest in the property for payment of the price, Goodrich Silvertown Stores v. Caeser, 214 N.C. 85, 197 S.E. 698 (1938), or where a person advances money for the purchase and takes a mortgage or deed of trust on the property as security for his advances. Smith Builders Supply, Inc. v. Rivenbark, 231 N.C. 213, 56 S.E. 2d 431 (1949): Weil v. Casey, 125 N.C. 356, 34 S.E. 506 (1899). The latter two cases involved security interests in real property but the same principle should apply to personal property.

For the applicability of this section of the Code. See the Comments to Sections 9-301, 9-302, 9-312.

Section 9—108. When After-Acquired Collateral Not Security for Antecedent Debt.

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

N.C. Comments

Prior Statutes: None

This section sets out the conditions under which the acquisition of a security interest in subsequently acquired property by virtue of an "after-acquired" provision in a preceding security agreement will be for new value. The section is primarily of importance in determining whether the acquisition of the security interest in the after-acquired property will be deemed a transfer for an antecedent debt under the Federal Bankruptcy Act § 60, and state statutes governing preferences such as GS 23-3. Although no cases have been found which are precisely in point with this section, there are indications that this section would not change the approach of the North Carolina court. In Godwin v. Murchison Nat. Bank, 145 N.C. 320, 59 S.E. 154 (1907) a debtor, more than four months before bankruptcy, promised a bank that he would pledge certain property as security for a loan. The debtor did not own the property at the time, but subsequently, within four months of bankruptcy, he acquired ownership and delivered the property to the bank. The court held that the transfer of the property was not for an antecedent debt on the theory that he had made an equitable assignment of the property at the time he borrowed the money. Probably, the same reasoning could, under existing law, be applied to a chattel mortgage with an after-acquired property clause to achieve a result similar to that intended with this section of the Code.

Whether this section will uniformly achieve its intended effect under the Federal Bankruptcy Act remains to be seen. See Generally, Coogan, Hogan, Vagts, Secured Transactions Under U.C.C. 1172 (1963).

Section 9—109. Classification of Goods; "Consumer Goods"; "Equipment"; "Farm Products"; "Inventory".

Goods are

(1) "consumer goods" if they are used or bought for use primarily for personal, family or household purposes;

(2) "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(3) "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

(4) "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

N.C. Comments — Prior Statutes: None

This section is new and has no counterpart in existing North Carolina law. The classification of the goods to be subject to the security interest is the starting point for determination of many factors concerning the security interest, e.g., the steps necessary for the perfection of the security interest, § 9-302, and others mentioned in the Official Comments to this section.

Section 9—110. Sufficiency of Description.

For the purposes of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described.

N.C. Comments — Prior Statutes: None

This section is substantially in accord with existing North Carolina law. Implicit in the North Carolina decisions is the rule that any description which reasonably identifies the property so

that it can be segregated from other property of a like kind owned by the debtor is sufficient. Foreheand v. Farmers Co., 206 N.C. 827, 175 S.E. 183 (1934) (dictum); Strouse v. Cohen, 113 N.C. 349, 18 S.E. 323 (1893) ("all my property located in the city of New Bern" is a sufficient description).

The North Carolina court has not followed the strict "serial number" test which this section of the Code is designed to replace. See Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 86 S.E. 2d 745 (1955); Twin City Motor Co. v. Rouzer Motor, 197 N.C. 371, 148 S.E. 461 (1929) ("one S.H. Coupe No._____Model T" is sufficient).

Likewise, where a security interest in personal property must refer to certain real property, as in the case of crop liens, a full legal description of the real property is not required. A description which reasonably enables an interested party to ascertain which property is included in the security agreement is sufficient. Hurley v. Ray, 160 N.C. 376, 76 S.E. 234 (1912) (by implication); Woodlief v. Harris, 95 NC.C 211 (1886) ("all crops raised on lands owned or rented by me" is sufficient).

Section 9—111. Applicability of Bulk Transfer Laws.

The creation of a security interest is not a bulk transfer under Article 6 (see Section 6—103).

N. C. Comments

GS 39-23 provides: "The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade....shall be void as against the creditors of the seller, unless the seller....(complies with the conditions)...." The problem presented in determining whether this section of the Uniform Commercial Code will change existing North Carolina law is defining the word "sale" as it appears in the statute.

A majority of jurisdictions have held that the execution of a chattel mortgage on a stock of merchandise is not a transfer within the purview of the bulk sales law where the statute does not specifically so provide. See e.g., Mackler v. Lahman, 196 Ga. 535, 27 S.E. 2d 35 (1943); Cozzi v. Pizzo, 337 Ill. App. 384, 86 N.E. 2d 294 (1949); Schwartz v. King Realty & Investment Co., 94 N.J.L. 134, 109 Atl. 567 (1920).

The North Carolina court has apparently held that the execution of trust receipts for a contemporaneous new consideration does not fall within the bulk sales law. McCreary Tire & Rubber Co. v. Crawford, 253 N.C. 100, 116 S.E. 2d 491 (1960) (semble). If the security had been given for a past consideration, the court indicated that the result would have been different. See also, Cowan v. Dale, 189 N.C. 684, 128 S.E. 155 (1925). The Uniform Commercial Code does not make such a distinction and to that extent probably would change North Carolina law.

Section 9—112. Where Collateral Is Not Owned by Debtor.

Unless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under Section 9—502(2) or under Section 9—504(1), and is not liable for the debt or for any deficiency after resale, and he has the same right as the debtor

(a) to receive statements under Section 9—208;

(b) to receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under Section 9—505;

(c) to redeem the collateral under Section 9—506;

(d) to obtain injunctive or other relief under Section 9—507(1); and

(e) to recover losses caused to him under Section 9—208(2).

N.C. Comments

Prior Statutes: None

There are no comparable provisions in North Carolina law.

Section 9—113. Security Interests Arising Under Article on Sales.

A security interest arising solely under the Article on Sales (Article 2) is subject to the provisions of this Article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

(a) no security agreement is necessary to make the security interest enforceable; and

(b) no filing is required to perfect the security interest; and

(c) the rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2).

N.C. Comments

Prior Statutes: None

See North Carolina Annotations to Article 2, 2-326, 2-401 and 2-502.

Section 9—201. General Validity of Security Agreement.

Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this Article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto.

N.C. Comments

Prior Statutes: GS 45-48

The first sentence of this section states the basic freedom of contract rule; that is, the parties may enter into any agreement they choose, and it will be enforceable unless otherwise provided by the Code or other regulatory statute. The principle is implicit in North Carolina cases. E.g., Rea v. Universal C.I.T. Credit Corp., 257 N.C. 639, 127 S.E. 2d 225 (1962).

The second Section reemphasizes the continuing validity and operation of present regulatory statutes which may affect security interests, such as Consumer Finance Act, N.C. GS 53-164 through 53-190, laws relating to usury, N.C. GS 24-1 and24-2, and laws relating to the regulation of pawnbrokers, N.C. GS 91-1 through 91-8.

Section 9—202. Title to Collateral Immaterial.

Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

N.C. Comments

Prior Statutes: None

This section would not make any significant change in the approach of the North Carolina law. The traditional distinctions between chattel mortgages and conditional sales contracts required ascertainment of location of title before and after the completion of the transaction resulting in detailed, and often times difficult, rules. However, there are so few situations in which the consequences of chattel mortgages and conditional sale contract would differ in North Carolina that the court has seldom faced the problem where its solution would make any difference. "The relationship between ... (the parties)...with respect to said automobile, by virtue of the contract which provides that the title to the automobile is retained by the plaintiff...until...the purchase price has been paid in full, is that of mortgagee and mortgagor; the title-retaining contract is to all intents and purposes a chattel mortgage." Harris v. Seaboard Airline Ry., 190 N.C. 480, 482, 130 S.E. 319, 321 (1925). See also, McCreary Tire & Rubber Co. v. Crawford, 253 N.C. 100, 116 S.E 2d 491 (1960)("conditional sales contracts for personalty are treated as chattel mortgages in this jurisdiction"); Mitchell v. Battle, 231 N.C. 68, 55 S.E. 2d 803 (1949); Hackley Piano Co. v. Kennedy, 152 N.C. 196, 67 S.E. 488 (1910).

However, this Official Comment states that this Section does not mean that title will never be significant. For tax, or other, purposes it may be necessary to determine the location of title, and the Code takes no position on the theory used for such purposes. Also, the North Carolina court has held that the finance charges under conditional sales contract are not subject to usury laws, whereas the interest charged for a loan secured by a chattel mortgage would be. Hendrix v. Harry's Cadillac Co., Inc., 220 N.C. 84, 16 S.E. 2d 456 (1941). In such a case under the Code, the court would have to determine location of title in order to determine if the security interest is in the nature of a conditional sale.

Section 9—203. Enforceability of Security Interest; Proceeds, Formal Requisites.

(1) Subject to the provisions of Section 4—208 on the security interest of a collecting bank and Section 9—113 on a security interest arising under the Article on Sales, a security interest is not enforceable against the debtor or third parties unless

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut, a description of the land concerned. In describing collateral, the word "proceeds" is sufficient without further description to cover proceeds of any character.

(2) A transaction, although subject to this Article, is also subject to .....*, and in the case of conflict between the provisions of this Article and any such statute, the provisions of such statute control. Failure to comply with any applicable statute has only the effect which is specified therein.

Note: *At * in subsection (2) insert reference to any local statute regulating small loans, retail installment sales and the like.*

The foregoing subsection (2) is designed to make it clear that certain transactions, although subject to this Article, must also comply with other applicable legislation.

This Article is designed to regulate all the "security" aspects of transactions within its scope. There is, however, much regulatory legislation, particularly in the consumer field, which supplements this Article and should not be repealed by its enactment. Examples are small loan acts, retail installment selling acts and the like. Such acts may provide for licensing and rate regulation and may prescribe particular forms of contract. Such provisions should remain in force despite the

enactment of this Article. On the other hand if a Retail Installment Selling Act contains provisions on filing, rights on default, etc., such provisions should be repealed as inconsistent with this Article.

N. C. Comments

Prior Statutes: GS 44-52; 44-70; 45-47.

Subsection (1) (b) in effect establishes a statute of frauds for security agreements. This would change existing law relating to chattel mortgages and conditional sales. As between the original parties, oral chattel mortgages or conditional sales are valid and enforceable. Kearns v. Davis Brothers, 186 N.C. 522, 120 S.E. 52 (1923); Odom v. Clark, 146 N.C. 544, 60 S.E. 513 (1908); Butts v. Screws, 95 N.C. 215, (1886). However, the security agreement must be reduced to writing for registration and hence protection from the intervention of third party's rights. Thus, the change is of minimal commercial significance.

Existing law requires that a security interest which is procured by way of a lien on crops for advances, a factor's lien, or a trust receipt must be reduced to writing to be enforceable. N.C. GS 44-52, 44-70, 45-47.

Subsection (1) (a) recognizes the validity of security interest where the secured party has possession of the goods even though there be no written evidence thereof. This is in accord with existing law.

See the comment to Section 9-110 which relates to the description of property which will be sufficient to satisfy this section.

The titles: "North Carolina Consumer Finance Act," N.C. GS 53-164 through 53-191, "A law relating to Usury," N.C. GS 24-1 and 24-2 and "A law relating to the regulation of Pawnbrokers," N.C. GS 91-1 through 91-8, should be inserted in the blank of Subsection (2). Where the Code conflicts with the provisions of those statutes, the latter shall control.

Section 9—204. When Security Interest Attaches; After-Acquired Property; Future Advances.

(1) A security interest cannot attach until there is agreement (subsection (3) of Section 1—201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

(2) For the purposes of this section the debtor has no rights

(a) in crops until they are planted or otherwise become growing crops, in the young of livestock until they are conceived;

(b) in fish until caught, in oil, gas or minerals until they are extracted, in timber until it is cut;

(c) in a contract right until the contract has been made;

(d) in an account until it comes into existence.

(3) Except as provided in subsection (4) a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement.

(4) No security interest attaches under an after-acquired property clause

(a) to crops which become such more than one year after the security agreement is executed except that a security interest in crops which is given in conjunction with a lease or a land purchase or improvement transaction evidenced by a contract, mortgage or deed of trust may if so agreed attach to crops to be grown on the land concerned during the period of such real estate transaction;

(b) to consumer goods other than accessions (Section 9—314) when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.

(5) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment.

N.C. Comments

Prior Statutes: GS 44-52; 44-77 and 44-71.

Subsection (1) states the rules governing "attachment" of the security interest. The concept of "attachment" and its consequences are, for the most part, new. Under the Code, the security interest has no existence with reference to specific collateral until the three steps necessary for attachment have taken place. This does not mean that the security interest always will have priority dating only from the time of attachment, but there are some situations in which the time attachment is the key to priority. See Comment to Section 9-312.

Subsection (2) specifies the time at which the debtor acquires rights in some specific types of collateral.

Subsection (2) (a) does not affect the priority of a lien on crops which is perfected by filing. Priority would date from the time of filing, as it does under present law. N.C. GS 44-52. See Section 9-312.

Subsections (3) and (4) validate, with exceptions, contractual provisions covering after-acquired property of the debtor. Present North Carolina statutes expressly provide for bringing after-acquired property under the original security agreement with reference to factor's liens, NC GS 44-71, and liens on accounts receivable, N.C. GS 44-77. The same result is achieved by implication under the statute governing liens on crops for advances. N.C. GS 44-52. The validity of the after-acquired property clause in chattel mortgages is still covered by common law, and most of the North Carolina cases involve real estate mortgages. However, the same principles should, and probably do, apply with equal force to mortgages of chattels. Merchants and Farmers Bank v. Clifton, 186 N.C. 609, 120 S.E. 210 (1923) (by implication). The court has long enforced the after-acquired clause as between the original parties, White v. Carroll, 146 N.C. 230, 59 S.E. 678 (1907); Perry v. White, 111 N.C. 197, 16 S.E. 172 (1892), and has recognized its validity as to lien creditors and purchasers where the mortgage is properly registered before those interests intervene. Standard Dry Kiln v. Ellington, 172 N.C. 481, 90 S.E. 564 (1916); Brown v. Dial, 117 N.C. 41, 23 S.E.

45 (1895). See also, Hunter v. Scruggs Drug Store, Inc., 113 F. 2d 971 (4th Cir. 1940). The ultimate usefulness of the after-acquired property clause is, however, qualified by the proposition that the mortgage covers the property as it comes into the hands of the debtor, Standard Dry Kiln Co. v. Ellington, supra, and the effect of the clause can be completely defeated if all subsequent acquisitions are subject to purchase money security interests. See Comment to Section 9-312 (4). The Code would not change that rule except as to inventory. See Comment to Section 9-312 (3).

The one year limitation for security interests in crops set out in Subsection (4) (a) is similar in effect to the North Carolina rule. N.C. GS 44-52.

Subsection (4) (b) limits the validity of after-acquired clauses in security interests covering consumer goods. This limitation probably would change existing law. Twin City Motor Co. v. Rouzer Motor Co., 197 N.C. 371, 148 S.E. 461 (1929) (dictum). However, the rule as to accessions would remain the same. Goodrich Silvertown Stores v. Caesar, 214 N.C. 85, 197 S.E. 698 (1938) (dictum); Twin City Motor Co. v. Rouzer Motor Co., supra. See also Comment to Section 9-314.

Subsection (5) would validate agreements that the security interest shall cover all future advances. As to the general validity thereof, North Carolina is in accord. In re Steele, 122 F. Supp. 948 (E.D.N.C.1954); State v. Surles, 117 N.C. 720, 23 S.E. 324 (1895); Moore v. Ragland, 74 N.C. 343 (1876) (real estate mortgage) (dictum). The final clause of the subsection is designed to displace those decisions which held that a mortgage could not secure future advances unless the mortgagee was obligated to make the advances and the security agreement so specified. See Official Comment No. 4 to this section. The status of the North Carolina law on this point is not clear and any statement concerning the effect of this section of existing law would be speculation. In Board of Comm'rs v. Wills & Sons, 236 Fed 362, 374 (E.D.N.C. 1916) (dictum), the Federal court, quoting from Jones on Mortgages, stated: "There is strong reason and authority for the rule that a mortgage to secure future advancements...whether the mortgagee be bound to make the advances or not, will prevail over the supervening claims of purchasers or creditors....". In a situation where it was not clear whether the mortgagee was obligated to make advances, the court did indicate that the provision for future advances would be valid as to all advances made prior to the time the first mortgagee received notice of the execution of a second mortgage. Todd v. Outlaw, 79 N.C. 235 (1878). Whether or not this subsection would change North Carolina law, it would clarify it.

The overall effect of this section, when combined with Section 9-205, would be to validate the "floating lien". That is, the parties, in most situations, would be free to enter into an agreement which covers all after-acquired property of the debtor and all future advances made by the mortgagee without necessity of restricting the debtor's use of the property or proceeds therefrom. The range

of possibilities is not unlike that now available to the factor under the North Carolina Factor's Lien Act, N.C. GS 44-70 through 44-75, except that the factor's lien device is available only to those persons who advance money to manufacturers.

Section 9—205. Use or Disposition of Collateral Without Accounting Permissible.

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts, contract rights or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.

N.C. Comments — Prior Statutes: GS 44-83

This section expressly validates security interests which have any one or all of several factors present which have in the past caused court to void the security interest as being fraudulent to creditors. The section is intended to change the result in cases like Benedict v. Ratner, 268 U.S. 353 (1925), wherein the court voided an assignment of accounts receivable which permitted the debtor to retain control of and collect the accounts without requiring the debtor to account for the proceeds of collection or requiring the debtor to substitute other security to replace the collected accounts.

This section would probably change existing North Carolina law, at least with reference to a mortgage on a stock of merchandise. The court has held that a mortgage on a stock of goods which leaves the debtor in possession with power to dispose of the goods without accounting to the mortgagee is presumtively fraudulent and void as to existing creditors. Blaton Grocery Co.v. Taylor, 162 N.C. 307, 78 S.E. 276 (1913); Boone v. Hardie, 87 N.C. 72 (1882); Cheatham v. Hawkins, 76 N.C. 335 (1877). See also, In Re Cleveland, 146 F. Supp. 765 (E.D.N.C. 1956). Apparently, the determinative factor in those cases was the failure of the mortgagee to require the debtor to account for the proceeds of the sale of the property. It has been held that the rule would not apply to a mortgage on fixtures or other items not in the stock in trade or inventory of the debtor.

If an assignment of accounts receivable is taken for security purposes in North Carolina and perfected under the Assignment of Accounts Receivable Statute, N.C. GS 44-77 through 44-85, the statute provides that " any permission by the assignee to the assignor to exercise dominion and control over protected assigned accounts or the proceeds thereof shall not invalidate the assignment as to third

persons," N.C. GS 44-83, which is generally in accord with this section of the Code. However, compare language in § 44-84 with § 44-83.

The existing law relating to chattel mortgages covering accounts receivable is not so clear. Where an unregistered security agreement gave the debtor control over the accounts with no specific requirements for segregation or use of the proceeds the security interest was voided. Sneeden v. Nurnberger's Market, 192 N.C. 439, 135 S.E. 328 (1926). The court hinted that if the agreement had been registered, the security interest would have been valid. However, a Federal District court has applied the rule of Benedict v. Ratner in voiding a chattel mortgage of accounts which give the debtor "unfettered dominion" over the accounts. In Re Steele, 122 F Supp. 948 (E.D.N.C. 1954).

Thus, this section would change North Carolina law to some extent, as it would the law of most states. It does not mean, however, that the secured party who does not carefully police his security interest and require periodic accounting of proceeds will have as good a security interest as one who does require those things. See Section 9-306 (4).

Section 9—206. Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties Where Security Agreement Exists.

(1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

(2) When a seller retains a purchase money security interest in goods the Article on Sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties.

N. C. Comments

Prior Statutes: None

No North Carolina cases in point have been found. However, most American courts have enforced clauses in conditional sales contracts or chattel mortgages whereby the debtor agreed not to assert defenses against the assignee of the security interest. See e.g., Refrigeration Discount Corp. v. Haskew, 194 Ark. 549, 108 S.W. 2d 908 (1937); Young v. John Deere Plow Co., 102 Ga. App. 132, 115 S.E. 2d 770 (1960); Commercial Credit Corp. v. Biagi, 11 Ill. App. 2d 80, 136 N.E. 2d 580 (1956). However, it is generally considered to be against public policy to permit such a waiver to defeat the defense

of fraud of the seller. See e.g., Equipment Acceptance Corp. v. Arwood Can Mfg. Co., 117 F. 2d 442 (6th Cir. 1941); Pacific Acceptance Corp. v. Whalen, 43 Idaho 15, 248 P. 444 (1926). The approach of this section of the Code is similar; that is, the clauses waiving defenses will be enforced except as to defenses which are available against a holder in due course of a negotiable instrument.

Apparently there is no North Carolina statute relating to consumer goods which would restrict the general operation of this section.

Section 9—207. Rights and Duties When Collateral Is in Secured Party's Possession.

(1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(2) Unless otherwise agreed, when collateral is in the secured party's possession

(a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(b) the risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;

(c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;

(d) the secured party must keep the collateral identifiable but fungible collateral may be commingled;

(e) the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.

(3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.

(4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

N. C. Comments

Prior Statutes: None

Subsection (1) states the common law rule that the pledgee has a duty to use reasonable care in preservation of collateral in his possession.

The second sentence of Subsection (1) is probably in accord with North Carolina law. In Lumber Co. v. Pollock, 139 N.C. 174, 51 S.E. 855 (1905), the court stated: "when a creditor takes a note of a third person as collateral security for his debt, he is bound to use due diligence in the collection of the collateral". In addition, the creditor is entitled to receive reasonable expenses incurred in the protection and collection of the collateral. Lumber Co. v. Pollock, supra. This is in accord with Subsection (2) (a).

No North Carolina cases have been found covering the other points made in this section, but it is reasonable to assume that North Carolina would be substantially in accord with this section.

Section 9—208. Request for Statement of Account or List of Collateral.

(1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.

(2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.

(3) A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding $10 for each additional statement furnished.

N. C. Comments

Prior Statutes: None

As to the similar rights of a person who has borrowed money from a finance company covered by the North Carolina Consumer Finance Act, see N.C. GS 53-181 and 53-182.

Section 9—301. Persons Who Take Priority Over Unperfected Security Interests; "Lien Creditor".

(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of

(a) persons entitled to priority under Section 9—312;

(b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts, contract rights, and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within ten days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest.

N. C. Comments

Prior Statutes: GS 45-53; 20-58; 47-20; 44-73; 44-80

This section would result in a significant revision of the North Carolina concept of priorities of lien creditors and purchasers for value. The existing equivalents of an "unperfected security interest" would be chattel mortgages or conditional sales which have not been registered, or purported pledges where the property is not in the possession of the pledgee. With the exception of the Uniform Trust Receipts Act, N. C. GS 45-53, the North Carolina registration statutes are deemed to express a strong public policy in favor of registration. Notice or actual knowledge of the security interest will not be a substitute for registration. Thus, lien creditors or purchasers for value will prevail over the unregistered security interest even though they had actual knowledge

of its existence at the time they acquired their interest in the property. See Smith v. Turnage-Winslow Co., 212 N. C. 310, 193 S.E. 685 (1937) (dictum); North State Piano Co. v. Spruill & Bros., 150 N. C. 168, 63 S.E. 723 (1909). Adoption of the Code would change this by establishing "lack of knowledge" as an element of the priority status of lien creditors and purchasers. Section 9-301 (1)(b) and (c).

Another change would be the introduction of a ten day "grace period" within which to file a purchase money security interest. If the financing statement is filed within ten days after the debtor receives possession of the collateral, the filing "relates back" to the day of delivery of possession and the security interest prevails over intervening lien creditors or transferees in bulk. See also Comment to Section 9-312. Existing North Carolina law does not generally recognize the relation back concept, except as to trust receipts, N. C. GS 45-53, wherein the grace period is 30 days, and as to security interests in automobiles, N. C. GS 20-58.

However, conceding the two broad conceptual changes, the results under the Code would be essentially the same as under existing law.

Subsection (1)(a) gives lien creditors priority over unperfected security interests. As heretofore indicated the North Carolina rule is the same as to chattel mortgages and other security interests which are not registered. See McCreary Tire & Rubber Co. v. Crawford, 253 N. C. 100, 116 S.E. 2d 491 (1960) (dictum); M. & J. Finance Co. v. Hodges, 230 N. C. 580 , 55 S.E. 2d 201 (1949).

Subsection (1)(b) extends the same priority to purchasers for value in the situations specified. This is generally in accord with existing law. However, it should be noted with reference to this section that under North Carolina law a subsequent mortgagee or other secured party would be treated as a "purchaser for value". North State Piano Co. v. Spruill & Bros., supra. Under the Code this would not be true. The relative priorities between secured parties are dealt with in Section 9-312. Also, the "buyer in the ordinary course of business" receives a special priority under the Code which is not generally available in North Carolina. See Comment to Section 9-307.

Subsection (2) has been dealt with above.

Subsection (3) sets forth definition of a "lien creditor". This definition is in accord with North Carolina law. A "creditor" whose rights are superior to an unrecorded security agreement is a creditor who has fastened his lien upon the personal property of the debtor by levy under execution of judgment, M. & J. Finance Co. v. Hodges, 230 N. C. 580, 55 S.E. 2d 201 (1949); Penland v. Leatherwood, 101 N. C. 509, 8 S. E. 234 (1888), or by attachment, Salassa v. Western Carolina Title and Mortgage Co., 196 N. C. 501, 146 S.E.

83 (1929). Also, a trustee under deed of assignment for benefit of creditors, Brem v. Lockhart, 93 N. C. 191 (1885), a trustee in bankruptcy, M. & J. Finance Co. v. Hodges, supra. (dictum), and a receiver in an equitable insolvency proceeding, General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928), will prevail over security interests which are not registered. See also, N. C. GS 45-53. Earlier drafts of this section of the Code indicated that a person would become a lien creditor at the time of the issuance of the process which results in attachment or levy. However, no such intention is expressed in the 1962 draft and, hence, the present North Carolina rule that one becomes a "lien creditor" at the time of the actual levy should not be affected by this section.

Section 9—302. When Filing Is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of This Article Do Not Apply.

(1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under Section 9—305;

(b) a security interest temporarily perfected in instruments or documents without delivery under Section 9—304 or in proceeds for a 10 day period under Section 9—306;

(c) a purchase money security interest in farm equipment having a purchase price not in excess of $2500; but filing is required for a fixture under Section 9—313 or for a motor vehicle required to be licensed;

(d) a purchase money security interest in consumer goods; but filing is required for a fixture under Section 9—313 or for a motor vehicle required to be licensed;

(e) an assignment of accounts or contract rights which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor;

(f) a security interest of a collecting bank (Section 4—208) or arising under the Article on Sales (see Section 9—113) or covered in subsection (3) of this section.

(2) If a secured party assigns a perfected security interest, no filing under this Article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing provisions of this Article do not apply to a security interest in property subject to a statute

(a) of the United States which provides for a national registration or filing of all security interests in such property; or

Note: *States to select either Alternative A or Alternative B.*

Alternative A—

(b) of this state which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property.

Alternative B—

(b) of this state which provides for central filing of security interests in such property, or in a motor vehicle which is not inventory held for sale for which a certificate of title is required under the statutes of this state if a notation of such a security interest can be indicated by a public official on a certificate or a duplicate thereof.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official.

N. C. Comments

Prior Statutes: GS 44-52; 44-72 44-79; 45-53 47-20

Subsection (1) (a) is probably in accord with North Carolina law. Although there has been some confusion in the past, it now appears that in all cases a secured party in possession of the collateral is protected from lien creditors or purchasers even though the security agreement has not been registered. McCreary Tire & Rubber Co. v. Crawford, 253 N. C. 100, 116 S. E.2d 491 (1960). Accord: N. C. GS 44-75, 44-52 (b).

Under existing law, if the debtor has possession of the collateral, conditional sales contracts, N. C. GS 47-20, chattel mortgages, N. C. GS 47-20, liens on crops for advance, N. C. GS 44-52, factor's liens, N. C. GS 44-72, and liens on accounts receivable must be registered in order to protect the secured party from intervention of the rights of lien creditors, and where applicable, purchasers for value. Trust receipt transactions are protected from lien creditors for 30 days without filing; and, if the financing statements are filed within the 30 day period following the delivery of the collateral to the debtor, the perfection "relates-back" to the day of delivery. N. C. GS 45-53.

Subsection (1) (b) is generally in accord with the Uniform Trust Receipts Act, N. C. GS 45-53 (b). See also, Section 9-304 and N. C. GS 45-54.

Subsections (1) (c) and (1) (d) provide that purchase money security interests in farm equipment with a purchase price of less than $2,500 and in consumer goods may be perfected without filing. However, the perfection without filing does not result in complete protection. See Comment to Section 9-307 (2). Existing law does not recognize such exemptions from filing; all non-possessory security interests must be registered for protection from lien creditors and purchasers for value.

The North Carolina Assignment of Accounts Receivable Statute, GS 44-77 through 44-85, is worded so broadly that in all probability every assignment of accounts as defined therein, would be included in the filing provisions. Subsection (1) (e) exempts from the filing requirements of the Code assignments which do not constitute a "significant part of the outstanding accounts" of the debtor, and to this extent it would probably change North Carolina law.

Subsection (2) is in accord with the North Carolina decisions. See Cutter Realty Co. v. Dunn Moneyhun Co., 204 N.C. 651, 169 S.E. 274 (1933) (by implication); Hodges v. Wilkinson, 111 N.C. 56, 15 S.E. 941 (1892).

North Carolina should adopt Alternative A of Subsection (3). The effect of that alternative would be to preserve the operation of the North Carolina certificate of title law relating to motor vehicles and the perfection of security interests therin. GS 20-58 through 20-58.10. The present North Carolina statute does not apply to security interests created by a dealer or manufacturer who holds the vehicle for resale, GS 20-58.9; therefore, those security interests would be governed by the Code filing provisions.

Furthermore, the substantive provisions of the Code relating to the creation of the security interest in all motor vehicles and the rights and duties of the parties with reference thereto would be governed by the Code. Only the perfection of that security interest would be governed by existing law.

Section 9—303. When Security Interest Is Perfected; Continuity of Perfection.

(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in Sections 9—302, 9—304, 9—305 and 9—306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

(2) If a security interest is originally perfected in any way permitted under this Article and is subsequently perfected in some other way under this Article, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this Article.

N.C. Comments

Prior Statutes: None

The first sentence of subsection (1) states the obvious. The third sentence acknowledges that a security agreement may be filed before any of the steps toward perfection have taken place, more particularly, before the secured party has given value or the debtor has acquired any rights in the property. It is apparently well settled in North Carolina that the original filing of a security agreement which covers after-acquired property is sufficient without the necessity of additional filing each time the debtor acquires the new property. See Comment to Section 9-204. This is consistent with the Code. The same reasoning should support the view that the filing of a security agreement covering a specific item, before that item is owned by the mortgagor, would be valid as to lien creditors and purchasers. No cases involving chattels have been found. But see, Jackson v. Mills, 186 N.C. 52, 118 S.E. 835 (1923) (involving estoppel as to real property); Builders Sash & Door Co. v. Joyner, 182 N.C. 518, 109 S.E. 259 (1921) (real property).

Subsection (2) provides for continuous perfection of the security interest where the changing character of the collateral for perfection purposes may require differing methods of perfection. If there is no lapse in perfection, all subsequent perfections relate back to the time of the original perfection. This is probably in accord with North Carolina law. Cf. McCreary Tire & Rubber Co. v. Crawford, 253 N.C. 100, 116 S.E. 2d 491 (1960).

Section 9—304. Perfection of Security Interest in Instruments, Documents, and Goods Covered by Documents; Perfection by Permissive Filing; Temporary Perfection Without Filing or Transfer of Possession.

(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5).

(2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor

(a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange; or

(b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

(6) After the 21 day period in subsections (4) and (5) perfection depends upon compliance with applicable provisions of this Article.

N.C. Comments

Prior Statutes: GS 45-48 45-53.

Subsection (1), in permitting perfection of a security interest in negotiable documents by filing, is substantially in accord with the Uniform Trusts Receipts Act, GS 45-47. However, see Section 9-309 for the extent of protection afforded by filing. A security interest in instruments can be perfected only by possession.

Subsection (5) permits return of possession of certain collateral to the debtor for certain purposes without loss of perfection. This is analogous to the right of a pledgee to return goods under existing law, except that existing law sets no definite time limit. See Bundy v. Commercial Credit Corp., 202 N.C. 604, 163 S.E. 676 (1932)(return of accounts for collection purposes). In addition, the privilege under the Code is somewhat more restricted as to type of collateral.

Section 9—305. When Possession by Secured Party Perfects Security Interest Without Filing.

A security interest in letters of credit and advices of credit (subsection (2) (a) of Section 5—116), goods, instruments, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this Article. The security interest may be otherwise perfected as provided in this Article before or after the period of possession by the secured party.

N.C. Comments

Prior Statutes: None

The first sentence of this section is generally in accord with existing North Carolina law to the effect that registration is not necessary to perfect a possessory security interest. See Comment to Section 9-301 (1).

The second sentence of this section abrogates the common law rule that the bailee must acknowledge that he held the goods on behalf of the pledge before the goods would be deemed to be in the possession of the pledgee. See Official Comments to this section. The North Carolina Supreme Court has apparently not dealt with this problem; but a Federal District court has stated, where the collateral was in the possession of a third person, that "the...writing...might have become effective as a pledge to secure Lineberry if the writing had been delivered to the bank and if the bank had agreed..." (to hold the collateral for Lineberry). United States v. Lucas, 148 F. Supp. 768, 769 (M.D.N.C. 1957) (emphasis added). If this represents the North Carolina rule, the Code would modify it.

The third sentence rejects the concept of "equitable pledge". This would probably change North Carolina law. See Godwin v. Murchinson Nat. Bank., 145 N.C. 320, 59 S.E. 154 (1907). However, the change is of little ultimate significance because the Federal

Bankruptcy Act §60 was amended in 1938 to make such interests generally voidable as preferences.

See the Official Comment to this section.

Section 9—306. "Proceeds"; Secured Party's Rights on Disposition of Collateral.

(1) "Proceeds" includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right. Money, checks and the like are "cash proceeds". All other proceeds are "non-cash proceeds".

(2) Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless

(a) a filed financing statement covering the original collateral also covers proceeds; or

(b) the security interest in the proceeds is perfected before the expiration of the ten day period.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest

(a) in identifiable non-cash proceeds;

(b) in identifiable cash proceeds in the form of money which is not commingled with other money or deposited in a bank account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a bank account prior to the insolvency proceedings; and

(d) in all cash and bank accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account, but the perfected security interest under this paragraph (d) is

(i) subject to any right of set-off; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings and commingled or deposited in a bank account prior to the insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the ten day period.

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the

goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

(a) If the goods were collateral at the time of sale for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under Section 9—308.

(c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (a).

(d) A security interest of an unpaid transferee asserted under paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

N.C. Comments

Prior Statutes: GS 45-55, 44-84(2).

This section states the rules regarding a secured party's rights to proceeds and when he has a perfected security interest therin. The North Carolina cases have by implication recognized that a secured party can have some interest in the proceeds of the sale of the property, but it has never been expressly said that the interest is a "perfected security interest". See Blanton Grocery Co. v. Taylor, 162 N.C. 307, 78 S.E. 276 (1913). However, most courts have held that the mortgagee does have a security interest in the identifiable proceeds, at least where the mortgage provides that proceeds shall be applied to discharge the mortgage. E.g., Smith v. Swift & Co., 320 F. 2d 268 (10th Cir. 1963). The Code would give the secured party a security interest proceeds in all cases, and in the event of insolvency of the debtor, the Code would go one step further in giving the secured party with a "perfected" security interest in proceeds a right to the non-identifiable proceeds in the form of cash or bank accounts to an amount not greater than the amount of proceeds received by the debtor within ten days preceding the institution of the insolvency proceeding. See Official Comment to Section 9-306. GS 45-55 (trust receipts).

Section 9—307. Protection of Buyers of Goods.

(1) A buyer in ordinary course of business (subsection (9) of Section 1—201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

(2) In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of $2500 (other than fixtures, see Section 9—313), a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes or his own farming operations unless prior to the purchase the secured party has filed a financing statement covering such goods.

N.C. Comments

Prior Statutes: GS 45-54, 44-73, 20-58.9.

In North Carolina a buyer in the ordinary course of business can be assured of having rights superior to those of a holder of a security interest in the goods in only three situations: (1) where he purchases from a merchant whose merchandise is financed under a trust receipt pursuant to the Uniform Trust Receipts Act, GS 45-54; (2) where he purchases from a manufacturer or processor whose goods are subject to a security interest created by a factor's lien, GS 44-73; and (3) when he purchases an automobile from a dealer. GS 20-58.9. In all other situations, the buyer in the ordinary course takes subject to the previous security interest unless the secured party has given an express power of disposition to the debtor or unless the conduct and dealing between the debtor and the secured party was such as to give rise to an inference that the secured party had waived his lien. Atlantic Discount Corp. v. Young, 224 N.C. 89, 29 S.E. 2d 29 (1944); Southern Railway Co. v. W.A. Simpkins Co., 178 N. C. 273, 100 S.E. 418 (1919). Proof that the mortgagee permitted the mortgagor to keep the goods in his possession and display them at the mortgagor's place of business is not sufficient evidence of waiver of the lien. Whitehurst v. Garrett, 196 N.C. 154, 144 S.E. 835 (1928); State Trust Co. v. M. & J. Finance Corp. 238 N.C. 478, 78 S.E. 2d 327 (1953). However, where the above facts are present and the mortgagor is not required by the mortgagee to satisfy the underlying obligation before sale of the goods, the buyer in ordinary course will prevail over the previous security interest. Atlantic Discount Corp. v. Young, supra. The Code would extend protection to all buyers in the ordinary course as defined in Section 1-201 (9). Thus, North Carolina law would to some extent be changed by this section, but the effect would only be to equalize the status of all buyers in the ordinary course of business. Subsection (2) would change existing law, in that a purchaser in the circumstances set out in the Code could not now prevail over a "perfected" security interest. See Comment to Section 9-301 (1). However, the significance of the change would be more theoretical than factual.

Section 9—308. Purchase of Chattel Paper and Non-Negotiable Instruments.

A purchaser of chattel paper or a non-negotiable instrument who gives new value and takes possession of it in the ordinary course of his business and without knowledge that the specific paper or instrument is subject to a security interest has priority over a security interest which is perfected under Section 9—304 (permissive filing and temporary perfection). A purchaser of chattel paper who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in chattel paper which is claimed merely as proceeds of inventory subject to a security interest (Section 9—306), even though he knows that the specific paper is subject to the security interest.

N.C. Comments: None

Prior Statutes: GS 45-54(a) 45-55

Section 9—309. Protection of Purchasers of Instruments and Documents.

Nothing in this Article limits the rights of a holder in due course of a negotiable instrument (Section 3—302) or a holder to whom a negotiable document of title has been duly negotiated (Section 7—501) or a bona fide purchaser of a security (Section 8—301) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this Article does not constitute notice of the security interest to such holders or purchasers.

N.C. Comments

Prior Statutes: GS 45-54(a)

This section is in accord with the Uniform Trust Receipts Act, GS 45-54 (a), in giving priority to the purchaser for value of negotiable instruments or documents of title left in the possession of the debtor, even though the security interest has been perfected by filing.

Section 9—310. Priority of Certain Liens Arising by Operation of Law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

N.C. Comments

Prior Statutes: GS 44-1 through 44-48.

This section preserves the priority of common law and statutory possessory liens, unless the statute giving the lien provides otherwise. Thus, the North Carolina statutory liens afforded persons who make repairs to personal property, GS 44-2, the warehouse storage liens, GS 44-28 and 44-29, liens given to hotel keepers and livery stable keepers would probably prevail over a Code perfected security interest so long as the person entitled to the lien retained possession of the property. This is in accord with existing law, at least insofar as it relates to the lien for repairs to personal property. See Johnson v. Yates, 183 N.C. 24, 110 S.E. 630 (1922). Other liens of this class which do not involve possession of the person claiming the lien would probably be subordinated to the Code perfected security interest. At least they would not be entitled to priority by virtue of this section.

Section 9—311. Alienability of Debtor's Rights: Judicial Process

The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.

N.C. Comments

Prior Statutes: GS 1-315 and 1-440.4

With regard to involuntary transfer such as levy under execution and attachment, this section is in accord with existing law. GS 1-315 and 1-440.4.

Section 9—312. Priorities Among Conflicting Security Interests in the Same Collateral.

(1) The rules of priority stated in the following sections shall govern where applicable: Section 4—208 with respect to the security interest of collecting banks in items being collected, accompanying documents and proceeds; Section 9—301 on certain priorities; Section 9—304 on goods covered by documents; Section 9—306 on proceeds and repossessions; Section 9—307 on buyers of goods; Section 9—308 on possessory against non-possessory interests in chattel paper or non-negotiable instruments; Section 9—309 on security interests in negotiable instruments, documents or securities; Section 9—310 on priorities between perfected security interests and liens by operation of law; Section 9—313 on security interests in fixtures as against interests in real estate; Section 9—314 on security interests in accessions as against interest in goods; Section 9—315 on conflicting security interests where goods lose their identity or become part of a product; and Section 9—316 on contractual subordination.

(2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

(3) A purchase money security interest in inventory collateral has priority over a conflicting security interest in the same collateral if

(a) the purchase money security interest is perfected at the time the debtor receives possession of the collateral; and

(b) any secured party whose security interest is known to the holder of the purchase money security interest or who, prior to the date of the filing made by the holder of the purchase money security interest, had filed a financing statement covering the same items or type of inventory, has received notification of the purchase money security interest before the debtor receives possession of the collateral covered by the purchase money security interest; and

(c) such notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

(4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined as follows:

(a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under Section 9—204(1) and whether it attached before or after filing;

(b) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under Section 9—204(1) and, in the case of a filed security interest, whether it attached before or after filing; and

(c) in the order of attachment under Section 9—204(1) so long as neither is perfected.

(6) For the purpose of the priority rules of the immediately preceding subsection, a continuously perfected security interest shall be treated at all times as if perfected by filing if it was originally so perfected and it shall be treated at all times as if perfected otherwise than by filing if it was originally perfected otherwise than by filing.

N. C. Comments

Prior Statutes: GS 44-52
44-80(3).

This section should be read with the other Sections of the Code set out in Subsection (1) to determine the overall priority of a security interest created under Article 9. Section 9-312 deals only with competing consensual security interests in the same property.

Subsection (2) is new. However, like the North Carolina statute governing liens on crops for advances, GS 44-52, this section does give a preferred status to security interests arising from giving new value to enable the debtor to produce the crops. The protection afforded the person making advances under the Code is not, however, as complete as the protection given under existing law. A present lien on crops will have priority over all other security interests in the crops with the exception of the liens of landlords and laborers, and an earlier registered lien for advances. GS 44-52. See also, Rhodes v. Smith-Douglas Fertilizer Co., 220 N.C. 21, 16 S.E. 2d 408 (1941); Eastern Cotton Oil Co. v. Powell, 201 N.C. 351, 160 S.E.292 (1931). The Uniform Commercial Code would give priority over previous encumbrances only to the extent that the debts secured by such encumbrances had matured more than six months prior to planting of the crops. The security interest in crops would also be subordinated to the landlord's lien, GS 42-15. See Comment to Section 9-104 (b). The status under the Code of the laborer's lien, GS 44-1 and 44-41, is not clear. Generally, the laborer's lien has priority only over encumbrances created after the beginning of the work. GS 44-41. It is not, as is the landlord's lien, individually excluded

from the operation of the Article 9 without reference to priority. Section 9-104 (b). Therefore, the laborer's lien would appear to fall within that class of liens excluded by Section 9-104 (c) wherein reference is made to section 9-310 for priority. The laborer's lien is not a possessory lien and probably would not be entitled to the automatic priority given in Section 9-310 to possessory liens. As a result, the laborer's lien might not be entitled to priority over the crop lien at least where the crop lien antedates the beginning of the work.

Subsection (3) is new and to the extent of its coverage it would change North Carolina law. The provision is designed to protect the holder of a "floating lien" on inventory, who will normally make advances on the incoming inventory of the debtor, from subordination to purchase money security interests without notice. The provision is designed to enable the holder of a "floating lien" on inventory to have notice that his security interest is being depleted by subordination to purchase money security interests, so that he will not make advances on collateral which he cannot acquire a superior interest in. If notice is not given by the holder of the purchase money security interest as required in Subsections (3)(b) and (3)(c), the "floating lien" will have priority. Under existing law, the holder of the purchase money security interest would probably have priority in all cases. See Comment to Subsection (4), infra.

Subsection (4) is generally in accord with North Carolina law, with the exception of the ten day "grace" period within which to perfect the security interest. Under existing law, the purchase money security interest has priority over previously registered security interest. Standard Dry Kiln Co. v. Ellington, 172 N.C. 481, 90 S.E. 564 (1916); Cox v. New Bern Lighting & Fuel Co., 151 N.C. 62, 65 S.E. 648 (1909). But see, Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 282, 63 S.E. 1045 (1909). There would be one change in law. The Code requires that the purchase money security interest be perfected within ten days after the debtor receives possession of the collateral to qualify for the priority. Heretofore, the North Carolina court has stated that the purchase money interest would prevail even though it was never registered or "perfected" because the registration statutes are for the protection of subsequent, not prior, purchasers and creditors. Cox v. New Bern Lighting & Fuel Co., supra.

Subsection (5) is generally in accord with North Carolina law. The first security interest registered will prevail even though it is not the first executed. See e.g., Commercial Inv. Trust v. Albermarle Motor Co., 193 N.C. 663, 137 S.E. 874 (1927) (registered chattel mortgage prevails over unregistered conditional sales contract on same property). Accord: GS 44-80 (3) (assignments of accounts receivable). Likewise, where a mortgagee has perfected the security interest by taking possession of the collateral, he should prevail over a subsequently registered mortgagee, covering the same collateral. Cf. McCreary Tire & Rubber Co. v. Crawford, 253 N.C. 100, 116 S.E. 2d 491 (1960).

The last phrases of Subsections (5) (a) and (5) (b) give priority to the first security interest filed, even though the debtor does not have rights in the property at the time of filing (or if for some other reason the security interest has not "attached" under Section 9-204 (1)). The North Carolina law on this point is uncertain. See comment to Section 9-303.

Subsection (6) reaffirms the rule of continuous perfection set out in Section 9-303.

Section 9—313. Priority of Security Interests in Fixtures.

(1) The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

(3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

(4) The security interests described in subsections (2) and (3) do not take priority over

(a) a subsequent purchaser for value of any interest in the real estate; or

(b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or

(c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(5) When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods re-

moved or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

N. C. Comments

Prior Statutes: None

As to a security interest which attaches to the goods before they become fixtures, this section is generally in accord with North Carolina law. In Cox v. New Bern Lighting & Fuel Co., 151 N. C. 62,65 S.E. 648, 650 (1909) the court stated: "One holding a mortgage on the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore, the title of a conditional vendor of such chattels, or of a mortgage of them before the time they were attached to the realty, is just as good against mortgagee of the realty as it is against the mortgagor."

However, in Standard Motors Finance Co. v. Weaver, 199 N. C. 178, 153 S.E. 861 (1938), the court held that a subsequent purchaser of the real estate at a foreclosure sale could not prevail over the mortgagee of a sprinkler system installed in the building. That case is contra to subsection (4).

Subsection (5) gives a party who holds a security interest in fixtures which is entitled to priority the absolute right to remove the fixtures, subject to his duty to reimburse the landowner for any loss suffered thereby. This is a departure from the generally recognized rule that the chattel mortgage will be subordinated where the fixture "cannot be removed without diminishing or impairing an existing mortgage..." on the real estate. Cox v. New Bern Lighting & Fuel Co. supra at 67, 65 S.E. at 651.

Section 9—314. Accessions.

(1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to Section 9—315(1).

(2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in subsection (3) but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.

(3) The security interests described in subsections (1) and (2) do not take priority over

(a) a subsequent purchaser for value of any interest in the whole; or

(b) a creditor with a lien on the whole subsequently obtained by judicial proceedings; or

(c) a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale other than the holder of a perfected security interest purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(4) When under subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of Part 5 remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

N. C. Comments

Prior Statutes: None

This section is very similar in approach to Section 9-313 which relates to fixtures. Subsection (1) gives priority to security interests which attach before the goods are installed. North Carolina law is in accord at least as to goods which do not become an integral part of the chattel to which they are attached. Goodrich Silvertown Stores v. Bennett Motor Co., 214 N. C. 85, 197 S. E. 698 (1938) (security interest in tires has priority over the security interest in the automobile). However, the Official Comments to Section 9-314 indicate that this section is intended to achieve a result opposite to that of Twin City Motor v. Rouzer Motor Co., 197 N. C. 371, 148 S. E. 461 (1929), wherein a security interest in an automobile was held superior to a subsequent chattel mortgage on a motor placed in the automobile.

No cases have been found dealing with the other problems in this section, but see Comment to Section 9-313 for analogous cases involving fixtures.

Section 9—315. Priority When Goods Are Commingled or Processed.

(1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if

(a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass; or

(b) a financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled.

In a case to which paragraph (b) applies, no separate security interest in that part of the original goods which has been manufactured, processed or assembled into the product may be claimed under Section 9—314.

(2) When under subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

N. C. Comments — Prior Statutes: None

This section is essentially new. It is intended to replace some decisions which held that a mortgage on goods was lost if the goods lost their identity by being processed. See Official Comment No. 2 to Section 9-315. No North Carolina chattel mortgage cases have been found. The North Carolina Factor's Act, N. C. GS 44-71, does permit a general lien upon goods in process which by implication extends to the goods after their original identity is lost.

Section 9—316. Priority Subject to Subordination.

Nothing in this Article prevents subordination by agreement by any person entitled to priority.

N. C. Comments — Prior Statutes: None

This section to the effect that a holder of a prior interest may by agreement subordinate his security interest to a security interest with a lower priority, is in accord with existing North Carolina law. See Avery County Bank v. Smith, 186 N. C. 635, 120 S. E. 215 (1923).

Section 9—317. Secured Party Not Obligated on Contract of Debtor.

The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions.

N. C. Comments

Prior Statutes: GS 45-57

This section is in accord with the North Carolina Uniform Trust Receipts Act, N. C. GS 45-57. No cases from North Carolina have been found.

Section 9—318. Defenses Against Assignee; Modification of Contract After Notification of Assignment; Term Prohibiting Assignment Ineffective; Identification and Proof of Assignment.

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 9—206 the rights of an assignee are subject to

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment under an assigned contract right has not already become an account, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the account has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

(4) A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective.

N. C. Comment

Prior Statutes: 44-82, 45-54(c)

Subsection (1) is in accord with North Carolina law. In William Iselin & Co., Inc., v. Saunders, 231 N. C. 642, 647, 58 S. E. 2d 614 (1950), the court stated: "the assignee of a non-negotiable chose in action, though he buys it for value, in good faith, and before maturity, takes subject to all defenses which the debtor may have had against the assignor based on facts existing at the time of the assignment or on facts arising thereafter but prior to the debtor's knowledge of the assignment".

Accord: Jennings & Sons, Inc. v. Howard, 212 N. C. 490, 193 S. E. 819 (1937). See also, Comment to Section 9-206.

Subsection (2) would probably change North Carolina law. No cases have been found, but heretofore, most courts would hold ineffective any change in the basic executory contract made by the account debtor and the assignor after assignment.

Subsection (3) would make a slight change in existing law. The present rules provide that the account debtor is free to pay the assignor only until such time as he receives notice of the assignment, irrespective of the source of the notice. Lipe Motor Lines v. Guilford Nat. Bank, 236 N. C. 328, 72 S. E. 2d 759 (1952) (dictum); Ellis v. Amason, 17 N. C. 273 (1832). N C GS 44-82 is generally in accord. The Code would put the burden on the assignee to notify the account debtor and to specify to whom payment is to be made. Absent specification, the account debtor would be entitled to pay the assignor.

Subsection (4) provides that a contractual restriction on transfer of an account shall be ineffective. No North Carolina cases have been found. However, during the last few years the courts have become increasingly adverse to the clause restricting assignment and are probably moving in the direction of Subsection (5). See Official Comment No. 4 to Section 9-318.

First Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded;

(b) in all other cases, in the office of the [Secretary of State].

Second Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts, contract rights or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the ..... in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the ..... in the county where the goods are kept, and in addition when the collateral is crops in the office of the ..... in the county where the land on which the crops are growing or to be grown is located;

(b) when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded;

(c) in all other cases, in the office of the [Secretary of State].

Third Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts, contract rights or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the ..... in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the ..... in the county where the goods are kept, and in addition when the collateral is crops in the office of the ..... in the county where the land on which the crops are growing or to be grown is located;

(b) when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded;

(c) in all other cases, in the office of the [Secretary of State] and in addition, if the debtor has a place of business in only one county of this state, also in the office of ..... of such county, or, if the debtor has no place of business in this state, but resides in the state, also in the office of ..... of the county in which he resides.

Note: *One of the three alternatives should be selected as subsection (1).*

(2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

(3) A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.

Alternative Subsection (3).

[(3) A filing which is made in the proper county continues effective for four months after a change to another county of the debtor's residence or place of business or the location of the collateral, whichever controlled the original filing. It becomes ineffective thereafter unless a copy of the financing statement signed by the secured party is filed in the new county within said period. The security interest may also be perfected in the new county after the expiration of the four-month period; in such case perfection dates from the time of perfection in the new county. A change in the use of the collateral does not impair the effectiveness of the original filing.]

(4) If collateral is brought into this state from another jurisdiction, the rules stated in Section 9-103 determine whether filing is necessary in this state.

N.C. Comments

Prior Statutes: GS 44-52, 44-78, 44-72, 47-20.2, 45-58(c)

North Carolina statutes do not now provide for the filing or registration of security interests in the Office of the Secretary of State; that is, the state has no "central filing" of security interests. In view of this fact, the most desirable alternative for coordination with existing practice would be the Third Alternative to Subsection (1). This alternative permits the maximum amount of local filing, while retaining central filing for those situations in which it is deemed to be most advantageous. Detailed comparisons of Subsection (1) with the present registration system would of necessity be extensive and probably futile. Suffice it to say that existing law and the Code are in agreement that where there are a number of possible places to file, the most logical is generally the location of the residence of the debtor, or if the debtor has no residence in the state, the location of the goods. However, the device of local

filing under the Code is limited to four situations: (1) when collateral is "equipment used in farming operations, or farm products, or accounts, etc. arising from sale of farm products; (2) when collateral is consumer goods; (3) when collateral is intended to become a fixture; and, (4) when debtor has a place of business in only one county or city of the state, or has no place of business but does have a residence in the state, in which case both local and central filings must be made. In all other situations only central filing need be made.

Subsection (b) relating to the filing of security interests in goods which are to become fixtures would probably change North Carolina law. There is no North Carolina statute on the subject, but the place of filing under existing law probably would be the place of filing of personal property. Standard Motors Finance Co. v. Weaver, 199 N.C. 178, 153 S.E. 698 (1938) (subjecting chattel to encumbrance indicates intention that it remain personalty).

Subsection (2) affords a limited validity to filings which are made in the wrong place. This would change existing law. "The recordation of a chattel mortgage or a conditional sale in any county other than that specified by law is of no effect." Montague Bros. v. Shepherd Co., 231 N.C. 551, 554, 58 S.E. 2d 118, 120 (1950)(dictum). See also, Bank of Colerain v. Cox, 171 N.C. 76, 87 S.E. 967 (1916).

There is one alternative to Subsection (3). However, the principal subsection, which provides that a filing which is initially made in the proper place remains effective even though the determinative facts have subsequently changed, is in accord with existing law. Montague Bros. v. Shepherd, supra; Harris v. Allen, 104 N.C. 86, 10 S.E. 127 (1889).

Subsection (4) reaffirms that the rules of Section 9-103 govern when security is brought in from another state. See comment to Section 9-103.

Section 9—402. Formal Requisites of Financing Statement; Amendments.

(1) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.

(2) A financing statement which otherwise complies with subsection (1) is sufficient although it is signed only by the secured party when it is filed to perfect a security interest in

(a) collateral already subject to a security interest in another jurisdiction when it is brought into this state. Such a financing statement must state that the collateral was brought into this state under such circumstances.

(b) proceeds under Section 9—306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral.

(3) A form substantially as follows is sufficient to comply with subsection (1):

Name of debtor (or assignor) .....
Address .....
Name of secured party (or assignee) .....
Address .....

1. This financing statement covers the following types (or items) of property:
   (Describe) .....
2. (If collateral is crops) The above described crops are growing or are to be grown on:
   (Describe Real Estate) .....
3. (If collateral is goods which are or are to become fixtures) The above described goods are affixed or to be affixed to:
   (Describe Real Estate) .....
4. (If proceeds or products of collateral are claimed) Proceeds—Products of the collateral are also covered.

Signature of Debtor (or Assignor) .....
Signature of Secured Party (or Assignee) .....

(4) The term "financing statement" as used in this Article means the original financing statement and any amendments but if any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment.

(5) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

N.C. Comments

Prior Statutes: GS 45-58 44-71, 44-62, 45-1, 45-20, 44-78.

This section adopts a "notice filing" system similar to that now in use in North Carolina as to trust receipts, factor's liens, and notice of assignment of accounts receivable. Under such a system, the security agreement proper need not be registered; a financing statement containing such general information as is deemed sufficient to put a party searching the record on notice that there is a security agreement outstanding against a particular person covering certain typ of collateral is all that need be filed. It should be noted that a financing statement would not be required; the parties could, if they chose, file the security agreement instead.

Existing law requires that the entire written agreement which results in a chattel mortgage, conditional sale, or crop lien be registe ed. The Code would change the requirement.

With the exception of the Uniform Trust Receipts Act, existing law requires that the instrument recorded be formally acknowledged. A formal defect in the acknowledgement of the debtor will render the registration totally void. Todd v. Outlaw, 79 N.C. 235 (1878). The Code would not require that the instrument be acknowledged nor would the filing be defeated if the requirements are substantially complied with.

Section 9-110 sets out the standards for sufficient description of the property.

Section 9—403. What Constitutes Filing; Duration of Filing; Effect of Lapsed Filing; Duties of Filing Officer.

(1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this Article.

(2) A filed financing statement which states a maturity date of the obligation secured of five years or less is effective until such maturity date and thereafter for a period of sixty days. Any other filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of such sixty day period after a stated maturity date or on the expiration of such five year period, as the case may be, unless a continuation statement is filed prior to the lapse. Upon such lapse the security interest becomes unperfected. A filed financing statement which states that the obligation secured is payable on demand is effective for five years from the date of filing.

(3) A continuation statement may be filed by the secured party (i) within six months before and sixty days after a stated maturity date of five years or less, and (ii) otherwise within six months prior to the expiration of the five year period specified in subsection (2). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it.

(4) A filing officer shall mark each statement with a consecutive file number and with the date and hour of filing and shall hold the statement for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.

(5) The uniform fee for filing, indexing and furnishing filing data for an original or a continuation statement shall be $.....

N.C. Comments

Prior Statutes: GS 44-52, 44-71, 44-73, 44-78 (4), 45-37, 45-58(d), 161-14, 161-10, 161-10.1.

Subsection (1) is in accord with the North Carolina Uniform Trust Receipts Act, GS 45-58(c). The subsection was intended to make clear that the security interest serves as constructive notice from the time of filing, i.e., presentation of instrument and payment of the fee. This implicitly removes the burden of failure to index from the secured party. This would change North Carolina law as to security interests other than trust receipts. Under present law a registration does not serve as constructive notice until it has been properly indexed and cross-indexed. Johnson Cotton Co. v. Hobgood, 243 N.C. 227, 90 S.E. 2d 541 (1955)(dictum); Ely v. Norman, 175 N.C. 294, 95 S.E. 543 (1918). Thus, the failure of the register to perform his duties properly is the responsibility of the secured party under existing law. Subsection (2) provides that a financing statement without a maturity date will remain effective for five years. Existing law varies from one year for trust receipts, GS 45-58(d), to fifteen years following the maturity date for mortgages, GS 45-37.

Subsection (3) sets out the requirements for filing of continuation statements. Existing law has such provisions which vary with the type of security interest. See GS 45-58(e) (trust receipts), 45-37 (5) (mortgages), 44-78 (4) (assignments of accounts).

Subsection (4) requires that the filing officer mark each statement with the date and hour of filing. This is required by existing law. GS 161-14 (registration of instruments). The subsection requires that only index, in the name of the debtor, be maintained. This would change the existing practice of maintaining two indexes, one in the name of the debtor and another in the name of the secured party. GS 161-14. In addition, the Code would require that the address of the debtor be noted in the index. Apparently, this is not done under present law.

The present system of filing fees sets the basic price for recording a statutory form of chattel mortgage at $.25. GS 161-10. However, there are numerous local exceptions with fees ranging to $1.00 for the chattel mortgage. GS 161-10.1.

Section 9—404. Termination Statement.

(1) Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor a statement that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must include or be accompanied by the assignment or a statement by the secured party of record that he has assigned the security interest to the signer of the termination statement. The uniform fee for filing

and indexing such an assignment or statement thereof shall be $..... If the affected secured party fails to send such a termination statement within ten days after proper demand therefor he shall be liable to the debtor for one hundred dollars, and in addition for any loss caused to the debtor by such failure.

(2) On presentation to the filing officer of such a termination statement he must note it in the index. The filing officer shall remove from the files, mark "terminated" and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto.

(3) The uniform fee for filing and indexing a termination statement including sending or delivering the financing statement shall be $.....

N. C. Comments

Prior Statutes: GS 44-74, 44-79, 45-37 through 45-42.1, 45-58(g).

This section would provide for a uniform method of terminating a financing statement or cancelling a security interest. It would replace the various provisions cited above.

Section 9—405. Assignment of Security Interest; Duties of Filing Officer; Fees.

(1) A financing statement may disclose an assignment of a security interest in the collateral described in the statement by indication in the statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. Either the original secured party or the assignee may sign this statement as the secured party. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in Section 9—403(4). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be $.....

(2) A secured party may assign of record all or a part of his rights under a financing statement by the filing of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be $.....

(3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record.

N. C. Comments

Prior Statutes: None

This section provides a method whereby the assignee of a security interest may indicate the assignment on the record. It is not, however, required as a condition to the continued perfection of the security interest as to the debtor and his creditors and purchasers. See Section 9-302(2).

Section 9—406. Release of Collateral; Duties of Filing Officer; Fees.

A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. Upon presentation of such a statement to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be $.....

N.C. Comments: None

Prior Statutes: None

[Section 9—407. Information From Filing Officer.

(1) If the person filing any financing statement, termination statement, statement of assignment, or statement of release, furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person.

(2) Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be $..... plus $..... for each financing statement and for each statement of assignment reported therein. Upon request the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee of $..... per page.

Note: *This new section is proposed as an optional provision to require filing officers to furnish certificates. Local law and practices should be consulted with regard to the advisability of adoption.*

N.C. Comments

Prior Statutes: None

This section is optional. However, in view of the innovation of central filing in this state if the Uniform Commercial Code should be adopted, it probably would be desirable to have this alternative method for procuring information available to interested parties.

It is true that similar provisions presently exist with reference to the duties of the register of deeds. However, there are probably no provisions applicable to the office of the Secretary of State.

Section 9—501. Default; Procedure When Security Agreement Covers Both Real and Personal Property.

(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in Section 9—207. The rights and remedies referred to in this subsection are cumulative.

(2) After default, the debtor has the rights and remedies provided in this Part, those provided in the security agreement and those provided in Section 9—207.

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (1) of Section 9—505) and with respect to redemption of collateral (Section 9—506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:

(a) subsection (2) of Section 9—502 and subsection (2) of Section 9—504 insofar as they require accounting for surplus proceeds of collateral;

(b) subsection (3) of Section 9—504 and subsection (1) of Section 9—505 which deal with disposition of collateral;

(c) subsection (2) of Section 9—505 which deals with acceptance of collateral as discharge of obligation;

(d) Section 9—506 which deals with redemption of collateral; and

(e) subsection (1) of Section 9—507 which deals with the secured party's liability for failure to comply with this Part.

(4) If the security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this Part do not apply.

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this Article.

N.C. Comments

Prior Statutes: GS 45-51 and 44-60.

This section provides for the basic rights and remedies of the secured party and debtor with reference to the collateral after a default has been made on the underlying obligation.

Subsection (1) reserves to the secured party any methods of judicial enforcement which existing law grants. This would, where applicable permit equitable foreclosure or other judicial action to secure possession of and provide for sale of the property. In addition, the secured party may proceed as any other creditor to reduce his claim to judgment without reference to the collateral. Subsection (5) provides that where this is done, the subsequent levy or attachment lien which the secured party, as judgment creditor, procures on the collateral in which he has a security interest relates back to the date of original perfection for the security interest. This provision is designed to minimize preference problems should the debtor subsequently be forced into bankruptcy.

In addition the secured party would have the rights granted by the other section in this Part, such as the right to take possession of the collateral, Section 9-503, and hold a sale for disposition thereof. Section 9-504.

The judicial remedies which the secured party would have under North Carolina law after enactment of the Code, would be at least an action for claim and delivery of the goods, Buffkins v. Eason, 112 N.C. 162, 16 S.E 916 (1893), and probably an action to foreclose. See Hackley Piano Co. v. Kennedy, 152 N.C. 196, 67 S.E. 488 (1910).

As to the rights of the secured party upon default under trust receipts, see GS 45-51 and comment to Section 9-504.

Section 9—502. Collection Rights of Secured Party.

(1) When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under Section 9—306.

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

N.C. Comments: None

Prior Statutes: None

Section 9—503. Secured Party's Right to Take Possession After Default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9—504.

N.C. Comments

Prior Statutes: GS 45-3.1 and 45-51.

By implication, this section gives the debtor the right to possession of the collateral before default, unless the parties agree otherwise. This is in accord with a recent North Carolina statute relating to installment sales, GS 45-3.1, and the Uniform Trust Receipts Act, GS 45-51.

The second sentence of this Section gives the secured party the right to take possession of the collateral upon default without aid of judicial process provided he commits no breach of peace. This is in accord with North Carolina law. Rea v. Universal C.I.T. Credit Corp., 257 N.C. 639, 127 S.E. 2d 225 (1962). Further, this section implies that the secured party may enter the premises of the debtor to secure possession of the collateral if entry can be made without causing a breach of peace. Whether this can be done in North Carolina, in the absence of an express agreement to that effect, is not clear. See Rea v. Universal C.I.T. Credit Corp., supra.

No North Carolina cases dealing with the provisions of the third and fourth sentences of this section have been found.

Section 9—504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

N.C. Comments

Prior Statutes: GS 45-51, 45-21.31, 45-21.18 and 45-21.19.

This section gives the secured party the right to sell collateral after default, unless the power of sale is modified or prohibited by the security agreement. Under existing law relating to chattel mortgages and conditional sales, the secured party has a power of sale whether or not the security agreement provides expressly for the power. GS 45-21.18. Accord: GS 45-51 (trust receipts).

The priority in disposition of the proceeds of the sale set out in Subsection (1) is in accord with present law. That is, where the secured party sells personal property pursuant to the power of sale, the proceeds thereof are applied first to the "costs and expenses of the sale," GS 45-21.31 (a)(1), and then to the obligation secured by the mortgage. GS 45-21.31 (a)(4). There is no express provision in the present statutes like that of Subsection (1)(c), but present law requires the mortgagee to turn over the surplus to the "party entitled thereto" who persumably could be a junior lien holder. GS 45-21.31 (b)

Subsection (2), in giving the debtor the right to any ultimate surplus of the proceeds, is in accord with existing law. However, there is no provision in the present statutes which would accept accounts, contract rights, or chattel paper.

Subsection (3) provides for the methods of sale. Under existing law, rather elaborate provisions for notice to the debtor must be complied with and a public sale must be held. GS 45-21.18. See also, Rea v. Universal C.I.T. Credit Corp., 257 N.C. 639, 127 S.E. 2d 225 (1962); GS 45-51 (trust receipts)(public or private sale may be held). The Code would substitute in place of these rigid requirements the standard of "commercial reasonableness" on the assumption that in most instances the collateral will bring a higher price if the secured party has some flexibility in the method of disposition. If, under the Code, it should be determined that the secured party did not act in a reasonable manner in the conduct of the sale, Section 9-507 gives the debtor an express remedy.

Present law requires at least 10 days notice to the debtor in the case of conditional sales and chattel mortgages, five days notice in the case of trust receipts, subject to the right of the parties to agree otherwise. Under the Code, "reasonable notification" is required. The Official Comment explains that this is notice sufficient to enable the persons entitled thereto to participate in the sale or otherwise protect their interests. Thus, as a practical matter, the Code requirements of notice would probably not make significant revision in existing law. Further, present law provides for an exception in the notice requirement in the case of perishable

goods, GS 45-21.19, as does the Code. However, the present exception would apply to any collateral which is likely to decline in value.

The last sentence of Subsection (3) provides that the secured party may purchase any collateral at a public sale, and certain types of collateral at a private sale. Accord: GS 45-51 (trust receipts). This is contra to North Carolina law relating to chattel mortgages. "(A) mortgagee with power to sell, cannot directly or indirectly purchase at his own sale. This is not because there is, but because there may be fraud." Harris v. Hillard, 221 N.C. 329, 333, 20 S.E. 2d 278, 280 (1942).

Subsection (4) provides that a sale by a secured party transfers to a purchaser for value all of the debtor's rights in the collateral and discharges any security interest subordinate thereto. This is probably contra to North Carolina law. However, the discharge of the security interest is offset by the obligation of the seller to pay the surplus to a junior lien holder, Subsection (1)(c), and the seller's liability under Section 9-507 for failure to do so in proper circumstances. Further, this subsection provides that a purchaser for value without knowledge of defects will get good title to the goods even though the seller did not comply with the requirements of sale. This would probably change existing law relating to chattel mortgages. See Ferebee v. Sawyer, 167 N.C. 199, 83 S.E. 17 (1914) (buyer gets no title where real estate mortgage foreclosure sale is defective). The trust receipts act, GS 45-51, is in accord with the Code.

Section 9—505. Compulsory Disposition of Collateral; Acceptance of the Collateral as Discharge of Obligation.

(1) If the debtor has paid sixty per cent of the cash price in the case of a purchase money security interest in consumer goods or sixty per cent of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this Part a secured party who has taken possession of collateral must dispose of it under Section 9—504 and if he fails to do so within ninety days after he takes possession the debtor at his option may recover in conversion or under Section 9—507(1) on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor and except in the case of consumer goods to any other secured party who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or is known by the secured party in possession to have a security interest in it. If the debtor or other person entitled to receive notification objects in writing within thirty days from the receipt of the notification or if any other secured

party objects in writing within thirty days after the secured party obtains possession the secured party must dispose of the collateral under Section 9—504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

Prior Statutes: None

N.C. Comment: None

Section 9—506. Debtor's Right to Redeem Collateral.

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Section 9—504 or before the obligation has been discharged under Section 9—505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

Prior Statutes: GS 45-21.2

N.C. Comments

This section is similar in purpose to GS 45-21.20, which gives the mortgagor or conditional vendor a right to redeem the collateral by payment of the debt and the expenses incurred with respect to the proposed sale at any time before the sale is held.

Section 9—507. Secured Party's Liability for Failure to Comply With This Part.

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposi-

tion which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

N.C. Comments

Prior Statutes: None

This section gives the debtor rights against the secured party for failure to comply with this part and sets forth some standards to be used in determining whether the secured party has in fact complied. It is similar in purpose to existing law. See Rea v. Universal C.I.T. Credit Corp., 257 N.C. 639, 127 S.E. 2d 225 (1962) (secured party liable for failure to comply with provisions for public sale).

Section 10—101. Effective Date.

This Act shall become effective at midnight on December 31st following its enactment. It applies to transactions entered into and events occurring after that date.

Section 10—102. Specific Repealer; Provision for Transition.

(1) The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

(Here should follow the acts to be specifically repealed including the following:

Uniform Negotiable Instruments Act
Uniform Warehouse Receipts Act
Uniform Sales Act
Uniform Bills of Lading Act
Uniform Stock Transfer Act
Uniform Conditional Sales Act
Uniform Trust Receipts Act

Also any acts regulating:

Bank collections
Bulk sales
Chattel mortgages
Conditional sales
Factor's lien acts
Farm storage of grain and similar acts
Assignment of accounts receivable)

(2) Transactions validly entered into before the effective date specified in Section 10—101 and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred.

Note

Subsection (1) should be separately prepared for each state. The foregoing is a list of statutes to be checked.

N. C. Comments

This section suggests that the following acts should be specifically repealed:

Uniform Negotiable Instruments Act- - - We have it. GS 25-1 through 25-199.

Uniform Warehouse Receipts Act- - - - - GS 21-1 through 27-53. GS 27-54 through 27-59 are penal sections that have no counterpart in the UCC and probably should be retained.

Uniform Sales Act - - - - - - - - - - - We do not have it.

Bulk Sales Act- - - - - - - - - - - - - GS 39-23.

Uniform Stock Transfer Act- - - - - - - GS 55-75 to 55-98.

Uniform Bills of Lading Act - - - - - - GS 21-1 to 21-41. The criminal section probably should be retained. GS 21-42.
Uniform Conditional Sales Act - - - - - We do not have.
Uniform Trust Receipts Act- - - - - - - GS 45-46 to 45-66.

This section also suggests repealing any acts regulating:

Bank Collections - - - - - - - - - - - -See GS 53-58.
Chattel Mortgages- - - - - - - - - - - -On chattel mortgages see GS 45-1 through 45-3.
Factors' Liens Act - - - - - - - - - - -Factors' liens GS 44-70 through 44-76.
Conditional Sales- - - - - - - - - - - -On Conditional Sales or Leases of Railroad Property see 47-24.
Assignment of Accounts Receivable- - - -See on assignment of Accounts Receivable GS 44-77 through 44-85.
Chattel Mortgages on Agricultural Liens-See GS 44-52 and 44-53.

Notice that UCC 2-725 sets out four year statute of limitations. This would probably require an examination of GS 1-52 (1).

It is suggested that a comparison of the following sections of the UCC be made with the cited statutes. Some of these statutes should be repealed or amended:

UCC 4-106. Compare 53-62.

UCC 4-204. Compare 53-58

UCC 4-211. Compare 53-71 and see 53-73.

UCC 4-214. Compare 53-20. Examine to see if should be amended.

UCC 4-402. Compare 53-57.

UCC 4-405. See GS 105-24.

UCC 4-406. Compare 53-76; 53-52; 53-75.

Article 5, Letters of Credit. See 53-56.

Section 10—103. General Repealer.

Except as provided in the following section, all acts and parts of acts inconsistent with this Act are hereby repealed.

Section 10—104. Laws Not Repealed.

[(1)] The Article on Documents of Title (Article 7) does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees' businesses in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title (Section 1—201).

[(2) This Act does not repeal .....
.....*,
cited as the Uniform Act for the Simplification of Fiduciary Security Transfers, and if in any respect there is any inconsistency between that Act and the Article of this Act on investment securities (Article 8) the provisions of the former Act shall control.]

Note: *At * in subsection (2) insert the statutory reference to the Uniform Act for the Simplification of Fiduciary Security Transfers if such Act has previously been enacted. If it has not been enacted, omit subsection (2).*