HE GENERAL STATUTES OF NORTH CAROLINA

1981 CUMULATIVE SUPPLEMENT

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

Under the Direction of
D. P. HARRIMAN, S. C. WILLARD, SYLVIA FAULKNER AND D. E. SELBY, JR.

Volume 1D

1965 Replacement

Annotated through 302 N.C. 222 and 50 N.C. App. 567. For complete scope of annotations, see scope of volume page.

Place in Pocket of Corresponding Volume of Main Set. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA
1981

Preface

This Cumulative Supplement to Replacement Volume 1D contains the general laws of a permanent nature enacted by the General Assembly at the 1966, 1967, 1969 and 1971 Sessions, the First and Second 1973, 1975, 1977 and 1979 Sessions and the 1981 Session through October 10, 1981, which are within the scope of such volume, and brings to date the annotations included therein. At the First 1973 Session, the General Assembly enacted Session Laws 1973, Chapters 1 to 826. At the Second 1973 Session, which was held in 1974, the General Assembly enacted Session Laws 1973, Chapters 827 to 1482.

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 all sections except catchlines carried for the purpose of notes only. An index to all statutes codified herein will appear in Replacement Volumes 4B and 4C.

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 30 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 by the General Assembly at the 1967, 1969 and 1971 Sessions, the First and Second 1973, 1975, 1977 and 1979 Sessions and the 1981 Session through October 10, 1981 affecting Chapters 21 through 27 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports through volume 302, p. 222.
North Carolina Court of Appeals Reports through volume 50, p. 567.
Federal Reporter 2nd Series through volume 650, p. 292.
Federal Supplement through volume 515, p. 55.
Federal Rules Decisions through volume 89, p. 719.
Bankruptcy Reporter through volume 11, p. 138.
United States Reports through volume 449, p. 410.
Supreme Court Reporter through volume 101, p. 2881.
North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

The General Statutes of North Carolina 1981 Cumulative Supplement

VOLUME 1D

Chapter 21.

Bills of Lading.

Article 5.

Criminal Offenses.

ARTICLE 5.

Criminal Offenses.

§ 21-42. Issuing false bills or violating Chapter made felony.

Any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment in this State, or with intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing, or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates or fails to comply with, or aids in any violation of, or failure to comply with any provision of this Chapter, shall be guilty of a Class I felony. (1919, c. 65, s. 41; c. 290; C. S., s. 323; 1979, 2nd Sess., c. 1316, s. 23.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class I felony" for "felony and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or both" at the end of the section. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Chapter 22.

Contracts Requiring Writing.

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

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

For note discussing the application of the main purpose rule in the statute of frauds, see 54 N.C.L. Rev. 117 (1975).

CASE NOTES

I. IN GENERAL.

Section 75-4 is consistent with the other "statute of frauds" provisions in the law, including this section and § 25-2-201(a). Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

Applied in Howard v. Hamilton, 28 N.C. App. 670, 222 S.E.2d 913 (1976); Mack Fin. Corp. v. Harnett Transf., Inc., 42 N.C. App. 116, 256 S.E.2d 491 (1979).

Cited in Chance v. Jackson, 17 N.C. App. 638, 195 S.E.2d 321 (1973); Bowling v. Hines, 17 N.C. App. 697, 195 S.E.2d 377 (1973).

III. PROMISE TO ANSWER FOR DEBT OF ANOTHER.

A. In General.

Or to Promise Creating Original Obligation. —

In accord with 3rd paragraph in original. See Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

There has been carved out an exception to this section where the promisor has such a direct, immediate, pecuniary interest in the subject matter of the principal debtor's contract so as to indicate that the guarantor has intended to adopt the original contract as his own. This exception is known as the "main purpose rule." Burlington Indus., Inc. v. Foil, 19 N.C. App. 172, 198 S.E.2d 194 (1973), aff'd, 284 N.C. 740, 202 S.E.2d 591 (1974).

North Carolina has long recognized an exception to the statute of frauds, generally referred to as either the "main purpose rule" or the "leading object rule." Generally, if it is concluded that the promisor has the requisite personal, immediate and pecuniary interest in the transaction in which a third party is the primary obligor, then the promise is said to be original rather than collateral and therefore need not be in writing to be binding. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974); McKenzie Supply Co. v. Motel Dev. Unit 2, Inc., 32 N.C. App. 199, 231 S.E.2d 201 (1977); Bassett Furn. Indus. of N.C., Inc. v. Griggs, 47 N.C. App. 104, 266 S.E.2d 702 (1980).

The promise to pay the debt of another is outside this section and enforceable if the promise is supported by an independent and sufficient consideration running to the promisor. This rule is generally referred to as the "main purpose rule" or the "leading object rule." McKenzie Supply Co. v. Motel Dev. Unit 2, Inc., 32 N.C. App. 199, 231 S.E.2d 201 (1977).

What Determines Nature of Promise as Original or Collateral. —

In accord with 2nd paragraph in original. See Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

The main purpose rule is applicable when a court has determined that the promisor's answering for the debt or default of another is merely incidental to his broader purposes. He is participating in the principal contract and making its obligation his own. The expected advantage to the promisor must be such as to justify the conclusion that his main purpose in making the promise is to advance his own interests. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974); Bassett Furn. Indus. of N.C., Inc. v. Griggs, 47 N.C. App. 104, 266 S.E.2d 702 (1980).

The benefit to be derived from one's ownership of stock or holding the position of an officer or director is too indirect or remote to invoke the application of the main purpose rule. Something more — some other expected benefit or advantage to be gained by making the promise — is required to make the main purpose rule applicable. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

B. Illustrative Cases.

Persons who sign a note with the 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).

A letter written by defendant as president of a corporation would be insufficient to constitute a definite promise to answer for the debt of another within the meaning of this section where the letter does not establish what amount the defendant would pay plaintiff, the date payment would be made, or the event that would determine when payment would be due. Marvel Lamp Co. v. Capel, 45 N.C. App. 105, 262 S.E.2d 368, cert. denied, 300 N.C. 197, 269 S.E.2d 617 (1980).

Promises by Stockholders, Officers, or Directors to Pay Debt of Corporation. — When the main purpose rule is applied to promises by stockholders, officers, or directors, to pay a debt of the corporation, it may be said that the promise is original where the promisor's primary object was to secure some direct and personal benefit from the performance by the promisee of his contract with the corporation, or from the latter's refraining from exercising against the corporation some right existing in him by virtue of the contract. Bassett Furn. Indus. of N.C., Inc. v. Griggs, 47 N.C. App. 104, 266 S.E.2d 702 (1980).

The benefit to the promisor is to be distinquished from the indirect benefit which would accrue to him merely by virtue of his position as a stockholder, officer, or director. If the benefit accruing is direct and personal, then the promise is original within the rule above discussed, and the validity thereof is not affected by the statute of frauds. Bassett Furn. Indus. of N.C., Inc. v. Griggs, 47 N.C. App. 104, 266 S.E.2d 702 (1980).

Promise of a corporate chairman who was the main stockholder in a school to stand good for the debt of the school to be incurred for the printing of catalogues was not in writing and was within the statute of frauds, but since the art studio which had contracted in its name for the printing offered evidence to invoke the application of the "main purpose rule," which is a well-known exception to the rule requiring that such promises be evidenced by a written memorandum, the question should have gone to the jury. Stuart Studio, Inc. v. National School of Heavy Equip., Inc., 25 N.C. App. 544, 214 S.E.2d 192 (1975).

Agreement to Assume Indebtedness for Equipment Installed in Restaurant. — An agreement whereby the purchaser of a restaurant assumed the original owner's indebtedness for equipment installed in the restaurant, and the seller of the equipment released the original owner from liability, was neither a promise to answer for the debt of another nor a contract for the sale of goods for $500 or more, and the statute of frauds did not apply. Thompson & Little, Inc. v. Colvin, 46 N.C. App. 774, 266 S.E.2d 46 (1980).

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

Legal Periodicals. — 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).

For note on the sufficiency of a will as a memorandum for purposes of the statute of frauds, see 54 N.C.L. Rev. 976 (1976).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

CASE NOTES

I. IN GENERAL.

Moreover, Parol Trust in Favor of Grantor Is Invalid. —

Except in cases of fraud, mistake, or undue influence, parol trusts or agreements will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on its face that such title was intended to pass. Rourk v. Brunswick County, 46 N.C. App. 795, 266 S.E.2d 401 (1980).

A deed is a contract which must meet the requirements of the statute of frauds. Overton v. Boyce, 26 N.C. App. 680, 217 S.E.2d 704 (1975), rev'd on other grounds, 289 N.C. 291, 221 S.E.2d 347 (1976).

This section has no application to parol trusts. —

State courts have tried to avoid the sometimes harsh results that a strict application of the statute of frauds would bring to unknowing and uneducated persons. It has been avoided on occasion by the application of a parol trust. Britt v. Allen, 21 N.C. App. 497, 204 S.E.2d 903 (1974).

Parol trust device is used to prevent a party from retaining property unfairly after purchasing it as the agent for another party. Britt v. Allen, 27 N.C. App. 122, 218 S.E.2d 218 (1975), aff'd in part, rev'd in part, 291 N.C. 630, 231 S.E.2d 607 (1977).

This section is applicable to option contracts for the purchase of property. Craig

v. Kessing, 36 N.C. App. 389, 244 S.E.2d 721 (1978), aff'd, 297 N.C. 32, 253 S.E.2d 264 (1979).

To be specifically enforceable an option-contract must meet the requirements of the statute of frauds. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Statute Is Not Applicable to Abrogation, etc. —

A lease which is required by the statute of frauds to be in writing may be rescinded orally by the mutual assent of both parties. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), rev'd on other grounds, 283 N.C. 277, 196 S.E.2d 262 (1973).

Even though a contract is one which would terminate at the promisee's death, the promisor may waive this feature of the contract and does so where he permits others, associated with the promisee in his lifetime in rendering the performance, to continue after his death and accepts such performance without giving notice within a reasonable time of an intention to consider the obligation as ended. Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

Recovery on Quantum Meruit. — Failure to prove a special contract would not preclude plaintiffs from having their case submitted to the jury if their evidence was sufficient to support a recovery based on quantum meruit. Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

Applied in Henry v. Shore, 18 N.C. App. 463, 197 S.E.2d 270 (1973); Britt v. Allen, 37 N.C. App. 732, 247 S.E.2d 17 (1978); Pierce v. Gaddy, 42 N.C. App. 622, 257 S.E.2d 459 (1979); Stallings v. Purvis, 42 N.C. App. 690, 257 S.E.2d 664 (1979); Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979).

Cited in Bundy v. Ayscue, 5 N.C. App. 581, 169 S.E.2d 87 (1969); Cornatzer v. Nicks, 14 N.C. App. 152, 187 S.E.2d 385 (1972); Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973).

II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.

An easement, etc. —

An easement is an interest in land and is subject to the statute of frauds. Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

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 2nd paragraph in original. See Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

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).

Valid Written Contract to Devise Land Is Enforceable. — Although an oral contract to devise land is unenforceable, a valid written contract to devise land is enforceable in equity. Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

An indivisible contract to devise, etc. —

In accord with original. See Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970); Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

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, cert. denied, 278 N.C. 702, 181 S.E.2d 603 (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).

In North Carolina a negative easement comes within the statute of frauds, and it cannot be proved by parol evidence. Peoples Serv. Drug Stores, Inc. v. Mayfair, 50 N.C. App. 442, — S.E.2d — (1981).

Construction of House. — This section does not apply to the construction of a house, as compared to a house already built, because a house not-built is not an "interest in realty." Smith v. Hudson, 48 N.C. App. 347, 269 S.E.2d 172 (1980).

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

No special form or instrument, etc. —

A memorandum, by its very nature, is an informal instrument, and the statute of frauds does not require that it be in any particular form. Hurdle v. White, 34 N.C. App. 644, 239 S.E.2d 589 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

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).

Where under all the circumstances the meaning of the writing including the description is clear and certain, it is sufficient to comply with the statute of frauds and bind the parties. Mezzanotte v. Freeland, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

A check can be a sufficient memorandum, provided it contains expressly or by necessary implication the essential elements of an agreement to sell. Hurdle v. White, 34 N.C. App. 644, 239 S.E.2d 589 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Essential elements of an agreement to sell include a designation of the vendor, the vendee, the purchase price, and a description of the land, the subject-matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. Hurdle v. White, 34 N.C. App. 644, 239 S.E.2d 589 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

The agreement must adequately express, etc. —

In accord with 1st paragraph in original. See Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

In accord with 2nd paragraph in original. See Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

Writing Must Describe Subject Matter. —

In accord with second paragraph in original. See Mezzanotte v. Freeland, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

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).

Omission from the memorandum of time of performance is not fatal. Where no time of performance is stated, the law implies that the option must be exercised within a reasonable time. Hurdle v. White, 34 N.C. App. 644, 239 S.E.2d 589 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

There Must Be No Patent Ambiguity. —

In accord with original. See Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

When Patent Ambiguity Exists. —

In accord with original. See Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

When a description in a contract to convey land leaves the land in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty, it is patently ambiguous and parol evidence is not admissible to aid the description. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

When description in contract to convey land is patently ambiguous the deed or contract is void. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Whether a description in a contract to convey land is patently ambiguous is a question of law. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Latent Ambiguity in Description. — A description in a contract to convey land is latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

A description is said to be latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made. Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

Patent and Latent Ambiguities Compared. — A patent ambiguity raises a question of construction; a latent ambiguity raises a question of identity. Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

If the ambiguity is latent, evidence dehors the contract is both competent and necessary. Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

Sufficiency of Description. —

In accord with 2nd paragraph in original. See Carlton v. Anderson, 276 N.C. 564, 173 S.E.2d 783 (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).

The writings must disclose, at least with sufficient definiteness to be aided by parol, the terms of the contract, the names of the parties, and a description of the property. Greenberg v. Bailey, 14 N.C. App. 34, 187 S.E.2d 505 (1972).

The designation of a tract of land by its popular name is sufficient under the statute of frauds to permit the introduction of extrinsic evidence to identify the particular tract intended. Hurdle v. White, 34 N.C. App. 644, 239 S.E.2d 589 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Statement of Price Not Always Required. — Where the vendor is the party to be charged, the statute of frauds does not require that the price be stated in writing. Hurdle v. White, 34 N.C. App. 644, 239 S.E.2d 589 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

In a contract for the sale of land, where the vendor is the party to be charged it is not necessary that the price be stated in writing. Northwestern Bank v. Church, 43 N.C. App. 538, 259 S.E.2d 313 (1979), cert. denied, 299 N.C. 328, 265 S.E.2d 397 (1980).

Omission from the memorandum of the manner of payment is not fatal. Where the contract fails to specify the manner and form of payment, the contract is construed to require payment to be made in cash simultaneously with tender or delivery of the deed. Hurdle v. White, 34 N.C. App. 644, 239 S.E.2d 589 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Requisites of Deeds. —

A valid contract to convey land must contain expressly or by necessary implication all the essential features of an agreement to sell, one of which is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

A contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, must contain a description of the land, the subject matter of the contract, which is either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. Watts v. Ridenhour, 27 N.C. App. 8, 217 S.E.2d 211 (1975).

A contract to convey a part of a tract of land, to be valid, must definitely identify the portion to be conveyed or designate the means or source by which it can be positively identified. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

A contract to convey, excepting a part of the land described, is valid provided land excepted can be identified. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

A contract to convey 200 acres of a larger described tract is saved from patent ambiguity by the provision that the acreage is "to be determined by a new survey furnished by the sellers." Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Excepted property in a contract to convey land is described with sufficient certainty if the exact location thereof is left to the election of the grantor or is capable of subsequent ascertainment otherwise. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Grant of Easement. — No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms. The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements. Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

Easement Not Void for Uncertainty of Location. — When the grant does describe with reasonable certainty the easement created and the dominant and servient tenements, but does not definitely locate it, the easement is not held void for uncertainty under the statute of frauds, but instead, the grantee is entitled to a reasonable and convenient way located in the manner and within the limits set forth in the grant. Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

And an easement may be located by the practical location by the grantee, acquiesced in by the grantor. Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

Conveyance of Remainder. — In a contract to convey land, once lands to be retained by the sellers are surveyed and the description of the property obtained, a conveyance, excepting the land to be retained by metes and bounds as shown by the survey, operates as a conveyance of the remainder. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

An agreement conditioned upon a party's obtaining financing was a valid and enforceable contract, supported by consideration. The contract included an implied promise by the party seeking financing to use reasonable effort to procure a loan and to exercise good faith in deciding whether the terms of the loan were satisfactory. Mezzanotte v. Freeland, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

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).

Will Not Sufficient, etc. —

In accord with 2nd paragraph in original. See Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

Memorandum Sufficient to Devise Property. — Memorandum which designates the property to be devised, identifies the parties, sets forth their respective obligations as consideration for their contract, and is signed by the party to be charged therewith, was sufficient as a memorandum to devise "for the purposes of the statute of frauds." Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

Joint Will May Be Sufficient. — Under certain circumstances a joint will may itself be a sufficient memorandum of an agreement between the parties to the will to satisfy the statute of frauds. Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

The memorandum need not be contained in a single document, etc. —

In accord with 1st paragraph in original. See Mezzanotte v. Freeland, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

In accord with 2nd paragraph in original. See Greenberg v. Bailey, 14 N.C. App. 34, 187 S.E.2d 505 (1972).

Contract when considered together with a separate sheet of "Attachment" constituted a memorandum sufficient to satisfy the statute of frauds, where the contract specifically stated that the tract being sold was "more particularly described in Attachment hereof." Mezzanotte v. Freeland, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

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. —

In accord with 1st paragraph in original. See Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

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).

The owner of real estate may sell such property through an agent, and when so acting the owner is not required to sign the agreement or to communicate with the purchaser. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

The agent may sign the contract to sell and convey in his own name or in the name of his principal or principals. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

The authority of a duly authorized agent to contract to convey lands need not be in writing under the statute of frauds. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

The authority of an agent to sell the lands of another may be shown aliunde or by parol. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

The owner of land may sell this land through an agent and the agent may sign a contract to sell and convey in his own name or in the name of his principal(s). Hayman v. Ross, 22 N.C. App. 624, 207 S.E.2d 348 (1974).

When Broker May Sign for Both Parties. — Ordinarily, a broker does not act in a dual capacity as the representative of both sides to a negotiation, but only as the agent of the party who first employed him. Once a deal is concluded, however, the law permits him to act as the representative of both parties if they assent thereto, for the purpose of signing a memorandum sufficient to take the transaction out of the statute of frauds. Hayman v. Ross, 22 N.C. App. 624, 207 S.E.2d 348 (1974).

A subsequent ratification of an unauthorized signing will make it valid within this section. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

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).

Proving Contract Required to Be in Writing. — A contract which the law requires to be in writing can be proved only by the writing itself, not as the best but as the only admissible evidence of its existence. Severe v. Penny, 48 N.C. App. 730, 269 S.E.2d 760 (1980).

Parol evidence is incompetent to establish an entire contract to convey land, and summary judgment was properly entered for defendants in an action for specific performance of an alleged contract to convey land where plaintiffs were unable to produce a written contract or any written memorandum of a contract to convey signed by the parties to be charged. Severe v. Penny, 48 N.C. App. 730, 269 S.E.2d 760 (1980).

Parol Evidence Competent When Description Latently Ambiguous. — Where a description is latently ambiguous plaintiff may offer evidence, parol and other, with reference to extrinsic matter tending to identify the property, and defendant may offer such evidence with reference thereto tending to show impossibility of identification, i.e., ambiguity. Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

But parol evidence cannot vary unambiguous terms of a written contract to convey real property. McCay v. Morris, 46 N.C. App. 791, 266 S.E.2d 5 (1980).

Testimony tending to show an oral agreement in direct conflict with the deed is incompetent. Rourk v. Brunswick County, 46 N.C. App. 795, 266 S.E.2d 401 (1980).

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).

Evidence to Show Husband's Authority to Act as Wife's Agent. — Where plaintiffs alleged and defendants denied that plaintiff entered into a binding contract with both defendants, plaintiffs were free to offer such evidence as they might have to show that the husband-defendant was authorized by his wife to act as her agent to contract to sell the lands belonging to both as tenants by the entirety. There was no necessity that plaintiffs allege that the contract was executed by the feme defendant through an agent. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

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 22A.

Signatures.

Sec.
22A-1. Use of a signature facsimile by a visually handicapped person.

§ 22A-1. Use of a signature facsimile by a visually handicapped person.

A visually handicapped person, as defined in G.S. 111-11, may use a registered signature facsimile as a proper mark of his legal signature. An example of the signature facsimile shall be registered by the visually handicapped person with the clerk of the superior court in the county of his domicile. The registered signature facsimile may be revoked at any time in writing by the visually handicapped person. (1973, c. 878.)

Chapter 22B.

Contracts Against Public Policy.

Article 1.

Construction Indemnity Agreements Invalid.

Sec.

ARTICLE 1.

Construction Indemnity Agreements Invalid.

§ 22B-1. Construction indemnity agreements invalid.

Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees. This section shall not affect an insurance contract, workmen's compensation, or any other agreement issued by an insuror, nor shall this section apply to promises or agreements under which a public utility as defined in G.S. 62-3(23) including a railroad corporation as an indemnitee. This section shall not apply to contracts entered into by the Department of Transportation pursuant to G.S. 136-28.1. (1979, c. 597, s. 1.)

Editor's Note. — Session Laws 1979, c. 597, s. 2 provides: "This act shall become effective July 1, 1979, and shall apply to contracts signed on or after the effective date."

The former Workmen's Compensation Act is now the Workers' Compensation Act. See §§ 97-1, 97-1.1.

Chapter 23.

Debtor and Creditor.

Article 1.

Assignments for Benefit of Creditors.

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

CASE NOTES

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. —

In accord with original. See Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

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); Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980).

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

CASE NOTES

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).

§ 23-3. Trustee to recover property conveyed fraudulently or in preference.

CASE NOTES

Applied in Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

ARTICLE 3.

Trustee for Estate of Debtor Imprisoned for Crime.

§ 23-18. Persons who may apply for trustee for imprisoned debtor.

When any debtor is imprisoned in the penitentiary for any term, or in a county jail for any term more than 12 months, application by petition may be made by any creditor, the debtor, or by his or her spouse, or any of his or her relatives, for the appointment of a trustee to take charge of the estate of such debtor. (1868-9, c. 162, s. 40; Code, s. 2974; Rev., s. 1943; C. S., s. 1626; 1977, c. 549.)

Effect of Amendments. — The 1977 amendment substituted "his or her spouse, or any of his or her" for "his wife, or any of his."

ARTICLE 4.

Discharge of Insolvent Debtors.

§ 23-23. Insolvent debtor's oath.

CASE NOTES

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.

Legal Periodicals. — For note on imprisonment of an indigent at low per diem rate for failure to pay fine, see 6 Wake Forest Intra. L. Rev. 509 (1970).

CASE NOTES

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.)

Effect of Amendments. — 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.)

Effect of Amendments. — 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.)

Effect of Amendments. — 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. (1868-9, c. 162, s. 10; Code, s. 2951; Rev., s. 1920; C. S., s. 1637; 1967, c. 24, s. 5.)

Effect of Amendments. — 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.

CASE NOTES

Cited in Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 23-30.1. Provisional release.

Every person who has filed a petition under the provisions of G.S. 23-30 shall be brought before a judge within 72 hours after filing the petition and shall be provisionally released from imprisonment unless a hearing shall be held and the creditor shall establish that the prisoner has fraudulently concealed assets. If, at the time he is brought before a judge, the prisoner makes a showing of indigency, the judge shall appoint counsel for him. A provisional release under this section shall not constitute a discharge of the debtor, and the creditor may oppose the discharge by suggesting fraud even if he has unsuccessfully attempted to oppose the provisional release on the basis of fraudulent concealment. The debtor may be provisionally released even though actual service upon the creditor has not been accomplished if 72 hours has passed since the debtor delivered the notice to the sheriff for service upon the creditor. (1977, c. 649, s. 5.)

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

§ 23-32. Notice; length of notice and to whom given.

CASE NOTES

Constitutionality. — The 20-day notice requirement of this section is constitutionally deficient and may not be enforced. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C.), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

This section postpones unconscionably and unconstitutionally, as a violation of procedural due process, the right of one imprisoned to have his day in court. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C.), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

Reasonable notice to be required pending legislative correction of constitutional infirmity. — See Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C.), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

§ 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 appoint 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.)

Effect of Amendments. — 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.

CASE NOTES

Applied in Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 23-36. Where fraud in issue, discharge only after trial.

CASE NOTES

Applied in Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 23-37. If fraud found, debtor imprisoned.

CASE NOTES

Applied in Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 23-38. Effect of order of discharge.

CASE NOTES

Discharge under section distinguished from release under § 23-32. — See Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C.), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

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.)

Effect of Amendments. — The 1971 amendment, effective Oct. 1, 1971, inserted "or district" near the middle of the section.

Chapter 24.

Interest.

Article 1.

General Provisions.

Article 2.

Loans Secured by Secondary or Junior Mortgages.

Article 1.

General Provisions.

§ 24-1. Legal rate is eight percent.

The legal rate of interest shall be eight percent (8%) per annum for such time as interest may accrue, and no more. (1876-7, c. 91; Code, s. 3835; 1895, c. 69; Rev., s. 1950; C.S., s. 2305; 1979, 2nd Sess., c. 1157, s. 1.)

Editor's Note. —

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

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, raised the legal rate of interest from six percent per annum to eight percent per annum. Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

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

CASE NOTES

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).

In the absence of an agreement, the injured party in cases involving breach of contract is entitled to interest at the legal rate of six percent. Interstate Equip. Co. v. Smith, 292 N.C. 592, 234 S.E.2d 599 (1977).

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 Mtg. &

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); Cordaro v. Singleton, 31 N.C. App. 476, 229 S.E.2d 707 (1976).

§ 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, commitment for a loan or forbearance other than a credit card, open-end, or similar loan may contract in writing for the payment of interest not in excess of:

(1) Where the principal amount is twenty-five thousand dollars ($25,000) or less, the rate set under subdivision (3) of this section; or

(2) Any rate agreed upon by the parties where the principal amount is more than twenty-five thousand dollars ($25,000).

As used in this section, interest shall not be deemed in excess of the rates provided where interest is computed monthly on the outstanding prinicipal balance and is collected not more than 31 days in advance of its due date. Nothing in this section shall be construed to authorize the charging of interest on committed funds prior to the disbursement of said funds.

(3) On the fifteenth day of each month, the Commissioner of Banks shall announce and publish the maximum rate of interest permitted by subdivision (1) of this section on that date. Such rate shall be the latest published noncompetitive rate for U.S. Treasury bills with a six-month maturity as of the fifteenth day of the month plus six percent (6%), rounded upward or downward, as the case may be, to the nearest one-half of one percent (½ of 1%) or sixteen percent (16%), whichever is greater. If there is no nearest one-half of one percent (½ of 1%), the Commissioner shall round downward to the lower one-half of one percent (½ of 1%). The rate so announced shall be the maximum rate permitted for the term of loans made under this section during the following calendar month. (1969, c. 1303, s. 1; 1977, c. 778, ss. 1, 3; c. 779, s. 1; 1979, c. 138, s. 1; 1981, c. 464, s. 1; c. 934, s. 1.)

Cross References. — For permissible late payment charges, see § 24-10.

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.

Effect of Amendments. — The first 1977 amendment inserted "commitment for a loan" in the introductory language of the first sentence and in the second sentence and added the last sentence.

The second 1977 amendment substituted "one hundred thousand dollars ($100,000) or less" for "more than fifty thousand dollars ($50,000.00) but not more than one hundred thousand dollars ($100,000.00)" in subdivision (2). Session Laws 1977, c. 779, s. 3, provides: "This act shall apply only to loans or loan commitments made after the effective date of this act." The act was ratified June 28, 1977.

The 1979 amendment rewrote this section.

Session Laws 1977, c. 779, s. 4, contains a severability clause.

The first 1981 amendment inserted "other than a credit card, open-end, or similar loan," in the introductory paragraph, deleted "Twelve percent (12%) per annum" at the beginning of subdivision (1) and added "the rate set under subdivision (3) of this section" in subdivision (1), and added subdivision (3). Session Laws 1981, c. 465, s. 3, provides, that the amendment to this section "shall become effective ten days after ratification except that the Commissioner of Banks shall have the authority to set a maximum rate effective on such tenth day as if this act had been in effect thirty days prior to ratification." The act was ratified May 28, 1981.

The second 1981 amendment rewrote the last sentence of subdivision (3).

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

A service charge taken for the creditor's forbearance from collecting on a portion of a debt owed to it is subject to the usury laws. Western Auto Supply Co. v. Vick, 47 N.C. App. 701, 268 S.E.2d 842, cert. granted, 301 N.C. 400, 273 S.E.2d 451 (1980).

Forbearance Agreement Held Not Usurious. — A forbearance agreement secured by a second deed of trust and executed after the effective date of former subdivision (3) was not usurious in providing for interest of 9% per annum, notwithstanding the note to which the forbearance agreement related was executed prior to the effective date of that subdivision and at a time when the maximum rate of interest was 6%. Ausband v. Wachovia Bank & Trust Co., 17 N.C. App. 325, 194 S.E.2d 160, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973).

Cited in Equilease Corp. v. Belk Hotel Corp., 42 N.C. App. 436, 256 S.E.2d 836 (1979); Haanebrink v. Meyer, 47 N.C. App. 646, 267 S.E.2d 598 (1980).

§ 24-1.1A. Contract rates on home loans secured by first mortgages or first deeds of trust.

(a) Notwithstanding any other provision of this Chapter, parties to a home loan may contract in writing as follows:

(1) Where the principal amount is ten thousand dollars ($10,000) or more the parties may contract for the payment of interest as agreed upon by the parties;

(2) Where the principal amount is less than ten thousand dollars ($10,000) the parties may contract for the payment of interest as agreed upon by the parties, if the lender is either (i) approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a national mortgage association or any federal agency; or (ii) a local or foreign bank, savings and loan association or service corporation wholly owned by one or more savings and loan associations and permitted by law to make home loans, credit union or insurance company; or (iii) a State or federal agency;

(3) Where the principal amount is less than ten thousand dollars ($10,000) and the lender is not a lender described in the preceding subdivision (2) the parties may contract for the payment of interest not in excess of ten percent (10%) per annum.

(b) No prepayment fees shall be contracted by the borrower and lender with respect to any home loan where the principal amount borrowed is one hundred thousand dollars ($100,000) or less; otherwise a lender and a borrower may agree on any terms as to the prepayment of a home loan.

(c) Except as limited by subsection (b) above, a lender may charge to the borrower the fees described in G.S. 24-10.

(d) The loans or investments regulated by G.S. 53-45 shall not be subject to the provisions of this section.

(e) The term "home loan" shall mean a loan where the principal amount is less than three hundred thousand dollars ($300,000) secured by a first mortgage or first deed of trust on real estate upon which there is located or there is to be located one or more single-family dwellings or dwelling units.

(f) Any home loan obligation existing before June 13, 1977, shall be construed with regard to the law existing at the time the home loan or commitment to lend was made and this act shall only apply to home loans or loan commitments made from and after June 13, 1977; provided, however, that variable rate home loan obligations executed prior to April 3, 1974, which by their terms provide that the interest rate shall be decreased and may be increased in accordance with a stated cost of money formula or other index

shall be enforceable according to the terms and tenor of said written obligations.

(g) The parties to a home loan governed by G.S. 24-1.1A(a) (1) or (2) may contract in writing to defer payments of interest and for payment of interest on deferred interest as agreed upon by the parties. The parties may agree in writing that said deferred interest may be added to the principal balance of the loan. This subsection shall not be construed to limit payment of interest upon interest in connection with other types of loans.

(h) The parties to a home loan governed by G.S. 24-1.1A(a) (1) or (2) may agree in writing to a mortgage or deed of trust which provides that periodic payments may be graduated during parts of or over the entire term of the loan. The parties to such a loan may also agree in writing to a mortgage or deed of trust which provides that periodic disbursements of part of the loan proceeds may be made by the lender over a period of time agreed upon by the parties, or over a period of time agreed upon by the parties ending with the death of the borrower(s). Such mortgages or deeds of trust may include provisions for adding deferred interest to principal or otherwise providing for charging of interest on deferred interest as agreed upon by the parties. This subsection shall not be construed to limit other types of mortgages or deeds of trust or methods or plans of disbursement or repayment of loans that may be agreed upon by the parties. (1973, c. 1119, ss. 1, 2; 1975, c. 260, s. 1; 1977, c. 542, ss. 1, 2; 1979, c. 362.)

Cross References. — For permissible late payment charges, see § 24-10. As to priority of security instruments securing certain home loans, see § 45-80.

Editor's Note. — Session Laws 1973, c. 1119, s. 4, provides: "This act shall become effective upon ratification and shall expire on June 30, 1975. Any real estate obligation existing before the effective date of this act shall be construed with regard to interest rates pursuant to the laws existing prior to the effective date of this act and this act shall only apply to loans or loan commitments made after the effective date of this act." The act was ratified April 3, 1974.

Session Laws 1973, c. 1119, s. 3, contains a severability clause.

Effect of Amendments. — The 1975 amendment rewrote the section.

Session Laws 1977, c. 542, repealed the original section and the 1975 amendatory act and enacted a new § 24-1.1A to read as set out in the subsections (a) through (f) above.

The 1979 amendment added subsections (g) and (h).

Session Laws 1975, c. 260, ss. 2 and 4, provide:

"Sec. 2. Any real estate obligation existing before the effective date of this act shall be construed with regard to interest rates pursuant to the laws existing prior to April 3, 1974, and this act shall only apply to loans or loan commitments made after the effective date of this act.

"Sec. 4. This act shall become effective upon ratification and shall expire on June 30, 1977." The act was ratified May 12, 1975.

Session Laws 1975, c. 260, s. 3, and Session Laws 1977, c. 542, s. 3, contain severability clauses.

Legal Periodicals. — For a note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact higher interest rates from the grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

CASE NOTES

Determining Principal Amount Financed. — The only reasonable interpretation of this statute is that the principal amount financed must be determined on a transaction-by-transaction basis, at least where the transactions are not contemporaneous, and not on the basis of the aggregate amount owing between the parties. Western Auto Supply Co. v. Vick, 47 N.C. App. 701, 268 S.E.2d 842, cert. granted, 301 N.C. 400, 273 S.E.2d 451 (1980).

§ 24-1.1B: Repealed by Session Laws 1979, c. 335.

§ 24-1.1C. Manufactured home loans; variable interest rate loans authorized.

(a) For the purposes of this section, the terms listed herein shall have the following meanings:

(1) "Lender" means a person regularly engaged in the business of selling or financing manufactured homes (i) who is an arranger of credit, or (ii) who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment) and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

(2) "Interest" means finance charge expressed as an annual percentage rate. The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the lender as an incident to or a condition of the extension of credit.

(3) "Manufactured home" shall mean a mobile home, as defined in G.S. 143-145(7), which is used as a residence, whether or not the home is affixed to real property.

(4) "Manufactured home loan" shall include both the credit sale of a manufactured home and a direct loan used to finance the purchase of a manufactured home, in which the seller or lender is secured by:

a. A security interest which is the first lien on a manufactured home and any personal property sold therewith as part of the home,

b. A first or second mortgage or deed of trust on real estate, or

c. A combination of these financing methods.

(b) A manufactured home loan may provide for a fixed rate of interest payable in substantially equal successive installments over a fixed term, or a manufactured home loan may provide that the rate of interest may be adjusted at certain regular intervals. In this latter event, the manufactured home loan shall be subject to the following provisions:

(1) Adjustments in the interest rate charged must be based on changes in a specific index, as set forth in the loan agreement, with the index base being fixed by the value of the index on the first day of the month in which the loan agreement is dated. The index may be only:

a. The monthly average yield on United States Treasury securities adjusted to a constant maturity of five years; or

b. An index expressly approved by the Federal Home Loan Bank Board or by the Office of the Comptroller of the Currency, Department of the Treasury, for adjustable or variable interest rates on residential mortgage loans.

(2) Adjustments to the interest rate may not exceed one-half of one percent (½ of 1%) a year for any six-month period. If the stated regular interval for rate adjustments is a twelve-month period, or longer, rate adjustments may not exceed one percent (1%) a year.

(3) The rate of interest shall not increase or decrease during the six-month period beginning with the date of execution of the loan agreement, and at least six months shall elapse between changes.

(4) Adjustments (either up or down) to the rate of interest on each adjustment date shall, for the initial adjustment, be equal to the difference between the index value for the third calendar month preceding the adjustment date and the index value on the date of execution of the manufactured home loan. For adjustments after the initial adjustment, adjustments shall be equal to the difference between the index value for the third month preceding the adjustment date and the index

value for the third month preceding the date of the immediately preceding rate adjustment.

(5) Any increase in the rate of interest permitted by this section is optional with the lender. Decreases in the rate of interest are mandatory whenever the total decrease in the index value equals or exceeds one fourth of one percentage point.

(6) By agreement of the parties, adjustments to the rate of interest may result in changes in the amount of regular installment payments due under the loan agreement, or in changes in the term of the loan agreement, or in a combination of such changes in amount and term.

(7) A lender shall allow a borrower to prepay in whole or in part at any time without a prepayment penalty.

(8) A lender may not charge any fees to, or assess any costs against, a borrower in connection with the processing of any rate adjustment, term adjustment or combination of rate and term adjustment.

(9) Before execution of a manufactured home loan agreement, the lender shall comply with all applicable requirements and disclosures pursuant to Part I of the Consumer Protection Act (Truth-In-Lending Act) 15 USC § 1601, et seq., as amended, and as implemented by Regulation Z promulgated by the Board of Governors of the Federal Reserve System. The required disclosures shall be made on the basis of the rate of interest in effect at the time the disclosure is made, assuming that each scheduled payment is made on the date it is due and in the scheduled amount. Such disclosures shall include the following information:

a. The circumstances under which the rate may increase;
b. Any limitations on the increase;
c. The effect of an increase; and
d. An example of the payment terms that would result from an increase.

(10) The lender shall send written notification of any rate adjustment, by first class mail, postage prepaid, at least one month before the date that the new rate of interest will take effect. The notification shall comply with all applicable requirements of Part I of the Consumer Protection Act (Truth-In-Lending Act) 15 USC § 1601, et seq., as amended, and as implemented by Regulation Z promulgated by the Board of Governors of the Federal Reserve System. Such notification shall include:

a. The current and new rates of interest;
b. The index value for the month during which the manufactured home loan agreement was executed or, for adjustments after the initial adjustment, the index value used for the immediately preceding rate adjustment, and the index value used to calculate the new change in the rate of interest; and
c. The amounts of new installment payments, if any, and the remaining maturity.

(c) The provisions of Chapter 25A, the Retail Installment Sales Act shall apply to the consumer credit sale of a manufactured home, provided that:

(1) A manufactured home loan shall be subject to Chapter 25A except for G.S. 25A-33(4);

(2) The provisions of this section shall control, where inconsistent with the provisions of Chapter 25A (G.S. 25-34 shall not be construed to limit variation in regular monthly payment amounts on loans under this section.); and

(3) Interest charges on manufactured home loans shall be computed and paid periodically as a percentage of the unpaid principal balance. This percentage shall be computed as the number of days actually elapsed,

times the effective annual percentage rate, divided by 365. Scheduled monthly payments may assume a 30-day month. Payments may be applied first to accrued interest, then to principal. No default charge shall be assessed on loans under this section.

(4) Nothing in this section shall be construed to alter the federal preemption allowing unlimited interest rate ceilings as they apply to first mortgage loans. (1981, c. 970, s. 1.)

§ 24-1.1D. Exempt loans.

Individuals may use any rates established in this Chapter, provided that an individual purchaser may contract with an individual seller for the payment of interest as agreed upon by the parties if such loan is a purchase money loan extended for the purchase of and secured by the principal residence of the seller, such principal residence being thereby conveyed to the purchaser. (1981, c. 465, s. 2.)

Editor's Note. — Session Laws 1981, c. 465, s. 3, provides that this section shall expire on July 1, 1983.

§ 24-1.2. Installment rates.

Except as otherwise provided in this Chapter or other applicable law, the parties to a loan, purchase money loan, advance, commitment for a loan, or forbearance, may contract in writing for the payment of interest not in excess of:

(1) On installment loans not exceeding five thousand dollars ($5,000), which are not secured by a security interest in any degree on real property, which are for periods of not less than six months nor more than 120 months, which are repayable in substantially equal consecutive monthly payments, which shall not be collected in advance, and which shall be computed monthly on the outstanding principal balance, the rate shall not exceed the rates set under subdivision (2a) of this section; 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 this loan without penalty. The due date of the first monthly payment shall not be more than 45 days following disbursement of funds under any such installment loan.

(2) On installment loans not exceeding twenty-five thousand dollars ($25,000), which are not secured by a first security instrument on real property, and which are payable at least quarterly in substantially equal payments of principal and interest, or in substantially equal payments of principal, the rate of interest, computed on the outstanding balance, shall not exceed the rate set under subdivision (2a) of this section: 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.

(2a) On the fifteenth day of each month, the Commissioner of Banks shall announce and publish the maximum rate of interest permitted by subdivisions (1) and (2) of this section. Such rate shall be the latest published noncompetitive rate for U.S. Treasury bills with a six-month maturity as of the fifteenth day of the month plus six percent (6%), rounded upward or downward, as the case may be, to the

nearest one-half of one percent (½ of 1%) or sixteen percent (16%), whichever is greater. If there is no nearest one-half of one percent (½ of 1%), the Commissioner shall round downward to the lower one-half of one percent (½ of 1%). The rate so announced shall be the maximum rate permitted for the term of loans made under this section during the following calendar month.

(3), (4) Repealed by Session Laws 1979, c. 138, s. 3.

(5) Nothing in this section shall be construed to authorize the charging of interest on committed funds prior to the disbursement of said funds. (1969, c. 1303, s. 2; 1971, c. 448; c. 1122, ss. 1, 2; c. 1165; 1977, c. 778, ss. 2, 4; 1979, c. 138, ss. 2, 3; 1981, c. 464, s. 1; c. 934, s. 2.)

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.

Effect of Amendments. — The first 1971 amendment made a change in former subsection (b) (subsequently designated subdivision (2)).

The second 1971 amendment added former subsections (c) and (d) (subsequently redesignated subdivisions (3) and (4) and deleted by the 1979 amendment).

The third 1971 amendment made a change in former subsection (b) (subsequently redesignated subdivision (2)).

The 1977 amendment added the introductory language and present subdivision (5), which was designated subsection (e) in the amendatory act. In view of the introductory language, the editors have redesignated all of the subsections as subdivisions.

The 1979 amendment substituted "twenty-five thousand dollars ($25,000)" for "three hundred thousand dollars ($300,000)" near the beginning of the first sentence of subdivision (2) and repealed subdivisions (3) and (4). Subdivision (3) provided for a maximum interest rate of 10% on installment loans of $50,000 or less secured by a first mortgage or deed of trust on real property, not used as the principal resident of the borrower, repayable within 2 to 10 years in quarterly installments and for prepayment at any time without penalty. Subdivision (4) provided a similar interest rate, on installment loans similarly secured, where the principal was $7,500 or less, and repayment was to be monthly over a period of 1 to 10 years, and contained an identical provision as to prepayment.

The first 1981 amendment rewrote subdivisions (1) and (2) and added subdivision (2a). Session Laws 1981, c. 464, s. 5, provides: "This act shall become effective 10 days after ratification except that the Commissioner of Banks shall have the authority to set a maximum rate effective on such tenth day as if this act had been in effect 30 days prior to ratification." The act was ratified May 28, 1981.

The second 1981 amendment rewrote the last sentence of subdivision (2a).

Legal Periodicals. — For article calling for a comprehensive federal consumer credit code, see 58 N.C.L. Rev. 1 (1979).

CASE NOTES

Cited in Equilease Corp. v. Belk Hotel Corp., 42 N.C. App. 436, 256 S.E.2d 836 (1979).

OPINIONS OF ATTORNEY GENERAL

Mr. Frank L. Harrelson, Commissioner of Banks, 40 N.C.A.G. 54 (1969).

§ 24-1.3: Repealed by Session Laws 1979, 2nd Session, c. 1302, s. 3, effective June 25, 1975.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1302, s. 4, makes the repeal effective retroactively to June 25, 1975.

§ 24-1.4. Parity of interest rates for savings and loan associations.

Notwithstanding any other provision of law, any savings and loan association in North Carolina may contract for interest on any loan, purchase money loan, advance, commitment for a loan or forbearance at any rate permitted by federal law to a savings and loan association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. (1981, c. 282, s. 3.)

Editor's Note. — Session Laws 1981, c. 282, s. 4, makes the act effective May 1, 1981.

§ 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.)

Effect of Amendments. — 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.

Legal Periodicals. — 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).

For comment on equity participation (a device to circumvent usury laws) in real estate finance, see 7 N.C. Cent. L.J. 387 (1976).

CASE NOTES

I. GENERAL CONSIDERATION.

They will be strictly construed. —

In accord with original. See Argo Air, Inc. v. Scott, 18 N.C. App. 506, 197 S.E.2d 256 (1973).

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); State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Effect of Usury, etc. —

The charging of usurious interest strips the debt of all interest, and it simply becomes a loan which in law bears no interest. Hansen v. Jonas W. Kessing Co., 15 N.C. App. 554, 190 S.E.2d 407, cert. denied, 282 N.C. 151, 191 S.E.2d 601 (1972).

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 interest 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, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Western Auto Supply Co. v. Vick, 47 N.C. App. 701, 268 S.E.2d 842, cert. granted, 301 N.C. 400, 273 S.E.2d 451 (1980).

That Is, Intentional Charging of More, etc. —

In accord with lst paragraph in original. See Western Auto Supply Co. v. Vick, 47 N.C. App. 701, 268 S.E.2d 842, cert. granted, 301 N.C. 400, 273 S.E.2d 451 (1980).

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); Argo Air, Inc. v. Scott, 18 N.C. App. 506, 197 S.E.2d 256 (1973).

Should the court determine that the transaction was usurious, the court will (1) eliminate the indebtedness of all interest charged, (2) determine the amount of interest paid, and (3) give plaintiff credit on the indebtedness for twice the amount of interest paid. Argo Air, Inc. v. Scott, 18 N.C. App. 506, 197 S.E.2d 256 (1973).

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 plaintiff's 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).

Intentional Charging Forfeits Entire Interest.—

In accord with 2nd paragraph in original. See Haanebrink v. Meyer, 47 N.C. App. 646, 267 S.E.2d 598 (1980).

The charging which constitutes a forefeiture is the contract, promise or agreement to a usurious rate of interest as opposed to the actual payment of that interest. Haanebrink v. Meyer, 47 N.C. App. 646, 267 S.E.2d 598 (1980).

What Is Forfeiture. — The forfeiture under this section is the taking, receiving, reserving or charging of a usurious rate of interest. Haanebrink v. Meyer, 47 N.C. App. 646, 267 S.E.2d 598 (1980).

Brokerage Commission for Usurious Loan Not Prohibited. — The conduct condemned by the usury statutes is the extraction or reception of more than a specified legal rate for the hire of money, and not for anything else and brokerage commissions may be recovered for negotiating a usurious loan. Hansen v. Jonas W. Kessing Co., 15 N.C. App. 554, 190 S.E.2d 407, cert. denied, 282 N.C. 151, 191 S.E.2d 601 (1972).

Defendant cannot avoid payment for brokerage services simply because the defendant and the lender chose to enter into an agreement which was in violation of the North Carolina usury statutes. There is nothing in this record to show that the plaintiff did more than bring the borrower and the lender together. He did not make the loan or negotiate its terms. Hansen v. Jonas W. Kessing Co., 15 N.C. App. 554, 190 S.E.2d 407, cert. denied, 282 N.C. 151, 191 S.E.2d 601 (1972).

Time Limitation on Forfeiture of Interest for Usury. — There shall be no forfeiture of interest for usury after the expiration of two years from the date of forfeiture under the provisions of this section. Haanebrink v. Meyer, 47 N.C. App. 646, 267 S.E.2d 598 (1980).

Applied in Lexington State Bank v. Suburban Printing Co., 7 N.C. App. 359, 172 S.E.2d 274 (1970); River Dev. Corp. v. Parker Tree Farms, Inc., 12 N.C. App. 1, 182 S.E.2d 211 (1971).

Cited in Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

II. SUBSTANCE CONTROLS NATURE OF TRANSACTION.

A. General Doctrine.

Form of Transaction Cannot Conceal, etc. —

In accord with 3rd paragraph in original. See Western Auto Supply Co. v. Vick, 47 N.C. App. 701, 268 S.E.2d 842, cert. granted, 301 N.C. 400, 273 S.E.2d 451 (1980).

The vitality of the usury statutes would not be maintained by allowing creditors to charge unlawful interest rates merely by disguising the form of their transactions; the court must be concerned with substance and not form. Western Auto Supply Co. v. Vick, 47 N.C. App. 701, 268 S.E.2d 842, cert. granted, 301 N.C. 400, 273 S.E.2d 451 (1980).

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).

A profit, greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposed upon the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned at all events, is a violation of the usury laws, it matters not what form or disguise it may assume. Western Auto Supply Co. v. Vick, 47 N.C. App. 701, 268 S.E.2d 842, cert. granted, 301 N.C. 400, 273 S.E.2d 451 (1980).

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); State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976); Western Auto Supply Co. v. Vick, 47 N.C. App. 701, 268 S.E.2d 842, cert. granted, 301 N.C. 400, 273 S.E.2d 451 (1980).

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); State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

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); State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

The sale of merchandise is not usurious when the sale is made for one price if cash is paid and for a higher price if payment is deferred or made in future installments, so long as the transaction is not a subterfuge to conceal a usurious loan. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Charge for Forbearance in Collection of Debt at End of Payment Period. — The two percent per month service charge sought to be imposed by plaintiff did not constitute a "time price" but was a charge for plaintiff's forbearance in the collection of the debt at the end of the payment period; as such, the two percent per month service charge was interest and usurious. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Requiring Endorsement of Seller as Guaranty of Payment. — It has been repeatedly held in this State that while one may buy a note from another, at any price that may be agreed upon, the bargain being free from fraud or unlawful imposition, if the pur-

chaser requires the endorsement of the seller as a guaranty of payment, the transaction, as between the immediate parties thereto, is in effect a loan, and will be so considered, within the meaning and purport of the laws against usury. Western Auto Supply Co. v. Vick, 47 N.C. App. 701, 268 S.E.2d 842, cert. granted, 301 N.C. 400, 273 S.E.2d 451 (1980).

Where a usurious note called for level monthly payments and the note provided that each payment was to be applied to principal and interest, defendant was entitled to recover twice the amount of interest paid. Equilease Corp. v. Belk Hotel Corp., 42 N.C. App. 436, 256 S.E.2d 836, cert. denied, 298 N.C. 568, 261 S.E.2d 121 (1979).

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, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971).

Where plaintiff failed to show that defendant 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, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971).

§ 24-2.1. Transactions governed by Chapter.

For purposes of this Chapter, any extension of credit shall be deemed to have been made in this State, and therefore subject to the provisions of this Chapter if the lender offers or agrees in this State to lend to a borrower who is a resident of this State, or if such borrower accepts or makes the offer in this State to borrow, regardless of the situs of the contract as specified therein.

Any solicitation or communication to lend, oral or written, originating outside of this State, but forwarded to and received in this State by a borrower who is a resident of this State, shall be deemed to be an offer or agreement to lend in this State.

Any solicitation or communication to borrow, oral or written, originating within this State, from a borrower who is a resident of this State, but forwarded to, and received by a lender outside of this State, shall be deemed to be an acceptance or offer to borrow in this State. (1979, c. 706, s. 3.)

Editor's Note. — Session Laws 1979, c. 706, s. 4, makes this section effective July 1, 1979.

§ 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.)

Effect of Amendments. — 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.

Legal Periodicals. — For comment on equity participation (a device to circumvent usury laws) in real estate finance, see 7 N.C. Cent. L.J. 387 (1976).

§ 24-5. Contacts, except penal bonds, and judgments to bear interest; jury to distinguish principal.

All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. (1786, c. 253, P. R.; 1789, c. 314, s. 4, P. R.; 1807, c. 721, P. R.; R. C., c. 31, s. 90; Code, s. 530; Rev., s. 1954; C. S., s. 2309; 1981, c. 327, s. 1.)

Effect of Amendments. — The 1981 amendment substituted the present second, third and fourth sentences for the former second sentence, which read: "In like manner, the amount of any judgment or decree, except the cost, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section."

Session Laws 1981, c. 327, s. 3, provides that the act shall not apply to pending litigation.

CASE NOTES

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); Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Interest on Costs. — In this State, interest on costs is expressly disallowed by statute. City of Charlotte v. McNeeley, 281 N.C. 684, 190 S.E.2d 179 (1972).

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); Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

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); Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), rev'd on other grounds, 283 N.C. 277, 196 S.E.2d 262 (1973); Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Where the amount of damages can be ascertained from the contract, interest is allowed from the date of the breach. Interstate Equip. Co. v. Smith, 292 N.C. 592, 234 S.E.2d 599 (1977).

Although in construing this provision the rule in North Carolina has been that interest should be allowed from the date of breach, this rule is applicable only when the action is one for breach of contract. State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Interest Provided from Date of Substantial 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).

In an action to enjoin deceptive acts and practices in the sale of antifreeze, interest on the court's judgment ordering defendant to make restoration payments to 33 customers was governed by this section, and should have been awarded only from the time of entry of the judgment. State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Applied in International Harvester Credit Corp. v. Ricks, 16 N.C. App. 491, 192 S.E.2d 707 (1972).

Cited in Hyde v. Land-Of-Sky Regional Council, 572 F.2d 988 (4th Cir. 1978).

OPINIONS OF ATTORNEY GENERAL

Not Applicable When Appearance Bond Forfeited. — See opinion of Attorney General to Mr. Roy R. Holdford, Jr., 41 N.C.A.G. 809 (1972).

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

Except with respect to compensatory damages in actions other than contract as provided in G.S. 24-5, when the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto. (Code, s. 529; Rev., s. 1955; C. S., s. 2311; 1981, c. 327, s. 2.)

Effect of Amendments. — The 1981 amendment substituted "except with respect to compensatory damages in actions other than contract as provided in G.S. 24-5, when" for "When" at the beginning of the section.

Session Laws 1981, c. 327, s. 3, provides that the act shall not apply to to pending litigation.

CASE NOTES

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).

§ 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.)

Effect of Amendments. — 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.

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

For comment on equity participation (a device to circumvent usury laws) in real estate finance, see 7 N.C. Cent. L.J. 387 (1976).

CASE NOTES

It is the making date which controls the ultimate determination whether the loan was usurious under this section. Rosenthal's Bootery, Inc. v. Shavitz, 48 N.C. App. 170, 268 S.E.2d 250 (1980).

Section Applicable to Loan Secured by North Carolina Realty. — Where a loan is secured by real estate located in North Carolina, the loan is subject to the laws of North Carolina relating to interest and usury. Appalachian South, Inc. v. Construction Mtg. Corp., 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (1971).

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 determine 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); Appalachian South, Inc. v. Construction Mtg. Corp., 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (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); Appalachian South, Inc. v. Construction Mtg. Corp., 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (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); Appalachian South, Inc. v. Construction Mtg. Corp., 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (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); Appalachian South, Inc. v. Construction Mtg. Corp., 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (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 counter-

claims 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); Hansen v. Jonas W. Kessing Co., 15 N.C. App. 554, 190 S.E.2d 407 (1972).

§ 24-9. 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 lender may charge and collect from such corporation, interest at any rate which such corporation may agree to pay in writing, 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. (1963, c. 753, s. 1; 1965, c. 335; 1969, c. 896; 1979, c. 138, s. 5.)

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

Effect of Amendments. — The 1969 amendment rewrote the former last sentence, which was deleted by the 1979 amendment.

The 1979 amendment substituted "lender" for "commercial factor" near the middle of the section, deleted "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" after "pay in writing" near the end of the section, and deleted the former second sentence which defined the term "commercial factor."

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

§ 24-9.1. Certain repayments to consumers by public utilities not subject to claim or defense of usury.

Notwithstanding any other provision of this Chapter or any other provision of law, any public utility, as defined by G.S. 62-3, shall pay to its customers such rate of interest as may be required by order of the North Carolina Utilities Commission in transactions wherein the utility is refunding to its customers funds advanced by or overcollected from the customers. As to such transactions, the claim or defense of usury by such public utility and its successors or anyone else in its behalf is prohibited. (1981, c. 461, s. 3.)

§ 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, any fees or discounts unless otherwise allowed where the principal amount is less than three hundred thousand dollars ($300,000) 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, and one percent (1%) on any other type of loan; provided, however, if a single lender makes both the construction loan and a permanent loan utilizing one note, the lender may collect the fees as if they were two separate loans. Except as provided herein or otherwise allowed, no party shall pay for the benefit of the lender any other fees or discounts.

(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 contract 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 to any person, persons, firm or corporation that assumes a loan, made under the provisions of G.S. 24-1.1 and secured by real property, a fee not to exceed one hundred seventy-five dollars ($175.00); provided, however, that if the original obligor is not released from liability on the obligation, the fee shall not exceed one hundred dollars ($100.00). The fees authorized by this subsection may be paid in whole or in part by any party but the total shall not exceed the maximum fees set forth herein.

(e) Any lender may charge a party to a loan made under G.S. 24-1.1A, a late payment charge on any installment of principal, interest, or both in an amount not to exceed four percent (4%) of such installment. The charges authorized by this subsection may not be charged by a lender unless an installment is more than 15 days past due; provided, however, for the purposes of this subsection, a late payment charge may not be charged until an installment is more than 30 days past due where interest on such installment is paid in advance.

(f) Any lender may charge a party to a mortgage loan made under G.S. 24-1.1 a late payment charge in an amount not to exceed four percent (4%) of any installment which is more than 15 days past due. (1967, c. 852, s. 1; 1969, c. 40; c. 1303, s. 6; 1971, c. 1168; 1979, c. 684; c. 849, s. 1; c. 969; 1981, c. 933.)

Editor's Note. — 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.

Effect of Amendments. — 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).

The first 1979 amendment added subsections (e) and (f).

The second 1979 amendment, in the first sentence of subsection (a), substituted "any fees or discounts unless otherwise allowed" for "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" near the beginning of the sentence, substituted "and one percent (1%) on any other type of loan" for "one percent (1%) if a construction loan on a one or two family dwelling, and one percent (1%) if other than a construction loan" near the middle of the sentence, inserted "however" and "both" and substituted "a" for "the" preceding "permanent" in the first proviso, substituted "as if they were two separate loans" for "herein provided for construction loans and the fees for any other construction loans" at the end of the proviso. The amendment also added the second sentence of subsection (a). The second 1979 amendment also added at the end of the first sentence of subsection (a) a second proviso which expired by

the terms of Session Laws 1979, c. 849, s. 2, on June 30, 1981 and which has been omitted in the section as set out above.

The third 1979 amendment, effective June 8, 1979, made a change in the second proviso added to the first sentence of subsection (a) by the second 1979 amendment.

The proviso added to the first sentence of subsection (a) by Session Laws 1979, c. 849, as amended by Session Laws 1979, c. 969, read "provided, in addition to the fees authorized above, a seller or any agent for a seller in a real estate sales transaction may pay to the lender in connection with the making of a loan fees or discounts in the aggregate not to exceed two percent (2%)."

The 1981 amendment, effective Oct. 1, 1981, rewrote subsection (d), which formerly authorized a fee not to exceed one percent of the principal amount due or $25.00, whichever was less, to be charged to any person assuming a loan made under § 24-1.1 where the principal amount assumed was not more than $50,000 and was secured by real property.

Legal Periodicals. — 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).

For a note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact higher interest rates from the grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

CASE NOTES

Cited in Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976).

§ 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 debtor if the account is paid in full within 25 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 computed on the unpaid portion of the balance of the previous month less payments or credit within the billing cycle or the average daily balance outstanding during the current billing period. No person, firm or corporation may charge a discount or fee in excess of six percent (6%) of the principal amount of the accounts acquired from or through any vendors 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 by application of a monthly periodic rate computed on the average daily balance outstanding during the billing period, such rate not to exceed one and one-half percent (1½%).

(c) Any extension of credit under an open-end or similar plan under which there is charged a monthly periodic rate greater than one and one-quarter percent (1¼%) may not be secured by real or personal property or any other thing of value, provided, that this subsection shall not apply to consumer credit sales regulated by Chapter 25A, the Retail Installment Sales Act; provided further, that in any action initiated for the possession of property in which a security interest has been taken, a judgement for the possession thereof shall be restricted to commercial units (as defined in G.S. 25-2-105(6)) for which the cash price was one hundred dollars ($100.00) or more.

(d) The term "billing date" shall mean any date selected by the creditor and the bill for the balance of the account must be mailed to the customer at least 14 days prior to the date specified in the statement as being the date by which payment of the new balance must be made in order to avoid the imposition of

any finance charge. (1967, c. 852, s. 1.1; 1969, c. 1303, s. 7; 1977, c. 148, s. 1; cc. 917, 1108; 1979, 2nd Sess., c. 1330, s. 3; 1981, c. 844, s. 1.)

Editor's Note. — 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.

Effect of Amendments. — 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.

The first 1977 amendment substituted "debtor" for "creditor" near the middle of the first sentence of subsection (a).

The second 1977 amendment, in subsection (a), substituted "debtor" for "creditor," inserted "in full" and "computed," and added "or the average daily balance outstanding during the billing period," all in the first sentence, deleted the former second sentence, which read "Such extension of credit may not be secured by real or personal property or any other thing of value," and substituted "six percent (6%)" for "four percent (4%)" and "vendors" for "vendor" in the present second sentence. In subsection (b), the amendment substituted the language beginning "by application of a monthly periodic rate" for "which shall not exceed one and one-fourth percent (1¼%) per month computed on the average balance outstanding of the previous months" at the end of the subsection and deleted the former second sentence which read "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." The amendment also added subsections (c) and (d).

The third 1977 amendment substituted the language beginning "and the bill for the balance of the account" for "but shall not be earlier than the date any bill for the balance of the account is mailed to the debtor" in subsection (d) as added by the second 1977 amendment.

The 1979, 2nd Sess., amendment substituted "one and one-half percent (1½%)" for "one and one-quarter percent (1¼%) on such balance up to and including five thousand dollars ($5,000), and such rate not to exceed one percent (1%) on such balance in excess of five thousand dollars ($5,000)."

The 1981 amendment, effective Jan. 1, 1982, substituted, near the end of the first sentence in subsection (a), "unpaid portion of the balance of the previous month less payments or credit within the billing cycle" for "unpaid balance of the previous month" and inserted "current" preceding "billing period" at the end of that sentence.

Session Laws 1981, c. 844, s. 2, provides that the act shall not affect pending litigation.

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969). For survey of 1976 case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

For article calling for a comprehensive federal consumer credit code, see 58 N.C.L. Rev. 1 (1979).

CASE NOTES

Section Applicable to Transactions between Merchants. — The application of this section is not limited to "consumer credit sales"; it extends to transactions between merchants as well as transactions involving a consumer. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Open Insurance Account. — Sections 24-11 and 58-56.1 authorize an insurance agent who extends customer credit on an open account to impose a finance charge on his own customers in an amount not to exceed an aggregate annual rate of 18 percent. Hyde Ins. Agency, Inc. v. Noland, 30 N.C. App. 503, 227 S.E.2d 169 (1976).

Imposition of Finance Charges on Open Insurance Account without Prior Express Agreement. — It was the intention of the legislature to authorize the imposition of finance charges on an open insurance account, even though there had not been any prior express agreement between the parties regarding such charges, but such charges could not be imposed unless the debtor was given proper notice that the creditor intended to impose such finance charges. Hyde Ins. Agency, Inc. v. Noland, 30 N.C. App. 503, 227 S.E.2d 169 (1976).

How Amount Due May Be Handled after Relationships Ended. — This section means that the extension of credit at the outset of a relationship as outlined in the statute may not be secured by real or personal property, etc., and does not mean that once the relationship is terminated, the amount due and owing to the creditor may not be handled in a fashion agreeable to both the creditor and the debtor. Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

A transaction whereby seller would forebear collection of the amount due from buyer on an open-end credit plan and reduce its interest rate on the balance outstanding and the buyer would execute a promissory note to the seller and give the seller a deed of trust on

a farm to secure the note was not an extension of credit within the meaning of this section, but rather constituted a novation of the old agreement. Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

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 twenty-five thousand dollars ($25,000);

(3) The loan is repayable in no less than six nor more than 181 successive monthly payments, which payments shall be substantially equal in amount. (1971, c. 1229, s. 2; 1979, 2nd Sess., c. 1157, ss. 2, 3.)

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

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "seven thousand five hundred dollars ($7,500)" in subdivision (2), and substituted "181" for "72" in subdivision (3). Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

§ 24-13. Principal amount defined.

The aggregate of the amount or value actually received at the time of the loan, plus the charges allowed by G.S. 24-14(b) and (c); 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; 1979, 2nd Sess., c. 1157, s. 4.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "charges allowed by G.S. 24-14(b) and (c)" for "hereinafter stated rate of charge." Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

CASE NOTES

Quoted in Clemmer v. Liberty Fin. Planning, Inc., 467 F. Supp. 272 (W.D.N.C. 1979).

§ 24-14. Limitations on charges and interest.

(a) No person, copartnership, association, trust, corporation or other legal entity making loans under this Article may charge, take or receive, directly or indirectly, simple interest in excess of one and one-half percent (1½%) per month or an annual rate equivalent to the Federal Discount Rate plus five percent (5%), whichever is the greater, computed on the actual or average daily unpaid balance of the principal amount of the loan for the time actually outstanding. However, interest may not be compounded.

(b) In addition to the interest permitted in subsection (a), the lender may include in the loan his actual expenses which are paid to third parties in

connection with the loan. Such expenses shall be limited to those for: title examination, title insurance, appraisals, surveys, and recording fees or releasing fees to trustees or public officials, and only such insurance charges as permitted in subsection (c).

(c) Evidence of hazard insurance may be required by the lender of the borrower. Decreasing term credit life insurance is optional, 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; provided (i) that the borrower has indicated a desire to purchase such insurance by signing a statement to that effect, (ii) that the borrower is advised that he may acquire this insurance from any insurance carrier, (iii) that the borrower is aware that this insurance may be rescinded within 15 days after receipt of the policy, and (iv) that the borrower directs the lender to purchase the above insurance from the proceeds of his loan.

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; 1973, c. 1150; 1977, c. 698, ss. 1, 2; 1979, 2nd Sess., c. 1157, ss. 5, 6.)

Editor's Note. — Section 24-15, referred to in subsection (b) of this section, was repealed by Session Laws 1979, 2nd Sess., c. 1157, s. 7, effective July 1, 1980.

Effect of Amendments. — The 1973 amendment made a change in subsection (a) as it stood before the 1979, 2nd Sess., amendment.

The 1977 amendment added "or any charges as authorized in G.S. 24-15" in subsection (b). In subsection (c), designated the former fourth and fifth sentences as the second paragraph, and in the present first paragraph, inserted "credit" and "is optional" in the second sentence, substituted the language beginning "provided (i) that the borrower" for "may also be required by the lender" at the end of the second sentence, and deleted the former third sentence, which related to the premium of term life insurance if paid by the lender on behalf of the borrower.

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted the language beginning "simple interest in excess" at the end of the first sentence of subsection (a) and the second sentence of subsection (a) for former subdivisions (1) and (2) of subsection (a), which detailed limitations on charges and interest. The amendment also rewrote subsection (b). Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

The 1981 amendment substituted "one and one-half percent (1½%)" for "one and one-third percent ($1^1/_3$%)" near the middle of the first sentence of subsection (a). Session Laws 1981, c. 464, s. 5, provides: "This act shall become effective 10 days after ratification except that the Commissioner of Banks shall have the authority to set a maximum rate effective on such tenth day as if this act had been in effect 30 days prior to ratification." The act was ratified May 28, 1981.

§ 24-15: Repealed by Session Laws 1979, 2nd Session, c. 1157, s. 7, effective July 1, 1980.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

§ 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.)

CASE NOTES

Quoted in Clemmer v. Liberty Fin. Planning, Inc., 467 F. Supp. 272 (W.D.N.C. 1979).

§ 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.)

Editor's Note. — Section 24-15, referred to in this section, was repealed by Session Laws 1979, 2nd Sess., c. 1157, s. 7, effective July 1, 1980.

§ 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.)

Editor's Note. — Section 24-15, referred to in this section, was repealed by Session Laws 1979, 2nd Sess., c. 1157, s. 7, effective July 1, 1980.

Chapter 25.

Uniform Commercial Code.

Article 1.

General Provisions.

Part 1. Short Title, Construction, Application and Subject Matter of the Act.

Sec.

Part 2. General Definitions and Principles of Interpretation.

Article 2.

Sales.

Part 1. Short Title, General Construction and Subject Matter.

Part 2. Form, Formation and Readjustment of Contract.

Part 3. General Obligation and Construction of Contract.

Part 5. Performance.

Part 7. Remedies.

Article 3.

Commercial Paper.

Part 3. Rights of a Holder.

Sec.

Part 5. Presentment, Notice of Dishonor and Protest.

Part 8. Miscellaneous.

Article 4.

Bank Deposits and Collections.

Part 1. General Provisions and Definitions.

Part 2. Collection of Items: Depositary and Collecting Banks.

Part 4. Relationship Between Payor Bank and Its Customer.

Article 5.

Letters of Credit.

Article 6.

Bulk Transfers.

Article 7.

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

Part 2. Warehouse Receipts: Special Provisions.

Sec.
25-7-209. Lien of warehouseman.

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.

Article 8.

Investment Securities.

Part 1. Short Title and General Matters.

25-8-102. Definitions and index of definitions.

Part 4. Registration.

25-8-403. Limited duty of inquiry.
25-8-407. [Repealed.]

Article 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

Part 1. Short Title, Applicability and Definitions.

25-9-101. Short title.
25-9-102. Policy and subject matter of article.
25-9-103. Perfection of security interests in multiple-state transactions.
25-9-104. Transactions excluded from article.
25-9-105. Definitions and index of definitions.
25-9-106. Definitions: "Account"; "general intangibles."
25-9-107. Definitions: "Purchase money security interest."
25-9-108. When after-acquired collateral not security for antecedent debt.
25-9-109. Classification of goods: "Consumer goods"; "equipment"; "farm products"; "inventory."
25-9-110. Sufficiency of description.
25-9-111. Applicability of bulk transfer laws.
25-9-112. Where collateral is not owned by debtor.
25-9-113. Security interests arising under article on sales.
25-9-114. Consignment.

Part 2. Validity of Security Agreement and Rights of Parties Thereto.

25-9-201. General validity of security agreement.
25-9-201.1. [Repealed.]
25-9-202. Title to collateral immaterial.

Sec.
25-9-203. Attachment and enforceability of security interest; proceeds; formal requisites.
25-9-204. After-acquired property; future advances.
25-9-205. Use or disposition of collateral without accounting permissible.
25-9-206. Agreement not to assert defenses against assignee; modification of sales warranties where security agreement exists.
25-9-207. Rights and duties when collateral is in secured party's possession.
25-9-208. Request for statement of account or list of collateral.

Part 3. Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority.

25-9-301. Persons who take priority over unperfected security interests; rights of "lien creditor."
25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply.
25-9-303. When security interest is perfected; continuity of perfection.
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.
25-9-305. When possession by secured party perfects security interest without filing.
25-9-306. "Proceeds"; secured party's rights on disposition of collateral.
25-9-307. Protection of buyers of goods.
25-9-308. Purchase of chattel paper and instruments.
25-9-309. Protection of purchasers of instruments and documents.
25-9-310. Priority of certain liens arising by operation of law.
25-9-311. Alienability of debtor's rights; judicial process.
25-9-312. Priorities among conflicting security interests in the same collateral.
25-9-313. Priority of security interests in fixtures.
25-9-314. Accessions.
25-9-315. Priority when goods are commingled or processed.
25-9-316. Priority subject to subordination.
25-9-317. Secured party not obligated on contract of debtor.

ARTICLE 1.

General Provisions.

PART 1.

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

§ 25-1-101. Short title.

Legal Periodicals. — 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).

CASE NOTES

Cited in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974); Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

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

CASE NOTES

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, rev'd on other grounds, 279 N.C. 352, 183 S.E.2d 109 (1971).

Applied in Michigan Nat'l Bank v. Flowers Mobile Homes Sales, 26 N.C. App. 690, 217 S.E.2d 108 (1975); Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Quoted in Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

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.

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

CASE NOTES

Trust Doctrine. — One principle made applicable by this section is the doctrine of trust pursuit under which a cestui que trust is enabled to follow the trust funds through changes in their state and form in the hands of the trustee. Michigan Nat'l Bank v. Flowers Mobile Homes Sales, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

Rescission. — Assuming without deciding that rescission remains available to a buyer as a remedy by virtue of this section, the Supreme Court gave effect to a buyer's allegation of "rescission" as an allegation of "revocation of acceptance" since that Code concept more nearly reflected the claims asserted by the buyer. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Applied in Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978); Standford v. Owens, 46 N.C. App. 388, 265 S.E.2d 617 (1980).

Cited in American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

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

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

Rights of creditors against sold goods. (G.S. 25-2-402).

Applicability of the article on bank deposits and collections. (G.S. 25-4-102).
Bulk transfers subject to the article on bulk transfers. (G.S. 25-6-102).
Applicability of the article on investment securities. (G.S. 25-8-106).
Perfection provisions of the article on secured transactions. (G.S. 25-9-103).
(1965, c. 700, s. 1; 1975, c. 862, s. 1.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. Subsection (1) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the five sections listed in subsection (2), and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course, the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare Global Commerce Corp. v. Clark-Babbitt Industries, Inc., 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident or geography may violate the commercial understanding of the parties.

4. The Act does not attempt to prescribe choice-of-law rules for states which do not enact it, but this section does not prevent application of the Act in a court of such a state. Common-law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

5. Subsection (2) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

6. Section 9-103 should be consulted as to the rules for perfection of security interests and the effects of perfection and non-perfection.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, substituted the last line in subsection (2) for a provision which read: "Policy and scope of the article on secured transactions §§ 25-9-102 and 25-9-103."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment only subsection (2) is set out.

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

CASE NOTES

Cited in Tennessee Carolina Transp., Inc. v. Strick Corp., 283 N.C. 423, 196 S.E.2d 711 (1973).

§ 25-1-106. Remedies to be liberally administered.

CASE NOTES

Purpose of Point 4 of Official Comment to § 25-2-715. — It was to bring the law into harmony with the market place that the draftsmen of the Uniform Commercial Code said in Point 4 of the Official Comment to § 25-2-715: "The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances." Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972).

Applied in Industrial Circuits Co. v. Terminal Communications, Inc., 26 N.C. App. 536, 216 S.E.2d 919 (1975).

Quoted in North Carolina Nat'l Bank v. Sharpe, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

PART 2.

General Definitions and Principles of Interpretation.

§ 25-1-201. General definitions.

Subject to additional definitions contained in the subsequent articles of this chapter which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in this chapter:

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

(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.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (G.S. 25-2-401) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts or chattel paper which is subject to article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under G.S. 25-2-401 is not a "security interest," but a buyer may also acquire a "security interest" by complying with article 9. Unless a lease or consignment is intended as

security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (G.S. 25-2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

(1967, c. 562, s. 1; 1975, c. 862, ss. 2, 3.)

AMENDED OFFICIAL COMMENT

* * * * * *

9. "Buyer in ordinary course of business". From Section 1, Uniform Trust Receipts Act. The definition has been expanded to make clear the type of person protected. Its major significance lies in Section 2-403 and in the Article on Secured Transactions (Article 9).

The reference to minerals and the like makes clear that a buyer in ordinary course buying minerals under the circumstances described takes free of a prior mortgage created by the sellers. See Comment to Section 9-103.

A pawnbroker cannot be a buyer in ordinary course of business because the person from whom he buys goods (or acquires ownership after foreclosing an initial pledge) is typically an ordinary user and not a person engaged in selling goods of that kind.

* * * * * *

37. "Security Interest". See Section 1, Uniform Trust Receipts Act. The present definition is elaborated, in view especially of the complete coverage of the subject in Article 9. Notice that in view of the Article the term includes the interest of certain outright buyers of certain kinds of property. The last two sentences give guidance on the question whether reservation of title under a particular lease of personal property is or is not a security interest.

* * * * * *

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, deleted "property" between "common" and "interest" in subsection (28).

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

The 1975 amendment, effective July 1, 1976, added the second sentence in subsection (9), substituted "accounts or chattel paper" for "accounts, chattel paper, or contract rights" in the third sentence of subsection (37).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only the introductory language and subsections (9), (28) and (37) are set out.

Legal Periodicals. — 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).

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

"Conspicuousness". — Determination on conspicuousness is a question of law for the court. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Good faith ("honesty in fact") and "notice," although not synonymous, are inherently intertwined. Therefore, the relation between the two cannot be ignored. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

The same facts which call a party's "good faith" into question may also give him "notice of a defense." Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Albeit "good faith" is literally defined as "honesty in fact in the conduct or transaction concerned," the Uniform Commercial Code does not permit parties to intentionally keep themselves in ignorance of facts which, if known, would defeat their rights in a negotiable document of title. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

"Holder". — The definition of "holder" in subdivision (20) of this section is applicable to § 45-21.16. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Ownership is not indispensable to holdership. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Where a negotiable instrument is made payable to order, one becomes a holder of the instrument when it is properly endorsed and delivered to him, and mere possession of a note payable to order does not suffice to prove ownership or holder status. Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980).

There was ample evidence that the beneficiaries of a deed of trust were holders of a valid debt where the notes secured by the deed of trust were payable to the beneficiaries or order, the notes were not endorsed, and the notes were in the possession of the original beneficiary-payees. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

As evidence that a plaintiff is holder of a note is an essential element of a cause of action upon such note, the defendant was entitled to demand strict proof of this element. The incorporation by reference into the complaint of a copy of the note was not in itself sufficient evidence to establish for purposes of summary judgment that the plaintiff was the holder of the note. Liles v. Myers, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

"Security Interest". — This section defines "security interest" without reference to whether title is in the vendor or the vendee under the security agreement. Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974).

Clause (b) of subsection (37) is not consistent with the fundamental proposition that to create a security interest the parties must have intended to create one. Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974).

"Signed". — Because of the importance placed upon financing statements, in cases dealing with the debtor's signature on financing statements the courts should apply the liberal definition of "signed" in subsection (39) of this section with caution. Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510, cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

Applied in EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972); Bulliner v. GMC, 54 F.R.D. 479 (E.D.N.C. 1971); Moser v. Employers Com. Union Ins. Co. of America, 25 N.C. App. 309, 212 S.E.2d 664 (1975); Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976); Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976); General Elec. Co. v. Pennell, 31 N.C. App. 510, 229 S.E.2d 713 (1976); Booker v. Everhart, 33 N C. App. 1, 234 S.E.2d 46 (1977); Smathers v. Smathers, 34 N.C. App. 724, 239 S.E.2d 637 (1977); Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. 1978); North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979); Hartford Accident & Indem. Co. v. Dean's Shop-Rite, Inc., 48 N.C. App. 615, 269 S.E.2d 282 (1980).

Quoted in First-Citizens Bank & Trust Co. v. Academic Archives, Inc., 10 N.C. App. 619, 179 S.E.2d 850 (1971); Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971); First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775 (1974); Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976); Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976); Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978); Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

Stated in Branch Banking & Trust Co. v. Gill, 286 N.C. 342, 211 S.E.2d 327 (1975); Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

Cited in Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978); Bank of N.C. v. Cranfill, 37 N.C. App. 182, 245 S.E.2d 538 (1978); Greeson v. Lexington State Bank, 497 F. Supp. 301 (M.D.N.C. 1980).

§ 25-1-202. Prima facie evidence by third party documents.

CASE NOTES

The bill of lading is evidence of the fact that the goods were delivered in good condition in the absence of notation or entry thereon to the contrary. American Home Prods. Corp. v. Howell's Motor Freight, Inc., 46 N.C. App. 276, 264 S.E.2d 774 (1980).

While a nonnotated bill of lading was some evidence of good condition at time of receipt, it was not sufficient alone to survive a motion for directed verdict where the bill of lading contained the words "in apparent good order, contents and condition of package unknown." American Home Prods. Corp. v. Howell's Motor Freight, Inc., 46 N.C. App. 276, 264 S.E.2d 774 (1980).

§ 25-1-203. Obligation of good faith.

CASE NOTES

Quoted in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

Stated in Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977).

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

§ 25-1-204. Time; reasonable time; "seasonably."

CASE NOTES

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282 (1979).

Quoted in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-1-205. Course of dealing and usage of trade.

CASE NOTES

Trade Usage May Be Matter of Fact or Law. — Ordinarily, the existence and the scope of a usage of trade are questions of fact to be determined by the fact finder. When, however, it is established that a usage of trade is embodied in a written code or similar writing, the interpretation of the writing becomes a question of law for the court. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Stated in Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977).

Cited in Recreatives, Inc. v. Travel-On Motorcycles Co., 29 N.C. App. 727, 225 S.E.2d 637 (1976).

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

Legal Periodicals. — 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.

CASE NOTES

This section does not apply to a check tendered in full payment of a disputed claim. Thus, a disputed claim for compensation for employment was extinguished when the debtor-employer tendered to the creditor-employee a check marked "account in full" and the creditor deposited the check after striking these words from the check and notified the debtor he was reserving his right to contend for the balance of the claim. Brown v. Coastal Truckways, Inc., 44 N.C. 454, 261 S.E.2d 266 (1980).

This section does not apply to a "full payment check," that is a check marked with some indication that it is tendered in full payment of a disputed claim. Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980).

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 creditor 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).

Applied in Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979).

§ 25-1-208. Option to accelerate at will.

Legal Periodicals. — For a note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact higher interest rates from the grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

CASE NOTES

"Good Faith" Standard Applicable Only to Insecurity Clauses. — This section imposes the "good faith" standard in § 25-1-201(19) only on insecurity-type clauses. Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976).

Insecurity and Default Clauses Distinguished. — Insecurity-type clauses are clearly distinguished from default-type clauses where the right to accelerate is conditioned upon the occurrence of a condition which is within the control of the debtor. Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976); In Re Foreclosure of Deed of Trust, 46 N.C. App. 654, 266 S.E.2d 686 (1980).

§ 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 amendment note to § 25-1-201.

ARTICLE 2.

Sales.

PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

§ 25-2-101. Short title.

Legal Periodicals. — 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).

§ 25-2-102. Scope; certain security and other transactions excluded from this article.

Legal Periodicals. — For survey of 1974 case law on the applicability of the Uniform Commercial Code to the sale of a business, see 53 N.C.L. Rev. 1097 (1975).

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

CASE NOTES

A transaction involving a sale of a tractor in consideration of payments of money and delivery of haulage services by the plaintiff is a sale of goods within the purview of this section. Owens v. Harnett Transf., Inc., 42 N.C. App. 532, 257 S.E.2d 136 (1979).

Applied in HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974); North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

§ 25-2-103. Definitions and index of definitions.

Legal Periodicals. — For article entitled, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

CASE NOTES

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282 (1979); Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

Quoted in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-2-104. Definitions: "Merchant"; "between merchants"; "financing agency."

Legal Periodicals. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

For note on farmers as merchants under the

Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

CASE NOTES

"Farmer" as "Merchant" Matter for Proof. — Since the growing and marketing of corn and soybeans is an important part of the agricultural economy of the area, and the procedures for marketing these crops are well known, it cannot be said that a particular "farmer," or a grower, is not a "merchant" within the code definition, but rather is a matter for proof. Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Evidence Sufficient to Support Finding that Farmer Was "Merchant". — The evidence that the defendant was a farmer raising corn and soybeans was sufficient to support a jury's finding that the defendant by his occupation held himself out as having knowledge or skill peculiar to corn and soybeans. This would put him within the statutory definition of merchant. There also was sufficient evidence to support a jury's finding that the defendant by his occupation held himself out as having knowledge or skill peculiar to the practice of dealing in corn and soybeans which would also put him within the statutory definition of merchant. Currituck Grain, Inc. v. Powell, 38 N.C. App. 7, 246 S.E.2d 853 (1978).

Applied in Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975); Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976); Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269 (1977); Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979); Maybank v. S.S. Kresge Co., 46 N.C. App. 687, 266 S.E.2d 409 (1980).

§ 25-2-105. Definitions: Transferability; "goods"; "future" goods; "lot"; "commercial unit."

Legal Periodicals. — For note discussing liquidated damages, specific performance and other remedies for breach of cotton sales contracts, see 53 N.C.L. Rev. 579 (1974).

For survey of 1974 case law on the applicability of the Uniform Commercial Code to the sale of a business, see 53 N.C.L. Rev. 1097 (1975).

CASE NOTES

Applied in Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975).

Quoted in Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Cited in HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

§ 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.)

Effect of Amendments. — The 1967 amendment, originally effective Oct. 1, 1967, substituted "any remedy for breach" for "remedy any breach" in subsection (4). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

Existence of Warranties as Showing Standard for Conformity. — The existence of any express or implied warranties would be relevant to show the standard to which the goods were supposed to conform. Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282, cert. denied, 297 N.C. 454, 256 S.E.2d 806 (1979).

Applied in Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972); Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269 (1977); North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

Cited in United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

§ 25-2-107. Goods to be severed from realty; recording.

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

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

(3) The provisions of this section are subject to any third-party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale. (1965, c. 700, s. 1; 1975, c. 862, s. 4.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
See Section 76, Uniform Sales Act on prior policy; Section 7, Uniform Conditional Sales Act.

Purposes:

1. Subsection (1). Notice that this subsection applies only if the minerals or structures "are to be severed by the seller". If the buyer is to sever, such transactions are considered contracts affecting land and all problems of the Statute of Frauds and of the recording of land rights apply to them. Therefore, the Statute of Frauds section of this Article does not apply to such contracts though they must conform to the Statute of Frauds affecting the transfer of interests in land.

2. Subsection (2). "Things attached" to the realty which can be severed without material harm are goods within this Article regardless of who is to effect the severance. The word "fixtures" has been avoided because of the diverse definitions of this term, the test of "severance without material harm" being substituted.

The provision in subsection (3) for recording such contracts is within the purview of this Article since it is a means of preserving the buyer's rights under the contract of sale.

3. The security phases of things attached to or to become attached to realty are dealt with in the Article on Secured Transactions (Article 9) and it is to be noted that the definition of goods in that Article differs from the definition of goods in this Article.

However, both Articles treat as goods growing crops and also timber to be cut under a contract of severance.

Cross References:
Point 1: Section 2-201.
Point 2: Section 2-105.
Point 3: Articles 9 and 9-105.

Definitional Cross References:
"Buyer". Section 2-103.
"Contract". Section 1-201.
"Contract for sale". Section 2-106.
"Goods". Section 2-105.
"Party". Section 1-201.
"Present sale". Section 2-106.
"Rights". Section 1-201.
"Seller". Section 2-103.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, substituted "sale of minerals or the like (including oil and gas)" for "sale of timber, minerals or the like" near the beginning of subsection (1) and inserted "or of timber to be cut" near the middle of subsection (2).

PART 2.

Form, Formation and Readjustment of Contract.

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

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

For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

CASE NOTES

Section 75-4 is consistent with the other "statute of frauds" provisions in the law, including § 22-1 and subsection (a) of this section. Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

Nonmerchant who signs nothing ordinarily will not be bound to a contract under the statute of frauds provision of this section. Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Contract for Services in Repair of Truck. — By its express terms, this section applies only to a contract for the sale of goods. Where the contract was one for services rendered in the repair of a truck, the fact that various parts are also required to properly repair and service the trucks is merely incidental to the repair contract, and does not bar its enforcement, either in its entirety or to the extent of the cost of the parts included. Mack Fin. Corp. v. Harnett Transf., Inc., 42 N.C. App. 116, 256 S.E.2d 491 (1979).

Invoices sent from one party to the other constitute writings "sufficient to indicate that a contract for sale has been made between the parties," within the meaning of this section. Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 285 N.C. 344, 204 S.E.2d 834 (1974).

Letter from Agent of Plaintiff's Assignor. — In an action to recover the purchase price of goods sold to defendant, a letter from the agent of plaintiff's assignor to defendant which identified the company as an agent and which stated that at the time of the sale it was agreed by the assignor that the goods were sold on a "guaranteed sales basis" is enough to comply with the statute of frauds and to make evidence of the guaranteed sales agreement admissible under the parol evidence rule. Equitable Factors Co. v. Chapman-Harkey Co., 43 N.C. 189, 258 S.E.2d 376, cert. denied, 298 N.C. 805, 262 S.E.2d 1 (1979).

Insufficient Writings. — Documents relied upon by plaintiff, who furnished material to builder, and signed by defendant for whom

home was being constructed did not make out an enforceable contract under this section. Lowe's Cos. v. Lipe, 20 N.C. App. 106, 201 S.E.2d 81 (1973).

Statute Not Defense for Merchant. — If a merchant receives a written confirmation sufficient as against the sender and fails to give written notice within 10 days, the statute of frauds would not be a defense. Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

"Farmer" as "Merchant" Matter for Proof. — Since the growing and marketing of corn and soybeans is an important part of the agricultural economy of the area, and the procedures for marketing these crops are well known, it cannot be said that a particular "farmer," or a grower, is not a "merchant" within the code definition, but rather is a matter for proof. Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

The sale of building materials to be used in the construction of a house may come within the statute of frauds provisions of the Uniform Commercial Code if the value of the building supplies (as goods) prior to construction exceeds $500.00. Smith v. Hudson, 48 N.C. App. 347, 269 S.E.2d 172 (1980).

Agreement to Assume Indebtedness for Equipment Installed in Restaurant. — An agreement whereby the purchaser of a restaurant assumed the original owner's indebtedness for equipment installed in the restaurant, and the seller of the equipment released the original owner from liability, was neither a promise to answer for the debt of another nor a contract for the sale of goods for $500 or more, and the statute of frauds did not apply. Thompson & Little, Inc. v. Colvin, 46 N.C. App. 774, 266 S.E.2d 46 (1980).

Tentative Negotiations Insufficient to Show Contract. — Where plaintiff's evidence merely represented tentative negotiations, it was insufficient to show a contract for the sale of stock. Oakley v. Little, 49 N.C. App. 646, 272 S.E.2d 370 (1980).

Oral Contract Made by Telephone for Sale of Yarn. — Evidence of both parties showed that a complete and valid oral contract for the sale of yarn was made by telephone, such oral contract being valid and enforceable since each party admitted "in his pleading, testimony or otherwise in court that a contract of sale was made." Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 285 N.C. 344, 204 S.E.2d 834 (1974).

Applied in Harwell Enterprises v. Stevens, 9 N.C. App. 228, 175 S.E.2d 739 (1970).

Quoted in Currituck Grain, Inc. v. Powell, 38 N.C. App. 7, 246 S.E.2d 853 (1978).

Cited in Grissett v. Ward, 10 N.C. App. 685, 179 S.E.2d 867 (1971); Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980); H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768 (1980).

§ 25-2-202. Final written expression; parol or extrinsic evidence.

CASE NOTES

Evidence of Additional Consistent Terms. — A security agreement in which the buyer of a mobile home acknowledged delivery of the mobile home "in good condition and repair" was not intended as a complete and exclusive statement of the terms of the agreement within the meaning of paragraph (b) of this section and the buyer's testimony with respect to the defective condition of the mobile home after it was installed was competent as evidence of additional consistent terms of the sale, where the evidence of both parties showed that the mobile home was to be delivered and set up on defendant's lot and where the security agreement was signed by the buyer before the mobile home was delivered and installed. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Parol Evidence as to Lease-Purchase Agreement. — Under paragraph (a), parol evidence raised by operation of a course of performance may be used in order to help explain and supplement a particular lease-purchase agreement. Robinson v. Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

Applied in Equitable Factors Co. v. Chapman-Harkey Co., 43 N.C. 189, 258 S.E.2d 376 (1979); Smith v. Hudson, 48 N.C. App. 347, 269 S.E.2d 172 (1980).

Cited in Recreatives, Inc. v. Travel-On Motorcycles Co., 29 N.C. App. 727, 225 S.E.2d 637 (1976).

§ 25-2-203. Seals inoperative.

Legal Periodicals. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

CASE NOTES

Applied in North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

Cited in Mobil Oil Corp. v. Wolfe, 297 N.C. 36, 252 S.E.2d 809 (1979).

§ 25-2-204. Formation in general.

Legal Periodicals. — For note on "Meeting of the Minds and U.C.C. § 2-204," see 46 N.C.L. Rev. 637 (1968).

§ 25-2-205. Firm offers.

Legal Periodicals. — For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

§ 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.)

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

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (2) is set out.

Legal Periodicals. — For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

CASE NOTES

Invoices sent from one party to the other constituted a "written confirmation" of a previously made oral contract for sale, within the meaning of this section. Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 285 N.C. 344, 204 S.E.2d 834 (1974).

Inclusion of Term Not Previously Agreed upon Constitutes Proposal for Addition. — When one party to a valid oral contract for the sale of goods, within a reasonable time after the making of such contract, sends to the other party a document purporting to set out in writing the terms of the contract and includes therein a term not previously agreed upon, this constitutes a proposal for an addition to the contract. Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 285 N.C. 344, 204 S.E.2d 834 (1974).

Which May Become Part of Contract Unless Materially Altering It. — When the parties to the contract are "merchants," as that term is defined in § 25-2-104(1), all proposed additional terms, to which the other party does

not object in due time, become part of the contract, unless "they materially alter it." Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 285 N.C. 344, 204 S.E.2d 834 (1974).

An addition to an oral contract inserting an "arbitration only" term was a material alteration of the contract, and could not be deemed incorporated into the contract for sale by reason of the mere silence of one party following its receipt of the other party's invoices containing the term. Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 285 N.C. 344, 204 S.E.2d 834 (1974); Supak & Sons Mfg. Co. v. Pervel Indus., Inc., 593 F.2d 135 (4th Cir. 1979).

An arbitration clause was such a material alteration of plaintiff's oral contract of purchase that it did not become binding on the plaintiff who never recognized, acknowledged or signed an agreement that its oral contract should be so amended or modified. Supak & Sons Mfg. Co. v. Pervel Indus., Inc., 463 F. Supp. 177 (E.D.N.C. 1978).

There is no conflict between 9 U.S.C. § 2, which provides for the validity and enforceability of arbitration clauses in contracts evidencing transactions in interstate commerce, and the decisional law of North Carolina holding an arbitration clause to be a per se material alteration under this section. Supak & Sons Mfg. Co. v. Pervel Indus., Inc., 593 F.2d 135 (4th Cir. 1979).

"Yarn Contracts" Attempting to Attach Additional Terms to Oral Contracts. — Where defendant's "yarn contracts" served not only to confirm oral telephone contracts between the parties but also attempted to attach additional terms to the agreement, to allow additional terms, which were material alterations, under the guise of "confirmation of the contract" would render this section meaningless. Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 19 N.C. App. 678, 200 S.E.2d 668, aff'd, 285 N.C. 344, 204 S.E.2d 834 (1974).

Applied in General Time Corp. v. Eye Encounter, Inc., 50 N.C. App. 467, — S.E.2d — (1981).

§ 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.)

Effect of Amendments. — 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.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (2) is set out.

CASE NOTES

Fact that exclusion of warranty raised by parties' course of performance is oral does not vitiate its utility or relevance. Robinson v. Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

Parol Evidence as to Lease-Purchase Agreement. — Under § 25-2-202(a), parol evidence raised by operation of a course of performance may be used in order to help explain and supplement a particular lease-purchase agreement. Robinson v. Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

Applied in Owens v. Harnett Transf., Inc., 42 N.C. App. 532, 257 S.E.2d 136 (1979).

§ 25-2-209. Modification, rescission and waiver.

Legal Periodicals. — For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

CASE NOTES

Applied in Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

§ 25-2-210. Delegation of performance; assignment of rights.

CASE NOTES

Stated in Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

PART 3.

General Obligation and Construction of Contract.

§ 25-2-301. General obligations of parties.

CASE NOTES

Prima Facie Case Presents Jury Question. — A seller's allegation of the sale and delivery of goods at an agreed price, and buyer's admission that he purchased the goods, executed the note and security agreement, and refused to pay a portion of the purchase price agreed upon, makes out a prima facie case entitling seller to go to the jury and, nothing else appearing, to recover the balance due on the note. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Cited in American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

§ 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. 1055, s. 3, provides: "This act shall be in full force and effect on and after October 1, 1971, and apply to transactions entered into and events occurring on and after that date."

Legal Periodicals. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

For note on requirement of privity and express warranties, see 16 Wake Forest L. Rev. 857 (1980).

CASE NOTES

Under subsection (1) determination of unconscionability is a question of law for the court. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

§ 25-2-306. Output, requirements and exclusive dealings.

CASE NOTES

Cited in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-2-309. Absence of specific time provisions; notice of termination.

CASE NOTES

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

§ 25-2-312. Warranty of title and against infringement; buyer's obligation against infringement.

CASE NOTES

Burden on Plaintiffs Seeking Recovery on Warranty. — In an action to recover the price paid by plaintiffs to defendants for a tractor where plaintiffs alleged that the tractor was sold to satisfy a lien which existed at the time of the sale, summary judgment was improperly granted for the plaintiffs where they neither alleged nor offered evidentiary material to show that they had no knowledge of the existence of the lien, since the burden was on the plaintiffs, as movants, to produce evidence on every element necessary for them to prove in order to be entitled to judgment, and in order to recover on the warranty provided by this section, plaintiffs must prove the presence of a lien or encumbrance of which they had no knowledge. Smith v. Taylor, 44 N.C. App. 363, 261 S.E.2d 19 (1979).

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

Legal Periodicals. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

For note on requirement of privity and express warranties, see 16 Wake Forest L. Rev. 857 (1980).

CASE NOTES

Prior law is in accord with this section with respect to the creation of express warranties. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Subsections (1)(a) and (2) work no change in the pre-code law of North Carolina. Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972).

"Seller". — There is a substantial question as to whether it would be appropriate in light of § 110(f) of the Federal Magnuson-Moss Warranty Act of 1975, 15 U.S.C. §§ 2301-2312, to interpret the word "seller" in this section to include a manufacturer (or anyone else) who issues an express warranty. Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp., 46 N.C. App. 248, 264 S.E.2d 768 (1980).

When Privity Not Required. — Privity in the sale of goods is not necessary in a purchaser's action on a manufacturer's express warranty relating to the goods. Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp., 46 N.C. App. 248, 264 S.E.2d 768 (1980).

The absence of contractual privity does not bar a direct claim by an ultimate purchaser against a manufacturer for breach of the manufacturer's express warranty which is directed to the purchaser. Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184, cert. denied, 301 N.C. 406, 273 S.E.2d 451 (1980).

In an action by plaintiff buyer against defendant manufacturer under an express warranty, which provides for a remedy in substitution for the general rule of damages applicable to breach of contract for sale of personal property, the remedy provided for in the express warranty is controlling at least where such provisions meet the general tests of legality. Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp., 46 N.C. App. 248, 264 S.E.2d 768 (1980).

Statement Held Mere Opinion. — Seller's statement that a mobile home "was supposed to last a lifetime and be in perfect condition" is merely an expression of opinion and does not create an express warranty. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Applied in Helson's Premiums & Gifts, Inc. v. Duncan, 9 N.C. App. 653, 177 S.E.2d 428 (1970); HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974); Potter v. Tyndall, 22 N.C. App. 129, 205 S.E.2d 808 (1974); Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976); Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976); ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Quoted in Griffin v. Wheeler-Leonard & Co., 290 N.C. 185, 225 S.E.2d 557 (1976).

Cited in Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282 (1979).

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

Legal Periodicals. — For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

For survey of 1972 case law on recovery for personal injury under implied warranty, see 51 N.C.L. Rev. 1159 (1973).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article entitled, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

CASE NOTES

This section accords with prior law. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

The requirements of "merchantability" spelled out in detail in subsection (2) include the prior case law definition that the personal property must be reasonably fit for the purposes for which sold. Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

Section Restricts Application of Doctrine of Caveat Emptor. — The common-law doctrine of caveat emptor historically applied to sales of both real and personal property. Its application to personal property sales, however,

has been restricted by this section. Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975).

Warranties arise under the Uniform Commercial Code only upon a sale of goods. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Sale by Merchant Gives Rise to Warranty. — Where seller was a merchant with respect to the sale of mobile homes, and the security agreement executed by buyer contained no language, as permitted by § 25-2-316, excluding or modifying the implied warranty of merchantability, the sale carried with it an implied warranty that the mobile home was fit for the residential purposes for which such goods are ordinarily used. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Completed Delivery Constitutes Sale. — If there has been a completed delivery by the seller, the sale has been consummated and implied warranties arise under this section. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

The implied warranty of merchantability applies equally to both the retailer and the manufacturer of goods. Gillispie v. Thomasville Coca-Cola Bottling Co., 17 N.C. App. 545, 195 S.E.2d 45, cert. denied, 283 N.C. 393, 196 S.E.2d 275 (1973).

But Not to One Who Merely Allows Seal of Inspection to Be Placed on Product. — This section and § 25-2-315 are not applicable to one that simply allows its seal of inspection to be placed on a product manufactured by someone else. Any implied warranty in such a case would concern the quality of inspection services rather than the quality of goods. Jones v. Clark, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Physician Issuing Prescription Not a "Seller". — The physician who issues a prescription for an oral contraceptive drug is not a "seller" within the meaning of this section and the issuance of the prescription does not constitute passing title. Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269, cert. denied, 292 N.C. 466, 233 S.E.2d 921 (1977).

State and Federal Regulatory Acts Aid in Assessing Merchantability. — In assessing the merchantability of goods under subsections (2)(a) through (f), various state and federal regulatory acts are instructive. This is especially pertinent in regard to a determination of merchantability under subsection (2)(a) and (c). Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976).

Disclaimer and Substitution of § 25-2-719 (1)(a) Limitations. — A merchant seller may disclaim all liability under § 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under § 25-2-315 and this section, substituting in place thereof the limitations of § 25-2-719(1)(a). Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Strict Liability in Tort Compared. — Strict liability in tort is a substantially more narrow basis of liability than breach of implied warranty of merchantability under subsection (1). Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976).

The action for breach of the implied warranty of merchantability is akin to the action of strict liability in tort, except that proof of negligence and foreseeability of injury are not required. It is also akin to a contract action, except that privity requirements have become considerably more relaxed by the various courts in recent years and, further, affirmative defenses of disclaimer and failure to give timely notice may be asserted by the seller. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979).

What Plaintiff Must Show. — In its pure form, an action for breach of implied warranty of merchantability under this section entitles a plaintiff to recover without any proof of negligence on a defendant's part where it is shown that (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979); Maybank v. S.S. Kresge Co., 46 N.C. App. 687, 266 S.E.2d 409 (1980), aff'd in part and rev'd in part, — N.C. —, 273 S.E.2d 681 (1981).

Under this section, a plaintiff must prove: first, that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods were defective at the time of sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result. Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651, cert. denied, 300 N.C. 195, 269 N.C. 622 (1980).

The attributes listed in subsection (2) are not exclusive nor exhaustive. Maybank v. S.S. Kresge Co., 46 N.C. App. 687, 266 S.E.2d 409 (1980), aff'd in part and rev'd in part, — N.C. —, 273 S.E.2d 681 (1981).

Damages for Breach. — Where there is breach of the implied warranty of merchantability the Uniform Commercial Code provides for recovery by the buyer of both "general" damages, which are implied by law, and "special" damages, which arise from the special

circumstances of the case and must be properly pleaded. Rodd v. W.H. King Drug. Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

Extent of Warranty of Fitness. — The warranty of fitness, either express or implied, is contractual and the contract extends no further than the parties to it and their privies. Privity to the contract is the basis of liability. Gillispie v. Thomasville Coca-Cola Bottling Co., 17 N.C. App. 545, 195 S.E.2d 45, cert. denied, 283 N.C. 393, 196 S.E.2d 275 (1973).

Pre-Code Warranty Excluded Containers. — Before adoption of the Uniform Commercial Code an implied warranty of fitness did not extend to a container in which a product came from the producer. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Code Extends Implied Warranty to Include Containers. — An implied warranty of fitness has been extended by the Uniform Commercial Code to include a product's container. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

And Injury Caused by Container Constitutes Breach. — The fact that it is the container, rather than the product inside, which causes injury, does not make the injury any less a result of the seller's breach of warranty. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Under this section, soft drinks are not merchantable if inadequately contained. If they are sold in a container which is inadequate, the seller has breached his implied warranty of merchantability and he is liable for personal injury proximately caused by this breach. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

The instructions accompanying product may be integral part of warranty. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979).

Failure to Warn of Dangerous Propensities May Render Product Unmerchantable. — When an aerosol deodorant can is viewed holistically, and especially where dangerous propensities under specified conditions inhere to both container and contents as well as their several interfaces, a failure to adequately warn of all such propensities may, in a proper case, render a product unmerchantable under subdivisions (2)(c), (e) and (f) of this section and provide grounds for an action to recover damages for breach of the implied warranty of merchantability embodied in subsection (1) of this section. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979).

Breach of Warranty as to Aerosol Deodorant. — Where an aerosol can of deodorant was being used for its intended purposes in a normal way, the expectation of the consumer that the product if used according to furnished instructions, would not injure him was found to lie within the warranty of fitness for ordinary purposes of subdivision (2)(c) of this section. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979).

Where the plaintiff used an aerosol can of deodorant in accordance with its directions and warnings, set the can down, walked across the room and lit his cigarette, simultaneously igniting the alcohol in the deodorant he had applied to himself, his cause of action, contending that he was given insufficient notice of the natural propensities of the product as it was constituted and that the label contained insufficient data from which he reasonably could have inferred any danger of what in fact occurred, was cognizable under a theory of breach of the implied warranty of merchantability under this section. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979).

Proof of compliance with government standards is no bar to recovery on a breach of warranty theory. Although such evidence may well be pertinent to the issue of the existence of a breach of any warranty, it is not conclusive. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979).

Where a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling, and, due to subsequent disclosures, both unknown to and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be used by the grantee, or by any subsequent grantees through mesne conveyances, for the specific purpose to which its use is limited by the restrictive covenants, the grantor breaches an implied warranty arising out of said restrictive covenants. Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975).

Distributor Must Disclose Limitation on Warranty. — Where the manufacturer gave ample warning to the distributor who failed to pass it on to the consumer, and the distributor selected the product, unqualifiedly recommended it, and sold it for immediate use, then in the absence of express warranty on the part of the manufacturer, the implied warranty of limited fitness between the manufacturer and the distributor placed the primary responsibility on the distributor to notify the user of the limitation on fitness. Wilson v. E-Z Flo Chem. Co., 281 N.C. 506, 189 S.E.2d 221 (1972).

Retailer Liable for Breach May Recover from Manufacturer. — Where the retailer purchases personal property from the manufac-

turer or wholesaler for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer. This rule is not applicable between the manufacturer who gave warning and the distributor who has been warned, but fails to pass on the warning to the user. Wilson v. E-Z Flo Chem. Co., 281 N.C. 506, 189 S.E.2d 221 (1972).

Where the retailer purchases personal property from the manufacturer for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Acceptance of Product Held Not to Bar Action. — While the purchaser of a mobile home was obligated to pay the contract price when she paid the loan on the home and released the lender, thereby accepting the home and barring rejection, she could still maintain an action for breach of warranty. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Merchantability Held Question for Jury. — Whether an aerosol can of deodorant, when viewed as a whole (including contents, packaging, labeling and warnings) was merchantable was a jury question not susceptible of summary adjudication on the basis of the labeling of the product. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979).

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

Where the defective product, a flashcube, was enclosed in its original container until use and nothing occurred between the purchase and use of the product which would indicate that plaintiff mishandled, damaged or altered the product, the evidence did not compel a finding that the product was not merchantable at the time of sale but the evidence was sufficient to permit a reasonable inference to the effect that the flashcube was not merchantable at the time of sale, and therefore, it was a matter of fact for the jury to decide and not a matter of law for the trial court. Maybank v. S.S. Kresge Co., 46 N.C. App. 687, 266 S.E.2d 409 (1980), aff'd in part and rev'd in part, — N.C. —, 273 S.E.2d 681 (1981).

Warranties Based on Contractual Theory. — Where plaintiff buyer brought an action to recover for a defective boat manufactured by defendant, there was no basis for plaintiff's claims of breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose, since those implied warranties are based on contractual theory, and there was no privity of contract between plaintiff buyer and defendant manufacturer. Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp., 46 N.C. App. 248, 264 S.E.2d 768 (1980).

Burden of Proof. — In order to effectively assert a claim under this section, the plaintiff must prove the giving of the warranty, the breach of that warranty, and damages resulting to him as a proximate result of the breach. Burbage v. Atlantic Mobilehome Suppliers Corp., 21 N.C. App. 615, 205 S.E.2d 622 (1974).

The burden is upon the buyer to establish a breach by the seller of the warranty of merchantability; that is, to show that the defect existed at the time of the sale. Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975); Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651, cert. denied, 300 N.C. 195, 269 N.C. 622 (1980).

Applied in Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

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

Legal Periodicals. — For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

CASE NOTES

This section did not repeal or limit the scope of former § 106-50.7(e)(4), since § 25-2-102 provides that the Uniform Commercial Code does not "impair or repeal any statute regulating sales to ... farmers." Potter v. Tyndall, 22 N.C. App. 129, 205 S.E.2d 808, cert. denied, 285 N.C. 661, 207 S.E.2d 762 (1974).

This section and § 25-2-314 are not applicable to one that simply allows its seal of inspection to be placed on a product manufactured by someone else. Any implied warranty in such a case would concern the quality of inspection services rather than the quality of goods. Jones v. Clark, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Distributor Must Disclose Limitation on Warranty. — Where the manufacturer gave ample warning to the distributor who failed to pass it on to the consumer, and the distributor selected the product, unqualifiedly recommended it, and sold it for immediate use, then in the absence of express warranty on the part of the manufacturer, the implied warranty of limited fitness between the manufacturer and the distributor placed the primary responsibility on the distributor to notify the user of the limitation on fitness. Wilson v. E-Z Flo Chem. Co., 281 N.C. 506, 189 S.E.2d 221 (1972).

Disclaimer and Substitution of § 25-2-719(1)(a) Limitations. — A merchant seller may disclaim all liability under § 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under § 25-2-314 and this section, substituting in place thereof the limitations of § 25-2-719(1)(a). Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Acceptance of Product Held Not to Bar Action. — While the purchaser of a mobile home was obligated to pay the contract price when she paid the loan on the home and released the lender, thereby accepting the home and barring rejection, she could still maintain an action for breach of warranty. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Retailer Liable for Breach May Recover from Manufacturer. — Where the retailer purchases personal property from the manufacturer or wholesaler for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer. This rule is not applicable between the manufacturer who gave warning and the distributor who has been warned, but fails to pass on the warning to the user. Wilson v. E-Z Flo Chem. Co., 281 N.C. 506, 189 S.E.2d 221 (1972).

Where the retailer purchases personal property from the manufacturer for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Warranties Based on Contractual Theory. — Where plaintiff buyer brought an action to recover for a defective boat manufactured by defendant, there was no basis for plaintiff's claims of breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose, since those implied warranties are based on contractual theory, and there was no privity of contract between plaintiff buyer and defendant manufacturer. Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp., 46 N.C. App. 248, 264 S.E.2d 768 (1980).

Evidence of Damages Insufficient. — A warranty action failed for lack of evidence of damages proximately resulting from defects at the time of sale some 17 months and 30,000 miles earlier. Cooper v. Mason, 14 N.C. App. 472, 188 S.E.2d 653 (1972).

For a case involving the sale of prescription drugs, i.e., birth control pills, as it relates to this section, see Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269, cert. denied, 292 N.C. 466, 233 S.E.2d 921 (1977).

Applied in Trio Estates, Ltd. v. Dyson, 10 N.C. App. 375, 178 S.E.2d 778 (1971); Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

Cited in Styron v. Loman-Garrett Supply Co., 6 N.C. App. 675, 171 S.E.2d 41 (1969); Maybank v. S.S. Kresge Co., 46 N.C. App. 687, 266 S.E.2d 409 (1980).

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

CASE NOTES

Legal Periodicals. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

For survey of 1972 case law on recovery for personal injury under implied warranty, see 51 N.C.L. Rev. 1159 (1973).

For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For article entitled, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For note on requirement of privity and express warranties, see 16 Wake Forest L. Rev. 857 (1980).

This section is not in conflict with the provisions of the North Carolina Seed Law relating to labeled seed. Billings v. Joseph Harris Co., 290 N.C. 502, 226 S.E.2d 321 (1976).

To be valid under this section, a disclaimer provision must be stated in express terms, mention "merchantability" in order to disclaim the implied warranty of merchantability, and be conspicuously displayed. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Buyer's Inspection Is Not Limited to Goods on Seller's Premises. — The principle in subsection (3)(b) of this section is not applicable where the contract of sale imposed on the seller the obligation to deliver a mobile home and block it on buyer's lot. Until that was properly done, fitness or unfitness for use as a home could not be ascertained by the buyer's examination and inspection of the goods on the seller's premises. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Provision Meeting Requirements of Subsection (2). — A provision which disclaims all other warranties, express and implied meets the requirements of subsection (2) where it was in writing, the implied warranty of merchantability was mentioned, and the exclusion was conspicuous as defined in § 25-1-201(10). Bulliner v. GMC, 54 F.R.D. 479 (E.D.N.C. 1971).

Fact that exclusion of warranty raised by parties' course of performance is oral does not vitiate its utility or relevance. Robinson v. Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

Disclaimer and Substitution of § 25-2-719(1)(a) Limitations. — A merchant seller may disclaim all liability under subsection (2) stemming from any breach of warranties of merchantability and fitness under §§ 25-2-314 and 25-2-315, substituting in place thereof the limitations of § 25-2-719(1)(a). Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

This Section and § 25-2-719 Distinguished. — Although this section and § 25-2-719 are closely related, the former is directed to the creation of a limited duty under the warranty, whereas the latter is directed to the limitation of the remedy available in the event of a breach of that duty. Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184, cert. denied, 301 N.C. 406, 273 S.E.2d 451 (1980).

Covenants to Repair and Replace Defective Parts. — Although limited warranties are valid, compliance with their covenants to repair and to replace defective parts requires that the warrantor do more than make good faith attempts to repair defects when requested to do so, and a manufacturer or other warrantor may be liable for breach of warranty when it repeatedly fails within a reasonable time to correct a defect as promised; moreover, a party seeking to recover for breach of a limited warranty is not required to give the warrantor unlimited opportunities to attempt to bring the item into compliance with the warranty. Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980).

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

Applied in Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972); Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975); General Elec. Co. v. Pennell, 31 N.C. App. 510, 229 S.E.2d 713 (1976); Bentley Mach., Inc. v. Pons Hosiery, Inc., 33 N.C. App. 482, 235 S.E.2d 790 (1977); Sealey v. Ford Motor Co., 499 F. Supp. 475 (E.D.N.C. 1980).

Cited in Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972); Griffin v. Wheeler-Leonard & Co., 290 N.C. 185, 225 S.E.2d 557 (1976); Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976); Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976); Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269 (1977); Isaacson v. Toyota Motor Sales, U.S.A., Inc., 438 F. Supp. 1 (E.D.N.C. 1976); Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 245 S.E.2d 801 (1978); Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979); Maybank v. S.S. Kresge Co., 46 N.C. App. 687, 266 S.E.2d 409 (1980).

§ 25-2-317. Cumulation and conflict of warranties express or implied.

CASE NOTES

Express Warranty by Manufacturer Does Not Exclude Implied Warranty by Retailer. — This section provides that warranties, express and implied, should be construed as consistent with each other and as cumulative. Thus, if the manufacturer of a mobile home had given an express warranty, it would not necessarily exclude an implied warranty given by the retailer. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

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

Legal Periodicals. — For comment on implied warranty of fitness, see 4 Wake Forest Intra. L. Rev. 169 (1968).

For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

For survey of 1972 case law on recovery for personal injury under implied warranty, see 51 N.C.L. Rev. 1159 (1973).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article entitled, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For note on requirement of privity and express warranties, see 16 Wake Forest L. Rev. 857 (1980).

CASE NOTES

General General Rule Is that Only Person in Privity May Recover. — Subject to some exceptions, it is the general rule that only a person in privity with the warrantor may recover on the warranty. Williams v. GMC, 19 N.C. App. 337, 198 S.E.2d 766, cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973).

As a general rule, one seeking to recover on an implied warranty is still required to prove privity of contract. This privity requirement has been relaxed in cases involving the sale of goods by this section. However, this relaxation of the privity requirement has not yet been extended to services. Jones v. Clark, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

And Plaintiff Must Be Person to Whom Section Extends Warranties. — There can be no recovery by implied warranty where the plaintiff is not one of those persons to whom the implied warranties extend by this section. Williams v. GMC, 19 N.C. App. 337, 198 S.E.2d 766, cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973).

Plaintiff could not take advantage of any warranties implied by the Uniform Commercial Code where her evidence showed that she was not a member of the family or household or a guest in the home of the buyer so as to escape the privity requirement. Williams v. GMC, 19 N.C. App. 337, 198 S.E.2d 766, cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973).

An individual partner may sue to recover damages for his personal injuries which proximately result from the breach of warranty on goods purchased by the partnership with partnership funds. Barnes v. Campbell Chain Co., 47 N.C. App. 488, 267 S.E.2d 388 (1980).

A partner is not an employee of the partnership entity; rather, the partner is a tenant in partnership in the entity itself, and as such, the partner is a purchaser of goods purchased with partnership funds by the partnership, not an employee of the purchaser and the partner has direct contractual privity. Barnes v. Campbell Chain Co., 47 N.C. App. 488, 267 S.E.2d 388 (1980).

Applied in Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979); Davis v. Siloo Inc., 47 N.C. App. 237, 267 S.E.2d 354 (1980).

§ 25-2-326. Sale on approval and sale or return; consignment sales and rights of creditors.

Legal Periodicals. — For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

CASE NOTES

Purpose. — The purpose of this section is to protect innocent creditors from deception by ostensible ownership. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

Parol evidence cannot be introduced to engraft an "or return" consignment provision onto a paper writing. Recreatives, Inc. v. Travel-On Motorcycles Co., 29 N.C. App. 727, 225 S.E.2d 637 (1976).

Applied in Equitable Factors Co. v. Chapman-Harkey Co., 43 N.C. App. 189, 258 S.E.2d 376 (1979).

PART 4.

Title, Creditors and Good Faith Purchases.

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

CASE NOTES

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); Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Completed Delivery Consummates Sale. — If there has been a completed delivery by the seller, the sale has been consummated and implied warranties arise under § 25-2-314. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Time of Payment Does Not Determine Time of Sale. — Under subsection (2) the time of payment is not determinative of the question of when a sale takes place. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Possession of Product in Self-Service Store Constitutes Sale. — The presence of soft drinks on the shelves of a self-service store constituted an offer for sale and delivery at a stated price; a sale occurred when the purchaser took the drinks into his possession with the intention of paying for them at the cashier's counter. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

And Seller Retains a Security Interest. — As long as a purchaser in a self-service store has a product in his possession, intending to pay for it, he has title to the product, and the seller's interest at that point is not "title" but a security interest to enforce payment; when the purchaser changes his mind and returns to the shelf a product which he has picked up with the intention of buying it, title is revested in the seller. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Effect of Right to Return. — Under subsection (4) a right to return delivered goods to the seller does not necessarily delay passage of the title until that right has expired. Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

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).

Section Controls as to Aircraft. — There is no statute applicable particularly to aircraft, but this section, which is applicable to sales of "goods" generally, is controlling. Norris v. Insurance Co. of North America, 26 N.C. App. 91, 215 S.E.2d 379, cert. denied, 288 N.C. 242, 217 S.E.2d 666 (1975).

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).

Applied in Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

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

Legal Periodicals. — 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."

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

CASE NOTES

"Good faith" in the context of this section means "honesty in fact" in the transaction involved. Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

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 § 25-2-401, 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).

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, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (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, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

Vendee Who Paid with Forged Check May Transfer Good Title. — Whether a check was a forgery, the transaction a cash sale or whether delivery was procured through fraud punishable as larcenous under the criminal law, contrary to the law as it may have been prior to the enactment of this section, the vendee in such a transaction may transfer a good title to a "good faith purchaser for value." Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604, cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972).

This section allows a person who has obtained delivery of goods under a transaction of purchase to transfer a good title to a "good faith purchaser for value" even though such person obtained delivery in exchange for a check which is later dishonored or procured the delivery through criminal fraud. Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

Original Transferor Held Entitled to Follow Proceeds of Resale. — Where the trial court found upon supporting evidence that original defendant paid for pigs purchased from plaintiff with a draft which was returned for insufficient funds, that additional defendants knew that original defendant had not paid plaintiff for the pigs and would not be able to do so and that plaintiff was seeking recovery of the purchase price or the pigs, and that the additional defendants were not purchasers of the pigs but acted as agent for the original defendant when they thereafter sold the pigs to third parties and applied the proceeds of the sale to debts owed by the original defendant to the additional defendants, the trial court properly held that title to the pigs remained in plaintiff, that plaintiff was entitled to follow the proceeds of the sale of the pigs, and that additional defendants were secondarily liable to plaintiff for the value of the pigs disposed of up to the balance of the purchase price due for the pigs. Gus Z. Lancaster's Stock Yards, Inc. v. Williams, 37 N.C. App. 698, 246 S.E.2d 823, cert. denied, 295 N.C. 738, 248 S.E.2d 863 (1978).

Burden of proof of transfer of good title rests upon party making later purchase. Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

To prevail the subsequent purchaser must prove (1) that he was a purchaser, (2) that he purchased in good faith and (3) that he gave value. Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

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).

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.)

Effect of Amendments. — 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.

Only Part of Section Set Out. — 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.

CASE NOTES

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, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

§ 25-2-508. Cure by seller of improper tender or delivery; replacement.

CASE NOTES

Seller May Make Conforming Delivery Regardless of Prior Nonconforming Delivery. — It is clear from this section that the seller may at any time before the expiration of the time for performance make a conforming delivery regardless of a prior nonconforming delivery. Meads v. Davis, 22 N.C. App. 479, 206 S.E.2d 868 (1974).

Even Though Seller Knew Prior to Delivery that Goods Were Not in Conformity. — This section deals with the situation in which the seller knows prior to delivery that the goods

are not in conformity, but has reason to believe that the buyer will accept. An example of such a situation might be where the buyer orders goods no longer carried by the seller, but the seller has goods which will perform the same function. Meads v. Davis, 22 N.C. App. 479, 206 S.E.2d 868 (1974).

Buyer's Obligation Abrogated after "Reasonable Time". — Where defendants were not able to and did not make a conforming delivery within a "reasonable time" or within the "contract time," the plaintiff buyer had no further obligations to purchase or accept any mobile home from defendant, whether the original unit was in a repaired condition or was a replacement. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Stated in Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

§ 25-2-510. Effect of breach on risk of loss.

CASE NOTES

Buyer Held Not Liable for Loss of Nonconforming Cable. — In an action to recover the sales price of nonconforming cable which was rejected by the buyer and which was stolen from the buyer's storage space three months after the buyer gave notice of rejection, where the buyer did not contract to return the cable and was not negligent in storing it, the trial court properly concluded the buyer was not liable for the resulting loss. Graybar Elec. Co. v. Shook, 283 N.C. 213, 195 S.E.2d 514 (1973).

§ 25-2-511. Tender of payment by buyer; payment by check.

CASE NOTES

Applied in Berube v. Mobile Homes Sales & Serv., 28 N.C. App. 160, 220 S.E.2d 636 (1975).

§ 25-2-512. Payment by buyer before inspection.

CASE NOTES

Mere fact that plaintiff paid before delivery does not constitute acceptance of goods or impair buyer's right to inspect or any of his remedies. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

A buyer's down payment on goods does not impair his right to inspect following delivery. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

§ 25-2-513. Buyer's right to inspection of goods.

CASE NOTES

Buyer Has Reasonable Time after Arrival to Inspect. — Unless otherwise agreed, when the seller is required to send the goods to the buyer, the inspection may be after their arrival, and the buyer is entitled to a reasonable time after the goods arrive at their final destination to inspect and reject them if they do not comply with the contract. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Applied in Graybar Elec. Co. v. Shook, 17 N.C. App. 81, 193 S.E.2d 392 (1972), aff'd, 283 N.C. 213, 195 S.E.2d 514 (1973).

PART 6.

BREACH, REPUDIATION AND EXCUSE.

§ 25-2-601. Buyer's rights on improper delivery.

CASE NOTES

Applied in Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972); Graybar Elec. Co. v. Shook, 17 N.C. App. 81, 193 S.E.2d 392 (1972), aff'd, 283 N.C. 213, 195 S.E.2d 514 (1973); Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975).

§ 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.

CASE NOTES

The Uniform Commercial Code emphasizes promptness and good faith. Graybar Elec. Co. v. Shook, 283 N.C. 213, 195 S.E.2d 514 (1973).

A prospective purchaser may exercise a valid right to reject. Graybar Elec. Co. v. Shook, 283 N.C. 213, 195 S.E.2d 514 (1973).

And even if he takes possession, responsibility expires after a reasonable time in which the owner has opportunity to repossess. Graybar Elec. Co. v. Shook, 283 N.C. 213, 195 S.E.2d 514 (1973).

Acceptance precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. HPS, Inc. v. All Wood

Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

What Constitutes Effective Rejection. — Effective rejection means (1) rejection within a reasonable time after delivery or tender and (2) seasonable notice to the seller. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Buyer Not Liable for Rejected Goods Which Were Later Stolen. — In an action to recover the sales price of nonconforming cable which was rejected by the buyer and which was stolen from the buyer's storage space three months after the buyer gave notice of rejection, where the buyer did not contract to return the cable and was not negligent in storing it, the trial court properly concluded that the buyer was not liable for the resulting loss. Graybar Elec. Co. v. Shook, 283 N.C. 213, 195 S.E.2d 514 (1973).

Remaining in Mobile Home after Revocation or Rejection. — The fact that plaintiff stayed in a mobile home unit after allegedly revoking or rejecting the unit does not alone necessarily vitiate any of the buyer's rights. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Finding of Revocation or Rejection Warrants Same Relief. — Any error committed by the district court in finding a rejection instead of a revocation of acceptance must be deemed harmless since evidence warranted a finding of revocation. In either case the plaintiff's relief is the same. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Recovery upon Revocation or Rejection. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Evidence of Rejection Insufficient. — Buyer's evidence was insufficient to support a finding that she rejected a mobile home where it showed that, after telling seller when the mobile home was installed that "this is not right and I do not want it," buyer moved into the mobile home and made three monthly payments under the terms of the contract. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Applied in Graybar Elec. Co. v. Shook, 17 N.C. App. 81, 193 S.E.2d 392 (1972), aff'd, 283 N.C. 213, 195 S.E.2d 514 (1973); Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975).

Cited in Trio Estates, Ltd. v. Dyson, 10 N.C. App. 375, 178 S.E.2d 778 (1971); Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184 (1980).

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

CASE NOTES

What Constitutes Acceptance. — Acceptance is ordinarily signified by language or conduct of the buyer that he will take the goods, but this does not necessarily indicate that the goods conform to the contract. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972); HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Acceptance may occur by failure of the buyer "to make an effective rejection" after a reasonable opportunity to inspect. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972); HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Acceptance in Code terminology is a term of art which is unrelated to the question of passage of title from seller to buyer and is "only tangentially related to buyer's possession of goods." HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

What Constitutes Rejection. — Effective rejection means (1) rejection within a reasonable time after delivery or tender and (2) seasonable notice to the seller. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Revocation of Acceptance. — Acceptance precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

The buyer may revoke his acceptance if (1) "the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured," and (2) the nonconformity substantially impairs the value of the goods. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Revocation of acceptance must be made within a reasonable time after the buyer discovers, or should have discovered, the ground for it, and it is not effective until the buyer notifies the seller of it. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Acceptance Entitles Seller to Recover Contract Price and Expenses. — An acceptance of the goods entitles the aggrieved seller to recover the contract price of the goods as well as any expenses reasonably incurred as a result of the breach. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Evidence of Acceptance Sufficient. — Buyer's evidence was sufficient to permit a jury finding that she initially accepted a mobile home on the reasonable assumption that plaintiff would correct the nonconforming defects where it showed that after telling seller when the mobile home was installed that "this is not right and I do not want it," buyer moved into the mobile home and made three monthly payments under the terms of the contract. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Buyer's actions in delivering the checks, signing all the paperwork, and taking delivery of the car were so inconsistent with the seller's ownership as to preclude any other interpretation than that she accepted the car. American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

In an action to recover for breach of contract in the sale of the typesetting equipment, where the record clearly shows that plaintiff retained the machines in question, had possession of them at the time of trial, and had ample time to reject them, particularly since the condition of the goods was fully known to plaintiff, the acts of plaintiff were inconsistent with the seller's (defendant's) ownership and constituted acceptance under subsection (1)(c) of this section. Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665, cert. denied, 300 N.C. 196, 269 S.E.2d 623 (1980).

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).

Applied in Ace Chem. Corp. v. Atomic Paint Co., 31 N.C. App. 221, 229 S.E.2d 55 (1976); ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976); Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980); Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184 (1980).

§ 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 References. — See note to § 25-2-606.

Legal Periodicals. — For note on requirement of privity and express warranties, see 16 Wake Forest L. Rev. 857 (1980).

CASE NOTES

Acceptance Limits Buyer's Remedy to Damages for Breach.—If buyer accepted a mobile home and did not revoke such acceptance, he was obligated to pay the balance due on the contract price and was limited on his counterclaim to recovery of damages for breach of implied warranty of fitness. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Acceptance of goods by the buyer required that the buyer pay the contract price for the goods accepted, retaining, however, the right to counterclaim for breach of warranty by the seller, and the burden of establishing such breach shifted to the buyer. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

But Does Not Bar Action for Breach of Warranty. — While the purchaser of a mobile home was obligated to pay the contract price when she paid the loan on the home and released the lender, thereby accepting the home and barring rejection, she could still maintain an action for breach of warranty. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

What Aggrieved Party Must Show. — Where an aggrieved party seeks to recover damages for breach of an express warranty, limited or otherwise, he must demonstrate both that he has fulfilled his own obligations under it and that he has taken the steps required by this article. Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980).

Covenants to Repair and Replace Defective Parts. — Although limited warranties are valid, compliance with their covenants to repair and to replace defective parts requires that the warrantor do more than make good faith attempts to repair defects when requested to do so, and a manufacturer or other warrantor may be liable for breach of warranty when it repeatedly fails within a reasonable time to correct a defect as promised; moreover, a party seeking to recover for breach of a limited warranty is not required to give the warrantor unlimited opportunities to attempt to bring the item into compliance with the warranty. Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980).

The burden is upon the buyer to establish a breach by the seller of the warranty of merchantability; that is, to show that the defect existed at the time of the sale. Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975).

Policy behind Subsection (3)(a) Notice Requirement. — Perhaps the most important policy behind the notice requirement of this section is enabling the seller to make efforts to cure the breach by making adjustments or replacements in order to minimize the buyer's damages and the seller's liability; however, in cases where the defective goods have caused personal injury, this policy has no application because the damage has already occurred and is irreversible. Maybank v. S.S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681 (1981).

Notice under Subdivision (3)(a) Condition Precedent to Recovery. — The notice "within a reasonable time" required by subdivision (3)(a) of this section in an action for breach of warranty against the immediate seller is a condition precedent to recovery which must be pled and proved by plaintiff rather than an affirmative defense which must be raised by defendant seller. Maybank v. S.S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681 (1981).

What Constitutes Notice "Within a Reasonable Time". — If a delay in giving the notice required by subdivision (3)(a) operates to deprive the seller of a reasonable opportunity to discover facts which might provide a defense or which might lessen his liability, thus defeating the policy behind the notice requirement, the notice might be said not to have been given within a reasonable time. Maybank v. S.S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681 (1981).

Jury Issue as to Seasonable Notice. — When the plaintiff in an action for breach of warranty is a lay consumer and notification is given to the defendant seller by the filing of an action within the period of the statute of limitations, and when the applicable policies behind the requirement of notice to the seller have been fulfilled, the plaintiff is entitled to go to the jury on the issue of seasonable notice to the seller. Maybank v. S.S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681 (1981).

In an action to recover on the theory of breach of warranty of merchantability for injuries resulting from the explosion of a flashcube sold to plaintiff by defendant, plaintiff's evidence was sufficient to go to the jury on the issue of whether plaintiff gave defendant notice "within a reasonable time" where it tended to show that the filing of the suit and accompanying service upon defendant some three years after the explosion was defendant's first notice that the flashcube was defective and had caused injury, that plaintiff was a lay consumer, and that the flashcube which exploded and the carton in which it was purchased were available as evidence at the trial. Maybank v. S.S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681 (1981).

Waiver of Defense. — Where defendant does not assert failure to give notice as an affirmative defense, it is deemed waived. Maybank v. S.S. Kresge Co., 46 N.C. App. 687, 266 S.E.2d 409 (1980), aff'd in part and rev'd in part, — N.C. —, 273 S.E.2d 681 (1981).

Evidence Sufficient to Make Out Case for Seller. — Seller's proof of the sale and delivery of a car at an agreed price and buyer's admission that she took the car, executed the papers connected with the sale and then refused to pay the purchase price makes out a case entitling seller to recover the amount due on the purchase price, nothing else appearing. American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Applied in Ace Chem. Corp. v. Atomic Paint Co., 31 N.C. App. 221, 229 S.E.2d 55 (1976); ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976); Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282 (1979); Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

Cited in Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

§ 25-2-608. Revocation of acceptance in whole or in part.

Legal Periodicals. — For survey of 1972 case law on revocation of acceptance, see 51 N.C.L. Rev. 1170 (1973).

CASE NOTES

Grounds for Revocation. — The buyer may revoke his acceptance if (1) "the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured," and (2) the nonconformity substantially impairs the value of the goods. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

What Buyer Must Show. — In order for the buyer to show that his revocation was justifiable, the following four elements must be proved: (1) that the goods contained a nonconformity that substantially impaired their value to him; (2) that he either accepted the goods knowing of the nonconformity but reasonably assuming that it would be cured, or that he accepted the goods not knowing of the nonconformity due to the difficulty of discovery or reasonable assurances from the seller that the goods were conforming; (3) that revocation occurred within a reasonable time after he discovered or should have discovered the defect; and (4) that he has notified the seller of his revocation. Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282, cert. denied, 297 N.C. 454, 256 S.E.2d 806 (1979).

What Constitutes Notice to Revoke. — Any conduct clearly manifesting a desire of the buyer to get his money back is a sufficient notice to revoke. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Tender of the goods by the buyer to the seller is not an essential element of a revocation of acceptance. All that is required is a notification of revocation. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Waiver of Right to Rescind. — The purchaser waives his right to rescind if, after discovery of the defect or fraud, he ratifies the sale by continuing to use the chattel for his own purposes. Cooper v. Mason, 14 N.C. App. 472, 188 S.E.2d 653 (1972).

Evidence of Revocation Sufficient. — Buyer's evidence was sufficient to permit a jury to find that she revoked her acceptance of a mobile home by reason of seller's failure to correct nonconforming defects where buyer continually complained to seller of the defects from September to December and thereafter ceased making payments under the contract. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Rescission May Be Treated as Revocation of Acceptance. — Assuming without deciding that rescission remains available to a buyer as a remedy by virtue of § 25-1-103, the Supreme Court gave effect to a buyer's allegation of "rescission" as an allegation of "revocation of acceptance" since that Code concept more nearly reflected the claims asserted by the buyer. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Reasonable Time Is Question for Jury. — What is a reasonable time for a buyer to revoke his acceptance is ordinarily a question of fact for the jury. Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282, cert. denied, 297 N.C. 454, 256 S.E.2d 806 (1979).

The existence of any express or implied warranties would be relevant to show the standard to which the goods were supposed to conform. Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282, cert. denied, 297 N.C. 454, 256 S.E.2d 806 (1979).

All Surrounding Circumstances May Be Considered. — In determining whether revocation was made within a reasonable time after the buyer discovered or should have discovered the nonconformity, it is proper to consider all the surrounding circumstances, including the nature of the defect, the complexity of the goods involved, the sophistication of the buyer, and the difficulty of its discovery. Indeed the reasonable time period may extend in certain cases beyond the time in which notice of the nonconformity has been given, as for example where the parties make attempts at adjustment. Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282, cert. denied, 297 N.C. 454, 256 S.E.2d 806 (1979).

Reasonable Time Exceeded. — Seventeen months and 30,000 miles were held to exceed a reasonable time for revocation of the purchase of an automobile. Cooper v. Mason, 14 N.C. App. 472, 188 S.E.2d 653 (1972).

Remaining in Mobile Home after Revocation or Rejection. — The fact that plaintiff stayed in a mobile home unit after allegedly revoking or rejecting the unit does not alone necessarily vitiate any of the buyer's rights. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Burden Is on Buyer to Show Revocation Justifiable. — When the buyer revokes his acceptance, the burden is on him to show that such revocation was justifiable before he will be allowed to recover. Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282, cert. denied, 297 N.C. 454, 256 S.E.2d 806 (1979).

Facts Insufficient to Justify Revocation. — An automobile buyer had no right under this section to revoke her acceptance of the automobile because (1) the odometer was not working when the car was delivered to her or (2) the fan belt broke two days after the delivery, since there was no evidence that the mileage shown on the odometer was not the actual mileage or that she was prevented from discovery of the actual mileage by the seller's assurances, and since the breaking of the fan belt was insufficient to show such nonconformity as would allow her to revoke her acceptance. American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Finding of Revocation or Rejection Warrants Same Relief. — Any error committed by the district court in finding a rejection instead of a revocation of acceptance must be deemed harmless since evidence warranted a finding of revocation. In either case the plaintiff's relief is the same. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Buyer Need Not Elect Remedies. — A buyer who revokes his acceptance is not required to elect between revocation of acceptance on the one hand and recovery of damages for breach of implied warranty of fitness on the other; both remedies are then available to him. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Recovery upon Revocation or Rejection. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Applied in Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975); Ace Chem. Corp. v. Atomic Paint Co., 31 N.C. App. 221, 229 S.E.2d 55 (1976); ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976); Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

Cited in Wachovia Bank & Trust Co., N.A. v. Smith, 24 N.C. App. 133, 210 S.E.2d 212 (1974), cert. denied, 286 N.C. 420, 211 S.E.2d 801 (1975).

§ 25-2-610. Anticipatory repudiation.

Legal Periodicals. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

CASE NOTES

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

§ 25-2-615. Excuse by failure of presupposed conditions.

Legal Periodicals. — For article discussing judicial reallocation of contractual risks under this section, see 54 N.C.L. Rev. 545 (1976).

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.)

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

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (3) is set out.

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

For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

CASE NOTES

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, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (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, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1977).

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, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (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, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (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, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

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

Cross References. — See note to § 25-2-702.

Legal Periodicals. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

§ 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.)

Effect of Amendments. — 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.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (2) is set out.

Legal Periodicals. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

§ 25-2-705. Seller's stoppage of delivery in transit or otherwise.

Legal Periodicals. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

§ 25-2-706. Seller's resale including contract for resale.

Legal Periodicals. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

Stated in Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

§ 25-2-708. Seller's damages for nonacceptance or repudiation.

Legal Periodicals. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

CASE NOTES

Applied in Industrial Circuits Co. v. Terminal Communications, Inc., 26 N.C. App. 536, 216 S.E.2d 919 (1975).

§ 25-2-709. Action for the price.

Legal Periodicals. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

CASE NOTES

Seller May Recover Contract Price and Reasonable Expenses. — An acceptance of the goods entitles the aggrieved seller to recover the contract price of the goods as well as any expenses reasonably incurred as a result of the breach. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

What Seller Must Prove. — In an action under subsection (1) of this section for the price of goods sold, the seller must carry the burden of proof as to four elements: (1) acceptance by the buyer of the goods; (2) the price of the goods accepted; (3) the past due date of the price; and (4) the failure of the buyer to pay. Leviton Mfg. Co. v. Butch Mfg. Co., 37 N.C. App. 726, 247 S.E.2d 1, appeal dismissed, 295 N.C. 734, 248 S.E.2d 864 (1978).

Evidence Sufficient to Establish Prima Facie Case. — Where the plaintiff-seller presented competent evidence tending to show delivery at invoice prices, acceptance and use of the goods by defendant-buyer, at invoice prices, demand for payment by plaintiff-seller, acknowledgment of the debt and agreement by defendant to pay, and failure to pay, at the close of the plaintiff's evidence which established a prima facie case, the burden of going forward with the evidence had shifted to defendant. Leviton Mfg. Co. v. Butch Mfg. Co., 37 N.C. App. 726, 247 S.E.2d 1, appeal dismissed, 295 N.C. 734, 248 S.E.2d 864 (1978).

§ 25-2-710. Seller's incidental damages.

Legal Periodicals. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

CASE NOTES

Seller May Recover Expenses Reasonably Incurred. — An acceptance of the goods entitles the aggrieved seller to recover the contract price of the goods as well as any expenses reasonably incurred as a result of the breach. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Applied in Industrial Circuits Co. v. Terminal Communications, Inc., 26 N.C. App. 536, 216 S.E.2d 919 (1975).

§ 25-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.

CASE NOTES

Recovery of Price Paid and Damages. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

There is no relation between the practice of "hedging" and "cover" under the Uniform Commercial Code. Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977).

Applied in Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975); Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282 (1979).

Stated in Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Cited in Wachovia Bank & Trust Co., N.A. v. Smith, 24 N.C. App. 133, 210 S.E.2d 212 (1974), cert. denied, 286 N.C. 420, 211 S.E.2d 801 (1975); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

§ 25-2-712. "Cover"; buyer's procurement of substitute goods.

Legal Periodicals. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

CASE NOTES

Requirements for Remedy of "Cover". — In order to employ the remedy of "cover," the buyer must meet the requirements set out in subsection (1) of this section. First, there must have been a breach of the contract, and the seller must have either repudiated the contract or failed to deliver the goods, or the buyer must have rightfully rejected or justifiably revoked his acceptance of the goods. Second, the buyer must have acted in good faith and without unreasonable delay in procuring the substitute goods. Finally, the replacement goods must be a reasonable substitute for those the buyer contracted to purchase. Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282, cert. denied, 297 N.C. 454, 256 S.E.2d 806 (1979).

There is no relation between the practice of "hedging" and "cover" under the Uniform Commercial Code. Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977).

Applied in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-2-713. Buyer's damages for nondelivery or repudiation.

Legal Periodicals. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

CASE NOTES

Applied in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

Cited in Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977).

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

CASE NOTES

The general measure of damages for breach of warranty allowed by the Uniform Commercial Code under this section is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980).

Subsection (2) is not the exclusive measure of damages for breach of warranty. ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Special Damages under § 25-2-715 Distinguished. — The distinction between general damages under this section and special damages under § 25-2-715 is principally important with regard to the pleadings and quantum of proof. General damages are the natural and necessary result of the wrong, are implied by law, and may be recovered under a general allegation of damages, whereas special damages, those which do not necessarily result from the wrong, must be pleaded, and the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand. Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

Amount of Damages Question for Jury. — The determination of the amount of damages recoverable was properly a question for the jury upon consideration of all the evidence presented. ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Burden of Proof of Value. — The burden of proving the (1) value the goods would have had if they had been as warranted and (2) the value of the goods as accepted, is on the buyer, and this burden of proof as to damages from breach of the sales contract cannot be met by mere conjecture. HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

The burden of proving the difference in value rests upon the purchaser. Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980); Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184, cert. denied, 301 N.C. 406, 273 S.E.2d 451 (1980).

Proof Not Required of Buyer. — Where the manufacturer failed effectively to limit the remedy available to the buyer for breach of warranty other than to exclude consequential damages, it was not necessary to plaintiff's recovery of damages under this section that he prove that any such limitation of remedies had failed of its essential purpose within the meaning of § 25-2-719(2). Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184, cert. denied, 301 N.C. 406, 273 S.E.2d 451 (1980).

Offset to Damages. — In an action to recover damages for an alleged breach of warranty by a car dealer and car manufacturer, plaintiff, upon a showing of such breach, would be entitled to recover the difference between the value of the vehicle as accepted and the value of the vehicle had it been as warranted; however, to the extent that the successful elimination of the vibration problem increased the value of the vehicle, defendants should be entitled to offset the damages by an amount representing that increase in value, an amount which defendants should have the burden of proving. The amount of offset to damages would be most fairly computed by determining (1) what the hypothetical depreciated value of the vehicle would have been as of the date the repairs were completed had the vehicle been as warranted, and (2) what the depreciated value of the vehicle was in its defective condition as of that same date not taking into account the repairs made. The difference between those two figures should reflect the amount of offset to damages which the warrantor could claim. Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184, cert. denied, 301 N.C. 406, 273 S.E.2d 451 (1980).

Owner Competent to Testify. — Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Contract Price May Serve as Strong Evidence of Value of Goods as Warranted. — See HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Quoted in Performance Motors, Inc. v. Allen, 11 N.C. App. 381, 181 S.E.2d 134 (1971); Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Stated in Ace Chem. Corp. v. Atomic Paint Co., 31 N.C. App. 221, 229 S.E.2d 55 (1976).

Cited in Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp., 46 N.C. App. 248, 264 S.E.2d 768 (1980).

§ 25-2-715. Buyer's incidental and consequential damages.

Legal Periodicals. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

CASE NOTES

Purpose of Point 4 of Official Comment to Section. — It was to bring the law into harmony with the market place that the draftsmen of the Uniform Commercial Code said in Point 4 of the Official Comment to this section: "The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances." Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972).

General Damages under § 25-2-714 Distinguished. — The distinction between general damages under § 25-2-714 and special damages under this section is principally important with regard to the pleadings and quantum of proof. General damages are the natural and necessary result of the wrong, are

implied by law, and may be recovered under a general allegation of damages. But special damages, those which do not necessarily result from the wrong, must be pleaded, and the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand. Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

Incidental damages are those that are causally related to the breach. B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

When Prospective Profits from Established Mercantile Business Recoverable. — It may be stated as a general rule that the prospective profits from an established mercantile business, prevented or interrupted by breach of contract, are properly the subject of recovery when it is made to appear (1) that it is reasonably certain that such profits would have been realized except for the breach of the contract, (2) that such profits can be ascertained and measured with reasonable certainty, and (3) that such profits may be reasonably supposed to have been within the contemplation of the parties, when the contract was made, as the probable result of a breach. Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972).

The owner of a knitting mill was not entitled to recover the loss of anticipated profits where the effect on the owner's profits of the contractor's breach of production requirements of a contract to construct a yarn-spinning mill was so remote as to be speculative. Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972).

Operating Losses. — Operating losses are special damages which must be alleged under § 1A-1, Rule 9(g) and are consequential damages which are recoverable under subsection (2) of this section if defendant knew or reasonably could have foreseen that the probable result of a malfunctioning product would be such operating losses. Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

Where the contractor, experienced in the design and construction of spinning mills, knew or reasonably could have foreseen that the probable result of an ill-equipped mill would be a decrease in production, shoddy yarn, and an increase in operating expenses, such operating losses are foreseeable and are recoverable as damages. Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972).

Applied in Harrington Mfg. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282 (1979); Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980); Maybank v. S.S. Kresge Co., 46 N.C. App. 687, 266 S.E.2d 409 (1980).

Cited in Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

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

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, added "or in other proper circumstances" at the end of subsection (1). See amendment note to § 25-1-201.

Legal Periodicals. — For note discussing liquidated damages, specific performance and other remedies for breach of cotton sales contracts, see 53 N.C.L. Rev. 579 (1974).

§ 25-2-718. Liquidation or limitation of damages; deposits.

CASE NOTES

Applied in Billings v. Joseph Harris Co., 290 N.C. 502, 226 S.E.2d 321 (1976).

§ 25-2-719. Contractual modification or limitation of remedy.

Legal Periodicals. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

For note discussing liquidated damages, specific performance and other remedies for breach of cotton sales contracts, see 53 N.C.L. Rev. 579 (1974).

For note on requirement of privity and express warranties, see 16 Wake Forest L. Rev. 857 (1980).

CASE NOTES

This Section and § 25-2-316 Distinguished. — Although § 25-2-316 and this section are closely related, the former is directed to the creation of a limited duty under the warranty, whereas the latter is directed to the limitation of the remedy available in the event of a breach of that duty. Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184, cert. denied, 301 N.C. 406, 273 S.E.2d 451 (1980).

Disclaimer and Substitution of Liabilities under This Section. — A merchant seller may disclaim all liability under § 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under §§ 25-2-314 and 25-2-315, substituting in place thereof the limitations of subdivision (1)(a) of this section. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Remedy Provided for in Express Warranty Controlling. — In an action by plaintiff-buyer against defendant-manufacturer under an express warranty, which provides for a remedy in substitution for the general rule of damages applicable to breach of contract for sale of personal property, the remedy provided for in the express warranty is controlling, at least where such provisions meet the general tests of legality. Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp., 46 N.C. App. 248, 264 S.E.2d 768 (1980).

Presumption That Remedies Are Cumulative. — Subsection (1) (b) of this section creates a presumption that, in the absence of a clear expression to the contrary, remedies are cumulative rather than exclusive. Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184, cert. denied, 301 N.C. 406, 273 S.E.2d 451 (1980).

Remedy Failing of Essential Purpose. — Where a defect in a truck was not or could not be repaired within a reasonable period as required by a warranty limiting the remedy available to the purchaser in the event of a breach to repair or replacement of parts, the limited, exclusive remedy "fails of its essential purpose" within the meaning of subsection (2) of this section, and the purchaser is entitled to recover damages as otherwise provided in the Uniform Commercial Code. Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980).

When Proving Such Failure Not Required. — Where the manufacturer failed effectively to limit the remedy available to the buyer for breach of warranty other than to exclude consequential damages, it was not necessary to plaintiff's recovery of damages under § 25-2-714 that he prove that any such limitation of remedies had failed of its essential purpose within the meaning of subsection (2). Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 269 S.E.2d 184, cert. denied, 301 N.C. 406, 273 S.E.2d 451 (1980).

Unconscionability relates to contract terms that are oppressive. It is applicable to one-sided provisions, denying the contracting party any opportunity for meaningful choice. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Applied in Billings v. Joseph Harris Co., 290 N.C. 502, 226 S.E.2d 321 (1976).

Quoted in Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972).

Cited in Maybank v. S.S. Kresge Co., 46 N.C. App. 687, 266 S.E.2d 409 (1980).

§ 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.)

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

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (2) is set out.

Legal Periodicals. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

§ 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.)

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, added the second sentence of subsection (1). See amendment note to § 25-1-201.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (1) is set out.

Legal Periodicals. — For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

CASE NOTES

Intent of Code. — The Uniform Commercial Code was not intended to shield manufacturers of defective products from indemnity claims made by their purchasers more than four years from the date of sale by the manufacturer. Walker Mfg. Co. v. Dickerson, Inc., 619 F.2d 305 (4th Cir. 1980).

When Statute of Limitations Begins to Run. — Where one person's liability for a tort or breach of warranty committed by another is secondary, the statute of limitations does not start running against his right to indemnity from the party primarily liable until he has paid damages to the injured party. Walker Mfg. Co. v. Dickerson, Inc., 619 F.2d 305 (4th Cir. 1980).

In an action to recover a deficiency remaining after repossession and sale of collateral security, where the defendant had purchased a motor vehicle on credit, executing a purchase money security agreement giving the seller a purchase money security interest in the vehicle and retaining title in the seller or its assignees until the purchase price was fully paid, and where the defendant immediately defaulted, the 10-year limitation of § 1-47(2) was applicable, rather than the four-year limitation of this section. North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

The plain language of Article 2 of the North Carolina Uniform Commercial Code and subsequent legislative history indicate that the North Carolina legislature intended Article 9 to govern the security aspects of purchase money security agreements, and that accordingly, the 10-year limitation of § 1-47(2), and not the four-year limitation of this section, is

applicable to such agreements executed under seal. North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

Cited in Hall v. Gurley Milling Co., 347 F. Supp. 13 (E.D.N.C. 1972); Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977).

ARTICLE 3.

Commercial Paper.

PART 1.

SHORT TITLE, FORM AND INTERPRETATION.

§ 25-3-101. Short title.

Legal Periodicals. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-3-102. Definitions and index of definitions.

CASE NOTES

Cited in Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

§ 25-3-103. Limitations on scope of article.

CASE NOTES

Cited in Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

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

CASE NOTES

The full tests for determining whether a particular instrument is a negotiable instrument under this Article can be determined only by reading §§ 25-3-104 through 25-3-112 as a unit. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

As Does Condition. —

Under the law of this State prior to the adoption of the Uniform Commercial Code, it was clearly established that a conditional promise or contingent condition contained in the instrument itself had the effect of defeating the negotiability of the instrument. This prior law is carried forward in subsection (1)(b). Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Note Not Payable to Order or Bearer, etc. —

A draft is not a negotiable instrument when it is payable to two named payees without the addition of the words "or order," or any similar words of negotiability. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

Under old law of commercial paper and now incorporated into the Uniform Commercial Code, a note payable neither to order nor to bearer is not negotiable. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Specificity on the face of the negotiable instrument is required whether payment be to order or to bearer. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

A traveler's check is a negotiable instrument within the purview of this article. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

A continuing guaranty was not a negotiable instrument where it provided a ceiling on the amount of defendant's liability but did not specify the amount of liability that was to be paid, and where there was no provision in the agreement that it was payable to order or bearer. Branch Banking & Trust Co. v. Creasy, 301 N.C. 44, 269 S.E.2d 117 (1980).

Applied in Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977); Liles v. Myers, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

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

OPINIONS OF ATTORNEY GENERAL

Distinction Between "Check" and "Draft". — See opinion of Attorney General to Mr. Fred P. Parker, Jr., Wayne County Attorney, 40 N.C.A.G. 817 (1969).

§ 25-3-105. When promise or order unconditional.

CASE NOTES

Reference to Separate Agreement. — Under subsections (1)(b) and (c), it is clear that mere reference in a note to the separate agreement or document out of which the note arises does not affect the negotiability of the note. But to go beyond a reference to the separate agreement, by incorporating the terms of that agreement into the note, makes the note "subject to or governed by" that agreement, and thus, under subsection (2)(a), renders the promise conditional and the note nonnegotiable. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

When the instrument itself makes express reference to an outside agreement, transaction or document, the effect on the negotiability of the instrument will depend on the nature of the reference. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-106. Sum certain.

CASE NOTES

Reason for Definite Sum. — It is necessary for a negotiable instrument to bear a definite sum so that subsequent holders may take and transfer the instrument without having to plumb the intricacies of the instrument's background. Branch Banking & Trust Co. v. Creasy, 301 N.C. 44, 269 S.E.2d 117 (1980).

For the requirement of a sum certain to be met, it is necessary that at the time of payment the holder is able to determine the amount which is then payable from the instrument itself, with any necessary computation, without any reference to an outside source. Branch Banking & Trust Co. v. Creasy, 301 N.C. 44, 269 S.E.2d 117 (1980).

§ 25-3-108. Payable on demand.

CASE NOTES

A note stating that it was due at request with 30 days' notice was a demand note. Shields v. Prendergast, 36 N.C. App. 633, 244 S.E.2d 475 (1978).

§ 25-3-110. Payable to order.

CASE NOTES

Draft Payable to Payees without Addition of Word "or Order," etc. — A draft is not a negotiable instrument when it is payable to two named payees without the addition of the words "or order," or any similar words of negotiability. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-3-111. Payable to bearer.

CASE NOTES

Specificity on the face of the negotiable instrument is required whether payment be to order or to bearer. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-112. Terms and omissions not affecting negotiability.

CASE NOTES

The full tests for determining whether a particular instrument is a negotiable instrument under this article can be determined only by reading §§ 25-3-104 through 25-3-112 as a unit. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

The payee's name is not one of the terms and omissions not affecting negotiability under this section. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-113. Seal.

Legal Periodicals. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

CASE NOTES

Cited in Bank of N.C. v. Cranfill, 37 N.C. App. 182, 245 S.E.2d 538 (1978).

§ 25-3-114. Date, antedating, postdating.

CASE NOTES

Stated in Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-115. Incomplete instruments.

CASE NOTES

The name of the payee is an essential element. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Dating is not a necessary element, the absence of which makes the instrument incomplete and unenforceable under this section. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Travelers checks which were not dated and did not bear the name of the payee remained incomplete and unenforceable as a matter of law, where plaintiff had the authority to complete the instruments, had nine years to do so, and did not. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

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).

§ 25-3-118. Ambiguous terms and rules of construction.

CASE NOTES

Subsection (e) of this section does not change the rule in this State that a prior endorser is not entitled to recover from a subsequent endorser in the absence of an agreement otherwise establishing liability. Wilson v. Turner, 29 N.C. App. 101, 223 S.E.2d 539, cert. denied, 290 N.C. 311, 225 S.E.2d 832 (1976).

Revealing Parties' True Relationship. — The true relationship existing between the parties may be revealed to alter the otherwise absolute obligation of the signers. Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

Comaker's Right to Contribution. — Because of the joint and several nature of a maker's obligation under a note, when one comaker pays the instrument he is entitled to contribution from other comakers. Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

A comaker's right to contribution is unaffected by the marital relationship of the parties to a note. Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

Name Signed at Place Regularly Provided for Makers. — Where the wife of one of the makers of a note affixed her signature and seal to the bottom right-hand corner of the instrument, among the signatures of the makers of the note, although her name was not typed in at the top as a "borrower-debtor," by signing the note at a place regularly provided for makers of a note, she thereby became a maker of the note rather than an endorser. Her signature at this place, plus the fact that the terms of the note itself refer to the

"undersigned" as "debtor," dispelled any ambiguity which might have rendered her an endorser under § 25-3-402. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-3-120. Instruments "payable through" bank.

CASE NOTES

A defendant bank was not a "payor bank" with respect to instruments which were "payable through" the defendant bank and were the subject of an action wherein the issuer of a banker's blanket bond sought to recover on the theory that the negligence of the defendant bank in misrouting, mislaying, or causing confusion in the collection process was the proximate cause of the loss sustained by the bank to which the bond was issued where the defendant bank was not named as a drawee and was not ordered or even authorized to pay drafts out of the drawee's account or any other funds of the drawee in its hands. Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

Applied in First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

Stated in North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

Quoted in Branch Banking & Trust Co. v. Gill, 286 N.C. 342, 211 S.E.2d 327 (1975).

§ 25-3-122. Accrual of cause of action; interest.

CASE NOTES

A note stating that it was due at request with 30 days' notice was a demand note. Shields v. Prendergast, 36 N.C. App. 633, 244 S.E.2d 475 (1978).

PART 2.

Transfer and Negotiation.

§ 25-3-201. Transfer; right to indorsement.

CASE NOTES

Purpose of Subsection (1). — The shelter principle of subsection (1) of this section seeks to ensure that a holder in due course always enjoys a ready market for the paper he owns. Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. 1978).

The shelter principle of subsection (1) applies with greatest vigor to holders of time instruments yet to come due for in such cases the holder cannot collect from the maker. If the holder needs immediate funds, he must turn to the market. If, however, notice of claims and defenses is widespread, free transfer will be inhibited. Thus, this section protects the transferee so as to create a market for the transferor. Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. 1978).

Exclusion from Shelter Principle of Persons Having Notice of Prior Claims. — The exclusion from the shelter principle of one who, having had notice of prior claims, takes back an instrument from a holder in due course rests upon sound principle and simple logic. Operation of the shelter principle in favor of such a person would defeat the purpose of subjecting him to defenses of the maker. Without the exception to the shelter principle, one not a holder in due course, by a transfer and an agreement to repurchase, could readily avoid the limitations under which he held the instrument in the first place. Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. 1978).

The pledgee of a negotiable instrument may qualify as a holder in due course, but the pledgee's rights are limited by his secured creditor's status. Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. 1978).

Claim Falling Outside Protection of Shelter Principle. — Assignee's claim seeking the face value of a certificate of deposit fell outside the protective sweep of the shelter principle in subsection (1) of this section, where the actual assignor of the instrument, having had notice of prior claims, first assigned the certificate to a third party as security for a loan, then in fact took back the instrument before it was assigned to the assignee, despite efforts to avoid the appearance of reacquisition. Since the actual assignor was not a holder in due course, the assignee could not have become a holder in due course derivatively. Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. 1978).

Applied in Smathers v. Smathers, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

§ 25-3-202. Negotiation.

CASE NOTES

Who Is Holder of Negotiable Instrument. — Where a negotiable instrument is made payable to order, one becomes a holder of the instrument when it is properly endorsed and delivered to him, and mere possession of a note payable to order does not suffice to prove ownership or holder status. Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980).

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).

Applied in First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972); Liles v. Myers, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

§ 25-3-203. Wrong or misspelled name.

CASE NOTES

Applied in Agaliotis v. Agaliotis, 38 N.C. App. 42, 247 S.E.2d 28 (1978).

§ 25-3-205. Restrictive indorsements.

CASE NOTES

Applied in Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

Stated in Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980).

Cited in Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-206. Effect of restrictive indorsement.

CASE NOTES

Stated in Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980).

Cited in Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-207. Negotiation effective although it may be rescinded.

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

PART 3.

Rights of a Holder.

§ 25-3-301. Rights of a holder.

CASE NOTES

Applied in Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977); Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980).

Cited in Smathers v. Smathers, 34 N.C. App. 724, 239 S.E.2d 637 (1977); Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978); In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

§ 25-3-302. Holder in due course.

CASE NOTES

Some Method of Delivery Necessary to Make the Obligation Enforceable. — While it is not indispensable that there should have been an actual manual transfer of the instrument from the maker to the payee, yet, to constitute a delivery it must appear that the maker in some way evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it and intentionally placing it under the power of the payee or of some third person for his use. Wolfe v. Eaker, 50 N.C. App. 144, 272 S.E.2d 781 (1980), cert. denied, — N.C. —, 277 S.E.2d 69 (1981).

The pledgee of a negotiable instrument may qualify as a holder in due course, but the pledgee's rights are limited by his secured creditor's status. Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. 1978).

Applied in Lowe's of Sanford, Inc. v. Mid-South Bank & Trust Co., 44 N.C. App. 365, 260 S.E.2d 801 (1979); Alamance Bldrs., Inc. v. Central Carolina Bank & Trust Co., 45 N.C. App. 46, 262 S.E.2d 338 (1980).

Stated in Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

Cited in Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

§ 25-3-303. Taking for value.

CASE NOTES

The wording of this section contemplates a simultaneous transaction — a commitment to a third person made when the holder takes the instrument, not a commitment made subsequent to the taking of the instrument. Therefore, plaintiff's subsequent reliance on payment of draft did not constitute a taking for value necessary to put plaintiff in the position of holder in due course. Bennett v. United States Fid. & Guar. Co., 19 N.C. App. 66, 198 S.E.2d 33, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Applied in Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979); Alamance Bldrs., Inc. v. Central Carolina Bank & Trust Co., 45 N.C. App. 46, 262 S.E.2d 338 (1980).

§ 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.

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

CASE NOTES

Applied in Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976); Ralph Stachon & Assocs. v. Greenville Broadcasting Co., 35 N.C. App. 540, 241 S.E.2d 884 (1978); Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. 1978).

Stated in Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

Cited in Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

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

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

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).

Applied in Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976); Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977); Ralph Stachon & Assocs. v. Greenville Broadcasting Co., 35 N.C. App. 540, 241 S.E.2d 884 (1978); Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

Stated in Wolfe v. Eaker, 50 N.C. App. 144, 272 S.E.2d 781 (1980).

Cited in Tifco, Inc. v. Insurance Designers Underwriters Group, Inc., 30 N.C. App. 641, 228 S.E.2d 60 (1976).

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

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

CASE NOTES

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, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (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, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (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, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (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, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (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, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (1971).

Applied in Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977); Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978).

Quoted in Wolfe v. Eaker, 50 N.C. App. 144, 272 S.E.2d 781 (1980).

PART 4.

LIABILITY OF PARTIES.

§ 25-3-401. Signature.

CASE NOTES

This section does not affect the liability of a nonsigner in connection with an original obligation for which the instrument was later given on other circumstances relating to the same transactions. North Carolina Nat'l Bank v. Wallens, 31 N.C. App. 721, 230 S.E.2d 690 (1976).

Cited in Bank of N.C. v. Cranfill, 37 N.C. App. 182, 245 S.E.2d 538 (1978).

§ 25-3-402. Signature in ambiguous capacity.

CASE NOTES

Signature Held Not Ambiguous. — Where the wife of one of the makers of a note affixed her signature and seal to the bottom right-hand corner of the instrument, among the signatures of the makers of the note, although her name was not typed in at the top as a "borrower-debtor," by signing the note at a place regularly provided for makers of a note, she thereby became a maker of the note rather than an endorser. Her signature at this place, plus the fact that the terms of the note itself refer to the "undersigned" as "debtor," dispelled any ambiguity which might have rendered her an endorser under this section. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

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

Cross References. — See note to § 25-3-307.

Legal Periodicals. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

CASE NOTES

Burden on Signing Party to Avoid Personal Obligation. — The clear intent of the statute is that the signing party has the burden to otherwise establish, else he incurs the personal obligation which the statute imposes. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

Undisclosed Intention Not To Be Personally Obligated Irrelevant by Itself. — It takes more than an intention of one party undisclosed to the other to establish the requisite understanding between the parties necessary to invoke the exception to personal liability under subdivision (2)(b) of this section. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

Subdivision (2)(b) allows introduction of parol evidence to establish requisite agency status to avoid personal liability. North Carolina Equip. Co. v. DeBruhl, 28 N.C. App. 330, 220 S.E.2d 867, cert. denied, 289 N.C. 451, 223 S.E.2d 160 (1976).

Alter Ego Doctrine Inapplicable. — Evidence establishing that defendant's den was the corporate office, that defendant had not read the corporate bylaws and that he was not familiar with the corporation's tax matters was not sufficient evidence to show that the corporation was "ignored as a separate entity," and was insufficient to apply the alter ego doctrine and hold defendant personally liable. North Carolina Equip. Co. v. DeBruhl, 28 N.C. App. 330, 220 S.E.2d 867, cert. denied, 289 N.C. 451, 223 S.E.2d 160 (1976).

Applied in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

Cited in Keels v. Turner, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

§ 25-3-404. Unauthorized signatures.

CASE NOTES

Retention of Benefits as Ratification. — A retention of benefits, with knowledge of his unauthorized signature, by one whose name was signed without authorization may be found to be a ratification. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

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

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

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

Cited in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

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

Legal Periodicals. — For note on estoppel and forged indorsements under the Uniform Commercial Code, see 47 N.C.L. Rev. 256 (1968).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

Applicable Standard of Conduct for Notifying Payors. — Section 25-4-406 makes provision for notifying a bank of unauthorized checks within certain time periods after bank statements have been received in order to hold the bank liable, and this is a standard of reasonable conduct which should also apply in regard to notifying other payors pursuant to this section. Hartford Accident & Indem. Co. v. Dean's Shop-Rite, Inc., 48 N.C. App. 615, 269 S.E.2d 282 (1980).

§ 25-3-407. Alteration.

CASE NOTES

Applied in First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972); Mitchell v. Republic Bank & Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978).

§ 25-3-408. Consideration.

CASE NOTES

Applied in Ralph Stachon & Assocs. v. Greenville Broadcasting Co., 35 N.C. App. 540, 241 S.E.2d 884 (1978); Wolfe v. Eaker, 50 N.C. App. 144, 272 S.E.2d 781 (1980), cert. denied, — N.C. —, 277 S.E.2d 69 (1981).

§ 25-3-409. Draft not an assignment.

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

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.

CASE NOTES

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 Constitute "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).

Applied in First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-3-413. Contract of maker, drawer and acceptor.

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

Quoted in Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

Cited in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

§ 25-3-414. Contract of indorser; order of liability.

Legal Periodicals. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

CASE NOTES

Presumption as to Order of Liability Unchanged. — The Uniform Commercial Code did not change the North Carolina rule that endorsers are presumed to be liable in the order in which their signatures appear on the instrument. Wilson v. Turner, 29 N.C. App. 101, 223 S.E.2d 539, cert. denied, 290 N.C. 311, 225 S.E.2d 832 (1976).

§ 25-3-415. Contract of accommodation party.

CASE NOTES

An accommodation party is always a surety. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

§ 25-3-417. Warranties on presentment and transfer.

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

When Warranty of Good Title Broken. — A warranty to a person who pays an instrument in good faith that the person who obtains payment has a good title to the instrument or is authorized to obtain payment on behalf of one who has a good title to it is broken if such person claims through the forged instrument of a joint payee having any interest in the proceeds of the paper. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-3-418. Finality of payment or acceptance.

CASE NOTES

Where a bank issued its own cashier's check in payment of a check to a third party drawn on an account of a depositor, and the depositor subsequently took action which rendered its check worthless, the bank's issuance of the cashier's check, which by definition is also an acceptance, constitutes an engagement by the bank to honor the check as presented extinguishing the right of the bank or anyone else to countermand the check. Lowe's of Sanford, Inc. v. Mid-South Bank & Trust Co., 44 N.C. App. 365, 260 S.E.2d 801 (1979).

Quoted in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

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

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

CASE NOTES

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).

Applied in Alamance Bldrs., Inc. v. Central Carolina Bank & Trust Co., 45 N.C. App. 46, 262 S.E.2d 338 (1980).

Quoted in North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

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.)

Effect of Amendments. — 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 amendment note to § 25-1-201.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (3) is set out.

§ 25-3-505. Rights of party to whom presentment is made.

CASE NOTES

Cited in Tifco, Inc. v. Insurance Designers Underwriters Group, Inc., 30 N.C. App. 641, 228 S.E.2d 60 (1976).

§ 25-3-507. Dishonor; holder's right of recourse; term allowing re-presentment.

CASE NOTES

Cited in Tifco, Inc. v. Insurance Designers Underwriters Group, Inc., 30 N.C. App. 641, 228 S.E.2d 60 (1976).

§ 25-3-512. Collection of processing fee for returned checks.

A processing fee, not to exceed ten dollars ($10.00), may be charged and collected for checks on which payment has been refused by the payor bank because of insufficient funds or because the drawer did not have an account at that bank if at the time the consumer presented the check to the person, a sign:

(1) was conspicuously posted on or in the immediate vicinity of the cash register;

(2) was in plain view of anyone paying for goods or services by check;

(3) was no smaller than 8 by 11 inches; and

(4) stated the amount of the fee that would be charged for returned checks.

Where the drawer sends the check by mail for payment of the debt, and the check is dishonored and returned, the processing fee may be collected if expressly authorized by the agreement creating the debt.

If a collection agency collects or seeks to collect the sum payable of a check, the drawer is not required to pay a fee unless the fee is expressly authorized by the agreement creating the debt. If an action is brought to recover the sum payable of a check, the remedies shall be as provided in G.S. 6-21.3. (1981, c. 781, s. 1.)

Editor's Note. — Session Laws 1981, c. 781, s. 3, provides: "This act shall become effective July 1, 1981, and applies to checks written on or after this date."

PART 6.

DISCHARGE.

§ 25-3-601. Discharge of parties.

CASE NOTES

Cited in Wolfe v. Eaker, 50 N.C. App. 144, 272 S.E.2d 781 (1980).

§ 25-3-602. Effect of discharge against holder in due course.

CASE NOTES

Cited in Liles v. Myers, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

§ 25-3-603. Payment or satisfaction.

CASE NOTES

Stated in Wolfe v. Eaker, 50 N.C. App. 144, 272 S.E.2d 781 (1980).

Cited in Tifco, Inc. v. Insurance Designers Underwriters Group, Inc., 30 N.C. App. 641, 228 S.E.2d 60 (1976).

§ 25-3-605. Cancellation and renunciation.

CASE NOTES

Cited in Wolfe v. Eaker, 50 N.C. App. 144, 272 S.E.2d 781 (1980).

§ 25-3-606. Impairment of recourse or of collateral.

CASE NOTES

Suretyship Defenses Are Available to Accommodation Maker or Acceptor. — Suretyship defenses are not limited to parties who are "secondarily liable," but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

Holder Not Required to File Security Agreement. — There is nothing in the Code nor any case law requiring the holder to file a security agreement. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

A trust company holding a note executed by a bankrupt corporation had no duty to the endorsers to file the security agreement later executed in proper form for recordation in order to protect the collateral for the endorsers. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

And Mere Failure to File May Not Constitute Unjustified Impairment of Collateral. — Since there is no absolute duty to file a security agreement, whether the mere failure to file would constitute an unjustifiable impairment of collateral must depend upon the facts of the particular case. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

Which Is Required by U.C.C. — Even though impairment of collateral by the holder would generally discharge the surety under the N.I.L. and even though the U.C.C. may have made that defense available to an accommodation endorser, nevertheless, the Code has added a requirement. The holder must have unjustifiably impaired the collateral. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

Applied in Better Adv., Inc. v. Peace, 43 N.C. App. 534, 259 S.E.2d 359 (1979).

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.)

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, added at the end of the second sentence of paragraph (b) of subsection (1) "to the extent of his discharge on the instrument." See amendment note to § 25-1-201.

CASE NOTES

Cited in Spector United Employees Credit Union v. Smith, 45 N.C. App. 432, 263 S.E.2d 319 (1980).

§ 25-3-803. Notice to third party.

CASE NOTES

Cited in IFCO of S.C., Inc. v. Southern Nat'l Bank, 42 N.C. App. 499, 256 S.E.2d 825 (1979).

§ 25-3-805. Instruments not payable to order or to bearer.

CASE NOTES

Article 3 of the Uniform Commercial Code applies to a nonnegotiable draft, payable to two named payees without the addition of the words "or order," or any similar words of negotiability, except that no holder of it can be a holder in due course. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

Applied in Branch Banking & Trust Co. v. Creasy, 301 N.C. 44, 269 S.E.2d 117 (1980).

Cited in Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978).

ARTICLE 4.

Bank Deposits and Collections.

PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

§ 25-4-101. Short title.

Legal Periodicals. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

CASE NOTES

Applied in First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-4-102. Applicability.

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

CASE NOTES

Applied in Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

§ 25-4-103. Variation by agreement; measure of damages; certain action constituting ordinary care.

CASE NOTES

Cited in Fidelity & Deposit Co. v. Bank of Bladenboro, 596 F.2d 632 (4th Cir. 1979).

§ 25-4-104. Definitions and index of definitions.

CASE NOTES

A savings account withdrawal slip is an instrument and an item within the meaning of subsection (1) (g) of this section. Burnette v. First Citizens Bank & Trust Co., 48 N.C. App. 585, 269 S.E.2d 317 (1980).

Instruments Held Drafts. — Instruments which consisted of three parts, with the top part being a bank "draft," the second part being a record copy of the draft, and the third part being an envelope into which titles of vehicles purchased with drafts were to be inserted and mailed, were not "checks" under this section, but were "drafts." Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

Applied in North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

§ 25-4-105. "Depositary bank"; "intermediary bank"; "collecting bank"; "payor bank"; "presenting bank"; "remitting bank."

CASE NOTES

Applied in North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978); Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978).

Cited in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

§ 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.)

Effect of Amendments. — 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 amendment note to § 25-1-201.

Legal Periodicals. — For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

CASE NOTES

Intent of 1967 Amendment. — The legislature, in deleting in 1967 the provisions of this section requiring the maintenance of separate deposit ledgers, intended to lessen the requirements for a branch to attain separate bank status. This amendment is consistent with the legislature's encouragement of statewide branch banking to serve the "needs and convenience" of the public. North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978), cert. denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

The application of this section is not mandatory. North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978), cert. denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

A branch or separate office may be treated as a separate bank for certain purposes while maintaining the single legal entity for other reasons. North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978), cert. denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

Branch Banks Entitled to Separate Status. — Branch banks, each operating through a different operations center which maintained the accounts of customers in its district separately, were entitled to separate bank status under this section in considering the issue before the court of whether the plaintiff preserved its right of charge-back against the defendant's account. North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978), cert. denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

PART 2.

COLLECTION OF ITEMS: DEPOSITARY AND COLLECTING BANKS.

§ 25-4-201. Presumption and duration of agency status of collecting banks and provisional status of credits; applicability of article; item indorsed "pay any bank."

CASE NOTES

Right to Refuse to Allow Withdrawal Against Uncollected Funds. — Each time a depositor seeks to make a withdrawal against uncollected funds, the bank is entitled to choose whether to stand on or waive its right to refuse to allow such a withdrawal. Discount Auto Mart, Inc. v. Bank of N.C., 45 N.C. App. 543, 263 S.E.2d 41 (1980).

A bank did not waive its right to refuse to allow a depositor to make withdrawals from his account against uncollected funds by allowing him to make such withdrawals over a period of 15 months. Discount Auto Mart, Inc. v. Bank of N.C., 45 N.C. App. 543, 263 S.E.2d 41 (1980).

§ 25-4-202. Responsibility for collection; when action seasonable.

CASE NOTES

A defendant bank, upon dishonor of a draft, did not have a duty to send the titles of automobiles to the bank to which plaintiffs had issued a banker's blanket bond where the titles were "accompanying documents" and where the bank to which the plaintiffs issued the bond never established a "security interest" in those titles prior to the time the defendant bank sent them back to the drawee after they were dishonored. Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

§ 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.

§ 25-4-207. Warranties of customer and collecting bank on transfer or presentment of items; time for claims.

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

For purposes of deciding whether to impose liability on a collecting bank at summary judgment, "good title" under this section means only that a collecting bank is warranting that it is presenting a check whose indorsements appear to be genuine. If in fact such indorsement is not genuine, then the collecting bank is not admitting strict liability for its breach of warranty, but can in turn sue the previous collecting bank. North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

Unproven and contested allegations of forged indorsement are insufficient as a matter of law to breach a warranty of good title under this section. North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

Applied in First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

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

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

CASE NOTES

Bank May Pay against Uncollected Item. — North Carolina law appears to contemplate that, in the exercise of ordinary care, a bank may conclude to pay against an uncollected item, because it gives a bank a security interest in an item against which it has made an advance. Fidelity & Deposit Co. v. Bank of Bladenboro, 596 F.2d 632 (4th Cir. 1979).

A defendant bank, upon dishonor of a draft, did not have a duty to send the titles of automobiles to the bank to which plaintiffs had issued a banker's blanket bond where the titles were "accompanying documents" and where the bank to which the plaintiffs issued the bond never established a "security interest" in those titles prior to the time the defendant bank sent them back to the drawee after they were dishonored. Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

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 in due course.

CASE NOTES

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 collec-

tion 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 nonbank 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.

§ 25-4-212. Right of charge-back or refund.

CASE NOTES

Applied in North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

§ 25-4-213. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.

CASE NOTES

Right to Refuse to Allow Withdrawal Against Uncollected Funds. — Each time a depositor seeks to make a withdrawal against uncollected funds, the bank is entitled to choose whether to stand on or waive its right to refuse to allow such a withdrawal. Discount Auto Mart, Inc. v. Bank of N.C., 45 N.C. App. 543, 263 S.E.2d 41 (1980).

A bank did not waive its rights to refuse to allow a depositor to make withdrawals from his account against uncollected funds by allowing him to make such withdrawals over a period of 15 months. Discount Auto Mart, Inc. v. Bank of N.C., 45 N.C. App. 543, 263 S.E.2d 41 (1980).

Applied in North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

PART 3.

Collection of Items: Payor Banks.

§ 25-4-301. Deferred posting; recovery of payment by return of items; time of dishonor.

CASE NOTES

Applied in North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

PART 4.

Relationship Between Payor Bank and Its Customer.

§ 25-4-401. When bank may charge customer's account.

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

Payment of any overdraft by a bank amounts to a loan to the depositor, and the amount may be recovered from the depositor. The action to recover the amount of the overdraft is based upon the implied promise which arises from the drawing of the check and the honoring of it by the bank. First-Citizens Bank & Trust Co. v. Perry, 40 N.C. App. 272, 252 S.E.2d 288 (1979).

Cited in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

§ 25-4-403. Customer's right to stop payment; burden of proof of loss.

Legal Periodicals. — For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

CASE NOTES

Drawer's Liability to Holder Not Discharged by Stop Order. — By acting in apt time, the drawer of a check may stop its payment, but his revocation of the bank's authority to pay the check does not discharge his liability to the payee or holder. Reeves v. Jurney, 29 N.C. App. 739, 225 S.E.2d 615, cert. denied, 290 N.C. 663, 228 S.E.2d 454 (1976).

Amount of Loss Must Be More than Mere Debiting of Bank Account. — Where the bank pleads nonloss by the bank customer, a bank customer, in order to recover for damages caused by the bank's payment of a check contrary to a valid stop payment order, must show some loss other than the mere debiting of his bank account in the amount of the check. Mitchell v. Republic Bank & Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978).

Burden of Proof. — A prima facie case of loss is established by the customer when he shows that the bank paid a check contrary to a valid stop payment order. Then the bank, exercising its subrogation rights created by § 25-4-407, has the burden of coming forward and presenting evidence of an absence of actual loss sustained by the customer. When the bank meets the burden of coming forward, the customer must sustain the ultimate burden of proving loss. Mitchell v. Republic Bank & Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978).

§ 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.)

Effect of Amendments. — 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 amendment note to § 25-1-201.

§ 25-4-406. Customer's duty to discover and report unauthorized signature or alteration.

(1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof. A customer will be considered to have acted with reasonable care and promptness if he notifies the bank within 60 days of receipt of the statement of account accompanied by such items.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

(b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim. (1965, c. 700, s. 1; 1981, c. 599, s. 19.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added the second sentence of subsection (1).

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

CASE NOTES

Applicability of Notice Provision. — This section makes provision for notifying a bank of unauthorized checks within certain time periods after bank statements have been received in order to hold the bank liable and this is a standard of reasonable conduct which should also apply in regard to notifying other payors pursuant to § 25-3-406. Hartford Accident & Indem. Co. v. Dean's Shop-Rite, Inc., 48 N.C. App. 615, 269 S.E.2d 282 (1980).

Effect of § 53-52 Altered by Subsection (2)(b). — The effect of § 53-52, which precludes recovery of losses by a depositor from a bank for payment of a forged check or other order to pay money unless within 60 days after the receipt of such voucher by the depositor, depositor notified the bank that such check or order so paid is forged, has been altered by subsection (2)(b) so that, when there has been a series of unauthorized signatures or alterations by the same person, the depositor cannot recover payments made by the bank during a period of time commencing within 14 days after the customer has first received one such item and ending with the time that the bank receives notice, and this applies only if the customer has been negligent under subsection (1). Burnette v. First Citizens Bank & Trust Co., 48 N.C. App. 585, 269 S.E.2d 317 (1980).

Any item paid by a bank in good faith on an unauthorized signature, even though payment is made from an account different from the one in which the bank customer was negligent in failing to report an unauthorized signature, would be governed by subsection (2)(b) of this section, which precludes a customer's recovery from a bank on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding 14 calendar days and before the bank receives notification from the customer of any such unauthorized signature. Burnette v. First Citizens Bank & Trust Co., 48 N.C. App. 585, 269 S.E.2d 317 (1980).

Action for Recovery of Losses Not Barred. — In an action to recover $13,500 withdrawn from plaintiff's savings account at defendant bank without her authorization, plaintiff was not barred by this section from establishing her right to recover her losses from defendant since evidence that plaintiff, a 95-year-old woman, examined her bank statements during 1976-1977 to see if they showed she had the right amount in the account, that she did not detect that any numbers had been erased or substituted, and that she noticed white tape on the statement but thought the bank was responsible for the tape, raised a jury question as to whether plaintiff failed to exercise reasonable care and promptness in examining the statements to discover her unauthorized signature. Burnette v. First Citizens Bank & Trust Co., 48 N.C. App. 585, 269 S.E.2d 317 (1980).

Applied in First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-4-407. Payor bank's right to subrogation on improper payment.

Legal Periodicals. — For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

ARTICLE 5.

Letters of Credit.

§ 25-5-101. Short title.

Legal Periodicals. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-5-102. Definitions and index of definitions.

CASE NOTES

The letter of credit is a contract. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

Applied in O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-103. Definitions.

CASE NOTES

Nature of Letter of Credit. — Since the letter of credit is essentially a contract between the issuer and the beneficiary, it is recognized by this Article as being independent of the underlying contract between the customer and the beneficiary. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-104. Formal requirements; signing.

CASE NOTES

Applied in O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-105. Consideration.

CASE NOTES

Applied in O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-109. Issuer's obligation to its customer.

CASE NOTES

Drawee bank is involved only with documents, not with merchandise. Its involvement is altogether separate and apart from the transaction between the buyer and seller; its duties and liability are governed exclusively by the terms of the letter, not the terms of the parties' contract with each other. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 528 F.2d 802 (4th Cir. 1975).

Drawee bank is not to be embroiled in disputes between buyer and seller, the beneficiary of the credit. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 528 F.2d 802 (4th Cir. 1975).

The legal standard which the issuer is required to meet in order to avoid liability is one requiring a careful examination of the documents to determine if they are regular on their face. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

When an issuer discovers a possible discrepancy, it is incumbent upon it to disclose that fact to the beneficiary as soon as reasonably possible so as to not waive the issuer's right to demand strict compliance with the terms of the credit. Courtaulds N. America, Inc.

v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

An issuer bank is bound by a promise in a letter of credit, which may be enforced by a person acting in strict compliance and on good faith thereof, and the bank cannot escape liability because of the insolvency of the person to whom the letter is addressed or the customer. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

Beneficiary Must Meet Terms of Credit To Recover from Drawee Bank. — The beneficiary must meet the terms of the credit — and precisely — if it is to exact performance of the issuer. Failing such compliance there can be no recovery from the drawee bank. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 528 F.2d 802 (4th Cir. 1975).

§ 25-5-114. Issuer's duty and privilege to honor; rights to reimbursement.

Legal Periodicals. — For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

CASE NOTES

A commercial letter of credit is essentially a third-party beneficiary contract by which a party wishing to transact business induces a bank to issue the letter to a third party. It is a contract between the procuring customer and the issuing bank for the benefit of the payee-beneficiary. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

It Is Independent of Contract between Customer and Beneficiary. — Since the letter of credit is essentially a contract between the issuer and the beneficiary, it is recognized by this Article as being independent of the underlying contract between the customer and the beneficiary. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

When Draft Must Be Honored. — In the event the documents appear regular on their face and the documentary demand for payment complies with the terms of the credit, the issuer must honor the draft. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

A reason given for the issuer's stringent duty to honor in spite of alleged infirmities in the underlying contract is that one of the basic purposes of the letter of credit is to eliminate the risk to the beneficiary that the customer will refuse or halt payment because of alleged deficiencies in the beneficiary's performance. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

When an issuer discovers a possible discrepancy, it is incumbent upon it to disclose that fact to the beneficiary as soon as reasonably possible so as to not waive the issuer's right to demand strict compliance with the terms of the credit. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

All Required Documents Must Be as Stated in Letter of Credit. — A bank is interested only in the documents to be presented and, therefore, the essential requirements of a letter of credit must be strictly complied with by the party entitled to draw against the letter of credit. This means all required documents must be as stated in the letter. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

An issuer bank is bound by a promise in a letter of credit, which may be enforced by a person acting in strict compliance and on good faith thereof, and the bank cannot escape liability because of the insolvency of the person to whom the letter is addressed or the customer. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

"Fraud in the transaction" under subsection (2) of this section refers to the beneficiary's accompanying his draft with documents or declarations which have absolutely no basis in the facts of the underlying performance. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

A "fraudulent" document presumably is one that is completely forged or drawn up without any underlying basis in fact, one that is but partly spurious or a document which has been materially altered. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

Fraudulent Attachment of Letter of Credit to Negotiable Instrument as Security. — The knowing and intentional attachment of a guaranty letter of credit, as collateral

security, to a negotiable instrument which that letter was not intended to secure, and the eventual presentation of these documents to the issuing bank for purposes of honor of the letter of credit, would amount to a presentation of fraudulent documents under subsection (2) of this section. In such a case, though the note may be valid as against other parties to the note, the documents, considered as a whole, are nonetheless fraudulent insofar as the letter of credit was not intended to secure that particular note, and the beneficiary had knowledge of this fact. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

When Payment of Draft May Be Enjoined. — Given the independence of the issuer's obligation to the beneficiary, and the commercial purposes which this independent obligation serves, it would appear that an injunction should issue to enjoin payment of a draft only in those instances where there is some action by the beneficiary which vitiates the transaction between the beneficiary and the issuer. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

Since the transaction between the beneficiary and the issuer is one consisting of an exchange of documents, only some defect in these documents would justify an injunction against honor. Subsection (2) of this section speaks to those defects in documents which are not apparent on the face of the documents, and permits dishonor or the issue of an injunction only in situations where the documents presented are themselves the product of some sort of fraud. Accordingly, the beneficiary's fraud on the customer in the inducement of their separate contract would not justify dishonor or an injunction, nor would a breach of warranty or defect in the quality of the goods delivered pursuant to the underlying contract, for these defects are not of the sort which relate to the contract between the issuer and beneficiary. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-116. Transfer and assignment.

(2) Even though the credit specifically states that it is nontransferable or nonassignable the beneficiary may before performance of the conditions of the credit assign his right to proceeds. Such an assignment is an assignment of an account under article 9 on secured transactions and is governed by that article except that

(a) the assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee which delivery constitutes perfection of the security interest under article 9; and

(b) the issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignee; and

(c) after what reasonably appears to be such a notification has been received the issuer may without dishonor refuse to accept or pay even to a person otherwise entitled to honor until the letter of credit or advice of credit is exhibited to the issuer.

(1975, c. 862, s. 5.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. The situation involved is typified by that of an exporter who has made a contract for sale with a foreign buyer and is beneficiary of a letter of credit initiated by the buyer, especially where the subject matter involves goods still to be manufactured. The exporter is frequently in need of the wherewithal not only to finance payment to his supplier but to assure the latter against cancellation of the order during the process of manufacture. For this purpose assignment of the exporter's rights under the letter of credit is frequently desirable.

Since, however, there is general confusion of thought as to the meaning of "assignment or transfer of a credit," the law remains uncertain. If "assignment of the credit" includes delegation of performance of the conditions under the credit then the initiating customer, who in many cases has put his faith in performance or supervision of performance by a beneficiary of established reputation, may be deprived of real and intended security. See

Comment to Section 2-210 on the comparable situation as to the sales contract. On the other hand, all "negotiation credits" involve a transfer of the rights of the beneficiary by way of negotiations of the draft and such transfer involves no important loss of the initiating party's intended safety. Meanwhile, the exceedingly useful institution of "back to back" credits, in which an American bank issues a credit with the exporter as the initiating customer and the exporter's supplier as the beneficiary, is dangerous for the banker unless he can secure in advance an effective assignment from the exporter of the latter's rights under the initial credit issued on behalf of his foreign buyer. Against this background, the section is drawn.

2. Subsection (1) requires the beneficiary's signature on drafts drawn under the credit unless it is expressly designated as assignable or transferable. If it is so designated, the normal rules of assignment apply and both the right to draw and the performance of the beneficiary can be transferred, subject to the beneficiary's continuing liability, if any, for the nature of the performance.

3. Subsection (2) makes clear that to safeguard among other things the letter of credit "back to back" practice, the assignability of proceeds in advance of performance cannot be prohibited in advance of performance. In this respect the letter of credit is treated like any other contract calling for money to be earned. See Section 9-318 generally and Section 2-210 as to sales contracts. But the special nature of the letter of credit as evidence of the right to proceeds is recognized by the additional requirement of delivery of the letter to the assignee as a condition precedent to the perfection of the assignment. Similarly, the fact that letters of credit normally require presentation of drafts or demands for payment which are drawn under it and that as a result notice of assignment of proceeds can exist simultaneously with a draft payable by order or indorsement to either the beneficiary or another third person leads to the necessity for permitting an issuer to protect itself against exhibition of the letter or advice of credit.

4. Subsection (3) makes clear that the section has no application to the normal case of negotiation of a draft or the transfer of a demand for payment unless effective assignment under the section has taken place.

Cross References:

Point 1: Section 2-210.

Point 3: Sections 2-210 and 9-318 and Article 9.

Definitional Cross References:

"Accept". Section 3-410.
"Account". Section 9-106.
"Beneficiary". Section 5-103.
"Credit". Section 5-103.
"Draft". Section 3-104.
"Honor". Section 1-201.
"Issuer". Section 5-103.
"Receive notification". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, substituted "of an account" for "of a contract right" near the beginning of the second sentence in subsection (2).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (2) is set out.

§ 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.)

Effect of Amendments. — 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.

Only Part of Section Set Out. — 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.

Legal Periodicals. — 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 References. — See amendment 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.)

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, repealed paragraph (e) of subsection (2). See amendment note to § 25-1-201.

Only Part of Section Set Out. — 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.)

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, repealed paragraph (c) of subsection (3). See amendment note to § 25-1-201.

Only Part of Section Set Out. — 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.)

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, repealed subsection (2). See amendment 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.

Legal Periodicals. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-7-102. Definitions and index of definitions.

CASE NOTES

Warehouseman Bears Risk That Agent May Issue Improper Receipts. — Section 25-7-203, coupled with the definition of issuer under (1)(g) of this section, clearly places upon the warehouseman the risk that his agent may fraudulently or mistakenly issue improper receipts. The theory of the law is that the warehouseman, being in the best position to prevent the issuance of mistaken or fraudulent receipts, should be obligated to do so; that such receipts are a risk and cost of the business enterprise which the issuer is best able to absorb. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Cited in Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

§ 25-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading or other document of title.

CASE NOTES

Applied in Branch Banking & Trust Co. v. Gill, 286 N.C. 342, 211 S.E.2d 327 (1975); Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

PART 2.

WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.

§ 25-7-203. Liability for non-receipt or misdescription.

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

The purpose of this section is to protect specified parties to or purchasers of warehouse receipts by imposing liability upon the warehouseman when either he or his agent fraudulently or mistakenly issues receipts (negotiable or nonnegotiable) for misdescribed or nonexistent goods. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Applicability of Section. — This section covers the situation where the sole question is: Under what circumstances and to whom is an issuer liable for the issuance of warehouse receipts when it has not received the goods which the receipts purportedly cover? Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Parties May Not Keep Themselves in Ignorance of Facts. — Albeit "good faith" is literally defined as "honesty in fact in the conduct or transaction concerned," the Uniform Commercial Code does not permit parties to intentionally keep themselves in ignorance of facts which, if known, would defeat their rights in a negotiable document of title. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

No Requirement to Take Documents through "Due Negotiation". — This section contains no requirement that the purchaser take negotiable documents through "due negotiation" before he can recover from the issuer. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Warehouseman Bears Risk That Agent May Issue Improper Receipts. — This section coupled with the definition of issuer under § 25-7-102(1)(g), clearly places upon the warehouseman the risk that his agent may fraudulently or mistakenly issue improper receipts. The theory of the law is that the warehouseman, being in the best position to prevent the issuance of mistaken or fraudulent receipts, should be obligated to do so; that such receipts are a risk and cost of the business enterprise which the issuer is best able to absorb. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Claimant's Burden of Proof. — To be entitled to recover under this section, claimant has the burden of proving that he: (1) is a party to or purchaser of a document of title other than a bill of lading; (2) gave value for the document; (3) took the document in good faith; (4) relied to his detriment upon the description of the goods in the document; and (5) took without notice that the goods were misdescribed or were never received by the issuer. Many of these terms are defined in § 25-1-201 and those definitions are also made applicable to Article 7, § 25-7-102(4). Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 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.)

Effect of Amendments. — 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 amendment note to § 25-1-201.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (3) is set out.

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

CASE NOTES

The proper issuance of a warehouse receipt requires not only mailing, but mailing to the proper address. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

And Question of Proper Address Is for Trier of Fact. — Where the question of whether defendant mailed the receipt to the proper address is disputed by the parties, it must be determined by the trier of fact and since it is a material fact, summary judgment for either party would not be proper. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

§ 25-7-210. Enforcement of warehouseman's lien.

CASE NOTES

The purpose of the requirement of subdivision (2)(f) that the advertisement must include a description of the goods is to insure that those who might be interested in buying the items will be present at the sale. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

And this purpose is not adequately served by the use of the general term "household goods," where the goods to be sold include such varied items as a stereo, color TV, lawn mower, aquarium, and washing machine. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

Defendant's noncompliance with subsection (f) would not invalidate the sale, but it would entitle plaintiff to whatever damages he can prove resulted from the noncompliance. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

OPINIONS OF ATTORNEY GENERAL

A Warehouseman with Liens Pursuant to Both Article 1 of Chapter 44A of the General Statutes and Article 7 of the Uniform Commercial Code May Enforce His Lien Pursuant to G.S. § 25-7-210 Without Allowing the Owner a Judicial Hearing Pursuant to G.S. § 44A-4. — See opinion of Attorney General to Resa L. Harris, Legal Officer, Office of the Clerk of Superior Court, Mecklenburg County, 48 N.C.A.G. 2 (1979).

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.)

Effect of Amendments. — 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.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (4) is set out.

CASE NOTES

Quoted in Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-307. Lien of carrier.

Legal Periodicals. — 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.

§ 25-7-501. Form of negotiation and requirements of "due negotiation."

CASE NOTES

Applied in Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Quoted in Branch Banking & Trust Co. v. Gill, 286 N.C. 342, 211 S.E.2d 327 (1975).

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

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

Determining Priority of Claims. — In situations where there are actual goods, and there are conflicting claims either to them or to the documents, this section and §§ 25-7-503 and 25-7-504 determine the priority of these claims. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

For hypothetical examples of the manner in which this section and § 25-7-504 are intended to work in determining the priorities of competing claims, see Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

The primary purpose of this section and § 25-7-504 is to determine the priority of competing claims to valid documents and goods actually stored in a warehouse and to determine the issuer's liability for a misdelivery of goods actually received by it. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Generally, a holder of negotiable warehouse receipts acquired through "due negotiation" will receive paramount title not only to the documents but also to the goods represented by them, the purpose of Uniform Commercial Code, Article 7, Part 5, being to facilitate the negotiability and integrity of negotiable receipts. Branch Banking & Trust

Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

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).

§ 25-7-503. Document of title to goods defeated in certain cases.

CASE NOTES

Determining Priority of Claims. — In situations where there are actual goods, and there are conflicting claims either to them or to the documents, §§ 25-7-502 through 25-7-504 determine the priority of these claims. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-504. Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

Determining Priority of Claims. — In situations where there are actual goods, and there are conflicting claims either to them or to the documents, §§ 25-7-502 through 25-7-504 determine the priority of these claims. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

For hypothetical examples of the manner in which this section and § 25-7-502 are intended to work in determining the priorities of competing claims, see Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

The primary purpose of this section and § 25-7-502 is to determine the priority of competing claims to valid documents and goods actually stored in a warehouse and to determine the issuer's liability for a misdelivery of goods actually received by it. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Generally, a holder of negotiable warehouse receipts acquired through "due negotiation" will receive paramount title not only to the documents but also to the goods represented by them, the purpose of Uniform Commercial Code, Article 7, Part 5, being to facilitate the negotiability and integrity of negotiable receipts. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Quoted in Branch Banking & Trust Co. v. Gill, 286 N.C. 342, 211 S.E.2d 327 (1975).

§ 25-7-506. Delivery without indorsement; right to compel indorsement.

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

Applied in Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Quoted in Branch Banking & Trust Co. v. Gill, 286 N.C. 342, 211 S.E.2d 327 (1975).

PART 6.

WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS.

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

CASE NOTES

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 warehouse 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.

Legal Periodicals. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-8-102. Definitions and index of definitions.

(3) A "clearing corporation" is a corporation

(a) at least ninety percent (90%) of the capital stock of which is held by or for one or more persons (other than individuals), each of whom

(i) is subject to supervision or regulation pursuant to the provisions of federal or State banking laws or State insurance laws, or

(ii) is a broker or dealer or investment company registered under the Securities Exchange Act of 1934 or the Investment Company Act of 1940, or

(iii) is a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934, and none of whom, other than a national securities exchange or association, holds in excess of twenty percent (20%) of the capital stock of such corporation; and

(b) any remaining capital stock of which is held by individuals who have purchased such capital stock at or prior to the time of their taking office as

directors of such corporation and who have purchased only so much of such capital stock as may be necessary to permit them to qualify as such directors. (1973, c. 497, s. 3.)

Effect of Amendments. — The 1973 amendment rewrote subdivision (3).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subdivision (3) is set out.

§ 25-8-106. Applicability.

Legal Periodicals. — 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.

Legal Periodicals. — 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.

Legal Periodicals. — 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.

CASE NOTES

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.

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

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).

No Right of Action against Broker. — While Article 8 confers on the true owner of securities which have been transferred upon an unauthorized endorsement, remedies against the issuer in this section and against the ultimate purchaser in § 25-8-315 and subsection (a) of this section, it does not appear that Article 8 provides any right of action in favor of the owner against the broker who consummated the transfer. North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

§ 25-8-315. Action against purchaser based upon wrongful transfer.

CASE NOTES

No Right of Action against Broker. — While Article 8 confers on the true owner of securities which have been transferred upon an unauthorized endorsement, remedies against the issuer in § 25-8-311, and against the ultimate purchaser in this section and § 25-8-311(a), it does not appear that Article 8 provides any right of action in favor of the owner against the broker who consummated the transfer. North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

§ 25-8-318. No conversion by good faith delivery.

CASE NOTES

Defendant Has Burden to Present Evidence of Good Faith. — While this section purports to protect a broker who transfers securities at the insistence of a principal who has no right to dispose of them, its protection is only available as a defense with the burden on the defendant to present evidence that it acted in good faith and in accordance with reasonable commercial standards. North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

§ 25-8-319. Statute of frauds.

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

For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

No Contract Where Writing Not Signed. — Where plaintiff's evidence in an action attempting to establish the formation of a contract consisted of two pages of notes that defendant allegedly gave plaintiff during a discussion of the proposed transaction, and where these notes disclosed many of the important terms, including the price and quantity of the proposed transaction, this evidence cannot, standing alone, fulfill the requirements of the statute of frauds since there was no showing that this document was signed by the defendant. Oakley v. Little, 49 N.C. App. 646, 272 S.E.2d 370 (1980).

Evidence of Business Being Transacted Insufficient to Prove Contract. — Where plaintiff's evidence consisted of tentative notes of an agreement unsigned by defendant and an insurance policy on plaintiff's life signed by defendant, these two writings, whether considered alone or together, did not evidence anything more than preliminary negotiations indicating that business was being transacted between plaintiff and defendant, and the transaction of business alone is not sufficient to show that a contract was made. Oakley v. Little, 49 N.C. App. 646, 272 S.E.2d 370 (1980).

Cited in Turner v. Atlantic Mtg. & Inv. Co., 32 N.C. App. 565, 233 S.E.2d 80 (1977).

PART 4.

REGISTRATION.

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

Legal Periodicals. — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

§ 25-8-403. Limited duty of inquiry.

(4) Neither this section nor this Article shall be construed to repeal the provisions of Article 2 of Chapter 32 entitled the Uniform Act for the Simplification of Fiduciary Security Transfers, and if there is in any respect an inconsistency between Article 2 of Chapter 32 and this Article the provisions of the former shall control. (1965, c. 700, s. 1; 1977, c. 814, s. 9.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, added subsection (4).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (4) is set out.

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

Cross References. — See § 55-57(e), which, under certain circumstances, permits a corporation to issue a replacement certificate without requiring a bond.

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

Legal Periodicals. — 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 References. — For present section containing the provisions of the repealed section, see § 41-2.2.

ARTICLE 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

PART 1.

SHORT TITLE, APPLICABILITY AND DEFINITIONS.

§ 25-9-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code — Secured Transactions. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

This Article sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures. It supersedes prior legislation dealing with such security devices as chattel mortgages, conditional sales, trust receipts, factor's liens and assignments of accounts receivable (see Note to Section 9-102).

Consumer installment sales and consumer loans present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification. Many states now regulate such loans and sales under small loan acts, retail installment selling acts and the like. The National Conference of Commissioners on Uniform State Laws has proposed a Uniform Consumer Credit Code dealing with this subject. While this Article applies generally to security interests in consumer goods, it is not designed to supersede such regulatory legislation (see Notes to Sections 9-102 and 9-203). Nor is this Article designed as a substitute for small loan acts or retail installment selling acts in any state which does not presently have such legislation.

Pre-Code law recognized a wide variety of security devices, which came into use at various times to make possible different types of secured financing. Differences between one device and another persisted, in formal requisites, in the secured party's rights against the debtor and third parties, in the debtor's rights against the secured party, and in filing requirements, although many of those differences no longer served any useful function. Thus an unfiled chattel mortgage was by the law of many states "void" against creditors generally; a conditional sale, often available as a substitute for the chattel mortgage, was in some states valid against all creditors without filing, and in states where filing is required was, if unfiled, void only against lien creditors. The recognition of so many separate security devices had the result that half a dozen filing systems covering chattel security devices might be maintained within a state, some on a county basis, others on a state-wide basis, each of which had to be separately checked to determine a debtor's status.

Nevertheless, despite the great number of security devices there remained gaps in the structure. In many states, for example, a security interest could not be taken in inventory or

a stock in trade although there was a real need for such financing. It was often baffling to try to maintain a technically valid security interest when financing a manufacturing process, where the collateral starts out as raw materials, becomes work in process and ends as finished goods. Furthermore, it was by no means clear, even to specialists, how under pre-Code law a security interest might be taken in many kinds of intangible property — such as television or motion picture rights — which have come to be an important source of commercial collateral.

While the chattel mortgage was adaptable for use in almost any situation where goods are collateral, there were limitations, sometimes highly technical, on the use of other devices, such as the conditional sale and particularly the trust receipt. The cases are many in which a security transaction described by the parties as a conditional sale or a trust receipt was later determined by a court to be something else, usually a chattel mortgage. The consequence of such a determination was typically to void the security interest against creditors because the security agreement was not filed *as a chattel mortgage* (even though it may have been filed as a conditional sale or a trust receipt). The already mentioned difficulty of financing on the security of inventory was got around to some extent by the device known as "field warehousing" as well as by the use of the trust receipt. After 1940 a number of states generally authorized inventory financing by enacting statutes, similar although not uniform, known as "factor's lien" acts. Also after 1940 the increasingly important business of lending against accounts receivable inspired new statutes in that field in more than thirty states.

The growing complexity of financing transactions forced legislatures to keep piling new statutory provisions on top of our inadequate and already sufficiently complicated nineteenth-century structure of security law. The results of this continuing development were increasing costs to both parties and increasing uncertainty as to their rights and the rights of third parties dealing with them.

The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.

Under this Article the traditional distinctions among security devices, based largely on form, are not retained; the Article applies to all transactions intended to create security interests in personal property and fixtures, and the single term "security interest" substitutes for the variety of descriptive terms which had grown up at common law and under a hundred-year accretion of statutes. This does not mean that the old forms may not be used, and Section 9-102(2) makes it clear that they may be.

This Article does not determine whether "title" to collateral is in the secured party or in the debtor and adopts neither a "title theory" nor a "lien theory" of security interests. Rights, obligations and remedies under the Article do not depend on the location of title (Section 9-202). The location of title may become important for other purposes — as, for example, in determining the incidence of taxation — and in such a case the parties are left free to contract as they will. In this connection the use of a form which has traditionally been regarded as determinative of title (e.g., the conditional sale) could reasonably be regarded as evidencing the parties' intention with respect to title to the collateral.

Under the Article distinctions based on form (except as between pledge and non-possessory interests) are no longer controlling. For some purposes there are distinctions based on the type of property which constitutes the collateral — industrial and commercial equipment, business inventory, farm products, consumer goods, accounts receivable, documents of title and other intangibles — and, where appropriate, the Article states special rules applicable to financing transactions involving a particular type of property. Despite the statutory simplification a greater degree of flexibility in the financing transaction is allowed than is possible under existing law.

The scheme of the Article is to make distinctions, where distinctions are necessary, along functional rather than formal lines.

This has made possible a radical simplification in the formal requisites for creation of a security interest.

A more rational filing system replaces the present system of different files for each security device which is subject to filing requirements. Thus not only is the information contained in the files made more accessible but the cost of procuring credit information, and, incidentally, of maintaining the files, is greatly reduced.

The Article's flexibility and simplified formalities should make it possible for new forms of secured financing, as they develop, to fit comfortably under its provisions, thus avoiding the necessity, so apparent in recent years, of year by year passing new statutes and tinkering with the old ones to allow legitimate business transactions to go forward.

The rules set out in this Article are principally concerned with the limits of the secured party's protection against purchasers from and creditors of the debtor. Except for procedure on default, freedom of contract prevails between the immediate parties to the security transaction.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

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

§ 25-9-102. Policy and subject matter of article.

(1) Except as otherwise provided in G.S. 25-9-104 on excluded transactions, this article applies

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

(b) to any sale of accounts or chattel paper.

(2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in G.S. 25-9-310.

(3) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

The main purpose of this Section is to bring all consensual security interests in personal property and fixtures under this Article, except for certain types of transactions excluded by Section 9-104. In addition certain sales of accounts and chattel paper are brought within this Article to avoid difficult problems of distinguishing between transactions intended for security and those not so intended. As to security interests in fixtures created under the law applicable to real estate, see Section 9-313(1).

1. Except for sales of accounts and chattel paper, the principal test whether a transaction comes under this Article is: is the transaction intended to have effect as security? For example, Section 9-104 excludes certain transactions where the security interest (such as an artisan's lien) arises under statute or common law by reason of status and not by consent of the parties. Transactions in the form of consignments or leases are subject to this Article if the understanding of the parties or the effect of the arrangement shows that a security interest was intended. (As to consignments the provisions of Sections 2-326, 9-114 and 9-408 should be consulted.) When it is found that a security interest as defined in Section 1-201(37) was intended, this Article applies regardless of the form of the transaction or the name by which the parties may have christened it. The list of traditional security devices in subsection (2) is illustrative only; other old devices, as well as any new ones which the ingenuity of lawyers may invent, are included, so long as the requisite intent is found. The controlling definition is that contained in subsection (1).

The Article does not in terms abolish existing security devices. The conditional sale or bailment-lease, for example, is not prohibited; but even though it is used, the rules of this Article govern.

2. If an obligation is to repay money lent and is not part of chattel paper, it is either an instrument or a general intangible. A sale of an instrument or general intangible is not within this Article, but a transfer intended to have effect as security for an obligation of the transferor is covered by subsection (1)(a). In either case the nature of the transaction is not affected by the fact that collateral is transferred with the instrument or general intangible. Such a transfer is treated as a transfer by operation of law, whether or not it is articulated in the agreement.

An assignment of accounts or chattel paper as security for an obligation is covered by subsection (1)(a). Commercial financing on the basis of accounts and chattel paper is often so

conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by subsection (1)(b) whether intended for security or not, unless excluded by Section 9-104. The buyer then is treated as a secured party, and his interest as a security interest. See Sections 9-105(1)(m), 1-201(37). Certain sales which have nothing to do with commercial financing transactions are excluded by Section 9-104(f); compare Spurlin v. Sloan, 368 S.W.2d 314 (Ky. 1963). See also Section 9-302(1)(e), exempting from filing casual or isolated assignments, and Section 9-302(2), preserving the perfected status of a security interest against the original debtor when a secured party assigns his interest.

3. In general, problems of choice of law in this Article as to the validity of security agreements are governed by Section 1-105. Problems of choice of law as to perfection of security interests and the effect of perfection or non-perfection thereof, including rules requiring reperfection, are governed by Section 9-103.

4. An illustration of subsection (3) is as follows:

The owner of Blackacre borrows $10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This Article is not applicable to the creation of the real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgagee continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This Article leaves to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or nonrecording of an assignment of the mortgagee's interest. See Section 9-104(j). But under Section 3-304(5) recording of the assignment does not of itself prevent X from holding the note in due course.

5. While most sections of this Article apply to a security interest without regard to the nature of the collateral or its use, some sections state special rules with reference to particular types of collateral. An index of sections where such special rules are stated follows:

ACCOUNTS

SECTION.	
9-102(1)(b)	Sale of accounts subject to Article
9-103(1)	When Article applies; conflict of laws rules
9-104(f)	Certain sales of accounts excluded from Article
9-106	Definitions
9-205	Permissible for debtor to make collections
9-206(1)	Agreement not to assert defenses against assignee
9-301(1)(d)	Unperfected security interest subordinate to certain transferees
9-302(1)(e)	What assignments need not be filed
9-306(5)	Rule when goods whose sale gave rise to an account return to seller's possession
9-318(1)	Rights of assignee subject to defenses
9-318(2)	Modification of contract after assignment of contract right
9-318(3)	When account debtor may pay assignor
9-318(4)	Term prohibiting assignment ineffective
9-401	Place of filing
9-502	Collection rights of secured party
9-504(2)	Rights on default where underlying transaction was sale of accounts or contract rights

CHATTEL PAPER

9-102(1)(b)	Sale subject to Article
9-104(f)	Certain sales excluded from Article
9-105(1)(b)	Definition
9-205	Permissible for debtor to make collections
9-206(1)	Agreement not to assert defenses against assignee
9-207(1)	Duty of secured party in possession to preserve rights against prior parties
9-301(1)(c)	Unperfected security interest subordinate to certain transferees
9-304(1)	Perfection by filing
9-305	When possession by secured party perfects security interest
9-306(5)	Rule when goods whose sale results in chattel paper return to seller's possession
9-308	When purchasers of chattel paper have priority over security interest
9-318(1)	Rights of assignee subject to defenses
9-318(3)	When account debtor may pay assignor

SECTION.

9-502 Collection rights of secured party
9-504(2) Rights on default where underlying transaction was sale

DOCUMENTS AND INSTRUMENTS

9-105(1)(e) Definition of document (and see 1-201)
9-105(1)(g) Definition of instrument
9-206(1) Rule where buyer of goods signs both negotiable instrument and security agreement
9-207(1) Duty of secured party in possession of instrument to preserve rights against prior parties
9-301(1)(c) Unperfected security interest subordinate to certain transferees
9-302(1)(b) and (f) What interests need not be filed
9-304(1) How security interest can be perfected
9-304(2, 3) Perfection of security interest in goods in possesion of issuer of negotiable document or of other bailee
9-304(4, 5) Perfection of security interest in instruments or negotiable documents without filing or transfer of possession
9-305 When possession by secured party perfects security interest
9-308 When purchasers of instruments have priority over security interest
9-309 When purchasers of negotiable instruments or negotiable documents have priority over security interest
9-501(1) Rights on default where collateral is documents
9-502 Collection rights of secured party

GENERAL INTANGIBLES

9-103(2) When Article applies; conflict of laws rules
9-105 Obligor is "account debtor"
9-106 Definition
9-301(1)(d) Unperfected security interest subordinate to certain transferees
9-318(1) Rights of assignee subject to defenses
9-318(3) When account debtor may pay assignor
9-502 Collection rights of secured party

GOODS

(See also Consumer Goods, Equipment, Farm Products, Inventory)

9-103 When article applies with regard to goods of a type normally used in more than one jurisdiction; goods covered by certificate of title; conflict of laws rules
9-105(1)(h) Definition
9-109 Classification of goods as consumer goods, equipment, farm products and inventory
9-203 Formal requisites of security agreement covering certain types of goods (crops or timber)
9-204 Validity of after-acquired property clause covering certain types of goods (crops, consumer goods)
9-205 Permissible for debtor to accept returned goods
9-206(2) When security agreement can limit or modify warranties on sale
9-301(1)(c) Unperfected security interest subordinate to certain transferees
9-304(2, 3) Perfection of security interest in goods in Possession of issuer of negotiable document or of other bailee
9-304(5) Perfection of security interest without filing or transfer of possession where goods in possession of certain bailees
9-305 When possession by secured party perfects security interest
9-306(5) Rule when goods whose sale gave rise to account to chattel paper return to seller's possession
9-307 When buyers of goods from debtor take free of security interest
9-313 Goods which are or become fixtures
9-314 Goods affixed to other goods
9-315 Goods commingled in a product
9-401(1) Place of filing for fixtures
9-402 Form of financing statement covering fixtures
9-504(1) Sale of goods by secured party after default subject to Article 2 (Sales)

Consumer Goods

SECTION	
9-109(1)	Definition
9-203(2)	Transaction, although subject to this Article, may also be subject to certain regulatory statutes
9-204(2)	Validity of after-acquired property clause
9-206(1)	Buyer's agreement not to assert defenses against an assignee subject to statute or decision which establishes rule for buyers of consumer goods
9-302(1)(d)	When filing not required
9-307(2)	When buyers from debtor take free of security interest
9-401(1)(a)	Place of filing
9-505(1)	Secured party's duty to dispose of repossessed consumer goods
9-507(1)	Secured party's liability for improper disposition of consumer goods after default

Equipment

9-103(2)	When Article applies with regard to certain types of equipment normally used in more than one jurisdiction; conflict of laws rules
9-109(2)	Definition
9-302(1)(c)	When filing not required to perfect security interest in certain farm equipment
9-307(2)	When buyers of certain farm equipment from debtor take free of security interest
9-401(1)	Place of filing for equipment used in farming operation
9-503	Secured party's right after default to remove or to render equipment unusable

Farm Products

9-109(3)	Definition
9-203(1)(b)	Formal requisites of security agreement covering crops
9-307	When a buyer of farm products takes free of security interest
9-312(2)	Priority of secured party who gives new value to enable debtor to produce crops
9-401(1)	Place of filing
9-402(1) and (3)	Form of financing statement covering crops

Inventory

9-103(3)	When Article applies with regard to certain types of inventory normally used in more than one jurisdiction; conflict of laws rules
9-109(4)	Definition
9-114	Consigned goods
9-306(5)	Rule where goods whose sale gave rise to account or chattel paper return to seller's possession
9-307(1)	When buyers from debtor take free of security interest
9-312(3), 9-304(5)	When purchase money security interest takes priority over conflicting security interest
9-408	Financing statements covering consigned or leased goods

---

Cross References:
Section 9-103 and 9-104.
Point 1: Section 2-326.
Point 2: Section 1-105.

Definitional Cross References:
"Account". Section 9-106.
"Chattel paper". Section 9-105.
"Contract". Section 1-201.
"Document". Section 9-105.
"General intangibles". Section 9-106.
"Goods". Section 9-105.
"Instrument". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, rewrote the introductory paragraph of subsection (1), substituted "or accounts" for "accounts or contract paper" in paragraph (1)(a) and deleted "contract rights" following "accounts" in paragraph (1)(b).

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

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

CASE NOTES

Security Interest Replaces Chattel Mortgages. — An Article 9 security interest by the terms of the Uniform Commercial Code replaces the older chattel mortgage as a method of protecting the creditor. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Quoted in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974).

Cited in Equilease Corp. v. Belk Hotel Corp., 42 N.C. App. 436, 256 S.E.2d 836 (1979).

§ 25-9-103. Perfection of security interests in multiple-state transactions.

(1) Documents, Instruments and Ordinary Goods. —

(a) This subsection applies to documents and instruments and to goods other than those covered by a certificate of title described in subsection (2), mobile goods described in subsection (3), and minerals described in subsection (5).

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

(c) If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or nonperfection of the security interest from the time it attaches until 30 days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the 30-day period.

(d) When collateral is brought into and kept in this State while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by part 3 of this article to perfect the security interest,

(i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this State, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;

(ii) if the action is taken before the expiration of the period specified in subparagraph (i), the security interest continues perfected thereafter;

(iii) for the purpose of priority over a buyer of consumer goods (subsection (2) of G.S. 25-9-307), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (i) and (ii).

(2) Certificate of Title. —

(a) This subsection applies to goods covered by a certificate of title issued under a statute of this State or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection.

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.

(c) Except with respect to the rights of a buyer described in the next paragraph, a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this State and thereafter covered by a certificate of title issued by this State is subject to the rules stated in paragraph (d) of subsection (1).

(d) If goods are brought into this State while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this State and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.

(3) Accounts, General Intangibles and Mobile Goods. —

(a) This subsection applies to accounts (other than an account described in subsection (5) on minerals) and general intangibles and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road-building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2).

(b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or nonperfection of the security interest.

(c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or nonperfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

(d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

(e) A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

(4) Chattel Paper. — The rules stated for goods in subsection (1) apply to a possessory security interest in chattel paper. The rules stated for accounts in subsection (3) apply to a nonpossessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.

(5) Minerals. — Perfection and the effect of perfection or nonperfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead, are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provisions:

Paragraph 1(d): Section 14, Uniform Conditional Sales Act.

Purposes:

1. The general rules on choice of law between the original parties in Section 1-105 apply to this Article. However, when conflicting claims to collateral arise, the question depends on *perfection* of security interests, and thus on the effect of perfection or non-perfection. These problems are dealt with in this section. The general rule (paragraph (1) (b)) is that these questions are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected. This event will frequently be the filing. If the last event is not filing and perfection is through filing, the filing required is in the jurisdiction where the collateral is when the last event occurs; prior filing in another jurisdiction is not effective and is not saved by the four-month rule discussed below, which applies only when the security interest was *perfected* in the jurisdiction from which the collateral was removed. If the security interest was perfected in one jurisdiction and then removed to another jurisdiction, maintenance of perfection in the latter jurisdiction or failure to do so is the "last event" to which the basic rule refers.

There are, however, exceptions to this basic rule:

2. If the parties to a transaction creating a purchase money security interest in goods understand when the security interest attaches that the collateral will be kept in another jurisdiction, the law of that jurisdiction governs perfection and the effect of perfection or non-perfection until 30 days after the debtor receives possession of the goods (paragraph (1) (c)). A filing in that jurisdiction perfects the security interest even before the goods are removed. The 30-day period is not a period of grace during which filing is unnecessary or has retroactive effect, but merely states the period during which the other jurisdiction is the place of filing. The effect of late filing is governed by other provisions, such as Sections 9-301 and 9-312.

3. If the goods reach that jurisdiction within the 30 days, the effectiveness of the filing in that jurisdiction continues without interruption. If the collateral is not kept in that jurisdiction before the end of the 30-day period, paragraph (1) (c) ceases to be applicable and thereafter the law of the jurisdiction where the collateral is controls perfection. A failure of the collateral to reach the intended destination jurisdiction before the expiration of the 30-day period because of a conflicting claim or otherwise may cause disappointment of expectations that the law of the destination jurisdiction will govern continuously, and caution may dictate filing both in that jurisdiction and in the jurisdiction where the security interest attaches.

This section uses the concepts that goods are "kept" in a state or "brought" into a state, and related terms. These concepts imply a stopping place of a permanent nature in the state, not merely transit or storage intended to be transitory.

4(a) Where the collateral is an automobile or other goods covered by a certificate of title issued by any state and the security interest is perfected by notation on the certificate of title, perfection is controlled by the certificate of title rather than by the law of the state wherein the security interest attached (subsection (2)).

(b) It has long been hoped that "exclusive certificate of title laws" would provide a sure means of controlling property interests in goods like automobiles, which because of their nature cannot readily be controlled by local or statewide filing alone. In theory the certificate of title should control the property interests in the vehicle wherever the vehicle may be. However, two circumstances operate to prevent the perfect operation of the certificate of title device:

First, some states have never adopted certificate of title laws. This results in a problem in the issuance of a certificate of title when the vehicle moves from a non-certificate to a certificate state, because the certificate-issuing officer is in no position to conduct a complete search to ascertain the condition of the title in a state of origin which requires no filing or in which filing could be in any one or more of several localities. Also, it seems that when a vehicle moves from a certificate to a non-certificate state, the officers issuing a new registration for the vehicle are not always meticulous to notify secured parties shown on the certificate to give them a chance to perfect their security interests in the non-certificate state when a new registration is issued. Moreover, some vehicles like mobile homes are not always registered and title certificates are not always issued even in a state which may have certificate laws applicable thereto, because the certificate laws may apply only if the mobile homes use the highways. Registration plates of a mobile home having a certificate could be removed and there would be nothing visible to show that a certificate had ever issued for it.

Second, various fraudulent devices based on allegations of loss of the certificate of title enable a dishonest person to obtain both an original and a duplicate of title; to have a security interest shown on only one thereof; and then to effect a transfer into a new state on the basis of the clean certificate, no matter how diligent the officers in the second state may be.

Given these practical problems, the choice of applicable rules of law after interstate removals of vehicles subject to certificate of title laws is most difficult. This Article provides the rules set forth below.

(c) The security interest perfected by notation on a certificate of title will be recognized without limit as to time; but, of course, perfection by this method ceases if the certificate of title is surrendered (paragraph (2) (b)). Since the secured party ordinarily holds the certificate, surrender thereof could not occur without his action in the matter in some respect. If the vehicle is reregistered in another jurisdiction while the secured party still holds the certificate, a danger of deception to third parties arises. The section provides that the certificate ceases to control after 4 months following removal if reregistration has occurred, but during the 4 months the secured party has the same protection for cases of interstate removal as is set forth in paragraph (1) (d) of the section and Comment 7, subject to additional limitation if the reregistration also involves a new "clean" certificate of title in the removal jurisdiction and a non-professional buyer buys while that new certificate is outstanding. See paragraph (2) (d) and Comment 4(e).

(d) If a vehicle not described in the preceding paragraph (i. e., not covered by a certificate of title) is removed to a certificate state and a certificate is issued therefor, the holder of a security interest has the same 4-month protection, subject to the provision discussed in the next paragraph of Comment.

(e) Where "this state" issues a certificate of title on collateral that has come from another state subject to a security interest perfected in any manner, problems will arise if this state, from whatever cause, fails to show on its certificate the security interest perfected in the other jurisdiction. This state will have every reason, nevertheless, to make its certificate of title reliable to the type of person who most needs to rely on it. Paragraph (2) (d) of the section therefore provides that the security interest perfected in the other jurisdiction is subordinate to the rights of a limited class of persons buying the goods while there is a clean certificate of title issued by this state, without knowledge of the security interest perfected in the other jurisdiction. The limited class are buyers who are non-professionals, i. e., not dealers and not secured parties, because these are ordinarily professionals. The protective rule mentioned does not apply if this state adopts a device used under some certificate of title laws, namely, stating on the certificate of title that the vehicle may be subject to security interests not shown on the certificate, where the collateral came from a non-certificate state.

In any event the security interest perfected out of state becomes unperfected unless reperfected in this state under the usual 4-month rule (paragraph (2) (d) of the section). States which place a cautionary statement on a certificate of title coming from a non-certificate state make provision to reissue the certificate without the caution after 4 months.

One difficulty is that no state's certificate of title law makes any provision by which a foreign security interest may be reperfected in that state, without the cooperation of the owner or other person holding the certificate in

temporarily surrendering the certificate. But that cooperation is not likely to be forthcoming from an owner who wrongfully procured the issuance of a new certificate not showing the out-of-state security interest, or from a local secured party finding himself in a priority contest with the out-of-state secured party. The only solution for the out-of-state secured party under present certificate of title laws seems to be to reperfect by possession, i.e., by repossessing the goods.

5. The general rules of the section based on location of the collateral could not be applied to certain types of intangible collateral which have no location in any realistic sense, or to certain movable chattels which have no permanent location.

(a) For accounts and general intangibles there is no indispensable or symbolic document which represents the underlying claim, whose endorsement or delivery is the one effectual means of transfer. There is a considerable body of case law dealing with the situs of choses in action such as these. This case law is in the highest degree confused, contradictory and uncertain: it affords no base on which to build a statutory rule.

An account arises typically out of a sale; the contract of sale may be executed in State A, the goods shipped from a warehouse in State B to buyer (account debtor) in State C. The account may then be assigned to an assignee in State D. The seller-assignor may keep his principal records in State E. Under the non-notification system of accounts financing, the seller-assignor, despite the assignment, bills and collects from the account debtor; under notification financing the account debtor makes payment to the assignee, but the bills may be prepared and sent out by either assignor or assignee. The contacts of the transaction are with many jurisdictions: to which one is it appropriate to look for the governing law? Even more complicated situations may be anticipated when the collateral consists of novel or uncommon types of personal property, which fall within the definition of general intangibles.

If we bear in mind that our principal question is where certain financing statements shall be filed, two things become clear. *First:* since the purpose of filing is to allow subsequent creditors of the *debtor-assignor* to determine the true status of his affairs, the place chosen must be one which such creditors would normally associate with the assignor; thus the place of business of the assignee and the places of business or residences of the various account debtors must be rejected in ordinary situations. *Second:* the place chosen must be one which can be determined with the least possible risk of error. The place chosen by subsection (3) is the debtor's location, which is ordinarily the location of its chief executive office. This concept is discussed below.

(b) Another class of collateral for which a special rule is stated in subsection (3) is mobile goods of types which are normally moved for use from one jurisdiction to another. Such goods are generally classified as equipment; sometimes they may be classified as inventory, for example, goods leased by a professional lessor. Subsection (3) provides that a security interest in such equipment or inventory is subject to this Article when the debtor's location, i. e., ordinarily its chief executive office, is in this state.

While automobiles are obviously mobile goods, they will in most cases be covered by subsection (2) of this section and therefore excluded from subsection (3) by paragraph (a) thereof. If an automobile is not covered by a certificate of title and is classified as equipment or as inventory under lease, it will be subject to subsection (3). Automobiles and other mobile goods which are classified as consumer goods are not subject to subsection (3).

The rule of subsection (3) applies to goods of a type "normally used" in more than one jurisdiction; there is no requirement that particular goods be in fact used out of state. Thus, if an enterprise whose chief executive office is in State X keeps in State Y goods of the type covered by subsection (3), the rule of subsection (3) requires filing in State X even though the goods never leave State Y.

(c) "Chief executive office" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief executive office" is not defined in this Section or elsewhere in this Act. Doubt may arise as to which is the "chief executive office" of a multi-state enterprise, but it would be rare that there could be more than two possibilities. A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place. The subsection states a rule which will be simple to apply in most cases, and which makes it possible to dispense with much burdensome and useless filing.

(d) If the location of the debtor is moved after a security interest has been perfected in another jurisdiction, the secured party has four months within which to refile, unless the perfection in the original jurisdiction would have expired earlier (paragraph (3) (e)).

(e) Under subsection (3) each state other than that of the debtor's location in effect disclaims jurisdiction over certain accounts and general intangibles which, by common law rules, might be held to be within its jurisdic-

tion; in the same way there is a disclaimer of jurisdiction over mobile chattels, even though they may be physically located within the state much of the time. If the jurisdiction whose law controls under this rule is a United States jurisdiction or has enacted legislation permitting perfection of the security interest by filing or recording in that jurisdiction, the law of that jurisdiction will be recognized in the disclaiming jurisdiction as perfecting the security interest. The jurisdiction of the debtor's location may not, however, have such legislation. For example, mobile equipment is used in New York; the debtor's chief place of business is in a Canadian jurisdiction which will not permit or recognize filing as to property not physically located therein. Paragraph (3) (c) solves this difficulty by permitting perfection through filing in the jurisdiction in the United States in which the debtor has its major executive office in the United States. Where the debtor is not located in the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the secured party may alternatively perfect by notification to account debtors.

(f) A sentence in paragraph (3) (d) provides a special rule for security interests in airplanes owned by a foreign air carrier. Without that sentence subsection (3) might refer such a case to the law of a foreign nation whose law is difficult or impossible to ascertain. The sentence clears up such doubts by treating as the location of the carrier the office designated for service of process in the United States under the Federal Aviation Act of 1958. To the extent that it is applicable, the Convention on the International Recognition of Rights in Aircraft (Geneva Convention) supersedes state legislation on this subject, as set forth in Section 9-302(3), but some nations are not parties to that Convention.

6. Subsection (4) deals with chattel paper, a semi-intangible security interest which may be perfected either by possession or by filing (Sections 9-304(1), 9-305). As to possessory security, subsection (4) provides that chattel paper shall be subject to the same rule as goods in subsection (1). As to non-possessory security, subsection (4) provides that it shall be subject to the same rule as the intangibles under subsection (3), except that notification to the account debtor is ruled out as an optional means of perfection under paragraph (3)(c). The reason for this is that a different alternative, possession, is available for chattel paper.

7. In addition to the foregoing rules defining which jurisdiction governs perfection of a security interest in the first instance, "this state" (i. e., a destination state after removal) adds its own rules requiring reperfection following removal of collateral other than that described in subsections (2), (3), and (5). "This state" will for four months recognize perfection under the law of the jurisdiction from which the collateral came, unless the remaining period of effectiveness of the perfection in that jurisdiction was less than four months (paragraph (1)(d)). After the four month period or the remaining period of effectiveness, whichever is shorter, the secured party must comply with perfection requirements in this state. This rule differs from the former rule of Section 14 of the Uniform Conditional Sales Act. Under that section a conditional seller was required to file within 10 days after he "received notice" that the goods had been removed into this state. Apparently, under the Uniform Conditional Sales Act, if the seller never "received notice" his interest continued or became perfected in this state without filing. Paragraph (1)(d) proceeds on the theory that not only the secured party whose collateral has been removed but also creditors of and purchasers from the debtor "in this state" should be considered.

The four-month period is long enough for a secured party to discover in most cases that the collateral has been removed and refiled in this state; thereafter, if he has not done so, his interest, although originally perfected in the jurisdiction from which the collateral was removed, is subject to defeat here by purchasers of the collateral. Compare the situation arising under Section 9-403(2) when a filing lapses.

It should be noted that a "purchaser" includes a secured party. Section 1-201(32) and (33). The rights of a purchaser with a security interest against an unperfected security interest are governed by Section 9-312.

In case of delay beyond the four-month period, there is no "relation back"; and this is also true where the security interest is perfected for the first time in this state.

If the removal occurs within a short period, like two weeks, before the lapse of the filing in the original state, the secured party has only that period, not the full four months, to reperfect in "this state". But ordinarily he would have filed a continuation statement in the original jurisdiction; and he may do so to avoid lapse and allow himself the full four months if he is searching for the collateral and needs more time.

Paragraph (1)(d) does not apply to the case of goods removed from one filing district to another within this state (see subsection (3) of Section 9-401), but only to property brought into this state from another jurisdiction.

8. Subsection (5) deals with problems relating to the financing of minerals (including oil and gas) as these products come from the ground. In some cases rights in oil and gas in the ground have been split into a large variety of interests. As the oil or gas issues from the ground, it may be encumbered by the group of persons having interests therein. Or the prod-

uct may be sold at minehead or wellhead and the resulting accounts assigned. The question arises as to the place of filing. The usual rule of this section in subsection (3) would make the place to search for encumbrances on the accounts the locations of the respective assignors; but the assignors might be a number of individuals located throughout the country. To avoid the difficult problems of search thus created, subsection (5) provides that the place for filing with respect to security interests in the minerals as they issue from the ground at minehead or wellhead or in the accounts arising out of the sale of the minerals at minehead or wellhead shall be in the state where the minehead or wellhead is located. Section 9-401 similarly provides that the place to file within the state is in the real property records in the county where the minehead or wellhead is located. These rules conform to pre-Code practice and to practice which seems to have continued in the early Code period before express provision was made for these situations.

The term "at wellhead" is intended to encompass arrangements based on sale of the product as soon as it issues from the ground and is measured, without technical distinctions as to whether title passes at the "Christmas tree" or the far side of a gathering tank or at some other point. The term "at minehead" is a comparable concept.

Cross References:
Sections 1-105, 9-302, and 9-401.

Definitional Cross References:
"Accounts". Section 9-106.
"Attaches". Section 9-203.
"Chattel paper". Section 9-105.
"Collateral". Section 9-105.
"Consumer goods". Section 9-109.
"Debtor". Section 9-105.
"Documents". Section 9-105.
"Equipment". Section 9-109.
"General intangibles". Section 9-106.
"Goods". Section 9-105.
"Instrument". Section 9-109.
"Purchase money security interest". Section 9-107.
"Purchaser". Section 1-201(33).
"Security interest". Section 1-201(37).

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, made a change in subsection (2) as it stood before the 1975 amendment. See amendment note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote this section.

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

This article does not apply

(a) to a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or

(b) to a landlord's lien; or

(c) to a lien given by statute or other rule of law for services or materials except as provided in G.S. 25-9-310 on priority of such liens; or

(d) to a transfer of a claim for wages, salary or other compensation of an employee; or

(e) to a transfer by a government or governmental subdivision or agency; or

(f) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to any assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness; or

(g) to a transfer of an interest in or claim in or under any policy of insurance, except as provided with respect to proceeds (G.S. 25-9-306) and priorities in proceeds (G.S. 25-9-312); or

(h) to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or

(i) to any right of setoff; or

(j) except to the extent that provision is made for fixtures in G.S. 25-9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or

(k) to a transfer in whole or in part of any claim arising out of tort; or

(l) to a transfer of an interest in any deposit account (subsection (1) of G.S. 25-9-105), except as provided with respect to proceeds (G.S. 25-9-306) and priorities in proceeds (G.S. 25-9-312). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provisions:
None.

Purposes:

To exclude certain security transactions from this Article.

1. Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this Article. The Ship Mortgage Act, 1920, is an example of such a federal act. The present provisions of the Federal Aviation Act of 1958 (49 U.S.C. 1403 et seq.) call for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator and such registration is recognized as equivalent to filing under this Article (Section 9-302(3)); but to the extent that the Federal Aviation Act does not regulate the rights of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this Article.

Although the Federal Copyright Act contains provisions permitting the mortgage of a copyright and for the recording of an assignment of a copyright (17 U.S.C. §§ 28, 30) such a statute would not seem to contain sufficient provisions regulating the rights of the parties and third parties to exclude security interests in copyrights from the provisions of this Article. Compare Republic Pictures Corp. v. Security-First National Bank of Los Angeles, 197 F.2d 767 (9th Cir. 1952). Compare also with respect to patents, 35 U.S.C. § 47. The filing provisions under these Acts, like the filing provisions of the Federal Aviation Act, are recognized as the equivalent to filing under this Article. Section 9-302(3) and (4).

Even such a statute as the Ship Mortgage Act is far from a comprehensive regulation of all aspects of ship mortgage financing. That Act contains provisions on formal requisites, on recordation and on foreclosure but not much more. If problems arise under a ship mortgage which are not covered by the Act, the federal admiralty court must decide whether to improvise an answer under "federal law" or to follow the law of some state with which the mortgage transaction has appropriate contacts. The exclusionary language in paragraph (a) is that this Article does not apply to such security interest "to the extent" that the federal statute governs the rights of the parties. Thus if the federal statute contained no relevant provision, this Article could be looked to for an answer.

2. Except for fixtures (Section 9-313), the Article applies only to security interests in personal property. The exclusion of landlord's liens by paragraph (b) and of leases and other interests in or liens on real estate by paragraph (j) merely reiterates the limitations on coverage already made explicit in Section 9-102(3). See Comment 4 to that section.

3. In all jurisdictions liens are given suppliers of many types of services and materials either by statute or by common law. It was thought to be both inappropriate and unnecessary for this Article to attempt a general codification of that lien structure which is in considerable part determined by local conditions and which is far removed from ordinary commercial financing. Moreover, federal law may displace state law in situations such as admiralty liens. Paragraph (c) therefore excludes statutory liens from the Article. Section 9-310 states a rule for determining priorities between such liens and the consensual security interests covered by this Article.

4. In many states assignments of wage claims and the like are regulated by statute. Such assignments present important social problems whose solution should be a matter of local regulation. Paragraph (d) therefore excludes them from this Article.

5. Certain governmental borrowings include collateral in the form of assignments of water, electricity or sewer charges, rents on dormitories or industrial buildings, tools, etc. Since these assignments are usually governed by special provisions of law, these governmental transfers are excluded from this Article.

6. In general sales as well as security transfers of accounts and chattel paper are within the Article (see Section 9-102). Paragraph (f) excludes from the Article certain transfers of such intangibles which, by their nature, have

nothing to do with commercial financing transactions.

Similarly, this paragraph excludes from the Article such transactions as that involved in Lyon v. Ty-Wood Corporation, 212 Pa.Super. 69, 239 A.2d 819 (1968) and Spurlin v. Sloan, 368 S.W.2d 314 (Ky.1963).

7. Rights under life insurance and other policies, and deposit accounts, are often put up as collateral. Such transactions are often quite special, do not fit easily under a general commercial statute and are adequately covered by existing law. Paragraphs (g) and (l) make appropriate exclusions, but provision is made for coverage of deposit accounts and certain insurance money as proceeds.

8. The remaining exclusions go to other types of claims which do not customarily serve as commercial collateral: judgments under paragraph (h), set-offs under paragraph (i) and tort claims under paragraph (k).

Cross References:
Point 1: Section 9-302(3).
Point 2: Sections 9-102(3) and 9-313.
Point 3: Sections 9-102(2) and 9-310.
Point 6: Section 9-102.

Definitional Cross References:
"Account". Section 9-106.
"Chattel paper". Section 9-105.
"Contract". Section 1-201.
"Deposit account". Section 9-105.
"Contract". Section 1-201.
"Deposit account". Section 9-105.
"Party". Section 1-201.
"Rights". Section 1-201.
"Security interest". Section 1-201.

Cross References. — As to application of Article 9 of the North Carolina Uniform Commercial Code to transactions under Chapter 159D, the North Carolina Industrial and Pollution Control Facilities Federal Program Financing Act, see § 159D-23. As to application of this Article to transactions under Chapter 159C, the Industrial Pollution Control Facilities Financing Act, see § 159C-28.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, deleted "such as the Ship Mortgage Act, 1920" following "United States" in subsection (a), substituted present subsection (e) for a provision which read "to an equipment trust covering railway rolling stock; or," rewrote subsection (f), added the exception clause in subsection (g) and the clause in parentheses in subsection (h), rewrote subsection (k) so as to eliminate a provision excluding "any deposit, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization," and added subsection (l).

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

CASE NOTES

The 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).

This section's exclusion of landlord's 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).

§ 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 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, but 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 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 or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of a 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) "Deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit;

(f) "Document" means document of title as defined in the general definitions of article 1 (G.S. 25-1-201), and a receipt of the kind described in subsection (2) of G.S. 25-7-201;

(g) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests;

(h) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (G.S. 25-9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also includes standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, and growing crops;

(i) "Instrument" means a negotiable instrument (defined in G.S. 25-3-104), or a security (defined in G.S. 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;

(j) "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like;

(k) An advance is made "pursuant to commitment" if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation;

(l) "Security agreement" means an agreement which creates or provides for a security interest;

(m) "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party.

(2) Other definitions applying to this article and the sections in which they appear are:

"Account." (G.S. 25-9-106).

"Attach." (G.S. 25-9-203).

"Construction mortgage." (G.S. 25-9-313(1)).
"Consumer goods." (G.S. 25-9-109(1)).
"Equipment." (G.S. 25-9-109(2)).
"Farm products." (G.S. 25-9-109(3)).
"Fixture." (G.S. 25-9-313(1)).
"Fixture filing." (G.S. 25-9-313(1)).
"General intangibles." (G.S. 25-9-106).
"Inventory." (G.S. 25-9-109(4)).
"Lien creditor." (G.S. 25-9-301(3)).
"Proceeds." (G.S. 25-9-306(1)).
"Purchase money security interest." (G.S. 25-9-107).
"United States." (G.S. 25-9-103).

(3) The following definitions in other articles apply to this article:
"Check." (G.S. 25-3-104).
"Contract for sale." (G.S. 25-2-106).
"Holder in due course." (G.S. 25-3-302).
"Note." (G.S. 25-3-104).
"Sale." (G.S. 25-2-106).

(4) In addition article 1 contains general definitions and principles of construction and interpretation applicable throughout this article. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provisions:
Various.

Purposes:

1. General. It is necessary to have a set of terms to describe the parties to a secured transaction, the agreement itself, and the property involved therein; but the selection of the set of terms applicable to any one of the existing forms (e. g., mortgagor and mortgagee) might carry to some extent the implication that the existing law referable to that form was to be used for the construction and interpretation of this Article. Since it is desired to avoid any such implication, a set of terms has been chosen which have no common law or statutory roots tying them to a particular form.

In place of such terms as "chattel mortgage," "conditional sale," "assignment of accounts receivable," "trust receipt," etc., this Article substitutes the general term "security agreement" defined in paragraph (1) (*l*). In place of "mortgagor," "mortgagee," "conditional vendee," "conditional vendor," etc., this Article substitutes "debtor", defined in paragraph (1) (d), and "secured party", defined in paragraph (1) (m). The property subject to the security agreement is "collateral", defined in paragraph (1) (c). The interest in the collateral which is conveyed by the debtor to the secured party is a "security interest", defined in Section 1-201(37).

2. Parties. The parties to the security agreement are the "debtor" and the "secured party."

"Debtor": In all but a few cases the person who owes the debt and the person whose property secures the debt will be the same. Occasionally, one person furnishes security for another's debt, and sometimes property is transferred subject to a secured debt of the transferor which the transferee does not assume; in such cases, under the second sentence of the definition, the term "debtor" may, depending upon the context, include either or both such persons. Section 9-112 sets out special rules which are applicable where collateral is owned by a person who does not owe a debt.

"Secured party": The term includes any person in whose favor there is a security interest (defined in Section 1-201). The term is used equally to refer to a person who as a seller retains a lien on or title to goods sold, to a person whose interest arises initially from a loan transaction, and to an assignee of either. Note that a seller is a "secured party" in relation to his customer; the seller becomes a "debtor" if he assigns the chattel paper as collateral. This is also true of a lender who assigns the debt as collateral. With the exceptions stated in Section 9-104(f) the Article applies to any sale of accounts or chattel paper: the term "secured party" includes an assignee of such intangibles whether by sale or for security, to distinguish him from the payee of the account, for example, who becomes a "debtor" by pledging the account as security for a loan.

On the applicability of the terms "debtor" and "secured party" to consignments and leases see Section 9-408 and Comment thereto.

"Account debtor": Where the collateral is an account, chattel paper or general intangible the original obligor is called the "account debtor", defined in paragraph (1) (a).

3. Property subject to the security agreement. "Collateral", defined in paragraph (1) (c), is a general term for the tangible and intangible property subject to a security interest. For some purposes the Code makes distinctions between different types of collateral and therefore further classification of collateral is necessary. Collateral which consists of tangible property is "goods", defined in paragraph (1) (h); and "goods" are again subdivided in Section 9-109. For purposes of this Article all intangible collateral fits one of five categories, two of which, "accounts", and "general intangibles" are defined in the following Section 9-106; the other three, "documents", "instruments" and "chattel paper" are defined in paragraphs (1) (f), (1) (i) and (1) (b) of this section.

"Goods": The definition in paragraph (1) (h) is similar to that contained in Section 2-105 except that the Sales Article definition refers to "time of identification to the contract for sale", while this definition refers to "the time the security interest attaches."

For the treatment of fixtures, Section 9-313 should be consulted. It will be noted that the treatment of fixtures under Section 9-313 does not at all points conform to their treatment under Section 2-107 (goods to be severed from realty). Section 2-107 relates to sale of such goods; Section 9-313 to security interests in them. The discrepancies between the two sections arise from the differences in the types of interest covered. A comparable discrepancy exists as to minerals. In the case of timber, both sections treat it as goods if it is to be severed under a contract of sale, but not otherwise.

If in any state minerals before severance are deemed to be personal property, they fall outside the Article's definition of "goods" and would therefore fall in the catch-all definition, "general intangibles", in Section 9-106. The special provisions of Section 9-103(5) would not apply and those of Section 9-103(3) would apply. The resulting problems should be considered locally.

For the purpose of this Article, goods are classified as "consumer goods", "equipment", "farm products", and "inventory"; those terms are defined in Section 9-109. When the general term "goods" is used in this Article, it includes, as may be appropriate in the context, the subclasses of goods defined in Section 9-109.

"Instrument": The term as defined in paragraph (1) (i) includes not only negotiable instruments and securities but also any other intangibles evidenced by writings which are in ordinary course of business transferred by delivery. As in the case of chattel paper "delivery" is only the minimum stated and may b accompanied by other steps.

If a writing is itself a security agreement o lease with respect to specific goods it is not a instrument although it otherwise meets th term of the definition. See Comment below o "chattel paper".

The fact that an instrument is secured by col lateral, whether the collateral be other instru ments, documents, goods, accounts or genera intangibles, does not change the character o the principal obligation as an instrument o convert the combination of instrument and col lateral into a separate Code classification o personal property. The single qualification t this principle is that an instrument which i secured by chattel paper is itself part of the chattel paper, while also retaining its identity as an instrument.

"Document": See the Comments under Sections 1-201(15) and 7-201.

"Chattel paper": To secure his own financing a secured party may wish to borrow against or sell the security agreement itself along with his interest in the collateral which he has received from his debtor. Since the refinancing of paper secured by specific goods presents some problems of its own, the term "chattel paper" is used to describe this kind of collateral. The Comments under Section 9-308 further describe this concept.

Charters of vessels are excluded from the definition of chattel paper because they fit under the definition of accounts. See Comment to Section 9-106. The term "charter" as used herein and in Section 9-106 includes bareboat charters, time charters, successive voyage charters, contracts of affreightment, contracts of carriage, and all other arrangements for use of vessels.

4. The following transactions illustrate the use of the term "chattel paper" and some of the other terms defined in this section.

A dealer sells a tractor to a farmer on conditional sales contract or purchase money security interest. The conditional sales contract is a "security agreement", the farmer is the "debtor", the dealer is the "secured party" and the tractor is the type of "collateral" defined in Section 9-109 as "equipment". But now the dealer transfers the contract to his bank, either by outright sale or to secure a loan. Since the conditional sales contract is a security agreement relating to specific equipment, the conditional sales contract is now the type of collateral called "chattel paper". In this transaction between the dealer and his bank, the bank is the "secured party", the dealer is the "debtor", and the farmer is the "account debtor".

Under the definition of "security interest" in Section 1-201(37) a lease does not create a security interest unless intended as security.

Whether or not the lease itself is a security agreement, it is chattel paper when transferred if it relates to specific goods. Thus, if the dealer enters into a straight lease of the tractor to the farmer (not intended as security), and then arranges to borrow money on the security of the lease, the lease is chattel paper.

Security agreements of the type formerly known as chattel mortgages and conditional sales contracts are frequently executed in connection with a negotiable note or a series of such notes. Under the definitions in paragraphs (1) (b) and (1) (i) the rules applicable to chattel paper, rather than those relating to instruments, are applicable to the group of writings (contract plus note) taken together.

5. Miscellaneous definitions.

"Deposit account" is a type of collateral excluded from this Article under Section 9-104(*l*), except when it constitutes proceeds of other collateral under Section 9-306.

The terms "encumbrance" and "mortgage" are defined for use in the section on fixtures, Section 9-113.

The term "transmitting utility" is defined to designate a special class of debtors for whom separate filing rules are provided in Part 4, thus obviating all local filing and particularly the several local filings that would be necessary under the usual rules of Section 9-401 for the fixture collateral of a far-flung public utility debtor. See Comments under Sections 9-401 and 9-403.

The term "pursuant to commitment" is defined for use in the rules relating to priority of future advances in Sections 9-301(4), 9-307(3), and 9-312(7).

6. Comments to the definitions indexed in subsections (2) and (3) follow the sections in which the definitions are contained.

Cross References:

Point 2: Sections 9-104(f) and 9-112.

Point 3: Sections 2-105, 2-107, 9-106, 9-109, 9-303 and 9-313.

Definitional Cross References:

"Account". Section 9-106.
"Agreement". Section 1-201.
"Document of title". Sections 1-201, 7-201.
"General intangibles". Section 9-106.
"Holder". Section 1-201.
"Money". Section 1-201.
"Negotiable instrument". Section 3-104.
"Person". Section 1-201.
"Representative". Section 1-201.
"Rights". Section 1-201.
"Security". Section 8-102.
"Security interest". Section 1-201.
"Writing". Section 1-201.

Effect of Amendments. — 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 amendment note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, eliminated references to contract rights in paragraphs (a), (c) and (d) and present paragraph (m) of subsection (1), inserted "but" near the middle of the first sentence of paragraph (b) of subsection (1), added present paragraphs (e), (g), (j) and (k) in subsection (1) and redesignated former paragraphs (e), (f), (g), (h) and (i) as (f), (h), (i), (l) and (m), respectively, added the language beginning "and a receipt" at the end of present paragraph (f) and substituted the language beginning "or minerals" for "contract rights and other things in action" at the end of the first sentence and inserted the provision as to standing timber in the second sentence of present paragraph (h). In subsection (2), the amendment deleted a reference to contract rights and added the references to "attach," "construction mortgage," "fixture," "fixture filing" and "United States."

CASE NOTES

"Security Agreement". — Any written agreement signed by a debtor which recites that certain personalty is being encumbered as security for a debt ought to operate as a security agreement under subsection (1)(l) of this section. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

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, rev'd on other grounds, 279 N.C. 352, 183 S.E.2d 109 (1971).

Applied in EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972); Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978); Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

Quoted in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974).

§ 25-9-106. Definitions: "Account"; "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, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money. All rights to payment 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 accounts. (1945, c. 196, s. 1; 1957, c. 504; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:

None.

Purposes:

The terms defined in this section round out the classification of intangibles: see the definitions of "document", "chattel paper" and "instrument" in Section 9-105. Those three terms cover the various categories of commercial paper which are either negotiable or to a greater or less extent dealt with as if negotiable. The term "account" covers most choses in action which may be the subject of commercial financing transactions but which are not evidenced by an indispensable writing. The term "general intangibles" brings under this Article miscellaneous types of contractual rights and other personal property which are used or may become customarily used as commercial security. Examples are goodwill, literary rights and rights to performance. Other examples are copyrights, trademarks and patents, except to the extent that they may be excluded by Section 9-104(a). This Article solves the problems of filing of security interests in these types of intangibles (Section 9-103(3) and 9-401). Note that this catch-all definition does not apply to money or to types of intangibles which are specifically excluded from the coverage of the Article (Section 9-104) and note also that under Section 9-302 filing under a federal statute may satisfy the filing requirements of this Article.

A right to the payment of money is frequently buttressed by ancillary covenants to insure the preservation of collateral, such as covenants in a purchase agreement, note or mortgage requiring insurance on the collateral or forbidding removal of the collateral; or covenants to preserve creditworthiness of the promisor, such as covenants restricting dividends, etc. While these miscellaneous ancillary rights might conceivably be thought to fall within the definition of "general intangibles", it is not the intention of the Code to treat them separately and require the perfection of assignment thereof by filing in the manner required for perfection of an assignment of general intangibles. Whatever perfection is required for the perfection of an assignment of the right to the payment of money will also carry these ancillary rights.

Similarly, when the right to the payment of money is not yet earned by performance, there are frequently ancillary rights designed to assure that an assignee may complete the performance and crystallize the right to payment of money. Such rights are frequently present in a "maintenance" lease where the lessor has continuing duties to perform, or in a ship charter. These ancillary rights, if considered in the abstract, might be thought to be "general intangibles", since they do not themselves involve the payment of money; but it is not the intent of the Code to split up the rights to the payment of money and its ancillary supports, and thereby multiply the problem of perfection of assignments. Therefore, all rights of the lessor in a lease are to be perfected as "chattel paper", and all rights of the owner in a ship charter are to be perfected as "accounts".

"Account" is defined as a right to payment for goods sold or leased or services rendered; the ordinary commercial account receivable. In some special cases a right to receive money not yet earned by performance crystallizes not into an account but into a general intangible, for it is a right to payment of money that is not "for goods sold or leased or for services rendered." Examples of such rights are the right to receive payment of a loan not evidenced by an instrument or chattel paper; a right to receive partial refund of purchase prices paid by reason of retroactive volume discounts; rights to receive payment under licenses of patents and copyrights, exhibition contracts, etc.

This Article rejects any lingering common law notion that only rights already earned can be assigned. In the triangular arrangement following assignment, there is reason to allow the original parties — assignor and account debtor — more flexibility in modifying the underlying contract before performance than after performance (see Section 9-318). It will, however, be found that in most situations the

same rules apply to accounts both before and after performance.

Cross References:
Sections 9-103(2), 9-104, 9-302(3), 9-318 and 9-401.

Definitional Cross References:
"Chattel paper". Section 9-105.
"Contract". Section 1-201.
"Document". Section 9-105.
"Goods". Section 9-105.
"Instrument". Section 9-105.

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, added the last sentence. See amendment note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, added "whether or not it has been earned by performance" at the end of the first sentence, deleted the second sentence, which defined "contract right," deleted "contract rights" preceding "chattel paper" in the present second sentence, added "and money" at the end of that sentence and substituted "are accounts" for "are contract rights and neither accounts nor general intangibles" at the end of the last sentence.

§ 25-9-107. Definitions: "Purchase money security interest".

A security interest is a "purchase money security interest" to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:
1. Under existing rules of law and under this Article purchase money obligations often have priority over other obligations. Thus a purchase money obligation has priority over an interest acquired under an after-acquired property clause (Section 9-312(3) and (4)); where filing is required a grace period of ten days is allowed against creditors and transferees in bulk (Section 9-301(2)); and in some instances filing may not be necessary (Section 9-302(1)(d)).

Under this section a seller has a purchase money security interest if he retains a security interest in the goods; a financing agency has a purchase money security interest when it advances money to the seller, taking back an assignment of chattel paper, and also when it makes advances to the buyer (e. g., on chattel mortgage) to enable him to buy, and he uses the money for that purpose.

2. When a purchase money interest is claimed by a secured party who is not a seller, he must of course have given present consideration. This section therefore provides that the purchase money party must be one who gives value "by making advances or incurring an obligation": the quoted language excludes from the purchase money category any security interest taken as security for or in satisfaction of a pre-existing claim or antecedent debt.

Cross References:
Point 1: Sections 9-301, 9-302 and 9-312.
Point 2: Section 9-108.

Definitional Cross References:
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Person". Section 1-201.
"Rights". Section 1-201.
"Security interest". Section 1-201.
"Value". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

CASE NOTES

Applied in North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

§ 25-9-108. When after-acquired collateral not security for antecedent debt.

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. Many financing transactions contemplate that the collateral will include both the debtor's existing assets and also assets thereafter acquired by him in the operation of his business. This Article generally validates such after-acquired property interests (see Section 9-204 and Comment) although they may be subordinated to later purchase money interests under Section 9-312(3) and (4).

Interests in after-acquired property have never been considered as involving transfers of property for antecedent debt merely because of the after-acquired feature, nor should they be so considered. The section makes explicit what has been true under the case law: an after-acquired property interest is not, by virtue of that fact alone, security for a pre-existing claim. This rule is of importance principally in insolvency proceedings under the federal Bankruptcy Act or state statutes which make certain transfers for antecedent debt voidable as preferences. The determination of when a transfer is for antecedent debt is largely left by the Bankruptcy Act to state law.

Two tests must be met under this section for an interest in after-acquired property to be one not taken for an antecedent debt. First: the secured party must, at the inception of the transaction, have given new value in some form. Second: the after-acquired property must come in either in the ordinary course of the debtor's business or as an acquisition which is made under a contract of purchase entered into within a reasonable time after the giving of new value and pursuant to the security agreement. The reason for the first test needs no comment. The second is in line with limitations which judicial construction has placed on the operation of after-acquired property clauses. Their coverage has been in many cases restricted to subsequent ordinary course acquisitions: this Article does not go so far (see Section 9-204 and Comment), but it does deny present value status to out of ordinary course acquisitions not made pursuant to the original loan agreement. This solution gives the secured party full protection as to the collateral which he may be reasonably thought to have contracted for; it gives other creditors the possibility, under the law of preferences, of subjecting to their claims windfall or uncontemplated acquisitions shortly before bankruptcy.

2. The term "value" is defined in Section 1-201(44) and discussed in the accompanying Comment. In this section and in other sections of this Article the term "new value" is used but is left without statutory definition. The several illustrations of "new value" given in the text of this section (making an advance, incurring an

obligation, releasing a perfected security interest) as well as the "purchase money security interest" definition in Section 9-107 indicate the nature of the concept. In other situations it is left to the courts to distinguish between "new" and "old" value, between present considerations and antecedent debt.

Cross References:
Point 1: Section 9-204 and 9-312.
Point 2: Section 9-107.

Definitional Cross References:
"Collateral". Section 9-105.
"Contract". Section 1-201.
"Debtor". Section 9-105.
"Purchase". Section 1-201.
"Rights". Section 1-201.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.
"Value". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-109. Classification of goods: "Consumer goods"; "equipment"; "farm products"; "inventory".

Goods are

(1) "consumer goods" if they are used or bought for use primarily for personal, family or household purposes;

(2) "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(3) "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

(4) "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. This section classifies goods as consumer goods, equipment, farm products and inventory. The classification is important in many situations: it is relevant, for example, in determining the rights of persons who buy from a debtor goods subject to a security interest (Section 9-307), in certain questions of priority (Section 9-312), in determining the place of filing (Section 9-401) and in working out rights after default (Part 5). Comment 5 to Section 9-102 contains an index of the special rules applicable to different classes of collateral.

2. The classes of goods are mutually exclusive; the same property cannot at the same time and as to the same person be both equipment and inventory, for example. In borderline cases — a physician's car or a farmer's jeep which might be either consumer goods or equipment — the principal use to which the property is put should be considered as determinative. Goods can fall into different classes at different times; a radio is inventory in the hands of a dealer and consumer goods in the hands of a householder.

3. The principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale. Implicit in the definition is the criterion that the prospective sale is in the ordinary course of business. Machinery used in manufacturing, for example, is equipment and not inventory even though it is the continuing policy of the enterprise to sell machinery when it becomes obsolete. Goods to be furnished under a contract or service are inventory even though the arrangement under which they are furnished is not technically a sale. When an enterprise is engaged in the business of leasing a stock of products to users (for example, the fleet of cars owned by a car rental agency), that stock is also included within the definition of "inventory". It should be noted that one class of goods which is not held for disposition to a purchaser or user is included in inventory: "Materials used or consumed in a business". Examples of this class of inventory are fuel to be used in operations, scrap metal produced in the course of manufacture, and containers to be used to package the goods. In general it may be said that goods used in a business are equipment when they are fixed assets or have, as identifiable units, a relatively long period of use; but are inventory, even though not held for sale, if they are used up or consumed in a short period of time in the production of some end product.

4. Goods are "farm products" only if they are in the possession of a debtor engaged in farming operations. Animals in a herd of livestock are covered whether they are acquired by purchase or result from natural increase. Products of crops or livestock remain farm products so long as they are in the possession of a debtor engaged in farming operations and have not been subjected to a manufacturing process. The terms "crops", "livestock" and "farming operations" are not defined; however, it is obvious from the text that "farming operations" includes raising livestock as well as crops; similarly, since eggs are products of livestock, livestock includes fowl.

When crops or livestock or their products come into the possession of a person not engaged in farming operations they cease to be "farm products". If they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory.

Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not determined by this Article. At one end of the scale some processes are so closely connected with farming — such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar — that they would not rank as manufacturing. On the other hand an extensive canning operation would be manufacturing. The line is one for the courts to draw. After farm products have been subjected to a manufacturing operation, they become inventory if held for sale.

Note that the buyer in ordinary course who under Section 9-307 takes free of a security interest in goods held for sale does not include one who buys farm products from a person engaged in farming operations.

5. The principal definition of equipment is a negative one: goods used in a business (including farming or a profession) which are not inventory and not farm products. Trucks, rolling stock, tools, machinery are typical. It will be noted furthermore that any goods which are not covered by one of the other definitions in this section are to be treated as equipment.

Cross References:

Point 1: Section 9-102, 9-307, 9-312, 9-401 and Part 5.

Point 3: Section 9-307.

Point 4: Section 9-307.

Definitional Cross References:

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Organization". Section 1-201.

"Person". Section 1-201.

"Sale". Section 2-106 and 9-105.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Legal Periodicals. — 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).

CASE NOTES

Priority of Security Interests in Bankrupt's Equipment. — In an action to determine which of two creditors was entitled to money in trustee's possession resulting from the sale of the debtor's boat, the evidence supported the contention that the corporate debtor's boat was purchased by the bankrupt corporation, used by it and was to be considered "equipment" of the bankrupt rather than "consumer goods" under this section, so that under § 25-9-312, the security interest of the first secured creditor in all present and future equipment owned by the bankrupt took priority over the security interest of the second creditor which was perfected more than 10 days after the bankrupt took possession of the boat. In re Boiling Springs Constr. Co., 3 B.R. 251 (E.D.N.C. 1980).

Bound Volumes Held "Inventory". — Where the buyer was engaged in the business 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, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

§ 25-9-110. Sufficiency of description.

For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

The requirement of description of collateral (see Section 9-203 and Comment thereto) is evidentiary. The test of sufficiency of a description laid down by this section is that the description do the job assigned to it — that it make possible the identification of the thing described. Under this rule courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called "serial number" test. The same test of reasonable identification applies where a description of real estate is required in a financing statement. See Section 9-402.

Cross References:
Sections 9-203 and 9-402.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-111. Applicability of bulk transfer laws.

The creation of a security interest is not a bulk transfer under article 6 (see G.S. 25-6-103). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:

None.

Purposes:

The bulk transfer laws, which have been almost everywhere enacted, were designed to prevent a once prevalent type of fraud which seems to have flourished particularly in the retail field: the owner of a debt-burdened enterprise would sell it to an unwary purchaser and then remove himself, with the purchase price and his other assets, beyond the reach of pro-

cess. The creditors would find themselves with no recourse unless they could establish that the purchaser assumed existing debts. The bulk transfer laws, which require advance notice of sale to all known creditors, seem to have been successful in preventing such frauds.

There has been disagreement whether the bulk transfer laws should be applied to security as well as to sale transactions. In most states security transactions have not been covered; in a few states the opposite result has been reached either by judicial construction or by express statutory provision. Whatever the reasons may be, it seems to be true that the bulk transfer type of fraud has not often made its appearance in the security field: it may be that lenders of money are more inclined to investigate a potential borrower than are purchasers of retail stores to determine the true state of their vendor's affairs. Since compliance with the bulk transfer laws is onerous and expensive, legitimate financing transactions should not be required to comply when there is no reason to believe that other creditors will be prejudiced.

This section merely reiterates the provisions of Article 6 on Bulk Transfers which provides in Section 6-103(1) that transfers "made to give security for the performance of an obligation" are not subject to that Article.

Cross References:
Section 6-103(1).

Definitional Cross References:
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-112. Where collateral is not owned by debtor.

Unless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under G.S. 25-9-502(2) or under G.S. 25-9-504(1), and is not liable for the debt or for any deficiency after resale, and he has the same right as the debtor

(a) to receive statements under G.S. 25-9-208;

(b) to receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under G.S. 25-9-505;

(c) to redeem the collateral under G.S. 25-9-506;

(d) to obtain injunctive or other relief under G.S. 25-9-507(1); and

(e) to recover losses caused to him under G.S. 25-9-208(2). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

Under the definition of Section 9-105, in any provisions of the Article dealing with the collateral the term "debtor" means the owner of the collateral even though he is not the person who owes payment or performance of the obligation secured. The section covers several situations in which the implications of this definition are specifically set out.

The duties which this section imposes on a secured party toward such an owner of collateral are conditioned on the secured party's knowledge of the true state of facts. Short of such knowledge he may continue to deal exclusively with the person who owes the obligation. Nor does the section suggest that the secured party is under any duty of inquiry. It does not purport to cut across the law of conversion or of ultra vires. Whether a person who does not own property has authority to encumber it for his own debts and whether a person is free to encumber his property as collateral for the debts of another, are matters to be decided under other rules of law and are not covered by this section.

The section does not purport to be an exhaustive treatment of the subject. It isolates certain problems which may be expected to arise and states rules as to them. Others will no

doubt arise: their solution is left to the courts.

Cross References:
Sections 9-105, 9-208 and Part 5.

Definitional Cross References:
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Notice". Section 1-201.
"Person". Section 1-201.
"Receive notice". Section 1-201.
"Right". Section 1-201.
"Secured party". Section 9-105.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-113. Security interests arising under article on sales.

A security interest arising solely under the article on sales (article 2) is subject to the provisions of this article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

(a) no security agreement is necessary to make the security interest enforceable; and

(b) no filing is required to perfect the security interest; and

(c) the rights of the secured party on default by the debtor are governed by the article on sales (article 2). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. Under the provisions of Article 2 on Sales, a seller of goods may reserve a security interest (see, e. g., Sections 2-401 and 2-505); and in certain circumstances, whether or not a security interest is reserved, the seller has rights of resale and stoppage under Sections 2-703, 2-705 and 2-706 which are similar to the rights of a secured party. Similarly, under such sections as Sections 2-506, 2-707 and 2-711, a financing agency, an agent, a buyer or another person may have a security interest or other right in goods similar to that of a seller. The use of the term "security interest" in the Sales Article is meant to bring the interests so designated within this Article. This section makes it clear, however, that such security interests are exempted from certain provisions of this Article. Compare Section 4-208(3), making similar special provisions for security interests arising in the bank collection process.

2. The security interests to which this section applies commonly arise by operation of law in the course of a sales transaction. Since the circumstances under which they arise are defined in the Sales Article, there is no need for the "security agreement" defined in Section 9-105(1) (*l*) and required by Section 9-203(1) and paragraph (a) dispenses with such requirements. The requirement of filing may be inapplicable under Sections 9-302(1) (a) and (b), 9-304 and 9-305, where the goods are in the possession of the secured party or of a bailee other than the debtor. To avoid difficulty in the residual cases, as for example where a bailee does not receive notification of the secured party's interest until after the security interest arises, paragraph (b) dispenses with any filing requirement. Finally, paragraph (c) makes inapplicable the default provisions of Part 5 of this Article, since the Sales Article contains detailed provisions governing stoppage of delivery and resale after breach. See Sections 2-705, 2-706, 2-707(2) and 2-711(3).

3. These limitations on the applicability of this Article to security interests arising under the Sales Article are appropriate only so long as the debtor does not have or lawfully obtain possession of the goods. Compare Section 56(b) of the Uniform Sales Act. A secured party who wishes to retain a security interest after the debtor lawfully obtains possession must comply fully with all the provisions of this Article and ordinarily must file a financing statement to perfect his interest. This is the effect of the "except" clause in the preamble to this section. Note that in the case of a buyer who has a security interest in rejected goods under Section 2-711(3), the buyer is the "secured party" and the seller is the "debtor".

4. This section applies only to a "security interest". The definition of "security interest" in Section 1-201(37) expressly excludes the special property interest of a buyer of goods on identification under Section 2-401(1). The seller's interest after identification and before delivery may be more than a security interest by virtue of explicit agreement under Section 2-401(1) or 2-501(1), by virtue of the provisions of Section 2-401(2), (3) or (4), or by virtue of substitution pursuant to Section 2-501(2). In such cases, Article 9 is inapplicable by the terms of Section 9-102(1) (a).

5. Where there is a "security interest", this section applies only if the security interest arises "solely" under the Sales Article. Thus Section 1-201(37) permits a buyer to acquire by agreement a security interest in goods not in his possession or control; such a security interest does not impair his rights under the Sales Article, but any rights based on the security agreement are fully subject to this Article without regard to the limitations of this section. Similarly, a seller who reserves a security interest by agreement does not lose his rights under the Sales Article, but rights other than those conferred by the Sales Article depend on full compliance with this Article.

Cross References:

Point 1: Sections 2-401, 2-505, 2-506, 2-705, 2-706, 2-707, 2-711(3), 4-208(3).

Point 2: Sections 2-705, 2-706, 2-707(2), 2-711(3), 9-203(1), 9-302(1) (a) and (b), 9-304, 9-305 and Part 5.

Point 3: Section 2-711(3).

Point 4: Sections 2-401, 2-501 and 9-102(1) (a).

Definitional Cross References:

"Debtor". Section 9-105.
"Goods". Section 9-105.
"Rights". Section 1-201.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

CASE NOTES

Cited in Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

§ 25-9-114. Consignment.

(1) A person who delivers goods under a consignment which is not a security interest and who would be required to file under this article by paragraph (3)(c) of G.S. 25-2-326 has priority over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were the property of the consignee, and also has priority with respect to identifiable cash proceeds received on or before delivery of the goods to a buyer, if

(a) the consignor complies with the filing provision of the article on sales with respect to consignments (paragraph (3)(c) of G.S. 25-2-326) before the consignee receives possession of the goods; and

(b) the consignor gives notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and

(c) the holder of the security interest receives the notification within five years before the consignee receives possession of the goods; and

(d) the notification states that the consignor expects to deliver goods on consignment to the consignee, describing the goods by item or type.

(2) In the case of a consignment which is not a security interest and in which the requirements of the preceding subsection have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor. (1975, c. 862, s. 7.)

OFFICIAL COMMENT

Prior Uniform Statutory Provisions:
None.

Purposes:

1. This section requires that where goods are furnished to a merchant under the arrangement known as consignment rather than in a security transaction, the consignor must, in order to protect his position as against an inventory secured party of the consignee, give to that party the same notice and at the same time that he would give to that party if that party had filed first with respect to inventory and if the consignor were furnishing the goods under an inventory security agreement instead of under a consignment.

For the distinction between true consignment and security arrangements, see Section 1-201(37). For the assimilation of consignments under certain circumstances to goods on sale or return and the requirement of filing in the case of consignments, see Section 2-326.

The requirements of notice in this section conform closely to the concepts and the language of Section 9-312(3), which should be consulted together with the relevant Comments.

Except in the limited cases of identifiable cash proceeds received on or before delivery of the goods to a buyer, no attempt has been made to provide rules as to perfection of a claim to proceeds of consignments (compare Section 9-306) or the priority thereof (compare Section 9-312). It is believed that under many true consignments the consignor acquires a claim for an agreed amount against the consignee at the moment of sale, and does not look to the proceeds of sale. In contrast to the assumption of this Article that rights to proceeds of security interests under Section 9-306 represent the presumed intent of the parties (compare Section 9-203(3)), the Article goes on the assumption that if consignors intend to claim the proceeds of sale, they will do so by expressly contracting for them and will perfect their security interests therein.

Cross Reference:
Sections 2-326 and 9-312(3).

Definitional Cross References:
"Consignment". Section 1-201(37).
"Debtor". Section 9-105.
"Goods". Section 9-105.
"Notification". Section 1-201(26).
"Proceeds". Section 9-306.
"Security interest". Section 1-201(37).

Editor's Note. — Session Laws 1975, c. 862, s. 10, makes the act effective July 1, 1976.

Legal Periodicals. — For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

PART 2.

VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERETO.

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

Except as otherwise provided by this Chapter a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provisions: Section 4, Uniform Conditional Sales Act; Section 3, Uniform Trust Receipts Act.

This section states the general validity of a security agreement. In general the security agreement is effective between the parties; it is

likewise effective against third parties. Exceptions to this general rule arise where there is a specific provision in any Article of this Act, for example, where Article 1 invalidates a disclaimer of the obligations of good faith, etc. (Section 1-102(3)), or this Article subordinates the security interest because it has not been perfected (Section 9-301) or for other reasons (see Section 9-312 on priorities) or defeats the security interest where certain types of claimants are involved (for example Section 9-307 on buyers of goods). As pointed out in the Note to Section 9-102, there is no intention that the enactment of this Article should repeal retail installment selling acts or small loan acts. Nor of course are the usury laws of any state repealed. These are mentioned in the text of Section 9-201 as examples of applicable laws, outside this Code entirely, which might invalidate the terms of a security agreement.

Cross References:
Sections 1-102(3), 9-301, 9-307 and 9-312.

Definitional Cross References:
"Collateral". Section 9-105.
"Creditor". Section 1-201.
"Party". Section 1-201.
"Purchaser". Section 1-201.
"Security agreement". Section 9-105.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

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

CASE NOTES

Cited in Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C. App. 242, 178 S.E.2d 124 (1970); Love v. Bache & Co., 40 N.C. App. 617, 253 S.E.2d 351 (1979).

§ 25-9-201.1: Repealed by Session Laws 1975, c. 862, s. 6, effective July 1, 1976.

Editor's Note. — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See amendment 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; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

The rights and duties of the parties to a security transaction and of third parties are stated in this Article without reference to the location of "title" to the collateral. Thus the incidents of a security interest which secures the purchase price of goods are the same under this Article whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed it or a lien to the secured party. This Article in no way determines which line of interpretation (title theory v. lien theory or retained title v. conveyed title) should be followed in cases where the applicability of some other rule of law depends upon who has title. Thus if a revenue law imposes a tax on the "legal" owner of goods or if a corporation law makes a vote of the stockholders prerequisite to a corporation "giving" a security interest but not if it acquires property "subject" to a security interest, this Article does not attempt to define whether the secured party is a "legal" owner or whether the transaction "gives" a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determine the location of "title" for such purposes.

Petitions for reclamation brought by a secured party in his debtor's insolvency proceedings have often been granted or denied on a title theory: where the secured party has title, reclamation will be granted; where he has "merely a lien", reclamation may be denied. For the treatment of such petitions under this Article, see Point 1 of Comment to Section 9-507.

Cross References:
Sections 2-401 and 2-507.

Definitional Cross References:
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Remedy". Section 1-201.
"Rights". Section 1-201.
"Secured party". Section 9-105.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Legal Periodicals. — For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

Quoted in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974).

Cited in Moser v. Employers Com. Union Ins. Co. of America, 25 N.C. App. 309, 212 S.E.2d 664 (1975); Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219 (1978).

§ 25-9-203. Attachment and enforceability of security interest; proceeds; formal requisites.

(1) Subject to the provisions of G.S. 25-4-208 on the security interest of a collecting bank and G.S. 25-9-113 on a security interest arising under the article on sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and

(b) value has been given; and

(c) the debtor has rights in the collateral.

(2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.

(3) Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by G.S. 25-9-306.

(4) A transaction, although subject to this article, is also subject to the North Carolina Consumer Finance Act (being G.S. 53-164 through 53-191), G.S. 24-1 and 24-2, and G.S. 91-1 through 91-8, the Retail Installment Sales Act (being Chapter 25A of the North Carolina General Statutes), and in the case of conflict between the provisions of this article and any such statute, the provisions of such statute control. Failure to comply with any applicable statute has only the effect which is specified therein. (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; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 2, Uniform Trust Receipts Act.

Purposes:

1. Subsection (1) states three basic prerequisites to the existence of a security interest: agreement, value, and collateral. In addition, the agreement must be in writing unless the collateral is in the possession of the secured party (including an agent on his behalf — see Comment 2 to Section 9-305). When all of these elements exist, the security agreement becomes enforceable between the parties and is said to "attach". Perfection of a security interest (see Section 9-303) will in many cases depend on the additional step of filing a financing statement (see Section 9-302) or possession of the collateral (Sections 9-304(1) and 9-305). Section 9-301 states who will take priority over a security interest which has attached but which has not been perfected. Subsection (2) states a rule of construction under which the security interest, unless postponed by explicit agreement, attaches automatically when the stated events have occurred.

2. As to the type of description of collateral in a written security agreement which will satisfy the requirements of this section, see Section 9-110 and Comment thereto.

In the case of crops growing or to be grown or timber to be cut the best identification is by describing the land, and subsection (1) (a) requires such a description.

3. One purpose of the formal requisites stated in subsection (1) (a) is evidentiary. The requirement of written record minimizes the possibility of future dispute as to the terms of a security agreement and as to what property stands as collateral for the obligation secured. Where the collateral is in the possession of the secured party, the evidentiary need for a written record is much less than where the collateral is in the debtor's possession; customarily, of course, as a matter of business practice the written record will be kept, but, in this Article as at common law, the writing is not a formal requisite. Subsection (1) (a), therefore, dispenses with the written agreement — and thus with signature and description — if the collateral is in the secured party's possession.

4. The definition of "security agreement" (Section 9-105) is "an agreement which creates or provides for a security interest". Under that definition the requirement of this section that the debtor sign a security agreement is not intended to reject, and does not reject, the deeply rooted doctrine that a bill of sale although absolute in form may be shown to have been in fact given as security. Under this Article as under prior law a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security and may then, on payment of the debt, assert his fundamental right to return of the collateral and execution of an acknowledgment of satisfaction.

5. The formal requisite of a writing stated in this section is not only a condition to the enforceability of a security interest against third parties, it is in the nature of a Statute of Frauds. Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies paragraph (1) (a) is not enforceable even against the debtor, and cannot be made so on any theory of equitable mortgage or the like. If he has advanced money, he is of course a creditor and, like any creditor, is entitled after judgment to appropriate process to enforce his claim against his debtor's assets; he will not, however, have against his debtor the rights given a secured party by Part 5 of this Article on Default. The theory of equitable mortgage, insofar as it has operated to allow creditors to enforce informal security agreements against debtors, may well have developed as a necessary escape from the elaborate requirements of execution, acknowledgment and the like which the nineteenth century chattel mortgage acts vainly relied on as a deterrent to fraud. Since this Article reduces formal requisites to a minimum, the doctrine is no longer necessary or useful. More harm than good would result from allowing creditors to establish a secured status by parol evidence after they have neglected the simple formality of obtaining a signed writing.

6. Subsection (4) states that the provisions of regulatory statutes covering the field of consumer finance prevail over the provisions of this Article in case of conflict. The second sentence of the subsection is added to make clear that no doctrine of total voidness for illegality is intended: failure to comply with the applicable regulatory statute has whatever effect may be specified in that statute, but no more.

Cross References:

Sections 4-208 and 9-113.
Point 1: Section 9-110.
Point 5: Part 5.

Definitional Cross References:

"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Party". Section 1-201.
"Proceeds". Section 9-306.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.
"Signed". Section 1-201.

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

The 1975 amendment, effective July 1, 1976, rewrote this section.

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

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

CASE NOTES

Subsection (1)(a) Writing Requirement in Nature of Statute of Frauds. — The requirement that the bargain be reduced to writing before it becomes effective is in the nature of a statute of frauds. Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

Writings May Be Incorporated to Satisfy Requirement. — As in other contracts involving a statute of frauds, two or more writings can be incorporated to satisfy the requirements of subsection (1)(a). Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

And Writing Need Not Be Denominated Security Agreement. — So long as there is written language which makes and evinces the bargain, it does not matter that the writing is not denominated a security agreement. Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

Instrument Must Manifest Intention to Create Security Interest. — There must be language in the instrument which leads to the logical conclusion that it was the intention of the parties that a security interest be created. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

The Code distinguishes between a security agreement and a financing statement. The security agreement is a writing which (1) creates or provides for a security interest; (2) contains a description of the collateral, plus a description of the land involved when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut; and (3) is signed by the debtor. The financing statement is a writing which (1) contains the signature and addresses of both the debtor and creditor and (2) a description of the collateral plus a description of the land involved when the financing statement covers crops growing or to be grown or goods which are or are to become fixtures. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Although the Code contemplates the execution of two separate writings, it does not prohibit the combination of a security agreement and financing statement. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement does not ordinarily create a security interest; it merely gives notice that one is or may be claimed. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement which does no more than meet the requirements of § 25-9-402 will not create a security interest in the debtor's property. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

But a financing statement may double as a security agreement if it contains appropriate language which grants a security interest. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement standing alone can serve as a sufficient memorandum of the security agreement. Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

If the financing statement contains the elements for a security agreement in addition to those for the financing statement, it would serve as the security agreement. The additional elements would be (1) something to indicate agreement; (2) a statement of the obligation or obligations secured; and, (3) provision for or creation of the security interest. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Where the financing statement contains language clearly manifesting the debtor's intent to grant, create, and provide for a security interest, bears his signature, describes the obligation secured, the collateral subject to the security interest, and the land involved, the financing statement meets the requirements of an enforceable security agreement and serves the double purpose. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Although the financing statement need only be a skeletonic statement that the parties intend to engage in future transactions which may never be consummated, § 25-9-402(1) specifically provides that "a copy of the security agreement is sufficient as a financing statement" if it contains the required information and is signed by both parties. There is no sound reason why a financing statement may not also serve as a security agreement if it meets the requirements of § 25-9-105(1)(h) and

subsection (1)(b) of this section. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Financing Statement Sufficient to Provide Security Interest. — Where the financing statement declared that it "covers the following type of collateral: (all crops now growing or to be planted on 5 specified farms) same securing note for advance money to produce crops for the year 1969," and the note contained the statement that it "is secured by Uniform Commercial Code financing statement of North Carolina," the financing statement and the note manifested defendant's intent to create in plaintiff a security interest in the described collateral and he did, in fact, provide for such interest when he stated that the crops described therein secured the note for money advanced to produce these crops. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Financing Statement Insufficient to Provide Security Interest. — Where the collateral was owned by debtor corporation, and the name of that corporation appeared only on one of the three documents, the financing statement, and the financing statement was not signed by any corporate officer of the debtor, no security interest was created because the document was not signed by the debtor in accordance with § 55-36(b). Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

"Rights in the collateral" under subsection (1)(c) is a term signifying not title, but merely some rights which may be transferred to the secured party. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976) (decided under former § 25-9-204).

A debtor may acquire "rights in the collateral" under subsection (1)(c) even where the collateral consists of consigned goods. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976) (decided under former § 25-9-204).

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).

Applied in Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510 (1978).

§ 25-9-204. After-acquired property; future advances.

(1) Except as provided in subsection (2), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.

(2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (G.S. 25-9-314) when given as additional security unless the debtor acquired rights in them within 10 days after the secured party gives value.

(3) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (subsection (1) of G.S. 25-9-105). (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. 1; 1955, c. 386, s. 1; c. 816; 1957, cc. 504, 999; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:

None.

Purposes:

1. Subsection (1) makes clear that a security interest arising by virtue of an after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement. That is to say: the security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party — such as the taking of a supplemental agreement covering the new collateral — is required. This does not however mean that the interest is proof against subordination or defeat: Section 9-108 should be consulted on when a security interest in after-acquired collateral is not security for antecedent debt, and Section 9-312(3) and (4) on when such a security interest may be subordinated to a conflicting purchase money security interest in the same collateral.

2. This Article accepts the principle of a "continuing general lien". It rejects the doctrine — of which the judicial attitude toward after-acquired property interests was one expression — that there is reason to invalidate as a matter of law what has been variously called the floating charge, the free-handed mortgage and the lien on a shifting stock. This Article validates a security interest in the debtor's existing and future assets, even though (see Section 9-205) the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral. (See further, however, Section 9-306 on Proceeds and Comment thereto.)

The widespread nineteenth century prejudice against the floating charge was based on a feeling, often inarticulate in the opinions, that a commercial borrower should not be allowed to encumber all his assets present and future, and that for the protection not only of the borrower but of his other creditors a cushion of free assets should be preserved. That inarticulate premise has much to recommend it. This Article decisively rejects it not on the ground that it was wrong in policy but on the ground that it was not effective. In pre-Code law there was a multiplication of security devices designed to avoid the policy: field warehousing, trust receipts, factor's lien acts and so on. The cushion of free assets was not preserved. In almost every state it was possible before the Code for the borrower to give a lien on everything he held or would have. There have no doubt been sufficient economic reasons for the change. This Article, in expressly validating the floating charge, merely recognizes an existing state of things. The substantive rules of law set forth in the balance of the Article are designed to achieve the protection of the debtor and the equitable resolution of the conflicting claims of creditors which the old rules no longer give.

Notice that the question of assignment of future accounts is treated like any other case of after-acquired property: no periodic list of accounts is required by this Act. Where less than all accounts are assigned such a list may of course be necessary to permit identification of the particular accounts assigned.

3. Subsection (1) has been already referred to in connection with after-acquired property. It also serves to validate the so-called "cross-security" clause under which collateral acquired at any time may secure advances whenever made.

4. Subsection (2) limits the operation of the after-acquired property clause against consumers. No such interest can be claimed as additional security in consumer goods (defined in Section 9-109), except accessions (see Section 9-314), acquired more than ten days after the giving of value.

5. Under subsection (3) collateral may secure future as well as present advances when the security agreement so provides. At common law and under chattel mortgage statutes there seems to have been a vaguely articulated prejudice against future advance agreements comparable to the prejudice against after-acquired property interests. Although only a very few jurisdictions went to the length of invalidating interests claimed by virtue of future advances, judicial limitations severely restricted the usefulness of such arrangements. A common limitation was that an interest claimed in collateral existing at the time the security transaction was entered into for advances made thereafter was good only to the extent that the original security agreement specified the amount of such later advances and even the times at which they should be made. In line with the policy of this Article toward after-acquired property interests this subsection validates the future advance interest, provided only that the obligation be covered by the security agreement.

The effect after-acquired property and future advance clauses in the security agreement should not be confused with the use of financing statements in notice filing. The references to after-acquired property clauses and future advance clauses in Section 9-204 are limited to security agreements. This section follows Section 9-203, the section requiring a written security agreement, and its purpose is to make clear that confirmatory agreements are not necessary where the basic agreement has the clauses mentioned. This section has no reference to the operation of financing statements. The filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, whether the security agreement involved is one existing at the date of filing with an after-acquired property clause or a future advance clause, or whether the applicable security agreement is executed later. Indeed, Section 9-402(1) expressly contemplates that a financing statement may be filed when there is no security agreement. There is no need to refer to after-acquired property or future advances in the financing statement.

As in the case of interests in after-acquired collateral, a security interest based on future advances may be subordinated to conflicting interests in the same collateral. See Sections 9-301(4); 9-307(3); 9-312(3), (4), and (7).

Cross References:

Point 1: Sections 9-108 and 9-312.

Point 2: Sections 9-205 and 9-306.

Point 4: Sections 9-109 and 9-314.

Point 5: Sections 9-301(4); 9-307(3); 9-312(3), (4), and (7).

Definitional Cross References:
"Account". Section 9-106.
"Agreement". Section 1-201.
"Collateral". Section 9-105.
"Consumer goods". Section 9-109.
"Contract". Section 1-201.
"Debtor". Section 9-105.
"Purchase". Section 1-201.
"Pursuant to commitment". Section 9-105.
"Rights". Section 1-201.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.
"Value". Section 1-201.

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, made a change in former provisions relating to attachment of security interests in crops. See amendment note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote this section.

Legal Periodicals. — For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

CASE NOTES

The Uniform Commercial Code limits a security interest in after-acquired consumer goods to those acquired within 10 days after the lender gave value. Anderson v. Southern Disct. Co., 582 F.2d 883 (4th Cir. 1978).

Security Interest in "Additions and Accessions" to Listed Chattels. — Where a promissory note was secured by certain household goods, each of which was listed and identified, and the agreement also provided for a security interest in all additions and accessions to the listed chattels, the use of the words "additions and" did not constitute a violation of the Truth-in-Lending Act as broadly including all after-acquired furniture and household furnishings; the obvious meaning and the only proper interpretation of the phrase is that it covers only accessions, articles later acquired and physically attached to one of the listed articles. Anderson v. Southern Disct. Co., 582 F.2d 883 (4th Cir. 1978).

Applied in Lowery v. Finance America Corp., 32 N.C. App. 174, 231 S.E.2d 904 (1977).

Cited in In re Dickson, 432 F. Supp. 752 (W.D.N.C. 1977); Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978).

§ 25-9-205. Use or disposition of collateral without accounting permissible.

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee. (1945, c. 196, s. 7; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provisions:
None.

Purposes:

1. This Article expressly validates the floating charge or lien on a shifting stock. (See Sections 9-201, 9-204, and Comment to Section 9-204.) This section provides that a security interest is not invalid or fraudulent by reason of liberty in the debtor to dispose of the collateral without being required to account for proceeds or substitute new collateral. It repeals the rule of Benedict v. Ratner, 268 U.S. 353, 45 S.Ct. 566, 69 L.Ed. 991 (1925), and other cases which

held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over the collateral. The principal effect of the Benedict rule has been, not to discourage or eliminate security transactions in inventory and accounts receivable — on the contrary such transactions have vastly increased in volume — but rather to force financing arrangements in this field toward a self-liquidating basis. Furthermore, several lower court cases drew implications from Justice Brandeis' opinion in Benedict v. Ratner which required lenders operating in this field to observe a number of needless and costly formalities: for example it was thought necessary for the debtor to make daily remittances to the lender of all collections received, even though the amount remitted is immediately returned to the debtor in order to keep the loan at an agreed level.

2. The Benedict rule was, in the accounts receivable field, repealed in many of the state accounts receivable statutes enacted after 1943, and, in the inventory field, by some of the factor's lien statutes. (Benedict v. Ratner purported to state the law of New York and not a rule of federal bankruptcy law. Since its acceptance is a matter of state law, it can of course be rejected by state statute.)

3. The requirement of "policing" is the substance of the Benedict rule. While this section repeals Benedict in matters of form, the filing requirements (Section 9-302) give other creditors the opportunity to ascertain from public sources whether property of their debtor or prospective debtor is subject to secured claims, and the provisions about proceeds (Section 9-306(4)) enable creditors to claim collections which were made by the debtor more than 10-days before insolvency proceedings and commingled or deposited in a bank account before institution of the insolvency proceedings. The repeal of the Benedict rule under this section must be read in the light of these provisions.

4. Other decisions reaching results like that in the Benedict case, but relating to other aspects of dominion (of which Lee v. State Bank & Trust Co., 54 F.2d 518 (2d Cir. 1931), is an example) are likewise rejected.

5. Nothing in Section 9-205 prevents such "policing" or dominion as the secured party and the debtor may agree upon; business and not legal reasons will determine the extent to which strict accountability, segregation of collections, daily reports and the like will be employed.

6. The last sentence is added to make clear that the section does not mean that the holder of an unfiled security interest, whose perfection depends on possession of the collateral by the secured party or by a bailee (such as a field warehouseman), can allow the debtor access to and control over the goods without thereby losing his perfected interest. The common law rules on the degree and extent of possession which are necessary to perfect a pledge interest or to constitute a valid field warehouse are not relaxed by this or any other section of this Article.

Cross References:

Point 1: Sections 9-201 and 9-204.
Point 3: Sections 9-302 and 9-306(4).
Point 6: Sections 9-304 and 9-305.

Definitional Cross References:

"Account". Section 9-106.
"Chattel paper". Section 9-105.
"Collateral". Section 9-105.
"Creditor". Section 1-201.
"Debtor". Section 9-105.
"Goods". Section 9-105.
"Proceeds". Section 9-306.
"Secured party". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, deleted "contract rights" preceding "or chattel paper" near the middle of the first sentence of the section.

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

(1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense,

except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the article on commercial paper (article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

(2) When a seller retains a purchase money security interest in goods the article on sales (article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 2, Uniform Conditional Sales Act.

Purposes:

1. Clauses are frequently inserted in installment purchase contracts under which the conditional vendee agrees not to assert defenses against an assignee of the contract. These clauses have led to litigation and their present status under the case law is in confusion. In some jurisdictions they have been held void as attempts to create negotiable instruments outside the framework of Article 3 or on grounds of public policy; in others they have been allowed to operate to cut off at least defenses based on breach of warranty. Under subsection (1) such clauses in a security agreement are validated outside the consumer field, but only as to defenses which could be cut off if a negotiable instrument were used. This limitation is important since if the clauses were allowed to have full effect as typically drafted, they would operate to cut off real as well as personal defenses. The execution of a negotiable note in connection with a security agreement is given like effect as the execution of an agreement containing a waiver of defense clause. The same rules are made applicable to leases as to security agreements, whether or not the lease is intended as security.

2. This Article takes no position on the controversial question whether a buyer of consumer goods may effectively waive defenses by contractual clause or by execution of a negotiable note. In some states such waivers have been invalidated by statute. In other states the course of judicial decision has rendered them ineffective or unreliable — courts have found that the assignee is not protected against the buyer's defense by a clause in the contract or that the holder of a note, by reason of his too close connection with the underlying transaction, does not have the rights of a holder in due course. This Article neither adopts nor rejects the approach taken in such statutes and decisions, except that the validation of waivers in subsection (1) is expressly made "subject to any statute or decision" which may restrict the waiver's effectiveness in the case of a buyer of consumer goods.

3. Subsection (2) makes clear, as did Section 2 of the Uniform Conditional Sales Act, that purchase money security transactions are sales, and warranty rules for sales are applicable. It also prevents a buyer from inadvertently abandoning his warranties by a "no warranties" term in the security agreement when warranties have already been created under the sales arrangement. Where the sale arrangement and the purchase money security transaction are evidenced by only one writing, that writing may disclaim, limit or modify warranties to the extent permitted by Article 2.

Cross References:
Point 1: Section 3-305.
Point 2: Section 9-203(2).
Point 3: Sections 2-102 and 2-316.

Definitional Cross References:
"Agreement". Section 1-201.
"Consumer goods". Section 9-109.
"Good faith". Section 1-201.
"Goods". Section 9-105.
"Holder". Section 1-201.
"Holder in due course". Sections 3-302 and 9-105.
"Negotiable instrument". Section 3-104.
"Notice". Section 1-201.
"Purchase money security interest". Section 9-107.
"Sale". Sections 2-106 and 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.
"Value". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

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

CASE NOTES

Applied in ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

§ 25-9-207. Rights and duties when collateral is in secured party's possession.

(1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(2) Unless otherwise agreed, when collateral is in the secured party's possession.

(a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(b) the risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;

(c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;

(d) the secured party must keep the collateral identifiable but fungible collateral may be commingled;

(e) the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.

(3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.

(4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. Subsection (1) states the duty to preserve collateral imposed on a pledge at common law. See Restatement of Security, §§ 17, 18. In many cases a secured party having collateral in his possession may satisfy this duty by notifying the debtor of any act which must be taken and allowing the debtor to perform such act himself. If the secured party himself takes action, his reasonable expenses may be added to the secured obligation.

Under Section 1-102(3) the duty to exercise reasonable care may not be disclaimed by agreement, although under that section the parties remain free to determine by agreement, in any manner not manifestly unreasonable, what shall constitute reasonable care in a particular case.

2. Subsection (2) states rules, which follow common law precedents, and which apply, unless there is agreement otherwise, in typical situations during the period while the secured party is in possession of the collateral.

3. The right of a secured party holding instruments or documents to have them indorsed or transferred to him or his order is dealt with in the relevant sections of Articles 3 (Commercial Paper), 7 (Warehouse Receipts, Bills of Lading and Other Documents) and 8 (Investment Securities). (Sections 3-201, 7-506, 8-307.)

4. This section applies when the secured party has possession of the collateral before default, as a pledgee, and also when he has

taken possession of the collateral after default. See Section 9-501(1) and (2). Subsection (4) permits operation of the collateral in the circumstances stated, and subsection (2) (a) authorizes payment of or provision for expenses of such operation. Agreements providing for such operation are common in trust indentures securing corporate bonds and are particularly important when the collateral is a going business. Such an agreement cannot of course disclaim the duty of care established by subsection (1), nor can it waive or modify the rights of the debtor contrary to Section 9-501(3).

Cross References:
Point 1: Section 1-102(3).
Point 3: Sections 3-201, 7-506 and 8-307.
Point 4: Section 9-501(2) and Part 5.

Definitional Cross References:
"Chattel paper". Section 9-105.
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Instrument". Section 9-105.
"Money". Section 1-201.
"Party". Section 1-201.
"Secured party". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

CASE NOTES

Obligation Not Applicable until Right of Possession Exercised. — The obligations of the secured party to secure and protect the collateral as required by this section are not applicable unless and until the party has exercised his right of possession. North Carolina Nat'l Bank v. Sharpe, 35 N.C. 404, 241 S.E.2d 360 (1978).

Cited in Love v. Bache & Co., 40 N.C. App. 617, 253 S.E.2d 351 (1979).

§ 25-9-208. Request for statement of account or list of collateral.

(1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.

(2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good-faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.

(3) A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding ten dollars ($10.00) for each additional statement furnished. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. To provide a procedure whereby a debtor may obtain from the secured party a statement of the amount due on the obligation and in some cases a statement of the collateral.

2. The financing statement required to be filed under this Article (see Section 9-402) may disclose only that a secured party may have a security interest in specified types of collateral owned by the debtor. Unless a copy of the security agreement itself is filed as the financing statement third parties are told neither the amount of the obligation secured nor which particular assets are covered. Since subsequent creditors and purchasers may legitimately need more detailed information, it is necessary to provide a procedure under which the secured party will be required to make disclosure. On the other hand, the secured party should not be under a duty to disclose details of business operations to any casual inquirer or competitor who asks for them. This section gives the right to demand disclosure only to the debtor, who will typically request a statement in connection with negotiations with subsequent creditors and purchasers, or for the purpose of establishing his credit standing and proving which of his assets are free of the security interest. The secured party is further protected against onerous requests by the provisions that he need furnish a statement of collateral only when his own records identify the collateral and that if he claims all of a particular type of collateral owned by the debtor he is not required to approve an itemized list.

Cross References:
Point 2: Section 9-402.

Definitional Cross References:
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Good faith". Section 1-201.
"Know". Section 1-201.
"Person". Section 1-201.
"Receive". Section 1-201.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.
"Send". Section 1-201.
"Written". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

CASE NOTES

Cited in Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

PART 3.

Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority.

§ 25-9-301. Persons who take priority over unperfected security interests; rights of "lien creditor".

(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of

(a) persons entitled to priority under G.S. 25-9-312;

(b) a person who becomes a lien creditor before the security interest is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not

in ordinary course of business or is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within 20 days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

(4) A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien. (1945, c. 182, s. 4; c. 196, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 1979, c. 404, s. 1.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:

Sections 8(2) and 9(2) (b), Uniform Trust Receipts Act; Section 5, Uniform Conditional Sales Act.

Purposes:

1. This section lists the classes of persons who take priority over an unperfected security interest. As in Section 60 of the Federal Bankruptcy Act, the term "perfected" is used to describe a security interest in personal property which cannot be defeated in insolvency proceedings or in general by creditors. A security interest is "perfected" when the secured party has taken whatever steps are necessary to give him such an interest. These steps are explained in the five following Sections (9-302 through 9-306).

2. Section 9-312 states general rules for the determination of priorities among conflicting security interests and in addition refers to other sections which state special rules of priority in a variety of situations. The interests given priority under Section 9-312 and the other sections therein cited take such priority in general even over a perfected security interest. A fortiori they take priority over an unperfected security interest, and paragraph (1) (a) of this section so states.

3. Paragraph (1) (b) provides that an unperfected security interest is subordinate to the rights of lien creditors. The section rejects the rule applied in many jurisdictions in pre-Code law that an unperfected security interest is subordinated to all creditors, but requires the lien obtained by legal proceedings to attach to the collateral before the security interest is perfected. The section subordinates the unperfected security interest but does not subordinate the secured debt to the lien.

4. Paragraphs (1) (c) and (1) (d) deal with purchasers (other than secured parties) of collateral who would take subject to a perfected security interest but who are by these subsections given priority over an unperfected security interest. In the cases of goods and of intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (instruments, documents and chattel paper) the purchaser who takes priority must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection (paragraph (1) (c)). Thus even if the purchaser gave value without knowledge and before perfection, he would take subject to the security interest if perfection occurred before physical delivery of the collateral to him. The paragraph (1) (c) rule is obviously not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer. Therefore with respect to such intangibles (accounts and general intangibles), paragraph (1) (d) gives priority to any transferee who has given value without knowledge and before perfection of the security interest.

The term "buyer in ordinary course of business" referred to in paragraph (1) (c) is defined in Section 1-201(9).

Other secured parties are excluded from paragraphs (1) (c) and (1) (d) because their priorities are covered in Section 9-312 (see point 2 of this Comment).

5. Except to the extent provided in subsection (2), this Article does not permit a secured party to file or take possession after another interest has received priority under subsection (1) and thereby protect himself against the intervening interest.

A few chattel mortgage statutes did have grace periods, i. e., a filing within x days after the mortgage was given related back to the day the mortgage was given. The Uniform Conditional Sales Act had a ten-day period which cut off all intervening interests. The Uniform Trust Receipts Act had a thirty-day period but did not cut off the interest of a purchaser who took delivery before the filing.

Subsection (2) gives a grace period for perfection by filing as to purchase money security interests only (that term is defined in Section 9-107). The grace period runs for ten days after the debtor receives possession of the collateral but operates to cut off only the interests of intervening lien creditors or bulk purchasers.

6. Subsection (3) defines "lien creditor", following in substance the provisions of the Uniform Trust Receipts Act.

7. Subsection (4) deals with the question whether advances under an existing security interest in collateral, made after rights of lien creditors have attached to that collateral, will take precedence over rights of lien creditors. See related problems in Sections 9-307(3) and 9-312(7). In this section, because of the impact of the rule chosen on the question whether the security interest for future advances is "protected" under Sections 6323(c) (2) and (d) of the Internal Revenue Code as amended by the Federal Tax Lien Act of 1966, the priority of the security interest for future advances over a judgment lien is made absolute for 45 days regardless of knowledge of the secured party concerning the judgment lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien obtained by legal proceedings. The importance of the rule chosen for actual conflicts between secured parties making subsequent advances and judgment lien creditors may not be great; but the rule chosen for the first 45 days is important in effectuating the intent of the Federal Tax Lien Act of 1966.

Cross References:

Section 9-312.

Point 1: Sections 9-302 through 9-306.

Point 7: Sections 9-204, 9-307(3) and 9-312(7).

Definitional Cross References:

"Account". Section 9-106.

"Buyer in ordinary course of business". Section 1-201.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 9-105.

"General intangibles". Section 9-106.

"Goods". Section 9-105.

"Instrument". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Purchase money security interest". Section 9-107.

"Pursuant to commitment". Section 9-105.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, substituted present paragraph (1)(b) for a provision which read: "a person who becomes a lien creditor without knowledge of the security interest and before it is perfected," inserted "or is a buyer of farm products in ordinary course of business" in paragraph (1)(c), deleted "contract rights" following "of accounts" near the beginning of paragraph (1)(d), substituted "after the debtor receives possession of the collateral" for "after the collateral comes into possession of the debtor" in subsection (2), and deleted the former second sentence of subsection (3), which read: "Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest." The amendment also added subsection (4).

The 1979 amendment substituted "20" for "10" near the beginning of subsection (2).

Session Laws 1979, c. 404, s. 3, provides: "This act is effective upon ratification [April 18, 1979] but does not apply to purchase-money security interests arising out of transactions occurring before that time."

CASE NOTES

Stated in Spector United Employees Credit Union v. Smith, 45 N.C. App. 432, 263 S.E.2d 319 (1980).

§ 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 G.S. 25-9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under G.S. 25-9-304 or in proceeds for a 10-day period under G.S. 25-9-306;

(c) a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;

(d) a purchase money security interest in consumer goods; but compliance with G.S. 20-58 et seq. is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in G.S. 25-9-313;

(e) an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor;

(f) a security interest of a collecting bank (G.S. 25-4-208) or arising under the article on sales (see G.S. 25-9-113) or covered in subsection (3) of this section;

(g) an assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing of a financing statement otherwise required by this article is not necessary or effective to perfect a security interest in property subject to

(a) a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this article for filing of the security interest; or

(b) the following statute of this State: G.S. 20-58 et seq. as to any personal property required to be registered pursuant to Chapter 20 of the General Statutes; but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of this article (part 4) apply to a security interest in that collateral created by him as debtor; or

(c) a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection (subsection (2) of G.S. 25-9-103).

(4) Compliance with a statute or treaty described in subsection (3) is equivalent to the filing of a financing statement under this article, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in G.S. 25-9-103 on multiple-state transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the provisions of the statute or treaty; in other respects the security interest is subject to this article.

(5) The filing provisions of this article do not apply to a security interest in property of any description or 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, and all such instruments, including those creating security interests in personal property, shall be recorded in the real property records and indexed in the real property indexes.

(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; 1975, c. 862, s. 7; 1977, c. 103.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 5, Uniform Conditional Sales Act; Section 8, Uniform Trust Receipts Act.

Purposes:

1. Subsection (1) states the general rule that to perfect a security interest under this Article a financing statement must be filed. Paragraphs (1) (a) through (1) (g) exempt from the filing requirement the transactions described. Subsection (3) further sets out certain transactions to which the filing provisions of this Article do not apply, but it does not defer to another state statute on the filing of inventory security interests. The cases recognized are those where suitable alternative systems for giving public notice of a security interest are available. Subsection (4) states the consequences of such other form of notice.

Section 9-303 states the time when a security interest is perfected by filing or otherwise. Part 4 of the Article deals with the mechanics of filing: place of filing, form of financing statement and so on.

2. As at common law, there is no requirement of filing when the secured party has possession of the collateral in a pledge transaction (paragraph (1) (a)). Section 9-305 should be consulted on what collateral may be pledged and on the requirements of possession.

3. Under this Article, as under the Uniform Trust Receipts Act, filing is not effective to perfect a security interest in instruments. See Section 9-304(1).

4. Where goods subject to a security interest are left in the debtor's possession, the only permanent exception from the general filing requirement is that stated in paragraph (1) (d): purchase money security interests in consumer goods. For temporary exceptions, see Sections 9-304(5) (a) and 9-306.

In many jurisdictions under prior law security interests in consumer goods under conditional sale or bailment leases were not subject to filing requirements. Paragraph (1) (d) follows the policy of those jurisdictions. The paragraph changes prior law in jurisdictions where all conditional sales and bailment leases were subject to a filing requirement, except that filing is required for purchase money security interests in consumer fixtures to attain priority under Section 9-313 against real estate interests.

Although the security interests described in paragraph (1) (d) are perfected without filing, Section 9-307(2) provides that unless a financing statement is filed certain buyers may take free of the security interest even though perfected. See that section and the Comment thereto.

On filing for security interests in motor vehicles under certificate of title laws see subsection (3) of this section.

5. A financing statement must be filed to perfect a security interest in accounts except for the transactions described in paragraphs (1) (e) and (g). It should be noted that this Article applies to sales of accounts and chattel paper as well as to transfers thereof for security (Section 9-102(1) (b)); the filing requirement of this section applies both to sales and to transfers thereof for security. In this respect this Article follows many of the pre-Code statutes regulating assignments of accounts receivable.

Over forty jurisdictions had enacted accounts receivable statutes. About half of these statutes required filing to protect or perfect assignments; of the remainder, one was a so-called "book-marking" statute and the others validated assignments without filing. This Article adopts the filing requirement, on the theory that there is no valid reason why

public notice is less appropriate for assignments of accounts than for any other type of nonpossessory interest. Section 9-305, furthermore, excludes accounts from the types of collateral which may be the subject of a possessory security interest: filing is thus the only means of perfection contemplated by this Article. See Section 9-306 on accounts as proceeds.

The purpose of the subsection (1) (e) exemption is to have from *ex post facto* invalidation casual or isolated assignments: some accounts receivable statutes were so broadly drafted that all assignments, whatever their character or purpose, fell within their filing provisions. Under such statutes many assignments which no one would think of filing might have been subject to invalidation. The paragraph (1) (e) exemption goes to that type of assignment. Any person who regularly takes assignments of any debtor's accounts should file. In this connection Section 9-104(f) which excludes certain transfers of accounts from the Article should be consulted.

Assignments of interests in trusts and estates are not required to be filed because they are often not thought of as collateral comparable to the types dealt with by this Article. Assignments for the benefit of creditors are not required to be filed because they are not financing transactions and the debtor will not ordinarily be engaging in further credit transactions.

6. With respect to the paragraph (1) (f) exemptions, see the sections cited therein and Comments thereto.

7. The following example will explain the operation of subsection (2): Buyer buys goods from seller who retains a security interest in them which he perfects. Seller assigns the perfected security interest to X. The security interest, in X's hands and without further steps on his part, continues perfected against *Buyer's* transferees and creditors. If, however, the assignment from Seller to X was itself intended for security (or was a sale of accounts or chattel paper), X must take whatever steps may be required for perfection in order to be protected against *Seller's* transferees and creditors.

8. Subsection (3) exempts from the filing provisions of this Article transactions as to which an adequate system of filing, state or federal, has been set up outside this Article and subsection (4) makes clear that when such a system exists perfection of a relevant security interest can be had only through compliance with that system (i. e., filing under this Article is not a permissible alternative).

Examples of the type of federal statute referred to in paragraph (3) (a) are the provisions of 17 U.S.C. §§ 28, 30 (copyrights), 49 U.S.C. § 1403 (aircraft), 49 U.S.C. § 20(c) (railroads). The Assignment of Claims Act of 1940, as amended, provides for notice to contracting and disbursing officers and to sureties on bonds but does not establish a national filing system and therefore is not within the scope of paragraph (3) (a). As assignee of a claim against the United States, who must of course comply with the Assignment of Claims Act, must also file under this Article in order to perfect his security interest against creditors and transferees of his assignor.

Some states have enacted central filing statutes with respect to security transactions in kinds of property which are of special importance in the local economy. Subsection (3) adopts such statutes as the appropriate filing system for such property.

In addition to such central filing statutes many states have enacted certificate of title laws covering motor vehicles and the like. Subsection (3) exempts transactions covered by such laws from the filing requirements of this Article.

For a discussion of the operation of state motor vehicle certificate of title laws in interstate contexts, see Comment 4 to Section 9-103.

9. Perfection of a security interest under a state or federal statute of the type referred to in subsection (3) has all the consequences of perfection under the provisions of this Article. Subsection (4).

Cross References:

Point 1: Section 9-303 and Part 4.
Point 2: Section 9-305.
Point 3: Section 9-304(1).
Point 4: Section 9-307(2).
Point 5: Sections 9-102(1) (b), 9-104(f) and 9-305.
Point 6: Sections 4-208 and 9-113.

Definitional Cross References:

"Account". Section 9-106.
"Collateral". Section 9-105.
"Consumer goods". Section 9-109.
"Creditor". Section 1-201.
"Debtor". Section 9-105.
"Delivery". Section 1-201.
"Document". Section 9-105.
"Equipment". Section 9-109.
"Fixture". Section 9-313.
"Fixture filing". Section 9-313.
"Instrument". Section 9-105.
"Inventory". Section 9-109.
"Proceeds". Section 9-306.
"Purchase". Section 1-201.
"Purchase money security interest". Section 9-107.
"Sale". Sections 2-106 and 9-105.
"Secured party". Section 9-105.
"Security interest". Section 1-201.

Cross References. — As to application of Article 9 of the North Carolina Uniform Commercial Code to transactions under Chapter 159D, the North Carolina Industrial and Pollution Control Facilities Federal Program Financing Act, see § 159D-23. As to application of this Article to transactions under Chapter 159C, the Industrial Pollution Control Facilities Financing Act, see § 159C-28.

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, made changes in paragraphs (c) and (d) of subsection (1) as they stood before the 1975 amendment, inserted "or by any electric or telephone membership corporation domesticated or incorporated in North Carolina" in subsection (5) and added subsection (6). See amendment note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote paragraphs (c) and (d), deleted "or contract rights" following "outstanding accounts" in paragraph (e), and added paragraph (g), all in subsection (1), and rewrote subsections (3) and (4). The amendment also, apparently through inadvertence, omitted "corporation" following "telephone membership" in subsection (5).

The 1977 amendment, effective July 1, 1977, in subsection (5), corrected an inadvertent omission by inserting "corporation" following "telephone membership" and added the language beginning "and all such instruments, including those creating security interests in personal property" to the end.

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

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

CASE NOTES

The requirement of perfection of security interests is relevant only to third-party priority claims and not to disputes between the secured party and the debtor. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978), aff'd in part, rev'd in part on other grounds, 296 N.C. 357, 250 S.E.2d 250 (1979).

Application of Provisions as to Place for Filing Financing Statements. — Provisions of the Uniform Commercial Code with reference to the place for filing financing statements have no application to vehicles subject to registration with the Department of Motor Vehicles. Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

Applied in Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510 (1978).

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

OPINIONS OF ATTORNEY GENERAL

Perfection of Security Interest in Motor Vehicle. — See opinion of Attorney General to Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 446 (1969).

§ 25-9-303. When security interest is perfected; continuity of perfection.

(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in G.S. 25-9-302, 25-9-304, 25-9-305 and 25-9-306. If such steps are taken before the security interest attaches, it is perfected at the time it attaches.

(2) If a security interest is originally perfected in any way permitted under this article and is subsequently perfected in some other way under this article, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this article. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:
1. The term "attach" is used in this Article to

describe the point at which property becomes subject to a security interest. The requisites for attachment are stated in Section 9-203. When it attaches a security interest may be either perfected or unperfected: "Perfected" means that the secured party has taken all the steps required by this Article as specified in the several sections listed in subsection (1). A perfected security interest may still be or become subordinate to other interests (see Section 9-312) but in general after perfection the secured party is protected against creditors and transferees of the debtor and in particular against any representative of creditors in insolvency proceedings instituted by or against the debtor. Subsection (1) states the truism that the time of perfection is when the security interest has attached and any necessary steps for perfection (such as taking possession or filing) have been taken. If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches.

2. The following example will illustrate the operation of subsection (2): A bank which has issued a letter of credit honors drafts drawn under the credit and receives possession of the negotiable bill of lading covering the goods shipped. Under Sections 9-304(2) and 9-305 the bank now has a perfected security interest in the document and the goods. The bank releases the bill of lading to the debtor for the purpose of procuring the goods from the carrier and selling them. Under Section 9-304(5) the bank continues to have a perfected security interest in the document and goods for 21 days. The bank files before the expiration of the 21 day period. Its security interest now continues perfected for as long as the filing is good. The goods are sold by the debtor. The bank continues to have a security interest in the proceeds of the sale to the extent stated in Section 9-306.

If the successive stages of the bank's security interest succeed each other without an intervening gap, the security interest is "continuously perfected" and the date of perfection is when the interest first became perfected (i. e., in the example given, when the bank received possession of the bill of lading against honor of the drafts). If, however, there is a gap between stages — for example, if the bank does not file until after the expiration of the 21 day period specified in Section 9-304(5), the collateral still being in the debtor's possession — then, the chain being broken, the perfection is no longer continuous. The date of perfection would now be the date of filing (after expiration of the 21 day period); the bank's interest might now become subject to attack under Section 60 of the federal Bankruptcy Act and would be subject to any interests arising during the gap period which under Section 9-301 take priority over an unperfected security interest.

The rule of subsection (2) would also apply to the case of collateral brought into this state subject to a security interest which became perfected in another state or jurisdiction. See Section 9-103(1) (d).

Cross References:
Sections 9-302, 9-304, 9-305 and 9-306.
Point 1: Sections 9-204 and 9-312.
Point 2: Sections 9-103(1) (d) and 9-301.

Definitional Cross References:
"Attach". Section 9-203.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, deleted "when" following "at the time" in the second sentence of subsection (1).

Legal Periodicals. — For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

§ 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.

(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than

instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5) of this section and subsections (2) and (3) of G.S. 25-9-306 on proceeds.

(2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor

(a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to subsection (3) of G.S. 25-9-312; or

(b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

(6) After the 21-day period in subsections (4) and (5) perfection depends upon compliance with applicable provisions of this article. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Sections 3 and 8(1), Uniform Trust Receipts Act.

Purposes:

1. For most types of property, filing and taking possession are alternative methods of perfection. For some types of intangibles (i. e., accounts and general intangibles) filing is the only available method (see Section 9-305 and point 1 of Comment thereto). With respect to instruments subsection (1) provides that, except for the cases of "temporary perfection" covered in subsections (4) and (5), taking possession is the only available method; this provision follows the Uniform Trust Receipts Act. The rule is based on the thought that where the collateral consists of instruments, it is universal practice for the secured party to take possession of them in pledge; any surrender of possession to the debtor is for a short time; therefore it would be unwise to provide the alternative of perfection for a long period by filing which, since it in no way corresponds with commercial practice, would serve no useful purpose.

For similar reasons, filing is not permitted as to money.

Subsection (1) further provides that filing is available as a method of perfection for security interests in chattel paper and negotiable documents, which also come within Section 9-305 on perfection by possession. Chattel paper is sometimes delivered to the assignee, sometimes left in the hands of the assignor for collection; subsection (1) allows the assignee to perfect his interest by filing in the latter case. Negotiable documents may be, and usually are, delivered to the secured party; subsection (1) follows the Uniform Trust Receipts Act in allowing filing as an alternative method of perfection. Perfection of an interest in goods through a non-negotiable document is covered in subsection (3).

2. Subsection (2), following prior law and consistently with the provisions of Article 7, takes the position that, so long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document and the proper way of dealing with such goods is through the document. Perfection therefore is to be made with respect to the document and, when made, automatically carries over to the goods. Any interest perfected directly in the goods while the document is outstanding (for example, a chattel mortgage type of security interest on goods in a warehouse) is subordinated to an outstanding negotiable document.

3. Subsection (3) takes a different approach to the problem of goods covered by a non-negotiable document or otherwise in the possession of a bailee who has not issued a negotiable document. Here title to the goods is not looked on as being locked up in the document and the secured party may perfect his interest directly in the goods by filing as to them. The subsection states two other methods of perfection: issuance of the document in the secured party's name (as consignee of a straight bill of lading or the person to whom delivery would be made under a non-negotiable warehouse receipt) and receipt of notification of the secured party's interest by the bailee which, under Section 9-305, is looked on as equivalent to taking possession by the secured party.

4. Subsections (4) and (5) follow the Uniform Trust Receipts Act in giving perfected status to security interests in instruments and documents for a short period although there has been no filing and the collateral is in the debtor's possession. The period of 21 days is chosen to conform to the provisions of Section 60 of the Federal Bankruptcy Act. There are a variety of legitimate reasons — some of them are described in subsections (5) (a) and (5) (b) — why such collateral has to be temporarily released to a debtor and no useful purpose would be served by cluttering the files with records of such exceedingly short term transactions. Under subsection (4) the 21 day perfection runs from the date of attachment; there is no limitation on the purpose for which the debtor is in possession but the secured party must have given new value under a written security agreement. Under subsection (5) the 21 day perfection runs from the date a secured party who already has a perfected security interest turns over the collateral to the debtor (an example is a bank which has acquired a bill of lading by honoring drafts drawn under a letter of credit and subsequently turns over the bill of lading to its customer); there is no new value requirement but the turnover must be for one or more of the purposes stated in subsections (5) (a) and (5) (b). Note that while subsection (4) is restricted to instruments and *negotiable* documents, subsection (5) extends to goods covered by non-negotiable documents as well. Thus the letter of credit bank referred to in the example could make a subsection (5) turn-over without regard to the form of the bill of lading, provided that, in the case of a non-negotiable document, it had previously perfected its interest under one of the methods stated in subsection (3). But note that the discussion of subsection (5) in this Comment deals only with perfection. Priority of a security interest in inventory after surrender of the document depends on compliance with the requirements of Section 9-312(3) on notice to prior inventory financer.

Finally, it should be noted that the 21 days applies only to the documents and to the goods obtained by surrender thereof. If the goods are sold, the security interest will continue in proceeds for only 10 days under Section 9-306, unless a further perfection occurs as to the security interest in proceeds.

Cross References:

Article 7 and Sections 9-303, 9-305 and 9-312(3).

Definitional Cross References:

"Chattel paper". Section 9-105.
"Debtor". Section 9-105.
"Document". Section 9-105.
"Goods". Section 9-105.
"Instrument". Section 9-105.
"Receives" notification. Section 1-201.
"Sale". Sections 2-106 and 9-105.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.
"Value". Section 1-201.
"Written". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, inserted "money or" near the beginning of the second sentence in subsection (1), added "of this section and subsections (2) and (3) of G.S. 25-9-306 on proceeds" at the end of that sentence and inserted the language beginning "but priority between" at the end of paragraph (5)(a).

CASE NOTES

Applied in Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978).

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

Cited in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974).

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

A security interest in letters of credit and advices of credit (subsection (2)(a) of G.S. 25-5-116), goods, instruments, money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this article. The security interest may be otherwise perfected as provided in this article before or after the period of possession by the secured party. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:

None.

Purposes:

1. As under the common law of pledge, no filing is required by this Article to perfect a security interest where the secured party has possession of the collateral. Compare Section 9-302(1) (a). This section permits a security interest to be perfected by transfer of possession only when the collateral is goods, instruments, documents or chattel paper: that is to say, accounts and general intangibles are excluded. See Section 5-116 for the special case of assignments of letters and advices of credit. A security interest in accounts and general intangibles — property not ordinarily represented by any writing whose delivery operates to transfer the claim — may under this Article be perfected only by filing, and this rule would not be affected by the fact that a security agreement or other writing described the assignment of such collateral as a "pledge". Section 9-302 (1) (e) exempts from filing certain assignments of accounts which are out of the ordinary course of financing: such exempted assignments are perfected when they attach under Section 9-303(1); they do not fall within this section.

2. Possession may be by the secured party himself or by an agent on his behalf: it is of course clear, however, that the debtor or a person controlled by him cannot qualify as such an agent for the secured party. See also the last sentence of Section 9-205. Where the collateral (except for goods covered by a negotiable document) is held by a bailee, the time of perfection of the security interest, under the second sentence of the section, is when the bailee receives notification of the secured party's interest: this rule rejects the common law doctrine that it is necessary for the bailee to attorn to the secured party or acknowledge that he now holds on his behalf.

3. The third sentence of the section rejects the "equitable pledge" theory of relation back, under which the taking possession was deemed to relate back to the date of the original security agreement. The relation back theory has had little vitality since the 1938 revision of the federal Bankruptcy Act, which introduced in Section 60a provisions designed to make such interests voidable as preferences in bankruptcy proceedings. This section now brings state law into conformity with the overriding federal policy: where a pledge transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected, before that under the rules stated in Section 9-204. The only exception to this rule is the short twenty-one day period of perfection provided in Section 9-304(4) and (5) during which a debtor may have possession of specified collateral in which there is a perfected security interest.

Cross References:
Section 5-116, 9-204, 9-302, 9-303 and 9-304.

Definitional Cross References:
"Chattel paper". Section 9-105.
"Collateral". Section 9-105.
"Documents". Section 9-105.
"Goods". Section 9-105.
"Instruments". Section 9-105.
"Receives" notification. Section 1-201.
"Secured party". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, inserted "money" near the middle of the first sentence.

CASE NOTES

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.

(1) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds are "noncash proceeds."

(2) Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected 10 days after receipt of the proceeds by the debtor unless

(a) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or

(b) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or

(c) the security interest in the proceeds is perfected before the expiration of the 10-day period.

Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this article for original collateral of the same type.

(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 only in the following proceeds:

(a) in identifiable noncash proceeds and in separate deposit accounts containing only proceeds;

(b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit 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 deposit account prior to the insolvency proceedings; and

(d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) subject to any right to setoff; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such periods and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subsection (4).

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

(a) If the goods were collateral at the time of sale, for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under G.S. 25-9-308.

(c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (a).

(d) A security interest of an unpaid transferee asserted under paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods. (1945, c. 196, s. 8; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 10, Uniform Trust Receipts Act.

Purposes:

1. This section states a secured party's right to the proceeds received by a debtor on disposition of collateral and states when his interest in such proceeds is perfected.

It makes clear that insurance proceeds from casualty loss of collateral are proceeds within the meaning of this section.

As to proceeds of consigned goods, see Section 9-114 and the Comment thereto.

2. (a) Whether a debtor's sale of collateral was authorized or unauthorized, prior law generally gave the secured party a claim to the proceeds. Sometimes it was said that the security interest attached to the "property" received in substitution; sometimes it was said the debtor held the proceeds as "trustee" or "agent" for the secured party. Whatever the formulation of the rule, the secured party, if he could identify the proceeds, could reclaim them or their equivalent from the debtor or his trustee in bankruptcy. This section provides new rules for insolvency proceedings. Paragraphs 4(a) through (c) substitute specific rules of identification for general principles of tracing. Paragraph 4(d) limits the security interest in proceeds not within these rules to an amount of the debtor's cash and deposit accounts not greater than cash proceeds received within ten days of insolvency proceedings less the cash proceeds during this period already paid over

and less the amounts for which the security interest is recognized under paragraphs 4(a) through (c).

(b) Subsections (2) and (3) make clear that the four-month period for calculating a voidable preference in bankruptcy begins with the date of the secured party's obtaining the security interest in the original collateral and not with the date of his obtaining control of the proceeds. The interest in the proceeds "continues" as a perfected interest if the original interest was perfected; but the interest ceases to be perfected after the expiration of ten days unless a filed financing statement covered the original collateral and the proceeds are collateral of a type as to which a security interest could be perfected by a filing in the same office or unless the secured party perfects his interest in the proceeds themselves — i. e., by filing a financing statement covering them or by taking possession. See Section 9-312(6) and Comment thereto for priority of rights in proceeds perfected by a filing as to original collateral.

(c) Where cash proceeds are covered into the debtor's checking account and paid out in the operation of the debtor's business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds. What has been said relates to payments and transfers in ordinary course. The law of fraudulent conveyances would no doubt in appropriate cases support recovery of proceeds by a secured party from a transferee out of ordinary course or otherwise in collusion with the debtor to defraud the secured party.

3. In most cases when a debtor makes an unauthorized disposition of collateral, the security interest, under prior law and under this Article, continues in the original collateral in the hands of the purchaser or other transferee. That is to say, since the transferee takes subject to the security interest, the secured party may repossess the collateral from him or in an appropriate case maintain an action for conversion. Subsection (2) codifies this rule. The secured party may claim both proceeds and collateral, but may of course have only one satisfaction.

In many cases a purchaser or other transferee of collateral will take free of a security interest: in such cases the secured party's only right will be to proceeds. The transferee will take free whenever the disposition was authorized; the authorization may be contained in the security agreement or otherwise given. The right to proceeds, either under the rules of this section or under specific mention thereof in a security agreement or financing statement does not in itself constitute an authorization of sale.

Section 9-301 states when transferees take free of unperfected security interests. Sections 9-307 on goods, 9-308 on chattel paper and instruments and 9-309 on negotiable instruments, negotiable documents and securities state when purchasers of such collateral take free of a security interest even though perfected and even though the disposition was not authorized.

4. Subsection (5) states rules to determine priorities when collateral which has been sold is returned to the debtor: for example goods returned to a department store by a dissatisfied customer. The most typical problems involve sale and return of inventory, but the subsection can also apply to equipment. Under the rule of Benedict v. Ratner, failure to segregate such returned goods sometimes led to invalidation of the entire security arrangement. This Article rejects the Benedict v. Ratner line of cases (see Section 9-205 and Comment). Subsection (5) (a) of this section reinforces the rule of Section 9-205: as between secured party and debtor (and debtor's trustee in bankruptcy) the original security interest continues on the returned goods. Whether or not the security interest in the returned goods is perfected depends upon factors stated in the text.

Paragraphs (5) (b), (c) and (d) deal with a different aspect of the returned goods situation. Assume that a dealer has sold an automobile and transferred the chattel paper or the account arising on the sale to Bank X (which had not previously financed the car as inventory). Thereafter the buyer of the automobile rightfully rescinds the sale, say for breach of warranty, and the car is returned to the dealer. Paragraph (5) (b) gives the bank as transferee of the chattel paper or the account a security interest in the car against the dealer. For protection against dealer's creditors or purchasers from him (other than buyers in the ordinary course of business, see Section 9-307), Bank X as the transferee, under paragraph (5) (d), must perfect its interest by taking possession of the car or by filing as to it. Perfection of his original interest in the chattel paper or the account does not automatically carry over to the returned car, as it does under paragraph (5) (a) where the secured party originally financed the dealer's inventory.

In the situation covered by (5) (b) and (5) (c) a secured party who financed the inventory and a secured party to whom the chattel paper or the account was transferred may both claim the returned goods — the inventory financer under paragraph (5) (a), the transferee under paragraphs (5) (b) and (5) (c). With respect to chattel paper, Section 9-308 regulates the priorities. With respect to an account, paragraph (5) (c) subordinates the security interest of the transferee of the account to that of the inventory financer. However, if the inventory security interest was unperfected, the transferee's interest could become entitled to priority under the rules stated in Section 9-312(5).

In cases of repossession by the dealer and also in cases where the chattel was returned to the dealer by the voluntary act of the account debtor, the dealer's position may be that of a mere custodian; he may be an agent for resale, but without any other obligation to the holder of the chattel paper; he may be obligated to repurchase the chattel, the chattel paper or the account from the secured party or to hold it as collateral for a loan secured by a transfer of the chattel paper or the account. If the dealer thereafter sells the chattel to a buyer in ordinary course of business in any of the foregoing cases, the buyer is fully protected under Section 2-403(2) as well as under Section 9-307(1), whichever is technically applicable.

Cross References:
Sections 9-307, 9-308 and 9-309.
Point 3: Sections 1-205 and 9-301.
Point 4: Sections 2-403(2), 9-205 and 9-312.

Definitional Cross References:
"Account". Section 9-106.
"Bank". Section 1-201.
"Chattel paper". Section 9-105.
"Check". Sections 3-104 and 9-105.
"Collateral". Section 9-105.
"Creditors". Section 1-201.
"Debtor". Section 9-105.
"Deposit account". Section 9-105.
"Goods". Section 9-105.
"Insolvency proceedings". Section 1-201.
"Money". Section 1-201.
"Purchaser". Section 1-201.
"Sale". Sections 2-106 and 9-105.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.

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

The 1975 amendment, effective July 1, 1976, rewrote subsection (1) and substituted "unless the disposition" for "by the debtor unless his action" in subsection (2). In subsection (3) the amendment substituted present paragraph (a) for a provision which read "a filed financing statement covering the original collateral also covers proceeds; or," added present paragraph (b) and redesignated former paragraph (b) as present paragraph (c) and added the last paragraph of the subsection. In subsection (4) the amendment added "only in the following proceeds" at the end of the introductory language, added "and in separate deposit accounts containing only proceeds" at the end of paragraph (a), substituted "neither commingled with other money nor" for "not commingled with other money or" in paragraph (b), substituted "a deposit account" for "bank account" in paragraph (c) and rewrote paragraph (d).

CASE NOTES

Continuously Perfected Security Interest. — If the security interest in the original collateral is perfected and the filed financing statement covering the original collateral also covers proceeds, the security interest in the proceeds is a "continuously perfected security interest." Michigan Nat'l Bank v. Flowers Mobile Homes Sales, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

There is no express limitation on right of secured party to trace proceeds subject to his security interest into a bank account of the debtor. Michigan Nat'l Bank v. Flowers Mobile Homes Sales, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

Bank's Right to Damage Proceeds on Collateral. — The bank had the right to require defendant to turn over to the bank for application on a note the proceeds of a check issued for damages to collateral machinery rather than allowing defendants to use the proceeds to repair the machinery. Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267, cert. denied, 289 N.C. 615, 223 S.E.2d 392 (1976).

Applied in Bank of Virginia-Central v. Taurus Constr. Co., 30 N.C. App. 220, 226 S.E.2d 685, cert. denied, 290 N.C. 659, 228 S.E.2d 450 (1976).

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

(1) A buyer in ordinary course of business (subsection (9) of G.S. 25-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

(2) In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods.

(3) A buyer other than a buyer in ordinary course of business (subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45-day period. (1945, c. 182, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 9, Uniform Conditional Sales Act; Section 9(2), Uniform Trust Receipts Act.

Purposes:

1. This section states when buyers of goods take free of a security interest even though perfected. A buyer who takes free of a perfected security interest of course takes free of an unperfected one. Section 9-301 should be consulted to determine what purchasers, in addition to the buyers covered in this section, take free of an unperfected security interest.

Article 2 (Sales) states general rules on purchase of goods from a seller with defective or voidable title (Section 2-403).

2. The definition of "buyer in ordinary course of business" in Section 1-201(9) restricts the application of subsection (1) to buyers (except pawnbrokers) "from a person in the business of selling goods of that kind": thus the subsection applies, in the terminology of this Article, primarily to inventory. Subsection (1) further excludes from its operation buyers of "farm products", defined in Section 9-109(3), from a person engaged in farming operations. The buyer in ordinary course of business is defined as one who buys "in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party." This section provides that such a buyer takes free of a security interest, even though perfected, and although he knows the security interest exists. Reading the two provisions together, it results that the buyer takes free if he merely knows that there is a security interest which covers the goods but takes subject if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party.

The limitations which this section imposes on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party has authorized the sale in the security agreement or otherwise, the buyer takes free without regard to the limitations of this section. Section 9-306 states the right of a secured party to the proceeds of a sale, authorized or unauthorized.

3. Subsection (2) deals with buyers of "consumer goods" (defined in Section 9-109). Under Section 9-301(1) (d) no filing is required to perfect a purchase money interest in consumer goods subject to this subsection except motor vehicles required to be registered; filing is required to perfect security interests in such goods other than purchase money interests and, for motor vehicles, even in the case of purchase money interests. (The special case of fixtures has added complications that are apart from the point of this discussion.)

Under subsection (2) a buyer of consumer goods takes free of a security interest even though perfected a) if he buys without knowledge of the security interest, b) for value, c) for his own personal, family, or household purposes and d) before a financing statement is filed.

As to purchase money security interests which are perfected without filing under Section 9-302(1) (d): A secured party may file a financing statement (although filing is not required for perfection). If he does file, all buyers take subject to the security interest. If he does not file, a buyer who meets the qualifications stated in the preceding paragraph takes free of the security interest.

As to security interests which can be perfected only by filing under Section 9-302: This category includes all nonpurchase money interests, and all interests, whether or not purchase money, in motor vehicles, as well as interests which may be and are filed, though filing was not required for perfection under Section 9-302. (Note that under Section 9-302(3) the filing provisions of this Article do not apply when a state has enacted a certificate of title law. Thus where motor vehicles are concerned, in a state having such a certificate of title law, perfection will be under that law.) So long as the security interest remains unperfected, not only the buyers described in subsection (2) but the purchasers described in Section 9-301 will take free of the interest. After a financing statement has been filed or after compliance with the certificate of title law all subsequent buyers, under the rule of subsection (2), are subject to the security interest.

4. Although a buyer is of course subject to the Code's system of notice from filing or possession, subsection (3) makes clear that he will not be subject to future advances under a security interest after the secured party has knowledge that the buyer has purchased the collateral and in any event after 45 days after the purchase unless the advances were made pursuant to a commitment entered into before the expiration of the 45 days and without knowledge of the purchase. Of course, a buyer in ordinary course who takes free of the security interest under subsection (1) is not subject to any future advances. Compare Sections 9-301(4) and 9-312(7).

Cross References:

Point 1: Sections 2-403 and 9-301.
Point 2: Section 9-306.
Point 3: Sections 9-301 and 9-302.
Point 4: Sections 9-301(4) and 9-312(7).

Definitional Cross References:

"Buyer in ordinary course of business". Section 1-201.
"Consumer goods". Section 9-109.
"Goods". Section 9-105.
"Knows" and "Knowledge". Section 1-201.
"Person". Section 1-201.
"Purchase". Section 1-201.
"Pursuant to commitment". Section 9-105.
"Secured party". Section 9-105.
"Security interest". Section 1-201.
"Value". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, deleted "and in the case of farm equipment having an original purchase price not in excess of twenty-five hundred dollars ($2,500.00) (other than fixtures, see § 25-9-313)" following "consumer goods" near the beginning of subsection (2), deleted "or his own farming operations" following "household purposes" near the end of subsection (2) and added subsection (3).

Legal Periodicals. — For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971). For note on the standard of good faith for merchant buyers under subsection (1) of this section, see 51 N.C.L. Rev. 646 (1973).

CASE NOTES

Second Loan as Future Advance. — To the extent the second loan may have placed an additional burden on the collateral, it must be considered a future advance. If the second loan was intended by the parties to extinguish the first obligation, the entire amount of the second obligation would be considered a future advance. Spector United Employees Credit Union v. Smith, 45 N.C. App. 432, 263 S.E.2d 319 (1980).

In an action to determine whether plaintiff lender was entitled to possession of personal property used to secure a loan which was subsequently sold to a third party, the trial court erred in granting summary judgment for plaintiff where a genuine issue of fact existed as to whether plaintiff and defendant borrower intended their loan transaction of June 1977 to renew, enlarge or extinguish the note executed in April 1976 by borrower which was secured by the property in question, since the nature of the second loan determined whether it was a future advance within the meaning of subsection (3) of this section and thus whether defendant purchaser from defendant borrower took the property in question free from plaintiff lender's security interest. Spector United Employees Credit Union v. Smith, 45 N.C. App. 432, 263 S.E.2d 319 (1980).

§ 25-9-308. Purchase of chattel paper and instruments.

A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument

(a) which is perfected under G.S. 25-9-304 (permissive filing and temporary perfection) or under G.S. 25-9-306 (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or

(b) which is claimed merely as proceeds of inventory subject to a security interest (G.S. 25-9-306) even though he knows that the specific paper or instrument is subject to the security interest. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Sections 9(a) and 10 of Uniform Trust Receipts Act.

Purposes:

1. Chattel paper is defined (Section 9-105) as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods". Such paper has become an important class of collateral in financing arrangements, which may — as in the automobile and some other fields — follow an earlier financing arrangement covering inventory or which may begin with the chattel paper itself.

Arrangements where the chattel paper is delivered to the secured party who then makes collections, as well as arrangements where the debtor, whether or not he is left in possession of the paper, makes the collections, are both widely used, and are known respectively as notification (or "direct collection") and non-notification (or "indirect collection") arrangements. In the automobile field, for example, when a car is sold to a consumer buyer under an installment purchase agreement and the resulting chattel paper is assigned, the assignee usually takes possession, the obligor is notified of the assignment and is directed to make payments to the assignee. In the furniture field, for an example on the other hand, the chattel paper may be left in the dealer's hands or delivered to the assignee; in either case the obligor may not be notified, and payments are made to the dealer-assignor who receives them under a duty to remit to his assignee. The widespread use of both methods of dealing with chattel paper is recognized by the provisions of this Article, which permit perfection of a chattel paper security interest either by filing or by taking possession.

2. Although perfection by filing is permitted as to chattel paper, certain purchasers of chattel paper allowed to remain in the debtor's possession take free of the security interest despite the filing.

Clause (b) of the section deals with the case where the security interest in the chattel paper is claimed merely as proceeds — i. e., on behalf of an inventory financer who has not by some new transaction with the debtor acquired a specific interest in the chattel paper. In that case a purchaser, even though he knows of the inventory financer's proceeds interest, takes priority provided he gives new value and takes possession of the paper in the ordinary course of his business.

The same basic rule applies in favor of a purchaser of other instruments who claims priority against a proceeds interest therein of which he has knowledge. Thus a purchaser of a negotiable instrument might prevail under clause (b) even though his knowledge of the conflicting proceeds claim precluded his having holder in due course status under Section 9-309.

3. Clause (a) deals with the case where the non-possessory security interest in the chattel paper is more than a mere claim to proceeds — i. e., exists in favor of a secured party who has given value against the paper, whether or not he financed the inventory whose sale gave rise to it. In this case the purchaser, to take priority, must not only give new value and take possession in the ordinary course of his business; he must also take without knowledge of the existing security interest. Thus a secured party, who has a specific interest in the chattel paper and not merely a claim to proceeds, and who wishes to leave the paper in the debtor's possession can, because of the knowledge requirement, protect himself against purchasers by stamping or noting on the paper the fact that it has been assigned to him.

4. It should be noted that under Section 9-304(1) a security interest in an instrument, negotiable or nonnegotiable, cannot be perfected by filing (except where the instrument constitutes part of chattel paper).

Thus the only types of perfected non-possessory security interest that can arise in an instrument are the temporary 21 day perfection provided for in Section 9-304(4) and (5) or the 10 day perfection in proceeds of Section 9-306. Where such a perfected interest exists in a non-negotiable instrument, purchasers will take free if they qualify under clause (a) of the section.

Cross References:
Point 1: Sections 9-304(1) and 9-305.
Point 2: Section 9-306.
Point 4: Sections 9-304 and 9-306.

Definitional Cross References:
"Chattel paper". Section 9-105.
"Instrument". Section 9-105.
"Inventory". Section 9-109.
"Knowledge". Section 1-201.
"Proceeds". Section 9-306.
"Purchaser". Section 1-201.
"Security interest". Section 1-201.
"Value". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-309. Protection of purchasers of instruments and documents.

Nothing in this article limits the rights of a holder in due course of a negotiable instrument (G.S. 25-3-302) or a holder to whom a negotiable document of title has been duly negotiated (G.S. 25-7-501) or a bona fide purchaser of a security (G.S. 25-8-301) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this article does not constitute notice of the security interest to such holders or purchasers. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 9(a), Uniform Trust Receipts Act.

Purposes:

1. Under this Article as at common law and under prior statutes the rights of purchasers of negotiable paper, including negotiable documents of title and investment securities, are determined by the rules of holding in due course and the like which are applicable to the type of paper concerned. (Articles 3, 7, and 8.) This section, as did Section 9(a) of the Uniform Trust Receipts Act, makes explicit the rule which was implicity but universally recognized under the earlier statutes.

2. Under Section 9-304(1) filing is ineffective to perfect a security interest in instruments (including securities) except those instruments which are part of chattel paper, and of course is ineffective to constitute notice to subsequent purchasers. Although filing is permissible as a method of perfection for a security interest in documents, this section follows the policy of the Uniform Trust Receipts Act in providing that the filing does not constitute notice to purchasers.

Cross References:
Articles 3, 7, and 8 and Sections 9-304(1) and 9-308.

Definitional Cross References:
"Bona fide purchaser". Section 8-302.
"Document of title". Section 1-201.
"Duly negotiated". Section 7-501.
"Holder". Section 1-201.
"Holder in due course". Sections 3-302 and 9-105.
"Negotiable instrument". Sections 3-104 and 9-105.
"Notice". Section 1-201.
"Purchaser". Section 1-201.
"Security". Sections 8-102 and 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

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

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 11, Uniform Trust Receipts Act.

Purposes:

1. To provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected.

2. Apart from the Uniform Trust Receipts Act which had a section similar to this one, there was generally no specific statutory rule as to priority between security devices and liens for services or materials. Under chattel mortgage or conditional sales law many decisions made the priority of such liens turn on whether the secured party did or did not have "title". This section changes such rules and makes the lien for services or materials prior in all cases where they are furnished in the ordinary course of the lienor's business and the goods involved are in the lienor's possession. Some of the statutes creating such liens expressly make the lien subordinate to a prior security interest. This section does not repeal such statutory provisions. If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this section provides a rule of interpretation that the lien should take priority over the security interest.

Cross References:
Sections 9-102(2), 9-104(c) and 9-312(1).

Definitional Cross References:
"Goods". Section 9-105.
"Person". Section 1-201.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

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

§ 25-9-311. Alienability of debtor's rights; judicial process.

The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. To make clear that in all security transactions under this Article, the debtor has an interest (whether legal title or an equity) which he can dispose of and which his creditors can reach.

2. Some jurisdictions have held that when a mortgagee or conditional seller has "title" to the collateral, creditors may not proceed against the mortgagor's or vendee's interest by levy, attachment or other judicial process. This section changes those rules by providing that in all security interests the debtor's interest in the collateral remains subject to claims of creditors who take appropriate action. It is left to the law of each state to determine the form of "appropriate process".

3. Where the security interest is in inventory, difficult problems arise with reference to attachment and levy. Assume that a debt of $100,000 is secured by inventory worth twice that amount. If by attachment or levy certain units of the inventory are seized, the determination of the debtor's equity in the units seized is not a simple matter. The section leaves the solution of this problem to the courts. Procedures such as marshalling may be appropriate.

Cross References:
Sections 9-301(4), 9-307(3), 9-312(7).

Definitional Cross References:
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Rights". Section 1-201.
"Sale". Sections 2-106 and 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

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

(1) The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: G.S. 25-4-208 with respect to the security interests of collecting banks in items being collected, accompanying documents and proceeds; G.S. 25-9-103 on security interests related to other jurisdictions; G.S. 25-9-114 on consignments.

(2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

(3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if

(a) the purchase money security interest is perfected at the time the debtor receives possession of the inventory; and

(b) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party, or (ii) before the beginning of the 21-day period where the purchase money security interest is temporarily perfected without filing or possession (subsection (5) of G.S. 25-9-304); and

(c) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(d) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

(4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within 20 days thereafter.

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

(a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.

(b) So long as conflicting security interests are unperfected, the first to attach has priority.

(6) For the purposes of subsection (5) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

(7) If future advances are made while a security interest is perfected by filing or the taking of possession, the security interest has the same priority for the purposes of subsection (5) with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made. (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. 196, s. 4; 1955, c. 816; 1957, c. 999; 1965, c. 700, s. 1; 1967, c. 24, s. 13; 1975, c. 862, s. 7; 1979, c. 404, s. 2.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. In a variety of situations two or more people may claim an interest in the same property. The several sections specified in subsection (1) contain rules for determining priorities between security interests and such other claims in the situations covered in those sections. For cases not covered in those sections this section states general rules of priority between conflicting security interests.

2. Subsection (2) gives priority to a new value security interest in crops based on a current crop production loan over an earlier security interest in the crop which secured obligations (such as rent, interest or mortgage principal amortization) due more than six months before the crops become growing crops. This priority is not affected by the fact that the person making the crop loan knew of the earlier security interest.

3. Subsections (3) and (4) give priority to a purchase money security interest (defined in Section 9-107) under certain conditions over non-purchase money interests, which in this context will usually be interests asserted under after-acquired property clauses. See Section 9-204 on the extent to which after-acquired property interests are validated and Section 9-108 on when a security interest in after-acquired property is deemed taken for new value.

Prior law, under one or another theory, usually contrived to protect purchase money interest over after-acquired property interests (to the extent to which the after-acquired property interest was recognized at all). For example, in the field of industrial equipment financing it was possible, by manipulation of

title theory, for the purchase money financer of new equipment (under conditional sale or equipment trust) to protect himself against the claims of prior mortgagees or bondholders under an after-acquired clause in the mortgage or trust indenture: the result was arrived at on the theory that since "title" to the equipment was never in the vendee or lessee there was nothing for the lien of the mortgage to attach to. While this Article broadly validates the after-acquired property interest, it also recognizes as sound the preference which prior law gave to the purchase money interest. That policy is carried out in subsections (3) and (4).

Subsection (4) states a general rule applicable to all types of collateral except inventory: the purchase money interest takes priority if it is perfected when the debtor receives possession of the collateral or within ten days thereafter. As to the ten day grace period, compare Section 9-301(2). The perfection requirement means that the purchase money secured party either has filed a financing statement before that time or has a temporarily perfected interest in goods covered by documents under Section 9-304(4) and (5) (which is continued in a perfected status by filing before the expiration of the 21 day period specified in that section). There is no requirement that the purchase money secured party be without notice or knowledge of the other interest; he takes priority although he knows of it or it has been filed.

Under subsection (3) the same rule of priority, but without the ten day grace period for filing, applies to a purchase money security interest in inventory, with the additional requirement that the purchase money secured party give notification, as stated in subsection (3), to any other secured party who filed earlier for the same item or type of inventory. The reason for the additional requirement of notification is that typically the arrangement between an inventory secured party and his debtor will require the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though he has already given a security interest in the inventory to another secured party. The notification requirement protects the inventory financer in such a situation: if he has received notification, he will presumably not make an advance; if he has not received notification (or if the other interest does not qualify as a purchase money interest), any advance he may make will have priority. Since an arrangement for periodic advances against incoming property is unusual outside the inventory field, no notification requirement is included in subsection (4).

Where the purchase money inventory financing began by possession of a negotiable document of title by the secured party, he must in order to retain priority give the notice required by subsection (3) at or before the usual time, i. e., when the debtor gets possession of the inventory, even though his security interest remains perfected for 21 days under Section 9-304(5).

When under these rules the purchase money secured party has priority over another secured party, the question arises whether this priority extends to the proceeds of the original collateral. Under subsection (4) which deals with non-inventory collateral and where there was no ordinary expectation that the goods would be sold, the section gives an affirmative answer. In the case of inventory collateral under subsection (3), where it was expected that the goods would be sold and where financing frequently is based on the resulting accounts, chattel paper, or other proceeds, the subsection gives an answer limited to the preservation of the purchase money priority only in so far as the proceeds are cash received on or before the delivery of the inventory to a buyer, that is, without the creation of an intervening account to which conflicting rights might attach. The conflicting rights to proceeds consisting of accounts are governed by subsection (5). See Comment 8.

The foregoing rules applicable to purchase money security interests in inventory apply also to the rights in consigned merchandise. See Section 9-114.

4. Subsection (5) states a rule for determining priority between conflicting security interests in cases not covered in the sections referred to in subsection (1) or in subsections (2), (3) and (4) of this section. Note that subsection (5) applies to cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4).

There is a single priority rule based on precedence in the time as of which the competing parties either filed their security interests or perfected their security interests. The form of the claim to priority, i. e., filing or perfection, may shift from time to time, and the rank will be based on the first filing or perfection so long as there is no intervening period without filing or perfection. Filing may occur as to particular collateral before the collateral comes into existence. Under the standards of Section 9-203 perfection cannot occur as to particular collateral until the collateral itself (and not prior collateral) comes into existence and the debtor has rights therein; but under subsection (6) of this section the secured party's priority may date from his time of perfection as to the prior collateral, if perfection or filing has been continuously maintained. Subsection (6) provides that a date of filing or perfection as to

original collateral is also a date of filing or perfection as to proceeds. This rule should also be read with Section 9-306, which makes it unneccessary to claim proceeds expressly in a financing statement and provides in effect that a filing as to original collateral is also a filing as to proceeds (with exceptions therein stated). Thus, if a financing statement is filed covering inventory, then (subject to the exception involving multistate problems) this filing is also a filing as to the resulting accounts and constitutes the date of filing as to the accounts.

The party who may have had a prior security interest in inventory or may have had the only such security interest does not automatically for that reason have priority as to the accounts. His claim to accounts may or may not have priority over competing filed claims to accounts. The priority is based on precedence as to the accounts under the rules stated in the preceding paragraph.

5. The operation of this section is illustrated by the examples set forth under this and the succeeding Points.

Example 1. A files against X (debtor) on February 1. B files against X on March 1. B makes a non-purchase money advance against certain collateral on April 1. A makes an advance against the same collateral on May 1. A has priority even though B's advance was made earlier and was perfected when made. It makes no difference whether or not A knew of B's interest when he made his advance.

The problem stated in the example is peculiar to a notice filing system under which filing may be made before the security interest attaches (see Section 9-402). The Uniform Trust Receipts Act, which first introduced such a filing system, contained no hint of a solution and case law under it was unpredictable. This Article follows several of the accounts receivable statutes in determining priority by order of filing. The justification for the rule lies in the necessity of protecting the filing system — that is, of allowing the secured party who has first filed to make subsequent advances without each time having, as a condition of protection, to check for filings later than his. Note, however, that his protection is not absolute: if, in the example, B's advance creates a purchase money security interest, he has priority under subsection (4), or, in the case of inventory, under subsection (3) provided he has properly notified A. (See further Example 3 below.)

Example 2. A and B make non-purchase money advances against the same collateral. The collateral is in the debtor's possession and neither interest is perfected when the second advance is made. Whichever secured party first perfects his interest (by taking possession of the collateral or by filing) takes priority and it makes no difference whether or not he knows of the other interest at the time he perfects his own.

This result may be regarded as an adoption, in this type of situation, of the idea, deeply rooted at common law, of a race of diligence among creditors. Subsection (5) (b) adds the thought that so long as neither of the interests is perfected, the one which first attached (i. e., under the advance first made) has priority. The last mentioned rule may be thought to be of merely theoretical interest, since it is hard to imagine a situation where the case would come into litigation without either A or B having perfected his interest. If neither interest had been perfected at the time of the filing of a petition in bankruptcy, of course neither would be good against the trustee in bankruptcy.

Example 3. A has a temporarily perfected (21 day) security interest, unfiled, in a negotiable document in the debtor's possession under Section 9-304(4) or (5). On the fifth day B files and thus perfects a security interest in the same document. On the tenth day A files. A has priority, whether or not he knows of B's interest when he files, because he perfected first and has maintained continuous perfection or filing.

6. The application of the priority rules to after-acquired property must be considered separately for each item of collateral. Priority does not depend only on time of perfection, but may also be based on priority in filing before perfection.

Example 4. On February 1 A makes advances to X under a security agreement which covers "all the machinery in X's plant" and contains an after-acquired property clause. A promptly files his financing statement. On March 1 X acquires a new machine, B makes an advance against it and files his financing statement. On April 1 A, under the original security agreement, makes an advance against the machine acquired March 1. If B's advance creates a purchase money security interest, he has priority under subsection (4) (provided he filed before X received possession of the machine or within ten days thereafter). If B's advance, although he gave new value, did not create a purchase money interest, A has priority as to both of his advances by virtue of his priority in filing, although the parties perfected simultaneously on March 1 as to the new machine.

The application of the priority rules to proceeds presents special features discussed in Comment 8.

7. The application of the priority rules to future advances is complicated. In general, since any secured party must operate in reference to the Code's system of notice, he takes subject to future advances under a prior security interest while it is perfected through filing or possession, whether the advances are

committed or noncommitted, and to any advances subsequently made "pursuant to commitment" (Section 9-105) during that period. In the rare case when a future advance is made without commitment while the security interest is perfected temporarily without either filing or possession, the future advance has priority from the date it is made. These rules are more liberal toward the priority of future advances than the corresponding rules applicable to an intervening buyer (Section 9-307(3)) because of the different characteristics of the intervening party. Compare the corresponding rule applicable to an intervening judgment creditor. (Section 9-301(4)).

Example 5. On February 1 A makes an advance against machinery in the debtor's possession and files his financing statement. On March 1 B makes an advance against the same machinery and files his financing statement. On April 1 A makes a further advance, under the original security agreement, against the same machinery (which is covered by the original financing statement and thus perfected when made). A has priority over B both as to the February 1 and as to the April 1 advance and it makes no difference whether or not A knows of B's intervening advance when he makes his second advance.

A wins, as to the April 1 advance, because he first filed even though B's interest attached, and indeed was perfected, before the April 1 advance. The same rule would apply if either A or B had perfected through possession. Section 9-204(3) and the Comment thereto should be consulted for the validation of future advances.

The same result would be reached even though A's April 1 advance was not under the original security agreement, but was under a new security agreement under A's same financing statement or during the continuation of A's possession.

8. The application of the priority rules of subsections (5) and (6) to proceeds is shown by the following examples:

Example 6. A files a financing statement covering a described type of inventory then owned or thereafter acquired. B subsequently takes a purchase money security interest in certain inventory described in A's financing statement and achieves priority over A under subsection (3) as to this inventory. This inventory is then sold, producing proceeds.

If the proceeds of the inventory are instruments or chattel paper, the rights of A and B on the one hand and any adverse claimant to these proceeds on the other are governed by Sections 9-308 and 9-309. If the proceeds are cash, subsection (3) indicates that B's priority as to the inventory carries over to the cash. Proceeds which are accounts constitute different collateral and the priorities as to the original collateral do not control the priority as to the accounts. Under Sections 9-306 and 9-312(6), A's first filing as to the inventory constitutes a first filing as to the accounts, provided that the same filing office would be appropriate for filing as to accounts under the rules of Section 9-306(3). Therefore, A has priority as to the accounts.

Many parties financing inventory are quite content to protect their first security interest in the inventory itself, realizing that when inventory is sold, someone else will be financing the accounts and the priority for inventory will not run forward to the accounts. Indeed, the cash supplied by the accounts financer will be used to pay the inventory financing. In some situations, the party financing the inventory on a purchase money basis makes contractual arrangements that the proceeds of accounts financing by another be devoted to paying off the first inventory security interest.

Example 7. In the foregoing case, if B had filed directly as to accounts, the date of that filing as to accounts would be compared with the date of A's first filing as to the inventory, and the first-to-file rule would prevail.

Subsection (6) provides that a filing as to original collateral determines the date of a filing as to the proceeds thereof. This rule implies, of course, that the filing as to the original collateral is effective as to proceeds under the rule of Section 9-306(3).

Example 8. If C had filed as to accounts in Example 6 above before either A or B had filed as to inventory, C's first filing as to accounts would have priority over the filings of A and B, which would also constitute filings as to accounts under the rule just mentioned. A's and B's position as to the inventory gives them no automatic claim to the proceeds of the inventory consisting of accounts against someone who has filed earlier as to accounts. If, on the other hand, either A's or B's filings as to the inventory constituted good filings as to accounts and these filings preceded C's direct filings as to accounts, A or B would outrank C as to the accounts.

If the filings as to inventory were not effective under subsection (6) for filing as to accounts because a filing for accounts would have to be a different filing office under Section 9-103(3), these inventory filings would nevertheless be effective for 10 days as to accounts. If the perfection of the security interest in accounts was continued within the 10 days by appropriate filings, then A and B's interests in the accounts would date from the date of filing as to inventory.

Cross References:

Sections 9-204(1) and 9-303.

Point 1: Sections 4-208, 9-114, 9-301, 9-304, 9-306, 9-307, 9-308, 9-309, 9-310, 9-313, 9-314, 9-315 and 9-316.

Point 3: Sections 9-108, 9-204, 9-304(4) and (5).

Points 4 to 7: Sections 9-204, 9-301(4), 9-304(4) and (5), 9-306, 9-307(3) and 9-402(1).

Point 8: Sections 9-103(6), 9-306(3).

Definitional Cross References:

"Chattel paper". Section 9-105.
"Collateral". Section 9-105.
"Collecting bank". Section 4-105.
"Debtor". Section 9-105.
"Documents". Section 9-105.
"Give notice". Section 1-201.
"Goods". Section 9-105.
"Instruments". Section 9-105.
"Inventory". Section 9-109.
"Knowledge". Section 1-201.
"Person". Section 1-201.
"Proceeds". Section 9-306.
"Purchase money security interest". Section 9-107.
"Pursuant to commitment". Section 9-105.
"Receives" notification. Section 1-201.
"Secured party". Section 9-105.
"Security". Sections 8-102 and 9-105.
"Security interest". Section 1-201.
"Value". Section 1-201.

Effect of Amendments. — The 1967 amendment, originally effective Oct. 1, 1967, corrected an error by substituting "or" for "of" in paragraph (b) of subsection (3) as it stood before the 1975 amendment. Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

The 1975 amendment, effective July 1, 1976, rewrote subsections (1) and (3), inserted "or its proceeds" near the middle of subsection (4), substituted "according to the following rules" for "as follows" at the end of the introductory language in subsection (5) and rewrote the remainder of that subsection, rewrote subsection (6) and added subsection (7).

The 1979 amendment substituted "20" for "10" near the end of subsection (4).

Session Laws 1979, c. 404, s. 3, provides: "This act is effective upon ratification [April 18, 1979] but does not apply to purchase-money security interests arising out of transactions occurring before that time."

CASE NOTES

Priority of Security Interests in Bankrupt's Equipment. — In an action to determine which of two creditors was entitled to money in trustee's possession resulting from the sale of the debtor's boat, the evidence supported the contention that the corporate debtor's boat was purchased by the bankrupt corporation, used by it and was to be considered "equipment" of the bankrupt rather than "consumer goods" under § 25-9-109, so that under this section, the security interest of the first secured creditor in all present and future equipment owned by the bankrupt took priority over the security interest of the second creditor which was perfected more than 10 days after the bankrupt took possession of the boat. In re Boiling Springs Constr. Co., 3 B.R. 251 (E.D.N.C. 1980).

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).

Applied in Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510 (1978).

Stated in Spector United Employees Credit Union v. Smith, 45 N.C. App. 432, 263 S.E.2d 319 (1980).

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

(1) In this section and in the provisions of part 4 of this article referring to fixture filing, unless the context otherwise requires

(a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;

(b) a "fixture filing" is the filing of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of

subsection (5) of G.S. 25-9-402 or of a mortgage or deed of trust conforming to the requirements of subsection (6) of G.S. 25-9-402;

(c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this article in ordinary building materials incorporated into an improvement on land.

(3) This article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within 10 days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this article; or

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 7, Uniform Conditional Sales Act.

Purposes:

1. Section 9-313 deals with the problem that certain goods which are the subject of chattel financing become so affixed or otherwise so related to real estate that they become part of the real estate, and that chattel interests would be subordinate to real estate interests except as protected by the priorities regulated by the section. These goods are called "fixtures". Some fixtures also retain their chattel nature in that a chattel financing with respect to them may exist and may continue to be recognized, if notice thereof is given to real estate interests in accordance with this section. But this concept does not apply if the goods are integrally incorporated into the real estate.

The term "fixture filing" has been introduced and defined. It emphasizes that when a filing is intended to give the priority advantages herein discussed against real estate interests, the filing must (except as stated below) be for record in the real estate records and indexed therein, so that it will be found in a real estate search.

Since the determination in advance of judicial decision of the question whether goods have become fixtures is a difficult one, no inference may be drawn from a fixture filing that the secured party concedes that the goods are or will become fixtures. The fixture filing may be merely precautionary.

2. "Fixture" is defined to include any goods which become so related to particular real estate that an interest in them arises under real estate law and therefore, goods integrally incorporated into the real estate are clearly fixtures. But under subsection (2) no security interest exists under Article 9 in ordinary building materials incorporated into an improvement on land.

Goods may be technically "ordinary building materials," e. g., window glass, but if they are incorporated into a structure which as a whole has not become an integral part of the real estate, the rules applicable to the ordinary building materials follow the rules applicable to the structure itself. The outstanding examples presenting this kind of problem are the modern "mobile homes" and the modern prefabricated steel buildings usable as warehouses, garages, factories, etc. In the case of the mobile homes, most of them are erected on leased land and the right of the debtor under a mobile home purchase contract to remove the goods as lessee will make clear that his secured party ordinarily has a similar right. See paragraph (5) (b).

In cases where mobile homes or prefabricated steel buildings are erected by a person having an ownership interest in the land, the question into which category the buildings fall is one determined by local law. In general, the governing local law will not be that applicable in determining whether goods have become real property between landlord and tenant, or between mortgagor and mortgagee, or between grantor and grantee, but rather that applicable in a three-party situation, determining whether chattel financing can survive as against parties who acquire rights through the affixation of the goods to the real estate.

The assertion that no security interest exists in ordinary building materials is only for the operation of the priority provisions of this section. It is without prejudice to any rights which the secured party may have against the debtor himself if he incorporated the goods into real estate or against any party guilty of wrongful incorporation thereof in violation of the secured party's rights.

3. Under these concepts the section recognizes three categories of goods: (1) those which retain their chattel character entirely and are not part of the real estate; (2) ordinary building materials which have become an integral part of the real estate and cannot retain their chattel character for purposes of finance; and (3) an intermediate class which has become real estate for certain purposes, but as to which chattel financing may be preserved. This third and intermediate class is the primary subject of this section. The demarcation between these classifications is not delineated by this section.

4. In considering fixture priority problems, there will always first be a preliminary question whether real estate interests per se have an interest in the goods as part of real estate. If not, it is immaterial, so far as concerns real estate parties as such, whether a chattel security interest is perfected or unperfected. In no event does a real estate party acquire an interest in a "pure" chattel just because a security interest therein is unperfected. If on the other hand real estate law gives real estate parties an interest in the goods, a conflict arises and this section states the priorities.

(a) The principal exception to the general rule of priority stated in Comment 4(b) based on time of filing or recording is a priority given in paragraph (4) (a) to purchase money security interests in fixtures as against *prior* recorded real estate interests, provided that the purchase money security interest is filed as a fixture filing in the real estate records before the goods become fixtures or within 10 days thereafter. This priority corresponds to one given in Section 9-312(4), and the 10 days of

grace represents a reduction of the purchase money priority as against prior interests in the real estate under the present Section 9-313, where the purchase money priority exists even though the security interest is *never* filed.

It should be emphasized that this purchase money priority with the 10-day grace period for filing is limited to rights against *prior* real estate interests. There is no such priority with the 10-day grace period as against subsequent real estate interests. The fixture security interest can defeat subsequent real estate interests only if it is filed first and prevails under the usual conveyancing rule recognized in paragraph (4) (b).

(b) The general principle of priority announced in this section is set forth in paragraph (4) (b). It is basically that a fixture filing gives to the fixture security interest priority as against other real estate interests according to the usual priority rule of conveyancing, that is, the first to file or record prevails. An apparent limitation to this principle set forth in paragraph (4) (b), namely that the secured party must have had priority over any interest of a predecessor in title of the conflicting encumbrancer or owner, is not really a limitation, but is an expression of the usual rule that a person must be entitled to transfer what he has. Thus, if the fixture security interest is subordinate to a mortgage, it is subordinate to an interest of an assignee of the mortgage even though the assignment is a later recorded instrument. Similarly if the fixture security interest is subordinate to the rights of an owner, it is subordinate to a subsequent grantee of the owner and likewise subordinate to a subsequent mortgagee of the owner.

(c) A qualification to the rule based on priority of filing or recording is paragraph (4) (d), where priority based on precedence in filing or recording is preserved, but there is no requirement that as against a judgment lienor of the real estate, the prior filing of the fixture security interest must be in the real estate records. The fixture security interest if perfected first should prevail even though not filed or recorded in real estate records, because generally a judgment creditor is not a reliance creditor who would have searched records. Thus, even a prior filing in the chattel records protects the priority of a fixture security interest against a subsequent judgment lien.

It is hoped that this rule will have the effect of preserving a fixture security interest so filed against invalidation by a trustee in bankruptcy. That would, of course, be the result under Section 60a of the Bankruptcy Act if the time of perfection of the fixture security interest were measured by the judgment creditor test applicable to personal property. It would not be the result if the time of perfection were measured by the purchaser test applicable to real estate. Since the fixture security interest arises against the goods in their capacity as chattels, the bankruptcy courts should apply the judgment creditor test. The effectiveness of the drafting to achieve its purpose cannot be known certainly until the courts adjudicate the question or until it is settled by amendment to Section 60a of the Bankruptcy Act.

The phrase "lien by legal or equitable proceedings" is suggested by Section 70c of the Bankruptcy Act, and is intended to encompass all liens on real estate obtained by any of the creditor action therein described.

(d) A special exception to the usual rule of priority based on precedence in time is the one of paragraph (4) (c) in favor of holders of security interests in factory and office machines, and in certain replacement domestic appliances, as discussed below. This is not as broad an exception as it might seem. To repeat, a fixture conflict is not reached if the goods are held as a matter of local law not to have become part of the real estate, which will frequently be the holding for goods of these types. If the opposite is held, the rule of paragraph (4) (c) operates only if the fixture security interest is perfected before the goods become fixtures. Having been perfected, it would of course have priority over subsequent real estate interests under the rule of paragraph (4) (b). Since it would in almost all cases be a purchase money security interest, it would also have priority over other real estate interests under the purchase-money priority of paragraph (4) (a), discussed in paragraph (a) above. The rule is stated separately because the permitted perfection is by any method permitted by the Article, and not exclusively by fixture filing in the real estate records. This rule is made necessary by the confusions of the law as to whether certain machinery and appliances become fixtures.

As an additional point, in the case of machinery, the separate statement of this rule makes clear that it is not overridden by the construction mortgage priority of subsection (6) discussed in Comment 4(e) below, as would have been true if reliance had been solely on the purchase money priority. Factory and office machines are not always financed as part of a construction mortgage, and the mortgagee should be alert of conflicting chattel financing of these machines.

As to appliances, the rule stated is limited to readily removable replacements, not original installations, of appliances which are consumer goods in the hands of the debtor (Section 9-109). To facilitate financing of original appliances in new dwellings as part of the real estate financing of the dwellings, no special priority is given to chattel financing of original appliances. This section leaves to other law of the state the question whether original installations are fixtures to which the protection

accorded by this section to construction mortgages would be applicable. Likewise, it is recognized that (when not supplied by tenants) appliances in commercial apartment buildings are intended as permanent improvements, and no special rule is stated for appliances in that case. The special priority rule here stated in favor of chattel financing is limited to situations where the installation of appliances may not be intended to be permanent, i. e., replacement appliances used by the debtor or his family (consumer goods). The principal effect of the rule is to make clear that a secured party financing occasional replacements of domestic appliances in noncommercial owner-occupied contexts need not concern himself with real estate descriptions or records; indeed, for a purchase-money replacement of consumer goods, perfection without any filing will be possible. (The priority of the construction mortgage has no application to replacement appliances.)

(e) The purchase money priority presents a difficult problem in relation to construction mortgages. The latter will ordinarily have been recorded even before the commencement of delivery of materials to the job, and therefore would be prior in rank to the fixture security interests were it not for the problem of the purchase money priority. Subsection (6) expressly gives priority to the construction mortgage recorded before the filing of the fixture security interest, but this priority of a construction mortgage applies only during the construction period leading to the completion of the improvement. As to additions to the building made long after completion of the improvement, the construction priority will not apply simply because the additions are financed by the real estate mortgagee under an open end clause of his construction mortgage. In such case, the applicable principles will be those of paragraphs (4) (a) and (4) (b). A refinancing of a construction mortgage has the same priority as the mortgage itself.

The phrase "an obligation incurred for the construction of an improvement" covers both optional advances and advances pursuant to commitment, and both types of advances have the same priority under the section.

5. The section makes it impossible for a fixture supplier to retain a security interest against a contractor, to the possible surprise and deception of real estate interests, unless the debtor has an interest of record in the real estate. See paragraphs (4) (a) and (b).

On the other hand, these paragraphs do recognize that fixture filing may be necessary when the debtor is in possession of the real estate (e. g., a lessee) even without an interest of record. This possibility of a filing against a debtor who is not in the real estate chain of title makes it necessary to require the furnishing of the name of a record owner in such cases. See Sections 9-402(3), item 3; 9-402(5); 9-403(7).

6. The status of fixtures installed by tenants (as well as such persons as licensees and holders of easements) is defined by paragraph (5) (b) to the effect that if the debtor (tenant or other interest mentioned) has the right to remove the fixture as against a real estate interest, the secured party has priority over that real estate interest.

7. Real estate lenders and title companies will have little difficulty in locating relevant fixture security interests applicable to particular parcels of real estate because of the provisions as to real estate description in fixture filings, the indexing thereof, and other related provisions in Part 4 of Article 9.

8. Real estate lending is typically long-term, and is usually done by institutional investors who can afford to take a long view of the matter rather than concentrating on the results of any particular case. It is apparent that the rule which permits and encourages purchase money fixture financing, which in contrast is typically short-term, will result in the modernization and improvement of real estate rather than in its deterioration and will on balance benefit long-term real estate lenders. Because of the short-term character of the chattel financing, it will rarely produce any conflict in fact with the real estate lender. The contrary rule would chill the availability of short-term credit for modernization of real estate by installation of new fixtures and in the long run could not help real estate lenders.

9. Subsection (8) is an important departure from Section 7 of the Uniform Conditional Sales Act and from much other conditional sales legislation. Under the Uniform Conditional Sales Act a conditional vendor could not sever and remove the affixed chattel if a "material injury to the freehold" would result. The courts of various jurisdictions were in sharp disagreement of the meaning of "material injury": some held that only physical injury was meant; others adopted the so-called "institutional theory" and denied removal whenever the "going value" of the structure would be materially diminished by the removal. Under these rules the conditional vendor either could not remove at all, or, if he could, could damage the structure on removal without becoming accountable to the real estate claimant. The situation was complicated by the fact that it became increasingly difficult to predict what types of goods the courts in a given jurisdiction would hold not subject to removal.

Subsection (8) abandons the "material injury to the freehold" rule. Instead a secured party entitled to priority may in all cases sever and remove his collateral, subject, however, to a duty to reimburse any real estate claimant

(other than the debtor himself) for any physical injury caused by the removal. The right to reimbursement is implemented by the last sentence of subsection (8) which gives the real estate claimant a statutory right to security or indemnity failing which he may refuse permission to remove. The subsection (8) rule thus accomplishes two things: it puts an end to the uncertainty which has grown up under the "material injury" rule, while at the same time it protects the real estate claimant under the reimbursement provisions.

Cross References:
Sections 2-107, 9-102(1), 9-104(j) and 9-312(1), and Parts 4 and 5.

Definitional Cross References:
"Collateral". Section 9-105.
"Contract". Section 1-201.
"Creditor". Section 1-201.
"Debtor". Section 9-105.
"Encumbrance". Section 9-105.
"Goods". Section 9-105.
"Knowledge". Section 1-201.
"Mortgage". Section 9-105.
"Person". Section 1-201.
"Purchase". Section 1-201.
"Purchaser". Section 1-201.
"Secured party". Section 9-105.
"Security interest". Section 1-201.
"Value". Section 1-201.
"Writing". Section 1-201.

Effect of Amendments. — 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 amendment note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote this section.

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

§ 25-9-314. Accessions.

(1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to G.S. 25-9-315(1).

(2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in subsection (3) but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.

(3) The security interests described in subsections (1) and (2) do not take priority over

(a) a subsequent purchaser for value of any interest in the whole; or

(b) a creditor with a lien on the whole subsequently obtained by judicial proceedings; or

(c) a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale other than the holder of a perfected security interest purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(4) When under subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of part 5 remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for

replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. To state when a secured party claiming an interest in goods installed in or affixed to other goods is entitled to priority over a party with a security interest in the whole.

2. This section changes prior law in that the secured party claiming an interest in a part (e.g., a new motor in an old car) is entitled to priority and has a right to remove even though under other rules of law the part now belongs to the whole.

3. This section does not apply to goods which, for example, are so commingled in a manufacturing process that their original identity is lost. That type of situation is covered in Section 9-315. Section 9-315 should also be consulted for the effect of a financing statement which claims both component parts and the resulting product.

Cross References:
Sections 9-203(1), 9-303 and 9-312(1) and Part 5.
Point 3: Section 9-315.

Definitional Cross References:
"Collateral". Section 9-105.
"Creditor". Section 1-201.
"Debtor". Section 9-105.
"Goods". Section 9-105.
"Knowledge". Section 1-201.
"Person". Section 1-201.
"Purchaser". Section 1-201.
"Secured party". Section 9-105.
"Security interest". Section 1-201.
"Value". Section 1-201.
"Writing". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-315. Priority when goods are commingled or processed.

(1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if

(a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass; or

(b) a financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled.

In a case to which paragraph (b) applies, no separate security interest in that part of the original goods which has been manufactured, processed or assembled into the product may be claimed under G.S. 25-9-314.

(2) When under subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. To state when a secured party whose collateral contributes to a product has priority over others who have conflicting claims in the same product.

2. This section changes the law in some jurisdictions where a security interest in goods (e. g.,

raw materials) was lost when the goods lost their identity by being commingled or processed. Under this section the security interest continues in the resulting mass or product in the cases stated in subsection (1).

3. This section applies not only to cases where flour, sugar and eggs are commingled into cake mix or cake, but also to cases where components are assembled into a machine. In the latter case a secured party is put to an election at the time of filing, by the last sentence of subsection (1), whether to claim under this section or to claim a security interest in one component under Section 9-314.

4. Subsection (2) is new and is needed because under subsection (1) it is possible to have more than one secured party claiming an interest in a product. The rule stated treats all such interests as being of equal priority entitled to share ratably in the product.

Cross References:
Sections 9-203(1), 9-303, 9-312(1) and 9-314.

Definitional Cross References:
"Goods". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-316. Priority subject to subordination.

Nothing in this article prevents subordination by agreement by any person entitled to priority. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:
The several preceding sections deal elaborately with questions of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate his claim. Only the person entitled to priority may make such an agreement: his rights cannot be adversely affected by an agreement to which he is not a party.

Cross References:
Sections 1-102 and 9-312(1).

Definitional Cross References:
"Agreement". Section 1-201.
"Person". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-317. Secured party not obligated on contract of debtor.

The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 12, Uniform Trust Receipts Act.

Purposes:
There were a few common law decisions, mostly in cases involving trust receipts, which suggested, if they did not hold, that a secured party who gave his debtor liberty of sale might be liable (for example, for breach of warranty) on the debtor's contracts of sale. The theory was grounded on the law of agency; the debtor being regarded as selling agent for the secured party as principal. This section rejects that theory. Section 12 of the Uniform Trust Receipts Act provided that the entruster was not subject to liability, merely because of his status as entruster, on sale of the goods subject to trust receipt. This section adopts the policy of the prior act and states it in general terms.

Cross Reference:
Section 2-210(4).

Definitional Cross References:
"Collateral". Section 9-105.
"Contract". Section 1-201.
"Debtor". Section 9-105.
"Secured party". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

CASE NOTES

Quoted in Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

§ 25-9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment.

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in G.S. 25-9-206 the rights of an assignee are subject to

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

(4) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest. (1945, c. 196, s. 6; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 9(3), Uniform Trust Receipts Act.

Purposes:

1. Subsection (1) makes no substantial change in prior law. An assignee has traditionally been subject to defenses or set-offs existing before an account debtor is notified of the assignment. When the account debtor's defenses on an assigned claim arise from the contract between him and the assignor, it makes no difference whether the breach giving rise to the defense occurs before or after the account debtor is notified of the assignment. When the account debtor's defenses on an assigned claim arise from the contract between him and the assignor, it makes no difference whether the breach giving rise to the defense occurs before or after the account debtor is notified of the assignment (paragraph (1) (a)). The account debtor may also have claims against the assignor which arise independently of that contract: an assignee is subject to all such claims which accrue before, and free of all those which accrue after, the account debtor is notified (paragraph (1) (b)). The account debtor may waive his right to assert claims or defenses against an assignee to the extent provided in Section 9-206.

2. Prior law was in confusion as to whether modification of an executory contract by account debtor and assignor without the assignee's consent was possible after notification of an assignment. Subsection (2) makes good faith modifications by assignor and account debtor without the assignee's consent effective against the assignee even after notification. This rule may do some violence to accepted doctrines of contract law. Nevertheless it is a sound and indeed a necessary rule in view of the realities of large scale procurement. When for example it becomes necessary for a government agency to cut back or modify existing contracts, comparable arrangements must be made promptly in hundreds and even thousands of subcontracts lying in many tiers below the prime contract. Typically the right to payments under these subcontracts will have been assigned. The government, as sovereign, might have the right to amend or terminate existing contracts apart from statute. This subsection gives the prime contractor (the account debtor) the right to make the required arrangements directly with his subcontractors without undertaking the task of procuring assents from the many banks to whom rights under the contracts may have been assigned. Assignees are protected by the provision which gives them automatically corresponding rights under the modified or substituted contract. Notice that subsection (2) applies only so far as the right to payment has not been earned by performance, and therefore its application ends entirely when the work is done or the goods furnished.

3. Subsection (3) clarifies the right of an account debtor to make payment to his seller-assignor in an "indirect collection" situation (see Comment to Section 9-308). So long as the assignee permits the assignor to collect claims or leaves him in possession of chattel paper which does not indicate that payment is to be made at some place other than the assignor's place of business, the account debtor may pay the assignor even though he may know of the assignment. In such a situation an assignee who wants to take over collections must notify the account debtor to make further payments to him.

4. Subsection (4) breaks sharply with the older contract doctrines by denying effectiveness to contractual terms prohibiting assignment of sums due and to become due under contracts of sale, construction contracts and the like. Under the rule as stated, an assignment would be effective even if made to an assignee who took with full knowledge that the account debtor had sought to prohibit or restrict assignment of the claims.

It is only for the past hundred years that our law has recognized the possibility of assigning choses in action. The history of this development, at law and equity, is in broad outline well known. Lingering traces of the absolute common law prohibition have survived almost to our own day.

There can be no doubt that a term prohibiting assignment of proceeds was effective against an assignee with notice through the nineteenth century and well into the twentieth. Section 151 of the Restatement of Contracts (1932) so states the law without qualification, but the changing character of the law is shown in the proposed Section 154 of the Restatement, Second, Contracts.

The original rule of law has been progressively undermined by a process of erosion which began much earlier than the cited section of the Restatement of Contracts would suggest. The cases are legion in which courts have construed the heart out of prohibitory or restrictive terms and held the assignment good. The cases are not lacking where courts have flatly held assignments valid without bothering to construe away the prohibition. See 4 Corbin on Contracts (1951) §§ 872, 873. Such cases as Allhusen v. Caristo Const. Corp., 303 N.Y. 446, 103 N.E.2d 891 (1952), are rejected by this subsection.

This gradual and largely unacknowledged shift in legal doctrine has taken place in response to economic need: as accounts and other rights under contracts have become the collateral which secures an ever increasing number of financing transactions, it has been necessary to reshape the law so that these intangibles, like negotiable instruments and negotiable documents of title, can be freely assigned.

Subsection (4) thus states a rule of law which is widely recognized in the cases and which corresponds to current business practices. It can be regarded as a revolutionary departure only by those who still cherish the hope that we may yet return to the views entertained some two hundred years ago by the Court of King's Bench.

5. The Federal Assignment of Claims Act of 1940 — to which of course this section is subject — requires that assignments of claims against the United States be filed as provided in that Act. Many large business enterprises, situated like the United States in that claims against them are held by hundreds or thousands of subcontractors or suppliers, often require in their contract or purchase order forms that assignments against them be filed in a prescribed way. Subsection (3) requires reasonable identification of the account assigned and recognizes the right of an account debtor to require reasonable proof of the making of the assignment and to that extent validates such requirements in contracts or purchase order forms. If the notification does not contain such reasonable identification or if such reasonable proof is not furnished on request, the account debtor may disregard the assignment and make payment to the assignor. What is "reasonable" is not left to the arbitrary decision of the account debtor; if there is doubt as to the adequacy either of a notification or of proof submitted after request, the account debtor may not be safe in disregarding it unless he has notified the assignee with commercial promptness as to the respects in which identification or proof is considered defective.

6. If the thing to be assigned is the beneficiary's right under a letter of credit, Section 5-116 should be consulted.

Cross References:

Point 1: Section 9-206.
Point 3: Sections 9-205 and 9-308.
Point 4: Section 2-210(2) and (3).
Point 6: Section 5-116.

Definitional Cross References:

"Account". Section 9-106.
"Account debtor". Section 9-105.
"Agreement". Section 1-201.
"Contract". Section 1-201.
"Good faith". Section 1-201.
"Party". Section 1-201.
"Receives" notification. Section 1-201.
"Rights". Section 1-201.
"Sale". Sections 2-106 and 9-105.
"Seasonably". Section 1-204.
"Term". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, inserted "or a part thereof" near the beginning of subsection (2), substituted "contract has not been fully earned by performance" for "contract right has not already become an account" near the beginning of the first sentence of subsection (2), substituted "that the amount due or to become due" for "that the account" in the first sentence of subsection (3) and substituted present subsection (4) for a provision which read: "A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective."

CASE NOTES

Applied in Equitable Factors Co. v. Chapman-Harkey Co., 43 N.C. 189, 258 S.E.2d 376 (1979).

PART 4.

FILING.

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

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the register of deeds in the county of the debtor's residence or if the debtor is not a resident of this State then in the office of the register of deeds in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown in the office of the register of deeds in the county where the land is located;

(b) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or when the financing statement is filed as a fixture filing (G.S. 25-9-313) and the collateral is goods which are or are to become fixtures, then in the office of the register of deeds in the county where the land is located;

(c) in all other cases, in the office of the Secretary of State and in addition, if the debtor has a place of business in only one county of this State, also in the office of the register of deeds of such county, or, if the debtor has no place of business in this State, but resides in the State, also in the office of the register of deeds of the county in which he resides.

(2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

(3) A filing which is made in the proper place in this State continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.

(4) The rules stated in G.S. 25-9-103 determine whether filing is necessary in this State.

(5) For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business. (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. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFFICIAL COMMENT

Editor's Note:
Subsection (1) is the "Third Alternative" discussed in the Official and North Carolina Comments on this section. Subsection (3) is principal subsection (3) of 1962 Official Text and not the alternative discussed in Official Comment 6 and the North Carolina Comment.

Prior Uniform Statutory Provision:
Section 4, Uniform Trust Receipts Act; Sections 6 and 7, Uniform Conditional Sales Act.

Purposes:

1. Under chattel mortgage acts, the Uniform Conditional Sales Act and other conditional sales legislation the geographical unit for filing or recording was local: the county or township in which the mortgagor or vendee resided or in which the goods sold or mortgaged were kept. The Uniform Trust Receipts Act used the state as the geographical filing unit: under that Act statements of trust receipt financing were filed with an official in the state capital and were not filed locally. The state-wide filing system of the Trust Receipts Act has been followed in many accounts receivable and factor's lien acts.

Both systems have their advocates and both their own advantages and drawbacks. The principal advantage of state-wide filing is ease of access to the credit information which the files exist to provide. Consider for example the national distributor who wishes to have current information about the credit standing of the thousands of persons he sells to on credit. The more completely the files are centralized on a state-wide basis, the easier and cheaper it becomes to procure credit information; the more the files are scattered in local filing units, the more burdensome and costly. On the other hand, it can be said that most credit inquiries about local businesses, farmers and consumers come from local sources; convenience is served by having the files locally available and there is not great advantage in centralized filing.

This section does not attempt to resolve the controversy between the advocates of a completely centralized state-wide filing system and those of a large degree of local autonomy. Instead the section is drafted in a series of alternatives; local considerations of policy will determine the choice to be made.

2. Fortunately there is general agreement that the proper filing place for security interests in fixtures is in the office where a mortgage on the real estate concerned would be filed or recorded, and paragraph (1) (a) in the First Alternative and paragraph (1) (b) in the Second and Third Alternatives so provide. This provision follows the Uniform Conditional Sales Act. Note that there is no requirement for an additional filing with the chattel records.

3. In states where it is felt wise to preserve local filing for transactions of essentially local interest, either the Second or Third Alternative of subsection (1) should be adopted. Paragraph (1) (a) in both alternatives provides county (township, etc.) filing for consumer goods transactions and for agricultural transactions (farm equipment, farm products, farm accounts and crops). Note that the subsection departs from Section 6 of the Uniform Conditional Sales Act and adopts instead the policy of many chattel mortgage acts in selecting the county of the debtor's residence, rather than the county where the goods are located, as the normal filing place. Where, however, the debtor is an out-of-state resident, the filing must of necessity be in the county where the goods are, and the subsection so provides. Though not expressly stated, it is evident that filing for an assignment of accounts arising from the sale of farm products by a farmer who is not a resident must be in the county where the debtor keeps his farm products. In the case of crops growing or to be grown, where the land is in one county and the debtor's residence in another, filing must be made in both counties. Neither this filing for crops in the county where the land is nor the requirements that the security agreement (Section 9-203(1)(a)) and the financing statement (Section 9-402(1) and (3)) contain a description of the real estate point to the conclusion that a financing statement for a security interest in crops must be filed in the real estate records. This Article follows pre-Code law which recognized such a financing as a chattel mortgage. The policy of the subsection is to require filing in the place or places where a creditor would normally look for information concerning interests created by the debtor.

For some incorporated farmers, reference to residence is an anomaly. Therefore subsection (6) provides that the residence of an organization is its place of business, or its chief executive office if it has more than one place of business. Compare Section 9-103(3), which reaches essentially the same concept as a definition of the "location" of a debtor.

4. It is thought that sound policy requires a state-wide filing system for all transactions except the essentially local ones covered in paragraph (1)(a) of the Second and Third Alternatives and land-related transactions covered in paragraph (1) (b) of the Second and Third Alternatives. Paragraph (1) (c) so provides in both alternatives, as does paragraph (1) (b) in the First Alternative. In a state which has adopted either the Second or Third Alternative, central filing would be required when the collateral was goods except consumer goods, farm

equipment or farm products (including crops), or was documents or chattel paper or was accounts or general intangibles, unless related to a farm. Note that the filing provisions of this Article do not apply to instruments (see Section 9-304).

If the Third Alternative subsection (1) is adopted, then local filing, in addition to the central filing, is required in all the cases stated in the preceding paragraph, with respect to any debtor whose places of business within the state are all within a single county (township, etc.) or a debtor who is not engaged in business. The last event test stated in Section 9-103(1) (b) and Comment thereto applies to determine whether local filing is required under the present section, as well as to determine in which state filing is required.

In states where the arguments for a completely centralized set of files (except for fixtures) prevail, the First Alternative subsection (1) should be adopted. That alternative provides for exclusive central filing of all security interests except those in fixtures.

5. When a secured party has in good faith attempted to comply with the filing requirements but has not done so correctly, subsection (2) makes his filing effective in so far as it was proper, and also makes it good for all collateral covered by the financing statement against any person who actually knows the contents of the improperly filed statement. The subsection rejects the occasional decisions that an improperly filed record is ineffective to give notice even to a person who knows of it. But if the Third Alternative subsection (1) is adopted, the requirements of paragraph (1) (c) are not complied with unless there is filing in both offices specified; filing in only one of two required places is not effective except as against one with actual knowledge of the contents of the defective financing statement.

6. Subsection (3) deals with change of residence or place of business or the location or use of the goods *after* a proper filing has been made. The subsection is important only when local filing is required, and covers only changes between local filing units in the state. For changes of location between states see Section 9-103(1) (d).

Subsection (3) is presented in alternative forms. Under the first, no new filing is required in the county to which the collateral has been removed. Under alternative subsection (3) the original filing lapses four months after the change in location; this is basically the same rule that is applied by Section 9-103(1) (d) to the case of collateral brought into the state subject to a security interest which attached elsewhere.

7. The usual filing rules do not apply well for a transmitting utility (defined in Section 9-105). Many pre-Code statutes provided special filing rules for railroads and in some cases for other public utilities to avoid the requirements for filing with legal descriptions in every county in which such debtors had property. The Code recreates and broadens these provisions by subsection (5) of this section, which provides that for transmitting utilities the filing need only be in the office of the Secretary of State. The nature of the debtor will inform persons searching the record as to where to make a search.

Cross References:

Sections 9-302, 9-304 and 9-307(2).
Point 2: Section 9-313.
Point 6: Section 9-103(3).
Point 7: Sections 9-402(5), 9-403(6).

Definitional Cross References:

"Account". Section 9-106.
"Collateral". Section 9-105.
"Consumer goods". Section 9-109.
"Debtor". Section 9-105.
"Equipment". Section 9-109.
"Farm products". Section 9-109.
"Financing statement". Section 9-402.
"Fixture filing". Section 9-313.
"Good faith". Section 1-201.
"Goods". Section 9-105.
"Knowledge". Section 1-201.
"Person". Section 1-201.
"Secured party". Section 9-105.
"Security interest". Section 1-201.
"Signed". Section 1-201.
"Transmitting utility". Section 9-105.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, deleted "contract rights" preceding "or general intangibles" near the beginning of paragraph (1)(a), inserted "growing or to be grown" and deleted "on which the crops are growing or to be grown" following "the land" near the end of that paragraph, rewrote paragraph (1)(b), deleted "If collateral is brought into this State from another jurisdiction" at the beginning of subsection (4) and added subsection (5).

Legal Periodicals. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

CASE NOTES

The requirement of perfection of security interests is relevant only to third-party priority claims and not to disputes between the secured party and the debtor. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978), aff'd in part, rev'd in part on other grounds, 296 N.C. 357, 250 S.E.2d 250 (1979).

Dual Filing Required for Farm Goods. — In order to perfect a security interest in farm products, crops, and equipment used in farming operations from subsequently acquired rights of third parties, the secured party must file a financing statement in the county of the debtor's residence and also in the county where the land on which the crops are growing, or are to be grown, is located. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Cited in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

OPINIONS OF ATTORNEY GENERAL

Perfection of Security Interest in Motor Vehicle. — See Opinion of Attorney General to Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 446 (1969).

§ 25-9-402. Formal requisites of financing statement; amendments; mortgage as financing statement.

(1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, 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, the statement must indicate that the collateral is or includes crops and must contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or when the financing statement is filed as a fixture filing (G.S. 25-9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this State.

(2) A financing statement which otherwise complies with subsection (1) is sufficient when it is signed by the secured party instead of the debtor if 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, or when the debtor's location is changed to this State. Such a financing statement must state that the collateral was brought into this State or that the debtor's location was changed to this State under such circumstances; or

(b) proceeds under G.S. 25-9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral; or

(c) collateral as to which the filing has lapsed; or

(d) collateral acquired after a change of name, identity or corporate structure of the debtor (subsection (7)).

(3) A form substantially as follows is sufficient to comply with subsection (1):

Name of debtor (or assignor) . . . . . .

Address . . . . . .

Name of secured party (or assignee) . . . . . .

Address . . . . . .

1. This financing statement covers the following types (or items) of property:

(Describe) . . . . . .

2. (If collateral is crops) The above described crops are growing or are to be grown on:

(Describe Real Estate) . . . . . .

3. (If applicable) The above goods are to become fixtures on * . . . . . .

* Where appropriate substitute either 'The above timber is standing on . . .' or 'The above minerals or the like (including oil and gas) or accounts will be financed at the wellhead or minehead of the well or mine located on . . .'

(Describe Real Estate) . . . . . .

(If the debtor does not have an interest of record)

The name of a record owner is . . . . . .

4. (If products of collateral are claimed) Products of the collateral are also covered.

(use whichever is applicable) . . . . . Signature of Debtor (or Assignor)

. . . . . Signature of Secured Party (or Assignee)

(4) A financing statement may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment. In this article, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

(5) A financing statement covering timber to be cut or covering minerals of the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or a financing statement filed as a fixture filing (G.S. 25-9-313) must contain a description of the real estate. If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner. A financing statement filed as a fixture filing (G.S. 25-9-313) must bear the statement "Collateral is or includes fixtures" or its substantial equivalent or have checked the appropriate box identifying "FIXTURES." If a copy of a security agreement is filed as a financing statement, 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."

(6) A mortgage or deed of trust is effective as a financing statement filed as a fixture filing from the date of its recording if

(a) the goods are described in the mortgage or deed of trust by item or type; and

(b) the goods are or are to become fixtures related to the real estate described in the mortgage or deed of trust; and

(c) the mortgage or deed of trust complies with the requirements for a financing statement in this section; and

(d) the mortgage or deed of trust is duly recorded in the real estate records. Such a mortgage or deed of trust shall not be indexed or filed in the Uniform Commercial Code files. No fee with reference to such a mortgage or deed of

trust is required other than the regular recording and satisfaction fees with respect to the mortgage or deed of trust.

(7) A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners. Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.

(8) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

(9) The Secretary of State shall have the authority to promulgate, issue and prescribe such financing statement forms and such other forms as he deems necessary to be used as standard forms for any filing contemplated by any section of 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; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Sections 13(3), 13(4), Uniform Trust Receipts Act.

Purposes:

1. Subsection (1) sets out the simple formal requisites of a financing statement under this Article. These requirements are: (1) signature of the debtor; (2) addresses of both parties; (3) a description of the collateral by type or item.

Where the collateral is crops growing or to be grown or when the financing statement is filed as a fixture filing (Section 9-313) or when the collateral is timber to be cut or minerals or the like (including oil and gas) financed at wellhead or minehead or accounts resulting from the sale thereof, the financing statement must also contain a description of the lands concerned. On description generally, see Section 9-110 and Comment 5 to the present section. An important distinction must be drawn, however, between the function of the description of land in reference to crops and its function in the other cases mentioned. For crops it is merely part of the description of the crops concerned, and the security interest in crops is a Code security interest, like the pre-Code "crop mortgage" which was a *chattel* mortgage. In contrast, in the other cases mentioned the function of the description of land is to have the financing statement filed in the county where the land is situated and in the realty records, as distinguished from the chattel records. Subsection (3) suggests a form which complies with the statutory requirements and makes clear that for the types of collateral mentioned other than crops, the financing statement containing a description of the land concerned is to go in the realty records. Note also subsection (5) on the adequacy of the description of land where the filing is to be in the real estate records. See also Section 9-403(7) on the indexing of these filings in the real estate records.

A copy of the security agreement may be filed in place of a separate financing statement, if it contains the required information and signature.

2. This section adopts the system of "notice filing" which proved successful under the Uniform Trust Receipts Act. What is required to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. Notice filing has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it

obviates the necessity of refiling on each of a series of transactions in a continuing arrangement where the collateral changes from day to day. Where other types of collateral are involved, the alternative procedure of filing a signed copy of the security agreement may prove to be the simplest solution. Sometimes more than one copy of a financing statement or of a security agreement used as a financing statement is needed for filing. In such a case the section permits use of a carbon copy or photographic copy of the paper, including signatures.

However, even in the case of filings that do not necessarily involve a series of transactions the financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the description of collateral in the financing statement is broad enough to encompass them. Similarly, the financing statement is valid to cover after-acquired property and future advances under security agreements whether or not mentioned in the financing statement.

3. This section departs from the requirements of many pre-Code chattel mortgage statutes that the instrument filed be acknowledged or witnessed or accompanied by affidavits of good faith. Those requirements did not seem to have been successful as a deterrent to fraud; their principal effect was to penalize good faith mortgages who had inadvertently failed to comply with the statutory niceties. They are here abandoned in the interest of a simplified and workable filing system.

4. Subsection (2) allows the secured party to file a financing statement signed only by himself where the filing is required by any of the events listed, each of which occurs after the commencement of the financing, and therefore under circumstances where the cooperation of the debtor is not certain. Section 9-401(3), alternative provision, contains similar permission on removal between counties in this state. The secured party should not be penalized for failure to make a timely filing by reason of difficulty in procuring the signature of a possibly reluctant or hostile debtor. Financing statements filed under this subsection must explain the circumstances under which they are filed with the signature of the secured party rather than that of the debtor.

In contrast to the signatures on original financing statements, an amendment to a financing statement must be signed by both parties, to preclude either from adversely affecting the interests of the other.

The reference in subsection (4) to an amendment which "adds collateral" refers to additional types of collateral. A security interest on additional units of a type of collateral already described can be created under an after-acquired property clause or a new security agreement. See Comment 5 to Section 9-204. On priorities in such cases see Section 9-312 and Comments thereto.

5. A description of real estate must be sufficient to identify it. See Section 9-110. This formulation rejects the view that the real estate description must be by metes and bounds, or otherwise conforming to traditional real estate practice in conveyancing, but of course the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test is that a description of real estate must be sufficient so that the fixture financing statement will fit into the real estate search system and the financing statement be found by a real estate searcher. Optional language has been added by which the test of adequacy of the description is whether it would be adequate in a mortgage of the real estate. As suggested in the Note, more detail may be required if there is a tract indexing system or a land registration system.

Where the debtor does not have an interest of record in the real estate, a fixture financing statement must show the name of a record owner, and Section 9-403(7) requires the financing statement to be indexed in the name of that owner. Thus the fixture financing statement will fit into the real estate search system.

6. A real estate mortgage may provide that it constitutes a security agreement with respect to fixtures (or other goods) in conformity with this Article. Combined mortgages on real estate and chattels are common and useful for certain purposes. This section goes further and makes provision that the recording of the real estate mortgage (if it complies with the requirements of a financing statement) shall constitute the filing of a financing statement as to the fixtures (but not, of course, as to the other goods). Section 9-403(6) makes the usual five-year maximum life for financing statements inapplicable to real estate mortgages which operate as financing statements under Section 9-402(6), and they are effective for the duration of the real estate recording.

Of course, if a combined mortgage covers chattels which are not fixtures, a regular chattel filing is necessary, and subsection (6) is inapplicable to such chattels. Likewise, filing as a "fixture filing" provided in Section 9-401 does not apply to true chattels.

7. Subsection (7) undertakes to deal with some of the problems as to who is the debtor. In the case of individuals, it contemplates filing only in the individual name, not in a trade name. In the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners, and not in any

other trade names. Trade names are deemed to be too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system. However, provision is made in Section 9-403(5) for indexing in a trade name if the secured party so desires.

Subsection (7) also deals with the case of a change of name of a debtor and provides some guidelines when mergers or other changes of corporate structure of the debtor occur with the result that a filed financing statement might become seriously misleading. Not all cases can be imagined and covered by statutes in advance; however, the principle sought to be achieved by the subsection is that after a change would be seriously misleading, the old financing statement is not effective as to new collateral acquired more than four months after the change, unless a new appropriate financing statement is filed before the expiration of the four months. The old financing statement, if legally still valid under the circumstances, would continue to protect collateral acquired before the change and, if still operative under the particular circumstances, would also protect collateral acquired within the four months. Obviously, the subsection does not undertake to state whether the old security agreement continues to operate between the secured party and the party surviving the corporate change of the debtor.

8. Subsection (7) also deals with a different problem, namely whether a new filing is necessary where the collateral has been transferred from one debtor to another. This question has been much debated both in pre-Code law and under the Code. This Article now answers the question in the negative. Thus, any person searching the condition of the ownership of a debtor must make inquiry as to the debtor's source of title, and must search in the name of a former owner if circumstances seem to require it.

9. Subsection (8) is in line with the policy of this Article to simplify formal requisites and filing requirements and is designed to discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged themselves. As an example of the sort of reasoning which this subsection rejects, see General Motors Acceptance Corporation v. Haley, 329 Mass. 559, 109 N.E.2d 143 (1952).

Cross References:

Point 1: Section 9-110.
Point 2: Section 9-208.
Point 4: Sections 9-103, 9-306 and 9-401(3).
Point 5: Section 9-110.
Point 6: Section 9-403(6).
Point 7: Section 9-403(8).
Point 8: Section 9-311.

Definitional Cross References:

"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Fixture". Section 9-313.
"Fixture filing". Section 9-313.
"Goods". Section 9-105.
"Party". Section 1-201.
"Proceeds". Section 9-306.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.
"Signed". Section 1-201.
"Transmitting utility". Section 9-105.

Effect of Amendments. — The 1969 amendment, effective at midnight June 30, 1969, deleted references to "record lessee" and made other changes in subsections (1) and (3) as they stood before the 1975 amendment and added present subsection (9).

The 1975 amendment, effective July 1, 1976, rewrote this section.

CASE NOTES

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.

This section adopts a system of notice filing. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Sample Form in Subsection (3). — Subsection (3) of this section sets out a form which, if substantially followed, will comply with the requirements for a financing statement. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

The Code distinguishes between a security agreement and a financing statement. The security agreement is a writing which (1) creates or provides for a security interest; (2) contains a description of the collateral, plus a description of the land involved when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut, and (3) is signed by the debtor. The financing statement is a writing which (1) contains the signature and addresses of both the debtor and creditor and (2) a description of the collateral plus a description of the land involved when the financing statement covers crops growing or to be grown or goods which are or are to become fixtures. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement does not ordinarily create a security interest; it merely gives notice that one is or may be claimed. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement which does no more than meet the requirements of this section will not create a security interest in the debtor's property. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement may double as a security agreement if it contains appropriate language which grants a security interest. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Although the Code contemplates the execution of two separate writings, it does not prohibit the combination of a security agreement and financing statement. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Where the financing statement contains language clearly manifesting the debtor's intent to grant, create, and provide for a security interest, bears his signature, describes the obligation secured, the collateral subject to the security interest, and the land involved, the financing statement meets the requirements of an enforceable security agreement and serves the double purpose. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

If the financing statement contains the elements for a security agreement in addition to those for the financing statement, it would serve as the security agreement. The additional elements would be (1) something to indicate agreement; (2) a statement of the obligation or obligations secured; and, (3) provision for or creation of the security interest. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Although the financing statement need only be a skeletonic statement that the parties intend to engage in future transactions, which may never be consummated, subsection (1) of this section specifically provides that "a copy of the security agreement is sufficient as a financing statement" if it contains the required information and is signed by both parties. There is no sound reason why a financing statement may not also serve as a security agreement if it meets the requirements of § 25-9-105(1)(h) and § 25-9-203(1)(b). Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Financing Statement Sufficient to Provide Security Interest. — Where the financing statement declared that it "covers the following type of collateral: (all crops now growing or to be planted on 5 specified farms) same securing note for advance money to produce crops for the year 1969," and the note contained the statement that it "is secured by Uniform Commercial Code financing statement of North Carolina," the financing statement and the note manifested defendant's intent to create in plaintiff a security interest in the described collateral and he did, in fact, provide for such interest when he stated that the crops described therein secured the note for money advanced to produce these crops. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Application of Definition of "Signed" in § 25-1-201 to Financing Statements. — In cases dealing with the debtor's signature on financing statements, the courts should apply the liberal definition of "signed" in § 25-1-201(39) with caution. Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510, cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

Typed Name on Financing Statement Not Signature. — Where there is nothing whatsoever on the face of a financing statement to suggest that the debtor "adopted" the typed name as his signature, the debtor has not signed the financing statement as required by this section, and that financing statement is ineffective. Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510, cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

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

(1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this article.

(2) Except as provided in subsection (6), or in article 12 of chapter 44, a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five-year period, whichever occurs later. Upon lapse the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

(3) A continuation statement may be filed by the secured party within six months prior to the expiration of the five-year period specified in subsection (2). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse. The filing officer shall so arrange matters by physical annexation of financing statements to continuation statements or other related filings, or by other means, that if he physically destroys the financing statements of a period more than five years past, those which have been continued by a continuation statement or which are still effective under subsection (6) shall be retained. Any continuation statement which is not filed in accordance with the requirements set forth herein and during the stated time periods set forth above shall be invalid.

(4) A filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition the filing officer shall index the statement according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.

(5) The uniform fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for an original financing statement or for a continuation statement shall be four dollars ($4.00) for an approved statutory form statement as prescribed in G.S. 25-9-402 when printed on a standard-size form approved by the Secretary of State, and for all other statements, a five dollar ($5.00) minimum charge for up to and including three pages and one dollar ($1.00) per page for all over three pages. There shall be an additional fee of two dollars ($2.00) for each financing statement and continuation statement subject to subsection (5) of G.S. 25-9-402.

(6) A real estate mortgage which is effective as a fixture filing under subsection (6) of G.S. 25-9-402 remains effective as a fixture filing until the mortgage is redeemed or satisfied of record or its effectiveness otherwise terminates as to the real estate.

(7) When a financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or is filed as a fixture filing, the filing officer, in addition to complying with subsection (4) of this section, shall:

(a) index the statements in the Uniform Commercial Code index to financing statements so as to reflect the name of any record owner given in the statement. When the debtor is not the record owner, the filing officer 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 filing officer shall make one index entry in the name of the debtor and shall stamp or print conspicuously beneath his surname the legend, "RECORD OWNER." The filing officer shall also:

(b) index the statements in the real estate indexes under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described, and, to the extent that the law of this State provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description in the same fashion as if the financing statement were a mortgage of the real estate described. (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, ss. 2, 4; c. 196, s. 2; 1955, c. 386, ss. 1, 2; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170; 1973, c. 1316, s. 1; 1975, c. 862, s. 7; 1977, cc. 156, 295.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:

Sections 13(3), 13(4), Uniform Trust Receipts Act; Section 10, Uniform Conditional Sales Act.

Purposes:

1. Prior law was not always clear whether a mortgage filed for record gave constructive notice from the time of presentation to the filing officer or only from the time of indexing Subsection (1) adopts the former position.

2. Prior statutes have usually limited the effectiveness of a filing to a specified period of time after which refiling is necessary. Subsection (2) follows the same policy, establishing five years as the filing period, with an exception for the cases mentioned in subsection (6). Subsection (3) provides for the filing of one or more continuation statements (which need be signed only by the secured party) if it is desired to continue the effectiveness of the original filing.

The theory of this Article is that the public files of financing statements are self-clearing, because the filing officer may automatically discard each financing statement after a period of five years plus the year after lapse required by subsection (3), unless a continuation statement is filed, or the financing statement is still effective under subsection (6). This theory materially lessens the tension that would otherwise exist to have the files cleared by termination statements under Section 9-404. Similarly, a person searching the files need not go back past this five years plus one year; and if the indices are arranged by years, he has a limited and defined search problem. The section asks the filing officer to attach financing statements whose life has been continued by continuation statements to the latter statements, so that anything contained in the files of old years can be discarded.

Subsection (6) provides certain special filing rules, namely, filings against transmitting utilities (Section 9-105), for which financing statements are filed in the office of the [Secretary of State]; and real estate mortgages which serve as fixture financing statements and which are filed in the real estate records. In both of these cases the financing statement is valid for the life of the obligations secured. No confusion as to the required scope of search should result, because of the special nature of the filings involved.

3. Under subsection (2) the security interest becomes unperfected when filing lapses. Thereafter, the interest of the secured party is subject to defeat by purchasers and lienors even though before lapse the conflicting interest may have been junior. Compare the situation

arising under Section 9-103(1) (d) when a perfected security interest under the law of another jurisdiction is not perfected in this state within four months after the property is brought into this state.

Thus if A and B both make nonpurchase money advances against the same collateral, and both perfect security interest by filing, A who files first is entitled to priority under Section 9-312(5). But if no continuation statement is filed, A's filing may lapse first. So long as B's interest remains perfected thereafter, he is entitled to priority over A's unperfected interest. This rule avoids the circular priority which arose under some prior statutes, under which A was subordinate to the debtor's trustee in bankruptcy, A retained priority over B, and B's interest was valid against the trustee in bankruptcy. In re Andrews, 172 F.2d 996 (7th Cir. 1949).

4. Subsection (7) makes clear that the filings in real estate records (Sections 9-401 and 9-402(3) and (5)) shall be indexed in the real estate records, where they will be found by a real estate searcher. Where the debtor is not an owner of record, the financing statement must show the name of an owner of record, and the statement is to be indexed in his name. See Sections 9-313(4) (b) and (c); 9-402(3); 9-402(5).

Cross References:

Point 3: Sections 9-103(3), 9-301 and 9-312(5).

Point 4: Sections 9-313(4) (b) and (c), 9-401(1), 9-402(3) and (5), 9-405(2).

Definitional Cross References:

"Debtor". Section 9-105.
"Financing statement". Section 9-402.
"Fixture". Section 9-313.
"Fixture filing". Section 9-313.
"Secured party". Section 9-105.
"Security interest". Section 1-201.
"Transmitting utility". Section 9-105.

Effect of Amendments. — 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 amendment note to § 25-1-201.

The 1969 amendment, effective at midnight June 30, 1969, added former subdivisions (a), (b), (c) and (d) of subsection (4), which were eliminated by the 1975 amendment.

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

The 1973 amendment, effective July 1, 1974, substituted "four dollars ($4.00)" for "two dollars ($2.00)" and "five dollars ($5.00)" for "three dollars ($3.00)" in subsection (5).

The 1975 amendment, effective July 1, 1976, rewrote this section.

The first 1977 amendment, effective July 1, 1977, in subsection (7), inserted "covers timber to be cut or" near the beginning of the introductory language and inserted a colon at the end of the introductory language.

The second 1977 amendment, effective July 1, 1977, added the last sentence of subsection (3).

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

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

A lien by levy pursuant to judgment does not relate back to the filing date of the financing statement when the security interest has become unperfected by the lapse of time under subsection (2). Hassell v. First Pa. Bank, 41 N.C. App. 296, 254 S.E.2d 768 (1979).

Applied in Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972); Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510 (1978).

Cited in Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145 (1978).

OPINIONS OF ATTORNEY GENERAL

A continuation statement must be filed within the six-month period prior to the last date the original financing statement would have been effective. Opinion of Attorney General to Eunice Avers, Register of Deeds, Forsythe County, 46 N.C.A.G. 209 (1977).

Continuation from Last Effective Date of Original Statement. — The financing statement is continued for five years from the last date the original statement would have been effective if no continuation had been filed. Opinion of Attorney General to Eunice Avers,

Register of Deeds, Forsythe County, 46 N.C.A.G. 209 (1977).

§ 25-9-404. Termination statement.

(1) If a financing statement covering consumer goods is filed on or after July 1, 1976, then within one month or within 10 days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must file with each filing officer with whom the financing statement was filed a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. In other cases 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, for each filing officer with whom the financing statement was filed, a termination statement to the effect 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 be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. If the affected secured party fails to file such a termination statement as required by this subsection, or to send such a termination statement within 10 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.

(2) On presentation to the filing officer of such a termination statement he must note it in the Uniform Commercial Code index and also, if the financing statement to be terminated is subject to subsection (5) of G.S. 25-9-402, in the real estate index. The termination statement shall then remain in the file for such period of time as the financing statement or a continuation statement would be effective under the five-year life provided in G.S. 25-9-403, and then may be destroyed. The filing officer shall remove from the files, mark "terminated" and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto. If the filing officer has received the termination statement in duplicate, he shall return one copy of the termination statement to the secured party stamped to show the time of receipt thereof.

(3) There shall be no fee charged for termination statements. (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; 1973, c. 1316, ss. 2, 3; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 12, Uniform Conditional Sales Act.

Purposes:

1. To provide a procedure for noting discharge of the secured obligation on the records and for noting that a financing arrangement has been terminated.

Since most financing statements expire in five years unless a continuation statement is filed (Section 9-403), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods. Because many consumers will not realize the importance of clearing the situation as it appears on file, an affirmative duty is put on the secured party in that case. But many purchase money security interests in consumer goods will not be filed, except for motor vehicles (Section 9-302(1)(d)); and in the case of motor vehicles a certificate of title law may control instead of the provisions of Article 9.

2. This section adds to the usual provisions one covering the problem which arises because

a secured party under a notice filing system may file notice of an intention to make advances which may never be made. Under this section a debtor may require a secured party to send a termination statement when there is no outstanding obligation and no commitment to make future advances.

Cross References:
Point 2: Section 9-402(1).

Definitional Cross References:
"Consumer goods". Section 9-109.
"Debtor". Section 9-105.
"Financing statement". Section 9-402.
"Person". Section 1-201.
"Secured party". Section 9-105.
"Security interest". Section 1-201.
"Send". Section 1-201.
"Value". Section 1-201.
"Written". Section 1-201.

Effect of Amendments. — The 1967 amendment, effective at midnight June 30, 1967, deleted former subsection (4), relating to termination of a financing statement or security agreement by presenting the original statement or agreement or an executed duplicate marked paid and satisfied. See amendment note to § 25-1-201.

The 1969 amendment, effective at midnight June 30, 1969, made changes in fee provisions formerly in subsection (1).

The 1973 amendment, effective July 1, 1974, increased fees formerly required in subsection (1) and repealed former subsection (3), which provided for a uniform fee for filing and indexing a termination statement.

The 1975 amendment, effective July 1, 1976, rewrote this section.

CASE NOTES

Applied in Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510 (1978).

§ 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 financing statement by indication in the financing 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. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in G.S. 25-9-403(4). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be four dollars ($4.00) when submitted on a standard-size form approved by the Secretary of State, and for all other statements a five-dollar ($5.00) 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 part of his rights under a financing statement by the filing in the place where the original financing statement was filed 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 Uniform Commercial Code index of the financing statement, and in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, he shall index in the real

estate index the assignment under the name of the assignor as grantor and, to the extent that the law of this State provides for indexing the assignment of a mortgage under the name of the assignee, he shall index the assignment of the financing statement under the name of the assignee. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of 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 four-dollar ($4.00) minimum charge for up to and including three pages and one dollar ($1.00) per page for all over three pages. When the assignment is of a financing statement subject to subsection (5) of G.S. 25-9-402, there shall be an additional fee of two dollars ($2.00). Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (subsection (6) of G.S. 25-9-402) may be made only by an assignment of the mortgage in the manner provided by the law of the State other than this Chapter.

(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; 1973, c. 1316, ss. 4, 5; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

This section provides a permissive device whereby a secured party who has assigned all or part of his interest may have the assignment noted of record. Note that under Section 9-302(2) no filing of such an assignment is required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor. A secured party who has assigned his interest might wish to have the fact noted of record, so that inquiries concerning the transaction would be addressed not to him but to the assignee (see Point 2 of Comment to Section 9-402). After a secured party has assigned his rights of record, the assignee becomes the "secured party of record" and may file a continuation statement under Section 9-403, a termination statement under Section 9-404, or a statement of release under Section 9-406.

Where a mortgage of real estate is effective as a financing statement filed as a fixture filing (Section 9-402(6)), then an assignment of record of the security interest may be made only in the manner in which an assignment of the mortgage may be made under the local state law.

Cross References:

Sections 9-302(2) and 9-402 through 9-406.

Definitional Cross References:

"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Financing statement". Section 9-402.
"Rights". Section 1-201.
"Secured party". Section 9-105.
"Signed". Section 1-201.
"Written". Section 1-201.

Effect of Amendments. — The 1967 amendment, originally effective Oct. 1, 1967, made a change in the last sentence of subsection (2) as it stood before the 1969 amendment. 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 former last sentences of subsections (1) and (2).

The 1973 amendment, effective July 1, 1974, increased the fees.

The 1975 amendment, effective July 1, 1976, inserted "financing" preceding "statement" in two places in the first sentence of subsection (1) and deleted the former second sentence of subsection (1), which read: "Either the original secured party or the assignee may sign this statement as the secured party." In subsection (2) the amendment inserted "in the place where the original financing statement was filed" near the beginning of the first sentence, rewrote the fourth sentence and added the last sentence.

§ 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. A statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. Upon presentation of such a statement of release 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 three dollars ($3.00) when submitted on a standard-size form approved by the Secretary of State, and for all other statements a four-dollar ($4.00) minimum charge for up to and including three pages and one dollar ($1.00) per page for all over three pages. There shall be an additional fee of two dollars ($2.00) when the statement of release affects a financing statement subject to subsection (5) of G.S. 25-9-402. (1965, c. 700, s. 1; 1967, c. 24, s. 25; 1969, c. 1115, s. 1; 1973, c. 1316, s. 6; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

Like the preceding section, this section provides a permissive device for noting of record any release of collateral. There is no requirement that such a statement be filed when collateral is released (cf. Section 9-404 on Termination Statements). It is merely a method of making the record reflect the true state of affairs so that fewer inquiries will have to be made by persons who consult the files.

If the statement of release is not signed by the secured party of record, the assignment procedure of Section 9-405(2) must be followed.

Cross Reference:
Section 9-404.

Definitional Cross References:
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Financing statement". Section 9-402.
"Secured party". Section 9-105.
"Signed". Section 1-201.

Effect of Amendments. — The 1967 amendment, originally effective Oct. 1, 1967, inserted "per page" near the end of the present fifth sentence. 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 present fifth sentence.

The 1973 amendment, effective July 1, 1974, substituted "three dollars ($3.00)" for "two dollars ($2.00)" and "four dollars ($4.00)" for "three dollars ($3.00)" in the present fifth sentence of the section.

The 1975 amendment, effective July 1, 1976, added the third and the last sentences of the section and inserted "of release" following "statement" near the beginning of the fourth sentence.

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

(1) If the person filing any financing statement, termination statement, statement of assignment or statement of release furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person.

(2) Upon request of any person, the filing officer shall issue his certificate 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 three dollars ($3.00) 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; 1973, c. 1316, s. 7; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. Subsection (1) requires the filing officer upon request to return to the secured party a copy of the financing statement on which the material data concerning the filing are noted. Receipt of such a copy will assure the secured party that the mechanics of filing have been complied with. Note, however, that under Section 9-403(1) the secured party does not bear the risk that the filing officer will not properly perform his duties: under that section the secured party has complied with the filing requirements when he presents his financing statement for filing and the filing fee has been tendered or the statement accepted by the filing officer.

2. Subsection (2) requires the filing officer on request to issue to any person who has tendered the proper fee his certificate as to what filings have been made against any particular debtor and to furnish copies of such filed financing statements. In view of the centralized filing system adopted by this Article (see Section 9-401 and Comment thereto), this provision is of obvious convenience to a person who wishes to know what the files contain but who cannot conveniently consult files located in the state capitol.

Cross References:
Point 1: Section 9-403(1).
Point 2: Section 9-401.

Definitional Cross References:
"Debtor". Section 9-105.
"Financing statement". Section 9-402.
"Person". Section 1-201.
"Secured party". Section 9-105.
"Send". Section 1-201.

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

The 1973 amendment, effective July 1, 1974, increased the uniform fee for a certificate from $2.00 to $3.00 in the second sentence of subsection (2).

The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-408. Financing statements covering consigned or leased goods.

A consignor or lessor of goods may file a financing statement using the terms "consignor," "consignee," "lessor," "lessee" or the like instead of the terms specified in G.S. 25-9-402. The provisions of this part shall apply as appropriate to such a financing statement but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (G.S. 25-1-201(37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing. (1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provisions:
None.

Purposes:

1. Where filing is required under Sections 2-326(3) and 9-114 for a consignment which is not a security interest (Section 1-201(37)), this section authorizes the appropriate adaptations of terminology.

Apart from the rules in Part 4, the rules of this article using the terms "debtor" and "secured party" will not apply to consignments if they are not security interests. Section 9-114 on consignments essentially parallels Section 9-312(3) on inventory priorities, and the latter rule therefore does not apply to consignments. Section 2-326 states the rights of creditors of a consignee who has not filed or otherwise complied with subsection (3), and Section 9-301 on unperfected security interests is therefore not applicable. Section 2-326 and the law of consignments supply rules which are provided by Section 9-311 for security interests and that section is therefore not applicable to consignments. For reasons indicated in the Comment to Section 9-114, Section 9-306 on proceeds is inapplicable to consignments. An equivalent to the protection of a buyer in ordinary course of business against a security interest under Section 9-307(1) is provided against consignments by Section 2-403(2) and (3).

2. If a lease is actually intended as security (Section 1-201(37)), this Article applies in full. But this question of intention is a doubtful one, and the lessor may choose to file for safety even while contending that the lease is a true lease for which no filing is required. This section authorizes filing with appropriate changes of terminology, and without affecting the substantive question of classification of the lease. If the lease is a true lease, none of the provisions of the Article is applicable to the lease as an interest in the chattel. Note, however, that the Article may be applicable to the lease in its aspect as chattel paper. See Section 9-105(b).

Editor's Note. —
Session Laws 1975, c. 862, s. 10, makes the act effective July 1, 1976. The former § 25-9-408, catchlined "Recording of financing statement and security agreement in lieu of filing," was repealed by Session Laws 1967, c. 562, s. 1.

PART 5.
DEFAULT.

§ 25-9-501. Default; procedure when security agreement covers both real and personal property.

(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in G.S. 25-9-207. The rights and remedies referred to in this subsection are cumulative.

(2) After default, the debtor has the rights and remedies provided in this part, those provided in the security agreement and those provided in G.S. 25-9-207.

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (3) of G.S. 25-9-504 and 25-9-505) and with respect to redemption of collateral (G.S. 25-9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:

(a) subsection (2) of G.S. 25-9-502 and subsection (2) of G.S. 25-9-504 insofar as they require accounting for surplus proceeds of collateral;

(b) subsection (3) of G.S. 25-9-504 and subsection (1) of G.S. 25-9-505 which deal with disposition of collateral;

(c) subsection (2) of G.S. 25-9-505 which deals with acceptance of collateral as discharge of obligation;

(d) G.S. 25-9-506 which deals with redemption of collateral; and

(e) subsection (1) of G.S. 25-9-507 which deals with the secured party's liability for failure to comply with this part.

(4) If the security agreement covers both real and personal property, the secured party may proceed under this part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this part do not apply.

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C. S., s. 2488; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 6, Uniform Trust Receipts Act; Sections 16 through 26, Uniform Conditional Sales Act.

Purposes:

1. The rights of the secured party in the collateral after the debtor's default are of the essence of a security transaction. These are the rights which distinguish the secured from the unsecured lender. This section and the following six sections state those rights as well as the limitations on their free exercise which legislative policy requires for the protection not only of the defaulting debtor but of other creditors. But subsections (1) and (2) make it clear that the statement of rights and remedies in this Part does not exclude other remedies provided by agreement.

2. Following default and the taking possession of the collateral by the secured party, there is no longer any distinction between the security interest which before default was non-possessory and that which was possessory under a pledge. Therefore no general distinction is taken in this Part between the rights of a non-possessory secured party and those of a pledgee; the latter, being in possession of the collateral at default, will of course not have to avail himself of the right to take possession under Section 9-503.

3. Section 9-207 states rights, remedies and duties with respect to collateral in the secured party's possession. That section applies not only to the situation where he is in possession before default, as a pledgee, but also, by subsections (1) and (2) of this section, to the secured party in possession after default. Nevertheless the relations of the parties have been changed by default, and Section 9-207 as it applies after default must be read together with this Part. In particular, agreements permitted under Section 9-207 cannot waive or modify the rights of the debtor contrary to subsection (3) of this section.

4. Section 1-102(3) states rules to determine which provisions of this Act are mandatory and which may be varied by agreement. In general, provisions which relate to matters which come up between immediate parties may be varied by agreement. In the area of rights after default our legal system has traditionally looked with suspicion on agreements designed to cut down the debtor's rights and free the secured party of his duties: no mortgage clause has ever been allowed to clog the equity of redemption. The default situation offers great scope for overreaching; the suspicious attitude of the courts has been grounded in common sense.

Subsection (3) of this section contains a codification of this longstanding and deeply rooted attitude: the specified rights of the debtor and duties of the secured party may not be waived or varied except as stated. Provisions not specified in subsection (3) are subject to the general rules stated in Section 1-102(3).

5. The collateral for many corporate security issues consists of both real and personal property. In the interest of simplicity and speed subsection (4) permits, although it does not require, the secured party to proceed as to both real and personal property in accordance with his rights and remedies in respect of the real property. Except for the permission so granted, this Act leaves to other state law all questions of procedure with respect to real property. For example, this Act does not determine whether the secured party can proceed against the real estate alone and later proceed in a separate action against the personal property in accordance with his rights and remedies against the real estate. By such separate actions the secured party "proceeds as to both," and this Part does not apply in either action. But subsection (4) does give him an option to proceed under this Part as to the personal property.

6. Under subsection (1) a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure, outside this Article, which state law may provide. The first sentence of subsection (5) makes clear that any judgment lien which the secured party may acquire against the collateral is, so to say, a continuation of his original interest (if perfected) and not the acquisition of a new interest or a transfer of property to satisfy an antecedent debt. The judgment lien is therefore stated to relate back to the date of perfection of the security interest. The second sentence of the subsection makes clear that a judicial sale following judgment, execution and levy is one of the methods of foreclosure contemplated by subsection (1); such a sale is governed by other law and not by this Article and the restrictions which this Article imposes on the right of a secured party to buy in the collateral at a sale under Section 9-504 do not apply.

Cross References:
Point 2: Section 9-503.
Point 3: Section 9-207.
Point 4: Section 1-201(3).
Point 5: Sections 9-102(1) and 9-104(j).
Point 6: Section 9-504.

Definitional Cross References:
"Agreement". Section 1-201.
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Documents". Section 9-105.
"Goods". Section 9-105.
"Remedy". Section 1-201.
"Rights". Section 1-201.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, substituted "(subsection (3) of G.S. 25-9-504 and 25-9-505)" for "(subsection (1) of § 25-9-505)" near the middle of subsection (3).

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

No Obligation to Take Possession upon Demand of Debtor. — The right of the secured party to take possession of the collateral does not impose an obligation to take possession upon demand of the debtor. North Carolina Nat'l Bank v. Sharpe, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

Applied in Graham v. Northwestern Bank, 16 N.C. App. 287, 192 S.E.2d 109 (1972); Hassell v. First Pa. Bank, 41 N.C. App. 296, 254 S.E.2d 768 (1979).

§ 25-9-502. Collection rights of secured party.

(1) When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under G.S. 25-9-306.

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebted-

ness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. The assignee of accounts, chattel paper, or instruments holds as collateral property which is not only the most liquid asset of the debtor's business but also property which may be collected without any interruption of the business, assuming it to continue after default. The situation is far different from that where the collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore the problems of valuation and identification, present where the collateral is tangible chattels, do not arise so sharply on the assignment of intangibles. Considerations, similar although not identical, apply to assignments of general intangibles, which are also covered by the rule of the section. Consequently, this section recognizes the fact that financing by assignment of intangibles lacks many of the complexities which arise after default in other types of financing, and allows the assignee to liquidate in the regular course of business by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i. e., payment by the account debtor to the assignee, "notification" financing) or indirect (i. e., payment by the account debtor to the assignor, "non-notification" financing). By agreement, of course, the secured party may have the right to give notice and to make collections before default.

2. In one form of accounts receivable financing, which is found in the "factoring" arrangements which are common in the textile industry, the assignee assumes the credit risk — that is, he buys the account under an agreement which does not provide for recourse or charge-back against the assignor in the event the account proves uncollectible. Under such an arrangement, neither the debtor nor his creditors have any legitimate concern with the disposition which the assignee makes of the accounts. Under another form of accounts receivable financing, however, the assignee does not assume the credit risk and retains a right of full or limited recourse or charge-back for uncollectible accounts. In such a case both debtor and creditors have a right that the assignee not dump the accounts, if the result will be to increase a possible deficiency claim or to reduce a possible surplus.

3. Where an assignee has a right of charge-back or a right of recourse, subsection (2) provides that liquidation must be made with due regard to the interest of the assignor and of his other creditor — "in a commercially reasonable manner" (compare Section 9-504 and see Section 9-507(2)) — and the proceeds allocated to the expenses of realization and to the indebtedness. If the "charge-back" provisions of the assignment arrangement provide only for "charge-back" of bad accounts against a reserve, the debtor's claim to surplus and his liability for a deficiency are limited to the amount of the reserve.

4. Financing arrangements of the type dealt with by this section are between business men. The last sentence of subsection (2) therefore preserves freedom of contract, and the subsection recognizes that there may be a true sale of accounts or chattel paper although recourse exists. The determination whether a particular assignment constitutes a sale or a transfer for security is left to the courts. Note that, under Section 9-102, this Article applies both to sales and to security transfers of such intangibles.

Cross References:
Sections 9-205 and 9-306.
Point 3: Sections 9-504 and 9-507(2).
Point 4: Sections 9-102(1) (b) and 9-104(f).

Definitional Cross References:
"Account". Section 9-106.
"Account debtor". Section 9-105.
"Agreement". Section 1-201.
"Chattel paper". Section 9-105.
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Instrument". Section 9-105.
"Notify". Section 1-201.
"Proceeds". Section 9-306.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, deleted "contract rights" following "sale of accounts" in the last sentence of subsection (2).

CASE NOTES

Burden on Secured Party Seeking Deficiency Judgment. — A secured party seeking a deficiency judgment under this section has the burden of establishing compliance with the twin duties of reasonable notification and commercially reasonable disposition. Placing the burden of persuasion on the secured party tends to insure that the deficiency sought has not been unnecessarily enhanced by abuses of the broad discretion accorded the secured party with respect to the disposition of collateral. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Quoted in Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

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

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under G.S. 25-9-504. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 6, Uniform Trust Receipts Act; Sections 16 and 17, Uniform Conditional Sales Act.

Purposes:

Under this Article the secured party's right to possession of the collateral (if he is not already in possession as pledgee) accrues on default unless otherwise agreed in the security agreement. This Article follows the provisions of the earlier uniform legislation in allowing the secured party in most cases to take possession without the issuance of judicial process. In the case of collateral such as heavy equipment, the physical removal from the debtor's plant and the storage of the equipment pending resale may be exceedingly expensive and in some cases impractical. The section therefore provides that in lieu of removal the lender may render equipment unusable or dispose of collateral on the debtor's premises. The authorization to render equipment unusable or to dispose of collateral without removal would not justify unreasonable action by the secured party, since, under Section 9-504(3), all his actions in connection with disposition must be taken in a "commercially reasonable manner".

Cross Reference:
Section 9-504.

Definitional Cross References:
"Action". Section 1-201.
"Collateral". Section 9-105.
"Debtor". Section 9-105.
"Equipment". Section 9-109.
"Rights". Section 1-201.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Legal Periodicals. — For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Cred-

itors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

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).

No Obligation to Take Possession upon Demand of Debtor. — The right of the secured party to take possession of the collateral does not impose an obligation to take possession upon demand of the debtor. North Carolina Nat'l Bank v. Sharpe, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

Right to Take Possession of Collateral Otherwise Exempt from Execution. — The legislature has seen fit to surround the family home with certain protection against the demands of urgent creditors to put it beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid. It has not seen fit to prevent a debtor from "selling" or otherwise transferring an interest in that property to another, thereby giving the other priority of right to possession of the collateral. The constitutional exemption operates against general creditors so as to allow the debtor to retain his most valued $500.00 of property in the face of their executions. It does not operate so as to hinder secured creditors from realizing on the terms of their bargain. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

In the cases of foreclosure of mortgages or of taking possession of collateral after default, no right to possession of property otherwise exempt remains in the debtor who has voluntarily bargained it away. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Debtor divested herself of her right to possession of personal property which might otherwise have been exempt by the terms of her consumer loan contract with her creditor whereby the creditor obtained a security interest in all of her personal property, including her household furnishings. When the debtor defaulted, the creditor had an immediate right to possess all articles in which she had given a security interest. However, this right must be distinguished from any interest which a creditor might seek under an executory waiver of the right to exemption. It has long been held that a debtor cannot be bound by any agreement to waive his exemption in case of levy upon her property. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Quoted in Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

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

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on sales (article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, endorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:

Section 6, Uniform Trust Receipts Act; Sections 19, 20, 21, and 22, Uniform Conditional Sales Act.

Purposes:

1. The Uniform Trust Receipts Act provides that an entruster in possession after default holds the collateral with the rights and duties of a pledgee, and, in particular, that he may sell such collateral at public or private sale with a right to claim deficiency and a duty to account for any surplus. The Uniform Conditional Sales Act insisted on a sale at public auction with elaborate provisions for the giving of notice of sale. This section follows the more liberal provisions of the Trust Receipts Act. Although public sale is recognized, it is hoped that private sale

will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable. In this respect this section follows the provisions of the section on resale by a seller following a buyer's rejection of goods (Section 2-706). Subsection (1) does not restrict disposition to sale: the collateral may be sold, leased, or otherwise disposed of—subject of course to the general requirement of subsection (2) that all aspects of the disposition be "commercially reasonable". Section 9-507(2) states some tests as to what is "commercially reasonable".

2. Subsection (1) in general follows prior law in its provisions for the application of proceeds and for the debtor's right to surplus and liability for deficiency. Under paragraph (1) (c) the secured party, after paying expenses of retaking and disposition and his own debt, is required to pay over remaining proceeds to the extent necessary to satisfy the holder of any junior security interest in the same collateral if the holder of the junior interest has made a written demand and furnished on request reasonable proof of his interest: this provision is necessary in view of the fact that under subsection (4) the junior interest is discharged by the disposition. Since the requirement is conditioned on written demand, it should not result in undue burden on the secured party making the disposition. It should be noted also that under Section 9-112 where the secured party knows that the collateral is owned by a person who is not the debtor, the owner of the collateral and not the debtor is entitled to any surplus.

3. In any security transaction the debtor (or the owner of the collateral if other than the debtor: see Section 9-112) is entitled to any surplus which results from realization on the collateral; the debtor will also, unless otherwise agreed, be liable for any deficiency. Subsection (2) so provides. Since this Article covers sales of certain intangibles as well as transfers for security, the subsection also provides that apart from agreement the right to surplus or liability for deficiency does not accrue where the transaction between debtor and secured party was a sale and not a security transaction.

4. Subsection (4) provides that a purchaser for value from a secured party after default takes free of any rights of the debtor and of the holders of junior security interests and liens, even though the secured party has not complied with the requirements of this Part or of any judicial proceedings. This subsection follows a similar provision in the Uniform Trust Receipts Act and in the section of this Act on resale by a seller (Section 2-706). Where the purchaser for value has bought at a public sale he is protected under paragraph (a) if he has no knowledge of any defects in the sale and was not guilty of collusive practices. Where the purchaser for value has bought at a private sale he must, to receive the protection of paragraph (b), qualify in all respects as a purchaser in good faith. Thus while the purchaser at a private sale is required to proceed in the exercise of good faith, the purchaser at public sale is protected so long as he is not acting in bad faith, and is put under no duty to inquire into the circumstances of the sale.

5. Both the Uniform Trust Receipts Act and the Uniform Conditional Sales Act required a waiting period after repossession and before sale (five days in the Trust Receipts Act, ten days in the Conditional Sales Act). Under subsection (3), the secured party in most cases is required to give reasonable notification of disposition to the debtor unless the debtor has after default signed a statement renouncing or modifying his right to notification of sale.

The secured party must also (except for consumer goods) give notice to any other secured parties who have in writing given notice of a claim of an interest in the collateral. This latter notice must be given before the debtor renounces his rights or before the secured party gives his notification to the debtor. Compare Section 9-505(2). Except for the requirement of notification there is no statutory period during which the collateral must be held before disposition. "Reasonable notification" is not defined in this Article; at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire.

6. Section 19 of the Uniform Conditional Sales Act required that sale be made not more than thirty days after possession taken by the conditional vendor. The Uniform Trust Receipts Act contained no comparable provision. Here again this Article follows the Trust Receipts Act, and no period is set within which the disposition must be made, except in the case of consumer goods which under Section 9-505(1) must in certain instances be sold within ninety days after the secured party has taken possession. The failure to prescribe a statutory period during which disposition must be made is in line with the policy adopted in this Article to encourage disposition by private sale through regular commercial channels. It may, for example, be wise not to dispose of goods when the market has collapsed, or to sell a large inventory in parcels over a period of time instead of in bulk. Note, however, that under subsection (3) every aspect of the sale or other disposition of the collateral must be commercially reasonable; this specifically includes method, manner, time, place and terms. See

Section 9-507(2). Under that provision a secured party who without proceeding under Section 9-505(2) held collateral a long time without disposing of it, thus running up large storage charges against the debtor, where no reason existed for not making a prompt sale, might well be found not to have acted in a "commercially reasonable" manner. See also Section 1-203 on the general obligation of good faith.

Cross References:

Point 1: Sections 2-706 and 9-507(2).
Point 2: Section 9-112.
Point 3: Sections 9-102(1) (b) and 9-112.
Point 4: Section 2-706.
Point 6: Sections 9-505 and 9-507(2).

Definitional Cross References:

"Account". Section 9-106.
"Agreement". Section 1-201.
"Chattel paper". Section 9-105.
"Collateral". Section 9-105.
"Consumer goods". Section 9-109.
"Contract". Section 1-201.
"Debtor". Section 9-105.
"Financing statement". Section 9-402.
"Gives" notification. Section 1-201.
"Good faith". Section 1-201.
"Goods". Section 9-105.
"Knowledge". Section 1-201.
"Person". Section 1-201.
"Proceeds". Section 9-306.
"Purchaser". Section 1-201.
"Receives" notification. Section 1-201.
"Rights". Section 1-201.
"Sale". Sections 2-106 and 9-105.
"Secured party". Section 9-105.
"Security agreement". Section 9-105.
"Security interest". Section 1-201.
"Send". Section 1-201.
"Term". Section 1-201.
"Value". Section 1-201.
"Written". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, inserted "or lease" and "leasing" near the beginning of subdivision (1)(a), deleted "contract rights" preceding "chattel paper" in subsection (2) and rewrote the former third sentence of subsection (3) as the present third, fourth and fifth sentences.

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For a note on directed verdicts in favor of the party with the burden of proof, see 16 Wake Forest L. Rev. 607 (1980).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

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).

Conclusive Presumption of Commercial Reasonableness Created by Compliance with Part 6. — If the secured creditor disposes

of the collateral in a manner in substantial compliance with Part 6 of this Article, a conclusive presumption of commercial reasonableness is created. ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

But a public sale may be commercially reasonable even though it does not substantially comply with Part 6 of this Article. ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Absent the establishment of the conclusive presumption of commercial reasonableness, under Part 6 of this Article, a question of fact remains as to whether the sale was conducted in a commercially reasonable manner under subsection (3) of this section. ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Section 25-9-507 offers guidance as to what constitutes a "commercially reasonable" disposition of the collateral under § 25-9-504. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

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).

A creditor, when suing for a deficiency, has the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner. ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Creditor Must Prove That Disposition of Collateral was Commercially Reasonable. — In order to recover the deficiency, the creditor must first prove that the disposition of the collateral was commercially reasonable. Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

"Price" is one of the "terms" of the sale within the meaning of subsection (3) of this section. Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

All Elements of Sale Must Be Considered Together. — There may be cases in which the price paid for the collateral will be commercially reasonable even though a higher price could have been obtained at a different time or in a different market. Nor is a price which is slightly inadequate necessarily commercially unreasonable. The trier of fact must consider all the elements of the sale together. Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Effect of Grossly Inadequate Price. — When the debtor offers independent evidence of a gross inadequacy of price, in North Carolina, that sufficiently raises the issue of the commercial reasonableness of the sale to take the case to the jury. Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Price Actually Received as Evidence of Value of Collateral. — Once the secured party makes a prima facie showing that the sale was otherwise "commercially reasonable," then the price he actually receives for the collateral must be accepted as competent evidence of the value of the collateral and, therefore, as competent evidence that the price was "commercially reasonable." Such evidence is sufficient to withstand defendants' motion for a directed verdict and to take the case to the jury. Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Burden of Proving Notice to Debtor. — In actions by a creditor to obtain a deficiency judgment, the burden of proving that notice was properly sent by the creditor to the debtor rests with the creditor. North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978), rev'd on other grounds, 297 N.C. 524, 256 S.E.2d 388 (1979).

Public Sale Held Valid Despite Absence of Other Bidders. — A lender conducted a valid public sale of a repossessed automobile pursuant to a purchase money security agreement, notwithstanding the fact that no third persons bid at the sale, where the lender duly sent notice to the debtor in accord with subsection (3) of this section, and the sale was held as scheduled, at which time any person had the right to enter a bid on the automobile. Under § 25-9-605(1)(a), the sale need not be postponed because of the lack of bidders. Therefore, the transaction did not constitute a mere transfer of collateral under subsection (5) of this section and defendant dealer had no obligation to account to debtor for any surplus proceeds received through its subsequent resale of the automobile. Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238, aff'd, 300 N.C. 366, 266 S.E.2d 658 (1980).

Applied in First Union Nat'l Bank v. Tectamar, Inc., 33 N.C. App. 604, 235 S.E.2d 894 (1977).

Quoted in Graham v. Northwestern Bank, 16 N.C. App. 287, 192 S.E.2d 109 (1972).

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

Cited in North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978); Shields v. Bobby Murray Chevrolet, Inc., 300 N.C. 366, 266 S.E.2d 658 (1980).

§ 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 G.S. 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; 1975, c. 862, s. 7.)

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

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 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 G.S. 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; 1975, c. 862, s. 7.)

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

Effect of Amendments. The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-505. Compulsory disposition of collateral; acceptance of the collateral as discharge of obligation.

(1) If the debtor has paid sixty percent (60%) of the cash price in the case of a purchase money security interest in consumer goods or sixty percent (60%)

of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part a secured party who has taken possession of collateral must dispose of it under G.S. 25-9-504, and if he fails to do so within 90 days after he takes possession, the debtor at his option may recover in conversion or under G.S. 25-9-507(1) on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within 21 days after the notice was sent, the secured party must dispose of the collateral under G.S. 25-9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 23, Uniform Conditional Sales Act.

Purposes:

1. Experience has shown that the parties are frequently better off without a resale of the collateral; hence this section sanctions an alternative arrangement. In lieu of resale or other disposition, the secured party may propose under subsection (2) that he keep the collateral as his own, thus discharging the obligation and abandoning any claim for a deficiency. This right may not be exercised in the case of consumer goods where the debtor has paid 60% of the price or obligation and thus has a substantial equity, and may be exercised in other cases only on notification to the debtor, unless the debtor has signed after default a statement renouncing or modifying his rights under this section, and (except in the case of consumer goods) to any other secured party who has given written notice of a claim of an interest in the collateral. In the latter case, notice must be given before the secured party receives the debtor's renunciation or before he sends his notice to the debtor. The secured party may keep the goods in lieu of sale on failure of anyone receiving notification to object within twenty-one days.

2. When an objection is received by the secured party he must then proceed to dispose of the collateral in accordance with Section 9-504, and on failure to do so would incur the liabilities set out in Section 9-507. In the case of consumer goods where 60% of the price or obligation has been paid the disposition must be made within 90 days after possession taken. For failure to make the sale within the 90-day period the secured party is liable in conversion or alternatively may incur the liabilities set out in Section 9-507.

In the absence of objection the secured party is bound by his notice.

3. After default (but not before) a consumer-debtor who has paid 60% of the cash price may sign a written renunciation of his rights to require resale of the collateral.

Cross References:
Sections 9-504 and 9-507(1).

Definitional Cross References:
"Collateral". Section 9-105.
"Consumer goods". Section 9-109.
"Debtor". Section 9-105.
"Knows". Section 1-201.
"Notice". Section 1-201.
"Person". Section 1-201.
"Purchase money security interest". Section 9-107.
"Receives" notification. Section 1-201.
"Rights". Section 1-201.
"Secured party". Section 9-105.
"Security interest". Section 1-201.
"Send". Section 1-201.
"Signed". Section 1-201.
"Written". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, rewrote the second sentence of subsection (2).

Legal Periodicals. — For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

§ 25-9-506. Debtor's right to redeem collateral.

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under G.S. 25-9-504 or before the obligation has been discharged under G.S. 25-9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:
Section 18, Uniform Conditional Sales Act.

Purposes:

Except in the case stated in Section 9-505(1) (consumer goods) the secured party is not required to dispose of collateral within any stated period of time. Under this section so long as the secured party has not disposed of collateral in his possession or contracted for its disposition, and so long as his right to retain it has not become fixed under Section 9-505(2), the debtor or another secured party may redeem. The debtor must tender fulfillment of all obligations secured, plus certain expenses: if the agreement contains a clause accelerating the entire balance due on default in one installment, the entire balance would have to be tendered. "Tendering fulfillment" obviously means more than a new promise to perform the existing promise; it requires payment in full of all monetary obligations then due and performance in full of all other obligations then matured. If unmatured obligations remain, the security interest continues to secure them as if there had been no default.

Under Section 9-504 the secured party may make successive sales of parts of the collateral in his possession. The fact that he may have sold or contracted to sell part of the collateral would not affect the debtor's right under this section to redeem what was left. In such a case, of course, in calculating the amount required to be tendered the debtor would receive credit for net proceeds of the collateral sold.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, made certain changes in punctuation.

Legal Periodicals. — For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

§ 25-9-507. Secured party's liability for failure to comply with this part.

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of

this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service plus 10 percent (10%) of the principal amount of the debt or the time price differential plus 10 percent (10%) of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

AMENDED OFFICIAL COMMENT

Prior Uniform Statutory Provision:

None.

Purposes:

1. The principal limitation on the secured party's right to dispose of collateral is the requirement that he proceed in good faith (Section 1-203) and in a commercially reasonable manner see Section 9-504. In the case where he proceeds, or is about to proceed, in a contrary manner, it is vital both to the debtor and other creditors to provide a remedy for the failure to comply with the statutory duty. This remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded. This section therefore provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide either that he proceed with the sale or other disposition under specified terms and conditions, or that the sale be made by a representative of creditors where insolvency proceedings have been instituted. The section further provides for damages where the unreasonable disposition has been concluded, and, in the case of consumer goods, states a minimum recovery.

A case may be put in which the liquidation value of an insolvent estate would be enhanced by disposing of all the debtor's property (including that subject to a security interest) in the liquidation proceeding and in which, if a secured party repossesses and sells that part of the property which he holds as collateral, the remainder will have little or no resale value. In such a case the question may arise whether a particular court has the power to control the manner of disposition, although reasonable in other respects, in order to preserve the estate for the benefit of creditors. Such a power is no doubt inherent in a Federal bankruptcy court, and perhaps also in other courts of equity administering insolvent estates. Traditionally it was not exercised where the secured party claimed under a title retention device, such as conditional sale or trust receipt. See In re Lake's Laundry, Inc., 79 F.2d 326 (2d Cir. 1935) and the remarks of Clark, J., concurring, in In re White Plains Ice Service, Inc., 109 F.2d 913 (2d Cir. 1940). It has been held that distinctions in results based on these distinctions in form have been made obsolete by this Article. In re Yale Express System, Inc., 370 F.2d 433 (2d Cir. 1966), 384 F.2d 990 (2d Cir. 1967).

2. In view of the remedies provided the debtor and other creditors in subsection (1) when a secured party does not dispose of collateral in a commercially reasonable manner, it is of great importance to make clear what types of disposition are to be considered commercially reasonable, and in an appropriate case to give the secured party means of getting, by court order or negotiation with a creditors' committee or a representative of creditors, approval of a proposed method of disposition as a commercially reasonable one. Subsection (2) states rules to assist in the determination, and provides for such advance approval in appropriate situations. One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer — a method which in the long run may realize

better average returns since the secured party does not usually maintain his own facilities for making such sales. Such a method of sale, fairly conducted, is recognized as commercially reasonable under the second sentence of subsection (2). However, none of the specific methods of disposition set forth in subsection (2) is to be regarded as either required or exclusive, provided only that the disposition made or about to be made by the secured party is commercially reasonable.

Cross References:

Point 1: Sections 1-203, 9-202 and 9-504.

Definitional Cross References:

"Collateral". Section 9-105.
"Consumer goods". Section 9-109.
"Creditor". Section 1-201.
"Debtor". Section 9-105.
"Knows". Section 1-201.
"Notification". Section 1-201.
"Person". Section 1-201.
"Representative". Section 1-201.
"Rights". Section 1-201.
"Secured party". Section 9-105.
"Security interest". Section 1-201.

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted the section without change.

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

Failure to Dispose of Collateral as Required Raises Presumption of Worth. — Creditor's failure to dispose of the collateral as required raises a presumption that the collateral was worth at least the amount of the debt. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

And places upon the creditor the burden of overcoming such presumption by proving the market value of the collateral by evidence other than the resale price. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Subsection (1) Contemplates Creditor's Right to Deficiency Judgment. — The provision of this section that a debtor has a right to recover from the creditor any loss caused by failure to comply with the Code contemplates the right to deficiency judgment by the creditor who fails to comply with the Uniform Commercial Code provisions in disposing of the collateral. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Creditor's Recovery by Deficiency Subject to Offset by Penalty under Section. — If the debtor asserts damages or penalty against the creditor under this section the creditor's recovery by deficiency is subject to credit or offset by such damages or penalty. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Credit against Debt Where Sale Not Commercially Reasonable. — Where sale is not conducted in a commercially reasonable manner, the debt is to be credited with the amount that reasonably should have been obtained through a sale conducted in a reasonably commercial manner according to the Uniform Commercial Code. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

This section offers guidance as to what constitutes a "commercially reasonable" disposition under § 25-9-504. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Subsection (2) Does Not Give Creditor Unbridled Discretion. — Subsection (2) only prohibits second-guessing the secured party; it does not give him unbridled discretion. Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

"Reasonable Commercial Practices" Necessitate Commercially Reasonable Price. — The sale of a single unit cannot be "in conformity with reasonable commercial practices among dealers" when the sale is for a commercially unreasonable price. In short "reasonable commercial practices" necessitate a commercially reasonable price. Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

But All Elements of Sale Must Be Considered Together. — There may be cases in which the price paid for the collateral will be commercially reasonable even though a higher price could have been obtained at a different

time or in a different market. Nor is a price which is slightly inadequate necessarily commercially unreasonable. The trier of fact must consider all the elements of the sale together. Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Subsection (2) does not make every inadequacy in price, however slight, commercially unreasonable. A truly gross inadequacy in price, however, if established by the evidence and believed by the jury, will support a finding that the sale was not "in conformity with reasonable commercial practices among dealers." Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

But Evidence of Gross Inadequacy Raises Issue of Reasonableness of Sale. — When the debtor offers independent evidence of a gross inadequacy of price, in North Carolina, that sufficiently raises the issue of the commercial reasonableness of the sale to take the case to the jury. Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Applied in First Union Nat'l Bank v. Tectamar, Inc., 33 N.C. App. 604, 235 S.E.2d 894 (1977); Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

§ 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; 1975, c. 862, s. 7.)

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

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 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 compensation 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; 1975, c. 862, s. 7.)

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

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

PART 6.
PUBLIC SALE PROCEDURES.

§ 25-9-601. Disposition of collateral by public sale.

Disposition of collateral by public proceedings as permitted by G.S. 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; 1975, c. 862, s. 7.)

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

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Legal Periodicals. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For a note on directed verdicts in favor of the party with the burden of proof, see 16 Wake Forest L. Rev. 607 (1980).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

Legislative Intent. — To minimize difficulties arising from § 25-9-504(3), the General Assembly has enacted this Part of Article 9. ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Constitutionality of Presumption of Commercial Reasonableness. — There is no merit to the contention of defendants that the presumption of commercial reasonableness created by this section denies them the opportunity to contest the reasonableness of a public sale of collateral by a secured party and thereby deprives them of their property without procedural due process in violation of Art. I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. The mandate of procedural due process contained in the Constitution and in the Fourteenth Amendment applies only to actions by the government which deprive individuals of their fundamental rights. The presumption of commercial reasonableness created by this section does not constitute "state action" in the constitutional sense. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

A Presumption if Commercial Reasonableness In Compliance With U.C.C. — North Carolina has by statute created a conclusive presumption of commercial reasonableness if the secured party substantially complies with part 6 of Article 9 of North Carolina's Uniform Commercial Code. Part 6 of Article 9 [§ 25-9-601, et seq.] of the North Carolina U.C.C. is not a part of the "Official Text of the U.C.C." but is in effect in North Carolina. The procedure therein and the conclusive presumption created by this section appear to be peculiar to North Carolina. Graham v. Northwestern Bank, 16 N.C. App. 287, 192 S.E.2d 109, cert. denied, 288 N.C. 426, 192 S.E.2d 836 (1972); Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976); ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

The public sale of collateral by the secured party is conclusively presumed to be commercially reasonable when the secured party has substantially complied with the procedures set forth in Part 6 notwithstanding allegations by the debtor of inadequate and unreasonably low prices. Graham v. Northwestern Bank, 16 N.C. App. 287, 192 S.E.2d 109, cert. denied, 288 N.C. 426, 192 S.E.2d 836 (1972); Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

Upon determination that the secured party has substantially complied with the procedures in Part 6 of Article 9 of U.C.C., the secured party is entitled to the conclusive presumption

that the sale was commercially reasonable in all aspects. Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

And This Presumption Does Not Violate Due Process. — The provision of this section which provides "any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in this part [Part 6] shall conclusively be deemed to be commercially reasonable in all aspects" does not offend the due process clause of the Fourteenth Amendment to the Constitution of the United States or the due process requirements of N.C. Const., Art. 1, § 19. Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

Prima Facie Showing of Substantial Compliance. — Where there is no perishable property, which would bring § 25-9-604 into operation; or no postponement of the public sale, which would bring § 25-9-605 into operation; or no order restraining or enjoining the public sale, which would bring § 25-9-606 into operation; a showing by the secured party that the contents of the notice of sale were substantially in accord with § 25-9-602, that the notice of sale was posted and mailed substantially in accord with § 25-9-603, and that a public sale was held in accordance with the notice of sale, makes a prima facie showing of substantial compliance with the procedures provided in Part 6 of Article 9 of the Uniform Commercial Code. Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

When Substantial Compliance Is Question of Law. — Upon a prima facie showing of substantial compliance, absent allegations and evidence of a failure to substantially comply with the contents of the notice of sale procedures, or of a failure to substantially comply with the posting and mailing of notice procedures, or of failure to hold a public sale as advertised, it is a question of law for the court whether the secured party has substantially complied with the procedures provided in Part 6 of Article 9 of the Uniform Commercial Code. Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

Commercial Reasonableness a Question of Fact Absent Presumption. — Absent the establishment of the conclusive presumption of commercial reasonableness, under this Part, a question of fact remains as to whether the sale was conducted in a commercially reasonable manner under § 25-9-504(3). ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Quoted in North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978).

§ 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; 1975, c. 862, s. 7.)

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

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Legal Periodicals. — For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

Purpose. — The "Procedures" statutes contained in this part providing for notice have the purpose of enabling the debtor to protect his interest in the collateral by paying the debt, finding a buyer or being present at the sale to bid, so that the collateral is not sacrificed by a sale at less than its true value. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Notice of Public Sale of Securities Complied with this Section. — A notice of public sale of securities pledged as collateral for six notes substantially complied with the requirements of this section where it listed and described all of the securities pledged as collateral for each of the six notes, although one of the security agreements was not referred to in the notice and two of the security agreements were referred to by incorrect dates. Graham v. Northwestern Bank, 16 N.C. App. 287, 192 S.E.2d 109, cert. denied, 288 N.C. 426, 192 S.E.2d 836 (1972).

Cited in ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976); Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101 (1978).

§ 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 the case of consumer goods, no other notification need be sent. In other cases, in addition to mailing a copy of the notice of sale to each debtor, the secured party shall also mail a copy of said notice by registered or certified mail to any other secured party from whom the secured party has received (before sending the notice of sale to the debtor(s)) written notice of a claim of an interest in the collateral.

(4) The time for the posting of the notice of sale and the mailing of the notice required by this section shall be computed so as to exclude the first day of posting and mailing and to include the day on which the sale is to occur. Rule 6 of the North Carolina Rules of Civil Procedure shall not apply. (1967, c. 562, s. 3; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1979, c. 579, s. 1.)

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

Effect of Amendments. — The 1969 amendment, effective at midnight June 30, 1969, rewrote subsection (3).

The 1975 amendment, effective July 1, 1976, rewrote subsection (3).

The 1979 amendment added subsection (4).

Legal Periodicals. — For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

Purpose. — The "Procedures" statutes contained in this part providing for notice have the purpose of enabling the debtor to protect his interest in the collateral by paying the debt, finding a buyer or being present at the sale to bid, so that the collateral is not sacrificed by a sale at less than its true value. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Subsection (2) of this section must be read and construed in conjunction with subsection (3) of § 25-9-504. Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

The notice required under this section is mandatory and is a distinct and separate requirement from the requirement for commercial reasonableness. North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978), rev'd on other grounds, 297 N.C. 524, 256 S.E.2d 388 (1979).

"Actual Address". — An "actual address" of a debtor, as used in this section, is an address where a notice of sale could reasonably be expected to be received by the addressee in the ordinary course of the mails. Whether an address utilized by a creditor is an "actual address" of a debtor is a determination which must be made on the basis of circumstances known to, or which should have been known to, the creditor at the time the notice of sale was mailed. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

No Requirement to Insure Notice Actually Received. — Substantial compliance is the prescribed standard in determining whether the procedures outlined in this section have been followed, and the secured party is not required to insure that the notice of sale is actually received by the debtor. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Effect of Substantial Compliance with Notice Procedures. — If the secured party who seeks a deficiency judgment can establish that he gave notice of a public sale of collateral in a manner which substantially complies with the procedures of Part 6 of Article 9, he is not required to further establish that the sale was commercially reasonable. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Burden of Proving Notice Is on Creditor. — In actions by a creditor to obtain a deficiency judgment, the burden of proving that notice was properly sent by the creditor to the debtor rests with the creditor. North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978), rev'd on other grounds, 297 N.C. 524, 256 S.E.2d 388 (1979).

Judgment N.O.V. Property Granted on Question of Commercial Reasonableness. — In an action to recover a deficiency after a sale of collateral, where the record in the case reveals that plaintiff's evidence is manifestly credible and establishes as a matter of law that plaintiff mailed notice of sale to an "actual address" of the debtors in substantial compliance with this section, judgment n.o.v. for plaintiff on the question of commercial reasonableness was properly granted. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Mailing of Joint Notice to Husband and Wife. — While the better practice would be for the secured party to make separate mailings of notice to each debtor, the mailing of a joint notice to husband and wife at the residence address where they both lived was substantial compliance within the meaning of this section. Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

Quoted in Graham v. Northwestern Bank, 16 N.C. App. 287, 192 S.E.2d 109 (1972).

Cited in Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976); ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976); Harris v. Latta, 298 N.C. 555, 259 S.E.2d 239 (1979).

§ 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; 1975, c. 862, s. 7.)

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

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Legal Periodicals. — For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

Cited in Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101 (1978); North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978).

§ 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; 1975, c. 682, s. 7.)

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

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Legal Periodicals. — For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

Under subdivision (1)(a), the sale need not be postponed because of the lack of bidders. Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238, aff'd, 300 N.C. 366, 266 S.E.2d 658 (1980).

Cited in ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976); Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101 (1978); North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978).

§ 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. 562, s. 3; 1975, c. 862, s. 7.)

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

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Legal Periodicals. — For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

CASE NOTES

Cited in Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101 (1978).

§ 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 G.S. 25-9-504(1) and (2), 25-9-504.1 and 25-9-504.2. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

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

Effect of Amendments. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Legal Periodicals. — For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

ARTICLE 10.
Effective Date and Repealer.

§ 25-10-101. Effective date.

Legal Periodicals. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

CASE NOTES

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); Hall v. Gurley Milling Co., 347 F. Supp. 13 (E.D.N.C. 1972).

Stated in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (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); Billings v. Joseph Harris Co., 290 N.C. 502, 226 S.E.2d 321 (1976).

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

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

CASE NOTES

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); Evans v. Everett, 270 N.C. 352, 183 S.E.2d 109 (1971).

§ 25-10-103. General repealer.

CASE NOTES

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 References. — See amendment note to § 25-1-201.

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

Cross References. — See amendment note to § 25-1-201.

ARTICLE 11.

1975 Amendatory Act — Effective Date and Transition Provisions.

§ 25-11-101. Effective date.

This act shall become effective at 12:01 A.M. on July 1, 1976. (1975, c. 862, s. 8.)

§ 25-11-101.1. Definitions.

(1) As used in this article, "old article 9" means: G.S. 25-1-105, 25-1-201(9), 25-1-201(37), 25-2-107, 25-5-116, and article 9 of chapter 25 of the General Statutes of North Carolina, Uniform Commercial Code, as they are in effect on June 30, 1976, immediately prior to the effective date of this act.

(2) As used in this article, "new article 9" means: G.S. 25-1-105, 25-1-201(9), 25-1-201(37), 25-2-107, 25-5-116, and article 9 of chapter 25 of the General Statutes of North Carolina, Uniform Commercial Code, as said provisions are enacted pursuant to this act, as of July 1, 1976, its effective date. (1975, c. 862, s. 8.)

§ 25-11-102. Preservation of old transition provisions.

The provisions of article 10 of chapter 25 of the General Statutes of North Carolina, Uniform Commercial Code, G.S. 25-10-101 through 25-10-106, thereof shall continue to apply to new article 9, and for this purpose the old article 9 and the new article 9 shall be considered one continuous statute. (1975, c. 862, s. 8.)

OFFICIAL COMMENT

This section may be necessary in states in which the U.C.C. has only recently been effective. It preserves the principle of Section 10-102(2) of the 1962 Code that pre-Code transactions continue to be governed by pre-Code law. A different principle is set forth in this Article 11 for transition problems between the old article 9 and the new article 9, because the changes are not nearly as great. That principle is that the new article 9 governs (with minor exceptions).

§ 25-11-103. Transition to new article 9; general rule.

(1) Transactions validly entered into after midnight on June 30, 1967, and before July 1, 1976, and which were subject to the provisions of old article 9 and which would be subject to this act as amended if they had been entered into after July 1, 1976, and the rights, duties and interests following from such transactions remain valid after the latter date and may be terminated, completed, consummated or enforced as required or permitted by the new article 9.

(2) Security interests arising out of such transactions which are perfected when new article 9 becomes effective shall remain perfected until they lapse as provided in new article 9, and may be continued as permitted by new article 9, except as stated in G.S. 25-11-105. (1975, c. 862, s. 8.)

OFFICIAL COMMENT

This makes the new article 9 applicable to existing security interests, e. g., the revised notice provisions of Part 5 will apply to existing security interests. This would be so even if a 30-day notice period concerning retention of the collateral in lieu of sale were running on the effective date of the new article 9.

Suppose that a security interest attached in State A and the secured party filed in State B and assumed that he had 30 days to have the goods reach State B, in a non-purchase money case, under Section 9-103(3) of the old article 9. Section 9-103(1) (c) of the new article 9 limits the 30-day provision on intended removals to purchase money cases. So long as an ample period of waiting and familiarization is allowed under Section 11-101, this should cause no practical problem.

The "except" clause at the end is necessary because of the possibility that new financing statements would have to be filed in different offices.

§ 25-11-104. Transition provisions on change of requirement of filing.

A security interest for the perfection of which filing or the taking of possession was required under old article 9 and which attached prior to July 1, 1976, but was not perfected shall be deemed perfected on July 1, 1976, if new article 9 permits perfection without filing or authorizes filing in the office or offices where prior ineffective filing was made. (1975, c. 862, s. 8.)

OFFICIAL COMMENT

This covers the case of a purchase money security interest in consumer goods, which would not have had to be filed under the original Code if the goods had not been fixtures. Under the new article 9, the security interest will be perfected without filing, subject to the rights of real estate parties. Section 9-301(1)(d).

This also covers the case of factory or office machinery or replacement consumer goods appliances where the filing of a financing statement under the original Code in the regular chattel files was invalid because the goods were fixtures, but under the new article 9 that filing would be proper.

Under the old article 9 the status of assignments of revenues and similar collateral for governmental obligations was unclear. Section 9-104(e) of the new article 9 will make clear that Article 9 does not apply to these transfers. Section 11-108 of this draft may apply on the theory that the changes made by the new article 9 are considered to be merely declaratory. If this does not dispose of the matter, and if it might sometime be held that an assignment by a municipality had been ineffective for lack of filing, this provision would then apply from the effective date of the new article 9.

§ 25-11-105. Transition provisions on change of place of filing.

(1) A financing statement or continuation statement filed prior to July 1, 1976, which shall not have lapsed prior to July 1, 1976, shall remain effective for the period provided in the old article 9, but not less than five years after the filing.

(2) With respect to any collateral acquired by the debtor subsequent to July 1, 1976, any effective financing statement or continuation statement described in this section shall apply only if the filing or filings are in the office or offices

that would be appropriate to perfect the security interests in the new collateral under new article 9.

(3) The effectiveness of any financing statement or continuation statement filed prior to July 1, 1976, may be continued by a continuation statement as permitted by new article 9, except that if new article 9 requires a filing in an office where there was no previous financing statement, a new financing statement conforming to G.S. 25-11-106 shall be filed in that office.

(4) If the record of a mortgage of, or a deed of trust on, real estate would have been effective as a fixture filing of goods described therein if new article 9 had been in effect on the date of recording the mortgage or deed of trust, the mortgage or deed of trust shall be deemed effective as a fixture filing as to such goods under subsection (6) of G.S. 25-9-402 of the new article 9 on July 1, 1976. (1975, c. 862, s. 8.)

OFFICIAL COMMENT

Subsection (1): All existing financing statements with a duration of less than 5 years are extended to the full 5 years. In the case of transmitting utilities for which a special rule of longer validity had been provided, the special rule will be continued.

Subsection (2) makes clear that all existing financing statements and continuations on the effective date remain valid for the remainder of the five years *as to existing collateral,* even though the appropriate place for filing may have changed under the new rules for accounts, general intangibles, etc. The existing filings also apply to new collateral acquired after the effective date, unless the appropriate filing place is different under the new rules. In that case there will have to be a new filing on the effective date to catch new collateral.

Subsection (3): A continuation statement may be filed after the effective date, but if the appropriate places under the new rules are different, the filing should be a financing statement.

Subsection (4) retroactively validates real estate mortgage recording as fixture filing.

§ 25-11-106. Required refilings.

(1) If a security interest is perfected or has priority when this act takes effect as to all persons or as to certain persons without any filing or recording, and if the filing of a financing statement would be required for the perfection or priority of the security interest against those persons under new article 9, the perfection and priority rights of the security interest continue until three years after July 1, 1976. The perfection will then lapse unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.

(2) If a security interest is perfected when new article 9 takes effect under a law other than chapter 25 of the General Statutes, Uniform Commercial Code, which requires no further filing, refiling or recording to continue its perfection, perfection continues until and will lapse three years after new article 9 takes effect, unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing, or unless under subsection (3) of G.S. 25-9-302 the other law continues to govern filing.

(3) If a security interest is perfected by a filing, refiling or recording under a law repealed by this act which required further filing, refiling or recording to continue its perfection, perfection continues and will lapse on the date provided by the law so repealed for such further filing, refiling or recording unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.

(4) A financing statement may be filed within six months before the perfection of a security interest which would otherwise lapse. Any such

financing statement may be signed by either the debtor or the secured party. It must identify the security agreement, statement or notice (however denominated in any statute or other law repealed or modified by this act), state the office where and the date when the last filing, refiling or recording, if any, was made with respect thereto, and the filing number, if any, or book and page, if any, of recording and further state that the security agreement, statement or notice, however denominated, in another filing office under chapter 25, Uniform Commercial Code, or under any statute or other law repealed or modified by this act is still effective. G.S. 25-9-401 and 25-9-103 determine the proper place to file such a financing statement. Except as specified in this subsection, the provisions of G.S. 25-9-403(3) for continuation statements apply to such a financing statement. (1975, c. 862, s. 8.)

OFFICIAL COMMENT

Subsection (1) covers farm equipment perfected without filing. The three-year period ought to cover most existing transactions. It also applies to equipment trusts, and would appear to allow three years for filing. But generally filing under Article 9 for equipment trusts is excluded by Section 9-302(3), and the old pre-amendment filing under the Interstate Commerce Act will continue to serve the purpose.

Subsection (2) covers transmitting utility statutes and the like which were *outside the Code,* and provided for indefinite duration. It allows three years for refiling. But perfection under a certificate of title law or the like continues to be effective.

Some states dealt with transmitting utilities by *internal amendment* of the Code to permit filing which was good indefinitely. Section 11-105(1) operates to validate those filings indefinitely even though they may not have been in the Secretary of State's office.

Similarly, Section 11-105(1) would preserve the effect of Ohio's present Section 9-403(2), which in effect makes financing statements related to combined real estate and chattel mortgages good for the duration of the real estate mortgage, whether or not the chattels are fixtures.

Subsection (3) covers the case (if any) where a prior transmitting utility provision outside the Code had a filing of limited duration.

Subsection (4) covers a case where an ordinary continuation statement cannot be filed because the original filing was a non-Code filing or was a Code filing in a different filing office. It was thought advisable to use the concept of financing statement rather than the concept of continuation statement for these fact situations.

§ 25-11-107. Transition provisions as to priorities.

Except as otherwise provided in article 11, old article 9 shall apply to any questions of priority if the positions of the parties were fixed prior to July 1, 1976. In other cases questions of priority shall be determined by new article 9. (1975, c. 862, s. 8.)

OFFICIAL COMMENT

Most questions of priority can be broken down to questions between two parties, and the rule is that the new article 9 applies unless the rights of both parties were fixed under the old article 9.

If a creditor acquires knowledge of an unfiled security interest before the effective date of the new article 9, but gets his judgment after the effective date, the rule of the new article 9 governs, since he has no rights until after judgment and levy.

CASE NOTES

Cited in Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510 (1978).

§ 25-11-108. Presumption that rule of law continues unchanged.

Unless a change in law has clearly been made, the provisions of new article 9 shall be deemed declaratory of the meaning of the old article 9. (1975, c. 862, s. 8.)

OFFICIAL COMMENT

This asserts that the new article 9 is declaratory, except where a change is clearly intended. This is an effort to minimize transitional problems.

Chapter 25A.

Retail Installment Sales Act.

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."

---

§ 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.)

Legal Periodicals. — For article discussing the scope of this chapter and its impact on the agreement and performance stages of a consumer credit transaction, see 50 N.C.L. Rev. 767 (1972). For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

CASE NOTES

Cited in State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

§ 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) or, in the case of a mobile home as defined in G.S. 143-145(7), regardless of the amount financed.

(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.

(d) For the purposes of this Chapter, a consumer credit sale shall be deemed to have been made in this State, and therefore subject to the provisions of this Chapter, if the seller offers or agrees in this State to sell to a buyer who is a resident of this State, or if such buyer accepts or makes the offer in this State to buy, regardless of the situs of the contract as specified therein.

Any solicitation or communication to sell, oral or written, originating outside of this State, but forwarded to and received in this State by a buyer who is a resident of this State, shall be deemed to be an offer or agreement to sell in this State.

Any solicitation or communication to buy, oral or written, originating within this State, from a buyer who is a resident of this State, but forwarded to and received by a retail seller outside of this State, shall be deemed to be an acceptance or offer to buy in this State. (1971, c. 796, s. 1; 1979, c. 706, s. 1; 1981, c. 970, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added subsection (d).

The 1981 amendment added at the end of subdivision (5) of subsection (a) "or, in the case of a mobile home as defined in G.S. 143-145(7), regardless of the amount financed."

CASE NOTES

Transaction Held Not Consumer Credit Sale. — A transaction whereby the seller would forbear collection of an amount due from the buyer on an open-end credit plan and reduce interest rates, and the buyer would execute a promissory note to the seller and give the seller a deed of trust on a farm to secure the note was not a "consumer credit sale" within the meaning of this section, but rather constituted a novation of the old agreement. Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

Applied in Commercial Credit Equip. Corp. v. Thompson, 48 N.C. App. 594, 269 S.E.2d 286 (1980).

Cited in General Elec. Credit Corp. v. Ball, 40 N.C. App. 586, 253 S.E.2d 574 (1979).

§ 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 deferment 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.)

CASE NOTES

Cited in State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

§ 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-four percent (24%) per annum where the amount financed is less than one thousand five hundred dollars ($1,500);

(2) Twenty-two percent (22%) 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) Twenty percent (20%) where the amount financed is two thousand ($2,000) or greater, but less than three thousand dollars ($3,000);

(4) Eighteen percent (18%) per annum where the amount financed is three thousand dollars ($3,000) or greater,

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

(c) A finance charge rate not to exceed the higher of the rate established in subsection (b) or the rate set forth below may be imposed in a consumer credit installment sale contract repayable in not less than six installments for a self-propelled motor vehicle:

(1) Eighteen percent (18%) per annum for vehicles one and two model years old;

(2) Twenty percent (20%) per annum for vehicles three model years old;

(3) Twenty-two percent (22%) per annum for vehicles four model years old; and

(4) Twenty-nine percent (29%) per annum for vehicles five model years old and older.

A motor vehicle is one model year old on January 1 of the year following the designated year model of the vehicle.

(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 sixteen percent (16%) 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; 1979, 2nd Sess., c. 1330, ss. 1, 2; 1981, c. 446, ss. 1-3.)

Effect of Amendments. — The 1979, 2nd Sess., amendment deleted "but less than five thousand dollars ($5,000), and" at the end of subdivision (4) of subsection (b), and deleted subdivision (5), which read: "Fourteen percent (14%) per annum where the amount financed is five thousand dollars ($5,000) or greater,".

The 1981 amendments ratified May 25, 1981, and effective 30 days after ratification, increased all finance charge rates in subsection (b) by two percent, and rewrote subsection (c), which formerly provided a rate not to exceed 29% in a consumer credit installment sale contract repayable in not less than six installments for a motor vehicle three model years or older in age where the amount financed did not exceed $1500, with a minimum finance charge of $15.00. The amendment also increased the maximum finance charge rate provided in subsection (d) from 12% to 16%.

Legal Periodicals. — For article calling for a comprehensive federal consumer credit code, see 58 N.C.L. Rev. 1 (1979).

CASE NOTES

Subsection (d) Not Applicable to Novation. — Where the transaction in question was not a "consumer credit sale" under this Chapter but a novation, the restrictions of subsection (d) of this section would not be applicable. Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

§ 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, modifying 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).

(6) Any property which is used for agricultural purposes, if the property sold is to be used in the operation of an agricultural business.

(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.

(d) The provisions of G.S. 24-11(a), limiting the taking of a security interest in property under an open end credit or similar plan, shall not apply to revolving charge account contracts regulated by this Chapter; provided, however, the application of payments rule set out in G.S. 25A-27 shall apply to such contracts; provided further, that in any action initiated by the seller for the possession of such property, a judgment for the possession thereof shall be restricted to commercial units (as defined in G.S. 25-2-105(6)) for which the cash price was one hundred dollars ($100.00) or more. (1971, c. 796, s. 1; 1977, c. 508; c. 789, s. 1.)

Effect of Amendments. — The first 1977 amendment added subdivision (6) to subsection (a).

The second 1977 amendment added subsection (d).

Session Laws 1977, c. 789, s. 2, provides, in part, that the act is intended to clarify existing law.

CASE NOTES

Cited in Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

§ 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 as 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. Preservation of consumers' claims and defenses.

(a) 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 claims or defenses available against the original seller, and the buyer may not waive the right to assert these claims or defenses in connection with a consumer credit sales transaction. Affirmative recovery by the buyer on a claim asserted against an assignee of the seller or other holder of the instrument of indebtedness shall not exceed amounts paid by the buyer under the contract.

(b) Every consumer credit sale contract shall contain the following provision in at least ten-point boldface type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(c) Compliance with the requirements of the Federal Trade Commission rule on preservation of consumer claims and defenses is considered full compliance with this act. (1971, c. 796, s. 1; 1977, c. 921.)

Effect of Amendments. — The 1977 amendment, effective June 30, 1978, deleted "if the debt is secured in whole or in part by a security interest in real property" following "consumer credit sale" in the first sentence of subsection (a), inserted "claims or" preceding "defenses" in two places and "the right to assert" after "buyer may not waive" in the first sentence of subsection (a), rewrote subsection (b), and added subsection (c).

CASE NOTES

Applied in General Elec. Credit Corp. v. Ball, 40 N.C. App. 586, 253 S.E.2d 574 (1979); Commercial Credit Equip. Corp. v. Thompson, 48 N.C. App. 594, 269 S.E.2d 286 (1980).

Cited in ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976).

§ 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 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; 1973, c. 1446, s. 3.)

Effect of Amendments. — The 1973 amendment substituted "or" for "of" in subdivision (3).

§ 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 unpaid, 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; 1977, c. 650.)

Effect of Amendments. — The 1977 amendment substituted "unpaid" for "not yet due" in subdivision (2) of subsection (b).

§ 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.)

CASE NOTES

Cited in State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

§ 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 to be utilized within 10 days in connection with funeral services. (1971, c. 796, s. 1; 1973, c. 672.)

Effect of Amendments. — The 1973 amendment, effective July 1, 1973, inserted "to be" and "within 10 days" in subdivision (5).

§ 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, or which complies with the requirements of the Federal Trade Commission Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales.

(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; 1975, c. 805, s. 1.)

Effect of Amendments. — The 1975 amendment, effective July 1, 1975, added the language beginning "or which complies with" at the end of subsection (a).

§ 25A-40. Form of agreement or offer; statement of buyer's rights.

(a) In a home-solicitation sale the seller must present to the buyer and obtain his signature to a fully completed written agreement or offer to purchase which is in the same language as that principally used in the oral sales presentation and which designates as the date of the transaction the date on which the buyer actually signs and which contains the name and address of the seller, and which contains in immediate proximity to the space reserved for the signature of the buyer in bold face type of a minimum size of 10 points, a statement in substantially the following form:

"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached Notice of Cancellation form for an explanation of this right."

(b) The seller must, in addition to furnishing the buyer with a copy of the contract or offer to purchase, furnish to the buyer at the time he signs the

home-solicitation sale contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the contract and easily detachable, and which shall contain in 10 point bold face type the following information and statements in the same language as that used in the contract:

"Notice of Cancellation

(enter date of transaction)

. . . . . .

(date)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, and payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to . . . . . (name of seller), at . . . . . (address of seller's place of business) not later than midnight of . . . . . (date).

I hereby cancel this transaction.

. . . . . (date)

. . . . . (Buyer's Signature)"

(1971, c. 796, s. 1; 1975, c. 805, s. 2.)

Effect of Amendments. — The 1975 amendment, effective July 1, 1975, rewrote this section.

§ 25A-41. Restoration of down payment; retention of goods.

(a) Except as provided in this section, within 10 business days after a home-solicitation sale has been canceled 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) Repealed by Session Laws 1975, c. 805, s. 3, effective July 1, 1975.

(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; 1975, c. 805, s. 3.)

Effect of Amendments. — The 1975 amendment, effective July 1, 1975, inserted "business" near the beginning of subsection (a) and repealed subsection (c), which related to retention of cancellation fees by the seller.

§ 25A-42. Duties as to care and return of goods; 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 canceled, the buyer must make available to the seller at the buyer's residence in substantially as good condition as received, any goods delivered under the contract or sale, or in the alternative, the buyer may comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. The seller shall within 10 business days of receipt of the buyer's notice of cancellation notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods. If the buyer makes the goods available to the seller and the seller does not pick them up within 20 days of the date of the notice of cancellation, the buyer may retain or dispose of the goods without any further obligation. If the buyer fails to make the goods available to the seller, or agrees to return the goods to the seller and fails to do so, then the buyer shall remain liable for performance of all obligations under the contract.

(b) The buyer has the 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 therefor.

(d) The seller shall not negotiate, transfer, sell, or assign any note, contract, or other evidence of indebtedness arising out of a home-solicitation sale to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased. (1971, c. 796, s. 1; 1975, c. 805, s. 4.)

Effect of Amendments. — The 1975 amendment, effective July 1, 1975, rewrote subsection (a), substituted "the duty" for "a duty" near the beginning of subsection (b), substituted "therefor" for "except the cancellation fee provided in G.S. 25A-41(c)" at the end of subsection (c) and added subsection (d).

§ 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.)

CASE NOTES

Quoted in Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Cited in Brenner v. Little Red School House, Ltd., 302 N.C. 207, 274 S.E.2d 206 (1981).

§ 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.)

CASE NOTES

Cited in State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972); Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977); Marshall v. Miller, 47 N.C. App. 530, 268 S.E.2d 97 (1980).

§ 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, c. 796, s. 3.)

CASE NOTES

Cited in State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Chapter 25B.

Credit.

Article 1.

Credit Rights of Women.

Article 1.

Credit Rights of Women.

§ 25B-1. Equal availability of credit for women.

(a) No married woman shall be denied credit in her own name if her uncommingled earnings, separate property or other assets are such that a man possessing the same amount of uncommingled earnings, separate property or other assets would receive credit.

(b) No unmarried woman shall be denied credit in her own name if her property, earnings or other assets are such that a man possessing the same amount of property, earnings or other assets would receive credit.

(c) For the purposes of this section, "credit" means the obtaining of money, property, labor or services on a deferred-payment basis. (1973, c. 1394, s. 1.)

§ 25B-2. Responsibility of credit-reporting agency to maintain separate credit histories.

A credit-reporting agency shall, upon written request of a married person, identify within any report delivered by the agency, both the separate credit history of each spouse and the credit history of their joint accounts, if such information is on file with the credit-reporting agency. (1973, c. 1394, s. 2.)

§ 25B-3. Right of action to enforce Article.

(a) A married or unmarried woman denied credit in violation of this Chapter shall have a right of action on account of such violation in which she shall be entitled to actual damages, and reasonable attorney's fees in the discretion of the court to be taxed as part of the cost.

(b) Violations of this Chapter may be enjoined by action of the Attorney General brought in behalf of the State pursuant to authority granted in G.S. 114-2. (1973, c. 1394, s. 3.)

§ 25B-4. Granting of credit not otherwise affected.

Nothing contained herein shall be construed to deprive any credit grantor of his right to deny credit or limit its terms based upon its evaluation of the applicant's capability or willingness to repay, or to require any credit grantor to give preferential treatment to any applicant because of sex or marital status. (1973, c. 1394, s. 4.)

Chapter 26.

Suretyship.

§ 26-1. Surety and principal distinguished in judgment and execution.

In the trial of actions upon contracts either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the magistrate in his judgment, shall distinguish the principal and surety, which shall be endorsed on the execution by the clerk of superior court. (1826, c. 31, s. 1; R. C., c. 31, s. 124; Code, s. 2100; Rev., s. 2840; C. S., s. 3961; 1973, c. 108, s. 14.)

Effect of Amendments. — The 1973 amendment substituted "magistrate" for "justice of the peace" and "clerk of superior court" for "clerk or justice of the peace issuing it."

CASE NOTES

Liability of Principal and Surety Limited to Terms of Contract. — The principal and his surety are liable under a contract expressed in definite terms and their liability cannot be carried beyond the fair meaning of those terms. State ex rel. Duckett v. Pettee, 50 N.C. App. 119, 273 S.E.2d 317 (1980).

Surety Held Liable for Face Value Amount of Its Bond. — Where individual defendant as guardian of an incompetent and defendant insurance company as surety executed a bond and where nothing in the language of the bond indicated any intent that the bond be anything other than continuous, the bond clearly went to the entire administration of the estate, not to a single year of the administration and, thus, defendant insurance company's maximum liability over the entire term of guardianship was the face amount of the bond. State ex rel. Duckett v. Pettee, 50 N.C. App. 119, 273 S.E.2d 317 (1980).

§ 26-3. Summary remedy of surety against principal.

Any person who may have paid money for and on account of those for whom he became surety, upon producing to the clerk of superior court, a receipt, and showing that an execution has issued, and he has satisfied the same, and making it appear by sufficient testimony that he has expended any sum of money as the surety of such person, may move the clerk for judgment against his principal for the amount which he has actually paid; a citation having previously issued against the principal to show cause why execution should not be awarded; and should the principal not show sufficient cause, the clerk shall award execution against the principal. (1797, c. 487, s. 1, P. R.; R. C., c. 110, s. 1; Code, s. 2093; Rev., s. 2842; C. S., s. 3963; 1973, c. 108, s. 15.)

Effect of Amendments. — The 1973 amendment inserted "clerk of" preceding "superior court" and deleted "or any justice of the peace having jurisdiction of the same" following "superior court" near the beginning of the section, substituted "clerk" for "court or justice of the peace, as the case may be" near the middle of the section and for "court or justice" near the end of the section and made certain other minor changes in wording.

§ 26-6. Dissenting surety not liable to surety on stay of execution.

Whenever any judgment shall be obtained against a principal and his surety, and the principal debtor shall desire to stay the execution thereon, but the surety is unwilling that such stay shall be had, the surety may cause his dissent thereto to be entered by the judge or clerk, which shall absolve him from all liability to the surety who may stay the same. And the sheriff or other officer, who may have the collection of the debt, shall make the money out of the property of the principal debtor, and that of the surety for the stay of execution, if he can, before he shall sell the property of the surety before judgment. (1829, c. 6, ss. 1, 2; R. C., c. 110, s. 3; Code, s. 2095; Rev., s. 2845; C. S., s. 3966; 1973, c. 108, s. 16.)

Effect of Amendments. — The 1973 amendment deleted "before a justice" following "obtained" near the beginning of the first sentence, substituted "judge or clerk" for "justice" near the end of the first sentence and substituted "sheriff" for "constable" near the beginning of the second sentence.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 15, 1981

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1981 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN

Attorney General of North Carolina