

# THE GENERAL STATUTES OF NORTH CAROLINA

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1971 CUMULATIVE SUPPLEMENT

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Completely Annotated, under the Supervision of the Department  
of Justice, by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF

W. M. WILLSON, J. P. MUNGER, SYLVIA FAULKNER AND  
H. A. FINNEGAN, JR.

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Volume 1D

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# Preface

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This Cumulative Supplement to Replacement Volume 1D contains the general laws of a permanent nature enacted at the 1966, 1967 and 1969 Sessions of the General Assembly and those ratified by the General Assembly at the 1971 Session through July 21, 1971, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.







# Scope of Volume

## Statutes:

Permanent portions of the general laws enacted at the 1967 and 1969 Sessions of the General Assembly and those ratified by the General Assembly at the 1971 Session through July 21, 1971, affecting Chapters 21 through 27 of the General Statutes.

## Annotations:

### Sources of the annotations:

- North Carolina Reports volumes 265 (p. 218)-279 (p. 191).
- North Carolina Court of Appeals Reports volumes 1-11 (p. 596).
- Federal Reporter 2nd Series volumes 347 (p. 321)-443 (p. 1216).
- Federal Supplement volumes 242 (p. 513)-328 (p. 224).
- United States Reports volumes 381 (p. 532)-403 (p. 442).
- Supreme Court Reporter volumes 86-91 (p. 1976).
- North Carolina Law Review volumes 43 (p. 667)-49 (pp. 1-591).
- Wake Forest Intramural Law Review volumes 2-6 (p. 568).
- Opinions of the Attorney General.



# The General Statutes of North Carolina 1971 Cumulative Supplement

## VOLUME 1D

### Chapter 22.

#### Contracts Requiring Writing.

§ 22-1. Contracts charging representative personally; promise to answer for debt of another.

##### I. IN GENERAL.

###### Editor's Note.—

For case law survey as to statute of frauds, see 45 N.C.L. Rev. 907, 966 (1967).

##### III. PROMISE TO ANSWER FOR DEBT OF ANOTHER.

###### B. Illustrative Cases.

Persons who sign a note with the

§ 22-2. Contract for sale of land; leases.

##### I. IN GENERAL.

###### Editor's Note.—

For article on options to purchase real property in North Carolina, see 44 N.C.L. Rev. 63 (1965). For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965).

Cited in *Bundy v. Ayscue*, 5 N.C. App. 581, 169 S.E.2d 87 (1969).

##### II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.

###### An oral contract to give, etc.—

In accord with 1st paragraph in original. See *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

In accord with 4th paragraph in original. See *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

**Option.**—Upon the plea of the statute of frauds by defendant in defense to an action on an option to sell realty, plaintiff may neither enforce the agreement nor recover damages for loss of a bargain. *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

###### An indivisible contract to devise, etc.—

In accord with original. See *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970).

original makers, the note being complete except for the insertion of the name of the payee, may not contend that their obligation was to answer on a special promise for the debt of another within the protection of the statute of frauds, since the writing is a sufficient memorandum within the purview of this section. *Jones v. Jones*, 268 N.C. 701, 151 S.E.2d 587 (1966).

###### Parol Release, etc.—

An unexecuted verbal agreement, made by a mortgagee for a valuable consideration, to release a real estate mortgage does not come within the statute of frauds. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795 (1971).

###### Negative Easement.—

A negative easement clearly comes within the statute of frauds. *Simmons v. Morton*, 1 N.C. App. 308, 161 S.E.2d 222 (1968).

##### III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

###### A. In General.

###### What the Writing Must Contain.—

In accord with 2nd paragraph in original. See *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

The statute of frauds requires that all essential elements of the contract be reduced to writing. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

**Statement of Time for Performance Not Necessarily Required.**—A memorandum of an agreement for the sale of land is not necessarily insufficient to satisfy the requirements of the statute of frauds because the time for performance is not stated therein. In case of an executory contract of sale, where the time for the execution of



the conveyance or transfer is not limited, the law implies that it is to be done within a reasonable time, and the failure to incorporate in the memorandum such a statement does not render it insufficient. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

#### **Sufficiency of Description.—**

In accord with 2nd paragraph in original. See *Carlton v. Anderson*, 276 N.C. 564, 173 S.E.2d 783 (1970); *Carlton v. Anderson*, 7 N.C. App. 264, 172 S.E.2d 255 (1970); *Sheppard v. Andrews*, 7 N.C. App. 517, 173 S.E.2d 67 (1970); *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

In accord with 3rd paragraph in original. See *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

A memorandum is insufficient to meet the requirements of this section where the writing itself does not point to anything except two roads and these roads do not enclose any boundary. *Carlton v. Anderson*, 276 N.C. 564, 173 S.E.2d 783 (1970).

#### **Presumption That Description of Land Applies to Property Which Party Owns.—**

The presumption should be strong that where a party contracts to convey land by a description which actually corresponds with property that he professes to own or control, the contract was intended to apply to that particular property even though the description is in such general terms as to fit equally well property that the contracting party does not profess to own or control; and extrinsic evidence should be allowed to fit, if it can, the description to the land professed to be owned or controlled by the contracting party. *Carlton v. Anderson*, 7 N.C. App. 264, 172 S.E.2d 255 (1970).

**Description of land held sufficiently definite to admit extrinsic evidence for the purpose of identification.** *Carlton v. Anderson*, 7 N.C. App. 264, 172 S.E.2d 255 (1970).

#### **Parol Acceptance of Option.—**

A written option offering to sell, at the election of the optionee, can become binding on the owner by a verbal notice to the owner. *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967), quoting *Burkhead v. Farlow*, 266 N.C. 595, 146 S.E.2d 802 (1966).

Where the vendor offers in writing to sell described realty at a stated price, payable in yearly installments, a verbal acceptance of the offer by the purchaser is sufficient to constitute an option enforceable by the purchaser. *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

**Joint Will May Be Sufficient Memorandum of Contract to Devise.**—An indivisible contract to devise real and personal property comes within the purview of this section, statute of frauds. But a joint will may itself be a sufficient memorandum of such contract to satisfy the statute of frauds. *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970).

**Sufficient Memorandum of Extension Agreement.**—See *Hardee's Food Sys., Inc. v. Hicks*, 5 N.C. App. 595, 169 S.E.2d 70 (1969).

### **B. The Signature.**

#### **What Constitutes Signing.—**

The signing of a paper writing or instrument is the affixing of one's name thereto, with the purpose or intent to identify the paper or instrument, or to give it effect as one's act. This is usually accomplished when a person affixes his name in his own handwriting, in such case the very act clearly evidencing the intent of the signer. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

A writing or memorandum is "signed" in accordance with the statute of frauds if it is signed by the person to be charged by any of the known modes of impressing a name on paper, namely, by writing, printing, lithographing, or other such mode, provided the same is done with the intention of signing. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

The signature to a memorandum under the statute of frauds may be written or printed and need not be subscribed at the foot of the memorandum, but must be made or adopted with the declared or apparent intent of authenticating the memorandum as that of the signer. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

Affixing one's handwritten signature is not the only method by which a paper writing may be considered as being signed within the meaning of the statute of frauds. It has been recognized that a printed name may constitute a sufficient signing under the statute of frauds, provided that it is recognized by the party sought to be charged. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

#### **Signature of Agent.—**

The writing required by the statute of frauds may be signed by an agent, and the agent's authority to do so need not be in writing. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

**Telegrams.** — A telegram to which the vendor's name has been affixed in print may be considered as having been signed

by the vendor within the meaning of the statute of frauds. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

### V. PLEADING AND PRACTICE.

#### Three Modes, etc.—

The contract, as alleged, may be denied and the statute pleaded, and in such case if it develops on the trial that the contract is in parol, it must be declared invalid. *Simmons v. Morton*, 1 N.C. App. 308, 161 S.E.2d 222 (1968).

#### Statute May Be Relied on under General Issue, etc.—

Defendant's general denial of the alleged contract invoked the statute of frauds as effectively as if it had been expressly pleaded and thereby imposed upon plaintiff the burden of showing a written contract sufficient to comply with its requirements. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

#### Defendant's failure to object, etc.—

In accord with 2nd paragraph in original. See *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

Defendant's failure to object to testimony as to an oral contract does not waive the defense of the statute. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

**Variance.**—Where plaintiff's attempted proof constituted an essential variance and departure from the terms of the written memorandum, he was not entitled to specific performance or damages in the face of defendant's plea of the statute of frauds. *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

**Review.**—In a suit for specific performance of a contract for the sale of land, where the federal district court found that the plaintiff failed to show and establish any contract, memorandum or note signed by or on behalf of the seller sufficient to repel his plea of the statute of frauds, unless the district court's findings of fact were clearly erroneous, the court of appeals must accept them. In the instant case, the district court's findings were amply supported by the record. *Darden v. Houtz*, 353 F.2d 369 (4th Cir. 1965).



## Chapter 23. Debtor and Creditor.

### Article 5.

#### General Provisions under Articles 2, 3 and 4.

Sec.

23-39. Superior or district court tries issue of fraud.

### ARTICLE 1.

#### *Assignments for Benefit of Creditors.*

#### § 23-1. Debts mature on execution of assignment; no preferences.

The relief afforded by this section is statutory and does not arise out of common law. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), aff'd, 276 N.C. 198, 171 S.E.2d 873 (1970).

This section does not define an assignment for benefit of creditors, but merely forbids a preference in such assignment. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

##### What Constitutes an Assignment.—

A general assignment for the benefit of creditors is ordinarily a conveyance by a debtor without consideration from the grantee of substantially all his property in trust to collect the amount owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

##### Same—Mortgage.—

A mortgage, given by an insolvent person upon substantially all of his property to secure a preexisting debt so as to prefer the beneficiary of the mortgage over his other creditors, is void as a preferential assignment for the benefit of creditors forbidden by this section. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

A voluntary and preferential deed of trust is also within the condemnation of this section. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

"Voluntary" Defined.—"Voluntary" has been defined as "without consideration." *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), aff'd, 276 N.C. 198, 171 S.E.2d 873 (1970).

Validity of Preferential Transfer by Insolvent Debtor.—Apart from the provisions of § 23-1 and § 23-2 a transfer, admittedly preferential, by a debtor admittedly insolvent, is not unlawful or subject to attack on

that ground. *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (1967).

It is not unlawful for an insolvent debtor to transfer his property in exchange for other property of a different form. *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (1967).

Transfer to Corporation in Exchange for Stock. A transfer of property by an insolvent debtor to a corporation newly formed for the purpose of satisfying creditors, in exchange for shares of stock in that corporation is a transfer for value, at least where it appears that shares were issued to other stockholders for cash, and the transfer is not an unlawful or invalid assignment. *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (1967).

Where defendant assigns his rights in certain certificates of deposit to a corporate defendant and in return for these certificates the corporate defendant assigns all shares of its corporate stock to the defendant to be used by him in satisfying his creditors, the transfer to the corporate defendant is for a valuable consideration and is, therefore, not an assignment for the benefit of creditors as envisioned by this section. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), aff'd, 276 N.C. 198, 171 S.E.2d 873 (1970).

Statute of Limitations. — The three-year statute of limitation applies to a creditor's action for relief under this section. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), aff'd, 276 N.C. 198, 171 S.E.2d 873 (1970).

Accrual of Cause of Actions.—The cause of action under this section accrues at the time of the assignments and the statutory period begins to run at that time. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), aff'd, 276 N.C. 198, 171 S.E.2d 873 (1970).

Cited in *Estridge v. Crab Orchard Dev. Co.*, 5 N.C. App. 604, 169 S.E.2d 53 (1969).



### § 23-2. Trustee to file schedule of property.

**Validity of Preferential Transfer by Insolvent Debtor.**—Apart from the provisions of § 23-1 and § 23-2 a transfer, admittedly preferential, by a debtor admit-

tedly insolvent, is not unlawful or subject to attack on that ground. *Estridge v. Den-son*, 270 N.C. 556, 155 S.E.2d 190 (1967).

## ARTICLE 4.

### *Discharge of Insolvent Debtors.*

### § 23-23. Insolvent debtor's oath.

Cited in *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

### § 23-24. Persons imprisoned for nonpayment of costs in criminal cases.

**Editor's Note.**—For note on imprisonment of an indigent at law per diem rate for failure to pay fine, see 6 *Wake Forest Intra. L. Rev.* 509 (1970).

**Imprisonment Beyond Statutory Maximum for Inability to Pay Fine Is Unconstitutional.**—A state may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

**Nor Can Inability to Pay Court Costs Justify Such Imprisonment.**—Inability to pay court costs cannot justify imprisoning an indigent beyond the maximum statutory term since the equal protection clause prohibits expanding the maximum term specified by the statute simply because of inability to pay. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

The holding regarding imprisonment for involuntary nonpayment of fines applies with equal force to imprisonment for involuntary nonpayment of court costs. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

**Since Equal Protection Requires That Statutory Ceiling on Imprisonment Be Same for All Defendants.**—The equal protection clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

Once the state has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

**And Discrimination Resting on Ability to Pay Is Impermissible.**—When the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs, there is an impermissible discrimination that rests on ability to pay. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

**But Imprisonment for Willful Refusal to Pay Not Precluded.**—Nothing in this decision precludes imprisonment for willful refusal to pay a fine or court costs. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

**Nor Is Imposition of Maximum Penalty on Indigent.**—Nothing in this holding precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

**Or Confinement for Nonpayment of Fine as Alternative.**—This holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of “\$30 or 30 days.” *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

**Mere fact that an indigent may be imprisoned longer than a nonindigent convicted of the same offense does not give rise to a violation of the equal protection clause.** *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).



**§ 23-25. Petition; before whom; notice; service.**—Every such person, having remained in prison for 20 days, may apply by petition to the court where the judgment against him was entered, praying to be brought before such court at a time and place to be named in the petition, and to be discharged upon taking the oath hereinbefore prescribed. The applicant shall cause 10 days' notice of the time and place of filing the petition to be served on the sheriff or other officer by whom he was committed. In cases of conviction before a magistrate the clerk of the superior court of the county where the convicted person confined for costs is, may administer the oath and discharge the prisoner. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, ss. 27, 28; 1873-4, c. 90; 1874-5, c. 11; Code, ss. 2968, 2969; 1891, c. 195; Rev., s. 1916; C. S., s. 1633; 1971, c. 1190, s. 1.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" in the third sentence.

**§ 23-26. Warrant issued for prisoner.**—The clerk of the superior court before whom such petition is presented shall forthwith issue a warrant to the sheriff, or keeper of the prison, requiring him to bring the prisoner before the court, at the time and place named for the hearing of the case, which warrant every such sheriff or keeper shall obey. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 29; Code, s. 2970; Rev., s. 1917; C. S., s. 1634; 1971, c. 1190, s. 2.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, deleted "or justice of the peace" following "superior court."

**§ 23-27. Proceeding on application.**—At the hearing of the petition, if the prisoner has no visible estate, and takes and subscribes the oath or affirmation prescribed in this Article, the clerk of the superior court before whom he is brought, shall administer the oath or affirmation to him, and discharge him from imprisonment, of which an entry shall be made in the docket of the court. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 30; Code, s. 2971; Rev., s. 1918; C. S., s. 1635; 1971, c. 1190, s. 3.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, deleted "or justice of the peace" following "superior court," and deleted "and, where the proceeding is before a justice of the peace, the justice shall return the petition and orders thereon into the office of the clerk of the superior court to be filed" at the end of the section.

**§ 23-29. Persons taken in arrest and bail proceedings, or in execution.**—The following persons also are entitled to the benefit of this article as hereinafter provided:

- (1) Every person taken or charged on any order of arrest for default of bail, or on surrender of bail in any action.
- (2) Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever. (1808-9, c. 162, s. 10; Code, s. 2951; Rev., s. 1920; C. S., s. 1637; 1967, c. 24, s. 5.)

**Editor's Note.**

The 1967 amendment, originally effective Oct. 1, 1967, corrected an error by substituting "of" for "or" in subdivision (1).

Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

**§ 23-34. Where no suggestion of fraud, discharge granted.**—If no creditor suggests fraud or opposes the discharge of the debtor, the clerk of the superior court before whom the petition is heard shall forthwith discharge the debtor, and, if he surrenders any estate for the benefit of his creditors, shall ap-

point a trustee of such estate. The order of discharge and appointment shall be entered in the docket of the court. (1773, c. 100, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 16; Code, s. 2957; Rev., s. 1925; C. S., s. 1642; 1971, c. 1190, s. 4.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, deleted "the justice of the peace or" preceding "the clerk of the superior court," and deleted "and if granted

by a justice of the peace a copy thereof shall be certified by him to the clerk of the superior court, where the same shall be recorded, and filed" at the end of the section.

ARTICLE 5.

*General Provisions under Articles 2, 3, and 4.*

**§ 23-39. Superior or district court tries issue of fraud.**—In every case where an issue of fraud is made up as provided in this Chapter, the case shall be entered in the trial docket of the superior or district court, and stand for trial as other causes; and upon a finding by the jury in favor of the petitioner the judge shall discharge the debtor; if the finding is against the petitioner he shall be committed to jail until he makes full disclosure. (1868-9, c. 162, s. 8; Code, s. 2949; Rev., s. 1935; C. S., s. 1647; 1971, c. 1190, s. 5.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, inserted "or district" near the middle of the section.



## Chapter 24.

### Interest.

#### Article 1.

##### General Provisions.

Sec.

- 24-1. Legal rate is six percent.  
 24-1.1. Contract rates.  
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 24-10. Maximum fees on loans secured by real property.  
 24-11. Certain revolving credit charges.

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##### Loans Secured by Secondary or Junior Mortgages.

Sec.

- 24-12. Applicability of Article.  
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 24-14. Limitations on charges and interest.  
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#### ARTICLE 1.

##### General Provisions.

#### § 24-1. Legal rate is six percent.

Editor's Note.—

Session Laws 1971, c. 1229, s. 2, effective July 1, 1971, designated §§ 24-1 through 24-11 as Article 1.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

**Absent an agreement between parties, six percent per annum is the rate due on money owed under a contract.** Hardy-Latham v. Wellons, 415 F.2d 674 (4th Cir. 1968).

And no discretion is vested in the court to determine what shall be the rate of interest in a given case. Hardy-Latham v. Wellons, 415 F.2d 674 (4th Cir. 1968).

**Applied in** Henderson v. Security Mtge. & Fin. Co., 273 N.C. 253, 160 S.E.2d 39 (1968); United States v. Wachovia Corp., 313 F. Supp. 632 (W.D.N.C. 1970).

§ 24-1.1. **Contract rates.**—Except as otherwise provided in this chapter or other applicable law, the parties to a loan, purchase money loan, advance or forbearance may contract in writing for the payment of interest not in excess of:

- (1) Eight percent (8%) per annum where the principal amount is fifty thousand dollars (\$50,000.00) or less and is secured by a first mortgage or first deed of trust on real property; or
- (2) Ten percent (10%) per annum where the principal amount is more than fifty thousand dollars (\$50,000.00) but not more than one hundred thousand dollars (\$100,000.00) and is a business property loan; or
- (3) Nine percent (9%) per annum where the principal amount is one hundred thousand dollars (\$100,000.00) or less and is not a transaction set forth in (1) or (2) above; provided, a minimum charge of ten dollars (\$10.00) or one dollar (\$1.00) per payment may be agreed to and charged in lieu of interest; or
- (4) Twelve percent (12%) per annum where the principal amount is more than one hundred thousand dollars (\$100,000.00) but not more than three hundred thousand dollars (\$300,000.00); or
- (5) Any rate agreed upon by the parties where the principal amount is more than three hundred thousand dollars (\$300,000.00).

As used in this section, a "business property loan" is a loan, purchase money loan, advance or forbearance secured by real property of the borrower which is held or acquired for sale, lease or use in connection with the borrower's trade, business or profession other than farming and livestock operations, and the proceeds of which are to be used for the purpose of either acquiring, refinancing or improving



such real property or in connection with such trade, business or profession of the borrower. A written statement of the borrower's intention to use the loan proceeds for such purpose, signed by the borrower and accepted in good faith by the lender, shall be conclusive evidence of the purpose for which the loan is made. As used in this section, interest shall not be deemed in excess of the rates provided where interest is computed monthly on the outstanding principal balance and is collected not more than thirty-one days in advance of its due date. (1969, c. 1303, s. 1.)

**Editor's Note.**—Session Laws 1969, c. 1303, s. 27, provides: "This act shall be in full force and effect upon ratification; provided, this act shall not affect pending liti-

gation, nor shall the provisions of this act apply to any loan made prior to the effective date of this act." The act was ratified July 2, 1969.

**§ 24-1.2. Installment rates.**—(a) On installment loans which shall not be for periods of less than six months nor for more than 120 months and which are repayable in substantially equal consecutive monthly payments, the parties to a loan may contract in writing for payment of rates of interest which shall not be collected in advance and which shall be computed monthly on the outstanding principal balance, on loans having an original amount of five thousand dollars (\$5,000.00) or less and which shall not be secured in any manner or to any degree by real property, an interest rate of fifteen percent (15%) per annum; provided, a minimum charge of ten dollars (\$10.00) or one dollar (\$1.00) per payment may be agreed to and charged in lieu of interest. The borrower may prepay all or any part of the loan without penalty. The due date of the first monthly payment shall not be more than 45 days following the disbursement of funds under any such installment loan.

(b) On installment loans not exceeding three hundred thousand dollars (\$300,000.00) not secured by a first security instrument on real property, payable at least quarterly in substantially equal payments of principal and interest, or substantially equal payments of principal, upon a written agreement signed by the parties, the rate of interest shall not exceed twelve percent (12%) per annum computed on the outstanding balance, provided a minimum charge of ten dollars (\$10.00) or one dollar (\$1.00) per payment may be agreed to and charged in lieu of interest. The borrower may prepay all or any part of the loan without penalty. No lender or lending agent which holds or makes a loan secured by a first security instrument on real property shall make within the first year from the date of the making of the loan secured by the first security instrument a loan secured by a subordinate security instrument on the same property which shall exceed twenty percent (20%) of the original amount of the loan secured by the first security instrument on such real property. Under the provisions of this subsection, a first security instrument is a first mortgage or first deed of trust on real property securing a loan payable in equal installments of principal and interest or equal installments of principal over a period of at least one year, such installments to have been paid at least annually. The maturity date of loans made under this section shall not be less than one year from the date of the advance.

(c) On installment loans not exceeding fifty thousand dollars (\$50,000), when secured by a first mortgage or deed of trust on real property where such real property is not used as the principal residence of the borrower, repayable in no less than two years nor more than 10 years at least quarterly in substantially equal payments of principal and interest, upon written agreement signed by the parties, the rate of interest shall not exceed ten percent (10%) per annum computed on the outstanding balance. The borrower may prepay all or any part of such loan at any time prior to maturity without penalty.

(d) On installment loans not exceeding seven thousand five hundred dollars (\$7,500), when secured by a first mortgage or deed of trust on real property, repayable in no less than one year nor more than 10 years in substantially equal monthly payments of principal and interest, upon written agreement signed by the



parties, the rate of interest shall not exceed ten percent (10%) per annum computed on the outstanding balance. The borrower may prepay all or any part of such loan at any time prior to maturity without penalty. (1969, c. 1303, s. 2; 1971, c. 448; c. 1122, ss. 1, 2; c. 1165.)

**Editor's Note.**—Session Laws 1969, c. 1303, s. 27, provides: "This act shall be in full force and effect upon ratification; provided, this act shall not affect pending litigation, nor shall the provisions of this act apply to any loan made prior to the effective date of this act." The act was ratified July 2, 1969.

The first 1971 amendment substituted, "For the purposes of the preceding sentence" for "Under the provisions of this section" at the beginning of the fourth sentence in subsection (b).

The second 1971 amendment added subsections (c) and (d).

The third 1971 amendment substituted "Under the provisions of this subsection" for "For the purposes of the preceding sentence" in the fourth sentence of subsection (b) as amended by the first 1971 act and substituted "one year" for "10 years" in the same sentence.

**Opinions of Attorney General.** — Mr. Frank L. Harrelson, Commissioner of Banks, 8/19/69.

### § 24-2. Penalty for usury; corporate bonds may be sold below par.

—The taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter or other applicable law, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest. If security has been given for an usurious loan and the debtor or other person having an interest in the security seeks relief against the enforcement of the security or seeks any other affirmative relief, the debtor or other person having an interest in the security shall not be required to pay or to offer to pay the principal plus legal interest as a condition to obtaining the relief sought but shall be entitled to the advantages provided in this section. Nothing contained in this section or in § 24-1, however, shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof. (1876-7, c. 91; Code, s. 3836; 1895, c. 69; 1903, c. 154; Rev., s. 1951; C. S., s. 2306; 1955, c. 1196; 1959, c. 110; 1969, c. 1303, s. 3.)

#### I. GENERAL CONSIDERATION.

##### **Editor's Note.**—

The 1969 amendment substituted "permitted by this chapter or other applicable law" for "six per centum per annum" near the beginning of the first sentence and deleted, at the end of the section, a provision relating to installment loans to private corporations. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

Michigan Nat'l Bank v. Hanner, 268 N.C. 668, 151 S.E.2d 579 (1966), cited in the note below, was commented on in 45 N.C.L. Rev. 899, 1151 (1967).

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

##### **Purpose, etc.**—

The statute against usury is striking at, and forbidding, the extraction or reception of more than a specified legal rate for the hire of money, and not for anything else. Michigan Nat'l Bank v. Hanner, 268 N.C. 668, 151 S.E.2d 579 (1966).

##### **Four Requisites, etc.**—

In accord with 2nd paragraph in original. See Michigan Nat'l Bank v. Hanner, 268 N.C. 668, 151 S.E.2d 579 (1966).

The elements of usury are these: (1) a loan or forbearance of money; (2) an understanding that the money loaned shall be returned; (3) payment or an agreement to pay a greater rate of in-



terest than that allowed by law; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968); *Hodge v. First Atl. Corp.*, 10 N.C. App. 632, 179 S.E.2d 855 (1971).

**The statutory penalty for charging usury is the forfeiture of all interest on the loan.** The charging of usurious interest as provided for by a partnership agreement is sufficient to cause a forfeiture of all the interest charged. The charging of such usurious interest strips the debt of all interest. It becomes simply a loan which in law bears no interest. Any payments of interest which have been made at a legal rate are by law applied to the only legal indebtedness—the principal sum. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**Double Recovery Not Allowed If Actual Interest Paid Was Not Usurious.**—Where a greater rate of interest than allowed by law was charged by means of a partnership agreement required, but no profit inured to the defendant under this agreement, and the only interest actually paid by plaintiff company was the 8% provided for in the note, this in itself was a legal rate so no usurious interest had been paid, and plaintiff company was not entitled to recover double the amount of the interest. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**And a renewal, etc.—**

A renewal of the original obligations does not constitute a settlement of the plaintiffs' right to invoke the statutory remedy for usury so as to purge the renewal contract of the taint. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

**Applied in Lexington State Bank v. Suburban Printing Co.**, 7 N.C. App. 359, 172 S.E.2d 274 (1970).

## II. SUBSTANCE CONTROLS NATURE OF TRANSACTION.

### A. General Doctrine.

**Form of Transaction, etc.—**

If in fact the transaction is a bona fide sale and not a loan of money, it is not usurious. But if the form of the transaction is a subterfuge to conceal an exaction of more than the legal rate of interest on what is in fact a loan and not a sale, the transaction will be regarded according to its true character and will be held usurious. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

### B. Specific Instances.

**Bonus.**—A profit, greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, is a violation of the usury laws, it matters not what form or disguise it may assume. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

**Commission.**—If the lender charges a commission in addition to the maximum rate of interest permitted by the statute, such charge is usury. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

**Fee for Finding Lender.** — One who makes no loan but, as broker or agent of the borrower, finds a lender and procures the making of a loan by him, has not received usury when he collects a fee for his services. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

**A bona fide credit sale, etc.—**

In accord with 1st paragraph in original. See *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

In accord with 2nd paragraph in original. See *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

There is no statute regulating time prices in general retail credit sales payable in instalments. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

A purchaser is not, like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

Usury cannot be predicated upon the fact that property is sold on a credit at an advance over what would be charged in case of a cash sale so long as it appears that the price charged is in fact fixed for the purchase of goods on credit with no intention or purpose of defeating the usury laws, even though the difference between the cash price and the credit price, if considered as interest, amounts to more than the legal rate. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

A vendor may fix on his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cash price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties and not to the courts, barring evidence of bad faith. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).



## VI. PLEADING AND PRACTICE.

**Burden of Proof on Plaintiff.**—Upon the trial of an action to recover for usury, the burden of proof is on the plaintiff throughout the trial to establish his cause of action. *Hodge v. First Atl. Corp.*, 10 N.C. App. 632, 179 S.E.2d 855 (1971).

Where plaintiff failed to show that de-

fendant did not in fact render services for the one percent "service charge" or "construction loan fee," defendant was entitled to directed verdict that such "charge" or "fee" was not a part of the interest charged on the loan. *Hodge v. First Atl. Corp.*, 10 N.C. App. 632, 179 S.E.2d 855 (1971).

**§ 24-4. Obligations due guardians to bear compound interest; rate of interest.**—Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him. On loans made out of the estate of their wards, guardians may lend at any rate of interest not less than four percent per annum and not more than the maximum lawful rate. This section shall in no way limit or affect the powers of guardians to make other investments which are now or may hereafter be authorized or permitted by the laws, statutory or otherwise, of the State of North Carolina. (1762, c. 69, P. R.; 1816, c. 925, P. R.; R. C., c. 54, s. 23; 1868-9, c. 201, s. 29; Code, s. 1592; Rev., s. 1953, C. S., s. 2308; 1943, c. 728; 1969, c. 1303, s. 4.)

**Editor's Note.**—The 1969 amendment substituted "lawful" for "legal" near the end of the second sentence. Session Laws 1969, c. 1303, s. 27, provides that the act

shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

**§ 24-5. Contracts, except penal interest; jury to distinguish principal.**

Absent an agreement between parties, six percent per annum is the rate due on money owed under a contract. *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968).

And no discretion is vested in the court to determine what shall be the rate of interest in a given case. *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968).

**Trend Is Toward Allowance of Interest.**—

In accord with original. See *T.C. Allen Constr. Co. v. Stratford Corp.*, 384 F.2d 653 (4th Cir. 1967).

**When Interest Added to Damages, etc.**—

In accord with original. See *T.C. Allen Constr. Co. v. Stratford Corp.*, 384 F.2d 653 (4th Cir. 1967).

**Interest Allowed from Date of Breach.**—

In accord with 1st paragraph in original. See *T.C. Allen Constr. Co. v. Stratford Corp.*, 384 F.2d 653 (4th Cir. 1967).

**Interest Provided from Date of Sub-**

**bonds, and judgments to bear in-**

**stantial Performance.**—In an action on a construction contract, wherein the defendant counterclaimed for damages for plaintiff's failure to complete the work in a good and workmanlike manner, the judgment entered by the court on the jury verdict should have provided for interest thereon from August 1, 1964 (the date upon which, the jury concluded, plaintiff had substantially performed its contract), even though there was a bona fide dispute as to the correct balance due between plaintiff and defendant. *T.C. Allen Constr. Co. v. Stratford Corp.*, 384 F.2d 653 (4th Cir. 1967).

**Tender of Payment.** — To constitute a valid tender of payment in North Carolina and thus stop the running of interest, the offer must include the full amount the creditor is entitled to receive plus all interest to the date of tender. *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968).

**§ 24-7. Interest from verdict to judgment added as costs.**

No discretion is vested in the court to determine what shall be the rate of interest

in a given case. *Hard-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968).

**§ 24-8. Loans not in excess of \$300,000; what interest, fees and charges permitted.**—No lender shall charge or receive from any borrower or require in connection with a loan any borrower, directly or indirectly, to pay, deliver, transfer or convey or otherwise confer upon or for the benefit of the lender



or any other person, firm or corporation any sum of money, thing of value or other consideration other than that which is pledged as security or collateral to secure the repayment of the full principal of the loan, together with fees and interest provided for in chapter 24 or chapter 53 of the North Carolina General Statutes, where the principal amount of a loan is not in excess of three hundred thousand dollars (\$300,000.00); provided, this section shall not prevent a borrower from selling, transferring, or conveying property other than security or collateral to any person, firm or corporation for a fair consideration so long as such transaction is not made a condition or requirement for any loan; provided that this shall not prevent the lender from collecting from the borrower for remittance to others, money in payment of taxes, assessments, cost of upkeep, recording fees, surveys, attorneys' fees, fire, title, life and mortgage insurance premiums and other such fees and costs, nor from receiving the proceeds from any insurance policies where a loss occurs under the terms of such policies. This section shall not be applicable to any corporation licensed as a "Small Business Investment Company" under the provisions of the United States Code Annotated, Title 15, section 661, et seq. nor shall it be applicable to the sale or purchase of convertible debentures, nor to the sale or purchase of any debt security with accompanying warrants, nor to the sale or purchase of other securities through an organized securities exchange. (1961, c. 1142; 1969, c. 127; c. 1303, s. 5.)

**Editor's Note.**—The first 1969 amendment, effective March 26, 1969, made this section as enacted in 1961 applicable to loans to "any foreign or domestic real estate investment trust (being a trust as determined under the provisions of § 105-130.12 of the General Statutes of North Carolina)," as well as to loans to corporations.

The second 1969 amendment, effective July 2, 1969, rewrote the section to read as set out above. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

**What Constitutes Loan.**—Definitions require that there be a delivery of money on the one hand and an understanding to repay on the other for a loan to have been made. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

North Carolina courts do not hesitate to look beneath the forms of transactions alleged to be usurious in order to determine whether or not such transactions are in truth and reality usurious. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Where a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction in order to deter-

mine what it in reality is. If this were not so, the usury laws of the State would easily be evaded by lenders of money who would exact from borrowers with impunity compensation for money loaned in excess of interest at the legal rate. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**What Plaintiff Must Show in Action for Usury.** — In an action for usury plaintiff must show (1) that there was a loan, (2) that there was an understanding that the money lent would be returned, (3) that for the loan a greater rate of interest than allowed by law was paid, and (4) that there was corrupt intent to take more than the legal rate for the use of the money. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

The court may declare a transaction usurious as a matter of law where there is no dispute as to the facts. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

A 25% interest in a partnership (which owned the realty conveyed to it by plaintiff) was a "thing of value." *Kessing v.*



National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

And this made the partnership agreement unlawful. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Hence, the loan was usurious under this section. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**Transaction Violating Statute Unenforceable.** — Where the defendant's counterclaims relate to the limited partnership and the trial court correctly adjudged that the loan transaction considered as a whole

violated this section, it followed, therefore, that the limited partnership agreement and the conveyances made to the partnership contrary to this section were void and the courts will not lend their aid to the enforcement of a contract which is unlawful and violates its positive legislation. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**Cited in** *Lexington State Bank v. Suburban Printing Co.*, 7 N.C. App. 359, 172 S.E.2d 274 (1970).

**§ 24-9. Certain loans to corporations organized for profit not subject to claim or defense of usury.**—Notwithstanding any other provision of this chapter or any other provision of law, any foreign or domestic corporation substantially engaged in commercial, manufacturing or industrial pursuits for pecuniary gain may agree to pay, and any commercial factor may charge and collect from such corporation, interest at any rate which such corporation may agree to pay in writing, provided such interest is charged upon loans, advances or forbearances which are secured by liens upon or security interests in accounts receivable, materials, goods in process, inventory, machinery, equipment and other similar personal property, whether tangible or intangible, and as to any such transaction the claim or defense of usury by such corporation and its successors or anyone else in its behalf is prohibited. For the purpose of this section, the term "commercial factor" shall be defined to mean any corporation, foreign or domestic, or any partnership which engages principally in the aforesaid secured financing. (1963, c. 753, s. 1; 1965, c. 335; 1969, c. 896.)

**Local Modification.**—By virtue of Session Laws 1967, c. 755, New Hanover should be stricken from the replacement volume.

**Editor's Note.**—

The 1969 amendment rewrote the last sentence.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

**§ 24-10. Maximum fees on loans secured by real property.**—(a) No lender on loans made under G.S. 24-1.1 shall charge or receive from any borrower or any agent for a borrower, or from any agent, seller or broker, which inures to the benefit of the lender, any fees or discounts, in addition to the provisions of G.S. 24-10(b) or in addition to lawful interest in connection with any loan where the principal amount is less than three hundred thousand dollars (\$300,000.00) and is secured by real property, which fees or discounts in the aggregate shall exceed two percent (2%) if a construction loan on other than a one or two family dwelling, one percent (1%) if a construction loan on a one or two family dwelling, and one percent (1%) if other than a construction loan; provided where a single lender makes the construction loan and the permanent loan utilizing one note, the lender may collect the fees herein provided for construction loans and the fees for other than construction loans.

(b) Any loan made under G.S. 24-1.1 in an original principal amount of one hundred thousand dollars (\$100,000.00) or less may be prepaid in part or in full, after 30 days notice to the lender, with a maximum prepayment fee of two percent (2%) of the outstanding balance at any time within three years after the first payment of principal and thereafter there shall be no prepayment fee, provided that there shall be no prepayment fee charged or received in connection with any repayment of a construction loan; and except as herein provided, any lender and any borrower may agree on any terms as to prepayment of a loan.

(c) "Construction loan" means a loan which is obtained for the purpose of financing fully, or in part, the cost of constructing buildings or other improvements upon real property and the proceeds of which, under the terms of a written con-



tract between a lender and a borrower, are to be disbursed periodically as such construction work progresses; and such loan shall be payable in full not later than 18 months in case of a loan made under the provisions of G.S. 24-1.1(1) or 36 months in case of any other construction loan made after the execution of the note by the borrower. A construction loan may include advances for the purchase price of the property upon which such improvements are to be constructed.

(d) Any lender may charge any person, persons, firm or corporation that assumes a loan made under the provisions of G.S. 24-1.1, where the principal amount assumed is not more than fifty thousand dollars (\$50,000) and is secured by real property, a fee not to exceed one percent (1%) of the principal amount due or twenty-five dollars (\$25.00), whichever is less. (1967, c. 852, s. 1; 1969, c. 40; c. 1303, s. 6; 1971, c. 1168.)

**Editor's Note.**—The second 1969 amendment rewrote this section as amended by the first 1969 amendment. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

The 1971 amendment added subsection (d).

Section 1.2, c. 852, Session Laws 1967,

**§ 24-11. Certain revolving credit charges.**—(a) On the extension of credit under an open-end credit or similar plan (including revolving credit card plans, and revolving charge accounts, but excluding any loan made directly by a lender under a check loan, check credit or other such plan) under which no service charge shall be imposed upon the consumer or creditor if the account is paid within twenty-five days from the billing date, there may be charged and collected interest, finance charges or other fees at a rate in the aggregate not to exceed one and one-half percent (1½%) per month on the unpaid balance of the previous month. Such extension of credit may not be secured by real or personal property or any other thing of value. No person, firm or corporation may charge a discount or fee in excess of four percent (4%) of the principal amount of the accounts acquired from or through any vendor or others providing services who participate in such plan.

(b) On revolving credit loans (including check loans, check credit or other revolving credit plans whereby a bank, banking institution or other lending agency makes direct loans to a borrower), if agreed to in writing by the borrower, such lender may collect interest and service charges which shall not exceed one and one-fourth percent (1¼%) per month computed on the average balance outstanding of the previous month. Such loans, exclusive of interest, may not at any time exceed five thousand dollars (\$5,000.00), and may not be secured by real or personal property or any other thing of value. (1967, c. 852, s. 1.1; 1969, c. 1303, s. 7.)

**Editor's Note.** — The 1969 amendment rewrote this section. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

Section 1.2, c. 852, Session Laws 1967,

provides: "The provisions of this act shall not apply to any loan made prior to the effective date of this act." The act was ratified June 21, 1967 and made effective on ratification.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971). For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

provides: "The provisions of this act shall not apply to any loan made prior to the effective date of this act." The act was ratified June 21, 1967 and made effective on ratification.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).



## ARTICLE 2.

*Loans Secured by Secondary or Junior Mortgages.*

§ 24-12. **Applicability of Article.**—This Article shall apply only to loans of money:

- (1) Secured in whole or in part by a security instrument on real property, other than a first security instrument on real property; and
- (2) The principal amount of the loan does not exceed seven thousand five hundred dollars (\$7,500); and
- (3) The loan is repayable in no less than six nor more than 72 successive monthly payments, which payments shall be substantially equal in amount. (1971, c. 1229, s. 2.)

**Editor's Note.** — Session Laws 1971, c. 1229, s. 3, makes this Article effective July 1, 1971.

§ 24-13. **Principal amount defined.**—The aggregate of the amount or value actually received at the time of the loan, plus the hereinafter stated rate of charge, plus the sum of all existing indebtedness of the borrower paid on his behalf by the lender, shall be deemed the principal amount of the loan. (1971, c. 1229, s. 2.)

§ 24-14. **Limitations on charges and interest.**—(a) No person, co-partnership, association, trust, corporation or other legal entity making loans under this Article may charge, take or receive, directly or indirectly,

- (1) Actuarial interest in excess of twelve percent (12%) per annum on the principal amount of the loan; and
- (2) A rate of charge in excess of ten percent (10%) of the principal amount of the loan, or three hundred dollars (\$300.00), whichever is less.

(b) The rate of charge as used in subdivision (2), subsection (a) above shall include any and every type of charge for compensation, consideration or expense, or for any other purpose whatsoever, including whatsoever name called, but not by way of limitation, application fees, title searches, title reports, title opinions, title guarantees, credit reports, investigation costs, preparation of instruments, placement or discount fees, brokerage fees, recordings, appraisals, other closing costs, and insurance of any nature except as provided in subsection (c) below, but shall not include actuarial interest at the rate of twelve percent (12%) per annum or less as authorized in the preceding subsection.

(c) Evidence of hazard insurance may be required by the lender of the borrower. Decreasing term life insurance, in an amount not exceeding the sum of the monthly installments payable under the loan and for a period not exceeding the term of the loan may also be required by the lender. The premium for any such insurance, if paid by the lender on behalf of the borrower, may not be included in the principal amount of the loan for the purpose of computing the rate of charge and the rate of interest applicable thereto, but shall not be considered as a "charge" for the purpose of the ten percent (10%) limitation on the allowable "rate of charge." The rates for the herein described insurance shall not exceed the standard rates approved by the Commissioner of Insurance for such insurance. Proof of all insurance issued in connection with loans subject to this Article shall be furnished to the borrower within 10 days from the date of application therefor by said borrower.

(d) No application fee or other charge shall be allowed in the event the loan is not consummated.

(e) The borrower shall further have the right to anticipate payment of his debt in whole or in part at any time, without payment of interest penalty, or any other fee or charge for such prepayment. (1971, c. 1229, s. 2.)



§ 24-15. **Rebates and late charges.**—(a) If a renewal or additional loan shall be made to the same borrower within 36 months after the original loan, or after a previous renewal or additional loan, the borrower shall receive a pro-rata rebate from the previously charged rate of charge computed by multiplying the number of months remaining in the loan contract by that quotient obtained by dividing the rate of charge by the total number of months in the loan contract of the loan which has been liquidated or renewed. Appraisal or recording fees actually paid by the lender to others for appraisals and registration, and which did not inure to the benefit of the lender shall not be included in the computation of rebates.

(b) A delinquent or late charge of five percent (5%) of the monthly payment or five dollars (\$5.00), whichever is less, may be charged on any installment delinquent more than 15 days after the regularly scheduled due date, said charge to be made only once after the regularly scheduled due date. (1971, c. 1229, s. 2.)

§ 24-16. **Itemized closing statements.**—Any person, copartnership, association, trust, corporation, or any other legal entity making on its own behalf, or as agent, broker or in other representative capacity on behalf of any other person, copartnership, association, trust, corporation or any other legal entity, a loan or real property financing transaction within the regulatory authority of this Article, at the time of the closing shall furnish the debtor or borrower or grantor in the mortgage, deed of trust or any other security instrument, in addition to the disclosures required by federal law known as "Truth in Lending," a complete and itemized closing statement which shall show all disbursements of the loan proceeds and which shall total the principal amount of the loan or security transaction, and the said closing statement shall be signed by the lending agency or a representative of the lending agency, or a responsible officer in its behalf and a completed and signed additional copy retained in the files of the lending agency involved and available at all reasonable times to the borrower, the borrower's successor in interest to the security real property, or the authorized agent of the borrower or the borrower's successor, until such time as the security instrument shall be satisfied in full. Such closing statement shall contain the following language printed in a conspicuous manner:

"This loan is one regulated by the provisions of Chapter 24, Article 2 of the General Statutes of North Carolina entitled 'Loans Secured by Secondary or Junior Mortgages.'" (1971, c. 1229, s. 2.)

§ 24-16.1. **Loans exempt from §§ 24-12 to 24-17.**—G.S. 24-12 to 24-17 shall not apply to loans made by banks, insurance companies, or their duly designated agents compensated directly by the lender, duly licensed credit unions, production credit associations authorized by the Farm Credit Act of 1933, or savings and loan associations authorized to do business in this State, or to loans made by any other lender licensed by, and under the supervision of, the Commissioner of Banks and the State Banking Commission, under the provisions of Chapter 53 of the General Statutes, or the Commissioner of Insurance, under the provisions of Chapter 58 of the General Statutes. (1971, c. 1229, s. 2.)

§ 24-17. **Misdemeanors.**—A wilful or knowing violation of G.S. 24-12 through G.S. 24-16 is hereby made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1971, c. 1229, s. 2.)



**Chapter 25.**

**Uniform Commercial Code.**

<p><b>Article 1.</b> <b>General Provisions.</b> Part 2. General Definitions and Principles of Interpretation. Sec. 25-1-209. Subordinated obligations.</p> <p><b>Article 2.</b> <b>Sales.</b> Part 3. General Obligation and Construction of Contract. 25-2-302. Unconscionable contract or clause.</p> <p><b>Article 4.</b> <b>Bank Deposits and Collections.</b> Part 2. Collection of Items: Depository and Collecting Banks. 25-4-204. Methods of sending and presenting; sending direct to payor.</p> <p><b>Article 6.</b> <b>Bulk Transfers.</b> 25-6-106. [Repealed.] 25-6-109. What creditors protected.</p> <p><b>Article 8.</b> <b>Investment Securities.</b> Part 4. Registration. 25-8-407. [Repealed.]</p> <p><b>Article 9.</b> <b>Secured Transactions; Sales of Accounts, Contract Rights and Chattel Paper.</b> Part 2. Validity of Security Agreement and Rights of Parties Thereto. 25-9-201.1. Security interests granted in</p>	<p>Sec. household and kitchen furniture. Part 4. Filing. 25-9-408. [Repealed.] Part 5 Default. 25-9-504.1. Payment of surplus to clerk. 25-9-504.2. Special proceedings to determine ownership of surplus. 25-9-508. Application of statute of limitations to serial notes. 25-9-509. Power of sale barred when foreclosure barred.</p> <p>Part 6. Public Sale Procedures. 25-9-601. Disposition of collateral by public sale. 25-9-602. Contents of notice of sale. 25-9-603. Posting and mailing notice of sale. 25-9-604. Exception as to perishable property. 25-9-605. Postponement of public sale. 25-9-606. Procedure upon dissolution of order restraining or enjoining sale. 25-9-607. Disposition of proceeds of sale.</p> <p><b>Article 10.</b> <b>Effective Date and Repealer.</b> 25-10-105. [Repealed.] 25-10-107. [Repealed.]</p>
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ARTICLE 1.

*General Provisions.*

PART 1.

SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT.

**§ 25-1-101. Short title.**

**Editor's Note.**—For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

**§ 25-1-102. Purposes; rules of construction; variation by agreement.**

**Use of Cases from Other Jurisdictions.**—Cases from other jurisdictions including some opinions by referees in bankruptcy and by the federal district courts were not

necessarily authoritative in this jurisdiction, but the Court of Appeals looked to them for guidance and explanation, remembering that one of the purposes of the

Uniform Commercial Code is "to make uniform the law among various jurisdictions." *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120 (1971).

Stated in *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

### § 25-1-103. Supplementary general principles of law applicable.

**Editor's Note.**—For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

### § 25-1-105. Territorial application of the act; parties' power to choose applicable law.

**Editor's Note.**—For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

## PART 2.

### GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION.

#### § 25-1-201. General definitions.

(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.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, deleted "property" between "common" and "interest" in subsection (28).

As the rest of the section was not changed by the amendment, only subsection (28) is set out.

Section 10, c. 562, Session Laws 1967, provides: "This act shall become effective at midnight on June 30, 1967. This act becomes effective on the same date as the Uniform Commercial Code, and the fact that the provisions of this act were enacted at a later date than the Uniform Commer-

cial Code shall not be considered in construing the provisions contained herein or any provisions of the Uniform Commercial Code."

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970).

Quoted in *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).

#### § 25-1-203. Obligation of good faith.

Cited in *Lexington State Bank v. Suburban Printing Co.*, 7 N.C. App. 359, 172 S.E.2d 274 (1970).

#### § 25-1-206. Statute of frauds for kinds of personal property not otherwise covered.

**Editor's Note.**—For article on statute of frauds as to personal property under the

Uniform Commercial Code, see 4 Wake Forest Intra. L. Rev. 41 (1968).

#### § 25-1-207. Performance or acceptance under reservation of rights.

**Reservation of Right to Collect Remainder of Unpaid Account.** — Where debtor pays thirty-five percent of an account with checks bearing on the face of one the words "first instalment of agreed settlement" and on the other "final instalment of agreed settlement," the credi-

tor reserves its right to collect the remainder of the unpaid account when it indorses the checks "with reservation of all our rights." *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

**§ 25-1-209. Subordinated obligations.**—An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a



creditor may subordinate his right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor. This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it. (1967, c. 562, s. 1.)

**Editor's Note.** — Section 10 of Session Laws 1967, c. 562, makes the act effective at midnight on June 30, 1967. See Editor's note to § 25-1-201.

ARTICLE 2.

*Sales.*

PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

§ 25-2-101. **Short title.**

**Editor's Note.**—For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

For note on "Products Liability—Sales Warranties of the Uniform Commercial Code," see 46 N.C.L. Rev. 451 (1968).

§ 25-2-106. **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 (§ 25-2-401). 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. (1965, c. 700, s. 1; 1967, c. 24, s. 6.)

**Editor's Note.**—

The 1967 amendment, originally effective Oct. 1, 1967, substituted "any remedy for breach" for "remedy any breach" in sub-

section (4). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

PART 2.

FORM, FORMATION AND READJUSTMENT OF CONTRACT.

§ 25-2-201. **Formal requirements; statute of frauds.**

**Editor's Note.**—For article on statute of frauds as to personal property under the Uniform Commercial Code, see 4 Wake Forest Intra. L. Rev. 41 (1968).

vens, 9 N.C. App. 228, 175 S.E.2d 739 (1970).

**Cited in** *Grissett v. Ward*, 10 N.C. App. 685, 179 S.E.2d 867 (1971).

Applied in *Harwell Enterprises v. Ste-*

§ 25-2-204. **Formation in general.**

**Editor's Note.**—For note on "Meeting of the Minds and U.C.C. § 2-204," see 46 N.C.L. Rev. 637 (1968).

**§ 25-2-207. Additional terms in acceptance or confirmation.**

(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.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, deleted "or different" following "additional" near the beginning of subsection (2). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

**§ 25-2-208. Course of performance or practical construction.**

(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 (§ 25-1-205).

(1967, c. 24, s. 7.)

**Editor's Note.**—

The 1967 amendment, originally effective Oct. 1, 1967, corrected the reference at the end of subsection (2). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

**PART 3.**

**GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT.**

**§ 25-2-302. 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. (1971, c. 1055, s. 1.)

**Editor's Note.** — Session Laws 1971, c. 1, 1971, and apply to transactions entered into and events occurring on and after that date. 1055, s. 3, provides: "This act shall be in full force and effect on and after October date."

**§ 25-2-313. Express warranties by affirmation, promise, description, sample.**

Applied in *Helson's Premiums & Gifts, Inc. v. Duncan*, 9 N.C. App. 653, 177 S.E.2d 428 (1970).

**§ 25-2-314. Implied warranty: Merchantability; usage of trade.**

A defendant is entitled to have his counterclaim, based upon a breach of implied warranty of merchantability, submitted to a jury unless the contract contains an ex-

clusion or modification of the implied warranty. *Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E.2d 778 (1971).



**§ 25-2-315. Implied warranty: Fitness for particular purpose.**

Applied in *Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E.2d 778 (1971).

Cited in *Styron v. Loman-Garrett Supply Co.*, 6 N.C. App. 675, 171 S.E.2d 41 (1969).

**§ 25-2-316. Exclusion or modification of warranties.**

A defendant is entitled to have his counterclaim, based upon a breach of implied warranty of merchantability, submitted to a jury unless the contract contains an ex-

clusion or modification of the implied warranty. *Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E.2d 778 (1971).

**§ 25-2-318. Third party beneficiaries of warranties express or implied.**

Editor's Note.—For comment on implied warranty of fitness, see 4 *Wake Forest Intra. L. Rev.* 169 (1968).

PART 4.

TITLE, CREDITORS, AND GOOD FAITH PURCHASES.

**§ 25-2-401. Passing of title; reservation for security; limited application of this section.**

**Concept of Title Abandoned.**—The most basic departure from previous law which is found in the Uniform Commercial Code is the abandonment of the concept of title as a tool for resolving sales problems. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

**Effect of Reservation of Title by Seller.**—Where there has been "delivery to the buyer," a reservation of title by the seller, by express provision of the Code, is "limited in effect to a reservation of a security interest." *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

**Interpretation of UCC Where Public Regulation Involved.**—The official comment to this section seems to say that the Uniform Commercial Code makes no attempt to set out a specific line of interpretation where a public regulation is involved, but that in case a court should decide to apply this private law definition and reasoning to its public regulation, that there should be a clear and concise definitional basis for so doing. Such comment leads to the conclusion that the sales act, a private law, is not necessarily applicable to public regulations unless the court chooses to make it so. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

**Transfer of Ownership of Motor Vehicle.**—The provisions of § 20-72(b) contain specific, definite and comprehensive terms concerning the transfer of ownership of a motor vehicle. Conversely, the Uniform Commercial Code does not refer to transfer of ownership of motor vehicles, but only refers to the passing of title to property generally described as "goods." Although the word "automobile" comes within the

general term of "goods," automobiles are a special class of goods which have long been heavily regulated by public regulatory acts. Section 20-72(b) is a special statute and the Uniform Commercial Code is a general statute. Thus, the special statute, even though earlier in point of time, must prevail. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

The documents of title referred to in this section do not include certificates of title to motor vehicles. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

The provisions of the Uniform Commercial Code do not override the earlier motor vehicle statutes relating to the transfer of ownership of motor vehicle for the purpose of tort law and liability insurance coverage. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

**Effect of Wrongful Transfer of Property by Bailee in Possession.**—In the absence of grounds for an estoppel and except as provided in § 25-2-403(2) or this section, no right, title, or interest may be acquired as the result of an unauthorized or wrongful sale, gift, exchange, pledge, mortgage, or other transfer of property by a bailee in possession, even though to an innocent purchaser. The bailor is not divested of his title by such an unauthorized act and may recover the property or its value from the vendee or transferee in any appropriate form of action. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).



**§ 25-2-402. Rights of seller's creditors against sold goods.**

**Editor's Note.**—For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

**§ 25-2-403. Power to transfer; good faith purchase of goods; "entrusting."**

The basic predicate for the operation of subsection (1) of this section is title, either actual or voidable, in the transferee. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

**And Unauthorized Transfer by Bailee Will Not Divest Bailor of Title.**—In the absence of grounds for an estoppel and except as provided in subsection (2) of this section or § 2-401, no right, title, or interest may be acquired as the result of an unauthorized or wrongful sale, gift, exchange, pledge, mortgage, or other transfer of property by a bailee in possession, even though to an innocent purchaser. The bailor is not divested of his title by such an unauthorized act and may recover the property or its value from the vendee or transferee in any appropriate form of action. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

**Where an entrustment does not qualify under subsection (2) of this section, pre-code law will be applicable** in determining the rights of the parties. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

**For subsection (2) to be applicable, there must be three essential steps:** (1) an entrustment of goods to (2) a merchant who deals in goods of that kind followed by a sale by such merchant to (3) a buyer in ordinary course of business. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

**The phrase "deals in goods"** in subsection (2) of this section is to be construed as one who is engaged regularly in selling goods of the kind. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

**"Buyer in Ordinary Course of Business".**—A company is not a "buyer in ordinary course of business," a purchaser who "brought goods in the open market," if it did not acquire possession of the goods as a purchaser in the ordinary course of business but received those goods in its capacity of a textile finisher, for the specific purpose of processing them on behalf of the owner. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

**Failure to Raise Question of Applicability of Section in Trial Court.**—The fact that the applicability of this section of the Uniform Commercial Code to a proceeding has not been brought to the attention of the district court on motion for judgment n.o.v. does not in all instances preclude appellate review. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

**Buyer with Voidable Title Can Transfer Better Title Than He Had.**—While the buyer might have had a voidable title if he had made fraudulent representations of solvency, one with voidable title can transfer better title than he had under this section. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).

**The holder of a perfected security interest in after acquired property** is a "good faith purchaser" whose rights are superior to a seller of the after acquired goods under § 25-2-702(2), several commentators have concluded. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).

## PART 5.

### PERFORMANCE.

**§ 25-2-501. 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 nonconforming 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.

(1967, c. 24, s. 8.)

**Editor's Note.—**

The 1967 amendment, originally effective Oct. 1, 1967, inserted, in paragraph (c) of subsection (1), "after contracting or for the sale of crops to be harvested within twelve months." Session Laws

1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (1) is set out.

**§ 25-2-502. Buyer's right to goods on seller's insolvency.**

**Seller Must Become Insolvent within 10 days after Receipt of First Installment of Purchase Price.** — Presumably, a seller cannot become insolvent prior to the receipt of the first installment of the purchase price or 11 days after receipt of the

first installment of the purchase price or on the very date of its receipt. He has to become insolvent within the given 10-day period. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).

**PART 6.**

**BREACH, REPUDIATION AND EXCUSE.**

**§ 25-2-602. Manner and effect of rightful rejection.**

**OFFICIAL COMMENT**

**Prior uniform statutory provision:** Section 50, Uniform Sales Act.

**Changes:** Rewritten.

**Purposes of changes:** To make it clear that:

1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under subsection (1), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective. The sections of this Article dealing with inspection of goods must be read in connection with the buyer's reasonable time for action under this subsection. Contract provisions limiting the time for rejection fall within the rule of the section on "Time" and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due "notifying" of rejection by the buyer to the seller is defined in Section 1-201.

2. Subsection (2) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the buyer's disposition, this section continues the policy of prior

uniform legislation in generally relieving the buyer from any duties with respect to them, except when the circumstances impose the limited obligation of salvage upon him under the next section.

3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (3) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.

4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

**Cross references:**

Point 1: Sections 1-201, 1-204(1) and (3), 2-512(2), 2-513(1) and 2-606(1) (b).

Point 2: Section 2-603(1).

Point 3: Section 2-703.

**Definitional cross references:**

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.



"Goods". Section 2—105.

"Merchant". Section 2—104.

"Notifies". Section 1—201.

"Reasonable time". Section 1—204.

"Remedy". Section 1—201.

"Rights". Section 1—201.

"Seasonably". Section 1—204.

"Security interest". Section 1—201.

"Seller". Section 2—103.

Cited in *Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E.2d 778 (1971).

### § 25-2-606. What constitutes acceptance of goods.

**Denial of Indebtedness by Defendant Raised Issue of Acceptance.**—In an action to recover the balance allegedly due on a contract of sale of a machine wherein the defendant admitted that he purchased and received the machine, that he made no payments under the contract except a down payment, and that plaintiff repossessed the machine, defendant's denial of any indebtedness to the plaintiff raised an issue for

the jury as to whether defendant accepted the machine within the meaning of this section; if the jury determines that the defendant accepted the machine, it must then determine what amount, if any, plaintiff is entitled to recover from defendant under the terms of the contract. *Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E.2d 778 (1971).

§ 25-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

**Cross Reference.**—See note to § 25-2-606.

## PART 7.

### REMEDIES.

### § 25-2-702. Seller's remedies on discovery of buyer's insolvency.

(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 under this article (§ 25-2-403). Successful reclamation of goods excludes all other remedies with respect to them. (1965, c. 700, s. 1; 1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, deleted "or lien creditor" following "purchaser" in the first sentence of subsection (3). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (3) is set out.

For a discussion of the constructive trust as a remedy for the seller, see 45 N.C.L. Rev. 424 (1967).

**The holder of a perfected security interest in after acquired property** qualifies as a "good faith purchaser." *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).

The holder of a perfected security interest in after acquired property was a "good faith purchaser" whose rights were superior to a seller of the after acquired goods under subsection (2), several commentators have concluded. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).

**Buyer with Voidable Title Can Transfer Better Title Than He Had.** — While the buyer might have had a voidable title, if he had made fraudulent representations of

solvency, one with voidable title can transfer better title than he had. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).

**Determination of Misrepresentation of Solvency Unnecessary.** — A determination of whether written proposals of exchange made by the buyer to the various sellers was a misrepresentation of solvency was not necessary where, even if the conditions to bring sellers within subsection (2) were present, it was clear that the rights of third parties have intervened to cut off their right to reclaim the property. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).

**Remedy of Reclamation Is Exception To Rule.**—Normally, after the seller has delivered the goods to an accepting buyer, the remedy is an action for the price, and it is too late to retrieve the goods. The remedy of reclamation provided by subsection (2) is an exception to this rule. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).



**§ 25-2-703. Seller's remedies in general.**

**Cross Reference.**—See note to § 25-2-702.

**§ 25-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.**

(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. (1965, c. 700, s. 1; 1967, c. 24, s. 9.)

**Editor's Note.**—

The 1967 amendment, originally effective Oct. 1, 1967, inserted the word "scrap" near the end of subsection (2). Session Laws 1967, c. 1078, amends the 1967

amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

**§ 25-2-714. Buyer's damages for breach in regard to accepted goods.**

**Quoted in** Performance Motors, Inc. v. Allen, 11 N.C. App. 381, 181 S.E.2d 134 (1971).

**§ 25-2-716. 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. (1965, c. 700, s. 1; 1967, c. 562, s. 1.)

**Cross Reference.**—As to action for claim and delivery as substitute for common-law action of replevin, see §§ 1-472 to 1-484 and notes thereto.

effective at midnight June 30, 1967, added "or in other proper circumstances" at the end of subsection (1). See Editor's note to § 25-1-201.

**Editor's Note.** — The 1967 amendment,

**§ 25-2-723. Proof of market price; time and place.**

(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.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, inserted "in commercial judgment or" near the middle of subsection (2). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

**§ 25-2-725. 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.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, added the second sentence of subsection (1). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (1) is set out.

ARTICLE 3.

*Commercial Paper.*

PART 1.

SHORT TITLE, FORM AND INTERPRETATION.

§ 25-3-101. Short title.

**Editor's Note.**—

For a symposium on the Uniform Com-

mercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-3-104. Form of negotiable instruments; "draft"; "check"; "certificate of deposit"; "note."

**Opinions of Attorney General.** — Mr. Fred P. Parker, Jr., Wayne County Attorney, 7/28/69.

Cited in Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

§ 25-3-115. Incomplete instruments.

**Scope of Presumptive Authority to Fill Blanks.**—The presumptive authority to fill blanks extends to every incomplete feature of the instrument. The authority is to fill all blanks in general conformity to the character of the paper or as the person in possession thinks proper. Jones v. Jones, 268 N.C. 701, 151 S.E.2d 587 (1966), construing former § 25-20 (Section 14, Uniform Negotiable Instruments Law).

Any and all blanks may be filled in which are necessary and proper to make the instrument a perfect and complete bill of exchange or promissory note, as the case may be. Jones v. Jones, 268 N.C. 701, 151 S.E.2d 587 (1966), construing former § 25-20 (Section 14, Uniform Negotiable Instruments Law).

The pronoun "I" or "We" may be inserted under the implied power to fill blanks. Jones v. Jones, 268 N.C. 701, 151 S.E.2d 587 (1966), construing former § 25-20 (Section 14, Uniform Negotiable Instruments Law).

**As May Name of Payee.**—Parties signing a note with others as makers, the note being complete except for the insertion of the name of the payee or payees, clothe the primary makers with authority to complete the instrument by inserting the name of the payees. Jones v. Jones, 268 N.C. 701, 151 S.E.2d 587 (1966), construing former § 25-20 (Section 14, Uniform Negotiable Instruments Law).

PART 2.

TRANSFER AND NEGOTIATION.

§ 25-3-202. Negotiation.

**Right of Payee to Assume that Check Requires His Endorsement.**—The payee of a check, as well as the drawer, has a right to expect the drawee bank to pay it in accordance with its terms. Therefore, when the drawer issues a check to the order of a named payee, the payee—absent his agreement to the contrary, or any conduct on his part creating an estoppel—can assume that he has valuable paper of a

particular commercial character, i.e., one which will require his endorsement for title to pass to a taker, or for discharge to be effected by the action of the drawee in marking the check "paid" and charging it against the account of the drawer. Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under NIL).

PART 3.

RIGHTS OF A HOLDER.

§ 25-3-305. 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
- any other discharge of which the holder has notice when he takes the instrument. (1899, c. 733, ss. 15, 16, 57; Rev., ss. 2165, 2166, 2206; C. S., ss. 2996, 2997, 3038; 1965, c. 700, s. 1.)

**Editor's Note.**—This section is set out in the Supplement to correct an error occurring in the replacement volume.

**§ 25-3-306. Rights of one not holder in due course.**

**One who acquires a note as a mere assignee,** without the paying of consideration therefor, is not a holder in due course.

*Ridley v. Jim Walter Corp.*, 272 N.C. 673, 158 S.E.2d 869 (1968).

**§ 25-3-307. Burden of establishing signatures, defenses and due course.**

**Editor's Note.**—For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970).

**Words Purporting to Be Indorsement Do Not Prove Themselves.** — Words, written on the back of a negotiable instrument, purporting to be an indorsement by which the instrument was negotiated, do not prove themselves. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785 (1971).

The mere introduction of a note, payable to order, with words written on the back thereof, purporting to be an indorsement by the payee, does not prove or tend to prove their genuineness. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785 (1971).

**Thus, Burden Shifted, etc.**—

Where an infirmity in the note has been established so as to create a valid defense by the maker and this defense is sought to be avoided by the establishment of a holder in due course, then the person claiming to be the holder in due course has the burden of proving it. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785 (1971).

**Burden of Establishing That One Is Holder in Due Course.**—For a person to acquire the position of a holder in due course of a negotiable instrument so as to effectually cut off any defenses which the maker might have, he has the burden of establishing that he is, in all respects, a holder in due course. This includes establishing the authority of a purported endorser to execute such indorsement. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785 (1971).

**Not Carried by Presenting Only Note to Prove Authority of Endorser.**—Where defendant had established, by admissions and affidavits, that it had a defense of failure of consideration insofar as the payee was concerned, and the plaintiff sought to cut off this defense by being a holder in due course, the burden thereupon fell to the plaintiff to show that it was "in all respects a holder in due course." By presenting nothing more than the note itself to prove the authority of the endorser to endorse for the payee, plaintiff failed to carry his burden. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785 (1971).

PART 4.

LIABILITY OF PARTIES.

**§ 25-3-403. Signature by authorized representative.**

**Cross Reference.**—See note to § 25-3-307.

**§ 25-3-405. Impostors; signature in name of payee.**

**Where Drawer Intends Imposter to Take Possession as Payee.**—Where the drawer, mistaken as to the identity of the

person to whom he delivers a check, nevertheless intends that the procurer himself shall take title and possession as payee,



the endorsement of the imposter will be regarded as genuine as to subsequent persons dealing in good faith with the instrument, and the bank's protected. Modern

Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under NIL).

### § 25-3-406. Negligence contributing to alteration or unauthorized signature.

**Editor's Note.**—For note on estoppel and forged indorsements under the Uni-

form Commercial Code, see 47 N.C.L. Rev. 256 (1968).

### § 25-3-409. Draft not an assignment.

**Payee Has No Right of Action, etc.**—

The acceptance of a check is the promise of the drawee to pay it, and, until that promise is made, no contractual relation exists between the drawee and the payee.

Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).

### § 25-3-410. Definition and operation of acceptance.

**Acceptance and Payment Are Different.**

—Payment is the performance of the drawee's promise—the expected and intended end of the check. Acceptance prolongs the life of the check; payment ends it. Thus, the two are fundamentally different. Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).

**The acceptance of a check is the promise of the drawee to pay it,** and, until that promise is made, no contractual relation exists between the drawee and the payee. Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).

**Marking Check "Paid" Did Not Consti-**

tute "Constructive Acceptance".—The act of a bank in marking a check "paid" and charging it against a depositor's account did not constitute a "constructive acceptance" under former § 25-144. That section provided that "where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery . . . to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same." It contemplated a case where the bill or check was delivered to the drawee for the purpose of procuring an acceptance or certification; it was never intended to apply to an erroneous payment. Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966).

### § 25-3-419. Conversion of instrument; innocent representative.

**Editor's Note.**—For case note on recovery by payee against drawee bank on checks paid over forged endorsement, see 44 N.C.L. Rev. 1073 (1966).

**Payment of Check on Forged or Unauthorized Endorsement.**—The majority of jurisdictions, both before and after the adoption of the NIL, allowed the holder to recover on the theory of a conversion of the check when the drawee paid a check upon a forged or unauthorized endorsement. Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966).

**In paying a check to an agent, a bank assumes the risk that he is without authority to endorse it.** Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).

The payee of a check as well as the drawer, has the right to expect the bank to pay the check in accordance with its tenor, and when the bank pays the check to an agent of the payee it is necessary to the

bank's protection that it ascertain that the agent is authorized to receive payment for the payee, and the drawer has no right, as against the payee, to direct its payment to anyone else. Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966).

**Payment to Unauthorized Person without Payee's Endorsement.**—When the drawee bank takes a check without the payee's endorsement, delivers cash in the amount of the check to one unauthorized to receive its payment, and ultimately returns the check to the maker, the bank has assumed complete control over the check, dealt with it as its own, and withheld it from its rightful owner. Such dealings constitute a tortious conversion of the check, and the payee is entitled to recover its value. *Prima facie*, this is the face value of the paper converted. Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).



## PART 5.

## PRESENTMENT, NOTICE OF DISHONOR AND PROTEST.

**§ 25-3-501. When presentment, notice of dishonor, and protest necessary or permissible.**

(3) Unless excused (§ 25-3-511) 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, territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico. 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.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, substituted "territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico" for "and territories of the

United States and the District of Columbia" at the end of the first sentence of subsection (3). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (3) is set out.

## PART 8.

## MISCELLANEOUS.

**§ 25-3-802. 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 to the extent of his discharge on the instrument.

(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. (1965, c. 700, s. 1; 1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, added at the end of the second sentence of para-

graph (b) of subsection (1) "to the extent of his discharge on the instrument." See Editor's note to § 25-1-201.

## ARTICLE 4.

*Bank Deposits and Collections.*

## PART 1.

## GENERAL PROVISIONS AND DEFINITIONS.

**§ 25-4-101. Short title.**

**Editor's Note.**—For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

**§ 25-4-102. Applicability.**

**Editor's Note.**—For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

§ 25-4-106. **Separate office of a bank.**—A branch or separate office of a bank 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. (1965, c. 700, s. 1; 1967, c. 562, s. 1.)

**Editor's Note.**—

The 1967 amendment, effective at midnight June 30, 1967, deleted "maintaining

its own deposit ledgers" following the word "bank" where it first appears in this section. See Editor's note to § 25-1-201.

## PART 2.

### COLLECTION OF ITEMS: DEPOSITARY AND COLLECTING BANKS.

§ 25-4-204. **Methods of sending and presenting; sending direct to payor.**

**Editor's Note.** — Session Laws 1967, c. 562, s. 1, amended the catchline of this section to read as set out above.

As the text of the section was not changed, only the catchline is set out.

§ 25-4-208. **Security interest of collecting bank in items, accompanying documents and proceeds.**

**Editor's Note.** — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

Cited in *Southern Nat'l Bank v. Universal Acc. Corp.*, 2 N.C. App. 319, 163 S.E.2d 10 (1968).

§ 25-4-209. **When bank gives value for purposes of holder on due course.**

Cited in *Southern Nat'l Bank v. Universal Acc. Corp.*, 2 N.C. App. 319, 163 S.E.2d 10 (1968).

§ 25-4-211. **Media of remittance; provisional and final settlement in remittance cases.**

(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 subparagraphs (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. (1965, c. 700, s. 1.)

**Editor's Note.**—Subsection (3) is set out to correct a typographical error in the replacement volume.



## PART 4.

## RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.

**§ 25-4-405. 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.

(3) A transaction, although subject to this article, is also subject to § 105-24, and § 41-2.1, and in case of conflict between the provisions of this section and either of those sections, the provisions of those sections control. (1965, c. 700, s. 1; 1967, c. 24, s. 10; c. 562, s. 1.)

**Editor's Note.**—

Session Laws 1967, c. 24, originally effective Oct. 1, 1967, corrected an error by substituting "of" for "or" in the first sentence of subsection (1). Session Laws 1967, c. 1078, amends c. 24 so as to make

it effective July 1, 1967. Session Laws 1967, c. 562, effective at midnight June 30, 1967, made the same correction in subsection (1) and added subsection (3). See Editor's note to § 25-1-201.

## ARTICLE 5.

*Letters of Credit.***§ 25-5-101. Short title.**

**Editor's Note.**—For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

**§ 25-5-117. 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 § 25-5-102 (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 charge 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.

(1967, c. 24, s. 11.)

**Editor's Note.**—

The 1967 amendment, originally effective Oct. 1, 1967, substituted "charge" for "change" near the beginning of paragraph (c) of subsection (1). Session Laws 1967,

c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (1) is set out.

## ARTICLE 6.

*Bulk Transfers.***§ 25-6-101. Short title.**

**Editor's Note.**—For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

**§ 25-6-106:** Repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967.

**Cross Reference.**—See Editor's note to § 25-1-201.

**§ 25-6-107. The notice.**

(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 (§ 25-6-104) 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) repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, repealed paragraph (e) of subsection (2). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, it is not set out.

**§ 25-6-108. Auction sales; "auctioneer."**

(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 (§ 25-6-104);

(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) repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, repealed paragraph (c) of subsection (3). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, it is not set out.

**§ 25-6-109. What creditors protected.**—(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 (§§ 25-6-105 and 25-6-107) are not entitled to notice.

(2) Repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967. (1907, c. 623; 1913, c. 30, s. 1; Ex. Sess., 1913, c. 66, s. 1; C. S., s. 1013; 1933, c. 190; 1945, c. 635; 1963, c. 1179; 1965, c. 700, s. 1; 1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, re-

pealed subsection (2). See Editor's note to § 25-1-201.



ARTICLE 7.

*Warehouse Receipts, Bills of Lading and Other Documents of Title.*

PART 1.

GENERAL.

§ 25-7-101. Short title.

**Editor's Note.**—For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

PART 2.

WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.

§ 25-7-209. Lien of warehouseman.

(3) (a) 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 § 25-7-503.

(b) A warehouseman's lien on household goods for charges and expenses in relation to the goods under subsection (1) is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" means furniture, furnishings and personal effects used by the depositor in a dwelling.

(c) Where the holder of a security interest with respect to the property stored, or any part thereof, has instituted appropriate legal proceedings for the recovery of possession of property, such holder shall be entitled to possession under the writ or other process upon payment of a fair fractional portion of the total storage charges reasonably allocable to the storage of the property described in the writ or other process.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, designated the former provisions of subsection (3) as paragraph (a) and added paragraphs (b) and (c) to subsection (3). See Editor's note to § 25-1-201.

As the rest of the section was not

changed by the amendment, only subsection (3) is set out.

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

PART 3.

BILLS OF LADING: SPECIAL PROVISIONS.

§ 25-7-301. Liability for non-receipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.

(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.

(1967, c. 24, s. 12.)

**Editor's Note.**—

The 1967 amendment, originally effective

Oct. 1, 1967, substituted "by" for "be" near the beginning of subsection (4). Session

Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (4) is set out.

### § 25-7-307. Lien of carrier.

**Editor's Note.** — For article concerning liens on personal property not governed

by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

## PART 5.

### WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER.

#### § 25-7-502. Rights acquired by due negotiation.

**Purchase of Warehouse Receipt without Knowledge of Lien Senior in Time.**—Under § 105-241, a lien for State taxes on personal property is not enforceable against a bona fide purchaser for value, except upon a levy upon such property under an execution or a tax warrant; but when a tax lien is perfected, it is, by § 105-376 (c), superior to all other liens or rights prior or subsequent in time. By subsection (1) (c) of this section a bona fide purchaser

of a warehouse receipt acquires good title against a lien senior in time of which the purchaser had no notice. Thus, an enforceable lien on oil stored in North Carolina would not arise until it was executed on; but it could not be attached when a warehouse receipt therefor was in the hands of one who purchased it not knowing of the lien. *Davenport v. Ralph N. Peters & Co.*, 386 F.2d 199 (4th Cir. 1967).

## PART 6.

### WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS.

#### § 25-7-602. Attachment of goods covered by a negotiable document.

**Attachment against Property in Possession of Warehouseman.**—North Carolina law does not permit an attachment against property in the possession of a warehouseman who has issued a negotiable ware-

house receipt therefor, unless the receipt is first surrendered or its negotiation enjoined. *Davenport v. Ralph N. Peters & Co.*, 386 F.2d 199 (4th Cir. 1967).

## ARTICLE 8.

### *Investment Securities.*

## PART 1.

### SHORT TITLE AND GENERAL MATTERS.

#### § 25-8-101. Short title.

**Editor's Note.**—For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

#### § 25-8-106. Applicability.

**Editor's Note.** — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

## PART 2.

### ISSUE—ISSUER.

#### § 25-8-204. Effect of issuer's restrictions on transfer.

**Editor's Note.** — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).



PART 3.

PURCHASE.

**§ 25-8-301. Rights acquired by purchaser; "adverse claim"; title acquired by bona fide purchaser.**

**Editor's Note.**—For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

**§ 25-8-309. Effect of indorsement without delivery.**

The elements of a gift *inter vivos* are: (1) The intent by the owner to give to the donee the shares of stock so as to divest himself immediately of all right and title to and control of the stock; and (2) the delivery, actual or constructive, of the stock certificate indorsed by him. *Fesmire v. First Union Nat'l Bank*, 267 N.C. 589, 148 S.E.2d 589 (1966) (decided under the Uniform Stock Transfer Act).

**Possession of Indorsed Certificate Held to Establish Delivery Prima Facie.**—Delivery of an indorsed stock certificate is constructive delivery of the shares which it represents, and possession of such certificate by the indorsee establishes prima facie the fact of delivery. *Fesmire v. First Union Nat'l Bank*, 267 N.C. 589, 148 S.E.2d 589 (1966) (decided under the Uniform Stock Transfer Act).

**§ 25-8-311. Effect of unauthorized indorsement.**

**Bona Fide Purchaser Held to Take Free of Lack of Authority.**—Under the Uniform Stock Transfer Act an unlimited indorsement and delivery of a certificate of stock to another, or the delivery of it to him together with a separate document containing a written assignment or a power of attorney to him for the transfer of the stock, clothed such other with indicia of ownership, and a bona fide purchaser for value took the shares free from any lack of actual authority. *Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 266 N.C. 489, 146 S.E.2d 390 (1966).

**Status as Bona Fide Purchaser as Affirmative Defense.**—Subdivision (2) a of former § 55-81 set up an affirmative defense which had to be pleaded and proved by the defendant, just as one claiming to be the holder in due course of a negotiable instrument must prove he has that status when it is shown that the person from whom he acquired the instrument negotiated it in breach of faith. *Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 266 N.C. 489, 146 S.E.2d 390 (1966).

**§ 25-8-319. Statute of frauds.**

**Editor's Note.**—For article on statute of frauds as to personal property under the

Uniform Commercial Code, see 4 Wake Forest Intra. L. Rev. 41 (1968).

PART 4.

REGISTRATION.

**§ 25-8-401. Duty of issuer to register transfer.**

**Editor's Note.**—For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

**§ 25-8-405. Lost, destroyed and stolen securities.**

**Cross Reference.**—See § 55-57(e), which, under certain circumstances, permits a cor-

poration to issue a replacement certificate without requiring a bond.

**§ 25-8-406. Duty of authenticating trustee, transfer agent or registrar.**

**Editor's Note.**—For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

§ 25-8-407: Repealed by Session Laws 1969, c. 1115, s. 1, effective at midnight, June 30, 1969.

**Cross Reference.** — For present section containing the provisions of the repealed section, see § 41-2.2.

ARTICLE 9.

*Secured Transactions; Sales of Accounts, Contract Rights and Chattel Paper.*

PART 1.

SHORT TITLE, APPLICABILITY AND DEFINITIONS.

§ 25-9-101. **Short title.**

**Editor's Note.**—For a symposium on the case law survey as to credit transactions, Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966). For see 44 N.C.L. Rev. 956 (1966).

§ 25-9-102. **Policy and scope of article.**

**Editor's Note.** — For article concerning by the Uniform Commercial Code, see 44 liens on personal property not governed N.C.L. Rev. 322 (1966).

§ 25-9-103. **Accounts, contract rights, general intangibles and equipment relating to another jurisdiction; and incoming goods already subject to a security interest.**

(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.

(1967, c. 562, s. 1.)

**Editor's Note.**—

The 1967 amendment, effective at midnight June 30, 1967, substituted "the" for "and" preceding "chief place of business" in the last sentence of subsection (2). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

§ 25-9-104. **Transactions excluded from article.**

**Editor's Note.** — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

The phrase "landlord's lien" is construed to refer to liens created by statute. A detailed reading of this section (the section excluding certain types of transactions from the Code) in its entirety, together

with the comments of the National Conference of Commissioners of Uniform State Laws, indicates that all of the other subsections deal with matters thought to be sufficiently covered by a statute of the United States or of the several states or that they deal with special transactions which do not fit easily into general commercial statute and which are adequately



covered by existing law. From this viewpoint it also appears that the term "landlord's lien" as used in the statute must be interpreted as referring to liens created by statute, for the matter of liens on property is obviously considered by all of the remainder of the Code as fitting into a general commercial statute. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

**liens is not applicable to consensual liens.** *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

**A lien on personal property granted a lessor by contract is not excluded** from the provisions of the Uniform Commercial Code. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

**This section's exclusion of landlord's**

**§ 25-9-105. 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, a charter or other contract involving the use or hire of a vessel is not chattel paper. 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 (§ 25-1-201);

(f) "Goods" includes all things which are moveable at the time the security interest attaches or which are fixtures (§ 25-9-313), 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 § 25-3-104), or a security (defined in § 25-8-102) 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.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, added, at the end of the first sentence of paragraph (b) of subsection (1), "a charter or other contract involving the use or hire of a vessel is not chattel paper." See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (1) is set out.

**Some Grant of Security Interest Required.** — A reading of the definition of "security agreement" in this section suggests that some grant of a security interest



is required. *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120 (1971).

**Insufficient Grant of Security Interest.**—The words, “This note is secured by Uniform Commercial Code financing statement of North Carolina” are not a sufficient grant of a security interest. *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120 (1971).

The language in the financing statement

**§ 25-9-106. 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. All rights earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are contract rights and neither accounts nor general intangibles. (1945, c. 196, s. 1; 1957, c. 504; 1965, c. 700, s. 1; 1967, c. 562, s. 1.)

**Editor’s Note.** — The 1967 amendment, effective at midnight June 30, 1967, added the last sentence. See Editor’s note to § 25-1-201.

**Contract Held to Include Lien on Returned Premiums of Insurance.**—Where a contract to assign a bankrupt’s accounts receivable clearly comprehended both customer accounts and any other legally enforceable debt arising out of a transac-

“same securing note for advanced money to produce crops for the year 1969” was not a sufficient grant of a security interest to cause the documents, entitled “FINANCING STATEMENTS,” to suffice as a security agreement. It, at most, was a recital of what the parties expected to do. *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120 (1971).

tion occurring in and to be paid in North Carolina, and which was made during the effective period of notice of assignment, this contract included the establishment of a lien thereby as against the returned premiums of insurance, under the terms of the contract between the bank and bankrupt. In the Matter of Dail, 257 F. Supp. 326 (E.D.N.C. 1966).

**§ 25-9-109. Classification of goods; “consumer goods”; “equipment”; “farm products”; “inventory.”**

**Editor’s Note.**—For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970). For article “Transferring North Carolina Real Estate Part I: How the Present System Functions,” see 49 N.C.L. Rev. 413 (1971).

**Bound Volumes Held “Inventory.”** — Where the buyer was engaged in the busi-

ness of microfilming books, journals, records, and other like material, and in buying and selling both microfilm records and printed material, the bound volumes sold to the buyer were “inventory,” and not “equipment.” *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971).

## PART 2.

### VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERETO

#### § 25-9-201. General validity of security agreement.

**Editor’s Note.**—For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Cited in *Dunham’s Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

**§ 25-9-201.1. Security interests granted in household and kitchen furniture.**—(1) Except as provided in subsection (2) of this section, all conveyances of household and kitchen furniture by a married person, made to secure the payment of money or other things of value, are void unless his or her spouse joins therein.

(2) A conveyance referred to in subsection (1) of this section is valid without the joinder of the spouse if:



- (a) The conveyance is made to secure the payment of all or part of the purchase price of the property conveyed; or
- (b) The spouse not joining in the conveyance has been adjudged a lunatic or insane; or
- (c) The spouse who executes the conveyance is authorized to do so by a valid and lawful deed of separation previously executed by the husband and wife; or
- (d) The spouse who executes the conveyance is the spouse not at fault in one of the instances described in G.S. 31A-1 (d). (1967, c. 562, s. 3.)

**Editor's Note.** — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

**§ 25-9-202. 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. (1965, c. 700, s. 1.)

**Editor's Note.**—This section is set out in the Supplement to correct a typographical error appearing in the replacement volume.

**§ 25-9-203. Enforceability of security interest; proceeds; formal requisites.**

(2) A transaction, although subject to this article, is also subject to the North Carolina Consumer Finance Act (being G.S. 53-164 through G.S. 53-191), G.S. 24-1 and G.S. 24-2, and G.S. 91-1 through G.S. 91-8, and in 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. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 2; c. 196, s. 2; 1955, c. 386, s. 1; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, revised the first sentence of subsection (2) so as to clarify the section references therein. See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

For article on statute of frauds as to personal property under the Uniform Commercial Code, see 4 Wake Forest Intra. L. Rev. 41 (1968).

**Some Grant of Security Interest Required.**—Although not explicit in this section, a reading of the definition of "security agreement" in § 25-9-105(1)(h) suggests that some grant of a security interest is required. *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120 (1971).

**Four Requirements for Enforceable Security Interest in Farm Products.** — From the language in this section, at least four requirements for an enforceable security interest in farm products appear: (a)

There must be a security agreement; (b) the debtor must sign it; (c) the collateral must be described; and (d) the land on which the crops are to be grown must be described. *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120 (1971).

**Insufficient Grant of Security Interest.**—The words "This note is secured by Uniform Commercial Code financing statement of North Carolina" are not a sufficient grant of a security interest. *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120 (1971).

The language in the financing statement in the instant case "same securing note for advanced money to produce crops for the year 1969" was not a sufficient grant of a security interests to cause the documents, entitled "FINANCING STATEMENTS," to suffice as a security agreement. It, at most, was a recital of what the parties expected to do. *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120 (1971).

**§ 25-9-204. When security interest attaches; after-acquired property; future advances.**

- (4) No security interest attaches under an after-acquired property clause
- (a) to crops which become such more than five years 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 (§ 25-9-314) when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, substituted "five years" for "one year" near the beginning of paragraph (a) of subsection (4). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (4) is set out.

**Landlord Perfecting Security Interest by Taking Possession Has Priority over Selling Company.**—In an action to determine the right of possession to a piece of property as between a landlord under a lease agreement and a company who sold the property under a conditional sales contract, neither party having filed a financing state-

ment, the landlord, who perfected its security interest under the lease by taking possession of the property pursuant to § 25-9-503, has priority over the selling company. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

**Security Interest in Lessor Created upon Lessee's Default.**—A lease agreement between a lessor and lessee is held to create a security interest in favor of the lessor, upon the lessee's default under the lease, in property that was acquired by the lessee for use on the premises. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

### § 25-9-206. Agreement not to assert defenses against assignee; modification of sales warranties where security agreement exists.

**Editor's Note.**—For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970).

## PART 3.

### RIGHTS OF THIRD PARTIES; PERFECTED AND UNPERFECTED SECURITY INTERESTS; RULES OF PRIORITY.

#### § 25-9-302. 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 § 25-9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under § 25-9-304 or in proceeds for a ten-day period under § 25-9-306;

(c) a purchase money security interest in farm equipment having a purchase price not in excess of twenty-five hundred dollars (\$2500.00); but filing is required for a fixture under § 25-9-313 or for a motor vehicle required to be licensed; however, compliance with G.S. 20-58 et seq. shall meet the filing requirements for such motor vehicles.

(d) a purchase money security interest in consumer goods; but filing is required for a fixture under § 25-9-313 or for a motor vehicle required to be licensed; however, compliance with G.S. 20-58 et seq. shall meet the filing requirements for such motor vehicles.

(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 (§ 25-4-208) or arising under the article on sales (see § 25-9-113) or covered in subsection (3) of this section.

(5) The filing provisions of this article do not apply to a security interest in



property of any description of any interest therein created by a deed of trust or mortgage made by a public utility as defined in G.S. 62-3(23) or by any electric or telephone membership corporation domesticated or incorporated in North Carolina, but the deed of trust or mortgage shall be registered in the county or counties in which such deed of trust or mortgage is required by G.S. 47-20 to be registered.

(6) The filing provisions of this article do not apply to any security interest created in connection with the issuance of any bond, note or other evidence of indebtedness for borrowed money by this State or any political subdivision or agency thereof. (1866-7, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1.)

**Editor's Note.—**

The 1967 amendment, effective at midnight June 30, 1967, rewrote paragraphs (c) and (d) of subsection (1), inserted "or by any electric or telephone membership corporation domesticated or incorporated in North Carolina" in subsection (5) and added subsection (6). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsections (1), (5) and (6) are set out.

§ 25-9-304. Perfection of security interest in instruments, documents, and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession.

Stated in *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

§ 25-9-305. When possession by secured party perfects security interest without filing.

Stated in *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

§ 25-9-306. "Proceeds"; secured party's rights on disposition of collateral.

(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 or setoff; 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

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**Opinions of Attorney General.** — Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 7/8/69.

Stated in *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the ten-day period.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, substituted "identifiable" for "indentifiable" near the beginning of paragraph (c) of subsection (4). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (4) is set out.

**§ 25-9-307. Protection of buyers of goods.**

**Editor's Note.**—For article "Transferring North Carolina Real Estate Part I: How

the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**§ 25-9-310. Priority of certain liens arising by operation of law.**

**Editor's Note.** — For article concerning liens on personal property not governed by

the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

**§ 25-9-312. Priorities among conflicting security interests in the same collateral.**

(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.

(1967, c. 24, s. 13.)

**Editor's Note.**—

The 1967 amendment, originally effective Oct. 1, 1967, corrected an error by substituting "or" for "of" near the middle of paragraph (b) of subsection (3). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (3) is set out.

**Landlord Perfecting Security Interest by Taking Possession Has Priority over**

**Selling Company.**—In an action to determine the right of possession to a piece of property as between a landlord under a lease agreement and a company who sold the property under a conditional sales contract, neither party having filed a financing statement, the landlord, who perfected its security interest under the lease by taking possession of the property pursuant to § 25-9-503, has priority over the selling company. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

**§ 25-9-313. Priority of security interests in 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.

(1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, deleted the former last paragraph of subsection (4), relating to the perfection of a security interest against real estate. See Editor's note to § 25-1-201.

As the rest of the section was not

changed by the amendment, only subsection (4) is set out.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

PART 4.

FILING.

§ 25-9-401. Place of filing; erroneous filing; removal of collateral.

**Opinions of Attorney General.** — Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 7/8/69.

§ 25-9-402. 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 and the name of the record owner thereof. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.

(a) each financing statement covering crops growing or to be grown or goods which are or are to become fixtures must contain the statement, "Collateral is or includes fixtures," and/or "Collateral is or includes crops," as is appropriate; or the appropriate box in Block 6 of said financing statements shall be marked, thus likewise so identifying such collateral.

(b) a duplicate, photostatic copy, photocopy or other facsimile of a security agreement is sufficient as a financing statement provided the security agreement copied 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 § 25-9-306 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 Including Record Owner of Same) .....



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 Including Record Owner of Same) .....

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.

(6) The Secretary of State shall have the authority to promulgate, issue and prescribe such financing statement forms and other forms as he deems necessary to be used as standard forms for any filing contemplated by any section under this article. (1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; C. S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1.)

**Editor's Note.** — The 1969 amendment, effective at midnight June 30, 1969, deleted "or record lessee" following "owner" near the end of the third sentence of subsection (1) and "or Record Lessee" following "Owner" in two places in subsection (3), added subdivisions (a) and (b) of subsection (1) and added subsection (6).

**Lien May Not Be Circumvented by Use of Technical Defects in Record.**—A trustee in bankruptcy shall not be allowed to circumvent a lien by use of technical defects in the record, especially where there

is no showing that any creditor was misled to any extent *Stafford v. Admiral Credit Corp.*, 280 F. Supp. 818 (M.D.N.C. 1968), decided under former § 45-58.

**Filing was satisfactory** under the former Uniform Trust Receipts Act where the defects in the filing were not such as to mislead a searcher of the record making reasonable inquiry. *Stafford v. Admiral Credit Corp.*, 280 F. Supp. 818 (M.D.N.C. 1968), decided under former § 45-58.

**Quoted** in *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120 (1971).

**§ 25-9-403. What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer.**

(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.

(a) as to all financing statements filed on or after July 1, 1969, in addition to the indexing required in the preceding sentence, where the financing statements bear the statement(s), "Collateral is or includes fixtures," or its substantial equivalent; or where the appropriate box identifying "FIXTURES" is checked or marked in Block 6 of such financing statements; the register of deeds shall index the statements in the index to financing statements so as to reflect the name of the record owner given in the statement. When the debtor is not the record owner, the register of deeds shall enter the name of the record owner in the place designated for entry of the name of the debtor and shall stamp or print conspicuously beneath the surname of the record owner the legend "RECORD OWNER" and shall note therein the file number of the financing statement. When the debtor is also the record owner, the register of deeds shall make one index entry in the name of the debtor and shall stamp or print conspicuously beneath his surname the legend, "RECORD OWNER."



(b) as to financing statements previously filed through June 30, 1969, if such statements show plainly on their face that they were intended to cover goods which are or are to become fixtures, by virtue of their having identified the collateral on the face of such statements as "FIXTURES," or by their having checked or marked the appropriate box in Block 6 of said financing statements; the register of deeds shall also index such financing statements in the index to financing statements so as to reflect the name of the record owner in the manner required by paragraph (a) above. This indexing shall be completed not later than July 1, 1972.

(c) if copies of security agreements are filed as financing statements, on or after July 1, 1969, as authorized by G.S. 25-9-402, to perfect security interests in fixtures, the secured party or other filer shall stamp or print conspicuously on the face of the first page of such copy the legend, "Collateral is or includes fixtures."

(d) as to copies of security agreements previously filed until July 1, 1969, as previously authorized by G.S. 25-9-402, to perfect security interests in fixtures, the secured party or other filer shall stamp or print conspicuously on the first page of such copy the legend, "Collateral is or includes fixtures." Further, such previously filed security agreements shall be so altered by said secured parties or filers not later than January 1, 1970.

(1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, deleted the former third sentence of subsection (4), relating to the filing or recording of an instrument covering fixtures. See Editor's note to § 25-1-201.

The 1969 amendment, effective at midnight June 30, 1969, added subdivisions (a), (b), (c) and (d) of subsection (4).

The 1971 amendment deleted all references to "crops" in subsection (4).

As the rest of the section was not changed by the amendments, only subsection (4) is set out.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**Note Held to Supply Time of Termination.**—Where the registration of a note and contract of assignment, one being contemporaneous with the other, was one act, the failure to state a time of termination in the contract would be supplied by the date stated in the note. In the Matter of Dail, 257 F. Supp. 326 (E.D.N.C. 1966).

**§ 25-9-404. 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 two dollars (\$2.00) when submitted on a standard size form approved by the Secretary of State, and for all other assignments or statements thereof, a three dollar (\$3.00) minimum charge for up to and including three pages and one dollar (\$1.00) per page for all over three pages. 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 (\$100.00), and in addition for any loss caused to the debtor by such failure.

(4) Repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967. (1945, c. 182, s. 5; c. 196, s. 3; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, deleted former subsection (4), relating to termina-

tion of a financing statement or security agreement by presenting the original statement or agreement or an executed dupli-



cate marked paid and satisfied. See Editor's note to § 25-1-201.

The 1969 amendment, effective at midnight June 30, 1969, added to the third sentence of subsection (1) the language begin-

ning "when submitted on a standard size form."

As subsections (2) and (3) were not affected by the amendments, they are not set out.

**§ 25-9-405. 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 § 25-9-403 (4). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be three dollars (\$3.00) when submitted on a standard size form approved by the Secretary of State, and for all other statements a three dollar (\$3.00) minimum charge for up to and including three pages and one dollar (\$1.00) per page for all over three pages.

(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 two dollars (\$2.00) when submitted on a standard size form approved by the Secretary of State, and for all other statements a three dollar (\$3.00) minimum charge for up to and including three pages and one dollar (\$1.00) per page for all over three pages.

(3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record. (1965, c. 700, s. 1; 1967, c. 24, s. 23; 1969, c. 1115, s. 1.)

**Editor's Note.**—The 1967 amendment, originally effective Oct. 1, 1967, substituted "two" for "three" near the end of subsection (2). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

The 1969 amendment, effective at midnight June 30, 1969, rewrote the last sentences of subsections (1) and (2).

**§ 25-9-406. 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 two dollars (\$2.00) when submitted on a standard size form approved by the Secretary of State, and for all other statements a three dollars (\$3.00) minimum charge for up to and including three pages and one dollar (\$1.00) per page for all over three pages. (1965, c. 700, s. 1; 1967, c. 24, s. 25; 1969, c. 1115, s. 1.)

**Editor's Note.**—The 1967 amendment, "per page" near the end of the section, originally effective Oct. 1, 1967, inserted Session Laws 1967, c. 1078, amends the



1967 amendatory act so as to make it effective July 1, 1967.

The 1969 amendment, effective at mid-

night June 30, 1969, rewrote the last sentence.

### § 25-9-407. Information from filing officer.

(2) Upon request of any person, the filing officer shall issue his certificate for which he shall not be liable 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 two dollars (\$2.00) plus one dollar (\$1.00) 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 one dollar (\$1.00) per page. (1965, c. 700, s. 1; 1967, c. 562, s. 1.)

**Editor's Note.** — The 1967 amendment, effective at midnight June 30, 1967, added the first and second sentences of subsection (2). See Editor's note to § 25-1-201.

As subsection (1) was not changed by the amendment, it is not set out.

§ 25-9-408: Repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967.

**Cross Reference.**—See Editor's note to § 25-1-201.

## PART 5.

### DEFAULT.

#### § 25-9-503. Secured party's right to take possession after default.

**Landlord Perfecting Security Interest by Taking Possession Has Priority over Selling Company.**—In an action to determine the right of possession to a piece of property as between a landlord under a lease agreement and a company who sold the property under a conditional sales contract, neither party having filed a financing

statement, the landlord, who perfected his security interest under the lease by taking possession of the property pursuant to § 25-9-503, has priority over the selling company. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

#### § 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition.

**Public or Private Sale.**—The Uniform Commercial Code specifically authorizes the disposition of collateral by either public or private proceedings. *Associates Financial Servs. Corp. v. Welborn*, 269 N.C. 563, 153 S.E.2d 7 (1967).

The statement in the North Carolina Comment to the Uniform Commercial Code appended to this section that "under prior law . . . a public sale had to be held," is not correct, and the authorities cited do not sustain this assertion. *Associates Financial Servs. Corp. v. Welborn*, 269 N.C. 563, 153 S.E.2d 7 (1967).

A provision in a conditional sales contract for private sale of the chattel after default and repossession, is not contrary to statute or public policy of this State, and is valid. *Associates Financial Servs. Corp. v. Welborn*, 269 N.C. 563, 153 S.E.2d 7 (1967).

A stipulation in a chattel mortgage or conditional sales agreement authorizing the creditor to sell the personal property described therein at private sale violated no statute or public policy of this State. *Appliance Buyers Credit Corp. v. Mason*, 269 N.C. 567, 153 S.E.2d 3 (1967) (decided under § 45-21.38 prior to the 1967 amendment thereto).

An authorization in a chattel mortgage or conditional sales agreement permitting a private sale of the personal property, does not relieve the mortgagee, in taking possession of and selling the property, from the duty of acting in the utmost good faith. *Appliance Buyers Credit Corp. v. Mason*, 269 N.C. 567, 153 S.E.2d 3 (1967) (decided under § 45-21.38 prior to the 1967 amendment thereto).

In order to recover a deficiency judgment under a conditional sales contract, plaintiff



had to allege and prove facts showing (1) that defendant executed and delivered to him or his assignor the contract upon which he sued; (2) that defendant was in default under the terms of the contract; (3) lawful repossession and sale of the property or facts establishing the impossibility of such repossession and sale; (4) the application

of the proceeds of the sale; and (5) the amount of the deficiency. *Associates Financial Servs. Corp. v. Welborn*, 269 N.C. 563, 153 S.E.2d 7 (1967) (construing § 45-21.38 prior to the 1967 amendment thereto)

Stated in *Lexington State Bank v. Suburban Printing Co.*, 7 N.C. App. 359, 172 S.E.2d 274 (1970).

**§ 25-9-504.1. Payment of surplus to clerk.** — (1) Any surplus remaining after the application of the proceeds of the sale or other disposition as set out in § 25-9-504 (1) and (2) shall be paid to the person or persons entitled thereto, if the party who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale or other disposition was held, if the disposition took place in this State. If the sale or other disposition took place outside this State, then the secured party or person making the sale or other disposition shall pay said surplus money to the clerk of superior court of any county in this State in which the secured party or other party conducting the said sale or disposition does business. Said payment discharges the secured party from liability to the extent of the amount so paid. Said clerk of superior court shall accept such surplus from said secured party and shall execute a receipt therefor.

(2) Said clerk of superior court is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto, or until it is paid out under the order of a court of competent jurisdiction. (1967, c. 562, s. 3.)

**Editor's Note.** — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

**§ 25-9-504.2. Special proceedings to determine ownership of surplus.**—(1) A special proceeding may be instituted before the clerk of superior court by any person claiming any portion of the surplus paid into the clerk's office under § 25-9-504.1, to determine who is entitled thereto.

(2) All other persons who have filed with the clerk notice of their claim to the aforesaid surplus or any part thereof, or who, as far as the petitioner(s) know, asserts any claim to said surplus or any part thereof, shall be made defendants in the proceeding.

(3) If any answer is filed raising issues of fact as to the ownership of the surplus (money), the proceeding shall be transferred to the civil issue docket of the district or superior court for trial.

(4) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who have asserted a claim to the fund by petition or answer. (1967, c. 562, s. 3.)

**Editor's Note.** — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

**§ 25-9-508. Application of statute of limitations to serial notes.**—When a series of notes maturing at different times is secured by a security agreement and the exercise of the power of sale or foreclosure for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale or foreclosure for the satisfaction of indebtedness represented by other notes of the series not so barred. (1967, c. 562, s. 3.)

**Editor's Note.** — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

**§ 25-9-509. Power of sale barred when foreclosure barred.**—(1) Except as provided in subsection (2), no person shall exercise any power of sale



contained in any security agreement, or provided by statute, when an action to foreclose the lien contained in said security agreement is barred by the statute of limitations.

(2) If a sale pursuant to a power of sale contained in a security agreement, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose the lien of such security agreement, the sale may be completed, although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of public sale is first posted or published as provided in this article (1967, c. 562, s. 3.)

**Editor's Note.** — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

## PART 6.

### PUBLIC SALE PROCEDURES.

**§ 25-9-601. Disposition of collateral by public sale.**—Disposition of collateral by public proceedings as permitted by § 25-9-504 may be made in accordance with the provisions of this part. The provisions of this part are not mandatory for disposition by public proceedings, but any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in this part shall conclusively be deemed to be commercially reasonable in all aspects. (1967, c. 562, s. 3.)

**Editor's Note.** — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

**§ 25-9-602. Contents of notice of sale.**—The notice of sale shall substantially:

- (a) Refer to the security agreement pursuant to which the sale is held;
- (b) Designate the date, hour and place of sale consistent with the provisions of the security agreement and the provisions found in part 6 of article 9 of chapter 25 of the General Statutes;
- (c) Describe personal property to be sold substantially as it is described in the security agreement pursuant to which the power of sale is being exercised, and may add such further description as will acquaint bidders with the nature of the property;
- (d) State the terms of the sale provided by the security agreement pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale;
- (e) Include any other provisions required by the security agreement to be included therein; and
- (f) State that the property will be sold subject to taxes and special assessments if it is to be so sold. (1967, c. 562, s. 3.)

**Cross Reference.**—See Editor's note to § 25-9-601.

**§ 25-9-603. Posting and mailing notice of sale.**—(1) In each public sale conducted hereunder, the notice of sale shall be posted on a bulletin board provided for the posting of such legal notices, in the courthouse, in the county in which the sale is to be held, for at least five days immediately preceding the sale.

(2) In addition to the posting of notice required by subsection (1), the secured party or other party holding such public sale shall, at least five days before the date of sale, mail by registered or certified mail a copy of the notice of sale to each debtor obligated under the security agreement:

- (a) At the actual address of the debtors, if known to the secured party, or
- (b) At the address, if any, furnished the secured party, in writing, by the debtors, or otherwise at the last known address.



(3) In addition to mailing a copy of the notice of sale to each debtor, the secured party or other party holding such sale shall, except in the case of consumer goods, also mail a copy of said notice by registered or certified mail to any other person who has a security interest in the collateral and who has duly filed a financing statement, which is on record in the proper filing office twenty days prior to the date of sale or who is known by the secured party to have a security interest in the collateral. (1967, c. 562, s. 3; 1969, c. 1115, s. 1.)

**Cross Reference.**—See Editor's note to effective at midnight June 30, 1969, rewrote § 25-9-601. subsection (3).

**Editor's Note.** — The 1969 amendment,

**§ 25-9-604. Exception as to perishable property.**—If, in the opinion of a secured party about to conduct a public sale of personal property hereunder, the property is perishable because subject to rapid deterioration or threatens to decline speedily in value, he may report such fact, together with a description of the property to the clerk of the superior court of the county in which the property is to be sold, and apply for authority to sell the property at an earlier date than is provided in this article. Upon the clerk's determination that the property is such perishable or speedily depreciating property, he shall order a sale thereof to be held at such time and place and upon such notice, if any, as he deems advisable. (1967, c. 562, s. 3.)

**Cross Reference.**—See Editor's note to § 25-9-601.

**§ 25-9-605. Postponement of public sale.**—(1) Any person exercising a power of sale or conducting a public sale hereunder may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale:

- (a) When there are no bidders, or
  - (b) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
  - (c) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable in his judgment, to hold the sale on that day, or
  - (d) When he is unable to hold the sale because of illness or for other good reason, or
  - (e) When other good cause exists.
- (2) Upon postponement of a public sale, the person exercising the power of sale shall personally, or through his agent or attorney:
- (a) At the time and place advertised for the sale, publicly announce the postponement thereof, and
  - (b) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted on the bulletin board provided therefor, as provided by G.S. 25-9-603, a notice of the postponement.
- (3) The posted notice of postponement shall:
- (a) State that the public sale is postponed,
  - (b) State the hour and date to which the public sale is postponed,
  - (c) Substantially state the reason for the postponement, and
  - (d) Be signed by the person authorized to hold the public sale, or by his agent or attorney.
- (4) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to hold the public sale may readvertise the property in the same manner as he was required to advertise the sale which was not held, and may hold a public sale at such later date as is fixed in the new notice of sale. (1967, c. 562, s. 3.)

**Cross Reference.**—See Editor's note to § 25-9-601.



**§ 25-9-606. Procedure upon dissolution of order restraining or enjoining sale.**—(1) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, as provided in G.S. 25-9-603, provide by order that the public sale shall be held without additional notice at the time and place originally fixed therefor; or he may, in his discretion, make an order with respect thereto as provided in subsection (2).

(2) When, after the date fixed for a public sale, a judge dissolves an order restraining or enjoining said sale, he shall, by order, fix the time and place for the sale to be held upon notice to be given and in such manner and for such length of time as he deems advisable. (1967, c. 552, s. 3.)

**Cross Reference.**—See Editor's note to § 25-9-601.

**§ 25-9-607. Disposition of proceeds of sale.**—The proceeds of any sale or other disposition of the collateral shall be applied by the person making the sale in the manner prescribed by § 25-9-504 (1) and (2), § 25-9-504.1 and § 25-9-504.2. (1967, c. 562, s. 3.)

**Cross Reference.**—See Editor's note to § 25-9-601.

ARTICLE 10.

*Effective Date and Repealer.*

**§ 25-10-101. Effective date.**

**Editor's Note.**—For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

Applied in *Yates v. Brown*, 275 N.C. 634, 170 S.E.2d 477 (1969); *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970); *Gore v. George J. Ball, Inc.*, 10 N.C. App. 310, 178 S.E.2d 237 (1971).

Cited in *Redmond v. Lilly*, 273 N.C. 446, 160 S.E.2d 287 (1968); *Southern Nat'l Bank v. Universal Acc. Corp.*, 2 N.C. App. 319, 163 S.E.2d 10 (1968); *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

**§ 25-10-102. Specific repealer; provision for transition.**

**Editor's Note.**—For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

**Section 20-72 Not Repealed.**—It would require a strained interpretation to hold that it was the intention of the General Assembly in adopting the Uniform Commercial Code to repeal the provisions of § 20-

72, relating to transfer of title to motor vehicles, without a mention of that section in the specific repealer. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

**Stated in *Baillie Lumber Co v. Kincaid Carolina Corp.***, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

**§ 25-10-103. General repealer.**

**Motor Vehicles Act Not Repealed.**—The legislature did not intend to repeal the Motor Vehicles Act in the general repealer

section. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

**§ 25-10-105: Repealed by Session Laws 1967, c. 562, s. 3, effective at midnight June 30, 1967.**

**Cross Reference.**—See Editor's note to § 25-1-201.

**§ 25-10-107: Repealed by Session Laws 1967, c. 562, s. 5, effective at midnight June 30, 1967.**

**Cross Reference.**—See Editor's note to § 25-1-201.

## Chapter 25A.

### Retail Installment Sales Act.

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**Editor's Note.**—Session Laws 1971, c. 796, s. 2, provides: "This act shall apply to contracts and transactions entered into on and after January 1, 1972."

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**§ 25A-1. Scope of act.**—This Chapter applies only to consumer credit sales as hereinafter defined, except that G.S. 25A-37, referral sales, applies to all sales of goods or services as provided therein. This Chapter does not apply to a bona fide direct loan transaction in which a lender makes a direct loan to a borrower, and such lender is not regularly engaged, directly or indirectly, in the sale of goods or the furnishing of services as defined in this Chapter.

Except for G.S. 25A-37, referral sales, this Chapter does not apply to any party or transaction that is not also subject to the provisions of the Consumer Credit Protection Act (Federal Truth-in-Lending Act). (1971, c. 796, s. 1.)

**§ 25A-2. "Consumer credit sale" defined.**—(a) Except as provided in subsection (c) of this section, a "consumer credit sale" is a sale of goods or services in which

- (1) The seller is one who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit,
- (2) The buyer is a natural person,



- (3) The goods or services are purchased primarily for a personal, family, household or agricultural purpose,
- (4) Either the debt representing the price of the goods or services is payable in installments or a finance charge is imposed, and
- (5) The amount financed does not exceed twenty-five thousand dollars (\$25,000).

(b) "Sale" includes but is not limited to any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods and services involved, and it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration, has the option to become, the owner of the goods and services upon full compliance with his obligations under such contract.

(c) A sale in which the seller allows the buyer to purchase goods or services pursuant to a credit card issued by someone other than a seller that is engaged in part or entirely in the business of selling goods or services or similar arrangement is not a consumer credit sale. A sale in which the seller allows the buyer to purchase goods or services pursuant to a credit card issued by the seller, a subsidiary or a parent corporation of the seller, a principal supplier of the seller or any corporation having shareholders in common with the seller holding over twenty-five percent (25%) of the voting stock in each corporation is a consumer credit sale within the terms of this Chapter. (1971, c. 796, s. 1.)

§ 25A-3. "Payable in installments" defined.—A debt is "payable in installments" when the buyer is required or permitted by agreement to make payment in more than four installments, excluding a down payment, and whether or not a finance charge is imposed by the seller. (1971, c. 796, s. 1.)

§ 25A-4. "Goods" defined.—(a) "Goods" means all things which are moveable at the time of the sale or at the time the buyer takes possession, including goods not in existence at the time the transaction is entered into and goods which are furnished or used at the time of sale or subsequently in modernization, rehabilitation, repair, alteration, improvement or construction on real property so as to become a part thereof whether or not they are severable therefrom. "Goods" also includes merchandise certificates.

(b) "Merchandise certificate" means a writing issued by a seller not redeemable in cash and usable in its face amount in lieu of cash in exchange for goods and services. (1971, c. 796, s. 1.)

§ 25A-5. "Services" defined.—(a) "Services" includes:

- (1) Work, labor, and other personal services; and
- (2) Privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals and other similar services.

(b) "Services" does not include:

- (1) Services for which the cost is by law fixed or approved by or filed with or subject to approval or disapproval by the United States or the State of North Carolina or any agency, instrumentality or subdivision thereof;
- (2) Insurance premiums financing covered by G.S. 58-55 through G.S. 58-61.2; or
- (3) Insurance provided by an insurer that is licensed to do business in this State. (1971, c. 796, s. 1.)

§ 25A-6. "Seller" defined.—"Seller" means one regularly engaged in the business of selling goods or services. Unless otherwise provided, "seller" also means and includes an assignee of the seller's right to payment but use of the term

does not itself impose on an assignee any obligation of the seller with respect to events occurring before the assignment. (1971, c. 796, s. 1.)

§ **25A-7. "Cash price" defined.**—"Cash price" of goods and services means the price at which the goods or services are offered for sale by the seller to cash buyers in the ordinary course of business and may include

- (1) Applicable sales, use, and excise and documentary stamp taxes; and
- (2) The cash price of accessories or related services such as installation, delivery, servicing, repairs or alterations. (1971, c. 796, s. 1.)

§ **25A-8. "Finance charge" defined.**—(a) "Finance charge" means the sum of all charges payable directly or indirectly by the buyer and imposed by the seller as an incident to the extension of credit, including any of the following types of charges which are applicable:

- (1) Interest, time price differential, service, carrying or other similar charge however denominated;
- (2) Premium or other charges for any guarantee or insurance protecting the seller against the buyer's default or other credit loss;
- (3) Loan fee, finder's fee or similar charge; and
- (4) Fee for an appraisal, investigation or credit report.

(b) Finance charge does not include transfer of equity fees, substitution of collateral fees, default or delinquency charges, or additional charges for insurance as permitted by G.S. 25A-17 or charges for insurance excluded by Section 226.4(a) of Regulation Z promulgated pursuant to Section 105 of the Consumer Credit Protection Act.

(c) With respect to a transaction in which the seller acquires a security interest in real property, finance charge does not include charges excluded by section 226.4(e) of Regulation Z promulgated pursuant to section 105 of the Consumer Credit Protection Act. (1971, c. 796, s. 1.)

§ **25A-9. "Amount financed" defined.**—(a) "Amount financed" means the total of the following to the extent that payment is deferred by the seller:

- (1) The cash price of the goods or services less the amount of any down payment whether made in cash or property traded in,
- (2) The amount actually paid or to be paid by the seller pursuant to an agreement with the buyer to discharge a security interest or lien on property traded in,
- (3) Additional charges for insurance described in G.S. 25A-8(b) and charges referred to in G.S. 25A-8(c), and
- (4) Official fees as described in G.S. 25A-10, to the extent they are itemized and disclosed to the buyer.

(b) If not included in the cash price, the amount financed includes any applicable sales, use or documentary stamp taxes and any amount actually paid or to be paid by the seller for registration, certificate of title or license fees. (1971, c. 796, s. 1.)

§ **25A-10. "Official fees" defined.**—"Official fees" means

- (1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest related to a consumer credit sale; or
- (2) Premiums payable for insurance in lieu of perfecting a security interest otherwise required by the seller in connection with a consumer credit sale if the premium does not exceed the fees or charges described in subdivision (1) of this section which would otherwise be payable. (1971, c. 796, s. 1.)



§ 25A-11. "Revolving charge account contract" defined.—"Revolving charge account contract" means an agreement or understanding between a seller and a buyer under which consumer credit sales may be made from time to time, under the terms of which a finance charge or service charge is to be computed in relation to the buyer's unpaid balance from time to time, and under which the buyer has the privilege of paying the balance in full or in installments. This definition shall not affect the meaning of the term "revolving charge account" appearing in G.S. 24-11(a). (1971, c. 796, s. 1.)

§ 25A-12. "Consumer credit installment sale contract" defined.—"Consumer credit installment sale contract" means the agreement between a buyer and a seller in a consumer credit sale other than a sale made pursuant to a revolving charge account. (1971, c. 796, s. 1.)

§ 25A-13. "Consumer Credit Protection Act" defined.—"Consumer Credit Protection Act" means the Consumer Credit Protection Act, an act of Congress of May 29, 1968, as amended (Public Law 90-321; 82 Stat. 146; 15 U.S.C. 1601 et seq.), and regulations and rulings promulgated thereunder. (1971, c. 796, s. 1.)

§ 25A-14. Finance charge rates for revolving charge account contracts.—(a) The finance-charge rate for a consumer credit sale made pursuant to a revolving charge account contract may not exceed the rates provided for revolving credit by G.S. 24-11(a).

(b) In the event the revolving charge account contract is secured in whole or in part by a security interest in real property, then the finance-charge rate shall not exceed the rate set out in G.S. 25A-15(d).

(c) No default or deferral charge shall be imposed by the seller in connection with a revolving charge-account contract, except as specifically provided for in G.S. 24-11(a). (1971, c. 796, s. 1.)

§ 25A-15. Finance charge rates for consumer credit installment sale contracts.—(a) With respect to a consumer credit installment sale contract, a seller may contract for and receive a finance charge not exceeding that permitted by this section. For the purposes of this section, the finance charge rates are the rates that are required to be disclosed by the Consumer Credit Protection Act.

(b) Except as hereinafter provided, the finance charge rate for a consumer credit installment sales contract may not exceed:

- (1) Twenty-two percent (22%) per annum where the amount financed is less than one thousand five hundred dollars (\$1,500),
- (2) Twenty percent (20%) per annum where the amount financed is one thousand five hundred dollars (\$1,500) or greater, but less than two thousand dollars (\$2,000),
- (3) Eighteen percent (18%) per annum where the amount financed is two thousand dollars (\$2,000) or greater, but less than three thousand dollars (\$3,000),
- (4) Sixteen percent (16%) per annum where the amount financed is three thousand dollars (\$3,000) or greater, but less than five thousand dollars (\$5,000), and
- (5) Fourteen percent (14%) per annum where the amount financed is five thousand dollars (\$5,000) or greater,

except that a minimum finance charge of five dollars (\$5.00) may be imposed.

(c) Notwithstanding the provisions of subsection (b) of this section, a finance charge rate not to exceed twenty-nine percent (29%) per annum may be imposed in a consumer credit installment sale contract repayable in not less than six installments for a self-propelled motor vehicle which is three model years or older



in age at the time of the sale and the amount financed does not exceed one thousand five hundred dollars (\$1,500), except that a minimum finance charge of fifteen dollars (\$15.00) may be imposed.

(d) Notwithstanding the provisions of subsections (b) and (c), above, in the event that the amount financed in a consumer credit sale contract is secured in whole or in part by a security interest in real property, the finance charge rate may not exceed twelve percent (12%) per annum.

(e) A seller may not divide a single credit sale transaction into two or more sales to avoid the limitations as to maximum finance charges imposed by this section. (1971, c. 796, s. 1.)

**§ 25A-16. Transfer of equity.**—If a buyer voluntarily transfers his rights in collateral pursuant to G.S. 25-9-311 and the seller agrees, the seller may impose a transfer fee not to exceed ten percent (10%) of the unpaid balance of the debt or thirty-five dollars (\$35.00), whichever is less. (1971, c. 796, s. 1.)

**§ 25A-17. Additional charges for insurance.**—(a) As to revolving charge account contracts defined in G.S. 25A-11, in addition to the finance charges permitted in G.S. 24-11(a), a seller in a consumer credit sale may contract for and receive additional charges or premiums for insurance written in connection with any consumer credit sale, against loss of or damage to property securing the debt pursuant to G.S. 25A-23, provided a clear, conspicuous and specific statement in writing is furnished by the seller to the buyer setting forth the cost of the insurance if obtained from or through the seller and stating that the buyer may choose the insurer through which the insurance is obtained.

(b) As to revolving charge account contracts defined in G.S. 25A-11, insurance that is required by a seller and is not an additional charge permitted by subsection (a) of this section, shall be included in the finance charge as computed according to G.S. 24-11(a).

(c) As to consumer credit installment sale contracts defined in G.S. 25A-12, in addition to the finance charges permitted in G.S. 25A-15, a seller in a consumer credit sale may contract for and receive additional charges or premiums (i) for insurance written in connection with any consumer credit sale, for loss of or damage to property or against liability arising out of the ownership or use of property, provided a clear, conspicuous and specific statement in writing is furnished by the seller to the buyer setting forth the cost of the insurance if obtained from or through the seller and stating that the buyer may choose the person through which the insurance is to be obtained; (ii) for credit life, accident, health or loss of income insurance, written in connection with any consumer credit sale, provided the insurance coverage is not required by the seller and this fact is clearly and conspicuously disclosed in writing to the buyer; and any buyer desiring such insurance coverage gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance. (1971, c. 796, s. 1.)

**§ 25A-18. Confession of judgment.**—A buyer may not authorize any person to confess judgment on a claim arising out of a consumer credit sale. An authorization in violation of this section is void. (1971, c. 796, s. 1.)

**§ 25A-19. Acceleration.**—With respect to a consumer credit sale, the agreement may not provide for repossession of any goods or acceleration of the time when any part or all of the time balance becomes payable other than for breach by the buyer of any promise or condition clearly set forth in the agreement. (1971, c. 796, s. 1.)

**§ 25A-20. Disclaimer of warranty.**—With respect to any consumer credit sale, the agreement may not contain any provision limiting, excluding, modify-



ing or in any manner altering the terms of any express warranty given by any seller (excluding assignees) to any buyer and made a part of the basis of the bargain between the original parties. (1971, c. 796, s. 1.)

§ **25A-21. Attorneys' fees.**—With respect to a consumer credit sale:

- (1) In the event that the seller institutes a suit and prevails in the litigation and obtains a money judgment, the presiding judge shall allow a reasonable attorney's fee to the duly licensed attorney representing the seller in such suit, said attorney's fee to be taxed to the buyer as part of the court costs.
- (2) In the event that a seller instituting suit does not prevail in the litigation, the presiding judge shall allow a reasonable attorney's fee to the duly licensed attorney representing the buyer in such suit, said attorney's fee to be taxed to the seller as a part of the court costs. (1971, c. 796, s. 1.)

§ **25A-22. Receipts for payments; return of title documents upon full payment.**—(a) When any payment is made under any consumer credit sale transaction, the person receiving such payment shall, if the payment is made in cash, give the buyer a written receipt therefor. If the buyer specifies that the payment is made on one of several obligations, the receipt shall so state.

(b) Upon the payment of all sums for which the buyer is obligated under a consumer credit sale, the seller shall promptly release any security interest in accordance with the terms of G.S. 25-9-404 or G.S. 20-58.4, whichever is applicable. In the event a security interest in real property is involved, the seller shall take such action as is necessary to enable the lien to be discharged of record under the provisions of G.S. 45-37. (1971, c. 796, s. 1.)

§ **25A-23. Collateral taken by the seller.**—(a) The seller in a consumer credit sale may take a security interest only in the following property of the buyer to secure the debt arising from the sale:

- (1) The property sold,
- (2) Property previously sold by the seller to the buyer and in which the seller has an existing security interest,
- (3) Personal property to which the property sold is installed, if the amount financed is more than three hundred dollars (\$300.00),
- (4) Real property to which the property sold is affixed, if the amount financed is more than one thousand dollars (\$1,000), and
- (5) A self-propelled motor vehicle to which repairs are made, if the amount financed exceeds one hundred dollars (\$100.00).

(b) A security interest taken in property other than that permitted in subsection (a) of this section shall be void and not enforceable.

(c) Nothing in this section shall affect any right or liens granted by Chapter 44A of the General Statutes. (1971, c. 796, s. 1.)

§ **25A-24. Identification of instruments of indebtedness.**—With respect to consumer credit sales, each instrument of indebtedness shall be identified on the face of the instrument as a consumer credit document, or otherwise clearly indicate on its face that it arises out of a consumer credit sale, provided, that such designation of an instrument of indebtedness regarding a sale which is not by definition a "consumer credit sale," shall not solely because of such designation cause the transaction to be a consumer credit sale. (1971, c. 796, s. 1.)

§ **25A-25. Defenses.**—(a) In a consumer credit sale, if the debt is secured in whole or in part by a security interest in real property, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any defenses available against the original seller, and



the buyer may not waive these defenses in connection with a consumer credit sale transaction.

(b) In a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any defenses available against the original seller, and the buyer may not waive these defenses in connection with a consumer credit sale transaction, except that in a consumer credit sale of personal property, the buyer shall be considered to have waived his defenses against an assignee of the seller who acquires the instrument or instruments of indebtedness in good faith and for value, if the buyer, following delivery of the property and after receiving from the assignee separate written notice of the waiver and the assignment containing the name and address of the assignee, fails for 30 days to notify the assignee of any defense against the seller; provided, however, a buyer may not waive defenses for fraud in the inducement or for failure of consideration. (1971, c. 796, s. 1.)

**§ 25A-26. Substitution of collateral.**—Subject to the provisions of G.S. 25A-23, if all involved parties agree, there may be a substitution of collateral under a security instrument in a consumer credit sale. For such substitution, the seller may impose a fee not to exceed ten percent (10%) of the unpaid balance of the debt or fifteen dollars (\$15.00), whichever is less. (1971, c. 796, s. 1.)

**§ 25A-27. Application of payments.**—(a) Where a seller in a consumer credit sale makes a subsequent sale to a buyer and takes a security interest pursuant to G.S. 25A-23 in goods previously purchased by the buyer from the seller, the seller shall make application of payments received, for the purpose of determining the amount of the debt secured by the various security interests, as follows:

- (1) The entire amount of all payments made prior to such subsequent purchase shall be deemed to have been applied to the previous purchases, and
- (2) Unless otherwise designated by the buyer, the amount of down payment on such subsequent purchase shall be applied entirely to such subsequent purchase, and
- (3) All subsequent payments shall be applied to the various purchases in the same proportion or ratio as the original cash prices of the various purchases bear to one another, except that, where the amount of the payments is increased after the subsequent purchase, the seller shall have the option to apply the amount of the increase to the subsequent sale and the balance of the subsequent payments to all sales on a cash price pro rata basis.

(b) Where a seller and a buyer agree to consolidate two or more consumer credit installment sale contracts pursuant to G.S. 25A-31, the seller shall apply payments received, for the purpose of determining the amount of the debt secured by the various security interests, as follows:

- (1) The entire amount of all payments received prior to the consolidation shall be applied to the respective contracts under which the payments were made, and
- (2) All subsequent payments shall be applied to the various contracts in the same proportion or ratio as the original cash prices in the various contracts bear to one another, except that, where the amount of the installment payments is increased after the consolidation the seller shall have the option to apply the amount of the increase to the contract last executed and the balance of subsequent payments to all contracts on a cash price pro rata basis. (1971, c. 796, s. 1.)

**§ 25A-28. Form of consumer credit installment sale contract.**—Every consumer credit installment sale contract shall be in writing, dated and signed by the buyer. (1971, c. 796, s. 1.)



§ **25A-29. Default charges.**—If any installment is past due for 10 days or more according to the original terms of the consumer credit installment sale contract, a default charge may be made in an amount not to exceed five percent (5%) of the installment past due or six dollars (\$6.00), whichever is the lesser. A default charge may be imposed only one time for each default.

If a default charge is deducted from a payment made on the contract and such deduction results in a subsequent default on a subsequent payment, no default charge may be imposed for such default.

If a default charge has been once imposed with respect to a particular default in payment, no default charge shall be imposed with respect to any future payments which would not have been in default except for the previous default.

A default charge for any particular default shall be deemed to have been waived by the seller unless, within 45 days following the default, (i) the charge is collected or (ii) written notice of the charge is sent to the buyer. (1971, c. 796, s. 1.)

§ **25A-30. Deferral charges.**—(a) A seller may, by agreement with the buyer, defer the due date of all or any part of one or more installments under an existing consumer credit installment sale contract.

(b) Except as provided by subsections (e) and (f) of this section, a deferral agreement must be in writing, dated and signed by the parties.

(c) A deferral agreement may provide for a deferral charge not to exceed the rate of one and one-half percent (1½%) of each installment for each month from the date which such installment or part thereof would otherwise have been payable to the date when such installment or part thereof is made payable under the deferral agreement.

(d) If a deferral charge is made pursuant to a deferral agreement, a default charge provided in G.S. 25A-29 may be imposed only if the installment as deferred is not paid when due and no new deferral agreement is entered into with respect to that installment.

(e) If the deferral agreement extends the due date of only one installment, the agreement need not be in writing.

(f) A deferral agreement for which no charge is made shall not be subject to subsections (b), (c) or (d) of this section. (1971, c. 796, s. 1.)

§ **25A-31. Consolidation and refinancing.**—(a) A seller and a buyer may agree at any time to refinance an existing consumer credit installment sale contract or to consolidate into a single debt repayable on a single schedule of payments, two or more consumer credit installment sale contracts.

(b) A refinancing or consolidation agreement must be in writing, dated and signed by the parties.

(c) The refinancing or consolidation agreement may provide for a finance charge which shall not exceed the rates provided in G.S. 25A-15, with the amount financed being the unpaid time balance of the contract or contracts refinanced or consolidated, less the rebate provided by G.S. 25A-32. In computing the rebate to be credited to the previous time balances for purposes of this section, no prepayment charge shall be imposed. (1971, c. 796, s. 1.)

§ **25A-32. Rebates on prepayment.**—Notwithstanding any provision in a consumer credit installment sale contract to the contrary, any buyer may satisfy the debt in full at any time before maturity, and in so satisfying such debt, shall receive a rebate, the amount of which shall be computed under the "rule of 78's," as follows:

"The amount of such rebate shall represent as great a proportion of the finance charge (less a prepayment charge of ten percent (10%) of the unpaid balance, not to exceed twenty-five dollars (\$25.00)) as the sum of the periodical time balances after the date of prepayment in full bears to the sum of all the periodical time balances under the schedule of payments in the original contract." No rebate is required if the amount thereof is less than one dollar (\$1.00).



If the prepayment is made otherwise than on the due date of an installment, it shall be deemed to have been made on the installment due date nearest in time to the actual date of payment.

If a seller obtains a judgment on a debt arising out of a consumer credit installment sale or the seller repossesses the collateral securing the debt, the seller shall credit the buyer with a rebate as if the payment in full had been made on the date the judgment was obtained or 15 days after the repossession occurred. If the seller obtains a judgment and repossesses the collateral, the seller shall credit the buyer with a rebate as if payment in full had been made on the date of the judgment or 15 days after the repossession, whichever occurs earlier. (1971, c. 796, s. 1.)

**§ 25A-33. Terms of payments.**—A consumer credit installment sale contract shall provide for complete payment of all charges due under the contract, including the amount financed, the finance charge, and additional insurance charges, if any, within a period from the time of the sale of

- (1) Forty-two months, if the amount financed is less than one thousand five hundred dollars (\$1,500), or
- (2) Sixty-four months, if the amount financed is one thousand five hundred dollars (\$1,500) or greater, but less than two thousand five hundred dollars (\$2,500), or
- (3) One hundred and twenty-two months, if the amount financed is two thousand five hundred dollars (\$2,500) or [or] greater, but less than five thousand dollars (\$5,000), or
- (4) One hundred and eighty-two months, if the amount financed is five thousand dollars (\$5,000) or greater, but less than ten thousand dollars (\$10,000), or
- (5) As the contract provides, if the amount financed is ten thousand dollars (\$10,000) or greater.

The provisions of this section shall not apply to a consumer credit installment sale contract executed in connection with any financing which is insured under regulations of the Federal Housing Administration or the Veterans Administration. (1971, c. 796, s. 1.)

**§ 25A-34. Balloon payments.**—With respect to a consumer credit sale, other than one pursuant to a revolving charge account, no scheduled payment may be more than ten percent (10%) (except the final payment may be twenty-five percent (25%)) larger than the average of earlier scheduled payments. This provision does not apply when the payment schedule is adjusted to the seasonal or irregular income of the buyer. (1971, c. 796, s. 1.)

**§ 25A-35. Statement of account.**—(a) One time during each 12-month period following execution of a consumer credit installment sale contract and when the buyer repays the debt early, the buyer shall be entitled upon request and without charge to a statement of account from the seller. The statement of account shall contain the following information identified as such in the statement:

- (1) The itemized amounts paid by or on behalf of the buyer to the date of the statement of account, except that upon early termination of the contract by prepayment or otherwise, the statement shall include itemized charges for expenses of repossession, storage and legal expenses;
- (2) The itemized amounts, if any, which have become due but remain unpaid, including any charges for defaults, expenses of repossession and deferral charges;
- (3) The number of installment payments and the dollar amount of each installment not due but still to be paid and the remaining period the contract is to run.



(b) The buyer may request and shall be entitled to additional statements of account but for such additional statements the seller may impose a charge of one dollar (\$1.00).

(c) If the buyer requests information for income tax purposes as to the amount of the finance charges, the seller shall provide such information within 30 days without charge but only once in each calendar year. (1971, c. 796, s. 1.)

§ **25A-36. Certificates of insurance and rebates.**—(a) Within 45 days following the purchase of insurance by the buyer from or through the seller, the seller shall deliver, send or cause to be sent to the buyer a policy or policies of such insurance or a certificate or certificates thereof. If such insurance is cancelled, or the premium adjusted, any rebate received by the seller shall be promptly applied to the purchase of other similar insurance, credited to the buyer's account, or rebated to the buyer. Unless otherwise required by law or the provisions of the policy, rebates of cancelled insurance shall be computed under the rule of 78's, without the deduction of a prepayment charge.

(b) In those cases where the insurance premium is added in the contract, and the buyer did not actually pay the premium, the return premium plus unearned finance charge on the amount of returned premium (at the same rate as used in the contract) shall be credited to the unpaid balance of the contract. If the required insurance premium is adjusted upward by the insurance company or is added in accordance with the contract, the buyer, after 10 days' notice,

- (1) May pay the additional premium, or
- (2) Have the additional premium plus finance charge (at the same rate as used in the contract) added to the unpaid balance and spread equally over the remaining installments not yet due, provided, the seller may require a buyer who wishes to finance such additional premium to be financed by the seller in accordance with North Carolina insurance regulations. (1971, c. 796, s. 1.)

§ **25A-37. Referral sales.**—The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful. Any obligation of a buyer arising under such a sale shall be void and a nullity and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale. (1971, c. 796, s. 1.)

§ **25A-38. "Home-solicitation sale" defined.**—"Home-solicitation sale" means a consumer credit sale of goods or services in which the seller or a person acting for him engages in a personal solicitation of the sale at a residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller or a person acting for him. It does not include

- (1) A sale made to a buyer who has previously engaged in a similar business transaction with the seller;
- (2) A sale made pursuant to a preexisting revolving charge account;
- (3) A sale made pursuant to negotiations between the parties on the premises of a business establishment at a fixed location where such goods or services are offered or exhibited for sale;
- (4) A sale which is regulated by the provisions of Section 226.9 of Regulation Z promulgated pursuant to Section 105 of the Consumer Credit Protection Act; or
- (5) Sales of personal wearing apparel, motor vehicles defined in G.S. 20-286(10), farm equipment and goods and services utilized in connection with funeral services. (1971, c. 796, s. 1.)



§ 25A-39. **Buyer's right to cancel.**—(a) Except as provided in subsection (e) of this section, in addition to any right otherwise to revoke an offer, the buyer has the right to cancel a home-solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase which complies with G.S. 25A-40.

(b) Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement or offer to purchase.

(c) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed and postage prepaid.

(d) Unless the seller complies with G.S. 25A-40(b), notice of cancellation given by the buyer need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the home-solicitation sale.

(e) The buyer may not cancel a home-solicitation sale if the buyer requests the seller in a separate writing to provide goods or services without delay because of an urgency or an emergency, and

- (1) The seller in good faith makes a substantial beginning of performance of the contract before the buyer gives notification of cancellation,
- (2) In the case of goods, the goods cannot be returned to the seller in substantially as good condition as when received by the buyer, and
- (3) Unless the buyer returns the goods, if any, to the seller at his expense.

(f) A buyer, who has not received delivery of the goods and services from the seller in a home-solicitation sale within 30 days following the execution of the contract (and such delay is the fault of the seller), shall have the right at any time thereafter before acceptance of the goods and services to rescind the contract and to receive a refund of all payments made and to a return of all goods traded in to the seller on account of or in contemplation of such contract, or if the goods traded in cannot or are not returned to the buyer within 10 days after cancellation, the buyer may elect to recover an amount equal to the trade-in allowance stated in the contract. By written agreement, the buyer may agree to a later time for the delivery of goods and services. (1971, c. 796, s. 1.)

§ 25A-40. **Form of agreement or offer; statement of buyer's rights.**

—(a) In a home-solicitation sale, unless the buyer requests the seller to provide goods or services without delay in an urgency or an emergency, the seller must present to the buyer and obtain his signature to a written agreement or offer to purchase which designates as the date of the transaction the date on which the buyer actually signs and contains a statement of the buyer's rights which complies with subsection (b) of this section.

(b) The statement must

- (1) Appear under the conspicuous caption: "BUYER'S RIGHT TO CANCEL," and
- (2) Read as follows: "If this agreement was solicited at your residence and you do not want the goods or services, you may cancel this agreement by mailing a notice to the seller. The notice (i) must say that you do not want the goods or services, (ii) must be mailed before midnight of the third business day after you sign this agreement and (iii) must state that you are prepared to return any goods received in substantially the same condition as received. The notice must be mailed to:

.....  
(Insert name and mailing address of seller)

If you cancel, the seller may keep all or part of your cash down payment."

If the seller provides the buyer with a copy of the statement as provided herein, notice of cancellation by the buyer not in substantial compliance with the foregoing shall be of no effect. (1971, c. 796, s. 1.)



§ **25A-41. Restoration of down payment; retention of goods; cancellation fee.**—(a) Except as provided in this section, within 10 days after a home-solicitation sale has been cancelled or an offer to purchase revoked in accordance with G.S. 25A-40, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness.

(b) If the down payment includes goods traded in, the goods must be tendered at the buyer's residence in substantially as good condition as when received by the seller. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

(c) The seller may retain as a cancellation fee one percent (1%) of the cash price but not exceeding the amount of the cash down payment. If the seller fails to comply with an obligation imposed by this section, or if the buyer lawfully avoids the sale on any ground independent of his right to cancel or revoke his offer as provided by the provisions of G.S. 25A-39(a), the seller is not entitled to retain a cancellation fee.

(d) Until the seller has complied with the obligations imposed by this section, the buyer may retain possession of goods delivered to him by the seller and has a lien on the goods in his possession or control for any recovery to which he is entitled. (1971, c. 796, s. 1.)

§ **25A-42. Duty of buyer; no compensation for services prior to cancellation.**—(a) Except as provided by the provisions on retention of goods by the buyer (G.S. 25A-41(d)), within a reasonable time after a home-solicitation sale has been cancelled or an offer to purchase revoked, the buyer, upon demand, must tender to the seller any goods delivered by the seller pursuant to the sale but he is not obligated to tender at any place other than his residence if the seller does not have a place of business within 25 miles of the residence of the buyer. If the seller fails to demand possession of goods within a reasonable time after proper cancellation or revocation, and tender, the goods become the property of the buyer without obligation to pay for them. For the purpose of this section, 40 days is presumed to be a reasonable time.

(b) The buyer has a duty of a bailee to take reasonable care of the goods in his possession before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk.

(c) If the seller has performed any services pursuant to a home-solicitation sale prior to its cancellation, the seller is entitled to no compensation except the cancellation fee provided in G.S. 25A-41(c). (1971, c. 796, s. 1.)

§ **25A-43. Unconscionability.**—(a) With respect to a consumer credit sale, if the court finds the agreement or any clause of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

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

(c) As used in this section, "unconscionable" shall mean totally unreasonable under all of the circumstances. (1971, c. 796, s. 1.)

§ **25A-44. Remedies and penalties.**—In addition to remedies hereinbefore provided, the following remedies shall apply to consumer credit sales:

(1) In the event that a consumer credit sale contract requires the payment of a finance charge not more than two times in excess of that permitted by this Chapter, the seller or an assignee of the seller shall not

be permitted to recover any finance charge under that contract and, in addition, the seller shall be liable to the buyer in an amount that is two times the amount of any finance charge that has been received by the seller, plus reasonable attorney's fees incurred by the buyer as determined by the court. However, if the requirement of an excess charge results from an accidental or good faith error, the seller shall be liable only for the amount by which the finance charge exceeds the rates permitted by this Chapter.

- (2) In the event that a consumer credit sale contract requires the payment of a finance charge more than two times that permitted by this Chapter, the contract shall be void. The buyer may, at his option, retain without any liability any goods delivered under such a contract and the seller or an assignee of the rights shall not be entitled to recover anything under such contract.
- (3) In the event the seller or an assignee of the seller (i) shall fail to make any rebate required by G.S. 25A-32 or G.S. 25A-36, (ii) shall charge and receive fees or charges in excess of those specifically authorized by this Chapter, or (iii) shall charge and receive sums not authorized by this Chapter, the buyer shall be entitled to demand and receive the rebate due and excessive or unauthorized charges. Ten days after receiving written request therefor, the seller shall be liable to the buyer for an amount equal to three times the sum of any rebate due and all improper charges which have not been rebated or refunded within the 10-day period.
- (4) The knowing and willful violation of any provision of this Chapter shall constitute an unfair trade practice under G.S. 75-1.1. (1971, c. 796, s. 1.)

§ 25A-45. **Conflict with Consumer Credit Protection Act.**—In all cases of irreconcilable conflict between the provisions of this Chapter and the provisions of the Consumer Credit Protection Act, the provisions of the Consumer Credit Protection Act shall control. (1971, ch. 796, s. 3.)

## STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

*November 1, 1971*

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1971 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

ROBERT MORGAN

*Attorney General of North Carolina*



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