Pennsylvania Annotations

to the

PROPOSED
UNIFORM COMMERCIAL CODE

A

Report

of the

SUBCOMMITTEE ON THE PROPOSED
UNIFORM COMMERCIAL CODE

of the

JOINT STATE GOVERNMENT COMMISSION

of the

GENERAL ASSEMBLY

of the

COMMONWEALTH OF PENNSYLVANIA

SEPTEMBER, 1952

The Joint State Government Commission was created by Act of 1937, July 1, P. L. 2460, as amended 1939, June 26, P. L. 1084; 1943, March 8, P. L. 13, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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INTRODUCTION

Pursuant to House of Representatives Concurrent Resolution No. 77 of the 1951 Session of the General Assembly, the Joint State Government Commission was directed to study and investigate the Proposed Uniform Commercial Code.

In accordance with the Act of 1943, March 8, P. L. 13, Section 1, the Commission created a subcommittee to aid in this study and investigation. Submitted herewith is an interim report consisting of Pennsylvania annotations to the proposed code, prepared under the auspices of a committee of the Pennsylvania Bar Association, and furnished to the Commission by The Honorable Robert E. Woodside, Attorney General, as requested by the subcommittee. In transmitting this material, the Attorney General stated:

> For upwards of ten years the National Conference of Commissioners on Uniform State Laws and the American Law Institute worked painstakingly on the preparation of the Uniform Commercial Code which is now ready for passage by the various state legislatures.
>
> The Pennsylvania Commission on Uniform State Laws has at all times cooperated faithfully and energetically in this work.
>
> The Code is one of the most momentous legal tasks of modern times. Hundreds of thousands of dollars were spent on its preparation and thousands of hours were occupied in conferences and discussions in which not only leaders in the legal profession participated but also many experts in the various fields of commercial transactions with which the Code deals. The Code will replace many uniform acts now on our statute books which have become outmoded through the passage of time and which have ceased to be uniform because of different interpretations of the same language by the courts of different states.
>
> Your sub-committee on Commercial Code some time ago requested the preparation of annotations to the Code calculated to show what changes the passage of the Code would make in the law of Pennsylvania as it now stands. A committee of the Pennsylvania Bar Association had already undertaken such a task and has since completed it. These annotations are presented herewith.
>
> This, too, has been a tedious undertaking involving much research and many hours of difficult work. The annotations will be extremely valuable not only to members of the legislature and to lawyers but also to businessmen, bankers and others who will be affected when the Code becomes a law.
>
> Together with the other Commissioners on Uniform State Laws for Pennsylvania, I am very hopeful that the legislature will enact the Code at the earliest possible date. These annotations will be of great value to many interested persons, and I trust the Joint State Government Commission can see its way clear to print them and make them available for rather wide-spread distribution.

These annotations were prepared under the auspices of the Committee on Work of the American Law Institute of the Pennsylvania Bar Association, acting through a subcommittee consisting of G. Ruhland Rebmann, Jr., chairman; Hon. Thomas J. Baldridge, Hon. Curtis Bok, Hon. Elder W. Marshall, Paul A. Mueller, and Allen Hunter White. Because seven annotators worked independently, the style of presentation and form of citation differ from article to article. The material for Articles 1 and 2 were furnished by John O. Honnold, Jr., of the New York Bar and Associate Professor of Law at the University of Pennsylvania; Articles 3 and 4 by Fairfax Leary, Jr., and Gordon W. Gerber, of the Philadelphia Bar; Article 5 by Noyes Leech, of the Philadelphia Bar and Associate Professor of Law at the University of Pennsylvania; Articles 6 and 9 by Marvin Schwartz, of the Philadelphia and New York Bars; Article 7 by Franklin Poul of the Philadelphia Bar; and Article 8 by Robert W. Valimont of the Philadelphia Bar. Alice H. Frey, of the Philadelphia Bar, acted as editor for the Bar Association Committee.

These Pennsylvania annotations are submitted by the subcommittee of the Joint State Government Commission to assist in the study of the Proposed Uniform Commercial Code.

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Pennsylvania Annotations

to the

PROPOSED UNIFORM COMMERCIAL CODE

TITLE

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Article 1
GENERAL PROVISIONS

Introductory Comment

Article 1, General Provisions, is in part devoted to the definition of terms which are used throughout the various articles of the Uniform Commercial Code, Sec. 1-201. These terms are given legal effect only when they are embodied in the rules of the Code; therefore it did not appear feasible in most cases to attempt separate annotations of the definitions.

Article 1 does lay down a number of general rules which require attention. These include rules for construing the Code which are similar to, but in some instances may modify the Pennsylvania Statutory Construction Act, 46 P.S. § 551. A significant part of this Article of the Code is the provision that a number of its rules may not be varied by contract, Sec. 1-102(3). This Article also lays down rules to determine when Pennsylvania Courts should apply the Code, Sec. 1-105; this part of the Code deserves attention since it would give the Code wider application than would present rules of Conflict of Laws. Also worthy of special attention are rules giving effect to written waivers which would extend the Uniform Written Obligations Act, 33 P.S. § 6; rules which expand the admissibility of documents issued by third parties, Sec. 1-202, beyond the point now permitted under the Uniform Business Records as Evidence Act, 28 P.S. § 916; *cf.* 28 P.S. §§ 63, 107 and 109; and provisions which

expand somewhat the legal effect now given to customs and usages of trade, Sec. 1-205. These and other provisions of the Code are treated in greater detail in the annotations which follow.

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

Sec. 1-101. Short Title.

Sec. 1-102. Purposes; Rules of Construction.

Purposes and Policies. Sub-sections (1) and (2) of the Code state broader purposes and policies than the present uniform acts, which generally state the single objective to "make uniform the law." See, *e. g.* 69 P.S. § 335. But see *accord* § 58 of the Statutory Construction Act of 1937, 46 P.S. § 558 (statutory provisions to be "liberally construed"). On consistency between the Code objectives of "flexibility" and "expansion of commercial practices" and present law, see the annotation to Sec. 1-205, *infra.*

Rules Not Subject to Contract Modification. Under sub-section (3), parts of the Code are made rules of public policy which may not be modified by agreement. Under 3(a) these include "formal requirements" affecting negotiability. This requirement can be considered only in connection with the provisions of the Code which define and to some extent relax present "formal requirements." See Article 3, Commercial Paper, Secs. 3-104 through 3-117. See also Sec. 7-104(1)(b), document of title negotiable "where recognized in overseas trade, if it runs to a named person or assigns"; Sec. 7-305, Destination Bills; Sec. 8-102, definitions of investment "securities" which, *inter alia,* are "commonly dealt in . . . or commonly recognized . . . as a medium for investment"; rights conferred on *bona fide* purchasers of such securities in Sec. 8-301 *et seq.* For conflict in present law on the effect of contract provisions on standards for negotiability see *Brannan's Negotiable Instruments Law* (6th ed. 1938) 111-113; (1929) 78 U.Pa.L.Rev. 258.

The rule of sub-section 3(b) that the rights of a third party may not be curtailed by an agreement to which he is not a party appears consistent with the rule that one promisor may not by subsequent contract affect the rights of other promisors unless authorized to do so. See Restatement, Contracts, § 127. Since the Code rule applies only to "parties" to the agreement it presumably would not affect the rights of beneficiaries of a contract. See Pennsylvania Annotations to Restatement, Contracts, §§ 142, 143. *Cf.* Logan v. Glass, 136 Pa. Super. 221, 7 A. 2d 116, *aff'd* 338 Pa. 489, 14 A. 2d 306 (1939); Brill v. Brill, 282 Pa. 276, 177 Atl. 840 (1925) (attempted discharge of obligation to creditor beneficiary ineffective).

The rule against contract modification applies under sub-section

3(c) to "general obligations" such as "good faith, due diligence, commercial reasonableness and reasonable care." The requirement with respect to "good faith" is consistent with cases which have applied promises conditioned on "satisfaction" to require at least an honest dissatisfaction. See Restatement, Contracts, § 265 and Pennsylvania Annotations. In barring contractual release from reasonable care, the Code follows § 3(b) of the Uniform Warehouse Receipts Act, 6 P.S. § 13. Similarly, the liability of common carriers for negligence may not be limited by a contract. See Stoneboro & C.L.I. Co. v. Lake Shore & M.S.R. Co., 238 Pa. 289, 86 Atl. 87 (1913). *Cf.* Brush v. Lehigh Valley Coal Co., 290 Pa. 322, 138 Atl. 860 (1927) (carrier may contract out of negligence not arising from the "ordinary duties"). But the Code probably modifies present law insofar as the Code bars such contracts outside the "public service" field. *Cf.* Manius v. Housing Authority of City of Pittsburgh, 350 Pa. 512, 39 A. 2d 614 (1944) (public policy favors immunity of housing authority); Lachman Co. v. Hercules Powder Co., 79 F. Supp. 206 (E.D. Pa. 1948) (disclaimer in sales contract barred recovery for negligence). But *cf.* Ebbert v. Philadelphia Electric Co., 330 Pa. 257, 198 Atl. 323 (1938) (broad disclaimer so construed as to allow recovery for negligence). See also Restatement, Contracts §§ 574, 575 and Pennsylvania Annotations.

Use of Official Comments (Sub-section 3(f)): Specific legislative provision for the use of draftsmen's comments is new. But the comments of a commission drafting legislation have been given weight in the absence of such a statutory provision. Tarlo's Estate, 315 Pa. 321, 172 Atl. 139 (1934) (construing Intestate Act of 1917). See, Miles's Estate, 272 Pa. 329, 116 Atl. 300 (1922). See also, Statutory Construction Act of 1937 § 51, 46 P.S. § 551 (reference to legislative history).

Prior Drafts. The rule against use of prior drafts of text and comments in construing the Code appears novel.

Sec. 1-103. Supplementary General Principles of Law Applicable. This section slightly expands §§ 2 and 73 of the Uniform Sales Act, 69 P.S. §§ 21, 334. *Cf.* § 196 of the Negotiable Instruments Law, 56 P.S. § 497.

Sec. 1-104. Construction Against Implicit Repeal. Substantially in accord: Statutory Construction Act of 1937, § 91, 46 P.S. § 591.

Sec. 1-105. Applicability of the Act; Parties' Right to Choose Applicable Law.

Choice of Law. The rules governing the instances in which a Pennsylvania court shall apply the Code are broad—in many instances broader than the "conflicts" rule which otherwise would be applicable. Under sub-section (2) Pennsylvania courts are directed to apply

the Code to sales, letter of credit and document of title transactions offered *or* accepted *or* to be performed *or* completed wholly *or* in part in the state, *or* where it relates to goods delivered *or* shipped *or* received within the State, *or* where the transaction involves specified documents which are issued, *or* delivered, *or* sent *or* received within the State. Except for Article 9 (Secured Transactions) and Article 10 (Bulk Sales) the conflicts rule prescribed by the Code is similarly broad. Contrast §§ 255-258, 312-331, 355, 356, 358-372 of the Restatement, Conflict of Laws, and Pennsylvania Annotations thereto. The Code would make a significant change in present rules of conflict of laws, which are designed to fix a single jurisdiction as the source of the legal rule. Under the Code the forum would apply the Pennsylvania (Code) rule where *any* one of several aspects of the transaction is connected with the state. This broadens the possibility that another forum which has not adopted the Code would apply a different law to the same transaction,—and thereby make the decision turn on choice of the forum.

Agreement as to Choice of Law, Subsection (6), in permitting parties by contract to choose applicable law, the Code resolves a mooted question. See Goodrich, Conflict of Laws (1949) 327 and materials cited at n. 70.

Sec. 1-106. Remedies to be Liberally Administered.

Administration of Remedies: Subsection (1). *Cf.* Statutory Construction Act of 1937, Secs. 58, 59, 46 P.S. §§ 558, 559; Jessup & Moore Paper Co. v. Bryant Paper Co., 297 Pa. 483, 147 Atl. 519 (1929) (liberal damage theory).

Enforceability of Rights by Action: Subsection (2). *Accord:* Uniform Sales Act, Sec. 72, 69 P.S. § 333.

Sec. 1-107. Waiver or Renunciation of Claim or Right after Breach.

This section changes present law. Under it, a release may be effected by a signed writing, which now to be binding must have consideration, seal, or a statement of intent to be bound under the Uniform Written Obligations Act, 33 P.S. § 6: Restatement, Contracts §§ 76, 402, 406 and Pennsylvania Annotations.

Sec. 1-108. Severability.

This is a standard provision on severability. See, *e. g.* Uniform Trust Receipts Act § 19, 68 P.S. § 569 (substantially identical). The Pennsylvania Statutory Construction Act, § 55, 46 P.S. § 555, sets forth a more detailed formula; but no difference in result appears to be intended.

Sec. 1-109. Section Captions.

This section slightly modifies Pennsylvania law. See Statutory Construction Act of 1937, 46 P.S. § 554. ("The headings prefixed

to chapters, articles, sections and other divisions of a law shall not be considered to control but may be used to aid in the construction thereof.")

Part 2. General Definitions and Principles of Interpretation.

Sec. 1-201. General Definitions.

Sec. 1-202. Prima Facie Evidence by Third Party Documents.

This section, which is confined to any "document authorized or required by the contract to be issued by a third party," is less broad than that of the Uniform Business Records as Evidence Act of 1939, 28 P.S. § 91 b, which embraces a "record of an act, condition or event . . . made in the regular course of business at or near the time of the act, condition or event." The most significant modification in the Code is to allow the introduction of third-party documents without verification; the Uniform Business Records as Evidence Act requires "the custodian or other qualified witness" "to testify to its identity." Other Pennsylvania statutes have provided for the introduction of documents of specified types of third parties. *Cf.* 28 P.S. § 63 (use of copies of "accounts kept by any common carrier . . . or other public corporation" which is impartial, but on affidavit of accuracy); 28 P.S. §§ 107, 109 (copies of bank-books, on advance notice, unless the bank is a party). *Cf., infra,* Sec. 2-724. Admissibility of Market quotations.

Sec. 1-203. Obligation of Good Faith.

The general requirement of *"good faith"* may expand present rules concerning performance, but its effect on present law is difficult to determine. In Sec. 1-201, the term "good faith" is defined as "honesty in fact," and to that extent is consistent with Uniform Sales Act § 76, 69 P.S. § 337, which applies the same test. The present law requires use of "good faith" in specific situations. See, *e.g.,* §§ 24, 25, 73 of the Uniform Sales Act, 69 P.S. §§ 202, 203, 334 (bona fide purchase; rules aplicable to fraud govern sales contracts). Also, under well-established rules, fraud provides a basis for various remedies for the innocent party. It is not entirely clear to what extent the Code means to go beyond these current rules.

Sec. 1-204. Time: Reasonable Time; "Seasonably".

This section dealing with action required to be taken within a "reasonable time" relates, *inter alia,* to Sec. 2-607 on buyer's notice to seller of breach with respect to accepted goods. Attention should be called to the provision that requirements for action within a "reasonable" time may be modified by the time set forth in an agreement if the agreed time is not "manifestly unreasonable." This would

modify the principle of § 71 of the Uniform Sales Act, 69 P.S. § 332 whereby if "...any right, duty or liability would arise... by implication of law, it may be negatived or varied by express agreement . . ." But see, in accord with the Code, Rothschild v. Bohm, 26 Luz. 85 (1930). (Contract time limit on notice of breach expanded to give time to discover defect.) In addition, under present law, rules of public policy occasionally override contract provisions. See cases cited under Secs. 2-718 and 2-719 on liquidation of damages and contractual modification of remedies.

Sec. 1-205. Course of Dealing and Usage of Trade.

Course of Dealing. Sec. 71 of the Uniform Sales Act, 69 P.S. § 332, gives effect to the "course of dealing between the parties." See also Electric Reduction Co. v. Colonial Steel Co., 276 Pa. 181, 120 Atl. 116 (1923) (acceptance of earlier shipment). Pennsylvania reinforced this provision by adding to the Uniform Sales Act the following: "All implications from surrounding circumstances, or from the nature of a contract or agreement, shall be regarded as forming part of the contract or agreement."

Usage of Trade. Sec. 71 of the Uniform Sales Act, 69 P.S. § 332, gives effect to "custom, if the custom be such as to bind both parties to the contract or the sale." The Code's test that a usage governs if "*currently recognized* as established" is consistent with decisions that parties must be in a position to be aware of the usage, but is designed to overcome holdings that a custom must be ancient or actually known by traders. See: Everly v. Shannopin Coal Co., 139 Pa. Super. Ct. 165, 11 A. 2d 700 (1940) ("custom . . . must be ancient, that is so old, continued and uniform as to be generally known"). Smuckler v. Di Napoli, 62 Pa. Super. Ct. 570 (1916); Albus v. Toomey, 273 Pa. 303, 116 Atl. 917 (1922); Corcoran v. Chess, 131 Pa. 356, 18 Atl. 876 (1890) (evidence of usage rejected where knowledge could not be assumed); National Bank of Fayette County v. Valentich, 343 Pa. 132, 22 A. 2d 724 (1941) (custom of particular bank not binding).

Relation to Contract. The provisions of subsection (4) that a course of dealing or usage, although controlled by express terms of the contract, may "qualify" the contract may give greater effect than at present to course of dealing or usage. *Cf.* Krehl v. Mosser, 264 Pa. 403, 107 Atl. 834 (1919).

Locale of Usage; Subsection (5). *Accord:* Guillon v. Ernshaw, 169 Pa. 463, 32 Atl. 545 (1895) (Spanish custom applicable to part of agreement to be performed in Spain).

Notice to Prevent Surprise; Subsection (6). No inconsistent Pennsylvania cases have been found. *Cf.* Electric Reduction Co. v. Colonial Steel Co., 276 Pa. 181, 120 Atl. 116 (1923) (notice from pleadings held adequate).

Sec. 1-206. Right to Signed Receipt for Goods or Payment.

A similar provision with respect to a receipt on payment for labor or materials is in existing law. 49 P.S. § 264. The Code would broaden the scope of such a requirement.

Sec. 1-207. Performance or Acceptance Under Reservation of Rights.

The permission to assent to performance under reservation of rights is consistent with § 49 of the Uniform Sales Act, 69 P.S. § 259, under which acceptance of goods with notice of defect "shall not discharge the seller from liability in damages or other remedy. . ." *Cf.* Secs. 2-607(2) and 2-609.

As to effect of words such as "without prejudice," see *accord:* In re Hand, 266 Pa. 277, 109 A. 692 (1920) (words "without prejudice" import an agreement that existing rights shall not be affected by payment).

Sec. 1-208. Option to Accelerate at Will.

This limitation on the effectiveness of contract provisions allowing acceleration of another party's obligation appears novel. The limitation, based on lack of good faith, is a narrow one.

The provision has some analogy to cases in which promises conditional on "satisfaction" have been construed to require reasonableness, or at least an honest dissatisfaction. See Restatement of Contracts § 265 and Pennsylvania Annotations, *accord.*

Article 2
SALES

Introductory Comment

Article 2 of the Code would supplant the Uniform Sales Act, which Pennsylvania adopted in 1915, 69 P.S. § 1 *et seq.* For the most part, the results presently in force under the Uniform Sales Act are preserved, although often the form of expression has been changed.

The principal change in approach has been the drafting of narrow and specific rules, in contrast to the broad and general provisions of the present Uniform Sales Act. Thus, the Uniform Sales Act lays down general rules governing the "property" or "title" in goods; many different consequences, such as risk of loss, replevin, and rights against creditors, may be affected by locating the "title". The Sales Article of the Code, in contrast, provides separate rules for risk, replevin, etc., not dependent on the concept of title. The

Code also provides specific rules to govern several types of transactions, such as C.I.F. and other typical overseas contracts, with which the present act does not deal, Secs. 2-319 through 2-325.

The Code is further expanded to cover a number of principles of contract law affecting sales, such as offer and acceptance, Secs. 2-206-7, delegation and assignment, Sec. 2-210, and definiteness Sec. 2-305.

The most significant changes from present law are the reshaping of the statute of frauds, Sec. 2-201; making certain "firm" offers binding without consideration, Sec. 2-205; the outlawry of "unconscionable" contracts, Sec. 2-302; the placing, in most instances, of risk of loss on the possessor rather than the one having "title," Sec. 2-509; strengthening of the buyer's right to replevy from seller, Sec. 2-716, and to obtain the goods on seller's insolvency, Sec. 2-502, and limiting the privilege of rejection for deviations from the contract which are immaterial or which seller can "cure," Secs. 2-508, 2-608, 2-612, 2-614.

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

Sec. 2-101. **Short Title.**

Sec. 2-102. **Certain Security and Other Transactions Excluded From This Article.**

This section continues the rule of § 75 of the Uniform Sales Act, 69 P.S. § 336, which excludes from coverage transactions which, although in the "*form*" of a sale, are in fact "intended to operate by way of mortgage, pledge, charge, or other security." Since transactions intended to operate "only" as security transactions are excluded, actual sales are subject to this Article of the Code, although a security interest is retained by the seller. *Accord:* Shannon v. Boggs & Buhl, 124 Pa. Super. 1, 187 Atl. 313 (1936) (warranty provisions applied in bailment lease). This section also protects from repeal specialized statutes governing financing such as the Motor Vehicle Sales Finance Act of 1947, 69 P. S. § 601 *et seq.*

Sec. 2-103. **Definitions and Index of Definitions.**

Requires no annotation apart from the sections in which the definitions appear. But note that the general definitions and principles of construction of Article 1, *supra,* are applicable to this Article on Sales. See especially Sec. 1-102, *supra.*

Sec. 2-104. **Definitions. "Merchant"; "Between Merchants"; "Financing Agency".**

Definitions of these terms are necessary to implement the special rules governing sales by "merchants" and transactions "between

merchants" set forth *inter alia,* in Secs. 2-201, 2-205, 2-209, 2-314, 2-326, 2-509, 2-603. On "financing agency" see Secs. 2-506, and 2-512 (1) (b).

The Code goes beyond present law in setting forth special rules for "merchants." However, the Uniform Sales Act in §§ 15 (2), 69 P.S. § 124, and 16 (3), 69 P.S. § 125, applied the warranty of merchantability to purchases from a "seller *who deals* in goods," and also left room to apply mercantile practice by reference to "custom," 69 P.S. § 332, "usage of trade," 69 P.S. § 253, and "the circumstances of the case," 69 P.S. § 255.

Sec. 2-105. Definitions. "Transferability"; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".

(1) ***"Goods."*** Since most of the provisions of Article 2 by their terms relate to transactions involving "goods," the definition of that term fixes the coverage of this Article of the Code.

The Uniform Sales Act in § 76, 69 P.S. § 337, defined "goods" as "all *chattels personal* other than things in action and money." Sec. 2-105 of the Code states the basic rule in terms of "all things *which are movable* at the time of identification" with certain exceptions.

(a) ***Installation; Construction.*** Things "movable at the time of identification" may include contracts for affixing specified objects to real estate, such as installation of identified fixtures. There is some indication that such contracts were not subject to the Uniform Sales Act. See, York Heating & Ventilating Co. v. Flannery, 87 Pa. Super. Ct. 19 (1926) (installation of heating system; sales aspect "incidental"); *Cf.* Farr v. Zeno, 81 Pa. Super. Ct. 509 (Sales Act applied to sale and installation of generator); Commonwealth v. Rust Engineering Co., 55 Dauph. 434 (1945).

(b) ***Things to Be Severed From the Land.*** The Uniform Sales Act laid down the broad rule in § 76, 69 P.S. § 337, that "goods includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." See, Cleveland Wrecking Co. v. Federal Deposit Ins. Corp., 66 F. Supp. 921 (E.D. Pa. 1946) (house to be removed by buyer subject to Pa. Sales Act). The Sales Article of the Code seems slightly narrower in scope. Sec. 2-105 of the Code is similar to the present act in including "growing crops and other identified things attached to realty" but adds the qualification that they be "capable of severance without material harm thereto." However, under Sec. 2-107, which amplifies this section, the Code will apply to contracts where severance would harm the realty, if the seller is to sever; if the buyer is to sever and damage would result, the Act applies only after severance has occurred. On insurable interest in growing crops, etc., see Sec. 2-501, *infra.*

(c) *Intangibles; Money; Stock.* Sec. 76 of the Uniform Sales Act, 69 P.S. § 337, like the Code, excludes "things in action." The Sales Act also excludes "money"; the Code excludes only money "in which the price is to be paid," thereby covering a sale of old coins and the like.

This Article specifically excludes "investment securities" covered in Article 8. The Uniform Sales Act was silent on this point but, apart from its Statute of Frauds provisions, has been held inapplicable. Henderson v. Plymouth Oil Co., 13 F. (2d) 932, (W.D. Pa. 1926) sales of stock have been held subject to warranty provision of Sales Act. See: Butcher v. Newburger *et al.;* 318 Pa. 545 (1935); Cochran *et al.* v. Posey, 148 Pa. Super. Ct. 492 (1942). And in a number of other cases the Sales Act has been applied to securities transactions. See, *e. g.* Ellis v. Greenbaum Sons Inv. Co., 307 Pa. 77, 160 Atl. 702 (1932) (bonds; measure of damages). (It is not clear whether the court thought the Act directly applicable, or applied it by analogy). *Cf.* Minnenberg v. Rash, 79 Pa. Super. Ct. 349 (1922) (contract for advertising space excluded). Contrast the applicability of the Statute of Frauds provision, Sec. 2-201 *infra.*

(2) *Necessity of Identification.* Subsection (2), in barring present sale or appropriation of unidentified goods, is substantially the same as § 17 of the Uniform Sales Act, 69 P.S. § 141. The remaining provisions of the subsection which draw the distinction between identified and "future" goods and preserve as a contract the purported present sale of future goods, are substantially the same as §§ 5(1) and (3) of the Uniform Sales Act, 69 P.S. § 61. See, Carey v. Berwager, 53 York 203 (1940) (title to future goods does not pass though language in present tense); Enterprise Wall Paper Co. v. Nilson Rantoul Co., 260 Pa. 540, 103 Atl. 923 (1918); Conard v. Pennsylvania R. Co., 214 Pa. 98, 63 Atl. 424 (1906) (passage of title delayed until selection); Cohen v. LaFrance Workshop, Inc., 112 Pa. Super. 309, 171 Atl. 90 (1934) (title remains in seller until selection).

(3) *Part Interests; "Fungible" Goods.* Subsections 3 and 4 in substance carry forward the rules of Section 6 of the Uniform Sales Act, 69 P.S. § 62.

Sec. 2-106. Definitions. "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation".

The definitions of these terms articulate specific sections of the Code and do not require separate treatment.

Sec. 2-107. Goods to Be Severed from Realty: Recording.

See annotations to Sec. 2-105, *supra.*

The provision of subsection (2) (b) that contracts for severance

may be recorded as an interest in land is an extension of existing law governing recording insofar as such interests are not included within the phrase "lands, tenements or hereditaments." 21 P.S. §§ 351, 444. Such interests as are included by this phrase must be recorded under existing law or are void as to subsequent *bona fide* purchasers.

Consideration should be given to amending the present recording act to show the wider coverage given by the Code.

Part 2. Form, Formation and Readjustment of Contract.

Sec. 2-201. Formal Requirements: Statute of Frauds.

Sec. 2-201 of the Code in part follows the pattern of the Statute of Frauds provisions of § 4 of the original Act, 69 P.S. § 42, in requiring a writing for the enforcement of sales for $500 or more, subject to exceptions in the event of (a) special manufacture, (b) receipt, or (c) payment. However, in a number of important respects the Code changes present rules.

(1) *The Memorandum.* (a) *Sufficiency.* The Uniform Sales Act did not specify how complete the memorandum must be, referring only to a "note or memorandum in writing of the contract of sale," 69 P.S. § 42. Sec. 2-201 of the Code lays down the general rule that the note or memorandum is sufficient if it indicates *"that a contract for sale has been made"* between the parties. The provision would relax the rule that "a memorandum which merely recognizes that there is a contract does not satisfy the requirements of the statute." Stein v. Camden Fibre Mills, 148 Pa. Super. 348, 25 Atl. (2d) 741 (1942); Vitro Mfg. Co. v. Standard Chem. Co., 291 Pa. 85, 139 Atl. 615 (1927) (terms not stated); Franklin Sugar Refining Co. v. John, 279 Pa. 104, 123 Atl. 685 (1924); Manufacturers' Light & Heat Company v. Lamp, 269 Pa. 517, 112 Atl. 679 (1921). The Code, however, is at least as strict as present law in providing that a contract may not be enforced beyond the quantity stated in the memorandum. *Accord:* Manufacturers' Light & Heat Co. v. Lamp, 269 Pa. 517, 112 Atl. 679 (1921) (duration of gas supply contract not stated—unenforceable).

Except for quantity, under the Code terms of the contract may be absent or may be shown to be incorrectly expressed in the memorandum, if the memorandum satisfies the general test above quoted. The rule of the Code is thus less strict than that declared in a number of decisions. Stein v. Camden Fibre Mills, Inc., 148 Pa. Super. 348, 25 Atl. (2d) 741 (1942) ("the note or memorandum must contain all essential terms of the contract"); Franklin Sugar Refining Co. v. Howell, 274 Pa. 190, 118 Atl. 109 (1922) (unenforceable in absence of a clear statement of price). The results of some of these cases might, however, be reconciled with the Code

on the ground that failure to state a significant term—as the price—could indicate that under subsection (1) there was no intent to execute a contract.

(b) ***Signatures.*** Under the Code, as under present law, signature of an agent is sufficient. See, McGowan v. Lustig-Burgerhoff Co., 93 Pa. Super. Ct. 227 (1928) (authority need not be in writing). *Cf.* Franklin Sugar Refining Co. v. Kane Milling & Grocery Co., 278 Pa. 105, 122 Atl. 231 (1923) (where broker signs for both, agency must be expressly stated). Under Sec. 1-201(39) "signed" includes "any authentication," which may liberalize present law.

(c) ***Failure to Object to Written Confirmation.*** Sec. 4 (1) of the Uniform Sales Act, 69 P.S. § 42, requires that an effective memorandum be "signed by the party to be charged." The Code changes present law if, in a transaction "between merchants," a written confirmation of transaction is received and no objection is given within ten days. No such provision was in the Sales Act, and the Statute of Frauds has been applied even though a confirmation was received without objection. *E. g.,* Stein v. Camden Fibre Mills, 148 Pa. Super. Ct. 348, 25 Atl. (2d) 741 (1942); Sall v. Mueller Brass Co., 361 Pa. 449, 65 A. 2d, 236 (1949).

(2) ***Special Manufacture for the Buyer.*** Sec. 2-201 (3) (a) for the most part follows the Uniform Sales Act which excepted from the Statute of Frauds contracts for goods which are "to be" manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business. See, American Shirt Co. v. Sapper, 70 Pitts. 492 (1922) (buyer's labels placed on shirts). The Uniform Sales Act did not specifically provide that the seller must have actually changed his position under a contract which called for special manufacture. Under the Code, the agreement is enforceable only if the seller has made a "substantial beginning" on manufacture or has made "commitments for their procurement."

(3) ***Admissions in Court.*** The provision of Sec. 2-201 (3) (b) giving effect to admissions in court is not found in the Sales Act but appears to be consistent with Pennsylvania law. *Cf.* Zlotziver v. Zlotziver, 355 Pa. 299, 49 A. 2d 779 (1947) (land; oral agreement enforced where admitted by seller).

(4) ***Payment and Receipt.*** Under present law, as under the Code, acceptance alone is not operative without actual receipt of the goods. Vitro Mfg. Co. v. Standard Chemical Co., 291 Pa. 85, 139 Atl. 615 (1927); Dolan M. Co. v. Marcus, 276 Pa. 404, 120 Atl. 396 (1923) (delivery to carrier not "receipt" by buyer). But under the Uniform Sales Act, the *entire* "contract" is made enforceable on

receipt of only *part*, or payment of *any part* of the price. Jessup & Moore Paper Co. v. Bryant Paper Co., 283 Pa. 434, 129 Atl. 559 (1925); Producers Coke Co. v. Hoover, 268 Pa. 104, 110 Atl. 733 (1920). The Code, in Sec. 2-201(3) (c) allows for such an exception only with respect to *those goods* delivered and accepted, or *those goods for which payment* has been made and accepted. The reasons for this modification are that payment or receipt speaks of a contract with respect only to the goods which have been received or paid for, and that the policy of the Statute of Frauds fully applies to a claim that there was an oral agreement with respect to other goods. *Compare*, as approximating the Code: Franklin Sugar Refining Co. v. Eiseman, 290 Pa. 486, 139 Atl. 147 (1927) (deliveries for successive months treated separately, although acknowledged together); *Cf.* Scott v. Troop Water Heater Co., 345 Pa. 368, 28 Atl. (2d) 922 (1933).

(5) ***Applicability to Choses in Action and Shares of Stock.*** The Statute of Frauds under the present Act applies both to "goods" and to "choses in action." The Statute of Frauds in Sec. 2-201 of the Code applies only to "goods," which under Sec. 2-105 *excludes* "investment securities" and "things in action." Shares of stock have been held to be subject to the Statute of Frauds of the Uniform Sales Act. Guppy v. Moltrup, 281 Pa. 343, 126 Atl. 766 (1924). Staples v. Pan-American Wall Paper and Paint Co., 63 F. (2d) 701 (C.C.A. 3d, 1933) (Pa. statute). Comparable Statute of Frauds provisions for securities are preserved in Article 8 of the Code, Sec. 8-319. However, under the Code, no Statute of Frauds provision would apply to sales of choses in action. In view of the importance of contracts to transfer notes, accounts receivable and the like, this is a significant change. (The omission may have been inadvertent.) On repeal of the Uniform Sales Act, no other Statute of Frauds provision now in force appears to apply to choses in action. See, 33 P.S. § 1-7.

Sec. 2-202. Final Written Expression: Parol or Extrinsic Evidence.

This Section in general is consistent with the "parol evidence" rule under the decisions of this State. In the absence of controlling provision in the Uniform Sales Act, parol evidence is governed by general contract rules. *Cf.* Uniform Sales Act §§ 5, 73, 69 P.S. §§ 41, 334.

(1) ***Writings Protected.*** The rule of the Code that those writings "intended by the parties as a final expression of their agreement" shall "not be contradicted" appears consistent with the prevailing concept of "integration." See Restatement, Contracts, §§ 228 and 237 and Pennsylvania Annotations thereto. See also, Gianni v. R. Russel Co., 281 Pa. 320, 126 Atl. 791 (1924) (parol evidence not admitted to vary terms of contract); Ward v. Zeigler, 285 Pa. 557,

132 Atl. 798 (1926) (parol evidence admissible where writing not the whole contract); Black v. Cinquegrani, 163 Pa. Super. Ct. 157 (1948); Note, (1935) 83 U. of Pa. L. Rev. 500.

(2) ***Explanation of Memorandum By Course of Dealing or Usage of Trade.*** The provision of the Code that a memorandum may be "explained" or "supplemented" by course of dealing or usage of trade appears to be consistent with Pennsylvania cases. See, Weinroth v. Mill End Clothing Co., 84 Pa. Super. Ct. 107 (1924); McGowan v. Lustig-Burgerhoff Co., 93 Pa. Super. Ct. 227 (1928) (meaning of commercial abbreviations); Warner Godfrey Co. v. Sheinman, 273 Pa. 105, 116 Atl. 671 (1922) (width of cloth measured before finishing); Electric Reduction Co. v. Colonial Steel Co., 276 Pa. 181, 120 Atl. 116 (1923) (evidence of usage that "free from tin" means commercially free from tin); Cirotti v. Wassell, 163 Pa. Super. Ct. 292, 295 (1948).

(3) ***Evidence of Consistent Additional Terms.*** The use of parol evidence to "explain" the written agreement is in accord with past decisions. See Pennsylvania Annotations to § 238(a) of the Restatement of Contracts. The cases seem in conflict on the question whether the parol evidence may "supplement" the writing. See Pennsylvania Annotations to §§ 238, 239 and 240 of the Restatement of Contracts, esp. at pp. 107ff. *Cf.* Note, (1935), 83 U. of Pa. L. Rev. 500.

Sec. 2-203. Seals Inoperative.

Under the Code, a seal has no effect. The seal is now given some legal effect in Pennsylvania. For example, a promise under seal need not be supported by consideration. See Restatement of Contracts, § 110, and Pennsylvania Annotations. See also *e. g.* Rynier's Estate, 347 Pa. 471, 32 A. 2d 736 (1943); Central-Penn National Bank v. Tinkler, 351 Pa. 123, 40 A. 2d 389 (1945). *Cf.* Uniform Sales Act § 3, 69 P.S. § 41.

The Code provides other devices reaching some of the results of a seal. Under Sec. 2-205 of the Code legal effect is given to a written statement by a merchant that an offer is firm for a limited period, without regard to consideration or the affixing of a seal. See also Sec. 2-209 (1) on modification of contracts without consideration.

Sec. 2-204. Formation in General.

(1) ***Manner of Formation.*** *Accord* with Subsection (1): Uniform Sales Act § 3, 69 P.S. § 41 (contract for sale "may be made in writing . . . or by word of mouth . . . or may be inferred from the conduct of the parties").

(2) ***Conduct Recognizing Existence.*** *Accord* with Subsection (2): Uniform Sales Act, § 3, 69 P.S. § 41, (contract may be "in-

ferred from the conduct of the parties"). *Cf.* Electric Reduction Co. v. Colonial Steel Co., 276 Pa. 181, 120 Atl. 116 (1923) (construction of contract in light of past dealing).

(3) ***Omitted Terms; Indefiniteness.*** See annotation to Sec. 2-305, Open Price Term, and Sec. 2-311, Options and Cooperation Respecting Performance. *Cf.* Potter v. Leitenberger Mach. Co., 166 Pa. Super. Ct. 31 (1950) (contract for delivery of new car too indefinite; neither price nor time specified).

Sec. 2-205. Firm Offers.

This section giving legal effect for a limited time to a "firm" or "irrevocable" offer signed by a merchant has no counterpart in the Uniform Sales Act, and would modify present rules as to "consideration." See Restatement of Contracts, §§ 35(1), 41 and 47, and Pennsylvania Annotations thereto. *Cf.* Uniform Sales Act § 73, 69 P.S. § 334. However, a comparable result is reached by the Uniform Written Obligations Act, 33 P.S. § 6, under which a written release or promise may be binding, without consideration, if it is expressly stated that the signer intends to be legally bound. See, Central-Penn National Bank v. Tinkler, 351 Pa. 123, 40 A. (2d) 389 (1945) (applying Act to surety transaction). *Cf.* also Real Estate Co. v. Rudolph, 301 Pa. 502, 153 Atl. 438 (1930) (option under seal binding without consideration).

Sec. 2-206. Offer and Acceptance in Formation of Contract.

(1) (a) ***Manner and Medium of Acceptance.*** Subsection (1) (a) in authorizing acceptance by a medium other than that used by the offeror is similar to the rule of Restatement of Contracts, § 66 (acceptance may be the means used by the offeror "or customary in similar transactions"). The Pennsylvania Annotations state there are no Pennsylvania cases. *Cf.* Restatement of Contracts, § 68.

(b) ***Acceptance by Shipment.*** On acceptance by action rather than promise see, *accord,* Restatement of Contracts, § 229 and Pennsylvania Annotations.

(2) ***Non-conforming Shipments.*** On the distinction in subsection (2) between shipments which purport to be an acceptance and those offered as an accommodation see Restatement of Contracts § 63 (a tender of performance requested "operates *as a promise* to render complete performance"). Pennsylvania Annotations notes no cases.

(3) The provision of subsection (3) that "the beginning of a requested performance can be a reasonable mode of acceptance" follows § 45 of the Restatement of Contracts, with the addition of a requirement of notice within a reasonable time. *Cf.* Restatement of Contracts, § 54 (notice required where the offeror "has no adequate

means of ascertaining" that performance has been completed). Pennsylvania Annotations to § 45 indicate that in charitable subscription cases Pennsylvania cases are in accord. See also annotations to § 54; and particularly Ross v. Leberman, 298 Pa. 574, 148 Atl. 858 (1930) (notice not necessary where party, as stockholder, could have ascertained facts).

Sec. 2-207. Additional Terms in Acceptance or Confirmation.

(1) ***Contract Closed in Spite of Additional Terms.*** The rule of subsection (1) that the offeree may bind the parties to a contract on the basis of the terms in the offer, and at the same time propose additional terms is in the main consistent with Restatement of Contracts, §§ 60 and 62. See, Pennsylvania Annotations stating that § 60 is supported by Pennsylvania decisions whereas the rule of § 62 has not been passed upon. However, the language of the Pennsylvania courts refusing enforcement in cases where the terms of the acceptance have varied from those of the offer would seem to indicate that this provision of the Code is an extension of the Pennsylvania law. See, Cohn v. Pennsylvania Beverage Co., 313 Pa. 349, 352, 169 Atl. 768 (1933). ("To constitute a contract the acceptance of the offer must be absolute and identical with the terms of the offer.") But *cf.* Newspaper Readers Service, Inc. v. Canonsburg Pottery Co., 146 F. 2d 963 (3d Cir. 1945) (§ 82 Restatement employed to hold contract binding).

(2) ***When Additional Terms Become Part of Contract.*** On giving effect to additional terms where no objection is made see, substantially in accord: Restatement of Contracts, § 72 (acceptance by silence) and Pennsylvania Annotations. See also, Empire Box Corp. v. Hazleton Baking Co., 29 Luzerne Legal Reg. Rep. 169 (1931) (acceptance varied terms of offer, but offeror did not object; contract binding). But a sharp change from present law arises from the implication of the Code that even if objection is promptly made to the new term and the parties cannot agree thereon, the parties are bound to a contract which is silent on the disputed point.

Sec. 2-208. Course of Performance or Practical Construction.

On rendering the failure to object to a course of performance "relevant" (but not controlling) to determine the meaning of the agreement see, *accord:* Uniform Sales Act § 3, 69 P.S. § 41 (contract "may be inferred from the conduct of the parties") and Pa. addition to Uniform Sales Act § 71, 69 P.S. § 332 ("all implications from surrounding circumstances" effective, in addition to "course of dealing"); Electric Reduction Co. v. Colonial Steel Co, 276 Pa 181, 120 Atl. 116 (1923) (acceptance of past shipments); Davis v. Alpha Portland Cement Co., 142 Fed. 74 (3d Cir. 1906) (reference to Pa. law).

Sec. 2-209. Modification and Waiver.

(1) ***No Need for Consideration.*** Whether a modification of a contract is effective under established doctrines of consideration is often a difficult problem. See Restatement of Contracts, §§ 88 ff. and Pennsylvania Annotations thereto. See also Pompey Coal Co. v. Giombetti, 29 D. & C. 9, (1937) (oral agreement to modify void for lack of consideration and failure to comply with Statute of Frauds). The power to effect a modification in writing regardless of consideration is an extension of the Uniform Written Obligations Act, 33 P.S. § 6 (release or promise by a signed writing stating that the promisor intends to be bound is effective).

(2) ***Effect of Signed Agreement Excluding Modification.*** Subsection (2) may change present law. See Restatement of Contracts, § 407, comment "a" (provision that the contract may be rescinded or nullified only by writing not effective). The Pennsylvania Annotations to § 407 indicate no decisions on this point. (*Compare* decisions there cited that an agreement under seal may be modified by subsequent oral agreement.)

(3) ***Effect of Statute of Frauds.*** The rule of subsection (3) is substantially the same as that of §§ 222-4 of the Restatement of Contracts. The Pennsylvania Annotations show a clear line of authority, *accord,* that a contract within the Statute may be *rescinded.* The cases there cited, however, seem in conflict on whether the agreement may be modified by parol. *Cf.* § 407, Comment (b), Restatement of Contracts, and see, Pompey Coal Co. v. Giombetti, 29 D. & C. 9 (1937) (oral agreement which purports to modify written lease for the mining of coal lands void as violative of *Statute of Frauds*).

(4) ***Attempt at Modification as Waiver.*** On subsection (4) see *accord:* Restatement of Contracts § 224.

(5) ***Retraction of Waiver of Executory Portion.*** *Accord:* Atlantic City Tire & Rubber Corp. v. Southwark F. & M. Co., 289 Pa. 569, 137 Atl. 807 (1927). Compare § 88(2) of the Restatement of Contracts giving a promisor power to reinstate an obligation which he had promised to forego if there has been no "substantial change of position by the promisee," and if there is still reasonable time to perform. *Cf.* Restatement of Contracts § 224 (attempt at modification operates as an excuse of a condition only if there is material change of position under the "agreement of permission, while it is *unrevoked*").

Sec. 2-210. Delegation of Performance; Assignment of Rights.

Performance Through a Delegate. Subsection (1) corresponds to the rule of § 160(3) (a) of the Restatement of Contracts that performance may be delegated, unless such performance "would vary

materially from performance by the person named in the contract . . ." Cases cited in the Pennsylvania Annotations seem to follow this rule.

Assignment of Rights. The rule of subsection (2) appears in accord with § 151 of the Restatement of Contracts. See Pennsylvania Annotations, citing cases in accord.

Assignment of Contract as Delegation of Performance: Interpretation. The rule of subsection (4) that, unless the circumstances indicate to the contrary, an assignment of the contract not only assigns rights but delegates duties, is comparable to that of § 164(1) of the Restatement of Contracts. *Accord:* Art Metal Construction Co. v. Lehigh Structural Steel Co., 116 F. 2d 57, 59 (3rd Cir. 1940) cert. denied 316 U. S. 694. Subsection (4) is also comparable to the rule of § 164(2) of the Restatement that acceptance of the assignment is interpreted "as a promise *to the assignor* to assume the performance of the assignor's duties." The Code, however, goes beyond the rule of the Restatement by providing the promise is enforceable by both the assignor and the other party. See *accord:* Art Metal Construction Co. v. Lehigh Structural Steel Co., *supra;* Blue Star Nav. Co. v. Emmons Coal Mining Corp., 276 Pa. 352, 120 Atl. 459 (1923).

Right to Assurances from Assignee. Subsection (5) providing for "assurances" is new.

Part 3. General Obligation and Construction of Contract.

Sec. 2-301. General Obligations of Parties.

(1) ***Obligations of Seller and Buyer.*** Sec. 2-301 of the Code in substance reiterates § 41 of the Uniform Sales Act, 69 P.S. § 251, in stating that the primary obligation of both parties is performance in accordance with the contract. The Code throughout increases the emphasis placed on the contract in sales transactions.

Sec. 2-302. Unconscionable Contract or Clause.

This section states a theory new to sales law. The section appears to be intended to carry equity practice into the sales field, and may be consistent with the results of decisions which avoid harsh provisions in sales contracts by construction. As to the latter, see: Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. Ct. 240, 189 Atl. 580 (1937) (warranty of fitness applied in spite of contract provisions disclaiming warranties). For equity doctrines denying a remedy which would impose undue hardship, see Friend v. Lamb, 152 Pa. 529, 25 Atl. 577 (1893); Campbell Soup Co. v. Wentz, 172 F. 2d 80 (3d Cir. 1949) (specific performance of contract to deliver carrots withheld as "unconscionable"). Compare Sec. 1-102(3), *supra* (certain rules of Code may not be changed by contract).

Sec. 2-303. Allocation or Division of Risks.

This section is consistent with present law. See Uniform Sales Act § 71, 69 P.S. § 332 ("any right . . . may be negatived or varied by . . . agreement . . .") See cases cited *infra* under Sec. 2-719. *Compare* also, in *accord,* § 22 of the Uniform Sales Act, 69 P.S. § 181 (risk follows title "unless otherwise agreed").

Sec. 2-304. Price Payable in Money, Goods, Realty or Otherwise.

(1) The provision that the price can be paid "in money or *otherwise*" broadens the coverage of this Article beyond that of § 9(2) of the Uniform Sales Act, 69 P.S. § 81 under which the price "may be made payable in any *personal* property." The effect of this change is seen most clearly under subsection (2), below.

(2) Under subsection (2), if realty is to be exchanged for goods, the Code fixes the obligations of the seller with respect to *the goods,* although not the realty. This constitutes an expansion beyond the scope of the Uniform Sales Act; under § 9(3), 69 P.S. § 81, the present Act is inapplicable if "any interest in real estate constitutes the whole or part of the consideration" for a sale.

Sec. 2-305. Open Price Term.

Existence of Contract. The rule under this section that the parties can bind themselves to a contract for sale without settling the price "if they so intend," resolves an ambiguity between §§ 9(1) and 9(4) of the Uniform Sales Act, 69 P.S. § 81. See: McNeely v. Bookmyer, 292 Pa. 12, 140 Atl. 542 (1928) (no contract found in view of lack of price). Compare the cases *supra* under Sec. 2-201 where memorandum does not state the price. See *e. g.* Franklin Sugar Ref. Co. v. Kane Milling & Grocery Co., 278 Pa. 105, 122 Atl. 231 (1923). It thus appears that this section of the Code will probably modify present law to render binding agreements where no price is stated. *Cf.* Restatement of Contracts § 32 and Pennsylvania Annotations. (See particularly illustrations 9 and 10.) But *cf.* A.M. Webb and Co., Inc. v. Robert P. Miller Co., 157 F. 2d 865 (3rd Cir. 1946) (reasonable price implied under § 9(4) Uniform Sales Act where no price specified). The buyer may not keep the goods without compensating the seller for them. Such was the result under § 9(4) of the Uniform Sales Act, although no price was stated. *Cf.* Simplex Steel Products Co. v. Goleman, 134 Pa. Super. Ct. 305, 4 A. (2d) 230 (1939).

Sec. 2-306. Output, Requirements and Exclusive Dealings.

The Code sets forth rules dealing with problems of quantity in requirements and output contracts. The Uniform Sales Act did not deal with this question.

Requirement and output contracts are enforceable in Pennsyl-

vania. Canonsburg Iron Co. v. McKeever *et al.*, 138 Pa. 184, 16 Atl. 97 (1890); *cf.* Walker v. Mason, 272 Pa. 315, 116 Atl. 305 (1922). *Cf.* Restatement of Contracts, § 32, Illustration 12; 2 Williston Sales, § 464A *et seq.* The Code provision that "output" or "requirement" means "such actual output or requirements as may occur in good faith" is not perfectly clear, but might change in part the result of Diamond Alkali Co. v. Aetna Explosives Co., 264 Pa. 304, 107 Atl. 711 (1919) (contract for "requirements" enforced to stated minimum although buyer resold rather than used). *Cf.* Canonsburg Iron Co. v. McKeever *et al.*, 138 Pa. 184, 16 Atl. 97 (1890) (requirements contract not broken when buyer substituted gas for coal); Stradling v. Allied Housing Associates, Inc., 349 Pa. 405, 37 A. 2d 585 (1944) (contract for requirements of lessor's vehicles held not to preclude lessee from using vehicles of a different size).

The last half of subsection (1), providing that no quantity unreasonably disproportionate to any stated estimate may be tendered or demanded, is in accord with Pennsylvania decisions. Poland Coal Co. v. Rogers, 260 Pa. 118, 103 Atl. 559 (1918) (contract calling for "requirements" estimated at 3,333 tons per month, held to mean an amount reasonably near the estimate). *Cf.* Diamond Alkali Co. v. Aetna Explosives Co., 264 Pa. 304, 107 Atl. 711 (1919) (stated minimum figure held to control buyer's obligation, rather than general term "requirements").

On construing a contract for sale of requirements to obligate the buyer to have requirements, see *accord:* Diamond Alkali Co. v. Tomson, 35 F. 2d 117 (3d Cir. 1929). In re United Cigar Store Co., 8 F. Supp. 243 (U.S.D.C., N.Y., 1934), aff'd 72 F. 2d 673 (2d Cir. 1934).

(2) ***Diligence in Exclusive Dealing.*** Supporting subsection (2), *cf.* Diamond Alkali Co. v. Tomson & Co., 35 F. 2d 117 (3d Cir. 1929) (contract to take "requirements" broken when buyer went out of business; change of position by seller).

Sec. 2-307. Delivery in Single Lot or Several Lots.

(1) ***Presumption of Single Delivery.*** The presumption that the goods shall be tendered in a single delivery carries forward the same rule laid down in § 45(1) of the Uniform Sales Act, 69 P.S. § 255.

(2) ***Presumption of Separate Payment for Each Lot.*** The presumption that where installment delivery is permitted, the buyer shall pay for each lot separately, applies to this particular situation the general rule of concurrent payment and delivery set forth in § 42 of the Uniform Sales Act, 69 P.S. § 252. *Cf.* Code, Sec. 2-511(1). See Burton Lumber Co. v. Miller Lumber Co., 18 Dist. 415 (1909). The qualification upon this rule that the price be apportionable was not expressly stated under the Uniform Sales Act, but is consistent with

it, since inability to apportion the price would bear upon the intent of the parties as to separate payment.

Sec. 2-308. Absense of Specified Place for Delivery.

(1) ***Presumption Against Obligation to Deliver.*** Subsections (a) and (b) state the same presumption against placing on the seller the obligation to deliver as was set forth in § 43(1) of the Uniform Sales Act, 69 P.S. § 253. Sussman Bros. v. Meier, 80 Pa. Super. Ct. 78 (1922); Franklin Sugar Ref. Co. v. Hanscom Bros., 30 Dist. 501 (1921).

(2) Subsection (c) is new as a statutory provision but probably expresses business understanding. See Smith Co. v. Marano, 267 Pa. 107, 110 Atl. 94 (1920) (documents forwarded through banking channels).

Sec. 2-309. Absence of Specific Time Provisions; Notice of Termination.

(1) ***Performance Within a Reasonable Time.*** Subsection (1) expresses in somewhat broader terms the requirement of § 43(2) of the Uniform Sales Act, 69 P.S. § 253. Sloss-Sheffield Steel & Iron Co. v. Tacony Iron Co., 46 Pa. Super. Ct. 164 (1911); See: Popper v. Rosen, 292 Pa. 122, 140 Atl. 774 (1928) (dictum); Mullen v. Hibbert, 153 Pa. Super. Ct. 102, 33 A. 2d 435 (1943).

(2) This subsection would substitute a single rule of duration of "a reasonable time," subject to termination on notice, in all cases where the contract fails to specify the duration. Under existing law the period of duration is determined by reference to the subject matter and the intention of the parties ascertained from the surrounding circumstances. If no time is stated, personal service contracts are terminable at will. Hand Estate, 349 Pa. 111, 36 A. 2d 485 (1944); Weidman v. United Cigar Stores Co., 223 Pa. 160, 72 Atl. 377 (1909). Unusual circumstances may indicate an agreement to continue in force as long as the buyer continues in business. Nolle v. Mutual Union Brewing Co., 264 Pa. 534, 108 Atl. 23 (1919) (contract to purchase beer not terminable on reasonable notice where circumstances indicated contrary intent); *cf.* dissenting opinion, 264 Pa. at p. 542; Rossmassler v. Spielberger, 270 Pa. 30, 112 Atl. 876 (1921) (sale of stock; promise by vendee continues so long as corporation exists); McCullough-Dalzell Crucible Co. v. Phila. Co., 223 Pa. 336, 72 Atl. 633 (1909) (where conditions change, contract terminable on reasonable notice); Slonaker v. P.G. Pub. Co., 338 Pa. 292, 13 A. 2d 48 (1940) (exclusive agency; in view of surrounding circumstances, reasonable time expired). *Cf.* General Supply Co. v. Marden, Orth and Hastings Co., 276 Fed. 786 (3d Cir. 1921) (contract "for the present" held terminable on reasonable notice).

(3) Insofar as this section operates to make an agreement dis-

pensing with notice invalid, it would seem to be a modification of existing law. *Compare* Secs. 1-102, 1-204, 2-302 of the Code, *supra.*

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

(1) ***Time for Payment.*** The presumption against extension of credit is consistent with existing law. Uniform Sales Act § 42, 69 P.S. § 252. (Payment due at "delivery," which in some circumstances occurs at point of shipment.) *Cf.* Uniform Sales Act § 46, 69 P.S. § 256 (delivery to carrier deemed delivery to buyer unless seller to pay freight). However, in making payment due only on "receipt," the Code would delay the time for payment arising under a technical reading of the present statute.

Sec. 2-311. Options and Cooperation Respecting Performance.

Indefiniteness. On subsection (1) under which later specification of details does not render contract indefinite see *accord:* Restatement of Contracts § 32.

Effect of Options to One Party Respecting Performance. The Uniform Sales Act did not deal with the problem presented when one party is given options as to performance. For cases *accord* with subsection (3) see: Mead & Speer Co. v. Krimm, 43 Pa. Super. Ct. 376 (1910) (seller may wait for buyer's order to deliver); McAvoy & McMichael v. Commonwealth Title, Ins. & Trust Co., 27 Pa. Super. Ct. 271 (1905).

Sec. 2-312. Warranty of Title and Against Infringement.

(1)(a) ***Title.*** Subsection (1)(a) restates with no apparent changes the implied warranty of title established under § 13(1) of the Uniform Sales Act 69 P.S. § 122. Mann v. Rafferty, 100 Pa. Super. Ct. 228 (1930).

(b) ***Freedom From Liens, Encumbrances and Claims.*** Subsection 1(b) sets forth a warranty of freedom from liens, encumbrances and claims comparable to that of § 13(2) and (3) of the Uniform Sales Act. *Accord:* James v. Singer, 63 D. & C. 538 (C.P. Luzerne 1948) (sale of building; tax lien). *Cf.* Cleveland Wrecking Co. v. Federal Dep. Ins. Corp., 66 F. Supp. 921 (D.C. Pa.) (warranty disclaimed). The present warranty is extended to include claims of infringement.

(2) Subsection (2) rephrases § 13(4) of the Uniform Sales Act, 69 P.S. § 122, freeing a seller from obligation if the seller does not purport to have title or to be able to convey title.

Sec. 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

(1) ***Express Warranties: Scope and Terminology.*** In addition to including affirmations and promises as "express" warranties, the

Code treats as "express" warranties descriptions of the goods and the use of samples or models. *Cf.* Uniform Sales Act §§ 14 and 16, 69 P.S. §§ 123, 125 (termed "implied" warranties).

(a) ***Affirmations and Promises.*** Subsection (1) (a), in giving both affirmations and promises the effect of warranties, is in accord with § 12 of the Uniform Sales Act, 69 P.S. § 121. See: Montgomery Foundry & Fittings Co. v. Hall Planetary etc. Co., 282 Pa. 212, 127 Atl. 633 (1925). A narrower rule was in effect in Pennsylvania before adoption of the Uniform Sales Act. McAllister v. Morgan, 29 Pa. Super. Ct. 476 (1905); Pyott v. Baltz, 38 Pa. Super. Ct. 608 (1909); McFarland v. Newman, 9 Watts 55 (1839) (liability based on "intent to be bound").

(b) ***Descriptions.*** Subsection 1(b) is comparable to § 14 of the Uniform Sales Act. 69 P.S. § 123, in treating descriptions of the goods as warranties, although in the Code they are termed "express" rather than "implied." Brown & Co. v. Standard Hide Co., 301 Pa. 543, 152 Atl. 557 (1930) (court pointed to relation between express warranty and description).

(c) ***Sample or Model.*** Subsection (1) (c) is comparable to § 16 of the Uniform Sales Act, 69 P.S. § 125, under which, in the case of a sale by sample, there is a warranty that the bulk correspond with the sample. Holmes v. Cameron, 267 Pa. 90, 110 Atl. 81 (1920) (seller liable though error made in showing sample); Irwin Gas Coal Co. v. Logan Coal Co., 270 Pa. 443, 113 Atl. 667 (1921); see Andrea, Inc. v. Dodge, 15 F. 2d 1003 (3d Cir. 1926) (Pa. Dist.).

Materiality of Affirmation, Promise, Description, Sample. Under the Code, the qualification that affirmations, etc. create a warranty if made "as a basis of" the bargain, appears to be substantially the same as the "reliance" qualification in § 12 of the Uniform Sales Act, 69 P.S. § 121.

(2) ***Formal Words Not Necessary.*** Subsection (2) rendering formal words unnecessary is in accord with § 12 of the Uniform Sales Act, 69 P.S. § 121 (warranties may arise from "any" affirmation or promise).

Statements of Value or Opinion. The qualification as to statements of "value" rephrases but does not appear materially to change § 12 of the Uniform Sales Act, 69 P.S. § 121. See: Madison-Kipp Corp. v. Price Battery Corp., 311 Pa. 22, 166 Atl. 377 (1933) ("economy accuracy and high speed production"); North Co. v. Binney, 25 Del. 388 (1935); Klerlein v. Werner, 307 Pa. 16, 160 Atl. 719 (1932) (net value of business; value rule applied to sale of stock).

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

(1) *Scope.* (a) *Sales by Merchant.* Special responsibility in sales by merchants carries forward the warranty of merchantability of § 15(2) of the Uniform Sales Act, 69 P.S. § 124, for goods bought by description from "a seller *who deals* in goods of the description." The Code, however, broadens the scope of the warranty by omitting the qualification that the sale be "by description." In Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 554, 28 A. (2d) 913 (1943) the Court referred to this requirement as "indefinite," and avoided construing the provision.

For decisions applying the warranty of merchantable quality see: Madden v. Great A. & P. Tea Co., 106 Pa. Super. Ct. 474, 162 Atl. 687 (1932); Young v. Great A. & P. Tea Co., 15 F. Supp. 1018 (D.C. Pa. 1936) (warranty applies to sales in sealed container). See: Henderson v. National Drug Co., 343 Pa. 601 23 A. (2d) 743 (1942) (liver extract administered by physician).

(b) *Serving of Food or Drink.* The Uniform Sales Act did not specify whether serving of food or drink would be a "sale" within its scope. In accord with the Code see: Campbell v. G. C. Murphy Co., 122 Pa. Super. Ct. 342, 186 Atl. 269 (1934) (sandwich served in restaurant). This is also the majority rule. See Anno., 7 A.L.R. 2d 1027 (1949).

(2) *Definition of Merchantable Quality.* The Uniform Sales Act did not define the term "merchantable quality." Neither have the Pa. cases clearly defined the term. The tests of subsection 2(a) and (b) in terms of "fair average quality" and "ordinary purposes" are consistent with cases denying liability where injury is the result of buyer's peculiarity. *Cf.* Jones v. Boggs & Buhl, 355 Pa. 242, 49 A. 2d 379 (1946) (allergy). But *cf.* Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. (2d) 913 (1943).

Sec. 2-315. Implied Warranty: Fitness for Particular Purpose.

This section roughly approximates § 15(2) of the Uniform Sales Act, 69 P.S. § 124. The Code is somewhat broader than the present statute in making clear that a warranty may arise if the buyer relies on the seller either "to select" or "to furnish" suitable goods. Under the Code a warranty is also imposed where the seller has "reason to know" a buyer's purpose. Contrast the weaker language of the present statute (warranty arises where the buyer "makes known" his purpose to the seller).

The warranty of fitness for purpose under the Uniform Sales Act, 69 P.S. § 124, has had broad application in the decisions. See: Jones & Laughlin Steel Co. v. Wood, 249 Pa. 423, 94 Atl. 1067 (1915); Wright v. General Carbonic Company, 271 Pa. 332, 114 Atl. 517 (1921); Peerless Electric Co. v. Call, 82 Pa. Super. Ct. 550 (1924);

The St. S. Angelo Toso, 271 Fed. 245 (C.C.A. 3d, 1921); Griffin v. Metal Product Co., 264 Pa. 254, 107 Atl. 713 (1919); Maine Electric Co. v. General Engineering Works, 95 Pa. Super. Ct. 397 (1929); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 Atl. (2d) 913 (1943) (retailer liable for defect in commodity sold in sealed container); Madden v. Great A. & P. Tea Co., 106 Pa. Super. Ct. 474, 162 Atl. 687 (1932). *Cf.* Demos Const. Co. v. Service Supply Corp., 153 Pa. Super. Ct. 623, 34 Atl. (2d) 828 (1944) (no reliance on seller found); Hill & McMillan v. Taylor, 304 Pa. 18, 155 Atl. 103 (1931) (no warranty where buyer orders according to specifications); Hartford Battery Sales Corp. v. Price, 119 Pa. Super. Ct. 165, 181 Atl. 95 (1935).

Sales Under Patent or Trade Name. The most significant modification is the omission of any provision comparable to § 15(4) of the Uniform Sales Act, which withdrew the warranty of fitness for purpose from sales "of a specified article under its patent or other trade name." This provision has caused difficulty in application, but, in general, has been taken to spell out one instance in which the buyer makes his own selection and does not rely on the seller. Montgomery Foundry and Fittings Co. v. Hall etc. Co., 282 Pa. 212, 127 Atl. 633 (1925) (warranty barred by patent name); Griffin v. Metal Product Co., 264 Pa. 254, 107 Atl. 713 (1919) (generic name not "trade name"); Tinius Olsen Testing Mach. Co. v. Wolf Co., 297 Pa. 153, 146 Atl. 541 (1929); Wolstenholme v. Jos. Randall & Bro., 295 Pa. 131, 144 Atl. 909 (1929) ("artificial silk carded" not a trade name); U.S. Gypsum Co. v. Birdsboro Steel Foundry & Machine Co., 45 D.&C. 259 (1943); Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. Ct. 240, 189 Atl. 580 (1937) (not sale under trade name designating article when buyer relies on seller). Occasionally the "trade name" qualification has been given greater effect. Madison-Kipp Corp. v. Price Battery Corp., 311 Pa. 22, 166 Atl. 377 (1933) (warranty excluded); Sebastianelli v. Frank, 108 Pa. Super. Ct. 550, 165 Atl. 664 (1933) (same). In view of the narrow scope generally given by cases to the "trade name" qualification, its omission from the statute clarifies rather than changes the law.

Sec. 2-316. Exclusion or Modification of Warranties.

(1) ***Construction of Disclaimer in Light of Express Warranty.*** Subsection (1), while not perfectly clear, appears consistent with the general principle that a contract must be read as a whole to give effect, if possible, to each provision, and that specific provisions govern more general language. See Restatement of Contracts §§ 235, 236, and Pennsylvania Annotations.

(2) ***Disclaimer of Implied Warranty of Merchantability or Fitness; Must Be Specific.*** Subsection (2) is somewhat comparable to

§ 15(6) of the Uniform Sales Act, 69 P.S. § 124, under which an express warranty does not exclude implied warranties, unless inconsistent. U.S. Gypsum Co. v. Birdsboro etc. Co., 45 D.&C. 259 (1945); Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. Ct. 240, 189 Atl. 580 (warranty of fitness established in spite of disclaimer). *Cf.* White Co. v. Francis, 95 Pa. Super. Ct. 315 (1929) (warranty of title); Cleveland Wrecking Co. v. Federal D.I.C., 66 F. Supp. 921 (D.C. 1946); Tate-Jones & Co. v. Union Electric Steel Co., 281 Pa. 448, 126 Atl. 813 (1924) (if seller warrants details of performance, no further implied warranty). Wright v. General Carbonic Co., 271 Pa. 332, 114 Atl. 517 (1921). However, if the requirement that implied warranties must be disclaimed in "specific language" means that such warranties must be referred to by name, the Code would probably change the result of cases like Madison-Kipp Corp. v. Price Battery Corp., 311 Pa. 22, 166 Atl. 377, (1933) (general disclaimer overturned implied warranty of fitness; alternative ground).

(a) On the overriding effect of clauses such as "as is" see *accord:* Industrial Rayon Corp. v. Clifton Yarn Mills, 310 Pa. 322, 165 Atl. 385 (1933) ("as is" overrode conformity with sample). But *cf.* Sec. 2-316 (1) and (2).

(b) Subsection (2) (b) closely follows § 15(3) of the Uniform Sales Act, 69 P.S. § 124. *Accord:* McKeage Machinery Co. v. Osborne & Sexton Machinery Co., 124 Pa. Super. Ct. 387, 188 Atl. 543 (1936); Thomas v. Cohen, 275 Pa. 576, 119 Atl. 604 (1923) (buyer barred although he did not make as thorough inspection as was possible).

(c) On effect of course of dealing or performance, or usage, see annotation to Sec. 1-205, *supra.*

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

Warranties To Be Construed as Cumulative. § 15(6) of the Uniform Sales Act, 69 P.S. § 124 set forth the comparable but narrower rule that "an express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith." See *accord:* Wright v. General Carbonic Co., 271 Pa. 332, 114 Atl. 517 (1921); Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. Ct. 240, 189 Atl. 580 (1937).

The more detailed rules of this section of the Code for reconciling different types of warranties have no counterpart in the Uniform Sales Act. The emphasis of the section upon construing warranties as cumulative and of subsection (b) on conformity with sample probably would require a different result in Industrial Rayon Corp. v. Clifton Yarn Mills, 310 Pa. 322, 165 Atl. 385 (1933) ("as is" clause negatived warranties although goods did not conform to sample). The emphasis under subsection (c) upon the warranty of

fitness for purpose has support under the decisions. See: Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. Ct. 240, 189 Atl. 580 (1937) (disavowal of warranties yielded to implied warranty of fitness). *Contra:* Madison-Kipp Corp. v. Price Battery Corp., 311 Pa. 22, 166 Atl. 377 (1933) (disclaimer overrode warranty of fitness).

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

The Uniform Sales Act did not specify whether the seller's warranty obligations ran to persons other than the immediate buyer. Recovery has been given to husband or wife on the ground that the commodity was purchased by the other spouse as "agent" of the one injured. Young v. Great A. & P. Tea Co., 15 F. Supp. 1018 (U.S. D.C. Pa. 1936); see: Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. 2d 913 (1943) (dictum). The cases in Pennsylvania, however, have not gone so far as the Code in extending protection to third parties. Also new is the prohibition against limiting by contract the responsibility to third persons.

Sec. 2-319. F.O.B. and F.A.S. Terms.

(1) ***F.O.B.*** The Uniform Sales Act did not define shipping terms such as F.O.B. This section of the Code, however, states commercial understanding that the term defines the point at which responsibility for paying transportation expense is the buyer's. See: American Foreign Trade Definitions (Chamber of Commerce, 1941) II A, II B.

Risk. In holding risk on seller until the F.O.B. point, and placing it on the buyer after that point, the Code is consistent with the result under §§ 19 (Rules 4 and 5), 22 and 46 of the Uniform Sales Act, 69 P.S. §§ 143, 181, 256. See Pittsburgh Provision & Packing Co. v. Cudahy Packing Co., 260 Pa. 135, 103 Atl. 548 (1918); New York & Pa. Co. v. Cunard Coal Co., 286 Pa. 72, 132 Atl. 828 (1926). A troublesome problem of construing the Code, with probable change in present law, arises where seller is obliged to pay the freight but that fact is not expressed by the term "F.O.B." See annotation to Sec. 2-509, *infra.* Commonwealth v. Wiloil Corporation, 316 Pa. 33, 173 Atl. 404, *affd.* 294 U. S. 169.

(2) ***F.A.S.*** The Code's definition in subsection (2) expresses commercial understanding of the term. American Foreign Trade Definitions (Chamber of Commerce, 1941) III; The W. Ferdinand Armstrong, 69 F. Supp. 824 (D.C. N.Y. 1946) (delivery free alongside buyer's dock).

(3) ***Buyer's instructions.*** On the rule of subsection (3) imposing on the buyer the duty to give needed instructions see *accord:* Mead & Spear Co. v. Krimm, 43 Pa. Super. Ct. 376 (1910) (seller

may wait for buyer's order to deliver): American Foreign Trade Definitions (Ch. of Comm. 1941) II-E, II-F, III.

(4) *Payment Against Documents.* Subsection (4) is new. *Cf.* Sec. 2-513 (3) of the Code.

Sec. 2-320. C.I.F. and C. & F. Terms.

(1) *C.I.F.* Uniform Sales Act does not specify the effect to be given shipping terms, such as C.I.F. Commercial understanding of these terms, however, was sufficient to override the presumption of § 19 Rule 5 of the Uniform Sales Act arising from seller's responsibility for freight, in order to place the risk of loss in transit on the buyer. Smith Co. v. Marano, 267 Pa. 107, 110 Atl. 94 (1920). Most of the details in this section of the code have not been established by the cases, but appear to reflect commercial understanding. See American Foreign Trade Definitions (Chamber of Commerce, 1941) V.

(2) *C. & F.* The Code, following the weight of case-law outside Pennsylvania, applies mercantile understanding that under a sale C. & F., although the seller pays the freight, his obligation is discharged by tender of documents and risk is on the buyer. *Contra:* Pittsburgh Provision & Packing Co. v. Cudahy Packing Co., 260 Pa. 135, 103 Atl. 548 (1918) (Term given same effect as F.O.B. destination; domestic rail shipment. Result consistent with Code possible if water shipment employed).

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

(1) The Uniform Sales Act does not deal with the problem covered by this section, and commercial practice on this point does not appear to have been made uniform. American Foreign Trade Definitions (Chamber of Commerce 1941) does not deal with the problem.

(2) Under subsection (2) a number of commercial expressions such as "net landed weights" and a warranty of quality "on arrival" bring about a delicate division of risks between the parties. Under the subsection "ordinary" deterioration, shrinkage, etc. fall on the seller, while other risks fall on the buyer. (It is not perfectly clear how some borderline risks, such as sweating, wetting, and shifting of cargo would be allocated, or whether it would be practicable to determine on arrival whether a defect in quality resulted from an "ordinary" or extraordinary risk.)

Sec. 2-322. Delivery "Ex-Ship".

The Uniform Sales Act does not deal with delivery "ex-ship." On commercial understanding, *compare* American Foreign Trade Definitions (Chamber of Commerce, 1941) I (Ex. Factory etc.);

VI (Ex. Dock). The section of the Code seems in accord with British authority. See 2 Williston, Sales (1948) § 280(g).

Permitting seller to deliver by some other ship than the one named is consistent with the Code's broader provision in Sec. 2-614 on Substituted Performance. *Compare, accord:* Wilbur & Sons v. Lamborn, 276 Pa. 479, 120 Atl. 478 (1923) (substitution for ship originally declared).

Sec. 2-323. Form of Bill of Lading Required in Overseas Shipment; "Overseas".

(1) ***Type of Bill of Lading.*** The Uniform Sales Act does not deal with this problem. Commercial practice is unsettled. See, American Foreign Trade Definitions (Chamber of Commerce 1941) II-A (under quotation F.O.B. inland carrier, seller must obtain "clean bill of lading or other transportation receipt"); II-E (Under quotation F.O.B. vessel, seller must provide "ship's receipt or *on-board* bill of lading"); IV & V (under quotations C. & F. and C.I.F. apparently use of "received for shipment" or "on board" bill of lading depends on contract). See also: Customs and Practices for Commercial Documentary Credits (Int. Ch. of Comm. 1938) Art. 19(a) (in the case of sea or ocean Bills of Lading, "Received for Shipment" or "alongside" Bills of Lading acceptable).

(2) Issuance of bill of lading in parts allowing tender of incomplete set of documents with indemnity bond against loss codifies Dixon, Irmaos & Cia. v. Chase National Bank, 144 F. 2d 759 (2d Cir. 1944) cert. denied 324 U.S. 850 (1945). *Contrast:* Customs and Practices for Commercial Documentary Credits (Int. Ch. of Comm. 1938) Art. 15(a) ("Full set" of sea or ocean bills of lading required).

Sec. 2-324. "To Arrive" Term.

The Uniform Sales Act has no comparable provision. In obliging seller to ship and giving the buyer the choice to accept or reject if there is casualty in transit but relieving seller of liability, the Code seems in accord with most cases outside Pennsylvania. See 1 Williston, Sales (1948) §§ 188, 188a, 188b. But *cf.* Potash v. Reach, 272 Fed. 658 (3d Cir. 1921) ("No arrival, no sale"; under special contract terms buyer bound to accept damaged shipment).

Sec. 2-325. "Letter of Credit" Term; "Confirmed Credit."

Irrevocable Letter of Credit Required. Subsection (3) appears in accord with the weight of authority outside Pennsylvania. See 2 Williston, Sales (1948) § 469(e) (cases at n. 11). But *cf.* Customs and Practices for Commercial Documentary Credits (Int. Ch. of Comm. 1938) Art. 3. (This inconsistent rule favoring revocability may however be construed as relating to relationship between customer and bank.)

Sec. 2-326. Sale on Approval and Sale or Return.

(1) ***Transactions Distinguished.*** The distinction between sales "or return" and sales "on approval" was also drawn in the Uniform Sales Act in § 19, Rules 3(1) and (2), 69 P.S. § 143. See 52 A.L.R. 589 (1925).

(2) ***Delivery at Fixed Price.*** The Uniform Sales Act has no provision comparable to that of subsection (1) making a transaction a "sale or return" if delivered for sale and charged at a fixed price. Although not clearly expressed apparently in such a transaction the Code makes the goods subject to levy by buyer's creditors. The test of charging at a fixed price has not been announced as controlling, but has been employed in deciding whether a relationship is agency or sale. Hallet & Davis Piano Co. v. Fisher, 83 Pa. Super. Ct. 408 (1924) (sale on commission; held, agency and creditors of agent could not attach); Davidson v. Adams Express Co., 43 Pa. Super. Ct. 53 (1910) (possessor to get commission, held that seller could recover from railroad); Peek v. Heim, 127 Pa. 500 (1889) (goods billed at fixed price; language of "consignment" created a "secret lien" which could not affect creditors). But later cases strengthening the right of the "consignor" would probably be overturned by the Code. See *e. g.* Keystone Watch Co. v. Fourth St. Nat. Bk., 194 Pa. 535 (1900) ("consignment" at fixed invoice price: creditors of consignee could not attach). *Cf.* Commercial Credit Co. v. Girard Nat. Bk., 246 Pa. 88, 92 Atl. 44 (1914) (Where S shipped on orders supplied by B held a "sale" although described as "agency"; S had no right to price due from purchasers from B). It does not appear that this problem is affected by the Factor's Lien Act of June 10, 1947, 6 P.S. § 221 (applies to one who "lends or advances" money to "owner").

It is expressly made possible to protect the seller's interest by "perfecting" a security interest in the manner prescribed in Article 9. See Sec. 9-102.

(3) On the parol evidence provision of subsection (3), compare Ward v. Ziegler, 285 Pa. 557, 132 Atl. 798 (1926) (where admission that whole of agreement not reduced to writing, parol evidence admissible to show sale not absolute).

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

(1) ***Sale on Approval:*** (a) ***Appropriation; Risk.*** Subsection (1) in shifting risk and title to the buyer on acceptance or use or failure to give reasonable notice, follows §§ 19 Rule 3(2), and 22 of the Uniform Sales Act, 69 P.S. §§ 143, 181. *Cf.* Butler v. School Dist. of Lehighton, 149 Pa. 351 (1892) (obligation to pay price if insufficient notice of refusal).

(b) *Return: Risk and Expense Seller's.* The Uniform Sales Act does not provide whether the risk and expense of return would fall on buyer or seller. In *accord* with Code see: White v. Miller, 43 Pa. Super. Ct. 572 (1910).

(2) *"Sale or Return":* (a) *Option to Return.* The Code's provision of a "commercial unit" has no counterpart in the Uniform Sales Act.

(b) *"Seasonable" Return. Accord:* Fox v. Davey Compressor Co., 318 Pa. 331, 178 Atl. 469 (1935); McCabe v. Northampton Trust Co., 60 Pa. Super. Ct. 18 (1915) (period for approval limited by date for payment); Butler v. School District of Lehighton, 149 Pa. 351 (1892).

(c) *Return: Risk and Expense Buyer's.* The Uniform Sales Act has no provision as to risk and expense of return. There is a close analogy, however, to rescission, in which the buyer must "return, or offer to return" the goods. See Uniform Sales Act § 69(1)(d), 69 P.S. § 314. *Compare,* as an analogy to the contrasting rule of subsection (1)(c), *supra,* § 50 of the Uniform Sales Act, 69 P.S. § 260, that if buyer "'refuses to accept" goods he "is not bound to return them to the seller."

Sec. 2-328. Sale by Auction.

(1) *Sale in Lots.* Subsection (1) follows § 21(1) of the Uniform Sales Act, 69 P.S. § 161. See Act of June 12, 1931, P.L. 533, 69 P.S. §§ 162-3, creating penalties for fraudulently and deceptively advertised auction sales. (Care should be taken in adopting the Code that these provisions be preserved.)

(2) *When Sale Complete.* The first sentence of subsection (2) follows § 21(2) of the Uniform Sales Act, 69 P.S. § 161. The provision as to bids made while the hammer is falling is new.

(3) *When "With Reserve"; Bids by Seller.* The Code follows § 21 of the Uniform Sales Act, 69 P.S. § 161 in presuming that auction sales are "with reserve" unless otherwise announced. § 21 of the Uniform Sales Act also provides that unannounced by-bidding renders the sale voidable. *Accord:* Flannery v. Jones, 180 Pa. 338, 36 Atl. 856 (1897). The Code, however, modifies the Uniform Sales Act in (1) giving the buyer the option to take the last bona fide bid and (2) in allowing unannounced by-bidding at a forced sale.

Part 4. Title, Creditors and Good Faith Purchasers.

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

The Code makes specific provision with respect to the various rights and obligations of seller and buyer, such as risk of loss, action

for the price, the effect of sale on rights of third persons. Thus, "title" has much less effect in determining the rights of the parties than under the Uniform Sales Act. Therefore, in dealing with any problem under the Code, it is important to ascertain whether any specific provision deals with the problem; if so, it will override any implication to be drawn from the location of the title.

(1) Subsection (1) provides that title cannot pass prior to "identification" of the goods to the contract. This is in substance the same rule as is laid down in § 17 of the Uniform Sales Act. See: Conard v. Pennsylvania R. Co., 214 Pa. 98, 63 Atl. 424 (1906) (prior to Act); Cohen v. LaFrance Workshop, Inc., 112 Pa. Super. Ct. 309, 171 Atl. 90 (1934). As under § 6 of the Uniform Sales Act, 69 P.S. § 314, there is a qualification in Sec. 2-105(4), *supra*, permitting title to pass in shares of fungible goods.

The further provision of subsection (1) that, subject to the foregoing limitation, title may pass in any manner "explicitly agreed upon" is consistent with § 18 of the Uniform Sales Act, 69 P.S. § 142. But, to make more certain the location of title, the Code requires "*explicit*" agreement to vary the effect of the rules stated in the Act. Under the Uniform Sales Act more flexibility based upon implied intent was necessarily allowed because of the many incidents of locating title.

The further provision of subsection (1) (a) that a reservation of title in the seller after delivery or identification shall be only as security for payment by buyer, is more detailed, but in general is consistent with the Uniform Sales Act, §§ 19(1), 20(2), 69 P.S. §§ 143, 144.

The abolition in subsection (1) (b) of the "cash sale" concept, limiting the right to recover from third persons goods obtained without payment or by a bad check, must be considered in connection with Sec. 2-403 which defines and limits the rights of *bona fide* purchasers.

The rule of subsection (2) in passing title when the seller "completes his performance with respect to the physical delivery of the goods" is differently phrased than the rules of § 19 of the Uniform Sales Act, 69 P.S. § 143. The distinction drawn in subsections (2) (a) and (2) (b) between shipment and requirement of delivery is similar to the distinction between Rules 4(2) and 5 of § 19 of the Uniform Sales Act, 69 P.S. § 143. For possible changes, see annotation to Sec. 2-509, *infra*.

The rule of subsection 3(a) is new. Subsection 3(b) is close to Rule 1 of § 19 of the Uniform Sales Act, 69 P.S. § 143.

Sec. 2-402. Rights of Seller's Creditors Against Sold Goods.

This section in part preserves local rules established independently of the uniform laws, as to transactions in fraud of creditors.

See *accord:* Uniform Sales Act § 26, 69 P.S. § 204. The exception in subsection (1) preserving the buyer's interest in goods left with a merchant-seller for a "commercially reasonable time in current course of trade" is not found in the Uniform Sales Act. This provision would appear substantially to modify the Pennsylvania rule that leaving goods in the seller's possession is deemed fraudulent as against creditors. See: Callahan v. Union Trust Co., 315 Pa. 274, 172 Atl. 684 (1934); Wendel v. Smith, 291 Pa. 247, 139 Atl. 873 (1927); Sterling Commercial Co. v. Smith, 291 Pa. 236, 139 Atl. 847 (1927) (transfer for security; tags indicating ownership placed on cars insufficient). Shipler v. New Castle Paper Products Corp., 293 Pa. 412, 143 Atl. 182 (1928); Barnett v. Cain, 88 Pa. Super. Ct. 106 (1926). But *cf:* In re Messenger, 32 F. Supp. 490 (1940) (dictum as to taking possession within "reasonable time"); Chase v. Ralston, 30 Pa. 539 (change of possession not practicable). Subsection (2) is designed to limit this innovation and to preserve existing state law with respect to preferential deliveries to buyers not in current course of trade.

Sec. 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

(1) Subsection (1) in giving a purchaser all title his transferor "has power to transfer" apparently is designed merely to continue present agency doctrines such as apparent authority, and does not change the law.

The rest of the subsection, which protects a good-faith purchaser for value against the claims of one with "voidable" title, follows § 24 of the Uniform Sales Act, 69 P.S. § 202. Neither the present Uniform Act nor the Code defines the difference between a title which is "void" and one which merely is "voidable." The Code presumably adopts the basic rule that the possessor of stolen goods has a "void" title.

The Code does solve the disputed question whether one who obtains delivery through a check not supported by funds has power to pass title to a *bona fide* purchaser. See 2 Williston, Sales (1948) § 346a. Under Sec. 2-401 (1) (b), *supra,* an intent to make a "cash sale" does not impair the rights of good faith purchasers from the buyer; the intent apparently is to foreclose such a ground for reclamation by one who sold in exchange for a bad check. For cases outside Pennsylvania, see Williston, *supra,* 31 ALR 578, 54 ALR 526. No Pennsylvania case precisely in point has been found. *Cf.* Frech v. Lewis, 218 Pa. 141, 67 Atl. 45 (1907) (reclamation from initial buyer barred by delay). Further to strengthen the rights of *bona fide* purchasers under Sec. 2-401 (1) (a) seller's interest in goods delivered or identified is limited to a "security interest," which would both bar the argument that the buyer's title is "void," and make

applicable Sec. 9-203 (1) (b) which provides that a security interest is not enforceable against third parties unless "the debtor has signed a security agreement."

(2) ***Delivery to a Merchant Who Deals.*** Where an owner delivers goods to a merchant who wrongfully resells, subsection (2) of the Code would also give more protection to purchasers than present laws. Thus, under the Code, the owner's loss of title does not depend on his having conferred on the merchant any authority to deal with the goods. No holding found in this state would go so far as to allow resale to cut off the owner's title of a watch left with a jeweler for repair or a car left with a garage for repair or storage. Contrary to the Code, see Restatement of Agency, §§ 174, 200 and Pennsylvania Annotations. The nearest support is a dictum in Rapp v. Palmer, 3 Watts 178, 180 (1834); but see Commercial Motors Mfg. Corp. v. Waters, 280 Pa. 177, 124 Atl. 327 (1924) (dictum *contra*). The Pennsylvania Factors Act protects pledges and similar transactions of a factor only if the factor was "authorized to sell" the goods, 6 P.S. § 201.

It should be noted that under the Code only a special type of purchase will cut off the owner's title in the situation just described. In this extreme situation, the Code protects only the "buyer in *ordinary course of business,*" which under Sec. 1-201 (9) is more restricted than a "good faith purchaser for value." See Secs. 1-201 (19) and (3) and 7-102 (1) (g). The Code defines "buyer in ordinary course of business" to exclude any purchase from a merchant out of the "ordinary course" of trade, such as a "transfer in bulk or for security." This test approximates that under present law which protects ordinary purchases of stock in trade from the claims of a lender secured by a trust receipt. See § 9 (2) (a) of Uniform Trust Receipts Act, 68 P.S. § 559. The Code further provides in Sec. 1-201 (9) that a buyer in ordinary course "does not include a person buying goods from a farmer or a pawnbroker." This distinction appears to be novel. The Code does not provide a definition of "farmer," and it is not entirely clear how the Code would classify stock-raisers, nursery houses and others who may deal in large quantities in commodities which are produced through more or less contact with the soil.

Part 5. Performance.

Sec. 2-501. Insurable Interest in Goods; Manner of Identification of Goods.

(1) ***Insurable Interest.*** On similarly broad application of insurable interest see: Dubin Paper Co. v. Insurance Co. of N.A., 361 Pa. 68, 63 A. 2d 85 (1949) (loss after contract to sell land; buyer had rights in seller's insurance).

(2) *Identification.* The concept of "identification" is new, but in substance is close to "appropriation" under § 19 Rule 4 of the Uniform Sales Act, 69 P.S. § 143. But whereas "appropriation" related to "title" with many consequences for both parties, "identification" under the Code is principally significant for buyer's insurable interest and his right to recover the goods from the seller under Secs. 2-502, 2-711 (2) and 2-716.

Crops, Unborn Young, Etc. The Code at this point solves a troublesome problem of identification not covered by the Uniform Sales Act.

Sec. 2-502. Buyer's Right to Goods on Seller's Insolvency.

(1) Subsection (1) is new. Under § 66 of the Uniform Sales Act buyer's right to recover goods depends on "title," 69 P.S. § 311. Although the provision is not wholly clear, if the right here conferred overrides the rights of attaching creditors under Sec. 2-402, it would modify the Pennsylvania rule that goods retained by a seller after sale are subject to attachment by seller's creditors. See annotation to Sec. 2-402, *supra.*

There is some analogy between this section and cases allowing a seller to recover goods obtained by a fraudulent representation of buyer's solvency. See annotation to Sec. 2-702, *infra.* But there is a large difference since this section deals with *money* obtained by a false representation of solvency and remedies the wrong by delivery of *property;* Sec. 2-702 merely permits *reclamation of property* fraudulently obtained.

Sec. 2-503. Manner of Seller's Tender of Delivery.

(1) *Seller's Obligation to Hold for Buyer's Disposition and Give Reasonable Notice.* The Uniform Sales Act did not specifically provide for notice to the buyer on tender at a reasonable hour. *Cf.* § 43 (4) of the Uniform Sales Act, 69 P.S. § 253.

(2) *Goods in Possession of Bailee.* Subsection (4) in general follows § 43 (3) of the Uniform Sales Act, 69 P.S. § 253. The provision that tender of a non-negotiable document of title is sufficient unless the buyer seasonably objects is new. But *cf. accord,* § 49 of the Uniform Sales Act, 69 P.S. § 259 (remedy for breach lost if no reasonable notice).

This section of the Code specifies a number of details which are new but are presumed to express the usual intention of the parties.

Sec. 2-504. Shipment by Seller.

(1) *Contract for Transportation.* In requiring that the goods be put into the possession of the carrier the Code follows § 46 (1) of the Uniform Sales Act supplemented by the definition of "delivery"

in § 76, 69 P.S. §§ 256, 337. The requirement of a reasonable contract follows § 46(2) of the Uniform Sales Act.

(2) *Effect of Failure of Notice or Failure to Make a Proper Contract.* The last sentence of Sec. 2-504 is comparable to § 46(2) of the Uniform Sales Act. There is a slight change in grouping "delay" with loss and damage, and in specifically providing that the effect must be "material." Compare § 19, Rule 4(2) of the Uniform Sales Act, 69 P.S. § 143, under which seller appropriates goods to the contract (and thereby shifts the risk and makes buyer liable for the price) only if the goods are delivered "pursuant" to the contract. *Accord:* Frank Pure Food Co. v. Dodson, 281 Pa. 125, 126 Atl. 243 (1924) (improper consignment: alternative holding).

Sec. 2-505. Seller's Shipment Under Reservation.

(1) *Bills of Lading: Security Titles.* On retaining security title through *order* bill of lading see *accord:* § 20(3) of the Uniform Sales Act, 69 P.S. § 144. On retaining security title through a *straight* bill of lading by consigning to one other than the buyer see *accord:* § 20(2) of the Uniform Sales Act, 69 P.S. § 144.

(2) *Improper Shipment.* *Cf.* analogy from § 19 Rule 4 and § 46 of Uniform Sales Act, 69 P.S. §§ 143, 256, (shipment must be "pursuant" to contract). *Cf.* Frank Pure Food Co. v. Dodson, 281 Pa. 125, 126 Atl. 243 (1924).

Sec. 2-506. Rights of Financing Agency.

This section is new. Details of the relationship between seller or buyer and financing banks are governed by article 4—Bank Deposits and Collections, and Article 5—Letters of Credit. The rights given the bank on making payment against a draft which relates to a shipment appear to be consistent with general principles of equitable assignment: *cf.* Betz v. Heebner, Pen. 1 & W. 280 (Pa. 1830) (security follows assignment of debt).

Sec. 2-507. Effect of Seller's Tender; Delivery on Condition.

The section states general principles consistent with present law. In making tender a condition of buyer's corresponding duty the Code is consistent with § 11(2) of the Uniform Sales Act, 69 P.S. § 101. Making payment, if due, a condition of the duty to tender is consistent with § 42 of the Uniform Sales Act, 69 P.S. § 252.

Sec. 2-508. Cure by Seller of Improper Tender or Delivery; Replacement.

(1) Subsection (1) allowing seller to replace a defective tender with a conforming tender *"within the contract time"* is novel as a

statutory provision, but may not change prevailing law. A defective tender coupled with notice of intention to perform fully within the contract time probably is not an anticipatory breach or repudiation. Restatement of Contracts, § 319 and Pennsylvania Annotations thereto (cases cited to effect that anticipatory breach may be withdrawn before "accepted and acted upon"). See Whitlaw v. Moore, 164 Pa. 451, 30 Atl. 257 (1894) (seller permitted to cure tender found too large on inventory).

(2) The qualified permission under subsection (2) for performance after the agreed date may somewhat modify present law. See Restatement of Contracts, § 276 and Pennsylvania Annotations thereto (indicating a conflict of authority on whether time is "of the essence").

Sec. 2-509. Risk of Loss in the Absence of Breach.

The rule of subsection (a) in transferring risk to buyer on delivery to carrier conforms with the result under § 19, Rules 4(2) and (5) and § 22 of the Uniform Sales Act, 69 P.S. §§ 143, 181, under which risk is derived from "title." See *accord,* Pittsburgh Provision & Packing Co. v. Cudahy Packing Co., 260 Pa. 135, 103 Atl. 548 (1918); New York & Pennsylvania Co. v. Cunard Coal Co., 286 Pa. 72, 132 Atl. 828 (1926); W. C. Downey & Co., Inc. v. Kraemer Hosiery Co., 27 North. 243, aff'd 136 Pa. Super. Ct. 553, 7 A. (2d) 492 (1941).

The requirement that the goods be "duly" delivered to transfer risk carries forward the requirement of § 19, Rule 4(2) of the Uniform Sales Act, 69 P.S. § 143, that the shipment be "in pursuance" of the contract. See, *accord,* Sec. 2-510 of the Code.

A troublesome problem of construction and of comparison with existing law is presented by subsection (1) (b) of this section of the Code. Risk is held on seller during shipment if the contract "requires him to deliver at destination." Under Sec. 2-319(1) (b) risk is on seller if the quotation is "F.O.B. the place of destination." But it is not clear whether the same result follows if the seller quotes a delivered price without use of the term "F.O.B." If under a delivered price risk is placed on the buyer, the Code thereby would change existing law under § 19 Rule 5, and § 46 of the Uniform Sales Act. 69 P.S. §§ 143, 256. (It would also appear that the Code would thereby make results turn on an insubstantial difference in the form of stating the price.)

(2) ***Passage of Risk When Goods "Duly Tendered."*** The rule of subsection (1) (b) transferring risk to the buyer when goods are tendered at destination, solves the problem under § 19, Rule 5 of the Uniform Sales Act, 69 P.S. § 143 of whether "title" (and therefore risk) passes when goods have "reached the place agreed upon." However, under this section of the Code, although risk may pass, buyer

may not be liable to pay the full price, and seller consequently may have the responsibility for disposing of the goods. See Sec. 2-709, *infra.*

Retention of Documents. The rule of subsection 1(b) that risk does not turn on the time of delivery of documents is in accord with § 22 of the Uniform Sales Act, 69 P.S. § 181. See also Popper v. Rosen, 292 Pa. 122, 140 Atl. 774 (1928); Smith v. Marano, 267 Pa. 107, 110 Atl. 94 (1920).

Risk Other Than in Shipment Cases. The rule of subsection (2) placing risk on seller until receipt by buyer if seller is a merchant, or otherwise until tender of delivery, delays transfer of the risk beyond the time prescribed under § 19, Rule 1 of the Uniform Sales Act, 69 P.S. § 143. *Cf.* Edson v. Magee, 43 Pa. Super. Ct. 297 (1910) (before Sales Act); Perkins v. Halpren, 257 Pa. 402 (1917).

Sec. 2-510. Effect of Breach on Risk of Loss.

(1) ***Loss on Non-Conforming Seller.*** Holding risk during delivery on a seller who is not conforming to the contract carries forward the rule of § 19, Rule 4(2) of the Uniform Sales Act, 69 P.S. § 143, that seller appropriates by delivering goods "in pursuance" to the contract. *Cf.* Frank Pure Food Co. v. Dodson, 281 Pa. 125, 126 Atl. 243 (1924) (labels not affixed to goods, delivery to carrier did not pass title to justify price recovery).

(2) ***Risk After Rightful Revocation of Acceptance.*** The general rule of subsection (2) placing risk on seller after buyer revokes acceptance is in accord with §§ 22 and 69(1)(d) of the Uniform Sales Act giving buyer power to rescind and thereby transfer risk to seller, 69 P.S. §§ 181, 314. It is, however, subject to an insurance provision discussed below.

(3) ***Insurance.*** Subsection (3) is new, in giving the seller an option to treat the risk of loss as in a defaulting buyer in event the seller's insurance coverage is not adequate. In limiting the risk of the breaching party where the other party has insurance, the Code in effect gives the seller the benefit of any insurance carried by the buyer. *Cf.* Dubin Paper Co. v. Insurance Co. of N.A., 361 Pa. 68, 63 A. 2d 85 (1949) (real estate contract; purchaser given benefit of sellers' insurance). To the effect that one in possession, although not responsible for risk, has an insurable interest see Vance, Insurance (1930) 135 and cases cited.

Sec. 2-511. Tender of Payment by Buyer; Payment by Check.

(1) ***Presumption Against Credit.*** The rule of subsection (1) that payment and delivery are presumed to be concurrent carries forward the same rule under § 42 of the Uniform Sales Act. See

accord: Cohen v. LaFrance Workshop, Inc., 112 Pa. Super. Ct. 309, 171 Atl. 90 (1934).

(2) ***Means of Payment; Legal Tender.*** New as a statutory provision, but probably does not change existing law. See 23 A.L.R. 1284 (1923); 51 A.L.R. 394 (1927); Schaeffer v. Coldren, 237 Pa. 77, 85 Atl. 98 (1912) (land contract; tender of certified check sufficient where no timely objection).

(3) ***Payment by Check Conditional; Effect of Dishonor.*** The Uniform Sales Act made no specific provision as to the rights in the goods between buyer and seller when payment is made by check that is dishonored. However, the provision appears to be in accord with existing law. Loux v. Fox, 171 Pa. 68, 33 Atl. 190 (1895) (bank failed after check accepted in payment); Levan v. Wilten, 135 Pa. 61, 19 Atl. 945 (1889) (note, later dishonored, accepted by seller in payment for horse). *Cf.* Scott-Smith Cadillac Co. v. Rajeski, 116 Pa. Super. Ct. 116, 118 (1950) (receipt of check not absolute payment). Analogous rules, in § 20(4) of the Uniform Sales Act, 69 P.S. § 144 are consistent with this provision. (Buyer "acquires no added right" by wrongfully retaining bill of lading without honoring draft.) Apparently the Code intends to allow seller to recover the goods from the buyer on dishonor of a check given in payment. This is consistent with prevailing rules allowing rescission for fraud. But it is to be noted that in making payment by check conditional the Code does not affect the rights of third parties, such as *bona fide* purchasers.

Sec. 2-512. Payment by Buyer Before Inspection.

(1) ***Obligation to Pay in Spite of Breach.*** Subsection (1) is novel. *Cf.* Pottash v. Reach, 272 Fed. 658 (3d Cir. 1921) (obligation to accept in spite of breach imposed by contract). It is not entirely clear how the duty imposed by the subsection could be enforced by recovery of more than nominal damages if the defect on discovery would justify revocation of acceptance (rescission). Subsection (2) is comparable to § 47(1) of the Uniform Sales Act, 69 P.S. § 257. *Cf.* Federated Fruit & Vegetable Growers v. Born, 94 Pa. Super. Ct. 136 (1928).

Sec. 2-513. Buyer's Right to Inspection of Goods.

(1) ***General Right of Inspection.*** The general rule of subsection (1) conferring the right of inspection on tender is comparable to § 47(2) of the Uniform Sales Act, 69 P.S. § 257. *Cf.* Hilmer v. Marcus, 68 Pitts. 807, 34 York 130 (1920) (usage of trade to show right of inspection before acceptance).

(2) ***Expenses of Inspection.*** Compare Sec. 2-603(2), and annotation thereto.

(3) ***Instances Where no Inspection Presumed, C.O.D.*** In accord with subsection 3(a): Uniform Sales Act § 47(3), 69 P.S. § 257.

(4) ***Place or Method of Inspection.*** No comparable provision is in the Uniform Sales Act. On place of inspection see: American Bridge Co. v. Duquesne Steel Foundry Co., 28 Pa. Super. Ct. 479 (1905) (inspection both at point of shipment and receipt). On conclusive effect of agreed method of inspection see *accord,* Field v. Descalzi, 276 Pa. 230, 120 Atl. 113 (1923) (agreement for Texas state inspection; applying Texas law but citing Pennsylvania cases).

Sec. 2-514. When Documents Deliverable on Acceptance; When on Payment.

This section states more broadly the rule now in force under § 41 of the Uniform Bills of Lading Act, 69 P.S. § 91.

Sec. 2-515. Preserving Evidence of Goods in Dispute.

(1) Subsection (a) giving access to goods which are the subject of claim or dispute is new. However, at least as to goods in possession of party making the inspection, the subsection probably does not change existing law. See, South Bend Woolen Co. v. Jacob Reed's Sons, 273 Pa. 140, 116 Atl. 805 (1922) (cutting off swatches of cloth for use as evidence does not revest title in seller).

(2) Subsection (b) effectuating agreements to be bound by the findings of third persons is not in the present commercial statutes. The provision, however, is in accord with the general provision for arbitration in the Arbitration Act of 1925, 5 P.S. § 161 *et seq.*

Part 6. Breach, Repudiation and Excuse.

Sec. 2-601. Buyer's Rights on Improper Delivery.

(a) ***Performance by Seller; Rejection of Whole.*** The general rule of subsection (a) allowing rejection is in accord with § 69(1)(c) of the Uniform Sales Act, 69 P.S. § 314. The right of rejection is, however, limited in other sections of the Code. See *e. g.,* Secs. 2-508 (cure); 2-612 (installment contracts). The Code abandons the distinction between "rejection" and "rescission" under §§ 69(1)(c) and 69(1)(d) of the Uniform Sales Act. However, roughly comparable to "rescission" is the power to revoke acceptance under Sec. 2-608, *infra.*

(b) ***Acceptance.*** *Accord:* §§ 49, 69(1)(a) and (b) of the Uniform Sales Act, 69 P.S. §§ 259, 314. Wright v. General Carbonic Co., 271 Pa. 332, 114 Atl. 517 (1921).

(c) ***Partial Acceptance.*** The Uniform Sales Act did not specifically provide for partial acceptance where seller tenders defective

goods, but an analogy favoring partial acceptance may be drawn from § 44(3) of the Uniform Sales Act, 69 P.S. § 254. *Accord* with Code see Moskowitz v. Flock, 112 Pa. Super. Ct. 518, 171 Atl. 400 (1934) (partial rescission possible if "beyond the power of the buyer to return . . . all); Bennett v. Perlstein & Co., 124 Pa. Super. Ct. 65, 188 Atl. 97 (1936) (same). The requirement that full return be impossible expressed by the cases is relaxed by the Code. Comparable to the Code's "commercial unit" test is that of "divisibility." See, Moskowitz v. Flock, *supra*. Compare the parallel provision on partial revocation of acceptance in Sec. 2-608, *infra*.

Sec. 2-602. Manner and Effect of Rightful Rejection.

(1) ***Rejection Within Reasonable Time; Notice.*** Subsection (1) is in accord with § 48 of the Uniform Sales Act, 69 P.S. § 258, under which buyer is deemed to have "accepted" goods if he keeps the goods an unreasonable time without notice of rejection. *Cf.* Uniform Sales Act § 69(3), 69 P.S. § 314, cutting off a buyer's right to "rescission" under such circumstances. See cases under Sec. 2-606 and 2-607, *infra*.

(2) ***Exercise of Ownership After Rejection; Duty of Buyer to Hold With Reasonable Care.*** The rule of subsection (2) (b) may impose a broader responsibility upon a buyer than that under § 50 of the Uniform Sales Act, 69 P.S. § 260, which provides that "it is sufficient if [buyer] notifies seller that he refuses to "accept" the goods.

Sec. 2-603. Merchant Buyer's Duties As to Rightfully Rejected Goods.

(1) ***Duty to Follow Instructions and Make Reasonable Efforts to Sell.*** The Uniform Sales Act does not specifically impose any duty upon a buyer who rightfully rejects to mitigate the seller's loss by selling. By § 50, 69 P.S. § 260, where B "refuses to accept" he is "not bound to return them"—and "it is sufficient if he notifies the seller that he refused to accept them." Where "rescission" is involved, § 69(3) of the Uniform Sales Act, 69 P.S. § 314, requires buyer to "return or offer to return" the goods.

As to non-perishable goods, cases prior to the Uniform Sales Act held that the buyer, upon rejection and notice thereof to seller, is under no duty to sell, but may if he chooses. White v. Miller, 43 Pa. Super. Ct. 572, (1910) (buyer returned furniture after notifying dealer of rejection); Youghiogheny Iron & Coal Co. v. Smith, 66 Pa. 340, (1870) (inferior iron delivered; buyer notified seller to take it away; held, buyer could dispose of it or use it, and seller entitled only to its actual market value).

Insofar as this subsection in stated circumstances places a duty on the buyer to resell it probably changes existing law. It is compar-

able, however, to the obligation imposed by the Perishable Agricultural Commodities Act, 7 U.S.C. § 499 (b) (3), which makes it unlawful for any commission merchant "to discard, dump or destroy without reasonable cause."

(2) *Buyer's Reimbursement for Expenses.* This specific provision is new. However, aside from the allowance of a selling commission of 10%, it appears to be in accord with general rules. See 29 A.L.R. 61, 66 (1924). The rule has been recognized in Pennsylvania as to a seller. Edson v. Magee, 43 Pa. Super. Ct. 272 (1910) (seller's recovery of storage charges).

Sec. 2-604. Buyer's Options as to Salvage of Rightfully Rejected Goods.

The Uniform Sales Act contains no comparable provision, but see *accord* cases cited Sec. 2-603, *supra.* However, under some circumstances a change in present law may be effected, since under § 48 of the Uniform Sales Act, 69 P.S. § 258, a buyer accepts by "any act" in relation to goods "inconsistent with the ownership of the seller." See, 77 A.L.R. 1165 (1931); 38 L.R.A. (N.S.) 1035 (1912). The Code provision is designed to encourage salvage by buyers who have rightfully rejected, without running the danger of incurring liability for the price by "acceptance."

Sec. 2-605. Waiver of Buyer's Objections by Failure to Particularize.

(1) *Failure to State Particular Defect in Connection with Rejection.* The Uniform Sales Act has no comparable provision. It has, however, been held that rejection may not be supported on a ground not stated. Popper v. Rosen, 292 Pa. 122, 140 Atl. 774 (1928) (excess freight billing). See also: United Fruit Co. v. Bisese, 25 Pa. Super. Ct. 170 (1904); Aaron Bodek & Son v. Avrach, 297 Pa. 225, 146 Atl. 546 (1929) (buyer must specify breach "with some reasonable particularity"). The section of the Code would limit the foregoing cases in that they do not confine the requirement of specific statement to either (a) instances of rejection (Bodek) or (b) possibility of cure by seller, or (c) a written request by buyer.

Sec. 2-606. What Constitutes Acceptance of Goods.

(1) *General Rule.* The Uniform Sales Act employs the concept of "acceptance," as in § 49 (buyer's right to an action for breach of warranty in spite of "acceptance") and in § 69 (3) (buyer's right to rescind lost if he accepts goods knowing of the defect) 69 P.S. §§ 259, 314. The term is defined in § 48 of the Uniform Sales Act in language comparable to that of subsections (a) and (b). The qualification in subsection (b) delaying acceptance until after a reasonable opportunity to inspect carries forward the rule of § 47 (1) of the Uniform

Sales Act, 69 P.S. § 257. See: Federated Fruit & Vegetable Growers v. Born, 94 Pa. Super. Ct. 136 (1928); Northern Lumber Co. v. Weingartner, 81 Pa. Super. Ct. 559 (1923); Kaminsky v. Levine, 106 Pa. Super. Ct. 278, 161 Atl. 741 (1932) (no acceptance by use necessary for trial).

On the period of time allowed for inspection, see *e. g.* Elk Textile Co. v. Cohen, 75 Pa. Super. Ct. 478 (1921); Beaunit Mills v. Burstein Bros., 92 Pa. Super. Ct. 206 (1927) (cutting goods before inspection as acceptance). A closely allied question is whether buyer, although accepting, is barred from claim for damage by delay in giving notice. See Sec. 2-607, *infra.*

(2) ***Acceptance of Part of Commercial Unit.*** The Uniform Sales Act has no provision comparable to subsection (2). But cases on partial rejection (see Sec. 2-601, *supra*) refer to the test of "divisibility" defined in § 76 of the Uniform Sales Act, 69 P.S. § 337.

Sec. 2-607. Effect of Acceptance; Notice of Breach.

(1) ***Payment at Contract Rate.*** Under the § 63(1) of the Uniform Sales Act liability to pay the price principally turned on passage of "title"; "acceptance" as a primary test is new. See Sec. 2-709, *infra.* Changing the test probably narrows seller's right to recover the contract price, since under present law title can pass on identification or shipment and prior to "acceptance."

(2) ***Effect as to Rejection.*** The Uniform Sales Act uses different concepts than the Code, but without substantially different effect at this point. Under present law the power of "rejection" ends on passage of "title," rather than "acceptance." But under both present Act and the Code failure to reject within a reasonable time constitutes "acceptance." See Sec. 2-606(1)(b), *supra.*

(3) ***Remedy Lost by Failure to Give Notice.*** Subsection (3) carries forward the requirement on notice of breach under § 49 of the Uniform Sales Act, 69 P.S. § 259. See: Texas Motor Coaches v. A.C.F. Motors Co., 154 F. (2d) 91 (3d Cir. 1946) (Pa. law; notice insufficient); U.S. Gypsum Co. v. Birdsboro Steel Foundry & Machine Co., 45 D. & C. 259 (1943); Warner-Godfrey Co. v. Sheinman, 273 Pa. 105, 116 Atl. 671 (1922) (falling market relevant to time for notification).

But under this section, where buyer accepts, he need merely notify seller "of breach." Pennsylvania cases have required specification of the breach with particularity. See Aaron Bodek & Sons v. Avrach, 297 Pa. 225, 146 Atl. 546 (1929) and Sec. 2-605, *supra.*

By failure to qualify the section by "unless otherwise agreed" the time for notice must be *in fact* reasonable. *Cf.* Sec. 1-204. Rothschild v. Bohm, 26 Luz. 85 (1930) (period for notice must give time for testing).

Sec. 2-608. Revocation of Acceptance in Whole or in Part.

The buyer's power under the Code to "revoke acceptance" performs the same general functions as rescission under § 69(1)(d) of the Uniform Sales Act, 69 P.S. § 314. The right is put in different language and some changes made.

(1) ***"Substantial Impairment of Value" Necessary.*** Under § 69(1)(d) of the Uniform Sales Act buyer's power to rescind arises "where there is a breach of warranty by the seller." No qualification as to "substantial impairment" was set forth. But in particular cases rescission has been denied for trivial breach. Wilbur & Sons v. Lamborn, 276 Pa. 479, 120 Atl. 478 (1923); Popper v. Rosen, 292 Pa. 122, 140 Atl. 774 (1928) (excess freight billing).

Under § 69(3) of the Uniform Sales Act buyer had a power to rescind unless he *knew* of the breach when he accepted, 69 P.S. § 314. Subsection (1) of the Code slightly restricts buyer's right to send the goods back to the seller since nondiscovery must have resulted from "difficulty."

(2) The Uniform Sales Act in § 69(3) similarly lays down the requirement of rescission within a "reasonable time." See Comfort Springs Corp. v. Allancraft Furniture Shop, 165 Pa. Super. Ct. 303 (1949); Siskin v. Cohen, 363 Pa. 580, 70 A. 2d 293 (1950) (two months' delay not too long in rescinding purchase of liquor business). See also, cases cited under Secs. 2-606 and 2-607. The provision on change of condition of the goods also parallels § 69(3) of the present Act, 69 P.S. § 314.

(3) Subsection (3) somewhat changes present law in situations where buyer's action must be termed "rescission," *e. g.* under § 69(3) of the Uniform Sales Act buyer must "return or offer to return" the goods. Code Sec. 2-602(2)(c). *Cf.* Douglass v. Universal Auto Sales Corp., 83 Pa. Super. Ct. 312 (1924) (no duty where return made impossible by seller). A more substantial change results from allowing buyer to both "rescind" and recover damages. See Sec. 2-711, *infra.*

Sec. 2-609. Right to Adequate Assurance of Performance.

(1) This section of the Code considerably expands the rule of § 63(2) of the Uniform Sales Act, 69 P.S. § 292, under which a buyer bound to pay in advance of seller's performance is excused if seller "has manifested an *inability* to perform" or "an intention not to perform" his obligations. Authority under the Code to suspend on impairment of the "expectation of receiving due performance" apparently gives wider grounds for excuse. The Code provision is close to that of § 280 of the Restatement of Contracts on manifestation of inability to perform. On "assurance" of due performance under the Code, *compare,* Restatement of Contracts § 287 (prospective inability to pay may be removed by "security"). Compare also § 57 of the

Uniform Sales Act, 69 P.S. § 286 (stoppage in transit on buyer's insolvency) and Dolan Mercantile Co. v. Marcus, 276 Pa. 404, 120 Atl. 396 (1923).

The breadth of the Code provisions on "insecurity" and "assurance" is, however, novel. The section would probably require a different result in Clavan v. Hermann, 285 Pa. 120, 131 Atl. 705 (1926) (after buyer's attempt to repudiate seller required inspection before shipment and cash payment; held improper).

(2) Subsection (3) allowing a party to insist on strict performance in future although not required in the past is consistent with Atlantic C.T. & R. Corp. v. Southwark Co., 289 Pa. 569, 137 Atl. 807 (1927). In *accord* with the requirement for a "demand" see: Webb & Co. v. Nov. Hosiery Co., 231 Pa. 297, 80 Atl. 173 (1911).

Sec. 2-610. Anticipatory Repudiation.

Giving the injured party the choice of suing or awaiting performance is consistent with present law. See: Zuck v. McClure & Co., 98 Pa. 541 (1881); Barber Milling Co. v. Leichthammer Baking Co., 273 Pa. 90, 116 Atl. 677 (1922). Restatement of Contracts §§ 306, 322 and Pennsylvania Annotations. On seller's power to suspend performance see Restatement of Contracts, § 280.

Sec. 2-611. Retraction of Repudiation.

As substantially in accord with this section see Clavan v. Hermann, 285 Pa. 120, 131 Atl. 705 (1926) (repudiation not "accepted and acted on" by seller).

Sec. 2-612. "Installment Contract"; Breach.

(1) ***Definition.*** The definition in subsection (1) is in language slightly different from that of § 45(2) of the Uniform Sales Act, 69 P.S. § 255, which applies to contracts to sell goods "to be delivered by stated installments, which are to be separately paid for."

(2) ***Power to Reject Non-Conforming Installments.*** This section of the Code probably changes present law in limiting the right to reject defective goods unless the non-conformity "substantially impairs the value" of the installment. Contrast § 69(1)(c) and (d) of the Uniform Sales Act, 69 P.S. § 314 (right to reject for any breach of warranty).

The rule of this section of the Code is different from that under Sec. 2-601, *supra,* under which if an installment contract is not involved a buyer may reject if the goods or tender "fail *in any respect* to conform to the contract." This distinction makes important the definition of "installment contract," which is not entirely clear, particularly in the qualification that the goods be "separately paid for."

(3) ***When Breach in Installment Breaks Entire Contract.*** The test under subsection (3) on breach relating to one installment as a

"breach of the whole" deals with the problem of § 45(2) of the Uniform Sales Act, 69 P.S. § 255 (whether the breach is "so material" as to "justify the injured party in refusing to proceed further," depends on "the terms of the contract and the circumstances of the case"). Both provisions although differently phrased call for examination of all of the facts of the case and probably are not substantially different in result. See: Traveler Rubber Co. v. Berguougnan Rubber Corp., 4 D. & C. 793 (1924); Monroe v. Diamond, 279 Pa. 310, 123 Atl. 817 (1924) (buyer could rescind when first installment did not live up to sample); Truitt v. Guenther Lumber Co., 73 Pa. Super. Ct. 445 (1920) (refusal to pay for installment justified seller's rescission); Pittsburgh Steel Foundry v. Pittsburgh Steel Co., 223 Pa. 430, 72 Atl. 813 (1909); Goodman v. Whiting Lumber Co., 62 Pa. Super. Ct. 230 (1916); G. B. Hurt, Inc. v. Fuller Canneries Co., 269 Pa. 85, 112 Atl. 148 (1920) (buyer's refusal to pay for installment); Guaranty Motors Co. v. Hudford Philadelphia Sales Co., 264 Pa. 557, 108 Atl. 30 (1919) (same); American Tube & Stamping Co. v. Erie Iron & Steel Co., 281 Pa. 10, 125 Atl. 304 (1924) (refusal to accept deliveries; slight refusal to pay will justify refusal to deliver).

Sec. 2-613. Casualty to Unique Goods.

This section deals with the problems treated separately in §§ 7 and 8 of the Uniform Sales Act, 69 P.S. § 63, 64. The Code substantially enlarges the buyer's rights on destruction or deterioration of specific goods.

Under the Uniform Sales Act, the seller was relieved of responsibility if the goods destroyed were "specific." Under the Revised Act, seller's excuse is narrowed to cases of identified goods which are "irreplaceable" or treated as "unique." A second modification arises since under the Uniform Sales Act the buyer was given the choice of receiving the goods only on payment of the *contract price* for all or for a "divisible" part. Under the Revised Act, the buyer may accept the goods with allowance for deterioration.

There has been little litigation involving this problem. *Cf.* Restatement of Contracts § 460 and Pennsylvania Annotations; Dixon v. Breon, 22 Pa. Super. Ct. 340 (1903) (contract discharged by destruction of specified timber).

Sec. 2-614. Substituted Performance.

(1) ***Failure or Impracticability of Agreed Manner of Delivery.*** The Uniform Sales Act does not specifically deal with the problem, but § 69 tends towards requiring strict compliance with the contract, with a possible exception under § 12 if the buyer did not "rely" on the provision, 69 P.S. §§ 314, 121. Supporting the Code see: Wilbur & Sons v. Lamborn, 276 Pa. 479, 120 Atl. 478 (1923) (seller allowed to substitute delivery on ship other than one originally declared; case

decided on "broad proposition" that the "ship having met with difficulties," sellers had right to deliver to buyer "sugar of similar kind by another vessel").

Sec. 2-615. Excuse by Failure of Presupposed Conditions.

The Uniform Sales Act had no comparable provision. The rules of this section of the Code deal with general contract rules governing "impossibility" and "frustration" incorporated into the Uniform Sales Act by § 73, 69 P.S. § 334. In accord with the Code's rule that "assumption" of heavier obligation by seller will bar excuse see: Lomis v. Ruetter, 9 Watts 516 (1840) (construction of dam; rise of low water assumed); Bradley v. McHale, 19 Pa. Super. Ct. 300 (1902) (seller of house should have foreseen difficulties).

(a) ***"Failure of Basic Assumption";*** the Code expressed in different language a test close to present rules of "impossibility" and "impracticability" in contract law. See Restatement of Contracts, §§ 454-467 and Pennsylvania Annotations. Excuse based on "foreign" governmental regulations expands the rule of the Restatement of Contracts, § 548.

(b) ***Failure of Part; Allocation.*** Subsections (b) and (c) are novel.

Sec. 2-616. Procedure on Notice Claiming Excuse.

The procedures established by this section implement the rules established under Secs. 2-614 and 2-615. No comparable provisions are in the Uniform Sales Act and the rules appear to be new.

Part 7. Remedies.

Sec. 2-701. Remedies for Breach of Collateral Contracts Not Impaired.

This section appears to limit the scope of the Sales Article to parts of a contract related to the sale of goods, and requires no annotation.

Sec. 2-702. Seller's Remedies on Discovery of Buyer's Insolvency.

(1) ***Seller's Remedies.*** (a) ***Refusal of Delivery.*** The right on insolvency to refuse delivery except for cash, even though credit was called for, follows § 54(1) (c) of the Uniform Sales Act, 69 P.S. § 283. On stoppage of delivery see Sec. 2-705, *infra*. The right to assert a lien on undelivered goods for payment of goods already delivered is new. *Cf.* § 55 of the Uniform Sales Act, 69 P.S. § 284, (presumption against surrender of lien on partial delivery).

(b) ***Right of Reclamation.*** The Uniform Sales Act made no provision as to seller's right to reclaim goods. A seller, however, has

been allowed to reclaim goods where the buyer has obtained credit by a fraudulent representation. See: Meyerhoff v. Daniels, 173 Pa. 555, 34 Atl. 298 (1896); In re Perelstine, 19 F. 2d 408 (W.D. Pa. 1927) (false credit statement; buyer not then insolvent). *Cf.* Frech v. Lewis, 218 Pa. 141, 67 Atl. 45 (1907) (right of reclamation where cash expected immediately but not forthcoming; but lost by delay).

Automatic reclamation on insolvency within ten days changes present law, which requires a representation. See: Smith v. Smith, 21 Pa. 367 (1853); Rodman v. Thalheimer, 75 Pa. 232 (1874); Berghman v. Bank, 159 Pa. 94, 28 Atl. 209 (1893) (questioning wisdom of restriction on reclamation but accepting it as well established).

On limiting the time within which seller may rely on buyer's representation see, *accord:* Sharpless v. Gummey, 166 Pa. 199, 30 Atl. 1127 (1895) (two and one-half years too long). The Code's three-month limitation is new.

Allowing reclamation for actual fraud is not inconsistent with bankruptcy legislation. See Collier, Bankruptcy Manual (1948) § 70.26; *cf.* In re Perelstine, 19 F. 2d 408 (W.D. Pa. 1927). The proposed reclamation for "presumed" fraud might, however, encounter difficulty. See Collier, *supra,* § 70.26 at notes 9 and 10.

Sec. 2-703. Seller's Remedies in General.

This section sums up the remedies given the seller under other sections of the Article, and requires no separate annotation.

Sec. 2-704. Seller's Right to Identify Goods to the Contract Notwithstanding Breach.

This section is introductory to later provisions giving seller the right to fix buyer's damages by resale (Sec. 2-706) and, in special circumstances, to sue for the price (Sec. 2-709). "Identification" also affects existence of an insurable interest (Sec. 2-501) and is a necessary element in shifting risk of loss to a party guilty of breach (Sec. 2-510). See implementing sections.

Sec. 2-705. Seller's Stoppage of Delivery in Transit or Otherwise.

(1) Subsection (1) continues the right now conferred under § 57 of the Uniform Sales Act, 69 P.S. § 286, on buyer's insolvency. The Code, however, broadens the right to include buyer's repudiation on failure to make a due payment, or any other instance (such as fraud by the buyer) where seller would have a right to withhold or reclaim.

(2) Subsection 2(a), ending the right of stoppage on receipt of the goods, corresponds to §§ 58(1)(a) and 58(2)(a) of the Uniform Sales Act, 69 P.S. § 287, ("delivery"). Subsections 2(b) and (c) on "acknowledgement" by bailee or carrier is more specific than

§ 58(2)(b) of the Uniform Sales Act, 69 P.S. § 287, and in the case of carriers apparently prolongs the right of stoppage beyond notification of arrival to require a separate contract with buyer. Subsections 2(b) and 3(c), under which a negotiable bill of lading over-rides the right of stoppage, follows § 59(2) of the Uniform Sales Act, 69 P.S. § 288.

A substantial change in the law of stoppage in transit is made in Article 7, Sec. 7-303. By this change a carrier is made immune from liability for honoring instructions from the consignor on a non-negotiable bill, even though the consignor's instructions may constitute an improper stop-order. This provision, however, does not impair buyer's rights against the seller where the stop-order is wrongful.

Sec. 2-706. Seller's Resale Including Contract for Resale.

(1) Subsection (1) allows the seller to act promptly to resell if buyer defaults; under § 60(1) of the Uniform Sales Act, 69 P.S. § 289, the right arises only when buyer has been in default an "unreasonable time." See, Atlantic City Tire & Rubber Corp. v. Southwark F. & M. Co., 289 Pa. 569, 137 Atl. 807 (1927) (dictum; eight months' delay held unreasonable). Subsections (1) and (2) are designed to give greater finality than under present law to the amount received by seller on resale of goods after breach by buyer. In general, the sale is designed to measure seller's damages, if effected reasonably.

Under the Uniform Sales Act if "title" had passed to buyer it was arguable that seller's resale executing a lien fixed the damages. Uniform Sales Act § 60, 69 P.S. § 289. The general rule, however, under § 64, 69 P.S. § 293, is that damages are determined by "market value," and the proceeds of seller's sale only evidence thereof. However, cases appear to give heavy weight to the amount received by seller, with the consequence that the Code will probably change the results of few cases. See: Atlantic City Tire & Rubber Corp. v. Southwark F. & M. Co., 289 Pa. 569, 137 Atl. 807 (1927) (price presumed correct); Huessener v. Fishel & Marks Co., 281 Pa. 535, 127 Atl. 139 (1927) (date of seller's resale fixes time for calculating damages although three months after breach). The Code might, however, change the result of Rees v. R. A. Bowers Co., 280 Pa. 474, 124 Atl. 653 (1924) (private sale where active market was available; there must be proof of "market" value).

(3) *Notice.* Subsections (3) and (4)(b) in some circumstances require notice to buyer. This modifies present law. Under § 60(3) and (4) of the Uniform Sales Act, 69 P.S. § 289, failure to give notice bears only on the question whether seller has sold too soon. But the change is slight, since failure to give required notice appar-

ently deprives seller only of the resale as an absolute measure of damages; in any event he could prove damage from market price.

(4) The requirements in subsection (4) as to the manner of holding a public (auction) sale are new; under § 60(5) of the Uniform Sales Act, 69 P.S. § 289, the only requirement is the exercise of "reasonable skill and judgment." See Atlantic City Tire & Rubber Corp. v. Southwark F. & M. Co., 289 Pa. 569, 137 Atl. 807 (1927).

(5) Subsection (5) changes present law in giving greater protection to *bona fide* purchasers. Under § 60(2) of the Uniform Sales Act, 69 P.S. § 289, the buyer is protected where a resale is "as *authorized* in this section."

(6) Subsection (6) follows § 60(1) of the Uniform Sales Act, 69 P.S. § 289, in giving a seller any profit from a resale. *Cf.* Van Benthuysen v. Felheim Co., 2 Erie 167 (1920). The balance of the section in making a buyer accountable for profit is new, and probably changes present law since a buyer's resale under § 69(5) follows the rules for sale by seller, under which profit may be retained.

Sec. 2-707. "Person in the Position of a Seller."

This section slightly expands § 52(2) of the Uniform Sales Act, 69 P.S. § 281, to include a financing agency with a security interest.

Sec. 2-708. Seller's Damages for Non-Acceptance.

The basic rule of measuring damages approximates that of § 64(3) of the Uniform Sales Act, 69 P.S. § 293.

Profit. Under present law loss of profit can also be shown, Mayer Brick Co. v. Kennedy Co., 230 Pa. 98, 79 Atl. 246 (1911) (computed by deducting cost of manufacturing from contract price); Mitchell v. Baker, 208 Pa. 377, 57 Atl. 760 (1904) (same). On allowance to cover overhead see *accord:* Jessup & Moore Paper Co. v. Bryant Paper Co., 297 Pa. 483, 147 Atl. 519 (1929) (seller in computing damages not required to deduct overhead chargeable to contract).

Sec. 2-709. Action for the Price.

(1) (a) ***Acceptance.*** The Code narrows seller's right to the full price, making an action for damages the basic remedy. Under this section, liability for the full price, in the first instance, turns on "acceptance" (as defined in Sec. 2-606) instead of "title." As under § 41 of the Uniform Sales Act, 69 P.S. § 251, acceptance is delayed until after a reasonable opportunity to inspect.

The most significant change from present law deals with goods placed on a carrier by the seller where buyer is responsible for the freight. Under § 19 Rule 4(2) and § 63(1) of the Uniform Sales Act, 69 P.S. §§ 143, 292, "title" passed on loading, and buyer became liable for the full price regardless of damage in transit or the resal-

ability of the goods. Popper v. Rosen, 292 Pa. 122, 140 Atl. 774 (1928). See, New York & Penna. Co. v. Cunard Coal Co., 286 Pa. 72, 132 Atl. 828 (1926); Pittsburgh P. & P. Co. v. Cudahy Packing Co., 260 Pa. 135, 103 Atl. 548 (1918) (1913 contract).

The Code also omits the provision of § 63(2) of the Uniform Sales Act, 69 P.S. § 292, under which a promise of advance payment is enforceable in full, in an action the equivalent of specific performance of a promise to lend.

(b) *Goods Not Resalable.* Subsection (1)(b) roughly corresponds to § 63(3) of the Uniform Sales Act, which gave sellor an action for the price if the goods could not be resold for a reasonable price. See, Everedy Mach. Co. v. Hazle Maid Bakers, 334 Pa. 553, 6 A. (2d) 505 (1939) (icing machine made to specifications).

Sec. 2-710. Seller's Incidental Damages.

Sections 64 and 70 of the Uniform Sales Act, 69 P.S. §§ 293, 331, set out general rules under which incidental damages may be recoverable. Although the Code provision is more specific, it probably does not change present law. Mattison Mach. Works v. Nypenn Furniture Co., 286 Pa. 501, 134 Atl. 459 (1926) (freight, cartage, storage and insurance); Frank Pure Food Co. v. Dodson Canning Co., 34 York 90 (1920) (charges for care of goods); Atlantic City Tire & Rubber Corp. v. Southwark F. & M. Co., 289 Pa. 569, 137 Atl. 807 (1927) (storage charges prior to resale).

Sec. 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

This section, like Sec. 2-703, *supra*, sums up remedies conferred in other sections of the Article.

Subsection (1) provides that buyer may *both* revoke acceptance *and* recover damages. This would change holdings that buyer may not both "rescind" and recover damages. Stanley Drug Co. v. Smith, Kline & French Laboratories, 313 Pa. 368, 170 Atl. 274 (1934).

Subsection (3) giving buyer a lien for price payment follows, with some elaboration, § 69(5) of the Uniform Sales Act, 69 P.S. § 314.

Sec. 2-712. "Cover"; Buyer's Procurement of Substitute Goods.

This section is designed to give greater weight than under present law to the price paid for substitute goods in fixing buyer's damages. Compare Sec. 2-706, *supra*, (seller's resale as fixing buyer's damages). Under § 67(1) and (3) of the Uniform Sales Act, 69 P.S. § 312, the basic test is "damages" measured by the difference between contract price and "*market . . . price . . .* at the time or times when they ought to have been delivered . . .," rather than the actual cost of repurchase. However, under present law weight is

given to the price paid by buyer on repurchase. Everett v. Delp, 67 Pa. Super. Ct. 47 (1917) (buyer forced to purchase different kind of corn—its price held the measure).

Sec. 2-713. Buyer's Damages for Non-Delivery.

(1) In general, subsection (1) follows § 67(3) of the Uniform Sales Act, 69 P.S. § 312. A modification is made, however, in relating damages to the time buyer *"learned* of the breach" (as in cases of anticipatory repudiation). Contrast Sec. 2-610(b) which allows a party to "await performance" by one who has repudiated, and annotations citing Pennsylvania cases, *accord.* (There thus appears to be an inconsistency between these sections of the Code.)

(2) Although not clearly expressed, the intention of the section as indicated in comment 1 is to use the market to which buyer has access as the measure of his damages. *Cf.* Abrams v. Schmidt & Sons, 143 Pa. Super. Ct. 339, 17 A. 2d 681 (1941) (in view of local shortage, use of another market available to buyer held proper).

Sec. 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.

(1) In allowing action for damages although buyer has accepted, the Code follows §§ 49 and 69(1)(a) and (b) of the Uniform Sales Act, 69 P.S. §§ 259, 314. The limitation to damages resulting "in the ordinary course of events" follows § 69(6) of the Uniform Sales Act, 69 P.S. § 314.

(2) Subsection (2) follows the general rule for measuring damages of § 69(7) of the Uniform Sales Act, 69 P.S. § 314.

Sec. 2-715. Buyer's Incidental and Consequential Damages.

(1) ***Incidental Damages: Components.*** The specification of expenses recoverable by the buyer is new. In allowing expenses in making "cover" (repurchase) the section may change the results of some cases. See, Armstrong v. Descalzi, 48 Pa. Super. 171 (1911) (buyer's expense in reselling excluded). In support of Code see: Cleveland Wrecking Co. v. Federal Deposit Ins. Co., 66 F. Supp. 921 (E.D. Pa., 1946) (cost of dismantling defective house).

(2) ***Consequential Damages.***

(a) ***Loss Resulting From Requirements or Needs.*** Subsection (1)(a) is new as a statute. See *accord:* Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 Atl. 1087 (1905) (buyer recovered profits lost when seller failed to furnish work for purchased machines). In giving buyer loss of which seller would have "reason to know," there may be reversal of cases holding seller must know specifically of buyer's contract for resale. See, Popkin Bros. v. Dunlap, 130 Pa. Super. Ct. 50, 196 Atl. 586 (1938) (knowledge that buyer in business of reselling insufficient. See cases cited in opin-

ion); Macchia v. Megow, 355 Pa. 565, 50 A. 2d 314 (1947) (similar). *Cf.* Wolstenholme v. Randall & Bros., 295 Pa. 131, 144 Atl. 909 (1929) (test applied to find buyer's liability to sub-vendees not too remote).

(b) ***Injury to Person or Property.*** *Accord:* Budd v. Mutchler, 98 Pa. Super. Ct. 420 (1930) (damage from crumbling of garage because of defective building blocks); *cf.* Young v. Great A. & P. Tea Co., 15 F. Supp. 1018 (W.D. Pa. 1936) (recovery not allowed for mental shock and physical consequences from foreign object in food).

Sec. 2-716. Buyer's Right to Specific Performance or Replevin.

Specific Performance. Sub-section (1) broadens the rule of § 68 of the Uniform Sales Act, 69 P.S. § 313 (Pennsylvania inserted an amendment requiring that "the remedy at law be inadequate"). The Code omits the requirement that goods be "specific or ascertained." In actual practice, this limitation seems to have been overlooked, and specific performance has been liberally granted. See: Cochrane v. Szpakowski, 355 Pa. 357, 49 A. (2d) 692 (1947) (contract for sale of restaurant and liquor business); Unatin 7-Up Co. v. Solomon, 350 Pa. 632, 39 A. 2d 835 (1944) (sale of soft drink business possessing favorable O.P.A. sugar quota). *Cf.* Sherman v. Herr, 220 Pa. 420, 69 Atl. 899 (1908) (sale of stock; before Sales Act). Pennsylvania Constitution, Art. 5 § 20 does not bar expansion of equity powers, Commonwealth v. Dietz, 285 Pa. 511, 132 Atl. 572 (1926).

Replevin. Sub-section (3) abandons the present rule that the action of replevin depends on the passing of title. Uniform Sales Act § 66, 69 P.S. § 311. In some instances the Code would narrow the right of replevin, as where title passed to goods available on the market. In other instances the right of replevin is expanded, where substitute goods are unavailable, but the title to the goods is deemed to be in the seller through a contract provision requiring seller to take the risk, or deliver, or complete work on the goods.

Sec. 2-717. Deduction of Damages from Price.

This section follows and enlarges upon the provision allowing recoupment in § 69(1)(a) of the Uniform Sales Act, 69 P.S. § 314. The requirement of notice of the deduction from the price is new. However, § 49 of the Uniform Sales Act, 69 P. S. § 259, requires notice of breach of warranty.

Sec. 2-718. Liquidation or Limitation of Damages; Deposits.

(1) ***Liquidated Damages.*** There is now no statutory provision. But cases have held excessive liquidation of damages to be void as penalties. Gross v. Exeter Mach. Works, 277 Pa. 363, 121 Atl. 195

(1923) (in sale of machines, $1000 set as liquidated damages for any breach; since breach might be minor provision held void). In general, the test proposed is similar to that set forth in § 339, Restatement of Contracts. For other Pennsylvania cases relating to distinction between liquidated damages and penalties, see Pa. Annotations to Restatement of Contracts, § 339. For recent cases sustaining contractual provisions as "liquidated damages" see, Holmes Electric Protective Co. v. Goldstein, 147 Pa. Super. Ct. 506, 24 A. 2d 161 (1942) (liquidated damages of 50% of $15 monthly service charge enforced); Phila. Dairy Products Co. v. Polin, 147 Pa. Super. Ct. 26 (1941) (forfeiture of $100); Vrooman v. Milgram, 124 Pa. Super. Ct. 145, 188 Atl. 538 (1936) (forfeiture of $300; sale of business for $2100); Becker-Mills, Inc. v. Bosher, 68 D. & C. 115 (1949) ($500 to be paid by new car buyer to "charity" upon re-sale of new car within six months); Martindale, Inc. v. Gorman, 165 Pa. Super. Ct. 612 (1950) (similar facts); Comm. v. Telegraph Press, 62 D. & C. 328 (1948) ($25 per day, Restatement of Contracts, § 339, cited); In Re Oscar Nobel, 117 F. 2d 326 (3d Cir. 1941) (Pa. law; forfeiture of $10,000 deposit; $100,000 sale of machinery). Recent cases holding contractual provisions void as a penalty are: Germain Lumber Co. v. U. S., 56 F. Supp. 1001 (W. D. Pa. 1944) (2% per day, or $250, held excessive).

(2) ***Return of Down Payment.*** Although sub-section (2) is not supported by the language of the Restatement (see §§ 340, 357 (2), Restatement of Contracts & Pa. Annotations thereto), it is not inconsistent with the results reached by some of the Pa. cases. See Ellis v. Roberts, 98 Pa. Super. Ct. 49 (1929).

For early cases, see Pa. Annotations to Restatement of Contracts, §§ 340, 357. For recent cases sustaining retention of deposit by seller as "liquidated damages" see, In re Oscar Nobel, 117 F. 2d 326 (3d Cir. 1945) (sale of machines for $100,000; $10,000 deposit forfeited; Pa. law); Messinger v. Lee, 163 Pa. Super. Ct. 297 (1948) (land contract; $12,000 price, $1,000 down. Actual damages to seller $250. Purchaser in default cannot recover any portion of money paid down, although no liquidated damage clause); Tudesco v. Wilson, 163 Pa. Super. Ct. 352 (1948) (10% down).

The ratio of the deposit to the contract price has been an important factor, among others, considered by the Pa. courts. See, Kraft v. Michael, 166 Pa. Super. Ct. 57, 70 A. 2d 424 (1950) (land contract; 10% deposit held not a penalty); Ellis v. Roberts, 98 Pa. Super. Ct. 49, 60 (1929) (land contract; 15% deposit, in light of all the circumstances, held a penalty). See also, Power Mfg. Co. v. Bellefonte Trust Co., 13 D. & C. 321 (1929) (liquidated damage clause requiring payment of 25% of purchase price of engine enforced). See also, Atlantic City Tire & R. Co. v. Southwark F. & M. Co., 289 Pa. 569, 137 Atl. 807 (1927) (dictum that buyer may

not recover down-payment on material breach; seller's damages exceeded deposit). The specified figures ($500 or 20%) below which forfeiture may be effective regardless of the amount of damages are new. They are, however, analogous to the provisions requiring resale of reclaimed goods if buyer has paid more than specified amounts, Uniform Conditional Sales Act § 19, 69 P.S. § 454.

Sec. 2-719. Contractual Modification or Limitation of Remedy.

(1) The rule of subsection (1) that remedies may be modified by agreement is consistent with the general rule of § 71 of the Uniform Sales Act, 69 P.S. § 332 that any right, duty or liability under the Act may be modified by agreement. See *accord:* Bechtold v. Murray Ohio Mfg. Co., 321 Pa. 423, 184 Atl. 49 (1936) (remedy for breach of warranty limited by contract to adjustment or replacement); Sharples Separator Co. v. Domestic Electric Refrigerator Corp., 61 F. (2d) 499 (3d Cir. 1932) (replacement warranty barred rescission of contract as to future performance); Hill & MacMillan v. Taylor, 304 Pa. 18, 155 Atl. 103 (1931) (similar).

(2) Subsection (2) is new, and in limiting the effect of the contract may be inconsistent with the theory of the cases cited above.

(3) The refusal to honor contracts limiting consequential damages if "unconscionable" is inconsistent with the theory of the present law. See cases, *supra.* However, it appears consistent with the result of some cases which have given narrow construction to form clauses limiting recovery, especially where the purchaser is an ordinary consumer. See, *e. g.* Ebbert v. Philadelphia Electric Co., 330 Pa. 257, 198 Atl. 323 (1938) (warranty limited to replacing parts of washing machine did not bar recovery for hand injury; tort action). *Cf.* Campbell Soup Co. v. Wentz, 172 F. 2d 80 (3d Cir. 1949) (refusal of equity enforcement of "unconscionable" contract).

Sec. 2-720. Effect of "Cancellation" or "Rescission" on Claims for Antecedent Breach.

The presumption against intent to renounce a claim for damages is consistent with Rees v. R. A. Bowers Co., 280 Pa. 474, 124 Atl. 653 (1924) (seller repaid buyer to get possession of rejected goods; "inference . . . consistent with established right . . . should prevail"). The section might, however, require a different result in Stanley Drug Co. v. Smith, Kline & French Laboratories, 313 Pa. 368, 170 Atl. 274 (1934) (buyer returned defective mouth wash and received refund of price; barred by § 69(1)(d) and by voluntary rescission in absence of "express reservation of claims").

Sec. 2-721. Remedies for Fraud.

This section is designed to insure that an action based on fraud is not restricted to common-law rules but is governed by rules at

least as liberal as those applicable where fraud is not present. In some situations this may change present rules. See Restatement, Restitution § 68 illustration 6 (partial rescission). See also Code Sec. 2-711, *supra*, and Stanley Drug Co. v. Smith, Kline & French Laboratories, 313 Pa. 368, 170 Atl. 274 (1934) (rescission excludes damages). The section would also overturn the Pennsylvania rule that in an action for deceit damages are limited to loss suffered, and the defrauded party may not recover the benefit which he would have obtained if the representations had been true. High v. Berret, 148 Pa. 261, 23 Atl. 1004 (1892); Browning v. Rodman, 268 Pa. 575, 111 Atl. 877 (1920); Henderson v. Plymouth Oil Co., 13 F. 2d 932 (W.D. Pa. 1926).

Sec. 2-722. Who Can Sue Third Parties for Injury to Goods.

(a) ***Rights After Acceptance.*** In view of the difficulty of determining whether buyer has "accepted" goods (Sec. 2-606) it is not clear whether sub-section (a) changes present law. If acceptance may occur before delivery, this sub-section might deny action to a seller with a lien interest—a result probably not intended. Otherwise, the section is in accord with principle giving action to the real party in interest. Pa. Rules of Civil Procedure, Rule 2002(a).

(b) ***Rights Before Acceptance.*** The Uniform Sales Act did not deal with the proper party for actions against a third person. In *accord* with the Code see, Tentzer v. Reading Co., 101 Pa. Super. Ct. 238 (1930) (buyer, as consignor of shipment ordered reconsigned, has action against carrier regardless of title); Robb v. American Railway Express, 78 Pa. Super. Ct. 1 (1928) (similar).

(c) ***Suit as Fiduciary.*** *Cf. accord:* Dublin Paper Co. v. Insurance Company of N.A., 361 Pa. 68, 63 A. 2d 85 (1949) (land contract). Rule 2002(b)(1), Pa. Rules of Civil Procedure would require the plaintiff to disclose the fiduciary capacity in the pleadings.

(d) This would seem to modify existing law, under which prior practice permitting a "to use" action to be maintained has been abandoned. See Note of Procedural Rules Committee to Rule 2002, 2 Goodrich-Amram, Procedural Rules Service, § 2002, p. 5. Under present practice, if both are beneficially interested, both probably must join in spite of an attempted assignment. See *id.* p. 6.

Sec. 2-723. Proof of Market Price: Time and Place.

(1) Subsection (1) is made necessary by Sec. 2-610(b) under which a party faced with anticipatory repudiation may "await performance." This choice is consistent with present law; see cases cited Sec. 2-610 *supra*. The measure of damage under Sec. 2-723 on trial prior to the time for performance appears new in theory. See Restatement of Contracts § 338 and Pennsylvania Annotations.

(There appears to be an inconsistency between Secs. 2-708 and 2-713 on whether damage in cases of anticipatory repudiation is measured as of the time of repudiation or the later date set for performance.)

(2) Subsection (2) allowing the use of a market other than one related to the contract is new as a statutory provision, but follows Mindlin v. O'Boyle, 283 Pa. 352, 129 Atl. 81 (1925) (in contract F.O.B. mines in Pennsylvania, proper to use New York price adjusted by transportation expense). The notice rule, if it would modify customary rules of pleading, appears new.

Sec. 2-724. Admissibility of Market Quotations.

The liberal rule of evidence in this section providing that published market reports are admissible goes beyond existing statutes. Compare Uniform Business Records as Evidence Act, 28 P.S. § 91 b. See, Lewis Estate, 44 D. & C. 413, 424 (1942), (to be admissible under Uniform Business Records as Evidence Act, report must be made "in the regular course of the business to which the entry relates"). Cases are few. Some courts have admitted such reports on the basis of their general reliability and known trustworthiness. See 6 Wigmore, Evidence § 1704. *Cf.* Bounomo v. United Distiller's Co., 77 Pa. Super. Ct. 113 (1921), ("standard daily market quotations under certain circumstances are admissible in evidence [but] . . . merely private price lists . . . are not admissible").

Sec. 2-725. Statute of Limitations in Contracts for Sale.

(1) ***Statutory Period.*** The four-year period under the Code would change present law. There is now a limitation of 6 years on contract actions from the time the right of action accrues. 12 P.S. § 31. The limitation for personal injury actions is 2 years. 12 P.S. § 34. An action based on breach of warranty resulting in personal injury under existing law would have to be brought within two years. Jones v. Boggs & Buhl, 355 Pa. 242, 49 A. 2d 379 (1946) (sale of fur coat; painful skin disease acquired from collar). Nightlinger v. Johnson, 18 D. & C. 47 (1932); Bradley v. Laubach, 23 Dist. 151 (1914) (action against druggist for personal injuries for failure to properly compound a prescription).

Modification by Contract. This provision does not seem to have any counterpart in existing statutes.

(2) ***Time When Action Accrues.*** Under existing law, the right of action is said to "accrue," and the statute begins to run, when "there is an existing right to sue forthwith." New York & Pa. Co. v. N.Y.C. R. Co., 300 Pa. 242, 150 Atl. 480 (1930); Foley v. Pittsburgh-Des Moines Co. *et al.*, 363 Pa. 1, 38, 68 A. 2d 517 (1949) (cause of action held to accrue when defective tanks exploded, not when installed by vendor; negligence action).

Lack of Knowledge. In accord with the general rule of subsection (2) that the statute runs from the breach rather than knowledge thereof; see, Deemer v. Weaver, 324 Pa. 85, 187 Atl. 215 (1936); *cf.* Bernarth v. Le Fever, 325 Pa. 43, 189 A. 342 (1937) (trespass for false representations resulting in loss of eye; statute held to run from time when representations made, though plaintiff then had no knowledge of falsity).

(3) *Substitute Action After Statutory Period.* There does not appear to be any existing statutory provision in this state of comparable scope. But *see,* 12 P.S. § 42 which applies a similar rule to judgments of a justice of the peace removed to a court of common pleas.

Article 3
COMMERCIAL PAPER

Introductory Comment

Scope Note: Article 3 includes not only what is presently covered by the Negotiable Instruments Law (Act of May 16, 1901, P. L. 194, 56 P.S. §§ 11-497 as amended by the Act of April 5, 1927, P. L. 118, (correcting typographical error)), but also the material now covered by the following statutes:

(a) Act of April 5, 1849, P. L. 424 § 10, 56 P.S. § 29 (relating to recovery of consideration on forged bills and notes).

(b) Act of April 27, 1909, P. L. 260, 56 P.S. § 326 amending N.I.L. § 137 to provide that mere retention of an instrument is not an acceptance unless a demand is made and that the section does not apply to a check.

(c) Act of February 27, 1797, 3 Sm.L. 278 § 1, 56 P.S. 472, (promissory notes negotiable in Philadelphia County, if they contain the words "Without Defalcation" or "Without Setoff").

(d) Act of June 12, 1919, P. L. 453 § 1, 7 P.S. § 211 (liability for non-payment of check through error).

(e) Act of May 15, 1933, P. L. 624, Art. IX, § 911 as added to by the Act of July 29, 1941, P. L. 586 § 2, 7 P.S. §§ 819-911 (liability respecting forged, altered or raised checks).

(f) Act of May 15, 1933, P. L. 624, Art. IX, § 912, as added to by the Act of July 29, 1941, P. L. 586, § 2, 7 P.S. § 819-912 (limitations on stop-payment orders).

Quaere: As to the effect of the enactment of the Code upon

(1) Act of April 12, 1872, P. L. 60, §§ 1 & 2, 56 P.S. §§ 9 & 9a (notes relating to patent rights must so state).

(2) Act of May 13, 1850, P. L. 746 § 6, 56 P.S. § 391 (relating to damages for dishonor of foreign bills, 5% on those inside of the United States, 10% outside except for certain areas when 15% applies).

Possibly some of the "most favored nation" or the "Equal treatment" treaties and conventions of the United States may prevent the application of this provision in any event.

(3) Act of March 30, 1821, P. L. 156, 7 Sm.L. 435, § 2, 56 P.S. § 392 (damages on protested bills of exchange to be in lieu of interest and other charges and rate of exchange at time of notice of protest and demand of payment shall determine damages).

(4) Act of May 31, 1893, P. L. 188, and amendments, 44 P.S. §§ 1-27, on Validity of Acts on Holidays.

Subdivisions of Article 3: Article 3 of the Code is divided into eight parts as follows:

Part 1. Short title, Form and Interpretation.
2. Transfer and Negotiation.
3. Rights of a Holder.
4. Liability of Parties.
5. Presentment, Notice of Dishonor and Protest.
6. Discharge.
7. Collection of Documentary Drafts.
8. Miscellaneous.

Certain topics usually thought of as bills and notes materials, or related thereto, are treated elsewhere in the Commercial Code:

See Article 4—Bank Deposits and Collections.
Article 5—Documentary Letters of Credit.
Article 8—Investment Securities (*Cf.* Act of March 29, 1927, P. L. 73, 56 P.S. §§ 511-513, Security Receipts Act).

Part 1. Short Title, Form and Interpretation.

Introductory Comment

(a) ***N.I.L. Topics Covered.*** N.I.L. Article 1, Form and Interpretation, ("Formal Requisites") §§ 1-9, 11, 12; and the definition of bill of exchange (N.I.L. 126, 128), the definitions of promissory note and check (184, 185) and the rules relating to interpretation of indorsements, effect of blanks, and position of signatures (N.I.L. §§ 13, 14, 15, 17, 41, 42 and 68). The effect of stating on an instrument that it is payable at a bank (N.I.L. 87) is also here stated.

(b) ***New Topics.*** Sections relating to the effect of a statement that an instrument is "payable through" a bank, that an instrument

is "void if not presented in ten days" or the like, and the effect of other writings executed as a part of the same transaction.

(c) ***N.I.L. Matters Covered Elsewhere.*** The "Bearer" character of instruments indorsed in blank, N.I.L. § 9(5), is covered in Sec. 3-204, and the "bearer" character of instruments payable to fictitious payees (N.I.L. § 9(3)) and imposters is covered in Sec. 3-405. The rule of N.I.L. § 16 as to the rights of a holder in due course is covered in Sec. 3-305. Secs. 19, 20 and 23 are covered in Part IV on liability of parties.

(d) ***Omissions.*** (1) N.I.L. § 10 stating that any terms are sufficient which clearly indicate an intent to conform to the Act.

(2) N.I.L. § 21. Effect of signature by procuration, omitted as obsolete in the United States.

Sec. 3-101. Short Title.

Sec. 3-102. Definitions and Index of Definitions.

Sec. 3-103. Limitations on Scope of Article.

Sec. 3-104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note".

(1a) *Accord:* § 1(1) N.I.L.; Donohoe's Estate, 271 Pa. 554 (1922).

(1b) *Accord:* §§ 1(2), 5 N.I.L.; South Side Bank & Trust Co. v. Doehler Metal Furniture Co., 44 Lack. Jur. 138 (1944).

(1c) *Accord:* § 1(3) N.I.L. See Annotation to Sec. 3-109 as to "definite time."

(1d) *Accord:* § 1(4) N.I.L.

(2a, b, & d) *Accord:* §§ 126, 184, 185 N.I.L.

(2c) *Accord:* Gordon v. Fifth Ave. Bank, 308 Pa. 323 (1932) as to a certificate of deposit containing words of "order." A certificate of deposit not containing a "to order" phrase but merely stating that it is "payable upon return of this certificate properly indorsed" is not a negotiable instrument within the Code. Early Pennsylvania holdings seem to be in *accord:* see Patterson v. Poindexter, 6 W. & S. 227; Charnley v. Dulles, 8 W. & S. 353; Lebanon v. Mangan, 28 Pa. 452; London Savings Fund v. Hagerstown Bank, 36 Pa. 498. Omission of § 10 N.I.L. if interpreted according to Comment 8 to this Section of the Code, reverses Penna. policy that where there is doubt the decision should be in favor of negotiability. Gerber's Estate, 337 Pa. 108 (1940); International Finance Corp. v. Philadelphia Wholesale Drug Co., 312 Pa. 280 (1933). However, this policy, as expressed in the foregoing cases, was not enunciated in connection with words of negotiability or their equivalent. Omission of § 10 is not intended to require that an instrument contain the exact words of the statute.

Sec. 3-105. When Promise or Order Unconditional.

(1) *Not Conditional.*

(a) *Accord:* Southside Bank and Trust Co. v. Doehler Furniture Co., 44 Lackawanna Jur. 138 (1943).

(b) *Accord:* § 3(2) N.I.L.; Trader's Security Company v. Kalil, 107 Pa. Super. Ct. 215 (1932) (notation on trade acceptance "the obligation of the acceptor hereof arises out of the purchase of goods from the drawer").

As to statement of the transaction which gave rise to the instrument; International Finance Corp. v. Philadelphia Wholesale Drug Co., 312 Pa. 280 (1933) (draft accepted for payment as per Reolo Contract). But *cf.* Danati v. Booth, 95 Pa. Super. Ct. 238 (1928) (promissory note, promise to pay as per contract).

(c) *Accord:* State Trading Co. v. Jordan, 146 Pa. Super. Ct. 166 (1941) (trade acceptance had notation "the obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase"). See also: Levitt v. Johnstown Office Supply Co., 103 Pa. Super. Ct. 76 (1931) (same notation, instrument assumed to be negotiable). But *cf.* State Trading Co. v. Addis, 35 Pa. D. & C. 123, appl. dismissed, 140 Pa. Super. Ct. 64 (1940) (same notation held to carry contract into the note and make the note non-negotiable). This latter case no longer valid as authority.

(d) No Pennsylvania decisions can be found on this point.

(e) *Accord:* Farmer's Bank of Mercersburg v. Crowell, 148 Pa. 284 (1892) (statement of existence of collateral security does not impair negotiability); Gerber's Estate, 337 Pa. 108 (1939) (provision in bonds "subject to the terms and conditions" of a deed of trust securing them did not destroy negotiability).

(f) *Accord:* § 3(1) N.I.L.

(g) *Contra:* Reeside v. Knox, 2 Wharton 233 (1837) (bill of exchange drawn on postmaster-general); O'Donnell v. Phila., 2 Brewster 481 (1868); O'Brien v. Radford, 113 Pa. Super. Ct. 88 (1934); Fischback and Moore Inc. v. Philadelphia National Bank, 134 Pa. Super. Ct. 84 (1939) (city warrants); East Union Township v. Ryan, 86 Pa. 459 (1878) (town warrants); Township of Snyder v. Bovaird, 122 Pa. 442 (1888); Benton v. Freedom Township Supervisors, 118 Pa. Super. 229 (1935) (township orders); Livingston v. School Board, 15 Pa. Super. Ct. 358 (1900) (school district orders). But see 53 P.S. § 14589 for statute that permits boroughs to issue negotiable credit memoranda to pay for work on water mains to the value of the assessment thereon.

(h) No Pennsylvania decisions were found on this subject. But cases such as Hibbs v. Brown, 190 N. Y. 167, (1907); Charles Nelson Co. v. Morton, 106 Cal. App. 144 (1930), are in *accord;* but *cf.* Lorinier v. McGreevy, 229 Mo. App. 970 (1935).

(2) *Instrument Made Conditional.*

(a) *Accord:* Post v. Kinzua Hemlock Railway Co., 171 Pa. 615 (1895) (Following instrument not negotiable "On the first day of July, 1891, without grace, there will be due to the American Car & Equipment Company or order two hundred and fifty dollars for rental of rolling stock under contract of lease and conditional sale of even date herewith, payable at the office of the American Car & Equipment Company in the city of New York, with interest at six per cent per annum added.")

(b) *Accord:* § 3(2) N.I.L.

Sec. 3-106. Sum Certain.

(1) (a) Identical to §§ 2(1), (2) N.I.L.

(b) *Accord:* See First National Bank of Miami v. Bosler, 297 Pa. 353 (1929).

(c) No decision squarely decides under N.I.L. whether discount notes are negotiable. Stevens v. Baldy, 67 Pa. Super. Ct. 145 (1917) by reversing lower court on other grounds, leaves question open. See Gray v. Mortimer 7 C.C. 671 (1889) for pre-N.I.L. view that discount notes non-negotiable.

Provision for additions after maturity upheld in Interstate Contracting Co. v. Mager (No. 1), 51 D. & C. 113 (1943).

(d) Identical to § 2(4) N.I.L., except for addition of words "or less exchange."

(e) Identical to § 2(5), except for addition of words "or both" and substitution of "upon default" for "at maturity." The addition is in *accord* with Penna. Law. Philadelphia National Bank v. Buchman, 314 Pa. 343 (1934). Note that Section 2(3) of the N.I.L. is omitted. Acceleration clauses are apparently not considered to affect the "sum certain" under the Code. See Code Sec. 3-109(1)(c).

(2) No Pennsylvania decisions were found on this point.

Sec. 3-107. Money.

(1) *Contra* (as to "currency," "current funds"): Wright v. Hart's Adm'r, 44 Pa. 454 (1863); The Louden Savings Fund Society v. The Hagerstown Savings Bank, 36 Pa. 498 (1860). No post-N.I.L. cases can be found in Penna. The weight of modern authority elsewhere, however, holds that an instrument otherwise negotiable is not rendered non-negotiable because payable in "current funds." 7 Am. Jur. § 123. *Cf.* Wharton v. Morris, 1 Dall. 124 (1785). ("Current money of Penna." held to mean legal tender.)

(2) No Pennsylvania cases, apparently, discuss the problem of a note or draft payable here, but with the amount expressed in terms of a foreign currency. The section states current bank practice.

Sec. 3-108. Payable on Demand.

(1) *Accord:* § 7, N.I.L. See Miners State Bank v. Auksztokolnis, 283 Pa. 18 (1925). On when interest starts to run see Weiskircher v. Connelly, 256 Pa. 387 (1917); Penn Safe Deposit and Trust Co. v. Stetson et al., 16 Pa. County 650 (1895), aff'd., 175 Pa. 160 (1896) (bringing the suit constituted demand to have the interest begin accruing).

Sec. 3-109. Definite Time.

(1a and b) *accord* with § 4(1) N.I.L., except for addition of word "stated" which does not change the sense.

(1c) Pennsylvania cases have generally upheld acceleration clauses. Empire Nat'l Bank of Clarksburg v. High Grade Oil Refining Co., 260 Pa. 255 (1918); International Financing Co. v. Magilansky, 105 Pa. Super. Ct. 309 (1932); Home Credit Co. v. Preston, 99 Pa. Super. Ct. 457 (1930). *Cf.* Hazell v. Sweeney, 22 Del. 481 (1932). But the phrase "subject to any acceleration" goes beyond the language of the decisions.

(1d) *Cf:* Citizens N. Bank v. Piollet, 126 Pa. 194 (1889) (notation that instrument will be renewed at maturity held to render instrument non-negotiable). The more recent cases elsewhere are in accord with this subsection. 7 Am. Jur. § 153.

(2) Changes the rule as to post-obit bonds expressed in § 4(3) N.I.L. However, the result of a post-obit bond can perhaps still be obtained under Code Sec. 3-109(c) by setting an extremely remote maturity date with acceleration upon the death of X. *Cf.* Zimmerman v. Zimmerman, 262 Pa. 540 (1919).

Sec. 3-110. Payable to Order.

(1) *Accord:* § 8 N.I.L. preamble & postamble, except that the word "assigns" now imports negotiability.

(a) *Accord:* § 8(2) N.I.L.

(b) *Accord:* § 8(3) N.I.L.

(c) *Accord:* § 8(1) N.I.L.

(d) *Accord:* § 8(4) and 8(5) N.I.L. with change of words which are, in effect, the same.

(e) *Accord:* Bacher, Admr. v. City National Bank of Philadelphia, 347 Pa. 80 (1943) which held that "Estate of Anna Hoffman" was a shorthand way of saying "pay to the Admr. of the Estate of Anna Hoffman deceased."

(f) *Accord:* § 8(6) of N.I.L.

(g) No Pennsylvania decisions were found on this point.

(2) *Contra:* Forrest v. Safety Banking and Trust Co., 174 Fed. 345 (C.C.A. Pa. 1909); *cf.* Gordon v. Fifth Avenue Bank of Pittsburgh, 308 Pa. 323 (1932) where it was held that certificates of deposit were negotiable (citing Forrest v. Safety Banking and Trust

Co.) where the certificate contained a statement ". . . payable to the order of himself, 6 months after date on return of this certificate properly indorsed." See annotation to Sec. 3-104 (2c).

(3) No Pennsylvania decisions were found on this point.

Sec. 3-111. Payable to Bearer.

(a) & (b) correspond to §§ 9(1), (2), N.I.L., except for addition of "order of bearer."

(c) corresponds to § 9(4) N.I.L. except for use of payable to "cash" as illustration.

Sec. 3-112. Terms and Omissions Not Affecting Negotiability.

(1a) *Accord:* §§ 6(2), 6(3), N.I.L.

(1b) *Accord:* § 5(1) N.I.L.

(1c) *Cf.:* Empire Nat'l Bank v. High Grade Oil Refining Co., 260 Pa. 255 (1918) (promise made to prevent acceleration).

(1d) *Accord:* § 5(2) N.I.L.; First Nat'l Bank v. Albright, 111 Pa. Super. Ct. 392 (1934); Interstate Contracting Co. v. Mager, 51 D. & C. 113 (1945) (installment note). Most judgment notes in use in Pennsylvania are not negotiable because judgment may be entered before the amount is due.

(1e) *Accord:* § 5(3) N.I.L.; First Nat'l Bank v. Albright, 111 Pa. Super. Ct. 392 (1934).

(1f) *Accord:* The Union Trust Co. v. Evans, 29 Lanc. L. Rev. 291 (1912), reversed on other grounds, 52 Pa. Super. Ct. 498 (1913).

(2) No specific cases were found.

Sec. 3-113. Seal.

Accord: § 8(4) N.I.L. Pennsylvania cases under the N.I.L. have held that the presence of a seal does not destroy the negotiability of an instrument and are to that extent in accord with this section: Balliet v. Fetter, 314 Pa. 284 (1934); see First Nat'l Bank v. Albright, 111 Pa. Super. Ct. 392. It is to be noted, however, that the provision that a sealed instrument is "within this article" would make available the defense of want of as well as failure of consideration which would be contrary to the present Pennsylvania law: Independent Coat Company v. Michalowski, 349 Pa. 349 (1944); Rynier's Estate, 347 Pa. 471 (1943).

Sec. 3-114. Date, Antedating, Postdating.

(1) The negotiability of an instrument is not affected by the fact that it is undated, *Accord:* § 6(1) N.I.L.; or that it is antedated or post-dated, *Accord:* § 12 N.I.L. Rathfon v. Locher, 215 Pa. 571 (1909) (there being no allegation that the notes were post-dated for an illegal or fraudulent purpose the instrument was valid).

(2) *Accord:* Richey v. York County National Bank, 52 York

Legal Record 33 (1938), aff'd, 142 Pa. Super. Ct. 236 (1940) (memorandum opinion only, majority of five judges unable to agree on grounds of affirmance).

(3) *Accord:* § 11 N.I.L. But it should be noted there is a slight change, the Code extends the presumption to all signatures.

Sec. 3-115. Incomplete Instruments.

(1) *Accord:* Hershberger v. Hershberger, 345 Pa. 439 (1942); Lincoln Deposit & Trust Co. v. Sanker, 305 Pa. 576 (1932).

(2) *Contra:* As to effect even though not delivered, § 15 N.I.L. But *cf:* Weiner v. The Pennsylvania Co. for Insurances and Granting Annuities, 160 Pa. Super. Ct. 320 (1947).

Accord: As to burden of proof: Massey v. Massey, 267 Pa. 239 (1920); Allem's Estate, 56 Montg. 63 (1939).

Sec. 3-116. Instruments Payable to Two or More Persons.

(a) There do not seem to be any Pennsylvania decisions on alternate payees, but the majority view seems in *accord:* Voris v. Schoonover, 91 Kansas 530 (1914); Page v. Ford, 65 Oregon 450 (1913); Union Bank v. Spies, 151 Iowa 178 (1911).

(b) *Accord:* § 41 N.I.L. but note the fact that permitting one partner to sign for the partnership has been dropped from the Code. But see the comment to Sec. 3-117 which states that the joint payees need not sign if one is authorized to sign for the other. This statement it seems is intended to cover the partnership situation here.

The last section of the comment says an instrument payable to "A and/or B" is payable alternatively or jointly which is in *accord* with Glen Falls Indemnity Co. v. Chase Nat'l Bank, 257 N. Y. 441 (1931).

Sec. 3-117. Instruments Payable with Words of Description.

(a) Accord with § 42 N.I.L. except that the Code extends the rule of that section to include all agents and officers of principals. No Pennsylvania decisions on the additional coverage of this section were found.

(b) *Accord:* Safe Deposit Trust Co. v. Diamond National Bank, 194 Pa. 334 (1900) (administrator); Hood v. Kensington National Bank, 230 Pa. 508 (1911) (guardian).

(c) *Accord:* Bryant v. McGowan, 151 Pa. Super. Ct. 529 (1943) (unremarried widow).

Sec. 3-118. Ambiguous Terms and Rules of Construction.

(a) *Accord:* § 17(5) N.I.L.

(b) *Accord:* § 17(4) N.I.L.

(c) *Accord:* § 17(1) N.I.L.

(d) *Accord:* § 17(2) N.I.L. See Coral Gables Corp. v. Smolevitz, 85 Pitts. L.J. 35 (1934) (interest governed by place of payment).

(e) *Accord:* §§ 17(7), 68 N.I.L. *Cf.:* Grange Trust Co. v. American Surety Co., 30 F. (2d) 445 (1928) (person signing below maker could not show by parol evidence that he signed merely as indorser).

(f) Will not change such cases as Lanahan v. Clark, 279 Pa. 297 (1924), where there is a separate agreement to extend indefinitely.

Sec. 3-119. Other Writings Affecting Instrument.

(1) *Accord:* Gordon v. Colonial-Northeastern Trust Co., 312 Pa. 73 (1933); Keller v. Cohen, 217 Pa. 522 (1909); National Bank of Kennett Square v. Shaw, 218 Pa. 612 (1907).

Contemporaneous parol agreements formerly could be set up: Faux v. Fitler, 223 Pa. 568 (1909); Gandy v. Weckerly, 220 Pa. 285 (1908).

Accord: As to rights of holder in due course, Meadville Park Theatre Corp. v. McGillick, 330 Pa. 329 (1938).

(2) *Accord:* Meadville Park Theatre Corp. v. McGillick, *supra.*

Sec. 3-120. Instruments "Payable Through" Bank.

This section is new and there seem to be no Pennsylvania decisions that deal with the problem. See First National Bank & Trust Co. of Lexington v. First Nat'l Bank in Hazard's Receivers, 260 Ky. 581 (1935).

Sec. 3-121. Instruments Payable at Bank.

§ 87 N.I.L. is in accord with Alternative A. The Code goes further in Alternative A requiring that payment may be made only out of current funds. The decisions seem to be in accord with N.I.L. § 87, Franklin Saving & Trust Co. v. Clark, 283 Pa. 212 (1925); Commercial Nat'l Bank v. Henninger, 105 Pa. 496 (1884). In the cited cases the bank was the holder of the note, but the former case cites a New York case, Aetna National Bank v. Fourth National Bank, 46 N. Y. 82 (1871) which is directly in accord with Alternative A.

Note, however, that some Pennsylvania banks follow Alternative B in practice and seek additional authorization from their customers before making payments. The Pennsylvania Bankers Association should determine which alternative represents the current practice of the largest number of banks.

Sec. 3-122. Accrual of Cause of Action.

(1) Cause of action on a demand note accrues on issue, *accord:* Dominion Trust Co. v. Hildner, 243 Pa. 253 (1914); Swearingen v. Sewnichley Dairy Co., 198 Pa. 68 (1901); Andress's App. 99 Pa. 421 (1882).

(2) Cause of action on a Certificate of Deposit does not accrue until return of it and demand for money, *accord:* Gardners' Estate, 228 Pa. 282 (1910).

Part 2. Transfer and Negotiation.

Introductory Comment

(a) *N.I.L. Topics Covered.* Most of Article 3 on Negotiation, §§ 30, 34, 36, 37, 39, 40, 43, 47 and 50; § 22 on effect of indorsement by infant or corporation, and parts of §§ 58 and 59.

(b) *New Topics.* Provisions governing the rights of a transferee of an instrument (Sec. 3-201 in part); stating that words of assignment, guaranty, condition, waiver, limitation or disclaimer accompanying an indorsement do not affect its sufficiency for transfer; statement of the right of a transferee to an unqualified indorsement; and a statement as to the effect of an indorsement prohibiting further transfer.

(c) *Matters Covered Elsewhere.* § 38 on qualified indorsement is covered in Part IV on Liability of Parties; §§ 41 and 42 are covered in Part 1 on Form and Interpretation as they cover payees and in part the liability of drawers; § 44 in Part IV on Liability of Parties.

(d) *Omissions.*

(1) N.I.L. § 35 permitting a holder to convert a blank indorsement into a special by writing over the indorsement any contract consistent with the character of the instrument.

(2) N.I.L. §§ 45 and 46. In the absence of evidence, instruments are presumed to be indorsed at the place of dating and indorsements to have been made before maturity.

(3) N.I.L. § 47. An instrument negotiable in its origin continues negotiable until it has been restrictively indorsed or discharged by payment or otherwise. Elimination of the concept of restrictive indorsement does not eliminate the usefulness of this section. *E. g.*, after maturity is a debt represented by a promissory note subject to garnishment by service upon the maker-debtor, or must the note be taken up?

Sec. 3-201. Transfer: Right to Indorsement.

(1) *Accord:* §§ 49, 58 N.I.L. These rights are transferred even where no value is given. Moyer's Estate, 341 Pa. 402 (1941).

(2) *Accord:* South Side Bank v. Raine, 306 Pa. 561 (1932).

(3) *Accord:* § 49, N.I.L. No Pennsylvania cases were found which determine whether the transferee is entitled to an unqualified indorsement, nor when a presumption of ownership arises. Other jurisdictions have held that unless the parties have agreed to the contrary the transferee is entitled to an unqualified indorsement. Brannan, Negotiable Instruments 658 (7th Ed.). The cases are in conflict as to whether possession of paper without indorsement creates a presumption of ownership. *Id.*, at 650.

Sec. 3-202. Negotiation.

(1) *Accord:* § 30 N.I.L.; Dominion Trust Co. v. Hildner, 243 Pa. 253 (1914).

(2) *Accord:* § 31 N.I.L., except "by and on behalf of the holder," which is in accord with § 30 N.I.L. and First Nat'l Bank v. Colonial Hotel Co., 226 Pa. 292 (1910).

(3) § 32 of the N.I.L. provides that the indorsement must be to the entire instrument, one that purports to transfer a part or to indorsees severally does not operate as a negotiation. But it may be indorsed as to the residue where the instrument has been paid in part.

What the effect of the last sentence will be is difficult to suggest. At common law the courts attempted to prevent multiplicity of suits and refused to permit partial assignments and transfer to parties severally of an instrument, Martin v. Hayes, 44 N.C. 423 (1853). But there was a view that such partial assignment was not objectionable if the parties all sued the payor jointly, Flint v. Flint, 6 Allen (Mass.) 34 (1863). And so several courts have held that a transfer to several indorsees was an assignment if the parties joined in their action, Goldman v. Blum, 58 Texas 630 (1883); King v. King, 73 App. Div. 547 (1902) (where court did not permit assignee of ⅕ part of note to sue); Blake v. Weiden, 291 N. Y. 134 (1943). At common law the majority rule seems to be that a partial assignment of the note could not be made. Anno. 63 A.L.R. 499 (1929).

(4) Words of Assignment *accord:* Hall v. Toby, 110 Pa. 318 (1888).

Words of guaranty: The only Pennsylvania decision found on this problem was prior to the N.I.L. and *contra:* Snevily v. Ehel, 1 Watts and Sargent 203 (1841) which held that when words of guaranty were used it was not a full negotiation so as to permit the transferee to sue in his own name against the guarantor, the rationale being the guarantor engaged "to pay if the drawer should be unable" whereas an endorser becomes "immediately liable on receiving notice of the note's dishonor."

Sec. 3-203. Wrong or Misspelled Name.

Accord: § 43 N.I.L.; Integrity Trust Co. v. Lehigh Ave. Business Men's Ass'n., 273 Pa. 46 (1922) (as to right of bank to insist on indorsement in given way).

Sec. 3-204. Special Indorsement; Blank Indorsement.

(1) *Accord:* § 34 N.I.L.

(2) *Accord:* § 34 N.I.L. *Contra* (as to negotiations by delivery after special indorsement): § 40 N.I.L.; Lawrence v. Fussel, 77 Pa. 460, 463 (1875); Bailey v. Armstrong, 4 W.N.C. 381 (1877). Although this subsection expressly refers only to order paper in-

dorsed in blank, the preceding subsection covers instruments originally payable to bearer and requires the indorsement of the special indorsee.

Sec. 3-205. Conditional Indorsement; Prohibiting Transfer.

Accord: §§ 36(1); 37; 39 except the words "the holder may enforce payment in disregard of the limitation" which existed by inference in the N.I.L. and so use of the phrase only serves to point out the power of the holder subject, of course, to any rights of the indorser. Also there is an exception to this latter limitation in the case of collecting banks. No Pennsylvania decisions were found on this point.

Sec. 3-206. Indorsement "for Collection", "For Deposit", to Agent or in Trust.

The "restrictive" indorsement concept of the N.I.L. is eliminated, as well as the inference from N.I.L. § 47 that a restrictive indorsement destroyed negotiability. The limitations affect the first taker and subsequent takers are entitled to assume, in the absence of notice to the contrary, that the first taker under such an indorsement is acting properly. This is not as great a change in the law as might at first appear. *Cf.* Lipschutz v. Phila. Savings Fund Society, 107 Pa. Super. Ct. 481 (1933); Pennsylvania Co. v. Skelly Bolt Co., 106 Pa. Super. Ct. 515 (1932); Hackett v. Reynolds, Lamberton & Co., 114 Pa. 328 (1886).

Sec. 3-207. Negotiation Effective Although It May Be Rescinded.

(1a) *Accord:* § 22 N.I.L., except that the Code extends the coverage to include any one else without capacity such as insane people, married women and other incompetents. See First Nat'l Bank v. Fidelity Trust Co., 251 Pa. 529 (1916) where it was held that the indorsement of a promissory note by an insane person rendered his estate liable therefor to the extent of the benefits received by him.

(1b-c) *Accord:* §§52 and 59 N.I.L. Under the N.I.L. where an indorser obtains the instrument by illegal means, his title was defective, but it was possible for him to pass good title to a holder in due course. (The presumption that such a transferee is a holder in due course drops, and the burden is placed on him to prove the elements of holding in due course, but he will recover if he carries this burden.) See such cases as Fehr v. Campbell, 288 Pa. 549 (1927). The Code changes the concept of the position of the party that obtained the instrument by unlawful means to that of a holder, subject to being divested of the instrument by the rightful party. This does not apply to lost or stolen instruments in the hands of the finder or that for delivery it is necessary to become a holder. One taker under a forged indorsement is still not a holder.

(2) Bill in equity would provide remedies suggested.

Sec. 3-208. Reacquisition.

Accord: §§ 48, 50, 121 N.I.L.; Heyl v. Bary, 92 Pa. Super. Ct. 352 (1928).

Part 3. Rights of a Holder.

Introductory Comment

(a) ***N.I.L. Topics Covered.*** All of Article IV on Rights of a Holder, §§ 51-59 inclusive, parts of §§ 15 and 16 relating to rights of a holder, and §§ 25-28 as to what is value.

(b) ***New Topics.***

(1) A payee may be a holder in due course.

(2) One is not a holder in due course who purchases at judicial sale or acquires under legal process, or in taking over an estate or who purchases or otherwise takes in bulk the assets of a prior holder not in ordinary course of such holder's business.

(3) Value includes security for an antecedent claim whether or not due, the giving up of a negotiable instrument or an irrevocable commitment to a third person.

(4) A considerable listing of matters which constitute or do not constitute notice to a purchaser in Sec. 3-304.

(5) Defenses of infancy and any other incapacity rendering the obligation a nullity are good against a holder in due course.

(6) Defense of a fraud in the factum is good against a holder in due course.

(7) Discharge in bankruptcy or other insolvency proceedings is good against a holder in due course, but knowledge of discharge of one party does not preclude a holder from being a holder in due course as to others.

(8) Signatures are admitted unless denied in the pleadings; burden is on party claiming under a disputed signature, but he is aided by a presumption of validity except where action is to enforce obligation of a purported signer who has died or become incompetent before proof is required.

(c) ***Matters Covered Elsewhere.*** N.I.L. § 29 on accommodation parties is covered in Sec. 3-415, and the effect of N.I.L. §§ 24 and 28, absence and failure of consideration as a defense, is found in Sec. 3-408.

(d) ***Omissions.*** N.I.L. § 26 that where value has at any time been given for an instrument, the holder is deemed a holder for value, is omitted as erroneous. The "shelter provision," Sec. 3-201, covers one claiming under a holder in due course or a holder for value, and a good faith donee from a bad faith payer of value should not qualify as a holder in due course by "tacking" his good faith and the value given by his donor.

Sec. 3-301. Rights of a Holder.

Accord: § 51 N.I.L. But *cf.* Long v. Long, 208 Pa. 368 (1904), where defense that plaintiff was not the owner of the notes sued on was upheld. The provision as to enforcing payment in the holder's name was held to be permissive, Hanratty v. Dougherty, 71 Pa. Super. Ct. 248 (1919).

Sec. 3-302. Holder in Due Course.

(1a, b) *Accord:* § 52(3) N.I.L. As to what is "value" and "good faith" see Secs. 3-303, 304 and annotations. The requirement of the observance of the reasonable commercial standards of a business changes the law from subjective good faith, by adding an objective test. Probably most juries applied some such test in determining credibility anyhow. *Quaere* if this represents much of a change as a practical matter.

(1c) The N.I.L. § 52(2) in its terms required that a holder in fact take before maturity, without regard to notice. Pennsylvania cases do not discuss the point, but the language of the cases speaks strongly of taking before maturity. See, Litcher v. North City Trust Co., 111 Pa. Super. Ct. 1 (1933); Liebig Mfg. Co. v. Hill, 9 Pa. Super. Ct. 469 (1899). This provision was intended to cover cases where the holder takes an instrument which may or may not have been accelerated. The same result has been reached under the N.I.L. by considering the default upon which acceleration hinges as a previous dishonor of which notice is necessary under § 52(2). See Bliss v. California Co-op Producers, 172 P. (2d) 62 (Calif. 1946), noted in 60 Harv. L. Rev. 647 (1947).

The provisions as to previous dishonor and infirmity are in accord with §§ 52(2), 52(4) N.I.L. As to "claim against it" see Sec. 3-304 and annotations.

(2) *Accord:* Johnston v. Knipe, 260 Pa. 504 (1918); Glassport Trust Co. v. Feightner, 300 Pa. 317 (1930). But *cf:* In re Smith's Estate, 23 Lanc. Rev. 9 (1905).

(3a) *Accord:* Second Nat'l Bank of Pittsburgh v. Anderson, 14 Pa. C.C. 513 (1894).

(3b) Although no Pennsylvania cases in point were found, other jurisdictions have held that a receiver is not a holder in due course. See Young v. Victory, 112 Fla. 66 (1933); Starley v. Desert Foods, 93 Utah 577 (1938).

(3c) This subsection comes within the principle that paper must be taken in the usual course of business, although no case dealing with the specific situations of bulk purchases was found. See Fehr v. Campbell, 288 Pa. 549, 566 (1927).

(4) This follows the general rule of protecting a pledgee only to the extent of his pledge. It is in accord with the Pennsylvania law.

Sec. 3-303. Taking for Value.

(a) "To the extent that agreed consideration has been performed." *Accord:* National Bank of Phoenixville v. Bonsor, 38 Pa. Super. Ct. 275 (1909) where it was held that the bank was a holder for value to the extent that the depositor to whom the bank had credited the amount of the drawer's check had reduced his balance below the amount of the check. Note the fact that the endorsee of a note may recover the full face value of the note from the maker although he has purchased it from the payee at a discount. Moore v. Baird, 30 Pa. 138 (1858); Burpee v. Smoot, 4 W.N.C. 186 (1877); Beckhaus v. Commercial National Bank, 9 Sadler 292 (1888).

(b) "As payment." *Accord:* N.I.L. § 25, Stein v. Jacobs, 20 Pa. Dist. R. 48 (1910), payment of an antecedent debt; Morrison v. Whitfield, 46 Pa. Super. Ct. 103 (1911), an indorsee who takes a promissory note for an antecedent debt is a holder for value.

"As security." *Contra:* Rahen v. Henry, 16 Dist. 207 (1907); Horrell v. Reeves and Nelson, 72 Pa. Super. Ct. 129 (1919) if taken as payment of pre-existing debt—value: or if taken as collateral security for pre-existing debt—no value. *Cf.* Beckhaus v. Commercial Nat'l Bank, 9 Sadler 292 (1888). There seems to exist a conflict in the American jurisdictions as to whether a note given as collateral constitutes the holder one in due course. The Federal rule is in accord with the Code, Swift v. Tyson, 16 Pet. 1 (1842); Melton v. Pensacola, 190 Fed. 126 (1911). New York held to the old rule that a note given for security did not constitute value even after the adoption of the N.I.L., Sutherland v. Mead, 80 App. Div. 103 (1903); but later in Kelso v. Ellis, 224 N. Y. 528 (1918) for the sake of unity adopted the rule of Swift v. Tyson, *supra,* and so is now in accord with the Code. *Accord:* Reynolds v. Park Trust Co., 245 Mass. 440 (1923). See note 194, 5 U.L.A. § 52 for other jurisdictions.

(c) "Gives a negotiable instrument for it." *Accord:* Stedman v. Carstairs, 97 Pa. 234 (1881); Trauch v. Hill, 10 Sadler 354 (1888), the latter case where consideration was $50 in cash, a due bill and two notes.

"Irrevocable commitment to a 3rd person." No Pennsylvania cases were found.

Sec. 3-304. Notice to Purchaser.

(1a) *Cf.* § 52(1) N.I.L. The cases have been in accord with the Code, requiring the irregularity to be one which indicates that something is wrong. See Hershberger v. Hershberger, 345 Pa. 439 (1942); New York Nat'l Exchange Bank v. Crowell, 177 Pa. 313 (1896); Citizens Nat'l Bank v. Williams, 174 Pa. 66 (1866); Alexander v. Buckwalter, 17 Pa. Super. Ct. 128 (1901).

(1b) This subsection apparently includes notice of such defenses denominated "defective title" under the N.I.L. § 55, which are now

called "infirmities." Since defenses which render the instrument a nullity are good even against a holder in due course, Sec. 3-305, there was no need to include defenses other than those rendering the obligation voidable. *Accord:* First Nat'l Bank v. Cattie Bros., 285 Pa. 202 (1926); Adams v. Ashman, 203 Pa. 536 (1902); Edkert v. Cameron, 43 Pa. 120 (1862); Bitner v. Diehl, 61 Pa. Super. Ct. 483 (1915); Bank v. Short, 15 Pa. Super. Ct. 64 (1900).

(2a) This is in accord with the policy of the Bankruptcy Act, 52 Stat. 869 (1938), 11 U.S.C.A., § 96 (1943).

(2b) *Accord:* §§ 4, 6, Uniform Fiduciaries Act; Fehr v. Campbell, 288 Pa. 549 (1927); Brown v. Pettit, 178 Pa. 17 (1896).

(3) McKinley v. Wainstain, 81 Pa. Super. Ct. 596 (1923) held that a holder who took a check indorsed in blank for collection is not precluded from being a holder in due course. See also: Pa. Co. v. Skelly Bolt Co., 106 Pa. Super. Ct. 515 (1932). No Pennsylvania cases were found on conditional indorsements or those prohibiting negotiation.

(4a, b) *Cf.* § 52(2) N.I.L. Overdueness which prevents holding in due course is not overdueness in fact but reasonable grounds to believe that the instrument is overdue either as to any part of the principal or by reason of any acceleration.

(4c) *Accord:* § 53 N.I.L. The cases where taking has been held to be after an unreasonable time have involved generally longer periods than that for checks under this subsection. See: Gordon v. Mapel, 311 Pa. 523 (1933); Gloor v. Fanfield Coal & Coke Co., 14 West. 55 (1922); Putnam v. Reynolds, 69 Pitts. 265 (1920). As to what is a reasonable time for presentment, as distinguished from that for negotiation, see Sec. 3-503, and annotation.

(5a) *Accord:* Land Finance Corp. v. Doubet, 21 Del. 110 (1927); Walker v. Geisse, 4 Wh. 252 (1839)

(5b) *Accord:* International Finance Corp. v. Philadelphia Wholesale Drug Co., 312 Pa. 280 (1933) (where the notice of separate agreement appeared on face of instrument); International Finance Co. v. Magilansky, 105 Pa. Super. Ct. 309 (1932).

(5c) *Accord:* First Nat'l Bank v. Dick, 22 Pa. Super. Ct. 445 (1903).

(5d) In Snyder v. Armstrong, 9 Phila. 146 (1873), it was held that a holder who was aware that one year had elapsed before filling in of blanks had notice that the completion may have been improper. Since filling in of blanks is in itself no defense, knowledge of a normal filling in does not affect the holder. Sec. 3-116.

(5e) *Accord:* § 6, Uniform Fiduciaries Act; Union Bank and Trust Co. v. Girard Trust Co., 307 Pa. 488 (1932).

(5f) No Pennsylvania cases were found on whether knowledge of default in interest is sufficient to prevent a transferee from being a holder in due course. Other jurisdictions are split, with New York

holding that it does and Massachusetts holding that it doesn't. See Newell v. Gregg, 51 Barb 263 (1868); National Bank v. Kirby, 108 Mass. 497 (1871).

(6) No Pennsylvania cases were found deciding whether recording is such constructive notice as to prevent a transferee from being a holder in due course, and cases in general litigating the point are rare. *Accord:* Foster v. Augustanna College, 92 Okl. 96 (1923). *Contra:* Murphy v. Barnard, 162 Mass. 72 (1894).

(7) *Accord:* Sloan v. Union Banking Co., 67 Pa. 470 (1871), where notice of defense given after holder had taken the instrument was held not sufficient to prevent him from being holder in due course. No case was found where notice given prior to the holder's taking has been sufficient, although under this subsection that may be possible under some circumstances. See Comment 14 to this section of the Code.

Sec. 3-305. Rights of a Holder in Due Course.

Preamble and subsection (1) are in accord with § 57 except that there is a change in wording to remove uncertainties by the replacing of the "takes" to "holds" and from "any defect of title of prior parties" to "all claims to it on the part of any person." See Holliday v. Potter, 80 Pa. Super. Ct. 194 (1922), where a judgment creditor of the payee of a promissory note could not get judgment against the maker, as garnishee, on an attachment execution, when the note was in the hands of a Holder in Due Course.

(2) *Accord:* See, Moore v. Hershey, 90 Pa. 196 at 202 (1879).

(a) *Cf.:* Montgomery v. Brown, 1 Del. Co. 307 (1880) where the court held that a note given by an infant in payment for necessaries, although good between the parties as a due bill or account stated, cannot be sued on even by a *bona fide* holder.

(b) Other incapacity: *Accord:* Phila. National Bank v. Snydman, 27 D. & C. 597 (1936) (married woman as co-surety); Wirebach's Executor v. First National Bank of Easton, 97 Pa. 543 (1881) (lunatic as an accommodation party). But *cf.*:—ultra vires acts—Cox and Sons Co. v. Northampton Brewing Co., 245 Pa. 418 (1914) (a corp. that has the general power to issue and indorse negotiable paper will be held liable on and to a *bona fide* holder in due course even though the corporation turns out to have been an accommodation indorser); Putnam v. Ensign Oil Co., 272 Pa. 301 (1922) where the court said the Penna. rule when the by-laws are violated in issuing paper is that the corporation will not be liable unless (1) the corporation receives benefit; (2) a previous course of dealing between the same parties; (3) a previous course of dealing generally under certain circumstances; and (4) where entire management and control of the company is handed over to one individual. The court suggests that the corporation should be held liable to a holder in due course on a

note if signed in the regular way, even if contrary to the by-laws. The obligation not being a "nullity," this section should result in making this "suggestion" the law in Pennsylvania. There seem to be no Pennsylvania decisions on guardianship nor on duress. Illegality: gambling debt *accord:* Unger v. Boas, 13 Pa. 601 (1850) (a negotiable note given for a gaming consideration is void, in the hands of even an innocent holder for value). Usury—The instrument is valid but the usurious interest is not due, Schutt v. Evans, 109 Pa. 625 (1885).

(c) Fraud in the factum: *Accord:* Resh v. First Nat'l Bank of Allentown, 93 Pa. 397 (1880) (maker signed a receipt which turned out to be the note; however, payee brought suit). There seem to be no Pennsylvania decisions on the extension of the doctrine to lack of knowledge of essential terms.

(d) § 14 of Bankruptcy Act, 11 U.S.C. § 14 (1946).

(e) See Sec. 3-304, (2) (b).

Sec. 3-306. Rights of One Not Holder in Due Course.

(a) *Accord:* § 58, N.I.L.

(b) *Accord:* § 58, N.I.L. Fehr v. Campbell, 288 Pa. 549 (1927).

(c) *Accord:* §§ 28, 16 N.I.L., Sissmore & Kierbow Co. v. Nicholas, 149 Pa. Super. Ct. 376 (1942).

Sec. 3-307. Burden of Establishing Signatures, Defenses and Due Course.

(1) *Accord:* R.C.P. § 1029(b).

(a) *Accord:* Boyd v. Kirsh, 234 Pa. 432 (1912).

(b) Presumption does not arise where signer has died or become incompetent; in accord with policy of the Act of May 23, 1887, P. L. 158.

(2) *Accord:* N.I.L. § 59; Peoples National Bank of Pensacola v. Hagard, 231 Pa. 552 (1911); Schultheis v. Sellers, 223 Pa. 513 (1908).

(3) *Accord:* N.I.L. § 59 but any defense now shifts the burden of proof. Bank of Morehead v. Hernig, 220 Pa. 224 (1908); Schultheis v. Sellers, 223 Pa. 513 (1909); Second National Bank of Pittsburgh v. Hoffman, 229 Pa. 429 (1911); Dull v. Mitchell, 283 Pa. 88 (1925); First National Bank of New Jersey v. Cuttie Brothers, 285 Pa. 202 (1926); Title Guaranty Co. v. Barone, 319 Pa. 499 (1935).

Part 4. Liability of Parties.

Introductory Comment

(a) ***N.I.L. Topics Covered.*** All of N.I.L. Article 4, §§ 60-69 inclusive, on Liability of Parties; §§ 127, 128, 132, 133, 136-142 on the definition and operation of an acceptance; §§ 187 and 188 on

certifications of checks, 189 on check not being an assignment; § 9(3) on fictitious payees; §§ 17(b), 18, 19, 20, 21 and 44 on effect of signature by representatives, in trade names, etc.; § 29 on accommodation parties; §§ 24 and 28 on consideration and the necessity therefore for liability; and §§ 23, 124 and 125 on forging and alteration.

(b) *New Topics.*

(1) Sec. 3-405 covering liability in cases of impersonation and extending the fictitious payee rule.

(2) Provision, Sec. 3-404(2), as to ratification of forged or unauthorized signatures.

(3) Special Sec. 3-406 governing negligent contribution to alteration or forgery.

(4) Sec. 3-417 setting forth warranties of a person obtaining payment or acceptance.

(5) Sec. 3-416 on the effect of words of guaranty added to a signature, making a distinction between "payment guaranteed," (no legal proceedings v. maker necessary) and "collection guaranteed" (where legal procedings v. maker are necessary). No notice of dishonor needed.

(6) Sec. 3-419 relieving innocent agents or brokers from liability for conversion where principal is not the owner.

(c) *Matter covered elsewhere.* None of the material found under this heading in the N.I.L. is covered elsewhere in the Code.

(d) *Omissions.*

(1) N.I.L. §§ 134 and 135 on acceptance by separate instrument and promise to accept bill before it is drawn because more properly covered in Article on Letters of Credit.

(2) All of N.I.L. Title 2, Article 5, §§ 161-170 on acceptance for honor and Article 6 §§ 171-183 on payment for honor, as obsolete.

Sec. 3-401. Signature.

(1) Accord with § 18 N.I.L. except that §§ 134 and 135 relating to "extrinsic" acceptances by other writings are not included in the Code.

(2) *Accord:* Flanders v. Snare, 37 Pa. Super. Ct. 28 (1908) (use of rubber stamp for signature).

Sec. 3-402. Signature in Ambiguous Capacity.

Accord: §§ 17(6), 63 N.I.L.

Sec. 3-403. Signature by Authorized Representative.

(1) *Accord:* § 19, N.I.L. Harr v. Bernheimer, 322 Pa. 412, (1936); Berks County Trust Co. v. Kotzen, 326 Pa. 541 (1937).

(2) *Accord:* § 20, N.I.L. However, the N.I.L. makes no provision for cases where the capacity in which a party signed is am-

biguous. It has been held that where the litigation is between the original parties parol evidence is admissible to resolve it. See Dormont Savings & Trust Co. v. Kommer, 338 Pa. 548, 553 (1940).

No Pennsylvania cases were found which indicate whether omission of § 21, N.I.L. will change the law. However, as indicated in Comment 4 to this section of the Code, "per procuration" is often understood to be the equivalent of "by." See Clinton v. Hibbs, 202 Ky. 304 (1924).

Sec. 3-404. Unauthorized Signatures.

(1) The first phrase is in accord with § 23 N.I.L. except for "unless he ratifies" which is discussed in (2).

The second phrase "or is otherwise precluded" continues the present law as to estoppel, laches and other grounds which prevent a person whose signature is forged from recovering. This is so because the same word "precluded" is used in N.I.L. § 23. See Robb v. Penna. Co., 3 Pa. Super. Ct. 254 (1897), aff'd, 186 Pa. 456 (1898); First Nat'l Bank v. Albright, 111 Pa. Super. Ct. 392, 395 (1934).

(2) *Contra:* First Nat'l Bank v. Albright, 111 Pa. Super. Ct. 392 (1934); Austen v. Marzolf, 294 Pa. 226, 229 (1928).

Also the majority of American cases say that forged signatures may not be ratified, see Anno. 150 A.L.R. 978 (1944). The reasons seem to rest on the ground that the alleged maker should not be permitted to allow the forger to go unpunished but the limitation of any ratification to "the purposes of this Article" avoids the difficulty. See lengthy discussion in the Official Comments.

Sec. 3-405. Impostors; Signature in Name of Payee.

(1a) *Accord:* North Philadelphia Trust Co. v. Kensington National Bank, 328 Pa. 298 (1937); Land Title & Trust Co. v. Northwestern Nat'l Bank, 211 Pa. 211 (1905). For view that it is immaterial that imposter posed through mails, see, Market St. Title & Trust Co. v. Chelten, 296 Pa. 230, 235 (1929). In States v. First Nat'l Bank of Montrose, 203 Pa. 69 (1902), the imposter posed as payee through the mails but the decision denying the drawer recovery from paying drawee was based on delay of the drawer in notifying drawee of the forgery.

(1b) *Accord:* Snyder v. Corn Exchange Nat'l Bank, 221 Pa. 599 (1908). Although the reasoning of the court is that such instruments are payable to bearer within § 9(3) N.I.L., since they are payable to "fictitious persons," the result is the same as if it be said that the "indorsement is effective." In either event the drawer cannot require the paying drawee to recredit his account.

(1c) *Contra:* Commonwealth v. Globe Indemnity, 323 Pa. 261 (1936); National Union Fire Insurance Co. v. Mellon, 276 Pa. 212 (1923). The instruments in these cases were held not to be in § 9(3)

N.I.L., since the drawer himself intended that the named payee be the real one, even though his employee did not.

The indorsement by "any person" eliminates any problem of proof as to the identity of the actual signer, but some signature is required since the paper is not classed as "bearer" paper.

Sec. 3-406. Negligence Contributing to Alteration or Unauthorized Signature.

Accord: Snyder v. Corn Exchange Bank, 221 Pa. 599, 610 (1908); First National Bank v. Albright, 111 Pa. Super. Ct. 392 (1934); Houser v. Nat'l Bank of Chambersburg, 27 Pa. Super. Ct. 613 (1905); Howie v. Lewis, 14 Pa. Super. Ct. 232 (1900).

Sec. 3-407. Alteration.

(1) *Accord:* § 125 N.I.L. Newman v. Cover, 300 Pa. 267 (1930) (addition of words "given for the debt of Park O. Cover"); Berks County Trust Co. v. Lyte, 250 Pa. 543 (1915) (place of payment altered); Baumer v. DuPont, 338 Pa. 193 (1940) (addition of seal); Bowman v. Berky, 259 Pa. 327 (1918); 262 Pa. 411 (1918) (addition of seal after one of the signatures to a promissory note); Shiffer v. Mosiner, 225 Pa. 552 (1909) (addition of witness); Craighead v. McLoney, 99 Pa. 211, 215 (1882) ("It is a mistake to infer that whether the pecuniary liability is increased . . . is the test" of the materiality of an alteration in a written instrument; "an alteration which changes the evidence or mode of proof is material").

(2a) "Alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents." *Accord:* N.I.L. § 124. The need that the alteration is done fraudulently is new and a change from the majority view, 2 American Jurisprudence 608 Note 33, 5 U.L.A. § 124, but *cf.* Brannan, Negotiable Instrument Law Annotated (7 ed.) 1198. Also Illinois amended the N.I.L. to require fraud in the alteration, Laws of 1907 p. 403, Smith Hurd Ann. St. Ch. 98 § 145. In Shaub v. Shaub, 71 Pa. Super. Ct. 456 (1919) it was held that the paper attached might stand in law despite a subsequent witnessing because the alteration appeared to have been done "without connivance or unlawful purpose"; cited with neither approval nor disapproval in Newman v. Cover, 300 Pa. 267, 273 (1930). It would appear, therefore, that this might not be a change in the law of Pa.

"Or is otherwise precluded from asserting the defense" *accord:* § 23 N.I.L. and see Code Sec. 3-407.

(2b) In accord with § 124 N.I.L. by implication and § 14 N.I.L. with regard to incomplete instruments. All Pennsylvania cases discussing whether alterations are "material" are in accord, by implication. Also see Sec. 3-116 this Code as to incomplete instrument.

(3) *Accord:* § 14 and § 124 N.I.L. See Luzerne County Nat'l Bank v. Lowenstein, 68 Pa. Super. Ct. 337 (1917) and 18 Luzerne 496 (1916).

Sec. 3-408. Consideration.

Accord: § 28, N.I.L. However, the wording is changed in order to cover persons who are within the "shelter provision." See Sec. 3-201, Code, and § 58, N.I.L.

Under the N.I.L. no distinction is made between "value" and "consideration," the same rule being applicable to both, § 25. Some Pennsylvania cases indicate that the rule stated in § 25 does not apply where the instrument is given to secure an antecedent debt. Horrell v. Reeves, 72 Pa. Super. Ct. 129 (1919); Gordon v. Rossen, 81 Pitt. L. J. 528 (1933); Raken v. Henry, 16 Dist. R. 207 (1907). The Code would bring these cases in accord with the majority view. Blanchard v. Porter, 317 Mass. 44 (1944); Zimbelman v. Finnegan, 141 Iowa 358 (1909). Early New York cases were in accord with the Pennsylvania view, Sutherland v. Mead, 80 A. Div. 103 (1903), but later cases have swerved to the rule of this subsection, Kelso & Co. v. Ellis, 224 N. Y. 528 (1918).

Sec. 3-409. Draft Not an Assignment.

(1) *Accord:* §§ 189 and 127 N.I.L. except that the language of § 189 N.I.L. is changed (see comment 3) to this section. School District of Robinson Township v. Cook, 91 Pa. Super. Ct. 207 (1927).

Sec. 3-410. Definition and Operation of Acceptance.

(1) Under the N.I.L., § 132, as under this subsection, the acceptance must be in writing. However, unlike the N.I.L., this subsection requires that it be written on the draft. See §§ 134, 135, 137, N.I.L., which provided for acceptance by separate instrument, by unconditional written promise to accept, and by retaining or destroying the instrument. Even under the N.I.L., the holder could require that the acceptance be written on the bill, § 133. As to the time an acceptance becomes operative this subsection accords with the definition of acceptance in § 191, N.I.L. Most of the value of the concept of "extrinsic" acceptance is preserved in the Article on Documentary Letters of Credit, Article 5.

(2) *Accord:* § 138 N.I.L.

(3) This is in accord with Sec. 3-116, Code, and § 14, N.I.L. on incomplete instruments.

Sec. 3-411. Certification of a Check.

(1) "Certification of a check is acceptance," *accord:* § 187 N.I.L.

Accord, that where the payee or holder procures certification of a check the drawer and all indorsers are relieved of liability on the

instrument. Steiner v. Germantown Trust Co., 104 Pa. Super. Ct. 38 (1931); Bulliet v. Allegheny Trust Co., 284 Pa. 561 (1925); Girard Bank v. Bank of Penn Township, 39 Pa. 92 (1861). The question of whether such a discharge occurs where the certification was procured by the drawer seems never to have been directly passed upon by the Pennsylvania courts although dicta in several cases suggest that in such a situation the drawer is not discharged: Hamburger Brothers & Co. v. Third Nat'l Bank & Trust Co., 333 Pa. 377 (1939); Gehringer v. Real Estate-Land Title & Trust Co., 321 Pa. 401 (1936); Farmers' & Merchants' Nat'l Bank v. Elizabethtown Nat'l Bank, 30 Pa. Super. Ct. 271 (1906). This is the general rule.

(2) There is no Penna. decision on this rule but the states that have decided this point are in *accord:* See, *e. g.*, Security State Bank v. State Bank of Brantford, 31 N. D. 454 (1915); Wachtel v. Rosen, 249 N. Y. 386 (1928) and also Anno. 62 A.L.R. 377 (1928).

There do not seem to be any Pennsylvania decisions directly on this point, but the other jurisdictions seem to be in *accord:* Paton's Digest, 800 (1940); Liptin v. Columbia Trust Co., 194 App. Div. 384 (1920). It is a useful procedure, holding funds for the check while obtaining, for example, a missing indorsement.

Sec. 3-412. Acceptance Varying Draft.

(1) *Accord:* § 142 N.I.L.

(2) Is in accord with § 142, N.I.L., insofar as the drawer and indorsers are discharged where the holder assents to an acceptance varying the terms of the instrument. However, under this subsection only the liability of those drawers and indorsers who affirmatively assent is retained, while under § 142, N.I.L., it is enough that they refrain from objecting within a reasonable time after notice. Also, this subsection differs from the N.I.L. in that it excepts cases where the variance is only as to place of payment. In International Finance Co. v. Philadelphia Wholesale Drug Co., 312 Pa. 280, 283 (1933) it was indicated that a qualified acceptance destroys the negotiability of an instrument. Of course, in such event there can be no holder in due course. *Accord:* International Finance Co. v. Northwestern Drug Co., 282 Fed. 920, 921 (1922); Gulf Export Co. v. Peoples' Bank, 203 Ala. 528 (1919).

(3) *Accord:* § 140, N.I.L.

Sec. 3-413. Contract of Maker, Drawer and Acceptor.

(1) Substantially in *accord:* § 60 N.I.L. Bulliet v. Allegheny Trust Co., 284 Pa. 561 (1925). Note that while the acceptor of an altered instrument is liable for the altered amount and may not defend on the ground of alteration; he is limited to a recovery against the person presenting it for acceptance for breach of the warranty against alteration, see Sec. 3-419. Since the person obtaining accept-

ance may very well be the forger this remedy is probably not worth much. Also under the Code the usual exculpatory clause "payable as originally drawn," is not effective.

(2) *Accord:* § 61 See Thomas v. Berger, 118 Pa. Super. Ct. 422 (1935).

(3) *Accord:* §§ 60, 61, 62; Citizens Bank v. Gwinner, 112 Pa. Super. Ct. 12 (1934) (it is no defense that there was no such corporation as the corporate drawer and no such person as the one who indorsed as president of drawer).

Sec. 3-414. Contract of Indorser; Order of Liability.

(1) *Accord:* Postamble of § 66 N.I.L.; the last clause makes it clear that a prior indorser is liable to a subsequent indorsee who takes the instrument even though such indorser had already been discharged.

(2) *Accord:* § 68 N.I.L. Tatem v. Galloway, 235 Pa. 420 (1912); Donman v. Barnes, 272 Pa. 33 (1912); Lehigh v. Segfried et al., 283 Pa. 1 (1925); Ruchdeschel v. Howell 337 Pa. 517 (1940).

Sec. 3-415. Contract of Accommodation Party.

(1) *Accord:* § 29, N.I.L.; Bishoff v. Fehl, 345 Pa. 539 (1942); United States National Bank v. Evans, 296 Pa. 541 (1929); Peoples-Pittsburgh Trust Co. v. Barth, 161 Pa. Super. Ct. 72 (1947); it is made clear that an accommodation party is a surety. See Part 6 on Discharge.

(2) *Accord:* Putnam v. Ament, 96 Pa. Super. Ct. 447 (1929).

(3) *Accord:* People's Nat'l Bank of Ellwood City v. Weingartner, 153 Pa. Super. Ct. 40 (1943).

(4) No Pennsylvania cases on this point were found. There is an inconsistency of theory between this section under which the chain of indorsements gives notice and the section on Reacquisition, 3-208, where a chain of indorsements does not give notice of a reacquisition, and so of a discharge.

(5) *Accord:* Mosser v. Criswell, 150 Pa. 409 (1892); Hess v. Gower, 139 Pa. Super. Ct. 405 (1940).

Sec. 3-416. Contract of Guarantor.

(1) Snevily v. Ekel, 1 W. & S. 203 (1841) a statement such as "I transfer the within note to X and guarantee the payment thereof" is not equivalent to a special indorsement and does not import the same obligation.

Iron City National Bank v. Rafferty, 207 Pa. 238 (1903) (court interpreted a statement on a note "We hereby guarantee prompt payment of the within note" to mean that the signers were liable as sureties, not as guarantors of collectibility).

The theory of subsection (1) accords with the majority of jurisdictions under the theory that such an indorsement is one with an

enlarged liability. See Anno. 21 A.L.R. 1375; 33 A.L.R. 97; 46 A.L.R. 1516 and Paton's Digest (1940) 2127.

(2) The only case that could be found with an indorsement in the form of "collection guaranteed" was State National Bank v. Hoylan, 14 Neb. 40 (1883) about which the court said it was effective to pass title and it had the effect of enlarged liability.

(3) See (1), *supra.*

(4) *Accord:* Iron City National Bank v. Rafferty, *supra.* Paton's Digest 2128 (1940).

(5) See A.L.R. Annotations cited, *supra,* No. 1.

(6) *Accord:* Statute of Frauds in Pennsylvania doesn't require a statement of the consideration. 33 P.S. § 2, Act of 1855, April 26, P. L. 308 § 1.

Sec. 3-417. Warranties on Presentment and Transfer.

(1) (a) Pennsylvania has a statute which produces results in accord with this section where a forged indorsement is involved. Act of 1849, April 5 P. L.. 424, § 10, 56 P.S. § 29. There are two theories on which courts permit the drawee to recover against the party that received money. Paton's Digest (1940) p. 1822. One on the theory of warranty and the other on mistake of fact. The former is adopted by the Code and the latter is the one expressed in the Pennsylvania Statute, *supra.*

(b) Together with Sec. 3-418, no recovery can be had where a payment was made to one who did not know of the stop order. This changes the law, for there are cases which permit the drawee to recover the amount of money paid out to the payee who presented in good faith when the bank made a mistake, such as violation of a stop order. Foster v. Federal Reserve Bank of Philadelphia, 113 Fed. (2d) 326 (1940); and also see Meredith v. Haines, 14 W.N.C. 364 (1884). *Contra* First National Bank v. Bode, 75 Pitts. L. J. 577 (1926). But *cf.* Restatement, Restitution § 33. Where the one receiving the money is not a *bona fide* holder, New York expresses no doubt that the drawee should be permitted to recover. Smith and McCorhen, Inc. v. Chatham Phenix National Bank & Trust Co., 239 App. Div. 318, 267 N. Y. S. 153 (1933). Considerable authority in other jurisdictions allows recovery when the recipient of the payment has not changed his position.

(c) As to material alteration, *accord:* Rapp v. National Security Bank, 136 Pa. 426 (1890). For unauthorized signature see (a) for forgery. As to the exception, there do not seem to be any Pennsylvania decisions on this question and the other jurisdictions do not seem to have settled the question. Beutel says the common law is *contra* to the Code. Beutel, Negotiable Instruments Law 917 (Brannan 7th ed. 1949). See also Anno. 22 A.L.R. 1153 (1923). "Payable as orignally drawn" has been adopted in some bank cer-

tifications to avoid the effect of the common law decision that upon certification of an altered check a bank becomes liable upon it as altered. The Code prevents disclaiming of such liability.

(2) *Accord:* §§ 66, 65 N.I.L. The code extends warranty beyond immediate transferee only where the transfer is by indorsement. Warranties on bearer paper remain as under the postamble of § 65. See Britton, Liability of Transferors (1932) 42 Yale L. J. 25, 28; Reading Nat'l Bank v. Giacobello, 19 Berks 95 (1926).

(3) *Accord:* Hoover v. Pursel, 67 Pa. Super. Ct. 130 (1917).

(4) *Accord:* § 69 N.I.L.

Sec. 3-418. Finality of Payment or Acceptance.

As to acceptance of an instrument this section is in accord with § 62 N.I.L. But as to payment this section is *contra,* the court having held that § 62 is inapplicable. Union Nat'l Bank v. Franklin Nat'l Bank, 249 Pa. 375 (1915); Colonial Trust Co. v. Nat'l Bank, 50 Pa. Super. Ct. 510 (1912). As to payment the Act of 1849, 56 P.S. § 29 (1930) controls, and a bank paying on a forged signature, whether of an indorser or the drawer, may recover back from the person receiving payment. However, the bank must not delay in discovering and notifying the person receiving the proceeds of the forgery beyond a reasonable time and to the injury of such person. Union Nat'l Bank v. Farmers & Mechanics Nat'l Bank, 271 Pa. 107 (1921); United States Nat'l Bank v. Union Nat'l Bank, 268 Pa. 147 (1920). The weight of authority, in accord with the Code, holds that § 62 is applicable to payments on forged instruments. See (1926) 24 Mich. L. R. 809. But where the person receiving payment has been negligent the drawee is permited to recover despite § 62. See cases cited in Beutel's Brannan, Negotiable Instruments 913 (7th ed. 1949).

Where a bank pays a postdated check before its date and drawer later stops payment, recovery may be had against person receiving proceeds. Second Nat'l Bank v. Zable, 66 Pitts. L. J. 774 (1918).

Where holder knows that the drawer has no funds, but bank credits his account by mistake it may change back after discovery. Peterson v. Union Nat'l Bank, 52 Pa. 206 (1866).

Sec. 3-419. Conversion of Instrument; Innocent Representative.

(1) (a) Changes § 137 N.I.L. so as to make drawee liable for conversion instead of deeming it an acceptance. *Accord:* Connelly v. McKean, 64 Pa. 113 (1870). It was held that § 137 N.I.L. applied to checks presented for payment and that no demand was necessary; but an amendment to the N.I.L. excluded checks and provided that demand is necessary. See Wisner v. First Nat'l Bank, 220 Pa. 21 (1908); 56 P.S. § 326.

(b) This subsection applies the same rule to instruments presented for payment, which would make it applicable to checks. This

is *contra* to the amendment to § 137 mentioned above. However, it is in accord with the Wisner case, *supra*, which is said to represent the weight of authority. See Beutel's Brannan, Negotiable Instruments 1249 (7th Ed. 1949).

(c) *Accord:* Lindsley v. First Nat'l Bank, 325 Pa. 393 (1937) (overruling previous decisions).

(2) No Pennsylvania cases were found on this point.

(3) *Accord:* First National Bank of Blairstown v. Goldberg, 340 Pa. 337, 17 A. (2d) 377 (1941) (no liability imposed on broker or agent who assisted another in the sale of stolen negotiable bonds, but turned over all the proceeds to his principal, when he acted throughout the transaction innocently and in good faith).

Part 5. Presentment, Notice of Dishonor and Protest.

Introductory Comment

(a) ***N.I.L. Topics Covered.*** All of N.I.L. Title 1, Article 6, §§ 70-88 (except § 87) on presentment for payment; all of Title 1 Article 7 §§ 89-118 (except § 117) on notice of dishonor; all of Title 2 Article 3, §§ 143-151 on presentment for acceptance; and all of Title 2 Article 4, §§ 152-160 on protest.

(b) ***New Topics.***

(1) Specification of reasonable time for initiating bank collection or presenting payment on check; 30 days for liability of drawer; 7 days for liability of indorser.

(2) A section (subsection (2) of Sec. 3-506) providing that payment may be deferred without dishonor pending examination to determine if the instrument is properly payable but, except as to letters of credit, payment must be made before the close of business on the day of presentment.

(3) A provision (subsection (4) of Sec. 3-507) allowing a holder if the draft so provides to waive a dishonor and present again. This is inserted as a move to allow uniformity with the law of South America and Continental Europe by appropriate drafting.

(4) A section (3-510) specifying that, in addition to the protest, stamps or writings of drawee and books and records of banks are admissible as evidence and, when showing the facts, create a presumption of dishonor and notice thereof.

(c) ***Matters Covered Elsewhere.***

(1) N.I.L. § 87 on effect of notes payable at a bank is covered by Code Sec. 3-122.

(2) N.I.L. § 88 on what constitutes payment in due course by Code Sec. 3-603.

(3) N.I.L. § 70 on discharge by refusal of tender is covered by Code Sec. 3-604.

(4) N.I.L. § 117 on failure to give notice of non-acceptance constituting a discharge except as against a subsequent holder in due course is covered in Code Sec. 3-602 which is much broader.

(d) ***Omissions.*** § 86 on how time is computed by excluding day from which time is to begin to run and by including date of payment.

Sec. 3-501. When Presentment, Notice of Dishonor, and Protest Necessary.

See *accord:* §§ 70, 143 (postamble) N.I.L.; Bucks County Trust Co. v. Kotzin, 326 Pa. 541 (1937); Dewees v. Middle States Coal & Iron Co., 248 Pa. 202 (1915).

(1) (a) *Accord:* § 143 (1) (2) (3) N.I.L.

(b) (c) Under § 70, N.I.L. all of the parties covered by these subsections except as noted under Sec. 3-502 are entitled to have the holder make presentment for payment. Subsection 4(c) extends the rule of N.I.L. § 186 as to checks to all paper payable at a bank.

(2) *Accord:* § 89 N.I.L. Subsection (b) extends the limited discharge rule applicable to failure to present bank paper (4) (c) *supra,* to a failure to give notice of dishonor.

(3) Under the N.I.L. "foreign bills" included those drawn or payable in another state, § 129. This subsection changes the definition to mean only those drawn or payable outside the United States, but otherwise applies the same rule to foreign bills. Hence a bill drawn in New York under the Code is not a foreign bill in Pennsylvania. But see §§ 118, 152 N.I.L..; Bell v. Anderson, 143 Pa. Super. Ct. 56 (1941). The permissive protest of § 118 is also continued without change.

(4) This subsection specifically overrides cases decided under the postamble to § 7 N.I.L. that presentment and notice as if for a demand instrument are necessary to charge one indorsing after maturity.

Sec. 3-502. Unexcused Delay; Discharge.

(1) (a) *Accord:* Under N.I.L. except as to indorsers that are primarily liable on the note. In a situation where the indorser is not an accommodation party or a surety, presentment and notice were not necessary and they were not discharged when there is an unexcused delay. Marquardt's Estate, 251 Pa. 73 (1915). Apparently under the Code a discharge will now follow in such cases.

(b) *Accord:* § 186 N.I.L. limited to checks. But the technique of carrying out the policy intended by the original section is changed to eliminate problems of burden of proof to show loss. *Cf.* Rosenbaum v. Hazard 233 Pa. 206 (1911).

(2) *Accord:* § 152 N.I.L.

Sec. 3-503. Time of Presentment.

(1) (a) (b) (c) (d) (e) *Accord:* §§ 71, 144 N.I.L.; North Penn Bank v. Whetstone, 272 Pa. 519 (1922). In addition, this subsection states the commercial understanding as to instruments payable after sight and accelerated paper.

(2) *Accord:* § 193 N.I.L.

(a) *Contra:* In that it greatly extends the time within which a check must be presented, Integrity Trust Co. v. Lehigh Ave. Business Men's B. & L. Ass'n., 273 Pa. 46 (1922); Gerrard Co. v. Tradesmen's Nat'l Bank, 318 Pa. 100 (1935); Willis v. Finley, 173 Pa. 28 (1896); Wendkos v. Scranton Life Insurance Co., 340 Pa. 550 (1941). These cases represent the weight of authority. See Brannan, Negotiable Instruments 1296 (7th Ed.).

(b) The N.I.L. did not distinguish between indorsers and drawers in defining reasonable time. See above.

(3) This subsection changes the rule of §§ 85, 146 N.I.L. See Comment to this section of the Code for reasons.

(4) *Accord:* §§ 72(2), 75 N.I.L., except that the provision for presentment at any hour before the bank closes in cases where the obligor has no funds is omitted.

Sec. 3-504. How Presentment Made.

(1) *Accord:* §§ 72 & 145 N.I.L.

(2) (a) Although §§ 72 & 145 N.I.L. do not specifically state that presentment may be made by mail or through a clearing house, they do say it may be made by some person authorized to do so. But see Stuckert v. Anderson, 3 Wh. 116 (1837) (presentment may be made by holder or his agent, but not by mail). Presentment through a clearing house, *accord:* Columbia-Kuicher Locher Trust Co. v. Miller, 215 N. Y. 191, 109 N. E. 179.

(b) *Accord:* § 73 with regard to presentment for payment.

§ 145 does not talk about places of acceptance, but uses general terms "to the drawee or some person authorized to accept." See Liberty Title & Trust Co. v. Aronomink Park Heating Co., 29 Del. 22 (1940) (presentment at a bank not necessary where bank has closed). See also, Anno. 11 A.L.R. 976, 50 A.L.R. 1202.

(c) *Accord:* With regard to acceptance § 145 preamble N.I.L. There is no statement in the N.I.L. regarding persons authorized to make payment, except in § 76 with regard to dead debtors where the personal representative is authorized to receive presentment.

(d) The N.I.L. is in accord with this section only if the makers, acceptors or drawees are partners § 77 N.I.L., § 145 (1) N.I.L. But *contra* where they are not partners nor have authority to receive presentment for the other §§ 79, 145 (1) N.I.L. *Accord* with view Beutel, Negotiable Instruments Law (Brannan 7th ed. 1949) 1008.

Sec. 3-505. Rights of Party to Whom Presentment Is Made.

(1) (a) § 74 N.I.L. states that instrument must be exhibited on presentment while the Code states that exhibition may be required. Although no Pennsylvania decisions on the question were found, there are cases elsewhere which say that exhibition will not be required unless requested by the obligor. Anno. 11 A.L.R. 977; 50 A.L.R. 1202.

(b) There do not seem to be any cases on question of identification of person making presentment. But the courts seem to be *contra* on the question of requiring the agent to show his authority, for they say that the possession of the instrument is sufficient evidence. Morris v. Foreman, 1 Dall. 193 (1787) 8 Am. Jurisprudence 380.

(c) *Accord:* § 73 N.I.L.; Marquardt's Estate, 11 Sch. 55 (1915).

(d) Surrender of note on full payment is in accord with § 74 N.I.L. But the right to demand a signed receipt is new and no cases were found discussing the point.

(2) This provision results from the concept of a good presentment even though none of the acts which may be so regarded were performed.

Sec. 3-506. Time Allowed for Acceptance or Payment.

(1) This subsection substitutes "close of the next business day" for the twenty-four hours of § 136 N.I.L. Under § 137 N.I.L. also, the holder could extend the period for acceptance.

(2) Under § 137 N.I.L. it had been held that failure to pay or return a check within twenty-four hours constituted acceptance of the check. Wisner v. First Nat'l Bank, 220 Pa. 21 (1908). However, this decision was rendered invalid by an amendment to § 137. See Annotation to Sec. 3-426. This does not prevent such retention from constituting dishonor.

Sec. 3-507. Dishonor; Holder's Right of Recourse; Term Allowing Re-Presentment.

(1) *Accord:* §§ 83, 149 N.I.L.

(2) *Accord:* § 84, N.I.L.

(3) See Paton's Digest p. 2059 for cases where bank has right to return check for proper indorsement.

(4) No Pennsylvania cases were found. The purpose of the subsection is to permit uniformity with the Civil Law through the insertion of an appropriate term in an instrument. See Husted and Leary, An Approach to Drafting an International Commercial Code, (1949) 49 Columbia L. Rev. 1072, 1090 ff.

Sec. 3-508. Notice of Dishonor.

(1) *Accord:* §§ 90, 94 N.I.L.

(2) Extends time of §§ 102, 103, 104, N.I.L. to three days for all except banks. For banks the time is midnight of the next banking

day, as compared to the "close of business hours on the day following" of the N.I.L.

(3) *Accord:* §§ 95, 96 N.I.L.

(4) *Accord:* § 105 N.I.L. See Sec. 3-102 (1) (e) for definition of "send."

(5) *Accord:* § 99 N.I.L.

(6) *Accord:* § 101 N.I.L.

(7) Makes the notice to personal representative of party who is dead permissive rather than mandatory as in § 98 N.I.L.

(8) *Accord:* § 92 N.I.L.

Sec. 3-509. Protest; Noting for Protest.

(1) The Code changes the existing law by requiring that only a bill drawn or payable in a foreign country be protested. See Sec. 3-501 (6). The N.I.L. required protest for out-of-state instruments § 152; Delaware County Trust Co. v. Long, 15 Delaware Co., 385 (1920). The law is changed also by allowing a United States Consul or Vice-Consul to act in the place of a notary. See Cozza v. Kirk, 74 Pitts. 374 (1925). The Code eliminates the necessity of protest taking place at place of dishonor or that there be present two respectable witnesses. The standard by which the protesting officer should proceed is changed.

(2) The Code does not require that the protest be annexed to the instrument as required by § 153 N.I.L., but the protest should sufficiently designate or identify the Bill, Anno. 43 Am. Dec. 220. The remainder of this subsection is in accord with § 153 N.I.L.

(3) Recognizes a widely adopted practice. 3 American Jurisprudence 388.

(4) *Accord:* § 155 N.I.L. Except that protest is due according to the Code when notice of dishonor is due.

(5) *Accord:* § 155 N.I.L.

Sec. 3-510. Evidence of Dishonor and Notice of Dishonor.

(a) *Accord:* Bittenbender Co. v. Bergen, 277 Pa. 27 (1923); First National Bank v. Delone, 254 Pa. 409 (1916); Zollner v. Moffett, 222 Pa. 644 (1909).

(b) (c) No Pennsylvania cases were found; *cf.* evidence rules as to business entries.

Sec. 3-511. Waived or Excused Presentment, Protest or Notice of Dishonor or Delay Therein.

(1) *Accord:* §§ 81, 113, 147, 159 N.I.L. House v. Adams, 48 Pa. 261 (1865) (blockade during state of war is sufficient excuse for delay); Hazlett v. Bragdon, 7 Pa. Super. Ct. 581 (1898) (absence from office not a sufficient excuse for delay).

(2) *Accord:* § 82, 109, 111 N.I.L. & §§ 79, 80, 114, 115, 112, 159 N.I.L.

(a) (b) *Accord:* Jones v. Jenkintown Nat'l Bank, 11 Cent. Rep. 698 (1888) (endorser who agrees to delay in presentment cannot take advantage thereof). See also, Meadville Park Theater Corp. v. McGillick, 330 Pa. 329 (1938).

(c) See Glenns Falls Trust Co. v. Edwards, 19 Luz. 393 (1916). Early Pennsylvania cases also charged holder only with due diligence: Smith v. Fisher, 24 Pa. 222 (1855); Hazlett v. Bragdon, 7 Pa. Super. Ct. 581 (1898).

(3) (a) *Accord:* J. W. O'Bannon Co. v. Curran, 129 App. Div. 90, 113 N. Y. Supp. 359 (1908).

(b) *Accord:* § 148 (3) N.I.L.

(4) *Accord:* § 116, 151 N.I.L.

(5) *Accord:* § 111, N.I.L.

(6) New, no Pennsylvania cases were found.

Part 6. Discharge.

Introductory Comment

(a) ***N.I.L. Topics Covered.*** N.I.L. Title I Article 8, §§ 119-123 inclusive; § 88 on payment in due course; N.I.L. § 70 as to effect of tender; N.I.L. § 48 on striking out indorsements.

(b) ***New Topics.***

(1) A Section (3-602) making all discharges personal defenses to the party discharged and so not available against a holder in due course.

(2) A Section (3-606) making it clear that suretyship defenses are available to indorsers and that impairment of recourse or security will discharge secondary parties.

(c) ***Matters Covered Elsewhere.*** N.I.L. §§ 124 and 125, on material alteration are covered in Part IV, Sec. 3-406 under liability of parties—effect of material alteration.

(d) ***Omissions.***

(1) N.I.L. § 88 on "payment in due course." The entire concept that payment must be "at or after maturity," and "in due course" is eliminated. Payment before maturity will be a personal defense, and as there can be no holder in due course at or after maturity a payment then creates a defense which can not be cut off.

(2) N.I.L. §§ 171-177 on "Payment for honor," as obsolete.

(3) N.I.L. § 123, on burden of proof as to unintentional cancellation.

Sec. 3-601. Discharge of Parties.

(1) Index—see other sections for Annotations.

(2) *Accord:* N.I.L. § 119. Many early Pa. cases in accord: *e. g.,* Watmouth v. Gilliame, 1 Phila. 572 (1851).

(3) (a) *Accord:* N.I.L. § 119 (5); 120 (1) Poff. v. Reinhart, 30 Lanc. 374 (1913) and see Reacquisition, *supra.* But *cf.* Sec. 3-602.

(b) See sections as specified by Index in subsection (1).

Sec. 3-602. Effect of Discharge Against Holder in Due Course.

Accord: Bradley v. Adrus, 107 F. 196 (3rd Cir. 1901); Runyan v. Reed, 5 Clark 439 (1857).

Sec. 3-603. Payment or Satisfaction.

(1) "Payment in due course" to the holder discharges the instrument N.I.L. § 51 and § 119. McKinley v. Wainstein, 81 Pa. Super. Ct. 596 (1923). But the payment as defined in N.I.L. § 88 is not the type that will discharge in the Code. The Code discharges that party that makes payment to the holder even though the holder's title may be defective unless the person claiming to be a "true owner" takes the type of action specified. Compare the Act of 1933, P. L. 624, Art. IV, § 905; 7 P.S. § 819-905 setting forth an almost identical procedure in the case of adverse claims to bank deposits.

(2) *Accord:* Where a stranger to a note voluntarily pays the holder and extinguishes the debt the stranger may not sue on the note as a transferee. But if done as a purchase (and such a transaction is *prima facie* a purchase) then the purchaser may sue the maker. Brown v. Marmaduke, 248 Pa. 247 (1915).

Sec. 3-604. Tender of Payment.

(1) This is the general rule as to tender. Dewees v. Middle States Coal & Iron Co., 248 Pa. 202 (1915); North Penna. Fire Ins. Co. v. Susquehanna Fire Ins. Co., 2 Pears 289 (1877); Croll v. Donahue, 47 Pa. C.C. 444 (1919); Merrell v. Merrell, 5 Pa. C.C. 531 (1888).

(2) *Accord:* N.I.L. § 120 (4).

(3) *Accord:* N.I.L. § 70. See Franklin Savings & Trust Co. v. Clark, 283 Pa. 212 (1925), where an indorser was held discharged by failure of bank to apply deposit of maker to payment of note it held. There is no mention of the N.I.L.

Sec. 3-605. Cancellation and Renunciation.

(1) (a) *Accord:* N.I.L. §§ 48, 119 (3), 120 (2).

(b) *Accord:* N.I.L. § 122. § 123 of N.I.L. eliminated, but rule of burden of proof is part of Penna. Law, Spade Motor Co. v. Reynolds, 25 D. & C. 350 (1935); Carlisle Trust Co. v. Group, 23 D. & C. 215 (1935).

(2) No Pennsylvania cases on this point were found.

Sec. 3-606. Impairment of Recourse or of Collateral.

This section applies to accommodation makers, which under the N.I.L. are not discharged by extentions of time to the principal debtor. See: Delaware County Trust Co. v. Haser, 199 Pa. 17

(1901); Eshleman v. Mylin, 33 Lanc. 171 (1916); Ostenton v. Nicholas, 6 West. 53 (1916). The Penna. cases are in accord with the majority view. See Annotations 48 A.L.R. 716, 65 A.L.R. 1426. However, this section changes the law only where the person granting the extension of time *knows* that the maker signed for accommodation.

(1) (a) In Diamond Nat'l Bank v. Peck, 13 D. & C. 632 (1930), the court held that the indorser had not consented to the release, not deciding expressly whether under the N.I.L. § 120 (5) such consent continues the indorser's liability. In Howard Nat'l Bank v. Newman, 50 A. (2d) 896 (Vt. 1947), it was held that express consent of the indorser did not continue his liability in the absence of a reservation of recourse. See Annotation, 169 A.L.R. 753. This result has been criticized. See Brannan, Negotiable Instruments, 1149 (7th Ed.). With respect to extension of time this subsection is in accord with N.I.L. § 120 (6).

(b) *Accord:* N.I.L. § 120 (3).

(c) *Accord:* First Nat'l Bank v. Tustin, 57 Pa. Super. Ct. 37 (1914).

(2) This subsection merely spells out the fact that where there is such reservation the indorser's rights are saved as well as the holder's right against him. *Accord:* Hagey v. Hill, 75 Pa. 108 (1874). In this case it is said that the reason for the rule is that the indorser is not harmed where his right to take up the instrument and proceed against the debtor is not affected.

(3) To be effective, notification of reservation of rights must be given to those against whom reserved, or due diligence must be used to so notify. This is a salutary change in the law.

Part 7. Collection of Documentary Drafts.

Introductory Comment

This part is new except for the concept of the "referee in case of need" found in N.I.L. § 131.

Sec. 3-701. Handling of Documentary Drafts; Duty to Send for Presentment and to Notify Customer of Dishonor.

Accord as to items accepted for collection: § 5, Bank Collection Code, Act of June 12, 1931, P. L. 568, 7 P.S. § 216. The requirement of giving reasons for notice of dishonor states bank practice. The section contains new law in imposing the duties of presentment and notice when bank has discounted or bought a draft, but in practice the self interest of a bank will cause it to present an item so as to receive payment and to give notice so as not to lose the indorser's liability of its customer.

Items taken for collection are governed by Article 4 and, in special cases, by Article 5.

Sec. 3-702. Presentment of "On Arrival" Drafts.

No Pennsylvania cases were found on this point. The section apparently states bank practice as to this type of draft, often used in *e. g.* the flour trade.

Sec. 3-703. Responsibility of Presenting Bank for Documents and Goods; Report of Reasons for Dishonor; Referee in Case of Need.

The reference to Article 5 covers drafts drawn under a letter of credit.

(a) *Compare:* § 41, Uniform Bills of Lading Act, Act of June 9, 1911, P. L. 838, 6 P.S. § 91. This changes the law by eliminating the distinction based upon whether payment was due not more than three days, after presentation, in which case documents were deliverable only upon payment. In practice, instructions quite regularly were to deliver upon acceptance of a draft which is dishonored upon non-acceptance. It is assumed that the word "acceptance" means acceptance of a draft which is dishonored upon non-acceptance.

(b) *Accord:* N.I.L. § 131. The Section makes it clear that the referee in case of need may give instructions. The N.I.L. is silent as to his powers once a holder "resorted" to him.

There do not seem to be any cases in the United States on Referees in Case of Need. See Brannan's Negotiable Instruments Law Annotated (7th ed. Beutel 1948) p. 1228.

No Pennsylvania cases were found discussing a bank's liability or obligations with respect to the goods represented by the documents attached to a draft, or with respect to the duty to request instructions. It seems reasonable, however, to require that the draft and documents be kept at destination pending instructions, and that the bank be not required to take any action involving further expense without prepayment or indemnity.

Sec. 3-704. Privilege of Presenting Bank to Deal with Goods; Security Interest for Expenses.

(1) No Pennsylvania cases were found discussing the liability of a bank holding a dishonored draft for having unloaded the goods, stored them in a commercial warehouse or acted to preserve perishable goods. The privilege granted by the section does not imply a duty.

(2) No Pennsylvania cases were found on this point.

On the section as a whole, compare as in *accord* on the policy Act of March 11, 1909, P. L. 19 § 34, 6 P.S. § 30, protecting a warehouseman who acts reasonably in the circumstances where perishable

goods are deteriorating and § 27 of the same Act, 6 P.S. § 23 as to the extent of a warehouseman's lien.

As to the enforcement of unpaid sellers' liens, see the Code, Sec. 2-706, and annotations thereto.

Part 8. Miscellaneous.

Introductory Comment

(a) *N.I.L. Topics Covered.* N.I.L. Title 2, Article 7, §§ 178-183 on bills in a set.

(b) *New Topics.*

(1) A section (3-802) providing that instruments are always taken in conditional payment; that obtaining payment of an instrument which contains a term providing that it is "in full of all claims" or the like discharges the obligation for which it was given unless the payee establishes that "unconscionable advantage" was taken by the obligor, or unless the drawer initiates bank collection for the payee.

(2) A section (3-803) codifying the practice of "vouching-in" or estopping a third party indemnitor by tender of defense of the action.

(3) A section (3-804) codifying the right of a person to sue on a lost, destroyed or stolen instrument and providing that the court "may" require security.

(4) A section (3-805) making the Article (except there can be no holder in due course) applicable to instruments not negotiable for the sole reason that they lack words of "order" or "bearer."

(c) *Matters Covered Elsewhere.* None.

(d) *Omissions.* None.

Sec. 3-801. Drafts in a Set.

(1) *Accord:* § 178 N.I.L.

(2) *Accord:* § 179, 180, 181 N.I.L.

(3) *Accord:* the first sentence: § 182 N.I.L. No cases on last sentence.

(4) *Accord:* § 183 N.I.L.

Sec. 3-802. Effect of Instrument on Obligation for Which It Is Given.

(1) *Accord:* Wendkos v. Scranton Life Insurance Co., 340 Pa. 550 (1941); Gehringer v. Real Estate Land Title Co., 321 Pa. 401 (1936); Gerrard Co. v. Tradesmen's Nat'l Bank, 318 Pa. 100 (1935); Newhall v. Arnett, 279 Pa. 317 (1924); Winters v. Wolfskill, 126 Pa. Super. Ct. 168 (1937); Wessel v. Montgomery, Scott & Co., 106

Pa. Super. Ct. 341 (1932). The Penna. cases do not distinguish between instruments given for antecedent debts and those in current transactions.

Other cases have indicated that instruments are presumed to have been given as collateral security. See: Morris & Bailey Steel Co. v. Bank of Pittsburgh, 277 Pa. 81 (1923); Philadelphia v. Neill, 211 Pa. 353 (1905); United States v. Hegeman, 204 Pa. 438 (1902); Philadelphia v. Stewart, 195 Pa. 309 (1900). Under this theory the original debt is not suspended.

(2) Some cases have reached this result even for instruments other than checks by holding that they were given as collateral security. See: United States v. Hegeman, 204 Pa. 438 (1902); Easton School District v. Continental Casualty Co., 304 Pa. 67 (1931).

(3) *Accord:* (where obligation disputed): Hutchinson v. Culbertson, 161 Pa. Super. Ct. 519 (1947); Barron Co. v. Fox & Co., 84 Pa. Super. Ct. 46 (1924); Osbourn v. Magee Carpet Co., 67 Pa. Super. Ct. 100 (1917).

Contra: (where obligation undisputed): Girard Fire and Marine Ins. Co. v. Canan, 195 Pa. 589 (1900); Szok v. Crown, 33 Pa. Super. Ct. 612 (1907); Davies v. Prichard, 70 Pitts. L. J. 602 (1922). But *cf.:* Carl v. Carl 40 D. & C. 305 (1923). This is in accord with the general rule that a smaller sum taken on settlement of a larger claim is not an accord and satisfaction. See: 1 C. J. S. 510. However, a note of the debtor may be considered a collateral thing and therefore sufficient. See Tucker & Marvin v. Murray, 10 Lanc. 235, 2 Pa. Dist. 497 (1893).

Sec. 3-803. Notice to Third Party.

Although substantively this section is new, procedurally it is in accord with the Penna. Common Law rule in which a defendant who had a claim of contribution or indemnity from a third party not a party to the action, could give notice to the third person to appear and defend the suit. The giving of proper notice made the judgment binding on the third party, to the extent that he could not relitigate the liability of the plaintiff to the defendant, in the original suit, when the defendant sued him for contribution. This procedure may still be invoked. See Goodrich-Amram Civil Practice § 2251-1 (1943).

Sec. 3-804. Lost, Destroyed or Stolen Instruments.

Accord: Vrostyak v. Titko, 268 Pa. 413 (1923); the court requires indemnity: Reisinger v. Magee, 158 Pa. 280 (1893). See also Barclay v. Lehigh Coal Co., 33 Pa. Super. Ct. 214 (1907). In Greggerson's Estate, 344 Pa. 498 (1942), however, where the claimants established a claim against decendent's estate based on a lost note under evidence that the note was in the possession of the decedent, estate was not entitled to demand indemnity against possible claims of others.

See Mahoney v. Collman, 293 Pa. 478, 481 (1928): "Where a negotiable instrument is lost and suit is had thereon, it is now very generally recognized that courts of law will entertain actions to enforce liability, although formerly relief could be had only in equity; indemnity is required to safeguard against possible loss: Bisbing v. Graham, 14 Pa. 14; Bigler v. Keller, 8 W.N.C. 323."

Sec. 3-805. Instruments Not Payable to Order or to Bearer.

One who signs a non-negotiable instrument is liable as indorser. Leidy v. Tammany, 9 Watts 353 (1840). But only if he signs after maturity. Raymond v. Middleton, 29 Pa. 529 (1858). This latter limitation is based on the questionable theory that one can't draw a "new bill" before the old obligation matures. *Id.* at 533. The majority of jurisdictions make no such distinction. See: 8 Am. Jur. §§ 556 et seq.; Annotation, 79 A.L.R. 719. Where the instrument is non-negotiable for reasons other than omission of words of negotiability there is no indorser liability in the absence of agreement. Homewood Peoples Bank v. Cull, 85 Pa. Super. Ct. 480 (1925). Some other jurisdictions hold that there is indorser liability even where instruments are non-negotiable for other reasons, provided the instrument is in the form of a "mercantile specialty." See cases in 79 A.L.R. 719.

There is no presumption of consideration, nor does possession create a presumption of transfer of title. Bircleback v. Wilkins, 22 Pa. 26 (1853). This is the majority view. 8 Am. Jur. § 1003.

The same rules apply to non-negotiable and negotiable instruments with regard to filling in blanks. Weaver's Adm'r. v. Paul, 16 Pa. C.C. 471 (1895).

Sec. 3-806. Letter of Advice of International Sight Draft.

No Pennsylvania cases were found. The section states present bank practice with respect to international drafts.

Article 4

BANK DEPOSITS AND COLLECTIONS

Introductory Comment

Adoption of the Code will necessitate the repeal of the following Acts and parts of Acts.

(a) Bank Collection Code of American Bankers Association, the Act of June 12, 1931, P. L. 568 §§ 1-17, 7 P.S. § 212-228.

(b) Act limiting liability for non-payment of check, Act of June 12, 1919 P. L. 453; 7 P.S. § 211.

(c) The Act respecting liability of a bank for forged, altered or raised checks, added as § 911 of the Banking Code by the Act of July 29, 1941, P. L. 586 § 2; 7 P.S. §§ 819-911.

(d) The Act limiting the effective period of stop-orders, added as § 912 of the Banking Code by the Act of July 29, 1941, P. L. 586 § 2; 7 P.S. §§ 819-912.

Part 1. General Provisions and Definitions.

Sec. 4-101. Short Title.

Sec. 4-102. Applicability.

(1) This restates the usual rule of interpretation that the particular governs the general.

(2) This is in substantial accord with the effect of the Restatement, Conflicts of Laws, §§ 349 and 336, which seem in harmony with the Pa. decisions (see Pa. Annotations thereto), as well as being in conformity with the general rules of conflicts of law as to contracts. This subsection is, however, new, in regard to conflicts of law legislation concerning banks, and makes the transfer effective at the place where the bank is in case of mail transfers. The section does, perhaps, change the law as to the type of presentment required by an indorser. It will not be that required by the place of contracting but that required at the place of presentment.

Sec. 4-103. Variation by Agreement; Measure of Damages; Certain Action Constituting Ordinary Care.

(1) The provision preventing disclaiming or limiting liability for the actor's own lack of good faith or of ordinary care is in accord with general rules of the law of bailments. The previous bank collection acts were subject to agreement otherwise by the parties.

(2) See: Weiler v. Marine Nat'l Bank, 285 Pa. 23 (1925) (drawer not entitled to recovery against bank for payment of improperly indorsed check, in absence of damage). No Pennsylvania cases were found on the question of "consequential damages" in bank collections.

(3) See: Hamburger Bros. & Co. v. Third National Bank & Trust Co. of Scranton, 333 Pa. 377 (1939), affirming 132 Pa. Super. Ct. 421 (1938) (a payee, whose note was turned over to a bank for collection, was bound by the prevailing reasonable custom among banks in that locality even though he did not know of the custom). But see: Cameron v. Carnegie Trust Co., 292 Pa. 114 (1928) (court would not enforce alleged custom whereby bank mingled money collected by it as an agent with its own funds). The present act does not require that the clearing house rules "or the like" which constitute ordinary care be found to be reasonable before becoming binding upon a non-assenting owner of an item in course of collection. The

owner of an item may, however, by giving special instructions avoid the binding effect of everything but Federal Reserve regulations and operating letters.

(4) See annotation to Secs. 4-103 (1) & (3).

Sec. 4-104. Definitions and Index of Definitions.

No comments.

Sec. 4-105. "Depositary Bank"; "Intermediary Bank"; "Collecting Bank"; "Payor Bank"; "Presenting Bank"; "Remitting Bank".

No comments.

Sec. 4-106. Separate Office of a Bank.

See: Act of June 12, 1931, P. L. 568, § 1, 7 P.S. § 212; Farmers National Bank of Beaver Falls v. Peoples' National Bank, 66 P.L.J. 193 (1918). The requirement that a branch keep separate books to be considered a separate bank is new, but proper as otherwise there appears to be no need for additional processing time.

Sec. 4-107. Time of Receipt of Items.

See and compare: Act of May 15, 1945, P. L. 509, No. 196, § 1, as amended, April 20, 1949, P. L. 624, § 1, 7 P.S. § 214, (an item received by a bank after its regular business hours, or during afternoon or evening periods when it is open for limited functions, shall be deemed to have been received at the opening of its next business day).

Sec. 4-108. Delays.

(1) See: Whitman v. First National Bank, 35 Pa. Super. Ct. 125 (1907).

And *cf.:* Act of June 12, 1931, P. L. 568, § 6, 7 P.S. § 217 (sets forth more rigid time limitations for forwarding and presenting items according to whether payable in same or another city).

(2) See: Act of June 12, 1931, P. L. 568, § 8, 7 P.S. § 219 (bank not liable for destruction or loss of item in transit).

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

Sec. 4-201. When Item Taken for Collection.

See: East Boston Coal Co. v. Luzerne Anthracite Inc., 39 Luz. L. Reg. 359 (1948) (whether bank becomes owner or agent depends on intention of the parties).

Accord: Act of June 12, 1931, P. L. 568, § 2, 7 P.S. § 213 (agency for collection continued notwithstanding withdrawal by de-

positor of a revocable credit); New York Hotel Statler Co. v. Girard Nat'l Bank, 89 Pa. Super. Ct. 537 (1927) (depositor's blank indorsement makes bank agent for collection).

Cf.: Act of June 12, 1931, P. L. 568, § 4, 7 P.S. § 215.

Sec. 4-202. Responsibility for Collection; When Action Seasonable.

The time for action has been considerably extended under this Code in certain circumstances. An item received by a depositing bank after 2:00 P. M. Monday but before the close of banking hours if a cut-off hour has been established under Sec. 4-107, need not be forwarded for collection until midnight on Wednesday. Formerly close of business on Tuesday. Assuming it is sent to the payor in the same city, it will be received on Thursday, and the payor will have until midnight Friday to determine whether the item is properly payable (Sec. 4-301 which is also the present Pennsylvania law) which time may be extended by the banks without notice to the original depositor until such hour on the following Monday as the depositary bank is no longer open to the public for carrying on substantially all of its banking functions [Sec. 4-108 and 4-104 (c)].

(1) *Accord:* Act of June 12, 1931, P. L. 568, § 5, 7 P.S. § 216 (collecting bank must use ordinary care); Cardillo v. Torquato, 161 Pa. Super. Ct. 356 (1947); Bank of Delaware County v. Broomhall, 38 Pa. 135 (1861); Linhart v. Central Nat'l Bank of Wilkinsburg, 67 Pa. Super. Ct. 507 (1917); Wingate v. Mechanics' Bank, 10 Pa. 104 (1848).

(2) *Cf.:* Act of June 12, 1931, P. L. 568, § 7, 7 P.S. § 217 (ordinary care defined in terms of taking action not later than the business day next following the day of receipt). See, Whitman v. First National Bank, 35 Pa. Super. Ct. 125 (1907) (bank received check drawn on itself, but drawer's account insufficient; bank endeavored to get depositor to make check good, notified correspondent bank of dishonor. The bank was held not liable to holder for failing to protest check on day received).

(3) *Accord:* Act of June 12, 1931, P. L. 568, § 5, 7 P. S. § 216 (bank not liable for lack of ordinary care on part of another bank); Cardillo v. Torquato, 57 D. & C. 293 (1946) (bank not liable to its depositor for negligence of foreign correspondent); Bank of Wesleyville v. Rose, 85 Pa. Super. Ct. 52 (1925); New York Hotel Statler Co. v. Girard National Bank, 87 Pa. Super. Ct. 94 (1925).

Sec. 4-203. Effect of Instructions.

See: Act of June 12, 1931, P.L. 568, § 2, 7 P.S. § 213 (authority to follow instructions of immediate forwarding bank); Hazlett v. Commercial National Bank, 132 Pa. 118 (1890); Elliott v. Peet, 202 F. 434 (C.A. 3rd 1913), affirming 192 F. 699 (D. C. Pa. 1912).

Sec. 4-204. Methods of Sending and Presenting; Sending Direct to Payor Bank.

(1) See annotations to Sec. 4-202 (1), Sec. 4-203, object is to allow some flexibility in routing without permitting circuitousness. See: Linhart v. Central Nat. Bank of Wilkinsburg, 67 Pa. Super. Ct. 507 (1917).

(2) *Accord:* Act of June 12, 1931 P. L. 568, § 6(a), 7 P.S. § 217 as to banks in other cities. Under this Code mail presentment can be used between banks in the same city. Under prior law this would only be permitted where either the depository or the payor is located in an "outlying district." It would still be negligence to send item directly to debtor not a bank: Merchants' Nat'l Bank of Phila. v. Goodman, 109 Pa. 422 (1885); Hazlett v. Commercial Nat'l Bank, 132 Pa. 118 (1890); although the presentment is good. Sec. 3-404 (2) (a).

Sec. 4-205. Supplying Missing Indorsement; No Notice from Prior Indorsement.

(1) *New.* Note that procedure is optional. The commonly used bank stamp "Deposited to the account of the within named payee" is now made effective as an indorsement except in the excluded situation. Hence a return of such an item for indorsement is improper. Under Act of June 12, 1931, P. L. 568, § 4, 7 P.S. § 215, bank had right to convert blank or special indorsement into a restrictive indorsement by writing over the signature of the indorser the words "for deposit" or "for collection" or other restrictive words.

(2) Query whether this is in conformity with the Uniform Fiduciaries Act, Act of May 31, 1923, P. L. 468, §§ 8 and 9, 20 P.S. §§ 3392 and 3393. A payor bank, not the depositary bank, would seem to be not liable under this subsection even if it acted with knowledge of the fiduciary's breach of duty, whereas under the Uniform Fiduciaries Act such bank would seem to be liable.

Sec. 4-206. Transfer Between Banks.

New. Designed to expedite the handling of checks and keep their backs cleaner. To the extent that a holder in due course may be created by a transfer without indorsement, this section *contra* to N.I.L. §§ 31 and 39.

Cf. Act of June 12, 1931, P.L. 568, § 4, 7 P.S. § 215.

Sec. 4-207. Warranties of Customer and Collecting Bank on Transfer or Presentment of Items; Time for Claims.

(1) *Accord:* N.I.L. §§ 62, 65, 66.

(2) *Accord:* Judge v. West Philadelphia Title & Trust Co., 68 Pa. Super. Ct. 310 (1917); N.I.L. § 64.

(3) *Accord:* Act of June 12, 1931, P. L. 568, § 4, 7 P.S. § 215.

Creating the effect of a "prior indorsements guaranteed" indorsement even when indorsed "pay any bank or banker."

(4) *Accord:* U. S. Nat'l Bank of Portland v. Union Nat'l Bank of Philadelphia, 268 Pa. 147 (1920); Pennsylvania Mutual Life Insurance Co. v. Trust Co., 116 Pa. Super. Ct. 81 (1935).

Sec. 4-208. When Bank Extending Credit for Item or Purchasing Draft or Time Instrument Has Security Interest.

(1) *Cf.:* Act of June 12, 1931, P. L. 568, § 2, 7 P.S. § 213 (where bank allows withdrawal, it shall have all the rights of an owner to the extent of the amount withdrawn). This subsection creates a lien in favor of the bank rather than creating ownership. Subsection (b) is in conformity with the Articles on Sales.

Accord: Lightfoot v. Bunnel, 76 Pa. Super. Ct. 468 (1921).

(2) *New.* Partial withdrawal is made on the security of the entire deposit.

(3) See: Fischbach & Moore v. Philadelphia National Bank 134 Pa. Super. Ct. 84 (1939).

Sec. 4-209. When Bank Gives Value for Purposes of Holder in Due Course.

Accord: Lightfoot v. Bunnel, 76 Pa. Super. Ct. 468 (1921).

See: Wisner v. First National Bank, 220 Pa. 21 (1908) (bank treated as holder).

Sec. 4-210. Presentment by Notice of Item Not Payable by, Through or at a Bank; Liability of Secondary Parties.

New. Sets forth a standardized procedure for presentment of items not payable by, through or at a bank, in accordance with practice of certain banks.

Sec. 4-211. Media of Remittance; Provisional and Final Settlement in Certain Cases.

This section merely spells out in greater detail the media of conditional payment which may be accepted and put in process of collection. It changes the prior law in that prompt collection of an attempted remittance in an unauthorized medium does not constitute lack of ordinary care. As under the prior statute, the collecting or depositary bank becomes a debtor, and not an agent for collection, only when it receives cash or as final credit which it accepts or has authorized.

See: Act of June 12, 1931, P. L. 568, §§ 9, 10, 11 and 12, 7 P.S. §§ 220, 221, 222, 223 (medium of payment), (medium of remittance), (election to treat as dishonored items presented by mail), and (Notice of Dishonor of Items presented by mail); also Act of

June 12, 1931, P. L. 568, § 2, 7 P.S. § 213 (credits given by bank revocable until such time as proceeds are received in actual money or unconditional credit on books of another bank).

Accord: S. A. Gerrard Co. of Phila. v. Tradesmen's National Bank & Trust Co., 318 Pa. 100 (1935), affirming 21 D. & C. 623 (1934). *Contra:* Fifth National Bank v. Ashworth, 123 Pa. 212 (1889).

See: Bunge v. First National Bank of Mount Holly Springs, 34 F. Supp. 119 (D. C. Pa. 1940) (bank accepted buyer's check and released bill of lading, check not paid and seller allowed recovery against bank).

Sec. 4-212. Right of Charge-Back or Refund.

(1) *Accord:* Act of April 5, 1849, P. L. 424, 56 P.S. § 29; Market Street Title & Trust Co. v. Chelten Trust Co., 296 Pa. 230 (1929); U. S. Nat'l Bank of Portland v. Union Nat'l Bank of Philadelphia, 268 Pa. 147 (1920); Foster v. Federal Reserve Bank of Philadelphia, 29 F. Supp. 716 (D. C. Pa. 1939), affirmed, 113 F. 2d 326 (C. A. 3rd 1940) (payor bank gave unconditional credit to collecting bank, then discovered drawer's stop payment order and notified collecting bank, payee brought suit against collecting bank which paid money into court and joined payor bank as defendant; court held for payor bank against payee).

See: Act of May 15, 1945, P. L. 509, No. 196, § 1, as amended, Act of April 20, 1949, P. L. 624, § 1, 7 P.S. § 214.

(2) *New. Cf.:* Hazlett v. Commercial National Bank, 132 Pa. 118 (1890); Merchants Nat. Bank of Phila. v. Goodman, 109 Pa. 422 (1885).

(3) See annotation to Sec. 4-212 (1).

(4) (a) See annotation to Sec. 4-208 (1) (a).

(b) See annotation to Sec. 4-202 (3). Note that even negligent bank may charge back, but, of course, would be liable under Sec. 4-202.

(5) Right of charge-back is optional.

(6) Customer, not bank, gains or loses on increase or decrease of dollar value. This is because bank, anticipating payment, has protected itself in the foreign exchange market on day credit was given.

Sec. 4-213. Final Payment of Item by Payor Bank; When Provisional Debits and Credits Become Final.

(1) See: Act of June 12, 1931, P. L. 568, § 7, 7 P.S. § 218 (item received by mail is paid when finally charged to the account of the maker or drawer); Seaboard National Bank v. Central Trust, 253 Pa. 412 (1916) (check not paid by payor bank when it gave pro-

visional credit to intermediary bank subject to check being good). Any question as to when payment becomes "final" is eliminated.

(2) All conditional credits become firm at the time the presenting bank receives final payment in clearing house transactions. This places risk of insolvency of correspondent banks occurring after payor bank has paid item upon banks selecting them. In other situations, the credits become final under Sec. 4-212, see annotation thereto. See: Hekler v. Ward, 21 F. Supp. 710 (E. D. Pa. 1938). *Cf.:* National Union Bank v. Earle, 93 Fed. 330 (E. D. Pa. 1899).

(3) *Accord:* Act of June 12, 1931, P.L. 568, § 3, as amended, May 15, 1945, P. L. 509, No. 196, § 1, as amended, April 20, 1949, P. L. 624, § 1, 7 P.S. § 214. See annotations to subsections (1) and (2) above.

Sec. 4-214. Insolvency and Preference.

(1) *Accord:* Act of June 12, 1931, P. L. 568, § 13 (a), 7 P.S. § 224 (a); In re Harr, 319 Pa. 302 (1935).

(2) *Accord:* Act of June 12, 1931, P. L. 568, § 13 (b), 7 P.S. § 224 (b); Farmers' & Mechanics' National Bank v. Cuyler, 18 Pa. Super. Ct. 434 (1901).

(3) *Accord:* Act of June 12, 1931, P. L. 568, § 13 (c), 7 P.S. § 224 (c). Franklin Trust Co. of Philadelphia, 319 Pa. 302 (1935). See, Lipshutz v. Philadelphia Saving Fund Society, 107 Pa. Super. Ct. 481 (1933) (depositary bank received final payment from another bank and then became insolvent; in a suit by depositor against the payor bank it was held that the depositor could not recover the checks). Appeal of North Philadelphia Trust Co., 315 Pa. 562 (1934), affirming 19 D. & C. 303 (1933).

Note: This section is not applicable to National Banks in the absence of Federal legislation, Tompkins v. Bender, 42 F. Supp. 211 (D. C. Pa. 1941).

Part 3. Collection of Items: Payor Banks.

Sec. 4-301. Deferred Posting; Recovery of Payment by Return of Items; Time of Dishonor.

Accord: Act of April 20, 1949 P. L. 264, 7 P.S. § 214.

Sec. 4-302. Payor Bank's Liability for Late Return of Item.

Provides the penalty or sanction to make Sec. 4-301 effective. *Accord:* Wisner v. First National Bank, 220 Pa. 21 (1908); Northumberland Bank v. McMichael, 106 Pa. 406 (1884); Wingate v. Mechanics' Bank, 10 Pa. 104 (1848). *Cf.:* Act of April 27, 1909, P. L. 260 (adding to N.I.L. § 137 that mere retention of bill by

Sec. 4-402. Bank's Liability to Customer for Dishonor.

Accord: Act of June 12, 1919, P. L. 453, § 1, 7 P.S. § 211; Bush v. Bank, 8 D. & C. 27 (1926); Palmieri v. Trust Company, 76 Pitts. 913 (1927); Weiner v. Pennsylvania Company, 160 Pa. Super. Ct. 320 (1947). To same effect: Stevens v. Market Street Title & Trust Company, 65 Pa. Super. Ct. 288 (1916); Weiner v. North Penn Bank, Inc., 65 Pa. Super. Ct. 290 (1916).

Sec. 4-403. Customer's Right to Stop Payment; Burden of Proof of Loss.

(1) *Contra:* Hunsberger v. National Bank & Trust Company of Schwenksville, 38 D. & C. 310 (1940) (depositor told bank cashier at latter's residence on Sunday night to stop payment on check but the check was cashed Monday morning before the cashier arrived at work. The bank was held liable to its depositor). See: Wall v. Franklin Trust Company of Philadelphia, 84 Pa. Super. Ct. 392 (1925); German National Bank v. Farmers Bank, 118 Pa. 294 (1888); Steiner v. Germantown Trust Company, 104 Pa. Super. Ct. 38 (1932). See also, Farmers' & Merchants' National Bank v. Elizabethtown National Bank, 30 Pa. Super. Ct. 271 (1906) (where first bank telegraphed second bank that check was good, and second bank thereupon cashed check, it was held no defense to first bank in suit by second bank, that drawer thereafter stopped payment).

(2) Oral stop orders are binding: see cases cited under subsections (1) and (3). Requirement of written stop order after opportunity is new. *Cf.:* Michaels v. First National Bank of Scranton, 51 Lack. J. 181 (1949) (written stop order releasing bank from liability held ineffective); Weller v. Broad Street National Bank, 15 D. & C. 321 (1931) (to same effect). Act of July 29, 1941, P. L. 586, § 2, 7 P.S. § 819-912 limits effect of stop order and renewal thereof to one year.

(3) *Cf.:* Michaels v. First National Bank of Scranton, 51 Lack. J. 181 (1949) (burden of proving check was paid through inadvertence, accident, oversight or in the normal course of its business rests upon the bank); Williams v. Dollar Savings & Trust Company, 66 P. L. J. 247 (1918).

Sec. 4-404. Bank Not Obligated to Pay Check More Than Six Months Old.

New. The N.I.L. requires that checks be presented within a "reasonable" time. As a matter of practice, banks, in general, follow a policy of questioning "stale" checks. See: Lancaster Bank v. Woodward, 18 Pa. 357 (1852).

Sec. 4-405. Death or Incompetence of Customer.

Cf.: Mellier's Estate, 320 Pa. 150 (1936); Kern's Estate, 171 Pa. 55 (1895), 176 Pa. 373 (1896); Hawley's Estate, 15 Dist. R. 24 (1905) (an unpaid check is revoked by the drawer's death).

drawee, unless its return is demanded, does not amount to acceptance, excepting checks).

Sec. 4-303. When Items Subject to Notice, Stop-Order, Legal Process or Setoff; Order in Which Items May Be Charged or Certified.

(1) See: Maryland Casualty Company v. National Bank of Germantown & Trust Company, 320 Pa. 129 (1936). Under this section mailing a remittance check for the aggregate of several items does not defeat a subsequent stop-order or attachment relating to one of the items. Stop-orders or attachments must be acted upon until the posting is made to the individual ledgers. For a situation in which the phrase "or otherwise has widened by action its decision to pay the item" would be applicable, see: Hamburger Bros. & Co. v. Third National Bank & Trust Co. of Scranton, 132 Pa. Super. Ct. 421 (1938) affd. 333 Pa. 377 (1939) (marking note "O.K." when presented by notary equivalent to certification, subsequent cancellation by notary ineffective as against payee).

(2) *Accord:* Reinisch v. Consolidated National Bank, 45 Pa. Super. Ct. 236 (1911).

Part 4. Relationship Between Payor Bank and Its Customer.

Sec. 4-401. When Bank May Charge Customer's Account.

(1) *Contra:* Lancaster Bank v. Woodward, 18 Pa. 357 (1852) (lengthy discussion of the evils of allowing the practice of banks to pay on items which create an overdraft in the depositor's account). *Cf.:* § 519 of the Pennsylvania Banking Code, 7 P.S. § 819-519 prohibiting overdrafts by officers, directors, attorneys and employees.

(2) (a) Although there appears to be no direct holding in point, the Pennsylvania decisions seem to indicate that the drawee is liable for paying a "raised" check unless the drawer is estopped from asserting the alteration by virtue of his lack of due care in drawing the instrument—an "all or nothing" theory founded on the theory of a contract between bank and depositor. See: Weiner v. The Pennsylvania Company for Insurance on Lives & Granting Annuities, 160 Pa. Super. Ct. 320 (1947); Houser v. National Bank of Chambersburg, 27 Pa. Super. Ct. 613 (1905).

(b) Where checks have been signed in blank, then filled in, the depositor has been held liable as against his bank on the theory that as between two innocent parties, the loss shall fall upon the one who made the loss possible: Weiner v. The Pennsylvania Company for Insurance on Lives & Granting Annuities, 160 Pa. Super. Ct. 320 (1947); Robb v. The Pennsylvania Company, etc., 186 Pa. 456 (1898) (dissenting opinion). The cases do not discuss the possibility the bank knowing that the item was incomplete when delivered, but rather assume the contrary to be the fact.

Sec. 4-406. Customer's Duty to Discover and Report Unauthorized Signature or Alteration.

(1) (a) *Accord: e. g.,* Union National Bank v. Franklin National Bank, 249 Pa. 375 (1916) ("immediately"); McNeely Company v. Bank of North America, 221 Pa. 588 (1908) ("prompt"); Interstate Hosiery Mills, Inc. v. First National Bank of Lansdale, 139 Pa. Super. Ct. 181 (1939) ("reasonable time"); Murray v. Real Estate Title Insurance & Trust Company, 39 Pa. Super. Ct. 438 (1909) ("promptly").

But *cf.:* Johnson v. First National Bank, 357 Pa. 459 (1951) (majority opinion summarized the standard as being that of "timely" notice at p. 463, dissenting opinion criticizes the use of this word and cites thirteen cases as requiring the test to be "prompt" notice at pp. 469-470. This case is *contra* in that it holds that freedom from negligence on the part of the bank must be shown before the failure of the depositor to give adequate notice precludes the depositor from recovery against his bank).

(b) *Accord:* without, however, establishing a specific 90 day limitation: Lesley v. Ewing, 248 Pa. 135 (1915) (two months delay); Connors v. Old Forge Discount and Deposit Bank, 245 Pa. 97 (1914) (six weeks delay); Globman v. Southwestern National Bank, 103 Pa. Super. Ct. 589 (1932) (three months delay); Knights of Joseph Building & Loan Assoc. v. Guarantee Trust & Safe Deposit Co., 69 Pa. Super. Ct. 89 (1919) (five weeks delay). *Accord:* as to subsequent forgery by same person: Myers v. Southwestern National Bank, 193 Pa. 1 (1899); Interstate Hosiery Mills, Inc. v. First National Bank of Lansdale, 139 Pa. Super. Ct. 181 (1939).

(c) *Cf.:* Act of July 29, 1941, P. L. 586, § 2, 7 P.S. § 819-911. (Bank not liable to depositor for forged, raised or altered check or draft after six (6) months. Act No. 165, 1951, places a limitation of seven years on the right to question the correctness of a bank statement, but without relieving the depositor from the duty to examine and report forged and altered checks.)

(2) See: Commonwealth v. Globe Indemnity Co., 323 Pa. 261 (1936) (notices of forged indorsements given seventeen and twenty-one days after discovery held sufficiently prompt—court emphasized that thousands of checks had to be examined to select those involved). No cases found involving "good cause" for failure to examine statement. It is not "good cause" that forging employee extracted cancelled checks from bank statement: Myers v. Southwestern National Bank, 193 Pa. 1 (1899); Interstate Hosiery Mills, Inc. v. First National Bank of Lansdale, 139 Pa. Super. Ct. 181 (1939).

Sec. 4-407. Payor Bank's Right to Subrogation on Improper Payment.

(a) *Cf.:* Hunsberger v. National Bank & Trust Co. of Schwenksville, 38 D. & C. 323 (1940) (drawee bank not subrogated to right

of payee since that would require litigating the rights of a party not party to the suit. Query the applicability of this reasoning where payee had transferred to a holder in due course who transferred to the payor bank).

(b) *Contra:* Hunsberger v. National Bank & Trust Co. of Schwenksville, 38 D. & C. 323 (1940) (it is no defense to an action against a bank for cashing a check after the drawer had notified it to stop payment, that the drawer was under a legal obligation to pay the sum represented by the check to the payee).

(c) See: Foster v. Federal Reserve Bank of Philadelphia, 29 F. Supp. 716 (D. C. Pa. 1939), affirmed, 113 F. 2d 326 (C. A. 3rd 1940); also, Second National Bank v. Zable, 11 Berks 27 (1918); but *cf.* First National Bank v. Bode, 74 P.L.J. 577 (1926); Bryan v. First National Bank, 205 Pa. 7 (1903). Theory of allowing recovery by payor bank against payee would appear to be that of payment under mistake of fact rather than subrogation.

Article 5

DOCUMENTARY LETTERS OF CREDIT

Sec. 5-101. Short Title.

Pennsylvania presently has no statutory provisions governing letters of credit, except to the extent that the provisions of the Negotiable Instruments Law, Act of May 16, 1901, P. L. 194, as amended, 56 P.S. § 1 *et seq.*, may affect drafts drawn under such letters. The applicability of the Negotiable Instruments Law, however, is minimal (see comment to Sec. 5-103 of the Code). Case law on the subject of letters of credit is practically nonexistent in Pennsylvania. Occasional reference is made in these comments to decisions of courts of jurisdictions other than Pennsylvania when there is no controlling Pennsylvania law.

Sec. 5-102. Scope.

Banking practice with respect to letters of credit, not only in Pennsylvania but also throughout the country and to a large extent internationally, has tended to become unified because of the adherence by banks to a set of rules promulgated and revised from time to time by the International Chamber of Commerce. The current regulations, effective since January 1, 1952, are known as the "Uniform Customs and Practice for Commercial Documentary Credits Fixed by the Thirteenth Congress of the International Chamber of Commerce." Originally adopted in 1938, the Uniform Customs are effective in controlling relations between banks which have agreed to adhere to

them. Not infrequently, letter of credit forms used by banks incorporate the regulations by reference.

Many of the Code provisions adopt rules established by the Uniform Customs; however, the draftsmen have not solidified all the details of banking practice currently set forth in the Customs.

Sec. 5-103. Definitions and Concepts.

A "credit" as here defined is broader in scope than the so-called "virtual acceptance" provided for in the Negotiable Instruments Law § 135, 56 P.S. § 324: "An unconditional promise in writing to accept a bill, before it is drawn . . . ." A "credit" is of necessity conditional, because it requires the presentment of documents and because payment will be made on the draft drawn under the credit only if the documents comply with the terms of the credit. This explains the general lack of direct application of the Negotiable Instruments Law to letters of credit. The requirement of the Code that the credit be a "signed writing" is a continuation of the rule of Negotiable Instruments Law with respect to the "virtual acceptance." See Finkelstein, Acceptances and Promises to Accept, (1926) 26 Col. L. Rev. 684, 706.

The Code treats of both "revocable" and "irrevocable" credits, as do the Uniform Customs (*cf.* Art. 2 of the Uniform Customs).

Sec. 5-104. Form of Credit.

See comment under Sec. 5-106(2) of the Code. Courts have frequently stated that no particular form is required for the letter of credit. See Second National Bank v. Columbia Trust Co., 288 Fed. 17, 20 (C.C.A. 3rd 1923); Moss v. Old Colony Trust Company, 246 Mass. 139, 151, 140 N.E. 803, 807 (1923). *Cf.* Pines v. United States, 123 F. 2d 825 (C.C.A. 8th 1942) (involving indictment for crime).

Sec. 5-105. Revocable Credit; Irrevocable Credit.

This is a codification of Art. 3, the Uniform Customs: "All credits, unless clearly stipulated as irrevocable, are considered revocable even though an expiry date is specified."

Sec. 5-106. Establishment and Cancellation of a Credit.

(1) The law has not recognized the enforceability of such commercial documents as bills of exchange, checks, or promissory notes where there has been an absence or failure of consideration. See §§ 24 and 28 of the Negotiable Instruments Law, 56 P.S. §§ 61 and 65. However, so far as these commercial documents are concerned, some change has been effected in the familiar common law requirement that the plaintiff promisee in a contract action must bear the burden of persuading the jury that there was consideration for the promise on which he is suing. In line with most courts, the Pennsylvania courts have interpreted the provisions of the Negotiable Instruments Law as placing on the defendant maker of a promissory

note the risk of non-persuasion of the jury on the question of consideration. See Girard Trust Company v. Kitsee, 82 Pa. Super. Ct. 277 (1923) (§ 24 means that a promissory note is "prima facie evidence of the debt and is presumed to be given for value . . . , and it was incumbent upon defendant to show the lack of it"). Pennsylvania courts have not gone beyond the point of shifting the burden of proof; they have not held that a paper is enforceable irrespective of consideration merely because it is a "commercial document." They have followed common law precedents in cases not involving such "commercial documents," and have held the question of consideration irrelevant only where signature of the maker of a note is under seal. Even in that situation the irrelevancy applies only to *want* and not to *failure* of consideration. See Independent Coal Co. v. Michalowski, 349 Pa. 349 (1944); Conrad's Estate, 333 Pa. 561 (1938). *Cf.* Commonwealth Trust Co. General Mortgage Investment Fund Case, 357 Pa. 349 (1947). At the most, subsection (1) of this section applies to the letter of credit the rule adopted only with respect to paper under seal. The result is to make of the letter a kind of "mercantile specialty." The necessity for establishing this rule by statute has arisen not because letters of credit have been legally unenforceable from lack of consideration. In fact, courts have uniformly enforced the letter, but both courts and text writers have had difficulty agreeing on the technical legal basis for doing what did not fit nicely into the mold of contract rules. For a discussion of various legal theories advanced to support the enforceability of letters of credit, see Doelger v. The Battery Park National Bank, 201 App. Div. 515, 194 N.Y.S. 582 (1922); Lamborn v. The National Park Bank of New York, 240 N.Y. 520, 148 N.E. 664 (1925); Moss v. Old Colony Trust Company, 246 Mass. 139, 140 N.E. 803 (1923); and text writers: Mead, Documentary Letters of Credit, (1922) 22 Col. L. Rev. 297, 300 (offer and acceptance, guaranty, estoppel, equitable assignment, third party beneficiary contract, contract supported by conventional consideration); 4 Williston on Contracts § 1011D (1936 ed.) ("The best view seems to be that the promise of the issuing bank's customer to reimburse the bank and pay a commission for issuing the credit is the consideration for the promise made by that bank or by that bank's correspondent at its request to the beneficiary of the credit. The validity of this form of credit, though unusual, has been sustained in the United States in other classes of cases, that is, it has been held that consideration for a promise need not proceed from the promisee"). See also McLaughlin, The Letter of Credit Provisions of the Proposed Uniform Commercial Code, (1950) 63 Harv. L. Rev. 1373, 1379; Trimble, The Law Merchant and the Letter of Credit, (1948) 61 Harv. L. Rev. 981, 994.

(2) The Act of May 10, 1881, P. L. 17, predecessor to the statute of frauds as to acceptances found in § 132 of the Negotiable Instru-

ments Law, 56 P.S. § 321, provided "That no person within this state shall be charged, as an acceptor on a bill of exchange, draft or order drawn for the payment of money, exceeding twenty dollars, unless his acceptance shall be in writing, signed by himself, or his lawful agent." In Ravenswood Bank v. Reneker, 18 Pa. Super. Ct. 192 (1901), it was held that a telegram promising to accept a draft bound the sender under the 1881 statute, although the court pointed out that the required writing was the original telegram deposited by the defendant with the telegraph company, the copy received by the plaintiff being admissible evidence thereof because the defendant had waived production of the original. That under the statute of frauds for sale of goods a code designation or a fictitious name may serve as a signature if adopted as such, see 1 Williston, Sales, § 112 (rev. ed. 1948); Bibb v. Allen, 149 U.S. 481 (1893). *Cf.* Tomilio v. Pisco, 123 Pa. Super. Ct. 423 (1936) (would-be signer's illegible handwritten signature to change-of-beneficiary application on insurance policy, adopted by him as signature, held binding).

(3) Art. 5, The Uniform Customs, provides that "Irrevocable Credits are definite undertakings by an issuing Bank and constitute the engagement of that Bank to the beneficiary or as the case may be, to the beneficiary and bona fide holders of drafts drawn thereunder that the provisions for payment, acceptance or negotiation contained in the credit, will be duly fulfilled provided that the documents or as the case may be, the documents and the drafts drawn thereunder comply with the terms and conditions of the credit. . . . Such undertakings can neither be modified nor cancelled without the agreement of all concerned." The Code's prohibition against modification or cancellation without agreement is more specific, since it has reference not to "all concerned" but to "all parties as to which it has been established." Subsection (2) of this section of the Code makes it clear that the credit may become established with reference to the beneficiary at a different time from its establishment with relation to the customer. Thus, it is possible for the customer to cancel or modify a credit without procuring consent of the beneficiary if such attempted modification takes place *after* the credit has been established in favor of the customer but *before* it has been established in favor of the beneficiary.

(4) Subsection (4) of this section codifies the present practice. See Art. 4, Uniform Customs: "Revocable credits are not legally binding undertakings between Banks and beneficiaries. Such credits may be modified or cancelled at any moment without notice to the beneficiary. When a credit of this nature has been transmitted to a branch or to another Bank, its modification or cancellation can take effect only upon receipt of notice thereof by such branch or other Bank, prior to payment or negotiation, or the acceptance of drawings thereunder by such branch or other Bank."

Sec. 5-107. Issuer's and Other's Responsibility.

(1) The requirement that the issuer must honor drafts meeting the terms of the credit codifies present commercial understanding with respect to the outstanding feature of the letter of credit. "In documentary credit operations, all parties concerned deal in documents and not in goods." Art. 10, the Uniform Customs. Camp v. Corn Exchange National Bank, 285 Pa. 337 (1926) (suit by customer against issuer; defense allowed that documents sufficiently met terms of credit); Second National Bank of Hoboken v. Columbia Trust Co., 288 Fed. 17 (C.C.A. 3rd 1923). The practice is to require the bank to examine the documents to see whether they conform to the credit, but not to examine the goods or to inform itself as to performance of the underlying contract. See Art. 9, the Uniform Customs and Sec. 5-111(1) of the Code. Bank of Italy v. Merchants National Bank, 236 N.Y. 106, 140 N.E. 211 (1923) (issuer not required to honor draft under credit for "dried grapes" where bill of lading for "raisins" presented with draft; implication that bank need not make inspection of goods to determine whether these two items are same); Laudisi v. American Exchange National Bank, 239 N.Y. 234, 146 N.E. 347 (1924) (bank paying draft accompanied by documents complying with language of credit not liable to customer who notified bank that goods did not conform to underlying sales contract). See Second National Bank of Hoboken v. Columbia Trust Co., 288 Fed. 17 (C.C.A. 3rd 1923).

Subsection (1) does not solve the difficult problem as to what documents meet terms of the credit, whether invoice description conforming to terms of letter is sufficient or whether bill of lading, in general terms, need only be consistent with terms of the credit. Laudisi v. American Exchange National Bank, *supra* (general bill of lading meets terms of credit).

Except to the extent that subsection (3) of this section may be applicable, the Code does not purport to deal with specific problem in Dixon, Irmaos & Cia. Ltda. v. Chase National Bank of City of New York, 144 F. 2d 759 (C.C.A. 2d 1944) (issuer required to make payment when draft accompanied by bank guaranty substituted for missing bill of lading; local bank custom relied on to interpret meaning of terms of credit). However, provisions of subsection (1) with respect to issuer's requiring specified documents to be satisfactory would allow issuer to be judge of sufficiency of guaranty. Pennsylvania courts have enforced contracts providing that performance must be satisfactory to one of the parties. The Code does not set up standards with respect to the satisfaction required. See Lippincott v. Warren Apartment Co., 307 Pa. 320 (1932) (dissatisfaction must be reasonable and *bona fide*).

(2) This subsection codifies substantially the existing business practice. Application forms for letters of credit usually embody

the agreement between the issuer and the customer. Such forms adhere closely to the time schedule set up in the Code although some banks reserve the right to demand funds, for payment of sight drafts, prior to presentment. A typical provision with respect to payment in United States funds follows:

> "As to drafts or acceptances under or purporting to be under the credit, which are payable in United States currency, the undersigned agrees (a) in the case of each sight draft, to reimburse you at your main office, on demand, in lawful money of the United States of America, the amount paid on such drafts, or, if so demanded, to pay you at your said office in advance in such money, the amount required to pay such draft, and (b) in the case of each acceptance, to pay you at your office, in lawful money of the United States of America, the amount thereof, on demand but in any event not later than one business day prior to maturity, or, in case the acceptance is not payable at your office, then on demand but in any event in time to reach the place of payment in the course of the mails not later than one business day prior to maturity."

(3) Subsection (3) puts into statutory form the release customarily found in application forms. This release of liability is frequently effected by the customer designating all parties involved, other than the issuer, as his agents rather than as agents of the issuer. Letters issued subject to the Uniform Customs might automatically incorporate similar releases found in Arts. 11, 12, 13 and 14.

Sec. 5-108. Advice of Credit; Error in Statement of Terms.

(1) Subsection (1) states the general understanding as to the function of an advising bank. Art. 6, Uniform Customs, provides: "Irrevocable credits may be advised to the beneficiary through an advising Bank without responsibility on the latter's part."

(2) Subsection (3) restates the provision customarily found in application forms, and conforms to the practice as stated in Art. 12, the Uniform Customs:

> "Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters, and/or documents, or for delay, mutilation or other errors in the transmission of cables, telegrams or other mechanically transmitted messages, or for errors in translation or interpretation of technical terms, and Banks reserve the right to transmit credit terms without translating them."

Sec. 5-109. Presenter's Reservation of Lien or Claim.

Courts have held that the interest of the presenter in the documents accompanying a draft is only a security interest, called variously a "special property" subject to defeasance upon transfer of the

draft with the documents attached (Guaranty Trust Co. of New York v. Hannay & Co., 2 K.B. 623, 631, [1918]), a "lien," a "pledge," or a "mortgage." See Note, The Tripartite Ownership Resulting from the Transfer of Bill of Lading to Seller's Order to a Discounting Bank, (1926) 26 Col. L. Rev. 63, 65. *Cf.* comment to Sec. 5-110(1) with respect to applicability of § 37 of Uniform Bills of Lading Act to such documentary transfers.

Sec. 5-110. Documents Not Genuine or Effective.

(1) See Kingdom of Sweden v. New York Trust Co., 197 Misc. 431, 96 N.Y.S. 2d 779 (1949) (confirming bank); Guaranty Trust Co. of New York v. Hannay & Co., 2 K.B. 623 (1918) (customer, asserting the right of the drawee of a draft, not permitted to recover from the party who had presented the draft accompanied by forged documents, the court stating that there was no implied warranty of genuineness given with such presentment); Springs v. The Hanover National Bank of City of New York, 209 N.Y. 224, 103 N.E. 156 (1913) (drawee of draft not entitled to recover from *bona fide* purchaser who presents with forged documents attached). In Goetz v. Bank of Kansas City, 119 U.S. 551 (1887) recovery was denied on counterclaim of acceptor who paid drafts accompanied by forged bills of lading, and then sued the holder to whom payment had been made, the court stating that the presenter had made no warranty as to the bills.

The rule is analogous to the common law doctrine arising from the case of Price v. Neal, 3 Burr. 1354 (King's Bench, 1762) to the effect that the drawee paying an instrument on which the drawer's signature is forged cannot recover from the innocent presenter. But Pennsylvania repudiated that doctrine by statute: Act of April 5, 1849, P. L. 424, § 10. Cases decided since the adoption of the Negotiable Instruments Law have held that § 62 of that Act, 56 P.S. § 153 ("The acceptor . . . admits: (1) The existence of the drawer. . . .") did not have the effect of repealing the 1849 statute and of reinstating the doctrine of Price v. Neal into Pennsylvania law. Market St. Title & Trust Co. v. Chelten Trust Co., 296 Pa. 230 (1929).

Since no cases have been found in Pennsylvania treating the problem involved in this subsection, and since the purposes to be served by the rule of "no warranty" with respect to forged bills of lading presented under letters of credit may be different from those involved in an adoption or rejection of the rule of Price v. Neal as applied to checks and drafts not so presented, it cannot be said whether this subsection changes Pennsylvania law.

To the extent that the presenter of a draft with documents attached is deemed to have a security interest in such documents (see Sec. 5-109 of the Code), this section is consistent with § 37 of the Uniform Bills of Lading Act, Act of June 9, 1911, P. L. 838, § 37,

6 P. S. § 87, providing that a ". . . holder of a bill for security, who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or to warrant the genuineness of such bill or the quantity or quality of the goods therein described." See 4 U.L.A. Ann. § 37 (Commissioners' Note); Williston, Note, An Interpretation of Section 35 of the Uniform Bills of Lading Act, (1926) 26 Col. L. Rev. 330 (§ 37 should be distinguished from § 35 of the Uniform Bills of Lading Act, which sets forth implied warranties made by one who negotiates or transfers for value a bill of lading by indorsement or delivery).

That the rule of this subsection (1) is particularly applicable to the collecting bank acting only as agent for the owner of a draft, see Archibald & Lewis Co. v. Banque Internationale de Commerce, 216 App. Div. 322, 214 N.Y. Supp. 366 (1926).

(2) Subsection (2) restates the rules of Art. 9 of the Uniform Customs: "Banks must examine all documents and papers with care so as to ascertain that on their face they appear to be in order," and of Art. 11 of the Uniform Customs:

"Banks assume no liability or responsibility for the form, sufficiency, correctness, genuineness, falsification or legal effect of any documents or papers, . . ."

See Kingdom of Sweden v. New York Trust Co., 197 Misc. 431, 96 N.Y.S. 2d 779 (1949).

Sec. 5-111. Excuse from Honor or Reimbursement.

(1) In accord with first clause of subsection (1) of this section: Bank of Taiwan v. Union National Bank of Philadelphia, 1 F. 2d 65 (C.C.A. 3rd 1924) (in action against issuer for dishonor of draft accompanied by documents conforming to credit, improper for defendant to introduce evidence of breach of underlying contract). *Cf.* Laudisi v. American Exchange National Bank, 239 N.Y. 234, 146 N.E. 347 (1924). As to non-conformity arising as result of forgery of the documents, see Craig v. Sibbett & Jones, 15 Pa. 238 (1850) and Goetz v. Bank of Kansas City, 119 U.S. 551 (1887), where acceptors of drafts accompanied by forged documents, forgery discovered after acceptance but before payment, held liable to holder (cases did not involve letters of credit). Text writers have not been wholly in agreement with respect to obligation of drawee to honor drafts where documents do not conform to terms of underlying sales contract because of forgery or fraud in the documents. See Thayer, Irrevocable Credits in International Commerce: Their Legal Effects, (1937) 37 Col. L. Rev. 1326, 1335 (contending that issuer should not have to pay draft accompanied by forged or fraudulent documents, and distinguishing that type of non-conformity of documents from

non-conformity resulting from breach of terms of contract of sale); Finkelstein, Legal Aspects of Commercial Letters of Credit (1930) p. 248. ("At any rate, the legal principle is clear. Where the bank can show that the seller has acted fraudulently, it is under no duty to pay the seller. The *bona fide* purchaser, however, is entitled to be paid."); Ward and Harfield, Bank Credits and Acceptances (1948) p. 94.

The provision of subsection (1) of this section of the Code, with respect to injunction of payment, codifies the result of Sztejn v. J. Henry Schroder Banking Corp., 177 Misc. 719, 31 N.Y.S. 2d 631 (1941) (court stated, however, that injunction not allowed against a holder in due course seeking payment on such a draft).

(2) Whether drawee is privileged, as against the customer, to honor draft even though he knows there has been a forgery or fraud in connection with documents accompanying draft: Brown v. Rosenstein Co., 120 Misc. 787, 200 N.Y. Supp. 491 (1923), aff'd w.o. op., 208 App. Div. 799, 203 N.Y. Supp. 922 (1924) (in suit by drawee against customer for reimbursement of amount paid on draft accompanied by forged bill of lading and insurance policy, defense by customer that documents were forged held irrelevant or insufficient, but note that draft had been accepted by drawee before notice received and that payment made to holder in due course). See Finkelstein, Legal Aspects of Commercial Letters of Credit (1930) p. 244.

Sec. 5-112. Time Allowed for Honor or Rejection; Withholding Honor or Rejection by Consent; "Presenter".

This section extends the time allowed by the Negotiable Instruments Law for consideration by the drawee whether to dishonor the draft or to accept and pay it. Section 136 of the Negotiable Instruments Law, 56 P.S. § 325, provides that the drawee is allowed 24 hours after presentment to decide whether to accept the bill. See Fidelity Title and Trust Co. v. First National Bank of Spring Mills, 277 Pa. 401, 406 (1923).

Sec. 5-113. Indemnities.

Although the Pennsylvania Banking Code prohibits banks from acting as surety, Act of May 15, 1933, P. L. 624, Art. 10, § 1022, as amended, 7 P.S. § 819-1022, this same section of the Banking Code provides that ". . . a bank or a bank and trust company shall have the power to give its bond, either alone or as surety for another, in connection with any *bona fide* transaction involving the importation, exportation, or domestic shipment of goods or commodities." See Ward & Harfield, Bank Credits and Acceptances (1948) p. 64, where question discussed whether giving such indemnities falls within the category of an ultra vires "guaranty." It has been held that a bank may give a guaranty if to do so is incident to transaction of business. Dunn v. McCoy, 113 F. 2d 587 (C.C.A. 3rd 1940).

Sec. 5-114. Availability of Credit in Portions.

The banks frequently include a provision in their application forms whereby the customer authorizes them to honor drafts drawn for part of the credit. The letter itself frequently contains a notation whereby an issuer expressly either allows or disallows partial shipments. This section of the Code does not change existing practice, since Art. 36 of the Uniform Customs provides: "Unless otherwise expressly stipulated, Banks may pay, accept or negotiate for partial shipments, even though the credit mentions the name of a vessel and when partial shipment is made by that vessel."

Sec. 5-115. Transfer and Assignment.

(1) Subsection (1) codifies the commercial understanding contained in Art. 49 of the Uniform Customs, although the Code does not further restrict transferability to the extent found in the Customs. Art. 49 of the Customs provides that ". . . the credit can be transferred once only . . ." even when it is designated as transferable. In Kingdom of Sweden v. New York Trust Co., 197 Misc. 431, 96 N.Y.S. 2d 779 (1949) the court held that the issuance of a secondary or "back to back" credit was not in conflict with accepted practice of New York banks and banks throughout the country (it had been argued that such a credit violated Art. 49 of the Uniform Customs as estabilshed by the Seventh Congress of the International Chamber of Commerce).

(2) The Pennsylvania cases which have held that the assignee of a contract right is not protected against payment by the obligor to the assignor, unless the obligor has received notice of the assignment, imply that the assignee who has given such notice can recover from the obligor who has paid the assignor. See Walker v. Emerich, 300 Pa. 9 (1930).

The importance attached by the Pennsylvania courts to the giving of notice by the assignee can be seen in the line of cases which holds that as between successive assignees of the same contract right, the first to give notice to the obligor prevails over the other, despite the chronology of the making of the assignments by the assignor. See Phillips's Estate (No. 3), 205 Pa. 515 (1903).

Section 170 (2) (a) of the Restatement of Contracts provides for discharge of the obligor, *inter alia,* if he obtains for value a discharge of the duty from the obligee or if the obligor "neither knows nor has reason to know facts showing that another person than the person giving the discharge has the right to receive performance." Emphasis is thus placed on notice. Unless this subsection of the Code can be interpreted as falling within § 170(3) of the Restatement, so as to require the assignee to obtain the letter of credit from the beneficiary and to present the letter to the issuer, it is out

of line with the usual contract rule. Justification must be sought for it in the peculiar requirements of letter of credit banking practice.

Sec. 5-116. Remedy for Improper Dishonor or Repudiation.

(1) Section 135 of the Negotiable Instruments Law, 56 P.S. § 324, gives the right of recovery, as on an acceptance, on a promise to accept a bill before it is drawn, only to the person "who upon the faith thereof, receives the bill for value." No such restriction is contained in subsection (1) of this section of the Code, which gives the right to receive the face amount of the draft to the *holder* without qualification.

Although § 135 of the Negotiable Instruments Law makes an actual acceptance out of a promise to accept, letters of credit do not fall within its scope because of the Negotiable Instruments Law requirement that the promise be "unconditional." The inference from the Negotiable Instruments Law is that recovery will be limited, on a promise to accept the bill, to the face amount of the bill. See Finkelstein, Acceptances and Promises to Accept, (1926) 26 Col. L. Rev. 684, 719 *et seq.* A "contract" recovery on the conditional promise on the letter of credit would allow recovery not only of the face amount of the draft but also of the reasonably foreseeable damages resulting from breach (the rule of incidental damages grounded in Hadley v. Baxendale, 9 Exch. 341 (1854)). See Siegel v. Struble Bros., Inc., 150 Pa. Super. Ct. 343 (1942) following that rule in a contract action. This subsection of the Code, in combination with subsection (3) precludes the recovery of such incidental damages by limiting recovery to the amount of the draft or letter. There are no Pennsylvania cases on the point. See Finkelstein, Legal Aspects of Commercial Letters of Credit (1930) p. 271.

(2) The Pennsylvania court allows an immediate recovery for anticipatory breach of contract. Cameron, to use v. Eynon, 332 Pa. 529 (1939).

Sec. 5-117. Insolvency of Bank Holding Funds for Documentary Credit.

This section makes explicit that a depositor of a sum for the specific purpose mentioned will be given a preference on insolvency. The cases have not been consistent on this point, some holding a "special" deposit to be entitled to a preference, on a theory that trust funds are being traced. Massey v. Fisher, 62 Fed. 958 (E.D.Pa. 1894). Others have held there is no such preference even as to the proceeds of bonds deposited for safekeeping. Hoffman v. Rauch, 300 U.S. 255 (1937) (on *certiorari* to C.C.A. 3rd). This section of the Code may go beyond the position taken by the court in the Massey case, since it does not require that the funds be traced into the bank's assets.

Article 6

BULK TRANSFERS

Introductory Comment

This Article would do little more than rephrase and clarify the Pennsylvania Bulk Sales Law, Pa. Laws 1919, pp. 262-265, as amended to date by Pa. Laws 1939, No. 97, pp. 189-190, 69 P.S. §§ 521-529.

In certain transfers not in the ordinary course of business, both this Article (assuming the enactment of the optional Code Secs. 6-106, 6-107 (2) (e), 6-108 (3) (c), 6-109 (2)) and the Pennsylvania statute impose upon the transferee the obligation to see to it that the proceeds of the transfer are applied to payment of the transferor's debts. Other salient features are requirements that the transferee obtain from the transferor a sworn list of the transferor's creditors and that the transferee give notice to those creditors of the proposed transfer.

Three changes of significance which this Article would effect are: (1) extending the applicability of the Bulk Sales Law to manufacturing enterprises; (2) restricting coverage of equipment transfers to situations in which inventory is also transferred; and (3) making it clear that bulk sales safeguards are applicable to the creation of security interests in exchange for other than new value.

The Pennsylvania statute includes its own criminal sanction for false swearing by the transferee. In the absence of a general Pennsylvania perjury statute, a similar provision would seem advisable here.

Sec. 6-101. Short Title.

Sec. 6-102. "Bulk Transfer"; "Transfer"; Transfers of Equipment; Enterprises Subject to This Article; Bulk Transfers Subject to This Article.

Substantially in accord with 69 P.S. § 525, except that subsection (4) includes manufacturing businesses, which have been held not subject to the Pennsylvania statute. Broad St. Nat. Bank v. Lit Bros., 306 Pa. 85, 158 Atl. 866 (1932); Gitt v. Hoke, 301 Pa. 31, 151 Atl. 585 (1930). Processing enterprises are subject to this Article and apparently to the Pennsylvania act as well. Baker v. Young, 17 D. & C. 9 (C.P. Snyder 1931) (flour mill). The precise language of subsection (4) achieves the same result as the specific exclusion of hotels and boarding houses in 69 P.S. § 526.

While subsection (3) excludes equipment transfers unless in connection with a transfer of inventory, the Pennsylvania act in 69 P.S. §§ 521, 525 applies to all "fixtures" of covered enterprises.

The Pennsylvania act, covering "*any* sale or transfer," 69 P.S. § 525, is broad enough to include as a transfer the creation of a security interest. However, in other jurisdictions having similar statutes, it is generally held that security transactions are not covered. See Note, 57 A.L.R. 1049 (1928).

Sec. 6-103. Transfers Excepted from This Article.

(1) See annotation to Code Sec. 6-102.

(2) *Accord:* 69 P.S. § 526.

(3) A sale in enforcement of a lien is apparently not excluded by the Pennsylvania act unless made under order of a court or by a public officer, 69 P.S. § 526.

(4) *Accord:* 69 P.S. § 526.

(5) *Accord:* 69 P.S. § 526, insofar as dissolution of a corporation requires a court order under 15 P.S. § 501.

Subsections (6) and (7) are new, but it has been held that the Pennsylvania act does not apply to a transfer to a corporation in return for all of its stock, with the corporation assuming the transferor's debts, McLean v. Miller Robinson Co., 55 F. 2d 232 (E.D. Pa. 1931), or to a transfer to a partnership of which the transferor becomes a member, Rosenberg's Account, 16 D. & C. 569 (C.P. Allegheny 1931).

(8) A new statutory provision, but a $300 debtor's exemption was granted in Bixler v. Kennedy, 64 Pa. Super. Ct. 41 (1916).

Sec. 6-104. Schedule of Property, List of Creditors.

The requirement that the transferee obtain from the transferor a sworn schedule of the property and a list of creditors is substantially the same as 69 P.S. § 521. A new requirement is that the transferee retain the list for six months or file it in a public office. As under the Pennsylvania act, responsibility for completeness and accuracy of the list rests upon the transferor. Abramowitz v. Krull, 73 Pa. Super. Ct. 373 (1920); Buch v. Miller, 94 Pa. Super Ct. 41 (1928).

The Code does not impose criminal sanctions for false statements by the transferor, as does 69 P.S. § 525, or for procuring lists of creditors for improper purposes, as does 69 P.S. § 528. In the absence of a general Pennsylvania perjury statute, provisions imposing criminal sanctions would seem advisable.

Sec. 6-105. Notice to Creditors.

(1) The Pennsylvania Act applies to "any" transfer, 69 P.S. §§ 521, 525, and there is no specific treatment of transfers to secure old debts, transfers in payment of old debts, transfers for new value, etc. The Pennsylvania Act has been held applicable to transfers in discharge of old debts. Schumacher-Brinzley Co. v. Riddle, 52 Pa. Super. Ct. 6 (1912).

(2) The Pennsylvania Act also requires ten days' notice to listed creditors, 69 P.S. § 522.

Sec. 6-106. Application of the Proceeds.

The obligation of the transferee under the Pennsylvania Act is "paying or seeing to it" that the listed creditors are paid, 69 P.S. § 523. The obligation of the transferee is not limited to the amount of the consideration, but to what the court or jury finds to be the "fair value." See West Shoe Co. v. Lemish, 279 Pa. 414, 124 Atl. 87 (1924); International Shoe Co. v. Duttenhoffer, 120 Pa. Super Ct. 102, 182 Atl. 91 (1935). A non-complying transferee is not personally liable to creditors beyond the fair value of the goods, and althought 69 P.S. § 523 provides that he shall "be held liable to the creditors . . . as a receiver," he may not be held in contempt for failure to pay. Miller v. Myers, 300 Pa. 192, 150 Atl. 588 (1930). The goods in the hands of the transferee were charged with interest and attorney's fees in Miller v. Myers, *supra*.

The Pennsylvania Act specifically provides for payment of the consideration into court by the transferee in case of dispute as to its distribution among creditors, 69 P.S. § 523. A similar provision would seem advisable here, since equity interpleader is not available in Pennsylvania to a transferee who has an interest in the fund. Prudential Ins. Co. v. Grabowsky, 144 Pa. Super. Ct. 243, 19 A. 2d 572 (1941); 17 P.S. §§ 282 (IV), 283. Once an action has been instituted against the transferee by a creditor, however, interpleader at law is available to the transferee even though he has an interest in the fund. Pa. R.C.P. 2301-2325.

Sec. 6-107. The Notice.

The form and content of the notice are substantially the same as that required by 69 P.S. § 522, but the Pennsylvania statute does not require listing other business names and addresses used by the transferor. Corporate transferors are required by 69 P.S. § 529 to notify the Department of Revenue ten days before the sale and to procure a certificate that all Commonwealth taxes have been paid.

Sec. 6-108. Auction Sales; "Auctioneer".

Auctioneers are held responsible for compliance with the Pennsylvania Bulk Sales Law, 69 P.S. §§ 521-523, but the statute could not be literally applied to them insofar as it requires advance notice to creditors of the price to be paid for the goods.

Sec. 6-109. What Creditors Protected; [Credit for Payment to Particular Creditors].

Accord: West Shoe Co. v. Lemish, 279 Pa. 414, 124 Atl. 87 (1924); Siegel v. Netherlands Co., 59 Pa. Super. Ct. 132 (1915).

Miller v. T.I.C. Consumer Discount Co., 69 D. & C. 585 (C.P.

Adams 1949) : buyer knew seller had two creditors; buyer took seller's affidavit of no creditors and paid the two creditors, but did not give notice of the sale to the two creditors who were paid. *Held* that an unlisted creditor could take advantage of the purchaser's non-compliance.

Seltzer v. Peddie, 24 D. & C. 456 (C.P. Clinton 1915) : complying purchaser who paid a non-listed creditor not permitted to set off the amount of that payment in an action by the vendor for the purchase price. Remedy of the non-listed creditor is criminal.

Sec. 6-110. Subsequent Transfers.

There is no corresponding provision in the Pennsylvania Act, which provides merely that non-complying transactions are "fraudulent and void," 69 P.S. § 523. No decisions have been found interpreting this phrase as to subsequent transferees. Compare Sinclair v. Healey, 40 Pa. 417 (1861) (*bona fide* purchaser for value takes free of claims of creditors as to whom vendor's interest is fraudulent) with Lecky v. McDermott, 8 S. & R. 500 (1822) (*bona fide* purchaser for value from carrier takes subject to claims of shipper and true owner).

Sec. 6-111. Limitation of Actions.

The limitation period in 69 P.S. § 523 is ninety days, and there is no provision for concealed transfers.

Article 7

WAREHOUSE RECEIPTS, BILLS OF LADING AND OTHER DOCUMENTS OF TITLE

Introductory Comment

Scope: The definition of a document of title under the Code is substantially the same as under the present Sales Act. It includes, in addition to the two most widely employed documents of title, bills of lading and warehouse receipts, all other documents used in the ordinary course of business as evidencing the right to control goods represented by the documents (Code, Sec. 1-201 (15) ; 69 P.S. § 337).

Under the present statutory scheme bills of lading and warehouse receipts are regulated in great detail by the Bills of Lading and Warehouse Receipts Acts (6 P.S. § 23 et seq.). Other documents of title are regulated only insofar as the incidents of transfer and negotiation are concerned by Sales Act provisions dealing generally with all documents of title and defining negotiability, prescribing

the manner and effect of negotiation and transfer, and regulating attachment of goods represented by a negotiable document (69 P.S. §§ 221-239).

The Code contains many regulations applicable only to warehouse receipts or bills of lading or both. But it also broadens considerably the scope of legislative treatment of other documents of title. In addition to the matters treated by the present Sales Act, the Code deals, in relation to all documents of title with liability of the issuer for non-receipt or misdescription of goods purportedly covered by the document, the effect of documents purporting to create obligations on persons other than the original bailee, irregularities in form, overissued or duplicate documents, the delivery obligations of the bailee and the manner in which they can be fulfilled, lost documents, and the resolution of conflicting claims pressed on the bailee. (Secs. 7-203, 7-302, 7-401, 7-402, 7-403, 7-404, 7-601, 7-603.)

Insofar as warehouse receipts and bills of lading are concerned, regulation under the Code is similar in scope to that effected under the existing statutory scheme except that the Code makes no provision for criminal penalties.

Repeal of Uniform Acts: Adoption of the Commercial Code is assumed to go hand in hand with total express repealer of the Warehouse Receipts, Bills of Lading, and Sales Acts. These acts exist on our statute books as:

(1) The Act of 1909, March 11, P. L. 19, as amended 1937, April 29, P. L. 550, § 1 (6 P.S. §§ 23-32, 131-180).

(2) The Act of 1911, June 9, P. L. 838 (6 P.S. § 51-105).

(3) The Act of 1915, May 19, P. L. 543, as amended Act of 1931, June 12, P. L. 533, § 1, 2 and Act of 1937, May 28, P. L. 1009 (69 P.S. §§ 1-339).

The effect which repealer of these statutes will have on the law of documents of title is largely treated under the annotations to the sections of the Code which replace them. In addition to the matters treated there, however, the following effects of the repeal of these statutes should be noted:

(1) The Bills of Lading Act requires all bills of lading to contain certain "essential terms" (6 P.S. § 52). These requirements are substantially the same as those contained in the Warehouse Receipts Act (6 P.S. § 132). The Code continues the requirements as to warehouse receipts (Sec. 7-202) but does not impose them on bills of lading. As to the effect of violation of the requirements under present law, see annotation to Sec. 7-202.

(2) The Code drops the provisions of the Bills of Lading Act with respect to the effect of the form of a bill of lading on the relative rights of consignor and consignee (6 P.S. § 90). These rights are regulated under Article 2 of the Code.

(3) The Code drops the provisions of the Bills of Lading Act dealing with the effect of submission of a draft with bill attached (6 P.S. § 91). The handling of documentary drafts is regulated under Article 3 (Part 7) of the Code.

(4) The Code discontinues the criminal penalty provisions of the Warehouse Receipts and Bills of Lading Acts (6 P.S. §§ 99-100, 170-175). In substance these sections impose criminal liability for the following conduct:

6 P.S. § 94: Issue of a bill of lading for goods not received.
6 P.S. § 95: Issue of a bill of lading with false statements.
6 P.S. § 96: Issue of a duplicate bill of lading without so marking it.
6 P.S. § 97: Shipment of goods not owned by shipper, a subject to lien, and subsequent negotiation of negotiable bill for the goods without revealing lack of clear title.
6 P.S. § 98: Negotiation or transfer of bill of lading with knowledge that the goods are not in possession of carrier, without disclosing the fact.
6 P.S. § 99: Securing the issue of a bill of lading for goods not delivered to carrier by inducing carrier to believe goods have been delivered.
6 P.S. § 100: Issuing a non-negotiable bill of lading without so marking it.
6 P.S. § 170: Issuing a warehouse receipt for goods not received.
6 P.S. § 171: Issuing warehouse receipt with false statement.
6 P.S. § 172: Issuing duplicate warehouse receipt without so marking it.
6 P.S. § 173: Issuing warehouse receipt for goods owned by warehouseman without so marking it.
6 P.S. § 174: Delivery of goods without canceling negotiable warehouse receipt.
6 P.S. § 175: Depositing goods subject to lien or not owned by depositor and subsequently negotiating warehouse receipt for the goods without disclosure.

All the foregoing penal provisions require an "intent to defraud" or an "intent to deceive" except those based on issue of a warehouse receipt for goods not received, issue of an unmarked duplicate warehouse receipt, issue of an unmarked warehouse receipt for goods of the warehouseman, and delivery of goods without cancellation of a negotiable warehouse receipt, these provisions requiring only knowledge of the facts (6 P.S. §§ 170, 172, 173, 174).

Indictments returned under these sections, if any, have been so few in number as to give rise to no reported cases.

Repeal of Statutes Other Than Uniform Acts:

(1) Act of 1874, June 13, P. L. 285, § 1 (6 P.S. § 1). This statute provides for making the holder of a negotiated document a garnishee in attachment proceeding against the goods covered by it. It should be repealed entirely. The holder is under the Code protected by Sec. 7-602.

(2) Act of 1874, June 13, P. L. 285, § 2 (6 P.S. § 2). This statute grants bailees immunity from liability whenever goods are taken from them by legal process. It should be repealed only as to bailees who have issued a document of title. The Code protects such bailees in Sec. 7-603, and it is clearly the intent of the draftsmen to force them to utilize the provisions of that section.

(3) Act of 1881, June 8, P. L. 86, § 1 (6 P.S. § 3). This statute expressly gives any bailee who delivers the goods to the wrong party the right to sue to get the goods back or for conversion. It is not in any way inconsistent with the Code, which leaves the point open, and it is not recommended for repeal.

(4) Act of 1925, May 7, P. L. 557, §§ 1-4 (6 P.S. §§ 11-14). This statute prescribes a method of enforcement of common law liens for work done or materials furnished. It seems that such liens if acruing to a warehouseman on goods stored, would be enforceable under the different procedure provided for in the Code (Secs. 7-209, 7-210). Consequently this statute should be repealed insofar as it conflicts with the Code to show that where the procedure provided for in the Code is available it is the only proper procedure.

(5) Act of 1863, Dec. 14 P. L. (1864) 1127, §§ 1-3 (6 P.S. §§ 15-17). This statute provides a procedure for enforcing liens and disposing of perishable goods, inconsistent with the provisions of the Code as to warehousemen and carriers (Secs. 7-206, 7-210, 7-308). It should therefore be repealed insofar as it relates to carriers and warehousemen.

Part 1. General.

Sec. 7-101. Short Title.

Sec. 7-102. Definitions and Index of Definitions.

Sec. 7-103. Relation of Article to Treaty, Statute, Tariff, Classification or Regulation.

Existing Legislative Provisions: None.

Comment: Existing legislation dealing generally with warehouse receipts, bills of lading, or other documents has never been interpreted as overriding regulations concerning specific types of transactions, and this provision merely makes explicit the normal rule of statutory interpretation.

Sec. 7-104. Negotiable and Non-Negotiable Warehouse Receipt, Bill of Lading or other Document of Title.

Generally in accord: 6 P.S. §§ 55, 135; 69 P.S. § 221.

Changes: Although the present Warehouse Receipts and Sales Acts recognize "bearer" documents (6 P.S. § 135; 69 P.S. § 221), the Code makes a change in acknowledging at least the theoretical possibility of a "bearer" bill of lading (6 P.S. § 55).

The Code dispenses with the existing requirement that warehousemen and carriers mark documents expressly "non-negotiable" when the documents do not contain words of negotiability (6 P.S. §§ 58, 137).

There is at present neither statutory nor judicial authority on the treatment to be accorded a document running to "X or assigns" in Pennsylvania. Since the negotiability of document depends on the law of the place of issue (Restatement, Conflicts of Law, § 336) the Code settles any problem that might arise about the negotiability of a document of title issued in Pennsylvania but designed for overseas trade.

The Code does not contain the express provision, appearing in existing statutes that the marking of an otherwise negotiable document "non-negotiable" is without effect (6 P.S. §§ 55, 135; 69 P.S. § 224). The result should be the same under the Code, however, since the section under discussion clearly makes negotiability strictly dependent on the language used to identify the person entitled to the goods.

Part 2. Warehouse Receipts: Special Provisions.

Sec. 7-201. Who May Issue a Warehouse Receipt.

Accord: 6 P.S. § 131. But compare Sec. 7-401 (d) and annotation thereto.

Sec. 7-202. Form of Warehouse Receipt; Essential Terms; Optional Terms.

Generally in accord: 6 P.S. § 132.

Changes: The Code makes clear that the only effect of omission of an essential term is to impose liability on the issuer for damages caused by the omission. The existing statute leaves room for the interpretation that a receipt which omits one of these terms is entirely outside the scope of the Act, regardless of the relevance of the omission to the question being litigated. See, National Union Bank v. Shearer, 225 Pa. 470, 474 (1909); Rapp v. Germantown Fireproof Storage Co., 44 D. & C. 169 (1942).

Sec. 7-203. Liability for Non-Receipt or Misdescription.

Generally in accord: 6 P.S. § 150.

Changes: The requirement that notation of the issuer's lack of knowledge be "conspicuous" is new.

Sec. 7-204. Duty of Care; Contractual Limitation of Warehouseman's Liability.

Generally in accord: 6 P.S. §§ 133 (b), 151.

Changes: The extent to which a warehouseman may enforce an agreed valuation of the goods or a provision as to when and how claims should be presented and prosecuted has not been decided in Pennsylvania under the Warehouse Receipts Act. Since the present statute merely forbids "limitation of liability" without further indication of what sort of stipulation comes within this prohibition, the Code would settle an open question in this respect.

Sec. 7-205. Title Under Warehouse Receipt Defeated in Certain Cases; Field Warehouse Receipt.

Existing Legislative Provisions: None.

(1) In Sec. 2-403 (2) the Code provides generally that "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." Consequently the subsection under discussion seems redundant since the depositor of goods with a "warehouseman who is also in the business of buying and selling such goods" is of course "entrusting . . . possession of goods to a merchant who deals in goods of that kind."

The present state of the law as to just what circumstances will suffice to work an estoppel against the depositor (and his transferees) in such a situation is not entirely clear, In Kendall P. Co. v. Terminal W. & T. Co., 295 Pa. 450 (1929) a depositor of beans was allowed to recover them from a good faith purchaser from the warehouseman who, it seems, was also a dealer. Although the beans were physically fungible, the Court stressed the point that they had in fact been kept in separate bins in the warehouse. It was indicated that at least where the depositor knows his goods will be mingled with those of the warehouseman and sales made from the common mass, the bona fide purchaser from the warehouseman will prevail. No attention was paid to the question of whether the purchaser took in the "ordinary course of business"—the crucial test under the Code.

See annotations to Article 9, Sec. 9-305 (2).

Sec. 7-206. Termination of Storage at Warehouseman's Option.

(1) *Existing Legislative Provisions:* None.

Comment: Since existing statutes impose no duty of continuing storage on a warehouseman, he has (in the absence of express or implied agreement as to minimum storage period) the theoretical

right to terminate storage at any time. On the other hand no practical method of enforcing this right, without considerable risk of liability, is available to him so long as storage charges are kept paid up. The Code in effect imposes a period of required storage for thirty days after notification of intent to terminate, and gives the warehouseman the same right thereafter to sell the goods as in the case of unpaid charges.

(2) *Existing Legislative Provisions:* 6 P.S. § 30.

Changes: Present law seems to require a deterioration in the intrinsic nature or quality of the goods before the authorized procedure may be utilized. The Code makes it clear that the same rights arise where the physical state of the goods remains the same but market conditions cause a "decline in value."

The existing statute permits, after "reasonable notice," either a public or private sale. The Code requires a public sale after at least one week of advertising or posting.

The existing statute seems to extend to attempted sales based on mere deterioration the same privilege of disposing of the goods "in any lawful manner" after an unsuccessful attempt to sell as is permitted by the Code only in the case of hazardous goods (subsection (3)).

(3) *Generally in accord:* 6 P.S. § 30.

Changes: Under the Code the hazards which will justify use of the authorized procedure are explicitly limited to those of which the warehouseman had no notice at time of storage. While this provision does not appear in the existing statute it may well be that the same result would be reached under present law on the basis of estoppel.

The existing statute expressly enumerates the hazards covered: "odor, leakage, inflammability, or explosive nature." The Code applies whenever the "goods are a hazard," thus clearly giving the warehouseman power to defend himself against harmful bacteria, insects, or other dangers not foreseen by the draftsmen of the statute.

(4) *Existing Legislative Provisions:* 6 P.S. § 30.

Changes: The existing statute on its face seems to limit the right of redemption to the person to whom notice was given—the owner or person in whose name the goods were stored; while the Code clearly gives the right to "any person entitled to the goods." It seems reasonable to assume, however, that even under present law any transferee of a receipt would be held to have acquired the right of redemption along with all the other rights in relation to the goods formerly held by the depositor.

The existing statutory provision authorizing sales of deteriorating or hazardous goods limits the right of redemption to the period specified in the notice of intent to sell, whereas the Code leaves the

right open until the sale is actually made. There is some possibility, however, that the result required by the Code, would be reached under present law either by importation of the redemption provision of 6 P.S. § 29 (sales to satisfy lien) under the doctrine of *pari materia*, or by holding that a notice period which expired before actual sale and was not extended on an offer of redemption was not "such notice ...as is reasonable and possible under the circumstances." 6 P.S. § 30.

(5) *Accord:* 6 P.S. §§ 30, 29.

Sec. 7-207. Goods Must Be Kept Separate; Fungible Goods.

(1) *Generally in accord:* 6 P.S. §§ 152, 153.

Changes: Under existing law the commingling even of fungible goods must be "authorized by agreement or custom" (6 P.S. § 153). The Code dispenses with this requirement.

Existing law defines fungibility in terms of the physical nature of the goods or "mercantile custom" (6 P.S. § 178). The Code explicitly permits the treatment of any goods as fungible by special agreement noted on the receipt (Sec. 1-201 (17)).

(2) ***Existing Legislative Provisions:*** 6 P.S. §§ 153-154.

Changes: Under present law "depositors" are given undivided interests in commingled fungible goods. Of course, a transferee of a depositor would have a right to share as the assignee of the depositor's rights. But where an overissue has taken place the bona fide purchaser of a negotiable receipt which did not in fact represent a deposit is given no interest in the goods. Under the Code all holders of duly negotiated receipts are given equal rights, regardless of which receipts were actually issued as a result of a deposit.

Sec. 7-208. Altered Warehouse Receipts.

Existing Legislative Provisions: 6 P.S. § 143.

Changes: The present statute does not deal with unauthorized filling in of blanks and the liability of the issuer to the holder of a duly negotiated receipt under such circumstances is an open one.

Where the alteration is immaterial, or non-fraudulent, or the rights of a bona fide purchaser are involved, the Code reaches the same result as the present law. Where, however, a dispute arises between issuer of a fraudulently altered receipt and the depositor, the Code clarifies and perhaps changes the law. Under the present statute the issuer remains liable to "deliver according to the terms of the receipt as originally issued," but is excused from "any other liability to the person who made the alteration and to any other person who took with notice of the alteration." This leaves room for considerable debate on which obligations of the issuer remain in force.

Is the issuer's liability for "misdelivery" (6 P.S. § 140), or "loss of or injury to the goods" (6 P.S. § 151) part of his basic liability "to deliver" or some "other liability" imposed generally by the statute but voided by the alteration? Under the Code it is clear, with respect to negotiable receipts, that all the issuer's original obligations remain in force.

The existing statute applies with equal force to all receipts. The Code, it seems, deals with alteration only of negotiable receipts since the term "the receipt" in the second sentence would normally be interpreted as a reference to the subject matter of the first sentence. Consequently, with the repeal of the Warehouse Receipts Act and enactment of the Code, the effect of alteration of a non-negotiable receipt would be decided under common law principles. While there is no judicial authority on the question dealing specifically with a document of title, there may be reason to believe that the result would be to cause both the depositor and a good faith purchaser of a non-negotiable receipt to forfeit title to the goods. See Arrison v. Harmstead, 2 Pa. 191 (1845); Sykes v. Gerber, 98 Pa. 179 (1881); Newman v. Coner, 300 Pa. 267 (1930).

Sec. 7-209. Lien of Warehouseman.

Existing Legislative Provisions: 6 P.S. §§ 23, 24, 25, 26.

Changes: The present statute is very unclear on the right of a warehouseman to claim a lien on one lot of goods by virtue of charges arising from the deposit of another lot. First it is provided that the warehouseman shall "have a lien on goods deposited . . . for all lawful charges . . . in relation to such goods" (6 P.S. § 23). But in the next section it is provided that this lien "may be enforced against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted . . ." (6 P.S. § 24). Thus it seems that the warehouseman does have the right to hold lot "A" for charges due on lot" B." Though he "has a lien" only on lot "B" he may "enforce" it against lot "A." But the indirectness of this terminology causes a serious problem. The warehouseman "loses his lien upon goods" (not merely his right to "enforce" a lien against them) when he surrenders the goods (6 P.S. § 25). Thus it might be argued that once a warehouseman gives up lot "B" he has lost his lien on it and has nothing left to enforce against lot "A." On the other hand the right to hold lot "A" for charges arising out of lot "B" is usually of practical importance only where lot "B" has already been surrendered. Consequently the literal interpretation of the statute renders the language "all goods, whenever deposited" in 6 P.S. § 24 almost pointless.

The Code clearly gives the warehouseman the right to retain lot "A" for charges due on lot "B" if and only if the right to do so is reserved by notation on the receipt issued for lot "A."

The notational requirements of the Code in relation to liens vary greatly from those of the existing statute.

The present statute imposes no requirement as to notation of liens on non-negotiable receipts other than that of 6 P.S. § 132 (i). This compels a "statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien." The last sentence of the section, however, imposes liability for damages for omission of the terms required therein only in the case of *negotiable* receipts. It has been noted in the annotation to Sec. 7-202 that it is unclear under present law whether the liability for damage spelled out in 6 P.S. § 132 is the only sanction for omission of a term required by the section, or whether, in addition, it might be held that the issuer of a defective receipt loses all his rights under the statute (including his lien). But even if the latter is true the Code imposes broader notational requirements on the issuer of a non-negotiable receipt than present law, because it is clear that the present requirement is limited to "advances made" and "liabilities incurred" whereas the Code requires notation of all liens but those specifically mentioned in Subsection (1) of the section under discussion. The most important sort of lien clearly not required to be noted on a non-negotiable receipt by present law but required to be noted by the Code is that for charges on goods other than those covered by the document.

Insofar as negotiable receipts are concerned the requirements as to notation of liens of the Code are in one respect narrower than those of the existing statute. The present law insists that all liens other than for storage charges must be noted. The Code exempts from notation charges for storage, transportation, insurance, and labor, providing only that if the amount of charges is not stated the warehouseman is limited, as against a bona fide purchaser, to a "reasonable charge."

On the other hand, with respect to those charges that the Code does require to be enumerated on a negotiable receipt in order for a lien to be effective, it enforces a more specific manner of notation than the existing statute. The present law requires that the "charges" be "expressly enumerated" but expressly refrains from requiring the *amount* of the charges (6 P.S. § 26). The Code, as to those charges of which it requires notation insists that a "maximum amount" be specified. It should be noted, however, that there is some internal conflict in the Code on the question of whether charges for "advances made" and "liabilities incurred" must have a maximum amount specified. *Compare* Sec. 7-202 (2) (i) with Sec. 7-209 (2).

Aside from the question of notation, the Code allows more latitude in the creation of liens. The present statute seems to permit no liens, even by express contract, outside the categories specifically authorized. 6 P.S. §§ 23, 26. The Code, on the other hand, clearly allows any lien agreed to as part of the storage transaction to be enforced if it is noted in compliance with Subsection (2).

The power of the depositor to subject the goods of another person to a lien effective against the owner is under present law made strictly dependent on whether the depositor would have had power to pledge the goods. Under the Code the power to subject goods to a lien varies according to the type of lien asserted, but with respect to all liens is broader than under existing law. The "basic" lien provided for in subsection (1) can be asserted even where the depositor is a mere thief so long as the warehouseman did not have notice of the depositor's lack of authority. The power to subject goods to the "extended" liens provided for in Subsection (2) is made dependent on the power of the depositor to give title by means of a negotiable document under the terms of Section 7-503. The extent to which this power is broader than the present power of someone other than the rightful owner to pledge (and therefore to subject to a lien) is discussed in the annotation to that section.

Sec. 7-210. Enforcement of Warehouseman's Lien.

(1) ***Existing Legislative Provisions:*** None.

Comment: Under present law no distinction is drawn between the sales of goods owned by merchants and those owned by other persons.

(2) ***Existing Legislative Provisions:*** 6 P.S. §§ 15, 29.

Changes: The present Warehouse Receipts Act authorizes virtually an identical procedure (6 P.S. § 29). In addition the warehouseman at present may utilize a more general statute enacted in 1863 dealing with the liens of "commission merchants, factors, and all common carriers, or other persons" (6 P.S. § 15). This statute, which provides procedural details very much like those of the Warehouse Receipts Act, has been held still in force as to warehousemen by virtue of the provision in the Warehouse Receipts Act that the remedies there provided are in addition to existing remedies. Brocon v. Wertz, 28 Dist. 828 (1919). Since this section of the Code contains a similar proviso (Subsection (7)), the older statute should be specifically repealed insofar as it relates to warehousemen.

(3) *Accord:* 6 P.S. § 29.

(4) (5) ***Existing Legislative Provisions:*** None. Under present law, a sale which does not comply with the statute is treated as a conversion, conferring no right on a good faith purchaser, and leaving the bailee liable for the full value of the goods. Bernstein v. Hineman, 86 Pa. Super. Ct. 198 (1926). The Code gives the good faith purchaser clear title and limits the liability of the bailee to damages caused by the non-compliance.

(6) *Accord:* 6 P.S. § 29.

(7) *Accord:* 6 P.S. §§ 28, 31.

(8) See annotations to Subsections (1) and (2).

Part 3. Bills of Lading: Special Provisions.

Sec. 7-301. Liability for Non-Receipt or Misdescription; "Said to Contain"; "Shipper's Load and Count"; Improper Handling.

Accord: 6 P.S. § 73.

Sec. 7-302. Through Bills of Lading and Similar Documents.

(1) ***Existing Legislative Provisions:*** 66 P.S. § 1177.

Changes: The existing statute, part of the Public Utilities Code, provides only that the initial carrier remains liable "for any loss, damage, or injury to such property" carried by a connecting carrier. This leaves open the question of whether the initial carrier is liable for misdelivery or the failure to cancel a negotiable receipt on the part of the connecting carrier. Under the common law the liability of the initial carrier for breaches of duty by a connecting carrier is made dependent on whether the contract with the original carrier was for delivery to ultimate destination or merely for delivery to the connecting carrier, and the criteria for ascertaining the "intent of the parties" in this regard are somewhat vague. See, Baltimore and Philadelphia Steamboat Co. v. Brown, 54 Pa. 77 (1867); Pennsylvania R.R. Co. v. Berry, 68 Pa. 272 (1872); Clyde v. Hubbard, 88 Pa. 358 (1879); Philadelphia and Reading R.R. Co. v. Ramsey, 89 Pa. 474 (1879).

The Code makes it clear that the initial carrier is liable for all defaults on the part of a connecting carrier, and that this liability cannot be varied by contract except in the case of overseas shipments.

The existing statutory and judicial authority deals only with the obligations of common carriers. The Code applies to all persons issuing documents of title under which it is contemplated that other persons will be given possession of the goods to fulfill the obligations created by the documents.

(2) ***Existing Legislative Provisions:*** None.

Comment: The result reached by the Code seems to be inevitable as a matter of common sense and to have been assumed in the cases cited in the annotation to subsection (1) dealing with the liability of the initial carrier.

Sec. 7-303. Diversion; Reconsignment; Change of Instructions.

Existing Legislative Provisions: None.

Since the existing statute does not deal expressly with the matters covered by this section, the privilege of the carrier under present law to permit a change of instructions depends strictly on whether it results ultimately in a "justified delivery," that is a delivery to the

holder of an order bill, the consignee on a straight bill or "a person lawfully entitled to possession of the goods."

Insofar as negotiable bills are concerned this section does not change existing law since it permits a change of instructions to be made only by the holder and requires it to be noted on the bill.

With respect to non-negotiable bills, however, the Code reverses the primary orientation of the carrier under present law, giving the carrier more freedom to comply with the instructions of the consignor and less freedom to comply with the instructions of the consignee. Under present law, delivery to the consignee on a straight bill is "justified" and the carrier is immune from liability, even though it turns out that the consignee was not really entitled to the goods. 6 P.S. § 62. Thus the carrier could divert at the request of the consignee, regardless of where the goods were, or of who had the document, or of whether the consignor issued contrary instructions—so long as these instructions did not amount to a proper request for stoppage in transit, under 69 P.S. §§ 286, 287, 288. Under the Code, however, the carrier cannot, without taking the risk that the consignee may not be entitled to the goods, divert at the request of the consignee before arrival of the goods at destination unless the consignee has possession of the bill; and in any event cannot make a risk-free diversion in conflict with instructions of the consignor. On the other hand under present law the carrier cannot comply with changed instructions of the consignor (other than a proper stoppage in transit) without taking the risk that the consignor had no right to make the change, whereas under the Code the carrier is privileged in complying with the changed instructions of the consignor.

Sec. 7-304. Bills of Lading in a Set.

Existing Legislative Provisions: 6 P.S. § 56.

Changes: Present law prohibits bills in sets of parts where transportation is to "any place in the United States on the continent of North America except Alaska." The Code prohibits bills in sets of parts except "where customary in overseas transportation" and "overseas" is defined as a sea or air shipment subject by usage to "practices characteristic of international deep water commerce" (Sec. 2-323).

The present statute merely prohibits domestic bills in sets of parts. The Code goes on to regulate the issue of bills in sets of parts where permitted. There is presently no Pennsylvania authority on the relationship created by the lawful issue of a bill of lading in a set of parts.

Sec. 7-305. Destination Bills.

Existing Legislative Provisions: None.

No document of the sort authorized by this section has ever been before a Pennsylvania court. It is possible that a document issued

on arrival would be held not a bill of lading at all since it could not, from a grammatical point of view at least, state "the place to which the goods are to be transported" as required by the Bills of Lading Act (6 P.S. § 52 (d)).

Sec. 7-306. Altered Bills of Lading.

Accord: 6 P.S. § 66.

Sec. 7-307. Lien of Carrier.

(1) *Existing Legislative Provisions:* 6 P.S. § 76.

Changes: The present law on carrier's liens is very unclear. Under the common law, before enactment of the Bills of Lading Act, it seems that a carrier could claim a lien only for transportation. In Nicolette Lumber Co. v. Coal Co., 213 Pa. 379 (1906) it was held that demurrage charges could not be the basis of a lien, and in Bacharach v. Chester Freight Lines, 133 Pa. 414 (1890) it was decided that back freight owed by the consignor could not be asserted as a lien against the consignee even though the lien was expressly provided for in the bill of lading. The Bills of Lading Act did not in terms create any new liens, but merely provided that there could be no lien asserted on goods covered by an order bill for anything but "charges on these goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill unless the bill expressly enumerates other charges for which a lien is claimed." It was then added that "in such case there shall also be a lien for the charges expressly enumerated so far as they are allowed by law and the contract between the consignor and the carrier." The extent to which these provisions, by negative implication lift the restrictions imposed by the common law on either negotiable or non-negotiable bills has not been decided. The Code makes it clear that demurrage and storage charges and preservation expenses do give use to liens whether the bill is negotiable or not. On the other hand under the Code it is clearly not possible to create miscellaneous liens by express contract whether the bill is negotiable or not. Although the enforcement of such liens is not explicitly prohibited by this section, comparison with Sec. 7-209 (2) dealing with warehouseman's liens, shows that the omission of authorization in the carrier's lien section is intended as a denial of power.

The present statute allows the enforcement of certain specified types of liens without any sort of notation on a negotiable bill. As to other types of liens it requires that they be "expressly enumerated" but makes no requirement as to showing the amount of those charges. The Code treats all liens in the same manner, making no absolute requirement as to notation at all but limiting the carrier's lien as against a good faith purchaser to a "reasonable charge" unless the amount of

the charges is contained in an "applicable tariff" or noted on the negotiable bill.

(2) *Existing Legislative Provisions:* None.

Comment: This is a considerable broadening of the power of someone other than the owner to subject goods to a carrier's lien. There being at present no statute on the subject the common law of liens is applicable, and this clearly does not permit enforcement of a lien against goods placed in the bailee's hands by a thief, regardless of the good faith of the bailee. See, Bankers' C. Security Co. v. Brennan & Levy, 75 Pa. Super. Ct. 196, 203 (1920).

(3) *Existing Legislative Provisions:* None. This, of course, represents the common law rule.

Sec. 7-308. Enforcement of Carrier's Lien.

Existing Legislative Provisions: 6 P.S. §§ 15, 16, 17.

Changes: The present statute provides a rigid and detailed procedure for enforcement of carrier's liens. Personal demand must be made, the goods held at least 60 days thereafter, and sold at a public auction advertised in newspapers and by handbills (6 P.S. § 15). If these provisions cannot be complied with, court approval must be secured for the sale (6 P.S. § 16). The Code substitutes a test of commercial reasonableness.

The Code does not make special provision for the disposition of deteriorating or hazardous goods by carriers as it does for warehousemen. The existing statute does provide for getting court approval to dispense with notice provisions in an application showing that the goods "are of such perishable nature, or so damaged, or showing any other cause that shall render it impractical to give the notice as provided for . . . "(6 P.S. § 16). Since this statute should be expressly repealed insofar as it relates to carriers, the effect of the Code is to make the condition of the goods significant only to the extent that it affects the question of whether the time and manner of sale are commercially reasonable.

Sec. 7-309. Duty of Care; Contractual Limitation of Carrier's Liability.

Existing Legislative Provisions: 6 P.S. § 53; 66 P.S. § 1177. The existing Public Utilities Code imposes absolute liability for damage to goods on common carriers and forbids contractual modification thereof except by shippers' declarations of value affecting the transportation rates in accordance with the regulations of the Public Utilities Commission (66 P.S. § 1177).

By virtue of Subsection (2) the Code leaves this statute in force, and consequently the Code does not affect common carriers in this respect at all.

With respect to contract carriers, the Code seems to clarify the law since the Bills of Lading Act merely prohibits stipulations which "impair" the obligation of exercising due care, without indicating whether valuation clauses, or provisions as to time and manner of presenting claims or bringing actions, constitute such impairment.

Part 4. Warehouse Receipts and Bills of Lading: General Obligations.

Sec. 7-401. Irregularities in Issue of Receipt or Bill or Conduct of Issuer.

(a) *Existing Legislative Provisions:* None.

Comment: There is no authority in Pennsylvania on the applicability of the Warehouse Receipts and Bills of Lading Acts to documents issued in violation of statutes or regulations external to those Acts. As to the effect of violation of the internal requirements of the Warehouse Receipts and Bills of Lading Acts see annotation to Sec. 7-202.

(b) *Existing Legislative Provisions:* None.

Comment: This is presently an open question.

(c) *Existing Legislative Provisions:* None.

Comment: The effect of issuer ownership is an open question under present law. It might be thought that as to warehouse receipts, at least, the existing statute impliedly recognizes that a valid document can be issued by the owner, since the fact of his ownership is required to be noted on the receipt (6 P.S. § 132 (h)). Some doubt on the propriety of this implication exists, however, in view of a dictum in Moore v. Thomas Moore Distilling Co., 247 Pa. 312, 325 (1915). The case was decided on the ground that the issuer of field warehousing receipts for whiskey was not a warehouseman, but it was indicated that this conclusion flowed inevitably from his ownership of the goods. It should be noted, though, that the court does not indicate any awareness that the Warehouse Receipts Act may have changed the earlier statute (Act of September 24, 1866, P. L. 1363) under which the authorities relied on had been decided.

(d) *Existing Legislative Provisions:* 6 P.S. § 131.

Changes: The existing statute provides that "Warehouse receipts may be issued by any warehouseman." It has been held that a "receipt" issued by one who is not a warehouseman is outside the scope of this statute. Moore v. Thomas Moore Distilling Co., 247 Pa. 312 (1915). Although the Code contains a similar provision (Sec. 7-201) the Code provides, in the section under discussion, against a similar interpretation.

Sec. 7-402. Duplicate Receipt or Bill; Overissue.

Existing Legislative Provisions: 6 P.S. §§ 57, 136.

Changes: The existing legislative provisions apply only to negotiable documents, whereas the Code makes it clear that a good faith purchaser of a non-negotiable document could sue the issuer for damages if it turned out to be an unmarked duplicate.

The Code expressly denies the purchaser of an unmarked duplicate any interest in the goods, leaving him only a right of action against the issuer. The same result, however, seems clearly indicated under the existing statute. The right to damages is given only to the purchaser of the duplicate or overissued document—a rule that presupposes that he is the only person who can be hurt, and therefore that the purchaser of the original document has the exclusive rights to the goods. The reasoning in Moore v. Thomas Moore Distilling Co., 247 Pa. 312 (1915) is clearly premised on the assumption that where two otherwise valid warehouse receipts are issued for the same goods the first one issued carries the only rights in the goods.

It should be noted that the exception with respect to overissue of documents for fungible goods is limited to warehouse receipts (Sec. 7-207), and consequently the Code leaves in force the existing law as to overissue of documents for fungible goods by carriers or miscellaneous bailees.

Sec. 7-403. Obligation of Warehouseman or Carrier to Deliver; Excuse.

(1) (a) *Accord:* 6 P.S. §§ 61, 62, 138, 139.
(1) (b) *Accord:* 6 P.S. §§ 61, 138, 151.

(1) (c) ***Existing Legislative Provisions:*** None.

Comment: It is clear that this effects no change in law.

(1) (d) *Accord:* 6 P.S. §§ 61, 92; 69 P.S. §§ 286, 287, 288.
(1) (e) See annotation to Sec. 7-303.
(1) (f) *Accord:* 6 P.S. §§ 101, 176.
(2) Substantially in *accord:* 6 P.S. §§ 61, 138.

Changes: Present law seems to require the person demanding possession to take the initiative in offering to satisfy the bailee's lien whereas under the Code it is clear that the bailee must make demand.

The Warehouse Receipts and Bills of Lading Acts, if given a literal interpretation, would justify a warehouseman in refusing to turn over goods to an owner from whom they had been stolen while a negotiable document is outstanding—even though the true owner's rights are superior to those of any possible holder of the document. The Code eliminates the possibility that a result so inconsistent with the overall statutory scheme could be reached.

The Code is more explicit in requiring the person demanding possession to surrender the document for notation of partial deliveries, where appropriate, as well as for cancellation where all the goods covered are being withdrawn. The same result, however, is clearly dictated under present law by 6 P.S. §§ 61 (b), 38 (b), 65, 142.

The requirement of willingness to sign a receipt is treated generally under the Code in Sec. 1-206.

(3) *Substantially in accord:* 6 P.S. §§ 65, 142.

Changes: The requirement that partial deliveries be "conspicuously" noted is new.

The Code makes the same correction of an anomaly here as is noted in the annotation to Subsection (2).

(4) ***Existing Legislative Provisions:*** 6 P.S. §§ 61, 138.

Changes: The Bills of Lading Act makes the "consignee" the person entitled under a non-negotiable bill. The Code permits the consignor by "written instructions" to change the original consignee —at least where the carrier consents to the change. See Sec. 7-303 (d) and annotations thereto. No change is caused with respect to warehouse receipts.

Sec. 7-404. No Liability for Good Faith Delivery Pursuant to Receipt or Bill.

Existing Legislative Provisions: None.

Comment: The closest provisions found in present legislation are the misdelivery sections of the Warehouse Receipts and Bills of Lading Acts. 6 P.S. §§ 63, 140. These impose liability for delivery to one not lawfully entitled to the goods *unless* the delivery is to the holder of a negotiable document or the person designated on a non-negotiable document. It seems to follow that a delivery to a person not lawfully entitled is nonetheless privileged if he is a holder or person designated (or, in the language of the Code, if the delivery is "according to the terms of the document"). But the Code expressly confers immunity on the bailee even though the depositor of the goods had no authority to dispose of them, whereas present legislation could be interpreted as applicable in this respect only where the original delivery of *goods* to bailee was proper and the disentitlement of the recipient from the bailee arose out of subsequent misconduct in regard to the *document.* Such an interpretation would receive support through analogy between the position of the bailee and a good faith purchaser of a negotiable document. The latter prevails over one who lost or was robbed of the document, although not over one who lost or was robbed of the goods prior to the issue of a document. 69 P.S. § 227.

On the other hand, although there are no Pennsylvania cases on the point, the Restatement of Torts, as a matter of common law, supports the position of the Code. § 230.

Part 5. Warehouse Receipts and Bills of Lading: Negotiation and Transfer.

Sec. 7-501. Form of Negotiation and Requirements of "Due Negotiation".

(1) *Accord:* 69 P.S. §§ 223, 222; 6 P.S. § 160.

(2) (a) *Accord:* 69 P.S. § 222 (a).

(2) (b) ***Existing Legislative Provisions:*** None.

Under existing law no question can arise as to whether the depositor or consignee can claim the rights created by negotiation since these are limited to rights which have meaning only in relation to a transferee, 69 P.S. § 227. All the rights such a person could claim under the Warehouse Receipts and Bills of Lading Acts are available to him as a "holder," "depositor," "consignee," "person injured," or "person entitled to the goods." This is largely true under the Code as well, but there are a few situations in which the person to whom the document runs must depend for his rights on having received the document by negotiation. See, for example, Sec. 7-207 (2), Sec. 7-304 (3), Sec. 7-304 (4).

(3) *Accord:* 69 P.S. § 222.

(4) ***Existing Legislative Provisions:*** 69 P.S. § 232; 6 P.S. §§ 139, 62.

Changes: Insofar as the rights of a transferee are concerned, the Code imposes a much more severe test on him than does present law. Under the present Sales Act he takes free of any defect in the title of his transfer to the document so long as he takes "without notice of the breach of duty or fraud, mistake, or duress" (69 P.S. § 232). Under the Code he must take, not only in good faith, but with observance of reasonable commercial standards and in the current course of business.

Insofar as the liability of the bailee for delivery to a holder who is not really entitled to the goods is concerned, the Code gives the bailee more protection than the existing Warehouse Receipts and Bills of Lading Acts. These statutes, although providing that delivery to a holder is "justified" (6 P.S. §§ 62, 139), nevertheless go on to impose liability for "misdelivery" if the bailee has been requested by the rightful claimant not to make delivery or has information that the holder of the document is not entitled to the goods (6 P.S. §§ 63, 140). The Code, on the other hand, seems to give the bailee the absolute right to turn the goods over to the holder, re-

gardless of any information he may have as to the holder's lack of right.

There is no present statutory or judicial authority on this point with respect to documents other than warehouse receipts and bills of lading.

(5) *Accord:* 69 P.S. § 225 (a).

(6) *Accord:* 6 P.S. § 59.

Sec. 7-502. Rights Acquired by Due Negotiation.

(1) *Substantially in accord:* 69 P.S. § 227.

Changes: See annotation to Sec. 7-503.

The present Sales Act recognizes delivery orders as documents of title (69 P.S. § 337). In defining the rights acquired on due negotiation, however, it gives the transferee "the direct obligation of the bailee issuing the document," thus assuming that the bailee and issuer are always the same person. The Code clarifies this situation by treating delivery orders separately.

(2) *Accord:* 69 P.S. §§ 227, 232, 288; 6 P.S. § 92.

Sec. 7-503. Document of Title to Goods Defeated in Certain Cases.

(1) ***Existing Legislative Provisions:*** 69 P.S. §§ 227, 201, 202, 203.

Changes: Under existing law the fact that a person wrongfully disposing of another's goods does so by first placing them in the hands of a bailee and securing a negotiable document for them is irrelevant to his power to give clear title to a bona fide purchaser. Defects in title to the goods arising before the issue of a document (unlike defects in title to the document, discussed in the annotation to Sec. 7-502) are overcome only under the same circumstances that would cure such defects in the case of a direct sale of the physical goods without intervention of the issuance of a document (69 P.S. § 227). The bona fide purchaser acquires no rights, whether he buys the goods directly, or a document of title to them, unless the wrongdoing seller had a "voidable" title (69 P.S. § 202), or was a seller continuing in possession (69 P.S. § 203), or the true owner had by his conduct been "precluded" from denying the wrongdoer's authority to sell (69 P.S. § 201). Under the Code, the power of a person in possession to give title to a bona fide purchaser by direct sale of the goods is expanded. Sec. 2-403. But under the Code power to give title to the bona fide purchaser by means of a negotiable document of title is no longer strictly dependent on the power to sell the goods themselves. So long as the owner acquiesced in the procurement of a negotiable document, his rights can be defeated by a good faith purchaser of the document in the ordinary course of business.

(2) *Existing Legislative Provisions:* None.

Comment: There is neither legislative nor judicial authority dealing with the situations here provided for under present law.

Sec. 7-504. Rights Acquired in the Absence of Due Negotiation; Effect of Diversion; Seller's Stoppage of Delivery.

(1) *Accord:* 69 P.S. § 228.

(2) *Existing Legislative Provisions:* 69 P.S. § 228.

Changes: Under the existing statute it is clear that any person who has assigned a non-negotiable document to "X" can defeat his rights by subsequently selling the goods to a good faith purchaser, before notification of the bailee by "X." Under the Code the subsequent sale cuts off the rights of "X" only if it comes within the provisions of Sec. 2-403. It should be noted that this section, unlike the present Sales Act provision (69 P.S. § 203) does not give every "seller still in possession" power to sell to a bona fide purchaser, but deals chiefly with merchants still in possession of the sort of goods they deal in. Consequently it is not clear what the result would be under the Code if a non-merchant were to sell his non-negotiable document to "X" and then to sell the goods to a good faith purchaser before "X" notified the bailee.

Under the present law it is clear that where successive sales are made to good faith purchasers of goods in the hands of bailee the first to notify the bailee prevails, since the first purchaser of a non-negotiable document is defeated only by *notification* to the bailee of the subsequent sale before notification of the first sale (69 P.S. § 228). Under the Code this point is not quite so clear since it is merely provided that the first purchaser's rights may be "defeated" by a subsequent sale, and provided in Sec. 2-503 (4) that notification of a buyer's rights "fixes" them.

The Code makes clear what seems the probable interpretation of the present statute: that the purchaser of a non-negotiable document can be defeated before notification to the bailee by a good faith purchase on the part of the bailee himself, 69 P.S. § 228.

(3) *Existing Legislative Provisions:* None.

Comment: This is a clear departure from existing law. In the usual sales transaction calling for shipment of goods title passes to the vendee at the time of delivery to the carrier (69 P.S. § 143). In such a case the vendee's rights are clearly superior to those of a subsequent purchaser via diversion (assuming nothing has happened to make him lose those rights against the vendor) since the situation does not fall within the exception provisions of the Sales Act (69 P.S. §§ 201, 202, 203).

(4) *Accord:* 69 P.S. §§ 287, 288.

Sec. 7-505. Indorser Not a Guarantor for Other Parties.

Accord: 69 P.S. § 231.

Sec. 7-506. Delivery Without Indorsement: Right to Compel Indorsement.

Accord: 69 P.S. § 229.

Sec. 7-507. Warranties on Negotiation or Transfer of Receipt or Bill.

Accord: 69 P.S. § 230.

Sec. 7-508. Warranties of Collecting Bank as to Documents.

Existing Legislative Provisions: 6 P.S. §§ 87, 166.

Changes: The Warehouse Receipts and Bills of Lading Acts provide that a holder of a document "for security, who in good faith demands or receives payment of the debt . . . shall not be deemed by so doing to . . . warrant the genuineness (of the document) or the quantity or quality of the goods therein described."

The sections providing for implied warranties make them dependent on "negotiation or transfer" (6 P.S. §§ 85, 164; 69 P.S. § 230). It might be argued that the exemption from warranties provisions, since they say nothing about transfer of the document, are simply designed to negate possible warranties arising out of mere collection and do not affect the warranties arising out of a transfer or negotiation even though it is incident to collection. But the collection process almost invariably involves a transfer or negotiation of the document held as security, and it therefore seems that, in spite of the awkward wording the existing statutes would be interpreted as protecting the bank or other pledgee.

The existing statutes protect the bank or other intermediary only when it is a "mortgagee or pledgee or other holder for security," that is, when it has actually made advances on the document. It would be an odd result if the intermediary who has not made advances, and therefore has less interest in the document, should nevertheless be held bound to warranties. In all probability even under present law, it would be held that the intermediary has made no warranty, either on the ground that it acted as a "mere agent" or that its position causes "a contrary intention" to appear within the "unless" clause of the warranty provision (69 P.S. § 230). The Code, however, makes the result clear and explicit.

Sec. 7-509. Receipt or Bill: When Adequate Compliance With Commercial Contract.

Existing Legislative Provisions: None. Since present legislation dealing with documents of title does not purport to decide these questions the external reference is already part of the statutory scheme.

Part 6. Warehouse Receipts and Bills of Lading: Miscellaneous Provisions.

Sec. 7-601. Lost and Missing Documents.

(1) *Existing Legislative Provisions:* 6 P.S. §§ 67, 144.

Changes: There is no present regulation of lost or destroyed documents other than warehouse receipts and bills of lading.

Present legislation deals only with negotiable documents.

The existing statutes deal in terms only with "lost or destroyed" documents. The Code expressly includes "stolen" documents, but it seems clear that these would be treated as "lost" under the present law.

The existing statutes leave the bailee liable to a bona fide holder of a lost receipt. Thus the holder must claim against the bailee, and the bailee must seek reimbursement from the bond. Under the Code the bailee is relieved of liability and the holder of the receipt may seek direct relief under the bond.

(2) *Existing Legislative Provisions:* None. The problem of whether a bailee is guilty of conversion in delivering to a person claiming to have lost a negotiable document is really presented only where in fact the person did not lose the document but either never had it, or sold it. If, except for having lost a document, the person who received possession was entitled to the goods it seems quite clear that the bailee is liable only for damages resulting from his failure to get the document out of circulation (6 P.S. §§ 64, 141).

There is neither statutory nor judicial authority in Pennsylvania on the question of a good faith delivery to a person falsely claiming under a supposedly lost document other than a warehouse receipt. The Restatement of Torts, however, is in *accord* with the Code (§ 230).

Insofar as delivery to a false claimant under an allegedly lost warehouse receipt is concerned, the warehouseman is liable under present law because he has delivered the goods to one who is "not in fact lawfully entitled to the possession of them" and is not the "holder" of the negotiable receipts (6 P.S. § 140).

Under the Code the warehouseman is clearly protected from liability for conversion if he acts in good faith and obtains the bond provided for in the last sentence of this subsection. It is not perfectly clear whether he is also protected if he acts in good faith but does not secure the bond. On the one hand it might be argued that the purpose of the entry of security is explicitly stated to be "to indemnify the warehouseman" and that the true owner should not, therefore, be in a position to complain about the warehouseman's waiver of his right. On the other hand, if the posting of security is not a condition of the warehouseman's immunity of liability for

conversion, it seems that the provision for posting of security is pointless. The warehouseman of course has the right to refuse absolutely to deliver without court order, or to require a bond in as large an amount as he may desire. If he also, in spite of the statute, has the right to waive the bond posting provision, then the inclusion of the provision becomes incomprehensible.

Sec. 7-602. Attachment of Goods Covered by a Negotiable Document.

Accord: 69 P.S. § 233.

Sec. 7-603. Conflicting Claims; Interpleader.

Accord: 6 P.S. §§ 70-71, 147, 148. Extension of the rights provided in this section to issuers of documents other than warehouse receipts and bills of lading is new.

Article 8
INVESTMENT SECURITIES

Introductory Comment

Article 8 covers the matter relating to the sale of securities now found in the Uniform Stock Transfer Act and the Uniform Sales Act, Uniform Negotiable Instruments Act and the Pennsylvania Security Receipts Act.

The following statutes would, therefore, have to be repealed or modified insofar as they relate to securities coming within the definition:

1. Uniform Stock Transfer Act, Act of May 5, 1911, P. L. 126 as amended by Act of May 9, 1929, P. L. 1701, § 548, 15 P. S. §§ 301-324.
2. Section 511 of the Business Corporation Law making the Uniform Stock Transfer Act applicable to voting trust certificates. Act of May 5, 1933, P. L. 364, § 511, 28 P.S. §§ 2852-511.
3. The act relating to the negotiation of equipment trust certificates and security receipts. Act of March 29, 1927, P. L. 73, 56 P.S. §§ 511-513.
4. The act dealing with Registration and Transfer of Bearer Bonds. Act of May 1, 1873, P. L. 87; as amended by the Act of May 2, 1879, P. L. 47, 8 P.S. §§ 51-54.
5. Additional statutes providing that bonds of certain issuers shall have all of the qualities of negotiable instruments under

the Negotiable Instruments Law and the law merchant. For example, the Municipality Authorities Act of 1935, as amended by Act of May 2, 1945, P. L. 382, 53 P.S. § 2900z-6-c.

6. It will also be necessary to coordinate the provisions of the Fiduciaries Act dealing with the duty of the issuer to inquire into the rightfulness of a transfer of security by fiduciary in whose name the security is registered or to be registered (Fiduciary Act of May 31, 1923, P. L. 468, 20 P.S. § 3351).

The applicability of the Uniform Negotiable Instruments Law to corporate bonds or bonds of investment type was expressly left open, In re Gerber's Estate, 337 Pa. 108, 9 A. 2d 438 (1940), but the provisions of the N.I.L. have been applied in cases relating to the transfer of bearer bonds. See *e. g.*, In re Stroudsburg Security Trust Co., 145 Pa. Super. Ct. 44, 20 A. 2d 890 (1941); Dengler v. Paul, 83 Pa. Super. Ct. 37 (1924).

In the following annotations, cases arising under the Negotiable Instruments Law are cited only if they deal with "Investment Securities" or are otherwise especially significant.

Article 8 is divided into four parts. Part 1 deals with the applicability of the Article and general matters; Part 2 covers the rights, responsibilities and defenses of the issuer; Part 3 is concerned with the rights of successive holders of or claimants to securities; and Part 4 provides for the registration of transfers. In the paragraphs which precede the annotations to each Part an attempt has been made to outline some of the salient provisions contained therein with special attention given to those sections which effect changes in present statutory or case law. For a comprehensive analysis, reference must be made to the Code itself viewed in the light of the Official Comments and the Annotations.

Part 1. Short Title and General Matters.

Introductory Comment

Notice. A significant change is effected in the matter of notice. By adopting the objective test of the reasonable man in determining whether or not a party is to be charged with notice, Article 8, by incorporating the definition of "Notice" contained in Sec. 1-201 (25), rejects the test of actual knowledge or *mala fides* prescribed by the N.I.L., the Fiduciaries Act, and the common law. Sec. 8-102 (5). See also Sec. 8-202 (5).

Issuer's Lien. Sec. 8-103 provides that a lien on a security in favor of an issuer is valid only if the right to such lien is conspicuously set forth on the security whereas the Uniform Stock Transfer Act provides that such a lien is valid if the right to it is stated on the certificate.

Overissue. Sec. 8-104 follows existing law in refusing to validate a security or to compel its issue or reissue where such action would result in an overissue. The section, however, does provide that the person entitled to such security may compel the issuer to purchase and deliver to him a valid security if such is available on the open market. If no security is available for purchase, the measure of damages is the price paid for the invalid security as opposed to the early Pennsylvania rule of the market value at the time transfer was demanded.

Sec. 8-101. Short Title.

Sec. 8-102. Definitions and Index of Definitions. (General definitions are commented upon where the terms appear in the annotation.)

(1) Under the "Blue Sky" laws of the Commonwealth a security is defined as ". . . any bond, stock, collateral trust certificate, transferable share, investment contract, certificate under a voting trust agreement, treasury stock, note, debenture, certificate in or under a profit sharing or participation agreement, subscription or preorganization certificate, fractional undivided interest in oil, gas, or other mineral rights, evidence of indebtedness, certificate of deposit for a security, certificate or instrument representing or secured by an interest in the capital assets or property of any company, other instrument commonly known as a security, or certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." 70 P.S. § 32.

(5) (For the definition of "notice" see Sec. 1-201 (25).) Under the Negotiable Instruments Law, to charge a person taking a negotiable security with "notice" it is required that he have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking amounts to bad faith, 56 P.S. § 136; In re Stroudsburg Security Trust Co., 145 Pa. Super. Ct. 44, 20 A. 2d 890 (1944).

Knowledge of facts sufficient to put a prudent man on inquiry is insufficient to charge a person dealing in negotiable bonds with "notice"; to have "notice" he must have actual knowledge or knowledge of "such facts that his failure to make further inquiry would indicate a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a vice in the transaction," First National Bank of Blairstown v. Goldberg, 340 Pa. 337, 17 A. 2d 377 (1941).

Likewise, at common law, persons taking negotiable paper were not charged with notice, even though they received the paper under circumstances which ought to excite the suspicion of a prudent man. *E. g.,* Phelan v. Moss, 67 Pa. 59 (1870) (Promissory note).

Sec. 8-103. Issuer's Lien.

A valid lien is not effected in favor of a corporation upon shares of stock represented by a certificate issued by the corporation unless the right of the corporation to such lien is stated upon the certificate, 15 P.S. § 315.

Sec. 8-104. Effect of Overissue; "Overissue."

Shares of stock issued in excess of the charter limit are invalid. Jutte v. Hutchinson, 189 Pa. 218, 42 Atl. 123 (1899); Mount Holly Paper Company Appeal, 99 Pa. 513 (1882); Wright's Appeal, 99 Pa. 425 (1882).

An early case held that a *bona fide* purchaser of such overissued stock has a right of action against the corporation with the measure of damages being the market value of the stock at the time transfer was demanded. Willis v. Philadelphia & Darby R.R., 13 Phila. 33, 6 W.N.C. 461 (1879). Dictum to same effect by Chief Justice Sharswood in People's Bank v. Kurtz, 99 Pa. 344, 349 (1882).

Where arrangements had been made for the corporation to increase its capital stock to take care of the overissue, the holders of the overissued certificates were afforded an election of accepting genuine shares or indemnification to the extent of their expenditure. Kisterbock's Appeal, 127 Pa. 601, 18 Atl. 381 (1889).

Part 2. Issue – Issuer.

Introductory Comment

(Under the definition contained in Sec. 8-201, an "issuer" may be either a maker, drawer, acceptor or accommodation party.)

Validation of Securities. Sec. 8-202 (2) (a) provides that a security other than one issued by a government or governmental agency, is valid in the hands of a purchaser for value without notice even though such security was issued with a defect going to its "validity." An exception, of course, is the case where an overissue would result. Validation is effected regardless of the value the issuer received for the security once it is in the hands of a subsequent *bona fide* purchaser.

The genuineness of the security remains a complete defense except the issuer is estopped as against a purchaser for value without notice, to deny an unauthorized signature if it has been placed on the security by a "person directly or indirectly entrusted by the issuer with the preparation or signing of similar securities." Secs. 8-202(3) and 8-205. As is indicated in the Official Comments, this estoppel provision is not intended to affect the holding of Dollar Savings Fund & Trust Co. v. Pittsburgh Plate Glass Co., 213 Pa. 307, 62 Atl. 916 (1906), because there the person effecting the forged signature, while

having access to the security, was not entrusted with its preparation and signing.

A governmental issuer is estopped to deny the validity of its securities only in those cases where it has received "substantial consideration" and where it has power to borrow for the stated purpose. Sec. 8-202(2)(b).

Warranties of an Authenticating Trustee, Registrar or Transfer Agent. For the first time the obligations of these parties are here made explicit by statute. Sec. 8-208 provides that such persons warrant the "genuineness" and "proper form" of the security; they further warrant that it does not constitute an overissue and that their participation in the issue of the security is within their capacity and scope of authority. However, unless otherwise agreed, no responsibility is assumed for the "validity" of the security. Sec. 8-208.

Miscellaneous. Non-delivery of a complete or even an incomplete security cannot be set up as a defense against a good faith purchaser. Secs. 8-202(4) and 8-206. This seems to effect a change from the provisions of the N.I.L. in respect to incomplete securities which have not been delivered. However, in a case involving a check, which the drawer signed in blank, and which was later stolen, completed, negotiated and paid, it was held that the drawer was estopped as against the paying bank to recover from the bank for the loss sustained. (See Annotations to Sec. 8-206.)

As under the Uniform Stock Transfer Act an altered security remains enforceable according to its original terms in the hands of any holder, whereas under the N.I.L., it could be so enforced only by a holder in due course. Sec. 8-206(2).

Under this Article one may, in certain instances, become a *bona fide* purchaser even though he takes after maturity. A purchaser is charged with notice of issuer's defenses upon taking a security one year after it has matured in cases where funds are available for the security's redemption and two years in the case of a defaulted security. Sec. 8-203. Also, in Part 3, "staleness" constitutes notice of claims of ownership to a purchaser only if he takes the security more than a year after its maturity if it is a defaulted security, and more than six months otherwise. Section 8-305.

As in the case of certificates of stock, equipment trust certificates, and security receipts, an issuer's restriction, even if otherwise lawful, is ineffective unless it is noted on the face of the security. Sec. 8-204. However, inasmuch as the official comments show an intent to make the restriction, not so noted, ineffective even against a purchaser who has actual knowledge of such restriction, this Section may go further than the existing provisions covering stock certificates, etc.

Sec. 8-207 affirmatively provides that the issuer may rightfully

treat the registered holder of a registered security as the one exclusively entitled to vote and receive notices, dividends, etc., as compared to the negative provision of the Uniform Stock Transfer Act to the effect that none of its provisions should be construed as to prevent a corporation's recognition of the registered owner as the one exclusively entitled to vote or receive dividends.

Sec. 8-201. "Issuer." (This term is commented on in the various Sections in which it is used.)

Sec. 8-202. Issuer's Responsibility and Defenses; Notice of Defect or Defense.

(1) Negotiability of a "bond" held not destroyed by a statement contained therein that such bond was issued and held subject to the terms of a deed of trust, In re Gerber's Estate, 337 Pa. 108, 9 A. 2d 438 (1939).

The negotiability of the bond "must be determined by what it says and without resort to instruments not attached to it." *Id.*

The reference to the deed of trust "related to the identification of the security and was intended to enable the prospective purchaser to ascertain by examining the bond whether the trustee had certified that it was one of the bonds entitled to the security." The court distinguished King Cattle Co. v. Joseph, 158 Minn. 491, 198 N. W. 798 (1924), affirmed on re-argument 158 Minn. 488, 199 N. W. 437 (1924) on the ground that in that case the deed of trust was made a part of the bond. *Id.*

The character of any security receipt or equipment trust certificate "is not affected by the inclusion therein of other provisions not limiting the right of transfer or negotiable quality thereof . . ." 56 P.S. § 511(f).

(2) (a) A holder in due course holds a negotiable instrument free from defects arising at the inception of the instrument. 56 P.S. § 137. See In re Gerber's Estate, 337 Pa. 108, 9 A. 2d 438 (1939) (transferee of negotiable bonds takes free from issuer's defense of usury).

A person to whom any security receipt or equipment trust certificate is negotiated for value without notice of any defects obtains "absolute title" to such security receipt or equipment trust certificate free of any defenses of the signer. 56 P.S. § 512(d).

Stock, which a corporation has power to issue, issued without proper authorization is valid in the hands of a *bona fide* purchaser. Bonini v. Family Theatre Co., 327 Pa. 273, 194 Atl. 498 (1937); Morris v. Stevens, 178 Pa. 563, 36 Atl. 151 (1897). Corporate bonds fraudulently issued will not be validated if the holder fails to show he is a *bona fide* purchaser, Shellenberger v. Altoona & Philipsburg Connecting R.R., 212 Pa. 413, 61 Atl. 100 (1905).

Article XVI, Section 7 of the Pennsylvania Constitution provides:

"No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increases of stock or indebtedness shall be void. . ."

This provision of the Constitution is not "self-executing." See *e. g.*, Yetter v. Delaware Valley R.R., 206 Pa. 485, 56 Atl. 57 (1903). Implementing legislation as to stock of a business corporation is provided in 15 P.S. § 2852-603 which provides:

"Shares of a business corporation shall not be issued except for money, labor done, or money or property actually received."

And 15 P.S. § 2852-610 provides:

"The fact that shares are issued in violation of, or without full compliance with the provisions of this act shall not make the shares so issued invalid, unless they are issued in violation of Article XVI, Section Seven, of the Constitution. . ."

Since 1933 there has been no implementing legislation relating to the issuance of bonds by business corporations. See, In re Dissolution of New Oxford Shoe Co., 45 D. & C. 53 (1943).

No case has held that the word "void" would permit a corporation to deny the validity of a security issued without adequate consideration when in the hands of a *bona fide* purchaser.

Recovery of the amount paid for stock by a *bona fide* purchaser has been allowed on the corporation's wrongful refusal to transfer shares fraudulently issued by the Secretary of the Corporation in his own name and for which there was no showing that the Corporation had received any consideration. Greensburg Title & Trust Co. v. Aspinwall-Delafield Co., 266 Pa. 160, 109 Atl. 631 (1930). (No reference to the constitutional provision.)

Corporation is liable to original purchaser of stock who paid the Treasurer of the Corporation for the stock, even though the latter failed to enter the fact of issue on the corporate books and embezzled the proceeds. Krall v. Lebanon Valley Savings and Loan Assn., 277 Pa. 440, 121 Atl. 405 (1923).

Dictum in McCandless v. Furlaud, 296 U.S. 140, 161, 56 S.Ct. 41, 48 (1935) that in Pennsylvania securities are "valid in the hands of innocent purchasers, whatever the consideration." See also Commonwealth ex rel., McCormick v. Reading Traction Co., 204 Pa. 151, 53 Atl. 755 (1902).

In the case of In re Stroudsburg Security Trust Co., 145 Pa. Super. Ct. 44, 20 A. 2d 890 (1941) it was said that the corporation would have been estopped to deny lack of consideration received for bonds issued by corporation's treasurer for his personal debt if the holder had not had notice. (Decided under the N.I.L.)

Bonds, if issued for an insufficient consideration, may be found to be "void" in the hands of the original owners. Guarantee Title & Trust Co. v. Dilworth Coal Co., 235 Pa. 594, 84 Atl. 516 (1912).

(2) (b) The Municipality Authorities Act of 1945 provides that the bonds of any Authority "shall have all the qualities of negotiable instruments under the law merchant and the negotiable instruments law of the Commonwealth of Pennsylvania." 53 P.S. § 2900 z-6c.

It has been held that municipal bonds issued in excess of the constitutional debt limit are invalid even in the hands of *bona fide* purchasers. *E. g.*, Millerstown v. Frederick, 114 Pa. 435, 7 Atl. 156 (1886). But a *bona fide* purchaser of municipal bonds takes free of equities existing between prior holders and the issuer including those instances where the municipality did not receive value for the bonds. Kerr v. Corry, 105 Pa. 282 (1884). (Provided of course, that the municipality has power to issue the bonds.) See also Mercer County v. Hackett, 1 Wall. 68 (U.S. 1863).

(3) See annotation to Sec. 8-205.

(4) Under the Negotiable Instruments Law where a negotiable security "is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him . . . is conclusively presumed." 56 P.S. § 21.

(5) See annotation to Sec. 8-102(5).

Sec. 8-203. Staleness as Notice of Defects or Irregularities in Issue.

Under the N.I.L., to be a holder in due course, one must become a holder before the instrument is overdue. 56 P.S. § 132.

Sec. 8-204. Effect of Issuer's Restrictions on Transfer.

A restriction on the transfer of shares of stock is not effective unless the right of the corporation to the restriction is stated upon the certificate. 15 P.S. § 315.

The issuer may impose restrictions giving the corporation itself or other stockholders the option to purchase the security at an ascertained price before it is offered to third parties. Wand v. Blum, 309 Pa. 551, 164 Atl. 596 (1932); Garrett v. Philadelphia Lawn Mower Co., 39 Pa. Super. Ct. 78 (1909).

To restrict the transfer of security receipts or equipment trust certificates an express provision limiting the right of transfer must be stated upon the receipt or certificate. 56 P.S. § 512 (b) and (c).

Sec. 8-205. Effect of Unauthorized Signature on Issue.

A forged or unauthorized signature is wholly inoperative under the N.I.L. unless the party is precluded from setting up the forgery or want of authority, 56 P.S. § 28.

Corporation is not liable for a stock certificate which, after having been signed by the President and Secretary and the seal of the

corporation attached, was taken by a clerk (who had access to it, but who was not entrusted with its preparation or signing), who forged the signature of the transfer agent, and transferred it. Dollar Savings Fund & Trust Co. v. Pittsburgh Plate Glass Co., 213 Pa. 307, 62 Atl. 916 (1906). Dictum in this case to the effect that had the forged certificate been put on the market by an officer of the Company, such as the president or secretary, the Company may have been estopped to assert the forgery.

Sec. 8-206. Completion or Alteration of Instrument.

(1) The person in possession of a negotiable security has a *prima facie* authority to fill in blanks. 56 P.S. § 19. To be enforceable against a person who became a party thereto prior to the completion, the instrument must be filled up strictly in accordance with the authority given and within a reasonable time. But in the hands of a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. 56 P.S. § 19.

The N.I.L. also provides that an incomplete instrument which "has not been delivered will not, if completed and negotiated without authority, be a valid contract in the hands of any holder or against any person whose signature was placed thereon before delivery." 56 P.S. § 20. But it has been held that a depositor, who signed a blank check which was later stolen, completed without authority, negotiated, and paid by drawee bank when presented, was estopped upon attempting to recover from the bank for the loss sustained. Weiner v. Pennsylvania Co. for Insurance on Lives, etc., 160 Pa. Super. Ct. 320, 51 A. 2d 385 (1947).

(2) The alteration of a stock certificate, even though fraudulent, does not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such certificate conveys to the transferee good title. 15 P.S. § 316.

Under the N.I.L. only a holder in due course may enforce an altered security according to its original tenor. 56 P.S. § 277.

Sec. 8-207. Rights of Issuer with Respect to Registered Owners.

(1) The Uniform Stock Transfer Act provides that nothing in the Act shall be construed to forbid a corporation's recognizing the registered owner as the person exclusively entitled to vote or to receive dividends. 15 P.S. § 303.

(2) 15 P.S. § 303 also states that nothing in the U.S.T.A. shall be construed to forbid a corporation's holding liable the registered owner of shares for calls and assessments.

As regards calls and assessments, the general rule is that a transferor of shares is not relieved from such calls or assessments

until the transfer is perfected on the corporation books unless the corporation accepts or consents to the transfer. Schmitt v. Kulamer, 267 Pa. 1, 110 Atl. 169 (1920).

Sec. 8-208. Effect of Signature of Authenticating Trustee, Registrar or Transfer Agent.

Transfer agents are responsible for an overissue. Bank of Kentucky v. Schuylkill Bank, 1 Parsons Equity Cases 180, 250 (1846) affirmed by Pennsylvania Supreme Court, 1 Parsons Equity Cases 269 (1849).

Banks and trust companies may act as transfer agents, registrars, and the like. 7 P.S. § 819-1105.

Part 3. Purchase.

Introductory Comment

Rights and Title Acquired by a Purchaser. Sec. 8-301 (2) extends protection to a *bona fide* purchaser of all investment securities by providing for his acquisition of a "perfect title." Protection does not turn on the security's negotiability or non-negotiability as it does under the N.I.L. The "shelter provision" now applicable to negotiable instruments, equipment trust certificates and security receipts is made applicable to a purchaser upon his taking delivery from the transferor. Sec. 8-301 (1).

The "delivery" necessary to constitute one a *bona fide* purchaser or to make a purchaser eligible for the "shelter provision" occurs not only when the purchaser acquires actual possession of the security, but also in cases where the security is in the hands of his broker provided it is specially indorsed or issued in the purchaser's name or if he receives confirmation from the broker of the purchase of a specifically identified security, and also in instances where attornment of an identified security is made by a person other than the transferor. Sec. 8-313. This is in contrast to the Stock Transfer Act's requirement of a "voluntary transfer of possession from one person to another" and that of the N.I.L. prescribing a "transfer of possession, actual or constructive, from one person to another."

Notice to Purchaser of Claims of Ownership. Four situations are prescribed as a matter of law as constituting notice to a purchaser. Sec. 8-304. Included are restrictive indorsements on either bearer or registered securities and unambiguous statements on bearer securities that the security is the property of a person other than a transferor. Even though a purchaser has received actual notice of a stolen security, he is charged with such notice as a matter of law only if he purchases the security within six months thereafter. Finally, a purchaser has notice when purchasing from a person whom

he knows or has reason to know to be a fiduciary if he pays for it in cash or to the fiduciary individually.

Warranties of a Transferor. A transferor of a security to a purchaser for value warrants the rightfulness of his transfer, the genuineness of the security, and his lack of knowledge of any fact which might impair the security's validity. Sec. 8-306(1). Unlike indorsers of negotiable instruments, but like indorsers of equipment trust certificates, an indorser of an investment security is not held by his indorsement to guarantee the issuer's honor of the security. Sec. 8-308(3).

Intermediaries are not held to the warranties of a transferor, but it is made clear that a broker buying or selling a security for another is not an intermediary for this purpose. Sec. 8-306(2).

Indorsements of Investment Securities. An indorsement of an investment security may be in blank or special. Sec. 8-308.

While an indorsement of a security in bearer form may effect notice of claims of ownership (Sec. 8-304), it does not affect the holder's right to registration. Sec. 8-310. These provisions concerning the indorsement of bearer bonds require that legislative consideration be given to amending the early statute dealing with bearer bonds, 8 P.S. §§ 51-54. This is so because the Code's provisions may not effect a repeal of this statute inasmuch as the attested "indorsement" of such bonds, provided for by 8 P.S. § 53, might be considered a form of self-registration rather than an indorsement as defined by the Code.

Forged indorsements remain wholly inoperative unless the owner is estopped from asserting the forgery. Sec. 8-311. An affirmation of the forged or unauthorized indorsement is recognized as effecting an estoppel in contrast to the Pennsylvania holdings that a forgery being a crime cannot be affirmed or ratified. This section protects a *bona fide* purchaser of a reissued certificate and the rightful owner is likewise protected by the requirement that the issuer who registered the security on the forged indorsement must deliver a like security to him. Secs. 8-311 and 8-404.

Warranties of a Signature or Indorsement Guarantor. The liability of a signature guarantor is for the first time set forth in a statute. He is held to warrant the genuineness of the signature, the legal capacity of the signer, and that the signer is the holder or has authority to sign for the holder. Sec. 8-312(1).

An innovation is effected in the field of guarantees by making provision for an "indorsement guarantee." Section 8-312(2). An "indorsement guarantor" is held to warrant not only the signature but also the rightfulness of the particular transfer. The utility of such a guarantee appears to be open to question inasmuch as an issuer cannot require it as a condition to registration of transfer of

a security (Sec. 8-312(3)), and the Article does not purport to deprive an issuer of the right to a bond of indemnity or a decree in an adversary proceeding in cases where the issuer has notice of conflicting claims, etc.

Duties of a Broker. A broker is regarded as the holder of any security in his possession which is not specifically identified as belonging to a purchaser. It is, thus, intended that he might be a *bona fide* purchaser so as to preclude his being held liable for "innocent" conversion (as has been the case in other jurisdictions) where no forgery of a necessary indorsement is involved or may be asserted under Sec. 8-311.

Scattered Pennsylvania cases dealing with the stock broker-purchaser relationship have almost entirely been concerned with matters of insolvency. They have either been decided prior to the adoption of the Uniform Stock Transfer Act or have made no mention of its "delivery" provisions. However, in each instance they have held that "title" to the stock vests at once in the customer upon the broker's sending confirmation of the purchase and apparently without regard to whether or not the securities were specifically identified.

The fulfillment of the broker's duty to deliver is covered by Sec. 8-314, and, as mentioned previously, his warranties as a transferor are prescribed by Sec. 8-306. None of the provisions concerning the broker-purchaser relationship is intended to affect the purchaser's right to reclamation in case of the broker's insolvency inasmuch as a section, contained in a former draft, covering this has been deleted from the Code on the theory that such a matter is best handled under the Bankruptcy Act.

Statute of Frauds Provision. Material changes in the Statute of Frauds provisions are found in Sec. 8-319. Any contract for the sale of securities is covered regardless of amount. Enforcement on the basis of part payment or part delivery is obtainable only to the extent of such part payment or delivery. A further change makes a contract enforceable against a party who received confirmation of a sale or purchase and failed to send a written objection to it within ten days thereafter. Contracts continue to be enforceable if evidenced in writing and signed by the party charged or his agent, or if the party against whom enforcement is sought admits the making of the contract in his pleading or otherwise in court, but the writing is no longer required to express all the terms of the contract for sale. Sec. 8-319(a).

Miscellaneous. Contrary to holdings under the N.I.L., Sec. 8-303 defines "value" so as to include the extension of immediately available credit though not drawn upon.

The fulfillment of the duty to deliver by the various parties involved in the transfer of a security is spelled out in Sec. 8-314; the reclaiming of a security wrongfully transferred is covered by Sec. 8-315; and the responsibility of the transferor to supply the purchaser with the requisites for registration of a transfer is provided for in Sec. 8-316.

Attachment or levy upon a security is not valid until it is actually seized or surrendered to the issuer as compared to the Stock Transfer Act which, in addition, makes effective a levy or attachment where the holder's transfer of the certificate is enjoined. Sec. 8-317.

Sec. 8-318 follows the Pennsylvania case of First National Bank of Blairstown v. Goldberg, 340 Pa. 337, 17 A. 2d 377 (1941) in providing that an agent who in good faith has received securities and sold, pledged, or delivered them according to the instructions of his principal is not liable for conversion even though the principal had no right to dispose of them.

Sec. 8-301. Rights Acquired by Purchaser; Title Acquired by Bona Fide Purchaser.

(1) A holder of a negotiable security under the N.I.L., who derives his title through a holder in due course acquires all the rights of such holder in due course, provided he is not himself a party to any fraud or illegality affecting the instument. 56 P.S. § 138. See Dengler v. Paul, 83 Pa. Super. Ct. 37 (1924). (Broker, purchaser of bearer bonds, claiming through a holder in due course.)

The "shelter provision" also applies to holders of security receipts or equipment trust certificates. 56 P.S. § 512(e). (No express provision is made here concerning an exception where there is participation in the fraud or illegality affecting the instrument.)

(2) Under the N.I.L. a holder in due course holds a negotiable security free from any defect of title of prior parties and free from any defenses available to prior parties among themselves. 56 P.S. § 137. See First National Bank of Blairstown v. Goldberg, 340 Pa. 337, 17 A. 2d 377 (1941) (transferee of stolen negotiable bonds for value and in good faith obtains good title as against the real owner); Porter v. Levering, 330 Pa. 392, 199 Atl. 482 (1938). (No reference to the N.I.L.) Earlier cases not decided under the N.I.L., held that a *bona fide* holder of negotiable bonds held such bonds free of equities existing between prior holders. *E. g.*, Cochran v. Fox Chase Bank, 209 Pa. 34, 58 Atl. 117 (1904); Gibson v. Lenhart, 111 Pa. 624 (1886); Mason v. Frick, 105 Pa. 162 (1894); Gibson v. Lenhart, 101 Pa. 522 (1882).

A person to whom a security receipt or equipment trust certificate is negotiated for value and without notice of prior defenses or claims of ownership obtains "absolute title" thereto free from

any defenses, equities, or claims of ownership of or enforceable against the signor or any prior holder. 56 P.S. § 512 (d).

Once a stock certificate is transferred to a purchaser for value, in good faith, and without notice, it cannot be reclaimed nor its transfer rescinded by a former owner on the ground that his indorsement or delivery of the certificate was procured by fraud, duress, mistake, or if the delivery was made without his authority or effected after his death or legal incapacity. 15 P.S. § 307; Jones v. Costlow, 349 Pa. 136, 36 A. 2d 460 (1944). (Purchaser from pledgee bank, which was the registered owner, acquired unimpeachable title to stock when not informed of any limitation on the pledgee's authority to sell.) See also Little v. Fearon, 252 Pa. 430, 97 Atl. 578 (1916). Even though a transfer has been rescinded or set aside, a subsequent transfer of the certificate to a *bona fide* purchaser gives such purchaser an "indefeasible right" to the certificate and the shares represented thereby. 15 P.S. § 308.

Sec. 8-302. "Bona Fide Purchaser". (This term is commented upon where it appears in the annotations.)

Sec. 8-303. "Value".

Any consideration sufficient to support a simple contract constitutes "value"; an antecedent or pre-existing debt constitutes value where a stock certificate, security receipt, or equipment trust certificate is taken either in satisfaction or security therefor. 15 P.S. § 322(1) (stock certificate); 56 P.S. § 511(c) (security receipt and equipment trust certificate).

Under the N.I.L. value likewise is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt also constitutes value. 56 P.S. § 62. Extension of credit, not drawn upon, under the N.I.L. has been held not to constitute "value." *E. g.*, National Bank of Phoenixville v. Bonsor, 38 Pa. Super. Ct. 275 (1909).

Sec. 8-304. Notice to Purchaser of Claims of Ownership.

(1) (a) Under the N.I.L. subsequent indorsees acquire only the title of the first indorsee under a restrictive indorsement. 56 P.S. § 89.

There have been no Pennsylvania cases which have considered the effect of a restrictive endorsement on a bearer instrument.

The Treasury Department has provided for restrictive indorsements of United States bearer securities. Its regulation provides that a bank may place restrictive indorsements on the face of United States bearer securities owned by it or by its customers at the time of forwarding such securities to a Federal Reserve Bank or Branch or to the Treasurer of the United States for payment, redemption, or optional exchange for a new issue. Such indorsements are author-

ized for no other purpose and at no other time. Treasury Dept. Circ. No. 853, § 328, 14 Fed. Reg. 6171 (1949). This indorsement makes the securities non-negotiable and is intended to afford the banks or their customers the same relief as is given in the case of registered securities in the event of loss, theft or destruction. It also makes possible savings in transportation and insurance charges.

(1) (b) Actual notice of theft of securities is required. Crittenden v. Hoffman, 279 Pa. 127, 123 Atl. 661 (1924). (Whether or not stockbrokers had notice of theft of unregistered coupon water bonds was a question for the jury—court gave no consideration to lapse of time between receipt of notice and purchase of bonds, which was in excess of six months.)

(1) (c) Holder of a bearer bond by proper indorsement when attested by a notary effects a type of self-registraton. 8 P.S. § 53.

(2) The Fiduciaries Act provides that one who, in good faith, pays or transfers to a fiduciary money or other property which the fiduciary is authorized to receive, is not responsible for the proper application thereof by the fiduciary, and any right or title acquired from the fiduciary as consideration for the money or property is not invalid in consequence of a misapplication by the fiduciary. 20 P.S. § 3331.

Sec. 8-305. Staleness as Notice of Claims of Ownership.

See annotation to Sec. 8-203.

Overdue coupons attached to a bond held not to put pledgee on notice. Listie Coal Co. v. Farmers' National Bank, 287 Pa. 337, 135 Atl. 105 (1926). But in determining bad faith of pledgee bank taking corporate bonds for personal debt of the corporation's treasurer, attachment of such coupons was considered "significant." In re Stroudsburg Security Trust Co., 145 Pa. Super. Ct. 44, 20 A. 2d 890 (1941).

Sec. 8-306. Warranties to Purchaser for Value.

(1) A person who for value transfers a stock certificate, unless a contrary intention appears, warrants that the certificate is genuine, that he has a legal right to transfer it, and that he has no knowledge of any fact which would impair the validity of the certificate. 15 P.S. § 311. An assignor of a claim secured by a certificate is held to these warranties, but his liability on such warranties shall not exceed the amount of the claim. 15 P.S. § 311.

Under the N.I.L., a person negotiating a negotiable security by delivery or qualified indorsement, warrants that the security is genuine, that he has a good title to it, and that he has no knowledge of any fact which would impair the validity of the security or render it valueless. 56 P.S. § 156. In addition, one indorsing without qualification, warrants to all subsequent holders in due course that the

security is valid and subsisting at the time of the indorsement. 56 P.S. § 157

The vendor of any chose in action warrants the title and its validity. Flynn v. Allen, 57 Pa. 482 (1868). (Township bonds.) But the parties may agree that the risks of title are on the buyer. Porter v. Bright, 82 Pa. 441 (1876). (City bonds.)

(2) The Uniform Stock Transfer Act provides that:

> "A mortgagee, pledgee, or other holder of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby." 15 P.S. § 312.

A broker or other agent who negotiates a security under the N.I.L. without indorsement, is held to the warranties of 56 P.S. § 156 unless he discloses the name of the principal and the fact that he is acting only as an agent. 56 P.S. § 160.

Sec. 8-307. Effect of Delivery Without Indorsement; Right to Compel Indorsement.

The transferee of a stock certificate has a specifically enforceable right to compel an indorsement where the certificate has been delivered with intent to transfer. 15 P.S. § 309. But the transfer takes effect, even as between the parties, when the indorsement is actually made. 15 P.S. § 309. See Townsend v. Union Trust Co. of Donora, 2 F. Supp. 734 (D.C. W.D. Pa. 1933). (Delivery without intent to transfer.)

The transfer for value of a negotiable instrument vests in the transferee such title as the transferor had therein; and the transferee has a right to have the indorsement of the transferor; but in determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. 56 P.S. § 101.

The donee of a gift *causa mortis* held to take good title to a negotiable certificate of deposit even though 56 P.S. § 101 indicates that it covers only transfers "for value." In re Mayer's Estate, 341 Pa. 402, 19 A. 2d 467 (1941).

Sec. 8-308. Indorsement, How Made; Special Indorsement; Indorser Not a Guarantor; "Partial Assignment".

(1) A stock certificate is indorsed "when an assignment or a power of attorney to sell, assign, or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby, or when the signature of such person is written

without more upon the back of the certificate. In any of such cases a certificate is indorsed though it has not been delivered." 15 P.S. § 320.

Indorsement of a negotiable security (under the N.I.L.) "must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement." 56 P.S. § 82. The indorsement of such negotiable security must be of the entire instrument; an indorsement that purports to transfer only a part or which purports to transfer it to two or more indorsees severally, does not constitute a negotiation. But an instrument paid in part may be indorsed as to the residue. 56 P.S. § 83.

(2) The N.I.L. provides that "An indorsement may be either special or in blank, and it may also be either restrictive or qualified." 56 P.S. § 84.

"A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable, and the indorsement of such indorsee is necessary to the further negotiation of the instrument." 56 P.S. § 84.

A blank indorsement "specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery." 56 P.S. § 86.

A holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. 56 P.S. § 87.

For modes of negotiation of interim certificates and equipment trust certificates see 56 P.S. § 512.

For modes of negotiation of bearer bonds which have been so indorsed by the holder to effect a self-registration see 8 P.S. § 53. See, also, 8 P.S. § 52.

(3) An indorser of an interim certificate or equipment trust certificate, by his indorsement, assumes no liability for any failure on the part of the signer of the certificate to fulfill his obligation. 56 P.S. § 512.

A person indorsing a negotiable instrument without qualification guarantees the honoring of the security provided the necessary proceedings are taken on dishonor. 56 P.S. § 157.

(4) Under the N.I.L. the indorsement must be an indorsement of the entire instrument. Partial indorsement does not operate as a negotiation of the instrument. 56 P.S. § 83.

Sec. 8-309. Effect of Indorsement Without Delivery.

Delivery is required to effect a valid transfer of:

(1) Stock certificates. 15 P.S. § 301;

(2) Negotiable securities under the Negotiable Instruments Law. 56 P.S. § 81; and

(3) Security receipts and equipment trust certificates. 56 P.S. § 512.

An attempted transfer of title to a certificate of stock without delivery amounts to a promise to transfer. 15 P.S. § 301.

Sec. 8-310. Indorsement of Security in Bearer Form.

Under the N.I.L. a security payable to bearer may be further negotiated by delivery even though specially indorsed. 56 P.S. § 92. There is no provision in the N.I.L. which indicates the effect to be given a "restrictive indorsement" of bearer paper.

Coupon or bearer bonds, issued by the state, or by any county, city, municipal authority, or private corporation, in effect are subject to self-registration by the holder by (1) stamping, printing, or writing across the face of the bond, "Payable to endorsed holder"; (2) indorsing on the bond "pay to the order of ——"; and (3) having it properly attested. 8 P.S. § 53.

See also Annotation to Sec. 8-304.

Sec. 8-311. Effect of Unauthorized Indorsement.

A forged or unauthorized signature is wholly inoperative under the N.I.L., unless the party is precluded from setting up the forgery or want of authority. 56 P.S. § 28. A corporation has been required to reissue stock to the owner where it transferred shares on a forged power of attorney. Egan v. United Gas Improvement Co., 319 Pa. 17, 178 Atl. 833 (1935). Owner of stock who delivered unindorsed certificate to a salesman of a brokerage firm with no intent to divest himself of title held not estopped to deny forged power of attorney executed by salesman. Townsend v. Union Trust Co. of Donora, 2 F. Supp. 734 (D.C. W.D. Pa. 1933).

Forgery, being a crime, cannot be affirmed or ratified, *e. g.*, Austen v. Marzolf, 294 Pa. 226, 143 Atl. 908 (1928); First National Bank of Shoemakersville v. Albright, 111 Pa. Super. Ct. 392, 170 Atl. 370 (1934).

Sec. 8-312. Effect of Guaranteeing Signature or Indorsement.

Where stock was transferred on basis of a forged signature held corporation could recover, from person presenting the stock for transfer, the amount it was obliged to pay to the registered owner of the stock even though a signature guarantee had been furnished as required by the rules of the Philadelphia Stock Exchange. Lake Superior Corporation v. Rebre, 65 Pa. Super. Ct. 379 (1917). The Court stated that the corporation might recover from either the signature guarantor or the person presenting the stock for transfer inasmuch as the latter impliedly represents that he is entitled to a new security.

Rule 340 of the Philadelphia-Baltimore Stock Exchange provides:

> "An endorsement of a certificate, or a guarantee of a signature to an assignment thereof or to a power of substitution thereon by a member or member firm, is a guarantee both of the genuineness of such certificate and of such signature, and is also a guarantee of the legal capacity and authority of the signer."

Sec. 8-313. When Delivery to the Purchaser Occurs; Purchaser's Broker as Holder.

Delivery under the Uniform Stock Transfer Act means "voluntary transfer of possession from one person to another." 15 P.S. § 322. "Delivery" of the certificate is required before title to the certificate and the shares represented thereby can be transferred. 15 P.S. § 301.

Under the N.I.L. delivery is defined as a "transfer of possession, actual or constructive, from one person to another." 56 P.S. § 492.

It has been held that "title" to stock carried on margin is not in the broker but rather the title vests at once in the customer upon notification of the purchase subject to payment of the brokers' commissions and such balance of the purchase money as remained due. Barbour v. Sproul, 239 Pa. 171, 86 Atl. 714 (1913) (customer entitled to stock held by sub-broker as against claim of receiver of insolvent broker employed as agent to purchase stock; broker had transmitted customer's instructions to sub-broker as to how the certificates should be issued).

Where a broker purchases stock on the order of a customer and so notifies him, the title to the stock passes to him even though the certificates have not been delivered, Englehart v. Cassatt, 305 Pa. 117, 157 Atl. 256 (1932).

Property in stock purchased by a sub-broker for the account of the broker is in the customer rather than the broker (even though the broker appeared to the sub-broker as the owner) upon noting in the proper account by the broker and rendering a memo to the customer showing the transaction. In re James Carothers & Co., 182 Fed. 501 (D.C. W.D. Pa. 1910) (bankruptcy proceeding prior to enactment of present § 60(e) of the Bankruptcy Act).

For the requisites which entitle the customer to reclamation under the Bankruptcy Act see 11 U.S.C. § 396 and In re McMillan, Rapp, & Co., 123 F. 2d 428 (3d Cir. 1941).

See also Jones v. Adams, 98 Pa. Super. Ct. 246 (1930) (relationship of broker and customer, when the broker buys for customer's account and risk, is that of principal and agent; in carrying the stock until the customer pays for it, the broker acts as pledgee); Sproul v. Sloan, 241 Pa. 284, 88 Atl. 501 (1913) (conversion by broker of stock carried on margin for the customer).

Sec. 8-314. Duty to Deliver, When Completed. (No Pennsylvania cases found.)

Sec. 8-315. Action Against Purchaser Based Upon Wrongful Transfer.

(1) The Uniform Stock Transfer Act permits an owner to reclaim a stock certificate and rescind the transfer if the indorsement or delivery of the certificate was procured by fraud or duress or was made under such a mistake as to make the delivery or indorsement inequitable, or if delivery was made without the authority of the owner or after the owner's death or legal incapacity unless the certificate has been transferred to a *bona fide* purchaser or the owner has elected to waive the injury or has been guilty of laches in enforcing his rights. 15 P.S. § 307.

Replevin of stolen coupon bonds permitted where defendant failed to prove it was a *bona fide* purchaser. Crittenden v. Hoffman, 279 Pa. 127, 123 Atl. 661 (1924).

(2) Owner of stock permitted to recover stock transferred on forged power of attorney. Townsend v. Union Trust Co. of Donora, 2 F. Supp. 734 (D.C. W.D. Pa. 1933).

(3) The right to reclaim a stock certificate or to rescind its transfer may be specifically enforced, and the further transfer of the certificate may be enjoined pending litigation. 15 P.S. § 307.

Replevin of stolen bonds permitted. Crittenden v. Hoffman, *supra.*

Sec. 8-316. Purchaser's Right to Requisites for Registration of Transfer on Books. (No Pennsylvania cases found.)

Sec. 8-317. Attachment or Levy Upon Security.

(1) An attachment or levy upon shares of stock for which a certificate is outstanding is not valid until the certificate is actually seized, or surrendered to the corporation which issued it, or until its transfer by the holder is enjoined. 15 P.S. § 313. See Mills v. Jacobs, 333 Pa. 231, 4 A. 2d 152 (1939) (attachment of shares of stock of a foreign corporation).

(2) Identical provision now found in the Uniform Stock Transfer Act. 15 P.S. § 314.

Sec. 8-318. No Conversion by Good Faith Delivery.

Where an attorney, acting as agent, assists in the sale of stolen negotiable bonds by procuring a bank to secure a broker, and the proceeds of the sale were deposited to the account of the attorney, who thereafter turned over all the proceeds to the client, and where both the bank and the attorney acted throughout the transaction innocently and in good faith, neither the attorney nor the bank was liable

to the true owner for conversion of the bonds. First National Bank of Blairstown v. Goldberg, 340 Pa. 337, 17 A. 2d 377 (1941).

Sec. 8-319. Statute of Frauds.

The Statute of Frauds provisions of the Uniform Sales Act apply only to contracts to sell or sales of choses in action of $500 or more. 69 P.S. § 42.

To be enforceable by action under 69 P.S. § 42 there must either be acceptance and receipt of a part of the items of sale, or part payment, or some note or memorandum in writing of the contract or sale signed by the party to be charged or his agent. See Staples v. Pan-American Wall Paper & Paint Co., 63 F. 2d 701 (3d Cir. 1933); Fidelity Philadelphia Trust Co. v. McCown's Estate, 41 Lancaster Rev. 111 (1928). It has been held that a broker may recover damages resulting from the purchase of stock for defendant on the defendant's verbal order; 69 P.S. § 42 was held not applicable because the relationship of the broker and customer is that of principal and agent and not buyer and seller. *E. g.*, Jones v. Adams, 98 Pa. Super. Ct. 246 (1930).

Part 4. Registration.

Introductory Comment

Duty of Issuer to Register a Transfer. An issuer is required to register a transfer as requested if (a) the security is sufficiently indorsed in conformity with Sec. 8-402; and (b) the issuer has not received notice of the "unrightfulness" of the transfer and is under no duty to inquire under Sec. 8-403; and (c) if proof of payment or waiver of taxes is submitted. Sec. 8-401.

In order to avoid the voluminous documentation issuers sometimes require when securities are attempted to be transferred by a person standing in a representative capacity, Sec. 8-402 sets the limits on the amount of evidence the issuer may require in such cases to establish the necessary indorsements. In all cases the issuer is entitled to proof that a person signing in a representative capacity is actually such a representative. In addition, he is entitled to a signature guarantee by a person reasonably believed by him to be responsible. The issuer, of course, is not so limited in cases where he has notice that the person signing the indorsement has no power to make it. Sec. 8-402.

No duty rests on the issuer to inquire into the rightfulness of a transfer of a security sufficiently indorsed unless he has notice of conflicting claims. Sec. 8-403(1). Knowledge that the registered owner holds the security in a fiduciary capacity imposes no duty of inquiry unless the issuer has notice that the transfer is to the fiduciary in his individual capacity or that the proceeds of the pur-

chase were placed in the fiduciary's individual account or made payable in cash to the fiduciary individually, etc. Sec. 8-403(2). This latter exception seems to effect a modification of the Pennsylvania version of the Fiduciaries Act which places no duty of inquiry on an issuer upon the transfer of a security which is registered *or to be registered* in the name of the fiduciary. (Emphasis supplied.)

Liability for Wrongful Registration. The issuer's liability for wrongful registration is limited to the replacement of the security by a new one; the existing alternative remedy of damages is no longer available. Sec. 8-404.

Lost, Destroyed and Stolen Securities. Upon the owner's filing a sufficient indemnity bond and fulfilling any other reasonable requirements, the issuer is required to issue a new security in place of the missing original unless he has notice that the missing security is in the hands of a *bona fide* purchaser. Sec. 8-405(1). No longer may the issuer require a court order as is allowed in the case of stock certificate replacements. The issuer must register the transfer of the original security if it is subsequently presented by a *bona fide* purchaser; however, he may recover the new security from anyone except a *bona fide* purchaser, and in such event he may recover from the original owner or the indemnitor for any loss sustained. Sec. 8-405(2). Under the Uniform Stock Transfer Act, the original certificate is ineffective except it gives to a *bona fide* purchaser a cause of action for damages against the corporation.

Duty of Authenticating Trustee, Transfer Agent or Registrar. These parties are expressly held liable to both the issuer and the security owner for a wrongful refusal to transfer as well as a wrongful transfer. Sec. 8-406.

Sec. 8-401. Duty of Issuer to Register Transfer.

(1) Corporation may demand evidence of authority to make a transfer before permitting it to be made; it is entitled to the protection of a judicial decree in an adversary proceeding, in which all parties interested would be parties, to determine the ownership of stock, the assignment of which is partially obliterated and the name of the purported assignee substituted for the original assignee. Soltz v. Exhibitors' Service Co., 334 Pa. 211, 5 A. 2d 899 (1939).

There is no duty to transfer stock on the part of the corporation where it has notice of conflicting claims. Leff v. Kaufman's Inc., 342 Pa. 342, 20 A. 2d 786 (1941) (mere possession of the certificate along with a blank indorsement does not entitle the one in possession to transfer where the corporation has notice of conflicting claims).

For a case dealing with the duty to register a transfer of stock appearing on the face of the certificate to be held in trust (decided prior to the adoption of § 3 of the Uniform Fiduciaries Act, 20 P.S. § 3351) see Bayard v. Farmers' and Mechanics' Bank, 52 Pa. 232 (1866).

Where executors held stock for more than six years after death of registered holder without selling it or making any demand for its transfer, upon application of executors to have the stock transferred to their vendee, it was the duty of the corporation to inquire into the right of the executors to make the sale. Livezey v. Northern Pacific R.R., 157 Pa. 75, 27 Atl. 379 (1893). Corporation on examining the will obtained notice of a trust and it also received notice of conflicting claims of ownership; thus it was entitled to a decree in an adversary proceeding before it could be held for damages on refusal to transfer. *Id.*

Neither corporation nor assignor of stock certificate permitted, in a mandamus proceeding to compel the registration of the transfer, to show that the consideration for the assignment was an illegal agreement, since the assignee could make out his case without disclosing the illegal contract, the contract having become fully executed at the time of the assignment. Commonwealth ex rel. Citizens National Bank v. Camp, 258 Pa. 548, 102 Atl. 205 (1917).

Bona fide purchaser entitled to damages for wrongful refusal to transfer stock. The West Branch and Susquehanna Canal Company's Appeal, 81½ Pa. 19 (1870).

(2) See Annotation to Sec. 8-404.

Sec. 8-402. Sufficiency of Indorsement.

Dictum appears in Bayard v. Farmers' and Mechanics' Bank, 52 Pa. 232, to the effect that a transfer agent may safely permit a transfer of stock by an executor without looking beyond his letters of administration; dictum in this case places trustee of insolvent debtor on same footing as an executor.

Trustee, before registering a transfer of trust certificates, has a right to demand that the registered owner be brought in to acknowledge her signature, and the trustee need not rely on the transferee's standing and/or a signature guarantee. Walker v. Pennsylvania Co. for Insurances on Lives, etc., 263 Pa. 480, 106 Atl. 795 (1919).

No duty on part of transfer agent to inquire as to whether or not stock standing in name of decedent is needed for the payment of debts before registering a transfer to a legatee; the certificate having been duly indorsed by the executor. Catherwood v. Guarantee Trust & Safe Deposit Co., 252 Pa. 466, 97 Atl. 703 (1916).

See also annotations to Sec. 8-403 for the provisions of the Fiduciaries Act, 20 P.S. § 3351.

Sec. 8-403. Duty to Inquire Into Rightfulness of Transfer.

(1) Corporation held to have notice of lack of authority of trustee to transfer stock because of examining will (which disclosed a ten year trust) at an attempted transfer two months previously and because of examining tax papers (which indicated date of death); thus, held liable for a transfer by the trustee 6 years before the

termination of the trust. First National Bank v. Pittsburgh, F.W.&C. Ry., 31 F. Supp. 381 (D.C. E.D. Pa. 1939). See also Leff v. Kaufman's Inc., 342 Pa. 342, 20 A. 2d 786 (1941) (refusal to transfer justified on basis of having notice of conflicting claims); Soltz v. Exhibitors' Service Co., 334 Pa. 211, 5 A. 2d 899 (1939) (refusal to transfer justified because of partial obliteration of transferor's signature); Catherwood v. Guarantee Trust & Safe Deposit Co., 252 Pa. 466, 97 Atl. 703 (1916) (no duty on part of transfer agent to inquire as to whether or not stock standing in name of decedent is needed for payment of debts before registering a transfer to a legatee).

(2) 20 P.S. § 3351 provides that an issuer, its transfer agent, etc., is not bound to inquire into the rightfulness of a transfer of stocks, bonds or other securities when a fiduciary or nominee of a fiduciary in whose name the securities *are registered or to be registered* applies for such transfer; liability for such registration or transfer is incurred only when made with actual knowledge that the fiduciary or nominee is committing a breach of trust in requesting the registration or when having knowledge of such facts that the participation in the registration amounts to bad faith.

For application of 20 P.S. § 3351 see First National Bank v. Pittsburgh, F.W.&C. Ry., 31 F. Supp. 381 (D.C. E.D. 1939).

To constitute "bad faith" under another provision of the Fiduciaries Act it has been held that the act must be done "dishonestly" and not merely "negligently." Davis v. Pennsylvania Co. for Insurances on Lives, etc., 337 Pa. 456, 12 A. 2d 66 (1940).

For cases decided prior to the adoption of 20 P.S. § 3351 see e. g., Appeal of Lehigh Coal & Navigation Co., 88 Pa. 499 (1879); Bayard v. Farmers' and Mechanics' Bank, 52 Pa. 232 (1866).

Sec. 8-404. Liability for Improper Registration.

Corporation that permits an erroneous or wrongful transfer of stock may be compelled, at the election of the rightful owner, to replace it or to answer in damages. First National Bank v. Pittsburgh, F.W.&C. Ry., 31 F. Supp. 381 (D.C. E.D. Pa. 1939) (certificates replaced); Egan v. United Gas Improvement Co., 319 Pa. 17, 178 Atl. 683 (1935) (certificates replaced); Walker v. Pennsylvania Co. for Insurances on Lives, etc., 263 Pa. 480, 106 Atl. 795 (1919) (must account for transfer of trust certificate on basis of a forged power of attorney); Pennsylvania Co. for Insurance on Lives, etc. v. American Fire Insurance Co., 181 Pa. 50, 37 Atl. 1119 (1897) (stock certificates replaced); Pennsylvania Co. for Insurances on Lives, etc. v. Franklin Fire Insurance Co., 181 Pa. 40, 37 Atl. 191 (1897) (stock certificates replaced); Pennsylvania Co. for Insurances on Lives, etc. v. Philadelphia, C. & N. R.R., 153 Pa. 160, 25 Atl. 1043 (1893) (damages for wrongful transfer of stock). But

where the negligence of the owner of stock causes the transfer, the corporation will not be liable for such transfer. Pennsylvania Railroad Co.'s Appeal, 86 Pa. 80 (1878).

Sec. 8-405. Lost, Destroyed and Stolen Securities.

(1) A corporation can be required to issue a new stock certificate as a replacement for a lost or destroyed certificate only upon a court order and upon the owner's filing a sufficient indemnity bond. 15 P.S. § 317.

(2) The original stock certificate, where a new one has been issued to the owner in its place, is ineffective except insofar as it represents an action for damages in the hands of a *bona fide* purchaser against the corporation. 15 P.S. § 317.

Sec. 8-406. Duty of Authenticating Trustee, Transfer Agent or Registrar.

(1) (a) Transfer agent is liable to corporation for a fraudulent overissue effected by such transfer agent. Bank of Kentucky v. Schuylkill Bank, 1 Parson's Equity Cases 180 (1846) affirmed by the Pennsylvania Supreme Court, 1 Parson's Equity Cases 269 (1849).

(1) (b) Transfer agents have been said to be "trustees to a certain extent" for the stockholders as to the title of each owner. They are held to "proper diligence and care" in the preservation of such title and for an unauthorized transfer would be liable to the owner of the stock. Bayard v. Farmers' & Mechanics' Bank, 52 Pa. 232 (1866). In this case, the Court didn't pass on the liability of the transfer agent for damages resulting from its refusal to transfer stock since it found that the refusal to transfer was not wrongful.

Mandamus will lie to compel a transfer agent to transfer stock. Catherwood v. Guarantee Trust & Safe Deposit Co., 252 Pa. 466, 97 Atl. 703 (1916).

Article 9

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

Introductory Comment

This Article would supplant and require the repeal of the following Pennsylvania statutes:

A. *Statutes of General Application:*

Act of June 28, 1947 (bailment lease), Pa. Laws 1947, No. 478, pp. 1141-1142; 69 P.S. §§ 511-514.

Factor's Lien Act, Pa. Laws 1947, No. 241, pp. 529-533, as amended by Pa. Laws 1949, No. 37; 6 P.S. §§ 221-229.

Act of June 1, 1945 (chattel mortgages), Pa. Laws 1945, No. 434, pp. 1358-1366, as amended to date by Pa. Laws 1947, No. 461, pp. 1070-1071; Pa. Laws 1947, No. 110, pp. 270-272; 21 P.S. § 940.

Act of July 31, 1941 (transfer of accounts receivable), Pa. Laws 1941, No. 255, pp. 606-607; 69 P.S. §§ 561-563.

Uniform Trust Receipts Act, Pa. Laws 1941, No. 138, pp. 307-317; 68 P.S. §§ 551-570.

Uniform Conditional Sales Act, Pa. Stat. Ann., tit. 69, §§ 361-504 (Purdon 1931; Cum. Supp. 1948); Pa. Laws 1925, No. 325, pp. 603-612, as amended to date by Pa. Laws 1935, No. 239, pp. 658-660; Pa. Laws 1939, No. 37, pp. 43-44; Pa. Laws 1943, No. 174, p. 373; Pa. Laws 1947, No. 477, pp. 1140-1141; Pa. Laws 1949, No. 109.

B. *Statutes Applicable to Special Types of Collateral:*

Act of March 7, 1929 (mortgage of vessels), Pa. Stat. Ann., tit. 21, §§ 921-930 (Purdon 1930); Pa. Laws 1929, No. 12, pp. 14-17.

Act of May 13, 1889 (mortgage of royalties from mineral lands), Pa. Stat. Ann., tit. 21, §§ 891-894 (Purdon 1930); Pa. Laws 1889, No. 217, pp. 197-198.

Act of April 28, 1887 (mortgage of enumerated iron and petroleum products), Pa. Stat. Ann., tit. 21, §§ 861-870 (Purdon 1930); Pa. Laws 1887, No. 32, pp. 73-75, as amended by Pa. Laws 1891, No. 78, p. 102.

Act of July 5, 1883 (security interests in railroad equipment), Pa. Laws 1883, p. 176, 67 P.S. §§ 561, 562.

Statutes protecting secured lenders against a landlord's right of distraint require amendment to conform them to the Code's disregard of the form of the security device. The statutes are collected in 12 P.S. §§ 2169-2180.

Clarification of the provisions of the Motor Vehicle Code relating to certificates of title would be necessary. 75 P.S. §§ 31(b), 33 etc.

Also necessary are modifications in the Motor Vehicle Sales Finance Act of 1947, 69 P.S. § 601 ff. to conform its provisions to the Code.

Part 1. Short Title, Applicability and Definitions.

Sec. 9-101. Short Title.

Sec. 9-102. Policy and Scope of Article.

Sec. 9-103. Accounts, Contract Rights and Equipment Relating to Another State; and Incoming Goods Already Subject to a Security Interest.

Subsection (1). Heretofore, the effect of an assignment as between assignor and assignee, the capacity of the assignor and the re-

quisite formalities have been determined by the law of the sometimes fortuitous place of assignment. Restatement, Conflict of Laws, §§ 350, 351, 352. Whether a contract right is capable of being assigned has been determined by the law of the place of contracting. *Id.*, § 348. The Restatement makes the law of the place of performance determinative as to whether the right of an assignee can be destroyed by payment to the assignor, § 353, and as to priority among successive assignees, § 354. This subsection shifts emphasis to the place at which the assignor keeps his records of the accounts concerned.

Subsection (2). Here, too, there has been a shift of emphasis. It has been generally true that the validity and effect of a security agreement are determined by the law of the state in which the chattel is located at the time the agreement is executed. In re Industrial Sapphire Mfg. Co., 182 F. 2d 589 (3d Cir. 1950); Personal Finance Co. v. General Finance Co., 133 Pa. Super. Ct. 582, 3 A. 2d 174 (1938); Restatement, Conflict of Laws, §§ 265, 272, 279 and Pa. Annot. thereto.

Subsection (3). The Pennsylvania common law prefers local creditors and purchasers over the out-of-state lender, unless the transaction takes the form of a bailment lease. See Schmidt v. Bader, 227 Pa. 37, 130 Atl. 295 (1925); Ott v. Sweatman, 166 Pa. 217, 31 Atl. 102 (1895); Pritchett v. Cook, 62 Pa. 193 (1869); Clow v. Woods, 5 S. & R. 275 (1819). Statutory modifications of the common law rule protect a conditional vendor if he files locally within ten days after having received notice of the filing district to which the goods have been removed, 69 P.S. § 432. A chattel mortgagee is apparently protected in Pennsylvania only if he files before the interest of a purchaser or creditor attaches, 21 P.S. §940.10, for it has been held of the Chattel Mortgage Act that it is in derogation of the common law and must be strictly construed. Arcady Farms Milling Co. v. Sedler, 367 Pa. 314, 80 A. 2d 845 (1951); First National Bank v. Sheldon, 161 Pa. Super. Ct. 265, 54 A. 2d 61 (1947); Aid Investment & Discount, Inc. v. McNiff, 70 Pa. D. & C. 71 (C.P. Cumberland 1949).

Governing Law Stipulations. Code Sec. 1-105 (6) permits the parties to a security agreement to stipulate that their transaction shall be governed by the law of any state or nation to which it "bears a reasonable relationship." The doctrine that the intention of the parties and hence a stipulation expressing that intention should govern choice of law finds recognition in the usury cases, which are collected in 2 Beale, Conflict of Laws 1241 (1935); Goodrich, Conflict of Laws 334 (3d ed. 1949). See, especially, Seeman v. Philadelphia Warehouse Co., 274 U. S. 403 (1927); Campbell v. Hunt, 60 Pa. Super. Ct. 332 (1915). It has been said that in insurance cases, courts will recognize governing law stipulations if they point to a rule whose content is at least as favorable to the claimant as that of the forum. Carnahan, Conflict of Laws and Life Insurance Contracts

245 (1942). Dicta in two cases involving other contracts would give effect to governing law stipulations even when the law chosen has no contact with the transaction involved. See Duskin v. Pennsylvania-Central Airlines Corp., 167 F. 2d 727, 730 (6th Cir. 1948); Vita Food Products, Inc. v. Unus Shipping Co., (1939) A.C. 277, 290. But the absence of a "reasonable relationship" will probably lead to disregard of a governing law stipulation. Owens v. Hagenbeck-Wallace Shows Co., 129 Atl. 158 (R.I. 1937). Governing law stipulations have been given effect in chattel security cases where the chosen rule has some substantial connection with the transaction and where the dispute is between the debtor and lender, rather than between lender and third persons. Ingleheart Bros. v. John Deere Plow Co., 114 Ind. App. 182, 51 N.E. 2d 498 (1943); Rubin v. Gallagher, 294 Mich. 124, 292 N.W. 584 (1940); Stevenson v. Lima Locomotive Works, 180 Tenn. 137, 172 S.W. 2d 812 (1943). But see the dictum of Chief Judge Learned Hand in E. Gerli & Co. v. Cunard Steamship Co., 48 F. 2d 115, 117 (2d Cir. 1931): "But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes." However, even the Second Circuit has given effect to such clauses when the element of performance in many states makes the ordinary choice of law rules difficult to apply. Hal Roach Studios v. Film Classics, 156 F. 2d 596 (2d Cir. 1946). To the same effect, see Ringling Bros.-Barnum & Bailey Combined Shows v. Olvera, 119 F. 2d 584 (9th Cir. 1941). In general, see Goodrich, Yielding Place to New: Rest Versus Motion in the Conflict of Laws, 50 Col. L. Rev. 881, 898-899 (1950).

Sec. 9-104. Transactions Excluded From Article.

Sec. 9-105. Definitions and Index of Definitions.

Sec. 9-106. Definitions: "Account"; "Contract Right".

Sec. 9-107. Definitions: "Purchase Money Security Interest".

Sec. 9-108. Definitions: "Value"; When After-Acquired Collateral Not Security for Antecedent Debt.

Sec. 9-109. Classification of Goods: "Consumer Goods"; "Equipment"; "Farm Products"; "Inventory".

Sec. 9-110. Sufficiency of Description.

Sec. 9-111. Applicability of Bulk Transfer Laws.

The language of the Pennsylvania Bulk Sales Law is broad enough to include transfers made for the purpose of giving security

for the repayment of new value extended to the transferor, but in other jurisdictions having similar statutes, it is generally held that security transactions are not covered. See Annotation to Code Secs. 6-102 (2), 6-103, 1).

Sec. 9-112. Where Collateral Is Not Owned by Debtor.

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

Sec. 9-201. General Validity of Security Agreement.

The general rule in Pennsylvania is that title retention agreements not accompanied by a change in possesion are void as to third parties unless saved by statute. The bailment lease is the lone common law exception to the rule. Pritchett v. Cook, 62 Pa. 193 (1869); Clark v. Jack, 7 Watts 375 (1838); Clow v. Woods, 5 S. & R. 275 (1819). So many statutory chattel security devices have been made available, however, that this section will make little practical change.

Sec. 9-202. Title to Collateral Immaterial.

Title is theoretically a crucial element in Pennsylvania in determining the rights of the secured lender vis a vis third parties. Thus, in a bailment lease situation, the bailor, never having parted with title, prevails over purchasers from or creditors of the bailee. Crist v. Kleber, 79 Pa. 290 (1875); Barnett v. Fein, 41 Pa. Super. Ct. 423 (1909); Clark v. Jack, 7 Watts 375 (1838). When statutory security devices are employed, title concepts are less important, since the secured lender can protect himself by filing.

Sec. 9-203. Enforceability of Security Interest: Formal Requisites.

There is no requirement that a bailment lease be in writing, but no case has been found upholding the rights of a bailor resting upon a parol lease as against purchasers or creditors. Stamping of the borrower's books is sufficient to protect a lender in the transfer of accounts receivable, 69 P.S. § 561. Writings are required when the security device employed is a conditional sale, 69 P.S. § 403; trust receipt, 68 P.S. §§ 552 (2), 554; chattel mortgage, 21 P.S. § 940.2; or factor's lien, 6 P.S. § 222. In addition, conditional sales contracts covering railroad equipment must be witnessed and acknowledged, 69 P.S. § 403, as must all chattel mortgages, 21 P.S. §§ 940.2, 940.8. An unwitnessed chattel mortgage is unenforceable, Arcady Farms Milling Co. v. Sedler, 367 Pa. 314, 80 A. 2d 845 (1951); if unacknowledged, a chattel mortgage may be stricken from the prothonotary's record upon petition by an interested party, Dealers Credit Corp. v. Rex Lumber Co., Inc., 66 Pa. D. & C. 452 (C.P. Wash. 1948).

Sec. 9-204. When Security Interest Attaches; After-Acquired Property; Buyer's Enabling Advance; Future Advances.

Debtor's Rights in the Collateral. It has been held that an interest in a partnership which is yet to be formed may be "pledged," so that the secured lender prevails over general creditors of the debtor. Appeal of Collins, 107 Pa. 590 (1883). The accounts receivable statute provides that "any indebtedness, due or to become due" is assignable, 69 P.S. § 563. This language seems to reflect the Pennsylvania common law view that accounts receivable could be assigned even though they had not yet accrued. East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96 (1879). Under this section, a lender takes no security interest in an assigned account until the account comes into existence, that is, until the debtor-assignor has "a right to payment for goods sold or leased or for services rendered." See Code Sec. 9-106.

After-Acquired Property. A security interest in after-acquired property is apparently permitted without restriction in a factor's lien, 6 P.S. § 222. But a chattel mortgage may attach to after-acquired chattels of the same class, to replacements, and to increase and produce of the secured goods, 21 P.S. § 940.3. After-acquired property clauses do not seem to be possible in trust receipt transactions, 68 P.S. §§ 552, 564, or in bailment lease situations unless the goods move from the lender to the borrower and each transaction can be looked upon as a separate bailment. See In re Rosensteel, 27 F. 2d 1009 (D.C. W.D. Pa. 1928); *cf.* Allen v. Allen, 2 P. & W. 166 (1830). The Chattel Mortgage Act contains a restriction similar to that of subsection (4) (a) for crops to be planted or grown within one year, 21 P.S. § 940.1. The exception provided for in subsection (4) (a) when the security interest is given in conjunction with a lease, land purchase mortgage or contract may, by analogy to the "industrial mortgage" doctrine, be in accord with existing Pennsylvania law. See Roos v. Fairy Silk Mills, 334 Pa. 305, 5 A. 2d 569 (1939). The consumer goods limitation of subsection (4) (b) is, in terms, new, but as modified by subsection (5), it effects no substantial change. Under the Chattel Mortgage and Conditional Sales Acts and in bailment leases, the parties may stipulate that previously purchased goods shall secure subsequent purchases until the former are paid for, 21 P.S. § 940.4a, 69 P.S. §§ 409, 511. These provisions are similar to subsection (5).

Sec. 9-205. Use or Disposition of Collateral Without Accounting Permissible.

Accord when the security device employed is a trust receipt, 68 P.S. §§ 552 (3), 559; conditional sale, 69 P.S. § 221; or a factor's

lien, 6 P.S. § 221. But apparently a mortgagor's power to sell the collateral must be conditioned upon payment of the proceeds to the mortgagee, 21 P.S. § 940.6 (d). As to accounts receivable, it has been said that the Pennsylvania rule is in accord with Benedict v. Ratner, 268 U.S. 353 (1925). See In re Pusey, Maynes, Breish Co., 122 F. 2d 606 (3d Cir. 1941). There can be no bailment lease of goods intended for consumption or resale. Bowser & Co. v. Franklin Mtge. & Inv. Co., 305 Pa. 459, 158 Atl. 170 (1931); Hoeveler-Stutz Co. v. Cleveland Motor Sales, 92 Pa. Super. Ct. 425 (1928); *cf.* Brown v. Billington, 163 Pa. 76, 29 Atl. 904 (1894) (trust receipt; trustee assimilated to bailee).

Sec. 9-206. Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties by Security Agreement.

No Pennsylvania cases have been found passing upon the validity of attempts to impart elements of negotiability to chattel paper. But in other jurisdictions, such attempts have in general been unsuccessful. See Note, (1948) 57 Yale L. J. 1414.

If a debtor executes a negotiable instrument in addition to a real estate mortgage, it has been held that the note imparts its negotiability to the security agreement, cutting off the debtor's defenses on the real estate mortgage as well as on the note. Welton v. Littlejohn, 163 Pa. 206, 29 Atl. 871 (1894); *cf.* Levy v. Gilligan, 244 Pa. 272, 90 Atl. 647 (1914). But in motor vehicle sales, the execution of such a note does not prevent the debtor from asserting against subsequent holders whatever defenses he may have against the seller. Motor Vehicle Sales Finance Act of 1947, § 15G, 69 P.S. § 615G. While subsection (1) does not go as far as the Motor Vehicle Sales Finance Act in protecting the consumer-debtor, it does soften the impact of Welton v. Littlejohn, *supra,* and Levy v. Gilligan, *supra.*

Sec. 9-207. Rights and Duties When Collateral is in Secured Party's Possession.

Accord:

(1) Lender's duty of reasonable care, Restatement, Security §§ 17 (chattels), 18 (instruments) and Pa. Annot. thereto.

(2) Borrower and lender may modify the normal incidents of a pledge relating to their respective privileges and duties. Restatement, Security § 14 and Pa. Annot. thereto.

(a) Reasonable expenses chargeable to borrower, Restatement, Security §§ 25, 26 and Pa. Annot. thereto.

(b) The lender's duty does not extend beyond reasonable care. Restatement, Security §§ 17, 18 and Pa. Annot. thereto.

(c) The lender has a security interest in the increase or profits of the collateral. Restatement, Security § 3 and Pa. Annot. thereto.

The lender must account to the borrower for any such increase. Restatement, Security § 27 and Pa. Annot. thereto. Certain corporate obligors who in good faith pay dividends, etc. to the borrower are protected by statutes collected in Pa. Annot. to Restatement, Security § 3, pp. 11-12. The lender is entitled to the aid of a court in equity if legal remedies are inadequate. Restatement, Security § 46.

(d) *Cf.* Stone v. Marshall Oil Co., 208 Pa. 85, 57 Atl. 183 (1904).

(e) Restatement, Security § 22.

(3) Restatement, Security § 20 and Pa. Annot. thereto.

Sec. 9-208. Request for Statement of Account or List of Collateral.

This section is similar to § 28 of the Motor Vehicle Sales Finance Act of 1947, 69 P.S. § 628.

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

Sec. 9-301. Persons Who Take Priority Over Unperfected Security Interests; "Lien Creditor".

Unless a conditional vendor files within ten days of the sale, he may lose his interest to any purchaser or creditor who without notice purchases the goods or acquires a lien by attachment or levy, 69 P.S. § 402. The time before which the lien creditor must be without knowledge of the lender's security interest is the hour at which the writ was placed in the sheriff's hands. Williams Patent Crusher & Pulverizer Co. v. Reilly, 118 Pa. Super. Ct. 64, 180 Atl. 158 (1935). Lien creditors may also defeat the lender's security interest in trust receipt transactions if filing is not completed in thirty days, 68 P.S. § 558. In chattel mortgage (21 P.S. §§ 940.5, 950.13) and factor's lien (6 P.S. § 222) transactions, the lender's security interest may, unless he files, be defeated by any creditor. The factor's lien statute also requires posting a notice on the borrower's premises. A pledge not perfected by delivery of the collateral may be defeated by a subsequent pledgee who gains possession without notice. People's Bank v. Etting & Groome, 108 Pa. 258 (1885).

Sec. 9-302. When Filing is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of This Article Do Not Apply.

Filing requirements in Pennsylvania have been governed by the form of security device employed, rather than by the type of collateral involved. Thus, in a credit sale of consumer goods, recording is required if the conditional sale or chattel mortgage device is used but not if a bailment lease is used. See Stern & Co. v. Paul, 96 Pa. Super. Ct. 112 (1929). For filing requirements see: conditional sale, 69 P.S. § 402; trust receipt, 68 P.S. § 557; chattel mortgage, 21 P.S.

§ 940.5; and the factor's lien, 6 P.S. § 222. Accounts receivable require stamping the assignor's books or giving notice to the obligor, 69 P.S. §§ 561, 562.

The implication of subsection (1) (d) that security interests in consumer goods must be filed if they do not secure advances of purchase money is in accord with the rationale of Pennsylvania decisions holding that the seller-lender is not protected against the purchaser's creditors if a purported bailment lease is executed after a transfer of possession. Morgan-Gardner Electric Co. v. Brown, 193 Pa. 351, 44 Atl. 459 (1899); Brunswick & Balke Co. v. Hoover, 95 Pa. 508 (1880); Bank of Secured Savings v. Rudolph, 83 Pa. Super. Ct. 439 (1924). Under Code Sec. 9-107, however, these transactions might qualify as purchase money security interests that would be effective without filing.

As to transactions involving licensed motor vehicles, a chattel mortgage on a motor vehicle is not perfected until the lien is noted on the certificate of title, 21 P.S. § 940.5. The Vehicle Code provides that liens and incumbrances shall be noted on the certificate of title and that such a notation shall be adequate notice to creditors and purchasers that a lien exists, 75 P.S. § 33. This provision is not applicable to manufacturers and dealers in new automobiles, 75 P.S. § 31 (b).

A bailment lease of a motor vehicle may not be perfected unless noted on the title certificate. General Motors Acceptance Corp. v. Colborn, 45 Pa. D. & C. 82 (C.P.Lack. 1942).

There are no decisions on the effect of failing to note on the title certificate an otherwise perfected security interest, *i. e.*, a duly recorded conditional sale. It is not clear, except for chattel mortgages, whether notation on the title certificate is necessary for perfection, nor is it clear whether a security interest for which a statute requires recording can be perfected by merely noting it on the certificate. These ambiguities in the law as it is today would be carried into the Commercial Code by Code Sec. 9-302 (1) (d) and (2) (b), which require filing for motor vehicle security transactions in the absence of a requirement that security interests be noted on the certificate of title. Hence, clarification of the Vehicle Code seems advisable.

Sec. 9-303. When Security Interest is Perfected; Persons Who Take Priority Over Perfected Security Interest; Perfection of Security Interest in Instruments and Documents.

Except as to the bailment lease and the assignment of accounts receivable, perfection in Pennsylvania requires filing. In factor's lien transactions, there is the additional requirement of posting the debtor's premises. Absent a power of resale, express or implied, a

perfected chattel mortgage or conditional sale cannot be defeated by a creditor or purchaser, 21 P.S. §§ 940.5, 940.6 (c), 69 P.S. §§ 401, 402. In a trust receipt transaction, the lender's interest can be defeated by certain common law lienors, 68 P.S. § 559 (2). A factor's lien may be defeated by a buyer in the ordinary course of trade and is inferior to a landlord's lien and to liens arising out of "contractual acts of the borrower with reference to the processing, warehousing, shipping or otherwise dealing with the merchandise in the usual course of the borrower's business preparatory to their sale," 6 P.S. § 224. Purchasers from or creditors of a bailee cannot defeat the security interest of the bailor. Crist v. Kleber, 79 Pa. 290 (1875); Barnett v. Fein, 41 Pa. Super. Ct. 423 (1909).

The trust receipt statute provides for a thirty-day grace period before filing, 68 P.S. §§ 557 (1), 558 (1), and the conditional sales act, ten, 69 P.S. § 402. No grace periods are provided for in the chattel mortgage, 21 P.S. § 940, and factor's lien, 6 P.S. §§ 221-229, statutes.

Sec. 9-304. Temporarily Perfected Security Interest in Instruments or Documents Without Transfer of Possession.

A surrender of pledged collateral to the debtor except for a "temporary and limited purpose" terminates the pledge. Restatement, Security §§ 11 (1), 11 (2) and Pa. Annot. thereto. Before the enactment of the Uniform Trust Receipts Act, case law protected the financing bank, except as against innocent purchasers, in trust receipt transactions, even though the debtor took possession of shipping documents and the goods in exchange for a "trust receipt." Canadian Bank of Commerce v. Baum, 187 Pa. 48, 40 Atl. 975 (1898); Brown v. Billington, 163 Pa. 76, 29 Atl. 904 (1894).

Sec. 9-305. When Possession by Secured Party Perfects Security Interest Without Filing; Field Warehousing: Filing Required.

Although manual delivery is required to create a pledge of an ordinary chattel, Restatement, Security § 5, it suffices as to "bulky goods" that they are identified and that "control" of them has been assumed by the pledgee. Restatement, Security § 6 and Pa. Annot. thereto. The fact that the goods remain on premises occupied by the borrower is not inconsistent with possession by the lender under Illustration 1 to § 6 of the Restatement; the opposite result is dictated by Subsection (2).

A pledge continues only so long as the pledgee remains in possession, Restatement, Security § 11 (1) and Pa. Annot. thereto, but § 11 (2) of the Restatement relaxes this requirement when possession is surrendered for a temporary and limited purpose. The latter provision is significantly not codified, except with respect to instruments and documents, and then only for 21 days. Code Sec. 9-304.

Subsection (2) is not in accord with the view of Pennsylvania law in In re Wyoming Collieries Co., 29 F. Supp. 106 (M.D. Pa. 1939). A field warehousing arrangement was held valid without filing in that case even though coal was stored on a lot next to the bankrupt's colliery and was stored and removed by the bankrupt's employees. No other cases were found.

Sec. 9-306. "Proceeds"; Secured Party's Rights on Disposition of Collateral.

The right of the bailor to trace identifiable proceeds of goods sold by his bailee was recognized in First Nat. Bank v. Bache, 71 Pa. 213 (1872). The secured lender is also given a lien against the proceeds by the chattel mortgage and factor's lien statutes, 21 P.S. § 940.6 (d), 6 P.S. § 224, respectively. The Uniform Trust Receipts Act, 68 P.S. § 560, gives the entruster a right in the proceeds equivalent to his right in the collateral if the proceeds are in the form of a debt, or are identifiable, or if the proceeds are received by the trustee within ten days prior to insolvency proceedings or to a demand for an accounting.

Although § 6 (d) of the Chattel Mortgage Act, 21 P.S. § 940.6 (d), like this section, gives the secured lender a security interest in proceeds, it has been held that the mortgagee may not recover the value of the collateral from an execution creditor who purchases the collateral at judicial sale and who subsequently disposes of it in good faith, all without knowledge of the existence of the security interest. Seaboard Consumer Discount Co. v. Landau's, Inc., 167 Pa. Super. Ct. 180, 74 A. 2d 737 (1950).

Subsection (4) is similar to § 9 (1) (a) of the Uniform Trust Receipts Act, 68 P.S. § 559 (1) (a). See annotation to Code Sec. 9-308.

Subsection (5) is new; there are no Pennsylvania cases.

Sec. 9-307. Buyers of Goods.

A purchaser from a borrower who has been given power to resell takes clear of the secured lender's interest in a trust receipt transaction only if he has no knowledge of any limitations upon the power of resale, 68 P.S. § 559. A purchaser's knowledge of any such limitations is immaterial as against the holder of a factor's lien, 6 P.S. § 224, and apparently immaterial as against a conditional vendor who has expressly or impliedly consented to resale, 69 P.S. § 406, or as against a chattel mortgagee who has expressly consented to resale, 21 P.S. § 940.6 (c), 940.6 (d). See annotation to Code Sec. 9-303.

Bankruptcy. Under § 60 (a) of the Bankruptcy Act as it was prior to the 1950 amendment, 11 U.S.C. § 96 (a) (1946), this section could have made almost every security interest in inventory

voidable as a preference by the debtor's trustee in bankruptcy. This, of course, was equally true of similar liens under the Pennsylvania trust receipt, chattel mortgage, or factor's lien statutes. So long as the applicable state law subjected the lender's security interest to defeat by a *bona fide* purchaser, the way was open for bankruptcy courts to hold that the security interest was perfected immediately before bankruptcy. See, Tyler State Bank & Trust Co. v. Bullington, 179 F. 2d 755 (5th Cir. 1950); In re Harvey Distributing Co., Inc., 88 F. Supp. 466 (E.D.Va. 1950); 3 Collier on Bankruptcy § 60.45 (14th ed. 1941). Section 60 (a) was amended, however, by Pub. L. No. 461, 81st Cong., 2d Sess., March 18, 1950, so that § 60 (a) (2) now reads in part as follows: "A transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." Under § 60 (a) as it now stands, there is no danger of a security interest being treated as a voidable preference merely because this section of the Code permits a buyer in ordinary course of trade to take the goods free of the lender's security interest. Moreover, § 60 (a) (7) of the Bankruptcy Act now provides that a "transfer shall be deemed to be made or suffered at the time of the transfer" if all formalities required by the local law (*i. e.*, filing) are complied with.

Sec. 9-308. Security Interest in Chattel Paper Without Transfer of Possession.

This section is similar to § 9 (1) (a) of the Uniform Trust Receipts Act, 68 P.S. § 559 (1) (a). If chattel paper evidencing a dealer's security interest in goods he has sold is "proceeds" of inventory, then a perfected security interest in the inventory would seem to prevail over an assignee from the dealer under the factor's lien (6 P.S. § 224) and chattel mortgage (21 P.S. § 940.6) statutes. It is provided in both of those statutes that the inventory lien attaches to "proceeds."

Bankruptcy. See bankruptcy annotation to Code Sec. 9-307.

Sec. 9-309. Purchasers of Instruments and Documents.

This section is similar to § 9 (1) (a) of the Uniform Trust Receipts Act, 68 P.S. § 559 (1) (a).

Sec. 9-310. Priority of Certain Liens Arising by Operation of Law.

A common law or statutory lien does not accrue to one who renders services to a bailee, and no such lien may be asserted by the artisan or warehouseman against the bailor. Estey v. Dick, 41 Pa. Super. Ct. 610 (1910) (storage of piano); Stern v. Sica, 66 Pa.

Super. Ct. 84 (1917) (automobile mechanic); Bankers' Com. Sec. Co. v. Brennan & Levy, 75 Pa. Super. Ct. 199 (1920) (automobile mechanic). The rationale of these cases, as well as of the leading case of Meyers v. Bratespiece, 174 Pa. 119, 34 Atl. 551 (1896), is that there can be no lien unless the work is performed at the request of the person who has title to the collateral.

Since an artisan, warehouseman, etc. would not acquire his lien by "attachment or levy," it would seem that the lender's perfected security interest would also prevail under the Conditional Sales Act, 69 P.S. §§ 401, 402. And so would a chattel mortgagee prevail over a lienor, 21 P.S. § 940.5. But an Ohio chattel mortgage, duly noted on an Ohio motor vehicle certificate of title, is inferior to the claim of a Pennsylvania automobile mechanic. Aid Investment & Discount, Inc. v. McNiff, 71 Pa. D. & C. 71 (C.P.Cumberland 1949). The language of the factor's lien, 6 P.S. § 224, and trust receipt, 68 P.S. § 561, statutes indicates that various common law or statutory liens are superior to a security interest.

It is not clear from this section whether a landlord's distraint for rent would take precedence over a security interest. But it has long been the rule in Pennsylvania that goods held by a tenant under any type of security arrangement—including a bailment lease—are subject to landlord's distraint. Reinhart v. Gerhardt, 152 Pa. Super. Ct. 229, 31 A. 2d 737 (1943); National Cash Register Co. v. Ansell, 125 Pa. Super. Ct. 309, 189 Atl. 738 (1937). In view of these cases, it seems probable that a landlord would be construed to be a person "who in the ordinary course of his business furnishes services" to goods kept on the rented premises. There are, however, many types of collateral which are exempted by statute from landlord's distraint if notice of the security interest has been given to the landlord: sewing machines and typewriters; pianos, melodeons and organs; soda fountains; ice cream cabinets; electric motors, fans or dynamos; household furniture and household goods; patented shoe machinery; cigarette vending machines. See 12 P.S. §§ 2169-2180. The language of these exemption statutes varies, and the lender must study the applicable one carefully before deciding upon the form of security device to be employed. For example, household goods are exempted if "leased or hired under bailment lease * * * or conditionally sold * * * ." 12 P.S. § 2178. It has been held that this statute does not protect a chattel mortgagee. Commercial Credit Plan v. Mahoney, 67 Pa. D. & C. 577 (C.P. Erie 1948). Should this decision be followed, form would retain importance even under this Article. To avoid such a result, it is suggested that the exemption statutes be revised to protect any security interest involving the designated types of collateral.

Since the bailment lease was the principal chattel security device available in Pennsylvania prior to the adoption of the Constitution of

1874, and since this form of transaction subordinated the lienor to the secured lender, the question arises of this section's validity under Pa. Const. Art. 3, Sec. 7, which prohibits special or local laws providing or changing methods for the collection of debts and the enforcing of judgments, or authorizing the creation, extension or impairing of liens. This provision has been interpreted in a case involving a mechanic's lien statute as freezing the law as it existed prior to 1874. Page v. Carr, 232 Pa. 371, 81 Atl. 430 (1911). Held invalid under it was a statute giving an attorney a lien upon his client's cause of action, "an enactment radically different from any law existing before the date of its passage." Laplacca v. Phila. Rapid Transit Co., 265 Pa. 304, 108 Atl. 612 (1919). Also invalidated was a statute giving to certain silk processors a lien upon goods which came into their hands for processing in the amount of *any* account due them, even if such account had no relation to the particular goods against which the lien was asserted. Gerli v. Perfect Silk Throwing Co., 70 Pa. Super. Ct. 299 (1918). On the other hand, more recent decisions have upheld similar statutes when "a real reason for the preference is made to appear." In re Cameron, 287 Pa. 560, 135 Atl. 295 (1926) (priority to bank depositors in bank liquidation proceedings); Ridgway Dynamo & Engine Co. v. Werder, 287 Pa. 358, 135 Atl. 216 (1926) (security interest of real estate mortgagee subordinated to that of conditional vendor); Rieck-McJunkin Dairy Co. v. Sachs Real Estate Co., 102 Pa. Super. Ct. 293, 156 Atl. 748 (1931) (security interest in ice cream cabinets exempted from landlord's distraint). The public policy bases of the common law liens would seem to be reason enough for the priority given by this section, so that the Cameron, Ridgway and Rieck-McJunkin cases, *supra,* should control.

Bankruptcy. A Code security interest is not open to attack as a voidable preference merely because this section makes such an interest inferior to a common law or statutory lien. Section 60 (a) (2) of the Bankruptcy Act, as amended by Pub. L. No. 461, 81st Cong., 2d Sess., March 18, 1950, provides that a transfer shall be deemed to have been made at the time when it became so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A lien obtainable by legal or equitable proceedings upon a single contract is defined in § 60 (a) (4) of the Bankruptcy Act so as not to include "liens which under applicable law are given a special priority over other liens which are prior in time."

Sec. 9-311. Alienability of Debtor's Rights; Judicial Process.

In general, an interest is seizable if salable, Gordon v. Rees, 154 Pa. Super. Ct. 594, 36 A. 2d 841 (1944), unless exempt from execu-

tion by virtue of some positive rule of law. Brennan v. Pittston Brewing Corp., 344 Pa. 495, 26 A. 2d 334 (1942).

Pledged goods are liable to execution in satisfaction of the debts of the pledgor-debtor, but subject to the rights of the pledgee-lender, 12 P.S. § 2115. A bailee's interest in collateral may be sold at the suit of his creditors, but no right of the bailor will thereby be extinguished. Edward's Appeal, 105 Pa. 103 (1884); Packard Motor Car Co. v. Mazer, 77 Pa. Super. Ct. 348 (1921).

Sec. 9-312. Conflicting Security Interests: General Rules of Priority.

Subsection (1) is similar to § 2 of the Factor's Lien Act, 6 P.S. § 222, insofar as it gives precedence to later advances as of a previous filing date. Future advances made within five years of the execution of a chattel mortgage are secured to the same extent and have the same priority as if made at the time of the execution of the mortgage, 21 P.S. § 940.4. The lien of a chattel mortgage dates from the time of filing, 21 P.S. § 940.5.

The priorities given by subsections (4) and (5) to purchase money security interests, as defined by Code Sec. 9-107, and certain crop loans are new. Heretofore, a lender who filed pursuant to the applicable chattel security statute was protected even as against purchase money interests. But the principle that purchase money obligations are to be accorded special treatment is not new in Pennsylvania. See the priority given purchase money real estate mortgages by 21 P.S. § 622.

Bankruptcy. Subsection (3) of this section applies to any interest in after-acquired property only insofar as that interest is acquired by the debtor free of any purchase money security interest duly perfected under subsection (4). Subsection (3) thus raises no difficulty in regard to § 60 (a) (2) of the Bankruptcy Act, as amended by Publ. L. 461, 81st Cong., 2d Sess., March 18, 1950, under which a transfer "shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien * * * obtainable by legal or equitable proceedings on a *simple contract* could become superior to the rights of the transferee" [emphasis added]. Any rights in after acquired collateral (whether outright or as surplus over purchase money) which the debtor acquires at all are acquired by him and are thereby transferred to the secured party free of all danger from any such *subsequent* lien as is described in § 60 (a) (2). See Restatement, Contracts, Special Note to § 11 and see § 7; 1 Williston on Contracts § 12 (rev. ed. 1936); Corn Exchange Bank & Trust Co. v. Klauder, 318 U. S. 434 (1943); In re Vardaman Shoe Co., 52 F. Supp. 562 (E.D.Mo. 1943); H. Rep. No. 1293, 81st Cong., 1st Sess. (1949).

Paragraph (4) of the amended § 60 (a) suggests a technique

for avoiding the harsh results which might flow from paragraph (2). Paragraph (4) defines a simple contract lien, as that term is used in paragraph (2), so as not to include "liens which under applicable law are given a special priority over other liens which are prior in time." Certainly the priority given by this section of the Code to purchase money security interests can be thought of as a lien which is given a special priority over other liens which are prior in time. But it can be argued, and with some force, that by "special" liens Congress had in mind such things as liens accruing to landlords, artisans, warehousemen and carriers, or in short, those liens given priority by Code Sec. 9-310.

The secured lender may also be helped by the rationale of In re Rosen, 157 F. 2d 997 (3d Cir. 1946), cert. denied, 330 U.S. 835 (1947). It can be said that the holder of a purchase money security interest does not prevail over a prior security interest in after-acquired property by virtue of his status as a simple contract lien creditor, just as it was held in the Rosen case under § 60 (a) as it formerly read, 11 U.S.C. § 96 (a) (1946), that a subsequent assignee did not prevail because of his status as a *bona fide* purchaser. The holder of a security interest in after-acquired property loses his rights to that property because of "subsequent events not connected with the original acquisition," 157 F. 2d at 1001. The subsequent events here are (1) a course of dealings out of which can be created a purchase money security interest under Code Sec. 9-107 and (2) perfection of the purchase money security interest as provided in Subsection (3) of this section.

Sec. 9-313. Priority When Goods Are Part of Realty.

Conditional Sales. A conditional vendor is protected against the claims of the owner or prior encumbrances if, prior to the affixing of the goods to the realty, he files with the prothonotary a copy of the contract and a statement describing the realty, 69 P.S. § 404. There is no requirement of filing with the Recorder of Deeds. The Pennsylvania act provides that if the parties cannot agree on the amount of the bond it may be fixed by the common pleas court on petition. This latter provision would seem worth carrying over into the Code as a simple method of settling such disputes, and its addition would not seriously conflict with the policy favoring uniformity.

The Conditional Sales Act was amended to read as it now stands in 1935, and there have been few decisions since. Before that time, however, the courts interpreted the fixtures provisions strictly and would not countenance removal by the conditional vendor if any material injury would result, despite the prior act's provision for the posting of a bond by the removing vendor, Pa. Laws 1927, No. 465, § 2, p. 979. It was held that the statutory term "injury to the freehold" means injury to the operating plant in its entire integrity,

rather than injury to the mere physical structure. Land Title Bank & Trust Co. v. Stout, 339 Pa. 302, 14 A. 2d 282 (1940); Central Lithograph Co. v. Eatmor Chocolate Co., 316 Pa. 300, 175 Atl. 697 (1934). This interpretation would seem precluded by the Code provision that damage caused by removal does not include "any diminution in value of the realty caused by the absence of the goods removed or by any necessity for replacing them." It has been said, moreover, that "The decision in the Eatmor Chocolate Company case led to the Act of 1935." In re Yough Brewing Co., 27 F. Supp. 729, 731 (W.D. Pa. 1939).

Chattel Mortgage. The lien of any mortgage on a chattel attached to realty appears to be superior to any interest in the realty to which it is attached, except for a prior real estate mortgage covering attached chattels, 21 P.S. § 940.5. Filing is in the office of the prothonotary, 21 P.S. § 940.8. There is no provision for indemnifying the owner of the real estate against damage resulting from removal.

Bailment Lease. Lessor of boilers to paper mill tenant permitted to remove them over the protests of the owner of the building, even though removal entailed tearing down wall of building. Lessor required to restore wall after removal, Wetherill v. Gallagher, 217 Pa. 635, 66 Atl. 849 (1907).

Sec. 9-314. Priority When Goods Are Affixed to Other Goods.

If the attached chattel can be severed from the principal chattel without detriment to the latter, a prior security interest in the attached chattel prevails over interests in the whole, White Co. v. Bowen, 84 Pa. Super. Ct. 484 (1925). This is the rule in most jurisdictions, but there are differences as to whether particular attachments are severable. Cases from other jurisdictions are collected and discussed in Lee, Accessories Attached to Automobiles Sold Under Title-Retaining Instruments, (1945) 19 Temple L. Q. 89; Note 92 A.L.R. 425 (1934). Held severable without detriment to the whole by Pennsylvania courts have been a truck chassis and truck body, White Co. v. Bowen, *supra*, and motor vehicle tires, Goodrich Silvertown, Inc. v. Bryner, 42 Dauph. 267 (1936); Worthington v. Jabs, 50 York 101 (1936); National Tire & Rubber Co. v. Daley's Blue Line Trans. Co., 28 Luzerne 6 (1933). In none of these cases did it matter that the instrument retaining title to the whole purported to cover accessories and replacement parts.

Sec. 9-315. Priority When Goods Are Commingled or Processed.

Accord: King v. Humphreys, 10 Pa. 217 (1849). If processed goods are "proceeds" of the raw materials in which the lender has his security interest, the borrower has an equivalent interest in the pro-

cessed goods under the Uniform Trust Receipts Act; he may also, of course, assert his interest in the fund realized through sale of the finished goods, 68 P.S. § 560. The lender is limited by the chattel mortgage and factor's lien statutes to proceeds realized through sale, 21 P.S. § 940.6 (d), 6 P.S. § 224, respectively.

Sec. 9-316. Priority Subject to Subordination.

Sec. 9-317. Secured Party Not Obligated on Contract of Debtor.

This section is taken from the Trust Receipts Act, 68 P.S. § 562, and is intended to forestall a tendency manifested in jurisdictions other than Pennsylvania to find an agency relationship between borrower and lender, with the latter liable as principal for the borrower's disposition of the collateral. See Commissioners' Note, 9 U.L.A. 668; Gilmore, Chattel Security: II, (1948) 57 Yale L. J. 761, 764. The assignee of a building contract is not liable as a principal for wage claims against the assignor, Brown v. German-American Title & Trust Co., 174 Pa. 443, 34 Atl. 335 (1896).

Sec. 9-318. Defenses Against Assignee; Modification of Contract After Notification of Assignment; Term Prohibiting Assignment Ineffective; Identification and Proof of Assignment.

Subsection (1). Accord: Restatement, Contracts § 167 (1) and Pa. Annot. thereto.

No Pennsylvania authority can be found on subsection (2), which would codify, divorced from the particular factual situation out of which it grew, the rule of Homer v. Shaw, 212 Mass. 113, 98 N.E. 697 (1912). There, the original parties to a construction contract were permitted to rescind and enter into a new agreement free of the assignee's interest. But it appeared that the assignor's performance of the original contract was made impossible by failure of the assignee to advance payroll funds, that the assignee would have had no rights under the original contract after the assignor's default, and that the obligor could not have safely made advances to the assignor under the original contract.

Subsection (4) is in accord with Restatement Contracts § 151 (c) and Pa. Annot. thereto.

Part 4. Filing.

Sec. 9-401. Place of Filing; Erroneous Filing; Removal of Collateral.

(1) Central filing with the Department of State as well as with the prothonotary of the county in which the debtor's principal place of business is located is provided for by the Uniform Trust Receipts Act, 68 P.S. § 563. Pennsylvania's other notice filing statute, the

Factor's Lien Act, requires filing only with the prothonotary in each county in which the collateral is located, 6 P.S. § 223. The conditional sales statute requires filing in the county in which the collateral is first kept for use by the buyer after the sale, 69 P.S. § 403, and chattel mortgages are recorded where the collateral is located, as well as in the county of the debtor's residence, 21 P.S. § 940.8.

Conditional sales of railroad equipment are specially provided for in 69 P.S. § 405, with filing in the office of the Secretary of State. The name of the seller-lender must be plainly and conspicuously marked upon each side of the car.

As to fixtures, see Annotation to Code, Sec. 9-313.

(2) *Accord,* in principle, Oberholtzer's Appeal, 124 Pa. 583, 17 Atl. 143 (1889); Oberholtzer v. Evans, 134 Pa. 366, 19 Atl. 681 (1890). In those cases, a mortgage on a farm which lay in both counties *A* and *B* was recorded only in *A*. As to the land in *A*, it appears that the mortgage was given precedence as duly recorded. But judgments filed in *B* took precedence over the mortgage as to the land in *B*.

(3) The Pennsylvania chattel security statutes are not explicit on the effect of moving a chattel from one filing district to another within the state. The Conditional Sales Act would seem to indicate that the seller is fully protected by his initial filing: "The conditional sale contract or copy shall be filed * * * *in the county in which the goods are first kept for use* by the buyer after the sale" [emphasis added], 69 P.S. § 403. The factor's lien and chattel mortgage statutes seem to look the other way. "The notice * * * may be filed *at any time or times* * * * in the office of the prothonotary of *each county in which the merchandise or any part thereof, is at any time located*" [emphasis added]. Factor's Lien Act, 6 P.S. § 223. "Any chattel mortgage * * * may be filed * * * (1) in the office of the prothonotary for *each county* in which the chattels or any portion of the chattles are located *at the time of filing* * * *" [emphasis added], Chattel Mortgage Act, 21 P.S. § 940.8 (a).

Sec. 9-402. Formal Requisites of Financing Statement.

The formal requisites laid down by this section are similar to those required in the trust receipt, 68 P.S. § 563, and factor's lien, 6 P.S. §§ 222, 223, statutes. In conditional sale and chattel mortgage transactions, the contract or mortgage instrument, or a copy thereof, must be filed, 69 P.S. § 403, 21 P.S. §§ 940.2, 940.8, respectively. If a chattel mortgage from another state is filed in Pennsylvania after removal of the collateral to Pennsylvania, the instrument filed in Pennsylvania need not be certified by the foreign filing officer if it is a duly executed duplicate original; certification is necessary only when a copy is filed, 21 P.S. § 940.10; In re Industrial Sapphire Mfg. Co., Inc., 182 F. 2d 589 (3d Cir. 1950). The collateral must be

identified with particularity. See 21 P.S. § 940.2 (chattel mortgage), and 69 P.S. § 407; In re Mineral Lac Paint Co., 17 F. Supp. 1 (E.D. Pa. 1936), aff'd. sub nom. Salkind v. Dubois, 105 F. 2d 640 (3d Cir. 1937) (conditional sale).

Sec. 9-403. What Constitutes Filing; Duration of Filing; Effect of Lapsed Filing; Duties of Filing Officer.

All of the chattel security statutes call for filing by date and hour and for indexes like those required by this section, 68 P.S. § 563 (trust receipt); 69 P.S. § 407 (conditional sale); 6 P.S. § 223 (factor's lien); 21 P.S. § 940.8 (chattel mortgage). Only the trust receipt statute, however, spells out what constitutes filing in order to place the risk of error. But the rule is clear that the filing party's responsibility ends once he has presented the paper to the filing officer and paid the fee, Glading v. Frick, 88 Pa. 460 (1879); Farabee v. McKerrihan, 172 Pa. 234, 33 Atl. 583 (1896).

Filing is of indefinite duration under the factor's lien statute, 6 P.S. §§ 221-227; trust receipts, one year, 68 P.S. § 463 (4); conditional sale, three years in general, but fifteen years for railroad equipment, 69 P.S. § 408; chattel mortgage, five years, 21 P.S. § 940.13.

Sec. 9-404. Statement of Termination of Financing.

This section is similar to § 5 of the Factor's Lien Act, 6 P.S. § 225; to a 1943 amendment to the Conditional Sales Act, 69 P.S. § 421; and to § 20 of the Motor Vehicle Sales Finance Act of 1947, 69 P.S. § 630.

Part 5. Default.

Sec. 9-501. Index of Rights on Default; Procedure When Security Agreement Covers Both Real and Personal Property.

Sec. 9-502. Rights of Assignee When Assignor Defaults.

This section is new. No Pennsylvania decisions have been found.

Sec. 9-503. Secured Party's Right to Take Possession After Default.

Subsection (1) is similar to 21 P.S. § 940.14 (chattel mortgage); 68 P.S. § 556 (trust receipt); 69 P.S. § 451 (conditional sale). The Factor's Lien Act, 6 P.S. §§ 221-229, makes no provision for repossession after default.

In a bailment lease transaction, the secured lender may repossess upon default before the expiration of the lease only if the lease so provides, Mason & Hamlin Co. v. Devon Manor School, 273 Pa. 398, 117 Atl. 78 (1922). But if the lease does so provide, the lender may repossess upon default and his motive for doing so is not

material, Quinlan & Robertson, Inc. v. Rundle, 273 Pa. 479, 117 Atl. 208 (1922). Notice to the person in possession is not necessary, Abel v. M. H. Pickering Co., 58 Pa. Super. Ct. 439 (1914).

Sec. 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.

The right of a secured lender who has repossessed the collateral to sell it and either sue for the deficiency or account for the surplus is recognized by existing chattel security statutes. Either a public or private sale is permitted in chattel mortgage (21 P.S. § 940.14) and trust receipt (68 P.S. § 556) transactions, with ten days' notice to the debtor required by the Chattel Mortgage Act and five days' by the trust receipts statute. A chattel mortgagee may also resort to foreclosure proceedings, in which case the collateral is sold as under execution, 21 P.S. § 940.15. When the bailment lease device is used, the bailor who has repossessed may apparently do with the collateral as he chooses.

The Conditional Sales Act requires a public sale within thirty days of repossession if the debtor has paid at least fifty per cent of the purchase price. The debtor must be given ten days' notice of the sale and at least three notices must be posted in the filing district. If $500 or more has been paid on the purchase price, the lender must also advertise, 69 P.S. § 455. If the debtor has paid less than fifty per cent of the purchase price, the lender need not sell unless the debtor so demands within ten days after repossession, in which event a public sale is required, 69 P.S. § 455. The provisions for disposition of any surplus and the liability of the debtor for any deficiency are the same as in subsection (1), 69 P.S. §§ 456, 457.

Only the trust receipts statute expressly protects purchasers from the secured lender, 68 P.S. § 556 (3) (c).

Restrictions on the financing agency's rights of repossession are also found in the Motor Vehicle Sales Finance Act of 1947, 69 P.S. §§ 623-627.

Sec. 9-505. Compulsory Disposition of Collateral; Acceptance of the Collateral as Discharge of Obligation.

When a conditional seller has received less than fifty per cent of the purchase price and the buyer has not demanded a public sale, the seller may keep the collateral in satisfaction of the debt, 69 P.S. § 458.

Sec. 9-506. Debtor's Right to Reclaim Collateral.

Unless a conditional seller has given notice of his intention to repossess, the buyer may within ten days redeem the collateral by paying the amount due under the contract at the time of repossession plus the expenses of repossession and storage, 69 P.S. §§ 452, 453. In

a chattel mortgage transaction, the debtor may redeem at any time prior to the sale of the collateral by paying the indebtedness secured by the mortgage, 21 P.S. § 940.14 (c).

Article 10

EFFECTIVE DATE AND REPEALER